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Civil Relationship of Children Born Without Marriage with Biological Father Based on Constitutional Court Decision Number 46/PUU-VIII/2010

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Abstract

The purpose of this study is to analyze the civil relationship between the children born without marriage with his biological father and the arrangement about the civil relationship between the children whose mothers did not have marriage. This study is a normative juridical which is the approach used in this is the statute approach, the case approach, and the conceptual approach. The legal material comes from document studies. This study is analyzed qualitatively. The results of this study showed that the children born outside marriage initially have only a civil relationship with their mother and mother's family according to Article 43 of Law Number 1 of 1974 concerning Marriage on what is meant by a child outside of marriage but with the Constitutional Court Decision Number 46/PUU-VIII/ 2010, then a child born outside marriage can have a civil relationship with father and his father's family. The father and mother have rights and obligations to the born, even if the child is born outside of marriage. In this study, it can be concluded that children born without marriage have civil relations with their biological father as stipulated in Decision of the Constitutional Court Number 46 / PUU-VIII / 2010. The arrangement of civic relationships between children whose mothers are not married as in Law Number 1 of 1974 on Marriage, but by Decision of the Constitutional Court Number 46/PUU-VIII/2010, the child has a civil relationship with his mother and father.

Keywords: biological father; civil relationship; child without marriage

1. INTRODUCTION

Children born outside a legal marriage are not legitimate children so that it brings consequences in inheritance because children born outside of marriage only have a civil relationship with their mother and mother's family, (Syahrani, 1989). This is regulated in Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage. In its development, Article paragraph (1) of Law Number 1 of 1974

concerning Marriage is tested materially to the Constitutional Court. The test was submitted by Hj. Aisyah Mochtar alias Machica Binti H. Mochtar Ibrahim Muhammad and Iqbal Ramadhan bin Moerdiono.

In the Decision of the Constitutional Court Number 46/PUU-VIII/2010 stated in the Decision as follows:

- Article 43 paragraph (1) of Law Number 1 of 1974 on Marriage

(Republic of Indonesia State Gazette of 1974 Number 1, the addition of the Republic of Indonesia State Gazette Number 3019) which states, "Children born out of wedlock only have a relationship of civil with her mother and his mother's family", contrary to the 1945 Constitution of the Republic of Indonesia as long as it means to eliminate proven civil relations with man which can be proven based on science and technology and/or other evidence according to the law turns out to have blood relations as his father;

- Article 43 paragraph (1) of Law Number 1 of 1974 on Marriage (Republic of Indonesia State Gazette of 1974 Number 1, the addition of the Republic of Indonesia State Gazette Number 3019) which states, "Children born out of wedlock only have a relationship of civil with her mother and his mother's family", does not have binding legal force as long as it means to eliminate civil relations with man which can be proven based on science and technology and/or other evidence according to the law turns out to have blood relations as his father so that the verse must be read, "Children born out of wedlock only have a relationship of civil with her 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";

The formation of a very interesting new norm in the Decision of the Constitutional Court is the recognition of children born out of wedlock. The decision states that a child outside of marriage has 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 the relationship

of civil with his father's family. Through this Decision, the Constitutional Court once again proved itself as a judicial institution that 'dared to oppose the flow', out of the grip of cultural and religious traditions, progressive and revolutionary towards substantive justice based on 1945 Constitution of the Republic of Indonesia, (Erlina, 2012).

If it is based on the position case submitted in the Constitutional Court Decision, it can be seen that the recognition of civil relations with biological fathers with biological children is against children born to fathers and mothers who have entered into a marriage but are not recorded. This decision can be interpreted that the civil relationship between the child and his biological father can only be recognized if between his parents have entered into a religious marriage without disability in the Civil Registry Office (for Non-Muslims) or the Office of Religious Affairs (for Muslims). On the other hand, Law Number 1 of 1974 concerning Marriage only recognizes the term legitimate children and children born out of wedlock. Based on these provisions, the definition of children outside of marriage also includes children born to fathers and mothers who have never entered into a marriage. The ambiguity of the norm regarding the phrase "child outside marriage" that causes the multiple interpretations is also recognized by I Nyoman Sujana. In his book it says:

The sentence born out of marriage actually contains a double meaning, in one side, it can be interpreted that a child born without a legal marriage from his parents, so that his child is often called the child of adultery which is certainly an out of marriage child; and also, on the other hand, it can be interpreted that the child is born from a marriage that has been carried out according to religious law as the formulation of the provisions of Article 2 paragraph (1) of the Marriage Law, but the marriage is not recorded as referred to in the

formulation of the provisions of Article 2 paragraph 2 Marriage Law, so that children according to state law are extramarital children, because their marriages have never been registered, (Sujana, 2015).

