

The Juridical Implications of the Status of Children Out of Wedlock after the Stipulation of the Constitutional Court Decision Number: 46/PUUVIII/2010

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Abstract. *This study aims to: 1. To find out the juridical implications of the position of illegitimate children after the stipulation of the Constitutional Court decision No: 46/PUUVIII/2010. 2. To find out the distribution of inheritance rights for children out of wedlock if there is a blood relationship with children out of wedlock. 3. Deed of inheritance rights issued by a notary. The approach in this research is the empirical juridical approach. Empirical juridical research is a problem approach regarding matters that are juridical in nature and the existing facts regarding matters that are juridical in nature. Empirical legal research or sociological research is legal research that uses primary data. The results of this study: 1. Juridical implications of the status of children outside of marriage after the stipulation of the Constitutional Court Decision Number: 46/PUUVIII/2010. The implications that arise from the presence of the Constitutional Court Decision Number 46/PUU-VIII/2010, children out of wedlock in Islamic law still only have the right to have family relations with their mother and family from their mother's side. As stated in Article 100 of the Compilation of Islamic Law (KHI) which reads: "Children born out of wedlock only have a family relationship with their mother and their mother's family". Therefore, if the adulteress is the father, then the male and female children of adultery do not have the right to inherit. However, if the deceased is the mother, then he has the right to be the heir. 2. Distribution of inheritance rights for children out of wedlock if there is blood relationship with children out of wedlock. Distribution of inheritance for children out of wedlock if it can be proven that there is a blood relationship between the child out of wedlock and his biological father, then the child out of wedlock can inherit together with the heirs of Group I. If the parents of the child out of wedlock pass away leaving legitimate offspring and/or the husband/wife who lives the longest, then the out of wedlock child he admits inherits one-third of what they were originally supposed to get if they were legitimate children (article 863 BW part one). 3. Deed of Inheritance Issued by a Notary. The deed of inheritance rights drawn up by a notary in the form of minutes of the power of attorney can be considered as perfect evidence. "Because the deed was made in*

accordance with the procedure for making an authentic deed according to the Law on Notary Position."

Keywords: Children; Court; Marriage.

1. Introduction

The Civil Code (KUHPerdata) divides the status of children into three groups, namely: 1) Legitimate children, namely children born in a legal marriage. 2) Recognized illegitimate child, namely a child born outside of legal wedlock, but recognized by a father and/or a mother. 3) Unrecognized illegitimate child, namely a child born outside of a legal wedlock, and is not recognized, either by the father or by the mother. Regarding whether children out of wedlock inherit from their fathers, we need to see first whether these children out of wedlock are recognized or not by their fathers. Article 863 of the Civil Code states: "If the heir dies leaving legal offspring and/or husband and wife, then the child out of wedlock who is recognized inherits 1/3 of the share, from those who had originally had to get it, if they were legitimate children". This means that if the father does not recognize the child out of wedlock, then the child will not get an inheritance. However, if the illegitimate child is recognized by the father, then the child will receive 1/3 of the share that should be if he is a legitimate child.¹

A child born out of wedlock is a child born to a woman who does not have legal marriage ties with a man who has instilled a child in her womb, the child does not have a perfect position in the eyes of the law like legitimate children in general.²In other words, illegitimate children are children who are not born in a legal marriage bond. While the notion of outside marriage is the relationship between a man and a woman who can give birth to offspring while their relationship is not in a valid marriage bond according to positive law and regulations in the religion they believe in. Regarding the civil rights of children with recognition, a civil relationship arises between the child and the father (mother) who has acknowledged it as stipulated in Article 280 of the Civil Code, but if there is no recognition by a father related to the absence of a legal marriage relationship.³

Based on Article 43 of Act No. 1 of 1974 concerning Marriage states that children born out of wedlock (legal) only have civil relations with their mothers and their mothers' families. Therefore, children out of wedlock have the right to inherit without the need for acknowledgment from their mother. However, it should be noted that since the Constitutional Court Decision No. 46/PUU-VIII/2010, Article 43 of Act No. 1 of 1974 concerning Marriage has had changes, namely that

¹Anisit Amanat, 2008. Dividing Inheritance Based on BW Civil Law Articles. PT. Raja Grafindo Persada, Jakarta. p.21

²Ibid., p. 23

³Ibid., p. 24

initially 'a child out of wedlock only has a civil relationship with his mother and his mother's family', becomes "a child out of wedlock does not only have a civil relationship with mother and her mother's family, but also has a civil relationship with the father and/or the father's family as long as it can be proven based on science and technology and or other evidence according to law that the man is the father of the child out of wedlock." The technology in question is to use a DNA test.⁴

