

Negotiation of Islamic Law and Positive Law Perspectives in the Wife's Inheritance Rights in Unregistered Marriage

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Abstract

The phenomenon of unregistered marriages in practice often raises legal issues, including matters related to inheritance rights for wives after the husband passes away. Qualitative research in the form of normative Islamic law studies aims to describe the position of a unofficial wife as an heir from the perspective of Islamic inheritance law and positive law. This study uses the Systematic Literature Review (SLR) analysis model. The research data uses scientific literature discussing Islamic inheritance in cases of unregistered marriages. Research results show that although a non-official wife is not recognized as a legitimate heir according to positive law, she can receive the husband's inheritance through a *wasiat wajibah* based on a court decree referring to the legal justice consideration by the judge, with the provision of a maximum of one-third of the total inheritance. The contribution of this research emphasizes that the position of a mandatory will can serve as a negotiation medium for the wife regarding the potential right to receive the husband's inheritance in cases of unregistered marriage.

Keywords: Islamic Inheritance, Unregistered Marriage, Wife, Wasiat Wajibah.

Abstrak

Fenomena perkawinan siri (perkawinan yang tidak tercatatkan oleh administrasi Negara) dalam ranah praktisinya sering menimbulkan persoalan hukum, antara lain berkaitan hak waris bagi isteri pasca suami meninggal dunia. Penelitian kualitatif dalam bentuk studi hukum Islam normatif ini bertujuan untuk mendeskripsikan kedudukan istri siri sebagai ahli waris dalam perspektif hukum waris Islam dan hukum positif. Penelitian ini menggunakan model analisa Systematic Literature Review (SLR). Data penelitian ini menggunakan literature ilmiah yang membahas tentang waris Islam dalam kasus nikah siri. Hasil penelitian menunjukkan meski istri siri tidak diakui sebagai ahli waris sah menurut hukum positif, namun dapat menerima harta peninggalan suami melalui wasiat wajibah berdasarkan penetapan Pengadilan mengacu pada konsideran keadilan hukum oleh hakim, dengan ketentuan maksimal sepertiga dari seluruh harta warisan. Kontribusi penelitian ini menegaskan posisi wasiat wajibah dapat menjadi medium negosiasi bagi isteri terkait potensi hak mendapatkan harta peninggalan suami dalam kasus nikah siri.

Kata Kunci: Waris Islam, Nikah Siri, Istri, Wasiat Wajibah

INTRODUCTION

In the context of marriage, Islam views the marriage contract as a sacred agreement that not only legitimizes the biological relationship between a man and a woman, but also generates reciprocal rights and obligations. In this regard, Islamic jurisprudence scholars hold that the law regarding marriage can change according to circumstances, ranging from permissible (*mubah*), disliked (*makruh*), recommended (*mandub/sunnah*), obligatory (*wajib*), to forbidden (*haram*). However, the development of social practices in Indonesia shows the emergence of the phenomenon of unregistered marriages (*nikah siri*).

Nikah siri is a marriage contract carried out in accordance with the pillars and conditions of a valid marriage in Islam, but it is not registered at the Office of Religious Affairs. This practice is usually conducted only by involving a guardian, witnesses, and a marriage officiant or ustaz, without official administrative procedures. Data from the Ministry of Religious Affairs in 2020 estimated that around 10–15% of marriages in Indonesia are unregistered, and most of them fall into the category of *nikah siri*. This raises legal problems, particularly concerning women's rights as wives

From the perspective of Islamic jurisprudence, an unregistered marriage (*nikah siri siri* marriage) remains valid as long as all the marital pillars are fulfilled: the presence of prospective husband and wife, a guardian (*wali*), two witnesses, and the marriage contract (*ijab kabul*). However, from the perspective of Indonesian positive law, a *siri* marriage is considered invalid because it does not comply with the provisions of Law Number 1 of 1974 concerning Marriage and Article 5 of the Compilation of Islamic Law, which emphasizes the importance of marriage registration. The absence of registration results in the marriage having no legal force and not receiving state protection. Consequently, questions arise regarding the legal status of a *siri* wife when legal events such as divorce or inheritance distribution occur. The direct impact of the state not recognizing a *siri* marriage is that the *siri* wife does not have the status of a lawful wife under positive law. As a consequence, the *siri* wife has no right to claim maintenance from the husband, has no rights over joint property (*gono-gini*) in the event of a divorce, and does not have the right to be an heir when her husband passes away.

The phenomenon above indicates a gap between Islamic legal provisions and positive law regulations in Indonesia. The general public is often confused about the legal status of a temporary (*siri*) wife in inheritance matters, because on one hand, Sharia recognizes the marriage as valid, but the state does not provide acknowledgment.

