

## **LAW ENFORCEMENT OF UNREGISTERED MARRIAGE PRACTICES IN INDONESIA LAWRENCE MEIR FRIEDMAN'S LEGAL EFFECTIVE PERSPECTIVE**

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### **Abstract**

Unregistered marriage is an endless problem with non-optimal law enforcement. Meanwhile, the massive impact of unregistered marriage is dangerous and this practice is not committed by one or two people but involves many parties. This research aims to describe parties involved in unregistered marriages and their respective roles. In addition, it provides information regarding unregistered marriage regulations and sanctions and determines law enforcement for the parties involved. This normative research used case approach and statutory approach. The data collection technique is documentation and the analysis technique is deductive and inductive. The results of this study found several parties involved in unregistered marriages. These parties are: first, main actors such as illegal rulers, husbands, and wives or marriage guardians. Second, parties who participate, such as marriage witnesses, brokers, and jockeys. Unregistered marriages are regulated in chapter 1 paragraph (2), chapter 3 paragraphs (1 and 2) of Law no. 32/1954 concerning the enactment of Law no. 22 of 1946 concerning registration of marriages, divorces, and reconciliation in all regions outside Java and Madura, the sanctions are contained in chapter 4 and chapter 45 paragraph (1) letter (a) PP No. 9/1975 concerning the Implementation of Law no. 1/1974 on marriage. Law enforcement against the perpetrators of unregistered marriages has not been optimal.

**Keywords: legal effectiveness; law enforcement; unregistered marriage**

## **INTRODUCTION**

### **Background**

Marriage (*perkawinan*) in a perspective of positive law, is seen as a covenant,<sup>1</sup> In Article 1 of the Marriage Law, it is explained that marriage is a physical and mental bond

between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on God Almighty.<sup>2</sup> The word "eternal" contained in the article indicates that the household relationship must be maintained from all things that can damage its integrity.

1 Sayuti Thalib, *Hukum kekeluargaan Indonesia* (Jakarta: Universitas Indonesia, 2007), 47.

2 "Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan," 1974.

The use of the term “marriage (perkawinan)” in the Indonesian legislative system is not without reason. The Indonesian government uses the term marriage (perkawinan) because the word marriage (perkawinan) has a broader meaning or scope than the term matrimony (pernikahan). If the word matrimony (pernikahan) only refers to a bond which is done or made by the husband and wife to live together, or refers to a process of the bond (Akad), so that the word marriage (perkawinan) contains the meaning of various events refers to the process, implementation and consequences of the marriage contract, such as the rights and obligations of husband and wife in the household, provision of maintenance, divorce arrangements, childcare, and others.<sup>3</sup>

Marriage arrangements are carried out by the Indonesian government to guarantee the rights of each party, husband and wife, in the event of problems in the future. Therefore, the Indonesian government obliges its people to carry out marriages under the supervision of government agencies authorized to register marriages, so that husband and wife get a marriage book (buku nikah).

The marriage book will be the authentic evidence which explains that the marriage has occurred. In addition, being authentic evidence of a marriage, the marriage book is also useful as a “legal guarantee” if the husband or wife commits a deviant act. For example, a husband does not provide a living that is his obligation, while he has the ability to provide such a living, or the husband violates the provisions of *taklik-talak* which he read when the marriage contract was held, then the wife who feels aggrieved can file a complaint or submit the case to the Court.<sup>4</sup>

However, if the marriage carried out by the husband and wife is not under a government agency authorized to register marriages, they do not get a marriage book, and it will harm both of them in the future. Furthermore, if one of the parties, husband or wife, makes a lawsuit in the matter of rights that he or she does not receive from his spouse submitted to the court, then of course the lawsuit is *Niet Ontvankelijke Verklaard* (NO) or rejected by the court. It happens because the legality aspect is not fulfilled, namely, there is no marriage book which is an authentic deed. Of course, this is very detrimental to every party in the marriage bond.

Nevertheless, there are still many unregistered marriage practices found in the midst of Indonesian society, using various terms, such as *siri marriage* or unregistered marriage. All of these terms have the same meaning based on the culture of the Indonesian people, so it is not a derivation. Although in the view of the Arabs, what is meant by *siri marriage* is a marriage that is carried out secretly and not announced.<sup>5</sup> Furthermore, in this paper the author will focus on using only one term, namely unregistered marriage, to maintain consistency in writing.

The practice of unregistered marriage among the Indonesian people is seen as not a taboo subject anymore. The general public views that unregistered marriages are common with various logical reasons for continuing to carry them out, for example from the point of view of Islamic Law. The public considers that unregistered marriages are legal, if they are in harmony with each other and the conditions have been met. Basically, the logic seems correct at first glance, but if it is explored further, it can be found that Islam has various legal provisions to regulate the

3 Asep Saepudin Jahar, Euis Nurlaelawati, dan Jaenal Aripin, *Hukum Keluarga, Pidana & Bisnis* (Jakarta: Kencana Prenada Media Group, 2013), 23–24.

4 Ahmad Rofiq, *Hukum Perdata Islam di Indonesia* (Jakarta: Rajawali Pers, 2013), 99.

5 Mariani, “Fikrah Sanksi Pidana Atas Pelaku Pernikahan Di Bawah Tangan,” *Journal Of Islamic And Islamic Studies* 5, no. 3 (2021): 320. Diakses 2 April 2022, <https://jurnal.uin-antasari.ac.id/index.php/jils/article/view/5843/2769>.

functioning of the family. Hopefully, with these arrangements, husband and wife, can obtain peace, love, security and bonding kinship.<sup>6</sup>

How can security be obtained if there is no guarantee regarding the rights of each husband and wife. Thus, the existence of a marriage registration that has an authentic deed is a form of the state's role in fulfilling the rights of husband and wife in domestic life.

The author's statement above, regarding the many practices of unregistered marriage in the midst of Indonesian society, is based on the results of research, findings, and case studies published in various forms of scientific work. They include the journal written by Fitrotni Jamilah with the title "Inheritance Rights of Children of Siri Marriage in Kalisat Village, Rembang District, Pasuruan Regency." In this paper, Fitroni focuses her discussion on the inheritance rights of children from unregistered marriages with the conclusion that in the perspective of the Kalisat population. The children from unregistered marriages are the same as children from registered marriages, even though children from unregistered marriages are different from the registered ones. Children from unregistered marriages still get inheritance in the form of grants if their stepfather is biologically proven to be their biological father.<sup>7</sup>

The next thesis was made by Khairani with the title "Illegal Wedding Officiant Practices of Performing Unregistered Marriage in Kahayan Hilir Pulang Pisau District." In the

article, the center of Khairani's study is the cause of illegal wedding officiants (*penghulu nikah*) who practice unregistered marriage, while the results of the research obtained are ignorance and lack of courage of the wedding officiant to refuse people who come to marry in an unregistered manner.<sup>8</sup>

Then, there is a journal written by Mesraini with the title "Underhand Marriage Practices in DKI Jakarta." The focus of the research study is to see the forms, causal factors, impacts, and impressions of the perpetrators of unregistered marriage.<sup>9</sup>

There are many more publications by legal academics in their writings. They attempt to describe the various existing practices of unregistered marriage, and of course this is one of the special concerns of legal academics in the field of marriage or civil law to show that Indonesia is still weak in regulating unregistered marriage.

In the result of the author's study, the previous author only discussed the issue of unregistered marriage in a small scope or area. There are not any publications that attempt to raise the issue of unregistered marriage globally in various regions. Thus, it becomes a chance for the author to write this paper. Moreover, there is no statistical data that accurately shows the number of unregistered marriages in Indonesia, this is because the practice of unregistered marriages is carried out secretly.

It is very logical to say that in an unregistered marriage, it is the women who have the potential to experience enormous losses, because a man who has married a

6 Harry Pribadi Garfes, "Pernikahan Tidak Tercatat Di Kecamatan Bungus Teluk Kabung," *DIRASAT: Jurnal Studi Islam dan Peradaban* 14, no. 02 (2019): 26. Diakses 2 April 2022, <https://dirasat.id/JSIP/article/view/83%0Ahttps://dirasat.id/JSIP/article/download/83/53>.

