

Conference Paper

Contradiction of CIVIL Code with Islamic Law Regarding Children Guardianship Outside Marriage in Indonesia

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Abstract.

Basically, child custody is the responsibility of both parents; however, in reality, in Indonesia, not all parents do it or get it. Many children do not get protection and rights, even though the related regulations already belong to the Indonesian state. It turns out that this can happen because of various factors that influence one of them related to legal marriage according to Civil law and Islamic law, there are differences between the two regulations. For example, according to civil law, marriage is legal if it is registered with the state, while in Islam it does not have to be. Under the existing rules, this causes an inequality between protection and the rights obtained by children. Based on these problems, this research was conducted to conduct an analysis related to civil law and Islamic law in Indonesia, which regulates child guardianship for children who are considered born out of wedlock, using qualitative research methods. The results obtained from this research show that according to civil law, marriage must be registered with the state to protect child custody and provide clear legal protection, not only for children but also for wives. Meanwhile, according to Islamic law, a marriage that cannot be registered with the state still has a valid law, for example, Siri marriage or underhand marriage. However, in both civil and Islamic law, it is clear that a child in this condition can only have a bloodline relationship between the mother and the mother's family. The biological father cannot be the guardian of the child. The current condition of society, which tends to take the matter of marriage lightly by ignoring marriage registration and so on, should receive special attention from the government. In this case, the government can more often provide premarital counselling and/or outreach related to marriage in Indonesia. Also, it is very important to increase public awareness.

Keywords: child born out of wedlock, marriage, custody

1. INTRODUCTION

According to Article 1 Clause 3 of the 1945 Constitution of the Republic of Indonesia, which declares Indonesia to be a republic under the rule of law, all Indonesian citizens are required to follow the country's laws. Many things are governed by law, including the

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guardianship of children born outside of a valid parent-child union, which is governed by both the Civil Code and Islamic law and serves as a guide for daily life and as a means of protection. Republik Indonesia, UUD 1945.

In both Islamic law and the Civil Code, there are several interpretations of what constitutes a legitimate marriage. Marriage is regarded as legal under the civil code if it complies with the standards set out in Marriage Law No. 1 of 1974. A marriage is lawful if it is carried out by the rules of each respective religion and belief, according to Article 2(1), which outlines the legal criteria for its execution. Every marriage must be registered by the applicable laws and regulations, according to Article 2(2).[2]

On the other hand, according to Islamic law, a marriage is legitimate provided it adheres to the principles of marriage that are outlined in the Quran. These pillars include two male witnesses to the marriage and the presence of a guardian, usually the bride's father. In this situation, it is not necessary to register the marriage with the local civil registration because it is regarded as genuine. The guardianship or custody of children born out of such marriages and potential future rights for the children may be impacted by these disparities in what constitutes a lawful marriage.[3]

In society, marriage is a very significant institution. The fact that this institution exists makes a man and a woman's relationship legally valid. The physical and spiritual relationship between a man and a woman as husband and wife is designed to create a joyful and eternal family (home) based on the belief in the One Almighty God, according to Article 1 of Law No. 1 of 1974 Governing Marriage.[4]

Whether a marriage complies with Article 2, clauses (1) and (2) of Indonesian Marriage Law No. 1 of 1974 determines whether it is lawful. If a marriage is performed in line with the rules of each distinct faith and belief, it is regarded as legal. Additionally, every marriage must be recorded by the current rules and legislation. Therefore, if a marriage is not properly registered, even if it is deemed lawful by religious law, it may not be recognized as such under the marriage legislation. As a result, a child born from an unrecorded marriage can be regarded as having no legal parentage. According to Article 1 of the Marriage Law No. 1 of 1974, marriage is a significant institution in society because it formalizes the connection between a man and a woman to create a happy, lifelong family based on faith in God Almighty.[4]

Given the evolution of Indonesian culture, there is a growing consensus that having sex outside of marriage is acceptable and not a big deal. As a result, children are frequently born outside of a valid marriage, or what is known as illegitimate births or "Anak luar kawin" in Indonesian. In everyday life, these kids are frequently labeled "Anak Haram," which denotes that their paternity is disputed and that they are solely

biologically and legally related to their mother, not to their father. As a result, these kids don't have a formal father-figure relationship.

