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23-24
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BANDAR LAMPUNG
UNIVERSITY (UBL),
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ICON-UBG
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THE FIRST INTERNATIONAL CONFERENCE
ON LAW, BUSINESS AND GOVERNANCE 2013

22, 23, 24 October 2013
Bandar Lampung University (UBL)
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PREFACE

The Activities of the International Conference are in line and very appropriate with the vision and mission of Bandar Lampung University (UBL) to promote training and education as well as research in these areas.

On behalf of the First International Conference on Law, Business and Governance (Icon-LBG 2013) organizing committee, we are very pleased with the very good response especially from the keynote speaker and from the participants. It is noteworthy to point out that about 67 technical papers were received for this conference.

The participants of the conference come from many well known universities, among others : International Islamic University Malaysia, Utrech University, Maastricht University, Unika ATMA JAYA, Universitas Sebelas Maret, Universitas Negeri Surabaya, Universitas Jambi (UNJA), Diponegoro University, Semarang, Universitas 17 Agustus 1945 Jakarta, Universitas Bandar Lampung, Universitas Andalas Padang, University of Dian Nuswantoro, Semarang, Universitas Terbuka, Universitas Airlangga, Bangka Belitung University, President University, Tujuh Belas Agustus University Jakarta, International Business Management Ciputra University, Surabaya, University of Indonesia, Business School Pelita Harapan University, STIE EKUITAS, Bandung, STAN Indonesia Mandiri School of Economics Bandung, Lampung University.

I would like to express my deepest gratitude to the International Advisory Board members, sponsor and also to all keynote speakers and all participants. I am also gratefull to all organizing committee and all of the reviewers who contribute to the high standard of the conference. Also I would like to express my deepest gratitude to the Rector of Bandar Lampung University (UBL) who give us endless support to these activities, so that the conference can be administrated on time

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INDONESIAN MARRIAGE LEGAL SYSTEM CONSTRUCTION IN ORDER TO PROTECT CHILDREN FROM MARRIAGE LAW THAT IS NOT RECORDED

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Abstract

The legal system of marriage in Indonesia there are three kinds. First Indigenous legal the system, the Second the system of Islamic law, the three Western legal the system. Indigenous legal systems of marriage can still be found in the country of Indonesia both ritual of "consent granted" in the sense of legitimacy and ritual ceremonies that accompany the validity of the marriage procession still found many. the Second the Islamic legal system, the system is still alive in the community that the majority of Lampung population is Muslim. Third Western legal system applicable as positive law means the law in force at this time in the land of Indonesia. Results reveal that the construction of Customary Law, Islamic Law and Western Law all three protects the children born of the marriage unregistered. It's just the difference between Islamic law and Customary Law with Western Law is Islamic law and Customary law run by the community and not become positive law, so if there are problems in the implementation of Indigenous law and Islamic law, the positive law are powerless to solve it. Thus arises the various effects such as smuggling law, impunity, etc.. Marriage Act as part of the Law of the West in terms of the written law does not protect the children born of the marriage that is not recorded.

Keywords : Marriage Legal System

1. BACKGROUND

According to fiqh law, the original law of marriage is permissible, but can turn out to be Mandatory, turned into Sunnah, Haram, and could turn out to be Disapproved.¹ The law changes depending on the circumstances of the parties who have mukallaf, ie a person who has been given the burden of responsibility.² This is confirmed by the hadith of the prophet who advocated marriage, meaning³ : "O youth, if there are any of you that have been able (able) to marry then go married because marriage is more condescending eyes and maintain the honor ".(HR Al Jamaah from Ibnu Mas'ud, Ra)⁴. The prophet hadith means that (1) marriage is worship and (2) is legally obligated to marry for the man who has been able to. Able means in the field of material and immaterial, among others, if one was not able to resist his lust and feared to commit adultery⁵. Marriage can be a shield guards the sanctity of self⁶ of reprehensible acts forbidden by Islam and that is the act with the nature of *fakhisyah*.⁷ Allah said that for people who can not afford to married he shall remain chaste (QS An-Nur: 33)⁸

Marriage is the right of every citizen that is part of human rights in accordance with free requirement of the prospective bridegroom. Inthe four Post amendment to the Constitution 45-Article 28 b paragraph (1) mentioned that every person is entitled to form a family and pursue a legitimate descendants through marriage.

