



The *Maslahah* of State Policy in Responding to Unregistered Marriage: Inclusion of Unregistered Marriage on The Family Card

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Abstract

Based on Minister of Home Affairs regulations No. 108 and No. 109 of 2019, unregistered (*siri*) marriage couples can now record their marriage in the Family Card. This article aims to analyze the policy of issuing Family Cards for unregistered marriage couples using the Islamic jurisprudence (ushul fiqh) approach. This article is a literature study, with data sourced from the Minister of Home Affairs regulations and various related literatures. The obtained data is then analyzed using a normative-philosophical approach, specifically ushul fiqh theories such as the concepts of public interest (*maslahah*) and preventing harm (*adz-dzari'ah*). The article argues that in every policy, there will be potential benefits (*maslahah*) and harms (*mudharat*). In the policy of recording unregistered marriages, the government needs to close the means that cause harm (*saddu al-dhariah*) to ensure this policy is not interpreted as a form of legalizing unregistered marriages. The government also needs to open the means that lead to benefits (*fathu al-dhariah*) so that the goal of fulfilling children's civil rights with the basis of having a birth certificate, and the purpose of the Marriage Law, namely the validity of marriage, can be achieved through the use of unregistered marriage data for expediting the marriage legalization process (*itsbat nikah*) in Religious Courts. The conclusion of this article is that to achieve the ideal policy objectives, aspects of benefits and harms need to be considered. This article contributes to understanding state policies from the perspective of ushul fiqh and indicates that it remains a relevant approach.

Keywords: Unregistered Marriage, Policy, Family Card, *Saddu al-Dhariah*.

Abstrak

Berdasarkan Permendagri No. 108 dan No. 109 Tahun 2019, pasangan nikah siri saat ini dapat mencatatkan perkawinan mereka di dalam kartu keluarga. Artikel ini bertujuan untuk menganalisis kebijakan penerbitan kartu keluarga bagi pasangan nikah siri dengan pendekatan ushul fiqh. Artikel ini merupakan penelitian pustaka yang data-datanya bersumber dari Peraturan Menteri Dalam Negeri dan beberapa literatur yang memiliki keterkaitan. Data yang didapat kemudian dianalisis menggunakan pendekatan normatif-filosofis khususnya teori-teori ushul fiqh seperti konsep *maslahah* dan *saddu al-dhariah*. Artikel ini berargumen bahwa di setiap kebijakan, tentu akan muncul potensi kemaslahatan maupun kemudharatan. Dalam kebijakan pencatatan perkawinan siri, pemerintah perlu menutup sarana penyebab kemudharatan (*saddu al-dhariah*) agar kebijakan ini tidak diartikan sebagai bentuk legalisasi nikah siri. Pemerintah juga perlu membuka jalan yang menyebabkan munculnya manfaat (*fathu al-dhariah*) agar tujuan pemenuhan hak keperdataan anak dengan dasar kepemilikan akta kelahiran dan tujuan dari UU Perkawinan, yaitu keabsahan perkawinan dapat dicapai dengan pemanfaatan data perkawinan yang belum dicatat untuk percepatan proses *itsbat nikah* di Pengadilan Agama. Kesimpulan artikel ini adalah untuk mencapai tujuan kebijakan yang ideal, aspek kemaslahatan dan kemudharatan perlu diperhatikan. Artikel ini berkontribusi pada pemahaman kebijakan negara dari perspektif usul fiqh dan menandakan bahwa ia masih merupakan pendekatan yang relevan.

Kata Kunci: Perkawinan Siri, Kebijakan, Kartu Keluarga, *Saddu al-Dhariah*.



Introduction

Debate on the validity of unregistered marriage both from Islamic Jurisprudence and Indonesian law understandings is the result of a half-assed process of legislation and legal codification. Indonesia as a state of law is unable to take over the authority of religious law (*fiqh*) that has been believed by the community and turn it into state authority. Finally, there is legal dualism and ambiguity, especially with regard to family law.¹ The ambiguity of marriage registration, in particular, is a manifestation of a root problem that has not been resolved to date. For those who support unregistered marriage, marriage without registration is valid because it is Islamic jurisprudence as a living law. As for those who state that marriage without registration is invalid, they argue based on the positive law in the Law on Marriage. This phenomenon is the culmination of a fundamental question, is registration currently a requirement for the validity of marriage, or is it just an administrative requirement?²

Initially, unregistered marriage (*siri* marriage) couples could not issue a family card (KK), because one of the requirements for its issuance is the availability of authentic proof of marriage (marriage book). However, with the issuance of Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 108 and 109 of 2019 concerning the Implementation Regulation of Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration, unregistered marriage couples have the right to register and manage family cards. Unregistered marriage couples who do not have a marriage certificate/marriage book excerpt can apply for a KK by completing the declaration of absolute responsibility (SPTJM) instead. Moreover, children born from a *siri* marriage can also create a birth certificate by including the KK and SPTJM. The difference is that the KK issued to a *siri* marriage couple will include the status "unregistered marriage."³ The issuance of this regulation shows a legal innovation in the field of family law, especially with regard to the civil rights of wives and children.

Siri marriage in Indonesia is a classic debate that continues to this day.⁴ Not only in Indonesia, *siri* marriage is also widely practiced in several countries. In Iran, the practice of *siri* marriage is often related to the problematic practice of underage marriage.⁵ In Tunisia, *siri* marriage, referred to as *nikah urfi*, is practiced by many university students. This practice arose due to the influence of *salafi* teachings⁶. In the United Kingdom, *siri* marriage is also a new trend practiced by many young people⁷ and about 80% of Muslim marriages are not recorded.⁸

¹ Euis Nurlaelawati, "Pernikahan Tanpa Pencatatan: *Isbat Nikah* Sebuah Solusi?," *Musāwa Jurnal Studi Gender Dan Islam* 12, no. 2 (2013): 261–77.

