



Legal Construction of Unregistered marriage: A Comparative Analysis from the Perspective of *Ushul Fiqh* and Positive Law

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Abstract

Unregistered marriages are a socio-religious phenomenon that continues to grow in Indonesian society, even though they are not officially recognized by the state. This phenomenon raises complex legal and social issues, particularly in relation to the protection of women's and children's rights and legal certainty in the institution of marriage. This study aims to analyze the legal construction of secret marriage practices through the perspective of *ushul fiqh* and Indonesian positive law. Using a qualitative method through a legal-normative approach, this study examines Islamic legal norms and national regulations related to marriage through an analysis of legislation, fatwas, and legal literature. The results of the study show that there is tension between the state's legal-formal principles and the normative flexibility in Islamic law regarding marriage registration. Therefore, an integrative and contextual legal formulation is needed, one that can accommodate social realities without neglecting the values of justice and legal protection. The implications of this research highlight the need for reform of Islamic family law that is responsive to religious practices at the grassroots level, while ensuring legal certainty and the civil rights of citizens.

INTRODUCTION

Marriage is a fundamental social institution in society, especially in the context of Islamic law (Nasution et al., 2024; Anggraini & Putera, 2023). The practice of unregistered marriages, or marriages that are not officially registered by the state, has become a complex phenomenon that has sparked various academic debates and significant legal implications. Social reality shows that the practice of unregistered marriage still exists in Indonesian society, even though it is strictly regulated in various positive legal regulations (Nasution, 2002). The complexity of unregistered marriage lies in the dialectic between universal and contextual Islamic legal norms and the applicable positive legal system. The *ushul fiqh* perspective provides space to deeply examine the philosophy and legal paradigms underlying marriage practices, while the positive law approach provides a normative framework regulating legal relationships between individuals within the state context (Abubakar, 2020; Ziaharar et al., 2024).

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Historically, the practice of unregistered marriage has undergone significant developments from the pre-colonial era to the contemporary era. In the early days of Islam, marriage was more flexible and was settled through social mechanisms. However, with the increasing complexity of social structures and the need for legal certainty, the state needed formal and standardized instruments for recording marriages (Rajafi, 2020). The fundamental issue that arises is the tension between the Islamic legal conception of marriage as a sacred bond and the state's need for legal certainty and protection of individual rights. The practice of unregistered marriage often leaves complex problems, especially regarding the legal status of children, inheritance rights, and the protection of women within the family structure (Umar et al., 2025). There are several factors behind the practice of unregistered marriage. First, economic factors that limit the ability of couples to register their marriage officially. Second, socio-cultural considerations that still maintain traditional marriage customs. Third, a rigid and incomplete understanding of the concept of marriage in Islam (Rohidin, 2017).

A study of the legal construction of secret marriages is crucial to generate a more comprehensive and systematic understanding. This research aims to conduct an in-depth analysis using an interdisciplinary approach, combining the philosophical perspective of *ushul fiqh* with the normative analysis of positive law. The methodological framework of this research will use a normative juridical method with data collection techniques through literature study and legal document analysis. A comparative approach will be used to compare legal constructions between the perspectives of *ushul fiqh* and positive law, in order to produce a comprehensive synthesis of understanding (Gibtiah, 2016).

The significance of this research lies in its attempt to deconstruct the partial understanding of unregistered marriages. This research does not merely criticize existing practices but also seeks to make an academic contribution in formulating a model of marriage law that is more equitable, responsive to social dynamics, and in accordance with the fundamental principles of Islamic law.

Thus, this research is expected to provide theoretical and practical contributions to understanding the complexity of secret marriage. Theoretically, this research will enrich the academic knowledge base on contemporary Islamic legal construction. Practically, this research is expected to serve as a reference for policymakers in formulating more comprehensive and equitable regulations.

