



## Marriage and Divorce Practices in the Society of Bandung: Contestation of Islamic and State Law

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### Abstract

*Differences in marriage and divorce law in Islamic and state law one of the triggers for the initial causes of the disorderly implementation of marriage and divorce in the Sukajadi Bandung community was an understanding regarding the separation of religious and state law as well as social welfare factors related to law enforcement. This study aims to analyze the legal consequences, factors, and legal remedies that can be taken in unregistered marriages and divorces. The method used in this study is empirical-juridical with a qualitative approach. This approach is carried out to obtain information that occurs in the Sukajadi Bandung community regarding unregistered marriages and divorces. The results of the study show that the factors behind the rampant practice of unregistered marriages and divorces are not recorded because people's understandings of the dichotomy between Islamic law and that of the state are different. There is a link between the legal awareness of the community and its understanding of religion and welfare. In addition, unregistered marriages and divorces have an impact on the absence of marriage, inheritance, custody, and maintenance, which are detrimental to children and wives. Several efforts need to be made to minimize the occurrence of unrecorded marriages and divorces, including counseling, legal assistance for divorce victims, mediation, and consultation. This effort does not only involve the government and law enforcers but also preachers, lektors, and social organizations.*

**Keywords:** Marriage, divorce, Islamic Law, state law

### Abstrak

Perbedaan hukum perkawinan dan perceraian dalam hukum Islam dan Negara Salah satu pemicu penyebab awal tidak tertibnya penyelenggaraan perkawinan dan perceraian pada masyarakat Sukajadi Bandung, hal ini terjadi karena adanya pemahaman terkait pemisahan hukum agama dan negara serta faktor kesejahteraan sosial terkait dengan penegakan hukum.



Penelitian ini bertujuan untuk menganalisis akibat hukum, faktor-faktor dan upaya hukum yang dapat dilakukan dalam perkawinan dan perceraian yang tidak dicatatkan. Metode yang digunakan dalam penelitian ini adalah yuridis empiris dengan pendekatan kualitatif, pendekatan ini dilakukan untuk mendapatkan informasi yang terjadi pada masyarakat Sukajadi Bandung tentang pernikahan dan perceraian yang tidak dicatatkan. Hasil penelitian menunjukkan bahwa faktor yang melatarbelakangi maraknya praktik nikah siri dan perceraian tidak dicatatkan karena pemahaman masyarakat terhadap dikotomi hukum Islam dan negara yang berbeda. Ada keterkaitan antara kesadaran hukum masyarakat dengan pemahaman keagamaan dan kesejahteraan. Selain itu, perkawinan dan perceraian tidak tercatat berdampak terhadap tidak adanya pernikahan, kewarisan, hak asuh dan nafkah yang merugikan anak dan Istri. Perlu dilakukan beberapa upaya yang dapat meminimalisir terjadinya pernikahan dan perceraian tidak dicatatkan, antara lain; penyuluhan, bantuan hukum bagi korban perceraian, mediasi dan konsultasi. Upaya tersebut tidak hanya melibatkan pemerintah dan penegak hukum, tetapi turut melibatkan para da'i, ustadz dan organisasi kemasyarakatan.

**Kata Kunci:** Perkawinan, Perceraian, Hukum Islam, Hukum Negara

## Introduction

Marriage is a solid inner and outer bond (*mitsaqan-ghalizha*) between a man and a woman to create an eternal and happy family in the *dunya* and the hereafter.<sup>1</sup> Prospective partners must be aware of the law and their responsibilities to achieve the marriage's goals. Therefore, all provisions mandated by religion and the State must be viewed as an attempt to attain happiness in the afterlife.<sup>2</sup>

Marriage laws in Islamic law and regulation must be implemented as proof that a person is a Muslim and a good citizen.<sup>3</sup> Marriage registration is one of the provisions that Muslims as citizens frequently ignore because it is not clearly regulated in Islamic law. However, this is governed by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 Concerning Marriage. According to Article 1 paragraph 1, marriage is lawful if it is conducted in accordance with the laws of each faith and belief. According to Article 2 paragraph 2, every marriage is documented in accordance with the applicable laws and regulations.<sup>4</sup>

The community views marriage solely as a means to fulfil fiqh requirements, ignoring the administrative interests of both partners as citizens and new families. This has resulted in widespread unrecorded marriage and unrecorded divorce. This is permissible from a religious standpoint, but it violates state regulations. Muslims, as citizens, must comply with state regulations in order to receive the State's intended benefits. Indonesia adheres to European-Continental law, which mandates that all matters be recorded and governed by applicable rules.

