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Unregistered Marriage with *Wali Muhakkam* in Shafi'i Fiqh Perspective and Indonesian Positive Law

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Abstract: This study investigated the practice of nikah siri (unregistered marriage) involving the use of a wali muḥakkam in Indonesia from the perspectives of Shafiʿi jurisprudence and positive law. The practice had frequently been justified as a theological response to administrative barriers or the refusal of a wali nasab (ʿadhal). However, it produced significant legal vulnerability for women and children. Employing a qualitative research design, the study adopted a library-based approach and jurisprudential analysis, utilizing content analysis to examine authoritative Shafiʿi legal texts alongside Indonesian marriage regulations and judicial decisions. The findings demonstrated that, in the contemporary context marked by extensive access to the Office of Religious Affairs (Kantor Urusan Agama/KUA), the invocation of a wali muḥakkam no longer satisfied the requirement of geographical necessity recognized in Shafiʿi fiqh. From a legal standpoint, the practice constituted a form of legal circumvention that undermined the authority of the state-appointed wali hakim. Furthermore, the study revealed that Indonesian religious court judges functioned as agents of substantive justice by safeguarding the rights of the wali mujbir through structured mediation mechanisms and rigorous verification procedures.The study concluded that religious legitimacy must be integrated with state legal frameworks to ensure legal certainty and to promote genuine mashlahah within the family institution.

Keywords: Unregistered marriage, Wali muḥakkam, Shafiʿi fiqh, Mashlahah

Introduction

Marriage in Islam is a form of mīthaqan ghalīẓa (a strong covenant) that has broad theological and legal implications. The term mīthaqan ghalīẓa, as mentioned in Q.S. An-Nisa [4]: 21, places marriage on the same level as the sacred covenant between Allah and His Prophets. According to M. Quraish Shihab in Tafsir Al-Misbah, the strength of this covenant requires transparency, testimony, and protection of the rights arising from the contract. Essentially, marriage aims to realize maṣlaḥah (benefit) in the form of protection of offspring (ḥifẓ al-nasl) and human dignity (Kafutra, 2025). This normative basis is based on Q.S al-Nūr [24]: 32 and the Prophet Muhammad's affirmation of the urgency of marriage for those who have ba'ah or material and biological capabilities (Arjani, N. H. Z., 2025).

In Islamic legal discourse, particularly in the Shafi'i Madhhab, the validity of a marriage contract is highly dependent on the fulfillment of certain conditions, of which the presence of a marriage guardian is an absolute requirement (conditio

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sine qua non). Without a valid guardian, the marriage is considered fasid (corrupt) or even baṭil (null and void) according to the law (Az-Zuhayli, 2011). Terminologically, marriage is defined as a contract that legalizes intimate relations between men and women through procedures determined by Islamic law. In Indonesia, this definition is legally constructed through Law No. 1 of 1974 as a physical and spiritual bond to form a happy family based on belief in One God (UU Nomor 1 Tahun 1974 Tentang Perkawinan, 1974). Therefore, the presence of a guardian judge represented by the state through the Office of Religious Affairs (KUA) is not merely an administrative formality, but an instrument to maintain the sanctity of the agreement so that it is not easily manipulated by interests that ignore long-term benefits.

However, the contemporary reality in Indonesia shows a phenomenon that contradicts the spirit of tanzīm (regulation) promoted by the state. The emergence of unregistered marriages using the services of a wali muḥakkam often becomes a shortcut for couples who face administrative obstacles or rejection by a wali nasab who is 'adhal (reluctant without a sharia reason). Sociologically, the persistence of the use of wali muḥakkam cannot be separated from the patron-client structure between the general public and local religious leaders. In areas with a strong religious base, the fatwa or actions of a kiai are often seen as an authority that transcends the formal legality of the state (Badri, 2020). This tension has a systemic impact on the protection of the civil rights of women and children, whereby the absence of registration results in wives losing their legal standing in claiming their domestic rights (Ningrum, 2025). This practice is often justified as a “sharia emergency,” but in practice it often disregards the principle of sad al-dharīʻah (closing the door to harm) in order to avoid the administrative responsibility of the state (Mustafa, 2021).

