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ISTBAT OF MARRIAGE IMPLEMENTATION FOR MARRIAGE AFTER ENACTMENT OF LAW NO. 1 OF 1974¹

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Abstract

Itsbat of marriage reserved for marriage have not been recorded and the case before Law No. 1 of 1974 (Marriage Law). The problem arises when many marriages that have been performed and are not listed that under the Act including marriage under hand, confirmed that happened after Marriage Law, then how is marriage legitimacy? Statement of problems is how is Judge Consideration in the Religious Court Judgment No. 0011/Pdt.P/2016/PA.Mkd granted that *itsbat* marriage happened after enactment of Law No. 1 of 1974? This study uses normative legal research, critical and analytical and many library research. The data collection method data carried out in the documentation and analyzed qualitatively. Discussion is composed of two sub, the decision analysis, and offer legal alternatives. Conclusion of Religious Court (*Pengadilan Agama/PA*) Mungkid which granted *itsbat* of marriage to the marriage after Marriage Law enacted was recognized as *ijtihad* by *masalah mursalah* method. This method used to give a benefit for child with the deviations of Art. 7 (d) Islamic Law Compilation. But, this judgment still have not enough legal considerations, so that should be added other legal considerations such as the Child Protection Law, Regulations on Citizenship Administration, and also the stressing on understanding of Art. 2 (1) of Marriage Law. The condition of acceptance (*itsbat*) of marriage which occurred in Judgment No. 11/pdt/2016/Mkd submitted by the husband and wife, can be categorized as the application of *voluntair*, that the products is designation.

Keywords: *Isbat Marriage, Marriage Certificate, the Religious Court*

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INTRODUCTION

Marriage recognized as a legal relationship between a man and a woman who meet the conditions of marriage and for a period as long as possible.² Marriage was arranged in Indonesian Law, and basically Act No. 1 of 1974 on Marriage (Marriage Law) is one of substantive law sources for the Courts. According to Art. 49 Par. 2 (22) of Act No. 7 of 1989 as amended by Act No. 3 of 2003 and changed by Act No. 50 of 2009 concerning to the Religious Court, that one of the absolute authority or competence of the Court in the marriage business is a statement of the validity of the marriage happened before Act No. 1 of 1974 and conducted according to other laws and regulations. One hand, on Art. 7 Par. 3 (d) of Islamic Law compilation emphasized that, *itsbat* of marriage that can be submitted to the Court limited to their marriage that occurred before the enactment of Act No. 1 of 1974.³

It can be understood that the application of *itsbat* of marriage which can be submitted to the Court basically only with the marriage occurred before the enactment of Marriage Law. So that, *a contrario* (*mafhum mukhalafah*) married happened after the Act No. 1 of 1974, the Court was not have authority to *itsbat* that marriage. But, in the practices, they are often found the application of *itsbat* marriage after Act No. 1 of 1974 enacted. One is the judgment of the Religious Court (*Pengadilan Agama/PA*) Mungkid No. 0011/pdt.P/2016/PA.Mkd. It was submitted by an applicant who married on July 23rd, 2000 to get a legal certainty on Marriage Law and to propose their child's birth certificate. During the wedding, the applicant has three children. This application submitted by the husband and wife to the Court of Mungkid, and the Court granted the application and stated that the marriage of applicant which happened on July 23rd, 2000 is valid. According to that condition, Author would like to examine how the consideration of Judge of Religious Court on Judgment No. 0011/pdt.P/2016/PA.Mkd that approving *itsbat* marriage which occurred after the enactment of Act No. 1 of 1974.

² Rien G. Kartaapoetra, *Pengantar Ilmu Hukum*, (Jakarta: Bina Aksara,1988), Cetakan I hlm. 9

³ Menteri Agama Republik Indonesia, *Kompilasi Hukum Islam, Hukum Perkawinan, Waris Perwakafan, Instruksi Presiden Nomor 1 Tahun 1991 Berikut Penjelasan*, (Surabaya: Karya Anda, 1991)

LITERATURE REVIEW

Religious Court Authority

The authority also called power or competence. Competence comes from the Dutch word “*competentie*” means the authority, the delegated authority of the law on the conduct of a task; prosecuting authority. Competence is also called the power or authority to hear matters related to the examination in a court or tribunal which is entitled to examine the matter. Judicial competence in relation to the procedural law of justice is divided two ways, namely Relative Authority and Absolute Authority.

