

Comparative Study: The Concept of Legitimate Children in The Perspective of Positive Law and Islamic Law

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Abstract

The interpretation of legal children is endless to discuss, considering that various problems continue to color the dimensions of marriage. Marriage issues that cannot be separated from turmoil to vent interest without obeying religious norms and applicable laws. As a result, it gives birth to a view of the validity of the relationship through informal marriage or that it is not at all bound by the bonds of marriage. Therefore, the indicators of legitimate children are interesting to discuss, in order to get factual answers to the criteria for legitimate children in state law and Islamic law. This study is classified as a literature review that examines the normative juridical and theological aspects. This research is explanatory by examining various laws and regulations relating to children. The summarized data will be analyzed using qualitative analysis and relevant to the theoretical aspects. The findings in this study are that the legitimate child under positive law is determined by the legality of marriage and if the child is out of wedlock still oriented to the legality of marriage. Meanwhile, in Islamic law, it is stipulated as a legitimate child if born from a legitimate marriage, if a child outside of marriage must have a span of six months between the marriage contract and the birth of a child. The implication of this finding is that legally married is the way to give birth to the best generation, because the consequences of illegitimate marriage will adversely affect the generation that was born.

Interpretasi anak sah tidak ada habisnya untuk dibahas, mengingat pelbagai problem terus mewarnai dimensi perkawinan. Persoalan perkawinan yang tidak bisa dipisahkan dengan gejolak untuk melampiasakan ketertarikan tanpa mematuhi norma-norma agama dan hukum yang berlaku. Akibatnya melahirkan sebuah pandangan keabsahan dari hubungan melalui perkawinan tidak resmi atau bahwa sama sekali tidak diikat dengan nikah. Maka indikator anak sah menjadi menarik untuk dijelaskan, demi mendapatkan jawaban faktual kriterian anak sah dalam hukum Negara dan hukum Islam. Kajian ini tergolong kajian kepustakaan yang menelaah aspek yuridis dan teologis normatif. Penelitian ini bersifat explanatoris dengan mengkaji pelbagai peraturan perundang-undangan yang berkaitan dengan anak. Data yang

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terangkum akan dianalisa dengan menggunakan analisis kualitatif dan merelevansikan aspek teoretis. Temuan dalam penelitian ini bahwa anak sah dalam hukum positif ditentukan oleh keabsahan nikah dan kalau anak di luar nikah tetap berkiblat pada keabsahan nikah. Sementara dalam hukum Islam ditetapkan sebagai anak sah jika lahir dari nikah yang sah, jika anak luar nikah harus memiliki rentang waktu enam bulan antara akad nikah dan kelahiran anak. Implikasi dari temuan ini bahwa menikah secara resmi adalah jalan untuk melahirkan generasi yang terbaik, karena konsekuensi dari nikah tidak sah akan berakibat buruk pada generasi yang dilahirkan.

Keywords: *Concept; legitimate children; positive law; Islamic law.*

Introduction

Children formally have parents as the cause of their birth in the world. Children are a gift and a mandate given by Allah to parents.¹ Children are the foundation of hope for every parent to continue their offspring. Because descendants are children whose parents are clear. Thus every child needs to get positive input from both parents and the community around him for the sake of clarity and maturity of the child for further growth and development, so that offspring and family relationships are maintained. In order to maintain legitimate offspring, it is necessary to link various parties, especially the government in particular and the community in general, to prevent actions that are not moral, because these actions are not in accordance with religious teachings and violate public order.

Prevention of the birth of illegitimate children, because faith and piety are actually a lamp to do positive things and at the same time reject negative rights. In terms of maintaining offspring, Islam recommends that children are not neglected without being cared for, cared for and educated as well as possible. Both parents have the right to protect their children from bad things. The law against children is stipulated in general rules, which are called the power of Allah with the hope of protecting children from various anxieties and worries. Families can be built or developed, therefore found components in groups, and established on a clear child basis. Binding a strong and true family, which draws one blood with the reason of equality and Islamic brotherhood.

Islamic teachings on legal arrangement provide an illustration, how Islam has actually arranged human life with established laws.² Islam does not allow

¹Samsul Munir Amin, *Masa Depan Anak Secara Islami* (Jakarta: Amzah, 2007), p. 1.

