

**LEGAL CONSEQUENCES OF UNREGISTERED MARRIAGE ON THE  
VALIDITY OF MARRIAGE IN INDONESIA AND MALAYSIA**

**THESIS**

**by:**

**ABIER NAILIN NI'AM  
19210119**



**ISLAMIC FAMILY LAW DEPARTMENT**

**SHARIA FACULTY**

**STATE ISLAMIC UNIVERSITY OF MAULANA MALIK IBRAHIM**

**MALANG**

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**MALANG**

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## STATEMENT OF THE AUTHENTICITY

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In the name of Allah,

With consciousness and responsibility toward the development of science, the writer declares that thesis entitled :

#### LEGAL CONSEQUENCES OF UNREGISTERED MARRIAGE ON THE VALIDITY OF MARRIAGE IN INDONESIA AND MALAYSIA

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Malang, March 10, 2024  
Writer,



**Abier Nailin Ni'am**  
SIN 19210119

## APPROVAL SHEET

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After reading and correcting thesis of Abier Nailin Ni'am Student ID 19210119.  
Islamic Family Law Department, Sharia Faculty of The State Islamic University  
of Maulana Malik Ibrahim Malang entitled :

#### LEGAL CONSEQUENCES OF UNREGISTERED MARRIAGE ON THE VALIDITY OF MARRIAGE IN INDONESIA AND MALAYSIA

The supervisor stated that this thesis has met the scientific requirements to be  
proposed and to be examined on the Assembly Board of Examiners.

Malang, March 10, 2024

Supervisor I,

Supervisor II,



**Dr. Jamilah, MA.**  
NIP. 197901242009012007



**Dr. Suparmi, M.Pd**  
NIP. 197704112023212004

Acknowledged by,  
Head of Islamic Family Law  
Department



**Erik Sabti Rahmawati, MA., M.Ag.**  
NIP. 19751108200901200

## LEGITIMATION SHEET

### LEGITIMATION SHEET


The assembly board of Thesis Examiners of Abier Nailin Ni'am, SIN 19210119, student of Islamic Family Law Department, Syariah Faculty of The Islamic State University Maulana Malik Ibrahim of Malang entitled :

#### **LEGAL CONSEQUENCES OF UNREGISTERED MARRIAGE ON THE VALIDITY OF MARRIAGE IN INDONESIA AND MALAYSIA**

Has been passed and with grade : A

Board of Examiners

1. Dr. Zaenul Mahmudi, MA.  
NIP. 197306011999031001

  
\_\_\_\_\_  
Main Examiner

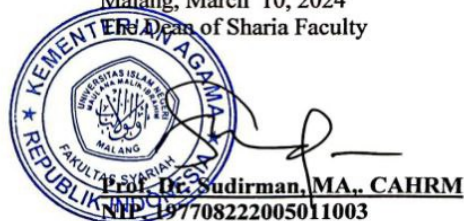
2. Erik Sabti Rahmawati, MA., M.Ag.  
NIP. 197511082009012003

  
\_\_\_\_\_  
Chairman

3. Dr. Jamilah, MA.  
NIP. 197901242009012007

  
\_\_\_\_\_  
Secretary

Malang, March 10, 2024  
The Dean of Sharia Faculty

  
Prof. Dr. Sudirman, MA., CAHRM  
NIP. 197708222005011003

## MOTTO

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَإِذَا أَمَرَ مِنْكُمْ

*“O you who believe, obey Allah, the Messenger (Prophet Muhammad), and the  
ululamri (power holders) among you.”*

*{QS. An-Nisa’/4:59}*

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Alhamdulillahirabbil'alamin, have given His rahmat and servan ,so we can finish this thesis entitled **“LEGAL CONSEQUENCES OF UNREGISTERED MARRIAGE ON THE VALIDITY OF MARRIAGE IN INDONESIA AND MALAYSIA.”** Peace be Upon into The Rasulullah Prophet Muhammad SAW who has taught us guidance (uswatun hasanah) to do activity correctly in our life. By following Him, may we belong to those believe and get their intercession on the last day of the end. Amen.

From all the teaching, advice, guidance, and helps of service for us to finish this thesis, then with all humility the writer will expresses the gratitude which is unequaled to:

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Malang, March 10, 2024  
Writer,

**Abier Nailin Ni'am**  
SIN 19210119

## TRANSLITERATION GUIDELINES

According to the General Guidelines for Indonesian Spelling, foreign words are written (printed) in italics. In the context of Arabic, there are special transliteration guidelines that apply internationally. The following table presents the transliteration guidelines as a reference for writing scientific papers.

### A. Consonant

The list of Arabic letters and their transliteration into Latin letters can be seen on the following page :

Arab	Latin	Arab	Latin
ا	`	ط	ṭ
ب	b	ظ	ẓ
ت	t	ع	‘
ث	th	غ	gh
ج	j	ف	f
ح	ḥ	ق	q
خ	kh	ك	k
د	d	ل	l
ذ	dh	م	m
ر	r	ن	n
ز	z	و	w
س	s	ه	h
ش	sh	ء	’
ص	ṣ	ي	y
ض	ḍ		

Hamzah (ء) which is often symbolized by alif, if it is located at the beginning of a word, then in its transliteration follows the vowel, it is not symbolized, but if it is located in the middle or end of a word, it is symbolized by the comma above (‘), turning around with a comma (‘) to substitute for the “ع” symbol.

## B. Vocal, Long Pronounce, and Dipthong

Arabic vowels, like Indonesian vowels, consist of single vowels or monophthongs and double vowels or dipthongs. Single Arabic vowels whose symbols are signs or harakat is written in the following way:

Arab	Name	Latin	Name
أ	Fathah	A	A
إ	Kasrah	I	I
أ	Ḍammah	U	U

Arabic double vowels whose symbols are a combination of harakat and letters transliterated in the form of a combination of letters, namely :

Sign	Name	Latin	Name
أِي	Fathah dan ya	ai	A dan I
أُو	Fathah dan wau	au	a dan U

Example :

- كَيْفَ : *kaifa*
- هَوْلٌ : *hauḷa*

## C. Maddah

*Maddah* or long vowels whose symbols are letters and letters, transliterated in the form of letters and signs, namely:

Harakat and Letters	Name	Letters and Sign	Name
أَـ	Fathah dan alif atau ya	ā	a dan garis di atas
إِـ	Kasrah dan ya	ī	i dan garis di atas
أُوـ	Ḍammah dan wau	ū	u dan garis diatas

Examples :

- مُعَامَلَةٌ : *mu'āmalah*
- رَضِيْتُ : *raḍītu*

#### D. Ta' Marbūṭah

There are two transliterations for *ta marbūṭah*, namely: *ta marbūṭah* which is alive or received *fathah*, *kasrah*, and *ḍammah*, the transliteration is [t]. Whereas *ta marbūṭah* that dies or gets a sukun, the transliteration is [h].

If the word ending in *ta marbūṭah* is followed by a word that uses the article *al-* and the two words are read separately, then the *ta marbūṭah* is transliterated with *ha* (h). For examples :

- حَضَانَةٌ : *ḥaḍānah*
- الرَّضَاعَةُ : *al-raḍā'ah*
- وَهْبَةُ الزُّحَيْلِيِّ : *Wahbah al-Zuhailī*

#### E. Syaddah (*Tasydīd*)

*Syaddah* or *tasydīd* which in the Arabic writing system is symbolized by a sign *tasydīd* (◌◌), in this transliteration is symbolized by a repetition of letters (double consonants) which is given a sign *syaddah*. For examples:

- سِرٌّ : *sirri*
- مُضَرَّةٌ : *muḍarrat*
- زَوَّجْتُ : *zawwajtu*

If letters ى has *tasydīd* at the end of a word and preceded by a letter with the letter *kasrah* (◌◌), then it is transliterated as if it were a letter *maddah* (ī).

For examples:

- الْغَزَيِّ : *al-Ghazī*
- وَهْبَةَ الرَّحِيلِيِّ : *Wahbah al-Zuhailī*

## F. Article

The article of faith in the Arabic writing system is symbolized by the letter ال (*alif lam ma'arifah*). In this transliteration guideline, the article of faith is transliterated as usual, al-, both when it is followed by a *shamsiah* letter and a *qamariah* letter. The article does not follow the sound of the letter directly following it. The article is written separately from the word that follows it and is connected with a horizontal line (-). For example:

- الْوَطَاءُ : *al-waṭau*
- الْعَقْدُ : *al-'aqdu*
- فَتْحُ الْقَرِيبُ : *fathu al-qarīb*
- وَلِيْمَةُ الْعُرْسِ : *walīmatul 'urs*

## G. Hamzah

The rule of trans'literating *hamzah* letters into apostrophes (') only applies to *hamzah* located in the middle and end of words. However, if the *hamzah* is located at the beginning of the word, it is not symbolized, because in Arabic writing it is an alif. For example:

- الْوَطَاءُ : *al-waṭau*
- تَأْمُرُونَ : *ta'murūna*
- شَيْءٌ : *syai'un*

## H. Auxiliary Verb

Arabic words, terms or sentences that are transliterated are words, terms or sentences that have not been standardized in Indonesian. Words, terms or sentences that are already common and part of the Indonesian language treasury, or are often written in Indonesian writing, are no longer written according to the above transliteration method. For example, the words Quran (from *al-Qur'ān*), sunnah, hadith, special and general. However, when these words are part of a series of Arabic texts, they must be transliterated as a whole. For example:

*Fiqh Sunnah*

*Fī zilaāl al-Qur'ān*

*Al-Sunnah qabl al-Tadwīn*

*Al-'Ibarāt 'Umūm al-Lafdz lā bi khuṣūṣ al-sabab*

## I. Lafadh al-Jalālah ( الله )

The word "Allah" preceded by particles such as jarr and other letters or as *muḍāf ilaih* (nominal phrase), is transliterated without the letter hamzah. For example:

- دِينُ اللَّهِ : *dīnullāh*

As for the *ta marbūṭah* at the end of a word that is based on *lafz al-jalālah*, it is transliterated with the letter [t]. Example:

- هُمْ فِي رَحْمَةِ اللَّهِ : *hum fi raḥmatillāh*

## **J. Capital Letters**

Although the Arabic writing system does not recognize capital letters (All Caps), in transliteration the letters are subject to the provisions on the use of capital letters based on the applicable Indonesian spelling guidelines (EYD). Capital letters, for example, are used to write the initial letter of proper names (person, place, month) and the first letter at the beginning of a sentence. When a proper name is preceded by the article (al-), the initial letter of the proper name is written in capital letters, not the initial letter of the article. If it is located at the beginning of a sentence, then the letter A of the article is capitalized (Al- ). The same provision also applies to the initial letter of the title of the reference preceded by the article al-, both when it is written in the text and in the reference notes (CK, DP, CDK, and DR). For example:

- Sayyid Sabiq
- Wahbah al-Zuhailī

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## ABSTRAK

Abier Nailin Ni'am, 19210119, 2024, Akibat Hukum Perkawinan Tidak Dicatat terhadap Keabsahan Perkawinan di Indonesia dan Malaysia, Skripsi, Program Studi Hukum Keluarga Islam, Fakultas Syari'ah, Universitas Islam Negeri Maulana Malik Ibrahim Malang, Pembimbing: Dr. Jamilah, MA, dan Dr. Suparmi, M.Pd.

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**Kata Kunci : Akibat Hukum; Perkawinan Tidak Dicatat; dan Keabsahan Perkawinan.**

Perkawinan tidak dicatat menjadi sebuah isu perkawinan disetiap negara. Di Indonesia perkawinan tidak dicatat dikenal dengan istilah *nikah sirri* sedangkan di Malaysia, perkawinan tidak dicatat dikenal dengan *nikah sindiket*. Secara umum, perkawinan tidak dicatat akan menghalangi istri dan anak yang dilahirkan pada perkawinan tersebut untuk menuntut hak-haknya. Undang-Undang Perkawinan di Indonesia tidak secara tegas mengatur mengenai pencatatan perkawinan, sehingga masih banyak terjadi perkawinan yang tidak dicatat, hal ini berbeda dengan akibat hukum perkawinan tidak dicatat di Malaysia yang sudah diatur dengan tegas mengenai sanksi hukum bagi pelaku pasangan perkawinan tidak dicatat.

Penelitian ini berfokus pada dua permasalahan, pertama mengenai bagaimana aturan tentang akibat hukum perkawinan tidak dicatat di Indonesia dan Malaysia. Kedua, bagaimana konsekuensi dari perkawinan tidak dicatat terhadap keabsahan perkawinan di Indonesia dan Malaysia. Penelitian ini termasuk penelitian hukum normatif dengan menggunakan metode penelitian kepustakaan. Menggunakan pendekatan perundang-undangan serta menggunakan pendekatan perbandingan untuk membandingkan Undang-Undang Perkawinan yang berlaku di Indonesia dan di Malaysia.

