

December 9<sup>th</sup> 2016



# The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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**UNISSULA PRESS**

ISBN. 978-602-1145-41-8



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## **LEGAL PROTECTION PROBLEM OF WIFE AND CHILDREN OF POLYGAMY SIRRI IN INDONESIA**

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### **ABSTRACT**

In order to ensure that the marriage of a citizen to the full protection of the State shall be recorded, the marriage already recorded shall in addition to obtaining legal force and assurance of legal certainty shall also ensure the legal rights of both the spouse and the child and of the marriage concerned that. Unmarried marriages will not have any protection and legal guarantees, so married couples and children born from unregistered marriages are always unable to access public services, whereas they are citizens who are constitutionally protected and have no discrimination.

The state has given the rules in the form of law or other written regulations to be implemented by its citizens, but the facts on the ground there are still many people who are not obedient, many examples of marriage monogamy or polygamy is not recorded (layman's term called marriage Under the hand / sirri). Parties who are very loss in marriage are not recorded are women and children are born right, because for him does not have a clear legal basis.

The purpose of the law is to give goodness and benefit to human beings, referring to the objective of Islamic law that in emergency / *dhorury* the rights of principle must come to the masses of people (for life, religion, descent, property and soul / mind); Whereas from marriage that is not recorded will be born human also. In principle the fifth principle of right must be owned by humans, then whatever the condition of married citizens are not recorded both monogamy and polygamy should be sought legal solution in order to get their legal protection as a citizen.

## A. Background.

Indonesian national law development is inseparable from the goals; social defence (social protection) and social welfare (social welfare) as contained in the preamble of the constitution of the Republic of Indonesia in 1945 alinea to four; ... to form a government of the State of Indonesia that protect the entire Indonesian nation and the entire homeland of Indonesia and to promote public welfare, educating the nation and participate in implementing world order based on freedom, lasting peace and social justice ....<sup>1</sup>

Many legal methods for realizing these objectives, among others, the progressive method of making laws is always open, dynamic and flowing<sup>2</sup>. Although John Austin stated that the law merely as a ruler orders (Austin's Broad approach to law was to regard it as the command of the sovereign)<sup>3</sup>. Austin also describes the law can and stressed that the law is as orders from the sovereign in a society that bias in the form of a person, such as a king or queen, or a group of elected officials such as law-making institution<sup>4</sup>.

That view is in line with the opinion of Jerome Frank<sup>5</sup>, a complete set of rules of the law that existed since ancient times and can not be changed unless restricted for law-making institution which has changed the laws that have been set. Opinion was in normal condition that can rated that all citizens are law-abiding and conscious, but what about the citizens who are not in such conditions? by reading the law as to which development objectives mentioned above there is no necessity of realizing alinea welfare. In terms of implementation there are obstacles, especially to the Judge as the last hope still many who were thinking of positivism that is thinking what contained in the rules (in the book) not see the real condition of the broader and useful (out of the book), the case the judge is authorized to excavate and creates interpret the law so that the law itself can be enjoyed from the values of justice and certainty.

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<sup>1</sup> .The set of Legislation of the Republic of Indonesia according to Engelbrecht system 2006. PT Ichtar New Van Hoeve.Jakarta .. p15..

<sup>2</sup> .Mahfud MD, et al, 2013, Deconstruction and Legal Thought Progressive Movement, Semarang, Thafa Media, First printing, Diponegoro University consortium Progressive Law, p. ix.

<sup>3</sup> .George Whitecross Paton, A Text Book Of jurisprudence, Second Edition, Oxford At The Clarendon Press, p. 6.

<sup>4</sup> .Werner Menski, 2012, Comparative Law in the Context of Global Systems Europe, Asia and Africa, Translation M.Khozim, Nusamedia, mold II, p.208.

<sup>5</sup> .Jerome Frank, 2014, Law & Modern Thought, Translation, Rahmani Astuti of the book Law and the Modern Mind, mold II, 2014, Nuance Scholar, Bandung, p.74-75.

Why the judge granted the authority as a judge made law<sup>6</sup>? because the judge has a role and the authority to formulate the law in simple language, clear, unequivocal and helpful by showing where in the realm of law in the books and law in the realm in which the action or out of the book.

In the community there are still many who do not follow the law prepared by the state such as getting married and polygamy is not recorded (Sirri / wedding undeclared), whereas these provisions to provide legal protection for himself and his generation, the assumption is awakened is understanding just important unmet material law, but they ignore the formal legal provisions.

