

**THE ESTABLISHING OF MARRIAGE (*ITSBAT NIKAH*) FOR *SIRRI* MARRIAGE
IN BANTUL RELIGIOUS COURT AFTER THE ENACTMENT OF THE
LAW NUMBER 1 OF 1974 ON MARRIAGE**

PUBLICATION MANUSCRIPT



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Field of Study : Civil Law

**FACULTY OF LAW
UNIVERSITAS MUHAMMADIYAH YOGYAKARTA**

2018

APPROVAL PAGE

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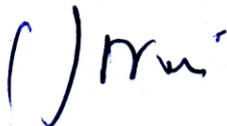
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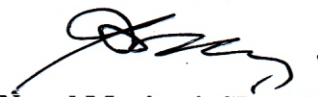
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On, February 9th, 2018

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ABSTRACT

According to Article 7 paragraph (1) of the Compilation of Islamic Law marriage for people who are married according to Islamic law can only be proved by the Deed of Marriage made by the Registrar Officer. On one hand, the marriage law states that marriage registration is the only evidence of the occurrence of marriage, but the law provides way out for people who cannot prove the existence of such marriage by way of determination of marriage (*itsbat nikah*) from the Religious Courts. This research aim at to elaborate the cours of *sirri* marriage, urgency of *itsbat* marriage and process of re- establishment (*itsbat*) of marriage at the religious court of Bantul. It is a normative and empirical legal research. This reaserch is a qualitative research using case approach. Thus the technique od data collecting is primary data that is bantul religious court decision. The result of this research shows that (*Itsbat nikah*) is a re-establishment of marriage that has been done, because of doubt on whether or not the marriage is legitimate, or the marriage cannot be proven by authentic deed (marriage certificate). The applicant appealed to the Religious Courts, so that the marriage can be legalized, and to further obtain the marriage certificate. *Itsbat nikah* is one of the authority of the Religious court. The existence of *itsbat* from the Religious Court will affect the marital status, where the marriage has been have the power of the law, the children who are born in the marriage received state recognition, and provide a guarantee on the rights of wives and children.

Keywords: *Marriage, Itsbat Marriage, legitimate, and Religious Court*

1. INTRODUCTION

Marriage is the strong bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Supreme Godhead.¹ One of the goals of marriage is to achieve the happiness of the life of the world of the hereafter and to abstain from adultery.

Marriage is protected by religion and state to create order in society, so every citizen must follow the rules. The Law Number 1 of 1974 on marriage states that marriage is lawful if it is done according to the law of each religion. The marriage according to Islam is valid if it fulfills *rukun* and term of marriage, but it has no legal power before it is registered at the marriage registrar's office. The function of marriage registration is to ensure lawful order which has a function as an instrument of legal certainty, legal convenience, and as the evidence of marriage.

In fact, there are still many marriages done without being registered in the office of religious affairs or civil registration as a marriage registrar that eventually cause problems someday, like marriage *sirri*.

Sirri marriage is a form of marriage which develops in the Muslim population of Indonesia. *Sirri* tries to avoid the marriage regulation system under the Marriage Law. For this reason, the applicant takes his own way which is not contrary to Islam. *Sirri* marriage does not have any legal effect because it does not have a marriage certificate. This means that if a husband

¹ Law No 1 of 1974 on Marriage, Article 1

or wife does not fulfill its obligations, then the wife cannot demand anything from the court. Even if one dies (husband/wife), then one cannot inherit the property. *Sirri* marriage in the hands of these legal system has a very high risk and very detrimental to women, especially in children which have been born.² The children will face difficulty in making administrative document such as birth certificates, ID cards, and others. And also don't have the right to demand a maintenance or inheritance from father.

Generally, *sirri* marriage is defined as a marriage performed in accordance with the provisions of Islam and has no legal force because it has not been recorded by the marriage registry officer, therefore, its actor does not get an authentic deed or marriage certificate as proof of marriage.³ Because it does not meet the procedures for recording according to the relevant legislation, *sirri* marriage will bring many problems, especially about civil records. There are still many people in Indonesia who perform *siri* marriage. In case of marriage cannot be proven with the marriage certificate, that marriage may be filed to the Religious Court for re-establishment.

The re-establishment (*itsbat*) is an administrative act, which must be done so that a legal marriage according to religion has the force of law. Then, the judge of the Religious Courts can make a decree (*itsbat*) that a marriage is declared legitimate then ordered the marriage registry officials

² Faizah Bafadhal, "Nikah Siri dalam Perspektif Undang Undang" <http://www.e-jurnal.com/2016/03/nikah-siri-dalam-perspektif-undang.html>, accessed on Friday, December 1st 2017 at 09.55 am

³ Muhaimin, *Praktek Kawin arakat Islam Daerah Istimewa Yogyakarta*, Penelitian Fakultas Hukum UGM, Yogyakarta, 1993 p.21

to record it in the marriage register. Thus, with the establishment by the Religious Courts, a person may receive a marriage certificate issued by the Office of Religious Affairs based on the determination of the Religious Courts even though the marriage has been done long time before. The process of determination by the Religious Courts seems to be one way out in solving the *sirri* marriage problems.