1. Relative authority means the power of the courts in one and the same level, the difference with the other courts of the same type and level.⁴ Article 4 (1) of Law No. 7 of 1989 stated: Religious Court is located in the municipality or in the district capital, and its jurisdiction covers the municipalities or districts.
2. Absolute competence means power of the court relating to the type or types of court cases.⁵ Briefly competence means absolute rule of court relating to the type of things, such as:
 - a. Religious Court authority to examine and adjudicate a Muslim marriage, while for non-Muslims to be the absolute competence of general courts.
 - b. Religious court authorities solve the problem of inheritance, bequest, endowment and charity Muslim, non-Muslim authority for the District Court.
- c. Court authorized to settle the civil case public, criminal, not a civil case Islam.

Absolute power of Religious Court under Article 49 and 50 of Law No. 7 of 1989 as amended by Law No. 3 of 2006 on the Amendment to Law No. 7 of 1989 on the Religious Courts. Religious Courts on duty and the authority to examine and decide, settle things on the first floor between the Muslims in the areas of: marriage, inheritance, wills, grants, endowments, charity, charity, charity, Islamic economy.

As the focus of this paper is to study *itsbat* marriage (marriage determination), which entered the realm of marriage. Then detailed its jurisdiction in accordance with Law No 1 of 1974 on Marriage are as follows:⁶

⁴ Royhan A. Rasyid, *Hukum Acara Peradilan Agama*, (Jakarta: RajaGrafindo Persada, 1992), hlm. 25.

⁵ *Ibid.*, hlm. 27

⁶ Law No. 1 of 1974 concerning to Marriage

- a. Permission to have more than one person (polygamy)
- b. Licensed marriage (marriage license): those who have at least 21 years, in the case of a parent or guardian of any difference of opinion;
- c. Dispensation marriage: if the bride is not old enough, man has not yet reached the age of 19 years and women have not yet reached the age of 16 years;
- d. Prevention of marriage: by the family in a straight line upwards, sideways;
- e. Rejection of marriage by the Marriage Registrar Officer;
- f. Annulment;
- g. Negligence lawsuit over the couple's obligations;
- h. Divorce because divorce;
- i. Divorce;
- j. Completion of the common property;
- k. Possession of child;
- l. The burden on the mother to bear the costs of maintenance and education of the child if the father should be responsible for not fulfilling it;
- m. Determination of the cost of living by the husband of his ex-wife or ex-wife for the determination of liability;
- n. The decision on the validity of a child;
- o. Decision on withdrawal of parental authority;
- p. Revocation of a guardian's authority
- q. The appointment of another person as trustee by the court in the case of a guardian's authority revoked;
- r. The appointment of a trustee in the case of a child who is not yet 18 years of age, left by his parents when there was no appointment of a trustee by both parents;
- s. Imposition of liability for damages against the trustee that has caused loss of property of the child in his hand;
- t. Determination of the origin of a child;
- u. Decision on refusal to grant to daylight to perform mixed marriages;
- v. Statement about the validity of the marriage occurred before the Act No.1 of 1974 on Marriage and others conducted according to regulations.

