



CHAPTER II

REVIEW OF RELATED LITERATURE

A. Previous Studies

A study by Suriaman Maman (2008), thesis of the Sharia Faculty, *Jinayah Siyasiah* Department, The State Islamic University of Sunan Kalidjaga Yogyakarta entitled " *Kriminalisasi Sosiologis Nikah Sirri*" . This study focuses on the consequences of *sirri* marriage as a violation of conflict and forbidden by law, it is realized through various criteria acts that can be called a crime. Regarding to

the penalty, the practitioners who do not heed the marriage certificate stated in Government Regulation Number 9 of 1975, Article 45, paragraph 1 and 2.¹

Meanwhile, another work by Shukri Fathudin AW and Vita Fitria (2008) entitled "*Problematika Nikah Sirri dan Akibat Hukumnya bagi Perempuan*". The qualitative study is aimed at gaining a deep understanding of the phenomenon and problem of *sirri* marriage. The results of this study indicated that the different background of conducting *sirri* marriages on a case by case, but generally, reasons practiced of *sirri* marriage want to gain validity in religion, so that to create peace of mind, at least avoid immoral acts.

Psychological problems and stress as a result of uncertainty about the legal status of marriage. The psychological burden is also occurred because of people's stereotypes of women offenders unregistered marriages are considered as savings wife, pregnant out of wedlock, and so forth affair. Looking at the weaknesses and threats which are occurred in *sirri* marriage, then the excess not be able to overcome the problems which is faced, except by take advantage of existing opportunities that *itsbat* marriage. Various insurances appears in *sirri* marriage, seems also needs to be studied more seriously about the validity of the *sirri* marriage which has been used as a shortcut to justify conjugal relationship.²

Drs. M. Nur Yasin , M. Ag, entitled " *Hukum Perkawinan Islam Sarak* " is the third research in term of *sirri* marriage. This study discuss the ineffectiveness

¹ Mawan Suriaman, *Kriminalitas Nikah Sirri Dalam Pandangan Hukum Pidana Islam*, Skripsi S-1(Yogyakarta: Universitas Islam Negeri Sunan Kalijaga, 2008).

² Syukri Fathudin AW dan Vita Fitria, *Problematika Nikah Sirri dan Akibat Hukumnya bagi Perempuan*, penelitian (UPT MKU Universitas Negeri Yogyakarta:2008).

of Compilation of Islamic Law (KHI) as a product of positive law which is sign on Compilation of Islamic Law (KHI) in Presidential Instruction No. 1 of 1990. Compilation of Islamic Law (KHI) is idealizing to be effective in Indonesian Muslim society, at least the Sasak Muslim community living in Mataram. In addition, to the ineffectiveness of Compilation of Islamic Law (KHI) in the city of Mataram, who conducted *sirri* marriage by the Sasak people of Mataram with the several reasons, including; first, economic factors are classified as low income communities so that no fee to register the marriage at the KUA (Kantor Urusan Agama/ Office of Religious Affairs). Second, social factors that *sirri* marriage performed by Sasak people has become a culture and tradition that are run by their parents earlier. Third, education factor is the lack of education as they did not have knowledge of the procedures and the laws of marriage in Indonesia. Fourth, biological factors that lust so as to be able to easily changed couples, and the last one is the geographical factor is the city of Mataram which is located in the village so it is difficult to obtain information on procedures of marriage.³

Still in another study by Faizah Bafadhal entitled” *Nikah Sirri dalam Perpektif Undang-Undang Perkawinan*” is performed according to religious law (in this case of Islam) is a valid marriage, but because it is not done recording, formally the juridical marriage does not qualify as requirements prescribed by the Law on Marriage 1974 (Law no. 1 of 1974) and its implementing regulations. As a result of the law, then the marriage is not received state recognition and when one of the parties of both husband and wife neglect their duties then the other

³ M. Nur Yasin, *Hukum Perkawinan Islam Sarak*, (Malang: UIN Press; 2008), p. 25.

party can not bring a legal action, because they have no authentic proof of marriage that they do. It is also contrary to the provisions stipulated in the Law on Marriage No. 1 of 1974.⁴

This research also concerns with the *sirri* marriage, but there are same differences from those earlier studies. The difference from those earlier studies is; the object, the scope and the method are different. The first previous researcher *sirri* marriage on positive law perspective, an offense contrary, prohibited by law, through a variety of criteria that can be termed as the act of a crime. While, the second researcher more focused on understanding behind the phenomenon and problem of *sirri* marriage. SWOT analysis of gender is also used. The third researcher more focused on the ineffectiveness of Compilation of Islamic Law (KHI) and *sirri* marriage phenomenon of Sasak people in Mataram. While, the last researcher more focused on *sirri* marriage in the Marriage Act perspectives.

B. Fundamentals of General Marriage

1. Definition of Marriage

In *bahasa Indonesia*, marriage comes from the word "marriage" which means is making a family with the opposite sex; sexual intercourse or intercourse. Marriage is also called "marriage", derived from the arabic *marriage* (نكاح) "that the language means to collect, each insert, and used to mean intercourse (*Wahti*)". The word "marriage" itself is often used to mean sexual intercourse (*coitus*), as

⁴ Faizah Bafadhil, "Nikah Sirri dalam Perpektif Undang-Undang Perkawinan," *Jurnal Ilmu Hukum*.

well as to the meaning of the ceremony.⁵ Quran explains that marriage is creating a family life between husband, wife, children and parents in order to achieve a safe and peaceful life (*Sakinah*), who love each other socially (*Mawaddah*) and sympathize with each other (*Rahmah*).⁶ Marriage, a legally and socially sanctioned union, usually between a man and a woman, that is regulated by laws, rules, customs, beliefs, and attitudes that prescribe the rights and duties of the partners and accords status to their offspring (if any).⁷

According to Islamic legal terms, there are several definitions, which are:

الزواج شرعا هو عقد وضعه الشارع ليفيد ملك استمتاع الرجل بالمرأة وحل استمتاع المرأة بالرجل

Marriage by syara' means the contract stipulated Personality to allow fun between men and women and justifies having happy women with men.

