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## Living in a Legal Limbo: Mechanisms to “Fix” The Legal and Social Positions of Unregistered Children in Indonesia

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### Cover Page Footnote

We would like to express our gratitude to the organizers of the 39th RIMO (Association for the Study of Islamic and Middle Eastern Law) Symposium, for giving us the opportunity to start this project and stimulating discussions. We also thank Stijn van Huis for his comments on the draft version of this article.



## Living in a Legal Limbo: Mechanisms To “Fix” The Legal and Social Positions of Unregistered Children in Indonesia\*

Hoko Horii and Theresia Dyah Wirastrii\*\*

### Abstract

*This paper examines the reasons and consequences of a lacking birth-registration in Indonesia, as well as the mechanisms to ‘fix’ it. In order to avoid the legal and social consequences of the lack of registration, creative and ad-hoc solutions are crafted – not only by the individual families who face the problem, but also by their community, including local and state actors who are involved in the mechanisms and paperwork. These mechanisms exist also because of state’s reluctance to enforce regulation related to unregistered marriage and children born into unregistered marriage as these matters are religiously and culturally delicate. We argue that the state facilitates all types of unregistered marriages, which results in blurring legal parameters of marriage. This leads unregistered children to be living in a legal limbo: their legal status and attached rights remain unclear, not being fully ensured of their rights to public services, inheritance, and child maintenance.*

**Keywords:** unregistered children, marriage registration, state legality, street-level bureaucrat

### Abstrak

Artikel ini mendiskusikan alasan dan konsekuensi kurangnya akta kelahiran di Indonesia, serta mekanisme untuk 'memperbaiki' kondisi ini. Solusi kreatif maupun ad-hoc dirancang untuk menghindari konsekuensi hukum dan sosial dari tidak dilakukannya pendaftaran, tidak hanya oleh keluarga individu yang menghadapi masalah, tetapi juga oleh komunitas mereka, termasuk aparat di tingkat lokal maupun pusat yang terlibat dalam mekanisme dan penerbitan dokumennya. Berbagai mekanisme ini muncul juga sebagai akibat dari keengganan negara untuk menegakkan peraturan terkait perkawinan tidak terdaftar dan anak yang lahir dari perkawinan dimaksud karena sensitivitas persoalan tersebut dari sisi agama dan budaya. Kami berpendapat bahwa negara kemudian memfasilitasi berbagai bentuk perkawinan tidak terdaftar, sehingga mengaburkan parameter hukum mengenai perkawinan di Indonesia. Hal ini menyebabkan anak-anak yang tidak terdaftar hidup dalam ketidakpastian hukum: tidak jelasnya status dan hak-hak hukum mereka, tidak sepenuhnya dijamin haknya atas pelayanan publik, hak untuk mewaris, dan mendapatkan nafkah.

**Kata kunci:** anak tidak terdaftar, pencatatan perkawinan, legalitas negara, *street-level bureaucrat*

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## I. Introduction

On a bright Sunday afternoon in Denpasar, the capital town of the island of Bali, I was walking in an outdoor park with a teenage girl Ratna, her mother, and her baby-boy. We were discussing a social problem they face: Ratna became pregnant when she was 16, but her boyfriend and his family did not recognize the paternity of the child back then, and did not want to marry her. Ratna, as an unmarried teenage mother, gave birth to her baby-boy Pranata, whom she was holding in her arms while we strolled around the park. As a consequence of her unmarried status, Ratna's baby-boy did not belong to any kinship system, since in the Balinese customary socio-legal structure, a baby always follows their father's lineage. And within the Balinese customary system, fatherhood is only recognized when a man has a marital relationship with the mother of the baby.

Ratna's relatives could not allow her baby to enter their family temple. "Baby boys have to go back to their father's family because of the inheritance system that applies in Bali", Ratna's mother said. The situation is problematic for Ratna's family because "When later Pranata becomes an adult he must have an ancestral temple, because for any important event, Pranata must ask permission from his father's family." Belonging to the family temple is central to one's life as a Balinese, as the temple is a place of worship, and people's life events and connection with their relatives and community are all organized based on the temple they belong to.

Pranata's position is not only problematic in the customary system, but also in the state legal system. Ratna, as an unmarried mother, could only obtain '*akta tunggal*' (single birth certificate) for her son. This single birth certificate indicates only the mother's name, while the standard birth certificate contains both mother's and father's names. Furthermore, under the single birth certificate the child is considered an extra-marital child ('*anak luar kawin*') which bears the connotation of 'illegitimate' child. With the single birth certificate, the child does not have a legal right to inherit from the father (more in Section IV).

Children without birth certificate are seen as a major problem in Indonesia. The National Child Protection Commission (KPAI) has estimated that 50 per cent of Indonesian children do not have a birth certificates, in most cases because of their parents' unregistered marriages (Nurcahyani 2012). This is an estimate, as no reliable statistics about unregistered children exist and the existing ones vary widely. According to UNICEF's report from 2013, a total of 41% of Indonesian children are not registered within one years from their birth (UNICEF 2013, 43). Government figures show that the



situation may be even worse in some provinces. In East Nusa Tenggara (a group of islands east of Bali) for example, it was reported in 2004 that 95.4% of all children did not have birth certificates (AsiaNews.it 2004). PUSKAPA (*Pusat Kajian Perlindungan Anak*, Center on Child Protection)'s analysis of Indonesia's 2019 National Socio-Economic Survey (SUSENAS)<sup>1</sup> data suggests 14% of children under 18 years do not have a birth certificate. The proportion goes up to 25% for children under 5, and 45% for children under 1 (Jati et al. 2021).

Indonesia has one of the lowest birth registration rates among Southeast Asian countries too. According to UNICEF, birth registration rate is 99.4% in Thailand, 96% in Vietnam, 90% in Philippines, 74.8% in Lao PDR, 72.4% in Myanmar, 66.6% in Indonesia, 62.1% in Cambodia, and 55.2% in Timor-Leste (United Nations Children's Fund 2015, 5).

