

## The Distribution of Inheritance to Extramarital Children (Comparative Study of Islamic Inheritance Law and Constitutional Court Decisions)

Maulana Amin Tahir<sup>1</sup>

<sup>1</sup> Faculty of Law, Tadulako University, Indonesia.

Email: [maulanaulan13@gmail.com](mailto:maulanaulan13@gmail.com)

Corresponding Author: [maulanaulan13@gmail.com](mailto:maulanaulan13@gmail.com)

Received: 20 Februari 2024

Accepted: 26 February 2024

Published: 1 June 2024

**Abstract:** Children are a precious gift from a higher power that require the utmost attention and care. They are the future of our nation and will carry on the ideals of a just and prosperous society. As a trust from a higher power, it is the responsibility of parents to properly guide and care for their children, as protecting children's rights is a fundamental obligation in many religious beliefs. In the case of an illegitimate child, born to a woman who is not legally married to the man who impregnated her, it is important to understand the distribution of inheritance from an Islamic law perspective in comparison to the position of illegitimate children in the Constitutional Court decision Number 46/PUU-VIII/2010. This research utilizes a descriptive normative juridical approach. The findings of this research conclude that, according to the Compilation of Islamic Law (KHI), illegitimate children are entitled to the same share of inheritance as legitimate children of their parents. Specifically, if there is a single daughter, the share is one-half, and if there is more than one daughter, the share is two-thirds. If there is a son, he becomes an ashabah. Meanwhile, in the Constitutional Court decision Number 46/PUU-VIII/2010, illegitimate children are recognized as legitimate children with an inheritance relationship with their biological father, requiring careful consideration of inheritance asset distribution.

**Keywords:** Inheritance, Extramarital Children, Islamic Inheritance Law, Constitutional Court Decisions.

**Abstrak:** Anak merupakan karunia Tuhan Yang Maha Esa yang membutuhkan perhatian sebaik-baiknya dan merupakan harapan bangsa yang akan meneruskan cita-cita bangsa untuk mewujudkan masyarakat yang adil dan makmur. anak sebagai amanah Allah SWT yang harus dijaga dan dibimbing dengan baik, terutama oleh orang tua yang tidak bisa mengabaikan anak begitu saja, karena menjaga hak anak adalah salah satu kewajiban orang tua yang ditetapkan dalam agama Islam. Anak luar kawin adalah anak yang dilahirkan oleh seorang perempuan, sedangkan perempuan itu tidak berada dalam ikatan perkawinan yang



sah dengan pria yang menghamilinya. Tujuan penelitian ini adalah memperbandingkan pembagian kewarisan anak luar kawin ditinjau dari perspektif hukum Islam dengan kedudukan anak luar kawin dalam putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010. Penelitian ini menggunakan metode yuridis normatif yang bersifat deskriptif. Kesimpulan dari penelitian ini adalah bahwa menurut Kompilasi Hukum Islam (KHI) ketentuan bagian warisan yang berhak diperoleh dan diterima oleh anak luar kawin dari harta peninggalan ibunya: apabila anak perempuan tunggal bagiannya adalah seperdua bagian dan bila lebih dari satu bagiannya adalah dua per tiga bagian. Bila ada anak laki-laki, anak laki-laki menjadi *ashabah*. Besarnya bagian bagi seorang anak luar kawin tidaklah dibedakan dengan besarnya bagian yang akan diterimanya seandainya dia adalah anak sah dari orangtuanya. Sedangkan dalam putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 kedudukan anak luar kawin diakui sebagai anak yang sah dan mempunyai hubungan waris dengan bapak biologisnya sehingga perlu dianalisis bagaimana pembagian harta warisan bagi anak luar kawin.

**Kata Kunci: Kewarisan, Anak Luar Kawin, Hukum Kewarisan Islam, Putusan Mahkamah Konstitusi.**

---

## A. Introduction

Children are considered to be a divine blessing, bestowed upon human beings by the Almighty. They require the nurturing attention of both parents and are instrumental in carrying forward the nation's ideals, which are essential in pursuing a just and prosperous society. To ensure that the children of today are fully equipped to shoulder their responsibilities in the future, it is imperative that they are provided with ample opportunities to grow and develop normally, both physically and mentally, and to also develop their social skills in a conducive environment.<sup>1</sup>

In Islamic jurisprudence, children are regarded as a sacred trust of Allah SWT and it is imperative for parents to maintain and guide them with utmost care and attention. The Islamic faith places a significant emphasis on the rights of children and recognizes them as individuals with absolute rights that cannot be overlooked. The term "child" in Islamic law is defined by an age limit, whereby children who are unable to live independently or have not attained

