

## **Challenging Legal Injustice against Children in Incest Cases: A Progressive and Islamic Human Rights Approach**

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Received: 27-08-2025	Revised: 01-12-2025	Published: 31-12-2025
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### **Abstract:**

Illegitimate children born from incest present complex issues in civil law, particularly concerning their legal status and the protection of their rights. The main legal problem concerns the position of the biological father. Under Islamic law, the biological father has no legal relationship of lineage, guardianship, or inheritance with the child. However, from a moral, constitutional, and human rights perspective, the father still bears responsibility for fulfilling the child's basic rights. This study examines the legal consequences and obligations of biological fathers toward illegitimate children using the perspectives of Progressive Law and Islamic Human Rights. The research employs a normative legal method, focusing on Article 283 of the Civil Code, which prohibits the recognition of illegitimate children. This provision is analyzed in relation to the Child Protection Law, the Human Rights Law, the International Covenant on Civil and Political Rights, and other relevant regulations. In addition, conceptual and philosophical approaches are used to reinterpret rigid legal norms by emphasizing justice, humanity, and social reality. The study finds that recognition of illegitimate children by their biological fathers may be permitted to the extent that it ensures the fulfillment of the child's fundamental rights, such as financial support, education, and health care. However, recognition should not extend to lineage, inheritance, or guardianship, in order to uphold the principle of *hifz al-nasl* (protection of lineage). These limitations are not discriminatory but aim to harmonize child protection with the principles of Islamic law. Furthermore, responsibility for protecting children does not rest solely on parents; the state and society also have a duty to ensure that all

children receive equal protection. This research offers a legal reconstruction that bridges Islamic law and human rights, providing a normative basis for child protection policies consistent with *maqāṣid al-sharī'ah*.

**Keywords:** biological father; incestuous child; children's rights; islamic human rights.

## Introduction

The birth of a child creates a blood relationship between the child and his or her biological mother and father.<sup>1</sup> This blood relationship forms the basis of civil relations and gives rise to obligations and rights between the child and his or her parents.<sup>2</sup> However, these obligations and rights arise only when the child is born within a valid marriage in accordance with Article 2 of the Marriage Law and Article 4 of the Compilation of Islamic Law. A child born within a valid marriage is referred to as a legitimate child, while a child born outside of a valid marriage is referred to as an illegitimate child.<sup>3</sup> Clarity of civil relations provides legal certainty for children and their parents, giving rise to obligations and rights between them.<sup>4</sup> Therefore, clarity regarding the civil status of children is important because it has legal consequences for children, including the rights and obligations that arise between children and their parents.<sup>5</sup>

The issue of fulfilling children's rights arises when a child is born from an illegal or prohibited relationship, one of which is incest.<sup>6</sup> From incestuous relationships, it

<sup>1</sup> E.P. Handayani et al., "Law Analysis of Birth Registration Based on the Biological Father's Recognition," in *Empowering Civil Society in the Industrial Revolution 4.0*, 1st ed., by Sukowiyono et al. (London: Routledge, 2021), 23–27, <https://doi.org/10.1201/9781003180128-5>.

<sup>2</sup> Muhammad Izudin, *Dinamika atas Perlindungan Hukum terhadap Anak yang Lahir di Luar Perkawinan* (Indramayu: Penerbit Adab, 2023), 248; Shinta Ayu Purnamawati et al., "Child-Friendly Justice and Children's Rights from Criminal Cases; Islamic Law Notes," *Legality: Jurnal Ilmiah Hukum* 32, no. 1 (March 2024): 141–54, <https://doi.org/10.22219/ljih.v32i1.31681>.

<sup>3</sup> Marilang Marilang, "Legal Relationship Between Illegitimate Children and Their Biological Father: The Analysis of Constitutional Court Decree No. 46/PUU-VIII/2010 in the Perspective of Civil and Islamic Law," *Journal of Indonesian Islam* 10, no. 2 (December 2016): 2, <https://doi.org/10.15642/JIIS.2016.10.2.335-354>.

<sup>4</sup> Sholahuddin Al-Fatih, "House of Role as An Effort to Protect Children From Violence: An Indonesian Human Rights Perspective," *Audito Comparative Law Journal (ACLJ)* 2, no. 1 (February 2021): 1–10, <https://doi.org/10.22219/aclj.v2i1.15145>; Dwi Aprilianto et al., "The Controversy of Child Marriage Culture in The Perspective of Maqāṣid Al-Usrah: A Case Study of The Authority of Lebe' in Brebes," *Al-Manahij: Jurnal Kajian Hukum Islam*, August 7, 2024, 199–218, <https://doi.org/10.24090/mnh.v18i2.11554>.

<sup>5</sup> WebAdm\_LK2FHUI, "Anak Luar Kawin Memiliki Hubungan Keperdataan Dengan Ayah Biologisnya," LK2 FHUI, April 14, 2012, <https://lk2fhui.law.ui.ac.id/anak-luar-kawin-memilki-hubungan-keperdataan-dengan-ayah-biologisnya-2/>.

<sup>6</sup> Incest is a sexual relationship between a man and a woman who are closely related by blood. See Saiful Abdullah, Jum'ati Jum'ati, and Roni Sulistyanto Luhukay, "Hubungan Sedarah (Incest) Yang Dilakukan Suka Sama Suka Pada Usia Dewasa Perspektif Tindak Pidana Kesusilaan," *Media Iuris* 6, no. 1 (February 2023): 127–50, <https://doi.org/10.20473/mi.v6i1.38244>; Ricy Fatkhurrohman, Muhammad Royhan Assaiq, and Tri Wastuti, "Covering Shame, Sacrificing Rights: A Maqāṣid al-Sharī'ah Perspective on Child Protection in Incestuous Marriage Practices," *International Journal of Social Science and Religion (IJSSR)*, November 22, 2025, 347–448, <https://doi.org/10.53639/ijssr.v6i3.380>.



is not uncommon for a child to be born who is referred to as an illegitimate child.<sup>7</sup> Incestuous relationships are prohibited by law, religion, and custom. In Indonesia, positive law prohibits incestuous relationships by making blood relations a prohibition on marriage in the Marriage Law<sup>8</sup> and the Compilation of Islamic Law.<sup>9</sup> Meanwhile, in terms of religion,<sup>10</sup> all religions agree to prohibit incestuous relationships. In Islam itself, incestuous relationships are prohibited in accordance with Allah's command in QS. An-Nisa' verse 23.<sup>11</sup> Meanwhile, according to custom,<sup>12</sup> incest is prohibited because it is taboo and violates religious and social norms.<sup>13</sup> From a health perspective, children born from incest are highly likely to have physical and mental biological weaknesses.<sup>14</sup>

Empirically, cases of incest still occur frequently in Indonesia. For instance, there was a case in Indonesia where a brother impregnated his biological sister in Rejang Lebong, Bengkulu, resulting in three pregnancies. The relationship occurred from 2021 until it was discovered in 2024. From this incestuous relationship, a child

<sup>7</sup> Wardah Nuroniyah, *Hukum Perlindungan Anak Di Indonesia* (Lombok Tengah: Yayasan Hamjah Diha, 2022), 15; Ratri Novita Erdianti, Wasis Wasis, and Sholahuddin Al-Fatih, "Child Friendly Villages as an Effort to Prevent a Child as Victims and as Perpetrator Crimes," *Jurnal Pengabdian Hukum Indonesia (Indonesian Journal of Legal Community Engagement)* 5, no. 2 (November 2022): 317–36, <https://doi.org/10.15294/jphi.v5i2.55978>.

