

THE CONSEQUENCES OF AN UNREGISTERED MARRIAGE FOR THE WIFE AND BORN CHILDREN ACCORDING TO THE LEGAL SYSTEM IN INDONESIA

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ABSTRACT

A male and a female who willingly and without any force demonstrates a commitment to initiate a family may conduct a marriage, a sacred and religious legal event. From such relation, rights and duties of the husband/wife and of a child towards his/her parents and towards the God Almighty subsequently appear. Article 2 of Law Number 1 of 1974 states that a marriage will be legitimate if conducted according to each bridegroom's religion and recorded in line with the prevailing provisions. This article attempts to illustrate a social reality where a number of marriages were not legally registered in the office of religious affair (for Muslims) and the office of civil record (for non-Muslims) as the designated institutions. The state, in fact, has provided a legal protection for the spouse (male and female) and for their children if an authentic proof of a marriage in the form of a birth certificate is available. This writing employs a juridical normative approach to examine the family law linked to the decision from the Constitutional Court Number 46/PUU-VIII/2010 regarding judicial legislation of Marriage Law. The investigation discloses several factors influencing the preference for an unregistered marriage including the lack of understanding towards the importance of legal record, an underage marriage and a financial hardship. The legal consequences of such practice are the illegitimacy of such relation, the inability of the male or female counterpart to draw a lineage, and the absence of a birth certificate stating the father and mother's name in that the child could not establish any legal relation with his/her biological father including inheritance and a guardian of wedlock particularly for a daughter.

Keyword: factors, unregistered marriage, legal consequences.

INTRODUCTION

As the part of legal events, a marriage results in legal consequences and protections for a husband and a wife as well as their born children. Article 2 of Law Number 1 of 1974 regulating marriage states that the process will become legal if conducted in accordance to religious law from each believer and recorded based on the prevailing provision. Nevertheless, the existing reality in the society, particularly among Islamic Indonesians, demonstrates that a number of spouses did not register their marriage (also called as the hidden marriage) in the designated state institution (the office of religious affair and the office of civil record). To their view, as long as Islamic prerequisites and conducts have been fulfilled, the registration to the marriage record official is unnecessary. This phenomenon has occurred ubiquitously from the middle-low income and less educated society to the high and educated ones.

Among them (particularly for the groom) have married for the first time, and even for the second or a number of times (polygamy). Since the marriage is not registered to the official record, therefore, the wife/female counterpart is often negatively labeled as the "mistress" (Bafadhal, 2011).

Some assumptions have been made to examine the motives behind an unregistered marriage and its following risks. In the legally less-informed and low income society, the practical and inexpensive procedure offered by unregistered marriage becomes a viable option. From the religious perspective, the seemingly legal and not-time consuming marriage to avoid sins and sexually immoral deeds has contributed to individual inner peace (Triwanto and Suryanto, 2013).

For the time being, the unregistered marriage tends to disadvantage the female counterpart and born children. Due to the absence of legal agreement in the form of marriage license, the husband can easily neglect his duty. The worst case happened is the male spouse abandons the family whereas the wife who does not have the authentic proof of their marriage could not sue him.

The infamous example of an unregistered marriage is Mrs. Machica Mohtar who was married to the former state secretary, (the late) Mr. Moerdiono, and having one child. Unfortunately, as their marriage was not legally recorded, a birth certificate stating Mr. Moerdiono as the father could not be issued. In this regard, Machica struggled for her child's legal status through judicial legislation of Article 43 of marriage law to the Constitutional Court.

In regards to the aforementioned issue, this article attempts to describe factors influencing the preference for an unregistered marriage and its legal consequences for the wife and born children.

UNREGISTERED MARRIAGE

In Indonesia, an unregistered marriage is known as *sirri* which comes from an Arabic word, *sirra, israr* meaning hidden. *Sirri* (unregistered) marriage is, therefore, literally perceived as the hidden marriage. According to the law, this practice is defined as the marriage which is not recorded by the officials and in the office of religious affair. Ramulyo affirms the term of unregistered marriage. *Kyai* or *ulama* (an Islamic prominent preacher) who is regarded as knowledgeable in terms of religious proselytizing usually has the privilege to lead the procedure. In its social practice, the witnesses for an unregistered marriage would be very few and the process would not be registered in the local office of religious affair (Baidhowi, 2009).

Moh Idris Ramulyo (2002) states the prerequisites of a marriage according to Islamic law including: 1) a bride and a groom, 2) an agreement between them, 3) an obligation to pay a bride-price from the male counterpart, 4) at least 2 witnesses, 5) a consent/final offer from the male relative who is legally responsible for a bride, 6) an acceptance statement by the groom, 7) a marriage announcement as a celebration (according to what they can afford), as well as a record in line with the analogical interpretation from the holy Qur'an of Al-Baqarah epistle of 282 verse "that...". In this regard, marriage is regarded as a holy agreement and expected for an eternity. For the benefit of legal certainty for the following generation, a civil record of that marriage in a Muslim leader and in the sub district office of religious affair is necessary based on the integrated interpretation of Article 2 Clause (1) and (2) of Law number 1 of 1974 regulating marriage.

