

THE LEGAL STANDING & INHERITANCE RIGHTS FOR OUT-OF-WEDLOCK CHILD IN TERMS OF CIVIL INHERITANCE LAW

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Abstract The problems regarding the legal standing of an out-of-wedlock child that demands inheritance rights from both biological parents. The purpose of this research are to find out about the legal standing regarding the relationship between out-of-wedlock children and how the inheritance rights of an out-of-wedlock child in the distribution of inheritance by both biological parents are related to the Constitutional Court Decision Number 46/PUU-VIII/2010 in terms of civil inheritance law. The type of research used in this journal is Normative Juridical. This research of the problem after the Constitutional Court's Decision Number 46/PUU-VIII/2010 can be concluded that the out-of-wedlock child has not only a civil relationship with his mother but also with his biological father if he/she can prove it with science and technology and in inheritance issues, the child out of wedlock in terms of civil law must be recognized by his biological father so that he/she can become an heir, but with the Constitutional Court Decision Number 46/PUU-VIII/2010, the out-of-wedlock child can get not only a share of the inheritance from his mother who is without recognition but also inheritance from his/her biological father if it is proven to have a civil relationship as evidenced by science and technology

Keywords: inheritance law; civil code law of inheritance; out-of-wedlock child.

I. Introduction

Both Marriage and Birth are two important events that can happen in every human life (Fadlyana & Larasaty, 2016). According to Article 45 Law Number 1 Year 1974 concerning Marriage (Marriage Law), the purpose of a marriage is to form a happy and eternal family or household (Scott, 2011). Marriage is legal if it is carried out according to the laws of each religion or belief and has been registered according to applicable laws. Marriage is an important event in the life of every human being with the bond of marriage itself that causes legal consequences between those who do the marriage or those who have certain interests (Handayani, 2016).

Because of a marriage, then emerge various law relations that contain rights and obligations between husband and wife. But a marriage can't be said to be perfect if the husband and wife in the marriage have not yet blessed with children. If a kid is conceived from the

marriage, at that point law relations will emerge between the children and the parents based on Article 45 of Law Number 1 Year 1974, law consequences between parents and children raises obligations for parents, one of them is the responsibility to care for and educate their children until they are independent (Alaudin, 2018).

Birth is a law event that causes many law consequences because of the birth event will lead to law relations such as inheritance relations, family relations, guardianship relations, and other relations related to the civil rights of children who have been in the womb of their parents that the conceived child already has the rights and obligations in obtaining his status and position before the law.

Generally, it is stated that a lawful child is a child that are conceived and born or as a consequence from a lawfully marriage as mentioned in Article 42 of Law Number 1 Year 1974 concerning Marriage which

regulates the position of the child. When a child is born from the relationship between a man and a woman who has not become husband and wife in a (legal) marriage, then the child is a child born out of wedlock or called an out-of-wedlock child (Mahmudi, 2018).

In the provisions of Article 43 section (1) of the Marriage Law, it regulates that children born out-of-wedlock have a civil relation with their mother and their mother's family.

However, in the past few years there was a lawsuit regarding the application for judicial review of Article 43 Section (1) of the Marriage Law against the 1945 Constitution of the Republic of Indonesia by artist Machica Mochtar and her son named Muhammad Iqbal Ramadhan, who is the son of a unregistered marriage to former Minister of State Secretary Moerdiono. As a result, the Constitutional Court with a legal breakthrough changed Article 43 Section (1) of the Marriage Law so the out-of-wedlock children's legal standing are changed which can affect many aspects of applicable law. The Constitutional Court states that Article 43 paragraph (1) of the Marriage Law is contradicting the 1945 Constitution of the Republic of Indonesia conditionally (conditionally unconstitutional) as long as that Section is interpreted to eradicate civil relations with males which can be proven based on science and technology and/or other proof as per the law has blood relations as his father.

Basically, a child born in a legal marriage does not cause a problem because the process of marriage does not conflict with applicable law provisions (Addilah & Ummu Siti, 2014). However, it is different if the child is an out-of-wedlock child which can cause problems for both those concerned, the child, and the community. One of the problems that arises is how the legal standing of the out-of-wedlock child in inheritance and how the law relates to both parents or one of their parents.

