

## Analysis of Judges' Decisions in Marriage Isbat Cases According to the Perspective of Positive Law and Islamic Law (Case Study No.076/Pdt.P/2022/Pa.Prob)

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### ABSTRACT

Isbat marriage is a determination of the validity of a marriage that is determined by a religious court. Marriage that is consecrated is a marriage that is legally religious but not yet legal by the state. So that the marriage does not get legal certainty. So not a few people do isbat marriage as a form of effort to get legal certainty for the marriage they do. This study reviews the cases of marriage constituencies that are still rife in Probolinggo district. Whith the focus of research namely the results of the analysis of the judge's decision at the Probolinggo religious court in accepting, analyzing, determining, and deciding cases of marriage registrations the analysis in question uses to two approaches, namely the perspektif of positif law and islamic law. Marriage isbat cases are cases is ranked number two after divorce cases filed by the local community. From the data the author obtained between 2021 and 2022 there were as many as 41 cases of marriage confirmation received by the religious courts. Marriage confirmation both in the perspektive of positif law and islamic law thend, beering in mind that marriage confirmtion is still wideli practiced, unfortunately, the party filing this case is the perpetrathor of the sirri marriage, the author want to make it clear to society in general that marriage confirmation is a matter that is as far as possible be used as the final step in completing siri marriage get vallidity of the marriage they do. This means that the marriage certificate is solely carried out because it is a necessity, not to legalize a sim marriage. The law specifically limits marriage isbat only to a number of urgent matters, primary by conducting interviews with the chief judge, deputy chief judge, and information desk officer. Meanwhile secondary data comes from reference to journals, scientific books and data reports at the Probolinggo religious court. Data collections tecniques include observation, interviews, and documentation.

**Keywords:** Islamic Law, Judge's Decision, Marriage Cerificate, Positive law

### ABSTRAK

Isbat Nikah adalah penetapan sahnya sebuah perkawinan yang ditetapkan oleh Pengadilan Agama. Pernikahan yang di isbatkan merupakan pernikahan yang sah secara agama, akan tetapi belum diakui secara legal oleh negara karena alasan tertentu. Sehingga pernikahan tersebut tidak mendapat kepastian hukum. Maka dari itu tidak sedikit masyarakat melakukan isbat nikah sebagai salah satu bentuk upaya untuk mendapatkan pengakuan di mata hukum secara sah. Penelitian ini mengulas tentang perkara Isbat Nikah yang masih marak terjadi di kabupaten probolinggo. Dengan fokus penelitian yakni hasil analisis putusan hakim pada Pengadilan Agama Probolinggo dalam menerima, menganalisa, menetapkan kemudian memutuskan perkara Isbat Nikah. Analisis putusan hakim yang dimaksud menggunakan dua pendekatan yakni

persepektif hukum positif dan hukum islam. Perkara Isbat Nikah merupakan perkara yang masih banyak terjadi di kabupaten Probolinggo, pasalnya perkara ini menduduki peringkat nomor dua terbanyak setelah perkara perceraian yang diajukan oleh masyarakat setempat. Dari data yang penulis dapatkan, pada tahun 2021 dan 2022 ada sebanyak 41 perkara isbat nikah yang diterima oleh Pengadilan Agama Probolinggo. Tujuan dari penelitian ini adalah untuk menganalisa sejauh mana pertimbangan hakim dalam memutus perkara isbat nikah. baik dalam persepektif hukum positif maupun hukum islam. kemudian, mengingat bahwa isbat nikah masih banyak dilakukan, sayangnya, pihak yang mengajukan perkara ini adalah pelaku dari pernikahan Sirri, maka penulis hendak meluruskan kepada masyarakat secara umum bahwa isbat nikah merupakan suatu perkara yang sedapat mungkin dijadikan langkah terakhir dalam penyelesaian pernikahan Sirri guna untuk mendapatkan keabsahan terhadap pernikahan yang mereka lakukan. Artinya isbat nikah semata-mata dilakukan karna suatu kebutuhan, bukan untuk melegalkan pernikahan sirri. Karna undang-undang secara spesifik membatasi isbat nikah hanya terbatas pada beberapa hal yang bersifat mendesak. Jenis penelitian ini adalah penelitian lapangan, penulis mengumpulkan data primer dengan cara melakukan wawancara kepada ketua, wakil ketua, hakim, dan petugas meja informasi. Sedangkan data skunder berasal dari referensi jurnal, buku-buku ilmiah, dan laporan data pada Pengadilan agama probolinggo. Teknik pengumpulan data meliputi observasi, wawancara, dan dokumentasi dan lain-lain.

