THE LEGAL STUDY OF MARRIAGE REGISTRATION AND THE PROBLEMS OF ISBAT OF POLYANDRY MARRIAGE AND ITS LEGAL CONSEQUENCES FOR THE CHILDREN

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Abstract

One of the important issues in marriage law in Indonesia that seems to be endlessly discussed is the registration of marriages and divorces in The Religious Courts. This issue is still being hotly discussed not only by Islamic law experts (ulama) but also among ordinary people. The purpose of this study is first, to explain that when a woman has a husband and divorces isn't in the Court (her marital status is recorded), when she remarries (underhands marriage) with another man and then files for marriage confirmation (itsbat nikah); second, to analyze related to a woman who divorces not in the Court with her ex-husband (underhands marriage), then she remarries (underhands marriage) with another man and then files for marriage confirmation (itsbat nikah). The research method includes, the type of doctrinal legal research. The results of this study are that the Religious Court has the authority to annul a marriage if the marriage is considered invalid (no legal force), or if a marriage is considered not to meet the requirements of a marriage that has been determined, or if the marriage that has been carried out is known to have a legal defect as a result of a

lie and mistake or because of coercion. Meanwhile, the data collection technique in this study was carried out using several stages, starting with the collection of secondary data in the form of primary legal materials and secondary legal materials related to marriage registration and the problems of polyandrous marriage confirmation and its legal consequences for the children.

1. Introduction

The existence of law is intended to provide order for the society. Especially when it comes to social interactions between citizens. The absence of legal regulations regarding relations between citizens can give rise to chaos. So, the role of the state is very important to be present in the midst of these problems.

Marriage is a sacred institution and not just an ordinary bond. Because of this sacredness, the effects of the marriage bond give rise to rights and obligations as well as legal status between husband and wife. Islam, as a religion that has a comprehensive set of rules, has rules related to marriage. The Al-Qur'an and Al-Hadith as sources of Islamic law were read and studied by Islamic legal experts, so that what is now called Fiqh emerged.

One of the discussions of Islamic law that is directly related to the duties and functions of the Religious Courts is around the issue of marriage. The Compilation of Islamic Law as a law book or otherwise called a codified fiqh book which is a reference for law enforcers, especially judges in Religious Courts, has outlined provisions regarding marriage law in Book I of the Compilation of Islamic Law (In Indonesian abbreviation is KHI).

In addition to the Compilation of Islamic Law (In Indonesian abbreviation is KHI), several laws and regulations, such as Law Number 1 of 1974 in conjunction with Law Number 16 of 2019 concerning Marriage, Law Number 7 of 1989 in conjunction with Law Number 3 of 2006 in conjunction with Law Number 50 of 2009 concerning Religious Courts, also include formal and material regulations regarding marriage law.

One of the important issues in marriage law in Indonesia that seems to be endlessly discussed is the registration of marriages and divorces in the Religious Courts. This issue

is still being hotly discussed not only by Islamic law experts (scholar of Islam) but also among ordinary people. This happens because several rules in the regulation are considered relatively new in the sense that they have not been mentioned in the classical fiqh books that are the reference of the Indonesian people (especially the ulama or scholar of Islam), so that when they appear in the format of contemporary fiqh or new fiqh, it is as if these rules are not Islamic legal rules. One example of such regulation is regarding the provisions for registering marriages by the Marriage Registrar of the Office of Religious Affairs and mandatory divorce before a Religious Court hearing.

There are many practices in society that do not pay attention to these rules. For these groups, the important thing is that marriage is carried out according to the conditions and pillars as has been known so far. As for the issue of registration, this is not a mandatory practice. Likewise with divorce, the obligation to have a divorce before a court is something that is not written at all in several classical fiqh books, therefore this provision is often forgotten by society or if it may say, is not cared about by some of society. As a result, many people get married without being registered and many people simply get divorced without involving the courts, and assume that the divorce is valid according to the religion. As a result, there are differences in perception between society on one side and the state on the other.

When the state has rules but society does not follow them. So, in the end, his rights will not be protected because of his disobedience in carrying out his obligations as a citizen. So when the society needs the state protection, only then will they carry out their obligations. The problem does not stop, because in practice there are still many cases that leave legal problems related to this matter, especially those related to the registration of marriages and divorces in the court.

