

**Legal Protection of Inheritance Rights for Children from Unregistered Polygamous Marriages A Comparative Analysis of Islamic Law and Indonesian Positive Law**

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**ABSTRACT**

The phenomenon of unregistered polygamous marriages has generated negative perceptions within society, particularly regarding justice in household relations. In practice, women and children born from unregistered marriages often lose their legal rights, such as maintenance and inheritance, due to the lack of state recognition of such marriages. Indonesian positive law, as regulated in Marriage Law No. 1 of 1974, requires marriage registration as the basis of legal validity; therefore, unregistered marriages do not provide formal legal protection. Meanwhile, from the perspective of Islamic law, an unregistered marriage is considered valid as long as it fulfills the pillars and requirements of marriage, thereby granting wives and children inheritance rights. This study aims to analyze the legal protection of inheritance rights for wives and children in unregistered polygamous marriages from the perspectives of Islamic law and positive law. The research employs a qualitative descriptive method with a normative juridical approach. Data were collected through observation, interviews with judges of the Religious Court and religious figures, as well as documentation from various legal sources. The results of the study indicate that: (1) under Islamic law, wives and children from unregistered polygamous marriages retain their legal status and inheritance rights as long as the marriage is religiously valid; (2) under positive law, the inheritance rights of wives and children from unregistered marriages are not recognized unless *isbat nikah* is conducted as a form of marriage legalization; and (3) mediation mechanisms and family deliberation serve as alternative means of resolving inheritance disputes; however, legal certainty ultimately requires official marriage registration and legalization.

**ABSTRAK**

Fenomena pernikahan poligami *sirri* menimbulkan pandangan negatif di tengah masyarakat, terutama terkait keadilan dalam rumah tangga. Dalam praktiknya, perempuan dan anak hasil pernikahan sirri seringkali kehilangan hak-hak hukum, seperti nafkah dan warisan, akibat tidak diakuinya pernikahan tersebut secara hukum negara. Hukum positif Indonesia, sebagaimana diatur dalam Undang-Undang Perkawinan No. 1 Tahun 1974, mensyaratkan pencatatan pernikahan sebagai dasar keabsahan hukum, sehingga pernikahan sirri tidak memberikan perlindungan hukum secara formal. Sementara itu, dalam perspektif hukum Islam, pernikahan *sirri* tetap dianggap sah selama memenuhi rukun dan syarat pernikahan, sehingga istri dan anak tetap memiliki hak waris. Penelitian ini bertujuan untuk menganalisis perlindungan hukum terhadap hak waris istri dan anak dalam poligami sirri ditinjau dari hukum Islam dan hukum positif. Metode penelitian yang digunakan adalah deskriptif kualitatif dengan pendekatan yuridis normatif. Data dikumpulkan melalui observasi, wawancara dengan hakim Pengadilan Agama dan tokoh agama, serta dokumentasi dari berbagai sumber hukum. Hasil penelitian menunjukkan bahwa: (1) Menurut hukum Islam, istri dan anak dari pernikahan poligami *sirri* tetap memiliki kedudukan dan hak waris selama pernikahan sah secara agama; (2) Dalam hukum positif, istri dan anak dari

**Kata Kunci:**

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pernikahan *sirri* tidak diakui hak warisnya kecuali setelah dilakukan isbat nikah sebagai bentuk legalisasi pernikahan; (3) Mekanisme mediasi dan musyawarah keluarga menjadi salah satu upaya penyelesaian sengketa waris, namun kepastian hukum tetap memerlukan pencatatan dan pengesahan pernikahan secara resmi.

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## A. Introduction

Marriage in Islam constitutes an institution that functions not merely as a legal bond but also as an act of worship (*ibadah*) aimed at preserving lineage, safeguarding personal dignity, and establishing a *sakinah* family founded upon love (*mawaddah*) and mercy (*rahmah*) (Rahman, 1996; Santoso, 2016). Islamic law (*sharia*) regulates marriage systematically, encompassing the dowry (*mahr*), guardian (*wali*), witnesses, and the offer and acceptance (*ijab qabul*) as essential pillars for the validity of marriage (Al-Juzairi, 2015; Ash-Shiddiqiey, 1975). Nevertheless, in practice, the phenomenon of marriages that are not officially registered by the state commonly referred to as *nikah sirri* (unregistered marriage) continues to occur with considerable frequency within Indonesian society (Islami, 2017; Isnaini, 2014).

