

# Legal Protection Children Outside Of Marriage

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## **Abstract**

*Children born out of wedlock still often experience discriminatory treatment, violence and injustice, and even become victims of the judicial system. Recently, children outside of marriage have become a phenomenon that has experienced a significant escalation. There has been no significant policy in favor of protecting the existence of children outside of marriage in society. The approach method used in this study uses a normative juridical approach. the research results were obtained Legal protection of children outside of wedlock and birth mothers includes protection of the juridical rights of children outside of wedlock. With the issuance of the Constitutional Court Decision, it becomes a legal breakthrough to demand recognition and ratification so as to provide legal protection for the rights of children to claim or obtain their civil rights, including illegitimate children resulting from adultery and donated children and protection for biological mothers to ask for responsibility for provide for and raise children outside of marriage to their biological father. The politics of child law outside marriage is also based on the Convention on the Rights of the Child which the Indonesian state has also ratified. a gift or a gift from Allah Almighty*

**Keywords:** *Children; Legal Protection; Outside of Marriage;*

## **1. Introduction**

Marriage is a culture and part of the human life cycle. This is the basis for the formation of a family. The family is a group of individuals who are related, live together and work together in one unit. Life in the group is not accidental, but bound by blood or marital relations.<sup>1</sup>

The main sources of all statutory regulations of the Republic of Indonesia are Pancasila and the 1945 Constitution. One of the precepts of Pancasila and occupying the first principle is God Almighty. This precept is also stated in the 1945 Constitution, one of the articles of the 1945

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1. Lindha Pradhipti Oktarina, Mahendra Wijaya, Argyo Demartoto, Pemaknaan Perkawinan: Studi Kasus Pada Perempuan lajang Yang Bekerja Di Kecamatan Bulukerto Kabupaten Wonogiri, *Jurnal Analisa Sosiologi*, April 2015,4 (1): page.75-90

Constitution stipulates state guarantees for the implementation of respective religious teachings.<sup>2</sup> Indonesian society is classified as heterogeneous in all its aspects. In the religious aspect, it is clear that there are two major groups of religions recognized in Indonesia, namely: Religion and Non-Samawi Religion; Islam, Hinduism, Buddhism, Protestant Christianity and Catholicism. All religions have their own rules, both vertically and horizontally; including the procedures for marriage.<sup>3</sup>

From a legal marriage there will be legal consequences, including the children born from that marriage to become legal children, the husband's obligation to finance and educate the children and his wife and seek a joint residence, have the right to inherit between husband and wife and children with parents, the father has the right to be the guardian of marriage for his daughter, and if one of the husband or wife dies, the other has the right to be the supervisor of the children and their assets.<sup>4</sup>

Currently, there are still members of the community who are married under hand. Basically, an underhand marriage is a marriage which is carried out according to their respective religions and beliefs but is not administratively registered with the authorized office. These underhand marriages are still carried out because of the low cost and do not require administrative requirements.

Considering that marriage has a very important role in supporting the welfare of the nation, in Indonesia there is a marriage law which is authentically regulated in Law No. 1 of 1974 concerning Marriage, the State Gazette of the Republic of Indonesia of 1974 Number 1. The explanation of this Law is contained in the Supplement to the State Gazette of the Republic of Indonesia Number 3019 which in the general explanation section describes some of the basic problems.<sup>5</sup>

According to Article 2 paragraph (1) of Law Number 1 of 1974, marriages carried out according to religious law, for example, under-hand marriages carried out according to Islamic or non-Islamic religions are legal but there is no marriage certificate. This means that if a marriage has fulfilled the requirements and is harmonious in marriage or the consent of the qabul has been carried out (for Muslims) or the priest / pastor has carried out a blessing or other ritual (non-Muslim), then the marriage is valid, especially according to religion and community belief, because it is considered legal as a result there are still marriages that are not registered for various reasons, for example, the cost is too expensive, the procedure is complicated, or to

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2. Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia; Antara Fiqh Munakahat Dan Undang-Undang Perkawinan*, Kencana, Jakarta, 2009, page. 22-23.

3. Sudarsono, *Hukum Perkawinan Nasional*, Rineka Cipta, Jakarta, 2005, page.6

4. Mohd Idris Ramulyo, *Hukum Perkawinan Islam Suatu Analisis Undang-undang Nomor 1 Tahun 1974 dan Kompilasi Hukum Islam*, Bumi Aksara, Jakarta, 1999, page. 248.

