

MARRIAGE *ISBĀT* IN *QIYĀS* PERSPECTIVE

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Abstract

The main problem discussed in this article is how the implementation of qiyās for marriage isbāt confirmation of marriage. This article discusses about marriage isbāt from qiyās perspective, analysing three sub-problems which are the focuses of this study; first, what factors that highly influence isbāt of marriage in Makassar Religious Court. Second, how Judge's consideration in the case isbāt of marriage, and third, how is the implementation of qiyās related to the case of marriage sibat in Makassar Religious Court. This research is a field study. Data sources were obtained during the field research at Makassar Religious Court by interviewing with the judges. The data were analyzed by the deductive method and presented descriptively using normative, juridical, sociological, and philosophical approaches. Theories used in analyzing data were theories of justice, certainty, and expediency, judges, existence, progressive law, to implement isbāt of marriage in Makassar Religious Court.

The results show that the number of marriage isbāt is still high in Makassar Religious Court which is driven by some factors, for instance: the case of spouses asked for the marriage certificate Marriage contract, spouses who asked for jointed-property, children who need a birth certificate, or inheritance purpose. Submission of marriage isbāt application to the religious court is in line with the law No. 1 of 1974, Article 2 Paragraphs 1 and 2 of Marriage Compilation of Islamic Law Article 7 Paragraph 3 letter d. The application for isbāt of marriage which was filed with the court and consideration of the judge the judge's consideration in granting the divorce was not bound by positive law alone, but also the consideration of justice, the sociology of law, and the public good.

The implication of this study recommends the importance of

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strengthening regulations that can accommodate present and future problems to avoid greater harm so that the problem of "Sirri marriage" that increases can be avoided.

Keywords:

Isbāt Marriag;, Judge; Qiyās; Sirri Marriag; Compilation of Islamic Law

Abstrak

Masalah utama yang dibahas dalam artikel ini adalah bagaimana pelaksanaan qiyās untuk pernikahan dan konfirmasi pernikahan. Artikel ini membahas tentang pernikahan isbāt dari perspektif qiyās, menganalisis tiga sub-masalah yang menjadi fokus penelitian ini; pertama, faktor-faktor apa yang sangat memengaruhi isbāt pernikahan di Pengadilan Agama Makassar. Kedua, bagaimana pertimbangan Hakim dalam perkara isbāt perkawinan, dan ketiga, bagaimana penerapan qiyā terkait dengan kasus sibat perkawinan di Pengadilan Agama Makassar. Penelitian ini adalah studi lapangan. Sumber data diperoleh selama penelitian lapangan di Pengadilan Agama Makassar dengan mewawancarai para hakim. Data dianalisis dengan metode deduktif dan disajikan secara deskriptif menggunakan pendekatan normatif, yuridis, sosiologis, dan filosofis. Teori-teori yang digunakan dalam menganalisis data adalah teori-teori keadilan, kepastian, dan kebijaksanaan, hakim, keberadaan, hukum progresif, untuk menerapkan pernikahan di Pengadilan Agama Makassar.

Hasil penelitian menunjukkan bahwa jumlah perkawinan isbāt masih tinggi di Pengadilan Agama Makassar yang didorong oleh beberapa faktor, misalnya: kasus pasangan yang meminta akta pernikahan, akad nikah, pasangan yang meminta properti jointed, anak-anak yang membutuhkan akta kelahiran, atau tujuan warisan. Pengajuan aplikasi pernikahan isbāt ke pengadilan agama sejalan dengan undang-undang No. 1 tahun 1974, Pasal 2 Paragraf 1 dan 2 Kompilasi Perkawinan Hukum Islam Pasal 7 Paragraf 3 huruf d. Aplikasi isbāt pernikahan yang diajukan ke pengadilan dan pertimbangan hakim pertimbangan hakim dalam memberikan perceraian tidak terikat oleh hukum positif saja, tetapi juga pertimbangan keadilan, sosiologi hukum, dan barang publik.

Implikasi dari penelitian ini merekomendasikan pentingnya penguatan regulasi yang dapat mengakomodasi masalah sekarang dan masa depan untuk menghindari kerugian yang lebih besar sehingga masalah "pernikahan sirri" yang meningkat dapat dihindari.

Kata Kunci:

Isbāt Nikah; Hakim; Qiyās; Nikah Sirri; Kompilasi Hukum Islam

A. INTRODUCTION

Marriage is one of the foundations of living, especially in a perfect society or social interaction, and marriage is also a key element in shaping a small people, which eventually became a member of a larger society. Humans are social creatures so they can not live without the laws of both religious or Islamic law. ⁵Humans and the law have a very close relationship and interdependence as there are between fish and water that are different but always united. A Roman philosopher, Celcius, asserted: *ubi societas ibi ius* where there is a people there is a law.⁶

Marriage is a legal relationship that is a legitimate relationship between a man and a woman who has fulfilled the conditions of marriage, for as long as possible ⁷. The main objective of legal regulation in marriage is an effort to realize a *sakinah, mawaddah* and *warahmah* tranquility, love and mercy household and avoid potential wrongs between one party and another. Marriage has been regulated in Indonesia. The Legal Aid Law No. 1 of 1974 on marriage is a source of material legality in the judiciary system. But at present, the case does not fully refer to the Law. As an example of the issue of Divorce in the Compilation of Islamic Law KHI in article 7 paragraph 3 it is explained that *Isbāt* marriage which was filed in the Religious Court is limited to the existence of marriage which occurred before the enactment of Law No. 1 1974.⁸

When referring to these conditions, if related to the fact that the year 1974 which was used as one of the provisions has so far left us who are currently in 2019. It means we continue to refer to 1974 in applying the provisions of marriage *isbāt*, I ensure the provision will be easily misused. Imagine if only marriages case that can be submitted in the period that has entered 2019, there will not be a couple who submitted marriage *isbāt* with the understanding that marriages that took place before 1974 have entered the age of 40 years of marriage and the couples have entered the age of more than 60 or even 70 years, a relatively old age that may no longer think about submitting marriage records.