<sup>8</sup> Law No. 1 of 1974 Concerning Marriage, Article 8 states: Marriage is prohibited between two people who: a. Are related by blood in a direct line of descent, either upward or downward, b. Are related by blood in a collateral line of descent, namely between siblings, between a person and a sibling of a parent, and between a person and a sibling of a grandparent, c. Are related by marriage, namely parents-in-law, stepchildren, sons-in-law or daughters-in-law, and stepmothers or stepfathers, d. Are related by breastfeeding, namely foster parents, foster children, foster siblings, and foster aunts or uncles, e. Related as siblings with a wife or as an aunt or niece of a wife, in the case of a husband with more than one wife, f. Having a relationship that is prohibited from marriage by religion or other applicable regulations.

<sup>9</sup> KHI, Article 39 states: It is prohibited to conduct a marriage between a man and a woman due to: (1) Blood relations, (2) Kinship relations, (3) Breastfeeding relations.

<sup>10</sup> Otavia Berlina Cahya Putri, Lukman Santoso, and Iqbal Saujan, "Why Pregnancy Is Not Enough: Judicial Interpretation of 'Urgent Grounds' in Child Marriage Dispensation Cases at the Madiun Religious Court," *Indonesian Journal of Sharia and Socio-Legal Studies* 1, no. 2 (November 2025): 174–92, <https://doi.org/10.24260/ijssls.1.2.117>.

<sup>11</sup> Anis Khafizoh, "Perkawinan Sedarah dalam Perspektif Hukum Islam dan Genetika," *Syariati : Jurnal Studi Al-Qur'an dan Hukum* 3, no. 01 (May 2017): 62, <https://doi.org/10.32699/syariati.v3i01.1142>; Mursyid Djawas et al., "The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law)," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 1 (June 2022): 139–55, <https://doi.org/10.22373/sjhk.v6i1.11904>.

<sup>12</sup> Areta Edgina Apta Maharani, Agus Yudha Hernoko, and Erni Agustin, "Prinsip Kepentingan Terbaik Bagi Anak Akibat Pembatalan Perkawinan Orang Tua Sedarah," *Media Iuris* 6, no. 1 (February 2023): 5, <https://doi.org/10.20473/mi.v6i1.40106>; Sudirman Sudirman et al., "Examining the Complexity of Child Marriage as Sexual Violence in Digital Era," *Legality : Jurnal Ilmiah Hukum* 31, no. 2 (September 2023): 310–28, <https://doi.org/10.22219/ljih.v31i2.28881>.

<sup>13</sup> Faisal et al., "Legal Analysis of Legal Protection for Children as Victims of Incest Criminal Act," *Journal of Law, Politic and Humanities* 5, no. 3 (January 2025): 1623–35, <https://doi.org/10.38035/jlph.v5i3.1117>.

<sup>14</sup> Hari Sutra Disemadi, Sholahuddin Al-Fatih, and Mochammad Abizar Yusro, "Indonesian Children Protection against Commercial Sexual Exploitation through Siri Marriage Practices in Maqashid Al-Shariah Perspective," *Brawijaya Law Journal* 7, no. 2 (October 2020): 195–212, <https://doi.org/10.21776/ub.blj.2020.007.02.04>.



was born who is now approximately three years old.<sup>15</sup> Another case of incest occurred in Ponorogo in 2021, where a father molested his two biological children for eight years. The abuse was first committed against one of his children in 2013, when the victim was 13 years old.<sup>16</sup>

In addition to this case, there was also an incestuous relationship between a father and his biological daughter in Purwokerto, Banyumas, in 2023. The incestuous relationship, which had been going on for years, resulted in the birth of seven babies, all of whom were killed and buried in a garden near the house by the father.<sup>17</sup> These cases show that children are born from incestuous relationships, raising the issue of civil rights for children born of incest, an issue that is often overlooked by society. This situation affects the legal status of children born of incest, which in turn affects the fulfilment of their rights.<sup>18</sup> In Indonesia, there are no specific regulations governing children born of incest. The Marriage Law<sup>19</sup> and the Compilation of Islamic Law (KHI)<sup>20</sup> only regulate the status of legitimate children and children born out of wedlock, and do not regulate anything else. Considering their origin, children born of incest are treated the same as children born out of wedlock or children born of adultery.<sup>21</sup> Therefore, the legal consequences for children born of incest are the same as those for children born out of wedlock.

Children born of incest (incestuous relationships) only have civil relations with their mother and her family.<sup>22</sup> The status of children born of incest (incestuous relationships) will certainly affect the fulfilment of their rights.<sup>23</sup> The rights obtained by children born out of wedlock (incest) are certainly different from those of

<sup>15</sup> Liputan6.com, "8 Kasus Inses yang Sempat Viral di Indonesia Seperti Hubungan Bapak Anak Purwokerto," *liputan6.com*, 28 Juni 2023, diakses 17 Maret 2025, <https://www.liputan6.com/news/read/5331123/8-kasus-inses-yang-sempt-viral-di-indonesia-seperti-hubungan-bapak-anak-purwokerto>.

<sup>16</sup> "Fakta Ayah Rudapaksa 2 Anak Kandung Di Ponorogo, Dilakukan Sejak 2013, Istri Takut Melapor - Serambinews.Com," accessed December 24, 2025, <https://aceh.tribunnews.com/2021/12/02/fakta-ayah-rudapaksa-2-anak-kandung-di-ponorogo-dilakukan-sejak-2013-istri-takut-melapor>.

<sup>17</sup> Tim detikJateng, "8 Fakta Pria Purwokerto Bunuh 7 Bayi Hasil Inses dengan Putri Kandung," *detiknews*, 26 Juni 2023, diakses 17 Maret 2025, <https://news.detik.com/berita/d-6793808/8-fakta-pria-purwokerto-bunuh-7-bayi-hasil-inses-dengan-putri-kandung>.

<sup>18</sup> Elridsa Nur Azizah and Amrullah Hayatudin, "Kedudukan Hukum Anak Hasil Incest menurut Putusan Mk No. 46/Puu-VIII/2010 dan Hukum Islam," *Jurnal Riset Hukum Keluarga Islam* Vol. 2, no. No. 1 (July 2022): 51, <https://doi.org/10.29313/jrhki.vi.902>.

<sup>19</sup> Law No. 1 of 1974 on Marriage, Article 42

<sup>20</sup> Compilation of Islamic Law (KHI), Article 99: A legitimate child is: a. a child born in or as a result of a valid marriage

<sup>21</sup> Annisa Hidayati, "Kedudukan Hukum Anak Yang Lahir Dari Perkawinan Sedarah Menurut Kuh Perdata dan KHI," *Stigma: Jurnal Ilmu Sosial Politik dan Humaniora*, March 1, 2022, 9; Wali Muhammad Memon, Arun Barkat, and Rehana Anjum, "A Comparative Analysis of Protections Guaranteed against Child Abuse under Islamic Law and International Human Rights Law," *Law Research Journal* 3, no. 1 (January 2025): 17–32.

<sup>22</sup> Mursyid Djawas et al., "The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law)," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 1 (June 2022): 163, 1, <https://doi.org/10.22373/sjhh.v6i1.11904>.

