

CONSIDERATIONS FOR THE FORMULATION OF FIQH MUNAKAHAT REASON AND CRIMINAL LAW ON POLYGAMY SIRRI PRACTICES IN INDONESIA

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Riwayat Artikel :

Penyerahan : 2 September 2024

Revisi : 19 Oktober 2024

Diterima : 20 November 2024

Diterbitkan : 28 Desember 2024

Keyword :

Fiqh Munakahat, Criminal Sanctions, Sirri Polygamy

Kata Kunci :

Fiqh Munakahat, Sanksi Pidana, Poligami Siri

Abstract

Polygamy in Islam is legal with the condition that it must be fair. In practice, justice is rarely realised. This is what makes the state take a preventive stance by obtaining permission from the first wife. The difficulty of obtaining permission makes sirri polygamy a practice under the pretext of religious syi'ar, even though the danger is the neglect of women and their offspring. This research is a normative research with a statutory approach, analytical approach and conceptual approach which is then reduced, displayed and drawn conclusions on the data obtained. The results of the study state that administratively the perpetrators of nikah sirri are criticised by religion, because in the Islamic concept marriage must be carried out openly (i'lan al-nikah) and administratively the state of marriage must be carried out at the marriage registrar, both at the Dukcapil and at the KUA. Meanwhile, the sanction for those who commit polygamy sirri or underhand is imprisonment for a maximum of six years or punishment in the form of compensation or a fine of Rp. 200,000,000 (two hundred million rupiah), this refers to article 126 of Law No. 1 of 2023 concerning the Criminal Code (KUHP). This research is expected to be a reference for policy makers in formulating regulations that are more comprehensive and effective in overcoming the problem of sirri polygamy, as well as for legal practitioners in providing legal assistance for victims.

Abstrak

Poligami di dalam agama Islam sah saja dilakukan dengan syarat harus adil. Dalam praktiknya, keadilan hampir jarang terwujud. Hal inilah yang membuat negara mengambil sikap preventif dengan cara izin dari istri pertama. Sulitnya mendapatkan izin membuat poligami sirri menjadi praktik dengan dalih syi'ar agama, padahal bahayanya adalah penelantaran terhadap perempuan dan keturunannya. Penelitian ini merupakan penelitian normatif dengan pendekatan perundang-undangan, pendekatan analitis dan pendekatan konseptual yang kemudian direduksi, didisplay dan penarikan kesimpulan atas data yang diperoleh. Hasil penelitian menyatakan bahwa secara administratif pelaku nikah sirri dikecam oleh agama, karena dalam konsep Islam pernikahan harus dilakukan secara terbuka (i'lan al-nikah) dan secara administratif negara pernikahan harus dilakukan di petugas pencatat nikah, baik di Dukcapil maupun di KUA. Sedangkan sanksi bagi mereka yang melakukan poligami sirri atau bawah tangan adalah penjara maksimal enam tahun atau pidana berupa ganti rugi atau denda uang sebesar Rp. 200.000.000 (dua ratus juta rupiah), hal ini merujuk pada pasal 126 Undang-Undang No. 1 tahun 2023 tentang Kitab Undang-Undang Hukum Pidana (KUHP). Penelitian ini diharapkan dapat menjadi rujukan bagi para pembuat kebijakan dalam merumuskan regulasi yang lebih komprehensif dan efektif dalam mengatasi permasalahan poligami sirri, serta bagi para praktisi hukum dalam memberikan pendampingan hukum bagi korban.

INTRODUCTION

Marriage is something that is indeed *sunnatullah* in human life. Having a marriage contract aimed at *sakinah mawaddah wa rahmah* is the dream of all households. Living harmoniously, peacefully and radiantly in a family is a very beautiful picture of the family frame. As a servant's nature, getting married is a *sunnah* way of following the Prophet's role model, Muhammad SAW. Apart from the aim of *hifz al-nasl* (protecting offspring), marriage is the formation of a close relationship between the two parties. So that the value of friendship in this case remains and exists. Maintaining a household is difficult in practice, so the presence of children always warms up household life. Something related to marriage and to this day continues to be a polemic is the legalization of polygamy. Religion legalizes the practice of polygamy provided that it must be fair. However, in practice, polygamy has become a new polemic that creates instability in married life. Musda Mulia (1999) defines polygamy as the marriage bond between a husband and more than one wife at the same time. In the al – Qur'an, the practice of polygamy is legal and is mentioned at the beginning of Surah QS. Al – Nisa' (4): 3, by allowing a maximum of four women to marry. *Mitsaqan ghalidhan*, which has always been a symbol of a lasting marriage, is sometimes destroyed due to third party conflicts. The government as a policy maker takes preventive measures to stem the practice of polygamy which is vulnerable to harming women. This is as stated in Article 4 and Article 5 of Law no. 1 of 1974 concerning marriage which states that it is permissible for a husband to have more than one wife, provided he submits an application to the court and then the court will accept the husband's application if there is permission from the first wife.

The permissibility of polygamy in religion, which seems so simple without such heavy conditions, has become a door that is hailed and agreed upon by several groups, especially men. Even though religious practices make it legal, this cannot be left alone, because this will become an outlet for lust, making it easy for crimes to occur in marriage. Marriage was originally sacred and a holy act (worship), so it was tainted with harmful halal practices. The state is present to bridge the complicated issue of polygamy. The existence of Law no. 1 of 1974 concerning marriage, Law no. 22 of 1946 concerning Marriage, Divorce and Reconciliation, there is a Compilation of Islamic Law (KHI) contained in Presidential Instruction (Inpres) No. 1 of 1991, and the existence of Government Regulation (PP) no. 9 of 1975 concerning the Implementation of the 1974 Marriage Law. All of these laws act as a legal bridge for polygamy but with certain limitations or conditions. The complexity of the existing requirements makes many people practice polygamy *sirri*, namely the practice of underhanded polygamy without the wife's consent and without it being registered with a marriage registrar such as Disdukcapil or the Office of Religious Affairs (KUA). This article is an analytical work by the author by presenting a study of the practice of polygamy *sirri* with the punishments contained in Law no. 1 of 2023 concerning the Criminal Code (KUHP). Where the practice of polygamy *sirri* must not be recognized by society, but must be minimized by enforcing penalties for marriage.

