

## The Law of Adoption of Children Out of Wedlock in the Perspective of Islamic and Indonesian Law

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### Abstract

*The adoption of children from extramarital relationships is a complex legal issue because it involves legal, social, and religious dimensions at the same time. This study aims to analyze the comparison of the regulation of adoption of children out of wedlock in Islamic law and positive law in Indonesia, especially related to the legal status of children, civil relations, and the implications of their rights. This research uses a normative-juridical approach with a comparative legal method, through an examination of laws and regulations, court decisions, fatwas, as well as relevant Islamic law and national law literature. The results of the study show that in Indonesia's positive law, children out of wedlock can obtain a civil relationship with their biological father as long as it is scientifically proven and determined through legal mechanisms, but does not automatically obtain inheritance rights from adoptive parents except through grants or mandatory wills. Meanwhile, Islamic law views the adoption of children in the form of kafālah, which emphasizes the parenting aspect without changing the child's nasab, inheritance rights, and marital status. The difference in principle between the two legal systems poses normative challenges in the practice of child protection, so an integrative approach is needed that is able to ensure the best interests of children without ignoring Islamic sharia values. This research contributes by offering a conceptual framework for harmonization between Islamic law and national law in the regulation of out-of-wedlock child adoption based on the protection of children's rights.*

**Keywords:** Out-Of-Wedlock Child; Adoption; Islamic Law; Indonesian Law; Kafalah.

### Abstrak

Pengangkatan anak yang berasal dari hubungan di luar pernikahan merupakan isu hukum yang kompleks karena melibatkan dimensi legal, sosial, dan keagamaan sekaligus. Penelitian ini bertujuan menganalisis perbandingan pengaturan adopsi anak luar nikah dalam hukum Islam dan hukum positif Indonesia, khususnya terkait status hukum anak, hubungan keperdataan, dan implikasi hak-haknya. Penelitian ini menggunakan pendekatan normatif-yuridis dengan metode perbandingan hukum, melalui telaah terhadap peraturan perundang-undangan, putusan pengadilan, fatwa, serta literatur hukum Islam dan hukum nasional yang relevan. Hasil penelitian menunjukkan bahwa dalam hukum positif Indonesia, anak luar nikah dapat memperoleh hubungan keperdataan dengan ayah biologisnya sepanjang dibuktikan secara ilmiah dan ditetapkan melalui mekanisme hukum, namun tidak secara otomatis memperoleh hak waris dari orang tua angkat kecuali melalui hibah atau wasiat wajibah. Sementara itu, hukum Islam memandang pengangkatan anak dalam bentuk kafālah, yang menekankan aspek pengasuhan tanpa mengubah nasab, hak waris, dan status kemahraman anak. Perbedaan prinsipil antara kedua



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sistem hukum tersebut menimbulkan tantangan normatif dalam praktik perlindungan anak, sehingga diperlukan pendekatan integratif yang mampu menjamin kepentingan terbaik anak tanpa mengabaikan nilai-nilai syariat Islam. Penelitian ini berkontribusi dengan menawarkan kerangka konseptual harmonisasi antara hukum Islam dan hukum nasional dalam pengaturan adopsi anak luar nikah berbasis perlindungan hak anak.

**Kata Kunci:** Anak Luar Kawin; Pengangkatan Anak; Hukum Islam; Hukum Positif; *Kafalah*.

## INTRODUCTION

From a legal and social perspective, the birth of a child from a relationship outside of marriage is a complex issue, especially when it is associated with adoption. Not infrequently, children born outside the institution of formal marriage experience challenges in the form of social stigma and difficulties in obtaining identity recognition, both in the nuclear family environment and in the community. From a legal perspective, the arrangements related to the status of children out of wedlock and the mechanism of child adoption have been described in several national legal instruments, including in laws regulating child protection<sup>1</sup>, as well as in the provisions of Islamic law contained in the KHI.<sup>2</sup>

Every year, millions of girls aged 15 to 19 are recorded as having pregnancies and childbirth, according to a global agency report. This figure is predicted to rise to around 19 million annual cases by 2035.<sup>3</sup> As attention to this issue increases, an in-depth study is needed on the comparison between the provisions of Islamic law and the national legal system in regulating the adoption of children born out of wedlock, including its implications for the legal status of the child and the adoptive family.

In Indonesia's national legal system, children born outside the marriage bond are legal under state law. Juridically, the child's civil legal relationship is limited to the biological mother and relatives of the maternal line. This arrangement confirms that out-of-wedlock children do not automatically have a legal relationship with the man who is their biological father, unless otherwise determined based on legally valid proof<sup>4</sup>. The phrase "extramarital affair" in the article is also understood to include forms of marriage that are not officially registered, such as marriage under the hand (*nikah siri*) or other informal forms that are not considered administratively by the state. Because this type of marriage does not have legal force, children born to extramarital relationships often face obstacles in accessing civil rights, including the right to inheritance, identity registration, or other legal recognition.<sup>5</sup>

Juridically, the practice of adoption in the Indonesian legal system is known as another term that has its own legal basis. This concept regulates the transfer of childcare and upbringing responsibilities from the previously responsible party to the new family through legal procedures.<sup>6</sup> Provisions regarding the procedures and principles of child

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<sup>1</sup> See Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection.

<sup>2</sup> See Compilation of Islamic Law, Book II on Marriage, Part Seven on Child Adoption.

