

## Legal Protection of Women in Un-Official Inter-Citizen Marriage

Ramdani Wahyu Sururie<sup>1</sup> & Dio Ashar Wicaksana<sup>2</sup>

**Abstract:** The phenomenon of un-official inter-citizen marriage has been rife in several places in Indonesia. As a result of such marriages, women often have no legal power and can not obtain legal identity rights such as marriage certificates, birth certificates for their children, including material rights such as joint property and property ownership. This study examines the process of informal marriages between citizens as well as examining the extent to which the state provides legal protection to women who engage in informal marriage. The method and approach taken are normative juridical by utilizing secondary data sources in the form of legislation, books, and scientific journals. The results show that the emergence of an un-official inter-citizen marriage is mostly due to the incompleteness of the documents needed from the country of origin of the prospective husband. To overcome this problem, the state has protected women in the form of preventive and restitutive protection women involved in intermarriages can obtain a clear legal position and protection.

**Keywords:** un-official inter-citizen marriage, *isbât nikâh*, religious court, marriage law

**Abstrak:** Fenomena perkawinan antar warga negara yang tidak resmi marak terjadi di beberapa tempat di Indonesia. Akibat perkawinan semacam ini seringkali perempuan tidak memiliki kekuatan hukum dan tidak dapat memperoleh hak identitas hukum seperti akta nikah, akte lahir bagi anaknya termasuk hak-hak kebendaan seperti harta bersama dan kepemilikan property. Studi ini mengkaji proses perkawinan tidak resmi antar warga negara sekaligus mengkaji sejauhmana negara memberikan perlindungan hukum kepada perempuan yang melakukan perkawinan di bawah tangan. Metode dan pendekatan yang dilakukan adalah bersifat yuridis normatif dengan memanfaatkan sumber data sekunder berupa peraturan perundang-undangan, buk-buku dan jurnal ilmiah. Hasil penelitian menunjukkan bahwa timbulnya perkawinan campuran di bawah tangan dilatarbelakangi ketidaklengkapan dokumen yang dibutuhkan dari negara asal calon suami sehingga perkawinannya tidak dapat dicatatkan ke KUA. Untuk mengatasi hal itu, negara telah memberikan perlindungan kepada pihak perempuan dalam bentuk perlindungan preventif dan restitutif. Melalui cara ini perempuan yang terlibat dalam perkawinan campuran dapat memperoleh kedudukan dan perlindungan hukum yang jelas.

**Kata kunci:** perkawinan campuran, *isbât nikâh*, Pengadilan Agama, Undang-Undang Perkawinan

<sup>1</sup>Universitas Islam Negeri Sunan Gunung Djati Bandung, Indonesia

<sup>2</sup>Oñati International Institute For The Sociology Of Law, Gipuzkoa-Spain

E-mail: [ramdani.wahyu@uinsgd.ac.id](mailto:ramdani.wahyu@uinsgd.ac.id), [2dioashar07@gmail.com](mailto:2dioashar07@gmail.com)

## Introduction

Marriage, according to Marriage Law No. 1 of 1974, is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the belief in the Almighty God. marriage is intended to form a family that lasts a lifetime and does not just break apart.<sup>1</sup> Under the auspices of the marriage institution, families can prepare superior generations for the development of the nation and state.

The Marriage Law also regulates intermarriages. Article 57 defines a intermarriage as a marriage between two people of different nationalities where one party is a foreign citizen and the other party is an Indonesian citizen.<sup>2</sup> Thus, an intermarriage according to this law can occur if: 1) The man is an Indonesian citizen. marrying a foreign woman or 2) Indonesian women marrying foreign men.

Previously, intermarriages were defined as marriages between different ethnicities, nationalities or religions. However, after the enactment of Law Number 1 of 1974, the definition of mixed marriage became narrower than the existing definition, both in law and jurisprudence governing intermarriages before the promulgation of Law Number 1 of 1974<sup>3</sup>. This means that marriage is between two people. those of different groups (Javanese and Papuans) or different religions (Islam and Christianity) but who are both Indonesians, are not considered intermarriages according to the law because of the same citizenship. Before entering into a marriage, each couple must pay attention to the provisions of Article 2 paragraph (2) of the Marriage Law which states that marriages must be registered. If a marriage is not registered, then it has no legal force Because it does not have a certificate to proves a marriage has really occurred; So, If in the

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<sup>1</sup> Laurensius Arliman S, 'Peran Lembaga Catatan Sipil Terhadap Perkawinan Campuran Berdasarkan Undang-Undang Perkawinan', *JCH (Jurnal Cendekia Hukum)*, 4.2 (2019), 288–301 (p. 291) <<https://doi.org/10.33760/jch.v4i2.40>>.

