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## LEGAL PROTECTION OF WIFE AND CHILDREN IN SELF MARRIAGE

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### Abstract

This study aims to contribute ideas in the form of knowledge to the public regarding the efforts that can be made by the parties to provide legal protection for wives and children in unregistered marriages, where unregistered marriages are generally known as valid marriages under sharia but are not recorded in administration. The state creates legal uncertainty for wives and children born in unregistered marriages. The research method used is the normative research method, where the author examines several positive laws governing marriage with various types. The contradiction in legal regulations that the authors found in the research results was then processed and analyzed. The authors found several solutions for wives and children born in unregistered marriages to obtain legal protection following the provisions of laws and regulations that are still valid but not known to the public. It is hoped that, from this research, there will be no more wives and children who are denied their rights because of the uncertainty of the status of Siri marriages.

Keywords: Legal Protection, Wife, Children, Unregistered Marriage, Marriage Law.

### INTRODUCTION

Marriage in Arabic is called *al-nikah*, which means *al-with 'and al-dammu wa al-tadakhul*. Sometimes it is also called *al-dammu wa al-jam'u*, or 'like' an *al-wath 'wa al'aqd*, which means intercourse, gathering, and contracting. Starting from this etymological meaning, fiqh scholars define marriage in the context of a biological relationship. According to Sayuti Talib, marriage is a holy, strong, and firm agreement to live together legally between a man and a woman to form an eternal, courteous, loving, serene, and happy family. (Manan, 2017; Saebani & Falah, 2011)

Hazairin stated that the essence of a marriage is sexual relations. According to him, there is no marriage (marriage) if there is no sexual relationship. Mahmud Yunus defines marriage as

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a sexual relationship. Meanwhile, Ibrahim Hosein defines marriage as a contract by which it becomes lawful for sexual relations between men and women, to be more explicit, marriage can also be defined as sexual relations (intercourse).(Ramulyo, 1996)

Lord Penzance provides the following definition of marriage: I conceive that marriage, as understood in Christendom, may...be defined as the voluntary union for life of one man and one woman to be an exclusion of all others. From some of the definitions above, there are at least three things that are the essence of a marriage. Namely, it must be voluntary, it is meant to be lifelong, and it is monogamous.(Ibrahim, 1971; Poulter, 1979)

In Marriage Law Number 1 of 1974, as contained in article 1 paragraph 2; Marriage is defined as: "the physical and mental bond between a man and a woman as husband and wife with the aim of forming a family, a happy and eternal household based on the Supreme Lordship."(Wibisana, 2016) Inclusion based on the one and only Godhead is because the State of Indonesia is based on Pancasila, the first precept of which is the One Godhead. Up to this point, it is firmly stated that marriage has a very close relationship with religion and spirituality so that marriage not only has a physical/physical element but also has an inner/spiritual element.(Erwinsyahbana, 2012)

According to the Islamic Law Compilation, as stated in Article 2, it is stated that marriage is in Islamic law, namely: "Marriage is a solid contract or *miitsaqun ghalidhan* to obey Allah's orders and carry out it is worship. The word *Miitsaqan ghaliddan* is drawn from the word of Allah SWT, which is found in QS. An-Nisaa 'verse 21 which means:(Abdullah, 1994)

How are you going to take the dowry that you have given to your wife, even though some of you have mingled (mixed) with others as husband and wife? And they (your wives) have taken from you a strong covenant (*miitsaqan ghalidhan*). (Amrullah, 2018) Concerning the purpose of marriage, the following article reads: "Marriage aims to create a safe, *mawaddah*, and *warahmah* (serene, love and affectionate) household life."

This goal is also formulated through the word of Allah SWT, which is contained in the QS. ar-Ruum verse 21 which means: Among the signs of His greatness, He created for you

wives of your own kind, so that you might be inclined and at ease with them, and made them feel affection among you. Surely in this, there are real signs of His greatness for the people who think.(Huda & Thoif, 2016)

From the explanation above, we can agree that marriage can be viewed as a contract. The contract or contract contained by Law Number 1 of 1974-as has been renewed by Law Number 1 of 2019 concerning Marriage-and the Compilation of Islamic Law is actually the definition desired by law. It is often said that marriage is "marriage in Islam is the purely civil contract" (marriage is a mere agreement).(Nastangin, 2018; Nazar, 2019)

In simple terms, a contract or agreement occurs when two people who, if they have the will or ability, are combined in one provision and are stated in words, or something that can be understood as such, then a legal event called an engagement occurs, which is in the language of fiqh. I called the contract.(Manan, 2017)

At least for the implementation of a contract, four conditions must be met:

1. 'Aqdi (perpetrator of the bond).
2. Mahallul al-'Aqdi (Ma'qud Alaih) or called the object of the contract (engagement).
3. Maudu 'al-'Aqdi (purpose of the contract).
4. Consent and qabul (statement of will and statement of acceptance).

