

Original Reserach Article

Status of Children Out of Marriage: A Review of the Law Regarding Marriage and Civil Law

Annisa Abdullah¹, Kasuwi Saiban¹, Kadek Indrayanti^{1*}

¹University of Merdeka Malang, Indonesia

Article History

Received: 06.01.2023

Accepted: 13.02.2023

Published: 15.02.2023

Journal homepage:

<https://www.easpublisher.com>

Quick Response Code



Abstract: This article investigates how Indonesian law, namely the Marriage Law and the Civil Code, addresses children born outside of marriage and their legal consequences. The adopted strategy employs two distinct techniques, the statute, and comparative law approaches, and is a standard legal research technique. The results indicate that the Civil Code and the Marriage Law have distinct regulatory needs (KUHP). Under the Marriage Law, a child born outside of marriage is only considered to have civil ties with the mother and her family. As the heir of the biological father, the child has no rights. In contrast, the Criminal Code addresses the status of children born outside of marriage.

Keywords: Position, Children out of wedlock, Marriage Law, Civil Law.

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INTRODUCTION

Some people appear to view having sexual experiences before marriage as usual, resulting in many children being born out of wedlock with all of the attendant problems. A child born outside of marriage has only a civil tie with his mother and her family, according to Article 43, paragraph 1, of Law Number 1 of 1974 regarding marriage. According to Article 100 of the Compilation of Islamic Law (KHI) in Indonesia, a child born out of wedlock has only a relationship with his or her mother and family. As a result, only the kid of the biological mother is listed on the birth certificate. Although the number of unmarried births registered by the Population and Civil Registry Office of the City of Samarinda continues to decrease from 2018 to 2021, it is still considered high, as there are still 2,331 cases in 2021 compared to 3,406 in 2018.

A child named David Saktiawan Sihite was born in Samarinda City on May 11, 2008, and was one of the unmarried births there. David Saktiawan Sihite's parents wed in the church on October 27, 2008, and on December 21, 2022, at the Population and Civil Registry Service Office. David Saktiawan Sihite cannot inherit anything from his father because, according to this instance, it is evident that he is an unmarried child. However, according to the Civil Code's (Burgerlijk Wetboek) rules, children who are not married have the

right to inherit property from those who do not have contact with them as long as the parents accept the child as their own. "A further consequence of the father's confession is that the illegitimate child has the right to use the father's surname, which previously used the mother's surname. Thus the child is entitled to alimony from his father.

Furthermore, Law Number 23 of 2002 concerning Child Protection, Article 3 of Law Number 23 of 2002, states that child protection aims to guarantee the fulfillment of children's rights so that they can live, grow, develop, and participate optimally in accordance with dignity. And human dignity, as well as protection from violence and discrimination, for the realization of quality, noble, and prosperous Indonesian children. Based on the description above, this article examines the legal position of a child out of wedlock and the legal consequences that arise for an out-of-wedlock child based on Law Number 1 of 1974 as amended by Law Number 16 of 2019 Concerning Marriage and the Book of Laws Civil (Burgerlijk Wetboek).

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*Corresponding Author: Isah Sarkin Fada

Department of Languages and Cultures, Federal University Gusau, Nigeria

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METHODOLOGY

This type of research is normative legal research because it examines and analyzes the position and legal consequences of children out of wedlock according to the provisions of the Marriage Law and the Civil Code (Burgerlijk Wetboek). The approach is an approach through the law (statute) and a comparative approach (Comparative approach). This research focuses on the position of children out of wedlock in law number 1 of 1974, as amended by law number 16 of 2019, concerning marriage and the civil law code book (Burgerlijk Wetboek).

RESULTS AND DISCUSSION

Due to interests that affect welfare, the situation of children born outside of marriage should be given legal protection. Child protection is a collaborative effort to safeguard, obtain, and fulfill children's bodily and spiritual needs by their interests and human rights (Arief, 1998). In addition, according to Article 22 of Law No. 23 of 2002 on Child Protection, the state and the Government are obligated and responsible for providing facilities and infrastructural support for implementing child protection. Furthermore, Article 23 states: "(1) The state and Government guarantee the protection, maintenance, and welfare of children by taking into account the rights and obligations of parents, guardians, or other people legally responsible for children. (2) The state and Government supervise the implementation of child protection (Gosita, 2004)." Then the provisions of the Civil Code (Burgerlijk Wetboek) regulate parental authority: children born out of wedlock have only civil relations with their biological parents. From the perspective of kid safety (Syukrie, 1996).