Based on the Civil Code and the Constitutional Court Ruling, an illegitimate child has the right to receive a share of the inheritance from his father if there is an acknowledgment from the father or there is valid evidence based on science and technology that he is truly the biological child of the father, while an illegitimate child has the right to inherit from his mother without need approval from his mother. The portion of inheritance here remains the portion of inheritance for children out of wedlock because the status of the child is an acknowledged child out of wedlock.⁵

The share of inheritance for children out of wedlock is regulated in article 863 of the Civil Code. Children out of wedlock who are recognized as heirs with all classes of heirs. The amount received depends on which group the illegitimate child inherits, or depends on the degree of kinship of the legal heirs, including if there are Groups I, II, III and IV. The heir leaves heirs in Group I (the longest living wife or husband & legitimate children): "If the heir dies leaving legal offspring and/or husband and wife, then the child out of wedlock who is recognized inherits 1/3 of the share, from those who were originally supposed to receive, if they were legitimate children."

Heirs leaving heirs of Groups II and III (parents, siblings, descendants of siblings, grandparents): or his descendants, then the recognized children will inherit 1/2 of the inheritance." Heirs leaving heirs of Group IV (distant relatives): "Children out of wedlock who inherit with heirs of the fourth class include relatives in a more distant degree, then the amount of the right to the share of children out of wedlock is 3/4 of the inheritance."⁶

The distribution of inheritance for children out of wedlock according to the Civil Code is as follows. 1) A child out of wedlock inherits with a Group I heir, his share: 1/3 of his share if he is a legitimate child. 2) Children out of wedlock inherit from class II and III heirs, the share: 1/2 of the inheritance. 3) Out of wedlock children inherit from class IV heirs, their share: 3/4 of the inheritance. If the heir does not leave legal heirs according to the law, the illegitimate child inherits all of the heir's property (865 of the Civil Code).⁷

⁴J. Andy Hartanto, 2015. Inheritance Law, Position and Inheritance Rights of Children Out of Wedlock According to "Burgerlijk Wetboek", After the Constitutional Court Decision. Laksbang, Surabaya. p. 71

⁵Ibid., p. 72

⁶Ibid., p. 72

⁷Ibid., p. 73

Before the decision of the Constitutional Court Number: 46/PUU-VIII/2010 regarding the inheritance rights of children outside of marriage, this was often a problem. This is due to a conflict between the Civil Code and Act No. 1 of 1974 concerning Marriage. Article 862 of the Civil Code states: "If the deceased leaves children out of wedlock who have been legally recognized according to law, then the inheritance is divided in the manner specified in the following articles (subsequent articles in the Civil Code. Meanwhile in article 280 which states: "With the recognition of a child out of wedlock, a civil relationship is born between the child and his father or mother."⁸

The provisions of Act No. 1 of 1974 concerning Marriage only recognize what is meant by a legitimate child is a child born in or as a result of a legal marriage. Then in Article 43 paragraph (1) it states that a child born out of wedlock only has a civil relationship with his mother and his mother's family. So that when referring to Act No. 1 of 1974 concerning marriage, children out of wedlock are not entitled to inherit from their real father based on blood relations. However, over time the Constitutional Court has issued a decision regarding the position of children outside of marriage.⁹

Based on the Decision of the Constitutional Court Number: 46/PUU-VIII/2010 regarding the review of Act No. 1 of 1974 concerning Marriage in its ruling the Constitutional Court has changed the meaning of Article 43 paragraph (1) of Act No. 1 of 1974 concerning Marriage to become as follows : "A child born out of wedlock has a civil relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence according to law has blood relations, including civil relations with his father's family"

The legal consequences arising from the Constitutional Court Decision, Act No. 1 Year 1974 Concerning Marriage is no longer in conflict with the provisions in the Civil Code and has recognized the position of children out of wedlock towards their father in terms of inheritance in particular and in other civil law relations in generally as long as the father of the child can be proven based on science and technology and/or other evidence according to law has blood relations, including civil relations with his father's family. Other evidence according to the law here is in line with the recognition of children out of wedlock contained in the Civil Code.¹⁰ However, it is necessary to understand the conditions for recognizing children out of wedlock based on the Civil Code, including: 1) Recognition of children out of wedlock can be made with an authentic deed (Article 281 of the

⁸Ali Uraidi, Inheritance Rights of Children Out of Wedlock According to the Civil Code. Scientific Journal of Phenomena, Volume XV, Number 2, November 2017. Faculty of Law, University of Abdurachman Saleh Situbondo. p. 12