Particularly within Sukajadi Sub-district, the public's understanding of marriage and divorce registration must be enhanced. This is due to a lack of understanding, so it does not

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<sup>1</sup> Agus Hermanto, *Larangan Perkawinan: Dari Fikih, Hukum Islam, hingga Penerapannya dalam Legislasi Perkawinan Indonesia* (Yogyakarta: Lintang Rasi Aksara Books, 2016), 83

<sup>2</sup> M. Zamroni, *Prinsip-Prinsip Hukum Pencatatan Perkawinan di Indonesia* (Surabaya: Penerbit Media Sahabat Cendekia, 2019), 144

<sup>3</sup> Khaeron Sirin, *Perkawinan Mazhab Indonesia: Pergulatan antara Negara, Agama, dan Perempuan* (Yogyakarta: Deepublish, 2018), 121

<sup>4</sup> Undang-undang Nomor 16 Tahun 2019 tentang Perubahan atas Undang-undang Nomor 1 Tahun 1974 tentang Perkawinan.

result in the implementation of legislation-required awareness. Unrecorded marriages and divorces will significantly impact spouses and children born of the marriage.

These impacts include marriages and divorces that are invalid in the eyes of the law and are, therefore, incapable of protecting the rights and fulfilling the obligations of the husband, wife, and children. When a party violates their rights and responsibilities, the injured party has no legal recourse, and the violating party is not legally required to fulfil these responsibilities.<sup>5</sup> For instance, if the husband does not provide for his wife's maintenance or if the wife does not fulfil her responsibilities, this cannot be prosecuted. In other instances, the fulfilment of rights cannot be pursued, such as when one of the spouses dies, the heirs of both the wife and children born from an unrecorded marriage are not entitled to inheritance property in addition to joint property at the time of divorce. Those whose divorces are not recorded are considered to be legally married to their former spouse. It will be easier for them to remarry if their status as the husband or wife of the other party remains intact. According to the Marriage Law, children born from unregistered marriages only have a blood relationship with their mother. Under state law, they are not regarded as legitimate children. In addition, marriage and divorce should be recorded from the start to avoid the problems listed above, and marriage and divorce will be considered illegal.

As previously stated, marriage registration is still an important issue, particularly in Sukajadi sub-district, which is 730 metres above sea level and encompasses five Urban-villages, including Cipedes, Sukagalih, Sukawarna, and Pasteur, the largest village. Geographically, Sukajadi sub-district is bordered by Sukasari and Cidadap Sub-districts to the north, Cicendo to the south, Coblong to the east, and Cimahi City to the west. In addition, Sukajadi Sub-district contains 49 Community Units (RW) and 332 Neighbourhood Units (RT) per sub-district. Pasteur is once again the administrative region with the most Neighbourhood Units, with 13 Community Units and 92 Neighbourhood Units.<sup>6</sup>

In 2018, the total population of Sukajadi Sub-district was 110,356, equivalent to 23,594 families. The Sub-district with the largest population, 32,840, was tallied as Cipedes. This makes Cipedes the most populous village in Sukajadi Sub-district, with a population density of 624.31 inhabitants per hectare. Sukabungah also received the most rice for low-income people with 525 Family Cards out of 2,138 families in Sukajadi Sub-district.<sup>7</sup> It can be concluded that Sukabungah Urban-village, with approximately 25 cases of unregistered marriages and divorces, is the jurisdiction with the most cases of unregistered marriages and divorces, based on the results of field research. Subsequently, the data was confirmed by Sukajadi Religious Affairs Office to indicate that at least 25 couples did not register their marriages between January 1, 2019, and June 30, 2021. This information was only what has been disclosed. This case is like an iceberg; it requires a more profound and broader investigation to uncover the truth.<sup>8</sup>

In addition to the community's lack of legal awareness, the registration of marriages and divorces must be higher. This impacts the administrative issues faced by couples and children born of unrecorded marriages and divorces.<sup>9</sup> In the community of Sukajadi Sub-District, which contains 332 Neighbourhood Units, unrecorded marriages and divorces are still rife. In Sukabungah Urban-village, Cipedes, for instance, every child who enrolls in school has trouble

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<sup>5</sup> Mardani, *Hukum Keluarga Islam di Indonesia*, (Jakarta: Kencana, 2017), 58

<sup>6</sup> Hasil wawancara dengan kepala kecamatan sukajadi pada tanggal 23 April 2022.

