





## Comparison of children's inheritance laws outside marriage in Indonesia with several other countries

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### Abstrak

The rights of a child, both legitimate children and children outside of marriage, should remain protected and prioritized. However, in reality there are still many parents who do not recognize children who have been born outside of marriage. Especially a biological father. This study discusses how the rights of a child outside of marriage and what the legal consequences are obtained. This study concluded that the rights of children out of wedlock in accordance with the provisions of civil law, Islamic law, and customary law states that their rights can be obtained if a child can prove that he is a legitimate descendant of his biological father. The way that can be taken can be in the form of proving through DNA tests and getting recognition from his biological father.

Keywords: children; comparison of law; inheritance; outdoors

## 1. Introduction

The position of the child in the family is important and very meaningful. Children are an investment in the future, and the expectations of their parents in the future. Children are also considered as capital in order to improve in the standard of living so as to control the social status of parents. Children inherit the signs of similarities with their parents, including characteristics, both good and bad, tall or low. Marriage is an important event in human life that causes legal consequences both on the relationship between the party that is carrying out the marriage itself, as well as with other parties who have certain interests (Faizal, 2016). If the marriage is born a child, then a legal relationship arises between the child and his parents. As citizens every child has the right to grow in accordance with his nature as a creature of God. Children have the right to get education, care, briefing so that they become adults (Wardana, 2016).

On January 2, 1974, Law Number 1 of 1974 was ratified concerning Marriage. With the enactment of the law, there is no more law governing marriages outside of this law or in other words since the passing of Law Number 1 of 1974 concerning Marriage Ends in the dualism of marriage law and the unification of marriage law has been achieved. In Chapter IX Law Number 1 of 1974 concerning Marriage regulates the position of children in the family where in Article 42 states that: "Legitimate children are children born in or as a result of legal marriages". Furthermore, in the provisions of Article 43 paragraph (1) of Law

Number 1 of 1974 concerning Marriage states that: "The child born outside of marriage only has a civil relationship with his mother and his mother's family" (Maramis, 2017).

The legitimate child occupies the highest and most perfect position in the eyes of the law compared to children in other groups, because the legitimate child holds all the rights granted by the law, including the highest inheritance among other heirs, social rights where he will get an honorable status in the midst of the environment of society, the right of aligning, the right to get the father of father in the birth certificate and other rights (Lamara, 2021). Children outside of marriage are children who do not have a perfect position like a legitimate child (Pratiwi et al., 2020). It is said that children outside of marriage, because their origins are not based on a legitimate relationship, namely the relationship between father and mother, who as husband and wife are obliged to maintain and educate children born from their marriage or by them to their adoptive children. In the law of Western inheritance, adultery and donations, children outside of marriage do not have a legal position at all, because the law has closed any opportunity for them to get more rights than just getting a living.

The recognition of the child that has been done by biological parents not only results in the emergence of inheritance rights for the child to his father or mother, but can also cause inheritance for the father or mother to the child if the child dies first than his father and mother (Sedy, 2019). Lately in society there are many cases of children born outside of marriage. Indonesia itself applies 3 legal systems in the case of giving inheritance to the first child is the law of inheritance according to Islam, the law of civil inheritance, and customary inheritance law. This research will focus on seeing the comparison between the three legal norms of inheritance and comparing with several other countries. Based on the description above, the problem is formulated, namely what is the difference in the right of inheritance of children outside of marriage in Indonesia and in several other countries and what are the legal consequences caused if the child is born from an invalid marriage.

## 2. Methods

The method used in this writing is a normative juridical writing method, which is in the form of library research, which is a writing method used by studying literature books, statutory regulations. This writing uses a systematic and directed method by using law as a legal basis as well as guidelines for analysis. The whole series of writing activities is basically aimed at collecting legal material, then the material is processed and associated with legal concepts, and the results obtained are outlined in the form of juridical thought. Data for this writing is obtained through primary legal materials legislation, and secondary legal material, which is in the form of textbooks by legal experts.

## 3. Result and Discussion

### 3.1. *The Inheritance of an Outside Marriage Child according to Indonesian Law*

#### 3.1.1. *Civil Law*

Inheritance law or inheritance according to civil law is the law of wealth in the family environment, because of someone's death there will be a transfer of assets left by the dead and the result of this transfer for those who obtain it, both in the relationship between them and third parties. The law of inheritance is a set of legal rules governing the heirs who have the right to inherit the inheritance of the dead, how the position of the heirs, how many acquisitions are fair and perfect.