---

<sup>1</sup> Rr. Murdiningsih, *Tesis: Peranan Notaris*, FH UI, Jakarta, 2009, p. 186

puberty are considered as such. The Islamic legal system also takes into account an individual's physical and mental characteristics when determining whether they are adults or not. Specifically, if a person exhibits the characteristics of an adult, such as reaching puberty, as prescribed by Islamic law, they are deemed to have attained adulthood. It is, therefore, incumbent upon parents to fulfill their parental obligations towards their children, as outlined in Islamic law, and ensure that their rights are safeguarded at all times.<sup>2</sup>

The issue of children in the family law environment is one that is fraught with complexity, particularly when it comes to the relationships between children, parents, and families. In essence, every child is entitled to basic civil rights, regardless of their origins. Children born from a legal marriage enjoy a certain status and position under the law, whereas those born from illegitimate unions bear the stigma of being extramarital children. The question of the position of such children in the context of family law is a sensitive one, as it touches upon issues that are often considered taboo and shameful within families. However, the law must provide a response to the challenges faced by society, in order to ensure legal certainty. This is especially important given that extramarital children not only have significant legal implications, but also pose social problems that can impede their future prospects.<sup>3</sup>

According to Article 1 of Law Number 16 of 2019, which concerns the amendments to the Marriage Law of 1974, marriage is defined as a union of both physical and mental aspects between a man and a woman as husband and wife. Its ultimate aim is to establish a joyous and everlasting family, or household, based on the

---

<sup>2</sup> Yaswirman, *Hukum Keluarga Karakteristik dan Prospek Doktrin Islam dan Adat Dalam Masyarakat Minangkabau*, Raja Grafindo, Jakarta, 2011, p. 246

<sup>3</sup> Muhammad Hajir Susanto, Yonika Puspitasari, dan Muhammad Habibi Miftakhul Marwa, "Kedudukan Hak Keperdataan Anak Luar Kawin Perspektif Hukum Islam," *JUSTISI* 7, no. 2 (15 Juli 2021): 105–17, <https://doi.org/10.33506/js.v7i2.1349>.

belief in the One and Only Godhead. This formulation of the meaning and purpose of marriage encapsulates the fundamental essence of this institution and its role in shaping the society at large.

Marriage holds a significant and profound meaning, as it not only unites two families, but also provides a platform for nurturing offspring - a crucial element of the matrimonial bond. The presence of children brings immense joy and contentment to parents, who consider them as the ultimate symbol of their union. To ensure a happy and prosperous family, parents shower their children with love and care, providing them with the best education, healthcare, and skills.

An extramarital child refers to a child born to a woman who is not legally married to the man who impregnated her. The term "outside marriage" denotes a relationship between a man and a woman capable of procreation, without the existence of a legal marriage bond as defined by positive law and religion.<sup>4</sup>

In the case of an extramarital child, inheritance rights can be granted if a legal relationship with the testator exists. Such a relationship can be established through recognition, which comes with legal consequences. If the acknowledgment is made by the biological father, the recognized child can use his surname and may be entitled to inheritance rights from the parents. Recognition can occur during the marriage by both the father and mother, allowing the recognized child to use the father's name without inheritance rights from the admitting parent. A recognized extramarital child must care for the acknowledging parent, and has the right to earn a living from the recognized parent. Moreover, the acknowledging parent must grant permission for the recognized extramarital child's marriage and has the right to be the marital guardian.

Legalizing an out-of-wedlock child can be achieved through his parents' marriage or by his father recognizing him during the marriage ceremony, followed by a letter of attestation. However, it

---

<sup>4</sup> Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia*. Kencana, Jakarta, 2008, p.80.

is crucial that the mother provides consent while she is alive to prevent any unauthorized parties from exploiting the child's recognition.

Since the Constitutional Court Decision No. 46/PUU-VIII/2010, illegitimate children are now recognized as legitimate and have the right to inherit from their biological father. This decision has brought significant changes to the Civil Law system and Marriage Law in Indonesia, as outlined in the Civil Code and Law Number 1 of 1974 concerning Marriage, particularly with regards to inheritance. While the decision was met with a mix of reactions from various groups, including the ulama, it has had a profound impact on the legal landscape.<sup>5</sup>

Children born out of wedlock have no control over the circumstances in which they are born or the conditions of their parents. They are just as deserving of love and protection as any other child. While the Constitutional Court's decision aligns with principles of justice, it does not address how inheritance should be distributed among illegitimate children. Against this backdrop, this article seeks to compare how inheritance is distributed under Islamic law and the Constitutional Court's ruling for illegitimate children.

