

Granting Inheritance to Extramarital Children in the Perspective of Islamic Law

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Abstract

The issue of granting inheritance to extramarital children presents a complex challenge within the framework of Islamic law, particularly in contemporary legal contexts where societal norms and family structures have evolved. This paper examines the jurisprudential perspectives and legal interpretations surrounding the inheritance rights of extramarital children in Islam. Through a comprehensive analysis of classical Islamic legal texts, contemporary scholarly opinions, and relevant legal precedents, this study elucidates the various arguments and debates surrounding this contentious issue. It explores the underlying principles of Islamic inheritance law, such as fairness, justice, and familial ties, and assesses how these principles intersect with the rights of extramarital children. Furthermore, this paper considers the social implications and ethical considerations associated with granting inheritance to extramarital



children, including questions of legitimacy, parental responsibility, and societal attitudes towards non-marital relationships. By critically evaluating different viewpoints and legal frameworks, this study aims to provide insights into potential approaches for reconciling Islamic legal principles with contemporary notions of justice and equality in matters of inheritance. The findings of this research contribute to ongoing discussions within both religious and legal communities regarding the rights of extramarital children under Islamic law, offering perspectives that may inform policy development and legal reform efforts aimed at ensuring equitable treatment for all individuals within the framework of Islamic jurisprudence.

KEYWORDS *Extramarital Children, Islamic Law, Indonesian Private Law, Inheritance*

Introduction

Marriage according to Schneiders is an art in life framed in responsibilities, relationships and expectations that are fundamental in marriage. For Muslims, marriage is one of the *sunnatullah* that commonly applies to all creatures of God, both in humans, animals, and plants. In Indonesia itself, the majority of its citizens are Muslims which means they also adhere to Islamic Law. Islamic law is a law that regulates the relationship between man and man or thing and the legal relationship between man and God.¹

Marriage is an action advocated by Allah SWT which has the aim of uniting two families who have different backgrounds. Marriage in Indonesia can be recognized as valid if it is officially recorded by the marriage officer, in this case there are two institutions in recording marriage events, namely the non-Islamic civil registry service and the Ministry of Religion's KUA for Muslims. Marriage also results in a bond

¹ Pasangan, A. (2002). *PERKAWINAN: ARTI PENTING, POLA DAN TIPE PENYESUAIAN ANTAR PASANGAN* Hepi Wahyuningsih Abstrak. VII, 14–24.

that also concerns customary relations, family inheritance, kinship and neighborliness involving various traditional and religious processions. Another purpose of marriage is to continue offspring because heredity is one of the most important aspects of a family.

The presence of children in a family is certainly news that makes the family happy without exception because the child is the fruit of marriage and as a basis for continuing offspring. However, not all parents and families feel the happiness of having children as it happens to children outside of marriage which generally has children because of something despicable so that it becomes a disgrace to the family.

According to Article 43 paragraph (1) of the Marriage Act, a child born outside of marriage only has a relationship with his mother and the mother's family. So this also affects the law of inheritance, which the law of inheritance from his father does not apply. A few moments later, Macicha Mokhtar finally conducted a judicial review and resulted in the issuance of the Constitutional Court ruling on February 17, 2012.

The ruling of the Constitutional Court regarding the law of inheritance reads " A child born outside of marriage has a civil relationship with his mother and his mother's family and with the man as his father which can be proven based on science and technology and/or other evidence according to law to have a blood relationship, including a civil relationship with his father ". The regulation is in accordance with Law No.12 of 2006 concerning Citizenship which concerns human rights and has binding legal force.

Inheritance law is a law that regulates the transfer of property left by a deceased person to those who are entitled to receive it. Those who are entitled to receive it here are the heirs stated in the will. In Indonesia, inheritance law still does not occur uniformity due to the variety of cultural and religious patterns that develop in Indonesian society.

According to the Civil Code, the law of inheritance for extramarital children is the Passive Inheritance Law. What is meant by passive inheritance law is the inheritance of an extramarital child who is recognized as the Heir. This is regulated in Articles 870, 871, and Article 873 paragraphs (2) and (3) of the Civil Code. In Article 870 it means that the inheritance of an out-of-wedlock child is for all descendants and their

husbands or wives. This also applies to the replacement of places for out-of-wedlock children recognized in a straight line down.