The legal basis of inheritance is as formulated in Article 830 of the Civil Code, namely inheritance only takes place because of death, the understanding that can be understood from the short sentence is that if someone dies, then all their rights and obligations switch or move to the heirs. So in this case inheritance will occur, if the fulfillment of three requirements, namely there are someone who dies, there are people who are still living as heirs who will get an inheritance when the heir dies and there are a number of wealth left by the heir.

Regarding the inheritance of children outside of marriage is regulated in Article 862 s.d. Article 866 of the Civil Code (Angelin et al., 2021). If the dead leaves a legitimate

descendant or a husband or wife, then the children outside the marriage inherit 1/3 part of the part they should have received if they are legitimate children (Article 863 of the Civil Code). If those who die do not leave offspring or husband or wife, but leave the family in blood, in a line up (mother, father, grandmother, etc.) or brothers and sisters or descendants, then the recognized children inherited 1/ 2 of the inheritance. However, if there are only brothers in a further degree, then the recognized children get 3/4 (Article 863 of the Civil Code). The outer marriage part of the marriage must be given first. Then the rest is only divided between legitimate inheritance (Article 864 of the Civil Code). If those who die do not leave the legitimate heirs, then they get the entire inheritance (Article 865 of the Civil Code). If the child outside the marriage dies first, then he can be replaced by his children (legitimate) (Article 866 of the Civil Code).

### 3.1.2. Islamic Law

Islamic law defines that a person can be said to be an outdoor child or an outside child of marriage if the process that results in the child becomes from an adultery that is prohibited by Islamic law, whether the act can be proven or not. If the act can be proven, then the provision of Islamic law determines that the child does not have a relationship with his father. Nasab is one of the strong foundations that support the establishment of a family, because Nasab is binding between family members with blood ties. In this case, the child is part of the father. Once the importance of a nasab, the nasab is one of five sharia maqashids. Wahbah Zuhaili said that a child's nasab against his mother could still be recognized from every side of birth, both sharia or not. The nasab of a child with his father can only be recognized by the existence of authentic or fasid marriage, or wathi 'syubhat (vague intercourse with legal status), or recognition of the nasab itself, in Islam is often referred to as istilhaq (reinforcing a child). Then he added that Islam had erased customary law that applies in the time of ignorance of the nasab of adultery.

Basically the child's relationship with the man who is the man who and his family in the field of family law is deemed non-existent, so that in this case there is no inheritance between the two this is adopted both in the compilation of Islamic law and the Civil Code. This encourages lawmakers, especially the Civil Code, made a recognition institution, which causes legal consequences for the child, including in this case the inheritance of the recognized external marriage child. However, the problem actually arises if the father is not willing to recognize his child, how the legal protection of the child. In the compilation of Islamic law it is stated that the child born outside of a legal marriage only has a nasab with the mother and family of his mother (Article 100 KHI), so that the child outside the marriage is only inheriting from the mother and family of his mother (Article 186 KHI) ([Hartanto, 2017](#)).

This also applies to siri marriage because in principle every marriage must be registered/recorded (Article 5 paragraph 1 KHI). There are differences and similarities regarding the status of the inheritance rights of the outside marriage. Both the compilation of Islamic law and civil law each have advantages and disadvantages in terms of regulation regarding children outside of marriage ([Lubis, 2019](#)).

However, basically the compilation of Islamic law still provides more legal protection to the child. For regulatory and law enforcement makers, both in the compilation of Islamic law and civil law should renew the regulations so that more assertive provisions are produced regarding the recognition of children outside of marriage which also affect the legal certainty regarding the inheritance.

The position of an outside marriage child in Islamic law initially had equality with the marriage law, which was only caused to the mother and relatives of their mothers, but after the cancellation of Article 43 of the Marriage Law by the Constitutional Court there was a difference between Islamic law and the marriage law, namely Islamic law In accordance with the Qur'an and Hadith still invade children outside of marriage to mothers and relatives while in the marriage law can be caused to his father as long as there is proof based on technology that the child has a genetic relationship with a man.

### 3.1.3. Customary Law

Customary Law is: "Rules of behavior that apply to native people and foreign Eastern people, which are positive, which on the one hand have sanctions, therefore "Law" and on the other hand, if they are not codified, therefore "Custom" (Putra et al, 2020). In the definition above, there are at least three characteristics possessed by Customary Law, namely: Positive, meaning that the law is declared officially valid at a certain time and place (namely here and now), has sanctions, meaning there are reactions/consequences from other parties for violations of a legal norm (including Customary Law), Codification, meaning the systematic recording of a certain area/field/field of law as a whole, complete and complete unit.

