

Implementation of *Itsbat Nikah* as A Way To Get The Legal Power Which is not Recorded

Achmad Budi Waskito¹

Abstract. Article 2 (1) states the Marriage Act, marriage is valid if it is done according to the law of each religion and belief. Furthermore, Article 2 (2) states every marriage is recorded in accordance with the legislation in force. Thus a marriage must comply with religious law and positive law. Statements about the validity of marriages taking place before Act No. 1 of 1974 concerning marriage and run other regulations. Solutions that marriage is not recorded can be reached by way of *itsbat nikah* propose marriage to the Religious Courts under Article 7 Compilation of Islamic Law (KHI). According to Article 7 paragraph (1) KHI marriages under Islamic law can only be proven with Marriage Certificate made by the Registrar of Marriage Officer. On the one hand Regulation Legislation Indonesia expressed registration of marriage is the only evidence of the occurrence of marriage, but on the other side of the law provide a way out for people who can not prove their marriage with the street Determination of Marriage (*Itsbat nikah*). *Itsbat nikah* as the authority of the PA need for legal protection should be equivalent law or legal rules included in the sort order legislation.

Keywords: Implementation of *Itsbat nikah*, Religious Courts Authority, Marriage Not Recorded.

1. Introduction

Marriage is a very important legal events in human life with a variety of legal consequences. Therefore the laws governing marriage in detail. Act No. 1 of 1974 About Marriage states that marriage is a bond physically and mentally between a man and a woman as husband and wife, with the aim of forming households (families) who are happy and everlasting based on belief in one God, the next article 2, paragraph (1) said, marriage is valid if it is done according to the law of each religion and belief, and in paragraph (2) states that marriage is recorded in accordance with the legislation in force.²

Under the provisions of the above can be said that the registration of marriages only an administrative act which has no effect on whether or not the marriage valid³. As such, the basic validity of a marriage is according to religion or belief. Statements concerning the validity of a marriage is confirmed in article 4 Compilation of Islamic Law which says that marriage is legal if carried out under Islamic law in accordance with Article 2 (1) of Act No. 1 of 1974 About Marriage.

Furthermore, Article 5 Compilation of Islamic Law states:

- Order to guarantee their marriage for Muslims every marriage must be recorded.
- Registration of marriages in paragraph (1), carried out by the Registrar of Marriage Officer as stipulated in Act No. 22 of 1946 jo. Act No. 32 of 1954.

Registration of marriage as described above, is aimed at establishing order in society. This is

¹ Students Master Program (S2) of Law UNISSULA email: achmadbudiwaskito093@gmail.com

² Munir Fuady 2014 *Konsep Hukum Perdata* PT Raja Grafindo Persada Jakarta p. 10.

³ Abd. Somad 2012 *Hukum Islam; Penormaan Prinsip Syariah dalam Hukum Indonesia* Kencana Prenada Media Group Jakarta p. 295.

an effort that is regulated by legislation, to protect the dignity and sanctity (*misaqan ghalidzan*) marriage,⁴ and more specifically women in married life.⁵

Furthermore, Article 6 states that:

- To comply with the provisions of Article 5, every marriage should be conducted in the presence and under the supervision of the Registrar of Marriage Officer.
- Marriages performed outside the supervision of the Registrar of Marriage Employees have no legal provisions.

The provisions of article 6, paragraph (1) and (2) above emphasized that marriage conducted without the employee before the marriage registrar means not recorded and can not be proved by a marriage certificate at the same time have no legal force.

Their legal event as well as registration of marriages conducted in the presence of VAT, then the husband and wife were each given official copies of marriage (Article 13 paragraph (2) Regulation No. 8 of 1975 on the implementation of Act No. 1 of 1974) so that the marriage can be proved with a marriage certificate.

