

## UNREGISTERED MARRIAGE IN ISLAMIC LAW PERSPECTIVE A CRITICAL STUDY OF ISLAMIC LAW COMPILATION

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### **Abstract**

*This article below constitutes author's dissertation that discusses the "unregistered marriage ( nikah sirri ) in perspective of Islamic law a critical study of Islamic Law Compilation". The problem statement of this, namely: how is nikah sirri in the perspective of Islamic law, what factors denote the background of nikah sirri, and how is the impact for those who do marriage nikah sirri? Unregistered marriage or nikah sirri according to Islamic law is valid if it meets the requirements harmonious and marriage. As for the cause, among others: economic factors, social status and moral crisis. Meanwhile the impact that would arise from a marriage that is not recorded are nominally: the marriage is considered invalid, even though the marriage was performed according to the religion and beliefs, but in the eyes of the state of marriage is invalid if it has not been noted by KUA or Civil Registry Office, Children born from such marriage only have a civil relationship with the mother and the mother's family, while a civil relationship with his father was not there. It means that the child can not claim the rights of the father. By being born in a marriage that is not recorded, the birth of a child becomes legally registered also in violation of the rights of children. Children's status as children outside of marriage. Further result of marriage is not recorded, both wife and children were born of the marriage is not entitled to demand a living or inherited from his father.*

**Keywords :** KHI, Islamic Law, Unregistered Marriage, Legal Status.

### **ملخص البحث**

تناقش هذه المقالة قضية الزواج غير الرسمي الذي لا يتم تسجيله في السجلات الرسمية للدولة، أو ما يعرف في إندونيسيا بـ'نكاح سري'. واستعانة بالخزانة الوفيرة للفقهاء الإسلامي في باب المناكحات، تتطرح المقالة عدة أسئلة محاولة الإجابة عليها، أهمها: ما هو منظور الشريعة الإسلامية للنكاح السري؟ وما هي العوامل المجتمعية التي أدت لظهور هذا النوع من الزواج؟ وما هي آثاره السلبية؟ وتخلص المقالة إلى أن النكاح السري معتبر من الناحية الشرعية طالما توفرت شروط النكاح والتراضي. كما تخلص إلى أن أهم العوامل التي أدت

لظهوره هي أسباب اقتصادية واجتماعية تتعلق بالوضعية وبالأزمة الأخلاقية في المجتمع الإندونيسي. ومن جانب آخر يخلص البحث إلى أن النكاح السري رغم صحته الشرعية إلا أنه يثير مشكلات للأطفال والزوجات تتلخص في عدم أحقيتهم في المطالبة بالنفقة والميراث، فضلا عن اقتصار العلاقة المدنية القانونية على الطفل وأسرته زوجته، بينما لا يمتلك الطفل علاقة مدنية بوالده، وهو ما يحرمه حقوقا كثيرة في هذا الصدد.

الكلمات الدالة: الشريعة في إندونيسيا، النكاح السري، مجموعة الأحكام الإسلامية

## Introduction

The last few years were busy discussing *unregistered marriage (nikah sirri)* that appeared in various print and electronic media. Marriage conducted without the guardian of the woman, marriage is vanity and invalid. Described by some scholars premises refers to the QS al-Baqarah / 2: 232, and then twist the guardian understanding with someone who represents the bride, do not have to have a blood relationship. That is the authorization of the bride to represent as a trustee, so that finally there was an unregistered marriage unknown by both parents and siblings, because marriage is done by using the trustee that there is no blood relationship.

Trusts in marriage is a power or authority over the human race *syar'i*, is delegated to the perfect person, because of certain deficiencies in people who ruled it, for the benefit of its own. The discussion on this matter, *Shafi'i*, *Maliki* and *Hanbali* argue; if woman is puberty and sensible she was a girl, then marry her right there on the guardian, but if a widow, then right there on both; trustee should not be marrying the widow woman without her consent. Instead the woman should not marry her even then without the consent of the guardian. However, the pronouncement is the custody agreement. Contract is spoken only by woman does not apply at all, even though the contract itself require approval.<sup>1</sup>

Meanwhile, the *Hanafi* said that the woman who has puberty and common sense should choose their own husbands and may also perform the marriage ceremony itself, whether she's a virgin or a widow. No one who has authority over her or to oppose her choice, with the proviso, that a person who chooses *kufu* (commensurate) with her and the dowry not less than *mitsil* dowry. But if she chose a man who was not her *kufu*, then her guardian should oppose it and asked to cancel the contract, *qadhi* illegitimate. If

<sup>1</sup> Muhammad Jawad Mughniyah, *Fikih Lima Mazhab*, (Jakarta: Lentera, 2008), p. 345.

the woman is married to another man with a dowry of less than dowry *mitsil*, *qadhi* may ask *mitsil* contract if dowry is not met by her husband.<sup>2</sup>

The majority imam Sunni school found a female puberty and sensible, caused by maturity, it is entitled to act doing any form of transaction and so on, as well as in matters of marriage, whether she is a virgin or a widow, either father, grandfather and other family members, or sanctioned his father, both of nobles and commoners, mating with people who have high or low social class, with no one, however her high position is entitled to forbid it.<sup>3</sup>

Meanwhile, Sunni school of thought says that the trust was only in the hands of a well and paternal grandfather, has full rights in the custody of the marriage ceremony for boys and girls. The scholars of the Sunni require that the trust, detrimental to the child. If a young feel doubtful by the marriage, then the child can choose when puberty whether to abort or continue. Imam Hanafi said that, when the father or grandfather marry off their daughters young people who are *not* as *kufu* or less than *dowry mitsil*, the illegitimate contract invalid if he is not known as a voter is ugly.<sup>4</sup>

In marriage law has been mentioned that a marriage should be done recording to obtain legal certainty, the fact that some people are still many who perform marriages without recording or known by the term *nikah sirri*-unregistered marriage, the reasons given can vary, they do weddings without recording, although the actual status of unregistere marriage is disputed by various groups, both among legal experts, and the public. When viewed from the Islamic law permits required in a marriage is not the guardian of the bride of the man, but the permission of the guardian bride.