Based on the description above, the author raises a case regarding inheritance disputes where a child whose status is an out-of-wedlock child who grows up to be an adult and he grows up with his mother but not with his biological father demands the distribution of inheritance from his parents including the biological father. The problems obtained from the background of the case dispute above are as follows:

1. What is the legal standing of the relationship between out-of-wedlocked children and their biological parents regarding the decision of the Constitutional Court Number 46 / PUU-VIII / 2010 (Constitutional Court Decision No. 46/PUU-VIII/2010)?
2. What is the legal position of an outside marriage child as an heir in the distribution of inheritance by his biological parents after the Constitutional Court Decision No. 46 / PUU-VIII / 2010 (Constitutional Court Decision No. 46/PUU-VIII/2010) in terms of civil inheritance law?
3. How is the ruling of the Constitutional Court Decision No. 46 / PUU-VIII / 2010 (Constitutional Court Decision No. 46/PUU-VIII/2010) regarding the issue of out-of-marriage children until now?

II. Methodology

The research method in writing this journal work uses normative juridical research (legal research) with the statute approach and conceptual approach (Peter Mahmud Marzuki, 2017). With the primary legal material namely the Indonesian Civil Code (*Burgerlijk Wetboek*), Law Number 1 Year 1974 concerning Marriage, and Verdict of the Constitutional Court's Number 46 / PUU-VIII / 2010.

While secondary legal materials used in this study are various literary books, which are related to the focus of research in this journal. But not only comes from the two legal materials that have been mentioned, the author also requires other additional materials that can be called tertiary legal materials such as legal dictionaries, encyclopaedias, magazines, newspapers, the internet, and journals. For data analysis, the authors use qualitative analysis methods (Soerjono Soekanto, 2018).

The next step in conducting a legal research is identifying legal facts. Then, collecting various legal materials and non-legal materials which has relevance to the problem. After that, examining the issues that will be discussed. Lastly, giving a prescription based on the argument that has been built in the conclusion (Marzuki, 2017).

III. Results and Discussion.

The Civil Code or *Burgerlijk Wetboek*, shows, it does not provide an understanding of marriage. In this case, Indonesia is still using the Civil Code (*Burgerlijk Wetboek*) but the usage is adjusted to the needs of the Indonesian people in order to accomplish the national legal system. Thus, Indonesia which is a religious country is reciprocal to item one in Pancasila as the country's basis, which is "God Almighty" and stated in the fourth paragraph of the Preamble of the 1945 Constitution of the State of the Republic of Indonesia

(Al-Fatih, 2018) with the definition of civil marriage is not a match with the basic of Indonesian state. So, after Law Number 1 Year 1974 concerning Marriage has been made and legislated, there is a definition of marriage that is in accordance with the basis of the country. So, in Article 1 of the Marriage Law the definition of Marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family or household based on the God Almighty (Tobing, 2018).

Marriage is not just to fulfil biological needs and human will, but marriage is a bond or physical and spiritual relationship between a man and a woman with the aim as an effort to create a happy life based on the Almighty God, so the marriage to be held has the power or a very close relationship with religion and spirituality. Whereas Article 2 of the Marital Law states that it is require to fulfil some requirement for a marriage to be legal, such as it is to be carried out according to the laws of both of the husband and wife religion and belief and the marriage must be listed according to the prevailing laws and regulations in Indonesia.

The definition of a children that born outside of marriage based on Article 272 of the Civil Code (*Burgerlijk Wetboek*) is divided into two parts, as in a limited sense and as in wide sense. Out-of-wedlock children in broad terms include natural children, discordant children, and other out-of-wedlock children. While out-of-marriage children in the narrow sense definition does not include natural and discordant children, out-of-wedlock children in this limited sense are one that can be recognized.

Children that born outside of marriage according to the terms used or known in the Civil Code (*Burgerlijk Wetboek*) are called *natuurlijk kind* (natural children). The approach to the term "Natural children" as "Children born outside of legal marriage", is different from the definition of natural children known in civil law, because in civil law, the term natural children are children born from a relationship of two people, male and female that are not husband and wife, where one or both are legally bound into one marriages to another person. Therefore, out-of-wedlock children are referred to in civil law are children who are conceived and born outside of marriage and other terms that are not interpreted as Natural child.

