



The Formalist vs Realist Constructs on Marriage Registration in Indonesia: A Study of the Perspectives of Kyai from Nahdlatul Ulama in Rembang

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Keywords:

Marriage registration, Nahdlatul Ulama, Rembang, Social Construction

Kata Kunci:

Pencatatan Perkawinan, Nahdlatul Ulama, Rembang, Kontruksi Sosial

Abstract:

Marriage registration plays an important role in safeguarding the rights of a marriage. However, it is often overlooked for various reasons. The validity of unregistered marriages has been a topic of debate until now. This research aims to answer the problems: 1) What is the social construction of the NU Rembang elite regarding marriage registration in the Islamic Law Compilation? and 2) What is the view of the NU Rembang elite regarding marriages that are not registered?. To answer these two problems, in this research the author chose to use qualitative research with Peter L. Berger's social construction theory approach. Data obtained by in depth interview to the NU Rembang elite selected who were active and involved in legal matters from both structural and non-structural circles, totaling four people, including: KH. Chazim Mabur, KH Syarofuddin Ismail Qoimaz, KH Chamid Mabur, and KH Ahmad Sunarto. Research findings show that based on social construction theory, the NU Rembang elite is divided into two groups, namely formalists and realists. The thoughts of the NU Rembang elite regarding marriages that are not registered based on this typology are as follows: for the formalist group, marriages that are not registered are still valid. Meanwhile, for the realistic group, marriages that are not registered are invalid. The implication of this research is that it highlights the differences in views between two groups of NU Rembang elites regarding marriage registration in the Compilation of Islamic Law. However, it should be noted that the researched issues related to marriage registration are only a small part of the legal issues of marriage in Indonesia. Therefore, further research is needed to explore other untouched issues, which can then be developed by future researchers.

Abstrak:

Pencatatan perkawinan berperan penting dalam menjaga hak-hak dalam sebuah perkawinan. Akan tetapi, perkara ini sering kali diabaikan karena berbagai sebab. Keabsahan perkawinan yang tidak dicatatkan telah menjadi tema perdebatan hingga kini. Penelitian ini bertujuan untuk menjawab permasalahan: 1) Bagaimana konstruksi sosial elit NU Rembang tentang pencatatan perkawinan dalam Kompilasi Hukum Islam? dan 2) Bagaimana pandangan elit NU Rembang tentang perkawinan yang tidak dicatatkan? Untuk menjawab kedua permasalahan tersebut, dalam penelitian ini penulis memilih menggunakan penelitian kualitatif dengan pendekatan teori konstruksi sosial Peter L. Berger. Data diperoleh melalui interview mendalam kepada Elit NU Rembang yang aktif dan terlibat dalam masalah hukum baik dari kalangan struktural maupun non struktural yang berjumlah empat orang, antara lain: KH. Chazim Mabur, KH Syarofuddin Ismail Qoimaz, KH

Chamid Mabruur, dan KH Ahmad Sunarto. Temuan penelitian menunjukkan bahwa berdasarkan teori konstruksi sosial, elit NU Rembang terbagi menjadi dua kelompok, yaitu formalis dan realis. Pemikiran elit NU Rembang tentang pernikahan yang tidak dicatatkan berdasarkan tipologi tersebut adalah sebagai berikut: bagi kelompok formalis, pernikahan yang tidak dicatatkan tetap sah. Sedangkan bagi kelompok realis, pernikahan yang tidak dicatatkan adalah tidak sah. Implikasi dari penelitian ini adalah menyoroti perbedaan pandangan antara dua kelompok elit NU Rembang terkait registrasi pernikahan dalam Kompilasi Hukum Islam. Namun, perlu dicatat bahwa permasalahan yang diteliti terkait registrasi pernikahan hanya merupakan sebagian kecil dari permasalahan hukum pernikahan di Indonesia. Oleh karena itu, penelitian lebih lanjut diperlukan untuk mengeksplorasi isu-isu lain yang belum tersentuh, yang kemudian dapat dikembangkan oleh peneliti di masa depan.

A. Introduction

Marriage registration plays an important role in providing legal certainty to the marriage event, especially in safeguarding the property and inheritance of the spouse left behind. However, registration is often neglected¹ by the community because it is considered a mere process of obtaining a marriage certificate.² In addition, the view that marriage registration is not a pillar of Islamic law contributes to the low level of marriage registration. This condition is further exacerbated by the absence of sanctions stipulated by Indonesian law against couples who do not register their marriages, in contrast to the policies of Malaysia and Brunei which impose fines and imprisonment for such offenders.³ Although Indonesian law basically requires that a valid marriage must be in accordance with religious teachings and be registered, the reality is that the practice of marriage registration is often not carried out thoroughly.

The presence of the Compilation of Islamic Law (KHI) in the Indonesian legal system is a series of national legal histories that can reveal the various meanings of life in Indonesian Islamic society. There are at least three things that were revealed by the emergence of the KHI, including: first, the existence of legal norms that live and participate and even regulate social interactions. Second, the actual normative dimension is due to the functional explanation of Islamic teachings which encourages the fulfillment of legal requirements. Third, the early

¹ Silva, Romesh. "Population perspectives and demographic methods to strengthen CRVS systems: introduction." *Genus* 78, no. 1 (2022): 8.

² Fauzi, Muhammad Latif. "Registering Marriage: The Relationship between Penghulus and Modins." In *Aligning Religious Law and State Law*, pp. 144-168. Brill, 2023.

