

Legitimizing the Legitimate: Legal Certainty of Marriage Law in Indonesia

Sukiati¹, Fatimah¹, Muhammad Hidayat¹, Nurcahaya¹ and Syafruddin Syam¹

¹Universitas Islam Negeri Sumatera Utara, Jl. Willem Iskandar, Medan, Indonesia

Keywords: Islamic law, *itsbat* of marriage, legal certainty, marriage, wedding acts

Abstract: This paper aims at discussing the problems of legal certainty of marriage in Indonesia. It is known that marriages in Indonesia are based on Wedding Acts No. 1 year 1974. In article 2 (1) of the Acts, it is explained that for married couple "Marriage is lawful if it is done according to the laws of their religions." This validity is reaffirmed by chapter 4 of KHI (Compilation of Islamic Laws) namely "Marriage is lawful if it is done according to Islamic law." However, so many marriages are not registered for several reasons. To fulfill the legal certainty of marriages, it must be registered to the Islamic Court or Religious Affairs Office through *itsbat* of marriage. Using some references as the data source, the authors find that the reasons in doing *itsbat* of marriage is not merely for having legal certainty of the marriage, but also for having administrative legitimization to divorce and for legitimizing polygamy.

1 INTRODUCTION

In Act No. 1 Year 1974 about marriage, in article 1, it is stated that "Marriage is the inner bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on the One Supreme God." Furthermore, in Article 2 paragraph (1), it is explained that "Marriage is lawful if it is done according to the laws of their respective religion and belief." For Muslim society in Indonesia, the Compilation of Islamic Laws (*Kompilasi Hukum Islam*) states that "Marriage is lawful if it is done according to Islamic law, it is in accordance to paragraph (1) Law of the Wedding Act No. 1/1974 above.

Marriage in Islamic law is declared valid if it is in accordance with the pillars of marriage and the legal requirements. The pillars of marriage in Islam consist of five items: the groom, the bride, the guardian, two witnesses, and the vow (*qabul'sijab*). Then, the legal requirements of marriage itself are requirements of the future husband, the future wife, the guardian, the witnesses, and the *ijabqabul* conditions (Syarifuddin, 2006).

However, within the Indonesian legal system, marriages that have been declared valid in religion cannot be acknowledged administratively before they are recorded in the authorized institution as what has been set in article 5 of the Compilation of Islamic

Law; (1) in order to ensure marriage order for Islamic society, every marriage should be recorded; (2) the registration of such marriage in paragraph (1) shall be conducted by the Registrar as stipulated in Act No. 22 of 1946 jo. Act No. 32 Year 1954. Therefore, in Indonesia the marriage is declared valid if it meets two procedures: first, it is carried out according to their respective religious law, and second it shall be recorded in accordance with applicable legislation.

In fact, the need to record marriage in the midst of this society is still a problem itself. There are still many marriages that are only conducted on the basis of religion without being registered to the Religious Court or the Office of Religious Affairs as the authorized institution to record marriages. Some of the reasons that people do not register their marriages in the Religious Court are: (1) the lack of knowledge and understanding of the need to record marriages, (2) the geographical conditions between the residence of the bride and the Office of Religious Affairs, (3) the lack of necessary administrative evidence, such as Personal Identity Cards, (4) expense, and (5) the deliberate intentions of both brides to ensure that the marriage being performed is not for public (Qohar, 2015).

Essentially, these unrecorded marriages have no clear legal certainty. However, when the bride and the groom are in a state of urgency demanding their legal certainty on matters relating to their marital status,

they will start applying to register their marriage. The attempt to record this marriage is called as *itsbat* of marriage. The *itsbat* of marriage is often done to overcome the problem of marriage contract which has been executed legitimately according to Islamic law, but not yet recorded in the Office of Religious Affairs or Court. The marriage of people who ask for *itsbat* marriage sometimes has lasted tens of years even until they have children and grandchildren. Therefore, *itsbat* of marriage is intended as a proof of the validity of marriage to guarantee the rights of spouses in the event of divorce, and to protect the rights of the child, such as the birth certificates, the handling of passport, and the right of inheritance.

Although there are lots of studies discussing *itsbat* of marriage, there is still very little of them which focuses on to the factors that affect the issues of *itsbat* of marriage. This paper is to examine the position of *itsbat* marriage in the legal system of Indonesia, the legal force used as the basic foundation of *itsbat* of marriage, the problems encountered, and the reasons contributing to the implementation of *itsbat* of marriage.