2. RESEARCH METHOD

2.1. Type of Research

The type of this research is mixed between empirical and normative. Empirical legal research is research will have an interview with some respondent who is an expert on this issue. While Normative legal research is research based on the library research, focusing on reading and analyzing the secondary materials.

2.2. Type of Data

The data used in this research is primary data and secondary data. Primary data is the legal data which are authoritative in nature. This means the data have an authoritativeness. The secondary data closely related to primary legal materials and can help analyze and understand primary legal materials.⁴

1. The primary legal material consists of regulation as follow:

⁴ Suratman, Philips Dillah, 2014, *Metode Penelitian Hukum*, Bandung, Alfabeta, p.67

- a. The Law No. 1 of 1974 about Marriage
 - b. The Law No. 7 of 1989 on Religious Judiciary
 - c. The Law No. 3 of 2006 on Amendment to The Law number 7 of 1989 about Religious Court
 - d. The Law No.50 of 2009 on Religious Court.
 - e. The Law Number 22 the of 1946 about Recording of Marriage, Divorce, and Reconciliation
 - f. The Compilation of Islamic Law
2. The secondary legal material consists of several documents that related to the primary legal material as follows:
- a. Books
 - b. Scientific journals
 - c. Other legal documents related the issue
 - d. Black laws dictionary
 - e. Trusted internet sites
- Other non-legal documents related to this research.

2.3. Method of Collecting Data

The primary data is collected through an interview with judges of the Religious Court of Bantul and the secondary data is collected by reading, analyzing and making a conclusion from related documents. Among the documents are regulations, law books, legal journals, and others which related to the main problem as the object of this research.

2.4. Data Analysis

The data were analyzed systematically through descriptive qualitative. Which means it was analyzed based on regulation and its implementation, especially relating to the issue of establishment of *itsbat* marriage at the Religious Court of Bantul.

3. DISCUSSION

3.1. *Sirri* Marriage

A. Data of *Sirri* Marriage

Sirri Marriage is a marriage performed by someone in the presence of a guardian, fulfilling pillars and marriage conditions but not registered in the Office of Religious Affairs (KUA) with the agreement of both parties. There are many reasons and considerations for someone to do this *sirri* marriage. *Sirri* derived from Arabic, namely *sirri* or *sir* which means secret. The existence of a legal marriage is valid in religious norms but is not legal according to legal norms, because marriage is not recorded in the Office of Religious Affairs.

In the census conducted by non-governmental organizations Empowering female heads of household (PEKKA), 25 percent of the people in Indonesia carry out *sirri* marriage and customary marriage in 2012. This means that this marriage is not recorded in the country. This census was carried out in 111 villages from 17 provinces. There are several provinces where the number of marriage is above 50 percent. In NTT 78 percent, Banten 65 percent, and NTB 54 percent.

While the results of research from the R & D and Education and Training Ministry Ministry of Religion (badan Litbang dan Diklat Kementerian Agama) in nine regencies in Indonesia, many people carry out siri marriage and underage marriage because the stigma of the community will be spinster status. Of the nine districts, among others, East Java, West Java, NTB, South Kalimantan and Yogyakarta.

It is important to know that cases of *sirri* marriage have occurred in the society. For this reason, the researcher will explain the practice of *sirri* marriage that occurs in the community. The Researcher took the example of the case of an Indonesian artist who did a *sirri* marriage that has been by many people. The discussion about the practice of *sirri* marriage covers how the meaning of *sirri* marriage by Nikita Mirzani, the process of implementation and the factors that cause *sirri* marriage.

B. Causes of *Sirri* Marriage

- a. Low Public Awareness of the Law
- b. Pregnancy Outside of Marriage
- c. Avoiding Lawsuits
- d. Provisions on marriage records which is not strict
- e. Economic factor
- f. The Difficulty of polygamy permits

3.2. The Legal Status and The Legal Consequences of *Sirri* Marriage

A. The Legal Status of *Sirri* Marriage based on the Islamic Religion

The legal status of *sirri* marriage based on the Islamic religion is legal and is legalized if the terms and conditions of marriage are fulfilled when the *sirri* marriage was held. In principle, as long as the marriage of the *sirri* meets *rukun* and term are fulfilled, then the marriage law is basically legal. It's just contrary to the order of the Prophet, who recommended that the marriage be open and announced to others so as not to be slanderous. The term *siri* marriage is already known among scholars.⁵

B. The Legal Status of *Sirri* Marriage based on Civil Law

The legal status of *sirri* marriage based on the Civil Law is invalid and don't have legal protection. Because, marriage is done according to Islam, and supervised by a marriage registrar who is appointed by the Minister of Religion or an employee appointed by him. The important of marriage registration in civil registration office is so that someone has evidence to prove he/she really did the marriage. The marriage registration office issue an official documents or proof issued by the state.

