

The Role of Government in Regulating Marriage Administration System in Indonesia¹

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Abstract

The purpose of this paper is to explain the purpose of rules siyasah syar'iyah; unrecorded marriages and its relation to marriage act; and the role of government in setting administrative order of marriage. The method used is the method of content analysis of the various references relevant to the issue of the role of government in setting administrative order marriage in Indonesia. Registration of marriage is regulated by laws and regulations at the level of application does not get the optimal response of Indonesian Muslims because the formulation of the law on registration of marriage is not found in the classical books of fiqh. Therefore, registration of marriages in an official institution that does not become a determinant term of whether or not a marriage is valid. Marriage is essentially an engagement, which, according to law, every marriage must be recorded with the aim to avoid things that are not desirable. According to positive Islamic law, an unrecorded marriage is not fulfilling the requirements of a marriage, because marriage in Islam is obliged to publish or authentic evidence that can justify one's marriage. Government through Siyasah Syar'iyah approach can set the registration as a condition of validity of a marriage.

Keywords: registration of marriage, positive law, Islamic law

Introduction

Registration of marriage is the existence of a formal marriage that legally recognized. Thus, a marriage is considered valid if it fulfills two conditions, namely: (1) Has met the provisions of material law, which has been carried out by qualified and pillars according to Islamic law, and (2) has been complied with administrative procedural law, which was listed to the authorized Marriage Registrar Official.² Both of these requirements are not difficult to be met. The reality is that person who does not meet the requirements of recording only unwillingness to obedient to the rule of law, in addition to other reasons as there is still an assumption that the only important thing is a religious legitimate. A fact issue is still happening in the community, there are still many marriages not recorded, which resulted in no evidence of a valid marriage.

They generally have the children who need access to the civil service as well as citizens and social service, they do not have a civic identity such as ID card, birth certificate, family card and so forth. They also lose the chance to win the rights of inheritance, taking care of passports for Hajj and *Umrah* trips, also the right to receive family benefits.

Furthermore, to prove the occurrence of a marriage bond, someone should have Book of Marriage Certificate, which is issued by the government.

According to Law No. 1 of 1974 and Government Regulation No. 9 of 1975, a marriage is a marriage that took place in the presence of the Religious Affairs Office by an authorized officer and the marriage registered under the applicable procedures legislation. This means that a marriage can only be considered valid when it has been carried out according to the provisions of law listed on religion and institutions that have been determined by the

¹ This paper has been presented at international by Postgraduate Programme IAIN North Sumatera on October, 22nd 2014 at Karibia Boutique Hotel, Jl. Timor Block J No. I-IV Komplek Center Point Medan-Indonesia.

² A. Mukti Arto, "Masalah Pencatatan Perkawinan dan Sahnya Perkawinan", *Mimbar Hukum*, (No 26 Thn VII 1996), p. 47-48

government (law), because by carrying a marriage registration will bring benefit especially for the couples themselves, as well as the associated parties of the marriage, such as children. Conversely, if the marriages were not recorded, it will cause many difficulties such as difficulty in completing house hold matters in religious courts, such as issues of divorce, division of joint property, inheritance, etc., and even cause difficulties in the completion of the state administration for example Birth Certificate, passports and others.

While the provisions of the validity of the marriage in the books of *fiqh* is when the conditions and requirements have been fulfilled. Shafi, for example, determines that the requirement of marriage consists of a guardian, two witnesses, the prospective groom, the bride, *ijab*, and *qabul*.³ Maliki school categorize the requirements of marriage consists of a husband, wife, guardian, dowry and witnesses.⁴ According to Hanafi, the pillar of marriage is *ijab* and *qabul*.⁵ As according to Hambali, consisting of a harmonious marriage are *ijab* and *qabul*.⁶ In addition to the pillars of the marriage, the legitimacy of a marriage is determined by certain conditions, he explained, according to the jurists on top of that to-separation are summarized in terms of a marriage and harmonious marriage can be summed up as follows, namely, the presence of the prospective groom and the bride, the presence of guardians, the presence of two witnesses, there is *aqad* (*ijab* and *qabul*), and the presence of a dowry and to meet several requirements. Thus, if a marriage is complete the requirements and conditions, and the absence of the things that hinder and forbid the marriage taking place, the marriage is valid without any element of marriage records as required by the positive law of marriage. There in the difference in the determination of the validity of the marriage between positive law and Islamic law.

From the above description, it can be understood that the actual recording of this marriage problem is a classic problem, however, the problem cannot be left floating for granted, because it has associated with the administration of state or government order, which requires every legal problem neatly arranged, especially having regard the social life of the community. Islamic jurists should dare to order recording laws in marriage. It is not associated with the addition of the pillars or to make a marriage more complicated. If there is a presumption of recording is considered difficult, it will be increasingly difficult again when the wedding does not go through the listing. The absence of records will bear double trouble for the couple and their offspring.

In addition, given the fact that there is that most of the people of Indonesia are still blind to the various provisions of the law, including the law of marriage. But if they develop a case (problem), they have to deal with legal institutions, even obliged to follow the laws and regulations in force.

