

# *Position of Non-Marital Children in Inheritance Reviewed From Tengger's Adat Law*

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*Abstract--The core family is the smallest group of a society consisting of father, mother and children. The child's existence in a family has a very important value for the family. Not only as a succession generation of family descendants but also a family heir. However, not infrequently the presence of children is no longer a result of marital relationships, but rather the process of pregnancy outside of marriage. In the national law itself, the child's position as a result of relationship outside marriage has been regulated in Article 43 paragraph (1) of Marriage Law No. 1 of 1974. Nevertheless, as a country that adheres to legal pluralism, Indonesia also recognizes the existence of customary law that regulated the position of a child as a result of the relationship outside of marriage. One of the tribes in Indonesia that recognizes this customary law is the Tengger tribe. This paper is essentially the results of the legal anthropology research conducted with an ethnographic approach. In this paper, it will be discussed how the Tengger tribe regulates the position of children as a result of relationship outside of marriage and how they regulate the rights of inheritance against a child outside of marriage.*

**Keywords-** *Adat Law; Inheritance; Non-Marital Children*

## I. INTRODUCTION

The ideal aim of carrying out a marriage is to form a happy and prosperous household. For most people, the assumption of a happy and ideal family is not only marked by the fulfillment of the family's economic needs, but also by the presence of a child. The presence of children for the family is not only expected to be the successor of the descendants, but also to be the successor of the family's wealth. Therefore, in discussing family law, it cannot be separated from the law of inheritance.

Although the presence of a child is expected by some families, it is not uncommon that there are a

child whose presence is not expected by the family. The presence of these children is usually the result of relationship before marriage, adultery, or rape relationships. In social life in Indonesia, the society actually recognize 2 (two) classifications of the status of children in the family, namely legitimate children and children outside of marriage.

The intended or legitimate children is a child born of a legitimate marital relationship based on the prevailing legal norms (which may be related to positive legal norms, social norms and religious norms). Meanwhile, the child outside of marriage is a child born before a marriage or a child born of a relationship outside of marriage.[1]

For most Indonesians, the existence of children as a result of relationships outside of marriage is a disgrace to the family. As far as possible, the existence of children outside of marriage is hidden from the public. There are many terms for referring to children outside of marriage, such as an illegitimate *anak jadah*, *anak kowar* and so on. Even though as a child whose birth is not expected, it does not mean that the child outside of marriage has lost his civil relationship with his parents. In Article 43 paragraph (1) of Law No. 1 of 1974 concerning marriage has been regulated concerning civil relations with his parents. In Article 43 paragraph (1) It is mentioned that the child who is born outside of marriage has a civil relationship only with mother and mother's family alone. However, the regulation in the Law on Marriage has been subjected to a judicial review at the Constitutional Court.

An application for a judicial review was made by a dangdut singer who came from the capital of Indonesia in the 1990s regarding the provisions in Article 2 paragraph (2) and Article 43 paragraph (1). The request for reconsideration of the two articles is related to the existence of her child as a result of an

unregistered marriage with a state official happened during the New Order era.

From the outcome of marriage based on religious law (*Siri*) without being registered in the Office of Religious Affairs (KUA), a child was born. After the child reaches adolescence, the mother, who is a female dangdut singer, fights for her child's civil rights towards her biological father.

The decision of the Constitutional Court on the judicial review of Article 2 paragraph (2) and Article 43 paragraph (1) of Law No. 1 of 1974 has changed the positive legal norms related to the inheritance rights of children born from relationships outside of marriage. With the change in positive legal norms, the Constitutional Court's decision was subsequently used as a basis for positive legal rights for the civil rights of members of relations outside marriage. Although the civil rights of a child outside of marriage have been regulated in the Marriage Law as well as a judicial review decision on the Law, it is important to remember that Indonesia is a country that recognizes Legal Pluralism.

Apart from positive law, Indonesia also recognizes and acknowledges the existence of other legal systems that are believed and lived by the community to regulate their social behaviour. The legal system is a religious legal system (Islam) and a customary law system (*Adat Law*). With the existence of several legal systems that apply in society, in Indonesia, there is no universal legal norm that regulates the inheritance rights of children outside of marriage.