7 Fitrotni Jamilah, "Hak Waris Anak Hasil Pernikahan Siri Di Desa Kalisat Kecamatan Rembang Kabupaten Pasuruan," *Al Hikmah: Jurnal Studi Keislaman* 7, no. 1 (2017): 7. Diakses 13 Oktober 2022, <http://ejournal.kopertais4.or.id/pantura/index.php/alhikmah/article/view/2873>.

8 Khairani, "Praktik penghulu ilegal melakukan nikah siri di kecamatan Kahayan Hilir Pulang Pisau" (Institut Agama Islam Negeri Palangkaraya, 2019), 122. Diakses 13 Oktober 2022, <http://digilib.iain-palangkaraya.ac.id/id/eprint/1986>.

9 Mesraini, "Praktik Perkawinan Bawah Tangan di DKI Jakarta" 51, no. 2 (2017): 251. Diakses 13 Oktober 2022, <https://asy-syirah.uin-suka.com/index.php/AS/article/view/51201/218>.

woman through an unregistered marriage, can either abandon or leave the woman, then remarry another woman at will. The man can do this since there is no legal protection and legal certainty in unregistered marriages. Therefore, it is common for these unregistered marriages to cause a lot of violent treatment of family members, so that it can affect the psychology of the related family members.<sup>10</sup>

It should be understood that the parties involved in the practice of unregistered marriages are not only husbands and wives, but there are certain people who act as the officiant of marriage. However, these officiants are not the party who have the authority from the state in carrying out the task of registering marriages.

If this condition is allowed to continue, it can undermine and damage the sacredness of marital relations and create an atmosphere that is not conducive to married life in various circles of society. This unregistered marriage is not just carried out by those from the lower middle class. The elite also often take advantage of this opportunity to release their desires blindly. It is because they feel they have material advantages to marrying many women so that women will become victims in the practice of unregistered marriages.

So far, there has been no firm action taken by the authorized parties. Is it due to the lack of legal legitimacy governing the issue of siri marriage? Is it considered normal, so it is presumed as customary matter? Even so, the problems of unregistered marriage are often underestimated by some people, apathy towards the eternal integrity of the household becomes the forerunner of violations of rights and obligations in the family environment.

On this basis, the author feels strongly called to carry out literature research with the aim of obtaining a description of the parties involved in the implementation of unregistered marriages and also providing information on the regulations governing unregistered marriages in Indonesia as well as seeing the effectiveness of law enforcement based on Lawrence Meir Friedman's theory of legal effectiveness. Furthermore, this research can also be a new formulation for the Indonesian government in creating legal policy directions that are binding and coercive, so that perpetrators in the practice of unregistered marriage feel a deterrent effect and are afraid to repeat deviant actions and damage the sacredness of the marriage bond.

### **Research Questions**

The research problem in this paper, has been focused on several fundamental matters by the author as follows:

1. Who are the parties involved in the practice of unregistered marriage in Indonesian society?
2. What regulations regulate the practice of unregistered marriage in Indonesia?
3. How is the law enforcement of the practice of unregistered marriage in Indonesia based on Lawrence Meir Friedman's theory of legal effectiveness?

### **Research Method**

This type of research is normative, namely by analyzing the problems discussed through the legal norms contained in the laws and regulations in Indonesia.<sup>11</sup> In its implementation, this research used several systematic scientific steps, which are:

1. Approach

This study used 2 (two) approaches,

<sup>10</sup> Septi Indrawati dan Ajeng Risnawati Sasmita, "Penyuluhan Hukum Dampak Perkawinan Siri dalam Kehidupan Masyarakat di Desa Balingasal," *Jurnal Dedikasi Hukum* 2, no. 1 (2022): 109. Diakses 2 April 2022, <https://ejournal.umm.ac.id/index.php/jdh/article/view/19022>.

<sup>11</sup> Ahmad Jazuli, "Diaspora Indonesia dan Dwi Kewarganegaraan dalam Perspektif Undang-Undang Kewarganegaraan Republik Indonesia," *Jikh* 11, no. 1 (2017): 99. Diakses 15 September 2022, <https://ejournal.balitbangham.go.id/index.php/kebijakan/article/view/215/pdf>.

first, the case approach, by conducting a study of cases related to the issues at hand.<sup>12</sup> This approach aims to look at the practice of unregistered marriage in various regions in Indonesia in order to find out the parties involved in the practice of unregistered marriage, along with the role of each party. Second is the statutory approach, by tracing all laws and regulations<sup>13</sup> related to the discussed legal issues.<sup>14</sup> The result of the search or study carried out is arguments or ideas to solve the encountered legal issues.<sup>15</sup>

## 2. Data Collection Technique

This research used a document study technique, by reviewing written information about the law that is not published in general but may be known by certain parties.<sup>16</sup> In practice, the author collected legal materials by identifying and taking an inventory of legislation and then researching library materials and other legal materials that are relevant to the legal issues being studied.<sup>17</sup>

In this study, there are two data, first is the **primary data**, namely laws and regulations on marriage in general and various cases of unregistered marriage practices that occur in various regions in Indonesia, both published and unpublished. Second is the **secondary**

**data** in the form of all publications on the law which are not official documents<sup>18</sup> such as legal journals and textbooks relevant to the title of this research.

## 3. Data Analysis Technique

The data that has been obtained is then analyzed and examined by deciphering cases of unregistered marriage practices and then connecting them with law enforcement theory in order to get a conclusion. The study was carried out in accordance with the stated research objectives.<sup>19</sup>

The data analysis in this study was carried out in three stages. The first is identifying legal facts in the form of certain actions, events, or circumstances. The second is finding laws related to legal facts (concrete norms); then examining the law to find legal concepts; indicators of behavior, or actions that are prohibited, allowed, and ordered. The third is applying legal norms toward legal facts.<sup>20</sup>

The nature of normative research analysis is prescriptive regarding right or wrong, as well as what should be done according to the legal view of the facts or legal event that is being researched.<sup>21</sup> The analysis process in this research was carried out using mixed logic thinking which is a combination of inductive and deductive thinking patterns.<sup>22</sup>

12 Ishaq, *Metode Penelitian Hukum* (Bandung: Alfabeta, 2017), 98.

13 Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2013), 137.

14 Muhaimin, *Metode Penelitian Hukum*, Cet. I (Nusa Tenggara Barat: Mataram University Press, 2020), 56.

15 Dyah Ochtorina Susanti dan A'an Efendi, *Penelitian Hukum (Legal Research)* (Jakarta: Sinar Grafika, 2014), 110.

16 Muhaimin, *Metode Penelitian Hukum*, Cet. I (Nusa Tenggara Barat: Mataram University Press, 2020), 66.

17 M Alvi Syahrin dan Setiawan Saputra, "Tindakan Hukum Terhadap Orang Asing Mantan Narapidana yang Memiliki Kartu Pengungsi UNHCR dalam Perspektif Keimigrasian (Legal Actions On Ex-Convict Foreigners Holder of UNHCR Refugee Card From The Immigration Point of View)," *Jikh* 2, no. Juli 2019 (2019): 143. Diakses 15 September 2022, <https://ejournal.balitbangham.go.id/index.php/kebijakan/article/view/575/pdf>.

18 Ishaq, *Metode Penelitian Hukum* (Bandung: Alfabeta, 2017), 68.

19 Bachtiar, *Metode Penelitian Hukum* (Tangerang Selatan: UNPAM Press, 2018), 164.

20 M. Syamsyudin, *Operasionalisasi Penelitian Hukum* (Jakarta: Raja Grafindo Persada, 2007), 143–145.

21 Muhaimin, *Metode Penelitian Hukum*, Cet. I (Nusa Tenggara Barat: Mataram University Press, 2020), 71.

22 M Alvi Syahrin dan Setiawan Saputra, "Tindakan Hukum Terhadap Orang Asing Mantan Narapidana yang Memiliki Kartu Pengungsi UNHCR dalam Perspektif Keimigrasian (Legal Actions On Ex-Convict Foreigners Holder of UNHCR Refugee Card From The Immigration Point of View)," *Jikh* 2, no. Juli 2019 (2019): 143. Diakses 15 September 2022, <https://ejournal.balitbangham.go.id/index.php/kebijakan/article/view/575/pdf>.