Melalui penelitian ini diperoleh hasil bahwa adanya kekosongan hukum pada aturan tentang akibat hukum perkawinan tidak dicatat di Indonesia. Di Indonesia, belum ada pembaharuan aturan mengenai akibat hukum perkawinan dicatat sehingga masih banyak masyarakat yang memanfaatkan adanya kekosongan hukum tersebut untuk melakukan perkawinan tidak dicatat yang dapat menimbulkan kerugian dikemudian hari. Sedangkan di Malaysia, aturan mengenai perkawinan tidak dicatat telah diatur secara ketat pada Enakmen masing-masing Negara Bagian. Aturan yang berlaku di kedua negara tersebut sepakat bahwa keabsahan suatu perkawinan tidak dapat ditentukan hanya dengan pencatatan perkawinan namun ditentukan oleh ketentuan agama masing-masing.

## ABSTRACT

Abier Nailin Ni'am, 19210119, 2024, Legal Consequences of Unregistered Marriage on the Validity of Marriage in Indonesia and Malaysia, State Islamic University of Maulana Malik Ibrahim of Malang, Supervisor : Dr. Jamilah, MA,. and Dr. Suparmi, M.Pd.

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**Keywords : Legal Consequences; Unregistered Marriage; and Validity of Marriage.**

Unregistered marriage is a marital issue in every country. In Indonesia, unregistered marriage is known as *nikah sirri*, while in Malaysia, unregistered marriage is known as *nikah sindiket*. Generally, an unregistered marriage will prevent the wife and children born during the marriage from claiming their rights. The Marriage Act in Indonesia does not strictly regulate marriage registration, so there are still many unrecorded marriages; this differs from the legal consequences of unrecorded marriages in Malaysia, which have been strictly regulated regarding legal sanctions for perpetrators of unrecorded marriage partners.

This research focuses on two problems. First is the rules regarding the legal consequences of unrecorded marriages in Indonesia and Malaysia. Second, what are the consequences of unregistered marriage on the validity of marriage in Indonesia and Malaysia? This research includes normative legal research using the literature research method. Statistic and comparative approaches were used to compare the marriage law in force in Indonesia and Malaysia.

This research found a legal vacuum in the regulations regarding the legal consequences of unrecorded marriages in Indonesia. In Indonesia, there has yet to be any renewal of the regulations regarding the legal consequences of registered marriages, so many people still take advantage of the legal vacuum to conduct unrecorded marriages, which can cause losses in the future. Meanwhile, in Malaysia, the regulations concerning unrecorded marriages have been strictly regulated in each state's Enakmen. The regulations that apply in both countries agree that the validity of a marriage cannot be determined only by recording the marriage but is determined by the provisions of each religion.

## ملخص البحث

عبير نبيل النعم. ١٩٢١٠١١٩. ٢٠٢٤. آثار الزواج غير الموثق رسمياً على صحة الزواج في إندونيسيا وماليزيا. رسالة جامعية، تخصص الأحوال الشخصية، كلية الشريعة، جامعة مولانا مالك إبراهيم إسلامية مالانج، تحت إشراف الدكتورة جميلة الماجستير و الدكتور سوفارمي.

الكلمات الرئيسية: آثار القانون، الزواج غير الموثق رسمياً، و صحة النكاح.

الزواج غير المسجل هو مشكلة زوجية في كل بلد. في إندونيسيا، يُعرف الزواج غير المسجل باسم نكاح السري، بينما في ماليزيا، يُعرف الزواج غير المسجل باسم نكاح السندكيت. بشكل عام، يمنع الزواج غير المسجل الزوجة والأطفال المولودين أثناء الزواج من المطالبة بحقوقهم. لا ينظم قانون الزواج في إندونيسيا تسجيل الزواج بشكل صارم، لذلك لا يزال هناك العديد من الزيجات غير المسجلة؛ وهذا يختلف عن العواقب القانونية للزواج غير المسجل في ماليزيا، والتي تم تنظيمها بشكل صارم فيما يتعلق بالعقوبات القانونية لمرتكبي الزيجات غير المسجلة.

يركز هذا البحث على مشكلتين. الأولى هي القواعد المتعلقة بالعواقب القانونية المترتبة على الزيجات غير المسجلة في إندونيسيا وماليزيا. الثانية، ما هي عواقب الزواج غير المسجل على صحة الزواج في إندونيسيا وماليزيا؟ يتضمن هذا البحث بحثاً قانونياً معيارياً باستخدام منهج البحث الأدبي. تم استخدام المنهج الإحصائي والمقارن لمقارنة قانون الزواج المعمول به في إندونيسيا وماليزيا.

وجد هذا البحث فراغاً قانونياً في اللوائح المتعلقة بالتبعات القانونية للزواج غير المسجل في إندونيسيا. في إندونيسيا، لم يتم تجديد اللوائح المتعلقة بالتبعات القانونية للزواج المسجل في إندونيسيا، لذلك لا يزال الكثير من الناس يستغلون الفراغ القانوني لعقد زيجات غير مسجلة، مما قد يتسبب في خسائر في المستقبل. أما في ماليزيا، فقد تم تنظيم اللوائح المتعلقة بالزيجات غير المسجلة بشكل صارم في كل ولاية في إيناكمان. وتتفق اللوائح المطبقة في كلا البلدين على أن صحة الزواج لا يمكن تحديدها فقط بتسجيل الزواج بل تحدها أحكام كل دين.

# CHAPTER I

## INTRODUCTION

### A. Background of the Study

Marriage registration is a writing activity carried out by someone regarding a marriage that occurred.<sup>1</sup> Marriage registration aims to create order in marriage in society, this is an effort regulated by government in every Muslim country to protect the dignity and sanctity of marriage, by the word of Allah SWT. in Surah An Nisa' verse 21

وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَىٰ بَعْضُكُم إِلَىٰ بَعْضٍ وَأَخَذْنَ مِنْكُم مِّيثَاقًا عَلِيمًا

*How will you take it (back), even though you have had sex with each other (as husband and wife) and they (your wives) have made a strong agreement (marriage bond) with you?*<sup>2</sup>

In principle, Islamic law, both the Qur'an and *hadith* does not specifically regulate marriage registration, because this is different from the regulations *mu'amalah* if the transaction is not made in cash for a certain time, it is ordered to record it. However, it is very important for every couple who wants to carry out a marriage to carry out marriage registration, because from marriage registration, written evidence will be produced as proof of the existence of the marriage regarding the continuation of the contract that has been carried out and the applicable legal consequences. With this evidence, husband and wife will be spared *muḍarrat* in the future, because this written

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<sup>1</sup> Siska Lis Sulistiani, *Hukum Perdata Islam : Penerapan Hukum Keluarga dan Hukum Bisnis Islam di Indonesia*. (Jakarta : Sinar Grafika, 2019), 59.

<sup>2</sup> Tim Penerjemah, *Mina Al-Qur'an Tilawah*, (Bandung : Sygma Exagrafika).

evidence can help each other if a dispute occurs or one partner is irresponsible, the other can take legal action to defend or obtain their respective rights.<sup>3</sup>

The Indonesian government has established the Marriage Act, which includes the advice to register weddings to realize the family's benefits, including the protection of women and children. The Marriage Act Article 2, Paragraph 2 declares means that every marriage must be registered according to applicable law. Based on these provisions, it is clear that becoming married merely requires filing for marriage on an administrative level, which means that the marriage is still considered valid as long as it fulfills the terms and conditions determined by the pillars and requirements of the religion of each party entering into the marriage.

The Indonesian marriage registration regulations aim to provide marriages with permanent legal status. The impact of unregistered marriage is that the spouses will not receive written proof in the form of a marriage certificate, thereby affecting the civil relations of children born from the marriage whom the state will not recognize because a birth certificate cannot prove them. This is in accordance with article 42 of the Marriage Act of 1974, which states that "*A legitimate child is born in or due to a valid marriage.*"<sup>4</sup> Which means that children born from unregistered marriages will be considered illegitimate children under state law. The inability of a wife and child to assert legal claims for the fulfillment of their economic rights or

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<sup>3</sup> Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, (Depok : Rajawali Press, 2019), 91.

<sup>4</sup> Article 43, The Marriage Act of 1974.

jointly owned assets is another legal consequence of a father or husband abandoning them.

In more detail, marriage registration is regulated by Government Regulation (PP) Number 9 of 1975. This Government Regulation also regulates fines given to spouses whose unregistered marriage and also to unofficial marriage interpreters as mentioned in Article 45 Chapter IX concerning Criminal Provisions. In reality, this rule is rarely enforced either for couples whose unregistered marriage or for unofficial marriage interpreters. However, in another regulation, which is the Compilation of Islamic Law (KHI) in article 7 paragraphs (2) and (3) it is stated that if the marriage cannot be proven by a marriage certificate, *isbat* marriage (*isbat nikah*) can be submitted to the Religious Court. This rule applies to Muslim spouses.

The phenomenon of unregistered marriage does not only occur in Indonesia, several other countries also recognize the term unregistered marriage. For example in Malaysia, unregistered marriage are known as marriage *sindiket*. According to the Chief Syariah Judge of the Federal Territory Syariah Court, YAA Dato' Mohamad bin Haji Abdullah, *sindiket* marriage is a marriage that does not follow the rules or violates the law, whether legal or illegal, whether through a company or not.<sup>5</sup> The marriage is considered one of a *perkahwinan tanpa kebenaran enakmen atau undang-undang hukum Islam* or marriage is not legally valid, because the marriage

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<sup>5</sup> Intan Nadia Ghulam Khan, dkk. "Fenomena Nikah Sindiket : Satu Huraian Awal", *Syariah and Law Discourse*, 23.



was carried out without being known and recorded by an authorized official, which is usually carried out contrary to Islamic sharia law.

The impact is the authorities (*Pendaftar Nikah*) will not issue a marriage certificate. Based on *seksyen 40* Enactment of Melaka Islamic Family Law 2002 a spouses who violate the *enactment* can be prosecuted by the Syariah Court with a maximum fine of RM 1.000 or 6 months imprisonment or both. Apart from that, this *sindiket* marriage has other consequences. Suppose the marriage is entered into by a guardian whose legal validity is doubtful. In that case, the Sharia Court may decide to dissolve the marriage (*faraq*) because the validity of the marriage is questionable.

It turns out that although Indonesia also regulates the legal consequences of unregistered marriages, there is a legal vacuum enclosing the regulation of unregistered marriages, so derivative regulations regarding unregistered marriages are needed. So, based on these facts, the author is interested in conducting research by comparing these differences and examining the marriage registration regulations that apply in Indonesia and Malaysia in more depth.

## **B. Problem of the Study**

Based on what the author has described in the previous background, several problems need attention, which is:

1. How are the regulation of legal consequences of unregistered marriage in Indonesia and Malaysia?
2. What is the consequences of unregistered marriages on the validity of marriages in Indonesia and Malaysia?

### **C. Objective of the Study**

This research aims to answer several problems as described in the problem formulation, namely:

- a. To analyze the regulation of legal consequences of unregistered marriage regulated in Indonesia and Malaysia.
- b. To analyze the legal consequences of unregistered marriages on the validity of marriages in Indonesia and Malaysia.

### **D. Significance of the Study**

By explaining the objectives that the author wants to achieve in this research, the author hopes that this research can bring benefits for the future, including:

#### **1. Theoretical Significances**

The result of this research can contribute to the body of knowledge, particularly concerning unrecorded aspects of marriage. Additionally, the result is intended to provide legal professionals with new perspectives and theoretical understanding on the creation of marriage-related legal provisions that need to be documented by the two nations, each with its own set of laws. In addition, this result is believed to theoretically enhance

conversations on the distinctions between different Muslim countries, particularly concerning the fact that marriages are not officially registered.

## 2. Practical Significances

Apart from the theoretical aspect, this research is also expected to bring benefits in the practical element. The practical aspect intended here is to increase insight and application of knowledge related to unregistered marriages or syndicate marriages, and it is hoped that it can be used as reference material or direction for future new research that has relevance to the study that the author has made.

## E. Definition of Key Term

The operational definition is needed to clarify several keywords related to this research:

### 1. Legal Consequences

Legal consequences are consequences caused by legal events, two examples are presented below:

- a. The punishment of a thief is a legal consequence of the act of stealing, namely the consequence of taking someone else's property without rights.
- b. The emergence of rights and obligations for the buyer and seller of land is a result of the legal act of buying and selling land between the seller and the buyer.<sup>6</sup>

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<sup>6</sup> Petrus Soerjowinoto, *Ilmu Hukum : Suatu Pengantar (Buku Panduan Mahasiswa)*, (Surabaya : CV. Garuda Mas Sejahtera, 2018), 43.

