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Indonesian Law Journal



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Jurnal

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National Legal Reforms About Unofficial Marriage*

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Abstract:

The legal consequences of Constitutional Court Decision Number 46/PUU-VIII/2010 perspective of national law reform are a progressive development of the law. The ruling granted part of the petition for judicial review of Article 2 (2) and Article 43 (1) of Law Number 1 in 1974 concerning Procurement of Articles 28B (1) and (2), and Article 28 D (1) of the 1945 Constitution of the Republic of Indonesia. The review of Article 2 (2) of the Marriage Law is not granted because the Constitutional Court is of the opinion that marriage registration is not a marriage restriction, but an orderly form of administration. Material review Article 43 (1) of the Marriage Law is granted by the Constitutional Court so that the child is a legal child. The Constitutional Court's decision on the unofficial marriage has positive and negative implications. One of the positive implications is the recognition of the child's relationship status with his biological father as long as it can prove the relationship and have a negative impact because it creates a sense of calm for the offender unofficial marriage (*nikah sirri*) and increase the quantity.

Keywords: Legal Consequences, the Constitutional Court, Unofficial Marriage (*Nikah Sirri*).

* Received: March 17, 2017, revised: April 20, 2017, accepted: Mei 12, 2017.

Pembaharuan Hukum Nasional Tentang Nikah Sirri

Abstrak:

Akibat hukum Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 perspektif pembaharuan hukum nasional merupakan pembangunan hukum progresif. Putusan tersebut mengabulkan sebagian permohonan pengujian materiil Pasal 2 (2) dan Pasal 43 (1) Undang Nomor 1 Tahun 1974 tentang Perkawinan terhadap Pasal 28B (1) dan (2), serta pasal 28D (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. Pengujian materiil Pasal 2 (2) Undang-Undang Perkawinan tidak dikabulkan karena Mahkamah Konstitusi berpendapat bahwa pencatatan perkawinan bukan pembatasan perkawinan, melainkan bentuk tertib administrasi. Pengujian materiil pasal 43 (1) Undang-Undang Perkawinan dikabulkan Mahkamah Konstitusi sehingga anak tersebut berstatus anak sah. Putusan Mahkamah Konstitusi terkait nikah sirri mempunyai implikasi positif dan negatif. Salah satu implikasi positifnya adalah adanya pengakuan status hubungan anak dengan ayah biologisnya sepanjang dapat membuktikan hubungan tersebut dan berdampak negatif karena menimbulkan rasa tenang bagi pelaku nikah sirri dan bertambah kuantitasnya.

Kata Kunci: *Akibat Hukum, Mahkamah Konstitusi, Nikah Sirri*

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Introduction

Marriage is a form of bond between a man and woman with the aim of forming a family to maintain the survival of human life. Marriage is the only means that can be done because one of the purposes of a marriage is to continue the offspring as an effort to regenerate humans in order to avoid extinction. It is realized by the state by providing legal protection either contained in the constitution of the state in the form of the 1945 Constitution of the Republic of Indonesia or in Law Number 1 in 1974 on Marriage (hereinafter referred to as UUP) and Presidential Instruction Number 1 in 1991 on Compilation Islamic Law (hereinafter referred to as KHI), as well as other regulations related to the matter.

Registration of marriage as stipulated in the UUP and KHI aims to provide legal protection for husbands, wives, or children of a marriage in order to create an administrative order. With the registration of marriage affixed in the Marriage Certificate (marriage book) then juridical clear that between a man and woman registered in the certificate are a husband and wife. This will have implications for subsequent administrative disciplines, such as changing the status of the Identity Card, Family Card, Birth Certificate, and other forms of documents so that it will facilitate the handling when a legal event will occur in the future.

In Indonesia, many marriage practices are not listed. This kind of marriage practice in society is better known as unofficial marriage. The marriage is done in accordance with the provisions of Islam. By religious law, the marriage has been in accordance with the Islamic law because it has fulfilled the pillars and requirements of marriage, that are the existence of the bride, dowry, *ijab* and *qobul*, marriage guardian, and two witnesses. When the pillars or requirements are met then the marriage is valid, although administratively not listed in the Office of Religious Affairs for those who are Muslims. Do not do marriage registration will certainly give the impact of harm for the offender unofficial marriage. Juridical state does not recognize the marriage and considers never marriage because there is no marriage registration. In addition, the processing of documents also usually will experience obstacles. A more sad result is that the status of a child born of marriage has only a civil relationship with his mother and his mother's family. Such circumstances would be very detrimental to the legal status of the child due to the mutilation of both parents. The law only recognizes that he is naughty from his mother and his mother's family so that in his birth certificate only his mother's name will be mentioned as his parents. There are no sanctions when his biological father abandons the

child. He also has no inheritance rights when the father dies. For girls when going to run, then do not have Marriage (parental) guardian but only Magistrate guardian appointed by the government.

The Constitutional Court's decision on this issue brings a fresh air to the status of children born of unregistered marriage practices. Judicial review filed on Article 2 clause (2) and Article 43 clause (1) of the UUP against Article 28 B clause (1) and clause (2), and Article 28 D clause (1) of the 1945 NRI Constitution, partly granted by the Constitutional Court so that a child born of unregistered marriage is entitled to recognition and rights. The existence of technological advancements allows for the testing of DNA to perform a suitability test or a blood relationship between the child and his biological father.

Based on the description above, the issue that needs to be addressed is how the position of the child born of marriage results that not registered after the decision of the Constitutional Court Number 46/PUU-VIII/2010. In addition to resulting in the legal status of the child, does this ruling indirectly affect the phenomenon of unofficial marriage?

Description of the Marriage Law Case

An applicant named Hj. Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim (Applicant I) and Muhammad Iqbal Ramadan ibn Moerdiono (Applicant II). The position of the applicant is as an individual, Indonesian Citizen, filed a judicial review of the Marriage Law, received by the Registrar's Office of the Constitutional Court on Monday 14th June 2010 based on the certificate of Receipt of Application File Number 211 / PAN.MK / 2010 and registered on Wednesday, June 23, 2010, under No. 46/PUU-VIII/2010 concerning the judicial review of the provisions of Article 2 clause (2) of the UUP stating that each marriage is recorded according to the prevailing laws and regulations and Article 43 clause (1) of the UUP stating that born outside marriage has only a civil relationship with his mother and his mother's family. According to the applicant, the provisions of this article are contradictory to Article 28B clause (1) of the 1945 Constitution of the Republic of Indonesia which states that everyone has the right to form a family and to continue the offspring through legal marriage. Article 28B Clause (2) of the 1945 Constitution also states that every child has the right to survive, to grow and to develop and to be entitled to protection from violence and discrimination. While Article 28D Clauses (1) of the 1945 Constitution of the Republic of Indonesia states that

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everyone is entitled to the recognition, guarantee, protection and legal certainty of justice and equal treatment before the law.

The reason for the applicants filed a judicial review of the provisions of Article 2 clause (2) and Article 43 clause (1) of the UUP is that on December 20, 1993, in Jakarta, there was a marriage between Applicant I (Hj Aisyah Mochtar alias Machica binti H. Mochtar Ibrahim) with a man named Drs. Moerdiono with marriage guardian of the deceased H. Mochtar Ibrahim witnessed by 2 witnesses each named KH. M. Yusuf Usman and Risman with dowries are a set of prayer tools, 2,000 Riyal money (Arab currency), a set of gold jewelry; diamonds paid in cash and with the *ijab* uttered by the guardian and *qobul* uttered by a man named Drs. Moerdiono. The marriage is not registered at the Office of Religious Affairs so that the marital status and the Applicant I are not recognized.

The 1945 Constitution of the Republic of Indonesia put forward the legal norm as a form of justice to anyone without discrimination. According to the applicants, the prevailing UUP causes the applicants to be impaired of their constitutional rights because according to the applicants, anyone is entitled to conduct marriage as long as it is not contradictory and in accordance with their respective religions and beliefs. In this case, the applicant has married in accordance with the religious norms that he embraced is Islam. Marriage has fulfilled the pillars and marriage requirements as Islamic law. The problem for the applicants is how the religious norm can be reduced by legal norms, so that legitimate marriage because it has done and fulfill the pillars and requirements of Islam, becomes invalid because it is not done marriage registration. This resulted in an invalid marital status of the applicant and the existence of child before the law becomes invalid, as a child who out of marriage has only a civil relationship with mother and mother's family.

