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POSITION OF CHILDREN OUT OF MARRIAGE IN PERSPECTIVE OF PROGRESSIVE ISLAMIC LAW

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ABSTRACT

Children born out of marriage are children born from marriages carried out according to their respective religions and beliefs. This understanding shows the existence of marriage, and if it is carried out according to the Islamic religion, then such a marriage is valid in the perspective of Islamic fiqh as long as it meets the requirements and pillars. Regarding to the position of children out of marriage, in 2012, the Constitutional Court issued a decision related to this matter which then raised pros and cons from various parties, both from legal practitioners, academics, the Indonesian Ulema Council, and even the community. Based on it, this research would like to examine more deeply related to the legal position of children out of wedlock in Indonesian legislation in the perspective of Progressive Islamic law. The type of research used is normative-empirical legal research using primary and secondary data, data analysis using qualitative descriptive and drawing conclusion using deductive thinking. The results showed that children out of marriage in the perspective of progressive Islamic law are children out of marriage have a kinship relationship with their father if born at least six months after marriage or within a grace period of four years after the marriage broke up provided it is evident that within four years their mother didn't excrete.

Keywords: *Children Out of Marriage, Progressive Islamic Law .*

A. INTRODUCTION

Humans as individual beings as well as social beings, who always interact with creatures and the surrounding environment in meeting their needs. Among human needs that require interaction with other humans is the desire to continue their generation. Therefore, Allah SWT provides a way through marriage to justify the relationship of men and women in order to ensure the sustainability of human life in the world, as a motivation to fulfill human desires and protect their offspring (Maki, 2021; Shabuny, 2001).

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Marriage is an effort given by Islamic teachings to maintain the right regeneration process. Marriage according to the provisions of Islamic teachings is a very sacred bond, not just a relationship between a man and a woman to justify sexual relations, Allah SWT mentions marriage with the sentence "*mitsaqon ghalizan*" (meaning a close promise), is a bond of agreement between a husband and wife in navigating life together, so that if both of them are separated by death in this world, then for couples who are obedient in carrying out the obligations and commands of Allah SWT, they will still be reunited and will continue to live together forever in the hereafter (Shihab, 2002). This is due to that marriage is not only a civil bond between individuals as usual, but also a bond that has religious values (Rofiq, 2000), and is the longest practice of worship in Islamic history (Maki, 2021).

Marriage is a spritual and physical bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead (BIP, 2017; Ja'far et al., 2021; Munawar, 2015). Shari'a marriage has some goals such as to have good children, maintain lineage, avoid disease and create a Sakinah family (Al-Zuhaili, 1997). As the word of Allah SWT., in the letter ar-Rum verse 21 which means: *And among His Signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): verily in that are Signs for those who reflect* (Departemen Agama RI., 2003).

Marriage in Indonesia basically must be carried out with procedures in accordance with Article 2 paragraph (1) and paragraph (2) of Law Number 1 of 1974 concerning Marriage that is what is meant by real marriage according to the marriage law (Rasyid, 2012). If the marriage is carried out only in accordance with Article 2 paragraph (1), then the marriage is called outside marriage or the marriage is not registered (Febriansyah, 2015; Pongoliu, 2013).

In February 2012 the Constitutional Court conducted a judicial review of Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage, which was proposed by Hj. Aisyah Mochtar alias Machica bint H. Mochtar Ibrahim who asked her son Muhammad Iqbal Ramadhan Bin Moerdiono to be recognized as the son of the late Moerdiono (Syahuri, 2013).

Then the issuance of the Constitutional Court's decision finally made the pros and cons among legal practitioners, academics, religious leaders, and community leaders in general, both regarding the content of its decision which was considered to legalize adultery and free sex, as well as confusion in multiple interpretations of what is meant by children outside marriage, including the issue of the content of the decision (Anshary, 2014).

On the basis of the above, the author tries to analyze the position of children out of wedlock by using legal analysis by taking arguments from the Koran, the decisions of the

Constitutional Court, and several laws and regulations. Furthermore, the development of the problem by re-interpreting and looking at the marriage period of both parents with the birth of the child based on the agreement of the majority of scholars.

