



Legal Protection for Children in the Womb Outside of Legal Marriage

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Abstract:

This article explains the law on children out of wedlock or children out of wedlock that are legitimate. Initially, the laws and regulations in Indonesia only regulated the status of legitimate children, because based on a legal marriage, all rights are attached to the rights of children. Meanwhile, children out of wedlock or children out of wedlock are only entitled to civil law protection from the mother's side or the mother's family. The research method used is to use normative literature research methods by using various literature in the form of library materials which are library research or secondary data. The results of the research are as recognized by the Convention on the Rights of the Child which has been ratified by Indonesia through Presidential Decree No. 36 of 1990. The ambiguity of the existing law regarding extra-marital children requires the harmonization of legal norms to ensure justice, expediency, and legal certainty. Initially, Indonesian law only protected the legal status of legitimate children born in marriage, so that illegitimate children only received civil protection from their mother or their mother's family. However, Constitutional Court Decision No. 46/PUU-VIII/2010 has equalized the legal status of legitimate and illegitimate children, ensuring they receive the same legal protection. This decision immediately overturned previous provisions that limited civil rights to the mother's side, granting equal legal standing to illegitimate children.

Keywords: *Legal Protection; Children; Womb; Marriage*

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Introduction

As a child protection law that applies as positive law in Indonesia, it is limited to regulating child protection at the conventional level, such as children's rights and obligations, parental care by children, child recognition, child validation, and others that are generally found. by several legal systems both according to Civil Law, the Customary Law system, the Islamic Law system, as well as in various laws and

regulations, for example Law no. 1 of 1974 concerning Marriage, Law no. 23 of 2006 concerning Population Administration, and others (Konoras 2013).

The civil rights of children out of wedlock have a large and wide influence on children, so they do not get legal protection such as the maintenance and welfare of children, including children's inheritance rights. Meanwhile, the position of a child out of wedlock will become a burden for a mother and her family, and the legal status of a child is also not regulated by law, such as in determining whether a child is legal or not, such as the status of a child out of wedlock. child's birth certificate. Whereas in the birth of a child out of wedlock, the child is not at all sinful except for the act of intercourse between his parents which caused him to be born into this world (Tijow 2010).

The development of new legal aspects is contemporary concerning children and their legal protection, such as the legal status of children of IVF, and recently a topic of actual concern is the legal protection of children out of wedlock. The legal status of a child out of wedlock in the substance of conventional child protection law in the Western Civil Law system (*KUHPerdata*), only has a civil relationship with the mother or the mother's family. Law No. 1 of 1974 also stipulates the same, as in its provisions "A child born out of wedlock only has a civil relationship with his mother and his mother's family" (Article 43 paragraph (1)). The civil rights of children out of wedlock have a big and wide influence on the child, because they do not get legal protection, such as the maintenance and welfare of children, including the child's right to inherit (Aryanto 2016).

The position of a child out of wedlock will become a burden to the mother and the mother's family, and the legal status of the child is also not covered by law, such as determining the legitimacy of a child, such as the status of a child's birth certificate. In fact, in the birth of a child out of wedlock the child is not sinful at all but the act of intercourse between his parents which caused his birth to this earth. The legitimacy of the child is closely related to the legitimacy of a marriage between the parents.

Legislation determines that a legitimate child is a child born from a legal marriage. In addition, the rights of children to live, grow and develop are not given legal protection, bearing in mind that the mother of a child out of wedlock will be



faced with fulfilling the child's material and psychological needs, while the father is not burdened with obligations and responsibilities (Nurhayati 2019).

“The 1945 Constitution of the Republic of Indonesia, both Article 1 paragraph (3) which stipulates that Indonesia is a rule of law, and Chapter XA are very closely related, because one of the elements of a rule of law (Rechtsstaat) is the protection of human rights against citizens. Chapter XA, which regulates a number of human rights provisions, is closely related to the protection of children outside of marriage as part of every person's right to live and defend his life and existence (Article 28A).”