³ Harisudin, M. Noor, and Muhammad Choriri. "On The Legal Sanction Against Marriage Registration Violation in Southeast Asia Countries: A Jasser Auda's Maqasid Al-Shariah Perspective." *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 5, no. 1 (2021): 471-495.

structural response gave rise to KHI stimulation, and Indonesian ulama anticipated these three things with the agreement that KHI is a written formulation of Islamic law that lives in line with the conditions of Indonesian law and society.⁴

The response of the Nahdlatul Ulama as jam'iyah and congregation to the presence and implementation of the KHI in Indonesia is very closely related to the NU jam'iyah's view of politics in which they – NU figures and its citizens – believe that in order to achieve the goals of the jam'iyah (organization) and the spread of Islamic da'wah, the political arena is the most effective means and the best vehicle. NU's next stance considers that the state institutions of the Republic of Indonesia have the authority to implement Islamic law.⁵

The above phenomenon cannot be separated from the central figures of kiai⁶ or elite figures who have become a culture within NU itself. Kiai are an elite group in the social, political and economic structure of Indonesian society. The existence of kiai has a very strong influence in society, his existence is also an important force in Indonesian political life. In the elite Kiai group, there is an exclusive stratification system between fellow Kiai, which is parallel to the stratification system of the social and political structure of modern Indonesian society. Kiai who lead secondary Islamic boarding schools are part of the provincial level elite. Meanwhile, the kiai who lead small Islamic boarding schools are district level elites.⁷

Among the Nahdliyin people, kiai occupy a quite special position, almost comparable to the position of saints (Awliya). The respect and love of Nahdliyin residents for the kiai (ulama) is based on reasons that have a social dimension in the form of the kiai's concern in responding to all the problems faced by the community, his devotion and service in providing learning and scientific and religious guidance, to the point of becoming a public complaint post in dealing with difficulties that arise they face.⁸

Previous discussions about marriage registration that the author found from several previous studies are as follows: first, Registration of Marriages of Unwed Pregnant Women in

⁴ Abdul Gani Abdullah, *Pengantar Kompilasi Hukum Islam dalam Tata Hukum Indonesia* (Jakarta: Gema Insani Press, 1994), 61.

⁵ Ahmad Zahro, *Tradisi Intelektual NU* (Yogyakarta: LKiS, 2004), 64.

⁶ The word kiai comes from Javanese which means great, noble, sacred and auspicious. Another name that is similar to kiai is Ajengan (Sunda), Teuku (Aceh), Syekh (Sumatra Utara), Buya (Minangkabau), Tuan Guru (NTB dan Kalimantan). Muhammad Tholhah Hasan, *Ablusunnah waljama'ah*, 291.

⁷ Zamakhsyari Dhofier, *Tradisi pesantren: Studi Pandangan Hidup Kiai dan Visinya Mengenai Masa Depan Indonesia*, edisi revisi (Jakarta: LP3ES, 2011), 96.

⁸ Muhammad Tholhah Hasan, *Ablusunnah waljama'ah* (Jakarta: Lantabora Press, 2005), 288.

Gedangan District in 2004. The research concluded that there is no difference in the marriage registration process for women who are pregnant out of wedlock and women who are not pregnant (KHI article 53 paragraph 1). Likewise, the marriage is valid and does not require marriage renewal.⁹

Registration of Inter-Religious Marriages; normative study of law and its implementation in the civil registry office. The findings of this research conclude that the civil registration office has the authority to perform and register inter-religious marriages. However, prospective couples are given two options, namely getting married by choosing one religion during the procession or getting married without being witnessed by a religious leader. Apart from all that, the permissibility of interfaith marriages being registered at the civil registry office through a quite complicated mechanism.¹⁰

Marriage Registration of Children Born from Sirri Marriage; Case study at KUA Gedangan Sidoarjo in 2003. This research discusses children born from unregistered marriages recorded as legitimate children at the time of marriage through adoption. however, his marriage used a judge's guardian.¹¹ Perceptions of PERSIS female students in Bangil District, Pasuruan Regency regarding the legality of government laws regarding marriage registration. The results of the research concluded that registration is only a complement to administration, not as a validation of the marriage. This is based on the reasons that it is not regulated in the Qur'an and hadith, there are too many costs so it is felt that it complicates the marriage process, worldly problems, government regulations are considered useless. Apart from that, they don't know the marriage laws.¹²

The perception of the people of Ketapang Daya Village, Ketapang District, Sampang Regency regarding the Implementation of Marriage Registration. This research produces conclusions about the reasons why people do not register their marriages at the KUA because they consider registration to be merely an administrative requirement and not a condition for the validity of a marriage. Apart from that, they consider recording not to be important because

⁹ Sayida Chotim, "Pencatatan Pernikahan Wanita Hamil di Luar Nikah di Kecamatan Gedangan Tahun 2004" (Skripsi-- IAIN Sunan Ampel Surabaya, Surabaya, 2005).

¹⁰ Saidi, "Pencatatan Perkawinan Antar Agama: Kajian Normatif Hukum dan Pelaksanaannya di Kantor Catatan Sipil" (Skripsi-- IAIN Sunan Ampel Surabaya, Surabaya, 2004).

