

Inheritance Child Out of Wedlock in The Compilation Of Islamic Law (KHI) Perspective And Civil Law (*Burgerlijk Wetboek*)

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Abstract. This study aims to determine the position of the beneficiary 1. child out of wedlock in perspective Compilation of Islamic Law and the Civil Law (*Burgerlijk Wetboek*). 2. similarities and differences in the position of heir child out of wedlock in perspective Compilation of Islamic Law and the Civil Law (*Burgerlijk Wetboek*). The methods used include normative juridical approach with a qualitative descriptive study specifications. The method of data collection is literature study / documentary study of the primary legal materials, secondary law and tertiary legal materials by using qualitative analysis. The results of the study showed that notch that the child outside the mating according to KHI only have a relationship of inheritance with her birth mother, while according to Article 272 of the Civil Law can be seen that in the Civil Law there are children who do recognition and can be passed that *Natuurlijk Kind*, and there is also a child that can not be done against the *overspeleg kind* of recognition and *blodsceneg*. With the recognition that there arose a civil relationship between children and parents outside mating admit as stipulated in Article 280 of the Civil Law. Equal status illegitimate children in the perspective of the KHI and Civil Law is equally no right of inheritance. The difference is the inheritance rights of children outside of marriage can be granted if there is recognition of illegitimate children *Natuurlijk* just kind only. Meanwhile, according to KHI just recognition of extramarital children who have a religious marriage that can be recognized.

Keywords: Inheritance; The position of heir; A child out of wedlock.

1. Introduction

In some communities in Indonesia, only marriage performed according to religious law, but do not do the recording so that the couple does not have a marriage certificate as authentic evidence of marriage that has been done. Marriages performed according to religious law but not listed on the marriage registration agencies such as the Office of Religious Affairs (KUA) for the Moslems and the Civil Registry Office for the non-Muslims, unknown as marriage or *Nikah Siri*.

Children born out of marriage siri under state law considered illegitimate children outside of marriage or because there is no proof of registration of marriage in the form of a marriage certificate. So that the child of the marriage of the series can only be denied by the husband and the husband does not want to perform the duties as a parent to keep the child. So that all of the obligations borne by the wife (the mother of the child) and the family of the wife (as defined in Article 43 UUP). Can be pulled understanding that a legitimate child is a child born of a legitimate marriage, while children born outside legal marriage is a child out of wedlock.

In the perspective of Islamic law, as compiled in the Compilation of Islamic Law other than described on the criteria for a legitimate child (children born in matrimony lawful), as set forth in Article 99 Compilation of Islamic Law, which states that a legitimate child is: 1) Children born in or due to legal marriage; 2) The results of the conjugal

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conception outside the womb and be born by the wife. Also known children born outside of marriage are legitimate, such as those listed in Article 100 Compilation of Islamic law that children born outside marriage has only *nasab* relationship with her mother and her mother's family.

Ali Afandi³, in his book "*Hukum Waris Hukum Keluarga Hukum Pembuktian*", states that the draft Civil Law classifies children into three (3), namely: 1) Children legitimate; that a child born in a marriage; 2) Children born out of wedlock, but is recognized by a father and / or mother; 3) Born out of wedlock, and not recognized, not by the father or by the mother. Regarding inheritance to children outside of mating is governed by Article 862 sd Article 866 of the Civil Law.

According to the setting of the Civil Law, heirs inherit only apply to children outside of mating recognized by the father and / or mother. Without the recognition of the father and / or mother, the child has no right to marry outside the heir. Unlike the case with the Islamic law in force in Indonesia. Beyond mating child only has civil relationship with her mother and her mother's family (see Article 43 paragraph (1) UUP jo. Article 100 KHI). It is also stressed by M. Ali Hasan,⁴ in his book "*Hukum Warisan Dalam Islam*", that child out wedlock heir only heir to the family of his mother's side alone.

