

Constitutional Court Decision Number 46 / Puu-Viii / 2010 Reviewed from the Perspective of Adat Law, Burgerlijk Wetboek (Bw) and Islamic Law

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Abstract: The polemic that arises relating to the Constitutional Court hearing No. 46 / PUU-VIII / 2010 concerning inheritance rights of children outside of marriage, provide those children with inheritance rights and civil relationship to the father. This can be implemented as science and technology or other evidences that can be accepted by law, prove the blood relationship. This study aims to analyse inheritance law for children outside of marriage in the perspective of Adat law, Burgerlijk Law (BW) and Islamic law. This study uses descriptive qualitative approach. According to Adat law, children outside of marriage does not receive inheritance rights nor inherit from the father, except in the custom of Minahasa for the reason of humanity aspect, which is called Mehelilikur. Burgerlijk Law (BW) article 867 and Islamic law stated that children born outside of marriage or adultery do not receive inheritance or inherit from the father. They have only the right to receive living expenses. In addition, the child born from a betel marriage is valid in Islamic law and has the civil right to his father to receive inheritance and inherit.

1 INTRODUCTION

The association between religion, moral attitudes and behaviour is widely discussed in academic and popular discourses. A potential effect of religion on behaviour can be seen through ethical standards imposed on the faith of the religion's moral code. One of good examples is the act of charity that plays an important aspect in many religions. On the other hand, throughout human history, there exist some perceptions that showed many aggression and violence that have been justified in the name of religion. Little agreement found on whether adherence to a faith is correlated with more or less ethical behaviour. Empirical assessments are complicated by the fact that understanding morality might differs for religious and non-religious people, across different faiths. Moreover, religious affiliation may affect the way people look at the religion, which may revealed some behaviour but not necessarily attitudes (Isadora, Jens, and Stefan, 2018).

An imbalance between morals and religion makes free sex more prevalent in Indonesian younger generation especially among adolescents.

This is confirmed through the survey conducted by National Population and Family Planning Agency, *Badan Kependudukan dan Keluarga Berencana Nasional*, BKKBN, on free sex behaviour in 2017 and concluded as follows:

Table 1: Free sex among adolescent.

No.	Behavior	Man	Woma n	Total
1.	Never do free sex	12.203	10.335	22.335
2.	Do Free Sex	1.018	265	1.283
Total		13.221	10.600	32.821

Source: data processed from www.bkkbn.go.id

The data mentioned above states that free sex is still relatively high, where more than 5 percent of total adolescents in Indonesia have conducted adultery. Some other concerns that come after looking at the numbers are, the brutal impact of free sex on future generation, early pregnancy for young women and the born of child outside marriage. Considering of the impacts mentioned above, the authors are interested to conduct a study with more emphasis on children outside marriage as it has been a major concern for many communities and families.

In this paper, the authors will discuss the rights of inheritance for children outside marriage. In particular, the study will look at the rights of inheritance from different perspectives of law.

2 METHODOLOGY

The study uses a descriptive qualitative approach with theoretical enlightenment of literature studies from books and scientific journals.

3 DISCUSSION

Indonesia today is still encompassed with various legal systems, which govern inheritance civil rights that applicable for the citizens. The first system is the legal system of inheritance according to the west that is stipulated in the Burgerlijk Wetboek (Civil Law Code), abbreviated Civil Code (UU), based on the provisions of article 131 IS jo. Staatsblad 1917 no. 129 jo. Staatsblad 1924 no. 557, jo. Staatsblad 1917 no. 12 on submission to European law, the Burgerlijk Wetboek (BW) that applies for Europeans and those who are equalized with Europeans, Chinese, Easterners, other Foreign Easterners and Indonesians who submit themselves to the European law.

The second legal system come from Adat laws. The diverse legal systems of Adat law that concern with inheritance rights are influenced by ethical practises and traditions in different geographic areas. For instance, the unilateral system in Java and alternated unilateral (unilateral switching systems) which found in Rejang Lebong and Lampung Papadon. Some Indonesian, who strongly relate themselves to the Adat law, commit and comply the concerned law according to their beliefs and customs, which prevail in certain community.

