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Protection to the Civil Right of Illegitimate Child in Indonesian Legal System

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Abstract—In the system of Marriage Law, illegitimate child has civil relationship with his/her mother and mother's family. This position is better than the system in the Civil Code of Indonesia since in the Civil Code illegitimate child does not have civil relationship with his/her father or mother. The Civil Code of Indonesia provides two institutions to provide civil relationship between illegitimate child with his/her biological father and/or mother, namely the institution of "child recognition" and the institution of "child legitimation". "Child recognition" is conducted with the statement of voluntarily or by judge coercion, namely illegitimate child recognized by his/her biological father and/ or mother. "Child legitimation" can be performed when the biological mother and father are married to each other. Both institutions continue to apply until recently. When a child is not recognized or not approved, the illegitimate child does not have civil relationship with his/her biological father and/ or mother. In the law, there are some efforts being made to provide protection for the civil rights of illegitimate child, i.e.: (1) the one structured in the system of legislation; and (2) in the jurisprudence. The aims of this paper are to describe the protection to the civil rights of illegitimate child in the Indonesian legal system and to describe the protection to the civil rights of illegitimate child through litigation. There are some jurisprudences dealing with the civil rights status of illegitimate child in the Constitutional Court, District Court and Religious Court.

Keywords: civil right, illegitimate child, litigation, law.

1. Introduction

Children are the future owners of a nation. This statement is not excessive considering the future of a nation and the State at any time in their hands. However, children are also weak creatures. Children are not adults in miniature. They are still the subjects of law and individuals, with all their physical weaknesses and limitations in their capacity to think as well as adults. Therefore, people who are more adults must think and act to provide protection to them. In the category of adults, they are not only parents, but also their families, communities and the State which must take a role to provide protection to children. In many ways, children often experience discrimination, abuse, and other violences in their lives. Law on the one hand provides protection to children, but on the other hand, law is not always that friendly to children.

One of law's unfriendly faces is that law distinguishes between legitimate and illegitimate children. This distinction affects the rights which may be enjoyed by a legitimate child may be different from the rights that can be enjoyed by illegitimate child.

There are various arguments given for this distinction. Ko Tjai Sing mentioned that the beginning of the distinction of legitimate and illegitimate children because in the past marriage was very sacred so that the relation between men and women out of authorized wedlock according to local standards was considered despised as well as the children who were born in the relationship. This distinction occurred because basically the legislators did not want children were grown and born out of wedlock.¹ To achieve it, lawmakers held the distinction between legitimate and illegitimate children (children born out of wedlock). Illegitimate children are given poor legal position, and the consequences of the mistakes of the

¹ Ko Tjai Sing, *Hukum Perdata Jilid I (Civil Law First Edition), Hukum Keluarga, (Full Textbook)*, Etikad Baik, Semarang, no year, p. 403.

father and mother are charged to the innocent children.² This distinction continues to this day. Although on the one hand law does not have friendly face to illegitimate child, but on the other hand, law still performs its function to provide protection to children.

Lawrence M. Friedman states that law has multiple functions, i.e.: (1) to distribute and maintain the allocation of correct values according to the community in which the allocation is generally referred to as justice; (2) to resolve the disputes arise in the community; (3) to perform social control; and (4) to create norms.³ Therefore, when imbalances occur in a society, law as a system can carry out the functions required to re-enforce the balance expected by the public.

In achieving legal function as the protection to human interests, law has purposes. According Sudikno Mertokusumo,⁴ the objectives of Indonesian positive law as stated in the fourth paragraph of the 1945 Constitution of the Republic of Indonesia are to establish the government of the state of Indonesia which shall protect the entire Indonesian nation and the entire homeland of Indonesia and to promote general welfare unum, to educate the nation, and to participate in implementing the world order based on freedom, everlasting peace and social justice.

When law is intended to give a sense of justice, expediency and legal certainty, any legal issues can be resolved within the system and by the system itself including the issues related to the protection to the civil rights of illegitimate child that will be resolved by the law and in the legal system itself.

