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**LEGAL IMPLICATIONS OF UNREGISTERED MARRIAGES
IN INDONESIA ON THE STATUS OF CHILDREN
ACCORDING TO ISLAMIC LAW AND POSITIVE LAW**

Wahibatul Maghfuroh, Herdy Pratama Susantyo, Azis Setyagama

The problem of unregistered marriages in Indonesia remains a complex issue that raises legal matters, particularly regarding the status of children. In Islamic law, unregistered marriages that fulfil the pillars and requirements of sharia, such as the presence of a guardian, witnesses and the consent are still considered valid, so that children born from them have a clear lineage to their father and obtain basic rights, including inheritance. However, in Indonesia a marriage is considered valid only if it is registered in accordance with Article 2 paragraph (2) of Law Number 1 of 1974 in conjunction with Law Number 16 of 2019. As a result, children from unregistered marriages are often only recognized as having a civil relationship with their mother, unless there is recognition or a court ruling, as affirmed in Constitutional Court Decision Number 46/PUU-VIII/2010. The paper uses a juridical-normative approach with a framework of lineage theory in Islamic law, legality theory in positive law, child protection theory, and progressive legal theory. Data were obtained through a review of literature, legislation, and court decisions. The research findings indicate a dual status for children born into unregistered marriages: legitimate according to religion, but not fully protected by state law. This discrepancy has implications for lineage rights, inheritance, population administration and child protection. The paper concludes that legal harmonization is essential. The state needs to strengthen the marriage confirmation mechanism, and establish marriage registration as an administrative tool to ensure legal child protection.

Keywords: unregistered marriage, child status, Islamic law, positive law, child protection, Indonesia.

ПРАВОВЫЕ ПОСЛЕДСТВИЯ НЕЗАРЕГИСТРИРОВАННЫХ БРАКОВ В ИНДОНЕЗИИ ДЛЯ СТАТУСА ДЕТЕЙ В СООТВЕТСТВИИ С ИСЛАМСКИМ ПРАВОМ И ПОЗИТИВНЫМ ПРАВОМ

Вахибатул Магфурох, Херди Пратама Сусанте, Азис Сетьягама

Проблема незарегистрированных браков в Индонезии является сложным явлением, вызывая правовые вопросы, особенно касающиеся статуса детей. В исламском праве незарегистрированные браки, которые соответствуют канонам и требованиям шариата, таким как наличие опекуна, свидетелей и согласия, по-прежнему считаются действительными, поэтому рожденные в них дети имеют четкую родословную от своего отца и получают основные права, включая право наследования. Однако в Индонезии брак считается действительным только в том случае, если он зарегистрирован в соответствии с пунктом 2 статьи 2 Закона № 1 от 1974 г. и Законом № 16 от 2019 г. Таким образом, дети от незарегистрированных браков часто признаются состоящими в гражданских отношениях только со своей матерью, если нет соответствующего признания или решения суда, как это подтверждено в решении Конституционного суда № 46/PUU-VIII/2010. Статья подготовлена на основе нормативно-правового подхода, основанного на теории происхождения в исламском праве, теории законности в позитивном праве, теории защиты детей и прогрессивной правовой теории. Данные были получены на основе обзора литературы, законодательства и судебных решений. Результаты исследования указывают на двойной статус детей, рожденных в незарегистрированных браках: законный в соответствии с религией, но не полностью защищенный государственным правом. Это несоответствие имеет последствия для права на происхождение, наследование, управления народонаселением и защиты детей. В статье делается вывод о необходимости гармонизации законодательства. Государству необходимо совершенствовать механизм подтверждения брака и установить регистрацию брака в качестве административного инструмента для обеспечения правовой защиты детей.

Ключевые слова: незарегистрированный брак, статус ребенка, исламское право, позитивное право, защита детей, Индонезия.