## DISCUSSION

### Parties Involved in Unregistered Marriage

The implementation of unregistered marriages that occur in Indonesia seems to be an endless problem and is very difficult to overcome, even though the massive impact of unregistered marriages has been known by most people to be very detrimental to various parties. This practice is detrimental especially in the issue of legal certainty in the event of a dispute over rights and obligations between husband and wife who carry out an unregistered marriage.

Unregistered marriages have indeed taken root in Indonesian society. Even further, it has been considered a natural thing to do even though the mindset instilled in the community is that unregistered marriage is an illegal act and must be a disgrace for the perpetrators. Unregistered marriage is illegal because it does not meet the administrative aspects of a marriage. In unregistered marriages, even though the state seeks to guarantee the rights of its citizens in domestic relations, if there is a deviation in unregistered marriages, it is absolutely impossible for state officials to defend the rights of the related parties. It is because the act of deviation committed by the husband and wife who performed the unregistered marriage was wrong from the beginning. In other words, it is they who have aborted their right to be guaranteed by the state.

Constitution of the Unitary State of the Republic of Indonesia Article 1 Number 3 of the 1945 Constitution states that Indonesia is a state of law. This statement certainly has juridical consequences that are accountable to the practice of life in society, nation, and state.<sup>23</sup> So, the regulation of marriage law

formulated by the government applies to all Indonesian people and becomes one of the concrete actions of the Indonesian government in enforcing the mandate of the constitution.

The emergence of unregistered marriage problems in Indonesian society has occurred since the enactment of Law No. 1 of 1974 concerning marriage and the issuance of PP (Government Regulation) No. 9 of 1975 as a provision in the implementation of Law No. 1 on marriage. Substantially, these two regulations require citizens to carry out marriage based on their respective beliefs or religions, then marriage must also be reported to the authorized official to be recorded to obtain legal certainty.<sup>24</sup>

According to the author, unregistered marriage is the root of all marriage problems in Indonesia. For example, a contract-marriage is certainly unregistered because there is no seriousness in building a household, and this type of marriage is not in line with the purpose of marriage as stated in the Marriage Law. Furthermore, early-age marriage is generally carried out by those who are not old enough to get married based on the provisions of Law Number 16 of 2019 concerning amendments to Law number 1 of 1974 concerning marriage, which is 19 years for men and women who want to get married.<sup>25</sup> Then, those who involved in early-age marriage are still determined to carry out their relationship by doing unregistered marriage. This statement is based on the findings of the author's research in the community.<sup>26</sup> In some cases,

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article/view/591/pdf.

23 Victorio Hariara Situmorang, "Lembaga Pemasyarakatan sebagai Bagian dari Penegakan Hukum," *Jurnal Ilmiah Kebijakan Hukum* 13, no. 1 (2019): 88. Diakses 15 September 2022, <https://ejournal.balitbangham.go.id/index.php/kebijakan/>

24 Jakobus Anakletus Rahajaan, "Legalitas Pernikahan Siri di Indonesia," *Public Policy: Jurnal Aplikasi Kebijakan Publik dan Bisnis* 1, no. 1 (2020): 3. Diakses 7 April 2022, <https://stia-saidperintah.e-journal.id/ppj/article/view/5>.

25 "Undang-Undang Republik Indonesia No. 16 Tahun 2019 Tentang Perubahan Undang-Undang No. 1 Tahun 1974 Tentang Perkawinan," (2019).

26 Tsania Kareema dan Harry Pribadi Garfes, "Peran KUA dalam meminimalisir Kasus Pernikahan Dini Di Kecamatan Sukmajaya Kota Depok,"

polygamy is committed by individuals who do not meet the administrative requirements of polygamy so they force themselves to continue their relationship unregistered.

Thus, if a binding and coercive legal legitimacy is established in the issue of unregistered marriage, then other marriage practices will automatically follow the law. On the contrary, if unregistered marriages are left unchecked, this type of marriage will become more and more rampant in Indonesian society. To put it into practice, unregistered marriages in Indonesia have various patterns and events as well as various actors involved in them.

To find out the parties involved in unregistered marriage in Indonesia, of course, one must know in advance about the practice of unregistered marriage in various regions, such as the case of unregistered marriage in Rembang Village, Rembang District, Pasuruan Regency. Rembang is an area where the level of unregistered marriage is high. The number of publications about this issue proves the region as the object or location of the unregistered marriage. Several parties took advantage of this situation by making earning extra money out of it. The irony is that few individuals practice this activity without being guided by or overriding the rules of religion and the state.<sup>27</sup>

Individuals who take advantage of unregistered marriages are brokers who have a dual role in the implementation of unregistered marriages. These roles are as a driver (the person who delivers) or as a marriage intermediary for local women

residents with the prospective groom who will marry her. Many young widows in the area are a big problem that becomes a business commodity as if unregistered marriage could change their status. The negative impact of the unregistered marriage culture in the area is that it is easy for divorce to occur. There is no marital property as the legal implications of divorce by women from the residents. Furthermore, the children born from these unregistered marriages do not have birth certificates causing neglected right to receive education because it requires a child's birth certificate.<sup>28</sup>

Not a few men from outside Rembang come with the intention of looking for a partner or even bringing their own partners to carry out unregistered marriages through intermediary liaison from the surrounding community. The beginning of the form of unregistered marriage in Rembang Village was due to marriages carried out by *Muballigh* who came to the Rembang area to spread Islam. It continuously developed according to the needs of the community. The forms of unregistered marriages that occur in Rembang Village can be classified into 2 (two). First, unregistered marriages are carried out to form and maintain a household only, second, unregistered marriages are carried out only to avoid adultery. The second form of unregistered marriage is usually carried out without the knowledge and permission of the female guardian.<sup>29</sup>

From other sources, the authors found that there are two forms of unregistered marriages that occur in the area. First, the

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*Dirasat* 15, no. 1 (2020): 67. Diakses 7 April 2022, <https://dirasat.id/JSIP/article/view/127>.

27 Yuniar mujiwati, Muhammad Baidowi, dan Adi Nur Aziz, "Mendidik Pelaku Pernikahan Sirri Dengan Perspektif Hukum Agama Islam dan Hukum Perdata," in *"Peluang dan Tantangan Pembelajaran Digital di Era Industri 4.0 Menuju Era 5.0,"* vol. 1 (Pasuruan, 2021), 546. Diakses 9 April 2022, <https://ojs.uniwara.ac.id/index.php/protrapenas/article/view/243>.

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28 Hisbul Luthfi Ashsyarofi, "Optimalisasi Pemberdayaan Perempuan Sadar Hukum Melalui Sekolah Pemberdayaan," *Jurnal Hukum dan Kenotariatan* 5, no. November (2021): 641. Diakses 10 April 2022, <http://riset.unisma.ac.id/index.php/hukeno/article/view/13883>.

