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Legal protection children of Siri Marriage in Indonesia

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Abstract. The founders on state have agreed that state protects the entire nation and entire homeland of Indonesia (Paragraph IV of Preamble to 1945 Constitution). The phrase protecting the whole nation has a very broad meaning, including protection against threats from within and from outside the country, as well as protection of human dignity as God's creatures. Such protection must be provided without distinction between men and women, young and old, as well as adults and children must receive the same treatment. The legal protection of civil rights children resulting from unregistered marriages is still very weak, because the Marriage Law does not regulate legal protection of children resulting from unregistered marriages. Whether or not there is legal protection must depend on recognition of biological father, or a notarial deed must be made. The struggle through the Padlan institution also has not given maximum results, because it only wins on paper, but it is not easy to implement. Therefore, it is necessary for state, with political will to make changes Marriage Law, which recognizes that children resulting from unregistered marriages have a civil legal relationship with their biological father.

Keywords. Legal protection; children; marriage

Introduction

The founders on state have agreed that state protects the entire nation and entire homeland of Indonesia (Paragraph IV of Preamble to 1945 Constitution). The phrase protecting the whole nation has a very broad meaning, including protection against threats from within and from outside the country, as well as protection of human dignity as God's creatures. Such protection must be provided without distinction between men and women, young and old, as well as adults and children must receive the same treatment.

Legal protection for children must be given from the womb until the child is born in the world. Children have the same rights in law as adults in general, so that legal protection is protection against children from all types of threats or treatment that is not in accordance with the rule of law and human dignity. The state's obligation to protect children is a consequence of Indonesia's adoption of the rule of law, as stated in Article 1 paragraph (3) of 1945 Constitution of the Republic of Indonesia, which is stated in the sentence: "Indonesia is a state of law".[1]

The existence of children resulting from unregistered marriages in Indonesia is like an iceberg phenomenon, which appears on the surface not as big as it actually is. This fact is partly due to the existence of unregistered marriages, which are carried out by Indonesian Muslims by fulfilling the pillars of marriage and their conditions, but are not registered by the 1974 UUP [2]. Siri marriage is indeed permitted by the state and Islamic religious law which is the religion

of the majority of Indonesian citizens. However, many births of children out of wedlock are not based on legal marriages either according to religion or state law.

In civil law, children born from unregistered marriages only have a civil legal relationship with the mother and her mother's family. This means that child has no civil relationship with biological father and his family. Such a phenomenon is certainly very detrimental to children born from unregistered marriages, because to obtain civil rights from their fathers, it must be done with a tiring struggle, either through deliberation or through legal channels.

The demand for guaranteed legal protection for children born from unregistered marriages is increasingly prominent in Indonesia, especially after Indonesia enacted Law Number 23 of 2002 concerning Child Protection, as amended by Law 35 of 2014 and Law Number 17 of 2016.

An artist, Machica Mochtar, to obtain legal status of civil rights of her child as a result of her marriage with Mordiono as a biological father who married her in a serial manner through a judicial review of Article 2 paragraph (2) and Article 43 paragraph (1) of Law Number 1 of 1974 concerning. The marriage to Constitutional Court on February 17, 2012, was an important moment for the recognition of civil law relationship between the children of the unregistered marriage and their biological father. Because the petition for judicial review was granted by Constitutional Court, through Decision Number: 46/PUU-VIII/2010. However, the decision has not provided legal certainty regarding the related law, because Mordiono's family has not or did not obtain recognition from his family as his biological father, which means that civil law relationship with his biological father and his family has not been realized. But at least based on decision of Constitutional Court, the child of an unregistered marriage no longer only has a civil relationship with mother and her mother's family, but also has a civil legal relationship with biological father and his family. Based on the background description as described above, the problems can be stated as follows: Legal protection for children resulting from unregistered marriages in Indonesia.