<sup>2</sup> Rahmadi Indra Tektona, 'Perlindungan Hukum Perempuan Terhadap Anak Hasil Perkawinan Campuran di Indonesia (Perspektif Socio-Legal)', *MUWAZAH: Jurnal Kajian Gender*, p. 442 <<http://e-journal.iainpekalongan.ac.id/index.php/Muwazah/article/view/267>>.

<sup>3</sup> Sri Budi Purwaningsih, 'Perlindungan Hukum Kedudukan Anak Luar Kawin Pasca Putusan Mahkamah Konstitusi No: 46/PUU-VIII/2010', *Jurnal Rechtsidee*, 1.1 (2014), 5 (p. 5).

future a dispute arises in the family that ends in divorce, many parties will be involved in difficulties. That is why the law stipulates that marriages must not only fulfill all requirements but must also be officially registered by a certain institution, namely the Office of Religious Affairs (KUA).<sup>4</sup>

The provisions regarding marriage registration as intended in Article 2 paragraph (2) above will provide legal certainty and protection for each party entering into a marriage. A marriage that is registered will receive a marriage certificate, legality and legal protection including guarantees of legal certainty such as joint rights and obligations of husband and wife, joint assets, status of children, etc.<sup>5</sup>

Guarantees and legal protection as mentioned above are even very necessary, especially for married couples who enter into intermarriages. This is because this couple will face various complicated problems, especially those related to legal issues, such as the citizenship status of themselves and their children, including ownership of immovable property because it will be subject to different laws.<sup>6</sup> That is why, in various society in Indonesia, many people do not support inter-citizen marriage as they considered it worthless and better avoided on account of the issue of differences in customs, heredity, and, most importantly, religion. All of this can hamper harmony in the family that, if not handled wisely, may ultimately lead to divorce.<sup>7</sup>

In spite the various obstacles and difficulties looming over the marriage, however, the practice of intermarriages, with diverse backgrounds and motivations, continues to flourish in several places in Indonesia. In

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<sup>4</sup> Darwis L. Rampay, 'Hak Waris Anak dalam Perkawinan Campuran Berdasarkan Undang- Undang Nomor 12 Tahun 2006 Tentang Kewarganegaraan', *MORALITY: Jurnal Ilmu Hukum*, p. 6 <<http://jurnal.upgriplk.ac.id/index.php/morality/article/view/27>>.

<sup>5</sup> Nenang Julir, 'Pencatatan Perkawinan di Indonesia Perspektif Ushul Fikih', *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi dan Keagamaan*, 4.1 (2018), 53–62 (P. 3) <<https://doi.org/10.29300/Mzn.V4i1.1010>>.

<sup>6</sup> Ahmadika Safira Edithafitri, 'Status Kepemilikan Benda Tidak Bergerak dalam Perkawinan Campuran di Indonesia', *LEX PRIVATUM*, 3.1 (2015), p. 74 <<https://ejournal.unsrat.ac.id/index.php/lexprivatum/article/view/7027>>.

<sup>7</sup> Mursyid Djawas and Nurzakia Nurzakia, 'Perkawinan Campuran di Kota Sabang (Studi Terhadap Faktor dan Persepsi Masyarakat Tentang Dampak Perkawinan Campuran)', *SAMARAH: Jurnal Hukum Keluarga dan Hukum Islam*, 2.2 (2019), 307–34 (p. 310) <<https://doi.org/10.22373/sjhk.v2i2.4740>>.

the Iboh-Sabang region, for instance, according to a report from the KUA Sukakarya District, as many as seven intermarried couples have occurred in the last few years. The same trend, even more so, can be found in tourist areas such as Bali, Kalimantan, Lombok, etc., where the number of intermarriages increases significantly every year. In Bali, based on a study, intermarriages continued to increase throughout 2015-2018.<sup>8</sup> This trend shows that currently in Indonesia, intermarriages are common among foreign and Indonesian couples. Cultural diversity and differences in nationality seem no longer to be a barrier or obstacle for Indonesian men or women in establishing marital relations with foreign nationals.

The phenomenon of intermarriages is motivated by various motives. Some are motivated by love, by economic reasons, by practical reasons such as the ease of obtaining a residence permit from the Indonesian government, as well as many other motives that are known only to those who carry out the intermarriage. In fact, in certain circles, there is also a tendency for intermarriage to become a matter of pride for the individual who carries it out.<sup>9</sup> On the side of prospective brides and grooms who are foreign citizens, the main motive for foreign men/women to marry Indonesian women/men is to make it easier to obtain a residence permit from the Indonesian government. Besides, there is also a desire to own land whose ownership status can only be obtained through marriage to an Indonesian citizen, mostly occurs in Bali.<sup>10</sup> In West Kalimantan Province, intermarriages are often motivated by economic factors where Taiwanese foreigners tend to prefer to marry Indonesian women because marrying Indonesian women is cheaper than marrying women from their home country.