Based on this background, the issues discussed in this paper are the purpose of rules *siyasah syar'iyah*; unrecorded marriages and its relation to marriage act; and the role of government in setting administrative order of marriage

The method used in this paper is analyzed the content or content analysis⁷ by using secondary data alone. The discussion focused on the relevant issues, are still actual and accurate data, especially the role of government in setting marriage administrative order in Indonesia.

The Purpose of Rules Siyasah syar'iyah

1. Maqashid Al-syar'iah

Islamic law comes with a lofty goal because it comes from God's command. The purpose of Islamic law is known as the *maqashid al-Shari'ah*, namely in order to maintain religion, soul, mind, wealth and offspring. Those are called *al-Kulliyatal-khamsah*.⁸

To ensure conformity of the law to be implemented by the authorities, the concept of *al-Shari'ah maqashid* should be applicated. This concept is intended for the implementation of Islamic Shari'ah must necessarily study the compliance with reference to the original purpose.

³Al-Syafi'I Muhammad Ibn Abi 'Abd Allah Muhammad Ibn Idris, *Al-Umm*, Jld 5, Cet I, (Beirut: Dar al Kutub al-'Ilmiyah, 1993), pp. 21-37

⁴Al-Kalabi Abi Qasim Muhammad ibn Ahmad Ibn Juzain, *Al-Qawaninul al fiqhiyah*, Cet. I (Beirut: Dar al Kutub al-Ilmiyah, 1998), p. 148.

⁵In Mazhab Hanafimarrriage matters is devided into 4 topics. Al-Kasani 'Ala'u al-Din Abu Bakr Ibn Mas'ud, *Bada'I'u al Sana'I fi Tartib Syara'I*, Jld II, (Beirut: Dar al Kutub al-'Ilmiyah, tt), p. 229

⁶Ibn Qudamah Muwafiq al-Din Abu Muhammad 'Abd Allah Ibn Ahmad, *Al-Mughni*, Juz 4, (Beirut: Dar al Fikr, 1992), p. 378-457

⁷R. Babbie, *The Practice pf Social Research Practice* (Belmont: Wadworth, 1977), p. 75.

⁸Abu Ishaq asy-syatibi, *al Muwafaqat fi ushul asy-syariah*, (Mesir: Dar Al -fikri, 1341), p. 5

If the goal of *Syara'* is not achieved with the implementation of the law, let studied and researched between *maqashidal-syar'iah* that need to be maintained and preserved *maslahah*.

In language it is understood that *al-syar'iah maqashid* consists of two words, namely: *maqashid* and *syar'iah*. *Maqashid* means intention or purpose, *maqashid* form *jama'* of *Maqsud* derived from *qashada* syllables which means desire and intend. *Maqashid* mean things desired and intended. *Shari'ah* means toward the water source. Meanwhile, according to a term that is toward the good life. In *al-syari'sah maqashid* concept, al-Syatibi said that *syar'iah* is rules that created by God to be guided by humans to regulate the relationship with God, with humans, either fellow Muslims or non-Muslims, natural and whole life.

After describing a brief definition of *syar'iah* and *maqashid* separately, it is necessary to define *maqashidal-Shariah* after those two words combined. According to Asafri Jaya Bakri that "the terms of *maqashid al syar'iah* has no specific definition made by the scholars of *usul fiqh*, maybe this is already known among them, including Syathibi itself does not make a special *ta'rif*, he only reveals of *syar'iah* and its function for human being as he said in the book of *al-muwafakat*."

According to Abu Ishaqal-Syatibi, Shari'ahs aimed to realize human welfare in this world and in the hereafter, and laws prescribed to maintain the benefit of servants. From the expressional-Syatibi cited by Asafri Jaya, it can be said that Al-Syatibi does not define *maqashidal-Sharia* comprehensively. He simply asserts that the core substance of *maqashidal Shari'ah* is one, namely *maslahah* or goodness and human welfare in this world and in the hereafter.

Thus, it can be concluded that *maqasid Shari'ah* is a concept that require benefit set by the *Shari'ah* for human beings. The ultimate goal of the law is *maslahah* or good and welfare of mankind. For that, there are things that must be the existence of life for the benefit of human beings, and if it is not there, their life becomes chaotic, the benefit is not achieved and the happiness hereafter will not be enjoyed.¹⁰

Overview of marriage registration in terms of *mashlahah*. Order of marriage registration is not mention directly in the texts. The implementation of recording was based on *ijtihad* of the scholars and adopted by the state in drafting legislation on marriage. Registration of marriage is based on "*mashlahah mursalah*" because the texts do not prohibit, and do not advise it either. Registration of marriage is very important to be implemented by the couple, because they will get a marriage certificate, which is authentic evidence of the validity of the marriage either by religion or by the state. With marriage letter/book they can prove the marriage and the heirs are legitimate. The goodness of recording is also very useful to marriage of mankind, especially in this era of globalization.¹¹

The question then is whether the status of registration of marriage is used as a formal requirement of marriage in the modern world can be included as a condition of harmonious or legitimate marriage?

As we know that registration of marriage has never been discussed in the classical *fiqh* books. This could be the problem has not been considered so important by Muslim jurists of his time, could also be due to the absence of the advice or definitive arguments that suggest that a marriage has to be recorded. However, this does not mean that the absence of strong fundamentals in Islamic law, as a guide to a marriage it should be noted, it is not necessary to study or we are finished, but the problem must be addressed especially in this modern era, where the marriage documentation is a necessity.

