



Fulfillment of the Principle of Justice in Making Birth Certificates for Children Born Outside of Legal Marriage between Both Parents

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Abstract

The problem in this study is related to the fulfillment of the principle of justice in making birth certificates intended for children born outside of marriage which is carried out legally between the two parents. This article is normative juridical research with a statutory and conceptual approach. The results of this legal research show that the principle of justice for illegitimate children can be fulfilled by adjusting the provisions regarding the making and issuance of birth certificates for illegitimate children based on the provisions on the status of illegitimate children in the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010. Its cause in contrast to the provisions of the Indonesia Marriage Law regarding the distributive status of children outside of marriage, justice for children in the provisions of the status of children outside of marriage in the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010 is more commutative. Furthermore, the provisions regarding the status of children out of wedlock in the Constitutional Court Decision Number: 46/PUU-VIII/2010 are teleologically more able to provide benefits and fulfill the purpose of establishing the rule of law and in line with the principle of child protection, namely the best interests of the child. The decision of the Indonesia Constitutional Court Number: 46/PUU-VIII/2010 can be implemented by creating a civil relationship between the child out of wedlock and the biological father and the family of the father. In addition, the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010 also has an impact on the administrative field, namely by being able to issue birth certificates for children out of wedlock by including the name of the biological father, so that it is not limited to only including the name of the biological mother.

Keywords: *Principle of Justice; Birth Certificates; Children Born; Outside of Legal Marriage; Indonesia Law*

Introduction

A child born as a result of a biological relationship carried out by a man and a woman will have status and position in the eyes of the law based on the marriage of his parents. Legal marriage will give birth to a child who has a legal status and position in the eyes of the law, while a child born from an illegitimate relationship without legal marriage, then the child will have the status of an illegitimate child

when he is born. in the world (Witanto, DY, 2012). An illegitimate child is a child born to a woman who does not have a legal marriage bond with a man who has planted a child in her womb, the child does not have a perfect position in the eyes of the law like a legitimate child in general. In other words, an illegitimate child is a child who was not born in or as a result of legal marriage (Witanto, D.Y., 2012).

This is in line with the Indonesian Civil Code (hereinafter referred to as the Civil Code), in Article 250 of the Civil Code which states that "Every child who is born or raised during the marriage has the husband as the father" from the article it can be concluded that the child Legal according to the Civil Code is a child who is born or a child who is raised in marriage and gets the husband as the father and the opposite understanding of the formulation of the article above is categorized as an illegitimate child. However, the Civil Code distinguishes children out of wedlock into 3 (three) groups, including adulterous children, discordant children, and illegitimate children who can be recognized. In the Civil Code, a child out of wedlock will only have a civil relationship with his father and mother if he has received recognition from his father and mother. We can see this in the provisions of Article 280 of the Civil Code.

Meanwhile, children out of wedlock according to the Indonesia Law Number 1 of 1974 concerning Marriage (hereinafter referred to as the Indonesia Marriage Law) is the opposite meaning of Article 42 of the Indonesia Marriage Law which reads that a legitimate child is a child born in or as a result of a legal marriage. So, an illegitimate child of an illegitimate child is a child who was not born in or as a result of a legal marriage. The validity of the marriage is if it fulfills Article 2 paragraphs (1) and (2) of the Indonesia Marriage Law, namely marriage is legal if it is carried out according to the law of each religion and belief. and each marriage is recorded according to the applicable laws and regulations.

So even though marriage is legal according to their respective religions, it is not necessarily legal according to the marriage law. This is because the marriage that is carried out is not registered according to the applicable laws and regulations. So if a child is born in a marriage that is not registered, it can be considered that the child is illegitimate. A child born out of wedlock according to Article 43 of the Indonesia Marriage Law only has a civil relationship with his mother and his mother's family, so in this case, the position of the child outside of marriage does not have a civil relationship with his biological father. The article was felt by Hj. Aisyah Mochtar alias Machica bint H. Mochtar Ibrahim and Muhammad Iqbal Ramadhan bin Moerdiono have violated their constitutional rights.