However, inter marriages, for those who are Muslim, are often carried out without being registered at the Religious Affairs Office (KUA) or at the Civil Registry Office for those who are non-Muslim. This negligence

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<sup>8</sup> Siah Khosiah, dkk., *Isbât Nikâh Atas Perkawinan Campuran Pada Wilayah Wisata Di Indonesia* (Bandung: Lembaga Penelitian dan Pengabdian kepada Masyarakat, 2018), pp. 90–91.

<sup>9</sup> R. Damayanti., *Kajian Akademis Rencana Program 30 Tahun Menghadirkan Manusia Indonesia Baru (Peluang Pengkondisian Perkawinan Antar Etnis, Ras, Bangsa dan Agama di Indonesia)* (Jakarta: Kementerian Pemberdayaan Perempuan dan Perlindungan Anak. Pusat Penelitian Kesehatan Universitas Indonesia, 2015), p. 15.

<sup>10</sup> Nur Faiz (A Judge in Badung Religious Court), *Motivasi orang menikahi pribumi*, 2018.

happens a lot and is regrettable. Prospective brides and grooms should be aware that unregistered intermarriages can result in many unpleasant legal consequences, especially for women. This marriage not only has no legal force for both parties, but also has an impact on the status of their children, including access and material rights which are generally owned by registered husband and wife couples. This means that the issue of intermarriages is an important matter and needs to be studied carefully, especially when it is related to the legal status of Indonesian women who enter into the kind of marriage.

### **The Procedure of Intermarriage**

In practice, the process of implementing a mixed marriage is the same as implementing a non-mixed marriage. What differentiates the two lies in fulfilling administrative requirements. According to the Regulation of the Minister of Religion of the Republic of Indonesia Number 19 of 2018 concerning Marriage Registration, as stated in Article 24, before registering a mixed marriage, the prospective bride and groom who are foreign citizens must first fulfill several requirements such as: a permission letter from the embassy/representative of the country concerned, or from the official agent of the prospective bride and groom in the country concerned, as well as submitting a photocopy of passport, photocopy of birth certificate, divorce certificate/death certificate for widowers and widows, personal data of both parents who are foreign citizens following the marriage certificate data of the country of origin of the prospective bride and groom. For husbands who wish to have more than one wife, they must submit a polygamy permit from a religious court or authorized institution in their country of origin, a statement on oath, and a marriage certificate from the embassy or country concerned. All required documents must be translated into Indonesian. If all requirements are met, the authorized office can issue a marriage certificate.<sup>11</sup>

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<sup>11</sup> M. Nur Kholis Al Amin, 'Perkawinan Campuran dalam Kajian Perkembangan Hukum: Antara Perkawinan Beda Agama dan Perkawinan Beda Kewarganegaraan di Indonesia', *Al-Ahwal: Jurnal Hukum Keluarga Islam*, p. 218 <<http://ejournal.uin-suka.ac.id/syariah/Ahwal/article/view/09206>>.

The difference between the process of registered intermarriages and that are not registered lies in the fact that prospective brides and grooms of different nationalities need a permission letter from the embassy of the country origin;<sup>12</sup> Whereas in the unregistered inter marriages, the practice is not under the supervision of the Marriage Registrar from the authorized agency (KUA) but by the parents as guardians, attended by the bride and groom, and witnesses. In the view of Islamic law, this practice is legal even though it does not involve marriage registrar.

Based on the research results, there are three main reasons that encourage parties in intermarriages not to register their marriage with the KUA, namely: 1. Documents owned by foreign husbands cannot be fulfilled or are issued from their country of origin, while wives have urged them to immediately getting married; 2. Parents are worried that adultery will occur; so that the process of accelerating marriage becomes an unavoidable option; 3. The applicants do not yet know that the function of registering a marriage or a marriage certificate is a very important legal document in obtaining other documents.

