



Legal Protection for Children Born Out of Wedlock: An Islamic Justice Perspective

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Abstract. The presence of a child born outside of marriage raises various issues both within families and society, particularly regarding the rights and obligations of the child. A child born out of wedlock may not solely result from an illicit relationship; it can also occur when a marriage is conducted only according to customary law without being officially registered. According to Article 80 of the Civil Code, prior to the Marriage Law, marriage must be performed in front of a Civil Registry official. Article 81 stipulates that religious ceremonies must occur after the civil registration. This research aims to analyze the implementation of birth registration regulations for children born out of wedlock based on Islamic justice, identify weaknesses in issuing birth certificates without a marriage certificate, and reconstruct these regulations in alignment with Islamic values. The research employs a constructivist paradigm, using a sociological-legal approach and various data collection methods. Findings indicate that the implementation of birth registration for children born out of wedlock lacks fairness, necessitating protection to ensure equal treatment with other children. Current regulations are insufficiently clear regarding children born out of wedlock, highlighting a need for better synergy among law enforcement. The reconstruction of these regulations is outlined in Law No. 23 of 2006 and the more recent Law No. 24 of 2013 regarding population administration.

Keywords: Reconstruction, Regulation, Legal Protection of Children, Islamic Justice

Received: January 25, 2024 | Revised: March 25, 2024 | Accepted: May 25, 2024



Abstrak. Kehadiran anak yang lahir di luar nikah menimbulkan berbagai persoalan baik dalam keluarga maupun masyarakat, khususnya mengenai hak dan kewajiban anak. Anak yang lahir di luar nikah tidak semata-mata terjadi karena hubungan terlarang, tetapi juga dapat terjadi karena perkawinan yang dilakukan hanya berdasarkan hukum adat tanpa dicatat secara resmi. Menurut Pasal 80 KUH Perdata, sebelum ada Undang-Undang Perkawinan, perkawinan harus dilakukan di hadapan pejabat Catatan Sipil. Pasal 81 mengatur bahwa upacara keagamaan harus dilakukan setelah pencatatan sipil. Penelitian ini bertujuan untuk menganalisis pelaksanaan ketentuan pencatatan kelahiran bagi anak yang lahir di luar nikah berdasarkan keadilan Islam, mengidentifikasi kelemahan dalam penerbitan akta kelahiran tanpa akta nikah, dan merekonstruksi ketentuan tersebut agar selaras dengan nilai-nilai Islam. Penelitian ini menggunakan paradigma konstruktivisme, dengan menggunakan pendekatan sosiologi hukum dan berbagai metode pengumpulan data. Hasil penelitian menunjukkan bahwa pelaksanaan pencatatan kelahiran bagi anak yang lahir di luar nikah kurang memberikan keadilan, perlindungan yang diperlukan untuk menjamin perlakuan yang sama dengan anak lainnya. Peraturan perundang-undangan yang berlaku saat ini belum cukup jelas terkait anak yang lahir di luar nikah, sehingga perlu adanya sinergi yang lebih baik antar penegak hukum. Rekonstruksi peraturan perundang-undangan tersebut dituangkan dalam Undang-Undang Nomor 23 Tahun 2006 dan Undang-Undang Nomor 24 Tahun 2013 tentang Administrasi Kependudukan.

Kata kunci: Rekonstruksi, Regulasi, Perlindungan Hukum Anak, Keadilan Islam

1. Introduction

In Indonesia, ambiguities persist regarding the material and formal requirements for marriage. Ideally, to achieve orderly marriage administration, marriage registration should not be merely administrative but integrated as a fundamental condition for marriage validity.¹ A marriage is considered legitimate not only when it meets the religious and belief-based criteria but also when it is officially recorded by relevant authorities. Various terms, such as “*nikah siri*,” “*perkawinan di bawah tangan*,” and “*kawin lari*,” refer to some terminologies of unregistered marriages. Notably, there is a significant distinction between “*perkawinan siri*” and unregistered marriages; the former often involves unmet conditions, such as the absence of a guardian or witnesses, while the latter refers to marriages that are performed with witnesses but not registered with government officials.² The absence of official registration leads to a loss of legal rights for wives and children born from such unions, leaving them vulnerable and without legal protection. Therefore, clarifying these distinctions and reinforcing the importance of registration is crucial for ensuring legal recognition and safeguarding rights within familial structures.

As a child classified as illegitimate, significant legal consequences arise that adversely affect the child. Firstly, the child's status as illegitimate means that their civil relationship is limited to their mother and her family, implying a lack of legal connection to their biological father. Secondly, from an administrative perspective, the birth certificate will reflect the child as a child born out of wedlock, listing only the mother's name and omitting the father's name.³ This exclusion can have social and psychological repercussions for the child. Thirdly, the uncertainty surrounding the child's legal status creates a lack of recognized bonds between the father and the child, allowing the man responsible for the child's birth to deny paternity. Lastly, the child is left without rights to financial support, education, maintenance, or inheritance from the man who contributed to their conception. These consequences underscore the urgent need for legal reforms to ensure the rights and recognition of all children, regardless of their birth circumstances.⁴

¹ Akhmad Munawar, “Sahnya Perkawinan Menurut Hukum Positif Yang Berlaku di Indonesia,” *Al-Adl: Jurnal Hukum* 7, no. 13 (2015): 28.

² Muhammad Andri, “Implikasi Isbath Nikah Terhadap Status Istri, Anak Dan Harta Dalam Perkawinan Dibawah Tangan,” *Jurnal Penegakan Hukum Indonesia* 1, no. 1 (2020): 89.

