

## **NIKAH SIRRI AND ITS RESPONSES FROM RELIGIOUS COURT: Taking Sides between Acceptation and Refutation**

*Titis Thoriquttyas\**

**Abstract:** *This paper describes on the regulation of nikah sirri and its responds from the various society, especially from the religious leader's view in Madura. Criminalizing the subject of nikah sirri become debatable issues for Madurese community in the socially and religiously context. Either the acceptations or refutations for this case become the crucial point to discuss academically because both of responses supported by the logical argumentations. It considered as the progressive policy to minimize it cases and protect the rights of wife and children legally, socially and economically. In other side, the criminalizing regulation viewed as the overlapping law because it reduction the Islamic Law. In order to bridge this case, the leader communities played the significant role to mediate it through the legal frameworks. Furthermore, this paper aims to provide the position of criminalizing regulation for the subject of nikah sirri as well as the role of leader communities in Madura to mediate the differs argumentations behind it. In conclusion, the researcher believed that the leader communities in Madura have the opportunities to solve the problems of nikah sirri based on the religious, social and cultural reasons.*

**Keywords:** *Nikah Sirri, The leader's community and The Criminalizing Regulation.*

**Abstrak:** *Penelitian ini menjelaskan tentang regulasi nikah siri dan tanggapannya dari berbagai segementasi masyarakat, khususnya dari pemimpin keagamaan di Madura. Kriminalisasi pelaku nikah siri menjadi isu yang hangat untk didiskusikan lebih lanjut, dalam konsteks kehidupan sosial dan keagamaan. Antara pihak yang pro maupun kontra terhadap isu tersebut menjadi titik sentral pembahasan dalam penelitian ini, karena kedua sisi tersebut didukung oleh argumentasi yang logis. Kebijakan tersebut dianggap mampu mengurangi permasalahan tersebut serta melindungi hak istri dan anak dari tinjauan hukum, namun disisi lain regulasi tersebut dipandang sebagai bentuk overlapping terhadap hukum Islam dimana memperbolehkan untuk nikah siri. Guna menengahi permasalahan tersebut, posisi dan peranan pemimpin keagamaan dianggap mampu memainkan peran yang signifikan melalui kerangka hukum positif. Lebih lanjutnya lagi, penelitian ini akan memaparkan posisi atas regulasi terhadap kriminalisasi pelaku nikah siri berdasarkan respon dari beberapa responden di Madura dan Peneliti berkeyakinan bahwa pemimpin keagamaan memiliki peluang untuk menyelesaikan permasalahan nikah siri didasarkan atas penjelasan secara keagamaan, sosial dan budaya.*

**Keywords:** *Nikah Sirri, Pimpinan Keagamaan dan Kriminalisasi Nikah Siri.*

---

\* State College for Islamic Studies (STAIN), Kediri, Visiting Scholar at Georg August Universitat Gottingen, Germany, [titisthoriq@gmail.com](mailto:titisthoriq@gmail.com)  
Justicia Islamica, Vol. 14 No. 2 Tahun 2017

## INTRODUCTION

When the regulation of *nikah sirri* included in RUU HMPA (*Hukum Material Pengadilan Agama: The Draft of Material Law of Religious Court*), the community leaders from diverse societies responded in various expression.<sup>1</sup> In the printing media, they have argumentations reflected from their polemic as well as they have debate which reflected in the public media. The community leaders came from the scholars, leaders of Islamic educational institutions, academicians, religious leaders of social organizations, legal practitioners, judges in the judiciary, members of the state commissions and the women activists. The debatable regulation is about the criminalizing of perpetrators for unofficial marriage (*nikah siri*). This includes their acceptability in the socio-religious life. There are several groups which support the idea about criminalizing regulation for *nikah sirri*, while the other groups reject it based on the idea for overlapping the authority of human law on the Divine law, especially about the permissibility of *nikah sirri*. The others groups stated the acceptance about this regulation as the *ijtihad* effort. The acceptance, rejection and the support idea of it case is sometimes difficult to find the meeting point, because among of them was insist on a justification of their arguments.

*Nikah Sirri* or vary terms like, the bottom hand - marriage, secret marriage or unofficial marriage, is the wedding procession conducted by the norms and rules of *fiqh* (Islamic law) or customs that implementation without registration and/or testimony from KUA (*Kantor Urusan Agama: "The Office of Religious Affairs"*), as the holders of formal authority according to the government rules and regulations.<sup>2</sup> The term of *nikah sirri* is not recognized in the laws and regulations in the Indonesian legal system and therefore has not been discuss explicitly in it. Although it is so, in the sociological term, it existed and recognized by the most citizens in social life. Even they tolerate its existence because of the implementation and it believed to be the legal status in accordance with the norms and rules of religion.

The Implementation of *nikah sirri* would be regarded ignore the rules and regulations concerning on the registration of marriages in Law No. 1/1974 on Marriage (UUP),<sup>3</sup> PP 9/1975 on the Implementation of the marriage Law,<sup>4</sup> and Presidential Instruction No. 1/1991 on dissemination of The Compilation of Islamic Law (KHI).<sup>5</sup>

Legally, the consequence is negating the validity of the marriage status. Such marriage has no the binding legal force. It means that the form of the legal

---

<sup>1</sup> RUU HMPA was legalized in PROLEGNAS (*Program Legislasi Nasional, "The Program of National Legislation"*) on 2010.

<sup>2</sup> Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia* (Jakarta: Kencana, 2006).

<sup>3</sup> Section II article II UUP, "every the marriage process registered based on the regulations law".

<sup>4</sup> Section II article I UUP, "the registration on marriage process according to Islam conducted by *Pegawai Pencatat Nikah* (PPN), as be intended in the Law no. 32 year 1954 about the marriage registration, divorce and reconciliation".