The major cause of their stigma is the ambiguity around the identity of the father of an illegitimate kid. offspring born out of wedlock only have civil contact with their mother and her family, according to Article 43 of Law Number 1 of 1974 regarding the status of illegitimate offspring. Illegitimate children therefore do not have any legal connections to their biological father under the law. It is thought that this clause infringed on their constitutional rights.[4]

Article 51 relates to constitutional rights outlined in the Republic of Indonesia Constitution of 1945, as stated in the explanation provided by the Republic of Indonesia Law Number 24 of 2003 about the Constitutional Court. The provisions of Article 43 of Law Number 1 of 1974 concerning the status of illegitimate children were deemed to be legally invalid insofar as they are interpreted to eliminate the civil relationship with a man who can be proven through scientific and technological evidence or other legal evidence to have a biological connection as the father by the issuance of Constitutional Court Decision Number 46/PUU-VIII/2010.[5]

The biological father, subject to acceptance by the child's biological mother and proof by genuine documents or scientific and technical evidence, such as DNA testing, is the legal caretaker of a child born out of wedlock between their parents. The biological father can act as the child's legal guardian in marriage-related proceedings after he satisfies certain conditions.[6]

The Civil Code states that the marital status of the child's parents is what distinguishes an unmarried child (Anak luar kawin) from an unmarried kid created via adultery (Anak zina). The kid is regarded as having been born out of adultery if one or both of its parents are still legally wed to someone else and have sexual relations that result in a child (Anak Zina). The kid is said to have been born out of wedlock (Anak luar kawin) if, on the other hand, the child's parents are not related by a legal marriage (for example, they are single, divorced, or widowed) and they have sexual relations that result in the birth of a child.[7]

2. METHODOLOGY/ MATERIALS

This article was written using a qualitative research method with a literature review approach to collect relevant sources such as books, journals, and laws that regulate child guardianship outside of marriage.[8] After gathering all the reading materials, they were critically analyzed to identify the issues and draw conclusions, resulting in

solutions for every problem related to child guardianship outside of marriage under civil and criminal law in Indonesia. The purpose of this article is to analyze how civil and Islamic law in Indonesia regulates child guardianship for children born outside of the legitimate marriage of their parents and provide opinions and solutions to address the issues.

3. RESULTS AND DISCUSSIONS

1. A STUDY OF MARRIAGE AND GUARDIANSHIP OF OUT-OF-WEDLOCK CHILDREN BASED ON THE INDONESIAN CIVIL CODE

2. The Indonesian Civil Code's interpretation of marriage

Marriage is a legitimate union where both partners share the trust and accountability for creating a happy and profitable home and family. As a result, the woman experiences a major psychological transformation, including pregnancy and childbirth, which need sacrifice. By Article 1 of Republic of Indonesia Law Number 1 of 1974 about Marriage, Marriage is a spiritual and physical bond between a man and a woman as Husband and Wife, to establish a happy and eternal family (home) based on the belief in the Almighty God.[4]

Marriage, according to Republic of Indonesia Law Number 1 of 1974 about Marriage and Islamic Law, should be seen not only from a legal but also from a religious and social perspective. While the formal part of marriage deals with administrative issues like registration with the Office of Religious Affairs and civil registration, the religious aspect establishes the legality of marriage.[9]

1. (a) The Indonesian Civil Code's conditions for a legal marriage

Marriage is defined as a physical and emotional relationship between a man and a woman as husband and wife, to create a happy and eternal family (household) based on faith in the Almighty God, according to Republic of Indonesia Law Number 1 of 1974 about Marriage. There are additional prerequisites for a lawful marriage outlined in this statute.[10]

1.2 The standard material specifications are:[11]

1. Free consent is the first important need. To be legally bound in marriage without the use of force, both potential spouses must agree or give their agreement. This is in compliance with the Republic of Indonesia Law Number 1 of 1974 about

Marriage, which specifies that a marriage must be founded on the consent of both prospective spouses in Article 6 paragraph (1).

2. Age is the second prerequisite for the substance. Article 7 paragraph (1) of Republic of Indonesia Law Number 1 of 1974 about Marriage states that a male must be at least 19 years old to get married, while a woman must be at least 16 years old.
3. The potential spouses must not already be married, which is the third important criteria. In essence, according to Republic of Indonesia Law Number 1 of 1974 concerning Marriage, Article 3 paragraph (1), a man may have only one wife, and a woman may have only one husband. There are, however, some exceptions to this rule, specifically when the conditions specified in Republic of Indonesia Law Number 1 of 1974 concerning Marriage, Article 3 paragraph (2) and Article 4, apply. These provisions state that a court may grant a husband permission to have more than one wife if the parties so request. If a husband wants to have more than one wife, he must apply to the local court. Only in cases where a woman is incapable of carrying out her obligations as a wife, has a physical impairment, an incurable sickness, or is unable to produce children, would the court allow a husband to have more than one wife.
4. Waiting time makes up the final material needed. A divorced woman must wait a certain amount of time before getting married again, as stated in Article 11 of Republic of Indonesia Law Number 1 of 1974 about Marriage. A divorced woman must wait a certain amount of time before she may wed again, which is referred to as the waiting period. So, a lady is not permitted to get married a second time before the waiting period is finished.

