



## Implications of unregistered polygamy marriage ratification in Indonesian marriage law

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### Abstract

An unregistered marriage (nikah sirri) takes place in the presence of a guardian, two witnesses, and ijab qabul (Islamic marriage contract). Unregistered marriage is a legal marriage, but it is not recorded in state documents. It means the country does not recognize marriage, even though it is religiously legal. Unregistered marriage is frequently used as an alternative for a small number of people who want to marry but are hampered by time and money-consuming administration, such as permission to polygamy. Because polygamy permits have cumulative requirements, unregistered polygamy marriage allows perpetrators to remarry easily. This will be a problem if a child is born from such a marriage, as the child will require legal certainty regarding his or her civil rights. Based on this reality, perpetrators of unregistered marriage must apply to the Religious Court for ratification of unregistered polygamy marriages. This study used an empirical juridical method, in which the author compared how marriage law is regulated in Indonesia to existing field facts. Based on the results of the research, this incident was legal smuggling (illegal polygamy), which the country must strictly regulate because applications for unregistered polygamy marriage certificates still exist in the Religious Courts. This indicates that unregistered marriage for polygamy is still prevalent in society.

**Keywords:** marriage ratification (isbat nikah), unregistered polygamy, religious courts

### Introduction

Marriage is a vow between a woman and a man to formalize a relationship to start a family. Marriage, according to article 1 of Law No. 1 of 1974, is "both physical and mental bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on Belief in the One and Only God," and then in the article Compilation of Islamic law (KHI), marriage is a contract to obey Allah's commands and is worship.

Marriage is only valid in the Islamic religion if it meets the 5 Pillars of Marriage. This includes the following (Mahzab Syafii):

1. There is a Bridegroom
2. There is a Bride
3. There is a Guardian for the bride
4. There are two men as witnesses in the marriage
5. Islamic Marriage Contract (*Ijab Qabul*)

In Indonesia, arrangements regarding marriage, especially for Muslims, are regulated in Law No. 1 of 1974 concerning Marriage. The law governs the principle of open monogamy, which is a legal marriage principle. This allows for a unique reality to emerge, namely, that a second marriage can be carried out within the first marriage (polygamy) if the parties (husband/wife) agree to it with a court order.

In applying for polygamy, the law certainly regulates certain reasons for the occurrence of polygamy for a husband against his wife, namely:

- a. The wife is no longer able to carry out her obligations
- b. The wife has a physical disability or an incurable disease
- c. The wife cannot bear children

These are known as alternative or facultative reasons, and any one of them could be the reason for applying. Then

there are the conditions that a husband must meet to practice polygamy, which is as follows:

- a. There has been the blessing/approval of the first/previous wife
- b. There is a certainty of the ability to provide for the needs of their wives and children
- c. That husbands must provide a guarantee to be able to behave and act fairly toward their wives and children

Meanwhile, the above conditions are cumulative, which means that all points of the requirements must be met to obtain permission for polygamy for a husband.

Seeing that there are so many requirements that must be met to carry out polygamy based on this law, it is difficult for a few people who want to practice polygamy to fulfill these requirements. Not to mention the additional court procedures involved in issuing a stipulation for polygamous marriages to be performed. This is undoubtedly an impediment that may put pressure on certain people who wish to enter into a polygamous marriage soon. As a result, religious law is positioned as an "alternative" to polygamous marriages. All of these requirements and reasons must be met, but if someone is in an unregistered marriage, court procedures that complicate polygamous marriages can be avoided. When a polygamous marriage is performed in an unregistered manner, the stipulations are not strictly enforced, making it easier for parties who want to hasten an unregistered marriage.

This is why unregistered marriage is a viable option for a small number of people who wish to practice polygamy without difficulty. However, the researcher was interested in learning how Indonesian law views this reality. This is an intriguing topic for the researcher to investigate, so the title "Implications of Unregistered Polygamy Marriage Ratification in Indonesia Marriage Law" was chosen. As a

result, the formulation of the problem that will be discussed in greater depth and detail as a result of this research is:

1. What does Unregistered Marriage (Nikah Sirri/Religious Marriage) mean?
2. What are the Implications of Unregistered Polygamy Marriage Ratification in the Perspective of Marriage Law in Indonesia?

### Method

The approach used in this research was the empirical juridical approach, which is legal research on the enactment or implementation of normative legal provisions in action in every specific legal event that occurs in society. In other words, this approach compared how legal product policies are implemented (practiced) in the field (regulations). Later, as a tangible manifestation of the existing reality, this research would be accompanied by event stamps.

