

# Juridical Review on Confirmation of Unregistered Marriage (A Case Study of Palu Religious Court)

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## ABSTRACT

The research problem formulated was concerning judges' consideration in determining the confirmation of unregistered marriage at Palu Religious Court as well as juridical review on the judges' consideration. The purpose of this research was revealing judges consideration in determining the confirmation of unregistered marriage at Palu Religious Court as well as juridical review on the judges consideration. This research used field research method with quantitative approach at Palu Religious Court. The data source was coming from observation, interview, and written sources. The writer used observation, interview, and documentation method in collecting the data. The research findings was that judges' consideration in Palu Religious Court in determining the confirmation of unregistered marriage generally was already in accordance with the rules existing. However, Palu Religious Court did not consider the age of the couples of unregistered marriage in which when they held marriage contract, evasion of law related to the marriage age of the couples was feared to happen for those holding the confirmation of unregistered marriage. The research implication was that the government should revise the marriage laws and include criminal elements for the couple unregistered marriage. The government also should apply marriage amnesty program for the couple holding unregistered marriage with a certain period of time and then apply criminal law for the people whose marriage unregistered.

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## ARTICLE INFORMATION

### Keywords:

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Unregistered marriage,  
Religious court,  
Case study.

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## 1. INTRODUCTION

Marriage registration, in addition to maintaining the administrative order, also aims to protect the rights of those who carry out marriages. It is also made as evidence that a marriage has really taken place. Thus, marriages conducted in Indonesia must be recorded in accordance with the existing regulations. Marriage that is not registered or not carried out outside the supervision of the Registrar of Marriage is considered an act that has no legal force.<sup>1</sup>

In the Marriage Law, a marriage is considered legal if it is carried out according to the laws of each religion. The establishment of marriage registration is intended to realize the order of marriage in the community, either those that are carried out based on Islamic law or secular law. Marriage registration is an effort to maintain the sanctity of legal aspects arising from marital ties. The realization of the registration gives birth to a marriage certificate owned by husband and wife, that can be used if there are parties who are disadvantaged from the marital bond to get their rights.<sup>2</sup>

Marriage that is not registered has no legal power and is considered illegitimate spouse before the law. This is a provision stated in the Marriage Law Article 2 Verse 2.

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<sup>1</sup>*Ibid*

<sup>2</sup>Zainuddin Ali, *Hukum Perdata Islam di Indonesia* (Ed. II; Jakarta: Sinar Grafika, 2007), 26

The illegitimacy of marriage in the eyes of the law has an impact on the absence of ties to fulfill the rights and obligations of the parties to the marriage. This is natural, because people who carry out underhand marriages basically consider it a means of complacency, and as a way to marry other women without the knowledge of a legitimate wife.<sup>3</sup> They do not want to be confused with the rights and obligations that must be borne in the marriage.

However, despite the obligations in the registration of marriages, the law still opens opportunities for people who carry out underhand marriage and not registered their marriages to obtain their rights and obligations through endorsement of marriage. This endorsement of marriage is based on Presidential Instruction Number 1 of 1991 concerning the dissemination of Islamic Law Compilation (KHI).

In Article 7 paragraph 2, the Compilation has explained that if a marriage cannot be proven by a marriage certificate, then the marriage can be submitted to the Court. In paragraph 3, it is stipulated that endorsement of marriage can only be carried out if it is related to settlement of divorce, loss of marriage certificate, doubt about the validity of one of the conditions of

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<sup>3</sup> Taufiqurrohman Syahuri, *Legislasi Hukum Perkawinan di Indonesia Pro-Kontra Pembentukannya hingga Putusan Mahkamah Konstitusi* (Jakarta: Kencana Prenada Media Group, 2013), 168

marriage, a marriage that occurred before 1974 and a marriage that did not have a marriage obstacle according to the Marriage Law Number 1 of 1974.<sup>4</sup>

This was later strengthened by the Law No. 7 of 1989 on Religious Courts, which contains the absolute power of the Religious Courts in the case of marriage, in which marriage that occurred before the Law No. 1 year 1974 on marriage, considered legal according to other provisions.<sup>5</sup>

However, endorsement of marriage is a *voluntair*<sup>6</sup> case that is settled on the condition that it is desired by law.<sup>7</sup>In the case of marriage endorsement itself, the Religious Courts Act only provides an explanation that the statement about whether a marriage is valid or not is one of the absolute powers of the Religious Court. However, there is no explanation as to what is the limitation in validating marriage. This is revealed in the Compilation of Islamic Law, which is not included in the order of the laws of the Republic of Indonesia.<sup>8</sup> In the Compilation of Islamic Law, one of the

reasons for the submission of marriage endorsement is that marriage which is carried out without the prohibition of marriage in the Law No. 1 of 1974. This leads to the understanding that underhand marriage can also be endorsed as long as the marriage is carried out according to Islamic teachings.