¹¹ Erika Novianti, "Pencatatan Pernikahan Anak yang Lahir dari Nikah Sirri: Studi Kasus di KUA Gedangan Sidoarjo tahun 2003" (Skripsi-- IAIN Sunan Ampel Surabaya, Surabaya, 2006).

¹² Sri Kutsiyah, "Persepsi Santri Putri PERSIS di Kecamatan Bangil Kabupaten Pasuruan terhadap Legalitas Hukum Pemerintah Tentang Pencatatan Nikah" (Skripsi-- IAIN Sunan Ampel Surabaya, Surabaya, 2003).

it is not regulated in the Koran and hadith. However, there are some who consider it important on the grounds that registration can be used as proof of legal certainty and guarantee the rights of husband and wife.¹³

The novelty that the author means more or less lies in the theory carried out in the context of searching for data related to the views of NU Rembang leaders on the Compilation of Islamic Law as well as the set of rules and regulations regarding marriage registration which were built through social construction theory. With this theory, the author wants to present an in-depth research and exploration of what and how should be done regarding the phenomenon that has occurred so far regarding the issue of marriage registration, of course in the elite construction of NU Rembang.

B. Method

This article is a field research that uses qualitative methods. The data is obtained using in depth interviews with four kyai figures of Nahdlatul Ulama Rembang, namely KH. Chazim Maburr, KH Syarofuddin Ismail Qoimaz, KH Chamid Maburr, and KH Ahmad Sunarto. The data obtained is then analyzed using Peter L Berger's social construction theory. The integration of interviews with key kyai figures and the application of social construction theory aim to provide a nuanced understanding of the social perspectives and constructions related to the specific context of marriage registration in Indonesia within the framework of Nahdlatul Ulama Rembang. Based on the explanation of the background to the research problem above, the author can explain the scope and identification of this research problem. First, to find out the social construction of the NU Rembang elite regarding marriage registration. Second, to find out the views of the Rembang NU elite regarding marriages that are not recorded.

C. Result

The NU Rembang Elite's view of the issue of marriage registration which was approached and studied through social construction theory resulted in the identification of the NU Rembang elite into two groups. First, the author calls the accommodative formalist group. The fiqh pattern of this formalist group is a representation of the NU fiqh pattern which places great emphasis on

¹³ Muhalli, "Persepsi Masyarakat Desa Ketapang Daya Kecamatan Ketapang Kabupaten Sampang Tentang Pelaksanaan Pencatatan Nikah" (Skripsi--IAIN Sunan Ampel Surabaya, Surabaya, 2008).

the authority of the ulama and the transmission of knowledge through the yellow books or what is better known as the line of orthodoxy or lineage. The second group is the Realistic Modernist group. What is meant by Realistic modernist is an approach to the study of jurisprudence that links the substantive dimensions of teachings with the socio-cultural context of its adherents with jurisprudence that views jurisprudence as a fact, not as a practice. With this theory, two forms of fiqh products emerged, namely religious law and positive law. The Realistic Modernist group is a view that links the substantive dimensions of teachings with the socio-cultural context of its adherents as a result of historical jurisprudence studies which then view jurisprudence as a fact, not as a practice.

D. Analysis and Discussion

1. Peter L. Berger's Theory on Social Construction

This theory is the work of Peter L Berger, a great theorist who can transcend paradigmatic tensions in the social sciences. It was he who produced social construction theory, which is a derivation of phenomenological theory.¹⁴ Phenomenological theory itself is one of three theories included in the social definition paradigm besides action theory and symbolic interactionism.¹⁵ In this theory, efforts to understand social construction are carried out through two things, namely first, defining "reality" and "knowledge". Social reality is something found in intersubjective experience and implied in social interactions expressed through communication through language, working together through forms of social organization and so on. Meanwhile, knowledge about social reality is related to the appreciation of social life in all its aspects, including cognitive, psychomotor, emotional and intuitive aspects. Second, to understand something intersubjective, Durkheim's way of thinking about objectivity and Weber's thinking about subjectivity are used. The purpose of Durkheim's objectivity is to place objectivity (society) above subjectivity (individuals). Meanwhile, Weber's subjectivity places subjectivity (humans) above objectivity (individuals).¹⁶

Society is both an objective reality and a subjective reality. As an objective reality, society seems to be outside humans and confronts them. As for society as a subjective reality, it means that individuals are in that society as an inseparable part. Therefore, individuals are

¹⁴ Nur Syam, *Bukan Dunia Berbeda: Sosiologi Komunitas Islam*, cet.pertama (Surabaya: Jenggala Pustaka Utama, 2004), 30.

¹⁵ George Ritzer, *Sosiologi Ilmu Pengetahuan Berparadigma Ganda*, Terj. Alimandan (Jakarta: PT Raja Grafindo Persada, 2003), 43.