There is a lot of research related to polygamy and it will never be finished, for example "*Poligami melalui nikah sirri sebagai penyelundupan hukum*" written by Ferdiansyah (2023), This is a descriptive analytical research related to polygamy in a secret manner (*sirri*), so that if a marriage is not officially carried out through a marriage registrar (or the term is an under – the – radar marriage), it causes the perpetrator (male) of polygamy *sirri* to be immune from the law with the loss of birth support. and thoughts if in the future he leaves his wife. This is legal smuggling. Apart from that, there is also research with the title "*Poligami dan kaitan dengan nikah Sirri*" written by Khairani Mukdin dan Asmanidar (2022), This research is only normative in nature and seems to only narrate the practice of polygamy which is often carried out in secret or privately. This means that there is no in – depth analysis regarding conflict resolution from marriages *sirri*. Apart from that, there is research with the title "*Dinamika pria yang melakukan pernikahan poligami secara sirri*" written by Hayani (2020), This research is the same as previous research, namely both normative, only this research focuses more on the practices

(dynamics) that occur in polygamy. There are many cases in the field or findings that it is common knowledge that polygamy is carried out using the practice of *sirri*. Apart from that, there are many other works with a similar theme (polygamy), but so far it is very rare to find discussions regarding criminal sanctions for perpetrators of polygamy *sirri*. So far, many studies have only focused on the legal status of polygamy in positive law and Islam, studying the impact of polygamy *sirri* on the wife and the biological children born.

The author tries to find a novelty by conducting a study of criminal law which the author then puts into the context of polygamy *sirri*. This means that the practice of polygamy, which has been something that has been taken lightly because it is religiously legal, will no longer be easy because of the criminal sanctions contained in the Criminal Code, as a preventive measure to eliminate losses that will arise after the polygamy *sirri* conflict. It is hoped that public awareness will increase to no longer carry out halal actions according to the Shari'a but which harm other people and the impact is very large. Awareness of always registering marriages is a religious command as a reconstruction of modern fiqh in the form of *I'tlan al-nikah* or *a'lin al-nikah*, announcing a marriage. The research is not rigid like most other research. This research describes many of the criminal factors that perpetrators will receive as punishment for carrying out the practice of polygamy *sirri*.

METHOD

Sumardi Suryabrata (1998) stated that in any form of research, having a method is a necessity. Apart from that, a research framework requires systematic, gradual and functional research (Rohman, 2023). The research with the title "*Considerations on the Formulation of Fiqh Munakahat Reasoning and Criminal Law on the Practice of Polygamy Sirri*" is a normative research with a conceptual approach, where the author will examine polygamy which then gave rise to the practice of polygamy *sirri*.

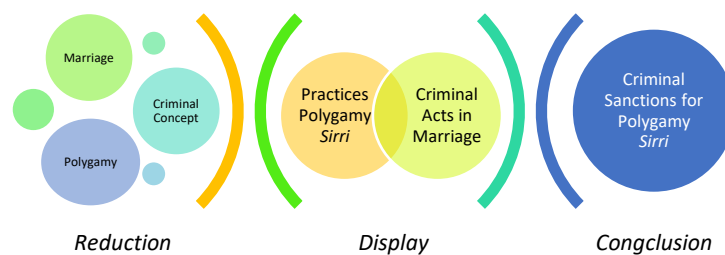


Figure 1. Polygamy Sirri Criminal Sanctions Research Methodology Flow

Apart from that, it also uses an analytical approach, where after discussing the practice of polygamy carried out using the *sirri* method, the author carries out an analysis using the Criminal Code (KUHP) by looking for criminal sanctions for those who commit polygamy *sirri*. Because this research uses laws as analysis, a statute approach can also be used (Tahir, et al. 2023). Since this research is normative research, not field research, the data collection method was carried out by means of library research or documentation review. From all the data collected, the author carried out analysis by carrying out three stages of reduction (data review), display (data presentation) and conclusion drawing (drawing conclusions). To make it easier, here is the flow of the research method that the author carried out.

RESULTS AND DISCUSSION

a. The Concept of Criminal Law in The Indonesian Context

Talking about crime is something that reminds us of the country of Nipon (Japan's nickname) as a part of history that once colonized the motherland, our beloved country, Indonesia. Why is that?, because the term criminal actually emerged or is a historical symbol that cannot be separated from Japanese colonialism in Indonesia. Before Japan occupied Indonesia, the Dutch first controlled the motherland for approximately 3 and a half centuries. During the colonial era, the terms "*strafrecht*" for criminal law and "*burgerlijkrecht*" or also known as "*privaaterecht*" for civil law were born. (Syamsuddin, 2019). As Prodjodikoro (2003) states, the use of the term "criminal law" is a politicization of the law to eliminate plagiarism with the impression of not copying the terms used by colonials (Dutch colonialists) at that time. As far as the existing definition is concerned, it can be understood that criminal law is a certain rule or norm, so that with the existence of these rules legal subjects (humans) become more organized in every step of life. Of the definitions mentioned, it shows a conclusion that criminal law can be abstractly described as rules or laws. Meanwhile, an act that conflicts with these rules is called a criminal act.

