

The legal and social position of children born outside wedlock or born from informal marriages children in Indonesia

Hoko Horii and Theresia Dyah Wirastri¹

1. Introduction

On a bright Sunday afternoon in Denpasar, the downtown of the island of Bali, I was walking around in an outdoor park with a teenage girl Ratna, her mother, and her baby-boy. We were discussing a problem they face: Ratna became pregnant when she was 16, but her boyfriend and his family did not want to recognize the paternity of the child nor to marry her. She, as an unmarried teenage mother, then later gave birth to her baby-boy Pranata, whom she was holding in her arms while we strolled around the park. The problem was that, the baby-boy did not have any family temple to belong to, as in the Balinese customary socio-legal structure, a baby always enters their father's lineage. And a baby's father is always defined by the marital relationship the mother forms with the man within their customary system.

Ratna's relatives could not accept her baby to enter their family temple. "Baby boys have to go back to their male 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 his ancestral temple, and if anything happens to him, Pranata must ask permission from his father's family." Belonging to the family temple is central to one's life as a Balinese, as their life events and connection with their relatives and community are all organized based on that belonging.

The problem with the position of Pranata was not only in the customary system, but also in the state legal system. Ratna, as an unmarried mother, could only obtain 'akta tunggal' (single birth certificate), without father's name. Unlike the standard birth certificate, under the single birth certificate the child is considered 'illegitimate' child ('anak luar kawin'). With the single birth certificate, the child does not have a legal right to inherit from their father (more in Section 4).

Having no birth certificate has been a major problem in Indonesia. The National Child Protection Commission (KPAI) has estimated that 50 per cent of Indonesian children have no birth certificates due to reasons such as unregistered marriages (Nurchayani, 2012). This is an estimate, and it is not an easy task to make an accurate statistic about unregistered children, so the statistics vary. According to UNICEF's report from 2013, 41% of Indonesian children are not registered within one years from their

¹ Hoko Horii is a lecturer at VanVollenhoven Institute for Law, Governance and Society at Leiden University (the Netherlands), and a post-doctoral fellow at Kobe University (Japan). Theresia Dyah Wirastri is a lecturer at Faculty of Law, Universitas Indonesia.

birth (UNICEF, 2013: 43). Government figures show that the situation is even worse in some provinces. In East Nusa Tenggara (a group of islands east of Bali) for example, 95.4% of all children have not issued 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)² data suggests 14% of children under 18 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).

Having no birth certificate has dire consequences for unregistered children and their rights. 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 the 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 would not be entitled to proper health care and all these uncertain conditions, and their fragile legal existence would eventually lead to their social exclusion and marginalization.

This paper examines the actual affects and consequences of lack of birth-registration, based on real-life account of those who faced the problem. Our informants faced the problem and dealt with it in different ways, and many of them found creative solutions to avoid having no 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 one 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, local and state actors who are involved in the paperwork and rituals. What do these ad-hoc solutions mean for the 'function of the law' and for the protection of children's rights? We will engage with these questions by analysing and evaluating the empirical knowledge from the cases of unregistered children from child marriage and polygamous marriage.

Following this introductory section, Section 2 will outline the regulations on birth registration in the Indonesian state legal system, as well as to summarize a pivotal case on the Constitutional Court on the legal status of a child born outside of wedlock. Section 3 then showcases different reasons why children become unregistered, including polygamous marriage and child marriage. Section 4 and 5 explores legal and social consequences of being unregistered in Indonesia. Section 6 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.

² <https://sirusa.bps.go.id/sirusa/index.php/dasar/view?kd=1558&th=2019>

2. Regulations on birth registration in Indonesia

2.1 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 that inhabitants of Indonesia are obliged 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(ing) 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 make it legal, there are three local and illegal procedures: (1) *isbath nikah* (having a marriage recognized retroactively by the court), (2) secret marriage (*nikah siri*) that remain unregistered, 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 an intermediary between the state institution and the people, co-create ad-hoc solutions for circumventing procedural rules, leading to a chain of violation 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).

2.2 The Constitutional Court cases

The Constitutional Court took what 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 ‘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 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 there was no legal guardianship, the father’s legal financial responsibilities, maintenance rights of the child, and inheritance rights. The way in which the 2012 decision has been implemented in each court defers. 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 this court decision suggest that the birth registration in Indonesia is a deeply religious issue, as the legal status of the child varies depending on their civil relationship with their father. And the consequent legal documents about their birth and paternity have powers to determine the rights the child can claim in the course of their life. Acknowledging civil relationship between a premarital child and his/her biological father seems to be in conflict with the Islamic concept, therefore, giving equal legal identities and rights to premarital child is met with resistance and reluctant by actors in Islamic institutions, including the religious court.

