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## ***THE POSITION OF THE INSTITUTION OF ITSBAT NIKAH IN THE MARRIAGE LAW AND THE COMPILATION OF ISLAMIC LAW***

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### **Abstract**

Itsbat nikah is an application that establishes the validity of a marriage that has been held. The institution of marriage is formed to accommodate Law No. 1 of 1974 concerning marriage in Article 2 paragraph (2), which requires marriage registration. The purpose of marriage registration is to ensure order in society. Marriage registration is marked by the issuing of a marriage certificate, as a sign that the marriage has been held and has received legality and Legal Protection from the state. The Purpose of this study is first, to find out the legal basis of itsbat Nikah. Second. Analyze the motivation for submitting the third marriage itsbat, the position of the marriage itsbat institution in Law No. 1 of 1974, and the compilation of Islamic law. This type of research is normative research with a qualitative approach, namely by conducting descriptive research analysis. One of the things that is done by collecting data by means of literature research.

**Keywords:** *Itsbat Nikah, Law No.1 of 1974, Compilation Of Islamic Law*

### **A. Introduction**

In Article 2 paragraph 1 of Law No. 1 of 1974, Article 2 paragraph 1 explains the definition of marriage: "Marriage is valid, if it is carried out according to the law of each religion and its belief". Islamic law views that a marriage is considered valid if the conditions and harmony in the marriage are met, even though it is not recorded. Article 1 paragraph 2 opens opportunities for the public to set aside the recording rules, as referred to in Article 2 paragraph 2 of Law No. 1 of 1974.

Recording in marriage aims to realize order and ensure that marriage takes place better in society as contained in Article 4 paragraph 1 of the Compilation of Islamic Law (KHI). Marriage Registrar Employees are required to register marriages, where those who have the right to issue a Marriage Certificate by the Head of the Sub-district Religious Affairs Office (Ka KUA). The Marriage Certificate is the only evidence of the marriage (article 100 of the Criminal Code and Article 7 (1) of the Criminal Code. Marriages that do not have a Marriage Certificate, do not receive legal protection from the state, which results in their civil rights are not guaranteed, because such marriages are considered non-existent, and never happened.

Existing legislation provides a way out of this problem, by creating *a marriage institution*, as a first step to obtaining a marriage certificate from the KUA. For Muslims, it is determined that the Religious Court is an institution that has the competence to handle issues surrounding the institution *of itsbat nikah*.

### **Definition of *Itsbat Nikah***

*Itsbat* means waiting, fixing, determining.<sup>1</sup> *Nikah* comes from the Arabic language which means *al-wath'i* and *al-dhammu wa al-tadakhul*. In other terms, it is also often called *al-dhammu wa al-jam'u*, or *'ibarat 'an al-wath'i wa al-'aqd*, which means to have sex, gather and contract.<sup>2</sup> Marriage in Indonesian comes from the word *kawin*, which is then given the suffix "per" and the suffix "an". The same term as the word *kawin* is *nikah*, when given the suffix "per" and the ending "an" becomes marriage. Marriage or marriage is defined as an agreement between a man and a married woman.<sup>3</sup> Meanwhile, according to the term, most jurists give a definition of marriage in the context of biological relations based on etymological meaning.

The definition of marriage according to Wahbah al-Zuhayli is: an agreement that allows the occurrence of *al-istimta'* (intercourse) with a woman or performing *wathi'*, and gathering, as long as the woman is not a woman who is forbidden to marry either because of descent or breastfeeding.<sup>4</sup> Still according to Wahbah al-Zuhayli that what is meant by marriage is a contract that has been determined by *Shari'a* so that a man can take advantage of doing *istimta'* with a woman or vice versa.<sup>5</sup>

According to scholars of Hanabalah, *nikah* is an agreement that uses the word *inkah* which means *tazwij* with the intention of taking benefits for fun.<sup>6</sup>