For the first reason, as stated by the clerk of the Denpasar and Tabanan Religious Courts, the majority of intermarriages that are not registered occur because of the complexity of the process and the long time required to obtain a marriage permit documents in the form of a CNI (Certificate of No Impediment) issued by the embassy.<sup>13</sup> For certain countries such as Japan, and Australia, CNI documents can be easily obtained at the embassies, consulates or attachés close to Bali Province. For citizens of other countries such as Germany and Korea, however, to obtain a certificate from the country's Ambassador will take a long time. In addition, all the documents mentioned above need to be translated into Bahasa Indonesia, which is also a taking-time business. This is the answer why intermarriages are often not recorded at the local KUA.<sup>14</sup>

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<sup>12</sup> Nur Anisah, 'Pelaksanaan Perkawinan Campuran di KUA Tahunan, Jepara dalam Tinjauan Undang-Undang Perkawinan di Indonesia', *Isti'dal : Jurnal Studi Hukum Islam*, p. 18 <<https://ejournal.unisnu.ac.id/JSHI/article/view/854>>.

<sup>13</sup> Karyadi and Mursal, (Registrars in Religious Court of Denpasar and Tabanan), 2018.

<sup>14</sup> Masruhan (Head of Religious Court of Southern Kuta Region), 2018.

The second reason why intermarriages are not registered is because the event took place immediately and without preparation. This happens because the bride's parents want the marriage to take place immediately to prevent adultery. Such a reason can be found in the decision of the Badung Religious Court Number: 0019/Pdt.P/2017/PA.Bdg. As the panel of judges informed, the unregistered marriage occurred not due to the negligence or deliberate intention of married couple but was caused by the bride's father who urged them to get married immediately to avoid adultery.<sup>15</sup> Similar factors can also be found in the decision of the Religious Court Number: 0015/Pdt.P/2015/PA.Dps.<sup>16</sup>

The third reason, although not stated clearly, is the husband and wife's ignorance of the importance of marriage registration. This assumption can be seen from the background of the marriage legalization application case submitted to the Religious Court. Referring to the reasons that emerged in the trial at the Cianjur Religious Court and the Tigaraksa Religious Court, West Java, for example, it can be understood that the reason the mixed marriage was not registered was due to the ignorance of the applicants. This research, however, has not succeeded in clearly revealing the causes of intermarriages in that region. This was confirmed by the results of an interview with the Chair of the South Kuta District KUA who stated that they had absolutely no idea why many marriages between local residents and foreigners were not registered at the South Kuta District KUA. They only suspect that there is pressure from the woman's family or local clerics who want the marriage to take place immediately to prevent adultery.<sup>17</sup> This unclear reason can also be traced in several Religious Court Decisions in the Bali Region (Badung and Denpasar), such as the Decision Number 0025/Pdt.P/2015/PA.Bdg, Decision Number 0008/Pdt.P/2016/PA.Bdg, and also in Decision Cianjur Religious Court No.1172/Pdt.P/2016/PA. Cjr, Decision Number 0004/Pdt.P/2016/PA.Cjr, Decision Number 0151/Pdt.P/2018/PA.Cjr, and Tigaraksa Religious Court Decision Number 0362/Pdt.P/2017/PA .Tgrs.

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<sup>15</sup> Mahmudah, (A Judge of Religious Court of Badung), 2018.

<sup>16</sup> Karyadi and Mursal, (Registrars in Religious Court of Denpasar and Tabanan), 2018.

<sup>17</sup> Karyadi and Mursal, (Registrars in Religious Court of Denpasar and Tabanan), 2018.

Because the intermarriages are not registered in the authorized agency documents, practically married couples will not obtain a marriage certificate. The absence of the certificate, in turn, will cause the parties to experience problems in obtaining other documents that require data support from the marriage certificate. Therefore, as a way out, the law allows married couples whose marriage has not been officially registered to submit an application for *isbât nikâh* (recognition of marriage) to the Religious Court to obtain recognition from the state for their marital status. By doing so, their old marriage can be declared valid, having the same status as other marriages registered at the KUA.

In general, the reason for applying *isbât nikâh* is similar, namely to obtain legal identity in the form of a marriage certificate. The position of a marriage certificate for a husband and wife is very important because it is an authentic certificate which explains that a marriage event has occurred between one individual and another individual. With legal recognition of the marriage event, a husband/wife, including children born from the marriage, will obtain legal status and certain rights that are necessary for the continuity of their household life.

For foreigners, by having their marriage legalized, they can easily obtain residence permits and other material rights. Foreign citizen husbands/wives who have assets acquired during their marriage are entitled to these assets if they have signed a previous agreement. This agreement is necessary because Indonesian law adheres to the principle of nationalism, where only Indonesian citizens can have rights to land as stated in the Agrarian Law (UUPA) Number 5 of 1960 concerning Land. By making agreements that are signed before the marriage, the foreign couple can obtain these rights because they have the same legal status as their partner.<sup>18</sup> Thus, the recognition of marriage (*isbât nikâh*) has great functions and benefits for both parties, where foreigners need a valid marriage while Indonesian citizens need for their future marriage.