The rate is likely to drop further. The 2019 constitutional court decision to raise the minimum age of marriage for girls to 19 years (previously 16 years), was a triumph of women's organizations who sought to eliminate child marriage, but the decision is likely to cause a hike in unregistered children. According to the data of BPS, percentage of women aged 20-24 who have ever been married below 18 was in 2012 25%, and for those who married below 16 then was much lower, 5.4%. From this we can calculate that the percentage of girls who married at 16 or 17 constitutes 19.6% (Badan Pusat Statistik (BPS) 2016, 28). The percentage of married adolescent girls or "*remaja perempuan*" (15-19 years old) varies by region, from 3.1 – 18.2%, and the national average is 11.1% (Ibid, 42). This corresponds with approximately 1.100.000 marriages. As a vast majority of children are born within two years of marriage this suggests that one million *more* new-born may go unregistered because of the new minimum age that has been raised with three years.

Having no birth certificate has dire consequences for children. Birth registration is understood as a child's "fundamental right" (UNICEF Office of Research- Innocenti 2002) and the United Nation's Sustainable Development Goal 16 set universal birth registration by 2030 as a target (Rashid 2015). Without birth certificate, Indonesian children are not able to be enrolled in schools, to apply for an ID card (KTP), to apply for jobs, nor to get a marriage certificate. They might be abused, forced to work underage, trafficked, or illegally adopted. They cannot access proper health care. During the

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<sup>1</sup> <https://sirusa.bps.go.id/sirusa/index.php/dasar/view?kd=1558&th=2019>



pandemic, they also could not obtain social assistance from the government (Kusumaningrum et al. 2022). All these uncertain conditions are caused by their fragile legal position, which often leads to social exclusion and marginalization.

This paper examines the actual effects and consequences of a lacking birth-registration, based on real-life accounts of those who have faced the problem. Our informants dealt with it in different ways – many of them found creative solutions to obtain a birth certificate for their children. From their accounts and ordeals that they went through to obtain the certificate, we can understand what the legal and social consequences are of not having a birth certificate and how serious these consequences can be. And we also found that the solutions to *avoid* these consequences are crafted not only by the individual families who face the problem, but also by their community, including local and state actors who are involved in the paperwork and rituals. What do these ad-hoc solutions mean for the population administration ‘function of the law’ in view of protection of children’s rights? We will engage with this question by analysing and evaluating the empirical knowledge from the cases of children from unregistered child marriages and unregistered polygamous marriages.

Following this introductory section, Section II will outline the regulations on birth registration in the Indonesian state legal system, as well as to summarize a pivotal judgment by the Constitutional Court on the legal status of a child born outside of wedlock. Section III then showcases different reasons why children become unregistered, including the polygamous marriages and child marriages of their parents. Section IV and V explores legal and social consequences of being unregistered in Indonesia. Section VI serves as a more theoretical exploration on the ad-hoc solutions for birth registration in problematic situations, in light of the function of the law and of children’s rights.



## II. Regulations on birth registration in Indonesia

### A. State legislation and falsification of documents

The Indonesian Law No.1 of 1974 on Marriage (hereafter Marriage Law 1974) states that every marriage is required to be registered according to the applicable regulations (Article 2 para 2), including mixed marriages (Article 61 para 1). Along the same line, Law No.23 of 2006 on Population Administration (amended by Law No.24 of 2013, hereafter Population Administration Law 2006) stipulates inhabitants of Indonesia to register a child in the birth registry within 60 days of the child's birth, after which the parents will receive a birth certificate. The Marriage Law 1974 does not contain legal sanctions for non-registration, while Government Regulation No.9 of 1975 sets a maximum fine of RP 7,500 for all persons who conclude a marriage without prior notice to the responsible marriage registrar (Article 45).

In addition, the Law No.23 of 2006 on Civil Registration (hereafter Civil Registration Law 2006) enables local governments to impose heavier administrative fines on failing to register life events such as birth and marriage, as well as legal sanctions for forgery and fraud by applicants and marriage registrars (see Van Huis & Wirastri 2012 for more details). Falsification of documents in the birth/marriage registration is a common practice in Indonesia, and a number of studies have demonstrated how various actors at villages and registration offices work to find ways to facilitate the illegal paperwork. Butt et al. (2016) have detailed the role of nonstate actors in Lombok: these middlemen help the rural villagers – for a fee – to deal with the paperwork at the registry offices, by “add(ing) false names on census documents, slip(ping) in a photocopy of a falsified identity card or request(ing) an official letter from a village head” (Ibid, 799). The official registrars do not really view the false documents as a problem, and they close their eyes because they value “real relationships” over “what gets put on the certificate” (Ibid).

In West Java, Grijns and Horii (2018) have observed similar practices and attitudes of actors towards the official paperwork on marriage. When underage parties marry, a religious marriage ceremony is a sufficient step to satisfy the eyes of their neighbors, yet, without registration such a marriage is not legal per state law. The trick is thus how and when to register underage religious marriage to legalize the marital union. Three mechanisms are used: (1) *isbath nikah* (having a marriage formally recognized retroactively by the court), (2) secret marriage (*nikah siri*) that remains unregistered by the State but is locally known (and often registered) by the community, and (3) raising



the age of the bride or groom by changing the birth date in the required documents (for details see Grijns & Horii 2018, 461-462). In these procedures, *amil* (assistant marriage registrar) and the village head are central actors: they hand out papers and arrange unofficial birth certificates, in order to help people with marriage and birth registration. They, as intermediaries between state institutions and the people, co-create ad-hoc solutions by circumventing procedural rules, leading to a chain of violations of rules.

The widespread practice of false papers suggest that it is a part of a more general ambivalence about documents and state institutions. Butt et al. (2016) argue that Indonesians have a complex relationship with documents that is partially grounded in Suharto era efforts to develop new governance forms using documentation as surveillance and authority. People feel that legal identity does not guarantee a good life and “legal identities are cocreated through collaboration among staff, local community workers and families” (Ibid, 799).