## Unregistered Marriage

### Definition of Unregistered Marriage (Nikah Sirri).

Judging from the words *sirri* it means "stealth" or "do not open". So *nikah sirri* means marriage in accordance with the provisions of the Islamic religion, but not recorded in the government administrative records (KUA) or marriage in accordance with the provisions of the Islamic religion and recorded by the marriage registrar, but not published in the form of *walimah* (*marriage ceremony*).

*Sirri* marriage is often interpreted by the general public by:

1. Marriage without a guardian (*wali*). Such marriages conducted in secret (*sirri*) because the female guardian do not agree, or because it

<sup>2</sup> *Ibid.*, pp. 345-346.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, p. 348.

- considers valid marriage without a wali, or simply because they want to satisfy the lust alone without considering again the provisions of the Shari'a.
2. A valid marriage in Islam but not recorded in the recording state institutions. Many factors that cause a person not registered marriage in the state civil registration agency. Some are due to the cost factor, can not afford the administrative record-keeping, some are due to the fear of getting caught breaking the rules prohibiting civil servants more than one marriage, and so forth.
  3. Secret marriage because of certain considerations. For example, for fear of getting a negative stigma from people who already taboo *sirri* marriage, or as complex considerations that forcing someone to conceal her wedding.<sup>5</sup> The marriage denotes contract between male candidate as wife to fulfilling the sexes are governed by Shari'ah. While understanding *sirri* marriage is a marriage in secret (secret-hidden). Called in secret because not reported all of Religious Affairs Office or KUA for Muslims or civil registry office.

*Sirri* marriage is usually done because the two parties have not been ready to officiate or celebrate, but on the other hand to keep to avoid things that are undesirable or are exposed to things that are religiously forbidden. The opinion of Imam Abu Hanifa, what is meant by *sirri* marriage is a marriage that can not bring a guardian and not registering marriages to KUA. He established that women who have puberty and understanding (in normal conditions) then allowed to choose their own future husband. He does not only depend on the guardian.

Further, he explains puberty and intelligent woman are also allowed aqad marriage contract herself either in a virgin or a widow.<sup>6</sup> *Sirri* marriage, namely marriage performed by the guardian of women with a man and witnessed by two witnesses, but not reported or not recorded in the Office of Religious Affairs (KUA).

The term marriage or *sirri* (secret) marriage was already known among the scholars. Only *sirri* marriage known in ancient times is different from *sirri* marriage at this time. Formerly referred to *sirri* marriage is marriage according to the tenets of marriage and the conditions according to the shari'ah, it's just that the witness is asked not to notify the occurrence of the marriage to the public, to society, and there is no *walimatul-'ursy*. The *sirri* marriage known by

<sup>5</sup> Abu Hamid Al-Ghazali, *Hukum Islam Tentang Nikah Sirri* (2009), <http://konsultasi.wordpress.com>. (17 of February, 2010).

<sup>6</sup> Wahyu Pratama, *Makalah Spai* (Mozilla Firepox 2009), p. I. <http://akmapala09.blogspot.com.html> (17 of February, 2010).

the people of Indonesia today is a marriage performed by the mayor or deputy mayor and witnessed by witnesses, but not carried out in the presence of the Registrar of Marriage Officer as official government apparatus or not listed in the Office of Religious Affairs for the Moslems or in Civil Registry for non-Muslims.<sup>7</sup>

The third Shari'a law on the facts are as follows:

#### 1. Law Wedding Without Mayor

As for the facts first, the marriage without a guardian; Islam in fact has banned a married woman without a guardian. Such provisions are based on a hadith narrated from Abu Musa ra companions that Messenger of Allah said;

عن ابن عباس قال: قال رسول الله صلى الله عليه وسلم لانكاح الا بولي مرشد (رواه الشافعي)

Artihnya:

«From Ibn Abbas, said Ibn Abbas, the Prophet said: Unauthorized a marriage without a wali prosperous minds. «(HR Shafi).<sup>8</sup>

Based *dalalah al-iqtidla'*, the word "laa" on Hadi's remarks show understanding' illegitimate', not just' not perfect' as the opinion of most of Jurists.<sup>9</sup>

Based on the above hadith can be concluded that a wedding without a marriage guardian is vanity. The culprit has been doing immoral to Allah, and are entitled to sanctions in the world. However, the law has not set forms and levels of sanctions for those who engage in marriage without a guardian. Therefore, the case of marriage without the guardian put into chapters ta'zir, and decisions regarding the form and content of the sanctions handed over entirely to a qadliy (judge). A judge may impose sanctions imprisonment, exile, and so forth to the perpetrators of marriage without a guardian.