<sup>23</sup> Lize Mills, "Born from Bad Memories: Considering the Best Interests of Children Conceived through Rape and Incest," *Journal for Juridical Science* 48, no. 1 (June 2023): 111–44, <https://doi.org/10.38140/jjs.v48i1.7059>.



legitimate children whose rights are guaranteed.<sup>24</sup> By only having a civil relationship with their mother and her family, children born out of wedlock only have their rights fulfilled by their mother, and indirectly, the biological father of children born out of wedlock (incest) has no legal obligation to fulfil the rights of the child born out of wedlock.<sup>25</sup> On the other hand, to date, there are no specific laws or regulations governing sanctions for biological fathers who are irresponsible for the birth of children born out of wedlock (incest).<sup>26</sup>

This situation clearly contradicts Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection, which states that: “The state, government, regional government, community, family, and parents or guardians are obliged and responsible for the implementation of child protection.”<sup>27</sup> This article identifies the parties responsible for ensuring child protection, including parents. Thus, both biological parents have the obligation and responsibility to fulfil their child’s rights regardless of the child’s status. However, in practice, child protection for children born of incest often continues to involve discrimination. The existence of current regulations that tend to place illegitimate children under social and legal sanctions necessitates legal reconstruction. Such reconstruction lies in the need for a paradigm shift from legal-moralistic to humanistic-protective. A reorientation of the interpretation of existing legal norms is required to ensure that the sins or mistakes of parents are not transferred to children in the form of restrictions on their civil rights.

Studies on children born out of wedlock, including those resulting from incest, have long attracted scholarly attention. Several studies related to the issue of children born out of wedlock (incest) have been conducted by Hasbi Umar et al. The study discusses the legal status of children born out of wedlock (incest) according to Islamic law and positive law. According to Islamic law, illegitimate children are classified as children born out of wedlock. According to positive law, the status of illegitimate children is the same as that of children born out of wedlock, which means they only have a civil relationship with their mother and her family.<sup>28</sup>

Another study was conducted by Ummu Aemanah and Usep Saepullah. In their study, they discuss inheritance from incestuous children according to the Marriage Law and the Compilation of Islamic Law, as well as according to Islamic law. The results of their research show that the inheritance status of incestuous children from annulled incestuous marriages is not retroactive. Therefore, children born of incestuous marriages that are annulled are still considered legitimate children

<sup>24</sup> Lia Noviana and Lukman Santoso, “Interpreting Legal Rights: Disparities in Judicial Treatment of Children Born Out of Wedlock in East Java, Indonesia,” *Lex Scientia Law Review* 8, no. 1 (September 2024): 321, <https://doi.org/10.15294/lsr.v8i1.4606>.

<sup>25</sup> Tateki Yoga Tursilarini et al., “Examining Child Victims of Incest in Indonesia: Between the Legal System and Family Dysfunction,” *JURIS (Jurnal Ilmiah Syariah)* 23, no. 1 (June 2024): 129–42, <https://doi.org/10.31958/juris.v23i1.12341>.

<sup>26</sup> Lia Noviana and Lukman Santoso, “Interpreting Legal Rights: Disparities in Judicial Treatment of Children Born Out of Wedlock in East Java, Indonesia,” 323.

<sup>27</sup> Law No. 35 of 2014, Article 20.

<sup>28</sup> Hasbi Umar, Husin Bafadhal, dan Ika Rusmayanti, “Kedudukan Hukum Anak Lahir Diluar Nikah Dari Hubungan Sedarah (Incest) Menurut Hukum Islam Dan Hukum Positif,” *ADHKI: Journal Of Islamic Family Law* vol.4, no. 1 (24 Juli 2023): 35, <https://doi.org/10.37876/adhki.v4i1.120>.





in general and retain their inheritance rights from their father. This differs from the opinions of the imams of the madhhabs and the majority of scholars, who hold that children born of incestuous marriages do not have inheritance rights from their father. This is because children born of incest are likened to children born out of wedlock, who only have a blood relationship with their mother and her family.<sup>29</sup>

Further research by Annisa Hidayat discusses the legal status of children born of incest according to the Civil Code and the Compilation of Islamic Law. Annisa Hidayat's research states that according to both the Civil Code and the Compilation of Islamic Law, the legal status of an illegitimate child (incest) remains that of an illegitimate child and cannot be recognised as a legitimate child.<sup>30</sup>

Moreover, research conducted by Elrisda Nur Azizah and Amrullah Hayatudin analyses the legal status of children born of incest with reference to Constitutional Court Decision No. 46/PUU-VIII/2010 and Islamic law. In their study, it was explained that Constitutional Court Decision No. 46/PUU-VIII/2010 has no bearing on children born out of wedlock (incest), as the children referred to in the decision are those born from a *nikah siri* (unregistered marriage).<sup>31</sup> Although the above studies have provided a comprehensive overview of the legal status and issues surrounding the inheritance rights of illegitimate children, they remain largely descriptive and normative, focusing primarily on the classification of children as "legitimate" or "illegitimate." There is still a lack of studies offering concrete solutions or procedural mechanisms through which illegitimate children may claim their basic rights from their biological fathers amid the blurred legal stigma in Indonesia.

Social reality shows that children born out of wedlock have the same basic needs as other children. However, enforcement of the biological father's obligation to fulfil the rights of children born out of wedlock is often constrained by rigid legal interpretations that fail to prioritise the best interests of the child. These limitations prompted this study to examine the issue of fulfilling the children's rights using a Progressive Law perspective. According to Satjipto Rahardjo, Progressive Law requires the law to evolve, promote flexible and responsive interpretations, and emphasise social justice.<sup>32</sup> Within this framework, the obligation of biological fathers to fulfil the rights of children born out of wedlock becomes highly relevant. This perspective encourages a more responsive and substantial interpretation of the law regarding the responsibilities of biological fathers of children born out of wedlock as a result of incest, in order to ensure the optimal protection of children's rights.

<sup>29</sup> Ummu Aemanah and Usep Saepullah, "Kewarisan Anak Hasil Insect," *Jurnal Pro Hukum* 11, no. 5 (2022): 56.

<sup>30</sup> Hidayati, "Kedudukan Hukum Anak Yang Lahir Dari Perkawinan Sedarah Menurut KUHPerdara dan KHI," 4–7.

<sup>31</sup> Elridsa Nur Azizah and Amrullah Hayatudin, "Kedudukan Hukum Anak Hasil Incest menurut Putusan Mk No. 46/Puu-VIII/2010 dan Hukum Islam," 51–52.

<sup>32</sup> Satjipto Rahardjo, *Hukum Progresif: Sebuah Sintesa Hukum Indonesia* (Yogyakarta: Genta Publishing, 2009), 6; M. Zulfa Aulia, "Hukum Progresif Dari Satjipto Rahardjo: Riwayat, Urgensi, Dan Relevansi," *Undang: Jurnal Hukum* 1, no. 1 (June 2018): 159–85, <https://doi.org/10.22437/ujh.1.1.159-185>; Fitriyadi Fitriyadi et al., "Redefining Legal Frameworks: Progressive Methods in Ascertaining Children's Lineage from Fasid Marriages in Religious Court Proceedings," *Syariah: Jurnal Hukum Dan Pemikiran* 24, no. 1 (May 2024): 148–71, <https://doi.org/10.18592/sjhp.v24i1.12894>.



