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Dekan Fakultas Hukum dan Komunikasi, Universitas Katolik Soegijapranata, dengan ini memberikan tugas kepada :

Nama	:	**Rika Saraswati, S.H., C.N., M.Hum., Ph.D. (NIDN. 0629036803)**
Jabatan	:	Dosen Program Studi Ilmu Hukum, Fakultas Hukum dan Komunikasi, Universitas Katolik Soegijapranata
Tugas	:	Mempresentasikan paper dengan judul "Reforming the Family Law System to Accommodate the Rights of the Child to Heard in Custody Disputes" dalam kegiatan the 2nd IANJ Conference of Socio-Legal Studies in Indonesia, yang diselenggarakan oleh Universitas Indonesia bekerjasama dengan University of Leiden, University of Melbourne, University of Sidney, University of New South Wales, and Nagoya U
Waktu	:	23-24 Agustus 2019
Tempat	:	Fakultas Hukum Universitas Indonesia
Lain – lain	:	Harap melaksanakan tugas dengan penuh rasa tanggung jawab, dan memberikan laporan setelah tugas selesai.

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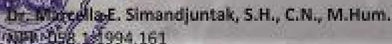

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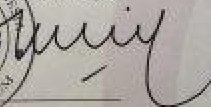

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24 July 2019

Our Ref: 1169 /UN2.F5.D/PDP.00.05.00/2019
Subject: Invitation

To: Ms. Rika Saraswati
Universitas Katholik Soegijapranata

Dear Madam,

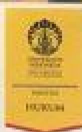
I am pleased to inform you that you are invited to present your papers titled "**Indonesian Minister of Education and Culture Regulation No. 27 Year 2016 on Educational Services Belief in God Almighty in the Educational Unit and Its Implementation to Protect the Student Who Holds Beliefs to Obtain Education**" and "**Reforming the Family Law System to Accommodate the Rights of the Child to be Heard in Custody Disputes**" at the 2nd IANJ Conference of Socio-Legal Studies in Indonesia (hereinafter "the Conference"). The Conference will be held at the Faculty of Law, Universitas Indonesia, Depok campus on 23rd – 24th August 2019. The Conference is organized by Universitas Indonesia, in cooperation with University of Leiden, University of Melbourne, University of Sydney, University of New South Wales, and Nagoya University.

The Conference will invite academics, practitioners, and related institutions to submit paper based on research, case-study, or critical review on socio-legal approach related to the provided panels. The registration fee for non-student presenters is IDR 1.500.000, covering access to all plenary and workshop sessions, the lunches and coffee breaks specified in the conference schedule, conference materials, and closing dinner. Please visit the Conference website for more details: https://sls2019.ui.ac.id/. Our preliminary program is also available on the website, please review it to determine your travel plans well in advance.

It should be understood that this invitation is not a commitment on the part of the committee to provide any financial support. If you have any questions or concerns, please contact us by email at lsd@ui.ac.id.

Sincerely,

Dr. Edmon Makarim, S.Kom., S.H., LL.M.
Dean



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Presented to

Rika Saraswati

for participating as

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in

The 2nd IANJ Conference of Socio-Legal Studies on Indonesia

"Contemporary Socio-Legal Issues in Indonesia: Towards Balanced Procedural and Substantive Justice"

held at

Faculty of Law Universitas Indonesia, Depok, Indonesia

23rd – 24th August 2019

Head of Department
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REFORMING THE FAMILY LAW SYSTEM TO ACCOMMODATE THE RIGHTS OF THE CHILD TO BE HEARD IN CUSTODY DISPUTES

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Abstract

The best interests of the child, especially the right to be heard, is a major factor for judges being able to make a decision that is cognisant of all viewpoints (that of the child as well as those of the parents) and more information than would otherwise be the case when dealing with child custody disputes. The right of the child to be heard is guaranteed by Article 10 of the Child Protection Acts 2002 and 2014. However, children's voices are often considered as 'information' (and of lower legal status) unlike (higher status) sworn statements or evidence from a witness. Consequently, children's opinions have never been included in court verdicts as legal reasons for a particular decision. The right of the child to be heard needs to be accommodated in court proceedings in order to protect children from the devastating effects of their parents' conflicts and to better take into account the children's situation, wishes and desires and their overall safety and welfare. This requires a focus on the welfare of the child and a proactive approach by all parties, including the court system. By improving the judiciary and court services can improve outcomes for children affected by custody disputes. Reforming the Family Law system is needed because the Marriage Act 1974 does not define 'the best interests' explicitly; the State Court and Religious Court each has its own legislation to determine whether (and when) children are able to be heard; and the role of other parties such as lawyers need to be reformed while social workers or mental health professionals need to be more involved in order to reduce the negation or omission of children's voices.