<sup>3</sup> Ferdian Ananda Majni, "Teenage Pregnancy Cases Are Quite High, PKBI Multifactor and Systemic," accessed April 24, 2025, <https://mediaindonesia.com/humaniora/474073/kasus-kehamilan-remaja-cukup-tinggi-pkbi-multifaktor-dan-sistemik>.

<sup>4</sup> See Law Number 1 of 1974 concerning Marriage, Article 43 paragraph (1).

<sup>5</sup> Busman Edyar, *The Status of Out-of-wedlock Children According to Positive Law and Islamic Law After the Issuance of the Constitutional Court's Decision on the Material Test of the Marriage Law*, t.t.

<sup>6</sup> See Article 1 number 9 of Law Number 35 of 2014 concerning Child Protection.

adoption have been specifically regulated in laws and regulations. The essence of this arrangement is that every adoption process must prioritize the best interests of the child. In addition, the process also needs to be adjusted to the customary norms that apply in the local community and carried out in accordance with the governing legal provisions. Although legally the child has become part of the adoptive family, the legal status between the child and his or her biological parents does not experience a termination of the blood bond despite the adoption process<sup>7</sup>.

In the legal system in Indonesia, approving children is known as "child adoption". The child who is adopted in this process is referred to as an "adopted child", while the adoptive party is called an "adoptive parent". The term refers to a legal process that regulates the transfer of responsibility for the custody and upbringing of a child from a biological parent to another legally legal party as an adoptive parent, based on applicable provisions.<sup>8</sup>

In the perspective of Islamic law, the practice of adopting children is known as *kafalah*. *Kafalah* is a parenting system for children who are abandoned or have no parents, where the identity of the child's fate is maintained. In Islamic teachings, this practice is permissible because it does not affect the status of kinship relationships, inheritance rights, or mahram boundaries between the child and his or her caregiver family.<sup>9</sup> On the other hand, Islam also recognizes the term *tabanni*, which is the adoption of children which resembles the adoption system in Western law which considers them completely as biological children, including in terms of *nasab*, inheritance, and other legal status. The *tabanni* system is not allowed in Islamic teachings because it has the potential to disguise the origin of the descendants and cause confusion in legal aspects. Islam only allows forms of child care, namely providing attention, sustenance, education, and other life needs, without changing the status of the *nasab* and making it seem as if a biological child.

The Indonesian Ulema Council (MUI), in establishing fatwas related to the practice of *tabanni*, explained that the understanding of Islamic law on this matter needs to consider two main forms. One form is when a person takes care of a child who is not of his flesh and blood and treats him or her like his own child, providing affection, living expenses, education, and other needs, without giving him legal status as a biological child.<sup>10</sup>

One of the conceptual differences between the provisions in Islamic law and the positive legal system of Indonesia in regulating the implementation of child adoption lies in the limitations of parenting authority. In an Islamic perspective, this practice is allowed only as a form of parenting and education, where responsibility for children can be transferred to the caregiver without erasing the child's fate status. Things such as kinship relationships, inheritance rights, and guardianship in marriage remain part of the authority of the biological parents<sup>11</sup>. On the other hand, according to the provisions in the national legal system, even if a child is legally adopted into a new family, his or her biological

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<sup>7</sup> See Article 39 paragraphs (1) and (2) of Law Number 35 of 2014 concerning Child Protection.

<sup>8</sup> Iin Ratna Sumirat and Muhamad Wahyudin, "Adoption Law in Islamic Perspective and Positive Law," *Journal of Gender and Child Studies* 8, no. 02 (2021): 168, <https://doi.org/10.32678/jsga.v8i02.5507>.

<sup>9</sup> "The Difference Between *Kafalah* (Nurturing) Orphans and Adopting Them | Almanhaj," February 23, 2019, <https://almanhaj.or.id/11223-perbedaan-antara-kafalah-memelihara-yatim-dan-mengadopsinya.html>.

<sup>10</sup> Sukardi, "ADOPTION OF CHILDREN IN ISLAMIC LAW," *journal of Gender and Child Studies* 5, no. 2 (2018).

<sup>11</sup> See Surah Al-Ahzab verses 4–5 and MUI Fatwa Number 11 of 2012 concerning the Status of Children Resulting from Adultery and Treatment of Them.

status is not automatically severed or removed through the adoption process<sup>12</sup>. However, in practice, adopted children are often treated equally with biological children, especially in the context of legal protection and the fulfillment of basic rights.<sup>13</sup>

The phenomenon of child births outside the official marriage bond has become an issue that is increasingly highlighted in Indonesian society. Children born from this kind of relationship often experience obstacles both legally and socially, especially in the context of adoption. In Islamic law, the status of children out of wedlock is regulated differently than the provisions in the national legal system. Most previous research has focused more on discussing child adoption in general from these two legal perspectives. One of the studies that can be used as a reference is the work of Iin Ratna Sumirat and Muhamad Wahyudin entitled *Adoption Law in an Islamic Perspective and Positive Law*.<sup>14</sup> On the other hand, various studies have also explored legal aspects related to adopted children, including discussions about the legal status of adopted children and the legal impact they cause.<sup>15</sup> Even so, until now there is no study that specifically discusses the legal aspects and implications of adoption for children born out of wedlock, both from the perspective of Islamic law and the national legal system.

