

## Comparison of Laws on Inheritance Rights of Children Born Out of Wedding According to the Compilation of Islamic Law with Civil Code

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**Abstract.** *The distribution of inheritance rights in Indonesia, especially for children born out of wedlock, is a problem that must be resolved in accordance with Indonesian inheritance law. Children born out of wedlock are often the subject of blame and are not recognized by their father's family or the father himself. Children born out of wedlock also have the right to receive a portion of the inheritance from their biological father. The purpose of this study is to analyze: 1) To find out and analyze the legal provisions on the inheritance rights of children born out of wedlock according to the Compilation of Islamic Law with the Civil Code. 2) To find out and analyze the similarities and differences in the legal provisions on the inheritance rights of children born out of wedlock according to the Compilation of Islamic Law with the Civil Code. The type of research used is using the normative legal research method. The approach method used in this study is the legislative approach method. The type of data uses secondary data obtained from primary legal materials and secondary legal materials. The data collection technique in this study is a literature study. The data analysis technique in this study is descriptive analytical. The results of the study concluded: 1) an illegitimate child is a child born outside of marriage who only has a civil relationship with his mother and his mother's family. It is explained in the KHI that a child born outside of marriage only has a mutual inheritance relationship with his mother and his mother's family. However, in the Civil Code there is a recognition of children, a recognized child can have a civil relationship with his biological father and has the right to inherit his inheritance. 2) Similarities and differences that illegitimate children according to the Compilation of Islamic Law and the Civil Code have the same meaning and rights, namely an illegitimate child is a child born outside of marriage who only has a civil relationship with his mother and his mother's family. However, in the Civil Code there is a recognition of children, where a recognized child can have a civil relationship with his biological father and has the right to inherit his inheritance.*

**Keywords:** Comparison; Inheritance; Marriage; Outside.

## 1. Introduction

The Republic of Indonesia is a state of law based on Pancasila and the 1945 Constitution, which aims to realize a just and prosperous, safe, peaceful and orderly life, and guarantee equal legal status for citizens. The affirmation that the state of law is the legal ideal (*rechtsidee*) of Indonesia which is normatively regulated in Article 1 paragraph (3) of the third amendment to the 1945 Constitution, which states that: "The State of Indonesia is a state of law (*Rechtsstaat*) not based on mere power (*Machtsstaat*)", and "Government is based on a constitutional system (basic law) and is not absolutist (unlimited power)".<sup>1</sup>

One of the elements of a State of Law is the guarantee of protection of human rights. Article 28 AJ of the 1945 Constitution. From the provisions of these articles, one of them, namely Article 28 H paragraph (4) states that "Everyone has the right to have personal property rights and these property rights may not be taken over arbitrarily by anyone."

Ownership rights in the lives of Indonesian people have a very important role, this can be seen from the definition of ownership rights themselves, which are hereditary, the strongest, and the most complete, which people can have on land. From the word hereditary, it means that the rights to the land can be inherited to the heirs.<sup>2</sup>The distribution of inheritance rights in Indonesia, especially for children born out of wedlock, is a problem that must be resolved in accordance with Indonesian inheritance law. Children born out of wedlock are often the subject of blame and are not recognized by their father's family or the father himself. Children born out of wedlock also have the right to receive a portion of the inheritance from their biological father.

The division of inheritance rights in Indonesia consists of an inheritance system based on the Compilation of Islamic Law, Civil Law and Customary Law. The existence of differences in calculations in the division of inheritance in Indonesia is a study to conduct a comparison of inheritance between one inheritance system and another. Comparative inheritance law is a method of investigation with the aim of obtaining deeper knowledge about the legal materials contained in the division of three inheritance law systems.

Lack of protection and justice for illegitimate children, the Constitutional Court issued a decision Number 46/PUU-VIII/2010 and was also followed by the Fatwa of the Indonesian Ulema Council Number: 11 of 2012 Concerning the Position of Children Resulting from Adultery and Their Treatment. With the Constitutional

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<sup>1</sup>Karel Wowor, "Land Inheritance Law According to Civil Law", *Jurnal Lex Privatum* Vol. VII, No. 6, 2019, page 100.