**Kata Kunci:** Hukum Islam, Hukum Positif, Isbat Nikah, Putusan Hakim

## INTRODUCTION

Marriage is a strong bond between two people who establish love which later with this bond will be expected to create a strong and dignified family, a *sakinah*, *mawaddah* and mercy household based on religious values (Law No. 1 of 1974). According to Talib (1996) marriage is a sincere promise that unites two noble people. so as to create a family that is strong, harmonious, peaceful and loves one another. Marriage is a place to form a family and all aspects of life starting from marriage, becoming a family to having children. Family is the first place of learning for a human being. Humans first learn and recognize something starting from their immediate environment starting from family, playmates to the outside environment. This is where humans begin to perceive how to speak, behave and ethics. Therefore, to form a family, the bride and groom who want to get married need sufficient supplies. Good educational provision, which includes an understanding of fostering a *sakinah* family, how to solve family problems, how to properly raise children, how to deal with the family economy. Strong mental provision in dealing with various family problems. This candidate should be prepared in advance, for husband and wife before getting married. for the realization of a strong and harmonious family.

Apart from the proper provisions, legal marriage must also be in accordance with existing laws, conditions and pillars of marriage must be fulfilled in advance both according to religious provisions and statutory regulations. The conditions for marriage in Islam include; prospective bride and groom (husband and wife), marriage guardian, witnesses and consent *qobul*. Meanwhile, according to the law, the conditions and pillars of marriage are contained in the Marriage Law No. 1 of 1974. And the ideal age or age that is said to be ready to marry is at least 19a years old. As contained in the 2019 Law number 16. If the marriage does not comply with these provisions, the marriage is invalid and legally flawed, even though it is legal from a religious point of view.

Legitimate according to Shari'ah but do not get legality and are not recognized by the state.

Then the law also confirms that marriage must also be legally registered in accordance with statutory rules, as has been emphasized "in article 2 paragraph 2 of the 1974 Marriage Law". Marriages that have not been recorded/registered in front of the Marriage Registrar are known as Sirri marriages. Sirri's marriage had no legal consequences nor was it legally recognized. The purpose of registering marriages is to make the administration of marriages orderly. This regulation is intended solely to maintain the dignity and sacredness of a marriage. Recording in marriage is similar to recording the most important moments in human life. For example, the day of birth is recorded with a birth certificate and the death of a person will be recorded with a death certificate (Sunna, 2004).

If a marriage is not registered (Sirri Marriage) by an authorized official, for certain reasons. In order to obtain legal recognition, the marriage must be registered or legalized first. As regulated in Article 7 paragraph (2) of the Compilation of Islamic Law, it is explained that when a marriage does not have a "legal" status, it can apply for an isbat (determination) of its marriage to the Religious Courts. However, not all marriages can be applied for isbat to the religious court. as stipulated in Article 7 paragraph (3) KHI, marriage confirmation may be carried out in a limited number of conditions as follows: "1. marriage in the framework of divorce settlement, 2. Lost marriage certificate, 3. Doubt whether one of the marriage conditions is valid or not, 4. There was a marriage that occurred before the enactment of Law number 1 of 1974 concerning marriage, and 5. Marriages performed by those who do not have marital obstacles according to Law Number 1 of 1974".

Even though in fact, isbath marriage can only be submitted for marriages carried out before the enactment of UUP No. 1 of 1974. As for marriages that took place after the enactment of this law, isbath marriage is no longer allowed. However, due to juridical and administrative reasons, the panel of judges can still accept cases of marriage confirmation. The Majelis Hakim in this case is still able to tolerate the reasons for this law, apart from that the facts on the ground show that Muslims in Indonesia in fact still apply quite a lot of cases for their marriage certificates to the Religious Courts, the possibility that the main cause is negligence and their lack of knowledge regarding marriage rules that every marriage must be officially registered. This strictness is regulated in law, "that every marriage must be proven by an authentic Marriage Certificate issued by the local Religious Affairs Office" (Bahrum, 2013). if this situation continues to occur without any special treatment to become an alternative to this problem, then there are still many sirri marriage statuses in Indonesia and will have a negative impact on the perpetrators.

