Implementation Of Marriage Isbat For People Who Have Died In The Surabaya Religious Court

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Abstract
In writing this thesis, the author aims to find out the implementation of marriage isbat of people who have died in the Surabaya Religious Court. In this research using empirical juridical methods, namely the data collection techniques carried out field research by seeing and observing what is happening in the field, the application of these regulations in practice in the community. Analysis of the data used is a qualitative approach to primary data and secondary data. Marriage is a very important thing for married couples because it is related to legal certainty so that the husband and wife avoid legal consequences arising from unregistered marriages. This results in this study can be concluded that the implementation of marriage isbat marriage for people who have died in the Surabaya Religious Court is fine to be processed in court while in filling it meets the formal requirements that must be met because marriage isbat itself can be done by prioritizing the benefit and interests of those who submit it. The judge's rationale in deciding the marriage request for a deceased person is related to the principle of ius curia novit where the judge is considered to know the marriage isbat, and the principle of the judge's freedom to find the law. Through a sociological approach to other regulations that have to do with the problems faced so that the law is not stagnant, but develops in accordance with the development of society or in accordance with laws that live and develop in society. One of the factors causing the submission of an application for marriage isbat for the deceased is for the distribution of inheritance. There is a huge impact on the decisions issued by the panel of judges related to the application for marriage isbat for the deceased is for the distribution of inheritance. There is a huge impact on the decisions issued by the panel of judges related to the application for marriage isbat for a deceased person is related to the principle of ius curia novit where the judge is considered to know the marriage isbat, and the principle of the judge's freedom to find the law. Through a sociological approach to other regulations that have to do with the problems faced so that the law is not stagnant, but develops in accordance with the development of society or in accordance with laws that live and develop in society. One of the factors causing the submission of an application for marriage isbat for the deceased is for the distribution of inheritance. There is a huge impact on the decisions issued by the panel of judges related to the application for marriage isbat for the deceased is for the distribution of inheritance. There is a huge impact on the decisions issued by the panel of judges related to the application for marriage isbat for the deceased is for the distribution of inheritance. There is a huge impact on the decisions issued by the panel of judges related to the application for marriage isbat for the deceased is for the distribution of inheritance. There is a huge impact on the decisions issued by the panel of judges related to the application for marriage isbat for the deceased is for the distribution of inheritance. There is a huge impact on the decisions issued by the panel of judges related to the application for marriage isbat for the deceased is for the distribution of inheritance.

Keywords: Marriage Isbat

I. Introduction

In human life in this world, between men and women have a sense of interest in each other so they can live together with the aim of creating a happy, harmonious, prosperous and eternal household. The nature of marriage according to the marriage law according to article 1 of 1974, marriage is a fabric of men and women as husband and wife whose aim is to build an eternal family based on one supreme deity, so marriage is a contract whose entire aspects are stored the word marriage or tazwij.1

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In its development, sirri marriage can also be called an unregistered marriage. Unregistered marriages have no legal consequences. The purpose of marriage registration is to create orderly marriage in the community. The purpose regulated in the legislation is to protect the sanctity of marriage, especially women in married life. Marriage records can also be said to record important events in a person's life. The solution that can be taken at sirri marriage so as not to harm her husband, wife and children is marriage isbat. A marriage that cannot be proven by a marriage certificate can apply for marriage isbat in a religious court. According to the compilation of Islamic law in article 7, marriage isbat can be submitted to the fixed religious court regarding: a. marriage divorce proceedings, b. loss of marriage certificate, c. doubt about the validity of the conditions of marriage, d. entered into a marriage before the entry into force of law number 1 of 1974 and, e. marriages that do not have obstacles according to marriage law.