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<sup>18</sup> Justitia Henryanto Ghazaly, 'Kepemilikan Hak Atas Tanah Dalam Perkawinan Campuran', *Jch (Jurnal Cendekia Hukum)*, 5.1 (2019), 117–30 (p. 122) <<https://doi.org/10.33760/jch.v5i1.183>>.



Although in general the reason for parties submitting applications for marriage recognition (*isbât nikâh*) is to obtain legal recognition in the form of a marriage certificate for the marriage they have previously entered into, there are also other reasons put forward by the applicants. As illustrated in the following table:

**Table 1. Reasons for Applying for *Isbât Nikâh* (Marriage Acknowledgment)**

No	Case number	Petitioner I	Petitioner II	Reasons for Applying for <i>isbât nikâh</i>	Place / Year of Marriage
1	0015/ Pdt.P/ 2015/ PA. Dps	Dutch Citizen	Denpasar	To obtain marriage & birth certificate	Pangandaran in 2013
2	0025/Pdt.P/2015/ PA.Bdg	British Citizen	Kuta	To obtain a marriage certificate	Kuta in 2013
3	0008/Pdt.P/2016/ PA.Bdg	Korea Citizen	Kuta	To obtain a marriage certificate	Kuta in 2013
4	0006/Pdt.P/2017/ PA.Bdg	Dutch Citizen	Kuta	To obtain a marriage certificate	Bojong, Soreang, Bandung, in 2002
5	0019/Pdt.P/2017/ PA.Bdg	New Zealand Citizen	Kuta	To obtain a marriage certificate	Pusakanagara Subang, in 2010
6	0004/Pdt.P/2018/ PA.Cjr	Pakistan Citizen	Cianjur	To obtain marriage certificate & Child status	Married in 2003
7	0151/Pdt.P/2018/ PA.Cjr	Saudi Arabia Citizen	Cianjur	To obtain a marriage certificate & Child status	Married in 2003
8	1172/Pdt.P/2016/ PA.Cjr	China Citizen	Cianjur	To obtain a marriage certificate	Married in 2010
9	004/Pdt.P/2017/ PA.Tgrs	Mali Citizen	Tangerang Selatan	To obtain a marriage certificate	Married in 2015
10	616/Pdt.P/2017/ PA.Tgrs	China Citizen	Tangerang Selatan	To obtain a marriage certificate	Married in 2015
11	070/Pdt.P/2018/ PA.Tgrs	Oman Citizen	Tangerang Selatan	To obtain a marriage certificate	Married in 2017
12	184/Pdt.P/2018/ PA.Tgrs	Korea Citizen	Tangerang Selatan	To obtain a marriage certificate	Married in 2011
13	0362/Pdt.P/2018/ PA.Tgrs	Saudi Arabi Citizen	Tangerang Selatan	To obtain a marriage certificate	Married in 2013

Source: Processed from the Decisions of *Isbât Nikâh* in Badung, Denpasar, Cianjur and Tigaraksa Religious Courts

## Legal Protection for Women in Uncertified Inter-Citizen Marriage

Furthermore, the practice of intermarriages in Indonesia provides status and rights that are recognized by law such as the right to joint property, the right to inherit, the right to earn a living and care for children, etc.<sup>19</sup> These rights can be obtained if the marriage is mixed. This is done according to the law, namely having a marriage certificate. On the other hand, intermarriages without a marriage certificate are considered to have no legal force. Therefore, Indonesians who marry foreigners without a marriage certificate will not obtain status recognized by law and may lose some material rights including child custody rights. For this reason, so that they do not lose their material rights, especially land rights, as a result of unregistered intermarriages, it is very essential for Indonesian women to understand the provisions regulated in the Marriage Law, the 1958 Citizenship Law, and Agrarian Law of 1960.<sup>20</sup> Thus, before getting married to a foreigner, An Indonesian woman must have sufficient understanding of the provisions in the law above to prevent losses that she will experience in the future, especially those related to ownership rights over immovable objects, such as land and buildings. Furthermore, Indonesian women marrying foreigner need to receive protection from the government. This protection can be carried out in two forms: preventive legal protection and restitutive legal protection.

