

PalArch's Journal of Archaeology of Egypt / Egyptology

THE RIGHTS OF THE LEGITIMATE CHILD OF AN APOSTATE WIFE ACCORDING TO ISLAMIC LAW

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CahyoAnugrohRachman, Fiska Silvia Raden Roro. The Rights Of The Legitimate Child Of An Apostate Wife According To Islamic Law--Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(4), 2634-2641. ISSN 1567-214x

Keywords: Apostasy, Marriage, Islamic Inheritance

ABSTRACT:

This research studies the rights of biological children due to apostate wives in the perspective of Islamic inheritance law. The purpose of this study is to analyze the legal consequences of couples who convert to Islam in the perspective of Islamic law and analyze the distribution and status of Islamic inheritance to children if their parents commit apostasy in various marital conditions associated with Islamic inheritance law. Normative juridical research is applied as the method of the research. It can be concluded that the legal consequences of a couple who converted to Islam in the perspective of Islamic law is that the marriage is broken based on Islamic teachings. Thus, the partner who commits apostasy by law loses custody of his child, and the wife could not receive the inheritance of the husband. This causes the couple's marital relationship to be damaged (*fasakh*) and if the convert is the wife, the wife loses her right to care for her child. However, the child is still entitled to inherit through mandatory wills.

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INTRODUCTION

Until now, Islamic law is still applied in the State of Indonesia for Indonesian Muslims, and its most distinct application can be seen on the dispute between Muslims in matters of divorce, inheritance, grants, etc. as stipulated in Article 49 of the Law No. 7/1989 jo Law No. 3/2006 concerning Religious Courts (hereinafter referred to as the Religious Courts Law), in which the Religious Courts have the authority to examine and adjudicate as regulated in Article 50 paragraph (2) The Religious Court Law and the basis for examining and judging are the Quran, Hadith, and the Compilation of Islamic Law (hereinafter referred to as CIL).

Marriage is a sacred process, in addition to the physical binding process, there is also a spiritual bonding process between a man and a woman based on God and aims to form a family that will be held accountable before God Almighty. Marriage, according to Article 1 of Law No. 1 of 1974 concerning Marriage, is a bond between a man and a woman as husband and wife to form a happy and lasting household based on the belief towards God. Marriage is also stated in article 2 paragraph (1), which states that marriage is legal if it is carried out according to the laws of each religion and belief; however, Islamic law and Indonesian statutory regulations prohibit interfaith marriages (Usman Adji, 1989).

There are 3 (three) inheritance law that is applied in Indonesia, namely Islamic inheritance law, western inheritance law or *burgerlijk wetboek* (hereinafter referred to as BW), and customary inheritance law. Inheritance law based on Islamic law applies to people who embrace Islam, western/BW inheritance law applies to Eastern and European groups, while customary inheritance law is a law that has always been applied to the community, although most of the rules are not written, they still exist in society (Subekti, 1987).

A broken marriage, as a result of an apostate partner, can have implications for children. Every child always needs his or her parents as persons who can set an example for them, give affection, and to be respected. Parents have an obligation to provide basic teachings about life that will be the main capital to shape the character of children. The most common basic teachings are about religion. In marriages where the parents are of different religions, the way parents can educate the religious basis of children is still questioned; this will be troublesome for children because they have to choose one of the two religions embraced by their parents, not to mention the impact which occurs when divorce occurs in parents of different religions. Distribution of inheritance is the right of heirs. The inheritance can be divided when the testator has died. One of the requirements as an heir is to have blood relations with the testator. In the rules of the Islamic religion, it is considered to be a problem when testator and heirs are different religions.

Hence, the purpose of this study is to analyze the legal consequences of couples who convert to Islam in the perspective of Islamic law, and analyze the distribution and status of Islamic inheritance to children when their parents commit apostasy in various marital conditions associated with Islamic inheritance law.

This research is expected to be able to contribute thoughts on the development of law in the field of Islamic inheritance and can be considered as a reference in the development of wider Islamic inheritance.

RESEARCH METHODS

This research is based on using normative juridical research methods with *Statute Approach*, which is a legal approach to the applicable laws and regulations that will be related to the rules and legal facts in the life of Indonesian people (Marzuki, 2005). The approach that is applied on this study research *Conceptual Approach* on legal concepts in Indonesia by discussing the opinions of scholars through writings and opinions of experts whose credibility can be recognized in accordance with the issues discussed, and become the basis for supporting this research and by the hope of finding and expressing ideas, understandings, concepts, and legal principles relevant to legal issues in this study. *Case Study* approach is also applied, a study of certain cases from various aspects of law, which in this study viewed from the point of marriage law and Islamic inheritance law.

Definition of Marriage according to Law

Marriage is said to be valid if it is carried out in accordance with their respective religions, which means that the prospective husband and future wife must have the same religion. Legitimate requirements in marriage have been regulated in Article 2 paragraph (1) and (2) of the Marriage Law, which has stated that marriage is legal if it is done according to the law of each religion and belief. Each marriage is recorded according to applicable laws and regulations. Marriage registration for Muslims is registered at the Office of Religious Affairs (hereinafter referred to as ORA) and for those who are non-Muslim to be recorded in the civil registry. The purpose of marriage, has been stated in Article 1 of the Marriage Law, which is to form a family that is happy, eternal, and based on the Godhead.