In practice, there are still a lot of deviations in relation to the rules of marriage registration. The practice of underhand marriage or *nikah sirri* still frequently occurs in Indonesia. It is recorded that, in 2016, from 1.226.877 cases of marriage registration in Indonesia, the number of marriage registration from marriage contract that occurred from 1991-2015 reached 12.023 cases.<sup>9</sup>The number does not include the case of marriage contract that occurred before 1991, and marriage contract that is validated by the Court but not recorded by the Religious Affairs Office (KUA), like marriage ratification conducted in the context of divorce in the court.

In addition, the implementation of marriage endorsement for underhand married couples violates existing regulations, such as restrictions of marriage age for women 16 years and men 19 years. In practice, throughout 2016 there were records

<sup>4</sup> President Instruction Number 1 Year 1991 on Dissemination of the Compilation of Islamic Law

<sup>5</sup>Roihan A. Rasyid, *Hukum Acara Peradilan Agama* (Cet: XIV; Jakarta: PT. RajaGrafindo Persada, 2010), 31

<sup>6</sup> A voluntair case is a case which becomes the authority of a judicial institution in which a civil rights claim is demanded by a party that has an interest in something that does not contain a dispute

<sup>7</sup>Mahmud Huda, *Yurisprudensi Isbat Nikah Dalam Pasal 7 Kompilasi Hukum Islam*, *Religi Jurnal Studi Islam* 5, no. 1 (2014): 52

<sup>8</sup>*Ibid*

<sup>9</sup>Kementerian Agama RI, "Pencarian Akta Nikah". *Official Website Sistem Informasi Manajemen Nikah Kementerian Agama RI*. <http://simkah.kemenag.go.id/asli.php?panel=4> (28 Februari 2017)

of marriages with a marriage contract that had occurred from 1991 to 2015 which violated the minimum age of marriage. From these data, there were 1,377 women who were under the age of 16 when they got married, and their marriage were endorsed in 2016. And there were also 1,107 men who entered into marriage contract under the age of 19,<sup>10</sup> not to mention other violations such as wild polygamy, hidden polyandry and other forms of violation.

The same also happened in Palu. According to data from the Religious Court of Palu, there were 211 cases of marriage endorsement which were put on trial and decided. In a number of stipulations, the reasons submitted by the applicant in marriage endorsement is almost the same, namely because they did not submit the proposal of marriage registration at the local KUA. If this continues, the existence of the KUA and the legal power of marriage registration that had already exists in the Law will be weakened by itself.

The existence of marriage endorsement can also make the people of Palu prefer doing underhand marriage rather than getting married and registering their marriage at KUA. This can be seen from the myriad of the proposal of marriage endorsement in KUA. Yet, according to Wasit Aulawi, as quoted by Mahmud Huda,

marriage endorsement for underhand married-couples should not be served, because the law does not authorize the court to try it. However, the existence of KHI makes the authority of the Religious Courts in the case of marriage endorsement is very broad and even tends to have no restrictions.<sup>11</sup>

## 2. LITERATURE REVIEW

### 2.1 Previous Research

In the study conducted by the author, there are several studies that concern the implementation of the endorsement of underhand marriage. Some studies that concern with this issue include *Nikah di Bawah Tangan dalam Perspektif Yuridis dan Sosiologis*, written by Munir Subarman, *Yurisprudensi Isbat Nikah dalam Pasal 7 Kompilasi Hukum Islam* by Mahmud Huda, and *Nikah Sirri Solusi Pernikahan Anak di Bawah Umur di Desa Petung, Panceng, Gresik* by Ahmad Badrut Tamam.

The study entitled *Nikah di Bawah Tangan dalam Perspektif Yuridis dan Sosiologis*, written by Munir Subarman was published in the Journal of *Ijtihad*, Vol. 13, No. 1, June 2013. This study deals with the juridical and sociological review of underhand marriage practices. The result of this study reveals that underhand marriages

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<sup>10</sup>*Ibid*

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<sup>11</sup>Mahmud Huda, *Yurisprudensi Isbat Nikah*, 51-52

are legal, but do not have legal certainty, giving rise to significant negative implications, namely: (a) there is no guarantee of legal certainty for the parties, (b) women's position is economically, socially, culturally, psychologically and legally, weaker because of patriarchal regulations; (c) there are the parties who are disadvantaged because of unclear status and future, such as children and wife. In addition, the result showed that marriage registration is not a requirement and basic of marriage contract, but it can improve the implementation of the rights and obligations arising from the marriage contract, and can ward off the negative implications that may occur in social life, especially for women and children.<sup>12</sup>

