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Legal Discovery of Religious Court Judges in Marriage Itsbat Cases: An Effort to Reform Marriage Law in Indonesia

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Abstract

Marriage as the foundation of the family has an important position in society, but problems often arise regarding marital status, especially in itsbat of marriage cases. This study aims to identify and analyze the legal findings of Bandung Religious Court judges in itsbat of marriage cases, as well as the extent to which these legal findings contribute to the reform of marriage law in Indonesia. This research uses normative legal research methods with a statute and case approach. Primary and secondary data obtained from itsbat of marriage decisions, books, and journals that have the same discussion as this research. The results showed that the Religious Court judge in deciding the itsbat of marriage case had made various efforts to provide fairer legal protection for the parties who filed the application. The resulting legal findings, such as the application of the precautionary principle in assessing evidence, considering aspects of material justice, and providing innovative solutions in complex cases, have contributed significantly to the development of marriage law in Indonesia. However, there are still some challenges that need to be overcome, such as limited access to evidence and legal uncertainty in some aspects. Therefore, further efforts need to be made to improve the regulations and mechanisms for resolving itsbat of marriage cases, so as to provide legal certainty and justice for all interested parties.

Keywords: Divorce, Itsbat of Marriage, Religious Court, Legal Discovery

Abstrak

Perkawinan sebagai fondasi keluarga memiliki kedudukan yang penting dalam masyarakat, namun seringkali muncul permasalahan terkait status perkawinan, khususnya dalam perkara itsbat nikah. Penelitian ini bertujuan untuk mengidentifikasi dan menganalisis

temuan hukum hakim Pengadilan Agama Bandung dalam perkara itsbat nikah, serta sejauh mana temuan hukum tersebut memberikan kontribusi terhadap pembaharuan hukum perkawinan di Indonesia. Penelitian ini menggunakan metode penelitian hukum normatif dengan pendekatan perundang-undangan dan studi kasus, data primer dan sekunder yang diperoleh dari putusan itsbat nikah, buku-buku, dan jurnal-jurnal yang memiliki pembahasan yang sama dengan penelitian ini. Hasil penelitian menunjukkan bahwa hakim Pengadilan Agama dalam memutus perkara itsbat nikah telah melakukan berbagai upaya untuk memberikan perlindungan hukum yang lebih adil bagi para pihak yang mengajukan permohonan. Temuan-temuan hukum yang dihasilkan, seperti penerapan prinsip kehati-hatian dalam menilai pembuktian, mempertimbangkan aspek keadilan materiil, dan memberikan solusi inovatif dalam kasus-kasus yang kompleks, telah memberikan kontribusi yang cukup besar bagi perkembangan hukum perkawinan di Indonesia. Namun demikian, masih terdapat beberapa tantangan yang perlu diatasi, seperti terbatasnya akses terhadap alat bukti dan ketidakpastian hukum dalam beberapa aspek. Oleh karena itu, upaya lebih lanjut perlu dilakukan untuk menyempurnakan peraturan dan mekanisme penyelesaian perkara itsbat nikah, sehingga dapat memberikan kepastian hukum dan keadilan bagi semua pihak yang berkepentingan.

Kata Kunci: Perceraian, Itsbat nikah, Pengadilan Agama, Penemuan Hukum

Introduction

Marriage itsbat cases accompanied by divorce in the religious court environment are called "Accumulation" cases which are consensual cases whose legal products are in the form of decisions and can be appealed and cassation if the parties do not accept the decision. The examination at the first trial of the case of the application for the accumulation of itsbat of marriage with divorce is carried out by checking whether or not a marriage is valid first and deciding the itsbat of marriage at the interlocutory decision, then at the next trial the divorce case is examined until the last hearing of the verdict. The marriage examination is carried out open to the public and the divorce is closed to the public, then the decision on the application for the accumulation of itsbat of marriage with divorce is made in unison with the divorce decision whose content is one of the amar, which stipulates the validity of the marriage of the applicant and the defendant, and another amar regarding the imposition of talaq. The problems found in this case are those who get married and married, and the error factor of the Marriage Registrar (PPN) who is negligent or deliberate in recording and reporting the marriage to the KUA.[1]

The tendency to issue a determination of itsbat of marriage for sirri marriage after the enactment of the Marriage Law (UUP) by a judge of the Religious Court due to Article 16