Introduction

From an Islamic legal perspective marriage is viewed not only as a social contract but also as a sacred bond aimed at building a family, preserving offspring and maintaining human dignity. In the context of Indonesian national law, marriage is regulated by Law No 1 of 1974 concerning marriage, which was later amended by Law No 16 of 2019. This regulation emphasizes the importance of marriage registration to ensure legal certainty and protection for all parties, especially women and children. However, in practice, the phenomenon of unregistered marriages remains common in society. These marriages, which are religiously valid but not officially registered with the Office of Religious Affairs or the Civil Registry, are often chosen for various reasons, ranging from economic factors, unauthorized polygamy, out-of-wedlock pregnancies, to evading state administrative regulations [10]. According to a report by the Indonesian Central Bureau of Statistics, the number of unregistered marriages in Indonesia remains significant, particularly in rural areas with limited access to civil registration services.

This phenomenon raises serious problems regarding the status of children born from unregistered marriages. In Islamic law, as long as the pillars and requirements of marriage are met namely, the presence of a guardian, two witnesses, and the consent and acceptance of marriage is considered valid. And the child born from the marriage has a clear lineage to the father. In contrast, positive law in Indonesia only recognizes marriages registered in accordance with Article 2 paragraph (2) of the Marriage Law. As a result, children from unregistered marriages are often only recognized as having a civil relationship with their mother, unless there is recognition or a court order (MK Decision No 46/PUU-VIII/2010). This difference in views between Islamic law and positive law has serious implications: lineage rights, inheritance rights, legal status and child protection. Children from unregistered marriages have the potential to face administrative discrimination, for example,

difficulty obtaining birth certificates, educational rights, and access to social security [12]. In fact, from the perspective of *maqāṣid al-sharīʿah*, the protection of offspring is one of the main objectives of Islamic law [3]. Real-life cases frequently appearing in religious courts demonstrate how children from unregistered marriages face legal vulnerabilities. For example, in a case at the South Jakarta Religious Court in 2019, a mother filed a marriage confirmation request to obtain a birth certificate listing the father's name. The judge granted the request on the basis that the marriage fulfilled sharia requirements, even though it was not registered. This case reflects the need to bridge the gap between religious norms and positive legal norms.

Similar phenomena have been found in other countries. In Malaysia, unregistered marriages, also known as underhand marriages, similarly pose legal challenges, although Malaysian sharia courts provide mechanisms for legalization and marriage recognition to mitigate the negative impact on children. In Egypt, marriage registration has been mandatory since colonial times, but unregistered marriages still occur, particularly in rural areas [8]. Meanwhile, in Pakistan the practice of unintelligible marriage often sparks debate regarding the status of children, although the majority of Islamic scholars maintain the validity of lineage if religious requirements are met.

Given this phenomenon, a study of the legal implications of unregistered marriages on the status of children under Islamic law is crucial. This research not only provides a normative analysis but also presents practical recommendations for harmonizing Islamic law with positive law in Indonesia, ensuring the protection of children's rights.

Methodology

This research is a normative juridical study with a statutory approach and a conceptual approach. Normative juridical research was used because the primary focus is on the study of laws and regulations, Islamic legal doctrine and court decisions relevant to the status of children born from unregistered marriages [q.v.: 9]. The secondary data sources are:

1. The Qur'an and Hadith relating to marriage and the status of children.

2. Law No 1 of 1974 concerning Marriage.
3. Compilation of Islamic law (Presidential Instruction No 1 of 1991).
4. Constitutional Court Decision Number 46/PUU-VIII/2010 [17, p. 8].

In addition to the normative approach, this study also uses a comparative approach by comparing how Islamic law and positive law view the status of children from unregistered marriages, as well as comparing practices in several other Muslim countries to enrich the analysis [6].

Results and discussion

The position of children from siri marriages according to Islamic law

In Islamic law the validity of a marriage is determined by fulfilling the pillars and requirements of marriage, namely the presence of a legitimate husband and wife, a guardian, two witnesses, and the acceptance of the marriage vows. As long as these requirements are met, the marriage is considered valid according to Islamic law, even if it is not registered in the modern state administration system. Therefore, children born from unregistered marriages are still considered legitimate and have clear lineage to their father.

