



Discrimination against Children Born Outside of Marriage in Indonesia

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Abstract

The protection of Indonesian children as the nation's next-generation that is free from discrimination has not been fully implemented, it is evident in our society that there are still many children who do not get enough attention in protecting and fulfilling their rights. Children born out of wedlock are sometimes not recognized and neglected by their biological father. Unlike legitimate children whose rights are guaranteed and there are sanctions if these rights are not fulfilled by the father, for children born outside of marriage there is no penalty if the biological father neglects them. The method used in this research is the normative legal research method. This paper discusses the conditions of children born outside of marriage in Indonesia, discrimination against children born outside of marriage in Indonesia, and expectations for children born outside of marriage in Indonesia. Currently, there are no laws and regulations that state sanctions if the biological father does not want to be responsible for the birth of this child. This is certainly not in accordance with the mandate of the 1945 Constitution of the Republic of Indonesia Article 28D paragraph (1) which reads: "Everyone has the right to recognition, guarantee, protection and legal certainty that is just and equal treatment before the law.

Keywords: *Discrimination; Children Born Out of Marriage*

Introduction

The term children born out of marriage refers to Law Number 1 of 1974 concerning Marriage Article 42: "Legitimate children are children born in or as a result of a legal marriage." Then Article 43 states: (1) Children born outside of marriage only have a civil relationship with their mother and their mother's family. " In the contrary, a child born outside of marriage is defined as a child born in or as a result of a relationship outside of a legal marriage.

Children are valuable assets for the future of the nation and state. Children as the younger generation who continue the struggle of the Indonesian nation must be properly cared for, protected, and educated. The future of this country depends on our children. Children are the hope of the nation who will determine the future of a country. The prosperity of our nation is dependent on our children today. So we

should give our best to our future generations so that later this nation will become a more advanced and developing nation.

The justice system for children has not prioritized protection for all children who are in contact with the law (Collier, 2005; Laming, 2009). Seeing the importance of a child for the future of a country, children should get the best care, education, and protection in life. Protection carried out for children must be able to be addressed to every Indonesian child without exception. Because basically, all children must get the best without differentiating the status of the child. This is as mandated in article 28 B paragraph 2 of the 1945 Constitution which reads: "every child has the right to live, grow and develop and has the right to protection from violence and discrimination".

Child protection is the protection of children from violence, exploitation, abuse, and interference in accordance with the United Nations Convention on the Rights of the Child providing protection for children inside and outside the home (Melton, 1991; Southall et al., 2000; Unicef, 2009). The protection of Indonesian children as the nation's next-generation that is free from discrimination has not been fully implemented, it is evident in our society that there are still many children who do not pay attention to protection in fulfilling their rights. They are children born out of wedlock. Children born out of wedlock are sometimes not recognized and neglected by their biological father. Unlike other legitimate children whose rights have been guaranteed and there are sanctions if these rights are not fulfilled by their fathers, children born outside of this marriage in reality still often experience discrimination. Currently, there is no statutory regulation that states sanctions if the biological father does not want to be responsible for the birth of this child. This is certainly not in accordance with the mandate of the 1945 Constitution Article 28D paragraph (1) which reads: "Everyone has the right to recognition, guarantee, protection, and legal certainty that is just and equal treatment before the law."

The high number of children born without the clear status of their biological father often receives treatment that does not reflect justice and also has a bad stigma in our society. In fact, a child cannot choose under which circumstances he will be born. And the State should provide legal protection and just legal certainty to the status of a child and the rights that exist in it, including for children born even though with the legal status of the marriage of their parents who are still in the dispute or have never been married by the two. his parents. Because in fact, no child wants to be born as a child for adultery, outside marriage, or other status based on the considerations of the Constitutional Court Decision Number of the Constitutional Court Number 46 / PUU-VIII / 2010 concerning the Status of Children Born Outside of Marriage. This article discusses the condition of children born outside of marriage in Indonesia, discrimination against children born outside of marriage in Indonesia, and hopes for children born outside of marriage in Indonesia.

Methods

This research uses the normative legal research method. Normative legal research is legal research that places law as a norm system building. This research examines the study of documents, which uses a variety of secondary data such as statutory regulations, court decisions, legal theory, and can be the opinion of experts and researchers.