## **B. The 2012 Constitutional Court case**

The Constitutional Court took what in Indonesia is considered a radical position on the legal status of children born out of wedlock in its 2012 ruling. The ruling established that children born out of wedlock have a ‘civil relationship’ with their biological father if medical technology can prove the paternity. Prior to this ruling, the civil relationship between father and child arose exclusively from a child’s being born into the father’s marriage that has been concluded and registered according to the 1974 Marriage Law.

This case is relevant to this paper’s topic in that, at least prior to 2012, children born out of wedlock had to be registered in the single birth certificate without their father’s name. This meant that the father had no legal guardianship, the father formally had no legal financial responsibilities, and the child no maintenance and inheritance rights. The way in which the 2012 decision has been implemented differs. Nurlaelawati and Huis’ (2019, 372) study has indicated that “general courts tend to allow for legitimation of non-Muslim children born prior to the marriage, whereas Islamic courts do not allow this for Muslim children, as that is considered to be in conflict with core Islamic concepts”. This means, at least in some cases, civil relationship is established, thus birth certificate with father’s name can be issued, even when the child is born out of wedlock.

The controversy and reluctance in implementing the constitutional court ruling suggest that birth registration in Indonesia is a deeply religious issue as it relates to the sanctity of marriage. The legal status of the child is fully dependent on his or her civil





relationship with the father. Consequently, the legal documents about birth and paternity determine the rights the child can claim in the course of his or her life. Acknowledging the civil relationship between a premarital child and his/her biological father is considered to be in conflict with the Islamic concept of blood relationship (“*nasab*”), therefore, giving equal legal identities and rights to premarital child is met with resistance and reluctance by actors in Islamic institutions, including the religious courts.

### C. The 2013 Constitutional Court case

Another Constitutional Court case in the following year 2013 also ruled in favour of removing a barrier to birth registration. Prior to its ruling, Article 32 (2) of the Population Administration Law 2006 required parents to obtain approval from the court if they were more than a year late in registering the birth of their child. The 2013 decision removed this requirement to ease the burden of cost and time for the population. The court emphasized that the process in court is not an easy process for ordinary people, therefore, having to obtain court approval can result in the obstruction of citizen’s constitutional rights to legal certainty (ASH 2013). The court considered that a person without a birth certificate does not exist in a legal sense within the state, and that a birth certificate is vital as it provides a guarantee of protection and legal certainty for a person’s rights as an individual and a citizen (Sumner & Kusumaningrum 2014, 22).

Following the decision, key articles in the Law on Population Administration 23/2006 were revised and issued as Law Number 24 Year 2013. The notable amendments included:

1. It provides a legislative basis for the Constitutional Court decisions (i) of 2012 to ensure that a child has a civil relationship with both the father and the mother in cases where a religious marriage has taken place that has not been legally registered and (ii) of 2013 to remove the requirement for a General Court case to obtain a birth certificate for children over 1 year of age. In particular, there will be a new requirement replacing the requirement for a marriage certificate for couples where (i) they have a religious marriage but have not obtained a marriage certificate and (ii) the father acknowledges his child in a statutory declaration (*surat pengakuan anak oleh ayah*).
2. The government now has an obligation to actively reach out to the community to facilitate birth registration.



3. Civil registration is now free of charge irrespective of the time of registration. Fees and fines for late registration will no longer be applied by civil registry officials.
4. There is a criminal sanction for collecting any kind of fees.
5. Registration can be done in the place of residence. (Ibid)

Despite these decision and revisions that ease birth registration, until today the registration rate remains low in Indonesia. The next section outlines different reasons why children become unregistered.

### III. Why children become unregistered

This section, with the following four sub-sections, showcases different reasons why children become unregistered: financial, geographical, cultural, and underage and polygamous marriage.

#### A. Financial

The first reason why parents don't register their children is financial. Before the Law on the National Civil Registration was enacted, a birth certificate costed between 5,000 and 10,000 Indonesian rupees. As the annual per capita Gross National Product in Indonesia is about 7.8 million rupees, the registration cost was not insignificant therefore not really accessible to ordinary or low-income households (AsiaNews.it 2004). The Law made the registration free of the cost, however, it is not clear whether all regencies have implemented free birth registration, and some studies have documented that there are usually various unofficial costs involved: travel cost to the registration office, pocket money paid to intermediary actors (Grijns & Horii 2018, 463; Van Huis 2015).

Until today, the children-registration rate in Indonesia is still lower in the low-income, low-education population residing in rural areas. No less than 62.5% of children without birth certificates live in the poorest 40% in the country, followed by 18.5%, 12.9% and 6% respectively in the third, fourth and the richest quintile (Sumner & Kusumaningrum 2014, 35). A 2014 study by PUSKAPA also reveals that children whose parents or caregivers live without physical disabilities are five times more likely to have a birth certificate than those whose parents or caregivers live with disabilities (Ibid, 39), which suggests a further link between the registration rate and the living condition (including financial). PUSKAPA study revealed that discrimination against people with



disabilities is one of the factors for non-registration, leading some people choose not to register them (Kusumaningrum et al. 2021).

## **B. Geographical**

In addition to the financial condition, geographical location seem to explain the low birth registration rate as well. Data shows that the number of children without a birth certificate in rural areas is double that of children in urban areas (Sumner & Kusumaningrum 2014, 2). In its efforts to increase the registration rate, the Indonesian government has recently “expanded civil registry offices, simplified documents, and eliminated over-the-counter fees for registering within 60 days after birth” (Butt & Ball 2017). These efforts favor sedentary, urban, and literate families and registration remains cumbersome with many hidden costs for low-income, rural, and migrant families (Butt et al. 2016). Within the decentralised system of the Indonesian government, the national registration drives have had more impact in the central area of the country, but in remote regions, an imperfect registration system persists (Butt & Ball 2017).

Long distances, lack of transportation, and poor road conditions make it more difficult for people to come to the registry office (Kusumaningrum et al. 2021). The rural residents live far away from even the closest registry office, which present barriers for families. Schools are also often far away, so less children are enrolled in schools, as some cannot afford the time and transportation cost to attend schools. Because less children attend public school anyway, there is also less perceived need to obtain the government documents, which is required to access education and other public services.

