Abstract: Unregistered marriage is not something uncommon in Indonesia, contrary to the promulgation of Law Number 1 of 1974 concerning Marriage requiring the state to only recognize the validity of a registered marriage. Unregistered marriage often puts women as victims and this practice tends to contravene Islamic law. There have been cases where women always end up with an unclear status as wives, considering that wives are not entitled to both juridical rights and Islamic law rights to cancel a marriage, while a divorce is not often clearly declared against wives by husbands. Despite the impacts resulting from unregistered marriage, this practice remains obvious in society. The notion demanding the criminalization of unregistered marriages is rising, while this view is opposed by some since it is deemed to contravene religious provisions. Departing from this polemic, this research employed a normative method to find out the legal standing of the criminalization of unregistered marriage pursuant to Islamic law. The research discovers that unregistered marriage is likely to take place according to the criminal perspective of Islam, especially when it is linked to merit and drawbacks in the matter. Although the legal standing of unregistered marriage is acceptable, overlooking the procedures set by the government is deemed to be disobedience since this instruction from the government as ulil amri is considered
ta’zir citizens have to obey. Thus, criminalizing unregistered marriage is not taken as a proscription in terms of marriage, but it is implemented to respond to the disobedience of the governmental procedures.

Keywords: Mafsadat, Maslahat, Unregistered Marriage, Sentencing, Siyasah

Introduction

Unregistered marriage is seen more like an iceberg phenomenon, where the tip of it is the only small portion of the problem visible. This notion departs from the view believing that unregistered marriage is based on *fiqh*. Many factors affect people’s decision to not register their marriage, such as early pregnancy before marriage and the desire for polygyny.\(^1\) Numerous cases of unregistered marriage in Indonesia have drawn the attention of the majority of the people, and it has also urged people to conduct studies regarding this case. Several studies focused more on the factors contributing to unregistered marriage, including child marriage across Indonesia.\(^2\) Some other focuses more on the impacts of unregistered marriage affecting wives and children,\(^3\) family establishment,\(^4\) and government administration.\(^5\)

The government has made some attempts to stop this practice. Juridically, Law Number 1 of 1974 serves as the constitutional basis for the government to recognize the unregistered marriage that is recorded in the state administration.

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Muslim people in Indonesia have always referred to *fiqh*, but they should also comply with Law Number 1 of 1974 in marriage.

Civil implications of unregistered marriage are massive, not only affecting the married couple but the children born from this marriage are also affected by this practice. Suggestions have been given to help them understand more about the negative impacts arising, especially in the view of civil matters. Unfortunately, unregistered marriage remains preferable in the muslim community.

Marriage Law has been perfected by the promulgation of Law Number 16 of 2019 concerning the Amendment to Law Number 1 of 1974 concerning Marriage, with its amendment leaning more toward the administrative instead of civil matters, while the criminal aspect of this matter is considered weak. This is one of the grounds why unregistered marriage is proscribed by the government, contrary to the fact where it is common in the community. The criminalization of unregistered marriage has been often debated within an academic purview.

However, the criminalization that often harms those involved in polygyny but having their marriage unregistered without any juridical requirements has been in the spotlight. The government once considered the criminalization of unregistered marriage, as governed in the Bill concerning substantive law at a religious court of marriage in 2010. Many, however, have opposed this approach, believing that unregistered marriage should be valid and acceptable and all conduct that is considered valid is deemed to be an observance. The argument for criminalizing unregistered marriage is intended to ensure that all parties concerned are protected from the impacts of the marriage,

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especially children and wives. Legal protection is not only related to positive law but also the religious law.

The legal impact of the cases of unregistered marriage has labeled wives with unclear status divorced from this marital tie. There have been several cases where the unregistered marriage ended up with a murky status for the wives when the marriage ended. In Bondowoso, East Java, for example, a wife decided to end her marriage, and a legal issue regarding the validity of the divorce and the following marriage emerged, since this divorce was not preceded by the declaration of divorce from her ex-husband or without any court decision. This situation implies that the wife was not a legitimate divorcee and still bound to her ex-husband; therefore, remarriage could not take place. The wife in this case was not entitled to legal standing simply because the marriage was not registered.  