Therefore, Hj. Aisyah Mochtar alias Machica bint H. Mochtar Ibrahim and Muhammad Iqbal Ramadhan bin Moerdiono submitted a judicial review of Article 2 paragraph (2) of the Indonesia Marriage Law which reads "Every marriage is recorded according to the applicable laws and regulations" and Article 43 paragraph (1) of the Indonesia Marriage Law which reads "Children born outside of marriage only have a civil relationship with their mother and their mother's family" which according to the petitioners is contrary to Article 28B paragraphs (1) and (2) The Constitution of Republic Indonesia 1945 which reads "everyone has the right to form a family and continue offspring through a legal marriage" and "every child has the right to survive, grow and develop and has the right to protection from violence and discrimination" and Article 28D paragraph (1) of The Constitution of Republic Indonesia 1945 which states "everyone has the right to recognition fairness, guarantees, protection, and legal certainty as well as an equal treatment before the law".

With the issuance of the decision of the Indonesia Constitutional Court No. 46/PUUVIII/2010, then Article 43 of the Indonesia Marriage Law is declared to have no binding legal force as long as it is interpreted to eliminate civil relations with men which can be proven based on science and technology and/or other evidence according to law. turns out to have blood relations as his father. In addition, the decision of Indonesia Constitutional Court No. 46/PUU-VIII/2010 also caused various controversies, especially regarding the status of children out of wedlock. And indirectly the decision of the Indonesia

Constitutional Court no. 46/PUUVIII/2010 has given recognition to children out of wedlock. Recognition of children out of wedlock is also regulated in the Civil Code Article 280-289.

Indonesia is one of the former Dutch colonies, so it is based on the principle of concordance / the principle of harmony, namely the principle of harmony in the application of law whose legal basis is regulated in Article 131 (2) of the Indische Staatsregeling (IS) which reads "For the Dutch group, it must be adhered to (exemplified) the law in the Netherlands". So, in Indonesia, the Civil Code, which has the same structure and content as the Dutch *Burgelijk Wetboek* (BW), applies.

After Indonesia's independence, based on the transitional rules for The Constitution of Republic Indonesia 1945, the BW will still be declared valid before being replaced by a new law based on The Constitution of Republic Indonesia 1945. Recognition of children out of wedlock in terms of the decision of the Indonesia Constitutional Court no. 46/PUU-VIII/2010 and the Civil Code have some differences. Despite these differences, the decision of the Indonesia Constitutional Court no. 46/PUU-VIII/2010 and the Civil Code have several similarities.

However, there are several categories of child discrimination in Indonesia, one of which is an illegitimate child, which is a child born out of a legal marriage between his two parents. This child out of wedlock in Article 43 paragraph (1) of Indonesia Marriage Law it is stated: "only has a civil relationship with his mother and her mother's family". The provisions of Article 43 paragraph (1) of the Indonesia Marriage Law are the basis for making a child's birth certificate, wherein the birth certificate only the mother's name will be written.

This is contrary to the provisions of Article 13 paragraph (1) letter a of the Indonesia Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection (hereinafter referred to as the Indonesia Child Protection Law) which states that "every child during parenting, guardians, or any other party responsible for the care, have the right to be protected from discriminatory treatment". The statement in Article 13 paragraph (1) letter a of the Indonesia Child Protection Law is in line with the provisions contained in Article 28 paragraph (2) of The Constitution of Republic Indonesia 1945 which states "every child has the right to survival, growth, and development, and develop and have the right to protection from power and discrimination."

Research Methods

The problem in this study is related to the fulfillment of the principle of justice in the making of birth certificates for children born outside of marriage which was carried out legally between both parents as well as regarding the juridical implications of the Indonesia Constitutional Court Decision No. 46/PUU-VIII/2010 on the registration of births of children born out of wedlock which is carried out legally between the two parents. This research is normative juridical research, statutory approach and conceptual approach, primary and secondary legal materials, which are analyzed using interpretation prescriptive and teleological.

Research Result and Discussion

After the Indonesia Constitutional Court's decision regarding Article 43 paragraph 1 of the Indonesia Marriage Law, which contains the position of children out of wedlock, there is a debate involving many groups, but the justice taken by the panel of constitutional judges, in this case, is based on rational justice in which the civil relationship between the father and children can not only be realized through marital relations but also blood relations. We must respect the decision of the Indonesia Constitutional Court which is a declaration constitute which means that it affirms that Article 43

paragraph 1 of the Indonesia Marriage Law is contrary to The Constitution of Republic Indonesia 1945 and then negates and creates a new law regarding the issue of the position of children out of wedlock. Children out of wedlock are also entitled to legal protection, including knowing who their parents are. Article 7 paragraph 1 of the Indonesia Child Protection Law explicitly states that "Every child has the right to know his parents, to be raised, and to be cared for by the child's parents."

