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## **Legal Protection Efforts for Children Resulted from Adultery through Obligatory Wills According to the Fatwa of the Indonesian Ulema Council (MUI) Number 11 of 2012**

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### **Abstract**

The decision of the Constitutional Court (MK) No.46/PUU/VIII/2010 has caused controversy among Islamic jurists and also practitioners of Islamic law in Indonesia, some accept it and some reject it. It is feared that this is a way of legalizing adultery and violating the Shari'ah by assigning a child out of wedlock to his biological father. The Indonesian Ulema Council (MUI) responded by issuing Fatwa No.11 of 2012. In this fatwa, children resulting from adultery have no family ties, marriage guardians, inheritance

and maintenance while the rights that must be given by his biological father are in the form of growth and development costs to meet his needs and a mandatory will as compensation for the absence of an heir. Thus, the Fatwa Commission of the MUI has certain legal protection reasons in granting the obligatory will. The main problems of the research are the legal protection efforts for children resulting from adultery through a mandatory will according to the results of the MUI Fatwa No.11 of 2012.

**Keywords:** Legal Protection, Children from Adultery, Obligatory Wills

### **1. Introduction**

The problem of dividing inheritance in Islamic law is one of the studies that is specifically discussed, namely in the jurisprudence of the roses.<sup>1</sup> The need to be discussed specifically in a separate jurisprudence, intended to prevent disputes between family members (fellow heirs) regarding inherited assets (relics of family members who died).<sup>2</sup> So that later in the distribution of inheritance no one will be harmed (let alone tyrannized), because after all the heirs are all members of the family. Don't because of inheritance problems, fellow family members become divorced, not united, don't get along and so on. Fellow family members should be able to live happily, safely and peacefully, because an eternal family will only be realized if there is mutual understanding, mutual respect and cooperation within the family.<sup>3</sup>

In Islamic law there are three things that cause mutual inheritance, namely al-qarabah, or lineage ties, al-musharahah or marital relations and al-wala' or freeing slaves, if the three elements above are fulfilled then mutual inheritance relations can occur, then permits the distribution of inheritance by taking into account the pillars of inheritance.<sup>4</sup>

There are three pillars of inheritance distribution, namely:<sup>5</sup>

1. Al-Muwarriith, namely the person who inherited his inheritance or the person who inherited his property. The condition is that al-Muwarriith really has died, whether he died intrinsically, juridically (hukmi) or in an approximate sense.
2. Al-Warith or heirs. heirs are people who have family or kinship relations either because of blood relations, marital relations (semenda), or because of the result of freeing slaves. With the condition that when Al-Muwarriith dies, Al-Warith is really still alive. Included in this definition is a baby who is still in the womb (al-hamli). Even if it is a fetus, if it can be ascertained that it is alive, through movement (contraction) or other means, then the said fetus has the right to inherit.

<sup>1</sup> Ahmad Warson al- Munawir, *kamus al- Munawir*, Pondok Pesantren al- Munawir, 1984, hlm. 1655.

<sup>2</sup> Ahmad Azhar Basyir, *Hukum Waris Islam*, UII Press, Semarang, 2014, hlm. 3.

<sup>3</sup> Darmawan, Suhaimi, Muhammad Natsir, T. Rasyidin, Mustakim, Relative Competence of the Sharia Court: Talaq Divorce Lawsuit and Protection of Women's Rights, *Samarah: Jurnal Hukum Keluarga dan Hukum Islam*. 2023; 7(1): 85.

<sup>4</sup> A. Rofiq, *Hukum Islam di Indonesia*, Raja Grafindo Persada, Jakarta, 2012, hlm. 398- 402.

<sup>5</sup> Ahmad Rofiq, *Fiqh Mawaris*, Raja Grafindo Persada, Jakarta, 2012, hlm. 28-30.

3. Al-Mauruth or al-mirath, namely the inheritance of the deceased after issuing or paying expenses, such as managing the body, paying debts (if Al-Mirath has a debt) and carrying out a will (if Al-Mirath has a will).