<sup>7</sup> Didin Sarifudin, *Sukajadi dalam Angka 2018*, Badan Pusat Statistik Kota Bandung, 39

<sup>8</sup> Hasil wawancara dengan kepala kecamatan sukajadi pada tanggal 23 April 2022.

<sup>9</sup> Farid, D., Muhammad Husni Abdulah Pakarti, Usep Saepullah, Hendriana. "Fastabiq: Jurnal Studi Islam." *Fastabiq: Jurnal Studi Islam* 3, no. 1 (2022): 30–39. doi: <https://doi.org/10.47281/fas.v3i2.108>.

registering because they lack a birth certificate to prove they are a legitimate child. Regarding inheritance rights, divorced widows and widowers cannot be determined as heirs because their marriage was never registered.

Similarly, a widow or widower of a living divorce has difficulty registering a subsequent marriage due to the unrecorded divorce.<sup>10</sup> Field research conducted in Sukajadi Sub-district revealed at least three undocumented marriages and divorces. Imagine the effect on legal actors if the information was collected from every Urban-village. Researchers are interested in studying the phenomenon of unrecorded marriages and divorces in Sukajadi Sub-district, as indicated by the preceding description.

This study employed a library research whose data sources were books, scientific papers, and other documents categorised in the literature, with an empirical normative approach, namely research that utilised case studies in certain legal regions in the form of legal behaviour products.<sup>11</sup> This research began with written legal provisions applied to actual societal events.<sup>12</sup>

### **Legal Consequences of Unrecorded Marriages and Divorces**

Currently, under-armed marriages are still prevalent; this is due to several factors, one of which is that the community understands the law but disregards it, and some people are very unfamiliar with the law; this affects various facets of life, including marriage and divorce. The legal consequences of unrecorded marriages and divorces based on interviews with stakeholders in Sukajadi District area conducted on March 20, 2021, at 11.00, and the results of these interviews are: Inquiring about the existence of people whose marriages and divorces were not recorded; initially, the head of 11 Community Unit stated that all marriages of 11 Community Unit residents were registered at the Religious Affairs Office and were in compliance with applicable regulations; however, b) the head of 11 Community Unit subsequently The chairman of 11 Community Unit was surprised to learn of the residents' confession because communication was not going well.

The researchers subsequently inquired as to what efforts the head of 11 Community Unit would make to resolve the issue; thus, the head of 11 Community Unit urged his community to complete the administration of marriage and divorce at the Religious Court immediately.<sup>13</sup> The interviews indicated that the community's and local officials' legal knowledge in Sukajadi Sub-district must be improved, particularly in marriage and divorce.

In addition to interviewing the head of 11 Community Unit, the interview was also conducted with the head of Sukajadi Sub-district. According to the results of the interviews, the community's reluctance to undergo the procedure of recording marriages and divorces due to financial constraints was the most significant obstacle. Thus, this became an issue in the administration of the relevant documents, such as the absence of a marriage certificate; it is challenging to create a birth certificate for a child; even if a birth certificate is created, it cannot contain the father's name.<sup>14</sup>

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<sup>10</sup> Farid, D., Muhammad Husni Abdulah Pakarti, Mohamad Hilal Nu'man, Hendriana Hendriana, Iffah Fathiah. "Talak Perspektif Kesetaraan Gender: Perintah Tuhan Menerapkan Egaliter Di Dalam Rumah Tangga." *Tahkim, Jurnal Peradaban Dan Hukum Islam* 6, no. 1 (2023): 1-18. <https://doi.org/10.29313/tahkim.v6i1.10849>.

<sup>11</sup> Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: Universitas Indonesia Press, 2008), 10.

<sup>12</sup> Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, (Bandung: Citra Aditya Bakti, 2004), 52.

