

# Registering the Unregistered: A Legal Analysis of the Ministry of Home Affairs' Policy on the Family Card for the Unregistered Married Couple

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**Abstract.** In October 2021, the Ministry of Home Affairs' General Directorate of Civil Registry issued a policy allowing the unregistered married couple to have a family card, which raised pros and cons among the public. The General Director of the Civil Registry said that such a policy did not mean to legitimate unregistered marriage. It only meant to provide registry service for the unmarried couple as it is part of the Directorate's everyday duties and authorities. The objective of this paper is to analyze whether or not the government should accommodate the registry of the unregistered married couple in the official family card. It analyses the issue from two perspectives: harmonization of the National Law and the Islamic law. This paper argues that such a policy contradicts the existing law of marriage and is not in line with the legal spirit of the Law Number 1 of the Year 1974. From the perspective of Islamic law, such a policy contradicts the principles of *maqasid al-sharia* as well as the philosophy of Islamic marriage.

**Keywords:** Civil Registry, Islamic Marriage, Marriage Law, Legal Policy

## 1 Introduction

*Nikah Siri* is a common practice of illegal marriage in Indonesia, particularly in Java. It refers to the practice of unregistered marriage among Muslims in Indonesia. Although it is illegal, as the marriage is not registered by the authority (the Office of Religious Affairs, *Kantor Urusan Agama*), society usually accepts the practice of *Nikah Siri* because it is considered to comply with Islamic law. *Nikah Siri* literally means "the secret marriage". It refers to the marriage carried out according to the principles of marriage in Islamic law, but it is not recorded nor registered by the government authority [1]–[4]. Such a practice of marriage is illegal under the state law. Nevertheless, many accepted the procedure because they believed such a marriage was valid under Islamic law.

Some people get married for various reasons. A study by Adillah (2011) indicates several reasons for doing the *nikah siri*. The first one is economic. Some couples did the *nikah siri* because they could not afford the financial expenses of marriage, including the administrative fees of marriage registration by the authority, which could sometimes double the "normal fees", and the other costs

related to traditional wedding ceremonies. Second, one of the couples, mostly the bride, has not reached the legal marriage age. Since Islamic marriage does not require a minimum legal age of marriage, the couple decides to marry under Islamic law while postponing the legal marriage procedure according to the state law. The third one is related to official job requirements. In some offices, an employee may marry after they finish an initial probation period. Some people who could not wait for the end of such a period to get married choose to do the *nikah siri* before they can officially register the marriage after the end of the period. Fourth, there is a strong belief in some members of the society that *nikah siri* is lawful according to the shari'a law. They consider that the registration of the marriage by the authority is just an administrative matter. The fifth reason is unintended pregnancy before the wedding. An unmarried couple may decide to do *nikah siri* because they experience unintended pregnancy to avoid social punishments. The sixth reason is a lack of understanding on the importance of official marriage registration. Seven, there is a negative stigma toward polygamy, so people avoid showing their second marriage by doing *nikah siri*. Eight, people who are planning to do polygamy face a strict regulations to do a lawful second marriage. Therefore, the *nikah siri* becomes their option as they believe that such an unregistered marriage is legal according to Sharia law [3].

However, the practices of *nikah siri* had resulted in some negative consequences, particularly for women and children of the marriage. Once the wedding is broken, they might have to deal with the problems of wealth distribution, child custody, maintenance rights of the divorced wife, housing, etc. The divorced wife or husband might be unable to bring their case to court if they have a dispute. Kids might find it challenging to obtain their civil registration rights, including the right to get a birth certificate, because their parents are illegally married. If domestic violence occurred, the victims might not be able to bring the case to court and ask for justice. According to state law, these problems are the consequences of unregistered marriage.

In October 2021, the Ministry of Home Affairs' General Directorate of Citizenship and Civil Registry (GD-CCR) issued a policy enabling unregistered married couples to get a family card [5]. Such a policy raised pros and cons among the public. The General Director of the Civil Registry said the policy was not intended to legitimate unregistered marriages. It offers a registry service for unmarried couples as the Directorate's everyday duties and authorities. This paper aims to analyse whether or not the government should accommodate the registry of unregistered married couple in the official family card. It starts with a presentation on the marriage law in Indonesia. Then, it discusses the policy made by the General Directorate of the Civil Registry regarding the family card for the unregistered married couple. The paper analyses the issue from two perspectives: harmonisation of the National Law and the Islamic law. The conclusion is presented at the end.