*Nikah sirri* refers to a marriage that is religiously valid according to Islamic jurisprudence but remains unrecorded within state administrative systems (Awaliah, 2022). Within the framework of Indonesian positive law, such marriages lack legal force, consequently giving rise to various legal complications, particularly concerning the protection of the rights of wives and children, including inheritance rights (Abdullah, 2022; Fatahullah et al., 2022). The absence of official registration fundamentally weakens the legal status of wives and children, rendering them vulnerable to the deprivation of legally guaranteed rights, such as maintenance (*nafkah*), legal protection, and equitable inheritance distribution (Ibnu, 2019; Zahro'ul, 2024). This phenomenon becomes increasingly complex within the context of unregistered polygamous marriages, wherein marriages are conducted without the consent of the first wife and without official registration (Muhlas, 2017; Basharahil & Sutrisno, 2018).

Unregistered polygamy not only contravenes administrative provisions as regulated in Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law (Republic of Indonesia, Supreme Court, 2011; Hadikusuma, 1990), but also possesses the potential to generate injustice for the parties involved, particularly second wives and their biological children (Cahyani, 2018; Yahya, 2013). When a marriage lacks legal recognition, civil rights such as inheritance cannot be accessed equitably by those who are substantively entitled to them (Fatahullah et al., 2022). This situation contradicts the fundamental principles of Islamic inheritance law (*faraidh*), which mandates just and proportional distribution of inheritance among rightful heirs (Malik, 2018; Lubis & Simanjuntak, 2013; Rofiq, 2002).

Indonesia, as a state founded upon the rule of law (*negara hukum*), upholds the principles of legal certainty and legal protection, guaranteeing equal rights for all citizens before the law (Utrecht, 1966; Soekanto, 2006). However, in reality, children born from unregistered marriages frequently lack access to official identity documents, which subsequently affects their legal status and fundamental rights, including access to education, inheritance, and state protection (Dewa et al., 2020; Sugianto & Hadi, 2016). Although the Constitutional Court, through Decision Number 46/PUU-VIII/2010, has recognized the civil rights of children born outside of registered

marriages, the implementation of this judicial policy continues to encounter various administrative and social obstacles (Andri, 2020; Dewa et al., 2020).

Within a legally pluralistic society such as Indonesia, the coexistence of Islamic law, customary law (*hukum adat*), and national statutory law frequently results in normative conflicts in the practice of marriage and inheritance (Irianto, 2016; Judiasih et al., 2020; Syarifuddin, 1984). Cases of unregistered marriages, particularly within the context of polygamy, illustrate the existence of legal lacunae and tensions between religious norms, customary norms, and state legal provisions (Wahyuni, 2020; Faisal, 2018). These issues not only affect individuals at the personal level but also raise structural concerns within the national legal system that necessitate comprehensive resolution (Manan, 2006; Merina, 2023).

Based on the aforementioned background, this study aims to examine the legal protection of inheritance rights for wives and children within the context of unregistered polygamous marriages, as well as to analyze the impact of legal uncertainty on socially and economically vulnerable parties. Furthermore, this research discusses the available legal remedies to obtain recognition and protection, and evaluates the effectiveness of existing legal mechanisms in safeguarding their civil rights. This study employs a comparative legal analysis approach, examining the intersection between Islamic law and Indonesian positive law to identify potential harmonization strategies that can provide more equitable legal protection for all parties involved in unregistered polygamous marriages.

## B. Methods

This study employed a descriptive qualitative method to describe and explain the issues under examination (Moeleong, 2014). The research approach applied was normative legal research, utilizing secondary data analysis comprising primary, secondary, and tertiary legal materials obtained from relevant literature and statutory regulations concerning the legal protection of inheritance rights in the context of unregistered polygamous marriages and their children (Soekanto, 2006). The data sources utilized in this study consisted of three categories. Primary data encompassed Law Number 1 of 1974 concerning Marriage, Law Number 35 of 2014 concerning Child Protection, the Compilation of Islamic Law (*Kompilasi Hukum Islam*), Government Regulation Number 9 of 1975, as well as interviews with judges of the West Jakarta Religious Court and Betawi community figures (Republic of Indonesia, Supreme Court, 2011; Abdullah, 1991; Hadikusuma, 1990). Secondary data were obtained from books, journals, articles, and undergraduate theses relevant to the research topic (Lubis & Simanjuntak, 2013; Rofiq, 2002; Malik, 2018). Tertiary data consisted of compiled data derived from the processing of primary and secondary data, including legal dictionaries and encyclopedias (Gilmour et al., 2007).