<sup>13</sup> Wawancara dengan H. Taufik Joesman pada tanggal 20 Maret 2021 Pukul 11.00

<sup>14</sup> Wawancara dengan Drs. Inci Dermaga Mustawan A., M.A.P, Kepala Kecamatan Sukajadi, tanggal 25 Maret 2021 Pukul 11.00

Mr Suhada, the Regional Leader of Muhammadiyah, was interviewed regarding marriage and divorce registration in the context of orderly legal administration. Mr Suhada stated that people must realise that Indonesia's legal situation and culture differ significantly from the past to the present. Under Law No. 1 of 1974 about marriage, the administration of related matters must be recorded with the state administration, as it is directly related to the needs of children, inheritance, and the rights of husband and wife.<sup>15</sup>

In addition, the legal consequences of unrecorded marriages and divorces include the inability to apply for a birth certificate with the father's name. In addition, the Education Office does not accept birth certificates without the father's name. When a divorce occurs, it cannot be processed by the Religious Court, so the couple cannot obtain a divorce certificate. Women do not have autonomy due to unrecorded marriages; for instance, they cannot present a marriage certificate if they want to borrow money and mention their marital status. Similarly, it is challenging to create a birth certificate; she cannot manage her own or her husband's pension, report domestic violence, or manage an inheritance. In addition to issues related to women's autonomy, couples, particularly women, experience additional consequences. Unregistered marriages are stigmatised as "to live together without being married", and this stigma is undoubtedly unsettling for both partners.<sup>16</sup>

Article 2 of government regulation number 9 of 1975 concerning the implementation of Law No. 1 of 1974 concerning marriage authorises two institutions to record marriages: the Religious Affairs Office for Muslim couples and the Population and Civil Registry office (known the Civil Registry Office) for non-Muslim couples.

Unrecorded marriages impact women because a woman's status as a wife is not recognised by the State, which impacts the recognition of her children as their father's children.

1. Not being able to apply for a birth certificate with the father's name on it.
2. Not being able to apply for a divorce and obtain a divorce certificate from the religious court.
3. Women do not have autonomy; for example, they cannot show their marriage certificate when borrowing money and mentioning their marital status.
4. Unable to apply for a pension for herself or her husband's pension,
5. Cannot report when she has experienced a domestic violence case.
6. Not being able to apply for a passport or visa for Umrah and not being able to use it for inheritance.
7. Being stigmatised as a couple living together without marriage or often called "to live together without being married".

### **Factors Affecting Unrecorded Marriages and Divorces in Sukajadi Sub-district Community**

Religious leaders generally view marriage registration as unnecessary, as no Ulama has ever mandated its requirement. Some religious leaders, on the other hand, view marriage registration as a positive endeavour. In addition, they lament the fact that religious figures are

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<sup>15</sup> Farid, D., Hendriana Hendriana, Muhammad Husni Abdulah Pakarti. "Analisis Metode Penafsiran Hakim Tentang Perkawinan Beda Agama (Studi Kasus Penetapan No. 959/Pdt.P/2020/Pn. Bdg Dan Penetapan No.71/Pdt.P/2017/Pn Bla)." *Usrah: Jurnal Hukum Keluarga Islam* 5, No. 2 (2022): 118-132. Doi: <https://doi.org/10.46773/Usrah.V3i2.549>.

<sup>16</sup> Kustini dan Nur Rofiah, *Perkawinan tidak Tercatat: Pudarnya Hak-Hak Perempuan* (Studi di Kabupaten Cianjur), *Jurnal Multikultural & Multireligius*, Vol. 12, No. 2, 77.

involved in unregistered marriages. There are unrecorded marriages for religious, legal, sociocultural, and economic reasons.

1. Religion

- a. The view that registration of marriages is not mandated by religion;
- b. The view that religion does not require the permission of the first wife for polygamy;
- c. The view that religion permits the practice of mut'ah marriage;
- d. The belief is that if a state regulation conflicts with religious teachings, the religious teachings should prevail. Likewise, government-determined marriage registration is not considered to be commanded by religion.
- e. The belief that widows could marry without the permission of their guardians resulted in many widows secretly marrying outside of the State-required marriage procedures.
- f. Efforts to criminalise individuals other than marriage officers criminalise Sharia because marriage is part of Sharia guidance.
- g. Existence of religious figures as the primary actors who marry unregistered couples.

2. Law

Better public legal awareness so that every member of society knows, understands, realises, and carries out their rights and responsibilities as citizens and citizens of society and respects human rights daily. Community legal awareness must begin in the home with young children. In reality, however, particularly in Sukajadi Sub-district community, some people do not know the marriage and divorce registration rules, others know the rules but disregard them, and others do not know the registration laws; however, follow them.<sup>17</sup> Many married couples, particularly those who have never interacted with the administration, view their unregistered marriages as equivalent to other marriages due to lax law enforcement.

