

ANALYSIS OF THE MARRIAGE GUARDIAN RIGHTS FOR CHILDREN BORN FROM UNREGISTERED MARRIAGES FROM THE PERSPECTIVES OF ISLAMIC LAW AND POSITIVE LAW: (A CASE STUDY IN PANGTONGGAL VILLAGE, PROPO DISTRICT, PAMEKASAN REGENCY)

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Abstract: Unregistered (*siri*) marriages, which remain prevalent in society, give rise to various legal issues, particularly concerning the rights of a marriage guardian (*wali nikah*) for children born from such unions. The differing perspectives between Islamic law and positive law in Indonesia regarding the status of the biological father as a marriage guardian create a complex issue, especially in practical implementation within society. This study aims to analyze the rights of a marriage guardian for children born from unregistered marriages from the perspectives of Islamic law and positive law, as well as to examine its implementation in Pangtonggal Village, Proppo District, Pamekasan Regency. This research employs a normative-empirical method, which examines applicable legal provisions based on Islamic legal norms and statutory regulations, and connects them with empirical facts found in the field. Data were collected through interviews with community leaders, village officials, and related parties, supported by a literature review of relevant legal sources. The results indicate that, from the perspective of Islamic law, children born from unregistered marriages still have a lineage (*nasab*) relationship with their biological father as long as the marriage fulfills the pillars and conditions, thus granting the father the right to act as a marriage guardian. Meanwhile, under positive law, children from unregistered marriages are administratively recognized as having civil relations only with their mother and the mother's family. Consequently, the biological father cannot automatically act as a marriage guardian without formal acknowledgment or a court determination. This difference creates legal and social implications in the practice of marriage within society. This study is expected to contribute to the development of Islamic family law and serve as a consideration for society and relevant authorities in addressing issues related to marriage guardianship for children born from unregistered marriages.

Keywords: *Marriage Guardian; Unregistered Marriage; Islamic Law; Positive Law; Normative-Empirical.*

INTRODUCTION

The practice of unregistered marriage (*nikah siri*) remains a relatively widespread phenomenon in Indonesia, driven by economic, social, and cultural factors (Gunawan et al., 2013). Such marriages are generally conducted in accordance with the pillars and requirements of Islamic law, but they are not officially registered with state institutions such as the Office of Religious Affairs (*Kantor Urusan Agama/KUA*) (Akmal et al., 2021). As a result, although religiously valid, these marriages do not possess administrative legal force from the perspective of the state.

The absence of registration gives rise to various legal implications, particularly concerning the status of women and children born from such marriages. Under Indonesian positive law, unregistered marriages are considered to lack legal evidentiary power, which leads to difficulties in obtaining civil rights such as birth certificates, inheritance, and other forms of legal protection (Faiz et al., 2025). Children born from unregistered marriages often face administrative and juridical challenges related to the recognition of their legal status.

Furthermore, the issue becomes increasingly complex when associated with the rights of a marriage guardian (*wali nikah*) for daughters born from unregistered marriages. In social practice, there are often differing interpretations regarding who is entitled to act as a marriage guardian, particularly when the parents' marital status is not recognized by the state (Rahman

et al., 2024). This situation creates legal uncertainty that has the potential to disadvantage the child, both from religious and formal legal perspectives.

Various previous studies have examined the position of children born from unregistered marriages from the perspectives of Islamic law and positive law. Research shows that Islamic law generally recognizes the legitimacy of a child as long as the marriage fulfills the required pillars and conditions, thereby granting the child lineage (*nasab*), maintenance rights, and inheritance rights (Arifin et al., 2025). In contrast, positive law emphasizes marriage registration as a requirement for legal validity, which in turn limits the recognition of the child's legal status (Rahman et al., 2024).

Other studies highlight the position of the marriage guardian in the context of unregistered marriages, affirming that a guardian is an essential element in Islamic law; however, under positive law, the presence of a guardian is insufficient without official registration (Gultom et al., 2024). This reflects a dualism of norms between religious law and state law, resulting in uncertainty regarding family legal status (Putri et al., 2025).