Marriage is said to be valid when it is carried out based on the religion of the bride and groom respectively, as regulated in Article 2 paragraph (1) of the Marriage Law which states that marriage is valid if it is carried out according to the law of each religion and belief. It is known that Islamic law has a big role in the formation of the Marriage Law. In addition to the Marriage Law, the Compilation of Islamic Law (hereinafter referred to as CIL) also mentions the meaning of marriage, as regulated in Article 2 of CIL.

From this arrangement it is clear that marriages must be in accordance with religion and be done based on the bride and groom's respective beliefs. In Islam, marriage is considered an act of worship, which means that the action is

carried out because of God, and must be in accordance with the laws and objectives that apply to Islamic teachings. The purpose of marriage in CIL has been regulated in Article 3, which states that the purpose of marriage according to Islam is to realize a *sakinah*, *mawaddah*, and *rahmah* household life. The goal of marriage as written in CIL Article 3 is that each marriage is responsible towards the obligation to regulate a peaceful, quiet, peaceful, comfortable home life (*sakinah*), love (*mawaddah*), and affection (*rahmah*), this is also in accordance with the word of God in Surah Ar-Rum.

Islamic law has a role in the formation of law regarding marriage in Indonesia. The first thing that is seen in accordance with the pillars mentioned is regarding the prospective husband and prospective wife as stipulated in Article 15 paragraph (1) KHI and Article 7 paragraph (1) of the Marriage Law, regarding the age limit of the prospective husband and prospective wife, with the former of 19 years and 16 years for the latter. In addition to the age restrictions that have been stated, there are also further requirements which state that a bride who is less than 21 years old must obtain parental permission in advance, as stipulated in Article 6 paragraph (2) of Marriage Law. The rules regarding parental consent for prospective brides and grooms who are not yet 21 years old are also regulated in CIL Article 15 paragraph (2).

Consequences of Apostasy Marriage Law

Apostasy is the conversion of one's religion from Islam to Non-Islam means that someone whose religion was originally Islam and he decided to convert to Christianity, this is what is known as apostasy. The definition of apostasy only applies to a Muslim who converts from Islam, in contrast to the case when a non-Muslim person leaves his religion and enters another non-Islamic religion, the term apostasy cannot be used, because that person has never been a Muslim, this is as stated in Ali Imran verse 85 and Surah Al-Baqarah verse 217.

The legal status of the apostate couples according to Islamic jurisprudence in the views of some experts is that if one of the married couples is apostate, that is, to leave Islam, the marriage is *fasakh* (nullified), and/or if there is a non-Muslim married couple in which one of the couple converts into Islam, while one of them still remains in his other belief, then the marriage was also canceled (Sayid and Sabiq, 1996). It can be seen that apostasy is one of the reasons for the cancellation of the marriage, which has been agreed by Islamic Jurisprudence experts, but in this case there is still a conflict on the difference of opinion between Jurists on the time of divorce and the legal cancellation of the marriage contract. Regarding this matter, 3 (three) opinions were accepted, the first opinion stated that the cancellation of the marriage happens on the time of apostasy, the second opinion said argues of an *iddah* period in order to provide an opportunity for the apostate to repent, and the last opinion states that the marriage is never nullified, in which it is considered valid again if the apostate has repented.

The validity status of children born in a family of apostasy is divided into 3 (three) groups, namely: 1). If the child is born when both parents are still Muslim, then the child is Muslim based on the opinions of the fuqoha; 2). If the child is born to an apostate parent, but when conceived his parents who are apostates were still Muslim, then the child is Muslim, because the biological relationship of the parents is done before apostasy; 3). If the child is conceived and born by an apostate mother, then the child is a non-Muslim.

In CIL, the obligations of parents towards their children are regulated in Article 77. Whereas in the case of parents undergoing a divorce, the custody of a child who is not yet 12 years old is the right of his mother, but when the child is an adult, the custody of his authority is entirely left to the child to choose to join the father or mother, as provided for in Article 105 of CIL. In CIL, the requirements of hadhanah is not clearly regulated, in which it must guarantee the physical and spiritual safety of the child, so that when the caregiver cannot guarantee the happiness of the child, then the right of hadhanah can be revoked and taken over by other closest people.

From the description above, it can be said that if the wife converts into another language from Islam, which is often called as an apostate, the marriage of the couple is considered to be divorced according to Islamic law. The legal consequence of an apostate wife is losing her right to care for her child, because in Islamic teachings, non-Muslims lack the rights to care for Muslim children. But it does not necessarily mean that the mother loses custody of her child, because the Quran does not forbid any apostate mother to care for her child as the general Islamic law previously stated.