<sup>5</sup> The compilation of Islamic Law section V article I, "in order to assure the orderliness of marriage for every Muslim citizen, every the marriage process have to registered".

act of *Nikah Sirri* seem never existed, never happened, or not recognized its existence.

In the reality, *Nikah Sirri* will be very disadvantage for the wife legally and socially.<sup>6</sup> By law: (a) the wife is not recognized as a legal entity; (b) the wife is not entitled to receive the income from her husband or inheritance properties if one day her husband died; and (c) the wife is not entitled to receive the joint property (*harta gono-gini*) if she divorced by her husband. It happened because of a legally binding and marital status has never been recognized by the government. Meanwhile, in the social live, the wife will be face the difficulties to socialize with another person in the around society, it because *Nikah Sirri* often viewed and treated by society as a cohabiting actors, that women live with men without marriage officially. The status of women as it is even considered to be the wife of deposits (*istri simpanan*).

Invalidity of *Nikah Sirri* according to the government regulations it also adversely affects on the children status. *First*, the legal status of children as an illegitimate child.<sup>7</sup> Consequently, children only have a civil relationship with his mother and family, but not with her/his father. In the birth certificate regard of their status as a child from outer the official marriage; *Second*, the vagueness on the legal status of children resulted *nasab* relationship between father and son is not solid so it could happen that the father does not want to admit the boy is his son; *Third*, in the event of divorce or death, the child was not entitled to demand the payment of living expenses in the form of living expenses, education expenses, medical expenses, and the legacy from the "real father".

On the other hand, almost there is no formal adverse impact to the husband. The reverse is actually "benefit" for him because: (a) the husband free to remarry because the marriage can be declared as unofficial marriage by law; (b) the husband can avoid or ignore their obligation to support his wife and his children; and (c) in the event of divorce or death, the husband free from the obligation to divide the joint properties (*harta gono-gini*), the inheritance properties, and the material affairs to his wife and children.

In the fact, the problems are relatively complicated due to *Nikah Sirri*, is not quite able to be anticipated, prevented, or prohibited by the government if only done by the prohibition on *Nikah Sirri* without a formal – legal setting and at the same time followed by clear and unequivocal sanctions. Therefore, in the bill draft of HMPA,<sup>8</sup> the government raises the articles about the arrangements of *nikah Sirri* and it believed to be more effective in its implementation. One of the ways is the criminalizing of *nikah sirri's* perpetrators. In the Bill draft of HMPA Article 143 states that "any person who intentionally performing a marriage while not in the presence of the Registrar of Marriage shall be punished by a fine of IDR 6.000.000, or imprisonment for 6 months." Determinations of the criminal

---

<sup>6</sup> Ahmad Rofiq, *Hukum Islam di Indonesia* (Jakarta: PT. Raja Grafindo Persada, 1998).

<sup>7</sup> UUP Section 42-43 and KHI Section 100.

<sup>8</sup> The position of RUU HMPA as the complement for UUP and its formulation refers to the contents of KHI which regulate more detail about the marriage (especially) for Muslim citizen. Its content including the requirements of marriage, divorce, custody of child, the rights and obligation of wife – husband, reconciliation and the criminal provision (the section 10) for those break the prohibition in that regulation.

provisions have attracted the attention from many sides. Some groups are support it and some other groups are reject it. The arguments in supported or rejected those the regulation, generally patterned in two mainstream thought. *First*, the supported arguments for the criminalizing regulation based on it have caused harm to women and offspring. This is contrary to the basic purpose of marriage is prescribed to realize the live in *sakinah, mawaddah, and rahmah* for mankind. Therefore, it needed the effective regulation to control, perform and evaluate this regulation. *Secondly*, the argument that reject for the criminalizing regulation based on their idea that it not needed because marriage is a private affair. The validity of marriage is determined by the fulfillment of the provisions of the religion norms and rules or the customs, not by the regulation which created by a group of people who work under the authority of the state.

The controversial sphere also occurs in Madura. On one side, these regulations are interpreted as a reformulation effort on the aspect of marriage law and as the complementary for the previous regulation and adaptation to the new needs.<sup>9</sup> On the other hand, it is considered as a useless policy or redundant regulation because it is beyond the authority of religion which legalized in the name of living and citizen interest. In the several formal and informal meetings, the researcher involved discussions with various Madurese community leaders about the reform ideas on marriage law, particularly the criminalization of *Nikah Sirri* for perpetrators. Controversial atmosphere always appear during the discussion. The differences mindset and perspective occur in the looking at the case and the solution for it. Those who reject the regulations (concerning the criminalization of *Nikah Sirri* for perpetrators) rely on the textual understanding of religious norms or availability of religious text. Meanwhile, those who support the renewal idea about this case rely on the contextual truth and the awareness on living realities.

This study has significant relevance in order to establish the climate of openness, freedom, and tolerance in the argumentation as well as the scholar contributions for the leaders of society. The results are expected to benefit theoretical and practical. Theoretically, it is expected to contribute to the formulation of marriage law reform. Practically, it is expected to give enlightenment thinking and behaving to the realization of gender equality and harmony in everyday life. From the description of this research mapped the main problem, namely the criminalizing regulation for *Nikah Sirri's* perpetrators according to the Madurese community leaders. In detail, problem of the study are include: (1) how the acceptability of criminalizing regulation on *Nikah Sirri* cases?, (2) what is the underlying argument behind it reasons?, and (3) how well the acceptability from the perspective of women and children protection?

