

INDONESIAN MARRIAGE LEGAL SYSTEM CONSTRUCTION IN ORDER TO PROTECT CHILDREN FROM MARRIAGE LAW THAT IS NOT RECORDED

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Abstract

The legal system of marriage in Indonesia there are three kinds. First Indigenous legal the system, the Second the system of Islamic law, the three Western legal the system. Indigenous legal systems of marriage can still be found in the country of Indonesia both ritual of "consent granted" in the sense of legitimacy and ritual ceremonies that accompany the validity of the marriage procession still found many. the Second the Islamic legal system, the system is still alive in the community that the majority of Lampung population is Muslim. Third Western legal system applicable as positive law means the law in force at this time in the land of Indonesia. Results reveal that the construction of Customary Law, Islamic Law and Western Law all three protects the children born of the marriage unregistered. It's just the difference between Islamic law and Customary Law with Western Law is Islamic law and Customary law run by the community and not become positive law, so if there are problems in the implementation of Indigenous law and Islamic law, the positive law are powerless to solve it. Thus arises the various effects such as smuggling law, impunity, etc.. Marriage Act as part of the Law of the West in terms of the written law does not protect the children born of the marriage that is not recorded.

Keywords : Marriage Legal System

1. BACKGROUND

According to fiqh law, the original law of marriage is permissible, but can turn out to be Mandatory, turned into Sunnah, Haram, and could turn out to be Disapproved.¹ The law changes depending on the circumstances of the parties who have mukallaf, ie a person who has been given the burden of responsibility.² This is confirmed by the hadith of the prophet who advocated marriage, meaning ³ : “*O youth, if there are any of you that have been able (able) to marry then go married because marriage is more condescending eyes and maintain the honor*”. (*HR Al Jamaah from Ibnu Mas’ud, Ra*)⁴. The prophet hadith means that (1) marriage is worship and (2) is legally obligated to marry for the man who has been able to. Able means in the field of material and immaterial, among others, if one was not able to resist his lust and feared to commit adultery⁵. Marriage can be a shield guards the sanctity of self⁶ of reprehensible acts forbidden by Islam and that is the act with the nature of *fakhisyah*.⁷ Allah said that for people who can not afford to married he shall remain chaste (QS An-Nur: 33)⁸

Marriage is the right of every citizen that is part of human rights in accordance with free requirement of the prospective bridegroom. Inthe four Post amendment to the Constitution 45-Article 28 b paragraph (1) mentioned that every person is entitled to form a family and pursue a legitimate descendants through marriage.

¹ Azzam, Abdul Azis Muhammad dan Abdul Wahab Sayyed wahhas, 2009. *Fiqh Munakahat*. Jakarta: Amzah. see Amnawaty, 2009. *Hukum dan Hukum Islam*. Bandar Lampung: Universitas Lampung. Page 87

² *Ibid*

³ Abu Hafs Usamah bin Kamal binAbdir Razzaq. *Panduan Lengkap Nikah*. Bogor: Pustaka Ibnu Katsir. page 18. HR Bukhari, hadis No. 5066. Translated by Akhmad Saikhu.

⁴ Abu Zakki Akhmad, 1996. *Fiqh Wanita*. Jakarta: Rica Grafika. page 99

⁵ *Ibid*.

⁶ *Op. Cit.* page 19

⁷ *Ibid*. page 100

⁸ Ahmad Tohaputra, 1998. *An Nur Alqur’an dan terjemahan*. Semarang: Asy Syifa. page 282

The regulation of marriage registration obligations in the Qur'an can not be found, either a *goth'i* verse or *dhonni*. This situation lasted from the time of Prophet Muhammad until Islam entered the archipelago in around the 7th century AH or around the year the 1300 AD, so in the archipelago there are two legal systems namely customary law system, then the system of Islamic law. The second system is the unwritten law but the legal system is still living in the community (living law), including the Islamic marriage laws.

Given the nature of the UUP that unification in the middle of the citizens of this diverse religious communities, the UUP future cause some problems, especially in Muslim marriages. The main problem is the issue of the validity of the concept of marriage, marriage records system and the legal consequences arising from the marriage records systems, as well as the role of the PPN in an event "consent granted" for Muslims.

The legal system of marriage and marriage records for the Muslims in Indonesia is still a problem, because the two systems of law on the legal marriage law living in the community (living law) is Islamic law that does not require marriage records, and state law (state law) which require marriage records that collide. The concept of legitimate marriage is also different between Islamic law and state law. The legal culture of law enforcement agencies related to the implementation of the law marriage that is PPN or PPPN and religious court judges different from the legal culture. PPN officials and religious court judges to arbitrate legal statute, while the lawless society with Islam law marriage material.

In other words, changing the concept of the idea that marriage certificate is proof of regular administration, similar with the evidence of other administrative, and not the only evidence of a legitimate marriage. This situation has implications for the legal process in the courts during the conduct religious marriages proof is based on the marriage certificate only, not on the existence of the marriage laws of Islam in society. marriage certificate Position continues to be important for civil relationship other than marriage, but remains parallel with other information when dealing with marriage and inheritance.