Keywords: Reforming, Family Law, Right to be heard, Custody, Disputes

1. Introduction

The right of the child to be heard is regulated in Article 10 of Indonesian Law number 23 of 2002 on the Child Protection Act, and the Indonesian Law number 35 of 2014 on the Amendment to Law number 23 of 2002 on the Child Protection Act mandates that “every child has the right to state and to have their opinion heard, to receive, seek and provide information corresponding to his or her intelligence and age according to the moral and propriety values”. This article has clearly defined the right of children to be heard, and gives children the opportunity to seek, receive and provide information corresponding to their age and intelligence by considering that this right is solely used for the benefit of their development. Therefore, when a child contributes their opinion to the proceedings, the judges should accept, consider and assess that input, deciding whether it could be used in the deliberation on the award of custody and consider whether the decision is in accordance with the wishes of the child. The judge’s arbitration should not be solely based on material that is tendered by everyone except the child; rather the child should be able to express his or her desires and opinions and have the chance to determine what is best for him or herself.

The implementation Article 10 seems not to have touched the divorce trial domain involving an appeal for child custody. This results in the child only being heard outside of court. Consequently, the child’s opinion is only considered by the panel of judges as “additional information” and does not affect the verdict, even though the child must know better what it best for him or herself and that this verdict has a significant impact on children’s lives. The child’s right of opinion and expression as well as the child’s right to be heard have not been a part of the legal deliberation for judges to determine a final verdict (Saraswati, 2018).

If the child’s opinion has been heard, then the account of the hearing process as a part of the trial proceedings — despite this occuring outside of court — must be contained within the legal deliberation of the final verdict, because this accords with the basic principle of respect for the children’s rights of opinion and expression and a respect for their rights to participate in the process and express their opinions contributory to and on the verdict, especially in a matter which so affects their lives. Thus, to ensure the rights of the child within the justice system (especially in Civil Law) transparency is necessary from the judiciary and the panel of judges as the executant, beginning with the inclusion of the child’s right of opinion and expression to contribute to the court’s final

verdict as stated in Article 12(a) of the Child Protection Act. If this right becomes a policy for the judge's decision-making process, then the panel of judges appointed to adjudicate must be formed by judges who are experienced in handling cases involving children or who have had sufficient experience with the Child Protection Act and are knowledgeable in child psychology. With a group of learned and knowledgeable judges in divorce cases involving children (Elrod, 2001) then the children's voices will most likely be heard and accepted or even adopted into the decision-making process in reaching the final verdict on child custody rights.

However, accommodating the rights of the child to be heard in custody disputes needs more effort due to several factors, including: the Marriage Act 1974 does not define 'the best interest' explicitly; the State Court and Religious Court each has its own legislation to determine whether (and when) children are able to be heard; and the role of other parties such as lawyers need to be reformed, while social workers or mental health professionals needs to be more involved in order to reduce the negation or omission of children's voices that should be contributing to decisions that are central to their lives. Therefore reforming the Family Law system to accommodate the rights of the child to be heard in custody disputes is needed.

2. Improving the legislation

a. The Best Interests of the Child

The basic principle of the best interests of the child under the Child Protection Act No.23 of 2002 is defined as "all actions concerning children, conducted by the government, the community, legislature and the judiciary, the best interest of the child shall be the primary consideration". Under such provision, the judge, as the judiciary that carries out judicial duties, is obliged to exercise this basic principle in carrying out his/her duty, especially prior to forming and during the delivery of a court decision in a case that involves or affects the life of a child — in this instance, in divorce cases where there is a petition for child custody. The Indonesian Legislation number 1 of 1974 (UUP) that regulates the Marriage Law does not regulate clearly on the best interests of the child. The term 'best interest' is contained in Article 41 of the Marriage Law. Article 41(a) of the states that after the divorce, both father and mother of the child/ren have an obligation to maintain and educate solely based on the child's best interest. In the event of a dispute over child custody, the Court shall decide. Furthermore, Article 41(b) regulates that the father is the party responsible for all

