

Legal Protection of Human Rights for Feties (Children) Outside of Legal Marriage According to Indonesian Legal Regulations

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Abstract

The Purpose of this research is addressed specifically how legal protection of human rights for fetuses (children) outside of legal marriage according to statutory provisions in Indonesia. This research is normative law research, also referred to as doctrinal law research. In this type of legal research, the concept of law is frequently thought of as what is written in laws and regulations (law in books) or as a rule or norm which is a standard for acceptable human behavior. The current statutory provisions do not fully guarantee a child's (foetus') right to life outside of a legal marriage, so the foetus may not be able to live as it should. This is due to a variety of factors from the child's prospective mother. The state, in this case the government, should develop a new paradigm that ensures the survival of children regardless of their legal marital status.

Keyword: Human Rights, Fetus, Abortion, Outside Legal Marriage.

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INTRODUCTION

Humans are complex creatures. Human growth and development, both physically and psychologically, reveal everything about them. In terms of Biology life begins at the moment of conception or fertilization. This is consistent with the Honculus school's belief from the Middle Ages that psychological development started at conception. As a result, humans are regarded as creatures that have existed since conception and, as such, have the right to live and develop in accordance with their human nature [1].

According to Article 25 paragraph (2) of the 1948 Universal Declaration of Human Rights (hereinafter referred to as the 1948 UDHR), states that all children, whether born within or outside of a legal marriage, must receive the same social protection. This means that children must receive special care and assistance regardless of the status of social differences to the child, namely the right to life, optimal growth, and development in accordance with his dignity as a human being.

Furthermore, article 1 paragraph (2) of Law Number 23 of 2002 Concerning Child Protection (hereinafter referred to as Law 23 of 2002) defines child protection as "all activities to ensure and protect children and their rights in order for them to live, grow and develop, and participate optimally in accordance with human dignity, and to be protected from violence and discrimination".

In essence, humans are God's creatures who have various kinds of needs in life, and every human being certainly wants to fulfill these needs properly, in order to be able to live life as a perfect human being, both individually, in the family and in society. On the one hand, in the life of the state, especially the state of Indonesia, of course, must comply with the rules that apply in that country, including regarding the existence of marital relations regulated by the law itself. Marriage is an inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on Belief in One Almighty God.

In essence, humans are God's creations with various types of needs in life, and every human being desires to properly meet these needs in order to live a perfect life as individuals, as the members of families, and in society. On the one hand, the state, particularly

¹ Wahyu Aprilia, 2020, *Perkembangan Pada Masa Pranatal dan Kelahiran*, Jurnal Pendidikan Anak Usia Dini. UIN Yogyakarta.

the state of Indonesia, must adhere to the laws that are in force there, including the existence of marital relations regulated by the law itself. Marriage is an inner and outer bond formed by a man and a woman as husband and wife with the goal of creating a happy and eternal family (household) based on faith in One Almighty God.

According to the provisions of the relevant regulations, the government does not recognize the existence of legal relationships outside of marriage under the provisions of the applicable regulations.

Research Problem Formulation

Based on this background, the authors formulate the problem, specifically how legal protection of human rights for fetuses (children) outside of legal marriage according to statutory provisions in Indonesia?

METHOD

This research is normative law research, also referred to as doctrinal law research. In this type of legal research, the concept of law is frequently thought of as what is written in laws and regulations (law in books) or as a rule or norm which is a standard for acceptable human behavior.

According to Soerjono Soekanto and Sri Mamudji [2], normative legal research is legal research conducted by examining secondary data literature, which includes:

1. Legal principles research, specifically legal elements, both ideal elements (*normawissenschaft/sollenwissenschaft*) that produce specific (written) legal systems.
2. Legal systematics research, specifically identifying the main meanings in law such as legal subjects, rights and obligations, and legal events in statutory regulations.
3. Vertical and horizontal synchronisation research, specifically examining the harmony of positive law (legislation) to ensure that it does not conflict based on the hierarchy of legislation (*stufenboutheory*).
4. Comparison of law that is, developing positive legal knowledge by comparing one country's legal system to another's legal system.
5. Legal history, which entails analyzing how legislation (positive law) has evolved over time in areas such as marriage, corporate taxation, and land law, among others.