Based on the position of heir child out of wedlock, according Compilation of Islamic Law and the Civil Law as described above, it is known that the Inheritance Law in force in Indonesia still does not have a legal entity that can be applied to all Indonesian citizens. The legal form of familial inheritance is determined by the nature and form of ownership of the treasure, which each religion, customs and culture of modern (Western). Based on the description of the background of the above problems, it needs to be examined on: "The position of Inheritance Child Out Of Wedlock In The Compilation Of Islamic Law (KHI) Perspective And Civil Law (*Burgerlijk Wetboek*)".

Research methods

The method used in the writing of this paper is a normative juridical research. This judicial law research means refers to the study of existing literature or of secondary data is used. Normative meaning of legal research that aims to acquire knowledge about the relationship between a normative regulations with other regulations and application in practice.

This study is descriptive qualitative data collection methods include literature study / documentary study of the primary legal materials, secondary law and tertiary legal materials by using qualitative analysis.

2. Results and Discussion

2.1 Inheritance Child Out Of Wedlock In The Compilation Of Islamic Law (KHI) Perspective And Civil Law (*Burgerlijk Wetboek*)".

2.1.1 Status of Inheritance Children Perspective Out of Wedlock in Compilation of Islamic Law.

Islamic inheritance law is the law that governs all things pertaining to the transfer of rights or obligations on a person's wealth after he had passed to his heir. Islamic

³Ali Afandi, 2000, *Hukum Waris Hukum Keluarga Hukum Pembuktian*, Rineka Cipta, New Edition, Jakarta, p. 40.

⁴M. Ali Hasan, 1973, *Hukum Warisan Dalam Islam*, Bulan Bintang, Jakarta, p. 134.

inheritance law also called *Faraidh* law, the plural of the word *Faridhah*, which is closely related to the word meaning *Fardh* obligations that must be implemented and Sharia is part predetermined for heirs.

Compilation of Islamic Law Article 174 outlines the grouping heirs include:

- According to the blood ties that group of men consisting of: father, son, brother, uncle and a group of women consisting of: mother, daughter, sister of the grandmother.
- According to the marital relationship consisted of: widowed.

Act No. 1 of 1974 on mentioning

"Children who legitimately are children who were born in or as a result of a legal marriage." Noting Article 42 of the Marriage Law, therein giving legal tolerance to children born within marriage are legitimate, despite the distance between the wedding and the birth of a child less than the minimum amount of time pregnancy. So, as long as the baby was born when his mother was in the bonds of a valid marriage, then the child is the legitimate child.

The law does not set a limit for the minimum age of the content, both in its Articles and in the explanation. KHI is confirmed and detailed in what is set in the Marriage Law.

Article 99:

"Children who are legitimate:

- Children born in or due to legal marriage;
- Results legitimate conjugal conception outside the womb and be born by the wife. "

Article 100:

"Children born outside marriage has only *nasab* relationship with her mother and her mother's family."

Article 101:

"A husband who deny the legitimacy of the child, while the wife does not deny it, can confirm his denial with *Li'an*."

KHI above provisions of Article 99 contains a legal reform in anticipation of the possibility of IVF, the ovulation process which is engineered outside the womb, through the tube prepared for it, then reinserted into the womb of the wife and the wife was born as well as by. Thus it remains confined between a husband and wife who are bound by a valid marriage.

The issue of children outside of mating is always cause problems in the community, both about public relations as well as on the rights and obligations. Often heard and witnessed that society is too quick to give a verdict against children born out of mating as the dregs of society, instead always treated outside of humanity, so that the result of his birth are thus, considered that the deeds he did not received. Meaning they had forgotten to Islamic law, because it is clear to say that every child born is a holy / clean from sin, both born of legitimate marriage and outside of marriage are legitimate, because the child is born it does not depend on or be responsible for the sins of the mother father.

It is expressly stated by the Prophet Muhammad in a hadith of Abu Hurairah narrated by Bukhari meaning reads as follows:

"Prophet SAW said, no one was born but in a state of purity, both mother-father (parents) that makes the child Jews and Christians, such as the birth of an animal, if ever you find severed ear (defects in the body), unless you yourself are cut (notice)."⁵

⁵Al-Kirmany, 1937, *Syarah Shahih Bukhary*, Kairo : Al-Bahriyah Al-Misriah, p. 76

Under the provisions of Article 186 Compilation of Islamic Law (KHI) mentions "Children born outside marriage has only heir mutual relationship with his mother and the family of the mother."

