

THE PROGRAM OF CIRCUIT *ISBAT NIKAH* AS THE EMBODIMENT OF ACCESS TO JUSTICE IN INDONESIA

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Abstract:

*Human rights guaranteed by the Constitution require, among other things, that every citizen should be able to access the judiciary. In reality, however, not all citizens can access the judiciary in Indonesia due to various factors including litigation costs, ignorance of litigation procedures, and distance problem. The same situation is also experienced by the society seeking for justice through Islamic judiciary (Pengadilan Agama or PA) across Indonesia. One of the Religious Courts deserved for a case study is PA Tenggarong. PA Tenggarong is one of the Religious Courts in East Kalimantan, which covers two district areas, namely Kutai Barat and Kutai Kartanegara. Kutai Barat consists of 12 sub-districts with 182 villages, while Kutai Kartanegara has 18 sub-districts with 227 villages. The geographical conditions and locations of the villages are mostly far away from the PA Tenggarong that render it difficult for the justice seekers in accessing the court, and, thus, obtaining their rights. Their legal problems mainly come from their unregistered marriages which make their unions do not exist according to the effective law. Hence, this article analyzes how the program of the legalization of unregistered marriages (*isbat nikah*) in PA Tenggarong has been implemented in order to assist the justice seekers in securing the legal certainty of marriage status. The finding reveals that the process of the legalization of marriage is conducted as a circuit marriage contract in different sub-district/village office or decent premises across Kutai Barat and Kutai Kartanegara. The program is free for eligible parties and is facilitative towards their needs and conditions, namely lacks of legal documents, ignorance of the litigation procedures, and afar domicile. This thus makes PA Tenggarong now more accessible to the public*

and the circuit isbat nikah as the embodiment of access to justice principle in Indonesia.

Keywords: *Circuit isbat nikah, access to justice, Islamic Judiciary in Indonesia*

Abstrak:

Hak asasi manusia yang dijamin oleh Konstitusi mensyaratkan, antara lain, bahwa setiap warga negara harus dapat mengakses peradilan. Namun kenyataannya, tidak semua warga negara dapat mengakses peradilan di Indonesia karena berbagai faktor termasuk biaya litigasi, ketidaktahuan prosedur litigasi, dan masalah jarak. Situasi yang sama juga dialami oleh masyarakat yang mencari keadilan melalui pengadilan Islam (Pengadilan Agama atau PA) di seluruh Indonesia. Salah satu Pengadilan Agama yang layak untuk studi kasus adalah PA Tenggarong. PA Tenggarong adalah salah satu Pengadilan Agama di Kalimantan Timur, yang mencakup dua wilayah kabupaten, yaitu Kutai Barat dan Kutai Kartanegara. Kutai Barat terdiri dari 12 kecamatan dengan 182 desa, sedangkan Kutai Kartanegara memiliki 18 kecamatan dengan 227 desa. Kondisi geografis dan lokasi desa-desa sebagian besar jauh dari PA Tenggarong yang membuat sulit bagi pencari keadilan dalam mengakses pengadilan, dan, dengan demikian, memperoleh hak-hak mereka. Masalah hukum mereka terutama datang dari pernikahan yang tidak terdaftar yang membuat serikat pekerja mereka tidak ada sesuai dengan hukum yang berlaku. Oleh karena itu, artikel ini menganalisis bagaimana program pengesahan perkawinan yang tidak terdaftar (isbat nikah) di PA Tenggarong telah dilaksanakan untuk membantu para pencari keadilan dalam menjamin kepastian hukum status pernikahan. Temuan ini mengungkapkan bahwa proses legalisasi pernikahan dilakukan sebagai ikatan kawin kontrak di kantor kecamatan / desa yang berbeda atau lokasi yang layak di Kutai Barat dan Kutai Kartanegara. Program ini gratis untuk pihak yang memenuhi syarat dan memfasilitasi kebutuhan dan kondisi mereka, yaitu kurangnya dokumen hukum, ketidaktahuan prosedur litigasi, dan domisili yang

lebih jauh. Hal ini menjadikan PA Tenggara sekarang lebih mudah diakses oleh publik dan rangkaian isbat nikah sebagai perwujudan prinsip akses terhadap keadilan di Indonesia.

Kata Kunci: *Isbat nikah keliling, access to justice, Pengadilan Agama di Indonesia*

A. Introduction

In Indonesia, a marriage is legitimate if it is carried out according to terms and conditions outlined in the respective bride and groom's religion and belief, as formulated in art. 2 (1) of Law No.1/1974 concerning Marriage. Besides, in art. 2 (2) it is confirmed that marriage shall be recorded according to the effective laws and regulations. This rule is reaffirmed in the Indonesian Compilation of Islamic Law (*Kompilasi Hukum Islam*, hereinafter KHI), art. 5 (1). In order to ensure marital orderliness for the Islamic community, every marriage must be recorded, and carried out in front of the Marriage Registration Officer (art. 6(1)). Meanwhile, marriage conducted outside the supervision of the Marriage Registration Officer does not have legal force (art. 6(2)). A marriage can only be proven by a marriage certificate made by Marriage Registration Officer (art. 7(1)). Although marriage registration is only considered an administrative requirement, it must be done, with the aim of disciplining the marital process and as authentic evidence in the form of a marriage certificate. Administrative requirements are intended to make it easier for related parties to take care of family matters, such as maintenance rights, inheritance rights, and other civil matters.¹

There are great number of people in Indonesia who do not have a marriage certificate. This situation is partly due to the understanding of the community which assumes that it is only important to perform marriage contract according to syariah (fiqh