The second research is *Yurisprudensi Isbat Nikah dalam Pasal 7 Kompilasi Hukum Islam* by Mahmud Huda, published in *Jurnal Religi: Jurnal Studi Islam*, Volume 5, Number 1, April 2014. This study discusses article 7 of the Compilation of Islamic Law which provides authority for the Religious Court to implement the endorsement of marriage with unlimited reasons, confusion and inaccuracy. So this article needs to be limited in its application

so as not to cause new problems in the community.<sup>13</sup>

The third research is about *Nikah Sirri Solusi Pernikahan di Bawah Umur di Desa Petung, Panceng Gresik* by Ahmad Badrut Tamam published by the journal of *Al-Ahwal*, Volume 13, No. 1 Year 2010. This study discusses the implementation of underhand marriages that are mostly carried out by the couples who are not of the marriage age. There are several factors that cause underhand marriage in Petung village, among others: (a) internal factors, namely, the willingness of children and the blessing of parents, the low level of awareness of the importance of marital institutions, the objective factors to anticipate extra-marital pregnancy; (b) external factors, which include social environment, social communication, lack of response and attention from the government. Other factors are education, economy and religion, and the rules listed in the Law No. 1 Year 1974 and KHI which allowed men aged at least 19 years and women 16 years to get married.<sup>14</sup>

What distinguishes between previous studies and this research lies in the research focus that use normative juridical review in analyzing the endorsement of underhand

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<sup>12</sup> Munir Subarman, "Nikah di Bawah Tangan Perspektif Yuridis dan Sosiologis", *Ijtihad*, Vol.13, No. 1 (Juni 2013), 81.

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<sup>13</sup> Mahmud Huda, "Yurisprudensi Isbat Nikah Dalam Pasal 7 Kompilasi Hukum Islam," *Religi Jurnal Studi Islam*, Vol. 5, No. 1 (2014): 52.

<sup>14</sup> Ahmad Badrut Tamam, "Nikah Sirri Solusi Pernikahan Anak di Bawah Umur di Desa Petung, Panceng, Gresik," *Al-Ahwal* 13, No. 1 (2010), 67

marriage that occur in the Religious Court of Palu. The normative juridical review in question is the written rules that are valid and prevailing in Indonesia, such as the 1945 Constitution of the Republic of Indonesia, Law Number 1 of 1974 concerning Marriage, Law Number 7 of 1989 concerning Religious Courts and other regulations that contain rules regarding the implementation of underhand marriage endorsement.

## 2.2 Overview of Underhand Marriage Endorsement

*Ithbat nikah* (endorsement of marriage) is derived from *ithbat* and *nikah*. *Ithbat* is verbal noun (*masdar*) from Arabic word *athbata*, which has such meaning as determination, endorsement. To do *ithbat* means “to determine the validity of something”.<sup>15</sup> The word *nikah* is verbal noun from *nakah* which means “sexual intercourse”. In Islamic law term, marriage is a contract that causes the ability to have sexual intercourse between a man and a woman and help each other and determine the limits of rights and obligations between the two.<sup>16</sup> Or, this also means that from this

contract, a husband can have fun with his wife and her whole body.<sup>17</sup>

In positive law, marriage means “inner and outer bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on the guidance of God. Therefore, *ithbat nika* is basically a way to endorse a marriage between man and woman as husband and wife, that was carried out according Islamic law, that is, meeting the requirements and pillars of marriage. However, marriage that occurred in the past was not yet registered by the authority, in this case, officer of KUA. Underhand marriage is a kind of marriage between a man and a woman without being registered by the officer who register marriage, and without any marriage certificate.<sup>18</sup>

From the above explanation, it can be concluded that *ithbat nika sirri* is a process of endorsing a underhand marriage between a man and a woman without being registered by the officer of KUA who register a marriage.

*Ithbat* of marriage is a product of the Religious Court. In this case, there is only an applicant, who submit the request of marriage endorsement. The voluntair case is a case which contains a petition, in

<sup>15</sup> Ahmad Sanusi, “Pelaksanaan Isbat Nikah di Pengadilan Agama Pandeglang,” *Ahkam*, Vol. 16, No. 1 (2016), 114

<sup>16</sup> Rahmat Hakim, *Hukum Perkawinan Islam untuk IAIN, STAIN, PTAIS* (Bandung: CV Pustaka Setia, 2000), 11-13

<sup>17</sup> Djamaan Nur, *Fiqh Munakahat* (Semarang: CV. Toha Putra, 1993), 1

<sup>18</sup> Zainuddin Ali, *Hukum Perdata Islam di Indonesia* (Cet. II; Jakarta: Sinar Grafika, 2007), 27

which there is no dispute, so there is no opponent. Basically the case of request for marriage *ithbat* is unacceptable, unless the law require such act.<sup>19</sup>

Legitimate marriage is a marriage that is carried out according to the provisions in each religion and are listed according to applicable regulations. In Islam, a marriage is considered valid if it meets the terms and conditions as follows:

1) Pillars of marriage<sup>20</sup>

- a. There are a prospective husband and wife who will get married.
- b. There is a guardian for the bride. Marriage contract will be considered valid if there is a guardian who will marry him.
- c. Two fair witnesses who witnessed the marriage contract directly.
- d. The wording of contract, namely the words of the guardian of the female bride, which is answered by the bridegroom with the word *tazwij* or the words of same meaning that is mutually connected and do not contradict with one another.<sup>21</sup> Or it can be interpreted as a consent granted by the guardian or his

representative from the female bride and answered by the bridegroom.

