



## Legal protection as well as possible of heritage rights of outside children after decision of the constitutional court number 46/ PUU-VIII/ 2010

Leonardo Jati Kusuma Wardoyo<sup>1</sup>, Dr. Yudho Taruno Muryanto SH M Hum<sup>2</sup>

<sup>1-2</sup> Universitas Seblas Maret, Magister of Law, Surakarta, Indonesia

### Abstract

The purpose of this research is to find out how the position of inheritance rights for children outside marriage after the issuance of the Constitutional Court Decision Number 46/PUU-VIII/2010 and by using normative juridical research methods, it is concluded: 46/PUU-VIII/2010, Inheritance Rights are something that is guaranteed by law. Every human being has the same rights before the law, including out-of-wedlock children who are also legal subjects and must be protected by the state. Before the issuance of the Constitutional Court Decision Number 46/PUU-VIII/2010, the position of out-of-wedlock children in national law experienced degradation after the enactment of Law Number 1 of 1974 concerning Marriage. After the issuance of the aforementioned Constitutional Court Decision, the current legal arrangements and the position of out-of-wedlock children are now quite well accommodated, because this is a guarantee given by the Constitution.

**Keywords:** child inheritance, outside legitimate marriage, constitutional court decision number: 46 / PUU-viii / 2010

### 1. Introduction

Marriage is something sacred and great for human life, especially for Muslims in Indonesia to want their marriage to be legal according to religious law and legal according to state law. The marriage is expected to form a prosperous family, because in the family can create a healthy generation physically and mentally <sup>[1]</sup>.

In an ideal marriage, the presence of a child is a dream for every parent, but the reality is not always the case, many facts show that parents are willing to throw away or even kill their own children to cover up the disgrace for their families. The birth of the child will bring shame to the family because the child is produced from extramarital relations which are not justified by the teachings of religion and ethics that apply in society at large. Children are a mercy and trust from God Almighty <sup>[2]</sup>. In Law Number 1 of 1974, the status of children consists of legal children and children outside marriage.

Out-of-wedlock children are children who are born not based on a legal marriage and only have a civil relationship with their mother, so the child does not have any rights from his biological father, because legally both religious law and national law he has no blood ties with men who is his biological father. So that children out of wedlock do not obtain material and moral rights that should be obtained by a child from his father, such as the right to care, maintenance rights, marriage custody rights for children, women, and inheritance rights when death occurs. Children out of wedlock are often the object of scolding in the community, as an illegitimate child. Such conditions provide an injustice for a child, in addition to injustice in terms of parental responsibilities that have caused him to be

born into the world as well as injustice caused by psychological stress he experienced due to the sins of his biological parents <sup>[3]</sup>.

Child protection law which applies as positive law in Indonesia is limited to regulating child protection in the conventional level, such as the rights and obligations of children, parental care (alimentation) by children, recognition of children, endorsement of children, etc. generally found in several good legal system according to the system of Civil Law West (Civil Code), customary law system, Islamic legal system, as well as in various statutory regulations, for example Law No. 1 of 1974 concerning Marriage, Law No. 23 of 2006 concerning Population Administration, and others.

The status of out-of-wedlock children in the Western Civil Law system (Civil Code), the Customary Law system, and the Islamic Legal system are included in a number of positive legal provisions such as Law No. 1 of 1974, considered lacking in providing legal protection, children out of wedlock as children born from relationships that are not bound by a legal marriage are not uncommon victims such as cases of baby disposal, neglect of infants, and others. In fact, children, anyone and any status have the right to live and continue their lives.

### 2. Problem Formulation

Based on the background description as described previously, the legal issues that can be formulated related to this research can be formulated as follows: "How is the protection and legal position of inheritance rights for children outside marriage after Constitutional Court Decision Number 46 / PUU-VIII / 2010?"

<sup>1</sup> Ali Afandi, Family Law According to Civil Law, Graha Ilmu, Yogyakarta, 1981, p.10

<sup>2</sup> D.Y.Witanto, 2012, Family Law Rights and Position of Outdoor Married Children After the Constitutional Court Ruling on Marriage Law Material Test, Literature Achievement Publisher, Jakarta.

<sup>3</sup> Rio satria, Overview of the Position of Outdoor Married Children in the Indonesian Marriage Law System, at <http://www.badilag.net/data/ARTIKEL/Review%20KebSerena%20Anak%20Luar%20Kawin.pdf>. Downloaded on 5/16/2019. at 20:39 WIB

### 3. Merhodology

This research uses the Normative research method, namely research using the statutory approach and conceptual approach. This means that researchers use the laws and regulations as the initial basis for conducting research, because the laws and regulations are the focal point of the research.

