

Article

A Secret Marriage and Denied Rights: A Critique from an Islamic Law Perspective

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Abstract: Today, secret marriages are a known problem among Muslims, but discussions and debates are avoided. People who are unwilling to take on the responsibilities of marriage yet do not want to commit adultery, one of the major sins in Islam, practice secret marriages. However, this leads to the deprivation of rights for parties and children born in these unions. Some claim that the legal justification for secret marriages is provided by the view that the presence of witnesses and the parties to be married is sufficient for a marriage contract. Therefore, this article aims to critically examine the views of the four Sunnī legal schools on testimony (*shahada*) or proclamation (*i'lan*) in relation to marriage, and how these conditions align with the requirement for protecting the rights of all parties involved in the marriage. Upon examination, this article also will delve into unregistered marriages and illustrate how both types of marriages do not adequately establish the rights of those involved. In order to accomplish this objective, the article will use a descriptive methodology that directly refers to primary texts and certain fatwa institutions, such as the Diyanet (the Presidency of Religious Affairs in Turkey), to present the jurists' discourses.

Keywords: secret marriage; unregistered marriage; announcement; Sunnī view; rights; the Diyanet



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1. Introduction

A marriage is a contract in Islamic law initiating a union between a man and a woman. Since it forms the basis for founding a family and affects society directly, all divine religions have granted great importance to marriage contracts, and Islam is no exception. A marriage contract is described in the Qurʾān (4:12) as being a “solemn pledge” (*mīthāq al-ghalīz*) and is considered a critical institution in establishing specific responsibilities for both parties. Additionally, Prophet Muhammad highly valued and encouraged marriage and emphasized the importance of fulfilling rights. Given the nature and importance of marriage as a social and legal foundation, marriage contracts are expressed broadly in Islamic legal texts as a type of contract with specific conditions that outline and ensure the rights of the parties, the responsibilities placed on them, and the terms that end a marriage.

Secret marriages, which are becoming an increasingly important problem, have become a very complex issue today. According to some, the contract formed by the parties in the presence of two credible witnesses is valid and cannot be considered a secret marriage. Furthermore, it is unnecessary to announce the marriage or have it registered by an official authority (Green 2022). The connection between registration, announcement, and witnesses will be briefly covered and illustrated with examples from predominantly Muslim countries, particularly Turkey. The issue of marriage in non-Muslim countries where Muslims are a minority is not the primary subject of this article. However, the framework presented in this article will provide an important basis for examining the marriages of Muslims living in non-Muslim countries.

After discussing secret marriages, this article will also focus on marriages that are not officially registered and critique both for not establishing the rights of the parties involved. The requirements of announcing a marriage and having witnesses, as outlined in classical literature, are important for establishing the rights and obligations of the parties.

However, these conditions are no longer sufficient for determining rights and obligations in today's society. Therefore, after examining the requirement of witnesses and announcement in classical literature, this article will discuss how the additional requirement of official registration was added to marriage in Ottoman law.

Islamic jurisprudence literature stipulates that for a marriage contract to be valid, it must meet certain conditions, including being formed in the presence of witnesses or announced and publicized. The presence of witnesses or a public proclamation of the marriage contract is required by jurists, as it serves as a basis for determining certain rights and obligations of the spouses. Despite this, there is a disagreement among jurists as to whether the conditions that ensure the protection of rights should be met through the presence of witnesses during the contract or through the announcement of the marriage.

As will be emphasized in detail in the following sections, according to Ḥanafī jurists, a marriage contract must be administered in the presence of two witnesses for a sound and complete contract (al-Sarakhsī 2016, vol. 5, p. 58). For Mālikī jurists, the aim is to certify the marriage contract. To this end, it is sufficient to announce the wedding publicly (Ibn Rushd 2013, p. 448). This disagreement stems from differing views on whether completing a marriage contract in the presence of witnesses is merely a religious obligation or whether it has an additional role of precluding possible disputes or denials.

Discussions about the need for the announcement of marriage in addition to the witness requirement in Islamic marriage have taken on another dimension in recent times. This dimension is the legal recognition of the marriage by the state. It is important to note that when the view that these requirements were put in place to prevent future disputes is adopted, it is necessary to emphasize that in today's context, the protection of rights is only possible through registration by official authorities. With the spread of the idea of modern governments, one of the critical factors is facilitating the official identification of married couples. Therefore, the protection of rights, which witnessing and announcement are intended to address, is related today to legality. Therefore, this article will analyze the issue of registration by official authorities, specifically for Muslim countries, which we believe is necessary in today's context of marriage, despite not being explicitly mentioned in classical literature, after discussing the conditions for witnessing a marriage contract.

This article is divided into three main sections. The first section of the article will begin by defining a marriage and secret marriage. It will then delve into the witness testimony requirements for a marriage contract according to the Ḥanafī, Shāfi'ī, and Ḥanbalī jurists. The second section of the article will examine the perspectives and reasoning of the Mālikī jurists, who consider the announcement of marriage to be a crucial requirement. In the third and final section of the article, the focus will be on the significance of registering marriages. Initially, the section will examine the 1917 Decree of Family Law (Hukuk-ı Aile Kararnamesi), which was specifically formulated to regulate family life in the Ottoman Empire, and its treatment of the topic of marriage witnesses. Later, this section will scrutinize the viewpoints of certain fatwa institutions, including the Diyanet (the Presidency of Religious Affairs in Turkey), on these issues.

