

Legal Certainty of Inheritance for Children Born Out of Wedlock Who Are Recognized as Legitimate by Their Biological Parents

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Abstract. *The birth of a child out of wedlock has a large and broad impact, namely whether or not to receive an inheritance, therefore it must receive legal protection in order to obtain clarity regarding the position and distribution of the inheritance. The purpose of this study is to analyze: 1). The legal status of obtaining inheritance rights for illegitimate children who receive legal recognition from their biological parents. 2). Legal protection for obtaining inheritance rights for illegitimate children who receive legal recognition from their biological parents. The approach method used in this study is normative juridical and supported by empirical juridical. The research specification used is descriptive analytical. The type of data uses primary data obtained through literature studies. The data analysis method used in this study is descriptive analysis. The results of the study concluded: 1). The Legal Status of an Illegitimate Child who receives legal recognition from his biological parents to obtain inheritance rights is to continue to receive the right to inherit, an illegitimate child who is recognized is entitled to a will grant as long as the grant does not harm other heirs and is in accordance with the provisions stipulated by the Law. Wirjono Prodjodikoro said that if an illegitimate child wants to receive legal recognition from his biological father, it must be based on the recognition and determination of the court. After receiving recognition and determination from the court, the illegitimate child has a civil relationship with his biological father and becomes an erfgenaam or legal heir according to law and statute and is entitled to receive inheritance from his biological father. 2). Legal Protection for Illegitimate Children who receive recognition from their biological parents to obtain inheritance rights is after the*

Constitutional Court (MK) Decision Number 46/PUU-VIII/2010, the heir has the right to file a lawsuit to the court to obtain his inheritance, of course it must be accompanied by concrete evidence that confirms having a blood relationship with the deceased testator. For example, a DNA test letter from a Forensic Doctor and a court decision that confirms the DNA test letter.

Keywords: Children; Illegitimate; Protection; Status.

1. Introduction

If examined further, the law is suspected of having a contribution that places children in a group that has not received proper legal recognition and protection, for example, the existence of illegitimate children who have the status of illegitimate children, placing them with different rights from children in general (legitimate children), that the child only has a civil relationship with his mother and his mother's family, while his biological father is legally a contrario to the definition of a legitimate child as stated in Article 42 "released" from his responsibilities as a parent. By understanding Law Number 1 of 1974 concerning Marriage², what is meant by an illegitimate child (illegitimate child) can be interpreted as a child who is not born in or as a result of a legitimate marriage.

According to the Indonesian Child Protection Commission (KPAI), almost 50 (fifty) million Indonesian children do not have birth certificates because their parents do not have marriage certificates because they have never been married and because they are in unregistered marriages, this figure is almost half of the number of children under 5 (five) years old in Indonesia. ³ The birth of an illegitimate child can also occur in the marriage of the parents which is not recorded as fulfillment of the administrative requirements stipulated by the Marriage Law. This is for example due to poverty factors that are unable to pay for marriage costs or because the man is still bound by a marriage with another woman who has not received approval from his wife or permission from the court. ⁴

Children of adultery, namely children born as a result of sexual intercourse outside of a valid marriage according to Islamic law, have the same status as other children. The Indonesian Ulema Council (MUI) has also issued a fatwa regarding the status of children resulting from adultery. In fatwa number 11 of 2012, it is stated that children resulting from adultery do not have any relationship of lineage, marriage guardian, inheritance, and nafaqah with

²<http://www.ronawajah.wordpress.com> accessed December 20, 2022

³Syafran Sofyan, Constitutional Court Decision on the Status of Children Born Out of Wedlock, <http://jimlyschool.com>, accessed 20 December 2022

⁴Y. Witanto, Family Law Rights and Status of Children Born Outside of Marriage After the Issuance of the Constitutional Court Decision on the Material Review of the Marriage Law, 1st Edition, Presentation Pustaka Jakarta, Jakarta: 2012. P. 16.

the man who brought about her birth. The MUI also stipulates that children resulting from adultery only have a lineage, inheritance and nafaqah relationship with their mother and her mother's family.