Therefore, departing from the aforementioned elaboration, this article is more focused on the perspective of Islamic law toward the idea of criminalizing unregistered marriage. This article also adheres to the conception of the regulation of crime in Islam (al-siyasah al-jinaiyah) that also involves the participation of the government in formulating criminal provisions not regulated in the sources of Islamic law such as the Quran and Hadiths.

Unregistered Marriage

Unregistered marriage is known as sirri in Bahasa, meaning ‘secret’. Although this marriage is done secretly, this is not forbidden by religion but illicit according to the rule of the government simply because this marriage is not officially registered. Sirri is not something new in the context of Islamic jurisprudence or fiqh.

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Experts refer to Islamic jurisprudence regarding the two definitions of unregistered marriage. First, the unregistered marriage is understood based on the terminology established by fiqh experts, holding that unregistered marriage completes the pillars of Islam and its other requirements, but in this case, both husband and wife and witnesses tend to keep it a secret.”

The second definition refers to a phenomenon of marriage taking place in several Arabian countries. Unregistered marriage under this definition is done without the presence of guardians and witnesses, or if existing, the witnesses are not part of their family members or relatives.

The unregistered marriage under the second definition is categorized as batil or falsehood. Some thoughts in the community of imam Madhab held that matrimony without the presence of witnesses or guardians, according to the thoughts of Malikiyyah, Syafiiyyah, and Hanabilah, was considered illegitimate simply because the validity of the matrimony would depend on the presence of both the guardians and witnesses. The Hanafiyyah people, however, believed that such matrimony remained legitimate since the presence of guardians did not determine the legitimacy of the marriage.

Referring to the first definition of unregistered marriage, with the presence of both guardians and witnesses, the marriage was done secretly, but most arguments imply that this marriage is lawful from the religious perspective although some ulama condemn it. Once Ibnu al-Arabi argued that an argument that allowed the case would be reliable. The secrecy of the marriage in

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9 Abdul Malik bin Yusuf, Zawaj al-Misyar Dirasatun Fiqhyyatun wa Naqdun Ijtima’yyatun, (Riyadh: Dar Ibnu Labun, 1423H.), 101
10 Ibid., 102
11 Ibnu Al-Rusyd, Bidayatul Mujtahid wa nihayatul muqtashid juz 3 (Kairo: Darul Hadit, 2004), 44; see also Abu Bakar Al-Husaini, Kifayatul Akhyar fi Hilli Ghayatil Ikhtishar (Darnaskus: Darul Khair, 1994), 355; see also Mahfudh bin Ahmad Al-Hasan, Al-Hidayah ala Madhabi Al-Imam Abi Abdillah Ahmad bin Muhammad bin Hanbal (Maussisah Ghiras Lin Nasyri, 2004), 384
12 Ibnu Abidin, Raddul Mukhtar alad Durril Mukhtart juz 3 (Bairut: Darul Fikr, 1992), 21
this matter may vanish due to the presence of witnesses.\textsuperscript{13} That is, the matrimony is no longer a secret.

Regarding unregistered marriage in Indonesia, two definitions underlie the differences of unregistered marriage because the secrecy of marriage in Indonesia is more related to the marriage that is not recorded administratively in the government, while this registration is under the order of the state.

Therefore, unregistered marriage in the context of Indonesia is not similar to the \textit{sirri} marriage in \textit{fiqh} studies. ‘\textit{Urфi} marriage is the terminology that closely represents an unregistered marriage in Indonesia. The term ‘\textit{urfi}’ derives from the word ‘\textit{irfanan} or \textit{ma’rifatan} meaning to recognize or to know, while \textit{ma’rifat} carries a more specific meaning.

