LEGAL STATUS OF CHILDREN OUT OF WEDLOCK ACCORDING TO THE DECISION OF THE CONSTITUTIONAL COURT IN INHERITANCE OF THE BURGERLIJK WETBOEK (BW) SYSTEM

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ABSTRACT

Objective: The purpose of this writing is to examine whether the protection of children out of wedlock has been achieved with the Constitutional Court Decision Number 46/PUU-VIII/2010. This research method uses normative legal research with a statutory approach, and the legal materials used include the Marriage Law No. 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, Burgerlijk Wetboek (BW), Law Law governing Children and Constitutional Court Decision Number 46/PUU-VIII/2010.

Method: The type of research used is normative research which is oriented towards legal materials and documents that are relevant to this research. Normative legal research is legal research conducted by examining literature or secondary source.

Results and conclusion: the study show that children out of wedlock as regulated in the Constitutional Court Decision Number 46/PUU-VIII/2010 do not receive maximum legal protection as expected by the applicant when submitting the application which gave birth to this Constitutional Court decision, especially in terms of inheritance. The results of the study show that children out of wedlock as regulated in the Constitutional Court Decision Number 46/PUU-VIII/2010 do not receive maximum legal protection as expected by the applicant when submitting the application which gave birth to this Constitutional Court decision, especially in terms of inheritance.

Research implications: From this study it was found that children out of wedlock have not been regulated in detail regarding the distribution of inheritance if the child out of wedlock does not receive recognition from their biological parents.

Originality/value: That the law seeks to provide protection to children out of wedlock by means of proof using technology.

Keywords: children out of wedlock, heirs and distribution of marital inheritance.
ESTATUTO LEGAL DAS CRIANÇAS FORA DO CASAMENTO DE ACORDO COM A DECISÃO DO TRIBUNAL CONSTITUCIONAL EM HERANÇA DO SISTEMA BURGERLIJK WETBOEK (BW)

RESUMO

Objetivo: O objetivo desta redação é examinar se a proteção das crianças fora do casamento foi alcançada com a Decisão do Tribunal Constitucional n.º 46/PUU-VIII/2010. Este método de pesquisa utiliza pesquisa jurídica normativa com uma abordagem estatutária, e os materiais legais utilizados incluem a Lei do Matrimônio n.º 16 de 2019, relativa as emendas à Lei n.º 1 de 1974, relativa ao Matrimônio, Burgerlijk Wetboek (BW), Lei que rege as Crianças e Decisão do Tribunal Constitucional n.º 46/PUU-VIII/2010.

Método: O tipo de pesquisa utilizado é a pesquisa normativa, orientada para materiais legais e documentos que são relevantes para esta pesquisa. A pesquisa legal normativa é uma pesquisa legal realizada examinando a literatura ou fonte secundária.

Resultados e conclusão: o estudo mostra que as crianças fora do casamento, conforme regulamentado na Decisão do Tribunal Constitucional n.º 46/PUU-VIII/2010, não recebem a máxima proteção legal como o esperado pelo requerente ao apresentar o pedido que deu origem a esta decisão do Tribunal Constitucional, especialmente em termos de herança. Os resultados do estudo mostram que as crianças fora do casamento, conforme regulamentado na Decisão n.º 46/PUU-VIII/2010 do Tribunal Constitucional, não recebem a proteção legal máxima, como esperado pelo requerente ao apresentar o pedido que deu origem a esta decisão do Tribunal Constitucional, especialmente em termos de herança.

Implicações da pesquisa: Descobriu-se deste estudo que as crianças fora do casamento não foram reguladas em detalhes no que diz respeito à distribuição da herança se a criança fora do casamento não receber o reconhecimento de seus pais biológicos.

Originalidade/valor: que a lei procura fornecer proteção para crianças fora do casamento por meio de prova usando tecnologia.

Palavras-chave: crianças fora do casamento, herdeiros e distribuição de herança conjugal.

1 INTRODUCTION

The issuance of the Constitutional Court Decision Number 46/PUU-VIII/2010 dated 17 February 2012 was due to a request from a woman named Hj. Aisyah Mochtar alias Machica bint H. Mochtar Ibrahim and her son Muhammad Iqbal Ramadhan bin Moerdiono who requested that the marriage between Hj. Aisyah Mochtar alias Machica bint H. Mochtar Ibrahim with Drs. Moerdiono, with the marriage guardian of the late H. Moctar Ibrahim, witnessed by 2 witnesses, each named the late KH. M. Yusuf Usman and Risman, with a dowry in the form of a set of prayer tools, 2,000 Riyals (Arabic currency), a set of gold jewelry, diamonds paid in cash and with an agreement spoken by the guardian and qabul spoken by a man named Drs. Moerdiono, it is legal according to religious norms / Islamic law can be recorded according to the applicable laws and
regulations. The Petitioner's marriage which is valid based on the pillars of marriage and Islamic religious norms, according to legal norms has not been recognized by the state because it is not registered according to Article 2 of Law Number 1 of 1974 concerning Marriage (hereinafter referred to as the Marriage Law), which stipulates that:

(1) Marriage is valid if it is carried out according to the laws of each religion and belief.

(2) Every marriage is registered according to the applicable laws and regulations.

