

## CHILD LINEAGE DETERMINATION IN UNDERAGE MARRIAGES: A PROGRESSIVE JUDICIAL PERSPECTIVE

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### Abstract

This research examines the legal and sociological dynamics in the determination of a child's lineage within the framework of Indonesian law, particularly focusing on cases that deviate from established regulations. Specifically, the study analyzes Decision No. 90/Pdt.P/2023/PA.Pare, where a child born from an unregistered marriage was declared legitimate despite the non-fulfillment of age requirements by one of the parents. The research employs a normative juridical approach through library research, utilizing document studies to gather relevant legal and sociological data. This method facilitates a comprehensive analysis of the legal reasoning applied in the case, with a focus on how the judge arrived at the decision to grant the petition for child legitimacy. The findings indicate that the judge's legal discovery method in this case was conducted on a case-by-case basis, taking into account both juridical and sociological factors. The decision reflects a progressive legal approach, where the judge prioritized the broader implications of justice and social welfare over strict adherence to legal formalities. This study contributes to the understanding of how progressive legal thought can influence judicial decisions in cases involving deviations from standard legal provisions. It offers a unique analysis of how judges may interpret the law flexibly to achieve just outcomes in complex family law cases. The research highlights the potential for progressive legal reasoning to shape future judicial practices in Indonesia, particularly in cases involving the legitimacy of children born from unregistered marriages. It suggests that such approaches could lead to more equitable outcomes in family law, aligning legal decisions with contemporary social realities.

**Keywords:** Child Lineage Determination; Indonesian Family Law; Unregistered Marriages; Progressive Legal Reasoning; Judicial Decision-Makin

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## INTRODUCTION

The invalidity of a marriage according to state law has a negative impact on the status of a child born in the eyes of the law. The status of a child born is considered an illegitimate child. Consequently, the child only has a civil relationship with the mother and the mother's family.<sup>1</sup> The position of a child-in-law cannot be separated from the issue of the validity of the marriage carried out by both parents. A valid marriage will produce a legitimate child, while an invalid or unregistered marriage will produce a child with the status of an illegitimate child. A child born from a valid marriage (a registered marriage) has both parents who have proven that the child is the legitimate biological child of his father and mother.<sup>2</sup> It is different if the marriage is not registered. The status of the child born becomes uncertain because the marriage of both parents is only valid according to religion.<sup>3</sup> This means that even though a child born from an unregistered marriage is a legitimate child, there is no authentic evidence that can strengthen that the child born from an unregistered marriage is the legitimate child of both parents.<sup>4</sup>

Marriage, based on the legal definition of Article 1 of Law Number 1 of 1974 and its amendments to Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, states that "marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the Belief in the one and only God". Furthermore, Article 2 Paragraph (1) and (2) of Law Number 1 of 1974 states that "marriage is valid if it is carried out according to the laws of each religion and belief" and "Every marriage is recorded according to the applicable laws and regulations".<sup>5</sup>

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<sup>1</sup>Ikmal Hafifi, "Urgensi Pencatatan Nikah Dalam Mengurangi Resiko Penyalahgunaan Perkawinan Perspektif Gender", *Jurnal Tahkim (Jurnal Peradaban Dan Hukum Islam)*, Volume 18, Nomor 1, Juni 2022, h. 85.

<sup>2</sup> Mardalena Hanifah, "Perkawinan Beda Agama Ditinjau dari Undang-undang Nomor 1 Tahun 1974 Tentang Perkawinan," *Soumatara Law Review* 2, no. 2 (2019): 297-308.

<sup>3</sup> Dinda Ediningsih Dwi Utami dan Taufik Yahya, "Akibat Hukum Nikah Siri Terhadap Hak Anak Dan Isteri Ditinjau Dari Kompilasi Hukum Islam," *Zaaken: Journal of Civil and Business Law* 3, no. 2 (2022): 228-45.

<sup>4</sup>Sabilal Rosyad, *Implementasi Hukum Islam Tentang Status Hukum Anak Di Luar Perkawinan* (Pekalongan: Nasya Expanding Managment, 2018), h. 19.

<sup>5</sup>Undang-Undang Republik Indonesia Nomor 1 Tahun 1974 Tentang Perkawinan.

