



Legal Protection Of Children From The Results Of Sirri's Marriage In The Perspective Of Marriage Law In Indonesia

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Abstract

Normatively, in Indonesia the registration of a marriage is mandatory. Although the existence of the marriage law umbrella, namely Law No. 1 of 1974 concerning Marriage (which has later been amended by Law No. 16 of 2019) has been relatively long, in reality there are still many who violate it. One of them is that there is still a phenomenon of unrecorded marriage (sirri marriage) in the community. This of course has an impact on legal certainty for children from the results of the sirri marriage. Therefore, this study discusses the Juridical review of the position of children in marriage serially based on Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law.

Keywords: legal protection; children; sirri's marriage

INTRODUCTION

The phenomenon of sirri marriage (unregistered marriage) still occurs in Indonesia, even though laws and regulations require a marriage to be registered (Maulana, 2022). So that unregistered marriages have no legal force. This will also have an impact on children born from sirri marriages.

The definition of marriage according to Article 1 of Law No. 16 of 1999 concerning Amendment No. 1 of 1974 concerning Marriage (Marriage Law) is an inner birth bond between a man and a woman with the aim of forming a happy and eternal family (household) based on the One and Only Godhead (Triadi, 2019).

In reality, there are still many marriages that do not meet the requirements in the Marriage Law, such as marriages that are carried out inopenly (commonly called sirri marriages, sirri

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marriages are marriages that are carried out in secret or not announced to the rama public, meaning that the marriage is valid according to religion because it meets the requirements and pillars of Islamic shari'a but is not recorded at the Office of Religious Affairs (KUA).

In fact, according to Indonesia's positive law, every marriage must be registered to ensure the order of marriage administration and legal certainty for the parties who carry out the marriage in order to form a sakinah family and provide legal protection for the fulfillment of the rights of children born from the marriage (Afhami & Mashdurohatun, 2017).

Although according to Akbar, (2014) Islamic law (Qur'an and Hadith) sirri marriage is valid because it is considered to have fulfilled the requirements and harmony of marriage but must be announced to the public and recorded at the Office of Religious Affairs (KUA), so that the marriage becomes valid and has legal force because it has fulfilled the legal requirements of marriage in applicable laws and regulations or positive law (Sujono, 2022).

Etymologically the word "sirri" comes from Arabic, namely "sirrun" which means secret (silent and hidden). The word sirri is then combined with the word nikah so that it becomes nikah sirri to mention that marriage is done secretly or hidden. This tacit and hidden meaning gives rise to two understandings, namely marriages that are secretly not announced to the public or marriages that are not recorded.

Sirri marriage (nikah sirri) emerged after the promulgation of Law Number 1 of 1974 concerning Marriage and the issuance of Government Regulation Number. 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage (Hanafiyah, 2022). Because in both regulations, it is stated that every marriage in addition to having to be carried out according to religious provisions must also be registered. Sirri marriage is usually carried out in front of religious leaders by performing rituals or the like, which are considered valid according to religion and community beliefs.

Sirri marriage is often known as marriage under the hand. The word sirri comes from Arabic which means secret, which means sirri marriage is a secret marriage (Islami, 2017). While the definition of sirri marriage is a marriage carried out based on religious rules or customs that are not recorded at the Office of the Marriage Registration Officer, in the sense that this kind of marriage does not have authentic evidence, so it is said to have no legal force.

Article 10 of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage has clearly regulated marriage registration, namely:

Paragraph (2) specifies: "The marriage procedure shall be performed according to the law of each religion and belief", while Paragraph (3): "By observing the marriage ordinance according to the law of his religion and belief, the marriage shall be performed in the presence of the Registrar and attended by two witnesses".

Based on this background, the author finds the following problems What is the position of sirri marriage and children resulting from sirri marriage according to Indonesian law (according to Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage and the Compilation of Islamic Law). How is the legal protection of children resulting from sirri marriages juridically.

METHODS

This research uses a normative juridical method that is descriptive, namely describing systematically and thoroughly the object under study. This research was also conducted and aimed at written regulations and other materials, as well as reviewing laws and regulations related to the writing of this research. While the nature of this research is descriptive, namely the type of research to provide as thorough data as possible about a symptom or phenomenon, in order to help in strengthening existing theories or trying to formulate new theories.

