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# The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



**IMAM AS SYAFEI BUILDING**  
Faculty of Law, Sultan Agung Islamic University  
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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## THE LAWS ON “SIRRI MARRIED AND INTS IMPACT

**Sahal Afhami**

Student of Doctoral Program Faculty of Law Sultan Agung Islamic University

Email: [afhami10@gmail.com](mailto:afhami10@gmail.com)

**Anis Mashdurohatun**

Doctoral Program Faculty of Law Sultan Agung Islamic University

Email : [anism@unissula.ac.id](mailto:anism@unissula.ac.id)

### ABSTRACT

Marriage is legal if it is done according to the Law on Religion and belief respectively and in order to have legal force and apply the power of the marriage must be registered. Reality is happening in the society there is a practice often seen Sirri marriage lawful religion, but does not have the force of law according to the positive effect. This study aims ffor know how the views of Islamic law and positive law in marriage Sirri, the factors that cause it, and how the process of completion according to the positive law. This research is normaif law, the research data source is the secondary law, both secondary-primary, and secondary-sekuder and secondary-tertiary. The tools used in the form of study documents, and the deductive and inductive analysis in descriptive form. The findings generated in this study are: (1) the grounds of marriage Sirri menurut Islamic law is valid, but according to the positive law of marriage does not have the force valid as evidence to ensure legal certainty. (2) the factors that lead to marriage Sirri was done because of lack of knowledge and awareness of the law that the marriage should be registered. (3) the process of completion once the divorce judgment to become one.

Keywords: impact, marriage Sirri, positive law.

### A. INTRODUCTION

There are three major events in human life that should be noted include the marriage. Marriage is inner and outer bond between a man and a woman to form a happy home eternally based on God. Similarly, the wording of Article 1 of Law No. 1 of 1974 on Marriage .. Marriage aims to establish keluarga (households) are happy and conserved in order to worship and bertaqarrub Ilallah and follow the Sunnah Rasul to build a happy prosperous households sakinah, mawaddah warahmah in order to give birth to generations of human kind and quality towards the creation of a good society that is blessed by God.

In this connection the Quran asserts in Surah An-Nahl: 72, which reads:

It means: "Allah has made for you wives of your own kind, and has given you from your wives, the children and grandchildren, and give you good luck than good. So will they believe in the falsehood and deny the favors of Allah? ".

Essential element in marriage is the willingness of both sides (men and women) to establish a family life because of feelings of pleasure / ridlo. Such things are not psychiatric seen there should be a firm sign to indicate their desire to hold a husband-wife bond. Signs could include the words clearly by both sides commonly referred to as Ijab and qabul. In Act No. 1 of 1974 Article 2 (1) states: "Marriage is legal, if done according to the law of each religion and belief it. While paragraph (2) states: Every marriage is recorded in accordance with the regulations, the applicable legislation ". And are also described in Article 7 paragraph (1) a compilation of Islamic Law (KHI) "Marriage is only evidenced by the Marriage Certificate created by the marriage registrar Employees".

In Indonesia, the national marriage law, serves to accommodate the principles and provide a foundation Marriage Law which has been the grip and has been in force for the various groups in society, and for those on the Muslims. But the fact that occurred in Indonesian society still many who do not carry out the marriage according to the rules in force as not registered their marriages in the authorized agency that KUA, but only according to Islam, it is a lot there is a pair of luke-wife does not have a marriage certificate for certain reasons that marriage is not registered as required by law.

Based on the above background, it can be questioned, What does the Law and the impact of marriage Sirri?

## **B. Result and Discussion**

In the case studies in this practice will be discussed analysis of marriage Sirri, the guardian judge in marriage and marriage settlement submission process with the mayor of judges with the following description:

### **Analysis of marriage Sirri**

Presentation and Analysis of Data About the Definition of Marriage  
An understanding of marriage in society is similar to Islamic law in general, about the wedding said there is a difference is made between the word "marriage" and the word "marriage". Marriage understood as a marriage according to Islam, that have the meaning of "contract" or "agreement", while "marry" according to positive law, the original word comes from the word "kawwana" meaning "stacked" or "match" .. In general, people

Muslim majority mention marriage, not marriage, and only those with more religious knowledge, they mention with nikah. Hal term is legally not an issue, because of the principle of "repetitive habits will have the force of law".

However, differences in the term does not affect the essence of the implementation of the marriage. In other words, people still wear traditional Islamic marriage manner. Evidently most of the population to register the marriage at KUA complete with the registration requirements such as proof of identity, the elderly, and so on. These requirements are something that should not be abandoned as a follow-up of KUA officials to check for a second pre-marital kelengkapan bride.

