



# Dilemma of Unregistered Marriage for Establishing Children's Lineage

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## Abstract

The applicant submitted a request for determination of lineage to ensure the fulfillment of children's rights. Based on legal considerations, the judge granted the request by considering the evidence submitted, such as letters and witness statements. The legal facts show that these children were born from the legal marriage of Petitioner I and Petitioner II, so they have the right to be recognized as legitimate children. This research aims to determine the background to the implementation of marriage reform/tajdid nikah and the submission of a request for determining the lineage of children in case Number 115/Pdt.P/2023/PA.PN at the Religious Court. The research method used by researchers is a legal approach (state approach) with descriptive-analytical specifications in case decisions: 115/Pdt.P/2023/PA.PN. The research results are first, the marriage reform in Case 115/Pdt.P/2023/PA.PN is based on reasons that are in line with religious and government regulations, such as the previous marriage breaking up due to the waiting period (*iddah*), for the validity of the administration and marriage. This is done solely for official records from the Office of Religious Affairs (KUA). Second, the background to the application for determining the child's lineage was that Petitioners I and II had a clandestine marriage in 2015, they were blessed with 2 children, their attempt to formalize the marriage was rejected, and then they officially registered their marriage in 2023. The aim was to guarantee fulfillment of children's rights such as birth certificates and education. Third, in deciding a child's lineage case, the judge's considerations are based on juridical, philosophical, and sociological aspects, taking into account the fulfillment of the child's rights and welfare.

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## INTRODUCTION

Determining a child's lineage can be interpreted as determining a child's lineage to a man as his father and a woman as his mother based on the recognition of a blood relationship with the recognized child (Arnold & Jamal, 2019; Ibrahim, 2020; Quthny & Muzakki, 2021; Anisa, 2022; Kurniawan & Al Amin, 2023). With this recognition, the child becomes legitimate and the two have a mutually beneficial legal relationship

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(Bakhroini, 2020). Parental determination is one of the most important rights of a child and has a significant impact on the child's personality and future (Nim, 2009; Indramawan, 2020; Dasopang et al., 2022).

The civil status of a child is closely related to the validity of his parents' marriage. In practice, civil status is easily determined if the child has authentic evidence, such as a birth certificate (Arliman, 2019; Mawardi, 2020). However, this is not easy for children born out of wedlock or whose births are not registered. Their status does not receive legitimacy from legal regulations (Quraisi, 2019; Ilyas et al., 2020; Subardan, 2023).

Law Number 1 of 1974 was promulgated and enforced at the same time as the implementing regulations were issued, namely Government Regulation Number 9 of 1975 concerning the Implementation of Marriages (Denmani, 2017; Faishol, 2019). According to the Marriage Law, it is stated: Marriage is a sacred bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on the belief in the Almighty God (Erwinsyahbana, 2012; Suseno, 2014).

Chapter 1 Article 2 of Law Number 1 of 1974 which has been amended to become Law Number 16 of 2019 concerning Marriage, states that "paragraph (1) marriage is valid if it is carried out according to the laws of each respective religion and belief, and paragraph (2) every marriage is recorded according to the applicable laws and regulations." This is further clarified in the Compilation of Islamic Law Article 5 paragraph (1), which states "to ensure orderly marriages for Muslims, every marriage must be recorded." Likewise, Article 6 paragraph (2) emphasizes that "Marriages carried out outside the supervision of marriage registration officers have no legal force" (Aldira, 2017; Darmawan, 2018; Wardhana & Raf'ie, 2022).