In more advanced age, where the government is in full swing to curb administrative and record keeping in all institutions, in many cases, a person who has a family or an existing family, should entail and require Excerpt of Marriage Certificate. Call it for the care of the Children's birth certificates, ID cards, KK, school entry requirements, applying for a job, divorce, retirement and others. Excerpt their Marriage Certificate is a prerequisite for further proceedings. If not, the matter will not be completed. Compilation of Islamic Law in Article 7 mentioned, marriage can only be proved by a marriage certificate in the case can not be proved with that, it can be submitted *itsbat nikah* endorsement of marriage or marriage to the Religious Courts.

Article 7 paragraph (3) Compilation of Islamic Law explained, however, only limited on matters relating to: their marriage in the context of a divorce settlement, the loss of Marriage Certificate, doubts have grappled with one of the conditions of marriage, their marriage that occurred prior to the enactment Act No. 1 of 1974, and the marriage is done by those who do not have a marriage impediment under Act No. 1 of 1974.

Based on the above, the authors are interested to examine how the implementation of *itsbat nikah* as a way to gain legal force of marriage were not recorded. Any constraints in the implementation of *itsbat nikah* as a way to gain legal force of marriage were not recorded and what's the solution?

Research Methods

In this study was used method of normative analysis, in finding data perpegang in juridical terms. Judicial approach used to assess and analyze the legal provisions concerning the implementation of *itsbat nikah* as a way to gain strength not recorded marriage laws contained in the positive law, both in Act No. 1 Of 1974 On Marriage and the Compilation of Islamic Law. While the normative approach is intended to examine the doctrinal provisions. Then this type of research is descriptive analytic, describing the legislation in force associated with the legal theory and practice of positive law which relates to issues of implementation of *itsbat nikah* as a way to gain legal force of marriage is not recorded.

⁴ Abdul Ghani Abdullah 2002 *Himpunan Perundang-Undangan Dan Peraturan Peradilan Agama* Gunung Jati Jakarta p 107.

⁵ Ahmad Rofiq 2000 *Hukum Islam Di Indonesia* PT Raja Grafindo Persada Jakarta p. 107.

2. Results And Discussion

2.1. Implementation of the Basic Law of *Itsbat nikah*

Definition of marriage in the perspective of Positive Law is more than just a contractual relationship between a man and a woman, but also a bond and unseen everlasting to everlasting, without being limited to a specific time and based on the foundation of religion and belief in God Almighty, as well as Act No. 1 of 1974 Article 2 (1) states that a marriage can be regarded as the marriage was performed according to religious law. Then the article 2, paragraph (2) states that, every marriage is recorded in accordance with the applicable legislation. Marriages made in accordance with this provision can be evidenced by the Marriage Certificate. With the evidence of Marriage Certificate is an authentic proof and evidence, of the existence of marriage that has been done by the community. The marriage certificate will be very beneficial for them and the children related to marriage, for example, to take care of matters related to administrative and civil issues. Then marriage does not take place before the VAT and did not note that it can not be proved by Certificate, although only comply with the religion of marriage is called "*nikah siri*" or under the hand, the marriage by Komplasi Islamic law is given the opportunity to apply *itsbat nikah* to acquire the force of law in the form of Marriage Certificate.

Itsbat nikah authority marriage case is basically the authority of the Religious Courts in history is reserved for those who perform marriages under the hand before the enactment of Act No. 1 of 1974 on Marriage and Government Regulation No. 9 of 1975 which is the implementing regulations of Act No. 1 of 1974. However, this authority evolved and expanded to the worn provisions of Islamic Law Compilation (KHI) Article 7 (2) and (3), in paragraph (2) disebutka that "in the case of marriage can not be proved with ceremony, can be submitted to the Religious Courts *itsbat nikah* illegitimate ". Compilation of Islamic Law in Article 7 (3) reads: *itsbat nikah* that can be submitted to the Religious Court limited on matters relating to:

- Their marriage in the context of a divorce settlement.
- The loss of Marriage Certificate.
- Their legitimate doubts about whether or not one of the conditions of marriage.
- Their marriage that occurred prior to the enactment of Act No. 1 of 1974.
- Marriages performed by those who do not have a marriage impediment according to Act No. 1 of 1974.

