

## The Legal Reasoning of Judges in Determining the Marriage *Itsbat* in *Siri* Marriage Cases (A Study at the Shariyya Court of Banda Aceh)

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### Abstract

This study aims to find out what are the judges of the Shariyya (Religious) Court of Banda Aceh rationale behind determination of the *itsbat* (confirmation of marriage) applications for *siri* (undocumented) marriage and its legal consequences from this decision. This juridical-empirical research employs two types of data sources: primary and secondary. The information was gathered through direct interviews with the respondents and informants who were selected from purposive sampling. Using qualitative descriptive analysis, it was concluded that the judge's decisions in determining the result of marriage *itsbat* applications including granting, rejecting, canceling, revoking, or declared inadmissible for the applications. The decision made by the judge has been carefully considered for the sake of *maslahah* (public benefit) and also examined its formal and material requirements. Therefore, judges have rights to grant proposals of marriage *itsbat* for *siri* marriage thus it becomes legal before the law. The applicants can also file a cassation if their applications were rejected and for the applications that were declared void/cancelled can make an attempt to reapply. There are some hopes to the government in regard to this matter: first, the government should make strong and firm laws to oblige the citizen to legalize their marriages based on the state law, second, the government needs to take action against illegal practice of Qadhi (Marriage Judge) and lastly, it is also urged to disseminate the information about the risk and negative effects of *siri* marriage through a massive campaign to the community.

**Keywords:** judge decision, *siri* marriage, marriage *itsbat*.

### Abstrak

Penelitian ini bermaksud ingin mengetahui apa saja yang menjadi pertimbangan hakim Mahkamah Syar'iyah Kota Banda Aceh pada saat melakukan penetapan *isbat* nikah terhadap pernikahan *siri* dan efek hukum dari penetapan hakim tersebut. Penelitian ini tergolong pada yuridis-empiris dengan memiliki dua jenis sumber data yakni primer dan skunder. Melalui teknik wawancara langsung terhadap responden dan informan yang telah direncanakan dengan cara kelayakan (*purposive sampling*).

Menggunakan Analisis deskriptif kualitatif sehingga ditemukan beberapa kesimpulan; bahwa terdapat beberapa jenis keputusan Hakim yang berisi mengabulkan, menolak, membatalkan, mencabut atau tidak menerima sebuah permohonan isbat nikah. Perilaku hakim yang penuh dengan prinsip hati-hati dengan pertimbangan kemaslahatan, syarat formil serta materil maka hakim dapat mengabulkan permohonan pernikahan *siri* sehingga menjadi sah sesuai hukum. Kemudian pemohon dapat mengajukan kasasi jika permohonannya ditolak. Baik permohonan yang dinyatakan gugur/batal dapat melakukan upaya permohonan kembali. Terdapat beberapa harapan dalam hal ini khususnya kepada hendaknya membuat aturan khusus perihal pernikahan *siri* dalam undang-undang, diperlukan sebuah aturan yang kuat dan tegas terhadap kewajiban untuk setiap orang untuk mengesahkan pernikahannya sesuai aturan negara serta dapat melakukan penindakan terhadap *qadhi liar*. Kemudian perlunya sosialisasi yang masif pada masyarakat tentang bahaya dan efek negative yang timbul dari menikah *siri*.

**Kata Kunci:** penetapan hakim, nikah *siri*, *itsbat* nikah

## INTRODUCTION

This paper examines the practice of Islamic family law in a marriage process, specifically in analyzing the considerations used by judges when examining the marriage *itsbat* application for *siri* marriages at the Religious Court of Banda Aceh. Based on religion and customs which are inherent in the society, *siri* marriage is legal in the customary law, however, this is not the case with positive law (Aditya, 2019). Referring to the contents of Article 2 paragraph (1, 2) of Law No.1 of 1974 that every marriage is declared valid if it is carried out based on the applicable laws and religious provisions of each spouse (Amri, 2020).

We often read in the media about the phenomenon of *siri* marriages which were performed by many people regardless their background and social stratification, not only in urban areas, but also in rural area. The factors that ignite this problem are starting from the demand for necessities of life, did not getting the parents blessing for marriage, or other reasons such as did not understanding the law that applied in their country. Therefore, the way that they have chosen is through performing *siri* marriage as a way of doing marriage, even though this action is against the rules that have been made by the state (Rika Nur Laili, 2021).

Indonesia is a legal state where all its citizens' action is based on the applicable law, hence, marriage registration is crucial in regard to this matter. Although *siri* marriage is legal in Islam (after meeting all the pillars and conditions) and does not require the documentation, however, this condition is contradicted to the state law. A registration in marriage is a must, so that all parties have a strong authentic evidence and the legal certainty before law (Afwan Zainuddin dan Zainuddin, 2017).

A marriage without an official record will adversely affect both husband and wife and also on the children who were born from this marriage (Devy & Rizqi, 2019). This marriage also considered as illegal before law, means, if something untoward happens, like one party does not fulfil its obligations or another party disowns the existence of the marriage, then both husband and wife cannot claim their rights.

This matter will also have impact on the distribution of properties, wills, inheritance and so forth. Sadly, women and children are much aggrieved in many *siri* marriage cases, even, every child born from this marriage is difficult to obtain a birth certificate (Khairi & Akim, 2018). Although in some cases a child born from a *siri* marriage can obtain a birth certificate, however, they can't inherit their father's lineage, therefore, this matter might become a psychological burden for the child in the future life (Djawas & Hani, 2020).

