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**JURIDICAL ANALYSIS OF MALANG REGENCY  
RELIGIOUS COURT JUDGMENT CONCERNING  
CANCELLATION OF MARRIAGE ISBAT  
ACCORDING TO MARRIAGE LAW AND ISLAMIC  
LAW**

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**ABSTRACT**

Marriage Isbat is a validation of marriage. Not all application of marriage isbat are accepted, one of which is Decision No. 0637/Pdt.G/2021/PA.Kab.Mlg where the Religious Court decided to cancel the marriage isbat that has been granted. The main issue in Decision No. 0637/Pdt.G/2021/PA.Kab.Mlg is that the application of marriage isbat is formally flawed due to the lack of parties in it. The writing method used is a normative juridical method with a qualitative juridical analysis method. The purpose of this study is to find out the consideration of the Court in deciding this case and the legal consequences of the cancellation of marriage isbat according to Indonesian Marriage Law and Islamic Law. Based on the result of the study, the Judge's consideration in Decision No. 0637/Pdt.G/2021/PA.Kab.Mlg is in accordance with the relevant regulations. Meanwhile the legal consequences of the marriage isbat cancellation is that the registered marital status is reverted to the unregistered marriage. Based on the Marriage Law, unregistered marriages have very detrimental effects for both wife and children. While based on Islamic law the legal consequences are the same as the validity of marriage based on the Marriage Law.

**Keywords:** cancellation of marriage isbat; formal defect; unregistered marriage.

**INTRODUCTION**

Society is a human being who has fallen to achieve various goals and needs in his life, whether individually or as well as in groups. In igniting his life, society always carries out interactions which begin because of a need and interdependence between

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one individual and another.<sup>1</sup> The form of interaction between individuals in society one of them is the marriage carried out by a man with a woman where the relationship of interaction must be given strict arrangements by the state through law applicable positive. The purpose of the regulation is to guarantee order and legal certainty, as well as the impact of the rule of law. In Indonesia, before 1974 matters concerning Marriage were regulated in various regulations such as in customary law and Islamic law. As for Law Number 1 of 1974 concerning Marriage is a form of realization of the state's regulation of a marriage.<sup>2</sup>

Legal unification in the field of family law, Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage ( hereinafter referred to as Marriage Law ) not only regulate marriage, but also about the position of the child, the rights and obligations between parents and children, and guardianship which are all part of family law.<sup>3</sup> Furthermore, regulations regarding marriage are also regulated in Presidential Instruction No. 1 1991 concerning Compilation of Islamic Law ( hereinafter referred to as Compilation of Islamic Law )

The marital arrangements other than in the Marriage Law shows that marriage is something that is considered sacred and sacred by every religion, therefore the marriage tongue and religious tongue are always interconnected. In the Marriage Law it is stated that: " Marriage is the birth bond of bathin between a man and a woman as husband and wife with the aim of forming a happy and eternal family ( household ) based on the Godhead of the One<sup>4</sup> Based on the law it can be concluded that the purpose of a marriage, to build a happy and eternal family that he experiences, gives rise to an obligation between husband and wife to complement and complement each other help so that each person can develop his personality in order to achieve the welfare of life.<sup>5</sup>

Marriage results in legal consequences for the husband and wife of which are related to the legal relationship between the two, the existence of marital property, the status and position of the child, and in terms of inheritance. As for the consequences of the law only for couples who have a legal marriage in accordance with the provisions of

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<sup>1</sup> Mochtar Kusumaatmadja dan B. Arief Sidharta, (2000). *Pengantar Ilmu Hukum: Suatu Pengenalan Pertama Ruang Lingkup Berlakunya Ilmu Hukum*. Bandung: Alumni. p. 14.

<sup>2</sup> Sonny Dewi Judiasih, (2015). *Harta Benda Perkawinan: Kajian terhadap Kesetaraan Hak dan Kedudukan Suami dan Isteri atas Kepemilikan Harta dalam Perkawinan*. Bandung: Refika Aditama. p. 1-2.

<sup>3</sup> Djuhaendah Hasan, (1988). *Hukum Keluarga Setelah Berlakunya UUU No. 1 Tahun 1974*. Bandung: CV. Armico. p.18.

<sup>4</sup> Pasal 1 Undang-Undang Nomor 16 Tahun 2019 Tentang Perubahan atas Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

<sup>5</sup> Djuhaendah Hasan. *Op.Cit.* p. 25.

Article 2 paragraph (1) and paragraph (2) Marriage Law, that is done based on religious law and beliefs which are then painted according to applicable laws and regulations.

Article 2 of the Marriage Law proves that religion remains the benchmark in establishing the validity or absence of a marriage. When carrying out a marriage, getting along well and the conditions of marriage must not be left behind can cause a marriage to be invalid. According to Islamic law, it is commonly called a marriage from a marriage, namely: a prospective husband and wife, a guardian, two witnesses, and handover.<sup>6</sup> If these provisions are fulfilled, then the marriage is considered to be shar'i (Islamic Shariat).

Religion is the benchmark for establishing the legal or not of a marriage as implied in Article 2 of the Marriage Law, therefore every religion certainly has a different mechanism. This can be seen from the variety of marriages, especially for Muslim communities who still have many marriages under the hands or stepmills, ie marriages that are not under the supervision of the Marriage Servants. The marriage is considered valid according to religion but does not have legal force because it does not have valid proof of marriage according to applicable law. Therefore this marriage is a demand for every couple who carries it out to obtain a marriage certificate which is very necessary to complete the administration so that the marriage is legal in the eyes of the state and has legal force.

For couples who have been religiously married and have never recorded their marriage in front of a marriage registrar, there is a mechanism for submitting marriages (marriage certificate), namely the determination of the ratification of the religious marriage of the religious court as stated in the Compilation of Islamic Law Article 7.