Several studies have attempted to analyze this phenomenon from a sociological perspective. Wahyudani emphasizes that the validity of unregistered marriages is often enforced through a false sense of maṣlaḥah, without considering the long-term legal risks (Wahyudani, 2020). Meanwhile, Farid's research highlights that unregistered marriages in Indonesia are often used as a legal loophole for those practicing polygamy who want to avoid court proceedings (Farid, 2021). In addition, a study by Kamalia et al. (2025) shows that the position of a wali nikah siri in positive law is still considered invalid if it is carried out outside the supervision of the Office of Religious Affairs (KUA), because the function of a wali hakim is an authority delegated by the state to official officials. This gap creates what is known as legal pluralism, where informal religious law competes with state law within the same social space (Griffiths, 1986).

The novelty of this study resides in its critical analysis of the redefinition of the concept of darurat (emergency) in the use of wali muḥakkam amid the current massive accessibility of state bureaucracy. While previous studies have focused on the sociological impact of unregistered marriages in general, this study specifically examines the theological integrity of the use of wali muḥakkam from the perspective of ikhtiyaṭ (caution) in the Shafiʻī Madhhab. This is crucial to answer the question: are the claims of geographical emergency found in classical texts still relevant as arguments in modern Indonesia, where access to the KUA (Office of Religious Affairs) is widely available? Using a legal pluralism framework, this study aims to synchronize substantive sharia obedience with administrative compliance as a form of integrated public interest.

Method

This research is a qualitative study using a library research approach. The primary data in this study is sourced from authoritative books of the Shafi'i Madhhab, particularly al-Majmu' Syarḥ al-Muhadzdzab (Al-Nawawi, 2003) and *Tuḥfat al-Muḥtaj* (Al-Haytami, n.d.). To enrich the practical analysis, this study also integrates jurisprudential perspectives from judicial practitioners to examine the implementation of law in courtrooms. The analysis was conducted using content analysis with a legal pluralism theoretical framework to examine the tension between informal law and formal state law (Griffiths, 1986). Furthermore, this study uses interactive model data analysis techniques that include data collection, data reduction, data presentation, and conclusion drawing stages. Researchers conduct dialectical synchronization between classical fiqh rules and the reality of jurisprudence that is currently developing in Indonesian Religious Courts. This approach allows researchers to see the elasticity of Islamic law in responding to advances in state bureaucratic infrastructure and the extent to which geographical emergency criteria can still be maintained. This approach is highly relevant for seeing how Islamic law and positive law interact in the social reality in Indonesia in order to achieve legal certainty that is fair and just (Flambonita, 2021).

Result and Discussion

Wali Muhakkam in Siri Marriage in Indonesia

In Shafi'i fiqh discourse, the use of a wali muḥakkam is not the primary option, but rather a last resort (al-maṭaf al-akhir). Ibn Hajar al-Haytami emphasized that the guardianship of a muḥakkam is only valid if it meets strict conditions, including the absence of a qadhi or a very long distance (more than 81 km) that prevents access to an official judge (Al-Haytami, n.d.). Fundamentally, this concept of emergency arose in the socio-geographical context of the Middle Ages, when human mobility was limited. If we apply this to the context of modern Indonesia, this claim of geographical emergency has been completely deconstructed by advances in infrastructure.

As long as a prospective bride or groom is within range of telecommunications signals and land transportation to the Office of Religious Affairs (KUA), the taḥkīm requirement is legally void. This is in line with the principle of al-mashaqqah tajlibu al-taysir (difficulty brings ease), but this ease must not exceed the limits of sharia if the normal route (state judge) is still wide open. The misuse of the emergency argument to legitimize unregistered marriages in urban areas is a form of "sharia law smuggling" that ignores the principle of iḥtiyāṭ or caution in maintaining the sanctity of the marriage contract (Nasoha, A. M. M., 2025).

