

CHAPTER II

LITERATURE REVIEW

A. Marriage

Marriage between a man and a woman is essential instinct as a social being to continue offspring. Two people who pledged themselves to the marriage process must be based on one common goal to form a happy family. Therefore, marriage arrangements are not only based on legal norms made by humans, but also derived from religious law.

Marriage is a religious order which is governed by *Shari'a*.⁵ In Indonesia, marriage comes from the word “*kawin*” which means forming a family with the opposite sex, having sex. In general, it is used for animals, plants, and humans.⁶ Marriage is inner and outer relationships between a man and a woman as husband and wife with the aim of forming a happy and eternal household based on the believing in one God.⁷ Marriage, according to Islam is a contract to justify the sexual relations between men and women in order to realize the happiness of family life that is covered with a sense of peace in a way which be blessed by God.⁸ Marriage is a legitimate relationship between a man and a woman for a long time.⁹

Based on Article 6,7 and 8 of the Law No 1 of 1974 on Marriage, there are conditions of marriage that must be met, namely:

Article 6 of the Law No 1 of 1974 on Marriage about the term of marriage :

(1) A marriage shall be based on the consent of the two prospective brides and groom

⁵ Ahmad Atabik, “Pernikahan dan Hikmahnya dalam Prespektif Hukum Islam”, *Yudisia*, V, P.286

⁶ Susanto, Hakekat Perkawinan Menurut Undang Undang Perkawinan, *Jurnal Hukum*, VII, (Desember, 2016)p.415

⁷ Law No 1 of 1974 on Marriage, Article 1

⁸ Ahmad Azhar Basyir, 1999, *Hukum Perdata Indonesia*, Yogyakarta, UII Press, p.14

⁹ Titik Triwulan Tutik, 2006, Jakarta, *Pengantar Hukum Perdata*, Prestasi Pustaka, p.55

- (2) Marriage of a person under age of 21 (twenty-one) years shall obtain the consent from both parents.
- (3) In the event that one of the parents has decrease or is unable to state their will, the consent referred to in Paragraph (2) of this Article is sufficient to be obtained from the surviving parent or from a parent capable of expressing his will.
- (4) In the case of both parents have decrease or are unable to express their will, the consent shall be obtained from the guardian of the nurturing person or family having blood relationships in straight lineage as long as they are alive and in a state of declaring their will.
- (5) In the case of any discrepancy between persons referred to in Paragraphs (2), (3) and (4) of this Article, or one or more of them not expressing their opinion, the Court in the area of residence of the person who will carry on marriage at the request of that person may grant permission after first hearing the persons referred to in Paragraphs (2), (3) and (4) in this Article.
- (6) The provisions of Paragraphs (1) to Paragraph (5) of this Article are applicable as long as the laws of their respective faiths and beliefs of the other do not specify otherwise.

Article 7 of the Law No 1 of 1974 on Marriage about the term of marriage :

- (1) Marriage is only permitted if the male marriage candidate has reached the age of 19 (nineteen) and the female marriage candidate has reached the age of 16 (sixteen).
- (2) In the event of any deviation of paragraph (1) of this article may request a dispensation to the Court or other Official appointed by both the male and the female parent.
- (3) The provisions concerning the circumstances of one or both parents in Article 6 Paragraphs (3) and (4) of this Law shall also apply in the case of the dispensation

request referred to in Paragraph (2) of this Article with no prejudice to Article 6 Paragraph (6).

Article 8 of the Law No 1 of 1974 on Marriage about the term of marriage

Marriage is prohibited between two people, namely :

- (1) related blood in the lineage straight down or up;
- (2) related blood in the lateral lineage between the brothers, between a person with a parent's brother and between a person and his grandparents;
- (3) related by marriage (*semenda*), that is in-laws, stepchildren, son-in-law and mother/stepfather;
- (4) related to feeding, child susceptible, relatives and aunt/uncle;
- (5) relate to a wife or as an aunt or niece of a wife, in the case of a husband having more than one wife;
- (6) who has a relationship which by his religion or any other applicable law is prohibited from mating.