Furthermore, Progressive Law needs to be discussed in relation to Islamic human rights. In this regard, Mashood Baderin emphasises the importance of building dialogue and finding common ground between international human rights law and Islamic law.<sup>33</sup> In this study, the Islamic human rights perspective will strengthen the argument regarding the dimension of biological fathers' responsibilities in fulfilling the rights of children born out of wedlock, which is in line with the principles of justice and *maslahah* in Islam, while remaining consistent with Islamic legal norms. Based on this background, this study focuses on the legal interpretation of children born out of wedlock as a result of incest by prioritising the best interests of children through the perspectives of Progressive Law and Islamic Human Rights. It also examines the rights that such children may obtain through a progressive legal approach that engages in dialogue with Islamic Human Rights principles. This study therefore prioritises the protection of children's rights born of incest in accordance with Islamic human rights, while adopting a progressive approaches to legal interpretation.

### Research Method

This research is a normative legal study that draws on primary legal materials (laws, regulations), secondary legal materials (textbooks, journals, research results), and tertiary legal materials (legal dictionaries, encyclopedias). This study adopts a normative approach by analysing Article 283 of the Civil Code, which prohibits the recognition of children, which is then reviewed with the Child Protection Law, Law No. 1 of 1999 concerning Human Rights, and the International Covenant on Civil and Political Rights. In addition, the study employs a conceptual approach to find solutions to the prohibition of recognizing incestuous children through the Progressive Law theory, which is used to deconstruct the rigid legal understanding of justice for incestuous children with the concept of "law for humans", and also uses Mashood Baderin's concept of Islamic human rights, particularly the concept of margin of appreciation, to identify a meeting point between international human rights standards and Islamic sharia values.

Meanwhile, a philosophical approach is used in this study to identify the ethical and moral foundations that legitimise the inherent nature of the rights of children born of incest from birth. This is achieved by exploring the essence of justice from legal doctrines that have developed in legal science, particularly addressing illegitimate children, in order to build legal arguments related to their rights.<sup>34</sup> The data used includes primary data related to legislation on children, namely Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage, Compilation of Islamic Law, Law No. 23 of 2002 on Child Protection, Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 on Child Protection, Law No. 1 of 1999 on Human Rights, MUI Fatwa No. 11 of 2012, and the International

<sup>33</sup> Mashood A. Baderin, *Hukum internasional hak asasi manusia & hukum Islam*, Cet. 2 (Jakarta: Komisi Nasional Hak Asasi Manusia, 2010), 15; Mashood A. Baderin, *International Human Rights and Islamic Law* (OUP Oxford, 2003).

<sup>34</sup> Sholahuddin Al-Fatih, *Perkembangan Metode Penelitian Hukum di Indonesia* (UMMPress, 2023), 18–22.



Covenant on Civil and Political Rights.<sup>35</sup> Secondary data includes various books, documents, or literature related to the research topic.

Operationally, the collected data were re-examined through an editing process by reviewing literature data such as articles taken from the Civil Code, Marriage Law, Compilation of Islamic Law, Child Protection Law, and Human Rights Law, as well as books and journals related to the theme of children's rights. The next step is data organisation, in which the data obtained from various laws, books, and journals that discuss and relate to children with disabilities is compiled using a framework found in Progressive Law theory, which emphasises that law must evolve in line with human development, as well as Mashood Baderin's Islamic Human Rights theory, which applies the concept of margin of appreciation in discussing the children's rights. The final stage involved further analysis of the data compiled from primary and secondary sources, which were then analysed using Progressive Law and Islamic Human Rights theory with normative legal research methods. The results of the analysis of these two theories were then synthesised and compared to identify commonalities, differences, or potential complementarities in viewing the issue of fulfilling the rights of children born of incest by their biological fathers.<sup>36</sup>

## Result and Discussion

### The Theoretical Concept of Progressive Law and Islamic Human Rights Regarding the Legal Rights of Incest Victims

Incest, from a legal perspective, is a sexual relationship between a man and a woman who are still related by family or kinship ties.<sup>37</sup> The term incest comes from the Latin word *incestus*, which originally meant “impure” and was then absorbed into English to denote sexual relations with a sibling or incestuous acts.<sup>38</sup> Based on the kinship between the perpetrator and the victim, incest is categorised into three types. *First*, parental incest refers to sexual relations between parents and children. *Second*, sibling incest refers to sexual relations between siblings. *Third*, familial incest refers to incest between other family members who have a close relationship and are prohibited from marrying each other by law, religion, or custom.<sup>39</sup> Legally, religiously, and culturally, incestuous relationships are prohibited. Although certain customary practices in Indonesia have historically tolerated incestuous relationships, the majority of customary norms reject them.<sup>40</sup> From a health perspective, incestuous relationships carry a high risk of producing offspring with physical and mental impairments or, in severe cases, life-threatening conditions.<sup>41</sup> Socially, incestuous

<sup>35</sup> Reza Banakar and Max Travers, *Theory and Method in Socio-Legal Research* (Bloomsbury Publishing, 2005).

<sup>36</sup> Mestika Zed, *Metode Penelitian Kepustakaan* (Jakarta: Yayasan Obor Indonesia, 2004).

<sup>37</sup> Wikipedia, *ensiklopedia bebas*, “Incest,” August 20, 2024, <https://id.wikipedia.org/w/index.php?title=Inses&oldid=26196078>.

<sup>38</sup> “Incest - kamus bab.la,” accessed 24 January 2025, <https://www.babla.co.id/bahasa-inggris-bahasa-indonesia/incest>.

<sup>39</sup> Nilam Widayarni, *Relasi Orang Tua Dan Anak* (Elex Media Komputindo, 2013), 28.

<sup>40</sup> Areta Edgina Apta Maharani, Agus Yudha Hernoko, and Agustin, “Prinsip Kepentingan Terbaik Bagi Anak Akibat Pembatalan Perkawinan Orang Tua Sedarah,” 40.

<sup>41</sup> Khafizoh, “Perkawinan Sedarah dalam Perspektif Hukum Islam dan Genetika,” 62.





relationships often result in social sanctions from the community, including ostracism of both perpetrators and victims of incest.<sup>42</sup>

Indonesian law prohibits incestuous relationships, as reflected in Article 8 of the Marriage Law<sup>43</sup> and Article 39 of the Compilation of Islamic Law,<sup>44</sup> which prohibit marriage between relatives. Islamic law also prohibits incestuous relationships in accordance with Allah's command in QS. An-Nisa' verse 23, which explains which women are forbidden to be married by men.<sup>45</sup> On the other hand, under Indonesian law, incestuous relationships may also constitute criminal offences.<sup>46</sup>

Although incestuous relationships are prohibited in Indonesia and considered criminal acts, such relationships continue occur in practice. It is not uncommon for children to be born to incestuous relationships. The birth of a child from incest raises civil law issues that have direct legal consequences for the child, particularly with regard to the fulfilment of the child's rights.<sup>47</sup> In Indonesia, there are no specific regulations governing children born of incest. The legislation only regulates legitimate children and children born out of wedlock.<sup>48</sup> Given the circumstances of their birth, children born of incest are legally equated with children born out of wedlock. This legal status inevitably affects the level of protection and fulfilment of rights that such children receive.