The phenomenon of using wali muḥakkam in Indonesia is often triggered by conflicts of authority. Rural communities often trust the authority of kiai or local religious leaders more than the state bureaucracy. Religious leaders who act as muḥakkam often provide legitimacy based on textual understanding without considering broader sociopolitical implications (Badri, 2020). From the perspective of legal pluralism, there is competition between informal law, which has social legitimacy, and formal state law, which has legal authority (Griffiths, 1986). This tension has led to what is known as legal disorientation among the general public. On the one hand, they feel that they are legally valid, but on the

other hand, they are "dead in civil law." This practice actually violates the essence of Siyāsah Syar'iyyah (Islamic political law), in which obedience to leaders (ulil amri) in matters of public welfare (such as marriage registration) is obligatory. Bypassing state authority for guardianship matters without an absolute emergency is a form of defiance against the welfare system that has been established through Law No. 1 of 1974.

The discussion regarding wali muḥakkam should not stop at whether the contract is valid or not, but must also address the fate of women and children after the contract. Marriages that use wali muḥakkam are almost certainly not recorded. This creates a condition of legal precariousness. Wives cannot claim alimony, child custody, or inheritance rights in religious courts because they do not have authentic evidence in the form of a marriage certificate (Ningrum, 2025). For children born from such marriages, the impact is far more destructive. Although Constitutional Court Decision Number 46/PUU-VIII/2010 has attempted to provide protection for children born out of wedlock through DNA testing, in practice, without a marriage certificate, it is difficult for children to obtain a birth certificate that includes their father's full name (Mahkamah Konstitusi RI, 2010). This prevents children from accessing other citizenship rights. Sociologically, marriage with informal muḥakkam often becomes a gateway to uncontrolled polygamy that exploits women and neglects children, which clearly contradicts the noble purpose of marriage to form a harmonious (sakinah) family (Oktasari, R. F., & Yuliandari, 2020).

From a jurisprudential perspective, Religious Courts in Indonesia have consistently rejected requests for marriage validation (isbat nikah) that use a wali muḥakkam if it is proven that access to the KUA was still available at the time of the marriage. Judges often base their decisions on the fact that the absence of a wali nasab should be resolved through the appointment of a wali hakim in court, rather than through the unilateral appointment of a wali muḥakkam (Mustafa, 2021). This rejection is a state protection instrument to prevent tashayul (legal manipulation) in marriage. The consistency of this law is important to maintain the authority of the judicial institution and ensure that every marriage in Indonesia is monitored by the state for the protection of vulnerable groups. Without firmness from the judicial authorities, the muḥakkam will continue to be misused as a place of refuge for those who marry underage or practice polygamy without clear court permission, which clearly damages the social order of Muslim families in Indonesia (Paputungan, S., 2025).

To understand the urgency of registration and the role of the state, Indonesia needs to look at the transformation of family law in other Muslim countries such as Malaysia and Morocco. In Malaysia, the Islamic Family Law (Federal Territories) Act 1984 establishes very rigid rules regarding guardianship. The use of walis outside of official authorities (marriage registrars) without court permission is considered a criminal offense. This aims to ensure that every marriage has equal legal protection (Kamalia, 2025). Malaysia has firmly closed its doors to individuals who unilaterally appoint muḥakkam, as the function of guardianship has been completely taken over by the state as the holder of wilāyah al-'āmmah authority.

Similar to Malaysia, Morocco also carried out major reforms through Mudawwanah al-Usrah (2004). Morocco positioned judges as the sole authority in resolving guardianship disputes. Reforms in these countries demonstrate a global

trend in the Islamic world that "emergency sharia measures" (such as wali muḥakkam) must be strictly controlled by state regulations for the sake of public interest (maṣlaḥah 'āmmah). This comparison shows that the practice in Indonesia, which still perpetuates the wali muḥakkam informally, is a legal setback when compared to the trend of Islamic family law reform at the international level (Arjani, N. H. Z., 2025).

Darurat Construction in the Practice of Wali Muḥakkam and Its Implications for Substantive Justice

Sociologically, the existence of informal wali muḥakkam in Indonesia is rooted in the strong influence of religious patronage. Religious leaders or kiai in rural areas are often seen as a "source of living law" that is closer to the community than the rigid KUA bureaucracy. However, this charismatic authority is often trapped in providing legitimacy to subjective emergency conditions. For example, the desire to hide a pregnancy outside of marriage or to facilitate polygamy without the first wife's permission is often constructed as an "darurat condition" that allows the use of wali muḥakkam services (Badri, 2020).