29 Yuniar Mujiwati, Muhammad Baidowi, dan Adi Nur Aziz, "Mendidik Pelaku Pernikahan Sirri Dengan Perspektif Hukum Agama Islam dan Hukum Perdata," 548.

marriage between the bride and groom without the presence of a guardian and witnesses, or in the presence of a guardian without witnesses, then they make an agreement to keep the marriage secret. This type of marriage is invalid in the view of most *fiqh* scholars, because it does not meet the requirements of the Islamic legal aspect, namely the element of guardian and witnesses. Second, marriage takes place with various pillars and complete conditions, such as consent and vow, guardians, and witnesses. However, they keep the marriage a secret from the community or the first wife of the man if he is polygamous.<sup>30</sup>

Contradictory to this practice, a good and beneficial marriage is a marriage that is announced to the public and then held a *walimatul 'ursy* (wedding celebration) based on the advice of the Prophet Muhammad SAW.<sup>31</sup>

There are several factors that cause the occurrence of unregistered marriages in the Rembang area, namely economic, educational and cultural factors. The people of Rembang in Islamic religious education are very firm and also humble towards their Kyai (Islamic religious leader). Furthermore, they also apply unregistered marriage because according to the local view it is legal from the aspect of Islamic law even though it does not have positive legal force. This perspective is what the author considers wrong, because in the implementation of unregistered marriage there is *mafsadat* (damage) which is quite fatal and continuous, compared to the *kemaslahatan* (benefit), which is solely to avoid adultery. In one of the rules of *ushuliyah* (basic rules) it is said:

30 Ashsyarofi, "Optimalisasi Pemberdayaan Perempuan Sadar Hukum Melalui Sekolah Pemberdayaan," 644.

31 Awaliah et al., "Akibat Hukum Pernikahan Siri," *Maleo Law Journal* 6, no. 1 (2022): 35. accessed on April 2022, <https://jurnal.unismuhpalu.ac.id/index.php/MLJ/article/view/2398>.

## الضَّرُّ يُزَالُ

"Adversity must be removed"<sup>32</sup>

And other rules which are derivatives of the above rules, namely:

## دَرْءُ الْمَفَاسِدِ مُقَدَّمٌ عَلَى جَلْبِ الْمَصَالِحِ

"Rejecting harm takes precedence over attracting benefit"<sup>33</sup>

Furthermore, one of the contemporary Islamic scientists, Quraish Shihab, has a tendency to believe that recording marriage is an obligation. According to his view, unregistered marriages are considered valid if based on religious law. However, unregistered marriages can be one of the causes of sin for the perpetrators, because they do not heed what is stipulated by the Government (as *Ulil Amri*). Qur'an has ordered all Muslim communities to submit and obey their leaders as long as the leaders are not against the Shari'ah or the law of Allah. And the registration of the marriage is not an act that is contrary to God's law,<sup>34</sup>

but strengthen God's law by recording all forms of legal events that have the opportunity for fraud or denial, as in one of the *mu'amalah* verses that Allah emphasizes in the Qur'an, namely:

32 Moh. Ahsanuddin Jauhari, *Filsafat Hukum Islam* (Bandung: PT. Liventurindo, 2020), 121.

33 Irzak Yulardy Nugroho, "Pendekatan Ushuliyah terhadap Penjatuhan Sanksi Pidana bagi Pelaku Nikah Siri: Telaah Pasal 143 RUU Materiil Peradilan Agama Bidang Perkawinan," *Al-Adillah: Jurnal Hukum Islam* 2, no. 1 (2022): 69. accessed on 15 April 2022. <http://ejournal.unibo.ac.id/index.php/aladillah/article/view/319/257>.

34 Azizul Anwar, I Nyoman Putu Budiarta, dan Ni Made Puspasutari Ujianti, "Pengaturan Dan Akibat Hukum Perkawinan Siri Online Ditinjau dari Perspektif Hukum," *Jurnal Interpretasi Hukum* 3, no. 1 (2022): 155. accessed on 15 April 2022, <https://www.ejournal.warmadewa.ac.id/index.php/juinhum/article/view/4736/3344>.

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ ....

“O you who believe, when you owe a debt for a specified time, you should write it down...”

(QS. Al-Baqarah, 2:282).<sup>35</sup>

Although the marriage contract is different from the debt contract, there is a similarity of the contract for both practices not to deny their action by recording it. So, recording marriages can be proof of the husband and wife to not deny their relationship. Furthermore, the study of Islamic legal philosophy teaches its adherents to minimize all harm in the context of *amaliyah*. By implementing Islamic laws, it requires tranquility and peace for Muslims.

However, people from some community groups still hide their marital status even though they are aware of the negative impact of marriages that do not have a material legal basis, and the potential that may harm women. In the event of a divorce, the woman left behind by her husband cannot claim her rights in the financial settlement (*talaaq* divorce) or inheritance rights (widowed) from her husband. Furthermore, the assumption from the people of Rembang about an unregistered marriage will end if within 3 months the husband does not provide a living, then divorce automatically occurs.<sup>36</sup>

It is very unfortunate if the case of unregistered marriage continues to grow in the lives of Indonesian people, because the state cannot protect every right they have. Other unregistered marriage practices also occur in Bangsalsari village, which is one of eleven villages located in the Bangsalsari

District, Jember Regency, East Java. This village is the one that has the most cases of unregistered marriage among other villages in the Jember Regency area.

The problem that occurs in the village is that man and woman who want to carry out a marriage vow only perform it in front of an ustadz or religious teacher from the local community. They do this marriage vow in the presence of several people as witnesses. The implementation of unregistered marriage in this area is considered to have fulfilled the pillars and requirements in accordance with Islamic law. However, there are still gaps in the aspect of marriage registration. This is influenced by the culture and beliefs of the local community due to the majority of the population of Jember Regency, especially those in Bangsalsari Village, are immigrants from the Madura Island or commonly known as Madura Swasta. Based on their characteristics and cultures, they position Kyai above all else

The author needs to emphasize that the author does not assert this misconception to the existing Kyai, because viewing the early history of the practice of unregistered marriages in Indonesia occurred as a result of the stipulation of Law No. 1 on Marriage and PP No. 9 of 1975. So, for some religious leaders, there are those who are unaware regarding the regulation and some are holding fast to their understanding of fiqh (Islamic law). Thus, what is needed to be underlined here is the dynamics in the community that must be able to be answered by the fiqh, so that by following marriage registration, it will position the fiqh in harmony in following and responding to the challenges of modern times in the aspect of marriage without losing the essence of the shari'ah.

The unregistered marriage carried out by the people of the Bangsalsari village is not without negative effects. It has significant impacts on the lives of the couples who

35 Tim Penulis Almahira, *Al-Qur'anul Karim* (Jakarta: Almahira, 2017), 48.

36 Fitrotin Jamilah, "Hak Waris Anak Hasil Pernikahan Siri Di Desa Kalisat Kecamatan Rembang Kabupaten Pasuruan," *Al Hikmah: Jurnal Studi Keislaman* 7, no. 1 (2017): 2. accessed 10 April 2022, <http://ejournal.kopertais4.or.id/pantura/index.php/alhikmah/article/view/2873>.

practice it, particularly for the wives and children. The absence of legal force in unregistered marriage has an impact on the husband who tends to violate the rights of the wives. Consequently, there will be an absence in claiming their rights. As for the children, it is difficult to obtain a birth certificate because there is no evidence of an authentic marriage carried out by the parents, which affects the rights of the children in terms of education process<sup>37</sup>, and also the inability in receiving legal inheritance rights from the biological fathers.<sup>38</sup>

Another region that still practices unregistered marriages is Kahayan Hilir Pulang Pisau District, Central Kalimantan. In this region, there are several corrupted Marriage Registrar Assistants (P3N) officers who took advantage of the situation based on the belief that they are carrying out legal actions that were previously given by the state to assist KUA (Religious Affairs Office) officers in carrying out marriage registration in the community.<sup>39</sup> However, after the implementation of the latest provision, P3N was abolished, but some of them are still determined to operate without a legal mandate from the country. Some people who are not aware of the revocation of the rights of P3N in the implementation of the marriage registration are easy marks for these irresponsible people. On the other

hand, people who are trapped in cases of unwed pregnancy also become the easy target and are effortlessly influenced by these P3N elements.

A similar case also occurred in Kalibening region, Banjarnegara Regency, Central Java Province. There are people who take advantages out of the situation in the uninformed community regarding the latest regulations in the field of marriage law, making this community as a business target. People who conducted unwed pregnancy also become easy pickings for the perpetrators. The researcher is confident in the hope of a law regulation to punish these unscrupulous officers who perform as marriage officiants for the local people binding them in unregistered marriages with strict sanctions and provides a deterrent effect.<sup>40</sup>

The author also found this pattern based on the results of the author's research several years ago in Bungus Teluk Kabung sub-district, Padang City, West Sumatra Province. In the study, the author found that there were illegal marriage officiants, some of whom were former P3Ns who had not received permission to serve anymore, but still managed to continue their profession. Bungus Teluk Kabung consists of 6 urban villages and in each has a minimum of 1 to 3 illegal marriage officiants. In the results of interviews, some of them felt reluctant to provide information and the researcher was considered to be interfering their livelihood.

