

JURIDICAL ANALYSIS OF THE IMPLEMENTATION OF ITSBAT NIKAH IN THE PRINCIPLE OF LEGAL CERTAINTY IN THE RELIGIOUS COURT DECISION NUMBER 93/PDT.P/2018/PA.TTE

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Abstract

Underhand marriage or nikah siri has been an issue that has arisen in line with the enactment of Law No. 1/1974 on marriage in Indonesia. Nikah siri refers to a marriage that is not valid according to the applicable law, conducted outside the provisions of the Indonesian marriage law. Marriage, as a social institution, is a means to legitimize sexual relations between husband and wife and to ensure the continuation of human existence. However, nikah siri, which often takes place without parental or government notification, has significant negative legal implications for the parties involved, including non-recognition of the legal status of the wife, disenfranchisement from inheritance or property, and the absence of a formal mechanism for separation. Islamic law stipulates that a marriage is valid if it fulfills its pillars and conditions and no prohibitions are preventing it. In the context of positive law, every marriage must be recorded by applicable laws and regulations. However, the issue of marriage recognition through itsbat nikah in Islamic law creates complexity and the need for clear restrictions on its application. Therefore, official registration by authorized officials is important to maintain order in marriage and provide legal protection for the parties involved.

Keywords: Itsbat nikah, legal certainty, religious court

Abstrak

Pernikahan di bawah tangan atau nikah siri telah menjadi permasalahan yang muncul seiring dengan diberlakukannya Undang-undang Nomor 1 Tahun 1974 tentang perkawinan di Indonesia. Nikah siri mengacu pada perkawinan yang tidak sah menurut hukum yang berlaku, dilakukan di luar ketentuan hukum perkawinan yang berlaku di Indonesia. Pernikahan, sebagai institusi sosial, merupakan sarana untuk melegitimasi hubungan seksual antara suami istri dan untuk memastikan kelangsungan eksistensi manusia. Namun, nikah siri, yang seringkali terjadi tanpa pemberitahuan orang tua atau pemerintah, memiliki dampak negatif yang signifikan secara hukum bagi pihak terlibat, termasuk ketidakmengakuan status istri sah, ketidakberhakannya atas warisan atau harta gono-gini, dan ketidakadanya mekanisme resmi untuk perpisahan. Hukum Islam menetapkan bahwa suatu perkawinan sah jika memenuhi rukun dan syarat-syaratnya serta tidak ada larangan yang menghalanginya. Dalam konteks hukum positif, setiap

perkawinan harus dicatat sesuai peraturan perundang-undangan yang berlaku. Namun, masalah pengakuan pernikahan melalui itsbat nikah dalam hukum Islam menciptakan kompleksitas dan perlunya pembatasan yang jelas dalam penerapannya. Oleh karena itu, pencatatan resmi oleh pejabat yang berwenang penting untuk menjaga ketertiban dalam perkawinan dan memberikan perlindungan hukum bagi pihak yang terlibat.

Kata Kunci: *Itsbat nikah, kepastian hukum, pengadilan agama*

INTRODUCTION

The term underhand marriage emerged after the effective implementation of Law Number 1 of 1974 concerning marriage. Underhand marriage, also known as illegal marriage, is in principle a marriage that violates the law, namely a marriage that is carried out outside the provisions of the marriage law that applies positively in Indonesia (Nandapratiwi dkk., 2022). Marriage is an effort to channel the sexual instincts of husband and wife lawfully in the household as well as a means to produce offspring that can ensure the continuity of human existence on earth. The existence of marriage is in line with the birth of man on earth and is human nature given by Allah SWT to his servants. In human life in this world, people of different sexes (men and women) naturally have an attractive attraction to one another to be able to live together, or logically form a physical and mental bond to create a family/household that is harmonious, prosperous, happy, and lasting. Nikah sirri or underhand marriage that occurs in society is a long-standing problem (Yusdika, 2024). Nikah sirri is a secret marriage, or a marriage that is not known by the parents, such as eloping, or secretly marrying, a marriage that is not known by many people and is not known by the legal government, in the sense that the marriage is not registered with the Marriage Registrar (Koniyo, 2020).

The negative impact of nikah siri legally, for example, a woman who is married is not considered her legal wife, the wife is not entitled to her inheritance, if her husband has died and is not entitled to the gono-gini property, if there is a separation between the two because in the marriage law stipulated in Marriage Law Number 1 of 1947 in force in Indonesia it never happened. In Marriage Law Number 1 of 1974 Article 2 Paragraph (1) explains "Marriage is valid, if it is carried out according to the laws of each religion and belief." Paragraph (2) explains "Every marriage is recorded according to the applicable laws and regulations." By understanding the formulation of article (1) of UUP Number 1 of 1974, it is not valid to marry outside the laws of each religion and belief, including the statutory provisions that apply to the group of religions and beliefs, as long as it does not conflict or is otherwise specified in this law, it cannot perform marriage unless it is carried out according to religion and belief. According to Islamic law, a marriage is declared valid if the marriage fulfills the pillars and conditions of marriage and there is no prohibition of marriage between those who will carry out the marriage (Nurmayasari dkk., 2021).