Then, Imam ibn 'Abidin in the book Radd al-Muhtar 'ala al-Durr al-Mukhtar argued that children resulting from adultery and li'an only get inheritance rights from the mother's side, because according to him, children resulting from adultery do not have a father. In this case, children resulting from adultery who are born outside of marriage do not bear the sin of adultery committed by their biological father and mother.⁵

The civil rights of children born out of wedlock have a major and wide impact on children, because they do not receive legal protection, such as child care and welfare, including the child's right to inherit. Observing the status of children born out of wedlock/marriage, problems arise that have an impact on children, namely whether or not they will receive an inheritance, because children born out of wedlock will obtain a civil relationship with their father, namely by giving recognition to children born out of wedlock.⁶

This quite drastic change has occurred with the existence of a judicial review application (material test) for several articles in the Marriage Law in the Constitutional Court Decision Number 46/PUU-VII/2010. The Constitutional Court Decision states, among other things, that Article 43 paragraph (1) of the Marriage Law which states "A child born out of wedlock only has a civil relationship with his mother and his mother's family must be read as a child born out of wedlock has a civil relationship with his mother and his mother's family as well as with a man as his father who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship, including a civil relationship with his father's family.⁷

The impact of the Constitutional Court's decision has resulted in changes, including the emergence of alimony obligations for men who can be proven to have blood relations as fathers of illegitimate children, which are now borne jointly by a man.

A man as a father who can be proven to have a blood relationship with the child, and the recognition of an illegitimate child having a civil relationship with his biological father will certainly have an impact on a child's right to receive inheritance. The position of an illegitimate child becomes equal to a child born as a result of a legal marriage.

The Constitutional Court's decision has brought many impacts, namely that illegitimate children get their rights to become heirs, get clarity regarding their position, and the distribution of their inheritance. The illegitimate children in question are of course different from children resulting from free sex or known as adultery children. The interests and rights of illegitimate children must be fulfilled and protected in an inheritance process. In principle, inheritance is the steps for continuing and transferring tangible and intangible inheritance from an heir to his heirs.⁸

After an illegitimate child is recognized, several problems can arise, namely the problem of inheritance distribution which may possibly trigger protests from children from a legitimate marriage. Thus, the role of the court and notary as officials authorized to make deeds of child recognition and inheritance distribution becomes important so that there is no chaos in the family just because of property issues. In addition to legitimate children, illegitimate children recognized in the Civil Code are also legitimate heirs of a testator. Descendants (*afstamming*) are blood relations between children and their parents. The law regulates legitimate children and illegitimate children (*wettige en onwettige kinderen*). The latter are also called illegitimate children (*natuurlijke kinderen*) or translated as "natural children".

In Indonesia we have a Public Official who can be called a Notary. With the ruling of the Constitutional Court which revised Article 43 paragraph (1) of Law No. 1 of 1974, "a child born out of wedlock has a legal relationship with the Notary."

civil with his mother and his mother's family. However, after the Constitutional Court Decision No. 46/PUU-VIII/2010, an illegitimate child has a civil relationship with his father as long as he can prove it based on science and technology and/or other evidence according to the law that he has a blood relationship including a civil relationship with his father's family. With this, the Notary plays a role in making a Certificate of Inheritance, after the status of an illegitimate child is improved so that his status is the same as a legitimate child through recognition. With this, an illegitimate child has the right to become the heir of his parents. So that the distribution of inheritance does not cause chaos in the testator's family, especially his children who receive the inheritance.

One of the activities that must be carried out by a notary before making the deed of inheritance is to first request information from the Central Will Registration Section at the authorized department, currently at the Ministry of Law and Human Rights of the Republic of Indonesia, regarding whether or not an heir left a will. This is very important to ensure the rights of the heirs. However, to ensure whether or not an heir had an illegitimate child during his/her lifetime, the mechanism is not further regulated by law. The presence or absence of an illegitimate child heir is only stated by the statement of the other heirs in the Deed of Inheritance Statement. So it is very possible that other heirs of an heir will emerge who then claim their rights after the Deed of Separation and Distribution of Inheritance. In this situation, a very large role will be required from the notary in resolving the inheritance problem of the illegitimate child.