To answer the question above, in the study of jurisprudence has been known three methods of legal reasoning pattern, the method of *Bayani*, *ta'lili*, and method of *istislahi (maslahah)*.¹²

The latter method (*istislahi*) is used when a very important issue, which must be answered in the social problems, found no legal basis either *sharih* in the Quran and the *Sunnah* of the Prophet. That is, this problem solving approach is done with *istislahi (maslahah)*, where the issue is studied and seen from the point of benefits and goodness when it is applied in the community.

⁹ Asafri Jaya, Konsep Maqashid Syari'ah menurut Al-syathibi, (Jakarta: PT Raja grafindo Persada.1996), p. 62.

¹⁰ Muchtar Yahya dan Fatchurrahman, Dasar-dasar Pembinaan Hukum, p. 333.

¹¹ Abdul Manan, Aneka Masalah Hukum Perdata Islam Di Indonesia. (Kencana 2006) p.xx

¹² Samiiah Abdul Wahhab Jundi, Ahammiyah al-Maqashid Fi al-Syari'ah al-islamiyyah Wa Atsaruhah Fi Fahmi an-Nash wa Istibath al-Hukm, (al-Iskandariyah: Daar al-Amyan, 2003), pp. 178-181.

When leaders see the situation has *maslahah*, then that is for the benefit and the good of the people and prevent damage. It can be concluded that *lafadz maslahah* has two meanings.

First, that the good deeds and benefits. Based on this definition, *mafsadat* is the act of bringing damage or harm. But this is the sense in *majazi*, because the act itself is not a benefit or *mafsadah*, but the cause of the birth of the *maslahah* or *mafsadah*.

Secondly is Goodness itself. While *mafsadah* is the ugliness. Here is the understanding of *mafsadah* and *maslahah* intrinsically. In other words, *maslahah* is a state of goodness as it should be, while *mafsadah* is the opposite.

The problem of marriage recording for example, where the benefits of registration of marriage has been very clear, and it is also very much needed by the people in defending their rights, if something happens that is not desirable in a marriage, as well as various other legal consequences.

Although there are no formal provisions of paragraph or *sunnah* which ordered that the marriage should be noted, however from the view of the goodness is in line with the actions of *Syara'*, which always aims to realize the benefit for human kinds. Because unrecorded marriage may cause a lot of harm for those who do, and those who have anything to do with the marriage.

With the above considerations, the registration of marriage which is one of the requirements of a formal juridical act of marriage is not contrary to Islamic law, even highly recommended because it brings benefits to all parties, especially to the two couples and their children.

Furthermore, if we note the al-Mudayanah verse, Surah: Al-Baqarah, verse 282, clearly hinting that written evidence is in dispensable in providing and maintaining the rule of law. Even the wording of the verse clearly illustrates that the records take precedence over the testimony, that in marriage become one of requirements.

Furthermore, the studies of *maslahah* of marriage registration can be guided as a rule of *fiqhiah*

دَرُّهُ الْمَفْسَادُ مُقَدَّمٌ عَلَى جَلْبِ الْمَصَالِحِ¹³

That is:

"Avoiding damage is preferred rather than taking the benefit"

Another Rule of *fiqhiah* said:

الضَّرَرُ يُزَالُ¹⁴

That is:

"The harm must be eliminated"

Thus, do the registration of marriages in an institution that has been prescribed by law, of course, very much in line with the word of God and the rule of *fiqhiah* above.

Because it will be able to anticipate the harm that will arise, such as inheritance rights issues, the status of the child, problematic rights and obligations of married couples and the difficulty of solving various family's cases.

Furthermore, the marriage records on authorized institutions will certainly bring benefits for married couples and related parties as a result of the marriage, such as the rights of their children to obtain birth certificates, inheritance rights and others. That is, do the registration of marriages in which the competent institution is certain to bring a variety of goodness.

2. Saad al-Zari'ah

Islamic law not only regulates human behavior that has been done but also that has not been done.

This means that Islamic law tended to curb the freedom of man. However, it is one of the goals of Islamic law is to realize the benefit and avoid damage (*mafsadah*).¹⁵ If an actor regulation alleged to have not done will cause damage, the things that lead to such actions is also forbidden. This is known as *Saddal-zari'ah* legal method.

¹³Fauzi Utsman Salih, al-Qawa'id wa ad-Dhawabith al-fiqhiyyah Wa tatbiqatuhā Fi as-Siyasah al-Syar'iyyah, (Riyadh: Daar al-Ashimah, 2011), p. 121.

¹⁴Ibid, p. 125.

¹⁵Said Ramadhan al-Bouti, Dhawabith al-Mashlahah Fi al-Syari'ah al-Islamiyyah, (Beirut: Muassasah al-Risalah, 1982), pp. 134-135.