II. Method

This research uses empirical legal research. Primary data from research conducted in the field will lead to this research. The author also uses how to examine the relevant laws and regulations concerning marriage isbat in order to support empirical research conducted by the author. Primary and secondary data are also used by the authors in this study. Primary data can be obtained by interviews, observations and questionnaires from community life. Secondary data was obtained by collecting data using field studies and literature. Primary and secondary data qualitative approaches are used to analyze data where the description includes the content and structure of positive law. The place that the writer chose to be used as research is in the Surabaya religious court.

III. Main Heading of the Analysis or Results

A. The Judge's Consideration In Refusing and Granting The Request for Marriage Isbat of People Who Have Died In The Surabaya Religious Court

The judge in handling the request for marriage marriage is not entirely acceptable to the application. As for the application rejected by the judge because according to a judge the product of the court itself is to accept, reject (niet ontvangelijke verklaard) or the lawsuit cannot be accepted. The judge will reject an application if the applicant submitting the request cannot fulfill the requirements to prove the arguments of the petition, but the judge can grant a request submitted by the applicant if the conditions of evidence needed
to support the arguments in the posita can be fulfilled. If the application is granted by the judge, the judge will proceed to the examination stage through the trial to present evidence of letters or statements from witnesses. From the application letter submitted and through the evidence submitted in front of the trial the judge can assess whether the marriage meets the requirements and the harmony of the marriage.2

The following is an example of a marriage case of a deceased person who was granted in a Surabaya religious court. In writing this case the identity of the parties is disguised from his real name:

Case number: 4442 / Pdt.G / 2018 / PA.Sby. On July 19, 1988, the AM applicant held a marriage with AY sirri in the Pabean Cantian District, Surabaya City. When the marriage of the applicant was 23 years old and AY was 23 years old, the marriage took place with the marriage guardian of the applicant’s father named AM also present two witnesses named MN and SW and with a dowry in the form of a thousand rupiahs of money. During the marriage the applicant and AY lived harmoniously like a husband and wife and had 3 children. During the marriage there was no third person who interfered with their marriage and at that time also the applicant with AY remained Muslim. On July 20 2019 AY died of illness. The applicant does not have a marriage certificate because his marriage is not registered at the religious affair office customs sub-district of the city of Surabaya, on the grounds that the applicant has no costs for completing the marriage certificate, while the applicant requires a marriage certificate to take care of the inheritance that requires the establishment of marriage approval. The judge’s consideration in granting this case is:

a. In his petition, the petitioner stated that he and the late AY had never divorced and remained Muslim for reasons of requesting the establishment of a marriage, therefore the petitioner had the right to submit the request for marriage registration as regulated in article 49 letter (a) of law number 7 of 1989 which had already been amended by law number 3 of 2006 and law number 50 of 2009, the religious court has the authority to examine and decide upon this marriage application.

2 Interview with Mr. Saifudin at the Surabaya Religious Court on November, 27 2019 at 10.30 WIB.
b. The respondent submits an oral answer in essence confirming all requests submitted by the applicant. In order to corroborate the request, the applicant provided written evidence and two witnesses named MN and SW. The applicant’s evidence letter according to the original is sufficiently stamped and has been in natzegelen, based on the provisions of article 165 HIR, and article 2 paragraph (3) of law number 13 of 1985 concerning stamp duty and article 1888 of the Civil Code, the evidence meets the formal requirements so that it can be accepted.

c. The testimony given by MN and SW as the applicant’s witness explains and is based on his own knowledge and is mutually compatible and does not include people who are prohibited from being witnesses as in article 145 HIR then based on article 171 paragraph (1) and 172 HIR, witness statements can be accepted to be used as evidence. Based on the statements of witnesses who are in conflict with each other, there is a fact which essentially corroborates the contents of the petition.

d. The legality of marriage according to the national marriage law has been regulated in Article 2 Paragraph (1) Law Number 1 of 1974 concerning Marriage Stating ‘Marriage is said to be valid if it is carried out according to religious and religious law’. The harmony of marriage / marriage according to Islamic law is that there must be fulfilled the five elements namely a. the prospective husband, b. future wife, c. marriage guardian, d. two witnesses present during the marriage contract, and e. the existence of sighat or consent and Kabul. In reality, at the time of the marriage ceremony the late AY and the applicant were present, the biological father of the applicant named AM as the guardian and two witnesses named MN and SW and the qobul consent agreement was conducted.