The definition of an outside marriage child according to the Expert/Doctrine of Ali Afandi in his book "Inheritance Law, Family Law, and Legal Certainty", states that the Civil Law Book (*Burgerlijk*

Wetboek) conducts 3 (three) classifications of children, namely:

1. Lawfully born/ legitimate children, a child who are born in a marriage;
2. Children born out-of-wedlock, but recognized by their father and/or mother. In this case between the child and the person who recognizes it arises a kinship ties. This kinship ties only the person who recognizes the child, and if the father and mother are married, then it becomes a Lawfully/legitimate child; and
3. Children born out-of-wedlock, but are not recognized by their father or mother. This child according to the law doesn't have a father and a mother, because it is child born outside marriage and not recognized, as such the children does not have a provision on inheritance law.

The Legal Standing of the Relationship Between Out-Of-Wedlocked Children and Their Biological Parents Regarding The Decision Of The Constitutional Court Number 46/PUU-VIII/2010

In the Marriage Law it is regulated the standing of children. Where it is explained that a legitimate child is a child born in or because of a legal marriage as stated in Article 42 of the Marriage Law. Whereas if the child is conceived and born outside the legal marriages, then the position of the child is a out-of-wedlock child.

The legal status of the child outside marriage is regulated in Article 43 Section (1) of the Marriage Law which reads "a out-of-wedlock child of marriage has only a relationship with his mother and his mother's family." Therefore a out-of-wedlock child only has a civil relationship with his birth mother and not his birth father (Ridwansyah et al., 2015).

Starting from the Decision Number 46 Year 2010 provides new provisions from the application for judicial review of the provisions of article 2 section 2 stating that every marriage is recorded according to applicable laws and Article 43 Section 1 Law Number 1 Year 1974, here in after referred to as the Marriage Law submitted by applicant Hj.Aisyah Mochtar alias Machica bint H. Mochtar Ibrahim (Petitioner I) and Mohammad Iqbal Ramadhan bin Moerdiono (Petitioner II) received by the Registrar of the Constitutional Court of the Republic of Indonesia in 2010, they pleaded in their petition stating that they had been harmed by both the mentioned section also creates law uncertainty for the marriage status of Petitioner I

and the legal status of children resulting from the marriage of Petitioner I namely Petitioner II.

After the Constitutional Court Decision Number 46/PUU-VIII/2010 on the application for judicial review in Article 43 Section 1 of the Marriage Law, the Constitutional Court made a "Legal breakthrough" which made article 43 section (1) of the Marriage Law should be read as "*Children that born out-of-wedlock have a civil relationship with his mother and his mother's family and with a man as his father which can be proven based on science and technology and/or other evidence according to the law to have blood relations, including civil relations with his father's family.*"

This means that the legal standing of the out-of-wedlock child in relation to the relationship between the two biological parents can change, which at first the out-of-wedlock child has civil relations with the mother and the mother's family, it is possible to have a civil relationship with his father if it can be proven based on science and technology, for example by conducting DNA testing which according to the law has blood relations, including having a civil relationship with his biological father.

The Legal Standing of An Outside Marriage Children As Heir in the Distribution of Inheritance by Their Biological Parents After The Constitutional Court's Decision Number 46/PUU-VIII/2010 in Terms of Civil Inheritance Law.

The law has a various important roles in human life, one of the laws that is needed to date is inheritance law because it is very closely related to human life related to wealth and human relations with one another. Inheritance law is part of the family law which can reflect the family system that applies in a society. In this case, inheritance law is a law that discusses and regulates the transfer of inheritance, management and continuation of the rights and obligations of a person who passes away to another person who still alive (Hidayah & Komariah, 2019) .

The birth of a child who is out-of-wedlock certainly has a different legal standing as previously explained which means the child does not have a 'Perfect' standing in the eyes of the law like a legitimate child in general. This certainly will lead to law relations including its position in inheritance law. This is certainly interesting to study because the law of inheritance is a part of civil law that is often polemic in society, especially in relation to the rights of respective heirs. The heirs who don't approve the request, then the person concerned has the right to file a lawsuit through

the court to carry out the distribution of inheritance.(Anggraeny, 2020). In this case, according to the Civil Code or *Burgerlijk Wetboek*, it is explained that the child outside of marriage can be categorized as a legitimate child as long as it is recognized by his parents.