Basically, every person is no exception applicant and his child has the constitutional right to get the legalization of marriage and legal status of his child. The constitutional rights that had by the applicant are guaranteed in the 1945 Constitution of the Republic of Indonesia but have been blackened by legal norms in the UUP, because the provisions of this law are unfair and harmful to the applicant. The marriage of the applicant is legitimate and in accordance with the pillars and marriage requirements in Islam, so that the born child also has the same legal status, but the provisions of articles of UUP, the applicants feel disadvantaged. On this basis, the applicant has the legal standing in the case filed.

Theoretical Review of Marriage

There are a lot of definition of marriage both in the legislation and the definition of the legal experts. The definition of marriage according to the provisions of article 1 of the UUP: "Marriage is the inner bond between a man and a woman as a husband and wife with the aim of forming a happy, everlasting family or household based on the One Supreme Godhead."

Based on Presidential Instruction Number 1 in 1991 on the Compilation of Islamic Law, the definition of marriage as set forth in the provisions of Article 2: "Marriage according to Islamic law is marriage, which is a very strong contract or *mitssaqan ghalidzan* to obey God's commands and carry it out is worship."

In language, marriage is derived from a marriage word synonymous with marriage derived from Arabic, which means gathering, assembling, and oppressing. Meanwhile, according to the term, marriage means a contract that justifies the sexual intercourse between non-mahrom men and women that create rights and obligations between the two¹. Meanwhile, according to M. Idris Ramulyo, marriage is a sacred covenant to form a family between a man and a woman. The agreement herein is the existence of an *ijab*, which is the legitimate offer of the Guardian's woman or his representative and the *qabul*, which is the legitimate acceptance of the prospective bridegroom or his representative². Marriage according to Islamic law is a contract or commitment to justify sexual relations between men and women in order to realize the happiness of family life, which is filled with a sense of tranquility and affection in a way that is pleasing to Allah.³

According to customary law, marriage is the implementation of the institutionalized command of God in society to form households in family ties⁴. Meanwhile, Iman Sudiyat states that the marriage of its citizens (male, female or both) is a means to keep the group's life in an orderly manner, a means by which a new generation can continue its group life⁵. Marriage is one of the regular cultures that follow the development of human culture in the life of

¹ Syarafuddin HZ.et al, *Studi Islam 2*, (Surakarta: Lembaga Studi Islam (LSI) UMS, 2003), p. 94.

² Mop. Idris Ramulyo, *Hukum Perkawinan Islam*, (Jakarta: PT. Bumi Aksara, 2002), p. 16

³ Ahmad Azhar Basyir, *Hukum Perkawinan Islam*, (Yogyakarta: UII Press, 2004), p. 14

⁴ Otje Salman Soemadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer*, (Bandung: PT. Alumni, 2002), p.173

⁵ Iman Sudiyat, *Hukum Adat Sketsa Asas*, (Yogyakarta: Liberty, 1981), p. 107.

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society. The culture of marriage and its rules that apply to a society or to a nation is inseparable from the cultural and environmental influences in which the society resides and the social interaction of its people is influenced by the knowledge, experience, belief, and religion of the community concerned⁶.

According to the Civil Code, marriage is a legitimate relationship between a man and a woman for a long time. The law sees marriage as a civil relationship, as stipulated in article 26 of the Civil Code. Legitimate marriage is a marriage that meets the requirements set forth in the Civil Code, and the religious terms and regulations are excluded⁷. Various notions of marriage above show that there are various kinds of understanding, but basically have the same sense, which equally mentions the existence of a bond or agreement between a man and a woman to form a family.

Regarding whether or not a marriage is legitimate, marriage must be carried out in accordance with the law of each religion and belief. This is as stipulated in the provisions of Article 2 clause (1) UUP Marriage is legal if done according to the law of their respective religions and beliefs. KHI affirms the provisions of that article that Marriage is legitimate "if done according to Islamic law in accordance with Article 2 clause (1) of the UUP. According to Islamic law, marriage is legitimate when it meets the pillars of the marriage candidate, wife, marriage guardian, two witnesses, ijab and qobul.

Given the large population and the creation of orderly administration of population, then to protect the interests of marriage registration is necessary. The provision is stipulated in the provisions of Article 2 clause (2) of the Marriage Law that each marriage is recorded according to the prevailing laws and regulations. In the provisions of KHI Article 5 is affirmed:

(1) In order to ensure the order of marriage for the Muslim community, every marriage should be registered.

(2) The marriage registration referred to in clause (1) shall be conducted by the Officer of the Registrar as stipulated in Law Number 22 in 1946 and Law Number 32 in 1954.

According to the UUP, marriage registration is an obligation, because if there is no registration of a marriage, there is no marriage document, which

⁶ Hilman Hadikusuma, *Hukum Perkawinan Indonesia*, (Bandung: CV. Mandar Maju, 2007), p. 1.

⁷ Subekti, *Pokok-pokok Hukum Perdata*, (Jakarta: PT. Intermasa, 1989), p. 23.

cannot result in the birth certificate, so that the child born from the marriage only has a civil relationship with his mother and his mother's family. The existence of this provision raises the ambiguity between the articles in the UUP, which states the legitimate of marriage if it has been done according to religious law and their respective beliefs. But on the other hand, an unregistered marriage will have difficulty in dealing with documents relating to kinship. Marriage is a legal event that has legal consequences for the perpetrators. The legal consequences of marriage are:

- a. The arising of rights and duties between husband and wife⁸.
- b. The existence of property in marriage, including joint property, is the property acquired during marriage into the joint property, in addition to the property, gift or Inheritance of each husband and wife⁹.
- c. The position of the child as well as the rights and obligations of parents and Children¹⁰.
- d. Inheritance rights among husband, wife, and child when one dies.

Due to the Law of Constitutional Court Decision Number 46/PUU-VIII/2010

Based on Article 24C clause (1) the 1945 Constitution of the Republic of Indonesia and Law Number 8 in 2011 concerning Amendment to Law Number 24 in 2003 regarding the Constitutional Court, as well as Article 29 clause (1) sub-paragraph an of Law Number 48 in 2009 regarding Judicial Authority, one of the Court's constitutional authorities is to hear at the first and final level the final decision of which is to test the Law against the 1945 Constitution of the Republic of Indonesia. In the Constitutional Court's ruling that holds the impairment of constitutional rights and/or authority as Article 51 Clause (1) of the Constitutional Court Law must meet 5 (five) conditions, namely: 1) the existence of constitutional rights and/or authority of the Applicant granted by the 1945 Constitution of the Republic of Indonesia; 2) Such constitutional rights and/or authorities by the Applicants are deemed harmed by the coming into effect of the law petitioned for review; 3) such constitutional impairment shall be specific (actual) and actual or at least potential in nature which, pursuant to

⁸ See the stipulation of Pasal 30 - Pasal 34 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (article 30th-34th act, No 1st 1974, about marriage law)

⁹ See the stipulation of Pasal 35 - Pasal 37 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan. (article 35th-37th act, No 1st 1974, about marriage law)

¹⁰ See the stipulation of Pasal 42 - Pasal 49 Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan (article 42nd-49th act, No 1st 1974, about marriage law)

logical reasoning, shall take place for sure; 4) the existence of causal relations (causal verb) between such losses and the enactment of the law petitioned for review; 5) the possibility that with the granting of the petition the constitutional impairment argued will not or does not occur.