²Massadi, Peluang dan Tantangan Pelaksanaan Pidana Islam di Indonesia." *Al-Bayyinah* 3.2 (2019), p. 258

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descendants to be treated like that, admitting a person's descendant relationship if they wish, even though the act of acknowledging and eliminating one's descendants is not in accordance with reality. So Allah has arranged from an early age in the Quran about marriage. Because in this way, the child to be born becomes valid. According to Islamic law, a child who is born is only considered valid if it meets the range of continuity of marriage. Meanwhile, in Law Number 1 of 1974 concerning marriage, it does not stipulate such a time limit, but what is emphasized is that it starts from the validity of the marriage.

Talking about children is very broad in scope and very important. The problem of children, whether children are legitimate or not, this issue is quite important to discuss and analyze, given the increasingly sophisticated times and social levels are difficult to avoid. Meanwhile, disputes over legitimate children in Islamic law and positive law still offer two different options, so it is not surprising that legal adjustments occur. This means that favorable legal rules serve as justification for their treatment. For this reason, it is important to provide confirmation of the legal consequences and implications for children born of illegitimate marriages.

Methodology

This study is a normative juridical and theological literature review. In the juridical field, it will review the laws and regulations related to legitimate children. In addition, in the field of Islamic law, it will conduct a normative study of texts (*nash*) and then relate them to the results of the interpretation of the verse. This research is explanatory in nature by conveying the applicable laws and regulations, including UUP Number 1 of 1974, Law Number 17 of 2016 concerning Child Protection, Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law and other regulations relevant to this study. A literature study is carried out in order to obtain the necessary data by searching, recording, analyzing, and understanding the secondary data mentioned above, as well as other materials that help to understand legitimate children. The data analysis method used is qualitative analysis, by analyzing problems, filtering information and rationally relevant in a theoretical perspective.

Discussion

Conception of Legitimate Children in the Perspective of Positive Law

Indonesia is a rule of law that regulates a society of various styles and forms, ethnicities and customs. The diversity of society creates laws that regulate in general for the whole which are principal. There are differences in beliefs, differences in

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faith and morals which in essence in establishing a law are of course different. For this reason, as a constitutional state, it must contain formal rules that apply to all citizens in the form of positive law that has been ratified on behalf of the State and is obliged to be guided. With regard to marriage, the law in Indonesia has enforced age restrictions, because it avoids the bad consequences that will later emerge.³

The relationship with legitimate children in formal law has been regulated in various regulations. However, those which are closely related to children, are specifically regulated in Law Number 1 of 1974 concerning marriage. It contains the definition of a child and indicators of a legitimate child recognized by the State as a legitimate child. In general, a child is someone born from a marriage between a woman and a man. Children are also the embryo of the birth of a new generation as the successor of the nation and the state as a resource in continuing national development.⁴

In Article 47 paragraph (1) of Law Number 1 Year 1974 it is said that children who have not reached the age of 18 (eighteen) years or have never been married are under the control of their parents as long as they are not deprived of their parental power. Article 50 paragraph (1) states that children who have not reached the age of 18 (eighteen) years and have not been married, are not under the authority of parents, are under the authority of a guardian. The articles mentioned above can be understood that children in Law Number 1 of 1974 are those who are not yet mature and have matured, namely 16 (sixteen) years for women and 19 (nineteen) years for men. Meanwhile, Law Number 16 of 2019 has equated the age of 19 to be eligible for marriage, so below is classified as a child.

The definition of a child according to civil law is built from several aspects of civilization that exist in children as an incapable legal subject. These aspects are immature status (age limit) as legal subjects. Children's rights are discussed in civil law. Article 330 of the Civil Code provides that a child is a person who is not yet mature and someone who has not reached the legal legitimacy age limit as a legal subject or as a national legal subject determined by civil legislation. So the provision of children lies in the meaning of adulthood and the legality to do the law and as a legal subject.

Law Number 3 of 1997 concerning juvenile justice in Article 1 paragraph (2) which reads "Children are people in cases of naughty children who have reached the age of 8 (eight) years but have not reached the age of 18 (eighteen) years and have never been married". So, children are limited to a span of eight years to

³Hasyim, "Implikasi Penetapan Usia Minimal Nikah Menurut Pasal 7 Undang-Undang No. 1 Tahun 1974 di Kabupaten Majene." *Al-Bayyinah* 3.1 (2019): 62.