Itsbat Marriage

According to the language *itsbat* marriage consists of two words, namely the word "*itsbat*" which is masdar or origin of the word of "*atsbata*" which means «set», and the word «marriage» is derived from the word "*nakaha*" which means

«intermarried» thus the word «*itsbat* marriage” has the meaning of “establishment marriage”⁷

According to Peter Salim said *itsbat* marriage has the sense of determining the truth about marriage.⁸ According to the Dictionary of Indonesian, married sanctions is the establishment of the truth (validity of) marriage. *Itsbat* marriage is a confirmation of the marriage which has been contracted by the tenets of Islam, but not recorded by PAN or VAT authorities.⁹

Article 2 Paragraph 1 of Law No. 1 of 1974 on Marriage states that marriage is valid, if done according to the law of each religion and belief. Article 2 (2) stipulates that every marriage is recorded in accordance with the laws and regulations in force. Registration of marriage will lead to public good because with this recording would provide legal certainty regarding the rights of the husband / wife, child welfare and other effects of marriage itself.

Under the terms of Article 7 Paragraph (1) of Islamic Law Compilation (KHI) and Article 100 of the Civil Code, a marriage can only be proved by a marriage certificate or marriage certificate which is recorded in the register. Even noted, a marriage certificate or marriage certificate is the only evidence of marriage. Without a marriage certificate is recorded, legally or not there has been no marriage. But according to Law No. 1 of 1974 on Marriage, it is understood that the Marriage Act and marriage are not the only evidence of the existence or **validity of the** marriage. Because even a marriage certificate as evidence, but rather as evidence of the validity of the marriage. Because the marriage law is religion that determines the existence and validity of the marriage.

Article 4 Compilation of Islamic Law underlines that “marriage is lawful when done according to Islamic law in accordance with article 2, paragraph 1 of Law no 1 tahun 1974 about marriage. Article 5 KHI summarize: (1) to guarantee order marriage for Muslims every marriage shall be recorded; (2) the registration of marriages in paragraph (1), conducted by the Marriage Registrar Officer as stipulated in Law No.22 of 1946 as amended by Law No. 32 of 1954.¹⁰

⁷ Ahmad Warsono Munawir, *Al-Munawir Kamus Arab-Indonesia*, hlm. 145.

⁸ Departemen Pendidikan dan Kebudayaan Republik Indonesia, *Kamus Besar Bahasa Indonesia*, hlm. 339

⁹ Keputusan Ketua Mahkamah Agung RI Nomor KMA/032/SK/2006 tentang Pedoman Pelaksanaan Tugas dan Administrasi Pengadilan

¹⁰ Ahmad Rofiq, *Hukum Islam di Indonesia*, (Jakarta: Raja Grafindo Persada, 2003), hlm. 107

Furthermore, Article 6 KHI summarize: (1) to comply with the provisions of Article 5, every marriage should take place in the presence and under the supervision of the Registrar of Marriage Officer; (2) marriages performed outside the supervision of the Registrar of Marriage Officer does not have the power of law.

Article 7 states that: (1) the marriage can only be proved by the Marriage Act made by the Marriage Registrar Officer; (2) in the case of marriage cannot be proven with *Akad* Marriage, may be submitted to the Court of *itsbat* illegitimate; (3) *itsbat* marriage that can be submitted to the Religious limited on matters relating to: (a) The marriage in the divorce settlement; (b) Loss of Marriage Act; (c) The existence of doubt as to the validity of one of the conditions of marriage; (d) The marriage occurred before the enactment of Law No. 1 of 1974 and; (e) The marriage made by those who have no barriers to marriage under the Act No.1 of 1974; (4) the right to apply for *itsbat* marriage is husband or wife, their children, guardians and interested parties to the marriage.

The sanctions married filing procedures, submitted to the Religious Court have a number of forms, including:¹¹

1. *Voluntair* (what it consists only of the applicant, no party Respondent):
 - a. If the petition filed by a husband and wife together;
 - b. If the petition filed by a husband / wife who left dead by husband / wife, being the applicant does not know of any other heirs besides him.
2. *Contentious*, (what it consists of the Applicant against Respondent or Plaintiff against defendant)
 - a. If the application is submitted by one spouse, by putting the husband or wife as the Respondent;
 - b. If re-submitted by the husband or wife is one of the spouses still have marital relations with other parties, the other party should also be made a party in the petition;
 - c. If the application is submitted by a spouse who was bereaved of husband or wife, but he knows there are other heirs besides him;
 - d. If the application is submitted by guardians, heirs or other interested parties