⁹Ibid., p. 13

¹⁰Vincientian Est. "The Impact of the Decision of the Constitutional Court of the Republic of Indonesia Number 46/PUU-VIII/2010 Concerning Children Out of Wedlock on the Development of Indonesian Civil Law", Law Review, Vol XII, No. 2 November 2012. p. 18

Civil Code) 2) Recognition of children out of wedlock is carried out by people who are old enough, that is, has reached nineteen years. Except for underage girls, they may make such confessions. (Article 282 of the Civil Code). 3). Recognition of a child out of wedlock is accepted as long as the mother's consent is obtained if the mother is still alive (Article 284 of the Civil Code).¹¹

Regulations relating to illegitimate children that apply in Indonesia, have differences between one regulation and another, for example in the Marriage Act No. 1 of 1974 there are differences regarding whether or not illegitimate children are recognized by the Constitutional Court Decision Number 46/PUU-VII/2010 concerning Review of Article 43 paragraph (1) of Act No. 1 of 1974 concerning Marriage. The Constitutional Court Decision Number 46/PUU-VII/2010 concerning the Review of Article 43 paragraph 1 of Act No. 1 of 1974 concerning Marriage also has different regulations. The difference lies in the position of children in the family and before the law. Thus, if the marriage is only carried out according to religion and is not carried out before the Civil Registry Officer, then the marriage law is only valid according to religion and does not have permanent legal force. So that later when a child is born, the child does not have fair legal recognition, guarantee, protection and certainty as well as equal treatment before the law according to the provisions of Article 28 D paragraph (1) of the 1945 Constitution.

The Constitutional Court's decision Number 46/PUU-VII/2010 using the term "child born out of wedlock" was never clearly defined in the Marriage Act No. 1 of 1974 or in the decision. This has caused controversy in society, because in the Constitutional Court Decision Number 46/PUU-VII/2010 children outside of marriage can have inheritance rights and civil relations with men as their fathers. Based on the description above, it can be concluded that the recognition and legalization of children outside of marriage is important. Legal certainty about children out of wedlock needs to be considered. This is so as not to cause polemic for the community at large.

2. Research Methods

The approach method used in the preparation of this thesis is normative juridical research (normative legal research method). The normative juridical research method is library law research which is carried out by examining literature materials or secondary data using deductive thinking methods (a way of thinking in drawing conclusions drawn from something of a general nature that has been proven to be true and that conclusion is intended for something special character). Thus the object analyzed with a qualitative approach is a research method that refers to legal norms contained in statutory regulations.¹²This research is analytical descriptive in nature, namely describing the data obtained from observations, interviews, documents and field notes, then analyzed which

¹¹Ibid., p. 19

¹²Peter Mahmud Marzuki. 2009. Legal Research. Jakarta, Kencana. p. 90

is poured into the form of a thesis to explain the problem with the chosen title, namely a juridical review of land sale and purchase agreements orally in the conception of legal certainty.¹³ Types and Data Sources As for the types and sources of data to be used in this study are:¹⁴ 1) Primary legal materials. 2) Secondary Legal Materials Namely legal materials that provide explanations regarding primary legal materials, such as law books, scientific papers, internet materials, magazines, newspapers, articles, opinions from circles. The legal expert (Legal Doctrine) insofar as it is relevant to the object of research study and other legal materials. 3) Tertiary Legal Materials.¹⁵ Method of collecting data. The data collection method in this study is using library research methods or methods using secondary data which includes primary legal materials.¹⁶ Data analysis method. The data that has been obtained is then analyzed through a qualitative analysis approach.¹⁷

3. Results and Discussion

3.1. Juridical Implications of the Status of Children Out of Wedlock after the Stipulation of the Constitutional Court Decision Number: 46/PUUVIII/2010

Marriages that are not recorded can be interpreted that the event of the marriage never existed so that children born out of wedlock according to the law are categorized as children out of wedlock. The legal status of a child out of wedlock will only have civil relations with the mother and the mother's family, while with the biological father and his family the child out of wedlock has no civil relations at all. Likewise in the case of making the identity of a child in the form of a birth certificate, the birth certificate of a child out of wedlock will record that the child is a child out of wedlock by only including the name of the mother, while the name of the father is not listed. This fact shows that there is discrimination and there is no legal protection for children born from unregistered marriages. This situation arose because of the provisions of Article 2 paragraph (1) and paragraph (2) of the Marriage Law which in practice created special difficulties and discrimination against women and children. In addition, it is also very contrary to human values, religious and cultural diversity which is very diverse in Indonesia.