#### 2. Without registered marriage at the Civil Registration Institution

The fact *sirri* second marriage, the marriage is valid according to the provisions of law but not listed on the civil registry institutions; actually there are two laws that must be assessed differently; namely (1) the law of marriage; and (2) the law does not register marriages in the recording state institutions.

<sup>7</sup> Irma Devita, *Akibat Hukum Dari Nikah Sirri* p. I. <http://irmadevita.com> (15 of February, 2010).

<sup>8</sup> Sayid Sabiq, *Fiqih aS-Sunnah*, Juz II (Lebanon: 1992), p. 98.

<sup>9</sup> *Ibid.* p. 99.

From the aspect of marriage, *sirri* marriage remains valid under the terms of the Shari'a, and the perpetrators should not be considered to perform acts of disobedience, thus entitled to legal sanctions. The reason, a new act considered immoral and is entitled to impose sanctions in the world and in the hereafter, when it was categorized "illicit work" and "compulsory leave". Someone recently declared valid perform disobedience when he was working on the unlawful act, or leave the obligations that have been established by law.

Similarly, people who leave or working lawless deeds sunnah, permissible, and makruh, then that person should not otherwise have done disobedience; thus entitled to sanctions in the world and in the hereafter. To that end, a qadhi 'should not be penalizing those who leave deeds sunnah, and permissible; or doing the act permissible or makrooh.

Someone new law entitled to impose sanctions in the world when the person;

1. Leaving obligations, such as leaving prayer, jihad, and so forth;
2. Working unlawful acts, such as drinking wine and deriding the Prophet, and so forth;
3. Violating rules state administration, such as breaking traffic rules fairy building, and other rules that have been set by the state.<sup>10</sup>

Based on the above explanation it can be concluded, the wedding that is not recorded in the recording state institutions should not be regarded as a criminal act so that the perpetrators are entitled to sin and sanctions in the world. Because the wedding that she did have met the tenets of marriage outlined by Allah. The pillars of marriage are as follows; (1) The trustee, (2) two witnesses, and (3) *ijab qabul*. If these three things have been fulfilled, then the person is considered valid marriage law even though not recorded in the civil registry. With regard to the registration of a marriage is not legal in the state registration of the institution, then this case can be broken down as follows:

1. Basically, the function of recording marriages in the civil registration agency is that someone has evidence (*bayyinah*) to prove that he really has done weddings with others. Therefore, one of the proofs that are considered valid as evidence of *syar'i* (*bayyinah syar'iyah*) is an official document issued by the state. When the marriage registered at civil registration agency, of course, someone has to have s an official documents that can

<sup>10</sup> Irma Devita, Irma Devita, *Akibat-Hukum Dari Nikah Sirri*, p. I. and <http://irmadevita.com> (15 of February, 2010), p. 1.

be used as evidence (*bayyinah*) in the presence of the judicial council, when there are disputes relating to marriage, and the dispute was born as a result of marriage, such as inheritance, custody children, divorce, livelihood, and so forth. However, official documents issued by the state, is not the only evidence of *syar'i*. Testimony of witnesses wedding or those who witnessed the wedding, also legitimate and should be recognized by the state as evidence of *syar'i*. Countries should not be established that the only evidence to prove the validity of a person's wedding is a written document. Because the law has established the validity of evidence outside of written documents, such as witness testimony, oath, acknowledgment (*iqrar*), and so forth. Based on this description it can be concluded that, people who did *sirri* marriage still have a legitimate inheritance relationship and other relationships are born out of marriage. In addition, the testimony of witnesses who attend the *sirri* marriage legitimate and should be recognized as evidence of *syar'i*. The state should not reject their testimony just because the marriage was not registered at the civil registration agency; or does not recognize the relationship of inheritance, nasab, and other relationships that originated from the *sirri* marriage.

2. In the golden era of Islam, in which the recording system has evolved with and forward, never encountered any Islamic government that criminalizes those who perform marriages that are not listed in the official records state institutions. Moreover, most people at that time, perform marriage without civil registration agency noted. Can not be stated that at the time of recording undeveloped institutions, and the state of society when it is not as complex as the current state of society. Because the rulers and clerics of the muslim when it understands that the legal origin of marriage records is not mandatory, but permissible. They also understand that *shar'i* proof not only written documents.
3. In the treasures of Islamic justice, it is true, the state is entitled to impose sanctions mukhalafat to those who commit acts of mukhalafat. Because the state (in this case a Caliph and the people who raised) have the right to establish certain rules to regulate the affairs of the people who have set rules and procedures for regulation by law; such as traffic affairs, home construction, exploration, and so forth. Khalifah has the right and authority to govern the affairs of this kind is based on *ijtihad*. Rules set by the caliph or qadhi 'the judge actions of this kind must be obeyed and implemented by the people. Anyone who violates provisions of the caliph

in these affairs, then he/she has fallen into action mukhalafat and deserve sanctions mukhalafat. For example, a caliph entitled to determine the distance the home page and the public streets, and prohibit people to build or plant beside him/her at a distance of so many meters. If someone violates these provisions, the caliph should sanction him/her with fines, flogging, imprisonment, and so forth.<sup>11</sup>

Khalifah also has the authority to set a dose, the scales, as well as special measures for the regulation of the sale and purchase and trade affairs. He has the right to impose sanctions for people who violate orders in this regard. Khalifah also has the authority to establish certain rules for cafes, hotels, rental place game, and other public places; and he is entitled to impose sanctions for those who violate these rules.