The legitimacy of the child is closely related to the legitimacy of the marriage between the parents. As laws and regulations determine that a legitimate child is a child born in a legal marriage. In addition, the child's right to live, grow and develop and receive less legal protection, in addition to that considering that the mother of a child out of wedlock will be faced with fulfilling the child's material and spiritual needs, while the father is not burdened with obligations and responsibilities. As the 1945 law of the Republic of Indonesia, both article 1 paragraph 3 which stipulates that Indonesia is a country based on law, then one of the elements of a country based on law is the protection of the human rights of citizens.

Then the status of children out of wedlock in the western civil law system, the customary law system, and the Islamic legal system is included in several positive legal provisions such as Law No. 1 of 1974, which are considered to lack legal protection. , a child out of wedlock is a child from an abusive relationship. Not bound by a legal marriage, it is not uncommon to become a victim, such as cases of abandoned babies, abandoned babies, and many other cases. Whereas every child and regardless of status has the right to live and continue his life. 46/PUU-VIII/2010 that children born out of wedlock have civil relations with the mother and the mother's family and with the man as the father which can be proven based on science and technology and/or other evidence according to law to have blood relations. relationship, including civil relations with his father's family. And just as the Constitutional Court's decision on the one hand is considered a legal milestone, but on the other hand it is seen as a form of adultery legalization, and for religious leaders

who are generally classified as conservative, the Constitutional Court's decision was "shocking" and even "too advanced" (Wardana 2017).

However, for some others, the decision is a historic decision that carries broad and complex legal implications for a number of conventional laws and conservative thinking. As a decision, the Constitutional Court refers to the provisions and principles of human rights, which in essence include the principles of justice, the principle of nondistance discrimination, and the principle of equality. While the problems that arise as a result of the Constitutional Court's decision are changes to several conventional legal provisions including the existing legal system, new problems will arise as a result of the Constitutional Court's decision, namely the legalization of the same provisions. sex marriage in the future, and so on. other.

Method

The research method used is to use the normative library research method by using various literature in the form of library materials which are library research or secondary data. Normative research, namely efforts to apply the law or the philosophical basis of the law, as well as efforts to make legal discoveries must be in accordance with the case under study (Mukti Fajar and Achmad 2010). In this study several research approaches were used, namely the statutory approach originating from laws and regulations related to research problems and the conceptual approach. (Mahmud 2017)

Discussion

Child

As we all know that children are legal subjects. Even though they are not old enough, children are not human in their miniature form. Children are still legal subjects who need protection, because children are unable/not yet able to protect themselves. Children always need protection from other people/parties, both parents, guardians, trustees, society and the state (Tahamata 2015)

Therefore, the state needs its participation to establish regulations that protect children. As well as protection policies by the state will be an important channel in determining the next steps. Children are individuals who have a special dimension



in their life. Child development requires the help of parents, but environmental factors also have a very important role in influencing the child's personality in welcoming the maturity phase. Children are people who will bear responsibility in the future, therefore if the state provides special protection for children from treatment that can damage their future. As in the sociological view, Haditono argues that children are creatures that need attention, affection, and a place for their development (Kuspraningrum 2006).

Children are part of the family, and families provide opportunities for children to learn behaviors that are important for proper development in living together. It is not excessive if children have the right to receive care, education and assistance from their parents. These rights shape and fill the character of the child, so that in the future they become human beings who are able to behave and act correctly and responsibly (Putra 2018).

Children in general (both legitimate children and children out of wedlock according to law) have civil rights attached to them because they are a child (person). Article 1 of the Civil Code stipulates that enjoying civil rights does not depend on state rights. Based on Article 1 of the Civil Code, civil rights are different from state rights, although basically state rights also regulate civil rights. State rights such as civil rights, economic rights, political rights, and others which reduce, among other things, the right to be guaranteed equality before the law, are closely related to civil rights that guarantee equality before the law applies. for all people, all tribes, all religions without any discriminatory provisions by the state and its practices in society (Dalise 2019).