## **C. Cultural**

Alongside with the above-mentioned financial and geographical reasons, perhaps the most eminent reason for not having birth certificate lies in the cultural meaning of birth registration. A child’s parental relationship is laden with legal, religious, and cultural meanings and consequences in Indonesia, therefore, Indonesian parents do not consider birth registration as a neutral administrative act, but, as an act which may recognize, reject or unveil the relationship between the mother, father and child (S. C. Van Huis 2019).

Butt et al. (2016) also demonstrated that a family’s sense of belonging draws primarily from relationships in the community and the region, and the state membership that is signified in the government documents is only a secondary concern. Therefore, most Sasak families in Lombok choose not to register their babies at birth and widely



used false documents and family cards (*kartu keluarga*) later to get the national identity cards (KTPs), which allowed them access to public health and social services when they need them. There are windows of opportunities for manipulating identities in the time between a child's birth and the moment the birth is registered as a civil registry. "This temporal gap allows families to negotiate parentage and create family structures in ways that incorporate the child into the home and produce a legal identity for the child." (Ibid, 797).

In sum, birth registration in Indonesia is loaded with cultural, social, and religious meanings<sup>2</sup> that are embedded in each community, but not necessarily associated with the state administration or membership. These meanings associated with birth registration make people indifferent, reluctant, or ignorant to register the birth of their child.

#### **D. Underage marriage and polygamous marriage**

So far in this section we have identified that poor, rural, illiteracy, and migrants' families are more likely to have no birth certificate than other families. We have discussed the cultural and religious meanings of birth registration that explain why many children in Indonesia remains unregistered, at least shortly after their birth. We also have seen that their families later on manage to obtain birth certificates for them by manipulating and falsifying documents, when it becomes necessary to access public services. There are yet other important reasons why parents are *not able to* legally register their children's birth: because their children are born within underage or polygamous marriages, that cannot legally be registered under the state legal system.

In case of underage marriage, most of these marriages result from unplanned premarital pregnancy of teenagers. Most of the informants from Bali and West Java consider it important to obtain birth certificate as it will be needed later to enroll their children in school.<sup>3</sup> The way they try to obtain it varies. One way is to simply wait for the couple (i.e., the parents of the child who needs the birth certificate) to reach the minimum age of marriage to register their marriage. In most of these cases, before they register their marriage they are already 'married' under their respective customary and religious laws. Customary law and rituals vary in each region and community of Indonesia, but in most

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<sup>2</sup> Furthermore, the patriarchal value is reflected in the system of birth registration system itself: the current Indonesian civil registry system is centered on the head of the family, which has to be a man.

<sup>3</sup> For instance, interview with a couple who registered their marriage by manipulating the age on their identity card, 18<sup>th</sup> May, 2017.



customary legal systems it is an essential issue to have a childbirth within customary marriage. In Bali, for instance, customary marriage ceremonies may take place only on ‘*hari baik*’ (‘good day’), so planning a ceremony becomes even more urgent when the bride is already pregnant – sometimes the bride gives birth directly after her customary marriage ceremony.<sup>4</sup> If giving birth takes place before the ceremony, the infant’s family has to conduct *mecaru*, a purification ritual, which could be very costly and shameful.

So, pregnant couples usually rush their customary marriage ceremonies and only later go to the registry office (*Kantor Catatan Sipil* for non-Muslims, and *Kantor Urusan Agama* for Muslims) to have it state-administered as well. In *Kantor Catatan Sipil* (hereafter KCS) in Bali, when the child was born before the date of the customary marriage, the child’s birth can’t be registered under the fathers’ name. Customary marriages are therefore essential for pregnant women. A marriage registrar from KCS explained:

*People who come to KCS have already done customary marriage, sometimes a few years before coming to KCS. They come to KCS only after they have reached the minimum age of marriage under the state law.*<sup>5</sup>

*For the birth certificate, once a birth occurs it can be registered straightaway and there is no time limit. There are two possibilities for birth registration. If the parents get married based on religious law, let’s say on 15 February 2016, the child would have her/his father’s name in the birth certificate when she/he was born after the date of the customary wedding ceremony. If the child was born before the date, she/he would not have her/his father’s name on the birth certificate. So, to have father’s name on it, child needs to be born after his/her parents’ customary marriage ceremony. Even if the baby is born only one day before the customary marriage date, birth certificate cannot be issued, but only single birth certificate.*<sup>6</sup>

In West Java we observed the practice of raising the age of the bride or groom by changing the birth date in the required documents, thereby enabling them to receive their official marriage certificates and subsequent birth certificates when the child is born. This is facilitated by the village head and staff, assistant marriage registrar or registration office officials, who in most cases receive varying amount of pocket money in return. The manipulation of age is also used to let the bride “jump” to 17<sup>7</sup>, the minimum age for an identity and family card, which opens doors to factory work and welfare support (Grijns & Horii 2018, 461).

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<sup>4</sup> Interview with applicants of marriage dispensation, waiting room of Civil Court (Pengadilan Negeri) in Bangli, 8<sup>th</sup> June, 2017.

<sup>5</sup> Interview with KCS official, Denpasar, 20<sup>th</sup> March, 2017.

<sup>6</sup> interview with KCS official, Denpasar, 3<sup>rd</sup> July, 2017.

<sup>7</sup> When the research was done, the minimum age of marriage was still 17 years. Since 2019, its is 19 years old for both men and women.



Yet another intriguing way is to register the underage girl's infant as her sister – thus the child of the girl's mother. Butt and Munro (2007, 587) note that this is a common practice in highland Papua: 9 out of their 10 respondents who had given birth outside marriage, the parents of the unmarried girl took the infants in as their own. The infants, then, grow up to call her mother 'sister' and her grandmother 'mother'. The author's research in Bali also observed the same practice in case unmarried pregnant girls and her families are unable to find a solution to marry under customary nor state legal system.