C. Legal consequences of *sirri* marriage

Those legal consequences of *sirri* marriage including;

⁵ Amir Syarifuddin, *Hukum Nikah Islam di Indonesia: Antara Fikih Munakahat dan Undang-Undang Nikah* (Cet. II; Jakarta: Kencana, 2007), p. 59.

- 1) There is no legal force that remains against the legality of the marriage so that if there is a wife's right that is violated by the husband, the wife cannot claim the right legally.
- 2) The interests of husband and wife in the household cannot be protected.
- 3) There is no proof of marriage, and also birth certificate cannot be served.
- 4) *Sirri* marriage makes one partner especially husband free to leave obligations, even treats his wife by force.
- 5) *Sirri* marriage can disturb the benefits of religion.
- 6) Since the child's identity is unclear, as a result, if the parents died, the child had difficulties to get an inheritance from his parents.⁶

4. CONCLUSION AND SUGGESTION

4.1. Conclusion

Based on the discussion in Chapter Four, it could be concluded:

First, there are many *sirri* marriages in Indonesia today and truly happened. As we know, *Sirri* marriage is also done by Indonesian artist, Nikita Mirzani. The reason of her *sirri* marriage is the request of her husband and does not want to be known by many people because of shame if they fail again. like a previous marriage. The Nikita Mirzani's reason to

⁶ Ali Uraidi, "Perkawinan Sirri dan Akibat Hukumnya Ditinjau dari Undang Undang No. 1 tahun 1974". *jurnal ilmiah fenomena*, X (november 2012), p. 990

held *sirri* marriage is one of several factors that cause *sirri* marriage. The others are:

1. Low public awareness of the law
2. Pregnancy outside of marriage
3. Avoiding Lawsuits
4. Provisions on Marriage Records
5. Economic Factors
6. The difficulty of polygamy permits

Even though the *sirri* marriage is considered a legitimate marriage if it meets the terms and *rukun* of marriage according to Islamic Law, but the consequences caused by the *sirri* marriage are greater than the benefits. The legal consequences of *sirri* marriage including:

1. There is no legal force that remains against the legality of the marriage.
2. The interests of husband and wife in the household cannot be protected
3. Because there is no proof of marriage, the interests which include, ID card, passport, birth certificate cannot be served.
4. *Sirri* marriage makes one partner especially husband free to leave obligations,
5. *Sirri* marriage can disturb the benefits of religion.

6. With no record of marriage by marriage registrars, then the child who is born does not have a clear identity that can be proven legally.
7. Because the child's identity is unclear, as a result, if his parents died, the child had difficulties to get an inheritance from his parents. And the wife also found it difficult to declare herself a legitimate heir.

The legal status of *sirri* marriage according to Islam is valid if it fulfills *rukun* and legal requirements for marriage and the legal status of the *sirri* marriage according to the law has no legal power because it is not registered at the marriage registrar's office.

Second, Itsbat marriage is the most important part of solving the problem from the *sirri* marriage. The urgencies of *itsbat* marriage are;

1. The urgency of *itsbat* marriage for the wife
 - a. There is a permanent legal force on the legality of the marriage after *itsbat* marriage
 - b. Protect the right of the wife in getting maintenance from her husband and easeing in declaring that she is a legal heir as a wife when her husband passed away.
 - c. the wife can sue the husband to court if the husband wants to divorce him because it already has authentic evidence.
2. The urgency of *itsbat* marriage for the husband

- a. The husband has the right to be the guardian of his daughter's marriage in the future.
 - b. The husband will get legal protection regarding rights and obligations in the household.
3. The Urgency of *itsbat* marriage for children
- a. children born from *sirri* marriages will not only have a civil relationship with mother and mother's family but also with father's family
 - b. Children born in the *sirri* marriage after *itsbat* marriage have the right to demand a maintenance or inheritance from the father.
 - c. Children born to the marriage become legitimate children according to the state law.
 - d. Father is entitled to be a marriage guardian for his daughter
 - e. Do not have problems in making administrative interests such as birth certificates, identity card, and others

Third, the process of the establishment of marriage (*itsbat nikah*) for *sirri* marriage in Bantul Religious Court is as follow:

1. Submit an application
2. Registration
3. Calling the trial
4. Trial
5. Settlement

4.2. Recommendation

Based on the problem that has been discussed, it can be proposed two suggestions. *First*, Religious courts must be careful in examining and deciding cases. Be careful in checking whether the marriage is legal according to Islamic law and the reason for the application of *itsbat* marriage fulfills the requirements for the application of *itsbat* marriage based on Law 1 of 1974 concerning marriage or not. Because at this time so many *sirri* marriages without following *rukun* and terms of marriage based on Islamic law. And also based on the strong evidence and testimony of the witness who confirmed the marriage which has been proposed to the Bantul Religion Court.

Second, for the community because of many adverse effects of its marriage, especially for wives and children, as much as possible the community does not do *itsbat* marriage. And for people who have *sirri* marriage should immediately register the application for *itsbat* marriage to a religious court to avoid the adverse effects of its marriage.

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