5. Budi Prasetyo, *Perspektif Undang-Undang Perkawinan Terhadap Perkawinan di Bawah Umur*, *Serat Acitya- Jurnal Ilmiah UNTAG Semarang*, Vol. 6 No. 1, 2017, page.135-142

release responsibility from administrative lawsuits from superiors, especially for second marriages (for Civil Servants or ABRI).<sup>6</sup>

In Article 2 paragraph (2) of Law Number 1 Year 1974, for those who are married according to the Islamic religion the registration is carried out at the Office of Religious Affairs (KUA) to obtain a marriage certificate as proof of the existence of the marriage, while for those who are non-Muslim registration is made at the Civil Registry Office to obtain a marriage certificate. In this article, it can be understood about the importance of marriage registration, especially for obtaining rights when something untoward occurs in terms of marriage, for example inheritance when the husband dies and vice versa, the cost of living or providing for the children, related to the status of the child. as a legal child as a result of the marriage, and the property of the gonogini when deciding on a marriage or divorce

According to the law of the state, an illegal marriage because it is carried out without the knowledge and supervision of a marriage registrar has no legal force and has no legal consequences. The absence of legal certainty for this under-hand marriage has a negative impact on the status of the child being born. The status of a child born as a result of an underhand marriage is considered an illegitimate child or an illegitimate child, consequently the child only has a civil relationship with the mother and the mother's family, meaning that the child does not have a legal relationship with the father.

A child who is born without sin, is still clean, pure, and has good intentions as a result of an underhand marriage will have an impact on the child when the child grows up. Just because the problem of a marriage that is carried out under the hands of both parents, the child who will experience various difficulties because there is no proof of a legal birth from the marriage of both parents, for example the child will enter education without a birth certificate will find it difficult to enter level of education and when he looks for a job it will be even more difficult because of the absence of a birth certificate. This felt very unfair to the child.

Even though it still raises pros and cons in society, the practice of hand-to-hand marriage is still common. In fact, marriage under hand will clearly have an impact not only on the spouse in question, but also on the offspring.<sup>7</sup>

In the Marriage Law, children are divided into two, namely legitimate children and illegitimate children. Legitimate children are children born in or as a result of a legal marriage, while children outside of marriage are children born outside of a legal marriage. An illegitimate child only has a civil relationship with his mother and his mother's family, so the child does not have a legal relationship with his father, both with regard to the cost of living and education, even

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6. *Ibid.*

7. Harpani Matnuh, Perkawinan Dibawah Tangan dan Akibat Hukumnya Menurut hukum perkawinan nasional, *Jurnal Pendidikan Kewarganegaraan*, Volume 6, Nomor 11, Mei 2016, page.899-908.

inheritance.<sup>8</sup>

Apart from being considered illegitimate, children born outside of marriage or unregistered marriage also only have a civil relationship with the mother or the mother's family (Articles 42 and 43 of Law No.1 of 1974). While there is no civil relationship with his father.

## 2. Research Method

The research method used in this research is library research. Mestika Zed defines library research as library research that utilizes library sources to obtain research data, so that library research limits its activities only to library collection materials.<sup>9</sup> Meanwhile, the approach used in this research is normative juridical. In Soerjono Soekanto's view, normative juridical research is a series of legal studies carried out by examining library materials or secondary data as the basic material for research by conducting a search of regulations and literature related to the problem under study.<sup>10</sup>

The legal materials used in this study consist of primary and secondary legal materials. Primary legal materials consist of statutory regulations, official records or minutes relating to this research. Meanwhile, secondary legal materials relate to legal materials that provide clarification to primary legal materials, such as books, literature, articles, papers and other materials taken from legal experts.

## 3. Result and Discussion.

### 1. Legal Politics of Children Outside of Marriage

Political law is an activity that determines the pattern or way of forming laws, supervises the operation of the law, and reforms the law to achieve the goals of the state. Political law also needs to be seen from the legal policy that will be enforced, either by forming new laws or by replacing old laws in order to achieve the goals of the state.<sup>11</sup> Marriage, which in religious terms is called "nikah" means a contract that legalizes association and limits the rights and obligations of men and women who are not Muslim.<sup>12</sup> The word nikah in the Koran is mentioned 23 times and nikah etymologically means "assembling" while the meaning of majaz is "sexual relations".<sup>13</sup> Marriage for humans is an important thing, because with a marriage a person will get a balance of life both socially, biologically, psychologically and socially.