Presentation and Analysis of Data on Conditions and Pillars of Marriage That pillar and the requirements imposed on KUA marriage is to be in accordance with the Islamic Shari'ah which include both the prospective bridegroom are male and female, guardian, both witnesses and consent and Qobul as the validity of the marriage. While the condition is Islam, mumayiz (understand), obviously sex, there is no compulsion, no relatives and so forth. Only applicable in KUA is in legislation that should be in accordance with Law No. 1 of 1974 (UUP), in conjunction with the Islamic Law Compilation Presidential Instruction No. 1 of 1991, date of June 10, 1991, hereinafter abbreviated as "KHI". In administratif marriage through KUA should be known clearly the identity of each candidate including their consent each candidate, reached the age specified in Islamic law and the legislation that is 19 years for men and 16 years for women. This is regulated in Article 14,15,16 and 17 KHI, each of these provisions is given a). form to be filled properly; b). Presentation and analysis of data on the impact of marriage

In this presentation, researchers will present data about the purpose of marriage and the consequences arising from the marriage in the context of society's understanding. As for the grain and the data analysis as follows:

a. Presentation and Analysis of Data About the Purpose of Marriage

Both prospective couples who will carry out the marriage would have a purpose, goals, mission and vision is good and can be realized simultaneously. In realizing these goals requires awareness, mutual understanding, respect and accept each other's opinions. This is the focus of attention in the marriage itself. It one way to achieve that marriage they do it is worth of worship, so that in the assembled Top of Form Implementation Marriage Marriage Religious Court under arms in Jombang very

difficult sighted or because of the type of marriage has been hidden is Sirri. That or do something in the family to be in a good way.

To achieve the goals of the marriage at the time of registration of marriage at KUA, officers will conduct checks and re-check on the status of the bride, family relationships with both candidates and checks on health, namely by filling out the registration forms available at KUA. In addition to the administrative checks KUA officials also establish suggestively informative destination wedding, this is done at the time of the marriage sermon lasted.

b. Presentation and Analysis of Data On Its Due Arising From Marriage

About the impact of these marriages, in essence, there are rights and obligations that apply to a husband and wife. That obligation is as a protective husband and family counselors. Here can be taken notion that the husband has no place as a leader, mentor at the same time protecting cap and keeper of the family. Thus, if deemed presence is heavy in hand. It is indeed its responsibility as the head of the household.

On the contrary that the husband is also entitled to service balanced with the obligation of the wife to the number specified by religion and norms of society. Realization that occur in the community seems consistent with the theory is an idea meets the criteria according to Islamic law above that have met the spiritual and physical.

What about the wife obligation? simply that the wife must serve her husband is obliged to manage the affairs of the household. In this case, including the needs and everyday purposes including, treating and caring for children, and no exception *mengenahi* biological needs. *Oleha* because the wife is right to make a living, safety and dignity as a wife.

It can be concluded that the impact after the marriage lasted how usually *terjadi* on society are the rights and duties of husband and wife is running properly, the husband acting as heads of households and wives tend subordinant of the husband.

c. Presentation and Analysis of Data on Marriage Siri

Based on the interview with the Religious Court Judge Jombang, that marriage under the hand or mating marriage Sirri is hidden from the general public or the community at large and also without the consent of the marriage registrar. In this case done in front of community leaders such as the clerics, and in practice there are only

bride, guardians and witnesses. He said that the public is still mostly found marriage marriage is not recorded in employees marriage registrar (VAT), or in other words the mating Sirri or married under the hand that is a marriage based solely on Islamic law (as per the terms and rukunnya), this can be evidenced by the number people who ask a marriage certificate or quote the marriage certificate (model NA) and some even ask for a duplicate or copy of the official copies of marriage in the face of a problem family is going to find a birth certificate of his son, will do a divorce, inheritance, or to the requirements of other purposes, for all the require a marriage certificate as one of the requirements to achieve the objectives. Officers learned that people do marriage Sirri, because after a check and re-check or rafak through interviews or data sought in Marriage Certificate / Register (Model N) does not exist. While the rules of registration of marriage actually have a good purpose. But when faced with the reality in the existing society often have gaps, this is the case because, first, the lack of public pengetahuan the law. Second, lack of awareness about the law. Third, the difficulty of polygamy because as a civil servant. This can be evidenced from istbat lawsuit filed in Jombang Islamic Court.