Scholars of four schools of thought have similar views. According to the Shafi'i school, the birth of a child is attributed to the husband of the woman who gives birth, in accordance with the rule of the child is attributed to the owner of the bed [2]. Imam Malik, Abu Hanifah and Ahmad bin Hanbal also agree that children from a legal marriage have a full lineage to their father, including inheritance and maintenance rights.

In the contemporary context, some scholars emphasize the importance of registration as a form of taqyīd, or administrative restriction, to prevent disputes. However, this registration does not determine whether a marriage is valid from a religious perspective [4]. This means that even if it is not registered, a marriage that meets the requirements of sharia remains valid, and any children born remain of legal lineage.

The Indonesian Ulema Council (MUI) has emphasized in several fatwas that marriage registration is an administrative obligation, not a legal requirement.

However, the MUI encourages registration as part of efforts to prevent harm (sadd al-dharī‘ah) and prevent future problems for women and children.

From the perspective of maqāṣid al-sharī‘ah one of the main goals of Islamic law is to protect offspring (ḥifẓ al-nasl). Therefore, Islam does not differentiate the position of children from a religiously valid marriage, whether registered or not. Children still have the right to receive recognition of their lineage, livelihood, education and inheritance from their father [3].

Thus, it can be emphasized that within the framework of Islamic law, children from unregistered marriages still have a strong position, even if the administrative aspects of registration are not fulfilled.

The status of children from unregistered marriages according to Indonesian positive law

Indonesian positive law places registration as an absolute requirement for a marriage to have legal force. Article 2 paragraph (2) of Law No 1 of 1974 in conjunction with Law No 16 of 2019 states: “Every marriage is registered according to applicable laws and regulations”. The implication is that a siri marriage, even if valid from a religious perspective, is considered invalid under state law. Consequently, children born from a siri marriage legally only have a civil relationship with their mother, not their biological father. This gives rise to discrimination, particularly in terms of birth certificates, inheritance rights and responsibility for child support [1].

Constitutional Court Decision No 46/PUU-VIII/2010 marked a significant milestone in protecting the rights of children born in unregistered marriages. This ruling stated that illegitimate children retain a civil relationship with their mother and her family, as well as with the man who is their father, as proven by science and/or other legal evidence. This ruling opens the way for children born of unregistered marriages to have their civil relationship with their father recognized, provided there is biological evidence such as a DNA test. However, in practice, the implementation of the Constitutional Court's ruling still faces obstacles, such as administrative

resistance at civil registry offices, which still require a marriage certificate for paternity registration on birth certificates [5].

In religious court practice unregistered marriage cases are often filed through a request for marriage confirmation (*isbat nikah*). If the court grants the request, the unregistered marriage gains formal legality, and the child's legal status is automatically recognized. Data from the Directorate General of Religious Courts at the Supreme Court of the Republic of Indonesia (2022) shows that marriage confirmation cases continue to increase, with the majority filed for child administrative purposes, such as birth certificates and school enrolment.

However, not all *isbat nikah* requests are granted, especially if the unregistered marriage is carried out for polygamy without court permission or to hide unlawful marriage practices [7].

From a positive legal perspective, the status of children from unregistered marriages is still weak because:

1. Limited to maternal recognition – the child is automatically connected only to the mother, so civil rights with the father only arise through proof in court.
2. Dependence on biological proof – the Constitutional Court ruling requires scientific evidence (e.g., DNA testing), which in practice is not always easily accessible to lower-middle-class people.
3. Administrative uncertainty – many local governments and civil registries have not fully implemented the Constitutional Court ruling, so children continue to have difficulty obtaining official documents that include the father's name.

Thus, even though there have been legal developments through the Constitutional Court's Decision, the status of children from unregistered marriages is still in a legally vulnerable position.

