

JURNAL HUKUM STAATRECHTS

(FAKULTAS HUKUM UNIVERSITAS 17 AGUSTUS 1945 JAKARTA)

Legal Disparities in Unregistered Polygamous Marriages from the Perspective of Justice and Child Welfare: A Philosophical Examination

Didi Jubaidi¹, Khoirunnisa Khoirunnisa²

Universitas 17 Agustus 1945 Jakarta

didijubaidi@gmail.com¹

Abstrak

Perkawinan poligami yang tidak dicatatkan (poligami siri) seringkali menimbulkan permasalahan hukum yang kompleks, terutama terkait perlindungan dan hak-hak anak. Ketidakharmonisan antara norma hukum positif dan realitas sosial menimbulkan kesenjangan hukum yang berakibat pada ketidakpastian status hukum anak yang lahir dari perkawinan tersebut. Situasi ini mengarah pada pertanyaan hukum utama: Bagaimana perumusan norma hukum dapat diarahkan untuk menjamin perlindungan hak-hak anak dalam konteks perkawinan poligami yang tidak tercatat? Penelitian ini bertujuan untuk menganalisis kesenjangan hukum tersebut melalui pendekatan filosofis, dengan menekankan pada prinsip-prinsip keadilan dan kesejahteraan anak. Dengan menggunakan metode kualitatif melalui tinjauan literatur, penelitian ini merefleksikan nilai-nilai keadilan substantif yang seharusnya mendasari perumusan dan implementasi hukum. Temuan penelitian menunjukkan bahwa kerangka hukum yang ada belum sepenuhnya menjamin perlindungan hak-hak anak dalam konteks poligami yang tidak tercatat. Oleh karena itu, diperlukan perumusan ulang norma hukum yang lebih responsif terhadap realitas sosial dan selaras dengan prinsip-prinsip keadilan dan kesejahteraan sebagai landasan filosofis hukum.

Kata kunci: Poligami Siri; Kesenjangan Hukum; Keadilan; Kesejahteraan Anak; Pendekatan Filosofis.

Abstract

Unregistered polygamous marriages (poligami siri) often give rise to complex legal issues, particularly regarding the protection and rights of children. The disharmony between positive legal norms and social realities creates legal disparities that result in uncertainty over the legal status of children born from such marriages. This situation leads to a central legal inquiry: How can the formulation of legal norms be directed to ensure the protection of children's rights in the context of unregistered polygamous marriages? This study aims to analyze these legal gaps through a

philosophical approach, emphasizing the principles of justice and child welfare. Using a qualitative method through literature review, this paper reflects on the values of substantive justice that should underpin legal formulation and implementation. The findings indicate that the existing legal framework does not fully guarantee the protection of children's rights in the context of unregistered polygamy. Therefore, a reformulation of legal norms is necessary one that is more responsive to social realities and aligned with justice and welfare principles as the philosophical foundation of law.

Keywords: *Unregistered Polygamy; Legal Disparities; Justice, Child Welfare; Philosophical Approach.*

A. Introduction

Marriage in Indonesia is not only a religious and cultural institution but also a legal one, governed by both Islamic teachings and state law. According to Law No. 1 of 1974 on Marriage, every marriage must be registered to obtain legal recognition and protection. However, the practice of *poligami siri*—unregistered polygamous marriages—remains prevalent. These informal unions are often conducted in secrecy, bypassing legal mechanisms, and result in a range of legal and social complications, particularly for the children born of such marriages.

Unregistered polygamy generally arises from a desire to avoid state regulations that require permission from the first wife and approval from the Religious Court before a man may take another wife legally. This bypassing of legal requirements creates a duality between religious validity and legal validity. While such marriages may be considered religiously legitimate, they lack legal standing, rendering the wife and especially the children vulnerable to legal exclusion.¹

The consequences for children are especially concerning. Without legal recognition of the marriage, children may face significant barriers in accessing civil rights such as birth certificates, inheritance, health insurance, and legal identity. In many cases, they are classified as children born out of wedlock, which carries profound legal and social stigma². These barriers hinder the state's obligation to protect children's rights as outlined in Law No. 35 of 2014 on Child Protection and the Convention on the Rights of the Child, which Indonesia has ratified.

Previous studies have extensively examined the legal, psychological, and sociological impacts of unregistered polygamy. For instance, focused on the normative legal consequences for children born in such marriages, noting the state's inability to offer

¹ Mutarofik Mutarofik et al., "Implications of Unregistered Polygamous Marriages for Children's Rights in Indonesia," *TAQNIN: Jurnal Syariah Dan Hukum* 6, no. 2 (2024): 185-196., <https://doi.org/10.30596/taqnin.v6i2.20571>.

² Ismail Shaiful Bahari et al., "Psychological Impact of Polygamous Marriage on Women and Children: A Systematic Review and Meta-Analysis," *BMC Pregnancy and Childbirth* 21, no. 1 (2021): 1-10, <https://doi.org/10.1186/s12884-021-04301-7>.

them protection.³ Similarly, research detailed the psychosocial effects on women and children, including neglect, psychological stress, and educational disadvantages. However, these studies primarily explore normative and empirical dimensions, such as legal disharmony and administrative barriers.⁴

There remains a notable lack of in-depth philosophical inquiry into the concepts of justice and child welfare within the context of *poligami siri*. Existing literature seldom examines how foundational legal-philosophical principles—such as justice, moral responsibility, and the ethical foundations of lawmaking—can be applied to ensure the protection of children’s rights in such contexts. This research aims to fill that gap by offering a philosophical analysis that highlights these core values while also informing future legal and policy reform.

