

Evasion of Law on Child Legal Status in Close-Shame Marriage's Institution

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Abstract

Close-shame marriage is done to cover the shame of a premarital pregnant woman because man who impregnate not want to marry her. However, it still leaves some crucial question such as the nature of the validity of the legal status of children born and the issue of civil relationship between children born to man who marry his/her mother. This research applies legal normative approach that assesses the rules of positive law with statute and conceptual approach. The result research shows that the existence of the institution of close-shame marriage is a form of legal evasion has caused confusion of the children who born. The conclusion of it is the legal status of the child is legally valid and null to be a child from a man who married his/her mother, but in essence the child is not the biological son of the man who married his/her mother. Therefore, it essentially does not have a civil relationship to man who marry his/her mother.

Keywords: close-shame marriage, the legal status of child, evasion of law.

1. Introduction

Every child in a family law perspective based on his/her legal status will be divided into 2 (two) groups, namely legitimate and illegitimate child. Essentially, a legitimate child is a child born in a legitimate marriage, while the status of illegitimate child is a child born of parents who are not bound by a legitimate marriage. Therefore, legitimate or illegitimate status of child is depended by the validity of the legal status of marriage of his/her parents. A legitimate marriage then is a marriage that has fulfilled all marriage requirements as qualified by the Law No. 1, 1974 on Marriage and recognized by the state.

Each legally marriage institution will have legal consequences of the subjects involved in it. The consequences will form in terms of : (1) rising rights and obligations between husband and wife; (2) maintaining and using of property in marriage by the husband and wife; and (3) rising a civil relationship between parent and child, or vice versa.

Ideally, after the marriage is done legally, the wife becomes pregnant and give birth to a child. However, in social life, this situation does not always take place normally. Sometimes, there is violation of decency and religious norms where the woman who is pregnant out of wedlock, then married by a man who not impregnate her. Such marriages may occur because man who impregnate does not want to be responsible to marry or the woman is indeed forbidden to marry by man who impregnate her. This such marriage in social life is referred to as close-shame marriage. It is done to some purposes such as covering the shame of woman, giving a legal status to the woman in question as a married woman (wife), and unborning child has a father.

It is inevitable, in the society all around the world that still adhere to traditional values and religion, that the position of a woman pregnant without a husband has stigma as not a good woman (hussy) and against her child born also called as an adultery child or unlawful child or illegitimate child, or other marginalized designation to draw the position of the child. Subekti¹ states it then as a child of nature. In Muna's Society Southeast Sulawesi province, it is called "*anahi patokoama*". It means that the child who have no father.²

Pregnancy without a husband basically is unwanted pregnancies that occur as a result of sex outside of marriage that the perpetrators generally are teenagers. The teenagers' characteristics are generally in proceeding process to search their identity. Indeed, this situation also takes place around the world.

According to data from the United Nations Fund for Population Activities (UNFPA) 2008³, the teenagers' population were nearly 1 out of 6 of the world population and 85% were in developing countries. The majority of them have ever had sexual intercourse. It is approximately 15 million of aged 15-19 have given birth every

¹ See Subekti, *the Basic of Civil Law*, Intermasa, Jakarta, 2012.

² See Muthalib, *the Right of Inheritance of Out Wedlock in Muna's Customary Law South East Sulawesi*, Paper, Faculty of Law University of Muhammadiyah, Kendari, 2012.

³ See <http://female-midwifery.blogspot.co.id>, accessed September 2015.

year, and 4 million of them has also been doing abortion. The UNFPA data is in line with data from the World Health Organization (WHO) in 2008. It is approximately 16 million of aged 15-19 have given birth every year, and 95% of them are in developing countries. According to WHO, it is a high risk to the teenagers to mother and even death for both mother and baby. In Indonesia as one of developing countries, the number of teenagers (aged 10-19 years) in 2008 was about 30%. The large number of the teenagers are held if no proper guidance, it can pose a particularly serious problem of health and law.

Pursuant to secondary data of Census¹ 2010 and Susenas 2012² of UNICEF Indonesia³ that 25% of woman were married before the age of 18 years. The practice of forced marriage took a very vulnerable place in boys and woman. According to data from the Girls Not Brides that girls are more exposure than boys in that situation of forced marriage. The composition of underage marriage is 7.5 to 1.