In the Marriage Law, some principles are considered sufficient principles, namely: (Harahap, 1975)

- a. To accommodate all the realities that live in Indonesian society today. The Marriage Law contains in it all the elements of the legal provisions of each religion and belief.
- b. Following the demands of the times. The purpose of the times is to fulfill women's aspirations that demand emancipation and socio-economic development, technological knowledge, which has implications for social mobility in all fields of life and thought.
- c. The purpose of marriage is to form an everlasting happy family. The purpose of this marriage can be elaborated into three things. First, the husband and wife help

each other and complete each other. Second, each of us can develop his personality, and for that personality development, husband and wife must help each other. Third, the last goal that the Indonesian national family wants to pursue is a happy family that is prosperous spiritually and materially.

- d. Awareness of each Indonesian citizen's religious laws and beliefs, namely that marriage must be carried out based on the law of religion and belief of each. This is a crucial point that almost drowns this law. Besides, the marriage must fulfill government administration and the form of registration (marriage certificate).
- e. The Marriage Law adheres to the principle of monogamy, but there are still opportunities for polygamy as long as the religious law allows it.
- f. Marriage and family formation are carried out by individuals who have matured in mind and body.
- g. The husband and wife's position in family life is balanced, both in household life and in social interactions.

In another perspective, Musdah Mulia explained that there are four principles of marriage that are based on the verses of the Al-Qur'an. (Mulia, 1999)

- 1) The principle of freedom in choosing a mate.  
This principle is actually a criticism of the Arab tradition, which places women in a weak position so that for herself, she does not have the freedom to determine what is best for herself. Therefore freedom to choose a mate is a right and freedom for men and women as long as it does not conflict with Islamic law.
- 2) The principle of mawaddah warrahmah.  
This principle is based on the word of Allah QS. ar-Ruum verse 21. Mawaddah warrahmah is a human character that is not shared by other creatures. If an animal has sexual intercourse solely for its sexual needs, it is also intended for reproduction. Meanwhile, human marriage aims to achieve the pleasure of Allah in addition to biological goals.
- 3) The principle of complementarity and protection.

This principle is based on the word of Allah SWT. contained in QS. al-Baqarah [2]: 187, which explains, "Wives are clothes as well as clothes for women. Marriage between men and women is meant to help and complement each other because everyone has advantages and disadvantages. "

- 4) The principle of Mu'asarah bi al-ma'ruf.

This principle is based on the word of Allah found in QS. an-Nisaa '[4]: 19, which orders every man to treat his wife in a ma'ruf manner. In this principle, actually, the main message is protection and respect for women.

If simplified, according to Law Number 1 of 1974, there are six principles of marriage:

- a) The purpose of marriage is to form a happy and lasting family.
- b) The validity of a marriage depends very much on the provisions of each religion's laws and beliefs.
- c) The principle of monogamy.
- d) The prospective husband and wife must be mature in mind and body.
- e) Make divorce more difficult.
- f) The rights and position of husband and wife are balanced

From the description above, it is found that the Marriage Law requires the validity of the marriage, depending on the provisions of the religious law and beliefs of each. This opens up the opportunity for an under-hand marriage, which is popularly called a Siri marriage in Indonesian society. Whether or not a Siri marriage is legal depends on whether or not the harmonious marriage is carried out by the two prospective brides.

In contrast to the fiqh perspective, the Marriage Law does not recognize the existence of a harmonious marriage. The Marriage Law only contains matters relating to marriage conditions, which can be found in Chapter II Article 6. This is not to be debated because the Marriage Law applies to all Indonesian citizens, both Muslim and non-Muslim. Concerning unregistered marriage, which is one of the variables in this paper, Article 2 of the Marriage Law confirms the validity of a marriage, namely:

1. Marriage is legal if carried out according to the law of each religion and belief.

2. Each marriage is recorded according to the prevailing laws and regulations.

Based on Article 2 paragraph (1) and (2), a marriage is valid if the marriage is carried out based on religious law and belief for the party conducting the marriage and must be recorded by an authorized officer. Here, the cumulative conditions apply, which means that all of these two conditions must be fulfilled to be valid for the marriage. However, various factors cause a marriage not to fulfill one of the conditions above, which the authors explain in the discussion chapter. Siri marriage is a form of marriage that does not fulfill one of the legal requirements of marriage as regulated by Article 2 of the Marriage Law. Other forms of marriage that do not fulfill one of the legal requirements of marriage based on Article 2 of the Marriage Law are interfaith marriages. There is also another form of marriage, which is called mixed marriage. The author focuses this paper only on unmarried marriage. Is it a legal marriage series? The author believes that unregistered marriages are legal as long as these marriages fulfill the pillars of marriage that have been determined by Islam. Following the explanation above, in brief, the harmonious marriage is as follows:

- a. There are a prospective bride and groom.
- b. Already pubescent / adult, according to Islam.
- c. There is a dowry/dowry.
- d. There is a legal guardian, according to Islam, on the side of the prospective bride.
- e. There are two men as witnesses of the marriage.
- f. There is a statement of consent and Kabul.
- g. There is an announcement.