The application of this legal norm has an impact on the legal status of children born out of wedlock by the Petitioner to become children outside of marriage and based on the provisions of legal norms in Article 43 paragraph (1) of the Marriage Law, the child only has a civil relationship with his mother and his mother's family. This discriminatory treatment creates problems because the status of a child before the law becomes unclear and invalid. The Petitioner's child born from a valid marriage according to the pillars of marriage and religious norms is deemed not to exist by the Marriage Law because the applicant's marriage is not registered as stipulated in Article 2 paragraph (2) of the Marriage Law.

Based on the petition above, it appears that what the Petitioner is petitioning for is that his marriage which is legal according to religious norms can also be legal according to legal norms, namely legal according to the Marriage Law even though it is not registered according to the applicable laws and regulations. According to the general explanation of the Marriage Law regarding the principles or principles contained in this Law, letter b, it is explained that:

b. This law states that a marriage is valid if it is carried out according to the laws of each religion and belief; and in addition, each marriage must be recorded according to the applicable laws and regulations. Recording of each marriage is the same as recording important events in a person's life, for example births, deaths stated in certificates, an official certificate which is also included in the register of registration.

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Based on the explanation above it appears that in order for a marriage to be considered valid if the marriage has been recorded according to the applicable laws and regulations, so if it has not been recorded then the marriage is considered not valid.

In relation to the Petitioner's petition, based on the decision of the Constitutional Court Number 46/PUU-VIII/2010 dated 17 February 2012, it indirectly considers that the Petitioner's marriage is invalid or at least there has not been a marriage. This can be seen in the decision of the Constitutional Court which only corrects the contents of Article 43 paragraph (1) of the Marriage Law, not Article 2 paragraph (2) of the Marriage Law or Article 42 of the Marriage Law which stipulates that a legitimate child is a child who is born in or as a result of a valid marriage. Article 43 paragraph (1) of the Marriage Law which originally regulated that:

(1) Children born out of wedlock only have civil relations with their mothers and their mothers' families.

"Children born out of wedlock have civil relations with their mothers and their mothers' families as well as with men as their fathers which can be proven based on science and technology and/or other evidence according to law to have blood relations, including civil relations with their father's family";

This decision of the Constitutional Court resulted in that a man who, although he does not recognize his child, but if it is proven based on science and technology and/or other evidence according to law, has a blood relationship with the man who does not want to admit it, it is considered that his child has a civil relationship with the man who don't want to admit it and the family of men who don't want to admit it. This Constitutional Court decision creates legal uncertainty, especially in inheritance law which concerns the distribution of inheritance for illegitimate children because the Civil Code or Burgerlijk Wetboek (BW) does not recognize the status of illegitimate children as stipulated in the Constitutional Court Decision Number 46/PUU-VIII/2010 dated 17 February 2012.

The Constitutional Court Decision No. 46/PUU-VIII/2010 also does not distinguish the status of a man who is required to recognize his child, whether he is married or not. If a man who is required to acknowledge his illegitimate child has the status of a husband, then his illegitimate child is a child of adultery. The position of the child of adultery in BW is not an heir or has no right to inherit from the father of adultery or his biological father. Likewise, this Constitutional Court decision does not consider the rights of legitimate children and spouses of men who are required to acknowledge their
illegitimate children, who are disturbed. Meanwhile, if a man who is required to acknowledge his illegitimate child is a bachelor or widower, the child's inheritance rights are highly dependent on the recognition of his/her biological father.

Due to the above condition impacted the Indonesian law and has arose problems related: the arrangement of illegitimate children in the decision of the Constitutional Court Number 46/PUU-VIII/2010 dated 17 February 2012 guaranteed legal certainty for the position of these illegitimate children as heirs? And how does the position of children out of wedlock according to the decision of the Constitutional Court Number 46/PUU-VIII/2010 dated 17 February 2012 not interfere with the interests of legitimate children and legal spouses of biological fathers of children out of wedlock on Indonesian legal regime that which will be reviewed and compared with.

2 RESEARCH METHOD

The type of research used is normative research which is oriented towards legal materials and documents that are relevant to this research. Normative legal research is legal research conducted by examining literature or secondary source.

3 RESEARCH RESULTS AND DISCUSSION

Arrangements for descent in the Civil Code or Burgerlijk Wetboek (BW) as well as in the Marriage Law, are distinguished by:

3.1 ad. 1. LEGITIMATE CHILD

Based on Article 42 of the Marriage Law, it stipulates that a legitimate child is a child born in or as a result of a legal marriage. Whereas Article 250 BW stipulates that every child who is born or raised during a marriage gets the husband as his father. The Child Protection Act defines a child as someone who is not yet 18 (eighteen) years old, including children who are still in the womb and child protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop and participate optimally in accordance with the dignity of humanity, and receive protection from violence and discrimination. Furthermore, in Law Number 4 of 1979 concerning

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Child welfare, it is regulated that a child is someone who has not reached the age of 21 (twenty one) years and has never been married. Based on the Child Protection Act and Law Number 4 of 1979, to determine the limit of a person being categorized as a child is only based on the child's age, while the status of a child as a legitimate child or child out of wedlock is not discussed at all.

Based on the Law on Marriage and BW, there are 3 criteria that cause a child to be categorized as a legitimate child, namely:

1. Children who are conceived and born in a legal marriage;
2. Children born out of wedlock but born in a legal marriage.
3. Children who are born in a legal marriage but are born outside of marriage.