1.3 Particular Material Needs

The circumstances relating to a person's status regarding authorization to marry and the ban on conducting a marriage are referred to as the "special material requirements." The Indonesian Marriage Law No. 1 of 1974 regulates permission to marry under Article 6, which states that the parties to the marriage must seek permission to marry:[4]

1. A person must have both of their parent's approval before getting married if they are under the age of 21.
2. If one of the parents has already died away or is unable to voice their intentions, permission may be sought from the parent who is still alive or is still able to do so.
3. Obtaining approval from the person providing care for the individual or a family member who has a blood tie in a direct lineal ascendant while they are still able

to voice their desires is an option in cases when both parents have died away or are incapable of doing so.

4. The court in the region where the prospective spouses reside may provide consent upon their request if there are disparities between those specified in points a, b, and c above.

1.4 Formal Requirments

Conditions about the formalities of marriage, including those that precede and follow its consummation, are referred to as formal prerequisites. The official criteria are as follows:[12]

1. Announcement of the impending nuptials

The couple or each guardian must give written or verbal notice of their desire to wed to the marriage registry office where the wedding is scheduled. A minimum of 10 days before the wedding, this notification must be sent.

1. Arranging the wedding

Except in situations where there is a dispensation owing to serious considerations, a marriage can only be done when the desire to marry has been proclaimed for 10 days, according to Government Regulation No. 9 of 1975.

1. Signing the wedding license

Immediately following the marriage, the couple, witnesses, and marriage registrar sign the marriage license.

1. (a) **The Indonesian Civil Code's definition of children born outside of marriage.**

A woman who is not legally married to the guy who caused her to get pregnant is said to have given birth to the kid out of wedlock. A kid of this type does not have the same legal standing as a child born within or as a result of a valid marriage. In other words, a kid who is not biologically yours is not accorded the same legal status as one who is.[13]

Children born outside of wedlock are classified as either legitimate or illegitimate under the Civil Code. Illegitimate children, often known as those born out of wedlock, are those who were not the product of a legally binding union between their parents. Legitimate children are those who were conceived during or as a result of a formal

marriage. According to Indonesian Marriage Law No. 1 of 1974's Article 42, legitimate children are those who are born during or as a result of a recognized marriage. However, this article makes no mention of how long it should take to decide if a kid is legitimate. The legal position of a child born in a recognized marriage is obvious in terms of their rights, including inheritance.

An "anak yang lahir di luar perkawinan yang sah" or "child born out of wedlock" is not the same thing as an "anak zina" or "illegitimate child" according to the Civil Code. A kid born to a man and a woman who are not married but who are both or one of them bound by a marriage to another person is defined as being illegitimate under the Civil Code. The Civil Code defines a kid born out of wedlock as one who was conceived and born outside of marriage and who is not otherwise considered to be an illegitimate child.[14]

According to the Civil Code, a kid born out of wedlock and a child born from an extramarital affair vary in the following ways:[15]

1. A kid is deemed to have been born out of wedlock or adultery if one or both of its parents are still contractually wed to another person and have sexual encounters that result in a child.
2. The kid is regarded as being born out of wedlock, or a child born outside of marriage, if its parents are not legally tied by any existing marriage (either being single, widowed, or divorced) and they have sexual encounters that result in the birth of a child.

A kid born out of wedlock only has civil relations with their mother and her family, according to Article 43 Paragraph (1) of Republic of Indonesia Law Number 1 of 1974 Concerning Marriage. According to Article 280 of the Civil Code, a child born outside of marriage naturally has legal links with their mother and her family without the requirement for previous recognition. However, to establish a legal relationship between a child born out of wedlock and their father, such recognition, as outlined in Article 280 of the Civil Code, is still required. This is one of the elements that distinguish a kid born out of wedlock from a legitimate child in terms of their legal standing. A legitimate kid has legal relationships with both parents without the necessity for previous recognition, unlike a child born outside of wedlock.[4]

1. (a) **Guardianship of children born out of wedlock under the Indonesian Civil Code**

The Republic of Indonesia Law Number 1 of 1974 concerning Marriage, Article 43 Paragraph (1), must be interpreted as follows, according to the Constitutional Court ruling: “A child born out of wedlock has civil relations with their mother and her family, as well as with the man as their father, who can be proven based on science and technology and/or other evidence according to the law, including civil relations with the father’s family.”

