



MAQASHID SHARIAH STUDY ON THE RECORDING OF UNREGISTERED MARRIAGE IN THE FAMILY CARD

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ABSTRACT

This study aims to analyze the status of unregistered marriages recorded in the Family Card from the maqashid syariah perspective. The methods applied in this study are normative legal research by relying on secondary data. The approaches used to analyze research problems are the statutory and conceptual approaches. The results of the study indicate that according to Islamic law perspective unregistered marriage is a legal marriage. Marriage and marriage registration are two different dimensions. The marriage contract which is pledged based on syariah law results in a religious legal relationship; while marriage registration results in legal acknowledgment in the view of national law and may protect the couple from any legal issue that may arise in the future. From the maqashid syariah perspective, unregistered marriage may cause a lot of harm for the lives of the couple and their children. The status of unregistered marriage is hard to be recognized by the Religious Courts because no evidence of marriage may be shown by the couple. Therefore, it is suggested for unregistered marriage couples to conduct *isbat nikah* (renew of marriage) so that their marriage is recognized and registered by the state through the Office of Religious Affairs.

Keywords: Maqashid Syariah; Unregistered Marriage; Marriage Registration

INTRODUCTION

Marriage is legally or formally recognized as a union of two people as partners in a personal relationship and it is very sacred. The relationship between these two persons is considered legal from a religious perspective. Marriage is not only a contract between two people, but it is a sacred contract between two people to Allah Almighty. Therefore, marriage in Islam is considered worship and the state observes it as a legal event that requires rules to regulate the rights, obligations, and responsibilities of each family member to create happiness, eternal and prosperous household.¹

Marriage in society is not always carried out in line with the rules, sometimes marriage is legally religious but its purpose is contrary to state law.² Many cases have occurred in recent times

such as forced marriage, under-aged marriage, polygamy without limit, and illegal marriage. These happen because society ignores the rule of law.³

One of the reasons for the issuance of Regulation Number 1 of 1974 concerning Marriage is to change the pattern of marriage in Indonesian society which still has many negative impacts. However, the rule has not accommodated the phenomenon of serial marriage that develops in the community.⁴ Siri marriage is a concept of marriage that is carried out without any registration through the Office of Religious Affairs (KUA) or Civil Registration (Disdukcapil). As a result,

¹ Ahyar Ari Gayo, "Problematika Status Kewarganegaraan Anak Melampaui Batas Usia 21 Tahun (Studi Kasus Provinsi Bali)," *Jurnal Penelitian Hukum De Jure* 19, no. 3 (2019): 269.

² Taufik H Simatupang, "Disharmoni Peraturan

Perundang-Undangan Di Bidang Pengawasan Perwalian Di Indonesia (Lintas Sejarah Dari Hukum Kolonial Ke Hukum Nasional)," *Jurnal Penelitian Hukum De Jure* 20, no. 2 (2020): 221–232.

³ Kementerian Agama, "Keputusan Menteri Agama Nomor 892 Tahun 2019 Tentang Sistem Informasi Manajemen Nikah Berbasis Web Pada KUA," 2019.

⁴ Mimin Mintarsih and Lukman Mahdami, "The Legal Status of Mut'ah Marriage in Indonesia," *Jurnal Penelitian Hukum De Jure* 21, no. 3 (2021): 397.

legally husband, wife, or the children that are born in siri marriage cannot take civil legal action with regard to their household.⁵

Previously the negative stigma of siri marriage according to positive law happens because it removes the rights and obligations of married couples for their children. But, now even the state does not legalize siri marriage, the rights of children born from that marriage as citizens can be recognized.

Children's rights are also protected by the International Convention on the Rights of the Child. One of the principles mentioned above is Non-Discrimination⁶. So, state law must be able to protect the same from all forms of discrimination, especially from unwanted external factors.⁷ Even for more advanced cases such as children with savant syndrome or often called idiots, retarded, or autistic will forever be in the weakest position to act legally.⁸

Then, the Government through the Minister of Home Affairs (Kemendagri) provides an opportunity for married couples who are married in siri way to have a Family Identity Card (KK). The purpose of this policy is that children born through siri marriage are permissible to make birth certificate. By doing so, a child from siri marriage is legally recognized as a child of an unregistered marriage partner and can be written on a birth certificate. This policy certainly caused controversy in its implementation.⁹

⁵ Agus Sahbani, "Nikah Siri Ditulis Di KK, 'Ini Kata Dekan Fakultas Syariah Dan Hukum UIN Jakarta', Hukum Online, Oktober 20, 2021. <https://www.hukumonline.com/berita/baca/lt616530078f90b/nikah-Siri-Ditulis-Di-Kk--Ini-Kata-Dekan-Fakultas-Syariah-Dan-Hukum-Uin.>"

⁶ Taufik Hidayat Simatupang, "Adult Age in Marriage in Indonesia (Theoretical Study of the Application of the Lex Posterior Derogat Legi Priori Principle)," *Jurnal Penelitian Hukum De Jure* 21, no. 2 (2021): 213.

