

## Religious Justice Judges In Determining The Written Law Of The Origin Of Children In *Sirri* Marriages In *Al-Maqasid Syari'ah* Perspective

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### Abstract

*This study aims to determine and analyze how the status of children born from marriages, with a sociological juridical approach, an approach that refers to legal norms on regulations related to the status of children born as a result of marriages and the determination of the child's status application. The results show that: 1) Based on the marriage law, the State has carried out its duties as a State of law in terms of determining the child born of a sirri marriage, 2) As a result of the law of the child born from a sirri marriage, the child's status can be requested so that the child's blood relationship can be connected to two parents so that the role of the judge as a judicial officer authorized by law to adjudicate a case before him, in examining a case the judge does not necessarily decide the case but based on certain considerations, with formal legal rules and material, the enforcement of the Law, is determined by the ability of the role of court judges in harmonizing the legal apparatus and legal awareness, so as to create order and legal certainty in society based on the conscience of justice.*

*Keywords: Role; Religious; Court; Judges; Children; Marriage; Sirri.*

### 1. Introduction

The Indonesian state of law is formulated in Article 1 paragraph 3 which states that the State of Indonesia is a state of law, the supreme commander is the law itself in its implementation in responding to problems that occur and the will to make changes to a better life situation, there needs to be a synergy between various elements fostering to be more advanced and improving to be more organized, in accordance with the noble ideals of justice.

Judges are the main actors in law enforcement in courts who have more roles when compared to prosecutors, lawyers and clerks. When enforced, the law starts from the *das sein* area (which it actually is) and leaves the *das sollen* territory (which it should).<sup>1</sup> The task of a religious judge is to examine, try and decide cases and his function is to uphold truth and justice, the judge's authority to carry out this is in accordance with what has been determined in article 16 paragraph (1) of Act No. 48 of 2009. The role of judges in the construction of development National law, as conceptualized above, implies a change in the basics of society, both structural and cultural. The basics of the society.

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<sup>1</sup> A. Hasan tohari, 2004, *Komisi Yudisial Dan Reformasi Peradilan*, Elsam, Jakarta, p. 178.

All problems that arise in an Indonesian community create a complex pattern of legal order, not least in the case of marriage and all the dynamics and problems that arise from it, including the issue of children, grow and develop and have the right to protection and discrimination.

The rights and protection of children are regulated in Act No. 23 of 2002 on child protection, so every child is entitled to protection from discriminatory treatment, exploitation both economic and social, cruelty, violence and abuse of injustice and other misconduct, children are entitled to protection from all types of discrimination caused by the beliefs or actions of parents of family members, friends, and others outside the family. The purpose of child protection laws is to guarantee and protect the child and his rights to grow and develop and participate optimally in accordance with the dignity and worth of humanity, not excluding children born out of wedlock (unregistered) still do not necessarily eliminate children's rights.

The dilemma of the problem is clear, especially if the law is defined as the actual output or result of the daily practice of legal officials, not regulations or legislation.<sup>2</sup> However, legal instruments are still used. At least, as a guide in describing the actual process of legal development. In essence, however law is defined, law is one aspect of culture. In this case the law is the result of human concretization of religious values in regulating human life itself.<sup>3</sup> Thus, the law can be found in various symbols or symbols. Among these symbols, the most assertive in expressing their content and meaning is in written form, "formal legal instruments". In this case, the law shows its ambiguous, "ambivalent" nature. Because, such a form shows the existence of legal certainty, and at the same time, such a form shows the existence of legal power.

The relationship between law and society is reciprocal or dialectical. Law gives judgment to society and also directs what they should do about their position and society provides social basis. But what often happens in society, the proposed measure does not match the reality faced or is usually interpreted as a social problem.<sup>4</sup> Directly or indirectly, these social issues are related to the role played by Religious Court judges. Religious court judges give and determine the procedures that must be followed in achieving the goals expected by the community. Therefore, the role of Religious court judges is to maintain the functional alignment of the other legal components. As the executing body of judicial power for the people seeking justice, the Judge of the Religious Court is in charge and has the authority to examine, decide and resolve matters in the field of marriage and everything that results from it, including the origin of children born in unrecorded marriages that fall into the category of resolving voluntary matters.

