



THE EXPLANATION OF THE CHILD AND WIFE'S INHERITANCE RIGHTS AS A RESULT OF SIRI LEGITIMATE MARRIAGE

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Abstract

Children out of wedlock (illegitimate children), according to Law No.1/1974, still have a legal relationship with their mother and their mother's family. In contrast, in KUHPdt/BW, the legal relationship exists only with the person who acknowledges it. The Constitutional Court stated that Article 43 paragraph (1) of the Marriage Law is conditional unconstitutional. The decision of Constitutional Court Number: 46 / PUU-VIII / 2010 regarding the status of children born outside of marriage raises new problems regarding the distribution of inheritance from the father to the child. In Islamic law, the distribution of inheritance cannot be implemented because, according to the concept of Islamic inheritance law, there are conditions such as lineage or a legal relationship according to marriage. In that regard, this study will comprehensively discuss the characteristics of inheritance distribution to children out of wedlock in positive Indonesian law, as well as the castration of a wife's inheritance rights as a result of the legal consequences of inheritance distribution to children out of wedlock based on Constitutional Court Decision Number: 46/PUU-VIII/2010. The method used in this research is normative legal research using the case approach method by analyzing the relevant laws and regulations and examining cases related to inheritance rights for children born out of wedlock. The results confirmed the apparent support for the inheritance rights of illegitimate children is indeed in the mother's family line. Article 863 BW states that if the inheritance leaves a legal offspring or husband or wife, the illegitimate children inherit 1/3 of what legitimate children would receive.

Keywords: *Illegitimate children, Inheritance, Marriage*

A. Introduction

Civil marriage is a legal relationship between a man and a woman for an extended period. From the point of view of the law, it is stated that marriage only comes from a civil relationship (Article 26 BW).¹ In the provisions of Article 26, BW only mentions that the law views marriage only from a civil point of view. Marriage in national law is a human right guaranteed and regulated in Article 28B of Law No. 1 of 1974 concerning Marriage (from now on referred

¹ Leonora Bakarbessy and Sri Handajani, "Kewarganegaraan Ganda Anak Dalam Perkawinan Campuran Dan Implikasinya Dalam Hukum Perdata Internasional," *Perspektif* 17, no. 1 (2012): 1, <https://doi.org/10.30742/perspektif.v17i1.89>.

to as UUUP).² Marriage itself can be considered valid if: 1. The marriage is carried out based on the law of his religion and belief. 2. Marriage is based on the consent of the bride and groom. 3. The male is at least 19 years old, while the female party is at least 16. 4. Parties under 21 years old must have the permission of both parents/guardians. Regarding the recording process, this does not make a marriage invalid because the registration process is an administrative process that must be fulfilled. However, in national law itself, the recording process referred to has become part of positive Indonesian law because only through this process will all rights and obligations of each party be recognized before the law.

According to the Marriage Law, every child can be directly related by blood to his mother.³ Meanwhile, according to the Civil Code, a child out of wedlock only has a blood relationship with his father if the father recognizes the child legally. The Constitutional Court stated that Article 43 paragraph (1) of the Marriage Law is conditionally unconstitutional. Dangdut artist Machica Mochtar has tested this article. He questioned Article 43, paragraph (1) of the Marriage Law, which stipulates that the status of a child out of wedlock will only have a legal relationship with the mother. In its ruling, the Constitutional Court stated that Article 43 paragraph (1) of the Marriage Law contradicts the provisions of the 1945 Constitution as long as it is interpreted as eliminating relations with men, which can be proven by science and technology and or other evidence that turns out to be related by blood as his father.

Administrative activities related to marriage, as mandated by Article 2 paragraph (2) of Law No. 1 of 1974 concerning Marriage, are not meant to limit the human rights of citizens.⁴ However, it is precisely to protect citizens in building families and to provide legal certainty for the rights of their husbands, wives, and children. The validity of a marriage cannot be recognized if it is not registered. The registration is to be carried out other than as a form of administrative order, then to provide legal certainty for the legal status of husband, wife, and children and also to guarantee the protection of rights that arise, such as inheritance rights, to obtain a birth certificate. So it can be said that this registration must meet the requirements and procedures in the Marriage Law. Several regulations align with Article 43 Paragraph (1) of the Marriage Law. Among them are Article 100 Paragraph (1) of the Compilation of Islamic Law (KHI), which reads, "Children born outside of marriage only have a kinship relationship with their mother and their mother's family." 186 KHI also states, "Children born out of wedlock only have an inherited relationship with their mother and their mother's family." These articles are used as legal considerations in the Religious Courts in deciding cases of child ratification applications.