³ Fitria Olivia, “Pelaksanaan Perolehan Akta Kelahiran Bagi Anak Luar Kawin dan Kendalanya di Suku Dinas Kependudukan dan Catatan Sipil Kotamadya Jakarta Barat,” *Lex Jurnalica* 9, no. 1 (2012): 18043.

⁴ Ahmad Baihaki, “Upaya Pemenuhan Hak-Hak Keperdataan Anak Yang Lahir di Luar Perkawinan,” *Jurnal Hukum Sasana* 9, no. 1 (2023): 189.

The presence of children born out of wedlock poses multifaceted challenges that deeply affect not only individual families but also broader societal frameworks.⁵ These children typically encounter profound uncertainties concerning their legal standing, entitlements, and societal inclusion. Their origins are diverse and can result from various circumstances beyond extramarital relationships, such as marriages conducted under customary laws that lack formal registration according to legal mandates. In many societies, children born out of wedlock often face stigma and discrimination, impacting their access to education, healthcare, inheritance rights, and other fundamental aspects of life. Legal frameworks often struggle to adequately address their unique needs and vulnerabilities, leading to inconsistencies in how their rights are protected and upheld. The lack of clear legal recognition can perpetuate cycles of marginalization and disadvantage for these children, hindering their ability to fully participate in society.⁶

The Constitutional Court has ruled on a judicial review of Law Number 1 of 1974 concerning marriage, addressing concerns about the legal status of children born out of wedlock, particularly in Articles 2(2) and 43(1). The Court's Decision No. 46/PUU-VIII/2010 invalidated the provision stating that “children born out of wedlock only have civil relations with their mother and her family.” This ruling allows for the establishment of civil relations between such children and their biological fathers, provided paternity can be scientifically or technologically proven. Following this decision, children born out of wedlock and their mothers can claim rights against their biological fathers. According to Article 49(1) of Law No. 24 of 2013, a father's acknowledgment of a child must be reported to the relevant authorities within 30 days, enabling these children to attain legitimate status. This legal framework aims to ensure that children born out of wedlock receive the same rights and protections as those born within marriage.

Noviana et al. examine discrepancies in judicial interpretations of the legal rights of children born out of wedlock in East Java, Indonesia. Despite existing regulations, such as Constitutional Court Decision Number 46/PUU-VIII/2010, judicial decisions still vary in protecting these children's rights.⁷

⁵ Hasbi Umar, Husin Bafadhal, and Ika Rusmayanti, “Kedudukan Hukum Anak Lahir Diluar Nikah dari Hubungan Sedarah (Incest) Menurut Hukum Islam dan Hukum Positif,” *Adhki: Journal of Islamic Family Law* 4, no. 1 (2022): 37.

⁶ Hari Sutra Disemadi, “Adultery Child Status In Islamic Law And in The Civil Code,” *Legal Standing: Jurnal Ilmu Hukum* 3, no. 2 (2019): 23.

⁷ Lia Noviana, Lukman Santoso, and Mega Puspita, “Interpreting Legal Rights: Disparities in Judicial Treatment of Children Born Out of Wedlock in East Java, Indonesia,” *Lex Scientia Law Review* 8, no. 1 (2024): 325.

Mero,⁸ explores adoption as a means of ensuring children's well-being, emphasizing the rights of adopted children to parental care and familial love. The paper also highlights the importance of genetic identity in adoption cases and the legal barriers in North Macedonia preventing adopted children from accessing information about their biological origins. Azwar et al.⁹ compare child filiation laws in Indonesia, Malaysia, and Turkey, revealing differences in maintenance and inheritance rights for out-of-wedlock children. Indonesia and Turkey provide more inclusive rights than Malaysia, influenced by Islamic legal schools and cultural values. Maulana et al.¹⁰ conclude that under Islamic law, children born out of wedlock lack inheritance rights unless recognized by the father and propose using DNA testing to determine nasab.

However, the societal norms and cultural attitudes surrounding children born out of wedlock vary widely, influencing their social acceptance and integration. These factors underscore the importance of examining and reforming legal and policy frameworks to ensure equitable treatment and comprehensive protection for all children, regardless of their parentage circumstances. The birth of a child outside of marriage can occur not only due to an extramarital relationship but also in specific circumstances, such as when a marriage is conducted solely according to customary law and is not officially registered as required by applicable regulations.¹¹ The presence of a child born outside of marriage raises various issues within families and society. These concerns relate to the child's rights and obligations.¹² According to Article 5 of Law Number 23 of 2002 on Child Protection, every child has the right to a name and citizenship status. Article 55 of Law Number 1 of 1974 on Marriage stipulates that a child's lineage must be proven through an authentic birth certificate issued by the relevant authorities, specifically the Civil Registration Office. This requirement affects the registration of children born out of wedlock. Authentic birth certificates are essential for establishing an individual's identity and rights. The birth of an illegitimate child often leads to

⁸ Arta Mero, "Adoption and Genetic Identity: Promoting the Best Interest of the Child," *Balkan Social Science Review* 23 (2024), 109.

⁹ Zainal Azwar et al., "Child Filiation and Its Implications on Maintenance and Inheritance Rights: A Comparative Study of Regulations and Judicial Practices in Indonesia, Malaysia, and Turkey," *Journal of Islamic Law* 5, no. 1 (2024): 69.

¹⁰ Anas Maulana et al., "Inheritance Rights of Nasabiyyah Children Born Out of Wedlock According to Islamic Family Law," *El-Usrah: Jurnal Hukum Keluarga* 7, no. 2 (2024): 447.

¹¹ Tri Khartika Nurry, Emmi Rahmiwita Nasution, and Irda Pratiwi, "Kedudukan Anak Yang Lahir Di Luar Pernikahan Di Tinjau Dari Kompilasi Hukum Islam," *De Lega Lata: Jurnal Ilmu Hukum* 5, no. 2 (2020): 211.

