

Reconstruction of the legal protection of civil rights for the child of adultery based on values of justice in Indonesia

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Abstract

The child of adultery as children born outside marriage has civil rights. Indonesian Constitutional Court Decision No. 46/PUU-VIII/2010 protects the civil rights of children born outside of marriage, but do not give a solution for the child of adultery. In this sense a reconstruction of the legal protection is needed. This manuscript should present an optimal legal protection based on the Constitutional Court Decision No. 46/PUU-VIII/2010 and also a revision of Article 43 paragraph 1 of Law No.1/1974, Article 283 of the Civil Code and Article 26, Paragraph 2 of the Law No.35/2014. Other structural aspects such as the expansion of the jurisdiction in deciding civil rights of the child of adultery and aspects of culture are also part of this analysis.

Keywords: *reconstruction, legal protection, civil right, adultery child.*

Introduction

The position of a child is very important for a family and the state. Children are part of a younger generation. As one of the human resources, the child is a great potential and a successor to the ideals of the nation. The child physic-, mental- and social development must be guaranteed as a whole, harmonious and balanced (Priest 2003, 2). Children, according to Article 1, paragraph 1 of Law No. 23 of 2002 in conjunction with Law 35 of 2014 on Child Protection states that a child is not an adult until 18 years old. Then Article 42 of Law No. 1 of 1974 on Marriage, and Article 250 Book of the Law of Civil Law (hereinafter referred to as the Civil Code), states that the legitimate child is a child born in or as a result of a legal marriage, or in other words children born throughout the marriage) and not like the case with children born outside normal conditions (Satrio, 2006, 151).

MK (Mahkamah Konstitusi/Constitutional Court) Decision No. 46/PUU-VIII/2010 is a revolutionary breakthrough in the law that protects civil rights to children outside of marriage. Indonesian Ulema Council (MUI) assesses that the Constitutional Court has exceeded the authority, it is excessive or overdosed. Initially the verdict was giving civil recognition to children who are not registered at KUA, but eventually expanded and regulated the relationship of the child of a civil adultery relationship. Consequently ratify nasab relationship, heirs, guardians will be living among the children of his adultery with the man who caused his birth (Mui, Ma'ruf and Selesa, 2012). Therefore, MUI Fatwa No. 11 of 2012 on the Status of Children states that: Children do not have a relationship adultery results nasab, guardian of marriage, inheritance, and living with a man who caused his birth.

In addition to the controversy above, the Constitutional Court Decision No. 46/PUU-

VIII/2010 caused some problems that must be solved in order to realize the sense of justice and protect the interests of the child of adultery, because the labeling of natural child is a moral burden in a society that is quite heavy, not only for the mother and her family, but especially for children themselves. This study aims to provide a description of the various problems experienced by the child of adultery, lack of legal protection and some recommendations the legal protection which can be a solution to the problems faced by children of adultery.

The method chosen for this analysis is sociological juridical approach; this research was based on legal research work in the community (Soerjono Soekamto dan Sri Mamudji, 2010, 15). According to Abdul Kadir Mohammed (2005), sociological research is a research that promotes legal research of everyday life in the community. These acts have a dual function, namely as a pattern of applied and become the normative form and applicable law living in the community. The primary data obtained through field research by interview or an interview using a list of questions, which is a process of questions and answers to the survey respondents to obtain information more clearly, so as to complement or support secondary data. Secondary data, ie were obtained through the research literature, with the writer trying to discover and collect material from documents, books of literature, laws and regulations that apply specifically to the Islamic Law Compilation (KHI), Law No. 1 of 1974 on marriage, the draft Civil Code (the Civil Code), the Child Protection Act, and other laws (Mahmud Marzuki, 2006, 141). Analysis of the data used is qualitatively inductive, which is defined as an activity to analyze the data in a comprehensive manner.