² M Faiz Kurnia Hadi, "Konsepsi Hukum *Nikah Siri* Di Indonesia: Upaya Sinkronisasi Antara Living Laws Dengan Positive Laws," *Indonesian Journal of Islamic Law* 1, no. 1 (2018): 18–40.

³ Agus Manurung and Lusia Sulastri, "Polemik Pencatatan Anak Dari *Nikah Siri*," *Jurnal Hukum Sasana* 7, no. 2 (2021): 321–32.

⁴ Eva F Nisa, "The Bureaucratization of Muslim Marriage in Indonesia," *Journal of Law and Religion* 33, no. 2 (2018): 291–309.

⁵ Ladan Rahbari, "Marriage in Iran: Women Caught between Shi'i and State Law," *Electronic Journal of Islamic and Middle Eastern Law (EJIMEL)* 7 (2019): 37–48.

⁶ Maaïke Voorhoeve, "Law and Social Change in Tunisia: The Case of Unregistered Marriage," *Oxford Journal of Law and Religion* 7, no. 3 (2018): 479–97.

⁷ Rajnaara C Akhtar, "Unregistered Muslim Marriages in the UK: Examining Normative Influences Shaping Choice of Legal Protection," in *Personal Autonomy in Plural Societies* (Routledge, 2017), 140–55.

⁸ Patrick S Nash, "Sharia in England: The Marriage Law Solution," *Oxford Journal of Law and Religion* 6, no. 3 (2017): 523–43.

There are many factors behind the widespread practice of *siri* marriage in Indonesia. In short, *siri* marriage is an easier shortcut to be implemented in order to legalize the relationship between husband and wife.⁹ As a result, there are many problems that will be experienced by *siri* marriage couples, especially the ancestry (*nasab*) for children born and the rights of women.¹⁰ Legally, *siri* marriage for women will result in the loss of a number of basic women's rights that she would have received if the marriage had been registered.¹¹ To anticipate this, the state provides facilities in the form of applying for marriage legalization (*isbat nikah*) at the Religious Court. *Isbat nikah* is a solution to obtain state recognition, legal certainty and legal protection from the *siri* marriage.¹²

Research on the registration of *siri* marriages in Family Cards has not been widely published. This is because the discourse on the registration of *siri* marriages in KK started in 2021. Meanwhile, the Indonesia government regulates the registration of *siri* marriages in KK was only issued in 2019. Fadli explained the positive side of recording *siri* marriage as a form of guarantee of legal protection for women and children born. Negatively, marriage registration causes several things, such as: the rise of *siri* marriage, opening other ways as a marriage process, weak legal protection, especially when domestic violence occurs.¹³ Agus Manurung believes that recording a *siri* marriage in a KK has no other effect, meaning that it is the same as a *siri* marriage that is not recorded. Children born from *siri* marriages, even though they are recorded in the KK, still have a birth certificate that only has the name of the biological mother written on it. This is because the lack of documents in the form of a marriage certificate and family relationship status on the KK is not strong enough to prove that the child is really born from legal marriage. As a result, if the child needs a legal relationship with the father, the child must prove who the real father is. Is it the one listed on the KK or not?¹⁴ Monica Putri Maharani explained that to register a child from a *siri* marriage can be done in 2 ways: first, officially but only tied to the mother; second, if couples want to make a citation for the parents recorded, they must complete the SPTJM of the birth and marriage of the parents. Then, in the child's certificate, it will still be written that the marriage of the two parents has not been registered at the Religious Affairs Office (KUA) or Civil Registry.¹⁵

So far, there has been no research that focuses on analyzing the policy of recording *siri* marriages in the family card from the perspective of ushul fiqh, especially when analyzed through the perspective of *maslahah* and the concept of *al-dhariah*. This article focuses on the aspects of benefit and harm of *al-dhariah* contained in the policy by analyzing the pros and cons of the presence of this policy with an ushul fiqh approach. This research contributes to the

⁹ Teuku Islahuddin, Dhiauddin Tanjung, and Ramadhan Syahmedi Siregar, "Implementation of Marriage Registration in Aceh Qanun Number 6 of 2008 Concerning Administrative Registration (Analysis of Illegal Marriage Practices in Lhoksukon District, North Aceh Regency)," *Britain International of Humanities and Social Sciences (BIOHS) Journal* 4, no. 1 (2022): 70–80.

¹⁰ Nasaiy Aziz, "The Great Phenomenon of Online Sirri Marriage for Male and Female," *Budapest International Research and Critics Institute (BIRCI-Journal): Humanities and Social Sciences* 1, no. 3 (2018): 445–50.

¹¹ Edi Gunawan, "Nikah Siri Dan Akibat Hukumnya Menurut UU Perkawinan," *Jurnal Ilmiah Al-Syir'ah* 11, no. 1 (2013).

¹² Ahmad Fauzi, "Isbat Nikah Solusi Bagi Nikah Siri," *Jurnal Sosial Sains* 1, no. 9 (2021): 978–84.

¹³ Fadli Fadli, "IMPLIKASI YURIDIS TERHADAP PENERBITAN KARTU KELUARGA BAGI PASANGAN NIKAH SIRI DI INDONESIA," *Jurnal MEDIASAS: Media Ilmu Syari'ah Dan Ahwal Al-Syakhsyiyah* 4, no. 1 (2021): 82–91.

¹⁴ Manurung and Sulastri, "Polemik Pencatatan Anak Dari Nikah Siri."

¹⁵ Monica Putri Maharani and Anjar Sri Ciptorukmi Nugraheni, "Legalitas Dan Akibat Hukum Kedudukan Anak Yang Lahir Dari Perkawinan Siri Pada Dinas Kependudukan Dan Pencatatan Sipil Kabupaten Sukoharjo," *Jurnal Inovasi Penelitian* 2, no. 3 (2021): 849–54.

development of new understandings of *fiqh* in Indonesian family law issues, especially that related to the aspects of benefit in the policy of listing *siri* marriages on family cards for women and children who will be born.

