

REGISTRATION OF MARRIAGE IN POSITIVE LAW: Analysis of Justice for Women and Islamic Jurisprudence (*Fiqh*)

Widya Sari¹, Muhammad Arif²

^{1,2}State Islamic University of Imam Bonjol Padang
Jl. Prof Mahmud Yunus Padang Postal Code 25153, Indonesia
E-mail ¹widya.pirugaparabek@gmail.com, ²arif.parabek@gmail.com

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Abstract: This study aims to analyze the provisions of the Indonesian Marriage Law and the Compilation of Islamic Law concerning the registration of marriage as a mechanism for the protection of women. The study employs a women's justice perspective by integrating feminist theory and Islamic jurisprudence (*fiqh*). Through a feminist approach, this research identifies scholarly perspectives that emphasize the importance of marriage registration in ensuring legal protection and justice for women. This research offers an integrative analysis of women's justice and *fiqh*, underscoring the importance of marriage registration as a legal guarantee for women. This study adopts a library-based research design, with data analyzed through content analysis. The findings indicate that marriage registration, from the perspective of women's justice, is not merely an administrative requirement but a crucial legal element that determines the legal recognition of marriage and prevents harm to women, particularly in cases of unregistered marriage. From the perspective of *fiqh*, marriage registration can be understood as a contemporary form of marriage declaration without introducing additional essential pillars of marriage. In this context, marriage registration may be integrated with the requirement of witnesses, where witnesses function not only as living witnesses but also as witnesses to the deed. Such witnesses ultimately serve as authentic legal evidence of marriage. Based on the combined analysis of women's justice and *fiqh*, this study proposes a revision of Article 2 of the Marriage Law and an amendment to Article 24 concerning marriage witnesses in the Compilation of Islamic Law in Indonesia.

Keywords: marriage registration; women's rights; positive law, women's justice; *fiqh*

Abstrak: Penelitian ini bertujuan untuk menganalisis ketentuan dalam Undang-Undang Perkawinan dan Kompilasi Hukum Islam terkait pencatatan perkawinan sebagai mekanisme perlindungan terhadap perempuan. Penelitian ini menggunakan perspektif keadilan perempuan dengan mengintegrasikan teori feminis dan hukum Islam (*fiqh*). Melalui pendekatan feminis, penelitian ini mengkaji pandangan para sarjana yang menekankan pentingnya pencatatan perkawinan dalam menjamin perlindungan hukum dan keadilan bagi perempuan. Penelitian ini menawarkan analisis integratif antara keadilan perempuan dan *fiqh* yang menegaskan pencatatan perkawinan sebagai jaminan hukum bagi perempuan. Penelitian ini menggunakan desain penelitian kepustakaan dengan analisis data melalui metode analisis isi. Hasil penelitian menunjukkan bahwa pencatatan perkawinan, dari perspektif keadilan perempuan, bukan sekadar persyaratan administratif, melainkan unsur hukum yang krusial dalam menentukan pengakuan hukum terhadap perkawinan serta mencegah terjadinya kemudaratan bagi perempuan, khususnya dalam kasus perkawinan tidak tercatat. Dari perspektif *fiqh*, pencatatan perkawinan dapat dipahami sebagai bentuk kontemporer dari pengumuman perkawinan (*i'lân al-nikâh*) tanpa menambahkan rukun esensial baru dalam perkawinan. Dalam konteks ini, pencatatan perkawinan dapat diintegrasikan dengan ketentuan saksi, di mana saksi tidak hanya berfungsi sebagai saksi hidup, tetapi juga sebagai saksi akta. Saksi akta tersebut pada akhirnya berfungsi sebagai alat bukti hukum autentik atas suatu perkawinan. Berdasarkan analisis keadilan perempuan dan *fiqh*, penelitian ini mengusulkan revisi Pasal 2 Undang-Undang Perkawinan serta perubahan Pasal 24 Kompilasi Hukum Islam terkait ketentuan saksi perkawinan di Indonesia.

Kata kunci: pencatatan perkawinan; hak perempuan; hukum positif; keadilan perempuan: *fiqh*

Introduction

Indonesia already has a law that regulates marriage issues, namely Law No. 1 of 1974 Junto Law No. 16 of 2019 concerning Marriage (hereinafter referred to as UUP). The Marriage Law consists of 14 chapters and 67 articles. The law is complemented by government regulation No. 9 of 1975 as its implementing regulation and was declared effective from October 1, 1975. The existence of this regulation is an important milestone in the development of family law in Indonesia¹

However, in the process of transitioning to a democratic nation, the community pro-actively participates in every process of state policy-making, especially matters related to the common good (the people). This includes the preparation of laws and regulations. One of the issues that emerged in the criticism of the UUP was the provision on marriage registration which was considered to still cause problems, especially legal protection for women.

This study reviews and analyzes the registration of marriage in positive law. The positive law in question is UUP No. 1 of 1974 jo Law No. 16 of 2019 concerning Marriage and the Compilation of Islamic Law in Indonesia.

In several critical studies of the UUP, several issues have arisen about articles that are “unsatisfactory” and “not appropriate” to be implemented. So there is an effort to review the UUP.² This critical effort is generally carried out by organizations that care about the interests of women. Articles that are used as material for proposed changes include the issue of marriage registration. Article 2 of the UUP states that marriage is legal, if it is carried out according to the laws of religion and beliefs of each and only then is it recorded according to the applicable laws and regulations.³ This leads to the dualism of the validity of marriage. On the one hand, marriage is considered religiously valid even if it is not recorded; On the other hand, the legal

status of marriage is not recognized by the state if there is no official registration. This dualism has a serious impact, especially on women and children, who have lost legal protection such as in cases of divorce, alimony and inheritance.