⁴D.Y. Witanto, *Hak dan Kedudukan Anak Luar Kawin* (Jakarta: Kencana, 2012), p. 59.

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eighteen years (8-18 years). Meanwhile, someone who belongs to the age range of 8 to 18 but has been married and or has been married (divorced) is categorized as an adult. So, it is not only age that is an indicator of children and adults but being married is also considered an adult.

The continuity and preservation of a nation requires future generations. To give birth to a generation there must be a law that will regulate it, in order to create an ideal order in society. The conception of the child is like that, it must be explained fundamentally the meaning of the substance. In depth the legitimacy of the child needs to be known, for that reason it is appropriate to put forward the definition of a legitimate child.

Legitimate children are legally described in Law Number 1 of 1974 concerning marriage, Article 42, legitimate child is a child born in or as a result of a legal marriage.⁵ Meanwhile, in Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law, Article 99 legitimate child is child born in or as a result of a legal marriage.⁶

This understanding can be understood that the legitimacy of a child born is very dependent on the legality of the marriage that has been carried out by both parents. In other words, before getting in touch, it must be preceded by a legal marriage bond. Hence, a legitimate child is a child born from a legal marriage between his father and mother. So what becomes the legal basis or foothold for a child born is very dependent on the validity of the marriage. The assurance of a child being legitimate depends on the legality of the marriage of the father and mother.

The legality of the child depends on the legality of the marriage, so it is necessary to emphasize the criteria for a formal marriage. In Article 2 of Law Number 1 of 1974 concerning Marriage it states that; (1) Marriage is legal, if it is carried out according to the law of each religion and belief. (2) *Each marriage is recorded according to the applicable laws and regulations. While the content of Article 2 of the Marriage Law (UUP), the legitimacy of marriage is emphasized in the law according to each religion and the marriage must be recorded so that marriage order is guaranteed in society.* In addition, the validity of marriage also depends on the fulfillment of the pillars and requirements based on religion and in line with the UUP in Article 14 to Article 29 Compilation of Islamic Law (KHI). In addition, the prospective groom is obliged to pay a dowry (*mahar*) to the prospective bride whose amount, form and type are agreed upon by both parties.

⁵Republic of Indonesia, *Law Number 1 of 1974 concerning Marriage* (Surabaya: Pustaka Tinta Mas, 1986), p. 17.

⁶H. Abdurrahman, *Kompilasi Hukum Islam di Indonesia* (First Edition; Jakarta Akademika Presindo, 1992), p. 137.

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The law regarding legitimate children has provided clarity about who really wants to have legal offspring. The way of marriage is legally carried out between the two parents. Because a legal marriage results in a child being born to be a legitimate child and becomes a bright spot for legal legitimacy. The consequence that can be obtained is that the result of the child being born can lead to the *Jariyah* sin. The responsibility is vertical or related to *ubudiyah* whose affairs are related to servants and Allah swt. For accountability not only to the state but to the Creator.⁷

The legality of the marriage also colors the legitimacy and illegitimacy of the child to be born. A legal marriage is the most basic and very decisive for the birth of a legitimate child, not sexual relations outside of a legal marriage. As a result of having sexual relations outside a legal marriage, will later give birth to illegitimate children. The validity of the marriage is done; (1) according to the law of each religion and belief; (2) in an orderly manner according to sharia law; (3) it is registered under the law and is attended by a marriage registrar.⁸

The provisions of the applicable laws and regulations are a condition for the validity of the marriage. The marriage bond in accordance with these provisions, the marriage becomes valid. If there is a violation of this provision, the marriage is null and void. The legitimacy of a child by law, the provisions of Article 42 which states that a child is valid if born during or from a legal marriage, further stipulates that a child born outside of a legal marriage only has a civil relationship with his mother and family. blood of his mother. Furthermore, Article 44 states that a husband can deny the validity of a child born to his wife as long as he can prove that the child is the result of his wife's adultery.⁹ So the level of validity is in the form of an acknowledgment or denial that can be clearly proven, that the child is or is not his child. And in paragraph (2) Article 44 explains that with a court decision will give the legality of the child in accordance with the request.