Results and Discussion

Condition of Children Born Outside Marriage in Indonesia

In the laws and regulations in Indonesia, the differentiation of the status of children is contained in the Civil Code, and the Marriage Law. The definition of illegitimate children (illegitimate children) is

used in two senses by the Civil Code, namely: (1) In a broad sense, are children born outside of marriage, including children who are adultery (*overspelig*) and discord (*bloedschenning*); (2) "In a narrow sense, are children born out of wedlock who are not children of adultery or disobedience" (Prawirohamidjojo & Pohan, 2000).

The definition and grouping of children are according to the Civil Code, whereas in Law No.1 of 1974 concerning Marriage, there are two divisions of children, namely as stated in Article 42: Legitimate children are children born in or as a result of a legal marriage. Then Article 43 states: (1) Children born outside of marriage only have a civil relationship with their mother and their mother's family.

The marriage law only mentions two definitions of children, namely legitimate children and children born outside of marriage, this is different from the Civil Code which mentions 4 types of children, namely legal children, illegitimate children, adultery children, and discordant child.

Naturally, there is not the slightest difference between children born from a legal marriage and children born outside of marriage. Both are legal subjects that must be protected by the State and the laws because according to religious views, there is no single teaching that adheres to the principle of hereditary sin. However, the negative stigma against children outside of marriage in Indonesia is still very much felt. Children born out of wedlock have a name from the community as "illegitimate children", "kampang children", "donated children", "kowar children" and so on.

In Indonesia, it is believed that if there are "illegitimate children" living in their environment, there will be a calamity for the surrounding environment, so that the child and his mother will be expelled from that place on the grounds that they will avoid the impact of the curse on other members of the community. The community does not realize that the birth of the child into the world is also caused by the act of his biological father who planted the seed in the mother's womb. Society rarely questions about the role of the biological father, or at least the male party who commits adultery is often not exposed to the stigma from society as experienced by the mother and her child. Even though the sin was actually committed by the two of them together, this is where perhaps the injustice that occurs where the children and women always get an unfavorable position before the law and society.

To overcome the negative stigma in society towards children outside of wedlock, in some areas there are institutions created specifically to cover up the shame of premarital pregnancy, among others in Java it is known as "tambelan marriage" or in Bali, it is known as "forced marriage" which in principle is the child is born still has a father legally, although it will not be able to completely remove the disgrace, because the phenomenon of premarital pregnancy will quickly become a sentimental issue in society, but at least it will minimize the risk for the child when dealing with the administration of his birth registration because he will be registered as a child who has neither father nor mother legally.

Data on children outside of marriage who are victims of the Information and Complaints Data Division of the Indonesian Child Protection Commission shows that in 2017 there were 11 complaints, in 2018 there were 42 complaints, and in 2018 there were 30 complaints. The complaint will be followed up by summoning the alleged biological father to come to the Indonesian Child Protection Commission (KPAI) office and provide clarification. However, from this complaint, the KPAI got a dead-end, namely when the alleged biological father was not willing to conduct a DNA test. When the alleged father was willing to volunteer to admit and then do a DNA test, the problem would be resolved. However, when the recommendation from the KPAI to carry out a DNA test was unwilling to be carried out by the biological father, the KPAI could not continue the next legal step and the complaint would stop halfway through.

Discrimination Against Children Born Outside of Marriage in Indonesian Law

Discrimination against children born out of wedlock is still very pronounced in Indonesia. It is proven by the community that it gives a negative stigma with the title “illegitimate children” and other names in several regions. Likewise, in the field of law, discrimination is seen by not accommodating the rights of children born outside of marriage when the biological father does not provide a living for him. This is certainly different from legitimate children whose rights are guaranteed if the parents' obligations are not carried out, namely through Law of the Republic of Indonesia Number 23 of 2004 concerning the Elimination of Domestic Violence, Article 49.

In 2010 a woman named Machica Mochtar requested a review of Article 2 paragraph 2 and Article 43 paragraph 1 in Law 1 of 1974 concerning Marriage. This article states that children born out of wedlock only have a civil relationship with the mother and the mother's family. This is because he feels that his child's rights are being harmed because the biological father named Moerdiono does not want to recognize the child from their religious marriage without being registered with the authorized institution. After going through a series of examinations, the judicial review was finally decided on February 17, 2012. The judges of the Constitutional Court granted Machica Mochtar's request for judicial review (Ghusairi, 2018).

Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage (State Gazette of the Republic of Indonesia of 1974 Number 1, Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states, "Children born outside of marriage only have a civil relationship with their mother and his mother's family ", does not have binding legal force as long as it is interpreted as eliminating civil relations with men which can be proven based on science and technology and/or other evidence according to the law has blood relations as the father, so the verse must be read," Children who born outside of marriage has a civil relationship with his mother and his mother's family and with a man as his father which can be proven based on science and technology and/or other evidence by law to have a blood relationship, including a civil relationship with his father's family, this is based on a Court decision. The Constitution Number, the Constituent Court Number 46 / PUU-VIII / 2010 concerning the Status of Children Born Outside of Marriage.