¹ Khairuddin Khairuddin and Julianda Julianda, "Pelaksanaan Itsbat Nikah Keliling dan Dampaknya terhadap Ketertiban Pencatatan Nikah (Studi Kasus di Kabupaten Bireuen)," *SAMARAH: Jurnal Hukum Keluarga dan Hukum Islam* 1, no. 2 (December 30, 2017): 322.

oriented) and denying the existence of marriage registration. The existence of marriage records is somewhat neglected, even considered unimportant. No wonder, if more people commit *nikah sirri* (unregistered marriages) than the marriage in front of marriage registrars. Based on the National Socio-Economic Survey (Survei Sosial Ekonomi Nasional, hereinafter SUSENAS) of households that are among the poorest 30%, more than half (55%) do not have marriage certificates and most of their children do not have a birth certificate (75%).²

Although the only proof of marriage has occurred is the existence of a marriage certificate in Indonesian marriage law, the law provides a way for unregistered marriages to establish marriages that have been carried out through the legalization of marriage procedure (*isbat nikah*) as formulated in art. 7(2) of KHI. Based on data compiled by Sumner, the application for *isbat nikah* has tripled in 359 Religious Courts in Indonesia. The Religious Courts has heard more than 23,000 cases in 2012,³ and 35,000 cases of *isbat nikah* in 2013.⁴

In addition to the *fiqh* oriented above, the constraints of transportation and the geographical conditions of several regions in Indonesia as well as the limited facilities and infrastructure to gain access to the courts have caused many difficulties for justice seekers to document their marriages, especially those in remote areas. This condition is one of the problems that prevents justice seekers from obtaining legal services and justice to the court.⁵ Based on Sumner's research which collaborates with the Indonesian Supreme Court and the Family Court of Australia and Indonesia Australia Legal Development Facilities (IALDF), the poor

² Ramdani Wahyu Sururie, "Isbat nikah terpadu sebagai solusi memperoleh hak identitas hukum," *Ijtihad: Jurnal Wacana Hukum Islam dan Kemanusiaan* 17, no. 1 (June 1, 2017): 118-19, <https://doi.org/10.18326/ijtihad.v17i1.113-133>.

³ Cate Sumner, *Studi Dasar AIPJ Tentang Identitas Hukum Jutaan Orang Tanpa Identitas Hukum Di Indonesia* (Jakarta: DFAT Australian AID, 2013), 9.

⁴ Sumner, 9.

⁵ "Surat Keputusan Ketua Muda Mahkamah Agung RI Urusan Lingkungan Pengadilan Agama No. 01/SK/TUADA - AG/1/2013 Tentang Pedoman Sidang Keliling Di Lingkungan Peradilan Agama," 1,

face major obstacles in financial and transportation issues to come to the court.⁶

This has been the basis for the Supreme Court to issue rules regarding the organization of circuit courts and court fee waivers with the *prodeo* process, through the Supreme Court Circular No. 10 of 2010 concerning Guidelines for Providing Legal Assistance, both within the General Courts and the Religious Courts.

The circuit court or trial outside the court building, is one of the manifestation of the principle “access to justice” that has become a commitment of the legal community in many countries. It is intended to bring legal services and justice closer to the community, so that justice can be reached by all people, and to realize a simple, fast and low cost judicial process, and to increase public legal awareness of Islamic law whose enforcement is the duty and function and authority of the court.⁷

The existence of *isbat nikah* in the Indonesian Marriage Law is still debated; yet, this study will not highlight the polemics about it. It seeks to describe whether the *isbat nikah* program in the Tenggara Religious Court can be the manifestation of the principle “access to justice”. This study is important in a way that it provides an overview of how well the program “access to justice for the community” in the Tenggara Religious Court area has been carried out. This is so especially considering the remote geographical conditions and areas from the court which make it difficult for the poor to reach it. With the circuit *isbat nikah*, a significant number of unregistered marriages have been documented; this thus has greatly help the community in the jurisdiction of the Tenggara Religious Court who lives far from the Court to obtain legal services and justice. From this stage, they then are able to document their children’s birth certificate or their

⁶ Cate Sumner, *Memberi Keadilan Bagi Para Pencari Keadilan: Laporan Penelitian Tentang Akses Dan Kesetaraan Pada Pengadilan Negeri Dan Pengadilan Agama Di Indonesia Tahun 2007 - 2009* (Laporan Penelitian Mahkamah Agung and Ausaid, 2010), 24.

⁷ “Surat Keputusan Ketua Muda Mahkamah Agung RI Urusan Lingkungan Pengadilan Agama No. 01/SK/TUADA - AG/1/2013 Tentang Pedoman Sidang Keliling Di Lingkungan Peradilan Agama,” 1-2.

household card to access government social assistance program. This study thus complement previous studies which reveal that women's access to justice has been found to positively impact gender equity development in Indonesia.⁸

B. *Isbat Nikah* and Debates on Its Existence

Related to the validity of marriage as per the art. 2(1) of Law No. 1/1974 concerning Marriage, the KHI states that a Muslim marriage is valid if it is carried out in accordance with Islamic Law.⁹ Furthermore, KHI stated that in order to ensure the marital order for the Islamic community, every marriage must be recorded.¹⁰ Like Art. 2 paragraph (1) and (2) Law No. 1 of 1974, the provision on the validity of marriage according to the KHI is also debated, whether the two articles (art. 4 and 5(1)) are mutually supportive and must be fully understood or both articles can be interpreted that the validity of marriage according to syariah does not require recording.¹¹ Furthermore, the KHI applies the concept of "double validity": meaning, on the one hand, the KHI retains the opinion of the classical scholars, that only religious conditions can determine whether the marriage contract is valid or not. On the other hand, recording is a must. Here marriage registration is only an administrative requirement.¹² As a result, many people commit *nikah sirri* (unregistered marriage) and ignore the existence of marriage records.