Article 7 (2) and (3) Compilation of Islamic Law that has given more powers than those provided by law, either by Act No. 1 of 1974 on Marriage and the Act No. 50 Of 2009 About Changes To 2 of Act No. 7 of 1989 on the Religious Courts. Article 7 (2) KHI has absolute competence very knowledgeable about implementation of *itsbat nikah* without limitation, issues the main one is the authority of the religious court to perform its functions optimally linked to the implementation of *itsbat nikah* marriage is not noted is the absence of legal protection strong. According to Article 2 MPR Decree No. III / MPR / 2000 on the source of law and order order legislation, Inpres is not included in the sort order for legislation of the Republic of Indonesia, for the implementation of the Constitutional of 1945 it is in the form of descriptions, such as MPR, Act (PERPPU) Government Regulation, Presidential Regulation,

and Local regulations both provincial and district or city level.⁶

More on this *itsbat nikah* Permenag No. 3 of 1975 which in Article 39 paragraph 4 specifies that if the Office of Religious Affairs can not make a duplicate of the marriage certificate because records have been destroyed or lost, or because of other reasons, then to determine the existence of marriage, divorce, or refer, shall be determined by the decision (in the sense of determination) Religious Court, but this is related to marriages performed before Act No. 1 of 1974 is not against the marriage that followed. Competence absolute about *itsbat nikah* as voluntair this case can not be analogous to (*Qiyas*) in case of cancellation of marriage, divorce, or polygamy. The principle is not to seek a court case but the case has become the authority because it has been granted by the Act.

Case *itsbat nikah* voluntair marriage is a matter which should be designated law, if the law does not authorize the courts have no authority. If the marriage under the hand after the enactment of Act No. 1 of 1974, given a place to *itsbat nikah*, then sociologically certainly would encourage the marriage under a massive hand. If we think more carefully, the provisions of Article 7, paragraph 2 KHI has given a very broad absolute competence of *itsbat nikah* this marriage without restrictions and exceptions, even though in explanation of the chapters just explained that this section only applied after the enactment of legislation religious courts. if the law does not authorize the courts have no authority. If the marriage under the hand after the enactment of Act No. 1 of 1974, given a place to *itsbat nikah*, then sociologically certainly would encourage the marriage under a massive hand. If we think more carefully, the provisions of Article 7, paragraph 2 KHI has given a very broad absolute competence of *itsbat nikah* without restrictions and exceptions, even though in explanation of the chapters just explained that this section only applied after the enactment of legislation religious courts. if the law does not authorize the courts have no authority. If the marriage under the hand after the enactment of Act No. 1 of 1974, given a place to *itsbat nikah*, then sociologically certainly would encourage the marriage under a massive hand. If we think more carefully, the provisions of Article 7, paragraph 2 KHI has given a very broad absolute competence of *itsbat nikah* without restrictions and exceptions, even though in explanation of the chapters just explained that this section only applied after the enactment of legislation religious courts. Sociologically it will surely encourage mating handed down massively. If we think more carefully, the provisions of Article 7, paragraph 2 KHI has given a very broad absolute competence of *itsbat nikah* without restrictions and exceptions, even though in explanation of the chapters just explained that this section only applied after the enactment of legislation religious courts. Sociologically it will surely encourage mating handed down massively. If we think more carefully, the provisions of Article 7, paragraph 2 KHI has given a very broad absolute competence of *itsbat nikah* without restrictions and exceptions, even though in explanation of the chapters just explained that this section only applied after the enactment of legislation religious courts.

⁶See also the provisions of Article 7 of Act No. 12 of 2012 on the Establishment of Legislation. Tata sequence that regulation reflects the hierarchy which is the political implementation of the law in writing. Samsul Wahidin 2017 *Politik Penegakan Hukum Di Indonesia* 1 Ed. Pustaka Pelajar Yogyakarta p. 23.

