

Inheritance rights of children from *sirri* marriages: An analysis based on fiqh and positive law in Indonesia

(Hak waris anak dari perkawinan *sirri*: Analisis berdasarkan fikih dan hukum positif di Indonesia)

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Abstract

Sirri marriage or marriage under the hand is a marriage that is kept secret and not registered and not recorded based on applicable regulations. The validity of marriage under *sirri* according to fiqh and positive law conflicts with opinion. This article reviews these provisions based on the views of the scholars of the madhab (fiqh) and the provisions of positive law based on Law Number 1 of 1974 concerning marriage and its derivative regulations, as well as the Compilation of Islamic Law. According to fiqh law, marriage is still valid as long as it fulfills the pillars and conditions of marriage according to Islamic law. Meanwhile, according to positive law, the *sirri* marriage is not recognized. It will have adverse effects on children born, namely not getting legal protection for children's rights, including the right to inheritance from their biological father and mother. However, when viewed through the lens of fiqh law, children who are born are considered to still get their rights from their father and mother, including being able to inherit property from both parents.

Keywords: inheritance right, *sirri* marriage, fiqh, positive law

Pernikahan siri atau nikah di bawah tangan adalah pernikahan yang dirahasiakan dan tidak didaftarkan serta tidak dicatatkan berdasarkan aturan yang berlaku. Keabsahan perkawinan di bawah *sirri* menurut hukum fikih dan hukum positif terjadi silang pendapat. Artikel ini mengulas ketentuan tersebut berdasarkan pandangan para ulama mazhab (fikih) serta ketentuan hukum positif berdasarkan Undang-Undang Nomor 1 Tahun 1974 tentang perkawinan dan aturan turunannya, serta berdasarkan Kompilasi Hukum Islam. Menurut hukum fikih perkawinan tersebut tetap sah asalkan memenuhi rukun dan syarat perkawinan menurut hukum Islam. Sedangkan menurut hukum positif, pernikahan siri tersebut tidak diakui adanya dan akan berakibat buruk terhadap anak yang dilahirkan, yaitu tidak mendapat perlindungan hukum atas hak-hak anak, termasuk hak untuk mendapatkan warisan dari ayah dan ibu kandungnya. Akan tetapi kalau ditinjau dengan kaca mata hukum fikih, anak yang dilahirkan dianggap tetap mendapatkan hak-haknya dari ayah dan ibunya, termasuk dapat mewarisi harta dari kedua orang tuanya.

Kata Kunci : hak waris, pernikahan *sirri*, fiqh dan hukum positif

A. INTRODUCTION

Marriage law is integral to Islamic law, inseparable from the dimensions of Islamic creed and morals. On this basis, marriage law wants to make marriage among Muslims into a tawhidic and moral marriage that aligns with Islamic law's objectives.

According to Islamic law, the ideal goal of marriage is to form a happy and lasting family, as confirmed in Article 1 of Law Number 1 of 1974 concerning marriage. Juridically, marriage is a physical and mental bond between a man and a woman as husband and wife to form a family (household), which is happy and eternal based on God Almighty.¹

In Indonesia, since 1974, a law on marriage has been promulgated, known as Law Number 1 of 1974 concerning Marriage. The material of the law is a collection of *munakahat* law contained in the Qur'an, the sunnah of the Prophet, and the classical and contemporary fiqh books, which the Indonesian national legal system has successfully raised from normative law to written law and positive law that has binding and compelling force on all Indonesian people including Indonesian Muslims. The validity of a marriage is a very principle matter because it is closely related to the consequences of marriage regarding children and property. Law Number 1 of 1974 concerning marriage has formulated the criteria for the validity of a marriage, which is regulated in Article 2, as follows:

- (1) Marriage is valid if performed according to the laws of each religion and belief.
- (2) Every marriage shall be recorded by the prevailing laws and regulations.

Article 2 of Law Number 1 Year 1974 establishes two legal lines that must be obeyed in conducting a marriage. Paragraph (1) clearly and explicitly regulates the validity of marriage, namely that the only condition for the validity of a marriage is if the marriage is carried out according to the religious provisions of those who will enter into the marriage. Meanwhile, paragraph (2) regulates the issue of marriage registration, that a marriage must be recorded according to the prevailing laws and regulations. From the provisions of this paragraph, the provisions of paragraph (2) have nothing to do with the issue of the validity of a marriage. Public awareness of the law and the importance of marriage registration is still arguably low.