## 2. Unregistered Marriages

In terms of terms, it can be understood that a marriage that is not registered is a marriage carried out outside an authorized marriage registration institution. In Indonesia, marriages that are not registered can also be called marriages that are not registered '*Sirri's Wedding*' which in Arabic says *sirri* سِرِّي means secret and closed<sup>7</sup>. In terms *sirri* wedding is known to the Indonesian people today is a marriage that is carried out in compliance with the pillars and requirements set by religion, but is not carried out before a Marriage Registrar as an official government official or a marriage that is not registered at the Religious Affairs Office for Muslims (KUA) or the Civil Registry Office for those who are Muslim. people who are non-Muslim and therefore do not have written proof in the form of a Marriage Certificate issued by the government.<sup>8</sup>

## 3. Legal Validity

According to the Legal Dictionary, validity is explained in various languages that have meaning to validate, to legalize, to ratify, to acknowledge which mean validate or authenticate something. Legal validity is very close to the positivist theory adopted in Indonesia, which states that the law passed and declared valid is the law that already exists, outlined in a law or written regulation. However, in Indonesia, unwritten laws, such as customary law, are also recognized.

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<sup>7</sup> Ahmad Sarwat, *Ensiklopedia Fikih Indonesia 8 : Pernikahan*, (Jakarta, PT. Gramedia Pustaka Utama, 2019), 313.

<sup>8</sup> Kumla Muhajarah, "Secercah Pandang Mengungkap Kasus Nikah Sirri di Indonesia", *Sawwa*, no. 2 (2015) : 248.

## **F. Research Method**

### **1. Research Design**

The type of research used in this study is library research, where all data sources come from library materials in journals, books, or written research results adapted to the theme being studied.

### **2. Research Approach**

In this research, the author used a comparative approach, which will help find answers to the legal issues that have been raised. This approach is carried out by comparing one country's laws with another country's laws regarding the same matter. It can also compare the rules with court decisions in that country for the same case.<sup>9</sup> The comparative approach in this research is done by comparing the Marriage Law in Indonesia and the Marriage Law in Malaysia. The function of this approach is to obtain similarities and differences between The Marriage Act of 1974 in Indonesia and The Enactment of Melaka Islamic Family Law 2002 in Malaysia.

### **3. Data Sources**

In conducting this scientific research, the author compiled it based on legal sources which are divided into two criteria, namely primary legal sources and secondary legal sources.

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<sup>9</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta : Kencana Prenada Media Group, 2010), 135.

a. Primary legal sources

Primary legal sources are legal sources that are authoritative or have authority.<sup>10</sup> The primary lawful source that the author uses in this research is the marriage law that applies in Indonesia, which is the Marriage Act of 1974, Government Regulation (PP) number 9 of 1975, Compilation of Islamic Law (KHI), the Enactment of Melaka Islamic Family Law 2002.

b. Secondary legal sources

Secondary legal sources are all materials that can explain primary legal materials.<sup>11</sup> The secondary legal sources that the author uses come from books, fiqh books, previous theses, as well as articles or journals related to this research.

c. Tertiary sources of law

Tertiary legal sources are legal sources that support the primary legal sources and secondary legal sources used, in this case the author uses tertiary legal sources in the form of the Big Indonesian Dictionary (KBBI) and the English Dictionary (Oxford Dictionary).

#### 4. Data Collection

In this research, the data collection technique uses the documentation method, namely the method of providing or collecting evidence or information in the form of images or quotations. The evidence or quotations collected or documented in this research are

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<sup>10</sup> Peter, *Penelitian Hukum*, 181.

<sup>11</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif : Suatu Tinjauan* (Jakarta: PT. Grafindo Persada, 2011), 13.

literary evidence or quotations relating to marriage registration, both in the form of laws and previous research used in Indonesia and Malaysia.

## **5. Data Analysis**

After the legal materials have been collected, the next step is analysis. Analyzing the collected data was carried out in five stages, namely data editing, classification, verification, analysis, and conclusion.

### **a. Editing**

This process begins with reviewing and sorting data regarding marriage procedures according to Islamic law and marriage procedures that apply in Indonesia or Malaysia, including the process and procedures for registering marriages.

### **b. Classification**

The next step is to organize the data that has been obtained and form it into the problem formulation. At this stage, the process of checking data and understanding is more accessible because if there are errors in the writing, correcting them will be more helpful and make it easier to get answers to the statement of problem.

### **c. Verification**

The next step continues with checking the data that has been obtained. They are examining the materials used as data sources that will be studied further regarding the legal consequences of unregistered marriages used for research materials.

d. Analysis

After verifying the data, the next step is analyzes the concept of marriage registration and the regulation of legal consequences of unregistered marriages that apply in Indonesia and Malaysia, and process the data obtained to obtain the required data results.

e. Conclusion

The last step is a conclusion, the author wraps up this phase of the legal analysis by summarizing the library research that was done.

## **G. Previous Study**

Previous research in this research is a concise and concise description which includes studies or research that have previously been carried out by previous researchers regarding problems that will be researched further by the author. This was done to find out and understand more about the differences and similarities between this research and previous research. The following is some previous research used as a reference in this research:

1. Research conducted by Faida Fidiani, a student at UIN Maulana Malik Ibrahim Malang, Islamic Family Law study program, entitled “Penalties for Unregistered Marriage and Polygamy (Comparative Study of Indonesia, Pakistan and Tunisia).” This research discusses the comparison of legal sanctions and their implementation in cases of unregistered marriages and polygamy that occur in Indonesia, Pakistan, and Tunisia. The results of this research found differences in the



application of punitive sanctions for perpetrators of unrecorded marriages and perpetrators of polygamy in Indonesia, Pakistan, and Tunisia.

2. Martina Purna Nisa Jaliensyah also researched comparative law between Indonesia and Malaysia. The research entitled “Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Laws in Indonesia, Malaysia, and the Maldives)” discusses the phenomenon of domestic violence, which has an impact on divorce. The similarity between this research and the one the author studied lies in its location. Both studies compare the marriage laws that apply in Indonesia and Malaysia, but the difference between the two studies is in the research topic. Researchers focus more on the consequences of the marriage registration laws in Indonesia and Malaysia. Meanwhile, previous research discussed the divorce laws that apply in Malaysia.
3. The next research was written by Muhammad Ngizzul Muttaqin, entitled “Unregistered Marriage Between Indonesian Citizens and Foreign Citizens with the Legal Perspective of Marriage in Indonesia.” In this research, it is stated that unregistered marriages between Indonesian citizens and foreign citizens, where the research focuses on foreign citizens in general, the author considers that marriages between Indonesian citizens and foreign citizens always give rise to legal problems, so the author found three legal solutions that can be implemented, namely by carrying out a marriage isbat either in Indonesia or at a representative institution abroad or the person concerned can

change citizenship and register their marriage in accordance with the regulations in force in that country.

4. The next research was written by Ruri Setyaningsih et al in the form of a scientific journal with the title “Legal Consequences for Children who are Born in Unregistered Marriage in The Perspective of Christian Law”. This research raised the same topic of discussion, namely regarding the legal consequences of marriage not recorded, but there is a difference in this research, namely that the research discusses the legal consequences that apply to children born from marriages that are not recorded based on the perspective of Christian law. Meanwhile, the research written by the researcher discusses a comparative study of the legal consequences of marriages not being recorded in Indonesia and Malaysia in accordance with the laws and regulations in force in the two countries.
5. M. Tahir Maloko also wrote a journal entitled Unregistered Marriage in Islamic Law Perspective a Critical Study of Islamic Law Compilation. In this research, it is explained that there are many factors that influence the occurrence of unregistered marriages in Indonesia, one of which is the existence of economic factors that make people feel burdened. Apart from that, there was the factor of rejection from the first wife if her husband wanted to practice polygamy, which ultimately resulted in the husband entering into an unregistered marriage which was only done to justify sexual intercourse. Based on the research conducted, it can be

concluded that the existence of these factors causes many Indonesians to enter into unregistered or unregistered marriages.

6. Further research was conducted by Siti Khosyi'ah in 2015, written in the form of a journal entitled *Akibat Hukum Perkawinan tidak Dicatat terhadap Istri dan Anak atas Hak Kebendaan menurut Hukum Islam di Indonesia*. Siti Khosyi'ah explained in the research that marriages that are not registered has a detrimental impact on the wife, especially for children born from unregistered marriages, because according to Siti Khosyi'ah children born from unregistered marriages cannot have an administrative relationship through the father's line because there is no authentic evidence in the form of the child's birth certificate. the.
7. The next research was written in 2015 by Nindiasanda Frengky Putri entitled *Keabsahan Perkawinan yang Tidak Dicatatkan setelah Ada Keputusan Mahkamah Konstitusi Nomor 46/PUU-VII/2010*. In this research, Nindiasanda wanted to find out more about the legal consequences of marriages that were not recorded and the validity of these marriages after the Constitutional Court decision Number 46/PUU-VII/2010, the results obtained were that marriages were not recorded before the Constitutional Court decision number 46/PUU -VIII/2010 is classified as a legal siri marriage following the rules of the Islamic religion, as explained in the 2006 MUI fatwa that a siri marriage is valid as long as the aim is to build a household. Marriage under the law is also valid if the marriage requirements and harmony are met, but it becomes

haram if it causes harm or negative impacts. Meanwhile, after research conducted by Nindiasanda, marriages that are not legally registered are still valid in the eyes of religion but do not have legal force in the eyes of state law.

No	Title	Similarities	Difference
1	Farida Fidiani, "Penalties of Unregistered marriage and Polygamy (Comparative Study of Indonesia, Pakistan and Tunisia)", (2020)	This research discusses comparative laws regarding unrecorded marriages	<ul style="list-style-type: none"> <li>- This research explains the comparison of legal sanctions and their implementation in Indonesia, Pakistan and Tunisia. Meanwhile, the research written by the researcher discusses a comparative study of the legal consequences of unregistered marriages in Indonesia and Malaysia</li> <li>- Apart from examining legal sanctions for perpetrators of unregistered marriages, this research focuses on legal sanctions given to perpetrators of polygamy in Indonesia, Pakistan and Tunisia.</li> </ul>
2	Martina Purna Nisa Jaliansyah, "Critical Review of Domestic Violence as Reason for Divorce (Comparasion of Divorce Laws in Indonesia, Malaysia and the Maldives)," (2021)	Comparing about Marriage Law in Indonesia and Malaysia	The topic on this research is differences with the previous research. The previous research is comparing about the divorce laws in Indonesia and Malaysia. Meanwhile the topic of this research is comparing the legal

			consequences of unregistered marriage in Indonesia and Malaysia
3	Muhammad Ngizzul Muttaqin, "Unregistered Marriage Between Indonesians Citizens and foreign Citizens with the Legal Perspective of Marriage in Indonesia", (2020)	Researching about marriages is not recorded	The focus of this research lies in the legal steps given to mixed-marriage couples who carry out unregistered marriages. Meanwhile, the research written by the researcher discusses a comparative study of the legal consequences of unregistered marriages in Indonesia and Malaysia
4	Ruri Setyaningsih, Tri Wahyu Anggraeni and Debora Tri Haryadi, "Legal Consequences for Children who are Born in Unregistered Marriage in the Perspective of Christian Law", (2020)	The research topic in this study is the legal consequences of marriage not being recorded	The research focus in this study is the legal consequences for children born from marriages that are not recorded, analyzed using a Christian Law perspective. Meanwhile, the research written by the researcher discusses a comparative study of the legal consequences of unregistered marriages in Indonesia and Malaysia
5	M. Tahir Maloko, "Unregistered Marriage in Islamic Law Perspective a Critical Study of Islamic Law Compilation", (2015)	Researching marriages is not recorded from the KHI perspective	Using an analytical approach, while the research that the author conducted used a comparative approach
6	Siti Khosyi'ah, "Akibat Hukum Perkawinan Tidak Dicatat terhadap Istri dan Anak atas Hak Kebendaan menurut Hukum Islam di Indonesia", (2015)	The research that the author will conduct discusses the legal consequences of marriages not being recorded	This research discusses the legal consequences of marriage not being recorded, but it is different from the research that will be written, namely regarding the different research focus. This research focuses on the

			<p>legal consequences that arise for the material rights of wives and children born from unregistered marriages analyzed using the perspective of Islamic law in Indonesia. Meanwhile, the research written by the researcher discusses a comparative study of the legal consequences of marriages not being registered in Indonesia and Malaysia based on the Marriage Laws that apply in Indonesia and Malaysia.</p>
7	<p>Nindiasanda Frengky Putri, " Keabsahan Perkawinan yang Tidak Dicatatkan setelah Ada Keputusan Mahkamah Konstitusi Nomor 46/PUU-VII/2010," (2015)</p>	<p>Both discussed marriages that were not registered</p>	<p>This research examines the validity of marriages that were not registered after the Constitutional Court decision Number 46/PUU-VII/2012. Meanwhile, the research written by the researcher discusses a comparative study of the legal consequences of unregistered marriages in Indonesia and Malaysia</p>

Based on several previous studies that have been conducted, it can be concluded that many previous studies have focused more on the legal consequences of unregistered marriages. While the novelty of this research is about the regulation of legal consequences arising from unregistered marriages and focuses on the legal validity provided for perpetrators of unrecorded marriages both in Indonesia and in Malaysia in accordance with the applicable laws in the two countries.