To begin normative legal research, start with legal events and then look for references to legal norms such as statutory regulations, principles -legal

principles, as well as legal doctrines taught by jurists to seek legal constructions and legal relations.

DISCUSSION

Human Rights

According to John Locke, human rights are rights that are given directly by God as something that is natural. Humans have it solely because of their dignity as human beings, not because it is bestowed upon them by society or based on positive law. In this sense, everyone has these rights, regardless of their skin color, gender, language, culture, or nationality at birth. These rights are not only universal but also unalienable.

Objectively, the principles of human rights protection between countries are the same, but subjectively, the implementation is not, implying that there were similarities in the nature of what should be protected and regulated at one time, but there are also differences in how different countries perceive human rights [3]. This situation is more caused by ideological, political, economic, and socio-cultural differences, as well as differences in each of these countries' national interests.

In Indonesia, political and constitutional discourse frequently includes discussion of human rights. We can see it clearly throughout the history of this nation's formation, which includes discussions about human rights [4].

Marriage Law

Marriage, according to Article 1 of Law Number 1 of 1974, is an inner and outer bond between a man and a woman as husband and wife with the purpose of forming a happy and eternal family (household) based on belief in the One Supreme God. This family is based on the concept of the one and only God, along with the Marriage Law Regulations. Every marriage is founded not only on the biological needs of a man and a woman who are recognized as legitimate, it also serves as the agent of how human life develops naturally.

In domestic life, one form of concern for the government for its citizens to maintain a normal standard of living as befits humans who want to have a partner, the state is present as a guarantee to fulfil their rights. In this instance, there is a guarantee of legality for those who carry out a bond based on statutory regulations, regardless of their strongly held beliefs.

²Soerjono Soekanto dan Sri Mamudji, 2006, *Penelitian Hukum Normatif Suatu Tinjauan*. Jakarta: PT Raja Grafindo persada. p. 1.

³ Susani Triwahyuningsih. *Perlindungan dan Penegakan Hak Azasi Manusia (HAM) Di Indonesia*. Jurnal Hukum Legal Standing. Vol 2. No. 2. 2018. Hal. 115. Dalam: Muhammad Amin Putra. *Eksistensi Lembaga Negara Dalam penegakan Ham Di Indonesia*. Fiat Justisia Jurnal Ilmu Hukum. Vol 9. No 3. 2015. p. 4

⁴ *Op. Cit.*

In addition to Law Number 1 of 1974, the Indonesian Civil Code also contains provisions governing marriage. These provisions have different definitions or refer to different concepts, some of which are as follows: Monogamy as a Concept in Marriage This idea is that the Law has explained it. The Civil Code defines marriages as having the meaning of monogamy. These marriages are absolute and cannot be challenged in their implementations [5].

Legal Protection of Human Rights for Feties (Children) Outside of Legal Marriage

It is well known that there are legal subjects in the study of law, i.e., everything that upholds rights and obligations. Humans, also known as natural persons, and legal entities, also known as *recht* persons, are two categories of these legal subjects or supporters of rights and obligations. Humans, including children, are legal subjects; while there are still exceptions in some cases, laws and regulations have designated children as legal subjects who must also be protected.

According to Law Number 23 of 2002, a child is defined as anyone under the age of 18 (eighteen), including children still in the womb. Furthermore, child protection encompasses all activities aimed at ensuring and protecting children's rights so that they can live, grow, develop, and participate to their full potential in accordance with human dignity and values, while also being protected from violence and discrimination.

Efforts to protect children must be put in place as soon as possible, because the protection of humans (children/fetuses) itself is very broad in scope of discussion. As a result, Indonesian laws, particularly those pertaining to human rights, have some flaws when it comes to ensuring that people are protected. If we interpret the marriage law, in a sense if a relationship is illegal under the law, the protection of the fetus or child does not yet have legal certainty, whereas under the Universal Declaration of Human Rights, protection is provided to all people, regardless of race, ethnicity, language, or place of origin.

