

The Legal Consequences Of Serial Marriage For Wives And Children Are Reviewed From The Constitutional Court Decision Number 46/Puu-Viii/2010 And The Compilation Of Islamic Law On The Civil Of Children Against Fathers In Serial Marriages

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Abstract : Children are gifts from God Almighty that must be maintained and protected because in children are attached dignity, dignity, and rights as human beings. For a child born from a valid marriage has a clear legal position so that obligations and rights arise between parents and children whereas, based on Article 43 of Law No. 1 of 1974 stipulates that "Children born out of wedlock only have civil relations with their mother and her mother's family". The research method used in this study is normative legal research, which uses the statutory approach method (statute approach) and conceptual approach (conceptual approach). The legal materials used are primary, secondary and tertiary legal materials and the legal material analysis techniques used in this study are qualitative descriptive analysis. The results of the research that has been conducted state that the decision of the Constitutional Court Number 46 / PUU-VIII / 2010 strengthens between religious norms and Indonesian legal norms, so that children outside marriage are entitled to their rights recognized by the state. Basically, between the decision of the Constitutional Court No. 46/PUU-VIII/2010 with article 99 KHI and article 53 KHI, all of them aim the same, namely to protect women as mothers and children before the law. And based on the Constitutional Court Decision Number 46 / PUU / VIII / 2010 it can be that an extramarital child has a civil relationship with his father as long as it can be proven by Science. Civil relations arising from this blood relationship include legal relations of rights and obligations between children and their fathers in the form of nasab relationships, mahram relationships, rights relationships, inheritance relationships and guardianship relationships.

Keywords: legal consequences of children, serial marriage, Constitutional Court rulings

1. Introduction

A. Background

Children born into the family are descended from father and mother in a legal marriage bond. During marriage, the supervision of the child is fully under the power and supervision of the parents in effect from the moment the child is born or from the day of its legalization and ends when the child is an adult or when the child has carried out the marriage or when the marriage of his parents ends, namely when the divorce of his parents occurs.¹ The Civil Code provides for a different arrangement between a legitimate child and an illegitimate child or extramarital child, that a legitimate child is a child born in or as a result of a

¹ Subekti, Basics of Civil Law, (Jakarta: PT. Intermasa, 1991), hlm. 50.

legal marriage. While illegitimate children or extramarital children are children born outside the legal marriage between their parents. Regarding legal children and illegitimate children or extramarital children are also regulated in Law No. 1 of 1974 concerning Marriage, hereinafter referred to as Law No. 1 of 1974. Article 42 of Law No. 1 of 1974 states that "A legitimate child is a child born in or as a result of a valid marriage."² However, the article does not explain the grace period for determining whether or not a child is legal.³

Prior to the Constitutional Court decision No. 46/PUU-VIII/2010, according to positive law in force in Indonesia, children born from unregistered marriages had the same legal status as extramarital children so they only had civil relations with their mothers. The legal consequence for a child born from an unregistered marriage is not having a legal relationship with his father. The birth certificate of an extramarital child lists the child's name, day and date of birth, order of birth, and only the mother's name and mother's date of birth are listed.⁴ In customary law there are various children, namely legal children, biological children, adopted children, stepchildren and children born out of wedlock. The following describes the meaning of these types of children, namely :⁵

1. A legitimate child is a child born of a valid marriage according to the laws of each religion and belief.
2. A biological child is a child born from the womb of his biological mother and father.
3. Adopted children are children who are not born from a husband and wife marriage, but are raised and treated like their own biological children, so that a relationship arises as much as the relationship between parents and their biological children.
4. A stepchild is the biological child of a widowed wife or widower's husband who follows his father or mother to a new marriage by one of his parents.

A child born out of wedlock is a child born in an illegitimate marriage between a husband and wife or a child born to a woman who does not have a husband.

For a child born from a valid marriage has a clear legal position so that obligations and rights arise between parents and children as stipulated in Articles 45 to Article 49 of Law No. 1 of 1974. Based on Article 43 of Law No. 1 of 1974 stipulates that "Children born out of wedlock only have a civil relationship with their mother and her mother's family." Thus, the legal position of the extramarital child does not have a civil relationship with his biological father.⁶

Marriage is an attempt to carry out something commanded by Allah Almighty, this is as it is said in Article 2 of the Compilation of Islamic Law that "Marriage according to Islamic law is marriage, that is, a very strong contract or

² Indonesia, Marriage Law, Law No. 1 of 1974, LN No. 1 of 1974, TLN No. 3019 of 1974, Ps. 42.