### Results and discussion

#### 1. Unregistered marriage

Marriage is a religious teaching that is explicitly forbidden in the Qur'an. The mention of "Allah" appears several times in the Qur'an. Marriage is commonly defined as the union of a man and a woman. Indonesia, as a country that adheres to the Pancasila (Five Principles of the Indonesian State) principles and is based on the 1945 Constitution, gives every citizen the independent right to marry according to their religion or belief. The country then provides legality for the union of the couple. However, the legitimacy granted by the country is not the primary requirement for the religious validity of a marriage (in this case, an Islamic religious marriage). This reality is causing quite a stir in various circles. Some argue that marriage is a human right that the government has no authority to regulate. This is consistent with the freedom stated in article 28B paragraph 1: "Every citizen has the right to form a family and continue offspring through a legal marriage" (second amendment to the 1945 Constitution).

Based on Indonesian marriage law, namely Law No. 1 of 1974, the country follows the principle of open monogamy. This means that if the parties, in this case, the husband and wife, agree, the Court can grant a husband permission to have more than one wife via a valid court order. This is in line with Article 3 paragraph 2 of Law No. 1 of 1971. It is distinct from the Civil Code's closed monogamy principle (BW). The principle of absolute monogamy in *Burgerlijk Wetboek* means that a husband can only have one wife and vice versa.

The term "sirri" (unregistered) marriage is not defined in related laws or regulations. This is due to the definition of society as it sees this reality. Experts define veiled marriage as legal as long as the marriage adheres to the pillars. Several madhabs have their definitions of unregistered marriage:

Malikiyyah assumes that *Sirri* is something that invalidates because it is adultery.

Syafi'iyah and Hanafiyah: *Sirri* marriage is legal because the secrecy that is carried out does not affect whether or not the marriage is valid because the dissemination of information on the intended marriage is something that is *sunnah* (the traditions and practices of the Islamic prophet Muhammad that constitute a model for Muslims to follow); Hambaliyah thinks that *Sirri* is *makruh* (the avoidance of which yields merit but the performance of which is not sinful).

1. Many factors made someone choose unregistered marriage compared to a state marriage, these factors were:
2. The perpetrators had difficulty meeting the requirements established by Indonesian marriage law, for example, the perpetrators were underage, and the application for underage marriage required a lengthy procedural process, so the perpetrators preferred unregistered marriages.
3. The perpetrators came into conflict with the administration because of their jobs; for example, a man working as a civil servant cannot have more than one wife. So, if he desires polygamy, he will enter into an unregistered marriage.
4. Unregistered marriage (nikah sirri) was frequently used to protect perpetrators from family disgrace, such as getting pregnant out of wedlock.
5. Then, unregistered marriage was frequently used as an alternative way to practice polygamy without the state's procedural regulations, allowing someone to have more than one wife without the wife's knowledge.

There were numerous other contributing factors. This is what keeps an unregistered marriage alive in Indonesian society to this day.

#### 2. Implications of sirri polygamy marriage law in the Perspective of marriage law in Indonesia

*Isbat nikah* (marriage ratification) refers to the ratification of a contract or determining the validity of a marriage. This is obtained through the Religious Courts' decisions. Marriage ratification is a method of preserving the registration of marriages that occurred before the existence of the marriage law, namely before the enactment of Marriage Law No. 1 of 1974. Marriage ratification is commonly referred to as a "statement of the validity of the marriage." As a result, marriage ratification refers to the determination of the truth (validity) of marriage, whereas a marriage certificate refers to an attempt to legalize marriage through the appointment of a judge at the Religious Court. Marriage ratification is intended for those who were married before the existence of the marriage law, namely before 1974. Marriages under the year 1974 can carry out marriage ratification by applying to the Religious Court to save marriages that have taken place so that they are registered by the country.

In the field, there were numerous cases of marriages after 1974 resulting in applications for marriage certificates for those who were already unregistered. The goal is for the state to recognize unregistered marriages that have occurred. This is because, in most cases, these marriages produce children who require legal certainty to fulfill the child's civil rights, which must be recognized by the country. As a result, perpetrators of unregistered marriage petition the religious court for marriage ratification.

According to the findings, unregistered marriage practitioners found it simple and legal to marry in an unregistered manner. Only by fulfilling the pillars of marriage could husband and wife relations be carried out without having to go through procedures. It was still cultivated in the Indonesian people's local wisdom, particularly in remote areas.