The ambiguity of norms regarding the definition of children outside of marriage raises legal uncertainty about the child's civil status. Which is the determination of civil relations between parents and children is a child's legal rights. Legal rights are defined as interests protected by law, or desires recognized by the law, doubtful by the fact that there would be no legal rights before the existence of law. As long as a right is not guaranteed by the rule of law, it is not yet a legal right. Then this means that the law precedes or coincides with rights, (Asshiddiqie & Safaat, 2012). Therefore, it is very interesting to compile a study entitled "Civil Relationship of Children Born without Marriage with Biological Father Based on Constitutional Court Decision Number 46 / PUU-VIII/ 2010". Thus, based on the background of the study above, the purposes of this study is to analyze the civil relationship between the children born without marriage with his biological father and the arrangement about the civil relationship between the children whose mothers did not have marriage.

2. METHOD

This study is a normative juridical study that examines the norms obscurity in Constitutional Court Decision associated with Article 42 of Law No. 1 of 1974 concerning what is meant by a child outside of marriage also includes children born without a marriage. The approach used in this study is the statute approach, the case approach, and the conceptual approach. The legal material of this study comes from document studies. The analysis of this study is done qualitatively.

3. RESULTS AND DISCUSSION

Civil Relationship of Children Born Without Marriage with their Biological Father

The civil status of a child is legally determined by the presence or absence of marriage and the marital conditions of both parents. Clarity of civil relationship will provide a sense of justice and protection for children. Children are a symbol of the continuing descendants of a family. Descendant (*afstamming*) is a blood relationship between children and their parents. The law regulates legitimate children and illegitimate children (*wettige en onwettige kinderen*). This illegitimate child was also named a child out of wedlock (*natuurlijk kinderen*) or translated "children of nature", (Kie, 2000). Provisions regarding legitimate children are regulated in the Civil Code and Law Number 1 of 1974 concerning Marriage. Article 42 of Law Number 1 of 1974 concerning Marriage states that "Legitimate children are children born in or as a result of a legal marriage." In the provisions of the Civil Code, the law governs the legal position of children, namely in Articles 250-271a of the Civil Code.

The existence of children born without a marriage bond between their parents is very likely to occur in social life in society. This condition is caused due to various reasons, namely:

- a. Children born are children from rape.
- b. Father and mother are minors.
- c. One parent or both parents of the child have entered into a marriage with the other.
- d. Father and mother have a love relationship but do not want or cannot get married.

In Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage expressly states that children born outside of marriage only have a civil relationship with their mother and mother's family. In the development of law in Indonesia, the provisions in Article 43 paragraph (1) of Law Number 1 of 1974 concerning

Marriage are considered to have harmed aspects of child protection and legal certainty of the child's identity. This development was responded by a legal breakthrough through the Constitutional Court Decision Number 46/PUU-VIII/2010. The Constitutional Court is a high state institution in the Indonesian constitutional system which is the holder of judicial power together with the Supreme Court, ([Mahkamah Konstitusi, 2012](#)). In carrying out this task, the Constitutional Court made a legal breakthrough through the examination of law against the 1945 Constitution of the Republic of Indonesia.

The application for judicial review is done by Hj. Aisyah Mochtar alias Machica Binti H. Mochtar Ibrahim and Muhammad Iqbal Ramadhan bin Moerdiono who acted as petitioners. The Petitioner is a group of people who suffer a loss of constitutional rights and there is a causal relationship (*causal verband*) between the intended loss and the enactment of the Law petitioned for review so that the Petitioner meets the *legal standing* requirements to submit a quo petition.

The Petitioner submits a material review of Article 2 paragraph (2) and Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage because the Petitioner is a party who directly experiences and feels his constitutional rights are impaired by the promulgation of the Marriage Law, especially concerning Article 2 paragraph (2) and Article 43 paragraph (1). This article turned out to cause legal uncertainty which resulted in losses for the Petitioner relating to the marital status and legal status of their children resulting from the marriage. This legal norm is seen as unfair and detrimental because the marriage of the Petitioner is legal and in accordance with the pillars of marriage in Islam.

The loss argued by the petitioner is a psychological and financial loss due to the coming into effect of Article 43 paragraph (1). The losses referred to are as follows: (Constitutional Court Number 46/PUU-VIII/2010).