2. Problems

Based on the above description, the problem to be described in this paper is how the protection practices to the civil rights of illegitimate child in Indonesian legal system?

3. Discussion

3.1. Protection to Civil Rights in Indonesian Laws

In the issue of the civil rights of illegitimate child, there are several laws that govern, i.e.:

3.1.1. The Civil Code of Indonesia (KUH Perdata/Civil Code)

Basically, the Civil Code of Indonesia does not apply in general to every person because from the beginning it was applied in the Dutch East Indies. The Civil Code of Indonesia was intended to apply only to those who had the nationals of Europe and some other nations who had the family law such as the family law system of the Netherlands. In a later development, the Civil Code applied to the people of Tiong Hoa and their descendants.

At the beginning of Indonesian independence, there were efforts to no longer enforce the Civil Code on the basis that the Civil Code does not match the soul of the nation of Indonesia. Yet, these efforts did not produce the results. Up to this time, the Civil Code of Indonesia has never formally repealed. If there is a part of the Civil Code of Indonesia which does not apply, it is not revoked but it has been abandoned by the practice of law as it does not fit anymore or revoked by the partial laws subsequently applied in Indonesia.

The Civil Code of Indonesia distinguishes children into legitimate and illegitimate children. Legitimate children have mothers and fathers who are bound by a marriage as their parents.⁵ The relationship is a civil relationship with various logical consequences. A child born out of legitimate wedlock or not as a result of a legitimate marriage is called an illegitimate child. Illegitimate child does not have civil relations with anyone, including his/her biological mother and father.

To illegitimate child, the Civil Code of Indonesia provides two institutions to establish civil relations between biological father and/or mother with their illegitimate child, namely: (1) the institute of child

² *Ibid.* as the note, Ko Tjai Sing uses the terms "legal child" and "illegal child".

³ Lawrence M. Friedman, *The Legal System: A Social Science Perspective (Sistem Hukum dalam Perspektif Ilmu Sosial)*, Cetakan III: Nusa Media, Bandung, 2009, p. 19-21.

⁴ Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar (Knowing Law; An Introduction)*, First Edition, Penerbit Universitas Atmajaya, Yogyakarta, 2010, p. 105.

⁵ Read Article 250 of the Civil Code of Indonesia.

recognition⁶ and (2) the institute of the legitimation to illegitimate child.⁷ "Child recognition" is a legal act in which a man, while the mother is still alive, with his consent passes the origin of a mother's illegitimate child in the name of the father.⁸ Illegitimate child can be "legitimated" by the marriage of his/her parents (if the child is initially recognized) or recognized in a marriage service by his/her father, or can be passed with a "letter of legitimation" when the father is negligent to admit the child at the latest on a marriage service.⁹

3.1.2. Marriage Law

Law No. 1 of 1974 on Marriage regulates illegitimate child in Article 43 as follows:

- (1) A child born out of wedlock has only a civil relationship with his/her mother and his/her mother's family.
- (2) The position of the child mentioned in paragraph (1) above will further be regulated in a government regulation.

Until recently, the Government Regulation referred by paragraph (2) above has not been published, so there is no positive legal norm that can be used as a reference.

If the provisions regarding illegitimate child in the Marriage Law are compared to the Civil Code of Indonesia, there will be a fundamental difference, that is; according to the Civil Code of Indonesia, illegitimate children do not have a father and mother. They are natural children (*natuurlijke kinderen*) who do not have anyone, have no right to care and inheritance. Consequently, their biological fathers and mothers have to give a confession if they require civil relationship with their illegitimate children. Without the recognition, the civil relationship has never existed. In the system of Marriage Law, illegitimate child has civil relationship with his/her mother and his/her mother's family. The one who is required to perform recognition is only his/her biological father. This concept is much more advanced and provides protection to illegitimate child.

Based on the petition for the judicial review of Article 43 paragraph (1) and Article 2 of the Marriage Law, the Constitutional Court ruled the Constitutional Court Decision No. 46 / PUU-VIII / 2010 which gives the opportunity to illegitimate children to have civil relationship their biological father and the family of his/her biological father. This decision is "conditional constitutional" to Article 43 of the Marriage Law.