However, although Siri marriages are legally based on the Islamic religion because they have fulfilled the rukun of marriage in its implementation, unmarried marriages do not fulfill the second requirement where unregistered marriages are not recorded according to the prevailing laws and regulations. The failure to fulfill these second conditions greatly affects the legal protection of the rights of wives and children born from unregistered marriages. In principle, unmarried marriage is very detrimental to the wife and children because:

First, children born in unregistered marriages only have a civil relationship with their

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mother and their mother's family. The status of the child is out of wedlock. The state equates the term outside of marriage, both for children born in unregistered marriages and children born because of adultery.

Second, legally the husband/father has no obligation to support his wife and children, so it only depends on the personal awareness of the responsibility of the husband/father.

Third, children are not recorded in the population administration records so that in the future, they will experience difficulties in processing official documents that require a birth certificate as a formal requirement.

Fourth, it is very easy for husbands to divorce their wives only orally, not having to go through the process of going to the Religious Court.

Fifth, the child is not entitled to share in the inheritance of the father. This is because the child is considered an out-of-wedlock child by the State.

Sixth, in terms of criminal law, the wife may be reported to the police by the first wife on suspicion of a criminal act of adultery. This can occur because both of them do not have a marriage book as an official document that legalizes the two of them living in one house as a marriage bond.

From the above explanation, the legal protection for wives and children in unregistered marriages is very important and needs to be pursued. This paper aims to provide a contribution of thought as knowledge for readers in general, and as a material for consideration, especially for women or female guardians, on several things that should be prepared, both before conducting a siri marriage and after carrying out a siri marriage.

### **METHODOLOGY**

The research method is a system of writing procedures and techniques. Thus, the research aims to reveal systematic, methodological, and consistent truths. (Ali, 2018) Writing in this journal uses the normative juridical research method, which is an approach that refers to applicable laws and regulations, while the normative approach is an approach carried out by

examining library materials or secondary data on legal principles and case studies, with, in other words, it is often referred to as literature law research.(Soekanto & Mamuji, 2018)

## **RESULT AND DISCUSSION**

Article 3 of the Marriage Law (UUP) explicitly stipulates that a man may only marry one woman as his wife. However, Article 4 of the Company Law allows the husband to remarry with special conditions, as follows:

1. There is permission from the first wife.
2. There is a ruling from the Religious Court.
3. There is a permanent obstacle for the wife to carry out her obligations as a wife.
4. They are considered financially able to have more than one household.

Due to these strict requirements, a man sometimes prefers to marry in unregistered marriage because the court only permits a husband who has more than one wife if:

- a. A wife cannot carry out her obligations as a wife;
- b. The wife has a disability or incurable disease;
- c. The wife cannot bear offspring.

### **A. The Factors Of Unmarried Marriage**

Many factors influence when a human couple decides to marry under the hand or commonly known as siri nikah. Among the many influencing factors are as follows:

1. The husband is still legally married to another woman.
2. The couple is still in education.
3. Does not recognize state law.

The difference between an official marriage and an unregistered marriage is that an official marriage is registered and carried out in the presence of an authorized officer under the country's law. Meanwhile, unregistered marriage only fulfills legal requirements only in religious terms.

Siri marriage is always defined as a secret marriage, which has two meanings, as follows:

- a. Turning away from state law, in this case, it is the obligation to register the marriage at the Office of Religious Affairs (for Muslims) and Civil Registry (for non-Muslims). However, Siri marriage is better known among Muslims.
- b. Not making announcements or what is commonly called a reception. Just invite a few people as witnesses. Some even present only the woman's guardian and two witnesses.

