
The Basis Of The Judge's Consideration In Deciding The Rejection Of The Marriage Isbat Application Against The Position Of The Child In The Gorontalo Religious Court

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ABSTRACT

This research aims to find out the basis of the judge's consideration in deciding the rejection of the marriage isbat application against the position of the child in the Gorontalo Religious Court, and to know the legal consequences of the rejection of the marriage isbat against the position of the child in the Gorontalo Religious Court. The research method used is empirical legal research with a data results approach on the ground. The results of the study showed the basis of the judge's consideration to reject the marriage application because the husband still has a marriage bond with his first wife, based on the provisions of Article 3 Paragraph 1 where a husband can only have a wife and vice versa, and also in article 9 of the Marriage Law where a married husband cannot marry again unless he has obtained the consent of the first wife or parties concerned. And as a result of the law their marriage is in the eyes of the law is not legal and their child only has a civil relationship with the mother and family of the mother because it is considered as a child of out-of-wedlock results.

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1. Introduction

Law No. 16 of 2019 concerning Marriage in Article 1 Paragraph 1 tells the truth: "Marriage is the bond of inner birth between a man and a woman as a married couple with the aim to build a happy household based on the supreme divinity".¹ In Article 2 Paragraph 1, that we know if marriage is conducted based on each religious law and belief, then marriage is considered legal. That is, if the marriage is qualified has also been carried out *ijab qabul* (for Muslims), then the marriage is valid according to their respective beliefs and religions. But the legality of this kind of marriage in terms of the beliefs and religion of the community needs to be re-acknowledged by the state in this case the provisions are regulated in Article 2 Paragraph 2 of the Marriage Law No. 16 of 2019 discussing the issue of marriage registration. To achieve the physical bond of inner birth as alluded to above, in Article 2 Paragraph 2 of the Marriage Act ensures that there has been registration by each marriage, the registration of marriage to aim to maintain comfort and basic confidence. The article states: "Every marriage recorded in accordance with the Law has taken effect".²

Marriage registration is an effort directed through the determination to ensure the dignity of the sanctity of marriage, and even more so for women in households. Through marriage registration, every married couple or those who do not want to be held accountable can be proven through a marriage certificate, because others can defend and obtain the rights of everyone through legal proceedings.³

Difficulties arise when their marriage is not registered so they do not get their marriage certificate. In Article 2 Paragraph 2 of Law No. 16 of 2019 has been stipulated, "Every marriage recorded in accordance with the Law has taken effect".⁴

In Article 5 Paragraph 1 compilation of Islamic law, "In order to be tested the comfort of marriage for the community and each marriage must be registered". Which is where the way of implementation must be mentioned according to article 6 of the *Kuhap*, the provisions in Article 5 must be fulfilled and every marriage is conducted directly in front of and must be in the examination of the marriage registration employee does not have legal provisions.

As for the marriage relationship under the hands often occurs after 1974 which runs after 1974 or after the birth of the Marriage Act, the judge in this case refers to the Compilation of Islamic Law Article 7 Paragraph 3 (e) which is generally

¹Marriage Law No. 16 of 2019 concerning Marriage, Article 1.

²Marriage Act 16 of 2019, Article 2.

³Ahmad Rofik, *Islamic Law in Indonesia* (Jakarta: Raja Grafindo Persada.1995) p. 109

⁴Ministry of Religious Affairs Law No. 16 of 2019 concerning Marriage, (Jakarta; 2004), p. 15 5

(e) which is generally accepted to all secret marriages that occur on the condition of the trial prove that the marriage has occurred legally and meets the pillars and the conditions of marriage are also not prohibited under religious law or violate the law, Because the judge also has a legal basis to approve the marriage. The reason why many people perform marriage isbat in religious courts. At that time, before Law No. 1 of 1974 came into force there was no such thing as a legally registered marriage only religiously so that at the time married people were not entitled to a marriage certificate. And after the enactment of Law No. 1 of 1974 afterwards there could be people who perform marriage sirri then over the time of their marriage the husband divorced the first wife, meaning the second wife will perform marriage isbat in the religious court. So the factor due to people doing the first marriage is how the marital status if the marriage is only religious then the marriage is only valid religiously, in Article 2 Paragraph 2 has not been fulfilled or invalid. Article 2 Paragraph 2 states "marriage is considered valid if registered civil and otherwise". Second is the status of the child, whether the child can be a child in this case the birth certificate is categorized as the child of the mother, Article 43 of the Criminal Code states "Children born only through religion, have a civil relationship with the mother or the mother's family".⁵ Although not yet supported by official information, the fact on the ground turns out that many married couples who realize the importance of marriage registration when faced with legal rule difficulties, if there is a separation from the woman cannot demand the division of common property, inheritance rights, and child birth certificates. Therefore, the existence of marriage isbat becomes very important for every citizen who does not register through the nearest Office of Religious Affairs (KUA).