Muhammad Abu Zahrah in his book *al-Ahwal al-Syakhsyiyah* defines marriage as a contract that has legal consequences in the form of halal intercourse between men and women, helping each other and giving rise to rights and obligations between the two.<sup>7</sup>

Furthermore, in the book *Kifayat al-Akhyar* by Imam Taqiyuddin that *nikah* is a *famous* (known) contract consisting of pillars and conditions and what is meant by the contract is *al-wathi'* (sexual intercourse).<sup>8</sup> This is even clearer and more emphasis, because according to al-Azhari, the original meaning of the word *nikah* for Arabs is *al-wathi'* (intercourse).<sup>9</sup>

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<sup>1</sup>Ministry of Education and Culture. 1995. *Great Dictionary of Indonesian*. Jakarta: Balai Pustaka. Fourth Printing. Yard. 388.

<sup>2</sup>Wahbah al-Zuhayli. 1989. *al-Fiqh al-Islam wa Adillatuhu*. Juz. VII. Damaskus: Dar al-Fikr. halaman. 29.

<sup>3</sup>W.J.S. Poerwadarminta. 1994. *General Dictionary of Indonesian*. Jakarta: Balai Pustaka. yard. 453.

<sup>4</sup>Wahbah al-Zuhayli. *Loc.Cit*.

<sup>5</sup>*Ibid*.

<sup>6</sup>Abd al-Rahman al-Jaziri. 1986. *Kitab al-Fiqh ; ala al-Mazahib al-Arba'ah*. T.t.p.: Dar Ihya al-Turas. 3.

<sup>7</sup>Muhammad Abu Zahrah. 1957. *Al-Ahwal al-Shakhsyiyah*. Cairo: Dar al-Fikr al-'Arabi. Page.19.

<sup>8</sup>Imam Taqiddin. *Kifayat al-akhyar fi haal ghayat al-akhter*. Component. E. Bandung: Pat al-ma'arif. Halman. 36.

<sup>9</sup>*Ibid*.

Marriage Law Number 1 of 1974 states that the definition of marriage is: "Marriage is an innate bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Godhead. (Article 1).

In the explanation of Law Number 1 of 1974, it is explained that as a country based on Pancasila where the first precept is the One Godhead, marriage has a very close relationship with religion/belief so that marriage not only has a born/physical element but also an inward/spiritual element also has an important role. Forming a happy family, and meeting the relationship with the offspring which is also the purpose of marriage marriage, maintenance, and education are the rights and obligations of parents.<sup>10</sup>

According to Sajuti Talib, marriage is a sacred, strong, and firm agreement to live together legally between a man and a woman forming an eternal, courteous, loving, peaceful, and happy family.<sup>11</sup>

According to T. Jafizham, citing the opinions of experts from various groups and nations, marriage is a close bond of friendship between men and women, showing good and orderly cooperation in a happy household.<sup>12</sup> Therefore, marriage is an engagement that automatically applies the basics of engagement in a marriage, namely the consent of both parties.

Hazairin said that the essence of a marriage is sexual intercourse. According to him, there is no marriage if there is no sexual intercourse.<sup>13</sup>

Ibrahim Hosen said that marriage is a contract by which sexual relations between men and women are halal. More specifically, marriage can also be defined as sexual relations (intercourse).<sup>14</sup>

Tahir Mahmood defines marriage in a rather interesting way, namely marriage as an innate bond between a man and a woman who become husband and wife respectively to obtain happiness in life and build a family in the Divine light.<sup>15</sup>

From the various definitions given by classical jurisprudence scholars and modern Islamic jurists, there is one common thread that can be drawn as a conclusion to describe the definition of nikah, namely nikah is described solely in the context of *an sich biological relationship*.

