

## CHAPTER IV

### FINDING AND ANALYSIS

#### A. *Sirri* Marriage

##### 1. Data of *Sirri* Marriage

Before reviewing how the process of *itsbat* marriage takes place in the Religious Court of Bantul, the researcher will explain how the practice of *sirri* marriage in society. *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.

From the meaning of *sirri* marriage, actually, Nikita Mirzani was well aware that the term *sirri* marriage was used for marriage which is not recorded by the marriage registrar.<sup>25</sup> And one of the risks of *sirri* marriage to the wife is not getting a maintenance. However, Nikita was performed *sirri* and not to worry about maintenance. Because she feels she has more property than her husband. While the implementation process, Nikita explained that she made sure that her marriage was valid according to the Islamic religion.<sup>26</sup> The prince (*penghulu*) from Central Java and the guardian of her marriage is Nikita's biological brother because Nikita's biological father has passed away. The marriage was attended by both the family that is the husband's family (Dippo Latief) and the Nikita family.

Regarding the motive of *sirri* marriage, Nikita explained that the *sirri* marriage is her husband's wish and Nikita agreed because she was afraid of failed again like the first marriage if it was announced to the public, considering that Nikita is an artist. And she

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<sup>25</sup> Iwan Zaenul Fuad, "Kriminalitas sosiologis Nikah Sirri", *Jurnal Penelitian*, VIII (Mei 2011), p. 28

<sup>26</sup> Corry Wenas Samosir, Nikita Mirzani Beberkan Kisah Pernikahan Sirrinya dengan Dipo Latief, 18 Juli 2018, <http://www.grid.id/read/04901216/nikita-mirzani-beberkan-kisah-pernikahan-sirinya-dengan-dipo-latief>, accessed on Wednesday, 22 August, 2018

doesn't care about living for herself and her child. Because she feels has been able to give living for herself and her children. *Sirri* marriage made Nikita's biological brother as a guardian disagree of this marriage. But Nikita explained that she had a good husband. And about the child who will be born, Nikita and Dipo do not too concerned about the problem at times it can be in an *itsbat* marriage. Because marriage is legitimate according to religion.

## 2. Causes of *Sirri* Marriage

*Sirri* marriage in Indonesia is still exist a lot both in the city and in the village and carried out by the lower economic community, middle and even upwards. Such conditions occur because of several causes, among other;

### a. Low Public Awareness of the Law

There are still many people do not understand the importance of marriage registration. Because of the low understanding of the community regarding marriage registration, the assumption that marriage is valid either or recorded and not recorded is the same. Especially marriage registration has a long procedure and makes many people choose the *sirri* marriage without knowing the bad effects of a *sirri* marriage.

Some *itsbat nikah* cases in Bantul Religious Court use this causes, including

1. Case number 575/Pdt.G/2017/PA.Btl
2. Case number 718/Pdt.G/2017/PA.Btl

### b. Pregnancy Outside of Marriage

In the era of globalization, information is so easy to get, like lifestyle, the social behavior of a particular society can be easily replicated. This is affected by changing behavior. They do not follow religious norms and rules in the association. As a result,

there are other things that arise due to promiscuity, like getting pregnant outside of marriage. The pregnancy that occurs outside of marriage, is a disgrace to the family. Then parents marry their children to men who make pregnant, with the reason to save the family's good name, and without involving the marriage registrar, but it is only carried out by *Kyai* without registering marriages.

c. Avoiding Lawsuits

To avoid lawsuits by his wife in the future. The marriages that are not recorded by the Office of Religious Affairs cannot be prosecuted in court. This case is usually happened by the *sirri* marriages to marry a second time (polygamy).

d. Provisions on Marriage Records which is not Strict

As we know, the provisions of article 2 of the Law Nomor 1 of 1974 on marriage are the main principles of marriage validity. From the legal facts and/or legal norms, it is actually enough to be the basis for Muslims about the obligation to register their marriages. However, these provisions contain weaknesses because the article is multi-interpreted and also not accompanied by sanctions for those who break it. In other words, the marriage registration provisions in the law not assertive. That is why in the last few years the government has made the Bill which until now has not been ratified in the parliament. In the Bill, the obligation of marriage registration is formulated firmly and accompanied by sanctions for those who break it. Article 4 of the Bill of Law affirms: every marriage must be recorded by a marriage registrar based on the prevailing laws. Then Article 5 paragraph (1) states: to fulfill the provisions of article 4, each marriage is required to be held in front of the marriage registrar.