This qualitative research in the form of a normative Islamic law study aims to describe the legal position of a temporary wife as an heir from the perspective of Islamic inheritance law. The research problem that this study seeks to answer concerns how the position of a temporary wife as an heir is viewed under Islamic inheritance law, as well as what requirements and conditions must be met for a bequest to a temporary wife to be considered valid and legally binding.

Various previous relevant studies, including research by Prastiawan, Noviardana, and Salsabilla, discuss the position of informal marriage husbands as heirs, focusing on the considerations of judges in the decisions of the Religious Court. This study, on the other hand,

centers its analysis on the position of informal marriage wives as heirs in Islamic inheritance law. The main differences lie in the research subjects (informal marriage wives), the scope of the issues (inheritance distribution and the validity of wills), as well as the theoretical contributions aimed at providing solutions to contemporary family law problems in Indonesia (Prastiawan, Noviardana, and Salsabilla 2024). Then the research by Prasetya, Prasyanti, and Nisa shows that a common-law wife can receive a will depending on the intention and clarity in drafting the will (Prasetya, Prasyanti, dan Nisa, 2025).

The urgency of this research is to provide a comprehensive understanding of the position of informal wives in Islamic inheritance law in Indonesia, while also examining the possibility of legal protection through the mechanism of mandatory bequest or contemporary *ijtihad*.

RESEARCH METHODS

This study uses a qualitative approach with the type of research being library research. All data were obtained from other relevant scientific literature. The selection of this method is based on the research objective, which emphasizes normative and interpretative analysis of the position of a temporary wife in Islamic inheritance law (Azwar 2013)

Data collection was conducted through systematic literature review with steps of identification, selection, and evaluation of credible sources. The data were analyzed using a descriptive-analytical method, by describing the rules of Islamic inheritance law, then comparing and interpreting their relevance to the practice of unregistered marriage in Indonesia. The results of the analysis were structured in such a way as to produce a research report that is logical, systematic, and easy to understand (Siregar and Fahmi, n.d.)

RESULTS AND DISCUSSION

The Position of a Unregistered Wife in Islamic Inheritance Law

Islamic inheritance law is an important subject in legal education, especially for prospective lawyers and the Muslim community (Rozikin et al., 2025). This is because the practice of Islamic inheritance makes it important to understand the legal framework, principles, and related aspects such as pillars, conditions, causes, and impediments (Irfan et al., 2024). The evolution of Islamic inheritance law in Indonesia contributes to a broader discussion on the promotion of gender justice within the framework of Islamic legal principles (Jalaludin, A, 2024).

Inheritance law in Islam is part of the sharia that has been regulated comprehensively, fairly, and systematically. In this regard, the Qur'an, as the primary source of Islamic law, has provided detailed guidance regarding the rights of ownership of inheritance as well as the procedures for transferring ownership from the deceased to the heirs, whether they have kinship relations or marital relations. These provisions are reinforced in Surah An-Nisa, verses 7, 11, 12, and 176, which explicitly regulate the distribution of inheritance between men and women. Unlike other laws that are *ijtihadi* in nature, inheritance provisions in Islam are *qath'i* (definite) because only a few details are

explained through the hadith of Prophet Muhammad (peace be upon him) or the *ijtihad* of scholars. This emphasizes that inheritance matters are an important part of social justice that Islam seeks to realize in society (Masitoh, 2019).

A clandestine wife is a woman who is married through a marriage contract that fulfills the conditions and pillars according to Islamic law, but is not officially documented at the Office of Religious Affairs. From a religious perspective, a clandestine marriage is still considered valid if the marriage pillars are met, namely the presence of a guardian, witnesses, marriage offer and acceptance (*ijab kabul*), and the giving of dowry. However, from the standpoint of positive law in Indonesia, a clandestine marriage has no legal standing as affirmed in Article 6 of the Compilation of Islamic Law and Article 45 of Government Regulation Number 9 of 1975, which requires marriage registration in order to obtain legal force. The difference in recognition between Islamic law and state law causes problems when it concerns the rights of a clandestine wife in the field of family law, including inheritance distribution. In Islam, a clandestine wife potentially has inheritance rights if it is proven that her marriage contract is valid according to Sharia. However, under state law, the position of a clandestine wife is not recognized, which automatically results in her losing the right to become a legitimate heir of her husband. This indicates the existence of legal dualism that causes disadvantages for women.