In reality, marriage practices that occur in society do not always fully comply with the law (Alifah, 2019). This is where cases of secret marriages or marriages carried out unofficially are increasingly mushrooming and becoming a separate phenomenon (Siahaan, 2016). Secret marriages or unofficial marriages are marriages that are not registered by the Marriage Registrar (Yono, 2010; Akbar, 2014; Lismiaty et al., 2020). Marriages that are not under the supervision of a marriage registrar are considered religiously valid but do not have legal force due to a lack of proof of a valid marriage according to applicable laws and regulations. Another opinion states that a secret marriage or unofficial marriage is a marriage carried out without fulfilling the requirements and procedures of statutory regulations (Islami, 2017; Mahbub, 2003). There are differences of opinion regarding the validity of informal marriages due to differences in interpretation of article 2 paragraph (2) of Law no. Law Number 1 of 1974 concerning Marriage. Article 2 paragraph (2) requires separate registration of marriages, while Article 2 paragraph (1) regulates the validity of marriages performed according to a person's religion and beliefs (Supriyadi, 2021).

Research by the Indonesian Child Protection Commission (KPAI) shows that marriages that do not comply with the law (unofficial marriages) are included in the top five factors causing child neglect in Indonesia (Thoriq, 2017). According to Indonesian positive law, a secret marriage is a marriage that is considered valid but has no legal force unless registered according to applicable laws and regulations (Fuad, 2010). If something happens in the marriage, the wife cannot legally claim her rights as she should. Likewise, regarding children born according to Law Number 1 of 1974, Article 43 paragraph 1 states that "children born out of wedlock only have a civil relationship with their mother and family" (Aimmah, 2010).

Another legal consequence of secret marriages for children is the absence of identity because according to Law Number 23 of 2006 concerning Population Administration, the submission of a birth certificate must be accompanied by a

marriage certificate from the state (Holik, 2023). However, without a birth certificate, a child will have difficulty getting a National Identity Card or passport, registering for school, and inheriting property. Marriages are not registered resulting in many children becoming victims due to lack of identity (Dermawan, 2019).

Law Number 23 of 2002 concerning Child Protection states that the state guarantees the welfare of all its citizens, including the protection of children's rights as human rights, and to achieve child protection and welfare, institutional support and legal regulations are needed that guarantee its implementation. One of the state institutions that has supported and contributed to ensuring the implementation of the protection of children's rights is the judiciary. To ensure the recognition of children born from clandestine or unofficial marriages by their parents, the state provides a solution through “*isbath nikah*” (proof of marriage) and “determining the origin of the child” (determination of the origin of the child). For communities that adhere to the Islamic religion, the determination of the child's origin can be done in the Islamic religious court (Zuraida, 2016).

The Islamic religious court as one of the state institutions in the field of law enforcement and justice for Indonesian citizens who adhere to the Islamic religion, has had a role in this matter since the enactment of Law Number 7 of 1989 (Tololiu, 2017). This can be seen from the authority possessed by the Islamic Religious Courts as regulated in article 49, including the explanation in paragraph (2) number 20 which states that the Islamic religious courts have the authority to determine the origin of a child, where through this determination, the child's lineage becomes certain. and the legal consequences become clear.

## METHODS

The research used in this study is qualitative. The reason for using qualitative research is to analyze marriage renewal to determine the origin of children in case decision analysis:115/Pdt.P/2023/PA.PN. The research approach used by researchers is legal (state approach) with descriptive-analytical specifications in case decisions:115/Pdt.P/2023/PA.PN. Research data uses primary, secondary, and tertiary sources, which are then analyzed using qualitative analysis (Lafia et al., 2016; Herzog, 2017). This descriptive research aims to provide systematic, factual, and accurate descriptions, illustrations, or writing about the facts, characteristics, and relationships between the phenomena being studied. This research uses a normative juridical approach which is carried out by examining and interpreting theoretical aspects related to principles, concepts, doctrine, and legal norms regarding evidence (Paul & Oluwakemi, 2014).

This approach involves analyzing cases related to the legal problems faced. The cases analyzed are cases that have received final court decisions and have permanent legal force, such as Case Decision Number 115/Pdt.P/2023/PA.PN concerning determining the origin of children. The main focus of each decision is the judge's considerations that lead to a decision, which can be used as an argument in resolving the legal problems faced (Sari & Asmendri, 2020).