- a. Article 43 paragraph (1) of the Marriage Law, causes an uncertain legal relationship between the child and his father. This has violated the constitutional rights of children to know their origins. Also causes a psychological burden on children due to the absence of recognition from their fathers for their presence in the world. Of course, this will cause anxiety, fear and discomfort of children in the community.
- b. The petitioner objectively suffered material or financial losses, namely the Petitioner must bear the costs for the life of the Petitioner as well as to finance in the context of child care and maintenance. This is because there are provisions in the Marriage Law that cause the absence of legal certainty over the marriage of the petitioner and the child resulting from the marriage. As a result, the Petitioner cannot claim the right to the obligation of the husband to provide physical and spiritual support and the costs to care for and maintenance for children.

The loss of constitutional rights experienced by the petitioner becomes the basis for the petitioner to submit an examination of the provisions in Article 2 paragraph (2) and Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage to the Constitutional Court. In the judges' consultative meeting by nine Constitutional Justices, that is Moh. Mahfud MD., as the Chairperson and Member, Achmad Sodiki, Maria Farida Indrati, Harjono, Ahmad Fadlil Sumadi, Anwar Usman, Hamdan Zoelva, M. Akil Mochtar, and Muhammad Alim, each as a member was decided as follows: (Constitutional Court Number 46/PUU-VIII/2010).

- Grant the petition of the Petitioners in part;

- Article 43 Paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, the addition of the State Gazette of the Republic of Indonesia Number 3019) which states, "Children born outside of marriage only have a civil relationship with their mother and his mother's family ", contrary to the 1945 Constitution of the Republic of Indonesia as long as it means to eliminate civil relationship with a man which can be proven based on science and technology and/or other evidence according to the law turns out to have blood relationship as his father;
- Article 43 Paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, the addition of the State Gazette of the Republic of Indonesia Number 3019) which states, "Children born outside of marriage only have a civil relationship with their mother and his mother's family", does not have binding force as long as interpreted as eliminating the civil relationship with a man which can be proven based on science and technology and/or other evidence according to the law turns out to have blood relationship as his father, so the verse must be read," The child who 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 a blood relationship, including the civil relationship with his father's family";
- Refuse the petition of the Petitioners for other than the rest;
- Order to include this decision in the Official Gazette of the Republic of Indonesia as it should;

The Decision of the Constitutional Court Number 46/PUU-VIII/2010 has brought enormous changes regarding the civil status of children born out of wedlock. In the decision stated, "Children born out of wedlock have a relationship of civil with her mother and her mother's family as well as with men as a father who can be proved by science and technology and/or other evidence according to the law has blood relationship, including the relationship of civil with his father's family." Which means, after the Constitutional Court Decision Number 46/PUU-VIII/2010, children born outside marriage can have a civil relationship with biological fathers and biological fathers' family as long as they can be proven based on science and technology and/or other evidence according to the law have blood relationship, (Constitutional Court Number 46/PUU-VIII/2010).

Consideration in the Constitutional Court Decision Number 46/PUU-VIII/ 2010 is a form of effort from the judicial institution in providing child protection. Basically, child protection is carried out based on the following principles: ([Pedoman Perlindungan Anak, 2016](#)).

- a. Non-discriminatory. Respect and guarantee the rights of every child in the jurisdiction of Indonesia without discrimination in any form, regardless of race, colour, sex, language, religion, political views or other views, national origin, ethnic or social origin, wealth, disability, birth or another status of the child or from the child's parents or legal guardians.
- b. Placing children in the context of their rights to survive and develop. The state as much as

possible guarantees the survival and development of children.

- c. The best interests of the child. All actions involving children carried out by the government and private institutions, the best interests of the child are the main considerations.
- d. Enlarge opportunities for children to participate to express their opinions in all matters.

The recognition of the civil relationship between a child and his biological father and his biological father's family after the Constitutional Court Decision No. 46/PUU-VIII/2010 provides justice and legal certainty of the rights of a child born without sin. Every child must be treated the same. The child does not need to bear the mistakes of both parents. The certainty of identity and other civil rights for children will be good for the development of the child, (Constitutional Court Number 46/PUU-VIII/2010). The children have the same rights without discriminatory treatment. The child has the right to the identity and recognition of both parents. The Constitutional Court through its decision also gave a legal principle in the field of family law, namely the principle of biological father's responsibility towards children outside of marriage, which certainly brought a paradigm shift that required both biological parents to be responsible for the child (children) born out of wedlock, (Usman, 2014).