Likewise, in terms of setting a wedding affair. Khalifah is to specify certain administrative rules to regulate the affairs of marriage; for example, a rule that requires people who get married for registering marriages in an official record state institutions, and so forth. Such rules must be obeyed and implemented by the people. To that end, the state is entitled to impose sanctions for those who do not register his/her marriage to recording state institutions. Because the people who did not record knacks ahannya countries are recording in institutions, whereas the country has set such rules has fallen on mukhalafat action. Forms and levels of sanctions mukhalafat left entirely to the caliph and the person who gave the authority.

Based on the definition above, the writer can give an idea about the meaning of *sirri* marriage is "to form a family with the opposite sex that is done in secret, or clandestinely and in accordance with the provisions of the Islamic religion however, are not recorded in the government administrative records (KUA)"

### **Sirri Marriage Implementation**

As befits the wedding in general, *sirri* marriage wedding procession carried out in accordance with Islam, that no bride, guardians, witnesses, qabul consent, and dowry. The difference is that the marriage was not registered at the KUA. Thus, the process of their marriage was not done by the VAT registration and supervision, but quite married to the person who is considered to understand

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<sup>11</sup> Wahyu Pratama, *Makalah Spai* (Mozilla Firepox 2009), p. I. <http://akmapala09.blogspot.com.html> (17 of February, 2010)., pp. 2-5.



Islam or ditokohkan, like kiai. Opinions that emerged during this that the ulama or kiai has very important role in the process of *sirri* marriage.

Meanwhile, in general, the implementation of *sirri* marriage do most people took place in the house, but nothing came to kiai's shelter. As well walimah conducted at the wedding ceremony, wedding ceremony of *Sirri* marriage was also attended by the invitations on average amounted to 10 to 20 people consisting of environment of family, both the groom and the bride and the neighbor who is near home.<sup>12</sup>

Formal wedding seems different from the concept of *sirri* marriage stating that marriage is a secret or hidden marriage. This shows that *sirri* marriage is not a secret anymore because they also do walimah which basically is the announcement of the wedding is done. This means that the general public recognizes the existence of people who do *sirri* marriage without having to question the validity of the marriage.

To legitimate this *sirri* marriage as usual practice of marriage in Islam, it is required for a guardian who must marry a woman with a man. By the time the wedding took place most of the subject makes her own father as the guardian of marriage, but some are using siblings. Marriage in addition there should be a trustee, other conditions which must be met in a marriage that is the witness. Witnesses present in the implementation of *sirri* marriage other than the two men are also subject presented two women or one man.

Other requirements as a condition of validity of marriage is *ijab qabul* or marriage contract. Syahar in writing stating that the schools put the *ijab qabul* as the first essential condition of marriage. *Qabul* carried guardian consent between the bride with the groom. *Qabul* consent in *sirri* marriage done the same if they were married in front of *p enghulu*, the only difference there is NO recording.

Unlike the wedding is done by recording the consent process *qabul* pronounced in anyway *sighat ta'lik*, as stated in the book of wedlock. If a man leaves his wife for two consecutive years, or do not provide a living compulsory three months, or a body or physical of wife, or letting her for six months, then wife is not the pleasure and complained to the religious court and pay the money for specified, then fell divorce one.

If you pay attention to the regulatory process *ta'lik sighat* Islam, apparently it was not done by people who do *sirri* marriage. Although not required and legitimate condition weddings, *sighat ta'lik* can provide certainty to women because in essence it is the promise of a husband to wifinya, so if uttered in front of the crowd would have been better.<sup>13</sup>

<sup>12</sup> Effi Setiawati, *Nikah Siri Tersesat di jalan Yang Benar* (Jawa Barat: Eja Insani, 2005), pp. 108-109.

<sup>13</sup> Effi Setiawati, *Nikah Siri Tersesat di jalan Yang Benar*, pp. 110-115.

Actually, they were aware that the *sirri* marriage do not have legal force because it was not recorded. Hence they are trying to make a statement whose contents explain that there has been a marriage between A and B. However, if the certificate can be used as material evidence before the law if anything happens to their marriage? It seems people are educated to realize that their position is weak, so they are trying to force the husband, of guardians and witnesses to sign the certificate.

Another requirement is an obligation that is giving dowry by the groom to the bride. According to Quraish Shihab, dowry is the symbol of the readiness and willingness of the husband to provide for birth to wife and her children.<sup>14</sup> Even regarding dowry confirmed in QS. An-Nisa ' / 4: 4 and also Compilation of Islamic Law in Chapter V of article 30 that, "Prospective groom is obliged to pay a dowry to the bride that amount, shape and type agreed upon by both parties."

Giving it the size of the dowry is set upon agreement of both parties, because the administration must be done with sincerity. From this it seems clear about the obligation of the husband gives a dowry to the candidate wifeny. If the marriage without dowry, the husband including debt if it is not or has not been dil unasi and a bill wife, in the event of divorce or widowed by her husband and the husband's legacy be cut first before distributed to the heirs including wife itself as a widow.