When the status of a child born of incest is equated with that of a child born out of wedlock, the rights afforded to that child differ from those of a legitimate child.<sup>49</sup> Illegitimate children (incest) have a civil relationship only with their mother and her family. consequently, responsibility for fulfilling all the rights of the child rests solely with the mother and her family, while the biological father indirectly has no legal obligation toward the child. At the same time, there are no binding laws for biological fathers regarding their obligations to fulfil the rights of their illegitimate children. This creates injustice for the child and the mother, because the law seems to exempt the man who caused the pregnancy and birth of the child born out of wedlock (incest) from responsibility as the biological father.<sup>50</sup>

This situation contradicts Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection in Article 20, which states that parents have an obligation to protect their children.<sup>51</sup> Similarly, Law No. 39 of 1999 on

<sup>42</sup> Nazaruddin Lathif, "Akibat Hukum Dari Pembatalan Perkawinan Suami Istri Yang Memiliki Hubungan Keluarga Sedarah," *PALAR (Pakuan Law Review)* Vol.6, no. No.2 (December 2020): 3.

<sup>43</sup> Law No. 1 of 1974 on Marriage, Article 8.

<sup>44</sup> Compilation of Islamic Law (KHI), Article 39.

<sup>45</sup> Khafizoh, "Perkawinan Sedarah dalam Perspektif Hukum Islam dan Genetika," 64.

<sup>46</sup> Dahlia, "Kebijakan Kriminal Dalam Menanggulangi Tindak Pidana Inses Dalam Rangka Pembaharuan Hukum Pidana Di Indonesia," *Badamai Law Journal* vol.7, no. 1 (Maret 2022): 33.

<sup>47</sup> Wardah Nuroniyah, *Hukum Perlindungan Anak Di Indonesia*, 15.

<sup>48</sup> Karto Manalu, *Hukum Keperdataan Anak di Luar Kawin* (Pasaman Barat: Cv. Azka Pustaka, 2021), 50.

<sup>49</sup> Rindi Putri Afifah, Nindya Prasetya Wardhani, and Aura Shava Dhinda Salsabila, "Perlindungan Hukum terhadap Hak Anak Incest Berdasarkan Hukum Negara Indonesia," *Jurnal Hukum Lex Generalis* 2, no. 6 (June 2021): 504, <https://doi.org/10.56370/jhlg.v2i6.120>.

<sup>50</sup> Asep Lukman Daris Salam, "Analisis Hukum Hak-Hak Nasab Anak Luar Nikah Menurut Putusan Mahkamah Konstitusi Nomor 46/PUU/VIII/2010," *As-Sakinah : Jurnal Hukum Keluarga Islam* 1, no. 1 (31 Mei 2023): 41, <https://doi.org/10.51729/sakinah11132>.

<sup>51</sup> Law No. 35 of 2014, Article 20.



Human Rights, Article 52 paragraph (2), states that children are part of human rights and that their interests are recognised and protected by law.<sup>52</sup> In essence, children's rights must be recognised and protected by the state through various regulatory instruments inherent in the 1945 Constitution, regardless of the status of the child. This is in line with Article 28 B paragraph (2) of the 1945 Constitution, which stipulates that every child in Indonesia is guaranteed and protected the right to survival and development, as well as protection from violence and discrimination.<sup>53</sup>

Based on the foregoing, achieving justice for illegitimate children and their mothers requires progressive legal thinking. Satjipto Rahardjo's theory of Progressive Law explains that law must evolve in line with social change and the times. The law must adapt to humans, because the law is for humans or for something greater than the law itself.<sup>54</sup> Illegitimate children (incest) need recognition from their biological fathers to obtain their rights. However, Article 283 of the Civil Code stipulates that illegitimate children (incest) cannot be recognised unless both parents are legally married,<sup>55</sup> a requirement that cannot be fulfilled in cases of incest, as consanguineous marriage is prohibited by law and religion.<sup>56</sup>

Referring to Satjipto Rahardjo's framework of Progressive Law, the prohibition of recognition of illegitimate children needs to be reconstructed. Progressively, the recognition of children can be carried out for children born of incest by considering several things. This is because, scientifically, a woman can't become pregnant without the meeting of an ovum and sperm, either through sexual intercourse or technology such as *in vitro fertilisation*.<sup>57</sup> The birth of a child from a man and a woman through sexual intercourse has legal consequences in the form of a legal relationship that includes reciprocal rights and obligations among the child, mother, and father. Thus, a child's relationship with a man as their biological father should not be determined solely by the existence of a marital bond.<sup>58</sup> Morally, the biological father of an incestuous child remains responsible for his child and accountable for his actions.<sup>59</sup> For this reason, judicial authorities should consider recognising the child born out of wedlock (incest). The mother of such child may file for child recognition in the court. Specifically, non-Muslims can file at the District Court, while Muslims can file at the Religious Court through an application for the determination of the child's origin.<sup>60</sup> This is an effort by the government or authorities to ensure that the

<sup>52</sup> Law No. 39 of 1999 on Human Rights, Article 52 paragraph (2).

<sup>53</sup> 1945 Constitution of the Republic of Indonesia, Article 28 B paragraph (2).

<sup>54</sup> Rahardjo, *Hukum Progresif: Sebuah Sintesa Hukum Indonesia*, 5.

<sup>55</sup> Civil Code, Article 283.

<sup>56</sup> Khafizoh, "Perkawinan Sedarah dalam Perspektif Hukum Islam dan Genetika," 65.

<sup>57</sup> Yazid Bustomi, "Politik Hukum Putusan MK No. 46/PUU-VIII/2010 sebagai Upaya Pembangunan Hukum Nasional," *Jurnal Ilmiah Hukum dan Hak Asasi Manusia* 3, no. 1 (July 2023): 17, <https://doi.org/10.35912/jihham.v3i1.1795>.

<sup>58</sup> Lukman Daris Salam, "Analisis Hukum Hak-Hak Nasab Anak Luar Nikah Menurut Putusan Mahkamah Konstitusi Nomor 46/Puu/Viii/2010," 42.

<sup>59</sup> Muh. Kadafi and Muhammad Shuhufi, "Perlindungan dan Kedudukan Anak di luar Nikah Perspektif Fikih," *Socius: Jurnal Penelitian Ilmu-Ilmu Sosial* Vol. 1, no. No. 11 (June 2024): 405, <https://doi.org/10.5281/ZENODO.12596487>.

<sup>60</sup> "Penetapan Asal Usul Anak dan Akibat Hukumnya dalam Hukum Positif," accessed December 26, 2025, <http://www.pa-mojokerto.go.id/prosedur-berperkara/panjar-biaya-perkara/9-berita/263-pengambilan-sumpah-jabatan-dan-pelantikan-panitera-pengganti-pengadilan-agama-mojokerto-2016.html>.



biological father of the child born out of wedlock (incest) remains responsible for his actions. This responsive measure is a contribution by the government in accordance with the provisions of Article 21 paragraph (1) of Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection, which obliges the state, government, and local governments to fulfil children's rights without discriminating based on the child's status and condition.<sup>61</sup>

Judges, as the authorities responsible for considering the recognition of illegitimate children, must consider the best interests of the child, as mandated by Article 3 of the Convention on the Rights of the Child, which states that the best interests of the child means that in all actions concerning children, whether undertaken by public or private entities, the best interests of the child must be a primary consideration.<sup>62</sup> Similarly, the International Covenant on Civil and Political Rights Article 24 paragraph (2) provides that<sup>63</sup> "Every child shall be registered immediately after birth and shall have a name." in this context, the term "have" implies recognition of the child by either the biological father or mother as the natural parent, regardless of the circumstances of the child's birth.