BW (Burgerlijk Wetboek) even explicitly regulates the status of children out of wedlock in one chapter and 8 articles. It was later discovered that these articles were mutually reinforcing. The contents are also in line with Article 43 Paragraph (1) of the Marriage Law.⁵

Novelty the article, the purpose of protecting children out of wedlock does not have to be done by acknowledging the civil relationship with the father. This choice can endanger the child's safety if it turns out that the father's family does not accept it. If this is the case, the danger that follows is a long grudge from both parties. It is better if the Government unites

² Puspaningtyas Panglipurjati, "Peran Judicial Review Di Mahkamah Konstitusi Dalam Reformasi Hukum Perkawinan Indonesia Yang Humanis, Adil Dan Beradab," *Justitia et Pax* 32, no. 1 (2016), <https://doi.org/10.24002/jep.v32i1.762>.

³ Budi Satria Wijaya, "JURISDICTION ANALYSIS OF CANCELLATION OF BLOOD MARRIAGE ASSOCIATED WITH EFFORT LEGAL PROTECTION," 1974.

⁴ Muhammad Adiguna Bimasakti, "Keabsahan Perkawinan Beda Agama Dan Kewenangan Mengadili Sengketanya Dalam Presfektif Hukum Antar Hukum Indonesia," *Journal of Islamic Law Studies* 4, no. 1 (2020): 36–61.

⁵ Luh Putu Putri Indah Pratiwi, "Pengaturan Terhadap Kedudukan Anak Di Luar Kawin Pasca Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010," *E-Journal Komunitas Yustisia Universitas Pendidikan Ganesha Program Studi Ilmu Hukum* 3, no. 1 (2020): 67–69.

them in a container that functions to organize their lives. They are victims and deserve to be protected and their future guaranteed by the State. Thus, on the one hand, they still get safer protection, on the other hand, the law in our country is not easily injured by the perpetrators of unregistered marriage and adultery.

B. Discussion

1. Characteristics of the distribution of inheritance to children out of wedlock in positive Indonesian law

In Indonesia, there are still several kinds of Inheritance Law systems that apply. The first is the Customary Law system, with various systems influenced by various forms of regional ethnicity in the customary law environment.⁶ Customary law in some areas is still powerful to be applied by the community. Customary law applies to all native Indonesians except those who have entered another legal group. Customary law also does not apply to native Indonesians who are Christians because the ordinance has determined other laws.

The second inheritance law system is the Islamic Inheritance Law, which is regulated in the Compilation of Islamic Law (KHI). The Western (European) Civil Inheritance Law system is the third inheritance law regulated in the BW or the Civil Code.

Several rules regulate Inheritance law in Indonesia. Law No. 1 of 1974, in conjunction with Law No. 16 of 2019 concerning Marriage,⁷ Burgerlijk Wetboek and the Compilation of Islamic Law for those who are Muslim, while for those who are not Muslim, it is regulated in the Burgerlijk Wetboek. The elements contained in the Law of Inheritance, among others, are as follows:

- a. An heir is a person who has died and left something that can be transferred to a living family, namely through kinship, marriage, or through a living partnership in the household;
- b. Inheritance is property left by a person who dies to his heirs.
- c. Heirs are people who are entitled to receive property legacy. The provisions regarding heirs in Customary Inheritance Law, Islamic Inheritance Law, and Civil Inheritance Law have different concepts.

The classification of children according to BW is divided into several groups, namely legitimate children (children born in a marriage) and children born out of wedlock but recognized by one of the parents. The statement above concludes that what is meant as an illegitimate child is a child born outside a legal marriage relationship and is not recognized by both parents. As a result, if both parents marry, they will become legal children; the third illegitimate children are not recognized by their parents, so the family does not bind them to their parents.

Wife, but leaves a blood family in an upward line or brothers and sisters or their descendants. Article 863 BW states that if inheriting by leaving a legal descendant or husband or wife, children out of wedlock inherit 1/3 of what they should receive if they are legitimate children. Then the recognized children can inherit 1/2 of the inheritance. The last one is if there are relatives to a more distant degree, the child gets 3/4 of the share outside marriage. Article 864 BW stipulates that the illegitimate children must be given first while the legal heirs are distributed after the illegitimate children get their share. Article 865 BW states that the child outside marriage will get the entire inheritance if the inheritance does not leave a legal heir. Article 866 BW provides legal consequences that will occur if the child out of wedlock dies first, which will be given to legitimate children.