The phenomenon of serial marriage still occurs in various regions, showing the weak public understanding of the importance of marriage registration as a guarantee of legal protection for women. This condition causes women to be legally and socially disadvantaged because their marital status is not officially recorded. An article in the Usraty journal written by Hendri et al shows that there is a face book group “*Jasa Nikah Siri Amanah Padang*”. The group often offers series wedding services and provides services for parties who want to do a series wedding. This fact shows that the practice of *nikah siri* is still socially accepted and considered religiously valid even though it has no legal force.⁴

The above description shows that there is a gap between the rules of Islamic jurisprudence (*fiqh*) and the UUP, in determining the validity of a marriage. In classical *fiqh*, the validity of marriage is sufficient to fulfill the harmony and conditions, including the presence of a guardian and two witnesses.⁵ However, *fiqh* does not recognize the official registration system as regulated in contemporary laws and regulations. On the contrary, positive law (UUP) places registration as an administrative aspect, not as an element of the legality of marriage. This difference of views raises new problems in the practice of Islamic family law in Indonesia.

Based on these conditions, this study considers it important to review the UUP article on marriage registration and the article on the existence of marriage witnesses in the Compilation of Islamic Law (KHI). This study looks at these issues through the perspective of women's justice, namely how law and *fiqh* can guarantee protection and justice for women, in this case a feminist approach is used.

¹ Marriage Law No. 1 of 1974 (Surabaya, n.d.).

² Among the writings by Zaini, Masduki, and Ahmad, “Secret Marriage: A Legal and Sociological Perspective,” *Journal of Islamic Civil Law*, 2022, <https://doi.org/10.37035/syakhsia.v23i1.6228> .

³ Marriage Law No. 1 of 1974 (Surabaya, n.d.). 2

⁴ Hendri and et al, “Practice of Siri Marriage at Amanah Padang Siri Marriage Services Munakahat Fiqh Perspective,” *Usraty: Journal of Islamic Family Law*, 2023.

⁵ bd al-Rahmân Al-Jazîrâ, *The Book of Jurisprudence According to the Four Schools of Law* (Beirut: Dâr al-Kutub al-‘Ilmiyyah, 1990). 16–17.

The feminist approach is not in the sense of feminist theory but the view of experts and thinkers who care about justice for women.⁶ This view highlights the importance of marriage registration as a legal instrument that can prevent injustice and ensure that women's rights are protected.

The women's justice perspective is used to highlight how marriage registration can function as a form of legal protection for women, not just an administrative matter. While the *fiqh* approach is used to understand the existence of marriage witnesses from the perspective of Islamic law, in this case the opinion of Imam Malik⁷ and the possibility of its reinterpretation in the context of contemporary laws and regulations, especially when religious practices and state legal norms show differences in determining the validity of a marriage.

The novelty of this research lies in the approach that combines positive legal analysis, *fiqh* and women's justice, in examining the role of marriage registration as a legal protection for women. Previous studies generally separate positive legal analysis and *fiqh*, this study combines the two directions, the findings of this research are expected to make an academic contribution through a new reading of the existence of witnesses in *fiqh*. This research offers the concept of marriage registration as a form of legal testimony (witness deed).

Then with this research, it is hoped that a contribution will be born to the improvement of the Marriage Law No. 1 of 1974 in the matter of marriage registration, as a marriage law for all Indonesian people and an article on marriage witnesses in the Compilation of Islamic Law in Indonesia. Thus, this study provides a new reading of the UUP that places recording not only as an administrative obligation, but also as part of the

⁶ Siti Musdah Mulia, Marzani Anwar, and (eds.), *Justice and Gender Equality (An Islamic Perspective)* (Jakarta: Women's Empowerment Team in Religious Affairs, Ministry of Religious Affairs of the Republic of Indonesia, 2001). 128

⁷ Imam Mâlik stated that the existence of witnesses in a marriage contract is essentially intended to make the occurrence of the marriage publicly known. Such an announcement is useful in order to avoid accusations or doubts from others. Al-Sarakhsî, Al-Mabsûth (Beirut: Dâr al-Mâ'rûfah, 1989).

function of modern publications and testimonies that ensure the protection of women's rights. This means that this research offers an interdisciplinary approach that connects *fiqh*, positive law and women's justice perspectives to renew the understanding of recording and testimony in marriage.

Method

This study uses a qualitative approach with a normative-juridical library research method, namely analyzing relevant laws and regulations, legal doctrines, and literature to understand the challenges in marriage registration. The data analysis used is content analysis. This means trying to understand data not as a collection of physical events but as a symbolic phenomenon in revealing the meaning contained in a text and gaining an understanding of the message represented.⁸ Data was collected through the study of primary legal sources such as Law Number 1 of 1974 concerning Marriage, Compilation of Islamic Law (KHI), and was also supported by secondary literature from scientific journals, law books, and reports of related institutions. Data analysis was carried out in a descriptive-analytical manner by emphasizing legal interpretation of regulatory differences, administrative barriers, and socio-cultural dimensions in the implementation of marriage registration.

Fiqh Observance

Before explaining the meaning of *fiqh*, it is necessary to clarify the meaning of *shari'ah* and *ushul fiqh*. In Islam, these two terms are usually translated into Islamic law. Sharia and jurisprudence are often confused in their use, sometimes becoming one different thing and sometimes as synonyms.

The word *shari'ah* means a road to an irrigation place or a place where water passes in the river.⁹ While *shari'ah* in terms is the provision of Allah related to the act of *mukallaf* in the form of doing

⁸ Agus S and Ekomadyo, "Prospects for the Application of Content Analysis Methods in Architectural Media Research," *Itenas Journal: Journal of Science, Technology and Art* 10, 2006. 51-57

⁹ Muhammad Rashid Ridha, *Tafsîr Al-Manâr*, 2nd ed. (Beirut: Dar al-Fikr, n.d.).413.

an act, choosing or *wadh'i* (determining something as a cause, condition or obstacle).¹⁰

According to Busthanul Arifin, sharia is part of ad-Din and sharia as a method to carry out ad-Din or as an implementation of ad-Din. If ad-Din is only one and uniform, the program of implementation is different in human history. Each messenger carries his own sharia. There is the Shari'ah of the Prophet Noah, the sharia of the Prophet Musa, the shariah of the Prophet Isa and others. As Allah Q.S. al-Maidah [5]: 48. The sharia of the Prophet Muhammad is the sharia that strengthens and straightens out the previous sharia, as well as the last sharia revealed by Allah.¹¹

While *fiqh* according to language comes from the word “*Faqiha*” which means to understand or understand.¹² As for the meaning in terms, as said by Abd al-Wahab al-Khalaf: “Knowledge of the Islamic sharia laws regarding human actions is taken from the postulates in detail. Or in other words, a collection of Islamic sharia laws regarding human actions taken from their postulates in detail”.¹³ Regarding the postulates referred to in the definition above, they are the postulates that are used as the basis of sharia law regarding human actions agreed upon by scholars, namely the Quran, sunnah, *ijma'*, *qiyyas*.