METHODS

This study uses a qualitative method with a legal-normative approach that aims to examine legal norms, principles of *ushul fiqh*, and positive legal regulations related to the practice of secret marriages in Indonesia (Zed, 2008; Anggito, 2018). This approach is used to examine legislation, Islamic legal doctrine, and relevant literature to gain a deep understanding of the legal construction of marriages that are not officially registered. Data collection techniques were carried out through literature review analysis, with data sources consisting of primary legal materials such as the Quran, Hadith, *ushul fiqh* books, the Marriage Law, and the Compilation of Islamic Law; secondary legal materials such as scientific journals, academic books, and previous research results; and tertiary legal materials such as legal encyclopedias and dictionaries of terms (Arfa, 2018). Data analysis was conducted through normative interpretation of legal texts, comparative analysis between Islamic legal principles and positive law, and a prescriptive approach to formulate legal recommendations that are integrative and responsive to social realities (Wijaya, 2019).

RESULT AND DISCUSSION

The Legal Construction of Unregistered marriage in the Perspective of *Ushul Fiqh*

Unregistered marriage represents a complex phenomenon in Islamic legal discourse, generating diverse academic debates within the framework of *Ushul Fiqh*. The term *sirri*, derived from Arabic meaning “secret” or “hidden,” refers to marital practices conducted without formal state registration or public announcement. The legal construction of such practices requires a comprehensive analysis that accounts for philosophical, normative, and contextual dimensions within the Islamic legal tradition (Widyatama, 2004). The *Ushul Fiqh* perspective offers a methodological framework to assess the legal status of unregistered marriage. The practice of *ijtihad* serves as a key instrument for interpreting the legal position of marriages that do not fully comply with modern administrative procedures (Harisi et al., 2024; Safithri & Shiddiqi, 2024). Scholars of *Ushul Fiqh* adopt a multidimensional approach, considering *maqasid al-shari'ah* (the objectives of Islamic law), the principle of *maslahah* (public interest), social context, and the pursuit of justice (Yasid, 2019).

From a normative perspective, unregistered marriage presents significant legal complexities. In classical Islamic law, marriages that meet essential conditions such as the presence of the bride and groom, a legal guardian (*wali*), witnesses, and mutual consent are generally considered valid in a spiritual sense (Hastarini, 2025; Antony & Ja'far, 2024). Most scholars argue that the substance of the marital contract takes precedence over formal administrative procedures imposed by the modern state. Nevertheless, the legal construction of such practices cannot be separated from *maqasid al-shari'ah* considerations. Principles such as the protection of lineage, preservation of dignity, and legal certainty are vital in evaluating the legitimacy and appropriateness of unregistered marriages. Any marital practice must guarantee the fundamental rights of individuals, especially women and children born from such unions (Muhammad Rizal Firdaus, 2024).

Analysis through *Ushul Fiqh* reflects a balance between the benefits (*maslahah*) and potential harms (*mafsadah*) of unregistered marriage. On one hand, such marriages may offer solutions for couples facing administrative barriers or seeking to avoid illicit relationships. On the other, they entail risks of legal uncertainty and potential violations of women's and children's rights. In contemporary social contexts, the legal construction of unregistered marriage becomes increasingly complex. The modern state requires administrative documentation to provide legal protection for its citizens, whereas the Islamic legal tradition emphasizes the spiritual and substantive dimensions of the marital contract. The tension between positive law and Islamic law poses a significant challenge in establishing a comprehensive and equitable legal framework (Hefni, 2022; Wahyu et al., 2024).

Contemporary Islamic legal thinkers seek to develop progressive approaches that bridge normative religious values and administrative requirements of the state. They emphasize the importance of synergy between Islamic and positive law, with a focus on the protection of individual rights and substantive justice. The legal complexity of unregistered marriage cannot be reduced to a binary opposition. Its legal construction demands a holistic approach, taking into account normative, philosophical, sociological, and cultural aspects simultaneously. Each case of unregistered marriage possesses unique characteristics and challenges that resist generalization. The evolving legal discourse on unregistered marriage within *ushul fiqh* demonstrates that Islamic law is a dynamic and contextual system. Thus, legal interpretation must remain responsive to social change while upholding the principles of justice and public welfare (*maslahah*) (Maulidin & Nawawi, 2024; Tanuri, 2025).