An analysis of the literature regarding the witnessing element of a marriage contract yields various studies. Specifically, in Turkish literature, there are articles and master's theses on the eyewitness condition for marriage contracts in Islamic law, such as Ayrık (2016) and Aktas (2018). However, most of these studies handle this topic from the perspective of only one Islamic school, or they do not focus on the relation between these conditions and registration that refers to the state's recognition of marriage, and the imposition of rights and responsibilities on the parties. In English literature, some articles deal with the issue of witnessing in general, such as Yasar (2018) and Tahir Maloko (2015); there are also specific geographical case studies on secret marriage, such as the Mauritania case (Corrinne Fortier 2011) or the Nigeria case (Ishola and Abdulrahman 2018). In Arabic literature, there are articles investigating witnesses in general. Consequently, this article contributes to the literature by analyzing this issue comparatively within the four madhhabs of Islamic law and makes connections to the issue of registration by official authorities.

2. Meaning of Marriage

“Nikāḥ” (Marriage), which derives from the letters “ن-ك-ح” in Arabic, means to get together and have intercourse (al-Jawharī 1984, vol. 1, p. 413; Ibn Manẓūr 1999, p. 279). As a technical term, it generally means a contract that sets up some rights between a man and a woman and makes it religiously permitted (*ḥalāl*) for them to benefit from each other in certain ways (Ibn Fāris 1979, p. 475; Bilmen n.d., p. 5). According to the Ḥanafī jurists, a marriage is a contract for conjugal enjoyment (al-Maydānī 2002, p. 377; Bilmen n.d., p. 5; Atar 2007). It is crucial to perceive marriage as a contract that confers rights to both parties in the definitions of marriage. This attribute is also closely linked to the concept of testimony.

Regarding the verses and hadith about marriage, jurists have observed that many aspects of a marriage contract, including social, legal, and spiritual aspects, are emphasized. For example, it should be noted that in the 21st verse of Sūra al-Nisā’, the marriage contract is described as a formal agreement, which is meant to be an ongoing and mutual promise between the parties. This agreement entails a significant amount of responsibility. Furthermore, the hadith not only emphasizes the importance of marriage but also addresses specific aspects, such as the importance of respecting the rights of women (Muslim, Hajj, 147).

Due to the emphasis on certain aspects of marriage in the Qur’an and hadith and the definitions of marriage in books, a debate arises in Islamic jurisprudence literature as to whether the worship aspect (*‘ibādāt*) or the transactional aspect (*mu‘āmalāt*) of marriage is more prominent. Some jurists put forward the opinion that worshipping is a deed performed for God, whereas marriage is a worldly act, like commerce, that enables one to meet sexual desires legitimately, implying that it is not primarily an act of worship. On the other hand, other jurists regarded marriage as worship as it facilitated the formation and raising of a family, which includes taking responsibility for one’s family and raising virtuous children to become valuable members of society. The assertion that marriage is mainly a transactional agreement is often accompanied by a strong emphasis on the importance of witness testimony and announcement. The Mālikīs, for example, place great value on the announcement requirement, which can be viewed as a reflection of the transactional nature of marriage. With the dominance of the transactional aspect in mind, it follows that this agreement should also have the ability to safeguard the parties’ rights in this life.

Depending on which of these two approaches regarding the understanding of marriage is taken—marriage as worship (*‘ibādāt*) or transaction (*mu‘āmalāt*)—the place and position of chapters on marriage contracts vary in these jurists’ texts. Jurists who regard it as more of a transaction and therefore as falling under the purview of *mu‘āmalāt* have placed their chapters on marriage after topics such as trade. Examples include al-Nawawī (d. 1277) in *al-Minhāj* putting marriage contract issues after their chapters on transactions (al-Nawawī n.d.). In contrast, al-Marghīnānī (d. 1135), who emphasizes the importance of marriage as an act of worship, in his work *al-Hidāya*, places the act of marriage as a topic after issues of worship (al-Marghīnānī n.d., vol. 1, pp. 224–25). Likewise, al-Sarakhsī (d. 1090) did the same in his work *al-Mabsūt* (al-Sarakhsī 2016). Taking marriage as worship or as a transaction and thinking that one side is more dominant over the other does not mean that the other is rejected outright. In other words, the two approaches are not necessarily mutually exclusive. al-Sarakhsī, who believed that the worship element of marriage is more prevalent, highlighted that the marriage contract is also a part of transactions in *al-Mabsūt* (al-Sarakhsī 2016, vol. 5, pp. 47–51).

As seen, even those who argue that the worship aspect of the marriage contract is more prominent emphasize that the transactional aspect of marriage is also very important. This approach is very critical in the context of secret marriages because, like other transactions, marriages should provide rights and responsibilities to the parties involved. However, before discussing the issue of rights and responsibilities, it is necessary to understand

the definition of secret marriage and its relationship with the requirement of witnesses and announcement.

3. Definition of Secret Marriages

Despite the consensus among scholars that secret marriage is prohibited, as clearly stated in the hadith (al-Tirmīdhī, *Nikāḥ*, 6), there are significant disagreements about what constitutes a secret marriage. Whether or not marriages are authorized to remain secret or unannounced after being performed in front of witnesses is the leading question within these disagreements. When reviewing the classical texts of Islamic law, it becomes evident that there are two approaches to defining secret marriages and that the issue is usually discussed in terms of what it is not, rather than what it is. Particularly in topics where questions of witnessing are raised, the subject of what does not constitute a “secret marriage” is addressed. According to the majority of jurists, including some Ḥanafī scholars, a marriage in front of witnesses cannot be considered a secret marriage even if witnesses are instructed not to share it with anyone. In other words, it is not considered secret if at least four people, including the parties, are aware of it (al-Shāfi‘ī 2001, vol. 5, p. 24; al-Sarakhsī 2016, vol. 5, p. 58; Bilmen n.d., vol. 2, p. 33). However, according to the Mālikīs, a secret marriage is an unannounced marriage where witnesses are told to keep it secret before or after the marriage contract (al-Saḥnūn 1909, vol. 5, p. 43).