The position of a legitimate child will get all the rights and obligations of his parents when his parents die. The division of rights and obligations of parents will automatically switch to children without the need for a certain action (Saisine Principle). Likewise, when a parent dies, even though the child's whereabouts are unknown and as long as they are still alive, this child also automatically gets an inheritance share that is equal to the share of other children whose whereabouts are known. Even parents cannot erase or eliminate their children's rights as heirs, as long as the child is not an incompetent heir. These heirs can also become substitute heirs, and the amount of the inheritance received by these heirs has also been determined in the BW.

If the parent or heir wants to give a larger or smaller inheritance than what has been stipulated in the law (in this case BW), then it can be made in a will. For inheritance that is larger than what has been stipulated in the BW, it may not interfere with the legitimacy of other legitimate heirs. If the portion specified in the will by the testator reduces the legitimacy share of other legitimate heirs, the portion in the will may be reduced.

Proof of the legitimacy of a child can be seen from the birth certificate registered in the civil registry. Based on the birth certificate a child can be known who the parents are and when the child was born. If there is no birth certificate, then based on Article 262 BW, it can be proven by real conditions in the child's daily life, that the child:

a. continuously enjoys a position as a legitimate child;
b. always uses his father's name which caused him to be born;
c. are treated as children and their education, maintenance and livelihood have been regulated;
d. recognized by society that he is the son of the father;
e. his relatives recognize him as the father's son.

The legitimacy of a child can also be denied by his father, if:

1. The child was born before the 180th day of his parents' marriage;

A child born before the 180th day of his parents' marriage means that the child was grown outside or before marriage even though he was later born in marriage, therefore the husband is given the right to deny the legitimacy of the child. This right is void or cannot be used if:

a) Prior to his marriage, the husband knew about his future wife's pregnancy; (Article 251 paragraph 1 BW). In this case, it is possible that the husband is the father of the child his wife is carrying or that the husband deliberately marries a pregnant woman to acknowledge someone else's child.

b) At the time of making the birth certificate the husband was present, and this certificate was signed by him, or contained a statement from him which stated that he could not sign it; (Article 251 paragraph 2 BW). In this case, the husband is deemed to have made a secret confession that the husband is the father of the child so that in the future the father has no right to deny it again.

c) if the child is born dead; (Article 251 paragraph 3 BW)

If the denial of the child above is approved, the status of the child born will be a child out of wedlock. because it was grown by a woman who was not bound by marriage.

2. The husband can prove that since the 300th day and 180 days before the birth of the child, he has been in a state of impossibility to have physical intercourse with his wife, either due to separate circumstances or due to a coincidence. (Art. 252 BW);

What the husband denies is the legitimacy of the children growing up in the marriage. Denial of this child must be based on the fact that a husband cannot have a relationship with his wife, because:

1. separated from his wife;

The meaning of being separated in this case is a situation where the husband is not there so it is impossible to have physical intercourse with his wife. For example, husband abroad, prison or sick in hospital.

2. because of something that just happened (toeval).
The meaning of something that is coincidental in this case is a situation where it is impossible for the husband to have physical intercourse with his wife, for example the husband is sick at home.

Denial of the child above if approved then the status of the child will be a child of adultery, because it is grown by a woman who is a wife with a man who is not her husband.

3. If the birth of a child is kept secret from the husband because his wife committed adultery (overspel) (Article 253 BW)

In order to deny the child in this case, the husband must prove that:

a. his wife committed adultery (overspel) and
b. the child born is kept secret. This secrecy was perfect proof that he was not the child's father.

The act of overspel must be proven first by a judge's decision even if it is not followed by a divorce. This judge's decision can then be used as a basis for denying the legitimacy of the child and at the same time to prove the existence of an act of concealing the birth of a child. If the birth of a child is deliberately not notified to the husband, it can be assumed that the birth of the child is hidden from the husband. However, if the birth of a child is notified to the husband, then the husband may not deny the legitimacy of the child based on adultery but instead use the condition of being away. Denial of children in Article 253 BW emphasizes the existence of an element of hiding the birth of a child while Article 252 BW emphasizes the existence of an element of adultery committed by the wife.

4. The child was born 300 days after the decision to separate table and bed.

This denial will have definite legal force as long as the wife is unable to bring up suitable events to prove that her husband is the father of the child. Refusal that has been declared valid does not cause the child to obtain the position of a legitimate child even though there is peace between the husband and wife. (Article 254 BW)

Who can do child denial is:

A. The husband of the mother of the child whose legitimacy will be denied (Art. 251-254 BW). If the condition of the husband is under guardianship (curatele), then the guardian (curator) will represent him;
Child denial must be carried out by court order. All deed of child denial made by the husband out of court, has no legal force, if within 2 months it is not followed by a claim before the judge.

Denial of this child must be done by the husband in time:

a) In 1 month, if she is at the child's birthplace or nearby;

b) In 2 months, if:

a. After returning, if he is not there or not present;

b. After knowing the deception, that child's birth had been concealed from him.

B. Husband's heir

Husband's heirs are people who will become joint heirs with the child whose legality is denied, except for the mother of the child who will be denied legal rights.

This heir can:

a. continued the lawsuit that had been filed by her husband.

This lawsuit must be continued within 2 months from the day the husband dies, if this is not done then the lawsuit filed by the husband is dropped. (Art. 257 BW).

b. carry out the will of the husband which has been stated in the deed of child denial made outside the Court.