However, the recognition of children born out of wedlock (incest) will be slightly different from the recognition of children in general due to the specific circumstances of their birth. In the framework of Islamic human rights, Mashood Badern explains that there needs to be a dialogue between international human rights law and Islamic law by interpreting Sharia more progressively and dynamically, which can accommodate modern human rights through a margin of appreciation. The concept of margin of appreciation in Islamic human rights is a tool that bridges the gap between international human rights law and Islamic law. This concept allows states discretion in implementation based on social, cultural, and public moral considerations.<sup>64</sup>

Referring to Mashood Baderin's framework of Islamic human rights, a dialogue between international human rights and Islamic law is needed in analysing the issue of the recognition of illegitimate children. Traditionally, Islamic law clearly distinguishes between legitimate children and children born out of wedlock (illegitimate children), where children born out of wedlock have no lineage with their biological father and the father cannot become guardians if they are female. Furthermore, children born out of wedlock cannot inherit from their biological father.<sup>65</sup> In contrast, international human rights law emphasises that all children have the same rights without discrimination, regardless of the status of their birth.<sup>66</sup> These two principles appear to conflict. From the perspective of Islamic human rights, Mashood Baderin does not ignore the existing principles of Islamic law, but considers that a more inclusive and progressive interpretation of the law is needed. By using

<sup>61</sup> Law No. 35 of 2014, Article 21 paragraph (1).

<sup>62</sup> Convention on the Rights of the Child, Article 3.

<sup>63</sup> Law of the Republic of Indonesia Number 12 of 2005 Concerning Ratification of the International Covenant on Civil and Political Rights, Article 24 paragraph (2).

<sup>64</sup> Baderin, *Hukum internasional hak asasi manusia & hukum Islam*, 2–3.

<sup>65</sup> Lukman Daris Salam, "Analisis Hukum Hak-Hak Nasab Anak Luar Nikah Menurut Putusan Mahkamah Konstitusi Nomor 46/PUU/VIII/2010," 50.

<sup>66</sup> Djawas et al., "The Legal Position of Children of Incest (A Study of Madhhab Scholars and Compilation of Islamic Law)," June 2022, 144.



the margin of appreciation as a bridge, it is possible to interpret and apply the country's own laws while still taking into account the values of international human rights norms. This requires a combination with existing principles in Islamic law, namely *maslahah* (public welfare) and *maqasid shari'ah* (sharia objectives).

By considering Islamic law and international human rights, it is found that fundamental rights of children, such as the right to protection, identity, welfare, and maintenance, can still be obtained by children born out of wedlock. In line with Baderin's opinion, considering the principle of *maslahah*, the rights and welfare of children are an integral part of *maslahah*,<sup>67</sup> because Islamic law also recognises the need for special protection for children due to their vulnerability.<sup>68</sup> Rights that cannot arise after the recognition of a *sumbang* child (incestuous child) are those related to the absence of a blood relationship, guardianship, and inheritance between the *sumbang* child and the biological father. This restriction is a form of consideration of the principle of *maqasid sharia* (sharia objectives), namely to protect offspring (*hifz al-nasl*).

Restrictions on lineage and guardianship rights, as well as inheritance, are a form of a country's margin of appreciation in implementing international human rights in accordance with the social, cultural, and moral values. The consideration of allowing the recognition of illegitimate children with restrictions on the establishment of lineage, guardianship, and inheritance are in line with and refer to MUI Fatwa No. 11 of 2012 concerning the Status of Children Born Out of Wedlock, which authorizes the state to impose responsibility on biological fathers through mechanisms such as providing maintenance and posthumous property distribution after his death via *wasiat wajibah* (mandatory will).<sup>69</sup> These measures impose accountability on the biological father while safeguarding the rights of the child, rather than providing legality to the blood relationship between the biological father and his child prohibited under Islamic law.<sup>70</sup> These considerations show that the law must be responsive and dynamic in protecting the rights of children born out of wedlock (incest) while still considering the absolute principles of Islamic law. This also shows the state's responsive measures in its efforts to fulfil its duty to provide legal protection for children and uphold equality before the law, as guaranteed by Article 28 D paragraph (1) of the Constitution.<sup>71</sup>

Progressive law views that “the law is for humans,” and not the other way around. Therefore, it is necessary to reconstruct the provisions in Article 283 of the Civil Code that prohibit the recognition of incestuous children. Scientifically, every child is born as a result of a biological relationships, and the child's legal status should not obstruct access to basic rights. Courts must therefore adopt progressive stance in recognising the relationship between the child and his biological father to guarantee

<sup>67</sup> Baderin, *Hukum internasional hak asasi manusia & hukum Islam*, 140; Baderin, *International Human Rights and Islamic Law*.

<sup>68</sup> Baderin, *Hukum internasional hak asasi manusia & hukum Islam*, 158.

<sup>69</sup> MUI Fatwa No. 11 of 2012 concerning the Status of Children Born Out of Adultery and the Treatment of Such Children, Point 5.

<sup>70</sup> Taufid Hidayat Nazar and Nita Rismawati, “Hak Keperdataan Bagi Anak Diluar Kawin Dalam Sistem Hukum Di Indonesia,” *Syakhsiyah Jurnal Hukum Keluarga Islam* Vol. 2, no. No. 1 (2022): 20.

<sup>71</sup> 1945 Constitution of the Republic of Indonesia, Article 28 D paragraph (1).





the fulfilment of the child's right to life and protection from discrimination. According to Mashood Baderin's Islamic human rights perspective, using the concept of margin of appreciation, Islamic human rights attempt to accommodate the international principle that every child has the same rights without discrimination, while remaining consistent with Islamic law. Based on the best interests of the child, children born of incest remain entitled to protection, identity, and financial support from their biological fathers, subject to restrictions on lineage in order to preserve descent.

Both perspectives, Progressive Law and Islamic Human Rights, have legal correlations in their efforts to achieve justice for children born of incest. Both perspectives recognise that children are innocent of their parents' actions and must have their fundamental rights (identity, livelihood, and welfare) protected. Both Progressive Law and Islamic Human Rights demand accountability from the biological father and advocate a more dynamic and flexible interpretation of the law. Progressive Law encourages judges to reconstruct the law by considering constitutional values and human rights to provide protection, while Islamic Human Rights uses a margin of appreciation to apply international human rights standards, which are then adjusted to the values of Islamic Sharia. Both approaches maintain a balance between rights and morality, ensuring that recognition of children born of incest serves exclusively the best interests of the child and does not legitimise incestuous relationships.