This view is very reasonable considering that the meaning of marriage in Arabic literature connotes sexual relations. One thing is certain, it must be admitted that marriage is the only solution to legalize a (biological) relationship between a man and a woman.<sup>16</sup>

From the various arguments and descriptions of marriage above, there are at least two meanings of marriage, namely nikah in the sense of biological relations and nikah in the figurative sense of a contract or agreement. In everyday use, the word nikah is more widely used in the sense of majaz.<sup>17</sup> *The Great Indonesian Dictionary* defines *itsbat nikah* as the determination of the truth (validity) of marriage.<sup>18</sup>

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<sup>10</sup>Arso Sosroatmojo, Referee Aulawi. 1975. *Marriage Law in Indonesia*. Jakarta: Bulan Bintang. yard. 103.

<sup>11</sup>Mohd. Idris Ramulyo. 1996. *Islamic Marriage Law: An Analysis of Law Number 1 of 1974 and Compilation of Islamic Law*. Jakarta: Bumi Aksara. Yard. 2.

<sup>12</sup>T. Jafizham. 2006. *Legal Cooperation in Indonesia with Islamic Marriage Law*. Jakarta: PT. Must. 2nd printing. yard. 255.

<sup>13</sup>Hazairin. 1961. *Indonesian National Family Law*. Jakarta: Tintamas. yard. 61 reviews

<sup>14</sup>Ibrahim Hosen. 1971. *Comparative Fiqh in Matters of Marriage, Talak and Reference*. Jakarta: Ihya Ulumuddin. yard. 65.

<sup>15</sup>Tahir Mahmood. 1987. *Personal Law in Islamic Countries*. New Delhi: Academy of Law and Religion. halaman. 209.

<sup>16</sup>The four purposes of marriage are: a) to calm the soul; b) creating (preserving) derivatives; c) meet biological needs; d) Responsibility Training. See M. Ali Hasan. 1998. *Masail Fiqhiyyah Al-Haditsah*. Jakarta: Rajawali Press. 3rd printing. yard. 2-7.

<sup>17</sup>Lili Rasjidi. 1991. *Marriage and Divorce Law in Malaysia and Indonesia*. Bandung: PT Remaja Rosdakarya. Page 2.

<sup>18</sup>Depdikbud. *Loc. Cit.*

Determination of marriage is the determination of the validity of a marriage that has been held. The word "that has been held" is a characteristic of *itsbat* nikah. This means that the marriage is carried out, but it has not or does not have the power of "action" and is not known by positive law, in relation to the marriage setting aside the rules of registration. This form of marriage is known as marriage under the hand.

The factors that cause marriage under the hands are as follows:

a) Cultural incompatibility and not having the blessing of parents

Cultural inconsistencies between couples who will get married are often challenged by parents, such as the marriage that occurred at the Sunda Kelapa Mosque between a woman and a widower man who is a Japanese citizen. The wedding took place very simply, with only a handful of people attending, even the bride's parents were not visible. Meanwhile, the groom was only escorted by a few office colleagues.

After the solemn and touching marriage contract, some of the groups present continued the event with a small party, eating at a restaurant. The bride's family did not participate, the reason was because they were concerned about the marriage carried out by the bride.

The marriage was indeed not approved by both of the woman's parents. Even though the two couples have gone far, by living together like husband and wife, their parents' attitude is not fluid either. Finally, the bride determines her attitude, so that she does not continue to do kebo gatherings. According to the bride, her partner turned out to be willing when asked to marry her in Islam. But, it turned out that the plan to navigate the side of life, without the blessing of the family, the bride's father was very opposed to the marriage. After all, that did not make him back down. Until the wedding took place as above.<sup>19</sup>

The marriage was carried out without going through the official procedures set by the Office of Religious Affairs. Marriage is carried out according to the procedure set out in Islamic law. Therefore, there is no marriage registration according to the procedures set by the government, resulting in them not getting proof of marriage (marriage certificate).

b) Prohibition of Polygamy and Psychological Factors

The prohibition of polygamy in marriage law in Indonesia is also believed to be a trigger for marriage under the hand. For example, the marriage carried out by Hendra at the house of an *Amil* in the suburbs of Jakarta, South.<sup>20</sup> In addition to the two brides, there were three other people present there. A woman and two men, who acted as witnesses, and *Amil* (not *qadhi*). After hearing a little advice from *Amil*, Hendra said *ijab kabul*. As soon as the ceremony was over, they shook hands with each other.