2 THE POSITION OF *ITSBAT* MARRIAGE IN THE LEGAL SYSTEM OF INDONESIA

As mentioned earlier, marriage will be considered valid if it is done according to their respective religion and beliefs. For the Muslim community, marriage is considered legitimate and officially recognized by the people if it is carried out according to the rules and laws of Islam. However, the state considers that religious marriage still can not be supervised by the state law because marriage in Islam cannot be proven. Therefore, Indonesia requires marriage to be recorded by the law.

In an attempt to disentangle the missing link of the legal understanding of marriage under the laws of law, Sheikh Jaadal-haq classifies the provisions governing marriage to two categories, namely *syara* and *al-tawtsiqiy* rules.

The rules of *syara* are those that determine the validity or illegality of a marriage. This regulation is established by Islamic Shari'a as formulated in the jurisprudence books of various *madhhabs*.

Tawtsiqiy regulation is an additional regulation with the aim that marriage among Muslims is recorded in the register book of Deed of Marriage which is made by the competent authority to be regulated in the regulation of state administration. It

functions to protect a marriage from the negative efforts of the parties who are not responsible. For example, as an anticipation of the denial of marriage ceremony by a husband in the future, it would be more protected by the presence of official records in the authorized institution.

Government efforts of course want to manage marriage administration in Indonesia that will clarify the position of family and its members in the society, especially regarding the status of wife and husband, children, marriage, and inheritance by law. Although it is legally valid, if it is not recorded, it will be very difficult to make a proof if there is a dispute.

3 THE LEGAL FORCE USED AS THE BASIC FOUNDATION OF *ITSBAT* MARRIAGE

According to *Kamus Besar Bahasa Indonesia* (KBI) – the Great Dictionary of the Indonesian Language, *itsbat* of marriage is defined as the determination of the truth (validity) of marriage (*Kamus Besar Bahasa Indonesia*, 1995). *Itsbat* of marriage is the endorsement of marriages which have been held according to the Shari'a of Islam, but not recorded by the the Office of Religious Affairs or the authorized MARRIAGE REGISTRAR (Decision of the Chief Justice of the Supreme Court Number KMA / 032 / SK / 2006 on Guidelines for Implementation of Duties and Administrative Courts).

The provisions of the Compilation of Islamic Law (KHI) article 7 paragraph (2) mentioned: "In the case of marriage that cannot be proven by marriage certificate, *itsbat* of marriage can be conducted in the Religious Court". In paragraph (3) it is mentioned that the *Itsbat* of marriage submitted to the Religious Courts is limited to matters pertaining to: a. The existence of marriage in the framework of divorce settlement; b. Loss of marriage certificate; c. The existence of doubts about whether or not a single legal requirement of marriage; and e. Marriage conducted by those who do not have marital obstacles according to Act Number 1 Year 1974.

The petition of *Itsbat* of marriage shall be submitted to the Religious Court by those who can not prove their marriage with the Marriage Certificate issued by the Registrar of Recording Officer because it is not recorded. The petition of marriage petition filed by the Petitioners or by the Religious Courts will be processed in accordance with the provisions of the procedural law. In the Technical Manual of Administration and Technical Religious Courts 2008

published by the Supreme Court of the Republic of Indonesia, it is mentioned that "The Religious Courts can only grant the petition of marriage, as long as the marriage has been fulfilled and the marriage rules of Islamic Sharia and the marriage does not violate the ban on marriage which is regulated in Article 8 s / d Article 10 of Law Number 1 Year 1974 jo. Article 39 s / d Article 44 Compilation of Islamic Law. "

In general, marriages are implemented after the enactment of Law No. 1 of 1974 on Marriage. Whereas in a contrario (*mafhum mukhalafah*) marriage that was implemented after the Act no. 1 Year 1974 on Marriage, religious courts are not authorized to conduct the *itsbat* marriage. However, because *Itsbat* of marriage is needed by the community, the Religious Court judges do "ijtihad" by deviating it, then granting the petition of marriage based on the provisions of Article 7 Paragraph (3) letter e Compilation of Islamic Law. If the marriage petitioned for inclusion is not a marriage barrier as set forth in Law Number 1 Year 1974 concerning Marriage, the Religious Courts will grant the petition of marriage even if the marriage is held after the coming into effect of Law no. 1 Year 1974 about Marriage.

On the basis of ratification or determination of marriage by the Religious Court, the applicant will then be used as a basis to register his marriage to the Officer of the Official of the Religious Affairs Office (*KUA*) Sub-District, and on the basis of the determination also the Registrar shall issue a Marriage Book or Marriage certificate.

