

**Protection to Illegitimate Children
(A Case Study at the Indonesian Child Protection Commission)¹**

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ABSTRACT

Illegitimate children experience discrimination in social life. They have the stigmas in the community with such names as "anak kampung", "anak kowar", "anak haram jadah" and so on. By law, illegitimate children lose their rights. One of the institutions intended to help fight for the rights of illegitimate children is the Indonesian Child Protection Commission (KPAI). The institution formed by the Indonesian government is a hope in fighting for child protection, including the protection to illegitimate children.

The method used in this paper was normative juridical. Based on the research, there were some community members who filed the cases of the protection to the rights of illegitimate children to KPAI. However, due to the illegitimate marital status of the illegitimate children's parents, KPAI had a difficulty in fighting for the rights of illegitimate children since there is no legal basis for forcing their biological fathers to provide care for the children. KPAI attempted harder to have persuasive approaches to solve incoming cases. In the future, KPAI should be given a bigger role to help resolve the issues related to the protection and interests of children, especially illegitimate children.

Keywords: protection, illegitimate children, persuasive, KPAI

I. Introduction:

The Indonesian Child Protection Commission (KPAI) is an independent state commission established under Article 74 of Law No. 23 of 2002 on Child Protection (2014: 3). The position of the KPAI is parallel to the other state commissions such as the National Commission on Human Rights (Komnas HAM), the National Commission on Violence Against Women (Komnas Perempuan), the Indonesian Broadcasting Commission (KPI), the National Police Commission (KOMPOLNAS), the Prosecutorial Commission, the Business Competition Supervisory Commission (KPPU), and others. KPAI is one of the three national institutions of human rights guardian and supervisor in Indonesia (NHRI / National Human Right Institution), i.e.: KPAI, the National Commission on Human Rights (Komnas HAM), and the National Commission on Violence Against Women

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(Komnas Perempuan). KPAI performs daily duties through the commissioners. One of the daily tasks is to receive public complaints regarding child protection issues.

By the community, the KPAI's performance is really expected to complete the tasks related to child protection. In recent years, there have been many big cases of child protection in the community. The case of the murder of Engeline (June 2015), for example, attracted not only the Indonesian people, but also the world community. According to KPAI records, during 2016, there were 1000 cases of violence against children, and, according to KPAI records, the quality of violence against children increased each year. (<http://www.kpai.go.id/berita/8194/> dated 7 December 2016).

Illegitimate children, in fact, are only a few of common children. In everyday social life, illegitimate children experience social discrimination in the form of scorn from the community because they are born from unlawful relationships. The community gives the nickname to illegitimate children, such as: illegitimate biological child (kowar child), *anake wong ora nggenah* (Java); *anak haram jadah* (Sunda), *anak kampung* (Malay), *anak astra* (Bali)" and so on (Hadikusuma, 2003). The nicknames become a stigma that will be a bad experience for the children during their lives. The children become the object of the scorn of their friends who see that the children born out of wedlock can bring disaster to the surrounding environment. The psychological impact of the ridicule and scorn will leave an impression on the children's memory until they grow up.

Normatively, illegitimate children have the civic relationship with their mothers and their mothers' family, as set forth in Article 43 of Law No. 1 of 1974 on Marriage (Marriage Law). In the practice of daily life, illegitimate children often experience limitations due to their parents' abilities (Mother and mother's family) to make a living for them. On the other hand, illegitimate children are the same as other children in general; they also have the right to grow and develop naturally. They have the right to life and a better future.

The rationale for illegitimate children to file a legal remedy in the form of recognition as a biological child or subsistence right is that it is, by nature, impossible for a woman to be pregnant without a meeting between ovum and spermatozoa either through coitus or other means based on the development of technology that leads to fertilization. Therefore, it is inappropriate and unfair when the law provides that a child born of a pregnancy due to a sexual relationship out of a legal marriage only has a relationship with the woman as his or her mother (MK, 2012).