Civil rights are within the scope of Civil Law. Sri Soedewi Masjchoen Sofwan formulated that Civil Law is the law that regulates the interests of one citizen and another citizen. Rights are always coupled with obligations, and constitute a legal relationship. Sudikno Mertokusumo explained that rights give enjoyment and freedom to individuals in carrying them out, while obligations are restrictions and burdens. Rights can also be divided into absolute and relative rights. Salim HS explains, including absolute rights are all public rights, namely:

- a) The right to express thoughts and feelings, through the press;

- b) Rights to apply in writing to those entitled/authorized;
- c) The right to embrace and adhere to their respective religions and beliefs freely.

While some of the civil rights, namely the rights that rely on Civil Law in an objective sense, for example are:

- a) Personality rights (person *lijkheidsrechten*) are human rights to himself, such as human rights to his soul, body, honor, first name and family name;
- b) Family rights (*familierechten*), are rights arising from family relationships. Included in family rights are marital rights, namely the power of a husband over his wife, the power of parents over their children, and the power of guardians over their children, the right of guardian over those who are in charge;
- c) Property rights (*vermogensrechten*), are rights that have a monetary value;
- d) Material rights (*zakelijkerechten*) are property rights that give direct power over an object. Direct power means that there is a direct relationship between the people who are entitled to the object;
- e) The rights to intangible goods (*rechten op immateriele goederen*) are rights regarding the results of human thought, such as copyrights and octroi rights.

The fact is the presence of children is not always expected. Many facts show that there are parents who throw away, even kill their children to cover up the disgrace of the family. Sometimes the birth of a child will cause embarrassment for the family because the child was born from a relationship outside of marriage which is not justified by religious and ethical teachings that apply in society (Wibowo and Luth 2020).

Handling Children Outside of Marriage

Children out of wedlock experience different status and legal treatment. As stated in the UUP, a child out of wedlock has a civil relationship with his mother and his mother's family. In its development, the Constitutional Court -based on a request



for review of Article 43 juncto Article 2 paragraph (1) *UUP*- issued a decision Number 46/PUU-VIII/2010, so that Article 43 paragraph (1) *UUP* must read :

"A child born out of wedlock has a civil relationship with his mother and his mother's family as well as with the man as the father which can be proven based on science and technology and/or other evidence according to law to have blood relations, including civil relations with his father's family".

And in the Civil Code system, legitimate children have full rights to maintenance, education and inheritance rights. Because children out of wedlock, do not get any rights. And a child out of wedlock is like a child who doesn't have a father and a mother (Sujana 2015).

Many practices discriminate against children outside of marriage continue to occur. The Civil Code system regulates the institution of "child recognition" and the institution of "authorization of children out of wedlock" as institutions to obtain civil relations with their biological parents. Where the *UUP* does not regulate the two institutions at all. . Given that there are no legal norms governing child recognition institutions and institutions for ratifying illegitimate children, in practice they refer to the Civil Code.

Seeing Legal Protection and Human Rights for children outside of marriage A number of legal provisions in positive law in Indonesia determine and regulate the legal status of children based on the legal status of the marriage of both parents. As if the marriage was carried out and recognized as valid, then the child born from that marriage is also a legitimate child. However, children in general (both legitimate and illegitimate children according to law) have civil rights attached to them, because they are children (humans). The Civil Code regulates in Article 1 that enjoying civil rights does not depend on rights based on Article 1 of the Civil Code, civil rights are different from state rights, although basically state rights also govern civil rights (Dunggio, Suleman, and Sumanto 2021) .

State rights such as civil rights, economic rights, political rights, and others which reduce, among other things, the right to guarantee equality before the law (*equality before the law*), are closely related to civil rights that guarantee equality

before the law applies to all people. , everyone. ethnicity, all religions without any discriminatory provisions by the state and its practices in society State rights such as civil rights, economic rights, political rights, etc. On the other hand, the right to guarantee equality before the law is very closely related to civil rights, that the guarantee of equality before the law applies to all people, all ethnic groups, all religions without any discriminatory provisions by the state and its practices in society.