³ Hilman Hadikusuma, Indonesian Marriage Law according to: Legislation, Customary Law and Religious Law, (Jakarta: Erlangga, 2003), p. 133.

⁴ *Ibid*, p. 212

⁵ Hilman Hadikusuma, Customary Inheritance Law, (Bandung: PT. Citra Aditya Bakti, 1999), p.80

⁶ Indonesia, Marriage Law, Law No. 1 of 1974, LN No. 1 of 1974, TLN No. 3019 of 1974, Ps. 42.

mitssaqaan ghalidzan to obey the commandments of Allah and carry them out is worship." ⁷ A child can be said to have a legal relationship with his father if born of a legal marriage. As for a child born outside of legal marriage, it cannot be called a legitimate child, commonly called an adulterous child or a child outside a legal marriage and he only has a sexual relationship with his mother. In the Compilation of Islamic Law, it is regulated regarding legal children as explained in Article 99 of the Compilation of Islamic Law that:

1. "A legitimate child is a child born as a result of a legal marriage.
2. The result of conjugal fertilization outside the womb and birth by the wife."

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In addition to regulating legal children, the Compilation of Islamic Law also regulates extramarital children as referred to in Article 100 of the Compilation of Islamic Law that "Children born out of wedlock only have a sexual relationship with their mother and her mother's family." ⁹

According to Abdur Rozak, children's rights are as follows :¹⁰

1. The rights of the child before and after birth
2. The right of the child in the chastity of his offspring
3. The right of the child to receive a good name
4. The child's right to receive milk
5. The child's right to care, care and maintenance
6. Children's rights in property ownership or inheritance rights for their survival
7. The rights of the child in the field of education and teaching.

With the creation of a relationship relationship, the rights of children with their parents will be created as stipulated in the marriage laws and regulations. The legal requirements for marriage are regulated in Article 2 paragraph (1) of Law No. 1 of 1974 which states that "marriage is valid if it is carried out according to the laws of each religion and belief".¹¹ From Article 2 paragraph (1), it can be concluded that a marriage is valid if it is carried out according to the laws of each religion and belief.

This is as stipulated in Article 2 paragraph (2) of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage hereinafter referred to as PP No. 9 of 1975 which states that: "The marriage registration of those who hold their marriages according to their religion and beliefs other than Islam, is carried out by the Marriage Registration Officer at the civil registry office as referred to in various laws regarding registration marriage." ¹²The essence of marriage is a legal relationship that binds the parties to marriage, namely between a man and a woman. Marriage according to Law No. 1 of 1974 can be said to be an

⁷ Indonesia, *Compilation of Islamic Law*, Ps. 2.

⁸ Indonesia, *Compilation of Islamic Law*, Article. 99

⁹ *Ibid*, Ps. 99

¹⁰ Abdur Rozak Husein, *Children's Rights in Islam* (Jakarta: Fikahati Aneska, 1992), p.21

¹¹ Indonesia, *Marriage Law No. 1 of 1974*, Ps. 2 paragraph (1)

¹² Indonesia, *Government Regulation on the Implementation of Law No. 1 of 1974 concerning Marriage*, *Government Regulation No. 9 of 1975*, *LN No. 1 of 1974*, *TLN No. 3019*, Ps. 2.

agreement between by interpreting the word agreement in a broad sense because to carry out marriage requires a corresponding agreement between a man and a woman and information about the existence of the agreement.¹³

Marriage is a legal event, therefore in its application it must follow the law that applies to the party. However, in Indonesian society there are still many who use the provisions and procedures of customary law or Islamic law, especially regarding marriage registration which is not a legal requirement for marriage. The following are the factors causing unregistered marriages, including: : ¹⁴