⁷ Evi Djurniati, "The Legal Position of Sumang Child According to Customary Law in Kopong Village of East Nusa Tenggara," *Jurnal Penelitian Hukum De Jure* 22, no. 2 (2022): 135–144.

⁸ Wahyu Saefudin; Rony Aryono Putro; Sriwiyanti Sriwiyanti, "Restorative Justice in Child Rape Perpetrators: A Case Study on Perpetrators With

Intellectual Disability," *Jurnal Penelitian Hukum De Jure* 22, no. 1 (2022): 49–62.

⁹ Novita Lestari, "Problematika Hukum Perkawinan

In Article 3 paragraph (1) of the Regulation of the Minister of Home Affairs Number 9 of 2016 concerning the Acceleration of Increasing the Scope of Making Birth Certificates, it is stated that the requirements for registering the birth of children must meet the requirements, namely a). Birth certificate from a doctor/midwife /birth helper b). Marriage certificate/marriage certificate excerpt c). Family Identity Card (KK) where the resident will be registered as a family member d). Electronic ID card of parent/guardian/informant e). Passports for non-residents and foreigners.

This article states that when processing a birth certificate for a child, a marriage certificate or excerpt of a marriage certificate is needed. However, the next article, namely article 4 paragraph (2) of this Regulation, is stated that when a married couple wants to have a Birth Certificate for their child, but does not have a book or Marriage Certificate, it can be replaced by using a Statement Letter of Absolute Responsibility (SPTJM) as a married couple.

In general, the requirements for submitting a child's birth certificate as regulated in the Ministerial Regulation are: 1) statement letter from a doctor/midwife/birth attendant; 2) Marriage certificate/excerpt of marriage certificate; 3) KK where the resident will be registered as a family member; 4) e-KTP of the parent/guardian/reporter; 4) Passport for a non-resident of Indonesian citizens/foreigners. These requirements for unregistered married couples cannot be fulfilled because they must attach a marriage certificate or a excerpt of marriage certificate. However, Article 4 paragraph (2) of the Ministerial Regulation provides an opportunity for unregistered married couples to obtain a Birth Certificate for their child by attaching a Statement of Absolute Responsibility (SPTJM) of truth as a married couple.

Legal experts responding to the above policy; one of them is A. Tholabi Kharlie, who said that it could substantially capture the spirit of protection of the rights of citizens, especially for children born in siri marriage partners through Permendagri Number 9 of 2016. This provides protection and recognition of the rights of citizens but actually violates the norms and the existence of other institutions. This policy will give an impact

Indonesia," *Mizani: Wacana Hukum Ekonomi dan Keagamaan*. 4, no. 1 (2017): 43–52.

on society, namely the trend of siri marriage will increase in society. According to him, the basic principle of marriage is the principle of registration as stated in Article 2 paragraph (2) of Law Number 1 of 1974, namely that each marriage is recorded according to the law.¹⁰

Disharmony of the law above certainly affects legal uncertainty so that there will be parties who are harmed and even further, and marriage can be interpreted as a formality for certain interests. In the process of submitting the *isbat* marriage, it tends to protect the parties who want to be polygamous because before the case of marriage ratification is tried, the bailiff/substitute bailiff announces the application 3 (three) times in 3 (three) months or the applicant's data will automatically be validated through the Management Information System application of Marriage (SIMKAH).¹¹ So that SPTJM is a solution to simplify administration in making Birth Certificates and KK.

The practice of siri marriage is generally guided by the pillars and requirements of Islamic law, namely, (1) the presence of the bride and groom, (2) the presence of a guardian, (3) The presence of a marriage witness, (4) the existence of dowry, (5) the existence of *ijab qabul* (marriage contract). The validity of marriage does not have to go through state legality. In the classical fiqh perspective, marriage registration is not the object of study, because the role of power does not regulate private matters. So legally this marriage religiously is valid.

The above legal discrepancies have a great effect on legal uncertainty so that there will be aggrieved parties. In Islamic law, marriage is valid if it meets the pillars and conditions that have been set, namely (1) the existence of the bride and groom, (2) the existence of a guardian, (3) the existence of a marriage witness, (4) the existence of a dower (5) the existence of a *ijab qabul* or contract.¹² This means that if the above pillars

are fulfilled, siri marriage is also considered valid under Islamic Law.

Islam is a very complex religion in paying attention to the benefit of human beings. Although siri marriage in Islam is valid because it meets the conditions (pillars) that have been mentioned, however Islam is also not spared from seeing the impact caused by the marriage. Marriage registration according to Islamic law is something that is permitted, but it is highly recommended because there are many public interests in it (*maslahat*), even according to some Islamic Law experts marriage registration is a must. This departs from two arguments that can be accounted for, namely Qiyas and Maslahat Mursalah.¹³

The first is Qiyas based on Q.S Al- Baqarah verse 282 regarding the recording of accounts payable. If a contractual debt is recommended to be recorded, the registration of a marriage with a stronger relationship should also be recorded. Second, based on the concept of benefit, what is not explicitly ordered in the Qur'an and Al-Hadith can be made rules that require it based on benefit and at the same time avoid harm. Based on this way of thinking, marriage registration can be required to protect the benefit of the husband, wife, and children.¹⁴

Furthermore, what if the marriage also gets the right from the state to be registered? How does the Ministry of Home Affairs Regulation (Permendagri) give *maslahat* as desired by Islamic Law? Of course, it needs further study to conclude a more comprehensive view of the law to answer this problem. Therefore, in this study, the writer will scrutinize the legal status of siri marriages which is recorded in the Family Identity Card (KK) according to Islamic Law. This study was done by using the *maqashid syariah* perspective.