The occurrence of problems of inheritance of illegitimate children is recognized when associated with the implementation of the notary's office, becoming an important discussion, considering that a notary is a public official who is authorized to make authentic deeds that will become evidence of a legal act. If the Deed of Separation and Distribution of Inheritance that has been made by the notary is problematic in the future, in this case an illegitimate child appears who is recognized as one of the legitimate heirs but is not included as one of the heirs in the deed that has been made, of course this will bring certain legal consequences for the notary concerned, in this case the notary can be sued for negligence and not being careful in carrying out his/her position, so that it can cause losses to certain parties in this case the acknowledged illegitimate child.¹⁰

After examining the problem of inheritance rights of illegitimate children who are legally recognized, where those born from marriages that are not registered in the State, often cause legal problems. Even though since the Constitutional Court's decision No. 46/PUU-VIII/2010, illegitimate children can be proven by science, namely DNA testing, that the child is the biological child of his father, so that it can be used as a basis for a request for a court ruling to be determined as an illegitimate child who is recognized so that he can be included in the list of heirs from his father's inheritance.

2. Research Methods

The method used in this study is the normative legal research method and is supported by empirical legal research. The approach focuses on the study of primary legal materials in the form of legislation, secondary legal materials in the form of scientific works, and tertiary legal materials in the form of dictionaries, as well as court decisions and jurisprudence. This type of research is analytical descriptive research. Analytical descriptive is

research that describes applicable laws and regulations in relation to legal theories and their implementation practices.¹¹ The existence of this research provides an explanation of data based on literature studies combined with existing facts to obtain a comprehensive and systemic picture of

various doctrines and positive laws that regulate the inheritance rights of illegitimate children that are recognized. Data sources come from primary data and secondary data. Data collection methods include library methods carried out by collecting (inventorying) legal materials that are considered related to the problems in the study, then these materials are collected to make a study on solving the problem. The data analysis method used in analyzing uses qualitative data analysis, which is a research method that produces descriptive data. In qualitative research, all investigators or researchers focus on the problems being studied, guided by a conceptual or theoretical framework.

3. Results and Discussion

3.1. Legal Status of Obtaining Inheritance Rights for Children Born Out of Wedlock Who Receive Legal Recognition from Their Biological Parents

At birth, a child has a legal status related to the marital status of his/her parents. This is as regulated in the Marriage Law which explains that the status of children is divided into legitimate children and illegitimate children. Based on Article 42 of the Marriage Law, a legitimate child is a child born in a legitimate marriage. Meanwhile, Article 43 paragraph (1) of the Marriage Law explains that an illegitimate child is a child born outside of marriage and only has a civil relationship with his/her mother and his/her mother's family.

Regarding children outside of marriage, there are two further definitions, the first is a child who is conceived and born outside of a legal marriage. Second, a child who is conceived outside of marriage, but is born after his parents are married. In civil law, such a child can be categorized as a child

legitimate. This is as regulated in Article 50 of Law Number 24 of 2013 which essentially states that the legitimization of a child must be reported to the implementing agency no later than 30 days since the father and mother of the child are married and receive a marriage certificate.

In Islamic Law, illegitimate children cannot inherit from their biological father. An illegitimate child can obtain the inheritance of their biological

father through several ways, for example by obtaining a letter of inheritance from their biological father and can apply to the religious court to obtain a *wajibah* will. The inheritance for an illegitimate child must not exceed the legal heir who receives the smallest share. To divide the inheritance of an illegitimate child, one third of the entire inheritance is first given to the illegitimate child, after which the other assets are given to the heirs. The same amount also applies to inheritance for illegitimate children given in the form of a gift.

