



The Legitimacy of The Marriage of Husband and Wife Who Are Converts to Islam and the Implications for Their Descendants

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Abstract

Marriage in Indonesia has been regulated in laws and regulations that apply to all Indonesian people, namely the Marriage Law Number 1 of 1974.[1] In this Law as stated in Article 2 which reads that marriage is only valid, if it is carried out according to each religion and belief, then each marriage is recorded based on the applicable laws and regulations.

The Jambi Religious Court as the executor of judicial power in the Jambi Religious High Court area has received 2 (two) cases *isbat/* marriage ratifications for non-Muslim husbands and wives to become converts to get legal certainty from marriage before embracing Islam, namely the case with Number 14/Pdt.P /2017/PA Jmb on 01 February 2017 and the case with Number 64/Pdt.P/2019/PA Jmb on 09 August 2019. The reason for converting husbands and wives to submit *isbat/* marriage ratification is because marriage before embracing Islam does not have a certificate marriage from the Civil Registry Office. So that the husband and wife of the converts filed a case *isbat/* marriage ratification to the Jambi Religious Court to ask for the validity of their marriage.

The Jambi Religious Court judge who tried the case, in his decision, granted the request and declared the marriage of a husband and wife to be converts to Islam without advocating remarriage. Even though the marital status of a non-Muslim husband and wife when they converted to Islam, the scholars were still debating until they were divided into two groups.

Keywords: Marriage Validity, Converts

Introduction

In registering marriages in Indonesia, only two government agencies can do, namely marriages carried out based on the Islamic religion, the marriage registrar will be carried out by officers from the Office of Religious Affairs. As for marriages held other than Islam, the registration is carried out by the marriage registrar at the Civil Registry Office.[2] Marriage registration is carried out by the government for the purpose of orderly administration so that the marriage gets authentic evidence of the marriage. However, if on the other hand a marriage that is not carried out in front of a marriage registrar who is only carried out based on religious provisions, this kind of marriage is also called an illegal or underhanded marriage.[3]

The group *first*, the majority of scholars are of the view that non-Muslim marriages when converted to converts are recognized as valid with the understanding that there is no need to renew (*tajdid*) their marriage.[4] Because the marriage of a husband and wife who converted to Islam at the time of the Prophet Muhammad was still alive. Many of the Prophet's companions embraced Islam, but Rasulullah SAW did not tell them to repeat their marriage.[5] As a friend of the Prophet SAW named Ghailan who converted to Islam from



Christianity. In this Hadith, Rasulullah SAW ordered Ghailan to choose four wives from 10 of his wives to remain wives, but Rasulullah SAW did not ask about the requirements for marriage that was carried out before converting to Islam for the four wives of Ghailan, this is based on the Hadith which reads:

"That Ghailan bin Salamah converted to Islam, while he had 10 (ten) wives and they also converted to Islam with him, the Prophet Muhammad SAW ordered him to choose 4 (four) wives from his wives." [6]

The group *second*, that non-Muslim husbands and wives when they become converts are recommended to renew (*tajdid*) their marriage. This is intended to fulfill the provisions of marriage contained in Islamic law, because marriages that have been carried out before embracing Islam become damaged and become void. [7] As according to Maliki scholars who state that non-Muslim marriages are carried out according to the teachings of their religion and then the husband and wife simultaneously become converts, marriage before embracing Islam is damaged because it is not in accordance with Islamic teachings. [8] According to Muhammad Jawad Mughniyah as quoted by Boedi Abdullah and Beni Ahmad Saebani, stated that the law will apply if someone embraces the religion of a people, so that the law that applies in the religion of a people will also apply to someone who embraces that religion.]