Married couples who have implemented the provisions of Article 2 paragraph (1), then only carry out the provisions of Article 2 paragraph (2) of Law No.1 of 1974. For example, immediately registering with the KUA when they find out that their wife has started to become pregnant and this situation shows that it is irrelevant if the isbat nikah is submitted because it is for the benefit of the child's birth certificate. Because there is

indeed an article in the Compilation of Islamic Law which states that “If a marriage cannot be proven by a marriage certificate, itsbat nikah can be submitted to the Religious Court (article 7 paragraph [2]) ”⁵ Regarding the itsbat nikah contained in article 7 of the Compilation of Islamic Law, there are no restrictions on marriages that were carried out before or after the enactment of Law No. 1 of 1974 concerning Marriage so that it can cause new problems again, so these restrictions are necessary so that there is no confusion in their application. By looking at Law No. 1 of 1974 concerning marriage, the issue of isbat nikah is not regulated in this law but regulates that every marriage must be recorded by an authorized official. This is intended to ensure order in marriage.

METHODS

This research was written using descriptive qualitative methodology and literature research techniques. The arguments put forward in this essay are based on a number of sources. In the literature study, conceptions or theories, views, or findings will be found (Winarni, 2021). The conception can be obtained from studying literature books and supporting books on the theory of marriage law, as well as documents related to the problem under study. In this case, the documents needed are a copy of the determination Number 93/Pdt.P/2018/PA.TTE.

RESULTS AND DISCUSSION

The regulation of Itsbat Nikah is contained in Article 7 of the Compilation of Islamic Law which states:

1. Marriage can only be proven by a Marriage Certificate made by a Marriage Registration Officer.
2. If a marriage cannot be proven by a Marriage Certificate, Itsbat Nikah can be submitted to the Religious Court.
3. Itsbat Nikah that can be submitted to the Religious Court is limited to matters relating to:
 - a. The existence of marriage in the context of divorce settlement.
 - b. The loss of a marriage certificate.
 - c. There is doubt about the validity or otherwise of one of the conditions of marriage.
 - d. The existence of a marriage that occurred before the enactment of Law No. 1 of 1974.
 - e. Marriages conducted by those who do not have a marriage impediment according to Law No. 1 of 1974 (Kurniawan dkk., 2023).

As previously described, Itsbat Nikah is the determination of a marriage entered into by a husband and wife, who have married by Islamic law by fulfilling the pillars and conditions of marriage, so that in fiqh law the marriage is valid. Indonesia as a state of law has laws governing marriage. Before independence, in Indonesia, the issue of

marriage was regulated based on Western Civil Law (Burgerlijk Wetboek) in Book II concerning People. However, after Indonesia became independent, on January 2, 1974, Law Number 1 of 1974 concerning Marriage was promulgated (Siswomiharjo dkk., 2023). As previously described, Itsbat Nikah is the determination of a marriage performed by a husband and wife, who have married by Islamic law by fulfilling the pillars and conditions of marriage, so that in fiqh law the marriage is valid. Indonesia as a state of law has laws governing marriage. Before independence, in Indonesia, the issue of marriage was regulated based on Western Civil Law (Burgerlijk Wetboek) in Book II concerning Persons. However, after Indonesia's independence, on January 2, 1974, Law Number 1 of 1974 concerning Marriage was promulgated (Hudodo dkk., 2023).

The Compilation of Islamic Law provides a formulation of a valid marriage and provisions for the orderly conduct of marriage. Article 4 of the Compilation of Islamic Law confirms that “marriage is valid if it is conducted according to Islamic law under article 2 paragraph 1 of Law No. 1/1974 concerning marriage. Article 5 KHI formulates: (1) to ensure the orderliness of marriage for the Islamic community, every marriage must be recorded (2) the recording of marriage as referred to in paragraph (1), is carried out by the Marriage Registrar as regulated in Law No.22 of 1946 jo Law No. 32 of 1954 (Hudalinnas dkk., 2020; Rofi’atun dkk., 2020).

The results showed that the Ternate Religious Court can be seen in the Determination of Itsbat nikah Number 93/Pdt.P/2018/PA.TTE. The Panel thinks that the legal norms stipulated in the provisions of Article 2 Paragraph 2 of Law Number 1 of 1974 and Article 7 Paragraph 3 letter (c) of the Compilation of Islamic Law are administrative in nature to maintain the order (maslahat) of marriage administration, while on the other hand protecting the rights of citizens is part of human rights that must be guaranteed, protected, and fulfilled by parents, family, community, government. And the state and in addition it is an effort to eliminate factors that can endanger (mafsadat) the growth of the life of the parents, On the other hand, protecting the rights of citizens is part of human rights that must be guaranteed, protected, and fulfilled by parents, family, community, government, and the state, and in addition it is an effort to eliminate factors that can harm (mafsadat) the growth of the life of the child who will be born from the marriage so that it is more important to be protected and prioritized, therefore in this case the Panel of Judges thinks that as long as it fulfills the pillars and conditions of marriage according to the provisions of Islamic law as mentioned above to avoid the negative impact (mafsadat) caused by it must take precedence over maintaining order in marriage procedures and administration (maslahah), under the fiqh rule reads:

دَرْءُ الْمَقَاسِدِ أَوْلَى مِنْ جَلْبِ الْمَصَالِحِ

Meaning: Rejecting distress (Ballarat) must take precedence over taking benefit.