Muhammad Abu Ishrah provides a broader definition, which was also cited by zakiah Daradjat:

⁵ Abd.Rahman Ghazaly, *Fiqh Munakahat* (Jakarta: Kencana Prenada Media Group, 2003), p. 7.

⁶ Idris Ramulyo, *Hukum Perkawinan Islam Suatu Analisis Dari Undang-Undang No. Tahun 1974 Dan Kompilasi Hukum Islam* (Jakarta: PT Bumi Aksara, 2004), p. 3.

⁷ <http://www.britannica.com/bps/user-profile/4419/the-editors-of-encyclopaedia-britannica>, access on 24th of May 2014.

عقد يفيد حل العشرة بين الرجل والمرأة وتعاونهما ويحدد مالكيهما من حقوق و ما عليه من

واجبات

Contract law to the benefit of skill to hold a family-relationship (husband and wife) between men and women and hold mutual help and provide limits to the rights of the owner and the fulfillment of their obligations to each other.

According to the Hanafi, marriage is a sexual relationship. According to the meaning majazi (*mathaporic*) or the meaning of the law is to contract (agreement) which makes lawful sexual relations between husband and wife as a man and the woman. Meanwhile, according to Imam Shafi'i, the notion that marriage is a contract became lawful sexual relations between men and women while in the proper sense majazi (*mathaporic*) that marriage means sexual intercourse.⁸

According to The Law on Marriage No. 1 of 1974 (section 1) , it is the marriage bond between the inner and outer man with a woman as husband and wife with the intention of forming a family (household) , are happy and eternal based on God . The consideration is based on Pancasila as the state where the first precept is on God , the marriage has a close relationship with religion , so marriage is not just to have an element of birth , but mental and spiritual elements also have an important role .⁹Section 2 article (1) of Act No. 1 of 1974,

⁸ Idris Ramulyo, *Hukum Perkawina,n* p.1-2.

⁹ Idris Ramulyo, *Hukum Perkawinan*, p. 2-3.

determines that the *marriage is valid, if it is done according to the laws of each religion and belief it.*¹⁰ Section 2 article (2), *provides that every marriage is recorded according to the legislation in force.*¹¹ Surely the people who perform marriages according to the Moslem religion, as well as other religions. About marriage documentation specific to those stipulated in Islamic Law No. 22 In 1946 in conjunction with Law No. 32 of 1954.¹²

In the Compilation of Islamic Law, the definition of marriage and its purpose is stated in sections 2 and 3 as follows: Section 2 "*Marriage is marriage according to Islamic law, which is a very strong agreement or mitsaqan ghalizan to obey God's command and execute it is worship.*"¹³ Section 3 "*Marriage aims to bring home life sakinah, mawaddah, and rahmah.*"¹⁴ Suggestion of marriage in Islam is described in Prophet's hadith, namely "*O young men , whoever among you is able and willing to want marriage that he should marry (marriage) , because it would alienate the real marriage blind eye to people who are not kosher seen and will keep him from the temptation of lust . "* Abd Allah ibn Mas'ud narrated, another tradition that promotes mating is of hadith scholar of hadith worshipers Apostle, "*And whoever is not able to marry let him due to*

¹⁰ Undang-Undang No. 1 Tahun 1974 tentang Perkawinan, Pasal 2 ayat (1).

¹¹ Law No. 1 of 1974 on Marriage, Article 2 paragraph (2). "Registration of marriage is the same as the recording of important events in one's life, such as birth, death stated in the paperwork, an official certificate that is also included in the list of recording."

¹² Idris Ramulyo, *Hukum Perkawinan*, p. 3.

¹³ Compilation of Islamic Law Section 2.

¹⁴ Compilation of Islamic Law Section 3.

fasting lust against women will be reduced." ¹⁵He suggested that getting married because the marriage can keep one eye sight and protect lust (*syahwat*).¹⁶

Qur'an explained "Marriage as a very strong agreement", referred to as "*mitsaaghan ghalizhan*". Marriage is a marriage entered into an agreement due to the way it is set in a marriage ceremony, pillars and requirements of marriage, how to decide the marriage also is set to divorce procedures, the possibility *fassakkh*, and *syiqaq*. Three special characters of the contract marriage, namely;¹⁷ marriages can not be performed without any voluntary element of both sides, both parties marriages binding agreement have the right to decide the marriage covenant by existing provisions in the Act, the marriage agreement set limits the legal limit on the rights and obligations of each party. Approval of the marriage is not essentially the same as the other agreements, such as the agreement of sale, lease, exchange, and others.¹⁸ According to Mr. Wirjono Prodjodikoro difference between marital consent and approval of the other is¹⁹, in the agreement was not contrary to morality, laws and public order. Conversely in a marriage has been previously determined by the contents of the consent law between husband and wife²⁰.

¹⁵ Idris Ramulyo, *Hukum Perkawinan*, p. 11.

¹⁶ Idris Ramulyo, *Hukum Perkawinan*, p. 13.

¹⁷ By means of making a proposal held in advance to find out if both parties agree to carry out the marriage or not.

