



Implications of Legislation on the Status of Children Born from Marriages That are Not Recorded in the Law

Moh. Dhiwa Ulfajri A. Ismail

Faculty of Law, Universitas Negeri Gorontalo. Indonesia. E-mail: diwaismail4@gmail.com

Nur Mohamad Kasim

Faculty of Law, Universitas Negeri Gorontalo. Indonesia. E-mail: nurkasim@ung.ac.id

Abstract:

The issue of child protection has become the main concern of the government in recent years. The challenges of child protection are very diverse, ranging from poverty, ownership of birth certificates, child participation to violence against children. Related to children's civil rights, in the form of basic rights to obtain birth certificate documents. If the child does not have proof of identity, his whereabouts are not recognized by the state. In fact, children cannot access educational facilities, health care, social assistance, and other vital services. The consequence of not having a birth certificate makes it difficult to prove the legal identity of the child. When both parents get into trouble in court, the rights of the child are always neglected because they cannot prove that they are legitimate children in the eyes of the parents. law. The purpose of this research To find out and analyze the perspective of laws and regulations on the legal status of children born from unregistered marriages. This study uses a sociological juridical research method with a descriptive qualitative research approach and interactive analysis techniques.

Keywords: *Laws; Child Status ; Unrecorded Marriages.*

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Introduction

Children born from their mother's womb are born in a state of fitrah, pure and clean and both parents are obliged to nurture, educate and protect their children as well as possible so that they become well-educated, pious, children, towards the ark of worldly life and ukhrawi, prosperous physically and mentally devoted for homeland and nation. These parental obligations apply until the child is an adult or able to stand alone or is married.

Children as a mandate from Allah SWT, must always be looked after and protected because in children inherent dignity and rights as human beings which must be protected and upheld. Children's rights are part of human rights contained in the Constitution of the Republic of Indonesia and the UN convention on children's rights. Viewed from the side of national and state life, children are heirs and at the same time portraits of the nation's future in the future, future generations of the nation's ideals so that every child has the right to survival, growth and development, participation and is entitled to protection from acts of violence and discrimination, have civil rights, freedoms and can accept their rights and be able to carry out their obligations (Lumingkewas 2022).

Today there are many marriages that are carried out only according to religion without the existence of registration of marriages by authorized officials. Marriage practices like this have violated the provisions of Article 2 of Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning marriage (Lukum, Junus, and Kamba 2022). This practice of marriage causes the husband and wife to not have evidence that the marriage has taken place in the form of an authentic certificate, namely a marriage certificate.



Marriages that are carried out only based on religious law, without being registered by an authorized official, in this case KUA officials for those who are Muslim, are commonly referred to as private marriages or unregistered *marriages*.

Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning marriage which is related to child protection should be able to provide protection for children based on the principles of non-discrimination the best for the future of the child, his survival and respect for the child whose status is still floating as a child who has been born to a husband and wife whose marriage has not been registered so that they do not yet have proof of their marriage, so the marriage is considered to have never happened .

According to marriage law in Indonesia, a legal marriage is a marriage whose validity is recognized both religiously and legally juridical. Religiously legal, namely the fulfillment of the pillars and conditions of marriage, while legally legal, namely as stipulated in Law Number 1 of 1974 jo. Law Number 16 of 2019 concerning marriage Article 2 paragraph (1) and paragraph (2), which reads:

- (1) Marriage is valid if it is carried out according to the laws of each religion and belief.
- (2) Every marriage is registered according to the applicable laws and regulations. (“UU No. 16 Tahun 2019 Tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan [JDIH BPK RI]” n.d.)