Based on the applicable regulations, the state will protect a legal marriage that has authentic evidence such as ownership of a marriage certificate issued from an authorized institution. In Article 7 paragraph (2) of KHI (Islamic Law Compilation) clearly states that those who do not have marriage certificates can apply for it through marriage *itsbat* request submitted to the Religious Courts, but, in paragraph (3) this request can only be proposed based on these criteria: 1) the original marriage certificate was lost; 2) when in doubt about the validity of the marriage; 3) the marriage was taking place before the adoption of Law No. 1 of 1974; 4) the marriage is in accordance with the applicable law and Law No. 1 of 1974.

*Itsbat* of marriage is a process to determine the validity (legitimacy) of a marriage. Any party who demands for a marriage *itsbat* letter can file a proposal to a Particular Religious Court in Aceh through the Sharia Court. However, the final decision of this matter is the jurisdiction of the court, so that every court rulings regarding the *itsbat* for *siri* marriages will be acknowledged by law if only the proposal was granted (Hanapi et al., 2021). Juridically, this application may only be submitted if the *siri* marriage took place before the adoption of the Marriage Law No. 1 of 1974. This provision is in accordance with the contents of article 49 in paragraph (2) of Law Np. 7 of 1989 jo, Law No. 3 of 2006 jo and Law No. 50 of 2009. It is stated that among the authorities of the Religious Courts in matters of marriage is the right to issue a statement regarding the validity of a marriage which took place before the adoption of Marriage Law no. 1 of 1974.

Based on the data submitted to the Religious Court of Banda Aceh regarding the proposal for marriage *itsbat* letter, the Religious Court will grant the confirmation of marriage that qualified one of criteria in law No. 7 paragraph (3) letter e in the KHI. This is written in Book II of the Supreme Court regarding Guidelines for the Implementation of Duties and Administration of Religious Courts that the Supreme Court emphasizes that the religious Court should prioritizes prudence principles in examining the case and in decision making on every proposal for marriage *itsbat*. Thus, this marriage *itsbat* letter can be used according to its designation and not as a tool for irresponsible people to legalize acts of legal abuse, such as facilitating the practice of polygamy by not undergoing procedures in accordance with applicable regulations (Erowati, 2018). According to the data at Religious Court of Banda Aceh, there were 145 applications during 2017 to 2019 and of all these applications already obtained legal provisions.

**Table. 1.** Data about marriage *itsbat* applications which were received and decided at the Banda Aceh Religious Court during 2017-2019

Year	Application for Marriage <i>Itsbat</i>	The <i>Itsbat</i> for <i>Siri</i> Marriage	The Determination of <i>Itsbat</i> for <i>Siri</i> Marriage					
			Granted	Rejected	Inadmissible	Void	Revoked	Dismissed
2017	30 Cases	11 Cases	4	1	5	1	-	-
2018	56 Cases	33 Cases	23	-	5	3	1	1
2019	59 Cases	42 Cases	29	3	7	1	2	-
<b>Total</b>	145 Cases	86 Cases	66	4	17	5	3	1

The declaration of granted for the marriage *itsbat* application of *siri* marriages denote a contradiction between formal legal regulations Law No. 3 of 2006 Jo, No. 50 of 2009 and empirical events. Hence, the judges of Banda Aceh Religious Court supposed to guide by the formal legal law. Furthermore, in the legal system Indonesia, the position of the law is higher than the Presidential Instruction. Hierarchically, the regulations which are lower in position must in line with the higher regulations, in this case the KHI regulation is based on the Presidential Instruction Number 1 of 1991. Following this, all cases that have been determined or granted by the panel of judges after year 1974 can be interpreted as a deviation, except if the panel of judges has other considerations in accordance with their own *ijtihad* (independent reasoning). In addition to the determination of the marriage *isbat* which was granted, there were also proposals that were rejected, refused, void, revoked and canceled (Gunawan, 2013).

From the facts above, there are several studies that also examine for the marriage *itsbat* such as (Munthe & Hidayani, 2017) which discusses the legal arrangement of the marriage *itsbat* and the legal considerations used by judges in determining the validity of a marriage. Research from Ekawati (2017) which examines the considerations of the panel of judges in granting marriage *itsbat* proposal at the Tapaktuan Religious Court. Then, the paper from Burhanuddin A. Gani (2018) which explores the reluctance of people who get married during gun conflict to propose the marriage *itsbat*. Among the factors hindered them are: that the Tengku (The traditional Islamic cleric) who married them had died, and then too far from the city center, fear of being humiliated by the surrounding community and feel worried about the cost that may arise.

Sulistiani (2018) in her research tries to find out how the juridical basis of marriage *itsbat* for *siri* marriages is, and how to comprehend the Article 7 of the KHI regarding marriage *itsbat* which still seems ambiguous and inaccurate, thus she opines that, it is necessary to set a clear boundary in application of this article to overcome the *siri* marriage problems in Indonesia. As it is known that the phenomenon of marriage *itsbat* is raised after Law Number 1 of 1974 has been issued.

By using juridical-empirical method, this research aims to explore what the judges of the Banda Aceh Religious Court rationale behind determination of marriage confirmation

proposal for *siri* marriage; and to observe what are the consequences arising from this determination.

## DISCUSSION

### The Marriage *Itsbat* and the Judges' Legal Reasoning for *Siri* Marriage

Among the absolute authority of the court is to examine and to make decisions on any cases, including marriage. Here, the judges have authority to ratify a marriage, regardless of it has been registered in accordance with the applicable law or not. For the case of marriages which have not been registered yet (*siri* marriage), proposing the marriage *itsbat* is the solution to legalize the marriage. This action is initiated with the submission of the marriage *itsbat* proposal voluntary and submitted jointly by both husband and wife or by those who are concerned on the marriage (Yunus, 2020).