The obligation to record as stipulated in Article 4 and Article 5 paragraph (1) is accompanied by a criminal threat to those who violate it. Criminal provisions relating to marriage registration violations are stated in Article 141 of the Bill which states: Every person who intentionally establishes a marriage which is not witnessed by the marriage registrar as referred to in Article 5 (1) shall be punished with a fine of a maximum of 6,000,000 (six million rupiahs) or the confinement of a maximum of 6 (six) months. Thus, so far there is no firmness in the recording provisions in the applicable law still giving an opportunity for the implementation of *sirri* marriage and became one of the factors causing the *sirri* marriage.

e. Economic Factors

There is an assumption that legal marriage is very expensive and even though a legitimate marriage or *sirri* marriage is not registered in the Office of Religious Affairs it is legal in the Islamic religion. To save costs and avoid many administrative procedures, the marriage then is not registered. But this is only the assumption of people. Actually, registration her marriage in civil registration office.

f. The Difficulty of Polygamy Permits

Not fulfilling the requirements for polygamy, especially the absence of consent from the previous wife, the person carries out a *sirri* marriage. The Law No.1 of 1974 uses the principle of monogamy, but still provides opportunities for them whose religion permits polygamy with very strict requirements. Someone who wants to do polygamy must fulfill a minimum of one alternative requirement which is determined limitlessly in the law, namely:

- 1) The wife cannot carry out her obligations as a wife;

- 2) The wife gets disability or sick that cannot be cured;
- 3) The wife cannot give children (article 4 paragraph (2) of Law no1 of 1974)

Actually, husbands are permitted by law to have more than one wife in Article 3 of the law number 1 of 1974 on marriage.

- 1) Basically a man can only have one wife. A woman can only have a husband.
- 2) Courts, may permit a husband to marry more than one if required by the parties concerned.

And the court will consider and will give permission for polygamy for someone who apply for it if the cumulative conditions are met, namely:

- 1) The approval of the wife
- 2) There is certainty that the husband is able to guarantee the necessities of life of the wives and their children
- 3) There is a guarantee that the husband will be fair to their wives and children;

With the coming into effect of the law number 1 of 1974, polygamy dropped dramatically, but illegal polygamy with all its forms still many, caused by:

- 1) There is no legal awareness from the community;
- 2) For those who are bound by certain regulations, because of their work
- 3) There is no firm action against illegal polygamy;

The difficulty of getting polygamy consent is one of the factors causing the *sirri* marriage, or unrecorded marriages. Like case number 575/Pdt.G/2017/PA.Btl, the reason of sirri marriage is difficult to get permission from the husband office because he

is government employees. And in case number 702/Pdt.G/2016/PA.Btl, the applicant doing *sirri* marriage because this is the second marriage of husband.

### 3. 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.<sup>27</sup>

But, *sirri* marriage in the past has different understanding with the *sirri* marriage can be at this time. In the past, the definition of *sirri* marriage was marriage in accordance with the principles of marriage and the conditions according to the *shari'ah*, only, the witness was asked not to inform the public about the marriage. According to *mahzab* Hanafi and Hambali a marriage which is based on the term and *syarat*, it is valid according to the religion of Islam even though the marriage is *sirri*.

Meanwhile, according to Kiayi Husein Muhamad (a commissioner of the National Commission for Women) stated that the *sirri* marriage between man and woman is a forbidden marriage because the marriage can harm the woman. Shia scholars allow *sirri* marriage. *Sirri* marriage, better than adultery which is so cursed by Allah SWT. Dr. Yusuf Qardawi as one of the leading contemporary Muslim

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<sup>27</sup> Amir Syarifuddin, *Hukum Nikah Islam di Indonesia: Antara Fikih Munakahat dan Undang-Undang Nikah* (Cet. II; Jakarta: Kencana, 2007), p. 59.

experts in Islam. He argued that the *sirri* marriage is legal as long as there is permission and witnesses.

KH. Tochri Tohir argued differently. He considered legal marriage to be legal and lawful because Islam never requires a marriage to be registered by the state. According to Tohir, the *sirri* marriage must be seen from the positive side, namely the effort to avoid adultery. But he also argued that at this time there was indeed an attempt to abuse *sirri* marriage just to satisfy lust. According to him, such a *sirri* marriage remains legally valid, but the marriage is not blessed.

b. The legal status of *sirri* marriage based on the 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. When marriages are registered in civil registration office, of course, someone already has an official document that can be used as evidence in front of the judiciary, when there is a dispute related to marriage, such as inheritance, child custody, divorce, livelihood.

According to the Marriage Law, marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim to form a happy and lasting family based on the One and Only God (Article 1 of the Marriage Law) which states;



- 1) Marriage is legal if it is carried out according to the law of each religion and belief;
- 2) Every marriage must be recorded according to the prevailing laws and regulations.

