

## The Comparison of Inheritance Legal Position of Illegitimate Children Based on Islamic Law & Civil Law

Edo Trisetya Hangartika

Faculty of Law, Universitas Islam Sultan Agung (UNISSULA), Indonesia, E-mail: [edotrisetya97@gmail.com](mailto:edotrisetya97@gmail.com)

**Abstract.** *The aim of this research is to analyze: 1) To determine the position of inheritance rights of illegitimate children based on the Compilation of Islamic Law and Civil Law. 2) To determine the similarities and differences in the legal position of inheritance of illegitimate children based on the Compilation of Islamic Law and Civil Law. The type of research used is normative legal research. The approach method used in this research is the statutory approach method and the legal comparison method. The research results concluded that the legal position of illegitimate children is based on Article 100 of the Compilation of Islamic Law. Children born out of wedlock only have a family relationship with their mother and her mother's family. In Article 186 of the Compilation of Islamic Law, children born outside of marriage only have an inheritance relationship with their mother and their mother's family. whereas in the Civil Code, a child born outside of a legal marriage has no civil relationship with his parents, unless there is a confession made by his biological parents.*

**Keywords:** *Children; Compilation; Illegitimate Inheritance; Islamic.*

### 1. Introduction

Having a family is the dream of all humans to complete happiness in their lives. For couples who feel they are physically and mentally ready to settle down, they will immediately get married so they can realize their dream of forming a new family. A married couple will of course have a husband and wife relationship and a child will be born from that relationship. With marriage, every child born from the husband's bed is absolutely the husband's child, without needing recognition from him.<sup>1</sup>

---

<sup>1</sup>Yusuf al-Qadhawi, 1976, Halal and Haram in Islam, PT Bina Ilmu, Surabaya , p. 304.

Article 1 of Law Number 1 of 1974 concerning Marriage states that marriage is a spiritual and physical bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on belief in the Almighty God.

With marriage, a small, harmonious family full of love and affection will be formed, and children will be born who will complete the happiness of their small family. Children are children whose presence is definitely awaited in a household relationship, in fact children are a priceless gift from God and parents will be willing to fight for their child's happiness.

Children are a priceless gift from Allah SWT, so parents must care for them, look after them, love them and fulfill their needs until they reach adulthood. Children born from a legal marriage relationship are a very important part of their position in a family and social life.

Islam views marriage as a sacred bond, not only an ordinary civil (social) relationship but also a very large legal act in which a relationship justifies a person to have a husband-wife relationship. With marriage, you will give birth to a family that is honorable, well cared for, and will receive the pleasure of Allah SWT.

With marriage, a child will be born who creates a lineage. In jurisprudence, lineage is a descendant, heir or someone who has the right to receive inheritance due to kinship ties based on the blood relationship between a child and his parents through a legal marriage relationship. This lineage then gives rise to the relationship between the rights and obligations of a child and his parents.

Children who are born legally in accordance with Islamic teachings and existing legal provisions will automatically have absolute civil rights with their parents, such as lineage, guardianship and inheritance rights. The fate of a child will not happen unless it is born from a marriage relationship that is halal and not haram.

However, as time goes by, in this modern era, promiscuity between young people often occurs, this often leads to negative things that are undesirable, such as extramarital sex and pregnancy out of wedlock. This is caused by cultural friction, so that currently it is a phenomenon in society that a man and a woman live together without any marriage ties. This will ultimately be detrimental to all parties concerned, including men, women, extended families, and even children who are born.

Children born outside of a legal marriage not only come from sexual relations outside of marriage between their parents on the basis of mutual consent, but

can also result from cases of rape, where a woman is forced and made helpless by a man to have sexual relations. sexual.

Children who are born not in a legal marriage relationship will experience various kinds of pressure from outside and within themselves. This causes psychological disorders for children, even though legally the child has no legal consequences from the actions of his parents, many problems arise as a result of the actions of his parents, such as the relationship between the child and his biological father, and so on from various legal perspectives. So it can be said that children born outside of a legal marriage are less fortunate.