¹² Gusti Ayu Ade Diah Gamatri, Ni Luh Made Mahendrawati, and I. Made Arjaya, "Kedudukan Hukum Anak yang Dilahirkan Diluar Perkawinan Sah Menurut Undang-undang Nomor 1 Tahun 1974," *Jurnal Konstruksi Hukum* 4, no. 3 (2023): 284.

conflicts within families and communities regarding the child's rights and obligations, as well as legal implications stemming from unregistered marriages.

This research aims to achieve several key objectives: first, to understand and analyze the implementation of birth registration regulations for children born out of wedlock in accordance with Islamic justice values. Second, it seeks to identify and analyze the weaknesses in the process of issuing birth certificates for these children, particularly when no marriage certificates exist, while grounding the analysis in Islamic justice principles. Lastly, the research intends to explore the reconstruction of regulations governing the issuance of birth certificates for children born out of wedlock without marriage certificates, ensuring alignment with the values of Islamic justice.

2. Research Methods

This research aims to achieve three primary objectives: to understand and analyze the implementation of birth registration regulations for children born out of wedlock based on Islamic justice values, to identify weaknesses in the process of creating birth certificates for these children without marriage certificates, and to explore the reconstruction of regulations regarding birth certificate issuance grounded in Islamic principles. Employing a qualitative design, the study focuses on interpreting legal texts and their social implications concerning the rights of children born outside of marriage. Utilizing a socio-legal juridical approach, it examines both the legal framework and socio-cultural context to capture the complexities surrounding these rights. The grand theory in this study utilizes Islamic Legal Justice Theory and the Fifth Principle of Pancasila, while middle theory employs legal system theory, and applied theory uses legal protection theory. Key legal documents analyzed will include Articles 80 and 81 of the Indonesian Civil Code, which address marriage requirements; Article 43(1) of Marriage Law No. 1 of 1974, defining the legal relationship of children born out of wedlock; the Constitutional Court Decision No. 46/PUU-VIII/2010, which recognizes limited civil relationships with biological fathers; and Presidential Regulation No. 96 of 2018 regarding birth registration requirements, along with the historical context set by the revoked Regulation No. 25 of 2008. The data analysis for this research will adopt a qualitative descriptive approach, focusing solely on the examination of relevant laws and regulations concerning children born out of wedlock in Indonesia. This will involve a thorough review of key legal texts, including the Indonesian Civil Code, the Marriage Law No. 1 of 1974, and the Constitutional Court Decision No. 46/PUU-VIII/2010. Each of these documents will be analyzed to understand their implications on the rights and obligations of children

born outside of marriage, specifically looking at how these laws establish legal relationships between these children, their mothers, and their biological fathers.

3. Results and Discussion

3.1. Legal Recognition and Social Landscapes of the Civil Rights

In Indonesia, the legal status of children born out of wedlock has historically been restrictive. According to Article 43, paragraph (1) of the Marriage Law No. 1 of 1974, these children establish a legal relationship only with their mothers and maternal families.¹³ This limitation is largely influenced by the Shafi'ite School of Islamic jurisprudence, which traditionally does not recognize the legal responsibilities of biological fathers toward these children. As a result, children born outside of marriage often face significant disadvantages compared to their legitimate counterparts.¹⁴

A notable change occurred with the Constitutional Court Decision No. 46/PUU-VIII/2010, which acknowledged a limited civil relationship between children born out of wedlock and their biological fathers, provided paternity is established through means such as DNA testing.¹⁵ This ruling redefined the civil status of illegitimate children, allowing them to establish a legal connection not only with their mothers but also with their fathers if paternity can be scientifically proven.

Under this decision, children born out of wedlock are entitled to civil rights that include a relationship with their maternal families and, under certain conditions, with their fathers (Constitutional Court Decision No. 46/PUU-VIII/2010). Birth registration must occur within 60 days of birth, requiring documentation such as a birth statement, evidence of marriage (if applicable), a family card, and the parents' identification. Even without marriage documentation, the child can still receive a birth certificate, although it will list only the mother's

¹³ Marilang, "Legal Relationship Between Illegitimate Children and Their Biological Father: the Analysis of Constitutional Court Decree No. 46/puu-viii/2010 in the Perspective of Civil and Islamic Law," *Journal of Indonesian Islam* 10, no. 2 (2016): 339. See also, Rohmawati, and Ahmad Rofiq, "Legal reasonings of religious court judges in deciding the origin of children: a study on the protection of biological children's civil rights," *Ijtihad: Jurnal Wacana Hukum Islam Dan Kemanusiaan* 21, no. 1 (2021): 15.

¹⁴ Muhamad Isna Wahyudi, "Judges' Legal Reasoning on Child Protection: Analysis of Religious Courts' Decisions on the Case of Child Parentage," *Al-Jami'ah: Journal of Islamic Studies* 55, no. 1 (2017): 135.

¹⁵ Bukhari Ali, Nur Wulandari, and Nahara Erianti, "Status of Children Born Out of Wedlock: A Study of Constitutional Court Decision and Its Relevance to the View of Ibnu Taimiyah," *EL-Urab: Jurnal Hukum Keluarga* 7, no. 1 (2024): 412.

name unless a court ruling acknowledges paternity (Article 51(1) of Presidential Regulation No. 96 of 2018).