From Article 2 Paragraph 1, we know that a marriage is legal if it is done according to the law of each religion and belief. This means that if a marriage has fulfilled terms and *rukun* of marriage, then the marriage is legal especially in the religion and belief of the community. But the validity of this marriage is in the religion and belief of the community need to be ratified by the state. In this case, the provisions are contained in Article 2 Paragraph 2 of the Marriage Law, concerning marriage registration. For those who are married according to Islam, the recording was carried out at the Office of Religious Affairs to obtain a marriage certificate as a proof of the existence of the marriage. Article 7 paragraph 1 Compilation of Islamic Law "Marriage can only be proven by the Marriage Certificate issued by the Marriage Registration Officer". And for those who are non-Muslim, recording is done at the Civil Registry office, to obtain a Marriage Deed.

Regarding marriage registration, it is explained further in Chapter II Article 2 of the Government Regulation No. 9 of 1975 concerning marriage records. For those who are married according to Islam, recording is done at the Office of Religious Affairs. whereas to the civil registration office those who are married based on religious other than Islam.

The procedure for recording marriages is carried out as specified in Article 3 to Article 9 of Government Regulation No. 9 of 1975, that is, every person who will get married notify verbally or in writing the marriage plan to the recording officer at the

place of marriage will be held, no later than 10 working days before the marriage takes place. Then the registrar examines whether the terms of marriage have been fulfilled and whether there is no marriage obstacle under the Law. Then after the procedures and conditions for notification are fulfilled and there is no obstacle to marriage, the registrar announces and signs the announcement about the notification of the will to marry by attaching an announcement letter at a place that has been determined and easily read by the public.

In the draft of law on *sirri* marriage, Article 143 of the bill which is only intended for Muslims embraces, every person who intentionally establishes a marriage is not in the presence of a marriage registrar being sentenced to varying penalties, starting from six months to three years and fines ranging from Rp. 6 million to Rp. 12 million. The Indonesian *Ulama* Council (MUI) also issued a fatwa on *sirri* marriage with 2 (two) legal provisions, that are;

- 1) Marriage under the law is legal because the terms and conditions of marriage are fulfilled, but it is prohibited if there is a negative impact.
- 2) Marriage must be officially registered with the authorized agency, as a preventive measure to reject *madharrah* matters.

c. Legal consequences of *sirri* marriage

*Sirri* that happens in Indonesia is legitimate in Islamic legal perspective if meets the *rukun* and terms of marriage. But can cause legal consequences which are detrimental to the wife and children. Those legal consequences of *sirri* marriage including;

- 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, religious rules are practiced incorrectly. If a marriage is not officially recorded in front of the authorized official, namely the marriage registrar, then the marriage cannot be controlled. Finally giving the husband the opportunity to remarry with other women without asking permission from the previous wife through the trial process. And gives the husband the opportunity to have a wife more than that determined in religious law.
- 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) Since the child's identity is unclear,
- 8) as a result, if the 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.<sup>28</sup>

That are some of the consequences of *sirri* marriage, even though the *sirri* marriage is considered a legitimate marriage if it meets the terms and *rukun* of marriage

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<sup>28</sup> Ali Uraidi, "Perkawinan Sirri dan Akibat Hukumnya Ditinjau dari Undang Undang No. 1 tahun 1974". *jurnal ilmiah fenomena*, X (november 2012), p. 990

according to Islam. But the consequences caused by the siri marriage are greater than the benefits<sup>29</sup>. The problem of marriage *sirri* can be resolved by submitting an application for *itsbat* marriage to the religious court.

## **B. The Urgency of Establishing of *Sirri* Marriage**

*Sirri* marriage is the legitimate marriage based on religious law but not recorded in the marriage registration 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.<sup>30</sup> Marriages which are not recorded, have a marital status as follows:

1. No state recognition and it is considered never happened marriage. Although marriage was done according to religion and belief, within the country, the marriage is considered invalid if it has not been recorded by the office of the religious affair, so it is not causing legal consequences.
2. Children born from *sirri* marriages only have a civil relationship with mother and mother's family. Article 42 and 43 of the Marriage Law states that children who were born outside marriage or marriage which are not recorded considered as illegitimate children, also have only a civil relationship with the mother or the mother's family. whereas the civil relationship with father does not exist.
3. Wife and children born within the *sirri* marriage have no right to demand a maintenance or inheritance from father.

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<sup>29</sup> Putri Rahmalia, *Penolakan Penetapan Itsbat Nikah terhadap Perkawinan Sirri*, skripsi fakultas Hukum Universitas YARSI.