The application of Article 2 paragraphs (1) and (2) of Law Number 1 of 1974, confirms that Indonesia is a legal state that has an orderly and law-abiding principle. A country that is based on law is filled with rules and regulations that must and must be obeyed by the people in a state of law. The affirmation of obedience and order in the law has been emphasized in Article 2 paragraph (1) and paragraph (2) of this



Marriage Law, namely when a person is about to carry out a marriage, the prospective bride or husband and wife must remember and implement the contents of Article 2 of the Law. Number 1 of 1974 concerning Marriage, namely that apart from obeying religious teachings and beliefs, they also obey the rules of the country. In conclusion, carrying out a legal marriage in the eyes of religious law and beliefs and legal according to the state provided that it must be registered. (Ratnawati et al. 2021)

The registration of marriages is also regulated in the Compilation of Islamic Law (KHI) Article 5 paragraph (1) which explains that in order to ensure orderliness of marriage for the Islamic community, every marriage must be recorded, which then in paragraph 2 states that the registration of marriages is carried out by Marriage Registrars as regulated in Law Number 2 of 1946 jo. Law Number 32 of 1954. If a marriage is carried out without registration from a marriage registrar, then the marriage has no legal force as stipulated in Article 6 paragraph (2) of the Compilation of Islamic Law.

Related to the above, according to Ahmad Rajafi that in order to get a happy family status from a material perspective, to be happy from a psychological perspective and to be happy from a theological (religious) point of view, registration of marriages is mandatory and very urgent to do, because if you do not register your marriage then it will be the same legal status of children born with children born of adultery. (Rajafi 2015)

Unregistered marriages or underhanded marriages (*sirri*) occur due to several factors, namely the absence of permission for polygamy from his first wife, still bound by an old marriage, lack of knowledge and public awareness regarding the importance of registering marriages, parental concerns about association their children with a



prospective husband or wife who is intimate so they are worried something negative will happen that is not desirable. (Syarifah 2018)

Research on the causes of the lack of public interest in registering marriages states that the community does not register their marriages due to a lack of understanding of the mandate of the Marriage Law and considers the registration of marriages to be only part of the administration and not important, so it is ignored by using cost, time and travel distance as reasons.

The issue of child protection has become the main concern of the government in recent years. The challenges of child protection are very diverse, ranging from poverty, ownership of birth certificates, child participation to violence against children. Related to children's civil rights, in the form of basic rights to obtain birth certificate documents. If the child does not have proof of identity, his whereabouts are not recognized by the state. In fact, children cannot access educational facilities, health care, social assistance, and other vital services. (Rahman Amin 2021)

The consequence of not having a birth certificate makes it difficult to prove the legal identity of the child. When both parents have problems in court, the rights of the child are always ignored because they cannot prove that they are legitimate children in the eyes of the law.

The importance of birth certificates is part of legal protection. It started with the process of registering births because children are legal subjects. The scope of birth registration in Indonesia in Law Number 23 of 2006 concerning Population Administration is listed in Article 27, Article 28, Article 29 and Article 30, in several of these articles embodies the commitment of all authorities in efforts to fulfill the most essential human rights of children, namely acquire legal identity and citizenship.



It can be seen that many people, especially parents, do not know the use of birth certificates, as is the case with the use of birth certificates for certainty and legal protection for children who already have certificates. If you don't have a marriage certificate, it is proof that the marriage is not registered with the State, so if you don't have a marriage certificate, then the marriage has no legal force and will become a problem if in the future there is a conflict in the marriage, for example at the birth of a child, you cannot make a marriage certificate. birth certificate in the name of the father and mother even though this is very important for the identity of the child, when it can be made, there is only the name of the mother in the birth certificate which means the child of the mother and is only bound to the mother and her family, or whether the child born in marriage is legal or not , or in the event of divorce or separation, the rights of the parties are not guaranteed by law.

The occurrence of underhand marriage or *sirri marriage* raises problems, especially related to the status of children born as a result of these marriages and also the relationship between children and their parents. This marriage has consequences for the birth of children who have the status of illegitimate children where this status has the consequence of only having civil relations with the mother and the mother's family as stipulated in Article 43 of Law Number 1 of 1974 concerning Marriage. Article 42 of the Marriage Law explains that a legitimate child is a child born in or as a result of a legal marriage. Then the decision of the Constitutional Court Number 46/PPU-VIII/2010 confirms that as long as it can be proven based on science and technology and/or other evidence of a blood relationship between an illegitimate child and his biological father, then the child has civil relations with his father and his father's family.