The marriage that is carried out in front of the *Amil*, is to fulfill the "conditions" of marriage according to Islamic law, namely the presence of witnesses. The choice of *Amil* (the person in charge of collecting zakat, infaq and sadaqah in the area), is because *Amil* is seen as a devout Muslim.

The marriage cannot be carried out in front of an officer (*qadhi*) determined by the KUA, because the marriage itself does not follow the procedures set by the government. The marriage contract ceremony was held secretly because Hendra was married and had two children. Hendra's reason is that it feels impossible to divorce his first wife, in addition to thinking about his children, he also still loves her and his family.

Meanwhile, asking for permission from the wife to remarry is also difficult to realize. Because later there will definitely be quarrels. As a result, it is not good, both for the continuity of the household and for children. On the other hand, she also cannot be separated from this lover. According to Hendra's confession, this marriage is valid religiously, because in the past people also married without a letter, the important thing was that they did not commit adultery.

c) Juridical Barrier

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<sup>19</sup>Report of the Bureau Team. Tempo Magazine No. 36 Year XVI-1 November 1986.

<sup>20</sup>*Ibid.*

Juridical and cultural obstacles to carrying out marriage exist in young people who have not met the age requirements to carry out marriage. But there is something that has been cultured among the local community against young marriages that are not old enough (especially if the wife-to-be has become pregnant before the marriage takes place), namely by holding marriages under the hands.

Marriage under the hands can be classified into two parts:

- 1) Marriage that meets religious provisions;
- 2) Marriages that violate religious rules.

Regarding the first classification, there is a possibility that the marriage can be registered by the Religious Court, regarding the validity of the marriage according to Article 2 Paragraph 1 of Law Number 1 of 1974 determined by the religious views held by those who are married. So *the marriage ceremony* is purely administrative. Based on this, it can be understood that the case of *Istbat Nikah* is placed in a voluntary case. Marriages with second qualifications will not be able to be held.

## **B. Discussion**

### **1. Legal Basis of *Istbat Nikah***

#### **a. Law Number 1 of 1974 concerning Marriage**

The regulation of *the institution of marriage* in Law No. 1 of 1974 concerning Marriage according to M. Yahya Harahap is contained in Chapter XIII Article 64.<sup>21</sup> This provision is a transitional rule to respond to legal interests for those who were married before the enactment of Law No. 1 of 1974 and do not have a marriage certificate. The Supreme Court of the Republic of Indonesia refers to Articles 25, 26, and 27 of Law No. 1 of 1974 as the legal basis *for marriage marriage*.<sup>22</sup>

If you look closely, this reference seems to be wrong, because these articles regulate the institution of annulment of marriage, whose *nota bene* is different from *the marriage istbat*. The essential difference is very clear, the annulment of the marriage concentrates on the desire to annul the marriage, while *istbat nikah* concentrates on the desire to legalize the marriage. In addition, the annulment of marriage is a contentious matter, while *istbat nikah* is a matter of application (voluntary). However, indeed, to determine whether a marriage is valid or not, these articles must be considered.

#### **b. Compilation of Islamic Law (KHI)**

The Compilation of Islamic Law (KHI) was stipulated based on Presidential Instruction No. 1 of 1991, then through the Decree of the Minister of Religion of the Republic of Indonesia No. 154 of 1991, its implementation was disseminated to the community and agencies in need. The debate and discussion around the validity of KHI as a source of law stems from its form of regulation. Apart from that debate, what is certain is that the need for KHI is very central in the world of legal practitioners. With the existence of the KHI, it is hoped that there will be no more legal disparities in the Religious Court because there is a single reference for legal material for Religious Court Judges in resolving cases.