The marriage *itsbat* decision (Huda & Azmi, 2020) is a product issued by the court for the voluntary marriage *itsbat* proposal. This voluntary proposal is widely used by individuals to legalize *siri* marriages in the hope of obtaining legal protection.

A careful consideration must be applied in every decision that will be issued by the judges, so that, it is not merely as an application of the law, but must be in accordance with the legal idea (*Rechtsidee*) of the state which are professional, fair, has legal certainty and legal benefits. Build upon this *rechtsidee*, judges may interpret the decisions according to their knowledge (Isnantiana, 2017).

The Religious Court of Banda Aceh grants the marriage *itsbat* proposal of the marriage which took place after the adoption of Law no. 1 of 1974 for the following reasons: first, there is the *ius curia novit* principle, means, judges are believed to have an understanding in marriage *itsbat* law, also understand the principle of freedom of judges in determining a problem where there is no applicable law which regulate it (*rechtsvacuum*). Second, carry out a sociological interpretation by linking another regulation with the legal problem at hand, so that, the law does not stop or stagnate, rather to strengthen legal rules which imply that the law is alive and developing (living law) continuously in social life. This step is known as the legal discovery event (*rechtsvinding*). Then the strengthening of the contents in accordance with the contents of Article 28 paragraph (1) of Law No. 49 of 2009 concerning judicial power, in this article it is stated that judges are required to explore, analyze and understand all the contents of legal values and promote a sense of justice in the midst of social life (Ananda, 2017).

Law No. 49 of 2009 clearly gives the authority to judges to decide a legal problem and event which has multiple interpretations and or a legal event with no rule of law. Along with that, it is also regulated that judges and courts have the authority to receive, to examine and to make decisions on a legal case. This is contained in Article 56 Paragraph 1 of Law No. 3 of 2006 concerning Amendments to Law no. 7 of 1989 concerning the Religious Courts, that courts may not refuse to conduct examinations nor to decide an application with no rule of law, however, judges are required to conduct examination and decide cases in line with the contents of Article 16 Paragraph 1 of Law no. 49 of 2009 concerning Judicial Power.

With the basic of this argument, the researchers opine that the judges grant every marriage *itsbat* proposal even though the marriage took place after the adoption of Law no. 1 of 1974.1 of 1974. Judges with their knowledge and competence are required to find both formal and material truths in every application for marriage *itsbat* submitted.

During the trial, the judges examine ether the formal requirements have been met or not. When all the formal requirements are completed, the judges then issue a decision containing the grant of the application (Faisal Yahya, 2018). On the other hand, the application will be rejected if the requirements are not complete. Formal requirements that must be met include: 1) the proposal or lawsuit filed with the Religious Court according to its designation; 2) the proposal which was submittted is dated and signed by the applicant; 3) have a clear identity; 4) have a clear *fundamentum pependi/posita* (subject matter); 5) have a clear *petitum* (a claim at law).

In line with the formal requirements above, the applications which are declared to be unclear (*obscur libel*), or the proposal does not comply with the stipulated requirements, for example, the name is written incorrectly, and or one of the parties' data is incomplete, the judges may stop the examination and issue a decision called not accepted or rejected.

These are the examples of the rejected marriage *isbat* proposal because the application is flawed, or the formal requirements are incomplete. For example, the application numbered 51/Pdt.P/2017/MS.Bna, the applicant requests to obtain a marriage certificate. This application cannot be accepted because he/she is not a resident of of Banda Aceh, so the application is declared formally invalid. Also case numbered 189/Pdt.P/2018/MS.Bna. This application was also rejected because the facts of the trial revealed that the wife still had a marriage bond with her previous marriage. Then the case number 146/Pdt.P/2019/MS.Bna also rejected because the husband as the first applicant does not have a polygamy permit which at the same time still has marital ties with another woman. Number 128/Pdt.P/2017/MS.Bna, was also rejected because the case was the same as the case above numbered 146/Pdt.P/2019/MS.Bna.

During the trial, the judges will certainly find hidden facts from the applicants through witnesses' testimony and available evidence which reveal the marriage fact where it was not carry out in accordance with religious and state regulations. Therefore, this type of application will be rejected due to incomplete requirements as in the Article 2 paragraphs (1) and (2) of Law no. 1 of 1974 jo. Articles 4 and 5 KHI. And the non-fulfillment of Article 8 of Law no. 1 of 1974, articles 6 and 14 of the KHI by the applicant. Furthermore, from the applicant's side, Article 8 of the KHI is also incomplete. The content of this article is that a divorced marriage must be proven in front of a religious court, except for divorce due to death. Based on this article, the marriage proposed by the applicant is not in accordance with Article 9 of Law no. 1 of 1974. It states that a person who is currently married is not allowed to remarry, unless he fulfills the requirements in Article 3 paragraph (2) and Article 4 of Law no. 1 of 1974.

