

LEGAL REVIEW OF THE ORIGIN OF CHILDREN FROM UNREGISTERED MARRIAGES (Study of Decision No. 483/Pdt.P/2023/PA.Krs)

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Abstract

The three objectives of this study are to: (1) ascertain the parentage of children in unregistered marriages; (2) ascertain the legal ramifications if children in a marriage are not registered under Indonesian law; and (3) ascertain the judge's legal considerations in decision Number 483/Pdt.P/2023/PA.Krs. Empirical and normative legal research are the types of research used in this study. The source and secondary legal materials employed in the data analysis were literary techniques, which were then examined using qualitative approaches. The study's findings indicate that the legal framework dictating how the parentage of children born to unregistered marriages is determined is routinely reviewed. This study makes reference to the laws governing marriage, No. 1 of 1974, and population management, No. 23 of 2006. Marriages that are both registered and unregistered are still regarded as legitimate but are subject to legal repercussions because the unregistered marriage. Marriages that aren't formally recorded with the Civil Registry office. Marriages that are not officially recognized by the Civil Registry Office have an effect on the children as well as the husband and wife legally.

Keywords: Marriage, Origin of Children, Decision No.483/Pdt.P/2023/PA.Krs

INTRODUCTION

Marriage is a fundamental human right as stipulated in Article 28B(1) of the 1945 Constitution of the Republic of Indonesia. According to Subekti, marriage is a lawful union between a man and a woman for an extended period of time. A marriage certificate is essential for establishing the legitimacy of children born from a marriage. Legal proceedings in court cannot be carried out if the marriage cannot be proven by such a certificate. Therefore, Article 7 of the Compilation of Islamic Law states in paragraph 1, "Marriage can only be proven by a marriage certificate issued by a marriage registrar." The legal consequences of an unregistered marriage, even if it is considered valid according to religion or belief, are that marriages conducted outside the supervision of a marriage registrar do not have permanent legal force and are considered invalid in the eyes of the law and the state. The legal implications of such marriages are very detrimental to wives and women in general, both legally and socially, as well as to the children born of such marriages. A child is considered legitimate regardless of when the child was conceived in the mother's womb and regardless of whether the child was born within a valid marriage or not. The legal recognition and legal protection of a legitimate child are solely dependent on the child being born within a marriage conducted in the presence of a marriage registration officer and properly registered. Despite the Constitutional Court Decision No. 46/PUU-VIII/2010, it is not easy for children born out of wedlock to obtain civil status with their fathers. Even Law No. 24 of 2014 amending Law No. 23 of 2006 on Population Administration has dashed the hopes of children born out of wedlock by stating that such children born before a valid marriage according to the religious law of their parents cannot be recognized, even though they did not choose to be born out of wedlock. This creates a conflict between civil law doctrine or jurisprudence and Islamic law with child protection law, as the Universal Declaration of Human Rights (UDHR) fundamentally does not discriminate against any human being. As in the case being raised by the author, the petition for child approval at the Kraksaan Religious Court, the petitioners have explained that they were legally married on November 18, 2011, at the Probolinggo Religious Affairs Office, and were blessed with a child born on June 12, 2014. In 2018, the petitioners divorced at the Kraksaan Religious Court, as evidenced by

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Divorce Certificate No. 1409/AC/2018/PA.Krs. By the end of November 2018, the petitioners reconciled and remarried religiously in Karanganyar Village, Paiton District, Probolinggo Regency. After marrying, the couple was blessed with a second child born on October 12, 2019, and the petitioners remarried before a marriage registrar on March 21, 2023. The petitioners wish to process the birth certificate for their second child but are facing difficulties due to the child's status, as the child was born before the petitioners were legally married. This is what motivates me as a researcher to conduct research and answer the issues raised in my thesis entitled **LEGAL REVIEW OF THE ORIGIN OF CHILDREN IN UNREGISTERED MARRIAGES** (Study of Decision No. 483/Pdt.P/2023/PA. Krs) to determine the procedures for establishing the origin of children that can serve as a legal basis and provide legal certainty.