<sup>30</sup> Neng Djubaidah, 2012, *Pencatatan Perkawinan dan Perkawinan Tidak Dicatat Menurut Hukum Tertulis di Indonesia dan Hukum Islam*, Jakarta, Sinar Grafika, p.159

4. Consequences to the Husband is there is no harm to the husband. The husband is free to remarry and not obliged to give maintenance to children and wife.<sup>31</sup>

In 2015 to 2014 there were 21 cases of *itsbat* marriage due to *sirri* marriage in the Bantul religious court and all applicants for marriage rights register the marriage certificate because it is difficult to make an administrative document for his child.

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

1. The urgency of *itsbat* marriage to wife
  - a. There is a permanent legal force on the legality of the marriage after *itsbat* marriage. So, if a wife's rights are violated by the husband, the wife can claim rights.
  - b. Protect the right of the wife to get a living from her husband and ease in declaring that she is a legal heir as a wife when her husband passed away.
  - c. After *itsbat* marriage, the wife can sue the husband to court if the husband wants to divorce her because it already has authentic evidence.
2. The urgency of *itsbat* marriage to husband
  - a. Because of *itsbat* marriage, the husband has the right to be the guardian of his daughter's marriage in the future.
  - b. Get legal protection regarding rights and obligations in the household.
3. The Urgency of *itsbat* marriage to children

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<sup>31</sup> Intan Ghina, "Analisis Yuridis Status Hukum Istri yang Menikah di Bawah Tangan Berdasarkan Ketentuan yang Berlaku Tentang Perkawinan" <https://intanghina.wordpress.com/2008/05/27/analisis-yuridis-status-hukum-istri-yang-menikah-di-bawah-tangan-berdasarkan-ketentuan-yang-berlaku-tentang-perkawinan/>, accessed on Saturday, March 31<sup>st</sup> 2018

- a. After *itsbat* marriage, children born from *sirri* marriages 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 father.
- c. Children born to the marriage become legitimate children in state law.
- d. Father is entitled to be a marriage guardian for his daughter.
- e. Do not have problems in making administrative documents such as birth certificates, ID cards, and others.<sup>32</sup>

### C. The Process of Establishment of *Sirri* Marriage in Religious Court of Bantul.

*Itsbat* marriage is a way to avoid the difficulties of life especially for children who are born from a marriage that is not registered not.<sup>33</sup> *Itsbat* marriage is one of the authorities under the Religious Courts. The Religious Courts have the duty and authority to uphold the Compilation of Islamic Law as a material law which applies to the Islamic community in Indonesia.<sup>34</sup> Before we register *itsbat* marriage to a religious court, we must know about several things, namely;

#### 1. Whether the marriage is valid or not

A legal marriage is a marriage that is carried out according to the law of each religion and belief. Marriage must be recorded according to the applicable law.

#### 2. The reason why marriage must be recorded.

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<sup>32</sup> Idris Ramulyo, *Hukum Perkawinan, Hukum Kewarisan, Hukum Acara Peradilan Agama dan Zakat Menurut Hukum Islam*, Sinar Grafika, Jakarta, 2006, p.49-50

<sup>33</sup> M. Khusnul Yakin, "Ratio Decidendi Penetapan Pengeshan (*Itsbat*) Nikah di Pengadilan Agama", *Yuridika*, XXX, (Mei,2015), p.256

<sup>34</sup> Soetandyo Wignjosoebroto, *Hukum dalam Masyarakat Perkembangan dan Masalah*, Bayumedia, Yogyakarta, 2008, p.126

As a valid proof of your marriage. To guarantee the rights in marriage if there is a divorce. Including the right to inherit and retire. To protect children's rights, for example in making birth certificates, passports and inheritance rights.

### 3. What if marriage has not been recorded

A marriage that is not registered and does not have a marriage certificate, does not have legal force. It is a must to submit an application for *itsbat* marriage so that the marriage has legal power.

### 4. Who Can Submit *Itsbat* Marriage

Those who can apply for *Itsbat* Marriage are;

- a. Husband
- b. Wife
- c. Child
- d. Parent/Guardian of Marriage.

Note:

For husband and wife who are still alive, then both of them must be the parties who submitted the application for *itsbat*. For couple who is one of them died, the party who is still alive who applies. The absence of the Defendant/Respondent in the case of *itsbat* marriage for divorce does not affect the settlement of cases.

### 5. Several reasons that can make the application for *itsbat* marriage accepted

- a. For the settlement of divorce.
- b. Loss of marriage certificate.
- c. If there is a doubt about the validity of one of the terms of the marriage.
- d. If she marriage is not recorded and occurred before 1974.