According to the Constitutional Court’s decision, if the biological link between a child born out of wedlock and their legal father can be established via science, technology, and/or other proof, the kid will have civil contact with their father and his family.[5]

The ruling of the Constitutional Court may be implemented if we compare it to the provisions of the Indonesian Civil Code insofar as it relates to children born outside of wedlock because there won’t be any conflicts with the articles concerning inheritance, where the position of the person in question is equated with a child born outside of wedlock who is recognized as legitimate as referred to in Article 862 of the Civil Code.[1]

However, if the kid is born out of wedlock or in an adulterous relationship, it may be difficult to carry out the inheritance since Article 867 of the Civil Code stipulates that illegitimate children are exempt from the rules outlined in Articles 862 to 866 of the Civil Code. In addition, if the father’s rightful heirs protest, it could be challenging to carry out the Constitutional Court’s ruling.[1] An illegitimate kid can be recognized in several ways:

1. The child’s birth certificate, which will be verified.
2. A real deed prepared specifically for this purpose in front of a notary public.
3. An official document prepared by the civil registration officer and entered into the civil register using the child’s birthdate.

An illegitimate child can be acknowledged by voluntary acknowledgment, which is when a person formally admits that he is the father (or mother) of a child born outside of wedlock. According to Article 280 of the Civil Code, acknowledgment creates a civil legal connection between the kid and the father (or mother) who has recognized the child. By the procedures listed in Article 281 of the Civil Code, the voluntary acknowledgment may be made by:[1]

1. A declaration of acknowledgment of a child born out of wedlock must be made before a civil registration officer, by Article 281 paragraph (1) of the Indonesian Civil Code, by the father, mother, and/or their representative based on an authentic power of attorney.

2. According to Article 281 paragraph 2 and Article 272 of the Indonesian Civil Code, acknowledging a child born outside of marriage can also be done during the parents' marriage and is documented in the marriage certificate. This acceptance will lead to the child's legitimacy being acknowledged.
3. As stated in the Indonesian Civil Code, Article 281, paragraph 1, acknowledgment of a child born out of wedlock can also be made in an authentic deed, such as a notarial deed.
4. A formal acknowledgment may also be issued using a document that is necessary for birth registration in the civil registration system based on the date of birth, as stated in the Indonesian Civil Code, Article 281, Paragraph 2.
5. According to Articles 287–289 of the Indonesian Civil Code, a child born out of wedlock may be forced to acknowledge the parent(s) by bringing a case in district court to have the parent(s) accept the kid as their legitimate child.

The following may also be acknowledged:

1. If it is carried out for the advantage of the deceased kid, for instance, if the child has descendants eligible for payments.
2. Children who were accepted as being born outside of marriage but whose parents' marriage cannot take place since the biological father passed away.

The following papers must be affixed to the request for acknowledgment:

1. It is necessary to certify the birth certificate.
2. The parents' marriage certificates and, if one of the parents hasn't already passed away, the death certificates.

The Supreme Court, the Head of State, or a body chosen by the Supreme Court performs the verification of familial status. The following people have the right to ask for verification:

1. The two parents.
2. The child or youngster themselves.

An individual, who may be the kid's mother or father, must comply with all legal criteria and procedures to recognize an illegitimate child. An illegitimate kid's parents and child

establish a cordial relationship as a result of the acknowledgment. Article 280 of the Civil Code makes this provision.[1]

To recognize an illegitimate child, either the child's mother or father must make a statement that complies with all legal criteria. This acknowledgment creates a civil connection between the kid and the acknowledging parent by Article 280 of the Civil Code. Given that the legislation is ambiguous about the timing of recognitions, they may be made whenever they like, regardless of the child's age. If there is an advantage for the kid, such as having descendants who can gain from the acknowledgment, even a deceased child may be honored. However, a married man's recognition will not have legal ramifications, particularly regarding how his estate would be divided after his passing. As long as there are heirs up to the sixth degree, the acknowledged child will not be included as an heir. This implies that the state has priority over the status of a kid acknowledged by a married man in terms of inheritance.

If there is a legal connection between the kid and the testator, an illegitimate child can inherit. Recognition creates the foundation for this connection. According to Article 285 of the Civil Code, a spouse's expression of satisfaction over an illegitimate kid who was conceived with someone other than their spouse during the marriage will not have an adverse effect on either the spouse or the marriage's legitimate child. The Civil Code places restrictions on the acknowledgment of an illegitimate child because, according to Article 285, it cannot harm the spouse or the legally born children of the marriage.[1]

In other words, an unmarried kid has no claim to an inheritance. This youngster simply receives what is needed to survive. This is because there is no formal legal connection between the kid and their parents. Article 286 of the Civil Code states that anybody with an interest in inheritance has the right to object to the recognition of a child born outside of marriage.[1]

Based on the aforementioned article, it is clear that an acknowledged illegitimate child has two inheritance options: either they can inherit from the father who acknowledges them, or they are not eligible to inherit from that father. If the father accepts the kid before getting married, the acknowledged illegitimate child can inherit the estate. An acknowledged illegitimate child, however, cannot inherit if the recognition is given after the father weds another person.