Islamic law is a law built on human understanding of the Qur'an and the *Sunnah* to regulate human life that is universally relevant in every age and human space.⁹ The purpose of the Islamic religion in establishing Allah's law is to bring the public good,

⁵Amrullah Ahmad, *Dimensi Hukum Islam dalam Sistem Hukum Nasional*, (Cet II, Jakarta: Gema Insani, 2006), h. 181.

⁶ F. Isjwara, *Pengantar Ilmu Politik* (Jakarta: Bina Cipta, 1992), h.79.

⁷ Rien G. Kartaapoetra, *Pengantar Ilmu Hukum* (Jakarta: Bina Aksara, Cetakan I, 1988), h. 9

⁸ Kementerian Agama Republik Indonesia, *Kompilasi Hukum Islam, Hukum Perkawinan, Waris, Perwakafan*, Inpres No. 1 TH 1991 Berikut Penjelasan (Surabaya: Karya Anda, 1991), h. 23

⁹ Said Agil Husin Al-Munawar, *Hukum Islam Dan Pluralitas Sosial* (Jakarta: Penamadani, 2004), h. 6.

by taking all that is beneficial and preventing or rejecting the evils, which is not useful for life. And prevent damage to humans and bring benefit to them, which mean directing them to the truth, justice, and policies, and explain the path that must be traversed by humans.

The Religious Court is one of the four judicial institutions under the Supreme Court of the Republic of Indonesia, indeed a judicial institution aimed for Muslims with an absolute scope of authority absolute competence, both regarding the case they are handling and their justice seekers. Special jurisdiction of the Religious Courts in the field of marriage, in the clarification of Article 49 paragraph 2 of the Law No. 7 of 1989 which has been amended by the Law of the Number No. 3 of 2006 which last modified by the Law of the Number 50 of 2009 on Religious Justice, broken down into 22 twenty-two types of things. From the 22 types of cases were lawsuit voluntary, others were volunteer. One of the matters of voluntary application which was the authority of the Religious Courts Article 49 Paragraph 1 of Law No. 3 2006 on Religious Justice was married *isbāt*.

The marriage application was filed in the Religious Court by those who could not prove their marriage under the Marriage Act issued by the Marriage registrars of the District Religious Affairs Office, because it was not recorded. The marriage application filed by the Applicant, by the Religious Court will be processed by the legal provisions of the law. Based on the explanation of Article 49 paragraph 2 of the Republic of Indonesia Law No. 71989 on the Courts of Religion and the provisions of Article 7 paragraph 3 letter d Compilation of Islamic Law KHI, it can be understood that a marriage application can be applied to the Religious Court only if marriages occurred before the enactment of the Republic of Indonesia Number 1 of 1974 on Marriage. Up to a contrario *mafhum mukhalafah* marriage that held post-RI Law No. 1 In 1974 on Marriage, the Religious Court was not authorized to record it.¹⁰

In reality, there are still many marriages that are carried out after the enactment of RI Law Number 1 of 1974 which is not registered with the Marriage Registrar of the Religious Affairs Office for various reasons and reasons so that they do not have a Marriage certificate certificate, which is then applied for marriage *isbāt* to the Religious Court. From this fact, it is clear that married couples who do not have a Marriage certificate because their marriage is not being registered or not registered, cannot obtain their rights to obtain the required personal documents including their children will not get a Birth Certificate from the Civil Registry Office. Even though the Civil Registry Office later issued a Birth Certificate, his father's name was not included. The only solution they can get is to file a marriage petition to the Religious Court. The conformation of marriage issued by the

¹⁰ Pagar, Himpunan Peraturan Perundang-undangan Peradilan Agama di Indonesia (Cet. II; Medan: Perdana Publishing, 2015), h. 154.

Religious Court is then used or will serve as the basis for recording their marriage to the marriage register of the Religious Affairs Office and subsequently, the Office of Religious Affairs will publish the Marriage certificate or Collection of the Marriage Act.

The main obstacle for the Religious Courts to be able to carry out their functions optimally to conduct marriages *isbāt* of being unregistered or unregistered marriages is the absence of a strong legal umbrella. The provisions of Article of Law which become the juridical basis for the Religious Courts to carry out marriage is an explanation of Article 49 paragraph 2 number 22 and Article 7 Paragraph 2 and Paragraph 3 letter d Compilation of Islamic Law.¹¹ Whereas both of these provisions limit marriages that can be applied for marriage *isbāt* marriage to the Religious Court only marriages that took place before the enactment of RI Law No. 1 of 1974 concerning Marriage, that can be applied for marriage *isbāt* With these restrictions, the Religious Courts do not have a legal umbrella to carry out their functions optimally in marriage. While the number of people submit a marriage request to the Religious Court continues to increase. This is due to the along with the administrative requirements of the school that requires every child who will go to school to attach a copy of the Birth Certificate and one of the administrative requirements that must be fulfilled to obtain a Marriage Certificate is a Marriage Certificate of parents. To register the existence of such marriage there must be a determination of "marriage *isbāt*" from the Religious court.

Registration is a state administration mechanism to create order and prosperity for its citizens. Recording means to include the marital status in the marriage certificate for each spouse. The quotation of the marriage act is authentic evidence made by the Marriage, Recording, and Referral Office of the Religious Affairs Office. The urgency of recording for the legality of marriage is indicated by the existence of a Marriage Certificate. Among other things, a Marriage Certificate can be used to take care of a child's birth certificate, marital status requirements, and so on. Marriage registration in principle is a basic right in a family. Besides recording is also a form of protection for wives and children in obtaining rights in the family, such as income, *haḍānah*, the status of *nasab*, inheritance, and so forth. Because without a marriage certificate, the rights of a wife or child in obtaining their rights in the family can be doubted.