LITERATURE REVIEW

Determination of Child's Origin

The determination of a child's origin in Islam is known as child recognition. The recognition of a child in Islam is intended for the welfare of the recognized child, a sense of social responsibility, to conceal the shame of a child born out of wedlock, and to anticipate greater problems in the future if the child is not recognized in the marriage (Abdul, 2004). The recognition is regulated under Article 281 of the Civil Code and can be done in the following ways: recorded in the child's birth certificate, in the parents' marriage certificate (if the parents later marry), in a document issued by the Civil Registrar and subsequently recorded in the birth registry according to the date the document was issued, or in another authentic document.

Based on the provisions of Article 2 and the official explanation of the Marriage Law, a marriage that is not reported or registered at the Civil Registry Office is a marriage that can be considered a secret marriage. Therefore, the legal status of a secret marriage under national law is that it is an invalid marriage, but it is not invalid under the law. Children born from an unregistered marriage do not have official legal status in the country where they were born or in the country of origin of their parents. As a result, the child lacks legal identity because Law No. 23 of 2006 on Population Administration requires that an application for a birth certificate must be accompanied by marriage documents from the country. Without a birth certificate, the child will face difficulties obtaining an ID card (KTP), a passport, enrolling in school, and inheriting property. Therefore, the brief explanation clearly shows the legal relationship between the determination of a child's origin, namely the existence of the Institution for the Recognition of Children Born Out of Wedlock, which establishes a civil relationship between the child and their parents, ensuring that the child's rights are protected and that they have the right to an identity, nationality, and family ties.

Definition of Children

In general, a child is someone born from the womb of a mother, which is the result of sexual intercourse between a man and a woman. The definition of a child in Islam is socialized as a creature created by Allah SWT who has a noble position through a process of creation that reflects the will of Allah SWT. This is explained in Surah Isra verse 70 as follows:

وَلَقَدْ كَرِمَنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيَّابَاتِ وَفَضَّلْنَاهُمْ عَلَىٰ كَثِيرٍ

مِنْ حَلَقَنَا لَقْصِيلًا

Meaning: “And indeed, We have honored the children of Adam, We have carried them on land and sea, We have provided them with good sustenance, and We have favored them with perfect excellence over most of the creatures We have created.”

Children's rights are clearly stated in Articles 5 to 18 of Law Number 23 of 2002 concerning Child Protection, which was amended by Law Number 35 of 2014, which states, among other things, that "children have the right to know their parents." Knowing a child's parents is related to the child's origins. A child's origin can be proven by a birth certificate. According to legal opinion, the stages of the birth process can be classified as follows:

1. If the process is legal, both according to state law and religious law, then when the child is born, he or she will be considered a legitimate child.
2. If the process is not legal, either according to state law or religious law, then when the child is born, they will be considered an illegitimate child (child born out of wedlock).

Itsbat Nikah

Itsbat Nikah refers to the legalization of marriages that have been conducted according to Islamic law but have not been registered with the KUA or PPN (Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number KMA/032/SK/2006 concerning Guidelines for the Implementation of Court Duties and Administration). This is based on the provision that the registration of a marriage is not a requirement for its validity, as a marriage is considered valid if it has been conducted in accordance with the religion and beliefs involved, leading to many marriages not being registered in accordance with applicable regulations. The validity of a marriage is further clarified in Article 4 of the Compilation of Islamic Law, which states that a marriage is valid if it is conducted in accordance with Islamic law as stipulated in Article 2(1) of Law No. 1 of 1974 on Marriage. Furthermore, Article 5 of the Compilation of Islamic Law states:

1. To ensure the orderliness of marriages for the Islamic community, every marriage must be registered.
2. The registration of marriages as referred to in paragraph (1) shall be carried out by Marriage Registrars as regulated in Law No. 22 of 1946 in conjunction with Law No. 32 of 1954.