To be able to prove the origin of a child can be done by: only birth certificates, birth identification certificates, and the testimony of two adults, accompanied by certificates from doctors, midwives, traditional birth attendants, and others. In principle, the validity of a child born more than 180 days after marriage cannot be denied, as explained in Article 251 of the Indonesian Civil Code (Burgerlijk Wetboek). Article 2 of the Child Protection Act regulates the principles of child protection, notably non-discrimination, the child's best interests, the right to life,

survival and development, and respect for children (Ramulu, 1993).

1. Legal Position of Children Out of Wedlock According to Law Number 1 of 1974 concerning marriage and the Civil Code (Burgerlijk Wetboek)

Article 43, paragraph 1, of Law No. 1 of 1974 Concerning Marriage states that a child born outside of wedlock has no civil tie with anyone other than his mother and her family. Then, Article 44 states, "A husband may contest the legitimacy of a child born to his wife if he can establish that his wife committed adultery and that the child is the result of that adultery." The Marriage Law clarifies that an unmarried child's only civil relationship is with his or her mother and not with the father or the father's family. Decisions regarding the legitimacy of the child's status may be presented to the court in line with the wishes of the parties involved (Hadikusuma, 2007). In addition, Article 272 of the Dutch Civil Code (Burgerlijk Wetboek) states:

"Except for children who are given in adultery, or incest, each child who is allowed out of wedlock, then the marriage of the father and mother becomes valid, if both parents before marriage have acknowledged it according to the provisions of the law, or if the recognition is made in the marriage certificate itself." Then, Soedharyo Soimin explained that, according to the Civil Code (Burgerlijk Wetboek), there are three levels of legal status for children born outside of marriage: children born outside of marriage whom both parents have not recognized; children born outside of marriage who have been recognized by one or both parents; and the child born outside of marriage becomes a legitimate child, as a result of which both parents enter into a legal marriage" (Soimin, 1992).

Therefore, if the kid born outside of marriage is legally acknowledged, it will have a legal relationship with the parents who recognize it so that he may inherit the property. There are two types of confessions, including both voluntary and coerced confessions. Children born outside of wedlock may only have civil ties with their biological mother and her family, according to Article 43 of Law Number 1 of 1974 Governing Marriage. This idea is particularly destructive to children since it opposes Article 28D, paragraph 1 of the 1945 Constitution of the Republic of Indonesia, which states, "Everyone has the right to recognition, guarantees, protection, fair legal certainty, and equal treatment under the law." Such as the inability to list the biological father's name on the birth certificate and family card owing to inheritance. Then, according to some, the provisions of Article 43 Paragraph (1) of Law Number 1 of 1974 Concerning Marriage are contrary to the 1945 Constitution of the Republic of Indonesia, so in 2010, the Constitutional Court, hereafter abbreviated as MK, issued Decision

Number 46/ PUU-VII/2010, which provides legal protection that children born outside of marriage have a civil relationship with their biological father if it can be proven. Article 43(2) of Law No. 1 of 1974 on Marriage states, "The position of the child referred to in paragraph (1) shall then be governed by a Government Regulation." However, since the implementation of Law No. 1 of 1974 until the revision of Law No. 16 of 2019, the Government has yet to produce a regulation governing the legal status of children born outside of marriage.

The Constitution prohibits the investigation of a man who can be proclaimed the biological father of a child born out of wedlock. However, a court can decide whether or not it is possible to discover who the father is. (According to Article 280 of the Civil Code) (*Burgerlijk Wetboek*). In addition to Presidential Instruction No. 1 of the Republic of Indonesia from 1991 regarding the Compilation of Islamic Law, KHI is abbreviated below (J. Satrio, 2000). KHI is a practical implementation rule that supplements the Marriage Law for Muslims. Furthermore, Syarifudin stated, "The Marriage Law is the parent of the KHI because most of the contents of the Law were transferred into the KHI although with a different narrative and formulation. According to Article 99 KHI, a legitimate child is "a child born in or as a result of a legal marriage, the result of the actions of a legal husband and wife outside the womb and born by the wife" (Syarifuddin, 2007). Children out of wedlock are not born under a legal marriage bond, both religiously and legally invalid in Indonesia.