e. As well as the facts and considerations, the judge argued that the marriage of the late AY and the petitioner on July 19, 1988, had fulfilled the requirements and the harmony in accordance with Islamic religious law was also in accordance with the laws and regulations applicable to Islamic marriages in Indonesia as regulated in article 8 to article 11 of law number 1 of 1974 and articles 14 to 38 juncto articles 39 to 44 KHI and between the late AY with the applicant there is no element of a marriage ban. based on the sound of article 7 paragraph (3) letter (e) it states that marriage isbat can be submitted to a religious court fixed on a marriage that does
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not have a marriage obstacle according to Law number 1 of 1974. The implementation of the marriage of the late AY and the applicant in accordance with the terms and conditions of marriage based on Islamic law and the applicable laws and regulations but the marriage is not registered in the marriage register book so that marriage certificates cannot be issued. In accordance with what has been considered, the petition of the applicant should be granted.

In addition to examples of cases of marriage isbat marriage for people who have died whose petition was granted by a judge of the Surabaya religious court, the author will also present examples of cases of marriage isbat marriage for people who have died whose cases were rejected by a Surabaya religious court judge:

Case number 0825/Pdt.G/2019/PA.Sby. On March 2, 1989 OP (as the applicant) entered into a marriage with HW with a guardian named PW and the dowry of the prayer tools and fifty thousand rupiahs. After marrying the applicant to the late HW lived like a husband and wife and had 2 children. At the time of marriage between the applicant and HW had already obtained a marriage certificate from the religious affairs office of Tegalsari sub-district of Surabaya, but after the death of HW on 14 December 2018, the applicant looking for an original marriage certificate quote found only a photocopy of a marriage certificate quote whereas original marriage certificate is not found. Then the applicant took the initiative to submit a duplicate request for a marriage certificate at the office of religious affairs in tegalsari sub-district, but a photocopy of the relevant marriage certificate quote was not found in the register at the religious affairs office of Tegalsari sub-district and the marriage concerned was not recorded in the marriage book register. Therefore the applicant requires the determination of marriage isbat which states that the marriage is legal and the stipulator is used to take care of the marriage certificate in the religious affairs office of the Tegalsari sub-district and to collect the pension fund. Judge’s legal considerations in rejecting this case are:

a. A new marriage is considered valid when the conditions and harmony of the marriage are fulfilled, and if the conditions and the pillars of marriage are not fulfilled then the marriage becomes invalid. In the teachings of Islamic marriage consists of: a. future husband, b. the prospective wife, c. Marriage guardian, d. and two witnesses, and e. consent and qobul. As determined in the compilation of Islamic law in article 19 which states that the marriage guardian of marriage is a
pillar that must be fulfilled by the prospective bride who will act to marry her and furthermore in article 20 paragraph 1 and paragraph 2 the compilation of Islamic law states that:

(1) Which can be used as marriage guardians are men whose Islamic legal requirements are met, namely Muslims, Aqil, Baligh.

(2) Marriage guardians consist of:
   a. Trustee nasab,
   b. Trustee of the judge

b. The marriage guardian in the marriage of the applicant is named PW whereas PW itself is not included as either the nasab guardian or the guardian of the judge, as has been explained by a witness named DY that PW is a close friend of the applicant. From the witness's statement it can be concluded that PW acts as a marriage guardian of the marriage of the applicant with HW not as a nasab guardian or guardian of the judge.

c. Elucidation of article 49 number (2), law number 7 of 1989, so that the religious court has the authority to examine the application for marriage isbat and according to the technical and administrative guidelines for religious court book II 2009 edition states the religious court can grant the request for marriage isbat if the marriage takes place fulfilling the requirements and the pillars of marriage according to Islamic law and based on the recognition of the applicant before the trial is proof that has perfect strength as regulated in article 174HIR.