The urgency of this inquiry stems from the gap between *das sein* (what is) and *das sollen* (what ought to be), particularly in the context of legal dualism between religious and civil law. In practice, *poligami siri* persists without legal safeguards for the children involved, reflecting a situation where religious legitimacy does not translate into legal recognition. Ideally, however, legal norms should reflect the ethical imperative to protect all children equally, regardless of their parents’ marital status. This discrepancy between the actual condition and the normative expectation reflects a fundamental legal and moral problem that this study seeks to address.

This study is thus positioned within the philosophical and legal discourse on child protection and justice, contributing to a more integrative framework of lawmaking that bridges normative ideals and practical realities.

The notion of *maslahah* plays a pivotal role in Islamic law and is particularly relevant in this context. Al-Ghazali and other classical scholars define *maslahah* as the preservation of five fundamental objectives: religion, life, intellect, lineage, and property.⁵ Protecting the rights of children, especially those born in legally ambiguous situations, is central to maintaining lineage (*nasab*) and human dignity. When the state fails to register polygamous marriages, it inadvertently denies children their right to *nasab*, thereby undermining this essential principle.

Additionally, the concept of justice (*‘adl*) in Islam demands equitable treatment for all individuals, particularly those who are vulnerable. The legal invisibility of children born from unregistered marriages conflicts with this ideal. Therefore, a re-examination of how laws are structured and enforced is necessary to ensure that legal norms do not contradict the ethical and theological imperatives of Islamic justice.

³ Mutarofik et al., “Implications of Unregistered Polygamous Marriages for Children’s Rights in Indonesia.”

⁴ Shaiful Bahari et al., “Psychological Impact of Polygamous Marriage on Women and Children: A Systematic Review and Meta-Analysis.”

⁵ Imam Mohammad Al Ghazali, *Al Mustasfa Min Ilm Al Usul: On Legal Theory of Muslim Jurisprudence* (South Carolina: CreateSpace Independent Publishing, 2018).

This paper further argues that legal reforms must be pursued not only to align with religious values but also to fulfill constitutional mandates. Article 28B (2) of the 1945 Constitution guarantees every child the right to survival, growth, and protection from violence and discrimination. Any law or policy that allows children to be disenfranchised due to the marital choices of their parents is in direct violation of this constitutional promise.

Moreover, the current dualism in the legal system—between religious and civil law—creates ambiguities that exacerbate the vulnerability of children. While religious authorities may recognize *poligami siri*, the civil legal system does not, leading to inconsistencies in legal protection. This conflict illustrates the need for a more integrative approach that harmonizes religious principles with human rights norms, ensuring that legal recognition of marriage prioritizes the welfare of all affected parties, especially children.⁶

In sum, the present study contributes to the ongoing discourse by offering a philosophical-legal evaluation of *poligami siri* and its implications for child welfare. Unlike earlier research, which tends to focus on empirical outcomes or statutory analysis, this article draws upon Islamic legal theory to argue that protecting children's rights must be a primary legal and ethical obligation. By doing so, it seeks to offer a more holistic framework for evaluating the justice of unregistered polygamy in Indonesia.

Literature Review

Unregistered polygamous marriages, known in Indonesia as *poligami siri*, raise complex legal and social issues—particularly concerning the protection of children's rights. Scholars have highlighted the discord between Islamic law and state law as a key factor contributing to legal disparities that negatively affect child welfare in such marriages.

Aminah and Muala (2023), in their study on the harmony between Islamic law and Indonesia's Marriage Law No. 1 of 1974, found that many polygamous marriages occur without official registration.⁷ As a result, wives and children are left without adequate legal protection. The authors argue that this legal vacuum often leads to social injustice, especially for children leads to social injustice, especially for children who lack legal identity, inheritance rights, and financial support. The study emphasizes the urgent need for legal reforms and stronger law enforcement to bridge the gap between religious practices and state regulations. They also propose policy integration that respects religious beliefs while securing children's rights under the law.

Widanarti, Riyanto, and Yunanto (2019) explore legal pluralism in Indonesia, where religious, customary, and national legal systems often overlap and conflict. They argue

⁶ Ni Putu Rai Yulianti, "Legal Protection of Women and Children in the Perspective of Human Rights," 2021, <https://doi.org/10.4108/eai.9-9-2021.2313650>.

⁷ Aminah Aminah and Asyharul Muala, "Analysis of Polygamy Law in Indonesia: Harmony between Islamic Law and State Law," *Indonesian Journal of Islamic Law* 6, no. 2 (2023): 1–17, <https://doi.org/10.35719/ijil.v6i2.2020>.

that unregistered marriages, although religiously valid, fail to provide legal certainty under national law—particularly regarding the civil rights of children.⁸ Their study references a pivotal Constitutional Court decision that recognizes a legal relationship between children born out of wedlock and their biological fathers, provided there is scientific or legal evidence. This legal shift marks a step toward recognizing the rights of children from unregistered marriages. The authors call for progressive legal reconstruction to better reflect social realities and to provide stronger child protection mechanisms.

Shaiful Bahar et al., (2021) focus on the legal validity of unregistered marriages from an Islamic legal perspective and their impact on children's rights, using a case study from children's rights, using a case study from the Singaraja Religious Court.⁹ Although such marriages are religiously valid, the lack of official documentation means that the marriage is not recognized by the state, which undermines children's rights to legal identity, inheritance, and support. The authors advocate for increased public awareness regarding the legal consequences of poligami siri, as well as governmental initiatives to encourage marriage registration and policy reform that better protects the rights of children born into such unions.