Research in this field has its own urgency because it can provide a clearer legal basis regarding the adoption of children out of wedlock and its consequences. The results obtained are expected to enrich the discourse in the development of Islamic family law and the implementation of national law in Indonesia. Thus, this study aims to fill the existing literature gap through an analysis of Islamic legal views as well as positive laws regarding the adoption of children from non-marital relationships, as well as explore their legal impact according to the two legal frameworks.

## RESEARCH METHODS

This study applies a normative descriptive approach combined with a comparative legal method. This approach was chosen because it allows researchers to decipher, analyze, and compare legal provisions related to the practice of child adoption in two different legal systems, namely Islamic law and Indonesian national law.

The study is descriptive-comparative, namely by explaining and analyzing the legal provisions related to the adoption of children from extramarital relationships. The analysis is linked to theories in positive law and its application in the framework of Islamic law and the national legal system. In addition, this study also explores the practice of implementing the law on the adoption of children out of wedlock in both systems.

The types of data sources analyzed are classified into two, namely primary data and secondary data. Primary data includes relevant national and Islamic legal regulations, such as laws governing child protection, guidelines in the Compilation of Islamic Law, and ulama fatwas related to child adoption. In addition, the sources of Islamic law such as the Qur'an, hadith, ijma', and the views of scholars are used as the main normative basis. The secondary data includes various scientific references, including academic papers, journals, and literature that discuss comparative aspects between the adoption provisions in the Islamic legal system and Indonesia's positive law.

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<sup>12</sup> See Law Number 35 of 2014 concerning Child Protection.

<sup>13</sup> Winda Winda and Vita Firdausiyah, "The Status of Adopted Children (Adoption) and Its Legal Consequences: A Comparative Study of Islamic Law and Positive Law," *AL-MUQARANA* 1, no. 1 (2023): 30–45, <https://doi.org/10.55210/jpmh.v1i1.286>.

<sup>14</sup> Sumirat and Wahyudin, "The Law of Adoption in an Islamic Perspective and Positive Law."

<sup>15</sup> Winda and Firdausiyah, "The Status of Adopted Children (Adoption) and Its Legal Consequences."

Data collection in this study was carried out through the library research method, namely by examining laws and regulations, official documents, scientific literature, and relevant Islamic law sources. The data collected were then analyzed qualitatively using a descriptive-comparative approach, to identify similarities and differentiators regarding the regulation of child adoption in Islamic law and positive law in Indonesia, using the deductive method, which is to draw conclusions from the general legal principles that exist in national and Islamic law, as well as the inductive method, which is to examine the legal views and actual practices that develop in society. to gain a complete understanding of the legal impact of child adoption outside of marriage.

## RESULTS AND DISCUSSION

### Adoption of Children Out of Wedlock in the Indonesian Legal System

In the legal system, the term *out-of-wedlock child* refers to a child born outside a legal marriage bond according to state regulations. Children in this category only have a civil relationship with the biological mother and the mother's family<sup>16</sup>. On the other hand, a new child is considered valid if it is born in a legally recognized marriage bond.<sup>17</sup> Based on this definition, children of a non-legally bound spouse do not fall into the category of legal children. Consequently, they do not receive equal legal treatment, especially in terms of basic rights such as the right to custody, maintenance, and inheritance.<sup>18</sup>

As a result of these conditions, children born outside the marriage bond do not have access to include the identity of their biological father in official documents such as birth certificates. In addition, they lose the right to alimony, inheritance, and forms of legal protection from their fathers. This reality gives rise to inequality in legal treatment and causes discrimination in the population administration system. In fact, the applicable legal provisions affirm that every child has the right to protection without discrimination or discrimination in any form.<sup>19</sup>

This situation also shows a lack of conformity with constitutional principles that guarantee children's right to a decent life, as well as to obtain protection from all forms of violence and discrimination.<sup>20</sup> Juridical restrictions that only recognize civil relations between children resulting from non-marital relationships and their biological mother are considered not to reflect social and biological realities, especially considering the role and existence of the biological father in the child's birth process. This kind of policy often draws criticism because it is considered to violate the principle of justice for children and creates legal uncertainty in the fulfillment of the rights of children born out of wedlock.

Since the issuance of the Constitutional Court Decision, there has been an important transformation in the civil law system regarding the status of children born out of wedlock. Through its ruling, the Court stated that children out of wedlock can establish a civil relationship with the biological father if the existence of the relationship can be legally proven, either through scientific approaches such as DNA tests and other legal evidence.<sup>21</sup> This ruling is an important milestone in expanding the guarantee of legal protection for children born out of wedlock, including recognition of the inheritance and

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<sup>16</sup> Law Number 1 of 1974 concerning Marriage, Article 43 paragraph (1).

<sup>17</sup> Ibid., Article 42.

<sup>18</sup> Ahmad Dedy Aryanto, *LEGAL PROTECTION OF CHILDREN OUT OF WEDLOCK IN INDONESIA*, T.T.

<sup>19</sup> See Article 2 paragraph (1) of Law Number 35 of 2014 concerning Child Protection as an amendment to Law Number 23 of 2002.

<sup>20</sup> See Article 28B paragraph (2) of the Constitution of the Republic of Indonesia in 1945.

<sup>21</sup> Constitutional Court Decision No. 46/PUU-VIII/2010 concerning the Examination of Law No. 1 of 1974 concerning Marriage against the 1945 Constitution.

inheritance rights of their biological fathers. However, this decision has caused differences of opinion, especially from religious circles, regarding the legality or legality of recognizing children resulting from adultery as descendants of biological fathers.