Data collection techniques were conducted through four methods: library research (*studi kepustakaan*), observation, interviews, and documentation. Library research involved systematic examination of written materials relevant to the research problem (Arikunto, 1990). Observations were carried out systematically to examine relevant aspects of the legal issues under investigation. Interviews were conducted with key informants, including the Chief Judge of the Religious Court and the Junior Court Registrar, to obtain practical insights regarding the implementation of inheritance rights in cases involving unregistered polygamous marriages. Documentation was employed to collect data from various forms of supporting documents, including court decisions and legal records.

Data analysis employed a statutory approach (*pendekatan perundang-undangan*) by examining relevant laws and regulations, as well as a case approach (*pendekatan kasus*) by analyzing cases of unregistered polygamous marriages (Manan, 2006). The analysis was qualitative in nature, utilizing deductive reasoning to examine legal concepts and regulatory frameworks related to inheritance rights in unregistered polygamous marriages based on the Compilation of Islamic Law and positive law (Irianto, 2016; Wahyuni, 2020). The analytical process involved identifying legal provisions, comparing Islamic law and positive law perspectives, and synthesizing findings to formulate comprehensive conclusions.

Data validity was ensured through triangulation techniques by combining interview results from multiple sources, field observations, and documentation (Moeleong, 2014). The trustworthiness of the research was established by considering four criteria in accordance with qualitative research standards: credibility, which was achieved through prolonged engagement with the data and member checking with informants; transferability, which was ensured through thick description of the research context and findings; dependability, which was maintained through systematic documentation of the research process; and confirmability, which was established through audit trails and reflexive analysis to minimize researcher bias (Arikunto, 1990).

### C. Result and Discussion

#### The Practice of Unregistered Polygamy and Its Legal-Social Implications for Women and Children

Based on the results of field research and interviews with informants, the practice of unregistered polygamy (*poligami sirri*) remains prevalent in Indonesian society, despite lacking official registration with the Office of Religious Affairs (Kantor Urusan Agama/KUA) (Islami, 2017; Awaliah, 2022). This form of polygamy is generally predicated solely upon the agreement of the parties involved and the fulfillment of the pillars and conditions of marriage under Islamic law, without being accompanied by state administrative legality (Cahyani, 2018). Consequently, unregistered polygamous marriages lack formal legal force, notwithstanding their religious validity under Islamic jurisprudence (Yahya, 2013; Hadikusuma, 1990).

K.H. Rohmat Romdhoni, Lc., stated in an interview that, in principle, Islam does not prohibit polygamy, as stipulated in Surah An-Nisa verse 3. However, Islam imposes stringent conditions, particularly the requirement of justice (*al-'adl*), which encompasses not merely material aspects but also emotional fairness, equitable distribution of time, attention, and equal treatment of all wives and children (Al-Juzairi, 2015; Ash-Shiddiqiey, 1975). According to the informant, the practice of unregistered polygamy possesses a high potential to cause harm (*mafsadah*) due to the absence of state legal protection for wives and children, particularly with regard to maintenance, inheritance rights, and the legal identity status of children (Fatahullah et al., 2022).

This perspective is reinforced by Ahmad Affendi, S.Ag., who emphasized that the primary problem of polygamy does not reside in the concept itself, but rather in its implementation. Numerous individuals who practice polygamy fail to comprehend the significant responsibilities attached to it, resulting in the frequent neglect of justice as its core principle (Muhlas, 2017). Low levels of religious understanding, insufficient mental and financial readiness, and weak awareness of the importance of marriage registration constitute dominant factors contributing to the widespread practice of unregistered polygamy in society (Isnaini, 2014; Basharahil & Sutrisno, 2018). In practice, unregistered polygamy is frequently conducted clandestinely, without the consent of the first wife and without official registration, thereby lacking legal recognition by the state (Andri, 2020). This condition not only engenders injustice toward wives but also generates social consequences for children born from such marriages, including discrimination and stigmatization within educational institutions and the broader community.

The research findings indicate that women and children involved in unregistered polygamous marriages occupy a highly vulnerable legal and social position (Abdullah, 2022; Zahro'ul, 2024). The absence of marriage registration causes unregistered wives to forfeit civil rights that should be protected by state law, such as the right to maintenance (*nafkah*), joint marital property (*harta bersama*), and inheritance rights (Fatahullah et al., 2022; Ibnu, 2019). When domestic conflict or divorce occurs, wives in unregistered marriages encounter significant difficulties in asserting their rights due to the lack of administrative recognition of their marital status.