Preventive legal protection means the law protects the rights of Indonesian women before entering into mixed marriage. Preventive legal protection also means preventing women from arbitrary actions that women might experience during their marriage. Preventive legal protection for women in intermarriages can be traced in existing laws and regulations. Before the enactment of Law Number 1 of 1974, Indonesia used the Mixed Marriage Law No. 158 of 1898 in Article 3 which states

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<sup>19</sup> Couples in intermarriages are also allowed to adopt children. The promotion of children for intermarriages, which is also known as *intercountry adoptions*, follows the provisions of Government Regulation No. 54 of 2007 concerning the Implementation of Child adoption. Read Yunanto Raesa Astiti Putri, 'Pangkatan Anak Warga Negara Indonesia Oleh Orang Tua Angkat dalam Perkawinan Campuran di Indonesia (Studi Kasus: Pangkatan dalam Kasus Angeline di Bali)', *Diponegoro Law Journal*, 5.2 (2016), 1–13.

<sup>20</sup> Sebastian Partogi., 'Implications of Mixed Marriage for Indonesian Women', Property Ownership - Business - The Jakarta Post', p. 7 <<https://www.thejakartapost.com/news/2015/09/12/implications-mixed-marriage-indonesian-women-s-property-ownership.html>>.

that women who enter into intermarriages follow the status of their husbands both in public and civil law.<sup>21</sup> However, after Law Number 1 of 1974 came into force, Indonesia no longer used the Mixed Marriage Law as the Law Number 1 of 1974 has specifically regulated the issue of intermarriages in articles 57-62.

Apart from the provisions above, preventive legal protection for women in intermarriages is also contained in the marriage law and citizenship law. The legal protection in question can also be interpreted from the provisions of Article 2 Paragraph (1) and Paragraph (2 of the Marriage Law No. 1 of 1974) which states that "a marriage is declared valid if it meets religious and marriage requirements and is officially recorded".

The provision in the above Article is a form of preventive protection to encourage every mixed marriage be carried out based on religious regulations and recorded by the Marriage Registrar. A marriage that is not registered will not only cause many difficulties, but can also bring legal sanctions as regulated in Law No. 1 of 1946 concerning Marriage, Divorce and Reconciliation Registration. In Article 3 of the Law, it is stated that "Anyone who enters into a marriage contract with a woman and does not carry it out under a marriage registration clerk, will be punished with a fine of R 50 (fifty rupiah)". Similar sanction is also stated in Article 143 the Material Law of the Religious Courts Bill that anyone who intentionally marries not before a Marriage Registrar Officer will be subject to a fine of IDR 6,000,0000 (six million rupiah) or a maximum imprisonment of 6 (six) months. These sanctions are similar to those applied in other countries for example in Iran where marriages carried out without registration from authorized officials are subject to imprisonment for 1 to 6 months, or a fine of 200 dinars or 2 years in prison. Likewise in other countries in the world. Jordan, the perpetrator of an unregistered marriage, was fined 1,000 dinars.<sup>22</sup>

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<sup>21</sup> Mutiara Hikmah, 'Perlindungan Hak-Hak Perempuan dalam Perkawinan Campuran Berdasarkan Instrumen-Instrumen Internasional Tentang Hak Asasi Manusia', *Indonesian Journal of International Law*, 3.4 (2006), 625-641-641 (p. 633) <<https://doi.org/10.17304/ijil.vol3.4.126>>.

<sup>22</sup> Nasaruddin Umar, 'Hukum Keluarga Kontemporer di Negara-Negara Muslim' (presented at the Seminar Nasional Hukum Materil Peradilan Agama, Antara Cita, Realita dan Harapan, Hotel Red Top, Jakarta, 2010), p. 8.

The existence of a marriage certificate document for intermarriages in Indonesia is very vital. Married couples of intermarriages whose marriage is registered will obtain a legal identity. The legal identity referred to here is proof of a person's legal identity, one of which is a marriage certificate/book. A marriage certificate/book in Indonesia is a document that can be issued by two authorized parties: the Religious Office for Muslims and the Civil Registration Office for non-Muslims. This marriage certificate/book is a legal document that proves the marital status of a couple based on marriage registration and the provisions in Law Number 1 of 1974 concerning Marriage, and Law Number 23 of 2006 concerning population administration.

On the other hand, those who carry out unregistered marriages or cannot prove the existence of a marriage by showing a marriage certificate will encounter various difficulties in obtaining legal identity. This situation will clearly bring harm to the family's husband, wife and children. Husband and wife from unregistered marriages cannot claim each other's rights, nor will children have difficulty obtaining birth certificates and other important documents because in the eyes of the law the marriage is considered to have never existed.