Meanwhile, in Cisarua and Cianjur areas, West Java Province, the existing practice of unregistered marriage is not performed independently. There are a number of parties who also helps in its implementation, such as brokers, jockeys, and even local religious leaders who have the trust of the local

37 Pijri Pajjar, "Problematika Pasca Nikah Siri dan Alternatif Penyelesaiannya," *Al-Ahwal Al-Syakhshiyyah: Jurnal Hukum Keluarga dan Peradilan Islam* 3, no. 1 (2022): 75. Diakses 14 April 2022, <https://journal.uinsgd.ac.id/index.php/al-syakhshiyyah/article/view/17463/6965>.

38 Pijri Pajjar, "Problematika Pasca Nikah Siri dan Alternatif Penyelesaiannya," *Al-Ahwal Al-Syakhshiyyah: Jurnal Hukum Keluarga dan Peradilan Islam* 3, no. 1 (2022): 75. Diakses 14 April 2022, <https://journal.uinsgd.ac.id/index.php/al-syakhshiyyah/article/view/17463/6965>.

39 Khairani, "Praktik Penghulu Ilegal Melakukan Nikah Siri Di Kecamatan Kahayan Hilir Pulang Pisau" (Institut Agama Islam Negeri Palangkaraya, 2019), 121. Diakses 18 April 2022, <http://digilib.iain-palangkaraya.ac.id/id/eprint/1986>.

40 Mareta Nur Wigati, "Fakto-Faktor Penyebab Perkawinan Dibawah Tangan" (Institut Agama Islam Negeri Purwokerto, 2018), 15.

community.<sup>41</sup> The incident certainly discredit the prestige of Islamic religious leaders in other areas, because it was shocking that religious leaders opened the practice of unregistered marriage.

There were seven cases of unregistered marriages in the form of polygamy in Cigugur Girang Village, West Bandung. The impact of serial polygamy was quite a lot, namely the emergence of conflicts, particularly after the legal wife found out, also in terms of community administration problems such as making identity cards, family cards, and birth certificates, The next impact is the difficulty in managing inheritance among family members and also the vulnerability to economic, educational and health issues.<sup>42</sup>

Based on all the legal cases regarding the practice of unregistered marriage that exist above, in this section, the author can conclude that the offender involved in the practice of unregistered marriage can be classified into two types. They are the main offender such as illegal headmen, men as prospective husbands, and women as prospective wives or marriage witnesses from the woman's side.

Meanwhile, the second party is an offender who participates in the implementation of an unregistered marriage, such as marriage witnesses, brokers, and jockeys. This party has a central role in the development of unregistered marriages in society. Thus, their practice of participating in supporting

illegal acts can be sanctioned as well, so that people would think twice about facilitating or supporting unregistered marriages.

### Rules Governing Unregistered Marriage

As a country administered by the government in order to create order in social life, the Indonesian government seeks to get into various lines of its people's life to regulate every behavior and act. It is why a legal instrument is needed in the form of laws or other regulations to control citizens in various regions. One of the provisions stipulated by the Indonesian government is the regulation of marriage.

Before understanding the regulations governing unregistered marriage, it is necessary for the author to describe all provisions governing marriage. In general, the regulations governing marriage for the Indonesian people are as follows:

#### 1. Marriage Law in Indonesia Before 1975

Before the Marriage Law was declared effective on October 1, 1975, existing marriage law in Indonesia was regulated in various kinds of legal regulations or legal systems that applied to various groups of citizens in various regions,<sup>43</sup> namely:

- a. Customary Marriage Law
- b. Islamic Marriage Law
- c. Code of Civil Law (*Burgerlijk Wetboek* or BW)
- d. Marriage Law according to Ordonansi
- e. Regulation of Mixed Marriages
- f. *Regeling op de Gemengde Huwelijken*.

#### 2. Law Number 22 of 1946

Law No. 22 of 1946 concerning the Registration of Marriage, Divorce and Reconciliation, initially this law was only

41 Kementerian Pemberdayaan Perempuan dan Perlindungan Anak dan Indonesia Research Foundation, *Perkawinan Sirri dan Dampaknya di Provinsi Jawa Barat, Paper Knowledge . Toward a Media History of Documents*, 2014, 41. Diakses 18 April 2022, <https://www.kemenpppa.go.id/lib/uploads/list/34529-laporan-riset-perkawinan-sirri-dan-dampaknya.pdf>.

42 Ade Darmawijaya, "Dampak Poligami Siri Terhadap Kehidupan Keluarga Di Desa Cigugur Girang Bandung Barat," *Asy-Syariah* 21, no. 2 (2019): 208. Diakses 13 Oktober 2022. <https://journal.uinsgd.ac.id/index.php/asy-syariah/article/view/5447>.

43 Jamaluddin dan Nanda Amalia, *Hukum Perkawinan* (Lhokseumawe: Unimal Press, 2016), 32.

applied to the Java and Madura regions, but with the enactment of Law No. 32 of 1954, the provisions were applied to all Indonesian citizens.<sup>44</sup>

3. Law Number 32 of 1954

Law number 32 of 1954 concerning the stipulation of the enactment of the law of the Republic of Indonesia dated November 21, 1946 Number 22 of 1946 concerning the registration of marriage, divorce, and reconciliation in all areas outside Java and Madura. as it reads this law only regulates the procedure for recording marriage, divorce, and reconciliation not about marriage material as a whole.<sup>45</sup>

4. Marriage Law Number 1 of 1974

On January 2, 1974, the bill on marriage was passed by the House of Representatives into Law No. 1 of 1974 concerning Marriage, which became effective on October 1, 1975.<sup>46</sup> The law applied to all citizens of the Republic of Indonesia, and most of its contents have met the demands of Indonesian society at that time.<sup>47</sup>

5. Government Regulation No. 9 of 1975

Government Regulation No. 9 of 1975 concerning the implementation of Law No. 1 of 1974 concerning Marriage. This Government Regulation only contains the implementation of some of the provisions contained in Law Number 1 of 1974.

6. Government Regulation No. 7 tahun 1989

Law No. 7 of 1989 concerning Religious Courts, as the material of this Law contains rules related to the procedures (formal law) for resolving marital disputes in the Religious Courts.<sup>48</sup>

7. Compilation of Islamic Law (KHI)

In the Indonesian Dictionary (KBI), the word compilation means a collection or set arranged in an orderly manner, a list of information, and essays.<sup>49</sup> Substantially, KHI compiles several provisions on marriage specifically for Muslims in Indonesia, where in the arrangement there are several things that are not included and become a perfection of the marriage law for Muslims. The compilation of KHI was carried out based on the *muktabarah fiqh* book in the field of marriage with a team of compilers who have qualified capabilities and credibility in their fields.

8. Law No. 16 of 2019

Law No. 16 of 2019 concerning amendments to Law No. 1 of 1974 concerning Marriage. In its substance, there are changes regarding the minimum age limit for men and women who want to marry, namely 19 years for both parties.

9. The Criminal Code

As one of the legal sciences that recognizes an intent to provide legal consequences in the form of special suffering (*bijzondere leed*) in the form of punishment to those who have committed a violation of predetermined obligations or prohibitions,<sup>50</sup> the Criminal Code has substantially regulated several

44 Direktorat Jenderal et al., *Himpunan Peraturan Perundang-Undangan Tentang Perkawinan*, (2015), 6.

45 Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia* (Jakarta: Kencana, 2009), 20.