### **The Obligations of Biological Fathers in Fulfilling the Rights of Children Born Out of Incest**

Progressive steps are necessary to realise legal protection for children born of incest, especially regarding their rights. To establish the obligations of the biological father, it is necessary to recognise children born of incest while still taking into account the absolute nature of Islamic law. Such recognition aims to hold the biological father of a child born of incest responsible for his child and for his actions. To realise legal protection for children, emphasis must be placed on the principles contained in the Convention on the Rights of the Child, one of which is the principle of the best interests of the child as stated in Article 3.<sup>72</sup> This principle means that in all actions concerning children taken by various government or private agencies, the best interests of the child must be a primary consideration.<sup>73</sup> Article 28B paragraph (2) of the 1945 Constitution explains the constitutional rights of children, which read: "Every child has the right to survival, growth, and development, as well as the right to protection from violence and discrimination." This article means that every child has the right to life from the moment of conception, and the right to grow and develop optimally, physically, mentally, socially, and intellectually, including in terms of education, health, and other essential aspects of well-being.<sup>74</sup>

Parental obligation towards children are regulated in Law No. 1 of 1974 concerning Marriage, Article 45, which states that parents are obliged to care for and

<sup>72</sup> Convention on the Rights of the Child, Article 3.

<sup>73</sup> Areta Edgina Apta Maharani, Agus Yudha Hernoko, and Agustin, "Prinsip Kepentingan Terbaik Bagi Anak Akibat Pembatalan Perkawinan Orang Tua Sedarah," 23.

<sup>74</sup> Izudin, *Dinamika atas Perlindungan Hukum terhadap Anak yang Lahir di Luar Perkawinan*.





educate their children to the best of their ability.<sup>75</sup> In addition, the obligations of biological fathers towards their children are also explained in detail in Law No. 35 of 2014 concerning Amendments to Law No. 23 of 2002 concerning Child Protection. Article 26 paragraph (1) explains the obligations that must be fulfilled by both parents, including:<sup>76</sup> (a) nurturing, caring for, educating, and protecting children; (b) developing children in accordance with their abilities, talents, and interests; (c) preventing marriage at a young age; and (d) providing character education and instilling moral values. This regulation stipulates that parents are obliged to provide for their children to fulfil their duties in caring for and educating them. This provision also applies to the biological father of a child born out of wedlock in fulfilling the rights of his child. The obligations of parents, including adoptive parents are also regulated in Law No. 39 of 1999 concerning Human Rights, Article 52 paragraph (1), which states that "Every child has the right to protection by their parents, family, community, and country."<sup>77</sup> Therefore, biological fathers, as parents, have an obligation to protect their children. The biological father has an obligation to provide good facilities for his biological child, such as providing decent housing, as well as access to education and health care.<sup>78</sup>

However, the obligations of the biological father do not apply in matters of lineage, guardianship, or inheritance. These limitations are grounded in Islamic law as one of the sources of law. Lineage and guardianship, as well as the right to inherit in related to children born of incest cannot be changed and are absolute,<sup>79</sup> as stipulated in Article 20 of the Compilation of Islamic Law regarding marriage guardianship.<sup>80</sup> The limitations on the legal relationship between illegitimate children and their biological fathers represents a responsive effort within Islamic law to accommodate international human rights norms while maintaining sharia boundaries. These restrictions are not intended to discriminate against illegitimate children, but to protect the lineage of illegitimate children (*hifdz al-nasl*) in accordance with Islamic law.<sup>81</sup>

The basis for the obligation to fulfill the rights of an illegitimate child by his biological father may also be grounded in MUI Fatwa No. 11 of 2012 concerning the Status of Children Born Out of Wedlock and the Treatment of Them in point 5 that:<sup>82</sup> "The government has the authority to impose *ta'zir* punishment on a man who commits adultery resulting in the birth of a child by requiring him to: (a) provide for

<sup>75</sup> Law No. 1 of 1974 concerning Marriage, Article 45.

<sup>76</sup> Law No. 35 of 2014, Article 26 paragraph (1).

<sup>77</sup> Law No. 39 of 1999 concerning Human Rights, Article 52 paragraph (1).

<sup>78</sup> Muh Jufri Ahmad dan Fahmi Nabil, "Hak Keperdataan Anak Hasil Perkawinan Incest" *Jurnal Penelitian Hukum* vol.2, no.1 (2022): 68.

<sup>79</sup> Prawitra Thalib, *Syariah Pengakuan Dan Perlindungan Hak Dan Kewajiban Manusia Dalam Perspektif Hukum Islam* (Surabaya: Airlangga University Press, 2018), 159.

<sup>80</sup> Compilation of Islamic Law, Article 20: a. The person acting as guardian is a man who meets the requirements of Islamic law, namely Muslim, aqil, and baligh. b. The guardian consists of a guardian of lineage and a guardian of wisdom.

<sup>81</sup> Areta Edgina Apta Maharani, Agus Yudha Hernoko, and Agustin, "Prinsip Kepentingan Terbaik Bagi Anak Akibat Pembatalan Perkawinan Orang Tua Sedarah," 34.

<sup>82</sup> MUI Fatwa No. 11 of 2012 concerning the Status of Children Born Out of Adultery and Treatment of Them, Point 5.



the child's needs, (b) transfer property to the child after death through a mandatory will (*wasiat wajibah*).” This provision reflects a form of responsibility for the man's actions. In terms of giving property, the biological father can give his inheritance to his illegitimate child through a mandatory will or grant. This is based on protecting the rights of the illegitimate child while remaining consistent with the elements of *maqashid sharia*, particularly the protection of religion (*hifdz al-diin*), offspring (*hifdz al-nasl*), and life (*hifdz al-nafs*).<sup>83</sup>

If the biological father fails to fulfil his obligations towards his child, he may be subject to both criminal and civil sanctions. Law No. 35 of 2014 Article 77 B provides that individuals who neglect children may be punished by imprisonment of up to 5 years and/or a maximum fine of IDR 100,000,000.<sup>84</sup> In addition, sanctions for biological fathers who do not fulfil their obligations are regulated in Article 49 of Law No. 23 of 2004 concerning the Elimination of Domestic Violence, which imposes criminal sanctions of up to 3 years’ imprisonment or a maximum fine of IDR 15,000,000.00. Beyond biological parents, both the government and society also have obligations in protecting children's rights. In fulfilling the constitutional rights of every person, the state has a responsibility to guarantee, protect, and fulfil the basic rights of citizens. These obligations and responsibilities are regulated in Articles 21-24 of Law No. 23 of 2002 on Child Protection, which state: (a) obligated and responsible to respect and guarantee the human rights of every child without discriminating against any child;<sup>85</sup> (b) obligated and responsible to provide support in the form of facilities and infrastructure for the implementation of child protection;<sup>86</sup> (c) guarantee the protection, care, and welfare of children by taking into account the rights and obligations of parents, guardians, or other persons who are legally responsible for children;<sup>87</sup> (d) supervise the implementation of child protection;<sup>88</sup> (e) guarantee children’s rights to express their opinions.<sup>89</sup>

These obligations must be fulfilled by the state regardless of the status of the child. In addition, children with disabilities also have constitutional rights as stipulated in Article 8 of the 1945 Constitution, which states that every citizen has the right to life, the right to a family, the right to self-development, and the right to recognition, security, protection, and legal certainty.<sup>90</sup> The state is obliged to provide facilities and infrastructure for the protection of children, as well as to guarantee the protection and welfare of children.<sup>91</sup> Community obligations in child protection are

<sup>83</sup> Delvia Fatma, Benni Rusli, dan Mahlil Adriaman, “Kedudukan Anak Yang Lahir Dari Perkawinan Sedarah Serta Pembatalan Perkawinannya (Studi Putusan Nomor : 24/Pdt.sus/2021/PA pyh)” *Sakato Law Jurnal* vol.1, no. 1 (2023): 25.

<sup>84</sup> Law No. 35 of 2014, Article 77B.

