

## **Progressive Legal Analysis on Writing Marriage through the Determination of Judge Religious Judgment Court Polewali**

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**Abstract:** The purpose of this study is to know and analyze the legal considerations used by judges in the Religious Courts of Polewali in the Stipulation of Isbat Nikah, and to know and analyze whether there is any relevance between progressive law which is used as legal consideration in Stipulation of marriage isbath by judge of marriage under the hands. This research is empirical law research, namely research on the implementation of legal rules and the effectiveness of Progressive Law Against Marriage through the Establishment of Religious Judges Polewali Judge. The result of the research indicates that the Religious Courts examining the marriage legal affairs case, in general, do not appear to violate the law's legal and regulatory requirements and the rules of Islamic law, in particular the stipulation of the validity of the marriage of the Petitioners by the panel of judges has also been able to fulfill the sense of justice for the Applicant. That is, the decision that has been taken and poured by the panel of judges, by validating the marriage of the Petitioners is appropriate.

**Keyword:** *Progressive Legal, Marriage*

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### **I. INTRODUCTION**

Indonesia is a country based on law. The law must be made the commander in running the wheel of life of nation and state. In addition to certainty and justice, the law also serves for the welfare of human life. So it can be said that punishment is a field and human struggle in the context of seeking happiness of life.

Law and justice are two sides of the coin that can not be separated, the law aims to bring about justice, while lawless justice will not be upheld. Law becomes something that is frightening to society. The law is no longer to make people happy but it is actually miserable society. Law fails to provide justice in society. The supremacy of law that has been echoed only as a sign (sign) without meaning. The legal texts are only language games that tend to be deceptive and disappointing.

The cause of stagnancy that occurs in the world of law is because it is still fixed to the single paradigm of positivism that is no longer functional as an analysis and control that combine with the living table of real human characteristics in a dynamic context and multi interest both on the process and in the event of law. So that law is only understood in a very narrow sense, that is only interpreted as a law, while values outside the law is not interpreted as a law.

The history of the Unitary State of the Republic of Indonesia there have been political changes in turn (based on the period of the political system) between democratic political configuration and authoritarian political configuration. In line with the changes in political configuration, the character of legal products also changes. At a time when the political configuration appears democratically, the legal products it produces are responsive in nature, whereas when the political configuration is authoritative, the laws it produces are orthodox. Reforms that have been rolling in Indonesia have brought a more democratic state of life, and this also brings about changes in the existing legal system, from a closed model to an open model with greater justice in society than just justice castrated by the Ruler.

Law is a part of human creativity that is used to uphold human dignity. Human beings do not indulge in the alphabet and semicolon contained in the Law as the fruit of the manifestation of reason, but the law that draws on the human interest to uphold human values. The law is not only product ratio, but part of intuition. Relevance with the basic value of nationality, is to realize the concept of civilized justice, such as the second principle of Pancasila. Justice is not a verification of saklek for the general purpose of implicative sentences formulated in the articles of the Act. Justice is not the routine task of knocking a hammer in the courthouse.

What is needed justice is the courage of interpretation of the Law to raise the dignity and dignity of Indonesian people.

The judge must apply the existing laws in the legislation. The existence of laws written in the form of legislation as a form of the principle of legality, it is more guarantee the existence of legal certainty. But the law as a political product, is not easy to change quickly following the changes of society. On the other hand, in today's modern and complex and dynamic lives, the legal problems facing society are increasingly and diverse that demand an immediate solution. In practice, the judge faces two kinds of obstacles, ie often the word or sentence of the law is unclear, or the Law is incomplete in the sense of not yet firmly arranging a concrete case submitted to a judge. Whereas on the other hand, as provided in Article 10 paragraph (1) of Law Number 48 Year 2009 on Judicial Power, the judge is prohibited from refusing to adjudicate a case filed against him under the pretext that the law is absent or less clear.

Judges also play a role in addition to applying the law also finds and creates laws. At the time of judgment, the judge prescribes the law in concreto against a particular event. Thus the judge's verdict is the law or by its verdict the judge made law. In addition to the legislature as an abstract objective lawmaker, the judge also forms or creates the law, only the law created by the judge is the law in concreto. Textually, as already mentioned, the law does require judges to explore the living values of society, which philosophically means prosecuting judges for the discovery of the law and the creation of the law.

Breaking up things that are not regulated in a rule of law, the judge explores or creates laws excavated from living values in society. This is in line with Satjipto Rahardjo's opinion that the function of law as a tool for the people he calls Progressive law. The essence of progressive law lies in progressive thinking and action which frees it from the shackles of the text of legal documents, because ultimately the law is not a legal text but for the happiness and welfare of man. Actually the thought of the law needs to return to its basic philosophy that is the law for man.