## RESEARCH METHODOLOGY

This study is located in the Madura region, covering four districts: Bangkalan, Sampang, Pamekasan, and Sumenep which concentrated to identify the acceptability of the criminalizing regulation on *Nikah Sirri* according to Madurese

---

<sup>9</sup> UUP, PP and KHI, the regulation of *nikah sirri* was stated as the unofficial marriage which have not the legal status

community leaders, the underlying argument, and its acceptability in the perspective of women and children. Design and qualitative approach used in this study to uncover phenomena, facts, and data in natural settings according to the context, the meaning and interpretation of the subject of research.<sup>10</sup> The presence and involvement of the researcher, as an instrument, it becomes a necessity to find the meaning, gain the understanding, and the formulating interpretations on the data collected. The step confirmation, correction, and re-checking to the subject of research on the data acquisition is done through the member check techniques and negative case analysis.<sup>11</sup>

Determination of the samples are done by using purposive and snowball sampling to select informants and develop their information by applying the principles of design funnel, collecting data as wide as possible then it narrowed and sharpened to the focus and purpose of the study. Informants in this study is the KUA officials, religious court judges, official Ministry of Religious Affairs (MORA) in charge of Islamic Affairs (URAIIS), The members of advisory Board, Chairman of the social organization, gender activists as well as women and children practitioner, as well as academician in Madura Island.

Data analysis was performed by organizing the data, classifying the data into a unit of study, synthesis the data; the searching pattern and the disclosure of meaningful things. Data analysis was performed during and after data collection. Techniques of data analysis include theoretical analysis, analysis of the interviews, and content analysis of documents. In obtaining a valid interpretation, validity test and interpretation data are performed in order to obtain truth worthiness. Because of that, the credibility test, the dependability test, and the conformability data test should be conducted.<sup>12</sup> Test of data validity was conducted in order to prove the validity of it in accordance with the factual conditions of "events" that happened.<sup>13</sup>

Test of data credibility using four from seven techniques available, including sources triangulation and methods of data collection, checking members, collegial discussion, as well as research referential adequacy.<sup>14</sup> Tests of Dependability carried out in order to correct inaccuracies in the conceptualization of research plan, data collection, findings interpretation, and reporting the results of research through the consultant review as the dependent auditors. Meanwhile, conformability test was performed to assess the relationship between information, data, and interpretations that are arranged in the results of organization reporting which supported by the using of study materials as well as an audit trail.

---

<sup>10</sup> Bogdan, RC. & Taylor, *Introduction to Qualitative Research Methods: A Phenomenological Approach to The Social Sciences* (NY: John Willey and Sons Inc., 1985). See also, Bogdan, RC, *Qualitative Research for Education: an Introduction to Theory and Methods*, (Boston: Allyn and Bacon Inc, 1982).

<sup>11</sup> Moeloeng, *Metodologi Penelitian Kualitatif* (Bandung: PT. Rosda Karya, 1990).

<sup>12</sup> Lincoln. YS, *Naturalistic Inquiry on Research*, (Beverly Hill, CA: SAGE Publication, 1985).

<sup>13</sup> Nasution. S, *Metode Penelitian Naturalistik Kualitatif* (Bandung: Tarsito, 1996).

<sup>14</sup> Denzin, N.K and Lincoln, YS, *Handbook of Qualitative Research* (Thousands Oak, CA: SAGE Publication, 1994).

## RESEARCH FINDINGS

### 1. The acceptance arguments about the criminalizing regulation for the doer of *Nikah Sirri*

The renewal regulation on *nikah sirri* cases particularly about the criminalizing of perpetrator, addressed by Madurese community leaders in different views. Most of them support or respond to it positively, as a progressive advancement in the practical development of law in accordance with the development dynamic of society. Their support idea is expressed in the following statements:

One of judges at The Religious Court (PA) in Pamekasan, Ali Ridla, believes that the new regulations on *nikah sirri* required in the form of legal laws that must be accompanied by sanction distinctly and forcefully, namely the criminalizing for the doer of *nikah sirri*. The rule becomes a necessity imposed by the Government to respond the new developments and the new needs to provide the legal protection for his wife and “life assurance “for the children.<sup>15</sup>

The similar argument was also expressed by some judges at The Religious Court (PA) in Sumenep. KH. Muhsin for example, argued that the new regulations on *nikah sirri* relevant to be published as soon as possible by the government. So many the serious problems caused due to practice *nikah sirri*. He was argued that the criminal sanction is the form of punishment to be expected effectively. The criminalizing of *nikah sirri*'s doer it seems becomes the key to answer this case.<sup>16</sup>

Another view is spoken by H. Ahmad Misbah, Judge at The Religious Court in Sampang. According to him, the government plan would to criminalize perpetrator of *nikah sirri* in RUU HMPA is a right decision.<sup>17</sup> In his opinion, the new regulation on *nikah sirri* which contains the criminalization for perpetrator is a necessity. The benefit is to ensure the fulfillment of marriage authentic evidence as the obligation which recognized by the religious norms, social norms, and constitutional norms legally.

Here are some argumentations from the number of figures who strongly supports the renewal regulation about the criminalizing in *Nikah Sirri* cases. The reason is impact of *nikah sirri* has clearly detrimental to women and children. Among others, the uncertainty position of marriage that resulted in the absence of protection for the fulfillment of fundamental rights of women and children, the position of men in *nikah sirri* is very dominant because whenever they could determine the fate of marriage including divorce, otherwise the position of women become subordinate or marginalize due to the absence of evidence that can be used as a basis for self-defense to their rights.

---

<sup>15</sup> This is based on the interview with Ali Ridha in the office of Religious Court (PA) Pamekasan, 10<sup>th</sup> May 2012.

<sup>16</sup> This is based on the interview with KH. Muhsin in the office of Religious Court (PA) Sumenep, 12<sup>th</sup> May 2012.

<sup>17</sup> This is based on the interview with H. Ahmad Misbah in the office of Religious Court (PA) Sampang, 15<sup>th</sup> May 2012.