3. Socio-cultural

*Insufficient Age*

Underage marriage is an additional contributor to unrecorded unions. According to Kustini, marriages between minors are still prevalent in the community. This is demonstrated in the underage marriage perpetrators who petition the local religious court for a marriage dispensation. Parents assume that a girl's marriage will reduce the family's economic burden because her husband will now be responsible for her.

*Polygamy*

The difficulty of polygamous rules for second, third, and subsequent marriages stems from the fact that the conditions for polygamy outlined in the marriage law, namely obtaining permission and consent from the previous wife, must be satisfied. In addition, because permission from the wife is difficult to obtain, the husband performs a religious marriage ceremony; however, unregistered known as *Siri* marriage.

4. Economy

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<sup>17</sup> Farid, D., Abdulah Pakarti, M., Hendriana, H., & Fathiah, I. (2022). Interfaith Marriage: Subjectivity of the Judge in Determination of No. 454/pdt.p/2018 Surakarta District Court. *Al-Istinbath: Jurnal Hukum Islam*, 7(2 November), 347-362. doi:<http://dx.doi.org/10.29240/jhi.v7i2.4574>.

The primary factor influencing the non-recording of marriages and divorces is economic difficulties. This is because, in the past, the community believed that registering a marriage required much money and complicated procedures. Moreover, modern society would benefit from a custom requiring the bridegroom to pay the dowry and the cost of the wedding feast, thereby requiring people to conduct halal marriages.

**Table 1.1 The following is data on individuals with unrecorded marriages:<sup>18</sup>**

<b>Name</b>	<b>Address</b>	<b>Reason Not Recorded</b>	<b>Purpose</b>
Sari	07 Neighborhood Unit/04 Community Unit	Polygamy	Inheritance
Rani Feriyanti	08 Neighborhood Unit/04 Community Unit	Underage	Child birth certificate
Warsih	10 Neighborhood Unit/04 Community Unit	Religious marriage	Administration
Rahmat	05 Neighborhood Unit/05 Community Unit	Assumption that religious marriage is sufficient	Joint property
Supriatin	10 Neighborhood Unit/04 Community Unit	Polygamy	Administration
Nia Rapidianti	03 Neighborhood Unit/04 Community Unit	Divorce not recorded	Remarriage
Iis	06 Neighborhood Unit/11 Community Unit	Husband does not bring marriage requirements	Birth certificate
Tati	05 Neighborhood Unit/11 Community Unit	Feeling old	Inheritance
Eni	07 Neighborhood Unit/10 Community Unit	Polygamy	Administration
Kartika	03 Neighborhood Unit/10 Community Unit	Ignoring the law	Birth certificate
Irma Komala	04 Neighborhood Unit/01	More trust in the cleric (Ustadh)	Birth certificate

<sup>18</sup> Sumber dari hasil survei lapangan oleh peneliti ke tempat penelitian dan hasil wawancara kepada masyarakat yang melakukan praktik perkawinan dan cerai tidak tercatat, pada tanggal 23 Juli 2022.

Devi	Community Unit		
Riani	04 Neighborhood Unit/01 Community Unit	Not approved by parents	Birth certificate

Initially, the community viewed the recording of marriages and divorces as unimportant, but when faced with administrative requirements, the community realised the significance of recording. By analysing some of the data in the table above, it can be concluded that unrecorded marriages continue to occur in Sukajadi Sub-district. One of the reasons is the need for a greater understanding of marriage and divorce registration laws.

### Legal Handling Efforts for Unrecorded Marriages and Divorces

#### *Counselling*

Legal counselling activities improve society so that each community member understands and abides by his or her rights and responsibilities as a citizen and realises a legal culture in a manner that is conscious, obedient, law-abiding, and respectful of human rights. Legal counselling activities include disseminating information and understanding the applicable legal norms, laws, and regulations. With legal counselling, it is hoped that the community will become aware of all applicable laws and regulations. Once aware, the community will comprehend the material and content contained in laws and regulations, motivating the community to respect and obey all applicable laws and regulations.<sup>19</sup>

The community is educated on the significance of marriage registration and the necessity of registration for achieving a *sakinah* family. The following steps are taken when conducting counselling: Coordinating with local authorities, providing qualified resource individuals, and inviting the community.<sup>20</sup>

In addition, there are unique regulations regarding legal counsel in Indonesia. Furthermore, legal advice is part of the legal fiction principle. According to the Regulation of the Minister of Law and Human Rights No. M.01- PR.08.10 of 2006 Concerning Legal Counselling Patterns, legal counselling is one of the activities of disseminating information and understanding applicable legal norms and laws. The objective is to realise and cultivate public legal awareness to establish a legal culture compliant with legal norms and legislation.<sup>21</sup>

According to Muhammad Yunus Affan, director of the National Law Development Agency (BPHN), Legal Counselling and Assistance Centre, the legal counselling mechanism has evolved. The public may directly visit BPHN, the Regional Office of Law and Human Rights in their place, or use the provided online system to submit questions. Additionally, BPHN utilises additional communication channels. "Our online legal counsel is provided through legal-savvy channels with legal consultation capabilities," he explained.