2) Conditions of marriage

- a. The agreement of both parties.
- b. Dowry
- c. Do not violate the prohibitions of marriage as determined by shari'ah.<sup>22</sup>

Marriage *ithbat* was originally a solution to implementation of Marriage Law No. 1 of 1974 based on article 2 paragraph (2) which requires marriage registration. Before that, many marriages were not registered; however, *ithbat* can be requested from the religious court. The authority of religious court regarding the *ithbat* of marriage is intended for those who engage in underhand marriages before the implementation of Law Number 1 of 1974 referring to article 64 that marriages that occurred before this law are considered legal.

Marriage registration means registering a marriage event to an authorized official to record it as evidence that the marriage actually took place. The main purpose of marriage registration is to take legal action, with the intention that the event can become clear, both for the person concerned and the community.<sup>23</sup>

<sup>19</sup> Mukti Arto, *Praktek Perkara Perdata pada Pengadilan Agama* (Yogyakarta: Pustaka Pelajar, 1996), 41.

<sup>20</sup> Zainuddin Ali, *Hukum Perdata Islam di Indonesia*, 46-47.

<sup>21</sup> H. Sulaiman Rasjid, *Fiqh Islam* (Bandung: Sinar Baru Algensindo; 42<sup>nd</sup> edition, 2009), 382.

<sup>22</sup> Kaelany HD, *Islam dan Aspek-Aspek Kemasyarakatan Edisi Kedua* (Jakarta: Bumi Aksara, 2000), 139

<sup>23</sup> Ainun Yudistira, "Latar Belakang Filosofis Pencatatan Perkawinan" *El-Wasathiya* 1, No. 2 (2013): 282.

Marriage registration is one of the rule contained in the law of marriage in Indonesia. This regulation was originally contained in Law No. 22 of 1946 concerning Registration of Divorce, Marriage and Reconciliation, which then came into force throughout Indonesia with the enactment of Law Number 32 of 1954 on the Establishment of the Law of the Republic of Indonesia of November 21, 1946 on Registration of Marriage, Divorce and Reconciliation in all regions outside Java and Madura.

In general, marriage regulations in Indonesia are heavily influenced by Islamic law. This is inseparable from the dominance of the ulama doctrine in the legislation process of the Marriage Law. However, this dominance is also one of the factors that makes the legal dualism of marriage.<sup>24</sup>

Although many marriage laws originate from Islamic law, the existence of this marriage registration has never been regulated in detail, both in the Quran and the Hadith which are the main sources in Islamic law. Marriage registration is not even found in the Islamic law of marriage in any school of Islamic law. The registration is considered administrative and not substantive.<sup>25</sup>

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<sup>24</sup> Muhammad Sodiq, "Dualisme Hukum di Indonesia: Kajian tentang Peraturan Pencatatan Nikah dalam Perundang-Undangan" *Al-Ah}wa>l* 7, No. 2 (2014): 109.

<sup>25</sup> Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia Antara Fiqh Munakahat dan Undang-*

#### 4.2 Violations of the Law in Underhand Marriage

Underhand marriage is a marriage that is carried out without registration. The existence of this registration of marriage is a form of state concern for the readiness and maturity of the couple in establishing a family. That is the reason the state made the law regarding marriage .

In the modern era, the notion of law that can be accepted is only the law created and enforced by the state. So that the state is an absolute element for the existence of modern law.<sup>26</sup>

The rule of law is different from other rules. Weber argued that law has three basic characteristics that distinguish it from other rules.

1. Emphasizing on complying on the law.
2. External actions or threats always include force.
3. Those who implement the threat of coercion are the officials who uphold the law.<sup>27</sup>

In relation to the marriage law that has been applied in Indonesia, the ineffectiveness of the law occur. This is due to the lack of force that forces the community to comply with the marriage law.

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*Undang Perkawinan* (3<sup>rd</sup> edition; Jakarta: Kencana Prenada Media Group, 2009), 29.

<sup>26</sup>Muh. Akbar Habe, *Pengantar Ilmu Hukum* (Makassar: Pustaka Refleksi, 2010), 29.

<sup>27</sup>*Ibid*



Yet in the normative legal system, it must contain the following elements:<sup>28</sup>

1. The regulation is established by official bodies in a country.
2. There is an element of command
3. There are strict sanctions against violations of these regulations
4. There are commands and prohibitions.
5. Coercive regulations

The absence of the strict sanctions, coercive rules, and ambiguous registration rules gives birth to a dualism of understanding in the Marriage Law makes underhand marriage occur in the community. Whereas the Marriage Law is a legal product that has been born since 1974, even the Law on Marriage Registration has existed since 1954. However, the practice is still deviating from the rules contained in it.