## METHODS

In this study the type of research that researchers used was a case study or descriptive qualitative. As explained according to Bogdan danataylor in Moleong's book, the qualitative method is "*a research procedure that produces descriptive data in the form of written and spoken words from people and observable behavior*" (Moleong, 2008). The qualitative approach is descriptive, namely data collected in the form of words, pictures, not numbers. The figures used are only as research support. Data collection techniques in this study used interviews, observation, analysis of case decisions, photographs, documentation, and others (Danim, 2002). This method is used because the data obtained is in the form of words, sentences or documents from the results of

observations that the writer obtained during the research process. Descriptive research is used to describe certain statuses or phenomena related to the research being conducted. Arif Furchan states that the purpose of descriptive research is "to be able to describe what variables or conditions exist in a situation" (Furchan, 2005). In short, descriptive research takes a problem or focuses on the actual problem as it was at the time the research was being carried out so that the research object becomes clear. In this case the research that the author conducted relates to the Analysis of Judge Decisions in Marriage Isbat Cases in the Perspective of Positive Law and Islamic Law (Case Study Case No. 076/Pdt.P/2022/PA.Prob).

## RESULTS AND DISCUSSION

### Definition of Marriage Isbat

Marriage certificate is the determination of the validity of a marriage that has not been considered legal, because it has not been recorded in the register book of the Marriage Registrar. The law provides an affirmation that every marriage must be registered. Thus, marriage certificates and registration of marriages to obtain a marriage certificate are a symbiosis of mutualism, namely marriage certificates are used to legalize the marital status (Zainuddin, 2022). The requirement for registration of marriages is stated in article 2 of the Marriage Law Number 1 of 1974 which reads "Every marriage is recorded according to the applicable laws and regulations".

Etymologically isbat nikah is the origin of the word from Arabic. Isbat which means to decide or approve. Marriage is a very strong contract or mitsaqon gholizon contract between a man and a woman as husband and wife (Law No. 1 of 1974). Isbat Nikah can be a settlement for marriages that are not recorded in the marriage book. Furthermore, H Satria Effendi M. Zain stated that there are similarities of opinion at the level of law enforcement, especially judges at the Religious Courts, Isbat Nikah is a declarative legal category, which is only limited to ensuring the validity of a marriage that has been carried out according to Islamic law but has not been considered legal. because it is not recorded, then the legal consequences after the marriage are deemed to be legally recognized (Zain, 2010). The rule which later became the reference for the judge in resolving cases of marriage confirmation refers to the provisions of "article 49 paragraph (2) number 22 of law number 7 of 1989 concerning religious courts". In this article, marriage confirmation is one of the cases which is the absolute authority of the Religious Courts. and "KHI article 7 paragraph (2)" which states that every marriage must be proven valid by means of a marriage certificate, if not, then the marriage can be declared valid through the marriage certificate or marriage stipulation.

However, according to the provisions above, marriage certificates are only intended for marriages that took place before the 1974 Marriage Law came into effect. Meanwhile, marriages which took place after this law was enacted, marriage certificates are not allowed. So automatically the Judge of the Religious Courts does not have a strong legal basis in granting the application for a marriage certificate. Meanwhile, on the other hand, marriage confirmation is needed by the community and the application for this case is still increasing in the religious courts as time goes by and administration needs. As in the case of registering a child's school that requires a birth certificate, before making a birth certificate a legal marriage book is needed. Then it is deemed necessary to perform the marriage certificate. therefore the Panel of Judges conducted ijtihad by setting aside the above Law and referring to the Compilation of Islamic Law (KHI). In the KHI, the marriage isbat is considered to be a relief and a solution for sirri marriages that wish to obtain legal status legally. As for the rules for the Marriage Isbat

which are regulated in "IPR contained in paragraphs 1, 2 and 3 of article 7" it is explained that marriage is only considered legal when it is officially registered as evidenced by a marriage book. but if it is not recorded, then the marriage is considered sirri and the solution is to carry out the Isbat Nikah to the religious court. However, not all marriages can be made through marriage certificates to obtain legal recognition. The types of marriages that can be filed for isbat are quite limited, for example the marriage book is lost, marriages that used to be conducted before the 1974 marriage law was passed, still have doubts about the conditions and harmony in the marriage and so on. For more details, see article 7 paragraph 2 of the Compilation of Islamic Law. This law is the guideline for judges in resolving marriage confirmation cases.