So far, there has been no comprehensive study done on this legal issue. However, several studies are considered quite relevant to this study.

¹⁰ Abdullah Wasian, "Akibat Hukum Perkawinan Siri (Tidak Dicatatkan) Terhadap Kedudukan Istri, Anak, Dan Harta Kekayaannya, Tinjauan Hukum Islam Dan Undang-Undang Perkawinan" (Pascasarjana Universitas Diponegoro, 2010).

¹¹ Agama, "Keputusan Menteri Agama Nomor 892 Tahun 2019 Tentang Sistem Informasi Manajemen Nikah Berbasis Web Pada KUA."

¹² Juz II Fiqh as-Sunnah, *Syaid Sabiq* (Beirut: Dar al-Fikr, 1998).

¹³ Abdul Halim, "Pencatatan Perkawinan Menurut Islam," *Jurnal Al Mabhats: Penelitian Sosial Keagamaan* 5, no. 1 (2020): 1–18.

¹⁴ Tasri, "Problematika Nikah Di Bawah Tangan Kaitannya Dengan Pengesahan Nikah, Arikel Pengadilan Agama Semarang,," https://pa-semarang.go.id/images/stories/Artikel/5-PROBLEMATIKA_NIKAH_DI_BAWAH_TANGAN_KAITANNYA_DENGAN.pdf, accessed 16 September 2022 at 6.15 PM.

First, a study was done by Rayani Saragih about Shifting the Law of Registration of Child Births from Unregistered Marriages (Studies at the City Population and Civil Registry Office) Dumai). The focus of this research is to examine the status of children from unregistered marriages and how it is recorded. The conclusion is that based on Law Number 24 of 2013 concerning amendments to Law Number 23 of 2006 concerning Population Administration, Birth certificates can still be made but they should be included the mother's name. However, when using Permendagri No. 9 of 2016 concerning the Acceleration of Increasing the Coverage of Birth Certificate Ownership, the certificate can be made in the name of the parents by attaching a Statement of Absolute Responsibility (SPTJM).¹⁵

Second, the research conducted by Satriani Hasyim regarding the Legalization of Siri Marriage in Marriage Isbat (cases at the Palopo Religious Court). This research focuses on 3 (three) aspects; a) the existence of unregistered marriage in positive law; b) legalization of unregistered marriage through marriage isbat; c) the implications of the legalization of unregistered marriage in the Palopo Religious Court. The results of the study indicate that unregistered marriage under positive law is illegal. The legalization of unregistered marriage through marriage isbat has its implications for marital status so that it has legal force as marriage to Marriage Registration Officers (PPN).¹⁶

In general, the difference between previous research and this study is about the object and substance of the problem. In this case, the author examines the policy of registering the status of unregistered marriage in the KK by attaching the SPTJM and how its legal force when it is compared to the Marriage Certificate. The author uses the Maqashid Syariah approach to review the legal status of marriage registration in Islamic law. Therefore, this study has a significant novelty in providing in-depth analysis based on the maqashid syariah view.

¹⁵ Rayani Saragih, "Pergeseran Hukum Pencatatan Kelahiran Anak Dari Perkawinan Tidak Tercatat (Studi Pada Kantor Dinas Kependudukan Dan Catatan Sipil Kota Dumai)" (Tesis, Universitas Muhammadiyah Sumatra Utara, 2017).

¹⁶ Satriani Hasyim, "Legalisasi Nikah Sirri Pada Perkara Isbat Nikah Di Pengadilan Agama Palopo" (Tesis, IAIN Pare Pare, 2021).

RESEARCH METHOD

This study analyzes the determination of marital status that has not been recorded in the Family Card related to the obligation to register marriage by using the maqashid syariah view. In other words, this study analyzes Islamic law regarding the determination of the status of unrecorded marriage in the Family Identity Card related to the obligation to register marriages.

This research was conducted by using secondary data sources which are obtained from laws and regulations and other literatures related to this research. The data used for this study consist of primary, secondary, and tertiary legal materials.

Two approaches were used in this study, first the statutory approach by reviewing Presidential Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration, and *Permendagri* Number 9 of 2016 concerning the Acceleration of Increasing the Scope of Ownership of Birth Certificates and also all regulations related to the object of research handled. Second, a conceptual approach by examining expert views related to marriage in Islam and expert views related to legislation viewed from a maqashid syariah perspective.

The data collection technique in this study was carried out by classifying three legal materials, primary, secondary and tertiary materials systematically. The data obtained from the results of the study were analyzed qualitatively and then presented by using a prescriptive analysis.