d. The applicant who had entered into a marriage with HW in 1994 was not in accordance with the provisions determined by applicable law, and in the trial the applicant was unable to submit complete evidence, both letter evidence or from witness statements, then in this case the judge argued that the request submitted by the applicant cannot be considered.

e. In the evidentiary process the applicant only confronts one witness named DY whereas according to the applicable legal provisions the number of witnesses required in the substantiation of a case is a minimum of two witnesses, if only one witness, and by borrowing the term used in the minimum number of witnesses,
namely ‘unus testis nullus testis’, then the value of a witness’s statement cannot be used as a basis for deciding a case. In accordance with these considerations, the panel of judges agreed that the petition of the applicant could not be considered and was more appropriate to be rejected.

From some examples of cases of marriage isbat requests either granted or rejected requests that the authors describe above it can be concluded that the consideration of a judge in deciding a marriage isbat marriage application for a deceased person can be done with normative juridical considerations in granting or rejecting a marriage isbat application for a deceased person. But the judge can also use the value of benefit as stated in the rules of Usul Fiqh under certain conditions. Normative juridical approach is carried out if the marriage requirements and pillars have been met and do not have a marriage obstacle as stated in the applicable law. Whereas if there is something that requires the judge to make other decisions than they should because there is an element of benefit, the judge can use the sharia maqashid approach in his legal considerations.

**B. Analysis of Judges’ Considerations in Rejecting or Granting Requests for Marriage Isbat Cases for Deceased Persons**

Several reasons the judge accepts and decides the application for marriage isbat of people who have died even though there are no rules governing it. First, it refers to the assumption that the judge knows the law of marriage or what is called the ius curia novit principle, and the principle of freedom of the judge can find the law over problems that do not have a rule of law. Secondly, through a sociological approach where other related regulations deal with problems so that the law can develop according to events in the community. This is known as legal discovery. In the provisions of law number 48 of 2009 article 28, a judge who is a person who enforces the law and justice for the community must seek, explore and understand the value of law in the community. In the procedural law, religious courts are based on Islamic sharia. the purpose is to fill the legal vacuum so that the decision made by the judge approaches the truth and justice of the blessing of Allah SWT.³

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³ Ali Rosadi. (2017). *The Implementation of Marriage Isbat by a Religious Court is Related to the Stipulation of a Subang Religious Court Number 009/Pdt.P/2013/PA. Shah Journals of Law, 8(1).*
There are several regulations that give authority to the judge so that he can grant the petition that the judge must examine and decide on the petition. In law number 3 of 2006 in article 56 paragraph 1 it is stated that the court must not refuse to examine and decide on an application submitted by the public on the grounds that there is no governing law. Then in the sound of article 16 paragraph 1 of law number 4 of 2004 concerning judicial power said the same thing.

C. Factors for submission of Marriage Information for Dead People in Surabaya Religious Court

Fulfillment of social rights for the community can realize social order so that if social order is realized harmony of life in society can be realized as well. Article 5 paragraph (2) compilation of Islamic law in order to realize the rule of law in the community as part of a definite and easy instrument of a law, besides that it is also used as relevant evidence that the government must guarantee and provide protection for the rights of married couples as well as children born to marriages that have been done.\(^4\)

According to the provisions in article 7 the compilation of Islamic law in paragraphs 2 and 3 says that, for marriages that do not have a marriage certificate can submit marriage isbat to the religious court. Almost every year there must be a marriage under the hand that asks for marriage isbat to a religious court, including the submission of marriage isbat applications whose subjects have died. The occurrence of marriage isbat requests for subjects who have died caused by a variety of factors and various reasons underlying the occurrence of a request.