In the laws and regulations as contained in Article 2 paragraph (2) of Law Number 1 of 1974 in conjunction with Law Number 16 of 2019 concerning Marriage in conjunction with Article 5 of the Compilation of Islamic Law, it is essentially stated that every marriage must be recorded. The registration of marriage by an official state institution has the consequence that the state only recognizes a person's marriage if there is an authentic certificate that shows the existence of the marriage. So, when there is a marriage that is not registered, it has no legal force.

The state policy regarding the regulation on marriage registration actually still leaves a gap, when people who do not have a marriage certificate, one day they want their marriage to be registered. Therefore, Article 7 paragraph (2) and (3) of the Compilation of

Islamic Law (CIL) provides the opportunity to carry out marriage confirmation (itsbat nikah) at the Religious Court as an effort to legalize the unregistered marriage.

In contrast to the provisions for registering marriages, in the case of divorce, the laws and regulations in Indonesia do not appear to provide a loophole for carrying out divorce ratification. Article 39 of Law Number 1 of 1974 in conjunction with Law Number 16 of 2019 concerning Marriage in conjunction with Article 65 of Law Number 7 of 1989 in conjunction with Law Number 3 of 2006 in conjunction with Law Number 50 of 2009 concerning the Religious Courts, emphasizes that divorce can only be carried out in front of a court hearing. In these regulations, there is no loophole for divorce to be recognized not in the court.

This situation is something that people fail to pay attention to, when they carry out underhand divorce, assuming that the divorce is legal, until finally they get into new marriages. In this new marriage, they just considered the existence of a marriage certificate important. So of course itsbat is the only way to get state recognition regarding the marital status.

However, what still remains a problem is when the marriage confirmation is submitted to the Religious Court, of course the religious court will examine the marriage, and what will not escape the court's examination is the status of the previous marriage. When confirmed with the parties and also the witnesses in court, it was proven that the parties had been married before, but on the other hand they did not have authentic evidence in the form of a divorce certificate as the only certificate proving their divorce. So, it is at this stage that the problem begins to emerge, because it means that the parties who were previously married and divorced underhand are legally still bound by their previous marriage.

The problem will be more complicated when the position of the woman is there, when the woman has been underhand married and underhand divorced then remarried and filed for marriage confirmation (itsbat nikah) to the court. From a legal perspective, she is still bound by her previous marriage to another man before she married her new husband. This is what is called polyandry, which is clearly prohibited by Islam.

Based on the description of the background above, there are several problems that the researcher will discuss in this research, including:

a. How is the Registration of Polyandrous Marriages?
b. What are the Problems of Validating Polyandrous Marriages and the Legal Consequences for the Children?

2. Research Method

This type of research is doctrinal research or normative legal research. The approaches used are the statute approach, the conceptual approach and the comparative approach. Meanwhile, the analysis of legal materials uses descriptive qualitative analysis, namely by formulating and explaining significantly several legal issues that are the object of study in this research, and is an answer as a result of findings from research objectives through systematic and sequential thinking patterns

3. Results And Discussion

3.1. The Form of Registration of Polyandrous Marriage

Among Islamic jurists there are differences of opinion that seem never to end. Whether or not marriage registration can be included in the pillars of marriage. For some people, registering a marriage is not included in the category of pillars of marriage, so that by fulfilling the conditions and pillars that have been stated in the books of Islamic jurisprudence, the marriage is considered valid. This is different from other groups who want registration to be included in the marriage agreement. They believe that the pillars of marriage that have been mentioned in classical Islamic jurisprudence books are not absolute and that this is even an area of ijtihadi. Therefore, based on the methodology of ijtihad and the interpretation that they hold, they conclude that marriage registration can be included in the category of pillars of marriage.

In the debate, Indonesian scholars, especially those who participated in formulating several related regulations, seemed to be in the middle of the debate, this can be seen from Law Number 1 of 1974 concerning Marriage or in the Compilation of Islamic Law in which marriage registration is not included in the category of pillars of marriage, but on the other hand citizens must register their marriages. By not registering the marriage, the consequence that will be borne is that the marriage will not be legally recognized, which means that the state will not protect citizens who do not register their marriage. For example, in everyday life, the state has certain rules, which include the requirement for a marriage certificate. Such as performing the Hajj, Umrah, issuing a child's birth certificate or in several government policies such as the distribution of social assistance, usually requires a marriage certificate for those who are married, not to mention when there are legal problems in court such as inheritance disputes that require authentic evidence in the

form of a marriage certificate when explaining the marital relationship of the parties.