Concerning the behavior and style of social life of diverse communities, there are many problems that arise and require a quick solution without ignoring the norms and rules that apply. Among them are marriages made by the community but not registered in the Office of Religious Affairs so that the public does not have authentic evidence of marriage has been done. The absence of this proof of marriage also affects other activities such as the handling of birth certificates, the handling of passports and so on

The solution of the community then propose the legalization of marriage in the Religious Court or often called isbat marriage. Basically a marriage that may be honored by the Religious Courts is a marriage that took place before the enactment of Marriage Act No. 1 of 1974. So that marriage which took place after the enactment of Marriage Law No. 1 of 1974 can not be granted except for the management of divorce.

One side of society is taught to obey the rules about the importance of marriage registration, but on the other hand there are also people who have not reached the information and low knowledge about marriage recording. So until now there are still many marriages that are done without registration in the KUA and just realized the importance of recording after the necessary other deeds such as birth certificates and passports.

The courts that became the solution to the problem also went awry. As a country that embraces the Continental European system where the judge must decide upon the law. On the one hand, the Court must decide upon the rules, but on the other hand the Court must also protect the welfare of the community. Therefore, many marriage isbat cases conducted after the enactment of Law No. 1 of 1974 also still be granted by the judges in the Religious Courts.

## **II. FORMULATION OF THE PROBLEM**

Based on the description in the background above, then the main problems in writing this Thesis are as follows:

- a. How is the judge consideration of Religious Policy Court In the Istbat Marriage Determination?
- b. How is the relevance of progressive law to marriage settlement under hand?

## **III. THEORETICAL FRAMEWORK**

### **1. The Theory of Legal Certainty**

Legal certainty is also called the principle of legal security and rechtszekerheid. Legal certainty is a legal instrument of a country that is able to guarantee the rights and obligations of every citizen. Legal certainty (rechtszekerheid) is also interpreted with guarantees for members of the community, that everything will be treated by the state / authorities based on the rule of law, not arbitrarily. According to Big Indonesian Dictionary, marriage isbat is the determination of the truth (validity) of marriage. Itsbat marriage is the endorsement of marriages which have been held according to the Shari'a of Islam, but not recorded by the KUA or the authorized VAT (Decision of the Chief Justice of the Supreme Court Number KMA / 032 / SK / 2006 on Guidelines for Implementation of Duties and Administrative Courts).

Marital status in this case is defined by the circumstances and marital status that has been held. In this aspect the law has actually given the formulation of a legal marriage. Article 2 Paragraph 1 of Law Number 1 Year 1974 Concerning Marriage states that marriage is lawful, if done according to the law of their respective religion and belief. In the explanation of Article 2 it is mentioned that By the formulation in Article 2 paragraph (1), there is no marriage outside the law of each religion and its belief, in accordance with the 1945 Constitution. The meaning of the law of each religion and its belief is included the provisions of legislation applicable to its religious class and beliefs to the extent not contradictory or otherwise provided for in this Law. Based on the provisions of Article 2 Paragraph 1 of the Marriage Law and its explanation, it is known that the benchmark for knowing a legal marriage is the law of the respective religions and beliefs of the parties as well as the provisions of applicable legislation insofar as they are not contradictory or otherwise specified in the Undang- Invite marriage.

Article 2 paragraph (2) states that each marriage is recorded according to the prevailing laws and regulations. Recording of marriage will cause general benefit because with this record will provide legal certainty related to the rights of husband / wife, the benefit of children and other effects of marriage itself. Marriages conducted under supervision or in the presence of the Registrar Officer / Office of Religious Affairs shall obtain a Marriage Certificate as evidence of a marriage being held. Akta The marriage certificate is authenticated because the Marriage Certificate is made by and in front of the Officer of the Registrar as an official authorized to register the marriage, made in accordance with the form stipulated by Government Regulation Number 9 Year 1975 and made at the place of the Officer of the Registration Officer / Office of Religious Affairs the task. Although, Laws and Regulations already require the existence of the Marriage Certificate as proof of marriage, but not infrequently married couples do not have the Marriage Certificate Quotes. The probable cause of the absence of the Marriage Certificate Citation is caused by several factors such as; (a) the negligence of the husband or wife of the married family without going through the prescribed procedures of the government. This is seen simply because of their ignorance of the rules and regulations (law blindness); (b) The amount of fees required when following such official procedures; (c) Due to the negligence of the Officers of the Recorders / Representatives as in examining the letters / terms of marriage or missing files; (d) Marriage before the birth of the Marriage Law (e) Non-fulfillment of the conditions for polygamy, in particular the absence of consent of the previous wife.