Ibn Khaldun in his book *Al-Muqaddimah Al-Mubtada' wal Khabar* as quoted by Muhammad Zaki, *fiqh* is the knowledge of the law of Allah SWT which is related to the act of *mukallaf*, dug out (*istinbath*) from the Quran, sunnah and from the evidences that are affirmed based on sharia.¹⁴

While Islamic law is a series of the words “law” and “Islam”. “Islamic law” as two sets of words has become the Indonesian language used, but

¹⁰ Abu Zahrah, *Ushūl Al-Fiqh* (Dar al-Fikr al-‘Arabi, n.d.). 26.

¹¹ Busthanul Arifin, *The Institutionalization of Islamic Law in Indonesia, the Historical Roots of Obstacles and Its Prospects*, 1st ed. (Jakarta: Gema Insani Prees, 1996) , 24.

¹² A.W Al-Munawwir, *Indonesian Arabic Dictionary* (Surabaya: Pustaka Progressif, 1997), 1067.

¹³ Abd al-Wahab Al-Khalaf, *Ilmu Ushūl Al-Fiqh*, 2nd ed. (Kairo: Dar al- Qalam, 1978), 14.

¹⁴ Muhammad Zaki, “Ushul Fiqh Dam Qawa'id Al-Fiqhiyah in the Trajectory of History,” *Journal of Religious Education and Social Affairs* 9 (2022), 19.1 <https://doi.org/10.51311/nuris.v9i2.521>.

it is not a word used in Arabic, and is not found in the Quran, nor in Arabic-language literature. Before giving an understanding of Islamic law, it is necessary to first explain the meaning of the word law. In simple terms, the law is: “A set of rules derived from formal and customary rules, which are recognized by a society and nation and binding on all its members”.¹⁵

The above definition provides an easy-to-understand understanding. So if the word law is connected with the word Islam, then Islamic law can be interpreted:

“A set of rules based on the revelation of Allah and the sunnah of the Prophet on the conduct of *mukallaf* people which are recognized and believed to be binding on all Muslims”.¹⁶

The term “set of regulations” refers to Islamic law as a detailed set of rules that carry binding authority. When described as being based on the revelation of Allah and the sunnah of the Prophet, it means that these rules are derived from and grounded in divine revelation and the Prophet's teachings, or popularly known as sharia. The words about *mukallaf* behavior mean that Islamic law regulates the innatity of human beings who have been subject to the law. The regulation applies and has power over those who believe in the truth of the revelation and the sunnah of the Prophet, which in this case means Muslims.¹⁷

From the explanation of the terms sharia, *fiqh* and Islamic law above, it can be distinguished that sharia is a provision set by Allah and His Messenger regarding human behavior, which is contained in the Quran and hadith. While the laws resulting from the understanding of mujtahid scholars taken from the verses of the Quran and hadith, or the provisions on human behavior that are concocted and formulated as a result of the understanding of the sharia, these are called *fiqh*.

¹⁵ Muhammad Muslihuddin, *Philosophy of Islamic Law and the Orientalists*, 2nd ed. (Lahore: Logos, 1980).

¹⁶ Amir Syarifuddin, *Ushul Fiqh*, 1st ed. (Jakarta: Logos, 1997), 17.

¹⁷ Amir Syarifuddin, *Reform of Thought in Islamic Law* (Padang: Angkasa Raya, 1993), 18-19.

Sharia has a permanent, unchanging and undisputed nature such as the obligation of fasting, *hajj*, the prohibition of pork and stealing. Meanwhile, *fiqh* is the result of *ijtihad* of scholars from the legal postulates contained in the Quran and hadith that accept changes and their nature develops. Meanwhile, Islamic law is interpreted more broadly, namely as a rule based on the revelation of Allah (the Quran and sunnah) which is also called shari'a as well as understanding and excavating the sharia which is popularly called *fiqh*. Based on this, it can be understood that the meaning of Islamic law includes sharia law and *fiqh* law, because the understanding of both is covered in it.

Women's Justice and Feminists

This study looks at the issue of marriage registration in positive law as legal protection for women, analysis of women's justice, namely how the law can function to ensure protection and justice for women.

According to Sheila Rowbotham, the term "feminist" first appeared in France in the early 19th century.¹⁸ This word comes from the English language to refer to women who fought for the right to vote in the 1890s. In subsequent developments, women's struggles were more popular with the term feminism.

According to Kamla and Nighat, Feminism is an understanding of the various forms of oppression and exploitation experienced by women in society, the workplace, and the family, along with deliberate efforts by both women and men to transform these conditions.¹⁹

According to E. Schussler Fiorenza²⁰, feminism is a social movement that aims to change the dominant patriarchal structure, as well as a theoretical vision of the world and society from the perspective of

¹⁸ Sheila Rowbotham, *Women in Movement: Feminism and Social Action* (London: Routledge, 1992), 8.

¹⁹ Budhy Munawar Rachman and Nasaruddin Umar Siti Ruhaini Dzuhayatin, *Liberal Islamic Interpretation of Gender Issues and Feminism in Indonesia, in a Methodological Reconstruction of the Discourse on Gender Equality in Islam* (Yogyakarta: PSW IAIN Sunan Kalijaga, McGill-ICIHEP, 2002), 32.

