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The Child Custody Status from Unregistered Marriage: An Islamic Law on The Basis of Constitutional Court Decision

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ABSTRACT

Unregistered marriages have an impact on the marriage itself and on the children born caused its marriage. Even though every child is sacred born and without a sin. A child cannot choose to be born from which parents, nor they can choose to be born from the marriage of their parents. Therefore, a child must be given the protection of their human rights and other rights by their parents, family and the state. The objectives of this research is to find out the child custody status from unregistered marriage on Islamic law in Indonesia. The method used in this research is juridical-normative approach (positive law). The data collection used was classified based on each title. The result of this research showed that the law of unregistered marriage is the same as the law of legal marriage, as regulated in Article 2 paragraph (1) on Law No. 1/1974 regarding of marriage. However, the status of unregistered marriage is still not recognized by Indonesian law, which has been regulated in Article 2 paragraph (2) on Law No. 1/1974. Otherwise, the children status of parents who have unregistered marriages, their status is still not recognized by Law and their custody rights over their mother and mother's family. However, according to Islamic law, the child custody status remains to their parents. The decision of the Constitutional Court will establish the existence of jurisprudential law to realize legal certainty regarding the legal position of children out of wedlock so that they obtain complete legal protection from their parents.

Keywords: *Islamic Law, The Child Custody Status, Unregistered Marriage*

INTRODUCTION

Every human being created by God aims to live a life related to one another. Life in the world is not only regulated by state law, it is also regulated by God's Law, one of which is marriage. Physical and spiritual preparation is an important point before getting married. The couple who are married must have the same vision and mission, which aims to make their marriage happily ever after. Marriage is an agreement between a man and a woman in accordance with legal and religious provisions to create a new family. Creating a happy family and having children is a God's sign for married couples. Unfortunately, everyone cannot legally marry under the state law. There are some people whose marriage is not registered under state law but it is still legal in religious law, especially in Islamic law. Unregistered marriage has two perceptions on the society, there are secret marriage and the marriage which not registered in government system.

According to Hanafi, Maliki and Syafi'i statement on Fiqih Maliki, unregistered marriage is a requisition from the groom and several witnesses to keep his marriage a secret even to his own relatives. They also stated that this marriage is not allowed in any faith. This statement is based on Umar Ibn Al-Khattab situation at that time, there was a wedding that was not attended enough by the witnesses and it caused his anger. Umar's opinion about marriage that if it is lack of the witness is an invalid marriage whether in Islamic law. The definition of unregistered marriage is quite different among the era. Nowadays, unregistered marriage only requires a few witnesses, the marriage is legal according to Islamic law, it's just that the marriage is not recognized as legal by state law. Meanwhile, in ancient time, the marriage which is lack of witness is invalid marriage and it can be an adultery.

According to Sayyid Sabiq in Fiqh Sunnah, *hadhanah* is taking care of children, whether they are male or female who have grown up, but have not been *tamyiz* without giving orders to them, make something that can be a good thing for them, protect them from something that can hurt and damage them, educate them physically, spiritually and intellectually. Therefore, they are able to stand on their own to face life and take on responsibilities.¹ Meanwhile, *tamyiz* is psychological condition of the children in praying and fasting. There is a God's law about the child custody status to whom had parents are in unregistered marriage.

In the previous statement, the children status of parents who have unregistered marriages, their status is still not recognized by Law and their custody rights over their mother and mother's family. However, according to Islamic law, the child custody status remains to their parents, but the child custody status is disapproval in state law. Based on *Maqashid Syariah* regarding of the child custody status in

¹ Levi Winanda Putri and Anis Hidayatul Imtihanah, "Hak Hadhanah Anak Yang Belum Mumayyiz Kepada Ayah Kandung Perspektif Hukum Islam," *Jurnal Antologi Hukum* 1, no. 2 (December 31, 2021): 132–144, <https://ejournal.iainponorogo.ac.id/index.php/antologihukum/article/view/305>.

unregistered marriage had many disadvantages for the children itself because it does not fill the principles of *Maqashid Syariah*.²

The child custody status caused from unregistered marriage in Islamic law, they have no relationship, financial material, inheritance rights, child caring and guardianship from their father. Marriage has two aspects that must be considered, that is its implementation which must be in accordance with religious law and applicable legal norms and the marriage obtains legality. Marriage is considered valid, not only fulfilling the requirements as determined by religion, but the marriage must also be registered in authorized agency. Unregistered marriage when referring to the discussion in Fiqh is a marriage whose conditions are not fulfilled, such as the absence of a guardian from the bride, the absence of witnesses or the marriage is deliberately secret from the public. An unregistered marriage will remove the rights of the wife and children who are born and they do not receive the legal protection. The civil relationship in question includes the child's lineage rights linked to the father and mother, the right to fulfill a living for the child, the right to care and education (*hadhanah*), the right to inherit, the right of marriage guardianship for the father over the daughter and other civil rights. Unlike the case with a relationship outside of marriage, it does not have any legal consequences, a man and a woman who have had a relationship outside of marriage, they do not get the legal protection because they have violated the law.

