



DOI: <https://doi.org/10.38035/jlph.v4i4>

Received: 6 May 2024, Revised: 16 May 2024, Publish: 18 May 2024

<https://creativecommons.org/licenses/by/4.0/>

## Legal Protection of Women and Children in Isbat Marriage accompanied by Divorce

Achmad Walif Rizqy<sup>1</sup>, Ishaq<sup>2</sup>, Muhammad Faisol<sup>3</sup>

<sup>1</sup> UIN Kiai Haji Achmad Siddiq, Jember, Indonesia, [achmad.rizqy87@gmail.com](mailto:achmad.rizqy87@gmail.com)

<sup>2</sup> UIN Kiai Haji Achmad Siddiq, Jember, Indonesia, [ishaqmardiyah@gmail.com](mailto:ishaqmardiyah@gmail.com)

<sup>3</sup> UIN Kiai Haji Achmad Siddiq, Jember, Indonesia, [mfaisol18@gmail.com](mailto:mfaisol18@gmail.com)

Corresponding Author: [achmad.rizqy87@gmail.com](mailto:achmad.rizqy87@gmail.com)

**Abstract:** Until now, it is felt that the marriage ceremony accompanied by divorce has not provided complete justice, especially in terms of applications by women. When women apply, their rights are often neglected, especially when the verstek decision means that the rights of women and children are lost. In this research, the focus is on discussing the rights of women and children in marriage isbat cases accompanied by divorce and forms of legal protection for women and children in marriage isbat cases accompanied by divorce. The research method in this research uses a normative/doctrinal type of research which focuses on the legal issue being researched and uses two approaches, namely the statutory approach and the conceptual approach. This research results in discussion that women and children in cases of isbat marriage accompanied by divorce actually have many regulations that regulate them to protect their rights, but are sometimes neglected because the law cannot reach far in ensuring justice is present in them, especially in the context of legal protection, especially Repressive legal protection does not yet describe a just situation that substantively guarantees the basic rights of women and children. Even though the regulations have been regulated in such a way, the implementation does not show justice, especially in cases filed by women.

**Keyword:** Legal Protection, Women and Children, Marriage Isbat, Divorce.

### INTRODUCTION

Marriage registration for some people still seems unnecessary. Furthermore, if there are individuals who take advantage of this opportunity to seek personal gain without considering the aspects and values of justice which is the main mission of a marriage (Mardani, et.al, 2022). Siri marriage is still often used as an alternative reason to anticipate promiscuity between non-Muslim men and women who are psychologically, morally and materially not yet ready to marry formally (Gunawan, 2013). Nur Putri Hidayah (2023) revealed that the problem of unregistered marriages causes many losses from a legal perspective. Both for husband and wife, as well as for offspring.

If the marriage is not legally registered, then matters related to the consequences of the marriage cannot be resolved legally. For example, the wife's right to receive physical and spiritual support, children's birth certificates are often hampered, child custody rights,

children's education rights, wife's inheritance rights, guardianship rights for daughters who are getting married and many other problems. The complexity of this problem has a negative impact on women as the party being married, while men are not burdened by formal responsibilities. Even if the man denies that the marriage has occurred, he will not receive any legal sanctions, because there is no authentic evidence that the marriage has legally occurred. This condition creates vulnerability and even neglect of women (Kemenppa, 2017).

Complex legal issues arise if a divorce is to be carried out, but at the same time, they were previously married in an unregistered marriage and had children. This case can be carried out by filing (accumulation of lawsuits or *samenvoeging van vordering*) for divorce combined with the legalization of the marriage (*Isbat Nikah*) (Setneg RI, 1989). The starting point for this research is that it does not focus on the implementation of procedural law for case accumulation, but on ensuring the legal protection of women and children after divorce.

Judges in deciding divorce cases through a Letter from the Directorate General of the Religious Courts of the Supreme Court of the Republic of Indonesia Number: 1669/DJA/HK.00/5/2021 dated 24 May 2021 concerning Guarantees for the Fulfillment of the Rights of Women and Children After Divorce basically explains that, upholding the principle Justice is one of the characteristics of a rule of law. Justice is a basic human right that is in line with the principle of equality before the law. Every person has the right to obtain remedy for violations of the rights suffered, while the state has the obligation to ensure the fulfillment of these rights. This accumulation and rights affirm that justice has become a human right that must be respected and its fulfillment guaranteed (Sidoarjo Religious Court, 2023).