This paper is intended to give false advice and thought that Indonesian citizens should acquire the same legal protection, as well as providing advice legal solutions that benefit the citizens at large.

## **B. Problems.**

- a. Why there is no legal protection against the wives and children of polygamy Sirri in Indonesia?
- b. Solution granting legal protection to the wife and children of polygamy Sirri in Indonesia in order to obtain justice?

## **C. Discussion**

### **1. Legal Protection against Wife and Children of Polygamy Sirri in Indonesia.**

Forms of legal protection is on the question of giving a sense of security, freedom from danger, free from interference, peaceful, do not feel scared or worried about

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<sup>6</sup> .Made in relation jude law, Bagir manan, stating the principle jude law is made in order to attempt Judge create legal reform through this putusannya.Konsep rosecoe pound line with the opinion that the legal meaning is as a reformer means community / law as "as a tool of social engineering "a phrase rosecoe pound in Indonesia introduced first by Muchtar kusumaatmaja (FH Unpad) to transform the concept of pound it into one of the basic policy of reform and development of national law, who was belaiu as well as the Ministry of Justice, the concept of the idea keeps rolling supported by Sunaryati Hartono (Unpad), Sacipto raharjo (Diponegoro University), Sutandyo (Airlangga University), and Purnadi purbacaraka and Suryono sukanto (UI). The transformation concept roscoe pound was similar but not identical to the concept of law as a means of reformer of our society, since the concept of roscoe puund as a reformer is a judge with his main source of legal norms anglo sexon / common law system, while the reformer of our society is a social reform that is based on regulation law. for realize it all the words of the law is not merely in the sense of the rules of the legal system, but the empowerment of various sub-systems covering law; legal education, the legal profession, law enforcement and other legal proceedings can be read sebagainya.Discussion complete in Varia Justice XXII 254 years to January 2007, p..5.



something<sup>7</sup>. According Sacipto Raharjo that form of legal protection is to give shelter to human rights (HAM) that harmed others and the protection given to the community to enjoy all the rights conferred by law<sup>8</sup>.

Bernard Arief Sidharta reminded that<sup>9</sup>: The purpose of the law is based on ideals of law Pancasila is giving shelter to humans, which is to protect humans passive (negative) to prevent arbitrary actions, and actively (positively) by creating conditions of social humane that allows the community takes place naturally so justly each person obtaining the potential of humanity as a whole.

The form of legal protection may include protection that is both preventive and repressive protection<sup>10</sup>. The significance of these two is the prevention and settlement. Enforcement of human rights against women is still not up to even leave a stigma on female sexuality seems still firmly rooted in the culture of the community. View dichotomous makes women easier access to their rights<sup>11</sup>.

Why did his wife and children in need of protection marriage? This is because his wife and children are also citizens' constitutionally guaranteed. In terms of wife marriage have the same rights in family law, what if the marriage is not registered? how Also, if women as wives polygamy Sirri? Means a marriage that is not recorded or Sirri is unfair treatment to his wife and child, state that makes them do not receive legal protection as well as difficulty accessing public services.

There are several benefits of marriage registration, as written by Ahmad Nuryani<sup>12</sup>:

- a. Imagine legal protection, for example the case of domestic violence (domestic violence). If she complained to the authorities, the complaint as the wife who gets violent action would not be justified. The reason is, because the wife is not able to show evidence of an official marriage certificate is authentic.
- b. Facilitate the affairs of other legal acts related to marriage pernikahan. Akta will help a husband and wife to perform other needs related to the law. as if to perform

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<sup>7</sup>.H.Salim HS, Erlies Septiana Nurbani, 2013, Application of Legal Theory Research Thesis and Dissertation On, PT.Raja Grafindo Persada, Jakarta, Molds kedua.p.260.

<sup>8</sup>.Ibid, p, 262.

<sup>9</sup>.Bernard Arief Sidharta, 2009, Reflections About the Structure of Legal Studies, Mandar Maju, third printing, p, 190.

<sup>10</sup>.H.Salim HS, Erlies Septiana Nurbani 2013. Op-cit, p. 264.

<sup>11</sup>.Maidin Gultom, 2014, Legal Protection Against Children and Women, Refika Aditama, mold into three, Bandung, p,67.

<sup>12</sup>.<http://kua-gedebage.blogspot.co.id/2010/10/dasar-hukum-pencatatan-pernikahan-di.html>.

the pilgrimage, marry the daughter, the maintenance of health insurance, and others.