A criminal act or what is often referred to as a delict or in the Criminal Code (KUHP) is called "*strafbaarfeit*", is a certain term as a characteristic in expressing the occurrence of a criminal law event. Simons defines a criminal act as a mistake against the law that can be accounted for by sanctions or punishment (Hamzah, 1994), this understanding is the same as that defined by Chairul Chuda (2006). Meanwhile Van Hammel stated in Dutch: "*Eene wettelijke omschreven menselijke gedraging, onrechtmatig, strafwaardig en aan schuld te wijten*" (Hamzah, 1994). Based on the existing understanding, in fact the expression "criminal act" is one of the many translations of the word *strafbaarfeit* contained in the Criminal Code (a colonial legacy), apart from that, experts differ in their interpretation. Apart from the word criminal act, there are also those who call it a criminal incident, there are also offenses, there are criminal violations, acts that may be punished and criminal acts (Wahyuni, 2017). Based on several existing definitions, both criminal law and criminal acts contain different meanings. Where criminal law is a norm or rule, while criminal act is only one of many terms for criminal incidents.

After knowing for sure about criminal law and criminal acts, in order to become more familiar with operational details, it is best to also try to know the scope of criminal law. Based on the *lex generalis* (general provisions) of the Criminal Code, it is stated that the scope of criminal law includes two things, namely the place where the crime occurred (*locus delicti*) and the time the crime occurred (*tempus delicti*) (Hakim, 2019). In general, an act or offense can be classified as a criminal act, it must have an intermediary element, in general it is an act that contains the implication of the emergence of criminal elements (Moeljatno, 2015). To review the elements of a criminal act, two points of view can be distinguished, namely a theoretical view and a juridical view. A theoretical view is a point of view that is reflected based on the sound of the formulation put forward by legal experts. Meanwhile, the juridical or statutory view is a mapping of criminal offenses according to existing statutory articles until they are finally categorized as certain crimes (Chazawi, 2002). Of the many elements contained in criminal offenses, they can be classified into two forms;

First, Material Elements. This element is an element that comes from the perpetrator himself (Huda, 2011). A saying that has become an important motto of criminal law is "*an ac does not make a person guilty unless the mind is guilty or actus non facit reum nisi mens sit rea*". In short, this is the same as the expression of the law of causality "there is an effect because there is a cause". Likewise, punishment or punishment occurs as a result of an act or mistake that violates the law. The meaning of a mistake in this case is a mistake that is truly a mistake (*intention/obzet/dolus*) or an error resulting from an oversight (*nedlegence or schuld*) (Huda, 2011). There are three categories of "intentional" in criminal acts, namely deliberate intent (*oogmerk*), deliberately accompanied by

repentance or regret (*opzet als zekerheidsbewustzijn*), and deliberately with known (possible) consciousness (*delus eventualis*). There are two types of negligence which are lighter in nature than intentionality itself. Namely, not being careful in acting and being careless in suspecting an action (Amir, 2012).

The second elements are formal/formil, is an external element of a criminal (Huda, 2011). This element consists of: 1) human actions are either active or positive or actions that are passive or negative (*omission*), such as silence or letting go; 2) as a result of human actions which can cause dangerous things, damage and eliminate important things that are protected by law, such as life, liberty, property rights, honor and so on; 3) *circumstances*; 4) Punishable and against the law. Marpaung (2012) states that being punishable or unlawful is an action that is contrary to the contents of the law, either a prohibition or an order. Meanwhile, according to Amir Ilyas (2012), unlawfulness is an act or deed that is legally prohibited by law and there are two types of this, namely against formal law or statute and against material law (not necessarily against the law). According to Moeljatno (2009), the nature of breaking the law is always an element of a criminal act, but it does not have to be an element that is always present by the public prosecutor, but rather depends on the formulation of the offense. The discussion above emphasizes that the existence of criminal acts and criminal law are two different things in terms of application. Criminal law is more about rules that bind it as a norm or law, while criminal acts are more about actions in the field that are against the law and receive sanctions from the legal provisions that are violated.

b. The Validity of Marriage in Normative Juridical Review

Marriage is a sacred thing in a person's social life. Even marriage is a barometer of someone's social maturity. Because if someone leaves being single, they will be seen as someone who is starting to organize their life with the direction of their own thoughts and is required to mature by circumstances. The goal of marriage is to expand human survival on earth by creating new genes. The bond in marriage is expected to be a lasting relationship (*mitsaqan ghalidhan*) within the framework of *sakinah mawaddah warahmah*. The reference as a legal basis (positive) regarding marriage is contained in Law Number 1 of 1974 concerning Marriage which states: "*Marriage is a spiritual and physical bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the belief in the Almighty God.*" (Pasal 1). Apart from this understanding, there is another meaning as the legal basis for marriage in Indonesia which is specifically for Muslims, this is contained in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law (KHI) which clearly states; "*Marriage according to Islamic law is a marriage, namely a very strong contract or *mothbqan ghalozan* to obey Allah's commands and carrying them out is an act of worship.*" (Pasal 2).

Substantially, the two definitions above contain the same aims and objectives even though the editorial language is slightly different. It's just that the strength of the two legal bases is different, clearly the legal basis that is the benchmark is Marriage Law no. 1 of 1974, which is plural in nature, stands for the plurality of adherents of six religions – Islam, Buddhism, Hinduism, Confucianism, Christianity and Catholicism – in Indonesia. As one example, the editorial definition of marriage in the Marriage Law above clearly states "based on the one and only God". This is not aimed at Muslims only. Meanwhile, the Compilation of Islamic Law (KHI) itself is only a Presidential Instruction (Inpres) which is intended as a binding basis for Muslims under the legal constitution of the Indonesian state. In positive law, the validity based on the 1974 Marriage Law is stated in articles 6 to 12 which implicitly indicate the existence of material and formal requirements that must be fulfilled for the sacredness of marriage. That is; *First*, there is agreement between both parties (pasal 6 ayat (1)), *second*, there is permission from parents or guardians (judges) for those who are not yet 21 years old (Pasal 6 ayat (2)), *third*, marriage age regulations, the prospective bride and groom must be at least 19 years old and the prospective bride must also be at least 19 years old (UU perkawinan No. 16 Tahun 2019), *fourth*, the bride and groom are both not dependent on the marriage (not

polygamous or monogamous) (pasal 9), *fifth*, there is a waiting period for women who are divorced (any form of divorce) by their husband (pasal 11), *sixth*, there is recording as an administrative requirement (pasal 2 ayat (2)), *seventh*, marriage is considered valid as long as each religion states it is valid (pasal 2 ayat (1)) and *eighth*, marriage may not be carried out by two parties who still have a bloodline relationship, both from top to bottom, sideways, marriage and family ties. (pasal 8).