To overcome the emergence of various problems due to the *nikah sirri*, and for the benefit of the state, the KHI regulates

⁸ See Alfitri Alfitri, "Legal Reform Project, Access to Justice and Gender Equity in Indonesia," *Indonesian Journal of International Law* 9, no. 2 (2012), <https://doi.org/10.17304/ijil.vol9.2.348>; Cammack et al., "Democracy, Human Rights, and Islamic Family Law in Post-Soeharto Indonesia," *New Middle Eastern Studies*, 2015, 5.

⁹ Article 4 *Kompilasi hukum Islam di Indonesia: Buku I Hukum perkawinan, buku II Hukum kewarisan, buku III Hukum perwakafan* (Humaniora Utama Press, 1992).

¹⁰ Article 5 Paragraph (1) *Kompilasi hukum Islam di Indonesia*.

¹¹ Euis Nurlaelawati, "Pernikahan Tanpa Pencatatan: Isbat Nikah Sebuah Solusi?," *Musawa Jurnal Studi Gender Dan Islam* 12, no. 2 (July 1, 2013): 265, <https://doi.org/10.14421/musawa.2013.122.261-277>.

¹² Nurlaelawati, 265.

the possibility of the validation of an unregistered marriage by applying for the *isbat nikah* to the Religious Courts. The *isbat nikah* can be interpreted as a legalization of an unregistered marriage issued by the Religious Court at the request of a husband and wife because the couple cannot prove their marriage which was carried out previously according to the Shari'ah through a marriage certificate issuance so that the previous marriage has the force of law.¹³ This marriage process then produces a marriage book/certificate which has a function as an authentic deed in proving the certainty of marriage has actually been implemented. With the marriage certificate, it will make it easier for couples to fight for their rights.¹⁴

Previous studies on *isbat nikah* illustrate that it is one of the means that provides convenience for parties who "intentionally" violate the law No. 1 of 1974. Another factor causing the *isbat nikah* is lack of knowledge, limited access to registration, and soaring costs of marriage. *Isbat nikah* is also used as a solution when there is an acknowledgment that the prospective wife has been pregnant or polygamy reasons because children have already been born, and to legalize the unregistered polygamy, the *isbat nikah* is applied.¹⁵

From here it can be seen, the rule of *isbat nikah* is like a double-edged knife; it has dualistic consequence. On the one hand, it can help people to get legal certainty related to the unregistered marriage, but on the other hand, it constitutes the justification of the *nikah sirri* committed by the community. Huda stated that if *nikah sirri* has been entrenched in the community, then every time the *isbat nikah* application marriage is submitted to the Religious

¹³ Ahmad Rofiq, *Hukum Islam di Indonesia* (Jakarta: PT Raja Grafindo Persada, 1997), 117; *Pemberdayaan Perempuan Kepala Keluarga (PEKKA), Panduan Pengajuan Itsbat Nikah* (Jakarta: Australia Indonesia Partnership, 2012), 2.

¹⁴ *Pemberdayaan Perempuan Kepala Keluarga (PEKKA), Panduan Pengajuan Itsbat Nikah*, 2.

¹⁵ Ninik Rahayu, "Politik Hukum Itsbat Nikah," *Musāwa Jurnal Studi Gender Dan Islam* 12, no. 2 (March 1, 2016): 282-83, <https://doi.org/10.14421/musawa.2013.122.279-294>.

Court, it would be granted. This situation actually would have adverse impacts that include:

- a) The historical meaning of the Marriage Law will be ineffective so that the purpose of the birth of the Law is not achieved;
- b) The normative purpose of marriage registration is not fulfilled as required in art. 2 of Law No. 1/1974 concerning Marriage, it will create a condition of irregularities in population registration;
- c) Muslim society is seen as no longer concerned with the life of the nation and state in the field of law, which ultimately comes to the assumption that the implementation of Islamic teachings does not require state involvement;
- d) It will be easy to find an unregistered marriage that only cares about the elements of religion rather than the elements of marriage registration procedures that invite uncertainty about the fate of women (wife);
- e) In the event of a breach of the marriage agreement, the opportunity for marriage breakup will open freely without being involved in legal procedures as a direct result of neglecting the state registration, so that the unregistered marriage is only followed by an arbitrary extra-judicial divorce;
- f) It will form a bad precedent so that people will tend to be light-hearted to ignore the recording of their marriage directly at the time of marriage.¹⁶

In addition, another thing that raises the debate regarding itsbat marriage is in terms of requirements. One of the conditions for filing itsbat nikah in the Religious Court as formulated in art. 7(3e) of the KHI is the existence of a marriage before the enactment of the Law No. 1/1974. However, in reality, the filing of itsbat nikah in the Religious Courts is actually carried out by marriages contracted after the enactment of Law No. 1/1974. The possibility

¹⁶ Mahmud Huda, "Yurisprudensi Isbat Nikah Dalam Pasal 7 Kompilasi Hukum Islam | Huda | Religi: Jurnal Studi Islam," *Jurnal Religi* 6, no. 1 (April 2015): 68–69, <http://journal.unipdu.ac.id/index.php/religi/article/view/414>.

of filing in *isbat nikah* for marriages that occur after the enactment of Law No. 1/1974 is considered to violate the requirements for the application of *isbat nikah* formulated in art. 7(3e) of the KHI.