## **H. Systematic Discussion**

This research was written using normative research methods, so the systematic writing was created using the following rules:

**CHAPTER I :** In the introduction, this chapter explains the background of the problem, which includes the reason the research was written, namely the differences in the background to implementing the rules regarding unregistered marriages and the legal consequences that apply in Indonesia and Malaysia. This chapter also describes the problem formulation, research objectives, and benefits of the research itself. This chapter also explains research methods and previous research related to the studied theme.

**CHAPTER II :** Literature Review, this chapter contains explanations of theories that are material for analysis, such as theories about the validity of marriage in Islam. Apart from that, this chapter explains the concept of marriage that applies in Indonesia and Malaysia.

**CHAPTER III :** This chapter explains the discussion of the themes studied. This chapter describes all the research results and examines data, both primary data and secondary data regarding unrecorded marriages in Indonesia and Malaysia.

**CHAPTER IV :** This chapter is the final chapter as well as the closing chapter which contains conclusions and suggestions. The conclusion contains a summary of the answers to the problem formulation in CHAPTER I as well as suggestions for analysis from the description of the research data.

## CHAPTER II

### LITERATURE REVIEW

#### A. The Concept of Marriage in Islam

Definition of Marriage according to Dr. Wahbah al-Zuhaylī explained in two meaning, *al-waṭu'* (الوطء) which means sexual relations or bodily relations between husband and wife and *al-'aqdu* (العقد) which means contract or agreement.<sup>12</sup> Meanwhile, in the *kitab* of *Syarah Faḥu al-Qarīb*, apart from being defined as physical relations between husband and wife, marriage is also defined as a contract with several pillars and conditions.<sup>13</sup> Islam requires marriage to help generations of Muslims spread widely with good bloodlines; apart from that, marriage is also a condition of fulfillment of human nature created by Allah SWT. so they tend to look for a partner and love them. Apart from that, in QS. al-Rum verse 21, Allah says that :

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً

*"And among the signs (of His greatness) is that He creates mates for you from your kind, so that you are inclined and feel at ease with them, and He creates a feeling of love and affection between you."*<sup>14</sup>

Marriage is one of the religious orders for men and women who can carry it out immediately. Because with marriage, you can reduce the immorality of your eyes and protect yourself from committing adultery. So, for those who wish to get married but do not yet have the provisions ready,

<sup>12</sup> Wahbah al-Zuhaylī, *al-Fiqh al-Islamī wa Adillatuh*, Juz 7, (Beirut : Dar al-Fikr), 29.

<sup>13</sup> Muhammad Fashihuddin, dkk. *Syarah Faḥu al-Qarīb*, (Malang : Ma'had Al-Jami'ah Al-Aly UIN Malang, 2021), 90-91.

<sup>14</sup> Tim Penerjemah, *Mina Al Qur'an Tilawah*, (Bandung : Sygma Extramedia).



the Prophet recommended fasting so that they can protect themselves from the disgraceful act of adultery. History from Abdullah ibn Mas'ud Rasulullah saw. Said:

يَا مَعْشَرَ الشَّبَابِ مَنِ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَعْظَمُ لِلْبَصْرِ، وَأَحصَنُ لِلْفَرْجِ،

وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ فَإِنَّهُ لَهُ وِجَاءٌ.

*“O young men, whoever among you can make provision, marry, for it will preserve the eyesight and private parts. Whoever cannot do so should fast, for fasting is a fortress.”<sup>15</sup>*

In Islam, marriage has to be under the pillars and clear conditions. The pillar (*rukun*) is an essential structure of something that determines the realization of that thing, it can also be called the core component of something that ensures its sustainability.<sup>16</sup> Because the consequence of abandoning the pillars in the realm of the contract is the invalidation of the agreement, then if the pillars that are not fulfilled, it can have an impact on the cancellation of the marriage contract. Generally, the pillars of marriage are divided into five things, namely: *ṣighāt* (*ijab and qabul*), wife, husband, guardian and two witnesses. The following explains the requirements for each pillar :

#### 1. *Ṣighāt*

The first pillar is *ṣighat* of the marriage contract, namely the *ijab qabul*, which is said by the guardian or representative of the woman and

<sup>15</sup> al-Zuhaylī, *al-Fiqh al-Islamī*, 7.

<sup>16</sup> Fashihuddin, *Syarah Fathu al-Qarīb*, 82.

answered by the prospective groom.<sup>17</sup> Shaykhul Islam Ibn Taymiyah explained that the marriage contract can be valid pronounced by using any language and sentence.<sup>18</sup> The Imams of the Madzhab agree that a marriage contract is valid if it is pronounced by the party proposing or the person representing him using the editorial *zawwajtu* (زَوَّجْتُ) which means *saya kawinkan* or *ankahtu* (أَنْكَحْتُ) which mean *saya nikahkan* and for the person receiving it to respond with the editorial *qabiltu* (قَبِلْتُ) which means I accept or *raḍītu* (رَضِيْتُ) which means I agree. But they are have a differences opinion regarding the validity of a marriage contract if it is pronounced without using *fi'il māḍī* (past tense) which indicates the meaning “has been”.<sup>19</sup>

## 2. Husband and Wife (Groom and Bride)

The Madzhab Imams agree that being wise and mature is one of the requirements for parties entering into a marriage contract.<sup>20</sup> In the Islamic concept, the issue of a person's maturity and capability is primarily seen in his physical body. This can be seen, for example, in the imposition of law (*taklif*) for someone who is termed as *mukallaf* or considered capable of bearing the burden of law or performing legal acts. In a hadith, the Prophet said:

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<sup>17</sup> Abdul Rahman Ghazaly, *Fiqh Munakahat*, (Jakarta : Kencana, 2010), 34.

<sup>18</sup> Sulaiman bin Ahmad bin Yahya Al Faifi, terj. Achmad Zaeni Dachlan, *Ringkasan Fiqh Sunnah*, (Depok : Senja Media Utama, 2017), 366.

<sup>19</sup> Muhammad Jawad Mughniyah, terj. Masykur A.B, dkk. *Fiqh Lima Mazhab*, (Jakarta : Lentera, 2011), 337.

<sup>20</sup> Mughniyah, *Fiqh*, 345.

رُفِعَ الْقَلَمُ عَنْ ثَلَاثِ النَّائِمِ حَتَّى يَسْتَيْقِظَ وَعَنِ الْمَجْنُونِ حَتَّى يَفِيْقَ وَعَنِ الصَّبِيِّ حَتَّى

يَخْتَلِمَ

*"The responsibility of a person is lifted from three things: a sleeper until he wakes up, a madman until he is cured, and a child until he dreams (ihtilam)."* <sup>21</sup>

Based on that hadith, the symptoms of sexual maturity of someone are looking by his physical maturity, namely the discharge of semen for men and menstruation for women. Other requirements are being Muslim, male (for the groom) and female (for the bride) in the sense that he is not a transvestite or someone whose status is not clear; the person is transparent, meaning his origin is known, he can give and asked for consent, he is sensible, he is not crazy and have no previous unknown marital relationship, and there are no obstacles to marriage.<sup>22</sup>

One of the obstacles to marriage for men is marrying a woman who is forbidden. According to Sayyid Sabiq in the book *Fiqh Sunnah*, there are several prohibitions on marriage, one of which is the prohibition of marriage that applies forever. Three things cause the ban on marriage that applies forever:

- a. Prohibition of marrying someone who still has a kinship relationship. Included in this category are seven kinds, namely :

<sup>21</sup> Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, (Depok : Rajawali Press, 2019), 62.

<sup>22</sup> Aulia Muthiah, *Hukum Islam (Dinamika Seputar Hukum Keluarga)*, (Yogyakarta : Pustaka Baru Press, 2017), 62.

- 1) Mother and so on in a straight lineup
  - 2) Daughter
  - 3) Sisters
  - 4) Daughters of brothers
  - 5) Daughter of sister
  - 6) Paternal aunt
  - 7) Maternal aunt
- b. Prohibition of marrying someone who is a cousin of breastfeeding (*al-raḍa'ah*). It is forbidden to marry someone who is related to one's mother. The category that includes the prohibition of marriage due to breastfeeding is the same as the category of the ban on marriage due to kinship. In Surah al-Nisa' verse 23 Allah swt. says that

حُرِّمَتْ عَلَيْكُمْ أُمَّهَاتُكُمْ وَبَنَاتُكُمْ وَأَخَوَاتُكُمْ وَعَمَّاتُكُمْ وَخَالَاتُكُمْ وَبَنَاتُ الْأَخِ وَبَنَاتُ الْأَخْتِ وَأُمَّهَاتُكُمُ اللَّاتِي أَرْضَعْنَكُمْ وَأَخَوَاتُكُم مِّنَ الرَّضَاعَةِ وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِبُكُمُ اللَّاتِي فِي حُجُورِكُم مِّن نِّسَائِكُمُ اللَّاتِي دَخَلْتُم بِهِنَّ فَإِن لَّمْ تَكُونُوا دَخَلْتُم بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ ۗ وَحَالَائِلُ أَبْنَائِكُمُ الَّذِينَ مِنْ أَصْلَابِكُمْ وَأَن تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ ۗ إِنَّ اللَّهَ كَانَ غَفُورًا رَّحِيمًا

*“Prohibited to you [for marriage] are your mothers, your daughters, your sisters, your father's sisters, your mother's sisters, your brother's daughters, your sister's daughters, your [milk] mothers who nursed you, your sisters through nursing, your wives' mothers, and your step-daughters under your guardianship [born] of your wives unto whom you have gone in. But if you have not gone in unto them, there is no sin upon you. And [also prohibited are] the wives of your sons who are from your [own] loins, and that you take [in marriage] two sisters simultaneously, except for*

*what has already occurred. Indeed, Allah is ever Forgiving and Merciful.*<sup>23</sup>

Based on that verse, the women who breastfeed are equal in status to mothers. So, he is forbidden to marry children who are breastfed. Therefore, breastfed children cannot marry the following women:

- 1) The mother of the breastfeeding woman because she is a grandmother;
  - 2) The breastfeeding woman's husband's mother because she is a grandmother;
  - 3) The mother's and father's sisters because she is an aunt;
  - 4) The breastfeeding woman's grandchildren and daughters because they are his grandchildren and daughters;
- c. Prohibition of marrying someone who in a marital relationship (*mushaharah*). The prohibition caused by a marriage relationship can only occur if the marriage contract is valid. In this case, there are four people:
- 1) The wife of the father (stepmother), grandfather, and so on in a straight line upwards;
  - 2) Mother of the wife (mother-in-law);
  - 3) Children and granddaughters of the wife (stepchildren);
  - 4) Wife's children and grandchildren.<sup>24</sup>

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<sup>23</sup> Tim Penerjemah, *Mina : al-Qur'an Tilawah*, (Bandung : Sygma Extramedia).

<sup>24</sup> Sayyid Sabiq, *Fiqh Sunnah*, (Mesir : Dar al-Ḥadith), 542-545.

### 3. Marriage Guardian

According to Sayyid Sabiq, a guardian in a marriage has a sharia power or authority that orders another party in a coercive manner.<sup>25</sup> Some Ulama' believe that a marriage cannot occur without a guardian. Based on the *hadith* of the Prophet Muhammad.

لَا نِكَاحَ إِلَّا بِوَالِيٍّ

"There is no marriage except with a guardian."<sup>26</sup>

The requirements for a guardian mentioned in the book of *Syarah Fathu al-Qarib* are :

- a. Islam,
- b. Maturity, and
- c. Rationality; his mind is not defective; a person whose tasharuf has been frozen because he is an idiot is not in ihram is fair.<sup>27</sup>

Imam Syafi'i added that one of the legalities of marriage in Islam is the guardian's permission. This refers to one of the *hadith* of the Prophet Muhammad.

