

Comparison of the Division of Inheritance Rights of Children Out of Wedding Based Onwestern Inheritance Law and Islamic Inheritance Law

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Abstract. *This study aims to examine and answer problems regarding the legal relationship between foreign children.married to parents and family according to Islamic law and Civil law, the legal status of illegitimate children in inheritance law according to Islamic law and Civil law, and the distribution of inheritance of illegitimate children based on Islamic inheritance law and the Civil Code. This type of research is a type of empirical juridical legal research that is sociological in nature. The results of this study indicate that with the recognition of the legal status of illegitimate children, they can change into recognized illegitimate children. Recognized illegitimate children have the right to inherit according to what class they inherit and what is regulated by the Civil Code. In Islam, illegitimate children do not receive inheritance from their father because there is no lineage between them. However, if they want to receive an inheritance, they must also obtain recognition of the child first.*

Keywords: *Children; Civil; Inheritance; Wedlock.*

1. Introduction

Islamic inheritance law is part of the muamalah law which regulates the distribution of inheritance left by the testator, which will be owned by the heirs proportionally based on the Al-Quran and the Hadith of the Prophet which prioritize the principles of Islamic inheritance.

Indonesian inheritance law is diverse, where each group of residents is subject to their own laws. In Indonesia there are 3 legal systems, namely the western legal system, the Islamic legal system and the customary legal system, as well as inheritance law in Indonesia. The regulation of the Western Inheritance system adheres to the Civil Code (KUH Per), the Islamic Inheritance System adheres to the

Compilation of Islamic Law (KHI), while the Customary Inheritance System adheres to the Customary Law that exists in society.

Both in Islamic Inheritance Law and in the Civil Code. The position of an illegitimate child does not have the same rights as a child from a legitimate marriage. The legal consequences of an illegitimate child concern the rights and obligations between the child, the mother who gave birth to him/her and his/her natural father/father (genetics), namely: maintenance, lineage, inheritance rights and guardianship. According to Islamic Inheritance Law, as a further consequence of the lineage relationship, an illegitimate child only has an inheritance relationship with his/her mother and his/her mother's family, as stated in Article 186 of the Compilation of Islamic Law: a child born out of wedlock only has an inheritance relationship with his/her mother and his/her family from his/her mother's side.

The BW inheritance system does not recognize the terms "original property or joint property" or property obtained together in marriage, because the inheritance in BW from anyone who is a "unit" that is whole and complete in its entirety will be transferred from the hands of the heir to the heir. This is emphasized in Article 849 of BW, namely

"The law does not look at the nature or origin of the goods in an inheritance in regulating inheritance."

In Islamic Inheritance Law, Faraidh Law applies. "Faraid" according to linguistic terms is destiny/qadar/provision and in syara it is the part that is qadarkan/determined for the heirs. Inheritance law according to Islamic law is "a number of assets and all rights of the deceased in a clean condition". This means that the inheritance inherited by the heirs is a number of assets and all rights, "after deducting the payment of the heir's debts and other payments resulting from the death of the heir."

According to Law No. 1 of 1974 According to Article 42 of the Marriage Law, that: "Legitimate children are children born in or as a result of a legitimate marriage". Then, do the provisions regarding illegitimate children also apply to children born from unregistered marriages or unregistered marriages.

According to Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage Law, a child born outside of marriage is a child who is born outside of marriage and only has a civil relationship with his mother and his mother's family. On the other hand, the Constitutional Court granted the applicant's request by reviewing the provisions of Article 43 paragraph (1) of Law Number 1 of 1974 which initially read; "a child born outside of marriage only has a civil relationship with his mother and his mother's family". Which ultimately became; "a child born outside of marriage has a civil relationship with his mother and his mother's family and with a man as his father who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship, including

a civil relationship with his father's family."

