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Concept and Legal Status of Underhand Marriages According to Indonesian National Law

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Abstract

Marriage is a means for humans to improve the quality and quantity of their lives. Thus, humans are very dependent on the institution of marriage, including the Indonesian people. Therefore, it is appropriate for the Indonesian people to protect it by placing its regulation in the 1945 Constitution. As a result, in addition to every citizen being guaranteed the right by the state to form a family through marriage, the state is also responsible for protecting the institution of marriage. However, this does not mean marriage can be conducted without discrimination due to various factors. As a result, it has encouraged many Indonesians to perform marriages outside the procedure such as underhand marriages. There are two problems in this study: 1) What is the concept of underhand marriage according to Indonesian national law? 2) What is the legal status of underhand marriage according to Indonesian national law? To discuss the two problems, a normative type of legal research is used, with secondary data sourced from library materials in the field of marriage law, while to obtain data the document study method is used, and data processing with the method of systematization. As for the approach, a statutory approach is used. The results and findings of this study are: that underhand marriages that have fulfilled certain pillars and conditions that have been determined in their respective religious laws are valid (legal) according to Indonesian national law. From these findings, the author concludes that; 1) An underhand marriage is a marriage between a man and a woman, which fulfills the pillars and conditions stipulated in their respective religious laws and laws and regulations, but is not recorded at the government agency authorized to do so; 2) The legal status of underhand marriage, seen from Indonesian national law, is a legal institution (legal) according to Indonesian national law. Suggestions that can be given by the author are: that if 1) It is important to socialize the concept of underhand marriage to the community so that they understand the pillars and conditions, so that they do not consider it equivalent to an unofficial relationship (kumpul kebo), 2) It is necessary to improve marriage regulations, especially Law No. 1 of 1974. The government's 2019 efforts that only focus on the marriage age limit are inadequate; the practice of underhand marriage also needs attention. If revision is difficult, the government must educate the public about Supreme Court Jurisprudence No. 57 K/Pdt/2005, which states that couples without a marriage certificate are still considered husband and wife if they are registered on one family card.

Keywords: Underhand Marriage, Concept, Legal Status

Introduction

Humans are essentially social creatures who have a tendency to depend on each other. This tendency makes it difficult for individuals to live independently, because they need the presence of others to be able to coexist and complement each other. In living their lives, humans should build relationships that are intertwined through bonds with other people.

The bond referred to here is a marriage, which is a process of inner and outer union between a man and a woman legally in accordance with the laws of their respective religions and beliefs. Marriage is not only a legal bond, but it is also the foundation for the formation of the family, which is the smallest unit in society. In this context, marriage serves as a means to create emotional and social stability, where couples support each other, share responsibilities, and build a life together. Meanwhile, in the perspective of Islamic law itself, the purpose of holding a marriage is to achieve peace in life, both for men and women, where marriage is considered an obligation that aims to form a harmonious and happy family in the world and the hereafter.[1]

On the one hand, in the context of kinship, the existence of a marriage institution or family institution in a marriage contains several purposes and objectives, namely to uphold religion, obtain offspring, prevent sin, build a peaceful and orderly household. In line with these objectives, Law No. 1/1974 on Marriage formulates that the purpose of marriage is to form a happy and lasting family (household) based on the Almighty God.[2] This means that marriage has a central position in human life, especially in Indonesian society, both as individuals and communes. Therefore, it is appropriate that marriage is seen as the basis of human civilization.[3]

The eternal and happy family or household reflects several functions: First, the procreative function, which is the relationship between husband and wife that is built based on the rights and obligations between husband and wife; second, the recreative function, which is the household that is built to obtain pleasure, tranquility, and enjoyment of life; third, the regenerative function, which is the household that is built with the aim of obtaining children or offspring; and fourth, the relative function, which is the household that is built to form relationships, strengthen family networks, both between husband and wife and with their respective families. If even one of these four functions is not fulfilled in a household, it is difficult to call it a happy household. For example, a household that loses its recreational function. From a household that loses this function, it is difficult for the husband, wife and children to get pleasure, tranquility and enjoyment in the household, and this condition can interfere with other functions.

Looking at the description above, it can be understood that marriage is a means for humans to be able to improve the quality and quantity of

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[1] Atabik Ahmad and Mudhiiah Koridatul, 'Pernikahan Dan Hikmahnya Perspektif Hukum Islam', *Yudisia*, 5.2 (2014), 286–316 <https://doi.org/http://dx.doi.org/10.21043/yudisia.v5i2.703>.