In practice, underhand marriage that occurs in society is like the phenomenon of the iceberg, that is, it occurs much in the community, but appears to the surface only a little. Underhand marriage often appears on the news is that is done by an artist or state officials.<sup>29</sup> This happened not only because of

the unlawful and ambiguous marriage law, but also caused by the following factors:<sup>30</sup>

1. Economic factors, which include administrative costs of marriage registration, in which some people, especially those in the lower middle class, feel unable to pay the registration administration. In addition, the tradition in community that a husband has obligation to pay dowry, the costs of marriage parties, as well as other customary events which cost a large amount of money. This is one of the reasons for men who are not yet economically established to marry secretly without being recorded.
2. The age factor. That is, immaturity is one of the factors that make underhand marriage a solution. Not enough age for the bride to get married in the Marriage Law makes them think of getting married without having to be recorded.
3. Work or school factors. There are regulations related to work and school that do not allow marriage during work or school for a certain time in accordance with an agreed agreement. If they are known getting married, they will be expelled from work or school, because it is considered to have violated the rules.

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<sup>28</sup>Muhammad Sodiq, "Dualisme Hukum di Indonesia, 117.

<sup>29</sup> Siti Ummu Adilah, "Analisis Hukum terhadap Faktor-Faktor yang Melatarbelakangi Terjadinya Nikah Sirri dan Dampaknya Terhadap Perempuan (Istri) dan Anak-anak," *Jurnal Dinamika Hukum* 11, Edisi Khusus (Februari 2011), 105.

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<sup>30</sup>Quoed in Siti Ummu Adilah, "Analisis Hukum terhadap Faktor-Faktor yang Melatarbelakangi Terjadinya Nikah Sirri dan Dampaknya Terhadap Perempuan (Istri) dan Anak-anak, 106-108.

4. There is an assumption that underhand marriage is legal according to religion, while registration is only an administrative requirement.
5. Pregnancy outside legal marriage as a free sex effect. Therefore, parents marry off their children in secret and without registration with the man who impregnated her with the reason to save the good name of the family.
6. Lack of understanding and public awareness about marriage registration. This results in people who still often get married secretly. There is an assumption that registered or not registered marriages are the same.
7. Social factor. Society has given a negative stigma to men who marry more than one (polygamy; therefore, to avoid the negative stigma, underhand marriage is a solution to carry out polygamy.
8. The difficulty of polygamy rules. In order to carry out polygamy, there are several conditions that must be met, in accordance with the conditions described in article 5 of the Marriage Law; a man must obtain permission and approval from the previous wife. This is expected to reduce the occurrence of polygamy for any reason. And because it is difficult to get permission from the first wife, then underhand marriage becomes a possible solution for them.

9. The absence of decisive action from the government makes many people still commit underhand marriage.

These factors indicate that marital rules in Indonesia are still difficult to be accepted absolutely by the community. They prefer to use religious law as the basis for conducting marriages, without assuming that marriage recognized by the state is necessity in building a family.

From these factors, it can also be seen that in general underhand marriages are carried out because of rules that cannot be fulfilled, so they prefer the way to carry out underhand marriages. There are some rules of marriage that are violated in the implementation of underhand marriage:

#### 1. Child marriage

In Law number 1 of 1974 article 7 paragraph (1) it is explained that "Marriage is only permitted if the man reaches 19 (nineteen) years old and the woman reaches 16 (sixteen) years old".

These rules are contained in the chapter on marriage requirements in Law Number 1 of 1974. Therefore, the obligation to marry at the age of 19 for men and 16 for women must be fulfilled. However, in paragraph (2) it is explained that if the age of the bride and groom has not reached the standard age of marriage, then a marriage dispensation can be requested from the Religious Court.

The age limitation for getting married, and the complicated way that must be traversed to register underage marriages makes people prefer the path of underhand marriage.

From the data obtained, throughout 2016 there were records of marriages conducted with a marriage contract held from 1991 to 2015 in Indonesia. In these data, there are 1,107 contract events that occur where the bridegroom is under the age of 19. While for women there are 1,377 events, where the bride is under the age of 16.<sup>31</sup>

The rise of underhand marriages shows the lack of strict rules in Indonesia regarding the control of marriages. Even in Petung Village, Gresik District, underhand marriage is a solution for the implementation of marriages under the standard marriage age. In this area, information from electronic media influences adolescents lifestyle and relationships that bring them easily to promiscuity.<sup>32</sup>

People assume that hastening marriage is an effort to overcome the dangers of promiscuity for teenagers. Teenagers in Petung village are sometimes

determined to get married even though they are not mature enough in terms of age because they feel they love each other. If they don't get married soon, they are feared that they will fall into adultery.

Even the parents support their children's steps for the same reason. They prefer underhand marriage as a solution because they assume that the way that has been outlined by the Law by requesting a dispensation to the Court is too complicated and it costs a lot. Furthermore, when their age is deemed to meet the minimum age for marriage, then the marriage is recorded in accordance with the provisions of the applicable legislation.<sup>33</sup>

Though marriage under standard marriage age is quite dangerous for women's health. The consequences include, among others:<sup>34</sup>

- a) Too early childbirth affects the health of young women.
- b) High rate of death during childbirth.
- c) Increased transmission of sexual diseases.
- d) Lack of opportunities, expertise and social support.
- e) Poor health of babies and children has a strong relationship with the age of the

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<sup>31</sup>Kementerian Agama RI, "Pencarian Akta Nikah". *Official Website Sistem Informasi Manajemen Nikah Kementerian Agama RI*. <http://simkah.kemenag.go.id/asli.php?panel=4> (28 February 2017)

<sup>32</sup> Ahmad Badrut Tamam, "Nikah Sirri Solusi Pernikahan Anak di Bawah Umur di Desa Petung, Panceng, Gresik," *Al-Ah}wa>l 3*, No. 1 (2010), 45.