The negative impact of the status of an unregistered wife is not limited to inheritance rights. An unregistered wife also potentially loses other rights such as the right to maintenance, legal protection within the household, and child custody rights. Nevertheless, Islamic law still provides room for recognition provided there is strong evidence of the validity of the marriage according to Sharia. Meanwhile, state law rejects any form of claims if not supported by official registration. Therefore, it can be concluded that the position of an unregistered wife in inheritance law is dilemmatic: recognized by Islamic law but not by the country's positive law.

Unlike the unregistered wife, a child born from an unregistered marriage still has certain rights, especially if the civil relationship with the biological father can be proven through valid evidence such as a DNA test. Children resulting from an unregistered marriage have rights to recognition, maintenance, education, and even a portion of inheritance, although the legal procedures they undergo are more complicated compared to children from a registered marriage. This indicates that there is stronger legal protection for children compared to children from informal marriages.

Wasiat Wajibah: Compromising Media Solution for the Wife's Inheritance Rights in Unregistered Marriage

The study of Islamic family law has become one of the most dynamic areas of Islamic legal studies, in line with changes in social, cultural, and gender relations within society (Rozikin et al., 2025). This conclusion serves as the main focus of discussion in this research, which examines the inheritance rights of wives in unregistered marriages.

Theoretically, a *wasiat* is the transfer of ownership of something to someone after the owner has passed away. In the Compilation of Islamic Law in Indonesia, a *wasiat wajibah* will

is defined as the giving of an object from the testator to another person or institution that *wasiat wajibah* take effect after the testator passes away (Muntasir and Mukhlas, 2024). In the case of a customary marriage wife not having the status of an heir under state law, a *wasiat wajibah* becomes one of the alternatives that allows the husband to give part of his assets to the customary marriage wife after his death. The *wasiat wajibah* itself is regulated in both the KHI and the Civil Code, with the definition as the transfer of rights or assets that takes effect after the testator passes away (Article 171 letter f KHI). Thus, although civil inheritance law rejects inheritance claims from a customary marriage wife, Islamic law still provides room for the giving of assets through the mechanism of a *wasiat wajibah*.

Wills in the KHI can be in written or oral form, as long as they are witnessed by at least two trustworthy witnesses. Meanwhile, the Civil Code is stricter, as it only recognizes wills that are made in the form of a deed. This demonstrates a fundamental difference between the two legal systems, even though both regard wills as a valid legal instrument. Furthermore, Articles 194–195 of the KHI regulate that the testator must be at least 21 years old, of sound mind, not under duress, and the property bequeathed must be the legitimate property of the testator.

Limitations on the giving of a will are also strictly regulated, namely a maximum of one-third of the total inheritance, except if all legal heirs give their consent for more. Thus, the rights of a non-registered wife to her husband's inheritance can only be obtained through a will with these limitations. If the will exceeds one-third without the consent of the heirs, the excess portion is considered invalid.

From the perspective of the Qur'an, specifically QS. An-Nisa verse 11, the implementation of a *wasiat* must be carried out after the settlement of the deceased's debts, and then followed by the distribution of inheritance to the rightful heirs. This emphasizes that a will holds an important position in the Islamic inheritance system, while also serving as a mechanism that can accommodate the presence of parties who are not included as heirs, such as a cohabiting wife. Thus, it can be understood that although a cohabiting wife does not have rights as an heir under state law, she still has the opportunity to receive a portion of her husband's inheritance through a *wasiat wajibah* that is valid according to Islamic law. This will serves as a legal bridge between the limitations of state recognition and the need to provide protection for vulnerable parties in cohabiting marriages.

CONCLUSION

This study concludes that the absence of marriage registration by the state administration can have a direct impact on the legal status of an informal wife, including in terms of inheritance. From the perspective of Indonesian civil law, an informal wife is not recognized as a legitimate heir and therefore has no right to her husband's estate. However, under Islamic law, there is a mechanism that can allow an informal wife to still receive a portion of her husband's estate, namely through a *wasiat wajibah*. Such a will is only valid if it meets the applicable requirements, including: the amount given does not exceed one-third of the total inheritance unless agreed upon by all heirs, it is made legally either orally or in

writing witnessed by witnesses, the object of the will is clear, and the beneficiary of the *wasiat wajibah* can be correctly identified.

Based on the findings of this research as mentioned above, the contribution of this research emphasizes that the position of *wasiat wajibah* can become a negotiation concerning the potential inheritance rights of the husband for the wife in a customary marriage, although it still leaves limitations in legal protection for unregistered wives. The limitation of this research remains in theoretical study; a case study analysis of Religious Court decisions is needed.

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