Some of the above circumstances make it difficult for citizens when they do not have a marriage certificate, and this is a consequence they must bear when state regulations are not complied with. Although the rules regarding marriage registration are not clearly stated in the Islamic texts of the Qur'an and Hadith or the fiqh books of classical scholars at that time. However, in subsequent developments, contemporary scholars began to become accustomed to using ijtihad as a problem solving tool for current realities. So the study of maqashid shari'ah becomes the answer when new problems are faced with Islamic law. Because theoretically, Islamic law is formulated by its formulator (Allah SWT). In general, the aim is to achieve benefit and avoid harm.[1]

Sheikh Jaad Al-Haq Ali Jaad al-Haq, an Egyptian mufti, divides the provisions governing marriage into two categories, namely sharia regulations and tawsiqi regulations. The sharia regulations referred to here are matters relating to the regulations that have been established by sharia, such as the conditions for the pillars of marriage that have been formulated by scholars in various schools of thought that are sourced from the Qur'an and the Hadith. As for the regulations that are tawsiqi in nature, they are additional regulations that are intended to ensure that marriages among Muslims are not illegal but are recorded by the agency that has the authority to do so.

This division, of course, is not intended so that every citizen can arbitrarily violate the rules related to marriage, because in the fatwa of the Mufti of Al-Azhar, he also emphasizes the importance of registering marriages, because compliance in registering marriages is an anticipation if it is necessary to deal with official court institutions or other government policies.

The main objective of registering marriages is to create orderly marriage administration in society, in addition to ensuring that the rights and obligations of husband and wife are upheld. This is a preventive state legal policy to coordinate its people in order to realize order and regularity in the life system, including in the matter of marriage which is believed to not be free from various irregularities and

[1] Satria Effendi M.Zein, *Problematika Hukum Keluarga Islam Kontemporer*, Cet ke-2, Jakarta: Kencana, 2004, hlm.29

disputes between husband and wife, therefore the involvement of the ruler/state in regulating marriage in the form of registration is a must.[2]

Therefore, the formulation regarding marriage registration does not conflict with Islamic law, even based on the maqashid sharia, especially in relation to the theory of welfare, marriage registration is a necessity that will provide legal and administrative order for every Muslim. In relation to this, the society needs to be educated that Islamic law is not just something written in a text, but can also be obtained from various legal ijtihad, when there is a new problem in the midst of society, or when existing laws cannot answer the problems that exist in society, then ijtihad is the solution.

Of course, to carry out ijtihad is not as easy as turning the palm of your hand, but it requires certain qualifications and even a factor of caution when carrying out ijtihad, especially now that many are proposing joint ijtihad (ijtihad jamai') which consists of expert scholars in their respective fields, so that the quality of an ijtihad will be better than just carrying out ijtihad individually.

In reality, there are still many Muslims who do not register their marriages with the local Religious Affairs Office, due to several factors, including; a) fiqh-centric and lack of understanding of the importance of registration; b) Negligence of the Priest; c) Implementation of marriage in front of an official who is not authorized to perform marriages; d) Marriage abroad.

To bridge the gap between people who do not register their marriages, Article 7 of the Compilation of Islamic Law provides an opportunity to submit a request for Marriage Confirmation to the Religious Court. This marriage confirmation itself is a trial process to validate a previous marriage that was not registered.

However, in this regulation, not all marriages can be confirmed, Article 7 paragraph (3) of the Compilation of Islamic Law states that matters that can be confirmed are limited to matters relating to; 1) The existence of a marriage in the context of divorce; 2) The loss of a marriage certificate; 3) The existence of doubts about the validity or otherwise of one of the conditions of marriage; 4) The existence of a marriage that occurred before the enactment of Law Number 1 of 1974 and 5)

[2] M. Anshari M.K, *Hukum Perkawinan di Indonesia*, Cet I, Yogyakarta: Pustaka Pelajar, 2010, hlm.18

Marriages carried out by those who do not have obstacles to marriage according to Law Number 1 of 1974.

Regarding to the authority of the Religious Court in examining cases of the Marriage Confirmation, especially marriages that occurred after 1974, in fact, among the judges of the Religious Courts themselves, there are still different views, whether the Court has the authority to examine cases of Marriage Confirmation whose marriages occurred after the enactment of Law Number 1 of 1974 concerning Marriage.