⁶ Nelly Indrayani and Siti Syuhada, "Seloko Adat Melayu Dalam Membangun Masyarakat Jambi Yang Berkarakter Dan Multikultural," *Criksetra: Jurnal Pendidikan Sejarah* 9, no. 2 (2020): 192–213, <https://doi.org/10.36706/jc.v9i2.11870>.

⁷ Cokorda Gede Yudha Putra, I Made Suwitra, and Gayatri Sudibya Diah, "Kedudukan Suami Menurut Hukum Waris Bali Dalam" 2, no. 2 (2021): 303–8.

Out-of-wedlock children regulated in this BW are illegitimate children recognized by their father and mother because if they are recognized, the child has a civil relationship. This is stated in Article 43, paragraph (1) of the Marriage Law in conjunction with Article 100 of the Compilation of Islamic Law.⁸ Article 99 of the Compilation of Islamic Law stipulates that children out of wedlock only have inheritance relationships in Islam. Children out of wedlock are not legal children, as stated in Article 99 of the Compilation of Islamic Law, namely children born in or as a result of a legal marriage and the result of fertilization of a husband and wife outside the womb and born by the wife.

Article 162 of the Compilation of Islamic Law explains the status of Li'an's children as a result of the husband's denial of the fetus or child born to his wife. Article 42 of Law No. 1 of 1974, in conjunction with Law No. 16 of 2019 concerning marriage, states that legal children and children born to women in a marriage bond with a grace period of at least 6 months between the event of marriage and giving birth to a baby, while the child born to a woman in a marriage bond whose time is less than the normal pregnancy but is denied by the husband. Based on the three types of inheritance law above, it can be concluded that the inheritance law regulation related to the inheritance rights of children out of wedlock is only in BW. Hence, the position of inheritance rights is in BW.

2. Castration of the Inheritance Rights of the Wife as a legal consequence of the distribution of inheritance to children out of wedlock based on the Decision of the Constitutional Court Number: 46/PUU-VIII/2010

The origin of the offspring of a child born out of wedlock is based on the legal relationship between the child and his biological father because the relationship with the mother has been created automatically. After all, it has been regulated in the BW, which adheres to the principle of absolute recognition. The regulation of illegitimate children in a family relationship with their father and mother significantly influences the monogamous marriage principle adopted by BW and Article 27 and the principle of absolute recognition. From both parents. For children born from adultery and blasphemy based on Article 272 BW and Article 283 BW, the position of these children may not be legalized by marriage or recognized by their parents, except for what has been stated in Article 273 BW Children out of wedlock According to inheritance law, BW can have a civil relationship with their parents if both biological parents make confessions as stated in Article 272 and Article 280 BW.), the provisions regarding the right to inherit do not apply to them. Adultery and discordant children will only get the right to a living measured based on the ability of the father or mother and their legal heirs according to law.

Children out of wedlock, according to the Constitutional Court Decision Number 46/PUU-VII/2010, still have a civil relationship with their father as long as it can be proven based on science and technology and or other evidence. The decision of the Constitutional Court Number 46/PUU-VII/2010 states that Article 43, paragraph 1 of the Marriage Law is considered contrary to the 1945 Constitution because it states that children born outside of legal marriage have no civil relationship with their father and their father's family. . The relationship referred to in this case is a civil relationship such as the costs required, not in the form of inheritance rights. There are three types of illegitimate children, namely illegitimate children who are born in a siri marriage, illegitimate children whose mother is then married by the child's father, and illegitimate children who are trained as a result of adultery. 284 of the Criminal Code, namely acts of sexual intercourse committed by a man or woman who is married to a woman or man who is not his wife or husband and does not get recognition from his parents.

⁸ Margareta Sevilla Rosa Angelin, Farida Danas Putri, and Akbar Prasetyo Sanduan, "Dilema Hak Mewaris Anak Luar Kawin Dalam Persepektif Hukum Perdata," *Jurnal Hukum Magnum Opus* 4, no. 2 (2021): 159–69.

Based on the understanding above, those who get inheritance rights are illegitimate children who come from unmarried marriages and also illegitimate children whose mother is finally married by the child's father. This is because the two illegitimate children have received recognition from both parents. So that they get their lineage. Lineage is understood as family ties based on blood relations as one of the consequences of a legal marriage.) down (children, grandchildren, and so on) or to the side (brothers, uncles, and so on). Based on the understanding of the lineage, the recognition of the child is indeed significant.

Adultery and discordant children who are not recognized even though they do not get lineage, but based on article 867 paragraph (2), BW will still get the right to live.⁹ This has also been confirmed by Article 869 BW, which states that if the father or mother, while still alive, has provided the necessary maintenance guarantee for a child born from adultery or blood staining, the child has further rights to claim an inheritance from his parents. So as has been stated in Article 100 of the Compilation of Islamic Law that children out of wedlock only have a legal relationship with their mother. Is inconsistent.