The implementation of these birth registration regulations often presents challenges. Typically, birth certificates for children born out of wedlock only list the mother's name, reflecting the lack of a marriage certificate. Despite these hurdles, children retain the right to obtain their birth certificates, which serve as crucial legal documents for their identity and access to services. The implications of the Constitutional Court Decision No. 46/PUU-VIII/2010 are significant. By recognizing a civil relationship with biological fathers, the decision enhances the civil rights of these children, including their rights to inheritance, child support, and guardianship.¹⁶ This aligns with the principle of equality before the law, asserting that all children, regardless of their birth circumstances, deserve equal recognition and protection.¹⁷

Despite these legal advancements, children born out of wedlock continue to confront social stigma and discrimination. Many families resort to manipulating identity documents to improve the child's social standing and mitigate the associated stigma.¹⁸ Furthermore, while some judicial decisions have begun to extend inheritance rights to these children, the majority remain confined to their maternal lineage.¹⁹ The ruling has sparked controversy and differing interpretations among judges and legal scholars, leading to inconsistencies in the application of the law.²⁰ Legal protections for these children are uneven, with some judges recognizing limited rights like living allowances and inheritance while others uphold traditional views. This inconsistency often results in children being

¹⁶ Joshua Yohanes, and Benny Djaja, "Antinomy of Biological Father's Liability to Out-of-Marriage Children in Notary Deed: Antinomi Pertanggungjawaban Ayah Biologis Terhadap Anak Luar Kawin dalam Akta Notaris," *Jurnal Konstitusi* 21, no. 1 (2024): 132. See also, Ali, Wulandari, and Erianti, "Status of Children Born Out of Wedlock," 409.

¹⁷ Hazar Kusmayanti et al., "The Justice for Illegitimate Children of Indonesian Women Workers Through Constitutional Court Decision No. 46/PUU-VIII/2010," *Jurnal IUS Kajian Hukum dan Keadilan* 11, no. 2 (2023): 259. See also, Alfian Qodri Azizi, Ali Imron, and Bagas Heradhyaksa, "Fulfillment of civil rights of extramarital children and its effect on social dimensions," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 20, no. 2 (2020): 243.

¹⁸ Leslie Butt, Jessica Ball, and Harriot Beazley, "False papers and family fictions: household responses to 'gift children' born to Indonesian women during transnational migration," *Citizenship Studies* 20, no. 6 (2016): 799.

¹⁹ I. Nyoman Sujana, and Irma Rachmawati Maruf, "The Constitutionality of Inheritance Rights for Extramarital Children: Assessing the Legal Response under Balinese Customary Law," *Hasanuddin Law Review* 10, no. 1 (2024): 89. See also, Kusmayanti et al., "The Justice for Illegitimate Children of Indonesian Women Workers," 259.

²⁰ Rohmawati and Rofiq, "Legal reasonings of religious court judges in deciding the origin of children," 12. See also, Ali, Wulandari, and Erianti, "Status of Children Born Out of Wedlock," 421.

perceived as having a lower status, which further restricts their access to civil rights and welfare benefits.

Moreover, societal perceptions can lead to manipulation of identity documents as families attempt to shield their children from stigma.²¹ The ambiguities in family law also create disparities in civil rights protection, leaving unmarried mothers and their children vulnerable to social rejection and limited support, adversely affecting their health and well-being.²² In contrast, the decision has gained some backing within progressive circles, particularly from scholars advocating for the acknowledgment of children's rights regardless of their birth circumstances. This reflects a broader dialogue about social justice and equality, emphasizing the need to recognize and protect the rights of marginalized children within the legal framework.

The ruling in Constitutional Court Decision No. 46/PUU-VIII/2010 has significantly impacted the legal landscape for children born out of wedlock in Indonesia. This decision has been crucial in recognizing the limited legal status of these children, extending their rights to include the potential for support, custody, and financial assistance from their biological fathers.²³ However, the implementation of these rights has encountered various challenges, particularly due to differing interpretations among judges in religious courts, leading to legal uncertainties.²⁴ For instance, under Balinese customary law, children born out of wedlock are typically excluded from inheritance claims against their fathers, although they can inherit from their mothers. Conversely, the Indonesian Ulema Council (MUI) has shown support for the Constitutional Court ruling, asserting that biological fathers must allocate part of their wealth to secure the financial futures of these children.²⁵ This creates a complex landscape where the rights of these children vary significantly based on local customs and interpretations of the law.

Additionally, children of Indonesian migrant workers are afforded similar legal protections, indicating a broader commitment to ensuring the rights of children born out of wedlock. However, the practical application of these laws often falls short. Many children still face barriers to accessing their rights, particularly in

²¹ Butt, Ball, and Beazley, "False papers and family fictions," 791.

²² Sujana and Maruf, "The Constitutionality of Inheritance Rights for Extramarital Children," 89.

²³ Kusmayanti et al., "The Justice for Illegitimate Children of Indonesian Women Workers," 261.

²⁴ Rohmawati, and Syahril Siddik, "Legal Protection for Children Out of Wedlock: Ensuring the Best Interests of Children Through Judge Decisions," *Al-'Adalah* 19, no. 2 (2022): 318. See also, Rohmawati and Rofiq. "Legal reasonings of religious court judges in deciding the origin of children," 15.

²⁵ Sujana and Maruf, "The Constitutionality of Inheritance Rights for Extramarital Children," 86.

regions where societal stigma against illegitimate children is prevalent. The ongoing challenges of stigma, inconsistent legal protections, and limited resources contribute to the struggle for recognition and support for these families in Indonesia. Despite the progressive intent of the Constitutional Court's ruling, societal attitudes often lag behind legal changes. Stigma surrounding children born out of wedlock persists, impacting their social status and access to essential services. Many families feel compelled to manipulate identity documents to enhance the social standing of their children, highlighting the pressures that these families face.²⁶

Furthermore, the ambiguity surrounding inheritance rights remains a contentious issue. While some courts have begun to acknowledge the rights of illegitimate children to inheritance from their biological fathers, the prevailing traditional views still influence many judges' decisions. This inconsistency complicates the legal landscape for these children and their families, resulting in unequal access to rights and protections based on judicial perspectives. The clash between progressive legal interpretations and conservative religious norms underscores the complexities surrounding the implementation of the ruling. While some religious scholars advocate for the acknowledgment of children born out of wedlock through mechanisms like *istilhaq* (acknowledgment) and *qiyafah* (facial resemblance), many uphold traditional views that deny these children a paternal lineage.²⁷ This divergence highlights the ongoing tension between legal reform and cultural resistance.