The first opinion states that marriages before 1974 can be confirmed, whereas marriages after 1974 cannot be confirmed. The argument built by this opinion is because Article 49 letter (a) number 22 of Law Number 3 of 2006 in its explanation only mentions the authority of the Religious Court in relation to marriage confirmation cases where the marriage event occurred before Law Number 1 of 1974. In addition, the case of marriage confirmation is generally a voluntary case (one-sided/without an opponent), so when a voluntary case is to be made the authority of the Religious Court, there must be a statutory provision that regulates and designates it. When the law does not regulate it (in relation to marriages after 1974) then the Court has no authority.

Meanwhile, in the Compilation of Islamic Law according to this opinion, viewed from the hierarchy of laws and regulations as regulated in Law Number 12 of 2011 concerning the Formation of Laws and Regulations, the Compilation of Islamic Law as the Executive Order is not included in the hierarchy of laws and regulations, and its level is far below the law, therefore the provisions of the Executive Order must not be in conflict with the Law.

Thus, when Law Number 3 of 2006 only states that marriages before 1974 can be confirmed, the provisions in Article 7 of the Compilation of Islamic Law must be interpreted to mean that marriages that can be confirmed are marriages before 1974.

As for the opinion that permits marriage confirmation after 1974, in terms of legal reasons, the Compilation of Islamic Law was compiled on the initiative of the State authorities, in this case the Chief Justice of the Supreme Court and the Minister of Religion (through a Joint Decree) and received recognition from scholars from various elements. Officially, the Compilation of Islamic Law is the result of a consensus (ijma') of scholars from various groups through workshops

held nationally which then received legalization from the state. The compilation of the Compilation of Islamic Law can be seen as a process of transforming Islamic law in unwritten form into statutory regulations.[3]

Besides that, the fact is that currently the Judges in the Religious Courts have made the Compilation of Islamic Law as a source of law in deciding cases they are handling, so from this brief argument, the Compilation of Islamic Law can be categorized as a binding regulation. By referring to Article 7 paragraph (3) letter € of the Compilation of Islamic Law, namely marriages carried out by those who do not have obstacles to marriage according to Law Number 1 of 1974. This article is usually used as legitimacy for the judges when accepting marriage confirmation cases (even if the marriage is after 1974). In the Marriage Law Number 1 of 1974, Article 2 paragraph (1) states that a marriage is valid if it is carried out according to the laws of each religion and belief.

Thus, as long as the underhand marriage that was carried out either before or after the Marriage Law was enacted in the context of marriage based on the Islamic religion has fulfilled the pillars and conditions and does not violate the prohibitions on marriage regulated in the Islamic religion and statutory regulations, especially the Marriage Law and the Compilation of Islamic Law, then the opportunity for the application for marriage ratification (itsbat nikah) is very large to be accepted/granted by the Religious Court.[4]

The researcher herself tends to follow the latter opinion, even though the marriage took place before 1974, the Court has the authority to examine the marriage confirmation case. Another reason that needs to be put forward is that it must be acknowledged that public awareness of the importance of marriage registration is not yet fully understood or even implemented by the public, including among the santri themselves. This is because the doctrine and knowledge of society through classical Fiqh books are still embedded, which do not require or have never even known the term marriage registration, in addition of course to the incomplete socialization factor from the government regarding the existence of this regulation,

[3] Cik Hasan Bisri, *Kompilasi Hukum Islam dan Peradilan Agama dalam Sistem Hukum Nasional*, Jakarta, Penerbit Logos Wacana Ilmu, 1999, hlm.8
[4] M.Khusnul Yakin, *Ratio Decidendi Penetapan Pengesahan (itsbat) Nikah di Pengadilan Agama*, Surabaya: Jurnal Yuridika FH UNAIR, 2015, hlm.275

plus it must be acknowledged that the government has not been optimal in being a good facilitator for orderly marriage administration.

Moreover, when talking about the aspect of welfare, the examination of the marriage confirmation must also be reviewed from the aspect of protection, both regarding the rights and obligations of the husband and wife, property in the marriage, and the children born from the marriage. It can be imagined what would happen if people did not have a way to validate their previously unregistered marriages, even though their marriages were previously in accordance with their religious laws, and now feel aware of the importance of registering their marriages. So, when their previous negligence was not due to bad faith, then if the unregistered marriage is a common phenomenon and is based on good faith or there is an emergency factor, then the judge must consider the application for confirmation of the marriage.