Another Constitutional Court case in the following year 2013 also ruled in favor of removing a barrier for 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 are 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 any 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). Despite these decision and revisions that ease the birth registration, until today registration rate remains low in Indonesia. The next section outlines different reasons why children become unregistered.

3. 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.

3.1 Financial

The first reason 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, registration rate is still lower in low-income, low-education population mostly residing in rural areas. 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 of 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).

3.2 Geographical

In relation to the financial condition, geographical differences 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 de-centralised 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).

The rural residents are 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.

3.3 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 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 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.

3.4 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 also 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 certificate for them by manipulating and falsifying documents, when it becomes necessary to access public service. There are yet other important reasons why parents are *not able to* legally register their children's birth:

because they are born within underage or polygamous couples, whose marriage 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.³ 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 for marriage to register their marriage. In most of these cases, before they register their marriage they are already ‘married’ under their respective customary law. Customary law and rituals vary in each region and community of Indonesia, but in most customary legal system it is an urgent 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.⁴ 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, people usually rush for customary marriage ceremonies, then only later they go to registry office (*Kantor Catatan Sipil* for non-Muslims, and *Kantor Urusan Agama* for Muslims) to have it as state-administered marriage as well. At least in *Kantor Catatan Sipil* (hereafter KCS) in Bali, as long as the child was born before the date of the customary marriage, the child’s birth can be registered retrospectively with their fathers’ name. 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.⁵

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.⁶

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

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

⁵ Interview with KCS official, Denpasar, 20th March, 2017.

⁶ interview with KCS official, Denpasar, 3rd July, 2017.

Another way we observed in West Java is 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. This is facilitated by the village head of lower 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, the minimum age for an identity and family card, which opens doors to factory work and welfare support (Grijns & Horii, 2018: 461).

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, most 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 has 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. Most 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 practice importance, as they live outside of the public system anyway. None of the underage marriages in their community that I studied were registered, nor was their babies’ birth – 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 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 3 children with his second wife – let us call her Rina. As their marriage was not registered, all of their children were also not registered (they did not have birth certificate) initially. Only the first child – let us call her Dewi – became registered when Rina sent her to live with Rita as Rina was angry at her husband. Rita and her husband registered Dewi under their family card, as one of their children. They used *Surat Pertanggungjawaban Mutlak* (SPTJM), which section 6.1 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 headmaster 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 make a trouble out of it and just accepted Dewi at the school as she felt “sympathetic, and thought Rita was brave to manage the situation”.

It is not clear if the other two children of Rina are registered, but it is unlikely. We presume that, also from other stories one of the authors gathered in her study on polygamous marriages in Indonesia, many children from unregistered polygamous marriages remain unregistered, rendering them and the second wife vulnerable under the state legal system. While systems like SPTJM might work and actors involved might be sympathetic and corporative, these children do not have many options and they need to deal with uncertainties.

4. Legal consequences of being unregistered

People go through all these troubles to obtain the birth certificate to get their children registered under the state system – to have their legal identity recognized by the state. State agents are also found quite accommodating and corporative to get the certificate for them. They all go through various, sometimes cumbersome processes for the government paperwork because they want to avoid consequences of not having one.

One of the legal consequences of not having a birth certificate is that, people without it are not 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 certificate to go to school.⁷

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

We got married with our 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.⁸

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 marriage could not get birth certificate. He said:

In my village, people marriage 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 because we are too afraid of 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 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 degree from formal education system is not of much use, therefore they do not have much motivation nor reason 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

⁷ Interview with KCS official, Denpasar, 20th March, 2017.

⁸ Interview with Murah (pseudonym), Denpasar, 25th April, 2017.

considered useless for girls.⁹ This creates the cycle of illiteracy. The example of the isolated community in the middle of Denpasar shows that even the communities who live in the cities, when isolated from the rest of the society, formal school education is considered irrelevant for their lives.

Birth certificate - birth registration under the state system - is increasingly important in the ‘modernized’ system in Indonesia. Compared to the ‘modernized’ urban areas, in rural areas such state documents and system has been less important/relevant for people’s lives. However, we have also observed that lately access to the 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.¹⁰ Married youngsters from rural area work day and night and find creative solutions to continue their education – “to get a good job, and a better future”.¹¹ 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, lack the confirmation of their legal identity, rendering them unable to access any public services and deprived of any rights under the state legal system. What is noteworthy here is that, not only unregistered children, but ‘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 nor 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 ‘civil relationship’ with their father, being entitled to financial supports. However, in practice, the decision seems to be met with resistance and reluctance to be implemented (see Section 2.2. for the details). This leads us to discuss the constructed social meaning of child’s birth status in Indonesia in the next section.

5. 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 – not 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 (only single birth certificate) carries negative social consequences because of the stigma for children born out of wedlock.

⁹ Interview with a worker at community school, Denpasar, 25th April, 2017.

