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## CHILDREN'S INHERITANCE RIGHTS TO MIXED MARRIAGE WHAT IS NOT RECORDED IN PERSPECTIVE INTERNATIONAL CIVIL LAW

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**ABSTRACT** This article aims to find out the protection of the inheritance rights of children of mixed marriages that are not recorded in the perspective of the Indonesian International Civil Law (HPI Indonesia). The research in this article is doctrinal legal research or dogmatic, or normative juridical method or also referred to as literature law research, with the method of deduction reasoning. This method of deduction reasoning is used to conclude things that are general to a special thing which is then drawn into a conclusion. The results of this article show that the law applicable to mixed marriages can be seen based on the principles of HPI Indonesia including the principle of *lex loci celebrationis*, joint nationality or joint residence, where the marriage takes place, where the husband and wife become citizens after marriage or the residence of the husband and wife. But for mixed marriages that are not recorded according to the applicable rules do not eliminate the inheritance of the child, especially from the father as long as there is recognition with an authentic deed. Not noting the marriage does not mean the marriage becomes void but only has not been recognized that there has been a mixed marriage so that the rights of the child are not obtained as they should be. It's just that children born from marriage are considered children outside of marriage. Constitutional Court Decision No. 46/PUU-VIII/2010 is a new legal breakthrough in which children born outside of marriage from unrecorded mixed marriages still have a civil relationship with both parents. So that with the unrecorded of mixed marriage does not eliminate the civil rights of children as legal heirs.

**KEYWORDS:** Inheritance Rights; children; Mixed Marriage; Not Recorded.

### INTRODUCTION

The development of technology and information brings significant changes in relations between countries.(Danuri, 2019) National borders are getting thinner, interactions between citizens are getting easier and faster, at the same time humans communicate well even in the realm of privacy.(Setiawan, 2018) Social media, for

example, is a means of establishing relationships between men and women and some are even committed to forming a family through mixed marriages.(Kusumaningtyas & Hakim, 2019) Mixed marriages often occur among celebrities in Indonesia, but many people who come from ordinary groups have done it, it becomes a matter of pride for the community or parties who carry out such marriages.(Damayanti, 2015)

Marriage is not just a personal matter but is closely related to the issue of belief, as a religious issue, almost every religion in this world has its regulations regarding marriage, the validity of a marriage can be seen when the marriage is based on religion. So religion has a very important role as a condition for the validity of the marriage. Mixed marriages in the view of international civil law are marriages that have foreign elements, carried out by two people who are subject to different laws.(Arliman, 2018; Fauzi, 2018) The existence of a link between the two legal systems, namely the Indonesian legal system and the foreign legal system due to the difference in the nationality of the marriages carried out is a matter of international civil law, namely which law applies to these legal events and what principles will apply to mixed marriages.(Fauzi, 2018)

Marriage is carried out in Indonesia according to the positive law of Law 16 of 2019 concerning Amendments to Law 1 of 1974 concerning Marriage (hereinafter abbreviated as UUP) in Article 1 states that marriage is an inner and outer bond between a man and a woman as husband and wife to form a family.(Sendy, 2019) or a happy and eternal household based on the One Godhead. Marriages are carried out according to the prevailing religious provisions in Indonesia, namely Islam, Protestantism, Catholicism, Hinduism, Buddhism and Confucianism and their beliefs. Meanwhile, Article 57 states that mixed marriages are marriages between 2 people who are subject to different laws because of differences in citizenship and one of the parties is an Indonesian citizen. (Panjaitan, 2020)

Theoretically in International Civil Law, two main views try to limit the understanding of mixed marriages of different nationalities, namely: 1) The view which assumes that a mixed marriage is a marriage that takes place between parties with different domiciles so that each party applies the rules - internal law rules of two different systems. 2) The view that a marriage is considered a mixed marriage if the parties have different nationalities or nationalities. (Hardjowahono, 2019)

Foreigners who come and stay temporarily in Indonesia still have civil rights guaranteed by law, where among the civil rights owned include foreigners buying and selling various types of goods including land with the status of use rights to build a residence. . In addition, he has the right to marry and can choose an Indonesian as his partner. Then with the marriage, foreigners have the right to obtain Indonesian citizens.(Supramono, 2019) Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia, underage children born from mixed marriages acquire the citizenship of both parents. As an adult, you can choose one of the citizenships of both parents or choose a third country citizen, as long as there is a legal relationship between the child and the chosen third country.(Fauzi, 2018)

The problem is not small in the practice of mixed marriages not being registered through the civil registry, when in marriage having children and assets will become a legal issue for the status of children. Not to mention if there is a divorce or one of the parents dies, what is the status and rights of the child towards parents who do not legally register their marriage. (Rafika, 2019)As is the case with the Burgerlijk Wetboek system, where children who are immature and not under the control of their parents, their legal status must be placed under guardianship, or the family if the child's parents die. After the parents are divorced, provisions must also be made regarding the guardianship of their underage children.(Matwig & Jayadi, 2013).

