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JUDUL ARTIKEL	:	THE CONSTITUTIONALITY OF INHERITANCE RIGHTS FOR EXTRAMARITAL CHILDREN: ASSESSING THE LEGAL RESPONSE UNDER BALINESE CUSTOMARY LAW
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#5170 Summary

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Title and Abstract

Title The Constitutionality of Inheritance Rights for Extramarital Children: Assessing the Legal Response under Balinese Customary Law

Abstract This article analyzes the inheritance rights of children of extramarital under the Balinese Customary Law post-Constitutional Court decision. This study focuses on the extramarital position in inheritance under Balinese Customary Law after the enactment of Constitutional Court decision. Any child born from unmarried parents and adultery is stigmatised as extramarital child (*walad al zina*) for his entire life and is forbidden from inheriting an estate of his biological father. Then, the reason why this legal issue is chosen as the main subject of the study is due to the legal circumstance in which the Balinese community does not grant a position to extramarital children under Balinese customary law in inheritance from the *Purusa* line. Hindu-Balinese religious leaders such as Parisada, as well as the Traditional Village Council, have never followed up the Constitutional Court's ruling stating that children born out of wedlock have civil relations with their biological fathers. Islamic religious leaders have followed up on the Constitutional Court's decision by issuing a fatwa of the Indonesian Ulema Council (MUI) imposing an obligation on biological fathers to separate their wealth for a guarantee of life to children. Applying the statutory approach, conceptual approach, sociological approach, and case approach, it can be understood that children born out of wedlock (Balinese call it *begin* at children) have no position as heirs in the *purusa* line but only have an inheritance relationship with their mother and their mother's family.

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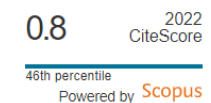
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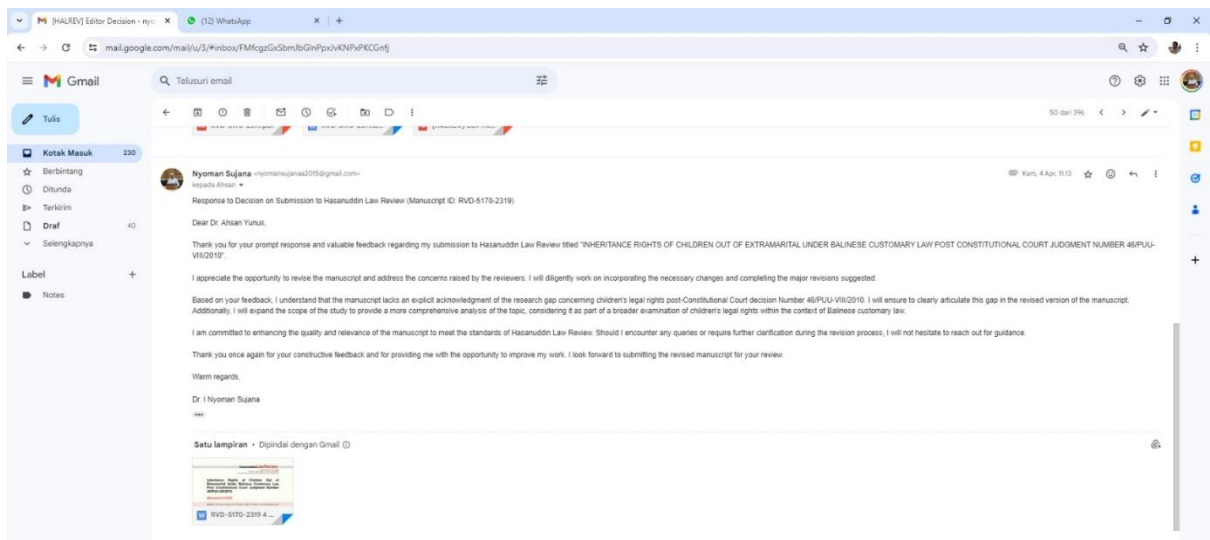
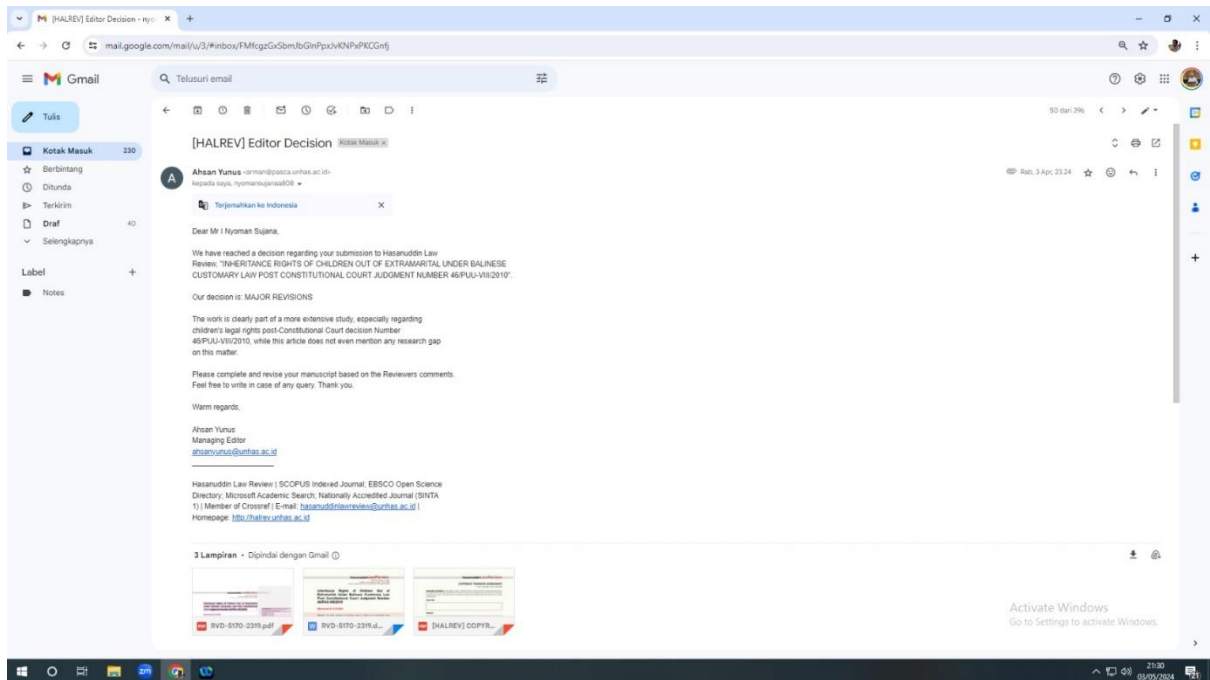
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Nyoman Sujana nyomansujana2015@gmail.com 4 April 2024, 13:39

Dear Dr. Ahoan Yunus,

Thank you for your prompt response and valuable feedback regarding my submission to Hasanuddin Law Review titled "INHERITANCE RIGHTS OF CHILDREN OUT OF EXTRAMARITAL UNDER BALINESE CUSTOMARY LAW POST CONSTITUTIONAL COURT JUDGMENT NUMBER 46/PUU-VIII/2019".

I appreciate the opportunity to revise the manuscript and address the concerns raised by the reviewers.

To complete the revision, herewith I would like to send Copyright Transfer Agreement (attached)

Thank you once again for your constructive feedback and for providing me with the opportunity to improve my work. I look forward to submitting the revised manuscript for your review.

Warm regards,

Dr. | Nyoman Sujana

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Inheritance Rights of Children Out of Extramarital Under Balinese Customary Law Post Constitutional Court Judgment Number 46/PUU-VIII/2010

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Abstract: This article analyzes the inheritance rights of children out of extramarital under Balinese Customary Law post Constitutional Court Judgment Number 46/PUU-VIII/2010". This study focuses on the position of extramarital in term of inheritance under Balinese Customary Law after the enactment of Constitutional Court Judgment Number 46/PUU-VIII/2010. The reasons why this legal issue is chosen as the main subject of the study is due to the legal circumstance in which Balinese community do not grant position to extramarital children under Balinese customary law in inheritance from the *purusa* line. Hindu-Balinese religious leaders such as Parisada, as well as traditional village leaders such as the Traditional Village Council (MDA) have never followed up on the Constitutional Court's ruling stating that children born out of wedlock have civil relations with their biological fathers, while Islamic religious leaders have followed up on the Constitutional Court's ruling by issuing a fatwa of MUI imposing an obligation on biological fathers to separate their wealth for guarantee of life to children born out of wedlock through a *wajibah* (mandatory) will. Applying the statutory approach, conceptual approach, sociological approach and case approach, it can be understood that children born out of wedlock (Balinese call it as *bebinjat* children) have no position as heirs in the *purusa* line, but only have an inheritance relationship with their mother and their mother's family.

Keywords: Inheritance Rights; Extramarital, Customary Law

1. Introduction

Seen from the life of nation and state, children are the next generation for the ideals of the nation, therefore every child reserves the right to survive, grow and develop and be free from discrimination and violence. It can be seen from the provisions of Article 3 Paragraph (3) of Law Number 39 of 1999 concerning Human Rights. In line with these provisions, the government's concern for the dignity of children has actually been observed since the promulgation of Law Number 4 of 1979 concerning Child Welfare, but until the issuance of Law Number 35 of 2014 concerning Child Protection, it turns out that child welfare is still far from being what it should be expected, where discrimination against children can be found as in the case of *stunting* in Indonesia, it is not only encountered by children born out of legal marriage (extramarital children), but also children born from legal marriages.

Along with the massive advances in information technology recently, where interaction amongst individuals is no longer limited to a certain area but has penetrated and even crossed the territorial boundaries of a country. This easy interaction relationship has

brought about a change in the perception of the current generation, called Z generation, considering that sex out of legal marriage is not something taboo, but has become a culture "try first then buy". This has become one of the triggers for early marriages, an increase in abortion cases, and even an impact on the number of children born out of legal marriages.