Drs. Aminuddin explained that under positive law, children born from unregistered marriages initially possess civil legal relations only with their mothers (Dewa et al., 2020). Although Constitutional Court Decision Number 46/PUU-VIII/2010 provides an avenue for recognizing

civil relations with the biological father through scientific evidence, the process is not straightforward and frequently encounters administrative obstacles (Andri, 2020; Sugianto & Hadi, 2016). Consequently, children from unregistered marriages frequently experience difficulties in obtaining birth certificates, health insurance coverage, access to education, and inheritance rights. In addition to legal vulnerability, women and children also confront social pressures in the form of stigma, discrimination, and exclusion within extended families and society at large (Irianto, 2016). Power imbalances within unregistered polygamous households increase the risk of domestic violence, exploitation, and neglect of the fundamental rights of women and children, contradicting the principles of justice and protection for vulnerable groups upheld in both Islamic law and national law (Manan, 2006).

### **Protection of Inheritance Rights from the Perspectives of Islamic Law and Positive Law**

Under Islamic inheritance law (*'ilm al-faraidh*), a wife who is religiously validly married whether as a first wife or a wife in a polygamous marriage retains inheritance rights provided that the marriage fulfills the pillars and conditions of a valid Islamic marriage and remains intact at the time of the husband's death (Malik, 2018; Lubis & Simanjuntak, 2013). Islamic law stipulates that a wife is entitled to one-eighth (*tsumun*) of the inheritance if the deceased leaves children, and one-fourth (*rubu'*) if there are no children (Rofiq, 2002; Munawar & Ghofur, 2023). Children born from a valid marriage are also entitled to full inheritance rights in accordance with Qur'anic provisions, based on the principle that a male child receives twice the share of a female child (*li al-dzakari mitslu hazzi al-untsayain*) (Assyafira, 2020; Ahlan Sarif et al., 2005).

Conversely, under Indonesian positive law, marriage registration constitutes the primary administrative requirement for legal recognition (Republic of Indonesia, Supreme Court, 2011; Hadikusuma, 1990). Unregistered marriages, including unregistered polygamy, do not produce legal consequences with regard to inheritance rights, joint property, or legal protection for wives and children (Awaliah, 2022; Merina, 2023). Nevertheless, Constitutional Court Decision Number 46/PUU-VIII/2010 and provisions of the Civil Code provide opportunities for recognizing the inheritance rights of children born outside registered marriages through proof of biological relationships (Dewa et al., 2020; Andri, 2020). This judicial decision represents a significant breakthrough in protecting children's civil rights, although its implementation continues to face various challenges in practice.

Indonesian positive law prioritizes administrative evidence as the foundation of legal recognition, whereas Islamic law emphasizes religious validity (*syar'i legitimacy*) (Wahyuni, 2020; Faisal, 2018). This difference in orientation creates normative tension in protecting the inheritance rights of wives and children from unregistered polygamous marriages (Irianto, 2016; Judiasih et al., 2020). Therefore, the role of judges becomes crucial in exploring substantive justice, *maqasid al-sharia* (objectives of Islamic law), and public welfare (*maslahah*) to provide more comprehensive legal protection through progressive judicial decisions (Manan, 2006; Syarifuddin, 1984). Judges must balance formal legal requirements with substantive justice considerations to ensure that the rights of vulnerable parties are adequately protected.

#### **1. Legal Remedies and Synergy between Islamic Law and National Law in Protecting Inheritance Rights**

This study finds that family mediation is frequently employed as an alternative mechanism for resolving disputes related to inheritance rights, spousal rights, and the rights of children arising from unregistered polygamous marriages. Mediation is considered to prioritize family values, prevent prolonged conflict, and maintain harmonious relationships among family members (Manan, 2006). It also serves as a convergence point between the values of Islamic law and positive law. Nevertheless, the effectiveness of mediation largely depends on the good faith, openness, and willingness of all parties to act fairly and reach a compromise. In numerous cases, mediation fails

due to internal conflicts, egoism, and mutual distrust, resulting in the continued neglect of the rights of women and children.