Itsbat marriage is only possible for a marriage that there was no evidence recorded by authorities that comply with Islamic law, marriage is certainly *itsbat* implemented to provide legal certainty implications of marriage and the status of children born of the marriage. Legal regulation of the status of children of whom can be seen from the following regulations:

¹¹Drs. H. Masrum M. Noor, MH.(Ketua Pengadilan Agama Jakarta Pusat), *Penetapan Pengesahan Perkawinan*, pdf

- a. Constitution of the Republic of Indonesia Year 1945, the Article 28-B of paragraph (1), that: “Everyone has the right to establish a family and to procreate based upon lawful marriage”;
- b. Law No. 1 of 1974 on Marriage in Article 42, that: “Children are the legitimate children born in or as a result of a legitimate marriage”;
- c. Article 2 (1), namely: “The marriage is valid, if done according to the law of each religion and belief”;
- d. Article 2 (2), namely: “Every marriage is recorded in accordance with the legislation in force”; If only to comply with Article 2, paragraph 1 only, can apply ***Itsbat Marriage*** Religious Court¹²
- e. KHI Article 99, the valid is: a. children born in or due to legal marriage;
- f. H acyl act legally married outside the womb, and born by the wife.

Istinbath Law with Mashlahah Mursalah

Istinbath comes from the word “*nabth*” (water began to gush from a well dug). Thus, according *istinbath* language is to remove something from his hide-out. According to the terms of *usul fiqh* is to dig or remove the Islamic ruling on the arguments of al-Quran and Sunnah.¹³

Istinbath law of al Quran and Sunnah can be reached through two approaches, ie approaches and principles *lughowiyah tasyri'iyah* approach. *Lughowiyah* rules approach in exploring legal means of proof of Quran and al-Sunnah approach to linguistic or *lafadz*. While the rules *tasyri'iyah* approach the soul or spirit of the teachings of the Quran and al-Sunnah.¹⁴

Approach in terms of language, known among scholars of *usul fiqh* theory *Bayani*, while the approach of the soul or spirit of the teachings of the Quran and al-Sunnah modified and developed as a theory and the theory *istislahi ta'li-li*. The third theory is considered more relevant for analyzing the main problem is

¹² Surat Edaran Nomor W11-A/863/HK.00.8/III/2012 oleh Pengadilan Agama se-Jawa Tengah, Pengadilan Tinggi Agama Jawa Tengah.

¹³ Asmuni Abdurrahman, *Qaidah-Qaidah Fiqhiyyah*, (Jakarta: Bulan Bintang, 1996), hlm. 1

¹⁴ A. Djazuli, dan Nuroel Aen, *Ushul Fiqh Metodologi Hukum Islam*, (Jakarta: Rajawali Grafindo, 2000), hlm. 231

the theory *istislahi (maslahah)*.

Maslahah etymologically the same as the benefits, both in terms of pronunciation and meaning. *Maslahah* also means benefits or a job that contains benefits.¹⁵ The terminology can be interpreted *maslahah* take profit and refused *madhorot* (danger) in order to maintain the goal of Shari'ah (Islamic law). The purpose of Islamic law is to be maintained to preserve religion, life, intellect, lineage and property. When one activity to preserve its fifth aspects of the purpose of Personality 'above, then named *maslahah*. In addition to rejecting all forms *madhorot* (danger) associated with the fifth goal of Islamic law, also named *maslahah*.¹⁶

Imam al-Ghazali considers that a benefit must be in line with the objectives of Islamic law, despite being contrary to human purposes. Because human benefit is not always based on the requirements of Islamic law.¹⁷ Benefit that can be taken into consideration (runway) to judge by al-Ghazali is when; *First, maslahah* was in line with the types of actions Islamic law. *Second*, it does not leave *maslahah* or contrary to the texts of Personality'. *Third*, *maslahah* that fall into the category *maslahah dhoruri*, both concerning the personal benefit as well as the many and universal, that applies equally to everyone.¹⁸