In civil law, marriage is declared legal when the marriage has been recorded and registered in the marriage registration book. Actually, registration is only done to regulate administration, not to ensure the validity of a marriage. if the marriage has not been registered or registered by an authorized marriage registrar or KUA, then the marriage status is still unregistered and does not receive legal recognition. Even though the marriage was carried out without deviating from the applicable rules. Likewise the panel of judges, will not be able to grant a request for a marriage certificate if all the pillars and conditions of the marriage are not in accordance with religious rules and UUP No. 1 of 1974. However, the existence of this rule is not to be taken lightly by the public. Marriage certificates cannot be submitted to court without clear reasons.

### **Marriage Isbat Procedures for Parties Who Want to Apply for Marriage Isbat in the Religious Courts**

The marriage certificate is seen from its type as a voluntary case or application case, not a lawsuit, this type of case only consists of one party, namely the requesting party. Therefore, the party filing this case only consists of the applicant party because there is no dispute in this case. Universally, the parties who become applicants in filing cases of marriage approval are mostly husbands or wives. In fact, in essence, other parties who have family relations in question may become applicants in this case to the Court. For example, their own children or other parties who have an interest in the marriage.

Prerequisites for submitting marriage certificates to the Religious Courts are regulated in Article 7 Paragraph (3) of the Compilation of Islamic Law, namely "(1) There is a marriage in the framework of divorce settlement, (2) The loss of the marriage certificate, (3) There is doubt about the validity or not of the one condition for marriage, (4) The existence of marriages that occurred before the enactment of Law Number 1 of 1974, and (5) Marriages carried out by those who do not have marital obstacles according to Law Number 1 of 1974 ". In its implementation, the Isbat Nikah case is similar to the trial process in general, which is to register first by attaching the requirements and proof of the application. As for the marriage certificate, namely (1) Photocopy of the Applicant issued with a stamp of 10,000, (2) Photocopies of the KTP of the children of the applicant issued with a stamp of 10,000, (3) Photocopy of Family Card, (4) Photocopy of KTP of husband and wife issued with a stamp of 10,000, ( 5) A copy of the death certificate (if one of the parties has died) is stamped 10,000 (Pa-Kraksaan.go.id), after which the down payment of the case fee is made. In the next stage, the applicant can conduct a hearing, read out the petition, provide information, and show evidence. The evidence that can be used in court consists of two pieces of evidence, namely evidence in the form of letters or documents and evidence from witnesses. Then, in the next stage, the Panel of Judges can find all the legal facts from the

evidence and the trial process which will later be concluded and determined in accordance with the facts and evidence obtained from the results of the trial.

After the Panel of Judges determines the case, the applicant will receive a letter from the court containing an order to the Office of Religious Affairs (KUA) to register the applicant's marriage in the marriage register book. A marriage certificate is proof of the validity of a marriage that has taken place and the marriage has received legal recognition. This marriage registration is a mandate mandated by the laws and regulations contained in "Article 7 Paragraph (1) KHI and Article 100 of the Civil Code", which reads "the existence of a marriage can only be proven by a marriage certificate or marriage certificate recorded in the register". This mandate has no other purpose in order to guarantee and protect the rights of every citizen, with the fulfillment of these rights, it is hoped that it will create order in the administration of marriage in society. Therefore, this Marriage Isbat is the answer to the problem of married couples who have married according to the provisions of the religious shari'a, but have not been registered or registered before the authorized official without having to perform the wedding ritual again. The parties who may apply for a marriage certificate are "(1) Husband, (2) Wife, (3) Children of a husband and wife who wish to apply for a marriage certificate, (4) other parties who have an interest in the marriage".

The stages that must be passed in submitting an application for Isbat Marriage to the Religious Court are, first, the applicant first registers at the registration table at the Religious Court. At the time of registration, the applicant makes a marriage certificate application. This application letter can be made by yourself or made by the applicant's attorney, if the applicant cannot make an application letter and is not accompanied by a legal authority, then the applicant can go to a legal aid post officer (posbakum) to make an application letter. Then the officer (posbakum) provides assistance to the applicant to make an application letter in accordance with the case that the applicant is referring to. On the other hand, the documents that will be used as evidence for the trial should be provided by the applicant in advance, the letter in question is in the form of a statement from the local KUA that the marriage has not been recorded or a certificate of loss of the marriage certificate, ID card and family card. After making the application letter, the applicant goes to table one with the application letter to make a down payment of the court fee. after that the officer will estimate the amount of court fees to be paid by the applicant. In the second stage, the applicant will come to table II to pay the court fee. after that the cashier will record these costs into the financial journal and provide a letter of application that has been made. When the payment stage has been completed, the applicant comes to table III to get the trial case number. The case number consists of four elements, namely: case number/type of case/year of case/and sample court code 123/Pdt.g/2020/PA.Prob. This case number will be recorded and submitted to the clerk to determine the day of the trial, the panel of judges and substitute clerks in the trial procession.