Third, the implementation of inheritance cases in the religious court, the judges have agreed to use book II of the Compilation of Islamic Law (KHI) on inheritance law as a reference, even though by law, the status of KHI is still under the Civil Code (UU) (Yani, 2016).

3.1 Inheritance from the viewpoint of Adat Law

Theoretically, the ancestral system in Adat law can be divided into three features, namely: the Patrilineal system, the descent system that is drawn according

to the father line, where the position of the man is more prominent than the position of the woman in inheritance. Matrilineal system, a descent system that is drawn according to the maternal line, where the position of a woman is more prominent than the position of man in inheritance. Parental or Bilateral System, a descent system that is drawn according to parental lines, or two-sided lines (father and mother), where the position of men and women is not differentiated in inheritance. The position of the child outside of marriage in Adat law with a patrilineal and matrilineal system has a civil relationship with the mother and the mother's family. The child is not entitled to receive inheritance rights and inherit from the father as he or she does not have a civil relationship with the father (Lucy, 2015). In Minahasa custom, the child born outside of marriage can have a legal relationship with the father. In local Minahasa Adat law, the father can give customary gifts to the child as evidence of recognition (Ellyne, 2014).

3.2 Inheritance from the viewpoint of Burgerlijk Wetboek (BW) Law

The Civil Code (BW) refers to children outside of marriage with the term *Natuurlijk Kind*, natural children (Edyar, 2016). BW inheritance law recognizes three principles, first, individual or personal principle where being an heir is an individual or personal not a heir group and not a clan, tribe or family group. This can be seen in Article 832 jo. 852 BW, which determines that the person who has the right to receive inheritance is the husband, or wife who lives the longest, the child and his offspring. Second, bilateral principles, meaning that a person does not only inherit from father but also from the mother, so does the brother inherit from his brothers, or his sisters. This bilateral principle can be found in Articles 850, 853 and 856 BW, which regulates that if children and offspring as well as husbands or wives who live the longest are no longer available, the mother, father, and relatives of both brothers and sisters inherit the inheritance of the deceased. Third, the principle of classification, giving those closer relative to the deceased more rights to receive inheritance and inherit than further relative. To facilitate the distribution of inheritance, the heirs must go through classification process to identify who are closer and further relatives (Oemar, 2017).

For unmarried children as stated in Article 283 BW (Burgerlijk Wetboek), namely children born due to acts of adultery and desecration, the provisions

regarding the right to inheritance do not apply to them. Adultery and discordant children will only get a living right that is measured based on the ability of the father or mother and his legal heirs according to the law (Ismawati, 2015). Unmarried children that can be recognized are based on Article 272 BW, namely: "An extramarital child who can be recognized is a child born to a mother but who is not seeded by a man who is in a legal marriage with the child's mother", and not including groups of adulterous children and discordant children (Youdhea, 2017).

3.3 Inheritance from the viewpoint of Islamic Law

According to the Compilation of Islamic Law (KHI), article 99, the scholars agree that: There is no right of inheritance between his biological father and the child. The child has only legitimate relationship (*nasab*) and can inherit from the mother. His biological father is not entitled to be a guardian because the child was born due to adultery (Purbasari, 2017). If a child is born of a woman, called her biological mother, due to an act of adultery with a man, also called biological father, then the law cuts off this child's descent relationship with his father. However, the descent relationship of the child with her mother remains. Thus, this means that the adulterous child does not inherit and receive inheritance with the biological father, but he or she still has inheritance relationship with the mother and only mother's family. Thus, if the father dies, the adulterous child will not be included in the list of heirs. Similarly, his biological father does not become the heir of the adultery child if the adulterous child dies (Achmad Yani, 2016).