Maslahah by Abu Ishaq al-Syathibi¹⁹ can be divided in terms of: **First**, in terms of quality and importance of the benefit, there are three kinds, namely: *Maslahah al-Dharuriyyah*, the benefit related to the basic needs of humanity in this world and the hereafter, namely the preservation of religion, life preserve, maintain common sense, the descendants preserve and maintain the property. The fifth benefit is called the *al-mashalih al-khamsah*. *Maslahah al-Hajiyah*, a benefit that is needed to enhance or optimize the benefit of the principal (*al-mashalih al-khamsah*) in the form of waivers to maintain and preserve the fundamental human needs (*al-mashalih al-khamsah*) above. *Maslahah al-tahsiniyyah*, a benefit that is complementary

¹⁵ Husein Hamid Hasan, *Nazariyyah al-Maslahah fi al-Fiqh al-Islami*, (Kairo; Dar al-Nahdhah al-Arabiyah), hlm. 3-4

¹⁶ Abu Hamid Al-Ghazali, *al-Mustashfa min 'Ilmi al-Ushul*, (Beirut; Dar al Kutub al-'Ilmiyah', 1980), hlm. 286

¹⁷ Abu Hamid Al-Ghazali, *al-Mustashfa min 'Ilmi al-Ushul*, (Beirut; Dar al Kutub al-'Ilmiyah', 1980), hlm. 286

¹⁸ Abu Hamid Al-Ghazali, *al-Mustashfa min 'Ilmi al-Ushul*, (Beirut; Dar al Kutub al-'Ilmiyah', 1980), hlm. 139

¹⁹ Abu Ishaq Al Syathibi, *al-Muwafaqat fi Ushul al-Syari'ah*, (Beirut; Dar al-Ma'rifah, 1973) hlm. 8-12

(complementary), flexibility and proper form which can complement previous benefit (*maslahah al-hajiyyah*). *Maslahah* division to determine priorities in taking a benefit. *Dharuriyyah* welfare must take precedence over the welfare and benefit of *hajiyyah* would take precedence over *masalahatan tahsiniyyah*.

Secondly, in terms of *maslahah*, there are three kinds, namely: *Maslahah al-Mu'tabaroh*, the benefit of which is supported by Islamic law. *Maslahah al-Mulghah*, *maslahah* rejected by Islamic law, as opposed to the provisions of Islamic law. *Maslahah al-Mursalah*, whose existence is not supported welfare rules nor canceled or rejected Islamic law through a detailed argument, but is supported by a group of *nash* meaning (verse or hadith).

In addition to the views Syatibi and al-Ghazali, View Najmuddin ath-Thufi about *maslahah* departs from the concept *maqoshid ash-Sharia* Islamic law, which confirms that it suggested to realize the benefit of universal humanity.²⁰ According to al-Thufi, the core of the teachings of Islam contained in the texts is *maslahah* (benefit) for mankind. Therefore, all forms of benefit and the benefit it suggested not need the support of texts, both by certain texts and the meaning of which is supported by a number of texts. *Maslahah* he says, is the most powerful argument that can independently determine the legal excuse in Islamic law.²¹

Based on the description of ath-Thufi insights about human benefit (*maslahah*), it is understood that the pattern *maslahah* ath-Thufi built on four basic²² are:

First, *istiqlal al-uqul bi idrak al-mashalih wa al-mufasid*, which means the mind can independently find out the pros and cons. especially in terms of transactions, and customs.

Second, *al-maslahah dalil syar'i mustaqil 'an an-nushus*, which means *maslahah* an independent proposition of *syar'i* authority which the authority value (argument, *hujjah*) it does not depend on the testimony and confirmation texts, but only relying on reason alone. According to him, to say something that *maslahah* (good) or not, it is only determined by the customs and experiment alone, without the need for user texts.

