



Legal Protection of Civils Rights on Childrens' Birth from the Unrecorded Marriage

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Abstract

Marriage is a rule to authorize the relationship of two different gender to become husband and wife. Sociologically, there are marriage that was done by religious law but was not recorded by the state even until it produced children. Law Number 1 from Year 1974 on Marriage confirms that marriage is valid if conducted according to the religion and registered as regulated on binding law.

This study aims to examine the law protection of civilization rights on childrens' birth from the unregistered marriage. Research methods is normative research with statute, conceptual, and case approaches. Conclusion, recording is one of the important aspects in marriage, if marriage is not recorded, even though it is legal based on the religious law, but in the state provision, marriage does not have the legal force. Furthermore, it is not recognized by the state because it does not have the right to manage all interests related to the state. Law protection on childrens' birth from the unregistered marriages can be taken by isbat nikah to legalize the marriage of their parents.

Keywords: Legal Protection; Children; Unrecorded; Marriage; Alimentation; Inheritance; Islamic Law

Introduction

Marriage is a very important phase in human life. In Indonesia, it is regulated in the Law Number 1 year 1974 concerning Marriage (hereinafter called Marriage Law). Article number 1 of the Marriage Law states that marriage is an inner bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on Belief in the one Supreme God. (Law of the Republic of Indonesia Number 1 year 1974 on Marriage).

Regarding the validity of marriage was stipulated in the Article Number 2 of the Marriage Law which states: (1) Marriage is legal if it was carried out according to the law of each religion and its beliefs, (2) Each marriage is recorded according to the applicable laws and regulations. From the provisions of the Article Number 2 paragraph (1) shows that if a marriage meets the requirements and the pillars of marriage or obedience have been carried out, then the marriage is legitimate in the eyes of religion and public trust. Furthermore, Article Number 2 Paragraph (2) states that legitimate marriage need to be ratified by the state by recording.

Marriage that has gone through recording contains benefit for the public, which means that the marriage protects the women's rights. According to the Indonesian positive law, unregistered marriages or underage marriages are not recognized at all by the state.

One of the purposes of marriage is to continue the descent by having children. Children are the mandate and gift from God (Wienarsih Imam Subekti and Sri Soesilowati 2005, 47), which inherits the dignity of a whole person. Every born child in the world has the same natural tendency as the Supreme God. This is as stipulated in the Article Number 28B paragraph (2) of the Constitution of the Republic of Indonesia from 1945 which states, "every child has the survival and development right and also protection right from violence and discrimination".

Marriage that was not recorded makes the child have no identity, because Law Number 23 from year 2006 concerning Population Administration as amended by Law Number 24 from year 2013 requires the submission of a birth certificate must be accompanied by marriage documents. Meanwhile, without a birth certificate the child will find it difficult to get a Citizenship Identity Card, passport, register for school and get inheritance.

B. The Obligations To Record Marriage Based On Indonesia's Positive Laws

According to the Law Number 1 from year 1974, marriage is based on religious law which is regulated in the Article number 1, "Marriage is an inner bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the belief in the One Supreme God.(Ibid)

Since the marriage took place, the position of man as husband and woman as wife has been appointed, and since that time husbands and wives also obtained certain rights and obligations in the marital ties. (Zahry Hamid, 1976, 55). Marriage creates legal consequences, among others, regarding the legal relationship between husband and wife, the form of marital property, position and status of the child, and the inheritance relationship. The emergence of the legal consequences of marriage can only be obtained if the marriage was done legally.

In the Article number 2 of the Marriage Law states that: 1) Marriage is legitimate, if it is carried out according to the laws of each religion and beliefs.(Hazairin 1986, 1), 2) Each marriage is recorded according to the applicable laws and regulations. From the provisions of the Article Number 2 paragraph (1) shows that if a marriage has fulfilled the requirements and the pillars of marriage, then it is legal in the eyes of religion and the public trust. Furthermore, the marriage that has been valid according to the religious law further in the Article Number 2 paragraph (2) needs to be ratified by the state by taking record book.

Saleh notes that (Wantjik Saleh 1976, 32) "It can be said that the recording of marriage aims to make it clear, both for the person concerned and for others, because it can be read in an official letter and contained in a special list provided, especially as an authentic written evidence."