46 Amiur Nurudin dan Akmal Tarigan, *Hukum Perdata Islam di Indonesia* (Jakarta: Kencana Prenada Media Group, 2014), 25.

47 Jamaluddin dan Nanda Amalia, *Hukum Perkawinan* (Lhokseumawe: Unimal Press, 2016), 35.

48 Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia* (Jakarta: Kencana, 2009), 21.

49 Tim Penyusun Kamus Bahasa Indonesia, *Kamus Bahasa Indonesia* (Jakarta: Pusat Bahasa, 2008), 743.

50 P.A.F. Lamintang dan Franciscus Theojunior Lamintang, *Dasar-dasar Hukum Pidana di Indonesia* (Jakarta: Sinar Grafika, 2014), 16.

provisions regarding marriages that are prohibited due to certain obstacles to bring order to society in general.

Of all regulations which author has described above, the provisions which regulate and have the power to punish unscrupulous persons or perpetrators of unregistered marriages are contained in Law Number 32 of 1954 concerning the enactment of the Law of the Republic of Indonesia dated November 21, 1946 Number 22 of 1946 concerning registration of marriage, divorce, and reconciliation in all regions outside Java and Madura; in Article 1 paragraph (2) and Article 3 paragraphs (1) and (2), namely:

Article 1

- (2) Those who are entitled to supervise marriage and receive notification of divorce and reconciliation are only employees appointed or instructed by the Minister of Religion.

Article 3

- (1) Whoever performs a marriage contract or marriage with a woman not under the supervision of the employee referred in paragraph (2) Article 1 or the representative, shall be punished with a maximum fine of Rp 50.000,00 (fifty thousand rupiahs).
- (1) Whoever carries out the work referred to in paragraph (2) Article 1 without any rights, shall be sentenced to a maximum imprisonment of 3 (three) months or a maximum fine of Rp 100.000,00 (one hundred thousand rupiahs).<sup>51</sup>

Furthermore, in Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, in article 45 paragraph (1) letter (a) it is emphasized as follows:

Article 45

- (a) Whoever violates the provisions stipulated in Article 3, 10 paragraph (3), 40 of this Government Regulation shall be punished with a maximum fine of Rp 7.500,00 (seven thousand five hundred rupiahs);<sup>52</sup>

It is also regulated in the Criminal Code which is generally used as a legal basis in giving sanctions to parties who carry out unregistered marriages or polygamy in an unregistered manner even though this is hindered by provisions as follows:

Article 279

- (1) Threatened with a maximum imprisonment of five years:
  1. Whoever enters a marriage knowing that the existing marriage or marriages are a legal barrier to that;
  2. Whoever enters a marriage knows that the marriage or marriages of another party are an obstacle to that.
- (2) If the person committing the act based on paragraph 1 point 1 hide from another party that an existing marriage is a legal barrier for that, he or she is threatened with a maximum imprisonment of seven years.
- (3) The revocation of rights based on articles No. 1-5 can be stated.

Article 280

Anyone who enters a marriage and intentionally does not inform the other party that there is a legal barrier is threatened with a maximum imprisonment of five years, if based on this barrier, the marriage is declared invalid.<sup>53</sup>

51 Direktorat Jenderal et al., *Himpunan Peraturan Perundang-Undangan Tentang Perkawinan*, (2015), 2-3.

52 Presiden Republik Indonesia, "PP No 9 Tahun 1975," (1975).

53 Redaksi Sinar Grafika, *KUHAP dan KUHP* (Jakarta: Sinar Grafika, 2006), 94–95.

Article 284

- (1) Threatened with a maximum imprisonment of nine months:
1. a. A married man who performs *overspel* (*gendak*) when it is known that Article 27 BW applies to him,  
b. A married woman who commits *overspel* when it is known that Article 27 BW applies to her;
  2. a. A man who participates in the act when he knows that the guilty party is married;  
b. A married woman who participates in the act when she knows that the guilty party has married and Article 27 BW applies to her.<sup>54</sup>

The nominal of fines stated in the articles above when measured by the current situation is considered very light. Meanwhile, the conversion of fines contained in all the articles mentioned above is not found. The foundation to determine the amount of fine is because the men and women who are going to get married do not notify their marriage to the authorities. This condition is indeed an administrative violation in context of marriage registration, in accordance with the mandate of Law Number 1 of 1974 concerning marriage.

From the fragments of several articles above, it can be clearly concluded that the person who carries out unregistered marriage can be punished. The party who performs the marriage contract can also be punished, but there is no provision that punishes the parties apart from those parties above. It is considered necessary to regulate participation of parties who assist or facilitate the practice of unregistered marriages. Thus, the space for unregistered marriages can be narrowed down and Indonesian law in the field of marriage can be updated in accordance with

the demands of times.

The Draft of Law (RUU) on the material law of the Religious Courts in the field of marriage was included in the list of the National Legislation Program (Prolegnas) in 2010. This RUU has provided a fresh air for several parties who reject or oppose unregistered marriages. However, until now, legislators have not finished discussing the matter. A great expectation was expressed by activists of legal marriage that unregistered marriage issue could be addressed immediately in order to create peace and order in aspect of marriage registration.

Criminal provisions are contained in the Draft of Law (articles 143-153), particularly related to unregistered marriage and polygamy. The penalties for these crimes vary, ranging from 6 months to 3 years of imprisonment and fines ranging from 6 million to 12 million rupiahs.<sup>55</sup>

When the bill has been completed by the legislators, surely, there will be controversy among the people in its stipulation. The researcher believes it is quite likely that a controversy happens since it acts as a representation of the individuals who objected the government policies which aimed for community benefit. Considering the harmonious arrangement in the household aspects, the government of Indonesia must take a wise decision through legal instrument as the means of controlling and regulating the society.

### **Law Enforcement of Unregistered Marriage Practice Based on The Theory of Lawrence M. Friedman**

Before examining how law enforcement for the parties involved in the practice of

54 Redaksi Sinar Grafika, *KUHAP dan KUHP*, 97.

55 Masruhan, "Pandangan Masyarakat Islam Surabaya Terhadap Kriminalisasi Nikah Sirri Dalam Reformasi Hukum Keluarga di Indonesia," *al-Jinayah: Jurnal Hukum Pidana Islam* 5, no. 1 (2019): 197. Diakses 18 April 2022, <http://jurnalfsh.uinsby.ac.id/index.php/HPI/article/view/821>.

unregistered marriage in Indonesia based on the theory of effectiveness by Lawrence M. Friedman, it is essential to describe the Theory of Lawrence M. Friedman about legal effectiveness and its law enforcement elements, these will be a tool to conduct analysis in obtaining conclusions later.

### 1. The Theory of Legal Effectiveness by Lawrence M. Friedman

The law practice in Indonesian society is based on a normative belief. Law is not only focused on principles, theories, concepts, and court decisions that are oriented towards law written in book, but law must also be viewed from a broader aspect, which is the law in action.<sup>56</sup>

The consideration of whether a law has been effectively implemented in society must be measurable through legal compliance. Should the law is obeyed by most of its targeted people, then it means that the rule of the law is already effective. On the other hand, should the rule of law is still violated by the majority of its targeted people, then it can be concluded that the rule of law is not effective yet.<sup>57</sup>

In the perspective of Lawrence Meir Friedman, there are three elements that need to be achieved in order to have an effective and coherent relationship between the law in book and the law in action. The elements are known as the following:

#### a. Legal Substance or Legal Content

In order to create justice for society, the legal content itself must really function as an embodiment of values and a sense of justice along with normative values consistent with the

norms in society. In addition to the legal content, the legal substance must not be contradictory with the substance of other existing laws. Hence, the reason why the entire system of social norms existed should be coherent with each other.

#### b. Structure

Structure mentioned in this section refers to an institution that has the authority to enforce law. A law, no matter how good the substance is, will not be able to be function if there is no institution that has the authority to implement the law. The institution needs to have the subjects to implement law, including the investigative institution such as police officers, and public prosecutors' institution such as prosecutors, and courts.