The issues of secret marriages that were previously discussed in classical works have taken on different dimensions and have become rather complicated today. Numerous types of marriages that meet the minimum requirements specified in the classical literature that are not publicly announced to society or not recognized by official authorities have now emerged in both Muslim countries and non-Muslim countries. For example, in Yemen, “temporary marriage” is a type of marriage formed for a specific period of time to fulfill the desires of individuals. It is not publicly announced or legally recognized. Similar characteristics may be seen in the *misyār* marriage, where a woman willingly gives up rights such as alimony and residing with her husband, and the marriage is usually kept secret, although all the requirements are met for the construction of a valid marriage contract in the Gulf countries (Gunay 2012, p. 509; Kose 2009). Even though they differ in many ways, the majority of these marriages are performed secretly with the idea of saving the couples the financial and moral obligations that a marriage contract imposes. Additionally, some of these marriages are not conducted in secret. Marriages based on customs and traditions which are frequently unregistered, and are typically referred to as “customary marriages” in Egypt, can be assessed within this scope. In Egypt, customary marriages take many different forms. While certain kinds are kept a secret from the public and the other wife, other types are announced but unregistered by authorities (Shahrani 2010, pp. 14–16).

Misyār or temporary marriages are not considered significant enough to be a concern when we examine the Turkish context. However, there is an unregistered marriage, known as “Imam marriage”, which means that the marriages are held in the presence of the religious leader such as an *Imam* but not accepted as the official in Turkey (Apaydın 2000, p. 374). This type of marriage is practiced for various reasons, including Turkey’s official ban on polygamy, the belief that the official marriage does not fulfill religious requirements, and the idea that the partners must not sin during their meetings before the official religious marriage. However, the primary reason for the use of *Imam marriage* in Turkey is a concern that the official marriage does not meet the religious requirements. Because of this, the issue of marriage in Turkey has long struggled to balance being legal and religious. The fact that 93.7% of Turkish citizens additionally have an *Imam marriage* after the official marriage, as per a 2013 study by the Turkish Statistical Institute, demonstrates the significance of this issue and how it influences the vast majority of people (TUİK 2013). To reconcile this contradiction, on 25 July 2017, provincial and district Muftis were authorized to perform legally binding marriages alongside marriage officers. This means that individuals now have the option to have their marriage performed in the presence of a religious authority and officially registered through this arrangement. By

having the marriage contract performed in the presence of *Muftis*, some people's concerns about the official marriage not fulfilling religious requirements were alleviated.

It should be noted that while marriages concealed from society pose far more issues, marriage publicized to society but not recognized by the official authorities also have many problems. Even though the marriages that are announced to the public are not referred to as secret marriages, it is possible to view them in the same category as secret marriages due to the presence of similar issues such as both types of marriages being unable to protect the rights of the parties involved. To this end, we aim to address unregistered marriages in our article while highlighting the significance of witnessing and announcement requirements. The conditions of announcement or witnesses, which are outlined in classical literature, have a crucial place in terms of stabilizing the rights and obligations in marriage, as explained in detail in the following section. Nevertheless, currently, these conditions are no longer sufficient for establishing rights and obligations. Before the 20th century, it was sufficient to have two witnesses attest to the marriage contract when there was an issue; however, currently, weddings not registered by the official authority do not offer the parties any rights or obligations. There have been numerous studies investigating the issue of unregistered marriages in various countries. This article will examine the conditions of witnessing and announcement, which are considered by some people to be the basis of secret marriages and unregistered marriages, in greater detail at a theoretical level. In this regard, it is possible to refer to research examining the countries in which Muslims are a minority, such as England (Vora 2016) and the Netherlands (Moors 2013), or Muslim countries, such as Egypt (Shahrani 2010) and Turkey (Apaydin 2000; Gunay 2012; Kose 2012).

4. The Conditions of Marriage Contracts and Witnesses

Marriage entails certain rights and responsibilities for the parties involved, which include critical and significant matters such as determining and continuing the lineage, protecting chastity, setting up a dowry, providing for alimony, and ensuring inheritance rights. For this reason, additional conditions are laid down in the process of forming a marriage contract in Islamic law. In this part, instead of analyzing all the conditions of a marriage contract in detail, we will dwell upon the requirements of witnesses and the announcement.

According to the Ḥanafī madhhab, a marriage contract's foundation (*al-inʿiqād*) is an offer and acceptance. Testimony is a condition of the soundness of the contract, and the presence of witnesses is essential for discerning a contract from fornication (al-Maydānī 2002, p. 377; Ibn ʿĀbidīn 1994, p. 69; Bilmen n.d., vol. 2, p. 15). As for the Shāfiʿī madhhab, in addition to offer and acceptance, the guardian (for the virgin girl) and testimony are also considered the foundational to a marriage contract (al-Shīrāzī 1990, p. 426; al-Shirbīnī 1997, p. 165). The Mālikīs, like the Shāfiʿīs, also see the condition of the presence of a guardian as the basis of a marriage contract for the virgin girl, but they think differently about testimony (Ibn Rushd 2013, p. 448). The Mālikīs say that instead of testimony, the announcement is a requirement for marriage. As for the Ḥanbalī madhhab, the presence of witnesses is accepted as a condition of the contract. The contract will be void if a guardian and two witnesses are not present at the moment of offer and acceptance (al-Hirakī 1993, p. 99).