²⁰ She is a Christian Biblical scholar and a feminist at the same time.

women. This feminist perspective is needed to correct the dominant masculinistic perspective in society. In a society dominated by a patriarchal mentality, men always have a higher social position than women.²¹

Myra Diarsi, an activist of the Kalyanamitra foundation, said feminism is an awareness of the conditions of oppression and exploitation of women in society, in the world of work and in the family, as well as an action movement by women and men to change it.²²

Meanwhile, Wardah Hafiz²³ explained that feminism is a process of seeking the essence of humanity and as part of women's contributions in answering the challenges of their times. In order to formulate a social system that can provide happiness, freedom, dignity, and peace to humans, nature, and other creations.²⁴

Feminism is also understood as an awareness of the oppression and exploitation of women in society, the workplace, and the family, along with deliberate actions by both women and men to transform these conditions.²⁵

From the above definition, it can be understood that feminism is an understanding of the awareness of the oppression and injustice against women in society, as well as an action taken by a person or group of people, both women and men, to change the situation and create equality, peace, and happiness in humans.

Whereas a person who recognizes the existence of discrimination on the basis of sex, male domination over women, the implementation of the patriarchal system, and he takes action to oppose it, then he can be categorized as a feminist, whether explicitly mentioned or not.²⁶

²¹ E.S Fiorenza, *Text and Reality- Reality as Text: The Problem of a Feminist Historical and Social Reconstruction Based on Texts* (Studia Theologica 1, 1989), 20.

²² Myra Diarsi, "Feminism Is Not Anti to the Role of Housewives," *Ulumul Qur'an* V (1994) , 36.

²³ She is one of the many Indonesian women feminists

²⁴ Wardah Hafidz, *Feminism as a Third Millennium Problem and Religious Attitudes*, ed. Martin L. Sinaga (Jakarta: Grasindo, 2000), 91.

²⁵ Kamla Bhasin and Nighat Said Khan, *The Main Question About Feminism And Its Relevance* (Jakarta: Gramedia Pustaka Utama, 1995), 4.

²⁶ This is expressed by Kamla Bhasin and Nighat Said Khan as

So, a feminist can be defined as a man or woman, who makes efforts to fight for justice for women.²⁷

Marriage Registration in UUP

In Chapter I article 1 it is explained:

Marriage is a bond born between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead.

Article 2:

- 1) Marriage is legal, if it is carried out according to the laws of each religion and belief.
- 2) Each marriage is recorded according to the applicable laws and regulations.

1. Women's Justice Perspective Through a Feminist Approach

The formulation of marriage in article 1 above is felt to be very ideal and more impressive as a formulation of religious teachings than a juridical (legal) formulation. In the law, it is not common to include the terms "inner birth" and "eternal happiness" because the law only reaches outwardly visible problems, not inwardly matters. After all, there is no law that can guarantee happiness and the permanence of marriage. The provisions regarding happiness and eternity are very relative and are not defined by law. From a legal perspective, marriage is a legal agreement between a man and a woman who have each met formal juridical requirements.²⁸

The formulation in Article 1, as stated in the explanatory section, indicates that as a nation founded on *Pancasila* whose first principle is Belief in One God marriage is closely connected to religious and spiritual values. Therefore, marriage is understood not only as a natural or physical union

quoted by Budhy Munawar Rachman, *Liberal Islamic Interpretation of Gender Issues and Feminism in Indonesia*

²⁷ Siti Musdah Mulia and Marzani Anwar, *Justice and Gender Equality (Islamic Perspective)* (Jakarta: Women's Empowerment Team for Religious Affairs, Ministry of Religion of the Republic of Indonesia, 2001), 128.

²⁸ Musdah Mulia, *A Retrospective of Law No. 1 of 1974 (Human Rights and Gender Perspective)* (Jakarta, 2000), 5.

but also as one in which inner and spiritual aspects play a significant role.

Article 1 also describes the balance of positions of men and women who enter the gate of marriage. Where men and women bind themselves in the bond of marriage to form a happy and eternal family together based on the One Godhead.

Article 2 paragraph 2 which regulates the registration of marriages still causes legal uncertainty. Is a new marriage valid if it has been registered according to the applicable law? Textually, there is an impression that the recording is just an administrative act, while the marriage is valid if it is carried out according to religious and belief laws as in paragraph 1. But after reading article 10 of Government Regulation No. 9 of 1975²⁹, the impression was obtained that the Marriage Registrar gave validity to the marriage.³⁰

In Nursyahbani Katjasungkana's observation, the practice of marriage that is legal according to religion but not recorded, this often causes problems for the wife and children she gives birth to. The position of the wife is very weak because at any time the marriage can be annulled. Also the issue of the identity of the child and the inheritance of the father even though they are legitimate children according to religion.³¹

Marriage registration is regulated and made for the benefit of both husbands, wives and children to provide legal protection, as well as provide maximum happiness for all family members. If the marriage goes through the registration process, then all parties will receive the rights that should be obtained.³²

²⁹ "By heeding the marriage procedures according to each religious law and belief, the marriage is carried out in front of the Registrar and attended by two witnesses."

³⁰ R. Subekti and R. Subekti, *Some Unclear Things in the Marriage Law, in the Reform of Islamic Law in Indonesia: In Memoriam Prof. Hazairin (Jarta, 1975)*, 25-26.

³¹ Nursyahbani Katjasungkana, *The Position of Women in Islamic Perspectives, (Comparative Paper)*, in *Indonesian Muslim Women in Textual and Contextual Studies* (Jakarta: INIS, 1993), 63.

³² Tri Winarni and Ismail Akhmad Nadirin, "Marriage Registration as an Effort to Protect Women and Children (Case Study at the Religious Affairs Office of Weru District)," *Court: Journal of Islamic Law Studies* 8 (2023), 250 <http://dx.doi.org/10.24235/mahkamah.v8i2.15786%A%OA>.