In line with the above, that in addition to the legality of children from the validity of marriage and court decisions, there must be a follow-up. Proof of the origin of the child as described in the Marriage Law (UUP) Article 55 that; (1) The origin of a child can only be proven by an authentic birth certificate, which is issued by an authorized official; (2) If the birth certificate referred to in paragraph (1) of this article is not available, the Court may issue a determination regarding the origin of a child after a thorough examination is conducted based on the evidence that meets the requirements; and (3) Based on the provisions of the court in

⁷Syaifulloh Maslul, "Hukum Islam dan Politik Hukumnya dalam Hukum Nasional." (2019), p. 20.

⁸Martiman Prodjohamidjoyo, *Tanya Jawab Undang-Undang Perkawinan Peraturan Pelaksanaan* (Jakarta: Pradnya Paramita, 1974), p. 23.

⁹Prins, *Hukum Perkawinan di Indonesia* (First print; Jakarta: Ghalia Indonesia, 1992), p. 71.

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paragraph (2) of this article, the birth registration agency in the jurisdiction of the court concerned shall issue a birth certificate for the child concerned. Based on this, administratively it must be recorded and obtain legality from the competent authorities.

Article 43 of Law Number 1 of 1974 states that children born outside of marriage only have a civil relationship with their mother and their mother's family. The child does not have a legal relationship with his father both with regard to inheritance and education. The illegitimate child cannot be attributed to his father so that he does not have a legal or kinship relationship with his father. So legally, the father is not obliged to provide a living for the child.

However, Article 43 is considered to belittle the position of the child out of wedlock, who essentially has civil rights over the biological father. So Article 43 has undergone changes in accordance with the legal political stance of the Constitutional Court in reforming Article 43 paragraph 1 of the Law. Number 1 of 1974 which reads "children born out of wedlock only have a civil relationship with his mother and his mother's family" to "a child born out of wedlock has a civil relationship with his mother and his mother's family as well as with a man as his father which can be proven based on science and technology and or other evidence according to the law have blood relations, including civil relations with his father's family". The decision is a progressive legal political step that is considered pro-justice law, which includes the interests of children and the protection of human rights.¹⁰

In relation to legitimate children, the Civil Code has actually accommodated the legitimacy of children outside of marriage as legitimate children. In Article 272 it is explained that "Children out of wedlock, except those born from adultery or blood stains, are legalized by a subsequent marriage from their father and mother, if prior to marriage they have made legal recognition of the child, or if the acknowledgment occurs in their own marriage certificate. This is in line with Article 44 which explains that the determination of a child is legal because of evidence and has been determined by the court as his child. In principle, not directly, but there are procedures, one of which is mentioned is that it can be proven.

Article 250 of the Civil Code states that: The legitimacy of a child born before the one hundred and eighty days of marriage can be denied by the husband. However, the denial should not be carried out, among others; (1) if before the marriage the husband had known of the pregnancy; (2) if at the time of making the

¹⁰Muhamad Beni Kurniawan. "Politik hukum Mahkamah Konstitusi tentang status anak di luar nikah: Penerapan hukum progresif sebagai perlindungan hak asasi anak." *Jurnal HAM* 8.1 (2017): p. 76.

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birth certificate he is present, and this deed is signed by him, or contains a statement from him which states that he is unable to sign it; (3) if the child is stillborn. So in addition to the time span, there are also other provisions that clearly explain that it is not permissible to deny the legitimacy of the child.

So the conception of a child that is wrong in positive law has two options. Legitimate children due to the validity of marriage, so that the child born becomes a legitimate child. In addition, the legitimacy of a child that can be proven as a child made before the marriage contract and determined as a legitimate child. The consequences are different, the first is because of his actions which resulted in his child becoming legitimate, while the second is considered valid because it can be proven.