Registration on marriage is very important since with registration, marriage will have benefits for the parties including: (Diana Silitonga and Lenny V Siregar, 2011, 420) (a) to determine the status of a child's birth in the marriage between husband and wife; (b) so that each side (both husband and wife) have the rights and obligations to each party and can make civil claims including the allotment of marital property; (c) as a control of polygamy, that can be seen if a person carries out a marriage on religion and belief in a place. Regarding the registration of marriage in the provisions of Article number 2 paragraph (2) on the Marriage Law, is further regulated in the Government Regulation Number 9 from year 1975

(hereinafter called as Government Ordinance Marriage) which is the implementing regulation of the Marriage Law. Articles relating to marriage procedures and records include Articles number 10, 11, 12 and 13.

Moreover, in the Compilation of Islamic Law (hereinafter called as CIL) Article number 4 mentioned that, marriage is legitimate if was done according to Islamic law in accordance with the Article 2 paragraph (1) of the Marriage Law. (Saidus Syahar 1981, 22) The purpose of marriage registration can be seen in the Article number 5 of CIL, which are; (1) in order to ensure marital order for the community, each marriage must be registered; (2) the registration of marriage was done by the Registrar of Marriage. In the Indonesian Marriage Law, marriage must be carry out and recorded by the Registrar of Marriage. If a marriage is not recorded, it has no legal force or administrative action.

If the description of CIL above is compared to the Islamic Marriage Law, it can be seen that there is a difference in terms of marriage registration. (Hasyimy 1995, 176). The Islamic Marriage Law does not require that a marriage should be recorded by a state institution, because in the era of the Prophet Muhammad, there was no government structure like nowadays. At that time, marriage had not occurred between different regions, prospective husband and wife were in the same area, so evidence on marriages other than witnesses are not needed (Ibid).

In Q.S Al-Baqarah verse 28, Allah SWT said, “O you who believe! When you contract a debt for a fixed term, record it in writing. Let a scribe record it in writing between you in (terms of) equity.” Based on this verse, it can be understood that recording is a written evidence. Although the recording order in the paragraph is related to a general agreement, it also applies to the issue of marriage. If the muamalah agreement (*akad*) is recommended to be recorded as evidence, then the marriage settlement as a solid and lasting commitment should be more than that (Ibid).

Based on the legal provisions that regulate marriage registration, it can be understood that marriage registration is an administrative requirement, which means that marriage is still legitimate, because the validity of a marriage is determined by the religious norms of the parties who execute marriage. Without recording, a marriage has no legal force (Ahmad Rofiq 2000, 110).

Therefore, the consequence if one party neglects its obligations, the other party cannot make legal efforts. This is by reason of no legitimate and authentic evidence from the marriage held by the couple. Manan also asserts that the function and position of recording marriage is to ensure legal order as an instrument of legal certainty, legal convenience and also as one evidence of marriage (Bagir Manan 2012, 157).

As a comparison on the urgency of recording marriage is Malaysia Law, on which it's law is based on Islamic Law, thus the regulation is using the Islamic Law, though there are partially legal sources adopted from the British Law product.

Malaysia's Law obliged the marriage recording after the *akad*, in practice the recorded process consist of three forms, are :

- a. To whom live in their respective country basically the recorded conducted soon after the *akad*, except for Kelantan District that regulated the recording is 7 (seven) days after the *akad*, testify by the trustee, two witnesses and the registrar
- b. To Malaysian that conducted the marriage in the Malaysia Embassy abroad, in principle, it is have the same process with the Malaysian that hold marriage in the country

- c. To Malaysian who live abroad and conducting the marriage in Embassy and Consulate General Offices, within six (6) months prior to akad, obliged the record their marriage in the nearest Embassy or Malaysia Consulate General Offices.

In the Law on Marriage and Divorced 1976 Act 164, the purpose of marriage recording is to confirm the pencatatan that concluded complete information of marriage that can be based to achieve the Marriage Deed and also can be used to conduct the lawsuit if the violation occurred in the marriage. The violation of this rule can be sanctioned i.e payment of certain amount of money or imprisonment.

C. Forms of Legal Protection towards the Civil Rights that Birth from Unrecorded Marriage

Unofficial marriage is then become a legal problem even though it is legal based on the religious law, but in the state provisions, it does not have legal force. A legal action that does not have legal force has no basis for the right to take care of all interests relating to the state since it is not recorded in the state's marital administration. The legal consequences of not registering marriage are: (a) marriage is considered invalid (b) although marriage is carry out based on the religion and belief, but in the eyes of the country it is considered invalid since it has not been recorded by the marriage registrar (c) children with the unrecorded marriage only have a civil relationship with their mother and family.(Rif'atul Khusnia, Yuliati and Hendarto Hadisuryo 2014, 37).