The Constitutional Court (MK) has issued Decision Number 46/PUU-VIII/2010 which is a judicial review of the Marriage Law. Previously, Article 43 paragraph (1) of the Marriage Law stated "A child born out of wedlock only has a civil relationship with his/her mother and her family". After the Constitutional Court Decision Number 46/PUU-VIII/2010 was issued, Article 43 paragraph (1) of the Marriage Law changed to "A child born out of wedlock has a civil relationship with his/her mother and his/her mother's family as well as with a man as his/her father who can be proven based on science and technology and/or evidence according to law to have a blood relationship, including a civil relationship with his/her father's family".

The institution of recognition and ratification for children by their biological parents is a legal act that has the consequence of increasing the legal status of illegitimate children in civil relations. Article 280 of the Civil Code stipulates that through recognition made to an illegitimate child, a civil relationship will arise between the child and their biological parents. Their position will increase if ratification is carried out, as in Article 277 of the Civil Code that the ratification of a child, either because of the marriage of the father and mother, or ratification according to Article 274 of the Civil Code, which results in the status of the illegitimate child being the same as a legitimate child having a civil relationship with the mother and father and a civil relationship with the family of the mother and father.

In Article 285 of the Civil Code, it is stated that recognition made during marriage by a husband or wife regarding the happiness of an illegitimate child, who before marriage was born to someone other than the wife or husband, will not bring harm either to the wife or husband, or to the children who born from their marriage. Meanwhile, if the marriage is dissolved, this recognition will have the consequences if no offspring are born from the marriage.

The following is an example of a Case Analysis of the Semarang High Court Decision Number 691/Pdt/2019/PT SMG, in this case the plaintiff is a child from a legal marriage between the testator and his mother, suing the will deed to the testator stating that all of the testator's inheritance was

granted as a will to the defendant who is the testator's illegitimate child during his lifetime which is recognized according to law. The plaintiff asked the judge to cancel the will deed made by the testator and stated that the plaintiff was the heir of the testator. The final decision, the Judge decided that the will deed made by the testator was null and void because it exceeded the provisions stipulated by law, namely that the will grant must not harm the heirs, and the judge stated that the plaintiff and defendant became the heirs of the heirs and the object of the dispute became the joint rights of the heirs in accordance with the provisions stipulated by the Law.

Children from a legitimate marriage or illegitimate children for the recognition of their heirs must be recognized through a notary deed, the testator gives a will grant to the heirs exceeding that which has been stipulated in the provisions of the law and harms the rights of other heirs, then the will is not enforced. So that all objects of the will are divided for all heirs. In this case, an illegitimate child who is recognized is entitled to receive a will grant as long as the grant does not harm other heirs.

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Legal protection for illegitimate children in inheritance rights must be truly implemented, in this case the biological father must make a legal recognition according to the law for illegitimate children, so that the civil rights of illegitimate children can be protected. For illegitimate children who have been recognized as inheritors with class I, class II, class III, and class IV, the large portion depends on the degree of kinship of the legitimate parties.

According to the Compilation of Islamic Law (KHI), a child born from a marriage of a pregnant woman due to adultery is a legitimate child because he was born in a legitimate marriage according to Article 53 of the Compilation of Islamic Law. However, if the marriage of a pregnant woman is carried out with a man who did not impregnate her, then the marriage is invalid and the child born has an illegitimate legal status or is an illegitimate child. Article 2 paragraph (1) of Law Number 1 of 1974 concerning marriage states that the status of a child born from a marriage of a pregnant woman due to adultery is a legitimate child if he is born from a legitimate marriage,

namely a marriage carried out according to the laws of each religion and belief.

The Compilation of Islamic Law (KHI) does not explain the recognition of children in detail and completely. Recognition of children in Islamic Law is called *istilhag* or *iqrar* which means a man's voluntary recognition of a child that he has a blood relationship with the child, whether the child is born out of wedlock or the child's origin is unknown. In the concept of Islam, there are 2 types of recognition, namely recognition for oneself and recognition of children for others. If the requirements for recognizing a child, whether for oneself or for the benefit of others, have been met, then the recognition is legally valid.