¹⁸ Idris Ramulyo, *Hukum Perkawinan*, p. 16-17.

¹⁹ For example: approval of the sale, lease, exchange, and others.

²⁰ Soemiyati, *Hukum Perkawinan Islam dan Undang-Undang Perkawinan* (Undang-undang No. 1 Tahun 1974, tentang Perkawinan (Yogyakarta: Liberty, 2004), p. 10.

2. Pillars of Marriage

Pillars and requirements of marriage in Islamic law is essential for the creation of a bond of marriage between man and woman. Pillars of marriage the main factor to determine the marriage's validity. The marriage requirements are the factors that must be met by the law which is the subject of an element or part of the marriage contract. ²¹ Imam Syafi'i said are five (5) pillars of marriage; bridegroom, bridesmaid, guardian, two witnesses and *sighat akad nikah*. ²²

According to section 14 of Compilation of Islamic Law, the pillars of marriage consists of prospective bridegroom on condition; not a mahram of the bride, of their own accord, not running *ihram of hajj* and clear her people. ²³ Bridesmaid on condition; no hindrance *syar'i*, not a husband, not a mahram, not being in the waiting period (*iddah*), on their own, clearly, and not doing *Ihram*, ²⁴ guardians, two male witnesses, and consent granted (*ijab kabul*). The five elements or pillars of marriage are met, then the marriage is valid, but on the contrary, if one or more elements or pillars are not met, then the marriage is not valid. ²⁵

Muhammad as cited in Nasir, Shafi'i, Zuhur (*Nailul Authar* vol 5) as the following description:

²¹Neng Djubaidah, *Pencatatan Perkawinan & Perkawinan Tidak dicatatkan Menurut Hukum Tertulis Di Indonesia dan Hukum Islam* (Jakarta: Sinar Grafika, 2012), p. 107.

²² Abd. Rahman Ghazaly, *Fiqh Munakahat* (Jakarta: Kencana Prenada Media Group, 2006), h. 48.

²³ M. Nur Yasin, *Hukum Perkawinan*, p. 58.

²⁴ M. Nur Yasin, *Hukum Perkawinan*, p. 59.

²⁵ Neng Djubaidah, *Pencatatan Perkawinan*, p. 107.

"Every marriage is not attended by four (elements), namely the bridegroom, 'aqid who contracted (mengakadkan), and two witnesses, then the marriage is not valid."

Therefore, the pillars of marriage according to Islamic law is obliged the Muslims who will hold the marriage. The impact of valid or invalid marriage is the influence other family law, in legal marriage itself and inheritance law.²⁶ One example of the impact of valid or invalid marriage is on the legal relationship between the child born from the mother and father marriage affecting marriage law and inheritance law. In marriage legitimate, marriage conducted according to religious law in accordance with section 2 article (1) *Law marriage result of the legal relationship between a child born to the marriage that is valid with the mother and father be valid anyway.*²⁷ In the legislation on marriage of Indonesia, the bridegroom and bridesmaid candidates are required to asking permission in advance to a parent or guardian before he did marriage. That is right, because marriage according to Islamic law not only civil law ties advance of individuals (husband and wife) are concerned, but also kinship between the two great families of both sides bride.²⁸

The context of marriage, guardianship is based on the etymology as a guardian conducting the marriage of a woman dependents. Based on terminology guardianship is a guardian execute a contract marriage with a woman who became his dependents with the willingness and dowry *mitsil*. A widow may determine the choice of men without the consent of a parent or guardian. While a

²⁶ Neng Djubaidah, *Pencatatan Perkawinan*, p. 108.

²⁷ Neng Djubaidah, *Pencatatan Perkawinan*, p. 108.

²⁸ Neng Djubaidah, *Pencatatan Perkawinan*, p. 110.

girl may not marry without the permission or approval of the her parents.²⁹ The islamic scholar as Maliki scholar in islam, approval to marry a person with child care, as one important element for the validity of marriage, but Hanafi and Hanbali considers the permission of the guardian only as a requirement only. The second scholar of thought is even more emphasized the importance of consent and qobul.³⁰ Shafi'i scholar perspective, according to the hadith of the Prophet Muhammad, which is narrated by Bukhari and Muslim (As Shahihani) from Siti 'Aisyah, *Prophet said, no marriage without guardian*. Hadith of the Prophet in Syafi'i scholar besad on hadith Prophet from Siti 'Aisyah (ra). Prophet said, the woman marriage without permission from guardian of marriage is valid, repeatedly valid, valid.³¹

About the guardian, the provisions of the Prophet hadith, on the basis of legal guardians is very important in determining the legal status of marriage . According to the hadith of the Prophet Muhammad, which is narrated by five of Imam from Abu Musa ra . From the Prophet, that he said: “not marriage, but by the (absence of) guardian”. The marriage is invalid, if the guardian are done by people who are not have the right to be the guardian of marriage. It is based on the hadith of Shafi and Daruquthi from Ikimah bin Khalid , that happens on a journey, among them there was a widow who gave her affairs to a man who is not his guardian (in order to marry her) , and then the man marry her . Came the case in

²⁹ Mahasiswa Program Pascasarjana Program Studi al-ahwal al-syakhsiyyah Universitas Islam Negeri Malang, *Isu-Isu Gender Kontemporer* (Malang: UIN Maliki Press, 2010), p. 68.

³⁰ Mahasiswa Program Pascasarjana Program Studi al-ahwal al-syakhsiyyah Universitas Islam Negeri Malang, *Isu-Isu Gender*, p. 68.