Because civil rights are within the scope of civil law. Sri Soedewi Masjchoen Sofwan formulated that Civil Law is the law that regulates the interests of one citizen against another citizen. Rights are always accompanied by obligations, and constitute a legal relationship. Sudikno Mertokusumo explained that rights provide pleasure and freedom to individuals in carrying them out, while obligations are limitations and burdens. As rights can also be divided into non-absolute and relative rights (Pancasilawati 2014).

As discussed above, seeking family rights (*familierechten*) is an important part that will explain the position and legal status of children out of wedlock, because it starts with legal protection for individuals that does not start with their legal status. as a legitimate child or child out of wedlock. Where the law provides protection for individuals without exception. And the protection provided by the law is contained in the conception of the provisions of the people's legislation which departs from the provisions of the constitution based on the 1945 Constitution of the Republic of Indonesia that "every citizen has the same position before law and government and is obliged to uphold the law. and government without exception" (Article 27 paragraph (1)).(Latumahina 2019)

As the law provides protection to people without exception. The protection provided by law is contained in the conception of statutory provisions for people who deviate from constitutional provisions based on the 1945 Constitution of the Republic of Indonesia that "all citizens have the same position before law and government and are obliged to uphold law and government without exception" (Article 27 paragraph (1)). The constitutional provisions above are actually a form of specific law. protection and human rights of citizens. However, this is related to the Amendment to the 1945 Constitution which specifically regulates human rights (Chapter XA) From Article

28A to Article 28J (Isra 2014), the particularistic protection of law and human rights apart from acknowledging its universal nature also views it as an internal problem of a nation, namely the nation and the Unitary State of the Republic of Indonesia, Indonesia, so it also needs to be regulated nationally. Muladi explained that the attitude of the Indonesian people is clear, that what we adhere to is a particularistic-relative view. Through the amendments to the 1945 Constitution, it is clear that human rights are placed as part of the constitutional provisions which are thus placed at the highest position in the constitutional system of the Republic of Indonesia (Azlany Prianda 2022).

One aspect that appears in human rights is the more prominent rights compared to obligations. James W. Nickel compiled 3 (three) theories about rights (Syafuri 2018), namely: the theory of granting rights, the theory of giving rights-plus, and the theory of granting rights implemented through laws,¹² as follows:

a) Rights theory

This theory argues that rights cannot be established by mere granting of rights, that moral or legal norms that guide the behavior of those who are responsible are essential to the existence of moral and legal rights and must be added to the granting of rights to constitute rights. HJ McCloskey elaborated on this theory, that rights are most appropriate when explained positively as granting rights to be exercised, owned, enjoyed, or have been exercised, and not negatively as something that conflicts with a number of other things.

b) Plus Theory of Rights

The theory of giving plus rights was put forward by Joel Feinberg which uses a distinction between claims to benefits and claims to (against) those who provide these benefits. The 'claim on' is what is called the right, and the 'claim on' is the 'plus' added to the right.

c) Theory of Granting Rights Implemented Through Law



Jeremy Bentham argues, the idea of rights created by positive law is sheer nonsense. Bentham might like to argue that rights can indeed exist as a conclusion to utilitarian arguments and can act as a basis for desirability regarding legal rights. Rights as a point of concern in the discussion are very closely related to human rights where rights are attached as the main unit compared to obligations (Djumikasih 2013).

What is the right of every person to live regardless of background, factors causing life, and in what direction is life going. Everyone has the right to live without the need for recognition from the state, from the government, from the law and even from society, because life itself is a natural thing. As the right to live in the Universal Declaration of Human Rights (Article 3) mentioned above, this is also in line with constitutional provisions in Indonesia according to the 1945 Constitution of the Republic of Indonesia, that "every person has the right to live and has the right to defend life and life" (Article 28A) (Samangun and Rofiko 2016)