The Construction of Positive Law and Its Juridical Implications

Positive law refers to the legal system that is formally recognized and enforceable within a state, established by legitimate authorities and endowed with binding power (Achmad & Thamrin, 2024). The construction of positive law is not merely a collection of codified rules but rather a dynamic representation of social consensus, fundamental values, and the complex and ongoing mechanisms of social control. In the Indonesian context, positive law has evolved through a long historical process involving various elements of the nation. The national legal system reflects a synthesis of colonial legal heritage, customary law, Islamic law, and modern legislative products. This complexity mirrors the multicultural and pluralistic nature of Indonesian society, where every legal product must accommodate diversity and ensure substantive justice (Taufiq, 2021).

The formulation of positive law requires careful consideration of various social dimensions. Legal norms should not be perceived as static entities but rather as dynamic instruments that are responsive to social change (Inriani, 2024). Legislative processes demand a comprehensive analysis that simultaneously considers philosophical, sociological, political, and academic perspectives. The juridical implications of positive law construction are evident in the mechanisms of law enforcement. A legal system not only defines the rules but also establishes institutional structures to ensure implementation and oversight. Judicial institutions, law enforcement agencies, and supporting bodies serve as the fundamental pillars in realizing the ideals of national law (Rauf, 2024).

The transformation of Indonesia's positive law has experienced dynamic phases since the reform era. The spirit of democratization and legal reform has prompted the enactment of more responsive, transparent, and equitable legislation. Laws are not merely instruments of control but are also intended to promote welfare and protect the rights of citizens (Efendy et al., 2023). The complexity of positive law construction becomes more evident through its interaction with diverse legal systems. Customary law, religious law, and modern legal frameworks constantly intersect within the social dynamics of Indonesia (Adriyan et al., 2024; Utami, 2024). Harmonizing these systems remains a fundamental challenge in establishing a comprehensive and just national legal framework.

A central challenge in constructing positive law lies in its capacity to accommodate rapid social transformations. The digital era, globalization, and technological advancement have introduced new complexities to the legal landscape. Legislative products are thus required to be adaptive, anticipatory, and responsive to contemporary developments, while maintaining their philosophical integrity. The juridical implications of positive law construction cannot be separated from the pursuit of substantive justice (Baiti, 2024). Law should not function solely as a procedural mechanism but also as a means of realizing social justice. Each piece of legislation must respond to humanitarian concerns, guarantee fundamental rights protection, and enable individuals to reach their potential within a democratic society (Faisal & Mariyani, 2018).

The development of positive law necessitates active participation from various societal sectors. The involvement of academics, legal practitioners, civil society organizations, and other stakeholders is essential in producing legitimate and representative legal products. Transparency, accountability, and public participation are crucial pillars in realizing democratic legal development. Looking ahead, Indonesia's positive law construction must continue to undergo reconstruction and transformation. The legal system must address complex national issues ranging from corruption and human rights enforcement to natural resource governance. Only through a holistic, responsive, and justice-oriented approach can positive law effectively guide the nation toward the fundamental ideals enshrined in the Constitution.

The Dialectic of *Ushul Fiqh* and Positive Law

The dialectical relationship between *ushul fiqh* and positive law represents a fundamental convergence between the Islamic legal tradition and the modern legal system. It reflects the complex dynamics in the development of legal thought. Etymologically, *ushul fiqh* refers to the “roots of Islamic jurisprudence” and serves as a principal methodology for understanding and interpreting the sources of Islamic law, namely the Qur'an and Hadith. As a methodological framework, *ushul fiqh* provides a set of principles and tools that enable scholars to derive legal excavation (*istinbat al-hukm*) from primary sources (Najib, 2023).

In the context of contemporary legal systems, this dialectic demonstrates a complex interaction between religious norms and state legal structures. Positive law, which is formulated and enforced through formal legislative mechanisms, often intersects with, compromises, or even adopts principles rooted in *ushul fiqh* (Abdulah, 2023). This interaction is not merely theoretical, but also practical, as evidenced in areas such as family law, religious courts, and Islamic financial transactions.

A crucial aspect of this dialectic lies in the methodological flexibility of *ushul fiqh* through mechanisms such as *qiyās*, *istihsān*, and *maslahah mursalah*. These methods have proven adaptable in addressing social and technological changes, allowing Islamic legal thought to remain relevant in modern contexts (Misran, 2020). At the same time, the formal structure of positive law in Muslim-majority societies cannot be entirely separated from Islamic values.