In the case, the applicant argues as an individual Indonesian citizen who has the constitutional rights regulated in the 1945 Constitution of the Republic of Indonesia. Article 28B clause (1) states that "Everyone has the right to form a family and continue the offspring through legitimate marriage and Article 28B clause (2) stating that every child has the right to survival, growth, and development and is entitled to protection from violence and discrimination, and Article 28D clause (1) stipulating that "Everyone shall have the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law. Such constitutional rights have been impaired due to the coming into effect of the provisions of Article 2 clause (2) and Article 43 clause (1) of Law Number 1 in 1974 concerning marriage. Article 2 clause (2) of the Law states that "Every marriage is registered according to the prevailing laws and regulations. While Article 43 clause (1) states that "Children born out of marriage have only civil relationships with their mother and mother's family", especially regarding the right to obtain the legal status of the child.

Noting the consequences experienced by the Applicants is related to the constitutional rights of them, according to the Court, there is a causal relationship between the aforementioned losses and the enactment of the Law petitioned for review so that the Applicants fulfill the legal standing requirement to file a quo petition. Regarding the registration of marriage according to the laws and regulations are about the legal meaning of it. With respect to the matter, General Elucidation of item 4 letter b UUP concerning the principles of marriage states, ... that a marriage is lawful if done according to the law of each of his or her religion and belief; and in addition, each marriage must be recorded according to the prevailing laws and regulations. The recording of each marriage is the same as recording important events in the life of a person, such as birth, death expressed in the letters, a certificate also listed in the list of records.

Based on the Elucidation of the Law on the registration of marriage is not a factor determining the legitimacy of marriage and recording is an administrative obligation required by law and regulation. The factors that determine the legitimacy of marriage are the conditions determined by the religion of each pair of the prospective bride. The compulsory registration of marriage by the state is an administrative obligation. The meaning of

administrative obligations according to the Court can be seen from two perspectives. First, from the perspective of the state, such records are required in the framework of the functioning of the State to provide assurance of protection, promotion, enforcement, and fulfillment of the human rights concerned which is the responsibility of the state and must be carried out in accordance with the principles of a democratic constitutional state regulated and set forth in the legislation (vide Article 28I clause (4) and clause (5) of the 1945 Constitution of the Republic of Indonesia).

Such recording according to the Court is not contradictory to constitutional provisions because the restrictions are stipulated by law and are conducted with the sole intent of ensuring the recognition and respect of the rights and freedoms of others, and to fulfill fair demands in accordance with moral considerations, religious values, security, and public order in a democratic society (vide Article 28J clause (2) of the 1945 Constitution of the Republic of Indonesia). Secondly, the administrative recording carried out by the state is intended to make marriage, as an important legal act in the life of the person concerned, which implicates the enormous legal consequences, in the future can be proved by perfect proof with an authentic certificate, and services by the state in relation to the rights arising out of a given marriage may be effected effectively and efficiently.

Regarding children born out of marriage, in essence, the child's relationship with a man as a father is not solely due to a marriage bond, but can also be based on the proof of a blood relationship between the child and the man as a father. Thus, regardless of the procedure/administration of the marriage, the child born must have legal protection. If not so, then the disadvantaged is a child born outside marriage, but the child is not sinful because of his birth outside of his will. Children born without father's clarity of status often get unfair treatment and stigma in society. The law must provide protection and legal certainty to the status of the child born and the rights attached to it. Article 43 clause (1) of the UUP stating, "Children born outside marriage only have a civil relationship with his mother and his mother's family, should be read, "Children born outside marriage have a civil relationship with their mother and mother's family and with men as their father who can be proven on the basis of science and technology and/or other evidence according to law have blood relation, including civil relations with their father's family.

According to the Constitutional Court, Article 43 clause (1) of the UUP stating, "Children born outside marriage only have a civil relationship with his mother and his mother's family is contradictory to the 1945 Constitution of the

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Republic of Indonesia conditionally that is unconstitutional as long as the paragraph is meant to eliminate civil relation with man which can be proven based on science and technology and/or other evidence according to law has blood relation as his father.

The decision of the Constitutional Court on the judicial review of Article 2 clause (2) and Article 43 clause (1) of the UUP against Article 28B clause (1) and clause (2), Article 28D clause (1) of the 1945 Constitution of the Republic of Indonesia is appropriate because marriage registration is the form of an orderly administration as a protection against marriage itself, so that it will be clearly known the status of the two persons who have engaged in marriage and guaranteed legal certainty in relation to family-related documents, such as the arrangement of Family Card, status on Identity Card, Birth Certificate, marriage guardians, inheritance rights, and so forth.

The decision of the Constitutional Court to grant the applicants' petition to article 43 clause (1) of this UUP is appropriate, because the right to be recognized and to obtain the recognition of a child having a civil relationship with his mother and his mother's family, and having a civil relationship with his father and his father's family is a necessity. A child born must be preceded by the relationship between men and women who started with a relationship that led to the process of meeting sperm and ovum so that fertilization occurs. Moreover, the marriage of the applicant has been done legally in accordance with Islam law, which fulfills pillar and marriage requirement although not done registration of marriage. The problem is if the decision of the Constitutional Court is used as a basis for the proof of the status of the offspring of the male and female outside of marriage in accordance with their religion and belief, because in Islamic law such a child has only a civil relationship with his mother and his mother's family.

This Constitutional Court ruling in the perspective of legal reform is a progressive legal step, in which the judge makes a legal discovery (*Recht finding*), the judge is not only the mouth of the law but must explore the living laws of a society that can provide justice for the people.

The term progressive comes from the word progress. The law should be able to keep up with the times, as well as to answer the changing of the times with all the foundations in it, and be able to serve the society by relying on the morality aspect of the human resources of law enforcement itself.¹¹ According

¹¹ Satjipto Rahardjo, *Membedah Hukum Progresif*, (Jakarta: Penerbit Buku Kompas, 2008), p. ix.

to Satjipto Rahardjo, the judge is expected to become the vigilante, one who is wary of the fate and state of his people from the possibility of social destruction or social instability. The judge must dare to do a rule-breaking, which is to make progressive legal breakthroughs to help the nation and country out of the downturn¹².

The discovery of law is defined by Mauwissen as a legal development (*rechts boefening*), which is the forming of law in society, which includes the activities of forming, implementing, finding, interpreting systematically, studying and teaching the law.¹³ Meanwhile, according to Sudikno Mertokusumo, interpretation is one method of legal discovery that provides the explicit explanation of the text of the law, so that the scope of rules in the law can be applied to certain legal events. The interpretation by the judge is an explanation that must lead to the acceptable exercise of society regarding the rule of law against concrete events. The ultimate goal of explanation and interpretation of the rules is to realize the function of the positive law to prevail.¹⁴

The Constitutional Court's decision to grant the petition for judicial review of the provisions of Article 43 clause (1) is a progressive step by the judges of the Constitutional Court, where the judge sees from various aspects of the article, which the judge believes is contrary to the Constitution. In conducting legal reform it must be seen the values contained in a law whether it is in the spirit and ideology of the Indonesian nation or not.

The establishment of national law according to Sunaryati Hartono, as quoted Nyoman Serikat Putra Jaya is that:¹⁵

The national law that we shall form together is a way of governing the actions of Indonesian human beings through available channels and legal institutions, in accordance with the philosophy of life, namely Pancasila. Because of the Pancasila, among other things also unearthed from the customary law, which is actually none other than the original law for us, then by itself our national law which together we form it must also be adapted to the needs of our society that

¹² Ahmad Rifai, *Penemuan Hukum Oleh Hakim Dalam Perspektif Hukum Progresif*, (Jakarta: Sinar Grafika, 2011), p. 15.

¹³ Ahmad Rifai, *Penemuan Hukum oleh Hakim Dalam Perspektif Hukum Progresif*, p. 23.

¹⁴ Ahmad Rifai, *Penemuan Hukum oleh Hakim Dalam Perspektif Hukum Progresif*, p. 61.

¹⁵ Nyoman Serikat Putra Jaya, *Relevansi Hukum Pidana Adat dalam Pembaharuan Hukum Pidana Nasional*, (Bandung: Citra Aditya Bakti, 2005), p. 15.

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Pancasila in the 20th century, and then must be able to fulfill the needs of our community in the future.

The description above concludes that in the framework of reforming the future national law either by replacing the whole of a law or by changing / abolishing the provisions of article, one of them through a court decision, it must be in accordance with the values of Pancasila this constitutes the philosophy of life of the Indonesian and the values that are believed to be true by the people, and provide a sense of justice for the people.