¹ Azzam, Abdul Azis Muhammad dan Abdul Wahab Sayyed wahhas, 2009. *Fiqh Munakahat*. Jakarta: Amzah. see Amnawaty, 2009. *Hukum dan Hukum Islam*. Bandar Lampung: Universitas Lampung. Page 87

² *Ibid*

³ Abu Hafs Usamah bin Kamal binAbdir Razzaq. *Panduan Lengkap Nikah*. Bogor: Pustaka Ibnu Katsir. page 18. HR Bukhari, hadis No. 5066. Translated by Akhmad Saikhu.

⁴ Abu Zakki Akhmad, 1996. *Fiqh Wanita*. Jakarta: Rica Grafika. page 99

⁵ *Ibid*.

⁶ *Op. Cit.* page 19

⁷ *Ibid*. page 100

⁸ Ahmad Tohaputra, 1998. *An Nur Alqur'an dan terjemahan*. Semarang: Asy Syifa. page 282

The regulation of marriage registration obligations in the Qur'an can not be found, either a *goth'i* verse or *dhonni*. This situation lasted from the time of Prophet Muhammad until Islam entered the archipelago in around the 7th century AH or around the year the 1300 AD, so in the archipelago there are two legal systems namely customary law system, then the system of Islamic law. The second system is the unwritten law but the legal system is still living in the community (living law), including the Islamic marriage laws.

Given the nature of the UUP that unification in the middle of the citizens of this diverse religious communities, the UUP future cause some problems, especially in Muslim marriages. The main problem is the issue of the validity of the concept of marriage, marriage records system and the legal consequences arising from the marriage records systems, as well as the role of the PPN in an event "consent granted" for Muslims.

The legal system of marriage and marriage records for the Muslims in Indonesia is still a problem, because the two systems of law on the legal marriage law living in the community (living law) is Islamic law that does not require marriage records, and state law (state law) which require marriage records that collide. The concept of legitimate marriage is also different between Islamic law and state law. The legal culture of law enforcement agencies related to the implementation of the law marriage that is PPN or PPPN and religious court judges different from the legal culture. PPN officials and religious court judges to arbitrate legal statute, while the lawless society with Islam law marriage material.

In other words, changing the concept of the idea that marriage certificate is proof of regular administration, similar with the evidence of other administrative, and not the only evidence of a legitimate marriage. This situation has implications for the legal process in the courts during the conduct religious marriages proof is based on the marriage certificate only, not on the existence of the marriage laws of Islam in society. marriage certificate Position continues to be important for civil relationship other than marriage, but remains parallel with other information when dealing with marriage and inheritance.

Issuance of marriage act is based on evidence materil of Islamic marriage law, until the question of the validity of a marriage proof can be done with the proof materil. The main function of marriage act is not for the validity of a marriage, but to other civil law relationships outside of marriage in relation to third parties. Thus the act of marriage still needed but without removing or eliminating the marriage materil Islamic law.

A lot of people do a marriage that is not listed in reality. Many santris do a marriage that is not recorded, they assumed it is well enough to regard the marriage which is not recorded, because to avoid adultery. In the year 2004 to 2007 in the village of Kendal Wonodadi there are 213 valid marriage according to religion and state, as well as the 37 marriages recorded.⁹

2. PROBLEMS

The description of the background is how the construction of "existing" in the Indonesian legal system marriage of legal protection of child marriage that is not recorded?

3. RESEARCH METHODS

Penelitian ini dilakukan dengan pendekatan yuridis normatif dengan mengacu pada bahan hukum sekunder. Analisis data dilakukan dengan analisis kualitatif dan content analisis.

4. RESULTS AND DISCUSSION

1. The construction marriage and child legal systems according to the Book of the Law of Civil Law (KUHPerd)

Marriage and children have a very strong legal relationship. Therefore, discussing about child can not be separated from marriage. According to KUHPerd Article 26, marriage is simply a civil relationship and applies only to those who are subject to KUHPerd and those who submit to the regulations in KUHPerd. KUHPerd can not apply to the indigenus people who are Muslims, unless the person submit to the provisions of KUHPerd. This subject themselves to the Civil Code as embodied in Article 11 of Regulation AB, Article 75 (2) RR, 131 (2) IS namely:¹⁰

- a. To apply to the Civil Code of the West to Indonesian and Foreign Eastern

⁹ Muntaha, 2008. *Pernikahan yang tidak dicatatkan masyarakat Wonodadi Kecamatan Plantungan Kabupaten Kendal* Tesis S2, page 7.