CONDITIONS OF MARRIAGE LEGALIZATION IN GORONTALO
RELIGIOUS COURT

NUMBER	YEAR	SUM		CASE		
		CASE	GRANTED	UNPLUG	REJECTED	FALL
1	2017	107	99	1	3	4
2	2018	224	221	1	1	1
3	2019	225	188	2	3	32
4	2020	15	13	1	-	1

Source: Gorontalo Religious Court ⁶

⁵Rossy Novita Equator, Implications for Crew System in Indonesia, Faculty of Law Universitas Brawijaya, 2013

⁶Gorontalo Religious Court

So from the data obtained from the Gorontalo Religious Court it can be concluded that in 2017 the marriage isbat was rejected as many as 3 cases, in 2018 only 1 case, in 2019 as many as 3 cases, and then in 2020 there were no cases.

As for the cause of the rejection of marriage isbat in the Religious Court, those who are rejected are mostly married, but not legal alias married sirri. Most of those who want to apply for marriage officially through isbat already have children but it turns out that there is still a marriage bond with a previous husband or wife.

In addition, there are also those who use unauthorized guardians. For example, they have biological parents but their guardians use others, this kind of case according to him can be known from the testimony of witnesses. There is more, the husband went so Indonesian labor a year no news, his wife then married someone else and there is also a marriage certificate of the married couple has been lost, therefore their marriage wants to be legalized by the religious court.

2. Research methods

This type of research uses empirical law, so this type of research refers to the results of research in the field. Empirical legal research is research that is observed in the field to observe and see what is happening on the ground and observe these rules in the reality that is in the community.

The research approach used by the author is qualitative, which is a way of analyzing research results that produce data, descriptive analysis (describing) data expressed in writing or orally and real behavior, and which is researched and studied as something intact.⁷

3. Discussion

The basis of the judge's consideration in deciding the rejection of the application for isbat against the position of the child in the Gorontalo Religious Court

Gorontalo Religious Court on April 27, 2017 has decided a case of rejection of marriage isbat. According to researchers from the determination data and the results of interviews with Gorontalo Religious Court Judges that the reason for

⁷Mukti Fajar ND, 2010. Dualism of Normative Legal Research Through Empirical, Fajar Library, Yogyakarta, p. 192 2

the marriage isbat application was rejected because one of the married couples still had a marriage bond with the previous person or the previous one, so the application for marriage isbat they submitted was rejected by the Gorontalo Religious Court.⁸

For Muslims, the affirmation of the validity of marriage that marriage is valid if carried out according to the law of each religion and its beliefs as mentioned in Article 2 Paragraph 1 and also mentions that each marriage is recorded according to the prevailing laws and regulations as also mentioned in Article 2 Paragraph 2 of the Marriage Act.

The judge's efforts in deciding the case, establishing the legal rules against the event are based on certain methods, so that the basis of consideration of the event is carried out in a relevant manner by law, so that the results obtained from the case process can be accepted and accounted for in law and society.

The marriage application submitted in the Religious Court received is the wish of the applicant who expects legal certainty over the marriage he has carried out. The marriage application submitted in the Religious Court received is the wish of the applicant who expects legal certainty over marriage, the court must see the evidence or witnesses or information from the applicant. In accordance with the statement delivered by Mr. Djufri Bobihu S.Ag., M.H as a Judge of the Gorontalo Religious Court it can be concluded that the marriage isbat that can be filed in the Religious Court because of :an that has been implemented.

1. Loss of Marriage Certificate.
2. The existence of marriage that occurred before the enactment of Law No. 1 of 1974.
3. There are doubts about the validity or not of one of the conditions of marriage.
4. The existence of marriage in order to resolve the divorce.
5. Marriages that are done have no obstacles.