Principles of Organizational Relationship Regulation between Children Whose Mother does not get Marriage

When referring to the formulation of Article 42 of Law Number 1 of 1974 concerning Marriage which states that "Legitimate children are children born in or as a result of legal marriage" and Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage which states that a child born out of wedlock only has a civil relationship with his mother and his mother's family, "based on an authentic

and systematic interpretation of the phrase "Child born out of wedlock has a civil relationship with his mother and his mother's family and 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 the civil relationship with his father's family" should include all children outside of marriage. This is in line with the thoughts of Mahfud MD as the Chair of the Constitutional Court which states:

The Constitutional Court's decision is very important and revolutionary, because since the Constitutional Court's Decision Number 46/PUU-VIII/2010 is made, all children born outside of legal marriages, whether from a secret marriage or infidelity, have a civil relationship with his father. In addition, this provision also applies to a man who has a relationship without marriage ties. Consequently, the man must be responsible for the child born".

This opinion is also supported by Rachmadi Usman who stated: "Because there is not a single sentence in the consideration of the Constitutional Court Decision Number 46/PUU-VIII/2010 which affirms or at least can be interpreted only applies to children born from secret marriages, the rule of law concerning the protection of children outside of marriage in the decision also applies to all types of children born out of wedlock", (Usman, 2014). The protection of children born without a marriage between their parents based on the Constitutional Court Decision Number 46/PUU-VIII/2010 provides legal certainty to the child's civil relationship with biological father and biological father's family.

The recognition of the civil relationship between a child and his biological father after Constitutional Court Decision Number 46/PUU-VIII/2010 does not negate the legal relationship between the child and his mother. A child born

outside of marriage has a relationship with his mother and can have a civil relationship with his biological father in accordance with the principle of children protection. The decision of the Constitutional Court Number 46/PUU-VIII/2010 builds a legal relationship between the child and the mother and his mother's family and biological father and biological father's family.

4. CONCLUSION

Based on the results and discussion of this study above, therefore it can be concluded that a) the children born without marriage have a civil relationship with their biological father based on Constitutional Court Decision Number 46/PUU-VIII/2010. The decision states that a child born out of wedlock has a civil relationship with his mother and his mother's family as well as a man as his father, which can be proven based on science and technology and/or other legal evidence that has blood relationship, including the civil relationship with the family his father. The decision implies that normatively there is no need for recognition of children outside of marriage in accordance with those stated in the provisions of the previous Civil Code. b) The principles of regulating the civil relationship between children whose mothers did not get marriage previously are stipulated in Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage which stated: "Children born out of wedlock only have a civil relationship with their mother and mother's family." The decision of the Constitutional Court Number 46/PUU-VIII/2010 which provides an opportunity regarding the establishment of a legal relationship between a child and his biological father does not negate the legal relationship between the child and his mother.

REFERENCES

Asshiddiqie, J., & Safaat, M. A. (2012). *Teori Hans Kelsen Tentang Hukum*. Jakarta: Konstitusi Press.

- Erlina. (2012). Access To Justice 'Anak Di Luar Perkawinan' (Analisis Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/ 2010 Tentang Pengujian Pencatatan Perkawinan Dan Status Hukum Anak Yang Dilahirkan Dari Perkawinan Yang Tidak Tercatat Undang Undang Nomor 1 Tahun 1974 Te. *Jurnal Konstitusi*, 1(1).
- Kie, T. T. (2000). *Studi Notariat Serba Serbi Praktek Notaris*. Jakarta: PT Ichtiar Van Hoeve.
- Mahkamah Konstitusi. (2012). *Majalah Konstitusi*. Jakarta: Mahkamah Konstitusi.
- Pedoman Perlindungan Anak. (2016). *Direktorat Bina Kesejahteraan Anak, Keluarga dan Lanjut Usia*. Jakarta: Departemen Sosial.
- Sujana, I. N. (2015). *Kedudukan hukum anak Luar Kawin Dalam Perspektif Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010*. Yogyakarta: Aswaja Pressindo.
- Syahrani, R. (1989). *Seluk Beluk dan Asas-Asas Hukum Perdata*. Bandung: Alumni.
- Usman, R. (2014). Prinsip Tanggung Jawab Orangtua Biologis terhadap Anak Di Luar Perkawinan. *Jurnal Konstitusi*, 11.
- The 1945 Constitution of the Republic of Indonesia
- Code of Civil law
- Law Number 1 of 1974 concerning Marriage. LN 1974 No 1; TLN No. 3019 dated January 2, 1974
- Law Number 23 of 2002 concerning Children Protection. LN of 2002 No. 109 and TLN No. 4235 dated October 22, 2002
- Law Number 35 of 2014 concerning amendment to Law Number 23 Year 2002 concerning Children Protection. LN Year 2014 Number 297; TLN No. 5606, October 17, 2014
- Constitutional Court Decision Number 46/PUU-VIII/2010.