Nevertheless, studies that specifically integrate the analysis of the rights of a marriage guardian for children born from unregistered marriages using a comparative approach between Islamic law and positive law remain limited. The novelty of this research lies in its focus on analyzing the legitimacy of the marriage guardian as well as its juridical implications for the protection of children's rights, through a more comprehensive and integrative approach between these two legal systems.

Research Objectives

This study aims to analyze the rights of a marriage guardian (*wali nikah*) for children born from unregistered marriages (*nikah siri*) from the perspectives of Islamic law and positive law in Indonesia, as well as to examine the similarities and differences between these two legal systems in providing legal certainty and protection for children.

This research is important because the phenomenon of unregistered marriages not only affects the legal status of the marriage itself but also directly influences the fulfillment of children's rights, particularly in determining the marriage guardian for daughters. The lack of legal clarity due to the absence of marriage registration creates serious problems, both from the perspective of Islamic law and positive law, thereby potentially leading to legal uncertainty and injustice for the child.

Furthermore, the differences in approach between Islamic law, which emphasizes religious (*syar'i*) validity, and positive law, which emphasizes administrative aspects, have resulted in disharmony in the practice of determining marriage guardians. This condition calls for in-depth academic study to bridge these differences, in order to provide a conceptual foundation for a more just and responsive legal harmonization in protecting children's rights.

Literature Review

1. Islamic Law Perspective

In Islamic law, a marriage guardian (*wali nikah*) is a fundamental pillar for the validity of a marriage. The majority of scholars (*jumhur*) agree that a marriage is not valid without a guardian (Basir et al., 2022), making the guardian a key determinant of the legitimacy of a marital relationship. In the context of unregistered marriages (*nikah siri*), as long as the pillars and conditions—such as the presence of a guardian, witnesses, and the *ijab kabul* (offer and acceptance)—are fulfilled, the marriage is considered valid according to Islamic law, even if it is not administratively recorded (Munir et al., 2026).

The consequence of the validity of *nikah siri* in Islamic law is the recognition of the child's status as a legitimate child. A child born from such a marriage maintains a lineage (*nasab*) relationship with the father and is entitled to maintenance, inheritance, and other forms of protection (Utami et al., 2022). This indicates that, in Islamic law, the legitimacy of a

marriage does not depend on state registration, but rather on the fulfillment of its pillars and conditions.

However, in practice, there are debates regarding the legitimacy of a guardian for daughters born from *nikah siri*, particularly when there are administrative or social doubts concerning lineage. Some studies suggest that as long as lineage can be proven according to Islamic principles, the biological father retains the right to act as the marriage guardian. Nevertheless, in certain circumstances—such as disputes or unclear lineage—the role of a judge-appointed guardian (*wali hakim*) may serve as an alternative (Rofiq et al., 2025).

Furthermore, contemporary studies highlight that the practice of *nikah siri* may conflict with the objectives of Islamic law (*maqashid al-shari'ah*), particularly in terms of the protection of lineage (*hifz al-nasl*). Administrative legal uncertainty may negatively affect child protection, even though the child is theologically considered legitimate. This reflects a tension between normative validity and social protection in modern Islamic law.

2. Positive Law Perspective

In Indonesian positive law, the validity of a marriage is determined not only by the fulfillment of religious requirements but also by official registration, as stipulated in the Marriage Law (Firdaus et al., 2024). Unregistered marriages are considered to lack legal force, resulting in various juridical implications, particularly concerning the status of children and their civil rights (Firdaus et al., 2024).

Children born from *nikah siri* were initially categorized as children born out of wedlock, having civil relations only with their mother and the mother's family. However, following the Constitutional Court Decision Number 46/PUU-VIII/2010, such children may establish a civil relationship with their biological father, provided it can be proven scientifically and legally. Nevertheless, the implementation of this decision still faces various challenges in practice (Agatha et al., 2021).

Regarding the marriage guardian, positive law tends to emphasize formal legal aspects. The biological father of a child born from *nikah siri* is not automatically recognized as a marriage guardian if the parents' marriage is not officially registered (Arifin et al., 2025). In such cases, a judge-appointed guardian (*wali hakim*) is often used by the Office of Religious Affairs to ensure the legal validity of the daughter's marriage.