The standing of a recognized illegitimate kid in this situation is therefore equivalent to that of a legitimate child in a married relationship between the parents. The situation of an unrecognized illegitimate kid, however, is that since the child has no legal connection to either parent, they are unable to inherit from or be inherited by either parent. Illegitimate children do not have inheritance rights under the Civil Code's Article 867,

Paragraph 2, but they do have the right to demand appropriate maintenance, the amount of which is determined by the condition of legitimate heirs and the ability of the father or mother.[1]

Illegitimate offspring may request certification from the Head of State, who will then give it after hearing the Supreme Court's ruling. The Supreme Court has the power to mandate that the applicant's blood relations' evidence be heard before certification is granted and that the certification must also be reported in the national media. The civil registry's birth records must include the certification. If the following conditions were not met when the voluntary recognition of an illegitimate child was made:

1. Through misperception, coercion, or stress;
2. By an underage kid under duress;
3. By an unmarried 18-year-old kid, except during their marriage;
4. without the mother's permission, which will be obtained while the mother is still alive; or
5. By a man who is being watched over.

Nearly 50 million children in Indonesia do not have birth certificates, according to the Indonesian Child Protection Commission (KPAI), for a variety of reasons, including invalid or unregistered marriages or "Siri" weddings. This figure reflects over half of Indonesia's total population of children under the age of five. KPAI is grateful for the Constitutional Court's recent decision to approve a material test application for the marriage law's illegitimate child provision.

The revision of the Marriage Law by the Constitutional Court, in the words of the Chairman of the National Commission for Child Protection, Aris Merdeka Sirait, "would serve as a legitimate legal foundation for increasing advocacy efforts for lawful children outside of marriage to gain their civil rights. As a result, yesterday's ruling by the Constitutional Court acknowledged civil rights that had not previously been recognized by the government. Because of this, their father's name is not shown on their birth certificates. Naturally, this will have an impact on their capacity to pass on their inheritance and prevent them from naming their father, which will be detrimental to their offspring. According to the UN Convention, the state must grant civil recognition—including identification, name, and citizenship—regardless of whether the marriage is genuine. Civil rights, however, are essential and guaranteed by the Constitution.

In addition, the request for judicial review of the Republic of Indonesia Law Number 1 of 1974 on Marriage against the Constitution of the Republic of Indonesia Year 1945 was

decided by Constitutional Court Decision Number 46/PUU-VIII/2010, which decided the constitutional case at the first and final levels.[16]

The Constitutional Court's ruling focuses on the legitimacy of religious teachings in addition to civic needs. The decision guarantees that unmarried children have the same civil rights as their biological dads. The notion that the law must offer equitable legal protection and assurance for the status and rights of children, even those born outside of a recognized marriage, is based on how this clarifies the child's position.

The judgment of the Constitutional Court assures that the kid has civil rights with their biological father as a manifestation of justice and human rights from the standpoint of child protection and constitutional rights to identify, name, and citizenship. As a result, the kid and father are in a civil relationship without the father making any prior declarations.

The ruling by the Constitutional Court further clarifies the topic of inheritance rights for unmarried children. Only recognized and legitimated children born outside of marriage are eligible to inherit, according to the Civil Code. Children born outside of marriage, however, are now accepted as legal and share inheritance rights with their biological fathers thanks to the Constitutional Court's ruling.

In terms of their inheritance rights from their biological dads, children born outside of marriage now have a better position. Children born outside of marriage now feel as though they are entitled to their father's fortune thanks to this Constitutional Court decision. This raises the question of whether the decision may be used to justify partnerships that are not marital and if it is by Articles 1 and 2 of Law No. 1 of 1974 on Marriage.[4]

1. A CHILD'S GUARDIANSHIP APPLICATION IN THE BOJONEGORO RELIGIOUS COURT (Judgment 138/Pdt.P/2017/PA.Bjn Bojonegoro Religious Court)

One of the guardianship issues involving children submitted before the Bojonegoro Religious Court (Decision No. 138/Pdt.P/2017/PA.Bjn of the Bojonegoro Religious Court) stemmed from a couple who were lawfully wed by religious conventions but neglected to file a marriage registration with the government, which made it challenging to put the father's name on their child's birth certificate. So they applied to the court for child guardianship and recognition. According to Constitutional Court Decision No. 46/PUU-VIII/2010, dated February 17, 2012, and Article 43 paragraph 1 of Law No. 1 of 1974, a child born out of wedlock has civil relations with their mother and her family, as well as with the man who can be proven to be their father based on scientific and technological

knowledge and/or other legal means, including blood relations and civil relations with the father. The judge granted their request.[4]

According to Article 7 paragraph 1 of Law Number 23 of 2002, which provides that every child has the right to know their parents and to be raised and fostered by their parents, one of a kid's rights is to know who their parents are.[17] A child born out of wedlock or in an unregistered religious marriage has the right to ask the Religious Court to recognize their parentage as a fundamental right to know and obtain certainty about who their parents are, according to the National Working Meeting of the Supreme Court of the Republic of Indonesia on October 31, 2012.