Legally there are some efforts that can be made by the illegitimate children or by their mothers so that they the right to the care of their biological fathers, namely by applying for a determination or a lawsuit either through general or religious court. However, if they are reluctant to file a petition or suit through the two agencies or the judge's decision cannot be executed, there is the KPAI which has the duty to resolve complaints from the public related to the protection of the rights of neglected children.

The paper may not be the only one that raises the theme of protection to illegitimate children . The paper with the theme of KPAI is found in a thesis prepared by Hilman Reza from Syarif Hidayatullah State University, Jakarta

entitled "The Role of the Indonesian Child Protection Commission (KPAI) in Overcoming Sexual Violence in Children" (Hilman Reza, 2014). The difference between the two papers is that Reza's paper is on the protection of children experiencing sexual violence, and this paper is to examine the role of the KPAI in the protection of illegitimate children . Therefore, the witer was interested in analyzing **the Protection to Illegitimate Children, A Case Study at the Indonesian Commission for Child Protection.**

II. Method and Materials

The method used in this paper was normative-juridical supported by primary and secondary data obtained from the KPAI Office in Jakarta.

III. Results and Discussion

A. Legitimate and Illegitimate Children

Legitimate children are children born in or as a result of legal marriage (Wantjik Saleh, 1980). It is regulated in Article 42 of the Marriage Law. Thus, the children born out legal marriages, or not as a result of legal marriages are illegitimate children.

The Civil Code provides for legitimate children in Article 250. Article 250 of the Civil Code states: "Any child born or grown throughout a marriage acquires the husband as his/ her father."

The word "throughout a marriage" means: from the time the marriage is held until the marriage breaks up. The presence of a marriage means: since the marriage is held legally. A marriage breaks up due to divorce, both dead divorce and living divorce (J. Satrio, 2000: 19). There are two measures used by legislators to establish who the father of a child is when the child is born in a family whose parents are legally married:

1. The child is born during the marriage of his/ her parents. In this case, the duration of the germination or pregnancy is not the problem.
2. The born child is grown/ nurtured throughout a marriage, including when he/ she is born after a marriage breaks up. (J. Satrio, 2000: 20).

In the Civil Code system, not every child born in marriage is a legitimate child. The Civil Code sets a 180-day deadline as the shortest pregnancy age limit and 300 days as the longest pregnancy age of a woman who is bound in marriage. According to Article 251 of the Civil Code, a child born before the one hundred and eightieth day in a marriage may be denied by the husband. However this denial should not be committed in certain matters, such as:

1. When the husband, before the marriage, has recognized the pregnancy of his wife;
2. When he has been present when the birth certificate is made and the certificate has been signed by him or contains a statement from him that he cannot sign it;
3. When the child is not alive when born.

The right to denial is also found in the Marriage Law, but the Marriage Law does not recognize the longest or shortest restriction of pregnancy age. Every child born in a legal marriage is a legitimate child even if the child is born soon after the

marriage takes place. Children born after marriage ends are also legitimate children as long as they are grown in marriage. It is different from the Civil Code.

The same principle between the Marriage Law and the Civil Code are that a legitimate offspring is based on a legal marriage (J. Satrio, 2000: 18). The same principle applies also in the law of the United States. Harry D. Krause mentions: "Legitimacy is defined primarily by reference to the marital status of the child's parents." (J. Satrio, 2000: 18).

According to *adat* law, a legitimate child is a child born in a legitimate marriage, in the sense that he/ she has a female mother who gives birth and has the father of his/ her mother's husband without the child's birth time (Sulastriyono, 2012). Although there are deviations in some environments against normal circumstances:

1. In some legal environments, illegitimate children have the mother of unmarried women who give birth to them, as well as the children with the mothers of the women who give birth to them in legal marriage (Minahasa, Ambon, Timor, Mentawai).
2. In other areas, there is a deep sense of hatred for unmarried mothers, and their children: Previously (once), both were expelled from a fellowship of law, killed (drowned), or handed over to the King as slaves. They were sent out of a fellowship of law (probably due to the fear of a child's birth that was not preceded by a marriage ceremony) (Iman Sudiyat, 1981: 91)

The view that a child has a direct relationship with his/ her mother, either to the child born from a legal marriage or to the child born by unmarried woman, is presumably the arrangement in Article 43 of the Marriage Law that an illegitimate child has a civic relationship with his/ her mother and his/ her mother's family.