## **B. Legal Certainty of Marriage Siri**

In connection with legal protection for wives and children in unregistered marriages, two stages can be taken, namely:

First, before implementing a Siri marriage, it is to enter into a prenuptial agreement (UUP uses the term marriage agreement in Article 29) between the two. As for the contents of the prenuptial agreement regarding the separation of assets, the husband's obligation to provide for both physically and mentally and to care for children contains the deadline for the end of the Siri marriage to be upgraded to an official marriage. The author believes that this still needs to be done to strengthen the evidence, even though the Constitutional Court in the Constitutional Court Decision No. 46 / PUU-VIII / 2010 has canceled Article 43 of UUP, which states that children born out of wedlock only have a civil relationship with their mother and their mother's family. With the cancellation of Article 43 of the Company Law, children born out of wedlock have a civil relationship with their father and father's family. In short, there are no differences in rights and obligations between legal children (the term used by Article 42 for children born in legal marriages) and children born out of wedlock, whether children born through unregistered marriage or as a result of adultery. In the case of the legal consequences of the cancellation of Article 43 by the Constitutional Court on children born from adultery, the author has a separate juridical analysis different from children born from unregistered marriages. Likewise, if the Constitutional Court's decision is not followed up in the Marriage Law's revision by the DPR and the government, it will be a separate discussion by the author.

Second, it is carried out after the implementation of the unregistered marriage, is to take efforts to petition the marriage. Itbat nikah is an application for marriage validation submitted to the Religious Court to declare the validity of the marriage and have legal force. It is also requested that the Religious Courts order the staff of the marriage registrar or the local sub-district KUA to register the marriage and provide an excerpt of the marriage certificate based on the decision of the Religious Court.

However, not all marriages can be requested for marriage. Submission of marriage licenses is limited only if:

1. The existence of marriage in the context of settling a divorce,
2. Loss of marriage certificate,
3. There are doubts about whether or not one of the conditions of marriage is valid,
4. The existence of a marriage that occurred before the enactment of the marriage law, and
5. Marriage by those who do not have a marriage impediment according to the marriage law.

One thing to remember is that the judge's request for marriage is not always granted. If the request is granted, the court will issue a verdict or ruling on the marriage ceremony. With the determination of the identity of the marriage, legally, the marriage has been recorded, and the parties can process the divorce process in accordance with the provisions of positive law in Indonesia.

Legal certainty or whether or not a Siri marriage according to Islam is valid, as long as the marriage meets the requirements stipulated by Islam. The legal requirements for marriage, according to Islam, are as follows:

- a. There are men and women who are getting married.
- b. Akil baligh or an adult according to religious standards.
- c. The existence of a dowry or dowry.
- d. There is a legal guardian religiously for the woman.
- e. There were two witnesses.

- f. Saying consent and granting.
- g. There is an announcement (option).

The author is of the opinion; it is still necessary to make an announcement on a Siri marriage. This is very important to fulfill the element of proof. The announcement in question is not an announcement in the sense of having to hold a large reception or celebration. This announcement is not only important for the strength of proof at the trial of marriage but also aims to prevent slander that appears in society.

Marriage intercourse must be filed through the local Religious Courts for Muslims and through the local District Courts for non-Muslims. The submission of the marriage certificate is in the form of a determination request. Applying for a marriage certificate is carried out as soon as possible, especially when the child is born or as soon as necessary. Filing an application for the legalization of marriage does not require the consent of the husband, but sometimes based on his interests, the marriage certificate can be filed in the form of a lawsuit.

In principle, a marriage ceremony is a form of the application filed without any disputes or disputes over rights. However, it can happen; the other spouse does not approve of the marriage ceremony while there are urgent interests. For example, legal certainty over the existence of the child, the wife can file a lawsuit to legalize the Siri marriage to be legal.

Parties who can apply for a marriage certificate are as follows:

- 1) Husband
- 2) Wife.
- 3) children.
- 4) Parents/guardians of marriage.

## **CONCLUSION**

Conflict of law is something that often occurs in countries that impose more than one legal basis; Indonesia is an interesting example that should be observed in terms of the frequency of conflict of law. The conflict of law examined in this paper is the contradiction of regulations between State law and religious law in the case of unregistered marriages. Article 2

of Law Number 1 of 1974 concerning Marriage requires that the validity of marriage lies in the parties' religious law and beliefs, and the marriage is recorded according to the prevailing laws and regulations (cumulative, not alternative). These two conditions lead to unregistered/underhanded marriages that are not legal according to the UUP, even though unregistered marriages are legal according to Islamic law, as long as the unregistered marriage fulfills all the pillars of marriage that have been regulated in the Islamic Law Compilation. The invalidity of a Siri marriage in the perspective of state law causes many losses to the wife and children born in this unregistered marriage. Efforts can be made to minimize these losses or even eliminate them so that wives and children in unregistered marriages still have the same rights as those of wives and children in formal marriages.

Based on the above discussion, the writer puts forward several suggestions for wives and children in unregistered marriages to get legal protection, namely:

1. The parties enter into a marriage agreement / pre-marriage agreement which can be used as evidence by using the amendment to Article 43 of the Marriage Law as a legal basis.
2. The parties immediately submit a request for itsbat nikah so that the marriage is validated and has legal force

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