Meanwhile, according to the dowry Ramayulis administration to justify the copulation between two couples. If the dowry debts he had never paid off and the cell ama together as husband wife is forbidden relationship.<sup>15</sup> Marriage is a form of agreement between men and women, resulting in lack of rights and obligations between men and women. Rights and obligations involving wife husband must be based on similarity, balance and fairness between the two. Ramayulis further divide the husband's rights and obligations of wife into two things:

a. Living

A husband b erkewajiban to support wife and children -anaknya. But not all wife of *sirri* marriage received living naturally from their husbands, even less so they were not given a living sepersenpun. But if the husband buys something he sometimes asked for two pieces with the intent one for himself and another.

b. Gender relations wife and husband in *sirri* marriage

Marriage is basically to establish kinship and kinship systems in which

<sup>14</sup> M. Quraish Shihab, *Perempuan Dari Cinta Sampai Seks Dari Nikah Mut'ah Sampai Nikah Sunnah Dari Biasa Lama Sampai Baru*, p. 145.

<sup>15</sup> Ramayulis, *Perluakah Pemberian Mahar Terhadap Calon Isteri*, (Jakarta: Lentera Hati, 2001), p. 37.

there are elements of friendship, intimacy and togetherness among them. According Ramayulis friendship, togetherness and familiarity is built in a way that is good, does not conflict with religious norms, accepted by common sense and in accordance with human nature. Friendship, intimacy and togetherness can be built by a family when decorated with *marwaddah* (love) and *mercy* (compassion) between husband and wife noodles in a *sakinah* family *sakinah*. However, it is not uncommon family built like standing on a fire because in it there is no love and affection, but more filled with bickering and distrust.<sup>16</sup>

### The Underlying Background Factor of The Sirri Marriage

Various reasons behind someone doing *sirri* marriage. There were married due to hit the economy, because most of the youth are not able to bear the cost of the party, prepare the house and belonging to property of Gono Gini , then they choose to marry in a way that is important *misyar* kosher, this is the case in most Arab countries. There also are not able to release funds to register with the KUA is considered so expensive. Or even financially this couple enough to finance, but fearing widespread marriage changed his/her mind to apply formally to the KUA or civil records. This is to eliminate any traces and free from lawsuits and administrative punishment from superiors, especially for second marriages and so on (for civil servants and army).

Mustafa pointed out that there are still many people who live *Sirri* marriage due to two factors. *First*, factor beyond the ability of the offender, such as to maintain the relationship of man and woman in order to avoid acts prohibited by religion, the absence of permission from a guardian, the reason polygamy and not *ri* ist permission first, and concerns not receive a widow's pension. The *second* reason, the view that registration of marriage is not a religious order. Another opinion written by Ali who claimed that the marriage was a factor of *Sirri* marriage culture in Indonesia, which has a shape like that, the high cost for registration of marriage outside the official wedding expenses, often the reason.<sup>17</sup>

According to psychologist Ekorini Kuntowati, *sirri* marriage also motivated by the family model of each partner. *Sirri* marriage or not, is not a guarantee to maintain the commitment. People should be wise, especially when state law does not menfasilitasinya. *Sirri* marriage occurred not only because of the motivation of the

<sup>16</sup> Ramayulis, *Perlukah Pemberian Mahar Terhadap Calon Isteri*, p. 38.

<sup>17</sup> Effi Setiawati, *Nikah Sirri Tersesat di Jalan Yang Benar*, pp. 41-42.

perpetrator / couple or family background, social environment or social value also helped shape it. Call it when the cost of recording a marriage is too expensive so there among the people can not afford not care legality. Other factors, there is a tendency to look for legal loopholes that are not bothered by a variety of procedures marriage is considered complicated, which is important to meet the goal, though should be willing to spend more money than it should. Act No. 1/1974 on Marriage and its implementing regulations set sufficient condition tight for someone or civil servants (PNS) to be married for the second time and so on, or who will do the divorce. Strict requirement that, for some people arrested as an opportunity "business" is quite promising. Namely by offering various facilities and amenities, from just married in *Sirri* (underhand) to make genuine but fake marriage certificate. For people who wish to forge, it was regarded as a shortcut or an appropriate alternative. Moreover, in the midst of legal awareness and knowledge level of the average community is relatively low. Not questioned, whether the marriage certificate or marriage ordinance was lawful or not, the important thing is no written evidence that states the marriage is legitimate. The author calls the phenomenon as "alternative mating".<sup>18</sup>

If *sirri* marriage done because of the cost; then in such cases the state should not criminalize and punish the perpetrators mukhalafat. Because the person is not registered his marriage due to his inability; whereas law burdens not a person beyond his limits. Therefore, the State should not penalize the person, even obliged to provide registration services for free to people who are not able to record the registration of marriage in the State institutions.

### Sirri Marriage in Perspective of Islamic Law

*Sirri* marriage law in Islam is legitimate or legal and lawful or permissible if the terms and the pillars of illegitimate fulfilled at the time of *sirri* marriage held. Pillar of marriage, namely: (1) The existence of both families, (2) The existence of guardian, (3) presence of witnesses of marriage, (4) The existence of a dowry or dowry, (5) The consent granted or contract.<sup>19</sup>

According to Islamic law *Sirri* nikah valid if (there are *guardians, witnesses, ijab qabul* and *dowry*).<sup>20</sup> In the legal compilation Islam 2 Paragraph 1 of this Article, explained that a marriage is valid if it is done according to the laws of each religion

<sup>18</sup> Wahyu Pratama, *Makalah Spai* (Mozilla Firepox 2009), p. I. <http://akmapala09.blogspot.com.html> (17 of February 2010).