One way to prove the legal status of a child born out of wedlock or as a result of marriage who is only religiously a legitimate child and has a civil relationship with his father and for the purpose of issuing a child's birth certificate can be pursued by submitting an application for a marriage certificate as stipulated in the Article 7 Compilation of Islamic Law or by submitting an application for determining the origin of the child to the court as regulated in 103 Compilation of Islamic Law which reads:

Article 103 KHI

- (1) The origin of a child can only be proven by a birth certificate or other evidence.
- (2) If a birth certificate or other evidence referred to in paragraph (1) is not available, the Religious Courts can issue a stipulation regarding the origin of a child after conducting a thorough examination based on valid evidence.
- (3) Based on the stipulation of the Religious Court referred to in paragraph (2), the Birth Registrar agency within the jurisdiction of the Religious Court issues a birth certificate for the child concerned.

Furthermore, Article 55 of the Compilation of Islamic Law explains that:

Article 55

- (1) The origin of a child can only be proven by an authentic birth certificate issued by an authorized official.
- (2) If the birth certificate referred to in paragraph (1) of this article is not available, the Court may issue a stipulation regarding the origin of a child after conducting a thorough examination based on evidence that meets the requirements.
- (3) On the basis of the provisions of the Court referred to in paragraph (2) of this article, the birth registration agency within the jurisdiction of the relevant Court shall issue a birth certificate for the child concerned.



Related to the above, it is very clear that the validity of a marriage is based on the respective religious laws, however, a marriage cannot be recognized for its validity if it is not recorded in accordance with statutory provisions, where the mandate of Article 2 paragraph (2) of the Law -Law Number 1 of 1974 aims to:

- 1) orderly administration of marriage .
- 2) provide certainty and protection of the legal status of husband, wife and children.
- 3) provide guarantees and protection of certain rights arising from marriage such as joint property rights of husband and wife, inheritance rights, rights to maintenance, rights to life, rights to obtain birth certificates and so on.(Sulistiani and Rojak 2019)

The registration of marriages is only regulated by one paragraph in Law Number 1 of 1974, namely article 2 paragraph (2), but the problem of registration is very dominant because it will clearly appear to be related to the procedure for the marriage itself, all of which are related to registration, so that it can be said registration as an administrative requirement that also determines whether or not a marriage is valid.

Method

The type of research used is Empirical legal research in completing research findings related to the object of research. This research is an empirical legal research that is used as a method to study an applicable legal provision, as well as how the realization and reality of these provisions in people's lives.

Discussion

1. Status of Children Born from Unrecorded Marriages



A child has a very important role in a household, because the purpose of getting married is not only to build a happy and prosperous household, but also to unite the family and continue offspring. Unrecorded marriages will bring legal consequences if the child is born. Children who have been born will receive a birth certificate but their parents' marriage is not recorded in the civil registry. People think that children born without a certificate are called children out of wedlock because the legal status is unclear. Thus, the result of a marriage is not recorded, it only obtains a relationship between the rights and obligations of the two parents, receives an inheritance and does not obtain a legal legal position or does not have a birth certificate or marriage certificate. (Irfan 2022)

Legal issues that occur in marriages are not recorded as giving long problems because the child's birth becomes illegitimate. As a result, they do not get a certificate for a child if their parents' marriage is not recorded in the eyes of the law. Therefore, the marriage of the parents is very important because in the future it will become a complicated problem if the marriage is not registered. In addition, the born child wants to get the status of a legitimate child and not be discriminated against. (Nawawi 2015)

However, a registered or unregistered marriage should provide legal protection for a child, in the future it will not occur, it is very important for a child to have legal status and obtain a fair legal status, only the parents who carry out the marriage are not recorded, the impact on the child. For this reason, the government takes its legal stance and views so that the child gets legal assistance and takes preventive action against unregistered marriages, because the law clearly provides for the rights of a child from birth. If a marriage is not recorded, it will result in losses for the wife and children. The view of residents that unregistered marriages are generally categorized



as mistresses where the marriage is carried out in secret, ignorance of the family or not being recorded at the KUA is considered out of wedlock. This is only to obtain a second wife (mistress) whose marriage is considered invalid according to the applicable law. The validity of the marriage was not recorded after the Constitutional Court Decision Number 46/PPUVIII/2010, that marriage is considered valid in the eyes of state law. The decision explained that the registration of marriages is an administrative record, it has no effect whatsoever because whether a marriage is considered valid or not is not recorded. (Pongoliu 2013)