Adultery children in the perspective of Islamic law are children born outside of legal marriage or born from an act of adultery, where there has been a relationship between the male and female genitals without a valid marriage bond, even though later the child is born in a legal marriage. This legal marriage can take place with a man who has committed adultery or another man who is not a man who has committed adultery.<sup>6</sup> So, the existence of sexual relations between men and women in question is in the form of entering the male genitals into the female genitals and releasing sperm, so that they become children.<sup>7</sup>

The fiqh scholars have different opinions regarding inheritance for children born as a result of adultery, in general the opinions of the fiqh scholars can be grouped into three opinions as follows:

The fiqh scholars have different opinions regarding inheritance for adultery children or those born as a result of adultery. In general, the opinions of fiqh scholars can be grouped into three opinions as follows:

1. The first opinion, namely the mother can inherit a fixed share, the mother's siblings also inherit a fixed share and the rest is returned to them, according to those who argue that there is a return (al-radd). Based on this opinion, the child cannot inherit from other people and other people cannot inherit from him in the same way asabah based on al-ukhuwwah or al-umumah.<sup>8</sup> The fiqh scholars who belong to this first group make the hadith narrated by Sahl bin Sa'du as the argument "Sunnah stipulates that a li'an child can inherit from his mother and his mother can inherit from him the portion that has been determined by Allah SWT."<sup>9</sup>
2. The second opinion, namely in a history from Ibn Mas'ud, Ibn Umar also held a similar opinion with this second opinion. This opinion was also held by great scholars from the tabi'in circle, such as 'Atha, Mujahid, an-Nakha'i, and asy-Sya'bi. The hadith that was used as the argument by scholars who held this opinion was the words of Rasulullah SAW when answering a question regarding this matter, "His ashabah is his mother's ashabah", according to As-Syaukani when explaining this opinion the mother gets her share, then for the mother's ashabah sequentially. This distribution is carried out, if there is no other person besides the mother and relatives, for example the deceased's son or wife has a son or wife, they are entitled to inheritance according to their share in matters of inheritance. According to this school of thought, if a child born as a

result of adultery or li'an dies leaving his wife, daughter and mother's siblings, then the wife gets 1/8 which becomes her permanent share (fardh), the daughter gets 1/2 as a fixed share, and siblings get the rest as ashabah, then if a li'an child dies, leaving the mother and maternal uncle, the mother gets 1/3 and the maternal uncle gets 2/3 as ashabah.

3. The third opinion is that there is a difference of opinion between this school and the previous one. In the second opinion, it is explained that the ashabah of li'an children and children born as a result of adultery are those who become the ashabah of their mother. If the mother lives, she can take her fixed share (fardh) and the rest is taken by her mother's ashabah. Meanwhile, this third opinion accepts those who become the guardians of their mothers as the guardians of li'an children and children born as a result of adultery, provided that the mother is absent or dies. If the mother is present, the mother is the ashabah, or in other words, the mother will take all the inheritance of the li'an children and children born as a result of adultery.

Consistent with the views of scholars regarding the inheritance rights of children of adultery, Article 100 of the Compendium of Islamic Law (KHI) stipulates that a child born out of wedlock is related only to his mother and his family; the existence of a child born out of wedlock is considered as a child born of adultery of parents under Sharia law. Decision MK No. 46/PUU-VIII/2010 of Monday, February 13, 2012 explicitly includes efforts to protect the rights of children born out of wedlock in Indonesia. This decision was issued on an application for review of the law submitted by Machicha Mochtar and his son Muhammad Iqbal, who asked for legal recognition of the position of his children who were born out of wedlock so that they have the same legal status as legitimate children in general, including protection of their civil rights.

In one of its judgments, the MK Judicial Panel held that under Section 43(1) of the Marriage Act, "a child born out of wedlock has a civil relationship with his mother and her family, and with the man who is the father, which relationship can be established on the basis of scientific evidence, technology and/or other evidence prescribed by law, and a blood relationship, including a civil relationship, with her father's family."<sup>10</sup>

The MK No.46/PUU-VIII/2010 was colored by controversy, some accepted it and some rejected it because they were afraid it would be a way to legalize adultery and violated the Shari'a by imposing children out of wedlock on their fathers, even the MUI issued Fatwa No.11 of 2012 concerning the Status of Children resulting from adultery and their treatment, in the fatwa children resulting from adultery have no family ties, marriage guardian, inheritance and subsistence, while children's rights what must be given by the biological father is the cost of growing up the child until he reaches adulthood. Apart from that, children out of wedlock are not entitled to inheritance and guardianship rights in marriage (if female) as compensation for the absence of inheritance, the MUI imposes a father's obligation to provide obligatory wills for children out of

<sup>6</sup> Amir Syarifuddin, *Hukum Kewarisan Islam*, Kencana, Jakarta, 2004, hlm. 148.

<sup>7</sup> Siti Farahsyah Addurunnafis, Rizanizarli, Suhaimi, Termination of Investigation by Investigators of the Crime of Sexual Intercourse Against Children: A Study in the Pidie Jaya Resort Police Jurisdiction, *International Journal of Advanced Multidisciplinary Research and Studies*. 2022; 2(6): 1191.