[1] Wafa Moh. Ali, *Hukum Perkawinan Di Indonesia Sebuah Kajian Dalam Hukum Islam Dan Hukum Materil*, *Yayasan Asy-Syari'ah Modern Indonesia*, 2018; Harman Harman, Jumni Nelli, and Azni Azni, "Hukum Perkawinan Islam di Indonesia Latar Belakang Sejarah dan Perkembengannya," *Ijtihad : Jurnal Hukum Dan Ekonomi Islam* 15, no. 2 (2022), https://doi.org/10.21111/ijtihad.v15i2.6308; Rizqi Suprayogi, "Reformasi Hukum Perkawinan Islam di Indonesia," *Indonesia Journal of Business Law* 2, no. 1 (2023), https://doi.org/10.47709/ijbl.v2i1.1962; Mesta Wahyu Nita, *Hukum Perkawinan Di Indonesia*, *LADUNY ALIFATAMA*, 2021.

paragraph (1) of Law Number 4 of 2004 concerning Judicial Power.[2] In addition, we can also see Article 22 AB which affirms that, if a judge refuses to settle a case on the grounds that the relevant laws and regulations do not mention it, it is unclear or incomplete, then he can be prosecuted for refusing to adjudicate.[3]

The Religious Court continues to open the marriage itsbat room for the marriage to be held that the Religious Court as the guardian of the enforcement of legal institutions comprehensively identifies that there is a common need for the marriage itsbat. This Itsbat of marriage policy is in reality considered still needed, even for marriages carried out after the enactment of the Marriage Law in article 7 paragraph 3 point (d) of the Compilation of Islamic Law (KHI) states that the application for itsbat of marriage can only apply to marriages carried out before the enactment of the Marriage Law. However, article 7 paragraph 3 point (d) of the Compilation of Islamic Law (KHI) is not used by the judges of the Religious Court in accepting applications for marriage marriage, in fact article 7 paragraph 3 point (e) is used as the basis for accepting marriage marriage applications, because the article is considered ineffective at this time because it is almost certain that there will be no more marriages before the enactment of Marriage Law Number 1 of 1974 which has not been registered.[4]

The process of marriage with the accumulation of divorce is known as "merger of cases". That the accumulation of lawsuits or *samenvoeging van vordering* is the merger of more than one lawsuit into one lawsuit or several lawsuits combined into one. Basically, each lawsuit that is combined is a stand-alone lawsuit. Merger of lawsuits is only allowed within certain limits. The civil procedure law that is generally applicable is both in the HIR, R.Bg. as well as the Rv does not expressly regulate and does not prohibit it. The only one that regulates the accumulation of lawsuits is Law No. 7 of 1989. Article 7 (paragraph 3) letter (a) of the KHI is allowed to combine itsbat of marriage with divorce. Basically, itsbat of marriage in the context of divorce can be justified, unless the marriage to be itsbat clearly violates the Law.[5]

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[2] Evie Christy, Wilsen Wilsen, and Dewi Rumaisa, "Kepastian Hukum Hak Preferensi Pemegang Hak Tanggungan Dalam Kasus Kepailitan," *Kanun Jurnal Ilmu Hukum* 22, no. 2 (2020), https://doi.org/10.24815/kanun.v22i2.14909.

[3] Abdul Manan and Muhammad Fauzan, "Pokok-Pokok Hukum Perdata: Wewenang Peradilan Agama," *(No Title)*, 2002; Nur Sa'adah Nur Sa'adah, "Akibat Hukum Terhadap Harta Bersama Yang Dilakukan Secara Sepihak," *Jurnal Surya Kencana Satu : Dinamika Masalah Hukum Dan Keadilan* 12, no. 1 (2021), https://doi.org/10.32493/jdmhkdmhk.v12i1.10211.

[4] Neneng Putri Siti Nurhayati Andra Triyudiana, "Penerapan Prinsip Keadilan Sebagai Fairness Menurut John Rawls Di Indonesia Sebagai Perwujudan Dari Pancasila," *Das Sollen: Jurnal Kajian Kontemporer Hukum Dan Masyarakat* 02, no. 01 (2023); Holili Holili, M. Yunus, and Winarto Winarto, "Kedudukan Yurisprudensi Sebagai Sumber Hukum Di Indonesia Sebagai Penganut Sistem Civil Law," *COMSERVA : Jurnal Penelitian Dan Pengabdian Masyarakat* 3, no. 09 (2024), https://doi.org/10.59141/comserva.v3i09.1140; Slamet Widodo, "Perkembangan Sistem Hukum Indonesia Dan Adat Berdasarkan Pemikiran Filsuf Hukum," *Jurnal Insan Pendidikan Dan Sosial Humaniora* 1, no. 1 (February 13, 2023): 15–31, https://doi.org/10.59581/jipsoshum-widyakarya.v1i1.74.