The word ‘\textit{Urф} is also known in the terminology of the Islamic law methodology of \textit{Ushul al-Fiqh}. The meaning of ‘\textit{Urф} is widely known and followed by humans, and it is obvious in their utterances and behavior. Dr. Abd. Aziz Khayyath argues that ‘\textit{urf} is made as a habit by human beings and internalized into their life.\textsuperscript{14}

One of the definitions was found in a magazine, discussing the matter of contemporary \textit{fiqh}. Unregistered marriage, as defined in the magazine, refers to a marriage not guaranteed under an official registration either in written or spoken form.\textsuperscript{15}

Dr. Abdul Fattah ‘Amar, on the other hand, defines ‘\textit{urфi} marriage as an agreement perfecting the requirements of syar’\textit{iyy}, only it is not guaranteed in writing or through attitude.\textsuperscript{16} Referring to this definition, the term unregistered marriage, or \textit{sirri} marriage, is widely known in Indonesia as \textit{urфi} marriage within the scope of \textit{fiqh}. The difference lies in the registration of \textit{urфi} marriage in a wider scope, comprising formal registration or the registration

\textsuperscript{13} Abdul Malik bin Yusuf, \textit{Zawaj al-Misyar Dirasatun Fiqhyyatun}, 103.
\textsuperscript{14} Ibid.
\textsuperscript{15} Majallatu al-Buhutsi al-Fiqhiyyat al-Mu’ashirat, Majallatun ‘Ilmiyyatun Muhakkimatun fil Fiqh al- Islami, I 37 (Year IX), 194
\textsuperscript{16} Abdul Malik bin Yusuf, \textit{Zawaj al-Misyar Dirasatun Fiqhyyatun}, 90
Criminality in Islam

Islam is an inarguably complex religion not only regulating the horizontal relationship between humans and their God but also taking into account human-to-human relationships. Allah gives both rewards and punishment according to the provisions concerned. What is forbidden is subject to punishment from God; whoever complies with what is commanded by God should be rewarded.

Violations committed by human beings lead to sanctions. In terms of *Fiqh*, *jarimah* refers to every conduct of violation, sin, and guilt subject to sanctions and punishment. The government or a leader, in this case, holds the authority to punish.

*Jarimah*, as formulated by Mawardi, refers to the conduct proscribed by sharia law, where Allah averts it by providing *had* or *ta’zir* (for perpetrators). In the tradition of jurisprudence, matters regarding criminal offenses and their sanctions are governed in *Fiqh Jinayat*—knowledge related to what is proscribed (*jarimah*) and the sanction (*uqubah*)—which is discovered from elaborate propositions.

In terms of criminal offenses or *jarimah* in Islam, three matters are explained regarding *had*, *Qishas*, and *Ta’zir*. *Had* is defined as a sanction (*’uqubah*) whose type is determined by the religion and it must be enforced and refers to the right from Allah.

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Qishas cannot be considered as had since it is not defined as the right to Allah. Similarly, Ta’zir is not categorized as had since no provision in Islam defines so. Qishas means to cut (al-Qat’ii). Literally, it refers to the punishment imposed on offenders who murder, dismember, or hurt others.21

Five aspects may lead to qishas, including malice aforethought or excessive act that hurts a person, or an act that is close to an intentional murder such as hitting somebody without the intention to kill but it accidentally kills the person, an accidental murder, an excessive act injuring a person; and accidental conduct injuring another but not causing death.22

**Ta’zir: One of Criminal Offenses in Islam**

Of the three criminal offenses along with their consequences, the concept focused on in this article is ta’zir. Regarding the definition of ta’zir, there are no criminal provisions governing the matter of unregistered marriage in Islamic law. Regarding the discourse of unregistered marriage, there have been opposing views against this policy since it is deemed to contravene Islamic teaching.