Determination of marriage *isbāt* by the Religious Court for the benefit of marriage registrants in the District Religious Affairs Office is no more than a policy to fill the legal vacuum governing marriage *isbāt* against marriages carried out after the enactment enactment of RI Law No. 1 of 1974 concerning Marriage. Marriage

¹¹ Pagar, Himpunan Peraturan Perundang-undangan Peradilan Agama di Indonesia, h. 154.

certificate as a product of KUA District office of religious affairs is very useful for Muslims to manage and get their rights in the form of letters or personal documents needed from the competent authority and to provide guarantees of legal certainty protection for each married couple, including protection against the status of the child born from the marriage and protection against the legal consequences that will arise later. Marriage is a very strong bond, thus the marriage contract in a marriage has a central position. Once the importance of the marriage contract was placed as one of the agreed marriage terms. Nevertheless, there is no requirement that the marriage contract must be written down or registered. It is on this basis that Islamic Jurisprudence does not recognize the registration of marriage.¹²

The Quran has recommended recording muamalah transactions in certain circumstances. As mentioned in QS al-Baqarah / 2: 282:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا يَأْبَ كَاتِبٌ أَنْ يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ.

Translation:

O you who believe, if you make no money for the appointed time, write it down. There should be a writer among you who writes it correctly. Let not the author refuse to write it as God has taught it, so let him write.¹³

There have been many issues that have arisen on the surface as a result of unregulated marriage registration laws. Islamic rules are the rules that determine the validity or validity of a marriage. But in terms of legal aspects *isbāt* marriage still does not have concrete legal provisions. In connection with this matter, currently, marriage requests are submitted to the Religious Courts for a variety of reasons, in general marriages carried out after the enactment of RI Law Number 1 of 1974 concerning Marriage. The Religious Court has so far accepted, examined, and provided the application for marriage *isbāt* for marriages that took place after the enactment of RI Law Number 1 of 1974 concerning marriages, while there are no legal provisions. Therefore, the determination of marriage *isbāt* by the Religious Court is nothing more than a policy to fill the legal vacuum governing marriage *isbāt* against marriages carried out after the enactment of RI Law No. 1 of 1974 concerning Marriage.

But concretely, there are no strict rules either in the article or in other regulations which confirm that marriage *isbāt* is done in a religious court. The Marriage *isbāt* application is voluntary in nature and a court product in the form of a decision. Then after the case is decided, the applicant will use the decision product in

¹² Khoiruddin Nasution, *Status Wanita di Asia Tenggara: Studi Terhadap Perundang-undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia* (Jakarta-Leiden: INIS, 2002), h. 139.

¹³ Departemen Agama RI, *Bahan Penyuluhan Hukum* (Jakarta: Departemen Agama RI, 2000), h. 70.

the form of a copy of the decision to be taken to the local religious affairs office where the applicant resides to be used as one of the requirements to register the marriage. If the applicant is dissatisfied or feels disadvantaged by the court's decision/determination, then he can submit an appeal to the Supreme Court.¹⁴ To realize justice based on the Almighty God, law enforcement does not only play a role in establishing legal certainty but also justice and greater good.¹⁵ The legal and justice protection in the court that must be given, covers all aspects of humanity which include religion, life, thought, ancestry, wealth, human rights, dignity and prestige, and civil rights based on the laws and regulations that can provide service to the people.¹⁶ In order to uphold law and justice, judges through the court must look and explore carefully, in detail and thoroughly the substance of the applicable law and in completing an application it is impossible to uphold the principle of both sides being heard before a decision is given because in order to make a decision or stipulation that is heard only applicant's eyes only. To uphold the law and justice, the judge through the court should look and dig in, thoroughly and thoroughly the substance of the applicable law and in the completion of the application. It is impossible to maintain the principle of both sides to be heard before the decision is given because to take one decision or decree the only side that can be heard is the applicant.¹⁷

Seeing Islamic law in the form of a decision/stipulation of the Religious Court is a decision/stipulation that contains clarity and legal reform.¹⁸ The decision referred to, is binding parties to the litigants. Besides, the decision/determination of the Religious Court is valuable as jurisprudence which in certain cases is used as a reference by the judge.¹⁹

Judges as law enforcement and justice are obliged to explore, follow, and understand the values of law living in society.²⁰ The judge in dealing with the case is obliged to pay close attention to the value of the law that lives in the people so that his decision is by the sense of justice and the execution of evil.²¹

¹⁴ Mahkamah Agung Republik Indonesia, *Pedoman Pelaksana Tugas dan Administrasi Peradilan Agama*, Buku II Edisi Revisi Direktur Badan Peradilan Agama, 2014, h 138.

¹⁵ Binsar Siregar, *Hukum Hakim dan Keadilan Tuhan* (Jakarta: Gema Insani Press, 1995), h. 34.

¹⁶ Abdul Qadir Audah, *Al-Tasyri' al- Jinat al-Islami*, (Cet. IIV Jakarta: PT Bulan Bintang, 2004), h. 19.

¹⁷ M. Yahya Harahap, *Hukum Acara Perdata Tentang Gugatan, Persidangan, Penyitaan, Pembuktian dan Putusan Pengadilan*, Cet ke XI, (Jakarta: Sinar Grafika, 2011), h. 39.

¹⁸ Mukti Arto, *Pembaharuan Hukum Islam Melalui Putusan Hakim* (Yogyakarta: Pustaka Pelajar), 2015, h. 3

¹⁹ Zainudin Ali, *Hukum Perdata Islam di Indonesia*, Cet, IV (Jakarta: Sinar Grafika, 2012), h.5-6.

²⁰ Republik Indonesia Undang-Undang Nomor 48 Tahun 2009, Pasal 5 Ayat 1 Tentang *Kekuasaan Kehakiman*.

²¹ Mukti Arto, *Teori dan Seni Menyelesaikan Perkara Perdata di Pengadilan Depok: Kencana*, 2017, h. 128.

B. RESEARCH METHOD

This article uses two types of qualitative research at once, namely field research and library research that are qualitative.²² Field research is positioned to interpret the problems examined with existing theories. The reason for the use of qualitative methods in this study was because the problems that exist in the object of research were very diverse, so to identify the urgent problem requires further study. Qualitative research is very closely related to contextual factors. The purpose of sampling, in this case, was to capture as much information as possible from various sources, so the purpose was not to focus on the differences that are developed in generalizations. The aim was to elaborate on the specificities that exist in a unique concoction of context.

While the library research was exploring various literature on the implementation of *qiyās* for the determination of Marriage Law which was oriented to the benefits analysis. In determining the location of research, researchers consider three important elements, namely: place, actor, and activity.²³ The location of this research in Makassar First or A-Level of Religious Court and several Religious Affairs Offices located in Makassar City.

