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# Sirri Marriage Review from Islamic Law and Positive Law

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## ABSTRACT

*Islamic Law sees Sirri Marriage as something allowed to conduct; yet, it is highly recommended to record or to list it in an official marriage document. However, positive Law sees it into two different points of view. Firstly, some experts consider sirri Marriage as something legal to conduct. Secondly, some experts (and also law upholde opporatus) consider it as something prohibited. Following this idea, the government present a draft of the marriage act to provide some punishments for people who conduct sirri Marriage.*

**Keywords:** Marriage, sirri Marriage.

## I. INTRODUCTION

Sirri Marriage/Un-registered marriages are available around the world. It does not happen to specific religion, tribe, educational or economic level. Iraq, Cambodia and Indonesia are three countries facing the problem of unregistered Marriage. Based on the data of the Indonesian Ministry of Religious Affairs, there are many unregistered marriages in 5 districts in Indonesia, namely Bangkalan District with 1,156 cases among 2009-2012, while in a period of 2010-2012, Indramayu with 1,144 cases, Malang with 756 cases, Tangerang with 300 cases and Yogyakarta, there were only six cases. [1]

Besides that, unregistered Marriage is also considered as a shortcut for couples who want Marriage but are not ready, or there are other things that do not allow them to be legally bound.

The factors behind the occurrence of unregistered marriages include: (Gunawan 2010)

- a. Sirri marriage is carried out because of a relationship that is not approved by the parents of both parties or one of the parties.
- b. Unregistered marriages are carried out with the reason that someone feels unhappy with their partner
- c. Sirri marriage is done under the pretext of avoiding the sin of adultery.

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- d. Sirri marriage is done because the couple feels they are not ready materially and socially.
- e. Sirri marriage is often placed as an option when someone wants to have polygamy for a number of reasons.
- f. Unregistered marriages are carried out only for exploration and legalizing sexual relations.
- g. Serial marriages are carried out to avoid the burden of costs and complicated administrative procedures.

The cases also happen in nearby-Bogor; there is an expatriate married with Indonesian but unregistered both have an impact not only for the woman on her marital status but also her child regarding the citizenship of the biological father who is an expatriate. He stays in Indonesia temporary. [2] Other factors, the couple does not register their Marriage since they believe registration is not compulsory as a rule of their religions.

## **II. DEFINITION SIRRI MARRIAGE**

Etymologically sirri means something hidden, secret, slowly, not explicitly. In contrast to jaher, it means open, not a secret, openly. In relation to Marriage or Marriage, in general, Indonesian interpret sirri Marriage carried out as Marriage carried out in the presence of a guardian and two fair witnesses and the existence of a qobul (acceptance) Oconsent, but this Marriage is not registered with the Office of Religious Affairs (KUA).

When viewed from the aspect of Islamic Law, this Marriage is a legal marriage because the Marriage fulfils the conditions and the pillars. What is meant by conditions is something that must exist in Marriage but does not include the essence of the Marriage itself. If one of the conditions of the Marriage is not fulfilled, then the Marriage is invalid (Soemiyati, 1986:30). These conditions are (Ahmad Azhar Basyir, 1987: 27)

- a. The halal bride is married to the man who will be her husband.
- b. Two male witnesses were present.
- c. There is a guardian of the bride who performs the contract.

Then what is meant by the pillars of Marriage or Marriage is the essence of Marriage itself, so without one of the pillars, Marriage cannot be carried out. The pillars of Marriage are the parties that carry out the marriage contract (bride and bride), guardians, witnesses and the marriage contract.

### **III. UN-REGISTERED MARRIAGE IN SOME COUNTRIES**

According to Bangladesh's civil Law, every Marriage must be registered, and the legally married couple must get a marriage certificate, which is the main document to prove the legal status of the Marriage. A marriage that is not registered is not legal. Therefore, a woman's marital status is not acknowledged. [3]

This marriage registration requires the couple to pay 400 Riels which is equal to IDR 1.325,95, Kurs 1 IDR = 3.3 Riel. Furthermore, couples who have not registered their married will be known as illegally married; the impact will appear in the divorce process. The women also will not be entitled to the property during Marriage or the right of child support because the father of the child is not recognized by Law either.[4]

Iraq has un-marriage issues in their community which has various religions. Iraqis who married based on their various beliefs. The couple will get their official marriage documents after they do the registration. However, Couples who have not registered their Marriage will have consequences such as unavailability of official marriage documents in regard to the legitimating of their married status. As thus an impact, they could not access their civil rights. [5]

As the impact of un-registered Marriage, Indonesia has a similar situation with Iraq and Cambodia, namely nonfulfillment of rights of women and girls, for example, Civil Rights. A child of un-registered married women faces a problem to have a birth certificate. Furthermore, her/his birth certificate only declared the mother's name. Research conducted in Sukabumi, Karawang, Subang and Cianjur districts shows that 15 to 20 per cent of birth certificate only mentions the mother's name.[6] In the future, this child will be bullied by his friends as "Anak Haram (Illegal child)."