Method

This article is literature research by taking primary data from the Minister of Home Affairs Regulations (Permendagri No. 108 and No. 109 of 2019), and secondary data from books, journals and articles that have related studies to marriage registration. The data was analyzed using qualitative methods. This article is normative-philosophical research that examines the law of marriage registration in terms of applicable norms in Indonesia, both in terms of positive law and Islamic law. The data obtained is processed and analyzed using the *ushul fiqh* approach. Based on the *ushul fiqh* study, there are agreed sources of law, such as the Qur'an, as-Sunnah, Ijma' and Qiyas. In addition, there are also sources of law that are muslim scholars debated such as *istihsan*, *maslahah mursalah*, *saddu al-dhariah*, *syar'u man qablana*. This article focuses on using the concepts of *al-dhariah* and *maslahah* to analyze the data.

History of the obligation to register marriages in Indonesia

The development of law in Indonesia cannot be separated from the influence of customary law and Islamic law that lives and practiced by the Indonesian people. The history of the growth and development of Islamic law in Indonesia can be traced from the arrival of Islam to the archipelago. Since then, it can be said that Islamic law began to be part of the religious and social practices of Indonesian society.¹⁶ Slowly, the practice of Islamic law in society was able to shift the existence of customary law. Thus, the application of Islamic law began to be recognized and enforced by several kingdoms of the archipelago at that time. Some policies, such as the establishment of Islam as the official religion of the kingdom, the appointment of officials who take care of religion, to the publication of guidebooks or laws based on Islamic law.¹⁷ As a result, the influence of Islamic law in society became stronger and its practice became more entrenched.

According to Munawir Sjadzali, the growth and development of the Islamic religious court system was motivated by the emergence of awareness of the Muslim community of their need for laws in accordance with their religion.¹⁸ The awareness and needs of the community were facilitated by the institution of religious courts organized by the *penghulu* during the royal period and located in the mosque. At that time, the implementation of the court was carried out in the porch of the mosque so that the court was often referred to as the porch court. This court handled cases relating to Islamic civil matters. Later, during the colonial period, this court moved under the *Landraad*, a kind of district court established by the colonial government.¹⁹

Historically, marriage registration in Indonesia was influenced by regulations implemented by the government during the colonial period. The emergence of the Draft Recorded Marriage Ordinance in 1937 had implications for the obligation to record indigenous

¹⁶ Jefik Zulfikar Hafizd, "Sejarah Hukum Islam Di Indonesia: Dari Masa Kerajaan Islam Sampai Indonesia Modern," *Jurnal Tamaddun: Jurnal Sejarah Dan Kebudayaan Islam* 9, no. 1 (2021).

¹⁷ Nabila Saifin Nuha Nurul Haq, "Politik Hukum Islam Era Kesultanan," *Reflektika* 12, no. 1 (2017): 1–19.

¹⁸ Munawir Sjadzali and Hukum Islam di Indonesia, "Pemikiran Dan Praktek," *Bandung: Remaja Rosdakarya*, 1994.

¹⁹ Akrim Hayata, Ravico Ravico, and Syukrawati Syukrawati, "SEJARAH DAN PERKEMBANGAN SISTEM PERKAWINAN DI INDONESIA MASA PRA-KEMERDEKAAN," *Istishab: Journal of Islamic Law* 1, no. 01 (2020): 47–60.

marriages.²⁰ Another consequence of this regulation was the prohibition of polygamy. In the end, this regulation drew protests because it was considered contrary to Islamic teachings. Faced with public protests over this regulation, the colonial government tried to improve the marriage regulations. This means that the marriage registration model can be said not to have arisen purely from the *ijtihad* of the muslim scholar (*ulama*). However, this regulation was initially heavily influenced by the regulations implemented by the government during the colonial period.

The efforts to order the administration that had been enacted during the colonial period were then continued by the Indonesian government after independence by issuing Law No. 22 of 1946 concerning Registration of Marriage, Divorce and Reconciliation.²¹ This law specifically regulated marriages performed by people who are Muslims must be under the supervision of a Marriage Registration Officer who was appointed by the Minister of Religion. This regulation was contained in Article 1 paragraphs (1-6). Furthermore, Article 3 mentions sanctions for people who do not register their marriages with the Marriage Registration Officer. In fact, people who marry couples, yet they are not officers, will also be sanctioned.

The discourse on the importance of marriage law as an effort to order administration among Indonesian people has emerged since the colonial era. This discourse can be seen from the results of the Al-Islam Ist Congress in Surabaya in 1938.²² This discourse continued until the post-independence period, precisely when KH. Wahid Hasyim served as Minister of Religious Affairs. At that time, several draft laws were produced that were in accordance with the times.²³ Then in 1958, when KH. Moh Ilyas served as Minister of Religious Affairs, a special Marriage Bill for Muslims had the opportunity to be submitted to parliament. However, there were pros and cons between the National National Development Party (PNI) faction which wanted a Marriage Bill that was general in nature and covered all elements of society, and the Nahdhatul Ulama (NU) faction which wanted the Marriage Bill to be based on religious norms. In the end, the discussion of this bill was deadlocked.²⁴

In 1973 the government was finally able to formulate a Marriage Bill which was then submitted to the House of Representatives (DPR). However, the submission of this draft bill was rejected by some Muslims on the argument that there was a clash of values between State Marriage Law and Islamic Law. Specifically, the United Development Party (PPP) faction rejected the validity of registered marriages (in front of officials) because it was considered contrary to Islamic teachings.²⁵ This rejection was caused by the results of the NU *ulema* deliberation in Jombang which stated that several articles in the draft Marriage Bill were not in accordance with Islamic teachings. The decision of the NU *ulema* deliberation was then brought by the PPP faction to Jakarta to be used as a basis for argumentation in the DPR session. This decision then received support from several Islamic organizations, such as Nahdhatul Ulama Student Association (IPNU), Islamic Student Association (PII), Islamic Student Movement (GMII) and several scholars.

