

# **LEGAL POSITION OF CHILDREN BORN FROM UNREGISTERED MARRIAGES ACCORDING TO THE PERSPECTIVES OF ISLAMIC LAW AND POSITIVE LAW**

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This research aims to find out, understand and analyze the legal position of children born from unregistered marriages and the legal consequences for children born from unregistered marriages according to the perspective of Islamic law and positive law. The research method used is the normative research method, namely a legal research method that uses a focus on studying legal norms, which includes regulations that are relevant to the problem being studied. The results of this research are that the legal status of children born from unregistered marriages according to Islamic law is legal, as long as the child is born from a marriage that meets the requirements and is harmonious in marriage. Meanwhile, according to positive law, the status is an illegitimate child, but the child can be recognized by the state as a legitimate child if it can be proven to be a legitimate biological child from the marriage of both parents, provided that it can be proven by the existence of a biological relationship between the child and the father based on science and technology and/or other evidence according to the law of having a blood relationship. The legal consequences for children born as a result of unregistered marriages according to the perspective of Islamic law are that there are no consequences of an unregistered marriage for the child as long as the marriage complies with the provisions stipulated in the Shari'a . Meanwhile, the legal consequences according to the positive law perspective are that children only have a civil relationship with their mother and their mother's family, children and their mothers have no right to support and inheritance, and the child's status is unclear in public. The legal solution for children born from unregistered marriages is to have a marriage law so that children born from unregistered marriages have clear legal status.

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## **LEGAL POSITION OF CHILDREN BORN FROM UNREGISTERED MARRIAGES ACCORDING TO THE PERSPECTIVES OF ISLAMIC LAW AND POSITIVE LAW**

### **INTRODUCTION**

Continue generation is one of right basic human inherent in Every individual who is executed through marriage , but when its implementation there is the difference caused Because diversity culture and culture with the religion they adhere to

Marriage is one of implementation from form implementation right constitutional respected citizen high , guarded , and must be valued in society , nation and state . [1]

Marriage is a process of unification carried out by a person men and women who are carried out with provisions stipulated in religion and applicable laws . A marriage considered legitimate If in accordance as well as follow regulation existing legislation , as set up in Article 2 Paragraph 2 of the Law Number 1 of 1974 concerning Marriage that states that each and every marriage noted according to regulation applicable legislation , therefore that , marriage series No in accordance with provision applicable law . Legitimate marriage in a way law set up in Article 2 paragraph 1 of the Law Number 1 of 1974 Concerning Marriage , which means that incident marriage That is valid evidence about children born from marriage said , if happen future disputes , either caused by a dispute biological . children and children stepmother , because birth a child is a incident the law that requires clear and written rules . [2] The purpose of this study is to determine the juridical analysis of the position of the child, the legal status of the child and to find out the government's efforts to overcome the position of the child from an unregistered marriage. This type of research is an empirical descriptive qualitative. The data source uses primary data sources and secondary data sources. Data collection techniques are interviews, observation and documentation. The results of the study indicate that children resulting from unregistered marriages are registered and then registered in the civil registration in order to obtain a legal legal position. The legal status of unmarried children is that after the Decision of the Constitutional Court Number 46/PUU-VIII/2010, if it can be proven based on science and technology and/or other evidence, it turns out that they are related by blood as their father, then they are entitled to inherit from their father. The government's effort in overcoming the position of children from unregistered marriages is to socialize so that siri couples become legal marriages, namely by registering with marriage istbat and re-marrying.

Constitution Number 1 of 1974 Concerning Marriage especially Article 2 paragraph 1, confirms that based on please First namely religion must as reference in marriage or , marriage must implemented with pay attention to each other's religion. Both the Law Number 1 of 1974 and Islamic law , marriage No only from only from a formal perspective , but also from religious and social aspects . From a formal perspective , marriage also involves aspect administration , namely recording at the Registry Office Civil for those who are religious non-Muslims and at the Office of Religious Affairs (KUA) for those who are religious muslim .