2.2. Analysis of Implementation of *Itsbat Nikah* For A way To Get Power of What Not Logged Marriage Law.

Regulations Compilation of Islamic Law emphasized that marriage valid when performed according to religious law, as in Article 2 paragraph (1) of Act No. 1 of 1974 is: "Marriage is legal, if done according to each religion and belief". Thus, the marriage made by Muslims to be valid if it is done according to the rules of marriage in Islam. In a contrario, then the marriage is done by Muslims by not based on the rules of marriage in Islam is not valid. Explanation of article 2, paragraph (1) of Act No. 1 of 1974 explained that the formulation of article 2, paragraph (1), there is no legal marriage outside their respective religion and belief, in accordance with the Basic Law 1945.⁷

Itsbat nikah petition submitted by the applicant, by the Religious Courts shall be processed in accordance with the procedural law. In the book of Technical Guidelines for Administrative and Technical Religion Court in 2008 issued by the Supreme Court stated: "Religious Court can only be granted *itsbat nikah*, during marriage has been held eligible and harmonious marriage in Islamic law and the marriage does not violate the ban arranged marriages Article 8 through Article 10 of Act No. 1 of 1974 jo, Article 39 through Article 44 Compilation of Islamic Law.

Compilation of Islamic Law in Article 7 paragraph (3) letter (a) declare their marriage in the context of a divorce settlement. According Neng Djubaidah, "This formula has not fully guarantee the right of inheritance-heir wives and children were legitimate under Islamic law but or not listed, because they found religious court decisions that refused *itsbat nikah* when her husband had died. Divorce settlement is done when the husband is still alive, whereas if the divorce because divorce die, die divorce does not include a reason for the filing of the petition *itsbat nikah*".⁸ Although there is a setting process of the examination request filed *itsbat nikah* is voluntair, the product form of stipulation. But if the husband or wife who had been left for dead by his or her spouse, can apply for marriage in contentious application *itsbat nikah* by putting other heirs as the respondent.⁹

Not to mention the advanced emerging issues such as how, if a claimant retract divorce case, or the applicant does not want to pledge to divorce for reconciliation as husband and wife, but already there is an interim decision on the validity of their marriage. Article 7 paragraph (3) (b) of the disappearance of Marriage Certificate, if the missing citations marriage certificate copies can be requested at KUA District of place where the marriage is done. But if an authentic record Marriage Certificate in KUA is missing or can not be found may still be obtained rangkapnya in the Office of Religious Court, as described in Article 13 paragraph (1) of Government Regulation No. 9 of 1975 which states "Deed of Marriage" was made two (2) pieces of first saved by Employees Registrar, the second page is stored on the Clerk of the Court within the Office of Marriage Registration were, as a preventive action or caution when the feared loss of notebook Deed the original marriage. If the deed of

⁷Ministry of Religious Affairs of the Republic of Indonesia 2004 officials of the Department Guidelines 2004 Edition Directorate General of Islamic Community Guidance and of Hajj Jakarta (hereinafter referred to as the Department of Religion of the Republic of Indonesia II) p. 504.

⁸ Neng Djubaidah 2012 *Pencatatan Perkawinan Dan Perkawinan Tidak Dicatat Menurut Hukum Tertulis di Indonesia Dan Hukum Islam* Sinar Grafika Jakarta p. 223.

⁹ The Supreme Court of the Directorate General for Religious Courts 2012 Guidelines for the Implementation and Administration of Justice Task Religion Jakarta MA RI.

marriage was still not there, the possibility can be searched and searched for photos copied relevant agencies ever to receive a copy of Excerpt of Marriage Certificate (for example in the village office while taking care of the new KK petition or at the Civil Registry Office when taking care of a birth certificate) and then used as the basis for the making of copies at KUA. So there is no need to apply *itsbat nikah* as stipulated in Article 7 ayat (3) (b) is. Article 7 paragraph (3) letter (c) of valid doubts about whether or not one of the conditions of marriage, this would lead to the cancellation of the marriage and not a matter *itsbat nikah*. If one of the conditions of marriage are not met, then it should be decided that the marriage is not valid and not to establish the validity of the marriage.