Conception of Legitimate Children in Islamic Law

Legitimate children in the framework of Islamic law then explore the normative study of the meaning of children who are considered to meet the criteria of children who are considered legitimate and in line with Islamic law. In various views, a legitimate child is a child born by considering the time span of the marriage contract. One of the opinions that explains the conception of a legitimate child in Islamic law is that a legitimate child is born after six months of marriage, or the woman is pregnant during the iddah period, and her ex-husband does not deny that the child in the womb is his child.¹¹

Scholars have agreed that a child born less than six months after the marriage contract cannot be attributed to his father. A child cannot be attributed to his father as a legitimate child, if the child was born less than 6 months after the marriage contract. Because according to them, the shortest grace period that must exist between the birth of a child and the marriage is 6 months.¹²

According to Abu al-Ainain Badran, children born from legal marriages have five rights, namely: (1) lineage rights; so that the child is protected from humiliation, futility and safe from reproach; (2) Breastfeeding rights; so that children are awake from hunger and thirst that can cause death; (3) The right to subsistence; This provision of maintenance is valid as long as the child is not yet able to be economically independent; (4) Hadanah rights; so that the child can be independent with all the knowledge and character; (5) Guardianship rights; over himself and his wealth to have his own skills.¹³

¹¹Abduerraof, *Al-Qur'an dan Ilmu Hukum*(Jakarta: Bulan Bintang, 1970), p. 90.

¹²Fatchurrahman, *Ilmu Mewaris*(Eleventh print; Bandung: PT. Alma'arif, 1981), p. 221.

¹³LathoifGhozali, M. "Anak Zina dalam Pandangan Hukum Islam." *AlQanun: Jurnal Pemikiran dan Pembaharuan Hukum Islam* 11.2 Dec (2008): 482.

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Exploring further the provisions of a legitimate child according to the conception of Islamic law has been ascribed to several texts that form the basis. Terminology of time span is not only considered possible, but is classified as the most popular opinion to serve as a guide in Islamic law. Among several verses or texts that are used as the basis for legitimate children, namely, QS. Lukman/31:14, QS. al-Ahqab/:46; QS. Al-Baqarah/2:233.

QS. Lukman/31:14:

وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ حَمَلَتْهُ أُمُّهُ وَهَنًا عَلَىٰ وَهْنٍ وَفِصْلُهُ فِي عَامَيْنِ أَنِ اشْكُرْ
لِي وَلِوَالِدَيْكَ إِلَىٰ الْمَصِيرِ.

The translation:

And We have commanded people to 'honour' their parents. Their mothers bore them through hardship upon hardship, and their weaning takes two years. So be grateful to Me and your parents. To Me is the final return.¹⁴

QS. Al-Ahqab/46:15:

وَوَصَّيْنَا الْإِنْسَانَ بِوَالِدَيْهِ إِحْسَانًا حَمَلَتْهُ أُمُّهُ كُرْهًا وَوَضَعَتْهُ كُرْهًا وَحَمَلُهُ
وَفِصْلُهُ ثَلَاثُونَ شَهْرًا حَتَّىٰ إِذَا بَلَغَ أَشُدَّهُ وَبَلَغَ أَرْبَعِينَ سَنَةً قَالَ رَبِّ أَوْزِعْنِي أَنْ
أَشْكُرَ نِعْمَتَكَ الَّتِي أَنْعَمْتَ عَلَيَّ وَعَلَىٰ وَالِدَيَّ وَأَنْ أَعْمَلَ صَالِحًا تَرْضَاهُ وَأَصْلِحْ لِي
فِي ذُرِّيَّتِي إِنِّي تُبْتُ إِلَيْكَ وَإِنِّي مِنَ الْمُسْلِمِينَ.

The translation:

We have commanded people to honour their parents. Their mothers bore them in hardship and delivered them in hardship. Their 'period of' bearing and weaning is thirty months. In time, when the child reaches their prime at the age of forty, they pray, "My Lord! Inspire me to 'always' be thankful for Your favours which You blessed me and my parents with, and to do good deeds that please You. And instil righteousness in my offspring. I truly repent to You, and I truly submit 'to Your Will'."¹⁵

¹⁴al-Mehri, A. B. (Ed.). *The Qur'ān: With Sūrah Introductions and Appendices: Saheeh International Translation* (Maktabah Booksellers and Publishers, 2010) p. 412.