Human beings from birth have rights and obligations, this also applies to children outside of marriage. Therefore, children outside of marriage also have the right to legal protection like other children, including the civil sector. The existence of this action is in accordance with Article 27 paragraph (1) of the 1945 Constitution that every citizen has the same legal position.

An out-of-wedlock child narrowly defines a child born from a couple relationship that is not tied to someone else's marriage but there is no prohibition against marrying each other. So that in accordance with Article 280 of the Criminal Code, the child can be legally recognized by his father. The civil relationship between the child and the father arises due to recognition. If the child is not recognized by both then in principle the child is not the child of anyone and has no legal relationship with both biological parents.

Writing Method, namely, the approach method used in this study uses a juridical approach. The juridical approach used for what happens with the presence of extramarital children analyzes various legal regulations that have correlations with out-of-wedlock children. The specifications used in this study are descriptive analytical.

Status of Children Outside of Marriage According to Islamic Law and Civil Law

As in Civil law, in Islamic law there is also the term child born from the result of a valid marriage and a child born from the result of adultery. However, despite this, Islam is unequivocal that a child born is holy in status. It is not distinguished whether the child is born with the legal marital status of the parents or not. A child born from the adultery of his parents cannot be blamed, because he was born following *sunnatullah*. The ones who bear his guilt are still his parents, because they have violated religious laws.

An out-of-wedlock child is someone who only has a *nasab* contact with his mother and his mother's family (Article 100 of the Compilation of Islamic Law). Thus, an out-of-wedlock child to a mother who gives

birth to him has a law relationship automatically even though it is not expressly recognized, and his position is the same as a legal child born from a valid marriage. The law in Islam that governs the *nasab* of man, divides the child into 2, the son of *Syar'iy* (due to the existence of a *nasab* legally with his father) and the son of *Tabi'iy* (not having a *nasab* with his father / child outside of marriage). There is a term marriage that is one of the reasons why children are considered children born out of wedlock. According to Fiqh science, a marriage can be considered valid, but if the marriage is not legalized or has been legalized but rejected by the Religious Court, then the status of the child is still considered an out-of-wedlock child. Although also in Law No. 1 of 1974 it has been stated that if carried out according to religious provisions, marriage is considered valid. Thus, the child born is thus considered a child of adultery.² In Civil Law, adulterous children with extramarital children the difference lies in:

1. A child born as a result of parents who are one or both still tied to another marriage but have sexual intercourse are called adulterous children.
2. A child born as a result of parents having sexual relations with status without being tied to another marriage, is called an extramarital child.

The Civil Code also classifies children into 3 groups as follows:

1. Legal child, child born in marriage.
2. A child born outside of marriage, but recognized by his father or mother. This familial connection only binds the person who recognizes the child.
3. A child born out of wedlock and not recognized by his father or his mother, according to the law the child has no mother.
4. Based on Article 43 paragraph 1 of Law number 1/1974, a child born outside of marriage only has a civil relationship with his mother and his mother's family. However, the out-of-wedlock child also has the force of law/right to demand inheritance rights, birth certificates, and other civil rights from his biological father.¹

² Sutrisno. Istikharoh. 2017. Studi Komporatif Hak Waris bagi Anak di Luar Nikah Menurut Kompilasi Hukum Islam dan KUHPperdata. Jurnal Al Wasith: Jurnal studi Hukum Islam Vol. 2 No.2 Tahun 2017

Those that include children out of wedlock include:

1. A child born to a woman who has no legal marriage bond with the man who impregnated her
2. Children born to women who became pregnant because of rape victims by one or more men.
3. A child born to a woman whom her husband desires.
4. A child born to a woman who became pregnant because of the wrong person (mistaken for her husband turned out not to be).
5. Children born to women whose marriages are forbidden.
6. A child born to a woman whose father did not know because of changing partners during intercourse.