Furthermore, with the basis of progressivism, it is very important in displaying a pattern of Islamic law that is applicable in the reality of everyday life, responsive to the dynamics of change and progress, without the need for complicated mystical Islamic packaging, or symbolic embodiments. Specifically, what is meant by this idea is the transfer of a "passive" or "aggressive-radicalist" Islamic atmosphere to the progressive actualization of Islamic law.

B. METHOD

This research is a normative-empirical legal research (applied law research), a legal research regarding the enforcement or implementation of normative legal provisions (codifications, laws, or contracts) in action on every particular legal event that occurs in society (Bachtiar, 2021). The implementation in action is an empirical fact and is useful to achieve the stated goals. Implementation in action is expected to take place perfectly if the formulation of normative legal provisions is clear, firm, and complete (Muhammad, 2004).

Normative-empirical (applied) legal research starts from written legal provisions (statutory regulations) that are applied to *in concreto* legal events in society (Bhattacherjee, 2012). In this study, it can be seen from the legal provisions regarding children born out of marriage contained in Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage which then when enacted it reaped the pros and cons in society. At the end of the study, conclusions are drawn using deductive thinking, the method of analyzing data using a general method. The nature of the general data is drawn to a more specific conclusion point (Hadi, 2012; Hanif & Susanto, 2020).

C. DISCUSSION

1. The Position of Children Out of Marriage in the Perspective of Islamic Fiqh

The word position in Islam is termed with *nasab*, it will refer to a very close family relationship, relationship between children and their parents, especially male parents (Ahmad & Nabil, 2022; Mutaqin & Ariono, 2021; Quthny & Muzakki, 2021). Determination of *nasab* in Islam has a very important role since it is with the determination of lineage that the child can know his family relationship with the father (Harlina, 2014; Na'imah, 2019).

A child can be said to have a legitimate *nasab* relationship with his father if he is born from a legal marriage. On the other hand, a child born outside a legal marriage cannot be called

a legitimate child (Muamar, 2016; Nurry et al., 2020). In fiqh there is no clear and unequivocal definition relating to a legitimate child, but it can be seen from the definitions of the verses of the Qur'an and hadith (Basri & Soiman, 2017; Harahap, 2017), such as the Qur'an surah al-Ahqaf verses 5-6 which means: *And who is more astray than one who invokes besides Allah, such as will not answer him to the Day of Judgment, and who (in fact) are unconscious of their call (to them)? And when mankind are gathered together (at the Resurrection), they will be hostile to them and reject their worship (altogether)!.* Furthermore, in surah al-Isra verse 32 it is also explained: *Nor come nigh to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils).*

The prohibitions of the Qur'an as in the letters of al-Ahqaf and al-Isra' above are not only intended so that everyone maintains his honor by avoiding prohibited acts, but also more importantly avoiding the worst effects of violating the prohibition itself. The birth of a child as a result of adultery is actually the result of an act of violating these prohibitions.

Regarding to a legitimate child, it can be understood that what is meant by a legitimate child is that it starts from the conception or fertilization of an ovum by a sperm that occurs in the womb of a woman as prospective mother and this conception must occur in a legal marriage between a man and a woman (Darwis, 2010; Yanti, 2019). So a child born in a legal marriage has the status of a biological child (Lahia, 2017; Purwaningsih, 2016). From this point, the determination of the legal child is carried out.

The scholars define adultery children as cons of legitimate children. An adulterous child is a child born by his mother from an illegitimate marriage relationship (Darwis, 2010; Harahap, 2017). *Li'an* children are children who are not legally assigned to their fathers, after the husband and wife have conducted *li'an* each other with clear accusations (Rahayu et al., 2022; Sipahutar, 2019). From this opinion, it can be seen that there are two types of child status: adultery children born from an illegitimate relationship (*zina*) and *li'an* children. If there is a legal marriage between husband and wife, then the wife conceives and gives birth to her child, then the husband can deny the legitimacy of the child if: The wife gives birth to a child before the pregnancy period; and giving birth to children after the maximum period of pregnancy from the time of divorce has passed (Edyar, 2016; Pongoliu, 2013).