عَنْ عَائِشَةَ أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ : (( أَيُّمَا امْرَأَةٍ نَكَحْتُ بِعَيْرِ إِذْنِ مَوْلَاهَا,

فَنِكَاحُهَا بَاطِلٌ, بَاطِلٌ, بَاطِلٌ ... ))

<sup>25</sup> Sabiq, *Fiqh*, 620.

<sup>26</sup> al-Zuhaylī, *al-Fiqh*, 82.

<sup>27</sup> Fashihuddin, *Syarah fathu al-qarib*, 90-91.

*"From 'Aisyah, the Prophet SAW said: "A woman who marries without a guardian, her marriage is annulled. Her marriage is annulled. Her marriage is annulled."*

Based on this hadith, Rasulullah saw. Emphasizes that a marriage must be carried out with the guardian's permission, even Rasulullah saw. reminded that marriages performed without the consent of the legal guardian are void.<sup>28</sup>

#### 4. Marriage Witness

Ulama' agrees that what is included in the pillars of marriage is the presence of witnesses to the contracted event directly,<sup>29</sup> except for Imam Malik, who said that a contract made without witnesses will still be considered valid, but if the husband intends to have a coupling with his wife, he must bring two witnesses if he interferes with his wife without any witnesses, then the contract must be forcibly annulled, and the closing of this contract has the same status as *talak ba'in*.<sup>30</sup>

Apart from that, Imam Syafi'i and Imam Hanbali added that witnesses attending the wedding must be :

- a. Male,
- b. Muslim,
- c. *Baligh*,

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<sup>28</sup> al-Zuhaylī, *al-Fiqh*, 83.

<sup>29</sup> Sarwat, *Ensiklopedia*, 95.

<sup>30</sup> Mughniyah, *Fiqh Lima Mazhab*, 339.

- d. Reasonable, and
- e. Understand the meaning of the marriage contract.<sup>31</sup>

In principle, marriage witnesses must consist of at least two people. This is intended to prevent cheating in the future. In the marriage contract, it is recommended to present many people from among the pious and religious leaders, which means that the witness here is not someone who is officially appointed but someone who sees the legal event in the form of marriage, either intending to witness it directly or by chance. Therefore, in the book *Syarah Fathu al-Qarib*, it is explained that anyone who fulfills the following conditions is classified as a witness to marriage:

- a. Independent (an enslaved person is not valid as a marriage witness because he is not a person who is capable of being a witness).
- b. Male: The scholars of the Madzhab agree that the witnesses must be two men, and if the professing faith comes from women, the professing faith has yet to be accepted, whether it consists of one woman or a combination of men and women. Except for the Hanafiyah, they believe that the professing faith of two women and one man is acceptable as long as they are fair people.<sup>32</sup>

Therefore, marriage is carried out with strict conditions; if the pillars and conditions are met, the marriage is valid and can give rise to all the rights and obligations of husband and wife. However, if a marriage does not meet

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<sup>31</sup> Mughniyah, *Fiqh Lima Mazhab*, 342.

<sup>32</sup> Fashihuddin, *Syarah Fathu al-Qarib*, 100.



the specified pillars and requirements, then the marriage is called a fraudulent marriage damage (*fasid*). If it does not fulfill the pillars of marriage, then the marriage is called canceled (*baṭil*). Islam does not stipulate the rules for registering marriages, but the Ulama' recommends official registration of marriages at authorized institutions as a form of prevention of negative impacts,<sup>33</sup> in this case referring to one of the rules of Islamic law which is :

دَرْءُ الْمَفَاسِدِ مُقَدِّمٌ عَلَى جَلْبِ الْمَصَالِحِ

*"Avoiding damage takes precedence over gaining benefit"*<sup>34</sup>

Islamic rules were created to prevent danger (*muḍarat*) because a marriage that is not registered can have a dangerous impact on the wife, children, or joint property obtained in the marriage. Marriage registration by the government is considered a solution to avoid *muḍarat*, primarily to protect women's rights.

## **B. The Concept of Marriage in Indonesia**

The definition of marriage in the Marriage Law explains that marriage is a physical and spiritual bond between a man and a woman as husband and wife to form a happy and eternal family or household based on the belief in the Almighty God.<sup>35</sup> Apart from this definition, there are several definitions of marriage. According to the expert Prof. Subekti, marriage has been a legal relationship between a man and a woman for a long time. Besides that, Prof. Ali Afandi said marriage is a family agreement. In contrast, according to Prof.

<sup>33</sup> Sulistiani, *Hukum Perdata Islam*, 61

<sup>34</sup> Ahmad Jauhari, *al-Qawā'idul fiqhiyah*, (Jombang : Madrasah Aliyah Tebuireng), 26.

<sup>35</sup> Article 1, The Marriage Act of 1974.

Dr. R. Wirjono Prodjodikoro, marriage is the cohabitation of a man and a woman who fulfills the requirements in the Marriage Law regulations.<sup>36</sup> Even though there are differences of opinion regarding the definition of marriage, one common element is that marriage is a family agreement between a man and a woman.

The principles of marriage law are derived from the Qur'an and Hadith, which are then outlined in legal lines through the Marriage Act of 1974, contain seven principles as follows:<sup>37</sup>

1. The principle of forming a happy and eternal family.
2. The principle of the validity of a marriage is based on religious law and the beliefs of the parties to the marriage and must be recorded by an authorized officer.
3. The principle of monogamy, namely, if the husband is unable to be fair to the rights of his wife, it is sufficient to marry only one.
4. The principle that the prospective husband and prospective wife are mature in body and soul and can carry out marriage to realize the purpose of marriage properly and get good and healthy offspring so as not to think about divorce.
5. The principle of making divorce difficult.
6. The principle of balancing the rights and obligations between husband and wife both in the life of the husband and wife.

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<sup>36</sup> P.N.H. Simanjuntak, *Hukum Perdata Indonesia*, (t.tp : Kencana, 2015), 34.

<sup>37</sup> Zainuddin Ali, *Hukum Perdata Islam di Indonesia*, (Jakarta, Sinar Grafika, 2018), 7.

The couples are only eligible to marry if they have complied with all applicable laws and regulations and the conditions outlined in their respective religions. The conditions for marriage in Indonesia have been regulated in Part II, Article 6, and Article 7 of the Marriage Act of 1974; these conditions include:

1. The consent of the prospective bride and groom.
2. The minimum age is 19 years for the groom and 16 years for the bride.<sup>38</sup>
3. Obtain permission from both parents for those who have yet to reach age 21.
4. Not currently married

The Compilation of Islamic Law (KHI) also states the conditions for marriage is :

1. Groom;
2. Birde;
3. Guardian;
4. Two Witness;
5. *Ijab* and *Qabul*.<sup>39</sup>

In addition to the conditions above, according to Salim HS, the conditions for the validity of a marriage are the existence of a marriage license report submitted to the authorized agency, namely the Marriage Registrar (PPN), and an announcement signed by the Registrar containing:

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<sup>38</sup> Namun terjadi perubahan undang-undang pada tahun 2019 dengan adanya Undang-Undang nomor 1 tahun 2019 tentang perubahan Undang-Undang Perkawinan, yakni disama ratakan usia perkawinan antara laki-laki dan perempuan pada usia 19 tahun.

<sup>39</sup> "Himpunan Peraturan Perundang-Undangan yang Berkaitan dengan Kompilasi Hukum Islam dengan Pengertian dalam Pembahasannya", (Jakarta : Mahkamah Agung RI, 2011), 66-67.

1. Name, age, religion/belief, occupation, residence of the prospective bride and groom and parents, and the name of the previous wife or husband.
2. The day, date, hour, and place of the marriage..<sup>40</sup>

Salim HS also summarizes the conditions of marriage that must be fulfilled based on the rules of the Civil Code, namely:<sup>41</sup>

#### 1. Material Requirements

*Material conditions* are conditions relating to the core or principal in carrying out marriage. Material requirements are divided into two types, namely:

- a. Absolute material requirements, namely conditions relating to a person's personality, must be heeded to carry out marriage. These conditions include:
  - 1) Monogamy, a man can only have one wife, and a wife can only have one husband.<sup>42</sup>
  - 2) Consent between husband and wife.<sup>43</sup>
  - 3) Fulfillment of the minimum age limit.<sup>44</sup>
  - 4) A woman who has been married and wishes to remarry must observe 300 days after the dissolution of the previous marriage.<sup>45</sup>
  - 5) Temporary permission of the parents or guardians of minors who have never been married is required.<sup>46</sup>

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<sup>40</sup> Salim HS, *Pengantar Hukum Perdata Tertulis (BW)*, (Jakarta : Sinar Grafika, 2019), 62.

<sup>41</sup> HS, *Pengantar Hukum*, 65.

<sup>42</sup> Article 27, Civil Code (KUH Per).

<sup>43</sup> Article 28, Civil Code (KUH Per).

<sup>44</sup> Article 29, Civil Code (KUH Per).

<sup>45</sup> Article 34, Civil Code (KUH Per).

b. Relative material conditions, prohibit a person from marrying a particular person. There are two types of prohibition, which include :

- 1) Prohibition of marriage with people who are very close in blood family relations and by marriage.
- 2) Prohibition of marriage due to adultery.
- 3) Prohibition of marriage to renew the marriage after a divorce if one year has not passed.

## 2. Formal Requirements

*Formal requirements* are requirements related to formalities in carrying out a marriage, such as notification of the intention to marry to the Civil Registry Officer and completing the requirements that must be fulfilled at the same time the marriage takes place.<sup>47</sup>

### C. The Concept of Marriage in Malaysia

Malaysia is a country that has thirteen states (Kedah, Kelantan, Melaka, Negeri Sembilan, Pahang, Perak, Perlis, Penang, Sabah, Sarawak, Selangor, and Terengganu) and three federal territories or territories that *Persektuan Tanah Melayu* directly under the control of the Prime Minister which are Kuala Lumpur, Labuan, and Putra Jaya. Before the entry of the British into Malaysia, the laws and regulations applicable in each State in Malaysia were a combination of the application of Malay customs by Islamic Shari'a.<sup>48</sup> This can be seen from the Melaka Law called *Kanun Melaka*. The

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<sup>46</sup> Article 35 until 49, Civil Code (KUH Per).

<sup>47</sup> HS, *Pengantar Hukum*, 66.

<sup>48</sup> Mohammad Fairuzabady, "Islamic Law in the Modern World", *Mizani Scientific Journal : Discourse on Law, Economics and Religion*, Vol.1, No.2 : (2014), 7.

law was made by referring to two books of *fiqh*, namely *at-Ṭāriq matan Abu Shuja' and Fathu al-Qarīb by Ibn Qāsim al-Ghazī*.<sup>49</sup>

The status of Islamic law was abandoned after the British arrived in Malaysia. So, most court decisions were based on English law. It was only in 1880 that Britain recognized the existence of Islamic law, including Islamic marriage and divorce law, by introducing Mohammedan Marriage Ordinance number V, which applied to countries in the straits such as Penang, and Melaka; The Registration of Muhammadan Marriages and Divorces Enactment 1885 for Malay states such as Perak, Selangor, Negeri Sembilan and Pahang; and The Divorce Regulation of 1907 for sheltered *countries* such as Kelantan, Terengganu, Perlis, Kedah and Johor. These rules later became the source of material law in various deeds or enactments enacted in each State and enforced since Malaysia became independent in 1957.<sup>50</sup> After Malaysia's independence, efforts began to reform family law, covering all aspects related to marriage and divorce, which were then adjusted to the provisions of the laws in force in each state.

Marriage regulation in Malaysia are regulated based on the laws in force in each state. In Melaka the marriage act are stipulated in *the Enactment of Melaka Islamic Family Law 2002* which is that handles marriage, divorce, income (*nafkah*), and issues related to family life intended for a person domiciled in Melaka. *The Enactment of Melaka Islamic Family Law of 2002*

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<sup>49</sup>Mohamed Azam bin Mohamed Adil, "Bidangkuasa dan Kedudukan Mahkamah Syariah di Malaysia Pasca Alaf 20 : Ke Arah Mana?", *Sharia Journal*, Vol.8: (2000), 103.

<sup>50</sup>Yusuf Abdul Azeez, et al, "Codification of Islamic Family Law in Malaysia : The Contending Legal Intricacies", *Journal : Science International*, Vol.28, Issue.2 : (2016), 1755.