Given the background provided, the forthcoming article aims to explicate the distribution of inheritance pertaining to extramarital children from an Islamic legal perspective.

## **B. Method**

The present article adopts a normative juridical research method to advance its argument. This research methodology is a well-established form of legal scholarship that focuses on the normative aspects of legal science. It involves a systematic analysis of written regulations and other legal materials to extract their normative characteristics and implications. By using this approach, the article

---

<sup>5</sup> Maulidina, Amiroatul, and Mery Risqi Damayanti. "Kewarisan Anak Luar Kawin di Indonesia Pasca Putusan Mahkamah Konstitusi No. 46/UUP-VIII/2010." *Jurnal Tana Mana* 4.2 (2023): 261-267.

aims to provide a rigorous and comprehensive analysis of the legal issues at hand, based on a sound methodological framework.

### **C. The Right of Inheritance of Extramarital Children in Islamic Law**

According to Islamic law, children who are born from a valid marriage are considered legitimate and will take on the name of their father. The legitimacy of a child is dependent on their legitimacy to their father, while for mothers, the woman who gives birth is automatically considered the legal mother. There is no legal action that can negate the relationship between a woman and the child she gives birth to. Simply put, whether or not a child is considered valid under Islamic law determines whether or not they have a family relationship with their father. This determination is not based on human will, but on the validity of the marriage contract.<sup>6</sup>

In the realm of Islamic law, the right of inheritance for extramarital children, be they male or female, remains a contentious issue. Such children are not recognized as having a blood relationship with their father, and therefore, they cannot inherit from him, nor can his relatives or brothers inherit from such a child. This is owing to the fact that there exists no mutual taking between the two parties, namely blood relations. Given that an illegitimate child is related to his or her mother by blood or is only recognized by his or her mother, then he or she can only inherit from the mother, as well as from her relatives or siblings. In the event of the death of an illegitimate child, the surviving mother and siblings from the same mother or father whose religion is not recognized are entitled to all the inheritance. If the mother or her relatives pass away, then the illegitimate child may receive inheritance from his or her mother's relatives.

---

<sup>6</sup> Ahmad Rezy Meidina, "Anak di Luar Kawin dalam Hukum Kewarisan Islam: Sebuah Ragam Perspektif dan Analisa," *El-Aqwal: Journal of Sharia and Comparative Law*, 1 Agustus 2022, p. 7, <https://doi.org/10.24090/el-aqwal.v1i1.6778>.

The law of inheritance is an integral part of Islamic jurisprudence, which regulates the ownership rights of the heirs and determines the entitlement of each heir to a specific share of the inheritance. In Islamic law, children are classified into three categories, namely legitimate children, children born outside of marriage who are recognized as legitimate, and children born outside of marriage who are not recognized. The Islamic inheritance law applied in Indonesia is guided by Article 43 paragraph 1 of the Marriage Law in conjunction with Article 100 of the Compilation of Islamic Law (KHI), which stipulates that illegitimate children only have a civil relationship with their mother and their mother's family.

According to Article 100 of the Compilation of Islamic Law outlined in Presidential Instruction no. 1 of 1991, children born out of wedlock are only considered to have a lineage relationship with their mother and maternal family. Illegitimate children can refer to those born outside of a legal marriage or as a result of an illegitimate relationship. As a result, the only blood ties recognized in such cases are between the child and the mother who gave birth to them. This principle is further supported by the hadith of the Prophet Muhammad, as recorded in Bukhari's history:<sup>7</sup>

عَنِ ابْنِ عُمَرَ رَضِيَ اللَّهُ عَنْهُمَا : أَنَّ رَجُلًا لَأَعَنَ امْرَأَتَهُ عَلَى عَهْدِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَفَرَفَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ بَيْنَهُمَا ، وَالْحَقُّ الْوَالِدَ بِأُمِّهِ (أَخْرَجَهُ الْبُخَارِيُّ)

"From Ibn Umar r.a it is said that a man accused his wife of adultery and she did not acknowledge the child (adultery), then the Messenger of Allah. said: Separate the two and connect the child with the mother." (HR. Bukhāri)

---

<sup>7</sup> Rina Suryanti, "Kewarisan Anak Luar Nikah (Studi Komparasi KUH Perdata dan Kompilasi Hukum Islam)." *PESAT*, Vol. 8. No. 3 (2022): 169-186.

The legal status of children born out of wedlock and their inheritance rights can be complex. In cases where there are previous marriages and offspring, the illegitimate child may not receive the full inheritance. However, if there are no previous marriages or descendants, the illegitimate child may legally represent their biological father's assets. This distribution of inheritance is often regulated by the Civil Code and the Compilation of Islamic Law (KHI), and is considered a gift rather than a division. It's important to note that according to the KHI, children born out of wedlock may not receive any inheritance.