The regulation of *marriage institutions* in the KHI is contained in Article 7 paragraphs (2), (3), and (4). Paragraph (2) regulates the urgency of *marriage marriage as* a means to obtain a marriage certificate and also regulates the institution that has the competence to examine and adjudicate marriage *applications*, namely the Religious Court. Paragraph (3) regulates the reasons for applying *for a marriage certificate* which are detailed as follows:

- a) There is a marriage in the context of settling the divorce.
- b) Loss of marriage certificate.
- c) There are doubts about whether or not one of the marriage conditions is legal.

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<sup>21</sup>M. Yahya Harahap. 1990. *Position, Authority and Procedure of Religious Courts*. Jakarta: Pustaka Kartini. page 145.

<sup>22</sup>Supreme Court of the Republic of Indonesia. 1991. *Guidelines for the Implementation and Administration of Courts Book I*. page 77.

- d) The existence of a marriage that occurred before the enactment of Law Number 1 of 1974 concerning Marriage, and
- e) Marriages carried out by those who do not violate the marriage barrier according to Law No. 1 of 1974.

These reasons are proposed alternatively or cumulatively. In the lawsuit, these reasons are contained in the *posita* (*pundamentum petendi*) which is the basis for the Applicant to apply for *marriage itsbat*, and for the judge to be the basis for the examination. The applicant's ability to convince the judge by proving the reason is the basis for granting or rejecting the application.

Paragraph (4) regulates the competent party to submit an application for *marriage itsbat*, namely: a) husband or wife; b) their children; c) the marriage guardian; and d) the parties interested in the marriage. However, the generality of point d provides breadth for justice seekers.

## 2. Motivation for Submitting *Itsbat* Marriage

*The marriage certificate* submitted by the Applicant is based on the desire to obtain a Marriage Certificate from the authorized agency. The Marriage Certificate is the only evidence of marriage. Article 100 of the Criminal Code states: "Marriage cannot be proved by any other means except by a Marriage Certificate made by the Civil Registration Officer who performs the marriage". The same thing is also found in the KHI in Article 7 paragraph (1): "Marriage can only be proven by a marriage certificate made by the Marriage Registrar".

Marriages that cannot be proven by a marriage certificate, in a positive legal view, are considered to have never existed and do not receive legal protection. Those who do so will lose their civil rights, such as not getting salary allowances for wives and children or husbands and children if one of them is a civil servant or a member of the TNI, cannot take savings in the bank from a husband or wife who has passed away first, children cannot get a birth certificate and others.

Based on the urgency of the marriage certificate, those who do not have a marriage certificate from their marriage, apply to the Court to obtain *a marriage certificate* which is the basis for the KUA to issue the marriage certificate.

Based on the various cases encountered, the *background* of a person to apply *for itsbat* nikah is as follows:

- a. To gain confidence in the validity of the marriage that has been held. This is illustrated by the case filed by Prof. Dr. H. Baharuddin Harahap to the South Jakarta Religious Court.<sup>23</sup> The wedding was carried out by phone. This form of marriage has never happened before. In response to this kind of marriage, Islamic legal experts are patterned in two extreme views. One views it as legitimate, and the other views it as invalid. This diversity of views has an impact on KUA in issuing marriage certificates. The KUA will issue a marriage certificate after a decision on the validity of the marriage from the Religious Court. In connection with this, the application *for itsbat* nikah was submitted.
- b. Because of the loss of the Marriage Book at KUA. This is illustrated by the case filed by Harjodimatno al. Matno to the Klaten Religious Court.<sup>24</sup> The applicant submits *the marriage* of his parents for an unexplained purpose. The wedding took place in 1926. The applicant has requested a duplicate of the Marriage Certificate from KUA, but the answer received is that the Marriage Book in question has been lost or does not exist.
- c. To get the validity of the marriage with the second wife. This is illustrated by the case filed by Ahmad Rafiq bin Hasyim to the Greater Jakarta Special Religious Court.<sup>25</sup> The applicant performs a second marriage without the knowledge and without the permission of the first wife, also without the permission of the Court. In commenting on this application, Hensyah

<sup>23</sup>Determination of the South Jakarta Religious Court No. 1751/1989 dated April 20, 1990.