The Compilation of Islamic Law (KHI) is quite different from the editorial details contained in the articles of the Marriage Law above. This difference can clearly be seen in that the Marriage Law does not mention the patent terms and conditions of marriage, whereas in the KHI there is a chapter that explains the terms and conditions of a marriage. It is clear that this difference occurs, because KHI itself is the essence of 13 books as a reference for the Syafi'i school of thought (Abdurrahman, 2010). The pillars of marriage are clearly contained in Article 14 of the Compilation of Islamic Law (KHI) in the form of prospective husband, prospective wife, marriage guardian, the presence of two witnesses and *sighat* of *ijab* and *qabul*. Apart from the series of conditions for marriage above mentioned in the Marriage Law and the Compilation of Islamic Law (KHI), there are several conditions which are actually stated in the Civil Code or what is known as *Burgerlijke Wetboek* (BW), that is; "Absolute material requirements" in the form of: 1) the existence of a marriage based on monogamy (pasal 27 BW). 2) agreement between husband and wife (pasal 28 BW). 3) There is a minimum age limit of 18 years for men and 15 years for women (pasal 29 BW), but now it follows Marriage Law no. 16 years 2019 jo. Marriage Law no. 1 in 1974. 4) There is a 300 day waiting period for women who are divorced (Pasal 34 BW). and 5) the guardian's approval or permission if the bride and groom or one of them is not yet of the specified age (pasal 35 until pasal 49 BW). Apart from that, there are also "relative material conditions" which include; 1) prohibition on marrying people of the same blood or descent either upwards or sideways. 2) prohibition on marriage due to adultery. And 3) there is a prohibition on marriage after a divorce that has not reached one year.

Apart from material requirements, there are also formal requirements contained in *Burgerlijke Wetboek* (BW) which includes marriage notifications and marriage announcements (Pasal 50 until pasal 51 BW) and the conditions that must be fulfilled for the marriage to take place. The explanation above shows that there are several rules regarding marriage in civil law. Because marriage itself is actually included in private or civil law. However, to that extent we will also review marriage as far as it is understood in criminal law. Regarding marriage, it is actually more about civil law, as some of the explanations above all refer to civil law. Regarding marriage matters, criminal law only regulates crimes during marriage as stated in Article 279 of the Criminal Code (Soesilo, 1960). This will be a criminal offense with a maximum penalty of five years in prison. R. Soesilo (1960) stated that the above article was born before the Marriage Law no. 1 of 1974, at which time marriage between one man and four women (polygamy) was considered legal without limits. This means that what is considered "a valid obstacle" is marrying more than four women, so a maximum sanction of five years in prison can apply. Meanwhile, in paragraph (2), the emphasis is more on the word "conceal", meaning deliberately concealing a valid marriage, so the maximum prison term is seven years in prison.

This review of the criminalization of marriage is something that is found in the Criminal Code which is a result of Dutch colonialism. At the end of 2022, the Indonesian Government enacted the latest law to perfect the old regulations with the birth of Law no. 1 of 2023 concerning the Criminal Code (KUHP). The author took the initiative to examine the article regarding punishment in marriage according to the contents of the article in the law. Regarding this matter, it is contained in CHAPTER XIV concerning Crimes Against Origin and Marriage. The occurrence of criminal acts of marriage as in article 402 is due to obstructions to the validity of the marriage and concealment of these obstructions. Based on the explanation of Law no. 1 of 2023 concerning the Criminal Code (KUHP) that what is meant by "an existing marriage is a legal obstacle" in article 402 is

a marriage that can be used as a reason to prevent and cancel the next marriage. This is as regulated in the marriage law. CHAPTER III of the Marriage Law explains the prevention of marriage as in Article 15 which clearly states that the prevention of marriage is the existence of a previous marriage which is still legally binding. Apart from that, this article also touches on articles 3 and 4 concerning the principles of monogamy and permission for polygamy. This means that in the latest Criminal Code what can be an obstacle is the existence of a previous marriage (even if you have one wife/don't have to wait for four wives) according to the Marriage Law. In this case, the maximum penalty is imprisonment for 4 years and 6 months or a category IV fine, namely Rp. 200,000,000 (two hundred million rupiah).

Meanwhile, the explanation "there is a valid obstacle" in article 403 is the failure to fulfill the marriage requirements which constitute the validity of the marriage, as regulated in the Marriage Law. The maximum punishment in this case is 6 years' imprisonment or a category IV fine, namely in the form of Rp. 200,000,000 (two hundred million rupiah). In Marriage Law no. 1 of 1974 explains that the conditions for the validity of a marriage for those who are still married must obtain permission from the person concerned (polygamy permission), this is as stated in article 3, article 4 and article 9 of the Marriage Law. As for article 404, it is a rule for administrative action for those who do not carry out marriages under the Office of Religious Affairs (KUA) or the Population and Civil Registry Service (Disduk Capil). Based on Article 3 paragraph (1) of Law no. 22 of 1946 concerning Marriage Registration, Divorce and Reconciliation states "*anyone who enters into a marriage contract or marriage with a woman who is not under the supervision of the employee referred to in paragraph (2) Article 1 or his representative, is punished with a fine of up to Rp. 50-(fifty rupiah)*". However, in Criminal Code Law no. 1 of 2023 as in article 404 above there is an additional action as a category II fine, namely in the form of Rp. 10,000,000 (ten million rupiah). Basically, registering marriages is something that must be done, this is clearly stated in several articles in both the Marriage Law and KHI as an administrative requirement for data collection. Because it is true that unregistered marriages or underhand marriages are rampant which are detrimental to women and administratively, in the civil registry, children born from unregistered marriages will have difficulties when they grow up.