Court Decisions are a source of law as well as judicial review which is one of the products of the decisions of the Indonesia Constitutional Court. Thus, the rule of law contained in the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010 is one of the sources of law applicable in Indonesia regarding the status of children out of wedlock. The rest, with the recognition of the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010 as a source of law, can be studied regarding legal certainty related to the rule. Legal certainty is realized by law with its nature which only makes a general rule of law. The general nature of the rule of law proves that the law does not aim to achieve justice or benefit, but solely for certainty (Ali, A., 2002).

The opinion regarding legal certainty was also expressed by Jan M. Otto as quoted by Sidharta, namely that legal certainty in certain situations requires its validity, namely as follows:

- a. there are clear, consistent, and easy-to-obtain legal rules issued by state authorities;
- b. government agencies apply the rule of law consistently and are subject to and obedient to it;
- c. the majority of citizens agree in principle with the content and therefore adjust their behavior to the rules;
- d. independent and impartial judges apply the rules of law consistently when they resolve legal disputes;
- e. judicial decisions are concretely implemented by the community (Sidharta, 2006).

The first requirement related to rules that are clear, consistent, and easy to obtain can be fulfilled by the rules in the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010, which can be shown by the absence of rules that have multiple interpretations and clear rules that can be implemented through comprehensive methods in their implementation. The comprehensive method meant here is a real method in the form of Deoxyribo Nucleic Acid (DNA) tests that can already be done so that the rules are not just empty. Furthermore, these rules can also be obtained easily because the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010 can be accessed through internet networks, especially the official website of the Indonesian Constitutional Court.

The second element that must be fulfilled is that government agencies apply the rule of law consistently and are also subject to and obedient to this element, so several government agencies must consistently follow the provisions of the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010 wrong the other is the Civil Registration Institute, which is the official agency authorized to make and issue birth certificates for children. Thus the Civil Registry Agency must make and issue birth certificates for children out of wedlock by the provisions of the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010, namely by writing that "the child is the child of the mother only" if the child outside of marriage cannot be proven to be the biological child of a certain man, on the contrary, it must be written that "the child is the child of the father and mother" if it can be proven that the child is the child of a certain man.

The majority of citizens in principle agree with the content and therefore adjust their behavior to this rule can be proven by the absence of members of the public who legally dispute the provisions in the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010. The fourth element in the form of independent and impartial judges applying these legal rules consistently when they resolve legal disputes

can be realized by judges as legal mouthpieces who act neutrally in deciding cases regarding the status of children out of wedlock after the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010 by taking into account the provisions contained in the decision.

While the last element which states that judicial decisions are concretely implemented in their implementation is closely related to the first element, namely the rule can actually be applied through existing methods and can be used, namely through the DNA test method. So that by using a DNA test the provisions in the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010 can concretely be implemented in practice in the community.

According to the Indonesia Constitutional Court's Decisions Number 46/PUU/VIII/2010, that article 43 paragraph (1) of the Indonesia Marriage Law states: "Children born out of wedlock only have a civil relationship with their mother and his mother's family", is contrary to the Constitution of Republic Indonesia 1945 as long as it is interpreted to eliminate civil relations with men who can be proven based on science and technology and/or other evidence according to the law to have blood relations as their fathers.

Article 43 paragraph (1) of the Indonesia Marriage Law which states: "Children born out of wedlock only have a civil relationship with their mother and their mother's family", do not have binding legal force as long as it is interpreted as eliminating civil relations with men who can prove based on science and technology and/or other evidence according to the law have blood relations as the father, so that the verse must be read, among others, as follows: "Children born out of wedlock have a civil relationship with his mother and his mother's family as well as with men. a man as the father who can be proven based on science and technology and/or other evidence according to the law has blood relations, including civil relations with the biological father and his father's family.

Based on the decision above, the decision does not abolish or change the provisions of Article 43 paragraph (1) of the Indonesia Marriage Law, it only changes the meaning as long as it fulfills the conditions (conditionally unconstitutional), namely unconstitutional as long as the paragraph is interpreted as eliminating civil relations with men who can be proven based on science and technology and/or other evidence according to the law to be related by blood as his father. Based on the explanation of the Indonesia Constitutional Court on Wednesday, March 7, 2012, it was stated that: first, every birth naturally must be preceded by a woman's pregnancy due to fertilization through sexual intercourse with a man or through technological engineering. "A man and a woman who caused the birth of the child must be responsible for the survival, growth, and development and have the right to protection from violence and discrimination.