In the Balinese Customary Law community, in daily interactions, however, it turns out that extramarital children are often bullied, insulted and ridiculed by calling them illegitimate children, children of adultery (*bebinjat* children). It means that the child born only has status and biological and juridical relationship with his biological mother, due to the man who caused the birth of the child has disappeared and does not want to be responsible, in addition to, it can also be that the mother is unable to show who is actually the biological father of the extramarital child.

Considering the existence of this legal fact, it is evident that it will significantly impact the status of these extramarital children, as they will not fully obtain their rights as future generations and heirs of the nation. It is explicitly stated in the state constitution, where in Article 28B paragraph (2) it is stated that: *"Every child reserves the right to survival, growth and development and is entitled to protection from violence and discrimination"*.

With regard to the existence of extramarital children in everyday life, they do not get their rights in accordance with the constitution, both the right to live, to grow and develop, as well as the right to inherit finally due to a lawsuit from a mother who gave birth to a child born out of legal marriage, has filed a lawsuit to the Constitutional Court. This lawsuit was granted by the Constitutional Court through its judgment as outlined in the Constitutional Court Judgment Number 46/PUU-VIII/2010, dated 17 February 2012. The rulings of this judgment stated that *"A child born out of wedlock has a civil relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence according to law to have blood relationship, including civil relationship with his father's family"*.

The existence of the Constitutional Court Judgment Number 46/PUU-VIII/2010, dated 17 February 2012 in its development which has exceeded a period of decade, it turns out that Hindu religious leaders in Bali have never followed up the judgment by paying special attention to the existence of extramarital children. Balinese customary law which is imbued with Hindu religious teachings adhering patrilineal kinship does not pay attention to extramarital children. Extramarital children under Balinese customary law do not obtain complete protection under Balinese customary law, as they only get rights from the mother who give birth to them, while the biological fathers seem free and no responsibilities. In contrast to what has been done by Islamic religious leaders through the MUI having issued Fatwa Number 11 of 2012 of which contents include: *the government is obliged to protect children resulting from adultery and prevent neglect,*

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especially by giving punishment to men causing their birth to fulfill their needs." In addition, the government also has the authority to impose *takzir* punishment on adulterers resulting in the birth of children by requiring them to: a) suffice the children's needs; b) provide assets after they die through a *wajibah* (mandatory) will.

With regard to the existence of extramarital children within the Balinese customary law community, they have not yet obtain justice and legal certainty up to the present regarding their rights as children of the nation's next generation, therefore, it will be discussed and studied in depth in this article: "What is the right of inheritance an extramarital child under Hindu religious law after the enactment of the Constitutional Court Judgment Number 46/PUU-VIII/2010 concerning the patrilineal line of kinship or *Purusa* line adhered to by Balinese customary law?"

2. Method

This article is an empirical legal study analyzing "The Inheritance Rights of Children Born Out of Wedlock under Balinese Customary Law After the Enactment of Constitutional Court Number 46/PUU-VIII/2010." The empirical characteristics of this paper are in line with what was stated by Irwansyah that empirical legal research makes social facts, social phenomena, or social symptoms in a reciprocal relationship with law as research objects or their starting point with a focus on studies on attitudes and behavior of individuals, groups, communities, institutions, and countries¹. The theory of Justice, Legal Certainty, Responsive Law and Human Rights as an analytical knife are applied to analyze legal issues being studied, with a statutory approach, concept approach and analytical approach, and a sociological approach. The data source used in this paper are primary data using direct interview techniques with selected informants *purposive sampling* carried out in the area of the Balinese customary law community divided into East Bali and West Bali. Meanwhile, the informants were selected based on their position as widows and/or women who gave birth to extramarital. The secondary data are taken from primary legal materials in the form of the Marriage Law, the Human Rights Law and other laws related to marriage, Child Protection and Women Protection Laws; the secondary law materials are in the form of scientific articles, journals, books on marriage, tertiary law materials are legal dictionaries, encyclopedias.²The legal material collection technique used is the library study technique. The data were obtained through direct interviews with informants and through literature searches, for example understanding and studying in more depth the literature and laws and regulations correlated with the discussions, both directly and indirectly concerning the existence of extramarital children within Balinese

¹ Irwansyah, 2021, *Legal Research, Choice of Methods & Article Writing Practices*, Revised Edition, 4th Print, Mirra Buana Media, Yogyakarta, p.185.

² *Ibid*, p.3

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For example.... How is it relevant to the previous related articles on the inheritance rights of children in the current positive law? What makes this study significant? Where does this study stand in comparison to others?

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customary law community which are imbued with Hinduism teachings, further analysis is carried out to get the final argument in the form of answers to the research problems.³

3. Inheritance Rights under Balinese Customary Law

Customary law is the law of indigenous community. The term indigenous community is known in various terms. Soepomo calls as the term of "legal alliance".⁴ Similarly, Surojo Wignyodipuro in his book entitled Introduction and Principles of Customary Law mentions the term as customary law community with the same term as Soepomo.⁵ Hilman Hadikusuma refers to customary law as a custom that has sanctions, while the term *adat* (custom) containing no sanctions is a normative habit, namely a habit that is in the form of rules of behavior applicable in a society.⁶ Otje Salman defines indigenous community as (*customrechtsgemeenschap*) namely a group of people who are regular, permanent, and have the power and authority to manage their own wealth in the form of objects both visible and invisible.⁷

Taking into account various formulations regarding customary law communities put forward by some of these scholars, it seems obvious that these customary law communities are bound by the same traditions passed down from generation to generation in an alliance that has autonomous self-government, has its own assets both worldly as well as religious magic. Regarding the tradition applicable from generation to generation in inheritance under Balinese customary law, the patrilineal kinship line or the line of inheritance to the *purusa* or based on male has been applied. However, this does not rule out the opportunity for daughters to receive an inheritance in the event that they choose "*sentana rajeg*" marriage system.⁸

In this inheritance relationship, as stated by Korn in the book of Gede Panetje writing about Various notes on Balinese Customary Law, it is stated that the Inheritance Law in Balinese Customary Law is the most difficult part. This is due to the existence of various differences in several areas within the area of Balinese Customary Law, both regarding

³ Pasek Diantha, I Made, 2016, *Normative Legal Research Methodology in Justification of Legal Theory*, Prenadamedia Group, Jakarta, p. 30.

⁴ R. Soepomo, 1979, *Chapters About Customary Law*, Third print, Pradnya Paramita, Jakarta, p.32

⁵ Soerojo Wignyodipuro, 1979, *Introduction and Principles of Customary Law*, Third edition, Alumni, Bandung, p.86.

⁶ Hilman Hadikusuma in Tolib Setiady, 2009, *Digest of Indonesian Customary Law*, Alfabeta, Bandung, p.23

⁷ Otje Salman Soemadiningrat, 2002, *Reconceptualization of Contemporary Customary Law*, third printing, Alumni, Bandung, p.114

⁸ Sentana Rajeg is a descendant, or female heir whose status is confirmed as a descendant or *purusa*; Look at: Sari Adnyani, Ni Ketut, 2017, "Nyentana Marriage System in the Study of Customary Law and Its Influence on Gender-Based Policy Accommodation", *Journal of Social Sciences and Humanities*, Vol.6 No.2, October 2017, p.171

the number of items to be inherited or regarding the number of shares for each heir, as well as regarding decisions of customary courts.⁹ Analyzing the inheritance rights of a child, Balinese Customary Law adheres to patrilineal kinship line. In daily practice, although Balinese Custom adheres to patrilineal kinship line, Balinese Customary Law. However, inheritance has applied the values of justice to every child, both male and female heirs. This is in line with the theory of justice put forward by John Rawls stating that *justice as fairness*¹⁰ marked by the principles of rationality, freedom, and equality. Referring to John Rawls's opinion, it can be seen that the position of a child in inheritance has actually been given equal rights universally in *fairness nature* without discriminating between boys and girls. Whoever carries out the obligation, then he or she will get the rights. The most important thing is that the marital status of parents will determine the position of children as heirs. In the case of choosing marriage out, it means that the child will lose his right to inherit from his parents, because the person concerned has the status of having left the place of residence (*kedaton*); and vice versa, when choosing a *sentana rajeg* marriage, even though biologically she is a daughter, but because in her marriage she is positioned as *senatana rajeg*, she will have the position of heir like a son.

Judging from the classification of inheritance, the first group of heirs is the descendant of the heir to the lower inheritance, namely biological children or *sentana* children. Daily practice within the Balinese customary law community shows that it is the biological sons and/or male/daughter *sentana* children who receive their father's inheritance. If a father leaves assets or debts, his children will accept them as the legal heirs. In the practice of daily social interaction in Bali, it is also found children born from unregistered marriages, in addition the children born from a mother whose biological father is unknown or what is often called an extramarital child.

Under the Law Number 1 of 1974 concerning marriage and its amendments, namely Law Number 16 of 2019, it is not clearly stated who is meant by an extramarital child, however, if it is seen from the provisions of Article 42, it only states that there is a limitation regarding the definition of an extramarital child, namely children born in or as a result of a legal marriage. Because there is no definition of child born out of wedlock or extramarital child, in this paper we use *logic of argumentum a contrario*. With regard to Article 42, what is meant by a child born out of wedlock or extramarital child is a child who is not born in or as a result of a legal marriage.¹¹ Based on the provisions of Article 42, it can be understood that a legal marriage will give birth to legitimate children, while

⁹ Korn in Gde Panetje, 1989, *Various Notes About Balinese Customary Law*, Gunung Agung, Denpasar, p.101

¹⁰ John Rawls, 2011, *A Theory of Justice, Theory of Justice, Basics of Political Philosophy to Realize Social Welfare in the Country*, Pustaka Pelajar, Yogyakarta, p.100.

¹¹ Sujana, I Nyoman, 2021, *The Legal Position of Children Out of Wedlock in the Perspective of the Constitutional Court Judgment Number 46/PUU-VIII/2010*, Revised Edition, Aswaja Pressindo, Yogyakarta, p.64

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an illegitimate marriage will give birth to illegitimate children, or extramarital children. The Balinese customary law community, having always been guided by the Marriage Law, has not completely regulated the position of children out of wedlock, because it only regulates civil relations with the mother and the mother's family, while the relationship with the biological father has not been completed even though a judgment from the constitutional court Number 46/PUU-VIII/2010 has been handed down which determined that "*A child born out of wedlock has a civil relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence according to law to have blood relations, including civil relations with his father's family*".