Based on these circumstances and statutory provisions, the panel of judges concluded that the applicant's application was valid and determined that the kid in question is the legally recognized offspring of both applicants, as indicated in the decision. This application was filed because what is recognized as valid under Islamic law and the Civil Code differs, yet what is recognized as legitimate under the Civil Code is also recognized under Islamic law.[18]

1. AN EXAMINATION OF MARRIAGE AND CUSTODY ARRANGEMENTS FOR CHILDREN BORN OUTSIDE OF WEDLOCK IN INDONESIA UNDER ISLAMIC LAW

1. Islamic Law's definition of marriage in Indonesia

Marriage is one of the noble acts of worship, according to Fiqh, and the procedures that lead up to or after marriage are also subject to rules that have been established by Islamic law. When examined in terms of its meaning, the Arabic phrase "Nikah" denotes "to gather" or "to collect". The "akad" (marriage contract) and the "jima" (marital relations), or the connection between the husband and wife, are two concepts that relate to this phrase. According to Article 2 of the Compilation of Islamic Law, marriage is seen as an act of worship and is characterized in Islamic law as a firm and binding compact, or "akad," or "mitsaqan ghalizhan, to follow and carry out Allah's order.[19]

National law formally recognizes marriage as a practice that joins two people. The Qur'an states in QS ar-Ruum/30:21, "And among His signs is that He created for you mates from among yourselves, that you may dwell in tranquility with them, and He has put love and mercy between your hearts, Verily, in that are signs for those who reflect." This poem emphasizes the value of marriage as a divine act and the importance of the married relationship, which is built on love, mercy, and respect for one another.

1. Indonesian Islamic law's guidelines on what constitutes a legal marriage

Islamic law, or sharia, and legal criteria both have an impact on the conditions for marriage. The four shari'a prerequisites for marriage are as follows:[20]

The terms of the marriage agreement (akad)[21]

1. The conditions for shighah
2. The language used must have two meanings, the ijab and qabul assemblies must be joined, and the acceptance (qabul) must concur with the proposition (ijab) while using clear language and avoiding the use of phrases that indicate the future tense to replace ijab.
3. The conditions for the two contracting parties
4. The ijab and qabul must be heard by both parties and understood by them to have the intention of establishing a marriage relationship based on mutual consent. Both parties must also be of sound mind and maturity.

The following conditions must be met before the two can wed:

1. The husband must be a Muslim.
2. The wife must not be a woman who is prohibited to be married, such as the mother, daughter, sister, paternal or maternal aunt.
3. It is required to marry a woman who is a woman, not a transgender person.

Validity requirements for marriage:

1. The bride must not be prohibited from marrying the groom.
2. Witnesses to the marriage must be present.
3. The verbal declaration (shighah) of the marriage contract must be enduring.

The Marriage Contract Performer's Requirements (Penghulu) It is necessary for the individual who leads the contract to be qualified to carry it out.

1. Every husband and wife must be sane, mature, and free.
2. Every person who performs the contract must have the legal status: as the original party, a representative, or a guardian of one of the two spouses.

Requirements for Luzum (necessity)

1. The person who arranges the marriage must be able to choose a suitable partner, such as a family member or close relative, for someone who cannot make the choice themselves.
2. The husband must be equal to the wife.
3. The dowry must be the appropriate amount.
4. There should be no deception regarding the ability of the husband.
5. The prospective husband must be free from bad qualities that would lead to divorce.

An unmarried kid is referred to as an “anak luar nikah” (illegitimate child) in Indonesian Islamic law. Most scholars of traditional fiqh concur that an illegitimate child has no right to inherit from their father, and the reverse is also true. Imam Shafi’i, as cited by Wahbah Zuhaili, made this claim, equating the status of a child born outside of marriage to that of a child born from a union that is illegal in Islam, with the caveat that the child’s inheritance rights are forfeited to their father and his family because there is no established line of descent between them.[22]

Article 186 of the Compilation of Islamic Law states that an unmarried child’s sole family to whom they are entitled to inherit is their mother and her family. A legitimate kid, according to Article 99 of the Compilation of Islamic Law, is one who:[23]

1. A child who is born as a result of a valid marriage.
2. A kid born to a woman who underwent fertilization outside of the womb According to Compilation of Islamic Law, Article 100, a kid born out of wedlock only has a relationship of lineage with the mother and her family, this child is also known as a child born out of wedlock.