³¹ Idris Ramulyo, *Hukum Perkawinan*, p. 51-52.

Umar bin Khattab , He was bind (whipping) people who marry and those who marry , and cancels the marriage.³²

Section 16 article (1) of Act No. 1 of 1974 about Marrital law that marriage must consent of the bridegroom and bridesmaid. Similarly, mentioned in section 16 article (1) and section 17 article (2) as follows: section 16 article (1) , marriage based on the consent of bride , section 17 article (2) , If the marriage was not consent by one of the bride, marriage can not be held .³³ Witness also the pillars of marriage in the hadith of the Prophet that must be met in every exercise of the marriage. Hadith narrated by Daruguthi from ' Aishah radiallahu ' anha, that, "There is no marriage except with a guardian and two witnesses were fair. If they are disagree, then authority who becomes guardian for those who no guardian." ³⁴Should of the two witnesses are Islamic, mature and fair. Qur'an does not explicitly set the witness of marriage , but in the case of divorce and reconciliation (*rujuk*) is mention of the witnesses , the conclusion that to prove the marriage needed the guardian and witness . It is important for the benefit of the bride, legal protection for the community, and for the bride not deny the sacred covenant of marriage in accordance the analogy of al - Quran surah al - Baqarah verse 282.³⁵

The final process of pillars marriage is *Ijab* and *Qobul*. Consent (*ijab*) is an expression of the bridesmaid who are usually represented by a guardian. An expression of the woman to tie themselves to a man as her husband formally ,

³² Neng Djubaidah, *Pencatatan Perkawinan*, p. 111.

³³ Law No. 1 of 1974 Paragraf 16 (1) and Paragraf 17 (2) about marrital act.

³⁴ Neng Djubaidah, *Pencatatan Perkawinan*, p. 112-113.

³⁵ Idris Ramulyo, *Hukum Perkawinan*, p. 52.

while Qobul means a declaration of acceptance of the men over the women's consent.³⁶ The parties of the contract must meet requirements in order contract legitimate. The requirements is; baligh as to have perfect skills , common sense , no compulsion , should know or understand and hear the speech or words respectively . The requirements of sighat ceremony is; *First*, consent (*akad nikah*) orally, except for who can not pronounce it orally may by writing or signs. *Second*, the consent (*akad nikah*) must be performed in a ceremony. *Third*, between *ijab* and *qobul* should not be interspersed with words or deeds that may divert an on going contract. *Fourth*, the *ijab qobul* should not be hung on a condition, based on the future, or be limited time. *Fifth*, each party must listen and understand spoken words or gestures at a time when the contract marriage.³⁷

A marriage is considered valid if meets the requirements set by legislation. there are two types, namely the material requirement and formal requirement. *First*, material requirerment that concerning the parties relating to marriage or personal related to someone who must be considered in performing a marriage. Several material requirements ; must permission from the parents of both parties if the brides has not reached the age of 21 years. a husband must be aged 19 years and women aged 16 years unless a dispensation granted by the court or registrar appointed , the brides are not in a state of marriage except religion that allows polygamy , for women who would perform the marriage for the second time based on law states after a waiting period.³⁸ Women who broke up his marriage because of death waiting period is 4 (four) months 10 (ten) days, the woman who broke up

³⁶ Idris Ramulyo, *Hukum Perkawinan*, p. 53.

³⁷ M. Nur Yasin, *Hukum Perkawinan*, p.64.

³⁸ M. Nur Yasin, *Hukum Perkawinan*, p. 65.

his marriage because divorce waiting period is 3(three) times sacred. *Second*, formal requirement is the procedures must be met before and at the time of marriage which include; report marriage, marriage reporting, prevention marriage, occur marriage.³⁹

C. Overview of *Sirri* Marriage

1. Definition of *Sirri* Marriage

Sirri marriage is derived from the word "*marriage*" and "*sirri*". The first definition of *sirri* marriage is the marriage that not compliting pillars and requirements of marriage, as stated by Umar ibn Khattab, when he received a complaint about the case that only marriage was witnessed by a male witness and a female witness. However the meaning of *sirri* marriage, ie compliting pillars and requirements of marriage but not yet recorded in the Office of Religious Affairs (KUA) Subdistrict for people who are Muslims.⁴⁰

According to Maliki of fiqh terminology, marriage is: marriage is over the husband's message, witnesses and local families must be secrecy. Maliki schools bans *sirri* marriage. The marriage be canceled, and the actors of *sirri* marriage could be punished *had* (flogging or stoning), if has been a sexual relationship between them must recognition by four witnesses. Likewise, Shafi'i and Hanafi scholar does not allow *sirri* marriage. According to the Hanbali scholar marriage was held according to the Islamic law is valid, although suppressed by families,

³⁹ M. Nur Yasin, *Hukum Perkawinan*, p. 66.