Marriage No only just bond external or spiritual , but rather both of them at once . Bond external reflect formal aspects of marriage , while bond inner reflect aspects that are not looks or is non-formal. Both aspect the become base main in build A family . [3]

Therefore That Marriage No just action civil , on the other hand it is also a action religious , because validity or whether or not a wedding fully regulated by religious and belief provisions every individual . Before the existence of the Marriage Law , provisions , procedures and validity wedding for Indonesian society in general regulated by religious and customary law local .

Siri marriage , like now known in Indonesia, is wedding attended by guardian or representative guardian and witnessed by witnesses , but No held in front of officer recording marriage (PPN) or at the office religious affairs (KUA) for Muslims or in the office notes civil (KCS) for non-Muslims.

Some Indonesian people believe that the marriage was secret fulfil condition legitimacy marriage , namely existence acceptance , acceptance , and candidate husband and candidate wife , guardian and witness must be two people. Siri marriage Still Lots chosen as one of the alternative For prevent socializing free between men and women who are not mahram and not willing Good in a way psychological , moral, and material For carry out marriage in accordance with state regulations . This is cause complex problems for those who carry out marriage said , which is not only cause problem law , but also problems psychological and sociological for the future children and of course will affecting status and rights inheritance children results marriage mentioned . [4]

After enactment Constitution Marriage , takes place unification law in marriage in Indonesia, which connects marriage in a way close to belief or a growing religion developing in Indonesia. provisions

the law that governs about marriage applicable in a way evenly and thoroughly , so public That must comply applicable provisions , in particular Constitution A functioning marriage as base in matter realize certainty law , in matter law family , property objects , and impact law after implementation marriage . [5]

Secret marriage is one of the example problem in matter marriage registration that emerged in this modern era . However , the Siri Marriage that was carried out No influence validity or invalidity marriage that was carried out according to rules Islamic law , meaning in a way Sharia Islam marriage series still considered valid . However based on provisions of Article 4 of Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law, marriage legitimate if done according to Islamic law according to with Article 2 Paragraph (1) of the Law Number 1 of 1974 concerning Marriage and Article 5 Paragraph (1) of the Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Religion.

Things contained in accordance Regulation legislation must obeyed when carry out marriage , and appointed officials must to witness ceremony marriage mentioned . Recording wedding is mandatory and important things . In addition to providing security , assurance and support law For spouse and offspring , union recognized workers in a way The law also protects and guarantees rights arising finished implementation marriage , including right For inherit treasure objects and rights others . Therefore that , a marriage that is not recorded on the employee recording marriage , no legitimate in a way law in accordance regulation the legislation currently in force in Indonesia .

Islam teaches when carry out wedding That must done with open and without hidden . Terms about implementation recording is a things that are regulated in Constitution but supposedly No obtained from principle laws regulated in Indonesia and Dutch civil law (BW) or Western law, but originate from ordered by Allah SWT in Surah Al-Baqarah verse 282: "O you who believe , if You do business No in a way cash For specified time , please You write it down " [6]

Based on things that are regulated and explained in Sharia Islam can known that , recording functioning as proof written . Although order regulated recording in Sharia Laws Islam That nature general , but matter this also applies in context problem marriage . if only contract transactions just recommended For noted as tool evidence , then marriage contract present become symbol strong and eternal bond .[6]

Sharia confirm No recorded A marriage still considered legitimate throughout the conditions fulfilled . Siri marriage almost The same with wedding others . However wedding the No recorded in a way officially at the Office of Religious Affairs (KUA). The Indonesian Ulema Council (MUI) with firm state that wedding the legitimate according to law Islam . Likewise with child who has married . Children from a marriage should have legal status if marriage That acknowledged in a way Sharia or law Islam . The problem is Constitution No confess validity This , the Law new confess child considered legitimate when child born from marriage the recorded .