As a response to the change in legal regulations, the Indonesian Ulema Council (MUI) issued a Fatwa regarding the position of children resulting from adultery and the treatment of them. It is explained that children born outside the marriage bond do not have a nasab relationship with the man who adulterated their mother, and do not have the right to guardianship in marriage, inheritance, or alimony dependents from their biological father. However, the man can still provide a limited amount of support to meet the basic needs of the child.<sup>22</sup> The difference between the two decisions creates dualism in the application of the law in society, especially for Muslims who make fatwas the main reference in their lives. This situation creates tensions between the legal norms of the state and religious teachings, as each has legal consequences that are not always in line with the status of children born out of wedlock. This is why concrete steps are needed to harmonize between positive law and religious values, in order to ensure that children out of wedlock are not harmed by the disharmony of the two legal systems.

Child adoption in the national legal system is regulated through a juridical mechanism that establishes the transfer of custody responsibilities from the original to the adoptive parents. This process is carried out through an official determination from the judicial institution and does not remove the biological legal status of the child<sup>23</sup>. Child adoption must be based on the principle of prioritizing everything that is best for children, and is carried out without forgetting the customary norms that exist in the community. Although the child is legally part of the adoptive family, the blood bond with his or her biological parents remains unbroken.<sup>24</sup>

In addition to referring to the law, the implementation of adoption is also regulated in government regulations that emphasize the importance of ensuring the welfare of children, without severing the biological relationship between children and their biological parents<sup>25</sup>. However, juridically, the status of adopted children is not necessarily equivalent to biological children in terms of the relationship between nasab and inheritance rights. Under the provisions of civil law, heirs only include blood relatives and legal spouses<sup>26</sup>. Even so, the gift of property to adopted children is still possible through grants or personal wills during life.<sup>27</sup> Thus, the Indonesian legal system stipulates that child adoption is a form of legal protection and custody of children, but still maintains the child's nasab and civil rights in his or her home environment, especially if the child comes from a relationship outside of marriage.

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<sup>22</sup> Salwa Nur Aisyah Sa'diah, *ANALYSIS OF THE POSITION AND CIVIL RIGHTS OF CHILDREN RESULTING FROM ADULTERY ACCORDING TO THE DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA NO. 46/PUU-VIII/2010 AND MUI FATWA NO. 11 OF 2012*, T.T.

<sup>23</sup> Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection, Article 1 number 9.

<sup>24</sup> Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection, Article 39 paragraphs (1) and (2).

<sup>25</sup> Government Regulation Number 54 of 2007 concerning the Implementation of Child Adoption.

<sup>26</sup> Civil Code, Article 832.

<sup>27</sup> Muslihah Ananda Putri Pratiwi, S.H., *Legal Status of Adopted Children in the Family - Perqara*, Marriage and Divorce, January 19, 2025, <https://perqara.com>, <https://perqara.com/blog/status-hukum-anak-angkat/>, <https://perqara.com/blog/status-hukum-anak-angkat/>.

The practice of adoption is not prohibited in the Indonesian legal system, as long as it is carried out in accordance with applicable legal procedures. The adoption process must comply with the procedures and requirements as stipulated in laws and regulations. Out-of-wedlock children who have obtained legal recognition or already have a birth certificate can be adopted as children through official mechanisms, either based on court decisions or through customary norms that apply in society. The fundamental purpose of adoption is to ensure the welfare and protection of children.

The adoption process can only be carried out through a court determination, by fulfilling a number of certain conditions as stipulated in Government Regulations.<sup>28</sup> Some of these requirements include children under the age of 18, included in the category of abandoned or abandoned children, being in the care of families or social institutions, and needing special protection. If the legal status of an out-of-wedlock child has been recognized, then administratively the appointment process can be carried out in accordance with applicable regulations.

In legal practice in Indonesia, the adoption process does not necessarily erase the lineage relationship between the child and the biological parents. Even if the child has been legally cared for by another family, his or her position as part of the biological lineage is still recognized. This also applies to children born out of wedlock, where their legal status as an out-of-wedlock child remains, including the limitations of their legal relationship with their biological father.<sup>29</sup>

Legally, adopted children do not automatically obtain inheritance rights from their adoptive parents. This is because in the terms of inheritance, only those who are considered legal heirs are those who have a direct blood or marriage relationship with the heir.<sup>30</sup> Adopted children, who do not have a nasab bond or marital relationship, do not fall into this category. However, adoptive parents can give part of their assets through a grant or will mechanism during life. If the will is not abandoned, the adopted child is still entitled to a share through the concept of *a compulsory will*, as stipulated in Islamic law, with a maximum limit of one-third of the total inheritance.<sup>31</sup> The same applies to children out of wedlock who are adopted as children, where the right to inheritance is not granted automatically. The child can only obtain a share of the property through the compulsory will mechanism as a form of legal protection of his rights.

According to the context of civil law, children out of wedlock who are adopted through the child adoption mechanism are still categorized as adopted children, as stipulated in Article 1 number 9 of Law Number 35 of 2014. However, because his birth was not of a legally valid marriage, the child had no civil relationship with his biological father. The relationship can only be recognized if there is scientific evidence, such as DNA test results, or based on an official decision from the court.<sup>32</sup> Thus, in the Indonesian legal system, the status of a child outside the legal relationship adopted does not change his or her lineage, his inheritance rights remain limited, and his legal status is only

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<sup>28</sup> Government Regulation of the Republic of Indonesia Number 54 of 2007 concerning the Implementation of Child Adoption, Article 12.

