

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

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**Abstract:** This article analyzes the inheritance rights of extramarital children under the post-Constitutional Court decision of Balinese customary law. Any child born of unmarried parents or out of adultery is stigmatized as an extramarital child (*walad al zina*) for his entire life and forbidden from inheriting an estate from his biological father. This legal issue is chosen as the main subject of this study is because of the legal circumstance in which the Balinese community does not grant status to extramarital children in matters of inheritance from the *Purusa* line. Hindu-Balinese religious leaders such as Parisada and the Traditional Village Council have never upheld the Constitutional Court's ruling that states 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). The fatwa imposes 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 (the Balinese call it *begin* at children) have no status as heirs in the *Purusa* line but have inheritance rights from their mother and their mother's family.

**Keywords:** Children; Constitutional Rights; Constitutional Court; Customary Law; Extramarital; Inheritance

### 1. Introduction

At present, there are many cases of early marriage that stem from pregnancy before the legal marriage takes place. This incident encourages community members to enter into legal marriages which result from children born out of wedlock.<sup>1</sup> Seen from the life of the nation and the 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. This is stipulated in the provisions of Article 3, Paragraph (3) of Law Number 39 of 1999 concerning Human Rights. In line with these provisions,

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<sup>1</sup> Khoyum, Adlian Aldita Alif Aisyah Ainur, Bertha Amilia, and Candra Hafidz Ardana. "Granting Inheritance to Extramarital Children in the Perspective of Islamic Law." *Contemporary Issues on Interfaith Law and Society* 2, no. 1 (2023): 103-112.

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, child welfare was still far from what it should be. An example of discrimination against children can be found in the case of stunting in Indonesia. It is encountered by both children born out of wedlock (extramarital children) and children born from legal marriages.

With the great advances in information technology, interaction amongst individuals has crossed the territorial boundaries of countries.<sup>2</sup> This easy interaction has brought about a change in the perception of the current generation, called Generation Z, which considers that sex outside of legal marriage is not a taboo but rather a "try first then buy" commodity. This has become one of the causes of early marriages, the increase in abortions, and the increase in the number of children born out of wedlock.

In daily interactions in the Balinese customary law community, extramarital children are often bullied, insulted, and ridiculed by being called illegitimate children, children of adultery (*bebinjat* children). Such children have status and a biological and juridical relationship only with their biological mother because the men who caused their birth have disappeared and do not want to be responsible.<sup>3</sup> In addition, there are cases in which the mother is unable to demonstrate who is actually the biological father of the extramarital child. It is evident that this fact will significantly impact the status of these extramarital children as they will not obtain full rights as heirs of the nation. state constitution, Article 28B, paragraph (2) of the state constitution explicitly states, "*Every child reserves the right to survival, growth, and development and is entitled to protection from violence and discrimination.*"

With regard to everyday life, extramarital children do not obtain, in accordance with the constitution, either the right to live, grow, and develop or the right to inherit. This is because another who gave birth to a child out of wedlock has filed a lawsuit with the Constitutional Court. This lawsuit was admitted by the Constitutional Court as outlined in 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 and also 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.*"

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<sup>2</sup> Sudiarmaka, Ketut, IGA Lokita Purnamika Utami, Ni Ketut Sari Adnyani, and I. Wayan Landrawan. "Study of Balinese Customary Law on Inheritance Rights of Children From Interfaith Marriages." *Jurnal Komunikasi Hukum* 9, no. 1 (2023): 529-539.

<sup>3</sup> Horii, Hoko. "Pluralistic legal system, pluralistic human rights?: teenage pregnancy, child marriage and legal institutions in Bali." *The Journal of Legal Pluralism and Unofficial Law* 51, no. 3 (2019): 292-319.

Constitutional Court Judgment Number 46/PUU-VIII/2010, dated 17 February 2012, has existed for a decade. 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 that adhere to patrilineal kinship, does not provide for extramarital children. Extramarital children under Balinese customary law do not obtain complete protection as they obtain rights only from their mother, while the biological father is free of responsibilities.<sup>4</sup> This is in contrast to Fatwa Number 11 of 2012, issued by Islamic religious leaders through the MUI. The fatwa states, *"The government is obliged to protect children who result from adultery and to prevent neglect, especially by punishing men who caused their birth to meet their needs."* In addition, the government also has the authority to punish adulterers who cause the birth of children by requiring them to meet the children's needs and provide assets by including them in a mandatory will.