Hindu religious leaders in Bali who predominantly adhere to the teachings of Hinduism which animate Balinese customary law have never followed up on the Constitutional Court Judgment Number 46/PUU-VIII/2010, even though the Constitutional Court handed down this judgment almost 14 years ago, but the existence of the position of children out of wedlock in Bali only obtains the right to inherit from the mother. This is also supported by the results of research conducted by Susianingsih,¹² while his biological father seems to be free without any responsibilities. If it is compared with the Islamic religion, it turns out that Islamic religious leaders have responded to the issuance of the Constitutional Court's Judgment by giving punishment to their biological father to separate part of his wealth through a mandatory will for the child out of wedlock.¹³ Upon this judgment, if a man is proven through science and technology that he is the biological father of a child out of marriage, then the man shall be obliged to fulfill his child's rights, both for recognition by issuing a birth certificate, the right to a living as well as inheritance rights.¹⁴

In the Balinese customary law community, it is indeed very difficult to provide a place for extramarital children in inheritance, because the Balinese Hindu religion, which is the main spirit for the Balinese indigenous community views that religious marriage determines a child's lineage as an heir. Based on the results of interviews with several religious leaders in various villages in Bali, it can be found that the relationship between a man and a woman is considered valid as husband and wife or a legal marriage if the bride and groom have performed the ceremony of *mebyakawon (mebyakala)*, while other ceremonies are not absolute requirements. Thus, it is religious marriage determining the legal position of a child as an heir.

¹² Susianingsih at.al, 2007, "The Position of Children born out of marriage in Balinese Customary Law and its relation to Article 43 of Law Number 1 of 1974", *Thesis*, Master of Notarial Affairs, Faculty of Law, Gadjah Mada University, Yogyakarta; downloaded on 24 July 2023

¹³ Fatwa MUI Number 11 of 2012

¹⁴ Nurpancha, Hartian, 2017, "Legal Status of Children Out of Marriage Based on Islamic Law, and Their Proof Status Through Science and Technology", *dspace.uui.ac.id*; downloaded on 24 July 2023

This opinion is in line with the jurisprudence of the District Court of Singaraja in 1959 *No.Crimineel*; stating that the marriage of a woman to her cousin by eloping and then a *mebyakawon* ceremony was made where the woman participated in it is considered legal, even though according to the court the marriage could be called as a forced marriage, because from the examination before the court there was sufficient evidence that the woman actually did not love her cousin, but already had prior plans to marry another guy. ~~Because the woman finally married the young man after the marriage with her cousin was legalized, she was sentenced for violating Article 279 of the Criminal Code in accordance with customary violations of "Drati Krama".~~

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This jurisprudence has obtained support from Parisada Hindu Dharma with its advice to Balinese Hindus living outside Bali in order that their marriage with women from other tribes or religions is legalized, at least by performing a ceremony in the form of *mebyakawon*. *Mebyakawon ceremony* is an absolute requirement for legalization of marriage, while the other ceremonies, such as, delivering *pemelepan*, paying the buyer and "*meciri Kulkul*" (the sound of wooden bell)¹⁵ is merely a supplement which in practice is often not done, for example if the bride's parents do not agree with the marriage and therefore forbid her child (and her son-in-law) to return to their original home and do not like receiving the buyer's money. The money from the buyer is recently decreasing, one way or another because accepting *petukonwadu* is considered selling children in a commercial sense.

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4. The Position of Extramarital Child Under Balinese Customary Law After the Constitutional Court Judgment No. 46/PUU-VIII/2010

The law should be responsive, as well as in the enforcement of customary law in Balinese customary law community, especially in determining the position of extramarital children in inheritance right. Extramarital children, under Balinese customary law are often referred to as *bebinjat* children, namely children whose biological father is unknown.¹⁶ The current situation prevailing in Balinese customary law community always pays attention to justice for all levels of society, however regarding the position of extramarital children in inheritance is still marginalized, because the determination of a child's position as an heir is always determined through the marital status of his/her parents. If the

¹⁵ *Meciri Kulkul* means broadcasting every incident involving Banjar members, and/or village members as well as broadcasting the death of a banjar or village membrs, this is mostly done in South Bali area. This broadcasting process is carried out at the time of Paruman Agung Banjar (General Meeting of Banjar) held every six months before Galungan holiday. The results of the interview on 2 July 2023 took place in Sesetan Traditional Village with Anak Agung Ngurah Gede and I Nyoman Arsana as the former Kelihan Banjar Kaja Sesetan, South Denpasar

¹⁶ Murniti, Ni Wayan, "Inheritance Rights of Extramarital Children under Balinese Inheritance Customary Law (A Case Study in Dukuh Village, Sidemen Sub-District, Karangasem Regency)", <https://jurnal.stahnmkaturan.ac.id>,

marriage is valid, then the children born will be the legal heirs. The point is that Balinese Hindu religious leaders should prioritize the legitimacy of children from marriages solemnized according to religion.

With regard to Extramarital Children, Balinese customary law which is imbued with Hindu religious teachings has not yet responded to the issuance of a Constitutional Court Judgment providing an opportunity for children out of marriage to obtain their rights as children from their biological fathers, even though the Judgment of Constitutional Court has been handed down more than a decade. Civil rights for extramarital children have not been fully and completely regulated yet by religious leaders and traditional leaders in Bali, because they only give rights from one side only, namely from the mother's line. The legal position of extramarital children within Balinese customary law community has not yet been regulated under autonomous and repressive legal regulations governing them, thus, upon the handing down the Constitutional Court Judgment Number 46/PUU-VIII/2010 ruling that *"A child born out of marriage or extramarital child has a civil relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence which under the law has blood relationship, including civil relationship with his father's family"*.

The traditional leaders in Balinese customary law community handling or resolving legal issues regarding the position of extramarital children with their biological fathers should provide a just and fair customary decision or settlement by responding to the judgment of Constitutional Court. Therefore, extramarital children in obtaining their rights as the heirs of their biological father from the purusa line can be realized through responsive customary institutions. This is in line with the views of Responsive legal experts put forward by Philippe Nonet and Philip Selznick in their book entitled "Responsive Law" stating that responsive law is a higher evolutionary stage compared to autonomous law and repressive law.¹⁷ For this reason, it is obligatory for Hindu religious leaders in Bali and traditional leaders to immediately respond to the Judgment of Constitutional Court stating that the biological father should also be imposed with responsibility for raising extramarital children like children born out of legal marriages. Thus, the existence of extramarital children in Balinese customary law community really obtains fair legal protection.

Paying attention to the legal facts regarding the marginalization of the position of extramarital children in inheritance rights in Balinese customary law community, where it has been proven that until now the regulation regarding the position of extramarital children in customary laws and regulations such as *awig-awig Desa Adat* or *awig-awig Banjar adat* has not been completed, therefore the position of extramarital children in inheritance right in Balinese Customary Law community still experiences discrimination

¹⁷ Philippe Nonet and Philip Selznick, 2013, *Responsive Law*, Nusamedia, Bandung, p.128

viewed from human right. This can be clearly seen from the attitude of legislators to set down regulations governing children born out of religiously valid marriages, which is based on the results of interviews with several traditional and Hindu religious leaders in Bali¹⁸ shows that there is an *awig-awig* of customary village which only regulates half of the section, namely the section regulating the civil relationship of extramarital children with their mothers and their mothers' families, while regulations regarding civil relationship with their biological fathers have not existed yet.

The gray and indecisive attitude shown by the government was also shared by traditional Hindu religious leaders in Bali who seemed indifferent to the existence of extramarital children in obtaining their rights as heirs of their biological fathers. Thus, the regulation regarding the rights of extramarital children in inheritance in customary ~~village~~ *village* in Bali or in the understanding of Hindu-Balinese religious leaders regarding the civil relationship of extramarital children with their biological fathers is still incomplete, because it only provides legal certainty regarding civil relationship with their mothers and mother's family, thus the legal protection of inheritance rights for extramarital children within the Balinese Customary Law community until now has not been fully and unanimously implemented.

Incomplete and unanimously legal protection of the extramarital children's inheritance rights within the Balinese customary law community is actually due to the fact that religious leaders and traditional leaders in Bali still refer to the Marriage Law number 1 of 1974, where the marriage law only regulates regarding civil relations with the mother and the mother's family, while civil relationship with the biological father have not been regulated yet, and it turns out that the government itself seems very indecisive. It is very difficult to amend the Marriage Law or to issue government regulations regarding extramarital children in civil relationship with their biological fathers, therefore, the deficiencies in the Marriage Law should be sought in another way, namely to respond to social developments in the community. In practice, it is often experienced that in a case it is not clearly regulated by law, including the Marriage Law which does not clearly regulate civil relationship between extramarital children and their biological fathers, and even marriage laws do not govern them at all.

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5. Conclusion

The position of extramarital children of in inheritance within the Balinese Customary Law community has not fully obtained their rights, upon the Indonesian Constitutional Court judgment, ~~Number 46/PUU-VIII/2010~~ of which ruling obliges their biological father to bear the responsibility as a parent by granting the rights of a child through scientific and

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¹⁸ Interview with Dr. Anak Agung Sudiana, SH., M.Fil., MH. as Bendesa Madya Indigenous City of Denpasar on 30 June 2023

technological evidence, has never been followed up by Parisada Hindu Dharma as the highest religious institution overseeing Hindu religious institutions, therefore, extramarital children still do not obtain justice and legal certainty in fighting for their rights as the heirs of their biological father (*Purusa* side). For this reason, in order to provide complete and unanimous legal protection to extramarital children in their position as heirs, Parisada Hindu Dharma should respond by following up the existence of the Constitutional Court's judgment through *bisama* by obliging biological fathers who are proven based on science and technology to have a blood relationship, to give part of his wealth as a guarantee for the continuity and welfare of the extramarital child.