¹⁰ Tamakiran S, 1992. *Asas-Asas Hukum Waris Menurut Tiga Sistem Hukum*. Bandung :Pionir Jaya, page 16-17

- b. To open group of Indonesia and Foreign Eastern to voluntarily submit to the Western Civil Law (Article 11 AB, Article 75 (3) PR, Article 131 (4) CI).

Book of Law Civil Law (KUHPerd / BW) marriage field profess azas monogamous absolutely, meaning in a marriage there is only one husband to one wife instead a wife to her husband. This is strictly regulated in Article 27 KUHPerd that content the same time that a man can have only one of the female as a wife and a woman has only one man as her husband¹¹. Although there is no polygamy does not mean there is no infidelity, therefore, KUHPerd gives the protection of children that born outside marriage. For a child born of adultery then there are preventive measures (prevention), the Civil Code (KUHPerd) provides solutions by classifying two kinds of out of wedlock children namely:

1. Children born from 6 months before the the marriage vows Wedding.

Children born of the marriage before one hundred eighty days from her parents marriage vows. This kind of children referred to children is illegal or illegitimate. Similarly, children born after three hundred days after his parents break the marriage (divorce) is a wholly void (Article 255 KUHPerd). According to Article 280 KUHPerd invalid child has the opportunity to be valid when both parents do the act that is the law of the competent authority in front confession, when his parents did not go to confession of course the children will be children without father and mother with the result of the ruling.

2. Children born outside of marriage that is not recognized by his father or his mother.

Children born outside marriage were not recognized by his father or his mother. According to the law the child does not have a mother.¹² According to Ali Affandi¹³ there are two kinds child born out of wedlock: first, child born of father and mother in whom there are no barriers between their marriages (*samenleven*). Second, child born of a father or mother prohibited for marriage for reasons determined by the law or if one of the father or mother married to somebody else bound (out of wedlock children version of The Civil Code).

Out of wedlock children is a child born from a mother who is fertilized by a male, while the male or female is still bound wedding. Status of the children born as adultery and incest are not permitted to be recognized by people who commit adultery, unless a dispensation from the president as stipulated in Article 283 KUHPerd which the contents is as follows:

All children fertilized in the incestuous or adultery never be recognized except to the latter what is specified in Article 273.

KUHPerd Article 272 states that unless the child fertilized in adultery or incestuous, each engendered child out of wedlock with his father and his mother married would be valid if the two of them before marriage according to the provisions or if the confession was made in the deed marriage itself¹⁴.

Admissions are confirmation of parents of children born outside marriage and verification can only be done with certainty KUHPerd Article 272, while confession arranged in KUHPerd Article 281 can be done in the following way:

1. Included in the child's birth certificate
2. In the parents' marriage certificate (if married then her parents)
3. In a deed made by the Civil Servants and then recorded in the register of births by date deed made earlier
4. In another authentic deed

Each interested person may demand that this confession was recorded in the child's birth certificate¹⁵.

The provisions of KUHPerd of Article 272 states that a child out of wedlock that can be recognized by the parents is a child born of a mother who fertilized by a man who is not married. However, if the married man, then the child can not be recognized and only have a legal relationship with the mother who gave birth to him only.

In connection with the inheritance of illegitimate child which his father and his mother can not get married because of proximity of blood relationship (son incestuous), and child outcomes adultery there is no possibility to be recognized by the father or mother. Such children are not entitled to the inheritance of his parents; the child is only entitled to recover the cost of his life alone. Invalid child only has a legal relationship with the parents to admit (Article 872 KUHPerd).

¹¹ Subekti dan Tjitrosudibio, 2001. *KUHPerd*. Jakarta:PT.Pradnya Paramita. page 8

¹² Affandi, Ali. 1986. *Hukum waris, hukum Keluarga dan hukum Pembuktian*. Jakarta:Bina Aksara.page40

¹³ *ibid*

¹⁴ *Ibid*.page 68

¹⁵ R.Subekti dan Tirtosudibio, 2001. *KUPerd dengan tambahan UU Agraria dan UU Pernikahan*.Jakarta:Pradnya Paramitha, page 69.