The only way for the intermarriage to be recorded and have a marriage certificate is to submit an application for *isbât nikâh* (recognition of marriage). Through this mechanism, couples who marry without being registered, both in cases of ordinary and intermarriages, find a solution for their problems. It is not surprising that the number of *isbât nikâh* applications in 359 Religious Courts in Indonesia has tripled, including cases heard through mobile courts at the village level which have also doubled. A study conducted in 2012 reported that more than 23,000 marriage *itsbat* cases had been heard in the Religious Courts, this number increased significantly in 2013 to more than 35,000 cases. This phenomenon shows that the role of the Religious Courts in facilitating the community in seeking their right to legal identity is very dominant. Therefore, it makes sense that in the future the government needs to facilitate the poor in obtaining similar facilities.<sup>23</sup>

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<sup>23</sup> Cate Sumner dkk, *Studi Dasar AIPJ Tentang Identitas Hukum Jutaan Orang Tanpa Identitas Hukum di Indonesia*. (Jakarta: DFAT, 2014), p. 9.

Furthermore, another form of legal protection for Indonesian women who enter into intermarriages is restitutive protection. This form of protection restores the situation, from having no to having legal status. In Law No. 1 of 1974 concerning Marriage it is stated that Siri marriages are considered to have no legal force and perpetrators can be subject to fines. To realize legal certainty and protection, however, the state provides another door for married couples to enter into intermarriages through a mechanism called *isbât nikâh* (recognition of marriage). This settlement is seen as a form of restitutive legal protection, as it provides unregistered marriages a recognition by which they obtain legal status. Thus, the essence of *isbât nikâh* itself shifts to discretion between articles in the Marriage Law.<sup>24</sup>

It should be noted, however, that the function of *isbât nikâh* is only to acknowledge the marriage and not justify it. This is because the marriages submitted to the Religious Court are essentially valid in the view of religious provisions. The requests for *isbât nikâh*, according to the Guidelines for the Implementation of Duties and Administration in the Religious Courts, can be made by both husband and wife or one of the husband and wife, also their children, marriage guardians or other parties to the Religious Court or the Shariah Court in the jurisdiction of the applicant residency. The requests for marriage recognition, certainly, must be accompanied by clear and concrete reasons and interests, as the panel of judges will consider various evidence of the unregistered marriage cases either in the form of witness, statements or legal facts forwarded at the hearing.

The existence of provisions regarding the recognition of marriage (*isbât nikâh*) in Indonesian law can be considered as a form of renewal of Islamic law, as well as restitutive protection for married couples who enter into illegal intermarriages. Because, until now, community compliance, especially Muslims, with the provisions for marriage registration cannot be said to be optimal. Society still has an ambiguous

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<sup>24</sup> Ramdani Wahyu Sururie., 'Polemik di Seputar Hukum Isbât Nikâh dalam Sistem Hukum Perkawinan Indonesia', *Al-Manahij: Jurnal Kajian Hukum Islam*, p. 237 <<http://ejournal.iainpurwokerto.ac.id/index.php/almanahij/article/view/1299>>.

attitude towards marriage regulations in Indonesia, whether to comply with state regulations which require marriage registration, or to comply with fiqh regulations which do not recognize registration as part of the determining element of the validity of a marriage. If such a policy is studied using the theory of *maslahah* and *maqâsid syari'ah* of Al-Syathibi, then the provisions regarding marriage registration contain elements of benefit for Muslims, especially if it is related to the following facts:

1. In an era where the population is increasing significantly, it is necessary to collect data in the form of population records, especially those related to birth rates, marriages, divorces, deaths and so on. Because if data collection is not carried out there will be chaos in social life which can ultimately lead to legal smuggling.
2. By not registering a marriage, protection of the rights of family members (husband, wife and children) in the form of rights to property, marital status or the right to personal identity cannot be obtained. This results in the main goals of marriage in the form of *hifdz al-nasl* (protecting offspring/honor) and *hifdz al-mâl* (preserving property) cannot be fulfilled. Therefore, regulating marriage recognition (*Isbât Nikâh*) for illegal intermarriages is very necessary, to protect against disaster/loss of rights of family members while providing benefits for them in the form of legal protection.
3. The benefits arising from the provision of *Isbât Nikâh* are general, not individual. In other words, these provisions apply to everyone, not limited to certain individuals, religions or groups. This is in line with the well-known principle of fiqh saying: *المصلحة العامة مقدمة على المصلحة الخاصة* (*The public benefit must take precedence over the benefit of the individual*).<sup>25</sup>
4. Normatively, marriage law has embodied the principles contained in the Pancasila and in the 1945 Constitution and has accommodated

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<sup>25</sup> A. Djazuli, *Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam dalam Menyelesaikan Masalah-Masalah yang Praktis*, Cet. ke 3 (Jakarta: Kencana, 2010), p. 11.

all aspects of life and religious law that exist in the society.<sup>26</sup> Therefore, the implementation of the *isbât nikâh* provisions must eliminate the difficulties faced by the community, both in terms of costs, time, and administration procedural requirements, etc. Because, if the implementation turns out to be difficult for some people, considering the high costs or because of the remote location, or due to legal obstacles (*al-man'i*) that cannot be avoided, then an alternative regulations must be made to minimize difficulties for society.