c. Analysis Studies; The Practice of Polygamy *Sirri* as a Criminal Offense

There is no end to talking about polygamy, this is due to the fact that it is considered taboo in people's lives, so that pros and cons with different arguments are increasingly emerging with the motto of justice. Al-Barry (1994) in the *Kamus Modern Bahasa Indonesia* says that polygamy is a marriage between one person and two or more people, but is often interpreted as a marriage between a man and two or more women. In fact, the word polygamy itself is a combination of two original Greek words, namely *polus* and *gamos*. The meaning of the *polus* is plural or many, while the meaning of the *gamos* is marriage. If the two meanings of the word are combined, it will produce a diction of meaning as a marriage practice carried out by more than one person (plural) (Mursalin, 2007). Almost the same, Musda Mulia (1999), one of the observers of feminism and gender in her book "*Pandangan Islam Tentang Poligami*" stated that polygamy is the marriage bond of a husband to several wives (more than one) at the same time. From the definitions above, the author can conclude that polygamy itself is the practice of marriage between one man and several women (although not simultaneously), whose marriage to the first wife has not been broken or has not been divorced. This means that one man builds a household ship with two or more women. The author also differentiates between polygamous marriage and remarriage (marrying twice). For the author, polygamy is a combination of marriages, where the legal wife remains under his responsibility but on the other hand he marries another woman. Meanwhile, remarriage means getting married to another woman, while the relationship with the previous wife has been terminated, either due to divorce or death.

As easy as this, the Koran (Islam) allows polygamy. So does Islam look down on women? This question may arise in our minds, because Islam seems to discredit women, and tends to give wide freedom to men. Polyandry is not permissible while polygamy is even legal. On the contrary, the aim of the verse above is to elevate the status of women with all their privileges. Muhammad Abduh in his leading work "*al-Manar*" as quoted by Chadijah Nasution (1977) states that the legality of polygamy in Islam is a narrowed regulation, where the main requirement for polygamy is justice, while justice itself is the most difficult thing when faced by humans. Likewise, al-Syiba'i stated that the verse of QS. Al-Nisa' (4): 3 shows the existence of polygamy orders (فَانكِحُوا) but it doesn't mean it's obligatory, it's just an ability. Apart from that, the implementation of polygamy must be subject to fair conditions between the several wives being married. The Qur'anic solution for those who cannot be fair is monogamy (one wife) (Nasution, 1977). Polygamy is indeed a legal nature of God in Islam, but even though it is something that has been recognized in the Qur'an with a maximum limit of 4, (QS. Al-Nisa' (4): 3), the existence of polygamy often hurts the parties. The main party fighting for family justice is women. Polygamy is often seen as discrimination between men and women, polygamy is often carried out to satisfy men's desires. The principle of marriage in Indonesia itself is said to adhere to monogamy (*tawahhud al-zawj*), this is as formulated in Article 3 paragraph (1) of the Marriage Law no. 1 of 1974: "*In principle, in a marriage, a man can only have one wife. A woman can only have one husband*". Regarding a woman having one husband, this is not a problem, because in fact Islam itself prohibits polyandry. However, the article above seems to emphasize that men must have one wife as long as there is nothing that allows it. This seems to be understood as state justification or a restriction on men's right to freedom in polygamy.

Neng Djubaidah (2010) in his book "*Pencatatan Perkawinan & Perkawinan Tidak Dicatat*" states that the meaning of article 3 paragraph (1) of the Marriage Law contains three elements of emphasis with the understanding that "*marriages that are not monogamous are null and void*" or "*marriages that are not monogamous is legally invalid*", or in another sense "*marriage that is not monogamous is prohibited by law*" or more extreme still "*marriage that is not monogamy is haram*". As a legal state with a philosophy based on Pancasila, the Indonesian state does not not legalize the practice of polygamy but rather closes the tap so that the legalization and proliferation of polygamy does not flow so easily with the many victims or losses suffered by women. Nevertheless, Indonesia does not completely cover up the practice of polygamy. This permission must be accompanied by permission from the wife. This is clearly contained in articles 55 to 59 of the Compilation of Islamic Law (hereinafter referred to as KHI) and articles 3, 4 and 5 of the Marriage Law. Both the Marriage Law and KHI all allow a husband to remarry with several conditions such as fair behavior towards his wife and children, permission from the valid wife through the Religious Court (PA), if there is no permission then the marriage with the next wife is declared null and void. legally. Apart from that, polygamy is permitted with the permission of the Religious Court if the wife is no longer able to carry out her obligations, has a disability or disease that cannot be cured and cannot produce offspring, as this is the main purpose of marriage, *hifz al-nasl* (see; Marriage Law, KHI and PP No. 9 of 1975).

The polygamy licensing process is in accordance with Government Regulation (PP) Number 9 of 1975 concerning the Implementation of Law No. 1 of 1974 concerning Marriage states that a husband must submit a written application to the Religious Court to carry out polygamy (Articles 40 and 41). In this case, the Religious Court (PA) will conduct an examination no later than 30 days after the application letter is submitted (article 42). During the examination process, the PA will call the wife concerned to ask for approval. The Religious Court (PA) will determine the permit after obtaining the consent of the legal wife in the court process (Articles 55 and 57). The results of this trial decision can be appealed or cassated, while civil registration officials or KUA employees are prohibited from registering marriages if the court decision states that this is not permitted (articles 33 and 43 and 44). The difficulty of the polygamy procedure means

that there is limited scope for movement for men in Indonesia, making them vulnerable to committing what is called polygamy *sirri*. Namely the practice of polygamy through unofficial means or underhand marriage. Etymologically, the word "*sirri*" is taken from the Arabic language, namely "*sirrun*" which means secret, quiet, silent, hidden as opposed to the word "*alanyah*" which means overt (Munawir, 1997). Regarding the meaning of "*nikbh sirri*" itself, there are many opinions, some say marriage without a guardian, some say marriage is religiously valid but not registered in authorized agencies such as the Office of Religious Affairs (KUA) for Muslims and the Civil Registry for non – Muslims. Apart from that, there is also an opinion that *nikbh sirri* is a secret marriage due to various considerations, for example, marrying a woman as a second wife which is done in secret because you don't want to get a negative stigma from society. Regarding whether the practice of *nikbh sirri* is valid or not, scholars agree that *nikbh sirri* remains valid or legal as long as the conditions and pillars of a marriage are fulfilled, but if none of the pillars of marriage are fulfilled then the law is clearly invalid (Kurniawati, 2019).