<sup>29</sup> See *Government Regulation No. 54 of 2007 concerning the Implementation of Child Adoption*, Article 12; *Law No. 1 of 1974 concerning Marriage*, Article 43 paragraph (1); and *Constitutional Court Decision No. 45/PUU-VII/2010*.

<sup>30</sup> See *the Civil Code*, Article 832.

<sup>31</sup> Nafiatul Munawaroh M.H S. H., "The Rights and Obligations of Adopted Children With Regard to Heritage | Klinik Hukumonline," April 18, 2024, <https://www.hukumonline.com/klinik/a/hak-dan-kewajiban-anak-angkat-berkenaan-dengan-warisan-cl6978/>.

<sup>32</sup> See *Compilation of Islamic Law (KHI)*, Article 209 paragraph (2).

recognized to the extent that is stipulated in the applicable legal provisions and procedures.<sup>33</sup>

Although the legal provisions regarding adoption have been contained in various regulations, the protection of adopted children born out of wedlock has not touched all aspects of the law comprehensively. One of the fundamental problems lies in the legal position of children out of wedlock who are normatively only connected civilly with the biological mother and her family. The legal relationship with the biological father is still limited and requires proof through scientific channels or legal stipulations. Even after the expansion of the meaning of civil law by constitutional institutions, its implementation at the practical level often encounters administrative obstacles and complicated proof.

Furthermore, although the adoption of a child is regulated with the main purpose of protecting and guaranteeing the best interests of the child, the process does not automatically make the adopted child have the legal status of a biological child. From this description, it can be concluded that although Indonesian law has provided space for the adoption of children out of wedlock, the protection is still limited and has not touched the civil aspect as a whole.

### **Adoption of Children Out of Wedlock in the Islamic Legal System**

In the view of Islamic law, the practice of raising children is known as *kafalah*, which is a form of responsibility for children who do not have a biological bond with the person who takes care of them. Through this system, the child's fate remains connected to his biological parents, while the caregiver is only obliged to provide care, education, and meet the child's life needs.<sup>34</sup> In Islam, *kafalah* is seen as a form of social responsibility that has a dimension of worship, because it is included in efforts to help others and protect the rights of weak and helpless children. This shows that the social system in Islam has recognized the concept of child protection long before the emergence of the modern adoption system. In contrast to the tabanni system which changes the child's nasab and legal status completely, in the sense of making the adopted child the same as the biological child.<sup>35</sup> *Kafalah* maintains the structure of descent and inheritance law in accordance with the sharia.

In Islamic teachings, concern for orphans is part of a noble social responsibility. Muslims are encouraged to meet the needs of orphans and provide proper affection and nurturing, and it is even considered noble if someone takes care of orphans by treating them like their own children. In a hadith that conveys the great virtue of anyone who takes care of and nurtures an orphan, that is, the reward will be with him in paradise, by gesturing his index and middle fingers and stretching a little.

Caring for orphans in Islamic teachings is not only valuable as a form of social concern, but also has a high position of worship. In one of the explanations of his commentary, Imam Al-Qurthubi stated that whoever takes care of orphans and meets their living needs, then it will be a barrier for him from the punishment of Hell on the Day of Resurrection.

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<sup>33</sup> Renata Christha Auli S.H, "Can You Admit Children Who Have Committed Adultery? | Legal Clinic," June 22, 2023, <https://www.hukumonline.com/klinik/a/mengakui-anak-hasil-zina-cl559/>.

<sup>34</sup> Burhanuddin, "ADOPTED CHILDREN IN THE PERSPECTIVE OF ISLAMIC LAW: POLICIES AND CHALLENGES," *SAMAWA : Journal of Islamic Family Law* 4, no. 2 (2024): 035–051, <https://doi.org/10.53948/samawa.v4i2.150>.

<sup>35</sup> Izzudin Karimi, "alsofwah.or.id/cetakanalisa.php?id=663&idjudul=661," retrieved July 13, 2025, <https://www.alsofwah.or.id/cetakanalisa.php?id=663&idjudul=661>.

From the previous description, it can be concluded that Islam strongly advocates caring for and meeting the living needs of underprivileged children, including in the form of parenting such as adoption. However, according to Islamic provisions, the practice of child adoption does not remove or break the relationship between the child and his biological parents. It is again clearly affirmed in Surah Al-Ahzab verses 4–5, which instructs that children should remain dependent on their biological father, not on adoptive parents. Even the Prophet صلى الله عليه وسلم said that whoever claims to be the son of a person who is not his biological father, then he will be cursed by Allah, the angels, and all mankind, and his deeds of worship will not be accepted on the Day of Resurrection. (HR. Bukhari).

The regulation of adoption of children based on the principles of Islamic law, differs in principle from the concept of adoption in civil law. The adopted child does not experience a change in his or her birth status, the nasab bond between the adopted child and his or her biological parents remains established even though it has gone through the adoption process. The rights and responsibilities of biological parents are not automatically lost, nor are the inheritance relationship between the child and his or her family of origin still recognized. On the contrary, there is no right of mutual inheritance between the adopted child and his or her adoptive family. Even so, the adopted child can still get a share of the inheritance through a mandatory will, provided that it does not exceed one-third of the total inheritance. In addition, the marital status between the adopted child and the adoptive parents is not formed automatically. Therefore, if the adopted child is female, he is still obliged to maintain the boundaries of association according to the sharia, including in relation to the adoptive father.<sup>36</sup> Thus, it can be concluded that the kafalah system in Islamic law sets a number of strict limits, especially related to the aspects of nasab, inheritance, and mahrra. This emphasizes that kafalah is not adoption in the sense of equating adopted children with biological children, but is a social protection mechanism that remains based on the principles of Islamic law.