Isbat marriage has a meaning which means establishing a marriage, the word isbat itself comes from the word tsa bat ta which has a fixed meaning and na ka ha which has the meaning of marriage.<sup>7</sup> Based on the Decision of the Chief Justice of RI No. KMA/032/SK/2006 concerning guidelines for carrying out court duties and administration, marriage sickness can also be interpreted as determining the truth of marriage or in other words an endorsement of the validity of a marriage that has been carried out based on Islamic law that is not painted to the Office of Religious Affairs or Nikah Registrar. Submission of marriage and marriage does not require the spouse to repeat the marriage again and this submission can be submitted by the husband or wife, their children, marriage guardians or those who have an interest in them.

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<sup>6</sup> Pasal 14 Instruksi Presiden No. 1 Tahun 1991 tentang Kompilasi Hukum Islam

<sup>7</sup> Ahmad Warsono Munawwir, (2002). *Al-Munawwir Kamus Arab-Indonesia*. Yogyakarta: Pustaka Progresif. p. 145.

To avoid legal smuggling, that is, an act carried out to eliminate an undesirable legal effect or to create a desired legal effect such as polygamy without procedure, The Court of Religion must be careful in handling requests for marriage and marriage must therefore refer and pay attention to Book II of the Guidelines for the Implementation of the Duties and Administration of Religious Justice in the ratification of marriage/marriage. Regarding this marriage certificate application, not all applications are granted and there are even a number of lawsuits relating to the cancellation of the marriage certificate decision that was previously granted, one of which is Decision Number 0637/Pdt.G/2021/PA.Kab.Mlg which invalidates the marriage certificate decision Number 1086/Pdt.G/2018/PA.Kab.Mlg.

The subject of the dispute in Decision Number 0637/Pdt.G/2021/PA.Kab.Mlg is a marriage certificate application submitted by the Defendants to the Malang District Religious Court and has been granted in accordance with Decision Number 1086/Pdt.G/2018/The PA.Kab.Mlg does not seat the Plaintiffs as parties, even though the Plaintiffs are siblings or legal heirs of Sinwani bin Legimin who also have a legal interest in the case, therefore the request for marriage isbates a quo is qualified for formyl defects caused by less parties (*plurium litis consortium*).

Formil defects have a relationship with a ruling that means that a lawsuit is unacceptable (*niet ontvankelijke verklaard*). The verdict of *niet ontvankelijke verklaard* or commonly called the NO ruling is a decision which has the meaning that a lawsuit cannot be accepted when the decision is deformed formil. One form of formyl defect is an *error in persona* lawsuit in the form of disqualification or *plurium litis consortium*<sup>8</sup> The presence of *error in persona* in the form of *plurium litis consortium* is caused by the party acting as the Plaintiff or even the party acting as the defendant is incomplete, so the lawsuit contains *error in persona* because the lawsuit filed is less party.<sup>9</sup>

Based on the background above, specifically the formulation of the problem to be discussed in this design is: i) What is the legal consideration of the judge in the decision of the Malang District Religious Court Number 0637/Pdt.G/2021/PA.Kab.Mlg concerning Cancellation of Isbated Verdict Marriage containing formyl defects caused by less parties (*plurium litis consortium*) based on Marriage Law and Islamic Law?; and ii) What is the legal effect of canceling the marriage certificate decision containing formile defects caused by less parties (*plurium litis consortium*) based on the Marriage Law and Islamic Law?

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<sup>8</sup> Wila Wahyuni. (2022). Mengenal Cacat Hukum. Available from: <https://www.hukumonline.com/berita/a/mengenal-cacat-hukum-lt62a329138bae7/?page=all>. [Accessed Juni 29, 2022].

<sup>9</sup> M. Yahya Harahap, (2017). *Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*, Edisi Kedua. Jakarta: Sinar Grafika. p. 119.

## RESEARCH METHOD

The research method used is the normative juridical approach method, that is, legal research by researching library materials, then secondary data is the main data source used in this study.<sup>10</sup> The secondary data consists of primary legal material, namely the Marriage Law, Decision Number 0637/Pdt.G/2021/PA.Kab.Mlg, Decision Number 1086/Pdt.G/2018/PA.Kab.Mlg., as well as other regulations and secondary legal material, the relevant library, to analyze the decision.

The data analysis method used is qualitative juridical, that is, an analysis that refers to norms, principles, and legislation as positive legal norms which are then analyzed qualitatively, so there is no need to use models or mathematical formulas.<sup>11</sup> The research specifications used are descriptive analysis, that is, a method used to describe and analyze applicable provisions and regulations is linked to legal theories concerning the object of research.<sup>12</sup>

## DISCUSSION

### **Judge's Consideration in the Decision of the Malang District Religious Court Number 0637/Pdt.G/2021/PA.Kab.Mlg concerning Cancellation of Isbated Verdicts that Contain Formile Defects are Caused by less Parties (Plurium Litis Consortium) based on Marriage Law and Islamic Law**

Marriage isbat is a legal solution for the community that runs a marriage so that the marriage is declared legal and has legal force by submitting a marriage certificate to a religious court. One of the cases submitted to the Malang County Religious Court was a case of marriage and marriage with case number 1086/Pdt.G/2018/PA.Kab.Mlg. Based on the Decree of the Chief Justice of the Supreme Court R No. KMA/032/SK/2006 concerning guidelines for carrying out court duties and administration, marriage sickness can be interpreted as determining the truth of marriage or in other words is an endorsement of the validity of a marriage that has been carried out under Islamic law which is not painted in the Office of Religious Affairs or Marriage Registrar.

Married Isbat itself can be categorized into cases that do not contain elements of dispute (*volunteer*) and into cases containing elements of dispute (*contentious*). Isbat marriage is *volunteer* if: 1) a request is delivered in a1-equal manner by husband and wife; and 2) a request submitted by a husband or wife who has been left dead by one of

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<sup>10</sup>Soerjono Sukanto dan Sri Mamudji, (2007). *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Raja Grafindo Persada. p. 33

<sup>11</sup> Amiruddin dan Zainal Asikin, (2006). *Pengantar Metode Penelitian Hukum*. Jakarta: Raja Grafindo Persada. p. 6.