Research by Indrasari (2016) as cited by Elyassin Firdaus et al highlights the lack of socialization from the government regarding the importance of marriage registration. The low legal literacy of the community leads to a dependence on oral and customary information, which is not always in accordance with state regulations. This shows the importance of the educational role of agencies such as KUA and the Population Office.³³

Marriage registration is seen as an important element of the validity of a marriage. 90% of respondents from the research results of the Office of the Minister of State for Women's Empowerment in collaboration with PSW UIN Syarif Hidayatullah Jakarta require marriage registration at official government offices. One respondent, the Chairman of the Hindu Dharma Indonesia Parisada of Mataram Municipality emphasized that “marriage must be witnessed by God, society, and the state. So that marriage registration is mandatory in Hinduism.”³⁴ The same thing was expressed by a lawyer in Surabaya. He said, “Marriage must be recorded to ensure the fulfillment of rights as wives and children. Otherwise, the wife will bear the burden if the husband is not responsible.” One interesting phenomenon is that scholars still strongly defend the principle that the validity of marriage in Islam is only determined by religious law. “The legal basis of marriage is religion”. A religious respondent, the chairman of the North Sumatra MUI, emphasized that: “Marriages must be recorded, but (recording) does not determine the validity of marriage. But the state is not responsible for taking care of it.” The nuances of dualism above can be seen in the results of interviews with three other respondents, namely the head of the Civil Registration Office of the city of Banjarmasin, the head of the Religious Affairs Office of Central Amuntai District, North Hulu Sungai, South Kalimantan and the chairman of one of the KUA in the city of Bandung. He said, “yes, if you look at it (from the perspective of) religion (unregistered

³³ Elyassin Firdaus and et al., “Challenges in Recording Valid Marriages by Religion and State in Indonesia,” *Al-Zayn: Journal of Social Sciences & Law* 3 (2025), 1968. <https://doi.org/10.61104/alz.v3i3.1485>.

³⁴ The results of the in-depth interviews in this report are written in italics. Writing in italics aims to easily distinguish which thoughts come directly from the respondents.

marriage), yes, it may be legal, but because we have a law, it is still invalid”.³⁵ This means that the dualism of marriage registration law is still relatively strong.

The emergence of the dualism model above can be used as a strong indicator of the influence of religious doctrines (let's call it *fiqh*) that do not see marriage registration as one of the substantive conditions that determine the validity of marriage. Meanwhile, *fiqh* has become a juridical, philosophical, and sociological value in society.

The basis of the legality of a marriage does not solely refer to religious doctrines. Since marriage is a serious and sacred choice for marriage that concerns the fate of many people (especially husband and wife), it is necessary to have a functional marriage law to realize the sacred mission of marriage. Therefore, marriage is not only a religious, traditional, social, and moral issue, but also a formal issue or state issue. This means that marriage must involve religious, moral, social, and legal control in the form of state intervention in supervising the practice of marriage.³⁶

The above research illustrates that respondents' opinions tend to be moderate. In this case, although religious doctrine (*fiqh*) is still quite felt, the respondents' thinking is more about their openness to new discourses and continues to roll in society. So that there is an assessment that the basis of the validity of a marriage does not solely refer to religious doctrines.

Unrecorded marriages cause the rights that must be obtained by the child to be neglected and even lost legally. Parents who are irresponsible and ignore the rights of their children cannot be prosecuted legally because they do not have an administrative legal basis, even if the marriage is legally legal. However, legally positive children's rights will be difficult to fight.³⁷

³⁵ The Office of the Minister of State for Women's Empowerment in collaboration with PSW IAIN Syarif Hidayatullah Jakarta, *Policy Studies in the Context of Presentation and Improvement of Marriage Law* (Jakarta, 2000), 88-89.

³⁶ Different Rossatria, *The Results of a Study on Law No. 1 of 1974, on Marriage* (Bogor: Deputy for Development and Information of the State Ministry of Women's Empowerment, 2002) 7.

³⁷ Sukiaty and Ratih Lusiani Bancin, “Protection of Women and Children: A Study of the Legal Consequences of Abandonment of Marriage Registration, Gender Equality,” *Internasional Journal*

The above findings show that the feminist perspective says that marriage is a process that is a sharia of religious teachings, as well as a legal contract of agreement. Therefore, recording steps in accordance with applicable laws are a must so that formally and materially they can be accountable to the general public. As well as being an important part that determines whether marriage is legal or not.

In this regard, it is necessary to propose a revision of article 2 of the Constitution by combining paragraph 1 and paragraph 2. The amendment was redacted: "Marriage is valid if it is carried out according to the laws of each religion and belief and must be recorded in accordance with the applicable laws and regulations."

While in another editorial it can be proposed: "Marriage is valid if it is carried out according to the law of each religion and every marriage is recorded according to the applicable laws and regulations".

The two redactions above both unite paragraphs 1 and 2. The difference is that the first one does not remove the word "trust" and add the word "mandatory". Meanwhile, in the second proposal, the word "trust" and the word "mandatory" were not found. The addition of the word "mandatory" from the above proposal more emphatically shows legal certainty. The need for this affirmation is because many mudharat occur from unrecorded marriages. Furthermore, it is necessary to include strict sanctions for violators, so as to effectively prevent the emergence of marriage cases under hand.

2. Fiqh Perspective

The discussion of marriage registration in classical *fiqh* books is not found. This issue occupies a leading place in modern jurisprudence, given the many practical problems arising from the unrecorded marriage related to important issues, such as the origin of children, inheritance and alimony. The birth of modern administration brought convenience in recording marriage contracts. On the other hand, the Quran in one of the longest verses and called the

closing verse, commands the recording of important transactions.³⁸ The meeting of practical interests and a review of *fiqh*, leads to an investigation of the parastic problem arising from the non-recording of the marriage contract.³⁹

Syaltut said the purpose of marriage registration is to preserve the rights of the husband/wife and children or descendants, such as maintenance and inheritance. The recorder is an effort to anticipate the depletion of the faith of Muslims. According to Syaltut, one of the consequences of the depletion of the Muslim faith is that there are more and more denials of promises that result in a pretext to run away from obligations. Therefore, the measure of faith is something hidden, one of the ways out as a preventive effort so that people do not run away from responsibility is to make written evidence.⁴⁰