Based on the perspective above, it is clear that the policy of *isbât nikâh* as a solution for parties engaging in uncertified intermarriage is really necessary and urgent.

Furthermore, apart from the provisions contained in Law Number 1 of 1974, other forms of restitutive legal protection for women in intermarriages can also be found in Law Number 12 of 2006 concerning Citizenship. Before the enactment of this law, the position of women in intermarriages had no place in the eyes of state law. So, in situations like that, there were various cases where mothers could not obtain justice regarding the status of their children, because of the old citizenship law (UU Number 62 of 1958) does not regulate this at all. It was only after the enactment of Law Number 12 of 2006 concerning Citizenship that the position of Indonesian women in intermarriages improved, as did the fate of their children in obtaining citizenship according to their mother's status.<sup>27</sup>

Furthermore, regarding the position of women in intermarriages, Law Number 12 of 2006 states that basically intermarriages are based on the principles of obedience and equality. The principle of obedience means that the wife follows her husband's position, both during the marriage and after the marriage. Meanwhile, the principle of equality

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<sup>26</sup> See *Penjelasan atas Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan*, Penjelasan Umum Nomor 3.

<sup>27</sup> Margono, 'Perlindungan Hukum Terhadap Anak Hasil Perkawinan Campuran di Wilayah Kota Yogyakarta', *Jurnal Jurisprudence*, p. 3. <<http://journals.ums.ac.id/index.php/jurisprudence/article/view/4192>>.

means that marriage does not affect a person's citizenship in the sense that each husband and wife are free to choose or determine their own citizenship status.<sup>28</sup>

If studied in depth, it can be said that the principle of intermarriages adopted in the Citizenship Law tends to follow the principle of equality. This can be seen in Article 26 Paragraph (1) which states that "Indonesian women who marry foreign men lose their citizenship if according to the law of the husband's country the wife's citizenship follows the husband's citizenship." However, this article is followed by another article, namely Article 26 Paragraph (3), which states that if a woman wants to retain her citizenship, she can submit a statement of her intention to an Indonesian official or representative in that country after 3 years. Indonesian women who marry foreigners will not lose their citizenship if they submit an application to the Ministry of Law and Human Rights.

Apart from that, the Citizenship Law actually also contains principles that protect Indonesian women who enter into intermarriages. This principle is contained in Article 26 Paragraphs 1 and 3 concerning the principle of single citizenship (one citizenship for each person). This principle is relevant for Indonesian women who enter into intermarriages, in which case they can regain their citizenship after submitting a letter of application to the Official or Representative of the Republic of Indonesia whose jurisdiction covers the area where the woman is domiciled. 29 This provision provides restitutive protection for Indonesian women to regain her Indonesian citizenship status, which previously followed her husband's citizenship, by submitting an application to the authorized official.

## Conclusion

Based on the description above, it can be concluded that a mixed marriage that is considered invalid is a marriage between a foreign man/

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<sup>28</sup> Titik Triwulan Tutik, *Pokok-Pokok Hukum Tata Negara* (Jakarta: Prestasi Pustaka Publisher, 2006), p. 244.



woman and a woman/man who is an Indonesian citizen. Even though all the requirements have been fulfilled, the marriage is not registered by the marriage registrar due to certain reasons, for example the required documents are incomplete which results in the marriage being carried out without the knowledge of the state institution.

Marriage law in Indonesia also protects Indonesian women who enter into intermarriages outside of marriage, both preventively and restitutively. This is confirmed in the provisions of Article 1 Paragraphs (1) and (2), Law Number 1 of 1974 concerning Marriage, Articles 57-62 of the Compilation of Islamic Law and Article 26 Paragraphs (1) and (3) of Law Number 12 of 2006 on Citizenship.

### **Author Contributions**

*Ramdani Wahyu Sururie* led the research by conceptualizing the research, selecting the suitable theory and research methodology. RWS also writing the initial manuscript, while *Dio Ashar Wicaksana* contribute by collecting the data, presenting the data, and editing the articles. Both authors collectively did the data analysis from the findings provided and refinement of articles. It has been done through discussion, commentary, and review over each author ideas.

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