The state and religion have difference opinion in a way significant about legitimate marriage . From a religious perspective , marriage considered legitimate when fulfilled terms and conditions certain . While If marriage That recorded in the marriage book , then legitimate by country. In Article 42 paragraph 1 of the Law Number 1 of 1974 which regulates about marriage " Legitimate child is child born in or consequence legitimate marriage ." The state continues reject For confess child born from marriage No recorded as children who have position law . Manage rights law , including inheritance , livelihood , even deed birth is challenge for they . Originated descendants from marriage series No considered legalized by the state because parents ' marriage No recorded in notes official state. Law Number 1 of 1974 Concerning Marriage stated that Article 42 was considered contradictory with Article 43 paragraph 1 below . According to this article , a child who is born extramarital only have connection Good with mother and relatives . Because That will harm descendants results marriage series If entered in Article 43 paragraph 1.

Until Decision Number 46/PUU-VIII/2010 was issued by the Court Constitution (MK) for to fix problem the about testing of Article 43 paragraph 1 of the Marriage Law , the problem This new revealed . Court Constitution to explain that , children born outside marriage now have connection law with his biological father besides mother and her family . In addition , no existence bond official between father and son have consequences that are not desired , namely obstruct illegitimate children for inherited his biological father .

Recording marriage is one of the determining elements validity marriage based on provisions in Article 2 paragraph 2 of the Law Number 1 of 1974 concerning marriage . The Law Only Mandates recording as need administrative . Requirement administrative This required For operate the state mandate ensures maintained as well as realization right basic the person concerned .

As for the problems that arise consequence legal marriage but without implementation recording no influence validity marriage that has been done according to law Islam , because recording only related with aspect administrative only . However , when marriage the No recorded , the impact partner husband and wife No own proof authentic that they has carry out a legitimate marriage . As a result , from aspect law marriage the No recognized by the government and not own strength binding law .

## **METHOD**

Study use type study law normative , [7] that is use the approach taken with method to examine approach theories , concepts , studying regulation relevant legislation with study This or often called with approach legislation . Research law normative also often called as study the law that lays down law as A building norm system . The norm system in question is about principles , norms, rules from regulation legislation , decision court , agreement as well as doctrine ( teachings ). The research used in study This is approach legislation and studies comparative or comparison legislation . Research This done in order to to obtain ingredients in the form of : theories , concepts , principles law as well as regulation correlated law with main discussion . Research This can used For interesting principles law in interpret regulation legislation . In addition , research this too, can used For look for principle the law that is formulated Good in a way implied and also written . In research law normative , the data collection process is carried out For obtain bibliographic data . bibliographic data consists of from material primary law , material law secondary , material law tertiary . Collection material law in writing study law normative use technique studies library , namely done with collection related primary , secondary and tertiary materials with issue existing laws in study this , then furthermore will analyzed based on theories that can used as guidelines , besides That study and quote material law from sources in the form of regulation legislation as well as literature related to research This . Analysis techniques material the law that researchers in manage material law is use method descriptive analysis that is Because the need for a depiction in a way comprehensive and in-depth to a setup and use technique interpretation grammatical with interpret text law that focuses on understanding the meaning of words, phrases , or sentence in Constitution or applicable regulation .[7]

## **DISCUSSION**

### **Status of Children Born from a Secret Marriage According to Islamic Law and Positive Law**

#### **According to Islamic Law**

Child as results from a wedding is very important part his position in a family according to Islamic Law. In Islam, children is a person who is born created through God's creation with wedding a man and one female . Legitimate child is child born in or consequence legitimate marriage , Result of the act husband legitimate wife outside womb and born by the wife The validity of a person

children in Islam are determine whether There is or No connection fatherhood or what is called with lineage with parents his man . In case connection lineage with his father No determined by will or willingness human , but determined by marriage in the name of Allah SWT. Child as trust from Allah SWT, then his parents have not quite enough answer For nurturing , educating , and fulfilling his needs until adults . [8]

Draft wedding series According to Islamic law, unregistered marriage considered legitimate because of according to Islamic Law, all pillars and conditions in marriage implementation is fulfilled in a secret marriage So , no . existence marriage registration official No become things that can cancel or result in No legitimacy a marriage . [8]

Secret marriage is a marriage under hand , in the sense of not reported and recorded in the institution official who regulates marriage , namely KUA , then the legal status is valid, as long as fulfil terms and conditions of marriage. So that sirri married with understanding This still require existence legal guardian , witness , consent and qabul marriage contract . It's just that , marriage kind of this is very not recommended , because government has set rules for all form wedding recorded by the agency official namely KUA. While We as race Muslims , commanded by Allah to obey government during rule That No contradictory with sharia . [9]