<sup>24</sup>Determination of the Klaten Religious Court No. 1242/1985 dated December 12, 1985.

<sup>25</sup>Determination of the Greater Jakarta Special Religious Court No. 695/1988 dated December 16, Syahlani stated: Sometimes there is an attempt to smuggle the law by the litigants through

voluntary cases by carrying out *itsbat nikah* against the second marriage which is basically a polygamous case.<sup>26</sup>

- d. To impose criminal provisions for those who violate the rules of polygamy without the permission of the Court, as referred to in Article 297 of the Criminal Code. This is illustrated by the case filed by the Prosecutor to the Bale Bandung District Court in April 1998 and to the Lhokseumawe District Court in December 1990.<sup>27</sup>

To obtain a Child Birth Certificate from a marriage underhand. This is illustrated by the case filed by Wagian bin Sukardi to the Tebing Tinggi Religious Court on May 7, 1994.<sup>28</sup>

### 3. The Position of *the Itsbat Nikah* Institution in Law No. 1 of 1974 and the Compilation of Islamic Law

Law No. 1 of 1974 concerning Marriage places the institution of *itsbat nikah* as a transitional rule intended to respond to the legal interests of those who have married before the enactment of the law if the marriage does not meet the provisions regulated by the law. The existence of transitional provisions in a law can create authority. Paul Scholten stated that a law, that does not recognize that the previous law was the law of its time, makes the authority of all laws, so also the authority of the law itself shaken.<sup>29</sup>

As a transitional rule, the institution of *marriage* is intended for a certain period of time, deleted by itself, and the article of the arrangement becomes a dead article. From this, it can be understood that the minimum reach of *itsbat nikah* in Law No. 1 of 1974 concerning Marriage. The consequences that arise from *the institution of marriage* are that it does not receive a sufficient portion of attention from the legislative apparatus. This is seen in:

- a. The disparity of the formulation of the parties in the lawsuit, and
- b. The ambiguity of the competence area in the world of justice.

The following will be described one by one.

#### a) Disparity of party formulations

As emphasized, *itsbat nikah* is a matter of request (a matter that is not real). Therefore, there should be only one party in the formulation of the lawsuit, by the Instruction of the Director General of Islamic Guidance No. D/Inst/117/75 dated August 12, 1975. However, in reality, in practice, deviations from these basic rules were found. This can be seen in the case filed by Harjodimatno al. Matno to the Klaten Religious Court.<sup>30</sup> In this case, Harjodimatno was in the position of the Applicant, as opposed to Mrs. Gusti Amat Herucokro al. Gendruk Arjo Sukarno as Respondent I and Gusti Amat Herucokro as Respondent II. The irregularities were further exacerbated by the filing of an appeal from a third party (R. Maryono Hadisudirjo) who subsequently filed an appeal. Regarding the deviation of the parties in the lawsuit, the Supreme Court did not provide corrections.<sup>31</sup> Similar to the Harjodimatno case, in the marriage *case* filed at the Greater Jakarta Special Religious Court, Ahmad Rafiq Bin H. Hasyim was in the opposite position as the Petitioner opposite Mrs. Siti Mayasari Binti Bustani as Respondent I and Mrs. Achtarun Nisa (Aisyah) Binti Abdul Manan as Respondent II.<sup>32</sup> On the other hand, some are in concert with the basic rules of the application, such as the case filed by Prof. Dr. H. Baharuddin Harahap in terms of the marriage of his daughter Dra. Nurdiani with Drs.

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<sup>26</sup> Hensyah Syahlani. 1992. *Discovery and Solving of Legal Problems in Religious Courts*. Jakarta: tp.. Page 12.