The meaning of *saadadh-dzari'ah* is a form of the phrase (*idhafah*) which is a combination of two words, namely *saad* and *adhdzari'ah*. Etymologically, the word *as-saad* is an abstract noun (*mashdar*). The word *saad* means closing a defective or damaged which caused the hole.¹⁶ While *al-zari'ah* is a noun (*isim*) singular which mean ways, means (*wasilah*) and the cause of something.¹⁷ Interminology, the meaning of *Saadal-zari'ah* is cutting off the damage. Although an act is free of damage element (*mafsadah*) as a way to avoid damage element (*mafsadah*), then it should prevent such actions.¹⁸

With same expression, according to *asy-saukani*, *Saddal-zari'ahis* a matter or matters that is basically allowed, but will lead to a prohibited act (*al-mahzhur*).¹⁹ According to *al-Syatibi*, in his book *Muwafakat*, said that *al-Saddal-zari'ah* is refuse something allowed in order to avoid something prohibited (*mamnnu*).²⁰ According to Mukhtar Yahya and Fathurrahman, *Saddal-zari'ah* is close a road that is leading to the forbidden act.²¹ Meanwhile, according to Ibnal-Qayyim al-Jauziyyah, roads or the intermediaries can be anything that is prohibited or allowed.²²

Of the above various scholars' view, it is understood that *Al-Saddal-zari'ah* is establishes a prohibition law on certain acts that essentially allowed or prohibited to prevent other prohibited acts.

While in the views of scholars deal, *al-Qarafy* and *ash-Syatibi* divide *al-zari'ah* into three kinds:

- a. Something that has been agreed not to be prohibited, although it can be a way or means to the occurrence of an act that is forbidden. For example, growing grapes, although it is likely to be *khamr*, or living next door even though there may be lead to fornication with neighbors.
- b. Something that is agreed to be barred, as berate the idols to people who knew or suspected that the pagans will reply immediately berate Allah anyway. Another example is the ban on digging a well in the middle path for those who know that the road would harm ordinary by passed and other creatures.
- c. Something that is still disputed to be banned or allowed, such as looking at women because it could be the occurrence of adultery, and buying and selling exchange stock, fearing the element of *riba*.

As for determining whether an act is prohibited or not, because he could be a means (*adh-dzari'ah*) to the occurrence of any other prohibited act, then in general it can be seen from two things, namely:

- a. Motive or purpose that drives a person to carry out an action that would have an impact on something that is permitted or forbidden.
- b. Consequences that occur from the act, without having to look at the motives and intentions of the perpetrator. If the consequences or effects that often occur from an act is prohibited or *mafsadah*, then that action must be prevented.²³

Sadd al-zari'ah is an Islamic legal system that is very good if properly applied in the context to answer the problems that occurred in Indonesia in accordance with the laws of *Syara'*. *Saddal-zari'ah* can be advice that can actually be used to create the benefit of the people and prevent damage to people. Moreover, if implemented by the authorities who are about to create wide spread social welfare in the community, not for the sake of group and personal. Government action should be based on the benefit of the people, rather than merely government interests. Official recognition (writing contract) in meanings listed on the KUA official or civil record is a matter which is required by law, to keep this contract of denial and deception after implementation, either by the husband or wife of another party.

The government in running prophetic function in maintaining world and religious matter should base on ratio, because humans ration have a tendency to submit to the leadership of the leader who can prevent a tyranny that

¹⁶Muhammad Hisyam al-Burhani, *Sadd al-Zari'ah Fi al-Syari'ah al-Islamiyyah*, (Beirut: mathba'ah al-Raihani, 1985), p. 5.

¹⁷Ibid, p. 6

¹⁸Zamakhshary Hasballah, *Teori –Teori Hukum Islam*, (Bandung: Citapustaka Media, 2013), p.149

¹⁹Muhammad Ali al-Syaukani, *Irsyad al-Fuhul fi tahqiq al-haqq min Ilm al-Oushul*, (Beirut: Muassasah al-Rayyan, 2000), Chapter 2, pp. 49-50.

²⁰Abu ishaq al-Syatibi, *al-Muwafaqaat Fi Oushul al-Syari'ah*, (Beirut: al-Maktabah al-Ashriyyah, 2000), Capter 4, pp. 28-29.

²¹Mukhtar yahya, fathurrahman, *Dasar-dasar Pembinaan Hukum Fikih Islam*, (Bandung : PT. Al- Ma' arif, 1986), pp. 276-277.

²²Ibnu Qayyim al-jauziyyah, *I'laam al-Muwaqqi'* in 'an Rabb al-Aalamiin, (Kairo: Daar al-hadits, 1993), jilid 3, pp. 48-49.

²³Muhammad Hisyam al-Burhani, *Op. Cit*, pp. 47-49.

befell the people and resolve disputes and enmity among people. If there is no leader and government they would live in a lawless irregular and become a primitive nation without bond.²⁴

In the context of the implementation of the function in the world and in the hereafter, the government is justified in making legislation in the field of *Siyasah syar'iyah*. *Siyasah syar'iyah* is defined as the policy provision of state affairs management by the government against its people that is based on the benefit in accordance with the provisions of the Islamic Shariah. In keeping descent, Islam prescribed wedding, other than that, the government should accommodate the things that improve it, namely the recording. By looking at the benefit contained in the marriage records as mentioned above, then the marriage records considered as a primary need in marriage, because marriage without the marriage record is not recognized by the government. So the recording laws, including part of the marriage. The determination of recording is through reasoning on texts that relies on the use of *mashlahah* in something of a problem, either the rules of *fiqh* and *siyasah Shari'ah* called *istishaliyah* reasoning. The result of this reasoning be divided into two, there being no *fiqh* and the *siyasah syari'ah*. Recording become *wajib* based on *wadh'i* legal jurisprudence. However, because of *fiqh* should meet individual needs, the recording is not effective in society. Meanwhile, recording as the *siyasah syari'iyah* that emphasize on *taklifi* law becomes the requirement of *nikah*. Thus to meet the needs of the State, then the recording of it became law that can force all the people to obey it.²⁵