Empirically, one form of forced marriage conducted in Indonesia is in the form of the institution of close shame marriage. In various regions in Indonesia, the close shame marriage institution has also various name to call it. The Sundanese people in West Java province call as “*the closure kawirang*”.⁴ In the Java community, it is known as “*mating tambelan*” or “*nyilih jago marriage*”. In Bali further, it is known as *forced marriage*.⁵ In Tolakinese in Southeast Sulawesi itself “*pakawi soro*”⁶ and in the Buginese community in South Sulawesi province called “*passampo'siri*”.⁷

However, a marriage made not to the man who impregnate still leaves some crucial question such as the nature of the validity of the legal status of children born and the issue of civil relationship between children born to man who marry his/her mother. Disclosure aspects of the validity on the legal status for a child is very fundamental in his/her life as a legal basis of civil relationship amongst him/her to his/her parents on a reciprocal basis, as well as a basic legal protection if his/her rights neglected. Therefore, it is very important and needed a legal research comprehensively to assess the nature of the validity of the legal status for child born of a close-shame marriage and also its nature of civil relationship status between the child and the man who marry his/her mother.

2. Research Method

The type's research is a normative legal research to recite the rules in positive law.⁸ The research's approach will be used is statute and conceptual approaches. The statute approach is done by examining Indonesian laws and regulations concerning to the legal issues at hand, while the conceptual approach is resulted from the views and doctrines that developed in the jurisprudence (legal science) particular the issue of legal status of child born in close-shame marriage.

Sources of legal materials used in this research are the primary and secondary legal materials. The primary legal materials are authoritative in the form of legislation. The secondary legal materials further are materials either published or unpublished such as some literature (books), legal journals, the law scientific papers and articles.⁹ Research's analysis is qualitative analysis. It means that content of the used materials in the reserach will interpret the law based on the theories and principles of law and then presented in a descriptive form that provides an overview of the nature of validity for the child born of close-shame marriage.

3. Findings and Discussion

3.1. Findings

The study found that the institution of close-shame marriage is something commonly done by various ethnic groups in various regions in Indonesia and is recognized as part of customary law with their own characteristics.

¹ Sensus means the procedure of systematically acquiring and recording information about the members of a given population.

² Susenas is national population and housing censuses.

³ See <http://pranikah.org/pranikah>, accessed (September 2015).

⁴ Abdul Wahab LC, *Legal Status of Pregnant Woman due to Adultery*, <http://forum.dudung.net>, posted January 2014, accessed 31 Januari 2014.

⁵ See D.Y. Witanto, *a Family Law: Rights and Position ot Out Wedlock Post Discharge Decision of Constitutional Court on the Indonesian Marriage Law*, Prestasi Pustaka, Jakarta, 2012.

⁶ See S. Setiawati, *Legal Status of Out Wedlock of Pakawi Soro in Inheritance of Tolaki Customary Law in Pomalaa Sub-district, Kolaka Regency*, Faculty of Law University of Muhammadiyah, Kendari, 2012.

⁷ See A. Mardiana, *Legal Fullfillmant of Civil Rights of Out Wedlock of Passampo Sirri in Puurema Subur Village, Lalembu Sub-district Konawe Regency*, Faculty of Law University of Muhammadiyah, Kendari, 2013.

⁸ See J. Ibrahim, *Theory and Method of Normative Legal Research*, Bayu Media Publishing, Malang, 2008.

⁹ See Peter Mahmud Marzuki, *Legal Reserach*, Kencana Prenada Media Group, Jakarta, 2007.

The close-shame marriage in Tolakinese community in the Sub-district Pomalaa, Kolaka Regency – Southeast Sulawesi shows that man who marry a pregnant woman before marriage can be done by anyone, both man voluntarily or by payment of a sum of money in return. However, if no one is willing, then one of the traditional leaders must marry the woman. The close-shame marriage in Tolakinese community called *pakawi soro*. The marriage is done in front of some witnesses, traditional leaders (called *putobu* and *pabitara*), and religious leaders (called *imam*) by following the procedures of customary and religious law. If man are not married to the other woman, then the marriage can be recorded by an authorized officer to obtain a marriage certificate issued by the Ministry of Religion. The marriage certificate is then given respectively to the husband and wife as a basis for recognition of a state to the marriage. It can be said also that the marriage had been conducted lawfully. But if man are willing to marry the woman still marry to another woman, then the marriage is performed by customary and religious law and can not be registered to find out the marriage certificate.