Moreover, positive law places marriage registration as an essential instrument to ensure legal certainty and the protection of citizens' rights. Without registration, women and children are in a vulnerable position and may face various forms of injustice, including issues related to inheritance, maintenance, and family legal status (Umilia et al., 2026). Therefore, the state considers registration as an integral part of the legal protection system.

Analysis

Based on these two perspectives, there is a fundamental difference between Islamic law and positive law in determining the validity of a marriage guardian for children born from *nikah siri*. Islamic law emphasizes substantive aspects (the fulfillment of pillars and conditions), meaning that as long as lineage is established, the father retains the right to act as a guardian. In contrast, positive law emphasizes administrative and formal legal aspects, so without registration, the father's guardianship is not legally recognized (Rofiq et al., 2025).

This disharmony leads to legal uncertainty and has the potential to disadvantage the child, particularly in the fulfillment of civil and religious rights. Therefore, an integrative approach is needed to accommodate the values of justice in Islamic law while ensuring legal certainty within the national legal system. Such harmonization is essential to ensure that children's rights, including the determination of a marriage guardian, are optimally protected both normatively and juridically.

RESEARCH METHOD

This study employs a qualitative approach with an empirical juridical (socio-legal) research design, which examines legal norms related to the rights of a marriage guardian (wali nikah) in Islamic law and positive law, while also linking them to the social realities occurring in society. This approach is chosen because the issue under study is not only situated at the normative level but also involves evolving social practices, particularly in the phenomenon of unregistered marriages (nikah siri) and their implications for the status and rights of children (Soekanto, 2014).

The research was conducted in four hamlets located in Pangtonggal Village, East Java, which were purposively selected based on the presence of unregistered marriage practices in the area. The research subjects consisted of three main informants, namely parents who have direct experience related to nikah siri and the determination of marriage guardians for their children. The informants were selected using a purposive sampling technique, based on the consideration that they possess relevant knowledge and experience aligned with the research focus (Moleong, 2018).

The data sources in this study consist of primary and secondary data. Primary data were obtained through in-depth interviews with informants to explore information related to the practice of nikah siri, the determination of marriage guardians, and the community's understanding of Islamic law and positive law. Meanwhile, secondary data were obtained from primary legal materials such as the Qur'an, Hadith, the Compilation of Islamic Law, Law Number 1 of 1974 on Marriage, and the Constitutional Court Decision Number 46/PUU-VIII/2010, as well as secondary legal materials in the form of books and scientific journals relevant to the research topic (Ibrahim, 2019).

Data collection techniques were carried out through interviews, observation, and documentation. Interviews were conducted in a semi-structured manner to allow the researcher to have guiding questions while remaining flexible in exploring deeper information. Observations were conducted to understand the social conditions of the community and the practices occurring directly, while documentation was used to complement the data through archives or documents related to the research (Sugiyono, 2020). This study was conducted over two months, from January to February 2026, with stages including preparation, data collection, analysis, and report writing, while also adhering to research ethics such as informed consent and data confidentiality.

Data analysis was conducted using an interactive qualitative analysis model, which includes data reduction, data display, and conclusion drawing. The collected data were categorized and analyzed by comparing empirical findings in the field with the provisions of Islamic law and positive law, allowing for the identification of similarities and differences between the two. A comparative approach was also used to strengthen the analysis of the rights of marriage guardians within these two legal systems (Miles, Huberman, & Saldaña, 2014).

To ensure data validity, this study employed triangulation techniques, both source triangulation and method triangulation, by comparing interview data with legal documents and relevant scientific literature, as well as testing the consistency of information from various informants. Thus, the research findings are expected to have validity and reliability that can be scientifically accounted for (Denzin, 2017).

RESULTS & DISCUSSION

The research findings obtained through interviews, observations, and documentation indicate that there are quite complex dynamics related to the community's understanding of

the rights of a marriage guardian for children born from unregistered marriages in Pangtonggal Village, East Java. Field data show that this issue is not only understood from a formal legal perspective but is also strongly influenced by social constructions and the religious understanding of the local community.