In connection with the Determination of Case Number 299/Pdt.P/2020/Pa.Wsb on the Origin of Children Born from Sirri Marriage which has been issued by the Wonosobo religious court on the origin of children has been explained in article 55 paragraph 1 of Act No. 1 of 1974, in its implementation has been described in the

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<sup>2</sup> Daniel S. Lev, 1980, *Peradilan Agama di Indonesia: Studi tentang Landasan Politik Lembaga-Lembaga Hukum*, alih bahasa H. Zaini Ahmad Noeh, PT Intermedia, Jakarta, p. 16.

<sup>3</sup> T. M. Hasbi Ash Shiddiqi, 1964, *Peradilan Hukum Acara Islam*, PT Al-Maarif, Bandung, p. 30

<sup>4</sup> Deden Effendi, 1985, *Kompleksitas Hakim Pengadilan Agama*, Departemen Agama R.I, Jakarta, p. 6.

same article paragraph 2, but in practice a child born from a Sirri marriage or a marriage not recorded in the KUA of each sub-district will be listed in the child's deed child of a mother.

The starting obligation for parents is to make birth certificates, birth certificates are children's rights that must be fulfilled by both parents, or by their guardians and the State is obliged to provide birth certificates for all Indonesian children regardless of the condition of the marriage of their parents, the government has designed and compiled regulations protect children's rights, in Act No. 23 of 2006 as amended by Act No. 24 of 2013 concerning population administration, Act No. 23 of 2002 as amended by Act No. 35 of 2014 concerning child protection and Minister of Home Affairs 109 of 2019 concerning the forms and books used in the population book that states that birth certificates are the rights of children, the State is obliged to provide birth certificates to all Indonesian children.

That according to article 55 of Act No. 1 of 1974, on proof of the origin of a child in article 55 paragraph 1 the origin of a child can only be proven with an authentic birth certificate, issued by an authorized official, 2. if the birth certificate is in paragraph (1) this article does not exist, so the court may issue a determination on the origin of the child after a thorough examination based on the evidence that meets the requirements. (3) on the basis of the provisions of the court, paragraph (2), the birth registration agency that exists in the jurisdiction of the court concerned shall issue a birth certificate for the child concerned.

Whereas in connection with that in article 272 of the Civil Code, children out of wedlock are legalized by the subsequent marriage of their father and mother if before the marriage they have made a legal confession to the child, or if the confession occurs in his own marriage certificate, consideration of article 1 number 17 Act No. 23 of 2006 as amended by Act No. 24 of 2013 on *adminduk*, significant events are events experienced by a person including birth, death, stillbirth, marriage, divorce, child recognition, child confirmation, adoption, change name and change of citizenship status, *jo* Decision of the constitutional court (MK) through Decision Number 46/PPU-VII/2010 dated 17 February 2012, ruled that article 43 paragraph (1) of the Marriage Law is contrary to the 1945 Constitution which reads "children born outside of marriage only has a civil relationship with his mother and his mother's family and *lak* The man as his father can be proven based on knowledge and technology and / or other evidence that according to the law has a blood relationship, including a relationship with his father's family. Thus, the Determination of Case Number 299/Pdt.P/2020/Pa.Wsb on the Origin of Children Born from a Sirri Marriage issued by the Wonosobo religious court can also be proven legally, namely through a court determination for the legal protection of the child.

The purpose of this study was to find out how the benefits of unified children born from Sirri's marriage and how the legal consequences of the judge's determination of unified children born of Sirri's marriage

## **2. Research Methods**

The research method used in this study is a sociological juridical approach, namely research that is carried out directly in the field to find out the real problems that occur, then it will be related to the applicable laws and regulations and existing legal theory.<sup>5</sup>

The type of study used by the author in compiling this research is descriptive-analysis,<sup>6</sup> where the author describes by means of a dialogue with the existing data so as to produce a comprehensive, systematic and objective research on the role of judges.