Although it violates one of the requirements for the application of its *isbat nikah*, the Religious Court judges may not reject this kind of *isbat nikah*. There are two reasons for this: first, related to the principle of “*ius curia novit*”, namely the judge is considered to know the law of *isbat nikah*, and the principle of freedom of the Judge to find the law against a problem or case whose no law/regulation (*rechtsvacuum*). Second, a sociological approach that encourages judges to analyze a case with a sociology of law approach and conduct teleological interpretation of other regulations that have to do with the problems faced so that the law is not stagnant, but develops according to the development of society or in accordance with the living law in society. These steps are then known as legal findings (*rechtsvinding*).¹⁷

As confirmed by Sidharta, the law finding was intended to enable the law to achieve its objectives, namely; justice, certainty and benefit.¹⁸ Equally important, the need for legal finding is getting stronger due to: first, the law is conservative, because once enacted it is silent, so it requires actualization of accommodation developments to be able to become a living law. Second, the authority to determine truth and justice in the trial is only a judge, while the law is born in the legislative process. Third, the community continues to grow.¹⁹ Further, the background of the need for a judge to find a legal finding was that the judge could not refuse to drop a decision on the grounds that the law was incomplete or unclear. When the law is unclear or incomplete to

¹⁷ Faizah Bafadhal, “*Itsbat Nikah Dan Implikasinya Terhadap Status Perkawinan Menurut Peraturan Perundang-Undangan Indonesia | Jurnal Ilmu Hukum*,” *Jurnal Ilmu Hukum*, March 2014, 8–9, <https://online-journal.unja.ac.id/index.php/jih/article/view/1956>; See also M. Khusnul, “*Ratio Decidendi Penetapan Pengesahan (Itsbat) Nikah Di Pengadilan Agama*,” *Jurnal Yuridika* 30, no. 2 (Mei 2015): 256, <https://e-journal.unair.ac.id/YDK/article/view/4655>.

¹⁸ Shidarta, *Moralitas profesi hukum: suatu tawaran kerangka berpikir* (Bandung: Refika Aditama, 2006), 79.

¹⁹ M. Yahya Harahap, *Hukum acara perdata* (Jakarta: Sinar Grafika, 2007), 860.

decide the case, that is when the judge must find the law (*rechtsvidng*).²⁰ This reinforces that the need for law findings is indeed urgent to be done so that the legal objectives of justice, certainty and usefulness can be achieved.

Therefore, the judge, in granting the petition for *itsbat nikah* must really consider, whether the determination of *isbat nikah* will provide benefits or just the opposite for the parties in the family. In addition, in the determination of the *isbat nikah*, it must accommodate the purpose of the implementation of the law, namely justice, certainty, and usefulness for the parties concerned..

C. The Program of Circuit *Isbat Nikah* in Tenggara Religious Court

The circuit court is a trial that is conducted permanently or incidentally outside the court building. The circuit court is a form of providing legal assistance as mandated in art. 28 D (1) of the 1945 Constitution, which states that every person has the right to the recognition, guarantee, protection and fair legal certainty and equal treatment before the law.

The legal basis for conducting the Circuit Court is the Supreme Court Circular No. 10 of 2010 concerning Guidelines for Providing Legal Assistance, both within the General Courts and the environment of the Religious Courts. The SEMA is backed by the results of Cate Sumner's research in collaboration with the Supreme Court and Family Court of Australia and Indonesia Australia Legal Development Facilities (IALDF), that the poor face major obstacles in financial and transportation issues to come to court.²¹ After that, it was perfected by several Decrees regulating the holding of the circuit court, including the Decree of the

²⁰ Ramdani Wahyu Sururie, "Polemik Di Seputar Hukum *Isbat Nikah* Dalam Sistem Hukum Perkawinan Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 11, no. 2 (December 1, 2017): 238, <https://doi.org/10.24090/mnh.v11i2.1299>.

²¹ Sumner, *Memberi Keadilan Bagi Para Pencari Keadilan: Laporan Penelitian Tentang Akses Dan Kesetaraan Pada Pengadilan Negeri Dan Pengadilan Agama Di Indonesia Tahun 2007 – 2009*, 24.

Chairperson of the Environmental Affairs of the Religious Courts and the Secretary of the Supreme Court of the Republic of Indonesia Number 04 / TUADA-AG / II / 2011 and Number 002 / SEK / SK / II / 2011 Regarding the Guidelines for Implementation of the Supreme Court Circular Letter Number 10 of 2010 Concerning the Legal Aid Guidelines for Annex B and the decision of the Chief of the Supreme Court of the Republic of Indonesia No. 026 / KMA / SK / II / 2012 concerning Judicial Service Standards also regulates the service of circuit courts. Then in 2013, a Guidance on the Implementation of the Mobile Assembly (*Buku Pedoman Pelaksanaan Sidang Keliling*, BUPEDLAKSILING) was established through the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia on Environmental Affairs of the Religious Court No. 01 / SK / TUADA-AG / 2013 concerning Guidelines for Mobile Courts in Religious Courts.