2. Legal consequences for children out of wedlock based on Law Number 1 of 1974 concerning Marriage and based on the Civil Code (*Burgerlijk Wetboek*)

Among the legal repercussions of having a kid outside of marriage are the following: A child born out of wedlock only has civil relations with the biological mother and her family. If female minor wishes to marry, she must utilize a judge or official appointed by the Minister of Religion to serve as her marital guardian. In the meantime, the provisions of the Civil Code (*Burgerlijk Wetboek*) regulate the legal consequences, including the following: if the child does not obtain recognition from his biological father, then the child has no civil relationship with his biological father; can obtain recognition by way of biological father and mother biological to face civil registry officials to acknowledge the child out of wedlock; can obtain recognition by doing it at the time of the marriage of the biological parents; can obtain recognition by doing it at the time the In accordance with Law No. 1 of 1974 Concerning Marriage, the legal consequences of a child born outside of marriage relate to the problem of the child's rights and obligations, the problem of inheritance (a child born outside of marriage can only inherit property from the mother), and

guardianship issues (children born outside of marriage cannot obtain guardianship from their biological father) (children born out of wedlock cannot obtain guardianship from their biological mother). Nevertheless, the Constitutional Court's Decision 46/PUU- VII/2010 protects various non-Constitutional rights. The right to marry is also the right to inherit.

In contrast to Law Number 1 of 1974 Concerning Marriage, the Civil Code (*Burgerlijk Wetboek*) already regulates the legal consequences for children out of wedlock related to the problem of inheriting the child has the right to receive the same distribution of inheritance as other children. In addition, the right to ask permission to marry from parents who admit that as long as they are not yet mature, this provision can be seen in Articles 39 and 47 of the Indonesian Civil Code (*Burgerlijk Wetboek*). There is an obligation of alimony from a child to a parent who recognizes it, this provision can be seen in Article 328 of the Civil Code (*Burgerlijk Wetboek*), and there will be a guardianship relationship with the father or mother who recognizes it, which occurs by law, this provision is contained in Article 909 of the Civil Code (*Burgerlijk Wetboek*).

Regarding guardianship and inheritance, legal consequences for children out of wedlock according to the Civil Code (*Burgerlijk Wetboek*) can be described as follows: legal consequences for children out of wedlock related to guardianship rights, in civil law, there is a principle that must be upheld, namely if a person can carry out legal actions and can be asked accountability, then those who carry out the legal action will be recognized as having the authority to carry out the legal action. "The authority to carry out legal actions has two meanings, namely: skill or ability to act because it fulfills legal requirements (bekwaamheid, capacity); power or authority because it is recognized by law even though it does not meet legal requirements (bevoegdheid, competence) (Muhammad, A., 1993).

The provisions of Law Number 1 of 1974 concerning Marriage in Article 50, there is no further explanation regarding guardianship of children born outside of marriage, but only stipulates that guardianship is carried out for children who are not under parental authority. "Guardianship (*voogdij*) is the supervision of minors who are not under the authority of their parents, and the management of the child's objects or assets is regulated by law. Children under guardianship are the second legitimate child whose parents have been deprived of parental authority; legitimate children whose parents are divorced; and children born out of wedlock (Subekti, 1983).

In the meantime, the Law No. 1 of 1974 on marriage does not control the interests of children born out of wedlock that can be exercised by their guardians as for legitimate children under parental authority as

outlined in Article 50 paragraph (2) of the Law No. 1 of 1974 on marriage. In this regard, Abdulkadir Muhammad noted, "Because the guardian's power genuinely transfers the authority of the parents, the guardian can also represent the child in all of his legal actions inside and outside of court, guardianship of the child's person and property. Children born outside of wedlock are not under the jurisdiction of their parents. Therefore, the guardian will have the right to represent the kid in all legal proceedings, both in and out of court, and guardianship over the child's person and property (Muhammad, A., 1993). Whereas for children born out of wedlock who are subject to the provisions of the Civil Code (*Burgerlijk Wetboek*), their right to be represented in all their legal actions both inside and outside the court, guardianship regarding the child's personality and property, according to the Code -The Civil Law Act (*Burgerlijk Wetboek*) Article 331b point 3e which states that: for legalized illegitimate children, their position is not under guardianship, but under the authority of their parents, for illegitimate children who are recognized, guardianship is exercised by a parent who acknowledges him or an appointed guardian. For discordant children due to marital relations, where both parents receive a dispensation to marry, their position is not under guardianship but under the parents' authority. For adultery children and incestuous children from blood relations, guardianship is not carried out by the mother or biological father. However, after the enactment of the Marriage Law, the child is under the mother's guardianship or a designated guardian."