child care and education costs; where the father is unable to fulfil this duty, the Court may determine that the mother also bear the costs. In the elucidation of Article 41(a) and (b) no further explanation of 'the interests of the child' is found. It only specifies that both father and mother still have an obligation to care for and to educate the child. However, it emphasises that the responsibility is primarily the father's rather than the mother's in terms of shouldering the costs of a child's care and education. The issue of 'best interest' for the child is regulated by the legislation only when the marriage of the parents is dissolved through divorce, and if dispute arises over child custody. In some developed countries (such as the United Kingdom, Australia and Canada), efforts to fulfil the best interests of the child are not limited to the cost of care and education but also ensuring regular physical contact with the parent who has lost custody of the child since it it is believed that contact is important in ensuring the best environment for the growth and development of the child (Maccoby and Mnookin in Cohen & Gershbain, 2001, p. 121 at 171; Saunders, cited by Rathus, 2007, p. 21 at 139, 157).

In the Convention on the Rights of the Child (CRC), the elaboration of the principle of the best interests of the child is contained in several articles. These articles include: Article 3(1) which states that the child's best interests are the primary consideration; Article 5 which states that the government should respect the responsibilities, rights and duties of parents to provide, in an ongoing manner adapted to the child's capacity and reasonable supervision; and Article 12(1) which provides that it is the right of the child to freely express his or her opinion in all matters relating to and affecting the child, including the existence of domestic violence

Based on research conducted by the author, cases related to domestic violence have not viewed this factor as a part of legal consideration. In comparing domestic court verdicts to those in various other countries, it has been found that in other jurisdictions the history and past records of the parent who had committed domestic violence would have been used as a reference to decide the right to custody. The basis used to determine child custody is the best interests of the child; the child should not be affected by domestic violence and the child's opinion should be heard (regardless of domestic violence) (Rathus, 2007; Taylor, 2006). If evidence of domestic violence is discovered, the judge would normally order limited visitation for a parent who had committed the violence (Rathus, 2007; Taylor, 2006).

In the end, the best interest of the child encompasses child protection or freedom from exposure to any violent act that is physical, psychological or where a child has experienced harassment, neglect and any other violence within the family. Such provisions exist under the provisions of the Australian Family Law Act 1975 (Cth) (s60B(1)). Furthermore, children have the right to know and be cared for by both parents (regardless of their living separately), as well as the right to spend time and to communicate with their parents (or certain other people) based on a schedule arranged which to allow both parents to delegate tasks and responsibilities regarding the welfare and development of their children (Australian Family Law Act 1975 (Cth) s 60B (2)).

b. The Threshold Age for Children to be Heard

The Indonesian Marriage Act (UUP) also does not regulate the age threshold for children to be heard in court. The statutory provision pertaining to such a threshold, however, does exist in the Compilation of Islamic Law (KHI) but this is only applicable to those who are Moslems and have filed a lawsuit for the right to custody in the *Pengadilan Agama* (the Religious Courts). *Kompilasi Hukum Islam* is a regulation that complements the Indonesian Marriage Law and is applicable to all Muslim Indonesians. It also includes the rights of a child to be heard, namely from the age of mumayyiz (the age of discernment) or 12 years old and above. Articles 105 and 156 of Kompilasi Hukum Islam states that in the case of a mumayyiz, it is left to the child to choose which parent should hold the right to custody.

Those who are non-Moslem can file for divorce and lodge a custody application for a child/ren through the *Pengadilan Negeri* (State Court). The judges of the State Court will base their decisions on the Marriage Law and the procedures of Civil Law (Indonesian Civil Code/Burgerlijk Wetboek) and the Criminal Code Procedures (HIR and RBG). Based on article 145 section 3 HIR and Article 1912 Civil Law “a child who is not yet 15 (fifteen) years of age”) is not qualified to be a witness. However, article 1910 of the Indonesian Civil Code provides an exemption to the children under 15 to be a witness if it deals with the costs of care and education of a child that is under-age and in an examination of the reasons which may lead to the release from or dismissal of custody from a parent or guardian.

Based on these various provisions, the threshold age at which children can be heard must be reformed in order to give unified legal guidance and provide certainty for judges in court hearings; and so that children's statements are valid as a statement of evidence presented in court and can be put in the verdict because hearing the opinion of the child (whether conducted inside or outside of courtroom) is a part of the judicial proceedings that is inseparable from the case and the case itself is inter-related to the child's own interests.