METHOD

This type of research leads to a normative and empirical legal research approach, which the author chose to use in conducting this research, where law is chosen as a legal norm system, namely research on secondary data. The author looks for aspects that are related to what is being researched and then links them to other variables in the compilation of laws. Legal sources are anything that can give rise to law and where law is found. Therefore, the data used in this study are primary and secondary data. Primary data are data obtained directly by researchers in the field through respondents by means of observation, interviews, and questionnaires. The target of primary data is data found directly by researchers in the field. In this case, the data is obtained from Decision No. 483/Pdt.P/2023/PA.Krs in the case of Child Origin. Secondary data is a data source that does not directly provide data at the time of data collection, for example, it can be through other people or documents. In this study, the sources of secondary data are in accordance with marriage laws, journals, theses, and legal documents related to the research topic regarding the determination of the origin of a child in Probolinggo. The data collection techniques used in this study are interviews and documentation.

RESULTS AND DISCUSSION

Legal Consequences if a Child Born in Marriage is Not Registered in Indonesian Law

Based on the Marriage Law and Compilation of Islamic Law, a child is considered legitimate if he or she is born within a legitimate marriage, even if the child is born from a woman who has been married for less than six months. This is regulated in Law No. 1 of 1974.

- Article 42 of Law No. 1 of 1974 states: "A legitimate child is a child born as a result of a valid marriage."
- Article 43 of Law No. 1 of 1974 states: A child born out of wedlock only has a civil relationship with his mother and her family. The status of such a child as referred to in paragraph (1) shall be further regulated by government regulations.
- Article 44 of Law No. 1 of 1974 states: A husband may deny the legitimacy of a child born to his wife if he can prove that his wife committed adultery and the child is the result of such adultery. The court shall render a decision on the legitimacy of the child upon the request of the interested or concerned party.

In accordance with the origin of the child, Article 55 of the Marriage Law states

- The origin of a child can only be proven by an authentic birth certificate issued by the competent authority.
- If the certificate referred to in paragraph (1) of this article is unavailable, the court may issue a determination regarding the origin of a child after conducting a thorough examination based on evidence that meets the required criteria.
- Based on the court's decision in paragraph (2), the birth registration office within the jurisdiction of the relevant court shall issue a birth certificate for the child in question.

Another legal consequence of unregistered marriages is that children cannot obtain or manage their birth certificates, as can be seen from the birth certificate applications that have been submitted to the civil registry office. If the child cannot present their parents' marriage certificate, it is explained in Article 5 of Law No. 23 of 2002 on Child Protection, which states: "Every child has the right to a name as a means of personal identification and to hold citizenship status." Therefore, the child's birth certificate is considered to be that of a child born out of wedlock, with only the mother's name recorded. The explanation that the child is born out of wedlock and the father's name is not recorded will have psychological and social implications for the child and the mother. The results of the author's

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interview with members of the Religious Court of Gunung Sitoli City, along with Mr. Fahmi Tanjung, S.H., M.H., an employee of the Religious Court of Gunung Sitoli City, on June 21, 2023, indicate that as a child recognized as born out of wedlock but deemed legitimate by both parents, can obtain a birth certificate through birth registration. However, only the mother's name is listed on the birth certificate. If the child wants to include the father's name on the birth certificate, a court ruling is required as proof that the child is recognized by the father. The Constitutional Court, as explained in Decision Number 46/PUU/VIII/2010 dated February 17, 2021, ruled that Article 43 paragraph (1) of the Marriage Law is inconsistent with the 1945 Constitution and must be read as follows: "A child born out of wedlock only has a civil relationship with his mother and her family, and with the man as his father, which can be proven based on science and technology or other evidence according to the law that establishes a blood relationship, including a civil relationship with his father's family."