Article 7 Paragraph (3) Sub-Paragraph d, Compilation of Islamic Law affirms; *Itsbat* of marriages that can be submitted to the Religious Courts if it is limited to the marriage that occurs before the enactment of Law No. 1 of 1974. It is understood that the petition of marriage that can be applied to the Religious Courts basically only to marriage that occurs before the enactment of Law No. 1 Year 1974 about Marriage. Therefore, in a contrario (*mafhum mukhalafah*) marriage that was implemented after the Act no. 1 Year 1974 on Marriage, religious courts are not authorized to conduct *Itsbat* of marriage.

The determination of *Itsbat* of marriage issued by the religious courts is then used as a basis for registering their marriage to the Marriage Officer of the Religious Affairs Office, and then the Religious Affairs Office shall issue a Marriage Book or Marriage Certificate. In addition, their marriage is considered legal by the state. Another consequence is that they are entitled to claim their rights as citizens in relation to marriage (Arto, 1996).

4 THE REASONS CONTRIBUTING TO THE IMPLEMENTATION OF *ITSBAT* MARRIAGE

Some of the reasons that contribute to the implementation of *itsbat* of marriage are as follows:

4.1 To Get Marriage Certificate

The marriage certificate will fulfill the social rights of family members, generates the social order in the society so that it will create harmony in social life. Married couples who have been married according to the religious law (Islamic), but are not recorded, simply will record their marriage to the Office of Religious Affairs by first applying their marriage to the Religious Court marriage, without having to re-marry or newly married (*tajdid an-nikah*) because it is contrary to the provisions of Article 2 Paragraph (1) of Law Number 1 Year 1974 about Marriage.

4.2 To Ratify *Sirri* Marriage

Sirri marriage (unregistered Marriage) is a marriage which is not recorded by the Registrar (MARRIAGE REGISTRAR). It is a marriage that is not under MARRIAGE REGISTRAR supervision, if it meets the pillars and requirements according to their respective religions and beliefs, for example in some Muslim societies that still adhere to traditional *Fiqh* perspectives. This marriage is legally valid, but has no legal force, because it does not have legal proof of marriage according to the prevailing laws and regulations (Mubarok, 2005).

4.3 To Ratify Polygamous Marriage

The phenomenon that often occurs today is the number of polygamy practices which is conducted with *sirri* marriage because of various reasons and backgrounds. In fact, *sirri* marriage causes problems for the family itself, regarding the status, property or material possessions. For children, for example, the *sirri* marriage can be a problem when a child needs his/her birth certificate for school, work and so on, and for wives (result of *sirri* marriage), it also causes problem when they need legal certainty for future needs or when mingling within the society.

For those who want to marry more than once will usually perform the *sirri* marriage which will be legalized through religious belief (*itsbat* of marriage), rather than following the polygamy procedures

according to the provisions of the marriage law. Thus, the Religious Courts must accept, examine, consider, and decide the petition of marriage to the Religious Courts with careful consideration and in-depth study, the Religious Courts must learn a lot from the cases that have been there.

4.4 To Get a Divorce

Isbat of marriage is also done by couples who want to divorce in front of the court when previously they have conducted *sirri* marriage and not recorded. In this case, for example, when the husband wants to divorce a wife who is married in *sirri* with him, then he applies for divorce to the Religious Court, then the first path that must be taken is to conduct an *itsbat* marriage. The existence of *itsbat* of marriage and *isbat* for divorce becomes a new issue for the practice of *sirri* marriage. This opens the opportunity for the practice of *sirri* marriage as *sirri* marriages for polygamy are not recorded. Therefore, *itsbat* of marriage can be seen as a two-edged knife, on one hand *itsbat* of marriage is to assist the community in resolving *sirri* marriage issues, but on the other hand, they also have opportunity to open the development of *sirri* marriage practice, because if *sirri* marriage can be compromised, it will legalize the marriage to the Religious Court by filing a petition bring good virtue, and eventually marital status becomes legitimate in the eyes of the State.

Therefore, for the judges, it will be their own homework, whether *itsbat* of marriage will bring more goodness or even bring *madharat* (badness) for all parties in the family (Ali, 2006)

4.5 To Get Marital Legal Certainty for Child's Status and Marital Property

Usually when people need legal certainty over their marriage and legal certainty about the status of their child, the couple will file a petition for the *itsbat* marriage in the Religious Courts.