²⁰ Najmuddin Al-Thufi, *et al. Syarh al-Arba'in an-Nawawiyah*, (Kairo; Dar al-Fikr), hlm. 13

²¹ Husein Hamid Hasan, *Nazariyyah al-Maslahah fi al-Fiqh al-Islami*, (Kairo; Dar al-Nahdhah al-Arabiyah), hlm. 525-552

²² Husein Hamid Hasan, *Nazariyyah al-Maslahah fi al-Fiqh al-Islami*, (Kairo; Dar al-Nahdhah al-Arabiyah), hlm. 525-552

Third, *majal al-amal bi al-maslahah huwa al-muamalat wa al-'adat duna al-'ibadah wa al-muqaddarat*, which means that *maslahah* only be explicit prohibitions in finance and customs only. While in the area of worship and *muqaddarat*, *maslahah* cannot serve as the legal basis. Both two fields, texts and consensus should be used or followed. The distinction made ath-Thufi is based on the logic that religious affairs are the prerogative *syar'i* (God), and therefore humans could not know his right, both in the amount, manner, time, or place, except on the basis of the official explanation that comes from his side.

Fourth, *al-maslahah aqwa adillat asy-syari'ah*, which *maslahah* recognized as the most strongest *dalil syar'i*. For the ath-Thufi, *maslahah* it not only *hujjah* when there is no *nash* (argument texts) and *ijma* (consensus), but it also should take precedence over the *nash* and *ijma*, when there is a conflict both to things (*nash* and *ijma*).

METHOD

This study used a normative legal research. As Wignjosoebroto opinion cited by Syamsuddin that research on normative considerations is one of normative law²³. This study was to analyze and criticize the normative considerations behind the decision of the judge, ie the two layers at once. The first layer is the judgment shows that the legal basis used by the judge who decided the case number 0011/Pdt.P/2016/PA.Mkd in focus, namely: first, how the legal reasoning judges in determining *itsbat* marriage; the second alternative solution to the problems of post-marital *Itsbat* UUP.

This type of research used in this paper is the library research. Library research means research using written documents as a source of data and in accordance with the object of research. The type of data used in this research is secondary data which includes primary and secondary legal materials. Primary materials include products that are the object of study of law and the law as an instrument of criticism as already mentioned above. Secondary materials include the sinking of primary legal materials such as the thought of scholars and experts thinking about marriage *itsbat* found in books, journals, and opinions in online sources.

²³ M. Syamsuddin. *Operasionalisasi Penelitian Hukum*. (Jakarta: Rajagrafindo Persada, 2007), hlm. 25-26

The data was collected by means of documentation in two steps. The first stage is preliminary. In accordance with the planned stages Elias²⁴ researchers made an important note on the question of the status of law enforcement agents and child marriages under the hands by requesting a copy of the document Judgement of Mungkid Religious Court, on Case No. 0011/Pdt.P/2016/PA.Mkd.

They were analyzed qualitatively. Adapting the methods of research by Shamsuddin,²⁵ the Author identifies the legal facts from the dictum of Judgment of Religious Court of Mungkid Case No. 0011/Pdt.P/2016/PA. Mkd and legal considerations related findings of fact of law (legal reasoning) used Judge to decide a Case No. 0011/Pdt.P/2016/PA. Mkd in practice data analysis, the researchers first put the dictum Decision No.329K/AG/2014 and the legal reasoning used by judge in a sub chapter. Then, in the next sub chapter, researchers construct a legal basis and studies to put an objection on the legal reasoning of that Judgment.

RESULTS AND DISCUSSION

PA Judgment No. 0011/Pdt.P/2016/PA.Mkd

Background and case position

This matter raised by a married couple who have made a marriage on July 22, 2000. This marriage has not been registered in accordance with law. While married bride widower status Men aged 66 and his wife 30-year-old virgin status. The pair has not been taking care of their marriage certificate. During this marriage, blessed with 3 children. In order to meet the population administration difficulties. Thus, as of January 25, 2016 to apply for marriage *itsbat*.