Article 42 of Law Number 1 of 1974 states that "A legitimate child is a child born, or as a result of a legitimate marriage". In addition, the Compilation of Islamic Law Article 99 also explains that "A legitimate child is a child born as a result of a legitimate marriage, the result of a legitimate fertilization of a husband and wife outside the womb and born by the wife."<sup>6</sup> The rights of children born are explained in Article 7 Paragraph 1 of Law Number 23 of 2002, which has been amended by Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection that every child has the right to know their parents, to be raised and cared for by their own parents.<sup>7</sup>

Guaranteeing the rights of every child to protection from discrimination regarding the status of children born out of wedlock is regulated by Law Number 1 of 1974 concerning Marriage in Article 55 paragraphs 1 to 3 stating that:

1. The origin of a child can only be proven by an authentic birth certificate issued by an authorized official.
2. When the birth certificate does not exist, the court can issue a determination of the child's origin after a thorough examination of the available evidence.
3. Based on the provisions of the court, the birth registration agency in the relevant jurisdiction issues a birth certificate for the child concerned.

This means that couples who have already married and are not registered and want to change the status of their child to a legitimate child are through a court ruling on the origin of the child.<sup>8</sup> The ruling aims to validate the legal status of a child as a legitimate child of both parents based on evidence in court regarding their origin.<sup>9</sup> This determination of the origin of the child can also be used as a legal basis in processing birth certificates. However, in practice, the fulfillment of the rights of each child tends to fail in its implementation. Unregistered marriages become an obstacle because they do not have evidence of a valid marriage according to the applicable laws as a formal

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<sup>6</sup>"Inpres No 1 Tahun 1991 Tentang Kompilasi Hukum Islam" (n.d.).

<sup>7</sup>"Undang-Undang Nomor 35 Tahun 2014 tentang Perubahan Atas Undang-Undang Tahun 2002 Tentang Perlindungan Anak" (n.d.).

<sup>8</sup> Erina Dwi Trisnawati, Nurwati Nurwati, dan Puji Sulistyarningsih, "Analisis Yuridis Penetapan Pengadilan Agama Tentang Anak Hasil Perkawinan Siri (Studi Putusan Nomor 571/Pdt. P/2021/PA. Mkd)," *Borobudur Law and Society Journal* 2, no. 4 (2023): 147-59.

<sup>9</sup> Dessy Elita, Abdullah Gofar, dan Kms Abdullah Hamid, "Prosedur Pencatatan Anak Luar Kawin di Catatan Sipil," *Repertorium: Jurnal Ilmiah Hukum Kenotariatan* 8, no. 1 (2019): 1-14.

document requirement in social services, education services, and the issuance of birth certificates, the rights of a child are automatically not fulfilled and tend to cause discrimination.

One of the interesting cases to study is the ruling by the Religious Court Number 90/Pdt.P/2023/PA.Pare. In the ruling, the panel of judges confirmed the status of a child born from an unregistered marriage and the applicants' marriage files had never arrived at the Religious Affairs Office because in terms of age Applicant 1 was still not old enough to get married at that time. After Applicant I was old enough, they remarried before the marriage registrar of the Religious Affairs Office. After going through a fairly long process, finally the panel of judges who tried and examined case Number 90/Pdt.P/2023/PA.Pare granted the applicants' request. Through this study, the judge's legal findings in determining the decision to grant the applicants' requests will be analyzed. In addition, this study is conducted to determine the weak points and strong points of the legal rules and legal considerations used by judges in deciding cases for the sake of more progressive legal development in the future.

## **METHOD**

This study was library research emphasizing the use of library materials as the main source of data with a normative juridical approach. The data used included primary and secondary data obtained from various literature such as books, articles, journals, research results, or other information related to this study. The data processing process included selection and verification of the completeness of the data obtained, as well as systematic classification and grouping of data.

## **RESULT AND DISCUSSION**

### **1. Judge's Legal Discovery Method for Child Lineage of Remarried Couple Application**

Based on the results of the study, the number of cases of child origin applications filed at the Parepare Religious Court was 3 cases in 2020, 5 cases in 2021, 18 cases in 2022, and 11 cases in 2023. The description can be seen in the table below.

