

Legal Protection of Children Born in Serial Marriages

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ABSTRACT

Serial marriage, which is a marriage that is legal according to Islamic law but is not registered in a state institution, raises serious legal problems, especially for children born from the bond. This study aims to analyze the construction of Indonesian law regarding the status and protection of children's civil rights from serial marriage, both before and after the birth of the Constitutional Court Decision Number 46/PUUVIII/2010. The research method used is normative juridical with a legislative, conceptual, and comparative approach. The results of the study show that before the ruling, children from serial marriages were categorized as children out of wedlock who only had a civil relationship with their mother and mother's family based on Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage, so that their basic rights — including the rights of identity, maintenance, guardianship, and inheritance — were systematically deprived. The Constitutional Court's decision in 2010 became a turning point by opening a civil relationship between the child and his biological father as long as it can be proven through science and technology, including DNA tests. However, the implementation of legal protection still faces a number of obstacles, including the rigidity of the bureaucracy of population registration, the high cost of proving nasab, and the conflict of norms between the Constitutional Court Decision and the Compilation of Islamic Law in terms of inheritance rights. From the perspective of Islamic law, child protection rests on the principles of sharia maqashid, especially the protection of nasab (hifdz annasl), which is in line with the spirit of positive legal restorative justice. This study recommends the revision of the Marriage Law, strengthening the population registration system, providing subsidized DNA test services, and issuing Supreme Court guidelines to realize legal certainty that is in favor of the best interest of the child.

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1. INTRODUCTION

Marriage is a social and legal institution that has a vital function in organizing public order. In Indonesia, the dualism of marriage regulation between religious norms and state norms often causes legal conflicts, especially related to marriages that are not registered with state institutions (Office of Religious Affairs/Civil Registry). This kind of marriage is popularly known as *nikah siri*, which is etymologically derived from the Arabic *sirri* which means secret. According to Islamic law, a series marriage fulfills the pillars and legal requirements of marriage if there is an *ijab qabul*, *wali*, two witnesses, and dowry, without requiring administrative registration. However, the Unitary State of the Republic of Indonesia through Law Number 1 of 1974 concerning Marriage (Marriage Law) requires that every marriage be recorded.² Non-compliance with this record-keeping obligation not only has an impact on the marital status of the parents, but more tragically causes constitutional harm to the child born from the bond.

In Indonesia's positive legal construction prior to the 2010 Constitutional Court ruling, children born from serial marriages were categorized as "children out of wedlock" who only had a civil relationship with their mother and her mother's family.³ This categorization automatically breaks the *nasab* (offspring) and legal relationship between the child and his biological father. As a result, the child is deprived of basic rights such as inheritance, alimony rights, the right to citizenship status, and even the right to identity through the Birth Certificate.

This phenomenon places the child as a victim of legal ambiguity and parental choice. In fact, the Indonesian constitution expressly guarantees the human rights of children without discrimination. Article 28B paragraph (2) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution) stipulates that "Every child has the right to survival, growth, and development, as well as the right to protection from violence and discrimination."⁴ This constitutional idealism clashes violently with the juridical reality that discriminates against children out of wedlock. Therefore, the study of the legal protection of children born in serial marriages is urgent to unravel the tangled thread between transcendental legitimacy (religion) and structural legitimacy (state) for the best interest of the child.

2. METHODS

This research uses a normative legal research method, a research method that focuses on examining legal norms contained in laws and regulations, court decisions, and the doctrines or opinions of legal experts related to legal protection for children born in serial marriages. This method was chosen because the research aims to analyze how the law regulates the status and rights of children, and the extent to which the legal system provides protection for children born from successive marriages. The approaches used in this research include a statute approach, a conceptual approach, and a case approach. The statutory approach is carried out by examining various relevant regulations, including the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019, Law Number 35 of 2014 concerning Child Protection, the Compilation of Islamic Law, and the Civil Code. A conceptual approach was used to examine legal concepts regarding child protection, the civil status of children, and the principle of the child's best interests. Meanwhile, a case study approach was conducted by examining relevant court decisions, including Constitutional Court Decision No. 46/PUU-VIII/2010, which strengthens the civil relationship between children and their biological fathers.