3.1.3. Convention on the Right of the Child

Convention on the Rights of the Child (CRC) is a convention that had been approved by the General Assembly of the United Nations on November 20, 1989. Indonesia had signed the convention on January 26, 1990 in New York.

In general, this convention provides protection to children - including illegitimate children - in a wide range of rights. The Convention consists of 54 articles ratified by the Presidential Decree (Keppres) No. 36 of 1990 on the Ratification of the Convention on the Rights of the Child.¹⁰ The important article relating to the civil rights of the child is Article 7 which states:

- a. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and cared for by his/her parents.
- b. The State Parties shall ensure the implementation of these rights in accordance with their national laws and their obligations based on the international instruments which are relevant in this field, in particular where the child would be stateless if not so.

⁶ Read Article 280 of the Civil Code of Indonesia.

⁷ Read Article 272 of the Civil Code of Indonesia.

⁸ H.F.A. Vollmar, *Pengantar Studi Hukum Perdata Jilid I (Introduction to Civil Law Study; First Edition)*, First Edition, CV Rajawali, Jakarta, 1983, p.130.

⁹ *Ibid.*, p.126.

¹⁰ Endang Sumiarni, Chandra Halim, *Perlindungan Hukum terhadap Anak dalam Hukum Keluarga (Legal Protection to Child in Family Law)*, First Edition, Penerbitan Universitas Atmajaya, Yogyakarta, 2000, p.319.

Article 8, paragraph (1) states: "the States Parties attempt to respect the right of the child to preserve his/ her identity, including nationality, name and family relations as recognized by law without unlawful interference."

Article 9 paragraph (1) states: "the States Parties ensure that a child shall not be separated from his/ her parents against their will ..."

Based on the articles, it can be seen that the Convention on the Rights of the Child guarantees that the economic and socio-cultural rights of children will be assured. Children will be able to grow in their environment, and all efforts are always with the best consideration for the child.

Although the Convention on the Rights of the Child (CRC) does not directly mention the civil rights of illegitimate child, CRC provides recognitions to the personal rights of the child regardless of his/ her origin, having a passion for providing the best interests of the child. The Convention on the Rights of the Child is implemented further by various laws, such as Law No. 23 of 2002 on Child Protection in conjunction with Law No. 35 of 2014 on the amendment of Law No. 23 of 2002 on Child Protection.

3.2. Protection through Litigation

Protection through litigation is taken when subjective rights are not met satisfactorily. There were several cases submitted to the court with regard to the protection to the civil rights of illegitimate child, through the Constitutional Court with regard to the review of the law, general courts and religious courts which can be described as follows:

3.2.1. The Constitutional Court

The awareness milestone of the protection to the civil rights of illegitimate child begins with the case of the petition to Law No. 1 of 1974 on Marriage. The case started with the birth of a child of the *sirri* marriage between the Petitioner and M. From the *Sirri* marriage, a boy named MIR was born. MIR did not get his rights as a legitimate child because he was born out of wedlock. The marriage of his parents was not officially recorded. The Petitioner experienced and felt that his constitutional rights were impaired by the enactment of the Marriage Law, particularly in relation to Article 2 paragraph (2) and Article 43 paragraph (1). This article is considered to lead to legal uncertainty resulting in losses for the Petitioner related to the marital status and the legal status of the child from the marriage.