Implication of Constitutional Court Decision Number 46 PUU-VIII/2010 against the Phenomenon of Practice Unofficial Marriage (*Nikah Sirri*)

According to the UUP, marriage is legal if it is done according to their respective faiths and beliefs, and then ordered that the marriage is recorded. The problem is that marriages not registered under this law create the problems. According to the religious law a marriage is legitimate and fulfills the pillars and marriage requirements, but because the marriage is not registered will cause many problems in the future, such as a child born of the marriage is considered a status as an outsider. This kind of marriage is better known as unofficial marriage.

The definition of unofficial marriage (*nikah sirri*) is a marriage not registered in the Office of Religious Affairs. The word *sirri* comes from the Arabic word *sirri* or *sir* which means secret. The existence of unofficial marriage is said to be legally valid but not lawful according to legal norms since marriage is not recorded in the Office of Religious Affairs.¹⁶ According to the positive law in Indonesia, that is, by the enactment of UUP, marriage is legal if done according to the law of each religion and believes it. For Muslims, in addition, to fulfill the pillars and requirements of marriage according to Islamic law, then every marriage must be held in the presence and recorded by Official Record Keeper according to the prevailing laws and regulations. A marriage that is not done in accordance with the provision has no legal force (vide Article 2 of Law Number 1 / 1974 Jo. article 2 (1) PP Number 9 / 1975).

From the legal point of view applicable in Indonesia, unofficial marriage (*nikah sirri*) is a marriage that is not done in accordance with the provisions of the applicable legislation. Based on the provisions of Article 2

¹⁶ https://id.wikipedia.org/wiki/Nikah_siri, accessed on 18th Mei 2016.

clause (1) and (2) UUP Jo. Article 4 and Article 5 clause (1) and (2) KHI, a marriage, in addition, must be done lawfully according to religious law, must also be recorded by authorized officials. Thus, in the perspective of legislation, unofficial marriage is a marriage that has no legal force. Unlawful marriage affects jurisdiction over the rights of public services by authorized agencies for the perpetrators. They do not obtain protection and legal services by authorized agencies as appropriate. There are 2 (two) opinions about the interpretation of the provisions of Article 2 of the UUP, that are:

1. The first opinion states that the tendency to separate the interpretation of Article 2 clause (1) under Article 2 clause (2), that marriage is legal if done according to the law of their respective religions and beliefs, whereas registration is administrative, it is done or not, does not constitute a defect and does not cause the invalidity of such marriage.
2. The second opinion interprets the provisions of Article 2 clause (1) and Article 2 clause (2) not only from a juridical standpoint, that is merely the validity of marriage, but also associated with the sociologist stating Article 2 clause (1) and clause (2)) cannot be separated, but is considered a series of unity like a thread with a cloth and intertwining into one, if one is loose then the other is reduced in strength and even disappears altogether. This opinion also relates also to the legal consequences of a marriage¹⁷.

The existence of the first interpretation causes some people are reluctant to register his marriage. This is based on several reasons as follows:

1. There is an opinion that both according to UUP and Islamic law have been legitimate to do unofficial marriage.
2. Avoid bureaucratically complicated.
3. Avoid the cost they think is expensive.
4. For people who want to get married a second time is to avoid the written permission of the first wife and avoid the responsibility of the second wife, so no need to apply for marriage to the Religious Court¹⁸.

Moh. Idris Ramulyo is more inclined to the second opinion, that Article 2 clause (1) and paragraph (2) of the UUP is a unity that cannot be separated

¹⁷ Mop. Idris Ramulyo, Tinjauan Beberapa Pasal Undang-Undang Nomor 1 Tahun 1974 dari Segi Hukum Perkawinan Islam, (Jakarta: Anggota IKAPI, 1990), p. 92.

¹⁸ Mop. Idris Ramulyo, Tinjauan Beberapa Pasal Undang-Undang Nomor 1 Tahun 1974 dari Segi Hukum Perkawinan Islam, p. 94.

absolutely¹⁹. The authors agree with this opinion because to further strengthen the legal standing of both parties who make a marriage, so that the legal consequences arising from a marriage can be protected by law and not ignored by the offender of unofficial marriage (nikah sirri).

This unrecorded practice of marriage is still prevalent among Indonesian Muslims. For all sorts of reasons, they have unofficial marriage, in the sense that the marriage is not recorded by the competent authority for it. The statement is quite staggering to come from the Ministry of Religious Affairs of the Republic Indonesia as reported by the Jakarta Post, on Thursday, December 25, 2014. According to the Ministry of Religious Affairs is estimated there are thousands of cases of silent marriage (sirri). It was based on survey results marriage isbat ever conducted Ministry of Religious Affairs. According to Machasin, Director General of Community Guidance (Bimas) of Islam Ministry of Religious Affairs If we look at marriage isbat survey, the number of thousands. But the real figures do not know because the number based on marriage isbat is for the case of unofficial marriage in the presence of theologian²⁰.

There are some consequences arising from unofficial marriages, such as the abandonment of children and their mothers by their biological fathers, lack of protection of inheritance rights, family allowance for employees, etc. due to the absence of documents expressing a child's relationship with his biological father or a woman with a man as her husband to take care of it, such as Birth Certificate, Family Card, and so on, so that the real legal relationship exists but does not get recognition for not being registered a marriage.

The description above actually illustrates the importance of registration a marriage as stipulated in Article 2 clause (2) of the UUP which provides legal protection to the parties. The suggestion of a marriage registration has been echoed long before Law Number 1 in 1974 on Marriage was born, that is with the National Law Seminar I in Jakarta on March 11, 1963, in the field of Principles of National Legal Procedures in the Field of Marriage Law recommend an official registration of all marriages²¹.

¹⁹ Mop. Idris Ramulyo, Tinjauan Beberapa Pasal Undang-Undang Nomor 1 Tahun 1974 dari Segi Hukum Perkawinan Islam, p. 95

²⁰ <http://possore.com/2014/12/25/pernikahan-sirri-pernikahan-main-main/> accessed on 18th Mei 2016.

²¹ Barda Nawawi Arief, Kumpulan Hasil Seminar Hukum Nasional Ke I s/d VIII dan Konvensi Hukum Nasional 2008, (Semarang: Pustaka Magister Semarang, 2009), p. 4.

The decision of the Constitutional Court which does not grant the applicant's petition for the judicial review of Article 2 clause (2) of this Law is appropriate, since marriage registration is not to impede or restrict every citizen from forming a family through marriage, but the purpose of recording is an administrative form of law as defined by law form of protection against the community itself, so that the decision is not contradictory even in accordance with the 1945 Constitution of the Republic of Indonesia.

According to the authors of the Implication of Constitutional Court Decision Number 46 / PUU-VIII / 2010 has a positive and negative impact on society. On the one hand, the granting of material testing, especially Article 43 clause (1), has a positive impact on children born outside of unregistered marriages, namely the legal status of the child as a legal child and the rights that can be fulfilled by the law as long as the proof of the child's biological father can be proven through the advancement of science and technology. This is a progressive legal step because it provides justice for the child.

On the other hand with the granting of material testing, especially Article 43 clause (1) will have a negative impact on the community. With this verdict, the perpetrators of the practice of unofficial marriage will feel calm and reluctant to register their marriage for various reasons, without the registration of marriage the child will be born will get his rights as like a child born of a registered marriage. Even the number of practitioner's unofficial marriage could be increased as said by the Director General of Islamic Bimas Kemenag. So that no granting of material testing of article 2 clauses (2) UUP is right. Therefore, anticipative steps for the Constitutional Court are required, for example by ordering marriage registration for offenders with the possibility of imposing administrative sanctions for those who do not implement it.