The literature underscores significant legal disparities caused by unregistered polygamous marriages (poligami siri) in Indonesia, particularly their impact on children, who are often excluded from legal protections. These studies emphasize the need to harmonize religious and state legal systems through reforms grounded in justice and child welfare. While previous research has largely focused on normative and empirical aspects—such as legal disharmony, marital validity, and child protection frameworks—it has rarely explored the philosophical foundations of justice and morality in this context. This research addresses that gap by offering a philosophical analysis of core legal values, including justice, moral responsibility, and ethical lawmaking, to better safeguard children's rights and inform responsive policy reform.

Theoretical Framework

This study draws upon a multidisciplinary theoretical foundation to analyze the legal disparities and consequences of unregistered polygamous marriages (poligami siri) in Indonesia, with a specific focus on children's welfare. The framework incorporates normative legal theory, Islamic legal philosophy, child rights under international law, and critical legal perspectives.

⁸ Herni Widanarti, Benny Riyanto, and Yunanto Yunanto, "Political Reconstruction of Law towards the Rights of Non-Marital Child through the State Recognition of Unregistered Marriage in Indonesia," *The First International Conference on Islamic Development Studies*, 2019, <https://doi.org/10.4108/eai.10-9-2019.2289417>.

⁹ Shaiful Bahari et al., "Psychological Impact of Polygamous Marriage on Women and Children: A Systematic Review and Meta-Analysis."

1. Justice Theory

The concept of justice, particularly John Rawls' Theory of Justice, underpins this study's normative inquiry. Rawls (2000) emphasizes justice as fairness, wherein all individuals are entitled to basic rights regardless of circumstances beyond their control. Applying this theory, children born from unregistered marriages should not be deprived of legal recognition and protection due to their parents' marital status. Justice, in this context, requires laws to ensure equitable access to identity, inheritance, and legal status for all children.¹⁰

2. Maqasid al-Shariah and Maslahah (Public Interest)

Islamic legal theory, especially the maqasid al-shariah (higher objectives of Islamic law), offers a foundational lens to examine the moral imperative behind protecting children's rights. Classical scholars such as Al-Ghazali and Al-Shatibi outline the protection of lineage (hifz al-nasl) as a core objective.¹¹ From this perspective, the welfare (maslahah) of children born from poligami siri must be a priority. These children are entitled to legitimacy and protection, not just under religious norms, but as a moral duty aligned with Islamic jurisprudence.¹² Legal systems should therefore reflect these values by safeguarding the rights of children, even when their parents bypass civil registration.

3. Critical Legal Theory

Critical legal studies (CLS) challenge the neutrality of law, positing that legal systems often reflect societal power structures that marginalize vulnerable groups. As argued by Unger (1983), laws may appear impartial but frequently sustain systemic inequalities. In the case of unregistered marriages, children are often treated as "less legal," facing discrimination in access to civil documentation and social services.¹³ CLS helps unpack how formalistic interpretations of law exclude children born in informal unions, calling for more inclusive legal reforms.

4. Children's Rights under International Law

The study is further grounded in the Convention on the Rights of the Child (CRC), ratified by Indonesia in 1990. Article 7 of the CRC guarantees a child's right to be registered immediately after birth and to acquire a nationality. Article 2 prohibits discrimination of any kind, including status of birth. Legal systems that deny full rights to children from poligami siri indirectly contravene these international

¹⁰ John Rawls, *The Law Of Peoples With "The Idea Of Public Reason Revisited"* (Cambridge, UK: HARVARD UNIVERSITY PRESS, 2000).

¹¹ Imam Mohammad Al Ghazali, *Al Mustasfa Min Ilm Al Usul: On Legal Theory of Muslim Jurisprudence*.

¹² Mohammad Hashim Kamali, *Shari'ah Law: An Introduction* (Oxford: Oneworld Publications, 2008), <http://books.google.com/books?id=tyHaHZcRLWEC&pgis=1>.

¹³ Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, *Harvard Law Review* (Cambridge, MA: Harvard University Press, 1983), <https://doi.org/10.2307/1341032>.

obligations.¹⁴ Thus, the harmonization of domestic legal norms with global child protection standards is essential.

5. Rechtsstaat and Constitutionalism

As a Rechtsstaat or constitutional state, Indonesia is expected to uphold the rule of law and ensure that all citizens—especially vulnerable groups—receive equal protection under the law. However, the discrepancy between religiously valid but unregistered marriages and legal recognition indicates a tension within the legal system. This study highlights the need for integrating formal legal structures with moral-ethical imperatives to protect children's dignity and legal identity.

Methodology and Analytical Framework

This research adopts a qualitative normative-legal approach (*yuridis normatif*) supported by a philosophical and critical interpretative analysis of legal texts, judicial practices, and Islamic legal principles. The study also incorporates elements of legal hermeneutics to bridge the understanding between statutory law, Islamic jurisprudence, and human rights instruments concerning children's legal protection in unregistered polygamous marriages.

1. Type of Research

This study is doctrinal legal research that analyzes existing legal materials—statutes, case law, scholarly opinions, and international conventions—through interpretative and philosophical analysis. It does not employ empirical data collection but rather focuses on primary and secondary legal sources to develop a normative and conceptual understanding of the issue.