On the basis of this opinion, it is clear that the marital status of a non-Muslim husband and wife when they both converted to Islam, the marriage before converting to Islam was damaged and canceled because both had embraced Islam. This is due to the damage and cancellation of their marriage due to the non-fulfillment of the conditions and pillars of marriage that have been regulated in Islamic law. based on these considerations, non-Muslim husband and wife marriages when both become converts must carry out a renewal (*tajdid* marriage) to obtain legal certainty from their marriage. [10]

The opinion of this second group of course has reasons for this opinion. Because the law will be able to change based on changes in time, place and circumstances. [11] Change will be needed if it is no longer relevant to changes in time, place, situation, and culture. Of course, changes and changes do not just change, but these changes are still oriented towards values, human identity and humanity. [12]

Basically, legal events will have legal consequences. Marriage that has been regulated and promulgated by religion and government, so that its implementation is a legal event that has and has legal consequences as well. With the stipulation of marriage ratification for husband and wife converts at the Jambi Religious Court as stated above, however, there will be legal consequences that need to be studied further, especially on the hierarchy of children born after the marriage of converts to Islam husband and wife was legalized at the Jambi Religious Court. [13]



Determination of the Legality of Married Marriages for Muslim Husbands and Wives

In Article 60 of the Law on Religious Courts Number 7 of 1989 what is meant by stipulation is a judge's statement which is delegated in writing then the statement is pronounced by the judge in a trial which is open to the public and the statement is the result of the examination of the petition/case volunteer. That the stipulation contains considerations and a dictum for the settlement of the petition case in the religious court.[14]

The linguistic determination is also called *al-Isbat* in Arabic while in Dutch it is called *beschikking*. Determination usually contains an affirmation or statement regarding a legal situation or position (relationship) between the parties in the application case.[15]

The stipulation is included in the decision *declaratoir* which is a product of the court whose petitum contains a statement regarding a condition and the condition is declared valid according to law. For example, in the case of *isbat*/ marriage ratification, the decision states that the marriage is valid between the litigants. So that the determination is only in the nature of establishing a situation for the parties who are legally litigants and not adjudicating because it is not a dispute in the case.[16]

According to Sulaikin Lubis and his colleagues, the determination is a product of the court which is called an unreal product of justice which is also known as *jurisdictio voluntaria*. This is because the stipulation does not contain an element of dispute between the litigating parties because in that case the parties are also called the applicant who is requesting to be determined about something.[17] Then the dictum of determination contains an affirmation or legal statement regarding the requested matter. Then the court in its statement may not include a dictum containing an element of punishing anyone.[18]

According to M. Yahya Harahap, the determination has the power of proof with the following reasons:

1. The stipulation has a perfect and binding evidentiary value (*volledig en bindende bewijskracht*), because every stipulation handed down by the court is valued as an authentic deed. Because the product of a court order is a deed officially made by an authorized official.[19]
2. The value of the power of proof is only attached to the parties who filed the case. This is in accordance with the nature of the examination process which is only *ex-parte*- or one sided, the value of the strength of evidence inherent in the determination is the same as the *ex-parte* itself.[20]
3. Basically the stipulation does not adhere to the principle *Ne bis Idem* because the stipulation only attaches unilateral binding power because there is no opposing party.[21]

a. The validity of marriage

Marriage is *sighat* a marriage contract which justifies social relations between a man and a woman who was not before *mahram* and between the two will give rise to rights and obligations. As the Word of Allah SWT:



"And if you are afraid that you will not be able to do justice to (the rights of) an orphaned woman (if you marry her), then marry (other) women that you like: two, three or four. Then if you are afraid that you will not be able to do justice, then (marry) only one, or the slaves you have. that is closer to not doing wrong." [22]

In the teachings of Islam for those who wish to get married, it is recommended to immediately carry out marriage, because marriage is an order in Islamic teachings that can prevent immoral acts, both eyesight and avoid adultery. However, if you are unable to carry out the marriage, it is recommended to fast. If fasting is expected to be able to fortify oneself from actions that are prohibited by Islam. [23] This is based on the Hadith of the Prophet Muhammad narrated by Abdullah ibn Mas'ud:

"O young people, whoever of you is able to prepare provisions, get married, because indeed marriage can protect eyesight and maintain farji, whoever is unable then he should fast, because fasting can be a fortress." [24]

Marriage is regulated in Islam so that humans can channel their biological needs in accordance with human norms. So marriage is a sunnah of the Prophet Muhammad. As the Hadith narrated by Anas ibn Malik, that the Prophet Muhammad SAW said:

"But I pray, sleep, fast, break my fast, and I marry women. So whoever hates my sunnah, then he is not one of my group." [25]

Based on the hadith of the Prophet Rasulullah SAW, to carry out a marriage is something full of values. Thus, it is hoped that the goal of a household life is to be achieved *sakinah, mawaddah, and rahmah*, so in carrying out marriage in Islam one must meet the requirements and pillars of marriage, so that the purpose of marriage is achieved. [26]

