

Criminal Sanctions of Unregistered Marriage under Article 402 of Law No. 1 of 2023: Perspectives from Islamic Law and Human Rights

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ABSTRACT

Nikah siri (unregistered marriage) is a marriage that fulfills the essential elements and conditions required by Islamic law but is not registered with the competent authority as required by statutory regulations. The enactment of Article 402 of Law Number 1 of 2023 concerning the Criminal Code has generated debate due to the introduction of criminal sanctions related to marriage registration. This study analyzes the criminal sanctions under Article 402 and examines their compatibility with Islamic law and human rights principles. Employing normative legal research with statutory, conceptual, and comparative approaches, the study relies on primary, secondary, and tertiary legal materials analyzed through a descriptive-analytical method. The findings show that the criminal sanctions represent a criminalization policy intended to ensure legal certainty, orderly marriage administration, and the protection of women and children. From the perspective of Islamic law, *nikah siri* remains religiously valid because it fulfills the essential elements and conditions of marriage, while marriage registration serves as a *maslahah* instrument consistent with the objectives of *Maqasid al-Sharia*, particularly the protection of lineage, honor, and property. From a human rights perspective, the regulation is acceptable insofar as its implementation complies with the principles of legality, proportionality, freedom of religion, and the right to form a family. Therefore, Article 402 should be enforced proportionately to balance legal certainty, justice, public interest, and human rights protection.

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1. INTRODUCTION

In the perspective of Islamic law, marriage is a solemn covenant (*mitsaqan ghalizhan*) between a man and a woman to form a family characterized by tranquility (*sakinah*), affection (*mawaddah*), and mercy (*rahmah*) (Karomah, 2026). Beyond serving as a means to fulfill biological needs in a lawful manner, marriage also aims to preserve lineage (*hifz al-nasl*) and honor (*hifz al-ird*), as well as to

foster the well-being of both individuals and society. In Indonesia, marriage is viewed not merely as a religious union but also as a legal act that gives rise to civil legal consequences. This is reflected in Law Number 1 of 1974 concerning Marriage—as amended by Law Number 16 of 2019—which stipulates that marriage must be solemnized in accordance with the respective religious laws and registered pursuant to statutory regulations (Rohman, 2022).

Although the obligation to register marriages is stipulated in Indonesian positive law, the practice of *nikah siri* /unregistered marriage remains widespread across various communities (Lukman Hakim, 2024). *Nikah siri* is generally understood as a marriage that fulfills the essential elements and conditions of Islamic law but is not registered with the competent authorities. This practice is influenced by various factors, including economic reasons, a desire to avoid administrative procedures, unauthorized polygamy, low legal awareness, and cultural or social factors (Siti Sholeha, 2025). On the other hand, the failure to register a marriage often gives rise to various legal issues—particularly for women and children—such as difficulties in obtaining birth certificates and securing rights to maintenance, inheritance, and legal protection, as well as uncertainty regarding legal status within the family; this creates complex challenges for law enforcement and the protection of human rights (Affan., 2022).

In an effort to strengthen legal order and safeguard citizens' rights, the government has established regulations regarding unregistered marriages under Article 402 of Law Number 1 of 2023. This provision is part of the national criminal law reform, sparking debate over the potential imposition of criminal sanctions for "unregistered marriages" (*nikah siri*) under specific circumstances defined by the law. The introduction of this rule has elicited diverse reactions from academics, legal practitioners, and the general public. Some view criminalization as necessary to ensure legal certainty, protect women and children, and prevent the abuse of unregistered marriage practices (Abdullah, 2026).

Previous studies have examined *nikah siri* (unregistered marriage) from the perspectives of Islamic law and positive law, as well as its legal consequences for women and children. Other research has explored the requirement for marriage registration as a form of legal protection and the importance of population administration in ensuring legal certainty. However, studies specifically analyzing the criminal sanctions for *nikah siri* under Article 402 of Law Number 1 of 2023—through the lenses of Islamic law and human rights—remain relatively limited. Yet, these two perspectives play a crucial role in assessing whether the criminalization of *nikah siri* constitutes a legal policy aligned with the objectives of Sharia, principles of justice, the protection of citizens' fundamental rights, and the principle of proportionality in criminal law. Therefore, this study offers a novel contribution by integrating Islamic law and human rights into an analysis of the policy regarding the criminalization of *nikah siri* within the Indonesian legal system.