The Constitutional Court Decision Number 46/PUU-VIII/2010 confirmed that the issue of unregistered registration finds interpretation from the point of view of religion and children, because the Constitutional Court Decision Number 46/PPUVIII/2010 satisfies the sense of justice for children whose parents' marriages are not registered to obtain legal protection and obtain a civil relationship with the person who is declared the father of the child. Viewed from the viewpoint of the Constitutional Court decision number 46/PUU-VIII/2010 it is stated that giving an opportunity in the thoughts and norms of some people who have a relationship outside of marriage without consent, it is feared that there will be pressure on the child being born, not obtaining a clear legal status, even though marriages are not recorded bring problems and legal consequences. (Rahmi and Sakdul 2017)

The issue of inheritance in children must provide for and educate them when they are adults, for this reason children who already have ties to both parents and their families do not get legal legal status. Because children born out of the marriage of their parents are not registered, the child does not receive a birth certificate. The provision of certainty and protection to children born out of unregistered marriages of both parents raises a contra in the Constitutional Court Decision Number 46/PUU-



VIII/2010 explaining that the right to obtain the same treatment as biological children. This is proven that there is a gap and is considered to have gone beyond the mere application of obtaining recognition of civil relations on the status of the child from the relationship of the two parents to a marriage not registered at the KUA, of course having a civil relationship on a child having an adultery relationship with a man due to his birth, matters This decision of the Constitutional Court Number 46/PUU-VIII/2010 has exceeded the limit and because of this decision there is an interpretation that the Constitutional Court has legalized adultery.(Masyhur 2020)

2. Parents' Obligations Towards Children Born From Unregistered Marriages

Parents are obligated by law and Islamic law as the embodiment and welfare of their children to achieve a decent and responsible life as long as the child is not yet an adult. Funding for education and food security so far is very important when children are not yet adults. According to the law, it does not force parents to provide for their children and have not been allowed to give up their parents' obligations to educate and raise them, at least there must be a parental principle to look after their children when they become teenagers. The emergence of an agreement between parents and children, so it is on the shoulders of the parents, even if the child is just born, even though he is burdened with obligations that must be fulfilled or obligations in the form of caring for, buying various kinds of children's needs, or educating them, it is clear that the parents must do this.(Yasin 2018)

This is expressly stated by, Article 45 of the Marriage Law with the statement that both parents are obliged to look after and educate their children as well as possible and the parents' obligations apply until the child marries or can stand alone, which obligations



continue even though the marriage between the two parents broke up. Listening to the obligations exposed to these provisions, gives a sign that all what is required is placed by law on the shoulders of the parents, a sign of the intervention of the will of each pair of parents concerned. As an obligation, of course it must be fulfilled and if it is not carried out it is classified as an unlawful act, with the result that the possibility of parental authority can be revoked. When carrying out their obligations as parents towards children, both husband and wife must work together in line with their respective roles as head of the family and housewife. The estranged child of this married couple should get what it needs during the growth period until the child marries or is able to stand on his own. The obligations of parents outlined by law in the form of caring for and educating children as well as possible, of course according to the level of socio-economic ability of the family concerned, are intended to prepare the child so that in the future he will have sufficient provisions as qualified and dignified members of society. (Pratiwi 2022)

What potential will be carried by children, precisely prepared and sculpted by parents from an early age. Conducive family situations for the proper needs of children, it is the responsibility of parents to create them non-negotiably. The physical and spiritual needs of children must be provided by parents, so that the growth of the body and soul is not fulfilled as it should. So the conclusion from the author in this case is that as a result of unregistered marriages they have not been able to obtain legal protection, on the basis of the marriage law and applicable regulations, especially regarding children from unregistered marriages, even though the marriage is considered valid but the status of the child has not been recognized in the eyes of Indonesian law. (Yanti, n.d.)