d. Analysis of Wali Hakim in Marriage and the Settlement Process

The meaning guardian judges are persons appointed by the Government to act as a trustee in a marriage. In that case the judge guardian is not immediately accepted or implemented, but must ask first or rafak that is why the guardian status of judges. Due to being a guardian judge there is a process that is if one bride :

- 1) Does not have nasab guardian at all
- 2) guardian mafqud, meaning not necessarily whereabouts
- 3) The mayor himself will be the groom, was the guardian who equals her absence.
- 4) The Trustee is in place which is a distance of masafatul qosri (As far as allowing prayer journey qashar) is 91.4 km.
- 5) Wali in prison or detention should not be found
- 6) Wali adhal, meaning the guardian is unwilling or refuses to marry.
- 7) Wali doing Hajj / Umrah

**Marriage Under implementation hand in Jombang**

a. Implementation Marriage

Marriage Religious Court under arms in Jombang very difficult sighted or because of the type of marriage has been hidden is Sirri. That marriage under the hand

that occur within the existing implementation in accordance with the Shari'ah and some are not in accordance with the shari'ah that have been determined by Islam and not in accordance with Law No. 1 Th. 1974 Article 2 (1) which reads Marriage under the hand that implementation is not in accordance with Law No. 1 Th. 1974 is invalid and of marriage petition filed itibat rejected by the Religious Courts. Because it can be said marriage valid if done according to Islamic law. Article 2 (1) of Law No. 1 Th. 1974.

As a result of the marriage under the hand it could have been because marriage is not recorded at KUA. Regarding not true under the law is obviously not true it means violating a state law that has been set up in detail, then the marriage is valid only be viewed by law only, because in Islamic law has actually determine the restrictions on legitimate and not the validity of a marriage, not questioning whether official or authorized by the state administration.

b. Divorce Marriage Religious Court

To do divorce there are particular reasons, among others, according to PP 9 In 1975, Article 19, namely :

- 1) Either party commits adultery or become drunks, compactor, gamblers and others who are refractory.
- 2) One party left the others for two years in a row without the consent of other party and without valid reason or other matters beyond control.
- 3) One party got a sentence of five years or more severe punishment after the marriage took place,
- 4) One of the parties to commit atrocities or severe abuse that endanger others.
- 5) One party gets disability or illness resulting entity can not carry out its obligations as husband and wife.
- 6) Between the constant marital disputes and quarrels, and no hope of living in harmony again in the household.

c. Factors Divorce Marriage Religious Court

Factors cause of divorce is the Religious Court may determine at the time of receiving, checking, divorce perpetrators in accordance with the legislation in force. These things can be detailed as follows.

## 1. The reason for the divorce because of factors that are moral

Can be classified into 3 types:

- a) Polygamy is not healthy
- b) moral crisis
- c) Jealousy

These three reasons mentioned above are all contained in the UUP No. 1 Th. 1974, Article 4. BAL No. 7 Th. 1989 Article 49 paragraph (2). The analysis is based on the opinions Yahya Harahap explained that the principal issue of polygamy is covered by a series of laws concerning:

1. unauthorized or reason polygamy, (Act No. 1 Th. 1974 Article 4 paragraph (2))
  - 2) Includes ratings polygamy terms, (Act No. 1 Th. 1974 Article 5)
  - 3) Including problems related to the maximum limit of the wife in the same time (no more than four wives)
2. Includes procedures for filing an application for a permit to the Islamic Court as set out in Chapter VIII PP. No. 9 1975.

Divorce because of the economy covered in regulating the rights and obligations of husband and wife is UUP No. 1 Th. 1974 Article 6 paragraph (1) and (3) which states :

Husband shall protect his wife and provide every necessity of home life according to his ability If a husband or wife dereliction of duty each can file a lawsuit to the court No. responsibility

3. This issue is also regulated in UUP No. 1 of 1974, Article 6, paragraph (2) which has been referred to above which stated kelaian against sumai obligation or wife

## 2. The reason for divorce because the marriage of underage

In this issue including the legal aspects of marriage are regulated in Chapter II, Article 6 UUP No. 1 Th. 1974 include :

- 1) issue a marriage license from parents.
- 2) The problem of determining the age of the bride.
- 3) the approval or the free will of the bride

Systematically under-age marriage is regulated in Law No. 7 Th. 1979 explanation of Article 49 paragraph (2), KHI Article 15 to 26 in conjunction with the UUP No. 9 Th. 1974 Article 7 of the administration to dispense the Religious Courts.

### 3. Divorce Reasons for Persecution

This issue is regulated in Law No. 1 Th. 1974 at the elucidation of Article 39 paragraph (2) letter (d), and PP. No. 9 Th. 1975 Article 18 is about the reason for the divorce because one of the parties to commit atrocities or severe abuse that endanger others.