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Journal :

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Inheritance Rights of Children Out of Extramarital Under Balinese Customary Law Post Constitutional Court Judgment Number 46/PUU-VIII/2010

[Manuscript ID: 5170-RVD]

Abstract: This article analyzes the inheritance rights of children out of extramarital under Balinese Customary Law post Constitutional Court Judgment Number 46/PUU-VIII/2010. This study focuses on the position of extramarital in term of inheritance under Balinese Customary Law after the enactment of Constitutional Court Judgment Number 46/PUU-VIII/2010. The reasons why this legal issue is chosen as the main subject of the study is due to the legal circumstance in which Balinese community do not grant position to extramarital children under Balinese customary law in inheritance from the *purusa* line. Hindu-Balinese religious leaders such as Parisada, as well as traditional village leaders such as the Traditional Village Council (MDA) have never followed up on the Constitutional Court's ruling stating that children born out of wedlock have civil relations with their biological fathers, while Islamic religious leaders have followed up on the Constitutional Court's ruling by issuing a fatwa of MUI imposing an obligation on biological fathers to separate their wealth for guarantee of life to children born out of wedlock through a *wajibah* (mandatory) will. Applying the statutory approach, conceptual approach, sociological approach and case approach, it can be understood that children born out of wedlock (Balinese call it as *bebinjat* children) have no position as heirs in the *purusa* line, but only have an inheritance relationship with their mother and their mother's family.

Keywords: Inheritance Rights; Extramarital, Customary Law

1. Introduction

Seen from the life of nation and state, children are the next generation for the ideals of the nation, therefore every child reserves the right to survive, grow and develop and be free from discrimination and violence. It can be seen from the provisions of Article 3 Paragraph (3) of Law Number 39 of 1999 concerning Human Rights. In line with these provisions, the government's concern for the dignity of children has actually been observed since the promulgation of Law Number 4 of 1979 concerning Child Welfare, but until the issuance of Law Number 35 of 2014 concerning Child Protection, it turns out that child welfare is still far from being what it should be expected, where discrimination against children can be found as in the case of *stunting* in Indonesia, it is not only encountered by children born out of legal marriage (extramarital children), but also children born from legal marriages.

Along with the massive advances in information technology recently, where interaction amongst individuals is no longer limited to a certain area but has penetrated and even crossed the territorial boundaries of a country. This easy interaction relationship has

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brought about a change in the perception of the current generation, called Z generation, considering that sex out of legal marriage is not something taboo, but has become a culture "try first then buy". This has become one of the triggers for early marriages, an increase in abortion cases, and even an impact on the number of children born out of legal marriages.

In the Balinese Customary Law community, in daily interactions, however, it turns out that extramarital children are often bullied, insulted and ridiculed by calling them illegitimate children, children of adultery (*bebinjat* children). It means that the child born only has status and biological and juridical relationship with his biological mother, due to the man who caused the birth of the child has disappeared and does not want to be responsible, in addition to, it can also be that the mother is unable to show who is actually the biological father of the extramarital child.

Considering the existence of this legal fact, it is evident that it will significantly impact the status of these extramarital children, as they will not fully obtain their rights as future generations and heirs of the nation. It is explicitly stated in the state constitution, where in Article 28B paragraph (2) it is stated that: *"Every child reserves the right to survival, growth and development and is entitled to protection from violence and discrimination"*.

With regard to the existence of extramarital children in everyday life, they do not get their rights in accordance with the constitution, both the right to live, to grow and develop, as well as the right to inherit finally due to a lawsuit from a mother who gave birth to a child born out of legal marriage, has filed a lawsuit to the Constitutional Court. This lawsuit was granted by the Constitutional Court through its judgment as outlined in the Constitutional Court Judgment Number 46/PUU-VIII/2010, dated 17 February 2012. The rulings of this judgment stated that *"A child born out of wedlock has a civil relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence according to law to have blood relationship, including civil relationship with his father's family."*

The existence of the Constitutional Court Judgment Number 46/PUU-VIII/2010, dated 17 February 2012 in its development which has exceeded a period of decade, it turns out that Hindu religious leaders in Bali have never followed up the judgment by paying special attention to the existence of extramarital children. Balinese customary law which is imbued with Hindu religious teachings adhering patrilineal kinship does not pay attention to extramarital children. Extramarital children under Balinese customary law do not obtain complete protection under Balinese customary law, as they only get rights from the mother who give birth to them, while the biological fathers seem free and no responsibilities. In contrast to what has been done by Islamic religious leaders through the MUI having issued Fatwa Number 11 of 2012 of which contents include: *the government is obliged to protect children resulting from adultery and prevent neglect,*

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- Commented [A8]:** What is MUI? Should be clear their authority, hence, non-Indonesian readers can immediately understand the context of the discussion in this article.
- Commented [A9R8]:** MUI stands for Majelis Ulama Indonesia, which translates to the Indonesian Council of Ulama. It is the highest clerical authority in Indonesia, responsible for issuing religious opinions and guidance on matters relating to Islamic law and ethics. This clarification helps non-Indonesian readers grasp the context of the discussion in the article, understanding the religious and cultural dynamics at play in the legal framework being discussed.

especially by giving punishment to men causing their birth to fulfill their needs." In addition, the government also has the authority to impose *takzir* punishment on adulterers resulting in the birth of children by requiring them to: a) suffice the children's needs; b) provide assets after they die through a *wajibah* (mandatory) will.

With regard to the existence of extramarital children within the Balinese customary law community, they have not yet obtain justice and legal certainty up to the present regarding their rights as children of the nation's next generation, therefore, it will be discussed and studied in depth in this article: "What is the right of inheritance an extramarital child under Hindu religious law after the enactment of the Constitutional Court Judgment Number 46/PUU-VIII/2010 concerning the patrilineal line of kinship or *Purusa* line adhered to by Balinese customary law?"

2. Method

This empirical legal study focuses on analyzing "The Inheritance Rights of Children Born Out of Wedlock under Balinese Customary Law After the Enactment of Constitutional Court Number 46/PUU-VIII/2010." The research methodology employed aligns with Irwansyah's characterization of empirical legal research, which emphasizes investigating social facts, phenomena, or symptoms in relation to the law. The study utilizes a theoretical framework encompassing Justice, Legal Certainty, Responsive Law, and Human Rights to analyze the legal issues at hand. Methodologically, it adopts a statutory approach, concept approach, analytical approach, and sociological approach.

Primary data for this study are collected through direct interviews with purposively sampled informants, specifically widows and/or women who have given birth to extramarital children, within the Balinese customary law community in both East Bali and West Bali. Secondary data sources include primary legal materials such as the Marriage Law, Human Rights Law, Child Protection Law, and Women Protection Law. Additionally, secondary legal materials such as scientific articles, journals, and books related to marriage are utilized, along with tertiary legal materials like legal dictionaries and encyclopedias. The study employs library study techniques to collect legal materials.

3. Data collection methods involve direct interviews with informants and literature searches to deepen understanding and study the literature and laws correlated with discussions regarding extramarital children within the Balinese customary law community, influenced by Hinduism teachings. Through analysis, the study seeks to provide answers to the research problems posed, particularly concerning the inheritance rights of extramarital children within this legal framework. This article is an empirical legal study analyzing "The Inheritance Rights of Children Born Out of Wedlock under Balinese Customary Law After the Enactment of Constitutional Court Number 46/PUU-VIII/2010." The empirical characteristics of this paper are in line with

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what was stated by Irwansyah that empirical legal research makes social facts, social phenomena, or social symptoms in a reciprocal relationship with law as research objects or their starting point with a focus on studies on attitudes and behavior of individuals, groups, communities, institutions, and countries¹. The theory of Justice, Legal Certainty, Responsive Law and Human Rights as an analytical knife are applied to analyze legal issues being studied, with a statutory approach, concept approach and analytical approach, and a sociological approach. The data source used in this paper are primary data using direct interview techniques with selected informants *purposive sampling* carried out in the area of the Balinese customary law community divided into East Bali and West Bali. Meanwhile, the informants were selected based on their position as widows and/or women who gave birth to extramarital. The secondary data are taken from primary legal materials in the form of the Marriage Law, the Human Rights Law and other laws related to marriage, Child Protection and Women Protection Laws; the secondary law materials are in the form of scientific articles, journals, books on marriage, tertiary law materials are legal dictionaries, encyclopedias.²The legal material collection technique used is the library study technique. The data were obtained through direct interviews with informants and through literature searches, for example understanding and studying in more depth the literature and laws and regulations correlated with the discussions, both directly and indirectly concerning the existence of extramarital children within Balinese customary law community which are imbued with Hinduism teachings, further analysis is carried out to get the final argument in the form of answers to the research problems.³

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4.3. Inheritance Rights under Balinese Customary Law

Customary law is the law of indigenous community. The term indigenous community is known in various terms. Soepomo calls as the term of "legal alliance".⁴ Similarly, Surojo Wignyodipuro in his book entitled Introduction and Principles of Customary Law mentions the term as customary law community with the same term as Soepomo.⁵ Hilman Hadikusuma refers to customary law as a custom that has sanctions, while the term *adat* (custom) containing no sanctions is a normative habit, namely a habit that is in the form of rules of behavior applicable in a society.⁶ Otje Salman defines indigenous

¹ Irwansyah, 2021, *Legal Research, Choice of Methods & Article Writing Practices, Revised Edition, 4th Print*, Mirra Buana Media, Yogyakarta, p.185.

² *Ibid*, p.3

³ Pasek Diantha, I Made, 2016, *Normative Legal Research Methodology in Justification of Legal Theory*, Prenadamedia Group, Jakarta, p. 30.

⁴ R. Soepomo, 1979, *Chapters About Customary Law*, Third print, Pradnya Paramita, Jakarta, p.32

⁵ Soerojo Wignyodipuro, 1979, *Introduction and Principles of Customary Law*, Third edition, Alumni, Bandung, p.86.