Conclusion

The Constitutional Court in the conduct of judicial review on the provision of Article 43 Clause (1) of the UUP concerning the status of the child outside of marriage is appropriate because it has seen the interests of the child who should not bear the legal consequences of the deeds of both parents. The rights of each child are equal, whether the child is born of a registered marriage or not. Children do not understand the actions of their parents. If the child only has a civil relationship with his mother and his mother's family then it will cause injustice for the child. Marriage practices not registered by a legitimate male and female based on religious provisions, such as Islam, with the verdict

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can make an effort to prove the status of the child through advanced science and technology, for example through DNA testing, as a child who not only had a civil relationship with his mother and his mother's family but also had a civil relationship with his father and his father's family.

No granting of a judicial review of the provisions of Article 2 clause (2) of the UUP is appropriate, to protect the interests of unregistered marriage perpetrators, that's by creating administrative order. Associated with the practice of unofficial marriage (nikah sirri) which today many occur in Indonesia, then the verdict is correct. However, with the granting of judicial review to the provisions of Article 43 clause (1) UUP feared to bring negative impact to the increasing quantity of the phenomenon of the practice of unofficial marriage, namely the feeling more comfortable for the perpetrators of it, because although their marriage is not registered, the child resulting from their marriage also get the same treatment with children born from the registered marriage, with proof of science and technology.

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Diversity in the Child Criminal Justice System *

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Abstract:

The Child Criminal Justice System in practice, the child as a victim of sexual violence does not always feel its justice being reversed because the diversion process involving the community, the police, the social department, and the parties concerned does not always have a victim's perspective. The absence of a victim's perspective in resolving the issue of sexual violence through diversities makes restorative justice incapable of restoring and fulfilling justice for child victims of sexual violence compared to the criminal justice system in general because diversity is unable to bridge the gap between the challenges faced by victims and the help available to victims. Legal protection of child victims of crime, especially crimes against morality, with child offenders under the Criminal Justice System which must prioritize the approach of Restorative Justice by guaranteeing the rights of child victims to the efforts of medical rehabilitation and social rehabilitation both inside and outside the institution; assurance of safety, whether physical, mental, or social; and ease in obtaining information about case development through diversion.

Keyword: Criminal Justice System, Child, Diversity

* Received: March 24, 2017, revised: April 28, 2017, accepted: Mei 20, 2017.

Diversi Dalam Sistem Peradilan Pidana Anak

Abstrak:

Sistem Peradilan Pidana Anak pada praktiknya, anak sebagai korban kekerasan seksual tidak selalu merasakan keadilannya dikembalikan karena proses diversi yang melibatkan masyarakat, polisi, departemen sosial, dan para pihak terkait tidak selalu memiliki perspektif korban. Ketiadaan perspektif korban dalam penyelesaian permasalahan kekerasan seksual melalui diversi membuat keadilan restoratif tidak mampu mengembalikan dan memenuhi keadilan bagi anak korban kekerasan seksual dibandingkan dengan sistem peradilan pidana secara umum karena diversi tidak mampu untuk menjembatani jurang antara tantangan yang dihadapi oleh para korban dan pertolongan yang tersedia untuk para korban. Perlindungan hukum terhadap anak korban kejahatan, khususnya kejahatan terhadap kesusilaan, dengan pelaku anak menurut Sistem Peradilan Pidana Anak yang wajib mengutamakan pendekatan Keadilan Restoratif dengan memberikan jaminan hak anak korban terhadap upaya rehabilitasi medis dan rehabilitasi sosial, baik di dalam lembaga maupun di luar lembaga; jaminan keselamatan, baik fisik, mental, maupun sosial; dan kemudahan dalam mendapatkan informasi mengenai perkembangan perkara melalui diversi.

Kata Kunci: *Sistem Peradilan Pidana, Anak, Diversi.*

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Introduction

The Criminal Justice System as a system is basically an open system; in the sense of criminal justice this system will always interface (interaction, interconnection, and interdependence) with its environment in rank, society: economy, politics, education and technology, as well as the subsystems of the criminal justice system itself.¹ In this system is contained systemic motion of its supporting subsystems, namely police, prosecutors, courts, prisons, and advocates that as a whole and is a totality trying to transform input into outcomes that are the goal of its system.²

The review of this system always has consequences and implications, is all subsystems will be interdependent, because the product of a subsystem is an input to other subsystems; the system approach encourages the existence of inter-agency consultation and cooperation, which in turn will enhance the strategy-making effort of the whole system; as well as policies decided and executed by one subsystem will affect other subsystems. ³The term judicial refers to the environment of the judiciary in which each judicial body has its respective powers and authorities in the task of completing the case.⁴ With the enactment of Law Number 11 Year 2012 on the Criminal Justice System of the Child, a new Criminal Justice System is established called the Criminal Justice System of Children, which is the whole process of settlement of the Children's case against the law, from the investigation stage to the guidance stage after the crime.⁵

This procedure is formed from the awareness that the child as a gift of God Almighty who has the dignity of a person, and to maintain the dignity and prestige of the child is entitled to special protection, especially the protection of the law in the judicial system; especially for the Republic of Indonesia as a State Party to the Convention on the Rights of the Child which regulates the principle of legal protection of children has an obligation to provide special protection against children in conflict with the law.⁶

¹ Muladi, *Kapita Selekta Sistem Peradilan Pidana*, (Semarang: BP Undip 1995) p. VII.

² Sidik Sunaryo, *Sistem Peradilan Pidana*, (Malang: UMM Press, 2004), p. 255.

³ Tim Universitas Indonesia Fakultas Hukum, 2001, *Sinkronisasi Ketentuan Perundang-Undangan Mengenai Sistem Peradilan Pidana Terpadu Melalui Penerapan Asas-Asas Umum*, p. 25.

⁴ Gatot Supramono, *Hukum Acara Pengadilan Anak*, (Jakarta: Djambatan, 2007), p. 16.

⁵ See the provisions of Article 1 paragraph (1) of Law Number 11 the Year 2012 on the Child Criminal Justice System.

⁶ See the weighing sections of letters (a), (b), and (c) of Law Number 11 the Year 2012 on the Criminal Justice System

The scope of Law Number 11 the Year 2012 on the Criminal Justice System of Children is a child who is in conflict with the law and the child who is a victim of a crime.⁷In addition to its special judicial environment, the Criminal Justice System of the Child shall prioritize the approach of Restorative Justice, namely the settlement of criminal cases involving perpetrators, victims, families of perpetrators / victims, and others concerned to jointly seek a fair settlement by emphasizing restoration of the original state, and not retaliation.⁸

With the advent of the Criminal Justice System of the Child, it is certainly interesting to examine how legal protection efforts against child victims of crime, especially crimes of against morality, with child offenders under the Criminal Justice System of Children who must prioritize the approach of Restorative Justice.

Legal Protection against the Subject of Law

Legal protection is an act of protecting legal subjects through applicable legislation and can be enforced by a sanction.⁹ Legal protection is any guarantee of legal certainty provided by the government to protect the rights and interests of the parties which will arise the rights and obligations of each party. Legal protection is also an attempt or legal action to safeguard and protect the legal subject from an act of harm.

Legal protection arises as a consequence of the nature of law, namely regulating and mastering legal relationships between individuals and individuals and individuals with society. Philipus M. Hadjon states that the principle of legal protection for the people in Indonesia is the principle of recognition and protection of the dignity of human beings which originated from Pancasila and the principles of a state based on Pancasila law.¹⁰Legal

⁷ See Article 1 Paragraph (3) of Law Number 11 the Year 2012 on the Criminal Justice System of the Child stating "Children Conflicting with the Law hereinafter referred to as Children is a child who is 12 (twelve) years old, but not yet 18 (eighteen)) years of alleged commission of a crime"; and Article 1 Paragraph (4) of Law Number 11 Year 2012 concerning the Criminal Justice System of the Child stating "Children who become Victims of Crime, hereinafter referred to as Child Victims are children who are not yet 18 (eighteen) years old who suffer from physical, mental, and / or economic loss caused by a crime."

⁸ See Article 1 paragraph (5) of Law Number 11 the Year 2012 on Child Criminal Justice System and Article 5 paragraph (1) of Law Number 11 the Year 2012 on Child Criminal Justice System.

⁹ Sudikno Mertokusumo, *Mengenal Hukum Suatu Pengantar*, (Yogyakarta: Liberty, 2005), p. 60.