<sup>19</sup> Wahyu Pratama, *Makalah Spai* (Mozilla Firepox 2009), p. I. <http://akmapala09.blogspot.com.html> (17 of February 2010).

<sup>20</sup> Miftah Farid, *150 Masalah Nikah Keluarga* (Jakarta: Gema Insani Press, 1999), p. 54.

and belief. This means that if a marriage has qualified and harmonious marriage or consent granted have been implemented (for Muslims), then the marriage is valid, especially in the eyes of the Islamic religion and public confidence. But the validity of this marriage in the eyes of the Islamic religion and belief communities need ratification by the state, which in this case the provisions contained in Article 2, Paragraph 2 of the Law of Marriage, on registration of marriages. For those who do marriage according to Islam recording done at KUA to obtain a Marriage Certificate as evidence of the existence of the marriage. (Article 7 paragraph 1 Compilation of Islamic Law (KHI) "marriage can only be proven with the Marriage Certificate made by the employee Nikah Registrar").<sup>21</sup>

Regarding the registration of marriage, described in Chapter II, Article 2 of Regulation No. 9 of 1975 on registration of marriages. For those who do marriage according to Islam, the recording is done at KUA. Every person who enters into a marriage will notify verbally or in writing to the employee plan marriage registrar at the marriage to take place, no later than 10 working days before the marriage took place. Then the registrar employees examine whether the terms of the marriage have been met and whether there is an obstacle. Then after fulfillment procedures and notification requirements and not found an obstacle to marriage, employees registrar announced and signed the announcement of the notice will enter into marriage by way of an announcement letter attached to an appointed place and readable by the public.

In the view of the Hanafi and Hanbali schools of a marriage valid terms and the elements then according to Islam even though the marriage is *sirri* marriage. Meanwhile, according to Hosen Muhammad, a marriage commissioner of Komnas Perempuan expressed adult man with women in *sirri* is forbidden marriage because marriage can be detrimental to a woman, while Islam actually protects woman rather than adverse.<sup>22</sup> *Sirri nikah* very detrimental to the women, consider loss for woman, the event of divorce, wife can not claim their rights to justice, as well as child birth, When her husband left her, then he is free without having to account for it, because of the absence of life, risk of violence in the family is very large and can not be prosecuted husband materially or financially, because of the absence of laws that govern them. *Sirri* marriage actually contrary to the philosophy of Islam, namely:

1. Islam considers marriage as a solid covenant (QS aL-Nisa / 4: 21) and also

<sup>21</sup> Mohd. Idris Ramulyo, *Hukum Perkawinan, Hukum Kewarisan, Hukum Acara Peradilan Agama dan Zakat* (Jakarta: Sinar Grafika, 2006), p. 87.

<sup>22</sup> Miftah Faridl, *150 Masalah Nikah Keluarga*, p. 86.

the Prophet declared:

حدثنا كثير بن عبيد حدثنا محمد بن خالد عن معرف بن واصل عن محارب بن دثار عن ابن  
عمر عن النبي صلى الله عليه وسلم قال أبغض الحلال إلى الله الطلاق

The translation as follow:

«We (Abu Daud) get the story of the Teller bin Ubaid; Cashier bin Ubaid narrated by Muhammad bin Khalid bin Muhammad Khalid of Muarrarraf in Wasil of Muharib bin Ditsar; from Ibn Umar from the Prophet who said: «The most hated halal Case God is divorce . “ (HR. Abu Dawud and Ibn Majah).<sup>23</sup>

2. In Islam, wife position as husband and vice versa s Clothing until legally wife and husband should have a position that is parallel or equal. The concept of *sirri* marriage contrary to the existing primary beneficiaries under Islamic law “*maqasid al-shariah* ‘ , (a concept which emphasizes the purpose of the establishment of Islamic law in an effort to preserve the benefit of human life, with the intention of bringing benefit and avoid danger).<sup>24</sup> To keep offspring in the absence of legal protection acceptable child of a *sirri* marriage.

Let marriage be announced. That is recommended in Islamic law. The Holy Prophet said:

حدثنا أحمد بن منيع حدثنا يزيد بن هارون أخبرنا عيسى بن ميمون الأنصاري عن القاسم بن  
محمد عن عائشة قالت قال رسول الله صلى الله عليه وسلم أعلنوا هذا النكاح واجعلوه في  
المساجد واضربوا عليه بالدفوف

This means:

«We (at-Tirmidhi) get the story of Ahmad ibn Mani ; Ahmad bin Mani told Yazid ibn Harun, dating to us Maimuna bin Isa al-Ansari of Qasim bin Muhammad of Aisha said; Prophet said: announce this marriage and make the marriage contract in the mosque, and beat tambourines » (HR, at-Tirmidhi through A'ishah).<sup>25</sup>

Not only to reveal the excitement of the marriage relationship between men and women, but also to be a witness in order to account for the many

<sup>23</sup> Syamsuddin Ideris, *Ulasan Hadis Tentang Perceraian*. <http://www.mozilla.firefox.com.htm> (15 of February, 2010).

<sup>24</sup> Sabri Samin, *Pidana Islam Dalam Politik Hukum Indonesia* (Jakarta: Kholam Publishing, 2008), p.72.