- c. Formal legality before the law marriages are considered legal marriage is a marriage legally registered by the Registrar of Marriage Officer (VAT), or designated for it. Because although the religion of a marriage without listed by VAT, essentially illegal under the law.
- d. A security guaranteed officially registered marriages would be guaranteed the security of the possibility of forgery and other fraud. For example, a husband or wife is about to falsify their name contained in the Marriage Certificate for deviant purposes. Thus, the authenticity of the Marriage Certificate can be compared with a copy of the Marriage Certificate contained in the relevant KUA married first place.

Linked with Islamic legal doctrine that the state in regulating the people is to be in the concept of welfare, as to which principle fiqhiyah<sup>13</sup>:

تصرف الأمام على الراعية منوط بالمصلحة

Meaning: "action leaders who take care of the people must be associated with benefit".

This meaning shows how important marriage are regulated by the State, so that the meaning of marriage subsntansial can be maintained and kept either by the perpetrator and the State to realize the role of the State provides legal protection to citizens, needs to know that marriage is a bond that is very sacred because it is associated with human existence as being the most noble among the creatures of Allah<sup>14</sup>.

There is another explanation of the importance of marriage certificate<sup>15</sup>:

1. Security and proof of identity becomes very important in criminal assault / domestic violence and trafficking in persons (human trafficking).
2. Asset land and whether the land sepencaharian property or joint property in marriage is registered in the name of the second husband or wife or her can be a determinant factor of one's wealth.

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<sup>13</sup> .Imam Jalaluddin Abdurahman Al Syuyuthi, 1983, Al-Ashbah wa al annadlair, daaru al polar al 'around the globe, Beirut, p.134.

<sup>14</sup> .Andi Syamsu Alam, 2005, Age Ideal Entering the World of Marriage An Endeavor Realizing Sakinah Family, First edition, Kencana Mas Jakarta, p. 10.

<sup>15</sup> .The Supreme Court and AusAID, 2010, Providing Justice to the Justice Seeker: A research report Access and Equity On Courts and Religious Courts in Indonesia in 2007-2009. p.23.

3. Movable property and who holds the movable property associated with the ability to generate income for the family or taking as collateral.
4. Identity Card and Family Card can evidence poverty and guarantee Access an on subsidies like health, other government services and cash transfers.
5. Contracts underage marriages are becoming increasingly common as a legal marriage with a minor requires court ruling on it. Marriage Certificate for deviant purposes. Thus, the authenticity of the Marriage Certificate can be compared with a copy of the Marriage Certificate contained in the relevant KUA married first place.
6. A birth certificate is important, because there is a link between an invalid marriage, and children who are unable to obtain a birth certificate.
7. Inheritance rights of children invalid marriage is very problematic because it has no legal basis.
8. Legal divorce provides a mechanism for spouses to be responsible for the availability of the food, health and education of children of the marriage. Legal divorce provides clear decision about the maintenance of children of the marriage after the marriage ends.

Humans as God has basic rights are absolute for every human being who should be protected are prevalent in the call have human rights (HAM). Regarding these rights has been affirmed in Article 28 of the Constitution of the Republic of Indonesia in 1945<sup>16</sup>. There are many rights that should have people living in a country, among others; every citizen has the right to live life-sustaining and life, the right to form a family and continue the descent through legitimate marriage, every child has the right to live, grow and develop and are entitled to protection from violence and discrimination, every person is entitled to the recognition of a guarantee of protection and legal certainty fair, equal before the law, everyone is entitled to citizenship.

Although in the implementation of the State's legal system is inseparable with the three components of the institutional structure of the law, legal materials and legal culture<sup>17</sup>. Of the three components must synergize each domain and appropriate authorities of each order legal benefits and purpose of the law is able to provide the benefit, certainty and benefits for all its citizens.

<sup>16</sup> .see article 28 A, B, C and D in the Constitution of the Republic of Indonesia 1945..

<sup>17</sup> .<http://temukanpengertian.blogspot.com/2013/09/pengertian-sistem-hukum-nasional..>

2. Solution granting legal protection to the wife and children of polygamy Sirri in Indonesia in order to obtain justice.