## **2. Progressive Law Theory**

Progressive is a word that comes from a foreign language (English) which origin he said is "progress" which means (forward). Therefore, Progressive Law means advanced law. The term progressive law here is a legal term introduced by Satjipto Rahardjo, based on the basic assumption that law is for man. Satjipto Rahardjo is concerned with the low contribution of law science in enlightening the Indonesian nation, in overcoming the crisis, including the crisis in the field of law itself. For that he threw a problem solving with the idea of progressive law.

The notion of progressive law itself is to change rapidly, make fundamental reversals in legal theory and practice, and make breakthroughs. The liberation is based on the principle that law is for man and not vice versa and the law does not exist for itself, but for something wider that is for human dignity, happiness, welfare, and human dignity.

This definition, as stated by Satjipto Rahardjo, means progressive law is a series of radical actions, by changing the legal system (including changing the rules of law if necessary) so that the law is more useful, especially in raising self-esteem and guaranteeing human happiness and prosperity.

More simply he says that progressive law is a law that liberates, both in the way of thinking and acting in the law, so as to allow the law to flow to complete its duties in human service and humanity. So there is no engineering or alignment in enforcing the law. Because according to him, the law aims to create justice and prosperity for all.<sup>1</sup>

The presence of law is attributed to its social purpose, so progressive law is also close to the sociological jurisprudence of Roscoe Pound. Progressive law also invites criticism of the liberal legal system, because Indonesian law also inherited the system. A moment of monumental change occurs when modern pre-modern law becomes modern.<sup>2</sup> So called because modern law shifts from its place as a justice seeking

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<sup>1</sup> Satjipto Rahardjo, *Ilmu Hukum; Pencarian, Pembebasan dan Pencerahan*, (Surakarta: Muhammadiyah Press University, 2004), hal. 17.

<sup>2</sup> e theory he often put forward is law as a tool of social engineering. According to him, the aim of social engineering is to build a society structure in such a way that it maximally achieves satisfaction of needs with minimum possible impact and waste. See Novita Dewi Masyitoh, *Criticizing Analytical Jurisprudence Versus*

institution into a bureaucratic public institution. Laws that follow the presence of modern law must undergo a total overhaul to be rearranged into a rational and bureaucratic institution. As a result, only legislative legislation is legally called the law.<sup>3</sup>

Progressive law teaches that the law is not a king, but a tool to describe the basis of humanity that serves to give grace to the world and man. The underlying assumption of legal progressiveness is that the first law exists for human beings and not for itself, both laws are always in law-making status and not final, the three laws are moral institutions of humanity.<sup>4</sup>

Based on the above assumptions the progressive legal criterion is, having a great purpose of human welfare and happiness, containing a very strong humanitarian moral content, progressive law is liberating law covering a vast dimension that not only moves in the realm of practice but also theories .Bersifat kritis dan fungsional.

Progressive law is still a discourse, but its presence feels very needed by the people of Indonesia who have experienced a crisis of confidence in the current law. Progressive law has yet to manifest itself as an established theory. Likewise with progressive law, there must be a core core of the program (hard core) that needs to be guarded and protected from errors that may arise when the law progressive it will be applied into the legislation. Therefore, when progressive law is developed from discourse to a theory, it must be equipped with complementary hypotheses. This is what seems to have no progressive law, so that the idea of Satjipto Rahardjo must be able to develop a scientific research program on progressive law seriously not only stop at the level of discourse.

The central point of the program that needs to be maintained in progressive law is that the law is for man, not the other way around. Adagium that law is for man needs to be defended from various falsifiable forms in order to position the law as a means to achieve something, not as a final destination. What is meant by falsifiable is a hypothesis or theory accepted only as a temporary truth so long as no fault has been found. The more difficult to find fault, then the hypothesis or theory that actually experienced inauguration.<sup>5</sup>

The law is not seen as a collection of letters or rigid sentences that can only be understood literally. The hermeneutic method may be developed by legal experts to open insights into the various situations surrounding the growing legal case and the public's attention. For example, corruption cases that occur among bureaucrats, not merely understood as a small form of salary they receive, so permissive attitude to corruption crimes committed often occur. Understanding the attitude of trust over their positions is much more important to demand their sense of responsibility. The law must be linked to one's ability to carry out the mandate. Thus the epistemological foundation of progressive law moves on the discovery of appropriate methodological steps, so that progressive law can be the basis of truth for Indonesian laws and regulations.<sup>6</sup>

The axiological base of the progressive law is related to the value problem contained in it. Axiology or Value Theory according to Runes is desire, desire, goodness, investigation of his nature, criteria, and metaphysical status. The desires, desires, and virtues of progressive law need to be determined criteria and metaphysical status in order to obtain a more comprehensive picture of the value contained therein. The value criterion is related to the standard of value testing which is influenced by psychological and logical aspects.