Thus, many children from underage marriage somehow do get registered. An exception is when the families see no need for the child's birth registration, notably when their community live in isolation from the rest of the society. For instance, the author interviewed several people from a small community who lived in Denpasar for two or three generations, with women and children working as carriers (*tukang suun*) at a traditional market or men working as parking guards or construction workers. They are all from a village from one of Bali's most remote and poorest areas, living in a small residential complex (*kost*). They seem to have little interaction with the rest of the world, and they only marry within their circle. Many of them have never had any schooling experience and are illiterate. For them and for their way of life, the state's registration of marriage is not of much relevance nor practical importance, as they live outside of the public system anyway. None of the underage marriages in their community that I studied were registered, nor were their babies' births – and it was not something they were concerned about or talked about.

In sum, even though their underage marriage cannot be legally registered, there are a number of ways people manage to get the necessary government paperwork, when these documents were perceived of practical relevance. These methods can sometimes be cumbersome and costly, and how and when they go through such process depends on their resources (if they have network and money to do so), their needs (if they want their children to go to school), and awareness (if they know about the registration system and procedure).

Registration of children from unregistered polygamous marriage is somewhat more complicated. One of our informants recounted the story of her cousin's polygamous marriage: let us call her cousin Rita. Rita is a highly educated woman with a PhD degree in Aceh. She has been married to her husband for 8 years and they have 3 children, and she only discovered about her husband's second marriage after the birth of her second child. She found out about his second marriage by following her husband returning to his



hometown, and was shocked, but other people convinced her that “this is okay, because it is not *zinah* (sin, extra-marital sexual intercourse) as he is married to the second wife”.

Rita’s husband had three children with his second wife – let us call her Rina. As their marriage was not registered, all of their children initially were also not registered (they did not have birth certificate). Only the first child – let us call her Dewi – became registered when Rina sent her to live with Rita. Rita and her husband registered Dewi under their family card, as one of their children. They used *Surat Pertanggungjawaban Mutlak* (SPTJM, a Statement Letter in which a couple declares itself to be married, confirmed with signature by local officials), which section VI A of this paper will explain – calling it “the magic letter” – they just filled in the form and the husband gave the signature to register Dewi.

When they enrolled Dewi to go to school, the head master of the school came to know their situation and she checked all the documents – finding out that Dewi had a different mother. The head did not problematize it and just accepted Dewi at the school as she felt “sympathetic, and thought Rita was brave to manage the situation”.

Whether the other two children of Rina can be registered in the same way is unclear. Our interviews with respondents suggest that registration of children born into unregistered polygamous marriages is more difficult because the formal mechanism of *isbath nikah* is not available to them. Hence, many children from unregistered polygamous marriages remain unregistered, rendering them and the second wife vulnerable under the state legal system. While mechanisms like SPTJM might work and actors involved might be sympathetic and cooperative, the legal status of these children remain problematic which makes the future enjoyment of their rights uncertain.

#### IV. Legal consequences of being unregistered

Couples put a lot of effort into getting their children registered as children born into a marriage under the state system and obtaining a birth certificate – to have their legal identity and parenthood recognized by the state. State agents are also found quite accommodating and corporative to get the certificate for them. Parents and state officials together go through various, sometimes cumbersome processes of arranging the paperwork as they both are aware of the negative (and often shameful / “*iba*”) consequences of not having one for the children and families concerned.

One of the legal consequences of not having a birth certificate is not being able to access around 17 public services that require legal identity documents for access. These



include schools, health insurance, judicial services, banking services, transportation, clean water, and electricity services (Jati et al. 2021). Access to schools seems especially important and frequently mentioned by our informants. A staff from registry office in Bali told me:

*In the marriage registration form at KCS, they have to fill the date of customary marriage. Sometimes they have had customary marriage a few years before they come to KCS to register their marriage. The form also asks the reasons for registering marriage at KCS, and most of the cases it is because their children need the certificate to go to school.<sup>8</sup>*

Murah (28 years old), who lives in Denpasar with her husband and their 4 children, recalled the time when she got married at the age of 17:

*We got married through a customary marriage ceremony, and the marriage was registered at Kantor Catatan Sipil (civil registry office). We registered the marriage at the office to obtain a marriage certificate and a birth certificate for their baby, because we heard from my husband's friends that the certificates will be needed for their baby being able to go to school. [...] I want to send my children to school because I want them to be able to read and write. I and my husband can't do so. I want my children to get a better job in the future. I want my children to continue school until university if possible. If not, elementary school is more than enough.<sup>9</sup>*

When Murah was a child, her mother did not send her to school because in her village in Karangasem (in East Bali), even the closest school was far away, and her family could not afford it. For her husband, too, school attendance has been difficult as he did not have a birth certificate. Most of the people in his village do not have marriage certificate, and children born from such unregistered marriage generally also do not have a birth certificate. He said:

*In my village, people marry just based on the customary system. If they want to get divorced, they just call the chief of customary village (kelian desa). [...] I have four children. I have registered my marriage because my friend told me to do so. In my village, everything is difficult. To register our marriage, we need to go to the town centre of Karangasem and it is far away from my village. [...] Another reason [why we are reluctant is] because we lack confidence in our ability as we cannot read and write. Hence, we just rely on our kelian, but we are afraid if the kelian told us to sign, we will think that we sign for something negative.*

The state-administrated education system has been considered less important for the lives of people residing in rural areas than those who live in big cities. The rural habitants are often prevented from attending schools anyway as schools are simply too far away and they cannot afford the time and transportation cost to send their children there. The entire community often engages in agriculture or fishery, for which a degree

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<sup>8</sup> Interview with KCS official, Denpasar, 20<sup>th</sup> March, 2017.

<sup>9</sup> Interview with Murah (pseudonym), Denpasar, 25<sup>th</sup> April, 2017.





from the formal education system is not of much use, therefore they do not have much motivation nor reasons to attend schools. The example of Murah and her husband show that some illiterate parents do envision sending their children to school to have ‘a better future’ than themselves, who must work long hours with less than minimal earnings. But most other families in their community do not know the importance of birth certificate, or sometimes only boys have them as education is considered less important for girls.<sup>10</sup> This creates the cycle of illiteracy. The example of the isolated community in the middle of Denpasar shows that this does not only applies to rural areas, as even communities who live in the cities may consider formal school education to be irrelevant to their daily lives when they live isolated from the rest of society anyway.