2. Sources of Legal Material

a. Primary legal materials include:

- 1) Law No. 1 of 1974 on Marriage (and its amendments)
- 2) Law No. 35 of 2014 on Child Protection
- 3) The 1945 Constitution of Indonesia, particularly Article 28B (2)
- 4) The Convention on the Rights of the Child (CRC)
- 5) Jurisprudence from the Religious Court regarding unregistered marriages

b. Secondary materials include academic books, peer-reviewed journal articles, fatwas from Islamic legal bodies, and reports from international institutions such as UNICEF and the Indonesian Child Protection Commission.

3. Analysis Technique

Data is analyzed using a qualitative content analysis method. This involves:

¹⁴ UNICEF, "Implementation Handbook for the Convention on the Rights of the Child. 3rd Ed.," New York: United Nations Children's Fund, 2007, <https://www.unicef.org>.

- a. Legal Interpretation: Applying grammatical, systematic, and teleological interpretation methods to assess the meaning and purpose of relevant statutes.¹⁵
- b. Philosophical Analysis: Interrogating how principles like *maslahah*, *hifz al-nasl*, and *adl* (justice) are operationalized in law, drawing on Islamic legal scholarship.¹⁶
- c. Critical Legal Analysis: Drawing from critical legal studies to examine how structural biases in the legal system affect children born into unregistered polygamous unions.¹⁷

The researcher also employs comparative analysis, examining how other Muslim-majority countries (e.g., Malaysia, Morocco) handle the registration of polygamous marriages and the legal status of children therein, to inform reform recommendations.

4. Philosophical-Legal Justification

This methodology enables a multilevel critique of the law: from its textual formulation (*lex lata*), its practical application in court judgments, to the philosophical legitimacy behind it (*lex ferenda*). This helps explore whether the legal exclusion of children from *poligami siri* aligns with Indonesia's constitutional mandate and Islamic moral imperatives.

5. Validity and Credibility

To ensure validity, triangulation is employed through:

- a. Cross-referencing statutory texts with jurisprudence and international conventions;
- b. Validating doctrinal interpretations with classical Islamic legal sources and contemporary scholarly consensus;
- c. Comparing legal reasoning across jurisdictions to assess the viability of proposed legal reforms.

B. Result & Discussion

The legal disparities surrounding unregistered (*siri*) polygamous marriages in Indonesia present a complex intersection between statutory legal systems, religious norms, and human rights frameworks. The current legal landscape demonstrates a formalistic bias, wherein the state recognizes only marriages registered under Law No. 1 of 1974. Consequently, children born from unregistered polygamous marriages suffer from

¹⁵ Peter Mahmud Marzuki, *Penelitian Hukum, (Ed. Revisi)*, 12th ed. (Jakarta: Kencana Prenada Media Group, 2016).

¹⁶ Kamali, *Shari'ah Law: An Introduction*.

¹⁷ Unger, *The Critical Legal Studies Movement*.

indirect legal discrimination, particularly in regard to civil documentation, inheritance rights, and social status.

This section explores the implications of such disparities through a critical and philosophical-legal lens, referencing theoretical frameworks previously discussed: justice theory, maqasid al-shariah, critical legal studies, and child rights under international law.

1. Legal Formalism vs. Substantive Justice

Indonesia's Marriage Law, specifically Article 2 of Law No. 1 of 1974, mandates the registration of all marriages to attain legal recognition. This requirement reflects a formalist legal framework that emphasizes adherence to procedural rules as a precondition for legal rights. However, this approach becomes problematic when it encounters deeply rooted religious and cultural practices—such as *poligami siri*—that persist outside the boundaries of state law. In these cases, marriages are conducted in accordance with religious norms but intentionally evade state registration to avoid bureaucratic or legal complications, such as obtaining the court's permission or consent from the first wife.

This legal dualism creates a systemic tension: the marriage is considered religiously valid (*sah*) but is legally invisible (*tidak tercatat*). As a result, children born within these unions find themselves in a precarious legal position. Denied birth certificates, these children may face barriers to education, healthcare, civil documentation, and even inheritance. The legal system, by privileging form over substance, imposes punitive consequences on children for a procedural failure committed by their parents—a violation of justice both morally and constitutionally.

From a philosophical standpoint, this issue illustrates the conflict between legal formalism and substantive justice. Legal formalism insists on strict compliance with codified law and procedures, often at the expense of social equity or moral consideration. In contrast, substantive justice focuses on the fairness of outcomes and the ethical implications of legal decisions. This latter approach aligns more closely with the concept of justice as fairness articulated by John Rawls. According to Rawls (2020),¹⁸ every individual deserves equal access to basic liberties and fair opportunities, regardless of arbitrary factors such as the legal status of their parents' marriage. By perpetuating a system where children's rights are contingent on marital paperwork, the state fails to fulfill its moral obligation to ensure fair equality of opportunity.

Ronald Dworkin's interpretivist legal theory further illuminates this issue. Dworkin contends that law should be interpreted not merely as a set of rules but as a moral enterprise aimed at achieving justice in particular cases.¹⁹ In his view, judges and lawmakers have a duty to interpret legal norms in a way that best fits and justifies the legal system as a whole. Applying this to *poligami siri*, the law should be interpreted and

¹⁸ Rawls, *THE LAW OF PEOPLES with "The Idea of Public Reason Revisited."*

¹⁹ Ronald Dworkin, *Law's Empire, The Journal of Politics* (Cambridge, MA: Harvard University Press, 1988).

reformed in a way that upholds children's dignity and rights, even if it means revisiting formalistic barriers.