In Islam, if someone had the bright no blood relationship with his mother and father, he inherited his mother and father and his mother and father inherited it as long as nothing is a barrier heritage and for the terms of heritage has been quite perfect, and can not be a person is deemed to have a blood relationship with the father alone without having seen the mother.⁶

In the 'modern *urf* called *wa'ad ghairu syar'i* (children who are not recognized religion). As his father called father *ghairu syar'i*. Therefore natural child, whether male or female, is not recognized blood relationship with his father, he did not inherit his father nor anyone relatives of the father, as his father did not inherit it. Because there is no reason inherit each other between the two, which is a blood relationship. Therefore child out wedlock was recognized blood relationship with his mother, he inherited his mother, as he inherited the relatives of his mother, and vice versa, so if it died a child who is a recognized religion, to leave father and mother were not recognized religion, then all the treasures legacy to his mother with *fardlu* road and the way of *radd*.⁷

If she dies and leaves a mother, brother, brother of the same mother and father were not recognized religion, then all legacy is to his mother and brother with the same mother *fardlu* and *radd*. When his mother died, or death of a relative's mother, the child who *ghairu shar'i* received inheritance from her mother and her mother's relatives. In this case held general code of the inheritance and if the father is not sharia dies or one of her relatives, the children were not *shar'i* not receive inheritance from him.

Similarly to *Li'an* child, if it has the perfect greeting *berli'an* between husband and wife before the court, the judge also set they split up and connect a child to his mother and to determine that there is no blood relationship between the child with his father. *Li'an* children in inheritance law the same as the natural child, so he got a gift from his mother and from his mother's relatives. As described previously that the children outside marry only have inheritance relationship with the birth mother.

2.1.2 Status of Inheritance Children Perspective Out of Wedlock in Civil Law (*Burgerlijk Weboek*)

In the Civil Law the inheritance children have accrued the most important among the other group heirs. In the Book of the Civil Law, children can be classified into two groups, namely:

- The legitimate child of children born by a legal marriage under law. This is in line with the wording of Article 250 of the Civil Law. Legitimate child of Article 250 of the Civil Law are the children who were born or grown throughout the marriage and the marriage broke up. As for the marriage breakup caused because that is due to a divorce, either dead or divorced divorce (Article 199 of the Civil Law),
- The illegitimate son of the children born money is not based on a valid marriage. In the case of illegitimate children is much beyond mating call as a child in a broad sense. The illegitimate child is still divided into three groups, namely:
 - children at the time of the birth parents were not legally married and not married well with others / were no marital relationship. Kids are called by *Natuurlijk Kind* (natural child). Contained in Article 280 of the Civil Law;

⁶*Ibid.*, p. 288

⁷*Ibid.*, p. 289

- children at the time of birth of his parents or one of his parents is bound in matrimony with others. Kids are called by *Overspeleg kind* (child out wedlock), when a woman entered into a relationship with other than her husband and child of that relationship was born along dengann marriage but her husband would be able to prove that the child is not his son, the child remains a child of adultery. It is stipulated in Article 283 of the Civil Law;
- children at the time of the birth parents should not be married, because the banned blood kinship mating. Kids are called *blodsceneg* (discordant kids). It is stipulated in Article 283 of the Civil Law. The law prohibits marriage between those who have a blood relationship closeness.

Of the two groups of children based on the above mentioned Civil Law sahlah only child could be the heir of his parents. As for their illegitimate children could not inherit. However, pursuant to Article 272 of the Civil Law can be seen that in the Civil Law there are children who do recognition and can be passed that *Natuurlijk Kind*, and also there are children who can not be done against the *overspeleg kind* of recognition and *blodsceneg*. With the recognition that there arose a civil relationship between children and parents outside mating admit as stipulated in Article 280 of the Civil Law. With the civil relationship is then brought as a result of one of them is the inheritance relationship.

