



UDC 34

## PROTECTION OF CHILDREN OUTSIDE OF MARRIAGE ACCORDING TO THE OLD (LAWAS) CUSTOMARY LAW OF KUTAI KARTANEGARA EAST KALIMANTAN

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### ABSTRACT

The existence of indigenous peoples and their customary rights is still recognized in Indonesia, as long as the customary law is still alive and maintained by the community. This recognition is stated in Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which formulates: "The State recognizes and respects the unity of customary law communities and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law".

### KEY WORDS

Children, marriage, protection, law, regulation.

One of the areas where the community and customary law still exist is Kedang Ipil Village, Kota Bangun Sub-district, Kutai Kartanegara Regency, East Kalimantan. Kedang Ipil Village is one of the oldest villages and has existed before Indonesia's independence, which was established in 1917. Kedang Ipil Village has distinctive customs and culture and has a wealth of natural and cultural attractions, which are very interesting. In addition to Kedang Ipil Village, there are also several traditional villages in Kalimantan that still maintain and maintain their respective customary laws.

The customary law regulates various issues in the community, both personal life and social life. Customary law has been considered as part of the hereditary side of community life. One of the indigenous villages that still maintains its customs is the Lawas Indigenous community. Until now, the Lawas Indigenous community still maintains and maintains its customary values consistently. The Lawas indigenous community has quite unique customary norms, including those regarding marriage, extra-marital children, traditional ceremonies, and so on.

The customary law applicable to extra-marital children of the Adat Lawas community is regulated by customary law that is different from the positive law applicable in Indonesia, namely in Law Number 1 of 1974 concerning Marriage (Marriage Law). This difference can be seen in the custom of marriage, the implementation of which doesn't require the conditions and procedures as regulated in the Marriage Law. Likewise, if a divorce occurs, it doesn't require formal procedures as regulated in the Marriage Law.

In addition, the institution of marriage and divorce is different from that regulated in the Marriage Law, which is interesting to research is the status of extra-marital children in the Adat Lawas community of Kedang Ipil village. Extra-marital children according to Adat Lawas law do not receive adequate legal protection, because extra-marital children are considered not to have a legal relationship with their biological father. So that according to Adat Lawas law, extra-marital children do not have the right to inherit from their biological father, but according to Adat Lawas law there are still several rules that make it possible for the biological father of the child to impose certain obligations on the child and the mother of the extra-marital child. The research question is the legal protection of extra-marital children according to the Customary Law of Kedang Ipil Village, Kutai Kartanegara, East Kalimantan.

This study is a normative legal research.

According to the Marriage Law, a marriage is valid only if it is between a man and a woman, and in accordance with the laws of their respective religions and beliefs, and the



marriage is registered. This means that the married couple must have the same religion or the same beliefs. In addition, marriage must be carried out according to state law, which must be registered in accordance with statutory regulations. Thus, the validity of marriage in Indonesia according to the Marriage Law must be valid according to religious law and valid according to state law.

Marriage according to Adat Lawas law is different from marriage according to the Marriage Law. Marriage according to Adat Lawas law is viewed as part of the customs of the local community. Customary Law Lawas is not a written law, but rather a set of unwritten rules and conventions passed down from generation to generation. It is a law that lives and develops in line with the changing needs of the community. Customary Law is also the customary law of the Kutai Lawas community used to resolve conflicts and disputes through customary forums using local wisdom. Customary Law Lawas is a law that lives and develops along with the changing needs of the community and is not a written law. Customary Law is also a customary law that is passed down from generation to generation and is used to resolve conflicts and disputes in the Kutai Lawas community.

The marriage of the Adat Lawas community is carried out simply, with a traditional ceremony led by the customary chief with simple traditional rituals; there is no blessing, as is done in a Christian or Catholic marriage, or a marriage contract in a marriage according to Islam. It is also sufficient for the local adat leader to legalize the marriage, as long as there is an agreement between the couple. Likewise, if a divorce is sought, a request for divorce is made by submitting it to the traditional/custom leader along with the reasons for the divorce. If it is the wife who is demanding divorce, then the customary leader asks several questions with the intention of clarifying the reasons for applying for divorce.

One of the issues that attract attention to be the object of this research is the status of extra-marital children. In addition to recognizing legitimate children born in a valid customary marriage, illegitimate children are also known according to customary law. Children who are included in the group of illegitimate children according to Adat Lawas law, are children born from marriages that are not valid according to customary law. The following description of what constitutes an illegitimate child can be found below.