The legal sources used in this research consist of primary, secondary, and tertiary legal materials. Primary legal materials include statutory regulations, court decisions, and international instruments such as the Convention on the Rights of the Child. Secondary legal materials consist of scholarly books, journal articles, previous research results, and the opinions of legal experts. Tertiary legal materials include legal dictionaries, encyclopedias, and various other supporting sources. The legal material collection technique was conducted through library research, namely collecting and reviewing various legal documents, academic literature, and scientific sources relevant to the research topic. All legal materials obtained were then analyzed qualitatively using descriptive-analytical methods. The analysis

was conducted by inventorying applicable legal provisions, identifying relevant legal principles, interpreting legal norms, and relating them to the issue of legal protection for children born in serial marriages. Furthermore, conclusions were drawn using a deductive method, namely drawing conclusions from general legal provisions to address the specific problems that are the focus of this research.

3. FINDINGS AND DISCUSSION

Right to Identity and Birth Certificate

The right to identity is the most fundamental right for a child. Article 7 of the Convention on the Rights of the Child requires states to record the birth of a child immediately after birth, including providing a name and nationality. In Indonesia, this is regulated in Law Number 24 of 2013 concerning Amendments to Law Number 23 of 2006 concerning Population Administration (Admuduk Law). Before the new regulation, the inclusion of the father's name on the Birth Certificate of children from serial marriages was very problematic. The Civil Registry refused to include the father's name because there was no evidence of a valid marital bond (Marriage Book). As a result, the father's name column on the birth certificate is left blank or crossed out. Positive developments occurred with the birth of the Regulation of the Minister of Home Affairs (Permendagri) Number 9 of 2016 concerning Population Event Registration. In Article 16 paragraph (1) letter c, it is stipulated that the registration of the birth of a child born from a marriage that is not recorded, the father's name is included based on the father's confession or based on a court determination. Then, the Regulation of the Minister of Law and Human Rights Number 7 of 2019 concerning Population Registration and Registration of Population Events further simplifies this process.

The legal protection mechanism for children of serial marriages to obtain a birth certificate with the father's name can now be pursued through two paths:

1. **Administrative Route (Father's Confession):** The biological father comes to the Population and Civil Registration Office (Disdukcapil) to admit it in writing. However, in practice, the Disdukcapil often asks for more legality (such as court determinations) for fear of administrative responsibility in the event of a dispute in the future.
2. **Judicial Route (Court Determination):** The mother or guardian of the child files a lawsuit for court determination to establish the father's fate, which is usually accompanied by a DNA test as perfect evidence. This court decision was then used as the basis by the Disdukcapil to include the father's name on the child's birth certificate.

Right to maintenance

Prior to the Constitutional Court's ruling, the biological father of the serial marriage did not have a legal obligation (legal object) to provide support to the children resulting from the serial marriage because by state law, they were not bound by a civil relationship. Alimony is only the husband's obligation to his wife and legal children (Article 46 of the Marriage Law). After the Constitutional Court's decision, the biological father's maintenance obligation can be legally requested. However, to obtain this alimony, the child must first prove the relationship between the child and the father. The most prevalent and powerful main evidence in court today is the DNA (Deoxyribonucleic Acid) test. The Supreme Court through several of its decisions has accepted the results of DNA tests as valid and strong evidence to prove the origin of descent, as stipulated in Article 1866 of the Civil Code (KUHPercivil) regarding valid evidence. This legal protection of alimony rights is a reward (compensation) for the father's non compliance in registering his marriage. The state provides a legal remedy so that the child does not suffer financially as a result of his father's administrative negligence.

Heirs' Rights

Inheritance rights are the most complex domain and are still reaping sharp debates to this day. In Western civil law (KUHPercivil), an out-of-wedlock child does not have inheritance rights from his

father, unless the father legally recognizes the child, and his inheritance rights are limited to only one-third of the legal child's share (Article 863 of the Civil Code), or through a mandatory will (Article 873 of the Civil Code).