By looking at this context, marriage that not recorded in *siyasah Syar'iyah* is not valid, by the reason that it does not meet the requirements, because in Islam, the marriage is compulsory published. Marriage records in the form of a marriage certificate at the time be authentic or evidence that can justify someone's wedding as well as to protect the rights and obligations of related persons, such as the protection of descendants, property, life, and others. Therefore, the government based on *siyasah Syar'iyah* approach can set recording as a condition of lawful marriage.

Broader discussion, among thinkers have been talking about the status of registration of marriages, among them is Ahmad Safwat, an Egyptian scholar and at the same time his writing was intended as an input in an effort to reform Egyptian family law. Safwat requires registration of marriage based on the idea that there are laws that require certain behaviors and that the law should not be changed, but only with the change of the legal objectives can be achieved with appropriate (efficient). That is, if there is an efficient way to achieve the goal, which is the preferred way. The presence of a witness in a marriage ceremony according to Ahmed Safwat, intended as an announcement to the public (the public). If there is a better way or a more satisfying to achieve these objectives, this way can be replaced with formal marriage documentation. In other words, marriage records for *Safwat* attendance instead of witness, pillars that must be met for the validity of the marriage ceremony.²⁶

The purpose of marriage records, according Shaltut, is to preserve the rights and obligations of the parties to the marriage, the rights of the husband/wife and children or descendants, such as child maintenance and inheritance. This recording as an attempt to anticipate the depletion of the Muslim faith is more and more going on denial of the promise which resulted pretext to escape from liability. Because of the value of faith is something that is hidden (abstract), one way as preventive efforts so that people do not run away from the responsibility of making the written evidence.²⁷

Quraish Shihab noted, all scholars agree on secret marriage ban based on the commands of the prophet to spread the marriage news. In the meantime, marriage without recording, in the Indonesian context, can lead to violation of conditions set by the government and Parliament.

While the Quran ordered to meet (obedient) to *ulil amri*, as long as does not conflict with the laws of Allah. Thus the orders to register the marriage is not only consistent but in line with the spirit of the Quran.²⁸

²⁴Imam al-Mawardi, *Hukum Tata Negara dan Kepemimpinan dalam Takaran Islam*, diterjemahkan oleh Abdul Hayyie al-Kattani dari *al-Ahkamus-sulthaniyah wal-wilayatud-diniyah* (Jakarta: Gema Insani Press, 2000), p. 15.

²⁵Alyasa' Abubakar, *Usul fiqh, Penalaran Istishlahiyyah*, p. 164.

²⁶Khoiruddin Nasution, *Hukum Perdata Islam Indonesia dan Perbandingan Hukum Perkawinan di Dunia Muslim*, (Yogyakarta: Academia 2009), p. 358

²⁷Mahmud shaltut, *al-Fatawa, Dirasah al -Muskhilat al -Muslim al-muasir fi hayatil al yaumiyyah al Ammah*, cet 111 (Dar al-Qalam), p. 271.

²⁸M. Quraish Shihab, *Wawasan Al-Quran : Tafsir Maudhui atas pelbagai persoalan ummat*, (Bandung: Mizan 1996), p. 204.

Most contemporary scholars and writers, including Yusuf Aliath-Thantawi, Yusuf al-Qaradawi, and others, argued the necessity of marriage certification issue in writing and formally documentation. Whoever does not registrated it means have commit sin and be penalized with a penalty set by *waliyul amr* (ruler), even though her marriage contract (still) valid if it is not accompanied by the certification. Their premise is:

1. Useful to establish the rights and laws of husband and wife, to maintain the rights of children, especially the now days when the damage has been rampant, more and more slanders, and parental responsibility has been lost. It should be communicated to them that the problem of *isyhad* (testify) to the audience and socialization is adequate for the purpose.
2. That waliyul amr (ruler) has issued a policy on certification and set and obedient to *waliyul amr* is an obligation, based on the word of God and the *Sunnah* of the Prophet.

In this context, Muhammad 'Aqlah says that the real view of Islam in principle does not require a particular form of symbol to enrich the wedding ceremony. Akad to the wedding ceremony similiarly to entire other contract that was settled by *ijab* and *qabul* (handover). The existence and survival is not dependent on written evidence. Even the testimony of people is enough to strengthen it, both the testimony relating to the contract itself and the implications such as dowry, income, and other rights.

It's just that this does not mean the essence preclude issuance of formal rules or administrative rule that is oriented to maintain of conjugal rights and welfare of marriage contract. It is also not contradictory with the establishment of policies that are considered by the government, in line with the dynamics of modernization and to resorts the up-to-date in documentation. Here Abdul Fattah 'Amr declared that "tightening the ceremony about the data collection in the frame of *Siyasah syar'iyah* (Shar'ie State constitutional law) that allows authorities to impose regulations that the people on account of the benefit.