The data collection technique is done by recording data from various written sources and then identifying contextual evidence, namely by looking for the relationship between the data and reality. Data processing is carried out through critical analysis, namely comparing and interpreting various research results, both primary and secondary data.

As for the data analysis process, selecting the collected data. Then coding is carried out according to the topic and discussion.

### **3. Result and Discussion**

#### **3.1. The benefit of united children born of Sirri's marriage**

Based on Article 7 paragraph (1) of Act No. 23 of 2002 concerning Child Protection, as amended into Act No. 35 of 2014 it is stated that every child has the right to know who his parents are, to be raised and cared for by his own parents. Based on these provisions, while proving the origin of the child in Article 55 paragraphs (1) and (2) of Act No. 1 of 1974 concerning Marriage, it is stated that: 1) The birth certificate issued by the competent authority serves as authentic evidence in determining the origin of the child. proposal of a child, 2) The court may give a determination regarding the origin of a child, after a careful examination is held based on the evidence that meets the requirements.<sup>7</sup>

In the case of a quo, the Judicial Council needs to present the basis of fiqh written in *Al-Fiqh al-Islam wa Adillatuh* page 690 Volume V which means: If it is true and obvious that a marriage took place, even though the marriage was broken/fasid or the marriage was conducted customarily, which took place based on custom or also in a certain way or contract (traditionally) by not registering the marriage officially, then it can be confirmed. that the lineage of a child born is the child of the husband and wife."<sup>8</sup>

The judge in this case grants the petitioner's request, of course, has its own considerations, in a determination or decision it must meet the elements of a legal

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<sup>5</sup> Bambang Sunggono, 2006, *Metode Penelitian Hukum*, Rajawali Pres, Jakarta, p. 75.

<sup>6</sup> Research is carried out by reporting and describing an object of certain circumstances, symptoms, habits or behaviors which are then analyzed sharply. See, Nanang Martono, *Metode Penelitian Kuantitatif*, (Jakarta: Rajawali, Pers, 2012), p.46

<sup>7</sup> Undang-Undang Nomor 23 tahun 2002 tentang Perlindungan Anak.

<sup>8</sup> Direktori Putusan Mahkamah Agung Republik Indonesia, "Putusan Pengadilan Agama Wonosobo Nomor: 299/Pdt.P/2020/PA.Wsb," in putusan.mahkamahagung.go.id, accessed on 2 August 2021, at 17.42. WIB

purpose. The ideal determination is one that fulfills all the elements of its legal objectives, but in many cases the judge must choose between justice, benefit and legal certainty, so the best one is chosen, so that the judge sees from case to case, case by case reacts differently.<sup>9</sup>

The determination of the Judge who granted the application is more appropriate due to welfare considerations. For the sake of the child's future, the child can be determined as a married couple born from a civil marriage because it meets the requirements and pillars (material requirements).<sup>10</sup>

The initial essence of the implementation of the Shari'ah is none other than the realization of the five main elements, namely, the preservation of religion, soul, lineage, intellect and property in every human being.<sup>11</sup> Judging from the aspect of its influence on human life, the benefit is divided into three levels, namely; dharuriyat, hajiyyat and tahsiniyyat.<sup>12</sup> Where the three cannot be separated because all three complement each other. The level of hajiyyat will perfect dharuriyat and tahsiniyyat to be perfect for hajiyyat. While dharuriyat is the main point of maintaining hajiyyat and tahsiniyyat.<sup>13</sup> Here is an explanation of the level of benefits required by the Shari'ah:<sup>14</sup>

- *Dharuriyat, is a primary benefit. Where human life is very dependent on it, both in religious and worldly aspects. So if this aspect is abandoned, human life will be destroyed.*

- *Hajiyyat, is a secondary benefit, which is something that humans need to make their life easier. So his absence will only make it difficult.*