This is evident from the fact that many underhand or *sirri* marriage practices are carried out in front of *kyai*, *teungku*, *modin*, *ustadz*, etc. Therefore, based on these thoughts, the author needs to examine and discuss the legal impact of underhand marriage or nikah *sirri* on children's inheritance rights according to fiqh and positive law.

B. DISCUSSION

¹ Amir Syarifuddin, *Hukum Kewarisan Islam*, (Jakarta: Pradana Media, 2004), h. 3

1. Overview of *Sirri* Marriages

The term *Sirri* means something secret or closed. Regarding *sirri* marriage, this is still a long debate. According to Article 4 of the Compilation of Islamic Law (*Kompilasi Hukum Islam* "KHI"), a marriage is valid if it is conducted according to Islamic law by Article 2 paragraph (1) of Law No. 1 of 1974 concerning marriage, which states "Marriage is valid if it is conducted according to the laws of each religion and belief."² However, the marriage must be reported and recorded at the Office of Religious Affairs or the Civil Registry for non-Muslims. This is in accordance with the provisions of Article 2, paragraph (2) of the Marriage Law, which states, "Every marriage is recorded according to the applicable laws and regulations". Similarly, Article 5 of KHI states:

1. In order to ensure the orderliness of marriage for the Muslim community, every marriage must be recorded.
2. The registration of marriage, as mentioned in paragraph (1), shall be carried out by the Marriage Registrar as stipulated in Law No. 22 of 1946 jo Law No. 32 of 1954.¹² Without such registration, the child born from a *sirri* marriage only has a legal relationship with his mother or his mother's family.

2. Overview of Inheritance

a. Definition of Inheritance

Inheritance in Arabic is called *al-irts* etymologically and has several meanings, including eternal. Besides that, it means moving. If it is said, *waritsa fulanan* means moving to him the property of so-and-so after he dies. Al-Mirats or *al-irts* are what are inherited.³ As for the term *shar'i* inheritance or *al-irts* is the transfer of something (property and including rights, especially those related to property) from one person to another because of the relationship of *nasab* (relatives), marriage or *wala'* (freeing from slavery).⁴

In another expression, *fiqh mawarits* is the science of sharia laws governing the transfer of property and rights related to property from one person to another because of the relationship of lineage, marriage or *wala'*, which is inferred from detailed arguments.

In the Compilation of Islamic Law article 171 (a), it is stated that inheritance law is the law that regulates the transfer of ownership rights of the inheritance (*tirkah*) of the heir, determining who is entitled to become heirs and how many parts each.⁵

b. Causes of Inheritance

Cause in language is a rope, or anything that conveys it to another. Whereas in terms of *shara* because it is to make a real and definite nature as a dependency on the existence of the law, namely prevalent with the existence of it

² *Kompilasi Hukum Islam di Indonesia*, (Direktorat Pembinaan Peradilan Agama Islam Ditjen Pembinaan Kelembagaan Islam Departemen Agama, 2001), h. 1.

³ Ibnu Manzur, *Lisan al-'Arab*, Jilid IX, (Kairo: Dar al-Hadits, 2003), h. 269

⁴ Al-Quraafi, *Az-Zakhira*, jld, XIII, (Dar al-Gharb al-Islami, 1994), h. 7.

⁵ *Undang-undang R.I. Nomor 1 Tahun 1974 Tentang Perkawinan & Kompilasi Hukum Islam*, (Bandung: Citra Umbara, 2015), h. 375.

there is a law.⁶ Thus, the existence or absence of inheritance depends on the existence of the cause, and if there is no it, then there is no inheritance law.

There are four reasons for inheritance:⁷

1. Nasab or relatives consist of *ashhabul furudh*, *'ashabah* and *zawil arham*. Nasab or relatives referred to here is any relationship caused by birth which includes the origin of the deceased, his descendants, as well as his siblings, both biological father and mother.
2. Legal marriage
The marriage that causes mutual inheritance between husband and wife is the existence of a valid marriage contract between them, whether there is *dukhul* or not. If one of the husband and wife dies before the *dukhul*, the spouse left behind is entitled to inheritance. This is because the verse stating the right to inherit between husband and wife is general. After the valid marriage contract, they are said to be husband and wife. In addition, the Prophet gave a verdict on the case of Barwa' bint Wasyiq where the husband died before intercourse, that Barwa' is entitled to have the entire dowry, must undergo an *iddah* period and is entitled to inheritance, If one of the husband and wife dies, and at that time a valid marriage bond still exists between them, they have never divorced, or a divorce has occurred, but the wife is still in *iddah thalaq raj'i*, then the party left behind is entitled to inheritance. The *zaujiyyah* (marriage bond) in the *iddah* period of *thalaq raj'i* still exists because the husband may refer to the wife without a new marriage contract and *mahr*. However, if the wife has completed the *iddah* period of *thalaq raj'i* or she is in the *iddah* period of *thalaq bain* then if one of the husband or wife dies, the party left behind is not entitled to inheritance due to the loss of the cause of inheritance between them.⁸
3. By freeing a person from slavery (*wala'*).
4. *Jihatul Islam* (Islamic relationship). If someone who dies does not have heirs, then the inheritance is handed over to Baitul Mal for the benefit of Muslims.