<sup>25</sup> Imam Malik, *Maja'fi Ila'an an-Nikah, dalam Mahtaba al-Shamilah vet.2* [CD ROM], hadis no. 1009.

negative issues that may arise among the public, or persecution can occur on one partner. Witness the marriage of at least two people, indeed scholars differed about the function of the witness whether their presence is a requirement for perfection marriage, the minimum must exist before mixing couples wife, or the terms legitimate marriage, so both the person who must witness the marriage ceremony. However, all scholars agree not to justify *sirri* marriage (secret).

Furthermore, among some scholars disagree whether if it is present to witness the marriage of two people, and then they were asked to keep the wedding, whether it included *sirri* marriage or not? Imam Malik argues that it includes *sirri* marriage, which is forbidden, while Imam Shafi'i and Abu Hanifa tolerate it. This is because they have different opinions about the function of the witness whether merely to be witnesses if there is a difference / denial of the marriage, or it is Sharia law that has the goal of exceeding the testimony in case repudation.<sup>26</sup> See the attendance of witnesses and wedding news dissemination function much further than just a witness if the denial of marriage. With the marriage put forward, would not be born bad numbers for the pair man and woman who were alone or making out. Not also lost the right of each case of divorce, death or divorce divorce either live with divorce, *khul'a*, and the like.

The rights of children who will be born clear who his/her parents. You can imagine what happens if the husband dies without any proof of marriage to a woman. When the legitimate inheritance rights and her son will be lost. Can also occur divorce life, her husband left wife rights concerning joint property of their livelihood. Thus religion expect the need for the implementation of the marriage, or at least the announcement about the marriage. Compilation of Islamic Law in force in Indonesia, are required for recording marriage for ensuring order and prevent a dispute without a settlement. This is almost true throughout Muslim-majority countries.<sup>27</sup>

One form of abuse against women that can eliminate their rights is *sirri* marriage, namely to perform marriages in secret (secret), it is not uncommon even born sex outside of marriage on the pretext of *sirri* marriage. This then would give birth to the term *male* and *female pets*, as confirmed in Sura al-Nisa / 4 : 25.

The verse fornicating declared that ban and the prohibition to women to *take men as pets aki- l* ; whereas, QS.al-Maidah / 5 : 5 prohibits men *take women as pets*,

<sup>26</sup> M.Quraish Shihab, *Perempuan Dari Cinta Sampai Seks Dari Nikah Mut'ah Sampai Nikah Sunnah Dari Biasa Lama Sampai Baru* ( Jakarta: Lentera Hati, 2005), pp. 214-215.

<sup>27</sup> M.Quraish Shihab, *Perempuan Dari Cinta Sampai Seks Dari Nikah Mut'ah Sampai Nikah Sunnah Dari Biasa Lama Sampai Baru*, pp. 215-216.

although he took it a laki- certain male or female certain because “maintaining” a laki- man as a friend joking and vice versa fornicate although it looks similar to a regular marriage, in fact he is not in line with legal marriage, which prohibits the confidentiality and the dissemination of news leads.<sup>28</sup>

According to the Shia cleric indeed allow such a way marriage. Namely *sirri* marriage, better than fornicate very cursed by Allah. Among Sunni cleric in Indonesia who found *sirri* marriage is lawful based on texts of the Qur’an and even some of them are doing so, not solely because of sexual needs, but in order to show all permission *sirri* marriage itself.<sup>29</sup>

Throughout the marriage conducted in accordance with the provisions of the Islamic law (there are guardians, witnesses, *ijab qabul*, and dowry) legally illegitimate Islam. The first one was not recorded by the registrar of marriage, legitimate Islamic religion, is not legally permissible applicable of regulations in the Republic of Indonesia. Disadvantages of the second implementation is no publicity, not widely announced to the public.

According to Islamic teachings, the marriage should not be secret, but it should be published so that the citizens, neighbors, families know. The Prophet gave the message that marriage was published (*walimah*), and distributed to family and neighbors. Even the Prophet recommends that carry *walimah* although only slaughter one goat. Which can be obtained from the publication of marriage it is to avoid slander and prejudice of others to the person concerned, while closing the possibility is concerned (especially wife) demand by others.

However, perhaps in the case of *sirri* marriage was considered necessary because of considerations of the common good, either the husband or the wife. This means that *sirri* marriage was done in order to rescue the concerned of the possibility of harm anything if the *sirri* marriage was quickly publicized.<sup>30</sup>

### The Impact Arising From Sirri Marriage

The impact that would arise from a marriage that is not recording in Juridical Formal, among others:

*First*, marriage is considered invalid. Although the marriage was performed according to the religion and beliefs, but in the eyes of the state the marriage

<sup>28</sup> Departemen Agama RI, *Alquran dan Terjemahannya*, pp. 216-217.

<sup>29</sup> Wahyu Pratama, *Makalah Spai* (Mozilla Firepox 2009), p. 2-3. <http://akmapala09.blogspot.com.html> (17 of February, 2010).

<sup>30</sup> Miftah Faridl, *150 Masalah Nikah Keluarga*, pp. 44-54.



is considered invalid if it has not been noted by KUA or Civil Registry Office (Kantor Catatan Sipil).