Marriage is one of the dimensions of life that is very important in human life in any world. The importance of marriage is so important that it is not surprising that the religions of the

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8. Ardian Arista Wardana, Pengakuan Anak Di Luar Nikah: Tinjauan Yuridis Tentang Status Anak Di Luar Nikah, *Jurisprudence*, Vol. 6 No. 2 September 2016, page.160-165
  9. Mustika Zed, *Metodologi Penelitian Kepustakaan*, Yayasan Obor Indonesia, Jakarta, 2008, page. 1-2.
  10. Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif (Suatu Tinjauan Singkat)*, Rajawali Pers, Jakarta, 2001, page. 13.
  11. Mahfud M.D, *Politik Hukum di Indonesia*, Rajawali Press, Jakarta, 2010, page.1.
  12. Sulaiman Rasyid, *Fiqih Islam*, Sinar Baru, Bandung, 2001, page.348
  13. M. Quraish Shihab, *Wawasan Al Qur'an*, Mizan, Bandung, 2007, page.191

world regulate marriage issues, even traditions or community customs and state institutions do not miss out on regulating marriages that prevail in society where one of the functions of marriage is to form a family. To maintain, protect the family and increase the welfare and happiness of the family, laws governing marriage and family are drafted.<sup>14</sup>

The family is a universal social institution, present at all levels and groups of society in the world, in addition to religion. The family is a miniature of society, nation and state. The two institutions, family and religion, are the institutions that are hardest hit by the currents of globalization and modern life. In the era of globalization, people's lives tend to be materialistic, individualistic, social control is getting weaker, husband and wife relationships are increasingly stretched, children's relationships with parents shift, family sanctity is increasingly depleted.

Every person who is already married is very natural if he wants to have children immediately to continue their offspring. What is meant by offspring is the relationship between children and parents, or more broadly between children on the one hand and parents and voorouder on the other. Heredity is the basis of blood bonding (*bloedverwantschap*). Offspring can be legal (*wettig*) or illegitimate (*onwettig*). Offspring has legal consequences and legal consequences are most perfectly attached to legal descendants.<sup>15</sup>

In the application of legal politics to the status of the child's position outside of marriage, it has actually been applied with decision No. 46 / PUU-VIII / 2010, the Constitutional Court adopted policies and considerations stating that Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage which reads "Children born outside of marriage only have a civil relationship with their mother and their mother's family. "This paragraph is very contradictory to the 1945 Constitution. And it does not have binding legal force as long as it is interpreted as eliminating the civil relationship between a child and a man as his father which can be proven based on science and technology, so the verse must be read," has a civil relationship with his mother and his mother's family as well as with a man as his father which can be proven based on science and technology and / or other evidence by law to be related by blood, including civil relations with his father's family"<sup>16</sup>

The legal politics of the Constitutional Court decisions are based on the principle of "equality before the Law", namely the principle of "equality before the law". This principle is contained in the 1945 Constitution Article 28B paragraph (1) and (2) as well as Article 28D paragraph (1) which reads: people have the right to recognition, guarantee, protection and legal certainty that is just and equal treatment before the law ". This is symmetrical with the

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14. Santoso, Hakekat Perkawinan Menurut Undang-Undang Perkawinan, Hukum Islam Dan Hukum Adat, *Yudisia*, Vol. 7, No. 2, Desember 2016, page.412-434.

15. Vollmar, *Hukum Keluarga (Menurut KUHPerduta)*, Tarsito, Bandung, 1981, page. 89.

16. Mahkamah Konstitusi Republik Indonesia, Putusan MK 46/PUU-VIII/2010 tentang status anak yang lahir di luar perkawinan, page. 37.

principles of rule of law put forward by Julius Stahl, one of which is the principle of equality before the law. This principle in the rule of law means that the government may not prioritize certain people or groups of people, or discriminate against certain people or groups of people. This is also in accordance with the opinion of Todung Mulya Lubis, as quoted by Satya Arinanto, that only in a state where human rights are protected, and a state based on law is the ideal home for human rights.<sup>17</sup>

The legal politics of the constitutional court are also based on the Convention on the Rights of the Child, which the State of Indonesia has also ratified. Article 2 of the Convention on the Rights of the Child clearly states:<sup>18</sup> "States parties will respect and guarantee the rights set forth in this Convention to every child in their jurisdiction without discrimination of any kind, regardless of race, color, sex, language, religion, political views, origins. nation, ethnicity or social, property, disability, or legal guardian according to the law".