Table 1. Data on Cases of Applications for the Origin of Children at the Parepare Religious Court in 2020-2023

2020	2021	2022	2023
<b>3 cases, 3 granted</b>	5 cases, 3 granted, 2 revoked	18 cases, 17 granted, 1 revoked	11 cases, 9 granted, 2 revoked

The facts of the case regarding the determination of the origin of child Number 90/Pdt.P/2023/PA.PARE are that the Applicants have submitted an Application for the Origin of the Child on June 15, 2023m which has been registered at the Parepare Religious Court Clerk's Office with register Number: 90/Pdt.P/2023/PA.Pare on June 15, 2023, with the following arguments:

“that Applicant I and Applicant II are a married couple who have been married according to Islam on Tuesday, June 29, 2021 at the residence of Applicant II's parents in Ujung District, Parepare City, married by the Imam of the mosque with the marriage guardian of Applicant II's first cousin because Applicant II's father has passed away, and attended by 2 (two) marriage witnesses, and a dowry in the form of cash of Rp200.000 (two hundred thousand rupiah) paid in cash, but the marriage has not been officially registered at the Religious Affairs Office, because the marriage documents of Applicant I and Applicant II have never been received by the Religious Affairs Office;”

“that at the time of the marriage, Applicant I had the status of a bachelor and Applicant II had the status of a maiden;”

“that after marriage, Applicant I and Applicant II lived in harmony as befits husband and wife and have been blessed with a child, born in Parepare, February 2, 2022 (1 year 3 months old);”

“that Applicant I and Applicant II then remarried on Thursday, June 8, 2023, in front of the Marriage Registrar of the Ujung District Religious Affairs Office, Parepare City with the marriage guardian being a first cousin of Applicant II's biological father, and attended by 2 (two) witnesses each and a dowry of Rp500.000 (five hundred thousand rupiah) paid in cash, and the issuance of a Marriage Certificate Extract Book on June 8, 2023;”

“that Applicant I and Applicant II have taken care of their child's birth certificate, but have encountered difficulties because the civil registry office requested a letter/determination stating that the child is the biological child of Applicant I and Applicant II, therefore Applicant I and Applicant II request a determination regarding the origin of the child, which can be used as a legal basis and has legal certainty;”

Based on the above matters, the Applicant respectfully requests the Chairman of the Parepare Religious Court c.q. The Panel of Judges who examined and tried this case should make the following determination:

- a. Granted the Applicant's request.
- b. Determining that the Applicant's children are the legitimate children of Applicant I and Applicant II.
- c. Charge the costs of this case to the DIPA Parepare Religious Court. Or, if the Parepare Religious Court has a different opinion, ask for the fairest possible decision.

The lineage or *mahram* relationship of a child is the basis for determining the relationship of a child with a father. A child must know about their lineage because knowledge of the lineage or origin of a child is related to the future and life that they will live in society later.<sup>10</sup>

Meanwhile, according to the applicable provisions, the marriage should first be submitted for marriage confirmation to the Religious Court in the jurisdiction of the husband and wife concerned. However, what happened here was that the Application for marriage confirmation was hampered because the Applicants' files had never been to the Religious Affairs Office, and at the time of the underhand marriage from the side of Applicant I, they had not met the requirements to conduct a marriage and had not applied for a marriage dispensation. The Applicants remarried and registered their marriage at the Ujung District Religious Affairs Office, Parepare City, and received a Marriage Certificate Extract from the Religious Affairs Office of Ujung District, Parepare

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<sup>10</sup> Fathul Mu'in dan Meli Yanti, “Pengaruh Pemahaman Masyarakat Terhadap Pergantian Nasab Anak Oleh Ayah Angkat Perspektif Hukum Islam,” *Syakhshiyah Jurnal Hukum Keluarga Islam* 3, no. 2 (2023): 176–92.

City. Thus, granting the Applicants' marriage confirmation request is not legally based. The correct procedure is to confirm the underhand marriage that the applicants have carried out, then register it with the local Religious Affairs Office.

Furthermore, in the issue of the origin of the child from the marriage, it cannot be proven with a birth certificate because the child was born when both biological parents had not yet registered their marriage with the Marriage Registrar Officer, in this case, the local Religious Affairs Office. The Applicants found it difficult to obtain legal recognition so that their child would have the status of a legitimate child even though after the child was born the Applicants remarried and registered it with the Marriage Registrar Officer of the Religious Affairs Office of Ujung District, Parepare City. Furthermore, in their petition, the Applicants requested that the child born be determined as the legitimate child of the Applicants so that the child could also be administratively registered as a family member in the family card they had.