Ahmad Rafiq explained that placing marriage registration only as an administrative condition is very unfavorable. In fact, if tracked, the methodological foundation is quite clear. Technically, the scholars of *ushul* call it *maslahah al-mursalah*.⁴¹ With the existence of marriage planning, the legal status becomes clear. So various kinds of harms such as uncertainty of status for farmers and children will be avoided.⁴²

The five basic values that are the main foundation in building a beneficial life are *hifzh al-din* (maintaining religion), *hifzh al-nafs* (preserving the soul), *hifzh al-aql* (preserving intellect), *hifzh al-nasl* (preserving offspring), and *hifzh al-mal* (preserving wealth). Marriage registration reflects protection efforts in these five aspects.⁴³

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُم بِدِينِ إِلَى أَجْلٍ مُسَمٍ فَاتَّبِعُوهُ
(“O you who believe, when you do mu•even not in cash for an indefinite time, write it down...” (QS: 2:282)

³⁹ Tahir Mahmood, *Family Law Reform in The Muslim World*, n.d., 158-159 .

⁴⁰ Mahmûd Syaltût, *Al-Fatâwâ Dirâsah Musykilât Al-Muslim Al-Muâsir Fî Hayâtihi Al-Yaumiyah Al-Âmmah*, 3rd ed. (Dâr al-Qalam, n.d.), 268-269.

⁴¹ Ahmad Rafiq, *Reform of Islamic Law in Indonesia* (Yogyakarta: Gema Media, 2001), 109.

⁴² Amiur Nuruddin and Azhari Akmal Tarigan, *Islamic Civil Law in Indonesia (A Critical Study of the Development of Islamic Law from Fiqh, Law No. 1 1974 to KHI)* (Jakarta: Kencana, 2004), 135.

⁴³ Kuni Qoneta, “Marriage Registration as Legal Protection

In this context, it can be seen how important it is to register marriages stipulated by law, but on the other hand, marriages that are not recorded, (as long as there are two witnesses) are still considered valid by religion, even if the two witnesses are asked to keep the marriage secret is still considered in the view of Islamic legal experts Shafī'ī and Abū Hanīfah.⁴⁴

It is interesting to see the views of fiqh scholars on how to notify about marriage. Regarding this issue, there is a difference of opinion.

The first opinion views that the way of notification is by the presence of witnesses when the marriage contract takes place. This opinion is held by the scholars. The evidence they hold is the hadith of the Prophet narrated by Imam Ahmad and 'Amran bin Husayn:

*“A marriage contract is not valid except with a guardian and two fair witnesses”.*⁴⁵

Then the hadith narrated by at-Tirmizi and Ibn Abbas:

“Adulterous women are those who marry themselves without the presence of a bayyinah (i.e. guardian or witness).” (Sunan Tirmizi: 1022)

According to the ratio, the marriage contract is a family relationship that should be the full concern of religion. To maintain the sanctity of the contract, it is natural to have a witness when the marriage contract takes place. Thus, it avoids the possibility of accusations of being oblique against the person who is already married, or denying the existence of a marriage contract, which will be detrimental to the wife and children.

The second opinion views that the method of notification can be done with anything as long as it can be known by other people before the

for Women and Children from the Perspective of Maqashid Sharia Al-Syatibi,” *El-Iqtishady: Journal of Sharia Economic Law* 7 (2025), 168.

⁴⁴ Quraish Shihab, *The Qur'an's Insight On The Tafsîr Maudhu'l On The Various Questions Of The Ummah* (Bandung: Mizan, 1996), 204.

⁴⁵ Ali bin Umar Ad-Dâruquthnî, *Sunan Ad-Dâruquthnî*, Juz IV, No. 3521 (Beirut: Ma'rifah, 2001), 322.

husband performs *dukhul* (intercourse). This opinion is held by Imam Malik. The reason is the hadith of the Prophet:

حَدَّثَنَا أَحْمَدُ بْنُ مَنْعِجَ حَدَّثَنَا يَزِيدُ بْنُ هَارُونَ أَخْبَرَنَا عَيْسَى بْنُ مَيْمُونِ الْأَنْصَارِيُّ عَنِ الْقَالِمِ بْنِ مُحَمَّدٍ عَنْ عَائِشَةَ قَالَتْ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَغْنِنُوا هَذَا النِّكَاحَ وَاجْعِلُوهُ فِي الْمَسَاجِدِ وَاضْرِبُوهُ عَلَيْهِ بِالدُّفُوفِ قَالَ أَبُو عَيْسَى هَذَا حَدِيثُ غَرِيبٍ حَسَنٌ فِي هَذَا الْبَابِ وَعَيْسَى بْنُ مَيْمُونِ الْأَنْصَارِيُّ يُضَعَّفُ فِي الْحَدِيثِ وَعَيْسَى بْنُ مَيْمُونِ الَّذِي يَرَوِي عَنْ أَبْنِ أَبِي نَجِيْحٍ التَّفَسِيرُ هُوَ ثَقِيقٌ

“Narrated to us Ahmad bin Mari, narrated to us Yazid bin Harun, narrated to us Isa bin Maimun Al Anshari from Al qasim bin Muhammad from Aisha (may Allah be pleased with him) said, The Messenger of Allah ﷺ said, “Announce the marriage, hold it in the mosque, and beat the tambourine to announce it.” Abu Isa said, “This is the hadith of gharib hasan in this chapter. Isa bin Maimun Al Anshari is weakened in this narration. Isa bin Maimun narrated from Ibn Abu Najih At Tafsir that it is tsiqah.” (Sunan Tirmizi: 1009)

This hadith clearly shows that the notification of the marriage contract can be done in any way between and hitting the drum. According to the ratio, what is intended by the marriage contract is the halal intercourse. Sexual intercourse that is haram is by way of adultery, which is done in a secret way for fear of being found out. Intercourse carried out with a marriage contract is halal intercourse, therefore it is necessary to know by other people by way of minimum notice before the intercourse occurs after the marriage contract takes place.⁴⁶

Based on the two opinions above, it can be concluded that the majority (*jumhur*) require the presence of witnesses for a marriage contract to be valid. This implies that the marriage contract is considered void if no witnesses are present. In contrast, the Maliki school emphasizes the need for notification prior to consummation after the contract.