Therefore, if the child wishes to have a civil relationship with his father, this can also be proven legally through a court ruling. For the purpose of issuing the child's birth certificate, a court ruling is necessary to ensure the child's legal protection. The State of Indonesia, based on Pancasila and the 1945 Constitution, is essentially obliged to provide protection and recognition of the legal status of individuals or families in important events experienced by the population or community in Indonesia. One example of the recognition of legal status in important events is the issuance of birth certificates. Furthermore, the competent court issues a ruling on the legalization of children born out of wedlock. For Muslims, the court ruling is submitted to the Religious Court. The Religious Court is tasked with and has the authority to examine, decide, and settle cases at the first level with the Muslim community in the field of marriage. One of the matters within the scope of marriage-related cases is the origin of a child and the adoption of a child based on Islamic law. Meanwhile, for non-Muslims, the court's decision on the recognition of children born out of wedlock is submitted to the District Court. If the court's decision confirms that the child in question is the child of the father and is proven by knowledge and Deoxyribonucleic Acid (DNA) technology, the next step is the issuance of a birth certificate.

Legal Considerations of the Judge in Decision Number: 483/Pdt.P/2023/PA.Krs

The Religious Court has the function of upholding justice, truth, and legal certainty. Based on the authority stipulated in Article 55 of Government Regulation No. 1 of 1974 in conjunction with Article 103 of the Compilation of Islamic Law, it is stated that:

- (1) The origin of a child can only be proven by a birth certificate or other evidence.
- (2) If the birth certificate or other evidence referred to in paragraph (1) is unavailable, the Religious Court may issue a ruling on the origin of a child after conducting a thorough examination based on valid evidence. Therefore, the Religious Court has the authority to issue a ruling on case number 483/Pdt.P/2023/PA.Krs regarding the origin of a child in a marriage that was not registered by Petitioner I and Petitioner II at the Religious Court of Kraksaan on May 24, 2023. The definition of the case regarding the submission of the petition for the origin of the child registered at the Kraksaan Religious Court Registry under No. 483/Pdt.P/2023/PA.Krs is as follows:

1. Identity of the Parties

The parties filing the petition for the child's origin consist of Petitioner I and Petitioner II, who are husband and wife. Petitioner I is the husband of Petitioner II, who was born in Probolinggo on June 13, 1989, and is currently 34 years old. Petitioner I is Muslim and resides in Probolinggo Regency. Petitioner II is the wife of Petitioner I, born in Probolinggo on May 12, 1988, and is currently 35 years old. Petitioner II is Muslim and resides in Probolinggo Regency.

2. Case Details

That Petitioner I and Petitioner II are a legally married couple who were married on November 18, 2011, at the religious affairs office, and their marriage has been registered. From this marriage, Petitioner I and Petitioner II were blessed with a child named Kevin Azka Maulana Hidayat, who was born in Probolinggo on June 12, 2014. In 2018, the Petitioners divorced at the Kraksaan Religious Court with divorce certificate No. 1409/AC/2018/PA.Krs. After that, in late November 2018, the Petitioners reconciled and remarried religiously in Probolinggo with the marriage guardian being the biological father of Petitioner II, named MOH. MISRO H., in the presence of two marriage witnesses and close relatives of Petitioner I and Petitioner II, with a dowry of Rp. 200,000 (Two Hundred Thousand Rupiah). However, this marriage has not been officially registered or recorded at the Religious Affairs Office of Probolinggo Regency. After getting married, Petitioner I and Petitioner II lived harmoniously as husband and wife and were blessed with a second child named Muhammad Habibi Hidayat, who was born in Probolinggo on October 12, 2019. Subsequently, the

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Petitioner I and Petitioner II remarried on March 21, 2023, before the Marriage Registration Officer at the Religious Affairs Office of Paiton Sub-District, Probolinggo Regency, with the marriage guardian being the biological father of Petitioner II, named MOH. MISRO H. as the marriage guardian, in the presence of two marriage witnesses and close relatives of Petitioner I and Petitioner II, with a dowry of Rp. 1,000,000 (One Million Rupiah), and subsequently issued a Marriage Certificate Extract Number: 351312103202352, dated March 21, 2023. In early May 2023, the Petitioners sought to obtain a birth certificate for their second child, named Muhammad Habibi Hidayat. However, when processing the birth certificate, the Petitioners encountered difficulties because the child was born before the Petitioners were legally married at the Probolinggo Religious Affairs Office. Therefore, the Civil Registry Office requested a letter stating that the children are the biological children of the applicants. For this reason, the applicants request that the determination of the children's origin be used as a legal basis and have legal certainty.