¹⁰Sudarto, *Hukum dan Hukum Pidana*, (Bandung: Alumni, 1990), p. 12.

protection arises as a consequence of the nature of law, namely regulating and mastering legal relationships between individuals and individuals and individuals with society.¹¹ Philipus M. Hadjon stated that the principle of legal protection for the people in Indonesia is the principle of recognition and protection of the dignity of human beings which originated from Pancasila and the principles of a state based on Pancasila.¹²

The principle of legal protection based on Pancasila means the recognition and protection of human dignity on the basis of divine value, humanity, unity, deliberation, and social justice. These values give birth to the recognition and protection of human rights in its form as individual beings and social beings in a united state container that upholds the spirit of kinship and for the sake of prosperity together.¹³ In terms of its kind, legal protection is divided into passive legal protection and protection of the active law.¹⁴ The protection of passive law is in the form of acts that give recognition and guarantee in the form of arrangements and policies relating to the rights and obligations of the legal subject, while the protection of the active law is in the form of actions relating to the efforts of the fulfillment of the rights of legal subjects, or legal protection in the empirical level.¹⁵

The protection of the active law is divided into preventive law protection and repressive law protection.¹⁶ Protection of preventive law is a form of legal protection to the people by giving an opportunity to lodge an objection or opinion before a government decision gets a definitive form, whereas the protection of the repressive law is a form of legal protection aimed at resolving disputes in the form of demands to the government that cause losses.¹⁷ The crime against the morality is an offense which is set out in Chapter XIV of the Second Book of the Criminal Code (KUHP) established for the purpose of providing protection to people who are deemed necessary to obtain protection resist immoral acts and against behaviors both in the form of words

¹¹ Sudarto, *Hukum dan Hukum Pidana*, p. 41

¹² Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, (Surabaya: Bina Ilmu, 1987), p. 20.

¹³ Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, p. 20.

¹⁴ Sulasno, *Perlindungan Hukum bagi Pengarang Dalam Perjanjian Penerbitan Buku Antara Pengarang dengan CV. Sahabat, Klaten*, Thesis on Master of Business Law Faculty of Law University of Gadjah Mada, 2002, p. 20.

¹⁵ Sulasno, *Perlindungan Hukum bagi Pengarang Dalam Perjanjian Penerbitan Buku Antara Pengarang dengan CV. Sahabat, Klaten*, p. 25.

¹⁶ Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, p. 3-5.

¹⁷ Philipus M. Hadjon, *Perlindungan Bagi Rakyat Indonesia*, p. 3-5.

and in deeds that offend moral.¹⁸ This is because it contradicts people's views of propriety in the area of sexuality, whether in terms of local communities views where the words have been spoken or the deeds have been done, as well as in terms of local customs in running their sexual lives.¹⁹

Here are some criminal offenses against decency with child victims: *First*, Article 287 of the Criminal Code, which states "(1) Anyone who has intercourse with a woman outside of marriage, knowingly or duly should expect it is not fifteen years, if age is not clear, take time to be married, threatened with a maximum imprisonment of nine years; (2) Prosecution shall only be made on the complaint, unless the age of the woman is not yet up to twelve years or if there is any matter under Article 291 and Article 294"; *Second*, Article 292 of the Criminal Code, which states that "an adult who commits a lewd act with another sex, knowingly or duly to be presumed to be immature, shall be punished by a maximum imprisonment of five years". There is a difference of age limit on child victims in the Criminal Code and Law Number 11 the Year 2012 on Child Criminal Justice System. Article 45 of the Criminal Code, stated that:

"In the case of a criminal prosecution of an immature person for committing an act before the age of sixteen, a judge may determine: order that the offender be returned to his or her parents, guardian or guardian, without any penalty; or order the guilty to be handed over to the government without any penalty, (...)".

Whereas in Article 1 paragraph (3) of Law Number 11 the Year 2012 on Child Criminal Justice System, Children in Conflict with Law, hereinafter referred to as Child, is a child who is 12 (twelve) years old, but not yet 18 (eighteen) years of allegedly committing a crime.

The problem of the relationship of criminals and victims is not a new problem, but over the centuries the victim is one of the most neglected subjects in the study of crime and in the conduct of criminal justice; in fact, the victims are not only the cause and the basis of the process of crime, but play an important role in the search for truth in an effort to understand the problem of crime, deliberation, and deviation.²⁰ Arif Gosita argues that victims are those who suffer bodily and spiritually as a result of the actions of others who seek

¹⁸ P.A.F. Lamintang dan Theo Lamintang, *Delik-Delik Khusus Kejahatan Melanggar Norma Kesusilaan & Norma Kepatutan*, second edition, (Jakarta: Sinar Grafika, 2009), p. 1.

¹⁹ P.A.F. Lamintang dan Theo Lamintang, *Delik-Delik Khusus Kejahatan Melanggar Norma Kesusilaan & Norma Kepatutan*, second edition, p. 1.

²⁰ Arif Gosita, *Masalah Korban Kejahatan Kumpulan Karangan*, (Jakarta: Akademika Presindo, 1993), p. 63.

the fulfillment of self-interest or others who are contrary to the interests and suffering suffer.²¹

Based on Article 1 paragraph (4) of Law Number 11 the Year 2012 on the Criminal Justice System of Children, "Children who become Victims of Crime, hereinafter referred to as Child Victims are children who are not yet 18 (eighteen) years old who suffer physical, mental, or economic loss caused by a criminal offense. "In this paper, the definition of the victim is restricted to children who are not yet 18 (eighteen) years of age suffering physical, mental, and/or economic losses caused by criminal acts of decency mentioned above.

The Juvenile Justice System shall prioritize the approach of Restorative Justice, Child Proclaimed Investigation and Prosecution conducted in accordance with the provisions of laws and regulations, unless otherwise provided in this Law; court proceedings of a Child conducted by a court within the public court; and coaching, guidance, supervision or counseling during the criminal proceedings or actions and after undergoing a crime or action.²² In the Criminal Justice System Child must have strived Diverse.²³ Diverse is the transfer of the settlement of a Child case from a criminal justice process to a process other than a criminal court aimed at achieving peace between the victim and the Child; resolve cases of Children outside the judicial process;²⁴ prevent the Child from deprivation of freedom; encourage people to participate; and instill a sense of responsibility to the Son.²⁵

At the level of investigation, prosecution and examination of the case of a Child in a district court, a Diversity should be attempted in the event that a criminal offense is punishable by imprisonment under 7 (seven) years; and not a repeat of a crime.²⁶ The Diversity process is conducted through deliberations involving the child and parents/survivors, victims and/or their parents/survivors, social counselors, and professional social workers based on restorative justice approach; in case of need, deliberation may involve Social

²¹ Arif Gosita, *Masalah Korban Kejahatan Kumpulan Karangan* p. 63.

²² Article 5 paragraph (1) and (2) of Law Number 11 the Year 2012 on the Criminal Justice System of the Child.

²³ Article 5 paragraph (3) of Law Number 11 the Year 2012 on Child Criminal Justice System.

²⁴ Article 1 paragraph (7) of Law Number 11 the Year 2012 on the Child Criminal Justice System.

²⁵ Article 6 of Law Number 11 Year 2012 on the Criminal Justice System of the Child.

²⁶ Article 7 paragraph (1) and (2) of Law Number 11 the Year 2012 on Child Criminal Justice System.