According to Amir Syarifuddin, among fiqh scholars there is an *ikhtilaf* in placing what are called the pillars and which are called the conditions for marriage. However, *ikhtilaf* among fiqh scholars is not substantial. *Ikhtilaf* This is influenced by differences in seeing the focus of marriage itself. For example, Hanafiyah scholars view marriage only in terms of the marriage contract carried out by the parties who carry out the marriage, so the Hanafiyah scholars only classify the marriage contract as a pillar of marriage, while the presence of witnesses at the time of marriage is only a condition of marriage as well as the dowry in marriage is also a sign of marriage. condition. Among the Hanafi scholars, the conditions for marriage are classified into 4 (four) groups, namely: [27]

1. The conditions that determine the implementation of a marriage contract are called *syuruth al-in'iqad*. In carrying out a marriage depending on the *sighat of the* marriage contract, then the conditions in question are conditions related to the contract itself, these conditions must be met. If these conditions are abandoned, then the marriage contract will be void.



For example, the parties to the contract are people who are deemed to have the ability to take legal action.

2. The conditions that determine its existence in marriage are called *syuruth al-shihhah*. Because these conditions must be fulfilled by people who want to carry out marriages because these conditions will have legal consequences, if these conditions are not met, then the marriage is not legally valid; such as the dowry in every marriage.
3. The conditions that determine the duration of a marriage are called *syuruth al-nufuz*. This requirement will have an impact on legal consequences after it is carried out so that the validity of a marriage depends on the existence of those conditions which are not fulfilled causing the breakdown of a marriage, for example the guardian of the marriage will hold a *sighat* marriage contract is someone who has the authority to do so.
4. The conditions that determine the certainty of a marriage in the sense that it depends on the continuation of the duration of a marriage so that with the existence of these conditions it is impossible for the marriage that has already taken place to be annulled. The condition in question is *syuruth al-luzum*. For example, if these conditions have not been met, the marriage can be annulled, for example, a husband must be in a *relationship* with his wife.

According to the Syafi'iyah scholars, what is said by marriage is a series of everything at the time of the marriage that becomes harmonious. So that what is said with the pillars of marriage in the opinion of Syafi'iyah scholars is not only a marriage contract, but also a series of everything that is realized in a marriage.[28]

Based on the opinion of the Syafi'iyah scholars, it is said that the main elements in a marriage are the prospective groom and the prospective bride who will carry out the marriage, *sighat* the marriage contract itself, the guardian of marriage from the woman's side who will carry out the contract with the prospective groom. witnessed by two witnesses at the time of the marriage contract. So the pillars of marriage according to the opinion of the Syafi'iyah scholars are as follows:[29]

- a. There are grooms and brides.
- b. The guardian of the marriage of the bride-to-be who will perform the marriage contract with the groom.
- c. There were two witnesses at the time of the marriage.
- d. *Ijab* spoken by the guardian and *qabul* pronounced by the groom.

According to Slamet Abidin and Aminudin, basically, the majority of scholars will agree if the matters involved in a marriage consist of:

1. There are prospective grooms and brides who will carry out the marriage;
2. The marriage guardian of the bride who will perform the marriage contract with the groom, because the *sighat* marriage contract becomes



valid, if there is a marriage guardian or his representative who will marry off,[30] based on the hadith of the Prophet Muhammad:

"Anywoman who marries without permission guardian, then the marriage is void."[31]

Then in another hadith the Prophet Muhammad SAW said:

"A woman should not marry another woman, and a woman should not marry herself."[32]

3. In carrying out the *sighat* marriage contract there must be two witnesses in witnessing the marriage contract, if the marriage is not witnessed by two witnesses then the marriage is invalid,
4. In the implementation of *sighat*, the marriage contract is a marriage agreement which is carried out between the marriage guardian and the prospective groom. Where the consent will be given earlier by the guardian representing the woman, then the groom will answer.[34]
5. In carrying out a marriage, there is a gift from the prospective groom to the prospective bride which is called a dowry or dowry. Giving this dowry is a form of expression of sincerity from the prospective groom to the prospective bride to foster a sense of love for a wife to a prospective husband.[35]