[5] Nita, *Hukum Perkawinan Di Indonesia*.

The above explanation can explain the background of civil cases related to the case of accumulation of itsbat of marriage and divorce lawsuits. The wife submitted an application for itsbat of marriage as a step towards divorce at the Religious Court. This case is studied in the civil procedure law there is an element of merging two objects of the case into one.

Although Itsbat of marriage was designed as a solution to unregistered marriages, problems still arise in its application.[6] There are many things that must be observed in this itsbat of marriage application, so that the judge in examining the itsbat of marriage case accompanied by a divorce lawsuit must be selective and careful so that the impression of facilitating the legalization of marriage through itsbat of marriage and divorce does not occur. Regarding the issue of the legal status of marriage under the hand, some consider that the marriage under the hand is valid religiously while the state is invalid, because a valid marriage can only be proven by a Marriage Certificate made by the marriage registrar, while the marriage under the hand clearly does not have a marriage certificate.[7] Some cases in the Religious Court usually combine itsbat of marriage with a Divorce Lawsuit.[8] Therefore, the Judge must respond and answer all kinds of applications and lawsuits that are filed. Procedural law in religious courts is regulated by law. Number 7 of 1989 concerning religious courts, which was later amended by law. No. 3 of 2006 concerning Amendments to Law No. 7 of 1989 concerning religious justice.

Divorce cases can be combined at the same time with the legalization of marriage, in accordance with Article 86 of Law Paragraph (1) No. 7 of 1989 concerning Religious Justice. Law No. 1 of 1974 regulates various provisions of the material law on marriage and everything related to it, while Government Regulation No. 9 of 1975 regulates marriage procedures and at the same time is the implementation of the Marriage Law. In addition to these two provisions, there are other provisions specifically for Muslims, namely those contained in the KHI and Law No. 7 of 1989.[9]

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6 Zainuddin Zainuddin and Nur Jaya, "Jaminan Kepastian Hukum Dalam Perkawinan Melalui Itsbat Nikah (Studi di Pengadilan Agama Makassar Kelas IA)," *Riau Law Journal* 2, no. 2 (2018), https://doi.org/10.30652/rlj.v2i2.6086; Farida Nurun Nazah and Husnia Husnia, "Kepastian Hukum Itsbat of Marriage Dalam Hukum Perkawinan," *Jurnal Hukum Replik* 6, no. 2 (2018), https://doi.org/10.31000/jhr.v6i2.1525.

7 Enju Juanda, "Konstruksi Hukum dan Metode Interpretasi Hukum," *Jurnal Ilmiah Galuh Justisi* 4, no. 2 (2017), https://doi.org/10.25157/jigj.v4i2.322; Sitti Mawar, "Metode Penemuan Hukum (Interpretasi Dan Konstruksi) Dalam Rangka Harmonisasi Hukum," *Ar-Raniry* 1 (2016).

8 Alifia Meita Putri and Muhamad Muslih, "Analisis Putusan Hakim Tentang Penolakan Permohonan Itsbat Nikah (Putusan No. 47/Pdt.P/2021/PA.Tas Hakim Pengadilan Agama Tais)," *Qanun: Jurnal Hukum Keluarga Islam* 1, no. 1 (2023); Burhanuddin Burhanuddin and Sri Yunarti, "Analisis Putusan Hakim Tentang Itsbat Nikah Perkara Nomor 2/Pdt.P/2019 Di Pengadilan Agama Sawahlunto Dalam Perspektif Fikih Munakahat," *JISRAH: Jurnal Integrasi Ilmu Syariah* 2, no. 1 (April 30, 2021): 141, https://doi.org/10.31958/jisrah.v2i1.3217; Feri Kurniawan and Abd. Qohar, "Analisis Putusan Hakim Tentang Itsbat Contencius Pada Pengadilan Agama Gunung Sugih," *AL-MANHAJ: Jurnal Hukum Dan Pranata Sosial Islam* 3, no. 1 (January 24, 2021): 67–88, https://doi.org/10.37680/almanhaj.v3i1.436.