<sup>27</sup> Legal Pulpit No. 31 Year VIII, 1997, page 79.

<sup>28</sup> Determination of PA Tebing Tinggi No.001/Pdt.P/1994/PA-TTD, dated June 8, 1994.

<sup>29</sup> Paul Scholten. 1993. *Mr. C. Asser*. Yogyakarta: Gadjah Mada University. Print II. page 192.

<sup>30</sup> Determination of PA Klaten No. 1242/1985 dated December 12, 1985.

<sup>31</sup> Supreme Court Decision No. 66/AG/1987 dated January 12, 1989.

<sup>32</sup> Determination of the Special Administrative Decree of Greater Jakarta No. 695/1988 dated December 16, 1988.

Ario Sutarto.<sup>33</sup> This case is popularly known as marriage by phone. The South Jakarta Religious Court granted the request, even though there was a sharp polemic in the community about whether the marriage was legal or not.

b) Ambiguity of competencies

In addition to the disparity in the formulation of the parties to the lawsuit, there is also an ambiguity in the competence of the authority to adjudicate *marriage cases*, especially in the case of a cumulative lawsuit between *marriage and* others. The *institution of itsbat* nikah here is an absolute in the settlement of the accumulation case. Examples are:

- 1) The case was filed by the prosecutor at the Bale District Court in Bandung in April 1988, where he was charged with committing a crime in violation of Article 279 of the Criminal Code.<sup>34</sup>
- 2) The case was filed with the Lhokseumawe District Court by the Prosecutor in December 1990 with the same charges.<sup>35</sup>

For these two cases, two examinations were carried out: first, whether the marriage was valid or not; second, about the legality or not of the violation of Article 297 of the Criminal Code.

The two examinations were carried out by their respective District Courts. In this regard, Damsyi Hanan argued: "The two examinations cannot be made into one case cumulatively".<sup>36</sup> The examination of case point 1 is the authority of the Religious Court, while the case in point 2 is the authority of the District Court.

In order for such a practice to be unsustainable, it is necessary to issue a Circular Letter on the authority of the District Court to adjudicate cases suspected of committing crimes for violating Article 279 of the Criminal Code, so that it is requested to first examine the case of *marriage istbat* to the Religious Court.<sup>37</sup>

In contrast to what is regulated in Law No. 1 of 1974, the KHI regulates marriage *institutions* in more detail and clarity. Perhaps this is motivated by empirical facts, that the rules that have existed so far are not realistic and actual. KHI places *the institution of marriage* as a solution to problems for those who are interested in obtaining a Marriage Certificate, not only limited to marriages that took place before the enactment of Law No. 1 of 1974.

If you look at Article 7 of the KHI, it is obvious that the reach of *the institution of marriage* is expanded, even though the article in paragraph (3) contains the word "limited". The breadth of the reach of *the marriage itsbat* board can be seen from:

- a. Various reasons that can be submitted.

Paragraph (3) of Article 7 of the KHI contains rules regarding the reasons that can be submitted in the case of *marriage marriage*. There are 5 reasons mentioned that should be interpreted alternatively. Of the five reasons, only one is the same as the reason contained in Law No. 1 of 1974, namely the reason "the existence of a marriage that occurred before the enactment of Law No. 1 of 1974". Meanwhile, the other four reasons do not mention the grace period. This means that it can be submitted to marriages that took place after the enactment of Law No. 1 of 1974. Thus, KHI has rejected the placement of *itsbat* nikah as a transitional institution, even placing it as a permanent institution.

The impact of the placement of *istbat* nikah as a permanent institution with an expansion of the reach, the reason is the fading of the authority of the marriage registration institution. On the other hand, the opportunity to marry under the hands is wide open. However, even so, it does not mean that marriage underhand is not risky at all. Such a marriage will cause many difficulties

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<sup>33</sup>Determination of the South Jakarta PA No. 1751/P/1989 dated April 20, 1990.