Illegitimate child be confirmed by his parents marriage or with confirmation letter then if the validation because of the wedding then his status is similar to children born of legitimate marriage. This means that it is entitled to full on heritage from his parents' omission as referred to in Article 916 KUHPerd which contents as follows:

Absolute part of the wedlock child who has been legally recognized by is half of the section that under the law originally had inherited in succession because of death¹⁶.

Status of children out of wedlock in terms of inheritance according to KUHPerd as follow:

If one of the blood relatives died with no relatives left in degrees that allow inheritance, and the husband and wife are living longer then the child out of wedlock entitled to claim inheritance for him to the exclusion of the country.

If verification is done by confirmation letter, then inheritance can not harm legitimate children before authentication is performed. With the clarification can be said about the status of an illegitimate child that can turn into a legitimate child when his parents acknowledged as long his parents are not ban on married according KUHPerd yo Article 273 Article 283. The conclusion was that the Civil Code is a complete system of written law in terms of legal protection of children in recognition of children's rights such as the recognition of the status of children out of wedlock, except for the children of adultery and incestuous child to do the recognition by his parents with the permission of the president. The kids still get inheritance to children out of wedlock that recognized by parents and for the children of adultery gained the recognition of his parents getting a grant or prize possessions. KUHPerd regulation does not apply to Muslims unless they subject themselves to the Civil Code.

With being revised Article 43 of Law Wedding (UUP) by the Court of Constitution then the chances of getting a confession from the biological father can be done for his children incest and adultery, so that the prohibition in the KUHPerd can be skipped (though it still requires a process). Considering the the revised chapters are in scope UUP then all children, regardless of religion adopted the child, and the child has no clear legal status can apply for judicial confirmation by the state for those who are subject to KUHPerd and for the Muslim religious courts .

2. Construction of child protection system Law according to Islamic Law

a. Islamic law system of of child protection.

According to Islam, the child is a creation of God as contained in the Quran surah Al-Hajj verse 5:

وَعَبْرَ مُخَلَقَةٍ مُضْغَةٍ مِنْ نَمْرٍ عَلَقَةٍ مِنْ نَمْرٍ نُطْفَةٍ مِنْ نَمْرٍ تُرَابٍ مِنْ خَلْقِنَاكُمْ فَإِنَّا أَلْبَعَثْنَا مِنْ رِبِّ فِي كُنْتُمْ إِنْ النَّاسُ يَتَأَيَّهَا
مَنْ وَمِنْكُمْ أَشْدُّكُمْ لَتَبْلُغُوا نَمْرَ طِفْلاً نُخْرِجُكُمْ نَمْرَ مُسَيِّ أَجَلٍ إِلَى نَشَاءٍ مَا الْأَرْحَامِ فِي وَنُقَرُّ لَكُمْ لِنَبِينَ مُخَلَقَةٍ
عَلَيْهَا أَنْزَلْنَا فَإِذَا هَامِدَةٌ الْأَرْضِ وَتَرَى شَيْئًا عِلْمٍ بَعْدَ مِنْ يَعْلَمُ لِكَيْلَا الْعُمْرِ أَرْدَلِ إِلَى يَرُدُّ مَنْ وَمِنْكُمْ يُتَوَفَّى
زَوْجٍ كُلِّ مِنْ وَأُنْبِتَتْ وَرَبَّتْ أَهْتَرَّتْ أَلْمَاءُ

Meaning : Know then We have created you from dust, then from a drop of sperm, then from a clot, then from a lump of flesh, a perfect and an imperfect creation, so we explain to you and set in the womb, what we want until the specified time, then We bring you forth as infants, then (with fade) you came to manhood. (QSAI- Hajj:5)

¹⁶ Ibid .page 240.