Research Method

This research is a normative legal research.[3]

Research Results and Discussion

Legal Protection Efforts Against Children Out of Wedlock

The status of children in Law Number 1 of 1974 concerning Marriage (Law on Marriage) is not regulated in detail, as well as in Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage. The Marriage Law only regulates the status of children born in legal marriages who are recognized as legitimate children, while children born from marriages and adopted children or adopted children are not clearly regulated in two laws and regulations.[4]

The definition of a legitimate child, in Article 250 of the Criminal Code, is formulated: "Every child who is born or raised during marriage, has husband as father". However, children born out of wedlock are still recognized as legal children, as long as the child is recognized by his father or mother or recognized by his father and mother. This arrangement is contained in provisions Article 272 of the Criminal Code, which is formulated: "Except for children who are conceived in adultery or each child born out of wedlock, and then the marriage father and mother will be valid, if two people before marriage have recognizes child according to the provisions of law or if recognition is made in a separate marriage certificate.

In Marriage Law, the definition of a legitimate child is contained in the provisions of Article 42, which is formulated: "A legitimate child is a child born in or as a result of a legal marriage". A legal marriage is a marriage that is carried out according to Marriage Law. Meanwhile, an illegitimate child is a child born outside a legal marriage, such as a child born from an unregistered marriage.

The status of children born outside of legal marriage is regulated in the provisions of Article 43 paragraph (1) of the Marriage Law, which is formulated: "Children born outside of marriage only have a civil relationship with their mother and their mother's family. The child has no civil law relationship with biological father and his family. If the child is born out of wedlock, and both parents do not recognize it, then child does not have a civil legal relationship with his parents. A similar provision can also be seen in Article 186 of Compilation Islamic Law on Inheritance, which stipulates that: "Children born out of wedlock only have an inherited relationship with their mother and their mother's family.

Recognition as a Legal Protection Effort for Children from Siri Marriage

Legal children according to law are dream of every child who is born. However, the fact is that not all children born automatically obtain legal status according to law, such as children born from unregistered marriages only have a civil legal relationship with the mother and her mother's family. An illegitimate child, in order to have a civil legal relationship with his father, the child must obtain recognition from his father. Children out of wedlock who have been recognized can be legalized or become legal children, if both parents (who breed them) then carry out a legal marriage. However, the acknowledgment of a child out of wedlock is *personalijk*, meaning that civil relationship only exists between child outside of marriage who is recognized and the parents who acknowledge it. Meanwhile, with relatives who admit it, there is no relationship." [5]

According to KUHPdt. a child may not only have no civil relationship with father, but also have no civil law relationship with his mother. The sense that between child and mother who gave birth to him and his biological father there is no civil relationship at all, so that a child does not have the right to ask for support, obtain inheritance rights, demand that his father become a guardian and other civil rights. The civil law relationship between child and mother will only occur if mother recognizes the child as her child.

The mother's acknowledgment of her child must be carried out in certain procedures, which according to Article 281 of Criminal Code, must be carried out with a separate authentic deed (a notarial deed), and if it has not been recorded in child's birth certificate or at the time of marriage, the recognition. This can be done with a deed made by the Civil Registry Officer (*ambtenaar bij de burgerlijk stand*). Recognition also aims to provide legal certainty for children resulting from unregistered marriages regarding the civil law relationship with their biological father. The purpose in law is not only to realize justice or benefit, but solely for legal certainty. According to Arif Gosita, legal certainty is sought for continuity of child protection activities and preventing abuses that have undesirable negative consequences in implementation of child protection.

Indirect child protection is an activity that is not directly aimed at children, but other people who carry out or are involved in child protection efforts. The law is grown and needed by humans precisely based on product of human judgment to create conditions that protect and promote human dignity and to enable humans to live a normal life in accordance with their dignity. According to 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 general provisions of authority or as a collection of rules or rules that will be able to protect something else.