²⁰ Daniel S Lev, *Peradilan Agama Islam Di Indonesia; Suatu Studi Tentang LandasanPolitik Lembaga-Lembaga Hukum* (PT Intermedia, 1981), p. 327.

²¹ Khoiruddin Nasution, *Status Wanita Di Asia Tenggara: Studi Terhadap Perundang-Undangan Perkawinan Muslim Kontemporer Di Indonesia Dan Malaysia* (Jakarta: INIS Jakarta, 2002), hlm. 146.

²² Lev, *Peradilan Agama Islam Di Indonesia; Suatu Studi Tentang LandasanPolitik Lembaga-Lembaga Hukum*. hlm. 327

²³ S H Nani Soewondo, "Kedudukan Wanita Indonesia Dalam Hukum Dan Masyarakat," *Balai Aksara-Yudhistira Dan Pustaka Saadiyah*, 1984.

²⁴ Nasution, *Status Wanita Di Asia Tenggara: Studi Terhadap Perundang-Undangan Perkawinan Muslim Kontemporer Di Indonesia Dan Malaysia*.

²⁵ F Z Amak, *Proses Undang-Undang Perkawinan* (PT Alma'arif, Bandung, 1976).

Faced with massive rejection, Mukti Ali as Minister of Religious Affairs at that time conducted a political lobby to the PPP faction and several groups that refused. As a result of the political lobby, there were several reductions and changes to the article. Particularly on the issue of the definition of a valid marriage, Article 2 paragraph (1) became, Marriage is valid if it is carried out according to the law of each religion and belief, and paragraph (2) every marriage is recorded for the sake of state administration.²⁶

The political lobby carried out by Mukti Ali resulted in a middle ground between the state's interest in making marriage registration an administrative requirement and the interests of Muslims to establish that the validity of marriage must be based on the pillars and conditions that have been determined in Islam. Although in the end, this article expressed to two counter-productive groups in understanding and interpreting the article on marriage validity. The first group separates the understanding of Article 2 paragraph (1) and paragraph (2), according to them, the validity of marriage is only based on the laws of religion and belief of each, while the recording carried out by the marriage registration officer is only a manifestation of the requirements of administrative order. The second group tries to understand and interpret Articles (1) and (2) holistically. This means that the validity of marriage is not only based on religious law and beliefs, but also on whether the marriage is registered or not.²⁷

In Law No. 1 of 1974, there are several principles related to the urgency of marriage registration, such as: that the purpose of marriage is to form an eternal and happy family, the validity of marriage is based on the laws that apply to each religion and belief, and the validity of marriage is based on the existence of marriage registration.²⁸ In essence, marriage registration aims to ensure legal certainty for the husband, wife, and children born from a marriage, as well as to ensure the benefit of their marriage. After being registered by the Marriage Registration Officer, the married couple will get an excerpt of the Marriage Certificate/Marriage Book as authentic evidence of the occurrence of the marriage event. The function of this recording is a form of legality, legal protection and guarantee of legal certainty. Other functions obtained when registering a marriage are not only related to the relationship of rights and obligations between husband and wife, but also the status of children born from the marriage.²⁹ Thus, marriage registration is very important to protect the rights of many parties, especially the rights of wives and children born from marriage.

The issuance of a marriage certificate can be used as a legal document proving that a man and woman have a valid marriage. In addition, authentic evidence of marriage registration also serves to ensure legal certainty born of a marriage consequence, such as the determination of heirs, and the existence of joint property. If a marriage is carried out *siri* or not registered by a marriage registration officer, various problems will arise that will be borne by one of the family elements. For example, a *siri* wife cannot be considered a legal wife so that the state cannot guarantee the wife's right to maintenance, joint property, and inheritance for the wife and children who are left behind. It is also difficult for *siri* wives to be accepted by the

²⁶ Maulida Zahra Kamila, "Dinamika Politik Dalam Penyusunan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Al-Ahwal Al-Syakhshiyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 3, no. 2 (2022): 207–20.

²⁷ Dwi Arini Zubaidah, "Pencatatan Perkawinan Sebagai Perlindungan Hukum Dalam Perspektif Maqāṣid Asy-Syarī'ah," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 12, no. 1 (2019): 15–28.

²⁸ Nastangin Nastangin, "TINJAUAN FILOSOFIS (Pasal 2 Ayat (2) Undang-Undang Perkawinan No 1 Tahun 1974 Tentang Pencatatan Perkawinan)," *Mahakim: Journal of Islamic Family Law* 2, no. 1 (2018).

²⁹ Nenang Julir, "Pencatatan Perkawinan Di Indonesia Perspektif Ushul Fikih," *JURNAL ILMIAH MIZANI: Wacana Hukum, Ekonomi, Dan Keagamaan* 4, no. 1 (2018): 53–62.

community because of the assumption that *siri* marriage is a form of cohabitation, or *siri* wives are mistresses. As a result, *siri* wives and children born from *siri* marriages lose their rights from a man.³⁰

Problematics of *siri* marriage in Indonesia

The dialectic of the importance of marriage registration in the discourse of Islamic family law in Indonesia is a long debate that has not yet found a meeting point between thinkers, academics, and several religious figures in Indonesia. The main reason for the lack of common ground between some of these views are because marriage registration is not a rule that is ordered in writing or explicitly in the Qur'an and al-Hadith. In addition, the classical *fiqh* books that are used as a guide do not mention the legal status of marriage registration. Meanwhile, classical *fiqh* has its own place in the lives of some people in Indonesia. In the end, often new *ijtihad* in the field of family law (marriage registration) receives mixed responses from several parties. Some accept the *ijtihad*, while others reject it on the argument that marriage registration is not something that is required by religion.³¹

There are many reasons why *siri* marriage is still widely practiced by the community, such as: economic factors, not old enough, the existence of official ties, recording only administrative matters, first pregnancy, lack of awareness in the community, and polygamy rules that are not easy.³² The many factors behind the practice of *siri* marriage in the community have led to classic debates that have not found a solution.³³ So that results in less effective enforcement of marriage registration rules, and the emergence of dualism of marriage law in society.