<sup>85</sup> Law No. 23 of 2002 on Child Protection, Article 21.

<sup>86</sup> Law No. 23 of 2002 on Child Protection, Article 22.

<sup>87</sup> Law No. 23 of 2002 on Child Protection, Article 23 paragraph (1).

<sup>88</sup> Law No. 23 of 2002 on Child Protection, Article 23 paragraph (2).

<sup>89</sup> Law No. 23 of 2002 on Child Protection, Article 24.

<sup>90</sup> Herdi Munte and Christo Sumurung Tua Sagala, “Perlindungan Hak Konstitusional Di Indonesia,” *Jurnal Ilmiah Penegakan Hukum* 8, no. 2 (December 2021): 186–87, <https://doi.org/10.31289/jiph.v8i2.4791>; Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge, United Kingdom: Cambridge University Press, 2015).

<sup>91</sup> Law No. 23 of 2002 on Child Protection, Articles 21-24.



regulated in Article 25 of Law No. 23 of 2002 concerning Child Protection, which mandates the creation of a good environment in which children can grow and develop without discrimination.<sup>92</sup> Children should not bear the consequences of their parents' actions.<sup>93</sup> Therefore, children born of incest must enjoy the same fundamental rights as other children.

Analysis through progressive Law and Islamic Human Rights reveals a shared foundation that leads to a practical solution: allowing biological fathers to recognize their illegitimate children, subject to restrictions on lineage and inheritance rights, as an optimal effort to fulfill the children's rights. The common ground between Progressive Law and Islamic Human Rights in the context of the biological father's obligations in fulfilling the rights of illegitimate children is as follows: (a) Emphasis on the importance of justice and the welfare of children. Progressive Law and Islamic Human Rights view children's rights as a form of justice based on the principle of *maslahah* and the objectives of sharia to protect the life and welfare of children; (b) The need for responsive and equitable legal interpretation that addresses social realities and reforms discriminatory norms; and (c) Both perspectives recognise that illegitimate children have the same basic rights as other children. Based on the above discussion, the following table is formulated:

**Table 1.** Legal Construction of the Protection of Children's Rights in Incest

	Legal Basis	Substance	Implication
General Principles	Convention on the Rights of the Child Article 3	The best interests of the child are the primary consideration	Children with disabilities are still protected
Constitutional Right	1945 Constitution Article 28B(2)	The right to life, to grow, to develop, free from discrimination	The rights of children are guaranteed by the Constitution
Parents' Responsibilities	Law No. 1/1974, Law No. 35/2014	Must maintain, educate, protect, and fulfil needs	The biological father is still obligated to provide financial support
Human Rights Protection	Law No. 39/1999 Article 52	Children have the right to be protected by their parents, society, and the state.	Fathers are obligated to provide shelter, education, and healthcare.
Sharia Restrictions	KHI Article 20	No lineage, guardianship, or inheritance	Limited contact, children's rights are protected
MUI Fatwa	Fatwa No. 11/2012	Fathers are obligated to provide financial support and can give	Children's rights are guaranteed without violating Islamic law.

<sup>92</sup> Law No. 23 of 2002 on Child Protection, Article 25.

<sup>93</sup> Lia Noviana and Lukman Santoso, "Interpreting Legal Rights: Disparities in Judicial Treatment of Children Born Out of Wedlock in East Java, Indonesia"; Anas Maulana et al., "Inheritance Rights of Nasabiyyah Children Born Out of Wedlock According to Islamic Family Law," *El-Usrah: Jurnal Hukum Keluarga* 7, no. 2 (October 2024): 444–61, <https://doi.org/10.22373/ujhk.v7i2.25072>.



Sanctions	Law No. 35 of 2014 & Law No. 23 of 2004	property through a mandatory will/gift. Child neglect/domestic violence: criminal charges and fines	The biological father can be punished for negligence
State Obligations	Law No. 23/2002 Articles 21–24	Guaranteed protection and facilities without discrimination	The state must protect all children
Community Obligations	Law No. 23 of 2002, Article 25	A good environment without discrimination	Children with disabilities are treated equally
The Meeting Point of Progressive Law and Islamic Human Rights	Analysis	Focus on justice and child welfare, responsive laws.	Fulfilment of children's rights without lineage/inheritance rights

**Source:** modification by authors, 2025

Based on Table 1, the protection of children born from incestuous relationships poses a dilemma in legal practice, including in Indonesia. On the one hand, the constitutional and statutory provisions affirm the rights of children to life, growth, and freedom from discrimination, thereby imposing obligations on biological fathers to fulfil the basic needs of their children. On the other hand, Islamic law imposes restrictions on rights in the context of descent, inheritance, and guardianship in order to preserve descent (*hifdz al-nasl*). The critical point is that these rules are often partial, with the state emphasising universal protection, while Sharia emphasises substantive and fundamental normative restrictions, as well as considering aspects of sustainability. Handling victims of incest requires a comprehensive legal approach, covering prevention, prosecution, and victim recovery. This aligns with Mashood A. Baderin’s view on the compatibility between Islamic law and the international human rights. To provide a progressive legal framework, Shariah must be interpreted dynamically to protect human dignity, especially vulnerable groups such as child victims of incest. Approaches that blame victims or neglect psychosocial recovery are contrary to Islamic human rights principles and *maqāṣid al-sharī‘ah*. Therefore, the state's response to incest must extend beyond a legal-positivistic approach focused on punishment. The state has an obligation to provide a legal system that guarantees access to justice, trauma-based victim protection, and structural prevention through education and social protection.<sup>94</sup> This paradigm can be a solution in fulfilling the rights of victims that are guaranteed without violating shariah. This shows the importance of reconstructing laws that are responsive, fair, inclusive, and non-discriminatory, while remaining aligned with the spirit of *maqāṣid al-sharī‘ah*.

<sup>94</sup> Yusna Zaidah, “Diskresi Peradilan dalam Penyelesaian Perkara Warisan: Menuju Keadilan Hukum Progresif di Indonesia,” *Syariah: Jurnal Hukum dan Pemikiran* 24, no. 1 (June 2024): 136–47, <https://doi.org/10.18592/sjhp.v24i1.13012>.



## Conclusion

Based on this study, it can be concluded that within the framework of Progressive Law and Islamic Human Rights, the biological father still has a moral and legal responsibility to fulfil the rights of the illegitimate child, even though such a child has civil rights only with his mother. Therefore, legal certainty is needed for the fulfilment of the rights of illegitimate children by their biological fathers, namely by allowing the biological father to acknowledge their illegitimate children. The recognition of illegitimate children born of incest constitutes a progressive legal response to the issue of fulfilling the rights of illegitimate children. However, the recognition of illegitimate children born of incest does not entail the establishment of lineage, guardianship, or inheritance rights. This limitation reflects a form of state discretion in implementing international human rights while still considering the principles of Islamic Law. Furthermore, according to Progressive Law and Islamic Human Rights, children of incest possess the same basic rights as other children and are entitled to equal legal protection. As a concrete measure to provide legal certainty for children born of incest, it is necessary to reconstruct or revise Article 283 of the Civil Code, which prohibits the recognition of illegitimate children. In addition, cases involving the rights of children born of incest require jurisprudential breakthroughs by judges in court, who must prioritise the best interests of the child when determining the fulfilment of basic rights of children born of incest owed by biological fathers.

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