According to customary law, in general in Indonesia marriage is not only meant as a civil engagement but also a customary engagement and at the same time a kinship and kinship engagement. So the occurrence of a marriage bond does not only have consequences for civil relations, such as the rights and obligations of husband and wife, joint assets, position of children, rights and obligations of parents, but also concerns customary relationships, family inheritance, and kinship and neighborhood as well as regarding traditional and religious ceremonies. Likewise, it concerns the obligation to obey religious commands and prohibitions, both in human relations with God (worship) and human relations with humans (mu'amalah) in social life in order to be safe in this world and safe in the Hereafter.

Traditional inheritance law is actually the law of passing on assets from one generation to their descendants. In this case, it can be seen how traditional law experts in the past thought about customary inheritance law. Customary inheritance law has its own characteristics and characteristics that are unique to Indonesia, which are different from Islamic law and western law (Wahyuni, 2006). Because the difference lies in the natural background of the thoughts of the Indonesian people who have the Pancasila philosophy and a society that is diverse and diverse. This background is basically a life together that is mutually helpful in order to create harmony, harmony and peace in life. Customary inheritance law in Indonesia cannot be separated from the influence of different kinship community structures. As Hazairin said: "Customary inheritance law has its own style from the traditional mind of society with forms of kinship whose descent systems are patrilineal, matrilineal, parental or bilateral, although the same form of kinship does not necessarily apply to the same inheritance system."

Customary inheritance law does not recognize the principle of "legitieme portie" or absolute share as in western inheritance law where for heirs the inheritance rights for certain parts of the inheritance are determined as regulated in article 913 of the Civil Code or in the Al-Qur'an Surah AnNisa'. Customary inheritance law does not recognize the right of heirs to demand at any time that inherited assets be distributed to the heirs as stated in the second paragraph of article 1066 of the Civil Code or also according to Islamic law. However, if the heir has needs or interests, while he is entitled to inheritance, then he can submit his request to be able to use the inherited assets by deliberating and reaching an agreement with the other heirs.

The most important heir in the customary law concept is one's own biological children (Aoslavia, 2021). With this biological child, other family members are closed to becoming heirs. In customary law communities, especially in matters of inheritance to illegitimate children, each region has its own regulations. Regarding the distribution according to the Supreme Court Decision dated November 1, 1961 Reg. No. 179 K/Sip/61, the daughter and son of a joint heir are entitled to inheritance in the sense that the son's share is the same as that of the daughter.

The inheritance rights of illegitimate children in customary law vary in each region in Indonesia. This is because customary law is law that originates from the customs of the people in a particular area and is unwritten so that determining inheritance rights, including the inheritance rights of illegitimate children according to customary law can be said to be quite difficult because of the differences in customs from each region. which has legal force that is not globally or universally binding because it only applies within a community in a

region that uses one of the kinship systems adopted by customary law. This turns out to make it difficult for judges in court when they find cases of disputes regarding customary inheritance related to illegitimate children. Therefore, several judges who handled the case issued decisions that could be said to be universal and could be used as consideration by other judges in deciding disputes regarding customary inheritance related to illegitimate children.

The following are several cases that have been decided by judges. The first is the case decided in the Supreme Court Jurisprudence Number 179/K/SIP/1960 dated 23 October 1961: this jurisprudence states that the inheritance rights of illegitimate children and legitimate children must be the same. Furthermore, Supreme Court Jurisprudence Number 415/K/SIP/1970 dated 30 June 1971 was heard in the area of customary law in the Padang area, North Sumatra, stating that the position of legitimate children and illegitimate children regarding the inheritance of their parents is different. In the Tapanuli area, granting and handing over inheritance rights to an illegitimate child is a "handover". The decision of the Supreme Court dated 18 March 1959, which stated that according to customary law in force in Central Java, illegitimate children are only permitted to inherit gono gini assets (joint assets from their biological father's family), while illegitimate children's inheritance (original goods) are not entitled to inherit them, Supreme Court jurisprudence Number 1037/K/SIP/1971 dated 31 July 1973 explains customary law in Pematang Siantar, North Sumatra, regarding the position of illegitimate children regarding the inheritance of their parents, in this case heirs who have died leaving behind an illegitimate child, then this illegitimate child is the sole heir and is entitled to the property he left behind.

### *3.2. Inheritance Rights of Children Outside of Marriage in Several Countries*

Love and support for children born out of wedlock is very rare but it is important to know that other rights even given by the government of a country can be said to always be fair. This happens because every country will always ensure that every citizen has the same rights and that there are no violations of their human rights.

