

Aspects of Legal Certainty for Unmarried Children in Constitutional Court Decision No.46/PUU-VIII/2010

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Abstract. Based on Article 43 Section (1) of Law No.1 of 1974, children born out of wedlock are traditionally recognized to have a civil relationship only with their mother and her family. However, Constitutional Court Decision No. 46/PUU-VIII/2010 has transformed this legal landscape by allowing children born outside of marriage to establish a civil relationship with their father, provided it can be scientifically proven. This shift is significant as it integrates modern technology and evidence-based approaches into determining parental relationships. This study employs a normative legal research method with a conceptual approach, focusing on analyzing the implications of Constitutional Court Decision No. 46/PUU-VIII/2010. Research materials will be gathered through literature review, analyzed systematically, and interpreted using the justice theory of John Rawls. The findings underscore that the Constitutional Court's decision solidifies the legal status of children born out of wedlock, providing them with rights previously uncertain, such as maintenance, education, health, guardianship, and inheritance. This decision marks a pivotal step towards ensuring these children receive rightful recognition and protections under the law.

Keywords: Legal Certainty, Unmarried Children, Constitutional Court Decision, Rights of Children

1 Introduction

Children's rights are one part of human rights that must be respected by everyone and protected by parents, families, communities, governments, and the state. The protection of children's rights is manifested in Article 1 Section (12) Law on Child Protection which states that "Children's rights are part of human rights that must be guaranteed, protected, and fulfilled by parents, families, communities, governments, and the state."

This rule is based on the Convention on the Rights of the Child's universal principles regarding non-discrimination, the best interests of the child, the right to life, survival and development, and respect for the child's opinion.[1] The principle of universal non-discrimination as defined in the Convention on the Rights of the Child is the protection of children's rights without discrimination of any kind regardless of race, color, sex, race, religion, creed, national origin, ethnicity, property, birth or other position of the child or the child's parents or legal guardians.[2]

Provisions of the Convention on the Rights of the Child which were subsequently manifested in Law No. 23 of 2002 have implications for the protection of children's rights that apply generally regardless of their status as children born within marriage or outside marriage.

However, this regulation is hampered by the clause in Law No. 1/1974 on Marriage which states that the status of children is based on the marital status of their parents.[3]

Definition of a legitimate child in Law No. 1/1974 has legal consequences on its children, in Article 43, which explains that children born out of wedlock only have a civil relationship with their mother and mother's family. This rule has implications for the civil relationship between the child and his biological father and loss of the father's responsibility for his child both materially in the form of maintenance and immaterial in the form of affection.

Some countries such as Malaysia, Brunei Darussalam, Egypt, including Indonesia still separate the legal position and rights of children out of wedlock. The severance of the civil relationship has consequences for the child in the form of the loss of the right to receive livelihood, education, health, guardianship, and inheritance.[4]

In civil law, children born out of wedlock are known as *natuurlijk kind* (natural children), the definition of extramarital children has two meanings, namely in a broad sense and a narrow sense.[5] J. Satrio states that based on doctrine and the provisions of the Civil Code, out-of-wedlock children in a broad sense are children born from extramarital relationships while the man and woman or one of them still have marriage ties with other people (adultery children), discordant children born from relationships between men and women and between the two there is a statutory prohibition on marriage, and narrow children, namely children born from the relationship between a man and a woman who are not married and there is no prohibition on marriage for both of them.[6]

The existence of Constitutional Court Decision No. 46/PUU-VIII/2010 provides a different paradigm regarding the legal status of children born outside of marriage. The Constitutional Court decided that children born out of wedlock can have a civil relationship with their mother and mother's family as well as the man who is their biological father as long as it can be proven based on science and technology.

This paradigm shift is based on the understanding of the Constitutional Court Judges regarding discrimination in the form of unfair treatment and stigma against children born out of wedlock or children who do not have clear paternity status. The Constitutional Court views that the law should provide protection and legal certainty for children born out of wedlock and their inherent rights.

However, it needs to be understood that the Constitutional Court's decision only accommodates the applicant's interestsjudicial reviewagainst the lawsuit under Article 43 Paragraph (1). This lawsuit is accompanied by the relevant application forjudicial review regarding the marriage registration article in Article 2 Paragraph (2) of the Marriage Law. The Petitioner stated in his lawsuit that the presence of this article was contrary to Article 28B (1) of the 1945 Constitution of the Republic of Indonesia, namely "Everyone has the right to form a family to continue their offspring through legal marriage."

