

# The Existence of Marriage Agreement and the Status of Illegitimate Children Among Moslem Community

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## ABSTRACT

Marriage agreement is one of the preparations in building a household before marriage. This kind of agreement usually arranges everything about marital property, either jointly acquired property or personally owned by one of the spouses. By doing marriage agreement, they can get legal certainty to use during marriage life and after divorce, in case there is one. This article contains the legal provisions regarding the process of drafting a marriage agreement until it's fixed. In addition, it explored marriage agreement from Islam's and Ulama's (Islamic scholar) perspective as it is made by the Muslim community in Indonesia and marriage agreements from the perspective of positive law No. 1 of 1974 on Marriage (hereinafter referred to as the Marriage Act). Children are a dream for every married couple. But what about the status of illegitimate children. Children who were born out of marriage are called illegitimate children who only have the right to a civil relationship with the mother and their mother's family.

**Keywords:** *marriage agreement, marriage agreement, illegitimate children.*

## 1. INTRODUCTION

According to Article 2 (1) and (2) of the Marriage Act, marriage is said to be valid if it is based on the law and their own beliefs. Subsequently, the marriage is registered and recorded based on applicable laws and regulations. For any marriage that is only legal in the term of religious law but not by the government law, then the child born from such marriage is considered as an illegitimate child.

Article 1 UUP explained that marriage is a bond of birth and spiritual between a man and woman as spouses with aims to establish a happy and eternal family (household) based on the first five moral principles, Belief in the Almighty God.

Nowadays, many people don't consider free sex as a taboo subject. So, the birth of a child outside marriage circumstances often happens. An illegitimate child is often called illegitimate because his biological father is unknown.

Article 28B paragraph (1) and (2) of the Constitution of the Republic of Indonesia of 1945 (hereinafter referred to as the 1945 Constitution) states that everyone has the right to continue the line through legal marriage and every child has the right to grow, to develop, and to get protection from violence and discrimination.

In addition to the birth of illegitimate children, there are also marriage agreements made by the community. The substance of a marriage agreement usually relates to property or custody of children in case a divorce happens. But the existence of this marriage agreement is considered as no strong commitment to live a married life. Because marriage is a very sacred contract (mitsaqan ghalizhan) to obey God's command and to perform as an act of worship, as stated in Article 2 of the Compilation of Islamic Law (hereinafter referred to as CIL). From the explanation above, there are two problems in this journal, namely:

1. What is the legal status of illegitimate children according to a positive legal perspective in Indonesia?
2. What is the Islamic perspective of the marriage agreement made by the Indonesian people?

## 2. RESEARCH METHOD

Based on the stated problems above, the type of research used was a literature review where relevant regulations were examined and analyzed. The approach used was a juridical approach, which is law research that prioritizes secondary data as the main material, while the specification of research was analytical descriptive.

### 3. RESULT AND DISCUSSION

#### *A. Definition of Illegitimate Child*

Article 99 CIL states that a legitimate child is a child born under legal and registered marriage. Article 100 CIL states that an illegitimate child only has descendants relationship with the mother and the mother's family.[1]

Imam Shafi'i and Imam Malik have the same opinion on this matter. If a man has intercourse with a woman outside of legal marriage and then the woman gives birth to a child after 6 months of marriage (not from the time of the intercourse), then the child cannot be included on the man's descendant line. While in Imam Hanafi's opinion, the born child can be attributed to the biological father as a legitimate child.[2]

In civil law, a child born from a cheating relationship between a man and a woman where either one or both of them are legally married to a different person is called an adulterous child.[3]

A child born from a relationship between a man and a woman who are not legally married is called an illegitimate child. The said child does not have a perfect position in the eyes of the law as a legitimate child in general.[4] Article 186 CIL stated that the illegitimate child can only inherit property from the mother and the mother's family.

#### *B. Status of Illegitimate Children According to Fiqh*

Illegitimate children do not have an inherited relationship with their biological father and only have an inheritance relationship with their mother and mother's family. This is in line with the hadith of the Prophet Muhammad, Abdul lah bin Amr bin Ash said, that the Prophet Muhammad decides that children from intercourse with slaves owned by another person, or from the result of adultery by a free woman couldn't be included into the biological father's descendants line and couldn't inherit his property [5]. However, illegitimate children can inherit their biological father's property by a will written by their biological father. Because a will can be given to other than heirs. The majority of ulama also agree that illegitimate children do not inherit from the biological father and vice versa.

#### *C. Status of Illegitimate child According to CIL*

Article 186 CIL stated that children who were born outside legal marriage only have a mutual inheritance relationship with their mother and their mother's family. Therefore, illegitimate children, whether male or female, have no lineage with their father. So the child doesn't have the right to inherit the property of their biological father and their biological father's family because it is

considered that there is no blood relationship between the two.