Court Decision As An Effort To Obtain Inheritance Rights Of Children From Siri's Marriage

One of the important aspects of whether or not there is a civil law relationship between children out of wedlock and their parents, especially to their fathers, is related to inheritance rights. According to inheritance legal system in Indonesia, the right to inherit children out of wedlock to their parents must be proven by a deed stating that child is result of a legal marriage between the parents. Regarding this inheritance right, the inheritance system in Indonesia has changed, and the change can be understood through the explanation of Article 55 of the Marriage Law, which stipulates: "If the origin of child cannot be proven by an authentic deed, then this will be determined by a decision competent court.[6]

The provisions in this article contain understanding that origin of child cannot be proven by an authentic deed, then to find out origin of the child must be done by submitting an application to Court regarding the origin of child. If the Court grants request for status of child in question, then legally based on Court's decision, the illegitimate child obtains a legal status regarding origin as basis for establishing a legal relationship with his parents, so that child has the right to inherit from his father.

Biological Factors as Evidence of the Civil Relationship of Children From Siri's Marriage with His Father

The civil relationship between a child and his father is the most basic and essential issue for a child resulting from an unregistered marriage. This is because the existence of a civil relationship will have civil legal consequences for children resulting from unregistered marriages against their fathers. In its development, the relationship of children resulting from unregistered marriages with their biological fathers is not solely due to existence of blood relations between children resulting from unregistered marriages with their fathers and their families. Thus, whether or not there is a civil law relationship between a child resulting from an unregistered marriage and his father, it can be done by proving existence of a blood relationship between two.[7]

Changes in the civil law system between children resulting from unregistered marriages and their biological fathers on the basis of blood relations, began with the granting of the petition for a judicial review of Article 2 paragraph (2) and Article 43 paragraph (1) of Marriage Law to Constitutional Court by Machicha Mochtar as Siri's wife from Mordiaono. The applicant is an unregistered wife who married Mordiono, who married him in 1993. The siri marriage was blessed with a son, but in 1998 the unregistered married couple agreed to separate.

Juridically based on provisions Article 2 paragraph (2) and Article 43 paragraph (1), child does not have a civil law relationship with biological father and his family. In connection with that, the applicant Machicha Mohtar wants a legal recognition by his father's family, that the child born from unregistered marriage is really child of his biological father. However, his father's family refused, saying that child was not Mordiono's biological son. To obtain legal certainty regarding status of his child, the applicant then submits a judicial already review two articles which determine that children born out of wedlock only have a civil legal relationship with mother and her mother's family.

After going through a series of examinations, finally the petition for judicial review was decided by Constitutional Court on February 17, 2012, which was stated in Decision Number: 46/PUU-VIII/2010 concerning Judicial Review of Article 2 paragraph (3) and Article 43 paragraph (1) of Law. Law Number 1 of 1974 concerning Marriage. The Constitutional Court's decision essentially recognizes that children out of wedlock have a civil legal relationship with their biological father. The judges of Constitutional Court granted request for judicial review of Machica Mochtar. Based on decision of Constitutional Court, children born from unregistered marriages have civil rights with their biological father and their father's family.

Decision Number 46/PUU-VIII/2010 is an effort to reform the system of civil legal relations between children resulting from unregistered marriages with biological fathers and their families, which initially did not have a civil legal relationship, and with this decision, children resulting from unregistered marriages are legitimate biological children of father, and has a civil law relationship with the father and his family. Therefore, biological fathers must be responsible for civil obligations to their children. Likewise, wife who is married in a siri can also sue the man who marries siri to provide for their children.

This affirmation is contained Constitutional Court Decision Order Number: 46/PUU-VIII/2010, which states: "Children born out of wedlock have a civil relationship with their mother and their mother's family as well as with a man as their father which can be proven based on science and technology. technology and/or other evidence according to law have blood relations, including civil relations with the father's family." Thus, the Constitutional Court's decision simultaneously serves as a legal umbrella for children resulting from unregistered marriages to officially obtain civil rights from their biological fathers.