<sup>2</sup>*Ibid.*

Court's decision and the MUI Fatwa, justice is provided for every illegitimate child and they can have a civil relationship with their biological father.

## **2. Research Methods**

This research was conducted using a normative legal approach method. The normative legal approach is a legal research conducted by examining library materials or secondary data as basic materials for research by conducting a search for regulations and literature related to the problems being studied.<sup>3</sup>The research specifications used are descriptive analytical, namely research that describes the object that is the main problem and analyzes it with the aim of drawing a conclusion.<sup>4</sup>

This study uses qualitative data types, while the data sources are focused on literature studies that come from secondary data, so that in accordance with the normative legal approach method, library materials are basic data that are classified as secondary data in the study. The data collection method uses literature studies/documentary studies of primary legal materials, secondary legal materials and tertiary legal materials. The data analysis used in this study is qualitative analysis, which is a research method that produces descriptive data. Using qualitative methods, namely in the form of analysis of data that has been obtained, both primary and secondary data. Inductive conclusions are drawn from general to specific things, so that this research is easier to understand.<sup>5</sup>

## **3. Results And Discussion**

### **3.1. Legal Provisions Regarding Inheritance Rights of Children Born Outside of Marriage According to the Compilation of Islamic Law and the Civil Code**

#### **a) Legal Provisions Regarding Inheritance Rights of Children Born Out of Wedlock According to the Compilation of Islamic Law**

Inheritance is a transfer of ownership of property from the testator to the heirs. The provisions for the distribution of inheritance are regulated in the Islamic legal system, where the rules are sourced from the Qur'an and also the Hadith. The rules of Islamic law in Indonesia are regulated in the Compilation of Islamic Law which was made based on Presidential Instruction No. 1 of 1991 as a reference in solving problems of marriage, inheritance and waqf.

An illegitimate child is a child born to a woman, while the woman is not in a legal marriage with the man who has sexual intercourse with her.<sup>6</sup>If an illegitimate child is born without a marriage, then the child only has a blood relationship with the mother. An illegitimate child can become a legitimate child if the mother marries while still pregnant. According to Article 53 (1) of the KHI, "A woman

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<sup>3</sup>Soerjono Soekanto and Sri Mamuji, Normative Legal Research; A Brief Review, Rajawali, Jakarta, 2001, p. 28.

<sup>4</sup>Cholid Narbuko, Research Methods (Jakarta: Bumi Aksa, 2003), page 114.

<sup>5</sup>Peter M. Marzuki, Legal Research, Jakarta: Kencana Predana Media Group, 2013, page 27.

<sup>6</sup>Abdul Manan, Abdul Manan, "Various Problems of Islamic Civil Law in Indonesia", Jakarta: Kencana Publisher, 2008, p. 80

who is pregnant outside of marriage can be married to the man who impregnated her". In Islamic law, illegitimate children are divided into 3 (three), namely: adulterous children, incestuous children and li'an children.

When compared to adopted children who are not actually biological children, they actually get a decent living compared to illegitimate children. The definition of an adopted child in the Compilation of Islamic Law (KHI) is a child whose care for daily life, education costs and so on are transferred from the original parents to the adoptive parents based on a court decision. An illegitimate child who is clearly the biological child of his father does not get his rights in the rules of the Compilation of Islamic Law.

In the case of illegitimate children, the person who is always disadvantaged is the woman. Where the woman will be branded badly by society because she is pregnant with a child who does not have a father because she is not married or is pregnant with a child from an affair (li'an child), as well as a child who comes from a blood relationship with her sibling, which in the Law there is a prohibition on marriage. In addition, women also have the responsibility to care for and raise their children alone.

Apart from the woman (mother), a child born out of wedlock and without a father figure is also a victim in society. Children born out of wedlock will be viewed badly and tend to be ostracized by society. While in this case the biological father does not bear the mental burden of being labeled by society as an adulterous man, because men do not have the characteristics of committing adultery.

The existence of the Constitutional Court Decision No. 46/PUU-VIII/2010 submitted by Hj. Aisyah Mochtar alias Machica binti H. Mochtar provides clarity on the rights of illegitimate children and the obligation of biological fathers to be responsible for their illegitimate children. In this decision, the main legal issue regarding children born outside of marriage is regarding the legal meaning of the phrase "born outside of marriage". To obtain an answer in a broader perspective, it is also necessary to answer related issues, namely the issue of the legitimacy of the child. Naturally, it is impossible for a woman to become pregnant without the meeting of the ovum and spermatozoa either through sexual intercourse (coitus) or through other means based on technological developments that cause fertilization.

