

THE PREPARATION OF ISLAMIC LAW CONCERNING DETERMINING THE STATUS OF THE ORIGINAL POSITION OF OUT-OF-WEDDING CHILDREN IN THEIR INHERITANCE RIGHTS

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Abstract: Law in its usefulness must then guarantee 4 substances, namely legal certainty, legal expediency, legal justice, and acceptance or recognition of law by citizens of the community governed by law. In the context of this research, it focuses on the unclear position of the inheritance of children outside of marriage due to legal dualism in Indonesia, namely civil law and Islamic law. In the legal facts that occur today, heirs of children outside of marriage are victims of adultery and/or invalid marriages because they do not meet the requirements regulated by Number 1 of 1974 concerning Marriage and the Civil Code. The presence of two laws with different elements and styles between Islamic law and civil law creates a disparity in legal substance, so that at the level of its application the community is given a choice as to which law they will adhere to or use. This study aims to analyse and examine the status of the position of origin of children outside of marriage in the perspective of the Civil Code and Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law which has implications for the distribution of inheritance. The results of the study show that civilly, the legal position of children outside of marriage can be elevated to the status of legitimate children if they receive recognition from their biological father which is then legalised through a court decision, even though civilly children outside of marriage receive a share of inheritance of one third of what they should receive as biological children. Meanwhile, in the provisions of Islamic law, children outside of marriage are adulterous children so that they only have nasab from the mother and her mother's family, so that children outside of marriage then if they get inheritance from their biological father, it is only in the form of a mandatory will and not inheritance.

Keywords: *Children outside of marriage, Inheritance, Civil Law, Islamic Law.*

I. INTRODUCTION

Reported through the web page malangposcomedia.id that there were dozens of children in Malang District born without a legal marriage seen during the third quarter of 2023 (Posco, 2023). This is illustrated by the number of child origination applications received by the Malang District Religious Court (PA) until September this year:

“Dozens of children born "without fathers" are from couples with a history of siri or unofficial marriage, and promiscuous sexual behaviour. The Religious Court recorded that at least 48 applications for the origin of children were received. Meanwhile, about 41 cases were decided (Wawancara, 2023).”

Law is normative because of the value of justice (*Legal Certainty*). Gustav Radbruch tried to overcome the dualism between *Sein* and *Sollen*, between matter and form. If Stamler and Kelsen were caught up in this dualism (so that what is important in law is only its formal dimension or form), then Radbruch did not want to fall into the same "error". Radbruch saw *Sein* and *Sollen*, matter and form as two sides of the same coin. Matter fills form and form protects matter.

According to Radbruch, the value of justice is the material that must be the content of the rule of law. Meanwhile, the rule of law is a form that must protect the value of justice. Law as a developer of the value of justice, according to Radbruch, becomes a measure of the fairness of the legal system. If referring to Radbruch's intention that between justice, finality, and certainty there will always be conflicts, then in the context of this legal research where finality is the development of individuals demanding the rule of law to test the legislation provides benefits, but the legality aspect of the provisions of the law has been regulated in such a way as legal certainty of course only relies on the binding norms, namely the principle of *expressie unius est exclusio alterius*. Therefore, to realise the right law, they must complement each other and not exclude each other. The prioritisation of one over the other and the basic value of the law will result in the emergence of tension (*spanning*) between each of these legal values.

The position of illegitimate children born outside marriage often causes problems. Children born outside a legal marriage are only cared for by their mother. In reality, these children tend not to get the attention of education, health, and even physical and mental sustenance from their biological father and his family (Zakkyah, 2016). This cannot be denied because according to the provisions of fiqh law and positive law, the child only has a nasab relationship to the mother and the mother's family.

Islamic law stipulates that a child is basically legitimate if at the beginning of the pregnancy there is a legal marriage (Basyir, 2000). However, among Indonesian society itself there are still many pregnancies outside of marriage. According to the view of the law, there are differences in terms of children, namely legitimate children and children born outside of marriage, this is a difference in the eyes of the law in differences in the status and acquisition of children's rights.