<sup>34</sup>MARI Decision No. 2147/K/Pid/1988 dated July 22, 1991.

<sup>35</sup> MARI Decision No.1948/K/Pid/1991 dated December 18, 1993.

<sup>36</sup> Damsyi Hanan. 1997. *Legal Pulpit No. 31 Year VIII*. Page 79.

<sup>37</sup> *Ibid.*, p. 83.



because, in the eyes of the law, the marriage is seen as never happening and does not receive legal protection. It is only on the consideration of difficulties (*masyaqqah*) that people are encouraged to get marriage certificates.

The benefit of expanding the reasons for submitting *its bat* nikah is the fulfillment of needs in practice, such as in the case of divorce from an unregistered marriage, from the case of violation of the provisions of Article 279 of the Criminal Code. Both cases are related to the legalization of marriage. Divorce can't occur and one cannot be punished for violating Article 279 of the Criminal Code if the marriage is not declared valid first.

On the other hand, due to the limited ability of human beings in terms of guarding, the marriage certificate is lost in a flood or engulfed in fire, and so on, while the duplicate does not arrive, to respond to that interest, it is more realistic to open a marriage *institution* institution. Then the geographical area of Indonesia, it may be possible in a place where there is no registrar, so to respond to this need, it is also necessary to open a *marriage institution of itsbat*.

b. Variety of parties who apply

Article 7 paragraph (4) of the KHI stipulates about the parties who can apply for *marriage itsbat*. In this article, the "party interested in the case" is designated as a person who can apply for *marriage*, after mentioning the husband, wife, their children, and the marriage guardian. This is intended to accommodate the possibility that there are parties other than those who have been detained who can apply for *marriage itsbat*. It is as if KHI gives anyone a chance.

The expansion of other parties who can apply for *itsbat* nikah is understandable because the marital relationship of a husband and wife is attached to him with rights and obligations both to his spouse, children, and the family of both parties. Marriage not only brings together two people of different sexes but also brings together two families from the husband and wife.

Marriage is a very central and sacred institution. From this institution, joint property institutions, inheritance institutions, and so on were born. Besides that, marriage is not only a private affair but also a public affair. The state feels that it is interested in regulating the institution of marriage, in connection with its position as a family builder which is an element of the formation of society. Public order greatly determines the stability of the country.

The inclusion of "interested parties" as parties has answered the dilemma regarding the party who will apply for a *marriage itsbat* in connection with a criminal violation of Article 279 of the Criminal Code. In this case, according to Damsyi Hanan, the prosecutor is an alternative party who can apply for *marriage itsbat* to the Court.<sup>38</sup> In the case of holding a Muslim marriage, of course, the Prosecutor should submit it to the Religious Court. In addition, the generality of the party opens up opportunities for all family members to apply for *itsbat* nikah.

### C. Cover

*Itsbat* nikah is an institution that determines the validity of a marriage that has been held if a marriage certificate cannot prove the marriage. This is possible because of the bias of the dichotomous gap of understanding between Article 1 paragraph (1) and Article 1 paragraph (2) of Law Number 1 of 1974 concerning Marriage.

Although *the marriage ceremony* is administrative, in determining the validity of a marriage, it must refer to the provisions of Article 1 paragraph (1) of Law No. 1 of 1974 concerning Marriage, which states that the validity of a marriage is determined by the religious rules adopted by the prospective bride. For Muslims, they must meet the provisions of Islamic law. So marriage is not only legal if it has been recorded.

Marriage that cannot be proven by a marriage certificate is not seen as a legal act, therefore it does not receive legal protection, so its civil rights are not guaranteed by law. Marriage is seen as

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<sup>38</sup> Damsyi Hanan, *Loc. Cit.*

unprecedented and does not give rise to rights, so if there is a domestic problem, it cannot be forced by the law of the person who does not carry out his obligations which is a right for others.

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