In the *kafalah* system, even though the anakat child does not obtain legal status as a biological child, Islam still provides and guarantees his rights comprehensively. Adopted children have the right to get the fulfillment of their living needs. This principle is in line with religious teachings that strongly emphasize the protection of orphans and children who are abandoned without care. This value is reflected in the Qur'an surah Al-Insan verse 8 which means: *"And they give food that they like to the poor, orphans, and captives."*

Children in care also deserve affection and gentle treatment. Islam strongly emphasizes that orphans or children in care are not dizhalimi and not degraded. The Prophet صلى الله عليه وسلم gave great encouragement to Muslims to pay attention to orphans, one of which was with his words: *"Whoever rubs the head of an orphan for the sake of Allah, then every hair he touches will bring him a good one"* (HR. Ahmad).

This hadith shows that treating adopted children with affection, warmth, and gentle treatment is part of their rights. Then adopted children also have the right to be treated fairly, not discriminated against their biological children, and also must not be treated discriminatory. This is included in the general principle of justice in Islam which is found in surah Al-Ma'idah verse 8 which means:

*"Be just, for justice is closer to piety."*

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<sup>36</sup> Erha Saufan Hadana, "ADOPTION OF CHILDREN IN THE PERSPECTIVE OF ISLAMIC LAW," *LENTERA* 1, no. 2 (2019): 128–40.

In this context, the *approach of maqāṣid al-shari'ah* is very relevant as a basis for footing. Among the main goals of sharia are *Hifz al-Nafs* and *Hifz al-Nasl*. The application of kafalah to children from extramarital relationships reflects the protection of the life and dignity of the child (hifz al-nafs), as well as ensuring that the child's fate is not wrongfully entrusted to other than his or her biological parents (hifz al-nasl). Thus, the kafalah system not only maintains sharia values, but also becomes a concrete form of Islamic social responsibility for children in need of care. It is this balance between social protection and compliance with the sharia that makes kafalah a good and relevant solution in the context of contemporary Islamic law.

In the Fatwa of the Indonesian Ulema Council, it is emphasized that in the Islamic view, every child is born clean and does not bear the sins of his parents, even though they come from a relationship outside of marriage<sup>37</sup>. This teaching affirms the important principle in Islam that sin is not passed down from generation to generation. Therefore, a child born of adultery still has the same right to attain a noble degree before God, depending on his own deeds and deeds. This view is in line with the words of Allah *Subhanahu wa Ta'ala* in the Qur'an, surah Al-An'am verse 164, Al-Isra verse 15, and Az-Zumar verse 7.

Therefore, there is no prohibition on adopting children out of wedlock, especially if you educate them, and bear all their needs.<sup>38</sup> A child born out of wedlock has a special legal status. The majority of scholars are of the opinion that the fate of children resulting from non-marital relationships cannot be connected to the man who commits adultery with his mother, but is only attributed to the mother. This is based on the principle in Islamic law that adultery is not a valid basis for establishing kinship between the child and the man involved in the act.<sup>39</sup> In other words, the act of adultery does not cause legal consequences in the form of recognition of the paternal status of the child from the relationship. In the view of the Shafi'i and Hambali schools, children from extramarital relationships only have a nasab relationship with their mother and family on the mother's side, not with the man who is their biological father. However, even though he does not have a nasab bond with the father, the child is still entitled to receive protection, affection, and education, based on *the maslahah mursalah approach* or considerations of the public interest.<sup>40</sup> According to the majority of scholars, it is permissible to adopt a child from out of wedlock in the form of kafalah, not an adoption that changes the nasab, so kafalah for children out of wedlock is considered valid and a good as long as it maintains the limits of sharia that have been set.

The kafalah system in Islam is basically a form of childcare that does not change the structure of sharia law, such as nasab, inheritance and mahram status. In contrast to the system of adopting children in civil law which stipulates the transfer of the legal status of the child, *kafalah* aims to ensure that the legal relationship between the adopted child

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<sup>37</sup> Fatwa of the Indonesian Ulema Council (MUI) No. 11 of 2012 concerning the Status of Children Resulting from Adultery and Treatment of Them.

<sup>38</sup> Eka Ahmad Sholichin, "Wanting to Adopt a Child Resulting from Adultery, What Is the Law in Islam?," *Tribunlampung.co.id*, February 27, 2015, <https://lampung.tribunnews.com/2015/02/27/ingin-adopsi-anak-hasil-zina-bagaimana-hukumnya-secara-islam>.

<sup>39</sup> Sarah Qosim, "The Status of Children Outside Marriage According to Islamic Law," *IS* 6, no. 3 (2022): 54–61, <https://doi.org/10.15408/adalah.v6i3.26980>.

<sup>40</sup> Nasrah Hasmiati Attas, "THE STATUS OF ADULTEROUS CHILDREN ACCORDING TO MADHHAB SHAFI'I AND HAMBALI," *Journal of Ar-Risalah* 4, no. 2 (2024): 71–83, <https://doi.org/10.30863/arrisalah.v4i2.5812>.

and his or her biological parents is maintained, without any termination of the nasab or change in the child's civil status.