The Constitutional Court's ruling also contributes to enhancing legal certainty in Indonesia by clarifying the status of children born out of wedlock. Historically, the Court has faced criticism for inconsistent rulings, particularly regarding regional head election disputes.²⁸ The 2010 decision serves as a pivotal step toward rectifying these inconsistencies, establishing clearer legal standards for the treatment of children born outside of marriage. Moreover, this ruling has implications for the state of democracy in Indonesia. While the Court grapples with consolidating democratic processes, its decisions, including No. 46/PUU-VIII/2010, help reinforce checks and balances among state organs. This function is vital in preventing the concentration of power and ensuring that various branches of government can effectively oversee one another.²⁹

²⁶ Butt, Ball, and Beazley, "False papers and family fictions", 795.

²⁷ Ali, Wulandari, and Erianti, "Status of Children Born Out of Wedlock, 415.

²⁸ Saut Parulian Manurung, "Inconsistent Constitutional Court Decisions Resulting in Uncertainty in Legal Dispute Regarding Regional Head Election Results," *Lentera Hukum* 6, no. 3 (2019): 321.

²⁹ Khairil Azmin Mokhtar, and Iwan Satriawan, "The role of Indonesian Constitutional Court in resolving disputes among the state organs," *Hasanuddin Law Review* 5, no. 2 (2019): 121.

It also clarifies the legal status of illegitimate children, some argue that adoption is a means to ensure the welfare of children, emphasizing the right of adopted children to receive parental care and family affection. Some note the importance of genetic identity in adoption cases and the legal barriers that prevent adopted children from accessing information about their biological origins.³⁰ In addition, the role of adoption is further reinforced by international norms that prioritize children's welfare. A study also compared child custody laws in Indonesia, Malaysia, and Turkey, revealing differences in custody and inheritance rights for illegitimate children.³¹ Indonesia and Turkey provide more inclusive rights than Malaysia, influenced by Islamic legal schools and cultural values. Furthermore, it concluded that under Islamic law, children born out of wedlock have no inheritance rights unless acknowledged by their father and suggested the use of DNA testing to determine *nasab* (lineage).³² Therefore, a broader legal reform and clearer guidelines are necessary to ensure consistent protection of children's rights and provide more inclusive rights in Indonesian legal system.

3.2. Legal Challenges and Procedural Standpoint

Despite these advancements, significant obstacles remain. The ongoing societal stigma, variations in legal interpretation, and cultural resistance necessitate further reforms to ensure equitable treatment for children born out of wedlock and their mothers. While legal frameworks have shifted to provide greater recognition and support, practical implementation often lags, leaving many children without the rights and protections to which they are entitled. While the Constitutional Court Decision No. 46/PUU-VIII/2010 marks a significant step forward in recognizing the rights of children born out of wedlock, its application remains complex and fraught with controversy. The legal and social challenges these children face highlight the need for continued advocacy and reform to ensure their rights are fully honored in practice.³³ As societal attitudes evolve and legal interpretations continue to develop, it is crucial to support marginalized children and their families, fostering an environment where all children, regardless of their birth circumstances, can thrive.

From a procedural standpoint, the effectiveness of these legal advancements is undermined by the requirements set forth in Law No. 23 of 2006, as amended by Law No. 24 of 2013 on Population Administration. Article 3 mandates that every

³⁰ Mero, "Adoption and Genetic Identity," 111.

³¹ Azwar et al., "Child Filiation and Its Implications on Maintenance and Inheritance Rights," 71.

³² Maulana et al., "Inheritance Rights of Nasabiyyah Children Born Out of Wedlock," 4479.

³³ Habib Shulton Asnawi, "Politik Hukum Putusan MK No. 46/PUU-VIII/2010 Tentang Status Anak di Luar Nikah: Upaya Membongkar Positivisme Hukum Menuju Perlindungan HAM," *Jurnal Konstitusi* 10, no. 2 (2013): 249.

resident report population events and significant occurrences to the implementing agency to fulfill the necessary requirements for population registration and civil registration. However, this provision is often criticized for its lack of clarity and effectiveness in implementation, as many families, especially those in vulnerable situations, may struggle with the bureaucratic processes involved. According to the theory of justice in Islamic law, actions should promote the welfare of humanity and foster tranquility. However, Article 3 does not adequately embody this principle, as the unresolved challenges faced by society indicate that effective solutions have not been provided. Thus, without clearer procedures and greater support for families navigating the registration process, the intended benefits of legal reforms are diminished, perpetuating the marginalization of children born out of wedlock.³⁴

Therefore, the relevant agencies should collaborate with local Neighborhood Associations (*Rukun Tetangga/Rukun Warga* or RT/RW) to collect data on both new and existing residents, as well as those who have passed away. By working with neighborhood authority, the challenges faced by the community can be addressed more effectively, allowing individuals to receive the solutions they deserve. Furthermore, the community often perceives this issue as trivial, given the complicated and time-consuming requirements and processes. As a result, many children still lack birth certificates, particularly those born out of wedlock. This situation adversely affects the children and contradicts the principles of justice in Islamic law and legal protection theory. The objective of laws and government regulations should be to ensure the welfare and justice of the Indonesian people, in accordance with the fifth principle of Pancasila.³⁵ Furthermore, the legal substance of Article 3 states that every resident is required to report population events and important occurrences they experience to the implementing agency, fulfilling the necessary requirements for population registration and civil registration. This article can be reconstructed to indicate that the implementing agency for population registration and civil registration should cooperate with local authorities to collect data on new, existing, and deceased residents. This collaboration will enable effective resolution of challenges related to population events, particularly concerning the birth certificates of children born out of wedlock, under the supervision of the implementing agency.