This practice of *sirri* marriage is also known as underhanded marriage. K.H. Ma'ruf Amin said that the term underhanded marriage is used to differentiate between the *sirri* marriage known to society, and this term is more in line with the provisions of the Islamic religion. In accordance with the results of the decision of the *ijtima'* ulama forum of the fatwa commission, what is meant by private marriage is a marriage that fulfills all the pillars and conditions stipulated in *fiqh* (Islamic law). However, the marriage was without official registration at the authorized agency as regulated by law (Rohman, 2017). So *Polygamy Sirri* is the practice of polygamy – combining marriages with other women – informally or without the wife's consent and is not registered with the marriage registrar. The occurrence of polygamy *sirri* is a phenomenon of public dislike for procedures that are considered too excessive in legalizing the practice of polygamy. Even though polygamy is legal in Indonesia, the prerequisites are complicated and you have to get permission from your first wife. This seems impossible to do. So the only way forward is polygamy *sirri*. This practice is often carried out by officials and also those who are seen as religious figures. Textually, marriage registration is never discussed in any classical *fiqh* books. However, contextually, marriage registration is a form of manifestation of *i'bn al-nikbh*. Regarding *i'bn al-nikbh* itself, it is a form of announcing a marriage so that it does not take place in secret (Rohman, 2021). Regarding marriage registration, it is an administrative requirement that must be fulfilled in marriages (not just unregistered marriages). Article 5 of the Compilation of Islamic Law (KHI) requires registration of marriages, apart from that the Marriage Law in Article paragraph (2) and Article 1 of Law no. 22 of 1946 concerning Marriage, Divorce and Reconciliation. Of the three laws, marriage registration is required and there are even administrative sanctions so that in article 404 of Law no. 1 of 2023 concerning the Criminal Code (KUHP) is classified as a criminal offense.

The practice of underhanded marriage (marriage *sirri*) is very detrimental (*mudharat*) to certain parties, especially women and the children they give birth to. As a matter of civil law, children born from unregistered marriages cannot be recognized as biological children by the father concerned. This is because there is no authentic evidence that the marriage occurred. So it is necessary to register marriages as authentic proof that a marriage has occurred so that children born are also recognized civilly (Rohman, 2021). The existence of polygamy *sirri* is a legal violation in criminal marriage. *First*; based on article 403 of Law no. 1 of 2023 concerning the Criminal Code (KUHP), this can be punished with a maximum prison sentence of six years in prison or a category IV fine in the form of Rp. 200,000,000 (two hundred million rupiah). *Second*; the existence of polygamy carried out under the hands (*sirri*) is very detrimental and contains *mudharat* which has a big impact on the polygamous wife and the children born from the practice of polygamy *sirri*. This offense violates article 404 of Law no. 1 of 2023 concerning the Criminal Code (KUHP) with a maximum fine of category II, namely Rp. 10,000,000 (ten million rupiah), this is already greater than Article 3 paragraph (1) of Law no. 22 of 1946

concerning Marriage Registration, Divorce and Reconciliation which states a fine of Rp. 50 (fifty rupiah).

In the event that criminal acts occur simultaneously – polygamy without permission and underhanded marriage (*sirri*) – this is known in the principles of criminal law as *concursum/samenloop* or a combination of criminal acts. The Indonesian Criminal Code as in "Part Five" concerning "*Concurrentity*" adheres to four types of systems (*stelsel*), namely: 1) *Absorptie stelsel*; namely, committing several offenses with the threat of separate penalties, then one heaviest penalty will be imposed. 2) *Comulatie stelsel*; commits several criminal offenses with individual criminal threats, then the criminal threats of imposing all kinds of criminal offenses in a cumulative manner, are added up. 3) *Verscherpte absorptie stelsel*; namely committing several criminal acts with separate criminal threats, then the heaviest penalty plus 1/3 of the action is imposed. And 4) *Gamatigde cumulatie stelsel*; commits several criminal offenses with the threat of their own punishment, then all criminal acts are imposed but the amount of the punishment must be reduced to no more than the heaviest penalty and then added by 1/3 of the action (Hakim, 2020). Regarding the practice of polygamy *sirri*, the author refers to article 126 of Law no. 1 of 2023 concerning the Criminal Code (KUHP), namely taking the heaviest punishment or belonging to the *absorptie stelsel system*. So the penalty for polygamy *sirri* is a maximum prison sentence of six years or a fine of Rp. 200,000,000 (two hundred million rupiah).

However, even though this criminal law has become part of the Indonesian law or constitution, the practice of polygamy will still be widespread. Considering the validity of polygamy *sirri* itself, there are various reasons to strengthen it. In the author's opinion, there are several reasons why the practice of polygamy *sirri* will continue to flourish and exist; *First*, Islam does not prohibit polygamy, so religious legalization of polygamy is stronger than the constitution. *Second*, marriage registration is only administrative and not a legal requirement for marriage, meaning that religiously the practice of private marriage or unregistered polygamy is still legal but legally invalidated by state law. *Third*, the existence of acculturation in society's deep – rooted understanding of religious beliefs has a big influence in creating law enforcement. *Fourth*, law enforcement is only understood by the upper classes or elites, while the lower classes (lay people) are more susceptible to religious law. *Fifth*, perpetrators of the practice of polygamy *sirri* are vulnerable or mostly those who are surrounded by religious leaders or community figures with a qualified economic status or high social strata, making it difficult to enforce the above punishment.