The circuit court or trial outside the court building, is one form of the access to justice that has become a commitment of the legal community in many countries, with the aim of bringing legal services and justice closer to the community, so that justice can be reached by all people, realize a simple, fast and low cost judicial process, and increase public legal awareness of syariah law whose enforcement is the duty and function and authority of the Religious Court.²² The implementation must be as effective and efficient as possible, taking into account the number and location of the circuit court.²³

The circuit court, especially the circuit court of *itsbat nikah*, makes it easier for people whose marriages are not recorded, to carry out *itsbat nikah*, so as to obtain legal certainty and legal identity. For the Religious Courts, the program of circuit court for *isbat nikah* is very beneficial, because it speeds up the litigation process and reduces the accumulation of cases. Data in 2009 reveals that more than 13,000 cases of *isbat nikah* were accepted

²² "Surat Keputusan Ketua Muda Mahkamah Agung RI Urusan Lingkungan Pengadilan Agama No. 01/SK/TUADA - AG/1/2013 Tentang Pedoman Sidang Keliling Di Lingkungan Peradilan Agama," 1-2.

²³ Tim Redaksi Nuansa Aulia, Pasal 15 "SEMA RI No. 10 Tahun 2010 Tentang Pedoman Pemberian Bantuan Hukum," 2010, 10.

by the Religious Courts. If the request for marriage validation is granted, the Religious Court provides a document regarding proof of marriage validity, where the document is used by the parties to obtain a legal identity, including birth certificates.²⁴

In this study, the researcher focused on the circuit court, especially the case of *isbat nikah* in the Tenggarong Religious Court from 2015 to 2017. The jurisdiction of the Tenggarong Religious Court covers 2 districts in East Kalimantan, namely, Kutai Kartanegara Regency and West Kutai Regency. Kutai Kartanegara Regency consists of 18 Districts with 227 villages, while Kutai Barat Regency consists of 12 Districts with 182 villages.²⁵

The jurisdiction of the Tenggarong Religious Court is very unique. This uniqueness is seen, for example, that one jurisdiction of the Tenggarong Religious Court is a Samboja sub-district. Geographically, Samboja sub-district is closer to Balikpapan Religious Court, with a distance of about 48.8 km (1 hour 23 minutes by car) but in reality, Samboja subdistrict is in the jurisdiction of the Tenggarong Religious Court, with a distance of about 98.9km (2 hours 28 minutes by car). Likewise Anggana and Loa Janan subdistricts are closer to the Samarinda Religious Court; from Anggana to the Samarinda Religious Court is about 35.4 km or about 1 hour by car). Yet, since they legally belongs to the the Tenggarong Religious Court's jurisdiction, Anggana residents need to travel 51.1 km to the Tenggarong Religious Court (1 hour 30 minutes by car).

To reach various regions far from Tenggarong PA and help justice seekers, PA Tenggarong held a circuit court. At the Tenggarong Religious Court, the circuit court had two types, namely a permanent circuit court and an incidental (non-permanent) circuit court.²⁶ Permanent circuit court, which is a

²⁴ Sumner, *Memberi Keadilan Bagi Para Pencari Keadilan: Laporan Penelitian Tentang Akses Dan Kesetaraan Pada Pengadilan Negeri Dan Pengadilan Agama Di Indonesia Tahun 2007 – 2009*, 24.

²⁵ "Wilayah Yurisdiksi," accessed March 4, 2018, <http://pa-tenggarong.net/2012-05-27-16-38-29/2012-05-28-00-55-15/wilayah-yurisdiksi.html>.

²⁶ Interview with Rumaidi Panitera Pengadilan Agama Tenggarong, March 13, 2018.

mobile court which is held regularly in a place that has been established and held regularly every year. To conduct a circuit court, following criteria must be met:

- a) Remoteness of area, namely the location of the area far from the office location of the court building within the district/city where the court building is located;
- b) Other regencies that have no court offices, which are still within their jurisdiction;
- c) Areas where transportation facilities are very difficult to reach;
- d) Areas that are far and difficult and result in high costs to call the litigants to the area.
- e) Case entry from the region based on case data for the past 3 years.

An incidental circuit court is a mobile court which is carried out at any time outside the permanent circuit court at the request or proposal of:

- a) Local people;
- b) Local government or village head;
- c) Other government agencies;
- d) Non-Governmental Organizations (NGOs) representing local communities, or universities in the local court of law area.²⁷

In carrying out the circuit court, it was not only for the case of the application for *isbat nikah*, but also for *talaq* (unilateral divorce by husband) and *cerai gugat* (the wife initiated divorce). This study focuses on the case of the application for *isbat nikah* because there were so many applications for *isbat nikah* made by the community.

The difference between the circuit *isbat nikah* and the regular *isbat nikah* are: (1) The parties involved in the circuit *isbat nikah* are the Religious Court, KUA, District or village head where the circuit court is held, the Local Government or NGO, while the regular *isbat nikah* only involves the Religious Court; (2) The place for the implementation of circuit *isbat nikah* is outside the court building, such as the local government hall, the sub-district office,

²⁷ See "Surat Keputusan Ketua Muda Mahkamah Agung RI Urusan Lingkungan Pengadilan Agama No. 01/SK/TUADA – AG/1/2013 Tentang Pedoman Sidang Keliling Di Lingkungan Peradilan Agama," 8.

the village hall, or other places that are suitable to be used as a place of trial, while the regular one is held inside the court building; (3) The *isbat nikah* that can be submitted at a circuit court is the voluntary *isbat nikah*, while the regular one can be in the form of voluntary or contentious; in both forms, the judge is in the form of a panel of judges.

Prior to the circuit court execution, the village head usually has coordinated with the local Sub-district and local office of the Ministry of Religious Affairs (*Kantor Urusan Agama*, hereinafter KUA). They collect data of those of who have not got the marriage certificate to register immediately to join the circuit *isbat nikah*. The requirements for joining the mobile marriage are: photocopy of husband and wife ID card, copy of guardian ID card, copy of ID card witnesses, certificate from the local KUA if the marriage has not been registered, and complete the registration form.