However, on October 7, 2011, before the verdict could be implemented, Moerdiono passed away. A DNA test was submitted to Machica Mochtar's child, but there was no comparison sample because the family of the deceased refused to do a DNA test. In Indonesia, there are no clear rules regarding the implementation of DNA testing, as well as provisions if the suspected biological father dies, or the refusal of DNA testing from the family of the suspected biological father. This case finally ran into a deadlock and until now, Machica Mochtar's child status is only the child of a mother or a child born out of wedlock.

The Constitutional Court decision is indeed final and binding, but in reality, until now the decision has not been implemented. This is due to the absence of clear implementing rules as a guideline in implementing this Constitutional Court decision so that until now the position of illegitimate children is unclear.

Several laws that have been mentioned above regulate the rights of children guaranteed by the State both for legitimate children and children born out of marriage. However, there is no legal rule that states sanctions if the parents do not give the rights of children born outside of this marriage.

In the practice of this discrimination is increasingly seen in the absence of a legal umbrella or protection that can be provided to children born outside of marriage by the government when there are complaints from the community regarding neglect of children outside of marriage. For example, in Malang City, Java Timur Province, the Office of Women Empowerment and Child Protection, Population Control, and Family Planning (DP3AP2KB) Malang City said that there were complaints about a case of a woman who was pregnant outside of marriage and a man who impregnated her

irresponsibly. complaints from women who have married religiously but are not recorded. The woman made a complaint to the DP3AP2KB office and hoped there would be justice for her and her child.

Based on the results of the interview, the officer accepted the complaint but could only provide advice in the form of possible assistance for the care of the child from the woman's family. Because DP3AP2KB in carrying out its duties holds that only legal families can be handled by DP3AP2KB. Legal family is meant here is a family with a legal marriage bond that is registered and recognized by the State. Those who have not yet married or are not married are not the authority of the DP3AP2KB in handling it. When referring to families with legal marital ties and problems in the form of neglect, the DP3AP2KB has concrete steps, namely in the form of psychological recovery and then including women victims of domestic violence in training so that women are better prepared for life from an economic perspective. DP3AP2KB also conducts mediation between the two parties, namely the mother and father so that the child still gets the rights of both parents. However, DP3AP2KB cannot do a number of things related to neglect when it comes to children whose parents have never been married.

Discrimination against children born outside of marriage does not only occur in Indonesia, America as a country which is known as a country that upholds human rights also has a dark history of discrimination against children born outside of marriage. In common law, a child born out of wedlock is *filius nullius* (not a child of anyone). They are social targets as evidenced by the terms used to describe them as "crook" or "illegitimate" and are often denied access to social, professional, and civic organizations.

Members of Parliament and American society at that time justified discrimination against unmarried children on the grounds that it would prevent the birth of illegitimate children and "preserve, strengthen traditional family life" (Monopoli, 2011).

No one will argue that for much of history in the United States, children born out of wedlock have suffered significant legal and social discrimination. Although many people believe that the legal harm inherent in "illegitimate" status has disappeared in the past forty years, this Article shows that the law continues to discriminate against unmarried children in a number of areas, including inheritance, citizenship, and child financing. Social bias towards children born out of wedlock also persists. The majority of Americans believe that the increase in non-married births is a significant social problem and nearly 50% believe that unmarried women should not have children. Some courts are aware of the social bias towards children born out of wedlock and have sought to protect children from the "stigma of illegality." However, legislative and executive efforts to promote marriage and reduce non-married births, along with some courts rejecting same-sex marriage as arguing that the state's goal in creating civil marriages is to prevent the birth of children born out of wedlock, have hinted that unmarried families getting married are deviant. These messages can reinforce people's disapproval of unmarried families and their children (Maldonado, 2011).

This discrimination is reflected in a court ruling in the state of Louisiana in which in the first case, *Levy v Louisiana*, Thelma Levy filed an improper death in a lawsuit in the name of seeking compensation for her sister Louise's extramarital child after their mother (Louise) was murdered. The Louisiana Court of Appeal confirmed the dismissal of the case by a state court of appeal. In reaching its decision, the appellate court interpreted the law as restricting the right to inherit with regard to the treatment of legitimate children only. The appeals court argued that because Louise's children were not legitimate children, they could not take advantage of the benefits offered by the law. In an attempt to justify his decision, the appellate court said the decision was necessary to promote morality and to protect the general welfare in order to encourage people not to have children without marriage (Lewis, 2007).