The results of the above analysis show the importance of marriage registration in an authorized institution for the benefit of the husband, wife and the heirs as well as for general administrative order. The *maslahah* (benefit) in this case is also related to ensuring legal certainty for them so that their rights are guaranteed in the future. In order to obtain *maslahah* (public benefit), *mudharah* (harm/bad thing) must be avoided, including avoiding all types of behavior that can lead to the emergence of harm. For example, doing marriages that are not in accordance with religious and state guidelines such as marriages without official registration which can lead someone to behave wrongly. Moreover if the case when the husband neglects his obligations or decide to run away from this family, then the wife and children remain there without having status in society, they do not get a living from husband and also have no position before the law (Hanafi & Bin Mohamad, 2020). If the case is the marriage substance like the pillars and conditions of marriage are not met, then the proposal for marriage *itsbat* cannot be granted by judges because it is against the religious rules. However, on the other hand, it can be used as an excuse that "Rejecting harm takes precedence over obtaining benefit." Thus, this statement is used by judges to reject the marriage *itsbat* proposal whose formal requirements are not met. Then, for marriages that are not or have not been legally recognized by the state but have fulfilled all the requirements for marriage according to religious guidance from both parties, it is then permissible to apply for the marriage *itsbat*. If this application is granted by the court, this marriage will get legal certainty and have equality before the law like other legal marriages, so that this marriage becomes legal before the state law as well as before religion. The decision to grant the marriage *itsbat* by the judge is indeed after reviewing all aspects, especially the aspects of justice and public benefit for both parties of husband and wife (Habibi, 2020).

There are examples of cases of applications for *itsbat* marriage which were submitted in 2019 with case numbers 160, 163 and 76. All the marriages occurred when Aceh was in a period of gun conflict between Indonesia and GAM (Free Aceh Movement) in 1998, 2000 and 2001. Due to this conflict, KUA cannot work properly so that the applicants can only hold their wedding at the bride's house (without the KUA officer/judge). In cases like this, judges consider to grant their *itsbat* proposal due to the factor behind this occurrence is beyond the applicants' control (gun conflict).

For the *itsbat* proposals which formal requirements has been fulfilled, it is then eligible to proceed to the next stage of examination, namely reviewing the material requirements, after that, a decision on this case will be made by the panel of judges. On the other hand, the panel of judges will reject the proposals if the formal and material requirements are not completed and are not in accordance with the applicable laws and regulations.

The material requirements in the *itsbat* of marriage must also be in accordance with Islamic religious guidelines and legal provisions in force in Indonesia. In this study, the authors found several cases that were rejected by the panel of judges, such as registration numbers 19/Pdt.P/2017/MS.Bna and 149/Pdt.P/2018/MS.Bna. This application was rejected because the marriage guardian was not from the bride lineage, whereas in fact, the



biological father of the bride is still alive and met conditions to marry his daughter. Apparently, this decision was taken by the applicant because the marriage request was not approved by her father. Based on this fact, this application found flawed from the material aspects, so the panel of judges decided to reject it (Devy & Bin Zahari, 2020).

In the sample case above, the applicant should have been completed the formal and material requirements at the time the trial was running. This is because during the process of examining the completeness of the requirements for marriage *itsbat* by the panel of judges, in addition to analyzing the relevance of facts in the trial, the judge will also check all the completeness of the conditions and pillars of marriage, namely the presence of the bride and groom, the presence of a marriage guardian, the presence of 2 legal witnesses, and the consent and acceptance of the bride and groom. In resolving the cases, the judges are definitely referred to *fiqh* books and the opinions of *fugaha* on the requirements that must be met for a marriage. In the trial, the applicant will also be asked about the facts related to the marriage *itsbat* proposal. In this context, the judge will definitely prioritize the benefit of all parties while exploring the formal and material truth. The intended benefits are to protect the rights of heirs, the rights of children and the rights of the wife who is indeed entitled to have a marriage certificate and a recognition before law as well as a living from the husband. Those kinds of benefits are considered by judges when examining and deciding the decision for marriage *itsbat*.

There is also a case with registration number 95/Pdt.P/2018/MS.Bna, the application for this case was cancelled by the panel of judges because the applicant was only present at the first trial. A summon was made by the court but the applicant still not present to the court. So, in such a long time, the court fees have been exhausted, a warning letter then issued. After reaching a specified limit, the applicant does not deposit the case fee nor doing further responds, therefore, the clerk cancelled this application and put mark in the Main Register Book as a "crossed out application".

In the case with registration number 159/Pdt.P/2017/MS.Bna, the panel of judges decided to declared void on this case because the applicant had never attended the trial even though two summons had been made. The judges have full authority over all cases submitted to them, so the judge can accept or reject the case based on the judges' principle of freedom (Haryono, 2017). In addition, judges are also given the right to explore and to find appropriate legal regulations in the case that is being handled, especially in the cases with no legal provisions or cases with multiple interpretations, therefore, the judges have authorities to make decisions on cases based on their judgements. The regulations which state this are UU no. 3 of 2006 in Article 56 Paragraph 1 concerning amendments to Law no. 7 of 1989 concerning Religious Courts. Article 16 Paragraph 1 of Law no. 4 of 2004 Article 16 Paragraph 1 and paragraph 1 are contained in Article 28. The essence of this article are the judges have rights to accept and reject cases which handled to them and are also legally required to examine the case even though there are no stipulated regulations about it.



Besides using legal approaches in deciding marriage *itsbat* cases, the judges are also concerned about the sociological aspects of law, where humans as legal objects and subjects continue to change and develop according to the times and technology. Ibn al-Qayyim al-Jauziyah al-Hambali said that the law will vary due to changes; changes in time, differences in places, situations and conditions as well as customs and intentions which accompany these legal events (Jamhuri & Zuhra, 2020).