The first finding reveals differences of opinion between biological fathers and community leaders regarding the status of the marriage guardian for children born from unregistered marriages. Some fathers, as informants, stated that they believe they still have the right to act as marriage guardians for their daughters because they consider the religiously conducted marriage to be valid. However, some community leaders argue that due to the absence of official registration, the legal status of the marriage is administratively weak; therefore, in practice, it is safer to use a judge-appointed guardian (*wali hakim*) to avoid legal issues in the future. This difference in views reflects a dualism between religious legitimacy and state legality within society (Soekanto, 2014).

The second finding shows that there are protests and objections from some members of the community regarding the practice of appointing marriage guardians for children born from unregistered marriages. Some residents object to recognizing the father from an unregistered marriage as a marriage guardian, as it is considered to create legal uncertainty and potential social conflict. These objections are mainly based on concerns about the administrative validity of the child's marriage and its implications for state registration. Observations also indicate a tendency among the community to prefer formal procedures through the Office of Religious Affairs (KUA) to avoid disputes in the future (Moleong, 2018).

The third finding highlights variations in academic studies derived from literature and scientific journals, which demonstrate differing conclusions regarding the status of a marriage guardian in the context of *nikah siri*. Some studies argue that Islamic law continues to recognize the legitimacy of the father as a guardian as long as the child's lineage can be proven in accordance with Islamic principles. Meanwhile, positive law emphasizes the importance of marriage registration as the legal basis for recognizing a marriage guardian. These differing approaches result in a range of academic conclusions, from those supporting the authority of the father as guardian to those recommending the use of a judge-appointed guardian to ensure legal certainty (Ibrahim, 2019).

Overall, the findings of this study indicate a lack of synchronization between community understanding, social practices, and academic studies regarding the rights of a marriage guardian (*wali nikah*) for children born from unregistered marriages (*nikah siri*). This condition reveals a space of normative conflict between Islamic law and positive law, which leads to uncertainty in practical implementation. Therefore, an integrative approach is required to bridge these differences in order to provide legal certainty while preserving the religious values that exist within society.

The results of the study show that the practice of determining marriage guardians for children born from unregistered marriages in Pangtonggal Village reflects a tension between Islamic legal norms, positive law, and the social realities of the community. The first finding, which highlights differences of opinion between biological fathers and community leaders, indicates that the construction of guardianship authority is still understood in a dualistic manner. Biological fathers tend to rely on the legitimacy of Islamic law, which emphasizes the validity of lineage (*nasab*) as the primary basis for guardianship, whereas community leaders emphasize formal legal aspects, particularly marriage registration as a requirement for legal recognition (Pornomo et al., 2025). In this context, such views are consistent with classical Islamic legal theory, which positions the guardian as an essential element of a valid marriage, while also considering the principle of public welfare (*maslahah*) in its application within modern society (Idris et al., 2026).

Theoretically, these differences can be explained through the concept of legal pluralism, which suggests that more than one legal system can coexist and interact within a society, namely state law and religious law (Panjalu et al., 2024). In the Indonesian context, Islamic law coexists alongside positive law, often resulting in differing interpretations in social practice. This is reinforced by studies indicating that legal pluralism within Indonesian Muslim families frequently leads to uncertainty in issues of marriage guardianship, especially in cases of unregistered marriages (Dihri et al., 2022). Thus, the differences in perspective between fathers and community leaders are not merely normative issues but also manifestations of legal pluralism operating within social practice.

The second finding, namely the existence of protests and objections from the community regarding the recognition of biological fathers as marriage guardians in unregistered marriages, indicates a tendency among society to prioritize formal legal certainty. These objections are based on concerns about potential administrative disputes and the future legal status of the child. From the perspective of legal certainty theory, the state is viewed as having an important role in providing legal assurance through marriage registration as an instrument of social control (Krestianto et al., 2025). This phenomenon aligns with studies showing that society is increasingly moving toward the formalization of family law as a response to the complexities of modern social life (Badruddin et al., 2023).