<sup>12</sup>Soerjono Sukanto dan Sri Mamudji, (2007). *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Loc.Cit.

them, while the Petitioner does not know that there are still other heirs besides himself. In addition, marriage isbates can also be contentious if: 1) a request is submitted by a husband or wife by making a husband or wife the Respondent's party; 2) a request is submitted by a husband or wife while one of them is still bound by a marriage with another party, so that the request must be included by the other party; 3) a request submitted by a husband or wife who has been left dead by one of his will but knows that there are other heirs besides himself; and 4) a request submitted by another interested party such as a marriage guardian, child or heir if both parents have died without the opportunity to request marriage, or even others.<sup>13</sup>

Marriage isbate case number 1086/Pdt.G/2018/PA.Kab.Mlg is *contentious* because this marriage application was delivered by a wife who had been left dead by her husband and knew that there were still other heirs besides her. In this case the Petitioner was Istontiyah bint Djumadi my wife who had been left dead by her husband named Sinwani bin Legimen, and the Respondent's party was Yedin Pranowo bin Sinwani, my daughter, the result of their marriage. The case is that the Petitioner requests marriage and marriage in order to complete the administrative requirements to take care of the child's birth certificate, after understanding and taking the information of the applicant and witnesses at the trial, The Panel of Judges granted the petition from the Petitioner.

The verdict of the marriage of the Malang County Religious Court, a lawsuit was found for cancellation from a third party. Case number 0637/Pdt.G/2021/PA.Kab.Mlg is a marriage certificate cancellation lawsuit filed on January 26, 2021 to the Malang County Religious Court by Ratija bint Legimin (Plaintiff I), Mustira bint Legimin (Plaintiff II), and Huri bin Legimin (Plaintiff II) hereinafter referred to as Plaintiffs against Istontiyah bint Djumadi (Plaintiff I) and Yedin Pranowo bin Sinwani (Tergugat II) hereinafter referred to as Plaintiffs.

Case number 0637/Pdt.G/2021/PA.Kab.Mlg which is a case for canceling marriage and marriage court is included in the field of marriage and the Malang District Religious Court is a Religious Court authorized to examine and try the case, this is in accordance with the Authority of the Religious Court which is divided into two authorities, namely absolute authority and relative authority. Absolute authority is an authority related to absolute power to prosecute cases, while relative authority is the

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<sup>13</sup>Yusna Zaidah, (2013). "Isbat Nikah Dalam Perspektif Kompilasi Hukum Islam Hubungannya Dengan Kewenangan Peradilan Agama". *Syariah: Jurnal Hukum dan Pemikiran*. Volume 13 (Nomor 1), p. 7-8.

authority to prosecute a case related to the jurisdiction ( jurisdiction ) where the parties live.<sup>14</sup>

Absolute authority is stated in Article 49 of Law Number 7 of 1989 concerning Religious Justice as amended by Law Number 3 of 2006 concerning Amendments to Law Number 7 concerning Religious Justice and Law No. 50 of 2009 concerning Second Amendment to Law Number 7 on Religious Justice ( hereinafter referred to as the Religious Justice Act ) which states that:

“ The religious court is tasked and authorized to examine, disconnect, and settle first-level cases between Muslim people in the field of: a. Marriage; b. Inheritance; c. Will; d. Grant; e. Endowment; f. Zakat; g. Infaq; h. Shadaqah; and i. Syari'ah economy. ”

The facts obtained by the author can be known that the Plaintiffs are siblings (heir) of the late Sinwani Bin Legimin based on the provisions in Article 171 letter c Compilation of Islamic Law (KHI) which states that: “Heirs are people who at the time of death have blood relations or marital relations with heirs, various Muslims and are not obstructed because of the law to become heirs”. Waris is based on a blood relationship in which between the late Sinwani Bin Legimin and the Plaintiffs is a brother because he is the biological child of the same parent, the late P. Legimin and Almarhumah B. Sarwi<sup>15</sup>

The subject of dispute in Decision Number 0637/Pdt.G/2021/PA.Kab.Mlg is a marriage certificate application submitted by the Defendants to the Malang District Religious Court and has been granted in accordance with Decision Number 1086/Pdt.G/2018/The PA.Kab.Mlg does not seat the Plaintiffs as parties, even though the Plaintiffs are siblings or legal heirs of Sinwani bin Legimin who also have a legal interest in the case. Therefore, the Plaintiffs consider the application not to meet formile requirements, so that the application for marriage is batics a quo is qualified for formile defects due to less parties (*plurium litis consortium*).

A formal defect has a relationship with a decision that means that a lawsuit cannot be accepted (*niet ontvankelijke verklaard*). Decision *niet ontvankelijke verklaard* or commonly called NO decision is a decision that means that a lawsuit cannot be accepted because the decision is formally defective.<sup>16</sup> There are various types of formal defects

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<sup>14</sup>Hazar Kusmayanti, Sherly Ayuna Putri, dan Linda Rahmainy, (2018). “Praktik Penyelesaian Sengketa di Pengadilan Agama Melalui Sidang Keliling Dikaitkan dengan Prinsip dan Asas Hukum Acara Perdata”. *JHAPER*, Volume 4 (Nomor 2), p. 147.

<sup>15</sup>Pasal 171 huruf c Instruksi Presiden No. 1 Tahun 1991 tentang Kompilasi Hukum Islam

<sup>16</sup>I Gusti Agung Ketut Bagus Wira Adi Putra, Ida Ayu Putu Widiati, dan Ni Made Puspasutari Ujianti, (2020). “Gugatan Tidak Dapat Diterima (*Niet Ontvankelijke Verklaard*) Dalam Gugatan Cerai Gugat di Pengadilan Agama Bandung”. *Jurnal Kontruksi Hukum*, Volume 1 (Nomor 2), p. 307.

that may exist in a lawsuit, including error in persona in the form of plurium litis consortium. The existence of error in persona in the form of plurium litis consortium is caused because the party acting as the Plaintiff or the party acting as the Defendant is incomplete, there are still parties that must be included as Plaintiffs or Defendants so that the lawsuit contains error in persona because the lawsuit filed lacks parties.<sup>17</sup>

On the day of the hearing the Defendants did not appear at the hearing so the Panel of Judges only advised the Plaintiffs to reconsider their claim, but the Plaintiffs still insisted on continuing their case. Furthermore, even though the Defendants were never present and did not submit a rebuttal, the Panel of Judges based on the principles of upholding truth and justice imposed the burden of proof on the Plaintiffs. Evidence is the presentation of lawful evidence to the judge examining the case to provide certainty about the truth about an event that is told.<sup>18</sup> Regarding this evidence, the plaintiffs in Case number 0637/Pdt.G/2021/PA.Kab.Mlg submitted two pieces of evidence, namely written evidence or letters and witness evidence.