¹⁰ Focus Group Discussion with teenager girls in Denpasar, 19th April, 2017.

¹¹ Several interviews with married teenagers in Bali, taken place between March-August 2017.

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 ‘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 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, 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 he refused to marry her. After a week, he eventually agreed to marry as he was ‘ashamed (*malu*)’, because their relationship was known 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’. 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.

One of the author’s observations at court hearings also indicate that the social consequences being an illegitimate child are emphasized to necessitate obtaining a birth certificate. A judge scolded the teenage mother in one of the hearings of the marriage dispensation¹² cases:

So, does the baby has a birth certificate? Actually, if the marriage are 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 name of his

¹² petition for the court to grant permission to register underage marriages

parent so in the future he can go to school without problem or minimize the possibility to be bullied by his society.¹³

The legal actors are equally concerned about the social consequences as the existence of ‘illegitimate child’ “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.

6. Ad-hoc solutions, the function of the law, and children’s rights

So far in this paper we have explained that there are several ad-hoc solutions 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. In recent years, there are some initiatives to create even more ad-hoc solutions. For instance, a KCS official explained:

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 legalised 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.¹⁴

This seems to be a method that has been created and adapted at the level of marriage registry, within discretionary capacity of these street-level bureaucrats. Another recent initiative is the creation of *Surat Perangungjawaban Mutlak* (SPTJM), which the next sub-section elaborates.

6.1 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. head of village, officers at the registration office), this regulation was seen as an effort to improve the status for spouses who are “religiously married” and not in possession of *buku nikah* and their children. The regulation offers a mechanism for parents to declare themselves as religiously 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).

¹³ Court hearing, Denpasar, 2017.

¹⁴ Interview with KCS official, Denpasar, 3rd July, 2017.

Subsequently, 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 stigma attached to a child of whom the blood relationship with the father is in doubt will be done away with. Thus, it is hoped that this policy will 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 legal provisions in a legal system). With the inclusion of marital status in the KK as unregistered marriage and marital status in the KTP as married, the state has both registered the unregistered marriages, and established that these marriages are not formally registered (thus lack 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 process (for instance informal polygamy).

6.2 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 for 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 because of the changed social practices of marriage in society 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 the law has 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).

In Indonesia, the 1974 Marriage Law introduced, for instance, minimum age of marriage, legal conditions for polygamy, and underlined that only registered marriages would be recognised by government institutions as legal marriages. Later in 2006, the new Population Administration Law, 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, 1992: 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 – even after 40 years after its introduction. 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 marital 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" will prefer not to register their children at all (Nurlaelawati and Huis 2019).

7. Conclusions

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 of 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 progressive ideas about women's rights and children's rights. As indicated in the case at the Constitutional Court, the birth registration in Indonesia is a deeply religious issue, as the legal status of the child varies depending on their civil relationship with their father.

The Marriage Law 1974 was a product of political compromises. When the state family law is supposed to regulate delicate religious issues, legislators tend to find a compromising solution, often resulting in exceptions and inconsistencies, and the consequent legal lacuna. Local institutions come up with various ad-hoc solutions such as manipulation of age, fake papers, marriage dispensation, and SPTJM, which are supported, promoted, and become widely used by the local population. And the government let these institutions deal with it as a way to avoid touching upon the 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 much strong cultural and social significance as birth registration is considered as simply a state administrative act, and confirmation of 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 any public services – notably to schools. They are also deprived of any 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 similar legal consequences in accessing some of the family rights such as child maintenance (*nafkah*) and inheritance. Being an 'illegitimate child', in other words, not having a *normal* birth certificate (only single birth certificate), carries negative social consequences as well. 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', 'programmatic', '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 such ad-hoc solutions 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 certain. 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 and implement the regulation regarding SPTJM. SPTJM is a relatively new devise, and the actual effects of it should be studied further in the future.

Such ad-hoc solutions sit in the legal lacune of the state law, made out of the state's reluctance to address delicate issues. And they are not consistent with the existing legislation such as Marriage Law and Population Administration Law. The purpose of these laws, that is to provide legal identity and rights to all citizens, is not fulfilled, and the state is failing to create orderly legislation that is in line with the Rule of Law.

Such ad-hoc policies sit in the legal lacunae that exist because of state's reluctance to enforce regulation related to informal marriage and children born out of wedlock as these matters are religiously and culturally (therefore politically) delicate. The ad-hoc policies are not consistent with the provisions in the Marriage Law and Population Administration Law; thus, hinder their function to provide legal identity and rights to all citizens.