In the sociology of law there is the term "*the maturity of law*" which means a good law is an effective and ideal legal product like clothes body of the society. This certainly has the sense of practicality in doing so, a high level of rationality and accuracy in the most actual conditions. As the hope is to be able to bridge the problem of the value of legal practice and a sense of justice into social life. And finally, the law is not just a formalistic rule, it requires an attitude that dares to "*contra legem*" in resolving all illogical rules (Suadi, 2018). Hence, the benefit and a sense of justice deserve to be considered in every decision issued by the judges in every trial, so a legal reform which lead to a better direction is needed in this complicated and vast changing conditions (Yuhermansyah & Mohd Akhir, 2019). After all, the courage of the judge is really needed in deciding solutions for all cases for the sake of benefit and social justice.

The judges examine the completeness of the formal and material requirements of the submitted marriage *itsbat* application, after all these conditions have been completely fulfilled, the judge then carefully considers the aspects of *maslahah*. After reviewing all the requirements and the case file is declared complete, the judges can grant or accept the marriage *itsbat* proposal. The judge's decision in rejecting all marriage *itsbat* applications if the formal and material requirements are incomplete will ignore the existing legal benefits as described above.

For the *itsbat* application which the formal and material requirements are incomplete can actually be accepted by the judge to be examined in front of the court by considering aspects of *maslahah*. Aspects of human benefit is also become an important consideration such as the benefit to maintain the five aspects: soul, reason, property, lineage, and religion, or known in *fiqh* as "*al-kulliyat al-Khamsah*". These aspects can be broadly grouped into 3 parts as follows (Sudirman, 2020): 1) obligation to maintain the five basic principles in life or *maslahah dharuriyat*; 2) liminating all kinds of distress by maintaining the five basic principles or *maslahah al-hajjiyat*; 3) men are expected to strive to complete the five principles or *maslahah al-tahsiniyat*.

Judges must prioritize the prudence principle in every decision taken, especially if the consideration of the case is based on the *maslahah* aspect. Abdul Wahab Khallaf confirm that *maslahah* must comply with the following conditions (Wahyudani, 2020): 1) consideration of *maslahah* should not only be based on presumption alone but intrinsic too; 2) the consideration of the *maslahah* must be upon the public interests not merely for individual basis; 3) consideration of *maslahah* must be in line with *maqashid shari'ah* (Higher Objectives of Islamic Law); 4) consideration of *maslahah* must prioritize the *dhanuri* aspect by avoiding all forms of harms; 5) consideration of *maslahah* must be based on common sense or logically acceptable.

The aforementioned case indicates that those who are marriage following the religious guidelines and fulfilling all the pillars and conditions yet for specific reasons are unable to commit it before the Marriage Registrar, the judges will grant their *itsbat* application after a prudential consideration. This marriage is legal before law or called as *masalahah* in an effort to maintain ones' heredity. Also, the spouse and the children who were born from this marriage have a legal position before the law or called as *masalahah* in maintaining one's honor.

The judges will reject the marriage *itsbat* application if the conditions are not met and are performed not in accordance with religious guidelines or deliberately do not register their marriage to the Marriage Registrar. Such an act is considered harmful because it will tarnish the honor as a civilized and virtuous human being. If the judge ratifies this marriage, it might ignite other harms to arise while the law clearly states that it is impossible to justify the unlawful.

The diversity of judges' decisions in the marriage *itsbat* cases reflect the judges' freedom in choosing, analyzing, exploring, and finding the right legal provisions. This is also proof that there are differences in judges' comprehension regarding the marriage *itsbat* cases.

Learning from the facts above, the judges are very concerned about all cases that are brought before them. They observe, conduct examinations, and decide the law for the sake of upholding the principle of legal certainty and promote a sense of justice. The element of legal certainty in the judges' decisions are based on formal regulations in Article 7 paragraph 3 letter e of the KHI as an alternative legal basis to declare *siri* marriage is valid as long as there are no obstacles in performing marriage. Furthermore, on the aspect of justice, the judges definitely ponder the *masalahah* in deciding the proposed marriage *itsbat* cases

### **Legal Consequences of the Judges' Decision for *Itsbat* of *Siri* Marriage**

Each judge's decision has the aim of deciding a case from two or more parties who submit their case to the court. All judges' decisions, both written and spoken in the trial, have legal force and are binding on all litigants.

Many legal experts emphasize that every decision pronounced by judges in the trial process (*uitspraak*) is a verdict and definitely equal to the written decision (*vonnis*). Decisions which contain considerations, and the dictum of case settlement are written as determinations (*beschikking; decree*). The Dictum which has declaratory characteristics can be described as follows: 1) the content of declarations is only about what is requested; 2) the *Condemnatoir Dictum* is not allowed, i.e., the ruling which contains sentence decision; and 3) does not contain a cancellation of an agreement nor a statement of ownership of an item or called a constitutive order in the general language.

The fundamental foundation and benchmarks that must be followed by judges to prevent legal defects on the stipulated regulations are as in the Article 178 HIR, Article 189 Rbg and Article 19 of Law no. 4 of 2004 concerning Judicial Power (Kariadi, 2020): 1) have a strong and well-detailed reason; 2) required to give a decision on all applications/lawsuits; 3)

here is the principle of *ultra petitem partium* that must be adhered to; and 4) must be submitted publicly.

The final ruling (*eindvonnis*) of each trial to conclude every civil case has a certain level of examination. Every civil case submitted to the court will go through two levels of examination in the legal process, namely examination at the Religious Court and examination at the Cassation stage through the Supreme Court as the final or second level examination. Thus, whatever is decided at the second level is the final ruling that must be obeyed by every litigant applicant.