The existence of legal certainty of *itsbat* of marriage on marital status and on the status of the child is closely related. The legal status of a child comes from a legal marriage. In the recognition of the State, a legitimate child is born of a recorded marriage. Therefore, the status of this child becomes one of the reasons for proposing *itsbat* of marriage. The status of the child is not only related to the validity of the child's status but also is closely related to his/her rights as the legal child including with regard to parental rights, livelihood rights, inheritance

rights, and so on. Another reason for filing *itsbat* of marriage is related to children's rights, the main reason that the petitioners apply for marriage to the Religious Courts is in order to deal with the Birth Certificate of their children in addition to obtaining the legal certainty of the marriage of the petitioners themselves.

In line with the legal certainty of *itsbat* of marriage on marital status and the status of the child, *itsba* of marriage will also provide legal certainty to the status of marital property. With the existence of *itsbat* of marriage, the legal marriage, and the settlement of marital wealth disputes can refer to the provisions of existing legislation, such as the provisions of Chapter VII Act No. 1 of 1974 regulate the property in marriage. Article 35 states that (1) The property acquired during the marriage becomes a common property; (2) The property of each husband and wife and the property acquired respectively as a gift or inheritance is under the control of each other as long as the parties do not specify otherwise.

4.6 The Role of the Religious Courts

Marriage recording is one form of government or state intervention to protect and ensure the fulfillment of the social rights of every citizen, especially married couples, and children born of the marriage. Religious Courts as State institutions with marriage have been contributed enormously and importantly in an effort to provide a sense of justice and certainty and legal protection for the community. Those who do not have a Family Card because they do not have Marriage Books, after the establishment of marriage ceremony by the Religious Courts will be easy to take care of Family Card and Birth Certificate of their children so that it is not difficult for their children to go to school. In fact, prospective pilgrims who do not have a Marriage Books are greatly helped by *itsbat* marriage conducted by the Religious Courts in order to get passports.

The establishment of *itsbat* of marriage by the Religious Courts aims to provide protection to children born from unrecorded marriages. The registration of marriage is a protection and guarantee for the fulfillment of social rights of every citizen, especially the married couples, and children born of the marriage. With the fulfillment of social rights, it will generate social order so that it will create harmony of social life.

5 THE PROBLEMS ENCOUNTERED IN *ITSBAT* MARRIAGE

5.1 The Legal Protection of *Itsbat* Marriage

The main obstacle for the Religious Courts to be able to perform its optimal function in undertaking *itsbat* marriages for unrecorded or unregistered marriages is the absence of a strong legal protection. Article 7 paragraph (1) The Compilation of Islamic Law published in 1991 states that "Marriage can only be proven by the Marriage Certificate made by the Registrar Officer".

This legal norm is intended to encourage married citizens to register their marriages in order for written evidence, recorded by the state that they are married. However, the existence of the article is still not able to actualize that every marriage event will be recorded, and will get their marriage certificate. Article 7 number (2) the Compilation of Islamic Law states that "In this case, marriage cannot be proven by marriage certificate, they can propose the *itsbat* marriage to the Religious Court."

The availability of this law is still of a relaceless nature, and there is an impression of coercive law enforcement that is obligatory. The lack of a legal protection on this *itsbat* of marriage is due to the Compilation of Islamic Law (KHI) which is not included in the hierarchy of the Legislation Regulation especially the one mentioned in Article 7 of Law Number 10 Year 2004 on the Establishment of Legislation. Therefore, the establishment of marriage ceremony by the Religious Courts is no more than a policy to fill the legal gap that regulates the establishment of marriage which is implemented after the enactment of Law Number 1 Year 1974 regarding Marriage.

5.2 The Sociological Administrative Condition and the Cost of *Itsbat* Marriage

Itsbat of marriage is the determination of marriage of a man with a woman as husband and wife who have been implemented in accordance with the provisions of Islam (the fulfillment of terms and marriages), but this marriage has occurred in the past and not registered to the authorized officials (the Office of Religious Affairs).

One of the disadvantages of not having a marriage certificate in terms of population administration

aspect is that a child of unregistered marriage cannot obtain a birth certificate. This condition is not conducive, and becomes a legal issue, and the legal impact is great enough for the child. The problem becomes more severe after the issuance of Law Number 23 Year 2006 regarding Population Administration and its amendment (Law Number 24 Year 2011) which aims to realize the orderly administration of population. Then, the ownership of demographic documents becomes very important in the fulfillment of the civil and political rights of every citizen.