In the community of Balinese customary law, extramarital children have not yet obtained justice and legal status with regard to their rights as the nation's next generation of children. The legal consequence of recognizing extramarital children is to change their status as biological children and entitle them to civil rights, one of which is inheritance. The question is whether the Constitutional Court decision can be used as a reference for granting inheritance rights to extramarital children under Balinese customary law.

## 2. Method

This article is an empirical legal study that focuses on the attitudes and behavior of individuals, groups, communities, institutions, and countries.<sup>5</sup> It uses primary data gathered through direct interview techniques with selected interviewees and purposive sampling carried out in the area of the Balinese customary law community, which is divided into East Bali and West Bali, Indonesia. Secondary data were derived from primary legal areas such as Marriage Law, human rights law, other laws related to marriage, child protection, and women's protection laws. Resources including scientific articles, journals, books on marriage, legal dictionaries, and encyclopedias were consulted. The data were obtained through direct interviews with interviewees and through literature searches. The searches were done to study the literature, laws, and regulations related to the discussions about extramarital children within the community

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<sup>4</sup> Sari, Emala, Djoni Sumardi Gozali, and Noor Hafidah. "Function Of Notary In The Appointment Of Extra-Marital Children As Testamento Heirs." *Journal Indonesia Law and Policy Review* 5, no. 2 (2024): 423-434.

<sup>5</sup> Irwansyah, 2021, *Penelitian Hukum, Pilihan Metode dan Praktik Penulisan Artikel*. Revised Edition, Mirra Buana Media, Yogyakarta, p.185.

of Balinese customary law. Further analysis was carried out to produce the final argument in the form of answers to the research questions.<sup>6</sup>

### 3. Inheritance Rights under Balinese Customary Law

Customary law is the law of indigenous communities. The term indigenous community is expressed in a variety of ways. Soepomo calls the term “legal alliance.”<sup>7</sup> Similarly, Wignyodipuro, in his book entitled *Introduction and Principles of Customary Law*, refers to customary law community with the same term as Soepomo.<sup>8</sup> Hadikusuma refers to customary law as a custom that has sanctions, while the term *adat* (custom), which contains no sanctions, is a normative habit, namely, a habit that reflects rules of behavior applicable in a society.<sup>9</sup> Otje Salman refers to indigenous communities as *customrechtsgemeenschap*, that is, groups 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.<sup>10</sup>

Considering the formulations regarding customary law communities put forward by some of these scholars, one may conclude that these customary law communities are bound by the same generations-old traditions in an alliance that has autonomous self-government and both worldly and religious assets. Regarding the tradition applicable from generation to generation in inheritance under Balinese customary law, patrilineal kinship or the line of inheritance to the *purusa* based on the male has been applied. However, this does not rule out the opportunity for daughters to receive an inheritance in the event that they choose the *sentana rajeg* marriage system.<sup>11</sup>

In this inheritance relationship, as stated by Korn in Gede Panetje’s book, *Various Notes on Balinese Customary Law*, inheritance law in Balinese Customary Law is the most difficult part. This is because of the existence of various differences in several areas within Balinese customary law regarding both the number of items to be inherited or the number of shares for each heir and the decisions of customary courts.<sup>12</sup> As for the

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<sup>6</sup> Pasek Diantha, I Made, 2016, *Normative Legal Research Methodology in Justification of Legal Theory*, Prenadamedia Group, Jakarta, p.30.

<sup>7</sup> R. Soepomo, 1979, *Chapters About Customary Law*, third print, Pradnya Paramita, Jakarta, p.32.

<sup>8</sup> Soerojo Wignyodipuro, 1979, *Introduction and Principles of Customary Law*, third edition, Alumni, Bandung, p.86.

<sup>9</sup> Tolib Setiady, 2009, *Digest of Indonesian Customary Law*, Alfabeta, Bandung, p.23.

<sup>10</sup> Otje Salman Soemadinigrat, 2002, *Reconceptualization of Contemporary Customary Law*, third printing, Alumni, Bandung, p.114.