In civil law can marry a child outside memporoleh heritage with all categories of beneficiaries contained in the Civil Law Group I, Group II, Group III, Group IV. Basic settings outside of mating heritage against children are on the Article 863 of the Civil Law.

- Outside child marriage inherit the Joint Group I
- Beyond mating child can inherit the group consisting of a legitimate child and his descendants and widows (widows is meant here is the husband / wife of the heir). Inheritance rights for children, outside of mating is 1/3 of the rights which they originally received, if he is a legitimate son.
- Outside child marriage inherit the Joint Group II
- In the case of children outside of class II married heir to the great legacy received is 1/2 of the legacy left by heir.
- Outside child marriage inherit the Joint Group III
- Same with joint heir to the class II major legacy of children who have inherited their wedding outside is 1/2 of the estate left by the testator
- Outside child marriage inherit the Joint Group IV
- In the case of children outside marry the heir to the Group IV receives legacy is 3/4 of the estate of the testator.

As has been mentioned above is only a child outside of mating recognized to heir to the possessions of parents who admit it, but in the Article 285 of the Civil Law states that the recognition by the husband or wife of the child conceived by someone other than their husband or wife committed during the marriage shall be without prejudice against the husband or wife or children born of their marriage. This means that the recognition can be done throughout the marriage by the husband or wife who admits, however, if the recognition of all marriages were brought losses to the spouses and children who were born during the marriage then such recognition should not be done.

2.2 Similarities and Differences of Inheritance Children Perspective Out of Wedlock in Compilation of Islamic Law and the Civil Law (*Burgerlijk Wetboek*).

According to the positive law in Indonesia, the child's status to the descendants distinguished legitimate and illegitimate offspring. Legitimate offspring based on the existence of a valid marriage in the sense that one is the other offspring based on birth in or as a result of a valid marriage, children were called legitimate children. While unauthorized descent is a breed that is not based on a valid marriage, people call such a child is a child outside of marriage.⁸

The draft Civil Law (BW) calls outside of mating with the term child as *Natuurlijk Kind* (nature child). Beyond mating child is the child born outside marriage are legitimate, in this case the child born to a mother, but not in benihkan by a man who is in a legal marriage with the mother of the child. Then the child standing outside marry here as children who are not legitimate.⁹

For children who are included in the category of children out of wedlock, Article 43 of the Marriage Law states that children born outside marriage has only a civil relationship with her mother and her mother's family. This article was reaffirmed in Article 44;

- A husband can deny the legitimacy of a child born to his wife when he can prove that his wife has committed adultery and the child was the result rather than the adultery.
- The court gave a decision on the legitimacy / absence of children at the request of the parties concerned.

Basically, the child's relationship with the outside of the mating male membenihkannya and his family in the Compilation of Islamic law are considered no legal effects, so in this case there is no inheritance laws between the two. In Compilation of Islamic Law, a child out of wedlock only have *nasab* relationship with her mother and her mother's family.

The legal consequences of children out of wedlock by KHI is the illegitimate child is not entitled to obtain *nasab* relations, livelihood, rights of inheritance, *hadhanah* (maintenance / care of children) and the guardianship of the father, but to his mother. Compilation of Islamic Law, Article 186 states that children born outside marriage has only heir mutual relationship with her mother and her mother's family.

Basically, the children's inheritance beyond mating position between the Civil Law Law Compilation Islam have in common is having inheritance rights only to the mother and her family.

In the Civil Law regarding children born outside of marriage or children outside of mating, recognized institute of recognition and validation of the child to know the institution of recognition and validation of the child as stipulated in Article 280 of the Civil Law which states that the confession made to a child outside of mating, there arose the relationship of civil law between the child with his father or mother.¹⁰

Recognition of the child outside of mating can be done in the following way:

- Volunteer recognition
Voluntary confession is a confession made by a person with the manner prescribed by law, that he was her father of a child born outside of marriage. With the recognition, there arises a civil relationship between the child and the father who has been admitted as stipulated in Article 280 of the Civil Law.
- Recognition of coercion

⁸J. Satrio, 2000, *Hukum Keluarga Tentang Kedudukan Anak Dalam Undang-undang*. Bandung , PT. Citra Aditya Bakti, p. 5.