In surah Kahfi children is called family jewelry, QS Al-Kafi verse 46:

أَمْلاً وَخَيْرٌ ثَوَابًا رَبِّكَ عِنْدَ خَيْرِ الصَّلَاحَاتِ وَالْبَقِيَّةِ الدُّنْيَا الْحَيَوةُ زِينَةٌ وَالْبَنُونَ أَمْالٌ

Meaning: Wealth and children are the jewels of life. (QS al-Kahfi:46)¹⁷

In its development the meaning children expanded to be hereditary, because in Islam children is a descendant. Islamic law does not distinguish between boys and girls. Muslim women alike to raise the degree of male. Walidain both parents consisted of mother and father, the mother is the woman who gives birth, then the intended mother is the biological mother while the father is also the biological father. The meaning of mother and father (walidain), is found in Surah An-Nisa ': 33¹⁸.

كَانَ اللَّهُ إِنَّ نَصِيْبِهِمْ فَفَاتُوهُمْ أَيْمَانُكُمْ وَعَقَدْتِ وَالَّذِينَ وَالْأَقْرَبُونَ الْوَالِدِ أَنْ تَرَكَ مِمَّا مَوْلَى جَعَلَهُ وَ لِكُمْ شَهِيدًا شَيْءٍ كُلِّ عَلَى

Meaning: For every property abandonment of the property left by parents and next of kin, We made the beneficiaries. And (if any) of the person with whom you have sworn to them, then give them parts. Surely Allah saw everything. (QS An-Nisa': 33)

So the children can not be regarded as ordinary individuals between members of the community, who can be treated with ordinary treatment. Children is God mandate who deposited to his parents. So between them received this great mandate and take responsibility for him. Thus both parents should pay attention to the mental development of children and avoid all the things that could sully the atmosphere and monitor the intellectual and moral aspects. Children view the family as a big world and spacious environment, they live in a world covered tranquility and beautiful dreams. With this, the family of a child can be seen as the main focus heading into the future. In it, their purposes become identified and personality traits are formed. Family in Islam is Walidain (both parents), and Walad (children can be interpreted male or female, and offspring) and with the close Aqrobun, if followed systematically, Aqrobun consisting of husband and wife or brother, single or plural male or female.¹⁹ The systematic thinking is contained in the Qur'an An-Nisa ': 7

كَثْرًا أَوْ مِنْهُ قَلًّا مِمَّا وَالْأَقْرَبُونَ الْوَالِدَانِ تَرَكَ مِمَّا نَصِيْبٍ وَلِلنِّسَاءِ وَالْأَقْرَبُونَ الْوَالِدِ أَنْ تَرَكَ مِمَّا نَصِيْبٍ لِلرِّجَالِ مَفْرُوضًا نَصِيْبًا

Meaning: For men there is the right part of the assets of the parents and near kindred leave, and unto women a right also from the assets of the mother, and the father and his kin, a bit or a lot of good that has been determined". (QS. An- Nisaa': 7)²⁰

The essence above is a view of the whole experts from various disciplines, including religious scholars of Islam. That is, among others, that the cause of Islam gives great attention to family coaching, attention commensurate with attention to the lives of individuals.²¹ Families are the smallest unit of a generating support and the birth of the nation and society, as long as the generator able to channel the flow is strong and healthy, as long as it is also the nation will become stronger and healthier. Indeed, the family has a large contribution to the wake or the collapse of a society, so it proved how the family is the backbone for the establishment of a nation²².

According to the Qur'an who referred to as a parent is his mother and father, because God created a child through marriage to a man and a woman gave birth to the child of the marriage, as in Al-Quran Surah An-Nisa 'verse 1:

¹⁷QS. Al- Kahfi (18): 46

¹⁸QS. An-Nisa' (4) : 33

¹⁹QS. Al-Hajj (4): 7

²⁰QS. An-Nisa' (4) : 7

²¹Op.cit

²²Irfan dkk, 2004.Pendidikan HAM Modal Fundamental Bagi Anak Didik Indonesia, Jakarta; Fauzan Inti Kreasi. page 110

وَاتَّقُوا وِئَاءَ كَثِيرًا رِجَالًا مِنْهَا وَبِتَّ زَوْجَهَا مِنْهَا وَخَلَقَ وَاحِدَةً نَفْسٍ مِّنْ خَلْقِكُمْ أَلاَّ يَرْبُّكُمْ رَبُّكُمْ اتَّقُوا النَّاسُ يَتَّيَّ
رَقِيبًا عَلَيْكُمْ كَانَ اللَّهُ إِنَّ وَالْأَرْحَامَ بِهِ تَسَاءُلُونَ الَّذِي اللَّهُ