The 1948 Declaration of Human Right emphasizes that the right to life is given special standards for everyone, including children, with guaranteed protection for mothers and children entitled to special care, and all children, whether born in or out of wedlock, receiving the same social protection. Firmness is also provided in Law 39 of 1999 on Human Rights, which states that everyone has the right to live, maintain their life, and improve their standard of living. According to the explanation of this law, the right to life

is directly attached to children, both those who have been born and those who are still in the womb.

Abortion is a form of crime against children. According to the high rate of abortion from year to year, there is currently a serious problem with abortion. According to medical science, abortion is defined as the ending of a pregnancy after the implantation of a fertilized egg (ovum) in sperm on the uterine wall or elsewhere before the fetus reaches the age of 20 weeks and after the egg transforms into a fetus. Abortion can be performed by anyone, whether legally married or not and whether permitted or not.

There are several terms in the world of health that allow for abortion, including:

- a. **Spontaneous abortion:** Abortion that occurs as a result of an unintentional trauma or natural cause.
- b. **Induced abortion:** is a type of intentional abortion.
- c. **Therapeutic abortion:** Abortion performed for therapeutic purposes when the mother's physical or mental health is at risk, this procedure is occasionally performed following rape.
- d. **Eugenic abortion:** Abortion performed on a defective fetus.
- e. **Elective abortion:** Abortion performed for other reasons.

According to Indonesia's Criminal Code, abortion is either classified as a crime or a crime against life. The following sections govern abortion, which is classified as a crime against human life:

- a. **Article 346:** A woman who intentionally aborts or kills her womb or orders another person to do so faces a maximum sentence of four years in prison.
- b. **Article 347:** Any person who intentionally aborts or kills a woman's womb without her consent, faces a maximum sentence of twelve years in prison.
- c. **Article 348:** (1) Any person who intentionally aborts or kills a woman's womb with her consent, subject to a maximum sentence of fifteen years in prison. (2) If the woman dies as a result of the crime, the offender shall be punished by a maximum imprisonment of seven years.
- d. **Article 349:** If a physician, midwife or pharmacist is an accomplice to the crime in Article 346, or is guilty of or is an accomplice to one of the crimes described in Articles 347 and 348, the sentences outlined in that Article may be enhanced with one third, and he may be deprived of the exercise of the profession in which he commits the crime.
- e. **Article 535:** Any person who either openly exhibits means for the disturbance of pregnancy, or openly or unrequestedly offers or shows where such means or services for the disturbance of pregnancy are available, shall be punished by a maximum light imprisonment of three months or a maximum fine of three hundred rupiahs.

⁵ Khoirul Anam, Studi Makna Perkawinan Dalam Perspektif Hukum Di Indonesia (Komparasi Kitab Undang-Undang Hukum Perdata (KUHP er) Dengan Kompilasi Hukum Islam. *Jurnal*. p. 62.

In addition to the legal provisions contained in the Criminal Code, abortion also regulates in Article 75 of Law Number 36 of 2009 concerning Health as follows:

- (1) Everyone is prohibited from having an abortion.
- (2) The prohibition as referred to in paragraph (1) may be exempted if one or more of the following conditions exists: (a) medical emergency indications detected at an early stage of pregnancy, both those that threaten the life of the mother and/or the fetus, those who suffer from severe genetic diseases and/or hereditary defects, or those that cannot be corrected so that makes it difficult for the baby to live outside the womb. (b) rape-related pregnancy, which can result in psychological trauma for the rape victim.
- (3) The actions referred to in paragraph (2) can only be carried out after undergoing pre-action counseling conducted by a qualified authorized counselor.

Thus, despite the fact that the Criminal Code and Health Law Number 36 of 2009 do not directly address abortion, the latter regulates that medical professionals may perform legal abortions on pregnant woman for medical reasons with their consent. Accompanied by her husband and family, she exudes concern. Despite the fact that abortion is illegal, in practice most abortions are still performed by women for a variety of reasons because the fact that existing laws and regulations do not take into account the causes that force women to have abortions (Pro Chice) [⁶].

CONCLUSION

The current statutory provisions do not fully guarantee a child's (foetus') right to life outside of a legal marriage, so the foetus may not be able to live as it should. This is due to a variety of factors from the child's prospective mother. The state, in this case the government, should develop a new paradigm that ensures the survival of children regardless of their legal marital status.

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⁶ *Op Cit.* p. 99