3. Improving the Judiciary and Court Services

Divorce cases have been viewed as less prestigious or important than corruption, political and religious conflict, and even graffiti, in Indonesia. As a consequence, custody disputes (which often are included in divorce cases or conducted subsequent to divorce) have been viewed less important due to their private and intimate nature. However, the impact of divorce and custody dispute is worst when children are psychologically, economically and socially harmed. Therefore, custody disputes require a specialised approach because of the complexities of the issues presented. Courts must be proactive in seeking ways to help parents protect or restore healthy relationships with their children and also develop mechanisms for resolving disputes between parents in a timely manner. There will be a need for collaboration and multi-disciplinary partnerships; special training will be necessary for all professionals who interact with the family.

a. Specialised and Educated Judges

The Indonesian government has several policies (such as training, introducing modules, etc) to improve judges' understanding of domestic violence and children issues (Kodir & Mukarnawati, 2013). The training is supposed to be sufficient to give judges' skill to understand the general dynamics of family relationships, the impact of divorce on litigants and children, the particular dynamics of high conflict cases and effective ways to manage conflict. It seems that the the training needs to be improved because the court judges require a specialised education and training judges who understand that domestic violence poses serious safety concerns for both parent and child (O'Brien & Nadkarni, 2000; Lemon, 1999; Schwaeber, 1998, p. 141 at 143; Zorza, 1996), and they should also be sensitive to the general behavioural patterns that victims of abuse exhibit (Barker Brandt, 2000). Judges

need to understand the developmental stages of children because children have different needs and different relationships with their parents at different stages of emotional maturation. The need for a specialised education and training for judges is pivotal because Indonesian judges rarely mention domestic violence as a legal consideration in their verdict when dealing with divorce and custody disputes (Saraswati, 2014; Saraswati, Kusniati & Boputra, 2018).

b. Professionals for the Child

(1) Appoint a lawyer for the child

In Indonesia lawyers in divorce cases usually are appointed by the parties, and these lawyers work on the behalf of the parties, including on their behalf in terms of "child interests". The lawyer representing the parent does not often take into consideration the welfare of the child because the child is not the "client'. In order to accommodate the children's interests, many jurisdictions have a policy of appointing a lawyer for the child. The role of this lawyer is important because the lawyer serves as an advocate for the child to give the child a voice and also to act as an independent fact-finder (*guardian ad litem*). *A guardian ad litem* is defined as a person appointed by the court to act as a guardian for the purposes of a particular court proceeding. *A guardian ad litem* decides what action to take in litigation on behalf of a minor or other person the law considers incompetent to make their own decisions (Ray-Bettineski, 1978). To give the child a voice, judges should appoint a specially trained lawyer just for the child. The reason for appointing a lawyer for the child is because whatever decision the judge makes will affect that child for the rest of his or her life because the child is the "party in interest" (Prescott, 2000) that must be able to fulfil his/her rights.

(2) Mental Health Professionals

Mental health professionals are rarely involved in custody disputes in Indonesia. They may need to be involved in a high conflict case, however either to treat a parent with a personality disorder, to conduct a child custody evaluation, or to serve as a mediator.

c. Alternative Dispute Resolution and Parenting Plans

In Indonesia, mediation is used to assist couples attempt to reconcile and is a precursor to applying for a divorce; indeed, failure at reconciliation is a prerequisite for divorce. Based on *Peraturan Mahkamah Agung Nomor 1 Tahun 2016 (PERMA 1 of 2016*) [Supreme Court Regulation No. 1 of 2016 on Procedure for Mediation], one of the duties of the judge as mediator is: drawing up an inventory of problems and scheduling discussions based on the scale of priority. The judges who serve as mediators must remind potential litigants of the needs and best interests of their children, and the need to be mindful of the need to respect their children's rights (Kearney, 2011). However, based on an examination of the court's decision and a questionnaire sent to judges, it was seen that the mediation undertaken by the Panel of Judges focused more on the willingness of the parties to divorce rather than on issue related to any children involved (Saraswati, Kusniati & Boputra, 2018). Judges never use their powerful position to encourage the parties make a parenting plan although the judges themselves argue that making a collective agreement for parenting planning is very necessary because an agreed parenting plan and its results when brought into the court process would provide legal force and such an agreement would be expected to protect the interests of fulfilling children's rights, especially their right to maintenance and education costs (Saraswati, Kusniati & Boputra, 2018). However, judges argued that the mediation process, including making a parenting plan, is placing a heavy burden on them and taking up their time (Mustika, 2015). Judges argued that the main obstacle to mediation was caused by the unwillingness of the parties to enter mediation in a meaningful way; the parties always put their egos first and the future of their children was left behind (Saifullah, 2015). The effort to obtain the children's rights is also not optimal because of the financial difficulties that the plaintiffs suffer; the plaintiffs are usually women with limited economic capacity and little understanding of the law, who struggle to file an expensive execution claim (Ferisma, 2017).