The legal material used is secondary data consisting of primary legal material, consisting of the Constitution of the Republic of Indonesia Year 1945 in Article 28 B paragraphs (1) and (2) concerning Human Rights, Law Number 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Marriage, Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, Compilation of Islamic Law in 1991, Constitutional Court Decision Number 46 / PUU-VIII / 2010 and Religious Court Decision Number 36 / Pdt.P / 2020 / PAJB which aims to complement and support these data, so that research becomes more perfect, sukunder legal materials, consisting of literature related to the problems studied, and tertiary legal materials consisting of Indonesian Dictionaries and Legal Dictionaries. This kind of research is commonly called literature study. The legal material obtained is analyzed qualitatively, normatively and explained deductively.

RESULTS AND DISCUSSION

1. Understanding Marriage and Its Legal Institutions

As mandated by the 1945 Constitution, as a legal state Indonesia has regulated the Marriage Law contained in Law No. 16 of 2019 concerning Amendments to Law No. 1 of 1974 concerning Perkawnan (Marriage Law), complemented by Government Regulation No. 9 of 1975 concerning the implementation of Law No. 1 of 1974 concerning Marriage (PP No. 9 of 1975), and Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law (KHI) and other regulations regarding marriage.

Based on the provisions of Article 1 of the Marriage Law, the definition of marriage is an inner birth bond between a man and a woman as husband and wife with the aim of

forming a happy and eternal family (household) based on the One and Only Godhead. Regarding the validity of marriage, it is contained in Article 2 paragraph (1) of Law Number 1 of 1974 concerning Marriage, namely Marriage is valid, if it is carried out according to the laws of each religion and belief.

This means that if a marriage has fulfilled the requirements and the pillars of marriage or *ijab kabul* have been performed (for Muslims) or the priest has performed blessings or other rituals, then the marriage is considered valid according to the religion and beliefs of the community. However, such marriages are not considered valid by the State if they have not been registered with the competent authorities. This is in accordance with the provisions **of Article 2 paragraph (2) of Law Number 1 of 1974 concerning Marriage concerning marriage registration, namely "each marriage is recorded according to applicable laws and regulations"**.

Article 2 of the Compilation of Islamic Law specifies that marriage, i.e. "a very strong covenant (*mitsaqan ghalidzan*) to obey Allah's commandments and perform them constitutes worship". The definition of marriage can simply be interpreted as an agreement between the prospective husband and the prospective wife to allow associating as husband and wife in order to form a family and carry out the commands of Allah Almighty. The purpose of marriage according to Article 3 of the Compilation of Islamic Law is: "Marriage aims to realize a *sakinah, mawadah, and rahmah* domestic life."

From the construction of marriage arrangements as stipulated in Article 2 of the Marriage Law, it can be seen that the religious element is so dominant. Marriage is actually a relationship between a man and a woman who is included in the private sphere, but because the relationship is considered important and involves a matter of public order, the state interferes in the recording of it which is carried out in a public register handled by a special institution. This marriage in many societies is recognized as sacred, where marriage registration is very important. Even because of the importance of the marriage registration issue, Article 81 BW states that: "No religious ceremony may be performed, until both parties to their religious officials prove that the marriage in the presence of a civil registry official has taken place."

From this provision, it can be seen that the matter of marriage registration is so *urgent*, that it defeats religious teachings that consider marriage sacred as evidenced by certain ceremonies.

2. Understanding Sirri Marriage

Etymologically the word "*sirri*" comes from Arabic, namely "*sirrun*" which means secret, silent and hidden. The word *sirri* is then combined with the word *nikah* so that it becomes *nikah sirri* to mention that marriage is done secretly or hidden. This tacit and hidden meaning gives

rise to two understandings, namely marriages that are secretly not announced to the public or marriages that are not recorded.

According to the assumptions of the sirri marriage community, there are three meanings, namely: First, marriage without guardians or witnesses. This marriage is carried out secretly or secretly. Such marriages according to Islamic law are neither valid nor forbidden. Second, a marriage attended by a guardian and two witnesses, but such witnesses may not announce it to the public. Jumhur ulama views such marriages as legal, but the law is forbidden. Because, a secret matter, if it has been attended by two or more people then it is no longer secret. It is forbidden, because of the order of the Prophet (peace be upon him) to walimah and omit elements that have the potential to invite doubts and false accusations. Third, marriages are carried out with a guardian and two fair witnesses and the existence of ijab and qobul, but these marriages are not registered at the Office of Religious Affairs (KUA). When viewed from the aspect of religious law, this marriage is valid because this form of sirri marriage meets the requirements and pillars of Islamic Shari'a (Witanto, 2012).

Sirri marriage / nikah sirri emerged after the promulgation of the Marriage Law and the issuance of Government Regulation Number. 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage. As is known in both regulations, it is stated that every marriage in addition to having to be carried out according to religious provisions must also be registered. This serial marriage is usually carried out in front of religious leaders by performing rituals or the like, which are considered valid according to religion and community beliefs.