Regarding the considerations of judges, the similarities between the Constitutional Court Decision No. 46/PUU-VIII/2010 and the MUI Fatwa No.

³⁴ Rendy Dwi Hermanto, "Analisis Putusan MK No. 46/PUU-VIII/2010 tentang Status Anak Hasil Nikah Siri Perspektif Maqāsid Sya'rah Imām Al-Syātībī," *Mahakim: Journal of Islamic Family Law* 6, no. 1 (2022): 57.

³⁵ Agus Surono, "Peranan Hukum Dalam Pengelolaan Sumber Daya Alam Skala Desa Oleh Badan Usaha Milik Desa (Bumdes) Dalam Meningkatkan Kesejahteraan Masyarakat Desa," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 6, no. 3 (2017): 471.

11 of 2012 on the status of children born out of wedlock are noteworthy. The author assesses that both documents share a commonality in their legal reasoning, as they assert that children born out of wedlock must be protected as a form of human rights protection. Human rights are fundamental rights inherent to all individuals. These rights encompass the right to life, the right to liberty or freedom, property rights, and other basic rights that are intrinsic to human beings and cannot be infringed upon by others. Essentially, human rights originate from the individual, bestowed upon each person at birth. However, significant weaknesses persist in the issuance of birth certificates for children born out of wedlock without marriage certificates based on Islamic justice values. This issue reflects a serious and concerning problem, as data indicates that many children still lack birth certificates. Such matters are often trivialized by local governments. It is imperative that local authorities give special attention to this issue to ensure that children receive the welfare they deserve.³⁶

Law No. 23 of 2006, as amended by Law No. 24 of 2013, Article 3 on Population Administration does not effectively explain how to address various challenges faced by society. Relevant agencies should collaborate with local neighborhood associations to collect and synchronize population data, particularly for the birth certificates of children in specific areas, based on the theory of justice according to Islamic Law or the theory of *maslahah mursalah*. From a legal structural perspective, issues regarding the birth certificates of children born out of wedlock without marriage certificates have not been adequately addressed because the relevant agencies should be more proactive in collecting population data.³⁷ Relying solely on residents to report is unlikely to be effective, given the complexity and time-consuming nature of the process.

Moreover, from a legal substance perspective, Article 3 of Law on Population Administration states that every resident must report population events and important occurrences they experience to the implementing agency, fulfilling the necessary requirements for population registration and civil registration. This can be reconstructed to indicate that the implementing agency for population registration and civil registration can cooperate with local authorities to collect data on residents, including new, existing, and deceased individuals. This collaboration ensures that challenges regarding population events especially concerning the birth

³⁶ Padma D. Liman and Aulia Rifai, "Legal Status of Children Out of Wedlock According to the Decision of the Constitutional Court in Inheritance of the Burgerlijk Wetboek (BW) System," *Journal of Law and Sustainable Development* 11, no. 3 (2023): e577.

³⁷ Gresky Gistor Mangayuk, "Akta Kelahiran Terhadap Anak Yang Dilahirkan Di Luar Perkawinan," *Journal of Law (Jurnal Ilmu Hukum)* 8, no. 1 (2022): 47.

certificates of children without marriage certificates from both parents can be effectively addressed under the supervision of the implementing agency.³⁸

Article 49, paragraph 1 of the Law on Population Administration does not explicitly state why a Child Acknowledgment Letter must be issued by the father and approved by the mother of the child. This lack of clarity is evident when viewed through the lens of Islamic justice theory or the theory of *maslahah mursalah*. The structure of the law should allow for the issuance of such acknowledgment letters by authorized parties, such as the local authorities chairman. By having the local authorities issue the acknowledgment letter, they can also collect and register this information with the implementing agency, which can then follow up on the reports provided. This approach serves to provide comprehensive legal protection for children without burdening them with complicated issues, particularly those arising from their parents.

From a legal substance perspective, Article 49, paragraph 1 of the Law on Population Administration states that the acknowledgment of a child must be reported by the parents to the implementing agency no later than 30 days from the date of the Child Acknowledgment Letter issued by the father and approved by the mother. This can be reconstructed to indicate that the acknowledgment of a child can be carried out by the local authorities, who would collect data on the child's birth and synchronize that information for registration with the implementing agency, allowing the agency to follow up on reports from the local authorities. Thus, this process should not rely on an active system where parents are solely responsible; rather, it should be the government that takes an active role. In reality, an active system can be detrimental to the child, who should receive what they are entitled to, such as a birth certificate. This certificate is essential for purposes like enrolling in school, registering for health insurance, and other needs. As there is tension between children's best interests and societal or religious norms, there are consequences, highlighting the need for clearer legal guidelines and reforms.³⁹

3.3. Reformulation of Legal Protections in Light of Islamic Justice Values

In Law No. 23 of 2006, the latest being Law No. 24 of 2013 concerning Population Administration, Article 49, paragraph one states that the acknowledgment of a child must be reported by the parents to the implementing agency no later than 30 days from the date of the Child Acknowledgment Letter

³⁸ Meylina Rudy, Utia Ritonga, Rifandy, "From State Sovereignty to People Sovereignty: A Case Study of Indonesia's Constitutional Court," *Journal of Legal, Ethical and Regulatory Issues* 24, no. 4 (2021): 1.