## RESULT AND DISCUSSION

### The Renewal Of Marriage/Tajdid An-Nikah

Say *tajdid* comes from the verb *jaddada-yujaddidu* which means “to renew” and *tajdid* means “renewal”. In Arabic, it is said that *tajdid* is the opposite of *ancient*. *Ancient* means “old” or “ancient”. Say, *tajdid* means “renewal”, indicating the creation of something new. Whereas “correction” comes from the verb *aslaba-yuslibu* which means “repair” or “increase”. Say “correction” comes from the root of the word *Salah* which means good, appropriate, worthy, and useful. In the history of Islamic thought, the words *correction* and *tajdid* were often used interchangeably with the same meaning,

namely “renewal”. Renewal means modernization when *tajdid* targets things that do not have a solid foundation, basis, or source and can change, such as methods, systems, techniques, strategies to be adapted to situations, conditions, space and space (Gunawan, 2016; Zein, 2018).

*Tajdid al-nikah* or marriage renewal is a practice carried out by some Muslim communities in Indonesia (Hanafi & Safrudin, 2020; Syarbini, 2022). This means renewing the marriage contract without canceling the original marriage contract. This practice is often seen as a solution to marital problems or as a way to increase the blessings of marriage. This renewal is not a new marriage contract but a repetition of an existing marriage contract. This practice is considered permissible in Islamic law and is not intended to replace the original marriage contract. This is based on the concept of “*tajdid*” which means renewal or rejuvenation.

Renewal of the marriage contract is often carried out for reasons such as economic difficulties, overcoming obstacles, or ensuring the blessings of the marriage. The practice of renewing a marriage contract is not mandatory and does not involve paying any more dowry. Generally considered as a way to strengthen marital ties and seek blessings for the family.

#### **Determination of the Origin of Children in Decision Matters: 115/PDT.P/2023/PA**

Determining the origin of a child is very important because it determines the child's legal relationship with his father. Even though in essence a child is born as a result of an intimate relationship between a man and a woman, for the child to be legally recognized as having a kinship relationship with his father, the intimate relationship must occur within the framework of a valid marriage according to law and religion. If you do not comply with religious rules, then the child born from that relationship is termed a child resulting from adultery. The consequence of being a child of adultery is that they only have family ties with their mother and family.

Regarding legitimate children, referring to the Indonesian Marriage Law of 1974, article 42 states that legitimate children are those born in or as a result of legal marriage (Halim & Darwis, 2020; Pratiwi et al., 2020; Nurwandri & Syam, 2021; Syarbini, 2022). On the other hand, Islamic law has more detailed criteria for determining the legitimacy of a child. This criterion is based on the Quranic verse in Surat Al-Ahqaf verse 15 and Surat Luqman verse 14. From the combination of the two verses, it can be understood that the minimum period required for a mother to carry her child until full term is six months.

The legal implication for children born from secret marriages (*nikah sirri*) is that there is no legal force regarding the child's paternity. Marriage registration is considered crucial because it is regulated by the state as a form of progressive law to guarantee the validity of marriages (Maloko, 2014).

In Indonesian positive law regarding children's rights, is stated in Articles 5 to 18 of Law Number 23 of 2002 concerning Child Protection as amended by Law Number 35 of 2014 which, among other things, states, “Children have the right to know their parents”. Getting to know one's parents is related to the child's origins. A child's origins can be proven, among other things, through a birth certificate. Of course, for a child born from a marriage that is valid according to religion and law, obtaining a birth certificate is not difficult, it only requires the fulfillment of several requirements. This ensures that children resulting from a valid marriage receive full protection about “*hifdlun nasl*” (preservation of lineage) along with all its legal consequences.