In the case of the birth of the child of *pakawi soro* who already have a marriage certificate, the child status in front of the customary and state law will be recognized as a legitimate child and have a relationship of civil (right to livelihood, custody, and inheritance) with his/her parents. The legal status of the legitimate child furthermore will adhere to the child, even if the age of marriage of his/her parents is short due to the man divorces the mother.

What happen in *pakawi soro* is found also in the institution of close-shame marriage in other Indonesian ethnic groups. In the Java community, it is commonly called *tambelan marriage* or *nyilih jago*. A village head in customary law of Java has the authority to force anyone to marry the woman who become pregnant before marriage or it can even be married by the head of the village in order to maintain either the good name of the woman's family or the child status. The *tambelan marriage* or *nyilih jago* can be also be registered by an authorized officer if the man is not bound by marriage. If there is no registration of the marriage, then the child born will get the civil rights such as the right to livelihood, the right of custody, and rights to inheritance from the man who married his/her mother. However, the child status in front of the state law is not recognized as a legitimate child.

In Minahasa - North Sulawesi Province further, the close-shame marriage institution called as *lelikur institution*. In this institution, a man just give enough the magical objects such as a dagger, sword, spear, or hair to pregnant woman as his recognition that a child born will be his son.¹

3.2 Discussion

Some experts in the study of classical legal pluralism reveals that the state law is not the only reference to behave in society. In many context, it can be found that the public has its own legal guidelines.² This means that beyond the state law (positive law), each community will be covered by customary law. The customary law itself is living law and abided by certain indigenous peoples. According to TO. Ihromi, the indigenous peoples are a group of people in psychotherapy is derived the same ancestor who inhabits a particular area, the same cultural value system, power over land and natural resources as well as organize and manage the behavior of society with laws and traditional institutions.³ Related to it, it can be said that the legal system in Indonesia, the existence of the institution of close-shame marriage is part of living law and recognized in the customary law as an unwritten law.

Pragmatically, the close-shame marriage can be an alternative solution to protect the rights of woman and the child. The marriage socially gain legitimacy as a marriage that is recognized and acceptable, including the legal status of child born. It is because the man who married had indeed been aware of and accept the existence of premarital pregnancy although the child is not his. If the marriage can be evidenced by the deed of marriage, the wife and child can be protected by state law (positive law) and has right to livelihood, maintenance rights, and the rights of inheritance. It can be said also that the close-shame marriage has valid and null according to the Law No. 1 of 1974 on Marriage Law, particularly in the Article 2 (1) and (2). Article 2 (1) states that “the marriage is valid if it takes place in accordance with the religious law and beliefs of the parties”; article (2) then states that every marriage is recorded in accordance with the legislation in force.

¹See I Made G. Damayana, *the Legal Standing of Out Wedlock Caused by the Customary Delict of Lokika Sangghara in Inheritance Customary Law in Tabanan Regency – Bali*, Thesis, Diponegoro University, Semarang, 2013.

²See Sulis Irianto and A. Cahyadi, *the Bulkhead Collapse of Civil and Criminal: Study Court Case of Violence against Woman*, Center of Study of Woman and Gender & Yayasan Obor Indonesia, Jakarta, 2008.

³See A. Salimin, *Settlement of Customary Delict Using Kalosara as an Alternative dispute Settlement in Tolakinese Community*, Faculty of Law University of Muhammadiyah, Kendari, 2009.

The legal fact of the existence of the institution of close-shame marriage, if studied further in a comprehensive manner from the perspective of family law in force in Indonesia, this kind of marriage may be regarded as a form of evasion of law. The evasion of law is a legal act to avoid legal status undesired, in which it applies another laws to obtain certain legal status that is desired. In terms of it, the evasion of law in the case of out wedlock is to obtain legal status of the child born within a marriage bond.

The evasion of law is done to avoid article 43 paragraph (1) of the Law of Marriage. The article states that the child born outside marriage only have a civil relationship with the mother and her family; and to carry out her willing to find out legal status for her child as a legitimate child, it is used Article 42 of the Marriage Law which states that the son is the legitimate child born in or as a result of legal marriage.