Third, the applicant returned home and waited for the court summons to arrive. In this case the one who will summon the applicant is the bailiff of the Religious Court. The bailiff will come directly to the applicant's house according to the address stated in the application letter that has been made. And the fourth stage. If the applicant has received a summons from the bailiff, then the applicant will undergo a trial process at the Religious Court on the appointed day, date and time. The flow of the trial that will be passed is the reading of the petition from the applicant, answer, replica, duplik, replication, reduplication and so on, evidence, conclusion and decision of the Panel of Judges. Because this case is a voluntary matter, it does not have to take the mediation

route. Next is the determination of the Panel of Judges. If the applicant's application is accepted by the Assembly, the applicant will receive a letter of determination of the applicant's case, but conversely, if the application is rejected, the marital status is invalid and does not receive the applicable legal umbrella. Legal according to religion, but its status is not recognized by the state.

### **Marriage Isbat Case at Probolinggo Religious Court (Judge's Decision No. 076/Pdt.P/2022/PA.Prob)**

Isbat Nikah is the determination of a marriage that is not registered/Sirri in the register of marriage registration. Apart from that, the marriage certificate is also required by the community to obtain authentic proof of marriage that has not been recorded/recorded. So that the evidence will be an administrative requirement. Such as registering children's birth certificates, sending children to school, going to pilgrimage and others. All of these activities, one of the requirements needed is a legally recognized marriage certificate.

Given the importance of this marriage certificate, a judge is required to be fair in deciding a case. Deciding a case is not only seen from a formal juridical aspect, but from the point of view of the benefits of the decision being made. This includes matters of marriage certificate. Moreover, the facts that are happening in the field still show indications that the application for marriage confirmation cases is still considered a series of cases that have been filed quite a lot, after the divorce case at the Probolinggo Religious Court. From year to year, cases of confirmation of marriage still exist in the list of cases that have been filed by the people of Probolinggo Regency. For example, in the table below, the description of isbatnikah applications in 2021 and 2022 at the Probolinggo Religious Court.

No	Case Year	Number of cases
1	2021	25 cases
2	2022	16 cases

In general, the Panel of Judges decided that the marriage certificate case referred to "article 7 Paragraph 3 KHI letter (e)" namely "marriage conducted by those who do not have marital obstacles according to Law Number 1 of 1974". Although basically marriage certificates are only allowed for marriages that took place before the enactment of UUP No. 1 of 1974. When the marriage is carried out after the enactment of the Law, applications for marriage certificates are not permitted. However, in reality, the current reality is that the Religious Courts still accept many applications for Isbat Marriage submitted by the public. Even though the marriage took place after the enactment of "Marriage Law No. 1 of 1974" this is where the role of the judge is needed. It is certain that a judge must be able to look for arguments that allow marriage certificates, both juridically, philosophically and sociologically. The judge is responsible for returning the law to its ideal ideals. That is, the law was made to facilitate the welfare of mankind. Judges in dealing with a problem must consider the aspects of juridical truth (law) and philosophical truth, namely justice. So with this consideration, judges are expected to make fair and wise decisions and avoid bad possibilities that will happen to society. Legal certainty is intended so that the law can be enforced properly, namely for the benefit of humans (Yuliastuti, 2017). In a judge there is an ideal character that radiates, judges are considered wise and fair. To support the wisdom and justice attached to a judge, the judge is equipped with a code of ethics, namely honesty, fairness, wisdom and so on. This code of ethics is very attached to a judge. According to

H.M Fauzan, "Judges in carrying out their duties and functions are obliged to maintain the independence of the court. Judges should have integrity and personality that is beyond reproach, honest, fair, professional and experienced in the field of law" (M. Fauzan, 2013).