The word ta’zir has the literal meaning of “preventing” and “teaching”. Ta’zir refers to a sanction seen appropriate by judges to be imposed on sinful conducts having no had and kafarat.23 Imam Kasani, however, defines ta’zir as compulsory punishment set in the religion, and this punishment is viewed as the haq of Allah or haq adami in immoral conduct having no had and kafarat.24

From this definition, principally, ta’zir is related to the violations of the haq of Allah or haq adami in which the type and

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21 Ibid., 25
22 Ibid., 26
form of the punishment are not determined by the religion. Therefore, the provision of the law is set by the leader (Ulil Amri). There have been several sanctions of ta’zir imposed by authorities, ranging from capital punishment,\textsuperscript{25} flagellation, and incarceration,\textsuperscript{26} to other types such as serious warnings, advice, remarks, being ostracized, and job termination.\textsuperscript{27}

In the connection between ta’zir and the government, the government is responsible to govern the citizens and establish rules congruent with the soul of Islam. Several terms are referred to by some Islamic figures to represent the role of the government in criminalization. Some refer to al-Siyasat al-Jinaiyyah to show the governmental authority to make a regulation regarding criminalization. Al-Siyasat al-Jinaiyyah is an instrument or regulation made by the government as the basis for imposing sanctions following an offense committed\textsuperscript{28}.

Some others offer identical but different terms by adding the word sharia at the end of the word al-Siyasat: al-Siyasat al-Syar’iyyah. This term refers to a legal instrument governing governmental affairs and maintaining harmony with the soul of sharia.\textsuperscript{29}

The two definitions above adequately represent ta’zir. Thus, all three terms bear no significant differences. Some scholars in Islamic law believe that there is a congruence between the meaning of ta’zir and al-siyasat al-Jinaiyyah.\textsuperscript{30}

There have been different views among religious figures about the formulation of sanctions imposed in the practices of ta’zir. This principle is based on the definition of ta’zir related to

\textsuperscript{25} Ibid., 29.
\textsuperscript{26} Ahmad Wardi Muslih, Hukum Pidana, 262.
\textsuperscript{27} Abdul Aziz Amir, Al-Ta’zir fil-Syari’at al-Islamiyyah, (Beirut: Dar al-Fikr al-Arabi, 1969), 436.
\textsuperscript{28} Ahmad Fathi, Al-Siyasat al-Jinaiyyah fil Syariat al-Islamiyyah, (Beirut: Dar al-Syuruq, 1983), 5.
\textsuperscript{29} Wahbah Zuhaili, Al-Dzara‘ah fil- Siyasat al-Syar’iyyah wa al-Fiqh al-Islami, (Damasyiq: Dar al-Maktabi, 1999), 9.
\textsuperscript{30} Ibid., 27.
the forms of criminalization not explicitly stated in the source of Islamic law. This point certainly principally highlights the difference between *ta’zir* and *had* or *qishos*.

In terms of the differences in the formula of the punishment imposed in *ta’zir*, Imam Syafii, Imam Hanbali, and Imam Abu Hanifah, viewed that the punishment of *ta’zir* must not transcend the limitation of the provision of *had*. In other words, the maximum limit of this punishment should be under the level of *had*. The notion of Imam Maliki implies that the punishment seems more lenient, where the government holds the authority to decide the criminal punishment imposed without being restricted by the sanction of *had*.\(^{31}\)

Still, in terms of the notion of Imam Malik, the choice of punishment is left to the hand of the leader, and its form should not be restricted to certain types of punishment. However, it is open to possibilities of new punishment that can apply to *ta’zir* from time to time.\(^{32}\)

**The Fundaments of Maslahat dan Mafasadat**

The involvement of a leader in the process of formulating a regulation that sets forth orders and proscription must be congruent with the *maslahat* consideration that should serve as the principal foundation for the government in terms of the enforcement of proscription and its sanctions. The basis of *maslahat* should also function as one of the bases of orders or proscription in the religion.