Positive law in Indonesia distinguishes between legitimate descendants and illegitimate descendants. The legitimate descendants are based on a legal marriage in the sense of deep descent or as a result of a legal marriage, while illegitimate descendants are descendants that are not based on an illegitimate marriage are called illegitimate children. The children born outside a legal marriage only have a relationship with their mother and the child does not have any rights from their biological father. Unfortunately, in Indonesian society divides children into three kinds of birth status, such as children born in parents which has a legal marriage; children born in parents which has an unregistered marriage, and the children born out of wedlock.

The Constitutional Court Decision

The presence of children is also important to improve the quality of married life. Basically, every child born, they come from the sperm of a man and that man will be their biological father because there is a blood relationship between him and the child who was born. Based on the Marriage Law in Indonesia concerning civil law, the relationship between a child with a father can be recognized, if the child is a biological child from the legal marriage of his parents. This law's article causes legal uncertainty and disadvantage for the woman whose marital status is an unregistered marriage. One of the disadvantages is that children born out of wedlock, they do not have a legal authority and often receive discriminatory

² Ahmad Al-mursi Jauhar Husain, *Maqashid Syariah*, Cetakan Ke. (Jakarta: Amzah, 2017).

treatment from the society.³ Therefore, the Constitutional Court considers that children born out of wedlock should receive legal maintenance and fair legal certainty, even though the validity of their parents' marriage is still being disputed. It is done because children who have been born into the world are not guilty of their birth status even though their parents' marital status is still not legally registered. Unfortunately, society's perspective on children from unregistered marriages cannot just disappear. However, this can be prevented if the two couples do not have sex when their marriage law is still not registered with the relevant institution.

In modern times, the Constitutional Court assumes that proof of a child born from an extramarital relationship can be tested for DNA (Deoxyribo Nucleic Acid). DNA testing is only used as a last resort in proving whether the child is the son of a man who has a relationship with his mother whether the man is legally married or not. The marriage is considered valid according to religion and law if the marriage is officially registered in a state institution, namely the KUA (Religious Affairs Office) for Muslims and DISDUKCAPIL (Civil Registry Service Office) for non-Muslims. The objectives of this research is to find out the child custody status from unregistered marriage on Islamic law in Indonesia.

RESEARCH METHODOLOGY

This research is based on legal systematics, certain methods and thoughts which aims to find out certain legal signs. The research method is the procedure in a research conducted by a researcher which includes research techniques and procedures. This research used library research. Library research itself means identifying and finding relevant information or data; analyzing what we find; and then developing and expressing our ideas.⁴ The main object of library research is various books related to research discussions. In collecting data, the author used a juridical-normative approach. The juridical-normative approach is an approach that is based on the main legal material by examining theories, legal principles and law regulations related to this research. This approach is also known as the library approach, that is the approach by analyzing the book contents, law regulations and documents related to this research. The source of data can be numbers, images, words, figures, facts or ideas. The data cannot be understood before we interpret it into meaningful information. The source of data is classified into two types, there are primary data and secondary data. The data in this research gathered through primary data and secondary data as completing data in a research. The primary data

³ President of The Republic of Indonesia, "Intruksi Presiden Republik Indonesia Nomor 1 Tahun 1991 Tentang Penyebarluasan Kompilasi Hukum Islam," in *State Secretariat Removal Gazette 1991* (Jakarta, 1991), 2.

⁴ Milya & Asmendri Sari, "Penelitian Kepustakaan (Library Research) Dalam Penelitian Pendidikan IPA," *Natural Science: Jurnal Penelitian Bidang IPA dan Pendidikan IPA* 6, no. 1 (2020): 41–53, <https://core.ac.uk/download/pdf/335289208.pdf>.

in this research is Quran and Hadees about the child custody status born from an unregistered marriage couple which is regulated also in on Law No. 1/1974 Article 43 Paragraph (1). The secondary data of this research is the implication of Constitutional Court Decision No. 46/PUU- VIII/2010 about unregistered marriage. The other secondary data are theories in books, documents, scientific writings related to the title of this research.