Normative Research is research that is often referred to as doctrinal research, that is research in which the object of study is in the form of statutory documents and other literature. In writing this article the researcher examined the legal protection for creditors in the fiduciary guarantee agreement based on law number 42 of 1999 concerning fiduciary guarantees

The research approach used is the statutory approach and the conceptual approach. The legislative approach is used by researchers with the intention of being the initial basis for analyzing. Conceptual approach used from the views and doctrines that develop in law.

In this study the authors use secondary data types such as documents, legislation, books, material theories from literature and other sources related to the problem.

Data collection techniques are carried out by means of literature study by reading, studying, and recording books and legislation that are relevant and related to the subject matter. Because in this study using the legislation approach, what must be done is to look for legislation relating to the subject matter discussed.

Models and Techniques of Analysis carried out in this study is the processing that is essentially to make a system of written legal materials. In accordance with the normative type of data used in data analysis techniques, qualifying, then linking theories related to the problem that ultimately produces a conclusion to determine the results of the study.

### 4. Discussion

#### Legal Protection and Position of Inheritance Rights for Children Outside Marriage after Constitutional Court Decision Number 46 / PUU-VIII / 2010.

##### Legal Protection for Overseas Children

Legal protection is all efforts to fulfill rights and provide assistance to provide security for witnesses and / or victims, legal protection for victims of crime as part of community protection, can be realized in various forms, such as through the provision of restitution, compensation, medical services, and legal assistance <sup>[4]</sup>.

Philipus M. Hadjon stated that legal protection is the protection of dignity and the recognition of human rights possessed by legal subjects in the rule of law based on the legal provisions in force in the country in order to prevent arbitrariness. Legal protection is generally in the form of a written regulation, so that it is more binding and will result in sanctions that must be imposed on those who break them <sup>[5]</sup>. Legal protection is divided into two types, namely <sup>[6]</sup>

Preventive legal protection that aims to prevent problems or disputes.

Repressive legal protection aimed at resolving problems or disputes that arise.

Preventive legal protection aims to prevent disputes, which direct government actions to be careful in making decisions based on discretion. Repressive protection aims to resolve disputes, including handling them in the judiciary <sup>[7]</sup>. In short, the Constitutional Court through decision No. 46/PUU-VIII/2010 dated 17 February 2012 decided that Article 43 paragraph (1) of Law no. 1 of 1974 concerning Marriage ("Marriage Law") is contrary to the 1945 Constitution if it is not read:

"Children born out of wedlock only have a civil relationship with their mother and 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. " The principle of legal protection in Indonesia is the principle of recognition and protection of human dignity and sources that originate from Pancasila. The principle of legal protection against government actions rests and comes from the concept of the recognition and protection of human rights because according to its history in the West, the birth of the concepts of recognition and protection of human rights is directed at the limitations and placing obligations of society and government <sup>[8]</sup>.

Legal protection for the position of out-of-wedlock children, especially out-of-wedlock children born not as a result of a legal marriage by a biological father who is still bound by a legal marriage with his wife, where his wife never agreed to her husband to repress polygyny is very relevant applied corrective justice theory that is, justice for the child outside of marriage can also be accommodated in court decisions that resolve or adjudicate various claims for rights from children outside of marriage <sup>[9]</sup>. The Indonesian Government's concern for children's dignity and values has actually been seen since 1979 when making Law No. 4 of 1979 on Child Welfare, but until the passage of the Child Protection Act and until now, the welfare and fulfillment of children's rights are far from what was expected <sup>[10]</sup>.

Decisions of the Constitutional Court not only bind the parties involved in the case (intra partes), but also must be obeyed by anyone called the verdict that is *erga omnes* <sup>[11]</sup>. The general binding provisions of the Constitutional Court ruling are due to the nature of the public law. The constitutional task of the Constitutional Court, especially in examining laws is to defend constitutional rights and interests that are protected by the constitution due to the enactment of an Act. The Constitutional Court by granting part of the Constitutional Court Decision No.46 / PUU-VIII / 2010 resulted in a child out of wedlock being able to get clarity in the view of the law to obtain rights and position in law in Indonesia. Out of wedlock children are recognized as

<sup>7</sup> Ibid.

<sup>8</sup> Philipus M Hadjon, 1987, *Legal Protection for the Indonesian People (a study of its principles)* Bina Ilmu, Surabaya.hal 38.

<sup>9</sup> I Nyoman Sujana, 2015, *Legal Position of Outside Married Children in Perspective of Constitutional Court Ruling Number 46 / PUU-VIII / 2010*, Aswaja Pressindo, Yogyakarta, p.232.

<sup>10</sup> Rika Saraswati, SH, CN, M.Hum, 2015, *Child Protection Law in Indonesia*. Bandung: PT Citra Aditya Bakti.232

<sup>11</sup> Martitah. 2012. *Functionalization of Social Networks in Implementing Regulatory Constitutional Court Decisions (Positive Legislature)*. Dissertation of Diponegoro University Semarang. p. 16

<sup>4</sup> Soerjono Soekanto, 1984, *Introduction to Legal Research*, Ui Press. Jakarta.