Relating to the minimum period of pregnancy, the majority of scholars have set it for six months (Darwis, 2010; Nugroho & Safiudin, 2021). The basis is the word of Allah in Surah al-Ahqaf verse 15 and Surah Luqman verse 14. In Surah al-Aḥqaf verse 15 it is explained cumulatively, the number of pregnant and weaning is 30 (thirty) months. Whereas in Surah Luqman verse 14 it is explained that the maximum limit for weaning is 2 years (24

months). So the minimum period of pregnancy is 30 months minus 24 months which is equal to six months (Algiftiah, 2021; Harahap, 2017; Puat, 2013).

This information was also given by Ibn Abbas and it was agreed upon by the scholars who interpreted that the first verse indicates that the period of pregnancy and weaning is 30 months (Darwis, 2010; Herawati, 2021). The second verse explains that weaning after the baby is fully fed takes two years or twenty-four months. Means the baby takes 30 - 24 = 6 months in the womb. This opinion was agreed upon by the fiqh experts obtained by capturing the evidence of the isyarah of the Qur'an. Even Wahbah Zuhaili calls it a valid form of taking the law.

Based on this opinion, it can be understood that in order for a child to be considered a legitimate child of his mother's husband through a legal marriage, the child must be born at least six months after the marriage or within the '*iddah* period of four months and ten days after the marriage broke up.

Regarding this grace period, there are some scholars of fiqh who argue that a child born after exceeding the '*iddah* period after the marriage is terminated, is a legitimate child of his ex-husband as long as it can be assumed that his birth was caused by sexual intercourse between the ex-husband and wife (Manan, 2017; Martinelli, 2017; Shihab, 2004). Based on these differences of opinion, a maximum grace period of four years is set, provided that within four years the mother does not excrete.

2. Children Out of Marriage in the Perspective of the Civil Code

In Civil Code, there are three types of children out of marriage (Hamzani, 2016; Mokodompit, 2021), they are: *First:* if the parents of one or both of them are still bound by another marriage, then they have sexual intercourse with another woman or man which results in pregnancy and giving birth to a child, the child is called an adulterous child (Hartanto, 2012). *Second:* if the parents of the illegitimate child are both single, they have sexual relations, and are pregnant and give birth to a child, then the child is called an illegitimate child (natural child). *Third:* discordant children in the Civil Code, namely children born from a relationship between a man and a woman who are forbidden to marry as stipulated in article 30 of the Civil Code because they have blood relations (Hartanto, 2012).

According to the Civil Code, with the existence of descendants outside of marriage, there has not been a familial relationship between the child and his biological father or mother, but after an acknowledgment (*erkenning*), a kinship ties with all the consequences, especially inheritance rights between child with parents who acknowledge him (Manan, 2006). If a

kinship relationship between the child and the family of the father or mother who acknowledges him does not yet exist, then that relationship can only be placed by ratification of the child (*wettiging*), which is a further step than recognition. Bear in mind, the law does not allow the recognition of adulterous children and discordant children (Manan, 2006).

According to the provisions in the Civil Code, the acknowledgment of children out of mariage is categorized into several parts (Kansil, 1995), they are: *First:* It should not be admitted that children born from: Adultery relations, are called adultery children, and discordant or incestuous relationships are called discordant children. *Second:* It can be recognized. If it is recognized it is called natural children recognized as legitimate *(erkend kinderen),* and children who are recognized can also be legalized *(gewettigd). Third:* If they are not recognized, they are called natural children who are not recognized *(natuurlijk niet erkend kinderen).*

Seeing from the level of legal status of children out of wedlock according to the Civil Code, there are: Children out of marriage, this child has not been recognized by his parents; illegitimate children who have been recognized by one or both parents; and last the illegitimate child becomes a legal child, as a result of both his parents holding a legal marriage (Kansil, 1995).

Child acknowledgment is a statement made by a person in the form stipulated by law, that the person making the statement is the father or mother of a child born out of marriage (Kansil, 1995). Then the illegitimate child can obtain a civil relationship with his father by giving recognition to the illegitimate child. Article 280 and Article 281 of the Civil Code confirms that with the acknowledgment of a child out of marriage, a civil relationship arises between the child and his father or mother. Recognition of children out of marriage can be done with an authentic certificate, if it has not been made in the birth certificate or at the time of the marriage.