¹⁶ Nur Syam, *Islam Pesisir* (Yogyakarta: PT LKiS Pelangi Aksara, 2005), 37.

the shapers of society and vice versa, society is the shaper of individuals. In other words, society is a human product and humans are a product of society.¹⁷

Social construction is the way in which new realities can be constructed through symbolic interactions and cultural equivalents in the intersubjective world and the institutionalization of new realities. Within the framework of constructivism, Suparno provides the following definition of social construction: Social construction is the cognitive work of individuals to interpret the existing world of reality because of social relations between individuals and the environment or people around them. Individuals then build their own knowledge of the reality they see based on previously existing knowledge structures.¹⁸

Social construction theory is a way to understand the human world based on its dual social reality, namely objective and subjective. Objective reality is reality that is outside humans, while subjective reality is reality that is within humans. These two social realities are connected through dialectical concepts known as externalization, objectivation and internalization. Externalization is adjustment to the sociocultural world as a human product. Objectivation, namely social interaction that occurs in an intersubjective world that is institutionalized or experiencing institutionalization. Internalization, namely the process by which individuals identify themselves with social institutions or social organizations of which the individual is a member.¹⁹

Through externalization society becomes a reality created by humans, through objectivation society becomes its own reality vis-à-vis humans and through internalization humans become a reality formed by society. In the moment of externalization (moment of self-adaptation) social reality is pulled out of the individual. The moment of objectivation (moment of self-interaction with the socio-cultural world) is referred to as social interaction through institutionalization and legitimation. In this institutionalization and legitimation, agents are tasked with pulling their subjective world into an objective world through jointly constructed social interactions.²⁰

¹⁷ Peter L. Berger, *Langit Suci Agama Sebagai Realitas Sosial*, Terj.Hartono (Jakarta: LP3ES, 1991), 4.

¹⁸ Burhan Bungin, *Konstruksi Sosial Media Massa: Kekuatan Pengaruh Media Massa, Iklan Televisi dan Keputusan Konsumen Serta Kritik Terhadap Peter L. Berger dan Thomas Luckman* (Jakarta: Kencana Prenada Media Grup, 2008),3.

¹⁹ Nur Syam, *Islam Pesisir* (Yogyakarta: PT LKiS Pelangi Aksara, 2005), 37-38.

²⁰ Nur Syam, *Islam Pesisir* (Yogyakarta: PT LKiS Pelangi Aksara, 2005), 21.

Meanwhile, in the moment of internalization (the moment of self-identification with the socio-cultural world) the objective world of social reality is drawn back into the individual, so that it seems to be within the individual. In this process, institutions in society are involved in identifying individuals who join it. As an effort to preserve the results of this identification, socialization and transformation efforts are carried out so that individuals are always identified with institutions or institutions, resulting in the identification of people or individuals as part of religious, social, political and other organizations.²¹

Phenomena that occur around social construction include: cultural scenarios, the influence of the people around the individual, and habit factors. The benefits of studying social construction include knowing: The process of social construction, the concept/form or social reality that is built, the concept of meaning and social implications of a symbol of social reality that is built.

2. Marriage Registration in Indonesia: a Contested Authority

The presence of KHI is an effort to transform Indonesian Islamic law which has several objectives, including: first, complementing the pillars of religious justice which are expected to have an organized judicial body based on the strength of the law, the existence of implementing organs and the existence of legal facilities as a reference.²² Second, equalize perceptions of the application of the law. Third, speed up the process of taqribi bain al-Ummah. Fourth, get rid of the concept of private affairs.²³

KHI as a legal product intended for Muslims, its presence does not automatically receive encouraging appreciation among Indonesian Muslims themselves. Indonesian Muslims with all their differences in ethnicity, madhhab, mass organizations and political parties are very likely to have differences in responding to the presence of KHI. One of the appreciations that came from Nahdlatul Ulama, which is the largest Jam'iyah and congregation in Indonesia, which culturally and structurally has its own characteristics, including responding to the presence of KHI.

²¹ Nur Syam, *Islam Pesisir* (Yogyakarta: PT LKiS Pelangi Aksara, 2005), 45.

²² Saekan, Ernati Effendi, *Sejarah Penyusunan Kompilasi Hukum Islam di Indonesia* (Surabaya: Arkola, 1997), 11.

²³ Sofyan Hasan, *Hukum Islam: Bekal Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia* (Jakarta: Literata Lintas Media, 2004), 141.

The existence of Marriage Registration in a marriage has many functions. Legally, marriage registration has functions including: it can be used as written evidence that a marriage has occurred, fulfills the administrative requirements set by the state, and becomes a legal basis. Apart from that, the existence of marriage registration functions to avoid misunderstandings between husband and wife regarding fulfilling the rights and obligations of husband and wife.²⁴

In a situation where there is a male and female couple who, if they do not get married immediately, are afraid they will fall into adultery, then in conditions like this the marriage may be carried out without registration. In another case, a husband who wants to marry for the second, third or fourth time may not have it registered. In other words, unregistered marriages or unregistered marriages as long as they are to avoid greater harm, namely falling into adultery, are permitted.²⁵

When viewed from the normative jurisprudence contained in the jurisprudential literature written by madzhab scholars, marriage registration is not a necessity. It is different when jurisprudence is institutionalized in a state institution which then crystallizes into a positive legal framework, the issue of marriage registration is a necessity and becomes part of official state documents. Therefore, if viewed from the perspective of contemporary jurisprudence, the existence of marriage registration becomes an obligation based on the law based on *shaddu dhariah* arguments. Thus, its existence becomes a unified legal product, both positive law and Islamic jurisprudence itself.²⁶

There are many facts that occur in society that have an impact on marriages that are not registered. Apart from not protecting the rights of husbands and wives, especially the wife's rights, she cannot obtain inheritance rights if her husband dies, the wife also cannot sue and the authorized institution - PA will not serve. Other impacts are felt by children both physically and psychologically when their rights are not fulfilled, then they will become neglected children. Thus, it appears that there are many disadvantages that haunt *siri* marriages, although this cannot be separated from the contribution of some clerics who marry *siri*, which is actually very regrettable.²⁷

²⁴ Chamid Mabur, Interview, Rembang, 26 May 2023.