<sup>5</sup> Philipus M. Hadjon, "legal protection for the people of Indonesia", PT. Bina Ilmu, Surabaya 1987, p. 205.

<sup>6</sup> Ibid, hal. 117

being different from adultery and discord, a fundamental difference with the recognition of a biological father<sup>[12]</sup>.

The purpose of the Constitutional Court is to emphasize that even children outside of marriage are entitled to legal protection. According to the considerations of the Constitutional Court, the law must provide fair legal protection and certainty for the status of a child being born and the rights that he has, including for children born even though the validity of his marriage is still disputed.

### **Position of inheritance rights for children outside marriage after Constitutional Court Decision Number 46 / PUU-VIII / 2010**

Decision of the Constitutional Court stressed that even children outside of marriage are entitled to legal protection. According to the consideration of the Constitutional Court, the law must provide legal protection and certainty for the status of a child born and the rights that are there to him, including for children born even though the validity of the marriage of his parents is still disputed<sup>[13]</sup>. Although after the Constitutional Court Decision Number 46/PUU-VIII/2010 dated February 17, 2012, civil relations between parents and children, both legitimate children and extramarital children, but the civil rights arising from civil relations between legitimate children and their parents in one side with civil relations between children outside marriage and mother / family of mothers and between children outside marriage with father / father's family is not the same<sup>[14]</sup>, especially relating to inheritance. Inheritance Rights for Out-of-Marriage Children After the Constitutional Court Decision Number 46/PUU-VIII/ 2010. Inheritance rights are something guaranteed by law. Every human being has the same rights before the law (equality before the law) including out-of-wedlock children who are also legal subjects and must be protected by the state. Before the issuance of the Constitutional Court Decision Number 46/PUU-VIII/2010, the position of out-of-wedlock children in national law experienced degradation after the enactment of Law Number 1 of 1974 concerning Marriage. After the issuance of the aforementioned Constitutional Court Decision, the current legal arrangements and the position of out-of-wedlock children are now quite well accommodated, because it is a guarantee given by the Constitution, the portion of inheritance for out-of-wedlock children who are subject to Western Civil Law, however the portion is not the same as a child born from a legal marriage, because the Constitutional Court's ruling only gives certainty the relationship between a married child and his biological father.

### **5. Conclusion**

The principle of legal protection in Indonesia is the principle of recognition and protection of human dignity and sources that originate from Pancasila. The principle of legal protection against government actions rests and comes from the concept of the recognition and protection of human rights because according to its history in the West, the birth of the concepts of recognition and protection of human

rights is directed at the limitations and placing obligations of society and government. The purpose of the Constitutional Court is to emphasize that even children outside of marriage are entitled to legal protection. According to the Constitutional Court's consideration, the law must provide fair legal protection and certainty for the status of a child born and the rights that it has, including for children born even though the validity of the marriage is still disputed.

Inheritance Rights for Out-of-Marriage Children After the Constitutional Court Decision Number 46 / PUU-VIII / 2010. Inheritance rights are something guaranteed by law. Every human being has the same rights before the law (equality before the law) including out-of-wedlock children who are also legal subjects and must be protected by the state. Before the issuance of the Constitutional Court Decision Number 46 / PUU-VIII / 2010, the position of out-of-wedlock children in national law experienced degradation after the enactment of Law Number 1 of 1974 concerning Marriage. After the issuance of the aforementioned Constitutional Court Decision, the current legal arrangements and the position of out-of-wedlock children are now quite well accommodated, because this is a guarantee given by the Constitution.

Distribution of Inheritance Children Inheritance After the Constitutional Court Decision Number 46/PUU-VIII/2010. Basically there is no difference in the portion or distribution of inheritance between out-of-wedlock children and children born from legal marriages when viewed from West Civil Law and Customary Inheritance Law for certain regions. After the issuance of Constitutional Court Decision Number 46 / PUU-VIII / 2010, the portion of inheritance for out-of-wed children who are subject to the Civil Code of the West and those who are still bound by ancestral customs becomes open especially to inherit the inheritance of biological father and his family. But the portion is not the same as a child born from a legal marriage, because the Constitutional Court's ruling only gives certainty the nasab relationship between a married child and his biological father.

### **6. Suggestion**

The author recommends that the Constitutional Court Decision Number 46/PUU-VIII/2010 should be followed up by the government in this case the legislative body to revise the relevant legal regulations (Law No. 1 of 1974). Because the legal khaidah of the Constitutional Court Decision is still multiple interpretations in practice. This means that there are still differences of opinion between opinions among experts and legal practitioners. For this reason, the government, in this case the legislature, takes quick steps to improve it so that it is clear that the legal position of inheritance rights for children outside of marriage.

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<sup>13</sup> Ibid, Rika Saraswati Oept hal. 233

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