The provisions of Article 832 and Article 280 jo Article 863 of the Civil Code clarify the position for heirs must have a blood relationship either legal or outside marriage. This is different from the Islamic inheritance law that applies in Indonesia. Article 43 paragraph 1 UUP jo Article 100 Compilation of Islamic Law explains that children outside of marriage only have a civil relationship with their mother and their mother's family. With the issuance of Constitutional Court Decision Number 46 PUU-VIII2010, Article 43 paragraph 1 of Law Number 1 Year 1974 basically changed the sound that children born also have a civil relationship with their biological father.

Thus, this study aims to examine the normative legal certainty of inheritance rights of both legitimate children and illegitimate children (outside of marriage) with a comparative

legal comparison between civil law and Islamic law as regulated in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, in terms of its urgency considering that the legal system of inheritance in Indonesia adheres to 3 systems, namely civil law, Islamic law, and customary law so that this study intends to minimise legal ambiguity and ensure legal certainty at the level of its application, especially in civil inheritance and inheritance under Islamic law of legitimate children and illegitimate children (children outside of marriage).

II. RESEARCH METHOD

The problem research method used in this research is the normative juridical method, namely approaching the problem through legal research by looking at applicable legal norms contained in laws and regulations, court decisions and experts' opinions. Statutory approach is an approach that is carried out by examining all laws and regulations related to the research to be carried out.

Conceptual Approach The conceptual approach departs from the views of doctrines that develop in legal science. Thus the researcher will find ideas that give birth to legal notions, legal concepts and principles that are relevant to the issue at hand. This research uses a type of qualitative research because it is carried out by observing and analysing data and using theory as a basis for research in order to describe reality in accordance with the facts in the field regarding a comparative analysis of the inheritance rights of children outside of marriage from the perspective of civil inheritance law and Islamic law.

III. RESULT AND DISCUSSION

On 14 September 2023, an interview was conducted with one of the judges and clerks at the Cirebon City Religious Court who knew more or less about the inheritance status of children outside of marriage. The first question the researcher asked about what is the status of children outside of marriage and their legal consequences, whether they have inheritance rights or not so that there will be legal certainty of the status and inheritance rights of these children outside of marriage. Given the many shades of law that are used and have not been unified.

He explained that an unmarried child can inherit from his father if he is legally recognised by his father by using an authentic Child Recognition Deed (Article 281 of the Civil Code). Marriage Law Number 1 of 1974 Article 43 paragraph 1, 'children who are born only have a civil relationship with their mother and their mother's family, Article 43 of the Marriage Law makes it difficult for children outside of marriage to get maintenance rights from their biological father because the Law does not regulate how the child's civil relationship with their biological father. However, in the Constitutional Court Decision Number 46 / PUU-VIII / 2010, which in essence changed the sound of article 43 paragraph (1) of Law Number 1 of 1974: "Children born outside marriage only have a civil relationship with their mother and their mother's family", was changed so that the child also has a civil relationship with his biological father, so the legal arrangements and position of children outside of marriage are currently quite well accommodated, because this is a guarantee given by the Constitution.

The origin of the child is the basis for showing the existence of a relationship of kemahraman (nasab) with the father. This is what is believed in Sunni fiqh. Because the scholars agree that adulterated children or li'an children, only have a nasab relationship with the mother or her mother's siblings. Unlike the understanding of the Syi'ah scholars that the child of adultery does not have a nasab relationship with the mother or father of adultery, therefore the child of adultery can not inherit both (Rofiq, 2001).

In Indonesia, there are several different legal provisions on the issue of child origins. This is understandable, because of the plurality of the nation, especially in terms of religion and customs, so the applicable legal provisions vary. There are at least three applicable laws, namely Islamic law, civil law contained in the Civil Code, and customary law as unwritten law. Each of these laws, in addition to having similarities, has very significant differences in terms of child origins, especially with regard to ethical and moral aspects (Rofiq, 2001).