²⁵ Chamid Mabur, Interview, Rembang, 26 May 2023.

²⁶ Chazim Mabur, interview, Rembang, 28 May 2023.

²⁷ Chazim Mabur, interview, Rembang, 28 May 2023.

In principle, the issue of marriage registration is not regulated in Islamic law (fiqh), in fact the Prophet's own marriage was never registered. Even if it is related to the provisions contained in Surah al-Baqarah: 282 which speaks of the order to record cases of debts and receivables, the scope of the law only extends to the issue of dowry where dowry payments can be made in cash or debt, and cannot be related to the issue of the marriage agreement itself. For example, what happened in the Indonesian context during the struggle for independence where many male fighters wanted to get married but did not have or even had much money to get married so the dowry was paid by debt. In this way, the marriage law is not recorded as long as the terms and conditions according to fiqh are fulfilled, the marriage is declared valid, although it cannot be denied that this is considered invalid according to the applicable law and is considered to be against the government.²⁸

As for the existence of the Compilation of Islamic Law as a local fiqh product that regulates marriage issues including inheritance and endowments, its existence is still not equivalent to the ijihad products of previous ulama. This is because the requirements to become a mujtahid itself are currently very difficult or are said to be insufficient. Apart from that, fiqh problems, including contemporary problems, are still covered in classical fiqh. In fact, the existence of local jurisprudence will make Muslim communities isolated from other Muslim communities. Even though there are benefits, the products produced always conflict with existing fiqh standards so that they will clash with compliance with the Shari'a which in the end will damage the legal order itself. Although it must be acknowledged that unification in the perception and application of law is very necessary, it is difficult.²⁹

The existence of a dichotomy between the area of fiqh and the area of the state (law) must be understood as a manifestation of the Ummati Rahmatun Ikhtilaf. Khilafiyah is a necessity and therefore the government must also understand and respect the laws that have been adhered to by society which are based on the opinions of Islamic school scholars as taught to the public by ulama and kiai so that options are born in the use of law between Islamic law (classical Fiqh) and existing laws.³⁰

In the classical jurisprudence books there is no law on marriage registration. However, its existence is highly recommended. The basis is Al Baqarah: 282. Based on the rules of *al-*

²⁸ Syarofuddin Ismail Qoimaz, interview, Rembang, 22 Dec 2023

²⁹ Syarofuddin Ismail Qoimaz, interview, Rembang, 22 Dec 2023

³⁰ Syarofuddin Ismail Qoimaz, interview, Rembang, 22 Dec 2023

Tbroh bi 'Umum al-al-Lafz la bi Khusus al –Sabab, the generality of the commands contained in the verse above, which initially spoke about debts, can also be related to the issue of registration in marriage. Like the meaning of *sighat amar* which was originally *irshad* can change to obligatory. This is influenced by the position of *muamalah fiqh* which is in the middle between the *fiqh* of worship and *muamalat* where *muamalah fiqh* contains elements of *muamalah* and worship. Thus, the existence of marriage registration using this legal approach is mandatory.³¹

Marriage registration has a huge impact on the rights and obligations of married couples. Marriages that are not registered will not receive full religious or state rights. For example, children born from unregistered or unregistered marriages will have difficulty getting a birth certificate because they don't have a family card, and then they won't get a family card if they don't have a marriage certificate. Apart from that, a child cannot claim inheritance rights from a religious court. Likewise, a wife cannot claim her husband's maintenance or inheritance rights in court. This is made worse by the ease with which husbands relinquish responsibility for their children and wives.³²

The implementation of worship cannot be separated from two interrelated dimensions, namely *Habl min Allah* and *Habl min al-Nas*. Apart from that, rejection or opposition to the provisions outlined by the government also violates Allah's command regarding the command to obey Allah and His Messenger and obey *ulil amri* or the government. As explained in *Surah al-Nisa: 59*.³³

Disputes that have occurred so far based on *madhhab* fanaticism should be abandoned and avoided as soon as possible. We should respect and implement all regulations that have been set by the government and there is no need to dispute any more by dichotomizing religious law and state law. In this case, the legal rules of *al-Hakim fi Masail al-Ijtihad Yarfa'u al-khilaf* apply (laws decided by judges in matters of *ijtihad* eliminating differences of opinion).³⁴

The importance of marriage registration in Islam has roots dating back to the early days of Islam and has evolved over time. Here are some points that can explain the history of

³¹ Ahmad Sunarto, interview, Rembang 2 January 2023.

³² Ahmad Sunarto, interview, Rembang 2 January 2023.

³³ Ahmad Sunarto, interview, Rembang 2 January 2023.

³⁴ A. Djazuli, *Kaidah-kaidah Fikih* (Jakarta : Prenada Media Group, 2006), 154.

the importance of marriage registration in Islam: Principles of Justice and Transparency, Involvement of Witnesses in Marriage Agreements, Protection of Rights and Duties, Prevention of Adultery, Preservation of Nasab and Legitimacy of Children, Fulfillment of Legal and Social Requirements, Prevention of Disputes, Influence of Norms and Culture. Overall, the importance of marriage registration in Islam is reflected in the attempt to apply the principles of justice, transparency and responsibility in the context of marriage.