⁶ Hilman Hadikusuma in Tolib Setiady, 2009, *Digest of Indonesian Customary Law*, Alfabeta, Bandung, p.23

community as (*customrechtsgemeenschap*) namely a group of people who are regular, permanent, and have the power and authority to manage their own wealth in the form of objects both visible and invisible.⁷

Taking into account various formulations regarding customary law communities put forward by some of these scholars, it seems obvious that these customary law communities are bound by the same traditions passed down from generation to generation in an alliance that has autonomous self-government, has its own assets both worldly as well as religious magic. Regarding the tradition applicable from generation to generation in inheritance under Balinese customary law, the patrilineal kinship line or the line of inheritance to the *purusa* or based on male has been applied. However, this does not rule out the opportunity for daughters to receive an inheritance in the event that they choose "*sentana rajeg*" marriage system.⁸

In this inheritance relationship, as stated by Korn in the book of Gede Panetje writing about Various notes on Balinese Customary Law, it is stated that the Inheritance Law in Balinese Customary Law is the most difficult part. This is due to the existence of various differences in several areas within the area of Balinese Customary Law, both regarding the number of items to be inherited or regarding the number of shares for each heir, as well as regarding decisions of customary courts.⁹ Analyzing the inheritance rights of a child, Balinese Customary Law adheres to patrilineal kinship line. In daily practice, although Balinese Custom adheres to patrilineal kinship line, Balinese Customary Law. However, in inheritance has applied the values of justice to every child, both male and female heirs. This is in line with the theory of justice put forward by John Rawls stating that *justice as fairness*¹⁰ marked by the principles of rationality, freedom, and equality. Referring to John Rawls's opinion, it can be seen that the position of a child in inheritance has actually been given equal rights universally in *fairness nature* without discriminating between boys and girls. Whoever carries out the obligation, then he or she will get the rights. The most important thing is that the marital status of parents will determine the position of children as heirs. In the case of choosing marriage out, it means that the child will lose his right to inherit from his parents, because the person concerned has the status of having left the place of residence (*kedaton*); and vice versa, when choosing a *sentana*

⁷ Otje Salman Soemadiningrat, 2002, *Reconceptualization of Contemporary Customary Law*, third printing, Alumni, Bandung, p.114

⁸ Sentana Rajeg is a descendant, or female heir whose status is confirmed as a descendant or *purusa*; Look at: Sari Adnyani, Ni Ketut, 2017, "Nyentana Marriage System in the Study of Customary Law and Its Influence on Gender-Based Policy Accommodation", *Journal of Social Sciences and Humanities*, Vol.6 No.2, October 2017, p.171

⁹ Korn in Gde Panetje, 1989, *Various Notes About Balinese Customary Law*, Gunung Agung, Denpasar, p.101

¹⁰ John Rawls, 2011, *A Theory of Justice, Theory of Justice, Basics of Political Philosophy to Realize Social Welfare in the Country*, Pustaka Pelajar, Yogyakarta, p.100.

rajeg marriage, even though biologically she is a daughter, but because in her marriage she is positioned as *senatana rajeg*, she will have the position of heir like a son.

Judging from the classification of inheritance, the first group of heirs is the descendant of the heir to the lower inheritance, namely biological children or *sentana* children. Daily practice within the Balinese customary law community shows that it is the biological sons and/or male/daughter *sentana* children who receive their father's inheritance. If a father leaves assets or debts, his children will accept them as the legal heirs. In the practice of daily social interaction in Bali, it is also found children born from unregistered marriages, in addition the children born from a mother whose biological father is unknown or what is often called an extramarital child.

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Under the Law Number 1 of 1974 concerning marriage and its amendments, namely Law Number 16 of 2019, it is not clearly stated who is meant by an extramarital child, however, if it is seen from the provisions of Article 42, it only states that there is a limitation regarding the definition of an extramarital child, namely children born in or as a result of a legal marriage. Because there is no definition of child born out of wedlock or extramarital child, in this paper we use *logic of argumentum a contrario*. With regard to Article 42, what is meant by a child born out of wedlock or extramarital child is a child who is not born in or as a result of a legal marriage.¹¹ Based on the provisions of Article 42, it can be understood that a legal marriage will give birth to legitimate children, while an illegitimate marriage will give birth to illegitimate children, or extramarital children. The Balinese customary law community, having always been guided by the Marriage Law, has not completely regulated the position of children out of wedlock, because it only regulates civil relations with the mother and the mother's family, while the relationship with the biological father has not been completed even though a judgment from the constitutional court Number 46/PUU-VIII/2010 has been handed down which determined that "*A child born out of wedlock has a civil relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence according to law to have blood relations, including civil relations with his father's family*".

Hindu religious leaders in Bali who predominantly adhere to the teachings of Hinduism which animate Balinese customary law have never followed up on the Constitutional Court Judgment Number 46/PUU-VIII/2010, even though the Constitutional Court handed down this judgment almost 14 years ago, but the existence of the position of children out of wedlock in Bali only obtains the right to inherit from the mother. This is

¹¹ Sujana, I Nyoman, 2021, *The Legal Position of Children Out of Wedlock in the Perspective of the Constitutional Court Judgment Number 46/PUU-VIII/2010*, Revised Edition, Aswaja Pressindo, Yogyakarta, p.64

also supported by the results of research conducted by Susianingsih,¹² while his biological father seems to be free without any responsibilities. If it is compared with the Islamic religion, it turns out that Islamic religious leaders have responded to the issuance of the Constitutional Court's Judgment by giving punishment to their biological father to separate part of his wealth through a mandatory will for the child out of wedlock.¹³ Upon this judgment, if a man is proven through science and technology that he is the biological father of a child out of marriage, then the man shall be obliged to fulfill his child's rights, both for recognition by issuing a birth certificate, the right to a living as well as inheritance rights.¹⁴

In the Balinese customary law community, it is indeed very difficult to provide a place for extramarital children in inheritance, because the Balinese Hindu religion, which is the main spirit for the Balinese indigenous community views that religious marriage determines a child's lineage as an heir. Based on the results of interviews with several religious leaders in various villages in Bali, it can be found that the relationship between a man and a woman is considered valid as husband and wife or a legal marriage if the bride and groom have performed the ceremony of *mebyakawon* (*mebyakala*), while other ceremonies are not absolute requirements. Thus, it is religious marriage determining the legal position of a child as an heir.

This opinion is in line with the jurisprudence of the District Court of Singaraja in 1959 *No.Crimineel*; stating that the marriage of a woman to her cousin by eloping and then a *mebyakawon* ceremony was made where the woman participated in it is considered legal, even though according to the court the marriage could be called as a forced marriage, because from the examination before the court there was sufficient evidence that the woman actually did not love her cousin, but already had prior plans to marry another guy. ~~Because the woman finally married the young man after the marriage with her cousin was legalized, she was sentenced for violating Article 279 of the Criminal Code in accordance with customary violations of "Drati Krama".~~

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This jurisprudence has obtained support from Parisada Hindu Dharma with its advice to Balinese Hindus living outside Bali in order that their marriage with women from other tribes or religions is legalized, at least by performing a ceremony in the form of *mebyakawon*. *Mebyakawon ceremony* is an absolute requirement for legalization of marriage, while the other ceremonies, such as, delivering *pemelepahan*, paying the buyer

¹² Susianingsih at.al, 2007, "The Position of Children born out of marriage in Balinese Customary Law and its relation to Article 43 of Law Number 1 of 1974", *Thesis*, Master of Notarial Affairs, Faculty of Law, Gadjah Mada University, Yogyakarta; downloaded on 24 July 2023

¹³ Fatwa MUI Number 11 of 2012

¹⁴ Nurpancha, Hartian, 2017, "Legal Status of Children Out of Marriage Based on Islamic Law, and Their Proof Status Through Science and Technology", *dspace.uui.ac.id*; downloaded on 24 July 2023

and “*meciri Kulkul*” (the sound of wooden bell)¹⁵ is merely a supplement which in practice is often not done, for example if the bride's parents do not agree with the marriage and therefore forbid her child (and her son-in-law) to return to their original home and do not like receiving the buyer's money. The money from the buyer is recently decreasing, one way or another because accepting *petukonwadu* is considered selling children in a commercial sense.

5.4. The Position of Extramarital Child Under Balinese Customary Law After the Constitutional Court Judgment No. 46/PUU-VIII/2010

The law should be responsive, as well as in the enforcement of customary law in Balinese customary law community, especially in determining the position of extramarital children in inheritance right. Extramarital children, under Balinese customary law are often referred to as *bebinjat* children, namely children whose biological father is unknown.¹⁶ The current situation prevailing in Balinese customary law community always pays attention to justice for all levels of society, however regarding the position of extramarital children in inheritance is still marginalized, because the determination of a child's position as an heir is always determined through the marital status of his/her parents. If the marriage is valid, then the children born will be the legal heirs. The point is that Balinese Hindu religious leaders should prioritize the legitimacy of children from marriages solemnized according to religion.

With regard to Extramarital Children, Balinese customary law which is imbued with Hindu religious teachings has not yet responded to the issuance of a Constitutional Court Judgment providing an opportunity for children out of marriage to obtain their rights as children from their biological fathers, even though the Judgment of Constitutional Court has been handed down more than a decade. Civil rights for extramarital children have not been fully and completely regulated yet by religious leaders and traditional leaders in Bali, because they only give rights from one side only, namely from the mother's line. The legal position of extramarital children within Balinese customary law community has not yet been regulated under autonomous and repressive legal regulations governing them, thus, upon the handing down the Constitutional Court Judgment Number 46/PUU-VIII/2010 ruling that “*A child born out of marriage or extramarital child has a civil*

¹⁵ *Meciri Kulkul* means broadcasting every incident involving Banjar members, and/or village members as well as broadcasting the death of a banjar or village members, this is mostly done in South Bali area. This broadcasting process is carried out at the time of Paruman Agung Banjar (General Meeting of Banjar) held every six months before Galungan holiday. The results of the interview on 2 July 2023 took place in Sesetan Traditional Village with Anak Agung Ngurah Gede and I Nyoman Arsana as the former Kelihan Banjar Kaja Sesetan, South Denpasar

¹⁶ Murniti, Ni Wayan, "Inheritance Rights of Extramarital Children under Balinese Inheritance Customary Law (A Case Study in Dukuh Village, Sidemen Sub-District, Karangasem Regency)", <https://jurnal.stahnmkuturan.ac.id>,

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relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence which under the law has blood relationship, including civil relationship with his father's family".