According to Imam Syafi’i and Imam Malik, a child cannot be credited to the man who caused the pregnancy if a man marries a woman who has been divorced or widowed and she gives birth to a kid six months after the marriage (not from the prior relationship). The mother is still regarded as being in her husband’s bed, according to Imam Hanafi, hence the kid’s nasab can be assigned to the husband as a legitimate child.[24]

1. Islamic Law in Indonesia Regarding Extramarital Child Custody

There is no inheritance tie between a biological father and a kid born through adultery, according to Islamic law. The biological father is not regarded as the legal father, as was

previously stressed. In this case, claiming inheritance would be viewed as stealing something that wasn't legitimately theirs. This position has been supported by the Prophet Muhammad, as shown by several Hadiths, such as the one in which Abdullah bin Amr bin Ash stated that the Prophet decided not to be considered the biological father of a child born to a slave he did not own or a child born out of adultery with a free woman. These children would also not inherit from him.[25]

A biological father may use a will to leave a portion of his assets to his biological kid who was born outside of wedlock. The father may specify in his will that his kid A will inherit a particular portion of his money after his departure. Because a will can be given to someone other than an heir, this is legal. Most experts of traditional Islamic law concur that a kid born outside of marriage has no right to inherit from their father and vice versa. The status of a child born in adultery is equal to that of a child conceived through li'an, as stated by Imam Shafi'i and cited by Wahbah Zuhaily, with the caveat that the child is not entitled to any inheritance rights from their father or their father's family since there is no legal lineage between them.

The link between a child conceived outside of marriage and the man who fathered them and his family is seen by the Compilation of Islamic Law as being legally irrelevant, and as a result, there is no inheritance tie between them. A kid born out of wedlock only has a lineal link with their mother and her family according to the Compilation of Islamic Law.

The Compilation of Islamic Law states that a child born out of wedlock is not entitled to lineage rights, maintenance, inheritance, guardianship, or custody from their biological father, but rather from their mother. The fatwa issued by the Indonesian Ulama Council on March 10, 2012, restated the Islamic view of a child born out of adultery and declared, among other things, that:[26]

1. The father of an adultery-based kid is not related to them by blood, marriage, inheritance, or support.
2. Only the mother and her family are related to an adultery-born kid in terms of lineage, inheritance, and upkeep.

A child born outside of marriage has no inheritance rights beyond those of their mother and her family, according to Article 186 of the Compilation of Islamic Law. Islamic law stipulates that upon inheriting an inheritance from their parents, a child comes first in the line of succession. An illegitimate kid is one who was born outside of a couple's union and who only has civil legal contact with their mother and her family. They do not have any legal connections to their father or his family. A child born out of

wedlock, whether male or female, is not considered to have a blood relationship with their father and therefore neither inherits his property nor does he inherit from any of his relatives because there is no legal blood relationship between them.[22] There are three techniques to establish a child's ancestry, specifically:

1. Initially, via a legal marriage. There is no denying that marriage marks the beginning of a lineage tie for children. This is a consensus among all Imam Mazhabs, without exception.
2. Second, by the acknowledgment of lineage or ancestry (*itsbat nasab bil iqrar*). In terms of *fiqh*, this is known as *Ishaq*. A child born out of wedlock as a result of an illegal relationship (*ghairu syari'*) can still be recognized through *istilhaq*, according to some Indonesian Islamic law experts like Abdul Manan, if it is not amply demonstrated that their relationship was illegal (*zina*), such as the absence of four just witnesses.[27]
3. Third, by way of evidence. Islamic law also provides requirements for proving a child's paternal lineage. This approach, also known as *mubaiyyinah* (comparison), is often used and is founded on reliable proof that a kid is connected to their parents. For instance, by examining the similarity between the father and the kid, reinforced by the community's acknowledgment of their ancestry.[22]

According to established Islamic law, the right to inherit must be justified, namely by legitimate marriage. Additionally, the right to inherit will be realized because marriage is one of the requirements for realizing the inheritance. This legal conclusion is supported by several chapters from the Quran, namely verses 11, 12, and 176 of Surah An-Nisa, which deal with inheritance. According to Surah An-Nisa verse 11 of the Qur'an, Allah has ordained for you [Muslims] what [your children's] inheritance should be: to the male, a part equal to that of two females.

According to the interpretation of this passage, the man has larger responsibilities than the female, such as paying the *mahr* (dowry) and supporting the family, which is why he is given twice as much as the female. According to Wahbah Zuhaili's exegesis of the phrase above, "your children" refers to descendants who are qualified to inherit from their father because of their blood link. Islamic law will acknowledge this blood link if it is preceded by a genuine marriage that creates a legal line of lineage. This situation also makes it clear that one legal action will have a qualitative relationship or reciprocity with another, as in the case of a child born outside of wedlock who is denied inheritance rights because of the legal action that forbids or comes before it, namely the act of adultery between his or her parents.