The terms of marriage according to Islamic law, namely: the existence of a free agreement, have *baligh*, and there is no barrier to marriage.¹⁰ Meanwhile, according to Islamic Law Compilation, to carry out marriage there must be a husband candidate, wife candidate, marriage witness, two witnesses, as well as offer (*ijab*) and acceptance (*Kabul*).¹¹

¹⁰ M Idris Ramulyo, 2000, *Hukum Perkawinan, Hukum Kewarisan, Hukum Peradilan Agama dan Zakat Menurut Hukum Islam*, Jakarta, Sinar Grafika, p 72

¹¹ Simanjuntak, 2016, *Hukum Perdata Indonesia*, Jakarta, Prenadamedia Group, p 80

Based on the Indonesian Civil Law, the legal requirement of marriage (material requirements) namely:

1. The application of the monogamous principle
2. There must be an agreement and a free will between the man and the woman
3. A man (18 years old) and a woman (15 years old)
4. There is a waiting period for a divorced woman, which is 300 days after divorce.
5. For the parties who are still underage, must have permission from their parents.¹²

Every marriage should be recorded. The marriage registration is done by the marriage registrar. Every marriage must be held in the presence and under the supervision of the marriage clerk. Marriages performed outside the supervision of the marriage registry officials do not have the force of law. The unregistered marriage in society is known as *Sirri* marriage. *Sirri* marriage is defined by the community with: First; marriage without a guardian. This kind of marriage is done in secret because the guardian does not agree; or because they consider the legitimate marriage without a guardian; or just because they want to satisfy the passions of lust without ignoring the provisions of the *Shari'a*.

Second, the marriage is legitimately religious but it is not registered in the state registration agency. Many factors cause a personal relevance to register his marriage at a civil state registration institution. Some are due to cost factors, or can not pay for the administration of records. There is also fear of being caught breaking the rules prohibiting civil servants for polygamy, etc; Third, marriage is kept secret for certain considerations; e.g. for fear of getting negative comments from the public; or because of complicated considerations that make a person to keep his marriage secret.

¹² *Ibid.*

Because *sirri* marriage is not recorded by the marriage registry officer, that marriage has no legal force.¹³ This can be bad for the wife and the children which will not be protected such as in inheritance, birth certificate, and others. To protect the rights of the wife and children, the parent should do a marital *itsbat*.

B. *Sirri* Marriage

Sirri Marriage is a marriage that does not meet the requirements and procedures of legislation.¹⁴ Literally "*sirri*" means "secret". So, *sirri* marriage is a secret marriage of the knowledge of the crowd. The other understanding about *sirri* marriage in the view of Indonesian Islamic society is a marriage that only meets the provisions of religion, which is eligible and fulfill *rukun* of marriage. The *rukun* of marriage and the requirement of marriage include;

1. the presence of a husband and wife candidate;
2. the guardian of the bride;
3. the existence of two witnesses (consisting of two men or a man plus two women);
4. *ijab* and *qabul*.
5. Dowry (*mahar*)

Sirri marriage, in addition, is violating the rules of positive law and also cause many problems in the future. So, it's better to register the marriage.¹⁵ It also means that when *sirri* marriage experiences divorce, dispute, inheritance, and others, the parties cannot file the case to the Religious Courts. Children who are born from *sirri* marriage usually also have trouble in getting birth certificates, because their parents do not have a marriage

¹³ Compilation of Islamic Law, Article 6

¹⁴ Abdul Shomad, 2010. *Hukum Islam (Penormaan Prinsip Syariah dalam Hukum Indonesia*, Jakarta, Kencana Prenada Media Group, p.34

¹⁵ Happy Susanto ,2007, *Nikah Siri Apa Untungnya?*, Jakarta Selatan, Visimedia, Cet. 1, p.67

certificate.¹⁶ The social impact of this *sirri* marriage, usually a *sirri* marriage will be judged by society as a marriage that is not ideal and does not create a harmonious home atmosphere. Indeed, not all siri marriages will always bring bad effects. There are some couples who don't have big problems as officially noted. There are also those who do a *siri* marriage to avoid adultery, but it is actually more disadvantage especially for women and children.

C. *Itsbat* Marriage

Every marriage should be recorded and the registration of marriage is done by the marriage registrar (Article 5 of the Compilation of Islamic Law). Every marriage must be held in the presence and under the supervision of the marriage clerk. Marriages performed outside the supervision of the marriage official do not have the force of law (article 6 of the Compilation of Islamic law).¹⁷ Each marriage is recorded according to the prevailing laws and regulations. The marriage was done in accordance with this provision which will obtain authentic evidence in the form of Marriage Deed. A marriage certificate is a valid proof of a marriage that has been committed by the community.