⁴⁰ Neng Djubaidah, *Pencatatan Perkawinan*, p. 345.

guardian and witnesses, it is *makruh*. According to the Caliph Umar ibn al-Khatthab been threatened the actors of *sirri* marriage by *had* punish.⁴¹

According to Ramulyo (2000) , *sirri* marriage is a marriage conducted by Indonesian Muslims, compliting the pillars and requairment of marriage, but not registered by the Law on Marriage No.1 of 1974 about marital law. Islamic sholar stated that is *sirri* marriage that is not hidden, and in accordance with the rules of marriage, it is just not listed in the administration of marriage. In others think that the *sirri* marriage hidden from public knowledge and does not need to be listed. Djubaedah in her interview with Feminah Magazine, she said that a shift in the meaning of *sirri* marriage . *Sirri* marriage is marriage not valid because it does not fulfill the pillars and requirements of marriage. The pillars of marriage is valid besad on two (2) witnesses, bridegroom and bridesmaid, guardian, if one is not complited the marriage is not valid. At the instigation of some certain circles, *sirri* marriage is a marriage that is not recorded, but in Islam concept marriage is not hidden, must be in the presence of walimah or wedding receptions.⁴²

Unregistered marriages in the view of Islam (Muhammad , 1992) is a marriage that is conducted to meet the requirements essential to the legitimacy of the marriage contract is characterized by : bridegroom , guardian , two witnesses , and *ijab qobul* . *Sirri* marriage process only perform the pillars of marriage only, while the sunnah is not done , especially regarding the wedding called by walimah / celebrations , the people who know the marriage is also limited circles . Two

⁴¹ Quzwini , *Perkawinan Siri* , p. 4.

⁴² Iwan Zaenul Fuad, Agus Fakhrina, Abdul Aziz, dan Ahmad Rosyid, “Kriminalitas Sosiologis, p. 26-27.

forms in social review of *sirri* marriage is: *first*, the bride 's wedding without the presence of witnesses and a guardian , or presence of guardian without witnesses , then they are intestate to keep the marriage . This type is invalid of marriage, because it does not meet the requirements , namely the element guardians and witnesses. *Second* , the marriage was meet the pillars and requairment of marriage but they were (briede's marriage, guardian and witnesses) keep the marriage from society.⁴³

A study by DR.H.M. Quzwini , M.Ag entitled " *Perkawinan Siri dalam Perspektif Hukum Islam dan UU Nomor 1 Tahun 1974 tentang Perkawinan* " explained that the actually means of *sirri* marriage is confidential or closed . However, in the later development, there are some perception or assumption that the *sirri* marriage interpret as:⁴⁴

- 1) *sirri* marriage is a marriage that held by a man and a woman without using a guardian or witnesses are justified by Islamic law. According to the scholars that this marriage is not valid and like an adultery as a prophet hadith "that a marriage that does not present the four parties (bridegroom, guardian and two witsesse) is an adultery.
- 2) *sirri* marriage is performed by a man with a woman without registration of marriage as defined in section 2, article 2 of Law no. 1 of 1974 on Marriage, section 22 of Regulation No. 9 of 1975 of UUP the Implementing Regulations, section 8 of the Law No.23 of 2006 on Population Administration. The definition actually was meet the pillars

⁴³ Thriwaty Aarsal, *Nikah Siri*, p. 163-164.

⁴⁴ Quzwini , *Perkawinan Siri* , p. 4.

and requairment of marriage. It is just the marriage is not registered by the Registrar of Marriage employees (PPN) or KUA.

The firts definition of *sirri* marriage above, as unregistered marriage does not qualify under Islamic law and marital law, the pillars and requairments of marriage are not full it. That means is automatically the marriage is not valid. The concept of Islamic law a child born of the *sirri* marriage categorized as adultery. In a case can not be carried registration of marriage, because of early marriage as valid besad on law.⁴⁵ As the result, *sirri* marriage is a marriage based on Religion and customs, but it was not announced at the general public and is not recorded in the Office of Religious Affairs (KUA). However, pillars and requirements are met and absence of a ban on marriage in the religion (Islam) for both. In case of *sirri* marriage is legal dualism,⁴⁶ is state law (the law of marriage abbreviated UUP) and religious law or Islamic law (fiqh). However , in the times that some interpret as *sirri* marriage performed by a man with a woman without using a guardian or witnesses are justified by Islamic law , according to the scholars they agreed that

⁴⁵ Quzwini , *Perkawinan Siri* ,p. 4.

⁴⁶ The duality between the formal law (state) and religion (fiqh) in the history of this country is very complicated , because the transformation of fiqh law to the laws of this country is not easy . During the occupation of the Dutch East Indies , one of the known theoretical formulations of religious law into the legislation that is in Complexu receptio theory . This theory states that each individual Muslims as a whole are bound by the laws of Islam as a religion. Schools of this theory raised by figures such as LWC Van Den Berg , Salomon Keizer , and Frederik C. Winter . Based on this theory , the Dutch government establish religious courts in Java and Madura in 1882 who has the authority to resolve disputes marriage and inheritance . In a way then , emerging theories of law in this country as an anti- thesis of the previous theories , one of which is a theory that suggests that existentialism : Islamic law is an integral part of national law . Islamic law there as a self-reliance , strength and authority recognized by national law and national law is Indonesian . Islamic legal norms function as filter material of national law . See , Chaerana , Musakkir and Arfin M. Hamid , *Juridical Analysis of the Guardians Marriage For Children Born of Marriage Siri* , p . 6 .

this type of marriage is unauthorized and as an adultery .⁴⁷ In the positive law there is no discussion about *sirri* marriage, but this problem can be studied when one does not record the marriage in registered institution of marriage , then the marriage is invalid and out of the existing provisions , because he did not get legal protection . The Law of the Compilation of Islamic Law section 7 (1), explained that: "*Marriage can only be proven by deed of marriage made by the employee of registered Marriage.* " In the article must affirm that marriage is no concrete proof that a marriage can already bind up with provide benefits to families and facilitate the child to receive education in adulthood, which is why the state giving best way for the community in terms of marriage through legislation provisions that already exist.⁴⁸

Three principles that should be considered in the legal marriage, namely: *first, absolute abstract* principle is a principle in law dating or brides of marriage actually has been determined by God. *Second, selectivity* principle is the principle of marriage must be select with whom he should or forbidden to marry. *Third*, the *legality* principle is a principle of marriage, obligatory listed.⁴⁹ *Sirri* marriage has become a phenomenon of Indonesian society as an alternative to provide lawful status in a relationship. Not only ordinary people on the science of religion and the poor who do not have the cost to register a marriage to KUA , the Kiyai ,

⁴⁷ Basically *sirri* marriage is not recognized by positive law in force in Indonesia, namely the law of marriage, so that implicates not only the consequences of the administration and the legal standing of marriage, but also has implications for the presence of his wife and children birth to, especially on the issue of due law posed to children whom she bore, one about fixing her marriage guardian,

See Chaerana, Musakkir and Arfin M. Hamid, *Juridical Analysis* p. 6.