Thus, it should be assumed that registration of marriages mandated by Act 22 of 1946 and Act No. 1 of 1974, its intellectual roots based on the Egypt Marriage Act of 1931. Historically, Egypt in 1931 (long before the Law No. 22 of 1946 on the registration of marriage, divorce and reconciliation drafted and enacted), has formed a marriage law. One substance is a recognized marriage, marriage as evidenced by an official marriage certificate.²⁹

Sujari Dahlan tried to support the registration of marriage with the benefit (*maslahah*) as the reason, and using three principles: first, the rule of *maslahah* (benefits), ie benefits and/or acquired resistance to damage. Second, the rules of *saddadh-dzari'ah*. Third, registration of marriage as a form of interaction between Islamic *fiqh* with community development as a result of the change (*taqhayyur al-ahkam bi taghayyur al-azman wa al-makan*).

Based on the views of contemporary scholars, we can conclude that in discussing the registration of marriages, contemporary scholars emphasize the necessity of a witness in a marriage contract. They only put more emphasis on the function and purpose, namely as a means of announcement and the evidence of witnesses (marriage contract). As a transaction, the marriage ceremony is certainly bore the consequences of the law between the parties and the descendants were born of the marriage. The purpose and function of witnesses in this case is to ensure the rights and responsibilities of the parties in marriage. This is what contemporary scholars contextualize in the form of records. Nowadays, the witness is not enough, as the demands of the past when people still communal society, but it must be in writing.

As for knowing the status of registration of marriage in the laws of Indonesia depends on the angle and perspective. Moreover, a number of efforts of reformers to make the recording as a condition of lawful marriage have been performed by some intellectuals in several countries, both based on the substance of the witness function and *siyasah shar'iyah*. Because the existence of a rule that must record the marriage can be a device to check if all of the marriage terms have been met, including the requirements that will be set out in legislation. Registration of marriage ceremony can be used as primary evidence to ensure the rights of the parties involved in the marriage and its legal consequences.

Unrecorded Marriages and Its Relation to Marriage Act

Registration of marriage issue still raises the pros and cons of the community and the practice of unrecorded marriage often happens. In fact, marriage is not recorded very detrimental, especially for women and children

²⁹Jaih Mubarak, *Modernisasi Hukum Perkawinan di Indonesia* (Bandung: Bani Quraisy, 2005), p. 60.

who later resulting from this marriage.³⁰ Consequently, the illegality of the marriage will result in the law on matters relating to the marriage affairs, such as child status, income, inheritance, and so on.

If we observed carefully, Law No. 1 of 1974 is not the first law regulating the registration of marriage for Indonesian Muslims. Previously, there was Law No. 22 of 1946, which regulates the registration of marriage, divorce and reconciliation. Originally this law only applies to the area of Java and Madura, but with the enactment of Law No. 32 of 1954 which was passed on October 26, 1954 it should be applied throughout Indonesia.³¹

About the registration of marriages in Law 22 of 1946 mentioned, marriage is over seen by the Servants of marriage Registrar. For couples who do a marriage without a marriage registrar supervision subjected to punishment for an offense.³² Because the purpose of marriage registration is to obtains legal certainty. When describing penalties for couples who make marriage unattended, it mentions that the intention of the punishment for couples who violate the rules is to endorse the administration law, but did not result in cancellation of the marriage. From this description it very firmly appears that recording function is only for administrative purpose, not for legitimate requirement of marriage.

Then in Act No. 1 of 1974 which became effective of October 1, 1975 on registration of marriages mentioned that "each marriage is recorded according to the laws in force". While another article mentioned the marriage valid if done according to the law of each religion or belief. While the explanation of the Law 1 of 1974 on the registration and validity of marriage mentioned; "There is no legal marriage outside the religion", meanings religious law including laws and regulations in force. Then in Government Regulation No. 9 of 1975 which is a regulation on the implementation of Law No. 1 of 1974, it was mentioned that the marriage to the Islamic faith by marriage registrar, with procedures (process) that began with the recording of the notice will establish a marriage ceremony before implementation marriage registrar officials and attended by two witnesses, signing a marriage certificate by two witnesses, employees and trustees registrar.

In the compilation of Islamic law (KHI) in Indonesia mentioned, the purpose of registration of marriages performed before and under the supervision of marriage registrar employees to ensuring the marriage order is affirmed. However, marriages those performed outside the marriage registrar employees do not have the force of law, and marriage can only be proved by marriage certificate made by the marriage registrar employees.

Based on the texts of Indonesian law, which speaks about the registration of marriage, appears that the recording function merely administrative matters, not as a condition of lawful marriage (marriage ceremony), except in the explanation of Law No. 1 of 1974 which states that legislation includes elements that must be met for the validity of the marriage ceremony.

When we viewed the text and explanation of the laws, it can be understood that the function of registration is only to meet the administrative paper work and it is not to determine whether or not a marriage is valid.

However, if the texts associated with the existing provisions in the body of the Act in particular Law No. 1 of 1974 as a whole, and connected with other laws and regulations applicable in Indonesia, apparently arising pros and cons about the recording function. Some scholars view that the recording became a legitimate requirement, while others view it as an administrative requirement.