In reality, a family who do not have a marriage certificate and have children cannot obtain a birth certificate for their children. Indonesians who have not recorded marriages are predominantly Muslim, where there is an obligation to conduct the *itsbat* of marriage in the Religious Courts prior to the registration of marriage by the Office of Religious Affairs. However, the cost of *itsbat* of marriage turned out to be one of the obstacles for couples who want to register his marriage, because the fees set by the Religious Court is quite expensive. In fact, couples who have not recorded marriages are generally classified as poor, making it difficult to expect them to prioritize the funds they have to do for marriage. This is quite ironic, considering that for non-Muslim residents, there is no provision of *itsbat* or court, but it is enough with a massive blessing that does not require a big cost, and afterwards can be recorded at civil registration without cost.

For example, according to the data from Qohar's study (2015), the cost of conducting *itsbat* of marriage is as follows: Religious Court Karawang Regency: Rp. 791.000, Religious Court Madiun Regency: Rp. 791.000, - Religious Court of West Sumbawa Regency: Rp. 811.000, - Religious Court Batam Rp. 600.000, - Religious Court of Sampang Regency: Rp. 400,000, - the amount of the fee may change as the cost is based on the zone or the distance radius between the applicant's location and the Religious Courts office. The further the applicant's location, the greater the cost is. The fee usually does not include the cost of purchasing the seal which is also the responsibility of the applicant.

6 CONCLUSIONS

Marriage in Islamic law is declared valid if it is in accordance with the harmonious and legal requirements. However, within the Indonesian legal system, marriages that have been declared legally valid cannot be recognized administratively before

being recorded in the authorized institution. In fact, there are still many marriages that are only based on religion without being registered to the Religious Courts or the Office of Religious Affairs. This unrecorded marriage does not have a clear legal certainty on matters relating to marital status. For that, *itsbat* of marriage is often done to overcome the problem of marriage contract that has been executed legitimately according to Islamic law, but not yet recorded in the office of religious affairs or court. *Itsbat* of marriage is intended as a proof of the legal marriage to guarantee the rights of spouses in the event of divorce, and to protect the rights of the child, such as the birth certificate, passport, and inheritance rights.

Although there are a lot of studies related to *itsbat* of marriage, still very little attention is given to the factors that contributes to the problems of *itsbat* of marriage. Therefore, it is necessary to study the position of marriage in Indonesian legal system, the force of law which is used as the foundation of *itsbat* of marriage law, the reasons that affect the implementation of marriage, and the problems faced.

After the cases in the Religious Courts and the Office of Religious Affairs are analysed, it can be seen that *itsbat* of marriage has an important position in the legal system of Indonesia because the state considers that religious marriage is still not able to be supervised by state law. The *itsbat* of marriage implementation will assist government efforts to discipline marriage administration in Indonesia which will then clarify the position of family and its members in the society, especially regarding the status of wife and husband, children, marriage, and inheritance by law.

Then, the law force of the marriage principle is based on the Compilation of Islamic Law (KHI) Article 7 paragraph (2) which states that "In the case of marriage cannot be proven by marriage certificate, *itsbat* of marriage can be conducted in the Religious Court". In paragraph (3) it is mentioned that The *itsbat* of marriages submitted to the Religious Courts is limited to matters pertaining to; a. The existence of marriage in the framework of divorce settlement; b. Loss of marriage certificate; c. The existence of doubts about whether or not a single legal requirement of marriage; and e. Marriage conducted by those who do not have marital obstacles according to Law number 1 Year 1974.

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Religious Court judges do *ijtihad* by deviating it, then granting the petition of marriage based on the provisions of Article 7 Paragraph (3) letter c Compilation of Islamic Law. If the marriage petitioned for inclusion is not a marriage barrier as set forth in Law Number 1 Year 1974 concerning Marriage, the Religious Courts will grant the petition of marriage even if the marriage is held after the coming into effect of Law no. 1 Year 1974 about Marriage.

The reasons that contribute to the implementation of *itsbat* of marriage are because the married couples (1) want to get marriage certificate or their marriage certificate is lost, (2) want to ratify *sirri* marriage, (3) want to ratify polygamous marriage, (4) want to get divorced, and (5) want to get marital legal certainty for child's status and marital property. *Itsbat* of marriage may also take place because of the role of religious courts.

The problems faced in *itsbat* of marriage are the lack of a legal protection on this *itsbat* marriage due to the Compilation of Islamic Law (KHI) which is not included in the hierarchy of the Legislation Regulation especially the one mentioned in Article 7 of Act Number 10 Year 2004 on the Establishment of Legislation, and the Sociological administrative condition and the cost of *itsbat* of marriage. The further the applicant's location, the greater the cost is.

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