Meaning: O mankind, fear your Lord, who created you from a single soul, and from which God created his wife, and from both of them Allah propagate a lot of male and girls. And fear Allah, that with (exploit) His name you ask one another, and (Ward) silaturahmi relationship. And surely Allah ever watches over you. (QS. An-Nisa': 1)²³

Of the above verse, that the relationship between the father and the mother can not be denied, because on a given verse a mother is the woman who gave birth to the child, while the father is who fertilize the fetus in the mother. Fatherly relationship of a child with a man as the father will continue to exist, if the woman who gave birth to children, with the men who impregnate a valid marriage occurred before the woman is pregnant.

Firmly the relationship between children and parents that raise reciprocal rights and obligations between parents and children is mentioned in the holy verses of Al Qur'an Al Baqarah: 233 as the parents' duties towards children:

“And the mothers breast feed their children two years complete, to who wanted/intended that (to) complete the lactation/breast feeding period, and on the born to him/father, (is the responsibility of) their provision and their dressing/clothing with the kindness/generosity , (that) no self be burdened/imposed upon except its endurance/capacity , no mother (is) to be harmed with her child, and nor a born to him/father (be harmed) with his child. And on the heir/inherent similar/equal (to) that, so if they wanted separation (weaning) on acceptance/approval from them , and discussion/consultation , so no offense/guilt/sin on them , and if you willed/wanted that to seek a wet nurse/breast feeder (for) your children, so no offense/guilt/sin on you if you handed/delivered over what you gave with the kindness/generosity , and fear and obey God, and know that God (is) with what you make/do seeing/known/understanding.”

According to the above verse, the man is obliged to children according to ability rate that is, breastfeeding their children for two whole years, father to feed and clothe them with kindness. In other words, parents are obliged to protect, nurture, educate, care for and protect it.

According to Wahbah al-Zuhaili, there are five kinds of rights of children against their parents, namely: *nasab* right (descent), *radla* right (breastfeeding), *hadlanah* right (maintenance), *walayah* right (guardian), and livelihood right (alimony). With the fulfillment of these five needs, parents will be able to deliver her child in a condition ready to be independent.²⁴ namely:

a. Radla' Right

Radla rights' means the rights of children to get the tree food service, nursing at his mother. And in this feeding who's responsible in the case of financing is the closest relatives according to the descendant line and in this case the father who has the position.²⁵

b. Hadlanah Right

According to language, the word "hadlanah" means to put something like a piggyback off the ribs, or put something in your lap. According fikih term, hadlanah is the task of maintaining and nurturing or educate your baby or toddler since he was born until able to care for and organized itself.²⁶ The Fiqh experts defined "hadhanah" as:

"Performing preservation of children is still small, male or female, or who are already big, but not tamyiz, without an order from him, providing something that makes virtues, take care of something that hurt and ruin, educate physical, spiritual, and his mind to be able to stand alone to face life and take on their responsibility. Hadlanah task will be represented by his parents together at once."²⁷

²³ QS. An-Nisa' (4): 1

²⁴ Quoted from Aris Bintania, *Hak Dan Kedudukan Anak Dalam Keluarga Dan Setelah Terjadinya Perceraian*, Majalah Hukum Islam Vol.VIII No.2 Desember 2008, page 157

²⁵ See Al-Qur'an Surah al-Baqarah verse 233

²⁶ M. Zuffran Sabrie, 1998 *Analisa Hukum Islam Tentang Anak Luar Nikah*. Jakarta : Departemen Agama RI, , page. 79-84.

²⁷ Mohammad Thalib. (Trans) Sayyid Sabiq, *Fikih Sunnah 8*, (Bandung : PT. Alma'arif, 1980), Get 15, page 173

c. Walayah (Guardian) Right

In the care of small children until puberty besides hadlanah right there is also guardianship rights. Guardianship duties besides contain meaning in marriage, as well as to the child's preservation task since the hadlanah period ended until it wise, or until marriage for girls and trust in wealth. In Islamic law, child trusteeship is divided into three types: Trusteeship in the care and education of children, property Trusteeship, marriage Trusteeship.²⁸

d. Livelihood Right

The right to earn a living is directly related to children's rights to the lineage. Once the child is born, the right to a living had begun to be fulfilled. Living rights of the child are intertwined with each right above.²⁹