The phrase "child born within marriage" in Article 42 will be used as justification by law that every child, born during his/her mother bound by her marriage with regardless of who the biological father of the child, is a legitimate child. If in a marriage that preceded pregnant before marriage, then the woman is married not the man who caused the pregnancy, according to the law, the child will be recognized as the legitimate child of the man who married his mother. The nature of humanity is that the legitimate child must be resulted from the biological father of the child. This distinguishes between humans and other living things as dignified human beings.

Conceptually, the evasion of law in the field of family law particularly in the areas of marriage, is generally done to get 2 (two) things: (1) legitimate of the marriage; and (2) recognition of the state law to the marriage. Both aspects are important because they are a guarantee for the fulfillment of the rights and obligations of each subject in the marriage law, either the husband, wife, or child.

In the context of close-shame marriage, the evasion of law in the legal system in Indonesia is performed by customary law as explained above to be covered the meaning of article 42 of the Marriage Law. The word "covered" in this case is to interpret that child born will be legitimate if born when his mother is married to a man. The evasion law is possible to occur because of the weakness of the Marriage Law. The Law does not require any proof whether the child comes from the biological father or not. It means that the child will get his/her status as a legitimate child pursuant to Article 42 of the and also he/she gain legitimacy from the community.

The evasion of law in fact constitutes a deviation from the meaning of desired marriage. It is because a good marriage not only must conform norms as mentioned in the Marriage Law but also avoiding arbitrary will of the parties. Article 1 of the Marriage Law clearly states that marriage is physical and spiritual bond a man and a woman as husband and wife, having the purpose of establishing a happy and lasting family founded on the belief in God Almighty. In terms of it, marriage in legal context in Indonesia is not only emphasize the physical aspect between a man and a woman, but also involves aspects of spirituality based on the values that they believe. Specifically to Muslims, the legal provisions on the issue of marriage of a pregnant woman has been dealt with separately in the Compilation of Islamic Law. The Compilation of Islamic Law is the substantive law that guide the judge in the Islamic Courts in resolving the cases.

In Article 53 paragraph (1) Compilation of Islamic Law has arranged that a pregnant woman outside the marriage can only be married to the man who impregnate her. This means in Indonesian positive law contained in the compilation of Islamic law has set strict requirements that only a man who impregnate the woman can perform marriages with the woman, not to just any man. If the woman is married by the man who do not impregnate her, according to the Compilation of Islamic Law the marriage is invalid. Therefore, the consequences of the invalid marriage is the child will be illegitimate child (an adultery child). In other word, the child does not have a blood relationship (civil relationship) with a man who married his mother.

This is in line with the concept of marriage in Islamic law that a reference in the formation of Compilation of Islamic Law. Pursuant to hadith Ruwaifi 'bin Thabit Radhiyallahu'anhu, Prophet Muhammad shallallahu'alaihi wasalam states "Anyone who believes in Allah and the Last Day, then do not pour water to the other crops". According to Abu Hanifah, the man may perform marriage and "jima" (sexual relationship) with the woman, if he is who engages in illicit sex. If he is not, the man may marriage her but should not be "jima", until her womb is empty of fetus with one menstruation or until delivery if she is pregnant.¹

¹ See Abu Muhammad Dzulqamain, *Fiqh Ibadah (Jurisprudence of Wordship), Munakahat and Family*, Muslimah, <http://akhwad.web.id>, posted 2008, accessed January 2014.

The concept of emptiness uterus from the fetus to perform a marriage becomes very principle in Islamic Law. The origin of the child in Islamic Law is closely related to the issue of *nasab*. *Nasab* is a linkage that determines the origin of a human being based on the legitimate marriage. In terms of it, a blood relationship will show connection between the child and his/her biological father.