The same thing is also stated in the Compilation of Islamic Law article 191, which reads: If the testator leaves no heirs at all, or the heirs are not known to exist or not, then the property by the decision of the Religious Court is handed over to the control of Baitu Mal for the benefit of Islam and public welfare.⁹

c. *Mani'* (barrier) of inheritance

Mani' means a barrier between a person and something he wants, which is the antonym of giving. *Mani'* what prevents from obtaining something. Meanwhile, in terms of *shara' mani'* is an external and definite trait prevalent in

⁶ Asy-Syaukani, *Irsyad al-fuhul*, (Kairo: Al-Halabi, 1937), h. 6.

⁷ J.Satrio, *Hukum Waris*, (Bandung: PT. Citra Aditya Bakti, 1990), h. 141-144.

⁸ Sitti Suryani Syarifuddin, *Fiqh Mawarits Pembagian Warisan Menurut Syariat Islam*, Cet-I, (Banda Aceh: Percetakan Bandar, 2022), h. 14.

⁹ Instruksi Presiden Nomor 1 Tahun 1991 tentang Kompilasi Hukum Islam (KHI)

its presence. There is no law or cancelling the cause. So if there is one of the following things: the heirs with a marriage bond or nasab relationship (relatives) with the deceased person are deprived of the right to get the inheritance. Mani' in inheritance are:¹⁰

1. Enslaved people: an enslaved person does not get an inheritance from his family, who died until he is free.
2. Different religions between the heirs and the testator. If someone dies and the heirs are of a different religion, the heirs are not entitled to inheritance from the deceased's family. Vice versa, Muslims are not entitled to inheritance from disbelieving families.
3. Apostasy: a person who leaves Islam does not get an inheritance from his family who still adheres to Islam. Vice versa, if he dies with the apostate status, then his family also does not inherit the property left behind.
4. Murder: the person who kills his family is prevented from getting the inheritance of the person he killed.

3. Inheritance Rights of Children from *Sirri* Marriage According to Jurisprudence and Positive Law

a. According to Jurisprudence

As stated, underhand marriage, known as *sirri* marriage, fulfills the pillars and conditions of valid marriage but is not registered at the Office of Religious Affairs. In fiqh law, a marriage carried out by fulfilling the pillars and conditions of marriage is considered valid. So, a legal marriage results in the following law:

- It becomes halal to have sexual intercourse and have fun between the husband and wife.
- Mahar (dowry) given by the husband becomes the wife's property.
- The rights and obligations of husband and wife arise.
- The husband becomes the head of the family, and the wife becomes the housewife.
- Children born as a result of the marriage become legitimate children.
- The husband is obliged to pay for the life of his wife and children.
- Prohibition of marriage due to consanguinity arises
- The father has the right to be the marriage guardian for his daughter.
- If one of the parties dies, the other party has the right to be the guardian of both the children and their property.
- Husbands and wives are entitled to inherit from each other, and children born out of marriage and their parents can inherit from each other.¹¹

Thus, if a *sirri* marriage or marriage under the hand of fiqh is declared valid, then based on the information above, *sirri* marriage has a legal impact on the children born out of the marriage.

¹⁰ Ahmad Rofiq, *Hukum Islam Di Indonesia*, (Jakarta: PT. Radja Grafindo, 2000), h. 35

¹¹ Mohd Idrus Ramulyo, *Hukum Perkawinan Hukum Kewarisan Hukum Acara Peradilan Agama Dan Zakat Menurut Hukum Islam*, (Jakarta, Sinar grafika, 2000), h. 22-23.

b. According to positive law

in this case, Islamic law has been promulgated into National Law in Indonesia. In this case, it is Law Number 1 of 1974 concerning Marriage. According to the Law on Marriage, Number 1 of 1974 in Article 2 paragraph (1), a new marriage is said to be valid if it is carried out in accordance with the provisions of their respective religions and beliefs and if you refer to article 2 paragraph (1) it is clear that the marriage lawfully submits to the provisions of their religion regarding the validity and invalidity of a marriage.