There are various legal norms in Indonesia that regulate the inheritance rights of children outside of marriage. It is primarily related to the legal norms that exist in customary law communities. In the research on customary law conducted by Van Vollenhoven, Indonesia is actually divided into 19 customary law environments (*rechtskring*). Each customary law environment is further divided into several sub-environments or what is known as the *Kukuban* customary (*Adat*) law.[2] Of the many customary law environments, of course, there are various variants of legal norms that regulate the inheritance rights of children outside of marriage. This is of course due to differences in cultural values in each indigenous community as the basis for the formation of legal norms that are used to regulate the social behaviour of its citizens.

One of the indigenous peoples in Indonesia who still applies customary law is the Tengger indigenous people who live around the Bromo Tengger Semeru National Park in East Java Province. The indigenous people of Tengger strongly uphold the values of harmony in their social life. They avoid themselves to commit or be involved in the destruction of nature. If there is damage or destruction to nature, they will perform certain rituals and carry out rehabilitation to restore natural conditions. Not only in nature, but the Tengger indigenous people always avoid conflicts with others. For the Tengger indigenous people, their involvement in conflict with others is a sin and will lead to karma in their lives.

The upholding of the values of harmony by the Tengger indigenous people is interesting when it is related to legal norms that regulate inheritance rights for subordinates of relations outside marriage. As can be seen, children resulting from relationships outside of marriage are basically considered a disgrace to the family. Even in some indigenous peoples, the existence of a child as the result of a relationship outside of marriage is also considered a disgrace because it has damaged the sanctity of the community's condition.

Apart from being considered as a disgrace, the existence of children as the result of a relationship outside of marriage sometimes creates conflicts between two parties or more. Due to relationships outside of marriage, sometimes the biological father of the child denies and releases responsibility for the child. The attitude of denial and letting go of the responsibility by the biological father to care for and raise this child is a factor that sometimes causes conflicts between parties.

Having the value of living in full harmony and the potential for conflict due to the existence of children outside of marriage becomes interesting if it is reviewed from the customary legal norm of the Tengger society which regulates the inheritance rights of children outside of marriage.

Research on the position of children outside of marriage among the Tengger indigenous people aims to determine the applicable customary law arrangements among the indigenous peoples of the Tengger tribe regarding pregnancy cases outside of marriage and to determine the position and distribution of inheritance to children resulting from relationships outside of marriage.

## II. PROBLEMS

1. How the cultural values that underlie the formation of customary law norms related to the inheritance of children born as a result of relationship outside of marriage?
2. How the customary law norms recognized by the Tengger indigenous community regulate the position of children outside of marriage in inheritance?

## III. RESEARCH METHOD

This article is the result of research conducted in Ngadas Village - Tumpang District, Malang Regency. Researchers chose the research location in Ngadas Village because this village is the residence of the Tengger indigenous people. Actually, the residence of the Tengger indigenous people are in several villages spread over four regencies (Malang Regency, Pasuruan Regency, Probolinggo Regency and Lumajang Regency) in East Java Province. Most of the villages where the Tengger indigenous people live are directly adjacent to the Bromo Tengger Semeru National Park. There are even 2 (two) villages located right in the middle (enclave) of the core zone of the Bromo Tengger Semeru National Park, namely Ngadas Village in Tumpang District - Malang Regency and Ranupani Village in Senduro District - Lumajang Regency.

This research is basically research that focuses on setting the customary norms of the Tengger community. Thus, this research can be categorized as Legal Anthropology. Legal Anthropology is basically one of the sub-sections of Cultural Anthropology which specifically observes and studies how people form their laws and behave socially in accordance with the laws they form.

In the perspective of Anthropology, law is one of three forms of culture, namely a system of ideas. Law is basically a system of ideas that are created, owned, taught and made belong to the community from generation to generation to regulate community members in their social behaviour. The purpose of the regulation itself is to obtain social order resulting in the social welfare of the community members. As an idea to regulate the social behaviour of community members, law is

strongly influenced by the orientation of the cultural values of the community. The cultural value orientation itself is the benchmark used by the community in relation to the concepts of "bad" and "good" which are used as guidelines in social behaviour. With this understanding, cultural values are used as the orientation of the rules needed in regulating human relations with their surroundings.[3] According to C. Kluckhohn, the cultural value orientation system can basically be divided into 5 (five) basic problems of human life, namely about the nature of human life, the nature of human work, the nature of human position in space and time, the nature of human relations with others and the nature of human relations with their natural surroundings.[4]

Based on the theory that the cultural value orientation affects the community in making arrangements in their customary law, this research was conducted. Researchers look for a correlation between the cultural value orientation of the Tengger indigenous people and their customary law arrangements regarding the inheritance rights of children outside of marriage.