A marriage must meet the legal requirements of marriage, as regulated in Law Number 1 of 1974 concerning Marriage (from now on referred to as the Marriage Law).¹⁰ The external requirements related to the formalities must be met in a marriage. Internal requirements are related to the parties who will enter into the marriage. The internal conditions of marriage consist of the following:

1. Marriage must be based on the agreement of both parties (Article 6 paragraph (1) of the Marriage Law);
2. Both parties must obtain permission from both parents if each candidate has not reached the age of 21 years (Article 6 paragraph (2) of the Marriage Law);
3. For men, they must have reached the age of 19 years, and for women, 16 years, unless there is a dispensation granted by the court or other official appointed by the parents of both parties (Article 7 paragraph (1) and (2) of the Marriage Law);
4. Both parties are not married, except for those whose religion allows for polygamy (Article 9 in conjunction with Article 3 paragraph (2) and Article 4 of the Marriage Law);
5. For a woman who is going to get married for the second time and so on, the law requires that after the waiting period has passed, which is at least 90 days for those whose marriages are broken up due to divorce, 130 days for those whose marriages are broken up due to the death of their husbands (Article 10 and article 11 of the Marriage Law).

Meanwhile, the external requirements in marriage are reports, announcements, prevention, and implementation.¹¹ In Civil Law, the principles of marriage are regulated by the provisions of the BW. The principle of monogamy in a marriage is absolute/absolute and cannot be violated. Marriage is an agreement between a man and a woman in family law. For a marriage to be valid, marriage must meet the conditions set by law. Marriage has consequences on the rights and obligations of husband and wife. Marriage causes blood ties, besides marriage has an impact on the wealth of husband and wife.

⁹ Dalam Mewaris et al., "Jurnal Ilmiah Universitas Batanghari Jambi Vol.15 No.1 Tahun 2015 SUATU TELAAH TENTANG KEBERADAAN ANAK SUMBANG DALAM MEWARIS DI LIHAT DARI ASPEK HUKUM ADAT. Iman Hidayat 1" 15, no. 1 (2015): 61–66.

¹⁰ Desi Fitrianti, "Harta Bersama Dalam Perkawinan Poligami Menurut Undang-Undang Nomor 1 Tahun 1974 Dan Hukum Islam," *Intelektualita* 6, no. 1 (2017): 83, <https://doi.org/10.19109/intelektualita.v6i1.1302>.

¹¹ A Afifah, "Efektivitas Pelaksanaan Bimbingan Keluarga Sakinah Di Kua Kecamatan Ulujadi Kota Palu," *Sakina: Journal of Family Studies* 5, no. 4 (2021), <http://urj.uin-malang.ac.id/index.php/jfs/article/view/1086%0Ahttp://urj.uin-malang.ac.id/index.php/jfs/article/download/1086/760>.

The principles of marriage that can be deduced from Law Number 1 of 1974 concerning Marriage are as follows the first is the principle of agreement; there must be an agreement between the prospective husband and wife. (Chapter II Article 6, paragraph (1) of the Marriage Law). The second is the principle of monogamy. In this principle, a man can only have one wife, and a woman can only have one husband. (Article 3 paragraph (1) of the Marriage Law), but there are exceptions (Article 3 paragraph (2) of the Marriage Law), with the conditions stipulated in Article 4-5 of the Law Marriage. The legitimacy of marriage must meet the requirements determined by law (Article 2 of the Marriage Law). Marriage has several consequences, namely, the effect on the husband and wife and the effect on the children/offspring of the marriage. Marriage also has consequences for the husband's property and the wife's.

The principles of marriage according to Islamic law, as regulated in the Compilation of Islamic Law (from now on referred to as KHI), are as follows; the first is the principle of voluntarism, which is the essential principle in Islamic marriage because in this principle there is voluntary action between the two parties. Husband and wife, as well as between the parents of both parties. The second is the principle of consent, a form of agreement by both parties. It is a logical consequence of the principle of voluntarism, and there should be no element of coercion in it (Articles 16 and 17 of the KHI).

Third, the principle of freedom is a principle that reflects the freedom to choose a partner while still paying attention to the prohibitions in marriage. Article 18 of the KHI states that there are no obstacles in marriage, but still pay attention to articles 39-44 of the KHI regarding the prohibition of marriage. The husband and wife partnership principle is the principle that regulates equal togetherness or kinship. This principle implies the rights and obligations of husband and wife (Article 77 KHI). The fourth is the principle of Forever and ever; in this principle, a marriage is carried out to carry out offspring and foster love and affection throughout life. (Article 2 KHI).