This is in line with Article 28B paragraph (2) of The Constitution of Republic Indonesia 1945. Second, the decision of the Constitutional Court opens the possibility for the discovery of legal subjects who must be responsible for the child referred to as the father, through legal mechanisms by using evidence based on the latest science and technology or law, in the context of eliminating legal uncertainty and injustice in society. Third, related to the perspective of the Indonesia Marriage Law which does have a distinctive character, in a formal sense it is a unification law so that there are legal norms that apply to all citizens.

The Indonesia Constitutional Court's Decision Number 46/PUU-VIII/2010 can be used as a legal basis for the protection of children out of wedlock which has not been recognized by the state. Because the government regulation regarding children born out of wedlock that has been promised by the government in article 43 paragraph (2) of the Indonesia Marriage Law has not yet existed, the decision of the Constitutional Court is the basis for protecting children out of wedlock."

Although the Indonesia Population Administration Law No. 23 of 2006 does not explicitly regulate birth certificates for children out of wedlock, if it is related to the implementing regulations, namely Presidential Regulation No. 25 of 2008 concerning Requirements and Procedures for Population Registration and Civil Registration, in particular the provisions in Article 52 paragraph (2), registration of births without evidence or a marriage certificate/marriage of parents can still be carried out / carried out. The sentence of Article 52 paragraph (2) states that: "If the birth report is not accompanied by a marriage certificate/marriage certificate of the parents as referred to in paragraph (1) letter e, the birth registration is still carried out."

And connected with the rules concerning child recognition and legalization of children, it can be interpreted grammatically and systematically that the rules are aimed at recording the birth of children out of wedlock. With the issuance of the Indonesia Constitutional Court Decision No. 46/PUU-VIII/2010, there will be a very basic paradigm shift. If previously the inclusion of the father's name in the birth certificate of an illegitimate child was solely based on the father's intention to acknowledge or ratify his illegitimate child, then with the issuance of the Indonesia Constitutional Court Decision No. 46/PUU-VIII/2010 the inclusion of the father's name in the birth certificate of an illegitimate child not only based on the father's intention to admit or not admit his illegitimate child or legitimize or disapprove of his illegitimate child, but can also come from the child's mother or even his child when it can be proven by science and technology or other evidence that the child this is the father's son.

The problem now is on how to prove scientifically and technologically, which has not been regulated in our evidentiary law and needs to be regulated further so that there is no legal vacuum (the vacuum of law). However, proof can still be done with other evidence in the form of suspicions, for example, proof of payment for childbirth costs by the man (Girsang, J., 2012). Witness evidence includes testimonies given by doctors, midwives or nurses, and families who see and know that the man is waiting or present at the time of the woman's delivery.

The two pieces of evidence can be used as evidence for suspicion, by Article 164 HIR, that evidence can be in the form of: "evidence of letters, evidence of witnesses, allegations, confessions, and oaths." Based on the description above, it can be said that from the Population Administration Perspective, both from the Indonesia Population Administration Law and Presidential Regulation No. 25 of 2008, the Introduction to the Indonesia Constitutional Court's Decisions No. 46/PU-VIII/2010 is based on the factors that underlie the change in the naming paradigm father in biology.

Birth certificates of illegitimate children, which initially only depended on the father's intention to acknowledge or ratify the illegitimate child, can also be carried out by the mother or the child herself, even without the father's approval if it can prove that the man in question is the biological father of the child. The problem that needs to be analyzed now is whether the Constitutional Court Decision Number 46/PUU-VIII/2010 poses a risk to the child's illegitimate certificate that existed before the Constitutional Court's decision was pronounced from the legal perspective of the Population Administration.

However, according to Djumikasih, the Indonesia Constitutional Court's Decision Number 46/PUU-VIII/2010 does not have any surprises on the birth certificates of children out of wedlock that existed before the Constitutional Court's decision was pronounced on 17 (seventeen) February 2012 (two thousand and twelve). This is based on Article 47 of the Indonesia Constitutional Court Law, which states: "The Constitutional Court's decision has permanent legal force since it has been pronounced in a plenary session open to the public" (Djumikasih, 2013).

Administrative issues, in general, are usually formal, based on authentic evidence, however, according to article 52 (2) of Presidential Regulation No. 25 of 2008 which reads "If the birth report is not

accompanied by a marriage certificate/marriage certificate of parents as referred to in paragraph (1) letter e, birth registration is still carried out." This shows that authentic evidence is not too much of a problem in population administration so that as long as it can be proven with valid evidence, illegitimate children born before the Constitutional Court's decision can also be recorded with the name of their biological father.