The trial process of cumulating marriage *isbat* with divorce is known as “*combination of cases*”. That cumulation of lawsuits or *samenvoeging van vordering* is the combination of more than one lawsuit into one lawsuit or several lawsuits combined into one. Merging claims is only permitted within certain limits. The civil procedural law which generally applies, whether in HIR, R.Bg., or Rv, does not strictly regulate or prohibit it. The only thing that regulates the accumulation of lawsuits is Law no. 7 of 1989 (Amnesti, 2019).

A problem that often occurs after divorce in the Religious Courts is the neglect of the rights of women and children, such as the right to support and other rights. This is detrimental to women and children whose rights should be lost, especially if the *verstek* is terminated (Mansari, 2019). In fact, through their authority, judges can decide cases by exploring the truth on the basis of justice, as is the legal basis given the authority to judges. This research aims to reconstruct the sensitivity of judges in providing the rights of women and children after divorce which is carried out by collecting divorce *isbat* lawsuits.

## **METHOD**

The type of legal research used by researchers in this article is normative legal research. This type of research is research with the object of study being legal and regulatory documents and library materials (Marzuki, 2017). This type has a specific aim, namely in explaining it in detail and preparing it systematically which is related to legal rules that specifically regulate certain issues, as well as analyzing the implications between regulations (Susanti & Efendi, 2014). In this research, there are several problem approaches that researchers use, namely the statutory approach and the conceptual approach.

## **RESULTS AND DISCUSSION**

### **Women's and Children's Rights After Marriage *Isbat* Cases Divorce Dissertation**

*Isbat nikah* is a solution to legal uncertainty regarding a religiously valid marriage but is not registered by the state because it does not follow the administrative requirements regulated by the state. There are still many marriage practices that are not recorded, resulting

in a weakened position of the people who carry them out and are vulnerable to losses for the people involved in them. Marriage can indeed be valid religiously, but in the state's view there are other provisions so that it can be recognized and registered. This is the peculiarity of the law in post-modern life, where the legality of marriage according to religion or belief must be in line with state administrative requirements (Yazid, 2019).

Isbat nikah as a solution to the problem of marriages that are not registered by the state is very important and necessary for those involved in the marriage, namely to provide justice, certainty and legal protection for society. In Islamic law, it is stated that one of the objectives of Islamic law is benefit, where Sharia laws are intended to benefit humans and prevent them from destruction. So the marriage isbat rules are included in the framework of the objectives of Islamic law, namely to bring benefit to people who need solutions because it concerns their basic needs within the framework of the state (al-Syathibi, 2003).

In an effort to implement women's rights, appropriate regulations are needed, this condition makes the law constantly change. Women's rights are included in human rights and must be protected (Hasanah, 2017). Legal regulations related to women's rights can be found in various legal instruments and implementation tools. In the existing regulations in Indonesia can be found in Law no. 1 of 1974 concerning Marriage, the Civil Code and the Compilation of Islamic Law. The Marriage Law explicitly regulates the legalization of marriage (isbat nikah) only for unrecorded marriages that occurred before 1974. Then the Compilation of Islamic Law regulates in more detail the reasons for isbat nikah.

The rights with legal certainty after the marriage isbat and divorce for the wife are the provision of proper mut'ah to the ex-wife. In each case, the giving of mut'ah to the wife from the husband's side is different. The size of the mut'ah provision is borne by the husband according to the ex-husband's ability in accordance with the explanation of Article 160 KHI. In deciding the case, the panel of judges did not arbitrarily determine the mut'ah fee for the ex-husband.

The panel of judges will analyze the husband's capabilities first. Mut'ah from an ex-husband is also seen from the size of the husband's income. The wife's mut'ah costs are large, of course because the husband's income is also large and vice versa. Another consideration is the length of the marriage period. And if there is a dispute regarding the amount of mut'ah that must be given, then the parties can resolve it amicably and amicably. If an agreement cannot be reached, the court can determine an amount that is adjusted to the husband's capabilities and does not burden him.

Apart from mut'ah, divorce also gives rise to the right to iddah living, namely maskan (residence) kiswah (clothing) for the wife during the iddah period in accordance with the court decision. This is regulated in article 81 of the KHI regardless of whether a wife is nusyuz or not (Murniasih, 2024). If there is a dowry owed, the ex-husband is obliged to pay off the dowry because it is the wife's right. In the explanation of article 97 KHI that the wife also has the right to joint property, the distribution of which is divided in accordance with the provisions of that article.