DISCUSSION AND ANALYSIS

1. Theoretical Review of Siri Marriage

Nikah and *perkawinan* in the Indonesian language are translated into marriage. These two dictions are often distinguished, but in principle, both are only different in attracting the root of the word.¹⁷ Marriage etymologically is to make a family of the opposite sex; carry out sex; have sex.¹⁸ The term marriage comes from Arabic, that is, حكني - حكن, derived from the word

¹⁷ Sudarsono, *Hukum Keluarga Nasional* (Jakarta: Rineka Cipta, 1997).

¹⁸ Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia Pusat Bahasa* (Jakarta: Gramedia, 2012).

– احاكن which means عَمَجَلًا وَّ مَظَانٍ i.e. joins and pools.¹⁹

In fiqh literature, عَطُولًا means (sex) and دَقْعًا the existence of these two possible meanings is because the word marriage is contained in the Quran. The word marriage which means sex refers to Qur'an Surah Al-Baqarah verse 230 while the definition of marriage with the meaning of contract (Solid covenant) refers to Qur'an Surah An-Nisa verse 22.²⁰ Scholars differ in opinion about the meaning of the word marriage. According to the proposed linguistics, copulation is the essential meaning of marriage, while akad is the meaning of majazi. Thus, if in the verses of the Qur'an or hadith the Prophet appears lafaz nikah with no indicators whatsoever, then the meaning is to have intercourse. Meanwhile, according to the fiqh expert, the essential meaning of marriage is an akad, while the meaning of majazi is to have intercourse because that meaning is what is famous in the Qur'an and hadith.²¹

As for marriage in the terminology of Islamic law, the Akad which provides legal benefits is the ability to hold family relations (husband and wife) between men and women and hold help and limit the rights of the owner and the fulfillment of obligations for each of them.²² Fiqh of Indonesian (read Kompilasi Hukum Islam) formulate marriages as a very strong kind of akad or mitsaqan ghalizani to obey the commands of Allah Almighty and carry them out in worship.²³

The concept of marriage in Indonesia is closely related to Islamic Law, it can be seen from the definition of marriage according to Article 1 of the Marriage Law Number 1 of 1974, namely the inner birth bond between a man and a woman as a husband and wife with the aim of forming a happy and eternal family (household) based on the

¹⁹ Taqiyuddin Abu Bakar bin Muhammad Al-Husaini Al-Hishni Ad-Dimasyqi Asy-Syafi'i, *Kifaayatul Akhyar Fi Halli Ghaayatil Iktishar* (Bairut: Darul Kutub Al-Ilmiyah, 2012).

²⁰ Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fiqh Munakahat Dan Undang-Undang Perkawinan* (Jakarta: Kencana Prenada Media Group, 2014).

²¹ Wahbah Al-Zuhaili, *Al-Fiqh Al-Islami Wa Adillatuhu (4)* (Beirut: Dar al-Fikr, 2004).

²² *Ibid.*

²³ Pemerintah Indonesia, "Kompilasi Hukum Islam (KHI) Buku Ke 1 Tentang Perkawinan," 1991.

One True God. Nevertheless, this definition has also accommodated the meaning of marriage in other religions. Basically, marriage is an important event which it has a shedding value that must be obeyed.

In addition to the marriage mentioned above, there is also the term siri marriage, this term appeared after Law Number 1 of 1974 was enacted. Generally, siri marriage is defined as a marriage that is carried out in accordance with the provisions of the religion (Islam). It has no legal force because it has not been recorded by the Registration of Marriages as determined by the Law. As a result, married couples do not get an authentic certificate in the form of a Marriage Certificate Excerpt or marriage book as proof of their marriage.

The practice of siri marriage for some Indonesians, especially Muslims on the island of Java is not synonymous with hiding marriage, because anyone who marries in a village is certainly known by all residents. The process of serial mating is quite varied; first, some perpetrators of siri marriages originate from the interest in relation to something material, so they have a strong intention to do siri marriages. Second, some of the perpetrators entered into siri marriages, starting with the mediator's propose. So he decided to marry by siri way. Third, some of the perpetrators started from the request of their parents. The child decides to have a siri marriage, because of the encouragement of the parents, so that in the spirit of obedience and filial piety the child does not shy away from the request. Fourth, the marriage began with an offer from a local religious leader. Given that culturally, the behavior of religious figures became a reference for the community, the support of local religious leaders for siri marriages gained momentum.²⁴

2. Marriage Registration in Juridical Review

The phenomenon of siri marriage arises from society's interpretation of the validity of marriage according to Marriage Law Number 1 of 1974. The article explains that marriage is valid if it is carried out according to the laws of each religion and its beliefs.²⁵ Referring to the

²⁴ Ahmad Sobari, "Nikah Siri Dalam Perspektif Islam," *Mizan, Jurnal Ilmu Syariah* 1, no. 1 (2013): 49–56.

²⁵ Republik Indonesia, "Law No. 1 of 1974 Concerning

fatwa of the Indonesian Ulama Council (MUI) No. 10 of 2008 concerning Siri Marriage which states that marriage registration is not classified into the conditions and pillars of marriage; its position is only to prove contractually. Besides, the discussion related to it is not explained in the work of experts in Islamic law. So, the legal conclusion on unregistered marriage is valid. This understanding is still a guide for modin who marry couples outside the KUA.