References

- ASH. (2013). MK Hapus Peran Pengadilan Urus Akta Kelahiran. *hukumonline.com*.
<https://www.hukumonline.com/berita/a/mk-hapus-peran-pengadilan-urus-akta-kelahiran-1t517fb4ccb4cf3>
- AsiaNews.it. (2004, July 21). Government pledges no more unregistered children. *AsiaNews.It*.
<http://www.asianews.it/news-en/Government-pledges-no-more-unregistered-children-1177.html>
- Butt, L., & Ball, J. (2017). Birth registration in Southeast Asia: A child's foundation right? *Asian Population Studies*, 13(3), 223–225. <https://doi.org/10.1080/17441730.2016.1239431>
- Butt, L., Ball, J., & Beazley, H. (2016). False papers and family fictions: Household responses to 'gift children' born to Indonesian women during transnational migration. *Citizenship Studies*, 20(6–7), 795–810. <https://doi.org/10.1080/13621025.2016.1204984>
- Butt, L., & Munro, J. (2007). Rebel girls? Unplanned pregnancy and colonialism in highlands Papua, Indonesia. *Culture, Health & Sexuality*, 9(6), 585–598.
<https://doi.org/10.1080/13691050701515324>
- Cotterrell, R. (1992). *The sociology of law: An introduction* (2nd ed.). London [etc.] : Butterworths.
- Davies, S. G. (2014). Surveilling sexuality in Indonesia. In L. R. Bennett & S. G. Davies (Eds.), *Sex and Sexualities in Contemporary Indonesia: Sexual Politics, Health, Diversity and Representations* (pp. 29–50). Routledge.
- Grijns, M., & Horii, H. (2018). Child Marriage in a Village in West Java (Indonesia): Compromises between Legal Obligations and Religious Concerns. *Asian Journal of Law and Society*, 1–14.
<https://doi.org/10.1017/als.2018.9>
- Horii, H. (2019). Pluralistic legal system, pluralistic human rights?: Teenage pregnancy, child marriage and legal institutions in Bali. *The Journal of Legal Pluralism and Unofficial Law*, 51(3), 292–319. <https://doi.org/10.1080/07329113.2019.1683429>
- Jati, H., Rahmi, M. A., Kusumaningrum, S., & Sari, W. (2021). The unregistered: The fragile foundations of civil registration in Indonesia. *The Conversation*.
<http://theconversation.com/the-unregistered-the-fragile-foundations-of-civil-registration-in-indonesia-158434>
- Nurchayani, I. (2012). Illegitimate child rights and its problems in Indonesia. *Antara News*.
<https://en.antaranews.com/news/80263/illegitimate-child-rights-and-its-problems-in-indonesia>
- Nurlaelawati, E., & Huis, S. C. van. (2019). THE STATUS OF CHILDREN BORN OUT OF WEDLOCK AND ADOPTED CHILDREN IN INDONESIA: INTERACTIONS BETWEEN ISLAMIC, ADAT, AND HUMAN RIGHTS NORMS. *Journal of Law and Religion*, 34(3), 356–382. <https://doi.org/10.1017/jlr.2019.41>

- Rashid, N. M. (2015, August 6). Event on “Birth Registration: Passport to Protection.” *United Nations and the Rule of Law*. <https://www.un.org/ruleoflaw/blog/2015/08/birth-registration-passport-to-protection/>
- Sumner, C., & Kusumaningrum, S. (2014). *AIPJ Baseline Study on Legal Identity: Indonesia’s Missing Millions*. Australian Aid, PEKKA, and PUSKAPA UI.
- UNICEF. (2013). *Every Child’s Birth Right: Inequities and trends in birth registration*. UNICEF. <https://data.unicef.org/resources/every-childs-birth-right-inequities-and-trends-in-birth-registration/>
- UNICEF Office of Research- Innocenti. (2002). *Birth Registration: Right from the Start* (Innocenti Digest No.9). Innocenti Digest no. <https://www.unicef-irc.org/publications/330-birth-registration-right-from-the-start.html>
- Van Huis, S. (2015). *Islamic Courts and Women’s Divorce Rights in Indonesia: The cases of Cianjur and Bulukumba* [Doctoral Thesis]. Leiden University.
- Van Huis, S. C. (2019). BIRTH REGISTRATION IN THE BEST INTEREST OF THE CHILD? *BINUS University Business Law*. <https://business-law.binus.ac.id/2019/08/25/birth-registration-in-the-best-interest-of-the-child/>
- Van Huis, S. C., & Wirastri, T. D. (2012). Muslim Marriage Registration in Indonesia: Revised Marriage Registration Laws Cannot Overcome Compliance Flaws. *Australian Journal of Asian Law*, 13(1), 1–17.
- Wirastri, T. D., & van Huis, S. C. (2021). The second wife: Ambivalences towards state regulation of polygamy in Indonesia. *The Journal of Legal Pluralism and Unofficial Law*, 53(2), 246–268. <https://doi.org/10.1080/07329113.2021.1912579>