### **IV. LAW AND PRACTICE IN INDONESIA**

#### **a. Indonesian Marriage Law**

Indonesia already has a national law that applies to all citizens of the Republic of Indonesia, namely Law number 1 of 1974 concerning Marriage. Prior to the enactment of this Marriage Law, Indonesia had enacted the marriage regulations regulated in the Civil Code (BW), Indonesian Christian Marriage Ordinance (Huwelijks Ordonansi voor de Christens Indonesiers) Staatsblaad 1933 No.74, Mixed Marriage Regulations (Regeling op de gemengde Huwelijken), Staatsblaad 1898 No. 158. In addition, the Law on Registration of Marriage, Divorce and Reconciliation (NTR) in the 1954 State Gazette No. 32 and the regulation of the

Minister of Religion regarding its implementation were also enacted. The NTR Registration Law only concerns the technical registration of Marriage, divorce, and reconciliation of Muslims, while the legal practice of Marriage, divorce, and reconciliation generally adheres to the provisions of the Syafi'i school of fiqh (Islamic Law extracted) with the issuance of the Marriage Law, the provisions stipulated in the previous Law, ordinance and regulations, to the extent that they have been regulated in the new Law are declared no longer valid.

As stated above that, a factor that contributed to unregistered Marriage is when a husband has more than 1 wife and does not get permission from his first wife. Article 3, paragraph 1 of Law No. 1 of 1974 mentions the principle of Marriage is relative. It means although it stated that every person might only have a wife/husband, there is an opportunity that a man may have more than one wife when the court gives permission to a husband. Mostly, the cases in having the second wife involved men who did not fulfil the requirements of Law No1 Year 1974 as stated in article 5. It mentions that the husband must have the consent of the wife/wives. He also must be able to guarantee the necessities of life of his wives. Advances in Social Science, Education and Humanities Research (ASSEHR), volume 141 152 and their children. Moreover, it must be ensured that the husband will be fair to his wives and their children

b. Legal Basis and Islamic View of Un-registered Marriage (Sirri)

The Law of unregistered Marriage, according to religion, is legal or legal if the conditions for Marriage are met at the time the unregistered Marriage is held. it's just contrary to the command of the Prophet SAW, who recommends that the Marriage is according to and announced to others so as not to become slander. (Hamid Sarong 2010)

Un-registered Marriage according to positive Law is a marriage that is not carried out in accordance with Law no. 1 of 1974 concerning Marriage. The legislation states that Marriage is legal if it is carried out according to the laws of each religion and belief, and each Marriage is recorded according to the applicable laws and regulations.

Stated that to Edi Gunawan in his journal entitled Un-registered Marriage and Its Legal Consequences According to the Marriage Law, the government views the existence of a law that requires the recording of marriage contracts, then it is a valid law and it is mandatory for the people to obey it and not violate it.

Un-registered Marriage is prohibited and invalid according to Islamic Law because there are elements of un-registered Marriage (the Marriage is kept a secret) that are contrary to Islamic teachings and can invite slander and can bring harm/risk to the perpetrator and his family. Un-registered Marriages are also invalid according to positive Law because they do not carry out

the standard and correct munakahat legal provisions, and the KUA does not register their marriages.

Based on the above description, it can be concluded that the legal un-registered Marriage is legal based on religious Law and invalid under state law because it does not meet the terms and conditions imposed. The religious Law of unregistered Marriage is legal or legal if the conditions for Marriage are met at the time the Marriage is held as long as the unregistered Marriage fulfils the pillars and conditions of Marriage agreed upon by the Islamic scholars, then it can be ascertained that the basic Law is valid.

## **V. DISCUSSION**

In positive Law (Law No. 1 of 1974 concerning Marriage), it is stated in Article 2 paragraph (1) that Marriage is legal if it is carried out according to the Law of each religion. Then in Article 2 paragraph (2), it is stated that every Marriage is recorded according to the applicable Law. The provisions contained in Law no. 1 of 1974 concerning Marriage is explicitly stated as such. In view of this, in the understanding of underhand Marriage, including legal or illegal Marriage, there are two conflicting opinions. Those who contend that the opinion that underhanded marriages are a legal state that in Law no. 1 of 1974 concerning Marriage regarding the purpose of this registration is not explained further, only in a general explanation it is stated that the recording of each Marriage is the same as the recording of other important events in human life such as births and deaths which are stated in a certificate. In the form of an official deed or called an authentic deed. By understanding the general explanation in the Marriage Law, the registration of the Marriage aims to make the marriage event clear for both the person concerned and other related parties. If in the future there is a dispute or dispute in the Marriage, then the official deed can be used as evidence that is strong enough. Thus the registration of a marriage does not determine the validity of Marriage but only states that the marriage event has occurred; this is purely administrative in nature (Soemiyati, 1986: 65). According to the opinion that underhand marriages are invalid, state that in Article 2 paragraph (2), it is stated that every Marriage is recorded according to the applicable Law. The one who records this Marriage is a registrar, in this case, the marriage registrar. If non-Muslim, the marriage registrar is a civil servant. The existence of this record is expected to ensure order in society.