Basic Theory

Aristotle in his nichomachean ethics, politics, and rethoric, stated that “the law can only be defined in relation to justice” (Friedrich, 2005, 24). Justice is a provision of the right to equality but not equally. This is to be understood that everyone or every citizen is equal before the law. Justice is the main virtue of the presence of social institutions. However, the virtues for the whole community can not be ruled out or sue the sense of justice of any person who has obtained a sense of justice. Particularly weak society seeking justice (Mohamad Faiz, 2009, 139). Hans Kelsen in his general theory of law and state, argued that the law as a social order can be declared unfair if it can regulate human actions in a satisfactory way so that they can find happiness in it (Kelsen, 2011, 7). To enforce the solid basis of a certain social order, according to Hans Kelsen there should be a notion of substantial legality. A general rule is “fair” if it really applied, while the general rule is “unfair” when applied to a case and does not apply to other similar cases (Kelsen, 2011, 16). The concept of justice and legality is applied in the national laws of Indonesia, which interpret that national law can serve as a legal umbrella for the rules of national law in a more appropriate level.¹

There is some sense of legal protection according to the experts, namely :

- The legal protection is to give shelter to humans, when harmed by others and the protection given to the people so they can enjoy all the rights conferred by law

¹ Undang-undang Republik Indonesia Nomor 12 Tahun 2011 tentang Pembentukan Peraturan Perundang-undangan

(Satjipto 1993);

- The legal protection is a protection of pride and dignity, as well as the recognition of human rights being owned by the legal subject under the provisions of the law of the authority (Philipus, 1987, 38);

- Legal protection is the protection provided by the law, relating to their rights and obligations, in this case possessed by humans as a legal subject in its interaction with fellow human beings and the environment (Kansil, 1989).

Another used method consists of Hermeneutics, which is the language of Islamic law based on the art of interpreting. It includes legal texts, legal events, legal facts, official documents, ancient texts, passages and scriptures or opinions and the results of ijthad jurists (doctrine) 9hamidi, 2005, 45).

Results and Discussion

Profile of the child of adultery

A valid marriage will give birth to a child who has a legitimate status and position in the eyes of the law, while a child born from a relationship will have the status of a child outside marriage. Based on data collected, an unknown number of children outside of marriage is shown in the following table :

Table 1. List of Children’s Adultery Results in the Gandatapa Village 2015

No	Child’s Name	Mother’s Name	Date of Birth	RT/RW
1	Abiyu Putra Qais	Tarsiti	20-06-2013	03/06
2	Damar Jati	Paini	14-08-2007	03/06
3	Rati Ramadhan	Paini	20-08-2009	03/06
4	Sri Haryatni	Paini	25-11-2010	03/06
5	Luvita Salsabila	Tarti	11-07-2010	04/02
6	Leni Tri Widiyarti	Tarti	04-08-2012	04/02
7	Firman	Tarsini	18-05-2002	02/01
8	Mugi Kurniawan	Tarsini	12-02-2012	02/05
9	Aa Setiawan	Sutirah	15-08-2009	05/03
10	Yogi Aryanto	Kaswati	15-09-2009	01/01
11	Feri Nirsamto	Kaswati	29-03-2002	01/01
12	Alif Nurrohman	Narwi	17-09-2014	07/01
13	Yeyen	Ruswati	02-10-2014	05/03
14	Nursetianingsih	Satini	19-02-2004	04/05
15	Aji Soleman	Wati	24-08-2014	03/03
16	Heriyanto	Saiti	27-08-2009	03/03
17	Dendi Setiawan	Saiti	24-09-2001	03/03

Source: *Processed Data 2015*

The data are very low in comparison to the reality, as stated by the Gandatapa Village Head. Masyarakat banyak yang mengetahui namun enggan mencatatkannya ke kantor Desa Gandatapa.² Based on data collected from interviews and observations from the informants, including the village chief, most of the biological mothers are less educated (graduates of primary school) and work as housemaids in big cities like Jakarta and Bandung, some are even Indonesian Workers (TKI) in Malaysia.