This is stated in Article 2 Paragraph (1) of Law Number 1 of 1974 concerning Marriage as amended by Law Number 16 of 2019 that a valid marriage is carried out according to the laws of each religion and belief. Regarding this provision, for citizens of the Republic of Indonesia who are Muslim such as the Applicants in this study, the Applicants' underhand marriage according to Islamic law is valid if it is proven that the implementation of the marriage contract meets the requirements and pillars of marriage in Islamic law.

a. *Fulfillment of the Pillars of Marriage*

Marriage is a legal act regulated by the rules of law and Islamic law in order to be considered valid, the implementation of the marriage must meet the requirements and pillars of marriage.<sup>11</sup> The marriage contract can occur after the fulfillment of the pillars and requirements of marriage, then it can be said that the marriage is valid.<sup>12</sup> The pillars

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<sup>11</sup> Andi Muhammad Akmal dan Mulham Jaki Asti, "Problematika Nikah Siri, Nikah Online Dan Talak Siri Serta Implikasi Hukumnya Dalam Fikih Nikah," *Al-Risalah Jurnal Ilmu Syariah Dan Hukum* 21 (2021): 45-59.

<sup>12</sup> Faizah Bafadhal, "Itsbat Nikah Dan Implikasinya Terhadap Status Perkawinan Menurut Peraturan Perundang-Undangan Indonesia," *Jurnal Ilmu Hukum Jambi* 5, no. 1 (2014): 43298.

and requirements are the presence of a prospective groom and prospective bride, a guardian for the prospective bride, witnesses, and *ijab qabul*.<sup>13</sup>

A valid marriage contract is a marriage contract that meets the requirements and pillars of marriage. This is as the marriage carried out by the Applicants in the stipulation 90/Pdt.P/2023/PA.PARE, that Applicant I and Applicant II were married in a secret marriage or under the hands according to Islamic law on June 29, 2021, at the residence of Applicant II's parents, and the one who married the Applicants was the imam of the Nurul Asia Mosque, and the guardian of Applicant II's marriage was a first cousin of Applicant II's biological father because Applicant II's biological father had passed away, attended by witnesses and a dowry of Rp200.000 (two hundred thousand rupiah) paid in cash, and there was an *ijab* and *qabul*.

The Panel of Judges stated that the Applicant's marriage, which was held on June 29 2021 had fulfilled the pillars of marriage according to Islamic *munakahat* law as in Article 14 of the Compilation of Islamic Law. The Applicants had fulfilled the pillars of marriage, however, the marriage was not registered at the local Religious Affairs Office because at the time Applicant I was not yet old enough to get married. The marriage is not included in the marriage that is void by law as stipulated in Article 70 of the Compilation of Islamic Law but is included in the marriage that can be annulled as stipulated in Article 71 of the Compilation of Islamic Law, and it turns out that until the Applicants remarried on June 8, 2023, before the Marriage Registrar of the Religious Affairs Office of Ujung District, Parepare City, no party filed for an annulment of the marriage under the hands of the Applicants on June 29, 2021.

b. *Status of Applicants*

In accordance with the evidence presented by Applicants 1 and Applicants 2 in the trial, and it has been checked by the Judge that the evidence is suitable and can be verified, hereby, Applicants 1 and Applicants 2 are not related by blood and are not

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<sup>13</sup> Beni Ahmad Saebani, *Fiqh Munakahat 1* (Bandung: Pustaka Setia, 2018), h. 204.



related. Then, at the time of the marriage, neither of them was married to another party so there was no prohibition on the applicants from getting married.

c. *Marriage Registration*

As argued by the Applicants in the decision of the Religious Court that the Applicants had remarried on Thursday, June 8, 2023 before the Marriage Registrar of the Religious Affairs Office of Ujung District, Parepare City with a marriage guardian who is a first cousin of Applicant II's biological father, and attended by 2 (two) marriage witnesses and a dowry of Rp500.000 (five hundred thousand rupiah) paid in cash.