In 2010, there were pros and cons regarding the criminalization of perpetrators of *siri* marriage. Several NU clerics strongly rejected the idea of criminalization on the argument that the regulation would hurt and defame the teachings of Muslims. KH Anwar Iskandar stated that all marriage rules have been legalized by religion. So, the prohibition rule will hurt Muslims. According to him, in Law No. 1 of 1974, marriage is the domain of religion, while the state's domain only records its administration. The discourse on criminal law for perpetrators of *siri* marriage is considered an attempt by the state to exceed its authority. KH Nurul Huda Djazuli thinks that the law of marriage is obligatory and *sunnah*, so the state does not need to participate in forbidding it.³⁴

Quraish Shihab states that a marriage that is not registered can be considered a valid marriage in terms of Islamic law. However, this marriage model can lead to a sin because it has violated state regulations. Meanwhile, Islam commands Muslims to obey leader as long as it does not contradict the Qur'an.³⁵ According to MUI, marriage registration is a recommendation so that there is no neglect of marriage. KH Ma'ruf Amin stated that although marriage is legal after fulfilling the pillars and conditions, it will become haram if it causes

³⁰ Jacobus Anakletus Rahajaan, "Legalitas Pernikahan Siri Di Indonesia," *PUBLIC POLICY (Jurnal Aplikasi Kebijakan Publik & Bisnis)* 1, no. 1 (2020): 61–75.

³¹ Mohsi Mohsi, "Pencatatan Perkawinan Sebagai Rekonseptualisasi System Saksi Perkawinan Berbasis Masalah," *Al-'Adalah: Jurnal Syariah Dan Hukum Islam* 4, no. 2 (2019): 134–48.

³² Siti Ummu Adillah, "Analisis Hukum Terhadap Faktor-Faktor Yang Melatarbelakangi Terjadinya Nikah Siri Dan Dampaknya Terhadap Perempuan (Istri) Dan Anak-Anak," *Jurnal Dinamika Hukum* 11 (2011): 104–12.

³³ Hadi, "Konsepsi Hukum Nikah Siri Di Indonesia: Upaya Sinkronisasi Antara Living Laws Dengan Positive Laws."

³⁴ detikNews, "Kiai Sepuh NU: UU Pidana Nikah Siri Menyakiti Umat Islam," detiknews, 2010, <https://news.detik.com/berita-jawa-timur/d-1301225/kiai-sepuh-nu-uu-pidana-nikah-siri-menyakiti-umat-islam>.

³⁵ M Quraish Shihab, "Wawasan Al-Quran Tafsir Mauhu'i Atas Persoalan Umat Cet VIII," *Bandung: Mizan*, 1998.

harm. This haram will arise if in that marriage, the husband neglects his children and wife. The *siri* marriage can be considered valid but *haram* because of the victims of the marriage. Therefore, to anticipate the harm that will arise, every marriage must be recorded by an authorized institution.³⁶ As for Muhammadiyah issued a fatwa on the mandatory registration of marriages for their members.³⁷

Unregistered marriage in contemporary *fiqh* discourse is often referred to as *zawaj al-'urfi* or marriage that has become a tradition. There are many contemporary scholars who forbid the practice of unregistered marriage. Muhammad Nabil Ganayim states that unregistered marriage is a contemporary crime and that is *haram*.³⁸ Although the pillars and conditions of marriage are fulfilled, Ahmad Umar Hashim states that without registration, the marriage is unlawful and will be in vain.³⁹

Registering *siri* marriage on the family card: an *Ushul Fiqh* Approach

Siri marriage can be interpreted with several concepts, but in the Indonesian context, *siri* marriage is interpreted as a marriage contract/marriage that has fulfilled all the conditions and pillars of marriage, but is not recorded by the Marriage Registration Officer (PPN). What characterizes *siri* marriage is the absence of documents and authentic administrative evidence of the occurrence of legal events (marriage).⁴⁰ In the context of Indonesian law, the perpetrators of *siri* marriage will experience obstacles to prove that they have married. Finally, there will be a lot of harm and losses that will be experienced by one of the couples or child born from the marriage. To anticipate some of the harm and losses arising from the practice of *siri* marriage, basically, couples who practice *siri* marriage can issue a marriage book/marriage certificate and family card through the procedure of applying for *isbat nikah* at the Religious Court.⁴¹

In practice, there are many reasons for *siri* marriage couples who eventually apply for *isbat nikah* in the Religious Court, such as: for the purposes of child birth certificates, administration to the requirements for performing the hajj.⁴² Based on this, it can be concluded that in the context of Indonesia as a state of law, the existence of authentic evidence of a legal event (marriage) is very important. This evidence has not only an administrative function, but also other functions related to legal protection, social, and civil rights.

There are many contemporary phenomena behind the practice of unregistered marriages, one of which is as a tactic for someone to commit a polygamy. There are many

³⁶ Meilya Nur Prianjani and Esther Masri, "Analisis Hukum Terhadap Penyedia Jasa Pernikahan Siri Secara Online Menurut Kompilasi Hukum Islam Dan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Widya Pranata Hukum: Jurnal Kajian Dan Penelitian Hukum* 4, no. 2 (2022): 206–17.

³⁷ Admin, "Fatwa Tarjih Tentang Nikah Sirri," Tanya Jawab Agama, 2020, <https://suaramuhammadiyah.id/2016/05/22/fatwa-tarjih-tentang-nikah-sirri/>.

³⁸ Muhammad Nabil Ganayim, *Nadwah Az-Ziwa'jal-'Urfi* (Kairo: Fakultas Dar al-'Ulum, 1997).

³⁹ Irwan Masduqi, "Nikah Sirri Dan Istbat Nikah Dalam Pandangan Lembaga Bahtsul Masail PWNU Yogyakarta," *Musāwa Jurnal Studi Gender Dan Islam* 12, no. 2 (2013): 187–200.