One of the children positioned as extra-marital according to Adat Lawas law is a child born as a result of infidelity. According to Adat Lawas, infidelity is a relationship between a man and a married woman, and vice versa between a woman and a married man. In these cases, the term often used is snatching someone's wife or snatching someone's husband. Infidelity according to Adat Lawas law is categorized as adultery, and is a customary criminal offense. Therefore, adultery or infidelity is an act that can be subject to customary criminal sanctions.

If the perpetrator of the offense of adultery or infidelity is caught red-handed (sumbang), then the arresting party is not allowed to take vigilante action. The arresting party is only allowed to take evidence or evidence of the offense of infidelity or adultery. The tools or evidence can be in the form of clothes, pants, sarongs, or the like used by the perpetrator at the time of committing the act. The evidence is then submitted to the party authorized by the local customary community to resolve the act of adultery. The person authorized to settle the case of infidelity or adultery must not have a blood relationship or kinship relationship with the complainant.

Regarding the customary fine to be paid in cash by the perpetrator, the amount was determined to be Rp 80,000 (eighty thousand rupiah), plus a fine of Rp 40,000 (forty thousand rupiah). Thus, total amount of the fine was Rp. 120,000 (one hundred and twenty thousand rupiah). The customary fine must be paid in cash and made in cash at that time.

If you pay attention to the process of resolving infidelity or adultery in the Adat Lawas community, the principles or principles adopted are actually no different from the resolution of criminal cases carried out in the settlement of criminal acts regulated in positive law. This means that the principles of solving customary problems of adultery or infidelity still respect the rights of the perpetrator, such as the prohibition of vigilantism, because vigilantism is not prohibited, it can endanger the perpetrator of adultery or infidelity. However, Adat Lawas has



not regulated the punishment that will be imposed on people who take the law into their own hands against people caught committing adultery or infidelity.

The status of extra-marital children in Adat Lawas law is actually not much different from the status of children born from infidelity or adultery regulated in positive law (Marriage Law). The child is not recognized as a legitimate child. Lawas customary law distinguishes between children born outside marriage and children born out of wedlock. Children born outside marriage occur to male and female couples who are not bound in a legal marriage status according to customary law. Meanwhile, children born as a result of infidelity or adultery occur as a result of sexual relations between a man and a woman, one or both of whom are bound by a valid marriage according to customary law. Meanwhile, children born as a result of infidelity or adultery are children born to an unmarried woman who has sexual intercourse with an unmarried man.

Such offenses are categorized as ordinary offenses and are referred to as "gempang". As an illustration, an example can be given of a pregnancy experienced by a girl without a husband (without marriage) or pregnant as a result of sexual intercourse with a man who does not marry her, until the child is born. In customary criminal offences such cases are resolved using customary criminal justice, namely by imposing on the man who is recognized as the cause of her pregnancy to be responsible for the child she is carrying until its birth. If the impregnating man is willing to admit to his actions, then he must be responsible for the child born from the womb of the woman he impregnated, even without having to marry her.

The man's responsibility is a fine imposed by the customary court in the form of payment of a sum of money which is determined to be 2 x Rp. 80,000 or Rp. 160,000 (One Hundred Sixty Thousand Rupiah). The fine is then handed over to the customary chief. In addition, the man who had impregnated the woman was also burdened with an additional fine of Rp 50,000 (Fifty Thousand Rupiah), and money was handed over in cash to woman who was impregnated as the cost of giving birth.

Furthermore, the child born out of wedlock is entitled to the cost of labor and delivery, and other needs at the time of delivery, such as preparing a swing, preparing baby clothes, and so on. If the biological father of the child continues to provide for the child, then according to the customary law of Kutai Kartanegara, North Kalimantan, the child is considered to be legitimate child of the man who impregnated him, even though he did not marry the woman. The child has the same status as a child born from a valid marriage according to Adat Lawas, including the right to inherit.

The customary fines imposed on men who impregnate without marrying estimation amount of Rp 180,00, - and Rp 50,000, - in perspective of justice are certainly unfair if seen by the woman. A fine of that amount of money for labor costs is certainly very small and worthless and not comparable when compared to the cost of childbirth in a hospital or by using the services of a midwife. Customary fines should be adjusted to the value or flexibly adjusted to the cost of childbirth, so that custom must be flexible to be adjusted to development of the cost childbirth.