Therefore, every Marriage must take place before and under the supervision of a marriage registrar. Marriages that are carried out outside the supervision of the marriage registrar will cause many problems.

This is related to Surah Al Baqoroh verse 282, the contents of which recommend to believers when carrying out transactions that are not cash to write them down or do a deed and for cash transactions, a deed may be made and a deed may not be made. This statement shows that the existence of a transaction will give rise to rights and obligations between the parties. If the transaction is cash, then the rights and obligations have been carried out by the parties, while if the transaction is not cash, then the rights and obligations of the parties will continue to exist as long as the transaction has not been completed. In view of this, for transactions that are not cashing in nature, it is highly recommended by the Shari'ah to do a deed. If this is related to the act of marrying, then recording or making a marriage certificate is highly recommended. With the implementation of Marriage, there will be rights and obligations between the parties. The rights and obligations imposed on these parties will continue as long as there is still a marriage bond and/or the termination of the Marriage (as a result of the Marriage). In view of this, the benefits obtained from the existence of the deed are very large compared to the absence of the deed. The facts in society show that when a marriage or Marriage does not have a certificate, it tends to be misused by certain parties who only seek personal gain; the victims are usually their children and wives. In view of this, the government, through laws and government regulations, regulates in full the procedures for conducting marriages. If these rules are obeyed, then the parties will get legal protection. If there is a divorce in un-registered Marriage, the religious court will refuse to settle it because there is no official certificate. Thus, it will be difficult to obtain legal protection regarding the distribution of assets, child care and possibly inheritance, and it is the women (wife) and children who are harmed.

The existence of such a phenomenon, the government, through the Ministry of Religion, submitted a draft marriage law that criminalizes unregistered Marriage or unregistered Marriage, polygamy and contract marriage. This act is considered an illegal act. Perpetrators of unregistered marriages or unregistered marriages will be subject to criminal sanctions, both married couples and those who marry. This bill has both pros and cons. Those who are pro that criminal sanctions are applied to unregistered marriages or unregistered marriages include the Chief Justice of the Constitutional Court Muhammad Mahfudh MD, who said "that he agrees that the perpetrators of unregistered marriages are criminalized because they can make children neglected and the first wife does not want to admit it. Usually, husbands who carry out un-registered marriage marriages, among others, are only to satisfy sexual desires. He also said that the prohibition of un-registered Marriage does not violate religious provisions because, in Islam, there are various interpretations. He chose an interpretation that agreed that un-registered marriage marriages must be regulated by law" (Muh. Mahfudh MD, 2010). In line

with the opinion above, the Chief Justice of the Supreme Court, Harifin Tumpa, also agreed with the existence of criminal sanctions. Then those who contra or disagree with the criminalization of unregistered marriages include the Chairman of the National Human Rights Commission (HAM) Ifdhal Kasim; he said that the government should not regulate too deeply about the formalities of Marriage, the state should only legalize Marriage by recording it and not too much regulation. About the formalities. In addition, there are also many scholars who do not approve of the existence of criminal sanctions for un-registered marriage marriages. If this is forced, then prostitution will flourish.

Based on the writer's opinion, without seeing any criminal sanctions, a marriage or Marriage with an authentic deed is more useful, because if there is a problem in the Marriage, for example, if the husband dies, the share of the inheritance of the children and the wife is clearer, if there is a divorce, the share of the property is clearer, wife and children can be calculated easily. This will be different if the Marriage is carried out in an unregistered marriage way; children and wife do not get an inheritance if the husband dies. Likewise, if the wife and children are divorced, they do not get a share of their property and others. Given this, it is better to avoid the occurrence of un-registered marriage marriages.

## **VI. CONCLUSION**

Sirri marriage / un-registered marriage that is carried out in accordance with the terms and conditions but is not registered with the marriage registration office or the Office of Religious Affairs. According to the Marriage Law, this Marriage is considered invalid.

The writer also argues that un-registered marriages, especially when there are minors, should not place women and girls in unfair treatment since her status as a wife is recognized by the Law. Although she has no legal status as a wife, as a mother, she must be identified as a member of a house who is protected by the state of any kind of violations.

Because it is considered illegal, if there is a problem, there is no legal protection, especially for the children and their wives. In view of this, it is better not to do sirri marriages.

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