⁴⁰ Rihlatul Khoiriyah, "Aspek Hukum Perlindungan Perempuan Dan Anak Dalam Nikah Siri," *Sawwa: Jurnal Studi Gender* 12, no. 3 (2017): 397–408.

⁴¹ Mahmud Huda and Noriyatul Azmi, "Legalisasi Nikah Siri Melalui Isbat Nikah," *Jurnal Hukum Keluarga Islam* 5, no. 2 (2020): 98–119.

⁴² Musfira Musfira, Jamal Jamil, and Istiqamah Istiqamah, "ANALISIS PELAKSANAAN ITS BAT NIKAH TERHADAP PERNIKAHAN SIRRI DI PENGADILAN AGAMA BANTAENG," *Iqtishaduna: Jurnal Ilmiah Mahasiswa Hukum Ekonomi Syari'ah*, 2021, 61–69.

negative stigmas that develop in society that consider polygamy a disgrace in the household.⁴³ In addition, there are also juridical phenomena that make polygamy rules more difficult. There are several conditions that must be met by men who will commit polygamy, one of which is the permission of the first wife and the permission of supervisors for civil servants.⁴⁴ With the difficulty of the existing polygamy rules, especially for civil servants, some men eventually choose a shortcut to marry unregistered.⁴⁵

This is exacerbated by the assumption that the Qur'an, al-Hadith and *fiqh* books do not regulate marriage registration as a condition or pillar of the validity of marriage. They consider that a marriage that is not registered is valid if it is carried out by fulfilling the conditions and pillars of marriage even though it is not registered. However, Constitutional Court Decision No. 46/PUU-VIII/2010, which decided on the civil status of Moerdiono and Machica Mochtar's children, is used as a sociological basis that the consequences of *siri* marriage (children's civil rights to the father) began to be recognized by the state.⁴⁶ In addition, the issuance of the Regulation of the Minister of Home Affairs of the Republic of Indonesia Number 108 of 2019 concerning Regulations on the Implementation of Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration Article 10 number (2) clearly states that unregistered marriages and divorces can apply for the issuance of a New Family Card.⁴⁷

In contemporary *fiqh* studies, the law of mandatory marriage registration is based on the reinterpretation of the prophet's hadith which instructs Muslims to hold a marriage reception in order to announce the marriage event that has occurred. Muhammadiyah considers that marriage registration was not known at the time of the Prophet because marriages were announced through ceremonial agenda (*walimatul al-'ursy*). If a marriage is disputed, the evidence used is the existence of witnesses in marriage. The form of marriage registration known in modern times is also evidence of the existence of marriage. Thus, all rights and obligations arising from the consequences of marriage can be guaranteed by the state. The change in interpretation of the Prophet's hadith, from the obligation to announce marriage (*walimah al-'ursy*) to the obligation to register marriage is a manifestation of the *fiqh* rule which states that changes in the law must be in accordance with changing times.⁴⁸

The obligation to register a marriage can also be based on the process of preferred analogy (*qiyas awalawi*),⁴⁹ namely when the effective cause (*illat*) of the derivate law (*far'u*) is stronger than the *illat* of the original law.⁵⁰ The *far'u* law of marriage registration can be analogized to the original law regarding the recording of debts in terms of interaction

⁴³ Adillah, "Analisis Hukum Terhadap Faktor-Faktor Yang Melatarbelakangi Terjadinya *Nikah Sirri* Dan Dampaknya Terhadap Perempuan (Istri) Dan Anak-Anak."

⁴⁴ JDIH BPK RI, "Peraturan Pemerintah (PP) Nomor 45 Tahun 1990 Tentang Perubahan Atas PP Nomor 10 Tahun 1983 Tentang Izin Perkawinan Dan Perceraian Bagi Pegawai Negeri Sipil," Database Peraturan, accessed November 29, 2021, <https://peraturan.bpk.go.id/Home/Details/60959/pp-no-45-tahun-1990>.

⁴⁵ Heru Susetyo, "Revisi Undang-Undang Perkawinan," *Lex Jurnalica* 4, no. 2 (2007): 17946.

⁴⁶ Aidil Alfin and Busyro Busyro, "*Nikah Siri* Dalam Tinjauan Hukum Teoritis Dan Sosiologi Hukum Islam Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 11, no. 1 (2017): 61-78.

⁴⁷ Peraturan Menteri Dalam Negeri Republik Indonesia Nomor 108 Tahun 2019 Tentang Peraturan Pelaksanaan Peraturan Presiden Nomor 96 Tahun 2018 Tentang Persyaratan Dan Tata Cara Pendaftaran Penduduk Dan Pencatatan Sipil

⁴⁸ Wawan Gunawan Abdul Wahid, "Pandangan Majelis Tarjih Dan Tajdid Muhammadiyah Tentang *Nikah Sirri* Dan Itsbat *Nikah*: Analisis Maqashid Asy-Yari' Ah," *MusâWa Jurnal Studi Gender Dan Islam* 12, no. 2 (2013): 215-36.

⁴⁹ Nastangin, "TINJAUAN FILOSOFIS (Pasal 2 Ayat (2) Undang-Undang Perkawinan No 1 Tahun 1974 Tentang Pencatatan Perkawinan)."

⁵⁰ Sakirman Sakirman, "METODOLOGI QIYAS DALAM ISTINBATHHUKUM ISLAM," *YUDISIA: Jurnal Pemikiran Hukum Dan Hukum Islam* 9, no. 1 (2018): 37-55.