#### *3.2.1. Texas America*

In Texas, until 1991, illegitimate or illegitimate children were not entitled to inheritance from their parents (Ray, n.d.). In 1991, the Texas Supreme Court, following a US Supreme Court decision, stated that the law would not confer inheritance rights on illegitimate children. However, this was declared to violate the US constitution. Texas law provides that inheritance rights will pass to illegitimate children if the child's father and mother marry after the child is born. This law has undergone several changes. The purpose of this change is so that a child still gets his rights before the child dies.

If an illegitimate child can prove that he is the biological child of his father, the child must have the same inheritance rights as a legitimate child. However, there will be problems if a child is not recognized by his father while his father is still alive. This can happen if during his lifetime the father did not know that he had a child from another woman. It can also occur when a father denies that he is the father but no paternity suit is ever filed. What illegitimate children in Texas can do if they encounter problems like this is to file a petition with the court. Illegitimate children can ask a judge to determine their paternity and inheritance rights. The statute of limitations requires that children must petition the court within a certain time limit after the death of a parent.

#### *3.2.2. Philippines*

Based on the latest amendment to the Philippine government's law called Code Reville, it is stated that illegitimate children are allowed to use their father's surname with the following provisions: Firstly, a father who has an illegitimate child can expressly recognize his illegitimate child by including his name on the child's birth certificate. secondly another option is to acknowledge their filiation which can be done by the father either in a public document in notarial brackets or a private handwritten instrument thirdly recognition of

biological children or children of unwed mothers can only be done during the lifetime of the alleged parents except in special cases.

If a mother knows the father of the child then one of the parents of the child or the mother can certainly claim legal and financial support for their illegitimate children according to the provisions of the family code or according to the laws of the Philippine government the law says that Children whose parents are not married can receive child support until the age of majority in the Philippines, namely 18 years. An illegitimate child is entitled to a certain share of his father's assets under certain conditions, but an illegitimate child can only inherit a portion of his father's assets which is equivalent to half of the legitimate child's inheritance.

According to Philippine law an illegitimate child can file a petition to establish his affiliation with his father by using evidence such as photographs, letters and testimonies of people he can prove that the father has recognized him as his biological child he may also use DNA testing to prove the child's affiliation in Extramarital marriage is a serious social problem although some people may say that they do not need a man in fact all children need a father this is not only for financial support but for the balanced development of the child's personality.

### *3.3. Inheritance Rights of Children Outside of Marriage in Several Countries*

The legal consequences obtained by children born out of wedlock are that the child will not inherit property from his father if the child is not recognized by the father (Susanti, 2013). If the child can prove that he is the child of his father, the child can fight for his rights by going to court. Proof that can be done is by, for example, carrying out a DNA test. This test can prove that the child is the biological child of the father.

The legal consequences of illegitimate children according to statutory regulations are only limited to the legal relationship to the mother and the mother's family, while the father and all his rights from the father's side cannot be obtained (Edyar, 2016). Legal protection for illegitimate children in Indonesia includes; 1) protection carried out by the state, namely through the Child Protection Law, 2) protection through validation and recognition, and 3) scientific proof of biological paternity through DNA testing. Because the legal consequences of having an illegitimate child have a very detrimental impact on the child's rights towards his or her biological father, it would be unfair if this risk were only borne by the child.

## **4. Conclusion**

The rights of children outside of marriage are very limited. Their rights will be obtained if they succeed in fighting in front of the court and get recognition from their biological father. According to the civil law a child must be able to prove that they are legitimate children through technological sophistication such as DNA tests to get their rights. However, according to Islamic law, a child born outside of marriage remains officially dated to his mother. This is because the child is not a legitimate child in Islamic law. Meanwhile, according to customary law. Customary law between one region with other regions has different habits. However, in general everything still prioritizes the rights of the child.