The legal consequences of the legal event of birth due to pregnancy, which is preceded by sexual relations between a woman and a man, is a legal relationship in which there are reciprocal rights and obligations, the legal subjects of which include the child, mother, and father. Based on the explanation above, the relationship between a child and a man as a father is not solely due to the existence of a marriage bond, but can also be based on proof of a blood relationship between the child and the man as the father. The law must provide fair protection and legal certainty for the status of a child who is born and the

rights that exist to him, including for children who are born even though the validity of their marriage is still disputed.

Based on the considerations of the judges mentioned, there are several decisions of the Constitutional Court Number 46/PUU-VIII/2010, namely:

- Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states, "A child born out of wedlock only has a civil relationship with his/her mother and his/her mother's family", is contrary to the 1945 Constitution of the Republic of Indonesia insofar as it is interpreted as eliminating civil relations with a man who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship as his/her father; "A child born out of wedlock has a civil relationship with his/her mother and his/her mother's family as well as with a man as his/her 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/her father's family".

From the Constitutional Court's decision, the Indonesian Ulema Council also decided in the Indonesian Ulema Council Fatwa Number: 11 of 2012 Concerning the Position of Children Resulting from Adultery and Their Treatment, namely: "Adulterers are subject to hadd punishment by the authorities, in the interests of maintaining legitimate offspring (hifzh alnasl)". "The government has the authority to impose ta'zir punishment on adulterous men who result in the birth of children by requiring them to meet the child's living needs, provide property after he dies through a wajibah will".

With the Constitutional Court Decision Number 46/PUU-VIII/2010 and also in the Fatwa of the Indonesian Ulema Council Number: 11 of 2012 Concerning the Position of Children from Adultery and Their Treatment, the rights of an illegitimate child become clear and the biological father has the responsibility to fulfill the child's living needs and also provide property after he dies through a mandatory will. This analysis is related to Gustav Radbruch's Theory of Legal Certainty where the Constitutional Court Decision and the MUI Fatwa become the legal basis and certainty of the rights of illegitimate children to their biological father.

#### b) Legal Provisions Regarding Inheritance Rights of Children Born Out of Wedlock According to the Civil Code

Inheritance law is a set of legal rules that regulate which heirs or legal entities have the right to inherit inherited property, what the position of each heir is and how much each heir will receive fairly and perfectly.<sup>7</sup>In the Civil Code, there are heirs in the form of illegitimate children. An illegitimate child is a child born outside of marriage. The Civil Code also explains several types of children born

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<sup>7</sup>HM Idris Ramulyo, *Several Problems in the Implementation of Western Civil Law (Burgerlijk Wetboek)*, Jakarta, Sinar Grafika, 1993, pp. 13-14.

outside of marriage, namely: illegitimate children, adulterous children, and incestuous children.

Children out of wedlock, children of adultery and incestuous children are explained in the Civil Code. In Article 280, an illegitimate child who is acknowledged by his/her parents then a civil relationship is born between the child and his/her father or mother. Recognition of an illegitimate child can be done with an authentic deed made by a Notary in the form of a deed of acknowledgement of an illegitimate child. With the acknowledgement of an illegitimate child by his/her father, the child can have a civil relationship with his/her father and receive inheritance according to its distribution.

The distribution of inheritance of illegitimate children is regulated in Article 862-865 of the Civil Code. It is explained that if the testator dies and leaves behind an illegitimate child who has been legally recognized according to the law, then the inheritance is divided according to several provisions. If the deceased testator has legitimate descendants according to the law or a husband or wife, then the illegitimate child has the right to inherit one third and the portion they were supposed to receive.

An illegitimate child can inherit half of the inheritance, if the testator does not leave any descendants, nor a husband or wife, but leaves blood relatives in the ascending line, or brothers and sisters or their descendants. Furthermore, an illegitimate child can receive an inheritance of three-quarters if the testator only leaves blood relatives who are still alive in a further degree. If the legal heirs according to the law are related to the deceased in different degrees, then the closest degree in one line can determine the portion of the inheritance that must be given to the illegitimate child, even to those in the other line.