From the previous description, it can be understood that Islam clearly prohibits the practice of *tabanni*, which is to place adopted children in a legal position equal to biological children related to lineage and civil rights. Nevertheless, Islam still provides ample space for the application of *kafalah* as a form of social responsibility for children who need care. In this case, *kafalah* is a legitimate alternative to fulfill children's rights, such as affection, education, and protection, without violating the principles of sharia.

Therefore, it can be concluded that the concept of *kafalah* is a relevant and adaptive system to contemporary legal needs, especially in answering problems related to the protection and upbringing of neglected children. As long as its application remains in accordance with the principles of Islamic law, *kafalah* can be an alternative solution that not only meets the humanitarian aspect, but also maintains the integrity of family law in Islam.

### **Legal Implications of Adoption of Children Out of Wedlock**

The legal implications of the adoption of children out of wedlock raise a number of problems, both in terms of legal status, inheritance rights, and social acceptance. The differences between the Indonesian legal system and Islamic law in regulating the adoption of children as a result of an extramarital relationship raises a number of legal implications that need to be analyzed in depth. This effort is important in ensuring that the fulfillment of children's rights continues to run fairly, without contradicting the principles of Islamic law. The difference between the provisions of religious law and state law does give birth to legal consequences that are not simple, so an integrative and harmonious approach is needed that is able to bridge the two proportionately for the sake of justice for adopted children from relationships without a legitimate relationship.

According to the Indonesian legal system, the legal status of non-marital children has undergone important changes after the issuance of the Constitutional Court's decision which provides opportunities for the child to have a civil relationship with his biological father, as long as it can be legally proven. This includes the recognition of nasab and other civil rights such as inheritance rights<sup>41</sup>. On the other hand, the perspective of Islamic law states that children born from extramarital relationships still only have a nasab relationship with their mother, without a legal relationship with their biological father. Therefore, the practice of adopting children in Islam (*kafalah*) does not change the status of nasab and does not give rise to inheritance rights between adopted children and adoptive parents.<sup>42</sup>

The distinction between the provisions of Islam and the Indonesian civil system in determining the legal status of adopted non-marital children has significant juridical consequences. In the national legal system, an out-of-wedlock child adopted can obtain recognition of a civil relationship with his biological father, including inheritance rights, as long as the relationship can be legally proven through the applicable legal mechanism. On the other hand, according to Islamic principles, children resulting from non-marital relationships do not have a nasab relationship or inheritance rights with their biological father or adoptive parents, except through grants or wills in accordance with sharia.

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<sup>41</sup> See Constitutional Court Decision No. 46/PUU-VIII/2010; MUI Fatwa No. 11 of 2012 concerning the Position of Children Resulting from Adultery; Compilation of Islamic Law (KHI) Article 209 paragraph (2).

<sup>42</sup> Yahya Ibadu Rahman, *Recognition of the Status of Out-of-Wedlock Children in the Perspective of Islamic Law and Positive Law*, 5 (2024).

Furthermore, in positive law, child adoption can affect the child's legal standing, including the inclusion of identity in the birth certificate.

As for Islamic law, adoption does not cause a change in fate, does not make the relationship mahram, and does not have an impact on other legal rights except for guardianship and maintenance. Thus, there are two sides to the legal treatment of children out of wedlock that are adapted between the two legal systems. This creates tension in implementation on the ground, especially when people adhere to religious values that are not fully in line with state law. Therefore, harmonization between the two is important so that the protection of children is guaranteed without ignoring Islamic law itself.

The adoption of children born out of wedlock not only raises legal problems, but also has a social impact in society. Although the law in Indonesia has provided space for the adoption of children out of wedlock, the reality in society shows that the social impact of the status of children from extramarital outcomes is quite severe, these children often experience discrimination, both in the family, school and community environment. This stigma often has a deep psychological impact, not only that, but it can also hinder the process of social integration.<sup>43</sup>

The existence of adopted children from relationships outside of marriage often causes moral conflicts in the adoptive family environment. Many families are reluctant to disclose the child's status publicly because they are worried about stigma or negative views from the surrounding community. This condition can have a bad impact on the psychological condition of children, especially in the process of forming their identity. The child may experience confusion about his or her origins or feel that he or she is not fully accepted in the family. In fact, based on the principle of child protection, every child has the right to receive affection, recognition, and fair treatment without discrimination on the basis of his or her birth. Therefore, the active role of society and the state is urgently needed to remove the social stigma against children out of wedlock who are adopted as children. The goal is that the adoption process is not only legally legal, but also socially and culturally accepted.

In addition to facing social pressure, the issue of adoption of children out of wedlock also creates tension between religious norms and state legal norms. In practice, there is a fundamental difference between the view of Islamic law which considers marriage to be legal according to sharia even without registration, and the national legal system which requires official registration as a condition for the validity of marriage in the eyes of state law. Children born of an unregistered marriage are then classified as out-of-wedlock children, who in state law do not have a direct legal relationship with their biological father<sup>44</sup>. Although there have been constitutional rulings that have tried to bridge this issue, implementation on the ground still leaves many obstacles<sup>45</sup>. Differences in interpretation among law enforcement officials and the absence of strict implementing rules have exacerbated this problem, creating gaps in children's legal protection and reinforcing disharmony between religious norms and the national legal system.<sup>46</sup>

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<sup>43</sup> Rahman, *Recognition of the Status of Out-of-Wedlock Children in the Perspective of Islamic Law and Positive Law*.