Izzuddin bin Abdissalam once said that forming the basis of the maslahat or mafasadat represents the love of the maker of sharia—Allah, to human beings. He added that Allah only gives commands on the basis of *maslahat* in the world and hereafter or in

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\(^{31}\) Abul Mudhaffar Yahya bin Muhammad, *Ikhtilaful Aimmatil Ulama*, 266.

Measuring the Likelihood of Unregistered Marriage

one of them. Allah only proscribes conduct on the basis of preventing *mafsadat* in this world and hereafter or in one of them.\(^{33}\)

Two methodologies of discovering relevant Islamic law are highlighted in the matter of unregistered marriage in relation to the principle of merit, namely the *maslahat* (merit) and *saddud dzari’ah*. Ulama divided *maslahat* in terms of its appropriateness to *nas* or *munasab* into three parts: *Maslahat Mu’tabaroh, maslahat mulghah* and *maslahat mursalah*.

*Maslahat mu’tabarah* is formulated in a way that is elaborated in the text of sharia. For example, this *maslahat* involves the maintenance of *al-maqashid al-syari’iyyah* (the objectives of *syara’*) in the laws of *syara’*,\(^{34}\) such as the obligation to pray to protect the law, the proscription not to murder to safeguard the soul, the proscription not to consume *khamar* to safeguard the mind, the proscription not to commit any adultery to keep the line of descendants intact, and the proscription not to steal to protect assets. The argumentation value of this *maslahat* is strongly believed to serve as the basis for setting religious law.

*Maslahat Mursalah* is the second *maslahat* believed to hold argumentation power. In another term, it is called *istiklah*, as introduced by Al-Ghazali.\(^{35}\) This second *maslahat* does not hold any textual fundament in Quran and Hadiths, but its principle is outlined in both.

Although the argumentation value is open to debate, this article follows the perspective that holds that *maslahat mursalah* can serve as a stepping stone to deciding a law. The community allowing for *ijtihad* on the basis of the principle of *maslahat mursalah* highlights several rules.

These rules underlie which aspects should be brought to the fore when inappropriateness takes place between the debatable

\(^{33}\) Izzuddin bin Abdussalam, *Syajaratul Ma’arif wal Ahwal wa Salihil Aqwal wal A’mal* (Beirut: Darul Kutub, 2003), 12.


principles of *maslahat* and the religious propositions (*dhanni*). Imam Syafi’I argues that it is the religious text that should be prioritized regardless of its *dhanni* value, while the followers of Imam Maliki and Imam Hanafi believed that the principle of *maslahat* must be prioritized.\(^{36}\)

Apart from the above *maslahat*, the last *maslahat* refers to *maslahat mulghah*, which should not be referred to as a stepping stone, and it has to be ruled out. This *maslahat* contravenes explicit (*qat’iy*) religious provisions \(^{37}\).

The second concept is *Sadd-al-Dzari’at*, or a preventive concept. Ibn al-Qayyim al-Jauziyah viewed Dzari’at as an instrument or a connector bridging two matters.\(^{38}\) Within the context of dzari’ah, there are two terms often used as references: dzari’at (sadd al-dzari’at) and dzari’at (fath al-dzari’at). The former aims to ban matters that may give rise to mafsadat (if this dzari’at ends up with mafsadat), while the latter refers to dzari’at if maslahat represents the conclusion of dzariat.

Thus, sadd al-dzari’at sees and analyzes a conclusion of all matters. If the conclusion represents *maslahat*, wasilah that passes information must be enforced (Fath al-dzari’at). If the conclusion is mafsadat, wasilah that passes information must be closed (sadd al-dzari’at).\(^{39}\)

The Order and Obligation to Obey

In Islam, a leader is the subject of obedience. Referring to the words of Syekh Nawawi Banten, compliance with the government or *ulil amri* represents one of the branches of faith number forty-nine.\(^{40}\) Therefore, obeying a leader will spare a noble