The traditional leaders in Balinese customary law community handling or resolving legal issues regarding the position of extramarital children with their biological fathers should provide a just and fair customary decision or settlement by responding to the judgment of Constitutional Court. Therefore, extramarital children in obtaining their rights as the heirs of their biological father from the purusa line can be realized through responsive customary institutions. This is in line with the views of Responsive legal experts put forward by Philippe Nonet and Philip Selznick in their book entitled "Responsive Law" stating that responsive law is a higher evolutionary stage compared to autonomous law and repressive law.¹⁷ For this reason, it is obligatory for Hindu religious leaders in Bali and traditional leaders to immediately respond to the Judgment of Constitutional Court stating that the biological father should also be imposed with responsibility for raising extramarital children like children born out of legal marriages. Thus, the existence of extramarital children in Balinese customary law community really obtains fair legal protection.

Paying attention to the legal facts regarding the marginalization of the position of extramarital children in inheritance rights in Balinese customary law community, where it has been proven that until now the regulation regarding the position of extramarital children in customary laws and regulations such as *awig-awig Desa Adat* or *awig-awig Banjar adat* has not been completed, therefore the position of extramarital children in inheritance right in Balinese Customary Law community still experiences discrimination viewed from human right. This can be clearly seen from the attitude of legislators to set down regulations governing children born out of religiously valid marriages, which is based on the results of interviews with several traditional and Hindu religious leaders in Bali¹⁸ shows that there is an *awig-awig* of customary village which only regulates half of the section, namely the section regulating the civil relationship of extramarital children with their mothers and their mothers' families, while regulations regarding civil relationship with their biological fathers have not existed yet.

The gray and indecisive attitude shown by the government was also shared by traditional Hindu religious leaders in Bali who seemed indifferent to the existence of extramarital children in obtaining their rights as heirs of their biological fathers. Thus, the regulation regarding the rights of extramarital children in inheritance in customary [village](#) in Bali or in the understanding of Hindu-Balinese religious leaders regarding the civil

¹⁷ Philippe Nonet and Philip Selznick, 2013, *Responsive Law*, Nusamedia, Bandung, p.128

¹⁸ Interview with Dr. Anak Agung Sudiana, SH., M.Fil., MH. as Bendesa Madya Indigenous City of Denpasar on 30 June 2023

relationship of extramarital children with their biological fathers is still incomplete, because it only provides legal certainty regarding civil relationship with their mothers and mother's family, thus the legal protection of inheritance rights for extramarital children within the Balinese Customary Law community until now has not been fully and unanimously implemented.

Incomplete and unanimously legal protection of the extramarital children's inheritance rights within the Balinese customary law community is actually due to the fact that religious leaders and traditional leaders in Bali still refer to the Marriage Law number 1 of 1974, where the marriage law only regulates regarding civil relations with the mother and the mother's family, while civil relationship with the biological father have not been regulated yet, and it turns out that the government itself seems very indecisive. It is very difficult to amend the Marriage Law or to issue government regulations regarding extramarital children in civil relationship with their biological fathers, therefore, the deficiencies in the Marriage Law should be sought in another way, namely to respond to social developments in the community. In practice, it is often experienced that in a case it is not clearly regulated by law, including the Marriage Law which does not clearly regulate civil relationship between extramarital children and their biological fathers, and even marriage laws do not govern them at all.

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6.5. Conclusion

The position of extramarital children of in inheritance within the Balinese Customary Law community has not fully obtained their rights, upon the Indonesian Constitutional Court judgment, Number 46/PUU-VIII/2010 of which ruling obliges their biological father to bear the responsibility as a parent by granting the rights of a child through scientific and technological evidence, has never been followed up by Parisada Hindu Dharma as the highest religious institution overseeing Hindu religious institutions, therefore, extramarital children still do not obtain justice and legal certainty in fighting for their rights as the heirs of their biological father (*Purusa* side). For this reason, in order to provide complete and unanimous legal protection to extramarital children in their position as heirs, Parisada Hindu Dharma should respond by following up the existence of the Constitutional Court's judgment through *bisama* by obliging biological fathers who are proven based on science and technology to have a blood relationship, to give part of his wealth as a guarantee for the continuity and welfare of the extramarital child.

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#5170 Review

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Authors: I Nyoman Sujana

Title: INHERITANCE RIGHTS OF CHILDREN OUT OF EXTRAMARITAL UNDER BALINESE CUSTOMARY LAW POST CONSTITUTIONAL COURT JUDGMENT NUMBER 46/PUU-VIII/2010

Section: Articles

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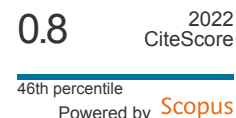
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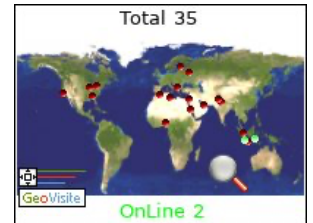
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Inheritance Rights of Children Out of Extramarital Under Balinese Customary Law Post Constitutional Court Judgment Number 46/PUU-VIII/2010

[Manuscript ID: 5170-RVD]

Abstract: This article analyzes the inheritance rights of children out of extramarital under Balinese Customary Law post Constitutional Court Judgment Number 46/PUU-VIII/2010. This study focuses on the position of extramarital in term of inheritance under Balinese Customary Law after the enactment of Constitutional Court Judgment Number 46/PUU-VIII/2010. The reasons why this legal issue is chosen as the main subject of the study is due to the legal circumstance in which Balinese community do not grant position to extramarital children under Balinese customary law in inheritance from the *purusa* line. Hindu-Balinese religious leaders such as Parisada, as well as traditional village leaders such as the Traditional Village Council (MDA) have never followed up on the Constitutional Court's ruling stating that children born out of wedlock have civil relations with their biological fathers, while Islamic religious leaders have followed up on the Constitutional Court's ruling by issuing a fatwa of MUI imposing an obligation on biological fathers to separate their wealth for guarantee of life to children born out of wedlock through a *wajibah* (mandatory) will. Applying the statutory approach, conceptual approach, sociological approach and case approach, it can be understood that children born out of wedlock (Balinese call it as *bebinjat* children) have no position as heirs in the *purusa* line, but only have an inheritance relationship with their mother and their mother's family.

Keywords: Inheritance Rights; Extramarital, Customary Law

1. Introduction

Seen from the life of nation and state, children are the next generation for the ideals of the nation, therefore every child reserves the right to survive, grow and develop and be free from discrimination and violence. It can be seen from the provisions of Article 3 Paragraph (3) of Law Number 39 of 1999 concerning Human Rights. In line with these provisions, the government's concern for the dignity of children has actually been observed since the promulgation of Law Number 4 of 1979 concerning Child Welfare, but until the issuance of Law Number 35 of 2014 concerning Child Protection, it turns out that child welfare is still far from being what it should be expected, where discrimination against children can be found as in the case of *stunting* in Indonesia, it is not only encountered by children born out of legal marriage (extramarital children), but also children born from legal marriages.

Along with the massive advances in information technology recently, where interaction amongst individuals is no longer limited to a certain area but has penetrated and even crossed the territorial boundaries of a country. This easy interaction relationship has

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brought about a change in the perception of the current generation, called Z generation, considering that sex out of legal marriage is not something taboo, but has become a culture "try first then buy". This has become one of the triggers for early marriages, an increase in abortion cases, and even an impact on the number of children born out of legal marriages.

In the Balinese Customary Law community, in daily interactions, however, it turns out that extramarital children are often bullied, insulted and ridiculed by calling them illegitimate children, children of adultery (*bebinjat* children). It means that the child born only has status and biological and juridical relationship with his biological mother, due to the man who caused the birth of the child has disappeared and does not want to be responsible, in addition to, it can also be that the mother is unable to show who is actually the biological father of the extramarital child.

Considering the existence of this legal fact, it is evident that it will significantly impact the status of these extramarital children, as they will not fully obtain their rights as future generations and heirs of the nation. It is explicitly stated in the state constitution, where in Article 28B paragraph (2) it is stated that: *"Every child reserves the right to survival, growth and development and is entitled to protection from violence and discrimination"*.

With regard to the existence of extramarital children in everyday life, they do not get their rights in accordance with the constitution, both the right to live, to grow and develop, as well as the right to inherit finally due to a lawsuit from a mother who gave birth to a child born out of legal marriage, has filed a lawsuit to the Constitutional Court. This lawsuit was granted by the Constitutional Court through its judgment as outlined in the Constitutional Court Judgment Number 46/PUU-VIII/2010, dated 17 February 2012. The rulings of this judgment stated that *"A child born out of wedlock has a civil relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence according to law to have blood relationship, including civil relationship with his father's family."*

The existence of the Constitutional Court Judgment Number 46/PUU-VIII/2010, dated 17 February 2012 in its development which has exceeded a period of decade, it turns out that Hindu religious leaders in Bali have never followed up the judgment by paying special attention to the existence of extramarital children. Balinese customary law which is imbued with Hindu religious teachings adhering patrilineal kinship does not pay attention to extramarital children. Extramarital children under Balinese customary law do not obtain complete protection under Balinese customary law, as they only get rights from the mother who give birth to them, while the biological fathers seem free and no responsibilities. In contrast to what has been done by Islamic religious leaders through the MUI having issued Fatwa Number 11 of 2012 of which contents include: *the government is obliged to protect children resulting from adultery and prevent neglect,*

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- Commented [A4R3]:** It is necessary to start by affirming the protection of children's rights as a constitutional right
- Commented [A5R3]:** Affirming children right as a constitutional imperative is crucial

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- Commented [A8]:** What is MUI? Should be clear their authority, hence, non-Indonesian readers can immediately understand the context of the discussion in this article.
- Commented [A9R8]:** MUI stands for Majelis Ulama Indonesia, which translates to the Indonesian Council of Ulama. It is the highest clerical authority in Indonesia, responsible for issuing religious opinions and guidance on matters relating to Islamic law and ethics. This clarification helps non-Indonesian readers grasp the context of the discussion in the article, understanding the religious and cultural dynamics at play in the legal framework being discussed.

especially by giving punishment to men causing their birth to fulfill their needs." In addition, the government also has the authority to impose *takzir* punishment on adulterers resulting in the birth of children by requiring them to: a) suffice the children's needs; b) provide assets after they die through a *wajibah* (mandatory) will.