Decision of the Constitutional Court Number 46/PUU-VIII/2010 regarding the status of children out of wedlock, which has a good impact in terms of the juridical position of a father towards his child if it can be proven based on science

¹³Zainuddin Ali, 2009. *Legal Research Methods*, Graphics, Jakarta, Sinar. p. 25

¹⁴*Ibid.*, p. 26

¹⁵*Ibid.*, p. 27

¹⁶Johnny Ibrahim, 2012. *Theory & Methodology of Normative Law Research*, Bayumedia Publishing, Malang. p. 39

¹⁷*Ibid.*, p. 40

and technology and/or other evidence which according to law has blood relations including civil relations with his father's family.¹⁸

Based on the explanation above, according to the Civil Code, the inheritance law for an illegitimate child is only between him and the parents who acknowledge him. So with the decision of the constitutional court, it has implications regarding his recognition because if a child can prove there is a blood relationship then the inheritance system becomes the first class as stated in Article 863: if the heir leaves legitimate offspring or a wife/husband then his share is 1/3 of part if he is a legitimate child. In other words, if he inherits together with group 1 heirs. Article 250 of the Civil Code, it is explained that: "Children who are born or raised during marriage, get the husband as their father". Furthermore, in Article 272 it is explained that children out of wedlock except for those born from adultery, are legalized by marriages that follow from their father and mother, if before carrying out the marriage they have made a legal recognition of the child, or if the recognition occurs in the marriage certificate itself. And in article 280 it is explained again that children outside of marriage obtain a civil relationship with their father or mother through confession. There are 3 (three) facilities permitted by the Civil Code as a place for the recognition of children out of wedlock. First, the acknowledgment is made using the marriage certificate of the illegitimate child's parents. This means that in the marriage certificate of the two children's parents there is a clause regarding the recognition of their child who was born before they entered into a legal marriage. Second, acknowledgment of the child by using the birth certificate of the child out of wedlock itself, and third is acknowledgment based on an authentic deed specially made for that purpose. The three means of recognizing children out of wedlock are regulated in article 281. In other articles of the Civil Code there are no provisions that allow the recognition of children out of wedlock using testaments.

3.2. Distribution of inheritance rights for children out of wedlock when it is proven that there is a blood relationship with a child out of wedlock

Based on the rule of law, a child born out of wedlock does not have legal family ties with those who marry him, so it can be concluded that the child inherits from a mother and her mother's family. The status of a child out of wedlock can be a big enough problem for a mother who gave birth to parents of women who gave birth to a child out of wedlock or without a legal marriage. A mother will also later feel ashamed because of the actions of her daughter in the local community so that she gives birth to a child out of wedlock. In addition, a child can also be ridiculed and ostracized by his friends in his association.¹⁹

¹⁸Witanto, DY 2012. Family Law: Rights and Status of Children Out of Wedlock After the issuance of the Constitutional Court's Decision on the Material Review of the Marriage Law. Jakarta: Library Achievement. p. 183

¹⁹Warsidi, Idham, 2015, Children outside of marriage according to law no. 1 of 1974 and Islamic Law, Rineka Cipta, Jakarta, p. 29

According to Article 43 of Act No. 1 of 1974 which states that when a child is born out of wedlock, he only has a civil relationship with his mother and his mother's family and with a man as his father, namely those with legal status in marriage to the child's mother, which can be proven by science and technology or the existence of other evidence based on the law having ties or blood relations is categorized as a civil relationship with the father's family.²⁰

The presence of the Constitutional Court Decision number 46/PUU-VIII/2010 Article 43 paragraph (2) of Act No. 1 of 1974 concerning marriage states that the position of the child in paragraph (1) will then be regulated in a separate government regulation, but until now the government has not issued government regulations regarding the position of illegitimate children while Government Regulation (PP) Number 9 of 1975 concerning the implementation of Act No. 1 of 1974 concerning marriage does not regulate the position of illegitimate children so that until now the issue of illegitimate children is still in limbo because of Article 43 paragraph (1) Act No. 1 of 1974 concerning marriage only mentions civil relations, while the rights that must be protected as a human being do not receive clear and detailed arrangements. As a result of civil relations with the mother and the mother's family, the child will only get inheritance rights from the mother and the mother's family, including all forms of maintenance until the child is an adult, only the responsibility of the mother.²¹