This marriage certificate will be beneficial to those involved in marriage, in the event of future problems and beneficial to their children if they are dealing with administrative and other civic matters. For example, to manage a child's birth certificate, the parent of the child must have a marriage certificate indicated to the Civil Registry Office. To make all the administrative matters of a child, such as an identity card, a birth certificate it is necessary to have a parent's marriage certificate as proof that the child was born in a legal marriage. If a parent does not have a marriage certificate, the child cannot make a birth

¹⁶ Ibid., p.105

¹⁷ Simanjuntak, Op.Cit.,p.78

certificate. There will be many other problems that arise if couple don't have a marriage certificate. The resolution of the problem of marriage that is not recorded and does not have a marriage certificate, namely by submitting the *itsbat marriage*.

In Arabic, *Itsbat* is derived from the word *atsbata-yutsbitu-itsbatan* which means is reinforcement. Whereas in the popular dictionary scientific, *itsbat* interpreted as deciding or setting¹⁸. Ahmad Rafiq stated that the benefits of (*itsbat nikah*) are two kinds, namely:

1. Preventive benefits, to prevent them from happening irregularities of *rukun* and term of marriage, both according to religious law and according to legislation.
2. The benefits of repressive, marriage registration to help people to get married not only concerned with the legal aspects of *fiqh*, but also civil aspects.

Isbat is a product of the Religious Courts, in the sense that it is not a real court and is termed *Jurisdictio Voluntair*. It is said not the real justice because in this case there is only the applicant, who registrar to be established about something that is the establishment of marriage.¹⁹ The voluntary matter is a matter of petition where and there is no dispute and there is no opponent. Basically, the petition is unacceptable, except for the interest of the Law so as to.²⁰ The authority of a judiciary to resolve cases that do not contain the element of dispute (volunteer) is with the requirement if desired (the existence of the provision/appointment)²¹. Voluntary cases submitted to the Religious Courts such as:

1. Determination of guardians for heirs who are unable to take legal action;
2. Determination of appointment of guardian;
3. Determination of adoption of children;

¹⁸ Tioma R.H, "Efektivitas Pelaksanaan Itsbat Nikah Terhadap Kepastian Hukum Status Perkawinan dan Hak Anak di Kecamatan Wuluhan Kabupaten Jember", *Rechtens*, V, P.85.

¹⁹ Mahmud Huda, "Yurisprudensi Isbat Nikah dalam Pasal 7 Kompilasi Hukum Islam", *Jurnal Hukum*, V, p.45

²⁰ H. A. Mukti Arto, 1996, *Praktek Perkara Perdata pada Pengadilan Agama*, Yogyakarta, Pustaka Pelajar, p.41

²¹ Article 2 paragraph 1 of Law no. 14 of 1970

4. Determination of marriage (*isbat* marriage);
5. Determination of guardians of *Adhal*

According to Endang Ali Ma'sum there is a common perception among law practitioners, especially Religious Court judges, that the meaning of *isbat nikah* is a declarative law product merely to declare the validity of marriage performed according to religious law but was not registered, with legal implications after the marriage is set to have legal certainty (*rechtszekerheid*). Regarding the terms of *isbat* marriage can be equated with the terms of marriage. This is because marriage *isbat* basically is the determination of a marriage which has been done in accordance with the provisions contained in the Islamic Shari'a but this marriage has not been recorded to the authorized official, namely Marriage Registration Officer.