Inheritance distribution in the previous article, if there is remaining inheritance, then it must be divided among the legitimate heirs. In another calculation in Article 873 it explains that if the heir does not leave a legitimate heir according to the Law, then the illegitimate child has the right to inherit the inheritance in its entirety. In addition, illegitimate children also have the right to receive inheritance from their blood relatives if the blood relative dies without leaving a blood family in the degree that is allowed to receive inheritance and without leaving a husband or wife, then the acknowledged illegitimate child has the right to claim the entire inheritance for himself by ignoring the state. Children of adultery and illegitimate children, according to Article 283 they may not be recognized and have no right to inheritance from both parents. The Civil Code does not provide inheritance rights to them, but in Article 867 children of adultery and illegitimate children can demand the provision of necessary maintenance to their parents.

In addition to not being recognized, adulterous and illegitimate children cannot be validated like illegitimate children. An illegitimate child can become a legitimate child if both of their parents are married. In the Constitutional Court's decision, "A child born out of wedlock 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."

With the Constitutional Court Decision Number 46/PUU-VIII/2010, illegitimate children who are not recognized by their parents can provide evidence in court by being proven by science and technology, namely in the form of a DNA test. With the existence of evidence and legalized by the court, the illegitimate child can have a civil relationship with his biological father and the child can have his rights in the form of receiving a living according to the ability of his biological father and receiving inheritance rights whose portion is determined by law.

The results of the analysis above are related to the theory of legal protection according to Satdjipto Rahardjo, namely that legal protection is providing protection for human rights that are harmed by others and that protection is given to the community so that they can enjoy all the rights granted by law. In addition to illegitimate children, if we look closely at the Constitutional Court's decision, it also provides protection for children of adultery and illegitimate children because the decision is not specifically applied only to illegitimate children but applies in general. So that with this decision, children of adultery and illegitimate children also have the right to get a decent living according to their biological father's ability and get a share of the inheritance.

### **3.2. Similarities and Differences in Legal Provisions Regarding Inheritance Rights of Children Born Outside of Marriage According to the Compilation of Islamic Law and the Civil Code**

Analysis of the similarities and differences of legal provisions on the inheritance rights of illegitimate children according to the Compilation of Islamic Law with the Civil Code is associated with the comparative theory of law. Rudolf B. Schlesinger said that comparative law is a method of investigation with the aim of obtaining deeper knowledge about certain legal materials. From the results above, similarities and differences were found in the ratification of illegitimate children, terms, recognition and validity of illegitimate children which will be further explained in the explanation below.

1. Similarities in Legal Provisions Regarding Inheritance Rights of Children Born Outside of Marriage According to the Compilation of Islamic Law and the Civil Code
  - a. The definition of an illegitimate child in the Compilation of Islamic Law and the Civil Code is that an illegitimate child is a child born outside of a legal marriage between both parents. A child born outside of marriage does not have a civil relationship and lineage to his father.
  - b. In the Compilation of Islamic Law, an illegitimate child can change status to a legitimate child if the child is still in the womb and has not been born, in accordance with Article 53 paragraph (1) which

states "A woman who is pregnant outside of marriage can be married to the man who impregnated her". In the Civil Code there is also an explanation regarding the ratification of an illegitimate child as a legitimate child, namely in Article 277 which states "The ratification of a child, either by following the marriage of his parents or by a letter of ratification according to Article 274, has the effect that the same provisions of the law apply to the children as if they were born in the marriage".

- c. Ill-gotten children between the Compilation of Islamic Law and the Civil Code have the same meaning. Ill-gotten children are children born from a blood relationship where they cannot marry because it is prohibited by law.