*clarifies that every marriage performed under this enactment must be registered in accordance with its provisions. The rules stipulated in this Enactment include :*

### 1. People Qualified for Marrying

The provisions of the law list only three parties who have the right to marry a woman who still has a family guardian. That is :

- a. Guardian;
- b. A representative from the guardian, with the permission of the registrar;
- c. In certain circumstances, the registrar can also act in place of the guardian's representative in performing the marriage contract.<sup>51</sup>

### 2. The Minimum Age for Marriage

The minimum age limit for marriage; which is the minimum age for men who wish to marry is eighteen, and for women is sixteen years.

This state in Article 8 of the Melaka Islamic Family Law,

*"Tiada perkahwinan boleh diakadnikahkan dibawah Enakmen ini jika lelaki itu berumur kurang daripada lapan belas tahun atau perempuan itu berumur kurang daripada enambelas tahun kecuali jila Hakim Syarie telah memberi kebenarannya secara bertulis dalam hal keadaan tertentu."*

### 3. The Regulation of Permission to Married

Generally, in ensuring the validity of a marriage, specific procedures are required depending on the circumstances and situation of the applicant who wants to get married. The procedure is divided into two

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<sup>51</sup> Article 7, The Enactment of Melaka Islamic Family Law 2002.

types which is Marriages Within the Region (*daerah tempat mastautin*) and Marriages Outside the State (*perkahwinan luar negara*). Every spouse who wants to get married should be guided by one of the procedures following their respective situations. However, to submit a marriage application, there is a need:

- a. Required to make a letter of marriage confirmation certified by the Imam at the local mosque (*Kariah Masjid*);
- b. Islamic pre-marital course certificate (*Modul Bersepadu Kursus Praperkahwinan Islam*) and HIV-free letter;
- c. Applicants for marriages to be held abroad must bring a marriage permit issued by the regional Religious Officer;<sup>52</sup>

#### 4. Application for Polygamy

The procedure for applying polygamy in Melaka is regulated in Article 23. In paragraph 4 of the article it is stated that

*“Permohonan untuk mendapatkan kebenaran hendaklah dikemukakan kepada Mahkamah mengikut cara yang ditetapkan dan hendaklah disertai dengan suatu ikrar menyatakan alas an-alasan mengapa perkahwinan yang dicadangkan itu dikatakan patut atau perlu, pendapatan permohonan pada masa itu, butir-butir komitmennya dan kewajipan dan tanggungan kewangannya yang patut ditentukan, bilangan orang tanggungannya, termasuk orang yang akan menjadi tanggungannya berikutan dengan perkahwinan yang dicadangkan itu, dan sama ada izin atau pandangan isteri atau isteri-isterinya yang sedia ada telah diperolehi terhadap perkahwinannya yang dicadangkan itu.”*

This paragraph is a summary of the requirements listed in the polygamy application form which must be fulfilled along with the

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<sup>52</sup> Siti Aishah Borhanuddin, dkk, “Kesalahan Berkahwin Tanpa Kebenaran bagi Orang Islam di Malaysia : Tinjauan berdasarkan Perspektif Syarak dan Undang-Undang,” *Jurnal Pengajian Islam*, Vol.15, Issue.2, : (2023), 106-107.



required documents attached. The polygamy procedure in Malaysia is quite complicated because it guarantees the rights of the polygamous wife, including her children.

#### **D. Unregistered Marriage in Indonesia**

Marriage that does not fulfill the regulated conditions will be considered invalid marriages, includes the marriage that are not registered. Unregistered marriage in Indonesia commonly known as *nikah sirri*. *Sirri* in Arabic means secret. *Nikah sirri* can be interpreted as a secret and closed marriage.<sup>53</sup> *Nikah sirri* can be defined as a marriage whose contract and reception process is kept secret, only meets the conditions stipulated by Islamic law and is not registered with an authorized marriage registration. As mentioned by Endang Zakaria, Shaykh Siapul Muaidah stated that most scholars believe that a marriage that is not announced openly or not attended by guardians and witnesses during the marriage contract is not considered a valid marriage.<sup>54</sup> The term of *nikah sirri* or secret marriage, has been known since age-old times, but *nikah sirri*, known in age-old times, had a different meaning from the term *nikah sirri*, which is understood today. The ancients interpreted the term of *nikah sirri* as a marriage carried out under the prescribed pillars and conditions, except that the marriage witness was asked not to announce the marriage to the public in the sense that there was no wedding party (*walīmatul ‘urs*).<sup>55</sup>

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<sup>53</sup> Sarwat, *Ensiklopedia Fikih*, 313.

<sup>54</sup> Endang Zakaria dan Muhammad Saad, “Nikah Sirri menurut Hukum Islam dan Hukum Positif,” *Kordinat : Jurnal Komunikasi Antar Perguruan Tinggi Agama Islam.*, Vol.20, No.2 (2021) : 255.

<sup>55</sup> Endang, “Nikah Sirri”, 256.

*Sirri* marriage can be entered into for a type of reason. M. Tahir Maloko categorized the factors of *nikah sirri* into three types:

1. A marriage that is not performed with a legal guardian;
2. A marriage carried out religiously but not registered with an authorized institution;
3. A marriage that is kept secret due to certain conditions.<sup>56</sup>

So it can be said that *sirri* marriage is not an invalid marriage, but it is not recognized by state law. Marriage that is officially recognized in Indonesia is a marriage that is registered under an authorized institution, which is the Office of Religious Affairs (KUA) for people who are Muslim or the Civil Registration Office for people who are religious other than Islam, as stipulated in Article 2 of Government Regulation (PP) 9 of 1975

*“(1) Pencatatan perkawinan dari mereka yang melangsungkan perkawinannya menurut agama Islam, dilakukan oleh Pegawai Pencatat sebagaimana dimaksud dalam Undang-Undang Nomor 32 Tahun 1954 tentang Pencatat Nikah, Talak dan Rujuk (2) Pencatatan perkawinan dari mereka yang melangsungkan perkawinannya menurut agamanya dan kepercayaannya itu selain agama Islam, dilakukan oleh Pegawai Pencatat Perkawinan pada kantor catatan sipil sebagaimana dimaksud dalam berbagai perundang-undangan mengenai pencatatan perkawinan.”<sup>57</sup>*

The mechanism of marriage registration in Indonesia is stipulated under the Government Regulation (PP) number 9 of 1975 concerning the Implementation of the Marriage Act of 1974 concerning Marriage . In Article 6 states that *“When registrar staff members are notified of a plan to marry,*

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<sup>56</sup> M. Tahir Maloko, “Unregistered Marriage in Islamic Law Prespective a Critical Study of Islamic Law Compiltion,” *Al-Mawarid : Jurnal Hukum Islam*, Vol.15, No.1 (2015), 51.

<sup>57</sup> Article 2 paragraph (1) and (2), Government Regulation (PP) 9 of 1975.

*they have a legal obligation to verify if all prerequisites for marriage have been met and if there are any legal barriers.”* The Government Regulation also explains the administrative requirements that must be fulfilled by prospective bride and groom couples wishing to get married, such as :

- a. Birth certificates of the bride and groom.
- b. Statement regarding the name, faith, occupation, and residence of the prospective bride and groom's parents.
- c. A permission court letter, if the prospective bride is under 21 years old or the prospective groom, has the status of a husband who still has a wife.
- d. Letter of dispensation from the Court if there are obstacles to marriage as intended in the Marriage Law or the marriage requirements still need to be fulfilled.
- e. For spouses who are getting married for the second time, they must attach a death certificate or divorce certificate.
- f. Letter of permission from the minister of defense and security for the bride and groom who are armed forces members.
- g. The registrar authorizes power of attorney if one or both bride and groom cannot be present for an important reason.<sup>58</sup>

After the administrative requirements have been fulfilled, the registrar will issue a marriage announcement notification so that the prospective bride and groom can proceed to the next stage, which is the marriage (*akad*) in

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<sup>58</sup> Article 6, the Government Regulation of 9 of 1975.

accordance with the rules and procedures that have been regulated by each religion.

#### **E. Unregistered Marriage in Malaysia**

In principle, marriage has to be registered by the law. In Malaysia, The Enactment of Melaka Islamic Family Law of 2002 regulates the marriage application procedure into three types, namely:

##### **1. Application for Marriage in the Country**

*Ordinary Nikah Application* is made by the bride and groom directly to the Marriage, Divorce, and Referral Registrar in their respective area without going through the Syariah Court. Any marriage that is to take place must first obtain permission from the Registrar of Marriages, Divorces, and Referrals of the qaryah masjid where the woman resides. Both parties must make the application by filling out the prescribed form. Suppose the man resides in a different qaryah masjid than the woman's regional mosque (*qaryah masjid*) or a different country. In that case, the woman's marriage license application must be accompanied by confirmation from the Recorder of Marriages, Divorces and Referrals of the regional mosque or by the competent authority of the country in which she resides, stating that all the information contained in the application is correct. This marriage application must be submitted at least seven days before the marriage date.<sup>59</sup>

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<sup>59</sup> Article 16, the Enactment of Melaka Islamic Famili Law of 2002.

## 2. Application for marriage abroad

*Overseas marriage* is a marriage that is conducted outside the territory of Malaysia who temporarily resides abroad. Such marriages may be solemnized and registered under the respective Enakmen of the Islamic Family Law by the appointed marriage registrar. However, the couple to be married must fulfill certain conditions, namely that one or both of the bride and groom to be married are residents in the country, each party is entitled to marry according to the established laws of syarah and statute, and if one party is not resident in the country, then the proposed marriage, if solemnized, will be considered valid in the place where the party resides. The marriage and marriage registration procedure is the same as for marriages performed within the country.

The marriage that is not performed in accordance with the enakmen is considered an invalid marriage. In Malaysia, an invalid marriage has another term, that is *perkahwinan tanpa kebenaran*. There are many types of *perkahwinan tanpa kebenaran*, one of which includes unregistered marriages or what is known as *kahwin sindiket*. *Kahwin sindiket* are marriages that do not follow the procedures set out in the country. Based on the rules that state that every marriage must be registered under the Enactment or *Akta* in force in that state. As a result of this syndicate marriage, the couple can be charged in court because they are found guilty and are subject to fines or imprisonment by applicable regulations. *Sindiket* marriage is a marriage conducted by a marriage registration officer who does not have a license or a

marriage registration officer whose certificate has expired. As a result, the marriage is not legally valid.

Intan et al. issue an understanding of syndicate marriages in the form of marriages witnessed by marriage registrar employees who do not have a certificate approved by the kingdom or an official Islamic body assembly. The result is that the marriage is considered to violate Article 25 of the Melaka Islamic Family Enakmen, which has the effect that if a husband and wife are suspected of having married in a syndicate, then the guardian and witnesses who were present at the time of the marriage must be summoned again to prove whether the marriage is valid or not.<sup>60</sup>

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<sup>60</sup> Intan Nadia Ghulam, dkk. "Fenomena Nikah Sindiket : Satu Huraian Awal," *Syariah Law and Discourse*, Vol.5. (2011) : 25.

### CHAPTER III

#### RESEARCH FINDING AND DISCUSSION

##### **A. Regulation of Legal Consequences of Unregistered Marriage in Indonesia and Malaysia**

###### 1. Regulation of Legal Consequences of Unregistered Marriage in Indonesia

In principle, every marriage must be registered to protect the rights that arise after marriage because a marriage can be considered a legal act, so it will have legal consequences, both between the two parties and with their descendants. The legal consequences of marriage cause rights and obligations in terms of property. Following that, Article 30, Chapter VI of the Marriage Law states, "*Husband and wife have a noble obligation to uphold the household, which is the foundation of society.*" In addition to the rights and obligations of husband and wife, if the marriage is blessed with children, then the child's position is that of a legitimate child who must also fulfill every right. Article 42 of the Marriage Law states, "*A legitimate child is a child born in or as a result of a valid marriage.*"

Marriages conducted without fulfilling the terms and conditions imposed are considered marriages that violate the rules. Because in Indonesia, a recognized marriage is a marriage that is registered with an authorized institution. Unregistered marriages are detrimental to the wife and children born from the marriage, both legally and socially.

Legally, an unregistered marriage can be detrimental to the wife because the marriage cannot be proven by valid evidence. Valid evidence

in the form of a marriage certificate (*akta nikah*) will be given if the marriage is carried out in the presence of two witnesses and a marriage registration officer, as explained in Article 11 of Government Regulation Number 9 of 1975, which states that

*"(1) Immediately after the solemnization of a marriage under the provisions of Article 10 of this Government Regulation, the bride and groom shall sign the marriage certificate which the Recording Officer has prepared under the applicable provisions.*

*(2) The marriage certificate, which the bride and groom have signed, shall also be signed by the two witnesses and the Recording Officer attending the marriage, and in the case of a marriage solemnized according to the Islamic religion, by the marriage guardian representing him.*

*(3) With the signing of the marriage certificate, the marriage has been officially recorded."*

So, if someone marries and does not have a marriage certificate, the marriage is considered unofficial according to the positive law of the country of Indonesia. Therefore, if in the future there are violations of the rights and obligations of the husband or wife, one cannot fight for their rights in court because they cannot prove that their marriage is legal. It also affect their rights regarding inheritance, social protection, child custody, and validity in colonial law.