A kid born out of wedlock only has a bond with his or her mother and her family, according to I Kompilasi Hukum Islam, specifically in Article 100. In this regard, it is stated in Book II of the Compilation of Islamic Law's provisions, specifically in Article 171 letter c, that the heirs are those who, at the time of the deceased's death, had a blood or marital relationship with them, were Muslims, and were not otherwise ineligible to inherit.[28]

In Islam, the legality of a marriage is directly tied to the status of a child. Clear status is guaranteed for the kid by a lawful marriage, the birth of a child inside or as a result of a valid marriage, or both. In contrast, the legal formal status of a kid is ambiguous when an invalid marriage or a child is born outside of a lawful marriage.

The status of a kid enables the determination of nasab (lineage), regarding inheritance and guardianship, between the child and their father. Islamic law makes further arrangements even if every kid is technically their father's child because they are biologically born from a man's sperm. If a kid is born during a legal marriage, they are regarded as legitimate and have a nasab relationship with their father. An unmarried kid, also known as a child of adultery or a child born out of wedlock, cannot be deemed legitimate and has a nasab relationship with their mother.[29]

A kid born outside of marriage solely has a familial bond with the mother and her family, according to Article 100 of the Compilation of Islamic Law. Even if the biological father is the individual who caused the woman to get pregnant, the kid cannot be legally assigned to him. While it may seem unjust and imbalanced to throw the responsibility entirely on the mother without also involving the biological father, this clause is thought to protect the integrity of marriage and guard against tainting it.[19]

The legality of a marriage is directly tied to the status of a child under Islamic law. The kid's clear status is guaranteed by a legitimate marriage or by the birth of a child from a valid marriage. On the other hand, a kid's legal status will be unclear if their parents were not married legally or if they were married but had a child outside of that union.

By determining a kid's status, the nasab (paternity) tie between the child and their father may be established, which is important for inheritance and guardianship. Islamic law makes different arrangements even though every kid is naturally born from a man's sperm and ought to belong to their father in the perfect world. If a kid is born from a legal marriage, the child might be thought of as having a lawful connection of nasab with their father. A kid born outside of a lawful marriage, also known as an illegitimate child or a child born outside of a valid marriage, cannot be recognized as a valid child and instead has a nasab connection with their mother.

According to Article 100 of the Islamic Law Compilation, a kid born outside of marriage only has a nasab relationship with their mother and her family. Therefore, even if the father is the guy who caused the lady to get pregnant, the kid cannot be legally assigned to their biological father. Although it may appear unjust to put the responsibility entirely on the mother and exclude the biological father, this clause is thought to maintain the integrity of marriage and prevent any harm to it.

Due to this legal situation, the mother and her family are in charge of meeting the child's requirements and costs. However, as stated in the Islamic Law Compilation, Article 80 (4), for a legitimate kid, the father is required to meet the child's fundamental necessities, such as healthcare and education, by his income, so long as he is still married to the child's mother. The Islamic Law Compilation, Article 19, states that the biological father cannot be legally recognized as the kid's guardian (wali nikah) if the child is a girl and she chooses to marry after reaching age:

1. A woman who wants to get married must have a guardian in the marriage.
2. The guardian must be a guy who complies with Islamic law, meaning he must be a Muslim, sane, and of legal age.
3. Children born outside of marriage are subject to the same legal restrictions as stated above.

If an illegitimate kid is given legal recognition under the Islamic Law Compilation, they are entitled to a sizeable inheritance that is comparable to that of a legitimate child.

4. CONCLUSION AND RECOMMENDATION

Civil law says that a marriage must be registered in order to be valid according to law; this is not just an administrative requirement. This is done in an effort to ensure legal clarity regarding the status of each partner in marriage through the registration of marriages. The act of registering a marriage must be taken seriously because it will lead to the issuance of a marriage certificate, which will serve as proof of the validity of a legal marriage. This is important for realizing the rights of children and wives in the future, especially in terms of inheritance and guardianship. Civil law and Islamic law both stipulate that children who are considered born out of wedlock or children from marriages that are not considered valid can only have a family relationship with their mother and family and are not entitled to inheritance or support from their biological father, nor can he be the guardian of the child.

Seeing some of the things that have been explained from the two existing regulations and the conclusions given, this study suggests the government be more aggressive in providing counseling related to marriage in Indonesia and what the existing regulations are. Because even though the existing regulations are clearly written, the state considers that the community already knows the law when the law is promulgated or ratified. In reality, this situation does not apply; therefore, outreach to the community really needs to be carried out so that the community can really understand the existing law and obey the existing rules.

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