[2] Republik Indonesia, *Undang Undang No. 1 Tahun 1974 Tentang Perkawinan* (Indonesia, 1974), pp. 1–39, Pasal 1.

[3] Kuntjoro Purbopranoto, *Hak-Hak Azasi Manusia Dan Pancasila*, Cet. V (Jakarta: Pradnya Paramita, 1976), h. 138.

their lives. Thus, humans are very dependent on the institution of marriage. The same applies to Indonesian society, which consists of a collection of households or families. Therefore, it is appropriate for the Indonesian people to protect the institution of marriage by placing its regulation in the state constitution, the 1945 Constitution (Article 28 paragraph 1 of the 1945 Constitution). This means that human rights in the field of marriage exist, are recognized and protected. Consequently, in addition to every citizen being guaranteed the right by the state to form a family through marriage, the state is also directly involved and responsible for protecting the institution of marriage itself.

However, this does not mean that marriages can be conducted freely or without discrimination due to ethnic, racial, socio-cultural or religious factors in society. History has shown that until now, there have always been cases in Indonesia where not everyone is free to marry. As a result, this has led many Indonesians to enter into marriages outside of procedures (not outside of the law) such as these underhand marriages.[4]

Regardless of whether it is legal or not, sociologically, underhand marriage is a social phenomenon in Indonesia and is needed by the community to overcome obstacles in marriage, and therefore it is difficult to avoid let alone completely eliminate in Indonesian society.

In the past, underhand marriage was not a problem in Indonesian society, because what was important was that a marriage fulfilled the pillars and conditions according to the laws of each religion. Even now, many Indonesian people still do it. One clear evidence is that every time there is a mass marriage organized by the government, there are always many married couples who participate in it, which generally consists of those who have lived together for some time as husband and wife and have even had children. This means that they are married couples from underhand marriages. In this case, the mass marriages were actually more accurately called "marriage renewals" with the aim of obtaining recognition from the state in the form of a "Marriage Certificate". Another piece of evidence is that there are still couples who request itsbat nikah in the District Court and Religious Courts even though itsbat nikah is only to fulfill divorce procedures (Article 7 Paragraph 2 of the Compilation of Islamic Law in Indonesia).

Thus, in its implementation, underhand marriage is often carried out by Indonesians in various social and professional strata until now. However, in reality not all Indonesians recognize the concept and its legal status as a legal marriage. As is the case in West Sulawesi itself, in the Polewali Mandar district, ordinary people there or almost the entire community still consider a marriage that is carried out without a valid marriage registration

[4] Abdurrahman, *Himpunan Peraturan Perundang-Undangan Tentang Perkawinan*, Cet. I (Jakarta: Akademika Pressindo, 1986), h. 26.

according to the applicable community law there, it will be considered an invalid marriage because it is only through an underhand marriage process.

In the context of marriage registration, the term official marriage refers to a marriage that has been registered. In Indonesia, there are legal provisions stating that every marriage must be recorded, and only a recorded marriage can be considered an official marriage with legal force. In contrast, unregistered marriages, known as underhand marriages, are considered unofficial and have no legal force.[5]

Those who say that underhand marriages are unclear in concept and that their legal status is invalid are arguing that they are not registered with the government agency authorized to do so. There are two factors that cause this to happen, namely: first, the public's inability to access information about legal developments, especially marriage law; and second, not everyone understands the law, including marriage law.

The term "Nikah Di Bawah Tangan" itself actually refers to a marriage that is not registered in an official institution determined by the religious law that applies in each region. The concept of nikah di bawah tangan emerged after the enactment of the Marriage Law officially in 1975 and it is said that legally, this marriage is considered valid according to Islamic law, provided that it is not based on the intention to hide (sirri), and of course it has fulfilled the applicable syari'at requirements. So, legally speaking, the marriage that is carried out through underhanded channels is actually valid or not?[6]

Considering the conditions as described above, the problems that arise around underhand marriage must be solved legally so that people are not allergic or reluctant to perform underhand marriage if they need it. For this reason, this research was conducted, namely to explain the concept of underhand marriage in Indonesian national law and to critically examine and then explain the legal status of underhand marriage in Indonesian national law as well.