In the theory of legal discovery, the Judge in deciding a case proportionally must contain three principles of 3 (three) elements, namely certainty, benefit, and justice. Because the development of community and social needs creates antinomy, the Judge must choose one of the legal principles in dealing with the antinomy.<sup>14</sup> Among the steps that can be used are Interpretation or legal construction as explained above, in the case of the child's origin application, the researcher argues that the Judge in dealing with the case has made a legal discovery using the legal interpretation method.<sup>15</sup> This is done because in this case there is already a law that regulates it, namely Article 103 of the Compilation of Islamic Law. There are several interpretation methods applied in the case above, including systematic interpretation, and grammatical interpretation.<sup>16</sup>

The first is systematic interpretation by understanding the relationship between a type of rule with other rules, such as in the case that to know the rights of a child as regulated in Law Number 23 of 2002 concerning Child Protection must see how the marriage of his parents is regulated in Law Number 1 of 1974 concerning Marriage so

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<sup>14</sup> Endrik Safudin, "Harmonisasi Hukum dalam Antinomi Hukum (Analisis Terhadap Penerapan Pasal 20 Ayat 2 Huruf B Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman)," *Al-Syakhsyiyah: Journal of Law & Family Studies* 2, no. 2 (2020): 201-29.

<sup>15</sup> Safudin.

<sup>16</sup> Muhammad Iqbal dan Rabiah Rabiah, "Penafsiran dispensasi perkawinan bagi anak di bawah umur (Analisis beberapa putusan Mahkamah Syar'iyah Aceh)," *El-Ussrah: Jurnal Hukum Keluarga* 3, no. 1 (2020): 101-14.

that the overall regulations in a country must be viewed as a complete system.<sup>17</sup> The interpretation used by the Judge next is grammatical interpretation, which is usually used by the Judge together with logical interpretation with legal reasoning so that it can be applied to texts that are unclear or vague.

The judge interpreted Law Number 23 of 2002 concerning Child Protection and Law Number 1 of 1974 concerning Marriage. Meanwhile, in order to be granted the petition, the validity of the applicants' marriage must first be examined, regarding the issue of marriage, it has also been regulated in Law Number 1 of 1974, which was amended to Law Number 16 of 2019 concerning Marriage and regarding the issue of children's rights regulated in Law Number 23 of 2002 concerning Child Protection. The two regulations above, namely Law Number 1 of 1974 concerning Marriage and Law Number 23 of 2002 concerning Child Protection, are not yet clear to be applied in the concrete events that occur, because there is a conflict between legal norms (*antinomy normen*), while in interpreting it still adheres to the text of the statutory regulations.

In dealing with this, the Judge takes steps based on the principle of legal preference: *Lex posterior derogate legi priori*, *Lex specialis derogate legi generali*, dan *Lex superior derogate legi inferior*. The Judge then reinterprets the legislation to deal with the conflict of norms that occurs, because the laws are equally strong.<sup>18</sup>

Furthermore, teleological/sociological interpretation is an interpretation of the purpose of making legislation with what society actually wants to achieve. In the case above, the Judge gave meaning to the purpose of the formation of Law Number 23 of 2002 concerning Child Protection and Law Number 1 of 1974 concerning Marriage, the purpose of which is none other than to achieve justice and prosperity in society.<sup>19</sup>

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<sup>17</sup> Jasmianti Kartini Haris, "Implementasi Dispensasi Nikah dalam Tinjauan Undang-Undang Nomor 23 Tahun 2002 Tentang Perlindungan Anak di Pengadilan Agama Takalar," *Jurnal Al-Qadaw: Peradilan dan Hukum Keluarga Islam* 5, no. 2 (2018): 205–26.

<sup>18</sup> Ahmad Rifai, *Penemuan Hukum Oleh Hakim : Dalam Perspektif Hukum Progresif*, h. 90.

<sup>19</sup> Stanley Muljadi Art, Muhammad Rangga Arya Putra, dan Rachel Milafebina, "Regulasi Bukti Elektronik Sebagai Instrumen Pembuktian Dalam Penyelesaian Sengketa Perdata Melalui Rechtsvinding oleh Hakim," *Jurnal Kewarganegaraan* 8, no. 1 (2024): 690–702.

After interpretation, it can be concluded from the case that the existence of Law Number 1 of 1974 concerning Marriage cannot be interpreted narrowly, but should be seen from the purpose of the legal regulations that were formed, namely to realize justice and prosperity of society, so that in this case the Judge prioritizes the future of the child and the rights of the child rather than merely fulfilling formalities that are subject to the rigidity of the text of the law.