\(^{37}\) Ibid., 753.
\(^{40}\) Syekh Muhammad Nawawi Banten, *Qami’u al-Tughyan*, (Surabaya: Toko Kitab al-Hidayah, t.t, 16.)
place in religion. Obedience to a leader is a greater adherence and observance. A leader must be obeyed regardless of either his evil or good characteristics as long as he leads in the right context of Islam.41

Syekh Ibnu Taimiyah compliance with Allah, His Messenger, and uli al-amri is an obligation of each individual. That is, those failing to comply with the leader do not deserve a place in the hereafter.42

An obligation to obey a leader is an order that is textually outlined in the nas of the religion. Surah An-Nisa’ verse 59 states: O you who believe! Obey God and obey the Messenger and those in authority [ulil amri] among you.

Regarding the term ulil amri, some ulama hold different views. Imam Abu Ja’far Muhammad binn Jarir Attabari once explained that an ulama believed ulil amri referred to all kinds of leadership. This notion was quoted from the thought of Abu Hurairah, Abdullah bin Abbas, and Zaid bin Thabit.

Another Ulama explained that ulil amri comprised a number of ulama and experts in Islamic jurisprudence or fiqh.43 Of these two views, Syekh ‘Imaduddin bin Muhammad at-Tabari opined that the strongest view believes that uli al-amri refers to a group of leaders.44

Unregistered Marriage in Indonesia

Departing from the above theoretical description, unregistered marriage in Indonesia refers to ‘urfî marriage with all the requirements and pillars being met. In the context of its

41 Muhammad bin Abdullah bin Sabil, Al-Adillat al-Syar’îyyah, 28.
appropriateness to religious law, ‘urfi marriage is lawful. Syekh al-Qardhawi accepted ‘urfi marriage as lawful.\textsuperscript{45}

Regardless of its legality, this marriage, however, is not recorded in a state administration, giving rise to double legal standings in \textit{sirri} (unregistered) marriage or known as ‘urfi marriage in Indonesia, implying that this marriage is legal in the face of the religion but not to the state because the state only recognizes the marriage following the procedures of governmental administration.

Following the elaboration of the provision of Islamic Law regarding the requirements and pillars of marriage, the validity of unregistered marriage should no longer be debated as long as the requirements of lawful marriage are fulfilled. Registering the marriage to the state administration is not, however, part of the requirements and pillars of marriage. Thus, the absence of this registration should not affect the validity of the marriage. The presence of guardians, witnesses, ijab, and qabul are the requirements to be met to allow for lawful marriage according to Islamic law.\textsuperscript{46}

Regardless of its validity, unregistered marriage is not without issues, considering that registering a marriage is required by the state policy intended to bring merit and prevent \textit{mafsadat} that may arise from the marriage that took place.

This official registration of marriage to the state is also intended to prevent the likelihood that a married man marries another woman. Moreover, marriage registration is also expected to assure the legal standing and the effect arising from civil matters that come from the side of the wife concerned. Registered marriage also prevents the likelihood of underage marriage.

When this regulatory provision is promulgated, it is binding to all citizens. That is, marriage must be registered according to the

\textsuperscript{45} Abdul Malik bin Yusuf, \textit{Zawaj al-Misyar Dirasatun Fiqhiyyatun}, 92

\textsuperscript{46} Ibid.
administrative procedures set by the state, which does not negate the validity of an unregistered marriage.\textsuperscript{47}

The legal standing of the registration of marriage is optional, and marriage registration is within the purview of principle or law, implying that “an act is allowed unless a proposition declares it haram”.\textsuperscript{48}

If registration is not declared compulsory, unregistered marriage is allowed. That is, marriage registration is optional. However, if the registration is set forth in the regulation set by the government, the position of this marriage is equal to the order commanded by \textit{uli al-amri}. Within this context, when the order of \textit{uli al-amri} carries the meaning of general maslahat, obedience to it is compulsory.\textsuperscript{49}

In other words, when marriage is done without official registration, the obligation to comply with the government is overlooked. This deviation, therefore, allows for sanctions or punishment the government can impose.