File a claim within 2 months of the husband's death (Art. 256: 4 BW).

c. filing a new or separate lawsuit.

A husband who has died and has not had time to deny the child while the time period for denying the child has not expired, the heirs can deny the child only on the basis that the husband is not related to the mother of the child who will be denied because he is not there. (Article 258 paragraph 1 BW)

The lawsuit to dispute the legitimacy of the child begins within 2 months from the time the child owns the husband's property, or since the heirs are prevented from having the right by the child to own the husband's inheritance. (Article 258 paragraph 2 BW)

The period of time given to the husband's heirs who are entitled to submit or continue a claim to deny the legitimacy of a child, is: (Article 259 BW)

a. In 1 year, if one or more of them reside abroad;

b. in 2 years, if there is war at sea.
Based on the principle of general law, a person's family rights cannot be passed on to his heirs, but there are exceptions in the case of child denial by the husband's heirs. If the husband's heirs are more than one person, then each heir can act independently, there is no need to continue the lawsuit together. If the child's denial is rejected or accepted by the judge, this decision applies to all other heirs because the decision regarding a person's legal position applies to everyone.

3.2 ad. 2. CHILD OUT OF WEDLOCK

In the Civil Code or Burgerlijk Wetboek (BW) distinguish children out of wedlock as follows:

1. Children out of wedlock who may be recognized are:
   a. Children out of wedlock are legalized;
   b. A recognized illegitimate child.

2. Children out of wedlock who may not be recognized, namely:
   a. Child discordant
   b. Child of fornication.

3.2.1 ad. 1. a. Legalized Out of Wedlock Child

Legalized illegitimate children are illegitimate children whose biological father and mother marry after they are born. As an illegitimate child, his position is the same as a legitimate child if his biological parents are married, unless he is a child of illegitimacy or adultery. Before validating this child, it must be preceded by an acknowledgment from the biological father. After that, legalization is carried out by way of marriage of the two biological parents. The validation of this child can be done in the marriage certificate of the parents by including the name of the legalized child. As a result of this legalization, the illegitimate child who was originally recognized becomes legalized and has the same biological parents as the legitimate child so that he obtains a position as a legitimate child. What distinguishes a legitimate child from a legalized illegitimate child is that a legitimate child is born when his parents are married, while a legalized illegitimate child is born when his parents are not yet married. The position of a child out of wedlock which was originally lower becomes equal to a legitimate child by marrying his biological parents.

In Article 272 and Article 273 BW, it is expressly regulated that children out of wedlock who cannot be legalized are children out of wedlock who:
a. seeded from adultery;
b. discordant child;
c. born to parents who did not obtain dispensation to marry each other;

However, this child can be recognized and his recognition is included in the parents' marriage certificate.

If the child's biological parents neglect to make a confession before marriage or fail to legalize their illegitimate child when married, this negligence can be corrected by submitting an application for approval to the Head of State. The President will give validation after considering the advice from the Supreme Court, even if the parents of an illegitimate child are unmarried as long as the illegitimate child has been recognized. Which causes his biological parents are not married because:

a. the biological father or mother has passed away;
b. there is objection to marriage between biological father and mother.

For ratification given by the President, it takes effect on the day the authorization letter is given and may not result in harm to the previous legal children in terms of inheritance, and does not apply to other blood relatives in terms of inheritance, unless the latter has agreed to grant the ratification letter. That.

Applications for validation must be submitted to the court and those who can apply for validation are:

1. Both parents of children out of wedlock;
2. Child out of wedlock itself.

The validation must be registered in the birth register at the civil registry. After the ratification of an illegitimate child, his position as heir and share in the inheritance will be exactly the same as a legitimate child.

3.2.2 ad. 1. b. A Recognized Illegitimate Child

A recognized child out of wedlock is a child out of wedlock whose biological father and mother did not marry after he was born, which later this child is recognized by his biological father.

Based on Article 280 BW, recognition from the biological father of a child out of wedlock only creates a civil relationship between the child and the father who admits it, not with the family of the father or mother who admits it. Whereas in Article 43 of the
Marriage Law, after the Constitutional Court Decision No. 46/PUU-VIII/2010 dated 13 February 2012, regulates that:

“Children born out of wedlock have civil relations with their mothers and their mothers' families as well as with men as their fathers which can be proven based on science and technology and/or other evidence according to law to have blood relations, including civil relations with their father's family”;

According to the provisions of Article 43, that a child out of wedlock can be considered automatically having a civil relationship with his father and his father's family as long as it can be proven based on science and technology and or other evidence according to law to have blood relations, does this apply automatically or does it have to be through a decision? court, this matter is not regulated. The provisions of Article 43 also cause the legal position of a child out of wedlock to be the same as a legitimate child, whereas Article 42 of the Marriage Law very strictly stipulates that a legitimate child is a child born in or as a result of a legal marriage. So there must be a marriage, then a child can be considered a legitimate child. Likewise, if it is related to the arrangement of children out of wedlock in BW, then the status of children in Article 43 of the Marriage Law is not recognized in BW, because:

A. not an illegitimate child who was legalized because his biological parents were not married;
B. not a recognized child out of wedlock, because the legal consequence of a child out of wedlock that is recognized is only the birth of a civil relationship between the child who is recognized and the father who acknowledges him but not with the family of the father who acknowledges him;
C. not an incestuous child, because his biological parents are not married, not because of a law prohibition;
D. not a child of adultery, because if the child of adultery will not have a civil relationship with his biological father.