Settlement of rights and obligations as a result of a person's death is regulated by inheritance law. In civil law, the definition of inheritance law is a collection of regulations that regulate the law regarding wealth due to the death of a person, namely regarding the transfer of wealth left by the deceased as a result of this transfer to the people who acquire it, both in the relationship between them and in the relationship between them and the other party.<sup>2</sup>

However, it cannot be denied, from the perspective of Islamic and civil inheritance law, it is necessary to differentiate the position of a child who is born as a reference for society, especially for Muslim society, in order to maintain the lineage and legal marriage relationship.

Based on the description above, the author is interested in conducting research regarding the legal position of inheritance of illegitimate children, both in Islamic inheritance law and civil inheritance law.

## **2. Research Methods**

The research approach used in this thesis is a normative legal research method, namely a process for finding legal rules, legal principles and legal doctrines in order to answer the legal issues faced.<sup>3</sup> Research that refers to legal norms contained in statutory regulations and court decisions, which relate to the position of illegitimate children according to Islamic Law and Civil Law. As well as the comparative method, comparative law is essentially a philosophical activity. This research refers to a study or comparative study regarding the intellectual conceptions that exist in western inherited law, namely the Civil Code or in Dutch Burgerlijk Wetboek with the Compilation of Islamic Law.

---

<sup>2</sup>A. Pitlo, 1979, Inheritance Law according to the Dutch Civil Code, translation by M. Isa Arief, Intermasa, Jakarta, p. 1.

<sup>3</sup>Peter Mahmud Marzuki, 2010, Legal Research, Kencana, Jakarta, p. 35.

### 3. Results and Discussion

#### 3.1. Position of Inheritance Rights for Illegitimate Children Based on a Compilation of Islamic Law and Civil Law

The position of an illegitimate child is in accordance with Article 100 of the Compilation of Islamic Law, namely that the child's lineage to his biological father is severed and he only has a lineage to his biological mother and his biological mother's family. However, the child is not the burden of the sins of his parents, because all children in the eyes of Allah SWT are holy, it's just that the parents are the ones who are guilty and sinful for what they did on earth.

Distribution of inheritance of illegitimate children, that is, if the child does not have strong legal evidence from his biological father to obtain his inheritance rights, then the child does not have the right to inherit assets from his biological father because on the basis that has been determined the assets of illegitimate children can only be obtained by him. only through his biological mother and his biological mother's family because from his biological father his lineage had been cut off.

Most scholars have argued to provide a solution for things like this because even though and however the child is a legitimate biological child in the eyes of Allah SWT, according to Islamic law the child can receive assets in the form of a mandatory will or gift from his biological father as long as the father wishes. give it to his son and while the father is still alive, the property can be given in the form of a gift. If the father has died and there is no written evidence, the child does not get anything from his biological father. If the child is given through a compulsory will by the father, the child is only entitled to receive.

Judging from Islamic Law, there is something called pregnant marriage. The marriage of a pregnant woman is a woman who becomes pregnant before entering into a marriage contract, then marries the man who impregnated her. The existence of the marriage of a pregnant woman is intended to provide legal certainty for the child in the womb, and logically to end the status of an adulterous child. The Compilation of Islamic Law in Indonesia which was declared to be in force with Presidential Instruction Number 1 of 1991 as a guide for judges in religious court institutions also discusses the marriage of pregnant women due to adultery and is declared permissible. The article which states the permissibility of marrying a pregnant woman does not directly explain the status of children born to women who were already pregnant. However, the Compilation of Islamic Law in Indonesia in another article explains the status of children. In this article it is stated that a legitimate child is a child born in or as a result of a valid marriage.

Based on Article 99 letter (a) of the Compilation of Islamic Law, it is clear that legitimate children are those born in or as a result of a valid marriage. The reason is that the child was born in a legal marriage. This child is not a child born outside of marriage. Children born out of wedlock according to Article 186 KHI only have a mutual inheritance relationship with their mother and their mother's family. Because this child was born in a legal marriage, he is not only mutually inherited by his mother and his mother's family, but he is also mutually inherited by his father and his father's family. In other words, there is no difference between this child and a child born as a result of a legal marriage<sup>4</sup>

In the Marriage Law, the principles are almost the same as Islamic Law, where a child born outside a legal marriage is only related to his mother. Marriage Law Number 1 of 1974 Article 43 paragraph (1) which states that "children born outside of marriage only have a civil relationship with their mother and their mother's family.", but this is different from the Civil Code, in the Civil Code, The Civil Law refers to illegitimate children as *Naturlijk Kind* (natural children).