Meanwhile, the third finding from academic documentation reveals variations in research outcomes regarding the status of marriage guardians in the context of *nikah siri*. Some literature states that in Islamic law, as long as lineage can be proven according to Islamic principles, the biological father retains the right to act as a marriage guardian. However, from the perspective of positive law, marriage registration is the primary requirement for the validity of legal relationships; therefore, without registration, the father's authority as a guardian is not administratively recognized. This difference reflects a divergence between the paradigm of substantive justice in Islamic law and procedural justice in state law.

Furthermore, these differing academic perspectives can be analyzed through the theory of *maqashid al-shari'ah*, particularly in the aspect of *hifz al-nasl* (protection of lineage). Islamic law emphasizes the protection of lineage as a primary objective, thereby allowing the biological father to retain guardianship rights. In contrast, positive law emphasizes protection through administrative legal certainty to prevent social disadvantages for the child. The tension between these two approaches demonstrates that no single legal system is entirely dominant; rather, there is an ongoing process of normative negotiation between religious values and the needs of a modern state.

Thus, this study confirms that the issue of marriage guardian rights for children born from unregistered marriages cannot be resolved through a single normative approach. Instead, it requires an integration of Islamic law and positive law. Such integration is essential to create legal certainty while preserving the religious values upheld by society, thereby ensuring that the protection of children can be realized in a more comprehensive and equitable manner.

CONCLUSION

The findings of this study indicate that the determination of marriage guardians (*wali nikah*) for children born from unregistered marriages (*nikah siri*) reveals a clear tension between Islamic law, positive law, and the social realities of the community. Differences in perspectives between biological fathers and community leaders reflect a dualistic understanding of guardianship, where Islamic law emphasizes the validity of lineage (*nasab*) as the basis for guardianship, while positive law prioritizes formal legal recognition through marriage registration. This condition is further shaped by legal pluralism in Indonesian society, where religious and state legal systems coexist and interact, often resulting in differing

interpretations and practices. The tendency of the community to favor formal legal certainty also shows an increasing awareness of the importance of administrative legality in preventing future disputes and ensuring the protection of children's rights.

Furthermore, the variation in academic perspectives highlights a fundamental distinction between substantive justice in Islamic law and procedural justice in positive law. Islamic law focuses on protecting lineage and maintaining religious legitimacy, whereas positive law emphasizes administrative order and legal certainty to avoid potential social harm. This divergence creates a normative gap that cannot be resolved through a single legal approach. Therefore, this study concludes that an integrative approach is necessary to harmonize Islamic law and positive law, so that legal certainty can be achieved without neglecting the religious values upheld by society, ultimately ensuring more comprehensive and equitable protection for children.

DAFTAR PUSTAKA

- Akmal, Andi Muhammad, and Mulham Jaki Asti. "Problematika Nikah Siri, Nikah Online Dan Talak Siri Serta Implikasi Hukumnya Dalam Fikih Nikah." *Al-Risalah Jurnal Ilmu Syariah Dan Hukum* 21 (2021): 45-59.
- Faiz, Ahmad, and Sri Redjeki Slamet. "Penetapan Isbat Nikah terhadap Perkawinan yang tidak Tercatat di Kantor Urusan Agama dan Implikasi Hukumnya terhadap Status Hukum Suami Istri dan Anak (Studi Kasus Penetapan Pengadilan Agama Jakarta Selatan Nomor 879/PDT. P/2021/PA. JS)." *Arus Jurnal Sosial Dan Humaniora* 5.2 (2025): 2525-2533.
- Faiz, Ahmad, and Sri Redjeki Slamet. "Penetapan Isbat Nikah terhadap Perkawinan yang tidak Tercatat di Kantor Urusan Agama dan Implikasi Hukumnya terhadap Status Hukum Suami Istri dan Anak (Studi Kasus Penetapan Pengadilan Agama Jakarta Selatan Nomor 879/PDT. P/2021/PA. JS)." *Arus Jurnal Sosial Dan Humaniora* 5.2 (2025): 2525-2533.
- Gunawan, Edi. "Nikah Siri dan Akibat Hukumnya Menurut UU Perkawinan." *Jurnal Ilmiah Al-Syir'ah* 11.1 (2013).