This study uses an approach commonly used at Alauddin Makassar State Islamic University UINAM, namely the methodological approach and scientific approach.²⁴ Descriptive approach hereby using a multidisciplinary,²⁵ normative, theological juridical, sociological, and philosophical approach.

The data showed that the practice of examination in hearings that grant cases of the Marriage *isbāt* application in a court of law which is used as a place of research in the Makassar Religious Court has gone well and is accepted by the petitioners, both granted and rejected. Every case of a Marriage *Isbāt* application submitted to a religious court certainly has a variety of problems it faces, mainly because it is because the Petitioners do not have a marriage certificate, children cannot have Birth Certificates, children do not go to school. In the best interest and the future life of the

²² Qualitative research method is a form of research method which is used to examine the natural condition of the object, the researcher is the key instrument, the data collection are carried out by triangulation combined, the data analysis is inductive/qualitative, and the result of emphasized generalization. See Sugiyono, *Metode Penelitian Kuantitatif, Kualitatif dan R & D* Cet. VI; (Bandung: Alfabeta, 2009 M), h. 8-9.

²³S. Nasution, *Metode Penelitian Naturalistic Kualitatif* (Bandung: Tarsito, 1996), h.43

²⁴ Abuddin Nata, *Metodologi Studi Islam* Cet. IX; (Jakarta: Raja Grafindo Persada, 2004), h. 28.

²⁵ It is called multidisciplinary because it uses logic or ways of thinking more than one branch of law. See C.F.G. Sunaryati Hartono, *Penelitian Hukum di Indonesia pada Akhir Abad ke-20* Bandung: Alumni, 1994 M, h. 124.

applicant household and their children, this marriage issue must be registered to the Religious Court.

The acceptance, examination, trial, and termination in the Marriage *isbāt* case is certainly very different between every religious court, seen from the local culture and customs that occur amid the people that are recognized and used as a guide so it cannot be ignored, then this will be a consideration in handling marriage *isbāt*. The difference in the views of each judge in seeing the Marriage *isbāt* case certainly gives its color that is very beautiful and can open new insights in the realm of science from the positive side so that the development of thought makes it advanced and active. From the judgment that the judges placed on the marriage *isbāt* through several stages of examination, in most of cases the marriage application filed by the applicants is always granted which promotes the validity of the marriage registry, to have legal certainty and legal protection for the Applicant and the children.

When the Religious Court has enough strong considerations after examining and adjudicating the issue of Marriage *isbāt* due to unresolved marriage issues at the Office of Religious Affairs KUA for various reasons, they can grant the applications for the good and the future of the Applicants and the children.

C. RESEARCH RESULT

The link in the Marriage *isbāt* with justice is that justice is part of the legal objectives and the legal objectives constitute the final estuary of the case settlement process, among the theories of legal objectives applicable in the religious court environment, are justice *gerachtgkeit*, expediency *zwegkmassigkeit* and legal certainty *rechtsicherheit*. These three things ideally should be considered in a balanced and professional manner, even though the implementation is difficult to undertake. So justice must be stressed to meet the legal needs of the justice seekers people.

Regarding the concept of the principle of justice, it means that judges must consider the law in society living law, which consists of unwritten customs and legal provisions. In this case, a sense of justice must be distinguished according to individuals, groups, and communities. Besides justice from a certain society, not necessarily the same as the sense of justice of other communities. So in considering its decision, a judge must be able to describe it all comprehensively in his decision. Jurisprudence is the first and foremost aspect of a judge's decision. In this case, the first judge must adhere to the prevailing legislation. Judges should understand the law by finding a law that relates to what is going on. Judges need to determine whether the law is fair, useful, or provide certainty when enforced because one of the purposes of the law is to create justice and order for the people.

Legal justice is justice based on law and legislation. In the sense that the judge decides the matter in dealing with it and considers it based on the positive laws and regulations of the law relating to marriage matters. Justice like this is justice

according to the positivistic legalist. In the pursuit of justice, a judge is merely a law enforcer, a judge does not have to look for sources of law outside of written law and judges only look to apply what is contained in the law on rational and solid matters. In other words, a judge is viewed as a funnel or mouth of law.

Legal justice is only available to the law, but it will in the long run cause injustice to the public because written laws have certain practices that will eventually die because when the law was created the element of justice defended society. However, as it was introduced, as the values of justice were changed, as a result, the element of justice in the law became lessened.

Exercising the duties and authority of a judge can create a framework for upholding justice and the truth by adhering to the laws, legislation, and values of justice that are developing in the people. In the case of the judge, he/she has established a trust that the rules of the law should be applied fairly and justly. If the application of the rules of law creates injustice, then the judge is obliged to prevail in moral justice and overthrow the law or legal justice.

A good law is a law that is by the law that lives in the people the living law which is certainly also appropriate or is a reflection of the values that apply in society social justice. Justice here referred to not procedural formal justice but must seek to create substantive material justice by the conscience of the judge. In essence, justice is to have a goal which is to provide true benefit or happiness for as many people, countries and laws as there is only for true benefits, namely the happiness of the majority of people, the law must create a humanist society, that is, a society that enhances happiness for the majority of people the greatest happiness of the greatest number of people.

Progressive law is the law of context, which is not bound by the rigidity of the legal text. Law should be able to keep up with the times, be able to answer the changing times with all the bases in it, and be able to serve the interests and needs of the people by relying on the morality aspects of the law enforcement of human resources themselves. The paradigm of progressive law strongly rejects the mainstream as it is centered on the rules/mechanisms of positivistic law so that progressive law reverses this understanding. Honesty and sincerity become the crown of law enforcement. Empathy, care, and dedication bring justice to be the spirit of law enforcement. Human interest welfare and happiness becomes the point of orientation and the ultimate goal of the law. Law enforcers become the spearhead of change. Progressivism departs from the view of humanity that human beings are good, have the qualities of compassion and concern for others as an important capital for building a life of justice in society. Progressivism teaches that law is not a king, but a tool to describe the basis of humanity that serves to give grace to the world and humans.