In order for a child's lineage to be considered valid under Islamic law, there are four requirements. Firstly, it must be possible for the wife to become pregnant and pregnancy should be considered a normal occurrence. According to Imam Abu Hanifah, even if a husband and wife do not engage in sexual relations, a child born to a legally married wife is considered legitimate. Secondly, the grace period for birth after marriage is a minimum of six months according to the consensus of scholars. This is because six months is considered the shortest duration of a pregnancy. If a child is born before this grace period ends, it is not considered legitimate. Additionally, if a husband doubts the minimum time between marriage and birth, he can deny the child using an institution called *li'an*. This is applicable if either the minimum or even the maximum pregnancy duration is exceeded.

If a husband can prove that a child born to his wife is not his own, it will have legal implications for the child's status as illegitimate, and the husband's civil relationship with the child will be severed. According to Article 102 paragraph (1) of the Instruction of the President of the Republic of Indonesia Number 1 of 1991 regarding the Dissemination of the Compilation of Islamic Law (abbreviated as KHI), husbands have the right to file a lawsuit for child abandonment within 180 days of the child's birth or 360 days after the dissolution of the marriage.

The matter of illegitimate children and their status within Islamic law has been a topic of debate among *fiqh* scholars. There are varying



opinions on whether a female child born from adultery can wed her biological father, as highlighted in the KHI. It is stated that illegitimate children, specifically girls, do not share a lineage with their father. As a result, this frees the individual from any restrictions on marrying someone who has a lineage relationship, marital ties, or breast milk relation.

According to the beliefs of Imam Malik and Imam Shafi'i, it is permissible for biological fathers to wed their daughters, granddaughters, sisters, and nieces, as these women do not share a lineage with their father. However, this viewpoint is subject to controversy, particularly when considering the prohibition on marriage due to milk relationships. It is worth noting that the milk a child consumes ultimately becomes a part of their blood and flesh.

The fact that there are children born outside of a legal marriage must be understood as a whole, looking at it not only from the actions of the parents but also regarding the children born. However, Jumhur Ulama has firmly stated that illegitimate children cannot be related to their biological father. These provisions have become a legal agreement among the ulama. However, this does not mean that the man who is the biological father can simply abandon the child who is believed to have come from his seed. There is still a sense of humanity that a father can give to a child, even though according to Sharia law it has no *nasab*. So, morally, fathers must provide for their children's needs, because religion does not justify neglecting children.

Children born out of wedlock have no control over the circumstances in which they are born or the conditions of their parents. They are just as deserving of love and protection as any other child. While the Constitutional Court's decision aligns with principles of justice, it does not address how inheritance should be distributed among illegitimate children.

#### **D. Conclusion**

In Islamic law, the position of children is similar to that of the Marriage Law. Article 100 KHI states that illegitimate children only

have a lineage relationship with their mother and her family, which is comparable to Article 43 paragraph (1) of the Marriage Law. Even though Islamic civil law does not recognize the biological father of illegitimate children, the father still holds responsibility for the child born from his seed. While illegitimate children are not entitled to civil rights like birthright, inheritance rights, and guardian rights, they do have the right to receive necessary support from their biological father until they reach the age of ta'zir as a punishment for him. But, Children born out of wedlock have no control over the circumstances in which they are born or the conditions of their parents. They are just as deserving of love and protection as any other child. While the Constitutional Court's decision aligns with principles of justice, it does not address how inheritance should be distributed among illegitimate children.

The KHI provisions regarding inheritance for illegitimate children outline that if a single woman is involved, the child is entitled to a half share. If there are multiple women, the child is entitled to two-thirds share. Furthermore, if a boy is involved, he receives the remaining share. It is important to note that the size of the share for an illegitimate child is equivalent to what they would receive if they were only entitled to a share of their mother's inheritance and not their father's.

## References

- Adiarta, I. Wayan. "Tinjauan Yuridis Tentang Kedudukan Anak Luar Kawin Dalam Pembagian Warisan." Tadulako University, (2015).
- Angelin, Margareta Sevilla Rosa, Farida Danas Putri, dan Akbar Prasetyo Sanduan. "Dilema Hak Mewaris Anak Luar Kawin Dalam Persepektif Hukum Perdata." *Jurnal Hukum Magnum Opus* 4, no. 2 (2021).
- Arief, Ahmad. "AL-TA'ASSUF PENGGUNAAN HAK PADA PUTUSAN MAHKAMAH KONSTITUSI NO. 46 TAHUN 2010 TENTANG ANAK LUAR NIKAH." *Bilancia: Jurnal Studi Ilmu Syariah dan Hukum* 12, no. 2 (31 Desember 2018): 201–39. <https://doi.org/10.24239/blc.v12i2.368>.