## **2. Discussion**

### **2.1. Marriage Law in Indonesia**

Marriage in Indonesia is regulated by the Law Number 1 of 1974 on Marriage. Article 2 of the Law mentions that the legal marriage should be conducted according to the religious beliefs of the bride

and the groom. It also notes that the marriage should be registered according to state regulations. The article says as follows:

Article 2 – Law Number 1 of 1974 on Marriage

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

On the one hand, the article shows a recognition towards religious authority, in which the state only acknowledges and legitimates a marriage conducted according to spiritual principles of the couple's beliefs. In other words, the state will not legalise the marriage status of couples who do not follow the principles of marriage determined by their religious beliefs. Such an acknowledgement is a constitutional consequence of the national principles of Pancasila, in which the first principle says, "The Belief in the One and Only God" (Ketuhanan Yang Maha Esa). This first principle of Pancasila is a moral foundation, which reflects a religious dimension for the country's nation-building. Such a divine value of the Pancasila reflects that the country's national existence may not be separated from the country's belief in the One God, which is believed to be the supreme source of goodness [6].

On the other hand, the article demonstrates the state's authority over the institution of marriage in the society. The state requires Indonesians to register their weddings in the authorized institutions. According to the Government Regulation Number 9 Year 1975 on the Implementation of the Law Number 1 Year 1974 on Marriage, two institutions are responsible for authorizing marriages in Indonesia: the Office of Religious Affairs (*Kantor Urusan Agama*) for Muslim citizens and the Office of Civil Registration (*Kantor Catatan Sipil*) for non-Muslim citizens. The Chapter 2 of the Government Regulation states:

Article 2 – Government Regulation Number 9 Year 1975 on the Implementation of the Law Number 1 of 1974 on Marriage

- (1) The marriage registration for those marrying according to the Islamic religion is conducted by a marriage registrar as stated in the Law Number 32 Year 1954 on the Registration of Marriage, Divorce, and *Rujuk* (Marriage Reconciliation).
- (2) The marriage registration for those who are marrying according to the religions and beliefs other than Islam is conducted by a marriage registrar at the Office of Civil Registry as stated in various regulations on marriage registration.

The explanation of the Law Number 1 Year 1974 highlights six principles and foundations of the law. One of the principles is that marriage is legal only if it follows the religious principles of the couple's religions and beliefs and that such a marriage *should* be registered and recorded according to the existing state laws. The explanation also mentions that such a marriage record is just like the record of the other people's important life events such as birth and date, which are also stated in official certificates.

One of the objectives of marriage registration is to strengthen marriage institutions. The President's Instruction Number 1 Year 1991 on the Islamic Law Compilation mentions in the article 5 (1) that marriage should be registered to "guarantee the orderliness of marriage for the Islamic community" (*agar terjamin ketertiban perkawinan bagi masyarakat Islam*). Such an "orderliness of marriage" is not only for the administrative purposes – that is, to achieve a good marriage record among the society and to provide official marriage certificates for those who are married. It is also intended to protect the marital rights and responsibilities of the married people and their children, including parental responsibility, custody right, financial support, and inheritance right.

Unregistered marriage is illegal, and may lead to some negative consequences for the couples, particularly women. She did not have a legal status as a wife, thus making her position very weak before the law. She does not have any legal protection of her marital rights. If one of the couple did an abuse against the other, they may not be able to bring the case to the court and legally resolve the case. Kids, if any, are legally unprotected. They may not have inheritance rights. They may also find it difficult to get birth certificates [2], [7]. Therefore, marriage registration make the marriage stronger and it protects the marital rights of the married couple and their kids.

Such a protection is in line with the mandate of constitution. One of the objectives of the Indonesian state, stated in the preamble of the 1945 constitution, is to protect the entire Indonesian nation and all of Indonesia's bloodshed (*melindungi segenap bangsa Indonesia dan seluruh tumpah darah Indonesia*). By requiring that every marriage should be recorded, the state is actually protecting its citizens from unexpected consequences of marital relationships. It also protects the marital rights of married people. Thus, the Law Number 1 Year 1974 on Marriage strengthens the institution of marriage in the society so their marital relationships of the married people are not easily broken, providing a longer-term benefit for the greater welfare of the citizens.

## **2.2. Family Card for the Unregistered Married People**

The policy made the Ministry of Home Affairs' General Directorate of the Citizenship and Civil Registry (GD-CCR) enables the unregistered married people to get their own family card. Indonesian couples, who did *nikah siri*, may get their own family cards form the Directorate, which say that their marriages have not officially registered. Zudan Arif Fakrullah, the General Director of the Citizenship and Civil Registry, talked to the media that his office was not in a position to legalize the marriage. It just wanted to record that a marriage has occurred. However, the couple have to provide necessary documents to get their unregistered married recorded on the family card. The most important one is *Surat Pernyataan Tanggung Jawab Mutlak* (SPTMJ), which is a statement letter indicating that the couple has been truly married and is signed by at least two witnesses [5], [8].