#### c. Culture or practice

The culture or practice brought up in this section indicated the culture practiced within the society involved in the legal system. A law can only be ideal should it is a direct product from the culture practiced within the society, hence the value system brought by the legal product will be acceptable in the society (since it is a manifestation) with the value embraced by the society.<sup>58</sup>

From the three elements described by the researcher above, they determine the effectiveness of law enforcement and law enactment in the society, including in the law enforcement against individuals who perform unregistered marriages in Indonesia.

Furthermore, when the theory above is associated with the unregistered marriage practices problem in Indonesia, it can be concluded that:

56 Lalu M. Alwin Ahadi, "Efektivitas Hukum dalam Perspektif Filsafat Hukum: Relasi Urgensi Sosialisasi terhadap Eksistensi Produk Hukum," *Jurnal Usm Law Review* 5, no. 1 (2022): 113. Diakses 13 Oktober 2022, <https://journals.usm.ac.id/index.php/julr/article/view/4965>.

57 Farida Azzahra, "Pemberlakuan Sanksi Administratif: Bentuk Upaya Paksa Meningkatkan Kepatuhan Pejabat atas Pelaksanaan Putusan Peradilan Tata Usaha Negara (Teori Efektivitas Hukum)," *Binamulia Hukum* 9, no. 2 (2020): 132. Diakses 13 Oktober 2022, <https://fh-ungris.com/journal/index.php/binamulia/article/view/122>.

58 Muhammad Yusuf Daeng, *Sosiologi Hukum* (Pekanbaru: Alaf Riau, 2018), 21–22.

1. The legal content or legal substance that regulates unregistered marriage does not seem to give a deterrent effect to those who practice unregistered marriage. Furthermore, the legal substance that regulates unregistered marriages must be renewed in order to be able to create justice and order within the society.
2. Structurally, law enforcement institution seems apathetic to the cases of unregistered marriage practices that occur in the society and consider these practices as normal. Ironically, there are also law enforcement officials involved in performing unregistered marriages even though they are aware that this practice is prohibited.
3. Culturally, Indonesia is a Muslim-majority country, so many laws are adopted from Islam. However, Islam does not arrange the practice of marriage registration. Unregistered marriage in the Arabian culture referred to a marriage carried out secretly due to unfulfilled certain rules or conditions. Meanwhile, from Indonesian's standpoint, unregistered marriage is a marriage that is not legally documented in the Office of Religious Affairs. Nevertheless, Indonesian culture has often performed a legal act by registering their marriage to obtain legal certainty and legal protection. This practice is the influence of western legal norms which have been developed in Indonesia.

Based on the explanation above, it can be concluded that the existing marriage law provision in Indonesia has not been an effective system to make the society obey the law when it is compared with the theory of legal effectiveness proposed by Lawrence Meir Friedman. That is why the implementation of the written legal norms will not run optimally. Therefore, it is necessary to improve or change the law concerning marriage which deal with criminal discipline for individuals

who perform or participate in the practice of unregistered marriage.

## 2. Elements of Law Enforcement

Law is one of the instruments that functions in ordering and protecting the interests of the community and should be oriented towards 4 elements of law enforcement, namely:

- a. Legal certainty (*rechtssicherheit*)
- b. Legal expediency (*zweckmassigkeit*)
- c. Legal justice (*gerechtigkeit*)
- d. Legal guarantee (*doelmatigheid*).<sup>59</sup>

Law enforcement is an activity in harmonising the value of relationship in legal rule that is applied to attitude and action as the final value to create order. Therefore, the success of law enforcement elements can be seen through several related factors, namely:

- a. Harmonised rule or law
- b. Adequate law enforcement facility
- c. Public awareness and legal certainty
- d. Good mentality of law enforcement officers.<sup>60</sup>

If it is related to the issue of unregistered marriage (*siri*) in the community, it can be seen that the lack awareness in community is one of the trigger for the rampant practice of unregistered marriage. In a developing country, public legal awareness is a supporting factor for facilitating law enforcement. Legal awareness is a value that lives in the society about comprehension and obedience or compliance with legal norm and applicable laws and regulations.<sup>61</sup>

59 Miswardi, Nasfi, dan Antoni, "Etika, Moralitas dan Penegak Hukum," *Menara Ilmu* 15, no. 2 (2021): 159. Diakses 18 April 2022, <https://www.jurnal.umsb.ac.id/index.php/menarailmu/article/view/2425/1896>.

60 Fithriatus Shalihah, *Sosiologi Hukum* (Depok: Rajawali Pers, 2017), 68.

61 Muhammad Agung Ardiputra, "Pola Efektif Pembinaan Hukum untuk Meningkatkan Keberhasilan Pembangunan Hukum," *Jurnal Ilmiah Kebijakan Hukum* 15, no. 1 (2021): 40. Diakses 15 September 2022. <https://ejournal.balitbangham.go.id/index.php/kebijakan/article/>

The practice of *siri* marriage still develops in Indonesia and it can be ascertained because of the element and supporting factor of law enforcement have not realised optimally by various groups. So, a legal reform is needed by providing sanction that will have a deterrent effect on individuals who perform or participate unregistered marriage.

### 3. Law enforcement of parties involved in unregistered marriage in Indonesia

Law enforcement means a process of making legal effort for the sake of upholding or functioning legal norms as a guide to behave in legally within life of society and state.<sup>62</sup>

In the previous discussion, the author explained the legal rule that can be imposed on the perpetrator of unregistered marriage. However, the regulation is irrelevant to the current situation. Consequently, the law enforcement from the government against unregistered marriage is not optimal, so that people who perform unregistered marriage are still carrying out their illegal activity in the society.

The lack of applied rule is the main reason that law enforcers have not been able to carry out their duty optimally. Legal enforcement of unregistered marriage is still serious issues that should be solved together. So far, the author has not found a strict legal action on unregistered marriage except for member of Indonesian National Armed Force (TNI). TNI members who commit polygamy through unregistered marriage, even though he has a first legitimate wife, can be subjected to sanction based on the provision contained in article 279 of the Criminal Code (*KUHP*) on Obstructed Marriage.<sup>63</sup> In addition, there is

a code ethic that applied specifically to TNI officers based on special regulations among them as public servant.

Meanwhile, Police officers who commit in marriage violation, including the unregistered one, are subject to intense examination. If they are proven guilty, they are subject to Police Regulation (PERKAP) Number 6 of 2018 as an ideal rule in handling marriage for member of the National Police, Police Regulation number 14 of 2011 concerning to the Professional Code of Ethics of the Indonesian National Police, Government Regulation of the Republic of Indonesia number 2 of 2003 concerning to Discipline members of the National Police and referring to Law number 2 of 2002 concerning to the Indonesian National Police.<sup>64</sup>

The strict regulations that applied among members of TNI and the Police can be seen from a Military Court decision number 02-K/PM.II-10/AL/II/2011. In the verdict of an unregistered marriage case, the perpetrator was subject to imprisonment for 1 (one) month 10 (ten) days.<sup>65</sup> TNI members who dare to do unregistered marriage are considered to commit an administrative offense and can be dismissed from their position.<sup>66</sup>

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no. 2 (2020): 111. Diakses 19 April 2022, <http://jurnal.bundamedia grup.co.id/index.php/sosek/article/view/61>.

64 Nur Ekowati et al., "Penanganan Pelanggaran Kode Etik Anggota Kepolisian atas Status Perkawinan," *Jurnal USM Law Review* 3, no. 2 (2020): 449. Diakses 19 April 2022, <https://journals.usm.ac.id/index.php/julr/article/view/2867>.

65 Direktori Putusan, Mahkamah Agung, dan Republik Indonesia, "Putusan Pengadilan Militer Nomor 02-K / PM.II-10 / AL / I / 2011." (Semarang: Pengadilan Negeri, 2011). Diakses 12 September 2022, <https://putusan3.mahkamahagung.go.id/direktori/putusan/1a7d52dc25a14793209cbe4308857ca3.html>.