This situation creates what John Griffiths calls destructive legal pluralism, in which religious law is used to evade the legal responsibilities of the state (Griffiths, 1986). This practice ultimately damages the image of Islamic law itself, because it seems as if Sharia provides a loophole for men to escape their administrative and financial responsibilities towards their families. This subjective "darurat" construct must be deconstructed through the strengthening of legal education that the wali muḥakkam is not a solution to social problems, but rather the seed of future legal problems (Oktasari, R. F., & Yuliandari, 2020).

This discussion reaches a crucial point regarding the reconstruction of the meaning of kemaslahatan. In fiqh rules, taṣarruf al-imam 'ala al-ra'iyyah manuthun bi al-mashlaḥah (the leader's policy towards his people must be based on kemaslahatan), the state, through Law Number 1/1974, is actually carrying out the mission of ḥifzh al-nafs (protection of life) and ḥifzh al-nasl (protection of offspring) (Amelia, 2025). The obligation to register marriages and the use of wali hakim (official guardianship) is not an attempt by the state to make worship difficult, but rather a way to ensure that the rights of wives and children are absolutely protected by state enforcement instruments (Ulya & Khair, 2025).

Marriages that use wali muḥakkam, although often claimed to be "religiously valid" by certain individuals, have in fact lost the aspect of maqashid al-sharia because they cause mafsadah (damage) in the form of legal uncertainty (Wahyudani, 2020). Therefore, the integration of classical fiqh requirements with state administrative obligations is a necessity. The wali muḥakkam should no longer be understood as an instrument to escape the state, but must be reinterpreted according to its original context in the classical book: namely, an emergency solution when the state (judge) is completely unreachable (Al-Nawawi, 2003).

Although theoretically the concept of wali muḥakkam is considered final in classical fiqh literature, its implementation in judicial practice in Indonesia faces very rigid evidentiary filters. Based on the practical perspective of the judicial authorities, the process of filing for marriage validation involving wali muḥakkam is not automatically accepted based solely on the applicants' acknowledgment. As emphasized by Khairul Badri, Deputy Chief Justice of the Pulau Punjung Religious

Court, every transfer of guardianship from a wali nasab to a muḥakkam must go through a careful examination and verification process in court. The main criterion that is the focus of the judge's examination is the verification of the status of the wali nasab. The emergency that allows the use of a muḥakkam is only considered legally valid if the applicant is able to prove that the wali nasab has died, is missing (mafqud), or that there is indeed no other wali nasab who is entitled to guardianship. This proof is not sufficient with verbal statements, but must be supported by official documents, letters of reference from local authorities, and the testimony of credible witnesses (‘adalah). This is in line with the principle of guardianship hierarchy in the hadith of the Prophet SAW: “Man la waliyya lahu fas-sulthanu waliyyuhu” (Whoever does not have a guardian, the ruler becomes his guardian). In the modern context, the ruler is represented by authorized state officials, so that the appointment of a muḥakkam outside of state procedures is still considered an action that risks causing legal and social problems in the future (Badri, Interview, 2025).

It is important to understand that the burden of proof in this case lies entirely with the applicant. The judge may not assume that the blood guardian does not exist simply on the basis of a unilateral claim. In the context of civil procedure law applicable in the Religious Court, the evidence must be conclusive. Therefore, if the petitioner alleges the existence of a wali muḥakkam on the basis of a mafqud (lost) wali nasab, the judge will require evidence in the form of a letter from the police or village authorities stating that a maximum effort has been made to locate the guardian. This strictness is a manifestation of the protection of the validity of lineage, because an error in determining the marriage guardian has direct implications for the halal status of the husband and wife's relationship in perpetuity (abadiyyah). With such strict filters, the court is actually educating the public that the muḥakkam door should not be seen as a practical solution, but rather an emergency door whose key is held tightly by the judicial authorities.