In Article 272 *Burgerlijk Wetboek* states that, "*Children out-of-wedlock, except those born of adultery or blood staining, are legalized by the marriage that follows from their father and mother, if before marriage they have legally acknowledged the children, or if that confession took place in their own marriage certificate.*"

Furthermore, in Article 250 *Burgerlijk Wetboek* explains that, the legitimacy of children born before the eighteen hundredth day of marriage, can be denied by the husband. However, this denial may not be done in the following matters:

1. If before the marriage the husband already knows about the pregnancy;
2. If at the time of making the birth certificate he is present, and this certificate is signed by him, or contains a statement from him which states that he cannot sign it;
3. If the child is born dead.

From what has been explained above it can be considered that a out-of-wedlock child has two meanings where the first is the child conceived and born outside a legal marriage. Second, children born outside of marriage but were born after their parents married, but were not recognized by their father and/or mother.

In the matter discussed earlier, an out-of-wedlock children according to the Civil Code or *Burgerlijk Wetboek*, is not an *overspel* Child which in Article 283 *Burgerlijk Wetboek* states, that a child born due to adultery or blood staining (incest, discordance), must not be recognized without reducing the provisions of Article 273 *Burgerlijk Wetboek* regarding blood staining children.

Inheritance law in Indonesia is closely related to the religion of the testator or the deceased party. If the heir is Muslim, the applicable inheritance law is Islamic inheritance law (Alaa N. Akkila & Samy S. Abu Naser, 2015). Meanwhile, if the heir is non-Muslim, the inheritance law used refers to the Civil Code or *Burgerlijk Wetboek*.

In the civil inheritance law, the birth of a child is the event of the appearance of the heir who will occupy the highest rank in inheritance or status as the heir of Group I (one) namely the family in a straight line downward, including children and their descendants

along with their husband or wife who have been left behind or who are left behind live the longest, whereas in family law the birth of a child will be the beginning of emergence for the rights and obligations of alimentionation or the right of parents to provide livings and livelihoods for the fulfillment of the needs of the child based on the court's decision and arises from the breaking of the parent's marriage, and whereas the guardianship law will arise in when the child's parents are unable to take responsibility for their child.

Regarding inheritance rights for out-of-wedlock children in terms of the law of inheritance, then if the author raises a case regarding a child whose position is an out-of-wedlock child who demands his inheritance rights against his two biological parents namely the father and mother of the child. Then there will be questions about whether the out-of-wedlock child has the right to inherit from his biological father, it must be considered in advance about whether the child outside of marriage is recognized or not by his biological father. In Article 863 *Burgerlijk Wetboek* states: "If the testator dies by leaving a legitimate descendant and/or husband and wife, then the out-of-wedlock child is recognized as having inherited 1/3 of the share, from those who were originally due, if they were legitimate children".

So, if the biological father does not recognize the out-of-wedlock child, then the that child will not be able to get inheritance or become heir. Then for the legal standing of a out-of-wedlock child as heir of his biological mother based on the provisions, Article 43 Section (1) of the Marriage Law, states that children born outside of (legitimate) marriage only have a civil relationship with their mother and mother's family. Therefore, the child outside of marriage has the right to be an heir and get the inheritance without the need for recognition from his mother.

However, after the Constitutional Court's Decision Number 46/PUU-VIII/2010 discussed earlier, the legal position of out-of-wedlock child as heirs has changed so that if it is reviewed based on Civil Code or *Burgerlijk Wetboek* related to the Constitutional Court's Decision, the out-of-wedlock is entitled to inheritance from his biological father if there is an acknowledgment from the father or the out-of-wedlock child has valid evidence based on science and technology that he/she truly is the biological child of the father, then out-of-wedlock child has the right to claim the inheritance from his biological father. The distribution of inheritance here remains a part of the

inheritance of an out-of-wedlock child because the status of the child is a recognized out-of-wedlock child.