- Candra, M. *Aspek Hukum Perlindungan Anak di Indonesia: Analisis tentang Perkawinan di Bawah Umur* (1st ed.). Prenadamedia Group. (2018).
- Dalise, Waren K. “Kedudukan Hukum Dan Hak Waris Anak Luar Kawin Menurut Hukum Perdata.” *Lex Privatum* 7, no. 2 (2019).
- Fadhilah, Firyal, dan FX Arsin Lukman. “Analisis Kedudukan Hukum Hak Waris Anak Luar Kawin Sebagai Pengganti dari Ahli Waris.” *Imanot: Jurnal Kemahasiswaan Hukum & Kenotariatan* 1, no. 2 (2022): 339–73.
- Hartanto, J. Andy, dan MH SH. *Hak Waris Anak Luar Kawin Pasca Putusan Mahkamah Konstitusi*. Jakad Media Publishing, 2018.
- International, Kluwer Law. “Common Market Law Review.” *Common Market Law Review* 46, no. 2004 (2009): 1113–34. <https://doi.org/10.1017/S0165070X00028436>.
- Itmam, Muhammad Shohibul. “Indonesian Jurisprudence Ahmad Qodri Azizy’s Perspective.” *Justicia Islamica* 16, no. 2 (2019): 367–94. <https://doi.org/10.21154/justicia.v16i1.1639>.
- Kumoro, R Youdhea S. “Hak dan Kedudukan Anak Luar Nikah dalam Pewarisan Menurut KUH-Perdata.” *Lex Crimen* 6, no. 2 (2017).
- Kuspraningrum, Emilda. “Kedudukan Dan Perlindungan Anak Luar Kawin Dalam Perspektif Hukum Di Indonesia.” *Risalah Hukum*, 2006, 25–32.
- Manan, Abdul. *Aneka Masalah Hukum Perdata Islam di Indonesia*. (2017).
- Meidina, Ahmad Rezy. “Anak di Luar Kawin dalam Hukum Kewarisan Islam: Sebuah Ragam Perspektif dan Analisa.” *El-Aqwal: Journal of Sharia and Comparative Law*, 1 Agustus 2022, 1–14. <https://doi.org/10.24090/el-aqwal.v1i1.6778>.
- Pancasilawati, Abnan. “Perlindungan Hukum Bagi Hak-Hak Keperdataan Anak Luar Kawin.” *FENOMENA* 6, no. 2 (2014): 171–216.
- Poespasari, Ellyne Dwi. “Kedudukan anak luar kawin dalam pewarisan ditinjau dari sistem hukum kekerabatan adat.” *Perspektif: Kajian Masalah Hukum dan Pembangunan* 19, no. 3 (2014): 212–22.
- Prinst, Darwan. *Hukum Anak Indonesia*. Citra Aditya Bakti, (1997).

- Putra, Lucy Pradita Satriya. "Hak Waris Anak Luar Kawin Menurut Hukum Adat Dan Yurispudensi Mahkamah Agung." Sebelas Maret University, (2015).
- Ramadhita, Ramadhita, dan Ahmad Farahi. "Keadilan bagi anak luar kawin dalam putusan Mahkamah Konstitusi nomor 46/PUU-VIII/2010." *De Jure: Jurnal Hukum dan Syari'ah* 8, no. 2 (2016): 74–83.
- Rr. Murdiningsih. 2009. *Tesis: Peranan Notaris*. Jakarta: Fakultas Hukum Universitas Indonesia. (2017).
- Susanto, Muhammad Hajir, Yonika Puspitasari, dan Muhammad Habibi Miftakhul Marwa. "Kedudukan Hak Keperdataan Anak Luar Kawin Perspektif Hukum Islam." *JUSTISI* 7, no. 2 (15 Juli 2021): 105–17. <https://doi.org/10.33506/js.v7i2.1349>.
- Yaswirman, Yaswirman. *Hukum keluarga: karakteristik dan prospek doktrin Islam dan adat dalam masyarakat matrilineal Minangkabau*. Rajawali Pers, (2011).
- Yosephus, Mainke. "Hak Waris Anak Luar Kawin Menurut Hukum Perdata, Hukum Islam Dan Hukum Adat." *Fakultas Hukum Universitas Pelita Harapan. Law Review Vol. XIII No. 1* (2013).