The Religious Court in carrying out Itsbat Nikah is also not arbitrary. They must investigate the reasons why people do Itsbat Nikah. Because in the era of globalization like today there are still people who do not register their marriages because maybe the marriages that are carried out are problematic. For example, sirri marriage. Even though

from this marriage, problems will arise related to children and property. So they must still seek recognition of the marriage to obtain their legally enforceable rights (Nurhadi & Almadison, 2022; Razak dkk., 2023).

Legal certainty is also known as the principle of legal security and *rechtszekerheid*. Legal certainty is a legal device of a country that can guarantee the rights and obligations of every citizen. Legal certainty (*rechtszekerheid*) is also defined as a guarantee for members of the community, that everything will be treated by the state/authorities based on legal regulations, not arbitrarily. Meanwhile, *Itsbat nikah* comes from Arabic which consists of *isbat* and *nikah*. *Isbat* means determination, confirmation, confirmation. *Isbat nikah* has become a term in Indonesian with a slight revision, namely as *isbat nikah*. According to the Big Indonesian Dictionary, *isbat nikah* is a determination of the truth (validity) of marriage. *Isbat nikah* is the validation of a marriage that has been held according to Islamic law, but not recorded by the KUA or the authorized PPN (Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number KMA/032 / SK / 2006 concerning Guidelines for the Implementation of Court Duties and Administration) (Fajriyyah & Alfitri, 2022; Ulya, 2024).

Furthermore, according to Prof. Dr. H. Satria Effendi M. Zein, there is a common perception among legal practitioners, especially Religious Court judges, that What is meant by *Itsbat Nikah* is a declarative legal product simply to declare the validity of a marriage that is carried out according to religious law but not recorded, with legal implications after the marriage *istsbatized* to have legal certainty (*rechtszekerheid*). For those who enter into a marriage but their marriage is not registered with the marriage registration officer, it is an indicator that they are not obedient and do not obey the law to register their marriage. For such marriages, the law does not protect them and is not recognized by the government (Aufa, 2024; Kusnandar & Rahma, 2023). Therefore, if they apply for *Itsbat Nikah* to the Religious Court, the judge must reject it because there is no logical legal reason to grant it. A Religious Court that grants an application for *Itsbat Nikah* of an underhanded marriage after the enactment of Law Number 1 of 1974, means legitimizing and recognizing a marriage that violates the law. In addition, sociologically *Itsbat Nikah* against marriages performed after the enactment of Law Number 1 of 1974 will foster the practice of *nikah sirri* in the community because in the end the unregistered marriage can be *itsbatkan* in the Religious Court (Agustina dkk., 2023; Islahuddin dkk., 2022).

What model of legal certainty is born from *Itsbat Nikah*? Legal certainty is a statement that can only be answered normatively, not sociologically. Normative legal certainty is when a regulation is made and promulgated with certainty because it regulates clearly and logically. Clear in the sense that it does not cause doubt (multi-interpretation) and logical in the sense that it becomes a system of norms with other norms so that it does not clash or cause norm conflicts. If this constataion is the parameter, then the legal certainty of “*Itsbat Nikah*” against marriage, the status of joint property, continues to attract passion to question and discuss it (Fauzi, 2021).

The function and position of marriage registration according to Bagir Manan is to ensure legal order, which functions as an instrument of legal certainty, and legal convenience, in addition to being one of the evidence of marriage. With the issuance of Itsbat Nikah, the status of the marriage is legal according to religion and officially recorded according to the law, which means that it is equipped with authentic legal evidence of the existence of the marriage (Izul Haq, 2023). Thus, since then the marriage has had legal certainty, both according to religious law and Indonesian law. The relationship between a man and a woman who have been determined as husband and wife in Itsbat Nikah, the rights and obligations between husband and wife have emerged as regulated in Article 30 to Article 34 of Law Number 1 Year 1974 and Article 77 to Article 84 of the Compilation of Islamic Law in Indonesia (Rahmawati dkk., 2023).

CONCLUSION

Based on the findings and discussion above the determination of Itsbat nikah Number 93/Pdt.P/2018/PA.TTE, the Panel thinks that the legal norms regulated in the provisions of Article 2 paragraph 2 of Law Number 1 of 1974 and Article 7 paragraph 3 letter (c) of the Compilation of Islamic Law are administrative to maintain the order (maslahat) of marriage administration, while on the other hand protecting the rights of citizens is part of human rights that must be guaranteed, protected and fulfilled by parents, families, communities, governments and the state. The legal certainty of “Itsbat Nikah” for marriage, with the issuance of Itsbat Nikah, the status of the marriage is legal according to religion and officially recorded according to the law, which means that it is equipped with authentic legal evidence of the existence of the marriage. Thus, since then the marriage has had legal certainty, both according to religious law and Indonesian law.

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