CONCLUSION

One of the purposes of implementing sanctions or punishment is deterrence, namely a deterrent effect. The practice of polygamy *sirri* seems to be an escape for them to carry out acts that are legally religious, but there is a lack of serious attention from the government in implementing sanctions. Even though the impacts and losses are so clear. The results of research conducted by the author regarding criminal sanctions for the practice of polygamy *sirri* are subject to criminal penalties referring to article 126 of Law no. 1 of 2023 concerning the Criminal Code (KUHP), namely taking the heaviest punishment or belonging to the *absorptie stelsel system*. So the penalty for polygamy *sirri* is a maximum prison sentence of six years or a fine of Rp. 200,000,000 (two hundred million rupiah). It is hoped that society will be aware of the disadvantages of practicing polygamy.

REFERENCES

Books

Abdullah, Mustafa and Ahmad, Ruben. 1993. *Intisari Hukum Pidana*. Jakarta: Ghalia Indonesia.

- Abdurrahman. 2010. *Kompilasi Hukum Islam di Indonesia*. Jakarta: CV. Akademika Pressindo.
- Amir, Ilyas. 2012. *Asas-Asas Hukum Pidana*. Yogyakarta: Rangkung Education.
- Asman, Asman, et al. *PENGANTAR HUKUM PERKAWINAN ISLAM INDONESIA*. PT. Sonpedia Publishing Indonesia, 2023.
- Dani, A. (2023). *ANALISIS DAMPAK POLIGAMI SIRI TERHADAP KEHARMONISAN KELUARGA POLIGAMI PERSPEKTIF HUKUM KELUARGA ISLAM (Studi Di Kampung Gunung Batin Udik Kecamatan Terusan Nunyai Kabupaten Lampung Tengah)* (Doctoral dissertation, UIN RADEN INTAN LAMPUNG).
- Departemen Pendidikan Nasional. 2008. *Kamus Besar Bahasa Indonesia*. Jakarta: Pusat Bahasa.
- Djubaidah, Neng. 2010. *Pencatatan Perkawinan & Perkawinan Tidak Dicatat; Menurut Hukum Tertulis di Indonesia dan Hukum Islam*. Jakarta: Sinar Grafika.
- Fadh, A. A. (2022). *Analisis Problematika Pernikahan Poligami Siri Terhadap Keharmonisan Rumah Tangga (Studi Kasus Di Desa Tambaharjo Kecamatan Pati Kabupaten Pati)* (Doctoral dissertation, IAIN KUDUS).
- Hakim, Lukman. 2019. *Asas-Asas Hukum Pidana; Buku Ajar Bagi Mahasiswa*. Yogyakarta: Deepublish.
- Huda, Chairul. 2011. *Tinjauan Kritis Terhadap Teori Pemisahan Tindak Pidana dan Pertanggung Jawaban Pidana*. Jakarta: Kencana.
- Instruksi Presiden (Inpres) Republik Indonesia No. 1 Tahun 1991 tentang Kompilasi Hukum Islam.*
- Kitab Undang-Undang Hukum Perdata (KUH-Perdata)*
- Kitab Undang-Undang Hukum Pidana (KUHP)*
- Kurniawati, Vivi. 2019. *Nikah Sirri*. Jakarta: Rumah Fiqih Publishing.
- Lamintang. 1984. *Dasar-Dasar Hukum Pidana Indonesia*. Bandung: Sinar Baru.
- Mulia, Siti Musda. 1999. *Pandangan Islam Tentang Poligami*. Jakarta: Lembaga Kajian Agama dan Gender.
- Munawwir, Ahmad Warson. 1997. *al-Munawwir; Kamus Arab-Indonesia*. Surabaya: Pustaka Progressif.
- Mursalin, Supardi. 2007. *Menolak Poligami; Studi Tentang Undang-Undang Perkawinan dan Hukum Islam*. Yogyakarta: Pustaka Pelajar.
- Peraturan Pemerintah (PP) Republik Indonesia Nomor 9 Tahun 1975 tentang Pelaksanaan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.*
- Prodjodikoro, Wirjono. 2003. *Asas-Asas Hukum Pidana di Indonesia*. Bandung: Refika Aditama.
- Rohman, M. M. "Asas – Asas Hukum Pidana. Padang: Global Eksekutif Teknologi." (2023).
- Rohman, Mujibbur, et al. "Metodologi Penelitian Kualitatif dan Kuantitatif." (2023).
- Soesilo, R. 1960. *Kitab Undang-Undang Hukum Pidana (KUHP) Serta Komentar-Komentarnya Lengkap Pasal Demi Pasal*. Bogor: Politeia.
- Sudarto. 1981. *Kapita Salekta Hukum Pidana*. Bandung: Alumni.
- Syamsuddin, Rahman. 2019. *Pengantar Hukum Indonesia*. Jakarta: PrenadaMedia Group.

Tahir, Rusdin, et al. *METODOLOGI PENELITIAN BIDANG HUKUM: Suatu Pendekatan Teori Dan Praktik*. PT. Sonpedia Publishing Indonesia, 2023.

Tobroni, F. (2016). Penafsiran hukum dekonstruksi untuk pelanggaran poligami. *Jurnal Yudisial*, 9(3), 281 – 301.

Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 tentang Perkawinan.

Undang-Undang Republik Indonesia Nomor 1 tahun 2023 tentang Kitab Undang-Undang Hukum Pidana.

Undang-Undang Republik Indonesia Nomor 16 Tahun 2019 tentang Perubahan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

Undang-Undang Republik Indonesia Nomor 22 tahun 1946 tentang Nikah, Talak dan Rujuk.