In determining the case, the Judge took the *fiqhiyah* arguments contained in the book *Al-Fiqh Al-Islam Wa Adillatuh* page 690 Volume V as follows:

“Marriage, whether invalid or legitimate, is a reason for determining the lineage of a child in a case. If a marriage has truly and clearly occurred, even if the marriage is broken/invalid or the marriage is carried out according to custom, which occurs based on custom or also in certain ways or contracts (traditionally) without officially registering the marriage, then it can be confirmed that the lineage of a child born is the child of the husband and wife.”<sup>20</sup>

The *fiqhiyah* arguments above are a source of law used by the judge as the basis for granting the child's lineage request, which prioritizes the future of the children of the parties. In short, in this case, the consequences would be greater if the application is rejected or not granted, especially since the Applicants have now remarried at the Religious Affairs Office of Ujung District and have lived in harmony until the time the application is submitted to the Parepare Religious Court.

## **2. Factors Affecting Judges' Considerations**

### **a. Juridical aspects**

The Juridical aspect is the first and main aspect based on applicable laws. First, Law Number 1 of 1974 concerning Marriage.<sup>21</sup> Article 55 paragraph (2) of Law Number 1 of 1974 states that if the birth certificate referred to in paragraph (1) of this article does not exist, the court may issue a determination regarding the origin of a child after conducting

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<sup>20</sup>Wahbah Az-Zuhaili, *Al-Fiqh Al-Islami Wa Adilatuh* (Beirut: Dar al-Kutub, 2005), h. 692.

<sup>21</sup> Henny Juliani, “Aspek Yuridis Transformasi Hukum Keuangan Publik Ke Keuangan Privat Terhadap Pengelolaan Kekayaan Negara Yang Dipisahkan Pada BUMN,” *Administrative Law and Governance Journal* 1, no. 1 (2018): 25–43.

a thorough examination based on evidence that meets the requirements.<sup>22</sup> In accordance with this Article, *a quo* case is used to prove the origin of the Applicants' children after conducting a thorough examination of the evidence submitted. Second, Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 concerning Religious Courts Article 49 of Law Number 7 of 1989 concerning Religious Courts as amended by Law Number 3 of 2006, and the Second Amendment by Law Number 50 of 2009 and its explanation Letter a Number 20 states that the Religious Court has the duty and authority to examine, decide, and resolve cases at the first level between people who are Muslim in the field of marriage. Third, in the Book of *Al Fiqh Al Islam Wa Adilatuhu*, the Judge's Considerations further refer to us in *Al-Fiqh Al-Islam wa Adilatuhu* that in Islamic law itself, determining the origin of a child or determining lineage is also done by taking into account the interests of the child, namely simply by having a marriage without considering whether the marriage is valid or not.

#### **b. Philosophical aspects**

The philosophical aspect is an aspect based on truth and justice.<sup>23</sup> The decision of the panel of judges from a philosophical perspective is shown by the panel of judges considering the child's origin request to fulfill the objectives of child protection and welfare, and not to conflict with the law based on the legal facts at trial. This consideration reflects the value of justice in the form of protecting children's rights and children's welfare. As the author's interview with Mr. Gazali, Judge of the Parepare Religious Court, said:

“One of the considerations for determining the origin of children of underhanded marriages stems from a sense of justice for the welfare, protection, and equality of children so that they have the same status as children born from legitimate marriages,

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<sup>22</sup> Lia Amaliya, “Penetapan Asal Usul Anak Sebagai Upaya Perlindungan Hukum Terhadap Anak Hasil Dari Perkawinan Siri (Studi Kasus Di Pengadilan Agama Karawang),” *Prosiding Konferensi Nasional Penelitian dan Pengabdian Universitas Buana Perjuangan Karawang* 2, no. 1 (2022): 375–90.

<sup>23</sup> Allen Buchanan dan Deborah Mathieu, “Philosophy and justice,” in *Justice: Views from the social sciences* (Springer, 1986), 11–45.

so the State, in this case, is present to guarantee the rights of the child. A child should not bear the blame of his parents, of course by looking at the legal events.”<sup>24</sup>

Based on the articles above, there is no exception to the human rights owned by every child. This means that the child's original rights (child lineage) apply to children born from marriage, including underhand marriages that have been remarried.