3. Claims

Based on the reasons/arguments explained above, the Petitioners request that the Head of the Kraksaan Religious Court grant the Petitioners' request to determine that the child named Muhammad Habibi Hidayat, born on October 12, 2019, is the legitimate child of the Petitioners' marriage, which took place at the end of November 2018. In the petition for the determination of the child's origin, the Petitioners presented two witnesses, namely:

- a. Heriyanto Bin Isman, 30 years old, Muslim, self-employed, residing at Dusun Mega RT. 002 RW. 001, Sidodadi Village, Paiton District, Probolinggo Regency.
- b. Basuni, 40 years old, Muslim, self-employed, residing at Krajan Hamlet RT.017 RW.008, Sukokerto Karanganyar Village, Paiton District, Probolinggo Regency.

After both witnesses swore to tell the truth and nothing but the truth, they gave the following statements:

- That the witness named Heriyanto Bin Isman is the cousin of Petitioner II, while the second witness named Basuni is a neighbor of the Petitioners.
- That Petitioner I and Petitioner II are a legally married couple who were married at the Religious Affairs Office on November 18, 2018.
- The marriage of Petitioner I and Petitioner II resulted in a child named Kevin Azka Maulana Hidayat, who was born in Probolinggo on June 12, 2014.
- The Petitioners divorced at the Kraksaan Court in 2018 with divorce certificate Number 1409/AC/2018/PA.Krs.
- That Petitioner I and Petitioner II were married in a religious ceremony at the end of November 2018, residing in Karanganyar Village, Paiton District, Probolinggo Regency.
- That at the time of marriage, Petitioner I's status was divorced and Petitioner II's status was divorced.
- As a result of this unregistered marriage, Petitioner I and Petitioner II were blessed with a child named Muhammad Habibi Hidayat.
- The person who officiated the marriage between Petitioner I and Petitioner II was the biological father of Petitioner II, named MOH. MISRO H., and the witnesses to the marriage were named Heriyanto Bin Isman and Basuni.
- The dowry for the marriage was in the form of cash amounting to Rp. 200,000 (Two Hundred Thousand Rupiah).
- There is no blood relationship or foster relationship between Petitioner I and Petitioner II.
- Furthermore, Petitioner I and Petitioner II were officially married before a Marriage Registrar at the Religious Affairs Office of Paiton Subdistrict, Probolinggo Regency, on March 21, 2023.

4. Legal Facts

Based on the reasons/arguments of Petitioner I and Petitioner II and the evidence presented, the following facts have been established:

- Petitioner I and Petitioner II were legally married at the Religious Affairs Office in Probolinggo on November 18, 2011.
- From this marriage, the Petitioners were blessed with a child named Kevin Azka Maulana Hidayat, who was born in Probolinggo on June 12, 2014.

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- The Petitioners divorced at the Kraksaan Court in 2018 with divorce certificate number 1409/AC/2018/PA.Krs.
- After that, Petitioner I and Petitioner II entered into a marriage by mutual consent at the end of November 2018 in Karanganyar Village, Paiton District, Probolinggo Regency.
- At the time of marriage, Petitioner I was a divorced man and Petitioner II was a divorced woman.
- From this informal marriage, the Petitioners were blessed with a child named Muhammad Habibi Hidayat, born in Probolinggo on October 12, 2019.
- At the time of the marriage between Petitioner I and Petitioner II, the guardian acting on behalf of Petitioner II was her biological father, MOH. - In the marriage, the dowry of the Petitioner was in the form of cash amounting to Rp. 200,000 (Two Hundred Thousand Rupiah).
- There is no blood relationship or foster relationship between Petitioner I and Petitioner II.

5. Determination

The Panel of Judges of the Kraksaan Court ruled on Case No. 483/Pdt.P/2023/PA.Krs, granting the petition of Petitioner I and Petitioner II, stating that the child named Muhammad Habibi Hidayat, born in Probolinggo on October 12, 2019, is the child of Petitioner I and Petitioner II. The Court orders Petitioner I and Petitioner II to register this decision with the Population and Civil Registration Office of Probolinggo Regency and imposes upon the petitioners the obligation to pay the case costs.