<sup>11</sup> Sentana Rajeg is a descendant or female heir whose status is confirmed as a descendant or *purusa*. See: 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* 6, no. 2 (2017): 171.

<sup>12</sup> Gde Panetje, 1989, *Various Notes about Balinese Customary Law*, Gunung Agung, Denpasar, p.101.

inheritance rights of a child, Balinese customary law adheres to patrilineal kinship. 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, who stated that *justice as fairness*<sup>13</sup> is marked by the principles of rationality, freedom, and equality. Referring to John Rawls's opinion, it can be seen that a child has actually been given equal rights to inheritance in *the nature of fairness* without discriminating between boys and girls. Whoever carries out the obligation will obtain the rights. Most importantly, the marital status of parents will determine the position of children as heirs. In the case of choosing marriage, the child will lose their right to inherit from their parents because the person concerned has the status of having left the place of residence (*kedaton*). Likewise, when choosing a *sentana rajeg* marriage, even though a daughter is biologically a girl, she will have the same hereditary status as a son because she is positioned as *senatana rajeg* in her marriage.

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 or daughters, *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 daily social interaction in Bali, there are also children born from unregistered marriages and children born from a mother whose biological father is unknown. They are what is often called extramarital children.

Under Law Number 1 of 1974 concerning marriage and its amendments, namely, Law Number 16 of 2019, the meaning of "extramarital child" is not clearly stated. The provisions of Article 42 only state 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 children born out of wedlock or extramarital children, 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 an extramarital child is a child who is not born in or as a result of a legal marriage.<sup>14</sup> 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 or extramarital children. The Balinese customary law community, having always been guided by the Marriage Law, has not completely regulated the status 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

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<sup>13</sup> 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.

<sup>14</sup> 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.

father has not been established even though a judgment from the Constitutional Court, Number 46/PUU-VIII/2010, determines 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 have never upheld Constitutional Court Judgment Number 46/PUU-VIII/2010 even though the Constitutional Court handed down this judgment almost 14 years ago. Children born out of wedlock in Bali only obtain the right to inherit from the mother. This is also supported by the results of research conducted by Susianingsih.<sup>15</sup> The biological father, however, seems to be free of responsibilities. For their part, Islamic religious leaders have responded to the issuance of the Constitutional Court’s judgment by obligating the biological father to separate part of his wealth through a mandatory will for the child born out of wedlock.<sup>16</sup> Based on this judgment, if it is proven through science and technology that a man is the biological father of a child born outside of marriage, then the man shall be obliged to take responsibility for his child’s rights. both for recognition by issuing a birth certificate, the right to a living as well as inheritance rights.<sup>17</sup>

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 predominant faith of the Balinese indigenous community, considers 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 determined 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 that determines the legal status of a child as an heir.

This opinion is in line with the jurisprudence of the District Court of Singaraja in 1959 *No. Crimineel*. The marriage of a woman to her cousin by eloping and then participating in a *mebyakawon* ceremony was considered legal even though, according to the court, the marriage could have been considered a forced marriage because examination by the court brought forth sufficient evidence that the woman actually did not love her cousin and already had plans to marry another man. Because the woman eventually

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<sup>15</sup> Susianingsih et 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.

<sup>16</sup> Fatwa MUI Number 11 of 2012

<sup>17</sup> Palguna, I Dewa Gede, Ita Nurjanah, Ni Komang Tari Padmawati, I. Komang Dananjaya, and I. Made Halmadiningrat. “Indonesia’s Constitutional Court Decisions on Outsourcing Scheme: Balancing Protection and Efficiency?.” *Journal of Indonesian Legal Studies* 8, no. 2 (2023): 405-452.

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 the customary violations of “*Drati Krama*.”

This jurisprudence obtained support from Parisada Hindu Dharma, which advised Balinese Hindus living outside Bali to legalize their marriages with women from other tribes or religions by performing a *mebyakawon* ceremony. A *mebyakawon ceremony* is an absolute requirement for the legalization of marriage, while other ceremonies, such as delivering *pemelepahan*, paying the buyer, and “*meciri Kukul*” (the sound of a wooden bell)<sup>18</sup> are merely supplementary and are not often performed. One such example is 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 homes and do not want to receive the buyer’s money. Money from buyers has recently been decreasing because accepting *petukonwadu* is considered selling children in a commercial sense.