Research Problems

Based on the description expressed above, the problems in this research are:

1. What is the concept of underhand marriage according to Indonesian national law?

[5] Samsidar Samsidar, Syamsuddin Pasamai, and Sri Lestari Poernomo, 'Efektivitas Pencatatan Perkawinan Menurut Undang-Undang Nomor 1 Tahun 1974 (Studi Di Kabupaten Polewali Mandar)', *Halu Oleo Law Review*, 3.1 (2019), 116 <https://doi.org/10.33561/holrev.v3i1.4751>.

[6] Irfan Islami, 'Perkawinan Di Bawah Tangan (Kawin Sirri) Dan Akibat Hukumnya', *ADIL: Jurnal Hukum*, 8.1 (2017), 69–90 <https://doi.org/10.33476/ajl.v8i1.454>.

2. What is the legal status of underhand marriage according to Indonesian national law?

Research Methods

In this research, the type of normative legal research used is legal research conducted by examining secondary data or library materials in the field of positive law, especially marriage law.

In accordance with the type of research chosen, the type of data studied is secondary data sourced from library materials in the field of positive law, especially marriage law.

To obtain the desired data according to the type of research and the type of data in this study, the method for obtaining data is the document study method, namely reading and examining and standardizing primary legal materials, secondary legal materials, and tertiary legal materials related to the scope of this research. While data processing activities are carried out by systematizing the written legal materials

As for the type of approach, in accordance with the type of research chosen, a statutory approach is used, namely research that prioritizes legal material in the form of laws and regulations as a basic reference material. In this case, this approach is carried out by examining legislation in the field of marriage law.

Discussion

1. Concept of Underhand Marriage

Before the definition of an underhand marriage is explained, it will be stated first in passing about the definition of marriage in general. From this it can be seen, where is the difference between underhand marriage and marriage in general that is commonly known or practiced in the community, or perhaps there is no significant difference between the two. This is because many people discuss underhand marriage, but instead of clarifying or improving people's understanding of underhand marriage, they obscure it. This is because they cannot take a distance from the object of discussion, which is underhand marriage, even though it is necessary to be able to see objectively and proportionally the problem.

Marriage comes from the word kawin, which means an arranged marriage between a man and a woman to become husband and wife or means marriage.[7] The word *"kawin"* then gets the addition of the prefix per and the suffix an, then forms a compound word into marriage which means marriage; celebration (affairs and so on) of marriage.[8]

[7] W.J.S Poerdaminta, *Kamus Umum Bahasa Indonesia* (Jakarta: Balai Pustaka, 1985), h. 453.
[8] Poerdaminta.

Terminologically, there are many definitions of marriage that have been put forward by people. In Law No. 1/1974 concerning Marriage, it is formulated that marriage is "a physical and mental bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the Almighty God" (Article 1 of Law No. 1/1974 concerning Marriage). K. Wantjik Saleh defines marriage as "an agreement made by two people, in this case an agreement between a man and a woman with a material purpose, namely to form a happy and eternal family (household) based on the Almighty God ..."[9] Hilman Hadikusuma formulated the definition of marriage as "a sacred act (sacrament; samskara), namely an engagement between two parties in fulfilling the commands and recommendations of God Almighty, so that family and household life and neighborly kinship run well in accordance with the teachings of their respective religions".[10] Meanwhile, Abdullah Siddik defines marriage as "a legal relationship between a man and a woman who live together (have intercourse) and whose purpose is to form a family and continue offspring, as well as prevent adultery and maintain peace of mind".[11]

From the several definitions of marriage above, there are differences with each other. This difference is due to the fact that marriage as a social institution has many facets and can be seen from various perspectives, such as legal, religious, and social. Nevertheless, it can be concluded that in terms of legal construction, marriage is an agreement made by a man and a woman with the aim of forming a happy and eternal household. Thus, marriage is a legal act that has the following elements: (1) the existence of a legal relationship (agreement); (2) between a man and a woman; (3) to form a family or household; (4) for a long time or eternally; (5) with a specific purpose.