¹⁵al-Mehri, A. B. (Ed.). *The Qur'ān*, p. 504

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These two verses describe the period of pregnancy and breastfeeding as well as the period of giving birth, a mother to her child. But at QS. Lukman/31:14 specifically explains about the time of maintenance and the perfect breastfeeding period, whether it is 2 years or 24 months for a mother who wants to perfect breastfeeding, according to the QS Al-Baqarah/2:233:

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ لِمَنْ أَرَادَ أَنْ يُتِمَّ الرَّضَاعَةَ وَعَلَى
 الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ لَا تُكَلَّفُ نَفْسٌ إِلَّا وُسْعَهَا لَا تُضَارَّ وَالِدَةٌ
 بِوَالِدِهَا وَلَا مَوْلُودٌ لَهُ بِوَالِدِهِ وَعَلَى الْوَارِثِ مِثْلُ ذَلِكَ فَإِنْ أَرَادَا فِصَالًا عَنْ
 تَرَاضٍ مِنْهُمَا وَتَشَاوُرٍ فَلَا جُنَاحَ عَلَيْهِمَا وَإِنْ أَرَدْتُمْ أَنْ تَسْتَرْضِعُوا أَوْلَادَكُمْ فَلَا
 جُنَاحَ عَلَيْكُمْ إِذَا سَلَّمْتُمْ مَا آتَيْتُم بِالْمَعْرُوفِ وَاتَّقُوا اللَّهَ وَاعْلَمُوا أَنَّ اللَّهَ بِمَا
 تَعْمَلُونَ بَصِيرٌ.

The translation:

Mothers may nurse [i.e., breastfeed] their children two complete years for whoever wishes to complete the nursing [period]. Upon the father is their [i.e., the mothers'] provision and their clothing according to what is acceptable. No person is charged with more than his capacity. No mother should be harmed through her child, and no father through his child. And upon the [father's] heir is [a duty] like that [of the father]. And if they both desire weaning through mutual consent from both of them and consultation, there is no blame upon either of them. And if you wish to have your children nursed by a substitute, there is no blame upon you as long as you give payment according to what is acceptable. And fear Allah and know that Allah is Seeing of what you do.¹⁶

Explaining from some of the verses above, in QS. Al-Ahqaf/46:15, explained cumulatively the number of pregnant and weaning, which is 30 months. While in QS. Luqman/31:14, explained the maximum limit for weaning, which is 2 years (24 months). So, a period of at least 30 months of pregnancy minus 24 months equals 6 months. The scholars interpret that the first verse indicates that the period of pregnancy and weaning is 30 months. The second verse explains that weaning after the baby is fully fed takes 2 years or 24 months. Mathematically $30 - 24 = 6$,

¹⁶al-Mehri, A. B. (Ed.). *The Qur'ān*, p. 37.

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then the baby takes 6 months to be in the mother's womb. This opinion is agreed upon by the fiqh scholars who are obtained by capturing the evidence of signs in the Qur'an.¹⁷

The analysis of the status of a legitimate child, which must be met, namely; (1) Pregnancy for a wife is not impossible, meaning it is normal and natural to get pregnant. This is a condition agreed upon by the majority of Ulama' except Imam Hanafi; (2) The grace period for the birth of the marriage is at least six months after the marriage is carried out.¹⁸ With regard to illegitimate children, illegitimate children are children born out of wedlock. Often children out of wedlock are called *jadah* children, adulterous children or *natuurlijkekinderen* or *onwettigekinderen*, while legitimate children are called *wettigekinderen*.¹⁹

In the Civil Code, it is stated that children resulting from adultery have the opportunity to inherit each other if there is a confession. However, in Islamic law, there is no right to be attributed to his father, including in the matter of inheriting. This is based on the hadith of the Prophet Muhammad (pbuh) from Umar r.a that a man had met his wife at the time of the Prophet and denied his wife's child, then the Prophet divorced between the two and brought the lineage of the child to his mother (hadith narrated by al-Bukhari). The implication is that even if the child or baby gets paternal recognition in Islamic law, it still does not get nazab and is not entitled to an inheritance.²⁰

A child is born less than a month after the marriage contract is held, then the child is categorized as an illegitimate child under Islamic law. The position of a child born less than six months old is the same as an adulterous child. So the child has no civil relationship with his father (a man who marries his mother), even though he himself impregnated the woman. So the consequences for children born as a result of the actions of the biological father and mother result in the position of the child.