This action has violated the rule of law because there are already applicable provisions but according to his belief it is considered valid. If the parties feel that they have



been harmed, the court can resolve it because the law can be determined by the judge and the existing rules. All of this needs proof of the existence of a marriage bond and an authentic certificate if the legal consequences occur. This problem is increasingly occurring because many unregistered marriages occur due to their respective belief systems, but from a legal viewpoint they are not valid, because an authentic deed or marriage record has not been recorded at the KUA or in the civil registry. Because this rule applies, the fate of children out of wedlock will become a polemic because there is no legal status. Therefore a child does not commit a sin because everything is borne by him for the mistakes of his parents who commit marriages that are not registered in government agencies. In fact, when a child is born as a result of the relationship between his parents, it is the responsibility of the parents to educate, look after, raise and prosper him until he becomes an adult. Child protection is prioritized because the rights and obligations have been explained in the applicable law. The treatment of the marriage of the parents of the child becomes like this, there is no legal status in the deed. (Pratiwi 2022)

Every child born has a birth certificate, so that it will become a guide in the future and avoid prolonged legal consequences. Many people say that their parents outside of marriage are considered illegitimate children, even though the result of an illicit relationship between their parents. The child remains innocent, only his parents are guilty. Children need guarantees of a decent life from both parents so that they are not raised wrongly and become the talk of the family and society. (Shahrullah and Violita 2017)

3. Implications of Laws and Regulations on the Status of Children Born in Unregistered Marriages



Sirri marriage which is known by the Indonesian people today is a marriage that is carried out by a guardian or deputy guardian and witnessed by witnesses, but not carried out in the presence of the Marriage Registrar as official government officials or marriages that are not registered at the Office of Religious Affairs for those who are Muslim or at Civil Registry Office for those who are not Muslim, so that by itself they do not have a Marriage Certificate issued by the government. Such marriages among the public are known as sirri marriages, also known as private marriages. Unregistered marriage or unregistered marriage according to Islamic law is valid if it fulfills the pillars and all the requirements for a valid marriage even though it is not registered. Thus registering a marriage contains benefits or benefits, a great good in people's lives.(Bafadhal 2014)

On the other hand, if the marriage is not regulated clearly through laws and regulations and is not registered, it will be used by the parties who are carrying out the marriage only for personal gain and harm other parties, especially the wife and children. While the legal basis according to positive law is Article 2 paragraph (2) of Law no. 1 of 1974 concerning Marriage and Article 7 KHI. Meanwhile, according to positive law, this unregistered marriage is invalid because it does not fulfill one of the requirements for a valid marriage, namely the registration of marriages to the Marriage Registrar Official. Without registration, the marriage does not have an authentic certificate in the form of a marriage book. Then legally, how the child is protected.(Matnuh 2016)

As parents who give birth to children, they must be responsible for the future of the child. The first step that must be taken by parents who carry out private marriages is to apply for a marriage certificate to the office of the religious court.



With regard to the registration of marriages with itsbat nikah, for those who are Muslim, but cannot prove the occurrence of marriage with a marriage certificate, they can submit an application for itsbat nikah (approval/certification of marriage) to the Religious Court (Article 7 KHI). Article 7 paragraph (3) letter c KHI is only possible if with respect to divorce settlement, loss of marriage certificate, doubts about whether one of the conditions for marriage is valid or not, marriage occurred before the enactment of Law no. 1 of 1974 concerning marriage, marriages carried out by those who do not have marital obstacles according to Law no. 1/1974. That is, if one of the five reasons above can be used, you can immediately apply for a marriage certificate to the Religious Court. On the other hand, it will be difficult if it does not meet one of the reasons specified and specifically for marriages under the hand, only itsbat marriage is possible with reasons in the framework of divorce settlement. (Taherong 2022)