As for a marriage, it must fulfill several elements and conditions or pillars that have been determined in the laws and regulations and not conflict with customary law, decency and public order (Public Order), what if this is fulfilled then only then is the marriage considered legally valid. A marriage is considered valid if it is carried out in compliance with all the provisions stipulated in the prevailing laws and regulations in Indonesia. The implication is that a valid marriage will provide legal certainty and protect the legal interests of the parties involved, whether it is a matter between husband and wife, children, inheritance, and others.[12]

Meanwhile, the term "unregistered marriage" itself was only recognized after the government issued Law No. 1/1974, which came into

[9] K. Wantjik Saleh, *Hukum Perkawinan Indonesia*, Cet. IV (Jakarta: Ghalia Indonesia, 1978), h. 14.
[10] Hadikusumah, h. 10.
[11] Abdullah Siddik, *Hukum Perkawinan Islam* (Jakarta: Tinta Mas Indonesia, 1983), h. 25.
[12] Akhmad Munawar, 'Sahnya Perkawinan Menurut Hukum Positif Yang Berlaku Di Indonesia', *Al-Adl : Jurnal Hukum*, 7.13 (2015) <https://doi.org/10.31602/al-adl.v7i13.208>.

effect on April 1, 1975, through Government Regulation Number 9 of 1975 concerning the Implementation of Law No. 1 of 1974 (PP No. 9/1975). Prior to that, the term unregistered marriage was not known in Indonesian society, although the practice had long been in existence. The term recognized by society was "nikah siri" (unofficial marriage).

In the legislation, there is no formulation of the definition of unregistered marriage; however, this term is no longer foreign to Indonesian society today. This means that, legally, unregistered marriage is not explicitly regulated in the legislation, but sociologically it has become a reality in Indonesian society.[13] The phenomenon of unregistered marriage has long existed, even well before the issuance of Law No. 1/1974, and today it is increasingly openly practiced by members of society, especially after the issuance of a fatwa by the Indonesian Ulema Council (MUI) which legitimizes unregistered marriages as a lawful legal institution to be used according to Islamic law.

The term used by society to identify clandestine marriages is not singular. Besides the term clandestine marriage, the term "nikah siri" is also used. The term clandestine marriage itself is utilized by the Fatwa Commission of the Indonesian Ulema Council (MUI), presumably not only to distinguish it from the nikah siri that is already known to the public but also because this term is considered more in accordance with Islamic law and applicable legal provisions.

But what is actually meant by clandestine marriage? Literally, clandestine marriage is understood as a marriage that is not attended by a government official authorized to record the marriage event or a marriage that is not recorded with the relevant government agency.

Terminologically, Idris Romuly defines a marriage under hand as "... a marriage conducted by Indonesian Muslims, fulfilling both the pillars and the requirements of marriage, but not registered for recording with the marriage registrar, as stipulated in Law Number 1 of 1974.".[14] Meanwhile, KH. Ma'ruf Amin defines a marriage under hand as follows: "a marriage between a man and a woman that does not meet Article 2 paragraph (2) of Law No. 1 of 1974 and the marriage procedures according to Government Regulation No. 9 of 1975".[15] The Indonesian Ulema Council (MUI) itself, in fatwa No. 10 of 2008 concerning Marriage Under Hand, defines marriage under hand as

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[13] Pada aspek praktik, perkawinan bawah tangan ini masih perlu penelitian lebih lanjut untuk mendapatkan gambaran motivasi pelakunya dan bagimana mereka mengelola atau mengatur rumah tangganya.

[14] Mohammad Idris Ramulyo, *Hukum Perkawinan, Hukum Kewarisan, Hukum Acara Peradilan Agama Dan Zakat Menurut Hukum Islam*, Cet. III (Jakarta: Sinar Grafika, 2004), h. 41.

[15] KH Ma'ruf Amin, 'Pencatatan Nikah Akan Memperjelas Status Hukum', *Hukum Online*, 2006, pp. 1–5 <https://www.hukumonline.com/berita/a/pencatatan-nikah-akan-memperjelas-status-hukum-hol15651/?page=1>.

"a marriage that fulfills all the pillars and requirements established in fiqh (Islamic law) but without official recording at the authorized agency as regulated by applicable legislation" (Fatwa of the Indonesian Ulema Council No. 10 of 2008 concerning Marriage Under Hand).