Welfare Workers or the community.²⁷ The diverse process must pay attention: the interests of the victim; welfare, and responsibility of the Child; avoidance of negative stigma; avoidance of retaliation; community harmony; and propriety, decency, and public order.²⁸

The result of a diversion deal may take the form of, among other things, peace with or without compensation; handover back to parent/Guardian; participation in education or training in an educational institution or Social Welfare Organization (LPKS)²⁹ for a maximum of 3 (three) months; or community service.³⁰ Child criminal justice proceeding in the process of Divers does not result in an agreement Diversity not implemented.³¹ Monitoring of the Diversity process and the implementation of the resulting agreement lies with the direct superior of the responsible official at each level of examination.³² During its process, until Diversity agreement is implemented, the Community Guidance Counselor is required to provide assistance, guidance, and supervision.³³ In the event that the Divers agreement is not executed within the stipulated time, the Counselor shall promptly report it to the responsible official and the Responsible Officer shall follow up the report within a maximum period of 7 (seven) days.³⁴

Child victims in the Criminal Justice System are entitled to medical rehabilitation and social rehabilitation, both within the institution and outside the institution; assurance of safety, whether physical, mental, or social; and ease in getting information about the progress of the case.³⁵ Based on the consideration or suggestion of a Community Guidance Counselor, a Professional Social Worker or Social Welfare Worker or Investigator may refer a Child Victim to an agency or institution dealing with the protection of a child or

²⁷ Article 8, paragraph (1) and (2) of Law Number 11 the Year 2012 on Child Criminal Justice System.

²⁸ Article 8 paragraph (3) of Law Number 11 the Year 2012 on Child Criminal Justice System.

²⁹ LPKS is an institution or where social services are carrying out social welfare for Children. See Article 1 (22) of Law Number 11 the Year 2012 on Child Criminal Justice System.

³⁰ Article 11 of Law No. 11 of 2012 on the Criminal Justice System Child.

³¹ Article 13 of Law No. 11 of 2012 on the Criminal Justice System Child.

³² Article 14 paragraph (1) of Law Number 11 the Year 2012 on Child Criminal Justice System.

³³ Article 14 paragraph (2) of Law Number 11 the Year 2012 on Child Criminal Justice System.

³⁴ Article 14 paragraph (3) and (4) of Law No. 11 of 2012 on the Criminal Justice System Child.

³⁵ Article 90 paragraph (1) of Law Number 11 the Year 2012 on Child Criminal Justice System.

child's social welfare Worker or Investigator may refer a Child Victim to an agency or institution dealing with the protection of a child or child's social welfare institution.³⁶ In the event that the Child Victims require immediate relief measures, the Investigator, without the social report of the Professional Social Worker, can directly refer the Victim's Child to a hospital or institution that deals with child protection in accordance with the conditions of the Child Victim.³⁷

Based on the results of Community Research of the Social Advisor and social report of the Social Worker Professional or Child Social Welfare Worker the victim is entitled to medical rehabilitation, social rehabilitation and social reintegration of the institution or agency that handles the protection of the child.³⁸ They in need of protection may obtain security from the institution that deals with the protection of witnesses and victims or social shelter houses in accordance with the provisions of legislation.³⁹ The public may participate in the protection of the Child from prevention to the social reintegration of the Child by, inter alia, contributing to the rehabilitation and social reintegration of the Child, Child Victim or Child Witness through a community organization.⁴⁰

The fundamental change in Law Number 11 Year 2012 on the Criminal Justice System of the Child from Law Number 3 of 1997 concerning the Juvenile Court is strictly regulating the Restorative and Divers Justice which is intended to avoid and keep the Children from the judicial process so as to avoid stigmatization of Children in conflict with the law and it is expected that the Child may return to the social environment fairly.⁴¹

At present, there have been several criminal cases involving child victims and perpetrators are resolved through the Child Criminal Justice System, including cases of rape and abuse cases. The first case was a rape case in Yogyakarta City with a victim named I and 16 years old and the perpetrator S who is a friend of the victim and 16 years old. Both are students of one high school (SMA). The rape case is not resolved through diversion due penalty of

³⁶ Article 91 paragraph (1) of Law Number 11 the Year 2012 on Child Criminal Justice System.

³⁷ Article 91 paragraph (2) of Law Number 11 the Year 2012 on Child Criminal Justice System.

³⁸ Article 91 paragraph (3) of Law Number 11 the Year 2012 on Child Criminal Justice System.

³⁹ Article 91 paragraph (4) of Law No. 11 of 2012 on the Criminal Justice System Child.

⁴⁰ Article 93 letter (e) of Law No. 11 of 2012 on the Criminal Justice System Child.

⁴¹ See General Explanation of Law Number 11 the Year 2012 on Child Criminal Justice System.

rape is twelve years,⁴² whereas Diversion can only be done in the case of a criminal offense committed is punishable by imprisonment under the 7 years; and not a repeat of a crime. Second and third cases should be resolved diversion because of the penalties in the Act No. 23 of 2002 on Protection of Children more than 7 years.⁴³ But in fact, diversion can be done by considering that the victim and the offender is a child.

In the second case, that is the case of fornication with the victim, a 4-year-old boy, and the perpetrator of an 11-year-old boy, who is also a neighbor next to the victim's home; this case is resolved through the version. The third case, the case of rape with the victim of a child-aged daughter and the perpetrator of a child-aged son who is a neighbor next to the victim's home; this case was resolved by diversion.

Although in general crime offenses against morality are regulated in the Criminal Code, specifically the crime against moral offenses against children is regulated in Law Number 23 the Year 2002 on Child Protection. Based on the legal principle of *lex specialist derogate legit general*, then the law applicable to child victims of crime against morality is regulated in Law Number 23 the Year 2002 on Child Protection. The second and third cases should not be resolved by diversion because of the threat of punishment in Law No. 23 of 2002 on Child Protection for more than 7 years.⁴⁴ In reality, however, diversion can be made by considering that the victim and the perpetrator are children.

Restorative Justice is a Diversity process, ie all parties involved in a particular crime jointly solve problems and create an obligation to make things better by engaging victims, children, and society in finding solutions to improve, reconcile and reassuring that is not based on retaliation.⁴⁵ It is true

⁴² See Article 285 of the Criminal Code which states whoever by force or threat of violence to force a woman to have sex with her outside of marriage, because rape is threatened with imprisonment for a period of twelve years.

⁴³ See Article 285 of the Criminal Code which states whoever by force or threat of violence to force a woman to have sex with her outside of marriage, because rape is threatened with imprisonment for a period of twelve years.

⁴⁴ See Article 81 paragraph (1) of the Constitution of the Republic of Indonesia Number 23 of 2002 on the Protection of the Child states that every person who intentionally commit violence or threats of violence to force children to do intercourse with her or with another person, shall be punished with imprisonment of 15 (five and a minimum fine of 3 (three) years and a maximum fine of Rp 300,000,000.00 (three hundred million rupiahs) and a minimum of Rp 60,000,000.00 (sixty million rupiah).

⁴⁵ See General Explanation of Law Number 11 the Year 2012 on Child Criminal Justice System.

that the purpose of Restorative Justice through Diversion is to avoid and keep the Son of judicial proceedings so as to avoid stigmatization against Children in conflict with the law and expected child can be returned to the social environment is natural, but if the process of diversion has been to restore justice to child victims?

In the second case, the background of the perpetrator is from a family with a lower middle-class economy, while the background of the victim is from an upward family so that the victim's families are rich. The Family of perpetrators often borrowed money to the victims' families. In the perpetrator's house, there are only two rooms, one used by the perpetrator's grandmother and the other is shared by the perpetrator, sister, father, and mother. What is the solution to reconciliation, and reassurance that is not based on retaliation for this obscenity case?

The victim's mother is fully aware that it is impossible to seek redress for the perpetrator's family to finance all kinds of physical and psychological recovery needs for the victim since the perpetrator's family often borrows money from the victim's family to meet their daily needs. It is true that there is a guarantee of the rights of the victim's child to the medical rehabilitation and social rehabilitation efforts, both within the institution and outside the institution and the safety guarantee, whether physical, mental, or social. However, who is responsible for fulfilling those rights?

In practice, the victim's mother financed the cost of daycare of her daughter as a social rehabilitation effort. When she reported to the police and then referred to the social service, the local district social office also briefly threw the victim's mother to the provincial social office because there was no procedure yet how to solve the problem. It was lucky victims live in the area of Yogyakarta so they can access assistance and counseling assistance from institutions that care about child issues.