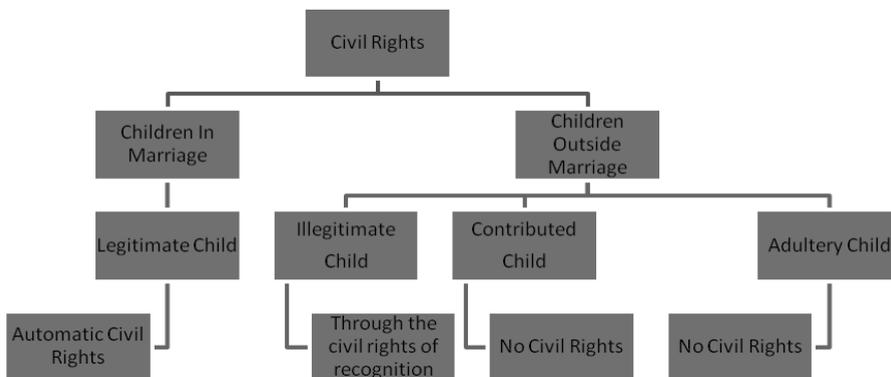
² Wawancara dengan Kades Gandatapa, 12 Juli 2015.

Lack of Legal Protection On Civil Rights for the Adultery Child

Civil rights are part of human rights. The rights of children in the perspective of the law have a universal aspect to the interests of the child. Putting a child rights law in view, suggests that the basic purpose of human life is to build human beings who hold religious teachings. Thus, the rights of children in view of the law covers the legal aspect in one's environment.

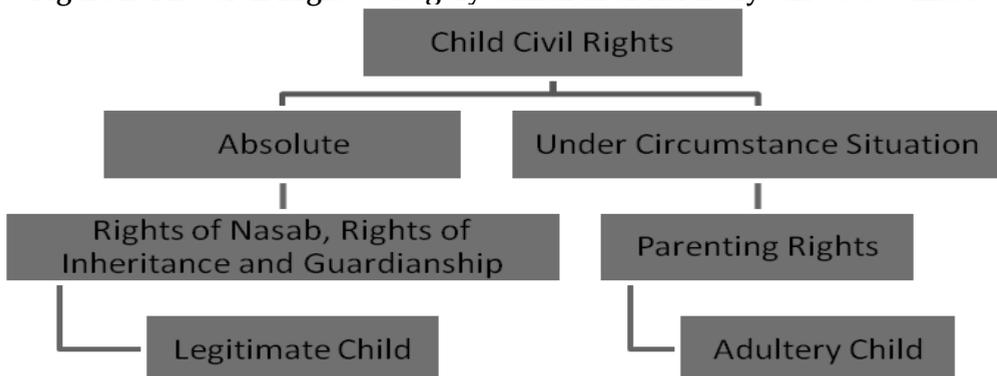
The position of adultery children is lower in comparison to legitimate children; such as inheritance for example. Besides this, the legitimate child goes under the authority of parents as provided for in Article 299 of the Civil Code, while adultery children are regulated in Article 306 of the Civil Code and consist of the guardianship.

Figure 1. The position of civil rights of the Child



The child of adultery does not have a relationship of inheritance by the male fertiliser. Article 171 (c) KHI states that the heir is a person who at the time of death has blood ties or marriage relationship to the deceased. Then Article 186 KHI also added that children born outside marriage have only heir mutual relationship with the mother and the family of the mother.

Figure 2. The Civil Rights Category Children of Adultery can be Obtained



The first category of civil relations can be characterized as civil enduring relationship. Meanwhile, the second category of civil relations can be characterized as a relationship situation and therefore a consideration of human rationality applies.

Multiple interpretations of the Constitutional Court Decision No. 46/PUU-VIII/2010 Related civil rights of the Child Outside Marriage and Child Adultery

The results of judicial review of Article 43 paragraph (1) of Law No. 1 of 1974 by the Constitutional Court which reads as follows: Children born outside marriage have civil links with her mother and her mother's family as well as with men who have blood relations proved by science knowledge and technology and/or other evidence under the law. There is interpretation of the process as if the Constitutional Court justifies adultery. It should be understood that a process between providing protection to children, and the issue of adultery are two different legal regimes.