The birth certificate - birth registration under the state system - is increasingly important in the ‘modernized’ governance system in Indonesia. Compared to the ‘modernized’ urban areas, in rural areas such state documents and system are less important/relevant for people’s lives. However, we have also observed that lately access to public services and education has been perceived more important, or at least, desirable. Girls from the most remote area of Bali strive for attending schools, and dream of enrolling in universities.<sup>11</sup> Married youngsters from rural areas work day and night and find creative solutions to continue their education – “to get a good job, and a better future”.<sup>12</sup> The public efforts to provide accessible birth registration, not only for urban and literate families, but also for rural, illiterate, and low-income families seems ever-more poignant.

Unregistered children are de facto stateless, lacking the confirmation of their legal identity, rendering them unable to access any public services and rights under the state legal system. What is noteworthy here is that not only unregistered children, but also ‘illegitimate children’ (children born out of wedlock, children with single birth certificate without father’s name) face similar legal consequences in accessing some of the family rights such as child maintenance (*nafkah*) and inheritance. As mentioned earlier in this paper, prior to the 2012 Constitutional Court decision children born out of wedlock could not, both in principle and in practice, inherit or obtain financial support from their father. The ruling deemed this discriminatory and violation of children’s rights, and concluded that children born out of wedlock have a ‘civil relationship’ with their father, being

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<sup>10</sup> Interview with a worker at community school, Denpasar, 25<sup>th</sup> April, 2017.

<sup>11</sup> Focus Group Discussion with teenager girls in Denpasar, 19<sup>th</sup> April, 2017.

<sup>12</sup> Several interviews with married teenagers in Bali, taken place between March-August 2017.



entitled to financial supports. However, in practice, the decision seems to be met with resistance and reluctance to be implemented (see Section II B. for the details). This leads us to the discussion of the constructed social meaning of a child's birth status in Indonesia in the next section.

#### V. Social consequences of being unregistered

The state legal identity is pragmatically important as mentioned in the previous section, but it does not carry much social and cultural significance. Being registered under the state system – having a birth certificate - is not very relevant in the social life of their community – confirmation of their local and customary identity is much more vital (recall Ratna's case). Yet, not having a *normal* birth certificate (with father and mother mentioned) carries negative social consequences because of the stigma for children born out of wedlock.

Illegitimate children are considered a 'major sin' (*dosa besar*) and a 'disgrace' (*aib*) (Butt et al., 2016: 801). Because of the stigma, their status as a 'child born out of wedlock may become a social and psychological burden to the child (Van Huis & Wirastri, 2012: 91), and their single birth certificate testifies their status. It is not only the children themselves who suffer from this stigma. In fact, their mothers are more likely to suffer overt discrimination because they are seen as promiscuous or immoral, and much of the stigma gets enacted through covert gossip, silent omissions, and nonverbal disapproval of the 'open secret' of the child's birth status (Butt et al. 2016, 801-2).

Within Indonesia, the derogatory term '*anak haram*' ('forbidden child') is widely used to refer to children who are classified as illegitimate or shameful (Butt et al. 2016, 796). Sometimes referred to as a 'culture of shame', the sentiment of shame has an eminent influence in the societal structure and people's behaviour – it is often a convincing explanation of people's behaviour, such as going through the troubles to get a normal birth certificate. The word '*malu*' ('shame') refers to a complex social response combining shyness and embarrassment (Lindquist 2009). The shame can extend to the extended family as well, which is described as "kinships of shame" (Davies 2014).

Stories of Balinese unmarried mothers also testify the significant social consequences of being an unmarried mother, or an illegitimate child. Swasti, is a woman who lives in a rural village in East Bali. She became pregnant when she was 15 years old, and had a customary marriage at the age of 16. At that time, she had been in a relationship with her boyfriend, who was 6 years her elder, for over a year. He first denied



that it was his child and refused to marry her. After a week, he eventually agreed to marry as he was ‘ashamed (*malu*)’, because their relationship had become public in their small village. Divorced at the time of the interview, she told me that she regretted having married her husband. She also did not want to have abortion as she was ‘scared’. But then, was it an option for her to be an unmarried mother? People in the village did not accept single mothers – if she gave birth out of wedlock, she and her family would have been ostracized from the local community. Especially in rural areas, community is so central to their lives that pregnant teenagers are left with no other choice but to marry.

My observation at court hearings also indicates that the social consequences of being an illegitimate child are emphasized to necessitate obtaining birth certificate. A judge scolded the teenage mother in one of the hearings of the marriage dispensation<sup>13</sup> cases:

*So, does the baby have a birth certificate? Actually, if the marriage is not recorded in the Marriage Registrar Office, the baby cannot have a status “anak bapak” (father’s child), he/she will still be “anak ibu” (mother’s child, implying ‘illegitimate child’). Please do not give another burden to the baby just because his parent was being irresponsible. This baby must have a birth certificate with both names of his parent so in the future he can go to school without problem or minimize the possibility to be bullied by his society.<sup>14</sup>*

The legal actors are equally concerned about the social consequences as they believe that the existence of ‘illegitimate children “disturbs the society” (Horii 2019, 307). They feel the need to maintain “harmony and morality in the community” (Ibid, 309) and this is the reason why they are accommodating and incorporative to the ad-hoc solutions.

## VI. Ad-hoc solutions for children born into unregistered marriages and its consequences

So far in this paper we have explained that there are several mechanisms to avoid having their child unregistered. That includes: manipulating age, fake papers, and marriage dispensation - all accommodated and facilitated by the state officials and community actors. For instance, *pengesahan anak* or legalization of a child born into a customary marriage after the parents have conducted a legal marriage recognized by state. A KCS official explained:

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<sup>13</sup> Petition for the court to grant permission to register underage marriages

<sup>14</sup> Court hearing, Denpasar, 2017.