3.4 Review of Decisions of the Constitutional Court No. 46 / PUU-VIII / 2010 from the Perspective of Adat, Burgerlijk Wetboek (BW) and Islamic Laws

As a country with the biggest Muslim population, the position of a Muslim in Indonesia cannot be separated from the religious rules that apply to every Muslim individual. These rules are the guidelines for life in this world to the hereafter, especially for a law enforcer. They must weigh and give justice to the people, not only Muslims, but also other religious communities. In 2012, an atmosphere of tension marked the history of marriage law in Indonesia

over the decision of the Constitutional Court of the Republic of Indonesia concerning the inheritance rights of children outside marriage. Based on the decision of the Constitutional Court No. 46 / PUU-VIII / 2010, article 43 paragraph 1 of Law No. 1 of 1974 concerning marriage which states that, "Child born outside of marriage only have a civil relationship with their mother and family, and with a man as his father that can be proven based on science and technology or other evidences that according to the law can clarify a blood relationship, including civil relations with his father's family".

Based on the above provisions, biological rights of child such as inheritance rights and others can be recognized constitutionally. The birth of the Constitutional Court's decision on the position of the biological child raises various problems in Indonesia, both normative and social issue. Normatively, Constitutional Court ruling No. 46 / PUU-VIII / 2010 dated February 17, 2012 has deconstructed sacred principles in the order of marriage laws such as Article 43 paragraph 1 of Law No. 1 of 1974 concerning marriage. The position of the child in article 43 paragraph 1 UUP which incidentally is an extraction that is built from classical *Fiqh* values from time to time. These values are destroyed by the appearance of the Constitutional Court's decision (Bahruddin, 2014).

This Constitutional Court decision has brought a new paradigm in the system of civil law and family law, especially in Indonesia. The submission of the judicial review was outlined in the Constitutional Court Decision No. 46 / PUU-VIII / 2010 with the pronouncement date of February 17, 2012. However, the decision has a lot of controversy with pros and cons. Some opinions state that the decision will provide a legal change in the effort to protect children's rights. While other opinions in some communities identified that, the decision of the Constitutional Court will rise new problems. It disturbs the order of life for Muslims and affect the Islamic law concerning of inheritance in the country. To some extent, the majority of the communities stated that the decision of the Constitutional Court had legalized adultery in Indonesia (Pahlefi, 2015). Based on the provisions of Law Number 1 of 1974 concerning Marriage, it has been stated that marital relations that are not in accordance with Article 2 paragraph (1) and paragraph (2) are illegal marriages and have legal consequences. The legal consequences is in accordance with Article 43 paragraph (1) Law Number 1 of 1974 concerning Marriage which states, "Children born outside of

marriage only have a civil relationship with their mother and family" (Monica, 2016).

Adat law is inherited from the principles that arise from the communal and concrete thoughts of the Indonesian nation (Stevi, 2017). In Minahasa, the child born outside of marriage can have a legal relationship to the father (Ellyne, 2014).

4 CONCLUSIONS

Constitutional Court Decision No. 46 / PU-VIII / 2010 is contrary to Adat law, Burgerlijk Wetboek law, and Islamic law. Adat law, which give inheritance rights for children outside of marriage, is in Minahasa custom. Burgerlijk Wetboek's law puts pressure on out-of-wedlock children to get inheritance rights from their mother and family. Whereas in Islam, inheritance rights for children outside of marriage can apply if the child is the result of a Betel marriage in which marriage is not recorded in the civil record in this case the religious affairs office, while for children resulting from adultery there is no inheritance right from the biological father. It is recommended that the Constitutional Court Decision Number 46 / PUU-VIII / 2010 must be followed up by the government in this case the legislative institution to revise the legal regulations related to Law No. 1 of 1974 which became a foundation of the Constitutional Court in providing results of decisions regarding inheritance rights for children born outside marriage. This Constitutional Court's decision is still multi-interpretation in practice, which can lead to cross-opinion between experts and legal practitioners. For this reason, the government should take quick steps to improve the situation.

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