The existence *nasab* child has consequences for the existence of a civil relationship with both parents. The Islamic Law is expecting that every child born has the status of a legitimate child with his father and mother. Therefore, the Islamic Law is keeping the sublime descent with the principle *khifdzu al-nasl* as the main principle in human regeneration. The principle ensures the purity of the human lineage in accordance with the Islamic Law. The religion of Islam strongly opposes the existence of illicit sex and get pregnant outside marriage. According to Hadith narrated by Imam Muslim from Abu Hurairah, the Prophet states that “*al-walad li al-firasy, wa li al-ahiri al-hajaru*” (an adultery child has a relationship with his mother and for the adultery actor will punish “stoning.”¹

The issue of the legal status of an illegitimate child from the standpoint of Islamic Law can not be separated from the concept of adultery. Adultery is sexual intercourse between a man and a woman who is not tied in marriage. According to the conception of the Islamic Law, adultery means sexual intercourse between man and woman whether they are bound by marriage or not, including whether they are single or not. The focus on that issue is the fornication is conducted out of marriage. If the fornication resulted in the birth of a child, then the child is a child outside of marriage - called fornication child.

The fornication child in all recognized schools (*mazhab*) in Islam (Hanafi, Malikiy, Syaf'i and Hanbali) states that the child will not have *nasab* with his/her biological father, even though the man recognizes the child as the result of a relationship outside marriage.² In terms of it, the legal status of the child is only be connected (*nisbat*) to his/her mother. So the child is from the viewpoint of the Islamic Religion that has no father.

In connection with some facts of the premartial pregnant that occurred in various parts in Indonesia, the law enforcement should be consistent with the provisions contained in the Compilation of Islamic Law in Article 53 (1) as discussed previously. Legal substances contained in the Compilation of Islamic Law is very careful in this issue of *nasab* because child *nasab* only hang on to a blood relationship with his/her biological father in marriage or as a result of legal marriage. However, in the society, it is commonly to found marriage committed against premartial pregnant without ever proof it who is the biological father of the child.

There is legal shortcomings formally in the Compilation of Islamic Law that. The shortcomings then create the avasion of law. This takes place because the Compilation does not require evidence too prove whether the child is biological child of the father. As a consequences of it, the legal status of the child is in question. The close-shame marriage is still happening in Indonesia and classified as invalid and misleading marriage.

In the positive law in Indonesia, there is an opportunity to change the legal status of the illegitimate child to become a legitimate child. This law applies only to citizens who are subject to the Code of Civil Law (applicable to non-Muslims). To implement it, the parents of the child are able to legalized the status of the child – called *wettiging*.

In the concept of civil law, the legalisation of the child is a legal act which carries a consequence an increase the legal position of an illegitimate child into a legitimate child. It means the child will have a civil relationship with his/her parents, including the civil relationship with the family's parents, as stipulated in Article 277 and 274 of the Code of Civil Law. Article 277 stipulates that the legalisation of child either the marriage of his/her father and mother or with the probate president will apply the provision of the Civil Law as same as if the child born in marriage. Article 274 of the Civil Code itself stipulates that if the parents before or when the marriage had neglected to admit the child outside their marriage, then this omission can be remedied by probate President after hearing the advice of the Supreme Court.

¹ See Deity Yuningsih, *Legal Protection to Civil Rights of Out Wedlock*, Dissertation, Postgraduate Program Hasanuddin University, Makassar, 2013.

² See Agus D. Riyana, *Authority of Biological Father as a Guardian of Marriage to Out of Wedlock (Comparative Study Between Indonesian Marriage Law and the Big Four of the Islamic Mazhab*, Thesis, University Muhammadiyah Surakarta, Surakarta, 2008.

Article 277 has conformed and stated clearly that legalisation of the child must be conducted by the parents only. In other words, the legalisation of the child only can be done by the parents (biological parents), not anyone as stipulated in the Laws. The existence of the institution of close-shame marriage therefore which is commonly known in customary law in principle has been against with the Article 277 whether it applies for muslim or non-muslim. Indeed, it is not only against article 277, but also the Compilation of Islamic Law. Thus, the legal status of the child remains as an illegitimate child and does not have a civil relationship with his/her father who marry his/her mother. The child has only a civil relationship with his/her mother and his/her mother's family alone.

4. Conclusion

The close-shame marriage institution in family law perspective is a form of avasion of law that has caused confusion to the legal status for the child and the child civil relationship to his/her father who married his/her mother. On the one hand, the child will find his/her legal status based on the customary law and the state law. However, on the other hand, it is essentially that the child is not biological child of the man who married his/her mother. Therefore, the child has no civil connection to the man who married his/her mother.

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