Inheritance Status of Child with Apostate Parents

The Marriage Law requires that a birth certificates is issued by the authorized official as a proof of the child's biological origin and, at the same time, as the implementation of the principle of legal certainty for the children's rights, as regulated in Article 55 paragraph (1) of the Marriage Law. The legitimate status of a child and his or her biological parents points out the rights and obligations of a parents towards their children in which they have the obligation to care for, educate, and raise their children as well as possible. In addition to these, legitimate children are also entitled to inheritance from their biological parents, even though the child is of different religion from his father. The Marriage Law does not regulate the prohibition of children of different religions from being heirs of the inheritance of their parents.

Inheritance law in Indonesia has a plurality in it (Muhammad, 2007), where inheritance law is divided into 3 (three) different types, namely the first is customary inheritance law which has long existed and applied in Indonesia since the existence of indigenous peoples in a certain regions, the two laws of western inheritance or BW that apply to foreign and eastern European societies, and the third Islamic inheritance law that applies to Muslims. In the plurality of inheritance law in Indonesia, it can be seen that Islamic inheritance law is based on religion and is recognized by the State of Indonesia, thus it can

be said that Islamic inheritance law is a concept of inheritance law that can only be used by Indonesian Muslims, and people who are non-Islamic religion can choose to use the customary inheritance legal system or the western inheritance legal system/ BW, in accordance with the rights of the community within the scope of civil law space which involves their Choice of Law according to what they believe in terms of inheritance.

The legal process is regulated in the Marriage Law and CIL. In Islamic society, the Islamic inheritance law is in accordance with the Religious Courts Act which states that the legal options revolving the disputes in the Islamic community falls to the Religious Courts. CIL is a collection of Islamic law that is applied in the community and various codified references. When viewed through a legal context, CIL can be perceived as a legal product that contains a description or material of certain Islamic laws, including those concerning inheritance, which are sourced from the words of Allah and Prophet Muhammad.

Islamic inheritance law is also called faraidh which is a plural form of the word faridhah which means "required to be implemented" (M. Anshary, 2013). In essence, the Islamic inheritance law is derived from Allah and Prophet Muhammad. CIL, which is also a legal product that is recognized by the Government, in its process of codification and compilation was sourced from the Quran and Sunnah of the Prophet. This causes several inheritance law principles to be abstracted as Principle, Ijbari, Bilateral Principle, Individual Principle, Open Inheritance Principle Due to Death, and Islamic Personality Principle (Syarifuddin, 2004).

Considering the common practice of marriages involving different religions and polemics, the position of their legitimate children and the inheritance rights as regulated in the Marriage Law must be understood. The Marriage Law divides the position of children into 2 (two) types, namely legal children and extramarital children (Darmabrata and Sjarif, 2004). Regarding the position of this child, SayutiThalib argues that in order for a child to be considered as legitimate, the child must be born according to applicable legal provisions, such as marriage among man and woman done under a religious and legal oath (Thalib, 1986).

In interfaith marriages, the most common thing that often causes problems is inheritance. The reason why inheritance is a problem that often occurs in marriage is related to one inevitable thing in human life: death, and inheritance law states that the property of a deceased person is to be handed over to someone else who is legally entitled to become the next owner. It should also be noted that heirs are not only entitled to their inheritance, but the testators' obligations must also be borne by the heirs, such as debt (Suparman, 1985).

The position of heirs in Islam is distinguished by its virtue. The virtues in Islamic inheritance law are distinguished by groups, differences in group virtues are usually caused by how strong their relationship is in the family of

the testator. The Quran distinguishes these virtue groups into 4 (four) types, namely the First Virtue Group, the Second Virtue Group, the Third Virtue Group, and the Fourth Virtue Group. Besides being grouped respectively in the position of heirs, there is also an heir who is drawn a lineage from his mother called *DhulArhaam*, as well as heirs drawn from his father's lineage are called *Ashabah*. In addition, there are also heirs who are referred to from the laws of bilateral inheritance *mawali* and *DhulQarabat*, another types of heirs have also been regulated by the Quran, these are called *dzulfaraa'idh* (Soelistijono, N and Djubaedah, 2005). Marriage is an either-or status. But marital unions differ in a multitude of ways, including the characteristics, such as education, earnings, religion, and cultural background, of each of the partners, and the homogamy of their match on these characteristics. Similarly, religion has multiple aspects (Waite, L et al, 2003). Joint religious communication is more strongly associated with marital satisfaction among mixed-faith couples than same-faith couples (David, 2013).

CONCLUSION

The legal consequence of a couple changing their religion in the perspective of Islamic law is that the couple's marital relationship is broken (*fasakh*) and if the convert is the wife, then the wife loses her right to take care of her child. The inheritance status of a child with his or her mother committing apostasy prior to childbirth, in which the father passes away following the birth of the child, based on the law of Islam the mother is declared apostate and has no right to inherit her husband's wealth, while the child is not classified as apostate, but is considered to be having a different belief than the father, yet he or she is still entitled to inherit through the mandatory wills.

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