\textbf{Is It Possible to Criminalize Unregistered Marriage?}

Since the promulgation of law Number 1 of 1974, elaborated in the Government Regulation Number 9 of 1975, perfected with law Number 16 of 2019, the order to register marriage has not posed a strong implication. Unregistered marriage remains popular although tracing it down is not easy.

The law lacks a coercing aspect, recalling that this law does not possess the mechanism of criminalization that imposes sanctions on every violator. This certainly leaves a loophole, allowing people to break it.

In the purview of positive law in Indonesia, the criminalization theory is comprehensively governed for whoever breaks the law. The criminalization system, in this case, is set forth

\textsuperscript{47} Ibid., 90.

\textsuperscript{48} Jalaluddin Abdurrahman As- Suyuti, \textit{Al-Asybah wa al-Nadhair}, (Beirut: Darul Kutub, 1990), 82.

\textsuperscript{49} Syekh Muhammad Nawawi Banten, \textit{Qami’u al-Tughyan}, 16.
in Article 10 of the Penal Code, consisting of primary punishment: 1) capital punishment, 2) incarceration, 3) detention, 4) fines, 5) alternative punishment; and additional punishment: 1) deprivation of certain rights; 2) forfeiture of certain goods; 3) publication of judicial verdict.50

In this context, the discourse of criminalization is crucial to be further discussed to lay the basis for the legitimation of the religion regarding whether this regulation can be made. It is because marriage is understood as an observance, and this understanding triggers the polemic when the idea of criminalizing unregistered marriage emerges.

What needs to be further understood is that the criminalization of unregistered marriage must not be taken as the criminalization of the marriage per se, but this is its procedure that is subject to sanctions. This can be understood in the following situation; for example, it is common for schools to forbid students to eat during lessons in a classroom. In this case, it is not the food that is forbidden, but it is the situation where they consume the food not appropriately, and not at the right time and place. When the prohibition lies on the matter of the food they consume, it, then, implies that they are forbidden to consume halal food, and this proscription will certainly contravene Islamic teaching. Similarly, the criminalization and proscription of unregistered marriage must be understood in such a manner. The proscription is not for the marriage, but for the absence of the matrimonial procedure. Since the proscription and provisions of the sanctions are not highlighted in the sources of Islamic law, like in murdering and stealing, the discussion is within the purview of ta’zir. The ta’zir of unregistered marriage in the form of the imposition of a sanction does not break Islamic law.

In addition to the essence of ta’zir of unregistered marriage that does not break the law, ta’zir in this context has been justified for the sake of merit. This point should serve as the normative basis for consideration for the government when it makes policies governing society. Thus, ta’zir in unregistered marriage must be seen from two different perspectives of legitimation, the maslahat (merit) and the prevention of defect.

Unregistered marriage should be seen as lawful according to Islamic law, recalling that all religious requirements and pillars have been met. However, the practice of unregistered marriage fails to comply with the formal procedure, tending to spark problems between the parties involved. In this case, both the wife and the child often become the aggrieved parties.

The importance of criminalization of unregistered marriage is growing in line with the merit that families have to enjoy, especially for potentially aggrieved parties due to this marriage. This approach is expected to minimize the cases of unregistered marriage not only dealing with the guarantee of the right of the wife and the child, but also with religious law.

As described earlier, unregistered marriage often leads to murky status for the wife. In such a condition, the wife often thinks that the marriage has ended although no word of divorce has been uttered by the husband. At this level, the wife often attempts to confirm her marriage status and she is not entitled to the right of uttering divorce simply because the marriage is not registered in the state administration.

Considering several cases that took place, the perspective of maslahat mursalah implies that formulating the proscription of unregistered marriage and its criminalization is necessary. The maslahat mursalah governs the following matters. First, every policy placed above the principle of maslahat is relevant to the objectives of sharia (maqasidh al-syariat) and does not contravene explicit religious provisions (qat’iy).