The implementation of circuit *isbat nikah* is carried out within a day, in the sense that within a day if the application for the determination of its marriage is granted, the applicants immediately get an appointment. The process and stages of the implementation of circuit *isbat nikah* are examination, verification, conclusion and determination.²⁸ In 2015, the Tenggara Religious Court carried out 11 circuit *isbat nikah*, as illustrated in the following table.

NO	DATE	PLACE	STATUS	
			ACCEPT	GRANTED
1	21 Maret 2015	Melak	1	1
2	29 Juli 2015	Loa Kulu	17	16
3	4 September	Muara Kaman	15	15

²⁸ Interview with the registrar of Tenggara Religious Court, Rumaidi, S.Ag., March, 13th 2018.

4	5 Oktober 2015	Kenohon	12	12
5	19 Oktober 2015	Muara Badak	21	21
6	23 Oktober 2015	Muara Badak	27	27
7	30 Oktober 2015	Tenggarong Seberang	13	13
8	09 November 2015	Loa Janan	24	23
9	13 November 2015	Loa Janan	24	23
10	27 November 2015	Muara Badak	11	11
11	30 November 2015	Muara Badak	8	8
Total			173	170

Table 1. Cases of circuit *isbat nikah* in 2015.

Source: Tenggarong Religious Court

From the data above, there are two types of mobile sessions, namely the regular circuit court and the incidental mobile court. The circuit court was held in Melak sub-district, West Kutai Regency. In terms of requirements, the implementation of the circuit *isbat nikah* has been fulfilled as a regular circuit court, namely the location far from the the Tenggarong Religious Court office, land transportation can be taken within 8 hours provided the road is not damaged, because the road is damaged, the distance from the Tenggarong Religious Court to Melak sub-district take around 14 hours, while the summoning fee to Melak was around 4 million rupiah,²⁹ a pretty fantastic amount for the poor. Melak is one of the districts in West Kutai Regency, while the Tenggarong Religious Court is Kutai Kartanegara Regency. Because

²⁹ Interview with the registrar of Tenggarong Religious Court, Rumaidi, S.Ag., March, 18th 2018.

there is no Religious Court in West Kutai district, West Kutai is included in the the Tenggaraong Religious Court's jurisdiction.

While for other regions as described in the table above, it is a type of incidental circuit court. As described previously, an incidental circuit court is a mobile court conducted at any time due to a request from the local government or village head or NGO. The incidental circuit of the *isbat nikah* cases above were carried out because there was a request from the village head, the sub-district coordinated with the local KUA, and coordinated with the Tenggaraong Religious Court. Of the total 173 requests for *isbat nikah*, 170 were granted while three applications were not granted because the applicants were not present in the trial.

In addition to the request of the village head and the territorial sub-district where the incidental circuit court was held, in 2015 the Tenggaraong Religious Court also conducted an incidental circuit court at the initiative of the Kutai Kartanegara Population and Civil Registration Service, as shown in the following table.

NO	DATE	PLACE	STATUS	
			ACCEPT	GRANTED
1	28 Agustus 2015	Sanga-sanga	21	18
2	02 September 2015	Muara Badak	18	15
3	18 September 2015	Muara Jawa	17	17
4	02 Oktober 2015	Samboja	20	20
5	20 Oktober 2015	Marangkayu	15	15
Total			91	85

Table 2. Five cases of circuit *isbat nikah* that held by the initiative of the Population and Civil Registry Service.

Source: Tenggaraong Religious Court

Table 2 above explains that circuit *isbat nikah* was held 5 times. Because this circuit court activity was the initiative of the Population and Civil Registry Service, the entire funding was borne by the office. What is done by the Department of Population and Civil Registry deserves to be appreciated, considering that there are still many people in the Kutai Kartanegara area who have not registered their marriages, in addition to costs, also because of the low understanding of the importance of marriage registration.

NO	DATE	PLACE	STATUS	
			ACCEPT	GRANTED
1	05 Februari 2016	Muara Kaman	14	14
2	12 Februari 2016	Anggana	18	18
3	15 April 2016	Tenggarong Seberang	9	9
4	18 Juli 2016	Samboja	24	24
5	22 Juli 2016	Samboja	23	23
6	25 Juli 2016	Muara Muntai	19	19
7	15 Agustus 2016	Loa Kulu	19	19
8	09 September 2016	Anggana	20	20
9	19 September 2016	Muara muntai	12	12
10	26 September 2016	Marangkayu	13	13
11	17 Oktober 2016	Kembang Janggut	6	6
Total			177	177

Table 3. Cases of circuit *isbat nikah* in 2016

Source: Tenggarong Religious Court

In 2016, circuit *isbat nikah* was held 11 times with a total of 177 applications for marriage. The data also shows that there are still many people in the Kutai Kartanegara area who do not register their marriages. From the data, all of the petitions were granted, because all applicants met the requirements for the determination of their marriage validity, including witnesses, marriages conducted in Islamic law and their conditions and conditions fulfilled, for example with guardians entitled to marry. Actually, the applicants of itsbat marriage exceeds the number as stated in the table above. This is because not all of them pass the file and requirements, for example by marriage in Islamic law but with a guardian who is not entitled to marry or sometimes the applicant cannot present the required witnesses.