As previously stated, because a marriage contract fulfills its predetermined aim only under certain conditions, jurists have accepted asking for additional requirements for a marriage contract (Ibn Rushd 2013, p. 447; al-Shirbīnī 1997, p. 165). However, there are disagreements about what those additional conditions are. Whether testimony or announcement is the first and foremost aspect in accomplishing the aims of a marriage contract is a debated area. The stances of jurists on testimony or announcement influence how they define secret marriages.

The jurists who regard a marriage contract formed in secrecy as not lawful have given different answers to the issue of "in the case of witnesses being advised not to disclose the

contract to anyone, where they do not mention it to anyone, is this contract made in secrecy, or not due to the presence of two witnesses?" The views and arguments of jurists about the condition of testimony will be presented in the next section to understand this query better.

5. The Views and Arguments of the Majority Who Consider Testimony as a Condition

One of the leading legal schools that set witnesses' presence during a marriage contract as a condition is the school of Ḥanafīs. For the Ḥanafīs, testimony is a condition of the soundness of the contract, and the presence of witnesses is essential for differentiating a contract from fornication. The reason testimony is necessitated is to validate the marriage contract in case of any disagreement and conflict or the denial of the marriage contract. In addition, the Ḥanafīs interpret the hadith on the announcement as recommended and not required, in contrast to the Mālikīs (al-Kasānī 1998, vol. 2, p. 252).

The Ḥanafīs consider the most significant point in support of requiring witnesses for a marriage contract to be the hadith, which explicitly states that a marriage contract cannot be valid without testimony (al-Bukhārī 1999, al-Shahādāt, 8). al-Jaṣṣāṣ (d. 981) criticizes scholars who do not accept this hadith (al-Jaṣṣāṣ 2010, vol. 2, pp. 243–45). al-Sarakhsī further emphasizes that the hadith indicates there must be witnesses present for a marriage contract to be valid (al-Sarakhsī 2016, vol. 5, p. 58).

Asserting that the Ḥanafīs carry out deeds based on this hadith, al-Sarakhsī quotes the opinions of Imam Mālik, Ibn Abī Laylā, 'Uthmān al-Battī on disproving the requirement of testimony as it does not act in accordance with this hadith. He also discusses their perspectives on the fundamental condition of marriage, which is proclamation (al-Sarakhsī 2016, vol. 5, p. 58). al-Sarakhsī narrates a statement of Prophet Muhammad, "Announce your marriage even if you use only a drum," as an argument for this view. In another hadith, the Prophet Muhammad attends the wedding of one of the Ansar, and he asks the whereabouts of the witnesses. Hereupon, a drum is fetched, and the Prophet Muhammad commands them to play it. The rational evidence that these jurists present is connected to the fact that what makes the action unlawful is its secrecy. The legitimate state of marriage is only possible with the announcement, which is the opposite of secrecy and removes all the related indictments (al-Sarakhsī 2016, vol. 5, p. 58).

After listing the evidence of the Mālikīs, al-Sarakhsī provides evidence of the Ḥanafīs. The primary evidence that he mentions is the hadith: every marriage contract is a kind of fornication when no four people are ready for the contract. These four people are the man who asks for the marriage, the guardian of the woman, and the two witnesses. Additionally, according to al-Sarakhsī, since the condition of the marriage proposal is to make it public, it is also possible with the witness of these two people, as the witness of these two people makes this pledge no longer a secret (al-Sarakhsī 2016, vol. 5, p. 58). For the Ḥanafīs, testimony is preferred to an announcement. Since testimony is borne during the contract, it is a more dependable solution. On the other hand, the announcement is made after the contract, not along the way of the contract (al-Jaṣṣāṣ 2010, vol. 4, pp. 243–45).

It is still a valid contract for the Ḥanafīs when the witnesses are told to keep the contract a secret if they are present during the marriage contract. In this regard, as Bilmen (d. 1971) notes, since the testimony is legitimate, the contract is valid for the Ḥanafī jurists; keeping the marriage secret does not undermine the contract. Even though it is better not to conceal the marriage, namely, to announce it, it is no longer a secret, as two people now know of it (Bilmen n.d., vol. 2, p. 33).

The Shāfi'īs, on the other hand, who consider testimony to be a part of the conditions required for initiating the contract, rather than a part of the conditions necessary for the soundness of the contract, agree with the Ḥanafīs about the differences between the conditions of testimony and announcement. In his work *al-Umm*, Imam al-Shāfi'ī (d. 820) states that it is obligatory to have two upright witnesses for a marriage contract and that a marriage contract is invalid if this condition is lacking (al-Shāfi'ī 2001, vol. 5, p. 23). Imam Shāfi'ī states that a marriage contract made without any witnesses yet announced later is

not lawful (al-Shāfi‘ī 2001, vol. 5, p. 24). In addition to the presence of two witnesses, the Shāfi‘īs necessitate that these two witnesses be male and upright (al-Rāfi‘ī 2005, p. 290).

Like the Shāfi‘īs, the Ḥanbalī madhhab regards a marriage contract performed without witnesses as incomplete. The Ḥanbalīs put forward certain conditions for testimony to be valid: there must be at least two witnesses, they must be male and Muslim, and they must have, at least seemingly, the quality of sound judgment (Ibn Qudamah 2000, pp. 303–6).