The decision and the legal considerations

On 22 March 2016 at the discretion of the judge granted the application *ithbat*. There are several considerations in the determination of the judge is Article 2 of Law No. 1 of 1974 vide KHI Article 14, relating to the validity of the marriage. And Article 8 Marriage Law vide 39 KHI there are no restrictions regarding marriage. Finally, the judge gave the verdict granted the application

²⁴ A. S. Elias. *Legal Research; How To Find And Understand The Law*. (Berkeley: Nolo, 2004), hlm. 5-8

²⁵ M. Syamsuddin. *Operasionalisasi Penelitian Hukum*. (Jakarta: Rajagrafindo Persada, 2007), hlm. 143-146

itsbat marriage.²⁶

DISCUSSION

Marriage Certificate is an act of authentic because of Marriage was created by and in the presence of officials Marriage Registrar as a competent authority for registration of marriage, is made in accordance with the form prescribed by the Government Regulation No. 9 of 1975 and made public officer Marriage Registrar/ Office for Religious Affairs the performance of his duties.

Under the terms of Article 7 Paragraph (1) of Islamic Law Compilation (KHI) and Article 100 of the Civil Code, a marriage can only be proved by a marriage certificate or marriage certificate which is recorded in register. Even noted that a marriage certificate or marriage certificate is the only proof of marriage. Meanwhile, according to Law No. 1 of 1974 on Marriage, Marriage Act and marriage are not the only evidence of the existence or validity of the marriage, because it even as evidence, but rather as evidence of the validity of the marriage. Because the marriage law is religion that determines the existence and validity of the marriage.

Judge consideration in approving the marriage *Itsbat* submitted by couples who have performed the marriage in 2000. Among the policies that apply to judges is Article 2 of Law No. 1 of 1974 regarding the validity of a marriage Article 14 Compilation of Islamic Law. In connection with the registration of marriages under Article 2 Paragraph (2) of Law No. 1 of 1974 on marriage, is a product of social politics as modern social politics deposit. Therefore, couples who have made a marriage according to religious law (Islam), but not recorded or recorded, simply were recorded in Official Marriage Registrar Office of Religious Affairs by first applying *itsbat* married to a religious court, without having to perform a marriage anniversary or a new marriage (*tajdid an-nikah*) because it conflicts with the provisions of Article 2 Paragraph (1) of Law No. 1 of 1974 on marriage.²⁷

Consideration of other judges in the case No 011/Pdt.P/2016/ PA.Mkd. is Article 8 of Law No. 1 of 1974 Compilation of Islamic Law Article 39, there is no

²⁶ Putusan Pengadilan Agama Mungkid No. 0011/Pdt.P/2016/PA.Mkd, hlm. 4

²⁷ Art. 2 (2), stated that: “*Tiap-tiap perkawinan dicatat menurut peraturan perundang-undangan yang berlaku*”; Jika hanya memenuhi Pasal 2 ayat 1 saja, dapat mengajukan permohonan **Itsbat Nikah** di Pengadilan Agama (Surat Edaran Nomor W11-A/863/HK.00.8/III/2012 oleh Pengadilan Agama seJawa Tengah Pengadilan Tinggi Agama Jawa Tengah)

prohibition to perform marriages according to this agama. Hal be understood in accordance with article 2, paragraph 2 of Law No. 1 of 1974.

In the decision still seems *Bayani* (namely Law No 1 of 1974 and KHI). Judges should also be able to bring legal considerations in determining *ithbat* married some of the following;

- Attention of community to apply *ithbat married* to the Religious continue to increase along with the administrative requirements of schools that require every child to go to school to attach a photocopy of a birth certificate, and one of the conditions of administration that must be met to get the Marriage Certificate is a Book marriage concerned parents.
- Marriage Act (Act No. 1 of 1974) mentions child protection laws in Article 41, 42, 45, 47, 48, and 49, including the status - legal relations, education and the care, maintenance and legal actions, and maintenance and property rights.
- Article 55 paragraph (2) of Law No. 1 of 1974 which states that “if a birth certificate mentioned in paragraph (1) of this section does not exist, then the court can issue a determination of the origin of a child after a careful examination of the evidence qualify “. The evidence in this case should be returned to the general principles of evidence in accordance with Article 284 and 164 Rbg HIR to prove the existence of a legitimate marriage plus other evidence as proof of the examination results of DNA tests to prove that the child is truly born of husband and wife
- Compilation of Islamic Law (KHI) child protection mentioned in Articles 98, 99, 104, 105, and 106.
- The role of the State as the organ responsible for the protection of children, as stipulated in Law No. 23 of 2002 on Child Protection, Article 20, Article 21.²⁸