(*muamalah*). The *muamalah* agreement stipulated in QS. Al-Baqarah (2):282 instructs Muslims to record *muamalah* events (debts) that are carried out in cash. Meanwhile, the marriage contract is an extraordinary agreement (*mitsaqon ghalidza*) as mentioned in QS. An-Nisa (4): 21. Analogously, if an ordinary *muamalah* contract (debt and credit) must be recorded, then marriage, which is a more sacred contract, must also be recorded.⁵¹

When viewed from the perspective of unrestricted public interest (*maslahah mursalah*), marriage registration is a manifestation of efforts to realize the benefits and prevent the disadvantages that will arise from marriage. The principle of benefit is one of the principles of determining Islamic law in accordance with the rules of *fiqh* which state that government decisions must be in line with the benefit of the people.⁵² Based on some of the legal derivation (*istinbat*) above, the law of registering a marriage is obligatory. Thus, when viewed from the concept of contrary understanding (*mafhum mukholafah*), a marriage that is not registered is an invalid form of marriage. Marriage registration is also in line with the holistic legal argumentation that characterizes contemporary Islamic law. Holistic law involves multi-perspectives, such as religious arguments, social conditions, cultural developments, demands of the times, and regulations set by the government. The goal is to realize the benefit of marriage.⁵³

Marriage registration in the context of Islamic family law in Indonesia when viewed from the perspective of *maslahah* can be called a new witness system. The existence of this new witness system does not necessarily replace the existence of marriage witnesses that have been explained in classical *fiqh* and religious texts. This new witness concept is only a complement whose existence must be fulfilled in the context of marriage in Indonesia today. This is because, indirectly, marriage registration has very broad benefits⁵⁴ such as the protection of children born (the existence of birth certificates and other civil rights), as well as protection for women.

The problem faced by the country today is the prevalence of unregistered marriages. Zudan Arif stated that in Indonesia there are two kinds of marriages, namely marriages that have been registered by the state, and there are marriages that have not been registered. According to him, not all unregistered marriages are *siri* marriages. Indeed, there are marriages that are not registered because the purpose is to hide the marriage. However, there are also marriages that have not been registered but are not *siri* (not intending to hide the marriage). In the view of legal positivism, a marriage that is not registered and does not have a marriage book is a marriage that has not been recognized by the legal regime of state marriage. Whereas in the historical and utilitarian view of law, the state must be able to provide justice for anyone, including children and wives who are legally married religiously, but have not been registered by the state.⁵⁵

The juridical basis for recording *siri* marriages departs from the mandate given by the state to Civil Registry Service Office (DISDUKCAPIL) in Law No. 23 of 2006 which was amended in Law No. 24 of 2013 to record all population events and important events. These

⁵¹ Admin, "Fatwa Tarjih Tentang Nikah Sirri."

⁵² Admin.

⁵³ Muhammad Aziz and Athoillah Islamy, "Memahami Pencatatan Perkawinan Di Indonesia Dalam Paradigma Hukum Islam Kontemporer," *ISLAMITSCH FAMILIERECHT JOURNAL* 3, no. 02 (2022): 94–113.

⁵⁴ Mohsi, "Pencatatan Perkawinan Sebagai Rekonseptualisasi System Saksi Perkawinan Berbasis Masalahah."

⁵⁵ Zudan Arif Fakrullah, "Problem Dan Solusi Perkawinan Yang Belum Tercatat Oleh Negara," Seminar Nasional. Wacana dan Praktik Hukum Keluarga Islam Kontemporer: Peluang dan Tantangan yang diselenggarakan oleh Al-Ahwal: Jurnal Hukum Keluarga Islam, Fakultas Syariah dan Hukum UIN Sunan Kalijaga Yogyakarta, 2021, <https://www.youtube.com/watch?v=Gm7xPa2NVLk>.

population events involve providing identity, recording population movements, and so on. While important events involve birth, death, marriage, child recognition, child attestation and changes in citizenship. Zudan interpreted that DISDUKCAPIL, based on this regulation, has the obligation to record these important events. Muslims who marry at the KUA, their marriages are recorded; Muslims who marry not at the KUA, their marriages are also recorded; divorces from *siri* marriages, the events are also recorded. Then the proof of the recording is written in the family card.⁵⁶ In the point 4.b of the General Elucidation of Law No. 1 of 1974, it is explained that the position of marriage registration is aligned with the registration of a person's important events, from birth to death. Thus, the key word that must be held is that the recording of marriage in the Family Card by the Population and Civil Registration Office is only limited to the concept of recording important events, and does not change the meaning of "the validation of marriage" contained in the Marriage Law.

The motivation for recording *siri* marriages in KK systems from the social fact, that there are millions of marriages that have not been registered by the state. The non-registration of one's marriage results in no legal certainty for the wife and children born in that marriage. Thus, the important goal of protecting the interests of wives and children cannot be achieved. Then, efforts to record important events (marriage) in the KK experience obstacles, namely how to write down the status of marriages that have not been recorded. So, there are 6 options to fill in the marital status column, namely: unmarried, registered marriage, unregistered marriage, registered divorce, unregistered divorce, and death. The objectives of this registration, among others, are: certainty of the status of family relationships in the KK regarding marital status; certainty of family relationships regarding who the father and mother are; provide ease of public services as an affirmative policy, especially the fulfillment of children's rights to obtain certainty of the origin of the child; obtain certainty of unrecorded marriage data to encourage the *isbat nikah* program; and improve the accuracy of population data.⁵⁷

Furthermore, Zudan emphasized that recording marriages on the Family Card is not the same as the purpose of registering marriages as intended in the Marriage Law. The output of marriage registration in the Marriage Law is legalization of the marriage by issuing a marriage book or marriage certificate, while the output of marriage registration in the Family Card is not legalization of the marriage. If we look at the goals to be achieved, marriage registration in the Marriage Law and marriage registration in the Family Card have the same goal, namely legal protection for wives and children born from a marriage. A child born from an unregistered marriage will still receive legal protection and rights as a citizen, because one of the requirements for issuing a birth certificate is the presence of a family card. Even though the child's birth certificate contains a statement (born from a marriage that has not been registered).⁵⁸ Fulfilling this benefit aspect is in line with the concept of *maslahah mursalah*, namely something that is a benefit that does not originate from the text of the Qur'an or Al-Hadith.⁵⁹

Registration of *siri* marriages in family cards can also be viewed from the rules of Islamic jurisprudence which state that if a goal cannot be fully achieved, it should not be

⁵⁶ Fakrullah.