This research is significant because the regulation of criminal sanctions for *nikah siri* (unregistered marriage) involves not only issues of legal certainty but also the protection of citizens' constitutional rights—specifically the freedom to practice religion and the right to form a family—as well as the protection of women and children. The findings are expected to contribute theoretically to the development of studies in Islamic law, criminal law, and human rights, particularly regarding the relationship between religious norms and criminalization policies within national law. From a practical standpoint, this research aims to serve as a reference for policymakers, law enforcement officials, academics, and the general public in gaining a comprehensive understanding of the application of Article 402 of Law Number 1 of 2023. Accordingly, this study aims to analyze the provisions regarding criminal sanctions for *nikah siri* under Article 402 of Law Number 1 of 2023 and to evaluate their alignment with the perspectives of Islamic law and human rights.

2. METHODS

This study is a normative legal research project employing a qualitative approach, aimed at analyzing the criminal sanctions for *nikah siri* (unregistered marriage) as stipulated in Article 402 of

Law Number 1 of 2023 concerning the Criminal Code, from the perspectives of Islamic law and human rights. The research examines the alignment of positive law provisions with Islamic legal principles and human rights protections regarding the regulation of criminal sanctions for nikah siri. The study utilizes statutory, conceptual, and comparative approaches. The statutory approach is employed to examine relevant regulations, including Law Number 1 of 2023 (Criminal Code), Law Number 1 of 1974 concerning Marriage (as amended by Law Number 16 of 2019), the Compilation of Islamic Law, and Law Number 39 of 1999 concerning Human Rights. The conceptual approach is used to analyze the concepts of criminalization, nikah siri, maqasid al-sharia (objectives of Sharia), ta'zir (discretionary punishment), and human rights, while the comparative approach contrasts positive law provisions with Islamic law. Legal materials consist of primary, secondary, and tertiary sources. Primary sources include the Quran, Hadith, legislation, the Compilation of Islamic Law, and human rights instruments. Secondary sources comprise books, journal articles, research findings, and expert opinions, whereas tertiary sources include legal dictionaries, encyclopedias, and other supporting references. Data collection was conducted through literature review and documentation. All legal materials were analyzed qualitatively using a descriptive-analytical method, involving the stages of data condensation, data presentation, and conclusion drawing. The analysis is conducted by interpreting Article 402 of Law Number 1 of 2023 based on criminal law concepts, and subsequently examining it through the perspectives of maqasid al-sharia, ta'zir, and human rights principles—including the right to marry, freedom of religion, legal certainty, proportionality, and the protection of women and children (Fitriah, 2023).

3. FINDINGS AND DISCUSSION

Criminal Sanctions for Unregistered Marriage (Nikah Siri) under Article 402 of Law Number 1 of 2023

The results obtained from the research have to be supported by sufficient data. The research results and the discovery must be the answers, or the research hypothesis stated previously in the introduction part. Research findings indicate that the provision regarding criminal sanctions for nikah siri (unregistered marriage) in Article 402 of Law Number 1 of 2023 is part of a criminalization policy aimed at strengthening legal protections within the realm of marriage. This provision is not intended to determine the religious validity of a marriage, but rather to ensure that every marriage possesses administrative legality, thereby providing legal certainty regarding the rights and obligations of the parties involved. The primary objective of Article 402 is not merely to penalize those who enter into nikah siri marriages, but to establish administrative order in marriage and safeguard the legal interests of women, children, and society (Tri Winarni, 2023).

Normatively, unregistered marriages are considered valid according to Islamic law if they fulfill the pillars and conditions of marriage (Saad., 2021). However, the failure to register a marriage often gives rise to various legal issues, such as difficulty in proving marital status, weak protection of a wife's right to maintenance, disputes over marital assets, and uncertainty regarding the legal status of children (Hasanah, 2023). This situation demonstrates that the registration of marriage serves not only an administrative function but also acts as an instrument of legal protection for the parties involved in the marriage (Nailur Rahmi, 2025).

Based on the analysis, the criminalization under Article 402 constitutes a form of state intervention intended to ensure the effectiveness of the national marriage legal system (Natasya Dwi Aprilia, 2026). The state has an interest in ensuring that any marriage giving rise to civil legal consequences can be validly proven through official registration. Therefore, the criminal provisions in question must be understood as a measure to protect broader legal interests, rather than as a rejection of the validity of the marriage according to religious teachings (Qoneta, 2025).

The use of criminal law as a means to address the practice of unregistered marriage (nikah siri) must take into account the principle of *ultimum remedium* —namely, that criminal sanctions serve as

a last resort when other legal measures are no longer effective (Fitika Andraini, 2024). Based on this principle, the application of Article 402 should not focus solely on punishment but also consider the effectiveness of rehabilitation, legal education, and administrative mechanisms as preventive measures (Siregar, 2023). Therefore, the implementation of Article 402 must uphold the principles of proportionality, legal certainty, and the protection of citizens' rights, ensuring that the objective of criminalization truly achieves justice and legal utility.