In addition to mediation, a significant legal remedy available is the submission of *isbat nikah* (marriage legalization) to the Religious Court (Andri, 2020; Abdullah, 1991). Through *isbat nikah*, an unregistered marriage can obtain legal recognition from the state, thereby enabling the enforcement of civil rights for wives and children, including inheritance rights (Ibnu, 2019; Zahro'ul, 2024). This mechanism serves as an essential bridge between the religious validity of marriage under Islamic law and administrative legality under positive law. The *isbat nikah* procedure provides a pathway for regularizing marriages that were initially conducted without state registration, thus affording legal protection to parties who would otherwise remain legally vulnerable.

Based on the findings and discussion, it can be concluded that marriage registration constitutes a crucial instrument for ensuring legal certainty and social protection for women and children in the context of unregistered polygamy (Republic of Indonesia, Supreme Court, 2011; Hadikusuma, 1990). Islamic law has firmly established principles of justice and protection for all family members; however, without formal state legality, these principles are difficult to realize concretely (Ash-Shiddiqiey, 1975; Al-Juzairi, 2015). Therefore, synergy between Islamic law and national law is necessary to prevent disparities in legal protection (Wahyuni, 2020; Irianto, 2016). Although marriage registration does not constitute a requirement for the religious validity of marriage, it serves as an essential mechanism for guaranteeing civil rights—particularly inheritance rights and for protecting vulnerable groups from harmful practices (Fatahullah et al., 2022; Abdullah, 2022). Harmonizing these two legal systems represents the key to achieving justice and legal certainty in addressing the practice of unregistered polygamy in Indonesia.

#### D. Conclusion

Based on the research findings and discussion presented above, the following conclusions can be drawn: First, the practice of unregistered polygamy remains prevalent in Indonesian society and generates significant legal and social implications for women and children. Although such marriages may fulfill the pillars and conditions of validity under Islamic law, the absence of state registration renders them devoid of formal legal force. This condition places wives and children in highly vulnerable positions, as they forfeit civil rights that should be protected by state law, including the right to maintenance, joint marital property, and inheritance rights. Children born from unregistered polygamous marriages initially possess civil legal relations only with their mothers, frequently experiencing difficulties in obtaining birth certificates, health insurance coverage, access to education, and inheritance entitlements. Furthermore, women and children confront social pressures in the form of stigma, discrimination, and exclusion within extended families and society at large. The primary contributing factors to this phenomenon include low levels of religious understanding regarding the stringent conditions for polygamy, insufficient mental and financial readiness, and weak awareness of the importance of marriage registration.

Second, there exists a fundamental divergence between Islamic law and Indonesian positive law in protecting the inheritance rights of wives and children from unregistered polygamous marriages. Under Islamic inheritance law (*ilm al-faraidh*), a wife who is religiously validly married retains inheritance rights provided that the marriage fulfills Islamic requirements and remains intact at the time of the husband's death, with wives entitled to one-eighth (*tsumun*) of the inheritance if there are children or one-fourth (*rubu'*) if there are no children. Children from valid Islamic marriages are entitled to full inheritance rights based on Qur'anic provisions. Conversely, Indonesian positive law prioritizes administrative evidence as the foundation of legal recognition, wherein unregistered marriages do not produce legal consequences regarding inheritance rights, joint property, or legal protection. Although Constitutional Court Decision Number 46/PUU-VIII/2010 provides an avenue for recognizing the civil rights of children born outside registered marriages through proof of biological relationships, its implementation

continues to face administrative obstacles. This difference in orientation—religious validity (*syar'i* legitimacy) versus administrative legality—creates normative tension that necessitates judicial exploration of substantive justice, *maqasid al-sharia*, and public welfare (*maslahah*) to provide comprehensive legal protection.

Third, several legal remedies are available to protect the inheritance rights of wives and children from unregistered polygamous marriages, and synergy between Islamic law and national law is imperative for achieving justice and legal certainty. Family mediation serves as an alternative dispute resolution mechanism that prioritizes family values, prevents prolonged conflict, and maintains harmonious relationships, functioning as a convergence point between Islamic law and positive law values. Additionally, the submission of *isbat nikah* (marriage legalization) to the Religious Court constitutes a significant legal remedy, enabling unregistered marriages to obtain state legal recognition and thereby facilitating the enforcement of civil rights for wives and children, including inheritance rights. This mechanism bridges the gap between religious validity under Islamic law and administrative legality under positive law. Marriage registration, while not constituting a requirement for religious validity, serves as an essential instrument for ensuring legal certainty and social protection. Therefore, harmonization between Islamic law and national law represents the key to preventing disparities in legal protection and achieving substantive justice for all parties involved in unregistered polygamous marriages in Indonesia.

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