Problems arise in society when marriages are not registered according to applicable law, so the marriage is considered invalid. To determine the origin of the

child, a decision or determination from the Religious Court is required, and not all requests for determining the origin of the child are granted by the Court. The court will only grant the request if it is proven to be based on and justified by law.

Based on the Decision in Case Number 115/Pdt.P/2023/PA.PN at the Religious Court which the author examined, the background to the petition for determining the origin of the child by the Petitioners is as follows. Firstly, Petitioner I and Petitioner II had an unregistered marriage in 2015. Second, from this marriage, Petitioner I and Petitioner II were blessed with two children, namely child 1 and child 2. Third, Petitioner I and Petitioner II then submitted an application for the legalization of the marriage (*isbat nikah*) at the Painan Religious Court, but his application was rejected and court fees were charged.

Furthermore, fourthly, applicant I and applicant II entered into a new marriage which was registered at the Religious Affairs Office. Fifth, the purpose of the application for determining the origin of the child is to fulfill the child's rights, especially for administrative purposes such as obtaining birth and education certificates, by statutory regulations and religious requirements. Sixth, the petitioners hope to obtain a determination that child A and child B are the biological children of Petitioner I and Petitioner II. This is the background to the request for determining the origin of the child based on the court decision as understood by the author.

#### **Legal Considerations of the Judge Who Granted the Application for the Determination of the Child's Origin in the Case Decision: 115/Pdt.P/2023/PA.PN**

This case is an application for determining the origin of a child submitted by a Muslim applicant. Therefore, by Article 49 paragraph (2) number 20 of Law Number 7 of 1989 which has been amended by Law Number 3 of 2006 and amended a second time by Law Number 50 of 2009 concerning Religious Courts, this case includes criminal cases. absolute authority of the Religious Courts.

The Petitioners based their petition on the provisions of Article 55 paragraphs (2) and (3) of Law Number 1 of 1974 concerning Marriage in conjunction with Article 103 paragraphs (2) and (3) of the Compilation of Islamic Law, to obtain a Determination of Child Origin for their children who were given name A, place and date of birth, Lumpo, 2 May 2017 and Child B, place and date of birth, Lumpo, 20 May 2019. The main points of the Petitioner's Petition are the absence of legal documents and protection of the legal status of the Petitioner's child, namely Child A who was born in Lumpo on 2 May 2017, and Child B who was born in Lumpo on 20 May 2019. These children were born to the Petitioner's family. The Petitioner's marriage is valid, but because they were born before the Petitioners officially registered their marriage at the KUA of the Pesisir Selatan region, the Petitioner intends to apply to determine the origin of their child to the Painan Religious Court. The aim is for these children to be recognized as the legitimate children of the Petitioners so that they are legally protected and have their rights as regulated in the laws and regulations in force in Indonesia, which are outlined in the case.

To strengthen his argument, the Petitioner submitted written evidence P.1 to P.7 and presented two witnesses at the trial. Exhibits P.1 to P.7 submitted by the Petitioners have been sufficiently stamped and sealed. Therefore, this evidence can be accepted and considered, by the provisions of article 3 paragraph (1) in conjunction with article 5 of Law Number 10 of 2020 concerning stamp duty. All of these documents are photocopies that have been verified against the original and proven to be accurate, so they can be considered further by Article 1888 of the Civil Law (Civil Code) which essentially states that the strength of written evidence lies in the original document. Evidence P.1 to P.7 consists of authentic deeds made by authorized officials so that they have perfect and binding evidentiary value, as regulated in Article 285 R.Bg Jo. Article 1870 Civil Code.

## CONCLUSION

Analysis of Case Decision:115/Pdt.P/2023/PA.PN can be concluded that the judge's considerations in Case Decision:115/Pdt.P/2023/PA.PN, in deciding the application for the origin of children resulting from unregistered marriages in the Religious Courts is based on three considerations, namely juridical, philosophical, and sociological. These three aspects implicitly consider children's rights, namely protecting children's rights and ensuring children's welfare.

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