As legal anthropological research, this research is using an ethnographic approach where the researcher describes the results of the interview and his observations on the object of research qualitatively. With this ethnographic research, the researcher stayed with the Tengger community for some time to observe their behaviour and conduct interviews with the community related to the research focus. The interview technique used is in-depth interviews using interview guidelines. The material that was asked of the respondents was about the cultural value orientation of the Tengger community and how the Tengger indigenous people regulate the inheritance rights of children outside of marriage. Interviewed respondents were selected using a purposive sampling technique. By using this technique, the researcher selects respondents in a focused manner by paying attention to the criteria set by the researcher and the respondent is willing to provide information on his knowledge to the researcher.[5] Based on the purposive sampling technique, the researcher determined a Tengger community traditional shaman (*Dukun Adat*), the village head and 3 (three) Tengger traditional community leaders as respondents. Furthermore, all

data from interviews with key respondents were analyzed using descriptive qualitative techniques.

#### IV. DISCUSSION

##### a. **Harmony as the Value of the Life of Tengger People**

The cultural value orientation system of the Tengger indigenous peoples is inseparable from the folklore that flourished among the indigenous Tengger people themselves. Folklore itself is part of the collective culture passed down from generation to generation. The inheritance of folklore is usually done orally and sometimes accompanied by examples in the form of sign language or other reminder tools.[6] Folklore is essentially a local genius knowledge in indigenous peoples which is full of ethics, values and morals which are internalized in the community and used as a guide in their social behaviour. Folklore is in the form of folk stories such as legends, myths, fables and saga (*Hikayat*).[7] The folklore that developed in the Tengger indigenous community is about the legend of the origin of the Tengger indigenous people.

A lot of literature explains that the Tengger indigenous people are the remnants of the people who lived during the Majapahit era, they then fled and settled around the Tengger Mountain Area at the foot of Mount Semeru due to a transfer of power in their area of origin. In the legend of the story, it is told that the Tengger indigenous people are descended from a daughter of the Majapahit king named Roro Anteng who married a young man named Joko Seger. Both husband and wife did not have children for a long time. Because they yearned the presence of a child, they then meditated on Mount Bromo and asked the Gods to give a gift in the form of a child. In the end, their request was granted by the Gods with the gift of 25 children on the condition that they were required to sacrifice their youngest child to be drowned in the crater of Mount Bromo.

In the legend, Roro Anteng and Joko Seger broke their promise to sacrifice their youngest child to the Gods. As a result, the Gods were angry and as punishment, the Gods caused disaster for them. The youngest child of Roro Anteng and Joko Seger felt sorry and was willing to sacrifice himself to enter the crater of Mount Bromo. Since then, all the disasters and calamities that had previously occurred have disappeared. The sacrifice of the youngest

children of Roro Anteng and Joko Seger is known as the *Kesada* tradition. *Kesada* is a tradition among the Tengger indigenous people to give sacrifices to Mount Bromo. They believe that by giving sacrifices to Mount Bromo, their economic life will be prosperous.

The Tengger indigenous people who live in the Tengger mountain area, in general, their economic life depends on the generosity of nature. The majority of them have their main livelihood as vegetable farmers, with the main commodities being potatoes, leeks and cabbage. Apart from being vegetable farmers, some of them work as people who provide for the needs of tourists (tourism actors) by providing homestays, car rental, horse rental, selling souvenirs and clothes or accessories used for protection against the particularly cold weather such as gloves and scarves. This is because the Tengger indigenous people live around the tourist attraction of Mount Bromo (The Bromo Tengger Semeru area where the Tengger indigenous people live has been designated a National Tourism Strategic Area (KSPN) based on Government Regulation No. 50 of 2011 concerning the National Tourism Development Master Plan 2010-2025).

The natural conditions around where the Tengger indigenous people live provide benefits such as the availability of resources that can provide welfare for the community, but these natural conditions also become a potential disaster that has a major impact on the Tengger indigenous people. In addition to being very close to Mount Bromo, the Tengger indigenous people are also very close to Mount Semeru. These two mountains are active volcanoes in Indonesia. With the condition as an active volcano, the two mountains in the vicinity of the Tengger indigenous people can be causing disaster to them at any time.