Article 28A explains the position and importance of the right to life in the first and foremost position of the many provisions on human rights in Chapter XA of the 1945 Constitution of the Republic of Indonesia, while at the same time indicating that the right to life is the main foundation of human rights. man. Recognition and regulation of the right to life in a legal perspective in Indonesia is contained in various laws and regulations, including in the Civil Code (KUHPerdata) which among other things reads that "enjoying civil rights does not depend on the rights of the state" (Article 1), as well as in the provision that "a child in a woman's womb is deemed to have been born, if necessary for the benefit of the child. Death at birth, is considered to have never existed (Article 2), and finally in the provision that "no law results in a civil death, or the loss of all citizenship rights (Article 3). So based on several legal provisions that regulate the right to life of every person above, it is part of the guarantee, law and legal protection of legal subjects. Regarding this legal subject, there are supporters of legal rights and obligations, which have a number of rights that are inherent and cannot simply be removed (Nur 2014).

As we all know, there are two main reasons for rights that are inherent and exist in every person (child), namely: humans have subjective rights; and legal



authorities. Legal authority is the ability to become a legal subject, namely as a supporter of rights and obligations. A child (child/infant) who is still in the womb is considered by law to have been born (exists) if he is born alive. As legal recognition like this relates to legal interests in the child himself, for example in relation to inheritance.

Legal protection for the child in the womb mentioned above is increasingly getting a place in the formulation of laws in Indonesia, for example contained in several laws and regulations, among others, in Law no. 39 of 1999 concerning Human Rights (SUGIHARTO, n.d.). That "*a child is every human being who is not yet 18 (eighteen) years old and is not married, including children who are still in the womb if it is for their interests (Article 1 Point 5)*" A similar formulation is also contained in Law Number 23 of 2002 concerning Child Protection, that "*a child is someone who is not yet 13 (eighteen) years old, including a child who is still in the womb*" (Article 1 Point 1) The legal status of a child in the womb: who is given rights by law as described above, prioritize the rights of the child rather than the obligations of the child, because of his position and all his limitations, because he is a child (in the womb).

Children in the womb, in situations and conditions and limitations, begin to have their rights attached by law and at the same time become part of legal protection. While the obligation has not been attached to the child in the womb. womb, considering that the main problem and priority is how he can live and continue his life in the future, whether as a child in the womb, children, adolescents, adults and so on.

Some of the problems that arise in the legal status and legal protection of children are more prominent and important in relation to their status as children outside of marriage, because administratively and legally, there is no marriage based on a legal marriage institution which is the legal basis. for the validity of the second marriage. her parents. Whereas Law Number 23 of 2006 concerning Population Administration, regulates matters concerning: recording of child recognition and recording of child validation. Both of these aspects are procedural forms of an administrative nature that depart from the importance of recording, both recording



the recognition of children and recording the validation of children and according to Law no. 23 of 2006 stipulates that the recording of a child's confession (Article 49) continues with the recording of the validation of the child (Article 50).

In the Elucidation of Article 49 paragraph (1) it is explained that what is meant by "child recognition" is the father's acknowledgment of his child born outside a valid wedlock with the approval of the child's biological mother. Based on the elucidation of Article 49 paragraph (1), recognition of a child is recognition of a child out of wedlock as a legitimate child as long as it has the consent of both parents.

Implementation of Legal Protection for Children Outside of Marriage After the Constitutional Court Decision No. 46/PUU-VIII/2010

The position of the Constitutional Court as a state institution is relatively new, namely when it was regulated in the 1945 Constitution of the Republic of Indonesia (Chapter IX) in Article 24 paragraph (2) and Article 24 C. According to Tutik's Quarterly Point,¹⁴ it is based on the constitutional system. The 1945 Constitution of the Republic of Indonesia, is known and distinguished by state institutions from the main state institutions. Because the Constitutional Court is the main state institution, while other institutions such as the General Election Commission are auxiliary state institutions that specifically deal with certain problems and functions (Nurhadi 2018).