The attitude of progressivism that does not want to make law as a technology that has no conscience, but rather an institution of moral in humanity. It is in this

logic that legal revitalization is carried out. Changes are no longer on the rules but on the creativity of legal actors actualizing the law at the right time and space. Change actions can be immediately carried out without having to wait for changes in regulations. This is because legal actors progressive law enforcement officers can make progressive interpretations of existing regulations.

The function of judges as officials who should be independent in handling cases means that they are not affected by situations outside the trial. Therefore, they have knowledge and integrity in seeking to uphold true justice for the justice seeker people. From the interviews it appears that all judges who carry out their duties and usually said to be the representative of God, carrying out their duties especially in handling Marriage *isbāt* cases based on the legal texts.

Researcher's review of the results of the application of *Qiyās* in the Determination of Marriage *Isbāt* in the Makassar Religious Court is that so far the judges have played their role in deciding Marriage *isbāt* not only as a formal legal implementer but with creativity in finding another side of justice and benefit the law itself. The way of thinking of judges has changed by reconstructing the paradigm of positivism law with the progressive mindset of judges in carrying out their duties to find the essence of effective law which is justice for the people. Judges in carrying out their duties should be based on progressive law. Progressive law in Marriage *isbāt* case is not fixed text. But it must also be able to see the benefits for justice seekers, namely in favor of the aspects of benefit as well as futuristic fulfillment of law and justice. The empirical judge paradigm from the results of the research is that resolving the Marriage *isbāt* case is not only formal legal or positivistic. Judges in this case see more the law that is fair, useful and protects the interests of justice seekers.

During the research, the researcher found out that the judge that not only using normative thinking but also substantive nature that is progressive. Thereof the average judge in handling Marriage *isbāt* cases does not only follow the legal positivism mindset in carrying out his duties as a judge examining, adjudicating and decides on cases submitted to judges, so that the spirit of progressive law is the law as something central in the judiciary so that in its development human beings are at the focal point of the rotation of the law. The law revolves around humans as the center. Law exists for humans, not humans for the law.

The implications of judges in Marriage *isbāt* cases with a non-positivistic progressive paradigm will certainly show that it will be easy for the judges in carrying out their duties because the ultimate goal is not solely the settlement of cases handled but is able to create other nuances in deciding cases so that the usefulness and futuristic certainty of the law will become real justice to the people. Examples of cases of Marriage *isbāt* in which the Petitioners have lived together for many years as husband and wife and have been blessed with offspring, but from unregistered marriages, so that married couples and children born do not get their

rights, of course, the rules of fiqh whose substance is avoiding damage must take it as a priority over benefits.

Basically in Law Number 1 of 1974 concerning Marriage which states in article 2 paragraph 1 and 2. In the case of irregularities in paragraph 2 of this article, a marriage may be requested from the Religious Court as well requested by a married couple and / or children. In reality, the provisions in the norms of this law are violated or in the term of the judge is called *contra legem*, it will be referred as incontextual progressive judge.

Based on the study above, empirically the result shows that the high number of on Marriage *isbāt* application submitted by the petitioners will bring up new ideas, namely how to reconstruct the paradigm of thinking of judges in handling, examining and adjudicating and deciding cases with progressive concepts, so as to realize principles of justice and expediency for justice seekers. The analytical study in this article is how to build the mindset of judges who have the perspective of developing progressive legal values like the theory of Satjipto Raharjo. Building and reconstructing the mindset is the process of law enforcement, in the concept of implementing *Qiyās* on Marriage Declaration / Decision.

Progressive judge law will be able to offer a new pattern by applying the principles of law to humans rather than human being forced to be punished. Progressive law is a law that essentially regulates human behavior through created legal norms that prioritize justice and happiness that are essential for life. Progressive law is a law that is needed for humans both in action-interaction with fellow humans, and humans with the universe, namely the social environment and the natural surroundings.

Mujtahid judges are judges who are brave and capable of utilizing all the potential they have. Their position and juridical authority give them independence granted by the constitution to *ex effecio* carry out discovery and legal reform in the form of interpretation, argumentation, construction, *counter-legem*, breakthrough law, penetrate the walls of conventional law, override *ultra petita* and create new laws and explore *ius con constituendum*, where it is needed to provide legal protection and justice to every justice seeker. Empirically, two conditions require legal breakthrough, namely: The existing applied legal norms are experiencing deadlock so that they are unable to penetrate legal objectives. The law experiences a gap between legal norms with expected legal objectives so that existing legal norms are not able to provide legal protection, fulfill the sense of justice as they should.

The efforts in making legal breakthroughs to find justice need to be taken through methodological steps in the reinterpretation and redefinition of legal verses, legal traditions, and also legal texts in various laws and compilations. A judge must also be able to see and be able to interpret that existing law can change in certain circumstances that is because it is influenced, circumstances, places, intentions, and

customs, so that later it will be easy to provide basic considerations in applying the concept of benefit and or *qiyās* in every case handled.

Judges as an embodiment of the State or leader in carrying out obligations in the field of law enforcement must provide the concept of law enforcement which emphasizes that avoiding harm is better than promoting good. In the handling of the Marriage *isbāt* case petitioned by the petitioners in the Makassar Religious Court, specifically, the court where the research was examined there must be a mujaddid judge, a judge who is capable and courageous to discover the renewal of Islamic law to uphold justice based on the Divine Almighty God.

The judge in dealing with the issue of marriage *isbāt*, therefore, restores the function of Islamic law, which is the function of providing legal protection and justice to the people in concrete terms for *maqāṣid al-syari'iyah*. The purpose of *maqāṣid al-syari'iyah* is to achieve the attainment of five very important things namely 1. preserving religion, 2. preserving the soul, 3. preserving the mind, 4. preserving property, and 5. keeping posterity.