The fifth is the principle of the benefit of life; this principle reflects the purpose of marriage, namely to create a family in a marriage that is ma'ruf (good), sakinah (peaceful), mawwadaah (love each other), and rahmah (love each other). This principle is implicitly regulated in Article 3 of the KHI. The sixth is the principle of Rejecting Mudharat and Taking Benefits, and this principle implicitly regulates the purpose of marriage to prevent committing heinous and evil deeds. The seventh is the principle of legal certainty, this principle implicitly explains that marriages must be announced, as stipulated in articles 5 – 10 of the KHI, such as marriages must be recorded and carried out by marriage registrar employees, marriage Isbath in the Religious Courts, Refer to evidenced by a citation of the Registration Book Referring to the Marriage Registration Officer, the dissolution of the marriage must be proven by a Court Decision. Articles 60-69 regulate the prevention of marriage and articles 70-76 of the KHI regulate the annulment of marriages.

The last is the principle of Islamic Personality; in this principle, it is regulated that a Muslim must marry a Muslim as well. Article 40, KHI letter C explains that non-Muslim women are prohibited from marrying Muslim men. In contrast, in article 44, KHI explains that Muslim women are prohibited from marrying men who are not Muslim. Marriage has several legal consequences on the property of both parties. Article 119 BW states that property acquired during the marriage becomes joint property, including all marital property, namely:

- a. Assets that already existed at the time of marriage;
- b. Assets acquired throughout the marriage. However, there is an exception that the property is not a mixed asset, namely if there is a marriage agreement and there is a grant or inheritance determined by the testator as stipulated by article 120 BW.

Article 35 of the Marriage Law states that joint property is property acquired during the marriage and Inherited property is the property brought into a marriage. The control remains

with each husband and wife who brought him into the marriage as long as the parties do not determine otherwise. As a result of marriage to offspring, based on article 250 BW, every child born or raised throughout the marriage gets a husband as his father. Article 42 of Law No. 1 of 1974, in conjunction with Law No. 16 of 2019 concerning Marriage, states that children born in or as a result of a legal marriage. A legal marriage can be denied based on Articles 251-254 BW.

The inheritance rights of the illegitimate children are indeed in the mother's family line, but Article 863 BW states that if the inheritance leaves a legal offspring or husband or wife, then the illegitimate children inherit 1/3 of what they should receive if they are legitimate children. Article 864 BW stipulates that illegitimate children must be given first. Suppose the inheritor does not have children or a husband or wife but leaves a blood family in the upward line or brothers and sisters or descendants. Then the recognized children can inherit 1/2 of the inheritance. The last is if there are relatives in the family. To a different degree, the illegitimate children get 3/4 of the share.

The wife can become an heir if she fulfills several conditions. The first is that the wife can only get an inheritance after the testator dies, as stated in Article 830 BW. He is not declared by law as a person who is not eligible to inherit because of death or is not considered incompetent to become an heir. Meanwhile, Pasal 832 BW states that a legal wife can be an heir.

The husband's religion uses the distribution of the husband's inheritance to the wife. The wife will get 1/8 of the entire inheritance after deducting the payment of the inheritance debt, and if she does not have children, she will get 1/4 share if the inheritor does not have children. Therefore, if the husband has a child from a recognized marriage outside of marriage, especially if the marriage is unregistered, then, of course, the inheritance rights of the wife, in this case, will be reduced because the inheritance should only be distributed to the wife and also to the husband's legitimate children. Article 863 BW provides evidence that children out of wedlock also get 1/3 from the husband if the husband has a wife and children from his legal family.

C. Conclusion

Above or brothers and sisters or their descendants. Children out of wedlock who are recognized by their parents according to Article 863 BW get inheritance rights equal to 1/3 of what they should receive if they are legal children. Then the recognized children can inherit 1/2 of the inheritance. The last one is if there are relatives to a more distant degree, the illegitimate child gets 3/4 of the share. Article 864 BW stipulates that the children out of wedlock must be given first. Therefore, recognition is an essential thing for children out of wedlock.

Communication in the family certainly needs to be done, especially in husband and wife relationships. The regulation of inheritance rights for illegitimate children, as explained in the paragraph above, can, of course, be said to castrate the wife's share, who gets 1/8 of the total inheritance after deducting the payment of the inheritance debt. If she does not have children, she will get 1/4 share if the inheritor does not have children. This castration is about the whole property.

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