- e. A marriage that was not recorded and occurred after 1974 and did not violate the provisions of the Law.<sup>35</sup>

#### 6. Court fee

Court fee is the fee that must be paid by the applicant to court, this fee is advance fees. When the trial is complete, the court can request the remaining court fees. Court fees are determined by the head of the Court and usually, the details of the fee are already on the notice board in court. Court fees differ from one court to another. This difference is determined by the distance from where the applicant live to the court office. Case costs consist of:

- a. The cost of calls
- b. Stamp
- c. Editor
- d. State Revenues Not tax.

To get certainty of costs and details, the applicant can contact the court office or see it on the court website.

The process of the establishment of marriage (*itsbat nikah*) for *sirri* marriage in Bantul Religious Court after the enactment of the law number 1 of 1974 on Marriage is:

- a. Submit an application

Application of *itsbat* marriage is registered by the applicant to the religious court where the applicant lives. Applicants who come to the religious court to submit an application for its marriage confirmation, meet the young clerk of application (*panitra muda permohonan*) to get information about how to make an application of *itsbat*

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<sup>35</sup> *Ibid.*



marriage. Then make application letter of *itsbat* marriage. Application letters can be made by the applicant himself. If he cannot make a request letter, he can ask for help from Legal Assistance post for free there are two types of application letter of *itsbat* marriage, namely:

- 1) Application letter of *itsbat* marriage combined with the divorce
- 2) Letter of application for *itsbat* marriage only

Application letter must contain the identity of the applicant, the reasons for registering *itsbat* marriage (*posita*) and application to the marriage is declared valid by the religious court (*petitum*)

b. Registration

The applicant meets the officer by bringing a letter of application of *itsbat* marriage and then the officer makes a procuracy to pay. Application letter of *itsbat* will be registered in the court case list if the applicant pays a court fee. For the applicants who cannot afford to pay, can apply to litigate for free. After the applicant gets a power of attorney to pay, then bring it to waste to pay court fees. And the officer gives the case number in the application letter. Then the applicant registers his case to the officer to record the application letter in the case register of the application. Then the applicant waits for a trial call from the bailiff the head of the religious court.

c. Calling to the trial

When the trial will be held, the applicant must be called to attend the trial by a surrogate bailiff (*juru sita*) on the orders of the judge's chairman. Letter of invitation it must be delivered directly to the residence and to the applicant itself. If it cannot be

delivered directly, then the letter of invitation submitted to the head of the village no more than 3 days before the trial opened

d. Trial

The applicant Comes to the Court on the date and time which is stated in the summons and arrives on time and shall not be late. For the first trial, he has to bring the documents such as Trial Letter, photocopy of the completed application form. In this first trial, the judge will ask for the identity of the Parties. For the next session, the judge will inform the Applicant/Respondent who will present at the hearing when is the next session. For the Applicant/Respondent who did not attend the hearing, the next hearing the summon will be repeated to the person concerned by mail.

For the second trial and so on, there is a possibility that the applicant has to prepare documents and evidence in accordance with the request of the judge. The judge will ask the applicant to present witnesses who know the marriage including marriage guardians and marriage witnesses, or closest people who know the marriage if needed.

Trial examination of *itsbat* is carried out by the judge no later than 30 days after receipt of the application case file. In the trial, the panel of judges immediately read out the petition from the applicant. If the letter is not changed by the applicant, then the trial proceed with exhibition proof, conclusion, and reading of the determination. Examination of the application case of *itsbat* marriage is carried out by a panel of judges with trials open to the public.

e. Settlement

After the application case of *itsbat* marriage, it is decided with a determination within 14 days and there is no legal remedy filed by the applicant, then the determination

has permanent legal force. Then the final settlement of the case is that the officer issues a copy of the determination that must be received by the applicant.

1. The establishment of marriage number: 702/Pdt.G/2016/PA.Btl

Marriage is the way to make man and woman as husband and wife by religious institutions, government or society that fulfill the legal procedure<sup>36</sup>. One type of marriage that does not fulfill the legal procedure is a *sirri* marriage. Even though in religion or customs are legitimate, *siri* marriages which are conducted without the registration of marriage by the registrars have no legal power and are illegal in law and children born from a *siri* marriage are difficult to get a birth certificate because they are born not based on a legal marriage. The Law of the population and the Marriage Law require a marriage to be registered.