An unmarried child is a child born to a woman, while the woman is not in a legal marriage with the man who has intercourse with her. Meanwhile, the definition of outside marriage is the relationship between a man and a woman who can give birth to offspring, while their relationship is not in a legal marriage according to positive law and the religion they follow (Manan, 2008).

According to the perspective of Western civil law based on the Civil Code, the definition of children outside of marriage (illegitimate children) is used in 2 (two) senses:

1. In a broad sense, children born out of wedlock, including children born out of overspelig and bloedschenning, or children born out of wedlock due to adultery and sumbang.
2. In a narrow sense, children born outside a legal marriage, who are not children of infidelity or adultery (Usman, 2006).

In Law Number 1 Year 1974 concerning Marriage Article 43 paragraph (1). Explaining "children outside of marriage are children born outside of marriage, and only have civil relations with their mothers and their mothers' families", as well as with men as their fathers who can be proven based on science and technology or other evidence according to the law to have blood relations, including civil relations with their father's family.

So, children who are included in children born outside of marriage, have no relationship at all with the man who gave birth (biological father). By only having a civil relationship from the mother's line, these children receive protection from the law. This means that from the moment they are born, they receive a mother from the woman who gave birth to them. Conversely, the woman cannot avoid that the children are not her children (Usman, 2006).

According to H. Herusko, there are many factors that cause children outside of marriage, including (Herusko, 1996):

1. A child born to a woman, but the woman is not married to the man who had intercourse with her and is not married to another man or woman.
2. A child born to a woman, the birth of which is known and willed by one or both of the parents, except that one or both of the parents is still bound by another marriage.
3. A child born to a woman, but the man who impregnated her is unknown, for example as a result of rape.
4. A child born to a woman during a divorce, but the child is the result of a relationship with a man who is not her husband. There is a possibility that this children outside of marriage can be accepted by the families of both parties reasonably if the woman who gave birth is married to the man who had intercourse with her.
5. A child born to a woman whose husband has been away for more than 300 days is not recognised by her husband as a legitimate child.
6. A child born to a woman whose religion dictates otherwise, for example, Catholicism does not recognise divorce, but she remarries and gives birth to a child. The child is considered an illegitimate child.
7. A child born to a woman, while the provisions of the State prohibiting marriage apply to them, for example an Indonesian citizen (WNI) and a foreign citizen (WNA) do not have 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 extra-marital child.

8. A child born to a woman, but the child does not know his/her parents at all.
9. A child born out of a marriage that is not registered at the Civil Registry Office and/or Religious Affairs Office.
10. A child born out of a customary marriage, not performed according to religion and belief and not registered at the Civil Registry Office and Religious Affairs Office of the District.

The following is the legal basis for changing the status of a children outside of marriage into a legal child. Based on civil law, the ratification of children outside of marriage into legal children is regulated in the Civil Code Articles 272, 275, 284 which read as follows:

- a. Article 272 of the Civil Code explains that Children outside of marriage, except those born of adultery or desecration of blood, are validated by the subsequent marriage of their father and mother, if before entering into marriage they have legally recognised the child, or if the recognition occurs in their own marriage certificate.
- b. Article 275 of the Civil Code:
 1. In the same manner as provided for in the preceding article, children outside of marriage who have been recognised according to law may also be legalised;
 2. If the child is born to parents who, by reason of the death of one of them, have not consummated their marriage; and
 3. If the child is born to a mother belonging to the Indonesian class or to a class similar thereto; if the mother is deceased or if there are, in the opinion of the President, important objections to the marriage of the parents.
- c. Article 284 of the Civil Code:

No recognition of a children outside of marriage shall be accepted while the mother is still alive, even if the mother belongs to the Indonesian class or to a class similar to that, if the mother does not consent to the recognition.