Consequently, the hadith, as mentioned earlier, is the essential reference point for scholars who regard the condition of testimony as sufficient and do not consider the condition of the marriage contract as necessary for a valid marriage contract. Indeed, it is specified in the hadith clearly and explicitly that a marriage contract would not be valid without witnesses. There is a significant relation between emphasizing witnesses and the prohibition of secret marriages in the hadith. The most important justification for prohibiting secret marriages is to safeguard the rights of women and unborn children, including those related to inheritance, dowry, and alimony paid for lineage. If a marriage contract is created without witnesses who can intervene in case of a conflict, or if the contract is secretive, it will result in various rights violations.

6. The Views and Arguments of the Mālikīs

The Mālikīs are among the scholars who stand on the side of proclamation in a marriage contract. What is needed for determining the responsibilities and rights, and what prevents a marriage contract from being a secret is not the presence of witnesses during the contract for the Mālikīs scholars but its announcement. Ibn Rushd offers significant insights into the concept of testimony and delves into the opinions and arguments of other jurists who view it as a mandatory prerequisite. A hadith frequently cited by those who argue for the necessity of testimony is narrated by Ibn ‘Abbās. Nevertheless, Ibn Rushd notes that this hadith has many unknown *Rāwis* (transmitters). For Ibn Rushd, it is incorrect to say that no companion of the Prophet Muhammad disagreed with Ibn ‘Abbās; even most scholars accepted this as *ijma’*, a consensus among Islamic scholars (Ibn Rushd 2013, p. 448). In addition, scholars such as Abū Thawr also said that testimony during a marriage contract’s performance is not obligatory. It is even narrated that al-Ḥasan b. ‘Alī performed a marriage contract without witnesses and publicly announced it (Ibn Rushd 2013, p. 448). Ibn Rushd’s evidence about a marriage contract without witnesses is crucial. In addition to asserting both rational and textual evidence, Ibn Rushd also remarks upon examples like that of al-Ḥasan b. ‘Alī, no matter how disputable its reliability is. The fact that Ibn Rushd gives this example indicates that this case is applicable in theory and is administered in practice.

According to the Ḥanafīs, it should be noted that the Prophet Muhammad both required the announcement and stated that a marriage contract must be performed with two witnesses. One of these narrations is broader than the other. The hadith about witnesses constrains the other broader hadith about the announcements. In other words, making a marriage contract in the presence of two people suffices for the announcement condition (al-Marghīnānī n.d., vol. 1, pp. 224–25).

When the texts of the Mālikī jurists are analyzed, it becomes clear that the stress on announcements is related to secret marriages. Therefore, secret marriages are strictly forbidden, according to Mālikī jurists. What removes the secrecy of a marriage is the announcement, which is the opposite of secrecy. Therefore, for the Mālikīs, an unannounced marriage is considered a secret marriage despite being made in the presence of witnesses, and concealing a marriage is prohibited, as stated in the hadith.

Jurists who do not consider the establishment of a marriage contract in secrecy to be legitimate have different opinions on whether a marriage is considered secret when the contract is formed with two witnesses who are instructed not to inform anyone afterward and comply with this instruction. Treating it as a secret contract, Imam Mālik claims that this contract would be nullified despite the presence of witnesses. Imam Abū Hanīfa and

Imam Shāfi‘ī adopt the idea that this contract is not a secret one, for it is performed before the eyes of witnesses (Ibn Rushd 2013, p. 448).

Ibn Rushd makes significant explanations concerning whether a marriage contract made in the presence of witnesses can be called a secret. For Ibn Rushd, the basis of announcing a marriage tracks back to the hadith. In this regard, the Prophet Muhammad utters, “Perform the marriages before the eyes of people and play the daf.” ‘Umar also stated about a marriage: “This is a secretly made marriage. If I probe into this marriage, I will stone them to death.” (Ibn Rushd 2013, p. 448). As can be seen, both the remarks of the Prophet Muhammad and the approach of ‘Umar highlight the prohibition of secret marriages. The explanations of ‘Umar, in particular, are highly remarkable. The utterance of ‘Umar that if I probe into their marriage, I will stone them into death, demonstrates that secret marriages are a case of fornication. As can be comprehended from this analogy, the Mālikī scholars assert that the purpose of testimony is the announcement of the marriage; consequently, a testimony that does not meet this condition is invalid. In this respect, when the hadith that the Mālikī scholars take as evidence is scrutinized in parallel with their viewpoints, it is understood that the announcement of a marriage contract is of great significance. To the Mālikī madhhab, there is no need for the attendance of a witness at the moment a marriage contract is being performed. Although two witnesses are present as the marriage contract is being made, this contract must be nullified if the witnesses agree to conceal the marriage.

Furthermore, according to the Mālikī scholars, the announcement is necessary depending on the principle of “*sadd al-dharā’i*” (blocking the means). In other words, announcing a marriage after the contract is a precaution to prevent the denial of the marriage, to solve disputes regarding the issues of marriages, and not to incriminate the parties for fornication (al-Qarāfi 1994, vol. 4, p. 400). If the witnesses are instructed to keep a marriage contract confidential, then it is necessary to create a new agreement and carry it out transparently without any secrecy involved (al-Sahnūn 1909, vol. 4, p. 43). Therefore, when the relevant narrations, such as announcing the marriage, playing the drum for the wedding, and performing marriage contracts in masjids, are examined and considered, it is understood that the crucial aspect of a marriage contract is the announcement. For this reason, a marriage contract is not fulfilled when only two people know about it.