The importance of understanding the foundation of values in a scientific theory or movement is to know exactly the orientation or direction of the theory or flow. The central issue in the axiology of science is: What is the purpose of science development? Is science value free or not? What values should be obeyed by scientists? The ultimate goal of science is for the benefit of human beings, not science to science. Science developed for the benefit of man will always favor the community, not on the documents or scientific sheets alone. When human interests are constrained by scientific documents, then there is the need for a basic value that can fight for and elevate human dignity as a form of *humanus actus*. Progressive law must have a foundation of value that is not trapped into the formal legal spirit, but in favor of the spirit of humanity.

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Sociological Jurisprudence In the Development of Indonesian Law, in *Al-Ahkam*, XX, Edisi II Oktober 2009, hal.19.

<sup>3</sup> Satjipto Rahardjo, *Ilmu Hukum; Pencarian, Pembebasan dan Pencerahan*, *op.cit*, hal.20.

<sup>4</sup> *Ibid.* hal. 20

<sup>5</sup> Chalmers, A.F, *Apa itu Yang Dinamakan Ilmu?*, Terjemahan: Redaksi Hasta Mitra, *What is this thing called Science?* (Jakarta: Penerbit Hasta Mitra, 1983)

<sup>6</sup>What is meant by the methodology here is the study of the sequence of steps taken (scientific procedures), so that the knowledge obtained really meet the scientific characteristics.

In the perspective of the configuration of the schools of law philosophy, Satjipto Rahardjo is not quite clear enough to position his thinking. He also gave some labels for this progressive legal thinking. For example, one day he says that progressive law is an intellectual movement. On another occasion he calls progressive law a paradigm and concept of punishment.<sup>7</sup>

#### IV. DISCUSSION

##### 1. Progressive Law in Indonesia

Progressive law incorporates behavior as an essential element of the law and more particularly in law enforcement. Legal experience in Indonesia is still strong with legal experience rather than behavioral experience. The legal process is still more seen as a regulatory process than the behavior of those involved. To overcome stagnation, it is suggested that the behavioral aspect is seen, cared for and discussed seriously, not inferior to the regulatory component. By the legal system becomes incomplete if the components of the system consists only of regulations and institutions and or structures only. Behavior becomes an integral part of the law, so advancing the law involves also how the role of behavior.<sup>8</sup>

Historically visible, law enforcement in Indonesia there are several factors that drive the spirit of law enforcement. First, the substance of law in Indonesia (laws and regulations under the law) tend to be passive and not futuristic, in the sense that the substance of the law is left behind from the dynamics of society that gave birth to many new problems completely untouchable. This is a reflection that the positive law in Indonesia is still classical and not visionary.<sup>9</sup>

Secondly, law enforcement in Indonesia tends to be permissive and passive (weak) to the defendant who in fact has a strong name and power structure, both in society and in government. One of the things that led to the condition is the lack of active prosecutors in searching for and applying for a tool to trap the defendant in court. The question now is is it possible that progressive law enforcement paradigm is implemented in Indonesia? In order to answer that question, it is necessary to review in advance the dimensions of change or renewal of national law. Ismail Saleh argued that in the framework of renewal and development of national law.

##### Analysis of Isbat Nikah

The word isbat means stipulation, submission, determination. To attribute means to assign, define, establish (truth something). Meanwhile, according to the marriage fiqh language means *إلا وطءوا* means "intercourse or mixed". The scholars of the 'fiqh scholars differ on the meaning of marriage, but overall it can be concluded that marriage according to fiqh experts means marriage ceremony established by syara' that a husband can utilize and have fun with the honor of a wife and his whole body. Being married according to the positive law is the bond of inner birth between a man with a woman as husband and wife with the aim of forming a family, happy and eternal household based on Belief in the One Supreme

Basically the authority of the marriage isbat for the Religious Courts in its history is intended for those who do marriage under the hands before the enactment of Law No. 1 of 1974 on the marriage of Jo. Government Regulation No. 9 of 1975 (Elucidation of Article 49 Paragraph (2), Jo Article 64 of Law Number 1 Year 1974). However, this authority developed and expanded with the use of the provisions of the Compilation of Islamic Law (KHI) Article 7 paragraphs 2 and 3, in paragraph (2) stated that "In the case of marriage can not be proven by marriage contract, may be filed isbat marriage to the Religious Court.