⁴⁸ Mawan Suriaman, *Kriminalitas Nikah* , p. 1-2.

⁴⁹ Idris Ramulyo, *Hukum Perkawinan*, p.34.

academics , artists and officials who were already many perform *sirri* marriage . *Sirri* marriage conducted by different backgrounds and factor of Indonesian society , including; people who have knowledge of the religion they choose to perform *sirri* marriage as to provide lawful status in a relationship and avoid adultery , case of Shyekh Pujiono who gets married to a little girl Lutfiana Ulfa. An owner *Miftahul Jannah* Boarding School. Ulfa's age (16 years old) as second wife. The officials a regent of East Kotawaringin named Supian Hadi who gets *sirri* marriage to Vita is artist of dangdut singer, Supian Hadi reported by his wife to the Jakarta Police that Supian Hadi married again and not with the approval of the first wife Iswanti. In addition, an Indonesia dangdut artist Rhoma Irama who gets *sirri* marriage to Angel Lelga, Rhoma gets divorce because the marriage is known by the public. Mataram society also use *sirri* marriage as a culture with various factors behind it, including; economic factors, culture, sociology, education and geography. Sasak society in Mataram which are in rural areas that are very difficult to access to information , minimal knowledge about marriage , the people who have low economic , and the existence of a tradition handed down from the parents as a factor of their previous *sirri* marriage.⁵⁰

In Malaysia there are phenomenon of Sindiket marriage is persons who perform activities or *sindekate penipunaan* to people who want to marriage . Sindikat is a person or a group of parties who activities that violate laws and regulations that have been established by stealth. Conducting marriage cross country with breaking the rules is not considered as run marriage, but called by

⁵⁰ M. Nur Yasin, *Hukum Perkawinan*, p.73.

sindiket marriage who do not register marriages and illegitimate legislation in Malaysia . There are groups that take an advantage of existing opportunities to gain large profits , but the marriage was not valid under Islamic rules .⁵¹

Sindiket marriage is the person who provides the provide things that are needed in the process of marriage as the prince and witness marriage for couples who have problems to do marriage without following the procedure. This facilitates getting married couples only contact parties in the Malaysia- Thailand region. The couple will be taken to meet with the priest (*imam*) and witnesses of marriage that has been provided and are willing to pay duties of committing sizable . Many as 3 % of the marriage problems without truth and cases that have occurred doing by Siti Ftimah bin Ibrahim in Kelantan .⁵²

Sindiket also providing ease paid less for couples to get married by bring prince and witnesses from Thailand to Malaysia to marry their areas and provide marriage certificate from Thailand. More provide convenience for the couple who have the problem because it does not require a passport. As a result, there was a fake marriage certificate is not approved by the Islamic Majlis of Thailand and Malaysia kingdom, because the couple of married by their irresponsible . It will be realized when the couple wanted to register their marriage (*ithbat nikah*) . Married couples from Malaysia who marraige in Thailand not only because the easy procedure, but there are also sources clandestinely sindiket services advertise

⁵¹ Hamidah binti Harun, *Perkahwinan*,p. 57.

⁵² Hamidah binti Harun, *Perkahwinan*,p. 58.

on the blog itself. Blog address is kosher. Com, marriage -
siamm.sukasamasuka.net.⁵³

But the marriage was essentially useless, because using the ruler or priest who does not have a scientific religion (bertauliah) . Therefore the issue of marriage can not be underestimated because it involves a child who will be born later.⁵⁴ Akta of Islamic Family Law (Wilayah Persekutuan) 1984⁵⁵ requires a registration of marriage in the Syariah Courts in Malaysia.

2. The Islamic Family Law Enactments, Selangor 1984

Selangor is the first state effort reforms Law Act 1952. The law regulated about authority and function Majlis of islamic religion, inauguration mufti and fatwa, the establishment of the Sharia Court, inauguration *kadi* and designation area authority of the Syariah Court and Family Law. Beside, it also set about

⁵³ Hamidah binti Harun, *Perkahwinan*, p. 57.

⁵⁴ Hamidah binti Harun, *Perkahwinan*, p. 58.

⁵⁵ The all section countries have law self in Family wide that generally by called enakmen or statuta (in Indonesian Language is Statuta). Enakmen-enakmen that mean as summary by Muchtar Zarkasyi are;

- (1) The Islamic Family Law Enactments, Kedah 1979 (1964);
- (2) The Islamic Family Law Enactments, Kelantan 1983;
- (3) The Islamic Family Law Enactments, Melaka 1983;
- (4) The Islamic Family Law Enactments, Negeri Sembilan 1983;
- (5) Deed The Islamic Family Law Enactments, Wilayah Persekutuan 1984;
- (6) The Islamic Family Law Enactments, Selangor 1984;
- (7) The Islamic Family Law Enactments, Perak 1984;
- (8) The Islamic Family Law Enactments, Pulau Pinang 1985;
- (9) The Islamic Family Law Enactments Penertiban, Terengganu 1985;
- (10) The Islamic Family Law Enactments, Pahang 1987;
- (11) The Islamic Family Law Enactments, Perlis (draft);
- (12) The Islamic Family Law Enactments, (Pindaan), Klantan 1985;
- (13) The Islamic Family Law Enactments, (Pindaan), Klantan 1987;
- (14) The Islamic Family Law Enactments, (Pindaan), Selangor 1988;
- (15) The Islamic Family Law Enactments, Johor 1990;
- (16) Ordinan Family Law, Serawak 1991;
- (17) The Islamic Family Law Enactments, Savah.