Furthermore, there are some meritorious and optional procedures in Islam by conducting a marriage sermon and celebration as well as mentioning a bride-price. Under the unregistered marriage procedure, those options are not undertaken, particularly in the celebration phase. As the marriage is known among a limited number of people, it is called as *sirri* or hidden or unannounced practice. In the next development, the term *sirri* is linked to the rules by the government and defined as the marriage which is not registered by the designated official in the office of religious affair. As stated by Ramulyo (2002), the marriage has fulfilled Islamic obligatory procedures and conducts but not registered in the official as regulated in Law Number 1 of 1974.

This unregistered marriage is socially regarded as hidden from not only the state but also the surrounding. According to Islamic law, the hiding practice is prohibited due to the lack of principle fulfillment and coupled with irresponsible intention (Baidhowi, 2009). An unregistered marriage is broadly defined as: First, a marriage without a relative who is responsible for a bride. That practice is frequently hidden due to the disagreement from the female relatives or due to the perception that the absence of a guardian is still legitimate or due to the desire to express voluptuous feelings; Second, a legitimate marriage according to the religious principle but it is not recorded in the state designated institution (Arsyal: 2012).

A MARRIAGE ACCORDING TO LAW NUMBER 1 OF 1974

Article 1 of Law Number 1 of 1974 states that a marriage is both an outward and inward bond between a male and a female as a spouse in order to create a joyful and eternal family (household) based on the belief to the God Almighty. From that statement, a marriage is not merely an external or spiritual bond, but it includes both ties (Syahrani, 2006: 62).

In Syahrani's book (2006 : 62), Saleh as stated in his book entitled Indonesian Marriage Law explains that as an outward bond, a marriage is a legal relation between a man and a woman to live together as a spouse. This formal relationship is evident for both themselves and the society. In this case, a ritual of marriage covenant becomes the major prerequisite for Islamic believers. Another expert in Syahrani's book, Haryono expresses further in his work entitled Islamic Law that a marriage, as an inward bond, is a spiritual connection due to the similarity and sincerity of intention between a male and a female to live together as a spouse. In the beginning, this connection is initiated and marked by the agreement from the bridegroom to get married. After this stage, their inward bond is reflected from the harmonious relationship between the husband and wife. Of course, that commitment becomes the primary principle to start a joyful and eternal family.

According to the legislative provision, furthermore, the creation of a family (household) is based on the faith for the God Almighty. In other words, the marriage shall be based on each religion and belief. Therefore, in Clause (1), Article 2 of Law number 1 of 1974 is stated that: "a marriage will be legitimate when conducted based on bridegroom's religion and faith".

In Syahrani's book (1006: 63), Hazairin in his writing entitled the Review of Law Number 1 of 1974, later quoted by Saleh in Indonesian Marriage Law explains that:

"...For Islamic believers, there will be no possibility to get married by violating religious principles. This is also applied to Christians, Hindus and Buddhas as occurred in Indonesia". In regards to the first principle of Indonesia's philosophy, Pancasila, a marriage has a close relation with religion. In addition, the joyful and supportive family becomes the ultimate objective of a marriage in that the children's protection and education are the obligation of parents (Kansil, 2000:16).

Furthermore, a marriage from the Islamic law is not only a regular civil contract but also a powerful covenant or *mitsaqan ghalidan* to obey God's order, carry out ritual prayers and to manifest a blessed household (Ramulyo, 2002:70). In Ramulyo's book (2002:27), Soemiyati, in her work entitled Marriage Law and Regulations mentions the purpose of a marriage according to Islam namely to fulfill the humanity purpose, to initiate a relationship between a man and a woman in order to create a joyful

family that cherishes love and care and to have legal descents through following Islam law. In a marriage, therefore, the husband and wife have vertical responsibility towards God Almighty and reciprocal duties among them and born children.

Article 2, Clause (2) of Law Number 1 of 1974 states that “each marriage shall be registered according to the prevailing provisions”. Thus, each marriage shall be conducted in front of the designated official. The absence of such registration will result in the weak legal protection (Article 6 of Islamic Law Compilation).

The procedure to register a marriage is regulated in Chapter V of third verse, paragraph 1 of article 34, 35, 36 of Law Number 23 of 2006 regarding the Civil Administration. Its purpose is to legalize the marriage status known for private and public matters. The other aim is to guarantee law certainty and order and as a marriage proof.