#### 4. The Constitutionality of Inheritance Rights for Extramarital Children and Their Status under Balinese Customary Law

The law should be responsive in the enforcement of customary law in the Balinese customary law community, especially in determining the status of extramarital children with regard to inheritance rights. Extramarital children under Balinese customary law are often referred to as *bebinjat* children, that is, children whose biological father is unknown.<sup>19</sup> The current prevailing situation in the Balinese customary law community always grants justice to all levels of society. However, extramarital children are still marginalized as concerns the issue of inheritance because the determination of a child’s status as an heir is always determined through the marital status of his/her parents.<sup>20</sup> 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.

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<sup>18</sup> *Meciri Kukul* means broadcasting every incident involving Banjar members or village members and broadcasting the death of a banjar or village member. This is done mostly in the South Bali area. This broadcasting process is carried out at the time of the Paruman Agung Banjar (General Meeting of Banjar), held every six months before the 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.

<sup>19</sup> 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>,

<sup>20</sup> Nurlaelawati, Euis, and Stijn Cornelis Van Huis. “The status of children born out of wedlock and adopted children in Indonesia: Interactions between islamic, adat, and human rights norms.” *Journal of law and religion* 34, no. 3 (2019): 356-382.

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 that provides an opportunity for children born outside of marriage to obtain their rights from their biological fathers even though the judgment was handed down more than a decade ago. Civil rights for extramarital children have not been fully and completely regulated yet by religious and traditional leaders in Bali because they give rights to one side only, namely, the mother's line.

The legal status of extramarital children within the Balinese customary law community has not yet been regulated under the autonomous and repressive legal regulations that govern them. Thus, Constitutional Court Judgment Number 46/PUU-VIII/2010 ruled that:

*"A child born out of marriage or an 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 with his family."*

The traditional leaders in the Balinese customary law community that handle legal issues regarding the status of extramarital children with their biological fathers should provide a just and fair customary decision or settlement by responding to the judgment of the Constitutional Court. Therefore, extramarital children can obtain their rights as the heirs of their biological father 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 *Responsive Law*, which states that responsive law is a higher evolutionary stage than autonomous law and repressive law.<sup>21</sup> For this reason, Hindu religious leaders in Bali and traditional leaders must immediately respond to the judgment of the Constitutional Court which states that the biological father should also bear the responsibility of raising extramarital children, the same as children born of legal marriages. Thus, extramarital children in the Balinese customary law community would obtain genuine legal protection.

Considering the legal facts regarding the marginalization of extramarital children in inheritance rights in the Balinese customary law community, where it has been proven that regulation regarding the status of extramarital children has not been completed, extramarital children under Balinese customary law community still experience discrimination. This can clearly be seen in the attitude of legislators who create regulations that govern children born outside of religiously valid marriages, which is based on the results of interviews with several traditional and Hindu religious leaders in Bali<sup>22</sup> shows that there is an *awig-awig* of customary village which only regulates half of

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<sup>21</sup> Philippe Nonet and Philip Selznick, 2013, *Responsive Law*, Nusamedia, Bandung, p.128.

<sup>22</sup> Interview with Anak Agung Sudiana, as Bendesa Madya Indigenous City of Denpasar on 30 June 2023.

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 traditional villages 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 their mothers' families. 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 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, which only regulates civil relations with the mother and the mother's family, while the civil relationship with the biological father has not been regulated yet. 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 relationships with their biological fathers. Therefore, the deficiencies in the Marriage Law should be addressed in another way, namely, by responding 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.

## **5. Conclusion**

The status of extramarital children as heirs within the Balinese customary law community has not been clarified. The Indonesian Constitutional Court judgment obliges their biological father to bear the responsibility as a parent by granting the rights of a child through scientific and technological evidence. This has never been followed up by Parisada Hindu Dharma as the highest religious institution overseeing Hindu religious institutions. Therefore, extramarital children still do not have 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 status as heirs, Parisada Hindu Dharma should respond by upholding the Constitutional Court's judgment through *bisama* by obliging biological

fathers who are scientifically proven to have a blood relationship to give part of their wealth as a guarantee for the continuity and welfare of the extramarital child.

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