Based on the definitions above, it can be understood that the non-registration of this marriage with the relevant government authority distinguishes it from marriages in general. This is due to the fact that in Law No. 1/1974 there is a clause regarding the registration of marriage (Article 2 paragraph 2 of Law No. 1 of 1974 concerning Marriage), which some people interpret as a requirement. However, the validity of a marriage is not determined by registration, but rather by the fulfillment of the legal requirements of religion and applicable national law. Although, legally, registration plays an important role in the law in Indonesia, this does not diminish the validity of unregistered marriages.[16]

From the perspective of legal construction, a private marriage can be understood as a marriage that meets the pillars and requirements established by the respective religious law and applicable regulations, but is not registered with the relevant government authority, namely the Office of Religious Affairs (KUA) for those who are Muslim or the Civil Registry Office (KCP) for those who are not Muslim. As a result of the non-registration, couples who enter into a private marriage do not possess a Marriage Certificate as written evidence of their marriage.[17]

Marriages conducted informally (without registration) essentially have no legal consequences and only affect the spouses. However, under Islamic law, unregistered marriages have legal consequences equivalent to those of marriages with a marriage certificate, in terms of inheritance, rights of the wife and children, and other aspects. If a marriage is not registered with the marriage registration officer, it is considered legally invalid, as it lacks written legal force. Therefore, the position of a marriage certificate is necessary not only to validate the marriage according to religion and law but also to fulfill various other interests. For instance, in a study conducted in the Pacet district of Cianjur regency, it was found that there are still many individuals in that area who enter into marriage without officially registering with the marriage registration officer. This is due to a lack of understanding regarding the importance of a marriage certificate, the high costs associated with obtaining a marriage certificate, and the presence of individuals who exploit the situation in the process of issuing marriage certificates..[18]

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[16] Elfirda Ade Putri, 'Keabsahan Perkawinan Berdasarkan Perspektif Hukum Positif Di Indonesia', *KRTHA BHAYANGKARA*, 15.1 (2021), 151–65 <https://doi.org/10.31599/krtha.v15i1.541>.

[17] Mohammad Idris Ramulyo, h. 21.

[18] Febioka Eri Sandi and others, 'Permasalahan Hukum Terhadap Perkawinan Tanpa Akta Nikah Menurut UU No 1 Tahun 1974 Dengan Hukum Islam (Studi Kecamatan Pacet

According to the author, there are at least several factors that encourage Indonesians to engage in informal marriages, which can be categorized into two factors:

First, external factors, namely: 1) Pancasila and the 1945 Constitution as the foundation and constitution of the state, which recognizes Human Rights (HAM) including the freedom to form a family (Article 28B of the 1945 Constitution), the freedom to receive fair treatment, guarantees, protection, and legal certainty as well as equal treatment before the law (Article 28D of the 1945 Constitution), and the freedom of religion (Article 29 of the 1945 Constitution). 2) The existence of diversity (plurality) within the Indonesian nation itself in terms of ethnicity, race, socio-culture, and religion (Presidential Regulation of the Republic of Indonesia Number 1/PNPS of 1965). In such conditions, social interactions among community members that transcend these boundaries are inevitable, leading to informal marriages that will always occur and cannot be prevented.

Second, internal factors, namely: 1) The difficulties in practicing polygamy. Polygamy for a man is human and the religion (Islam) itself permits it. Meanwhile, a second or subsequent marriage for a man is not an easy matter, especially in Indonesia, because it must meet numerous external-procedural requirements, which require a long time and considerable costs to fulfill, and therefore, for some individuals engaging in informal marriages, it is viewed as very inefficient. 2) Economic limitations experienced by men, as in practice, not only do they have to bear the costs of marriage registration if they marry, but also the costs of the reception, which are relatively much more expensive depending on the customs of the community where the individuals engaging in informal marriages reside.

Thus, it can be understood that informal marriages do not stand alone, but rather are fostered by structural, cultural, and socio-economic conditions within Indonesian society itself.

2. Legal Status of Marriage Under Hand

To achieve the very significant goal (super goal) of marriage as described above, discussions regarding unregistered marriages, including their legal status, should be conducted objectively. If not, it could lead to a negative stigma for this type of legal institution and its practitioners within society. If the discussion is headed in that direction, it is essential to examine the applicable marriage law norms and understand them using valid scientific methodology. The important thing is to proportionally address the issue of unregistered marriages within the legal domain by researching the applicable marriage law norms, whether from legislation, jurisprudence, legal compilations, or fatwas, particularly regarding unregistered marriages. This is absolutely necessary considering that

Kabupaten Cianjur)', *Jurnal Impresi Indonesia*, 1.10 (2022), 1052–61 <https://doi.org/10.58344/jii.v1i10.467>.

unregistered marriages, as has been stated, have become a reality in this diverse Indonesian society and cannot be prevented.