1. Parental consent is important in the implementation of marriage, especially for the bride-to-be because the father is the guardian of the nasab who has the right to be the guardian at the time of the marriage contract. Various cases of serial marriage that occur are caused without parental consent.
2. The practice of serial marriage also occurs, husbands who marry siri because they do not get permission from the wife to carry out a second marriage or polygamy as stipulated in Article 3 paragraph (2) of Law No. 1 of 1974.
3. The implementation of serial marriage is easier and all conditions can be completed, for example there is no guardian then used by the guardian of the judge even though there is no power from the wali muzbir and wali nasab, the iddah period has not expired can be married, there is no dowry only mentioned as a condition.
4. The Marriage Law in Indonesia regulates the age requirement for marriage. With such a regulation, when a man and woman who are ready to marry but have not reached the legal age, then they choose not to register their marriage.

B. Problem Formulation

1. What is the position of wife and children in serial marriages according to the decision of the Constitutional Court Number 46 / pii-VIII / 2010 and the compilation of Islamic law?
2. What are the legal consequences of serial marriage for wives and children according to the Constitutional Court Number 46/pii-VIII/2010 and the compilation of Islamic law?

C. Research Methods

The type of research used is normative juridical, namely research that refers to legal norms contained in laws and regulations. The nature of the research is descriptive analytical, used to describe a condition or ongoing state that The goal is to be able to provide data about the object of research so that it can be analyzed based on legal theories that laws and regulations use. The approach method used in this writing is to use the legal approach method where this approach is carried out by examining all laws and regulations related to the legal issue at hand. In addition, the author also uses a conceptual approach method, where the approach is carried out by studying views and doctrines in

¹³ Wantjik Saleh, *Indonesian Marriage Law*, (Jakarta: Ghalia Indonesia, 1992), p.80

¹⁴ Zainuddin, *Legal Certainty of Siri Marriage and Its Problems Reviewed from Law Number 1 of 1974*, (Yogyakarta: CV Budi Utama, 2015), p. 55.

legal science. Legal data analysis is carried out qualitatively, namely explaining and describing theories, principles, principles, norms, doctrines, and legal rules regarding serial marriage. Qualitative analysis of legal materials according to Jhony Ibrahim is an analysis based on relevance to problems, qualitative analysis bases analysis on doctrines, principles, norms, principles, principles, and concepts. Then the legal material analysis of legal material will be put forward deductively (logical reasoning from general to specific) in the form of a systematic description by explaining the relationship between various legal materials so that problems can be answered.

2. Discussion

- A. The position of wife and child in serial marriage according to the decision of the Constitutional Court Number 46/pii-VIII/2010 and the compilation of Islamic law

In the case of Article 2 paragraph (2) it is stated that each marriage is recorded according to the applicable Law. The existence of this recording is expected to ensure order in the community. Therefore, every marriage must take place before and under the supervision of a marriage registrar. Marriages that are carried out outside the supervision of marriage registrars will cause many problems. However, in the community, there are still many special cases regarding unregistered marriages or serial marriages, this situation raises a new polemic for the position of wives and children that should have been listed in the law. The non-registration of a serial marriage officially does not mean that it negates the element of responsibility between husband, wife and the status of the resulting child.

In line with the above statement issued the existence of the Constitutional Court decision Number 46 / PUU-VIII / 2010 strengthens between religious norms and Indonesian legal norms, so that children outside marriage are entitled to their rights recognized by the state. First, children born out of wedlock have no legal force and often receive decriminative treatment in society, so the Constitutional Court considers that children born out of wedlock should receive the same legal protection and legal certainty even though the validity of the marriage is still disputed, because the child does not sin against birth outside marriage. Second, an out-of-wedlock child essentially remains a relationship between a man and a woman, so the Constitutional Court considers it unfair if an out-of-wedlock child only has a relationship with a woman as his mother, and the law exempts the man who caused the pregnancy and birth of the child from the responsibility of a father and at the same time, the law negates the rights of the child to the man as his father. Third, along with the development of the times and the advancement of science, the Constitutional Court considers that with the development of technology it is possible to prove that children outside marriage are children of certain men.