Collective awareness of the ecological conditions around the place where the Tengger indigenous people live, which they later made into a folklore legend about Roro Anteng and Joko Seger. This legend actually contains the value of harmonious life between humans representing the micro-world (microcosmos) and nature representing the macro world (macro cosmos). There is a mutual need between the microcosmos and the macro cosmos. In the understanding of the Tengger indigenous people, humans as a microcosmos are given the opportunity to ask the macro cosmos for

welfare (symbolized by the request of Roro Anteng and Joko Seger to ask for many children). However, humans as a microcosmos are also obliged to pay attention (in the form of sacrifices) to the macro cosmos. There is a harmonious relationship between the microcosmos and the macro cosmos.

This cultural value of living in full harmony is the guideline for the Tengger indigenous people in their social behaviour. The Tengger indigenous people maintain a very harmonious attitude with each other. They always avoid conflicts with others. This cultural value about living in harmony has a lot of influence on customary law in the Tengger community. This includes customary law related to the inheritance rights of children outside of marriage.

**b. The Law of the Inheritance of the Tengger Indigenous People to Children Outside Marriage**

In discussing a law of inheritance, it cannot be separated from the kinship law and the law of marriage. This is because, with marriage, it will form a kinship relationship due to marriage which affects the basis for the distribution of the inheritance of the assets left behind.[8] In this section, we will first discuss the law of marriage among the Tengger indigenous people.

Marriage according to the Tengger indigenous people is not just the union of two people to build a household and procreate to produce the next generation, but marriage is seen as an effort to strengthen the unity of the Tengger indigenous community. As described earlier, they believe that in fact they still have kinship as the descendants of Roro Anteng and Joko Seger. The occurrence of marriage among members of the tribe is considered to strengthen the brotherhood between the Tengger tribe. However, in their traditional marriage system, it is still possible for the Tengger tribe to marry someone outside their tribe. The Tengger indigenous people only prohibit marriage with someone who still has family ties related to descent (*Nasab*), such as marriage with a mother, father, sibling, mother's brother, father's brother, or brother-in-law. This marriage system is known as Eleutherogamy.[9]

For the Tengger indigenous people, marriage is also considered a sacred magical event. Therefore, the marriage must go through traditional rituals. With this level of sacredness, for the Tengger

indigenous people, a marriage is considered valid if the couple has performed a traditional ritual. If a person registers their marriage at the Office of Religious Affairs (KUA) or the Civil Registry Office, it is still considered invalid if they have not performed a traditional ritual. Therefore, a couple may not live together in one house if they have not yet performed a traditional marriage ritual. If there is a partner who violates these norms, it is considered that they have violated the customary norms and damaged the sanctity of the village.

Customary norms that are so strong in maintaining sacred and magical values of sanctity also manifest in the prohibition norms for pre-marital sex. The occurrence of sex before marriage is considered a violation of norms and undermines the sanctity of the village. Using the theory created by Emile Durkheim, the Tengger indigenous people have mechanical solidarity. This society that has mechanical solidarity has repressive laws in the form of offences or criminal law. Criminalization is intended to overcome or prevent violations of collective norms. People who have mechanical solidarity are homogeneous local people so that violations are considered to have injured collective norms.[10]

In the case of pregnancies outside marriage and giving birth to children resulting from relationships outside of marriage, the woman's family is obliged to perform traditional rituals as a form of social sanction. This traditional Ritual is meant for the apology from women and their families to Gods over the deed of breaking the norm. Customary rituals are also intended to make the purification of the condition of the village that is tainted by disgrace. To a man who commits an immoral deed outside of marriage is also given customary sanction, in the form of a for purchasing 100 bags of cement and asked to marry the woman who was impregnated.

In the event that a man does not want to marry the woman he is pregnant with, the woman who is pregnant will find a partner from another man as a candidate. The hope is, when the child is born, the child will have a mother and father. This is because children born without a father are considered to be a disgrace for the Tengger indigenous people. However, for women and men who want to become husbands or wives, the children who are born are still cared for by the mother and the woman's family,

and are still allowed to live in the village where the Tengger indigenous people live. The position of children born outside of marriage who are still allowed to live in the village with their mother and their mother's family is a form of prioritizing humanity. Children born outside of marriage for the Tengger indigenous people do not regulate the sins committed by their parents.

The custody of children outside of marriage is then exercised by the mother and the mother's family. All support for children born outside of marriage is borne by the mother and the mother's family. Although care for the child outside of marriage is in the mother's family, the man who becomes the father of the child has an obligation to provide for his child.