The Louisiana Supreme Court refused to hear the case; although the US Supreme Court gave certiorari. Based on rational analysis, the Court concluded that the law did not support constitutional

collection. Judges argued that the purpose of the law was to compensate children who lost their parents so that their birth status was irrelevant.

The court ruled that children born out of wedlock are legally entitled to the same protection as legal children. The court established several reasons for rejecting the state's argument and overturning the law. First, the Judge argued that the children's dependence on their mother for support had nothing to do with their birth outside of marriage. Second, the Court concluded that perpetrators of torture should not be exempted from the liability for the harm they inflicted on Louise simply because the child was born out of wedlock (Lewis, 2007).

Finally, the Judges ruled that under Louisiana law, both parents were given the duty to support their children born out of wedlock. Thus, if Louise was still alive, she would be obliged to provide financial support for her children. The culprit mistakenly caused Louise's death, thereby depriving her of her ability to fulfill the task. Therefore, the Court ruled that the perpetrators of the crime should be required to fulfill Louise's financial obligation to compensate her children regardless of their birth status.

A few months after Levy's ruling, the Supreme Court heard a second case relating to the constitutionality of the same Louisiana law. In *Gloria v American Guarantee & Liability Insurance Co.* Minnie Glona is suing for damages for the improper death of one of her children born out of wedlock. After concluding that Louisiana law did not allow a mother to recover damages for the loss of an out-of-wedlock child, a Louisiana court rejected Glona's claim. When the case reached the US Supreme Court, the State of Louisiana sought to justify differences in parental treatment of children born out of wedlock by arguing that there was a state interest in punishing illegality. The state maintains this by harming the parents of children born out of wedlock, so as to discourage people from having children without marriage ties.

Despite the Louisiana arguments, the Court concluded that the law violated the Equal Protection clause because there was no rational relationship between the interests of the state and the application of the law. The court argued that the true beneficiaries of the law, as it was implemented, were the perpetrators of the crime and not the state (Lewis, 2007).

Criminals benefit because they are allowed to injure children born out of wedlock with impunity. Furthermore, the Court found no rational basis for the relationship of fear of not being compensated for the wrongful death of a child born out of wedlock and the woman's cessation of having children born out of wedlock.

Discrimination above is a dark history that exists in the United States, but America has stepped forward and tried to eliminate discrimination against children born out of wedlock through the Uniform Parentage Act 2002. This law is the starting point for the equalization of positions between children born outside. legal marriage and children. It is time for Indonesia to eradicate any traces of discrimination by imitating America who had done it earlier so that justice was created for children born outside of marriage.

Hope for Unmarried Children

It is often forgotten that in fact there is no single religion that teaches that children born from forbidden acts should be punished like their parents. Isn't a child born never having a role in the actions of his parents? Even upon his birth, he never asked or was given the opportunity to choose whose Rahim he would be born from because all this happened by the power and will of God. Negative views on children outside of marriage actually occur a lot because of the impact of bad views on their parents, this is a conception of the paradigm that between parents who commit adultery and children born from that act often become one package because both have mutual bonds that give rise to each other. cause and effect, where the child is the result of adultery and adultery that causes the child to be born.

Social problems that include the status of out-of-wedlock children can actually be eliminated if the legal system provides more space for interested parties, including children and their mothers, to be able to fight for the status and position of the child before the law and society in general. If the child or mother is given the right by law to prove who the father is to fight for his civil rights without having to wait for the father's intention to give his recognition voluntarily, then besides the child can get his right to be able to live a more decent life with support and responsibility from his biological father, he will also get a better position in the eyes of society.

From this it appears that there is a problem in the form of a legal vacuum, that is, there is an event that occurs in society but there is no legal norm that regulates it. The state is obliged to protect all its citizens, especially children from ill-treatment and discrimination so that policy in the field of criminal law is needed that can overcome this problem and bring justice to children who are abandoned by their biological fathers. Due to the increasing number of children born out of wedlock, a regulation must be made to protect the interests of these children. They are sons of sons and they are entitled to financial support both during life and after the death of their parents. Regardless of morality, the decision of parents to have children out of wedlock is an option that can have serious legal consequences for children born outside of marriage.