A clear illustration of this convergence can be observed in Indonesia's national legal system. The presence of religious courts and regulations concerning marriage, inheritance, and Islamic economics reflects partial integration of *ushul fiqh* principles into state law. However, this integration also presents challenges particularly in maintaining a balance between Islamic legal ideals and the pragmatic demands of national legislation (Ali & Bakar, 2025).

The *maqāṣid al-sharī'ah* approach, which emphasizes the core objectives of Islamic law namely the preservation of religion, life, intellect, lineage, and property has emerged as a strategic method to mediate tensions between the two legal systems (Nurhikmah, 2024; Fadli & Helmi, 2024). This approach facilitates the contextualization of Islamic law in a way that is responsive to contemporary developments while retaining its ethical and spiritual substance.

Ultimately, the dialectic between *ushul fiqh* and positive law is an evolving dialogical process, shaped by societal demands and ongoing transformation. It is not simply an attempt to synthesize two distinct legal systems, but rather an intellectual and spiritual process of transformation aimed at developing a just, contextual, and universally oriented legal framework (Nurjanah et al., 2025).

Socio-Legal Implications

The socio-legal dimension is essential in understanding how legal structures both influence and are influenced by social realities. Law functions not only as a normative system that governs behaviour but also as an instrument of social change that adapts to the evolving cultural, economic, and technological dynamics of modern society (Readi, 2024; Rohman et al., 2024). In today's complex and multicultural world, law plays a strategic role not only as a mechanism of social control but also as a mediator of conflict, a facilitator of justice, and an agent of social transformation (Afifah & Warjiyati, 2024). Every legal policy has the potential to reshape social relations, power structures, and collective awareness of values such as justice, equality, and human rights.

Legal transformation as a driver of social change is evident in issues such as gender equality, child protection, and family rights. Gender-just regulations, for instance, contribute to the deconstruction of patriarchal systems and open up broader participation for women in public life (Dhita et al., 2025). Likewise, the growing use of

restorative justice in criminal systems reflects a paradigm shift from retributive approaches toward social restoration and offender reintegration (Wahyuningsih, 2024).

The rise of information technology and globalization adds further complexity to socio-legal implications. Regulations concerning digital privacy, cyber security, and intellectual property rights in the digital age demand that legal systems be responsive to rapid and disruptive changes in how people live and work (Lazarus, 2024). From an economic standpoint, law plays a pivotal role in establishing fair distribution systems through labor regulations, social protection policies, and fiscal measures (Badalu, 2025). In the environmental domain, legal regulations embody not only ecological concerns but also social justice and the protection of indigenous communities (Syamhari, 2023).

In multicultural societies, law faces the challenge of balancing universal principles with local wisdom. Protecting minorities and recognizing cultural diversity are key indicators of an inclusive and responsive legal system. Thus, socio-legal implications are not merely the consequences of regulatory enactments, but rather a dialectical process between norms and lived realities. Effective law is not only valid in a formal sense but also substantively and contextually just.

CONCLUSION

Unregistered marriage is a complex and multidimensional legal phenomenon, which reveals the dynamic dialectic between religious norms and state regulations. In-depth studies show that the practice of unregistered marriage cannot be understood in simple terms, but requires a holistic approach that considers theological, social, and juridical aspects. The *ushul fiqh* perspective reveals that although unregistered marriage has historical foundations in Islamic tradition, the practice has the potential to cause significant legal and social problems. The principle of *maqashid syariah*, which aims to protect offspring, maintain family dignity, and realize benefits, shows that unregistered marriages can contradict the true spirit of Islamic law, especially when the practice ignores the fundamental rights of spouses and children born from the marriage. From a positive law perspective, the journal article asserts that unregistered marriages pose a serious challenge to the legal system governing marriage. The absence of official registration not only affects the legal status of the marriage, but also has broad implications for the protection of individual rights, especially those of women and children. The article concludes by emphasizing the importance of harmonizing religious norms and positive law in dealing with the practice of unregistered marriage, by encouraging a comprehensive, dialogical, and equitable approach.

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