The similar view is presented by Moh. Modin Hasan, *modin* in Gapura Barat Village, Sumenep. In his view, the necessary sanctions for perpetrators are purposed in order they do not underestimate the sacred of law marriage. The sanctions were solely as endeavor to minimize *nikah sirri*, either for the first marriages or polygamy.<sup>18</sup>

In view of Kiai Syamsuddin, administrators of Bahtsul Masail Institute (LBM) NU Burneh Bangkalan, although polygamy secretly in Bangkalan including "the tradition of *kyai*" who believed lawful from religion perspective, but he agreed that if the government intends to regulate the practice of marriage in society by making the marriage regulations that includes the criminalization sanctions for perpetrators of *Nikah Sirri* or polygamy because it tends to marginalize the right of women.<sup>19</sup>

## 2. The refutation arguments about the criminalizing regulation for the doer of *Nikah Sirri*

Behind the acceptance ideas, there are always followed by the refutation ideas. In addition, there is a group of leader community in Madura who supporting the renewal regulation in *Nikah sirri* cases through the criminalization for perpetrator, there are also groups that reject these ideas. They responded it as an excessive regulation and that idea is overlapped beyond the basic law. Indeed, reducing the legal norms on marriage regulation that had been arranged comprehensively in the religious law. Their statement explained below:

Farhanah, judge at the religious court in Pamekasan, stated the disagreement for this regulation. The reason is, in addition to the draft regulations would be contrary to the law, as well as disapprove with the content of Criminal Code; references for the criminal laws. In his view, the new regulation was not needed.<sup>20</sup> The perpetrators of *nikah sirri* will feel by himself for the legal consequences of his actions through the lack of legal protection for themselves and his offspring because they are unofficial according to the laws that already exist. The government does not need to criminalize perpetrators because they do it on the conscious condition.

Similar views were expressed by Ruhul Wahyu, Chairman of *Aisiyah*, Sampang and Erie Hariyanto, legal observers in Pamekasan. For those, these regulations which now apply about *nikah sirri*, actually is sufficient however the socialization that need to be optimized. Therefore, a new regulation is no longer needed as well as the criminalizing rules for the perpetrators. The main problem is the government is less than optimal in delivering socialization to provide the legal awareness for the community.<sup>21</sup>

---

<sup>18</sup> This is based on the interview with Moh Hasan in his home at Gapura Barat, Sumenep, 12<sup>th</sup> May 2012

<sup>19</sup> This is based on the interview with Kyai Syamsuddin in his home at Bangkalan, 19<sup>th</sup> May 2012

<sup>20</sup> This is based on the interview with Farhanah in the office of religious court (PA) in Pamekasan, 10<sup>th</sup> May 2012

<sup>21</sup> This is based on the interview with Ruhul Wahyu and Edie Hariyanto in their home, Pamekasan, 10<sup>th</sup> May 2012

### 3. The “middle ways” arguments and its existed between the acceptance - refutation idea

Beside the acceptance and the rejection group for these cases, there is a middle group which is the group who accepts and rejects the criminalizing regulation partly. Their statements were delivered on the following paragraph:

Kyai Abd. Wahid, one of the leaders element and caregivers in PP Al-Amien Prenduan Sumenep,<sup>22</sup> and Syafik, Chairman of the Religious Affairs Office (KUA) Pamekasan.<sup>23</sup> They argued that the government's efforts as the marginalization step of religious law. The reason is the validity of the marriage in *fiqh* is determined by the fulfillment of requirements based on the authority of religion, not by the marriages registration. Both are different, one in the legal status, while other in the administrative enforcement. Although it is so, the violators of the rule both of them should receive the sanctions, in the form of administrative sanctions such as fines, for example, to pay a fine of IDR forty five million. If the fine is [only] IDR six million, as listed in RUU HMPA, less giving the chary effect for the doer of *nikah Sirri*.

The different views presented by KH Abd. Ghaffar (Chairman of *Tanfidziyah* PCNU Pamekasan),<sup>24</sup> Moh. Zahid (vice - chairman of *Musytasar* PCNU Pamekasan), Slamet Imam Santoso (Regional Board Chairman of *Muhammadiyah* Pamekasan), Tin Suwandi (Chairman of the Regional Board *Aisiyah* Pamekasan). Basically, the stated the agreement on the new regulations for *nikah sirri* cases because it is believed that happened in the historical necessity perspective. Although it is so, they do not fully agree if the perpetrator should be criminalized. They believe that the position of marriage registration is to fulfill *tahsiniyah* requirements (preferably filled) for the perfection of marriage and it not *lazimah* requirements of marriage (have to be filled) for the validity of a marriage.

When expressed his views, Tin Suwandi looked worried and concerned about the practices of *nikah sirri* and all the problems that surrounded it, including the involvement of religious leaders in this case. In his view, the new regulations on *nikah sirri* become the necessity. In addition to realizing the social order in the religious and social life, as well as to protect the rights of women and children. The applicability of this regulation will be effective if deemed not in contrary with the religious law, there is support action and example model from religious leaders, especially from *kyai* and *ulama* who had been impressed also "simplify" in the case of *nikah sirri*.<sup>25</sup>

From the description above which enrich by the field observation along with the summary of content obtained the conclusions of research findings as follows:

---

<sup>22</sup> This is based on the interview with Kyai Abd. Wahid in STAIN Pamekasan, 21<sup>th</sup> May 2012.

<sup>23</sup> This is based on the interview with Syafik in STAIN Pamekasan, 21<sup>th</sup> May 2012.

<sup>24</sup> This is based on the interview with KH. Abd.Gaffar in PCNU office Pamekasan, 22<sup>th</sup> May 2012.

<sup>25</sup> This is based on the interview with Tin Suwandi in the office of PD Muhammadiyah Pamekasan, 22<sup>th</sup> May 2012.