First, written evidence or letters. According to Sudikno Mertokusumo, a letter is something that contains punctuation marks that aim to express a thought that can be used as evidence.<sup>19</sup> The Plaintiffs in case number 0637/Pdt.G/2021/PA.Kab.Mlg submitted eleven pieces of letter evidence named P.1 to P.11. Second, witness evidence. Testimony is certainty given to the judge at the trial about the disputed event by means of oral and personal notification by a person who is not one of the parties to the case, who is summoned at the trial.<sup>20</sup> The Plaintiffs in case number 0637/Pdt.G/2021/PA.Kab.Mlg presented five witnesses, namely Lani bint Salikin (Witness I), Muksin bin Asduki (Witness II), Roqi'ah bint Abu Bakar (Witness III), Nur Hamidi bin Jumari (Witness IV), and Suktikno bin Misli (Witness V).

The next consideration, the judge argued that the filing of a lawsuit for annulment by the Plaintiffs as the heirs of Sinwani was in accordance with Article 23 letter d of the Marriage Law. Then, the panel of judges argued to avoid legal smuggling, namely an action taken to negate an undesirable legal effect or to create a desired legal effect such as polygamy without procedure, the Religious Court must be careful in handling the application for isbat nikah, therefore it must refer to and pay attention to Book II on Guidelines for the Implementation of Duties and Administration of Religious Courts in the section on marriage validation/isbat nikah.

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<sup>17</sup>M. Yahya Harahap, *Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*, *Op. cit.*, p. 119.

<sup>18</sup>Efa Laela Fakhriah, (2015). "Perkembangan Alat Bukti dalam Penyelesaian Perkara Perdata di Pengadilan Menuju Pembaruan Hukum Acara Perdata". *JHAPER*, Volume 1 (Nomor 2), p. 138.

<sup>19</sup>*Ibid*, p. 139

<sup>20</sup>*Ibid*, p. 140.

The 2014 edition of the book page 144 at number (5) states that a husband or wife who has been left dead by one of them can apply for isbat nikah in a contingent manner which places other heirs besides himself as the Respondent, while the final product is in the form of a decision that can be appealed and cassated. Furthermore, number (10) outlines that other parties who are not parties but have a legal interest in the case in numbers (3), (4) and (5) can file a lawsuit to cancel the case that has been decided and authorized by the religious court or sharia court.

The Plaintiffs as the heirs of Sinwani bin Legimin who have an interest in the case even though from the siri marriage there was a child, namely Defendant II, the position of Defendant II before the marriage of Defendant I with Sinwani bin Legimin has not been legalized by the religious court, so legally it does not hinder the position of the Plaintiffs as heirs (vide Article 171 letter c KHI), so that the Plaintiffs have the position and quality to be made a party in Case Number 1086/Pdt.G/2018/PA.Kab.Mlg as required by Article 23 letter d of the Marriage Law.

Based on these matters, the Panel of Judges decided that by not seating the Plaintiffs in the case of Application for Isbat Nikah Number 1086/Pdt.G/2018/PA.Kab.Mlg which was decided on February 28, 2018, the application did not meet the formal requirements, so that it was qualified as containing a formal defect due to lack of parties (*plurium litis consortium*) and must be canceled. Furthermore, because the Defendants, although legally and properly summoned, never appeared at the trial, and their absence was not proven to be caused by a legitimate obstacle, the Defendants were declared absent. Then, because the Plaintiffs' claims have fulfilled legal reasons and are not against the right, then based on 125 HIR the Plaintiffs' claims are granted by *verstek*.

The legal considerations of the judges at the Malang Regency Religious Court in case number 0637/Pdt.G/2021/PA.Kab.Mlg above, it can be concluded that the core of the panel of judges decided the case because the Isbat Nikah Application Case Number 1086/Pdt.G/2018/PA.Kab.Mlg contained a formal defect due to lack of parties (*plurium litis consortium*) because the decision was not in accordance with what was stated in Book II of the Guidelines for the Implementation of Duties and Administration of Religious Courts in the section on marriage validation/isbat nikah.

The author agrees with the legal considerations used by the panel of judges, the panel of judges has decided the decision in accordance with the applicable regulations in this case. However, the author also argues that the consideration is still inaccurate even though it is sufficient. In the judge's consideration above, which decided that the annulment of the Isbat Nikah Application Case Number 1086/Pdt.G/2018/PA.Kab.Mlg was due to a formal defect due to lack of parties (*plurium litis consortium*) according to

the author was less precise. The Plaintiffs as the heirs of Sinwani bin Legimen were not seated, while Defendant II as a child whose position before the marriage of Defendant I with Sinwani bin Legimin had not been legalized by the religious court was not an heir of Sinwani bin Legimen was seated as a party, so from this it appears that the case was wrong in seating the Plaintiffs not lacking parties. So, the case should be canceled because it contains a formal defect because the lawsuit is wrongly targeted at the party being sued (*gemis aanhoeda nigheid*).

A lawsuit that misses the target of the party being sued (*gemis aanhoeda nigheid*) is a form of error in persona. The claim is false and incorrect. In addition, misdirection can also occur if the party being sued is a minor or under guardianship without the participation of their parents.<sup>21</sup> To strengthen these reasons, it is necessary to add other reasons. In the annulment of the Isbat Nikah Application Case Number 1086/Pdt.G/2018/PA.Kab.Mlg due to a formal defect due to the wrong target of the party being sued (*gemis aanhoeda nigheid*) in fact not only violates what is stated in Book II of the Guidelines for the Implementation of Duties and Administration of Religious Courts in the section on marriage validation/*isbat nikah*, but has also violated Article 43 paragraph (1) of the Marriage Law jo. Article 100 of the Compilation of Islamic Law which states that children born outside marriage only have a civil relationship with their mother and their mother's family.