Based on these provisions, a marriage carried out by a male and female couple who have fulfilled the pillars and conditions of religious provisions is valid, so the children born to the married couple will also be valid in substance. However, the existence of the marriage is not legitimized legally because it is not recorded under applicable law. Likewise, there is still a long debate regarding children born from nikah sirri or underhand marriage.

According to the Compilation of Islamic Law (KHI) article 4, a marriage is valid if it is conducted according to Islamic law by article 2 paragraph (1) of Law Number 1 of 1974 concerning marriage, which states, "Marriage is valid if it is conducted according to the laws of each religion and belief". However, the marriage must be reported, registered, or registered at the Office of Religious Affairs or civil registration for non-Muslims.

This is in accordance with the provisions of Article 2 paragraph (2) of the Marriage Law, which states that "Every marriage shall be recorded in accordance with the applicable laws and regulations". Similarly, article 5 of the Compilation of Islamic Law (KHI) states: 1. To ensure the orderliness of marriage for the Islamic community, every marriage must be recorded. 2. The Marriage Registrar shall carry out the recording of the marriage mentioned in paragraph (1). As also regulated in Law Number 22 of 1946 jo. Law Number 32 of 1954.

Without marriage registration, children born to couples who enter a *sirri* marriage will only have a legal relationship with their mother or their mother's family. Article 42 of the Marriage Law states that "a legitimate child is a child born in or as a result of a legal marriage". Article 43, paragraph (1) of the Marriage Law states, "Children born outside marriage only have a civil relationship with their mother or their mother's family".

So, the child born out of wedlock can prove himself as the biological child of the testator. However, if you reflect on Article 285 of the Civil Code, which states that if there is recognition from the father, giving rise to a legal relationship between the testator and the extramarital child, then the recognition of the extramarital child must not harm the wife and biological children of the testator. This means that the extramarital child is considered invalid. Therefore, proving the existence of a legal relationship of the child from the *sirri* marriage does not cause him to inherit from his biological father (although technologically, it can be proven).

The act of not registering a marriage, even though the marriage has been carried out in accordance with Islamic teachings, is considered to have committed legal smuggling, aka not obeying the law. Indonesia is a State of law, and all Indonesians must comply with the laws of Indonesia. Law Number 1 Year 1974 is

the law of the State of Indonesia that regulates marriage. A marriage carried out without complying with the marriage law will have consequences for those who carry out the underhand marriage, their offspring and their property, including the inheritance rights of children against their father and mother. Likewise, a marriage carried out under the hand will not have legal force, not even recognized by the state in the occurrence of property problems, including the problem of joint property and the inheritance rights of children against the property of their father and mother. When there is a problem regarding the division of inheritance and when this problem is submitted to the Religious Court, the Religious Court cannot decide the matter because there is no legal basis for the status of the child, whether the child is the child of the heir or not, because there is no authentic evidence that can be used as a basis. An invalid marriage will have legal consequences for the child's inheritance rights, namely children who are produced or born from a marriage that is not recognized by the state, so the state will not want to know the problems that arise in the marriage, including the inheritance rights of children who are not recognized.¹²

Based on the explanation above, it can be understood that according to positive law, marriages that are not registered based on the applicable legal provisions do not have legal force, so if there are problems, such as disputes regarding the distribution of inheritance, then this cannot be processed through the court. This is very different from the provisions of fiqh law, which do not require marriage registration. Then, the *sirri* marriage becomes the basis for determining inheritance rights. However, the distribution is also based on Islamic law that applies to the family.

C. CONCLUSION

Sirri marriage, according to Islamic law, is a marriage carried out by a male and female couple based on religious provisions, namely a marriage that is carried out by fulfilling the pillars and conditions of marriage. *Sirri* marriage is considered valid according to Islamic law. Because a marriage carried out legally will also result in legal, religious law. Meanwhile, *sirri* marriage, according to positive law or according to the state, will have legal consequences for children who are born, namely not getting legal protection for children's rights, including the right to inheritance from their biological father and mother in the event of a dispute.

¹² Anshary, *Hukum Perkawinan Di Indonesia Masalah-Masalah Krusial*, (Yogyakarta, Pustaka Pelajar, 2010), h. 45

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