In its decision, the Constitutional Court rejected the application on the grounds that marriage registration was an administrative obligation. The court's considerations can be seen from two perspectives, namely that recording aims to carry out the state's function in carrying out the protection, promotion, enforcement and fulfillment of human rights. The second reason regarding the obligation to carry out administrative registration is because marriage is a legal act that has broad legal implications, so that the registration can have an authentic deed and the state can provide guarantees and protection effectively and efficiently.

Kelsen opined that a right is a legal power based on subjective understanding and is a force of will given by law.[7] This is the reason for legal subjects to protect and defend their rights from interference/threats from any party, including the rights of children born out of wedlock to their biological father.

Attempts to protect the rights of out-of-wedlock children are further accommodated in the decision of the Constitutional Court and are considered to have contributed to the reform of marriage law in Indonesia. Although it has caused polemics, this decision has restored the rights of out-of-wedlock children, especially regarding their civil relationship with biological fathers as long as this can be proven in accordance with science such as DNA tests and other evidence that is valid according to law.

2 Research Methods

This research is classified as normative juridical because it analyzes in depth the aspects of legal certainty of children out of wedlock based on Constitutional Court Decision No. 46/PU-VIII/2010.[8] The approach used in this research is a qualitative approach because this research produces descriptive data[9] about legal certainty related to the civil rights of children out of wedlock based on Law No.1 of 1974 and Constitutional Court Decision No. 46/PU-VIII/2010. The technique of legal material collection carried out is a literature study technique by collecting legal sources in the form of laws, research literature, expert opinions, and Constitutional Court Decision 46/PUU-VIII/2010.

3 Discussion

Legal certainty is one of the objectives of law and a way to realize justice. The law is tasked with creating legal certainty because it has the aim of realizing public order. Law is generally applicable, therefore the law binds everyone.[10]

Indonesia as a law-based country is influenced by the positivistic concept of law which has a correlation with the principle of legal certainty. The point is to provide clarity on positive law because the positivistic school requires regularity and certainty to support the performance of the legal system properly.[11]

Legal certainty is absolute because it aims to protect individual interests and public interests as a driving force to realize justice in society.[12] Jhon Austin said that legal certainty is the ultimate goal of legal positivism and to achieve legal certainty it is necessary to separate the law from morals with the aim of producing a logical, fixed, and closed system (*close logical system*).[13] The existence of the principle of legal certainty is a form of protection for legal subjects who seek justice against arbitrary actions with the aim of obtaining something that is expected in particular circumstances.[14]

Regarding legal certainty, there is one clause in Law No 1/1974 which states that a legitimate child is a child born in or as a result of a legal marriage which has implications for the discriminatory treatment of children born out of wedlock. The clause of legitimate children according to the law certainly results in the existence of the term illegitimate children in the law. The legal consequences arising from the existence of this clause are also contained in the Marriage Law, that is, children born out of wedlock only have a civil relationship with the mother and her family.

Furthermore, Law No. 1 of 1974 in Article 43 (2) regulates that children born out of wedlock will be specifically regulated in a Government Regulation. Currently, however, the clause referred to in the article has never been drafted and ratified, resulting in an unclear legal status for out-of-wedlock children in relation to their civil status with their biological father.

The non-existent civil relationship between a child and their biological father is considered a roadblock for out-of-wedlock children to get the justice that they should get like legitimate children based on the law. Additionally, out-of-wedlock children should get the same portion before the law to get their rights as children as mandated in the Child Protection Law.

Constitutional Court Decision No. 46/PUU-VIII/2010 started with a petition to review Article 2(2) and Article 43(1) of Law No.1 of 1974 against the Constitution of the Republic Indonesia 1945 on behalf of Hj. Aisyah Mochtar and Muhammad Iqbal Ramadhan. In their petition, the petitioners state that the law in question is considered contrary to Articles 28 B Section (1) and Section (2) and Article 28D Section (1) on the Constitution of the Republic Indonesia 1945.

The inclusion of Article 43 Section (1) of Marriage Law is due to discrimination against out-of-wedlock children. It is further explained in the petition that the discrimination is because the child loses the legal relationship with his or her father which causes the loss of the father's responsibility for the child.

The petitioner's legal reasoning stated that the country should provide protection to every child born either in a legal situation - as argued in the law - or out of wedlock. In this case, the child referred to in the petition for judicial review was a biological child born as a result of a marriage that was valid according to religion but was not recorded administratively in accordance with applicable procedures.