*Secondly*, children only have social matters relationship with the mother and mother's family, no civil relationship with his/her father. This means that a child can not claim the rights of the father. By being born in a marriage that is not recorded, the birth of a child becomes legally registered also in violation of the rights of children. These children the status of children outside of marriage.

*Third*, due to the further away from marriage is not recorded, either wife or children born out of marriage is not entitled to demand a living or inheritance from their father or her husband.

Broadly speaking, a marriage that is not recorded tantamount to letting their living together outside of marriage, and this is very detrimental to the parties involved (especially women), especially if there are children who are born. They were born to parents who live together without marriage registered, is beyond mating child who only have a legal relationship with his mother, in the sense of having no legal relationship with his father. In other words, legally does not have Mr. (*Wila Chandrawila, 2001*). In fact, there is no compulsion for people to record per marriage. In that sense, if not mencatatkan marriage, does not mean doing some crime. But it is clear that this is an impact or certain legal consequences that are particularly detrimental to women and their children.<sup>31</sup>

Tangent to the importance of registration of marriage, also such as ID card or driver's license, actually talking about a public service that is the responsibility of the state. So it should pay attention to the principles of *good governance*, one of which is a set fee in accordance with people's lives and the procedure is not straightforward (*user-friendly*). With the procedure is straightforward and appropriate cost the public are invited to register marriages. Basically, the Prophet has encouraged the people to disseminate wedding by holding *walimatul 'ursy*. Prompts to do *walimah*, although not until the obligatory but strongly recommends Prophet. Many positive things that can be achieved by someone from the wedding broadcasting them are: (1) to prevent the emergence of slander in the midst of society, (2) facilitate the public to give testimony, if later there are issues related to the bride and groom, (3) makes it easy to identify whether a person is married or not.

This sort of thing is certainly different from the wedding that was not broadcast, or withheld (*Sirri*). In addition will lead to the emergence of

<sup>31</sup> Wahyu Pratama, *Makalah Spai* (Mozilla Firefox 2009), pp. 3-5. [http://akmapala09.blogspot.com Wahyu.html](http://akmapala09.blogspot.com/Wahyu.html) (17 of February, 2010).

slander; for example, if women are married *Sirri* pregnant, it would appear negative allegations of the society against women; *sirri* marriage also will complicate the culprit when asked for testimony regarding his marriage. If he does not have an official document, then in all cases requiring testimony, he had to present witnesses *sirri* marriageher; and it would be very difficult for him. On that basis, the recommendation for registration of a marriage in the country recording become relevant institutions, in order to bring convenience to the camp udahan-ri ist husband and the community and to prevent the defamation.<sup>32</sup>

*Sirri* marriage when viewed in terms of state law indicates that a marriage has no legal protection because it was not done by the recording of VAT, so that the couple did not have a marriage certificate. The absence of this marriage certificate, causing the couple does not have authentic proof of marriage. This means that women do not have legal protection, so it can cause many problems for himself. The problems experienced by the perpetrators of *sirri* marriage. For example, wife ditingg al husband remarries, then wife can not ask for accountability husband, when divorce, then wife can not ask for their rights as a divorced wife.

Turns ease leaving a spouse, the *sirri* marriage is not only done by the husband but also wife, because after marriage without the formal recording will provide an opportunity for anyone, both husband and wife deny marriage to each other. *Sirri* marriagebesides providing convenience to every couple to leave each other, also provides an opportunity to practice polygamy with ease. If we hear polygamy was like to be a terrible thing. Many women who suffer because of polygamy, but to date polygamy continues to occur even impressed more and more men are doing it, even though done in secret.<sup>33</sup>

Another negative impact of *sirri* marriage apart easily abandoned, which easily happens polygamy, and *sirri* marriage also often cause anxiety for those who live it. Because marriage has no legal power.<sup>34</sup>

## Conclusion

To end this article, based on description, analysis and the discussion that have been conducted in previous section of this writing, it can be concluded several conclusions below:

1. That *sirri* marriage is marriage under the hand or marriage clandestinely. Called in secret because not reported all of Religious Affairs Office for Muslims or

<sup>32</sup> *Ibid.*

<sup>33</sup> Effi Setiwati, *150 Masalah Nikah Keluarga*, pp. 136-138.

<sup>34</sup> *Ibid.*, p. 146.

non muslim civil records. The opinion of Imam Abu Hanifa, that the meaning of *sirri* marriage is a marriage that can not bring a guardian and not registering marriages on Religious Affairs Office (KUA).

2. That several factors that influence on the *sirri* marriage namely: economic factors, administrative processes are deemed too difficult marriage, did not obtain approval or approval of the first wife if the husband wants to marry again, from the beginning of either the woman or man who does *sirri* marriage did not have faith well, just justifies the relationship intercourse alone.
3. That the impact that would arise from a marriage that is not recorded formal judicial: the marriage is considered invalid. Although the marriage was performed according to the religion and beliefs, but in the eyes of the state of marriage but invalid e ters if not already noted by KUA or Civil Registry Office (KCS). The children born from such marriages only have a civil relationship with the mother and the mother's family. While a civil relationship with his/her father was not there. This means that a child can not claim the rights of the father. By being born in a marriage that is not recorded, the birth of a child becomes legally recording also in violation of the rights of children. Children's status as children can be regarded as outside of marriage. The further result of a marriage that is not listed is either wife and children born out of marriage is not entitled to demand a living or inherited from his/her father.

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