6. Legal Considerations

- a. The main arguments of the Petitioners are that Petitioner I and Petitioner II request that the Court determine that the child named Muhammad Habibi Hidayat, born in Probolinggo on October 12, 2019, is the legitimate child of the marriage between Petitioner I and Petitioner II.
- b. To support the grounds for the petition, Petitioner I and Petitioner II have submitted evidence in the form of documents and witnesses, which constitute authentic documents meeting both formal and material requirements. According to Article 165 of the HIR, such evidence possesses perfect probative force and is binding.
- c. Under Article 42 of Law No. 1 of 1974, a legitimate child is a child born within or as a result of a valid marriage, while a valid marriage is defined in Article 2(1) of Law No. 1 of 1974 as a marriage conducted in accordance with the religion of the parties. Article 14 of the Compilation of Islamic Law states: to perform a marriage, there must be a prospective husband, a prospective wife, a marriage guardian, two witnesses, and ijab and qabul.
- d. Based on the facts, including the evidence, the requirements for a marriage as stated in Article 14 of the Compilation of Islamic Law have been fulfilled.

Based on the considerations mentioned above and pursuant to the provisions of Article 55(2) of Law No. 1 of 1974, the requests of Petitioner I and Petitioner II are granted. Article 55 of Government Regulation No. 1 of 1974 states:

- a. The origin of a child can only be proven by an authentic birth certificate issued by an authorized official.
- b. If the birth certificate referred to in paragraph (1) of this article is not available, the court may issue a determination regarding the origin of a child after conducting a thorough examination based on evidence that meets the requirements.
- c. In accordance with the provisions of paragraph (2) of this article, the birth registration office within the jurisdiction of the relevant court shall issue a birth certificate for the child in question.
- d. Considering that this case is part of a marriage case, in accordance with the provisions of Article 89(1) of Law No. 7 of 1989 on Religious Courts, as amended by Law No. 3 of 2006 and the second amendment by Law No. 50 of 2009, and the costs of the case shall be borne by the Petitioners.

7. Panel of Judges

The Panel of Judges of the Kraksaan Court in deciding case 483/Pdt.P/2023/PA.Krs consisted of:

- a. Chief Judge : Dra. Siti Rohma, M.Hum.

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b. Associate Judge I : Drs. Muhsin, M.H.
c. Associate Judge II : Bustani, S.Ag., M.M., M.H

CONCLUSION

1. The marriage validation process is the right solution to resolve issues related to unregistered marriages. Itsbat nikah is carried out through the religious court and aims to provide legal certainty regarding the status of the marriage and the children born from it. By conducting itsbat nikah, children born from unregistered marriages can be recognized as legally legitimate children and have the same rights as children born from registered marriages. Therefore, it is important for couples who have entered into an unregistered marriage to undergo the itsbat nikah process in order to protect their rights and those of their children.
2. In an unregistered marriage, even if it is considered valid according to religion or belief, a marriage conducted outside the supervision of marriage registration officials does not have legal standing and is considered invalid under the law and by the state. The impact of this marriage law is very detrimental to wives and women in general, as well as to the children born from such marriages. The origin of a child is the basis for proving the existence of a relationship of kinship (nasab) with the father.
3. In decision 483/Pdt.P/2023/PA.Krs, the judge considered the arguments of the petitioners who filed for itsbat nikah (legal recognition of marriage) for a child born from an unregistered marriage. The judge also considered the evidence submitted by the petitioners, such as documents and witnesses, which met the formal and material requirements. Pursuant to Article 42 of Law No. 1 of 1974, the judge ruled that the child is the legitimate child of the petitioners' marriage. The judge also ordered the petitioners to register this decision with the Population and Civil Registration Office and imposed the case costs on the petitioners.

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Undang-Undang Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Tahun 1974

Undang-Undang Nomor 24 Tahun 2013 Tentang Asministrasi Kependudukan