The problems arising from the implementation of *itsbat nikah* is related to the provision of the implementation time of marriage before the enactment of the Marriage Act No. 1 of 1974, as stipulated in Article 7 paragraph (3) letter d KHI, whereas in fact the *itsbat nikah* petition filed against marriages performed after or at the top in 1974. Against such cases, judges need to mix ratio, logical and legal reasons that allow the search for religious courts receive case *itsbat nikah* despite being petitioned marriage occurred after the enactment of the marriage Act.¹⁰ There are at least two reasons to accept the Islamic Court and deciding cases *itsbat nikah* to marriage after the enactment of the Marriage Act. The first reason, with regard to the principle of *ius curia Novit* the judge deemed to know the law *itsbat nikah*, and the principle of freedom of the judge to find the legal issues or cases that there are no legal regulations (*rechtsvacuum*). Second, the sociological approach that encourages judges to analyze a case with the approach of the sociology of law and conduct theological interpretation (*exegesis sociological*) against another rule that has to do with the problems encountered so that the law is not stagnant, but evolve to follow the progress of society, or in accordance with the laws of the living and evolving (*living law*) in the community. These steps are then known as legal discovery (*Rechtsvinding*).¹¹

Some legislation also be legal reasons this argument, among others, Article 10, paragraph (1) of Act No. 48 Of 2009 concerning Judicial Authority that states are prohibited Court refused to examine, hear and decide a case filed on the grounds that the law does not exist or is less clear, but mandatory for going over and put him on trial, and article 5, paragraph (1) of Act No. 3 of 2006 on the Amendment of Act No. 7 of 1989 About Religion Court also stated that same. Whereas Article 5 (1) of Act No. 48 concerning Judicial Authority reads "Justice and judges of the constitution shall explore, and understand the legal values and sense of justice in society".

Thus, according to the authors *itsbat nikah* that has been done by a religious court has met the elements of reason, as noted above, the submission of application for administering *itsbat nikah* or birth certificates for marriage arrangement that *Syar'iyah* committed after the enactment of Act No. 1 1974. But the judge must be careful in considering in earnest that the *Itsbat nikah* really will bring good or it will bring *kemudharatan* for the parties in the family.

Article 7, paragraph 4 is very important to clarify the parties are entitled to nominate *itsbat nikah*, and also further explained the "other side" with an interest in the marriage.

¹⁰ Endang Ali Ma'sum 2012 *Kepastian Hukum Itsbat Nikah*, paper presented Discussion Forum Research conducted by the Research and Training Kumdil MA RI at the hotel Le Dian Serang dated May 15 2012 p. 2.

¹¹ *Ibid* p. 7.

Statements about the validity of marriages taking place before Act No. 1 of 1974 concerning marriage and run other regulations. The solution on the issue of marriage that took place before the enactment of Act No. 1 of 1974 on Marriage can be reached by means of proposing *Itsbat nikah* Religious Court as provided for in Article 7 Compilation of Islamic Law.¹²

As the principle of legality Act No. 1 Of 1974 About Marriage is not retroactive it mean, marriage is not recorded who performed the first and second and subsequent occurring prior to 1 October 1975 was valid, meaning marriages taking place before Law 1 of 1974 is what must be granted by the court in future if requested petition *itsbat nikah* because marriage is not recorded before 1974 is necessary and important to get authentic proof that the marriage certificate for the sake of the family.

How important the rule of law as an instrument of legal certainty, as well as a means of evidence of marriage. Registration of marriage intended that the validity of the marriage have the force of law, so it does not determine whether it is a marriage. Therefore, for couples who have been into marriage according to religious law (Article 2 (1) of the Law of Marriage), but have not been recorded, just done recording the Marriage Registrar Employees (VAT) Religious Affairs Office (KUA) Districts. By first applying to the Religious Courts *itsbat nikah*. On the basis of *Itsbat nikah* endorsement or determination by the Islamic Court, then the applicant will be used or used as the basis for clerks registered their marriages at the Registrar of Marriage Religious Affairs Office (KUA) Districts.