On the petition, the Constitutional Court in its verdict No. 46/ PUU-VIII/ 2010 states:

Article 43 paragraph (1) of Law No. 1 of 1974 on Marriage (the State Gazette of the Republic of Indonesia of 1974 Number 1, the Supplement to the State Gazette of the Republic of Indonesia Number 3019) which states, "Children born out of marriage only have civil relationship with their mother and mother's family ", does not have binding legal force as long as it is interpreted to eliminate the civil relation with a man who can be proven by science and technology and/ or other evidence according to the law that is found to have blood relationship as the father. Hence, the verse should read, "Children born out of marriage have only civil relationship with their mother and mother's family as well as with a man as a father who can be proven by science and technology and/ or other evidence according to the law that is found to have blood relationship, including civil relation their father's family. "

The decision of the Constitutional Court is a new thing as a milestone in the respect for the relationship between illegitimate child with his/ her biological father. Many parties criticized the decision and the Constitutional Court was considered to legalize adultery. Nonetheless, the Constitutional Court decision opens up the recognition of the civil rights of illegitimate child.

3.2.2. District Court

District Court is a general court that handles a variety of civil and criminal cases. In the matter of the protection to the civil rights of illegitimate child, District Court handles the lawsuit or petition on the civil rights of illegitimate child of those who are not Muslim.

In a study in Semarang District Court, the following data was obtained:¹¹

¹¹ B. Resti Nurhayati, Ign. Hartyo Purwanto, Hak Keperdataan Anak yang Lahir di Luar Perkawinan sebagai Hak Asasi Anak (*Civil Rights of Illegitimate Child as Child's Human Rights*), Unika Soegijapranata, Semarang, 2015, p. 67.

Table 01: the Case Data of the Recognition and Legitimation Application in Semarang District Court

No.	Year	Number of Cases
1	2012	5
2	2013	12
3	2014	15
4	2015*	7
Total		39

Source: the Secondary Data from Semarang District Court in 2015.

* in the year of 2015, until the case filed in April 2015.

In the study, it is found that the parties applying for the recognition and legitimation of illegitimate child are the descendants of Tiong Hoa who were subject to the Civil Code of Indonesia.¹² Although the current classification of population under Article 131 of *Staatsregeling Indies* have long been abolished, in practice, the descendants of the Far East group of Tiong Hoa are subject to the legal provisions applicable to them under the provisions of the 1917 Statute No. 525.¹³

In the case of the application for recognition and validation of illegitimate child at Semarang District Court, it was found that children born before the legitimate marriage of their father and mother, but the children's parents were still alive and had been married legally in accordance with the provisions of the Marriage Law. In general, the application for child recognition and legitimation applied was granted by the judges when the evidence was sufficient. Thus, the children have the same position as legitimate children with all the rights and obligations attached to them, and the protection to the civil rights of illegitimate child is carried out.

3.2.3. Religious Court

Law No. 3 of 2006 on the Amendment of Law No. 7 of 1989 on Religious Court in Article 2 states that Religious Court is one of the institutions of judicial power for the people of justice seekers who are Muslims about certain matters referred to in this law. Religious Court has the duty and authority to examine, decide and solve the cases in the first instance among people who are Muslims in the field of:

- a. marriage;
- b. inheritance, wills, and grants, which are based on Islamic law;
- c. wakaf (endowments) and Sadaqah (charity).

Justiciable in Religious Court is limited to the people who are Muslims.

For having the cases regarding the civil rights of illegitimate child in Religious Court, there are several ways that can be performed by filing: (1) the application for determining or applying the lawsuit regarding the origin of the child; or (2) the application for child legitimation; or (3) by submitting *Isbat* (confirmation) of Marriage.

In Indonesian civil law system, the determination of the origin of the child can be performed voluntarily¹⁴ or by forced confessions¹⁵. The reasons used to apply for the determination of the origin of the child are:

- a. Because Petitioner does not have concrete proof (deed) so that the status is not clear and the Civil Registry cannot register the child to make the birth certificate;

¹² *Ibid.*, p. 74.

¹³ *Ibid.*, p.75.

¹⁴ Voluntary Child Recognition is statement as stated in the Civil Code. See Abdul Manan, *Aneka Masalah Hukum Perdata Islam (Various Issues in Islamic Civil Law)*, First Edition, Kencana Prenada MediaGroup, Jakarta, 2006, p. 99.