Based on this, according to the author, mixed marriages that are not registered at the Civil Registry Office or at the KUA do not hinder the rights of children to the property of their parents. Where children's rights can be protected according to civil law if prior recognition is made. Recognition aims to create civil relations so that children can be legal heirs.

## **METHODOLOGY**

The research in this article is a doctrinal legal research or dogmatic, or normative juridical method or also referred to as library law research. Doctrinal legal research is research that uses only a legal problem approach, namely the application of law with the support of concepts and theories and the fact that there is a difference between what is expected (*das sollen*) and reality (*das sein*). The research approach used is the statute approach by analyzing the articles in the legislation and the conceptual approach.(Barus, 2013)

The legal material analysis technique used in this study is the method of deductive reasoning. This deductive reasoning method is used to conclude general things to specific things which are then drawn into a conclusion.

## **RESULTS AND DISCUSSION**

The institution of marriage is a sacred thing, no one wants marriage for a limited time, the marriage bond at the beginning has been promised to build an eternal, happy and prosperous family. Through eternal marriage, in essence, husband and wife with love cultivate the spirit of seeking and maintaining property, saving their household and children from destruction. Divorce essentially kills the soul of children because at least divorce can damage the psychological development of children.(Fatmawati, 2018) Divorce does not mean the loss of parental responsibility to children, children have material rights from their parents because of that husband/wife who has property before marriage with a marriage agreement protects assets that can be inherited to children.

Mixed marriages according to international civil law can be seen as having foreign elements because of the subject, place and legal actions carried out. There is no prohibition in mixed marriages as long as the rules that apply in Indonesia are adhered to. The legal basis for mixed marriages can be found in Articles 56 to 62 of the UUP. According to Article 56 paragraph (1) of the Marriage Law, it is stated that a marriage can be held outside Indonesia between two Indonesian citizens, or an Indonesian citizen and a foreign citizen is legal if it is carried out according to the applicable law in the country where the marriage was held and for citizens, Indonesia does not violate the provisions of this law.

Every citizen has the right to marry as long as the conditions for a valid marriage are fulfilled, mixed marriages can be carried out in Indonesia or abroad. In this marriage, a husband/wife can gain or lose their citizenship, according to the applicable provisions (Article 58). The determination of the place where the marriage takes place is aimed at the husband/wife being able to later determine which law will apply in the marriage. Failure to register mixed marriages can be subject to 1-month imprisonment, while for employees who record the marriage, the threat of punishment is increased to three months in prison and also added to an office sentence (article 61 paragraph 2 and paragraph 3).

The status of minors is determined by the nationality of their parents. The aim is to provide protection and legal status that the marriage which is held is administratively registered. If not the rights of the child will be harmed civilly, however, the child was never asked to be born, for that is the obligation for parents to protect by registering the marriage performed.

The types of mixed marriages are:(Isnaeni, 2019)

1. Marriage in which the parties are of different groups;
2. Marriage in which the parties are of different nationalities;
3. Marriage in which the parties are in different regions;
4. Marriage in which the parties differ in their customary law;
5. Marriage in which the parties are of different religions.

Regarding administrative issues for mixed marriages, Article 37(1) of Law Number 23 of 2006 concerning Population Administration states that: Marriages of Indonesian citizens outside the territory of the Unitary State of the Republic of Indonesia must be registered with the competent authority in the local country and reported to the Representative Republic of Indonesia.

Marriages that have been registered are valid with all legal consequences including the legal status of children, marital property, inheritance, rights and obligations of husband and wife if the marriage ends due to divorce, and or so on. However, for the validity of marriages held abroad, it must be recorded and reported to the Population and Civil Registry Office in Indonesia within a period of 1 (one) year.(Purnamasari, 2014) After the specified time has passed, it must go through the District Court by the domicile in question and will be subject to a fine by the local Regional Regulation in conjunction with Article 107 of Presidential Regulation Number 25 of 2008 concerning Requirements and Procedures for Population Registration and Civil Registration.