The purpose of the marriage registry by Syaltūt is to safeguard the rights and obligations of the parties to the marriage, namely the rights of the husband/wife and children or posterity, such as the preservation and inheritance. This is an attempt to anticipate the degeneration of the Muslim faith. Because according to Syaltūt, one of the consequences of declining the Muslim faith is the increasing number of disobedient promises that lead to a break from duty. Because the measure of faith is hidden abstract, one way to avoid preventing people from taking responsibility is to make written evidence.²⁶

To unravel the missing link on the legality of marriage under the law, Satria Effendi M. Zein cited the ruling of former Sheikh Sheikh Azhar Head Teacher DR. Jaad al-Haq 'Ali Jaad al-Haq about al-zawaj al-'urfy is an unregistered marriage as required under applicable law. The Shaikh Jaad al-haq classifies the provisions governing marriage into two categories, namely the rule of shara 'and the rule of *taḥsīnī*.²⁷

Rules of syara- the rules that determine whether a marriage is valid or invalid. This rule is a rule set by the Islamic Shari'ah as formulated in the devotional books of various madzhabs which is essential to the existence of the *ijāb* and kabul of each of the two wills guardian and prospective husband spoken at the assembly Equally, by using a pronouncement which shows that there has been talking and speech made by each of the two persons who can perform the deed or akad according to the Islamic law. Also, it attended by two witnesses who are moslems, of which two witnesses it

²⁶ Mahmūd Shaltūt, al-Fatāwā: Dirāsah al-Mushkilāt al-Muslim al-Mu'āṣir fī Hayātihi al-Yaumīyah al-Āmmah, cet. 3 t.tp.: Dār al-Qalam, t.t., h. 271.

²⁷ Effendi M. Zein, *Problematika Hukum Keluarga Islam Kontemporer* Jakarta: Kencana, 2005, h. 33-34

is required to listen to the marriage views themselves. The two witnesses understood the content of the *ijāb* offering and *qabūl* acceptance as outlined in the fiqh, and The aforementioned regulations are the elements forming the marriage contract. If the constituent elements as stipulated in the Islamic Shari'ah have been perfectly fulfilled, then according to him the marriage agreement has been legally considered valid, so that halal associates as befits a legitimate husband and wife and the child of a husband and wife relationship is already considered a child legitimate.

Tawsiqī regulations are additional regulations with the aim that marriages among Muslims are not wild, but are recorded in the Marriage Certificate register made by the authorities for that which are regulated in the state administrative legislation. Its usefulness so that a marriage institution which is a very important and strategic place in an Islamic society can be protected from negative efforts from irresponsible parties. For example, as an effort to anticipate the existence of a denial of the marriage contract by a husband in the future, although it can be protected by the presence of witnesses, of course, it will be even more protected by official registration at the authorized institution for that. According to the Marriage Law of the Arab Republic of Egypt No. 78 of 1931 states that no complaint will be heard about the marriage or matters based on marriage, except based on an official marriage document. However, according to the fatwa *Jad al-Ḥaq Āli Jād al-Ḥaq*, without fulfilling the laws and regulations, the marriage is legally considered to be valid, if it has completed all the conditions and harmony as regulated in Islamic Sharia.

Wahbah Al-Zulaily in his work *Al-Fiqh Al-Islāmī wa Adillatuhu*, expressly divides the terms of marriage into terms of shar'y and terms of tawsiqiy.²⁸ The syar'iy condition is a condition regarding the validity of a legal event depending on it, which in this case is the marriage pillars with the conditions that have been determined. Whereas the condition of *tawsiqī* is formulated to be used as evidence of action in anticipation of future uncertainty. The conditions of *tawsiqī* do not relate to the legal conditions of action, but as evidence of the existence of that act. For example, the presence of two witnesses in every form of transaction is a condition for *tawsiqī*, except the presence of the two witnesses in a marriage engagement is a syar'iy condition, because it is an element that forms the procession of the marriage and also determines the validity or illegality of a marriage event, besides as a condition for *tawsiqī*.

²⁸ The first category is also called nau 'syar'iyah, which is related to the provisions of Article 1 paragraph 1 of the Marriage Law, while the second category is also called nau' tawsiqiyah, which is related to the provisions of Article 1 paragraph 2 of the Law Marriage.

An example of the conditions for *tawṣīqī* in the Qur'an is the condition for recording sales and purchases by not in cash, as confirmed in the Word of God Almighty. in QS al-Baqarah / 2: 282:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُّسَمًّى فَاكْتُبُوهُ وَلْيَكْتُب بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا يَأْبَ كَاتِبٌ أَنْ يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ.

Translation :

Believers! Whenever you contract a debt from one another for a known term, commit it to write. Let a scribe write it down between you justly, and the scribe may not refuse to write it down according to what Allah has taught him; so let him write.²⁹

and in the next verse it is stated in Surah al-Baqarah / 2: 283:

وَإِنْ كُنْتُمْ عَلَىٰ سَفَرٍ وَلَمْ تَجِدُوا كَاتِبًا فَرِهَانٌ مَّقْبُوضَةٌ

Translation :

If you on journey and you do not find the scribe, then let ther be a pladge taken form the debtor this is sufficient.³⁰

If the use of these two verses is understood in a textual manner without associating them with the teachings in the next verse, then the immediate conclusion is that there is a need for a record of debt and the obligation to provide the debt as collateral. it seems that debt is not considered legal when it is not recorded and or if there is no guarantee. Such an understanding is not in line with the understanding of the scholars in his field. Because according to the scholars' conclusions, the position of the registers and securities was merely an instrument of proof and an assurance that the debt would be paid in the time that it was promised. These scholars conclude that the understanding of the above verse is related to the following verse as follows:

فَإِنْ أَمِنَ بَعْضُكُم بَعْضًا فَلْيُؤَدِّ الَّذِي أُؤْتِمِنَ أَمَانَتَهُ

Translation:

However, if some of you believe in others, let the trust pay their debt and if one trusts the other, then let him who is trusted deliver the thing untrusted.³¹

This last paragraph shows the recording and collateral is a *tawṣīqī* tool, if the *tautsiqiy* or trust exists in each party, then the recording and collateral are no longer needed and the debt receivable is a mandatory obligation to be paid. Differences in interpretation of records should be seen from the situation and conditions and the needs of transactions at that time. The need for written evidence

²⁹Departemen Agama RI, *Al-Qur'an dan Terjemahnya*, (Jakarta: Departemen Agama RI, 2006), h. 61.