Meanwhile, in Islamic law codified in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI), the status of recognized children is specifically regulated. Article 186 of the KHI states: "A child born out of wedlock has only a civil relationship with his mother and his mother's family."¹⁸ This is in line with the text of the pre-Constitutional Court Marriage Law. However, KHI regulates important exceptions through the Mandatory Will institution. Article 209 paragraph (2) of the KHI stipulates: "The inheritance of children outside of marriage as referred to in paragraph (1) is divided by using a mandatory will in accordance with the provisions of Articles 176 to 191 as far as possible from one-third of the property."¹⁹ Although this article literally mentions "inheritance of children outside of marriage" (inheritance from children to parents), the Supreme Court in its jurisprudence has reversed the direction of this mandatory will so that it applies from the father of recognition to the child out of wedlock (Supreme Court decisions No. 368 K/AG/1995 and No. 51 K/AG/1999).

After the Constitutional Court Decision No. 46/PUU-VIII/2010, a new polemic emerged: Are children from post-Constitutional Court series marriages entitled to pure inheritance rights (such as legal children) or remain through a mandatory will? Some judges argued that because the Constitutional Court had opened a civil relationship between the child and the father, the inheritance rights must also apply intact. However, the majority of judges in the Religious Court hold the principle that inheritance in Islam is closely tied to the validity of marriage (*nasab shar'i*). The Constitutional Court's decision does not necessarily legalize serial marriage, but only opens a civil relationship (*nafkah, nasab*). Therefore, the inheritance rights of children of serial marriage from their fathers can still only be obtained through a mandatory will, not a *faraidh* inheritance (inheritance as pure as a child in a legal marriage). This is a form of legal compromise so that children's rights are protected without destroying the construction of Islamic inheritance law.

Guardianship Rights

In Islamic law, marital guardianship is the right of a father to his daughter who has never been married (guardianship of *nasab*). Article 174 of the KHI states that the guardian of the *nasab* is only from the father's side, grandfather, and so on. For a daughter from a serial marriage, the guardianship of her father's *nasab* is questionable. Because the marriage of his parents is invalid according to the state and damages the *shari'i nasab*, some scholars and judges consider the father of the *shari'i* marriage not entitled to be the guardian of the *nasab*. The girl must use a guardian judge (guardian appointed by the state/Religious Court). However, as a logical consequence of the Constitutional Court's Decision that recognizes a civil relationship if the *nasab* is proven, some people argue that if the paternal *nasab* has been recognized or determined by the court, then the biological father has the right to become the guardian of the *nasab*. However, in order to avoid a stalemate in the marriage (because the KHI is very strict about the line of fate), in practice, the Religious Court often prefers to appoint a guardian judge for the certainty of the validity of the girl's marriage in the future, as stipulated in Article 21 of the KHI.

4. CONCLUSION

The legal protection of children born in serial marriages in Indonesia has gone through a long and winding journey. From the originally discriminatory legal construction (Article 43 of the Marriage Law), there has now been a progressive leap through the Constitutional Court Decision Number 46/PUU-VIII/2010 which opens the door to civil relations between children and their biological fathers, as long as it can be proven through science/DNA tests. However, the recognition of the civil relationship does not necessarily solve all problems. The right to identity (birth certificate), maintenance rights, guardianship rights, and inheritance rights still face various obstacles to implementation, ranging from the rigidity of the Disdukcapil bureaucracy, the high cost of DNA tests, to the conflict of norms between

the Constitutional Court's Decision and the Compilation of Islamic Law which is still a debate among judges of the Religious Court. Substantially, the inheritance rights of children of serial marriages are still limited through compulsory wills, not as pure heirs as legitimate children. In the end, the dualism between transcendental legitimacy (religion) and structural legitimacy (the state) must be subjugated for the best interest of the child. Children never choose to be born from serial marriages. Therefore, the state and the legal system must ensure that no child is deprived of his or her civil rights simply because his or her parents choose a non administrative legal path. Legal reconstruction, bureaucratic reform, and scientific proof subsidies are normative imperatives for the upholding of restorative justice for Indonesian children.

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