Article 402 of Law Number 1 of 2023 represents a criminal law policy aimed at strengthening legal protection in the realm of marriage through the requirement of marriage registration. However, the effectiveness of its implementation depends not merely on the imposition of criminal sanctions, but also on balancing the state's interest in establishing administrative order with the protection of public rights. Consequently, this provision requires further analysis from the perspectives of Islamic law and human rights to assess its alignment with the principles of justice, public interest, and respect for citizens' fundamental rights (Eko Budi Sariyono, 2026).

Analysis of Criminal Sanctions for Nikah Siri from an Islamic Legal Perspective

Under Islamic law, the validity of a marriage is determined by the fulfillment of its essential pillars and conditions: the prospective husband, the prospective wife, a marriage guardian (*wali*), two witnesses, and the offer and acceptance (*ijab and qabul*). Provided these elements are met and there are no legal impediments to marriage (*mawani' al-nikah*), the marriage contract is considered valid under Sharia (M.H Ainul Yaqin, 2025). The majority of scholars from the Hanafi, Maliki, Shafi'i, and Hanbali schools of thought hold the view that marriage registration is neither an essential pillar nor a condition for the validity of a marriage. Consequently, an unregistered marriage (*nikah siri*) remains valid under Sharia, even without administrative recognition from the state.

Developments in contemporary Islamic legal thought demonstrate that marriage registration holds a crucial position as an instrument of legal protection. Registration is viewed not merely as an administrative obligation, but as a means to ensure legal certainty, prevent disputes, and safeguard the rights of women and children (Fitriah, 2023). Analysis indicates that this registration requirement aligns with the objectives of Sharia (*maqāṣid al-syarī'ah*), which seek to realize public interest and prevent the various forms of harm that could arise from a marriage remaining unregistered.

From the perspective of *maqāṣid al-shari'ah* (the objectives of Islamic law), regulations concerning marriage registration are closely linked to the protection of lineage (*hifz al-nasl*), honor (*hifz al-ird*), and property (*hifz al-mal*). A registered marriage provides legal certainty regarding the status of the husband, wife, and children, thereby facilitating the fulfillment of civil rights such as maintenance, inheritance, and the division of marital assets (Mubarak, 2023). Conversely, unregistered marriages carry the potential for legal disputes and diminish the protection afforded to vulnerable parties. Therefore, the requirement for marriage registration can be understood as a form of implementing the objectives of Sharia to promote the public interest.

From the perspective of Islamic criminal law, the imposition of sanctions for violating the obligation to register a marriage can be linked to the concept of *ta'zir*. Unlike *hudud* and *qisas* punishments, which are explicitly prescribed in religious texts (*nash*), *ta'zir* is a form of punishment the determination of which is entrusted to the government (*ulil amri*) to maintain public order and the common good. Research indicates that the provisions of Article 402 of Law Number 1 of 2023 can be viewed as a form of *ta'zir* policy, as the aim is to enhance public compliance with marriage registration requirements and provide legal protection for women, children, and families. Fundamentally, this regulation does not conflict with Islamic legal principles, provided it is intended to realize the common good and does not alter Sharia provisions regarding the validity of a marriage contract (Abdullah, 2026).

The imposition of criminal sanctions for nikah siri (unregistered marriage) must uphold the principles of justice and proportionality that characterize Islamic law. The jurisprudential maxim *tasarruf al-imam 'ala al-ra'iyah manutun bi al-maslahah* affirms that every government policy must be grounded in the public interest (Mubarok, 2023). Furthermore, the maxim *dar' al-mafasid muqaddam 'ala jalb al-masalih* dictates that the prevention of harm takes precedence over the pursuit of benefit. Based on these principles, the use of criminal law as a primary instrument should be a measure of last resort (*ultimum remedium*), particularly when the objective of legal protection can still be achieved through administrative mechanisms, legal education, or by raising public awareness regarding the importance of marriage registration (Siregar, 2023).

Based on this analysis, Islamic law does not fundamentally reject the requirement of marriage registration, as it aligns with the objectives of Sharia regarding the preservation of public interest (Rosyadi, 2023). Although an unregistered marriage (nikah siri) is still considered valid provided it meets the essential elements and conditions of marriage, registration serves a strategic function in ensuring legal certainty and protecting the rights of the parties involved. State policy regulating marriage registration is justifiable from the perspective of Islamic law; however, the imposition of criminal sanctions must adhere to the principles of justice, proportionality, and public interest to avoid criminalizing marriages that are valid under Sharia.