Thus, the opportunity for marriage confirmation is wide open for the community to carry out, when the marriage that has been carried out is hampered because it is not registered, of course the Judge must be careful regarding this examination, especially because this marriage confirmation is a voluntary/application case which is vulnerable to legal smuggling because there is indeed no opponent who can correct the arguments that are submitted. When previously the marriage was not registered due to common factors in society such as economic factors, ignorance factors, due to negligence of officials, and so on, of course all of that after the requirements and pillars of marriage were fulfilled, then the marriage confirmation was worthy of being granted. However, on the other hand, when the application for marriage confirmation is due to the reason that the marriage was previously hidden from the first wife or other factors which are essentially for legal smuggling or are clearly intentionally against the law, then the judge may declare that he cannot accept the application for marriage confirmation.

3.2. The Problems of Validating Polyandrous Marriages and the Legal Consequences for Their Children

One of the reasons for the rejection of the marriage confirmation is because the wife is still married to another man. This was because when she was married, the wife felt that she had divorced her first ex-husband. Regarding wives who claim to have divorced their first husbands, this is a phenomenon that occurs in society

and has even become a belief in the society that divorce can be done verbally through the husband's words to his wife without having to go through a trial process in the court. There are several things that need to be considered by the religious court judges in assessing the status, namely; First, such divorce is already a belief and custom in the society, even classical Islamic jurisprudence books consider divorce in that way valid; Second, on the other hand, our country has very strict regulations for the purpose of protecting the institution of marriage which states that divorce is complicated and must go through a court process.

The two things above are a double-edged coin, on the one hand the condition of society is such (low legal awareness), so it is unwise not to recognize the divorce. However, on the other hand, when the judge acknowledges the validity of the divorce, it means that the judge acknowledges that the divorce not in the court is worthy of being accepted as valid. This would be contrary to the concept of legal certainty, usually when handling divorce cases, the religious courts complicate divorce with strict procedures, even the divorce itself must be in accordance with several reasons listed in the laws and regulations, but when trying a marriage confirmation case (a previous marriage whose status was already underhand divorced or according to Islamic law, the judge easily acknowledges the validity of the underhand divorce. Of course, this decision will create a bad precedent for law enforcement and also legal order in society.

From the explanation above, researchers tend not to recognize underhand divorce because this will destroy the divorce system that has been implemented in the religious courts. By recognizing the validity of underhand divorce or according to Islamic law, of course the authority of the court, especially when handling divorce cases, will be eroded to some extent, because it is possible that the society considers that there is no need for divorce through the courts, and in the end, if it is confirmed, the divorce will also be recognized.

There is a case where the wife was previously married to her first ex-husband who was not registered at the Office of Religious Affairs and claimed to have divorced, whereas now the wife has married her second husband and will carry out the marriage confirmation at the Religious Court. In relation to this problem, if the wife's first marriage is not recorded, it means that there is no legal status for her first marriage and it is considered to have never happened (never existed), because how could she possibly want a divorce when her marriage is considered to have not

existed. Unless previously she filed a divorce case with the Court with the cumulative confirmation of marriage in the context of divorce as stated in Article 7 paragraph (3) letter a of the Compilation of Islamic Law, then even though her marriage was not registered, the Court had already recognized the validity of the marriage, so that when examining her divorce, the court considered her marriage to be valid.

From the description above, it can be concluded that, first, when a woman has a husband and divorces not in the court (her marital status is recorded), when she remarries (underhand) with another man and then submits a marriage confirmation, then in this case, the application tends to be rejected by the panel of judges because there are several things that are violated, such as the woman is considered to still be bound to another man. Second, when a woman divorces her ex-husband not in the court (underhanded marriage) with another man and then applies for the marriage confirmation. Therefore, in relation to this matter, it is possible that the Court will accept the marriage confirmation because even though the woman do the underhand divorced, because her previous marriage was not registered, her marriage is considered non-existent, so that if she remarries another man, she is considered not to be in a marriage, because by law her previous marriage (the first) is considered non-existent (never existed). Several cases like this often occur in society, in the end they will have difficulty obtaining administrative population documents because their marriage is not legal. Besides this, it will have an impact on the offspring resulting from their relationship.

The existence of a child is an invaluable gift from Allah SWT. Therefore, parents should be able to maintain their survival, especially when they have not yet reached puberty. Every child born into this world certainly cannot choose whose child they want to be. Of course, if he wants to choose, he wants to be born from a good family, wealthy, authoritative, and so on. Currently, there are many children whose rights cannot be protected, whether because of the mistakes of their parents, their environment or because of a system that prevents these children from getting their rights.