In this discussion, the author raises a Judge's decision in the Marriage Isbat case to be used as a research object. This step is carried out to find out the dimensions of the Judge's considerations in a wider spectrum in deciding a case. the author believes that the law was created for the benefit of human life. Law cannot only be seen as a rigid framework of rules. The case in question is case number (076/Pdt.P/2022/PA.Prob). This case was filed by the applicants aiming to obtain a marriage certificate, and other administrative needs. From the results of the minutes of this case it was explained that the applicants were married on July 8 2018 according to Islamic religious law at the home of the applicant's wife. This marriage was attended by two witnesses and the one who married the two of them was the father of the applicant's wife with a dowry in the amount of Rp. 50,000. then from the results of this marriage they were blessed with a child named Muhammad Alfin Lam Alif. Born on June 30 2019. But unfortunately the marriage was not recorded in the marriage registration book due to sirri. Therefore, the applicants submit a Marriage Certificate to the Probolinggo Religious Court on July 29, 2022 to obtain a Marriage Certificate with the following instructions:

**Primary:**

1. Granted the petition of the Petitioners;
2. Determine the validity of the marriage of Petitioner I and Petitioner II which was held on January 8 2019 at the home of Petitioner I, Probolinggo City;
3. Ordered the Petitioners to report this stipulation for the registration of the Petitioners' marriages to the Head of the Office of Religious Affairs (KUA) of Wonoasih District, Probolinggo City;
4. Charge legal fees;

**Subsidiary:**

If the Panel of Judges has a different opinion, ask for the fairest decision (*"ex aequo et bono"*). To grant this case, the Panel of Judges conducted legal considerations, both formal and material law. Formally, the Panel of Judges considers that the intention of the applicant filing this case has been explained above. Whereas the application is basically for the purpose of receiving proof of a valid marriage and to make a birth certificate for the applicant's child, which in this case must first go through the determination of the Religious Court. So, according to the panel of judges, this case is very urgent in the interest of receiving proof of the validity of the marriage that the applicants are doing. As stipulated in "article 7 paragraph 1 of the Compilation of Islamic Law that marriage can only be proven by a marriage certificate made by a marriage registrar." along with that, this case has been announced in advance on the notice board of the Probolinggo Religious Court for 14 days before this case was tried in accordance with the "Guidelines for the Implementation of Duties and Administration of the Religious Courts Book II Revised Edition 2010, which was enacted based on the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: KMA/032/SK/VI/2006 dated 4 April 2006";

Considering that every case requires clear evidence, it is deemed necessary for the applicants to present valid evidence, both written evidence and witness evidence. Even though this case is a voluntary case or a petition case where no other party is suing, it is important for the Panel of Judges to study the available evidence, whether the marriage really existed and complies with the terms and pillars of marriage according to



the applicable laws and regulations. Then the applicants attach evidence in the form of letters and evidence of (2) witnesses each of whom has given testimony under oath. then the written evidence submitted by the Petitioners was a copy of the identity and authentic deed that had been sealed by the post office, then the Panel of Judges matched the originals which had been declared appropriate. and have also complied with the provisions of "Article 3 of the Law of the Republic of Indonesia Number 10 of 2020 Concerning Stamp Duty, then in accordance with Article 1868 and Article 1870 of the Criminal Code jo. Article 165 HIR, the Panel of Judges is of the opinion that the written evidence above can be accepted at trial, as well as perfect and binding evidence (volledig en bindende bewijskracht)". "As for the evidence in the form of witnesses, the applicants have presented two witnesses who have fulfilled the formal requirements as stipulated in Article 145 paragraph 1 number 3e HIR and have provided information regarding the marriage of the applicants, which was actually seen and witnessed by themselves. The statements of the two witnesses are in harmony with one another. So in accordance with Articles 171 and 172 HIR the statements from these witnesses can be accepted as valid evidence.

Materially, that the marriage of the applicants which took place at the home of applicant II (Applicant's wife), city of Probolinggo on January 8 2019, has fulfilled the conditions and pillars of marriage as stated in "articles 2 and 6 of Law Number 1 of 1974, jo. Article 14 KHI and the marriages carried out by the applicants "have no obstacles to marriage in accordance with Article 8 UUP No. 1 of 1974 jo. Article 39 KHI". The marriages that have been carried out by the applicants are in accordance with the applicable provisions, but the marriage is not registered at the local KUA. Because sirri marriage. Whereas the provisions in "Article 7 paragraph (1) and (2) of the Compilation of Islamic Law (KHI), that marriage can only be proven by a marriage certificate made by a Marriage Registrar, in the event that marriage cannot be proven by a Marriage Certificate, its marriage certificate can be submitted to the Religious Court. And according to Article 7 paragraph (3) letter e of the Compilation of Islamic Law, itsbat of marriage that can be submitted to the Religious Courts, among others, are marriages performed by those who do not have marriage obstacles according to Law No. 1 of 1974, therefore the petition of the Petitioners can be examined;" not only formal law and material law, the Panel of Judges also referred to the Ulama's Books as material for consideration in granting the Isbath Marriage case. there are at least two reference books, namely the book I'anaatuth thalibin and the Book of Mughni Mumtaz.