Sirri marriage is often known as marriage under the hand. The word siri comes from Arabic which means secret, which means Serial marriage is a secret marriage. While the definition of serial marriage according to law is a marriage carried out based on religious rules or customs that are not recorded at the Office of the Marriage Registration Officer, in the sense that this kind of marriage does not have authentic evidence, so it is said to have no legal force.

The definition of sirri marriage itself varies according to the depth of their respective knowledge. Some people state that nikah sirri is classified into 3 (three) parts, including:

- a. Sirri marriage is a marriage whose implementation is carried out by kyai or community leaders.
- b. Sirri marriage is a marriage whose implementation is not registered at the Office of Religious Affairs (KUA), or the marriage contract is not in supervision of the registration officer of the KUA for Muslims, at the Civil Registry Office for non-Muslims.
- c. Sirei marriage is between a man and a woman who perform their contract by their guardian himself. ¹⁵

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Marriage that fulfills the pillars and requirements according to Islamic shari'a is an act of *haq*, not *bathil*, so it is very appropriate if it is concealed or announced through a wedding feast or *walimah*, as a sign of gratitude to Allah Almighty and to avoid slander. Because the purpose of marriage is to form a family that is *ma'ruf, sakinah, mawaddah, and rahmah*, as *worship* (Sabiq, 2017).

Normatively, sirri marriage is invalid according to the Marriage Law. This has been stipulated in Article 2 paragraph (1) and paragraph (2) of the Marriage Law, that marriage is valid if it is carried out according to the laws of each religion and belief. In paragraph (2) it is determined that every marriage shall be recorded in accordance with the prevailing laws and regulations. Based on the formulation of the provisions of the article, for the validity of a marriage, it must meet the provisions of the article as a whole, namely fulfilling the provisions of paragraph (1) and paragraph (2), and if only reviewed from paragraph (1) by ignoring the provisions of paragraph (2), then the marriage can be categorized as a secret marriage or sirri marriage because it does not meet the provisions of paragraph (2) of the provisions of Article 2 of the Marriage Law. Thus, a new marriage is valid according to State law, if the provisions of Article 2 paragraph (1) and paragraph (2) are carried out as a whole as a single legal regulation (Nyoman, 2020; Syamdan & Purwoatmodjo, 2019)

Article 2 of the Marriage Law refers to the registration of marriages with various procedures. This is clarified in the Compilation of Islamic Law (KHI) Article 5 paragraph (1) states, that: "In order to ensure the order of marriage must be recorded." likewise in Article 6 paragraph (2) states, that: "Marriages performed outside the supervision of the Marriage Registration Officer have no legal force."

Nowadays, administrative filing is an unavoidable thing. The child's birth line must be proven by a birth certificate and this certificate can come out if proven by a marriage certificate. Meanwhile, a marriage certificate cannot be issued if there is no registration of the marriage contract at the Office of Religious Affairs (KUA). Thus, marriage registration by the marriage registration officer at the Office of Religious Affairs (KUA) becomes something very important and can even be included in the mandatory category (Djubaedah, 2010).

Marriage registration is an important thing, it has been determined through law, especially if there is a husband-wife dispute, the wife married by Sirri does not have the legal power to ask for her rights because there are no documents that prove that she is the wife of the fulan. Safeguarding the rights of wives and children is an obligation and one way to maintain this obligation is to register the marriage at the Office of Religious Affairs (KUA) (Adi, 2012).

The purpose of this marriage registration is to provide legal certainty and protection for the parties who carry out the marriage, so as to provide authentic evidence of the occurrence of marriage. Because with sirri marriage for irresponsible men will easily not do what is their duty to his wife and children.

Another legal consequence is for the child born from the sirri marriage that the child born from the sirri marriage does not have a civil relationship with his biological father, but only has a civil relationship with his mother and his mother's family, as stated in Article 43 paragraph (1) of the Law on Marriage. Because, sirri marriage is not valid according to the State. And therefore a child born from a sirri marriage is considered equal status to an out-of-wedlock child. In the birth certificate, the child born as a result of the sirri marriage is listed only the mother's name (Goodhart, 1930).

In relation to Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law which has been submitted a test application against the Constitution of the Republic of Indonesia Year 1945 filed by Hj. Aisyah Mochtar alias Machicha Mochtar bint H. Mochtar Ibrahim and Muhammad Iqbal Ramadhan, the Constitutional Court has granted the application for review of Decision Number 46/PUU-VIII/2010.