From the explanation regarding women's rights from marriage isbat accompanied by divorce, namely that women have rights including mut'ah, iddah, maskan and kiswah, dowry owed, and rights to joint property. This is determined by the court as the institution that has the authority to determine the maintenance that must be borne by the ex-husband as well as what is necessary to ensure the preservation of goods which are joint rights and goods which are the rights of the woman after divorce. The court's authority is based on requests that can be submitted by women as regulated in PP No. 9 of 1975 concerning the Implementation of the Marriage Law.

Then the rights of children after a marriage isbat and divorce are that children have the right to receive hadanah fees for those who have not reached the age of 21 years (Syarifuddin, 2006). Divorce can occur even though the marriage period has not been long.

The consequence that arises from the existence of unregistered marriages is that children resulting from unregistered marriages need financing because usually in terms of their age they are still small and there is no time for them to earn a living. To confirm the status of a child from his father as a result of an unregistered marriage, legal measures can be taken, namely through marriage isbat.

Efforts to legalize marriage isbat must be made so that the father, administratively, is declared as the person responsible for financing the child, where men are vulnerable to avoiding their responsibilities after they separate from their wife which is considered valid according to religious law (as their marriage is valid based on religious law but it was not recorded by an official appointed by the state so that the marriage had no legal force). All *hadānah* costs and child support must be borne by the father. If the father neglects the obligations of care and provision that have been decided by the religious court for his children, or even neglects the children, then the injured party can file a civil suit with the court to claim the child's civil rights.

With the existence of a marriage isbat, the status of children from unregistered marriages becomes valid according to state law. Indonesia requires every citizen to be recorded in population data, first with a birth certificate. The absence of a birth certificate has legal consequences for citizens that their personal data cannot be recorded on any family card. As a result, you will face various difficulties in your future affairs. such as a birth certificate which cannot be issued because the parents do not have a marriage certificate. Article 42 of Law no. 1 of 1974 stipulates the provision that: "A legitimate child is a child born in or as a result of a valid marriage." To determine whether a marriage is valid according to state law is the existence of a Marriage Book.

The next problem that arises is related to the school registration of children born from unregistered marriages due to not having a Family Card (KK), Identity Card (KTP), SIM, Health Insurance, Passport Management and others, for children born from unregistered marriages. , so that they lose many rights as citizens due to various regulations requiring an ID card, such as General Elections, assistance from the government or agencies, as well as other state programs. In connection with the registration of marriages at the KUA by children born from unregistered marriages due to the absence of their data at the Population Service. As regulated in the 1945 Constitution, Article 28B paragraph (1), namely: "Every person has the right to form a family and continue their offspring through legal marriage." The next rights include the status of heir, marriage guardian, and so on (Yazid, 2019).

After marriage isbat accompanied by divorce in the Marriage Law or KHI it is explained that children have the right to continue to receive maintenance, care and education from both parents. In this case, his father has the obligation to bear it. As previously mentioned, this is referred to as *hadhanah* income to realize children's rights as regulated in Law no. 23 of 2002 concerning Child Protection.

### **Legal Protection for Isbat Marriage Cases Accompanied by Divorce on the Rights of Women and Children**

Marriage and divorce are two interrelated legal events. Legal complexity occurs if a marriage is not registered, because even though it is legal, according to state regulations the marriage does not have legal force, a legal act that does not have legal force cannot be recognized by the state as a basis for rights (Basir, 2016). Moreover, the marriage is not registered, but there are children and the divorce process will be carried out. So it is necessary to validate the marriage accompanied by a divorce.

In Indonesia, divorce is part of marriage and civil law. If marriage is an inner and outer bond between a man and a woman, then divorce is the breaking of that inner and outer bond which then results in the end of the family (household) relationship between husband and wife (Murniasih, 2022). After a divorce occurs, there are legal consequences in the form of

rights and obligations that arise to be fulfilled as intended in Chapter XVII of the Compilation of Islamic Law (KHI) and the Marriage Law.

1. Legal protection of women's rights after divorce according to statutory regulations

Article 144 of the KHI states that divorce can occur due to a divorce from the husband or a divorce lawsuit filed by the wife. The divorce can only be carried out on the basis of a judge's decision in a Religious Court session. The court can require the ex-husband to provide living expenses and/or determine obligations to his ex-wife. The obligations of the ex-husband in the form of mut'ah, iddah maintenance and maintenance for the children. In this case, even though there is no demand from the wife, the panel of judges can sentence the ex-husband to pay the ex-wife in the form of mut'ah support, iddah support and child support (Fatimah, et.al, 2014).

