

Legal Protection Against Children of Consanguineous Marriages

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Abstract

A secret marriage is considered invalid by the state, therefore, children born from this marriage are considered as children born out of wedlock. This is different from the religious perspective. This opinion is based on article 43 paragraph (1) of the Marriage Law which states that "Children born out of wedlock may only have a civil relationship with their mother and their mother's family. Therefore, a secret marriage will annul the rights of the wife and children. However, there are quite a few implementations of marriage in regions where the implementation of marriage is only based on religious law and customary law, without involving the Marriage Registrar so that this marriage is considered a secret marriage which often causes losses to the wife and children born. The lack of guarantees of civil rights as a result of a secret marriage results in the child not getting citizenship status, and the child only has a civil relationship with the mother and her mother's family, which in turn bears the burden of child maintenance costs. Married couples must comply with religious and state laws. In Islamic law, marriage must fulfill the pillars of marriage which include prospective husband, prospective wife, marriage guardian, two witnesses, ijab and kabul, while state law requires that the validity of the marriage must be registered in accordance with applicable laws. However, there are many implementations of marriage in regions where the implementation of marriage is only based on religious and customary laws, without involving Marriage Registrars so that this marriage is considered a secret marriage which often causes losses to the wife and the children born. The lack of guarantees of civil rights as a result of a secret marriage results in the child not getting citizenship status, and the child only has a civil relationship with the mother and her mother's family, which in turn bears the burden of child maintenance costs.

Keywords: Serial marriage, Legal protection of children resulting from serial marriage

BACKGROUND

Human rights are a gift from God Almighty which is natural/fundamental, therefore the protection of human rights must be preserved from birth to death. The right to continue the lineage, or what is termed marriage is a physical and spiritual bond between a man and a woman in line with the rules of their religion or belief and the rules of the state, by holding their marriage before a marriage registrar in accordance with applicable laws.

The Marriage Law recognizes two types of child status, namely legitimate children and illegitimate children, as explained in Article 42 of the Marriage Law, which states that legitimate children are children born in or as a result of a legitimate marriage. This law does not mention a time limit for determining the legitimacy of a child. Meanwhile, the position of illegitimate children is contained in Article 43 of the Marriage Law, which states that children born outside of marriage only have a civil relationship with their mother and their mother's family. The principal differences as mentioned above have further consequences

in law. The position of illegitimate children in law is apparently inferior (worse or lower) compared to legitimate children. Legitimate children are basically under the authority of their parents, while illegitimate children are under guardianship. The rights of legitimate children in the inheritance of their parents are greater than those of illegitimate children and the rights of illegitimate children to enjoy inheritance through a will are limited.

Child protection is all activities to guarantee and protect children and the fulfillment of their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and honor, and receive protection from violence and discrimination. Children's rights are part of human rights that must be promoted, protected, fulfilled, and guaranteed by parents, families, communities, governments and the State.

According to Law No. 1 of 1974 concerning Marriage in Article 2 paragraph 2 states that "Every marriage is recorded according to the provisions of applicable laws". Therefore, every marriage carried out in

a secret manner is considered invalid under Indonesian law.

A secret marriage is a marriage that is carried out in secret. Etymologically, the word *siri* comes from Arabic, namely *sirrun* which means secret, silent, hidden as the opposite of "*Alaniyah*" which means openly. The word *siri* is then combined with the word *nikah* so that it becomes *nikah siri* to mention that the marriage is carried out secretly or secretly. This meaning of secretly and hidden gives rise to two understandings, namely a marriage that is secretly not announced to the public or a marriage that is not known or recorded in state institutions (Asnawi, 2004:114).

This kind of marriage, if there is a dispute between the couple or even a divorce, of course it cannot be done legally formally before the Religious Court. Therefore, legal protection for women/wives and children is difficult to achieve, so that women and children continue to get their rights, the state facilitates it by legalizing their marriages that have not been registered with the marriage confirmation institution. Moreover, with the integrated marriage confirmation service which is a collaboration between the Religious Affairs Office, the Population and Civil Registration Service and the Court, it is a state service so that the public can more easily obtain the legality of their marriage for legal certainty.

Although there is a polemic about marriage registration, on the one hand, some say that if a marriage is not registered before a Marriage Registrar, then the marriage is considered invalid, on the other hand, there is an editorial that marriage registration is not an absolute thing to do, so it does not determine the validity or invalidity of a marriage.