The Constitutional Court Decision Number 46/PUU-VIII/2010 has an effect on changing the law for children born from the sirri marriage. On February 17, 2012 the Constitutional Court issued a ruling regarding the legal status of extramarital children, related to the judicial review of Article 2 paragraph (2) and Article 43 paragraph (1) of the Marriage Law. According to the Constitutional Court, Article 43 paragraph (1) of the Law which reads "A child born out of wedlock only has a civil relationship with his mother and his mother's family", contradicts the Constitution of the Republic of Indonesia Year 1945 *conditionally (conditionally unconstitutional)* which is *unconstitutional* As long as it is interpreted to eliminate civil relations with men as long as it can be proven that the two are biological. So the verse must read, "A child born out of wedlock has a civil relationship with his mother and his mother's family and with a man as his father who can be proven based on science and technology and/or other evidence according to law to have a blood relationship, including a civil relationship with his father's family" (Deviyanti et al., 2018).

The ruling has consequences for the civil relationship of the child with his father and his father's family, the child's sexual relationship with his biological father, and the existence of rights and obligations between the child and his biological father, both in the form of bread, guardianship, inheritance and so on. This certainly applies if proof is first carried out through science and technology such as DNA tests and so on that are successful. Yes, it is true that the out-of-wedlock child has a blood relationship with a man as his biological father.

Children resulting from sirri marriage do not have the meaning of guaranteeing legal certainty for the marriage of sirri both parents, because in the implementation of the marriage does not meet the requirements for the validity of marriage according to positive law.

3. Proving the Origin of the Child

In terms of proving the origin of children, Law Number 1 of 1974 concerning Marriage Article 55 confirms that:

- a. The origin of a child can only be proven by an authentic birth certificate issued by an authorized official;
- b. If the deed mentioned in subsection (1) of this article does not exist, the Court may issue a determination as to the origin of a child after a careful examination based on qualified evidence;
- c. On the basis of the provisions of the Court in paragraph (2) of this article, the birth registration agency in the jurisdiction of the Court concerned. Issue a birth certificate for the child concerned.

Article 103 of the Compilation of Islamic Law states, that:

- 1) The origin of a child can only be proven by a birth certificate or other evidence;
- 2) If the birth certificate or other evidence mentioned in subsection (1) is missing, the Religious Court may issue a determination on the origin of a child after conducting a careful examination based on valid evidence;
- 3) On the basis of the provisions of the Religious Court paragraph (2), the birth registration agency in the jurisdiction of the Religious Court issues a birth certificate for the child concerned.

Based on the Constitutional Court Decision Number 46/PUU-VIII/2010, several parties who have performed sirri marriages later in order to protect the interests of children, married couples remarry and register their marriages and apply to the Court to certify the origin of children. In this study, the author took a case study of Determination Number 36/Pdt.P/2020/PA. JB which occurred at the West Jakarta Religious Court on February 27, 2020, where the West Jakarta District Court had granted the determination in the Child Origin Probate case filed by **Mr. Taufik Rachmat bin Moch. Yusran Tahir** and **Mrs. Devi Nur Ramdhani bint Aselih, who had previously performed a sirri marriage.**

On January 5, 2017, a marriage according to Islam was held between Taufik Rachmat and Devi Nur Ramdhani, who acted as the guardian of the marriage was Aselih as the biological father of the bride attended by 2 (two) witnesses and the dowry in the form of a gold necklace paid in cash. However, the marriage has not been officially registered at the Office of Religious Affairs (KUA).

From the marriage, a son named Mohammad Adelta was born in Jakarta on September 29, 2017. From the birth of the child until now it has been maintained by Petitioner I with Applicant II that until now no third party has interfered with the claim with the maintenance and whereabouts of the child.

Previously, Applicant I and Applicant II have remarried and recorded their marriage on September 15, 2019, before the Marriage Registration Officer of the Religious Affairs Office of Kebon Jeruk District, West Jakarta City and have obtained a marriage certificate. But the person concerned still experienced obstacles in obtaining legal protection from both his father and mother.

CONCLUSION

Sirri marriage is a marriage that does not meet the requirements of the laws and regulations, so that this sirri marriage is not invalid (has legal force) according to Indonesian law. Moreover, the child of the sirri family also has no legal force. The impact of sirri marriage has no legal force to affect the children of the sirri marriage. As provided in Article 99 of the Compilation of Islamic Law, a legal child is a child born of a valid marriage in accordance with Article 42 of the Marriage Law. Likewise, with civil relations, children from serial marriages only have civil relations with their mothers and their mother's families as stated in Article 43 of the Marriage Law. In order for the child to get legal certainty, the two parents of the child must register the marriage. By having registered the marriage, the child becomes a legal child and has a civil relationship with both parents.

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