Problem-solving because *sirri* marriage can be solved by submitting an application *itsbat* Marriage in the Religious Court<sup>37</sup>. *Itsbat* Marriage is a process of recording marriage that has been carried out in Islam.<sup>38</sup> Marriage registration is carried out to obtain a marriage certificate as proof of the validity of the marriage that has been carried out. Marriage registration aims to realize certainty, order and legal protection and of course, *itsbat* marriage will provide legal certainty to the status of the child born in the marriage. This is the main reason for the applicant in the case of *itsbat* marriage Number 702/Pdt.G/2016/PA.Btl to submit an application for *itsbat* marriage to the Bantul Religious Court, which is to arrange the Birth Certificate of their children and to get the legal certainty of the applicant's marriage itself.

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<sup>36</sup> Thriwati Aرسال, "Nikah Sirri dalam Tinjauan Demografi", Fakultas Ekologi Institut Pertanian Bogor, VII (September, 2012), p.75

<sup>37</sup> Irfan Islami, "Perkawinan Dibawah Tangan (nikah siri) dalam akibat hukumnya", Fakultas Hukum Universitas Yarsi, IV, (Mei 2007), p.117

<sup>38</sup> Ahmad Ainani, *Itsbat Nikah dalam Hukum Perkawinan di Indonesia*, universitas Islam Negeri Purwakarta, XI, P.120

In the application for the *Itsbat* Marriage Case number: 702/Pdt.G/2016/PA. BTL located at the Bantul Religious Court, Petitioner I, Suyatin bin Ngatijan, 62 years old, residing in Gemahanan, RT 01, Ringinharjo Village, Bantul and Petitioner II. Jumirah Binti Hadi Suwarno, 51 years old, Islam, residing in Rt 52 Rw 11, Wirobrajan, Yogyakarta. The purpose of the Applicant to submit a marriage certificate is to take care of the Petitioner's child documents. Therefore, the applicant submits the *itsbat* marriage in Bantul Religious Court and followed the process of determining its marriage confirmation, namely;

- a. Submit an application
- b. Registration
- c. Calling the trial
- d. Trial
- e. Settlement.

After the process has ended, then the judge decided to grant the application *itsbat nikah* of the applicant with the judge's considerations (Judge's consideration is the rationale the of judge uses in deciding a case)<sup>39</sup> as follows:

- a. The application of marriage are in accordance with article 4 of the Compilation of Islamic Law and Article 2 paragraph 1 of the Marriage Law which states that marriage is legal if it is carried out according to the law of each religion and belief. the applicants have fulfilled terms and conditions of marriage in accordance with Article 14, namely;
  - 1) Bride and groom

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<sup>39</sup> Reno Julianto, *Pertimbangan Hakim dalam Itsbat Nikah dan Upaya Pembentukan Keluarga Sakinah.*”Kmentrian Agama Kabupaten Rejang Lebong, I (April, 2016) p,33

The prospective couple is only for those who have reached the age specified in article 7 of Law No. 1 of 1974 that is, the prospective husband is at least 19 years old and the prospective wife is at least 16 years old. At the time of marriage, the couple candidate have fulfilled the requirements as a bride candidate that has been stipulated by the law, namely, applicant 1 is 30 years old and applicant II is 19 years old.

## 2) Marriage guardian

a) Marriage guardians in marriage are *rukun*.

That must be fulfilled for prospective brides to marry them (article 19)

b) Article 20 states that;

(1) The guardian of marriage is a man who meets the requirements of Islamic law, namely Muslims, *aqil*, and *baligh*.

(2) The marriage guardian consists of:

(a) *Nasab guardian*;

(b) Hakim guardian (Article 20)

c) (1) The guardian of *nasab* consists of four groups;

(a) First, the father, grandfather from the father's side and so on.

(b) Second, biological brothers or sisters, and their male descendants.

(c) Third, a group of uncle's relatives, namely the siblings of their fathers, their siblings, and their male descendants.

(d) Fourth, the group of siblings of grandfather, male brothers and their male descendants.

(2) If in a group of marriage guardians there are several people who are equally entitled to be guardians, then the most entitled to be a guardian is the closer degree of kinship with prospective brides.

(3) If in a group with the same degree of kinship, the most entitled to be a marriage guardian are biological relatives of one father's relatives.

(4) If in one group, the degree of kinship is the same, namely the degree of birth or relative, they are entitled to become guardians of marriage, by prioritizing the older ones and fulfilling the conditions of guardian.

(Article 21)

d) If the guardian of marriage is the most entitled, does not fulfill the requirements as a marriage guardian or because the marriage guardian is suffering from speech, deaf or elderly, then the right to be a guardian shift to another marriage guardian according to the next degree. (Article 22)

e) (1) Guardian of the judge

Can only act as a marriage guardian if (*nasab* guardian) does not exist or is unlikely to present it or unknown place of residence or reluctance.