To prove the propositions of his application, the Petitioners have submitted 2 (two) witnesses each named Rahman Dauwango bin Isa Dauwango and Hawaisa Talamati bin Hamoja Talamati both have given evidence under oath, which in essence gives evidence that in fact the first wife of Applicant I was still alive but

⁸ Interview With Gorontalo Religious Court Judge Mr. Djufri Bobihu S.Ag., M.H. On December 8, 2021 at 8:00 am

had long separated, and the full witness statement has been contained in the news of the trial event.

Based on the results of interviews with respondents or as an applicant that applicant 1 claimed to be a dead widower and his first wife was still alive but had been separated for 2 years because her husband had not provided a living. And they secretly married sirri without the knowledge of the first wife. As for the reason they conducted the wedding sirri because of economic problems because it is considered more instant and economical, they also said in conducting the wedding officially many requirements and also documents that must be taken care of or fulfilled first so that it takes effort and time to take care of it. In addition, couples who are officially married usually do a reception, which also costs a lot. Also the reason they applied for isbat nikah for the purposes of legal certainty over their marriage and to take care of their child's family card and birth certificate.⁹

3. Legal Considerations of the Judges

After a case like this in the Gorontalo Religious Court related to the submission of marriage isbat that was rejected it turned out that there were several things found so that the reasons the Religious Court judge rejected the marriage isbat application.¹⁰

As for the reason for the rejection of a marriage application is the non-fulfillment of the conditions formil carried out by both parties. In this case, the reason the judge in rejecting the application for marriage is that there is an obstacle according to the laws and regulations to hold a marriage that the judge rejects the application for marriage of both petitioners because Applicant I is still bound by marriage with his previous wife. This is in line with the Marriage Act Article 3 Paragraph 1 which reads "basically a man can only have a wife. A woman can only have a husband." Also in Article 9 which states "a person who is still attached to the marriage rope with another person cannot marry again. Unless, the court can give permission to a husband to marry more when desired by the parties concerned. So that it became a reference for the gorontalo religious court judge to reject the marriage application.¹¹

⁹ Interview With Respondents as Marriage Isbat Applicants

¹⁰ Interview With Gorontalo Religious Court Judge Mr. Djufri Bobihu S.Ag., M.H. On December 8, 2021 at 08.00 Ama

¹¹ Interview With Gorontalo Religious Court Judge Mr. Djufri Bobihu S.Ag., M.H. On December 8, 2021 at 08.00 Am

Considering, the purpose and purpose of the Petitioner's application is as outlined above that the Petitioner submits the application for *Itsbat Nikah* with the propositions as in the case sitting.

Furthermore, the Petitioners submitted evidence in the form of 2 (two) witnesses who are adults, have been sworn in and there is no reason that can prevent both of them from becoming witnesses, so that both have met the formal requirements of witnesses as stipulated in Article 145 HIR / Article 172 R.Bg.

That the testimony of the two witnesses knew that the status of Applicant I at the time of marriage to Applicant II was still having a wife who was still alive, but had long separated. From the testimony of the witness, Applicant II confirmed, so that the Sole Judge argued that the marriage of Applicant I with Applicant II could not be ratified because at the time Applicant I married applicant II the status of Applicant I still had a wife, so the petitioner's application should be rejected.

This case is heard in integrated services in the framework of the issuance of marriage certificates and birth certificates, so based on the purpose of Article 12 paragraph (4) of the Supreme Court of the Republic of Indonesia Regulation No. 1 of 2015, the examination of this case can be carried out by a Single Judge.

Therefore this case is included in the field of Marriage, then based on the provisions of Article 89 paragraph (1) of Law No. 7 of 1989 which has been amended by Law No. 3 of 2006 and the second amendment of Law No. 50 of 2009, all costs incurred in this case are charged to the Applicants.

Taking into account all the provisions of the provisions of the applicable laws and regulations and the law of *syara'* relating to this case establishes and declares the petitioners' application rejected by the Religious Court.