This research is directed towards examining the legal status of informal marriages under Indonesian law, necessitating a thorough, critical, and comprehensive study of the legal norms pertaining to such informal marriages. In this regard, there are two categories of legal norms: religious legal norms and statutory regulations. Both determine the legal status of informal marriages in Indonesia, specifically whether such a legal institution is valid (legal) or invalid (illegal) for use by Indonesian citizens.

a. Marriage Under Hand According to Religious Law

Before 1974, several regulations regarding marriage were in effect in Indonesia, which in certain respects contradicted one another. However, with the enactment of Law No. 1/1974, all those scattered marriage regulations were declared invalid, except for matters of marriage that are not regulated in Law No. 1/1974 (Article 66 of Law No. 1 of 1974 on Marriage). Thus, Law No. 1/1974 serves as the fundamental law concerning marriage law in Indonesia, and therefore must be referenced in the implementation of marriage.

Referring to the aforementioned law, religious law plays a crucial role in determining the validity of a marriage. Article 2 paragraph (1) of Law No. 1/1974 stipulates that a marriage is valid if conducted according to the law of each respective religion and belief. According to the authentic explanation of this article, there is no marriage conducted outside the law of each respective religion and belief in accordance with the 1945 Constitution. Therefore, since the law determines the validity of a marriage based on or reliant upon the law of each respective religion and belief, this means that for individuals who are Muslim, their marriage is conducted according to Islamic law, while for individuals of other religions, it is conducted according to the laws of their respective religions. Thus, the legal status of religions constitutes positive law in Indonesia in the field of marriage, and therefore must be applied.

Berdasarkan peraturan dalam pasal tersebut, sah atau tidaknya suatu perkawinan adalah semata-mata ditentukan oleh hukum agamanya dan kepercayaannya itu dari calon suami dan calon isteri yang hendak mengadakan perkawinan. Ini berarti bahwa perkawinan yang dilaksanakan bertentangan dengan ketentuan hukum agama, dengan sendirinya dianggap tidak sah dan tidak mempunyai akibat hukum sebagai suatu ikatan perkawinan. Dan hukum agama itu adalah hukum dari agama-agama yang dimaksud dalam UU No. 1/PNPS/1965, yaitu agama Islam, agama Katholik, agama Kristen, agama Hindu, dan agama Buddha.

Based on the regulations in the aforementioned article, the validity or invalidity of a marriage is solely determined by the religious law and beliefs of the prospective husband and wife intending to enter into marriage. This

means that a marriage conducted in violation of the provisions of religious law is automatically considered invalid and has no legal consequences as a marital bond. The religious law referred to is the law of the religions mentioned in Law No. 1/PNPS/1965, namely Islam, Catholicism, Christianity, Hinduism, and Buddhism.

However, this writing will only discuss Islamic law regarding informal marriages, while the laws of religions other than Islam will be addressed later. This choice is due to the fact that in Indonesia, Muslims are the majority and predominantly discourse on the validity or invalidity of informal marriages, which is always related to Islamic law. The only issue surrounding informal marriages is that this marriage is not registered with the relevant government authority, as stated above. Therefore, what is important to understand is how the law regarding the registration of marriage is according to Islamic law (Sharia), whether it is obligatory or not.

In the Quran, there is no verse whose legal norm can be understood as a mandatory order to record marriage events. The only legal event performed by humans that is mentioned in the Quran to be recorded is related to economic activities, specifically debt transactions, as stated in QS. al-Baqarah: 282, which is translated as follows:

> *"O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write between you in justice. And let no scribe refuse to write as Allah has taught him. So let him write..."*

Some people haphazardly equate the law of marriage registration with the law of debt registration, thereby easily asserting that the law of marriage registration is mandatory. However, this is not permissible because there is no similarity or resemblance in the legal constructs between the two. One pertains to debt transactions, while the other concerns marriage, two fundamentally different matters. Legal experts, particularly those specialized in usul fiqh, certainly understand this. Moreover, it should be noted that the term "faktubûhu" in the above verse is understood differently by scholars. Scholars from the Dhahiriyah school argue that this verse serves as evidence for the obligation to register debt transactions,[19] while the majority of scholars from the Hanafiyah, Malikiyah, Shafi'iyah, and Hanabilah schools hold that the registration of debt transactions is not obligatory; rather, the command is merely a guidance to encourage individuals to be more cautious in debt transactions.[20]