According to the judgment 46/PUU-VIII/2010 of the Constitutional Court, any child born outside of marriage, including a child born out of wedlock, an illegitimate child, or an adulterous child, is legally protected, either on his initiative or by a party representing his interests. His guardianship rights are enforced by petitioning or suing his biological father in court. The Civil Code (*Burgerlijk Wetboek*) requires a civil relationship with both parents, namely by the biological parents recognizing or validating the child's status, albeit not all children born outside of wedlock can be legalized and recognized by their biological parents.

Next, a related comparison position of children out of wedlock is based on KHI. According to KHI, there are at least five rights related to children, namely: due to knowing the origin; article 103 of the KHI provides that "the origin of a child may be determined using a birth certificate or other evidence." In the absence of a birth certificate or other evidence, the Religious Courts may issue a stipulation regarding the child's origin after a careful examination of valid evidence. Based on the Religious Court's decision, the Population and Civil Registry Service, which falls under the jurisdiction of the Religious Court, may issue a birth certificate for the child in question.

The right to receive care and education from parents in principle, every child has the right to receive care and education from both parents. Article 28B of the 1945 Constitution of the Republic of Indonesia states that "every child has the right to survival, growth, and development and is entitled to protection from violence and discrimination." The mandate of this Constitution is emphasized in Law Number 23 of 2002 concerning Child Protection Articles 4-18, which states that "the rights of the child include the right to receive education and teaching." Moreover, this obligation rests on the shoulders of the mother (Candra, M., 2008).

Article 100 KHI, which states that "a kid born out of wedlock has only a relationship with his mother and her family," grants the right to subsistence. According to the rules of Article 100, the biological father of the kid is not required to support the child. Hence the child has no legal right to receive maintenance from his biological father. The biological father does not have the right to marry off the child, nor does he have the right to be the child's marital guardian. This is reinforced by Article 20 KHI, which states, "A man who satisfies the qualifications of Islamic law, namely being Muslim, Akil, and baligh, is the marriage guardian." According to the rules of Article 100 KHI, "a kid born out of wedlock has only a relationship with his mother and her family in terms of inheritance rights." Regarding inheritance, Article 171 letter c KHI states, "Heirs are individuals who, at the time of the heir's death, have blood or marriage ties to the heir, are Muslim, and are not prohibited by law from becoming heirs."

CONCLUSIONS

Based on the preceding description and analysis, several conclusions can be drawn, including the fact that, according to Law No. 1 of 1974 concerning Marriage Article 43 Paragraph (1), the legal status of children born outside of marriage is limited to civil relations with the biological mother and her family. A child born outside of wedlock has the right to a civil relationship with his biological father if this can be scientifically or technologically demonstrated. In the interim, according to Article 280 of the Dutch Civil Code (*Burgerlijk Wetboek*), an illegitimate child may acquire the legal status outlined in that section. Acknowledging an illegitimate child establishes a civil relationship between the child and his or her biological parent. The legal consequence of this admission is that children born outside of marriage receive full civil law rights, including inheritance and guardianship. In addition, according to Law No. 1 of 1974 regulating marriage, the following legal implications apply to children born outside of marriage: A child born outside of wedlock has no civil tie with his biological father and only a civil relationship with his mother and her family, meaning he cannot inherit. However, if their biological father is accepted, they will have the same legal rights as children born through lawful marriage.

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Cite This Article: Annisa Abdullah, Kasuwi Saiban, Kadek Indrayanti (2023). Status of Children Out of Marriage: A Review of the Law Regarding Marriage and Civil Law. *East African Scholars J Edu Humanit Lit*, 6(2), 60-64.