The background of the decision of the Supreme Court number 46/PUU-VIII/2010 was Machica Mochtar's lawsuit against the status of her child. This case started with a siri marriage between Machica Mochtar and Moerdiono which produced a child out of wedlock named Iqbal Ramadhan. In this case, Machica Mochtar fought for his son's civil rights which were not recognized by his biological father, Moerdiono. The Constitutional Court decided the case through Constitutional Court decision Number 46/PUUVIII/2010 by granting part of Machica Mochtar's request. In its ruling, the Constitutional Court emphasized that Article 43 paragraph (2) is conditionally unconstitutional contrary to the 1945 Constitution. Article 43 paragraph (2) which should read:

a. Deed of Inheritance Rights Issued by a Notary

The deed according to its form is divided into authentic deed and private deed. Theoretically, the meaning of an authentic deed is a letter or deed that was deliberately made officially from the start to prove if one day a dispute occurs, dogmatically according to positive law, an authentic deed is contained in the Civil Code Article 1868, an authentic deed is a deed whose form is determined by law and made by or before an official authorized to make the deed. Authentic deeds are further distinguished into official deeds (*acte ambtelijk*) and parties' deeds

²⁰Ibid., p. 30

²¹Syamsul Anwan, Isak Munawar, February 27 2012, Family of Children Outside of Marriage After the Constitutional Court Decision Number 46/Puu-Viii/2010, According to Jurisprudence Theory and Legislation, Pg. 30

(*partijacte*).²² Based on the arguments, statements and explanations accompanied by evidence, the judge will evaluate the evidence presented. Evaluation of evidence in civil cases judges have the freedom to assess evidence in evidence at trial, judges are not bound by the strength of evidence proven in trials unless the law regulates that judges are bound by the evidence, therefore judges have the authority to judge evidence (*yudex facti*). The strength of proof attached to an authentic deed is perfect strength and means that the proof is sufficient with the deed itself unless there is opposing evidence (*tegen bewijs*) which proves otherwise or proves otherwise from the deed.²³

Authentic deed as evidence that is considered the strongest and most complete. Establish a clear legal relationship between the parties concerning rights and obligations, the deed itself is made to guarantee legal certainty and in order to avoid disputes in the future. One of the authorities to make this authentic deed is the Notary Officer, as stated in Article 1 UUJN No. 2 of 2014 concerning changes to UUJN No. 30 of 2004 namely Notary is a public official authorized to make authentic deeds and other authorities as referred to in the Act, which is further explained in Article 15 UUJN No. 2 of 2014 concerning amendments to the Heir Certificate, in general, it is made privately issued by the village head/*lurah* and known by the sub-district head for certain purposes. The certificate can also be *warmeked* by a notary after a statement from the local sub-district office.²⁴

The notary deed contains statements from the parties and is made at the will or request of the parties, the notary makes it in a form that has been determined by law, the notary is not a party contained in the deed, the notary's name is included in the deed due to a law order. In the binding sale and purchase agreement on the basis of a certificate of inheritance rights made by/before a notary, the responsibility of the notary is only limited to the procedures and procedures for making an authentic deed which must be in accordance with the provisions of the applicable laws and regulations.

4. Conclusion

The implications that arise from the presence of the Constitutional Court Decision Number 46/PUU-VIII/2010, children out of wedlock in Islamic law still only have the right to have family relations with their mother and family from their mother's side. As stated in Article 100 of the Compilation of Islamic Law (KHI) which reads: "Children born out of wedlock only have a family relationship with their mother and their mother's family". Therefore, if the adulteress father dies, the male and female children of adultery do not have the right to inherit. Therefore, if the adulteress is the father, then the male and female children of

²²Nawawi Arman, 2011. Notary Deed as Perfect Evidence, Media Science, Jakarta. Matter. 72

²³*Ibid.*, p. 73

²⁴*Ibid.*, p. 74

adultery do not have the right to inherit. However, if the deceased is the mother, then he has the right to be the heir.

5. References

Regulation:

- [1] The 1945 Constitution of the Republic of Indonesia
- [2] Civil Code
- [3] Act No. 1 of 1974 concerning Marriage
- [4] Act No. 4 of 2004 concerning Judicial Power
- [5] Act No. 1 of 2013 Concerning the Constitutional Court,
- [6] Act No.11 of 2012, Concerning the Juvenile Justice System, Listed in Article 1 Paragraph (2).

Etc:

- [1] Accessed via, <https://www.google.com/search?q==implication+law+is&oq==implication+law+is&aqs=heirloom-srp> on 9-11-2021. O'clock. 18.00.
- [2] Accessed via, <https://www.gurudik.co.id/pengertian-implicate/> on 9-11-2021. O'clock. 18.00.