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<sup>33</sup>*Ibid*

<sup>34</sup> Arnistin Yulvianti Sabi, Gambaran Status Kesehatan dan Faktor Penyebab Pernikahan Usia Dini pada Remaja di Desa Cio Gerong Kabupaten Pulau Morotai Maluku Utara, *Official Website Repositori Institusi Universitas Kristen Satya Wacana*, [repository.uksw.edu/bitstream/123456789/2237/3/T1\\_462008047\\_BAB%20II.pdf](http://repository.uksw.edu/bitstream/123456789/2237/3/T1_462008047_BAB%20II.pdf) (31 Maret 2017)

mother who is too young. Children born to mothers under the age of 20 have a high enough risk of death.

### 3. METHOD OF RESEARCH

The approach used in this research is a qualitative approach with a case study research design in the Religious Court of Palu. The qualitative approach itself is a research procedure that produces descriptive data in the form of written or oral words from people or observable behavior.

The object of this research is the Palu Religious Court. Data were collected using observation techniques, in-depth interviews and studies from shared written documents. While the data analysis is done using reduction and verification techniques with various data sources. The data that has been reduced is then analyzed by claiming to the theoretical concepts used in this study.

### 4. RESULTS AND DISCUSSION

#### 4.1 Judge's Consideration in Determining the *Ithbat* of Marriage

Marriage *ithbat* is one of the absolute authorities granted by the Law to the Religious Courts. It is a voluntair case, a case that is not contradictory, but in the form of a request whose legal product is in the form of stipulation.<sup>35</sup> In this voluntair case,

<sup>35</sup> Interview with Mal Domu, Judge of the Religious Court of Palu, 10 August 2017

the court only implement the function of *executive power*, not *judicative power*.<sup>36</sup>

In addition to the form of a request, marriage *ithbat* can also be carried out in the form of a lawsuit, if the request is accompanied with divorce lawsuit by the wife.<sup>37</sup>

The settlement of the request of marriage *ithbat* in the Religious Court of Palu is carried out in two ways, namely integrated marriage *ithbat* in which the Religious Court carries out mobile marriage *ithbat* in several villages and sub-districts in Palu City, and the implementation of marriage *ithbat* conducted in the Palu Religious Court Office.<sup>38</sup>

The number of marriage *ithbat* cases received throughout 2016 at the Palu Religious Court amounted to 257 cases, both for integrated marriage *ithbat* and marriage *ithbat* which were held in the Office. 2016 and the remaining cases that have not been decided in 2015.<sup>39</sup>

The details of the case decisions regarding marriage *ithbat* in the 2016 Palu Religious Court are as follows:

Table 1. Results of Determination of Marriage License in 2016

<sup>36</sup> Roihan A. Rasyid, *Hukum Acara Peradilan Agama* (Jakarta: PT. RajaGrafindo Persada, 2010), 59

<sup>37</sup> Interview with Mal Domu

<sup>38</sup> Observation

<sup>39</sup> Pengadilan Agama Palu, *Laporan Keadaan Perkara Pengadilan Agama Palu Tahun 2016*

No	Establishment	Number of Cases
1	Approved	234
2	Withdrawn	9
3	Unvalid	5
4	Rejected	1
5	Canceled form registration	8
6	Not Accepted	1

Sources: The Religious Court of Palu, 2016

The results can be explained as follows:<sup>40</sup>

- a. Determination is granted. If the application submitted to the Court can be verified the truth of its argument, the request is granted in full.
- b. The decision was revoked by the panel of judges to withdraw the case at the request of the petitioners.
- c. Determination of null and void is declared by the Court if the applicant is not present before the Court on the appointed day, and does not order another person as his representative, even though he has been properly summoned, while the respondent (if the case is followed by divorce) is present. Therefore, for the interest of the respondent who has sacrificed time and costs, the determination must be decided. And in this case, the petition of the applicant was

declared null and void and was paid to pay the court fee.

- d. The decision is rejected. If an application is submitted by the applicant to the Court and before the court hearing, the Applicant cannot submit the evidence of the truth of the petition, then the petition is rejected. The rejection can be wholly or partly dependent on the applicant being able to submit his application.
- e. Determination of *NO* (*Niet ontvankelijk verklaart*). That is, the determination of the court that the request of the applicant can not be accepted because there are reasons justified by law. The reason is probably because (1) An application is not based on law, meaning that the application submitted must have a clear legal basis in demanding their rights; (2) The applicant does not have a direct legal interest attached to him. Not all those who have a legal interest can submit a request if that interest is not directly attached to him. People who are not in direct relation must have legal power from those directly involved; (3) a vague request letter means the *posita* and *petitum* in the petition are not mutually supportive or the evidence of the petition is contradictory, it may also be that the disputed object is unclear, the *petitum* may be unclear or not detailed about what is received; (4) *Nebis in idem* application, is a request submitted by an

<sup>40</sup> Mahkamah Agung RI, *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama Buku II* (Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2013), 98-100

applicant that has already been decided by the same Court with the same object and the same parties; (5) *error in personarequest* is false request; (6) Past applications are applications submitted that have exceeded the time stipulated by the Act; (7) A terminated application is the termination of the application due to a dispute over the authority to adjudicate between the Religious Court and the District Court.