<sup>8</sup> Fathur Rohman, *Ilmu Waris*, Al-Ma'arif, Bandung, 1971, hlm. 222

<sup>9</sup> Imam Muhammad bin Ali Asy Syaukani, *Nayl al-authar Juz IV*, Dar Ibn Jauzi, tt, hlm. 184.

<sup>10</sup> Ahmad Farahi, *Keadilan Bagi Anak Luar Kawin Dalam Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010*, Jurnal Hukum dan Syari'ah De Jure, Vol. 8, No. 2, 2016, hlm. 74.

wedlock.<sup>11</sup> So it is interesting to study and analyze related to legal protection and implementation of the fatwa related to the obligation of biological fathers to provide obligatory wills as a form of compensation for inheritance to their children from the proceeds of adultery.

## 2. Research Methods

This research falls under the umbrella of normative legal studies, also known as pedagogy, library research, or literature research. It is called theoretical research because this kind of research is done only on the basis of written rules or other materials. It is also known as library research or document research because this research is mostly done on secondary data in libraries, such as books and official government documents. This normative research is jurisprudence research.

The method adopted in this study is the legislative method, that is, the research and analysis of all laws and regulations related to the legal issues involved. Then, a conceptual approach is adopted if the researcher does not deviate from existing legal rules. This happens because there is no or no legal regulation on the issue at hand. In developing this concept, the researchers didn't just dream and look for fantasies, but first he must depart from the views and doctrines that have developed in the science of law.

## 3. Result and Discussion

Children resulting from adultery in Islamic law are children born not because of a legal marriage relationship. Children of adultery are not considered as children of men who have intercourse with their mothers, even though these men later marry their mothers. Children born due to relationships without marriage are called *walad ghairu syar'i* (illegitimate children).<sup>12</sup> According to Article 100 of the KHI which reads "a child born out of wedlock only has a family relationship with his mother and his mother's family"<sup>13</sup>

The child of adultery in Islamic law must be seen and studied in its entirety, not only stopping at the act of adultery committed by both parents, the act of adultery committed by both parents, the act of adultery is a heinous act and a grave sin, it cannot be denied, defended, denied, etc. so on, but it is not fair if it is borne only by children.<sup>14</sup> Islam as a religion that is a blessing to the universe does strictly regulate people who commit adultery which is mentioned in the Qur'an in Q.S. An-Nur verse (2) which means as follows: "The female adulterer and the male adulterer, lash each of them a hundred times and do not feel compassion for both of them preventing you from (carrying out) the religion (law) of Allah if you believe God and the Hereafter. Let the (implementation of) punishment upon them be witnessed by some of the believers".<sup>15</sup>

It has been very strict about the rules for adultery, but this cannot be equated with the status of a child who is born later or a child who has not yet been born or is in the womb the

result of adultery cannot be limited in his rights because children also have the same position before Allah SWT, State and Law. This is inherent in every person which is a gift from Allah SWT and if this right is not fulfilled then this is contrary to existing law and even violates its nature.

Society's views regarding children resulting from adultery are always bad, even to the extent that there is the term "illegitimate child" for children born as a result of adultery, but in essence this is not in line with Q.S. Al-Hujurat verse (13) which means as follows: "O people, indeed We have created you from a male and a female. Then We made you peoples and tribes so that you might know one another. Verily the most noble of you in the sight of Allah is the most pious of you. Verily, Allah is All-Knowing, All-Seeing."<sup>16</sup>

From the explanation above, it can be seen that Allah SWT created humans only to differ in their level of piety, not to their social status, and sins for adulterers are also not passed on to their children, with regard to sin, human sins cannot be borne by other humans as explained in Q.S. Al-An'am verse (164) which means as follows: "Say (Prophet Muhammad), "Do I (should) seek a god other than Allah, even though He is the Lord of all things. Everyone who commits a sin, he himself will be responsible. One person will not carry the burden of another's sins. Then, to your Lord you will return, and He will tell you what you used to dispute."<sup>17</sup>

Under Islamic law, children born of adultery, also known as children born of an illegitimate marriage, not have the same rights as other children, especially the right to receive a share of the estate from their parents. Article 186 of the "General Principles of Civil Law" stipulates: "A child born out of wedlock has a mutual inheritance relationship with his mother." The interpretation of this article shows that, as the biological father of a child born out of wedlock, a man has no obligation to grant his child the right of inheritance.<sup>18</sup> Discussion of children born out of wedlock has once again become a hot topic in mainstream society following the issuance of MK Decision No.46/PUU-VIII/2010, which affirmed that Article 43(2) of the Marriage Act that "children born out of wedlock have only a civil relationship with their mother and their family" is in violation of the 1945 Constitution, as this provision has been interpreted as excluding civil relationships with men that can be proven through scientific techniques and/or technology. other evidence. This paragraph must be read if the law determines that he is related by blood to his father. The paragraph must read: "A child born out of wedlock has a civil relationship with his mother and father that can be legally established based on scientific technology and/or other evidence, and has a blood relationship, including civil relationship, with his father's family."<sup>19</sup>