- a. The argumentations from the groups who support the new regulation on *nikah sirri* cases, especially on the criminalization regulation for the perpetrators because the impact of *nikah sirri* has clearly disadvantages to the rights of women and children.
- b. The argumentations from the group who reject the new regulation on *nikah sirri* cases, especially on the criminalization regulation. According to their ideas, this regulation considered overlapping the regulation of religious law which allowed *nikah sirri*. In addition to, the criminalization on *nikah sirri* cases recognized will be impact on the clash between the code of religious law and the code of criminal law.
- c. The argumentations from the group who support and reject the new regulation on *nikah sirri* cases partly. They stated that the new regulation on *nikah sirri* should be accompanied by the strict sanctions because it very needed in order to establish the social order. Meanwhile, the criminalization sanction for the perpetrators of *nikah sirri* is inappropriate decision and it should be changed by the others sanction, such as the administrative sanction (paying the amount of fines).

#### ANALYSIS OF RESEARCH FINDINGS

In this study produced the findings that most of community leaders have the agreement on criminalization regulation for *nikah sirri* cases in the draft legislation in order to fulfill the purposes of *maṣlahah al-‘ammah* (the public interest). Thus, benefit for the majority of citizens could be achieved through the registration control of marriage. Therefore, the registration of marriage becomes an important part of achieving *maṣlahah al-‘ammah*, so the essential law behind it also must be implemented. Without any the registration of marriages, it tend to be chaos, if it is not said to be the disorder of social life, which can threaten human interests (*darūriyyah*), mainly the offspring clarity (nasab), the material rights as well as the self-respect and family.<sup>26</sup>

Some the other community leaders (Madurese) do not support this regulation because it considered overlapping the essence of religious law. Moreover, they presume it as the systematic attempt to marginalize the religion law, in addition to; it will collide with the implementation process of the Criminal Code. According to them, the validity of a marriage can only be ensured if its requirements are fulfilled. Thus, the validity of marriage is the authority of religion fully and there are no others that able to reduce it. This includes the state and its administrative products as well as its regulations. Therefore, the state is not in place to regulate and intervene in the religious authority.

However, the others expressed support for the new regulations on *nikah sirri*, but they reject the criminalization regulation (penal sanctions). Their refusal was based on the status of law validity in *nikah sirri* which cannot be replaced by a cancellation due to the lack of government regulation in the form of registration. According to them, the position of marriage registration is just as the

---

<sup>26</sup> Amir Nuruddin, *Hukum perdata Islam di Indonesia: Studi Kritis Perkembangan Hukum Islam dari Fikih, UU No. 1/1974 sampai KHI* (Jakarta: Prenada Media, 2004)

fulfillment of requirements (*mustahsinah*) and it does not mean a requirement that must be fulfilled (*lazimah*). Its accommodative solutions are they suggest a replacement type of administrative sanction in the form of penalties or paying the fines. The main reason is the effectiveness of regulation enforceability that would be achieved if accompanied by the sanctions. Meanwhile, the sanctions are considered relevant when it does not negate the validity of marriage.<sup>27</sup>

The differences in attitudes, opinions, or views are accompanied by a variety of basic arguments which elaborated by each of the three groups of community leaders it was interesting to mapped and found an alternative solution. Such a solution is absolutely necessary in order to obtain the position clarity on the problems of legal validity's status for *nikah sirri* issues. The next issue, are we (still) need the formulation of sanctions for it case from perspective of the legal - religious law and its relevant, is it?. That is the fundamental issue which will explained and analyzed in this section.

Within the re-actualization framework of the divine values, Islamic law which is seen (and believed) flexible, supple, dynamic or in line with the times and places wherever it applies to real life, the jurists (legal philosophers of Islam) creating the legal norms, namely *Maqāṣid al-Sharia*, the purpose of Islamic law that is accordance with the will of Allah. According to Jurists, the purpose of Islamic law is to save the order of human life in the world and the hereafter.

The term of *maqṣid* (plural: *maqāṣid*) refers to a purpose, objective, principle, intent, goal and the end. *Maqāṣid* of the Islamic law are the objectives or purposes behind the Islamic rulings. For the number of Islamic legal theorist, it is an alternative expression to people's interest (*maṣalih*). For example, Abdul Malik Al Juwaini, one of the earliest contributors to *al-maqāṣid* theory as we know it today used *al-maqāṣid* and public interest (*maṣlahah al-'ammah*) interchangeably. Al Qarafi linked *al-maṣlahah* and *al-maqāṣid* by a fulfillment of some good (*maṣlahah*) or the avoidance of some mischief (*mafsadah*). Therefore, a *maqāṣid* or objective in the Islamic law is there for the "interest of humanity". This is the rational basis for the *maqāṣid* theory.<sup>28</sup>

Traditional classifications of *maqashid* divide them into three levels of necessity, which are the necessities (*ḍarūriyyāt*), the need (*ḥājjiyyāt*) and the luxuries (*taḥsiniyyāt*). Necessities are further classified into what preserves one's faith (*ḥifẓ al-dīn*), soul (*ḥifẓ al-nafs*), wealth (*ḥifẓ al-māl*), mind (*ḥifẓ al-'aql*) and offspring (*ḥifẓ al-nasl*). Some jurist added the preservation of honor (*ḥifẓ al-'ird*) to the above five widely popular necessities.<sup>29</sup>

The necessities (*ḍarūriyyāt*) were considered essential matters of human life itself. There is also a general agreement that preservation of these necessities is the objective behind any revealed law, not merely the Islamic law. The purposes at the level of need (*ḥājjiyyāt*) are less essential for human life. Examples are marriage, trading and any kinds of transportation. Islam encourages and

---

<sup>27</sup> Jaih Mubarak, *Modernisasi Hukum Perkawinan di Indonesia* (Bandung: Pustaka Bani Quraisy, 1990).