Islamic jurists agree that marriages performed by Indonesian people as long as they meet the requirements and pillars of Islamic marriage are valid.²⁶ This is also emphasized by the issuance of a fatwa of the Indonesian Ulama Council (MUI) Number 10 of 2008 concerning Marriage Under the Hands which states that marriage registration does not include the requirements and pillars of marriage, but only proof because there is no discussion about the obligation to record the marriage in the books of classical jurisprudence.²⁷

Furthermore, Article 2 Paragraph 1 of the Undang-Undang Perkawinan (UUP) is a provision for marriage registration, namely Each marriage is recorded according to the applicable laws and regulations. This means that every marriage must be followed by marriage registration according to applicable laws and regulations. If the two paragraphs in Article 2 of the UUP are connected to each other, it can be considered that the registration of marriage is an integral part that determines the validity of a marriage, in addition to following the provisions and conditions of marriage according to the laws of each religion and its beliefs.²⁸

Jurists have different interpretations regarding

Marriage Law," 1974.

²⁶ Ummul Khaira and Azhari Yahya, "Pelaksanaan Upaya Perdamaian Dalam Perkara Perceraian (Suatu Kajian Terhadap Putusan Verstek Pada Mahkamah Syar'iyah Bireuen) (Reconciliation Efforts in a Divorce Lawsuit (A Review to the In-Absentia Decision at the Shariah Court of Bireuen))," *Jurnal Penelitian Hukum De Jure* 18, no. 10 (2018): 319–334.

²⁷ Khairuddin Nasution, *Hukum Perdata (Keluarga) Islam Indonesia Dan Perbandingan Hukum Perkawinan Di Dunia Muslim* (Yogyakarta: Academia Tazafa, 2009).

²⁸ Rachmadi Usman, "Makna Pencatatan Perkawinan Dalam Peraturan Perundang-Undangan Perkawinan Di Indonesia," *Legislasi Indonesia* 14, no. 3 (2017): 255–274.

marriage registration. First, is the differentiating interpretation, that is, the interpretation that separates the regulation of the validity of marriage from the regulation of the obligation to register marriages. Article 2 paragraph (1) of the Marriage Law regulates the validity of the marriage contract determined by the laws of each religion and its beliefs. Meanwhile, Article 2 paragraph (2) regulates the registration of marriage as an administrative matter of marriage that is not related to the legal conditions of marriage. The two articles above expressly state that if religion and belief have been declared valid for marriage, then there is no reason for the state to declare it invalid.²⁹

Second, coherent interpretation. The point is that interpretations that view article 2 paragraph (1) and paragraph (2) of the Marriage Law should not be separated because they are interrelated with each other. The validity of marriage according to the national marriage law must meet two elements, namely the process of carrying out the marriage must be carried out according to the religion and beliefs of the bride and groom and must be recorded according to the procedure. The juridical arguments are: first, Article 28J of the 1945 Constitution. The second argument is that marriage registration is part of the principle of national marriage law. If the regulation of marriage registration is only an administrative regulation, then marriage registration should not need to be a principle of national marriage law. The third argument, Supreme Court Jurisprudence No. 1948/K/Pid/1991 dated December 18, 1991.³⁰

In the view of state law juridical issues arising from siri marriages relate to the validity of the marriage. Indonesian positive law only legalizes marriages that are recorded in accordance with applicable laws and regulations. The negative stigma from the community also understands that the perpetrator of the siri marriage will experience serious obstacles when taking care of all state administration including the Child's Birth Certificate.

²⁹ Masruhan, "Pembaruan Hukum Pencatatan Perkawinan Di Indonesia Perspektif Maqasid Syariah, Al-Tahrir," *urnal Hukum Islam* 13, no. 2 (2013): 233–252.

³⁰ Ibid.

The confidentiality of siri marriage is certainly a problem for the State to answer the constitutional mandate that guarantees the rights of every citizen. The issue must be addressed wisely, how the state should protect and record the legal events. One of the human rights guaranteed in the constitution is with regard to the right regarding a person's citizenship status as stipulated in Article 28D paragraph (4) of the 1945 Constitution which states that everyone has the right to citizenship status.

This provision means that the state based on the 1945 Constitution is essentially obliged to provide protection and recognition of the determination of citizenship status experienced by Indonesian residents who are inside and/or outside the territory of Indonesia. This is also reinforced under Article 28D paragraph (1) which states that everyone has the right to recognition, guarantee, protection, fair legal certainty, and equal treatment before the law. The mandate of the 1945 Constitution as a result of the amendment of Article 26 paragraph (3) also states that matters concerning citizens and residents are regulated by law. The derivative of this article has given birth to Law Number 23 of 2006 which was later replaced by Law Number 24 of 2013 concerning Population Administration which contains Population Events and Important Events.