3. Children Born Out of Marriage in the Perspective of Law Number I of 1974 Concerning Marriage

The provisions in Law Number I of 1974 concerning Marriage Article 42 Chapter IX states that: a legitimate child is a child born in or as a result of a legal marriage (Redaksi Sinar Grafika, 2004), While a legal marriage based on Article 2 paragraph (1) is a marriage is legal, if it is carried out according to the law of each religion and belief (BIP, 2017). Then article 43 paragraph (1) states that children born out of wedlock only have a civil relationship with their mother and their mother's family. The verse reads before the decision of the Constitutional Court is issued.

Description of the Decision of the Constitutional Court Number 46/PUU-VIII/2010 The decision of the Constitutional Court began with an application submitted by Hj. Aisyah Mochtar alias Machica bint H. Mochtar Ibrahim and Muhammad Iqbal Ramadhan bin Moerdiono and their attorneys, Rusdianto Matuwawa, Oktryan Makta and Miftachul I.A.A., as stated in Power of Attorney Number 58/KH.M&M/K/VIII/2010 dated August 5, 2010. The essence of the petition is a judicial review of Article 2 paragraph (2) of Law Number 1 of 1974 which states that every marriage is recorded according to the applicable laws and regulations and Article 43 paragraph (1) which reads that children born out of marriage only have a civil relationship with their mother and their mother's family.

The reason for the petition for judicial review of the two articles above is due to that the Petitioner is a party who directly experiences and feels that his constitutional rights have been harmed by Article 2 paragraph (2) and Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage. These two articles create legal uncertainty that results in losses for the applicant related to the marital status and legal status of his child resulting from the marriage.

Based on these legal considerations, the Constitutional Court affirms that Article 43 paragraph (1) of Law Number 1 of 1974 which states: "Children born out of marriage only have a civil relationship with their mother and their mother's family" must be read: "Children born out of marriage have a civil relationship with their mother and their mother's family as well as with a man as their father which can be proven based on science and technology and/or other evidence according to the law having blood relations, including civil relations with their father's family.

Overall, on the judicial review submitted by the petitioners, the Constitutional Court decided that the arguments of the petitioners as far as Article 2 paragraph (2) of Law Number 1 of 1974 was based were not legally grounded. As for Article 43 paragraph (1) of Law Number 1 of 1974 which states "a child born out of marriage only has a civil relationship with his mother and his mother's family" is conditionally unconstitutional contrary to the 1945 Constitution, unconstitutional as long as the verse is interpreted as eliminating civil relations with men who can be proven based on science and technology and/or other evidence according to the law, have blood relations as their fathers (Kurniawan, 2017; Matnuh, 2016).

4. Children Out of Marriage in the Perspective of the Compilation of Islamic Law

The provisions in Article 99 of the Compilation of Islamic Law explains that legitimate children are: letter (a) children born in or as a result of legal marriages; letter (b) the

result of legal fertilization of husband and wife outside the womb and born by that wife (Tim Redaksi, 2015). Article 103 of the Compilation of Islamic Law states that: paragraph (1) the origin of a child can only be proven by a birth certificate or other evidence. Paragraph (2) if there is no birth certificate or other evidence as referred to in paragraph (1), the Religious Courts may issue a determination regarding the origin of a child after conducting a thorough examination based on valid evidence. Paragraph (3) on the basis of the decision of the Religious Court in paragraph (2), the birth registrar agency in the jurisdiction of the Religious Court shall issue a birth certificate for the child concerned (Tim Redaksi, 2015).

Article 100 of the Compilation of Islamic Law states that: Children born out of marriage only have a kinship relationship with their mother and their mother's family. In order for a child to be considered a legitimate child of his mother's husband, it must be born at least six months after the marriage or within the *iddah* period (4 months and 10 days) after the marriage is terminated (Projodikoro, 1981). A child born within a period of 6 months after the marriage or after the marriage is terminated is an illegitimate child, meaning that the child does not have a kinship relationship with his father, but the child still has a kinship relationship with the mother who gave birth to him (Aisyah et al., 2021; Rahmi & Sakdul, 2017).