Based on the explanation above, it can be asserted that the legal status of recording a marriage event with government authorities is not regulated under Islamic law. Something that is not governed by law means that its

[19] Muhammad Ar-Rifai'i, *Ringkasan Tafsir Ibnu Katsir: Terjemahan Oleh Syihabuddin*, Jilid 1 (Jakarta: Gema Insani, 1999).
[20] M. Quraish Shihab, *Tafsir Al-Misbah*, Cet. 1 (Ciputat Tangerang: Lentera Hati, 2005), h.462-463.

legal status is permissible to be carried out. This indicates that the recording of marriage is not considered urgent under Islamic law. Therefore, spouses who do not register their marriage are not in violation of the law. Thus, what is meant by Article 2 paragraph (1) of Law No. 1/1974 is that there is no marriage conducted outside the law of their respective religions and beliefs, which pertains only to the scope of the pillars and conditions for a valid marriage, not the recording of the marriage. From this, it can be concluded that the legal institution of an unregistered marriage under Islamic law constitutes a legitimate (legal) marriage institution.

b. Marriage Under Hand According to Legislation

Once again, the term "underhand marriage" is actually only applied to unregistered marriages that fulfill the conditions and requirements based on the laws of each respective religion and belief. There are some who assess that underhand marriages are considered invalid, while on the other hand, some people regard them as valid marriages. To this day, in the realm of thought, the issue of underhand marriage is disputed, including among scholars, regarding its legal status. Some declare it haram, meaning they consider the legal institution of underhand marriage to be illegal, while others deem it halal, meaning they consider it legal. According to KH. Ma'ruf Amin, even among Indonesian scholars, this difference occurs, with some scholars declaring it haram and others declaring it halal.[21] For those who consider underhand marriage to be invalid, they argue that such marriages lack blessings and are devoid of legal protection.[22] owever, for those who regard it as legal, they reason that Article 2 paragraph (1) of Law No. 1/1974 stipulates that marriage is valid if conducted according to the laws of each respective religion and belief, not solely because it is registered.

But what is the actual legal status of marriages conducted under hand according to the applicable legislation, is it a legal institution to be enforced or not? Referring to Law No. 1/1974 as the basic law of family law in Indonesia, the registration of marriage is mentioned in Article 2 paragraph (2), which states that "every marriage shall be registered in accordance with the prevailing laws and regulations." Unlike Article 2 paragraph (1), Article 2 paragraph (2) does not provide an explanation and annotation "clear" indicating that its meaning is already clear by the lawmakers. This indicates two things: first, this article is unclear in its meaning; second, there is doubt among the lawmakers regarding the obligation or non-obligation of marriage registration. Thus, Article 2 paragraph (2) does not carry legal consequences for marriage registration. In law, a clause can only be regarded as a legal norm that can produce legal consequences for a legal act if it contains the words mandatory/must, prohibited/not allowed, or permitted. Meanwhile, Article 2 paragraph (2) does not contain any of those

[21] KH Ma'ruf Amin.

[22] Soetojo Prawirohamidjojo, *Pluralisme Dalam Perundang-Undangan Perkawinan Di Indonesia* (Surabaya: Airlangga University Press, 1986), h. 140.

words. Therefore, it is not considered an unlawful act for couples who conduct marriages under hand.

If we look into the Fatwa issued by the Indonesian Ulema Council, namely MUI Fatwa Number 10 of 2008 concerning Unregistered Marriage, it states that a sirri marriage or unregistered marriage is valid, provided that it meets the stipulated conditions and pillars of marriage. However, the MUI also emphasizes the importance of registering such a sirri marriage with the relevant authorities if there is a potential harm that may arise in the future.[23]

As explained above, regarding the concept of unregistered marriage according to several experts and the regulations in force in Indonesia, it is stated that such unregistered marriage is essentially a marriage conducted without any marriage registration, which has fulfilled the requirements for a valid marriage, the pillars of marriage, and does not contradict religious law, customary law, or public morality and order prevailing in a society. Therefore, this marriage should be considered as a legally valid marriage but merely unregistered as evidence that the parties have entered into a marriage. However, after the concept of this marriage emerged, a debate arose from various literature stating that an unregistered marriage also falls under the category of sirri marriage (silent marriage), while others argue otherwise and provide a significant distinction.