The Constitutional Court (MK) Decision and Islamic Law are two things that cannot be equated and connected. The Constitutional Court Decision is a guideline for regulations and is applied in District Courts and Religious Courts. The Constitutional Court Decision actually has no effect on Islamic Law for illegitimate children. Because in Islamic Law, a legitimate marriage, an illegitimate child, even if not registered, has the same status as a legitimate child. Except for an illegitimate child due to adultery, it cannot change anything.

So it can be concluded that the legal status of an illegitimate child who has received legal recognition from his biological father to obtain inheritance rights is to still have the right to inherit, an illegitimate child who is recognized has the right to receive a will grant as long as the grant does not harm other heirs and is in accordance with the provisions stipulated by the Law. Wirjono Prodjodikoro said that if an illegitimate child wants to receive legal recognition from his biological father, it must be based on the recognition and determination of the court. After receiving recognition and determination from the court, the illegitimate child has a civil relationship with his biological father and becomes an *erfgenaam* or legal heir according to law and statutes and has the right to receive inheritance from his biological father.

3.2. Legal Protection for Obtaining Inheritance Rights for Children Born Out of Wedlock Who Are Recognized by Their Biological Parents

Legal protection for illegitimate children is inseparable from the provisions of Article 8 of Law Number 23 of 2002 concerning Child Protection which states "Every child has the right to obtain health services and social security in accordance with physical, mental, spiritual, and social needs". Also regulated in Article 28D paragraph (1) which states: "Everyone has the right to recognition, guarantee, protection, and certainty of fair law and equal treatment before the law." And based on Article 1 paragraph (2) of Law

Number 35 of 2014 concerning Child Protection, it states that "Child Protection is all activities to guarantee and protect children and their rights so that they continue to live, grow, develop, and participate optimally in accordance with human dignity and dignity, and receive protection from violence and discrimination".

Treatment of illegitimate children varies greatly, some areas accept it and some areas strongly reject it. Darwan Prinst said that children are part of the younger generation, as the successors of the ideals of the nation's struggle. Every child has their own nature and way, therefore every child needs protection to ensure harmonious and balanced physical, mental, and social growth and development. In general, illegitimate children and legitimate children do not have any real differences in positive law in Indonesia.

The following is an example of a case analysis of the Semarang High Court Decision Number 691/Pdt/2019/PT SMG, in this case the plaintiff is a child from a legal marriage between the testator and his mother, suing the will deed to the testator stating that all of the testator's inheritance was granted as a will to the defendant who was the testator's illegitimate child during his lifetime which is recognized according to the law. The plaintiff asked the judge to cancel the will deed made by the testator and stated that the plaintiff was the heir of the testator. The final decision, the Judge decided that the will deed made by the testator was null and void because it exceeded the provisions stipulated by law, namely that the will grant must not harm the heirs, and the judge stated that the plaintiff and defendant became the heirs of the heirs and the object of the dispute became the joint rights of the heirs in accordance with the provisions stipulated by the Law. Legal protection for illegitimate children in terms of inheritance rights, namely that legal procedures must be carried out properly, meaning that the biological father of the illegitimate child must make a legal recognition according to law, so that the illegitimate child can be protected.

To analyze the case above, the author uses the theory of legal protection according to Phillipus M. Hadjon's opinion that legal protection for the people is a preventive and repressive government action. Preventive legal protection aims to prevent disputes from occurring, which directs government actions to be careful in making decisions based on discretion, and repressive protection aims to resolve disputes, including handling them in judicial institutions.

Phillipus M. Hadjon's legal theory is very relevant to research on the legal protection of inheritance rights of illegitimate children who are recognized as legitimate by their biological parents (fathers), because the biological

father of an illegitimate child can carry out preventive legal protection with Recognition and Determination from the court. While repressive legal protection if an illegitimate child who is recognized as legitimate does not get his inheritance rights, then the illegitimate child who is recognized as legitimate can demand his rights by suing in court.