Implications of the differences between Islamic law and positive law on the status of children from unregistered marriages

The fundamental differences between Islamic law and Indonesian positive law regarding unregistered marriages have serious implications for the legal status of children. Under Islamic law, children remain kin to their father, while positive law

often limits children's rights to a civil relationship with their mother. This difference has consequences for kinship, inheritance rights, and child protection.

Implications for lineage, where lineage is a crucial foundation of Islamic family law, relate not only to identity but also to other legal rights, such as inheritance, maintenance, and guardianship.

According to Islamic jurisprudence, children from unregistered marriages still have a clear lineage to their father because the marriage is considered valid if it meets the requirements and pillars of marriage. This is in accordance with the hadith of the Prophet: “*Al-walad lil firāsh wa lil 'āhir al-ḥajar*” (HR. Bukhari and Muslim), which emphasizes that children are assigned to the owner of the bed (legal husband)

In contrast, Indonesian positive law places the lineage of children from unregistered marriages in a problematic position. Article 42 of Law No 1 of 1974 states that a legitimate child is a child born in or as a result of a legal marriage. Because unregistered marriages are not considered valid under state law, children born from such marriages are often not automatically traced to the father. Legal paternity can only be established through a court decision based on biological evidence, such as a DNA test [11].

This leads to serious discrimination, particularly in the context of population administration. Children of unregistered marriages often have difficulty listing their father's name on their birth certificates, leaving their legal identity incomplete.

Implications for inheritance law: in Islamic law inheritance rights automatically belong to children who are legally related to their father. Children born in unregistered marriages, because their marriages are religiously valid, have full rights to their father's inheritance. However, under Indonesian positive law, children born in unregistered marriages do not automatically receive inheritance rights because their parents' marriages are considered invalid. To inherit, a child must first have their relationship with their father recognized through a court order. As a result, many children born in unregistered marriages lose their inheritance rights due to limited legal access, legal costs, or parental ignorance [16].

This difference creates substantive injustice. Islam emphasizes the principle of justice in the distribution of inheritance, while positive law limits children's rights based on the parents' marital status. This contradicts the principle of the best interest of the child as stipulated in the Convention on the rights of the child (CRC, 1989) and Law No 35 of 2014 concerning child protection.

Implications for child protection: From an Islamic legal perspective, children should not be blamed for their parents' marital status. Islam affirms that every child has the right to protection, education, and care without discrimination. The Islamic jurisprudence principle “*lā taziru wāziratun wizra ukhraa*” (no one bears the burden of another's sins) emphasizes that children should not bear the consequences of their parents' mistakes (Quran 1:164).

In positive law despite Constitutional Court Decision No 46/PUU-VIII/2010, which broadened the recognition of children's relationships with their biological fathers, its implementation remains weak. Many children born to unregistered marriages face administrative discrimination, such as difficulty accessing healthcare, education, or social assistance due to a lack of complete population documents [15].

Furthermore, the unclear legal status of children from unregistered marriages has the potential to create social stigma. Children are often viewed as “illegible children”, who are considered to have less equal status than children from registered marriages. This stigma clearly contradicts the principle of non-discrimination in child protection [14].

Harmonization efforts in marriage law in Indonesia

The differences in the status of children born of unregistered marriages under Islamic law and Indonesian positive law give rise to substantive justice issues. On the one hand, Islam emphasizes that children from religiously valid marriages retain their lineage to their father; on the other hand, positive law emphasizes registration as a prerequisite for legality, often depriving children of their rights. To bridge this gap, legal harmonization efforts are needed. Marriage registration should be understood not merely as an administrative formality, but as a means of legal protection. The

state has an interest in ensuring that every marriage is registered to ensure legal certainty for women and children [5].

However, the obligation to register must be balanced with ease of access. In some remote areas, registration services are still limited, making unregistered marriages a frequent option. Therefore, the government needs to expand registration services to the village level and simplify the bureaucracy to discourage people from registering their marriages.