In Islamic law the validity of a marriage is determined by the pillars and conditions of marriage that are manifested in a marriage between a man and a woman.[36] Because from a legal point of view, to determine whether a marriage is valid or not, it is the fulfillment of the pillars and conditions that have been determined.[37] This is in line with the opinion of Mahmud Yunus who stated that all the sequences contained in carrying out a marriage must be fulfilled because it is a pillar of marriage, if it is not fulfilled in carrying out a marriage, then the marriage is considered null and void.[38]

A marriage is considered null and void due to the non-fulfillment of the conditions and pillars that have been set by the syara' law. This results in damage to a person's practice from a legal point of view. Then if the conditions and pillars that have been determined are not fulfilled, the act is categorized as an act that is prohibited and even forbidden by Islam. So, in general, the cancellation of a marriage is "damaged or invalid marriage because it does not meet one of the conditions or one of its pillars, or other reasons that are prohibited or forbidden by religion".[39]

Whereas according to Al-Jaziri what is said about marriage *fasid* and marriage *false*, as stated in his book entitled *al-fiqh 'ala al-Mazahib al-Arba'ah*:



Fasid marriage is a marriage that does not fulfill any of the conditions, while a false marriage is when it does not fulfill its pillars. The law of fasid and false marriage is the same, that is, it is not valid.”[40]

The opinion above differs from the opinion of Ash-Shan'ani who argues that the term marriage is *fasid* not found in the Qur'an and al-Hadith so that the *share* does not exist. Then Ash Shan'ani argued that in Islamic law there are only two known marriages, namely a valid marriage and marriage *false*. So according to Ash-Shan'ani there is no such thing as marital status that exists between a valid marriage and marriage *false*. However, the fiqh experts in the Al Hadawiyah circle are fattening Between a valid marriage and a *false* marriage, there is actually a marriage called *Al Aqdul Nikah* in a further development is called the *marriage of fasid*. Even though Ash Shan'ani in his opinion does not recognize the existence of *fasid marriage* this, but among other fiqh experts in the various works that have been compiled, admitting the existence of *fasid marriage* this by providing limitations on this matter, in the discussion of *marriage al fasid* it is still very limited and the classification is also different between "*nikahul fasid*" and *marriage illegitimacy*.[41]

Based on these two points, Islamic jurists have different opinions regarding the *marriage of fasid*, but the two things are usually inseparable from each other and hence it is difficult to distinguish between the two. *Marriage* is a marriage that does not fulfill everything that is a series in marriage, namely the pillars of marriage that have been determined by sharia law so that the marriage becomes void. Furthermore, what is meant by stipulated by *nikahul fasidsharia* is a marriage carried out by a man with a woman who does not meet the requirements that have been law so that the marriage is damaged. So on that basis, there is an invalid marriage and must be annulled.[42]

b. converts

Mu'allafahquluubuhum or as we know it converts it, said converts in the language is the heart of someone who has been lured or tamed, in other words, his heart has been conquered. So what can be done is to gently attract sympathy. Meanwhile, according to Sayyid Sabiq, a convert is defined as a person whose heart must be softened in embracing Islam. The aim is to strengthen his weak Islam, so as to prevent bad deeds against Muslims.[43]

The definition of converts according to Yusuf Qardhawi are people whose hearts are inclined to Islam and are expected to increase to Islam, so that it is hoped that their hearts will be prevented from having evil intentions against Muslims and bringing benefits to Islam, namely defending and helping Muslims from enemies. [44]

Yusuf Qardawi's opinion is in line with Hasbi Ash-Shiddieqy's opinion which states that converts are people whose hearts need to be softened and their sympathy drawn to the religion of Islam and people whose hearts have been softened need to be rejected for their crimes against Muslims and these people are expected to be will defend religion and Muslims.[45]



Based on the above definition, the researcher can conclude that converts are people who already have a tendency to Islam so that their beliefs need to be strengthened again about Islam so that they are expected to provide benefits to Muslims and avoid crimes against Muslims.