Equating the position of a child born who has not reached the age of the marriage contract for six months with an adulterous child is a form of hatred for the actions of humans who have forbidden relationships. The legal consequences caused by the marriage contract have a very large influence on the legitimacy of the child being born. For this reason, a child born as a result of adultery is an

¹⁷Rizal Darwis. "Fiqh Anak di Indonesia." *AlUlum* 10.1 (2010), p. 125.

¹⁸AbdulAzizDahlan,dkk, *Ensiklopedi Islam* (Third print; 4th Edition; Jakarta: PT IchtiarBaru Van Hoeve, 1994), p. 7252.

¹⁹Iman Jauhari, "Hukum Perwalian Anak Zina Dan HakWarisnya." *Kanun Jumalllmu Hukum* 13.2 (2011), p. 5.

²⁰AghisMustaghfir, *Kewarisan Anak Zina dalam Tinjauan Hukum Islam dan KUH Perdata*. Diss. IAIN Ponorogo, 2018.

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illegitimate child. Adultery children under Islamic law are still considered illegitimate children even though their parents are married and recognize their children. Because the act of adultery is a vile and dirty behavior, even approaching it is forbidden by Allah sw., let alone to do it. This is explained in the word of Allah in QS. Al-Isra'/17:32.

وَلَا تَقْرَبُوا الزَّوْجَ إِنَّهُ كَانَ فَحِشَةً وَسَاءَ سَبِيلًا .

The translation:

And do not approach unlawful sexual intercourse. Indeed, it is ever an immorality and is evil as a way.

The verse above forbids to approach the act of adultery, namely anything that can lead to adultery. The reason is clear, that adultery is an abominable act and an accursed path,²¹ and can have a negative impact on the child being born. Regarding the stipulation that children born not reaching the age of six months of marriage are categorized as adulterous children, they still require legal considerations. Considering the legal implications seem to only refer to the child being born; the child has nothing to do with the sins committed by his parents. This means that the sins of the parents are not borne by the child who is born but should be borne by the adulterer. This is in line with the word of Allah in QS. An-Najm/53:38.

أَلَا تَرَىٰ وَازِرَةً وِزَّرَ أُخْرَىٰ .

The Translation

That no bearer of burdens will bear the burden of another.²²

Therefore, the child resulting from adultery must be treated humanely, because every person who persecutes himself for committing a sin, then actually the one who bears the sin is himself, no one can replace him as the guarantor. Meaning with what is mentioned in another verse through the word of Allah in QS Al-Fathir/35:18:

وَلَا تَرَىٰ وَازِرَةً وِزَّرَ أُخْرَىٰ ۗ وَإِن تَدْعُ مُثْقَلَةٌ إِلَىٰ جَمَلِهَا لَا تُحْمَلُ مِنْهُ شَيْءٌ وَلَوْ كَانَ ذَا قُرْبَىٰ ۗ إِنَّمَا تُنذِرُ الَّذِينَ يَخْشَوْنَ رَبَّهُم بِالْغَيْبِ وَأَقَامُوا الصَّلَاةَ ۗ وَمَن تَزَكَّىٰ فَإِنَّمَا يَتَزَكَّىٰ لِنَفْسِهِ ۗ وَإِلَى اللَّهِ الْمَصِيرُ .

²¹Ali Mohtarom, "Kedudukan Anak Hasil Hubungan Zina Menurut Hukum Islam Dan Hukum Positif." *AL MURABBI* 3.2 (2018), p. 193.

²²al-Mehri, A. B. (Ed.). *The Qur'ān*, p. 527.

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The translation:

And no bearer of burdens will bear the burden of another. And if a heavily laden soul calls [another] to [carry some of] its load, nothing of it will be carried, even if he should be a close relative. You can only warn those who fear their Lord unseen and have established prayer. And whoever purifies himself only purifies himself for [the benefit of] his soul. And to Allah is the [final] destination.²³

Regarding legitimate children in Islamic law, legitimate children include children born from legal marriage relationships. This is in accordance with the call for legally binding marriages between men and women. However, in relation to children born out of wedlock, Islamic law provides criteria for the age range of the marriage contract six months after the birth of the child. Six months becomes the minimum limit after reducing the period of pregnancy and weaning, so that children who are born and married before six months are categorized as illegitimate children or adulterous children.