The provisions of Article 171 letter c of the Compilation of Islamic Law states that, heirs are people who at the time of death have blood relations or marital relations with the testator, are Muslims and are not hindered by law to become heirs. Therefore, as stipulated in Article 43 of the Marriage Law and Article 100 KHI of the Compilation of Islamic Law which states that children born outside of marriage only have a legal relationship or *nasab* with their mother and their mother's family only, so it can be said that children born outside of marriage do not have a legal relationship or *nasab* with their father and of course the child cannot be the heir of his father.

With the Constitutional Court Decision Number 46/PUU-VIII/2010, Article 43 paragraph (1) of the Marriage Law should read "Children born out of wedlock have a civil relationship with their mother and mother's family and with the man as their father who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship, including a civil relationship with the father's

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<sup>21</sup>M. Yahya Harahap. *Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*. Op. Cit., P. 118.

family". Thus, the child is entitled to inheritance from his biological father after proof is carried out<sup>22</sup>

Case No. 1086/Pdt.G/2018/PA.Kab.Mlg can be said to contain formal defects due to the wrong target of the party being sued (*gemis aanhoeda nigheid*) because the Respondent in the case is not appropriate. Defendant II is not an heir of Sinwani because he is a child born from a siri marriage as in accordance with Article 43 paragraph (1) of the Marriage Law which states that: children born outside a legal marriage only have a civil relationship with their mother, although after the Constitutional Court Decision Number 46/PUU-VIII/2010, Article 43 paragraph (1) of the Marriage Law must be read "Children born outside marriage have a civil relationship with their mother and their mother's family and with the man as their father who can be proven based on science and technology and/or other evidence according to the law to have a blood relationship, including a civil relationship with the father's family".

The facts that the author found, until the annulment of *isbat nikah* case number 0637/Pdt.G/2021/PA.Kab.Mlg was filed, there was no evidence according to the law proving that Defendant II had a blood relationship, including a civil relationship with his father's family. Furthermore, on September 6, 2019, it is known that Defendant II submitted an application for Determination of Heirs to the Religious Court of Malang Regency with case number 1166/Pdt.P/2019/PA.Kab.Mlg. However, on the appointed trial day, the Panel of Judges attempted to advise Defendant II regarding his application and apparently these efforts succeeded in convincing Defendant II which resulted in Defendant II being allowed to withdraw his case, so that the Panel of Judges in its ruling granted the revocation of case number 1166/Pdt.P/2019/PA.Kab.Mlg. Because the application for determination of heirs was revoked, it can be concluded that Defendant II is still not the heir of Sinwani bin Legimin, so it is clear that Decision No 1086/Pdt.G/2018/PA.Kab.Mlg has also violated Article 43 paragraph (1) of the Marriage Law jo. Article 100 of the Compilation of Islamic Law, in which Defendant II should not be an heir, which results in not being allowed to be submitted as a Respondent in the marriage *isbat* application case.

The term annulment of *isbat nikah* due to lack of parties or wrong parties is not known in the Marriage Law and the Compilation of Islamic Law so that there are no rules regarding annulment of *isbat* due to lack of parties or wrong parties. The Marriage Law and the Compilation of Islamic Law only regulate the annulment of marriage, which is regulated in Articles 22 to 28 of the Marriage Law and Articles 70 to 76 of the

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<sup>22</sup>Ury Ayu Masitoh, (2018). "Anak Hasil Perkawinan Siri Sebagai Ahli Waris Ditinjau Dari Hukum Perdata Dan Hukum Islam". *Diversi Jurnal Hukum*, Volume 4 (Nomor 2), P. 131.

Compilation of Islamic Law. Even so, implicitly the regulation regarding the annulment of isbat nikah due to lack of parties or wrong parties can be based on the articles listed in the Marriage Law and the Compilation of Islamic Law, such as Article 43 paragraph (1) of the Marriage Law jo. Article 100 of the Compilation of Islamic Law is used as an excuse by the author to add a legal basis for the judge's consideration in Decision Number 0637/Pdt.G/2021/PA.Kab.Mlg.

In Islamic law is also not known as the term cancellation of isbat nikah due to lack of parties or wrong parties, especially in Islamic law the term isbat nikah itself is not known because in Islam marriage is not required to be registered, the most important thing is that the marriage is in accordance with the pillars and conditions of marriage according to Islamic law as stated in Article 14 of the Compilation of Islamic Law, namely: a) there is a prospective husband and wife; b) there is a guardian of the prospective wife; c) there are two witnesses from each party; and d) there is ijab and qobul. The pillars and conditions of marriage according to Islamic law function so that the validity of a marriage can be accounted for. Witnesses in law as a means of I'lan because Islam is very respectful and protects the rights of a person. If one day it is necessary to prove the marriage, the witnesses are obliged to give their testimony based on what they witnessed. Therefore, in classical fiqh studies, marriage registration is not discussed because it has not received serious attention in fiqh studies.<sup>23</sup>

Marriage registration in the Al-Quran and Hadith is not found, registration in Islamic law refers more to the act of muamalah, as stated in Q.S. Al-Baqarah verse 282 which means:<sup>24</sup>

"Who believe! When you do business for a fixed time, write it down. And let a scribe among you write it down correctly..."

The verse above recommends recording muamalah transactions, especially those that are not in cash, besides that it must be witnessed by two men or if there is no one, it can be by one man and two women who aim to avoid doubt, confusion, and uncertainty. In addition, marriage in Q.S. Al-Nisa verse 21 is called not ordinary muamalah but *mitsaqan ghalidzan*, which is a strong and great agreement not only between men and women and their families but also with Allah SWT. Referring to this, if non-cash muamalah transactions are recommended to be recorded, marriage, which is a *mitsaqan ghalidzan*, should be more important to be recorded.

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<sup>23</sup>Chaula Luthfia dan Hamdan Arief Hanif, (2022). "Urgensi Pencatatan Perkawinan Perspektif Hukum Islam". *Sahaja: Journal Shariah and Humanities*, Vol 1 (Nomor 2), p. 89.