Although the Mālikīs, who argue that the announcement of the marriage is necessary, remain in the minority, their evidence is at least as strong as the majority’s evidence. Additionally, it is an important detail that Mālikīs take into consideration the principle of “*sadd al-dharā’i*” while using hadith as evidence in this matter. Indeed, the announcement of the marriage is more effective in determining rights and responsibilities than the witness. When considering the conditions and circumstances of today and the practice of secret marriages, the approach of the Mālikīs is more effective in preventing problems. The view of the majority, which considers the presence of witnesses as sufficient, opens the door to secret marriages. Therefore, although Diyanet (the Directorate of Religious Affairs) generally adopts the Ḥanafī view, it issues fatwas on this particular matter with the view of the Mālikīs. According to Diyanet, it is also necessary for marriages to be announced after they are contracted in the presence of witnesses (3 November 2022).

As per the argument presented in this article, along with the witness requirement, there should be a mandatory announcement. When analyzing the opinions of the majority, who consider two suitable witnesses to be sufficient, it can be seen that this requirement is to prevent future disputes. Therefore, all necessary requirements for solving potential problems in the future should be met at the establishment of the marriage contract. Furthermore, it should be noted that in today’s world, the announcement of marriage is also not sufficient in determining rights and responsibilities by official authorities. Subsequently, the article will examine the significance of officially registering marriages in modern state systems, particularly in Muslim countries, in addition to publicly announcing the marriage.

7. The Meaning of Witnessing or Announcement and Formality in Ottoman Family Law

One of the important issues that should be emphasized in the conditions of witnessing or announcement is the meaning of this condition. The focus should be placed on the relationship between the contract and the witnessing or announcement, and whether this requirement is only relevant to the establishment of the contract soundly or whether it also serves as a tool for the party who is treated unfairly to use as evidence if the other party violates the terms of the contract. The primary foundation for the witnessing matter is derived from the Surah al-Baqarah verse 282. To grasp the true significance of testimony, it is essential to consider Imam Māturidī's explanation of it, particularly in the interpretation of this verse. In his view, testimony is not just a component of the pledge but also an evidence tool that must be used to prevent rights from being lost in case of a dispute between the parties. For him, this is the meaning of the command to hold a witness in verse (al-Māturidī 2005, vol. 2, p. 209).

Similar to Imam Māturidī's approach, one of the leading Shāfi'ī scholars also emphasized essential points regarding testimony. For him, a marriage contract is unique among other contracts because it affects the rights of other people, particularly the rights of children. For this reason, the presence of witnesses when a marriage contract is being performed is seen as a condition contrary to other contracts (al-Rāfi'ī 1998, vol. 7, pp. 515–16). al-Rāfi'ī considers the condition of testimony as connected with the protection of rights. Therefore, the crucial question is whether witnessing or announcement now completely serves its previous purpose in terms of its significance and meaning.

When we analyze the views of Islamic scholars regarding this issue, it is understood that the conditions of testimony and announcement are connected to the matter of secret marriages because the secrecy of a marriage prevents the taking of rights and the fulfillment of responsibilities. Testimony or announcement aims to prevent the construction of a marriage contract that is likely to give rise to a violation of rights.

In light of the modern paradigm, it is important to carefully consider whether the issue of testimony and announcement facilitates the identification of rights and obligations. If including the conditions of announcement and testimony affects the protection of such various outcomes of a contract as lineage, heritage, alimony, and dowry, then it is necessary to take additional precautions to protect these rights. The condition that today's marriage contracts need to be affirmed by an official authority is similar to the conditions of testimony or announcement.

The matter of registering marriage contracts legally is not a new one, as there were important cases related to it during the Ottoman era. At that time, penalties were imposed on marriage contracts made without the permission of a Muslim judge (qadī), which is required for marriages conducted according to the law. In the era of Bayazid I (d. 1403), there are data indicating that the court conducted marriages and received a fee from the parties (Aydm 1985, p. 88).

In small settlements, such as villages, the *Imams* authorized by the Muslim judges perform marriage contracts. Until the establishment of the *Mukhtar* system, since the official representative of the state in these regions was the *Imam*, it was deemed necessary for the marriage to be conducted in the presence of the *Imam* in order to ensure the rights of the marrying parties are guaranteed by the law in the Ottoman Empire. Based on this practice, the people who are to get married go to the court in person or by sending their guardians or inviting the court official to their house, and their marriage is made official in the presence of witnesses. In order not to experience problems related to the marriage process, the parties bring a document or a letter of authority from the Muslim judge showing that there is no obstacle to having a marriage contract (Aydm 1985, p. 90).

In addition to the prohibition of marriage without the permission of a Muslim judge, certain problems arise for the parties in cases where there is no record (Ortaylı 1980, p. 37). This issue is clearly expressed in the fatwas of Shayk al-Islam Abū al-Su'ūd, (in modern Turkish, Ebussuud Efendi d. 1574), who issued a fatwa stating that marriages held without

the judge's permission are prohibited. The fatwa is as follows: "Is a marriage contract without the knowledge of the judge valid when there is an order of the Sultan that marriage is not possible without the knowledge of the judge? The response: It is not valid for the sake of avoiding hostility and dispute" (Duzdag 1972, p. 38). As can be seen in Abū al-Su'ūd's fatwa, a marriage without the permission of the judge is not considered valid. Despite laws being enacted, attempts to place the condition under state authority were not successful because it is not considered a contract condition in classical Islamic law. Additionally, because of the absence of a modern state system at that time, it was difficult to monitor whether marriages in areas distant from the center were being registered or not.

Towards the end of the 19th century, greater importance was given to the "official" marriage contracts under the supervision and control of the state, although it had been made compulsory since the period of Mahmud the Second (d. 1839). In fact, in the Registry of Population Regulation on 2 September 1881, it was ordered that the marriages were required to be based on the permission given by the religious courts, and the status of the *Imam* who would perform the marriage should be reported to the registered registrar within eight days (Aydm 1982, pp. 1–12). In the enactment of family law dated 1917, the principles of proclaiming the marriage before its execution, the presence of the judge or a deputy judge authorized by the special permission of the judge during the marriage, and issuing the contract are included.