### 4. Reasons for Divorce Sentenced

There is the explanation of Article 39 (2) (c) of the UUP number 1 Th. 1974 and Article 19 PP 9 Th. 1975 stating the reason for the divorce because one party gets 5-year prison sentence or a more severe punishment after the marriage took place Divorce for Biological Disabilities Covered in the elucidation of Article 39 paragraph (2) letter (e) UUP No. 1 1974, and Article 19, PP. No. 9 Th. 1975 is one of the parties gets record or disease entity with sodium absorption ratio due to perform the duties as husband / wife.

5. Divorce because it clashed continuously which can be classified into three
- a. Politis
  - b. Third party trouble
  - c. Not there is harmony

Three things into the background of the quarrel between husband and wife is included in the elucidation of Article 30 paragraph (2) letter (f) UUP No. 1 Th. 1974, Articles 19 and 22 PP 9 Th. 1975 states that: Between husband and wife constantly disputes and quarrels that there was no hope of living in harmony again in the household.

And also in Article 22 of PP. No. 9 Th. 1975, which reads :

Divorce is for that reason Article 19 letter (f) shall be submitted to the court where the defendant Religion The lawsuit referred to in paragraph (1) may be accepted if it has been quite clear to the court about the causes of disputes and quarrels after hearing the family and those close to the husband / wife.

### d. Marriage Divorce Settlement under the hand of the Religious Court Jombang

In marriage divorce litigation under the hand of the Religious Court, both regarding the registration procedure, penyelesaiannya and pemptusannya is the same as the procedures for filing another lawsuit-filing, which can be divided into several phases, among others :

Marriage Divorce case registration process under the hand of the Religious Court Jombang. As the initial process stage of divorce registration of marriage under the hand is as follows :

The lawsuit / petition for divorce and marriage legalization submitted together by section secretariat that will be recorded in a number of cases. Marriage divorce case under the hand of the petition filed in the lawsuit, both for the lawsuit or petition for divorce, although the petition form but in essence is contentious, because it contains elements of the dispute. Therefore it must be processed in the contentious case to protect the rights of wives in seeking legal remedy and justice. So that the judge's decision to grant the divorce thalak the form of a decision by amar titled set. Whereas in contested divorce cases, because therein consists of two parties that plaintiff and defendant in the opposite, then called the Jurisdiction Contentious or real justice. And the product of justice for contentious matters in the case of divorce (both contested divorce or divorce thalak) is the verdict.

In a civil lawsuit filed under the authority of the Religious Court, the plaintiff / applicant in submitting the lawsuit petition can be through oral and written. But basically all claims / requests must be made in writing, but if the applicant can not write to it may be made orally to the Religious Courts. This therefore applicable in the Religious Court, namely the secretariat which helps in typing or making of a claim / appeal to those who can not make it themselves and also for those who are illiterate to replace the fee of Rp 25,000.

After the letter / petition was registered at the secretariat received the Religious Court clerkships file a lawsuit letter / petition to be studied and the research concerns whether the lawsuit / entry will.

SKUM given by the cashier as the mark has been registered and recorded registered, then signed by penitera who served at table II. For marriage under the hands of the case is filed in court Religion Jombang, it turns out the suit / petition accumulated so to this case filed jointly, included in the petition the primary one.

The lawsuit / requests were included in the case file folder to be submitted to the deputy clerks then submitted to the chairman of the Islamic Court. Not later than 7 days. Chairman of Religious court appoint judges to examine, hear and resolve cases accompanied by PMH (Determination of the judges). And chairman also

assign the case to be tried in numerical order. In PMH appointed judges to the panel of judges shall be regulated by setting a schedule hearings for each judge in a court of Religion that every case that goes not need busy determine who will be appointed to handle the case, but has been in accordance with the timetable for take up the case, but has been in accordance with the schedule. In practice judges appointed always composed of the presiding judge and two members and the clerk of the trial, the above in accordance with the provisions of Law No. 14 Th. 1970 jo. Law No 4 Th, 2004 On Judicial Authority, Article 15 paragraph (19), of the provisions of the number of judges in the trial of three judges.

After receiving the case files were examined and resolved from the chairman, the panel designated to learn and correct the docket to be prescribed by the PHS (The Day of Assembly) by the head of the panel and the parties are given to face on the date and time specified.