<sup>24</sup>Umar Haris Sanjaya dan Aunur Rahim Faqih, (2017). *Hukum Perkawinan Islam di Indonesia*. Yogyakarta: Gama Media Yogyakarta, p. 82.

At Tirmidhi there is a hadith that instructs to do the marriage contract in the mosque, which means:<sup>25</sup>

"Ā'isyah said that the Messenger of Allah (blessings and peace of Allah be upon him) said: Announce the marriage and make a place for announcing it in the mosques and beat the tambourines." (H.R. At-Tirmidhi No. 1089).

The hadith above recommends announcing marriage (*I'lan al-nikah*) with the intention of announcing that a marriage has occurred and preventing the suspicion of adultery. This means that in fiqh implicitly recording marriage is already implied in the tradition of *I'lan al-nikah* which is then realized in the form of a *walimah* al'urusy celebration<sup>26</sup>

The verses of the A-Quran and hadith above, there is also a fiqh rule that states *Darul mafasidu muqaddamun ala jalabil mashalih*, which means preventing harm takes precedence over seeking benefit. Recording refers to the benefit, therefore it is not a problem if Q.S Al-Baqarah verse 282 is used as qiyas in the marriage registration process. Based on fiqh law, this can be said to be *mashlahat mursalah*, which means deciding a law on a *masalahah* whose provisions are not mentioned in the Qur'an or sunnah, while this decision is carried out as a way to find benefit and ward off damage to human life. Imam Syafii said that "every event must have legal certainty and Muslims are obliged to carry it out". If it is found that there is no ruling, then *ijtihad* can be used through the *qiyas* method.<sup>27</sup>

### **Legal Consequences of the Cancellation of Isbat Nikah Decisions Containing Formal Defects Due to Lack of Parties (Plurium Litis Consortium) Based on the Marriage Law and Islamic Law**

The annulment of marriage is a decision of the court which means that the marriage carried out is said to be invalid (*no legal force or declared void*) and therefore by itself the marriage is likened to never happening or never existing (*never existed*), therefore the married couple whose marriage is annulled is considered to have never had a marriage.<sup>28</sup>

The court that has the authority to annul a marriage is the court whose jurisdiction covers the place where a marriage took place or the residence of the husband and wife or the residence of one of them. For Muslim communities, marriage annulment is

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<sup>25</sup>Chaula Luthfia dan Hamdan Arief Hanif, (2022). "Urgensi Pencatatan Perkawinan Perspektif Hukum Islam". *Op. Cit.*, p. 88.

<sup>26</sup>*Ibid.*

<sup>27</sup>Umar Haris Sanjaya dan Aunur Rahim Faqih, (2017). *Hukum Perkawinan Islam Di Indonesia. Op.Cit.*, p. 83.

<sup>28</sup>M. Yahya Harahap, (1975). *Hukum Perkawinan Nasional Berdasarkan Undang-Undang Nomor 1 Tahun 1974 dan Peraturan Pemerintah Nomor 9 Tahun 1975*. Medan: CV Zahir Trading Co., p. 71.

submitted to the Religious Court, while for non-Muslim communities, marriage annulment is submitted to the District Court. The authority to annul a marriage is in the Religious Court and the District Court in order to avoid the annulment of marriage by other agencies outside the court, considering that the annulment of a marriage has far-reaching consequences for the husband and wife or their families.<sup>29</sup>

The annulment of marriage in the Marriage Law is regulated in Articles 22 to 28. Article 22 of the Marriage Law states that:

"A marriage may be annulled if the parties do not fulfill the conditions for entering into a marriage."

The rules regarding the annulment of marriage for people who are Muslims, apart from the Marriage Law, are also regulated in the Compilation of Islamic Law Articles 70 to 76. Regarding the annulment of this marriage, the Compilation of Islamic Law distinguishes between marriages that are null and void and marriages that can be annulled.

Marriage that is null and void is due to the violation of a marriage prohibition and as a result the marriage is considered to have never existed, while a marriage that can be annulled is due to the violation of certain requirements or applicable regulations and is only related to other parties whose rights are harmed, and as a result the marriage returns to its original position before the marriage took place.<sup>30</sup>

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<sup>29</sup>Karimatul Ummah. (2020). Status dan Hak Anak Akibat Pembatalan Perkawinan Orang Tuanya. Available from: <https://www.hukumonline.com/klinik/a/status-dan-hak-anak-akibat-pembatalan-perkawinan-orang-tuanya-lt5efeccbed6ae>. [accessed Maret, 7, 2023].

<sup>30</sup>*Ibid.*

Marriages that are null and void are regulated in Article 70 of the Compilation of Islamic Law which states that:

"Marriage is void if:

- a. The husband enters into marriage when he is not entitled to do the marriage contract because he already has four wives, even if one of them is in the iddah of divorce;
- b. a person marries his ex-wife whom he has divorced;
- c. a person marries his former wife whom he has divorced three times, except if the former wife was married to another man and then divorced again ba`da al dukhul and the man and the iddah period has expired;
- d. the marriage is entered into between two persons who are related by blood, consanguinity and consanguinity to a certain degree which precludes marriage according to Article 8 of Law No.1 of 1974, namely:
  1. blood related in a straight line of descent down or up.
  2. related by blood in a deviant line of descent, namely between brothers, between a person and his parents' brother and between a person and his grandmother's brother.
  3. related by marriage, namely in-laws, stepchildren, sons-in-law and mother or stepfather.
  4. related by consanguinity, namely parents of consanguinity, children of consanguinity and aunts or uncles of consanguinity.
- e. the wife is a sibling or is the aunt or niece of his wife or wives."

Marriage that can be annulled is regulated in Article 71 of the Compilation of Islamic Law which states that:

"Marriage may be annulled if:

- a. a husband commits polygamy without the permission of the Religious Court;
- b. the woman who is married is later found out to still be the wife of another man who is mafqud;
- c. the woman to be married is still in iddah and another husband;
- d. a marriage that violates the age limit for marriage as stipulated in Article 7 of Law No.1. of 1974;
- e. a marriage contracted without a guardian or contracted by an unauthorized guardian;
- f. a marriage contracted under duress."