2. Research Methods

Normative Research Method is a legal research that uses secondary data sources or data obtained through library materials. In the legal research method this normative law is conceptualized as what is written in the laws and regulations (law in books) or law is conceptualized as a rule or norm that is a benchmark for human behavior that is considered appropriate. This study was conducted to obtain materials in the form of theories, concepts, legal principles and legal regulations relating to the subject of the Comparison of the Distribution of Inheritance Rights of Children Born Outside of Marriage Based on Western Inheritance Law and Islamic Inheritance Law.

3. Results and Discussion

3.1. Inheritance Rights of Children Born Out of Wedlock Based on the Compilation of Islamic Law and Western Law.

1) Children out of wedlock based on Compilation of Islamic Law.

In the opinion of the Hanafi school of jurisprudence, a child born less than six months after the marriage contract is considered an illegitimate child, and in inheritance law is referred to as a mula'anah child, namely one who does not have a father in inheritance. It is mentioned in a hadith of the Prophet صلى الله عليه وسلم that a mula'anah child is attributed to his mother, and is considered not to have a kinship relationship with his father, with it also being interpreted that a mula'anah child does not receive inheritance rights or inherit from his father, and only inherits or receives inheritance from his mother's relatives. The Prophet said which means: "Indeed, the Prophet Muhammad SAW said: "When a man commits adultery with a free woman, or a slave woman, then gives birth to a child from adultery, then the child is not inherited (from the father) or inherited (to the father, and relatives of the father)." And it is narrated from others, Ibn Luhai'ah this hadith, from Amru bin Syu'aib and his practice of this knowledge for the people of knowledge: That the child of adultery (child out of wedlock) does not receive an inheritance from his father."

The concept of inheritance distribution based on the Compilation of Islamic Law in general. As with the general provisions in Western Inheritance, maintaining the right to a new inheritance occurs when the testator dies. However, the heirs who are entitled to receive maintenance (inheritance) of the testator's inheritance are not only based on blood relations. Article 171 c of the KHI emphasizes that the so-called heirs are people who at the time the testator dies:

- 1) Having a blood relationship with the heir
- 2) Having a marital relationship with an heir, widower or widow

3) Muslim

4) Not prevented by law from becoming an heir.

Children out of wedlock are divided into two definitions, namely children out of wedlock in the narrow sense and children out of wedlock in the broad sense. Children out of wedlock in the narrow sense are children born from a relationship between a man and a woman who are actually allowed to marry but are not married, these children are often also called "natural children". While children out of wedlock in the broad sense are:

- a. Children born from the relationship between a man and a woman who are actually allowed to marry but are not married are added to;
- b. An illegitimate child from a relationship between a man and a woman according to statutory regulations it is forbidden to marry, for example: children born from adulterous relationships (children born are called "sons of adultery") and children born from consanguineous relationships (incestuous children).

In the compilation of Islamic Law, it is stated that a child born out of wedlock only has a bloodline relationship with the mother and the mother's family (Article 100 KHI), so that the child born out of wedlock only inherits from the mother and the mother's family (Article 186 KHI) which states that: "A child born out of wedlock only has a bloodline relationship with the mother and the mother's family."

In the meaning of these provisions, Article 186 of the Compilation of Islamic Law states:

"A child born out of wedlock only has a mutual inheritance relationship with his mother and his mother's family."

So the legal implications of adulterous children and li'an children are as follows:

- a. A child resulting from adultery has no relationship, marriage guardian or support with the man who gave birth to him.
- b. Child The result of adultery only has a lineage, inheritance and livelihood relationship with her mother and her mother's family.

Children of adultery and illegitimate children are not recognized as are children born out of wedlock (Article 283 of the Civil Code in conjunction with Article 273 of the Civil Code), unless they receive a dispensation from the President after hearing the considerations of the Supreme Court. Article 273 of the Civil Code also emphasizes that such children cannot be legalized, except to the extent of being

recognized in the marriage of both parents (after receiving a dispensation from the President). Therefore, they cannot be recognized by their father, they are only entitled to the provision of maintenance (Article 867 of the Civil Code).

An acknowledgement made by a person in a manner determined by law, that he is the father (mother) of a child born out of wedlock.