LITERATURE REVIEW

Legal Protection Theory by Philipus M. Hadjon

Legal protection is the protection of the dignity and worth, as well as the recognition of human rights owned by legal subjects based on legal provisions from the authorities. According to Philipus M. Hadjon, there are two kinds of legal protection for the people, namely (1) preventive legal protection and (2) repressive legal protection. The statement from Philipus M. Hadjon makes it easier in analyzing the legal protection because there are at least two people who get the legal protection, which is focused on one person. The concept of legal protection for the status of children from relationships outside of marriage stated by Philipus M. Hadjon is very relevant to be used in examining the principles of legal protection of children out of wedlock, especially the protection of their civil rights.⁵ Meanwhile, according to Soerjono Soekanto, legal protection is basically a protection given to the legal subjects in the form of legal instruments. There are several elements that need to be considered in legal protection, such as (1) there is government protection for its citizens, (2) there is a guarantee of legal certainty, (3) it is related to the rights possessed by citizens, and (4) there are punitive sanctions against the party who violates it.⁶

Legal Theory of Child Protection by J.E Doek and H.M.A. Drewes

According to J.E Doek and H.M.A Drewes on the legal definition of child and adolescent protection based on in jengdrecht definition. They divide it into two meanings, namely (1) in a broad meaning, child protection law is all the rules life that provides protection to those who have not adults and provide an obligation for them to develop and (2) in a minor meaning, child protection law includes legal protection contained in the provisions of civil law (regles van givilrecht), criminal law provisions (regles van stafredit), procedural law provisions (reglen van

⁵ et al Philipus M Hadjon, *Pengantar Hukum Administrasi Indonesia* (Yogyakarta: Gadjah Mada University Press, 2019).

⁶ Dede Muhammad Gufron, "Unregistered Marriage and the Legal Impact, A Book Review 'Kepastian Hukum Perkawinan Siri Dan Permasalahannya' Zainuddin SH MH & Afwan Zanuddin SH MH, Deepublish Yogyakarta, 95 Pages, ISBN: 978-602-435-120-1," *Indonesian Journal of Advocacy and Legal Services* 3, no. 2 (September 30, 2021): 257–262, <https://journal.unnes.ac.id/sju/index.php/ijals/article/view/34776>.

telijkeregels).⁷ Meanwhile, according to Shanty Dellyana about the child protection is an effort to make themselves in providing protection for children so that they can carry out their rights and obligations in the future.⁸

Theory on the Application of Law in the Norms of Constitutional Court Decisions by Hans Kelsen

The legal theory put forward by Hans Kelsen against the decision of the Constitutional Court No. 46/PUU-VIII/2010 relating to the background, legal basis, legal considerations and the scope of the decision of the Constitutional Court, the defendant's request against the norms contained in Article 43 Paragraph (1) has violated the basic norms contained in the 1945 Constitution, namely Article 28B Paragraph (2).⁹ Meanwhile, the legal considerations by the judges of the Constitutional Court to abolish Article 43 Paragraph (1) of the Marriage Law because it is contrary to the basic norms contained in Article 28B Paragraph (2) of the 1945 Constitution have been appropriate.

RESULTS AND DISCUSSION

The researcher used the legal protection theory by Philipus M. Hadjon as the first theory. He stated that legal protection is Legal protection is the protection of the dignity and worth, as well as the recognition of human rights owned by legal subjects based on legal provisions from the authorities. According to Philipus M. Hadjon, there are two kinds of legal protection for the people, namely (1) preventive legal protection and (2) repressive legal protection. The statement from Philipus M. Hadjon makes it easier in analyzing the legal protection because there are at least two people who get the legal protection, which is focused on one person. The concept of legal protection for the status of children from relationships outside of marriage stated by Philipus M. Hadjon is very relevant to be used in examining the principles of legal protection of children out of wedlock, especially the protection of their civil rights. The meaning of this statement is the legal position of children out of wedlock in obtaining their civil rights is very weak, especially in the case which there is a man who should be the biological father of the child, but he does not want to admit that the child is related his relatives. That problem can be solved through a legal mechanism based on IPTEK (Science and Technology) or using

⁷ Robbi Sitompul, Roswita; Alesyanti; Hartono; Rahim, "Legal Protection for Children Born from Unregistered Marriage in Medan City and Its Socialization Through Website," *International Journal of Engineering & Technology* 7 (2018): 246–250, <https://penelitian.uisu.ac.id/wp-content/uploads/2018/08/IJET-14685-1.pdf>.