The criminal policy in question is the criminalization of biological fathers for neglect of children born outside of marriage. The criminal law policy that will be initiated later is not intended to justify the actions of their parents who have committed adultery or have not registered their marriage or to legitimize and facilitate adultery, but this policy is intended to protect the rights of children born outside of marriage and provide legal certainty for They are without discrimination with legitimate children in fulfilling their rights, because children cannot choose under which circumstances or in which family they will be born.

Adultery will be more prevalent when people know that the consequences of their actions cannot be prosecuted, so that criminalization of this act will actually make people think again or feel afraid to commit adultery because if pregnancy occurs, the biological father cannot just escape responsibility. and there are criminal threats awaiting.

As in the United States which can be used as an example, there is a program namely Child Support Enforcement as a federal-state program to help strengthen families by securing financial support for children from parents without custody of them consistently and on an ongoing basis and by helping some families to remain independent and not depend on public assistance. Child support is a cash payment that parents without custody must pay for the financial support of their children. The Child Support Enforcement Program (CSE) was signed into law in 1975 (P.L. 93-647, Title IV-D of the Social Security Act) (Solomon-Fears et al., 2012).

Payment of child support allows parents who do not live with their children to fulfill financial responsibilities to their children by contributing to the payment of child care costs. The CSE program is based on the premise that both parents are financially responsible for their children. The basic responsibility for administering the CSE program is devolved to the states, but the federal government has a leading role in defining the main design features of state programs; funding, monitoring, evaluating country programs; providing technical assistance; providing assistance in finding parents without custody and obtaining child support payments.

Included in the methods available to collect child support obligations, the state uses the threat of imprisonment. All states have criminal laws relating to failure to pay child support. Thus, in all states, failure to pay child support is technically a crime under state criminal code.

We can apply this model in America to apply in Indonesia in the context of protecting the rights of children outside of marriage without any discrimination. But of course, this requires a long process and time, even though the fate of an out-of-marriage child is currently at stake.

As a short-term solution due to this legal vacuum, mothers of children born out of wedlock or guardians should not be silent and take legal steps. The legal step that can be taken is to file a lawsuit in court. The court which has the authority to examine and adjudicate children's livelihoods is included in the field of marriage law and is therefore subject to the Marriage Law Number 1 of 1974. According to the provisions of Article 63 paragraph (1) UUP, what is meant by the court in this law is a religious court for them. who are Muslims and district courts for others.

For those who are Muslims based on the principle of Islamic personality, then a Muslim mother applies and obeys Islamic sharia law. Someone is considered to be Muslim if it is known from the Identity Card or confession or practice or testimony; while for newborns or children who are not yet mature, they have religion according to their father or environment (Article 172 KHI). Analogous to this provision, because a biological child legally does not have a legal father, the child's religion is attributed to the mother both as the legal parent and as the closest environment to the child. Thus, if the mother is Muslim, then her child is legally considered to be religious according to the mother's religion, namely Islam, and therefore the child's interests apply and comply with Islamic sharia law, including here the importance of supporting the child.

Furthermore, because the interests of the child apply and comply with Islamic sharia law, all disputes related to it must be resolved according to Islamic sharia law, and therefore, based on sharia principles, this case becomes the absolute competence of the religious court. Article 56 paragraph (1) of the Religious Courts Law states that courts may not refuse to examine and adjudicate a case filed on the pretext that the law does not exist or is unclear, but is obliged to examine and decide it.

In the lawsuit which will be filed, basically asking the judge to carry out genetic testing, then determine the child born out of this marriage as the biological child of the alleged biological father, punish the defendant or the biological father who is suspected to pay for hospital delivery, sentence the defendant or father biologists suspected of paying for the unpaid child care costs, stipulating that according to law the Defendant was obliged to pay the cost of caring for the child every month until the child was an adult or able to become independent, Punish the Defendant or biological father who was suspected of paying compensation for any late payments every day.

After filing a lawsuit and the request is granted by the judge, often the biological father does not carry out the judge's order from the district court or the religious court where the lawsuit was filed. The biological father problem can be reported to the police by adhering to Article 216 paragraph (1) of the Indonesian Criminal Code.

Conclusion

Discrimination against children born out of wedlock is still very pronounced in Indonesia. It is proven by the community that it gives a negative stigma with the title "illegitimate children" and other names in several regions. Likewise, in the field of law, discrimination is seen by not accommodating the rights of children born outside of marriage when the biological father does not provide a living for him. As a short-term solution due to this legal vacuum, mothers of children born out of wedlock or guardians should not be silent and take legal steps. The legal step that can be taken is to file a lawsuit in court.

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