Reconstruction is formulated in general terms as realignment or attempt to re-examine the actual occurrence of an offense which is done by repeating the demonstration as the actual incident (Hamzah, 1989, 88). Article 7 paragraph (1) of Law No. 23 of 2002 "On the protection of children" mentioned explicitly: "Every child has the right to know its parents, grew up and was raised by her own parents", certainly not only limited by his mother only. The marriage in its Constitution, namely Article 2, paragraph 2 determines: "Every marriage is recorded in accordance with the legislation in force." That means registration of marriage is one of granting rights to the child in the family. According to Article 2 paragraph (2) Marriage Law, the constitutional rights of Indonesian citizens as guaranteed by Article 28 and paragraph (1) and (2) and Article 28 D Paragraph (1) of the Constitution of the Republic of Indonesia. Then Article 28 and Paragraph (2) of the Constitution of the Republic of Indonesia states: "Every child has the right to live, grow, and develop as well as the right to protection from violence and discrimination". Smith even stated that it is perfect, the whole international human rights instruments it is at the "heart" of children's rights (El Muhtaj, 2009, 25).

Reconstruction is the value of strengthening legal protection for children, both of which are based in law by referring to the Law on Human Rights (Law No.39 / 1999), the Child Protection Act (Act No.35 / 2014) and on private law with reference to the Civil Code, law No.1/1974 and the Islamic law Compilation (KHI), in particular the strengthening of the legal protection of civil rights of the child of adultery with the protection of the mother in the form of protection fees life, medical expenses, education expenses, and the cost of raising a child to adulthood.

Speaking of "legal system" means talking about something with a very broad dimension. Friedman (1984) analyzed that the legal system can easily be divided into three components, namely: (1) the legal structure, (2) the substance of the law, and (3) the legal culture. The first component is the legal structure. According to Lawrence M. Friedman, who referred to a structure of the legal system is:

... its skeleton or framework, the durable part, which gives a kind of shape and definition to the whole.... The structure of a legal system consists of elements of this

kind: the number and size of courts; their jurisdiction (that is, what kind of cases they hear, and how and why); and modes of appeal from one court to another. Structure also means how the legislature is organized, how many members..., what a president can (legally) do or not do, what procedures the police department follows, and so on. Structure, in a way, is a kind of cross section of the legal system? a kind of still photograph, which freezes the action.

The second component of the legal system is a legal substance, namely “... *the actual rules, norms, and behavior patterns of people inside the system*”. This definition shows the meaning of a legal substance that is broader than just the formal norm. Friedman also incorporates patterns of social behavior and social norms in addition to the law, so as well as social ethics such as the principles of truth and justice (Awaludin, 2010, 265)*.

Table 2. Reconstruction of Legislation Related to the Adultery Child Civil Rights

No	Legislation Before Reconstruction	Weaknesses	Legislation After Reconstruction
1	Article 43 paragraph (1) of Law No. 1 of 1974 on Marriage: “Children born outside marriage has only a civil relationship with her mother and her mother’s family”	<ul style="list-style-type: none"> - Child of adultery did not get legal certainty. - Many of child of adultery displaced 	Article 43 paragraph (1) of Law No. 1 of 1974 on Marriage: Same as before Paragraph (2) biological father, or countries provide living expenses, medical expenses, education fees and the cost of raising a child to adulthood, got borrowed or grant
2.	Article 100 Compilation of Islamic Law (KHI), reads: “Children born outside marriage has only a civil relationship with her mother and her mother’s family”	<ul style="list-style-type: none"> - Child of adultery did not get legal certainty. - Many of child of adultery displaced 	Article 100 Compilation of Islamic Law (KHI), reads: “: Same as before Paragraph (2) biological father, or countries provide living expenses, medical expenses, education fees and the cost of raising a child to adulthood, got borrowed or grant
3	Article 283 of the Civil Code, which reads: “Once a child conceived in adultery or in tune at all times should not be recognized, unless the latter is what is specified in Article 273 of the Civil Code	<ul style="list-style-type: none"> - Child of adultery did not get legal certainty. - Many of child of adultery displaced 	Article 283 of the Civil Code, which reads : Same as before Paragraph (2) biological father, or countries provide living expenses, medical expenses, education fees and the cost of raising a child to adulthood, got borrowed or grant.