Furthermore, it is necessary to remember the provisions in Article 285 *Burgerlijk Wetboek*, that if there is a confession from his biological father, so a legal relationship arises between the father and the out-of-wedlock child, recognition of the out-of-wedlock child may not harm the wife and biological children in the matter of inheritance. That means the child outside of marriage is not entitled to inheritance from his biological father (Muhammad, Luth, Rachmad, & Hamidi, 2014).

It should be remembered again that the outside of marriage child referred to in *Burgerlijk Wetboek* is not the overspel Child in Article 283 *Burgerlijk Wetboek* states, that the child is born due to adultery or blood staining (incest). The child must not be recognized without reducing the provisions of Article 273 *Burgerlijk Wetboek*. So if it is based on the provisions in the *Burgerlijk Wetboek*, natural children cannot inherit from their parents.

Based on Article 867 *Burgerlijk Wetboek*, natural children only get the income they need from their parents as a fulfillment of their parents' obligations towards their biological children. In Article 867 *Burgerlijk Wetboek* contains "*The provisions above do not apply to children born due to adultery or blood staining. The law only provides living for them as needed*".

The ruling of the Constitutional Court Decision Number 46/PUU-VIII/2010 Regarding the Issue of Out-of-marriage Children until Now.

Regulations regarding the standing of out-of-wedlock children which in the provisions of Article 43 Law Number 1 Year 1974 concerning Marriage so far have been deemed inadequate in providing legal protection for out-of-wedlock children, as for children out of wedlock or children born outside of legal marriages status only have a civil relationship with his mother and his mother's family without any responsibility from his biological father. With the Constitutional Court Decision Number 46/PUU-VIII/2010, it certainly causes many positive and negative reactions

However, if taking from the positive side, the Constitutional Court's Decision also reflects the principle of Equality before the law as referred to in Article 28D section (1) of the 1945 Constitution of the Republic of Indonesia which reads, "*Everyone has the*

right to fair recognition, guarantee, protection and legal certainty and equal treatment before the law”.

So that it can be inferred that the Constitutional Court makes a progressive “legal breakthroughs” to protect children so that out-of-wedlock children get legal protection (Pancasilawati, 2014), because basically the child has no sin and of his birth is certainly outside his will.

Until now, the Constitutional Court Decision Number 46/PUU-VIII/2010 regarding the existing problems of out-of-wedlock children can be used as legal considerations as one of the reasons used as a reference because its position is more update.

IV. Conclusion

Based on the analysis and description of the discussion above, the author reaches a conclusion as follows; 1. With the Constitutional Court Decision Number 46/PUU-VIII/2010 from the application for judicial review in Article 43 Section (1) of the Marriage Law concerning problems of out-of-wedlock children, the legal standing of out-of-wedlock children to date is children born out of (legal) marriage has no only a civil relationship with the mother and her mother's family but also with her biological father if it can be proven by science and technology and/or strong evidence. This certainly can affect various aspects of the law concerned with the standing of the out-of-wedlock child.

2. In terms of the civil code, that out-of-wedlock child's status can be classified as an acknowledged out-of-wedlock child, that is, a child born outside a legal marriage, but recognized by a father and/or a mother and unrecognized out-of-wedlock child, that is, a child born outside a legal marriage, and is not recognized, either by the father or by his/her mother. In the civil code inheritance law, an out-of-wedlock child has the right to be an heir from his mother because this concordant with the provisions of Article 43 Section (1) of the Marriage Law, but to be an heir of his biological father, there needs to be acknowledgment from father.

3. Related to the Constitutional Court Decision Number 46/PUU-VIII/2010 which if the child outside of marriage can prove with science and technology that he/she is the biological child of the biological father, then he/she can claim and have the right to become an heir and get the inheritance from his biological father but also based on provisions Article 285 *Burgerlijk Wetboek* recognition of the out-of-wedlock child may not harm the wife and biological children in the matter of inheritance. Whereas a child born due to blood

staining cannot be recognized and cannot inherit from their parents.

Based on the conclusion's description above, there are some suggestions from the author that is as follows:

1. The need for deeper socialization and elaboration by related agencies in order to understand and accept the positive side of the Constitutional Court Decision Number 46/PUU-VIII/2010 concerning protection and legal certainty for out-of-wedlock children.
2. Regarding the problem of inheritance of out-of-wedlock children should be solved first through a family consultation with the heirs in order to minimize the occurrence of conflicts or disputes.