Some rules about *isbat nikah*, that is;

1. Marriage can only be proven by the Marriage Certificate made by the Marriage Officer
2. In case of marriage cannot be proven by Deed of Marriage, the marriage may be submitted to Religious Court.
3. *Isbat* which may be submitted to the Religious Courts are limited to matters pertaining to;
 - a. The existence of marriage in the framework of a divorce settlement; Loss of Marriage Certificate;
 - b. There is doubt about whether or not one of the conditions of marriage is valid;
 - c. The existence of a marriage that occurred before the coming into effect of the Law No. 1 of 1974 on Marriage and

- d. Marriage conducted by those who do not have marital obstacles according to the Law Number 1 of 1974.²²

That the petition of marriage is submitted to the Religious Courts, namely to request that the marriage is declared valid and instructed to the local Religious Affairs Office to record this marriage and give the Quotation of Deed of Marriage based on the Decision of the Religious Court.²³

D. Religious Court

Religious Courts are one of the perpetrators of judicial power for the people who seek justice who are Muslims regarding certain cases as referred to in the Law. Technical counseling, organization, administration and financial is carried out by the Supreme Court (Article 5 paragraph 1). A court judge is an official who carries out the duties of a judicial authority. The Religious Court culminated in the Supreme Court domiciled in the capital of the Republic of Indonesia, Jakarta. The religious court has the duty and authority to examine, decide, and settle cases at the first level between people who are Muslim in the fields of:

1. marriage;
2. inheritance;
3. will;
4. grant;
5. endowments;
6. zakat;
7. infaq;

²² Simanjuntak, Op.Cit., p.78

²³ Article 3 paragraph 5 of Law Number 22 of 1946 on Recording of Marriage, Divorce, and Reference and Article 7 Compilation of Islamic Law

8. sadaqah; and
9. sharia economy.

The main task of the Religious Courts as the executing agency of the judicial authority is to receive, examine and adjudicate and settle cases that go to religious courts, also solve voluntary cases. Religious Courts are tasked and authorized to provide legal and justice services in the family and marriage property for those who are Islamic, based on Islamic law. The Religious Courts are in charge to uphold the Compilation of Islamic law as a material law that applies to Muslims in Indonesia.

When there is a dispute over property rights or other disputes in a case in Article 49, specifically regarding the object of the dispute must be decided in advance by court in the General Courts. If there is a dispute over property rights as referred to in paragraph (1) whose legal subject is between people who are Muslim, the object of the dispute is decided by the religious court together with the case as referred to in Article 49A Religious Court consists of :

1. Religious Courts as first-level courts located in the district capital with the jurisdiction of the district.
2. Religious High Court as an appellate court domiciled in the provincial capital, and its jurisdiction covers the province.

In Religious Courts there are several types of cases, namely:

- a. Volunteer case

The Volunteer case is a matter of petition and there is no dispute, so there is no opponent. Basically, the petition is unacceptable, unless the interest of the law so requires. Volunteer cases submitted to Religious Courts such as:

- 1) Determination of the guardian of the heirs for the heirs who are unable to take legal action.
- 2) Determination of the guardian's appointment.
- 3) Determination of adoption.
- 4) Determination of marriage certification (*isbat nikah*).
- 5) Establishment of *adhol* guardians, etc.

Parties in the volunteer case were the applicant only. There are petitioner I, Petitioner II, Petitioner III, and so on because there is no dispute.

b. Contentious case

Contentious matters are cases containing disputes between parties. In contentious cases, there are two or more parties to the dispute. The party who filed the lawsuit is called the plaintiff, and the party being sued is called the defendant. If the plaintiff and the defendant are more than one person, they are called Plaintiff I, Plaintiff II, Plaintiff III and so on. Similarly, Defendant I, Defendant II, and so on. Sometimes there are also parties that participate in the Defendant that is the party who is not directly sued but there is a possibility of having rights in the disputed object, but he does not want to also sue.

Religious Court has the organizational structure that consists of:

- 1) chief of judge
- 2) member judges

- 3) clerks
- 4) secretaries and
- 5) bailiffs.

The head of the Religious Court consists of a chairman and vice chairman. The judge is an official who exercises judicial power.

There are some case which can be resolved in religious court:

- 1) marriage;
 - a) disputes of engagement and its legal consequences
 - b) underage marriage dispensation, men (19 years old) and women (16 years old)
 - c) a marriage permits from parents to those not yet 21 years old
 - (1) *adhol* guardian
 - (2) prevention of mating
 - (3) permission to have more than one wife the establishment of the validity of the marriage
 - (4) cancellation of marriage
 - (5) the refusal of mixed marriage permits
 - (6) the determination of legitimate references
- 2) inheritance;
- 3) will;
- 4) grant;
- 5) endowments;
- 6) zakat;
- 7) infaq;

8) sadaqah; and

9) sharia economy