³⁹ Noviana, Santoso, and Puspita, "Interpreting Legal Rights," 326.

issued by the father and approved by the mother of the child concerned.⁴⁰ This raises the question of what happens if the biological father refuses to acknowledge the child. If the child's mother subsequently has a new partner who claims to be the father of the child, and the mother agrees to this new father figure, despite him not being the biological father, can the implementing agency resolve the disputes faced by society? Article 49, paragraph one of Law No. 23 of 2006, as amended by Law No. 24 of 2013, does not clearly regulate the acknowledgment of the child by the father and the approval by the mother.

The law on Population Administration, specifically Article 49, paragraph one, needs to be reevaluated considering that many children still do not have birth certificates, particularly those with issues related to their birth certificates without having marriage certificates from both parents. From the perspective of legal protection theory and justice theory according to Islamic Law, this article does not reflect a sense of justice for the community, especially for children who need birth certificates without marriage certificates from both parents.⁴¹ Based on legal protection theory, justice theory according to Islamic Law, and justice theory according to Pancasila, particularly the fifth principle, it should be possible to report to the local neighborhood association, so that the local authorities of RT/RW can collect data and register it with the implementing agency. The implementing agency should then follow up on the reports given to them without requiring an acknowledgment letter, and the neighborhood authority should also be involved in monitoring whether the father is indeed the biological father or merely a new father figure.

In Law No. 23 of 2006, as amended by Law No. 24 of 2013, Article 49, paragraph (1) states that the acknowledgment of a child must be reported by the parents to the implementing agency no later than 30 days from the date of the Child Acknowledgment Letter issued by the father and approved by the mother of the child concerned. If based on Article 49, paragraph (1), the acknowledgment of a child must be reported by the parents to the implementing agency no later than 30 days from the date of the Child Acknowledgment Letter issued by the father and approved by the mother of the child concerned, then Article 49, paragraph one should indeed be revised to ensure that the authority records any births and can synchronize data with both parents regarding any issues related to the child. If there are indeed problems concerning the child, particularly regarding the child's birth certificate without marriage certificates from both parents, the authority can

⁴⁰ Euis Nurlaelawati, and Stijn Cornelis van Huis, "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, no. 3 (2019): 358.

⁴¹ Efrinaldi et al., "Revealing the Enforcement of Mbasuh Dusun Tradition for Pregnant Women Outside of Marriage in Indonesia," *Al-Istinbath: Jurnal Hukum Islam* 8, no. 2 November (2023): 627.

report this to the implementing agency so that the agency can provide the best solution for the issues faced. In practice, many children still do not have birth certificates, especially in cases where there are issues without marriage certificates from both parents.

So, in terms of legal substance, Article 49, paragraph one states that the acknowledgment of a child must be reported by the parents to the implementing agency no later than 30 days from the date of the Child Acknowledgment Letter issued by the father and approved by the mother of the child concerned. This can be reconstructed to state that the acknowledgment of a child can be carried out by the local neighborhood association collecting data on the birth of the child and synchronizing that data for registration with the implementing agency.⁴² This way, the implementing agency can follow up on the reports provided by the local authorities. Thus, the approach should not be one of active systems where parents are solely responsible, but rather it should be the government that takes an active role. In reality, an active system can be detrimental to the child, as the child should receive what they are entitled to, such as a birth certificate. This certificate is essential for purposes like enrolling in school, registering for health insurance, and other needs.

The state bears the responsibility to fulfill, protect, and promote human rights, particularly those of every child. Children's rights are inherent and universally applicable, granted without discrimination.⁴³ These rights represent a fundamental entitlement that belongs to every child, encompassing all aspects of their rights, including personal rights, irrespective of the legal marital status of their parents. In examining cases of unregistered marriages, it is insufficient to rely solely on statutory regulations regarding marriage validation. A deeper analysis should consider the values and constitutional rights protecting children, particularly Article 28B, paragraph (2) of the 1945 Constitution of Indonesia. The state must ensure the availability of services and facilities dedicated to child welfare, establishing social service standards that all responsible institutions must adhere to, accompanied by effective monitoring of compliance.⁴⁴ This highlights that children should not be left to advocate for their rights alone; the state has a vested interest in the well-being of all its citizens. Unregistered marriages jeopardize the interests

⁴² Noviana, Santoso, and Puspita, "Interpreting Legal Rights," 327.

⁴³ Siti Rohmawati and Rofiq, Ahmad, "Legal Reasonings of Religious Court Judges in Deciding the Origin of Children: A Study on the Protection of Biological Children's Civil Rights," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 21, no. 1 (2021): 11. See also, Said Abdelli, "The Status of a Child Born Out of Wedlock: An Analysis of the Foundations of Legal Protection," *Al-Ahwal* 13, no. 2 (2020): 187.

⁴⁴ Tri Jata Ayu Pramesti, *Akta Kelahiran untuk Anak Luar Kawin*, (Jakarta: Hukumonline, 2021), 98.

and fulfillment of children's rights, directly impacting their legal status and human rights protections.⁴⁵

From a legal standpoint, it is imperative for religious courts and relevant agencies to revise the existing regulations pertaining to the registration of children born out of wedlock who lack birth certificates. This modification aims to secure the rights and entitlements of these children, ensuring they are not marginalized due to their birth circumstances.⁴⁶ The implementation of birth registration, aligned with Islamic principles of justice, necessitates enhanced focus from authorities on both the legal substance and framework.