Unregistered marriage are considered marriage that are against the Government Regulation. In Article 45 of this regulation states that anyone who againts the provisions shall be punished with a fine of up to Rp. 7.500,- In reality, the fines prescribed under this Article are rarely enforced, and even the monetary value of these fines is considered not demanding, so the people still choose to perform *nikah sirri*. It happens



because of the lack of firmness in law enforcement; in the Marriage Act of 1974, the factor that caused this was the need for the government to emphasize its ability to sanction people who performed unregistered marriages.

## 2. Regulation of Legal Consequences of Unregistered Marriage in Malaysia

The Enactment of Melaka Islamic Family Law of 2002 not only stipulate marriage's process and administrative requirements but also the sanctions that apply to couples who violate this law. In the case of a invalid marriage, the Court is responsible for investigating if there are irregularities in the conduct of the marriage. This is because marriages conducted without the permission of the Court will have a negative impact :

### a. Impact on wife's Rights

The problem of unregistered marriage risks hurting the parties both during the marriage and after the marriage. The consequence of a marriage without consent is that the wife cannot claim her rights in court, such as alimony, as regulated in Part VI the Enactment of Melaka Islamic Family Law, because the Sharia Court in Malaysia has no authority to adjudicate all claims for unregistered marriage in Malaysia.<sup>61</sup> For example, marriages are held at the border or in the South of Thailand using the services of a certified guardian judge.

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<sup>61</sup> Najibah Mohd Zin, et al. *Undang-Undang Keluarga (Islam) : Siri Perkembangan Undang-Undang di Malaysia*, (Selangor : Dawarma Sdn. Bhd, 2007), 21.

This marriage remains an offense under the Islamic family enactment if the Registrar does not approve the marriage.

b. Impact on Children Rights

Unregistered marriage not only has an impact on the wife but also has a negative impact on the children born from the marriage. The child's status may be legal according to Sharia law, but they want their birth to be registered before the parents report their marriage first. This means that it is difficult for children to get a birth certificate if their parents cannot prove the validity of their marriage.

Birth registration can only be carried out if the parents have proof of marriage through a marriage certificate. Based on regulations issued by the State Registration Department (JPN), every couple who wants to register the birth of their baby must have a valid marriage document that an Islamic religious official in each country has issued.

c. Inheritance Right

In the case of inheritance, according to Islamic law, the child is still entitled to inheritance rights. In the Qur'an surah An Nisa' verse 33 says that :

وَلِكُلِّ جَعَلْنَا مَوَالِي مِمَّا تَرَكَ الْوَالِدِينَ وَالْأَقْرَبُونَ ۚ وَالَّذِينَ عَقَدَتْ أَيْمَانُكُمْ فَآتُوهُمْ

نَصِيبَهُمْ ۚ إِنَّ اللَّهَ كَانَ عَلَىٰ كُلِّ شَيْءٍ شَهِيدًا

*“And for all, We have made heirs to what is left by parents and relatives. And to those whom your oaths have bound [to you] - give them their share. Indeed, Allah is ever, over all things, a Witness.”*

Based on that verse, a blood relationship is one of the grounds for an inheritance, so children born from an unregistered marriage still have blood relations with their fathers because, indirectly, the marriage is legally valid according to Islamic Law. Still, in the case of civil inheritance, the wife and children are born in an unregistered marriage, and it will be challenging to obtain their rights because they have to provide written proof that their marital relationship is valid. The difficulty of obtaining a birth certificate from the Population and Civil Registry Office and the difficulty of gaining recognition as a legitimate child are among the consequences that a child of an invalid or failed marriage will bear. The child will be considered an illegitimate child because the parents cannot prove the validity of their marriage.

In the context of an invalid marriage, if the marriage can be proven and recognized by the Shari'ah Court to have been carried out in accordance with the shar'i requirements, then the child's lineage comes from the legal father. However, if not, then the child will be categorized as a bastard child and cannot be inherited by the father but must be inherited by Abdullah. The illegitimate child also cannot

be named after the mother, as this can have a psychological impact on the child.<sup>62</sup>

d. Fine

The Enactment of Melaka Islamic Family Law state has regulated sanctions in the form of fines and imprisonment for couples who are proven to have performed an invalid marriages, this can be seen in Article 40 paragraph (2) of the Enactment of the Islamic Family Law (Negeri Melaka) 2002

*"any person who marries, or who forms as a marriage, or who undergoes a marriage contract with, any person contrary to any designation Part II commits an offence and shall be punished with a fine not exceeding one thousand ringgit or imprisonment for a period not exceeding six months or both such imprisonment fines."*<sup>63</sup>

Based on the article, it is understood that any couple who enters into a marriage that is not recorded will be subject to a fine of RM 1,000 or imprisonment of a maximum of 6 months or both. For example, is the decision of the Jasin Melaka Regional Sharia Court with registration number 04003-164-0080-2010. The ruling stated that the Jasin Melaka Regional Muslim Marriage, Divorce and Referral Registrar had received an application to register a marriage that had taken place on February 12, 2009 in the Pattani Region of Thailand. Based on the facts of the judgment, the petitioner and respondent are found to have performed a marriage without the permission of the clerk or judge or competent state official, therefore

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<sup>62</sup> Khan, dkk, "Fenomena Nikah Sindiket," 30.

<sup>63</sup> Seksyen 40 (2), Enactment 12 of the Islamic Family Law (Negeri Melaka) 2002.

the applicant and respondent are deemed to have violated the provisions mentioned in Article 19 of the Enactment of Melaka Islamic Family Law 2002 that every marriage to be performed must obtain permission from the clerk or Hakim Syar'i, Thereafter the Petitioner and the Respondent were charged under Article 40 paragraph (1) of the same enactment with a fine of RM600.00 or a maximum imprisonment of 3 months or both.

e. Annulment of Marriage

In the case of unregistered marriages, the Sharia Court also has the authority to carry out *faraq* or annulment of marriages for couples who are proven to have had unregistered marriages. Apart from the couple being sentenced to a fine or imprisonment, their marriage will be examined based on the witnesses present. Witnesses will be asked to provide information about whether the marriage was carried out under Sharia law. If the marriage was proven to be carried out in violation of Sharia law, the Court will decide to annul their marriage.<sup>64</sup>

In terminology, the definition of *faraq* used in the fiqh books is not much different from the linguistic definition of *faraq*. *Faraq*, in linguistic terms, means separation or dissolution of marriage, either by divorce or otherwise. However, in the Islamic legal system in

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<sup>64</sup> Norain Mohd Shah dan Khairul Azhar Meerangani. "Faktor Poligami Tanpa Kebenaran : Analisis Kes di Mahkamah Syariah Muar, Johor," *E-Journal of Islamic Thought and Understanding*, Vol.1 (2021), 9.

Malaysia, the term *faraq* refers more to the breakup of a marriage rather than divorce.<sup>65</sup>

f. Sharia Crime

Spouses whose marriage is unregistered can be accused of committing the crime of prohibited relation (*kesalahan berkhalwat*). This is regulated in Article 55 of the Enactment of Melaka Sharia Criminal Law of 2002. It happens because the spouses do not have documents to prove their marriage. Based on these Article the spouses can be fined RM3000.00 or imprisoned for twelve month or both after the court finds them guilty of the offense.<sup>66</sup>

3. Differences and Similarities

Generally, the regulations of marriage registration are not directly regulated in Islamic law. Islam only regulates the necessity to record a contract that can potentially cause liability (*muḍarrat*) in the future, such as everything in the form of *mu'āmalah* affairs (trade, indebtedness, etc.). As mentioned of Allah in the Qur'an Surah Al Baqarah verse 282

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدِينٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ ...

“O you who believe, when you do business not in cash for a specified time, you should write it down. And let a writer among you write it down correctly ...”

<sup>65</sup> Wan Abdul Fattah Wan Ismail, dkk, “Faraq Perkahwinan bagi Pasangan Tak Sah Taraf di Negeri Sembilan,” *International Journal of Islamic Thought*, Vol.13 (2018) : 125.

<sup>66</sup> Article 55, the Enactment of Melaka Sharia Criminal Law 2002.

Based on the pillars and conditions of marriage in Islam, it is only determined based on the existence of a prospective bride and groom, a guardian, two witnesses, and a spoken contract (*ijab qabul*). Indonesia and Malaysia are countries where the majority of citizens are Muslims, so concerning these provisions, these two countries both consider that marriage registration is not a condition for the validity of a marriage. Both countries legislate marriage registration into the law, so the government requires its citizens to register marriages as a form of organizing marriages.

Both countries also stipulate that unregistered marriages are considered marriages not recognized by the state, so they cannot have the legal force of marriage. Unregistered marriages are also considered marriages that violate the rule of law, so couples who perform such marriages can be subject to fines. However, the imposition of fines for the perpetrators of unregistered marriages in Indonesia is not as strict as in Malaysia. In Malaysia, spouses who are proven to have an unrecorded marriage will be subject to a fine of a maximum of RM1,000 and or imprisonment for a maximum of 6 months; besides that, if the marriage is proven to be an invalid marriage under Islamic law, the Court can impose a marriage annulment (*faraq*). Meanwhile in Indonesia, enforcing fines is still more relaxed than in Malaysia; even the nominal fines given are considered not burdensome. Besides that, the rules regarding fines for unrecorded marriage partners are not regulated in the hierarchy of the

primary laws, so many Indonesian people still take advantage of this legal vacuum.

**Table of Comparison**

No	Indicator	Indonesia	Malaysia
1	Legal Status	Marriages not recognized by the state	Marriages not recognized by the state
2	Legal Consequences	Fine of Rp 7.500	Max. fine of RM1.000 and/or Max. Imprisonment of 6 month
3		-	Annulment of Marriage
4		-	Sharia Crime (max. fine of RM3.000 and/or max. imprisonment of 12 month)

## **B. The Consequences of Unregistered Marriages on the Validity of Marriages in Indonesia and Malaysia**

### **1. Validity of Marriages in Indonesia**

Marriage registration regulations can become a legal protection for women in the possibility of divorce. Because the divorce process in unregistered marriages is straightforward to carry out without going through court proceedings, this condition is often exploited by a husband to divorce his wife at will. However, if the marriage is registered, a marriage certificate will appear as proof that the marriage is valid so that the Religious Court process has the authority to help provide a divorce decision, which the judge will not easily give a divorce decision for the husband and wife, and try to carry out mediation first. Divorce in court will occur if the law can not defend the marriage.

In principle, unregistered marriages are carried out because there is something that is kept secret, so people will only carry out legal marriages



according to religious norms without having to register them with the competent authorities.

The regulation of marriage registration in Indonesia is generally regulated in Article 2 of the Marriage Act of 1974, which states that :

- “1) Perkawinan adalah sah, apabila dilakukan menurut hukum masing-masing agamanya dan kepercayaannya*
- 2) Tiap-tiap perkawinan dicatat menurut peraturan perundang-undangan yang berlaku.”<sup>67</sup>*

Based on that regulation, Article 2, paragraph 1 clearly states that marriage in Indonesia is considered valid if the provisions of their respective religions fulfill it. Meanwhile, in the next paragraph of the article, marriages have to be registered in compliance with the relevant laws and regulations. It means that every marriage must be followed by marriage registration according to the applicable law. If the two verses are combined, *marriage registration* is a part that determines the validity of a marriage and fulfills the provisions and conditions of marriage of each religion. In contrast, in Islam, marriage registration is not a condition of the validity of marriage but only a requirement for the completeness of marriage administration.

This incomplete interpretation of the principle of marriage registration can lead to legal uncertainty and injustice. Basically, every marriage must be recorded to guarantee legal certainty and protection, which indicates that marriage registration is a necessity that must be fulfilled in addition to fulfilling the terms and conditions of marriage

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<sup>67</sup> Article 2, the Marriage Act of 1974.

according to each religion. The principle of marriage registration adopted in the Marriage Act of 1974 becomes meaningless if the validity of a marriage is not related to marriage registration by the applicable laws and regulations so that it can provide opportunities for unrecorded marriages.