2) Children Born Out of Wedlock According to Western Inheritance Law

In the note that children born outside of marriage are legitimate children, if both parents of the child are legalized in the marriage certificate of both parents, then the child's status is no longer that of an illegitimate child, but rather that of a legitimate child (Article 272 of the Civil Code).⁵

The provisions regarding illegitimate children are separate from the Constitutional Court Decision No. 46/PUU-VIII/2010 which states that an illegitimate child can have a legal relationship with his biological father by submitting evidence. In the discussion of illegitimate children according to the Civil Code, the Constitutional Court's decision on illegitimate children is stated in the Civil Code. Here are some facts about illegitimate children:

- 1) An illegitimate child is a child born outside a legal marriage. By Therefore, in order to be declared a legitimate child, the marriage of both parents must be registered at the Office of Religious Affairs (KUA) or Civil Registry in accordance with Article 2 Paragraph 2 of Law No. 1 of 1974 concerning marriage (Marriage Law).
- 2) Child The marriage partner only has a civil relationship with the mother and the mother's family (Article 43 Paragraph of the Marriage Law).
- 3) As a result, illegitimate children who have not received recognition only inherit from their mother and their mother's family.

The share of illegitimate children based on Article 863 of the Civil Code is as follows:

- 1) If you inherit together with Group I, you will receive $\frac{1}{3}$ of the share if you are a legitimate child.
- 2) If you inherit Group II and Group III together, you get $\frac{1}{2}$ share of all the inheritance.
- 3) If inheriting together with Group IV, then they will receive $\frac{3}{4}$ of the total inheritance.

4) If there are no other heirs, then all inherited assets become the share of illegitimate children (Article 865 BW).

Although born outside of a legitimate marriage, an illegitimate child who is recognized is a descendant of the heir. Therefore, an illegitimate child is also legitimate and has absolute rights as an heir (*Legitieme portie*), which is $\frac{1}{2}$ of the rights he should receive if he were a legitimate child.

Children born out of wedlock cannot be heirs of their father and will only receive inheritance from their mother and their mother's family, but the father must be responsible for children born without marital status in civil relations such as maintenance, and a father can also provide a number of assets by way of gifts or grants.

3.2. Equality of Inheritance of Illegitimate Children According to Islamic Law and Western Law.

The results of the study show that the position of illegitimate children according to the provisions of Islamic Law, namely that children born outside of marriage only have a mutual inheritance relationship with their mother and their mother's family. Therefore, children who are not related to their father cannot inherit from each other. Meanwhile, according to the Civil Code, inheritance only applies to illegitimate children who are recognized by their father and/or mother. The equality of the inheritance position of illegitimate children in Islamic Law and the Civil Code, namely both are born outside of marriage, who do not have a lineage to their father, while the difference in Islamic Law, illegitimate children only have a mutual inheritance relationship with their mother and their mother's family, while according to the Civil Code, inheritance only applies to illegitimate children who are recognized by their father and/or mother.

Recognition of an illegitimate child as a form of protection can be seen from the principle of inheritance in the Civil Code, there is a principle that states that the requirement for an illegitimate child to inherit is that the illegitimate child must be legally recognized. So it can be understood here that an illegitimate child will only receive his rights, especially regarding the distribution of inheritance belonging to his biological parents (in this case, especially male parent/father) if the biological father legally acknowledges the legitimacy of the illegitimate child.

Civil Law with Islamic Law. Both inheritance laws basically regulate the same thing, namely regulating the distribution of inheritance from someone who has died by leaving wealth to one or more people, the only difference lies in its implementation, the Civil Code and Islamic law state that children (legitimate children) of the testator are the most important group of heirs because the children of the testator are the only ones.

Regarding illegitimate children, there are differences, according to the Civil Code,

an illegitimate child can be raised in status to become an acknowledged child and a legitimate child, whereas according to Islamic law, an illegitimate child cannot be raised in status, but even so, the illegitimate child inherits from the mother and the mother's family, and according to the Civil Code, a child who is illegitimate alone does not have the right to inherit.