From the standpoint of Islamic legal philosophy, the principles of *maslahah* (public interest) and *'adl* (justice) offer further ethical grounding. Classical Islamic scholars such as Al-Ghazali argue that the law's ultimate objective is to preserve fundamental human interests: religion, life, intellect, lineage (*nasab*), and property.²⁰ The denial of legal identity to children undermines their *nasab*, a core objective in Islamic jurisprudence. Moreover, the principle of *'adl* obligates equitable treatment for all, especially vulnerable groups such as children. A legal system that withholds rights from children based on unregistered parental status stands in opposition to these Islamic ethical mandates.

Thus, a substantive approach to justice requires the law to recognize the lived realities of children born into *poligami siri* and provide legal remedies that are not strictly tied to procedural formalities. This could include retrospective registration mechanisms, special family court procedures, or legislative amendments that prioritize the best interest of the child. Only through such integrative reforms can the law bridge the gap between *das sein* (what is) and *das sollen* (what ought to be), fulfilling both constitutional promises and religious imperatives for justice and protection.

2. The Ethical Imperative of *Maqasid al-Shariah*

Islamic jurisprudence, particularly the framework of *maqasid al-shariah* (higher objectives of Islamic law), provides an ethical foundation that emphasizes the protection of essential human interests, including religion (*din*), life (*nafs*), intellect (*'aql*), property (*mal*), and progeny (*nasl*). Among these, the protection of progeny (*hifz al-nasl*) is particularly crucial when discussing the rights and legal status of children born from unregistered polygamous marriages. According to Al-Shatibi's theory, the primary purpose of Islamic law is to promote welfare (*maslahah*) and prevent harm (*mafsadah*), ensuring that legal rules align with the overarching moral aims of the Sharia.²¹

The principle of *hifz al-nasl* does not only pertain to biological lineage, but also includes the legal, social, and moral responsibilities attached to parenthood and child protection. Failure to register a marriage might be religiously acceptable to some, but the consequent denial of children's legal identity and access to rights represents a form of harm that is clearly incompatible with Islamic ethical teachings. In this sense, *maqasid al-shariah* requires the state to intervene and ensure that legal mechanisms are aligned with the moral imperative to protect children, regardless of the marital status of their parents.

Al-Shatibi emphasized that *maslahah* is not merely a theoretical construct, but a dynamic principle that must be applied contextually, particularly in response to evolving social realities. In the context of Indonesia, where unregistered polygamous marriages remain common due to sociocultural and economic factors, the harm faced by children from such

²⁰ Imam Mohammad Al Ghazali, *Al Mustasfa Min Ilm Al Usul: On Legal Theory of Muslim Jurisprudence*.

²¹ Herdiansyah Herdiansyah, "Al Muwafaqat Karya Masterpiece Imam Asy-Syatibi," *Das Solen* 3, no. 01 (2019), <https://ejournal.unisi.ac.id/index.php/das-sollen/article/view/1334>.

unions demands an ethical and legal response. Their exclusion from civil registration systems, education, health care, and inheritance law constitutes a violation of *maslahah* and undermines the objective of justice (*‘adl*) in Islamic law.²²

Furthermore, the concept of *rahmah* (compassion) is central to Islamic ethics and is inseparable from the implementation of just laws. The Prophet Muhammad’s teachings consistently emphasized the importance of protecting the vulnerable, particularly orphans and children, as part of fulfilling the ethical objectives of Islamic governance. When the legal system fails to recognize children born in *poligami siri*, it not only contradicts the principle of *rahmah*, but also violates the Quranic mandate to act justly and compassionately towards the weak and marginalized.²³

Therefore, harmonization between statutory law and Islamic legal-ethical principles is not just a legal necessity but a moral obligation. The Indonesian legal system must reform its registration and family law mechanisms to reflect the ethical demands of *maqasid al-shariah*, particularly the principles of *adl*, *rahmah*, and *maslahah*. This would ensure that children’s rights are not conditional upon the marital decisions of their parents but are protected as part of the state’s commitment to justice and public welfare.

Legal recognition of children born from unregistered marriages should thus be seen not as a concession to irregular unions, but as a fulfillment of the ethical imperative within both Islamic jurisprudence and constitutional law. This approach would bridge the normative divide between *das sein* and *das sollen* and embody a legal philosophy that genuinely centers the welfare of the most vulnerable.

3. Structural Discrimination in Law: A Critical Legal Studies Perspective

Critical Legal Studies (CLS) emerged as a movement that critiques the idea of law as a neutral, objective, and apolitical institution. Scholars such as Roberto Unger (1983) argue that legal structures are deeply embedded within the prevailing social, political, and economic hierarchies. From a CLS perspective, law often functions not as a tool of justice, but as a mechanism that preserves the status quo and reproduces inequality.²⁴ In the Indonesian context, this critique becomes particularly relevant in examining the consequences of formal marriage registration laws on marginalized groups, especially women and children in unregistered polygamous marriages.

Indonesia’s legal insistence on marriage registration as a prerequisite for legal recognition—outlined in Law No. 1 of 1974 on Marriage—creates structural barriers that disproportionately affect individuals in non-conforming marital arrangements. These include *poligami siri*, which although religiously valid, remain unrecognized by state institutions. For women in such unions, especially those from lower socio-economic backgrounds, the lack of registration strips them of legal standing in matters such as inheritance, spousal support, and property claims. The legal system’s failure to account

²² Kamali, *Shari’ah Law: An Introduction*.

²³ The Holy Qur’an, *Surah An-Nisa* [4:75], n.d.