The group argues that the recording as a marriage validation in general terms, is a group of scholars and legal experts who have been subject to and implement positive marriage under Islamic law. They argue, the start of his legal marriage is after enrollment/registration of marriage. As for there as on stated by this group:

First, in addition to the legal practice of support public bodies, as well as article of law and implementation of the Marriage Act (Government Regulation No. 9 of 1975) as well as from the spirit and essence of the Marriage Act itself.

³⁰Happy Susanto, Nikah Sirry, apa untungnya, (Jakarta: Vissi Media, 2007), p. 87.

³¹Berdasarkan Presidium Undang-Undang No 22 Tahun 1946 sebelumnya sudah ada aturan tentang hal yang sama ,yakni Huwelijksordonnantie Buitengewesten nomor 482 Tahun 1932, Yakni Peraturan tentang Pencatatan Nikah ,Talak ,ruju' yang berlaku di daerah-daerah swapraja, Lihat: Khoiruddin Nasution, Hukum Perdata Islam Indonesia dan Perbandingan Hukum Perkawinan di Dunia Muslim, (Yogyakarta :Academia 2009), p. 333

³²Undang-Undang No 22 Tahun 1946, Pasal 3 ayat (1) "barang siapa yang melakukan akad nikah dengan seorang perempuan tidak dibawah pengawasan pegawai yang dimaksud pada ayat 2 pasal 1 atau wakilnya dihukum denda sebanyak-banyaknya Rp 50. Pasal 4 disebutkan hal-hal yang boleh dihukum seperti pada pasal 3 disebut pelanggaran.

Secondly, the existing paragraph in Article 2 of Law No. 1 of 1974 as a unification, which means that qualified representative should be immediately followed by registration or recording.

Third, if the contents of Article 2 is associated with Chapter III, the prevention and the cancellation of marriage can only be performed if the procedure of registration or recordation taken as provided by Regulation No. 9 of 1975. So, if marriage can be valid beyond the recording/registration, the chapter on prevention and the cancellation is almost no use or effect, as well as in case of registration of marriage is not regarded as one of the causes of invalidity of marriage. It looks like many of the measured improvement of the expectations of this law cannot be achieved, for example supervision on polygamy, child marriage prevention (under age) and the like.

Fourth, in terms of language, the meaning of the word "and" in Article 2 paragraph (1) of Law No. 1 of 1974 according to Sunarto Sudibroto, means cumulative. Assertion, "according to Article 2, paragraph (1) of Law No. 1 of 1974 that marriage is valid if it satisfies two requirements, namely the religious law and beliefs, which means that if just done only according to their religious, the marriage was not valid.

Fifth, according to Said us, there are several provisions that explicitly support this opinion, for example, the contents of Government Regulation No. 9 of 1975, Article 10, paragraph 3, "with regard to the procedure of marriage according to the laws of each religion or belief, marital conducted before employees attended registrar and two witnesses". Therefore, the best way for the implementation of the articles in Law No. 1 of 1974, in particular on the prevention and others, must change the substance (essence) of Act 1 of 1974, instead of the procedure alone. Therefore, in order to realize the purpose and effectiveness of Act No. 1 of 1974 on the prevention of permits and marriage, the interpretation of the validity of the marriage is only with recording.

The group that found registration is only as a matter of administrative records, are generally held by the Muslims as well as by many legal experts, that the validity of a marriage is not when the start time of registration or recording, registration is only a mere administrative function. While the start of a valid marriage is right after the *ijab qabul*. They reasons that:

Firstly, supported by habits since Law No. 22 of 1946 which applies to the whole of Indonesia Law No. 32 of 1954, the law on marriage records, divorce and reconciliation, where religious officials who act as watch dogs of marriage, divorce and reconciliation, which means it is only an event, not legal materials.

Secondly, that subsection (1) of Article 2 of Law No. 1 of 1974 is separated from paragraph (2). Legal explanation on article 2 more clearly shows the direction of the opinion that the recording just as the administrative matters.

Third, to declared that the recording as an administrative requirement is due to the difficulty of transportation. Consequently, if the recording made as a condition of lawful marriage would burden people who live in remote areas that are difficult to reach by public transport. The reason is of course every temporal in nature, as a means of transportation can be overcome, this reason is irrelevant now.

According Jaih Mubarak, an explanation on Law 1 of 1974 about marriage, the interpretation of which probably correspond to the will of the State is the second interpretation, the structural interpretation. This explanation of the validity of marriage and registration of marriage cannot be separated, as contained in the body of the Law No. 1 of 1974. In the law stipulated that "marriage valid if done according to each religion and each marriage must be noted, according to the applicable regulations". Violation of the regulations is classified as a criminal offense, punishable by a fine as high as seven thousand five hundred rupiahs. That is, marriage conducted without the supervision of the Registrar of Marriage Officer including criminal offense. Thus, these provisions reinforce the structural interpretation that requires registration of marriages be made as a condition of marriage.

Wasit Aulawi explains, judging from the formation of Marriage Act, the Marriage Act to make the initial concept of recording as a legitimate condition, but because it is not approved by united party fraction, eventually becoming the administrative requirements. However, we get the long period from 1974 to 2014, the marriage records raises issues that are very complex. Act or are very detrimental to a marriage that is not recorded is mainly on women and children. So the renewal of the previous Act debate about marriage should be amended or government policies need to set registration as a condition of marriage. The function of the current administration to immediately provide a concrete definition of marriage as a condition to the registration of marriage and the offense of requirement will be subject to an imprisonment.