As a result of the unknown position of the child in BW, the distribution of inheritance in Indonesia which is subject to BW for children according to Article 43 of the Marriage Law is not known to be analogous to which child's status.

Since further regulations regarding Article 43 have not yet been issued, the BW provisions governing the recognition of illegitimate children remain in effect as long as they do not conflict with those regulated in Article 43.
There are 2 types of recognition of children known in BW, namely:

1. Confession voluntarily
   Voluntary acknowledgment is a statement of will made by a father according to law that he is the father of a child born out of wedlock.

2. Confession by force
   Recognition based on a court decision that determines the father of a child out of wedlock.

Based on Article 281 BW, recognition of children out of wedlock must be made in the form of an authentic deed and done by:

a) in the child's birth certificate;
b) at the time of the child's marriage;
c) an authentic certificate made by a Civil Registry Officer, and registered in the register of births according to the day it was signed and included in the birth certificate book. Failure to register this deed of recognition may not be used to refute the recognition that has been obtained by the child.
d) With other authentic deeds even though the deed is not specifically intended for that purpose, for example the recognition of a child in an open will.

Recognition of children out of wedlock is invalid and void, if it is done because:

a. trick/persuasion, mistake/error or coercion.
b. By an immature person as a result of inducement.
c. Performed by a man who has not reached the age of 19, unless the confession is made during his marriage.
d. Done without permission from the child's mother, as long as the mother is still alive.
e. the child to be recognized is a child of adultery or a child of incest (unless the parents receive dispensation from marriage)
f. Performed by an insane person, it does not matter whether he is under guardianship or not or by a person placed under pardon on the basis of stupidity or darkness.
g. Done contrary to natural law, for example: recognizing a child who is only a few years different from him (so it is impossible that the child is biologically the same age as his child). For example, a man who is 30 years old is asked to recognize someone who is 25 years old as his child. This is not possible because
how can a man when he is 5 years old can have conjugal intercourse and result in a woman getting pregnant

Confession of a child out of wedlock can only be made by the biological father of a child out of wedlock after obtaining approval from the child's mother and the biological father's age is at least 19 years old and the confession given is not the result of coercion, deception or inducement. The legal consequence of recognition is that it creates a legal relationship between a child out of wedlock only with the parents who acknowledge them, not with the families of the parents who recognize them. Recognition of a child out of wedlock by a biological father who has the status of a husband will not bring harm to his wife and children born from their marriage, except if their marriage is dissolved then the recognition will have the consequences, if there is no a descendant is born. Parents who acknowledge their illegitimate child are obligated to look after and educate their illegitimate child according to their abilities regardless of whether or not they exercise the position of guardian until the child is an adult. However, if the child out of wedlock has a disability so that he cannot support himself, the father who has recognized him is still obliged to provide maintenance for his child out of wedlock even though the child he acknowledges is an adult.

Meanwhile, the alimony obligation of the acknowledged child against the father who acknowledges it is null and void if the recognition is only made after the acknowledged child is an adult. In terms of getting married, a child out of wedlock who is recognized requires permission from the parents who recognize it. Meanwhile, in terms of inheritance, a recognized illegitimate child remains entitled to the inheritance of the father who acknowledges it as long as the recognition by the father is made when he is not yet a husband. The share of inheritance that is the right of a child out of wedlock that is recognized is less or smaller than that of a legitimate child. Children out of wedlock who are recognized as legitimate have the right to jointly inherit with heirs from class 1 to group 4 and if the father who recognizes them dies without leaving heirs from class 1 to group 4, this illegitimate child has the right to claim the entire inheritance for himself with the exclusion of the state. On the other hand, if the illegitimate child who is recognized as legitimate dies without leaving any heirs, then his inheritance becomes the closest family of the parents who have recognized him if the parents who have recognized him have died. Out of wedlock children who are not recognized as legitimate by their biological father, do not have the right to claim the inheritance of parents who do not
recognize it, but can inherit testamentally as long as this gift does not reduce the legitimacy part.

3.2.3 ad. 2. a. Contributing Child

Contributing child is a child born out of wedlock from a relationship between a woman and a man who has a close relationship or who is prohibited from marrying by law, except with a dispensation from the president. According to Article 273 BW, the position of an incestuous child can only be recognized, it cannot be legalized and the method of recognition is carried out in a marriage certificate. This is because the relationship between the biological parents of discordant children is forbidden by law to enter into marriage.

3.2.4 ad. 2. b. Child of Adultery

A child of adultery is a child born from an adulterous relationship, namely a relationship between a man and a woman where one of them is bound by marriage. So a child born from a relationship between a wife and another man or a relationship between a husband and another woman. The position of a child of adultery is not determined by birth, but by the time of growth or incubation.

A child of adultery may not be recognized and may not be legalized by his biological father. This child of adultery also cannot be the heir of his biological father. The legal position of the child of adultery is the lowest compared to other children out of wedlock. This is stipulated in the law that a child of adultery cannot or cannot be legally recognized by his biological father, even though his two biological parents are married. Therefore, a child of adultery can never have a civil relationship with his biological father. As a result, it is impossible for a child of adultery to become the heir of abintestato and cannot claim any position from his biological father. The child of adultery can only enjoy the necessary living provided by his biological father.