The 1945 Constitution of the Republic of Indonesia stipulates that "The Constitutional Court has the authority to try at the first and final levels whose decisions are final to review laws against the Constitution, decide on disputes over the authority of state institutions whose powers are granted by the Constitution, decide on the dissolution of parties politics and resolve disputes regarding the results of general elections" (Article 24C paragraph (1)). Of the several powers of the Constitutional Court, what is relevant to this discussion is the authority to review laws against the Constitution. , which in state administration is usually called a judicial review. The 1945 Constitution of the Republic of Indonesia also stipulates that "The appointment and dismissal of constitutional judges, procedural law and other provisions regarding the Constitutional Court are regulated by law" (Article 24C paragraph (6)) The law in question is the Law Number 24 of 2003 concerning the Constitutional Court which was legalized and promulgated on August 13, 2003 and



announced in the State Gazette of the Republic of Indonesia of 2003 Number 98 (Rahmi and Sakdul 2017).

As Law no. 24 of 2003 concerning the Constitutional Court which consists of Chapter VII and 88 Articles, rearranged the editorial of Article 24 C paragraph (1) of the 1945 Constitution of the Republic of Indonesia to become Article 10 paragraph (1) of Law no. 24 of 2003 without changing words or sentences. One of the new changes to laws and regulations in Indonesia in connection with the existence of a Constitutional Court decision, namely the existence of a regulation in Law Number 12 of 2011 concerning the Formation of Legislation, in the provision that "In the event" (Handini 2019).

That an Act is suspected of contradicting the "The 1945 Constitution of the Republic of Indonesia, the review was carried out by the Constitutional Court" (Article 9 paragraph (1). Therefore, children outside of marriage actually do not know anything, are born in a state of purity, are innocent. If the perspective of sin it is argued, in fact both parents must bear the sin, but not children born due to promiscuity and various other examples because children do not have any faults. So when Article 43 paragraph (1) of Law No. 1 of 1974 was challenged, in a number of constitutional provisions, clearly contrary to Article 28B paragraph (2) and Article 28D paragraph (1) of the Constitution of the Republic of Indonesia (Martinelli 2017).

Indonesia in 1945. Article 28D paragraph (2) states "every child has the right to survival, growth and development and is entitled to protection from violence and discrimination". Likewise in the provisions that "everyone has the right to recognition, guarantees, protection, and legal certainty that is just and equal treatment before the law" (Article 28D paragraph (1).

Conclusion

As we all know that children's rights are human rights. Therefore, every child has the right to enjoy the right to care and the right to education. Because it refers to the KHA (Convention on the Rights of the Child) which has been ratified by the State of Indonesia in the Decree of the President of the Republic of Indonesia Number 36 of 1990. Because this disharmony creates legal ambiguity that has the potential to harm illegitimate children, therefore it is necessary to harmonize legal norms so as to ensure justice, benefit, and legal certainty. As legal protection for children shifts from originally legal protection only given to children born in marriage or as a result

of marriage to legal protection provided by law for children outside of marriage or children outside of marriage.

In the laws and regulations in Indonesia, originally only protected the legal status of legitimate children, based on legal marriage with all the rights attached to legitimate children, while children outside of marriage or children outside of marriage are only entitled to civil law protection. from third parties. mother or mother's family. Of course the shifts and changes to the law above are implications of the Constitutional Court Decision Number 46/PUU-VIII/2010, which equalizes the legal status of legitimate children and children outside of marriage by respecting civil rights. As well as the implementation of legal protection for children outside of marriage after the Constitutional Court Decision Number 46/PUU-YIII/2010, it will take effect immediately, so that the old provisions governing civil relations between children out of wedlock are only from the mother's side. or the mother's family becomes disabled and the child out of wedlock has the same status and law.

Recommendation

To ensure effective implementation of legal protection for children born out of wedlock following Constitutional Court Decision No. 46/PUU-VIII/2010, it is recommended to amend Law No. 1 of 1974 on Marriage, strengthening legal protection and human rights for these children. Additionally, it is crucial to enhance the understanding of law enforcement officials, including those in the Civil Registry Service (Discapil), to properly apply the Constitutional Court's decision. Religious leaders should also be educated to prevent misinterpretation of the ruling as a legalization of adultery.

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