Conclusion

Marriages that are not carried out before an official who has authority cannot legally be recognized, because this marriage does not have authentic evidence, so that everything arising from the marriage will have an impact on the parties involved, such as husband or wife who want to take care of the deed. Birth of a child[46] as well as making a passport must attach a Marriage Certificate Quotation.[47] So to obtain legal certainty from marriages that are not carried out before an authorized official for Muslims, you can take a case in a religious court to file a case *isbat/* marriage ratification. Because the case *isbat/* marriage ratification is the authority of the religious court to try it as stated in Article 7 paragraph 2 of the KHI which states that "marriages that cannot be proven by a marriage book or marriage certificate, can file a case *isbat/* marriage ratification to the religious court".

So that every Indonesian citizen who is Muslim to obtain legal certainty from his marriage has clearly regulated the procedure, both in Law Number 7 of 1989 and KHI. However, the regulation does not clearly and definitely regulate the way out for the marital status of husband and wife to convert to Islam to obtain legal certainty from their marriage before embracing Islam because the marriage was not recorded by the competent authority. In fact, the regulation is one of the legal instruments for judges in religious courts to examine and decide on a case *isbat/* ratification the marriage he tried. Because the religious court is an institution that exercises judicial power to enforce law and justice based on Islamic law, for the sake of the implementation of the State of Law of the Republic of Indonesia based on Pancasila.

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[1] Jamaluddin and Nanda Amalia, *Teaching Marriage Law*, (Lhokseumawe: Unimal Press, 2016), p. 25.

[2] This is as stated in Article 2 paragraphs 1 and 2 of the Government Regulation of the Republic of Indonesia Number 9 of 1975.

[3] Illegal or underhanded marriages are also referred to as unofficial marriages because they are not carried out before an official who has the authority. So that illegal marriages do not get legal force, if illegal marriages are carried out based on the rules set out in Islamic law, namely the terms and pillars that have been stipulated in Islamic law, then the marriage is valid. see Beni Ahmad Saebani, *Fiqh Munakahat*, (Bandung: Pustaka Setia, 2018), p. 84.



- [4] Wahbah az-Zuhili, *al-Fiqh al-Islami wa Adilatuhi*, cet. 2nd, (Damascus: Dar al-Fikr, 1985), p. 159.
- [5] Beni Ahmad Saebani, *Op.Cit.*, p. 86.
- [6] (Narrated by Imam Ahmad and At-Tarmidhi, No. 1047).
- [7] Beni Ahmad Saebani, *Op.Cit.*, p. 86.
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- [19] *Ibid.*, p. 41.
- [20] *Ibid.*
- [21] *Ibid.*, p. 42.
- [22] Surah An-Nisa verse 3.
- [23] Ahmad Rifiq, *Islamic Law in Indonesia*, (Jakarta: RajaGrafindo Persada, 1995), p. 69.
- [24] (Narrated by Bukhari, No. 5065 and Muslim, No. 1400).
- [25] (Narrated by Bukhari No. 5063, Muslim No. 1401, Ahmad (III/241, 259, 285), An-Nisa'i (VI-60), and Al-Baihaqi (VII/77).
- [26] Ahmad Rifiq, *Op.Cit.*, pp. 70.
- [27] Amir Syarifuddin, *Islamic Marriage Law in Indonesia (Between Munakahat Fiqh and Marriage Law)*, (Jakarta: Kencana, 2007), p. 59-60.
- [28] *Ibid.*
- [29] *Ibid.*, p. 61.
- [30] Amir Syarifuddin, *Op.Cit.*, p. 46.
- [31] (It was determined by the four Imams of Hadith except An-Nasa'i and declared valid by Abu Awabah, Ibn Hibban, and Al-Hakim).
- [32] (HR. Ad-Daraqutni No. 3:227 and Ibn Majah).
- [33] (HR. 'Abdurrazzaq (VII/215) and authenticated by Shaykh Al-Albani in Al-Irwaa' (No. 1858).
- [34] Amir Syarifuddin, *Op.Cit.*, p. 47.
- [35] Beni Ahmad Saebani, *Op.Cit.*, pp. 108-109.



- [36] Jamaluddin and Nanda Amalia, *Op.Cit.*, pp. 49-50.
- [37] Amir Syarifuddin, *Op.Cit.*, pp. 59.
- [38] Beni Ahmad Saebani, *Op.Cit.*, pp. 107.
- [39] Abdul Rahman Ghozali, *Fiqh Munakahat*, (Jakarta: Kencana, 2008), pp. 141.
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