One of the most crucial contributions to the dynamics of family law in Indonesia is the emphasis on the rights of the wali mujbir. Often, unregistered marriages with a wali muḥakkam occur due to the refusal or absence of consent from the wali nasab. In dealing with cases such as these, judges in the Religious Court apply a more progressive and cautious approach through the principle of substantive justice. Judges not only act as formal adjudicators, but also as mediators to maintain the integrity of the family structure. In the process of examining a marriage validation case, a wise judge will summon the wali nasab to be questioned and clarified directly. This effort is made to ascertain whether the wali nasab’s refusal is 'adhal (reluctant without sharia reasons) or has a strong moral basis. If during the trial the guardian expresses his consent, then the marriage validation can be granted for the sake of the common good. However, if the guardian still does not give permission and his reasons for refusal are justified, then the marriage validation request must be rejected to respect the position of the guardian. This approach aims to balance two interests: maintaining the validity of the marriage that has already taken place while preserving family relations (silaturraḥim) so that they are not severed as a result of legal smuggling through muḥakkam. This synergy reflects that Islamic law in Indonesia pays close attention to the aspect of caution (iḥtiyath) in every determination of the legal status of marriage.

The integration of the concept of iḥtiyath (caution) is crucial, given that the

position of wali mujbir in the Shafi'i Madhhab has great authority but is limited to the welfare of the child (Hanum & Adly, 2025). The judge, as a representative of the state, enters into this dispute not to take away the rights of the guardian, but to ensure that the rights of the mujbir are not abused (abuse of power). Conversely, the judge also ensures that the prospective bride and groom do not take a 'shortcut' by arbitrarily appointing a muḥakkam, which would damage the family's reputation. Through the official summons of the guardian, the court opens up a space for dialogue that often does not occur in the process of unregistered marriages. This is the essence of substantive justice. A justice that not only pursues formal legal certainty on paper, but also pursues the welfare of human relationships in harmony with the noble values of Islamic law in maintaining the integrity of the social structure of society.

Conclusion

This study concludes that the practice of unregistered marriage using a wali muḥakkam in Indonesia is a theological and juridical anomaly that arises from a simplification of the meaning of sharia emergency. From the perspective of Shafi'i fiqh, a wali muḥakkam is an "emergency door" instrument that is only valid if access to official authorities (guardian judge/state) is completely cut off. However, facts on the ground show that claims of emergency are often subjective and are used to avoid state administrative procedures. The use of wali muḥakkam amid easy access to the Office of Religious Affairs (KUA) is not only administratively flawed, but also does not meet the standard of ikhtiyath (prudence) in maintaining the sanctity of the marriage contract. A redefinition of the concept of geographical emergency to functional emergency is absolutely necessary given the transformation of the bureaucratic infrastructure that has reached remote areas of the country. Furthermore, this study found that in judicial practice, the validity of a wali muḥakkam cannot be viewed in isolation but must go through a rigorous process of verification.

An important finding from a legal practitioner's perspective confirms that judges in the Religious Court act as guardians of substantive justice who prioritize the rights of the guardian. The legal validation of marriages with a wali muḥakkam cannot be granted automatically; judges are required to verify the reasons for the refusal of the wali nasab and seek mediation in order to maintain good family relations (ṣilaturraḥim). If the wali nasab still does not give his blessing for valid reasons, then the rejection of marriage validation is the right step to prevent legal evasion. This judicial measure is the last line of defense in ensuring that the institution of marriage is not used as a tool to exploit the civil rights of one of the parties. Therefore, the reconstruction of Muslim families in Indonesia must be based on the synergy between religious validity and state legality. This study provides concrete recommendations to the Directorate General of Religious Courts (Badilag) to tighten the Standard Operating Procedures (SOP) for examining marriage validation cases involving wali muḥakkam, by requiring the physical summons of blood guardians to ensure that the rights of wali mujbir are not neglected. In addition, it is necessary to strengthen the legal literacy of religious leaders so that they do not easily legitimize unregistered marriages that carry the risk of legal precariousness. Thus, the institution of marriage is not only valid in terms of ritual, but also has a strong legal and moral foundation to ensure protection for women and children as vulnerable groups in the household, in order

to realize the noble goals of sharia law within the framework of the rule of law.

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