### **c. Sociological Aspects**

Sociological aspects are aspects that review the values that exist in society.<sup>25</sup> The Judge's consideration in determining 90/Pdt.P/2023/PA.PARE in the sociological aspect is shown by the Judge considering that the last child from the Applicant's marriage who has fulfilled the provisions of sharia and has fulfilled the administrative requirements for marriage, then the child has the right to receive lineage from both parents, namely the Applicant. The determination of the panel of judges at the Parepare Religious Court who examined the case of the application for the origin of the child from the remarried couple has fulfilled the sociological aspect, which is reflected in the principle of benefit, namely providing legal certainty for children born from the marriage of the Applicants who have fulfilled the provisions of Islamic law by determining the child's lineage to both Applicants as their parents, so that the child's status becomes a legitimate child who has rights that must be fulfilled. Determination of the child's origin in this case automatically allows the child to obtain a birth certificate which means that the child obtains the fulfillment of identity rights. The right to identity is a form of state recognition of a person's existence before the law, so that children receive full fulfillment of their basic rights by the state, such as health, education and other social security.

### **3. Progressive Legal Analysis of Considerations for Child Lineage of Remarried Couple Application**

The result of the determination of Number 90/Pdt.P/2023/PA.PARE regarding the case of the origin of the child, namely the Judge granted the petition of Applicant I and

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<sup>24</sup>Wawancara dengan Muh Gazali Yusuf(45 Tahun) Hakim Pengadilan Agama Parepare.

<sup>25</sup> Agus Susilo dan Yadri Irwansyah, “Pendidikan Dan Kearifan Lokal Era Perspektif Global,” *SINDANG: Jurnal Pendidikan Sejarah dan Kajian Sejarah* 1, no. 1 (2019): 1-11.

Applicant II and determined the Applicant's child to be the legitimate child of the Applicant. The Panel of Judges dared to make a decision by deviating from articles 1 and 2 of the 1974 Marriage Law, which in essence regulates that marriages must be registered, and article 7 of Law Number 16 of 2029 Amendment to Law Number 1 of 1974 concerning Marriage which reads "marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years.

The considerations are regarding children's rights and protection of children. The Religious Court should base its considerations on the principle of "the best interests of the child", namely considering the child's right to growth and development both from the psychological aspect of the child's development and from the aspect of statutory regulations as regulated in Article 52 paragraph (1) and paragraph (2) of Law Number 39 of 1999 concerning Human Rights and Article 2 and Article 7 paragraph (1) of Law Number 23 of 2003 concerning Child Protection as amended by Law Number 35 of 2014, and in the *a quo* case the child will receive legal certainty and receive protection as stipulated in the provisions if determined to be the biological child of Applicant I and Applicant II.

In carrying out their duties, judges are not only mouthpieces of the law but also always try to make legal discoveries by always interpreting a provision of the law by connecting events or legal facts that occur in the trial.<sup>26</sup>

Judges in considering the cases described above apply the concept of progressive law by exploring existing legal sources, and then interpreting the law not in writing, but by exploring the deeper meaning of the law and making decisions towards progress.<sup>27</sup> In this decision, the Judge prioritizes the profitable aspect over other aspects. The ideal decision guarantees justice, interests, and legal certainty, therefore the best decision is

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<sup>26</sup> Amanda Dea Lestari, "Putusan Ultra Petita Mahkamah Konstitusi: Memahami Fenomena Holistik Penemuan Hukum (Rechtsvinding) yang Progresif," *Limbago: Journal of Constitutional Law* 1, no. 1 (2021): 1–20.

<sup>27</sup> Sentot Ismudiyanto Kuncoro et al., "Basis Nilai Penalaran Hukum Non-Sistemik Dalam Kerangka Dialektika Penalaran Hukum Sistemik Ke Arah Penalaran Hukum Non Sistemik," *ARMADA: Jurnal Penelitian Multidisiplin* 1, no. 6 (2023): 525–38.

chosen, allowing the Judge to consider each specific case, each specific case, to see how it happens.<sup>28</sup>

The presence of progressive law certainly brings a breath of fresh air and awakens this country from the shortcomings of the legal system. According to progressive law, the law is not carried out simply according to the black and white of the regulations (according to the letter), but by exploring the spirit and meaning more deeply (to the very meaning) of the statute or law. The law should be carried out with spiritual intelligence. Carrying out the law to find a way to provide prosperity to the nation.<sup>29</sup>

A child's lineage or *mahram* relationship is the basis for determining a child's relationship with a father.<sup>30</sup> A child must know about their lineage because knowledge of the child's lineage or origin is related to the future and life that he will live in society later. The scholars agree that a child who is *dili'an* or a child of adultery can only be related to his mother and his mother's siblings, thus determining lineage is the most important right for a child, because it will later have an impact on his personality and future.