The Religious Court has established several forms of decisions regarding the submitted applications of marriage *itsbat* which details as seen below:

1. The Panel Judges Declared "Granted". Basically, the determination of the application for marriage *itsbat* is declaratory because there is no recognition on this from the state. Therefore, when a proposal of marriage *itsbat* is granted, the marriage becomes legal before the law and is entitled to all its rights and obligations before the law. The panel of judges will grant the application for marriage *itsbat* submitted to them after seeing and examining all the applicants' arguments which can be proven to be true by the applicant, and also after fulfilling all the conditions and pillars of the marriage. In accordance with applicable law, the judge's determination is authentic evidence and has the same legal force as a marriage certificate. However, in fact, the written result of this decision is not handy to be carried as it is large in size, therefore, the KUA then issues the marriage certificate for the applicants in exchange for the written decision. After all, the marriage is legal before the religion and state law. Based on that basis, each applicant will get his rights before the law and in the society.
2. The Panel Judges Declared "Rejected". Judges are always fully considering the applicable regulations before determining the cases. Therefore, judges will issue the decision called "rejected" due to many things such as the applicant are unable to prove it in front of the trial, incomplete requirements and pillars of marriage, and in general, are not completing both material and formal requirements
3. The Judges Declared "Inadmissible". In the case that was submitted to the Banda Aceh Religious Court, the judge's decision containing "Inadmissible" or also called *Niet Onvankelijk Verklaard*, was caused by several things such as: the existence of a legal rule that was violated, the existence of an *obscuur libel* (application is unclear), the application was outside the relative authority of the sharia court or the applicant is not a resident of the city of Banda Aceh, in addition to that there are not enough pillars and conditions for marriage and one or both applicants are still bound by a previous marriage when married to Siri (polygamy). The application for polygamous marriage *itsbat* on the basis of Siri marriage, even if it is for the benefit of the child, must be declared "inadmissible" as stipulated in the Circular Letter of the Supreme Court of the Republic of Indonesia Number 3 of 2018. This kind of reason dominates the determination of the inadmissibility of the application at the Banda Aceh Syar'iyah Court.

4. Declared Void. This stipulation is regulated in Article 124 HIR and Article 77 Rv. If the applicants are never attending to the court nor order their representative to attend where they have been officially and properly summoned, then the judges have authorities to make to declare void for the applications and charge the applicants to pay the court fees. Against this decision, the applicant cannot file a fight or *verzet*, because the nature of the void decision is final and binding. Beside unable to file a fight, the applicants also cannot file an appeal or cassation. The only solution is to submit a new application with the same subject matter because the void decision is not attached to *ne bis in idem*, but the applicant will be charged with a new court fee, as the cost of a case which declared void has been paid for the initial case.
5. Declared Revoke. The revocation of the application can be done at any time during the examination process and the reasons behind this are vary widely. In Banda Aceh Religious Court, the revocation is carried out in two ways, outside the trial and during the trial. The revocation of a case outside the trial is carried out by the clerk by deleting the case from the case register without issuing any decision or other court output. Revocation in a trial is conducted before a judge, the judges will then issue a decision to withdraw the case by granting the request for revocation and charging the case fee to the applicant.
6. Declared Dismissed. If the applicant has been present at the trial once but never been present for next trials even though he has been officially and properly summoned and has been given a notification that the case fees have been exhausted to the applicant but have not been paid, then the clerk will then issue a statement that the case fees have been exhausted, so that the clerk at the will of the panel of judges issues a ruling which dismisses all of the applicant's claims.

The decision issued by the final court at the Supreme Court is an *ingkracht* decision, meaning that there is no further legal action that can be taken by the applicant. Because legal efforts can only be made through cassation according to the Law No. 14 of 1985 and its amendment, state that a cassation can be filed if an appeal has been made and it is also emphasized that based on this rule a cassation can only be filed once.

There is an exception in this case, even though the applicant has not yet file an appeal, he might directly file a cassation if he meets the requirements according to applicable regulations such as the decision of the panel of judges who cannot make an appeal, then the only way is through a cassation which is in accordance with Article 43 paragraph (1) MA Law.

The applicant can file a cassation after the case is decided by the panel of judges and there is a period of 14 days to consider about it and to follow up on the cassation for the applicant. The registration process is similar to the initial registration, the difference is only about the case fee. The conditions are as follows: 1) here is a registration fee; 2) the court will send the cassation fee to the treasurer of the Supreme Court of the Republic of Indonesia in accordance with the contents of Article 2 paragraph (1) letter (a) PERMA Number 02 of 2009; 3) pay the fee of sending the cassation case file; 4) pay the examination fee and the document

of the cassation case; 5) pay the fee for officer who sends the cassation case file; 6) pay the fee for officer who notifies the applicant of the decision.

All fees to be paid by the applicant, both down-payment fees and other costs, are transferred through the bank after being completed with a SKUM (power of attorney to pay). After all proof of payment is received by the officer it will be signed and given a "paid off" stamp. Subsequently, on the same day, the clerk issues the deed of the cassation request, and the cassation request is recorded in the Main Case Registry Book and the Cass Application Registry Book. No later than 14 days after cassation application has been registered, all files will have been arrived at the Registrar's Office. However, if on the fourteenth day the memory of the cassation does not reach the clerk, the cassation will automatically be deemed ineligible to be proceed.