Legal aid consultations, lectures and discussions, legal awareness meetings, simulations, socialisation, and legal awareness competition exhibitions are examples of direct legal aid –

<sup>19</sup> <https://lampung.kemenkumham.go.id> di akses pada tanggal 22 Oktober pukul 22.00 WIB.

<sup>20</sup> Farid, D., Muhammad Husni Abdulah Pakarti, Usep Saepullah, Hendriana. "Fastabiq: Jurnal Studi Islam." *Fastabiq: Jurnal Studi Islam* 3, no. 1 (2022): 30–39. doi: <https://doi.org/10.47281/fas.v3i2.108>.

<sup>21</sup> Pakarti, Muhammad. 2022. "Putusan Hakim Pengadilan Negeri Surakarta Terhadap Perkawinan Beda Agama Yang Legal Secara Hukum Negara". *Mutawasith: Jurnal Hukum Islam* 5 (2), 99-110. <https://doi.org/10.47971/mjhi.v5i2.445>.



second indirect legal counselling, disseminating legal information through online and print media. The expansion of legal counselling tools due to technological advancements includes films, outdoor advertisements, running text, pamphlets, booklets, and fillers. Currently, technology increasingly facilitates counselling activities. Direct legal counselling activities are now shared through social media and the Legal Counsel Center's website.

#### *Consultation*

Legal consultation is a legal service consisting of advice, explanation, information, or direction provided to people with legal issues to assist them in resolving those issues per applicable laws and regulations. People who are eligible for legal consultation have legal problems. The phases of the consultation activity are as follows:

- a) A person litigating or has a problem that must be resolved legally through a religious court has made a request.
- b) The principal will explain the entire problem during the consultation.
- c) After understanding the issue, the mediator must provide a response and legal justification for his opinion on behalf of the principal.

#### *Mediation*

Article 2, paragraph 2 of Supreme Court Regulation No. 1 of 2008 stipulates that the mediator judge and parties must follow the dispute resolution procedure through mediation before proceeding with the main case procedure. Since this process is also an integral part of the court, the judge must follow the settlement procedure through mediation; if the judge does not follow the procedure, the judge's decision may be declared null and void.

#### 1. Handling of Legal Aid to the Court and Religious Affairs Office

Based on the issues that have been previously mentioned. The economy and the cost of processing cases primarily influence community disobedience in marriage and divorce registration administration. Case-handling assistance for religious courts is the actual effort that the community can directly perceive and receive.

Each religious court has a prodeo quota for those who wish to resolve civil cases within the religious court's jurisdiction but are financially constrained. In addition to the courts that provide special quotas for resolving these cases, there are Legal Aid Institutions that have been accredited by submitting case-related documents and a certificate of poverty, in collaboration with the Ministry of Law and Human Rights, in order to assist those who are constrained by economic issues.

Legal assistance is required even during the judicial process to assist the community in resolving their legal issues because not all levels of society understand the litigation procedure. An advocate is a party who can provide legal assistance until the conclusion of the judicial process. Law No. 16/2011 on Legal Aid emphasises that everyone has the right to legal aid, ensuring that only people experiencing poverty are eligible for free legal aid. Access to legal assistance is no longer restricted to the wealthy.

#### 2. Marriage determination

Marriage determination is a legal remedy for the provisions governing Muslim marriages in Indonesia in addition to the provisions on legislation that require marriage registration so that the marriage will receive an official marriage certificate; there are additional provisions governing Marriage determination, namely; is a legal effort that can be made to obtain state

recognition for unrecorded marriages by submitting a marriage determination.<sup>22</sup> Article 7, paragraph (2) of the Compilation of Islamic Law states: "If a marriage certificate cannot prove a marriage, an Marriage determination may be submitted to the Religious Court," and paragraph (3) states: "The Marriage determination that may be submitted to the Religious Court is limited to matters about the marriage." The court's jurisdiction is limited to the following:

- a) Marriage status in the context of marriage settlement;
- b) The loss of a marriage licence;
- c) Existence of doubts regarding the validity of a marriage.
- d) The existence of a marriage performed before the enactment of Law No. 1 of 1974; and
- e) Marriages performed by those who do not have a marriage impediment according to Law number 1 of 1974.