⁴⁶ Ibrahim Hosen, *Fiqh Comparison of Marriage Problems* (Jakarta: Pustaka Firdaus, 2003), 259.

In relation to Imam Malik's opinion above, the existence of witnesses in the marriage contract is essentially to inform that the marriage has occurred. Therefore, marriage registration must be seen as a new form of declaring (declaring marriage). This means that marriage registration can be integrated with the existence of witnesses. A marriage witness can be understood as a living witness and a witness to the deed. Witness deeds ultimately become authentic evidence and witnesses of a marriage.

However, according to Quraish Shihab, in the context of Indonesia, although such a marriage is considered valid under religious law, a "marriage under the hand" may still lead to sin for those involved, as it contravenes the regulations established by the government and the House of Representatives (*ulil amri*), the Quran commands every Muslim to obey *ulil amri* as long as it does not contradict the laws of Allah. In this case, the recording is not only not contradictory, but it is also very much in line with the spirit of the Quran.⁴⁷

Another opinion says that according to Islamic law, marriage registration can be determined by using the theory of *qiyyas*, *maslahah mursalah*, *syaddu al-dzari'ah*, *istihsan* or others, that is, marriage registration is part of Islamic law aimed at maintaining the integrity of the marriage.⁴⁸

According to Abdul Somat, as quoted by Anas Maulana, the practice of marriage has not been recorded as having been legalized by the State through the Islamic Court, before the issuance of Law Number 1 of 1974. Based on the decision of the High Islamic Court No.23/19 of 1953 it is emphasized that if the marriage pillar is complete, but not registered, then the marriage is still valid, but the person concerned is subject to a fine because the marriage is not registered.⁴⁹

⁴⁷ Ibrahim Hosen, *Fiqh Comparison of Marriage Problems*.

⁴⁸ M. Fahmi Al Amruzi, "Marriage Registration and Sari Marriage Problems," *Ulumul Syar'i Journal of Law and Sharia Sciences* 9 (2020), 6. <https://doi.org/10.52051/ulumulsyari.v9i2.79>.

⁴⁹ Anas Maulana, "Marriage Registration in Permendagri Number 109 of 2019 concerning Forms and Books Used in Population Administration," *Islamic Law, Jurnal Siyasah* 7 (2022), 62. <https://doi.org/10.53429/law.v7i02>.

Marriage registration is an obligation that must be carried out by every Indonesian citizen, because the benefits are greater so that the purpose of shari'a can be fulfilled. Marriage registration is not only administrative, but also has implications for the legitimacy of the marriage identity.⁵⁰

According to Amir Syarifuddin, the record of this marriage can be returned to the Quran, the words of Allah Q.S [2]:282, which reads:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايِنُتُمْ بِدِينِ إِلَى أَجْلٍ مُسَمٍ فَاکْتُبُوهُ ...

"O you who believe, if you do mu'veen not in cash for an indefinite time, write it down..." (Quran: 2:282)

The above paragraph basically orders that the debt and receivables transactions be recorded. However, this verse can be understood as an order to record all forms of transactions carried out, including marriage contracts. Therefore, according to Amir, the *muwafaqah* of this verse is if in the contract debts and receivables alone it has been shari'ah to be written, let alone a contract that is binding between two human children. In other words, marriage registration is more important to do than the recording of debts and receivables.

Review of Marriage Registration in Positive Law, Analysis of Women's Justice and *Fiqh*

Marriage in Islam is not merely a civil contractual relationship. Marriage is a *mitsâqan ghalizhan* (strong covenant), which contains spiritual values, so a valid marriage has the value of worship. Marriage in Islamic law is included in the category of *mu'amalah*, which is related to society. For this reason, rules that apply to all people are needed that allow them to obtain the rights resulting from the marriage.

Marriage registration institutions are a necessity of modern society. Through this, a marriage between a man and a woman has strong evidence, namely a marriage certificate. This institution is not found in

⁵⁰ Muhammad Sulthan Akbar, Yufi Wiyo Rini Masykuroh, and Olivia Rizka Vinanda, "Mashlahah Mursalah Marriage Registration in Islamic Family Law," *Knowledge: Journal of Innovation Research and Development Results* 5 (2025), 54. <https://doi.org/10.51878/knowledge.v5i1.4590> %A %A.

the books of jurisprudence. In classical jurisprudence, marriage is not proven by a marriage certificate, but by the testimony of two witnesses who were present when the marriage took place. The purpose of having witnesses in marriage is so that the marriage that takes place becomes official and understood by the community.

In the absence of *fiqh* books mentioning the tradition or provision of marriage registration as a condition or condition of the validity of a marriage, many consider that this registration is solely to fulfill the law of the state and has nothing to do with sharia. It could be that the emergence of this understanding is based on the condition of the Muslim community from the first to the middle centuries in a simple social system or a small Muslim population. In a simple and small population society, the control of society over the event of marriage is very strong, so that the rights and obligations arising from a marriage agreement can be maintained.

In modern society, the above understanding can no longer be maintained. The structure of modern society cannot rely on the increasingly eroded function of customs, for the norms of marriage bonds. A very dense population and increasing mobility of society, and various other social changes demanded a provision regarding the registration of marriages. Cases where the rights of a married couple (read: women) are not guaranteed, and even tend to be oppressed, occur in unrecorded marriages.

It is very possible that there will be a legal reform in connection with this marriage registration. It should be noted that in the schools of *fiqh* the main Sunni *fiqh*, there is a method of applying the law based on *qiyyâs* (analogy), and *mashlahah mursalah*. By analogy, the provisions for recording marriage are no different from the recording of buying and selling transactions or debts and receivables which in Islam are commanded to record. Meanwhile, in terms of *mashlahah*, marriage registration is very effective in protecting the rights of the parties who carry out the marriage.