²⁴ Unger, *The Critical Legal Studies Movement*.

for the socio-cultural and gendered realities that lead to unregistered marriages reflects what CLS calls structural discrimination—legal frameworks that appear neutral but result in unequal outcomes due to underlying power relations.

This structural discrimination extends to children born from *poligami siri*. As legal recognition of paternity is typically tied to formal marriage, children from unregistered unions are often considered *anak luar kawin* (children born out of wedlock). This classification affects their civil rights, including the right to a birth certificate bearing their father's name, which in turn impacts their access to education, health services, and inheritance. In this sense, the law functions not as a protector but as a gatekeeper that privileges legally compliant families while excluding others from full citizenship.

While there have been efforts to mitigate these impacts, such as the Constitutional Court's decision in Putusan MK No. 46/PUU-VIII/2010,²⁵ which allows for the establishment of legal paternity based on biological evidence rather than marital status, implementation has been inconsistent. The burden of proof is often placed on the mother or child, and decisions can vary significantly across jurisdictions. This judicial discretion, coupled with bureaucratic hurdles and social stigma, further entrenches inequality. CLS critiques would suggest that these inconsistencies are not aberrations but rather manifestations of a legal system designed to preserve dominant norms and marginalize deviations.

Furthermore, the lack of institutional responsiveness to these gaps reveals a broader issue: the disconnect between legal formalism and substantive justice. The rigidity of the marriage registration framework ignores the lived experiences of many Indonesians who, due to cultural, religious, or economic factors, cannot easily comply with formal legal requirements. A CLS-informed approach advocates for reforms that center on social justice rather than mere procedural conformity. This includes recognizing unregistered marriages for the purpose of protecting vulnerable parties and ensuring that legal outcomes reflect the realities of those most affected.

4. Child Rights Under the CRC and National Law

Indonesia, as a state party to the Convention on the Rights of the Child (CRC) since its ratification through Presidential Decree No. 36 of 1990, has committed itself to ensuring the protection of all children's rights, regardless of their origin or the legal status of their parents' marriage. Article 2 of the CRC explicitly prohibits discrimination of any kind, including that based on the status of birth, while Article 7 affirms the child's right to a name and nationality from birth. These international obligations require the state to provide equal access to civil documentation, legal identity, and social services for all children.

Despite this, in practice, children born from *poligami siri* often face bureaucratic and legal obstacles in acquiring basic civil documents, particularly birth certificates. This is largely

²⁵ Mahkamah Konstitusi Republik Indonesia, "Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Pengujian Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945" (Jakarta, 2012), <https://www.mkri.id>.

due to Law No. 23 of 2006 on Population Administration, as amended by Law No. 24 of 2013,²⁶ which mandates that the registration of a child's paternity must be based on a legally recognized marriage. If such marriage is unregistered, as in the case of *poligami siri*, the child is considered born out of wedlock, and the process of civil documentation—particularly for naming the father—requires a court ruling.

The Constitutional Court's decision in Putusan MK No. 46/PUU-VIII/2010 was a significant legal development that attempted to correct this injustice by allowing for judicial recognition of paternal relationships even outside of marriage. However, the implementation of this ruling remains limited and inconsistent, with local civil registration offices often interpreting the provisions variably. Additionally, the cost and complexity of accessing court procedures present a significant barrier for families with limited resources, reinforcing structural inequality.

These barriers create a form of de facto discrimination that is incompatible with the CRC and the constitutional mandate in Article 28B (2) of the 1945 Constitution of Indonesia,²⁷ which guarantees every child the right to survival, growth, and protection from violence and discrimination. Without effective administrative reform and clearer legal pathways to ensure the civil identity of all children, Indonesia risks violating both its domestic constitutional guarantees and its international human rights obligations.

5. Comparative Insights and Reform Imperatives

Comparative analysis with other Muslim-majority countries such as Malaysia and Morocco demonstrates that a more integrated and adaptive legal framework can ensure better protection of children's rights in the context of unregistered marriages. These countries have developed institutional mechanisms that not only acknowledge the social reality of such marriages but also secure the civil and legal rights of children born within them.

In Malaysia, the *tauliah nikah* (marriage validation) process is handled through the Syariahs courts, allowing for the retroactive recognition of marriages that were not registered at the outset. This mechanism is relatively accessible and does not impose excessive burdens on families seeking legal recognition for their children. Even if the original marriage failed to meet administrative requirements, the Syariahs courts have the authority to grant formal validation, thereby ensuring that the child's rights to identity, inheritance, and legal protection are upheld²⁸.

Morocco, through its 2004 reform of the *Moudawana* (Family Code), adopted a child-centered approach that guarantees equal rights for all children, regardless of the marital

²⁶ Republik Indonesia, *Undang-Undang Nomor 5 Tahun 2013 Tentang Administrasi Kependudukan, Kementerian Hukum Dan Hak Asasi Manusia* (Jakarta, 2013), [sc.syekhnrjati.ac.id/esscamp/aturan/APARATUR_SIPIL_NEGARA_\(ASN\).pdf%5Cn](http://sc.syekhnrjati.ac.id/esscamp/aturan/APARATUR_SIPIL_NEGARA_(ASN).pdf%5Cn).

²⁷ Pemerintah Indonesia, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Sekretariat Jenderal MPR RI* (Jakarta, 2020), https://www.mpr.go.id/img/sosialisasi/file/1610334013_file_mpr.pdf.