Among the important events mentioned are marriage and birth, both of which are legally recognized by proving authentic deeds.³¹ In the process of issuing it, there are several important documents that must be attached, including the existence of a marriage book/excerpt of marriage certificates and Family Identity Cards (KK). For the perpetrator of the marriage, these requirements certainly cannot be met. To answer the above problems, the Government through the Ministry of Home Affairs provides space for married couples who are married in siri to still get a KK by completing the data form of the Statement Letter of Absolute Responsibility (SPTJM). This is

stated in the provisions of Permendagri Number 9 of 2016 concerning the Acceleration of Increasing the Scope of Ownership of Birth Certificates.

³¹ Taufik H Simatupang, "Disharmoni Peraturan Perundang-Undangan Di Bidang Pengawasan Perwalian Di Indonesia (Lintas Sejarah Dari Hukum Kolonial Ke Hukum Nasional)."

The SPTJM document itself has two formats. First, the Birth Certificate made by the biological parents/guardians/applicants with full responsibility for the correctness of a person's birth data by being known by two witnesses. Secondly, the correctness of SPTJM of Truth as a Married Couple made by the biological parents / guardians / applicants with full responsibility for the status of a person's marital relationship with the proof of two witnesses.³²

If further reviewed, the SPTJM document only contains witnesses with names and NIK, it is not explained more firmly the position of witnesses against siri marriage partners. The qualifications of the two witnesses were residents who knew when the SPTJM document was made, not related to the evidence of when the marriage was carried out. The full charge of responsibility remains charged against the biological parents/guardians/applicants who make the SPTJM statement so that the evidentiary power is still weak and cannot be binding on other parties.³³

The same criticism was also filed by the Commissioner of the National Commission for Women, Siti Aminah Tardi, that the SPTJM is not an authentic deed that can replace the marriage book, the letter in question is only a statement paper about the existence of a marriage issued by a person.³⁴ Marriage registration has two functions, namely the formal function and the material function. First, the formality function of the formal (formality causa), that the completeness or perfection (and not for the validity) of a marriage, must be made an authentic certificate, that is, a marriage certificate made by the clerk of the marriage registrar. Here the marriage certificate is a formal requirement for a valid marriage. While the material function (probations causa) means that the marriage certificate has a function as evidence, as well as the divorce certificate and reference deed.³⁵

This implication shows that the information on the KK made based on the marriage book can

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³² Departemen Dalam Negeri, "Permendagri Number 9 of 2016," 2016.

³³ Ibid.

³⁴ CNN Indonesia, "Kemendagri: Pasangan Nikah Siri Bisa Buat Kartu Keluarga, CNN Indonesia, Oktober 22, 2021.," 2021.

³⁵ Zainuddin Ali, *Hukum Perdata Islam Di Indonesia* (Jakarta: Sinar Grafika, 2006).

be used as a probations causa that can be presented in the court while the position of the KK made under the STPJM is limited to the registration of population but has no legality before the Court. Marriage can only be proved by a marriage certificate made by the Registrar of Marriages. The deed is the only evidence that can prove that a marriage has occurred.

3. Islamic Law View of Siri Marriage Registration

The phenomenon of siri marriage as explained in the previous chapter becomes a social problem that requires special attention to solve it. Before analyzing further, the author needs to re-identify the terminology of siri marriage. In fiqh siri, marriage means a marriage that is not attended by two male witnesses or attended by witnesses but the number is not sufficient. This understanding is taken from the words of Umar bin Khattab quoted by Imam Malik about the testimony of a marriage attended only by a man and a woman.³⁶

Imam Malik had a different interpretation of the hadith, according to him the marriage was siri because it was not announced. The existence of witnesses is only complementary then marriages where there are witnesses but are not announced are considered unqualified marriages. The Maliki School emphasized the announcement of marriage as a condition of validity, while Abu Hanifah and Shafii judged the function of the witness itself to be an announcement then the presence of the witness was sufficiently representative, even if it was asked to be kept secret. Because the news that has been known by the four people is no longer considered a secret.³⁷

The concept of siri marriage discussed in this study is a siri marriage that has developed in Indonesia, namely, a marriage that has met the pillars and requirements for marriage but has not been / is not registered. For some people, all marriages based on syariah law are valid, whether through the KUA or not because they have met the requirements for marriage in Islam, namely there

are prospective grooms and grooms, guardians, witnesses, and ijab kabul.

In practice, siri marriage has given rise to certain motives, meaning that the marriage carried out is no longer in accordance with the purpose of marriage in Islam, namely to build a household that is sakinah, mawadah, and warahmah.³⁸ Siri marriage is used as a means to facilitate a marriage that has the potential to contain negative stigma in society. Responding to the above problems, the Indonesian Ulama Council (MUI) has issued fatwa Number 10 of 2008 concerning private marriage. In its decision, it is stated that the marriage law under the hand is a valid marriage because it has fulfilled its conditions and harmony, but it will have an illegitimate status if there is a mudharat thing arising from the marriage. Therefore, marriages must be officially registered with the competent authority as a preventive measure to resist negative impacts/mudharat.³⁹