According to Wahbah Zuhaili [6], there are three ways to determine the lineage of a child, namely the existence of a legal marriage, the recognition of lineage of descent (*itsbat nasab bil iqrar*), and by proof.

#### *D. Implementation of Marriage Agreements in Indonesia*

Indonesia has a motto *Bhinneka Tunggal Ika*, which means that although Indonesia is a multi-ethnic country with many different ethnicities and cultures in society and hold fast to religious values and oriental customs, during its development the society becomes increasingly complex and intricate [7]

People used to know that marriage not only unites two human beings but also unites family and property. This stems from the mutual trust between husband and wife. But nowadays many spouses do marriage agreements mostly to discuss about property and custody of children in case there is a divorce between the two.

Article 1 of the UUP states that marriage is an innate bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on the Supreme Deity. From this definition, we can conclude that marriage must be based on love and affection.

Written Marriage agreements would cause legal consequences for both parties, where the parties have tied up n down themselves and there are penalties for breaking the law, as stated in the draft Article 1313 of the Civil Code (hereinafter BW).

This agreement is usually made before the marriage takes place intending to regulate the rights and obligations of the husband and wife and property after they get married. This is contrary to the purpose of marriage, which is to form a happy and eternal family based on the Almighty God. Because there are indications for divorce or economic/political motivation since the beginning of the marriage.

The marriage agreement can be made by both parties themselves, then ask for approval from an authorized official or made in front of a Notary to obtain strong legal force.

Since the marriage agreement is made based on the agreement of both parties, it cannot be changed unilaterally both parties agree to change it. The statement is based on Article 29 paragraph (4) of UUPA about the ban of a third party involvement during the changes of the agreement Court Decision No. 69/PUU-XIII/2015 dated October 27th, 2016 with the UUP judicial review case, as follows:

- a. Article 29 Paragraphs ( 1 ), ( 3 ), and ( 4 )
  1. At or before the marriage takes place both parties agree to enter into a written agreement which is then legalized by the marriage registrar, after which the contents also apply to the third party as long as the third party is involved.
  2. The agreement takes effect from the time the marriage takes place.
  3. The agreement cannot be changed unless both parties agree to change and the change does not harm the third party.
- b. Article 35 paragraph (1), jointly acquired property is a property acquired during the marriage. That Constitutional Court's decision on Article 29, paragraph UUP is contrary to the 1945 Constitution written agreement approved by the marriage registrar officer or notary, shall also apply to third parties as long as they get involved.
- c. Article 29 paragraph (3) of the UUP is contrary to the 1945 Constitution as long as it is not interpreted as the agreement becomes applicable since the marriage took place unless there is a specific rule in the marriage agreement".

### ***E. Marriage Agreement in the perspective of Positive Law and Islamic Law***

Based on the hadith of the Prophet Muhammad SAW, Islamic law does not explicitly state that Prenup is done before or at the time of the marriage. However, there are differences in the application of the marriage agreement from the Ulama'such are Syafi'i, Hanafi, Maliki, and Hambali, the agreements contain as follows:

- a. An agreement contains the husband's obligation to support the wife including food, clothing, and housing. The scholars agree that this is an absolute obligation that must be fulfilled by the husband to the wife.
- b. An agreement states that the wife is not allowed to leave the house, travel, and practice polygamy. According to Imam Hambali, this agreement must be fulfilled by the husband, but according to Syafi'I, Hanafi and Maliki the husband is not obliged to fulfill the agreement.
- c. The agreement in which the husband had to divorce his first wife before getting into a new marriage. All of the scholars agree that this agreement is not required to be fulfilled because prophet Muhammad (peace be upon to him) bans the breaking of an existing marriage.
- d. The agreement that states the dowry will not be paid by the husband, alimony will not be given by the husband, the wife will not get the same turn, in a week the husband only comes to the wife overnight,

the wife will support the husband and so on. The scholars agree that the agreement is void by itself and is not obligatory because it is not valid.

- e. A temporary agreement or a contract-based marriage, a mut'ah marriage/ one that is declared after intercourse can be divorced, a muhallil marriage is an agreement where the husband has to marry his daughter to the woman's guardian without a dowry. The agreement is automatically void because it is invalid.

The substances of a marriage agreement that are allowed under Article 45 of Chapter VII of CIL are Talaq taklik (impotent divorce) and any agreement that is not contrary to the law of Islam. Furthermore, Article 46 paragraphs (1), (2), and (3) explain that the content of the talaq taklik must not be contrary to Islamic law and if the conditions required in the talaq taklik does occur later, the talaq does not fall by itself. For the divorce effort to truly fall, the wife must file her case to the Religious Court. Talaq taklik agreement is not a treaty that must be held, but once legalized, it cannot be revoked.