- f. Crossing out the registration / cancel is the court's determination of the case based on the Court's warning letter to pay the case fee within one month after the letter of warning was issued. If it cannot be paid, then the Court will determine the case void and be dropped from registration.

The reason for submitting marriage *ithba>t* in the Palu Religious Court is quite varied. And the dominant reason for submission is that the couple do not carry out marriage registration at the local KUA or this marriage is called as underhand marriage. From this article, it can be seen that the procedural law that applies to public justice institutions also applies to religious justice institutions except those specifically regulated in Law Number 7 of 1989. In the Religious Courts Law, only specifically regulated settlement of cases related to marital disputes, both divorce divorce,

divorce or divorce on the grounds of adultery. Whereas the completion of the marriage isbat application still refers to the procedural law that applies to the general court. Of the 258 cases of marriage *ithba>t* decided in the Palu Religious Court, researchers took 23 sample cases to find out the reasons why the petitioners were carrying out marriages underhand, and the 23 case files did not mention the reasons the applicants did underhand marriage. On the posita, what is written is that the applicants were married, but did not take care of the registration at the local KUA.

#### 4.2 Juridical Review on Underhand Marriage

##### *Ithbat*

The settlement of the request of marriage *ithba>tis* one of the absolute powers held by the Palu Religious Court for the people in Palu City. The existence of marriage *ithba>t* is expected to help residents in the city of Palu to get their rights from marriages that have not been recorded.<sup>41</sup>

The procedure for implementing marriage *ithba>t* in the Religious Court is closely related to the procedural law that applies to religious justice institutions. Law Number 7 of 1989 on Religious Courts article 54 explained that

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<sup>41</sup>Kunti Nur Aini, Hakim Pengadilan Agama Palu, *Wawancara*, Palu, 14 November 2016

The procedural law that applies to the courts in the Religious Courts is the Civil Procedure Law that applies to courts in the General Courts, except those specifically regulated in this Law.

From this article, it can be seen that the procedural law that applies to public justice institutions also applies to religious justice institutions except those specifically regulated in Law Number 7 of 1989. In the Religious Courts Law, only specifically regulated settlement of cases related to marital disputes, divorce which includes talak divorce, contested divorce, or divorce on the grounds of adultery. Whereas the settlement of the marriage *ithba>t* application still refers to the procedural law that applies to the general court.

The regulations that form the core of civil procedural law in general courts are<sup>42</sup>

- a. HIR (*Het Herziene Inlandsche Reglement*) or called RIB (Reglemen Indonesia revised)
- b. RBg (*Rechts Reglement Buitengewesten*) or also called the regulation for Java and Madura.
- c. Rsv (*Reglement op de Burgerlijke Rechtsvordering*) which in the past colonial Dutch applies to *Raad van Justitie*.
- d. BW (*Burgerlijke Wetboek*) or also called The European Civil Code.

e. Law Number 2 Year 1986 on Public Justice.

From this discussion, it can be seen that the procedural law that avails in the Palu Religious Court for the settlement of the application for marriage *ithba>t* is Law No. 7 of 1989 jo. Act No. 3 of 2006 jo. Law Number 50 of 2009 on Religious Courts and RBg which is a civil procedural law that applies outside Java and Madura. Added to the Law Number 14 of 1970, Law number 48 of 2009 on Judicial Power, and Law Number 1 of 1974 on Marriage.<sup>43</sup>

In addition to the rules above, the Supreme Court has also issued a Guidance on the Implementation of Duties and Administration of the Religious Courts (Book II) which is based on applicable regulations and is made in detail to be used as a reference for Religious Courts officials both judges, registrar and bailiffs in doing their tasks in the administration and of the judiciary.

In book II on the Guidelines for the Implementation of Duties and Administration of the Religious Courts, it is explained rules in relation to the implementation of marriage *ithba>t* in the Religious Courts. The explanation related to marriage *ithba>t* in Book II is:<sup>44</sup>

<sup>43</sup>*Ibid.*

<sup>44</sup> Mahkamah Agung RI, *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan*

<sup>42</sup>Roihan A. Rasyid, *Hukum Acara Peradilan Agama* (Jakarta: PT. RajaGrafindo Persada, 2010), 21