³⁰ Departemen Agama RI, *Al-Qur'an dan Terjemahnya*, h.61.

³¹ Departemen Agama RI, *Al-Qur'an dan Terjemahnya*, h. 61.

at that time may have been a regular requirement because the broad coverage of the world area of transactions still tended to be small so it could still be replaced by the principle of mutual trust. However, the current condition is to avoid disputes, disputes, and the achievement of legal certainty which is then used for legal verification, so the legal record is mandatory. If related to this study is the analysis of marriage registration using the *Qiyās* method, which is only considered to have legal certainty, when complete with additional rules *tawṣīqī* requirements.

The development of thoughts about the basic command of marriage registration, at least the reasons, namely *qiyās*; If the agreement comes to an end or there is a period by the agreement, then the marriage agreement can essentially end with the death of one of the spouses or with other conditions. This also shows that the marriage contract transaction also has a certain period. 'Illat law in the form of transactions that have a period is 'illat which is directly appointed by the text, so it is obligatory to record in each transaction based on a strong argument. This category belongs to the *musawi qiyās* because 'illat in the branch is the same weight as illat in the *ashal*, namely 'illat law is obliged to record the marriage contract which in this case is a branch equal to illat 'obligation with the act of recording non-cash transactions in paragraph 282 surah al-Baqarah. This type of decoration according to some scholars is called *qiyās jali*.³²

Based on the arguments above, the compulsory marriage registration obtained through *Qiyās* can be used as a *hujjah* to determine the validity of the law. The obligation to record is not to make a new law, but only to see and explain the law of Allah SWT due to the similarity of 'illat with illat law, the obligation to record all *muamalah* transactions that have deadlines. From this point of view, it is possible for a judge's thinking to be able to prove that Islamic law is suitable in all eras, areas, and environments because Islamic sharia has a flexible nature that always adapts to situations and conditions so that it can uphold and implement legal principles and functions for the realization of justice, certainty, and benefit.

Considering some legal rules and objectives, the postulates commonly used in considering the marriage *isbāt* case to implement the Marriage *Isbāt* to provide legal certainty and public good are as follows:

تَصْرُفُ الْإِمَامِ عَلَى الرَّعِيَّةِ مَنْوُطٌ بِالْمَصْلَحَةِ.

Translation:

Every state policy towards society must be based on benefit³³

³² Teungku Muhammad Hasbi Ash Shiddieqy, *Pengantar Hukum Islam*, (Semarang: PT. Pustaka Rizki Putra, 2001), h.205.

³³ Jalaluddin al-Suyuti dalam kitab *al-Asybah wa al-Nazha'ir fi Qawa'id wa Furu' Fiqh al-Syafi'iyyah*, h. 142.

دَرْءُ الْمَفَاسِدِ مُقَدَّمٌ عَلَى جَلْبِ الْمَصَالِحِ

Translation:

Avoid harm is more important than taking benefits.³⁴

A marriage that can be legally accounted for is a marriage that is by shariah and *tawsiqī* regulations. In being responsible for the marriage, it should be by hariah regulations. It means to also meet the requirements of *tawsiqī*, then the marriage is an absolute necessity for the orderly administration of marriage in the Indonesian jurisdiction by applicable laws and regulations. These has significant implications for the legal certainty of marital, child, and marital property status.

Seeing what has been explained in the results of this study, the summary is as follows: 1. The number of unregistered marital problems raised by Marriage *isbāt* that which document in the Makassar Religious Court were made as research objects. 2. Marriage *Isbāt* application filed by the Petitioners to the Religious Court are the benefit of husband and wife and children, hajj requirements, determination of heirs, taking care of the passport. 3. Most of the cases submitted by the Petitioners to the Religious Courts are almost dominated for marriage registration so that the Petitioners obtain a marriage certificate, and the child receives a Birth Certificate to apply to the school. 4. The panel of judges in handling Marriage *isbāt* in consideration for granting the application is more concerned with the issue of the child's interest.

Seeing the high number of requests submitted to the Makassar Religious Court regarding Marriage *Isbāt* cases, it is necessary to be reviewed in providing Marriage *Isbāt*. Looking at the high number of requests submitted to the Makassar Religious Court regarding the Marriage *Isbāt* case, it is necessary to review it in providing Marriage *Isbāt*; Then to prevent the conception that the Court easily provides opportunities and facilitates the occurrence of Marriage *isbāt*, even avoids the presumption that the court legalizes an act committed in violation of religious rules and laws, it is necessary to make strict requirements and criteria for justice seekers in *Isbāt* cases. Based on these requirements, the researcher thought that the judge on the process of granting or rejecting the Marriage Concerns filed by the petitioners, it is also necessary to pay attention to the following matters; The Religious Court as one of the institutions of judicial power that have the main function of receiving, examining, and adjudicating and deciding cases that are submitted to it by being examined on the principle of simple, fast, and low cost.

The high number of marriage registration applications in the Makassar Religious Court is due to the interests of legal certainty, legal protection for the Petitioners and their children. The case of marriage *isbāt* application submitted to the

³⁴ Jalaluddin al-Suyuti dalam kitab *al-Asybah wa al-Nazha'ir fi Qawa'id wa Furu' Fiqh al-Syafi'iyyah*, (Riyadh: Maktabah Nizar Mustafa al-Baz, tahun 1997), h. 159.

Religious Court on the consideration that the marriage *isbāt* application is granted is the act of choosing a smaller risk of the two risks that are certainly based on the greater good. In cases which are granted the Marriage *Isbāt* application submitted to the Court, the panel of judges accepted on the grounds of law, and if they rejected it the applicant will take other legal actions namely applying for the determination of the status of the child, which is a new legal problem. The problem of the high number of Marriage is at applications submitted to the Religious Court, of course, this is not just a matter of the Court and judges who are upstream, but it is important that the downstream is the concern of all groups, the government must find a solution to overcome it for the benefit of the family's future applicant and child in the future and benefit.