66 Agung Prama Sarno, Asni, dan Siti Nurul Fatimah, "Perspektif Hukum Islam Terhadap Perkawinan Siri Bagi Prajurit TNI Terhadap Istri Kedua," *Qadauna: Jurnal Ilmiah Mahasiswa Hukum Keluarga Islam* 3, no. 2 (2022): 388. Diakses 16 September 2022, <https://journal3.uin-alauddin.ac.id/index.php/qadauna/article/view/27359>.

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[view/1588/pdf](http://www.view/1588/pdf).

62 Jimly Asshiddiqie, *Penegakan Hukum*, 2008, 1. Diakses 18 April 2022, [http://www.jimly.com/makalah/namafile/56/Penegakan\\_Hukum.pdf](http://www.jimly.com/makalah/namafile/56/Penegakan_Hukum.pdf).

63 F Khairani, "Penegakan Hukum Terhadap Oknum Anggota Tentara Nasional Indonesia Angkatan Darat Yang Melangsungkan Perkawinan Tidak Tercatat," *SOSEK: Jurnal Sosial dan Ekonomi* 1,

Positioning unregistered marriage as an offense in the civil aspect should be socialised to the community. It is because this mandate is clearly stated in Law Number 32 of 1954 in Article 4, namely, "Things that can be punished in Article 3 are considered as offenses." In the other words, religious leaders in various remote areas really need to be approached and given a strong understanding of the aspects of marriage registration through religious instructors from KUA (The Office of Religious Affairs) at the sub-district level. In addition, it is important to spread the understanding of the importance about the administration of marriage registration required by the state to community. Thus, the religious teachers and leaders will become additional player in carrying out socialisation to the community as the role models in their community.

After knowing the lack of law enforcement of unregistered marriage, the author hopes that the Bill on the material law of the Religious Courts about marriage will be completed immediately. In principle, the author tends to choose violations in unregistered marriage is included in the criminal realm. By doing so, the perpetrators get physical sanctions and will be given a deterrent effect. Law is objective to regulate social life, therefore the contribution of various parties in the process of it is an absolute thing.<sup>67</sup> Even though the Criminal justice policy of legislators in Indonesia want to unregistered marriage to be included as a criminal act, there is still a difference of understanding regarding the cluster of unregistered marriage as a deviation or not.<sup>68</sup>

If legislators are too preoccupied in debating definitive or cluster aspects of a legal issue, they will fall behind in settling the latest cases. One recent example is unregistered marriage conducted online through various platforms. The procedure for such a marriage follows the same steps as in KUA, but the process is different. A bride or groom may easily find a partner for an unregistered marriage and choose religious authority with whom they are acquainted.<sup>69</sup>

The main focus in this case is, of course, its validity and legality. The incapacity to carry out the requisite legal provisions, arrangements for unregistered marriages, whether in person or online, are still prohibited under Indonesian marriage law. Thus, the marriage is null and void since it was fundamentally faulty legally.<sup>70</sup>

As a result of evolving science and technology, the legislation governing unregistered marriage must be prepared to meet such a scenario. Furthermore, services to make illegal marriage books (*buku nikah*) are increasingly prevalent in the community. The perpetrators have even begun to publicly advertise their illegal business on various social media platforms. At this moment, no legal action has been taken against them.

The indifference of various parties in the domain of Indonesian marriage law causes cases to become more overlapping. A strategic approach is required in creating a legal formulation that is on target and incorporates the values of order and justice for its citizens.

If legal action is firm and based on clear legal provisions, people will no longer feel ambiguous in viewing unregistered marriages

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67 Syarif Budiman, "Analisis Hubungan Antara Hukum dan Kebijakan Publik: Studi Pembentukan UU No. 14 Tahun 2008 (Analysis of Relation Between Law and Public Policy: Establishment of The Act No.14/2008)," *Jurnal Ilmiah Kebijakan Hukum* 11, no. 2 (2017): 110. Diakses 16 September 2022, [https://ejournal.balitbangham.go.id/index.php/kebijakan/article/view/161/pdf\\_1](https://ejournal.balitbangham.go.id/index.php/kebijakan/article/view/161/pdf_1).

68 Sartini, Abdul Bari Azed, dan Suzanalisa, "Kriminalisasi Nikah Siri Dalam perspektif Hukum Pidana," *Lagalitas: Jurnal Hukum* VIII (2016): 7.

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Diakses 17 April 2022 <http://legalitas.unbari.ac.id/index.php/Legalitas/article/view/88>.

69 Irfanul Yamin, "Analisis Hukum Islam terhadap Jasa Nikah Siri di Situs Jasanikahresmi.com" (Universitas Sunan Ampel Surabaya, 2021), 69.

70 Anwar, Budiarta, dan Ujianti, "Pengaturan Dan Akibat Hukum Perkawinan Siri Online Ditinjau dari Perspektif Hukum," 157.

which often indoctrinate their beliefs. Unregistered marriages and those who provide the service are growing increasingly frequent. In certain cases, they have the exact same marriage books as those issued by KUA, although it is unknown where they obtained it. The serial number on the book is not registered in the SIMKAH (*Sistem Informasi Manajemen Nikah*/Marriage Management Information System), the KUA's application for marriage management. Therefore, the book is only accessible through the KUA's internal system.

The digitization program for all KUA employees and personnel in the marriage registration division is critical in order to monitor all KUA employees' activities, particularly marriage officiants. Furthermore, cross-sectoral collaboration, such as cooperation with village hall, is essential because they often know the identities of the offenders and victims of unregistered marriage.<sup>71</sup> Reports from the village hall and KUA are then used to take action or enforce the law against unregistered marriage violators.

## CLOSING

### Conclusion

Parties involved in unregistered marriage can be classified into 2 (two) categories: First category includes the main actors, such as the illegal marriage officiants, men as potential husbands and women as potential wives, or guardians. Second category includes individuals who cooperate in the conduct of unregistered marriages, such as witnesses, brokers, and jockeys.

Regulations governing unregistered marriages are constituted in Law number 32 of 1954 concerning the enactment of the Law of the Republic of Indonesia dated November 21 of 1946 Number 22 of 1946 concerning Registration of Marriage, Divorce, and Reconciliation in all regions outside Java and Madura; in Article 1 paragraph (2) and Article 2 paragraph (1) and (2), followed by the sanctions in Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, in Article 45 paragraph (1) letter (a). It is also regulated in the Penal Code in articles 279, 280, and 284.

If measured by Lawrence Meir Friedman's Theory of Legal Effectiveness, law enforcement against unregistered marriage violators is ineffective. This is due to the legislation regulating punishment for unregistered marriage is no longer relevant, necessitating a substantial renewal by incorporating legal consequences against several parties involved in the unregistered marriage practices. Furthermore, law enforcement officers appear largely apathetic to the practice, with some actively taking part in it. Indonesia has a long history of documenting legal activities in order to acquire legal certainty and protection. This is the influence of Western legal principles on Indonesian law.

### Suggestion

The author suggests that the DPR or other relevant authorities accelerate the process of revising the legislation governing unregistered marriages, which should be accompanied by criminal sanctions for certain parties involved in the practice of unregistered marriages. Furthermore, the Ministry of Religious Affairs, through KUA officials, can maximize socialization initiatives regarding the risks of unregistered marriage and cooperate or coordinate with cross-sectoral officials to identify solutions to overcome

71 Nispul Khoiri, Ramadhan Syahmedi Siregar, dan Ilham Maulana, "Implementasi Penguatan Keputusan Menteri Agama Nomor 447 Tahun 2015 Tentang Lima Nilai Budaya Kementerian Agama Dalam Mengantisipasi Pernikahan Siri Di Kantor Kua Medan Belawan," *AT-TAFAHUM: Journal of Islamic Law* 3, no. 1 (2019): 65. Diakses 20 April 2022, <http://jurnal.uinsu.ac.id/index.php/attafahum/article/view/6766>.

various obstacles. Thus, establishing public knowledge that unregistered marriage is an unlawful conduct is possible. People also should not be tempted by the persuasion of unregistered marriage because it comes with a number of risks and disadvantages, particularly for women. The author wishes that those who engage in unregistered marriages immediately stop their illegal activities in order to avoid endangering a large number of people.

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