Conclusion

The conception of a legitimate child according to positive law is a child born in or as a result of a legal marriage, from this understanding it can be understood that the legitimacy of a child born depends on the validity of the marriage that has been carried out by both parents. Before having a biological relationship, it must be preceded by a legal bond (a marriage contract) as a result of the legitimacy of the child. While the conception of a legitimate child in Islamic law is that a legitimate child is born after six months of marriage, or the woman is pregnant during the iddah, and her ex-husband does not deny that the child is his child. Islamic law stipulates that a legitimate child is a child born within a minimum period of 6 months after the marriage takes place, while according to positive law those born in or as a result of a legal marriage, without specifying a minimum time limit after the marriage takes place.

References

- al-Mehri, A. B. (Ed.). *The Qur'ān: With Sūrah Introductions and Appendices: Saheeh International Translation*. Maktabah Booksellers and Publishers, 2010.
- Amin, SamsulMunirAmin. *MasaDepanAnakSecaraIslami*. Jakarta:Amzah, 2007.
- Abdurrahman. *Kompilasi Hukum Islam di Indonesia*. 1st Edition; Jakarta Akademia Presindo, 1992.

²³al-Mehri, A. B. (Ed.). *The Qur'ān*, p. 436.

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DOI: 10.35673/al-bayyinah.v4i2.813

- Abduerraof. *Al-Qur'an dan Ilmu Hukum*. Jakarta: Bulan Bintang, 1970.
- Beni Kurniawan, Muhamad. "Politikhukum Mahkamah Konstitusi tentang status anak di luar nikah: Penerapan hukum progresif sebagai perlindungan hak asasi anak." *Jurnal HAM* 8.1 (2017).
- Dahlan, AbdulAziz. *Ensiklopedi Islam*. Third Print; 4th Edition; Jakarta: PT Ichtibar Baru Van Hoeve, 1994.
- Darwis, Rizal. "Fiqh Anak di Indonesia." *AlUlum* 10.1 (2010): 119-140.
- Fatchurrahman. *Ilmu Mewaris*. Eleventh print; Bandung: PT. Alma'arif, 1981.
- Ghozali, M. L. (2008). Anak Zina dalam Pandangan Hukum Islam. *AlQanun: Jurnal Pemikiran dan Pembaharuan Hukum Islam*, 11(2 Dec), 480-499.
- Hasyim, H. (2019). Implikasi Penetapan Usia Minimal Nikah Menurut Pasal 7 Undang-Undang No. 1 Tahun 1974 di Kabupaten Majene. *Al-Bayyinah*, 3(1), 61-76.
- Jauhari, I. (2011). Hukum Perwalian Anak Zina Dan Hak Warisnya. *Kanun Jurnall Ilmu Hukum*, 13(2), 1-20.
- Massadi, M. (2019). PELUANG DAN TANTANGAN PELAKSANAAN PIDANA ISLAM DI INDONESIA. *Al-Bayyinah*, 3(2), 252-268.
- Maslul, S. (2019). Hukum Islam dan Politik Hukumnya dalam Hukum Nasional.
- Mohtarom, A. (2018). Kedudukan Anak Hasil Hubungan Zina Menurut Hukum Islam Dan Hukum Positif. *AL MURABBI*, 3(2), 193-202.
- Mustaghfir, A. (2018). *Kewarisan Anak Zina dalam Tinjauan Hukum Islam dan KUH Perdata* (Doctoral dissertation, IAIN Ponorogo).
- Prodjohamidjoyo, Martiman. *Tanya Jawab Undang-Undang Perkawinan Peraturan Pelaksanaan*. Jakarta: Pradnya Paramita, 1974.
- Prins. *Hukum Perkawinan di Indonesia*. First print; Jakarta: Ghalia Indonesia, 1992.
- Republic of Indonesia, *Law Number 1 of 1974 concerning Marriage*. Surabaya: Pustaka Tinta Mas, 1986.
- Witanto, D.Y. *Hak dan Kedudukan Anak Luar Kawin*. Jakarta: Kencana, 2012.