According to law Islam , marriage under hand or secret marriage is legitimate provided has fulfillment terms and conditions marriage , but from aspect regulation legislation this model of marriage Not yet complete because of Not yet recorded . Recording marriage only is action administrative which is not affect the validity whether or not marriage . But usually victims appear as a result existence This model of marriage (sirrihasan siri ) , clashes and a interest in form denial Because the occurrence marriage under hands done and not done Children are rarely born in marriage this is also not acknowledged . [10]

Position child as results from marriage is part important in a family in Islamic law . Children born from marriage series is child valid . A child legitimate is , the child who was born from legal marriage between his father and mother . And the legality a child in Islam can determine whether child the follow lineage from connection father or no . [11]

In terms of This connection lineage No can determined on will and willingness man That alone , but determined by marriage in the name of Allah whose conditions and harmony Already fulfilled . So from that , child the result of an unregistered marriage is also considered legitimate and entitled get status, rights , and also protection law along with confession from father and family his father .

Therefore that , Islam does not distinguish the status of children in marriage series . During marriage the Already fulfil terms and conditions the marriage that has been set in Islamic law , then his marriage the the law legitimate so do children results from unregistered marriage that's his status and rights The same as child valid .

However Wedding series often become choice consequence pregnancy out of wedlock for close shame them . However , the marriage that was built on base coercion and without thorough preparation precisely potential cause problem new later day .

According to Islamic Law children new considered valid and have connection lineage with his father when child the born six month after marriage . [12] Outside provision That is child considered No legitimate or child the result of adultery.

In Islamic law a legitimate child born at least six months (177 days ) since his parents ' marriage , no care is that person born when his parents Still bound in wedding or Already separate Because his death the husband , know because divorce during his lifetime . If child That born before even term 177 days time That so child That only legitimate for her mother . Outside provision That so child considered as child No legitimate or natural child . Children born from wedding series will

considered legitimate Because born from legal marriage according to Islam, then child the will have rights and obligations towards his parents who gave birth although when Then day both of his parents has divorced . A divorce No result the disappearance parental obligations For still give living to his children until mature or can stand alone . [3]

The scholars of Islamic jurisprudence has agreed that the minimum birth limit is six month . This is based on on calculation that One month The same with 30 days , which means the birth period is 180 days . They worship with 2 verses of the Koran, namely al- Ahqaf : 15 and al- baqarah : 233.

Group Jafariyah to argue If wife give birth to child in legal marriage and 6 months or more since intercourse , then child connected his lineage to husband . Meanwhile , if He give birth to child before That or more from nine month since intercourse , then lineage child No may connected with her husband , except he admit it ( iqrar ) or not say that child That originate from adultery and him No known his lies . In fact , Ja'fariyah in a way firm state If man to marry Woman pregnant who has adultery , then give birth to child not enough from 6 months since marriage contract , then child No may connected his lineage to man the as his father , except If he admit it and not say that child That the results of adultery and he No known his lies . [13]

With Thus , the recognition is one of method determination lineage , besides legitimate marriage and its equivalents as well as proof ( bayyinah ) .

In the study law Islam For determine lineage child to his parents can determined through :

#### Legal marriage

Scholars agree that married woman with valid contract if he give birth to child so child That benedicted to her husband that . The child is born and can benedicted to husband the according to Hanafiyah scholars child That born six month after marriage . The majority of scholars added with condition husband wife That has do connection intimate . If the birth That not enough from six month so child That No can benedicted to husband the women . Six months is limits agreed upon by scholars. [14]

With method through confession or lawsuit to child

Confession , inside literature law Islam called Isthahq or iqrar which means confession a man in a way voluntary to a child that He have connection blood with child said , good child the having extramarital status or child the No known origin his suggestion , then confession That can justified and child That can benedicted to man mentioned . [14]

#### Through Proof

Evidence in matter determine lineage is in the form of testimony , where is the status of the testimony This more strong than just confession , cause testimony as tool proof always involving other people as amplifier , while with confession Not yet Of course supported by others.