The Civil Registry Agency is an agency established by the Government which is tasked with recording or registering every important event experienced by members of the public such as marriage, divorce, birth, death and recognition, which is used as proof of the existence or occurrence of these events.

Likewise, with the presence of a child born from a legal marriage ('registered

marriage') both parents have proven that the child is the legitimate biological child of his father and mother. The legal consequences if the marriage is not registered (generally known as "*siri marriage*"), the status of the child born from the marriage will be uncertain, because the marriage of both parents is only valid according to religion.

In other words, even though the child is a legitimate child, there is no authentic evidence that can confirm that the child is legitimate from both parents. This causes a bad impact on the child's life in the future, the child's rights can be violated such as the child does not have the right to inherit from his father according to the law of the country, even though religiously the child has the right to do so. So that legal efforts are necessary for the child to obtain the status as a legitimate child of both parents.

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Child protection is all activities to guarantee and protect children and the fulfillment of their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and honor, and receive protection from violence and discrimination. Children's rights are part of human rights that must be promoted, protected, fulfilled, and guaranteed by parents, family, society, government and state

RESEARCH METHOD

The research used is normative legal research, namely by collecting data through library studies by examining library materials or secondary legal materials. This research is mostly conducted on secondary data in the library, because this research is conducted only on written regulations or other legal materials. This secondary data is used as a source or

information obtained from primary legal materials, secondary legal materials and tertiary legal materials.

The data sources used in this study are secondary data. According to Soekanto & Mamudji (2019) secondary data has a very broad scope of sources, including personal letters, diaries, books, to official documents issued by the government. Secondary data includes official documents, books, research results in the form of reports, journals, and so on. In this study, secondary data consists of:

Data Collection Techniques and Sources To obtain data in this study, a literature study was conducted on legal materials, both primary legal materials, secondary legal materials and tertiary legal materials:

a. Primary Legal Materials

Namely legal material that has binding force, in the form of statutory regulations, including:

1. 1945 Constitution.
2. Law Number 35 of 2014 concerning Child Protection.

b. Secondary Legal Materials

It is a legal material that provides an explanation of primary legal material, such as research results and scientific journals from legal circles related to the research problem.

c. Tertiary Legal Materials

Tertiary legal materials are legal materials that are explanations or instructions for primary and secondary legal materials obtained from both print and electronic media (Soemitro, 2017). Tertiary legal materials are obtained from Indonesian and English dictionaries, legal dictionaries and encyclopedias related to the research.

RESULTS AND DISCUSSION

In its development, Indonesia has had special regulations on child protection, namely Law Number 4 of 1979 concerning Child Welfare, Law Number 3 of 1997 concerning Juvenile Courts which were later replaced by Law Number 11 of 2012 concerning the Juvenile Criminal Justice System and Law Number 35 of 2014 concerning amendments to Law Number 23 of 2002

concerning Child Protection. Although we have a good set of regulations, it is still considered ineffective in resolving cases of children in conflict with the law.

Every child has dignity and worth that should be upheld and every child that is born should get their rights without the child asking for it. This is in accordance with the provisions of the convention on the rights of the child ratified by the Indonesian government through Presidential Decree Number 36 of 1990 which states the general principles of child protection, namely non-discrimination, the best interests of the child, survival and development, and respecting child participation.

Clarity of the marital status of husband and wife through authentic evidence of their marriage, becomes the basis for clarity of the legal status of a child. As for the administration of the child's birth certificate, the basis is the marriage certificate. If the husband and wife have never registered their marriage, then when the child is born and requires a birth certificate, the population office will not issue the birth certificate.

In addition, with an unregistered marriage, the certainty of the rights and obligations of parents and children cannot be fully protected by law. The origin of a child can only be proven by an authentic birth certificate issued by an authorized official or by the District Court after conducting a thorough examination of the relevant application (Article 55) a legitimate child is a child born in or as a result of a legitimate marriage. Whereas if the marriage is unregistered, then the clarity regarding the status of the child will only have a civil relationship with his mother and his mother's family.