The Compilation of Islamic Law states that children born out of wedlock only have a kinship relationship with their mother and their mother's family. Article 101 states that: a husband who denies the legitimacy of the child, while the wife does not deny it, can confirm his denial with *li'an* (Tim Redaksi, 2015). Then a husband who denies a child born to his wife can file a lawsuit with the Religious Court within 180 days after the final day or 360 days after the marriage is dissolved or after the husband finds out that his wife has given birth to a child and is in a place where he can file a case with the Religion Courts. Denial submitted after the elapsed time cannot be accepted. The origin of a child can only be proven by a birth certificate or other evidence, if there is no certificate and other evidence, the Religious Courts can issue a determination regarding the origin of the child after conducting a thorough examination based on valid evidence, then On the basis of the provisions of the Religious Courts, the Birth Registrar Institution within the jurisdiction of the Religious Courts issues a birth certificate for the child concerned (Tim Redaksi, 2015).

5. Progressive Islamic Law

The idea of deconstructing Islamic law in Indonesia, epistemologically, is hypothesized in the form of Islamic social thought by reformers of Islamic legal thought. Strong beliefs and opinions about Islam, as well as eliminating doubts, to arrive at this goal, logic plays a very

important role in examining the rationality of the Qur'an to gain knowledge, as a basic framework for the truth of a belief. With this, the veil that covers the birth of these epistemes will be opened by re-reading (*iadah al-qiraah*) the texts that gave birth to the formulation of the epistemology of Islamic law. In this way, it is hoped that Muslims can distinguish between normative and historical Islam, or between sociological truth and ultimate truth, so that the phenomenon of sacralization of thought (*taqdis al-afkar*) and moreover the phenomenon of *taqlidism* and sects that characterize the lives of Muslims will be minimized. Progressive Islamic law becomes the most substantive and most decisive entity for the truth of an Islamic proposition.

This progressive Islamic legal thought seeks to find deep-rooted knowledge of moderate and adaptive Islamic science with social change, to produce puritan beliefs or faith, which is then implemented in epistemologically accountable behavior with reference to elastic Islamic law or charity that active-progressive. This progressive Islam is truly progressing with a pioneering spirit, because inclusive progressiveism contains a critical nature, which criticism is seen in a strong pressure to make distinctions, categories, analyzes, and so on with great respect for the role of ratio (Sulthon, 2019). The foundation of progressivism is very important in displaying a pattern of Islamic law that is applicable in the reality of everyday life, responsive to the dynamics of change and progress, without the need for complicated mystical Islamic packaging, or symbolic embodiments. Specifically, what is meant by this idea is the transfer of a "passive" or "aggressive-radicalist" Islamic atmosphere to the progressive actualization of Islamic law.

Ijtihad is a method of extracting meaning and legal material with benefit as the goal (Bahrudin et al., 2022; Hidayatulah, 2020). In the current context, ijtihad can mean progressive work to update the rules contained in the text of the Qur'an or Sunnah so that they are able to cover new situations and conditions by providing a new solution (rule of law) (Rahman, 1982).

It is a necessity to explore the law on legal events in various fields, especially those concerning the portion of the *dzanni* arguments maximally for which there is no legal stipulation based on the texts of the Qur'an and Hadith. Contemporary jurists should reformulate an up-to-date conception of fiqh that is accommodating to the development of situations and conditions in the life of modern society. Where the problems of people's lives are always developing and increasingly diverse problems. Regarding problems relating to the law for which there is no legal stipulation, there is no other way but ijtihad. Ijtihad is a noble task as an effort to provide alternative solutions to increasingly complex legal problems (Arfa & Marpaung, 2018; Efrinaldi, 2018).

The flexibility of the fundamental structure of Islamic law in practice is sometimes not balanced with the productivity of substantive understanding through the ijtihad method. The implication is that the tradition of Islamic sciences, especially Islamic law, mainly after the 10th century AD tends to be legal, formalistic and stagnant. The assumption that the existing *fiqh* contains the points of divine law (*syari'ah*) has hampered the substantive interpretation of ijtihad, so the tradition of *taqlid* thrives (Esposito, 1994). This situation becomes even worse when interpretive texts of Islamic law are made into authoritative texts. Even though often the text is only a commentary (*syarh*) or maybe even a comment on a comment *(hasyiyah*) so that the first text actually gets lost. In turn, the formulation of Islamic law loses its relevance to the realities of practical life.