Husband's rights and obligations wives in mixed marriages are not regulated, either according to Islamic marriage law, Law Number 1 of 1974 concerning Marriage or in the Compilation of Islamic Law, in which all rights and obligations of husband and wife in ordinary and mixed marriages are the same. For UUUP in Chapter VI, Pasal 30 to Article 34, while according to the provisions of the Compilation of Islamic Law it is regulated in Chapter XII, Article 77 to Article 84. Thus, all rights and obligations of husband and wife both in ordinary and mixed marriages are the same and must by the applicable laws and regulations, namely

Article 30 to Article 36 of Marriage Law. (Mamahit, 2013) Children are legal subjects who have not been able to carry out legal actions themselves, must be assisted by parents or guardians who have the skills.(Candra, 2018)

Marriage Laws aims to regulate a perfect, happy and eternal life in a household to create a sense of affection and love for each other. However, the reality of human history that has been around for thousands of years has proven that this cannot always be achieved, on the contrary, it foundered or failed in the middle of the road, because no agreement was reached or because of it one of the parties or the behavior of both parties that contradicted religious teachings. Indonesia upholds religious values, so in the implementation of marriage it must be based on the regulations of each religion, marriages carried out according to the laws of their respective religions and beliefs will be considered valid both in the eyes of religion and law.(Dahwal, 2016) A marriage that is not in harmony is not good to be allowed to drag on so that for the sake of both husband and wife, the marriage is divorced. Of course it will result in the children of their daughters who have never done anything wrong, bearing the consequences of their parents' actions.(Djubaidah, 2012)

Furthermore, in Government Regulation Number 9 of 1975 concerning the Implementation of the UUP, it is explained that a marriage can be registered at the place where the marriage will take place where the conditions for marriage have been fulfilled. Legality of mixed marriages in the eyes of Indonesian law, in principle, marriage is a human right that is guaranteed in Article 28B of the 1945 Constitution. Marriage between two people, namely a man and a woman who have different nationalities based on the provisions in force in Indonesia, can be implemented.

As long as the parties who have registered mixed marriages abroad are per the law in force in the country where the marriage is taking place, then the marriage is valid with all the legal consequences. The legal consequences in question include the status of children, marital property, inheritance, rights and obligations of husband and wife if the marriage ends due to divorce and or so on.

The status of children in mixed marriages must first be seen in the marriage of their parents as a preliminary matter, if the marriage of their parents is legal, then the child has a legal relationship with his father. However, if the marriage is not valid or has not been recognized because it is not registered according to Indonesian law, then the status of the marriage can be said to be carried out under the hands or in an unregistered marriage. This will result in children who only have a legal relationship with their mother.

The process of registering a marriage in principle does not make the marriage invalid, because the registration process is an administrative process. However, in Indonesian national law, this registration process has become part of positive law. With this recording process, each party will be recognized for all their rights and obligations before the law.

Bagir Manan believes that marriage certificates and marriage registration are not the only evidence regarding the existence of marriage or the validity of marriage, because marriage certificates and marriage registration are evidence but not decisive evidence. Recording per the explanation of Article 2 paragraph (2), is seen as an important event, not a legal event, because marriage as a legal event is determined by religion, the recording will not have legal consequences let alone override the validity of marriages that have met the requirements of each religion. (Indriani et al., 2018)

The legal consequences of not registering a marriage include:

- a. Marriage is considered invalid if it has not been recorded by the KUA or the Civil Registry Office.
- b. The child only has a civil relationship with the mother and the mother's family. in or as a result of a legal marriage. Article 1 43 states: (1) Children born out of wedlock only have a civil relationship with their mother and their mother's family;
- c. Children and their mothers are not entitled to a living and inheritance as a result of further marriages that are not recorded are neither the wife nor the children born of the marriage have the right to demand a living or inheritance from their father.