<sup>28</sup> Jasser Auda, *Maqasid al-Shari'ah as Philosophy of Law: A system Approach* (London, and Washington: The International Institute of Islamic Thought, 2008).

<sup>29</sup> Jasser, Auda, *Maqasid al-Shari'ah: a Beginner's Guide* (London: The International Institute of Islamic Thought, 2008).

regulates these needs. However, the lack of any of these needs is not a matter of life and death, especially on the individual basis. Purposes at the level of luxuries (*taḥsiniyyāt*) are “beautifying purposes”, such as using perfume and stylish clothing. These are things that Islam encourages but also asserts how they should take a lower priority in one’s life.

As noticed by Imam Asy-Syatibi, the levels in the hierarchy are overlapping and interrelated. In addition, each level should serve the level (s) below and as illustrated below:

From the illustration above, Asy Syatibi tries to elaborate the sequence of *maqāṣid* from the needs (*ḍarūriyyāt*) until the luxuries (*taḥsiniyyāt*) which inside the necessities contains also the five main aspects in *maqāṣid sharīah* that arranged chronologically. The idea of Asy Shatibi is represent the classical thought of *maqāṣid sharīah* and it existence criticized by the modern jurist. Contemporary theorists criticized the above classical classification of necessities for a number of reasons, including following:

1. The classical *maqāṣid* are concerned with individuals rather than families, societies and human in general
2. The classical *maqāṣid* classification did not include the most universal and basic values, such as justice and freedom aspects
3. The classical *maqāṣid* were deduced from the Islamic legal heritage itself, rather than the original sources or scripts.

In order to remedy the above concept of *maqashid*, modern scholars introduced the new conceptions and classifications of *maqashid* by giving consideration to new dimension. Some of the modern scholar is Jasser Auda.

In his book entitled, “*Maqashid Al Shari’ah as Philosophy of Islamic Law: A system Approach*”, Auda tries to reconstruct the classical concept of *maqāṣid* which characterized by “Protection-Preservation” toward the modern concept of *maqāṣid* which characterized by “Development-Rights”.

In addition, Jasser Auda also introduce the new model of three components of *maqāṣid* which elaborated by Ash-Syatibi hierarchically by “the model of interrelatedness”. Auda tries to reconstruct the basic paradigm about the classical concept of *maqāṣid sharīah* which introduced by Ash Shatibi. Auda’s concept on the contemporary model of *maqāṣid sharīah* tries to shift it concept from the hierarchies to equalities understanding. The hierarchy concept on the need (*ḥājīyyāt*), the necessities (*ḍarūriyyāt*) and the luxuries (*taḥsiniyyāt*) is shifted toward the interrelatedness - integratedness concept which considered these three elements equally and proportionally.<sup>30</sup>

Relating to the case of *nikah sirri* and its new regulation about the criminalizing regulation for the perpetrator is could be analyze from the horizon of *maqāṣid sharīah* according to Jasser Auda’s concept. According to Auda, the cases on *nikah sirri* and its effects is could be classified into the preservation of offspring (*ḥifẓ al-nas*) and preservation of soul (*ḥifẓ al-nafs*).

---

<sup>30</sup> Mohammad Darwis, “*Maqashid al-Shari’ah dan Pendekatan Sistem dalam Hukum Islam Perspektif Jasser Auda*,” dalam *Studi Islam Perspektif Insider/Outsider* ed. M. Arfan Mu’ammam & Abdul Wahid Hasan. (Yogyakarta: IRCiSoD, 2012).

The cases of *Nikah sirri* could be classified into the preservation of offspring (*ḥifẓ al-nafs*) problems because it related with the ways to preserve the existence of human being. In addition, Auda emphasizes in the contemporary concept of *maqāṣid sharīah*, especially for *nikah sirri* cases, as the violation on the essence of marriage itself. Basically, the existence of marriage is to preserve the life of human beings well as to protect the rights of women and children. In *nikah sirri* case, the position of women and children are unconsidered by the state because of there is no the official certification or registration. In addition, it impacted to the difficulties for women and children to access their rights as the citizen. Although, *nikah sirri* is the legally from the views of the religious law, but from the perspective of legal law, it could not be considered as “the completed – marriage”, because it not registered by the official board (KUA).

In other hand, *nikah sirri* could be categorized as the misapplication on the preservation of soul (*ḥifẓ al-nafs*). From the classical perspective of *maqāṣid sharīah*, “*ḥifẓ al-nafs*” is only focused on the preservation on the soul of human being as individual creature. Meanwhile, Auda offered the contemporary concept which focus to the preservation of human rights in the general understanding and it applicable in the global context. In *nikah sirri* cases, the impact of unregistered marriage is disadvantages for the women and children’s side, so based on the contemporary model of *maqāṣid sharīah*, the cases of *nikah sirri* have to avoid by every Muslim because the disadvantages behind it is greater than the advantages that will got. Moreover, the victims on *nikah sirri* cases are the rights of women as wife and the children will be threatened.

In the next discussion on the criminalizing regulation for the perpetrator of *nikah sirri*, the researcher inspired from the concept of Jasser Auda about “the system approach”. “The system approach” which introduced by Jasser Auda, simply could be understand as the ways to look up the particular phenomenon based on the maqashid’s perspective. Epistemologically, the concept of the system approach has the six elements, such as the cognitive nature; the wholeness; the openness; the interrelated hierarchy; the multi dimensionality and the purposefulness.