⁵⁷ Fakrullah.

⁵⁸ Fakhrullah

⁵⁹ Muhammad Nazir Alias, "A Review of Maslahah Mursalah and Maqasid Shariah as Methods of Determining Islamic Legal Ruling," *Turkish Journal of Computer and Mathematics Education (TURCOMAT)* 12, no. 3 (2021): 2994–3001.

completely abandoned. This rule requires someone to do something according to their capacity. If there are obstacles in doing something, then, that person should not leave the job without the slightest effort.⁶⁰ The purpose of marriage registration as intended in the Marriage Law is orderly population administration and guaranteed legal protection for women and children born.

Registration of *siri* marriage couples in family cards is a legal breakthrough carried out by the Ministry of Home Affairs through the population and civil registration services. This legal breakthrough has both positive and negative effects at the same time. The positive aspects have been mentioned before. Meanwhile, on the negative side, there are several things that might arise as a result of the implementation of marriage registration regulations for unregistered couples, such as: *first*, the ease of access to marriage in the form of registration in the KK, will give rise to the possibility of widespread unregistered marriages (especially for young couples and those who are hampered by administration marriage) in Indonesia; *second*, opening another way in the marriage procession in Indonesia (issuing marriage books through the *isbat* process based on the decision of the Religious Court; *third*, weak legal protection for unregistered married couples. For example, if a crime of violence occurs, a judge cannot refer to the PKDRT Law as material for consideration of the decision.⁶¹

In the study of *ushul fiqh*, there is a method of establishing Islamic law which aim is to avoid damage by closing and prohibiting facilities and infrastructure that lead to that damage. This method is known as *saddu al-dhariah*.⁶² If the result of a work is a harm, then the use of the means leading to that result is prohibited by law. Ibnu Asyur explained that *saddu al-dhariah* is an effort to cancel and prevent all actions that are thought to cause damage.⁶³ As previously explained, the registration of unregistered marriages in the Family Card as mentioned in Permendagri. It is feared that Law No. 108 and 109 of 2019 will cause some harm, like the increasing prevalence of unregistered marriages in Indonesia. This concern arises from the assumption that even without a policy for registering unregistered marriages on the Family Card, there will be many practices of unregistered marriages, especially since this policy exists. Therefore, to achieve the goals of marriage as intended in the Marriage Law and the protection of children's civil rights, the concept and implementation of the unregistered marriage registration policy needs to be reconsidered.

The government must take concrete steps in implementing this regulation, such as making a classification of what unregistered marriages are included in the category (can be included) in the family card, or a form of forgiveness for unregistered marriages carried out within a certain period⁶⁴ (for example, only unregistered marriages carried out before this regulation was issued only those that could be included in the family card). These regulatory

⁶⁰ Abdul Latif ibn Sa'ud As-Sarami, "Qaidah Mā Lā Yudroku Kulluhu Lā Yutroku Kulluhu Ta'Shilan Wa Tathbiqan," accessed November 29, 2022, <https://ketabonline.com/ar/books/107313/read?part=1&page=21&index=2401487>.

⁶¹ Fadli, "IMPLIKASI YURIDIS TERHADAP PENERBITAN KARTU KELUARGA BAGI PASANGAN NIKAH SIRI DI INDONESIA."

⁶² Nurdhin Baroroh, "Metamorfosis 'Illat Hukum' Dalam Sad Adz-Dzari'ah Dan Fath Adz-Dzariah (Sebuah Kajian Perbandingan)," *Al-Mazaahib: Jurnal Perbandingan Hukum* 5, no. 2 (2017).

⁶³ Ibn Asyur and Muhammad Al-Thahir, "Maqashid Al-Syari'ah Al-Islamiyah," *Yordania: Dar Al-Nafaiz*, 2001. hlm. 365

⁶⁴ M. Bahtiar Tahir, Sahabuddin Sahabuddin, and Marzuki Marzuki, "Juridical Review on Confirmation of Unregistered Marriage (A Case Study of Palu Religious Court)," *INTERNATIONAL JOURNAL OF CONTEMPORARY ISLAMIC LAW AND SOCIETY* 1, no. 1 (November 5, 2019): 1–21, <https://doi.org/10.24239/ijcils.Vol1.Iss1.2>.

restrictions must be implemented to minimize efforts to smuggle the law in the future and avoid any form of government failure in implementing the Marriage Law regulations.

It cannot be denied that recording unregistered marriages on the Family Card will give rise to several disadvantages. However, the state's neglect of the practice of unregistered marriages is a greater harm, such as neglect of the rights of wives and children, non-fulfillment of children's civil rights, widespread polygamy and polyandry due to unclear (absence of) marital status, and so on. In this case, the general rule of Islamic jurisprudence applies which states that all harm (*ad-dharar*) must be eliminated (*yuzal*).

Conclusion

The policy for registering unregistered marriages (*siri*) in the family card is contained in Permendagri No. 108 and 109 of 2019 must be understood as efforts limited to recording important events. This registration does not mean legalization of the marriage as intended in the Marriage Law. This research contributes to aspects of Islamic jurisprudence in considering the beneficial and detrimental aspects contained in the policy, then developing a strategy to maintain *al-dhariah* whether it should be opened or closed. From the benefit aspect, if there are two benefit contradictions between the policy of registering marriages in the Family Card and the regulations regarding the validity of marriage, the greater benefit of the two must take priority. Meanwhile, from the aspect of harm, smaller harm in accordance with the rules must be prioritized. This article concludes that restrictions on the rules for including marriages that are not registered in the family card need to be considered. The new regulations which do not limit the periods and categories of unregistered marriages that can be included in family cards have the potential to give rise to legal smuggling efforts and a new perception that the country has legalized unregistered marriages.

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