Such a policy may give advantages for the unregistered married couple since they could get their names written on the same family card. Nevertheless, the policy is against the spirit of the marriage laws in Indonesia. As has been discussed in the previous section, the Law Number 1 Year 1974 has strengthened the institution of marriage in Indonesia. It ensures that marriage is conducted according to the religious beliefs of the couple. On behalf of the law, the officials record the occurrence of marriage after conducting a thorough inspection and assessment that the prospective bride and groom have meet all necessary requirements based on religious norms as well as state laws. In other words, only those who are allowed by religious norms could get official marriage certificates issued

by the authority. Such a thorough inspection and assessment could not be found in the process of getting family cards for unregistered married couples. The SPTMJ letter, as is required by the Ministry of Home Affairs' GD-CCR, could not guarantee that the occurrence of marriage stated in the letter has been truly conducted based on the requirements set by religious laws.

In addition, unlike the family card issued for the unregistered married couple, the official marriage certificates issued by the authority constitute a very strong proof that people have married under religious as well as state laws, making hard for the couples to break the marriage. As a legal marriage couple, one of the husband or wife has to file a divorce application to the Court to a divorce. They have to go through several trials before a divorce was decided by the judge. This process does not work in the case of unregistered married couple. Although they have the family card issued by the GD-CCR, they do not need to go to the court for a divorce. As they do not have any legal standing as a married couple, they can just break the marriage once there is unresolvable dispute among the couple. Accordingly, whereas Law Number 1 Year 1974 on Marriage builds a strong marriage institution, the GD-CCR's policy provides an incentive for couples to build a relatively weak marital relationship.

Furthermore, Law Number 1 Year 1974 on Marriage strengthens the institution of marriage by giving a legal protection for the married couple. A legal married couple people have their marital rights protected by the Law. Once there is a marital dispute among the couple, they could bring the case to the court so the judge can resolve the case using a strong legal judgment. The unregistered married couple cannot obtain such a strong legal protection. Instead of getting a legal marriage protection, the illegal married couple who did the *nikah siri* can easily lose their marital status and their marital rights may go undefended.

From the perspective of Islamic law, the GD-CCR's policy is against the *maqasid al-shari'ah*, the objectives of the Islamic law. As the Islamic jurists, including Ibn Taimiyyah, have argued, the objectives of Islamic law is to achieve the betterment of human beings and to protect their rights and interests, particularly five primary interests: religion, soul, mind, descendant, and property [9], [10]. The Islamic marriage law is formulated to achieve these objective of Islamic law (*shari'a*), particularly the protection of descendants. The GD-CCR's policy on family card for the unregistered married couple encourages illegal marriages, which leave the children of the marriage unprotected. It did not protect the marital rights of the wives or husbands as their marriage is unregistered and, therefore, is illegal.

Many people considered that *nikah siri* is religiously acceptable. As a matter of fact, such an unregistered marriage violates the philosophy of marriage in Islamic law. The Quran mentions that marriage should constitute "a strong agreement" (*mithaqan ghalidan*) between a man and a woman in building a strong marital relationship (Al-Nisa: 21). The practice of *nikah siri*, which is entitled for the GD-CCR's family card, does not create such a strong agreement between a man and a woman in a marital relationship as one partner can easily leave the other without having to go through a complicated court process. This article suggests, instead of facilitating the illegal married couple to get a family card, the Ministry of Home Affairs' GD-CCR should work together with the other government units, particularly the Ministry of Religious Affairs, to strengthen the institution of marriage and to eradicate the practice of *nikah siri* that clearly violates the spirit of Law Number 1 Year 1974 on Marriage as well as the spirit of Islamic marriage (*mithaqan ghalidan*).

### 3 Conclusion

This article argues that the policy made by the Ministry of Home Affairs' GD-CCR is not in line with the legal spirit of the Law Number 1 of the Year 1974 on Marriage. It contradicts the spirit of the existing law of marriage. Whereas the Law aims at providing the legal certainty as well as the legal protection for the marriage couples and their descendants, the policy does not provide any legal protection for the couples. As a matter of fact, it may encourage the increasing number of the illegal marriage (*Nikah Siri*) among the public so that it put especially the women and children without legal protection. From the perspective of Islamic law, such a policy contradicts the principles of *maqasid al-sharia* as well as the philosophy of Islamic marriage. Instead of facilitating the illegal married couple to get a family card, this article recommends the GD-CCR to work together with the other government units, particularly the Ministry of Religious Affairs, to eradicate the practice of *nikah siri* and to strengthen the institution of marriage in the society.

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