In the inheritance system of Article 832 of the Civil Code, those who are entitled to be heirs are blood relatives, both those who are legitimate according to the Law and those who are not married, and the husband and wife who live the longest to receive inheritance from the testator. Protection of the rights of illegitimate children as an implication of the Constitutional Court Decision No. 46/PUU-VIII/2010, has equalized the legal status between legitimate children and illegitimate children in obtaining civil rights. Protection of the rights of illegitimate children and biological mothers includes protection of the legal rights of illegitimate children to demand recognition and validation so as to provide legal protection for the rights of children and for biological mothers to request responsibility for supporting the upbringing of illegitimate children to their biological fathers. Likewise, the right to receive inheritance without discrimination.

After the Constitutional Court (MK) granted the judicial review of Article 43 paragraph 1 of Law Number 1 of 1974 concerning Marriage (UUP). Shortly after the decision No. 46/PUU-VIII/Year 2010, the decision immediately received a variety of responses from various groups, from those who appreciated it to those who were worried and anxious. Not long after, the MUI issued a fatwa Number 11 of 2012 concerning the Status of Children from Adultery and Their Treatment. The government has indeed issued a Government Regulation implementing the Marriage Law, namely Government Regulation Number 9 of 1975, but the Government Regulation does not mention legal protection for children outside of marriage. The matters regulated in Government Regulation Number 9 of 1975 are only around marriage registration, marriage procedures, marriage certificates, divorce procedures, marriage annulment, waiting period, having more than one wife, and criminal provisions.

With the Constitutional Court Decision Number 46/PU-VIII/2010, the relationship between an illegitimate child and his/her father is a blood relationship in the biological sense that is confirmed based on a legal process. The Constitutional Court Decision opens up the legal possibility for the discovery of a legal subject who must be responsible for an illegitimate child to act as his/her father through a legal mechanism using evidence based on the latest science and technology and/or law. The Constitutional Court Decision only strengthens the position of the mother of the

illegitimate child in requesting recognition of the biological father of the illegitimate child if the father does not want to voluntarily acknowledge the illegitimate child.

Therefore, it is necessary to have a law reform of the child protection system in Indonesia by adjusting Law Number 1 of 1974 concerning Marriage after the Constitutional Court decision, by emphasizing the legal protection and human rights of illegitimate children. It is hoped that the role of the Indonesian Child Protection Commission (KPAI) can synergize with the government to immediately issue implementing legal regulations in accordance with the Constitutional Court Decision so that there are no overlapping opinions and views that can affect administrative legal procedures regarding the validity of marriages so that they are prone to violations of the rights of children outside of marriage only because the status of the validity of their parents' marriage is problematic.

Following the Constitutional Court (MK) Decision Number 46/PUU-VIII/2010, Article 834 of the Civil Code states that heirs have the right to file a lawsuit to obtain their inheritance against all persons who hold ownership of all or part of the inheritance with or without a legal basis, the lawsuit aims to demand that anything that is in the inheritance with any legal basis be handed over, along with all income, revenue and compensation, according to these regulations, this is contained in Chapter III concerning the reclaiming of ownership rights.

And the role of the Notary here is indeed a very important role, namely making a deed of inheritance for illegitimate children by making a Deed of Cancellation of Agreement. The deed made by the Notary is based on the principle of freedom of contract, the contents of which confirm the wishes of the parties, with the cancellation an agreement made must also be based on an agreement by the parties.

It has been explained above in Article 834 of the Civil Code that heirs have the right to file a lawsuit to the court to obtain their inheritance, of course, it must be accompanied by concrete evidence that justifies having a blood relationship with the deceased heir. For example, a DNA test letter from a Forensic Doctor and a court ruling that justifies the DNA test letter.

4. Conclusion

According to Philipus M. Hadjon, it is very relevant to research on legal protection of inheritance rights of illegitimate children who are recognized as legitimate by their biological parents, because the biological father of an illegitimate child can carry out preventive legal protection with Recognition and Determination from the court. This legal protection aims to prevent disputes from occurring. While repressive legal protection is to resolve

disputes if an illegitimate child who is recognized as legitimate does not receive his inheritance rights, then the illegitimate child who is recognized as legitimate can claim his rights by suing in court.

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