(Muchtar Zarkasyi, *Hukum Keluarga Islam di Malaysia, makalah*, Published by DEPAG RI, 19 Septemberth 2002, p. 1-2).

See on Muhammad Amin Summa, *Hukum Keluarga Islam di Dunia Islam* (Jakarta: PT Raja Grafindo Persada, 2004), p. 170.

mosques, converts, finance and public affairs. ⁵⁶This reforms was followed by other countries by releasing Enakmen Pentadbiran of Islamic Law by state respectively. The enakmens is;⁵⁷

1. Enakmen Pentadbiran Undang-undang Islam, Selangor, 3/1952, 4/1960, 7/1961, 8/1962.
2. Enakmen Pentadbiran Undang-undang Islam, Terengganu, 4/1955, 2/1964.
3. Enakmen Pentadbiran Undang-undang Agama Islam, Pahang, 5/1956, 2/1960, 14/1960, 12/1963.
4. Enakmen Pentadbiran Undang-undang Islam, Melaka, 1/1959.
5. Enakmen Pentadbiran Undang-undang Islam, Pulau Pinang, 3/1959.
6. Enakmen Pentadbiran Undang-undang Islam, Negeri Sembilan, 15/1960.
7. Enakmen Pentadbiran Undang-undang Islam, Kedah, 9/1962, 1/1963, 8/1965/1978.
8. Enakmen Pentadbiran Undang-undang Islam, Perlis, 3/1964. Enakmen Pentadbiran Undang-undang Islam, Perak, 11/1965.
9. Enakmen Mahkamah Syariah dan tentang Perkahwinan Islam Kelantan, 12/1966.
10. Enakmen Pentadbiran Undang-undang Islam, Johor, 14/1978.

Shafi'i scholar a reference of Islamic Family Law early 60s or the independence of Malaysia. Nevertheless, most of these laws were made after

⁵⁶ Miftahul Rohmah, "Perkawinan di Bawah Tangan dan Solusi Hukumnya di Indonesia dan Malaysia," *Skripsi*, (Jakarta: Universitas Negeri Syarif Hidayatullah, 2011), p. 38.

⁵⁷ Raihanah Hj Azahari, "Kedudukan Mazhab Syafi'i dalam Undang-Undang Keluarga Islam: Satu realiti," *Jurnal Fiqh*: No. 4 (2007), p. 3.

independence, it does not much change the way of Islamic Law in Malaysia. Hence, every country has own laws then there are many weakness, such as in terms of the function or implementation. In principle all legislation that is similar to the Shafi adopt but still no difference. Therefore, the effort has been taken to equalize the Family Law for countries in Malaysia . The purpose of *jawatankuasa* (minister) has been formed to reform this law. They have been referred to the Marriage and Divorce Ordinance to the matters in accordance with Islam. Reference is also made to the family laws in Muslim countries in the Middle East such as Egypt, Syria and Pakistan. Draft legislation has been updated and has received several countries have followed the example of legislation. These laws have included the:⁵⁸

1. Enakmen Undang-undang Islam Keluarga Islam, 1983, Kelantan (No. 1 of 1983).
2. Enakmen Undang-undang Islam Islam (Negeri Sembilan), 1983 (No. 7 1983).
3. Enakmen Undang-undang Islam Keluarga Islam, 1983, Malacca, (No. 8 of 1983).
4. Enakmen Undang-undang Islam Keluarga Islam, 1984, Kedah (No. 1 of 1984).
5. Akta Undang-undang Keluarga Islam (Wilayah Persekutuan) 1984 (Akta 303).

⁵⁸ Raihanah Hj Azahari, *Kedudukan Mazhab*, p. 4-5.

6. Enakmen Undang-undang Islam Keluarga Islam 1984, Selangor (No.4 of 1984).
7. Enakmen Undang-undang Islam Keluarga Islam 1984, Perak (No. 13 of 1984).
8. Enakmen Undang-undang Islam Keluarga Islam 1985, Pulau Pinang (No.2 of 1985).
9. Enakmen Undang-undang Islam Keluarga Islam (Terengganu) 1986.⁷

Basically, the Laws that update about engagement, marriage, registration of marriage, dissolution of marriage, living, childcare, *faraid* and heritage. Legislation reform is seen as keeping the law of Syarak and do not obey the law of *syarak* it can be valid. While, if there are lacunae (*lakuna*) the law of *syarak* also be a reference *muktamad*.⁵⁹

3. *Sirri* Marriage in the Islamic Perspective

Sirri marriage is valid if meets the requirements and pillars of marriage even though not listed/registered. Qur'an and Sunnah are not set in concrete about register of marriage. According to the positive law, unregistered marriage is not valid because it does not comply of the requairment of marriage is the registration of marriage . Without the recording , a marriage have not deed authentic is marriage certificate. The marriage certificate was obtained marriage ithbat petition submitted to the Religious Courts . The contract or other employment relationships should be listed , should the marriage ceremony is to be listed. The marriage record contains the benefit in people's lives . Conversely , if the marriage