One of the judges of the MK, Akil Mochtar, argued that the decision should not be read as a justification for extramarital relations and not contradictory to Articles 1 and 2 of Law No.1 of 1974. As for those related to inheritance, for example, civil rights cannot be realized. in the form of the concept of Islamic inheritance, but in other forms such as

<sup>11</sup> *Ibid*, hlm. 80.

<sup>12</sup> Amir Husein Nasution, *Hukum Kewarisan*, Cet-2, Rajawali Pers, Jakarta, 2012, hlm. 189.

<sup>13</sup> Kompilasi Hukum Islam pasal 100.

<sup>14</sup> A. Malthuf Siroj, *Analisis Hukum Terhadap Kedudukan Ahli Waris Pengganti, Anak Hasil Zina Dan Anak Hasil Luar Nikah*, TRILOGI: Jurnal Ilmu Teknologi, Kesehatan dan Humaniora, Vol. 3, No. 1, Januari-April 2022, hlm 42.

<sup>15</sup> Q.S. An-Nuur (24): 2.

<sup>16</sup> Q. S. Al-Hujurat (49): 13.

<sup>17</sup> Q. S. Al-An'am (6): 164.

<sup>18</sup> Kompilasi Hukum Islam pasal 186.

<sup>19</sup> Ahmad Farahi, *Keadilan Bagi Anak Luar Kawin Dalam Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII//2010*, Jurnal Hukum dan Syari'ah De Jure, Vol. 8, No. 2, 2016, hlm.79.

the concept of obligatory wills. Likewise with regard to maintenance, the child's living costs are not manifested in the child's maintenance as the concept of Islamic law, but in another form of obligation in the form of punishment for the biological father to pay an amount of money/assets for the child's living expenses until he reaches adulthood.<sup>20</sup>

To the Ruling of the MK Decision Number 46/PUU-VIII/2010 in this case the Indonesian Ulema Council responded by issuing Fatwa of the MUI No.11 of 2012 concerning the Status of Children from Adultery and the Treatment Thereof is a legal product that builds a new legal construction regarding children resulting from adultery. For more details, the content or material of the MUI Fatwa No.11 of 2012 which was issued on March 10, 2012 AD, coinciding with the 18th of Rabi'ul Akhir 1433 Hijri, stipulates that:

1. A child resulting from adultery is a child born as a result of bodily relations, but is not born in a legal marriage according to religious law, and is a finger (crime).
2. The obligatory will is the policy of *ulil amri* (ruler) which requires the father who caused the child to be born as a child of adultery, to will that he give part of his wealth to the child when he later dies.<sup>21</sup>
3. Children born as a result of adultery do not have family relations based on blood relations (*nasab*), become marriage guardians, become heirs and are entitled to maintenance with the man who caused their birth. However, only has a family relationship (*nasab*) with his mother or his mother's family.
4. The government has the authority or right to punish with *ta'zir* punishment against men who result in the birth of the child of adultery. In addition, it must also fulfill or provide for the child's needs through a mandatory will, later after the man dies.
5. The punishment given was not to legitimize the family relationship (*nasab*) between the man who caused the child to be born out of wedlock, but solely to protect the child.<sup>22</sup>

One of the main points of the order is that the man who is the biological father is obliged to donate property after his death through a binding will after the enactment of the law in the form of *Tazir* sanctions when a child is born as a result of adultery in accordance with the MK Decision No.46/PUU-VIII/2010. The MUI emphasized that the Indonesian Ulema Committee is still guided by the opinions of *Jumhur Madzhab Fiqh Hanafiyyah, Malikiyyah, Syafi'iyah and Hanabilah*, that is, the principle of determining parent-child relationship is that due to the existence of a legal marriage relationship, there is no legal consequence of parent-child relationship, so the adulterous child belongs to its mother, not the adulterer.<sup>23</sup>

Giving an inheritance in the form of a mandatory will to a man who causes the birth of a child resulting from adultery is a form of *hadd* punishment with the aim of preventing neglect while simultaneously protecting legitimate offspring

(*hifz al-nasl*), while the *ta'zir* punishment is intended to provide protection for the child does not mean can be attributed to the man who caused his birth.