The status of a child out of wedlock before being proven as a child of adultery, the mother becomes the legal guardian. If after it is clearly proven that in a decision that she was conceived in adultery, the judge must appoint a special guardian for her. For guardianship, the judge may consider the mother or father of the adulterous child as long as they are not revoked of their right to be appointed as guardian.

In the Netherlands, there is no civil relationship between adultery children and
their parents, but both parents are obliged to look after and educate children in the event that they have disabilities that prevent them from being able to earn their own living after they grow up, according to the strength of the abilities of their respective parents. Children of adultery do not need permission from their biological father to marry. A child of adultery does not have the right to inherit or the right to a legitimate portion of the inheritance of his parents. They can only inherit testamentarily. The testamentary inheritance is not limited as long as it does not reduce the legal portion of the legal heirs.

Inheritance Distribution According to Burgerlijk Wetboek (BW)

1. In the distribution of inheritance according to BW, several principles of inheritance are known, including:
2. The principle of death, meaning that there will be no inheritance without preceded by the death of the owner of the property (heir)
3. The principle applies to inheritance without a will, meaning that all the assets left by someone who has passed away belong to his heirs according to law, insofar as he has not made a valid decision regarding this matter
4. Genealogical Principles, meaning that those who are first entitled to inheritance are the next of kin. (Article 832 BW)
5. The Saisine principle is that the heir obtains all the rights and obligations of the deceased without requiring a certain action even if the heir does not know about the existence of the inheritance
6. The Principle of Equality of Rights in inheritance between the sexes, meaning that there is no sex distinction in the division of inheritance.
7. The principle of heirs in a straight line cannot be revoked by the heir.

Based on genealogical principles, the distribution of heirs is divided into 4 (four) groups, namely:

1. Group I, consisting of the longest living partner (husband or wife) as well as heir children and their offspring.
2. Group II, consisting of the heir's parents (father and mother) and siblings as well as the heir's father's or mother's siblings and their offspring while half-siblings are not heirs in this second group
3. Group 3, consisting of families in a straight line upwards after the father and mother (grandmothers and grandfathers from the mother's and father's side heirs and so on upwards);
4. Group 4, consists of families in a straight line to the side after the father and mother to the sixth degree.

These four groups of heirs are abintestato heirs, meaning heirs who have been determined by law so that based on the principle of inheritance without a will, they will automatically become heirs when the heir dies. In addition to abintestato heirs, testamentary heirs are also known, namely someone who becomes an heir because he is appointed by a will or testament made by the heir. So without a will or testament that determines someone to be the heir, he will not be a testamentary heir. The position of the heirs of the first class covers the heirs of the second class, the heirs of the third class and the heirs of the fourth class, meaning that if the heirs of the first class are still there or are still alive then the heirs of the second class, the heirs of the third class and the heirs of the fourth class are not entitled to inherit. If the heirs of the first class no longer exist or have all died, then the heirs of the second class have the right to inherit but cover the heirs of the third class and the heirs of the fourth class. Likewise, if the heirs in the first and second groups are no longer there or all have died, then the heirs in the third class have the right to inherit and close the heirs in the fourth class. The heirs of the fourth class are only entitled to inherit if the heirs of the first class, second class and third class are no longer there. In inheritance, heirs can inherit due to:

   a. Because of his own strength or
   b. Due to replacement

Since the position of illegitimate children is in the first group, only the heirs in the first group will be discussed. Heirs in this group besides the heir's longest living partner who is the heir's wife or husband, are also the heir's children. Only children who can become heirs in this first group:

   a. legitimate children, i.e. children who are born in the heir's marriage\(^5\) or children who are born outside the heir's marriage but are born in the heir's marriage or children who are born in the heir's marriage but are born outside the heir's marriage.
   b. adopted child or adopted child, namely the process of adopting a child through or determined by a court,

\(^5\) Marriage includes mixed marriages and those which are carried out outside Indonesia and are recorded as included in legal marriages see Padma D. Liman, Perlindungan Hukum Terhadap Perkawinan Campuran Di Indonesia, Jurnal Ilmiah Publika, Vol. 9 no. 2, 2021.
c. legalized illegitimate child, namely the heir who is conceived and born out of wedlock of the heir with the child's biological mother and then the new heir acknowledges it when the heir makes a marriage certificate with the child's biological mother by including the name of the child born out of wedlock in the deed marrying the heir with his biological mother or using a separate certificate which is then attached to the marriage certificate of the heir with the child's biological mother.

d. illegitimate child who is recognized as legitimate, namely the heir's child who is incubated and born outside of the heir's wedlock with the child's biological mother and the heir has never married the child's biological mother. Recognition of the heir to his child must be with a court order.

Furthermore, the heir's stepchildren are not the heirs of the heir and are not included in the heirs in this first class. Between the heir and his stepchildren there is no blood relationship and the heir's stepchildren only inherit from their biological parents, not inherit from their stepparents. There is no inheritance relationship between stepchildren and their stepparents. Vice versa, stepparents are not the heirs of their stepchildren.

The regulation of children out of wedlock in Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage stipulates that

Children born out of wedlock have civil relations with their mothers and their mothers’ families as well as with men as their fathers which can be proven based on science and technology and/or other evidence according to law to have blood relations, including civil relations with their father's family.