With regard to the existence of extramarital children within the Balinese customary law community, they have not yet obtain justice and legal certainty up to the present regarding their rights as children of the nation's next generation, therefore, it will be discussed and studied in depth in this article: "What is the right of inheritance an extramarital child under Hindu religious law after the enactment of the Constitutional Court Judgment Number 46/PUU-VIII/2010 concerning the patrilineal line of kinship or *Purusa* line adhered to by Balinese customary law?"

2. Method

This empirical legal study focuses on analyzing "The Inheritance Rights of Children Born Out of Wedlock under Balinese Customary Law After the Enactment of Constitutional Court Number 46/PUU-VIII/2010." The research methodology employed aligns with Irwansyah's characterization of empirical legal research, which emphasizes investigating social facts, phenomena, or symptoms in relation to the law. The study utilizes a theoretical framework encompassing Justice, Legal Certainty, Responsive Law, and Human Rights to analyze the legal issues at hand. Methodologically, it adopts a statutory approach, concept approach, analytical approach, and sociological approach.

Primary data for this study are collected through direct interviews with purposively sampled informants, specifically widows and/or women who have given birth to extramarital children, within the Balinese customary law community in both East Bali and West Bali. Secondary data sources include primary legal materials such as the Marriage Law, Human Rights Law, Child Protection Law, and Women Protection Law. Additionally, secondary legal materials such as scientific articles, journals, and books related to marriage are utilized, along with tertiary legal materials like legal dictionaries and encyclopedias. The study employs library study techniques to collect legal materials.

3. Data collection methods involve direct interviews with informants and literature searches to deepen understanding and study the literature and laws correlated with discussions regarding extramarital children within the Balinese customary law community, influenced by Hinduism teachings. Through analysis, the study seeks to provide answers to the research problems posed, particularly concerning the inheritance rights of extramarital children within this legal framework. This article is an empirical legal study analyzing "The Inheritance Rights of Children Born Out of Wedlock under Balinese Customary Law After the Enactment of Constitutional Court Number 46/PUU-VIII/2010." The empirical characteristics of this paper are in line with

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what was stated by Irwansyah that empirical legal research makes social facts, social phenomena, or social symptoms in a reciprocal relationship with law as research objects or their starting point with a focus on studies on attitudes and behavior of individuals, groups, communities, institutions, and countries¹. The theory of Justice, Legal Certainty, Responsive Law and Human Rights as an analytical knife are applied to analyze legal issues being studied, with a statutory approach, concept approach and analytical approach, and a sociological approach. The data source used in this paper are primary data using direct interview techniques with selected informants *purposive sampling* carried out in the area of the Balinese customary law community divided into East Bali and West Bali. Meanwhile, the informants were selected based on their position as widows and/or women who gave birth to extramarital. The secondary data are taken from primary legal materials in the form of the Marriage Law, the Human Rights Law and other laws related to marriage, Child Protection and Women Protection Laws; the secondary law materials are in the form of scientific articles, journals, books on marriage, tertiary law materials are legal dictionaries, encyclopedias.²The legal material collection technique used is the library study technique. The data were obtained through direct interviews with informants and through literature searches, for example understanding and studying in more depth the literature and laws and regulations correlated with the discussions, both directly and indirectly concerning the existence of extramarital children within Balinese customary law community which are imbued with Hinduism teachings, further analysis is carried out to get the final argument in the form of answers to the research problems.³

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4.3. Inheritance Rights under Balinese Customary Law

Customary law is the law of indigenous community. The term indigenous community is known in various terms. Soepomo calls as the term of "legal alliance".⁴ Similarly, Surojo Wignyodipuro in his book entitled Introduction and Principles of Customary Law mentions the term as customary law community with the same term as Soepomo.⁵ Hilman Hadikusuma refers to customary law as a custom that has sanctions, while the term *adat* (custom) containing no sanctions is a normative habit, namely a habit that is in the form of rules of behavior applicable in a society.⁶ Otje Salman defines indigenous

¹ Irwansyah, 2021, *Legal Research, Choice of Methods & Article Writing Practices, Revised Edition, 4th Print*, Mirra Buana Media, Yogyakarta, p.185.

² *Ibid*, p.3

³ Pasek Diantha, I Made, 2016, *Normative Legal Research Methodology in Justification of Legal Theory*, Prenadamedia Group, Jakarta, p. 30.

⁴ R. Soepomo, 1979, *Chapters About Customary Law*, Third print, Pradnya Paramita, Jakarta, p.32

⁵ Soerojo Wignyodipuro, 1979, *Introduction and Principles of Customary Law*, Third edition, Alumni, Bandung, p.86.

⁶ Hilman Hadikusuma in Tolib Setiady, 2009, *Digest of Indonesian Customary Law*, Alfabeta, Bandung, p.23

community as (*customrechtsgemeenschap*) namely a group of people who are regular, permanent, and have the power and authority to manage their own wealth in the form of objects both visible and invisible.⁷

Taking into account various formulations regarding customary law communities put forward by some of these scholars, it seems obvious that these customary law communities are bound by the same traditions passed down from generation to generation in an alliance that has autonomous self-government, has its own assets both worldly as well as religious magic. Regarding the tradition applicable from generation to generation in inheritance under Balinese customary law, the patrilineal kinship line or the line of inheritance to the *purusa* or based on male has been applied. However, this does not rule out the opportunity for daughters to receive an inheritance in the event that they choose "*sentana rajeg*" marriage system.⁸

In this inheritance relationship, as stated by Korn in the book of Gede Panetje writing about Various notes on Balinese Customary Law, it is stated that the Inheritance Law in Balinese Customary Law is the most difficult part. This is due to the existence of various differences in several areas within the area of Balinese Customary Law, both regarding the number of items to be inherited or regarding the number of shares for each heir, as well as regarding decisions of customary courts.⁹ Analyzing the inheritance rights of a child, Balinese Customary Law adheres to patrilineal kinship line. In daily practice, although Balinese Custom adheres to patrilineal kinship line, Balinese Customary Law. However, in inheritance has applied the values of justice to every child, both male and female heirs. This is in line with the theory of justice put forward by John Rawls stating that *justice as fairness*¹⁰ marked by the principles of rationality, freedom, and equality. Referring to John Rawls's opinion, it can be seen that the position of a child in inheritance has actually been given equal rights universally in *fairness nature* without discriminating between boys and girls. Whoever carries out the obligation, then he or she will get the rights. The most important thing is that the marital status of parents will determine the position of children as heirs. In the case of choosing marriage out, it means that the child will lose his right to inherit from his parents, because the person concerned has the status of having left the place of residence (*kedaton*); and vice versa, when choosing a *sentana*

⁷ Otje Salman Soemadiningrat, 2002, *Reconceptualization of Contemporary Customary Law*, third printing, Alumni, Bandung, p.114

⁸ Sentana Rajeg is a descendant, or female heir whose status is confirmed as a descendant or *purusa*; Look at: Sari Adnyani, Ni Ketut, 2017, "Nyentana Marriage System in the Study of Customary Law and Its Influence on Gender-Based Policy Accommodation", *Journal of Social Sciences and Humanities*, Vol.6 No.2, October 2017, p.171

⁹ Korn in Gde Panetje, 1989, *Various Notes About Balinese Customary Law*, Gunung Agung, Denpasar, p.101

¹⁰ John Rawls, 2011, *A Theory of Justice, Theory of Justice, Basics of Political Philosophy to Realize Social Welfare in the Country*, Pustaka Pelajar, Yogyakarta, p.100.

rajeg marriage, even though biologically she is a daughter, but because in her marriage she is positioned as *senatana rajeg*, she will have the position of heir like a son.

Judging from the classification of inheritance, the first group of heirs is the descendant of the heir to the lower inheritance, namely biological children or *sentana* children. Daily practice within the Balinese customary law community shows that it is the biological sons and/or male/daughter *sentana* children who receive their father's inheritance. If a father leaves assets or debts, his children will accept them as the legal heirs. In the practice of daily social interaction in Bali, it is also found children born from unregistered marriages, in addition the children born from a mother whose biological father is unknown or what is often called an extramarital child.

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Under the Law Number 1 of 1974 concerning marriage and its amendments, namely Law Number 16 of 2019, it is not clearly stated who is meant by an extramarital child, however, if it is seen from the provisions of Article 42, it only states that there is a limitation regarding the definition of an extramarital child, namely children born in or as a result of a legal marriage. Because there is no definition of child born out of wedlock or extramarital child, in this paper we use *logic of argumentum a contrario*. With regard to Article 42, what is meant by a child born out of wedlock or extramarital child is a child who is not born in or as a result of a legal marriage.¹¹ Based on the provisions of Article 42, it can be understood that a legal marriage will give birth to legitimate children, while an illegitimate marriage will give birth to illegitimate children, or extramarital children. The Balinese customary law community, having always been guided by the Marriage Law, has not completely regulated the position of children out of wedlock, because it only regulates civil relations with the mother and the mother's family, while the relationship with the biological father has not been completed even though a judgment from the constitutional court Number 46/PUU-VIII/2010 has been handed down which determined that "*A child born out of wedlock has a civil relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence according to law to have blood relations, including civil relations with his father's family*".