Thus, based on the provisions of Article 272, Article 275, and Article 284 of the Civil Code, the legal status of an children outside of marriage can be changed to a legal child, with certain conditions, with more emphasis on the consent of the mother of the children outside of marriage to the recognition permit from the father of the children outside of marriage.

In the case of the validation of the registration of an children outside of marriage, the applicant must attach several requirements as stipulated in Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Registration and Civil Registration Article 50 Paragraph 1:

1. Excerpt of birth certificate;
2. Excerpt of marriage certificate that explains the occurrence of marriage event of religion or belief in God Almighty occurred before the birth of the child;
3. Family card of the parents; and
4. Electronic identity card.

The procedure for obtaining a court order in general is to apply to the District Court in accordance with the region, attach supporting evidence and pay the court fee. The court then schedules a hearing for the child out of wedlock, which is presided over by a single judge and is relatively quick. The flow of the hearing is as follows:

1. Reading of the application;
2. Evidence of letters and witnesses;
3. Conclusion; and
4. Reading of the judgement.

So based on the description of the legal basis and stages of the procedure above, it can be concluded that children born outside marriage or Anak luar kawin can have a legalisation certificate in the form of a Family Card that changes its status from "Child of a Mother" to "Child of a Father and Mother", including the lineage of the father and mother after obtaining a determination from the District Court of the competent area.

However, a new problem arises as to what the legal consequences of changing the status of a child out of wedlock to a legal child are on his or her inheritance rights, both then according to civil law and based on Islamic law (which is regulated in the Compilation of Islamic Law).

An interview was conducted on Tuesday 10 October 2023 with the Judge of the Cirebon City Religious Court Sayyed Sofyan, S.H.I., M.H. he explained that marriage in its sense has been regulated as Articles 2, 3, and 4 in the Compilation of Islamic Law.:

Article 2:

Marriage according to Islamic Law is marriage, which is a very strong contract or *mitsaqan ghalidza* to obey the commandments of Allah and performing it is an act of worship.

Article 3:

Marriage aims to create a household life that is *sakinah, mawadah, warahmah*.

Article 4:

Marriage is valid, if performed according to Islamic law in accordance with Article 2 paragraph (1) of Law Number 1 of 1974 concerning Marriage which reads, "Marriage is valid if performed according to the laws of each religion and belief".

So according to Islamic Law which is regulated in KOMPILASI HUKUM ISLAM and Law Number 1 Year 1974 concerning Marriage, interfaith marriages are invalid both in state law (positive law) and religious law. Thus, in this case, children according to Islamic Law are divided into 2, namely Legal Children and Children outside of marriage. Legal Children as regulated in KOMPILASI HUKUM ISLAM Article 99 letters a and b, namely:

- a. Children born in or as a result of a legal marriage
- b. The result of a lawful act of husband and wife outside the womb and born to the wife.

Meanwhile, what is meant by children outside of marriage is as stipulated in the Compilation of Islamic Law Article 100 is that children born outside of marriage only have *nasab* with their mother and their mother's family. So based on the provisions of these laws and regulations, the position of children outside of marriage in inheritance according to Islamic inheritance law is that they have absolutely no inheritance rights to the estate of their father who died. So the following is a table comparing the inheritance rights of children outside of marriage in terms of the Civil Code and the Compilation of Islamic Law:

Tabel 1. A Comparison of the Inheritance Rights of Unmarried Children in View of Civil Law and the Compilation of Islamic Law