In the third case, the victim and her family are immigrants in the perpetrator's village. The diversion agreement was conducted at the local police station and signed by, among other things, the sister of the victim's mother, the perpetrator's parents, and the village apparatus. Parents of victims who were not directly involved in the diversion agreement were suddenly visited by the village apparatus the night after the signing of the diversion. The village apparatus blames the victim's parents and asks the victim's parents to apologize to the perpetrator's parents. As an outsider, the victim's parents do not want to prolong the problem and then apologize to the perpetrator's parents. Feeling

above the wind, the perpetrator's parents cursed the victim's parents and incited the neighbors to hate the victim's parents.

Upon the incident, the victim and his parents stay away from the society. The act of apparatus that disclosed the victim was alleged because the perpetrator's parents gave a bribe to them. Does description on the third case has shown that diversion has been a solemn attempt to correct, reconcile, and reassure the heart that is not based on retaliation for this rape case?

Is there a guarantee of the rights of the victim to have the medical rehabilitation and social rehabilitation efforts, both within the institution and outside the institution; assurance of safety, whether physical, mental, or social; and ease in getting information about the progress of the case. Has the guarantee been reflected in a diversion in the third case?

As in most cases where the victim does not understand his or her rights and does not know where to report if his rights are violated, in the third case the victim was lucky she is accompanied by an institution concerned with the child's problem. After the victim's parents reported to the police, the social services and those who organized the diversion in order to take action against the village apparatus. Nevertheless, the victims themselves are already exhausted by all these processes and ultimately surrender justice to the Almighty. Is the diversion settlement in the third case reflective of the Restorative Justice for the victims?

It is true that it is difficult to restore justice to the children of victims of moral crimes, whether it is with an adult, especially with a child perpetrator. Breakthrough Diverse in order to achieve Restorative Justice is expected to make a legal breakthrough that can restore the sense of justice for the victim. Although in practice diversion does not fully restore or even restore a sense of justice for the victim, John Braithwaite hypothesizes that:⁴⁶

1. *Restorative justice restores and satisfies victims better than existing criminal justice practices;*
2. *Restorative justice restores and satisfies offenders better than existing criminal justice practices; and*
3. *Restorative justice restores and satisfies communities better than existing criminal justice practices.*

⁴⁶ John Braithwaite, *Restorative Justice, and Responsive Regulation*, (New York: Oxford University Press, 2002), p. 45.

Restorative Justice returns and satisfies victims better than criminal justice because the victims feel the process is not formal, can access information on the process of seeking justice, can participate in the process, treated with respect and fairness, there is a material loss and there is an emotional return in the form of apology.⁴⁷

Restorative Justice restores and satisfies the offender better than the practice of criminal justice, for example in a village in Java there is a boy caught stealing hand; the results of the meeting within the framework of Restorative village officials are giving offenders a bag of rice to villagers should feel embarrassed because there are people who are very poor, until he had to steal.⁴⁸

Restorative Justice returns and satisfies the community better than the practice of criminal courts, for example in the case of sexual abuse of girls committed by teenage boys who completed the masculine culture of cooperation to combat exploitative in Australia.⁴⁹ Given that the problems affecting the individuals in a society, of course, there are also problems in the community, the solution to the problems of individuals in society should also involve the role of the public to examine the values that live in that society. Thus, the ideal solution to the case of individuals in a society can satisfy not only individuals that are problematic but also for society in general.

Retributive Justice Howard Zehr's argued that his understanding begins with an understanding of a crime that is a violation of the state, which is interpreted as a violation of law and error; justice is determined by mistake and regulation of harm between the perpetrators and the state governed by systematic rules.⁵⁰ Restorative Justice sees things differently, that crime is a violation of people and relationships that then create rights; to achieve justice, the need for inclusion of victims, perpetrators, and communities in order to find solutions that provide improvement, reconciliation and peace of mind.⁵¹

Here are some differences between retributive justice and Restorative Justice: First, focus on the retributive justice and lawlessness,⁵² while the Restorative Justice focuses on violation of people and relationships; Second, Retributive justice seeks restoration of the law by determining errors and

⁴⁷ John Braithwaite, *Restorative Justice, and Responsive Regulation*, p. 46.

⁴⁸ John Braithwaite, *Restorative Justice, and Responsive Regulation*, p. 70.

⁴⁹ John Braithwaite, *Restorative Justice, and Responsive Regulation*, p. 68.

⁵⁰ Allison Morris and Gabrielle Maxwell (Ed.), *Restorative Justice for Juvenile*, (Oxford, Portland Oregon, 2001), p. 3.

⁵¹ Allison Morris and Gabrielle Maxwell (Ed.), *Restorative Justice for Juvenile*, p. 3.

⁵² Allison Morris and Gabrielle Maxwell (Ed.), *Restorative Justice for Juvenile*, p. 3.

regulates punishment, whereas Restorative Justice seeks victim recovery by knowing the injuries or losses of the victim and creating obligations for the offender to improve the situation; and Third, Retributive justice involves the state and perpetrators in the formal justice process, whereas Restorative Justice involves victims, perpetrators and communities to find solutions.

In the Criminal Justice System of the Child, Restorative Justice clearly restores and satisfies child offenders better than the practice of criminal justice because the rationale of juvenile justice establishment is that children as a part of the young generation are the assets of the nation, the successor of the nation's struggle and human resources for development national; so as to realize qualified human resources, survival, physical and mental development and protection from various dangers that can integrate their integrity and future, it needs sustainable and integrated coaching efforts.⁵³

Is the Child Criminal Justice System, Restorative Justice restoring and satisfying the victim's child better than the criminal practice? The Criminal Justice System of the Child through Restorative Justice can restore and satisfy the victim's child better than the criminal court practice because the victim is involved in the process of seeking justice. Unfortunately, in practice, victims do not always feel that their justice is restored because the process of diversion by involving the community, perpetrators, police, social agencies and other concerned parties does not always have a victim perspective.

In the absence of a victim-perspective party in the settlement of the case through the diversion, there can be no Restorative Justice that can restore and satisfy the victim's child better than the practice of a criminal court because diversion cannot bridge the gap between the problems faced by the crime victim and the assistance available to the victim. ⁵⁴It is ironic then, when diversified within the framework of Restorative Justice designed to restore justice for victims of crime fails because it is unable to recognize the position and loss suffered by the victim, so that the victims of crime cannot access

⁵³ Romli Atmasasmita, dkk (Ed.), *Peradilan Anak di Indonesia*, (Bandung: Mandar Maju, 1997), p. 5.

⁵⁴ See on William G. Doerner and Steven P. Lab, *Victimology*, (Burlington: Anderson Publishing, 2012), h. 103. *"There is a serious gap between . . . problems faced by crime victims and the help available to them. Unless this gap is bridged, victims may come to realize they stand a good chance of incurring even greater financial losses if they cooperate with the criminal justice system. The anticipated financial loss due to enter into the system may be sufficient to deter such citizen involvement. It is ironic that the system which is designed to protect the constitutional rights of the offender fails even to recognize the victim's position and then turns around and wonders why its citizenry is apathetic."*

justice, not because of the justice-seeking system, but because there is no perspective victim in solving this problem.

However, in solving legal protection efforts against child victims of crime, especially crimes against morality, with child abusers under the Criminal Justice System of the Child who must prioritize the approach of Restorative Justice is a dilemma because each victim and perpetrator is a child. Thus, each of them is entitled to survival, growth, and development; and are entitled to protection from violence and discrimination and should receive protection from the negative impact of the development of rapid development, the globalization in the field of communication and information, the advancement of science and technology, as well as changes in the style and way of life of the majority of parents who have brought social change fundamental in public life which influenced the values and behaviors of the Child.⁵⁵

Conclusion

Legal protection for child victims of crime, especially crime against morality, with child offender according to Child Criminal Justice System which must prioritize Restorative Justice approach is to give guarantee to child victim right to medical rehabilitation and social rehabilitation both inside and outside institution; assurance of safety, whether physical, mental, or social; and ease in obtaining information about case development through diversion. However, in practice, the diversion has not been able to fully provide legal protection to the Victim's Child and return the justice to the Child Victim because the diversion is not done by the parties with the victim perspective, so that the gap between the problems faced by the crime victim and the aid available to the victim cannot be bridged.

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