#### Through Estimate ( Qifayah )

Determination lineage through estimates ( Qifayah ) , although method This Still debated by scholars. Definition Qifayah in a way etymology means to browse trace , resemblance nature , appearance or color skin with use knowledge or ways certain .

In Islamic law children That shared into two parts , namely known child connection blood with the father and son who are not known connection blood with his father and only have connection civil with Mother gave birth to her and could have connection civil with his father If his father That admit it .

## **Consequences and Solutions for Children Born from a Secret Marriage According to Perspective of Islamic Law and Positive Law**

### **According to Islamic Law**

In view Islamic law , marriage series that is done with fulfil terms and conditions legal marriage in a way Sharia will produce legal marriage in a way law Islam . Therefore that , Islam does not distinguish the status of children in marriage series . During marriage the Already fulfil terms and conditions the marriage that has been set in Islamic law , then his marriage the the law legitimate in a way Sharia so do children results from wedding series That his status as child valid . [5]

According to Islamic law , consequences law from a legal marriage among others can formulated as following :

It is halal to do connection sexual and fun between husband wife the

Mahar ( dowry ) given become belongs to the wife

The emergence rights and obligations between husband wife , husband become head House stairs and wife become Mother House ladder

Children born from marriage That become legitimate child

arise obligation husband For finance and educate children and wife as well as to strive place stay together

Entitled each other inheritance between husband wife and children with parents

The emergence prohibition marriage Because connection scholarship

You have the right become marriage guardian for child his woman

When between husband wife if one of them dies , then the other one will die entitled become guardian supervisor to children and their property . [15]

Explanation on is consequence from a legal marriage Good both in Islam and according to state law . Arise A question How as it is with marriage siri ? . Related matter the appear a number of difference opinion . Some say that an unsuccessful marriage recorded That own consequence law as legal marriage throughout has fulfil provision Islamic law , but another opinion says on the contrary , although his marriage has fulfil provision Islamic law but Because marriage That No recorded so He No can own consequence law as described on .

According to economical author , in Islamic law does not There is difference consequence from a an unsuccessful marriage registered ( unregistered marriage ) with registered marriage throughout marriage That has fulfil the provisions set out in Sharia so that marriage That valid . The difference lies in what his marriage That has valid ( fulfills) conditions and pillars ) or No , no fulfil terms and conditions ) .

## **CONCLUSION**

Position law child born from results marriage series according to law Islam is his status valid , as long as child born the originate from results legal marriage between his father and mother who had fulfil terms and conditions marriage . While position law child born from results marriage series according to law positive is child only will recognized by the state as child outside marry or child No valid and only own connection civil with mother and family his mother only , but with existence

Decision Court Constitution no. 46/PUU-VIII/2010 then child outside marry results an unsuccessful marriage recorded can acknowledged as child legitimate sibling from marriage both parents and have the right inherit from treasure his father with submit application determination court question validation child through the evidence that has been stipulated in Article 43 paragraph (1) of the Law Number 1 of 1974 Concerning Marriage that is can proven based on knowledge knowledge and technology and/ or tool other evidence according to law have connection blood , including connection civil with family his father ", and can also be with do itsbat nikah so that the marriage that is not recorded get recognition and legalization by the state in order to obtain legality in the form of marriage certificate which is then is conditions attached in management deed birth child For ensure certainty law for the child so that get connection inheritance with his biological father as well as For get his rights as child can acknowledged . Recommended . for KUA, Religious Courts , and agencies government other increase return or Socializing the importance of legal marriage religiously and recognition by the state in order to obtain legality to have certainty law For prevent and reduce possibility the occurrence things that are not wanted in the future upcoming as well as No Again found issues concerning the legal status child who causes No fulfillment rights and obligations child The Indonesian government will immediately press practice marriage series through various regulation and enforcement the law that requires that marriage must recorded in a way official in state institutions with method revise to related articles with marriage series and position child results marriage series For minimize the occurrence marriage series .

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