Besides the essence of marriage registration to maintain legal order which has profound benefits for the spouse, the designated institution also becomes the administrative prerequisite in that process. Moreover, the marriage certificate aims at protecting the rights of each party, including the husband, wife and the family of bridegroom. A marriage covenant procedure will be included there when the guardian, a father, will hand over his responsibility. Regarding its spiritual nature, the covenant shall be conducted directly and witnessed by others (Arsyal:2012).

A LEGITIMATE MARRIAGE

According to Article 2 Clause (1) of Law Number 1 of 1974, a marriage will be legitimate if conducted in line with bridegroom's belief and religion. Clause (2) states that each marriage shall be recorded based on the prevailing legislative provisions. There are two interpretation for that verse viz firstly, an argument separating clause 1 and 2, a marriage is legitimate if conducted in accordance with each bridegroom's belief and religion so that the registration to the local office of religious affair is merely an administrative prerequisite. It means that a marriage between two muslims is legitimate if they have fulfilled the conducts as elaborated above. The other argument integrates clause 1 and 2 drawn from sociological interpretation and linked to the legal consequences.

The preference for the second argument is based on the principle of legal certainty since Law Number 1 of 1974 was formulated to attain justice towards a certainty. Based on that law, marriage is legitimate if conducted in line with each bridegroom's belief and religion (muslims shall be in line with Islamic principles) and recorded by the designated official based on Law Number 32 of 1954 regulating Marriage record, divorce and reconciliation.

FACTORS INFLUENCING AN UNREGISTERED MARRIAGE

In most cases, an unregistered marriage is carried out due to private issues. Consequently, the problem is burdened to the related parties including the born children (Widiastuti, 2008).

Adillah (2011) elaborates a number of factors on why people do not register their marriage in the designated institution; they are: *first*, an economic consideration including the administrative expense to record that covenant. For a vast majority of society, particularly the low income group, the cost which is sometimes doubled than the official expense is not affordable; *second*, the underage bridegroom in that the office of religious affair will reject their registration; *third*, work or study duty/responsibility which only permits a marriage until the previously agreed contract such as a certain employment period or a study graduation has been fulfilled; *fourth*, an assumption regarding the legitimacy of an unregistered marriage according to bridegroom's religion believing that the registration to the office of religious affair is merely an administrative matter; *fifth*, a pregnancy outside a legal marriage, regarded as a disgrace, due to a free lifestyle; *sixth*, lack of understanding and awareness of society concerning the marriage record in which some people still view the administrative procedure as unnecessary; *seventh*, social factor related to the negative stigma for a man having more than one marriage (polygamy) thus an unregistered marriage is preferable to avoid that stigma; *eight*, the complicated procedure for a polygamy in that the second, third or respective marriages shall obtain an approval from the previous wife as regulated in Article 5 of Law Number 1 of 1974 formulated to reduce the chances of polygamy with unacceptable motives. Eventually, the male counterpart prefers to have an unregistered marriage due to the complexity of aforementioned issues.

LEGAL CONSEQUENCES OF AN UNREGISTERED MARRIAGE

As a consequence, a husband or a wife in an unregistered marriage will not obtain state acknowledgment. If duty negligence cases occur, his/her sue could not be processed due to the absence of marriage authentic proof. It also contradicts the regulation stated in Law Number 1 of 1974.

This article elaborates legal consequences of an unregistered marriage particularly for a wife and born children, the most suffering people here. Since the marriage is not officially recorded, the female counterpart could not be acknowledged as the legitimate wife and not have financial rights whenever a divorce is proposed because the marriage is not legally registered. Socially, a female in an unregistered marriage is deemed as negative cohabiting or even mistress for the society do not know their legal bond.

Children born from an unregistered marriage often deal with legal difficulties. In the civil conduct, they are only acknowledged from the maternal relation meaning that they do not have the right to receive any financial support, living cost, education fee and heritage from their father. As a legal consequence of an unregistered marriage, furthermore, the children would not have a birth certificate as the basis of other official documents later which will be required for the welfare subsidy, insurance or inheritance. Though according to Islamic law, an unregistered marriage is not prohibited, its legal risks will always result in disadvantageous circumstances for the wife and children. A child from this marriage will not have the rights as a citizen since their birth is not acknowledged by the state. Not to mention, the marriage certificate is absent as the covenant is not recorded in the designated institution. Actually the certificate does not determine the legitimacy of a marriage but it is the proof that the covenant was ever legally conducted (Muamar, 2005).