²⁸ Arifki Budia Warman et al., "Reforming Marriage Registration Policies in Malaysia and Indonesia," *Bestuur* 11, no. 1 (2023): 61–74, <https://doi.org/10.20961/bestuur.v11i1.66320>.

status of their parents. The Moroccan system prioritizes the child's best interests and provides various pathways to legal recognition, including community testimony, judicial discretion, or DNA evidence.²⁹

Drawing from these comparative models, Indonesia could adopt progressive legal reforms to reduce structural discrimination and enhance child protection. Policy recommendations include:³⁰

1. Simplifying judicial procedures for establishing paternal linkage (*penetapan asal-usul anak*) through non-litigious, administrative processes.
2. Expanding mobile legal aid services to reach marginalized and rural populations.
3. Introducing automatic child recognition provisions based on DNA testing, notarial affidavits, or credible religious or community testimony.

Such reforms would not only strengthen child rights protections but also reflect Indonesia's commitment to eradicating structural inequality embedded in its population administration system. These recommendations are also consistent with Islamic legal objectives (*maqasid al-shariah*), particularly *hifz al-nasl* (protection of lineage) and *maslahah* (public interest). By integrating best practices from other jurisdictions, Indonesia can work toward a more just, inclusive, and socially responsive legal system that honors both its constitutional mandates and its Islamic ethical foundations.

6. Reconstructing Legal Norms Toward Child-Centered Justice

Addressing the legal disparities associated with *poligami siri* requires a fundamental reconstruction of the legal paradigm—from a focus on marriage-centered legitimacy to a framework rooted in child-centered justice. In the current legal structure, a child's civil status, access to identity documents, and right to inheritance are often contingent upon the formal legal recognition of their parents' marriage. This approach fails to uphold the principles of substantive justice and disproportionately penalizes children for circumstances entirely beyond their control.

A child-centered legal approach aligns with the philosophical underpinnings of both Rawlsian liberalism and Islamic legal theory. From Rawls' perspective, justice demands that institutions be arranged so that they benefit the least advantaged members of society (Rawls, 1971). Children born into unregistered polygamous marriages are undeniably among the most legally disadvantaged, often facing exclusion from critical rights and services. Shifting the legal focus toward their welfare reflects the principle of justice as fairness.

Similarly, Islamic jurisprudence upholds *maslahah* (public interest), *rahmah* (compassion), and *hifz al-nasl* (protection of progeny) as core objectives of the *maqasid*

²⁹ Muhammad Ihsanul Arif and Adib Al Farisi, "PERBANDINGAN PEMBAHARUAN HUKUM KELUARGA ISLAM NEGARA PENGANUT MAZHAB SYAFI'I (MALAYSIA DAN YAMAN)," *Al-Ahwal Al-Syakhsiyyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 4, no. 1 (2023): 123–32, <https://doi.org/10.15575/as.v2i2.14327>.

³⁰ Syofiaty Lubis et al., "Optimizing the Roles of Posbakum and Islamic Organizations in Medan City for Child Victims of School Violence," *Jurnal Ilmiah Al-Syir'ah* 22, no. 1 (2024): 113–24, <https://doi.org/10.30984/jis.v22i1.2958>.

al-shariah, underscoring the moral imperative to secure the welfare and dignity of every child, regardless of their birth status. The ethical obligation to treat all children equitably is rooted in the Qur'anic injunction to uphold justice and protect the vulnerable.³¹

From a constitutional standpoint, Article 28B (2) of the 1945 Constitution of the Republic of Indonesia affirms that “every child shall have the right to live, to grow and develop, and to be protected from violence and discrimination (Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, Pasal 28B ayat (2)).³²” In line with this, Law No. 35 of 2014 on Child Protection emphasizes that the best interests of the child must be a primary consideration in all matters concerning children. Legal practices that condition a child's rights on their parents' compliance with marriage registration procedures contradict these legal.³³

Therefore, the state must reposition itself not merely as a gatekeeper of marriage validity, but as a proactive guardian of children's fundamental rights. This includes implementing inclusive registration procedures, recognizing paternity through accessible legal means, and reforming inheritance laws to reflect a child's needs and humanity, rather than the formality of their parents' union. Only through such a reorientation can the legal system fully embrace justice that centers on the child.

C. Conclusion

The legal status of children born from unregistered polygamous marriages in Indonesia reflects a broader institutional failure to harmonize statutory, religious, and human rights frameworks. While the formal legal system prioritizes registration as the basis for rights recognition, this model inadvertently marginalizes children who are innocent bystanders in their parents' marital decisions. From a justice theory perspective, this constitutes a breach of fairness. From an Islamic legal standpoint, it violates the moral imperatives of *maslahah* and *adl*. Internationally, it contravenes Indonesia's obligations under the CRC.

To achieve substantive justice, the state must adopt a child-centered legal paradigm, where legal recognition and protection are granted based on the child's inherent rights rather than the legality of the parental union. Only through such integrative reforms can Indonesia fulfill its commitment as a constitutional state and uphold the moral vision embedded in both its religious and secular laws.

³¹ Qur'an, *Surah An-Nisa* [4:75].

³² Pemerintah Indonesia, *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*.

³³ RI Kemensesneg, *Undang - Undang Nomor 35 Tahun 2014 Tentang Perubahan Atas Undang – Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak, UU Perlindungan Anak* (Jakarta, 2014), <https://peraturan.bpk.go.id/Home/Details/38723/uu-no-35-tahun-2014>.