The legal politics of the Constitutional Court decisions are inherent with the concept of Human Rights which terminologically is defined as basic rights or basic rights brought by humans from birth as gifts or gifts from Allah Almighty. Rights possessed by children are not because they are given to them by society or based on positive law, but are solely based on the child's dignity as a human being.<sup>19</sup>

The result of this decision has the consequence of having an out-of-wedlock child's relationship with their biological father; There are rights and obligations between the child out of wedlock and the biological father, both in the form of a living, inheritance and so on. This is certainly valid if first evidence is carried out through science and technology such as DNA testing and so on, which proves that it is true that the child out of wedlock has a blood relationship with a man as his biological father.

Among other things, injustice towards children outside of marriage or children born outside of legal marriages are: The child experiences losses caused by the actions of both parents, the psychological burden caused by the community being labeled as illegitimate children / children resulting from adultery. Socially, children also have to bear unfair treatment and negative stigma from society. Moreover, in connection with the absence of civil relations with their biological father, the existence of children as citizens is systematically reduced. This can be seen from Law No. 23 of 2006 which requires the making of a child's birth certificate must be accompanied by an official marriage document from the state. In the absence of a birth certificate, a child will experience problems when he has to get access to education, health

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17. Satya Arinanto, *Politik Hukum 2*, Program Pascasarjana Fakultas Hukum Universitas Indonesia, Jakarta, 2001, page.190.

18. Siti Musdah Mulia, *Islam dan Hak Asasi Manusia: Konsep dan Implementasi*, Naufan Pustaka, Yogyakarta, 2010, page.254.

19. Ack Donnely, *Universal Human Right in Theory and Practice*, Corenell University Press, London, 2003, page. 21.

services, social assistance, and several other public services.<sup>20</sup>

Without a birth certificate, this will imply that the child does not get “inheritance rights”, this is very detrimental to children’s rights. In the case of ‘illegitimate’ marriages, the child is not worthy of the status of child, both according to state law and religious norms, because his birth was against his will.

Regulations regarding the position of children out of wedlock are regulated in the provisions of Article 43 paragraph 1 of the Law. No. So far, 1 of 1974 is not sufficient in providing legal protection and tends to be discriminatory, the status of children outside of marriage or children born outside of legal marriages only have civil relations with their mothers and their mothers’ families without the responsibility of their biological fathers. So that in reality a child must share in the losses incurred by the actions of both parents.

## **2. Legal Protection of Children Outside Marriage**

After the issuance of the Constitutional Court decision, both the recognition of children on a voluntary principle by using a child recognition institution by the father, and the recognition of children with the principle of coercion against the father of an illegitimate child in cases of decency crimes, currently it is not important, because by law it provides a legal protection measure. which must be carried out by anyone to be responsible both civil and non-judicially with the issuance of the Constitutional Court Decision Number 46, even though it is not a case of decency crimes, a woman and her child are given the opportunity by law to prosecute before the court and fight for the child’s rights. to have a civil relationship with his father.

If a woman and / or child can prove by means of science and technology (i.e. DNA testing) and / or with other legal evidence that there is a blood relationship between the child and boy being sued, the judge can issue a decision regarding the civil relationship between them. In this case it can be said that there was forced confession.

Legally, a biological father who wants to acknowledge his child voluntarily also experiences problems if he wants to recognize a child outside of marriage because the recognition of a child outside of marriage can only be done in one way, namely by making a child recognition certificate and there must also be consent from the biological mother the child.<sup>21</sup> If a biological mother of an out-of-wedlock child can provide for and fulfill the needs of an out-of-wedlock child until adulthood, while the biological father of an out-of-wedlock child wants to admit his child voluntarily, but the biological mother of an out-of-wedlock child disagrees, the recognition of this child cannot happen and this is the case. does not become a legal problem for biological mothers because they do not agree with the recognition of their biological father, apart from this problem, basically the decision of the Constitutional Court of the Republic of Indonesia

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20. M. Beni Kurniawan, Politik Hukum Mahkamah Konstitusi Tentang Status Anak Di Luar Nikah: Penerapan Hukum Progresif Sebagai Perlindungan Hak Asasi Anak, *Jurnal HAM*, Vol 8, No 1, Juli 2017, page.67-78

21. Pasal 43 Undang-undang Perkawinan No 1 tahun 1974

No. 46 / PUU-VII / 2010 wants to provide legal protection for children outside of wedlock and for a biological mother of a child. outside of marriage if a biological mother cannot support and care for a child outside of marriage until adulthood, in this case a biological mother in taking care of her underage child can claim her father's rights using the legal basis of the Constitutional Court decision No. 46 / PUU-VII / 2010 This is certainly an effort that can be taken continuously through the process of proof in court according to the verdict MK RI No 46 / PUU-VII / 2010.