Based on the regulation, every cassation application submitted, especially about the completeness of the application in Bundle A and Bundle B, will has been sent to the Supreme Court within 60 working days. If the formal requirements are not or have not been completely fulfilled, the opposite will happen, the file will not be sent to the Supreme Court. The judges may decide that the cassation application is rejected after examining and reviewing the report made by the clerk regarding the incompleteness of the requirements for submitting a cassation request by the cassation applicant. The Registrar will send a copy of the judges' decisions to all interested parties, so that if legal action has reached this point, the petition for cassation by the applicant can no longer be carried out and in accordance with the rule of law in Indonesia, no further legal steps can be taken. The decisions which have been issued by the court is final and binding in nature. This is confirmed by the act of recording by the clerk with the code "TMS" (Not meeting formal requirements) in the Case Register Main Book.

## CONCLUSION

Based on the research, it come to the conclusion that the judges declare reject, grant, dismiss and revoke on the submitted applications for marriage *itsbat*. Through considering the formal and material aspects and also considering social approaches such as the *maslahah*, every request for marriage *itsbat* will be granted after the conditions and pillars has been fulfilled and Article 7 paragraph 3e has been reviewed. At last, for the sake of legal certainty and sociological considerations, the proposed marriage *itsbat* application is decided to be granted. In the case where the decision is granted, the applicant's marriage status is legal and valid according to the applicable law. Therefore, the decision's order can be used as evidence to obtain a marriage certificate from the KUA (Religious Affairs Office), and for the rejected proposal, an appeal can be filed. For the applications that are rejected, dismissed and void, they can re-submit them to the court by considering the conditions that have not been completed in the initial submission. The author suggests that the government needs to stipulate a law regarding the *itsbat* of *siri* marriages and include them to be part in the marriage regulations, so that the judges and the applicants can have clear and strong guidelines in this regard. The practice of illegal *qadhi* (marriage judge) is another important issue which closely related to *siri* marriage. This

urge the relevant parties to disseminate massive campaign about the consequences of the illegal *qadhi's* practice as this act is violating the law and violating the rights of both parties, also, the rights of the children born from the marriage cannot be fairly protected. Therefore, it is hoped that those illegal *qadhis* to be punished so the practice of *siri* marriage is no longer prevalent in the community.

## BIBLIOGRAPHY

- Aditya, Z. F. (2019). Romantisme Sistem Hukum Di Indonesia : Kajian Atas Kontribusi Hukum Adat Dan Hukum Islam Terhadap Pembangunan Hukum Di Indonesia. *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, 8(1), 37.
- Afwan Zainuddin dan Zainuddin. (2017). Kepastian Hukum Perkawinan Siri & Permasalahannya. In Penerbit Deepublish.
- Amran Suadi. (2018). Sosiologi Hukum. In Bogor. Kencana.
- Amri, A. (2020). Perkawinan Beda Agama Menurut Hukum Positif dan Hukum Islam. *Media Syari'ah*, 22(1), 48. <https://doi.org/10.22373/jms.v22i1.6719>
- Ananda, A. R. (2017). STUDI KASUS TERHADAP PENETAPAN MAHKAMAH SYAR' IYAH BANDA ACEH NOMOR 169 / PDT . P / 2013 / MS-BNA TENTANG PENGESAHAN NIKAH SIRI. *JIM Hukum Bidang Keperdataan*, 1(1), 1-12.
- Burhanuddin A. Gani, N. N. (2018). Keengganan Pasangan Suami Istri Dalam Melakukan Isbat Nikah (Studi Kasus Di Kecamatan Bandar Baru, Kabupaten Pidie Jaya). *Media Syari'ah : Wahana Kajian Hukum Islam Dan Pranata Sosial*, 20(1), 1-24.
- Devy, S., & Bin Zahari, M. S. (2020). Status Hukum Pernikahan Yang Dilaksanakan Oleh Wali Hakim Luar Negeri (Studi Kasus di Mahkamah Syariah Negeri Kelantan). *Media Syari'ah*, 20(1), 39. <https://doi.org/10.22373/jms.v20i1.6500>
- Devy, S., & Rizqi, A. M. (2019). Perceraian Nikah di Bawah Tangan dan Pengaruhnya terhadap Pengasuhan Anak (Studi Kasus di Kecamatan Peusangan Kabupaten Bireun). *SAMARAH: Jurnal Hukum Keluarga Dan Hukum Islam*, 2(2), 287. <https://doi.org/10.22373/sjkh.v2i2.4739>
- Djawas, M., & Hani, N. (2020). Pandangan Hukum Islam Terhadap Istri Sebagai Penanggung Jawab Keluarga (Studi Kasus di Kec. Kute Panang Kab. Aceh Tengah). *Media Syari'ah*, 20(2), 202. <https://doi.org/10.22373/jms.v20i2.6515>
- Ekawati, R. N. dan. (2017). Pertimbangan Hakim Tentang Putusan Isbat Nikah Setelah Berlakunya Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan (Analisis Putusan Nomor : 0036/Pdt.P/2016/MS.Ttn). *Jurnal Al-Mursalah*, 3(1), 57.
- Faisal Yahya, W. M. A. (2018). Penerimaan Kesaksian Tanpa Sumpah Dalam Perkara Cerai Talak ( Analisis Putusan Hakim Tingkat Banding Nomor 45 / Pdt . G / 2017 / MS . Aceh ) Faisal Yahya Wani Maulida Alsa Fakultas Syariah dan Hukum UIN Ar-Raniry. *Media Syari'ah*, 20(2), 242-260.
- Gunawan, E. (2013). NIKAH SIRI DAN AKIBAT HUKUMNYA MENURUT UU PERKAWINAN. *Jurnal Ilmiah Al-Syir'ah*, 11(1). <https://doi.org/10.30984/as.v11i1.163>
- Habibi, M. (2020). Legalitas Hukum Islam dalam Sistem Peradilan Indonesia. *Media Syari'ah*, 22(2), 129-149. <https://doi.org/10.22373/jms.v22i2.8050>
- Hanafi, A., & Bin Mohamad, M. H. (2020). Peran Bahagian Sokongan Keluarga Dalam Masalah Pemenuhan Nafkah Isteri Pasca Perceraian (Studi Kasus Di Mahkamah Tinggi