9 Holili, Yunus, and Winarto, "Kedudukan Yurisprudensi Sebagai Sumber Hukum Di Indonesia Sebagai Penganut Sistem Civil Law"; Muhammad Habibi, "Legalitas Hukum Islam Dalam Sistem

The accumulation of itsbat of marriage cases with divorce carried out by the judges of the soreang and ngamrpah Religious Courts of West Bandung in this case is not in accordance with the Religious Court Law Number 7 of 1989 Article 66 paragraph (5) and Article 86 paragraph (1). The case of itsbat of marriage and divorce in both claims has different legal consequences. Itsbat of marriage results in proof and divorce results in the dissolution of the marriage. However, in the Soreang and West Bandung Religious courts, the panel of judges decided the itsbat and divorce cases in one event.

The case of itsbat of marriage murni[10] there will be no problem because the judge's determination has a point ordering the parties to register their marriage in the relevant KUA, so that the KUA has a basis to issue the marriage book as the authentic deed of marriage of the applicants. In the case of the accumulation of marriage and divorce itsbat, a new problem will arise because the decision of the panel of judges does not have the point of ordering the parties to register their marriage to the KUA, this is because the marriage itsbat is not for the registration of marriage but for the sake of divorce, so that the parties do not have a trace of their marriage administrative registration, there is only a trace of their divorce administration. For those who do not have children, there is no significant legal effect, but for those who have children, especially if they are still minors, the legal effect will be prolonged.[11]

The accumulation of Itsbat of marriage and divorce in the decision of the West Java Religious Court, this is not in accordance with Law Number 23 of 2002 concerning child protection and the protection of a wife, because the judge did not provide appropriate protection to what had been done when considering this case.[12] Procedural law in Religious Courts is regulated by Law No. 7 of 1989 concerning Religious Courts, which was later amended by law. No. 3 of 2006 concerning Amendments to Law No. 7 of 1989. As an actor of judicial power, religious courts are a place for justice seekers, especially for every Muslim to solve problems related to Islamic civil matters. As well as the issue of divorce lawsuits, inheritances, joint property and so on.[13]

Based on this, judges are obliged to participate in determining what is the law and what is not, if the law does not regulate a case, the judge must act on his own initiative to find and explore the unwritten legal values that live among the people (*living law*). Judges have the freedom to interpret and argue, judges have free attachment (*vrije gebondenheid*) in

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Peradilan Indonesia," *Media Syari'ah : Wahana Kajian Hukum Islam Dan Pranata Sosial* 22, no. 2 (2021), https://doi.org/10.22373/jms.v22i2.8050.

10 The meaning of a pure isbat marriage is an isbat marriage case that does not have any other issues or problems, such as legal witnesses, legally valid marriage guardians, or others that do not conflict with the isbat marriage procedure.

11 Nur Sa'adah, "Akibat Hukum Terhadap Harta Bersama Yang Dilakukan Secara Sepihak."

12 Indra Utama Tanjung and Dhiauddin Tanjung, "Undang-Undang Perkawinan Dan Marriage Beda Agama Hukum Islam Dan Hukum Positif," *Jurnal Kewarganegaraan* 6, no. 4 (2022); Habibi, "Legalitas Hukum Islam Dalam Sistem Peradilan Indonesia."

13 Zainal Asikin, *Hukum Acara Perdata Di Indonesia*, *Prenadamedia Group (Kencana)*, 2018; I Wayan Yasa and Echwan Iriyanto, "Kepastian Hukum Putusan Hakim Dalam Penyelesaian Sengketa Perkara Perdata," *Jurnal Rechtens* 12, no. 1 (2023), https://doi.org/10.56013/rechtens.v12i1.1957; Halida Zia, Mario Agusta, and Desy Afriyanti, "Pengetahuan Hukum Tentang Hukum Acara Perdata," *RIO LAW JURNAL* 1, no. 1 (2020), https://doi.org/10.36355/.v1i2.404.

carrying out their duties to adjudicate a case, while on the other hand, the legal system in Indonesia adheres to the school *of rechtsvinding* which emphasizes that judges must base their decisions on the applicable laws and regulations.[14]

This is where a problem arises that needs to be affirmed because if itsbat of marriage is allowed for sirri marriage after the enactment of the 1974 Marriage Law, according to the author, there will be dualism of legal force in the registration of marriage, on the one hand it is not recognized by the UUP and on the other hand the Religious Court ratifies it with an itsbat of marriage hearing.[15]

In accordance with one of the legal principles, the judge is bound by the principle that the judge is prohibited from rejecting the case submitted to him, on the grounds that the law does not exist, the rules are incomplete, the events are not regulated, but the judge is obliged to adjudicate the existing case as long as the case meets the material requirements and is in accordance with absolute competence and relative competence.[16] To fill in the gaps in the law, the judge uses his or her logical reasoning to further develop a legal text. This means that judges no longer adhere to the sound of the text of the law, but judges also do not ignore legal principles as a system.[17] Thus, in the case of the accumulation of itsbat of marriage and divorce, legal construction is needed, namely the way the judge works or thinks in determining the law or applying a provision of the law. Legal construction consists of analogy construction, legal refinement and *argumentum a contrario*. Legal construction is in the form of interpretation in order to find the law, so that legal certainty and justice in society can be well established.