Renewing the limitations and scope of ijtihad also urgently needs to be reconstructed. In the dynamics of Islamic historicity, ijtihad as a dynamic medium of Islamic law is very progressive, free without any formal rules that follow it. However, in its development, *Ushul fiqh* scholars made rules, including limitations on the scope and conditions of ijtihad. Ushul scholars then make a distinction between the laws that are the area of ijtihad and those that are not ijtihad plots. Broadly speaking, this area of ijtihad includes two things: first, laws that have no textual instructions at all; and second, the laws appointed by *nash zhanni*. While the laws that have been designated by *qath'i dilalah* are practiced in no any opportunity for ijtihad (Bahrudin et al., 2022; Manan, 2008).

In ijtihad, the text of the Qur'an and precedent (Sunnah) can be understood to be generalized as principles and that these principles can then be formulated into new rules. The working mechanism of ijtihad includes understanding the text and precedents in the integrity of their past contexts, understanding new situations that are happening now, and changing the legal rules contained in the text or precedent (Alyafie, 2009; Ruslan, 2019). This reformulation of the conception of ijtihad functions as an effort to reform Islamic law, as well as an effort to answer the challenges of new situations in the context of Indonesia.

Al-Quran and Hadith as sources of ijtihad, which is also then are *mashadir al-ahkam* (Adam, 2021; Shomad et.al., 2020). However, on the other hand, the legal argument is also a method of ijtihad (*thuruq al-istinbath al-masalik)*. With this double method, Indonesian *fiqh* was then reformulated by not eliminating the objectives contained in the texts of the Qur'an and Hadith but adjusting to Indonesian conditions.

In the methodological aspect, the method of comparison (comparative) schools *(muqaranah al-madzahib*) is proposed. This comparative method, within the context of the contextualization of *fiqh* thought in Indonesia, is used if the problems faced by the community

have already been solved in these schools, both Sunni and non-Sunni schools, as long as their use is still relevant to social developments and changes in society.

If the problem is more complex, while the solution has not been formulated by the previous fuqaha', it is seen in *ijtihad bi al-ra'yi*, namely determining the law based on benefits, lecture rules, and *'illat* law. At the implementation level, the methods used include: *qiyas, istihsan, istishlah, 'urf,* and *istishab*. These methods are applied in accordance with the relevant fiqh rules. Material and formal legal decisions are taken through *ijtihad jama'i* (collective ijtihad) or *ijma'* (consensus). In the context of legislation, with reference to the Qur'an, Sunnah, or *ra'yu,* this is done through consultation on the orders of the head of state, not *ijtihad fardi*. The crystallization of the results of *ijtihad* into *ijma*' and then the policy of *taqnin* (stipulation of Islamic law into law) is an effort to socialize the results of ijtihad.

This pattern of ijtihad taken collectively, or better known as *ijtihad jama'i*, since the content of this ijtihad will offer more choices or qualitative alternatives. Meanwhile, if you rely solely on *ijtihad fardi*, it will give birth to many different opinions. Rationally, collective views will certainly be better than personal views and to ground collective ijtihad, how significant the establishment of the *ahl al-hall wa al-'aqd institution* is (Iqbal, 2016; Muthhar, 2018). This institution is supported by two sub-institutions: First, *hai'ah siyasah* (political institution). The members of this institution consist of people elected by the people, from the people, and for the people. The category of capabilities in this context, they do not have to meet the requirements of a mujtahid, but simply master the field they represent. Second, *hai'ah tasyri'iyah* (legislative institution). This institution includes the components of *ahl al-ijtihad* and *ahl al-ikhtishas* significantly.

D. CONCLUSION

According to the view of Islamic fiqh, it does not recognize marriage registration, so the meaning of outside marriage is the same as adultery, while the Indonesian Marriage Law, since it requires recording, and cannot be equated outside of marriage with adultery. Outside marriage in Indonesia according to Islamic law is legal, while adultery according to Islamic law is never touched by the term marriage. While the position of a child out of marriage in the perspective of progressive Islamic law is to have a kinship relationship with his father if he was born at least six months after the marriage or within a grace period of four years after the marriage was broken, provided it was evident that within the past four years his mother had not excreted.

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