In this regard, there is actually a distinction between the concept of a private marriage (nikah di bawah tangan) and a clandestine marriage (nikah sirri). Both private marriage and clandestine marriage are forms of marriage that are not registered with the relevant authorities; however, there are fundamental differences between them. Among these, the concept of a clandestine marriage is a subset of private marriage but is significantly different from the practice of private marriage. Clandestine marriage leans towards a marriage that is indeed conducted with the intentional motive of carrying out the marriage secretly, and deliberately avoids producing legal consequences, which may lead to future harm. In contrast, the concept of a private marriage is essentially just a record of marriage that is not registered, but in its process, there is no element of "secretly and intentionally avoiding the legal consequences that arise".[24]

What has been a concern for some individuals, particularly those who believe that informal marriages are prohibited or not lawful, is the negative impact on the parties involved, the children, and the joint property if one party (the dominant party in the household) does not take responsibility for

[23] Muhammad Yunus Hidayatullah and others, 'Perkawinan Sirri Menurut Fatwa Majelis Ulama Indonesia', *Ma'mal: Jurnal Laboratorium Syariah Dan Hukum*, 3.1 (2022), 64–83 <https://doi.org/10.15642/mal.v3i1.117>.
[24] Harpani Matnuh, '"Perkawinan Di Bawah Tangan Dan Akibat Hukumnya Menurut Perkawinan Nasional"', *Pendidikan Kewarganegaraan*, 6.11 (2016), 903–4 <https://ppjp.ulm.ac.id/journal/index.php/pkn/article/download/727/632>.

the marriage. For them, informal marriages "cannot be proven to exist," allowing one party lacking honesty to evade their responsibilities towards the other party, both concerning the children and the joint property.

However, since 2005, this issue is no longer a problem, insofar as it concerns marriages conducted under hand, rather than "*Kumpul Kebo*".[25] To prove the occurrence or non-occurrence of a marriage conducted under hand, or the existence or non-existence of such a marriage, other evidence may be presented if the husband or wife does not possess a marriage certificate. The jurisprudence of the Supreme Court of the Republic of Indonesia Number 57 K/Pdt/2005 dated May 29, 2005, states that although the plaintiff and the defendant do not have evidence of marriage (a marriage certificate), there are indications that they live together as if they are a family, which can be evidenced by the Family Card, thus making them appear as husband and wife (Jurisprudence of the Supreme Court Number 57 K/Pdt/2005 dated May 29, 2005). This is a legal principle known as jurisprudential law, which is a legal principle that arises from judicial decisions in court, in accordance with its function as judge-made law, holding the same status as other legal principles. Therefore, to prove that a marriage has occurred or exists for a couple who has conducted a marriage under hand, this can be done solely through the Family Card.

Based on the description presented above, it can be concluded that a private marriage under Indonesian national law is a legal marriage. The legal consequences of this are binding on the parties involved and produce legal effects both for the husband and wife, as well as for the children and property resulting from the private marriage.

Conclusion

Based on the description of informal marriages in the previous section, the following conclusions can be drawn:

1. An informal marriage is a marriage between a man and a woman, which fulfills the pillars and requirements set forth in their respective religious laws and regulations, but is not recorded by the authorized government agency.
2. The legal status of an informal marriage, viewed from Indonesian national law, is considered a legitimate legal institution according to Indonesian national law.

[25] The term "Kumpul Kebo" is not found in the national legal literature of Indonesia, but it is commonly used in the daily interactions of Indonesian society to indicate a relationship similar to that of husband and wife between a man and a woman without a legitimate marriage bond. By Indonesian society, such a relationship is likened to the gathering of animals, buffaloes. (Jawa: kebo)

Suggestion

1. There needs to be socialization to the community regarding the concept of underhand marriage so that the public understands it, including its pillars and requirements, so that it is not easily mistaken for a relationship between a man and a woman without a marriage bond. (kumpul kebo).
2. There is a need to amend the legislation in the field of marriage, specifically Law No. 1/1974, not only regarding the marriage age as the government did in 2019, but also other matters including hand-written marriages. If that is difficult to implement, then the government needs to socialize the Supreme Court of the Republic of Indonesia Jurisprudence Number 57 K/Pdt/2005 dated May 29, 2005, which states that even if a man and a woman living together do not have a Marriage Certificate, if they are both registered in one Family Card, then they are considered husband and wife.

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