Based on the decision of the Constitutional Court Number 46 / PUU-VIII / 2010, it can be concluded that the child who is married with the condition of betel marriage between father and mother remains a LEGAL child in the eyes of the law and is legally protected with provisions that have been determined as an indication of how to validate the status of the resulting child. The existence of

the Constitutional Court decision No. 46/PUU-VIII/2010, should be a solution for strengthening the law of children born out of wedlock without legalizing adultery. Therefore, the definition of a legitimate child according to the KHI will not be ambiguous if the definition of a legitimate child is a child born as a result of a legal marriage. Basically, between the decision of the Constitutional Court No. 46/PUU-VIII/2010 with article 99 KHI and article 53 KHI, all of them aim the same, namely to protect women as mothers and children before the law.

Furthermore, it is also explained in the ruling regarding the RIGHT to Earn a Living, where the responsibility to maintain and educate children outside marriage is not only imposed on the mother and her mother's family, but also falls on the father and his father's family. The biological father is obliged to fulfill the rights of the child related to clothing, food, shelter, education, and health. Thus, there is a child's right to sue his biological father if he does not fulfill this obligation. Regarding the arrangement of inheritance for children betel marriage has also been regulated in the decree where children born out of wedlock get the same division as legal children, as stated in article 174 of the Compilation of Islamic Law on groups that get inheritance one of which is children. It is also stipulated in the ruling that girls born out of wedlock have the right to have guardianship from their biological father.

- B. The legal consequences of wife and child in serial marriage according to the decision of the Constitutional Court Number 46 / pii-VIII / 2010 and the compilation of Islamic law

Based on article 30 which reads *"Husband and wife bear a noble obligation to uphold the household which is the basic joint of the structure of society"*. What is meant by the article is that husband and wife must love each other, love, respect, be faithful, and give birth and mental assistance to one another. Article 31 paragraph 1 *"The rights and position of the wife are balanced with the husband in domestic life and social life with society Paragraph 2 all parties are equally entitled to perform legal acts, paragraph 3 the husband is the head of the household and the wife is the housewife"*.

Article 32 paragraph 1 *"Husband and wife must have a permanent place of residence"*. As for other consequences arising from the relationship between husband and wife contained in the KUHPdt / BW, husband and wife must live together in one household the wife must submit obediently to her husband, she must follow where the husband sees good to live, the husband is obliged to accept his wife and give her what is necessary and role model with her position and ability, Husband and wife bind themselves reciprocally to nurture and educate children. Article 33 reads *"husband and wife must love each other, love, respect, be faithful and give inner birth assistance to one another"*.

Article 34 paragraph 1 The husband is obliged to protect his wife and provide all household needs according to his ability, And paragraph 2 the wife is obliged to take good care of the household and wife, paragraph 3 if the husband or wife neglects their respective obligations can file a lawsuit in court.

Serial marriages that occur in Indonesia are still considered valid from a religious perspective if they have fulfilled the pillars and conditions, but this

marriage contract can have legal effects and consequences that harm wives and children. The position of the wife in serial marriage according to positive law or Law Number 1 of 1974 concerning Marriage and also in the Compilation of Islamic Law. That because serial marriages are not recognized and are not recognized in the state, they have no right to legal protection.

The rights of both wives and husbands can be protected by law after having authentic evidence of their marriage. Article 6 of the Compilation of Islamic Law states that: "Every marriage shall take place before and under the supervision of the Marriage Registrar." Problems will arise when a marriage that has been valid (fulfilling the pillars and requirements of marriage according to Islam), but is not registered with the state registration agency, usually there will be many problems after the marriage. It is undeniable that serial marriages become a pleasure in the front, bringing disaster in the back and having a negative impact because the laws are not fulfilled. Serial marriages have a very detrimental impact on wives and women in general, both legally and socially, namely:

1) Legally :

- a. Wife is not considered a legal wife;
- b. The wife is not entitled to the nafaqah and inheritance from her husband if she dies;
- c. The wife is not entitled to property in the event of divorce, because legally the marriage is considered to have never taken place.