Based on the discussion above, it can be concluded that the Indonesia Constitutional Court's Decision Number 46/PUU-VIII/2010 regarding the Examination of Article 43 paragraph (1) of the Indonesia Marriage Law when viewed from the point of view of legal certainty, the decision will not have any implications juridical to the birth certificates of illegitimate children who have been issued and illegitimate children born before February 17, 2012, because if applied it would be contrary to the principle of legality as interpreted from Article 47 of the Indonesia. Constitutional Court Law and Article 28 letter (i) of The Constitution of Republic Indonesia 1945.

But if viewed from the point of view of justice and expediency, especially for the applicant/seeker of justice, in this case, is Machicha Mochtar, this decision becomes unfair and useless, because even though he has tried hard to seek justice at the Constitutional Court, and the Court granted his request but the Constitutional Court's decision cannot be applied to their children, who receive protection from the Act and Child Protection. This is because Machicha Mochtar's son, Iqbal, was born before the Constitutional Court's decision was pronounced, about 16 (sixteen) years ago. This of course triggers legal irony.

In the Civil Code a child born out of wedlock or a child born out of wedlock can occur for three reasons. marriage. The two discordant children, discordant children are children born from relationships between men and women where the law prohibits marriage between them because they are still bound by blood marriage. The three natural children or other illegitimate children are children who are conceived or born to men and women, both of whom are not bound and there is no prohibition against intermarrying with each other.

In the Civil Code to obtain a civil relationship between an illegitimate child and his mother and father, there must be an acknowledgment from both or one of them. Article 280 of the Civil Code states that with a confession made to a child out of wedlock, a civil relationship arises between the child and his mother and father. But this article only applies to natural children, not to adulterous children and discordant children because both are not allowed to be recognized, this is by the provisions of Article 283 of the Civil Code.

With the decision of the Indonesia Constitutional Court Number 46/PUU-VIII/2010, the civil relationship of an illegitimate child does not only arise from recognition but can arise because of a blood relationship between an illegitimate child and his/her biological father. It is recognized that the child outside of marriage then arises a civil relationship between the child outside of marriage and the biological father and his father's family.

In customary law, children out of wedlock are children born from the actions of their parents not according to religious and customary provisions. In customary law, after the marriage occurs, husband and wife are responsible not only for taking care of, maintaining, and educating their legitimate biological children and illegitimate children. Some indigenous peoples consider that the position of illegitimate children in society is considered a disgrace. Then the child and mother can be subject to customary fines or expelled from the customary law alliance.

Some consider it a normal thing, meaning that it can be accepted by the surrounding community, such as in Java and Minahasa. In the Minahasa and Javanese communities, the position of illegitimate

children may be the same as legal children. In Minahasa, a sign of the father's acknowledgment of his biological child, the father gives a "*lilikur*" in the form of a traditional gift to his mother. In Java, an illegitimate child can have a civil relationship with his biological father based on humanity (*parimirma*/wisdom). So with the decision of the Indonesia Constitutional Court Number 46/PUU-VIII/2010, it is hoped that this decision can provide legal protection for the position of children out of wedlock in customary law which some indigenous peoples have not been able to accept. the position of children out of wedlock because the decision is comprehensive for all Indonesian citizens.

Conclusion and Suggestion

The principle of justice for illegitimate children can be fulfilled by adjusting the provisions regarding the making and issuance of birth certificates for illegitimate children based on the provisions on the status of illegitimate children in the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010. This is because in contrast to the provisions of the Indonesia Marriage Law regarding the distributive status of children outside of marriage, justice for children in the provisions of the status of children outside of marriage in the Indonesia Constitutional Court Decision Number: 46/PUU-VIII/2010 is more commutative. Furthermore, the provisions regarding the status of children out of wedlock in the Indonesia Constitutional Court Decision are teleologically more able to provide benefits and fulfill the objectives of the rule of law and are in line with the principle of child protection, namely the best interests of the child.

The Indonesia Constitutional Court's Decision Number: 46/PUU-VIII/2010 can be implemented by creating a civil relationship between the child out of wedlock and the biological father and the family of the father. In addition, the Indonesia Constitutional Court's Decision Number: 46/PUU-VIII/2010 also has an impact on the issuance of birth certificates for children out of wedlock by including the name of the biological father, so that it is not limited to only including the name of the biological mother of the child out of wedlock.

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