The cognitive nature is considered the essence of any law, including Islamic law as the result of human interpretation and it impacted on the opportunity to false or wrong. *Fiqih* as the human interpretation and perception should to analyze critically because of the subjective sense from its interpreter. Auda elaborate the basic fault that sourced on the perception of *ijmā’*. Many in the classical resources explained that the *ijmā’* is the source of Islamic law and it could be implement for every context and condition. Meanwhile, Jasser auda argued that *ijmā’* is not a source of law, but it is merely a mechanism of consultation or to use system terminology, multiple-participant decision making.<sup>31</sup>

The wholeness concept is simply understood as the model of thought that holistically and systematically to view the certain case. Taking the issues of *nikah sirri* and its regulation to criminalize the perpetrator should to view it from the global perspective. The impact behind *nikah sirri* and the consideration for the

---

<sup>31</sup> *Ibid.*

rights of women and children as well as the allowance of *nikah sirri* from the views of Islamic law should be determining advisedly and thoughtfully, especially to criminalize the perpetrator.

The openness concept is the cognitive culture of jurist should to broaden and fully understand about the scientific, humanities and religious knowledge in order to determine the regulation which appropriate with the social context as well as the religious text.

The concept of interrelated - hierarchy is exemplified by the interrelated concept on the position of the need (*ḍarūriyyāt*), the necessities (*ḥājīyyāt*) and the luxuries (*taḥsīniyyāt*) as the interrelated understanding, is not the hierarchies understanding that is the need (*ḍarūriyyāt*) component is more prioritized among other components.

The multidimensionality paradigm is model of thought that integrated and interconnected - oriented. This model of thought could be considered as the solution for the dichotomy paradigm which it separate oppositely between "I" and "other".<sup>32</sup> This paradigm tries to view the certain cases in one - rank thinking's model (right or wrong - black or white) and it tend to the model of one-dimensional. In relating with *nikah sirri* cases, the new regulation on criminalizing for the perpetrator, should be analyze through the model of multidimensionality concept which there is "the middle ways" as the alternative solution for this case, means by giving the fines advisedly based on the context.

The last elements are purposefulness. This element is "the common link" for the six previous elements. The purposefulness concepts become the fundamental principles which it meets with the standards of methodological basis on Islamic law, are rationality, utility, justice and morality. In relating with the case of criminalizing regulation for the perpetrator should to fulfill the requirement about the purposefulness of this regulation, especially for the women, the children as well as the men as the subject of *nikah sirri*.

In relating to the validity and the criminalization sanction of *nikah sirri* as the major theme in this study, Islam guarantees and ensures the existence of offspring and their safety [*al-maṣāliḥ al-ḍarūriyyāt*]. In order to realize it, Islam enacted (obligated) the marriage and prohibited the adultery. To realize the protection of the descent, it needed a media in the form of marriage [*al-maṣāliḥ al-ḥājīyyāt*] which it have to fully completed the requirements, in the form of documentation or recording as the written - authentic evidence about the legal status of marriage [*al-maṣāliḥ al-taḥsīniyyāt*] that the authority mandated by the Law to the Registrar of Marriage, the officials of Office of Religious Affairs/KUA.

Without the roles, the duties, and the responsibilities of KUA's officials, as the competent authority shall recorded or documented, a marriage is very possible and can be done. Although it is so, the presence of KUA officials with various devices and properties, tend to better ensure the rights and obligations of the parties being aware, especially when there is the lawsuit. Marriage certificate, for example, can be used as the authentic evidence by the parties who concerned

---

<sup>32</sup> Siti Rohmaturrasyidah, "Maqashid syariah dan Pendekatan sistem dalam hukum Islam (Studi Pemikiran Jasser Auda)", Unpublished paper, The seminary class in Prof.Amin Abdullah lecturing program, Post Graduate Program State Islamic University Sunan Kalijaga, 2012.

to maintain and protect their legal position and the legal status of them in the marriage or kinship [*al-maṣāliḥ al-taḥsiniyyāt*].

The conditions that need more attention are the status and condition of legal law could be change, which originally positioned as the need may turn out become as the necessity along with the principles of Islamic law, namely: *Al-Ḥajjah tanzil manzillah al-ḍarūrah*.<sup>33</sup> The Code can be understood that in order to do something-for example, the marriage in Indonesia-it similar as the command to conduct the completeness requirement in the context of Indonesia itself, such as the marriage registration, the obligation to married in the witnessed by KUA officials (the Registrar of Marriage), and the obligation to have the Marriage Certificate.

In order to anticipate the possibility of similar events, jurists apply the principle of law, *shadd al-dzari'ah* (preventive action).<sup>34</sup> The main objective to be achieved is to realize the fulfillment of the central purpose of family life or marriage, which it realized through the legal protection for his wife and children. Thus, the implementation of this rule allows the achievement of *maqāṣid al-ḍarūriyyāt*. If it not completed, then the basic needs (*maqāṣid al-ḍarūriyyāt*) of human life will be disrupted the stability and its continuity.

The findings of this research are synergized with the renewal effort on the marriage law than compared to the classical regulation written in *fiqh* books. As elaborated before that the regulation of *nikah sirri* as the continuation from the regulation of marriage registration that advised strongly in KHI, moreover is the one of reformative aspect on UUP and KHI in order to response the development of human life's needs; such as preservation of human right, realization on the social order and especially, the protection of the right of wife as well as the children.

### Closing and Conclusion

Based on the elaboration and description above, it can be presented the four kinds of conclusions. *First*, the acceptability for the criminalizing regulation on *nikah sirri* cases from the perspective of Madurese leader's community can be mapped into three variants. The first variant is the acceptance idea for this regulation fully. The second variant is the rejection idea for this regulation fully. The last variant is the alternative variant between the acceptance and the rejection idea. In addition, the third variant have the argumentation to change the criminalizing regulation become the paying of fines as the sanctions for *nikah sirri*. According to their argumentation, the relevant sanction for *nikah sirri* cases is the administrative sanctions, such as the paying of fines and it could be changed into the criminal sanctions such as the imprisonment.