Similarities and differences in the inheritance of illegitimate children are:

3) Equality:

In both legal systems, recognition by the biological father plays a significant role in determining the rights of illegitimate children. This recognition is an important step in obtaining certain rights for the child.

4) Difference:

1) Law Islam: Recognition does not change the status of lineage and inheritance rights of the biological father. Children born out of wedlock still do not have inheritance rights from their father.

2) Western Law: Recognition by biological father or court decision grants inheritance rights and other rights equal to those of legitimate children.

3.3. Factors Causing the Occurrence of Children Out of Wedlock According to Islamic Law and Western Law.

According to H. Herusko, there are many factors that cause illegitimate children, including:

1) A child born to a woman, but the woman does not have a marital relationship with the man who has intercourse with her and does not have a marital relationship with another man or woman.

2) A child born to a woman, the birth of which is known and desired by one or both of the parents, only that one or both of the parents are still bound by another marriage.

3) A child born to a woman, but the man who impregnated her is unknown, for example due to rape.

4) A child born to a woman during the iddah period of divorce, but the child born is the result of a relationship with a man who is not her husband. There is a possibility that this illegitimate child can be accepted by the families of both parties in a reasonable manner if the woman who gave birth is married to the man

who had intercourse with her. A child born to a woman whose husband has left her for more than 300 days, the child is not recognized by her husband as a legitimate child.

5) A child is born to a woman, even though the religion they adhere to dictates something different, for example in the Catholic religion it does not recognize divorce, but it is done anyway, then she remarries and gives birth to children. The child is considered an illegitimate child.

6) Child who are born from a woman, while they are subject to state regulations prohibiting marriage, for example Indonesian citizens (WNI) and foreign citizens (WNA) do not receive permission from the Embassy to marry, because one of them already has a wife, but they still mix and give birth to the child, this child is also called an illegitimate child.

7) A child born to a woman, but the child does not know his parents at all.

8) Children born from marriages that are not registered at the Civil Registry Office and/or Religious Affairs Office.

9) Children born from customary marriages are not carried out according to their religion and beliefs and are not registered at the Civil Registry Office and the District Religious Affairs Office.

4. CONCLUSION

Based on the overall results of the research conducted, the following conclusions can be drawn from this research: Referring to the inheritance of an illegitimate child, he can get an inheritance from his biological father, namely by submitting a Marriage Certificate for his parents' marriage, his parents remarrying, the father making a will, the father donating property while he was still alive to the child. Marriage certificate is a marriage that was originally not registered to be registered and legalized by the State, and has legal force. Submission of marriage certificate can be done by way of application (*voluntair*) or lawsuit (*kontentius*). Illegitimate children only have a mutual inheritance relationship with their mother and their mother's family, while according to the Civil Code, inheritance only applies to illegitimate children who are recognized by their father and/or mother. In principle, an illegitimate child and a legitimate child generally do not have a clear distinction in positive law in Indonesia, both illegitimate and legitimate children. Recognition of Illegitimate Children as a Form of Protection If we look at the principles of inheritance in the Civil Code, there is one principle that states that the requirement for an illegitimate child to be able to inherit is that the illegitimate child must be legally recognized. Although it has been described that recognition of an illegitimate child is a form of protection, in its realization, an agreement is also required from the mother/woman who is pregnant and gives birth to the illegitimate child as a mandatory requirement in recognition.

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Regulation :

Article 250 of the Civil Code (KUHPer).

Article 45 paragraph (1 and 2) of Law Number 1 of 1974 in conjunction with Article 1 paragraph (1) of Law Number 23 of 2002 concerning child protection.

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Law Number 1 of 1974 does not explain the complete definition of an illegitimate child. However, this can be understood from the definition of a legitimate child in Article 42, "a legitimate child is a child born in or as a result of a legitimate marriage. From this definition it can be concluded that an illegitimate child is a child who is not born in or as a result of a legitimate marriage. Article 186 of the KHI defines a child born out of wedlock as a child born outside of a legitimate marriage or as a result of an illegitimate relationship.