The registration of the identity of the out-of-wedlock child listed is only the name of the mother without the father's name because it only has a civil relationship with the mother. In order to obtain his rights as a child as a whole, it is necessary to have the recognition that a child has been born who has a civil relationship with his father or mother. (Article 280 of the Civil Code)

Thus, it can be said that an extramarital child will have a civil relationship with his father or mother after the recognition of the child. Thus, if the child outside the marriage is born from a serial marriage, for example, although the parents are biological fathers and mothers, the child is juridically considered to have no father and no mother. Thus, both have no rights and obligations before the law over the child of a serial marriage that has occurred in the absence of recognition.³

The Position of Children's Inheritance Rights Outside of Marriage

Juridically, children outside of marriage still get recognition, protection and legal certainty along with equal treatment before the law because they are still Indonesian citizens, as stipulated in Article 28 D paragraph (1) of the 1945 Constitution. What is not the same is the legal

³ Kompilasi Hukum Islam di Indonesia, (Jakarta: Direktorat Pembinaan Peradilan Agama Islam Ditjen Pembinaan Kelembagaan Islam Departemen Agama, 2001), p.51

protection of the state for the child, that is, the right to claim inheritance from the property left by his father, because the legal relationship between the two is not accompanied by authentic evidence in the form of a marriage certificate from the father and mother, so formally the child cannot file a lawsuit for inheritance through the judiciary. Except if it is unconstitutional (family deliberations or with village officials).

According to customary inheritance law, according to customary law a child born from the illegitimate marriage of his father and mother is not entitled to be the heir of his parents. Only bequeathed from his mother or mother's relatives. An out-of-wedlock child cannot become an heir if :

1. By the judge he was convicted of murdering the testator, so there must be a judge's verdict sentencing him.
2. Prevent the will of the testator to make a will forcibly.
3. Obliterate or forge the testator's will.
4. Violates the customary provisions that apply to the heir.

A child born out of wedlock, according to the customary law of inheritance in Java, only becomes an heir in his mother's estate and in the mother's family inheritance property. A child is not legally considered to have a father. As to the relationship with the mother, there is no difference between a legitimate child and an out-of-wedlock child.⁴

Division of Inheritance Rights to Children Outside of Marriage Compared to Their Siblings Who Are Legal Children

Extramarital children, although recognized as not under the power of parents, but under the power of guardianship, their share of inheritance rights is different from the right of inheritance of legal children. Children out of wedlock who have been recognized by their parents are only entitled to a living or *shodaqoh* as a form of parental responsibility to their children.

In western inheritance law, extramarital children are differentiated into recognized extramarital children and legalized extramarital children. An out-of-wedlock child who is legalized is in a different position from a

⁴ Soepomo, Bab-Bab Tentang Hukum Adat, Pradnya Paramita, Jakarta, 1994, p., 85.

recognized out-of-wedlock child. An out-of-wedlock child can be recognized before a legal marriage occurs between one of his parents and another person who is not his parent and the existence of the child does not interfere with the existence of his parents' marriage to another person who is not his parent.

Such a share of the right of inheritance is 1/3 part of the property if he is a legitimate child who becomes a joint heir of class I (the legal child and the legal wife of his parents). Will get 1/2 if he becomes a joint heir of class II and III, (his grandfather, uncle, aunt, and great-grandfather). And will get 3/4 share if he is a joint heir of class IV (a relative farther away from his parents who is the heir).ⁱⁱ The share of children out of wedlock must be given first, then the rest is only divided between the legal heirs. If the deceased does not leave a legal heir, then the out-of-wedlock child gets the entire inheritance. If the out-of-wedlock child dies first, then it can be replaced as the legal child of his parents.

The division of the same inheritance to an out-of-wedlock child with a legal child is based on the *principle of parimirma* on the basis of willingness. Thus, the out-of-wedlock child and the out-of-wedlock family have no right to claim inheritance from their biological father. The size of the division of inheritance for extramarital children does not adhere to a formal rule because the legal basis governing it does not exist. The amount of division is only based on the willingness of the family, how much and in what form of goods the biological father's family will give or in the form of a will regarding what property his biological father will give. Similarly, with the inheritance of the mother, the out-of-wedlock child is also entitled to the property but must still be taken into account with other descendants who cannot be transferred.⁵

The settlement of inheritance disputes against children out of wedlock has also been regulated in several jurisprudences issued by the Supreme Court:

⁵ Masitoh, Ury Ayu. 2018. Anak Hasil Perkawinan Siri sebagai Ahli Wari Ditinjau dari Hukum Perdata dan Hukum Islam. *Diversi Jurnal Hukum Uniska* Vol. 4 No. 2

1. Supreme Court Jurisprudence No. 179/K/SIP/1960 October 23, 1961

Regulates the right of inheritance between a legal child and an out-of-wedlock child together entitled to the inheritance of the heir. In other words, the share of the inheritance of the legal child is the same as the share of the out-of-wedlock child.