In Imam Malik's view, the existence of witnesses in the marriage contract is essentially to inform that the marriage has taken place. Therefore, marriage registration must be seen as a new form

of declaring (declaring marriage). This means that marriage registration can be integrated with the existence of witnesses, meaning that the existence of marriage registration does not add new harmony. A marriage witness can be understood as a living witness and a witness to the deed. Witness deeds ultimately become authentic evidence and witnesses of a marriage.

If the Indonesian Law is understood in an integrated (integral) manner, marriage registration should be a valid requirement. On the other hand, if only seen from the text and explanation, the function of recording is only an administrative requirement. Marriage registration is not just an administrative matter, but a legal requirement for the validity of a marriage. Thus, the recording and *ijâb kabûl* are a combination of events that make the marriage valid both for the state and religion at the same time.⁵¹

In order for certainty and legal order, there needs to be emphasis and sanctions. Sanctions are not only given to Marriage Registrars, but also to marriage perpetrators who violate the applicable laws.

The analysis of justice for women requires that the registration of marriage is not only an administrative issue, but is also a part that determines the validity of marriage, because marriage under the hands of many harms women. In the concept of *fiqh*, there are several views, including that the concept of classical *fiqh* is not found in this problem, but it is interesting if you look at Imam Malik's opinion about the existence of witnesses in the marriage contract in essence to inform that marriage has occurred. Therefore, marriage registration must be seen as a new form of declaring (declaring marriage). This means that marriage registration can be integrated with the existence of witnesses, the existence of marriage registration does not add new harmony. A marriage witness can be understood as a living witness and a witness to the deed. Witness deeds ultimately become authentic evidence and witnesses of a marriage.

⁵¹ Directorate General of Law and Legislation of the Department of Justice, *Around the Establishment of the Marriage Law and its Regulations*, n.d., 131.

The findings of the above study show that the analysis of women's justice with a feminist approach says that marriage registration has important value because it is directly related to the protection of women's rights from the practice of marriage under the hands that is detrimental to them legally and socially. Meanwhile, from the perspective of jurisprudence, especially according to the opinion of Imam Malik, the main function of a marriage witness is to announce the occurrence of marriage (*i'lân an-nikâh*). Therefore, in the context of contemporary legislation, marriage registration can be seen as a new form of legal announcement or testimony (witness deed), without adding new pillars to the marriage contract. Based on this feminist and jurisprudence perspective, it is necessary to revise the formulation of articles in the Marriage Law so that the registration function in marriage can guarantee and be in line with the principles of justice and legal protection for women.

Based on the analysis of women's justice with a feminist and *fiqh* approach, especially Imam Malik's view on the existence of witnesses as a means of notifying/announcing a marriage contract, it is necessary to revise or update the provisions of Article 2 of Law Number 1 of 1974 junto Law Number 16 of 2019 concerning Marriage. The formulation of the current article reads:

Article 2

- 1: Marriage is legal, if it is done according to the laws of each religion and belief.
- 2: Each marriage is recorded according to the applicable laws and regulations.

The above formulation places recording as an administrative obligation and does not affect the validity of the marriage. This opens up space for marriage to occur under the hands which results in legal uncertainty for women and children. Therefore, it is necessary to revise this article with a new formulation that affirms that recording is part of the element of the validity of marriage. The following is a proposed revision of article 2 of the UUP on the analysis of justice for women and *fiqh*.

Article 2

Marriage is legal, if it is carried out according to the laws of each religion and beliefs and recorded by the authorized officials.

In addition to article 2 of the UUP above, it is also necessary to update the article on marriage witnesses which has a contextual *fiqh* basis from Imam Malik's opinion. This marriage witness article is not explicitly stated in the UUP but is technically regulated in the Compilation of Islamic Law (KHI) in Indonesia. Article 24 states that:

Article 24:

- (1) Witnesses in marriage are the pillars of the implementation of the marriage contract
- (2) Every marriage must be witnessed by two witnesses

The above formulation still departs from the concept of *fiqh* which emphasizes the presence of physical witnesses and does not require written legal evidence of a contract (witness deed), which can be used as a basis for legal protection, especially for women and children. According to Imam Malik, the main function of the marriage witness is the '*I'lân nikah* or the notification of the occurrence of the marriage. This means that marriage registration can be understood as a form of the function of the witness, namely a witness who is not only physically present but also legally written through a marriage certificate. For this reason, it is necessary to expand the meaning of witnesses in marriage. The proposed revision of Article 24 is as follows:

Article 24:

- 1) Witnesses in marriage are the pillars of the implementation of the marriage contract
- 2) Every marriage must be witnessed by two witnesses who are qualified according to the rules of Islamic law
- 3) In addition to the witnesses referred to in paragraph 2, the registration of marriage by the authorized official is a form of deed witness or legal testimony on the occurrence of a marriage and

functions as authentic evidence that has legal force to protect the rights of the parties, especially the wife and children.

Conclusion

The main findings show that the analysis of women's justice requires that marriage registration is not only an administrative issue, but is also a part of determining the validity of marriage and ensuring the protection of women's rights, because marriage under the hands is much detrimental to women. Meanwhile, the re-examination of the existence of witnesses in marriage strengthens the argument that the perspective of *fiqh* can provide space for the protection of justice for the benefit of women.

The analysis of *fiqh* states that marriage registration must be seen as a new form of announcing (pretending marriage). This means that marriage registration can be integrated with the existence of witnesses, the existence of marriage registration does not add new harmony. A marriage witness can be understood as a living witness and a witness to the deed. Witness deeds ultimately become authentic evidence and witnesses of a marriage.

The integration between women's justice analysis and *fiqh* results in an understanding that marriage registration must be seen as a legal witness to protect the parties, especially women and children. Based on this, it is necessary to revise Article 2 of the UUP so that the registration of marriage is part of the validity of the marriage. Likewise, the arrangement of marriage witnesses in *fiqh* needs to be expanded by adding a witness to a deed recognized by the state. Thus, Article 24 concerning marriage witnesses in the Compilation of Islamic Law in Indonesia needs to be revised.

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