Regarding the legitimate of a marriage, the child's status can be determined. The status of the child will always depend on the issue of the legitimate marriage and all legal aspects that accompany it. This is because the legitimacy of the child's birth will be determined by the validity of the marriage that performed by their parents. In the Article number 42 of the Marriage Law Jo. Article number 99 CIL states that a legitimate child was born in a legal marriage, while an illegitimate child was born outside of a legal marriage or in a legal marriage but denied by a husband for *li'an* reasons.

In the Article number 43 paragraph (1) note that, "a child who was born outside a marriage can only have a civil relationship with their mother and their mother's family". As an example based on this case, the decision of the Constitutional Court of the Republic of Indonesia Number 46 / PUU-VIII / 2010 granted the petition of Macicha Muktar who filed a lawsuit against the Article number 43. The Article number 43 then became, "a child who was born outside a marriage have a civil relationship with their mother, their mother's family, and their father who can be proven based on science and technology and/ or other evidence according to the law to have blood relations". This decision will bring many legal problems in the community because of the unclear meaning about the *children outside a marriage* and the limitations of civil relations in the decision.

Legitimate children both in the eyes of religious and state law will automatically get their full rights since the guarantee of the legal protection by the state, but not so for children who was born with the unrecorded marriage. Hence, this can lead to discrimination, because every born children in the world has the same nature in front of the God Almighty, as stipulated in the Article number 28B paragraph (2) on the Constitution of the Republic of Indonesia from year 1945 that states, "every child reserve the right to survival, development, and protection from violence and discrimination ".

To resolve violations of recorded marriage as well as an effort to provide legal protection for childrens' birth from unregistered marriages can be done by submitting a court application through isbat *nikah* /marriage ratification and determination of the origin of the child. Marriage certificate refers to the Article number 7 of the CIL, while for the origin determination of the child refers to the Article number 55 on Marriage Law juncto CIL Article 103.

For christians, hindus, buddhists, and confucians who cannot prove their marriage with a marriage certificate can ask for a determination from the District Court and then register at the Civil Registry Office to obtain the marriage evidence in the form of marriage certificate, while those who are moslems can apply to the Religious Court.

Article number 7 on the Compilation of the Islamic Law states that: (1) Marriage can only be done with a marriage certificate which made by a Marriage Registrar; (2) marriages that cannot be proven by a certificate can be submitted to the Religious Courts. Even though it provides an opportunity for married couples without registration, the Compilation of Islamic Law limits its ability to marriages with certain conditions as stated in the next paragraph. The verse confirms that: (3) certificate which can be submitted to the Religious Court is limited to matters relating to: (a) the existence of marriage in the context of the settlement divorce; (b) the lost of marriage certificate; (c) there are doubts about whether or not a marriage requirement is valid; (d) the existence of a marriage that occurs before the validity of the Marriage Law; (e) marriages that carry out by those who do not have marital barriers under the Marriage Law, then in paragraph (4) it is stated that those who have the right to apply for *isbat nikah* are husbands or wives, their children, marriage guardians, and parties concerned with the marriages.

According to Drs. H. To'if, MH, the legal consequences that arises from the stipulation of *isbat nikah*/ marriage ratification and the origin determination of the child, is a child who was born from legitimate marriage, with legal consequences as follows: (Hasyim Nawawi 2015, 4) (a) the emergence of rights and obligations between parents and children as stated in the Article number 45-49 of the Marriage Law; (b) the emergence of inheritance between parents and their children; (c) there is a *nasabiyah* barrier (an obstruction to carry out marriage because the child have been given to his/her parents); (d) a daughter has the right to have her father as a guardian of marriage; (e) children are entitled to get guardianship from their parents.

Conclusion

Recorded marriage is one of the important aspects on marriage. If the marriage is not recorded, even though it is legal based on religious law, but in the state provisions the marriage do not have legal force. A legal action that does not have legal force is not recognized by the state because it does not have the right to manage all interests related to the state since it is not recorded in the state's marital administration. Children who get legal protection are legitimate children, seeing that they were born from legal marriages. Marriage is said to be valid if it is carry out according to the law of religion and belief and are listed in accordance with the applicable laws and regulations.

Meanwhile, legal protection for children who were born from unregistered marriages can be taken by *isbat nikah* to legalize the marriage of their parents. If the parents marriage is legal, then automatically the child becomes a legitimate child. Hence, the childrens' civilization rights (alimentation and inheritance) are recognized and received legal protection.

Therefore, to avoid the occurrence of multiple interpretations on the provisions of the Article number 2 paragraph (1) and paragraph (2) of Law Number 1 from year 1974 concerning Marriage, it is necessary to carry out a revision on the Law Number 1 from year 1974 concerning Marriage, especially related with the existence of recording in a marriage.

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