⁸ Maria Yuniana Restuningtyas, "Gender-Based Violence: How Child and Women Are Protected?," *Law Research Review Quarterly* 7, no. 3 (2021): 269–284, <https://journal.unnes.ac.id/sju/index.php/snh/article/view/48160>.

⁹ Chatib Rasyid, "ANAK LAHIR DILUAR NIKAH (SECARA HUKUM) BERBEDA DENGAN ANAK HASIL ZINA Kajian Yuridis Terhadap Putusan MK NO. 46/PUU-VIII/2010," in *Seminar Status Anak Di Luar Nikah Dan Hak Keperdataan Lainnya* (Semarang: IAIN Walisongo, 2012).

other legal evidence. In this weak position, children out of wedlock are required to get protection from the government, both preventive and repressive protection.

The second theory used by the researcher is legal theory of child protection by J.E Doek and H.M.A. Drewes. According to J.E Doek and H.M.A Drewes on the legal definition of child and adolescent protection based on in jengdrecht definition. They divide it into two meanings, namely (1) in a broad meaning, child protection law is all the rules life that provides protection to those who have not adults and provide an obligation for them to develop and (2) in a minor meaning, child protection law includes legal protection contained in the provisions of civil law (regles van givilrecht), criminal law provisions (regles van stafredit), procedural law provisions (reglen van telijkeregels). Based on this statement, the researcher state that unregistered marriages have an impact on the marriage itself and on the children born caused its marriage. Even though every child is sacred born and without a sin. A child cannot choose to be born from which parents, nor they can choose to be born from the marriage of their parents. Therefore, a child must be given the protection of their human rights and other rights by their parents, family and the state. A child born within the territory of NKRI (the Unitary State of the Republic of Indonesia) which has Pancasila as the basis of the state, the state should provide legal protection for children born from registered marriages.

The last theory used by the researcher is theory on the application of law in the norms of constitutional court decisions by Hans Kelsen. The legal theory put forward by Hans Kelsen against the decision of the Constitutional Court No. 46/PUU-VIII/2010 relating to the background, legal basis, legal considerations and the scope of the decision of the Constitutional Court, the defendant's request against the norms contained in Article 43 Paragraph (1) has violated the basic norms contained in the 1945 Constitution, namely Article 28B Paragraph (2). Meanwhile, the legal considerations by the judges of the Constitutional Court to abolish Article 43 Paragraph (1) of the Marriage Law because it is contrary to the basic norms contained in Article 28B Paragraph (2) of the 1945 Constitution have been appropriate. Based on this statement, the researcher state that Constitutional Court Decision No. 46/PUU-VIII/2010 on February 17, 2012 concerning children out of wedlock is a legal breakthrough for the realization of perfecting the legal position of children out of wedlock regulated in the Marriage Law which has not been completed.¹⁰ On the other hand, the children out of wedlock are expected to grow and develop like other children properly, especially in getting attention from their biological fathers. The basis for consideration of the Constitutional Court Decision is to provide legal protection to children out of wedlock, especially regarding the relationship with their biological father.¹¹ The decision of the Constitutional Court

¹⁰ Ibid.

¹¹ Muhammad Tahir Azhary, "HUKUM PERKAWINAN ISLAM DAN UU NO. 1 TAHUN 1974," *Jurnal Hukum & Pembangunan* 17, no. 1 (June 14, 2017): 49, <http://jhp.ui.ac.id/index.php/home/article/view/1224>.

will establish the existence of jurisprudential law to realize legal certainty regarding the legal position of children out of wedlock so that they obtain complete legal protection from their parents.

CONCLUSION

Unregistered marriages have an impact on the marriage itself and on the children born caused its marriage. Even though every child is sacred born and without a sin. A child cannot choose to be born from which parents, nor they can choose to be born from the marriage of their parents. Therefore, a child must be given the protection of their human rights and other rights by their parents, family and the state. The Constitutional Court Decision No. 46/PUU-VIII/2010 on February 17, 2012 concerning children out of wedlock is a legal breakthrough for the realization of perfecting the legal position of children out of wedlock regulated in the Marriage Law which has not been completed. On the other hand, the children out of wedlock are expected to grow and develop like other children properly, especially in getting attention from their biological fathers. The basis for consideration of the Constitutional Court Decision is to provide legal protection to children out of wedlock, especially regarding the relationship with their biological father. The decision of the Constitutional Court will establish the existence of jurisprudential law to realize legal certainty regarding the legal position of children out of wedlock so that they obtain complete legal protection from their parents.

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