Because the existence of an illegitimate child has its own legal consequences, J.Satrio said in his comments looking at Civil Law in positioning the position of a child born outside of a legal marriage, "an illegitimate child cannot simply have a legal family relationship with his father or mother (a person old). "The child does have biological "similarities" to both parents, but legally speaking they do not have any rights and obligations towards the illegitimate child."

In R. Soebekti's opinion, only when recognition has occurred will a family relationship emerge along with all its consequences, especially inheritance rights between the child and the parents who acknowledge it.

In the Civil Code there are two different legal consequences if the confession occurs before or after marriage to someone other than the mother (out-of-wedlock child). If the confession is made before marriage to someone other than the mother (out-of-wedlock child) then Article 863 of the Civil Code applies which reads "If the deceased leaves behind legal descendants according to law or a husband or wife, then the children those outside of marriage inherit the third and share that they would have received, had they been legitimate children according to the law; they inherit half of the inheritance, if the deceased does not leave any descendants, husband or wife, but leaves blood relatives in the upward line, or brothers and sisters or their descendants, and three-quarters if only blood relatives are still alive to a greater extent. If the legal heirs according to law are related to the deceased in unequal degrees, then the closest in rank in the same line, determines the size of the share that must be given to the illegitimate children, even to those who are in another line."

---

<sup>4</sup>Ibid, pp. 14-15

Meanwhile, if the confession is made after marriage to someone other than the mother (out-of-wedlock child) then Article 285 of the Civil Code applies where the article reads "Confession given by one of the husband and wife during the marriage for the benefit of a child in out of wedlock, which is conceived before marriage with someone other than the wife or husband, cannot cause harm, either to the husband or wife or to the children born of that marriage. However, the confession made by the father and mother, as well as all claims to position made by the child, can be disputed by anyone who has an interest in the matter."

It needs to be explained that the Civil Code does not allow the recognition of children born from adultery and incestuous children born and relationships between two people who are prohibited from marrying each other.<sup>5</sup>This is based on article 283 of the Civil Code, which reads as follows: "All children born in adultery or incest may never be recognized, except for the child born as specified in article 273." There are differences in principle regarding the motivation for recognizing children according to western civil law and the motivation for recognizing children according to Islamic law.

The distribution of inheritance for illegitimate children is regulated in the Civil Code. However, it should be noted that the heirs of illegitimate children can be recognized when there is recognition from their father. If there is no recognition then illegitimate children cannot become heirs of their biological father.

From the description above, we can understand the comparison of the legal position of inheritance of illegitimate children based on the compilation of Islamic law and civil law. There are several similarities regarding the inheritance of illegitimate children, according to the Compilation of Islamic Law and the Civil Code, an illegitimate child is a child born outside of a valid marriage, and inheritance occurs when there is death, without death, inheritance will never occur.

In terms of inheritance rights, a child born outside of a legal marriage cannot inherit his father's inheritance, because based on Article 186 of the Compilation of Islamic Law, children born outside of marriage only have a mutual inheritance relationship with their mother and their mother's family. Based on the provisions of the Civil Code, illegitimate children are considered to have no legal relationship whatsoever with their parents if there is no recognition from the father or mother, thus if the illegitimate child is recognized then he can inherit the inheritance from the parents who acknowledged him, and of course the distribution of inheritance under the law. However, on the one hand, with the

---

<sup>5</sup>Amir Syarifuddin, 2006, *Islamic Marriage Law in Indonesia Between Fiqh Munakahat and Marriage Law*, 1st Cet, Prenata Media, Jakarta, p. 89.

enactment of the Marriage Law, namely Law Number 1 of 1974 (Article 43 paragraph 1),

Fathers cannot be guardians of illegitimate children. If an illegitimate child happens to be a woman and is an adult and wants to get married, then her biological father has no right to marry her.<sup>6</sup>

In the Burgerlijk Wetboek (BW) civil law, child status is divided into two:<sup>7</sup>

In detail, there are three legal statuses or positions of illegitimate children in Burgerlijk Wetboek civil law:<sup>8</sup>

1. An illegitimate child does not have a civil relationship with either the mother who gave birth to him or the man who impregnated his mother, if both of them have not or do not admit it.
2. An illegitimate child has a civil relationship with the mother who gave birth to him, if he acknowledges it. Or with the man who got his mother pregnant who admits it, or with both of them who have admitted it.
3. An illegitimate child becomes a legitimate child, namely an illegitimate child recognized by the mother who gave birth to him and the father who gave birth to him and followed by their marriage.