V. References

- Addilah, & Ummu Siti. (2014). Implikasi Hukum Dari Perkawinan Siri Terhadap Perempuan dan Anak. *Implikasi Hukum Dari Perkawinan Siri Terhadap Perempuan Dan Anak*, 7(1), 1–30.
- Al-Fatih, S. (2018). Model Pengujian Peraturan Perundang-Undangan Satu Atap Melalui Mahkamah Konstitusi. *Jurnal ilmiah hukum legality*, 25(2), 247. <https://doi.org/10.22219/jjih.v25i2.6005>
- Alaa N. Akkila, & Samy S. Abu Naser. (2015). Proposed expert system for calculating inheritance in Islam. *World Wide Journal of Multidisciplinary Research and Development*, 2(9), 38–48.
- Alaudin, A. (2018). Analisis Yuridis Tanggung Jawab Ayah Kandung Terhadap Nafkah Anak Setelah Perceraian. *Al-Ahkam: Jurnal Hukum Pidana Islam*, 1(1), 1–21.
- Anggraeny, I. (2020). Legal review of selling land of inheritance without approval of all heirs. *Legality: Jurnal Ilmiah Hukum*. <https://doi.org/10.22219/ljih.v28i1.11817>
- Fadlyana, E., & Larasaty, S. (2016). Pernikahan Usia Dini dan Permasalahannya. *Sari Pediatri*, 11(2), 136. <https://doi.org/10.14238/sp11.2.2009.136-41>
- Handayani, A. (2016). Kepuasan Perkawinan pada Wanita Menikah antara Wanita Karier dan Ibu Rumah Tangga. *Prosiding Seminar Nasional Psikologi*, 5, 149–155.
- Hidayah, N. P., & Komariah, K. (2019). Peningkatan

Kapasitas Kelompok PKK Desa Sumbersekar Kecamatan Dau Kabupaten Malang untuk Mengatasi Problematika Hukum Waris Islam. *Jurnal Penelitian Dan Pengabdian Kepada Masyarakat UNSIQ*, 6(3), 122–127. <https://doi.org/10.32699/ppkm.v6i3.719>

Mahmudi, Z. (2018). *The Status of Children Born Out of Wedlock in Indonesian Context with Special Reference to Their Inheritance Right Perspective of Maqasid Al-Shariah*. 192(Icils), 113–117. <https://doi.org/10.2991/icils-18.2018.21>

Marzuki, P. M. (2017). *Penelitian Hukum*. Jakarta: Kencana.

Muhammad, B., Luth, T., Rachmad, A., & Hamidi, J. (2014). The Inheritance Rights of Illegitimate Children outside Marriage in the Perspective of Children ' s Rights. *International Journal of Sciences: Basic and Applied Rsearch*, 14(1), 49–62.

Pancasilawati, A. (2014). Perlindungan Hukum Bagi Hak-Hak Keperdataan Anak Luar Kawin. *Fenomena*, 6(2), 171. <https://doi.org/10.21093/fj.v6i2.168>

Peter Mahmud Marzuki. (2017). *Penelitian Hukum: Edisi Revisi* (Cetakan ke). Jakarta: Kencana.

Ridwansyah, M., Syariah, F., Syeikh, J., Rauf, A., Darussalam, K., & Aceh, B. (2015). Konsep Hifzhu Al-Nafs the Alimony of Child Born Out of Wedlock Under the Concept of Hifzhu Al-Nafs. *Jurnal Yudisial*, (1), 65–83.

Scott, R. G. (2011). *The Eternal Blessings of Marriage*. 94–97. Sunday Afternoon Session.

Soerjono Soekanto. (2018). Penelitian Hukum Normatif: Suatu Tinjauan Singkat. In *Rajawali Press*. Jakarta: Rajawali Press.

Tobing, R. D. (2018). Prevention of Child Marriage Age in the Perspective of Human Rights. *Sriwijaya Law Review*, 2(1), 1. <https://doi.org/10.28946/slrev.vol2.iss1.107.pp1-17>