<sup>44</sup> Article 2 paragraph (2) of Law No. 1 of 1974 concerning Marriage.

<sup>45</sup> Constitutional Court Decision No. 46/PUU-VIII/2010 concerning the recognition of civil relations of children out of wedlock.

<sup>46</sup> Ahmad Baihaki, *Efforts to Fulfill the Civil Rights of Children Born Out of Wedlock*, 9, no. 1 (2023).

In the practice of policy implementation in the field, imbalances are still found. Civil registration officers often face confusion when processing birth certificates for adopted children out of wedlock, due to differences in interpretation of regulations and the lack of technical guidelines that govern the detailed registration procedures for such cases. For example, at the Population and Civil Registration Office of Buleleng Regency, it was found that there was a discrepancy between the procedure for issuing birth certificates and the normative provisions in the applicable regulations. Indonesian children only need to attach proof of marriage, while for children resulting from mixed marriages or from foreigners, a court determination is required. This difference creates inconsistencies in the administrative treatment of out-of-wedlock children.<sup>47</sup>

Furthermore, the incompatibility between juridical approaches and socio-religious norms often causes confusion among adoptive families in determining the right legal measures. On the one hand, they are faced with the obligation to follow positive legal provisions that provide civil recognition to children, but have the potential to be contrary to the principles of Islamic law. On the other hand, they want to remain consistent with religious teachings, but face administrative obstacles such as difficulties in the civil registration process. This condition not only causes emotional tension, but also creates legal uncertainty that can affect the future and protection of the child's rights.

Seeing the various tensions between the Indonesian legal system and Islamic legal values in the regulation of the adoption of children out of wedlock, including the issue of nasab, inheritance, and the legal status of adopted children, a more comprehensive legal position is needed and combines various aspects simultaneously. The adoption of children out of wedlock, which has been given space in the Indonesian legal system through administrative approaches and biological proof, has not been fully in line with the principles of sharia that uphold the clarity of lineage (nasab). This often causes social rejection and confusion in the implementation in the field, especially in a society that strongly holds religious values. For this reason, a legal reconstruction is needed that not only prioritizes the principle of child protection as a human right, but also pays attention to the aspect of religious sensitivity that lives in Indonesian society.

On the other hand, it is also necessary to prepare laws and regulations from the government to harmonize implementation in the field. The decision needs to be followed up with implementing regulations that explain the mechanism for the recognition of out-of-wedlock children administratively and judicially so as not to cause multiple interpretations, both by officers at the Population Office and at the Office of Religious Affairs. This clarity is important so that the adoption process of an out-of-wedlock child does not become an additional legal burden for the adoptive family, and remains within the legal corridor.

The principle of the best protection for children must be the spirit of every policy, both procedurally and substantially. Therefore, alignment between state law and religious law is urgently needed, not only to ensure legal certainty, but also so that the adoption process runs safely, dignifiedly, and does not cause legal doubts in the future. This step is not only a wise middle ground, but also reflects the spirit of the constitution and the moral values of the Indonesian people as a whole.

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<sup>47</sup> Putu Diana Prisilia Eka Trisna, Ratna Artha Windari, Ni Ketut Sari Adnyani, "IMPLEMENTATION OF LAW NUMBER 24 OF 2013 CONCERNING POPULATION ADMINISTRATION IN THE ISSUANCE OF BIRTH CERTIFICATES OF OUT-OF-WEDLOCK CHILDREN AT THE POPULATION AND CIVIL REGISTRATION OFFICE OF BULELENG REGENCY," *e-Journal of the Judiciary Community, Universitas Pendidikan Ganesha* 1 (2018).

## **CONCLUSION**

Based on the normative and comparative analysis that has been conducted, this study concludes that in the Indonesian legal system, the adoption of children originating from extramarital relationships is legally possible as long as they meet the administrative requirements and obtain a court determination. Out-of-wedlock children can obtain civil legal protection, including the recognition of a civil relationship with their biological father if proven through valid scientific evidence, such as DNA tests, and determined judicially. However, the status as an adopted child does not automatically give rise to inheritance rights to the adoptive parents, unless it is provided through a grant mechanism or a mandatory will in accordance with the provisions of laws and regulations.

Meanwhile, from the perspective of Islamic law, the practice of adoption in the form of *tabannī* is not justified because it has implications for changes in fate and inheritance rights. Islamic law only recognizes child care in the form of *kafālah*, which is parenting that emphasizes social and religious responsibilities without changing the status of the child's *nasab*, inheritance rights, or marital relationship. Children born from extramarital relationships in Islam only have a *nasab* relationship with their biological mother, but are still entitled to proper protection, affection, and education from foster parents as part of the principles of justice and humanity.

The fundamental difference between national law and Islamic law raises juridical and sociological implications, especially related to the *nasab*, inheritance, and legal administration of child adoption, which in practice often raises tension of norms in Indonesian society. Therefore, this study recommends the need for harmonization of child adoption regulations through strengthening the concept of *kafālah* in the national legal system, drafting judicial guidelines that are sensitive to Islamic sharia principles, and increasing the role of the state in ensuring the protection of children's rights without causing conflicts between positive law and religious values.

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