Based on Article 43 paragraph (1) of the Marriage Law, this illegitimate child does not need to be recognized, what is important is that it can be proven based on science and technology and/or other evidence according to law to have blood relations. So that children out of wedlock in this case have no rank or level as heirs in receiving inheritance. Likewise, it does not distinguish children out of wedlock who are children of incest or children of adultery. Furthermore, in paragraph (2) of Article 43 of the Marriage Law it stipulates that the position of the child referred to in paragraph (1) above will then be regulated in a Government Regulation, however, because the Government Regulation

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specifically governing children out of wedlock has not yet existed, then based on the principle of concordance, provisions governing the distribution of inheritance for illegitimate children in the Civil Code or Burgerlijk Wetboek (BW) are still valid.

Amendment to Article 43 paragraph (1) of the Marriage Law by Constitutional Court Decision Number 46/PUU-VIII/2010 dated 17 February 2012 which only gives rights to children out of wedlock without providing an explanation of the criteria or status of children out of wedlock has created its own contradictions or controversies in the verdict. This is very different from the arrangement of heirs in BW, where there are different levels of the position of children out of wedlock as heirs in receiving inheritance. Heirs whose status is legalized illegitimate children have exactly the same rights and obligations as legitimate children, so that the share of inheritance received by legalized illegitimate children is the same as legitimate children. Furthermore, illegitimate children who are recognized have a lower position than legalized illegitimate children, meaning that the rights received as heirs are smaller than the rights received by legalized illegitimate children. Meanwhile, discordant children have the same position as illegitimate children who are recognized if these discordant children are recognized by their biological father. Furthermore, the position of the child of adultery, can never become an heir because it cannot be recognized so that it cannot become the heir of its biological father. This is expressly regulated in Article 283 BW that children of adultery cannot be recognized and Article 867 BW stipulates that children out of wedlock who have the status of children of adultery do not receive an inheritance.

As a result of the absence of distinctions in the status of children out of wedlock, the position of children out of wedlock as regulated in Article 43 paragraph 1 of the Marriage Law, there is absolutely nothing that can be analogized or accommodated in one of the definitions of children out of wedlock in BW. The heirs of illegitimate children regulated in Article 43 paragraph 1 of the Marriage Law are not recognized in the arrangement of BW heirs so that the distribution of inheritance cannot use BW because there is no regulation.7

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7 OECD mentioned:
Comparisons in other countries for children out of wedlock can be seen in practice in the following OECD data:
Whereas there are different definitions of birth outside of marriage, in general it is defined as birth to a mother whose legal marital status at the time of birth was not married. This includes births to mothers who are single or living with a partner outside of marriage, births to mothers who are divorced or widowed, and
Furthermore, in the distribution of inheritance according to the Civil Code or Burgerlijk Wetboek (BW), the legal position of an illegitimate child who is recognized as legitimate does not automatically receive an inheritance from a father who recognizes it. This depends on when the confession was made by the man who confessed it. If the confession is made by the man who admits that he is married to another woman (not the biological mother of the child out of wedlock) then this child out of wedlock will not receive an inheritance when the man who acknowledges him dies. This is regulated in Article 285 BW, that:

Acknowledgment made during marriage by a husband or wife for the happiness of a child out of wedlock, who before marriage was fertilized by someone other than the wife or husband, will not bring harm to either the wife or husband, or to the children born from their marriage.

However, if the father who acknowledges the marriage disbands and the dissolved marriage has no children, then the illegitimate child who is recognized can receive an inheritance.

Sample case:

- Before man A married woman B, man A had a child out of wedlock with woman C, namely D. If A recognizes D as his illegitimate child before A marries B, then when A dies, D can receive A's inheritance by status of children out of births to mothers who live with a partner in a "civil" or "de facto" union (unless their legal marital status is on at birth also 'married').

In addition, the OECD also stated that there were differences in Australia, Japan, Korea, New Zealand, and Canada (1960-1973 only), the data referred to births outside of marriage/out of wedlock, namely, where the child's parents were not registered. married to each other (or, for New Zealanders, in civil union with each other) at birth.


while in Dublin it is regulated that:

*if you are the guardian of a child in Ireland, you have a duty to look after and look after the child properly and you have the right to make decisions about the child's religious and secular education, health requirements and general welfare.*

The married parents of a child are joint guardians and have equal rights in relation to the child. Parental guardianship rights are provided for in Section 6 of the Infant Guardianship Act, 1964. For children born out of wedlock, only the mother has the right to automatically become guardian. (While the father's name may appear on a child's birth certificate, this does not give him custody of the child.) See Dublin Citizenship, Guardianship and cohabiting couples, https://www.citizensinformation.ie/en/birth-family-relationships/cohabiting-couples/guardianship-and-cohabiting-couples/, accessed on 2022, 21 December.
wedlock who are recognized as legitimate. However, if the recognition of an illegitimate child against D is carried out by A when A is already married to B, then when A dies, D will not receive A's inheritance even though his status as a legitimate illegitimate child is recognized.

- Furthermore, if A's marriage with B dissolves, then D can receive A's inheritance if in A's marriage with B there are no offspring (children) of A and B. Meanwhile, if there are children in A's marriage with B, then D will not get inheritance.