The ban on unregistered marriage is, on one hand, related to an effort to bring merit as part of the objectives of sharia. With the
proscription and criminalization of unregistered marriage, the rights of a wife and her child, substantively, can be assured for protection as part of the protection of the asset (*hifdhul mal*).

Last but not least, there is a dimension of protection of the religion (*hifdhud dzin*) in the proscription and criminalization of unregistered marriage because a wife can play an active role in ensuring that her status will not last long. This approach is expected to hamper the act of remarriage taken by the woman amidst the unclear status she previously gained from unregistered marriage.

Second, the merit gained should also be rational. This rationality can be seen from to what extent the parties involved can stay in line with common sense. Within the context of the proscription and criminalization of unregistered marriage, the element of *maslahat* fought for must also be rational simply because it is related to the loss that the aggrieved parties have experienced so far.

Third, the aspect of *maslahat* fought for is not the exclusive one (*maslahat khassah*), as it only deals with personal interest. The *maslahat* should touch the common good or general *maslahat* (*maslahat ‘ammah*). That is, the only reference to the personal *maslahat* or the *maslahat* of a certain group will not apply.  

What emerges from unregistered marriage and the cases of unregistered marriage have been within the public interest. Thus, the regulation should transcend the interest of one or two persons, widely extended to the public interest and the interest of women as the aggrieved party.

All those three considerations are fulfilled in the context of proscription and criminalization of unregistered marriage. This criminalization is not addressed to the order set in the religion. Islamic boarding schools, for example, always require students to do *dhuha* prayer together, or a sanction will be imposed. This

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sanction, however, does not mean that the boarding schools have violated the religious requirement by forbidding them to pray dhuha individually (munfarid), not collectively (jama’ah).

*Ta’zir* in unregistered marriage is related to the obligation to obey the order of authorities, whether this obligation is written or spoken. Law Number 1 of 1974 is the representation of the order from the government requiring marriage to be registered in the state administration before a marriage registrar. This order must be obeyed by all citizens of the state and is inextricable from the obligation to follow the order given by God and His Messenger, the *ulil amri*. As explained above, this marriage registration procedure must be followed by all citizens.

When this order is overlooked, a sanction—*ta’zir*—may apply. If *ta’zir* is given as the punishment for those doing immoral conduct, the question arises: is unregistered marriage considered immoral conduct? Marriage is not immoral and is recommended by the religion. The problem is when it is not registered in the state administration simply because this negligence of registration is seen as disobedience of the governmental policy. Thus, what is immoral does not lie on the substantive matter of the marriage, but it is more on the negligence of the obligation that is reckoned as a forbidden act.52

Failing to abide by the policies set by a leader is seen as immoral, considering that obedience to a leader is an obligation in the religion.53 Thus, *ta’zir* in the case of criminalizing people not registering their marriage is relevant to the teaching of the religion.

**Conclusion**

In a normative-exoteric scope, the criminalization of unregistered marriage is possible to apply. Moreover, in terms of the *maslahat* consideration, the criminalization of unregistered

53 Ibnu Taimiyyah, *Qaidah Mukhtasharat fi Wujubi Ta’atillahi wa Rasulih wa Wulati al-Umur*, (Madinah: Markaz Syu’un al-Da’wat, 1416 H.), 35.
marriage does not contravene the religious provisions because this criminalization is not related to the essence of the marriage but more to the marriage procedure. *Sirri* (unregistered) marriage is certainly valid from a normative perspective because it meets the requirements set by the religion. However, since the way it takes place fails to follow the procedure set by the government, the law declaring it haram emerges as a logical consequence of this conduct. The orders of the state regarded as *mubah* (permitted) are considered obligatory for all the citizens of the state. Obedience to the orders of the state is taken as immoral conduct underlying the initiation of *ta‘zir* against this conduct. The form of *ta‘zir* exists within the domain of the government to decide in the form of either civil matters such as fines or criminal matters such as physical sanction. *Wallahu a‘lam.*

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