⁵⁹ Raihanah Hj Azahari, *Kedudukan Mazhab*, p. 4-5.

is not clearly regulated and not recorded will be used by the parties only for personal interests and harm others , especially wife and children .⁶⁰

The events that occurred in the family (has legal aspects), need to be registered and recorded, so that both are concerned and other interested persons have authentic evidence about these event. Authentic proof that can be used to support the position of a person which make by institution.⁶¹ Suryadharma Ali⁶² explained that *sirri* marriage is a valid marriage, because the pillars and requairment of marriage was meet. He argues in terms of fiqh , there is no term about *sirri* marriage . *Sirri* marriage is a marriage not recorded, if the development was abused, that is mean the *sirri* marriage is not wrong , but the actors of *sirri* marriage is wrong. Suryadharma Ali recognizes that need regulate the issue of unregistered marriages, polygamy, temporary marriages in an Act. Not yet well decided by the government, because It is due to the Law draf (RUU) and must be discussed based on academic research and input from various parties and there should be a discussion in interdept .⁶³

4. *Sirri* Marriage in the State Legal Perspective

Sirri marriage in the of state legal prespective relates to the registration of marriages in government authorities is the Office of Religious Affairs (KUA) , as regulated by Marriage Act No. 1 of 1974 , the Act was not the first that regulates the registration of marriage for Indonesian muslim, existing Act 22 of 1946 , which regulates the recording of marriage , Divorce and referred , mentioned : (1)

⁶⁰ Thriwaty Aarsal, *Nikah Siri* , p. 165.

⁶¹ Thriwaty Aarsal, *Nikah Siri* , p. 165.

⁶² Ministry of Religion (Menag) Republic of Indonesia.

⁶³ *Nikah Sirri Sah*”, Telaah Utama, Edisi 19, tahun III, Februarith 2010, p. 11.

marriage was supervised by the registrar of marriage , (2) for couples to marriage without the supervision of a registrar of marriage get penalties as is an offense . The purpose of registration of marriages is get secure law and order , The Law on Marriage No. 1 of 1974 on registration of marriage is mentioned , " each marriage is recorded according to the laws in force " , while at the another article mentioned , " marriage is valid , if done according to the laws of each religion and belief" .⁶⁴

Explanation of the Marriage Act and the validity of the registration of marriage mentions : (1) *there is no legal marriage outside the religion and (2)* the means of religious law , including the provisions of the applicable legislation . Compilation of Islamic Law (KHI) in Indonesia mentions, the purpose of registration of marriages by the supervision of the Registrar of Marriage employee is to guarantee the order of marriage. Marriage are not listed by the state as to tolerate living together outside of marriage, and this is very detrimental to the parties involved (especially women), especially there are children who are born, they are born from parents who live together without marriage registered, and a child only has a legal relationship with the mother, in the sense of having no legal relationship with the father, in other words, has no juridical father.⁶⁵

A marriage can be proved by marriage certificate which is released by an Officer Civil or Office of Religious Affairs (KUA). Other evidence can not be used as evidence of a marriage which is based on the provisions of section 100 of BW. If it can be shown that the marriage certificate , then the certificate is " the

⁶⁴ Thriwaty Aarsal, *Nikah Siri* , p. 166.

⁶⁵ Thriwaty Aarsal, *Nikah Siri* , p. 166.

only proof" and a " perfect evidence " (*Volledig bewijis*) . By showing a marriage certificate, then it should be not requested another evidence (additional evidence). In addition, people can not submit evidence to the contrary (*tegen - bewijis*) on the marriage certificate . With the evidence to the contrary, the strength of the marriage certificate can not be weakened, it can only alleges that the marriage certificate was a fake.⁶⁶

Marriage is valid it has been requairment and pillars of marriage was meet. Marriage must be a bride (husband and wife), guardian, two witnesses, and *sighat* (consent and qabul) . If the pillars have been complited even unregistered marriage in the Registrar of Marriage (PPN). Section 6 article (2) of compilation of Islamic law (KHI) states that marriages performed outside the purview of the Registrar of Marriage Employees do not have the force of law. This shows that the government does not want marriage performed under the hand. The existsof *sirri* marriage, it may lead a harmful effect for *sirri* marriage actors.⁶⁷

Government makes Draft Law of *sirri* marriage or draft material law by the Religious Affairs which would penalize marriage without official document or as unregistered marriages. The draft proposed of *sirri* marriage (RUU Nikah *Sirri* Hukum Materil) accomodating about *sirri* marriage or marriage not recorded in the office of religious affairs (KUA). The article states, if someone does *sirri* marriage or an arranged marriage , he can be threatened with imprisonment . Section 143 of Draft law of *sirri* marriage is only for Muslims, that muslim who

⁶⁶ R. Soetojo Prawirohamidjojo dan Marthalena Pohan, *Hukum Orang dan Keluarga* (Surabaya: Airlangga University Press, 2008), p. 41.

⁶⁷ Mahasiswa Program Pascasarjana Program Studi al-ahwal al-syakhsiyyah Universitas Islam Negeri Malang, *Isu-Isu Gender Kontemporer*, p. 76-77.

conduct unregistered marriage should be punished with a penalty varies , ranging from six (6) months to three (3) years and fines ranging from Rp 6 million to Rp12 million .⁶⁸



⁶⁸ See.... Rancangan Undang-Undang (Law Draf) of Sirri marriage at Jakarta KOMPAS.com , Friday, 12 Februarith 2010 , 08:05 p.m.