Issuance of marriage act is based on evidence materil of Islamic marriage law, until the question of the validity of a marriage proof can be done with the proof materil. The main function of marriage act is not for the validity of a marriage, but to other civil law relationships outside of marriage in relation to third parties. Thus the act of marriage still needed but without removing or eliminating the marriage materil Islamic law.

A lot of people do a marriage that is not listed in reality. Many santris do a marriage that is not recorded, they assumed it is well enough to regard the marriage which is not recorded, because to avoid adultery. In the year 2004 to 2007 in the village of Kendal Wonodadi there are 213 valid marriage according to religion and state, as well as the 37 marriages recorded.⁹

2. PROBLEMS

The description of the background is how the construction of "existing" in the Indonesian legal system marriage of legal protection of child marriage that is not recorded?

3. RESEARCH METHODS

Penelitian ini dilakukan dengan pendekatan yuridis normatif dengan mengacu pada bahan hukum sekunder. Analisis data dilakukan dengan analisis kualitatif dan content analisis.

4. RESULTS AND DISCUSSION

1. The construction marriage and child legal systems according to the Book of the Law of Civil Law (KUHPerd)

Marriage and children have a very strong legal relationship. Therefore, discussing about child can not be separated from marriage. According to KUHPerd Article 26, marriage is simply a civil relationship and applies only to those who are subject to KUHPerd and those who submit to the regulations in KUHPerd. KUHPerd can not apply to the indigenous people who are Muslims, unless the person submit to the provisions of KUHPerd. This subject themselves to the Civil Code as embodied in Article 11 of Regulation AB, Article 75 (2) RR, 131 (2) IS namely:¹⁰

- a. To apply to the Civil Code of the West to Indonesian and Foreign Eastern

⁹ Muntaha, 2008. *Pernikahan yang tidak dicatatkan masyarakat Wonodadi Kecamatan Plantungan Kabupaten Kendal* Tesis S2, page 7.

¹⁰ Tamakiran S, 1992. *Asas-Asas Hukum Waris Menurut Tiga Sistem Hukum*. Bandung :Pionir Jaya, page 16-17

- b. To open group of Indonesia and Foreign Eastern to voluntarily submit to the Western Civil Law (Article 11 AB, Article 75 (3) PR, Article 131 (4) CI).

Book of Law Civil Law (KUHPerd / BW) marriage field profess azas monogamous absolutely, meaning in a marriage there is only one husband to one wife instead a wife to her husband. This is strictly regulated in Article 27 KUHPerd that content the same time that a man can have only one of the female as a wife and a woman has only one man as her husband¹¹. Although there is no polygamy does not mean there is no infidelity, therefore, KUHPerd gives the protection of children that born outside marriage. For a child born of adultery then there are preventive measures (prevention), the Civil Code (KUHPerd) provides solutions by classifying two kinds of out of wedlock children namely:

1. Children born from 6 months before the the marriage vows Wedding.

Children born of the marriage before one hundred eighty days from her parents marriage vows. This kind of children referred to children is illegal or illegitimate. Similarly, children born after three hundred days after his parents break the marriage (divorce) is a wholly void (Article 255 KUHPerd). According to Article 280 KUHPerd invalid child has the opportunity to be valid when both parents do the act that is the law of the competent authority in front confession, when his parents did not go to confession of course the children will be children without father and mother with the result of the ruling.

2. Children born outside of marriage that is not recognized by his father or his mother.

Children born outside marriage were not recognized by his father or his mother. According to the law the child does not have a mother.¹² According to Ali Affandi¹³ there are two kinds child born out of wedlock: first, child born of father and mother in whom there are no barriers between their marriages (*samenleven*). Second, child born of a father or mother prohibited for marriage for reasons determined by the law or if one of the father or mother married to somebody else bound (out of wedlock children version of The Civil Code).

Out of wedlock children is a child born from a mother who is fertilized by a male, while the male or female is still bound wedding. Status of the children born as adultery and incest are not permitted to be recognized by people who commit adultery, unless a dispensation from the president as stipulated in Article 283 KUHPerd which the contents is as follows:

All children fertilized in the incestuous or adultery never be recognized except to the latter what is specified in Article 273.

KUHPerd Article 272 states that unless the child fertilized in adultery or incestuous, each engendered child out of wedlock with his father and his mother married would be valid if the two of them before marriage according to the provisions or if the confession was made in the deed marriage itself¹⁴.

Admissions are confirmation of parents of children born outside marriage and verification can only be done with certainty KUHPerd Article 272, while confession arranged in KUHPerd Article 281 can be done in the following way:

1. Included in the child's birth certificate
2. In the parents' marriage certificate (if married then her parents)
3. In a deed made by the Civil Servants and then recorded in the register of births by date deed made earlier
4. In another authentic deed

Each interested person may demand that this confession was recorded in the child's birth certificate¹⁵.