There are several aspects that are used as background by the applicant to submit marriage isbat for people who have died in the Surabaya religious court:

1. To take care of the distribution of inheritance. The most important factor to administer the distribution of inheritance is in the Surabaya Religious Court. Most people who apply for marriage isbat are the children of parents whose marriages will be granted or can also be one of the husband and wife who became the applicant.

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2. Loss of marriage certificate. The loss of the marriage certificate is usually caused by the negligence of the employee not registering the marriage with the relevant religious affairs office.

3. Take care of pension funds. This factor is usually proposed by the wife whose husband has died, whose marriage has not been registered and does not have a marriage certificate, then the wife asks for marriage ratification so that her husband’s pension fund can be disbursed.

4. The management of the pilgrimage. People who want to go on the pilgrimage must have formal proof that people who want to go on the pilgrimage are really married with proof of a marriage book, it is very necessary because if the person going to travel abroad must have formal proof of being husband and wife even though one of his parties has death must still be authentic proof of marriage.\(^5\)

5. Negligence of a husband or wife or a family that can get married is not in accordance with the policies set by the government because they do not understand the rules and legal provisions in force.

6. Neglect of the marriage registrar, for example when checking marriage documents or conditions or documents that are actually present but have been lost.\(^6\)

**D. The Legal Consequences of The Judge’s Determination of The Marriage Term of The Deceased Person**

With the decision made by the panel of judges regarding the marriage of the deceased, of course there is an impact of the decision on the wider community. The panel of judges are quite aware of the continued granting of the marriage isbat application for the deceased, in which the community will simplify and underestimate the importance of marriage registration, even though in law number 1 of 1974 it is clear that marriage must be registered but with the existence of this marriage isbat the implementation of Law number 1 of 1974 is not effective.\(^7\) Emergence of conditions of irregularity in population

\(^5\) Interview with Mr. Saifudin at the Surabaya Religious Court on November, 27\(^{th}\), 2019 at 10.30 WIB.


\(^7\) Interview with Mr. Saifudin at the Surabaya Religious Court on November, 27 2019 at 10.30 WIB.
registration so that the normative objectives of marriage registration are not fulfilled in accordance with article 2 of law number 1 of 1974.⁸

In addition to the negative impact of the decision made by the panel of judges about the marriage isbat of a deceased person, there is also a positive impact of the decision, namely the existence of the marriage decision isbat, the deceased person can provide legal protection to those who need marriage ratification in order to take care of administrative or can provide legal protection for children whose parents have died to take care of the distribution of inheritance or take care of their parents’ pension funds.⁹

II. Conclusion

In the case of marriage isbat application for a deceased person there is an application that is granted or rejected by a panel of judges. The judge's own basic consideration in deciding the marriage request for a deceased person is related to the principle of *ius curia novit* where the judge is considered to understand the marriage term, and the principle of freedom of the judge finds law against issues that do not have a rule of law. Through a social approach the interrelationship of the problems faced can cause the law to not be passive but rather grow in accordance with developments that occur in the community. When accepting or rejecting an application for marriage isbat the person who has died the panel of judges can not be based on the case of whether the marriage isbat marriage for the dead can be granted or rejected, the judge will reject the marriage isbat marriage case if the applicant cannot fulfill the arguments in posita petition of the applicant and will grant the request of the applicant if the applicant can prove his application.

In the case of marriage isbat application for a deceased person there are several reasons why the community submits the request and the most frequently encountered in the Surabaya religious court is the community submits the marriage isbat marriage request for the person who died because of the determination of the marriage isbat will be made a legal basis by the community to take care division of inheritance. The decision made by the panel of judges related to the application for marriage isbat marriage of people who have died would certainly have a very big impact among the community. One of them is

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⁹ Interview with Mr. Saifudin at the Surabaya Religious Court on November, 27 2019 at 10.30 WIB.
that the public will tend to overestimate or underestimate how important it is to register their marriage and the implementation of Law number 1 of 1974 does not apply effectively.

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