Both in past and present time, some indigenous peoples have their own systems to solve the problem of the birth of illegitimate children. The system is meant to release a mother and her child from the unfortunate fate of:

1. forced marriage of a man with a woman who designates him as the person who causes her pregnancy (fiancé or not).
2. emergency marriage, namely an arbitrary marriage (e.g the Village Head) with a pregnant woman so that the birth of the baby will occur in a legal marriage bond (Javanese: *nikah tambelan*; Bugis: *pattonkoh sirik*; cover of embarrassment). (Iman Sudiyat, 1981: 92).

In Ngadas village, Poncokusumo Kusumo Sub-District, Malang Regency, East Java, where the Tengger tribe lives, approximately 1800 residents of the Tengger tribe live in the village. They have the tradition of "*petekan*" (*dipetek* means pressed). The *petekan* tradition is a pressing of abdomen between navel and the genitals.

The term '*petekan*' comes from the word '*dipetek*' which has the meaning of pressed. The process of the tradition is indeed performed by a shaman of baby who presses the stomach of the participants of *petekan*. The palpable part is between navel and genital. In the medical world, it is called "palpation". It is usually performed by midwife to detect the presence of baby in the stomach. The *petekan* tradition is performed by an experienced and trusted shaman of baby. The midwife can also feel whether the unmarried participant is still a virgin or not.

The *petekan* tradition is performed once every 3 months and must be followed by girls who grow up and widows who are still in childbearing age. The purpose of the *petekan* tradition is to prevent sexual intercourse and pregnancy out of marriage. Unmarried women who are found in a condition of pregnancy will apply *adat* law. When the woman who is pregnant out of wedlock is a girl, the man who makes her pregnant will be sought. When the man who impregnates has the status of unmarried, the couple will be fined to pay 50 sacks of cement to the village no matter whether they are from a well-off family or not. After that, they will be wedded customarily and religiously.

When the cause of pregnancy is a married man, the man will be fined 100 sacks of cement and the woman pays 50 sacks of cement. Both will be embarrassed; both must sweep the village streets clean. The couple will be married customarily, but the marriage is only until the woman gives birth to her child. After that, the man must divorce her. In addition, the woman and her families will be excommunicated by the community.

From the description, it appears that *adat* law (customary law) is still valid today, including the efforts made by indigenous peoples to avoid the birth of children out of wedlock. In Tengger community, in the village of Ngadas, *adat* law is still firmly held by the people.

B. The Status of Illegitimate Children in Indonesian Legal System

Illegitimate children experience discrimination in their social lives. They have a stigma in society with the mention of "*anak kampung*", "*anak kowar*", "*anak haram jadah*", "*anak astral*" and so forth. Legally, illegitimate children have different civil rights when compared to the children born in legal marriage.

When traced from the positive laws that have prevailed in Indonesia, there are the Civil Code (Civil Code) and the Marriage Law which regulate the legal status of illegitimate children in Indonesia.

Illegitimate children are the children born out of wedlock. The Marriage Law regulates the civil status illegitimate children. Article 43 paragraph (1) states that illegitimate children have civil relationship with their mothers and mothers' family. The status of the civil relationship between the child and his/ her mother is automatically formed without any legal effort. Based on the civil relationships with his/ her mother and his/ her mother's family, an illegitimate child has the right as a child in general; the right to care, the right to education, and the right to inheritance. However, the rights are only obtained from his/ her mother and his/ her mother's family. On the side of his/ her biological father, an illegitimate child does not have any rights because legally he/ she has no civil relationship with his/ her biological father.