Rights and responsibilities are two things that can not be separated, the child has the rights of parents and the parents burdened with responsibilities for their children. If classified children's rights can be categorized into four major groups, namely the right to life, the right to grow and develop, the right to protection and the right to participate.³⁰

The child born of a valid marriage (according to Islam) will have the right and obligation of the birth parents even though his parents were divorced. A divorce does not result in the loss of parents' duties to remain maintenance to their children reaching adulthood or can stand alone.³¹

However, it all depends on both parents, whether to still meet its obligations when both husband and wife have been divorced. Everything can be resolved by discussion with a base understanding of religion and individual conscience to realize that there are children who still need both parents.

In addition to a child's blood relationship with her parents, children and parents ties concerning the rights of a child as submitted by Abdul Razak Husain concerning 7 the rights of a child ie:³²

1. The child's rights before and after birth
2. The child's rights in purity and ancestry.
3. The child's rights in the provision of a good name.
4. The child's rights in receiving milk.
5. The child's rights in obtaining care, treatment and preservation.
6. The child's rights in property ownership or inheritance for survival.
7. The child's rights to education and teaching

It is almost similar delivered by Masruri³³ that the legal protection of children based on the Qur'an is that children have a sense of transcendental grace of God that children is to be a parent successor and trustee, and a test for parents, so each child was granted various rights, children's rights are built upon the glory (karomah) which is right to survival (survival), to grow and develop (development) and protection (protectonal). Children's rights are specified according to the Qur'an, namely:

1. Rights of unborn child
2. Right after his birth
3. The right of children protection at the time grows
4. Discriminatory treatment of child rights.

With the above description it is clear that the children born from the marriage of religion with the principle and terms that properly there is no deviation of the prohibitions married the status of the children is legal child and he has the right as appropriate

A valid marriage in Islam is when done by fulfilling a set Pillar and Conditions of Shari'ah do not violate the prohibitions of Islamic marriage. That is when Pillars and Conditions were really true and there is no marriage prohibitions are violated, then the marriage is legitimate. Legal consequences that arise are children born of this marriage are a legitimate child. Its legal consequences are children entitled to get enough love, clothing and food as well as other legal rights such as the right to recognition as a

²⁸ Satria Effendi Zein, *Makna, Urgensi dan Kedudukan Nasab dalam Perspektif Hukum Keluarga Islam*, (Article of Jurnal Mimbar Hukum, Jakarta, AI-Hikmah dan DITBINBAPERA Islam No. 42 Tahun X 1999), page 7-19

²⁹ M. Zuffran Sabrie. *Op.cit*, page. 79-84

³⁰ Saifullah, *Problematika Anak dan Solusinya (Pendekatan Sadduzzara'i)*, (Artikel Jurnal Mimbar Hukum, Jakarta, AI-Hikmah dan DITBINBAPERA Islam No. 42 Tahun X1999), page 48

³¹ Aris Bintania, *Op.cit*, page 160

³²Adul Razak Husain, 1992. *Hak Anak Dalam Islam*. Jakarta, Fikahati Aneka.page 21

³³Masruri, 2005. *Hak Perlindungan Anak dalam perspektif Islam*. Semarang: IAIN Walisongo. Tesis S2 non publikasi

result of blood relation with the ruling, are entitled to the cost of education, the right to grant, the right to inheritance from parents

3. UUP and Compilation of Islamic Law on children.

According to the UUP and KHI, children are grouped into two categories, namely legitimate children and illegitimate children. Legitimate child is a child that was born in or as a result of a legal marriage, illegitimate children are children born of the marriage that not valid. As described above the legal concept of marriage is a religious marriage conducted and witnessed by the PPN and listed at KUA. UUP do not recognize length of pregnancy as proof of legitimate children and illegitimate children as it is known in Islam and KUHPerd. However, set about the denial of the legitimacy of a child by the husband, if he can prove that his wife has committed adultery and the child is the child of adultery.³⁴ Institutions process such denial is a court, by requiring the concerned sworn denial (Article 44 UUP) against the validity of the children.