Despite adopting a Hanafi-based legal system, the Ottoman authority did not attempt to govern any school of thought until recently. Still, codification activities gained momentum due to the time's political, economic, and sociological circumstances, particularly after the *Tanzimat*. One of the last examples of the legalization movements that started shortly after the *Tanzimat* was the 1917 Decree of Family Law (*Hukuk-ı Aile Kararnamesi*). In the history of Islamic and Ottoman law, this Decree is regarded as the pioneering example of family law. Although it was only in effect for approximately a year and a half in the Ottoman Empire, it remained in effect for longer periods in countries such as Syria, Jordan, Lebanon, and Palestine, and had a considerable impact on the development of Islamic law despite its short life (Aydm 1998, vol. 18, pp. 314–18). The Decree of Family Law comprises 157 items and is divided into 2 parts (books), 9 chapters, and 20 subsections. The Decree of Family Law is not an entirely comprehensive family law, despite the advances it has brought. For example, the Decree does not specify the provisions of lineage, care, and supervision of children in case of a divorce, guardianship, property regulation, and alimony about kinship.

One of the issues that the Decree focuses on is the requirement of witnessing and an announcement during the marriage contract. According to articles 33 and 34 of the Decree, announcement and testimony both are required for the marriage contract (Oge 2017, p. 30). As stated above, both the requirement to announce marriage contracts based on the views of the Mālikī madhhab and the requirement to have witnesses present during the contract were preserved.

Additionally, according to the regulation in the Decree, "The judge of the district where one of the male or female parties who will marry during the marriage contract resides or an officer assigned by him is present, arranges, and registers the marriage contract." (The 1917 Decree of Family Law, article 37).

Taking the opinions of Mālikī madhhab in the Family Law Decree and introducing the registration condition, which is not included in the marriage conditions of classical Hanafi madhhab, can be regarded as addressing the various needs and benefits of that period. Similarly, this arrangement attempted to prevent undesirable circumstances, such as several marriages without the first spouse's or the family's knowledge. This modification in the Family Law Decree is a significant prelude to today's discussions. It may be reasonable to explain why, with the shift in society and governmental structure, the scholars who regulate the Family Decree in law, despite their strict adherence to the Hanafi madhhab, do not consider that the witnessing condition is sufficient. Likewise, for the marriages to be recognized by the state authority, they must be performed in the presence of a civil servant.

Therefore, in the modern world, not only does the marriage require witnesses, but it should also be recognized by the official authorities to prevent secret marriages and violations of rights for both the parties and the children from being born.

As it is stated in the family decree, today, as well as being held in the presence of witnesses, marriages should be announced and registered by official authorities, especially in Muslim countries. However, it is not possible to say that couples who have sexual intercourse because of such a marriage commit adultery. There are two pieces of evidence that can be presented to illustrate this. First, according to Ḥanafīs, adultery requires the absence of both marriage and the doubt of an existence of a marriage between the couple (al-Kasānī 1986, vol. 2, p. 252). Secondly, according to the jurists, the person who thinks that he is having sexual intercourse with his wife has not committed adultery. Therefore, sexual intercourse is not considered adultery because of the possibility of the woman being his wife (Esen 2013, vol. 44, p. 440). In addition, there is a doubt that the parties are spouses. In both respects, it is not possible to consider this sexual intercourse as adultery.

8. Some Views on Secret and Unregistered Marriages Today

The issue of secret marriage and unregistered marriage is becoming an increasingly important problem in non-Muslim and Muslim countries. Although we do not have clear data because there is no detailed field of study on these issues, the increase in academic works on the subject and that it is the subject of fatwas show how much the issue has become known. The article by Lisa L. Wynn (2016), in which she describes the examples in Egypt, or the post of Adeel Zeb, a Muslim chaplain at Claremont Colleges, provide some examples of this (Green 2022).

Marriages conducted in the presence of two witnesses but not recognized by an official authority and not announced cause various problems. Lisa L. Wynn (2016), in her article titled "Like a Virgin," and Emma Green (2022), in her article describing the experiences of secret marriage partners, illustrate the problems in detail. Especially secret marriages, which affect families and society, are mostly short-term because they are not built on solid foundations. Since these marriages are not official, the parties cannot benefit from any rights after separation. Women are deprived of rights such as *mahr*, alimony, and inheritance, while children are deprived of rights such as lineage, alimony, and inheritance. In many instances, it is seen that the father abandoned the woman and the child and that the child has no ties to the father and the family on the father's side. For this reason, children born from this kind of marriage face many psychosocial problems (Sidiya 2010).

Many Islamic scholars oppose marriages that are secret and not recognized by the official authority. For example, Shaykh Mohammad Akram Nadwi (2022), who said that secret marriage should be banned, stated the following: "Secret marriage is one of several kinds of violation by men of the rights and dignity of women. This violates the laws and good purposes of marriage and a vicious exploitation of women whose circumstances oblige them to enter such contracts."

The Diyanet (3 November 2022), which approaches the issue similarly, states the following:

"A marriage held secret from the families and close circles despite being conducted in the presence of witnesses is called a secret marriage. It is against the general principles of religion regarding marriage and family life since it does not meet the requirement of publicity that should be present in the marriage. Therefore, it cannot be said that a marriage contract known only by two witnesses is public."