## 2. Differences in Legal Provisions Regarding Inheritance Rights of Children Born Outside of Marriage According to the Compilation of Islamic Law and the Civil Code

Apart from the similarities in the legal provisions regarding the inheritance rights of illegitimate children according to the Compilation of Islamic Law and the Civil Code, there are also differences between the two legal regulations, namely:

- a. In the Civil Code there is a term for recognition of illegitimate children in accordance with Article 280 which states "With the recognition of an illegitimate child, a civil relationship is born between the child and his/her father or mother". While in the Compilation of Islamic Law there is no term for recognition of illegitimate children. In the Compilation of Islamic Law, illegitimate children cannot be recognized, even if the biological father wants to recognize the illegitimate child.
- b. The definition of a child of adultery according to the Compilation of Islamic Law is not the same as the definition of a child of adultery in the Civil Code. A child of adultery in the Compilation of Islamic Law is a child born outside of marriage, namely a child born from two people who are both not yet married, in addition, a child born from an unmarried woman to a married man also has the same meaning, namely a child of adultery. In the Civil Code, a child of adultery is a child born outside of marriage where one or both of them have a marriage bond with their partner.

## 4. Conclusion

Legal provisions on the inheritance rights of illegitimate children according to the Compilation of Islamic Law and the Civil Code, that illegitimate children according to the Compilation of Islamic Law and the Civil Code are children born outside of marriage who only have a civil relationship with their mother and their mother's family. It is explained in Article 100 of the KHI that children born outside of marriage only have a blood relationship with their mother and their mother's family, and Article 186 of the KHI that children born outside of marriage only have a mutual inheritance relationship with their mother and their mother's



family. However, in the Civil Code there is a recognition of children according to Article 280, where a recognized child can have a civil relationship with their biological father and has the right to inherit his inheritance. In the KHI, an illegitimate child who is still in the womb can be validated by the marriage of both parents. In Civil Law, a child can be validated by the marriage of both parents or by a presidential ratification letter. With this intention, it is unfair if a child is not recognized or a child who only has a civil relationship with his mother. With the issuance of the Constitutional Court Decision of the Constitutional Court Number 46/PUU-VIII/2010 which states "A child born out of wedlock has a civil relationship with his/her mother and his/her mother's family and with a man as his/her 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/her father's family" and the Fatwa of the Indonesian Ulema Council Number: 11 of 2012 In its decision, it emphasized that the Government has the authority to impose ta'zir punishment on adulterous men who result in the birth of a child by requiring him/her to meet the child's living needs and provide property after he/she dies through a mandatory will. This decision is certain for every child born out of wedlock to have their rights as a child by being given a decent living and receiving inheritance rights from their biological father. For Muslim illegitimate children, they can obtain their biological father's property through a mandatory will.

## 5. References

Civil Code (KUHPerdata).

Compilation of Islamic Law and Islamic Inheritance Law.

Constitutional Court Decision Number 46/PUU-VIII/2010.

Fatwa of the Indonesian Ulema Council Number: 11 of 2012 Concerning the Position of Children Resulting from Adultery and Their Treatment

Idris Ramulyo, HM. Some Problems in the Implementation of Western Civil Law [Burgerlijk Wetboek], Jakarta Sinar Grafika 1993.

Law No. 24 of 2013 concerning Amendments to Law No. 23 of 2006 concerning Population Administration.

Law Number 1 of 1974 concerning Marriage.

Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage.

Law Number 23 of 2006 concerning Population Administration.

Marzuki, Peter M., Legal Research, Jakarta: Kencana Predana Media Group, 2013.

Narbuko, Cholid. Research Methods Jakarta: Bumi Aksa, 2003.

Salim and Erlies Septiana, Comparative Civil Law, Raja Grafindo Persada, Jakarta, 2014.

Soekanto, Soerjono and Sri Mamuji, Normative Legal Research; A Brief Review, Rajawali: Jakarta, 2001.

Sumardi Gozali, Djoni. Introduction to Comparative Legal Systems (Civil Law, Common Law, and Customary Law), Bandung: Nusa Media, 2018.

Syarifuddin, Amir. Islamic Inheritance Law. Jakarta: Kencana, 2004.

The 1945 Constitution of the Republic of Indonesia.

Witanto, DY Family Law, Rights and Status of Children Born Outside of Marriage After the Issuance of the Constitutional Court Decision on the Material Review of the Marriage Law (First). Prestasi Pustaka, 2012.

Wowor, Karel. "Land Inheritance Law According to Civil Law", Jurnal Lex Privatum Vol. VII, No. 6, 2019.