Government Role in the Marriage Administration Control

The most fundamental consideration is that marriage is not recorded by the competent authority often lead to discrimination against women's rights because unrecorded marriage put women in a very weak position, easily oppressed and disadvantaged. Unrecorded marriage becomes the field of discrimination to the rights and interests of women. It cannot be denied that in a marriage relationship the position of women and women's rights must also be met, such as the use of the rights in the use or maintenance of property.³³

The Government is very concerned about the practice of marriage without recording because women always become the victims. When they married without recording, if at a later date does not get a match, usually women will be left alone, in the absence of a divorce settlement in a responsible manner, and in the end the woman cannot demand their rights. Worse yet, if the woman is already pregnant or already have children, the court may not impose sanctions on her husband.

Besides women (wives), the child could also be harmed because they do not get the rights that should be included in the processing of documents as birth certificate, school administration, and so on. Conjugal obligation is to provide a good education for their children. Before giving a formal education in schools for the children, parents must register their children at the registry office to obtain a birth certificate, so that the children regarded as legitimate children. Among the requirements for obtaining a birth certificate is that parents are legally married as evidenced by a marriage certificate. Thus the parent who are not legally married, cannot obtain a birth certificate for their son, so that one of the child's right to acquire formal education is constraint.

The government should be responsible for recording the wedding, because when the marriage was not registered under the laws, the applicable legal consequences would be problematic. The presence of the wife in a marriage that did not exist, as well as children born of the marriage cannot be held responsible when the children were born of the unregistered marriage cannot be held accountable of their parents. Children who cannot be held accountable of their parents will grow wild and become a bad boy in public, when the bad boy, the community and the state will lose money, the country will be disrupted the stability of nation.

Marriages that were not officially recorded often lead to problems. Even though there is regulation order to record the wedding but not the least is that some wedding without recording. This phenomenon is then forced the government to plan the implementation of the above criminal perpetrators. In the draft of Materiel Law on Religious Court on Division of Marriage is an attempt to realize the material field of marriage law that could eventually replace the position of Islamic Law Compilation (KHI) using the Presidential Instruction.

The purpose of Materiel Law on Religious Court on Division of Marriage is to create legal certainty for all concerned parties with the issue of marriage and family. It is also intended to counterpart and fill in the various legal vacuum (*recht vacuum*) contained in the Marriage Act. The presence of Materiel Law on Religious Court on Division of Marriage bill is complementary to the Field of Marriage Act No. 1Year 1974 on marriage and Implementation Regulations. It also can eliminate the doubts of some people because of the marriage laws have been included in the sub-national legal system. Materiel Law on Religious Court on Division of Marriage consists of XXIII Chapters and 150 Articles.³⁴

In Chapter XXI containing criminal provisions of Article 140 stated: "Anyone who does not hold a marriage before the Registrar of Marriage as referred to in Article 5 paragraph (1) shall be punished by a maximum fine of 6.000.000,-, or imprisonment of more than 6 (six month)."

This much different what is stated in article 45 of Government Regulation No. 9 of 1975, the maximum fine is 7500,- (seven thousand five hundred rupiahs)."Discourse of criminal sanctions against perpetrators of unregistered marriage is normal. The State has an obligation to protect its citizens.

Conclusion

Registration of marriage is regulated by laws and regulations at the level of applications do not get the optimal response of Indonesian Muslims because the formulation of the law on registration of marriage is not found in the classical books of *fiqh*.

³³Fachruddin Hasballah, Psikologi Keluarga dalam Islam, (Banda Aceh, Yayasan Pena 2007) p. 97.

³⁴Tenth Draft of Constitution of Republik of Indonesia concerning Materiel Law on Religious Court .

Issue of marriage documentation does not have an adequate place (do not get special attention) in the classical *fiqh*, marriage is still considered valid according to *fiqh* if it has met the requirements of marriage as determined by the jurists. Therefore the registration of marriages in an official institution like KUA is not a legitimate requirement that can decide whether or not a marriage valid. Marriage is essentially an engagement, which, according to law, every marriage must be recorded with the aim to avoid things that are not desirable. According to positive Islamic law, unrecorded marriage is not fulfilling the requirements of a marriage, because marriage in Islamic obliged to publish or authentic evidence that can justify the existence of the marriage of a person and to protect the rights and obligations of related persons, such as the protection of descendants, property, spirit and others. Therefore, the government can set a recording as a condition of validity of a marriage through *siyasah Syar'iyah* approach.

It takes an active role of the government to define marriage as a condition of registration of a valid marriage. For any person intentionally hold marriage without registration needs to be given official sanction. Beside, public awareness of the need for the recording of marriage as a form of precautionary efforts to reduces the occurrence of the victims of the irresponsible individuals. It needs awareness to the perpetrators of marriage to register the marriage (regardless of polygamous marriages). Furthermore is improvement (reconciliation) to Muslims beliefs about their religion, because if he takes some part and refuses other part is a form of infidelity, unrecorded marriage is condoned by religion, but according to positive Islamic law will bring a problem if it does not comply with applicable government regulations.

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