The Constitutional Court considers that children born out of wedlock should receive fair protection before the law. This is interpreted as a way to restore the responsibility of the biological father with the aim of restoring the rights of the child.

This Constitutional Court decision considers that the provision in Article 43 Section (1) Law No. 1 of 1974 which reads "*Children born outside marriage only have a civil relationship with their mother and their mother's family*" is contradicted by the Constitution of the Republic Indonesia 1945. This provision applies if it is interpreted as the loss of civil relations of men who can be proven based on science and technology to have a blood relationship with their biological children so that it should read "*Children born outside of marriage have a civil relationship with the mother and her family and with a man as the father who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship, including a civil relationship with the father's family.*"

Based on Imam Musthofa, the annulment of the validity of Article 43 Section (1) Law No. 1 of 1974 has ethical objectives including: 1) to provide a legal legality of the blood relationship between the child and his biological father, which has implications for the responsibility of the legal relationship. 2) Providing legal protection of basic rights, both to the father and the father's family, 3) Providing fair treatment for all children without discrimination due to the legal status attached to certain children, 4) Affirmation of the civil relationship between the child and his father and his family 5) the existence of a legal relationship makes the father must fulfill his responsibilities to the child, 6) Providing inheritance rights from his father because of blood relations and legally recorded.[15]

On the aspect of justice, the Constitutional Court's decision on the legal status of non-marital children should be appreciated because it prioritizes the aspect of legal certainty as an effort to realize justice. The legal status of extramarital children based on the Marriage Law is very discriminatory and does not fulfill the principle of legal certainty, which obviously further distances the purpose of law itself, namely justice.

Jhon Rawls attempted to formulate two principles of distributive justice, that are the greatest equal principle, which means that everyone must have the same rights to the broadest basic freedoms as basic rights that everyone must have (the principle of equal rights). These

rights include individual freedoms to participate in political life, to speak, to believe, and to defend private property rights. This principle of equal rights is aligned with the obligations and responsibilities that each person has.

In this case, children born out of wedlock should have their fundamental rights protected from birth as a basic freedom in recognition of the human rights of every person. As a country based on law, children born out of wedlock also have the same position before the law because this is a mandate of the Constitution of Republic Indonesia.

The second principle of Rawls' justice is divided into two concepts, which are the difference principle and the principle of fair equality of opportunity. In the first principle, justice is interpreted as an approach to distributing benefits in accordance with social and economic realities so that they are more effectively targeted.[16] Justice based on the principles of difference and fair equality of opportunity must also be given to out-of-wedlock children in the sense that it does not discriminate against and close opportunities for out-of-wedlock children to grow and develop.

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In legal terms, extramarital children who regain civil rights with their biological father can regain the rights of their biological father such as maintenance, inheritance, and guardianship. The legal certainty contained in the norms of the Constitutional Court Decision can restore the rights of children that should be obtained but are hindered by Article 43 Section (1) Marriage Law.

The existence of the Constitutional Court Decision should be appreciated because it provides more clarity regarding the legal status of children born out of wedlock with their biological father, which in its decision affirms that the proof must go through a valid testing stage based on law, technology and science. This decision is considered a progressive legal reform because it prioritizes aspects of justice in it that provide opportunities for children out of wedlock to obtain their civil rights with their fathers so as to restore the rights inherent in children out of wedlock to be able to feel grow and develop like legitimate children in the Marriage Law.

4 Conclusion

The marriage rule in Article 43 (1) Law No. 1 of 1974 is considered to provide discriminatory legal treatment for extra-marital children because the civil relationship with their biological father is disrupted. This has implications for the loss of civil rights such as obtaining alimony, education, child maintenance, guardianship in marriage, and inheritance. Furthermore, in Section 2 of the same Article, it is explained that the regulation of the civil status of extra-marital children will be regulated through a Government Regulation. Unfortunately, until now the regulation has not been made and ratified so that the legal certainty of extra-marital children regarding their civil status with their biological father cannot be obtained by the child.

Constitutional Court Decision No. 46/PUU-VIII/2010 states that Article 43 Section (1) on Marriage Law contradicts the Constitution of the Republic Indonesia 1945 insofar as it is interpreted as eliminating civil relationships with men who are proven based on science and technology to have a blood relationship with an out-of-wedlock child. This Constitutional Court decision provides clarity and legal certainty to children born out of wedlock to restore their civil

status and restore their rights. The existence of legal certainty for children out of wedlock is a way to realize the ideals of law, which is justice.

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