Not having a legal marriage registration can have significant negative impacts. The following are some of the negative impacts that may arise: Uncertainty of Legal Status, Non-enforceability of Spouses' Rights, Uncertainty of Children, Limitations of Legal Protection, Non-assurance of Social Protection, Religious and Cultural Uncertainty, Difficulties in Migration Process, Impossibility of Obtaining a Marriage Certificate or Divorce Certificate. In many societies, legal marriage registration is considered essential to create a stable legal and social base for couples and their offspring.

3. The Formalist and Realistic: The Social Construction of Nahdlatul Ulama Rembang on Marriage Registration

Nahdlatul Ulama (NU), whether jam'iyah or jama'ah, has a role in the process of national and state awareness as well as being involved in Indonesian national insight. Since its birth, NU has not questioned the issue of nationalism. Since the beginning, NU has been ready and existed in the midst of the nation's progress, and often took part in solving the nation's problems. Both jam'iyah and jama'ah, NU has played many roles for the nation, not limited to political and religious issues, but also in efforts to educate the nation, efforts to improve public health, and efforts to develop the people's economy.³⁵

Nahdliyin residents' respect for kiai has two forms. First, respect within an organizational framework. This can be seen from the placement of ulama in the NU organizational structure with all the authority given to them, namely (formally) as the highest leadership of the organization at all levels from the general management to branch administrators, with the functions and authority as coaches, controllers, supervisors and policy makers. Second, respect within an individual framework, in general the Nahdliyin people are very respectful and obedient and love the ulama. For them, the presence of ulama really

³⁵ Muhammad Tholhah Hasan, *Ahlusunnah waljama'ah* (Jakarta: Lantabora Press, 2005), 353.

touches their daily lives, from spiritual guidance, consultations, to personal and family needs, such as naming new born children and grandchildren, choosing good times and afdol for marriage, to being the officiant at a wedding without the need to present a marriage registrar from the religious affairs office (KUA).³⁶

The importance and centrality of the role and position of kiai in society cannot be denied. In the reality of people's daily lives, kiai or ulama have at least three roles to play, namely: First, as teachers and spiritual guides to the community. Second, to accommodate and formulate community aspirations. Third, as a leader and influence of community movements.³⁷

Some of them, the Nahdliyin, consider that everything is sufficient with the intermediary of a kiai as the certifier and giver of blessing to the marriage. This can be seen by the large number of Nahdliyin residents who carry out marriages without going through the registration process by and/or in the presence of authorized officers. The existence of a majestic kiai figure who is considered sacred in a marriage is enough to provide legal legitimacy for the validity of the marriage. Indirectly, practices like this can foster the emergence of the notion of private affairs which has an impact on the generalization of worship that falls into the *ubudiyah* group and worship that is *muamalah*. Both are considered and realized as a personal matter between humans and God. Everything is considered an absolute individual right without interference from society and the authorities.

From the pattern structured through the dialectic of social construction (externalization, objectivation, internalization), the typology of thought by the NU Surabaya elite regarding unregistered marriage law using a *fiqh* study method approach is divided into two groups. First, the Formalist group takes a textual approach which limits itself to written texts and pays little attention to the living Islamic tradition.³⁸ NU elites identified as part of the formalist group are KH. Chamid Mabrur and KH. Syarofuddin Ismail Qoimaz.

According to the formalist group, unregistered marriages are declared legally valid and have the same status as registered marriages in terms of rights and obligations. However, this group still recommends to the public to register their marriages so that they do not encounter

³⁶ Muhammad Tholhah Hasan, *Ablusunnah waljama'ab* (Jakarta: Lantabora Press, 2005), 302.

³⁷ Muhammad Tholhah Hasan, *Ablusunnah waljama'ab* (Jakarta: Lantabora Press, 2005), 305.

³⁸ Ahmad Baso, *NU STUDIES: Pergolakan Pemikiran Antara Fundamentalisme Islam dan Fundamentalisme Neo Liberal* (t.t: PT Gelora Aksara Pratama, 2006), 33.

difficulties in the future in processing documents or other administrative requirements related to the state.

This thinking is based on an understanding of conventional fiqh books which do not provide an explicit explanation regarding this matter, so that the law returns to the original law of everything, namely mubah (al-Aslu fi al-Ashyai al-Ibahah). Even if we take the argument from the pronunciation of the body facts contained in Surah al-Baqarah: 282, the law is only irshad as in the case of buying and selling because marriage also contains an element of mu'amalah.

Regarding the offer to carry out ijihad in a manhaji manner, this group is content to carry out ijihad in the qauli model. According to him, the requirements to become a mujtahid are very difficult to fulfill at this time. He further added that the problems of jurisprudence, both classical and contemporary, are all still covered in the jurisprudence books of Islamic school scholars. Even if KHI is called a product of today's ijihad, for them it cannot be said to be the result of ijihad but rather a result of effort. So its existence cannot annul the existing jurisprudence.³⁹

The fiqh pattern of this formalist group is a representation of the NU fiqh pattern which places great emphasis on the authority of the ulama and the transmission of knowledge through the yellow books or what is better known as the line of orthodoxy or lineage. This kind of understanding was emphasized by the great leader of NU KH. Hasjim As'jari recommended that NU ulama examine the chain of transmission of religious knowledge from teacher to previous teacher who he acknowledged had authority and mu'tabar.⁴⁰ Within the scope of the sect, this kind of pattern is known as the principle of diachronic hermeneutics (followers of any sect are required to maintain their loyalty to tradition by appreciating the achievements of their predecessors). Don't be rash in drawing conclusions just by reading the Koran and Hadith without following the understanding skills of previous scholars in interpreting the Koran and Hadith of the Prophet.⁴¹

³⁹ Ahmad Baso, *NU STUDIES: Pergolakan Pemikiran Antara Fundamentalisme Islam dan Fundamentalisme Neo Liberal* (t.t: PT Gelora Aksara Pratama, 2006), 44.