The researcher sampled applications for marriage ratification registered at the Wonogiri Religious Court in

2022, reaching 24 marriage applications whose validity was requested through Applications for Determination of Marriage Certificates. This means that unregistered marriages performed in the Wonogiri district will continue to exist until 2022. This request was not always granted, according to SIPP data from the Wonogiri Religious Court. When deciding on marriage ratification, the judge must exercise extreme caution in making decisions based on the evidence presented at trial. The judge would examine the validity of the previous unregistered marriage and whether the applicant had truly fulfilled the pillars of marriage. If the pillars of marriage have been followed correctly, and the perpetrator of the unregistered marriage is a young man and a virgin, the judge will grant it as long as he has strong evidence in court. It is a different story if the application for marriage ratification is made for those who have been married unregistered but not in the first marriage, implying that the unregistered marriage is carried out in another marriage. With the determination of the marriage ratification from the religious court, this becomes a green card for husbands to practice polygamy without having to fulfill the legal obligations and requirements of polygamy. This is a veiled way for a handful of people who want to do polygamy to be free from the existing procedures, they will perform unregistered marriage first (in the first marriage) and then will apply for a marriage certificate to the Religious Court. Of course, this is law smuggling (illegal polygamy) which is still found in the field.

For example, in the case under the jurisdiction of the Wonogiri religious court with case number 138/Pdt.P/2022/PA.Wng, Petitioner I (future husband) was still married to his first marriage at the time of the core of the case, and later in that marriage, Petitioner I Unregistered marriage to Petitioner II. Petitioner I and Petitioner II's unregistered marriage was then registered with the Wonogiri Religious Court to apply for marriage ratification. In legal considerations, the Judge examined the validity of the pillars of marriage performed by the applicants, and based on the pillars of marriage, the unregistered marriage in question was valid, but in point 3 of the facts of the trial, it was stated, When the unregistered marriage took place, Petitioner I was still bound by marriage to his wife to 1, even though Petitioner I's first marriage entered the divorce process. However, the Judge determined that the divorce proceeding was still within the marital bond between Petitioner I and his first marriage. On this basis, the Judge denied the application for a marriage certificate in case number 138/Pdt.P/2022/PA. Wng. The same thing happened with the Karanganyar Religious Court's decision in case number 0021/Pdt.P/2016/PA.Kra. The case that the researcher made summarized that Petitioner I filed a marriage certificate with Petitioner II to save the civil rights of children resulting from the unregistered marriage of Petitioner I and Petitioner II. Petitioner, I entered into an unregistered marriage because during the first marriage, Petitioner I did not obtain any children so Petitioner I entered into an unregistered marriage with Petitioner II and was blessed with two children. Petitioner I and Petitioner II filed a marriage ratification application at the Karanganyar Religious Court to protect the child's civil rights. According to the judge's findings, the second marriage (unregistered marriage) that was performed was something that could not be granted a marriage ratification application, because when the unregistered marriage was performed, Petitioner I

(husband) was still in a marriage bond with his wife in the first marriage. This would be illegal polygamy if the judge granted the marriage certificate request. Examining the reality of this happening, how to save the civil rights of children resulting from unregistered marriages but cannot be married off, referring to SEMA Number 3 of 2018, in circumstances like this, the Petitioners can apply for the origin of the child. It is intended that the civil rights of children can be saved. If the judge granted the marriage certificate request, this would be illegal polygamy. Examining the reality of what is happening and how to protect the civil rights of children born of unregistered marriages but unable to marry off, the Petitioners can apply for the child's origin under SEMA Number 3 of 2018. It is intended to protect children's civil rights.

Based on previous cases, the implication of unregistered polygamy marriage ratification based on Indonesian marriage law was a reality that poses challenges to the existence of existing law. This is because there is no strict regulation regarding unregistered marriage in Indonesian marriage law, particularly in the case of unregistered polygamy. As a result, there is a legal loophole in this situation through which legal smuggling is carried out (illegal polygamy). Judges can carry out *rechtvinding* because there are no strict regulations governing this matter (law discovery). Using a legal sociological approach, judges can examine cases and reach settlements. The freedom of judges to make legal discoveries is, of course, balanced with society's sense of justice.

### Conclusion

Unregistered marriage is a marriage performed by fulfilling the religious pillars of marriage. Unregistered marriage is not a forbidden marriage, but it is not documented in state records. As a result, the country does not recognize the marriage that occurred. Unregistered marriage, on the other hand, is frequently used as an alternative by perpetrators because it does not necessitate a lengthy procedure. This is a legal loophole that can be used by those who want to practice polygamy but don't want to deal with the administrative side of things. Later, with a request for marriage ratification, the unregistered marriage will be validated through a religious court. This is primarily because unregistered marriage perpetrators require a valid state document to care for the status of the children born from the marriage. According to Indonesian marriage law, marriage ratification (*isbat nikah*) of unregistered polygamy is legal smuggling (illegal polygamy). It is because the state has established a separate procedure for polygamous marriages. The country's concern should be to be more stringent in regulating illegal polygamy so that no legal loopholes are exploited.

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