D. References

Books/Articles/Reports

- Aminah, Aminah, and Asyharul Muala. "Analysis of Polygamy Law in Indonesia: Harmony between Islamic Law and State Law." *Indonesian Journal of Islamic Law* 6, no. 2 (2023): 1–17. <https://doi.org/10.35719/ijil.v6i2.2020>.
- Arif, Muhammad Ihsanul, and Adib Al Farisi. "PERBANDINGAN PEMBAHARUAN HUKUM KELUARGA ISLAM NEGARA PENGANUT MAZHAB SYAFII (MALAYSIA DAN YAMAN)." *Al-Ahwal Al-Syakhsiyyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 4, no. 1 (2023): 123–32. <https://doi.org/10.15575/as.v2i2.14327>.
- Dworkin, Ronald. *Law's Empire*. The Journal of Politics. Cambridge, MA: Harvard University Press, 1988.
- Herdiansyah, Herdiansyah. "Al Muwafaqat Karya Masterpiece Imam Asy-Syatibi." *Das Solen* 3, no. 01 (2019). <https://ejournal.unisi.ac.id/index.php/das-sollen/article/view/1334>.
- Imam Mohammad Al Ghazali. *Al Mustasfa Min Ilm Al Usul: On Legal Theory of Muslim Jurispudence*. South Carolina: CreateSpace Independent Publishing, 2018.
- Kamali, Mohammad Hashim. *Shari'ah Law: An Introduction*. Oxford: Oneworld Publications, 2008. <http://books.google.com/books?id=tyHaHZcRLWEC&pgis=1>.
- Lubis, Syofiaty, Nawir Yuslem, Budi Sastra Panjaitan, and Hazrul Afendi. "Optimizing the Roles of Posbakum and Islamic Organizations in Medan City for Child Victims of School Violence." *Jurnal Ilmiah Al-Syir'ah* 22, no. 1 (2024): 113–24. <https://doi.org/10.30984/jis.v22i1.2958>.
- Marzuki, Peter Mahmud. *Penelitian Hukum*. Ed. Revisi. 12th ed. Jakarta: Kencana Prenada Media Group, 2016.
- Mutarofik, Mutarofik, Ali Trigiyatno, Ihyaul Arifin, Musyafa Achmad, and Antik Azizah. "Implications of Unregistered Polygamous Marriages for Children's Rights in Indonesia." *TAQNIN: Jurnal Syariah Dan Hukum* 6, no. 2 (2024): 185–196. <https://doi.org/10.30596/taqnin.v6i2.20571>.
- Qur'an, The Holy. Surah An-Nisa [4:75], n.d.
- Rai Yuliartini, Ni Putu. "Legal Protection of Women and Children in the Perspective of Human Rights," 2021. <https://doi.org/10.4108/eai.9-9-2021.2313650>.
- Rawls, J. *THE LAW OF PEOPLES with "The Idea of Public Reason Revisited."* Cambridge, UK: Harvard University Press, 2000.
- Shaiful Bahari, Ismail, Mohd Noor Norhayati, Nik Hussain Nik Hazlina, Che Abd Aziz Mohamad Shahirul Aiman, and Nik Ahmad Nik Muhammad Arif. "Psychological Impact of Polygamous Marriage on Women and Children: A Systematic Review and Meta-Analysis." *BMC Pregnancy and Childbirth* 21, no. 1 (2021): 1–10. <https://doi.org/10.1186/s12884-021-04301-7>.
- Unger, Roberto Mangabeira. *The Critical Legal Studies Movement*. Harvard Law Review. Cambridge, MA: Harvard University Press, 1983. <https://doi.org/10.2307/1341032>.

UNICEF. *Implementation Handbook for the Convention on the Rights of the Child*. 3rd Ed. New York: United Nations Children's Fund, 2007. <https://www.unicef.org>.

Warman, Arifki Budia, Wahyu Abdul Jafar, Musda Asmara, Arwansyah bin Kirin, and Sheikh Adnan Ahmed Usmani. "Reforming Marriage Registration Policies in Malaysia and Indonesia." *Bestuur* 11, no. 1 (2023): 61–74. <https://doi.org/10.20961/bestuur.v11i1.66320>.

Widanarti, Herni, Benny Riyanto, and Yunanto Yunanto. "Political Reconstruction of Law towards the Rights of Non-Marital Child through the State Recognition of Unregistered Marriage in Indonesia." *The First International Conference on Islamic Development Studies*, 2019. <https://doi.org/10.4108/eai.10-9-2019.2289417>.

Laws and Legal Decisions

Kemensesneg, RI. *Undang - Undang Nomor 35 Tahun 2014 Tentang Perubahan Atas Undang – Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak*. UU Perlindungan Anak. Jakarta, 2014. <https://peraturan.bpk.go.id/Home/Details/38723/uu-no-35-tahun-2014>.

Mahkamah Konstitusi Republik Indonesia. *Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010 Tentang Pengujian Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. Jakarta, 2012. <https://www.mkri.id>.

Pemerintah Indonesia. *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*. Sekretariat Jenderal MPR RI. Jakarta, 2020. https://www.mpr.go.id/img/sosialisasi/file/1610334013_file_mpr.pdf.

Republik Indonesia. *Undang-Undang Nomor 5 Tahun 2013 Tentang Administrasi Kependudukan*. Kementerian Hukum Dan Hak Asasi Manusia. Jakarta, 2013. [sc.syekhnurjati.ac.id/esscamp/aturan/APARATUR_SIPIL_NEGARA_\(ASN\).pdf](http://sc.syekhnurjati.ac.id/esscamp/aturan/APARATUR_SIPIL_NEGARA_(ASN).pdf)