NO	DATE	PLACE	STATUS	
			ACCEPT	GRANTED
1	24 Februari 2017	Muara Muntai	11	10
2	03 Maret 2017	Muara Muntai	20	20
3	10 Maret 2017	Anggana	13	13
4	17 Maret 2017	Samboja	25	25
5	05 Mei 2017	Anggana	24	23
6	19 mei 2017	Loa Janan	20	16
7	11 Agustus 2017	Marangkayu	14	14
8	20 Oktober 2017	Loa Kulu	41	35
9	02 November 2017	Muara Jawa	19	17
10	07 Desember 2017	Melak	14	14
Jumlah			201	188

Table 4. Cases of circuit *isbat nikah* in 2017

Source: Tenggaraong Religious Court

In 2017, the circuit *isbat nikah* was held 10 times with a total of 201 applications, while 188 were granted. 3 applications were not granted because the applicant was not present at the time of the trial. The type of trial is an incidental circuit court and a regular circuit court. The circuit court was held in Melak Subdistrict, while for other regions as illustrated in the table above was an incidental circuit court.

The description of the three-year mobile circumference of *isbat nikah* shows that there are still many people who do not register their marriages. The data above, only based on the people who submitted it, because there are still many people who have not submitted, because of their ignorance of the implementation of mobile marriage, or there is a possibility of a low understanding of the importance of marriage registration. The circuit *isbat nikah*, on the one hand provides benefits to the community, namely the existence of legal certainty about their marriage so as to have a marriage certificate, but on the other hand, the community does not consider the importance of marriage registration. As a result, the existence of the state as a regulator of order in social life is deemed absent.

The program of circuit *isbat nikah* is basically one of the efforts of the Tenggaraong Religious Court to serve the people who are in their jurisdiction, related to the large number of people who do not register their marriages. This is as affirmed by the the Tenggaraong Religious Court's Legal Clerk, Faidil Anwar, the most frequent case of application to the Tenggaraong Religious Court is *isbat nikah* which can reach 360 cases in a year. This is because many people committed *nikah sirri* (unregistered marriage), especially in the Upper and Coastal Mahakam river. For this reason, the Religious Courts made an effort to pick up the ball in

cooperation with the village head and the local KUA to record the citizens who did not have a marriage book.³⁰

The existence of mobile marriage is considered important, because for people whose marriages are not registered, they will not get a marriage certificate. In fact, the marriage certificate is the parent of all legal identities. With a marriage certificate, parents will be able to take care of and get their child's birth certificate. With a marriage certificate, the rights of the wife will be more guaranteed. In addition, a marriage certificate is also required in making a passport, and so on.

The causes of many people who do not have a marriage certificate include: (1) the community still considers that marriage registration in KUA is expensive, so they prefer to have *nikah sirri*³¹; (2) lack of public knowledge of the importance of marriage in front of a marriage registrar, when they have children and come to the Civil Registration Office to arrange a birth certificate, then realize the importance of the marriage certificate³²; (3) the negligence of Imam P3N does not report the marriage records that have been made to the local KUA because of the distance to reach KUA.³³

Based on interviews with the Chairperson of the Tenggara Religious Court for the period 2012 to 2016, Mr. H.M. Asy'ari, S.Ag., SH., M.H., it was revealed that the circuit *isbat nikah* was carried out to bring services closer to the community, given that there were no religious court representatives in the sub-district, while most of the sub-districts were quite far from the Regency due to the vast area of Kutai Kartanegara. In addition, it is an embodiment of the principle of justice that is simple, fast and low in cost, because the litigant community does not need to come all the way to the Religious Court located in the Regency with a

³⁰ "Stok Janda Di Kukar Semakin Banyak," accessed November 15, 2017, www.poskotakaltimnews.com.

³¹ According to Abbas explanation, one of residents in *Kelurahan Muara Jawa*, March, 01st 2018.

³² Interview with Poniman, one of Loa Janan residents, March 12nd 2018

³³ Interview with H. Nasrun S.Ag, the former Section Chief of Islamic Affairs ministry of Religious Affairs Tenggara District, Year 2012-2015.

considerable distance and cost a lot.³⁴ This was reinforced by H. Baharuddin S.Ag., MM., representing the district head of Muara Jawa, that the circuit *isbat nikah* makes it easy for people not to come to the Court because of the distance to register their marriage registration.³⁵ As an embodiment of access to justice, the circuit court of the Tenggara Religious Court was also equipped with a legal consultation program. The legal consultation program that was packaged in this mobile session clearly had a positive impact, as affirmed by Taufik Ismail, S.Ag, Head of KUA in Marangkayu Sub-district.³⁶

In its implementation, there are several obstacles in this circuit *isbat nikah* program, so that some applications are rejected. These include: the applicant does not bring witnesses as required in the trial, the marriage has not fulfilled the conditions and conditions in accordance with Islamic law, such as *nikah sirri* employing a guardian who does not has the right to be a guardian. However, almost 90 percent of applications were granted, because three weeks before the trial, the Religious Court came to the location of the hearing to verify the completeness of the application file.³⁷

Access to justice means being treated fairly by law, not only against advocates and courts, but also against other justice institutions.³⁸ Access to justice provides the opportunity or ability of every citizen without distinguishing his background (race,

³⁴ Interview with HM. Asy'ari, S.Ag., SH., MH, Head of Tenggara Religious Judiciary periode 2012-2016. Now, Judge of Samarinda Religious Judiciary. March, 18th 2018.

³⁵ "PA Tenggara Gelar Isbat Keliling Di Muara Jawa," accessed March 20, 2018, <http://kaltim.kemenag.go.id/berita/read/504346>.