So the state must be present in maintaining and protecting, one of which is by taking preventive measures to encourage socialization by policy makers as an effort to protect the law for its people to avoid victims of unregistered marriages. Supreme Court Regulation Number 1 of 2015 concerning Integrated Services for Mobile Courts of District Courts and Religious Courts/Sharia Courts in the Framework of Issuing Marriage Certificates, Marriage Books, and Birth Certificates which is a collaboration between the Population and Civil Registry Office, Religious Courts and the Office of Religious Affairs to facilitate the community in marriage confirmation. Technically, the implementation of the trial is only attended by a single judge, then the marriage confirmation decision is given to the KUA to issue a Marriage Certificate, then the Marriage Certificate data is submitted to the Population and

Civil Registry Office to issue Family Cards and Child Birth Certificates. 11 This convenience must of course be balanced with accuracy and precision by officers as in the Technical Guidelines so that there is no legal smuggling in cases of facilitating polygamy.

The issuance of the Supreme Court Regulation (Perma) is in response to the challenges of the times to facilitate people who are hampered by costs, distance and time in completing marriage registration and birth registration which is done simply, quickly and at low cost. Because basically everyone has the right to receive legal recognition without discrimination. Including the right to form a family and the right of children to self-identity which is manifested in a birth certificate. Likewise, the *isbat nikah* for unregistered marriages which are legalized by the Religious Court with the intention of organizing administration and having legal force.

The purpose of Child Protection is all activities to guarantee and protect children and their rights so that they can live, grow, develop and participate optimally in accordance with human dignity and honor, and receive protection from violence and discrimination. 13 Meanwhile, Children's Rights are part of human rights that must be guaranteed, protected, and fulfilled by parents, families, communities, countries, governments and local governments.

Children's rights in the family are included in Article 14 of Law Number 35 of 2014 paragraph (1), which states that every child has the right to be cared for by his/her own parents, unless there are valid reasons and/or legal regulations that show that the separation is in the best interests of the child and is a final consideration.

The status of children in unregistered marriages should naturally be protected, not left without any alternative solutions. The correction made by the Constitutional Court (MK) through Decision Number 46/PUU-VIII/2010 (check) regarding the Testing of Article 43 paragraph (1) of the UUP opens up a new horizon regarding the status of children in unregistered marriages. The decision can be concluded that children born outside of marriage not only have a civil relationship with the mother and her family, but also have a civil relationship with their biological father. 21 If only referring to the civil/lineage relationship with the mother and the mother's family, all child maintenance costs will also be transferred to the mother and the mother's family alone, so that the husband does not share the legal obligation to maintain, care for and finance the

child, as a result the mother cannot claim the right to the husband's obligation to provide physical and spiritual support and costs to care for and maintain the child.

Another problem with the provisions of Article 43 paragraph (1) of the Marriage Law, apart from causing legal uncertainty between the child and his father, the absence of the child's origin will also cause a psychological burden on the child in social interactions for the child because of the lack of recognition or unclear status of the father. In fact, in medical science it is clearly impossible for a woman to become pregnant without first meeting between spermatozoa and ovum, through sexual intercourse or other means that can bring spermatozoa and ovum together until fertilization occurs. Therefore, it is very unfair and inappropriate if the law decides that a child born from a husband-wife relationship is only related to the mother.

CLOSURE

Marriage must fulfill the pillars and requirements so that the marriage can still take place. Article 14 of the Compilation of Islamic Law explains that the implementation of a marriage must include a prospective husband, prospective wife, marriage guardian, two witnesses, *ijab* and *kabul*. Article 2 of Law 1/1974 paragraph (1) states that "a marriage is valid if it is carried out according to the laws of each religion and belief", while paragraph (2) states "every marriage is recorded according to the applicable laws and regulations". A marriage that is only carried out based on the provisions of religious law and customary law is considered valid, but is not complete if it is not registered before a Marriage Registrar, which results in the marriage being categorized as a secret marriage, and has no legal certainty regarding the marriage. Other purposes of registering a marriage are (1) to regulate the administration of marriage; (2) to guarantee the rights to obtain birth certificates for children, make Identity Cards, make Family Cards, obtain inheritance rights; (3) to provide certainty and protection for the status of husband, wife and children; (4) provide protection for marital status; (5) provide protection for civil rights resulting from marriage.

Legal protection for children resulting from unregistered marriages can be obtained based on the Constitutional Court Decision Number 46/PUU-VIII/2010 which states that illegitimate children have a civil relationship with their biological father as long as it can be proven by science. The proof carried out does not consider

whether the parents' marriage is valid or not, but only focuses on protecting the child's rights. With the proof, the child has a civil relationship with his biological father and the child has the right to inherit his biological father's property. Legal protection for children resulting from unregistered marriages can also be obtained by carrying out *Itsbat Nikah* or Validation of the parents' marriage at the Religious Court.

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