- a. Rules of ratification of marriage *ithbat* is made on the basis of a marriage that takes place based on religion or not recorded by the authorized officials.
- b. Legalization of marriage is regulated in Article 2 paragraph (5) of Law Number 22 of 1946; Article 49 number (22) of the explanation of Law Number 7 of 1989 as amended by Law Number 3 of 2006 and the second amendment to Law Number 50 of 2009 and Article 7 paragraph (2), (3) and (4) Compilation of Islamic Law.
- c. In Article 49 number (22) in the explanation of Law Number 7 of 1989 as amended by Law Number 3 of 2006 and Article 7 paragraph (3) letter (d) of Compilation of Islamic Law, marriages that are validated are only marriages that were held before the implementation of Law Number 1 of 1974. However, Article 7 paragraph (3) letter (a) of the Compilation of Islamic Law provides an opportunity for the legalization of marriage recorded by the marriage registering officials, that was conducted before or after the enactment of Law Number 1 of 1974 for the purpose of divorce (Article 7 paragraph (3) letter (a) Compilation of Islamic Law).
- d. The *ithbat* of marriage in settling divorce is not made separately, but rather becomes a single unit in a verdict of divorce.
- e. To avoid the smuggling of law and polygamy without procedure, the Religious Court should be aware in dealing with the request for marriage *ithbat*.
- f. The process of submitting, examining and completing the requests for the *ithbat* of marriage should be guided by the following points:
- 1) the request for *ithbat* of marriage can be submitted by both husband and wife or one of them, children, guardians of marriage, other related parties, to the Religious Court in the jurisdiction of the applicant. The proposal of marriage *ithbat* must be accompanied by the clear reasons.
  - 2) The process of examining the request for *ithbat* of marriage submitted by a husband or wife is voluntair in nature, and the product is in the form of verdict. If the contents of the verdict rejects the request for marriage registration, then the husband and wife collectively or individually can submit a cassation appeal.
  - 3) The process of examining the request for *ithbat* of marriage submitted by a husband or wife is contentious in nature by positioning a wife or husband who does not submit an application as the



respondent, and the product in the form of a decision and against the decision can be appealed appeal and cassasated.

- 4) If in the process of examining the request for *ithba>t* of marriage in numbers (2) and (3) above, it is known that her husband is still bound in a legal marriage with another woman, then the previous wife must be made as a party to the case. If the applicant does not want to change his application by including his previous wife as a party, the request must be declared unacceptable.
- 5) The request for *ithba>t* of marriage can be done by children, guardians of marriage, and other parties in a contentious way, by placing husband and wige and other heirs as the respondents.
- 6) Husband or wife who has been left dead by his wife or husband, can apply for *ithba>t* of marriage in a contentiuous way,by placing other heirs as the respondent. The product is in the form of a decision and it can be appealed and cassasated.

## 5. CONCLUSION

From the above discussion, it can be concluded that:

The considerations of the judges at the Religious Court of Palu before stipulating the case of marriage under the law as follows: (1) Initially the judge will

examine the truth of the contents of the petition by reading the petition which will then be justified by the applicant.

The judge will examine the evidence submitted by the applicant by first checking the written evidence and then examination of witness. Written evidence submitted by the applicant must be relevant to the marriage request. If it is not relevant, the judge will rule out the evidence in the determination. In addition, written evidence must be matched to the original and sufficiently stamped document. This is done to see the truth of the evidence against the contents of the petition.

After examining the written evidence, the judge will examine the witnesses presented by the applicants. These witnesses will be examined alternately with the examination material, namely: (a) The witness's relationship with the applicant; (b) Conformity between the contents of the request of the applicant and the witness' statement; (c) The truth that the marriage of the applicant has taken place and is in accordance with Islamic law and theexisting law.

At that time, the judge will ask about the time, date and place of the marriage, the person who got married, the guardian, witnesses at the wedding, the dowry amount, the truth that the witness saw, heard or attended directly the implementation of the marriage contract, the status of the applicants

before marriage, the petitioners' reasons for not registering their marriages, the reasons of the petitioners for submitting a marriage endorsement, the children resulting from underhand marriages, as well as the information that the applicant's household is still harmonious and no one objected to their marriage.

Based on this examination, the judge will then make legal considerations that are based on Islamic law and the existing laws in Indonesia. In addition, the legal basis used by the judges of Religious Court in determining marriage is the Law Number 7 Year 1989 on Religious Courts as amended by Law Number 3 Year 2006 and the second amendment to the Law Number 50 Year 2009, Law Number 1 Year 1974, Book II on the Guidelines for Implementation of Duties and Administration of Religious Courts in 2013 Revised Edition, Presidential Instruction Number 1 Year 1991 on the Dissemination of Compilation of Islamic Law, *Rechtreglement voor de Buitengewesten* (RBg) or known as Civil Procedure Law for regions outside of Java and Madura.

In general, the implementation of the underhand marriage endorsement in the Religious Court Palu is in accordance with the laws and regulations applicable in Indonesia. However, the issue of underhand marriage is not in accordance with Islamic

law and legislation. The rise of this kind of marriage eliminates the sacredness of the rules on marriage age in the Law on Marriage Law. The endorsement of under the marriage legal age is the only problem in the endorsement of underhand marriage at the Religious Court of Palu which is not in accordance with applicable laws and regulations.

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