⁴⁰ Ahmad Baso, *NU STUDIES: Pergolakan Pemikiran Antara Fundamentalisme Islam dan Fundamentalisme Neo Liberal* (t.t: PT Gelora Aksara Pratama, 2006), 39-40.

⁴¹ M.Ali Haidar, *Nabdatul Ulama dan Islam di Indonesia Pendekatan Fikih dalam Politik* (Jakarta: PT Gramedia Pustaka Utama, 1999), 73.

The second group is the Realistic Modernist group. What is meant by Realistic modernist is an approach to the study of jurisprudence that links the substantive dimensions of teachings with the socio-cultural context of its adherents with jurisprudence that views jurisprudence as a fact, not as a practice. With this theory, two forms of fiqh products emerged, namely religious law and positive law. Religious law refers to fiqh conclusions produced by jurists, while positive law is a product of legal law or judicial jurisprudence.⁴² The NU elite identified in this group is KH. Chazim Mabror and KH. Ahmad Sunarto. Both of them have the same opinion about the law of unrecorded marriages.

According to KH. Chazim Mabror and KH. Ahmad Sunarto's unregistered marriage results in the marriage being invalid. This understanding is an integralistic understanding between the law contained in fiqh and the law contained in marriage law in Indonesia. Marriage registration not only fulfills administrative matters, but also determines whether the marriage is valid or not. They interpret the existing marriage law as a representation of current ijihad which they feel is capable of regulating and bringing order to marriage matters. According to this group, fiqh as a medieval product is considered only effective in the modern world if it has been modified and rationalized in such a way that it becomes Islamic law that is conducive to local conditions.

In the understanding of this second group, it is time for al-fiqh suggestions which have only been used as theory and memorized to be applied to carry out legal exploration in order to respond to legal problems that arise in society today. In other words, it is time for the qauli ijihad pattern that has been used to be transferred to the manhaji pattern. This is done to provide space for the use of maqasid as a basis for making legal decisions in addition to looking at the reality that occurs in society. Besides that, apart from using al-fiqh proposals, another facility that needs to be developed in solving contemporary legal problems is using qawaid fiqhiyah (legal maxims).⁴³ Qawaid fiqhiyah is a crystallization of jurisprudence in the form of rules that are compiled based on the similarity of the reason/cause of law or illah and the secret of law or wisdom found by means of istiqlal (Induction) which functions as a binding factor of the soul. Al qawaid fiqhiyah was born as the embodiment of efforts to loosen the strict

⁴² Muhammad Khalid Mas'ud, *Filsafat Hukum Islam dan Perubahan Sosial* terj. Yudian W. Asmin (Surabaya: al-Ikhlash, 1995), 38.

⁴³ Abdul Mun'im Saleh, *Hukum Manusia Sebagai Hukum Tuhan: Berpikir Induktif Menemukan Hakikat Hukum Model al-Qawaid al-fiqhiyah* (Yogyakarta: Pustaka Pelajar, 2009), 317-319.

qiyas which can only use illat as its basis. While al-qawaid al-fiqhiyah legitimizes the use of wisdom as a basis for analogy (ilhaqi).

The use of qawaid fiqhiyah is important because it is actually a reflection of divine and humanitarian aspirations. Every legal thought through al-Fiqh proposals must receive alignment with the final formulation from al-qawa'id al-fiqhiyah so that the product of thought has optimal truth. This means that the two of them should be paired as working partners because they both provide formal and material truth to a legal thought.

Externalization is the initial process in social construction which is a moment of self-adaptation to the socio-cultural world. At this time the means used are language and action. Adaptation is done to sacred texts and old traditions.

The next moment is the objectivation process, which is the moment of self-interaction with the socio-cultural world. At this time, social reality seems to be outside humans and becomes an objective reality. In addition, there are two realities of self, namely the reality of the subjective self and other realities that are outside the objective self. In social construction, this moment is referred to as social interaction through institutionalization and legitimacy. In the construction of the Social Construction of NU Rembang Elites on Nikah Registration, the objectification process in question is how the existing social reality is rationalized by the elites so that it becomes an objective condition. The effort made is to provide legitimacy so that the knowledge possessed by the NU elite makes sense subjectively.

In this case, Nikah Registration obtains legitimacy from the Al-Quran based on surat al-Baqarah verse 282 by trying to interpret or understand the pronunciation of bodily facts. The meaning of Sighat Amar Lafaz Fakbangunu used by the NU Rembang elite is different. Kiai Navis understands the meaning of Sighat Amar from lafaz fakbody as irsyad or guidance in the context of the problems described in the verse which explains the problems of debt and credit (mu'amalah). Likewise, marriage also has elements of mu'amalah. The implication for the law of marriage registration is only considered a recommendation, not an obligation, so that it does not affect the validity or invalidity of a marriage.