2. Legal protection of children's rights after divorce according to statutory regulations

In Indonesian legal regulations, children as citizens have rights that must be protected. These rights are regulated in Law Number 23 of 2002 concerning Child Protection (UU No. 23 of 2002). The enactment of Law no. 23 of 2002 is a consequence of Indonesia as a legal state and a consequence of the ratification of the Convention on the Rights of the Child. UU no. 23 of 2002 regulates several children's rights, namely, the right to life; the right to religion, thought and expression; health and welfare rights; education and teaching rights; protection rights; custody rights; the right to justice (Murniasih, 2022).

The technical regulation of the religious justice environment also provides confirmation of certainty regarding the legal protection of women and children after divorce based on the Letter of the Directorate General of the Religious Courts Agency of the Supreme Court of the Republic of Indonesia Number: 1669/DJA/HK.00/5/2021 dated 24 May 2021 concerning Fulfillment Guarantees Women's and children's rights after divorce, especially at SEMA.02.Th.2019. Regarding the application/enforcement of the formula resulting from the plenary meeting of the Supreme Court chamber in 2019, it also provides for child maintenance rights that can be requested, apart from that as a form of protection for women after divorce in the *posita* and *petitum* relating to maintenance, the phrase "... paid beforehand" can be added. The defendant took the divorce certificate."

Basically, legal protection does not differentiate between men and women. Indonesia as a legal state based on Pancasila must provide legal protection to its citizens because this legal protection will give rise to recognition and protection of human rights in their form as individual and social creatures within a unitary state that upholds the spirit of kinship in order to achieve common prosperity.

Philipus M. Hadjon (1987) can be understood through two types of legal protection, as follows:

1. Preventive Legal Protection: In this preventive legal protection, legal subjects are given the opportunity to submit objections or opinions before a government decision, the aim is to prevent disputes from occurring. Preventive legal protection means a lot for government actions that are based on freedom of action because with the existence of preventive legal protection the government is encouraged to be careful in making decisions based on discretion;
2. Repressive legal protection: Repressive legal protection aims to resolve disputes. The principle of legal protection against government actions is based on and originates from the concept of recognition and protection of human rights because according to western history, the emergence of concepts of recognition and protection of human rights was directed at limiting and placing obligations on society. and government.

The context of legal protection for women and children in *Isbat* marriage cases accompanied by divorce which is manifested in this theory can be identified as follows:

1. Preventive legal protection: has been accommodated in various laws and policies. Especially in SEMA.02.Th.2019 which strictly regulates the implementation of legal protection, but it still needs to be implemented in the rights of women and children, especially in cases filed by women (divorce) which protects the rights of women and children as stated in in cases filed by the man (divorce talak);
2. Repressive legal protection: even though the settlement of marriage isbat cases accompanied by divorce has been rigidly regulated, there are not many judges who can implement this on SEMA.02.Th.2019 issues. letter b which focuses on the burden on the husband to redeem maintenance rights before taking the divorce certificate even though the case is filed by the woman;

If the issue of marriage isbat and divorce can be resolved effectively and efficiently, it certainly requires appropriate arrangements or management in the process. This includes the litigation process in court which will run well if all the elements in it are carried out in accordance with their duties and functions. One of the important elements that influences the process of litigating in court is the conduct of trials (Purwodadi, 2024).

## CONCLUSION

Isbat nikah as a solution to the legal problem of marriages that are not registered by the state is very important and necessary for those involved in the marriage, namely to provide justice, certainty and legal protection for society. With the existence of marriage isbat, the status of children from unregistered marriages becomes legally valid in the state, and women also become legally valid. However, there is a legal problem when the marriage isbat is accompanied by divorce. There are rights that women and children have in it, so that post-legalization and divorce have the meaning of protecting the legal interests, especially of women and children.

Legal protection for women and children has been widely accommodated in legal norms, however in court decisions there have not been many adoptions as regulated in statutory regulations. So that the legal and justice interests of women and children are not accommodated after divorce, such as the right to various types of income that should be obtained.