Article 4 of the Compilation of Islamic Law states, "Husband or wife, their children, marriage guardians, and interested parties may apply for *itsbat nikah*." The provision that allows Marriage determination, as stipulated in Article 7 of the Compilation of Islamic Law, indicates that the regulations in force in Indonesia recognise the validity of an unrecorded marriage and, for the reasons listed in the details of paragraph (3) of the Compilation of Islamic Law, the marriage can be recorded and be determined; administratively, this situation recognises the marriage.<sup>23</sup> Article 7 of the Compilation of Islamic Law has also provided opportunities for unrecorded marriages to register themselves correctly; this condition is also considered to benefit the perpetrators of unrecorded marriages;<sup>24</sup> in addition, it is the responsibility of the authorised institutions to provide opportunities for people who want to realise that their marriage is legally recognised so that it has superior legal force.

The Marriage determination procedure is the existence and independence of the Religious Courts since the birth of Law Number 3 of 2006 concerning amendments to Law Number 7 of 1989 concerning Religious Courts, where the Religious Courts have the same position as other courts and one roof under the Supreme Court; consequently, the Religious Courts are required to implement the law as effectively as possible as an institution that serves the public in seeking justice. Marriage determination is a case in which there is neither a dispute nor a volunteer, and the Religious Courts have the authority to handle it if the law requires it.

In general, the court does not actively seek out cases. Article 7 of the Compilation of Islamic Law has granted the Religious Court broad, absolute jurisdiction over the Marriage determination case. Marriage determination is a petition to legalise and recognise a previously performed marriage contract without authentic proof of marriage. The procedures that the applicant must complete are as follows:

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<sup>22</sup> Muhammad Husni Abdulah Pakarti, Iffah Fathiah. "Itsbat Nikah Sebuah Upaya Mendapatkan Mengakuan Negara." *Tahkim, Jurnal Peradaban Dan Hukum Islam* 5, no. 2 (2022): 21–42. <https://doi.org/10.29313/tahkim.v5i2.10064>.

<sup>23</sup> Muhammad Husni Abdulah Pakarti. 2022. "Putusan Hakim Pengadilan Negeri Surakarta Terhadap Perkawinan Beda Agama Yang Legal Secara Hukum Negara". *Mutawasith: Jurnal Hukum Islam* 5 (2), 99–110. <https://doi.org/10.47971/mjhi.v5i2.445>.

<sup>24</sup> Nuryamin, Nuryamin, Diana Farid, Muhammad Husni Abdulah Pakarti, Hendriana Hendriana, and Mohamad Hilal Nu'man. 2023. "Putusan Hakim Dalam Menuntaskan Sengketa Perkawinan Poligami Di Indonesia". *JUSTISI* 9 (2):133–44. <https://doi.org/10.33506/jurnaljustisi.v9i2.2303>.

- a. As applicants, the husband or wife, widow or widower, children, marriage guardian, and other parties interested in the marriage process file a written petition with the court;<sup>25</sup>
- b. The application is submitted to the Religious Court in the applicant's place of residence, and it must include the following information: a) The party's identity (applicant or applicants); b) Posita or the reasons/arguments supporting the petition; and c) Petition or the matter for which a court decision is sought.

Article 39, subsection (4) of Minister of Religious Affairs Regulation No. 3 of 1975 contains the provision regarding Marriage determination. This provision only applies to marriages before the passage of Law Number 1 of 1974 and not to marriages after the law's enactment. This provision permits the Religious Courts to exercise their jurisdiction in this matter for reasons other than Marriage determination that occurred before the enactment of Law No. 1 of 1974, based on the individual interpretation and judgment, to provide applicants with a sense of justice. Often, the submission of Marriage determination is accompanied by the submission of the legitimacy of children born from unrecorded marriages to obtain the same validation as Marriage determination; this is due to the emergence of phenomena in society if children born cannot be recognised by civil records as children born from legal marriages, so careful consideration is required because many phenomena in some areas of Indonesia do not accept if their children are declared baptised. There is only a civil relationship with the mother, and the father's name is not mentioned.<sup>26</sup>