In Islamic law, someone who has a relationship outside of marriage is an act of adultery, which is different from the definition of adultery in the Civil Code, which in the Civil Code means the act of adultery or mukah, according to Article 284 of the Code. Civil law is sexual relations or intercourse outside marriage carried out by a man and a woman, both or one of whom is still married to another person. So in principle, adultery in Islam is sexual intercourse between a man and a woman who is not his wife/husband without having to have any ties between the two or one of them being the wife or husband of someone else.

### **3.2. Differences in the Legal Position of Inheritance of Illegitimate Children Based on the Compilation of Islamic Law and Civil Law**

In the definition of illegitimate children based on Islamic law and civil law is different, where in Islam there is a child born outside of a legal marriage, it can be said that the child is the result of an adulterous relationship between his

---

<sup>6</sup>Amir Syarifuddin, 2002, *Breaking the Freeze of Ijtihad*, Ciputat Press, Jakarta, p. 195.

<sup>7</sup>Soetojo Prawirohamidjojo and Marthalena Pohan, 1991, *Person and Family Law: Personen en Familie-Recht*, Airlangga University Press, Surabaya, p. 164-165.

<sup>8</sup>Sodharyo Soimin, 2002, *Person and Family Law*, Sinar Graphics, Jakarta, p. 41.

parents, but in civil law the meaning is different between an illegitimate child and an adulterous child, if a child of adultery is the result of sexual relations between his parents where one or both of them are someone else's husband/wife, while an illegitimate child is a child born outside of a legal marriage by single parents (without a marital relationship with anyone).

Then, in the Islamic Law Constitution, it is not regulated in detail regarding the inheritance rights obtained by illegitimate children, but based on Article 863 of the Civil Code, it is regulated regarding the distribution of inheritance of illegitimate children to groups I, II, II, or IV which reads "If the deceased leaves legal descendants according to the law or a husband or wife, then the illegitimate children inherit one third and the share that they would have received, if they were legitimate children according to the law; they inherit half of the inheritance, if the deceased does not leave any descendants, husband or wife, but leaves blood relatives in the upward line, or brothers and sisters or their descendants, and three-quarters if only blood relatives are still alive to a greater extent. If the legal heirs according to law are related to the deceased in unequal degrees, then the closest in rank in the same line, determines the size of the share that must be given to the illegitimate children, even to those who are in another line."

#### **4. Conclusion**

In creating a family that is *sakinah, mawadah, warohmah*, it is necessary to have a legal bond between people who love each other with the aim of giving birth to good offspring and also creating a harmonious family. With a legal marriage, there will be a clear lineage relationship so that it will not cause problems in the future.

#### **5. References**

A. Pitlo, 1979, *Hukum Waris menurut Kitab Undang-undang Hukum Perdata Belanda*, terjemahan M. Isa Arief, Intermedia, Jakarta,

Amir Syarifuddin, 2002, *Meretas Kebekuan Ijtihad*, Ciputat Press, Jakarta,

Amir Syarifuddin, 2006, *Hukum Perkawinan Islam di Indonesia Antara Fiqih Munakahat dan Undang-Undang perkawinan*, Cet ke-1, Prenata Media, Jakarta,

Peter Mahmud Marzuki, 2010, *Penelitian Hukum*, Kencana, Jakarta,

Sodharyo Soimin, 2002, *Hukum Orang dan Keluarga*, Sinar Grafika, Jakarta,



Soetojo Prawirohamidjojo and Marthalena Pohan, 1991, *Hukum Orang dan Keluarga: Personen en Familie-Recht*, Airlangga University Press, Surabaya,

Yusuf al-Qadhawi, 1976, *Halal dan Haram dalam Islam*, PT Bina Ilmu, Surabaya.