*Second*, the arguments which expressed by the first variant who accept the criminalizing regulation fully, is based on the principle of *maṣlahah* and rationality for the empirical data. The arguments which expressed by the second

---

<sup>33</sup> Mokhtar Yahya, *Dasar-dasar Pembinaan Hukum Fiqih Islami* (Bandung: PT Al Maarif, 1986).

<sup>34</sup> Direktur Pembinaan Badan Peradilan Agama Islam, *Himpunan Peraturan Perundang-undangan dalam Lingkungan Peradilan Agama* (Jakarta: Dibirpera Islam, Departemen Agama RI, 2010).

variant is based on the adherence to the classical religious lesson textually, so there is no the opportunities for *ijtihad*. According to this group, the criminalizing regulation is considered overlapping the Islamic Law and even, marginalizing it in the social life which potentially impact on its implementation process. Meanwhile, the last variant is based on the fulfillment of *maṣlaḥah* as well as the realization of marriage regulation effectively.

*Third*, in the perspective of the human rights protection for women and children, the third variant group is revealed and expressed their commitment and encouragement to assure the protection of the rights of women and children as the humanities (*insāniyyah*) basic rights that must be respected. Meanwhile, the second variant group express their views, attitudes, and arguments to disregard and neglect of the rights of women and children which clearly detrimental in *nikah sirri* cases.

The last conclusion is the contemporary concept of *maqāṣid sharīah* have to accommodate into the reality with the central discussion is “preservation and protection” for the five elements of *maqāṣid al-ḍarūriyyāt* proportionally. Especially in the case of *nikah sirri* and its acceptability on the criminalizing regulation it could to consider as the renewal effort on the classical concept of marriage which colored by the mainstreaming only on the *maqashid ad daruriyat* based on Ash Syatibi’s perspective. Meanwhile, Jasser Auda offer the contemporary concept of *maqāṣid al-ḍarūriyyāt* that should to fulfill the six element of system approach; the cognitive nature, the wholeness, the openness, the interrelated-hierarchy, the multi-dimensionally and the purposefulness.

Based on these six elements, the researcher stand on the third position as the moderate group who support on the criminalizing regulation for *nikah sirri* but it delivered and implemented through the paying of fines in appropriate with the regional or cultural context. The criminalizing regulation which it will imprison the perpetrator of *nikah sirri*, according to the researcher, is the contra-productive with the criminal code and also, based on the element of multi-dimensionally and the openness, as elaborated by Jasser Auda, it will be incompatible with the religious law about the allowance of *nikah sirri*.

Based on the conclusions above, it suggested to the policy makers and the drafting renewal team on the marriage regulation law in the government level in order to minimize the gender bias thinking in the legal policies. Also it recommended for the lecturers or academicians, the students of Shariah’s Department/*Aḥwāl al-Shakṣiyyah*, and the researcher on gender and human right issues, so the findings of this research effort could be implement into the empowerment program of women’s rights as well as the protection on their rights and to create a conducive environment for the future of society and the nation

## REFERENCES

Auda, Jasser, *Maqasid al-Shari’ah as Philosophy of Law: A system Approach*, (London, and Washington: The International Institute of Islamic Thought, 2008).

- Auda, Jasser, *Maqasid al-Shariah: a Beginner's Guide*. London: The International Institute of Islamic Thought, 2008.
- Bogdan, RC. & Taylor, *Introduction to Qualitative Research Methods: A Phenomenological Approach to The Social Sciences*. NY: John Willey and Sons Inc., 1985.
- Darwis, Mohammad. "Maqashid al-Shari'ah dan Pendekatan Sistem dalam Hukum Islam Perspektif Jasser Auda," dalam *Studi Islam Perspektif Insider/Outsider* ed. M. Arfan Mu'ammam & Abdul Wahid Hasan. Yogyakarta: IRCiSoD, 2012.
- Denzin, N.K & Lincoln, YS, *Handbook of Qualitative Research*. Thousands Oak, CA: SAGE Publication, 1994.
- Direktur Pembinaan Badan Peradilan Agama Islam, *Himpunan Peraturan Perundang-undangan dalam Lingkungan Peradilan Agama*. Jakarta: Dibirpera Islam, Departemen Agama RI, 2010.
- Lincoln. YS, *Naturalistic Inquiry on Research*. Beverly Hill, CA: SAGE Publication, 1985.
- Manan, Abdul, *Aneka Masalah Hukum Perdata Islam di Indonesia*. Jakarta: Kencana, 2006.
- Moeloeng, *Metodologi Penelitian Kualitatif*. Bandung: PT. Rosda Karya, 1990.
- Mubarok, Jaih, *Modernisasi Hukum Perkawinan di Indonesia*. Bandung: Pustaka Bani Quraisy, 1990.
- Nasution. S, *Metode Penelitian Naturalistik Kualitatif*. Bandung: Tarsito, 1996.
- Nuruddin, Amir, *Hukum perdata Islam di Indonesia: Studi Kritis Perkembangan Hukum Islam dari Fikih, UU No. 1/1974 sampai KHI*. Jakarta: Prenada Media, 2004.
- Rofiq, Ahmad, *Hukum Islam di Indonesia*. Jakarta: PT. Raja Grafindo Persada, 1998.
- Rohmaturrasyidah, Siti, "Maqashid syariah dan Pendekatan sistem dalam hukum Islam (Studi Pemikiran Jasser Auda)", Unpublished paper, The seminary class in Prof.Amin Abdullah lecturing program, Post Graduate Program State Islamic University Sunan Kalijaga, 2012.
- Yahya, Mokhtar, *Dasar-dasar Pembinaan Hukum Fiqih Islami*. Bandung: PT Al Maarif, 1986.