2) Socially :

Wives will find it difficult to socialize because women who perform serial marriages or underhand marriages are often considered to have lived in the same house with men without marriage ties or the wife is considered to be a mistress. Not all children born outside a legal marriage bond can be recognized. So there are certain extramarital children who should not be recognized. In the Civil Code there are two kinds of extramarital children, namely:

- a. Recognized extramarital children
- b. Unrecognized extramarital child

An unrecognized extramarital child will not cause legal consequences in inheritance, because an extramarital child who is not recognized by either his mother or father cannot inherit the property left by his parents. While an extramarital child who is recognized as legitimate either by his mother or by his father or both will cause legal consequences by inheritance. With this recognition, it will result in a civil relationship between the recognized extramarital child and the recognized parent. According to the Marriage Law and the Compilation of Islamic Law, a legitimate child is a child born in or as a result of a legal marriage, even if the child is born from the marriage of a pregnant woman whose gestational age is less than 6 months since she was legally married.

This is regulated in Law Number 1 of 1974. Article 42 of Law Number 1 of 1974: "*A legitimate child is a child born in or as a result of a legal marriage*".

Another legal consequence of serial marriage for children is that children cannot take care of birth certificates, it can be seen from the birth certificate application submitted to the civil registration office. If you cannot show the marriage certificate of the child's parents, Article 5 of Law Number 23 of 2002 concerning Child Protection states: *"Every child has the right to a name as self-identity and citizenship status"*.

So in the child's birth certificate the status is considered as an out-of-wedlock child, the name of his biological father is not written and only his biological mother is written. Information in the form of status as an out-of-wedlock child and the unrecorded name of the father will have a very deep social and psychological impact on the child and his mother. As a child who is considered born outside the legal marriage of both parents, he can get a birth certificate through birth registration. It's just that, the birth certificate only lists his mother's name. If you want to include the father's name also on the birth certificate, a court determination is needed as a form of recognition of the child by the father. Nikah siri has a negative impact on the children born, especially about the fulfillment of children's rights. Children born from serial marriages who only have civil relations with their parents. Parents will be responsible for children from serial marriages, namely: A birth certificate is a certificate resulting from civil registration from the results of a person's birth. The importance of birth certificates is proof and as the identity of a child born, as basic data for the government for early proof of citizenship and the first identity a child has. With a birth certificate, children can sue their parents, for example, in the event of divorce, children from their marriage can sue their parents to meet their needs.

The birth certificate is also a very strong evidence for a child to obtain inheritance rights from his parents and also to prevent adulteration, underage marriage, violence against children, child trafficking, prevent illegal adoption and sexual exploitation. Juridical birth certificate to obtain protection, welfare, education, residence and other rights as an Indonesian citizen.

The relationship of a child from a serial marriage with someone who is considered to be his father and his family is considered non-existent, so in this case there is no inheritance law between the two. Children born from serial marriages or in civil law are called children out of wedlock, because the mother cannot prove the marriage certificate. The status of inheritance rights of extramarital children in the Compilation of Islamic Law states that the child is only entitled to inherit from his mother and his mother's family and vice versa. Meanwhile, for the biological father of the child there is absolutely no legal relationship so that it does not cause a relationship of mutual inheritance.

3. Conclusion

- A. The position of wife and children in serial marriage according to the decision of the Constitutional Court Number 46 / pii-VIII / 2010 and the compilation of Islamic law, that wives and children still get their rights outwardly and mentally. Children can also claim civil rights such as operational costs, pocket money every day, housing while immature, school fees. But a child born outside of a legal

marriage cannot inherit from his father because he only has a lineage from his mother.

- B. The legal consequences of wife and child in serial marriage according to the decision of the Constitutional Court Number 46 / pii-VIII / 2010 and the Compilation of Islamic Law, that the marriage is null and void or considered that there has never been a marriage and cannot inherit. A child born outside of a legal marriage can claim his or her civil rights unless it can be proven by technology through DNA testing. If according to Islam that the child can inherit.

4. Advice

Based on the many cases in the community regarding the polemic of children resulting from serial marriages, it can be a reference for the government to review more laws regarding the status of children in a serial marriage. This can be taken into consideration for the urgent discussion of a more specific and detailed decision in order to protect various parties. The public is expected to be more educated on the results of research that has been conducted, the importance of knowledge on the birth registration of children that have resulted from serial marriages is also an important point for the future of the child concerned. Considering the impact that can be experienced by the child, it is expected to be a planning material for couples to hold a wedding. Preparing for marriage administratively is also an important step that must be done for the mutual benefit.

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