Internalization is the process of individuals identifying themselves in their socio-cultural world. Internalization is when social reality is drawn into oneself or social reality becomes subjective reality. Social reality is within humans and thus humans will be identified in their socio-cultural world.

In an effort to preserve the identification, socialization and transformation are used so that individuals are always in the identification. From this process, there is a pattern of unity or consistency between speech and action as a result of the previous construction process, namely externalization and objectivation.

From the previous construction process, it is known that the Social Construction of NU Rembang Elites in the internalization process can be divided into two groups, namely the Formalist group and the Realistic group. The formalist group emphasizes more on the text and formal teachings of Islam contained in the Koran, Hadith, and Islamic fiqh of the Imam Madzhab. While the realistic group emphasizes the substantive dimensions of the teachings and the socio-cultural world.

For the formalist group, the socialization and transformation carried out is to provide understanding or awareness to the surrounding community about the existence of two laws in marriage. The laws in question are sharia law (fiqh) and state law (marriage law). According to this group, the existence of the two laws is alternative or optional and cannot negate each other. Therefore, for those who feel burdened by the provisions of the law, for example getting married in an emergency, then the solution is to marry according to the provisions of fiqh. However, if there are no obstacles such as financial constraints, marriage registration should be carried out as a form of compliance with the state.

As for the realistic group, the socialization that is always carried out is so that marriages are registered as much and as completely as possible. In fact, this group does not tolerate parties who want to carry out a siri marriage, including those who are involved and take part in it. For them, the current law contains benefits so that marriage registration is mandatory. If you violate it, it is tantamount to violating the rules of Allah that have been determined by Ulil Amri, therefore in addition to the marriage being invalid, the person who does it is also sinful. The transformation carried out is to change the perspective in carrying out rituals from the qauli method to the manhaji method. So that the laws that are born are always relevant to the conditions of society without forgetting the existing local culture so as not to seem textual and stagnant.

E. Conclusion

The NU Rembang Elite's view of the issue of marriage registration which was approached and studied through social construction theory resulted in the identification of the NU Rembang elite into two groups. First, the author calls the accommodative formalist group, namely a view that is limited to understanding written texts, in this case Imam Madhhab fiqh as a form of elaboration of diachronic hermeneutic principles. Nevertheless, they still accommodate fiqh in the form of positive law apart from fiqh as religious law produced by previous jurists. However, they provided conditions for both to run side by side without canceling each other out. The NU Rembang elite identified in this group is KH. Chamid Mabur and KH. Syarafuddin Ismail Qoimaz. Second, the Realistic Modernist group, namely a view that links the substantive dimensions of teachings with the socio-cultural context of its adherents as a result of historical jurisprudence studies which then view jurisprudence as a fact, not as a practice. With this understanding, it is recognized that there are two forms of fiqh products, namely religious law and positive law. It didn't stop there, this group then tried to rationalize fiqh not only as religious law but also as positive law in an effort to make fiqh more effective in today's modern world by modifying and rationalizing old fiqh which was considered no longer relevant for use today. The NU elite identified in this group is KH. Chazim Mabur and KH. Ahmad Sunarto.

Based on the identification process produced through the social construction of the NU Rembang elite regarding the Compilation of Islamic Law regarding marriage registration, two answers were found regarding the law on unregistered marriages according to the NU Rembang elite. Firstly, according to the accommodative formalist group, marriages that are not legally registered are still valid on the grounds that the law of registration itself is only permissible because in Islamic jurisprudence (fiqh madhhab) itself this is not found so it does not determine the validity of the marriage. However, they still recommend that every Muslim couple who is getting married register their marriage. This is a form of fulfilling state administrative requirements that have been stipulated by marriage law in Indonesia. Second, according to the Modernist realistic group, a marriage that is not registered will result in the marriage being invalid. This is the result of the understanding that has been built in the previous process where marriage law and all other sets of regulations are understood as current jurisprudence replacing old jurisprudence whose effective period has expired.

The problems that the author examines regarding marriage registration in the social construction of the NU Rembang elite are only a small part of the problems of marriage law in Indonesia. For this reason, further research is needed on other issues that have not been touched upon and then developed by future researchers.

E. Conflict of Interest Statement

I Abdul Rozak declare that I have no affiliation or involvement in any organization or entity with any financial interests (such as honoraria, educational grants, participation in speaker's bureaus, memberships, employment, consulting, stock ownership, or other equity interests and expert testimony or patent licensing arrangements), or non-financial interests such as personal or professional relationships, affiliations, knowledge or beliefs in the subject matter or material discussed in this manuscript.

F. Acknowledgment

Thank you to UIN Sunan Kalijaga for accepting the publication of this journal. To the NU leaders and their staff (abdi ndalem) who have provided research data and thanks to the people who are willing to be interviewed.

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DOI: <https://doi.org/10.14421/al-mazaahib.v11i2.3187>

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How to cite	Rozak, Abdul and Akbar, Hasan. "The Formalist vs Realist Constructs on Marriage Registration in Indonesia: A Study of the Perspectives of Kyai from Nahdlatul Ulama in Rembang" <i>Al-Mazaahib: Jurnal Perbandingan Hukum</i> 11, no. 2 (2023): 115-136. https://doi.org/10.14421/al-mazaahib.v11i2.3187
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