No	Aspek Hukum	KUH Perdata	KOMPILASI HUKUM ISLAM
1.	Marriage	Article 26, marriage only in civil relationships. Article 27, monogamy. Article 103, husband and wife must be faithful to each other, help each other and assist each other.	Article 2, marriage is a very strong commitment to obey the commandments of Allah. Article 3, marriage is a marriage of sakinah, mawadah, warahmah. Article 3, a valid marriage is conducted in accordance with Law No. 1/1974 Article 2(1). Article 55-59, polygamy.
2.	The Heir	Article 830, inheritance only occurs by death.	Article 171 letter b, people who at the time of death or declared dead based on a PA decision, died outside of marriage heirs and inheritance.
3.	Heir Apparent	Article 832, blood relatives, whether legal or extra-marital, and the husband and wife who live the longest.	Article 172, the heir is Muslim by showing an identity card and/or there is recognition, practice, or testimony, while a newborn baby or a child who is not yet an adult has a religion according to his father or environment.
4.	Legal child	Article 852, children or descendants even if born and various marriages inherit the property of their parents.	Article 99, a legitimate child is a child born of a legal marriage, and is the result of a legal act of the husband outside the womb and born to the wife.
5.	children outside of marriage	Article 284, with acknowledgement, a child out of wedlock can be changed to a recognized children outside of marriage.	Article 100, children born out of wedlock only have a nasab relationship with their mother.
6.	Testamentair	Article 874, all the property of the testator belongs to the heirs according to the law only against the will has not been taken a valid decree.	Article 195; paragraph (1) Oral with two witnesses and/or writing before a notary with 2 witnesses, (2) wills as much as 1/3 of the estate unless all heirs agree.
7.	Inheritance is divided	Article 863, if there is a legitimate descendant of children outside of marriage or husband or wife, children outside of marriage inherits 1/3, if as stipulated earlier children outside of marriage is descended from children outside of marriage gets 1/2; if there is no children outside of marriage, children outside of marriage's blood relatives or descendants get 3/4.	-

Thus, if seen in the comparison table above, children outside of marriage in civil law have a position as heirs as stipulated in Article 832 and Article 863 of the Civil Code, while in Islamic law itself an children outside of marriage does not have the same position as an heir because (MUI, 2012):

The child of adultery does not have a relationship of nasab, wali nikah, inheritance, and maintenance with the man who caused his birth:

1. The child of adultery only has a relationship of nasab, inheritance, and maintenance with his mother and his mother's family;
2. The child of adultery does not bear the sin of adultery committed by the person who caused his birth;
3. Adulterers are subject to hadd punishment (a type of punishment whose form and rate have been regulated in the Qur'an), in the interests of preserving legitimate offspring (hifzh al-nasl).

The government is authorised to impose a ta'zir punishment (type and punishment given by the competent authority) on the adulterous man who caused the birth of the child by obliging him to do so:

1. Provide for the child's needs;
2. Providing assets after his/her death through a mandatory will; and
3. The punishment referred to in number 5 aims to protect the child, not to legalise the nasab relationship between the child and the man who caused his birth.

The form of this mandatory will is a "gift" different from inheritance where inheritance is an inheritance in the form of "rights" to be fulfilled in accordance with applicable laws and regulations (except in the distribution has been regulated in the will). According to Sayyed Sofyan, Judge of the Cirebon City Religious Court, the issue of the distribution of inheritance or wills in the Religious Court Trial should be a form of "effort to compile Islamic Law" when the heirs do not find consensus in a family manner in the way of distribution, as explained in Article 183 of the Compilation of Islamic Law:

"The heirs can agree to make peace in the division of the inheritance, after realising their respective shares."

The application of a mixed system in the scope of judicial inheritance law between Civil Law and Islamic Law is an adoption of the ordinance system for the division of legal enforcement from the Netherlands which Indonesia still applies today. Thus, this is an acknowledgement of the juridical philosophy of Pancasila, the first principle of Belief in One God and a form of state protection to the community for the guarantee of protection of their human rights, as stipulated in the 1945 Constitution of the Republic of Indonesia Article 28 letter e paragraph (1), namely that everyone is free to embrace religion and worship according to their religion on condition that it does not conflict with the values and norms that grow and develop in the social life of Indonesian citizens.