Zain al – Don bin Abd Azoz al – Malobbri, *Fath al-Mu'on* (t.tp: Gerbang Andalus, t.t), 145.

Journal

Afwa, A. U., & Shidiq, G. NIKAH SIRI DITINJAU DARI SEGI KEMASLAHATANNYA MENURUT KYAI PONDOK PESANTREN DI BUGEN. *Prosiding Konstelasi Ilmiah Mahasiswa Unissula (KIMU) Klaster Humanoira*.

Aini, S. M. Q., & Rofi'ah, I. H. (2023). PROBLEMATIKA NIKAH SIRRI DI INDONESIA. *JAS MERAH: Jurnal Hukum dan Ahwal al-Syakhsiyyah*, 2(2), 33 – 45.

Azharuddin, A. (2023). Criminal Sanctions Against Perpetrators of Underhand Polygamy. *Jurnal Mediasas: Media Ilmu Syari'ah dan Ahwal Al-Syakhsiyyah*, 6(2), 100 – 111.

Ferdiansyah, Ferdiansyah. "Poligami Melalui Nikah Sirri Sebagai Bentuk Penyelundupan Hukum." *Hukum Responsif* 14.1 (2023): 28 – 37.

Hanna, S., & Ahmad, L. F. (2024). NASAB OF SIRRI MARRIAGED CHILDREN FROM A FIQH PERSPECTIVE AND THE COMPILATION OF ISLAMIC LAW (KHI). *Al Hakam: The Indonesian Journal of Islamic Family Law and Gender Issues*, 4(1), 26 – 40.

Hayani, Hayani. "DINAMIKA PRIA YANG MELAKUKAN PERNIKAHAN POLIGAMI SECARA SIRRI." *Humanistik'45* 8.2 (2021).

Ismail, Miftahul Ulum, Moh Mujibur Rohman, and Mohsi Mohsi. "TAQNĪN AL – AHKĀM (Telaah Sejarah Legislasi Hukum Perdata Islam dalam Hukum Nasional Indonesia)." *Ulumuna: Jurnal Studi Keislaman* 6.1 (2020): 85 – 109.

Junaidi, Junaidi, et al. *HUKUM & HAK ASASI MANUSIA: Sebuah Konsep dan Teori Fitrah Kemanusiaan Dalam Bingkai Konstitusi Bernegara*. PT. Sonpedia Publishing Indonesia, 2023.

Makfiyati, N., Syafe'i, Z., & Hidayat, A. (2024). The Relationship Between Isbat Marriage Polygamy Sirri and Supreme Court Circular Letter (SEMA) Number 3 of 2018. *Journal of Law, Politic and Humanities*, 4(6), 2044 – 2054.

Marpaung, Z. A., Kalo, S., Ablisar, M., & Barus, U. M. (2013). Pertanggungjawaban Pidana terhadap Perkawinan Poligami tanpa Persetujuan Istri yang Sah (Studi Putusan Mahkamah Agung No. 330k/pid/2012). *USU Law Journal*, 2(2), 108 – 122.

Mohsi, M., Moh Mujibur Rohman, and Miftahul Ulum. "Telaah Fatwa Mui No. 10 Tahun 2008 Tentang Nikah di Bawah Tangan Berbasis Sadd Al – dzarī 'ah dan Keadilan Gender." *An-Nisa': Journal of Gender Studies* 14.1 (2021): 74 – 87.

- Mukdin, Khairani, and Asmanidar Asmanidar. "Poligami dan Kaitan dengan Nikah Sirri." *Takammul: Jurnal Studi Gender dan Islam Serta Perlindungan Anak* 11.2 (2022): 53–73.
- Munawar, A. E. (2019). Nikah Sirri dan Poligami (antara Kesadaran Sosial Keagamaan dan Benturan Perundang–undangan). *Jurnal Hukum Islam IAIN Pekalongan*, 17(1), 20–39.
- Rahman, M. L. (2018). Nikah Sirri: Keabsahan Dan Akibatnya. *Al Hikmah: Jurnal Studi Keislaman*, 8(1), 128–135.
- Rauf, S., Yunus, F., & Hasjad, H. (2024). Analisis Poligami Ilegal Berdasarkan Pasal 279 KUHP Dengan Undang–Undang Nomor 16 Tahun 2019 Tentang Perubahan Atas Undang–Undang Nomor 1 Tahun 1974 Tentang Perkawinan. *Innovative: Journal Of Social Science Research*, 4(4), 11920–11933.
- Rohman, M. M., Mark, E., Maharjan, K. (2023). "The Position of Judges in the Indonesian Legal Idea. *Journal Emerging Technologies in Education*, 1(2), 115–124. <https://doi.org/10.55849/rjl.v1i2.392>
- Rohman, Moh Mujibur, and M. Mohsi. "Konstruksi Ilan Al–Nikah Dalam Fiqh Pancasila (Telaah Pencatatan Perkawinan Perspektif Sad Al–Dzariah)." *Ulumuna: Jurnal Studi Keislaman* 3.1 (2017): 15–35.
- Rohman, Moh Mujibur, and Moh Zarkasi. "REFORMASI HUKUM KELUARGA DI DUNIA ISLAM (Studi Normatif Perbandingan Hukum Perceraian Mesir–Indonesia)." *Al-Syakhshiyah* 3.1 (2021): 363553.
- Surur, N. (2022). Pemidanaan Nikah Sirri Dalam RUU HMPA (Pasal 143) Perspektif Maşlahah Mursalah. *El-Usrah: Jurnal Hukum Keluarga*, 5(2), 398–408.
- Wahid, W. G. A. (2013). *Pandangan Majelis Tarjih Dan Tajdid Muhammadiyah Tentang Nikah Sirri Dan Itsbat Nikah: Analisis Maqashid Asy-Yari'Ah. MusbWa Jurnal Studi Gender Dan Islam*, 12(2), 215-236.