(2) In the event that (*adhal* guardian) is reluctant, then the judge guardian can only act as a marriage guardian after the decision of the Religious court about the guardian. (Article 23)

In the marriage of the applicant I and applicant II, the guardian of marriage is the father of applicant II, Mr. Hadi Suworo.

3) Two witnesses

- a) (1) Witnesses in marriage are one of *rukun akad* marriage.  
 (2) Each marriage must be witnessed by two witnesses (article 24)
- b) Those who can be appointed as witnesses in the marriage contract are Muslim men, fair, *aqil baligh*, not disturbed by memory and not deaf. (Article 25)
- c) The witness must attend and witness directly in *Akad* marriage and sign the Marriage Certificate at the time and place *akad* marriage is held. (Article 26)

Those who are witnesses in the marriage of applicant 1 and applicant 2 are Hanafi as witnesses of the man and Raharjo as a witness from a woman.

#### 4) *Ijab Kabul*

- a) *Ijab* and *Kabul* between guardians and prospective grooms must be clear, successive and not intermittent. (Article 27)
  - b) *Akad nikah* carried out privately by a marriage guardian. (Article 28)
  - c) (1) Those who have the right to say *Kabul* is prospective groom in person.  
 (2) In certain cases, speech *kabul nikah* can be represented to another man with the provision of the prospective groom giving written authority that the acceptance of the *akad nikah* on behalf of for the groom.  
 (3) If the bride's guardian does not accept if the bridegroom to be, so the marriage contract cannot be held. (article 29)
- b. In Article 7 paragraph (2) the Compilation of Islamic Law states that in the case of marriage it cannot be proven by the Marriage Certificate, it can be submitted *itsbat* marriage to the Religious Court. Furthermore, in paragraph (3) it is stated that the marriage principle which can be submitted to the Religious Court is limited to matters which include in letter (e) related

to marriage conducted by those who do not have a marriage obstacle according to Article 8 to Article 10 of Act Number 1 of 1974, namely:

1) Marriage is prohibited between two people who:

- a) Having deep blood relationship in bloodline straight down or up;
- b) Having blood relationship in a sideways line
- c) Having *semenda* relations
- d) Having relation to *persusuan*
- e) Having relation to wife or as an aunt or niece of the wife, in the case of a husband having more than one wife;
- f) Having a relationship that by religion or other applicable regulations, is prohibited from marrying. (article 8)

2) A person who is still in marriage with another person cannot remarry, except in the case of Article 3 paragraph (2) and Article 4 of this Law. (Article 9)

3) If husband and wife those who have been divorced then remarry with each other and divorce again for the second time, then they will no longer be allowed to remarry again, insofar as the laws of each religion and their beliefs do not determine otherwise. (Article 10). And does not violate Article 39 to Article 44 of the Compilation of Islamic Law, namely;

a) Prohibition of marriage between a man and a woman due to:

- (1) Because of affinity *nasab*:



- (a) With a woman who gave birth or her offspring;
- (b) With a woman of father or mother descent;
- (c) With a woman from the mother's family.

(2) Due to kinship *semenda*:

- (a) With a woman who gave birth to his wife or ex-wife;
- (b) With a woman his father's ex-wife;
- (c) With a woman of his wife or ex-wife, except for the breakup of a marriage relationship with his ex-wife *qobla al dukhul*;
- (d) With a woman from his son's wife.

(3) Due to linkage *sesusuan*:

- (a) With breastfeeding woman and so on in a straight line up;
- (b) With a woman *sesusuan* and so on according to a straight downline;
- (c) With a woman *sesusuan*, and a niece *sesusuan* down;
- (d) With a woman namely aunt *sesusuan* and grandmother aunt *sesusuan* upwards;
- (e) With a child who is breastfed by his wife and offspring. (article 39)

b) It is forbidden to conduct a marriage between a man and a woman because of certain circumstances:

- (1) Because women are still tied to a marriage with another man;
- (2) A woman who is still in the *iddah* period with another man;
- (3) A woman is not Muslim. (Article 40)

c) (1) A man is prohibited from marrying a woman who has a *nasab* relationship or *sesusuan* with his wife;

(a) Siblings, father or mother or his descendants

(b) Woman with her aunt or niece.