¹⁵ Forced recognition is based on judge decision through the petition or lawsuit on the determination of the origin of the child. Read Abdul Manan, *Ibid.*

- b. Because of the denial of the husband over the child born by his wife.
- c. Because the child is born from a *sirri* marriage/ unregistered marriage under the State law.

Child legitimation application is based on Article 172 of the Civil Code of Indonesia as both parents are then legally married to each other.¹⁶ Meanwhile, the third way is by submitting *Isbat Nikah* (confirmation of marriage). According to Article 7 paragraph (2) of the Islamic Law Compilation (KHI), in the case of a marriage that can not be proven by Marriage Certificate, the *Itsbat Nikah* can be submitted to the Religious Court. The *Itsbat Nikah* that can be submitted to the Religious Court is limited on the matters relating to:

- a. The presence of a marriage in the context of a divorce settlement;
- b. The Marriage Certificate is lost;
- c. There is a hesitation on the legality of one of marriage requirements;
- d. The marriages occurred prior to the enactment of Law No. 1 of 1974 and;
- e. The marriage performed by those who have no impediment of marriage under Law No. 1 of 1974;

The research results indicate that over the past few years, noone applied for child legitimation and the determination of the origin of the child in the Religious Court of Semarang. The protection to the civil rights of illegitimate child can be obtained by submitting *Isbat Nikah* (confirmation of marriage). The data on the efforts to get the protection to the civil rights of illegitimate child is shown in table 02 below:¹⁷

Table 02: The Case Data on the Application of *Isbat Nikah* (confirmation of marriage), Child Legitimation and the Origins of the Child in the Religious Court of Semarang

No.	Year	Child Legitimation	Origin of Child	<i>Isbat Nikah</i>
1	2012	0	0	6
2	2013	0	0	17
3	2014	0	0	27
4	2015	0	0	14
Total		0	0	64

Source: The Secondary Data at the Religious Court of Semarang, April 2015.

Not all cases of *Isbat Nikah* (Confirmation of Marriage) ended by the granting of the petition, but there were also the cases which were not accepted, dropped from the list, and some were revoked. The end result can be described as follows:

Table 03: the Case Data of *Isbat Nikah* which were not Received/Cancelled/Barred from the Register

No.	Year	Number of <i>Isbat Nikah</i> Cases at Semarang Religious Court			
		Applied	Unaccepted	Barred	Revoked
1	2012	6	1	-	-
2	2013	17	-	-	1
3	2014	27	-	1	3
4	2015	14*	-	-	-
Total		64	1	1	4

Source: Secondary Data at Semarang Religious Court in April 2015.

* The cases to April 2015.

The writer seems to agree with M.Anshary¹⁸ saying that, in the aspect of Islamic law, the issue of living is the domain of civil relationship and has no correlation with the issue of *nasab* relationship

¹⁶ Read Article 280 of the Civil Code of Indonesia.

¹⁷ B. Resti Nurhayati, Ign. Hartyo Purwanto, *Op.cit.*, p. 76.

¹⁸ H.M.Anshary, *Kedudukan Anak dalam Perspektif Hukum Islam dan Hukum Nasional (Child Position in the Perspectives of Islamic and National Laws)*, Mandar Maju, Bandung, 2014, p. 90.

(lineage). Then, a biological father may be burdened with the responsibility to fulfill his obligations towards his illegitimate child. Therefore, when the biological father is someday proven not to meet the aspects relating to the civil obligation to the child, the child may assert his/ her rights through the courts in order to demand the obligations of his/ her biological father. It is part of efforts to protect the civil rights of illegitimate child in Indonesian legal system.

4. Conclusion

Based on the description above, it can be concluded that:

- 4.1. Illegitimate child needs to get attention, particularly to develop personally.
- 4.2. Indonesian law provides protection through: (1) Non litigation/ existing legislation, such as in the Civil Code of Indonesia, Law No. 1 of 1974 on Marriage, and the Convention on the Rights of the Child; (2) Litigation, in the practice adopted by the District Courts, Religious Courts, and the petition to review laws through the Constitutional Court. They are all intended to provide protection to the civil rights of illegitimate child.

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