Unlike the Marriage Law, according to the concept of the Civil Code, illegitimate children do not have civil relationship either with their biological fathers or with the mothers who give birth to them. Even their mothers have to make a recognition in advance to establish the civil relationship (Ko Tjai Sing, 1960). The illegitimate children who have been recognized have the civil rights with their fathers or mothers who recognize them (J. Satrio, 2000).

In the view of adat law, all children born from the marriage of their fathers and mothers are biological children. When the marriage of their fathers and mothers is legitimate, they are "legitimate children". However, when the marriage of their fathers and mothers is illegitimate, the children are called "illegitimate children". An illegitimate biological child likely, in his/ her life, lives with his/ her father and mother who gives birth to him/ her. There is also the possibility that the child only follows his/ her mother without his/ her biological father, or perhaps he/ she only follows his/ her father without his/ her biological mother. It is also possible that he/ she may follow others as the parents who take care of him/ her, and he/ she becomes a "*anak piara*", "adopted child", "*anak akuan*" and so forth. (Hadikusuma, 2003).

The issue of illegitimate children according to the writer's opinion is the neglect of illegitimate children's rights by their biological fathers. According to the Constitutional Court, it is inappropriate and unfair if the law frees the man who has sexual intercourse leading to the pregnancy and the birth of a child from his responsibilities as a father, and, at the same time, the law negates the child's rights to the man as his/ her father. Moreover, based on technological developments, it is possible to prove that a child is a child of a particular male. (MK, 2012) .

C. The Main Duties and Functions KPAI

The Indonesian Child Protection Commission (KPAI) was established based on the Presidential Decree no. 77 of 2003 on the Indonesian Child Protection Commission. KPAI is located at Jl. Teuku Umar No. 10, Gondangdia, Menteng, Central Jakarta.

The members of the KPAI shall consist of 1 (one) Chairman, 2 (two) Vice Chairmen, 1 (one) Secretary, and 5 (five) Members. The KPAI Membership consists of government elements, religious leaders, community leaders, social organizations, community organizations, professional organizations, non-government organizations, businesses, and the community groups concerned about child protection. The KPAI has nine (9) commissioners, and each commissioner oversees one cluster.

The nine KPAI commissioners oversee the following fields:

- a) Religion and Culture,
- b) Education,
- c) Health and Drug;
- d) Child's Civil Rights and Participation
- e) Family and Alternative Care
- f) Children Faced with the Law (ABH),
- g) Child Exploitation and Trafficking,
- h) Social, Children in Emergency Situations and Children with Disability, and;
- i) Pornography and Cyber Crime.

In addition, the basic duties of the KPAI are regulated in Article 76 of the Child Protection Law as follows:

- a) Socializing all provisions of legislation related to child protection, collecting data and information, receiving public complaints, conducting

review, monitoring, evaluating and supervising the implementation of child protection.

- b) Providing reports, suggestions, inputs and considerations to the President in the context of child protection.

D. The Cases Submitted to the KPAI

Based on the research results, most cases submitted to the KPAI are the cases of Children Faced With the Law (ABH). The cases submitted to the KPAI for approximately 5 (five) years (from 2011 to the month of January 2016) are completely described in the following table:

Table 01 : Child Complaint Cases By Child Protection Cluster of the KPAI

No	Cluster/Field	Years						Total
		2011	2012	2013	2014	2015	2016*	
1	Social and Children in Emergency Situations	92	79	246	191	174	9	791
2	Family and Alternative Care	416	633	931	921	822	46	3769
3	Religion and Culture	83	204	214	106	180	21	808
4	Civil Rights and Participation	37	42	79	76	110	8	352
5	Health and Drug	221	261	438	360	374	19	1673
6	Education	276	522	371	461	538	40	2208
7	Pornography and Cyber Crime	188	175	247	322	463	31	1426
8	ABH	695	1413	1428	2208	1221	67	7032
9	Exploitation and Trafficking	160	173	184	263	345	17	1142
10	Others	10	10	173	158	82	4	437
	TOTAL	2178	3512	4311	5066	4309	262	19.638

*The Data from 2016 to January 31, 2016 (KPAI, 2016)

**The KPAI Data was from: direct complaint to the KPAI, print and online media monitoring, complaints from the data bank of child protection, data from the partner institutions of the KPAI all over Indonesia.