(2) The prohibition in paragraph (1) remains valid even though his wives have been banned *raj`i*, but still in the *iddah* period. (article 41)

d) A man is prohibited from having a marriage with a woman if the man is having 4 (four) wives, all four of whom are still married or still in the *'idah of talak raj`i* or one of them is still tied to a marriage while others are in the *iddah* period of *raj'i talak*. (Article 42)

e) (1) Marriage is prohibited between a man:

(a) With his ex-wife, who has been terminated three times

(b) With his ex-wife, who involved in *li'an*

(2) The prohibition in paragraph (1) letter a. falls if the ex-wife had married another man, then the marriage was broken *ba'da dukhul* and had expired the *iddah*. (Article 43)

f) An Islamic woman is prohibited from marrying a man who is not Muslim (article 44)

Therefore, there is no legal reason to declare the marriage illegal according to religion. In the book *Pedoman Teknis Administrasi dan Teknis Peradilan Agama 2008*, issued by the Supreme Court of the Republic of Indonesia stated that "The Religious Court can only grant the request *itsbat* marriage, if the marriage that has been held, fulfill the terms and *rukun* in Islamic law and the marriage does not violate the prohibition of marriage as regulated in Article 8 to Article 10 of the Law Number 1 of 1974.

- c. Article 7 paragraph (4) the Compilation of Islamic Law states that those who are entitled to apply *itsbat* marriage are husband or wife, their children, guardians of marriage and those who have an interest in the marriage. In this ruling, *itsbat* marriage is submitted by husband and wife.
- d. Based on the provisions of article 7 paragraph (2), (3) and (4) the Compilation of Islamic Law namely:
- 1) Marriage can only be proven by the Marriage Certificate issued by the Marriage Registration Officer.
  - 2) If the marriage cannot be proven by the Marriage Certificate, the marriage confirmation can be submitted to the Religious Court.
  - 3) An *itsbat* marriage which can be submitted to the Religion Court is limited to matters relating to:
    - a) Marriage in the context of settling a divorce;
    - b) Loss of Marriage Certificate;
    - c) There are doubts about the validity of one of the terms of marriage;
    - d) Marriage arrangements that occur before the coming into effect of the Law No.1 of 1974 and;
    - e) Marriage conducted by those who do not have a marital obstacle according to the Law No.1 of 1974;
  - 4) Those who are entitled to submit a marriage application are husband or wife, their children, guardians of marriage and those with an interest in the marriage.

Then Petitioner I and Petitioner II in submitting this application already have legal standing and each has the quality as an Applicant in this case so that the petition can be further examined.

- e. Petitioner I and Petitioner II have submitted evidence of letters (P.1, P.2, P.3, and P.4) and 2 (two) witnesses.

That proof of P.1, P.2, and P.4 in the form of a photocopy of identity card in the name of Petitioner I, Petitioner II which has been stamped adequately and match the original is an authentic deed, the contents of the evidence explain about each identity which includes name, place of birth / age, religion and place of residence, so that the evidence meets the formal and material requirements, and has strength perfect proof and binding, so that it has been proven the name and place of residence and other identities of Petitioner I, Applicant II is as written in the application letter. witnesses are adults and have been sworn in, and give testimony in the trial, so that they fulfill formal conditions as regulated in *Herzein Inlandsch Reglement*, they are;

- 1) 15 years old and over
- 2) Sound mind
- 3) There is no family and family *semeda* relationship from one party according to a straight line unless the law determines otherwise
- 4) There is no marital relationship with one party even though they are divorced

- 5) There is no working relationship with one of the parties by receiving wages unless the law stipulates otherwise
  - 6) Facing at trial
  - 7) Taking an oath according to his religion
  - 8) at least two people to witness an event or reinforced with other evidence (article 169 HIR), except for adultery.
  - 9) Called to enter the courtroom one by one (article 144 (1) HIR).
  - 10) Give verbal information (article 147 HIR).
- f. Information from witnesses regarding the facts seen by themselves or heard alone and relevant to the argument that must be proven by the applicant. Therefore, the witness's testimony has fulfilled the material requirements as stipulated in Article 171 of the HIR (*Herzien Inlandsch Reglement*) so that the testimony of these witnesses has the power of proof and can be accepted as evidence; Material requirements of witnesses are:
- 1) Explaining what he saw, he heard and experienced by himself (Article 171 HIR / 308 R.Bg)
  - 2) It is known the reasons for knowing the event
  - 3) It is not the witness's own opinion or conclusion
  - 4) Mutual correspondence with each other (Article 170 HIR)
  - 5) Not against common sense.

Based on several judges' considerations, the panel of judges decided to grant the petition applicant I and applicant II, stating the legal marriage between Petitioner I (Suyatin Bin Ngatijan) and Petitioner II (Jumirah Binti Hadi Suwarno) which was held on October 17, 1984 in Wirobrajan Village, Wirobrajan District, Yogyakarta City and to Petitioner I and Petitioner II to pay this court fee of Rp. 281,000.00. With the expiry of the hearing and declared marriage valid, applicant 1 and applicant II are entitled to get a marriage certificate to administer the administration of their child and the child will have a clear status and has legal certainty and has the legal power.