- *Tahsiniyyat, is a benefit in the form of demands that aim to increase goodness and glory. So that by not achieving it will not be difficult or even damaging. In the category of meeting needs, this tahsiniyyat benefit is classified as a tertiary need.*

The following are the five main missions of sharia according to needs and priority scale;<sup>15</sup>

- *Hifdz Din (maintaining religion/religious rights), this right is not only to maintain the sanctity of religion but also to create a pattern of healthy relationships in carrying out religious teachings, both among fellow religions or different religions.*
- *Hifdz Nafs (protecting the soul/right to life), this right should not only be used as a tool for self-defense but is directed at maintaining a better quality of life for each individual as a whole.*
- *Hifdz 'Aql (maintaining reason/right to education). In fact, the orientation of guarding reason does not only keep him from going crazy. But more than that, it is a guarantee of security for each individual's intellectual work such as copyrights, works and someone's creations.*

<sup>9</sup> Wakhid, interview, Wonosobo, 5 July 2021.

<sup>10</sup> Ibid.

<sup>11</sup> Al-Syatibi, *al-uwafaqat fi Ushul al-Syari'ah*, (Kairo: Mustafa Muhammad, t.th), 8

<sup>12</sup> Wahbah al Zuhaili, *ushul al-Fiqh al-Islami*, (Beirut: Darr al-Fikr, 1986), 1020-1023

<sup>13</sup> Al-Syatibi, *al-uwafaqat...*, 11

<sup>14</sup> Ghofar Shidiq, *Teori Maqashid al-Syari'ah dalam Hukum Islam, Sultan Agung, Vol. XLIV, No. 118, June-August, 2009*, 123-124

<sup>15</sup> Ridwan Jamal, *Maqashid al-Syari'ah dan Relevansinya dalam Konteks Kekinian, Jurnal Ilmiah al Syir'ah 8 (1), 2016*, 8-9

- *Hifdz Nasl (maintaining offspring/honor), every individual is guaranteed lineage-offspring so as not to be tarnished.<sup>16</sup> Therefore marriage is prescribed, because if that does not happen the existence of the offspring will be threatened.<sup>17</sup> Therefore a person gets the full right to determine his or her marriage and descent.*
- *Hifdz Maal (maintaining property/rights to work), this right is not only an effort to protect assets from interference from others. But it also guarantees every individual to get halal sustenance by working. Thus everyone can maintain the quality of their welfare with the property rights they have.*

The framework in the recognition of children born from nikah sirri is more inclined towards Hifdz Nasl (maintaining lineage/ honor), because children born from nikah sirri are legally recognized as their children if the procedures performed are in accordance with Islamic law then they can be submitted to religious court with Voluntair (Petition), the origin of the child.

### **3.2. Consequences of the Law on Recognition of Children from Married Couples sirri**

The marriage registration aims to make the legal events that took place clear, to the spouses, others and the community and to be authentic evidence.<sup>18</sup> Legal events are not a final scheme (finite scheme), but continue to move, change, following the dynamics of human life. Therefore, the law must be dissected and explored through progressive efforts to reach the light of truth in achieving justice.<sup>19</sup> Always changing and adjusted according to the need to adapt to changing patterns of society and progress of thought.

The occurrence of underhand marriages can be identified in the following ways:

- The public's lack of understanding of legal developments
- People only use Islamic law (Fiqh)
- Lack of parental control over children
- There are no concrete sanctions against underhanded marriages
- Not knowing that underhand marriage is against the law
- Political, economic and efficiency factors<sup>20</sup>

The legal consequences of sirri marriages, the biggest impact is the birth of a child. It is said to be an illegitimate child because there is no written evidence that the child is a legitimate descendant of his parents. As a result, the child cannot or is not entitled to a birth certificate, thus having difficulty registering for school. Even though a birth certificate is given, only the name of the mother who gave birth is listed as the parents according to the decision of the Constitutional Court: NO: 46/PUU-VIII/2010.