Regarding inheritance, even though the right to care for children outside of marriage is exercised by the mother, for the Tengger indigenous people, children born outside of marriage still have family inheritance rights. The provision of inheritance to a child outside of marriage is given when the child has become an adult. The giving of inheritance to a child outside of marriage is carried out by considering humanity and accountability for the father's actions. Granting of inheritance rights to children outside of marriage can be granted before the child's father dies (grant). This condition is as it happens to other indigenous peoples, that the inheritance can be given to heirs before the death of the heir.[11]

In contrast to the amount of inheritance rights received by children resulting from legal marriages, the value of inheritance given to children resulting from relationships outside of marriage is not determined. Giving is more of a responsibility and compassion which is given by the father to the child outside of marriage. This is done by basing on the cultural values of the Tengger indigenous people who uphold living in harmony and avoiding conflicts between father and mother or father's family with the mother's family of children outside marriage. Usually, the inheritance given to children outside of marriage is in the form of cash or land. The provision of inheritance in the form of land is usually used for agriculture only as an economic provision.

In the event that the father has died without giving a will for inheritance rights, the family of the father (wife and child from a legal marriage) can give inheritance to the child outside of marriage on

a voluntary basis. If the family does not give up inheritance, then children outside of marriage will not be given inheritance. However, during cases that have occurred in indigenous peoples, the father's family has never given a share of the inheritance to the child outside of marriage.

Taking into account the position of the child outside of marriage in the distribution of inheritance to the Tengger indigenous people and comparing it to the recognized cultural value orientation, it appears that there is a very strong relationship. The Tengger indigenous people are a society that maintains harmony in life. They view that humans in their lives must always be responsible for their actions. According to the beliefs of the Tenggerese indigenous people, every human action will result in karma. Therefore, every human being is obliged to be accountable for his actions.

Personal actions that result in the birth of a child outside of marriage are obliged to continue to be given compensation. Although the Tengger customary community obliges a man who impregnates a woman before marriage takes place to then marry her, if he cannot marry the woman for various reasons, he is still obliged to support the child as a result of a relationship outside of marriage. Taking responsibility for these actions can also be done to avoid conflicts between parties.

Paying attention to the customary law of the Tengger community, it reminds us of the Constitutional Court's decision on the judicial review of Article 43 paragraph (1) of Law No. 1 of 1974 concerning Marriage. In Article 43 paragraph (1) it can be explained that a child who is born out of wedlock or not with a legal marriage, the child only has a civil relationship with his mother and relatives of his mother. However, this article creates confusion where a child born outside of marriage only has a relationship with his mother and his mother's family. It is a form of injustice if a man has had a relationship with a woman which then produces a child, but then the man releases the responsibility for his actions. Therefore, in the decision of the Constitutional Court on the judicial review of Article 43 paragraph (1) it must be read that a child outside of marriage has a civil relationship with the mother and the mother's family as well as with the male as the father.

The customary law of the Tengger community also aims to prevent children outside of marriage

from being considered as "illegitimate" children, which will result in the child experiencing psychological disorders and being embarrassed to interact with other people.

## V. CONCLUSION

The Tengger indigenous people are people who have cultural values that prioritize harmony, where they believe that every action will cause karma. Therefore, the Tengger indigenous people strongly believe that every action must be accounted for. This cultural value orientation affects the customary law arrangements related to the position of the inheritance rights of children resulting from relationships outside of marriage.

For the Tengger indigenous people, children outside of marriage are children who do not bear the sins of their parents. He was born into a pure child like other children who were the result of a legal marriage. The occurrence of pre-marital sex for the Tengger indigenous people is an act that violates norms. A man who has impregnated a woman outside of marriage, is obliged to marry the woman to make her his wife. However, if the man does not want to marry, then the woman will be found a husband to replace the man who has impregnated her. This substitute husband is intended so that the child who is being conceived when he is born will still have the figure of a father. Even though he already has a "surrogate father", the biological father has an obligation to support the children who are the result of the relationship outside of marriage. Meanwhile, child care outside of marriage is carried out by the mother or the mother's family.

Children outside of marriage also have inheritance rights from their father. Inheritance rights can be granted in the form of a grant and given before the child's father dies. The inheritance given is not in the form of a house or an heirloom. The inheritance given is in the form of land or money. The inheritance in the form of land is usually used for agriculture as an economic provision.

In the case where the father of a child outside of marriage dies, the granting of inheritance rights depends on the willingness of the father's legal family. If the father's legal family does not provide

inheritance, then the child cannot claim inheritance rights.

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