4.	Article 26 paragraph (2) of Law No. 23 of 2002 jo Law No. 35 of 2014 reads: In the case of the Parent do not exist, or is not known to exist, or for some reason can not carry out their obligations and responsibilities, obligations and responsibilities responsibility referred to in paragraph (1) may be transferred to the family, which is carried out in accordance with the provisions of the legislation.	<ul style="list-style-type: none"> - The existence of stigmatization of children adultery is still very strong, like jinxed, so rarely families who want to take care of children of adultery. - Sometimes there are families who want to accommodate the natural child, but the origin of the child in question is hidden 	Article 26 paragraph (2) of Law No. 23 of 2002 jo Law No. 35 of 2014 revamped phrases : In case of Parents do not exist, or is not known to exist, or for some reason can not carry out their obligations and responsibilities, obligations and responsibilities referred to in paragraph (1) may be transferred to the family, and country.
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Table 3. Reconstruction of the legal protection of civil rights for the child of adultery based on values of justice

No.	Concern	Description and Conclusion
1.	Basic Reconstruction	Local Wisdom UUDNRI Pancasila and 1945, the Child Protection Act (Act No.23 of 2003 in conjunction with Law 35 of 2014), the Human Rights Act (Act 39 of 1999), and the International Wisdom child protection practice adultery results in various foreign countries.
2.	Paradigm Reconstruction	Constructivism, establish legal protection of civil rights to the child of adultery based on values of justice
3.	The Theories Used	<ol style="list-style-type: none"> 1. Theory of justice 2. Theory of Legal Protection 3. Theory of Legislation 4. Theory of Social Engineering 5. Theory of kemashlahatan in Ijtihad method

4.	Findings	<ol style="list-style-type: none"> 1. The inadequacies of the legal protection of civil rights to the child of adultery today: many children are neglected, ugly stigma of society, the biological father of the child of adultery is not responsible, if there is a family would give a natural child, the child's origin is hidden. 2. A. Value Reconstruction The child of adultery with the protection of mother, father, biological, and countries such as the protection of living expenses, medical expenses, education expenses, and the cost of raising a child to adulthood, got borrowed or grants, but did not get the inheritance from the father of biological, as well as state obliged to provide shelter the child of adultery B. Reconstruction of the legal protection of civil rights for the child of adultery <ul style="list-style-type: none"> - Article 43 paragraph 1 UUP reads: "Children born outside marriage has only a civil relationship with her mother and her mother's family". Paragraph 2: Mr biological, or countries provide living expenses, medical expenses, education expenses, and the cost of raising a child to adulthood, was borrowed or received grants. - Article 100 KHI, reads: "Children born outside marriage has only nasab relationship with her mother and her mother's family", Paragraph 2: Mr biological, or countries provide living expenses, medical expenses, education expenses, and the cost of raising a child to adulthood, was borrowed or received grants. - Article 283 KUH.Perdata, which reads: "At the same child conceived in adultery or in tune at all times should not be recognized, unless the latter is what is specified in Article 273", Paragraph 2: Mr biological, or countries provide living expenses, medical expenses, education expenses, and the cost of raising a child to adulthood, was borrowed or received grants. - Article Article 26, paragraph 2 of Law No. 23 of 2002 in conjunction with Law No. 35 of 2014 reads: In the case of the Parent do not exist, or is not known of its presence, or for some reason can not carry out their obligations and responsibilities, obligations and responsibilities as referred to in paragraph (1) may be transferred to the family, which be realized-kan in accordance with the provisions of the legislation. Revamped phrases: In case of Parents do not exist, or is unknown.
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