Article 7 paragraph (3) reads: "Isbat marriage that can be submitted to the Religious Courts limited on matters relating to:

- a. The existence of marriage in the framework of divorce
- b. Loss of Marriage Deed
- c. There is doubt about whether or not one of the terms of marriage is valid
- d. The existence of marriage that occurred before the enactment of Law no. 1 year 1974
- e. Marriage conducted by those who do not have marital obstacles according to Law no. 1 year 1974.

By looking at the description of article 7, paragraph 2 and KHI, it means that KHI has given more authority by Law no. 1 year 1989 on Religious Courts, whereas according to Article 2 TAP MPR RI. III / MPR / 2000 on the source of law and order of the INPRES legislation is not included in the order of the Republic of Indonesia's

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<sup>7</sup> He also writes, "Progressive law is a concept of the way of punishment, the way of punishment is not just one: it is various." Among the various ways of punishment, progressive law has its place. " Read Satijpto Rahardjo, "Progressive Law: Action, Not Text," in Satya Arinanto & Ninuk Triyanto, ed., *Memahami Hukum: dari Konstruksi sampai Implementasi*, (Jakarta: Rajawali Pers, 2009), hal. 3.

<sup>8</sup> Sacipto Rahardjo, *Hukum dan Perilaku*, *op.cit*, hal. 78.

<sup>9</sup> *Ibid.*

legislation. Article 2 paragraph 1 of Law no. 14 of 1970 along with its explanation to determine that the authority of a judiciary to resolve cases that do not contain elements of the dispute (voluntair) is on condition if desired (the provision / appointment by the Act).

Regarding this marriage isbat PERMENAG No. 3 of 1975 which in article 39, paragraph 4 determines that if the KUA can not duplicate the marriage certificate because its records have been damaged or lost or for any other cause, then to determine the existence of marriage, divorce, divorce or reconciliation shall be determined by a Decision stipulation) of the Religious Courts, but this relates to marriages made before Law no. 1 year 1974 is not a marriage that happened afterwards.

The absolute competence of marriage as a matter of voluntair can not be analogized (qiyaskan) with matters of cancellation of marriage, divorce, or polygamy. Principally the court is not looking for a case but the case has become an authority because it has been granted by the Act. According to Prof. Aulawi's Wasiat, MA, argued that a marriage isbat is not served.

The matter of marriage isbat in the voluntair case which must be appointed by law does not give authority then the court is not authorized. If the marriage is under the hand after the coming into effect of Law no. 1 year 1974, given the place for marriage isbat, then sociologically surely will encourage the occurrence of marriage under the hands of a massive.

The provisions of article 7, paragraph 2, KHI has provided a very wide absolute competence on this marriage isbiden without limitation of exception, whereas in the explanation of the articles only explained that this article only applied after the enactment of Law no. 7 of 1989 on Religious Courts. Not to mention chapter 7 verse 3 letters (a) which may contain further problematics such as what if the plaintiff revokes his divorce case, or the applicant does not perform the pledge of talak for having reconciled as husband and wife, whereas there has been an interlocutory decision regarding the legal of their marriage.

In Article 7, paragraph 3, (b), in the case of the loss of quotation, the duplicate of the marriage certificate may be requested to the KUA, and as a preventive or prudent action will allow the loss of the original deed record, article 13 paragraph 1 of PP. 9 of 1975 has determined that the second strand of the marriage certificate shall be deposited (sent by VAT) to the Court Clerk within the territory of the marriage register.

The provisions of Article 7 paragraph (c), namely the existence of doubt about whether or not one of the terms of marriage, it is actually directing to what is included in the case of marriage cancellation, not marriage isbat, because usually people who do marriage through Kyai / ustas is already lawful and in accordance with Islamic Shari'a (comply with the provisions of article 2, paragraph 1). Also against the provisions of Article 7 paragraph 3 letter (e), namely marriages made by those who do not have marriage barriers according to Law no. 1 year 1974, this is a very wide chapter that does not provide explanation limitations.

Subsequently, the determination is a court decision on the case of a petition (voluntary), for example the determination in the case of marriage dispensation, marriage license, guardian adhal, polygamy, guardianship, marriage isbat, and so on. Determination is a jurisdiction of valuntaria (not a real judgment). Because on the determination there is only the applicant there is no opposite law. In the determination, the judge does not use the word "judge", but simply by using the word "Setting". The Verdict is a court's decision on a lawsuit based on a dispute or dispute, in the sense that the verdict is a court product in case of contentiosa, ie a real court product. Called jurisdiction contentiosa, because of 2 (two) opposing parties in the case (the plaintiff and the defendant).