1. In the book I'anaatuth Tholibin Juz IV page 254 which reads:

وفي الدعوى بنكاح على امرأة ذكر صحتها و شروطه من نحوولى وشاهدى عدل

*"In acknowledging the marriage of a woman, it must state the validity of the marriage and its conditions, such as the presence of a guardian and two fair witnesses."*

2. In the Mughni Muhtaz book, juz 12 page 125 which reads:

وَيَقْبَلُ إِقْرَارَ النِّبَالِغَةِ الْعَاقِلَةِ بِالنِّكَاحِ عَلَى جَدِيدٍ

*"And the recognition of people who are mature and wise about their marriage to someone is accepted, according to qouljadid."*

After carrying out legal considerations, the panel of judges then concluded and gave a decision on the case as follows. Among them:

1. Granted the petition filed by the petitioners in its entirety
2. Give ratification to the applicant's marriage which took place on January 8, 2019.

3. Give orders to Applicant I and Applicant II to report this determination to the KUA Wonoasih sub-district, Probolinggo City to make a valid Marriage Certificate.
4. Charge court fees to the applicants in the form of cash in the amount of Rp. 475,000 (Four Hundred Seventy Five Thousand Rupiah)

### **Isbat Marriage in the Perspective of Islamic Law**

Juridically, the provisions regarding cases of isbat marriage are regulated in Article 7 Paragraph (2) of the Compilation of Islamic Law, then it is clarified regarding the limitations and prohibitions in Article 7 paragraph 3 KHI namely "(1) There is a marriage in the framework of divorce settlement, (2) The loss of the marriage certificate, (3) There are doubts about whether one of the conditions for marriage is valid or not, (4) There are marriages that took place before the enactment of Law Number 1 of 1974, and (5) Marriages carried out by those who do not have marital obstacles according to Law Number 1 of 1974". Meanwhile, according to the perspective of the salaf scholars, isbat marriage in tawtsiq is not something absolute that the marriage must be recorded/registered in advance of a legal official. This means that marriage is only important in terms of its validity according to the Shari'a, in accordance with the terms and pillars of marriage. does not have to be officially recorded or recorded by a marriage registrar. However, at the present time, the era is far different from the past. Marriage registration becomes a necessity for a person as identity and administrative equipment. If the marriage is not registered, then there will be a lot of harm that will be faced, for example in case 076/Pdt.P/2022/PA.Prob of the applicant's marriage is not recorded, so the applicant submits a certificate for the purpose of making a marriage book and making a certificate of birth of his child. Meanwhile, in the process of making a child's birth certificate, there is a condition where the parents of the child must first show their marriage book to find out that this child is indeed the biological child of the parents concerned. Bearing this in mind, Islam came as a religion that brings mercy to mankind, Islam provides solutions to the difficulties faced by mankind on earth. In Islam there is a rule of "Fiqh which reads "Ad-dhararu yazilu" which means that harm must be eliminated. Which in this case is probably the worst, even if it's as small as possible to avoid it. This includes matters relating to the registration of marriages with the aim that the marriage will receive legal recognition and avoid administrative difficulties in the future.

Indeed, in the case of marriage registration, there are pros and cons among Islamic scholars. Because it is a matter of registration of marriages that have only recently taken place. Not when the Prophet Muhammad was still alive. The scholars who agreed and took the middle way in this debate were named Sheikhul Azhar JaadzAl-HaqzAli JaadzAl-Haq. He divides the conditions for marriage into two things, namely the terms according to syara' and al-tawtsiqiy (Asasriwarni, 2018). In line with the opinion of Syekhul Azhar Jaad Al-Haq Ali Jaad Al-Haq, sheikh Wahbah Al-Zulayli in his work, "Al-Fiqh al-Islami wa Adillatuh" also groups the requirements for marriage into two categories, namely "syar'i requirements and tawtsiqi requirements.". The syar'i requirement is a legal provision that becomes the standard for the validity of a legal event. In terms of marriage, the syar'i requirements are the terms and pillars of marriage that have been determined. Then the tawtsiqi requirement is proof of the truth of an incident that can be used as evidence of a case if unwanted things happen in the future (Sanusi, 2016).