The existence of a legal marriage will have three legal consequences in the form of rights and obligations to husband and wife, to children, and joint property. (Judiasih, 2015) The presence of a child is happiness and prosperity for a mother and her family because children are the fruit of marriage and as the basis of descent. (Sembiring, 2016)

Mixed marriages, including the realm of Indonesian International Civil Law, have foreign elements, so there are principles that apply. 1) The principle of *lex loci celebrationis* which means that the material validity of a mixed marriage must be determined based on the legal rules of the place where the marriage is inaugurated or held; 2) The principle which states that the material validity of a marriage is

determined based on the legal system of where each party becomes a citizen before the marriage takes place ((joint nationality); 3) The principle which states that the material validity of a marriage must be determined based on the legal system of each Each party is domiciled before the marriage takes place (*joint residence*); and 4) The principle which states that the validity of a marriage must be determined based on the legal system of the place where the marriage takes place (*locus celebrationis*), without ignoring the marriage requirements that apply in the legal system of the parties before the marriage takes place.(Situngkir, 2018)

If a problem occurs, the provisions of the pointer will determine which law will be used. Because every point of reference contains an understanding that includes the material that is its object. To find out which indication provisions, the facts and legal relationships must be known. Whereas regarding the inheritance of the object, it is still controlled by the applicable law from the place where the object is located (*lex rei sitae*). (Situngkir, 2018)

The legal status of a mixed marriage will affect the legal status of the child, especially in the event of a divorce. In certain conditions where the parents of the unregistered children of mixed marriages die, there will be inheritance rights to the inheritance of the parents. HPI Indonesia imposes a choice of law in inheritance matters, namely civil/western inheritance law, customary inheritance law and Islamic inheritance law. The three inheritance laws differ in regulating inheritance.

Inheritance law is the law that regulates the transfer of assets left by someone who dies and the consequences for the heirs. In principle, only rights and obligations in the legal field of wealth or property can be inherited. (Usman, 2018) Inheritance is the steps to continue or transfer the inheritance from an heir to his heirs.

Determination of children as heirs can be determined, among others:

1) Legal heirs (*ab intestato*);

The form of inheritance in which blood relations are a determining factor in the inheritance relationship between the heir and heirs. (Matompo & Harun, 2017)

2) Heirs according to a will or testament (*testamentair erfrecht*)

This heir is based on a will, namely in Article 874 of the Civil Code (BW), where every person who is legally given a will by the testator and Article 875



of the Civil Code (BW), a will or testament is a deed containing a person's statement about what he wants to happen after he dies, which can be revoked.

Inheritance rights of children resulting from mixed marriages who are not registered still get their rights as heirs, especially from their fathers. Not registering the marriage does not mean that the marriage is null and void, but only that it has not been recognized that a mixed marriage has occurred, so that the rights of the child are not obtained properly. This marriage has not been recognized, resulting in children born from that marriage being considered as children born out of wedlock. The issuance of the Decision of the Constitutional Court (MK) Number 46/PUU-VIII/2010 becomes the basis that children born outside of marriage only have a civil relationship with their mother and mother's family as well as with men as their fathers which can be proven based on science and technology and/or other evidence which according to the law has a blood relationship, including civil relations with his father's family. The Constitutional Court's decision has breached the law by deciding that Article 43 paragraph (1) of the UUUP contradicts the 1945 Constitution. The decision was born to fulfill the public's sense of justice even though it "goes beyond" the text of the rule-breaking legislation in an effort to seek substantive justice in the midst of the community.(Abdillah, 2019)

Children born from unregistered mixed marriages are also entitled to legal protection. The status of children who are not recognized by law due to mixed marriages of their parents who are not registered still receive fair legal certainty for a child born even though the validity of the marriage of his parents is still in dispute.

Blood relations between children and fathers in a biological sense can be obtained based on legal processes. To give acknowledgment to a child resulting from a mixed marriage that is not registered by the father, it can be done by obtaining recognition from his father. With the acknowledgment from his father, at that time there will also be a civil relationship with the father and his family where the confession is made through an authentic deed.

## **CONCLUSION**

Legal protection for children who are not registered in the Indonesian HPI field through the Constitutional Court Decision, a breakthrough before the child only has a civil relationship with his mother, based on human rights considerations, the child is also entitled to have a civil relationship with his father as long as it can be proven by science and technology. Inheritance rights of children resulting from

mixed marriages who are not registered still get their rights as heirs, especially from their fathers. Not registering the marriage does not mean that the marriage is null and void, but only that it has not been recognized that there has been a mixed marriage so that the rights of the child are not obtained properly.

The need for an online service model for couples who have mixed marriages provides knowledge and legal awareness of the importance of registering marriages. The recording of marriage is one of the efforts to protect children, especially the civil relationship between their parents who are also legal heirs.

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