## REFERENSI

- Al-Syathibi, A.I, (n.d) *al-Muwafaqat fi Uşūl al-Syari'ah*. Riyad: Maktabah al-Riyadh al Haditsah
- Basir, M. Solusi Hukum Bagi Perkawinan Tidak Tercatat (Sirri), <https://gorontalo.kemenag.go.id/files/gorontalo/file/file/Humas/qgsi1446352991.pdf>,
- Fatimah, Adawiyah, R dan Rifqi, M (2014). "Pemenuhan Hak Istri dan Anak Akibat Putusnya Perkawinan Karena Perceraian (Studi Kasus di Pengadilan Agama Banjarmasin)", Jurnal Pendidikan Kewarganegaraan, Vol. 4. No. 7. Banjarmasin: Universitas Lambung Mangkurat
- Gunawan, "Nikah Siri dan Akibat Hukumnya Menurut UU Perkawinan,"
- Hadjon, P.M, (1987) *Perlindungan Hukum Bagi Rakyat Indonesia*. PT. Bina Ilmu: Surabaya,
- Hasanah, D.U (2017). "Hak-Hak Perempuan Dalam Putusan Pengadilan Agama (Studi Perbandingan Hukum Keluarga Islam dan Konvensi CEDAW)" *Tesis* UIN Syarif Hidayatullah Jakarta.
- <https://pa-purwodadi.go.id/index.php/sub-bag-keuangan/pedoman/26-halaman-depan/artikel/358-peran-hakim-dalam-mewujudkan-asas-keadilan-kepastian-hukum-dan-kemanfaatan-putusan>
- Instruksi Presiden No. 1 tahun 1991 Kompilasi Hukum Islam (KHI), Pasal 160
- Kementerian Pemberdayaan Perempuan dan Perlindungan Anak dan Indonesia Research Foundation, () "Perkawinan Siri dan Dampaknya di Provinsi Jawa Barat," Laporan

- Telaah (Jawa Barat, t.t.). *Online* <https://www.kemenpppa.go.id/lib/uploads/list/34529-laporan-riset-perkawinan-sirri-dan-dampaknya.pdf>.
- Mansari dan Moriyanti, (2019). Sensitivitas Hakim Terhadap Perlindungan Nafkah Isteri Pasca Perceraian. *Gender Equality: International Journal of Child and Gender Studies* 5, No. 1, <https://doi.org/10.22373/equality.v5i1.5377>.
- Mardani, Manullang, O dan Kusumadewi, Y “Problematika Perkawinan Tidak Tercatat (Nikah Siri) dan Solusi Hukumnya,”
- Marzuki, P.M. (2017). *Penelitian Hukum*. Jakarta: Kencana.
- Murniasih, (). “Perlindungan Hak-hak Perempuan dan Anak Pasca Perceraian Menurut Peraturan Perundang-Undangan, *Jurnal Pengadilan Agama Sanggau*. *Online*., <https://www.pa-sanggau.go.id> diakses pada 06 Mei 2024 pukul 21.00
- Pengadilan Agama Sidoarjo. () “Pelaksanaan Jaminan Pemenuhan Hak-Hak Perempuan Dan Anak Pasca Perceraian Di Pengadilan Agama Sidoarjo,” *Online* <https://pa-sidoarjo.go.id/berita-seputar-peradilan/405-pelaksanaan-jaminan-pemenuhan-hak-hak-perempuan-dan-anak-pasca-perceraian-di-pengadilan-agama-sidoarjo>. diakses 24 Oktober 2023
- Sekretariat Negara Republik Indonesia, (1989). *Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama, Pasal 86 Ayat 1*. Jakarta: Sekretariat Negara Republik Indonesia,
- Susanti D.O dan Efendi, A. (2014). *Penelitian Hukum (Legal Research)*. Jakarta: Sinar Grafika.
- Syarifuddin, A. (2006) *Hukum Perkawinan Islam di Indonesia: Antara Fiqh Munakahat dan Undang-Undang Perkawinan*. Jakarta: Prenada Media.
- Universitas Muhammadiyah Malang. () “Nikah Siri Timbulkan Banyak Masalah, Ini Kata Dosen Hukum UMM,” *Online*, <https://www.umm.ac.id/id/arsip-koran/media-suara-publik/nikah-siri-timbulkan-banyak-masalah-ini-kata-dosen-hukum-umm.html>. diakses 27 September 2023
- UU Nomor 1 Tahun 1974 tentang Perkawinan, Pasal 42
- Yazid, I. (2019). Menikah Untuk Dicerai: Menyorot Hak-Hak Perempuan Pada Isbat Nikah Untuk Cerai Di Pengadilan Agama Medan Tahun 2015-2017. *Al-Manāhij: Jurnal Kajian Hukum Islam* Vol. XIII No. 1.