Even though the matter of Isbat of marriage is not specifically explained in the Koran and hadith, there are other references that can be used to find out the basis for the order that marriages must be recorded or recorded, namely qiyas and references to classic books (Sanusi, 2016). first, qiyas, defined in "Q.S Al-Baqarah Verse 282 which means: O you who believe, if you don't do muamalah in cash for a specified time, you should write it down". In this surah it can be used as a reference in matters of registration of marriage. In muamalah debts and relationships between human beings that require records are ordered to be recorded let alone a marriage that is very noble and sacred. Then the basis for judges in registering marriages is sourced from the arguments in classic books including in the book I'aaanatuth Tholibin Juz IV page 254 which reads:

وفى الدعوى بنكاح على امرأة ذكر صحتها و شروطه من نحوولى وشاهدى عدل

*"In acknowledging the marriage of a woman, it must state the validity of the marriage and its conditions, such as the presence of a guardian and two fair witnesses."*

In the Mughnil Muhtaz book, juz 12 page 125 which reads:

ويقبل اقرار البالغة العاقلة بالنكاح على جديد

*"And the recognition of people who are mature and wise about their marriage to someone is accepted, according to qouljadid."*

Then, another principle that is used in terms of marriage registration is the principle of maslahat. Maslahat is a principle that is reviewed from the aspect of its usefulness. This principle is neither ordered nor prohibited by the Islamic religion, it only exists on the basis of need and provides solutions for society. Law stipulation with the principle of benefit for the Muslim community is the principle of stipulation of Islamic law.

## CONCLUSIONS

Marriages that are not recorded or recorded in the marriage registration book (*Nikah Sirri*) cause a lot of harm. *First*, the marriage that was carried out did not receive legal recognition. *Second*, the child from the marriage did not receive status as an heir from his father and could not claim the distribution of the inheritance. *Third*, unregistered marriages will face difficulties when making birth certificates for children, registering children's schools, going on pilgrimages and so on. So the answer to the aftermath of Sirri's marriage problem is Isbat Nikah or the determination of the validity of a marriage by a religious court, so that the marriage is recognized as legal and gets legal recognition.

Isbat marriage is a matter that is still frequently asked by the people of Probolinggo Regency. However, the irony is that those who filed the case were almost dominated by people who were previously married in a Sirri manner or were not recorded in the marriage registration register. even though the Marriage Isbat was originally only intended for a marriage that took place before the enactment of the marriage law number 1 of 1974, but due to social and administrative reasons our law enforcers made concessions in cases of marriage registration which were then contained in the Islamic Law Compilation (KHI) article 7 paragraphs 1, 2 and 3. Regarding the details of the boundaries of the marriage certificate, it is regulated in Article 7 paragraph 3 KHI, namely "(1) There is a marriage in the framework of a divorce settlement, (2) The marriage certificate is lost, (3) There is doubt about

whether or not one of the marriage certificates is valid or not. conditions for marriage, (4) marriages that took place prior to the enactment of Law Number 1 of 1974, and (5) marriages carried out by those who did not have any obstacles to marriage according to Law Number 1 of 1974”.

The leniency in this law is solely for a logical and urgent reason. But unfortunately the facts that occur in the field, marriage certificates are often submitted by the parties because they want to legalize Sirri's marriage or do not get legality from the state. It is okay to legalize a marriage because it is recommended by law. but not by way of marriage certificate. the legality of a marriage because the marriage is in accordance with existing rules or procedures. The irony is that the sirri marriage is based on a marriage that is still not old enough. Simply put, the marriage of a husband and wife who are still not old enough for marriage (early marriage) is then forced to marry for certain reasons, later when they are old enough then they submit a marriage certificate to the Religious Court. It sounds funny, but if this is allowed to go on like this it will lead to an increase in sirri marriages in Indonesia, either sirri marriages because they are not old enough or for other reasons.

Therefore, it is our duty together. All elements of society must synergize, work hand in hand in alleviating this problem. Starting from law enforcers, scholars, government, policy makers, legislators must jointly address this matter. Judges cannot walk alone, because what judges do before the court in deciding cases of marriage confirmation is only implementing and based on existing rules. Because the Indonesian state in its legal system adheres to the continental European system, laws are the basis for judges in deciding every case.

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