*For a child who was born and registered into a single parent (mother), the parent may get married legally once their age met the requirement and legalize the child. We will put her father's name in back page of her single birth certificate. We call this 'pengesahan pencatatan anak' (legalising the child registration). This can be done if the mother and father have a marriage certificate. If father's name is in the back page, it is possible to have inheritance. But consequences in adat system might be different.<sup>15</sup>*

This procedure has its legal basis under Art. 50 of the Population Registration Law and Art. 272 of the Civil Code, which previously was not implemented at the level of marriage registry – only by courts. This new policy substantially increases the discretionary capacity of these street-level bureaucrat in child registration.

Another recent initiative is the creation of *Surat Pertanggungjawaban Mutlak* (SPTJM), which can be considered as an ad-hoc solution for child registration, as the next sub-section elaborates.

#### **A. *Surat Pertanggungjawaban Mutlak* (SPTJM)**

As a follow-up to the 2013 Amendment of the 2006 Civil Registration Law, the Ministerial Decree of Home Affairs (*Permendagri*) No. 9/2016 concerning the Acceleration of Increasing the Coverage of Birth Certificate Ownership (*Percepatan Peningkatan Cakupan Kepemilikan Akta Kelahiran*) was issued. For many of the street-level bureaucrats (e.g. heads of village, officers at the registration offices), this regulation was seen as an effort to improve the status for spouses who are “religiously married” yet not in possession of *buku nikah*, and serves to protect their children. The regulation offers a mechanism for parents to declare themselves as married or parents of a child via an “Absolute Responsibility Statement Letter” or *Surat Pertanggungjawaban Mutlak* (SPTJM).

The Appendix to the above-mentioned *Permendagri*, states that this mechanism is meant for religiously married couples who do not have a marriage certificate / *buku nikah*. Based on the statement in the SPTJM, their religious marital relationship can be registered in the Family Card (*Kartu Keluarga/KK*). In the birth certificate of their children the name of both parents (mother and father) can be recorded with the additional phrase “whose marriage has not been registered in accordance with the laws and regulations.” The purpose of this regulation is to stimulate parents in religious marriages to register their children. By allowing the registration of the father it is hoped that a large part of the

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<sup>15</sup> Interview with KCS official, Denpasar, 3<sup>rd</sup> July, 2017.



stigma attached to a child of whom the blood relationship with the father is in doubt will be done away with and remove one of the main barriers to birth registration in Indonesia.

This SPTJM policy of ‘self-reporting of unregistered marriages’ has drawn controversy. This policy creates internal incompatibility (incompatibility between two legal provisions in a legal system). The Indonesian government grants a “de facto” marital status to people living in unregistered marriages by the inclusion of informal marriages in the Family Card but only accepts formally registered marriages as proof of marital for identity cards (*Kartu Tanda Penduduk/ KTP*). The registration of both registered and unregistered marriages may cause confusion in society, obscuring the fact that in Indonesia’s legal system only registered marriages carry formal legal status. Moreover, it causes a discrepancy between two purposes of registration: the obligation to register marriages in Article 2 paragraph 2 of the Marriage Law as a means to realize legal certainty on the one hand, and formal recognition of unregistered marriages to create administrative order on the other. There is also concern that this regulation will cause a rise in unregistered marriages – and more civil registration problems in the future (for instance, it will facilitate informal polygamy<sup>16</sup> concluded in violation of the legal conditions mentioned in the Marriage law).

## **B. Function Vs Purpose of the law**

The functions of marriage law are twofold: *First*, providing a clear legal framework of marriage for the population by establishing the rules and procedures for how a legal marriage can be conducted, dissolved and annulled; *Second*, marriage law, as part of personal status law, is an essential component of population administration, as it requires citizens to register their marriages and divorces at the civil registry. Compared to the function of marriage law the purposes of marriage law relate directly to the social context in which it is introduced. The substantive legal changes in provisions of a marriage law usually have the purpose to adjust the law in view of existing social practices of marriage in society, for instance to narrow the gap between marriage regulations and societal norms (as happened in Western Europe), or, quite the opposite, by introducing legal conditions and legal sanctions with the purpose of changing social practices of marriage that are considered undesirable by the government – for instance child marriage, polygamy, informal marriage (Cotterrell 1984, 74-76).

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<sup>16</sup> In this article, even though the correct ‘etic’ term for our subject is polygyny, we use the term polygamy, because it is close to the Indonesian ‘emic’ term of “poligami”.



The 1974 Marriage Law introduced minimum age of marriage and legal conditions for polygamy. To make the implementation of these legal changes effective, registration of marriages is essential. Hence, the Marriage Law stipulates that only official marriage certificates are recognised by government institutions as proof of marital status. Later in 2006, the new Population Administration Law (amended by Law No. 24/2013), which tightened existing marriage registration rules and legal penalties for non-registration of marriages, had the purpose of curbing social practice of informal marriage that was seen as undesirable by the Government of Indonesia because the negative impact it has on birth registration and legal identity for children (Wirastri 2018, 217). However, implementation of the law has been lax, partly out concern for poor households (Huis and Wirastri 2012), partly because key state officials (marriage registrars, religious court judges) themselves are ambivalent and exhibit ambivalent behaviour about state definitions of marriage and the attached personal status laws (Wirastri & van Huis 2021). In this situation of ambivalence towards the legitimacy of the state to control marital practices that is exhibited by both state and society, social change is slow. As Roger Cotterrell has pointed out in his analysis of law as an instrument of social change:

*If law is to be effective it must be in the interest upon whom the law depends for its invocation or enforcement to set the legal machinery in motion (Cotterrell 1984, 87).*

In Indonesia, not reporting or not timely reporting of vital life events goes unpunished, so many people tend to report life events of marriage, divorce, and birth only when there is an incentive or bureaucratic requirement to do so. Similar to the practices of unregistered polygamy, the practices of unregistered marriage that lead to the issues of non-registration of children born out of wedlock poses the Indonesian state with a dilemma. The 1974 Marriage Law and the 1991 Compilation are the result of a political compromise, but failed to achieve a social consensus. This has consequences for one of the functions of Marriage Law as personal status law: arranging an orderly population administration through civil registration of marriages, births, and divorces. For more than four decades, social practice of marriage (including polygamy) – the so-called religious marriages - continued without being accompanied by an orderly population registration, meaning that many children are living within legally defective marriages – socially and religiously accepted marriages, that lack the personal status and legal consequences of a formal registered marriage.