Observing the research above, the writer found that marriage and divorce laws in Indonesian laws and regulations show that there is no balance between the two contained in several laws and regulations in Indonesia, especially Law Number 1 of 1974 concerning marriage, Law Number 7 of 1989 concerning Religious Courts and Presidential Instruction Number 1 of 1999 concerning Compilation of Islamic Law in Indonesia. According to article 39 of Law No.1 Year 1974 concerning Marriage and article 65 of Law No. 9 of 1989 concerning Religious Courts, divorce can only be conducted in front of a court hearing after the court in question has tried and failed to reconcile the two parties. Divorce can occur because a husband requests the Religious Court to witness the pledge of divorce called *talak* or husband ask for separation or because of a wife's lawsuit called divorce. To divorce, there must be sufficient reasons.

Divorce, even though it belongs to the private law area, the problem of divorce also involves broad interests, namely the peace of the household, the fate of children whose parents divorced, and even concerns even broader interests, namely about certainty in society whether a couple has separated or still in marriage ties. Therefore, divorce cannot be done recklessly. Instead, arrangements must be made in such a way as to bring about order and order in society.

In the hadith of the Prophet SAW stated that divorce is a lawful thing but is hated by Allah. The Prophet SAW said:

أَبْغَضُ الْحَلَالِ إِلَى اللَّهِ الطَّلَاقُ

Translation:

“The one thing that Allah SWT hates the most is divorce.”HR Abu Dawud and al-Baihaqi.³⁵

This means that divorce should not be taken lightly and made easy because divorce is hated by God even though it is lawful. Divorce is included in the private

³⁵ Abu Abdillah Muhammad ibn Yazid Qusuwaini, *Sunan Ibnu Majah*, (Cet. I Tahun 2009 H/1430 H). h. 180

jurisdiction. While marriage is also included in private law. If the real divorce issue concerns broad interests, namely the peace of the household, the fate of children whose parents are divorced, even with broader interests, namely about certainty in society whether a couple has separated or are still in a marriage bond, then it is no different with *isbāt* marriage which also concerns for wider interests, namely about the legal certainty of married couples in society in marriage ties.

In the Islamic view, marriage is worship and obedience. By marriage, a believer gains rewards and gratitude, of course, when he fulfills his intentions, straightens his will, and intends his marriage to protect himself from things that are forbidden, rather than just the impulse/animal instinct that is the fundamental purpose of marriage.

In the hadith of the Prophet SAW it was stated that marriage was obedience to Allah. The Prophet SAW said:

الزَّكَاةُ مِنْ سُنَّتِي ۖ فَمَنْ لَمْ يَعْمَلْ بِسُنَّتِي فَلَيْسَ مِنِّي

Meaning:

"Marriage is MY Sunnah, whoever does not want to follow My Sunnah, is not MY group.³⁶

In Indonesia's law which regulates marriage, illegal marriage, or privately made deed marriage divorce is not regulated and known. The definition of divorce according to Article 117 KHI is the husband's pledge before the hearing of the Religious Court which is one of the reasons for the termination of the marriage. Article 117 KHI states: "Divorce is the husband's pledge before the hearing of the Religious Court which is one of the reasons for the termination of marriage, in the manner referred to in Articles 129, 130, and 131.³⁷

Accordingly, divorce according to the law is the husband's pledge pronounced before the religious court hearing. Whereas if divorce is carried out or pronounced outside the court, then divorce is legally only religious, but it is not yet legally valid or does not have legal certainty, because it has not been conducted before a religious court hearing.

As a result of divorce carried out outside the court is the marriage bond between husband and wife has not broken legally, or in other words, whether the husband or wife is still legally registered as husband and wife. Likewise, "*sirri*" marriages that occur after the RI Laws are also valid, because they are not specifically regulated in RI Law Number 1 of 1974 in conjunction with PP Number 9 of 1975 and also in Presidential Instruction Number 1 of 1999 concerning Compilation of Islamic Law in Indonesia.

³⁶ Abu Abdillah Muhammad ibn Yazid Qusuwaini, *Sunan Ibnu Majah*, h. 54

³⁷ See the president's instruction Number 1 1999 about Islamic Law Compilation in Indonesia.

If the marriage is performed without being registered at the KUA, then the marriage does not have the legal power, even though it is legal according to the Religion because it has fulfilled the conditions and the harmony of the marriage.

As a result of marriages that are conducted outside the KUA record, the marital ties between husband and wife, do not have the legal power, or in other words, both the husband or wife has not been registered as a legally married couple according to the state.

Because this problem is a national problem, the country of Indonesia is an archipelago that stretches from Sabang to Merauke, it seems difficult to overcome or anticipate this "sirri" marriage. So, therefore, the state must be present to provide solutions by forming *isbāt* institutions, so that marriages can have legal certainty, marriage issues must be submitted in court. With an *isbāt* institution, divorce has legal certainty. If divorce can only occur before a court hearing after trying to reconcile it doesn't work. Likewise, to have legal certainty, the *isbāt* marriage must undertake in front of a court hearing after being proven to meet the requirements and terms of marriage.

D. CONCLUSION

Based on the discussion above, it can be concluded as follows: a. Implementation of *Qiyās* regarding the decision or judgment of marriage *isbāt* in Makassar Religious Court, in legalized the privately deed marriage, are: "Implementasi *Qiyās* terhadap penetapan atau putusan Marriage *isbāt* di Pengadilan Agama Makassar, dalam melegalkan pernikahan *sirri*" are: Prioritizing the interest of documenting the marriage, thereof it has legal certainty and protection to the applicants and their children. The judges play their roles in deciding the marriage *isbāt* not only as of the executor of formal legal, but being creative in finding another side of justice and benefits of the law to find the essence of law, its effectivity, and fairness for people.

The judges in their consideration and claim on the decisions of marriage *isbāt* command the applicants to register their marriages to Makassar Religious Court within the area where they live. 'Illat of law consist of transaction which has a period is'illat which directly appointed by Nash or its sources, thus the necessity of documenting in every transaction based on strong sources. What kind of *qiyās* categorised as *qiyās* musawi because 'illat on a branch is the same with 'illat on ashal, which is 'illat of law is a must to record the marriage vow the same as documenting noncash transaction. This form of *qiyās* based on some ulama or Muslim scholars named *qiyās* jail.

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