The religious court judges are required to make “*ijtihad*” to do *istimbath* law, in this case, Article 7 point d deviate it. Then consider all the pros/benefit available

²⁸ Pasal 20 Undang-Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak menyebutkan, “Negara, pemerintah, masyarakat, keluarga, dan orang tua berkewajiban dan bertanggung jawab terhadap penyelenggaraan perlindungan anak”. Pasal 21 “Negara dan pemerintah berkewajiban dan bertanggung jawab menghormati dan menjamin hak asasi setiap anak tanpa membedakan suku, agama, ras, golongan, jenis kelamin, etnik, budaya dan bahasa, status hukum anak, urutan kelahiran, dan kondisi fisik dan/atau mental

to *married its bat* granted under the provisions of Article 7 paragraph (3) letter e Compilation of Islamic Law.²⁹

When marriage which asked to be *itsbat* it was no impediment to marriage as stipulated in Law No. 1 of 1974 on Marriage, the religious court will grant the request even if the marriage was *married itsbat* executed after the enactment of Law No. 1 Year 1974 about marriage. Although, the Islamic Law Compilation (KHI) is not included in the hierarchy of legislation referred to in Article 7 of Law No. 10 of 2004 on the Establishment of Regulations. This is done by setting *itsbat marriage* Religious Court, as a policy to fill the law governing *marriage* with marriage *itsbat* executed after the enactment of Law No. 1 of 1974 on Marriage.

The policy was taken because *itsbat marriage* by religious court, for consideration *mashlahah* (containing benefit) for Muslims. *Itsbat marriage* is very beneficial for Muslims to take care of and get their rights in the form of letters or personal documents required from the authorities and to guarantee the protection of legal certainty to each couple, including the protection of the status of children born marriage, and the protection of the legal consequences which will appear later. It is also an embodiment of *justice for all*, especially for the poor Muslim communities and to ensure the rule of law (legal order) as an instrument of law enforcement, legal services, as well as authentic evidence of their marriage.

Things confirmation (*itsbat*) marriage that occurs in Judgment of Mungkid Religious Court No. 0011/Pdt.P/2016/PA.Mkd filed by the husband and wife, can be categorized as the application is *voluntair*, products such designation.

On the other hand it should judge may also decide to reject the application *Itsbat* marriage. Rejection judgment is Article 7, paragraph 3 point d *itsbat* that marriage is only for marriage done before confirmed of Marriage Law. Including article 2, paragraph 2, of the importance of marriage. So it becomes important that the marriage should be listed after the Marriage Law confirmed. Marriage Law for the sake of it should be considered a sanction for marriage was not recorded after the passage of Marriage Law.

²⁹ Pasal tersebut berbunyi “Perkawinan yang dilakukan oleh mereka yang tidak mempunyai hangan perkawinan menurut menurut Undang-Undang Nomor 1 Tahun 1974

CONCLUSIONS AND IMPLICATIONS

Policy/*ijtihad* determination *itsbat marriage* after years 1974 by Judge of Religious Cour, an aberration of article 7 letter d KHI one side. On the other hand, considering *mashlahah mursalah* (containing a benefit for the Muslims) *itsbat* post Marriage Law No 1 of 1974 enacted should be implemented to resolve the legal gap.. The case of confirmation (*itsbat*) marriage that occurs in Judgment No.011/pdt/2016/MKD filed by the husband and wife, can be categorized as the application is *voluntair*, products such designation.

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