Without an official *buku nikah* or marriage certificate from their parents, children born in socially accepted marriages, are legally considered born-out-of-wedlock since the



marriages lack legal status. The lack of marital status has the consequence that children born into unregistered religious marriages have a civil law relationship only with their mother as stipulated in the Ministerial Decree of Home Affairs (Permendagri) No. 9/2016. In the birth certificate of these children only their biological mother will be mentioned as the parent. As marriage is still the only socially accepted family form in Indonesia, doubts about the status of the father will create social stigma. Moreover, from the perspective of Islamic law the non-recognition of the father has important legal consequences, as the father's "family ties based on blood relations" (*nasab*) may be put into doubt, meaning that the father's guardianship over his children may be put into doubt as well (*perwalian*) and he will have trouble in fulfilling his role as father. Therefore, to prevent doubts, couples in unregistered "religious marriages" for whom it is difficult to find a "creative" solution (especially in cases of informal polygamy), will prefer not to register their children at all (Nurlaelawati and Huis 2019).

Superficially, the introduction of SPTJM seems to serve the interest of the state in organizing population registration –one of the functions of law, yet it works against the purpose of the Marriage Law to bring about certain social changes, specifically reducing child marriages and polygamy. Religious marriages can now simply be registered in the family card, without any regard of the rules set in the 1974 Marriage Law regarding marital age and legal conditions on polygamy. In the end, the SPTJM makes population registration itself "messy" as it blurs the borders between formal and informal marriages. These problems are less profound in the solutions found by parents and officials when registering child marriages and children born into these marriages. The mechanisms involved are often sought in the best interests of the child (and parents' honour), and in the end do not disturb the functioning of population registration much. However, they just as much work against the purpose of the Marriage Law to reduce child marriage.

## VII. Conclusion

This paper has shown different reasons and ways children become unregistered in Indonesia. The reason may be financial, geographical, cultural, or a combination of those factors. Underage marriage and polygamous marriage are often the cause for non-registration as well. They are both sensitive issues in terms of religious morality, often being a subject of debate and compromise between the conservative religious power and liberal groups with more progressive ideas about women's rights and children's rights. As indicated in our analysis of the 2012 ruling by the Constitutional Court, birth



registration in Indonesia is a deeply religious issue, as acknowledging the civil relationship between a premarital child and his/her biological father is considered to be in conflict with the Islamic concept of blood relationship (“*nasab*”).

The Marriage Law 1974 was a product of political compromises. Since family law regulates delicate religious issues, legislators tend to find a negotiated solution, often resulting in exceptions and inconsistencies, and the consequent legal limbo. Local institutions come up with legal and illegal solutions such as manipulation of age, fake papers, marriage dispensation, and SPTJM, which are supported, promoted, and become widely used by the local population. The government allows local-level governmental institutions, the street-level bureaucrats, to deal with the problems relating to civil registration, as a way to avoid touching upon sensitive issues. Within the scope of the state legality, the Marriage Law seems to be circling around the issue of legality of marriage and children born outside wedlock.

This paper also outlined various legal and social consequences that unregistered children face. As an identity issue, the state legal identity does not carry a strong cultural and social significance as birth registration is considered a state administrative act: their local and customary identity is much more vital for most people’s lives. Yet the state legal identity is pragmatically important, as unregistered children, lacking the confirmation of their legal identity, are unable to access public services – most notably schools. They are also deprived of inheritance and maintenance rights under the state legal system. It is important to note that, not only unregistered children, but ‘illegitimate children’ (children born out of wedlock, children with single birth certificate without father’s name) face adverse legal consequences in accessing some of the family rights such as child maintenance (*nafkah*) and inheritance. Moreover, being an ‘illegitimate child’, in other words, not having a *normal* birth certificate (only single birth certificate), carries negative social consequences. Strong stigma is attached to children born out of wedlock.

The ad-hoc solutions are created to solve these problems by actors who look for an emergency exit. These ad-hoc solutions are often understood as ‘humane’, ‘empathetic’, ‘programmatically’, ‘accommodating’ (Grijns and Horii 2018; Huis and Wirastri 2012, 99, 101), serving for ‘citizenship from below’ (Butt et al. 2016, 806) as they allow families in a problematic situation to get access to personal document needed to access state-sponsored programs, formal education, and legal rights ensured under the state law. But do they really improve the condition of those who are affected and ensure their rights ascribed in laws?





SPTJM is the primary example of an ad-hoc solution that may serve as a temporary solution to some problems but not as an ultimate solution for their legal identity. The document enables a child's birth certificate to have both parents' names, which mitigates social stigma attached to single birth certificate. However, the appendix clearly states that SPTJM is not a replacement of a state-issued marriage certificate (*buku nikah*). The children with SPTJM are still in a vulnerable position, as their legal identity is not ensured and remains uncertain. For example, whether or not they have right to inherit from their father is still in question, as there is no certainty on the validity of this document within the state legal system and on how the judges interpret the status of a self-declared marriage through a SPTJM. SPTJM is a relatively new devise, and the actual effects of it should be studied further in the future.

The mechanisms described in this paper exist because of state's reluctance to enforce regulation related to informal marriage and children born into unregistered marriages as these matters are religiously and culturally (therefore politically) delicate. We argue that when such mechanisms are not consistent with the provisions in the Marriage Law and Population Administration Law, they offer solutions to individual cases but create structural problems relating to the functions and purposes of the above-mentioned Laws, which are establishing a clear family law framework, organizing an orderly population registration, eradicating child marriages and reducing unregistered polygamy. The legal status and attached rights offered to the children through the SPTJM mechanism is unclear: will they be fully considered as *anak sah* (a legitimate child) by the Indonesian legal system and society? The state seems to facilitate all types of unregistered marriages and accepts other proof of marriage than a marriage certificate, which contravenes the Marriage Law, thus blurring the legal parameters of marriage even further.



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