Even though in the Constitutional Court Decision Number 46/PUU-VIII/2010 dated 17 February 2012, it was decided that the illegitimate child has a civil relationship with the father who acknowledges it or the father's family who recognizes it, but the arrangement for dividing the inheritance of illegitimate children is not stipulated in the Court Decision. The constitution so that what is used is the inheritance distribution arrangement regulated in the Civil Code or Burgerlijk Wetboek (BW). The recognition of children according to the Decision of the Constitutional Court Number 46/PUU-VIII/2010 whether it includes the recognition of children out of wedlock by force, is not regulated further. According to the author, the status of children out of wedlock based on the Constitutional Court Decision Number 46/PUU-VIII/2010 includes the type of forced confession. Proof of a child out of wedlock is no longer based on a court decision but is directly determined by law that the child is a child out of wedlock from a man as long as there is evidence based on science and technology and/or other evidence according to law having blood relations can be used as evidence in establishing that a man is the father of a child out of wedlock.

As for the provisions in BW, the amount of inheritance received by recognized illegitimate children is:

a. One-third of the portion that he would have received had he been a legitimate child, if the out-of-wedlock child had jointly inherited from the first class.

b. Half of the inheritance, if the out of wedlock child inherits together with the Second class or the Third class.

c. Three-quarters of the inheritance, if the illegitimate child inherits together with the fourth group.

a. One-third of the portion that he would have received had he been a legitimate child, if the out-of-wedlock child had jointly inherited from the first
class.

b. Half of the inheritance, if the out of wedlock child inherits together with the Second class or the Third class.

c. Three-quarters of the inheritance, if the illegitimate child inherits together with the fourth group.

One of the considerations for a child out of wedlock is determined to still have a civil relationship with his biological father is that the child's relationship with a man as the father is not solely due to the existence of marital ties, but can also be based on proof of the existence of a blood relationship between the child and the man. it as father. Thus, regardless of the matter of the procedure/administration of the marriage, the child born must receive legal\(^8\) protection. If this is not the case, then the one who is harmed is the child born out of wedlock, even though the child is innocent because the child was born against his will. Children born without clear father status often get unfair treatment and stigma in society. The law must provide protection and legal certainty that is fair to the status of a child who is born and the rights that exist for him, including for children who are born even though the validity of the marriage is still disputed.

Based on the above considerations it seems clear that the biological father of a child born out of wedlock is required to be responsible for children born out of wedlock. This aims to protect the interests of children born out of wedlock. This situation is not a problem if the biological father of the child out of wedlock is not in a state of marital bond with a woman who is not the biological mother of the child he will acknowledge. However, if a man who is responsible for recognizing his illegitimate child is bound in a marriage with another woman, is the protection for children born out of wedlock appropriate? Is it not excessive because it has interfered with the priority rights of legitimate children born in legal marriages? What about the rights of a legitimate child born in a marriage, is it the sin of another woman who she doesn't know and who consciously takes advantage of her father so that it interferes with her rights must also be borne by her? Meanwhile, the legal status of legitimate children and biological mothers is higher than children out of wedlock. In this case the panel of judges of the Constitutional Court Decision Number 46/PUU-VIII/2010 dated 17 February 2012 did not at all consider the rights of a legitimate child born in a legal marriage to the man who

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\(^8\) Birkah Latif, Padma D. Liman, Efforts To Understand Community Law Through Utilization Of Legal Consultation And Aid Units, Jurnal Hermeneutika, Vol. 7 no. 1, 2023.
is the biological father of the illegitimate child. This situation certainly creates injustice and is different from the arrangement of children out of wedlock in BW which still protects children out of wedlock who are recognized but whose rights are under legitimate children.

4 CONCLUSION AND SUGGESTION

4.1 CONCLUSION

1. The regulation of children out of wedlock in the decision of the Constitutional Court Number 46/PUU-VIII/2010 dated 17 February 2012 which amends Article 43 paragraph (1) of the Marriage Law does not guarantee legal certainty for the position of children out of wedlock as heirs, instead it creates conflict with the inheritance law in force in Indonesia based on the principle of concordance in this case BW. BW does not know the heirs of illegitimate children as regulated in the Constitutional Court Number 46/PUU-VIII/2010 because it equates all statuses of illegitimate children and it is considered that all have rights as heirs so that the distribution of inheritance for illegitimate children according to Article 43 paragraph (1) marriage law is not accommodated by BW.

2. The Constitutional Court Decision Number 46/PUU-VIII/2010 dated 17 February 2012 did not consider the interests of legitimate children and legal spouses of men who have children out of wedlock, resulting in injustice for them.

4.2 SUGGESTION

1. In order to create legal certainty for illegitimate children, especially in inheritance, the government should immediately make regulations that distinguish the position or level of illegitimate children and the distribution of inheritance for illegitimate children according to their position to accommodate the provisions in Article 43 paragraph (1) of the Law Marriage.

2. In order to make the above regulations, the government must also consider the rights of legal children and legal spouses of men who have children out of wedlock whose legal standing is stronger than those of children out of wedlock who are recognized so as not to result in injustice for them.
REFERENCES


Birkah Latif, Padma D. Liman, Efforts To Understand Community Law Through Utilization Of Legal Consultation And Aid Units, Jurnal Hermeneutika, Vol. 7 no. 1, 2023.