Meanwhile, filing a marriage itsbat for other reasons (not in the context of divorce) is only possible if you already have a marriage certificate from an authorized official. Taking into account these clauses, KHI has accommodated the issue of unregistered marriages in order to obtain legalization through marriage constituencies. Why is there no clause, "There are doubts about whether one of the conditions of marriage is valid or not"? Actually, the problem lies not there. If religion considers it valid, then there is no problem with it. And, the problem of the presence of the Marriage Registrar, so that it becomes an absolute requirement for the recording of existing laws and regulations is not included as one of the requirements for validity. It is this logic that later gave birth to the phenomenon of re-marriage



among the community and also the rampant extortion by unscrupulous Marriage Registrars for placing their presence they are very central.(Oelangan 2013)

In fact, in order to make things easier, this can be changed with a reporting process where within a certain period of time, the husband and wife accompanied by their guardians and witnesses inform them about the process of carrying out the marriage. Determination of law on the basis of benefit is one of the principles in determining Islamic law, as stated in the qaidah which means: An action of the government is aimed at ensuring the interests and welfare of its people. , namely the recognition made by the father of a child born out of wedlock that is legal according to law. Basically, child recognition can be done by either the mother or the father.(Hamdani, Mansar, and Erwinsyahbana 2022)

Based on Article 43 of Law Number 1 of 1974 jo. Article 100 of the Compilation of Islamic Law (KHI) which basically states that children born out of wedlock do not have a civil relationship with their father, so to obtain a new civil relationship, a father can carry out Child Recognition. However, child recognition can only be made with the consent mother, as regulated in Article 284 of the Civil Code. However, the implementation of the provisions of Article 284 of the Civil Code depends on whether the child's biological father is subject to the provisions of Civil Law. Meanwhile, for children born out of wedlock or who are born not in a legal marriage (the parents live together and are not married under the hand), then it can still be get a birth certificate with the condition that only the name of the biological mother is listed. If private marriages are to be terminated and "legalized", there are two ways, namely by registering a marriage with itsbat nikah and remarrying by following the KUA registration procedure. To prove it with a marriage certificate, you can submit an



application for itsbat nikah (marriage confirmation/validation) to the religious court.(Andrizal and Akhbarizan 2022)

However, according to the author, it will be difficult if one does not fulfill one of the stated reasons. Usually for underhand marriages, itsbat is only possible with the reason being in the context of finalizing the divorce. Meanwhile, filing for itsbat marriage for other reasons (not in the context of divorce) is only possible if you already have a marriage certificate from an authorized official. So if you look at the requirements for filing itsbat marriage, according to the author, the decision of the panel of judges is contrary to the provisions of applicable law. The existence and independence of the institution Religious Courts since the issuance of Law no. 3 of 2006 concerning changes to Law no. 7 of 1989 concerning the Religious Courts, its position is equal to other judicial institutions within the General Courts, State Administrative Courts and Military Courts. The authority of the Religious Courts (PA) after the issuance of the new law has become wider.(Aningsih 2017)

Conclusion

The status of a child born out of unregistered marriage only has a civil relationship with his mother and his mother's family. This has the consequence that children born out of marriages that are not legally registered by the state, the child does not have a civil relationship with his father. children resulting from unregistered marriages do not have the right to inherit or inherit property from their father. This can be avoided by the way the father confesses to the child, either through voluntary confessions or forced confessions. Parents' obligations to children born out of wedlock are not recorded as a manifestation of responsibility towards their children to finance their life, food, clothing



and education as long as these children are still immature.

Recommendations

As for the process of legal protection for children born from underhand marriage in the view of Islamic law and law no. 1 of 1974, namely parents submitting the issuance of a child's birth certificate after first performing isbath marriage or marriage legalization and registration of marriage at the Office of Religious Affairs (KUA).

According to Islamic law, the position of children born from underhand marriage is that the child born is considered valid as long as the pillars and conditions for marriage of the parents are fulfilled and carried out according to the laws of each religion and belief, this is based on Article 2 paragraph (1) of the Law Law No. 1 of 1974 and Article 4 of the Compilation of Islamic Law, whereas according to the positive law, children from unregistered marriages or underhand marriage only have civil relations with their mothers and their mothers' families, whereas after the Constitutional Court's decision. No. 46/PUU-VIII/2010, children from unregistered marriages or underhanded marriages not only have civil relations with the mother and the mother's family, but can also have civil relations with their father if they receive recognition from their biological father or can be proven by science and technology.

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