³⁶ "PA Tenggara Luncurkan Layanan Konsultasi Hukum Gratis | (23/8) - Direktorat Jenderal Badan Peradilan Agama," accessed March 20, 2018, <https://badilag.mahkamahagung.go.id/seputar-peradilan-agama/berita-daerah/pa-tenggara-luncurkan-layanan-konsultasi-hukum-gratis-23-8>.

³⁷ Interview with HM. Asy'ari, S.Ag., SH., MH, Head of Tenggara Religious Judiciary periode 2012-2016. Now, Judge of Samarinda Religious Judiciary.

³⁸ Adrian W. Bener dan Val Jacqueline, "Sebuah Kerangka Analisis untuk Penelitian Empiris dalam Bidang Akses terhadap Keadilan", In Adrian W. Bener, *Kajian Sosio Legal: Seri Unsur-Unsur Penyusun Bangunan Neagar Hukum*, Edisi 1 (Bali: Pustaka Larasan, 2012), 15.

descent, education, or place of birth) to obtain justice through the judiciary.³⁹ Efforts to realize access to justice in its implementation includes three things: First, the right to benefit and use judicial institutions; second, there is a guarantee of the availability of means to fulfill the rights of the poor to achieve justice; and thirdly, the existence of effective methods and procedures to expand public access to justice.⁴⁰

The concept of access to justice in Indonesia according to BAPPENAS,⁴¹ constitutes circumstances and processes, in which the state guarantees the fulfillment of basic rights under the 1945 Constitution and universal principles of human rights, and guarantees access for every citizen to have the ability to know, understand, realize and use these basic rights through both formal and non-formal institutions, supported by a good and responsive public complaint mechanism in order to obtain optimal benefits to improve the quality of their lives with the aim of preventing and reducing poverty.

The concept above explains that access to justice is not just the fulfillment of the rights of the community to justice, but more than that, ensuring access for every citizen to have the ability to know, understand, realize and use these basic rights. The implementation of the concept in the Tenggara Religious Court was the Court coordinate with public officials by sending letters to the regions and territories that would carry out mobile marriage. The existence of this notification letter provides an opportunity for the public to be able to find out the existence of the court, so that the community with an interest in the court can use these rights properly. The existence of legal consultations in the circuit court process also proves that the Tenggara Religious Court seeks to provide understanding to the justice seekers, as implemented in

³⁹ Djohansyah, *Akses Pada Keadilan, Makalah Pada Pelatihan HAM Bagi Jejaring Komisi Yudisial* (Bandung, 2010).

⁴⁰ Agus Raharjo, A. Angkasa, and Rahadi Wasi Bintoro, "Akses Keadilan Bagi Rakyat Miskin (Dilema Dalam Pemberian Bantuan Hukum Oleh Advokat)," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 27, no. 3 (February 10, 2016): 436, <https://doi.org/10.22146/jmh.15881>.

⁴¹ *Strategi Nasional Akses Terhadap Keadilan*, (BAPPENAS Direktorat Hukum dan HAM, 2009), 5-6.

the Marangkayu District as described above. The implementation of circuit *isbat nikah* is for all justice seekers without distinguishing their background (race, descent, education or place of birth).

In addition, the embodiment of access to justice with the aim of bringing legal services and justice closer to the community through the circuit court program has been done by visiting locations far from the District Courts 11 times a year. So that the rights of the community, especially the poor to get justice and legal certainty are achieved. The implementation of access to justice clearly has been realized, because the community has benefited from the marriage trial of its unregistered marriage. They then obtain legal certainty about their marriage, so that it can have a marriage certificate, which is the parent legal identity for every citizen. In addition, the implementation of the circuit court of its marriage in sub-district offices or buildings that are appropriate for the meeting place, is a manifestation of the availability of infrastructure to obtain justice. Effective methods and procedures to expand public access to justice are realized in the form of providing data collection facilities and verification of the requirements for submitting an application for *isbat nikah*. Meanwhile, the head of the village, the local KUA collects data on the people who do not have a marriage certificate. After all the documents as required are complete, the court representative comes to the location to check whether the application meets the requirements or no. Here the community does not need to come to court, so it does not take time and money.

Besides that, the implementation of the trial is only one day and if granted immediately gets the marriage certificate. This is the embodiment of the principle of quick and simple trial, because it is not convoluted. The program is financed by the the Tenggara Religion Court's budget and the parties who initiated the implementation of the circuit *isbat nikah*; this is clearly an embodiment of the principle of affordable and low cost trial, because here the community does not need to pay a lot of money. Even, they sometimes are freed from paying the fee because it has

been borne by the initiating party, as done by the 2015 Kutai Kartanegara Population and Civil Registry Service.

D. Conclusion

The program of circuit *isbat nikah* in the Tenggara Religious Court is the embodiment of access to justice, with the aim of bringing legal services and justice to the community. It has been implemented for several years in which the circuit court may ensue around 10 to 11 times a year and the applications accepted are up to 200 cases per year. This program clearly helps justice seekers, because they do not need to come to the court office; instead, the court picks up the ball, by visiting areas far from the court. In addition, the community has benefited from the program by obtaining legal certainty about their unregistered marriage in the form of a marriage certificate, which is a legal identity parent for every citizen. The circuit *isbat nikah* is also a manifestation of the principle of light costs, because the costs incurred by the community are relatively light and affordable, even sometimes the costs are free, because it has been borne by those who initiate the implementation of circuit *isbat nikah*. Last but not the least, it is the manifestation of fast trial principle since the proceeding only takes a day and the applicants immediately get a determination of the legality of their unregistered marriage if granted.

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