Using the theory of protection proposed by Suhardjo, namely the theory of protection,<sup>22</sup> Whereas child protection can be divided into two definitions, namely juridical protection which includes protection in: the field of public law, the field of civil law. Protection of a non-juridical nature which includes, among others: the social sector, the health sector, the education sector.<sup>23</sup>

Protection of children outside of wedlock and birth mothers includes protection of the juridical rights of children outside of wedlock. With the issuance of the Constitutional Court Decision, it becomes a legal breakthrough to demand recognition and ratification so as to provide legal protection for the rights of children to claim or obtain their civil rights, including children outside of marriage as a result of adultery and donated children and protection for biological mothers to ask for responsibility for providing. and raising children outside of marriage to their biological father. To prove the biological father of an out-of-wedlock child can be done with a forensic test, namely a DNA test, but the civil rights of an out-of-wedlock child after the issuance of the Constitutional Court's decision still contradicts Article 287 of the Civil Code where investigating who is the father of a child is prohibited which means that through a Court decision cannot determine who the father of a child is.

Child protection in law No. 1 of 1974 on marriage and Islamic law can be seen as follows:<sup>24</sup>

1. Child protection that can be found through Law No.1 of 1974 is that there is no space or space for providing protection without the existence of a marriage registration. The registration of marriage in marriage in this law is an absolute requirement that must be met for every Muslim citizen of Indonesia who intends to get married.
2. Child protection in Islamic law can be carried out by determining the origin of the lineage for the child in a legal marriage and this protection can also be given to the child through confession.
3. Protection of children outside of marriage, whether unregistered marriages or children born

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22. Abdul Manan, *Aspek-Aspek Pengubah Hukum*, Penerbit Kencana, Jakarta, 2009, page.23

23. Irma Setyowati Soemitro, *Aspek Hukum Perlindungan Anak*, Bumi Aksara, Semarang, 1990, page.13

24. Fikri, Budiman, Andi Bahri, *Perlindungan Anak Di Luar Nikah Dalam Hukum Negara Dan Hukum Islam (Perspektif Hakim Pengadilan Agama Parepare)*, *Diktum : Jurnal Syariah dan Hukum*, Vol 12 No 1 (2014), page.1-22

without marriage, can be realized in the Religious Courts. Protection of children outside of marriage whose parents' marriages are not recorded can be done through the marriage certificate and the application of Article 43 paragraph 1 of the marriage law after the judicial review of the Constitutional Court. Children out of wedlock who are born without a valid marriage cannot be given protection through the marriage ceremony, because they do not have a legal basis to request for marriage, but the protection that can be provided by the judges of the Religious Court for these children can only be provided through Article 43 paragraph 1 after the test. material of the Constitutional Court. The rights that can be granted to children out of wedlock without a legal marriage are limited to civil rights regarding the right to live a living, the right to education and health and the right to get public services, so that civil rights related to inheritance rights and guardianship rights are not can be given to a child out of wedlock without a legal marriage.

The status as children born outside of marriage is a problem for the out-of-wedlock children, because they cannot get their rights and positions as children in general like legitimate children. The rights of children while still in the womb until they finish breastfeeding, the mother has the same rights between legal children and illegitimate children.

## **1. Conclusion.**

Legal protection of children outside of wedlock and birth mothers includes protection of the juridical rights of children outside of wedlock. With the issuance of the Constitutional Court Decision, it becomes a legal breakthrough to demand recognition and ratification so as to provide legal protection for the rights of children to claim or obtain their civil rights, including illegitimate children resulting from adultery and donated children and protection for biological mothers to ask for responsibility for provide for and raise children outside of marriage to their biological father. The politics of child law outside marriage is also based on the Convention on the Rights of the Child which the Indonesian state has also ratified. a gift or a gift from Allah Almighty.

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