## **2. Analysis of Stipulation of Marriage Isbat by Judge Religious Agency Polewali**

As described in the previous chapter, this research is a normative legal research in which the object of this research is the determination of the judge. One of the stipulations of marriage Isbat will be the writer of the study as a sample is Determination Number 264 / Pdt.P / 2013 / PA.Srg, which will be tested with the material of the primary law in the form of legislation and will be tested also with secondary legal materials in the form of views jurists and fiqh scholars related to the problems raised in this study. In addition to completing this research in this study will also be described excerpts of interviews to the Chairman of the Assembly a quo case.

The following will present some key points contained in the Decision of Religious Courts Ruteng Number 264 / Pdt.P / 2013 / PA.Srg to be analyzed. The analysis of the Stipulation will begin by thoroughly delineating the case position of the fact (which is a legal event) revealed in the hearing or in the language of Determination more commonly referred to as a sitting case. Then from the position of the case will be presented legal considerations used by the judge in dropping the Stipulation. The final position of the case and the legal considerations will be in the sub chapter of the paragraph will be continued with a description of whether the judge's judicial consideration in the form of the application of articles and methods of legal discovery has been in accordance with applicable law (positive law and Islamic law).

*The determination of the court in addition to containing the grounds and grounds of the Stipulation also contains certain articles of the relevant legislation or source of the unwritten law on which the prosecution*

is based. The clause of the passage clearly reveals that in a proper Court Decision it is contained two elements, namely the Reason and the Basis of Determination (*ratio decidendi*). And certain Articles in legislation as well as unspoken legal sources.

Both of these matters are absolute in a Court Decision for the establishment of a Quality Assignment that can fulfill the public sense of justice without overriding the rule of law in the form of applicable legislation. *Ratio decidendi* based on material facts shows that the science of law is a science that is prescriptive, so *dictum Penetapan* (which is descriptive) is not a reference in approaching a legal case. In other words, the case approach used in this study refers to the *decidendi ratio* even though to deliver to it it is also necessary to cite part of the *dictum* of Determination relating to the position of the case. Here are the results of research on the establishment of RELIGIOUS POLICY COUNCIL No. 264 / Pdt.P / 2013 / PA.Srg.

Determination Number 264 / Pdt.P / 2013 / PA.Srg. is the First Judge's Decision in the marriage certification petition filed by Masuli bin Adih (Petitioner I) and Rohmawati bint Rasiban (Petitioner II), the spouse who has held the previous marriage by not registering it to the authorized party (in this case the Office of Religious Affairs). In its petition dated August 20, 2013 which has been registered in the Registrar's register of the Religious Court of Ruteng with Number 264 / Pdt.P / 2013 / PA.Srg. the Petitioners argue matters (related to the research theme) which are principally as follows:

- a. The Petitioners held a marriage on February 26, 2012 in Walantaka Sub-district, Serang City.
- b. The marriage of the Petitioners was conducted by using the marriage guardian of Petitioner II's father named Rasiban bin Ahmad and who was in the position to marry was Penghulu named (Alm) Aliyudin.
- c. When the marriage took place, submitted dowries by Petitioner I to Petitioner II in the form of money amounting to Rp. 50.000, - (fifty thousand rupiah) witnessed by two witnesses named Wahyudin bin Asman and Yusro bin Suki.
- d. The Petitioners also argued that at the time of the marriage Petitioner I was in the status of *Jejaka* and Petitioner II was a *Virgin* status, and during the marriage was never divorced.
- e. Whereas after the marriage the Petitioners have lived in Cibonteng Village RT 002 RW 001, Kelurahan Lebakwangi Walantaka District, Serang City, until now; Whereas the Petitioners have lived in harmony as husband and wife and are blessed with 1 child named Mutiah (Female) age 22 days;
- g. Whereas between Petitioner I and Petitioner II there is no blood relation and dairy and fulfill the requirement and there is no prohibition to conduct marriage according to the provisions of Islamic law;
- h. Whereas during the marriage there was no third party interfering with the petition of the Petitioners' petition and during that time the Petitioners remained Muslim;
- i. Whereas during the marriage of Petitioner I and Petitioner II until now it has not been registered at the Office of Religious Affairs of the Sub-District;
- j. Whereas the Petitioners have filed a petition for marriage certificate for the purpose of administering the Birth Certificate of the Child and to be registered at the Office of Religious Affairs, and that the marriage of the Petitioners may be ratified according to the prevailing laws and regulations;
- k. That in the order of the administration of marriage, it is ordered to the applicant to register this determination to the Officer of Marriage / Religious Affairs Office in the area of residence of the Petitioners to be recorded in the list provided for it;
- l. Whereas the Petitioner is willing to pay case fee in accordance with the prevailing provisions;

From the principal arguments of the Petitioners' petition as has been disclosed above, in essence the Petitioners in their petition have applied for several matters, namely:

1. To grant the petition of the Petitioners;
2. To declare the legal marriage between Petitioner I (Masuli bin Adin) and Petitioner II (Rochmawati bint Rasiban) carried out in the territory of Religious Affairs Office of Walantaka Sub-district, Serang City, on February 26, 2013;
3. To instruct the Petitioners to submit copies of the Stipulation of RELIGIOUS POLITICAL COURTS to the Marriage Officer / KUA in the area of residence of the Petitioners to be recorded in the lists provided for it;
4. Establishing legal fees according to law; Of the four basic matters requested by the Petitioners, in accordance with the title of the study, the in-depth discussion will only be focused on the validity of the marriage which the Petitioners direct both according to positive law and Islamic law, by analyzing judges' considerations from a progressive legal perspective according to the title of this study .

Furthermore, in relation to the principal examination of the case, the Petitioners argued that they had married Islamic Sharia which they did not record and requested that the marriage be legalized and obtained legal recognition. On the arguments of the Petitioners, the panel of judges in its consideration states if the legal basis for the argument expressed by the Petitioners is Law Number 22 Year 1946 concerning Marriage Article 3 paragraph (5) jis. Law Number 7 Year 1989 on Religious Courts explanation of Article 49 number (22) jo. Compilation of Islamic Law Article 7 paragraph (1), paragraph (2), and paragraph (3) letter (e), so on the basis

of the articles of the Panel of Judges opinion if the petition for legalization of marriage of the Petitioners has been based on law and can be examined further. The following are the clauses of the articles which form the basis of the arguments of the Petitioners' petition:

Law Number 22 of 1946 concerning Marriage Agreement Article 3 paragraph (5) reads: "If there is one such thing at the first, second and third paragraphs and arises due to the determination of the judge, that there is no marriage with adequate supervision or talak or rujuk shall not be notified to the jurisdictioner, the police judge of the judge shall send a copy to his or her assignment to the relevant marriage official and the employee shall enter the marriage, divorce and marriage in their respective registration book by calling a letter to the Assessor of Justice declaring the matter that."

Law Number 7 Year 1989 on Religious Courts explanation of Article 49 point (22) reads: "The meaning of marriage field as regulated in Law Number 1 Year 1974 concerning Marriage, among others, is: a statement about the validity of marriage that occurred before the Law law No. 1 of 1974 on Marriage and carried out under other regulations. "

Compilation of Islamic Law Article 7 paragraph (1), paragraph (2), and paragraph (3) letter (e) reads: "(1) Marriage can only be proven by the Marriage Certificate made by the Registrar. (2) If the marriage can not be proven by the Marriage Deed, her marriage may be filed to the Religious Court. (3) The marriage of marriages which may be submitted to the Religious Courts shall be limited to matters concerning: (e) Marriage by those who have no marriage barriers according to Law No. 1 of 1974 on Marriage. "

The three chapters above which are used as a foothold by the Panel of Judges in essence contains the rules of marriage registration and what if there is a condition where the marriage takes place without being registered by the authorities in this case the Registrar Officer at the Office of Religious Affairs. The three articles are used as a foothold because it is directly related to the principal case in the petition of the Petitioners to obtain the legal status of marital attestation.

After the series of examination of the case from the stage of the reading of the request to the conclusion which includes the evidentiary event by presenting the evidence of the letter and witnesses, the panel of judges found the legal facts set forth in the legal considerations which then by the Panel of Judges looked for ratio decidendi and the rule of law over the fact law who appeared before the court.

Although the explicit facts of the facts state that if the Petitioners have established marriages believed by the Petitioners to be in conformity with Islamic law. However it is interesting to note what the judges have applied in their legal considerations. Here are some points concerning the subject matter made by the judges as the legal foundation in imposing the Stipulation:

First, the Panel of Judges with guiding Book II Revised Edition 2010 p. 149 points (11) in the event of a request for marriage isbat it is necessary to notice to the Community, therefore through Announcement Letter Number 264 / Pdt.P / 2013 / PA.Srg. dated 23 August 2013 The Assembly has announced to the public that those parties who objected and harmed by the application of the Marriage Approval may object to the RELIGIOUS POLICY AGENCY not later than 14 (fourteen) days from the date of the announcement, but even though the deadline has been exceeded, no one from any party has come to complain, therefore the Assembly declares that the petition of the Petitioners may be considered to be continued.