An unregistered marriage also has negative implications in terms of legal process for the related issues. For instance, if a wife under that scheme is abandoned by her husband, she could not sue the male counterpart as the absence of written proof. Moreover, she does not have the right for any financial support and heritage when her husband passed away and any material demands when the divorce is proposed. The wife will hardly socialize with the neighbors as the society sometimes labels her as a mistress or living with the male counterpart without any legal bond. Asmin (1986) also emphasizes the negative impacts for the children born from an unregistered marriage as they will only be legally related to the mother and maternal family and not have any rights for financial duty from their father.

THE IMPLICATION OF CONSTITUTIONAL COURT DECISION ON JUDICIAL REVIEW OF ARTICLE 43 CLAUSE (1) TOWARDS THE LEGAL SYSTEM REGULATING FAMILY MATTERS

Hj. Machicha Mochtar proposed a judicial review of Article 43 clause (1) of Legal Marriage to the Constitutional Court. The decision from the Court MK No. 46/PUU-VIII/2010 stated that Article 43 clause (1) was conditionally unconstitutional and shall be interpreted as *children born from an unregistered marriage have a legal relation with the mother and maternal family as well as the man scientifically proven as their father, including his family.*

If analyzed, the logic of that decision has a consequence on the relationship of children born in an unregistered marriage with their biological father, the inextricable rights and duties between the children and their biological father in terms of finance, inheritance and etc. It could possibly happen after a scientific proof was provided such as DNA and similar tests stating that the children have blood relation with their biological father. As a result, the legal relation between children and their biological father from an unregistered marriage based on Constitutional Court decision is also applied to prostitution matter, unregistered monogamous marriage and unregistered polygamous marriage resulting in legal rights and duties between two parties reciprocally. According to Khatulistiwa (2013), the rights of children in line with that regulation are: *first*, the right for financial support due to the acknowledgment of their status based on the Constitutional decision. Their father either legal or biological is, therefore, in charge of providing proper life for them since an unregistered marriage has an equal status with the legal one. In this regard, the financial responsibility includes living cost, health insurance, education fee, etc based on the father's income. The logic underlying the decision of Article 43 clause 1 basically states "it is unfair and incorrect if the male is exempted from his responsibility as a father after a sexual intercourse resulted in the female counterpart's pregnancy and the birth of a child and at the same time the law abolishes the child's rights fulfilled by his/her father". Implied in that statement, a male could neglect his duty as a biological father. After the provision in that article is reviewed, the biological father is forced by law to demonstrate his responsibility after what has been committed.

The second consequence is the role of a guardian responsible for a marriage based on the provision in Article 19 and Article 20, clause (1) of Islamic Law Compilation stating that the marriage guardian is the obligatory requirement for the bride during a covenant. Who acts as the guardian is a male fulfilling Islamic law who is Muslim, mature and mentally healthy. In the Article 20, clause (2) of Islamic Law Compilation, the guardian consists of two groups namely biological and legal representative. It can be best understood that the father has a biological relation with his daughter during or as a result of a legitimate marriage according to the Article 42 of Marriage Law. In other words, this provision regulates the legal relation between a child and his/her parents related to the guardian right. Unless the child's birth is in accordance to that provision, the father does not have any legal relation resulted in ineligibility as a guardian for his daughter's marriage and placed that role to the legal representative.

The final implication is the inheritance right. A decision from the Constitutional Court requires the provision of Article 43 clause 1 to be interpreted as a child from an unregistered marriage also has a civil relation with his/her father as long as it is proven scientifically and legally by an acceptable tool. Consequently, the opportunity for that child to receive the inheritance from his/her biological father is available. According to the theory of legal protection, the decision from the Constitutional Court attempts to manifest the protection for a child born from an unregistered marriage. For the time being, an equality of status between that child and the ones born from legally recorded covenant is feasible, in terms of financial support and inheritance.

On the other hand, the decision seems to weaken the function and essence of marriage institution. Its role becomes less relevant, even for an administrative task, concerning the equality among children from a registered and unregistered marriage. Moreover, its sanctity is decreased and in the worst case, there would be opinions that the institution is unnecessary as the children's protection could be obtained from an unregistered marriage.

This research will be continued by focusing on how the implementation of Constitutional Court decision number 46/PUU-VIII/2010 affects the request for marriage legalization; whether or not the Constitutional Court decision number 46/PUU-

VIII/2010 significantly affects the number of unregistered marriage spouses who propose the acknowledgement of their marriage. As a result, that decision will indirectly benefit the society.

CONCLUSION

Factors influencing a spouse conducted an unregistered marriage include the lack of understanding of marriage record, an underage bridegroom and financial difficulty. The legal consequences of such marriage is the illegitimacy of that covenant according to the state provisions, the inability to create lineage, the absence of a birth certificate stating the biological father and mother of the born children, the absence of legal relation between the child and his/her biological father such as inheritance and a guardian for a daughter's marriage. Unless scientifically proven, the relation between a child from an unregistered marriage and his/her father is legally unacknowledged.

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