Analysis of Criminal Sanctions for Unregistered Marriages (Nikah Siri) from a Human Rights Perspective

From a human rights perspective, the right to marry and found a family is a fundamental right guaranteed by the 1945 Constitution of the Republic of Indonesia, Law Number 39 of 1999 concerning Human Rights, and various international human rights instruments ratified by Indonesia. Therefore, any state policy regulating marriage must respect, protect, and fulfill these rights.

Human rights law recognizes the principle that the state may restrict a right provided that the restriction has a clear legal basis, aims to protect the public interest, and is implemented proportionately (Harris, 2022). Analysis indicates that the obligation to register a marriage constitutes an administrative measure designed to provide legal certainty regarding the status of the husband, wife, and children, while simultaneously ensuring the fulfillment of various civil rights arising from the marriage. This registration requirement cannot be viewed as a restriction on the right to marry; rather, it serves as a mechanism for the legal protection of all parties involved in the marital relationship (Marwin., 2014).

This study also indicates that a primary reason for the enactment of Article 402 was to provide protection for the groups most vulnerable to harm resulting from unregistered marriages (*nikah siri*): women and children. In practice, many women struggle to secure rights to maintenance, the division of marital assets, or legal protection upon divorce due to the lack of authentic proof of their marital status. Similarly, children born of unregistered marriages often face obstacles in obtaining legal recognition, civil registration documents, and the fulfillment of other civil rights. These circumstances demonstrate that marriage registration serves a crucial function in safeguarding human rights—specifically the right to recognition before the law and the right to equal protection without discrimination.

The principle of legality requires that every criminal provision be clearly formulated to avoid legal uncertainty, whereas the principle of proportionality necessitates a balance between the intended objective and the restrictions imposed by the state (Ilyas, 2017). The application of Article 402 should not be construed as the criminalization of religious practices, but rather as a legal policy aimed at protecting the broader public interest (Ali, 2018). Therefore, the imposition of criminal sanctions must be carried out cautiously to avoid imposing excessive restrictions on citizens' freedom to marry in accordance with their religious beliefs.

From a human rights perspective, the existence of Article 402 can essentially be justified provided it satisfies the principles of legitimate aim, necessity, and proportionality. These three principles affirm that restrictions on a right are permissible only if they serve a legitimate purpose, are strictly necessary to protect the public interest, and employ means that are proportionate to the intended objective. Thus, the effectiveness of the regulation in Article 402 is measured not merely by the existence of criminal penalties, but also by its capacity to provide legal protection without unduly infringing upon the fundamental rights of citizens.

Based on the analysis, it is evident that the provision of criminal sanctions for *nikah siri* (unregistered marriage) under Article 402 of Law Number 1 of 2023 aligns, in principle, with the objective of protecting human rights—specifically by ensuring legal certainty and safeguarding the rights of women and children. However, its implementation must remain proportionate, striking a balance between the state's interest in establishing orderly marriage administration and respect for the right to marry and the freedom to practice one's religion.

4. CONCLUSION

Based on the research findings, it can be concluded that the provision regarding criminal sanctions for nikah siri (unregistered marriage) in Article 402 of Law Number 1 of 2023 constitutes a criminalization policy aimed at ensuring legal certainty and orderly marriage administration, as well as providing legal protection for women and children. This provision does not alter the validity of the marriage under religious law; rather, it regulates administrative aspects to ensure that every marriage receives state legal recognition and establishes certainty regarding the rights and obligations of the parties involved.

From an Islamic legal perspective, nikah siri remains valid provided it meets the essential pillars (*rukun*) and conditions (*syarat*) of marriage. However, marriage registration holds significant value for the public interest (*maslahah*) as it supports the realization of *maqasid al-shari'ah* (the objectives of Sharia) goals—specifically the preservation of lineage (*hifz al-nasl*), honor (*hifz al-ird*), and property (*hifz al-mal*). Therefore, the mandatory registration of marriage can be justified as a *ta'zir* policy established by the legitimate authority (*ulil amri*), provided it aims to realize the public interest and does not alter Sharia provisions regarding the validity of the marriage contract.

From a human rights perspective, the regulation in Article 402 is fundamentally consistent with the principles of protecting the rights of women and children and upholding the right to legal certainty. Nevertheless, its implementation must adhere to the principles of legality and proportionality, while respecting freedom of religion and the right of every individual to marry and form a family. Consequently, the imposition of criminal sanctions for nikah siri should be treated as a measure of last resort (*ultimum remedium*), ensuring that the goal of legal protection is achieved without compromising the values of justice, public interest, and respect for human rights.

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