In its ruling, the Judge then granted the Applicants' request to determine that the child born from the Applicants' unregistered marriage was the Applicants' legitimate child. After an examination of the validity of the Applicants' marriage, while regarding the status of the child itself, it has been explained in the previous chapter, that the Applicants' child is classified as a child from a marriage that is legitimate according to religion (meets the material requirements), only not registered (formal requirements are not met). This means that the child is not a child from adultery. Article 75 of the KHI letter (b) also explains the provisions for annulment of marriage which do not apply retroactively to children born from the marriage that occurred.

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<sup>28</sup> Teguh Hariyono, "Mediasi Penal sebagai Alternatif Upaya Penyelesaian Perkara Pidana di Luar Pengadilan," *Jurnal Penegakan Hukum dan Keadilan* 2, no. 1 (2021): 1-18.

<sup>29</sup>Bernard L Tanya, h. 215.

<sup>30</sup> Abu Yazid Adnan Quthny dan Ahmad Muzakki, "Urgensi nasab dalam Islam dan silsilah nasab Habaib di Indonesia," *Asy-Syari'ah: Jurnal Hukum Islam* 7, no. 2 (2021): 131-51.

Thus, progressive law ultimately encourages the birth of conscientious law enforcers who know the true truth, enforcing the law even with risks.<sup>31</sup> The application of the concept of progressive law in the determination determined by the Panel of Judges in case Number: 90/Pdt.P/2023/PA.Pare has certainly carried out several considerations regarding its law to then be issued a determination by taking *Al-Fiqh al-Islam wa Adillatuh* Page 690 Volume V. Then, to achieve the legal principles that contain the elements of a decision, it appears that the Judge in this case has considered the existence of the Convention on the Rights of the Child, which was ratified by the United Nations General Assembly on November 20, 1898 and ratified by the Indonesian Government through Presidential Decree Number 36 of 1990 on August 25, 1990, and adopted in Article 2 of Law Number 23 of 2002 concerning Child Protection, which states that the basic principles of child protection rights are non-discrimination, the best interests of the child, the right to life, the right to survive and develop and respect for child participation. Judges try to guarantee the best interests of the child, thus trying to make the best decision for the child, to guide the future.

The process of change towards progressive law is not only oriented towards regulations but is also reflected in the creativity of legal subjects in appropriate situations and conditions when updating the law. Even imperfect laws, no matter how bad, will not prevent progressive law enforcers from achieving justice for all who seek it. They can interpret the regulations in an up-to-date manner without having to wait for changes to existing regulations or change the law every time a legal problem arises.<sup>32</sup>

In conclusion, the decision taken by the Judge of Parepare Religious Court regarding the request for remarriage of the couple's lineage is correct when viewed from a progressive law perspective. This is because the essence of progressive law is a law that pays attention to regulations and social realities/needs.

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<sup>31</sup>Hyronimus Rhiti, h 45.

<sup>32</sup>Bernard L Tanya, h. 212.



## CONCLUSION

The Judge's legal discovery method for granting the request for the lineage of a remarried couple's child in decision number 90/Pdt.P/2023/PA.Pare using the method with the case they are facing (case by case), especially the method of legal interpretation, through systematic interpretation, grammatical interpretation, and teleological/sociological interpretation as well as the practice of reinterpreting the laws and regulations used and refusing to handle conflicting norms. The factors considered by the Judge of Parepare Religious Court in granting the request for the lineage of a child in decision number 90/Pdt.P/2023/PA.Pare are from the legal aspect, philosophical aspect, and sociological aspect. Progressive legal analysis of the legal considerations of the Judge of Religious Court regarding the granting of the request for the lineage of a child in decision number 90/Pdt.P/2023/PA.Pare, namely the Indonesian legal system, which adheres to civil law, is suitable for progressive law and is the spirit of progressive law.

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