According to Abdul Manan, several factors encourage the parties to carry out siri marriages, including the desire for polygamy, parents' concern for their child's mate and to cover up the shame of having a husband and wife relationship before marriage. In the ijma' forum of 1000 scholars at the Gontor Ponorogo Islamic Boarding School, the Indonesian Ulama Council (MUI) led by Ma'ruf Amin agreed that the law of siri marriage is a legal marriage because the conditions and pillars are met, but the status of the marriage can be changed to become unlawful. There is also an adverse event that causes one or both parties to lose their rights in the eyes of the law. Its illegitimate status emerged after it was indicated that there were victims, namely his wife and children. This conclusion was then formulated in fatwa Number 10 of 2008 concerning Siri Marriage.⁴⁰

Muhammadiyah has a different view on the implementation of siri marriage, in the 35th Muhammadiyah Muktamar mentions that among the qualities of Muhammadiyah is "heeding all laws, laws, regulations, and the legal basis and philosophy of the state". Marriage registration is a

³⁶ Imam Malik bin Anas, *Al-Muwatha' Juz II* (Beirut: Dar al-Fikri al-Arabi, n.d.).

³⁷ Abdullah Wasian, "Akibat Hukum Perkawinan Siri (Tidak Dicatatkan) Terhadap Kedudukan Istri, Anak, Dan Harta Kekayaannya, Tinjauan Hukum Islam Dan Undang-Undang Perkawinan" (Universitas Diponegoro, Semarang, 2010).

³⁸ Fuzi Narin Drani, "Legal Protection for Minors as Victims of Sexual Harassment in Indonesia," *Jurnal Penelitian Hukum De Jure* 21, no. 4 (2021): 525–540.

³⁹ Majelis Ulama Indonesia, "Fatwa Majelis Ulama Indonesia Nomor 10 Tahun 2008 Tentang Nikah Di Bawah Tangan," 2008.

⁴⁰ Ibid.

statutory order hence it is considered an obligation. Substantively Muhammadiyah wants to assert that the marriage law is invalid.⁴¹

The same problem also arises in Middle East countries. But the term used is not siri marriage but 'urfi marriage. The legality of marriage 'urfi became a discourse among the government and clerics. One of the clerics who often delivers such fatwas is the former Grand Mufti of Egypt, namely 'Ali Jum'ah, according to him the registration of marriages in institutions appointed by the government needs to be carried out, there will be some consequences that occur if a marriage is not recorded. However, marriage registration is not a necessity on the grounds that marriage and marriage registration are two different dimensions.⁴²

If the marriage contract has been pledged in a sharia manner, then there is no shortage in it except only the recording in the government, while the recording is useful for maintaining legality in the eyes of the law from the consequences that arise, and not legalizing the marriage itself.⁴³ Marriages performed in 'urf have the same legal consequences, they are valid and have rights and obligations as mandated in Islam. If halfway through the two divorced, they already knew that the lawsuit could not be settled in a religious court.⁴⁴

The legal conclusion that can be drawn from the statements above, is that the legality of marriage registration according to Islamic law is something that is encouraged (sunnah muakkad). Because there is no qarinah (legal instruction) that indicates an obligation to register a marriage. The negative impact caused is not a legal argument that can be used as a comparison in legalizing a marriage.⁴⁵

⁴¹ Wawan Gunawan Abdul Wahid, "Pandangan Majelis Tarjih Dan Tajdid Muhammadiyah Tentang Nikah Sirri Dan Itsbat Nikah: Analisis Maqashid Asy-Yari'ah," *Musāwa Jurnal Studi Gender dan Islam* 12, no. 2 (2013): 215–236.

⁴² Ali Jum'ah, *Al-Kalim at-Tayyib Fatwa Asyirah* (Kairo: Dar as-Salam, 2013).

⁴³ Drani, "Legal Protection for Minors as Victims of Sexual Harassment in Indonesia."

⁴⁴ Ali Jum'ah, *Al-Kalim at-Tayyib Fatwa Asyirah*.

⁴⁵ Taufik Hidayat Simatupang, "Adult Age in Marriage in Indonesia (Theoretical Study of the Application of the Lex Posterior Derogat Legi Priori Principle),"

As for the legality of STPJM as a substitute for marriage books if it is analyzed according to the theory of maqasid syar'iah, what must be seen is the value to be achieved from the existence of the rule. Since the essential purpose of Islamic law is a benefit, there is not a single law that is enshrined in either the Qur'an or the Sunnah but in it, there is a benefit.⁴⁶ To see maslahat in the concept of maqasid, a problem must be seen from three categories, namely; dharuriyah, tahsiniyah, and hajjyah.

If a form of maslahah has a very large function for beings and if it is not fulfilled there will be inequality and injustice that destroys the social order, then the goal falls into the category of dharuriyah. If a form of maslahah function is not too threatening to the safety of mukallaf, but will experience difficulties and distress then this is categorized in tahsiniyah. And if human life must be comfortable, easy, and peaceful then it is categorized as hajjyah.