Hindu religious leaders in Bali who predominantly adhere to the teachings of Hinduism which animate Balinese customary law have never followed up on the Constitutional Court Judgment Number 46/PUU-VIII/2010, even though the Constitutional Court handed down this judgment almost 14 years ago, but the existence of the position of children out of wedlock in Bali only obtains the right to inherit from the mother. This is

¹¹ Sujana, I Nyoman, 2021, *The Legal Position of Children Out of Wedlock in the Perspective of the Constitutional Court Judgment Number 46/PUU-VIII/2010*, Revised Edition, Aswaja Pressindo, Yogyakarta, p.64

also supported by the results of research conducted by Susianingsih,¹² while his biological father seems to be free without any responsibilities. If it is compared with the Islamic religion, it turns out that Islamic religious leaders have responded to the issuance of the Constitutional Court's Judgment by giving punishment to their biological father to separate part of his wealth through a mandatory will for the child out of wedlock.¹³ Upon this judgment, if a man is proven through science and technology that he is the biological father of a child out of marriage, then the man shall be obliged to fulfill his child's rights, both for recognition by issuing a birth certificate, the right to a living as well as inheritance rights.¹⁴

In the Balinese customary law community, it is indeed very difficult to provide a place for extramarital children in inheritance, because the Balinese Hindu religion, which is the main spirit for the Balinese indigenous community views that religious marriage determines a child's lineage as an heir. Based on the results of interviews with several religious leaders in various villages in Bali, it can be found that the relationship between a man and a woman is considered valid as husband and wife or a legal marriage if the bride and groom have performed the ceremony of *mebyakawon* (*mebyakala*), while other ceremonies are not absolute requirements. Thus, it is religious marriage determining the legal position of a child as an heir.

This opinion is in line with the jurisprudence of the District Court of Singaraja in 1959 *No.Crimineel*; stating that the marriage of a woman to her cousin by eloping and then a *mebyakawon* ceremony was made where the woman participated in it is considered legal, even though according to the court the marriage could be called as a forced marriage, because from the examination before the court there was sufficient evidence that the woman actually did not love her cousin, but already had prior plans to marry another guy. ~~Because the woman finally married the young man after the marriage with her cousin was legalized, she was sentenced for violating Article 279 of the Criminal Code in accordance with customary violations of "Drati Krama".~~

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This jurisprudence has obtained support from Parisada Hindu Dharma with its advice to Balinese Hindus living outside Bali in order that their marriage with women from other tribes or religions is legalized, at least by performing a ceremony in the form of *mebyakawon*. *Mebyakawon ceremony* is an absolute requirement for legalization of marriage, while the other ceremonies, such as, delivering *pemelepahan*, paying the buyer

¹² Susianingsih at.al, 2007, "The Position of Children born out of marriage in Balinese Customary Law and its relation to Article 43 of Law Number 1 of 1974", *Thesis*, Master of Notarial Affairs, Faculty of Law, Gadjah Mada University, Yogyakarta; downloaded on 24 July 2023

¹³ Fatwa MUI Number 11 of 2012

¹⁴ Nurpancha, Hartian, 2017, "Legal Status of Children Out of Marriage Based on Islamic Law, and Their Proof Status Through Science and Technology", *dspace.uii.ac.id*; downloaded on 24 July 2023

and “*meciri Kulkul*” (the sound of wooden bell)¹⁵ is merely a supplement which in practice is often not done, for example if the bride's parents do not agree with the marriage and therefore forbid her child (and her son-in-law) to return to their original home and do not like receiving the buyer's money. The money from the buyer is recently decreasing, one way or another because accepting *petukonwadu* is considered selling children in a commercial sense.

5.4. The Position of Extramarital Child Under Balinese Customary Law After the Constitutional Court Judgment No. 46/PUU-VIII/2010

The law should be responsive, as well as in the enforcement of customary law in Balinese customary law community, especially in determining the position of extramarital children in inheritance right. Extramarital children, under Balinese customary law are often referred to as *bebinjat* children, namely children whose biological father is unknown.¹⁶ The current situation prevailing in Balinese customary law community always pays attention to justice for all levels of society, however regarding the position of extramarital children in inheritance is still marginalized, because the determination of a child's position as an heir is always determined through the marital status of his/her parents. If the marriage is valid, then the children born will be the legal heirs. The point is that Balinese Hindu religious leaders should prioritize the legitimacy of children from marriages solemnized according to religion.

With regard to Extramarital Children, Balinese customary law which is imbued with Hindu religious teachings has not yet responded to the issuance of a Constitutional Court Judgment providing an opportunity for children out of marriage to obtain their rights as children from their biological fathers, even though the Judgment of Constitutional Court has been handed down more than a decade. Civil rights for extramarital children have not been fully and completely regulated yet by religious leaders and traditional leaders in Bali, because they only give rights from one side only, namely from the mother's line. The legal position of extramarital children within Balinese customary law community has not yet been regulated under autonomous and repressive legal regulations governing them, thus, upon the handing down the Constitutional Court Judgment Number 46/PUU-VIII/2010 ruling that “*A child born out of marriage or extramarital child has a civil*

¹⁵ *Meciri Kulkul* means broadcasting every incident involving Banjar members, and/or village members as well as broadcasting the death of a banjar or village members, this is mostly done in South Bali area. This broadcasting process is carried out at the time of Paruman Agung Banjar (General Meeting of Banjar) held every six months before Galungan holiday. The results of the interview on 2 July 2023 took place in Sesetan Traditional Village with Anak Agung Ngurah Gede and I Nyoman Arsana as the former Kelihan Banjar Kaja Sesetan, South Denpasar

¹⁶ Murniti, Ni Wayan, "Inheritance Rights of Extramarital Children under Balinese Inheritance Customary Law (A Case Study in Dukuh Village, Sidemen Sub-District, Karangasem Regency)", <https://jurnal.stahnmkuturan.ac.id>,

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relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence which under the law has blood relationship, including civil relationship with his father's family".

The traditional leaders in Balinese customary law community handling or resolving legal issues regarding the position of extramarital children with their biological fathers should provide a just and fair customary decision or settlement by responding to the judgment of Constitutional Court. Therefore, extramarital children in obtaining their rights as the heirs of their biological father from the purusa line can be realized through responsive customary institutions. This is in line with the views of Responsive legal experts put forward by Philippe Nonet and Philip Selznick in their book entitled "Responsive Law" stating that responsive law is a higher evolutionary stage compared to autonomous law and repressive law.¹⁷ For this reason, it is obligatory for Hindu religious leaders in Bali and traditional leaders to immediately respond to the Judgment of Constitutional Court stating that the biological father should also be imposed with responsibility for raising extramarital children like children born out of legal marriages. Thus, the existence of extramarital children in Balinese customary law community really obtains fair legal protection.

Paying attention to the legal facts regarding the marginalization of the position of extramarital children in inheritance rights in Balinese customary law community, where it has been proven that until now the regulation regarding the position of extramarital children in customary laws and regulations such as *awig-awig Desa Adat* or *awig-awig Banjar adat* has not been completed, therefore the position of extramarital children in inheritance right in Balinese Customary Law community still experiences discrimination viewed from human right. This can be clearly seen from the attitude of legislators to set down regulations governing children born out of religiously valid marriages, which is based on the results of interviews with several traditional and Hindu religious leaders in Bali¹⁸ shows that there is an *awig-awig* of customary village which only regulates half of the section, namely the section regulating the civil relationship of extramarital children with their mothers and their mothers' families, while regulations regarding civil relationship with their biological fathers have not existed yet.

The gray and indecisive attitude shown by the government was also shared by traditional Hindu religious leaders in Bali who seemed indifferent to the existence of extramarital children in obtaining their rights as heirs of their biological fathers. Thus, the regulation regarding the rights of extramarital children in inheritance in customary [village](#) in Bali or in the understanding of Hindu-Balinese religious leaders regarding the civil

¹⁷ Philippe Nonet and Philip Selznick, 2013, *Responsive Law*, Nusamedia, Bandung, p.128

¹⁸ Interview with Dr. Anak Agung Sudiana, SH., M.Fil., MH. as Bendesa Madya Indigenous City of Denpasar on 30 June 2023

relationship of extramarital children with their biological fathers is still incomplete, because it only provides legal certainty regarding civil relationship with their mothers and mother's family, thus the legal protection of inheritance rights for extramarital children within the Balinese Customary Law community until now has not been fully and unanimously implemented.

Incomplete and unanimously legal protection of the extramarital children's inheritance rights within the Balinese customary law community is actually due to the fact that religious leaders and traditional leaders in Bali still refer to the Marriage Law number 1 of 1974, where the marriage law only regulates regarding civil relations with the mother and the mother's family, while civil relationship with the biological father have not been regulated yet, and it turns out that the government itself seems very indecisive. It is very difficult to amend the Marriage Law or to issue government regulations regarding extramarital children in civil relationship with their biological fathers, therefore, the deficiencies in the Marriage Law should be sought in another way, namely to respond to social developments in the community. In practice, it is often experienced that in a case it is not clearly regulated by law, including the Marriage Law which does not clearly regulate civil relationship between extramarital children and their biological fathers, and even marriage laws do not govern them at all.

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6.5. Conclusion

The position of extramarital children of inheritance within the Balinese Customary Law community has not fully obtained their rights, upon the Indonesian Constitutional Court judgment, Number 46/PUU-VIII/2010 of which ruling obliges their biological father to bear the responsibility as a parent by granting the rights of a child through scientific and technological evidence, has never been followed up by Parisada Hindu Dharma as the highest religious institution overseeing Hindu religious institutions, therefore, extramarital children still do not obtain justice and legal certainty in fighting for their rights as the heirs of their biological father (*Purusa* side). For this reason, in order to provide complete and unanimous legal protection to extramarital children in their position as heirs, Parisada Hindu Dharma should respond by following up the existence of the Constitutional Court's judgment through *bisama* by obliging biological fathers who are proven based on science and technology to have a blood relationship, to give part of his wealth as a guarantee for the continuity and welfare of the extramarital child.

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