Another reason for the annulment of marriage is regulated in Article 72 of the Compilation of Islamic Law which states that:

- "(1) A husband or wife may file a petition for annulment of marriage if the marriage was contracted under an unlawful threat;
- (2) A husband or wife may file a petition for annulment of marriage if at the time of the marriage there has been deception or misrepresentation concerning the husband or wife;
- (3) If the threat has ceased, or the person who was mistakenly believed realizes his/her situation and within a period of 6 (six) months thereafter continues to live as husband and wife, and fails to exercise his/her right to file an annulment petition, his/her right shall be waived."

Marriage isbates containing formyl defects caused by less parties (plurium litis consortium), then according to the author of the case including the depth of the marriage category which can be canceled because in the case certain conditions or regulations have been violated, that is, it has violated the rules listed in Book II on the 2014 edition of the Guidelines for the Implementation of Religious Justice and Administration in the marriage endorsement section/marriage isbate page 144 of the number (5) stated that a husband or wife who has been left dead by one of them can request a marriage isbat application by means of a contingent which occupies another heir besides himself as the Respondent, the product finally takes the form of a decision that can be appealed and cassated.

Cancellation of a marriage certificate decision containing formyl defects caused by less parties (plurium litis consortium ) certainly has legal consequences for the parties involved. According to the author, the legal consequences of canceling the marriage is different from the legal consequences of marriage cancellation under the Marriage Law and Compilation of Islamic Law, this is subject to reasons for cancellation used differently.

The reason for canceling the marriage of marriage is brought to contain formyl defects caused by less parties resulting in marital status that has been repainted into an unpainted marriage or siri marriage, whereas the reasons for marriage cancellation based on the Marriage Law and Compilation of Islamic Law provided for in Article 22 of the Marriage Law and Article 71 Compilation of Islamic Law results in the termination of a marriage, so that the marriage is considered invalid and in itself is considered to have never existed or in other words that were originally husband and wife to be canceled and likened to never be husband and wife.

The validity of marriage under the Marriage Law is regulated in Article 2 of the Marriage Law and based on the Compilation of Islamic Law is regulated in Article 4 to Article 6 of the Compilation of Islamic Law which basically states that: Marriage is legal if it is carried out according to the law of each religion and its beliefs and marriages are

recorded according to applicable laws and regulations. Thus, even though the marriage has been carried out according to the law of each religion and its beliefs but is not painted, the marriage is considered invalid. This is certainly different from Islamic law which under the Islamic law of marriage is considered valid if it is in accordance with the pillars and conditions of marriage according to Islamic law as stated in Article 14 Compilation of Islamic Law, namely: a) there are prospective husbands and wives; b) there is a guardian of a future wife; c) there are two witnesses from each party; and d) there are *ijab* and *qobul*.

in Decision Number 1086/Pdt.G/2018/PA.Kab.Mlg which was canceled due to containing less party formile defects, thus resulting in the marital status between Defendant I and Sinwani bin Legimen returning to an unpainted marriage or *siri* marriage. In general, marriage in the perspective of Islamic law is permitted as long as it meets the pillars and conditions of marriage. In contrast, marriage in the perspective of Indonesian positive law is illegal marriage. Based on Indonesia's positive legal perspective, marriage *siri* is interpreted as marriage under the hands, namely marriages that do not heed the rules set out in Article 2 paragraph (2) Marriage Law which states that " Every marriage is recorded according to applicable laws and invitations ".

The article can be interpreted that the couple who is going to marry the bran tells the marriage to the state by recording it to KUA for various Muslims and to the Civil Registration Office for non-Muslims. Regarding marriage registration has been regulated in Article 2 to Article 9 of Government Regulation Number 9 of 1975 CHAPTER II concerning Marriage Registration.

Based on the provisions contained in Government Regulation Number 9 of 1975 it can be said that a marriage carried out without involving the state is strictly prohibited by the state, therefore marriages under the hands do not have legal consequences so that if there is one party feeling disadvantaged then the other party cannot make legal remedies that there is no valid and authentic evidence from the marriage which of course is a conflict with the purpose of the marriage.<sup>31</sup>

The consequences of an unpainted marriage or marriage for more details can be described as follows:

1) Against wives

Under the Marriage Law, self-marriage is an illegal marriage, so the marriage does not have legal force as stated in Article 6 paragraph (2) Compilation of Islamic Law which states that:

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<sup>31</sup> Wati Rahmi Ria, (2009). *Hukum Waris Islam*. Bandar lampung: Lembaga Penelitian Universitas Lampung, p. 95.

“(2) Marriage conducted outside the bodyguard of the Nikah Registrar does not have legal force”.

Siri marriage or unpainted marriage is very detrimental to the wife. Legally the effect that can be felt is that the position of the wife is not considered a legitimate wife, so it is not entitled to a living, a property of gono-gini, and the inheritance of the husband because of the marriage is not legally considered valid because it is not recorded by the Civil Registry Office or the Office of Religious Affairs.<sup>32</sup>

This view is differentiated from Islamic law which, based on Islamic law, self-marriage is permitted and is a legal marriage as long as it meets the pillars and conditions of marriage. As for the legal consequences of marriages that are legal according to Islamic law, they are:<sup>33</sup>

- a. Having sexual relations and having fun between husband and wife becomes halal;
- b. Obligations and rights between husband and wife;
- c. Children born from such marriages are legitimate children; and
- d. Between husband and wife and children and with parents are entitled to inheritance.

Marriage certificate application number 1086/Pdt.G/2018/PA.Kab.Mlg which has been canceled, based on the Marriage Law, Defendant I is not considered the legal wife of Sinwani bin Legimen. This is evident from the information of witnesses and Plaintiffs who stated that they did not know Defendant I as the wife of Sinwani bin Legimen. Unrecognition of Defendant I as a legal wife resulted in Defendant I not being entitled to a living, gono-gini property, and inheritance from Sinwani bin Legimen. This is certainly different from Islamic law which considers Defendant I to be the legal wife of Sinwani bin Legimen because the self-marriage they have done is in accordance with the pillars and conditions of marriage, so that Defendant I has the right to a living, the property of the gono-gini, and the inheritance of Sinwani bin Legimen.