Second, the Panel of Judges views if the facts revealed in the hearing have fulfilled the provisions of the Compilation of Islamic Law Article 14 which reads: "To conduct marriage must exist: a. Future husband; b. Candidate Candidate; c. Guardian of marriage; d. Two witnesses and; e. Ijab and Kabul. "

Thirdly, the Panel of Judges considered ownership of Identity Card and Family Card as a meaningful husband and wife between Petitioner I and Petitioner II had been socialized and socialized like Husband Wife in general and registered in the administration of population in surrounding environment with no problems whatsoever, therefore it is allegedly as the confession between the concerned marriage has occurred that have fulfilled harmonious and marriage conditions according to Islamic religion so well received by the community environment;

Fourth, the judges considered that although the marriage between Petitioner I and Petitioner II took place and was implemented after the enactment of Law Number 1 Year 1974, nevertheless the trial was not proven in the marriage concerning the existence of marriage barriers as intended in Article 8, Jo Article 9 Jo Article 10 Law No. 1 of 1974 Jo Article 42, Jo Article 40, Jo Article 41, Jo Article 42, Jo Article 43 and Jo Article 44 Compilation of Islamic Law, and on the other hand the marriage is carried out with the fulfillment of the terms and conditions as intended in Article 14 Compilation of Islamic Law, therefore the Assembly is of the opinion that even though the a quo marriage takes place and is held within the period after the enactment of Law Number 1 Year 1974, but because it is clearly not in conflict with the aforementioned requirements therefore the marriage between Petitioner I with Petitioner II being declared valid;

Based on the considerations related to the matter of marriage ratification petitioned by the Petitioners, the panel of judges of the Religious Courts of POLEWALI overthrew the amorphous stipulation that read: 1) To grant the petition of the Petitioners; 2) To declare the lawful marriage between Petitioner I (Masuli bin Adin)

and Petitioner II (Rochmawati bint Rasiban) held in the territory of Religious Affairs Office of Walantaka Sub-district, Serang City, on February 26, 2013; 3) To order the Petitioners to register this Isbat Nikah to the Officer of the Official of Religious Affairs Office of Walantaka District of Serang City; 4) To declare that the cost of this case amounting to Rp.291.000,00 (two hundred ninety one thousand rupiah) shall be borne by the Petitioners.

Based on the results of interviewees on the Decision of the Panel of Judges RULES OF POLEWALI AGE No. 264 / Pdt.P / 2013 / PA.Srg. At least in terms of its usefulness, by presenting interviews to one of the Panel of Judges to hear the case (in this case the Chairman of the Assembly) will provide an overview of how the actual construction of the thoughts used by the judge in examining and adjudicating a quo case.

According to him, an unregistered marriage can be ratified as long as there is no halangn which can make the marriage unlawful under Islamic law, at least Article 7 paragraph (3) letter e Compilation of Islamic Law can be used as a legal basis for the judges in establishing a marriage lawful.

In addition to explaining how an unregistered marriage can be passed by a judge, he also explains that the marriage of the Petitioners made by the judge's guardian is not a government official, in the condition as encountered by the Petitioners (read: the absence of an Islamic guardian) , although it is very clear in the Compilation of Islamic Law Article 1 letter a, it is stated that the guardian of the judge is an official appointed by the Minister of Religious Affairs to become the guardian of a marriage of a person. He added that despite the contradictions between the law's intentions on the judges and the reality of the Petitioners' marriage, because according to Islamic law derived from the Qur'an, the Prophetic Hadith, and the opinions of the ulama, there is no a reason for the judge not to endorse the marriage of the Petitioners.

Against the application of the ultra petitum partium principle by the judge in the order of marriage registration of the Petitioners, he explained that in addition to the benefit of the Petitioners, the order of registration is also an anticipative step in order to marry the Petitioners who have been ratified by the judge can be registered at the Office of Religious Affairs designated. This means that what has been imposed by the Judge also has direct and decisive implications to the official authorized to record the marriage that has been appointed by the judge.

## V. CONCLUSION

From the description of the discussion of the application of marriage isbat after the marriage law no. 1 Year 1974 in Serang Religion Court, the writer tries to give conclusion which is the essence of discussion of material in this thesis, as for conclusion which writer can mention is:

1. Although in its consideration it seems less comprehensive, but what has become the decision of the Judges Council of Religious Courts to examine the case of marriage legalization, in general does not appear to violate the law, both the laws and regulations and the rules of Islamic law, especially the establishment of the legality of marriage the Petitioners by the panel of judges have also been able to fulfill the sense of justice for the Petitioners. That is, the decision that has been taken and poured by the panel of judges, by validating the marriage of the Petitioners is appropriate.
2. There is no reason for the judge not to establish the legitimate marriage under the hands of the Petitioners, because the marriages conducted by the Petitioners do not substantially violate the provisions of the legislation and the provisions of Islamic law, in particular the determination that has been imposed by the judges has been can fulfill the legal wishes and sense of justice expected by the Petitioners.

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