Interestingly, the Diyanet did not find it sufficient to have witnesses and the parties in the marriage contract present, as the Ḥanafīs say. The Diyanet, which generally adheres to the Ḥanafī madhhab, in this case, has adopted the views of Mālikīs and defines secret marriage as one that has not been publicly announced. According to the Diyanet, marriages that are not publicly announced and are only performed in the presence of witnesses violate

the main tenets of Islam about marriage and family life. A marriage that has only two witnesses is regarded as having been secretly conducted.

The hadith that the Mālikīs also included in their texts appears first in the list of evidence that the Diyanet uses to support its position. As it is stated in the hadith, “Playing the drum and making an announcement is what distinguishes the halal marriage from the haram relationship” (al-Tirmīdhī 1996, Nikāh, 6). This hadith suggests that the marriage should be declared as per the explanations provided in Diyanet’s fatwa. The practices of Abū Bakr, which the Mālikī scholar named al-Saḥnūn (d. 855) included in his book titled *al-Mudawwana*, are another piece of evidence given by the Diyanet (Diyanet 2022).

In addition to these approaches, some scholars do not recommend this type of marriage but think it is permissible since publicity is not considered among the necessary conditions for forming a marriage contract in classical Ḥanafī fiqh books. For example, according to some fatwa organizations such as the Deoband (3 November 2022), a marriage is valid if it fulfills the conditions put forward by the jurists. The answer they provide to a question about secret marriage is as follows:

“If you and the girl were present in the same meeting and the *ijab-o-qubool* of *nikāḥ* (proper exchange of *nikāḥ* statements) was done in the presence of two witnesses, then the *nikāḥ* was valid. However, you did not do good in performing *nikāḥ* without informing your parents.”

Unregistered marriages are similar to secret marriages in terms of the inability to establish rights and responsibilities. However, despite clear fatwas being issued regarding secret marriages, there are not many fatwas stating that marriage must be recorded officially. For example, the Diyanet remains silent on the issue of registering the marriage, even though it says that marriage must be announced. It would not be expected for the Diyanet, as an official institution, to state that marriages could be valid even if they were not recorded.

Similarly, many fatwa institutions do not provide a clear answer to the question about unofficial marriages. For example, the Jordan Ifta department (17 January 2023) (Iftaa Department (Jordan) 2023) has provided the following answer:

“In order for a marriage contract to be considered valid, there has to be a Wali (Guardian) of the bride, two honorable witnesses, and the contract has to be documented at an Islamic court. And Allah the Almighty knows best.”

In addition to the above fatwa, the department answered another question asked about unregistered marriage, as follows (17 January 2023):

“It is imperative that you proclaim this marriage to preserve rights. Therefore, you must register it in an Islamic court. A second marriage isn’t forbidden, however, if the unregistered marriage had taken place without the consent of the woman’s guardian nor the presence of two honorable witnesses, then it is considered void and your relationship with this woman is forbidden. Therefore, you must conclude a new marriage contract with the approval of her guardian and the presence of two honorable witnesses. We advise you to fear Allah and adhere to the teachings of Sharia in this regard since sinful conduct is that which turns in your heart (making you feel uncomfortable), and you dislike that it would be disclosed to other people. Allah the Almighty knows best.”

It may not be possible for official fatwa institutions, especially in Muslim countries, to give a fatwa that contradicts the laws requiring the registration of marriages. Therefore, it can be said that they either do not bring up this issue at all or provide ambiguous answers to related questions.

9. Conclusions

The requirements of witnesses or public announcement in marriage are critical in determining whether a marriage is secret or not. The debate around this issue is closely tied to the meaning and significance of these conditions in the marriage contract. While the

majority view, including the Ḥanafīs, maintains that a marriage contract conducted in front of two witnesses is not considered a secret marriage, the Mālikī madhhab takes a different stance and considers any marriage not publicly announced, even if performed in front of witnesses, to be a secret marriage.

This article concluded that announcing marriages is necessary, based on the hadith promoting announcements, the example set by companions such as ‘Umar and Abū Bakr, and the negative social consequences associated with secret marriages. Although the Mālikīs, who argue that the announcement of the marriage is necessary, remain in the minority, their evidence is as strong as the majority’s evidence. In addition, this view is more functional today for the determination of rights and responsibilities. Therefore, the Diyanet follow the Mālikī approach in this issue.

Additionally, as is underlined in the article, debates on secret marriages now take on a new angle. Because informal marriages are concealed from state authorities, and the parties cannot obtain their rights, whether these marriages may be categorized under the same framework has been investigated. Although it cannot be stated that marriages declared to the public but not registered are secret marriages by name, these marriages, like secret marriages, deprive the parties and offspring of these unions of their legal rights; hence, it is important to consider them in a similar way to secret marriages. As highlighted in this article, the witness and announcement requirement holds great importance in safeguarding rights and obligations. Imam Māturidī clarified this point in his interpretation of the verse concerning bearing testimony. Likewise, witnessing entails defending rights, according to some jurists such as al-Rāfi‘ī. Whether the witnessing requirement is a Shari‘ah order or merely a precaution against further discussion arose from the dispute among the jurists on the testimony or announcement requirement.

The issue of the protection of rights, which is established through witnessing and announcement, is today related to registration. Although the jurists have different views on the condition of witnessing and announcement, it has been emphasized that marriage should commonly protect rights. The witnessing, which ensured the protection of the rights of parties and children in the past and prevented the loss of lineage, should be seen as equivalent to registration today. For this reason, the Ottoman state also stipulated that the official authority must approve the marriage. Considering the significance of marriage, its fundamental goals, and its compatibility with moral values, marriage must be registered with the official authority, particularly in Muslim countries. Given the uniqueness of the minority Muslim population in non-Muslim countries, a separate article should be written with in-depth criticism of their situation.

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