The efforts that must be made to achieve harmonization of marriage law in Indonesia are as follows:

1. Optimizing marriage confirmation

Marriage confirmation is an important legal instrument for changing the status of a siri marriage to a valid one under positive law. Through a religious court ruling, a siri marriage can be recognized and has legal force. However, the practice of marriage confirmation still faces obstacles: legal costs, limited information, and certain requirements.

2. Implementation of the Constitutional Court Decision

MK Decision No 46/PUU-VIII/2010 expanded the recognition of illegitimate children by establishing a civil relationship with the biological father. However, implementation in the field remains suboptimal.

Some civil registry offices remain reluctant to include the father's name on birth certificates without a marriage certificate. This creates legal uncertainty and violates the principle of final and binding court decisions. Therefore, the Ministry of Home Affairs needs to issue derivative regulations to strengthen the implementation of the MK decision [7].

Furthermore, judicial institutions must be more progressive in granting child recognition requests based on scientific evidence such as DNA testing. This approach is crucial for the practical implementation of child protection principles.

3. Integration of child protection principles legal harmonization efforts must also be oriented toward child protection.

The Convention on the rights of the child, ratified by Indonesia through Presidential Decree No 36 of 1990, emphasizes the principle of the best interest of the child. This means that every legal policy must prioritize the child's best interests. Islam also adheres to similar principles; therefore, both Islamic law and positive law must be synergized to avoid discrimination against children from unregistered marriages. For example, marriage registration may remain mandatory, but children's rights to identity, education, and protection should not be diminished even if their parents' marriages are unregistered. Therefore, the parents' administrative status should not be a barrier to children's rights.

4. Progressive legal reconstruction

Progressive legal theory emphasizes that the law must favour substantive justice, rather than being bogged down in formal procedures. In the context of unregistered marriages, progressive law encourages children to continue receiving full protection even if their parents' marital status is unregistered [13].

Progressive legal reconstruction can be achieved through:

- a) Amend the marriage law to include norms that guarantee the protection of children born of unregistered marriages without discrimination.
- b) Government regulations that emphasize the obligation to register, while still providing administrative protection for children.
- c) Judicial jurisprudence that consistently grants rights to children born of unregistered marriages.

Conclusion

The implications that occur if the marriage is carried out with a secret marriage, then the marriage is considered invalid under state law, because it is not registered at the Marriage Registration Office. However, from an Islamic legal perspective, the marriage is valid because it has fulfilled the pillars and requirements of marriage, namely the presence of a guardian, two witnesses and reciting the *ijab* and *qabul*. Because it is not registered at the Government Marriage Registration Office, it has implications for the legal status and position of the child. Children born without being registered at the Marriage Registration Office will have difficulty in

determining their legal status, because the child only has a civil relationship with their mother without any relationship with their biological father unless the child can prove the truth of their biological father. The implications that occur for children from this secret marriage are not receiving inheritance from their biological father, difficulty in obtaining a complete Birth Certificate that only lists the mother's name without the father's, lack of legal protection for children from a secret marriage regarding inheritance rights, maintenance and others.

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Data about the authors:

Wahibatul Maghfuroh – Lecture of Law Faculty, Panca Marga University (Probolinggo, Indonesia).

Herdy Pratama Susantyo – Lecture of Faculty of Humanities and Social Sciences, University of Nurul Jadid (Probolinggo, Indonesia).

Azis Setyagama – Doctor of Law, Associate Professor of Law Faculty, Panca Marga University (Probolinggo, Indonesia).

Сведения об авторах:

Вахибатул Магфурох – преподаватель юридического факультета Университета Панча Марга (Проболинго, Индонезия).

Херди Пратама Сусанте – лектор факультета гуманитарных и социальных наук Университета Нурула Джадида (Проболинго, Индонезия).

Азис Сетьягама – доктор права, доцент юридического факультета Университета Панча Марга (Проболинго, Индонезия).

E-mail: wahibatulmaghfuroh@upm.ac.id.

E-mail: herdy@unuja.ac.id.

E-mail: setyagama.azis@gmail.com.