The provisions of KUHPerd of Article 272 states that a child out of wedlock that can be recognized by the parents is a child born of a mother who fertilized by a man who is not married. However, if the married man, then the child can not be recognized and only have a legal relationship with the mother who gave birth to him only.

In connection with the inheritance of illegitimate child which his father and his mother can not get married because of proximity of blood relationship (son incestuous), and child outcomes adultery there is no possibility to be recognized by the father or mother. Such children are not entitled to the inheritance of his parents; the child is only entitled to recover the cost of his life alone. Invalid child only has a legal relationship with the parents to admit (Article 872 KUHPerd).

¹¹ Subekti dan Tjitrosudibio, 2001. *KUHPerd*. Jakarta:PT.Pradnya Paramita. page 8

¹² Affandi, Ali. 1986. *Hukum waris, hukum Keluarga dan hukum Pembuktian*. Jakarta:Bina Aksara.page40

¹³ *ibid*

¹⁴ *Ibid*.page 68

¹⁵ R.Subekti dan Tirtosudibio, 2001. *KUPerd dengan tambahan UU Agraria dan UU Pernikahan*.Jakarta:Pradnya Paramitha, page 69.

Illegitimate child be confirmed by his parents marriage or with confirmation letter then if the validation because of the wedding then his status is similar to children born of legitimate marriage. This means that it is entitled to full on heritage from his parents' omission as referred to in Article 916 KUHPerd which contents as follows:

Absolute part of the wedlock child who has been legally recognized by is half of the section that under the law originally had inherited in succession because of death¹⁶.

Status of children out of wedlock in terms of inheritance according to KUHPerd as follow:

If one of the blood relatives died with no relatives left in degrees that allow inheritance, and the husband and wife are living longer then the child out of wedlock entitled to claim inheritance for him to the exclusion of the country.

If verification is done by confirmation letter, then inheritance can not harm legitimate children before authentication is performed. With the clarification can be said about the status of an illegitimate child that can turn into a legitimate child when his parents acknowledged as long his parents are not ban on married according KUHPerd yo Article 273 Article 283.

The conclusion was that the Civil Code is a complete system of written law in terms of legal protection of children in recognition of children's rights such as the recognition of the status of children out of wedlock, except for the children of adultery and incestuous child to do the recognition by his parents with the permission of the president. The kids still get inheritance to children out of wedlock that recognized by parents and for the children of adultery gained the recognition of his parents getting a grant or prize possessions. KUHPerd regulation does not apply to Muslims unless they subject themselves to the Civil Code.

With being revised Article 43 of Law Wedding (UUP) by the Court of Constitution then the chances of getting a confession from the biological father can be done for his children incest and adultery, so that the prohibition in the KUHPerd can be skipped (though it still requires a process). Considering the the revised chapters are in scope UUP then all children, regardless of religion adopted the child, and the child has no clear legal status can apply for judicial confirmation by the state for those who are subject to KUHPerd and for the Muslim religious courts .

2. Construction of child protection system Law according to Islamic Law

a. Islamic law system of of child protection.

According to Islam, the child is a creation of God as contained in the Quran surah Al-Hajj verse 5:

وَعَبْرَ مُخَلَقَةٍ مُضْغَةٍ مِنْ نُّمِّ عَلَقَةٍ مِنْ نُّمِّ نُطْفَةٍ مِنْ نُّمِّ تُرَابٍ مِنْ خَلَقْنَكُمْ فَإِنَّا أَلْبَعَثُ مِنْ رَبِّ فِي كُنْتُمْ إِنْ النَّاسُ يَتَأَيَّهَا
مَنْ وَمِنْكُمْ أَشَدُّكُمْ لَتَبْلُغُوا ثُمَّ طِفْلاً نُخْرِجُكُمْ ثُمَّ مُسَىٰ أَجَلٍ إِلَىٰ نَشَاءِ مَا الْأَرْحَامِ فِي وَنُقَرُّ لَكُمْ لِنَبِينَ مُخَلَقَةٍ
عَلَيْهَا أَنْزَلْنَا فَإِذَا هَامِدَةٌ الْأَرْضِ وَتَرَىٰ شَيْئًا عِلْمٍ بَعْدَ مِنْ يُعَلِّمَ لِكَيْلَا الْعُمْرِ أُرْدَلِ إِلَىٰ يَرُدُّ مَنْ وَمِنْكُمْ يُتَوَفَّى
زَوْجِ كُلِّ مِنْ وَأُنْبِتَتْ وَرَبَّتْ أَهْتَرَّتْ أَلْمَاءُ

Meaning : Know then We have created you from dust, then from a drop of sperm, then from a clot, then from a lump of flesh, a perfect and an imperfect creation, so we explain to you and set in the womb, what we want until the specified time, then We bring you forth as infants, then (with fade) you came to manhood. (QSAI- Hajj:5)

¹⁶ Ibid .page 240.