Table 1. Reformulation of Law on Population Administration

No	Before Reconstruction of Law No. 23 of 2006, as amended by Law No. 24 of 2013	Weaknesses	After Reconstruction of Law No. 23 of 2006, as amended by Law No. 24 of 2013
1	Article 3: "Every resident is required to report population events and important events they experience to the implementing agency, fulfilling the necessary requirements for population registration and civil registration."	In practice, many children still do not have birth certificates due to the low awareness among the public about the importance of birth certificates for children.	Article 3: "The implementing agency can cooperate with local neighborhood associations to collect data and synchronize information regarding every resident who experiences population events and important events, so that the implementing agency can follow up on the issues faced through the local authorities."
2	Article 49, paragraph 1: "The acknowledgment of a child must be reported by the parents to the implementing agency no later than 30 days from the date of the Child Acknowledgment Letter issued by the father and approved by the mother of the child concerned."	In practice, a) many children still don't have birth certificates due to low awareness among the public about importance of birth certificates for children; b) many parents are reluctant to create a Child Acknowledgment Letter due to their limited knowledge.	Article 49, paragraph 1: The acknowledgment of a child can be carried out by the local neighborhood association collecting data on the birth of the child and synchronizing that data for registration with the implementing agency, so that the implementing agency can follow up on the reports provided by the local authorities. Thus, the approach should not be one of an active system, but rather the government should take an active.

⁴⁵ Singgih Susilo et al., "Investigation of early marriage: A phenomenology study in the Society of Bawean Island, Indonesia." *Journal of Population and Social Studies [JPSS]* 29 (2021): 547.

⁴⁶ Simanjuntak, *Hukum Perdata Indonesia*, (Jakarta: Kencana, 2017), 76.

The findings indicate that there is a significant need for the government and religious leaders to facilitate community education, enabling individuals to understand their responsibilities upon marriage, such as reporting to the marriage registry and ensuring equitable treatment for all children. This need is underscored by research highlighting the importance of legal recognition and protection for children born out of wedlock, particularly in the context of Indonesia, where inconsistencies in judicial rulings have been identified as barriers to proper legal protection.⁴⁷ Additionally, outreach efforts by government entities and relevant institutions are essential for raising public awareness about the importance of obtaining birth certificates for children born out of wedlock. Studies emphasize that the lack of birth certificates can lead to significant disadvantages for children, including limited access to education and social services.⁴⁸ Strengthening both the legal substance and the structural support for these initiatives is crucial to aid those who may not fully comprehend the registration process. Legal scholars and advocates argue that providing clearer guidelines and support for those navigating the legal landscape will ensure better protection for children.⁴⁹ Such measures should specifically target children who have not yet received their birth certificates, thus addressing a critical gap in legal recognition and protection.⁵⁰ By fostering a more informed community, these efforts can significantly enhance the welfare and rights of children born outside of marriage, aligning with broader principles of justice and equality in society.⁵¹

⁴⁷ Ali, Wulandari, and Erianti, "Status of Children Born Out of Wedlock," 421. See also, Abdul Jarir, Lukito, Rachmad, and Ichwan, Muhammad N, "Legal Reasoning on Paternity: Discursive Debate on Children Out of Wedlock in Indonesia," *Abkam: Jurnal Ilmu Syariah* 23, no. 2 (2023): 453.

⁴⁸ Siti Rohmawati, "Legal Protection for Children Born out of Wedlock: Ensuring the Best Interests of Children through Judge Decisions," *Al-'Adalah* 19, no. 2 (2022): 319.

⁴⁹ Euis Nurlaelawati and Stijn Cornelis van Huis, "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, no. 3 (2019): 358.

⁵⁰ Marilang, "Legal Relationship Between Illegitimate Children and Their Biological Father," 337.

⁵¹ Eva Schlumpf, "The Legal Status of Children Born Out of Wedlock in Morocco," *Electronic Journal of Islamic & Middle Eastern Law* 4 (2016): 1. See also, Björn Bentlage, "Legislating for the Benefit of Children Born Out of Wedlock," *Die Welt des Islams* 55, no. 3-4 (2015): 382.

4. Conclusion

The findings indicate that the implementation of birth registration regulations for children born out of wedlock, grounded in Islamic justice values, has not yet realized equitable outcomes. Ensuring protection for these children is essential to prevent discriminatory treatment and to affirm their status as equal to other children. Legal safeguards are necessary to protect their civil rights, particularly when their status is questioned. Additionally, the deficiencies in birth registration processes for children born out of wedlock highlight a lack of clear legal frameworks that define their rights within substantive law. Furthermore, structural challenges exist, including inadequate collaboration among law enforcement agencies, which underscores the need for a coordinated approach involving multiple stakeholders. The necessity for reform in the regulations governing birth registration, particularly for those born without marriage certificates, is addressed in Law No. 23 of 2006 and subsequently in Law No. 24 of 2013, specifically in Article 3 concerning Population Administration.

The findings suggest several implications for improving child registration processes. First, enhancing socialization efforts regarding the government program for free birth certificate issuance can increase public awareness and engagement, fostering a supportive environment for population administration. This includes encouraging schools to require birth certificates as a mandatory criterion for enrollment. Second, the government should reconsider the application of marriage validation (*istbath nikah*) for couples who married after the enactment of Law No. 1 of 1974 on marriage. Maintaining such a requirement could inadvertently legitimize extramarital relationships, as couples may exploit it to obtain birth certificates for their children by easily seeking validation through religious courts. Lastly, the Constitutional Court Decision No. 46/PUU-VIII/2010 should be uniformly applied to all children seeking birth certificates, ensuring that children from unregistered marriages receive the legal recognition and protections they deserve.

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