Since decision of Constitutional Court, all children resulting from unregistered marriages in Indonesia have a civil legal relationship with their biological father and family. However, considering that decision requires of use technology to prove existence a blood relationship, the proof must be done using a DNA test. With Decision of Constitutional Court Number 46/PUU-VIII/2010, all children resulting from unregistered marriages have the right to take care of all their identities accompanied by their father's name, for various purposes such as entering educational institutions or other formal institutions.

In addition, related to civil rights, legitimate children have the right to have a birth certificate which is regulated in Law Number 24 of 2013 concerning Amendments to Law Number 23 of 2006 concerning Population Administration. A birth certificate an official registration of a child's birth certificate by the State. A birth certificate is a permanent and official document for a person, which contains a complete identity and becomes a source of administrative information for children to adulthood. The issuance a birth certificate is also has a result of an agreement with Convention on the Rights of Child, which in Article 1, stipulates that every child must be registered immediately after his birth.

A birth certificate is a very important document to protect a valid personal identity and other rights. Ideally, birth certificates are part of an effective civil registration system that recognizes a person's existence and legal identity, enforces the child's family ties, keeps track of important events in a person's life, from birth, marriage, and death. The data recorded should include the place and date of birth, name and gender child, the address and nationality of parents.

Problems faced by children resulting from unregistered marriages, as well as mothers, to obtain blood samples for the purposes of DNA testing, in an effort to prove the existence of a blood relationship between children resulting from unregistered marriages and their biological fathers, namely if biological father and or his family refuse to be asked to provide a blood

sample. If this happens, DNA test will fail. Thus, even though Machica Mochtar was legally won, in fact the decision was difficult to implement.

As a critical note on legal efforts to obtain legal child status through judicial institutions, in this case the Constitutional Court, only gives false hope to justice seekers. This is because in reality seeker of justice only wins and gains recognition as legitimate child of his biological father from an unregistered marriage, but at the level of implementation it is difficult to implement. Meanwhile, the judiciary that decides the applicant for justice does not have a legal instrument that can enforce the execution of decision judicial institution.

In order to provide legal protection for children resulting from unregistered marriages, amendments should be made to the provisions of Article 43 paragraph (1) of the Marriage Law, by reconstructing the article, by making changes to the formulation by adding two more paragraphs, namely (paragraph 2) and paragraph (3) with the sentence paragraph (2) "Children born outside a legal marriage have a civil legal relationship with the biological father and his family, as long as it can be proven to have blood relations with his father. Meanwhile, paragraph (3) with the sentence "for the benefit of a child born outside a legal marriage, father or family of biological father is obliged to provide a blood sample for the purpose in proving the existence, such a biological relationship.

The change in provisions article is of course taking into account the human rights of children as human beings who have human dignity and worth. In addition, children are a gift from God Almighty whose presence is not desired by children, and birth children in the world is due to mistakes of their parents. Therefore, the state must be present in providing solutions or alternative solutions to problems in an effort to provide legal protection for children out of wedlock. This effort can be done by reconstructing several articles in Marriage Law.

At least with legal recognition of children resulting from unregistered marriages through changes to the Marriage Law, it can educate the related community, especially men who will carry out unregistered marriages. Marriage is basically a noble legal act, as emphasized in Article 1 of Marriage Law, that marriage is an inner and outer bond between a man and a woman with the aim of forming a happy and eternal family (household) based on One Godhead. So, marriage is sacred, not a game for legality of mere biological lust, but a noble husband and wife bond.

Conclusion

The legal protection of civil rights children resulting from unregistered marriages is still very weak, because the Marriage Law does not regulate legal protection of children resulting from unregistered marriages. Whether or not there is legal protection must depend on recognition of biological father, or a notarial deed must be made. The struggle through the Padlan institution also has not given maximum results, because it only wins on paper, but it is not easy to implement. Therefore, it is necessary for state, with political will to make changes Marriage Law, which recognizes that children resulting from unregistered marriages have a civil legal relationship with their biological father.

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