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**References**

- Angelin, M. S. R., Putri, F. D., & Sanduan, A. P. (2021). Dilema Hak Mewaris Anak Luar Kawin Dalam Persepektif Hukum Perdata. *Jurnal Hukum Magnum Opus*, 4(2).  
<https://jurnal.untag-sby.ac.id/index.php/Magnumopus/article/view/5440/3883>
- Aoslavia, C. (2021). Perbandingan Hukum Waris Adat Minangkabau Sumatera Barat Dan Hukum Perdata Barat. *Mizan: Jurnal Ilmu Hukum*, 10(1), 54–63.  
<https://ejournal.uniska-kediri.ac.id/index.php/Mizan/article/view/1545/1163>
- Edyar, B. (2016). Status Anak Luar Nikah Menurut Hukum Positif dan Hukum Islam Pasca Keluarnya Putusan MK Tentang Uji Materiil Undang Undang Perkawinan. *Jurnal Ilmu Hukum Islam*, 1(2), 181–200.  
<http://journal.iaincurup.ac.id/index.php/alistinbath/article/view/115/63>
- Faizal, L. (2016). Akibat Hukum Pencatatan Perkawinan. *Asas: Jurnal Hukum Ekonomi Syariah*, 8(2), 58–66.  
<http://ejournal.radenintan.ac.id/index.php/asas/article/view/1247/987>
- Hartanto, J. A. (2017). Hak Waris Anak Luar Kawin Pasca Putusan Mahkamah Konstitusi. <https://books.google.com/books?hl=en&lr=&id=PkXYDwAAQBAJ&oi=fnd&pg=PA1&dq=konstitusi&ots=Hl3lXNs3Ve&sig=rr3lZT700tvAPCPgZNsJRg4zQWQ>
- Lamara, R. (2021). Tinjauan Fatwa Mui Nomor 11 Tahun 2012 Tentang Kedudukan Anak Hasil Zina dan Perlakuan Terhadapnya (Studi Kasus Penelantaran Anak di Kecamatan Wayhalim Kota Bandar Lampung). Universitas Islam Negeri Raden Intan Lampung.  
<http://repository.radenintan.ac.id/16432/1/SKRIPSI%201-2.pdf>
- Lubis, M. L. (2019). Hak Waris Anak Luar Kawin Berdasarkan Kompilasi Hukum Islam Dan Kitab Undang-Undang Hukum Perdata, Setelah Keluarnya Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010. *Jurnal Civil Law*, 1.  
<http://download.garuda.kemdikbud.go.id/article.php?article=1427469&val=4116&title=HAK%20WARIS%20ANAK%20LUAR%20KAWIN%20BERDASARKAN%20KOMPILASI%20HUKUM%20ISLAM%20DAN%20KITAB%20UNDANG-UNDANG%20HUKUM%20PERDATA%20SETELAH%20KELUARNYA%20PUTUSAN%20MAHKAMAH%20KONSTITUSI%20NOMOR%2046PUU-VIII2010>
- Maramis, F. M. (2017). Hak Mewaris Anak di Luar Perkawinan Menurut Sistem Hukum di Indonesia. *Lex Crimen*, VI(4), 119–126.  
<https://ejournal.unsrat.ac.id/v3/index.php/lexcrimen/article/view/16446/15943>
- Pratiwi, L. P. P. I., Mangku, D. G. S., & Yuliantini, N. P. R. (2020). Pengaturan terhadap Kedudukan Anak di Luar Kawin Pasca Putusan Mahkamah Konstitusi Nomor 46/puu-viii/2010. *Jurnal Komunitas Yustisia*, 3(1), 13–24.  
<https://ejournal.undiksha.ac.id/index.php/jatayu/article/view/28831/16326>
- Putra, I. G. N. B. P., Budiono, A. R., & Susilo, H. (2020). Hak Mewaris Anak Luar Kawin Berdasarkan Pengangkatan Oleh Kakeknya Menurut Hukum Waris Adat Bali. *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan*, 5(1), 75–84.  
<http://journal2.um.ac.id/index.php/jppk/article/view/10322/6101>
- Ray, R. (n.d.). Inheritance Rights of Illegitimate Children. Retrieved November 17, 2022, from <https://www.texasinheritance.com/inheritance-rights-of-illegitimate-children/>
- Sendy, B. (2019). Hak yang Diperoleh Anak dari Perkawinan Tidak Dicatat. *Jurnal Hukum Responsif*, 7(7), 1–13.  
<https://jurnal.pancabudi.ac.id/index.php/hukumresponsif/article/view/486/458>
- Susanti, A. D. (2013). Tinjauan Yuridis Mengenai Kedudukan dan Pembinaan Anak Luar

- Kawin Dilihat dari Segi Hukum Perdata. *Jurnal Ilmu Hukum Legal Opinion*, 1(4), 1–9.  
<https://media.neliti.com/media/publications/148221-ID-tinjauan-yuridis-mengenai-kedudukan-dan.pdf>
- Wahyuni, S. (2006). Kedudukan Anak Luar Kawin Menurut Hukum Waris Adat Di Kecamatan Boyolali Kabupaten Boyolali. Universitas Diponegoro.  
<https://core.ac.uk/download/pdf/11715371.pdf>
- Wardana, A. A. (2016). Pengakuan Anak di Luar Nikah: Tinjauan Yuridis tentang Status Anak di Luar Nikah. *Jurisprudence*, 6(2), 162.  
<https://doi.org/10.23917/jurisprudence.v6i2.3013>