The court needs to adopt specific and concrete plans to assist parents in fulfilling the tasks of parallel parenting to reduce the likelihood that they remain engaged in conflict. The more specific these plans are, the more parents can understand the rules and avoid conflict. All parenting plans should include a

residential schedule (including holidays, birthdays and vacations), decision-making responsibilities and methods for resolving disputes. Implementation of parenting plans is important and PERMA has also given judges the task as mediators to help parties in making and arranging the contest of such mutual agreements (Article 14 PERMA 1/2016 on Mediation Procedure in Court).

d. The Role of Lawyers

The lawyers or advocate profession is a noble profession, because they can be a mediator for the parties from criminal and civil cases (including special civil matters relating to cases in Islam), to administrative cases. However, in Indonesia, the profession has advantages and disadvantages, and certainly has had an “image problem” as some people thought that lawyers were always “twisting the facts”; people argued that law is profession that works for or defends the wrong, gets pleasure from the suffering of others, and obtain money by exchanging truth and falsehood (Rosyadi & Hartini, 2003).

Regardless of the negative image of Indonesian lawyers, lawyers who deal with both clients and the courts possess the power to control the pace and tone of a custody case. The lawyers should take a proactive role in reducing, rather than increasing, conflict between disputing parents and promoting collaborative problem solving. Lawyers who want to help families should have additional training in child development, child abuse and neglect, domestic violence and alternative conflict resolution. Then, they could better understand family dynamics and the impact of divorce on all of the parties, in addition to gaining a knowledge all of the complexities of pensions and child support.

Lawyers can help reduce conflict in custody disputes by counseling clients to not dispute inappropriately and discussing with clients the negative effects of a custody dispute on children. Lawyers have to cooperate with the client in defining and limiting the issues, procedures, and evidence necessary to determine the best interests of the child. Lawyers have a role to advise parents about the availability of resources to reduce conflict as well as alternatives to litigation, such as mediation, and do important deeds to minimise the intensity of the conflict.

e. Supervised Visitation and Child Transfer Centres

Every court in Indonesia should have supervised parenting programs as other countris have (Elrod, 2001). Supervised transfers or visitation are necessary when the child needs protection from physical or psychological harm while preserving the parent-child relationship. Supervised visitation is contact between a parent and one or more children in the presence of a suitable third party who can observe, listen and intervene if necessary to protect a child. Supervised visitation may be ordered when there is a risk that a visiting parent may abuse a child physically or sexually; to protect a partner from an abusive partner, and reduce the prospect of false allegations being made about a visiting parent's behaviour during a visit. Supervised visitation can also assist when a child is refusing to visit; when separated parents are in protracted high conflict and children show signs of loyalty conflict; where there are concerns about a visiting parent's ability to care adequately for the child; or to provide factual information to assist in evaluations.

Indonesia has already pekerja sosial or social worker under the supervision of Social Ministry in regard to child issues. Their existence and the tasks that they are charged with. They can be a supervisor for children who are under a guardian (custodian) based on a court order. Indonesia is very weak in protecting and to fulfiling children's needs and interest after a marriage breakdown. Indonesia courts (Religious Court and State Court) do not have a Family Support Division ― a division which is provided by Syariah Court in Selangor, Malaysia. Indonesian courts can adopt the system of a *Family Support Division* (FSD) which is a part of Syariah Court to implement a court order when dealing with women's and children's needs and interests. FSD has a mechanism to handle children's living through a child support agency. This system is built to ensure a husband fulfils his obligation of supplying a living and education support to his children after divorce (Fadly, 2017). Supervised visitation and child transfer centres as an institution to protect and to fulfil children's needs and interests after divorce must be built up by the Indonesian government.

4. Conclusion

Reforming Family Law needs to be undertaken because the legal system does not accommodate the children's rights in custody disputes. The reformation should be started with the substance of the Marriage Act 1974 on the definition of the best interest of the child and the threshold age from which a child is deemed able to be heard; improvement of the Judiciary and Court Services is required; and increased knowledge and skills are needed by human resources such as judges, lawyers, and the parties themselves.

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