If a maslahah plays a major role in the sustainability of human life and the environment and if it is not fulfilled, inequality and injustice will occur which destroys the social order, then this goal is included in the category of dharuriyah. If a form of maslahah functions to prevent a disgraceful act or become a means for good deeds and its position is recommended then this is in hajjyah. However, if a maslahah aims to organize morals and patterns of human interaction in association, then it is categorized as tahsiniyah.

In the previous description, it has been explained that the Family Identity Card (KK) made under the STPJM is not recognized as a *probationis causa* or strong evidence in Court. This means that even though siri marriage status has been proven by STPJM remains illegal in the eyes of the law, so the existence of this rule does not actually guarantee the rights of individuals as citizens. If it is related to cases of domestic violence and children's rights, of course, this evidence has not supported the parties who sued on it.

When related to the concept of maqasid, the problem can be seen from two aspects, first, it

Jurnal Penelitian Hukum De Jure 21, no. 2 (2021): 213–222.

⁴⁶ Asafri Jaya Bakri, *Maqashid Syari'ah Menurut Al-Syatibi* (Jakarta: Amzah, 1996).

can be categorized as tahsiniyah because it only affects some siri marriage perpetrators. The case only arises if it is resolved in court, or one of the parties does not admit to having had a marriage but if the parties resolve peacefully then the negative aspects as mentioned do not exist, at this stage, marriage registration is not an obligation but is limited to recommendations.

If it is associated with the concept of maqasid syariah, the problem can be seen from two aspects. Firstly, it can be categorized as hajiyyah because legal problems related to the state will only arise if the parties sue the marriage in court. Unregistered marriages will continue to take place and are bound by religion even if they are not registered through the State Institution. Even unregistered marriages in the administrative context have been helped through the SPTJM policy by the Disdukcapil. At this stage, marriage registration is not an obligation but only a recommendation.

Secondly, it is also categorized as dharuriyah because at a further stage the state has not guaranteed the human rights of all its citizens. The percentage of emergencies is not measured based on the impact caused. Maslahat is the strongest and most effective postulate of syara' in social life, rather than certain partial postulates of juz'iyah, so if there is a difference between nash (text) and maslahat, then maslahat comes first.⁴⁷ Marriage registration has a very good purpose in order to provide benefits for those who carry out the marriage. Three things are the legal purpose of marriage disability.

By considering the purpose of marriage registration, namely, first, as an effort to unify the law in order to create order and equality in marriage. Second, protect the sacred values contained in marriage and maintain human dignity in association with the opposite sex. So, marriage registration can be included as a condition in marriage. If it continues to be carried out without recording, the marriage is *fasid* (void).

First, as an effort to unify the law to realize the order of marriage in society. Second, it protects the sanctity of marriage and specifically elevates and protects the status of women in domestic life. Third, responding to the development and demands

of the times because the traditional concept of jurisprudence is considered unable to provide solutions to existing problems.⁴⁸ Therefore at this stage marriage registration is categorized as mandatory. Unregistered marriages and the absence of legal force such as siri marriage apply the method of jalb al-mashalih wa daf' almafasiid (bringing benefit and refusing damage).

CLOSING REMARK

A. Conclusion

First, the issuance of Permendagri No. 9 of 2016 makes it easier for unregistered married couples to obtain a KK so it has implications for increasing the practice of unregistered marriages. The rule is contained in Article 34 which approves the existence of a Statement of Absolute Responsibility (SPTJM) as a substitute for a marriage book. The position of the KK made based on the SPTJM is limited to the registered population, but does not have legality before the Court. Marriage can only be proven by a marriage certificate made by the Marriage Registrar. The deed is the only authentic deed and legal evidence that can prove that a marriage has occurred.

The dualism of rules related to marriage registration has given birth to legal disharmony and caused legal uncertainty in the event of a dispute. The Sharia Court or Religious Court only recognizes the marriage book as an authentic deed in family law cases, hence any other evidence is considered weak and invalid. Islamic law highly upholds human dignity and the rights attached to it, in the study of Islamic Law every problem must be traced based on basic needs. Marriage registration in the perspective of Maqashid al-Shariah studies is classified as a dharuriyat aspect, so the siri marriage recorded in the family identity card (KK) is considered a weak document and has a negative impact (mudharat) especially for women and children because their rights automatically die before the Court.

B. Suggestion

There is a need for the role of the Government, especially the Ministry of Religion, community leaders, and religious leaders, to socialize marriage

⁴⁷ Husain Hamid Hasan, *Nazariyat al-Maslahatfi al-Fiqh al-Islamiy*, (Kairo: Dar al- Nahdat al-Arabiyah, t.th), 233.

⁴⁸ Sabilal Rosyad, *Implikasi Hukum Islam Tentang Status Hukum Anak diluar Perkawinan*, (Pekalongan: Nasya Expanding, 2018), 172.

or marriage isbat through the Office of Religious Affairs or the Civil Registry Office. There is a need for a Judicial Review of Presidential Decree No. 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration in particular Article 34 because it contradicts Article 2 paragraph 2 of Law No. 1 of 1974 concerning Marriage and is also not in line with Article 25 of Regulation of the Minister of Religion No. 20 of 2019 concerning Marriage Registration.

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