Related to the context being discussed in this research is that children's rights are often not protected because their parents' marriage is not registered or because their parents' marriage is considered invalid, which has an impact on the child's status. If their parents' marriage is invalid, it means that the child's status is

also considered not to be a legitimate child. As a consequence, the child only has a civil relationship with the mother and the mother's family. This means that the child does not have a legal relationship with his father, as stated in Article 42 and Article 43 of Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Marriage and the Compilation of Islamic Law Article 100, in his birth certificate his status is considered as an illegitimate child, so the name of the mother who gave birth to him is listed. The information regarding the status of being an illegitimate child and the absence of the father's name will have a profound social and psychological impact on the child and the mother. Then, the unclear status of the child before the law results in the relationship between father and child being weak, so that at some point the father may deny that the child is not his biological child.[5]

In the case that the researcher discussed previously, often the legalization of the marriage was hampered because the wife was still bound by someone else's marriage, meaning that the wife felt that she had previously been divorced by her husband (divorce not in the Religious Court). With this kind of reality, judges often consider it as a marriage that cannot be validated.

In the perspective of Islamic law, there are the terms fasid marriage and vanity marriage. According to Al-Jaziry [6] what is meant by fasid marriage is a marriage that does not meet the legal requirements for carrying out a marriage, while a false marriage is a marriage that does not fulfill the pillars of marriage that have been determined by the syara'. The law of marriage of both forms of marriage is equally invalid. In relation to this case, among the Shafi'i school of thought, a fasid marriage can occur in several forms, including; a) A marriage between a man and a woman but the woman is during another man's iddah period; b) Marriage during the istibro period due to doubtful matters; c) A marriage between a man and a woman but whose iddah is doubtful for the woman because of signs of pregnancy; d) Marrying a watsani woman and an apostate woman, the latter two of which are invalid because of the Islamic requirements. [7]

In contrast to the Syafi'iyah, according to the Hanafi school, a fasid marriage can occur in several forms, such as; a) Marriage without witnesses; b) Contract

[5] Fitria Olovia, *Akibat Hukum Terhadap Anak Akibat Perkawinan Siri Pasca Putusan Mahkamah Konstitusi*, Lex Jurnalica Volume 11 Nomor 2, Agustus 2014, hlm. 133
[6] Abdurrahman Al-Jaziri, *Al-Fiqhu Ala Madzahibil Arbaah*, Juz IV, Beirut: Daar Al-Fikr, 1982, hlm.118
[7] Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia*, Cet ke 3, Jakarta: Kencana, 2012, hlm.43

marriage; c) Marrying more than 4 (four) women at one time; d) Marrying two sisters at the same time, marrying his wife and his aunt at the same time, either his paternal aunt or his maternal aunt; e) Marrying a woman without knowing that her status is still someone else's wife (polyandry); f) Marrying a mahram even though he knows that it is not permitted. [8]

Based on the opinions of the two schools of jurisprudence mentioned above, polyandrous marriages can be categorized as fasid marriages, especially if the woman feels that she has divorced her previous husband even though she has not. So here there is confusion regarding his previous marital status, especially regarding his first divorce.

Relating to the status of children resulting from fake marriages. Can it be attributed to his biological father? In Islamic law, especially according to several Hanafiyah scholars such as Imam Al-Kasani (Imam 'Alauddin Abu Bakar bin Mas'ud Al-Kasani Al-Hanafi) and Shaykh Nizhan (Al-'Allamah Humam Mawlana Al-Sheikh Nizham), states that children born from fasid marriages can still be related to their biological father.[9]

From the perspective of positive law in Indonesia, it is not expressly stated that there is an institution of nikahul fasid in marriage law in Indonesia. There are only a few articles that regulate the annulment of marriage, namely Articles 27 to 38 of PP Number 9 of 1975. The article states the authority of the Religious Court to annul a marriage if the marriage is deemed invalid (no legal force), or if a marriage that has been determined, or if a marriage that has been carried out is known to be legally flawed as a result of a lie and error or because of coercion.