The marriage agreement has legal implications, such are [8]:

- 1) Regarding joint property, article 48 paragraph (1) CIL, the arrangements of separation of the joint property could not eliminate the husband's obligation to fulfill the needs of the household. Article 48 paragraph (2) explained further that if the provisions in paragraph (1) are not met then it is considered that there is still a separation of joint property and the husband is obliged to bear the cost of household needs.
- 2) Regarding the amalgamation of property, article 49 paragraphs (1) and (2) CIL stated that the amalgamation of property in question includes innate property or property acquired during the marriage or is limited to the innate property only.

Article 50 paragraph (1) of CIL stated that marriage property agreements, binds on all involved parties from the date of the marriage are conducted in the presence of the Registrar. Then article 50 paragraph (2) CIL explained that the marriage agreement on the property can be revoked by mutual consent.

Article 50 paragraph (4) of CIL stated that if within six months the spouses don't announce the revocation, then the revocation registration immediately falls and doesn't bind on third parties. Continued in paragraph (5), the revocation of the marriage agreement regarding property shall not harm the previous agreement with a third party.

Article 51 CIL stated that a violation of the marriage agreement gives the wife the right to request annulment of marriage or file it as a reason for a divorce lawsuit to the Religious Court.

This marriage agreement which is regulated in Article 29 of the UUP is narrower because it only covers *Verbintenissen* that originate only from the consent of the *Overenkomsten* and on acts that are not against the law. So it does not cover *Verbintenissen Uit De Wet Allen* (alliances derived from the Law) [8]. It is said to be narrower because the marriage agreement in this law does not include *talaq taklik* as contained in the marriage certificate.

In Article 147 of the BW, the marriage contract must be made by notarial deed before the marriage ceremony and begin applicable immediately after. It can be concluded that the Notary deed is an absolute condition of the marriage agreement.

According to Article 149 BW, after the marriage takes place, the marriage agreement cannot be changed in any way. Article 50 paragraph 5 CIL, the revocation of a marriage agreement on the property shall not be prejudicial to the previous agreement with a third party. Article 51 CIL, violation of the marriage agreement gives the wife the right to request annulment of marriage or file it as a reason for a divorce lawsuit to the Religious Court.

Article 139 BW stated that marriage agreement shall not be contrary to public order and decency. In addition, it must not violate the marital rights of the husband, as follows:

1. The husband has to settle where the wife will live
2. Husband's right as a parent
3. The rights to be the heir over the spouses' inheritance who died first
4. The husband's right as a priest or head of the household, unless otherwise agreed such as the wife's right to take care of and enjoy her personal property.
5. The right to the inheritance from his descendants (Article 141 BW) [9].

Article 142 of the BW stated that the part of the debt that falls to one of the parties shall not be agreed upon to be greater than the part of the profit. Furthermore, in Article 143 BW, it should not be agreed in general words that the marriage bond must obey the foreign provisions, customs, or local regulations. Then in Article 151 BW, it's stated that the person who enters a marriage contract must be able to act according to the law, except for a minor where he can enter into a marriage contract once he reaches 18 years old and 15 years old for a woman.

3 types of properties that become the legal consequences of the marriage agreement are the joint property, the husband's personal property, and the wife's personal property. [9] Personal property consists of:

- 1) Movable goods or receivables due to a letter of conveyance (*toonder*) before the marriage.

These items can be seen in the marriage agreement or the list attached to the marriage agreement (Article 165 BW).

- 2) Immovable goods or receivables in the name of or due to a letter of instruction (*order*) before the marriage. The origin of these goods and receivables can be detected because the deed or receipt letter is written.
- 3) Movable goods obtained due to grants or inheritance during the marriage can be proven by the existence of an intent letter regarding the goods. If such an item is in the husband's and the claim does not exist, then the item should not be considered as the personal property of the husband but falls on the union. If the goods are in the wife's possession, while there is no proof, the wife or her family can prove the origin of the goods by presenting witnesses and public knowledge if necessary. If the proof cannot be held then the goods are in the joint property (Article 166 BW).
- 4) Immovable goods and securities in the name of or because of a letter of intent (*order*) obtained during the marriage and there is information that proves it as personal property. If this information is not available, then the goods are on the joint property (Article 159 BW).

## 4. CONCLUSION AND SUGGESTION

### A. Conclusion

1. The status of illegitimate children according to BW only has a legal relationship with the parents who acknowledge it. Meanwhile, according to Islamic law, an illegitimate child only has a descendant relationship with the biological mother and the mother's family. Therefore, the child doesn't have the right to the biological father's inheritance heir, alimony. The said father does not have the right to be a marriage guardian.
2. A Marriage agreement that is written by both parties will cause legal consequences for both parties (Article 1313 BW). While the view of Islamic law on marriage agreements indicates that as long as it is not contrary to Islamic law, any marriage contract can be made. In positive law, the agreement cannot be ratified if it violates the boundaries of law and decency.

### B. Suggestion

The government and the community must be in synergy with the regulations of law that have been established to ensure no rights of citizens are harmed by

the existence of marriage and marriage agreements that are contrary to the UUP.

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