Indeed, marriage registration is regulated in Indonesian Marriage Law legislation, which generally applies to all Indonesian citizens regardless of religion. However, for Muslim Indonesian citizens, the regulation of registration is reaffirmed in the Compilation of Islamic Law, with the statement that marriage must be carried out in the presence of a registrar to implement registration. Article 5 of the Compilation of Islamic Law states,

*"(1) To ensure the orderliness of marriage for the Islamic community, every marriage must be recorded. (2) The marriage registration, as referred to in paragraph (1), shall be carried out by a Marriage Registrar as stipulated in Law No. 22 of 1946 j.o. Law No. 32 of 1954."*

The Compilation of Islamic Law stipulates that marriages that have not been recorded can be requested for validity (*isbat nikah*) by the Religious Court. Article 7, paragraphs (2) and (3) state that *"if a marriage cannot be proven by a marriage certificate, an isbat nikah can be submitted to the Religious Court."* *Isbat Nikah* is only possible when it relates to :

- a. In the context of divorce settlement;
- b. Loss of marriage certificate;

- c. There is doubt about the validity or invalidity of one of the conditions of marriage;
- d. The marriage took place before the Marriage Act of 1974;
- e. Marriages conducted by those who do not have a marriage impediment according to the Marriage Act of 1974.;

In reality, court judges have different legal considerations when making validations. *Isbat nikah*, initially reserved for marriages with certain conditions, can be used to legalize marriages that are not actually included in the category of marriages that can be legalized, as mentioned in Article 7 of the Compilation of Islamic Law. However, because *isbat nikah* is needed by the community, so in this case the judge looks for a legal basis that allows the Religious Court to accept *isbat nikah* even though the marriage submitted for the validity of the marriage occurred after the existence of the marriage law. The Religious Court judge then grants the application for *isbat nikah* if the marriage requested to be legalized has no marital impediment as stipulated in Article 7 paragraph (3) letter e of the Compilation of Islamic Law. The Court will grant the *isbat nikah* application.

## 2. Validity of Marriages in Malaysia

In Malaysia, every couple wishing to marry must apply for marriage registration to the Divorce and Referral Registrar's Office (*Pejabat Nikah Cerai dan Rujuk*) at the Islamic Department (*Jabatan Agama Islam*) either their residence or the location of the upcoming

marriage. Article 16 of the Enactment of the Islamic Family Law states that :

- 1) *“Bilamana diperlukan untuk melangsungkan perkawinan di Negara Malaka, masing-masing pihak dalam perkawinan yang diusulkan harus mengajukan permohonan izin kawin sesuai dengan formulir yang telah ditetapkan kepada Panitera di paroki masjid tempat tinggal pihak perempuan.*
- 2) *Apabila pihak laki-laki bertempat tinggal di paroki masjid yang berbeda dengan paroki masjid perempuan atau bertempat tinggal di suatu Negara, maka permohonannya harus memuat atau disertai keterangan dari Panitera paroki masjidnya atau oleh pejabat yang berwenang di Negara tersebut. yang bersangkutan, yang berarti sepanjang ia dapat memastikan bahwa hal-hal yang disebutkan dalam permohonan itu adalah benar.*
- 3) *Permohonan masing-masing pihak harus disampaikan kepada Panitera paling lambat tujuh hari sebelum tanggal rencana perkawinan, namun Panitera dapat memberikan waktu yang lebih singkat dalam hal tertentu.*
- 4) *Permohonan kedua belah pihak dianggap sebagai permohonan bersama.”*

The registration of marriage is essential, because it aims to create marriage order in the community.<sup>68</sup> This rule of marriage registration is made by law to protect the dignity and sanctity of marriage, primarily to protect children and women in domestic life. By registering a marriage, each spouse will obtain a marriage certificate (*sijil nikah*), which is authentic proof of their marriage. According to Article 26 of the Enctment of Islamic Family Law, a marriage certificate will be issued when the marriage registration fee is paid at the time of marriage registration. Therefore, if the marriage is not recorded and registered, the marriage registrar cannot issue a marriage certificate.

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<sup>68</sup> Rofiq, *Hukum Perdata Islam*, 91.

Thus, if a dispute between them or one does not exercise their rights and obligations, the other may resort to legal remedies to defend or obtain their respective rights. However, an unregistered marriage will have no legal force, the result is that if one party neglects its obligations, the other party cannot take legal remedies, because it does not have valid evidence of the marriage that has been performed.

Marriages not carried out by the applicable statutory provisions cannot be considered valid marriages, as well as in Islamic Sharia Law. In this case, *sindiket* marriages are usually carried out by people who do not have guardianship authority. As mentioned in the following hadiths

عَنْ عَائِشَةَ رَضِيَ اللَّهُ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ : لَا نِكَاحَ إِلَّا بِوَلِيٍِّّ وَشَاهِدَيْنِ عَدْلٍ, وَمَتَّ

كَانَ مَنْ نِكَاحٍ عَلَى غَيْرِ ذَلِكَ فَهُوَ بَاطِلٌ

*“From Aisyah r.a., Rasulullah saw. said, ‘Marriage is not valid except with a guardian and two fair witnesses. Marriages that take place other than that are void.’*

The majority of scholars other than Imam Hanafi believe that a marriage without a guardian is invalid under Islamic law. In this regard, the validity of marriage in Malaysia is seen in Islamic law.<sup>69</sup> Based on Article 7 of the Enactment of Melaka Islamic Family Law of 2002 states that Persons who can enter into marriage are:

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<sup>69</sup> Wan Abdul Fattah Wan Ismail, et. al, “Perwalian dan Isu Berkaitan dengannya menurut Syarak dan Perundangan Islam di Malaysia,” *The 8<sup>th</sup> Proceeding of International Prophetic Conference*, (2022), 4.

- a. A guardian in the presence of the Registrar;
- b. A deputy guardian with the witness and permission of the Registrar;  
or
- c. The Registrar as deputy guardian.

Furthermore, for a woman who does not have a guardian (*wali*) from the family line, according to Syarak Law, the marriage must be solemnized only by the *Wali Raja*. So if the marriage is not performed by a legal guardian, the marriage is considered a marriage that is contrary to the law. Regarding Malaysian law, the Enactment of Melaka Islamic Family Law of 2002 does not mention matters relating to guardians, such as the order of *nasab* guardians (*wali nasab*). However, it can be understood through the explanation of the meaning of *wali raja* in Article 7 of the law, namely, a guardian assigned by the *Yang di-Pertuan Agong* in the case of the federal territory, Melaka, Penang, Sabah, and Serawak or by the King in the case of other states to marry a woman who does not have a guardian from the lineage.

Marriages that are contrary to the law cannot be registered with an authorized institution except by annulling the marriage (*faraq*) under the procedures and mechanisms stipulated in the Enactment of Melaka Islamic Family Law Chapter V on Dissolution of Marriage. This is in accordance with mentioned in Article 12 of the Enactment of Melaka Islamic Family Law of 2002 which states that “*a marriage contrary to this Enactment cannot be registered under this Enactment.*”

The fulfillment of marriage requirements based on Islamic law determines the validity of a marriage in Malaysia; this is under Article 11 of the Islamic Family Law (Negeri Melaka) 2002, which states that “*a marriage is not valid unless the necessary conditions are fulfilled, according to Syarak Law, to make it valid.*” However, apart from having to comply with Sharia rules in carrying out a valid marriage, someone who wants to get married must still follow the legal rules that have been established. When someone wants to practice polygamy, it must be done under the procedures determined by the competent Court; namely, the applicant must submit a statement of support along with the reasons for the request to the Sharia High Court to obtain an order allowing polygamy. With such strict procedures, some couples prefer to get married without going through court permission. This kind of marriage is usually carried out with the help of syndicates in Southern Thailand, especially the Songkhla region, Thailand. This determination was made to avoid negative impacts on the wife and the continuity of the marriage and to avoid irregularities that occur both before and after marriage so that administrative matters regarding marriage are more systematic and orderly.

## CHAPTER IV

### CONCLUSIONS AND SUGGESTION

#### A. Conclusions

Based on the discussion of research results regarding the comparison of legal consequences in force in Indonesia and Malaysia, it can be concluded that :

1. After analyzing the regulation of the legal consequences of unregistered marriages in Indonesia and Malaysia, it can be concluded that there is a legal vacuum regarding the legal consequences of marriages that occur in Indonesia, so many people still take advantage of this to conduct unregistered marriages. Generally, the marriage law only regulates the substance of the marriage process itself, so derivative regulations governing marriage registration are needed. The rules regarding sanctions imposed on perpetrators of unrecorded marriages are no longer burdensome, so legal reform is needed regarding these sanctions.
2. In addition, Indonesia and Malaysia do not consider marriage registration an issue that can determine the validity of a marriage. In Indonesia, the validity of marriage is seen from the fulfillment of the provisions and conditions of marriage in each religion. However, unrecorded marriages in Indonesia are considered marriages not recognized by the state, so couples who conduct unrecorded marriages must apply for marriage validation to the Religious Court to apply for administrative rights. Unlike Indonesia, Malaysia considers unrecorded marriages as unlawful marriages, so marriage validation can be done after the Sharia Court assesses whether



the marriage is a marriage under Islamic law; if the marriage is proven to be invalid under Islamic law, then the marriage must be separated by annulment.

## **B. Suggestion**

As the final part of the preparation of this research, the suggestions given are for future researchers so that further research on this topic can present empirical data to see the actual practice in society regarding unregistered marriage. In the context of law, there is a need to update the law regarding the rules for registering marriages by looking at the legal dynamics that occur in society to reduce the phenomenon of marriages not being recorded. For the general public, when carrying out a marriage, couples getting married should prepare everything reasonably and under applicable legal regulations, both religious law and state law. So it will not cause problems in the future.

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Government Regulation 9 of 1975.

The Enactment of Melaka Islamic Family Law 2002.

The Enactment of Melaka Criminal Law 2002.

The Marriage Act of 1974.

## APPENDIX



KEMENTERIAN AGAMA REPUBLIK INDONESIA  
UNIVERSITAS ISLAM NEGERI MAULANA MALIK IBRAHIM MALANG  
FAKULTAS SYARIAH

Jl. Gajayana 50 Malang 65144 Telepon (0341) 559399 Faksimili (0341) 559399  
Website fakultas: <http://www.wissh.um-malang.ac.id> atau Website Program Studi: <http://p3.um-malang.ac.id>

## CONSULTATION PROOF

Name : Abier Nailin Ni'am  
Student Number : 19210119  
Department : Islamic Family Law  
Supervisor : Jamilah, M.A., Ph.D  
Title : Legal Consequences of Unregistered Marriage in Indonesia and Malaysia (Comparative Study The Marriage Act of 1974 and Enactment of Melaka Islamic Family Law 2002)

No	Day / Date	Subject of Cosultation	Signature
1	Friday, 15 September 2023	Consultation Chapter I	
2	Wednesday, 4 Oktober 2024	ACC Chapter I	
3	Monday, 23 Oktober 2023	Consultation Chapter II	
4	Wednesday, 8 November 2023	ACC Chapter II	
5	Wednesday, 17 November 2023	Consultation Chapter III	
6	Fiday, 1 Desember 2023	Revision Chapter III	
7	Wednesday, 24 January 2024	ACC Chapter III	
8	Wednesday, 24 January 2024	Consultation Chapter IV and Abstract	
9	Wednesday, 7 February 2024	ACC Chapter IV and Consultation Abstract	
10	Friday, 10 February 2024	ACC Thesis	

Malang, 12 February 2024

Acknowled by,  
Head of Islamic Family Law Department

**Erik Sabti Rahmawati, M.A., M.Ag.**  
NIP. 197511082009012003

## CURRICULUM VITAE



### PERSONAL INFORMATION

---

**Name** : Abier Nailin Ni'am  
**SIN** : 19210119  
**Place, Date of Birth** : Malang, May 14<sup>th</sup> 2001  
**Address** : Dsn. Kalimalang RT 015 RW 004 Tawangargo  
 Kecamatan Karangploso Kabupaten Malang  
**Phone Number** : +62 896-8101-7708  
**E-mail** : abierniam@gmail.com  
**Religion** : Islam  
**Gender** : Female

### FORMAL EDUCATION

---

2007 MI Hidayatul Mubtadi'in Tasikmadu  
 2013 MTsN 1 Kota Malang  
 2016 MA Salafiyah Syafi'iyah Tebuireng, Jombang  
 2019 UIN Maulana Malik Ibrahim Malang

### NON-FORMAL EDUCATION

---

2013 Ma'had Al Qalam MTsN 1 Kota Malang  
 2016 Pondok Pesantren Putri Tebuireng, Jombang  
 2019 Ma'had Sunan Ampel Al-Aly