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<sup>32</sup> Wati Rahmi Ria, (2009). *Hukum Waris Islam*. Bandar Lampung: Lembaga Penelitian Universitas Lampung, p. 95.

<sup>33</sup> Muhammad Idris Ramulyo, (2006). *Hukum Perkawinan, Hukum Kewarisan, Hukum Acara Peradilan Agama dan Zakat Menurut Hukum Islam*. Jakarta: Sinar Grafika, p. 49.

## 2) Against children

Under the Marriage Law, a legitimate child is a child born in or as a result of a legal marriage, despite being born to a pregnant woman whose womb is less than six months old since she was officially married.<sup>34</sup>

Self-marriage under the Marriage Law is an illegitimate marriage because the marriage is not painted, therefore the child born from the marriage only has a civil relationship with the mother and the mother's family if there is no evidence of a law that proves that the child has a blood relationship, including civil relations with his father's family. This is as mentioned in Article 42 and Article 43 of the Marriage Law, yes, children born from illegitimate marriages only have a civil relationship with the mother and mother's family, whereas civil relations with fathers are nothing which means the child cannot claim any rights from his father. In addition, the birth of the child is not legally implied so that the child is a child born out of marriage<sup>35</sup>

The provisions contained in Article 43 paragraph (1) after the MK Decision Number 46/PUU-VIII/2010 must be read:

“ Children born out of marriage have a civil relationship with their mother and mother's family and with men as their fathers which can be proven based on science and technology and/or other means of evidence according to the law have blood relations, including civil relations with his father's family”.

Based on this, so that Plaintiff II can have a silvery relationship with Sinwani bin Legimen who is his father and in order to obtain his rights such as the right to recognition and legal protection, can then submit child endorsement to the Religious Court on the basis of MK Decision Number 46/PUU-VIII/2010.

The writer believes that the rules mentioned above are certainly different from the rules of Islamic law which in Islamic law do not distinguish between legitimate children and children outside of marriage, which causes even if a child is born from a self-marriage that is in accordance with the conditions and get along well with the marriage, the child is said to be a legitimate child. Thus, it can be concluded that a child born from a siri marriage is entitled to recognition from the father, a living from both parents, and to get inheritance from both parents.

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<sup>34</sup> Addin Daniar Syamdani dan Djumadi Purwoatmodjo, (2019). “Aspek Hukum Perkawinan Siri dan Akibat Hukumnya”. *Notarius*, Volume 12 (Nomor 1), p. 463.

<sup>35</sup> Vivi Kurniawati, *Nikah Siri, Op. Cit.*, p. 29-30.

Children born of a step marriage even though they are recognized as legitimate children in Islamic law and get their rights such as getting recognition from fathers, living from both parents, and get inheritance from both parents, but this does not apply in Indonesia. Positive law in Indonesia, namely the Marriage Law and Compilation of Islamic Law still does not recognize any self-marriage, so that the child can only directly inherit his mother's property, not his father.

Based on the above exposure, it can be concluded that marriages under the hands cause a lot of badness ( mudharat) for the parties bound in the marriage, especially for the wife and child. Therefore, the recording of marriage or marriage isnation is required which is in accordance with Article 2 paragraph (2) The Marriage Law states that: “ Every marriage is recorded according to applicable laws and regulations ”.

in this Article it can be interpreted that the couple who is to marry the warhead notifies the marriage to the state by recording it to KUA for various Muslims and to the Civil Registry Office for non-Muslim religious. In addition, in accordance with Article 5 of the Compilation of Islamic Law which states that:

- “(1) The guaranteed marriage order for the Islamic community every marriage must be recorded.
- (2) the recording of the marriage in paragraph (1), is carried out by the employee of the Marriage Registrar as stipulated in Law No. 22 of 1946 jo. Law No. 32 of 1954.”

Referring to Decision Number 0637/Pdt.G/2021/PA.Kab.Mlg which invalidates the marriage isbatical decision number 1086/Pdt.G/2018/PA.Kab.Mlg based on the provisions contained in the Marriage Law, Compilation Islamic Law, and Book II on Guidelines for the Implementation of Religious Justice and Duties Administration in the marriage / marriage ratification section, then the legal effect that arises is the marriage between Defendant I and Sinwani bin Legimen returning to an unpainted marriage or step marriage which has very detrimental consequences for the wife and child born as explained above. As for if after the decision was handed down and there was one party feeling disadvantaged, then the party can appeal to the High Court of Religion through the Malang District Religious Court within a deadline of 14 days after the decision is read or if the party is not present then within the deadline 14 the day after the party receives notification regarding the contents of the decision.

## CONCLUSIONS

Based on the discussion above, the following conclusions can be drawn. The judge's consideration in the decision of the Malang District Religious Court Number 0637/Pdt.G/2021/PA.Kab.Mlg is in accordance with the regulations in force in this case.

Under the Marriage Law, Isbat Nikah Decision Number 1086/Pdt.G/2018/PA.Kab.Mlg has violated Article 43 paragraph (1) Jo Marriage Law. Article 100 Compilation of Islamic Law in which Defendant II should not be an heir which results may not be submitted as a Respondent in the case of the request for marriage. Whereas, based on Islamic law the decision of marriage and marriage does not violate the rules of Islamic law, in Islamic law the term is not known as marriage isbatikal is carried out in Islam. Marriage is not required to be painted the most important thing the marriage has fulfilled the harmony and the conditions of marriage according to Islamic law as stated in Article 14 Compilation of Islamic Law.

Due to the law of cancellation of the marriage certificate decision containing formile defects caused by less parties (plurium litis consortium) ie marital status that has been repainted into an unpainted marriage or siri marriage. Under the Marriage Law, self-marriage is an illegal marriage, so the marriage does not click on the legal force as stated in Article 6 paragraph (2) Compilation of Islamic Law, which is very detrimental to the wife and child born in the marriage. Whereas, based on Islamic law self-marriage is permitted and is a legal marriage provided that it is in accordance with the pillars and conditions of marriage, so that the consequences of the law that are caused are the same as marriages that are legal according to the Marriage Law.

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