From the table, it shows that the highest case was the problem of children dealing with the law which reached an average of 35.8%. Then, the case of the protection to illegitimate children in general was in the form of complaints for the application of the right to a living. The case of illegitimate child protection was included into the case groups of family and alternative care which reached an average rate of 19.19%.

Based on the data obtained in the KPAI, the cases of child's civic rights complaints both born from *sirri* marriage and illegitimate children were included in

the case group of "family and alternative care". From 2011 to January 2016, the cases of family and alternative care can be described in the following table:

Tabel 02: The Cases of Family and Alternatif Care of the KPAI, 2011-2016

No	Case Description	Years					
		2011	2012	2013	2014	2015	2016
1	Children as the Victims of the Struggle for Right to Care	166	278	368	374	287	15
2	Children as the Victims of Access Prohibition for Meeting Their Parents	132	166	256	282	312	17
3	Children as the Victims of Economic Negligence (right to living)	94	154	237	223	182	12
4	Lost Children	24	35	70	42	41	2
	TOTAL	416	633	931	921	822	46

Source: The Secondary Data of the KPAI, 2016.

E. The Roles of the KPAI in Providing Protection to Illegitimate Children

The KPAI, through the commissioners, has the duties to: (1) socialize all legislative provisions related to child protection, collect data and information, receive public complaints, conduct review, monitoring, evaluation and supervision of the implementation of child protection, and (2) provide reports, suggestions, input, and consideration to the president in order to protect children.

According to the informants of the KPAI, there were two important issues on the case of illegitimate children:

1. The emphasis of case settlement is based on child's best interests. The KPAI still tries to help solve the problems by calling the complained party (biological father). However, the KPAI realizes that there is no legal obligation for the biological father to come. Therefore, if the biological father is not willing to come, the KPAI cannot force.
2. Difficulties in the proof, because, in general, the biological father does not recognize that the child is his biological child.

The case of the protection to illegitimate children complained to the KPAI, in general, is in the form of a request for the fulfillment of right to livelihood. In solving the proposed cases, the KPAI uses mediation. However, pre-mediation was performed in advance by inviting biological mother and father and mediator from the KPAI. In practice, if the case can be resolved, the biological father is required to make a "Statement Letter" (not a Mediation Agreement) about the ability to provide for a living or anything else that is claimed. The statement only goes to the KPAI. Because it is only a statement, there is no legal obligation to fulfill as well as a mediation agreement.

When mediation does not result in an agreement, the KPAI will send it to the P2TP2A or to the Police, accompanied by a letter of reference and recommendation. Usually, the agency will report the progress of the case (otherwise, it will be required to report the progress of the case by the KPAI).

Constraints are faced by the KPAI because, in principle, the KPAI functions mostly on guarding and supervising the implementation of child protection carried out by the stakeholders of child protection. The KPAI is not an institution that solves the problems faced by the community, such as the court.

In the future, the KPAI needs to be given a bigger role to help resolve the issues related to the protection and interests of the child, especially the illegitimate children.

IV. Conclusion

1. Normatively, illegitimate children are not the children who have perfect civil rights. They have various limitations of rights due to their juridical and factual circumstances.
2. The constraints in providing protection to illegitimate children by the KPAI is that, in principle, the function of the KPAI is to oversee and supervise the implementation of child protection carried out by the stakeholders of child protection.

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