⁹Syahrini Ridwan, 1992, *Seluk Beluk dan Azaz Hukum Perdata*, Bandung, Alumni, p. 82.

¹⁰Rosnidar Sembiring, 2016, *Hukum Keluarga Harta-harta Benda dalam perkawinan*, Jakarta, PT Raja Grafindo Persada, p. 127

Recognition of children outside the mating may also occur coercion that can be done by a child born outside marriage by filing a lawsuit against the father or mother to the District Court, so that children outside of mating in the narrower sense it is recognized as the child's father or mother. As set forth in Article 287 - Article 289 of the Civil Law.

Against children outside of mating is not recognized, because it does not have a family then also there is no provision concerning the legal heirs. Therefore, outside of mating child that is not recognized will not inherit from anyone. Beyond mating child only has a legal relationship with the person claimed. As for the run in families of parents who admit that they have no legal relationship at all. Thus, the child is not entitled to the family belongings of parents who admit (Article 872 of the Civil Law).

The exception is, if it does not leave an heir to the degree that permit inheritance, then the child outside the mating inheritance entirely right to demand the exclusion of the state (Article 873 of the Civil Law). Child outside marriage mate may be authorized by their parents or with a letter of acknowledgment. If the recognition of the marriage of her parents, the state of the children at the children born in a marriage.¹¹

This means that he is entitled to the full on the open heritage legacy of her parents. If recognition is done with the instruments then in terms of inheritance should not be detrimental to the legitimate children that existed before the acknowledgment was done. In the case of inherited regulated by the Civil Law, the right part of the child outside of the mating depends on with whom the child outside the married heir.

Beyond mating child recognized by their parents are also entitled or demanding absolute or Legitieme portie section. According to Article 961 of the Civil Law or Legitieme portie essential part of the outside of the mating is half (1/2) of the part under the laws had been due to be passed on in inheritance due to death. The provisions of Article 862 of the Civil Law states that a child just outside the mating has been recognized by the biological father alone to obtain a treasure inherited from his father's lineage.

This is clearly different from the provisions on inheritance as set According to Islamic law, a child outside marry only have a relationship *nasab* only with the birth mother and her mother's family that is not entitled to inheritance rights, the right to make a living with her biological father and biological father does not have the right to be the guardian marriage. So even though there is some recognition of the biological father is not necessarily a child outside of marriage would have inheritance rights over the treasures of the testator. Even after the decision of the Court Number 46 / PUU-VIII / 2010, a child born outside marriage can only be the inheritance rights of the biological parent if the biological parents at birth the child was getting married religiously and have not been registered at the Office of Religious Affairs locals.

3. Closing

3.1. Conclusion

- The position of a child out of wedlock by KHI only have a relationship of inheritance with her birth mother (Article 186 KHI), while according to the Civil Law, Article 272 is known that in the Civil Law there are children who do recognition and can be passed that *Natuurlijk Kind*, and there are also children who acknowledgment can not be done against the *overspeleg kind* and *blodsceneg*. With the recognition that

¹¹*Ibid*, p. 146

there arose a civil relationship between children and parents outside mating admit as stipulated in Article 280 of the Civil Law.

- Equal status illegitimate children in the perspective of the Civil Law KHI and is equally no right of inheritance. The difference is the inheritance rights of children outside of marriage can be granted if there is recognition of illegitimate children *Natuurlijk kind* just only. Meanwhile, according to KHI just recognition of extramarital children who have a religious marriage that can be recognized.

3.2. Suggestion

The government together with the relevant stakeholders to make changes related to Article 186 Compilation of Islamic law more in line with the Constitutional Court's decision No.46 / PUU-VII / 2010 so as to create legal protection for children outside of marriage.

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