Following are the rights of children resulting from adultery after the issuance of the Fatwa of the MUI No.11 of 2012, namely:

1. Inheritance: Obtaining a share of inheritance from his mother's lineage and his mother's family only.
2. Livelihood: Get the right to support from the mother and the mother's family only.
3. Marriage guardian: The man who causes the birth is not entitled to become a marriage guardian but is appointed by the local KUA official as a judge's guardian.
4. Fulfilling the needs of children in the form of property/objects until adulthood: *Ta'zir* punishment from the government/authority/judicial institution to adulterers who cause the birth of the child as a form of obligation to provide protection for children resulting from adultery.
5. Wills *Hajbah*: *Ta'zir* punishment from the government/authority/judicial institution to a male adulterer who causes the birth of the child as a form of obligation to provide protection for the child resulting from adultery.

What is interesting and can be observed from the establishment of a *ta'zir* in the form of a mandatory will for children resulting from adultery is a new legal provision in Islamic family law in Indonesia and serves as a bridge between Islamic law and the needs of modern society who are aware of the fulfillment of human rights which have so far been unresolved.

The term obligatory will is a new invention in the XX century, after previously the term was not known in classical *fiqh* literature. The first use of the term codified in Egypt was in Law No. 77 of 1943 concerning intestate inheritance, as well as Law No. 71 of 1946 concerning testamentary inheritance. The Egyptian law was taken over with slight changes by other countries that imposed the obligatory will, namely Morocco, Syria, Tunisia, Kuwait, Syria, Iraq, Jordan and Pakistan.<sup>24</sup>

In Indonesia, obligatory wills are stipulated not for orphaned grandchildren but for adopted children and adoptive parents as explained in Article 209 of the Compilation of Islamic Law. In fact, in its development, there is the Supreme Court Jurisprudence which stipulates that the obligatory will be given to non-Muslim heirs.

#### 4. Conclusion

Children resulting from adultery after the issuance of the Fatwa of the MUI No.11 of 2012 concerning the position of children resulting from adultery and their treatment are entitled to obtain assets through a mandatory will from their biological father after he dies as an obligation as well as a *ta'zir* punishment for the adultery he committed and the granting of this obligatory will aims to prevent neglect of children and to protect legitimate offspring (*hifz al-nasl*). As for the awarding of *ta'zir* punishment to adulterers in the form of the obligation to give property through a mandatory

<sup>20</sup> Irma Devitasari, *Kiat-Kita Cerdas, Mudah Dan Bijak Memahami Masalah Hukum Waris*, Cet.1, PT.Mizan Pustaka, Bandung, 2012, hlm. 219.

<sup>21</sup> Fatwa Majeis Ulama Indoneis Nomor 11 tahun 2012, hlm.10.

<sup>22</sup> *Ibid*, hlm.11.

<sup>23</sup> *Ibid*., hlm.6.

<sup>24</sup> Ahmad Junaidi, *Konsep Wasiat Wajibah dalam Kompilasi Hukum Islam (Studi tentang Pasal 209 mengenai Wasiat Wajibah dalam KHI*, Tesis Pasca Sarjana UIN Sunan Kalijaga Yogyakarta, 2000, hlm. 209.



will after he dies to his child, it is not to legalize the descent (nasab) between the child and the man that resulted in the birth, but in principle the MUI is still guided by the Opinion of the Juhur Madzhab Fiqih Hanafiyyah, Malikiyyah, Syafi'iyah and Hanabilah which states that the determination of lineage is due to a valid marriage relationship so that children resulting from adultery are assigned to their mothers only, not to men who commit adultery.

### 5. Suggestion

It is recommended that the government together with the legislative (DPR-RI) add regulations related to the rights of children resulting from adultery, including the provision of assets through a mandatory will from the man as the biological father into the child protection law as the MUI has issued a fatwa No.11 of 2012 concerning the Status of Children resulting from Zina and their Treatment and providing education to the public not to discriminate against children resulting from adultery by treating them like any other child so that children resulting from adultery do not receive negative stigmatization from society by guaranteeing their inherent rights.

It is recommended to the government together with the legislative (DPR-RI) to increase the regulation related to the rights of children from adultery, including giving assets through mandatory wills from men as biological fathers into the Child Protection Act, so that there is a comprehensive and integrated legal basis<sup>25</sup> regarding children, as MUI has issued Fatwa No.11 of 2012 concerning the position of adultery and handling and handling education and education society. guarantee their inherent rights.

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