Regarding a marriage that can be annulled, this is due to several reasons, one of which is because the woman who was married was later discovered to still be the legal wife of another man. Related to the case being discussed here, namely a woman who felt that she had been divorced by her husband not in the court. So the researcher assessed that this was almost the same as this situation, where the woman felt that she had divorced her husband (a secret divorce) but in fact in the legal of the law she had not yet divorced. So, the man feels that he is marrying a

[8] Wahbah Azzuhaili, *Al-Fiqh Al Islamy Wa Adillatuhu*, Jilid VIII, Beirut: Daar Al-Fikr, 1985, hlm.109-1116
[9] Imam Al-Kasani, *Bada'I al Shanai Fi Tartib al Syara'*, Jilid III, Beirut: Daar Al-Ilmiyyah, 2003, Cet. Ke 2, hlm. 416

woman who is not tied to another person's marriage, but in reality, he is marrying a woman who is still tied to someone else.

This is where syubhat or doubts arise in the marriage. Regarding the correlation with the legal consequences of a void marriage, the marriage can be annulled. The problem of revocable fasid marriages does not apply retroactively to the children born from such marriages, this means that some of the mistakes made by the parents cannot be passed on to their children born from revocable fasid marriages. In this way, these children have a clear and official legal status as the children of their parents.

The advocacy for child protection in Indonesia was confirmed by the birth of Constitutional Court Decision Number 46/PUU-VIII/2010 dated 13 February 2012 which in essence stated that Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage is contrary to the 1945 Constitution insofar as it is interpreted as eliminating the civil relationship between a child and a person who can be proven scientifically and technologically to be a blood relative of the child in question. With this Constitutional Court Decision, the wording of Article 43 paragraph (1) which originally read: "A child born out of wedlock only has a civil relationship with his mother and his mother's family" does not have binding legal force as long as it is interpreted as eliminating the civil relationship with a man who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship as his father, so that the paragraph must be read as follows: *"A child born out of wedlock has a civil relationship with his mother and his mother's family and with a man as his father who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship, including a civil relationship with his father's family."*

The Constitutional Court's decision is actually also an effort to protect the children from illegitimate marriages, in this case because of the mother's polyandrous marriage. So that the child's status is still maintained as a legitimate child of his/her parents so that the child's basic rights are guaranteed to be fulfilled by both of the child's biological parents.

In addition, it needs to be emphasized that responsibility for an act is imposed on the party who made the mistake or liability by fault, and does not apply to parties who did not make the mistake. The mistakes made by the parents of the child who did into the marriage as mentioned above become the burden or

responsibility of the parents or the legal consequences that arise from them, do not extend to the status or position of the child who is born because in any case the child is born in a natural or pure state and does not bear the sins or mistakes made by both parents. Based on this, it can be concluded that the legal consequences of an invalid or annulled marriage only apply to the parents, in this case the parents' marriage is a void marriage, but the status of the child born is not affected.

It should be noted that the legal status of a child from a void marriage is different from the result of a biological relationship without the bonds of marriage. A fasid marriage, as mentioned at the beginning, still fulfills the pillars of marriage, but because certain conditions are not met, the marriage is considered fasid. As for the status of a child born out of wedlock, of course it cannot be said to be a legitimate child of both parents, however, as stated in the Constitutional Court ruling above, the child has the right to have a (limited) civil relationship with his biological father.

In relation to this, the existence of the child protection for the status of the children should not be used as a loophole for unmarried couples to legalize children produced from their offspring, especially since there is currently the Regulation of the Minister of Home Affairs Number 9 of 2016 which allows birth certificates to include the names of the father and mother even though the marriage has not been legalized by the Court. This is because the certificate is only obtained on the family card, while the family card only comes from the recognition that the two partners are indeed husband and wife, not on the basis of research and assessment as with the examination at the Religious Court which carefully examines whether the marriage relationship between the man and woman is in accordance with Islamic law or related regulations or not.

4. Conclusion

Based on the description above, if in practice in the field there are still applicants for the marriage confirmation who are rejected on the grounds of a failed marriage, then the next legal effort to protect their children and descendants is to file a case regarding the origin of the child. As mentioned, some scholars of the Hanafi school of thought are of the opinion that a child born from a void marriage can still be linked to his biological father so that his status can still be recognized. So when making a birth certificate, the

name of the biological father can still be included, and the Court can also avoid sending a copy of its decision to the local Civil Registration and Population Service.

When the child makes a birth certificate, the name of the biological father will be listed on the certificate. Most judges do not agree with the opinion of the Hanafiyah priest, therefore the trial itself still really depends on the judge who examines the case.

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