3. Closing

3.1. Conclusion

Based on the previous chapters the authors conclude:

- Implementation of *itsbat nikah* contained in Article 7 Compilation of Islamic Law which states that marriage can only be proven with Marriage Certificate created ole Employees Pencat marriage. *Itsbat nikah* can be submitted to the Religious Court in the case of marriage can not be proved by the Marriage Certificate. *Itsbat nikah* the proposed marriage in terms of: 1). Their marriage in the context of a divorce settlement. 2). The loss of Marriage Certificate. 3). Tentag their legitimate doubt whether or not one of the conditions of marriage. 4). Their marriage that occurred prior to the enactment of Act No. 1 of 1974 and 5). Marriages performed by those who do not have a marriage obstacle by Undang No. 1 of 1974.
- *Itsbat nikah* as the legal basis for registration of marriage and the a way to gain legal force of marriage were not recorded.

3.2. Suggestion

- It needs a strong legal framework as the basis for the implementation of the permissibility of *Itsbat nikah* occurred after the enactment of the Marriage Act. As the authority of PA rule of law should be the level of the Act.
- The government should be more active to disseminate to the public the importance of registration of marriages and *Itsbat nikah* as well as proof of their determination of

¹² Chatib Rasyid dan Syairuddin 2009 *Hukum Acara Perdata Dalam Teori dan Praktik pada Peradilan Agama* UII Press Yogyakarta p. 21.

marriage.

4. Bibliography

- [1] Abd. Somad 2012 *Hukum Islam; Penormaan Prinsip Syariah dalam Hukum Indonesia* Kencana Prenada Media Group Jakarta.
- [2] Abdul Ghani Abdullah 2012 *Himpunan Perundang-Undangan Dan Peraturan Peradilan Agama* Gunung Jati Jakarta.
- [3] Ahmad Rofiq 2009 *Hukum Islam Di Indonesia* PT Raja Grafindo Persada Jakarta 2000.
- [4] Chatib dan Syairuddin *Hukum Acara Perdata Dalam Teori dan Praktik pada Peradilan Agama* UII Press Yogyakarta
- [5] Departemen Agama Republik Indonesia 2004 *Pedoman Pejabat Urais* Direktorat Jenderal Bimbingan Masyarakat Islam dan Penyelenggaraan Haji Jakarta.
- [6] Munir Fuady 2014 *Konsep Hukum Perdata* PT Raja Grafindo Persada Jakarta.
- [7] Mahkamah Agung RI Direktorat Jenderal Badan Peradilan Agama 2012 *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama* MARI Jakarta.
- [8] Neng Djubaidah 2012 *Pencatatan Perkawinan Dan Perkawinan Tidak Dicatat Menurut Hukum Tertulis di Indonesia Dan Hukum Islam* Sinar Grafika Jakarta.
- [9] Samsul Wahidin 2017 *Politik Penegakan Hukum Di Indonesia* Cetakan Pertama Pustaka Pelajar Yogyakarta.
- [10] *Law of the Republic of Indonesia No. 1 of 1974 About Marriage* Top Kesindo Surabaya. 2006.
- [11] Government Regulation No. 9 of 1975 on Implementation Act Marriage.
- [12] Presidential Instruction No. 1 of 1991 About the Compilation of Islamic Law.
- [13] Law of the Republic of Indonesia Number 3 of 2006 (Amendment Act No. 7 of 1989) About the Religious Courts.
- [14] Act No. 50 of 2009 regarding the Second Amendment to Act No. 7 of 1989 About the Religious Courts.
- [15] Endang Ali Ma'sum *Kepastian Hukum Itsbat Nikah* Makalah disampaikan Forum Diskusi Penelitian dilaksanakan oleh Balitbang Diklat Kumdil MA RI di hotel Le Dian Serang tanggal 15 Mei 2012.