- Syariah Kedah, Malaysia). *Media Syari'ah*, 20(1), 57.  
<https://doi.org/10.22373/jms.v20i1.6501>
- Hanapi, A., Mulyadi, M., & Djawas, M. (2021). Isbat Nikah Siri dalam Putusan Hakim Mahkamah Syar'iyah Lhoksukan. *Media Syari'ah : Wahana Kajian Hukum Islam Dan Pranata Sosial*, 23(1), 72. <https://doi.org/10.22373/jms.v23i1.9181>
- Haryono, W. S. (2017). Asas Kebebasan Hakim Dalam Memutuskan Perkara Pidana Dalam Perspektif Kepastian Hukum. *IUS CONSTITUTUM Universitas 17 Agustus 1945 Jakarta*, 1(1).
- Huda, M., & Azmi, N. (2020). Legalisasi Nikah Siri Melalui Isbat Nikah. *Jurnal Hukum Keluarga Dan Islam*, 5, 98-119.
- Jamhuri, J., & Zuhra, Z. (2020). Konsep Talak Menurut Ibnu Qayyim Al-Jauziyyah (Analisis Waktu Dan Jumlah Penjatuhan Talak). *Media Syari'ah*, 20(1), 95.  
<https://doi.org/10.22373/jms.v20i1.6503>
- Kariadi. (2020). Kekuasaan Kehakiman Dalam Undang - Undang Dasar Negara Republik Indonesia Tahun 1945 "Saat Ini Dan Esok". *Justisi*, 6(Juli).
- Khairi, M., & Akim, I. (2018). Pemenuhan Hak Anak Atas Dokumen Akta Kelahiran Di Kabupaten Nunukan Provinsi Kalimantan Utara. *Jurnal Jatiswara*, 33(3), 255.  
<https://doi.org/10.29303/jatiswara.v33i3.176>
- Mul Erowati, E. (2018). Permohonan Ijin Poligami Tidak Sesuai Dengan Alasan Dan Syarat -Syarat Hukum Positif Indonesia. *Jurnal Jatiswara*, 33(3), 359.  
<https://doi.org/10.29303/jatiswara.v33i3.183>
- Munthe, R., & Hidayani, S. (2017). Kajian Yuridis Permohonan Itsbat Nikah pada Pengadilan Agama Medan. *Jupii: Jurnal Pendidikan Ilmu-Ilmu Sosial*, 9(2), 121.  
<https://doi.org/10.24114/jupii.v9i2.8240>
- Nur Iftitah Isnantiana. (2017). Legal Reasoning Hakim dalam Pengambilan Putusan Perkara di Pengadilan. *Islamadina*, 18(2), 53.
- Rika Nur Laili, L. S. (2021). Analisis Penolkan Isbat Nikah Perspektif tуди Hukum Kritis. *Al-Manhaj*, 53(9), 1689-1699.
- Sudirman, I. I. (2020). RESOLUSI ISBAT NIKAH DI INDONESIA : Sebuah Pendekatan Masalah. *Journal of Islamic Law*, 1(1), 100-114. <https://doi.org/10.24260/jil.v1i1.16>
- Sulistiani, S. L. (2018). Analisis Yuridis Aturan Isbat Nikah Dalam Mengatasi Permasalahan Perkawinan Sirri Di Indonesia. *Tahkim (Jurnal Peradaban Dan Hukum Islam)*, 1(2), 40-51.  
<https://doi.org/10.29313/tahkim.v1i2.4103>
- Wahyudani, Z. (2020). Keabsahan Nikah Siri Dalam Perspektif Masalah. *Jurisprudensi: Jurnal Ilmu Syariah, Perundang-Undangan, Dan Ekonomi Islam*, 12(1), 44-63.  
<https://doi.org/10.32505/jurisprudensi.v12i1.1508>
- Yuhermansyah, E., & Mohd Akhir, M. H. Bin. (2019). Implementasi Batas Umur Pernikahan (Studi Kasus di Mahkamah Rendah Syari'ah Bukit Mertajam Pulau Pinang). *SAMARAH: Jurnal Hukum Keluarga Dan Hukum Islam*, 2(2), 485.  
<https://doi.org/10.22373/sjhc.v2i2.4749>
- Yunus, A. (2020). Hukum Perkawinan dan Itsbat Nikah Antara Perlindungan dan Kepastian Hukum. In *Humanities Genius*.  
[https://www.google.co.id/books/edition/Hukum\\_Perkawinan\\_dan\\_Itsbat\\_Nikah/\\_yBRDwAAQBAJ?hl=en&gbpv=1&dq=Isbat+Nikah&printsec=frontcover](https://www.google.co.id/books/edition/Hukum_Perkawinan_dan_Itsbat_Nikah/_yBRDwAAQBAJ?hl=en&gbpv=1&dq=Isbat+Nikah&printsec=frontcover)