Islamic law is the ultimate purpose of human welfare and no one law that enacted, both in the Qur'an and Sunnah US- but there is benefit. Speaking about the purpose of the law is enacted as a form of embodiment of protection so that all citizens obtain justice. Justice in English is "justice" according to the Dutch language "rechvaardig". Fair acceptable interpreted objectively. Justice The intention right properties (deeds, treatment) fair. there are three terms fair, namely: (1) no bias or partiality (2) in favor of the truth (3) or not arbitrary<sup>18</sup>. In terms of seeing justice is the focus of Jhon Stuart Mill argued necessary existence essence of justice and fairness<sup>19</sup>. Still according to Jhon Stuart Mill intent existence justice is justice is a moral rule, whereas the essence / essence of justice is a right granted to individuals to perform.

From the above description, the role of the wife in polygamy Sirri legal protection becomes very weak and unfulfilled benefit / *maslahah* for the protection of the rights and obligations in the household be touched upon which to base a marriage can not be proved.

Abdul Manan<sup>20</sup> cites the opinion of al-Khwarizmi stated that *maslahah* is maintaining the goal of Islamic law by refusing to disaster or damage dubious of human beings. As we know that the goal of Islamic law is to preserve religion, morality, life, property and descent.

Abdul Manan<sup>21</sup> still cites the opinion of al-Ghazali; that according to *maslahah* origin that means something that brings benefit or advantage and keep damage is to maintain the goal of Personality 'in setting the law, while according to the ad-Din Zaki Sha'ban is *maslahah* is something established by law will be successful in attracting benefits.

The solution needed to fit the character of the Indonesian nation :

1. Taking into account the five precepts of *Pancasila*, which reads "Social justice for all Indonesian people" are described in as translation into three namely: Maintaining a balance between rights and obligations. As a citizen of granting a balance between rights and obligations there is no requirement, it is given the citizens recognized in a country are legal citizens. But in a country that has a constitution also requires that citizens abide by the

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<sup>18</sup> .H.Salim HS, Erlies Septiana Nurbani, 2014, Application of Legal Theory On Research Dissertation and Thesis, the second book, PT.Raja Grafindo Persada, Jakarta, First edition, p.25.

<sup>19</sup> . *ibid*,p,26.

<sup>20</sup> .H.Abdul Manan, 2007, the Law Reform Islam in Indonesia Overview of Aspects Metodologi.Legalisasi, and Jurisprudence, p.262.

<sup>21</sup> . *Ibid*,p,262-263.



provisions set out in the institution of 1945. Against this condition all citizens in any condition of his legal status should be given legal protection.

2. For comparison in countries neighboring Malaysia only good polygamy setting regulations and procedures can be summarized as follows<sup>22</sup>: the issue of marriage, divorce and cases that are related to it have been documented for a long time embracing the principles of Islamic Laws. Malaysia began fikus set about polygamy from 1970 to 1980, specialized in Selangor and Negeri Sembilan state what would if polygamy should make divulging confessions in accreditation forms that he had a wife and several announcement about the ability of the husband. The consequences of polygamy that does not follow the deed in Malaysia imposed a fine or imprisonment<sup>23</sup>.
3. What if such a formal legal rules must be adhered to marriage laws without exception, it has been a legal vacuum on the legal protection to his wife and child of a polygamous Sirri based on values of justice. The role of judges through the creation her verdict will determine their fate that they obtain legal protection as citizens protected by the constitution, by taking refuge in welfare, then digging theory *maqasid al-Sharia*, *maslahah* and progressive law should the judge have a chance to make law (judge made law ) like making opportunities throughout the *contentiousithbat syar'i* marriage is not obstructed.

#### **D. Conclusion.**

1. The protection of the law against women as wives in polygamous Sirri did not exist, because it has no legal standing. Similarly, the legal protection of children as a result of polygamous marriage Sirri generation becomes very weak.
2. Subject to the purpose of the law is for the benefit and ensure the certainty and fulfill justice; then from every institution in connection with the purposes fulfilled legal protection for citizens that is in substance that the charge material is expected to be able to accommodate all the needs of law, structures that stakeholder authorities did not minded narrow (in the book), but should be open minded in the future with the development of state (out of the book), as well as a culture that law enforcement must be recognized as a basic requirement to guarantee citizens during live a life that can not be separated from the law as a ritual applicable generations, so that the benefit of humanity can be realized.

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<sup>22</sup> .Disarikandari Raihanah Abdullah, 2014, *Poligami Penjelasan berdasarkan Perspektif Undang-Undang Keluarga Islam di Malaysia*, cetakan pertama, Jabatan Kemajuan Islam Malaysia (JAKIM), p. 13-19.

<sup>23</sup> . *Ibid*, p, 21-22.

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