Thus the meaning of a legitimate child according to the UUP is a child born of a valid marriage. A valid marriage is when a marriage contracted according to religion and belief, and recorded on the board. Recording for Muslim citizens by the Office of the Registrar of Marriages performed from the local Religious Affairs Office. PPN not only do the recording but also do the monitoring of the implementation of wedlock. When the implementation is not done before the solemnization of PPN and not monitored face-to-face by the PPN, although Pillars and Conditions Married fulfilled then the marriage is not legitimate. A result of the ruling is the children born from this kind of marriage are invalid children. This is mentioned in Article 42 on UUP that invalid child is a child born from an illegal marriage.

4. Status of children after constitutional revision of Article 43 (1) UUP

Prior to the revised Article 43 of the UUP contents as follows:

Children born out of wedlock only have civil relationship with her mother and her mother's family.

The new article 43 of UUP as follows:

Children born outside marriage has civil relationship with her mother and her mother's family as well as with the male as the father that can be proved by science and technology and or other devices in accordance with the law of evidence have blood relations including civil relationship with her father's family.

The Court's decision raises a lot of pros and cons. Counter parties said that the new provision is to equalize the children born of the marriage that legitimate and natural child. Party pros say that the children have the right to obtain recognition from the biological father though. In both types of children's Islamic legal consequences on lineage. Children born of the marriage invalid even though not listed in KUA legal consequences on that lineage and the children are entitled to all legal consequences arising from their parents and parents shall provide such rights, while adultery children is lineage on his mother and children does not get the right to lineage on his father and all his rights. The Court's decision as to equate the two types of children, children born of legitimate marriage but not listed and adultery children, but in the context of Islam this two are very different thing.

Rasulullah SAW clearly states that natural child is not having lineage relationship to the biological father as adultery must be punished. Because the child being lineage on the mattress owner of women that gave birth (Hadith narrated by Bukhari and Muslim).³⁵ In another hadith of Abu Dawud narrated that Rasulullah said when asked about the person that requested the recognition of natural child the apostle confirms: There is no recognition in the Islamic period of ignorance has passed, the child is for the owner of the mattress / husband of the woman that gave birth and for the adulterer is the stone (punished) (narrated by Abu Dawud).³⁶

With the above description according to Ahmad Rofiq³⁷ it is very clear that the decision of the Constitutional Court declared that children born out of wedlock has a civil relationship with her mother and her mother's family and the father's male as can be proved by science and technology and or other devices in accordance with the law of evidence have civil relationships with family his father was a

³⁴ Ridwan Syahrani. 2000. *Hukum Pernikahan Nasional*. Jakarta: Rineka Cipta. page.55

³⁵ Ahmad Rofiq, 2012. *Hak-hak konstitusi anak dan putusan MK No.46/PUU-viii/2010 tentang perubahan Pasal 43 UUP* makalah disampaikan pada seminar nasional pada Unisula Semarang. page 2

³⁶ *Ibid*.

³⁷ *Ibid* page 2

reckless decision, does not wise, even in conflict with Islam.³⁸ According to Ahmad Rofiq³⁹ New and revised Article 43 of the Constitutional Court should have read "a child born of a religious wedding, have a civil relationship to the mother and her family, as well as the biological father that can be proved by science and technology, and or other evidence that the law has a blood relationship "

Thus the Constitutional Court did not need to force change of Article 43 paragraph (1) that according to the writer also creates ambiguity because the content of Article 43 (1) new can be interpreted differently by each reader.

However, the opportunities opened by the Constitutional Court, to change Article 43 (1) UUP does not undermine the stand of religious judge of South Jakarta Religious Court of adopting positivistic law, that is to reject the application for admission Machicha Moechtar son, Iqbal Rhamadan, as the valid son of the late Moerdiono .

5. CLOSING

Existing all three construction Customary Law, Islamic Law and Western Law protect the children born of the marriage that is not recorded. Just that the difference between Islamic law and Customary Law with Western Law is Islamic law and Customary law run by the community and not a positive law, so if there are problems in the implementation of Indigenous law and Islamic law, the positive law are powerless to solve it. Thus arises the various effects such as smuggling law, impunity, etc.. Marriage Act as part of the Law of the West in terms of the written law does not protect a child born of a marriage that is not recorded.

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³⁸ *Ibid*, page 2

³⁹ *Ibid* page. 15

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