IV. CONCLUSION

Indonesia is a state of law (rule of law) thus implies that integrally holistic regulates the life of community behaviour through law (normative) in all aspects including in terms of inheritance distribution. Based on the description of the research results above, it can be concluded that in civil law, children outside of marriage automatically receive inheritance rights from their parents (biological father) if there is recognition by fulfilling the conditions as stipulated in the authentic Child Recognition Deed (Article 281 of the Civil Code). Regarding the amount of inheritance, civilly, children outside of marriage get 1/3 of the share they would have received if they were legitimate children (863 Civil Code). With the exception that if the testator does not die outside the marriage of a legitimate heir according to the law, then the extra-marital child inherits the testator's property entirely (865 Civil Code). Children outside of marriage can claim the entire inheritance for themselves to the exclusion of the state (873 Civil Code). In Islamic law, children outside of marriage have a

legal status as regulated in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law as children of adultery or illegitimate children (children outside of marriage).

Thus, children outside of marriage according to Islamic law have absolutely no rights as heirs to inherit the property of the heirs of their parents (biological father) because they are determined to have only their mother's lineage. If the testator dies and then wants to give some of his inheritance, it is legal under Islamic law through a mandatory will (gift), provided that it cannot be more than 1/3 of the assets that they should receive as legitimate children. In essence, the division of inheritance is not absolutely resolved within the scope of the court. Taking the formal legal route is an attempt to apply the Compilation of Islamic Law if there is no agreement (mufakat) by the heirs on the division of their property either based on civil submission or according to Islamic law.

REFERENCES

- Abdul Manan, 2008. *Aneka Masalah Hukum Perdata Islam di Indonesia*. Jakarta: Kencana.
- Ahmad Azhar Basyir, 2000. *Hukum Perkawinan Islam*. Yogyakarta: UII.
- Ahmad Rofiq, 2001. *Hukum Islam di Indonesia*. Jakarta: PT Raja Grafindo Persada.
- Fatwa MUI Nomor 10 Tahun 2012 tentang Anak Hasil Zina Tidak Mempunyai Hubungan Nasab, Wali Nikah, Waris, dan Nafaqah Dengan Lelaki yang Menyebabkan Kelahirannya.
- H. Herusko, 1996. *Anak di Luar Perkawinan, Makalah pada Seminar Kowani*, Jakarta. Kitab Undang-Undang Hukum Perdata.
- Kompilasi Hukum Islam.
- Posco Media, 2023. *48 Anak Lahir Tanpa Bapak*. Malang Posco Media: <https://malangposcomedia.id/48-anak-lahir-tanpa-bapak/>, diakses pada 4 Agustus 2023 pukul 17.09
- Putusan Mahkamah Konstitusi Nomor 46/ PUU-VIII/2010 tentang Pengujian Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.
- Rachmadi Usman, 2006. *Aspek Hukum Perorangan dan Kekeluargaan di Indonesia*. Jakarta: CV Sinar Grafika.
- Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
- Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.
- Zakyyah, 2016. *Nasab Anak luar kawin Menurut Hizfu Nasl*, Jurnal Yudisial Vol. 9 Fakultas Syariah dan Hukum UIN Ar-Raniry.
- Wawancara Malang Posco Media dengan Muhammad Khairul Humas Pengadilan Agama Kabupaten Malang: <https://malangposcomedia.id/48-anak-lahir-tanpa-bapak/>, diakses pada 4 Agustus 2023 pukul 17.09
- Wawancara dengan salah satu Panitera Pengadilan Agama Kota Cirebon pada hari Kamis tanggal 14 September 2023 pukul 13.20.
- Wawancara dengan Hakim Pengadilan Agama Kota Cirebon Sayyed Sofyan, S.H.I., M.H. pada hari Selasa tanggal 10 Oktober 2023 pukul 10.15.