After analyzing the case, the author learned that the legal basis used by the judges in this case is the provisions of the Marriage Law Article 3 paragraph (1) which reads "Basically in a marriage a man can only have a wife, a woman can only have a husband". Article 9 reads, "A person who is still attached to the marriage with another person cannot marry again, unless the court can give permission to a husband to marry more when desired by the parties concerned. Article 28 B of the 1945 Constitution says: "Every child is entitled to survival, growth and development and is entitled to protection from violence and discrimination.". Article 28 B consists of two verses in which both discuss the rights of everyone in

forming a family through legal marriage as well as the rights of every child related to their survival, survival and protection of themselves from violence and discrimination.

Itsbat Nikah which has been submitted by Applicant I and Applicant II to the Gorontalo Religious Court is to establish or legalize their Marriage. Marriage that has been carried out by Applicant I with sPemohon II is in accordance with the provisions of Islamic sharia where the terms and pillars of marriage have been fulfilled. In Law No. 1 of 1974 Article 2 paragraph (1) on Marriage states that marriage is legal, if done according to the law of each religion and its beliefs.¹²

Performing a marriage in accordance with the procedure of legal marriage is useful to ensure the preservation of the rights of the wife, especially the right to the child. In Islam, marriage registration does not result in the legality of marriage as long as marriage meets the elements of the requirements and pillars of marriage, while the recording of marriage in positive law results in the legality of marriage in the eyes of the law.¹³ According to positive law if marriage is not recorded in the marriage registry then the marriage is considered never happened and has no legal force. Article 2 paragraph (2) of Law No. 1 of 1974 on Marriage states that each Marriage is recorded according to applicable Government Regulations.

The Panel of Judges in making the decision of a case will see and observe the *posita* (sitting case), in the case of Itsbat Nikah filed by Petitioner I and Applicant II is to certify their Marriage in order to obtain marriage certificates and other administrative needs. In the verdict of the case mentioned that Applicant I and Applicant II during the household have been in contact like husband and wife and have been blessed with 4 (four) children, but at the time of marriage held on August 25, 2005 Applicant I is still bound by a legal marriage with the previous person. Therefore, when the marriage takes place Applicant I is still the husband of another woman that is (still bound by a legal marriage with his first wife), then the Marriage according to the judges has violated the Marriage Act, so that the Marriage cannot be legalized and the petitioner's application cannot be accepted or rejected.¹⁴

¹² Marriage Law No. 1 of 1974 concerning Marriage Article 2

¹³ Suparman Usman, *Islamic Law*, Media Style Pratama, Jakarta, 2001, pp. 227.

¹⁴ Interview With Gorontalo Religious Court Judge Mr. Djufri Bobihu S.Ag., M.H. On December 8, 2021 at 08.00 Am

According to the legislation, the Gorontalo Religious Court Judges in rejecting the application for marriage is in accordance with Marriage Law No. 1 of 1974 Article 3 paragraph (1) which reads "Basically in a marriage a man can only have a wife, a woman can only have a husband. Article 9 reads, "A person who is still attached to the marriage with another person cannot marry again, except in the case mentioned in Article 3 paragraph (2) and Article 4.

Performing a Marriage if one of the couples is still bound by another marriage or the husband is still bound by a legal marriage with another woman then it is not legal for the marriage law, so it is clear that the marriage isbat case is rejected by the Judge's Panel because the husband is still bound by another marriage. If the Marriage wants to be legalized in the eyes of the law, Applicant I and Applicant II must remarcate in kua and must be recorded in kua and also the husband is divorced with the first wife and not bound by other marriages.¹⁵

4. Conclusion

The basis of the judge's consideration in deciding the rejection of marriage isbat that is the legal basis used by the panel of judges in this case is the provisions of the Marriage Law Article 3 paragraph (1) which reads "Basically in a marriage a man can only have a wife, a woman can only have a husband". Article 9 reads, "A person who is still attached to the marriage with another person cannot marry again, except in the case mentioned in Article 3 paragraph (2) and Article 4. Also considering, that the testimony of the two witnesses knew that the status of Applicant I at the time of marriage to Applicant II was still having a wife who was still alive, but had long separated so that the Single Judge argued that the marriage of Applicant I with Applicant II could not be legalized because at the time applicant I married applicant II the status of Applicant I still had a wife, so that the petitioner's application should be rejected.

¹⁵ Interview With Gorontalo Religious Court Judge Mr. Djufri Bobihu S.Ag., M.H. On December 8, 2021 at 08.00 Am

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