However, the customary fine is adjusted from time to time, for example Rp. 500,000 (five hundred thousand) x 10 = Rp. 5,000,000 (five million rupiah). As a substitute for loss or by calculating the price of gold per gram at this time. If you want to change the fine or the amount of customary fines or new rules, the customary elders, the customary council must hold a big erau (big event). Erau is a high level event, but it is very unfortunate that no one can or is able to work on, carry out these activities at this time. This is because the culture, customs and traditions of the Kutai Adat Lawas tribe have been eroded by the times, because the customary elders have decreased and no one wants to continue the ritual of belief.

In addition to the two types of illegitimate children according to the customary law of Kutai Kartanegara, North Kalimantan, also included as extra-marital children whose existence is not recognized are children born as a result of rape. The reason why children born as a result of rape are not recognized as legitimate children is because they were not born as a result of a valid marriage conducted according to customary law. A child born as a result of rape is considered an unmarried child, which the biological father is not obliged to



recognize. In the perspective of justice, such a child is actually felt to be unfair, because the child doesn't want this right to happen to him. Children who are born in the world are basically not because of their will, but solely because of the will of God Almighty, through the process of meeting between spermatozoa originating from men and ovum produced from women's eggs.

The status of extra-marital children in customary law doesn't receive proper legal protection, especially in relation to the right to inherit from their biological father. Extra-marital children are children born from marriages that are not in accordance with Adat Lawas law. Extra-marital children are children born from marriages that are not legal according to customary law.

Justice can be prioritized at the expense of benefit for the wider community. *Gustav Radbruch* said that there is a priority scale that must be carried out, where the first priority is always justice, then expediency, and finally legal certainty. Law performs its function as a means of conserving human interests in society. The purpose of law has a target to be achieved which divides rights and obligations between each individual in society. The law also authorizes and regulates how to solve legal problems and maintain legal certainty.

Children born outside a legal marriage have a negative impact in the eyes of law. The status of child born will be uncertain because there is no authentic evidence that can corroborate that the child is the legitimate child of both parents, his position in the eyes of law is also considered an illegitimate child. Consequently, the child only has a civil relationship with mother and the mother's family. This means that the child doesn't have a legal relationship with his biological father. In the Adat Lawas community, extra-marital children also do not have a legal relationship with their biological father. This status is the same as that found in Article 43 Paragraph (1) of the Marriage Law, which stipulates that children born outside of marriage only have a civil relationship with their mother and their mother's family. The status of extra-marital children is also found in Islamic law and KUHPdt, which in principle determines that extra-marital children do not have a nasab relationship with their biological father.

According to Adat Lawas, a child who is born without a legal biological father, but who is recognized as a legitimate child, is consequently entitled to inheritance from his biological father, just like a child born from a valid customary marriage. Although the biological father of the child is married to another woman, the child must be considered as a sibling of children born to a wife from a legal marriage. The brotherhood of children born out of wedlock with their biological father's children out of wedlock is based on the reason that these children are related by blood so that there is a blood family bond.

If the biological father of a child born outside a valid marriage according to customary law doesn't recognize his child, then the biological father of child must be expelled or ostracized from the community of Kedang Ipil Village, Kutai Kartanegara, East Kalimantan, and must go to forest away from the community for one year. In addition, the person is lowered in the social strata of Kedang Ipil community. Such sanctions actually aim to deter the perpetrator or at least to provide therapy for the perpetrator. In addition, it also aims to prevent the act from being repeated by other members of the community. Such sanctions are more of a psychological sanction for perpetrator, and such sanctions are actually more deterrent than the customary fines imposed in customary courts.

**Conclusion.** According to Adat Lawas law, an extra-marital child is a child born from a marriage that is not valid according to customary law, so that extra-marital children are considered illegitimate children, so they do not have the right to inherit from their biological father. However, extra-marital children receive legal protection by the existence of local customary law. In this case, if the biological father of the out-of-wedlock child is willing to admit his actions, then according to customary law, the child becomes a legitimate child like children born from a valid marriage according to customary law. If the person who committed infidelity or adultery admits his or her actions in the adat court, then the perpetrator is sanctioned with a customary fine, but if he or she does not take responsibility for his or her actions, then the person is expelled to the forest far from the adat community, as a form of psychological sanction that is considered to be deterrent.



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