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<sup>16</sup> Ali Yafie, *Merintis Fiqh Lingkungan Hidup*, (Jakarta: Ufuk Press, 2006), 186

<sup>17</sup> Ainul Yakin, Urgensi Teori Maqashid al-Syari'ah dalam Penetapan Hukum Islam dengan Pendekatan Masalah Mursalah, *Jurnal at-Turas*, Vol. 2, No. 1, Januari-Juni, 2015, 31.

<sup>18</sup> Ali Mansyur, 2009, kajian yuridis nikah siri dan problematikanya di Indonesia, *Jurnal khoiru ummah*, Vol. 4, No. 1. p. 4

<sup>19</sup> Satjipto Rahardjo, 2010, *Penegakan Hukum Progresif*, PT. Kompas Media Nusantara, Jakarta, p. VII.

<sup>20</sup> Munasir, 2015, Rekonstruksi Hukum perkawinan di bawah tangan dalam perspektif fiqh berdasarkan nilai kemaslahatan, *Jurnal pembaharuan Hukum*, Vol. 2, No. 1, p. 10-11.

This has a profound impact on the child and its mother, both socially and psychologically, even including the material impact.

Regardless of the problems of marriage procedure and administration described earlier, in article 2 paragraph (2) and article 43 paragraph (1) of the Marriage Act No. 1 of 1974, children born out of wedlock must obtain legal protection, obtain appropriate education as other children as well as get good and worthy treatment. If the child is not recognized and treated unfairly, then the most disadvantaged is the child, while he himself does not want such a situation and does not know that both parents have a secret marriage.

A child can be said to have a legal relationship with his father if he is born from a legal marriage. On the other hand, a child born outside of a legal marriage cannot be called a legitimate child, commonly referred to as an adulterous child or a child outside a legal marriage, he only has a kinship relationship with his mother. Thus, talking about the origin of the child is actually talking about a legitimate child.<sup>21</sup>

As important as the existence of children in household life, then the marriage prescribed by God must be carried out in accordance with procedures either determined in the thinking of previous scholars (Islamic law or jurisprudence) or the thinking of Indonesian scholars formulated in the rules of positive Indonesian Islamic law. A marriage performed in accordance with the procedure makes it a valid bond. A valid bond in Indonesian Islamic positive law is if it is done according to the law of each religion and belief. This means that people who are Muslims, their marriage is only considered valid if it is done according to Islamic law. In addition every marriage must be recorded in accordance with applicable legislation. Thus a child born of a lawful marriage can be recognized in the eyes of the law.

The position of a child born of a sirri marriage has the same rights as a child in general according to the marriage and applicable law, the rights of children are regulated in the law of the republic of Indonesia number 4 of 1979 on child welfare and sound in article 2 to article 8 of these laws, there are 10 children's rights in addition to that are also regulated in Act No. 23 of 2002 on child protection which in essence is the protection of children born from marriages or marriages under the hands.<sup>22</sup>

#### **4. Closing**

Sirri marriage in accordance with the rules of Islamic law is legal but has a legal effect on the child born from the marriage, the child born still has the right as a child and can file a petition of origin of the child in a religious court, with sufficient examination accompanied by conditions formal and material that is met then an examination is made on the legality and otherwise of a religious marriage to the father and mother, with the approval of the determination, the child can be related to his

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<sup>21</sup> Amiur Nurudin, 2004, Azhari Akmal Tarigan, *Hukum Perdata Islam Di Indonesia*, First Edition print-3 Prenada Media Grup, Jakarta, p. 276.

<sup>22</sup> Fatmawati, anis mashdurohatun, 2017, perlindungan hukun terhadap anak yang lahir dibawah tangan, jurnal hukum khairu ummah, Vol. 12, No. 3.

biological father, this brings benefits to the child, but not an encouragement to have a civil marriage, ideally marriage is registered religiously and registered in the State, so that it does not bring a bad impact on the wife or on the future of the child born.

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