With the process of registration that is so, then it can be analyzed that the dossier prevailing in Jombang Islamic Court in accordance with:

- 1) Act No. 14 Th. 1970 jo. UU no. 4 Th. 2004, Article 2 of the main tasks of the court
- 2) Act No. 7 Th. 1989, Article 26 of the basic tasks clerks
- 3) Act No. 7 Th. 1989 Section of the main tasks of the administration of the case, namely the making of a list of all cases received in an orderly manner.
- 4) Act No. 7 Th. 1989, Article 101 of the clerk's responsibility for managing the case
- 5) Once the trial is complete then the task table III to submit a copy of the Court's decision to the parties concerned religion, then compile / into all the files to be transferred.

e. Marriage Matters of divorce settlement process in Religious Court Hands Down Jombang.

In the court case investigation then everything that happens in the hearing must be written in an official report of each case by the trial court clerk. According to Jombang religious court judge who has completed and deciding cases under the marriage divorce in 2010 that for the examination, a divorce case (thalak / accountability) is done in a closed session, while legalization of marriage (nikah ithbat) conducted hearings open to the public. It is the difference between divorce cases and other matters. This according to him in accordance with the provisions of Law No. 7 In 1989, Article 59 (1), Article 68 (2) and Article 80 (2).

#### f. Marriage Divorce Decisions Under the Religious Court Hands in Jombang

Jombang Religious Courts adjudicate civil cases in the first instance. In the verdict of divorce and marriage istbat determination in accordance with the absolute and relative authority of the Religious Court Jombang under Article 4 (1) and Article 49 of Law No. 7 of 1980 on the Religious Courts.

In handling cases of divorce marriage under the arm, the Religious Courts Jombang always had accumulated (combine) the lawsuit was that the case is one case number has two decisions divorce, the base of KHI Article 7 (3), whereas in decisions divorce marriage under hand as an overview of the entire ruling in Jombang Islamic Court judges based on legal considerations.

From this we can assume that in Jombang still widely obtained marriage Sirri whose marriages are not listed in the Employees Registrar of Marriage (VAT), or in other words the mating Sirri or married under the hand that is a marriage based solely on Islamic law (as per the terms and rukunnya) whereas this marriage registration rules actually have concrete goals for the rule of law. But when faced with the reality in the existing society often have gaps, this happens because: First, the lack of public knowledge of the law. Second, kurtang public awareness of the law. Third, the difficulty of polygamy because as a civil servant. This is evident from the case ithbat marriage filed in Jombang Islamic Court.

## V. Conclusion

View of Islamic law and positive law on marriage is that marriage Sirri Sirri is a term developed in the community, Islamic law and positive law does not recognize the term. But it can be understood that the definition of marriage Sirri is a marriage made under the hand, the origin of eligible wedlock, and not be registered to obtain a marriage certificate as proof of marriage. So according to Islamic law is valid, but according to the Positive Law marriage was not valid, as the legal principle that says something legitimate not necessarily apply, meaning that marriage does not have the power as evidence to ensure legal certainty.

1. Factors that lead to marriage Sirri, and the way to resolve it is that in a society still encountered the practice of underage marriages are marriages in the hands of its implementation is not listed in the Employees Registrar of Marriage, in this case due to a lack of knowledge and awareness of the law. It can also be affected by the Act No. 1

Th. 1974 Article 2 (1) which states that a valid marriage apabilah done based on religion or belief.

In the implementation of marriages under the hand done in front of community religious leaders (Kyai) in accordance with the pillars and conditions but not announced on the community at large and also not registered at the Registrar of Marriage Employees (VAT) at KUA. Loss of credit for all of it affects:

- a. The cause of marriage Sirri divorce that occurred in the Religious and moral nature which is syiqoq
- b. That the marriage of divorce litigation procedures under the hand of the Religious Court in which it is registered as another judge actions. Marriage under the hand can be said to marry religion, do not have a marriage certificate in relation to the registration of the case as evidence or replace a marriage certificate is a certificate from KUA. In the settlement, the first step is to check that produce these marital affair divorce verdict.

### **Recommendation**

1. Seeing a marriage that has a very noble goal, and have to make difficult divorce principle, there should be people who carry it out of the marriage since the beginning of the process in accordance with the applicable legislation namely the registration of marriages so there will be many cases of divorce the marriage did not have a marriage certificate.
2. The need for public understanding of the legal consequences arising after marriage Sirri. Of course KUA officials did not hesitate to segannya to disseminate to the public through community leaders or at meetings of coordination with other agencies. Thus making the people know and understand about it the eventual implementation of the reduced Sirri marriage does not even exist because marriage always registered with the appropriate authority of the Office of Religious Affairs of the local district.

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