2. Supreme Court Jurisprudence No. 415/K/SIP/1970 June 30, 1971

Regulating the granting and surrender of inheritance rights for extramarital children in the Tapanuli area is a handover of release. With the aim of softening the customary law in the area that initially did not recognize the right of inheritance for children outside of marriage to the granting of equal inheritance rights between legal children and extramarital children.

3. Supreme Court Jurisprudence No. 1037/K/SIP/1971 July 31, 1973

Regulates the right of inheritance of children outside of marriage in the Pematang Siantar area. If the heir dies and leaves the child out of wedlock, then the child is the only heir and is entitled to the property left behind.

Conclusion

A child outside of marriage according to Islamic law is a child born to a woman who does not have legal marital status with the man who impregnated her. The child's status is only related to his mother and his mother's family. Meanwhile, an out-of-wedlock child according to Indonesian marriage law is a child born as a result of parents having sexual relations with status without being tied to another marriage. The child will have a civil relationship with his father or mother after the recognition of the two of the children. Children outside of marriage who have been recognized by their parents are only entitled to a living or shodaqoh as a form of parental responsibility to the child. Children outside of marriage are not entitled to claim inheritance from their biological father, unless there is a willingness from their family. According to western inheritance

law, a child outside of marriage gets 1/3 share of the property if he is a legal child who becomes a joint heir of class I (the legal child and the legal wife of his parents). Will get 1/2 if he becomes a joint heir of class II and III, (his grandfather, uncle, aunt, and great-grandfather). And will get 3/4 share if he is a joint heir of class IV (a relative farther away from his parents who is the heir). Although children outside of marriage are still recognized by Islamic Law and National Law (Civil), it would be better for such a phenomenon to be eliminated. What can be done is to minimize the negative things that are factors causing the birth of children outside the marriage, some of which are by carrying out legal marriages both religiously and legally and not committing acts of violating norms.

References

- Adiarta, I Wayan. "Tinjauan Yuridis tentang Kedudukan Anak Luar Kawin dalam Pembagian Warisan". *Jurnal Ilmu Hukum Legal Opinion* 3, No. 4 (2015).
- Pelealu, Firjenia A. "Kedudukan Hukum Dan Hak-Hak Anak Dalam Hukum Waris Adat Di Indonesia." *Lex Privatum* 6, No. 9 (2018).
- Jefrizal, O., Disa, M., & Akim, P. S. (2010). Hukum Waris Islam Pasca Putusan Mahkamah Konstitusi Nomor 46 / PUU-VIII / 2010 Fakultas Hukum Universitas Muhammadiyah Jember.
- Kompilasi Hukum Islam di Indonesia, (Jakarta: Direktorat Pembinaan Peradilan Agama Islam Ditjen Pembinaan Kelembagaan Islam Departemen Agama, 2001).
- Kunto Dewandaru, H., Prananingtyas, P., & Hafidh Prasetyo, M. (2020). Pelaksanaan Pembagian Waris Dalam Sistem Kewarisan Patrilineal Menurut Masyarakat Timika, Papua. *Notarius*, 13(2), 493–503. <https://doi.org/10.14710/nts.v13i2.30884>
- Masitoh, Ury Ayu. 2018. Anak Hasil Perkawinan Siri sebagai Ahli Wari Ditinjau dari Hukum Perdata dan Hukum Islam. *Diversi Jurnal Hukum Uniska* Vol. 4 No. 2.
- Soepomo, *Bab-Bab Tentang Hukum Adat* (Pradnya Paramita, Jakarta, 1994).

Sutrisno. Istikharoh. 2017. Studi Komporatif Hak Waris bagi Anak di Luar Nikah Menurut Kompilasi Hukum Islam dan KUHPerdara. *Jurnal Al Wasith: Jurnal studi Hukum Islam* 2 No.2 (2017).

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