Because it is common for a man to deny a child conceived by a wife, as explained in Article 44 of Marriage Law Number 1 of 1974 and Article 102 of the Compilation of Islamic Law, the submission of children included in the Marriage determination must be authentically proven by the person concerned. Paragraph (2) of the law authorises the court to decide whether the child is legitimate at the request of an interested party.<sup>27</sup> The court requires a procedure for determining whether a child is legitimate under existing law's applicable procedures and rules. Article 55 of Marriage Law Number 1 of 1974 states:

- a. The only way to prove the origin of a child is with an authentic birth certificate issued by an authorised official.
- b. If the birth certificate referred to in paragraph (1) of this article does not exist, the court may determine the origin of a child after a careful examination of qualified evidence; and
- c. Under the court's order specified in paragraph (2) of this article, the birth registration agency within the court's jurisdiction shall issue a birth certificate for the child in question.

One of the supporting pieces of evidence is that the child is only in the custody of a woman who knows whose seed she is carrying. However, this condition will lead to discrimination and put women in a difficult position because men can deny it. The problematic

<sup>25</sup> Farid, D., Muhammad Husni Abdulah Pakarti, Mohamad Hilal Nu'man, Hendriana Hendriana, Iffah Fathiah. "Talak Perspektif Kesetaraan Gender: Perintah Tuhan Menerapkan Egaliter Di Dalam Rumah Tangga." *Tahkim, Jurnal Peradaban Dan Hukum Islam* 6, no. 1 (2023): 1-18. <https://doi.org/10.29313/tahkim.v6i1.10849>.

<sup>26</sup> Ridwan, Ridha Romdiyani, Arfi Hilmiati, Muhammad Husni Abdulah Pakarti. Surat Ar-Ruum Ayat 21 Petunjuk Tuhan Untuk Menjalankan Nilai-Nilai Pendidikan Dalam Keluarga." *Usrah: Jurnal Hukum Keluarga Islam* 5, No. 2 (2022): 143-160. Doi: <https://Doi.Org/10.46773/Usrah.V3i2.558>.

<sup>27</sup> Nuryamin, Nuryamin, Diana Farid, Muhammad Husni Abdulah Pakarti, Hendriana Hendriana, and Mohamad Hilal Nu'man. 2023. "Putusan Hakim Dalam Menuntaskan Sengketa Perkawinan Poligami Di Indonesia". *JUSTISI* 9 (2):133-44. <https://doi.org/10.33506/jurnaljustisi.v9i2.2303>.

nature of the woman's proof causes women to despair. Demanding the husband's responsibility is another way to prove that the child is a legitimate offspring of an unrecorded marriage; this can be done through legal means as outlined in the Law on Child Protection Number 23 of 2002 article 13: "Every child while in the care of parents, guardians, or any other party responsible for care is entitled to protection from: a. Discrimination; b. Economic or sexual exploitation; c. Neglect; d. Cruelty." Cruelty, violence, and other forms of abuse, e. Injustice; and f. Other forms of mistreatment.

Suppose parents, guardians, or carers of children administer all of the treatments mentioned above. In such cases, the perpetrators face a maximum sentence of 5 years in prison and/or a maximum fine of IDR 100,000,000. Kustini continued that if it is not recorded, the marriage has no legal standing in the eyes of the State. Legally, the wife is not considered a legal wife; therefore, she has no right to maintenance or inheritance in the event of divorce or death.

## Conclusion

Many still need to comprehend the law governing marriage registration and unrecorded divorces, which impedes administration processes such as birth certificates, joint property, and inheritance. In addition to issues related to women's autonomy, couples, particularly women, continue to experience additional consequences. Couples with unregistered marriages face the stigma of living together without marriage, also known as "living together without being married." This stigma is certainly not reassuring. The non-registration of marriages and divorces in Sukajadi Sub-district is influenced by financial and legal awareness, insufficient age, and polygamy factors. Litigants are assisted with legal matters through legal counseling, consultation, mediation, and handling legal aid for the court and the Religious Affairs Office.

The suggestions for the government or other stakeholders on how these problems can be resolved include conducting legal counseling so that the community can gain insight into marriage and divorce; thus, the community understands that living in a legal state means obeying the rules of the state (laws) not only about religion but also the rules of the state; subsequently, what has happened immediately facilitates and provides legal assistance to the court in order to resolve the problem; and finally, break up the practice of unregistered marriages and divorces from an early age and do not transmit it to our descendants.

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