Examining the above reality, it is necessary to change the regulation of marriage law, especially in this case the regulation of the status of marriage that is not recorded by the marriage registrar, so that there is no dualism of legal rules in its ratification, and also to avoid overlapping *between laws and regulations in Indonesia, namely, the UUP, the Compilation of*

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[14] Siska Lis Sulistiani, "Analisis Yuridis Aturan Nikah Dalam Mengatasi Permasalahan Perkawinan Sirri di Indonesia," *Tahkim (Jurnal Peradaban Dan Hukum Islam)* 1, no. 2 (2018), https://doi.org/10.29313/tahkim.v1i2.4103.

[15] Muhammad Husni Abdulah Pakarti and Iffah Fathiah, "Itsbat Nikah Sebuah Upaya Mendapatkan Mengakuan Negara (Studi Pengadilan Agama Garut)," *Tahkim (Jurnal Peradaban Dan Hukum Islam)* 5, no. 2 (2022), https://doi.org/10.29313/tahkim.v5i2.10064; Rizky Amelia Fathia and Dian Septiandani, "Dampak Penolakan Itsbat Nikah Terhadap Pemenuhan Hak Anak," *JURNAL USM LAW REVIEW* 5, no. 2 (2022), https://doi.org/10.26623/julr.v5i2.5681.

[16] Siti Malikhatun Badriyah, "Penemuan Hukum (Rechtsvinding) Dan Penciptaan Hukum (Rechtsschepping) Oleh Hakim Untuk Mewujudkan Keadilan," *Jurnal Masalah Masalah Hukum* 40, no. 3 (2011); Dhoni Yusra, "Politik Hukum Hakim Dibalik Penemuan Hukum (Rechtsvinding) Dan Penciptaan Hukum(Rechtsschepping) Pada Era Reformasi Dan Transformasi," *Lex Jurnalica* 10 (2013); Abdul Manan, "Penemuan Hukum Oleh Hakim Dalam Praktek Hukum Acara di Peradilan Agama," *Jurnal Hukum Dan Peradilan* 2, no. 2 (2013), https://doi.org/10.25216/jhp.2.2.2013.189-202; Siti Malikhatun Badriyah, "Penemuan Hukum (Rechtsvinding) Dan Penciptaan Hukum (Rechtsschepping) Oleh Hakim Untuk Mewujudkan Keadilan"; Muwahid -, "Metode Penemuan Hukum (Rechtsvinding) Oleh Hakim: (Sebuah Upaya Untuk Mewujudkan Hukum Yang Responsif)," *Al-Hukama'* 7, no. 1 (2017).

[17] Mawar, "Metode Penemuan Hukum (Interpretasi Dan Konstruksi) Dalam Rangka Harmonisasi Hukum"; Sudikno Mertokusumo, "Penemuan Hukum Sebuah Pengantar Edisi Revisi," *Yogyakarta: Liberty*, 2014.

Islamic Law (KHI), Law Number 50 of 2009 concerning Religious Courts, If done with careful thinking and planning, the update/reform of the Marriage Registration Law can be a solution to the problem of the legal status of marriage in Syria without changing the existing marriage law, so as not to interfere with the issue of whether or not marriage is valid according to religion that has been determined by law. This legal rule is regulated in a legal regulation so that there is clarity regarding the legal position of sirri marriage in marriage law in Indonesia so that it can become a legal umbrella that is fair for all people.[18]

This study uses normative law research methods[19] With a legislative approach and case studies, primary and secondary data are obtained from laws and regulations, the Marriage Law, KHI, Supreme Court decisions, court decisions related to the case of marriage marriage at the Bandung Religious Court, literature related to marriage marriage, books and journals that have the same discussion as this research. Meanwhile, data analysis techniques go through the process of data reduction, data presentation and conclusion drawn. The data collected will be analyzed qualitatively to produce in-depth findings regarding judicial practice in marriage cases at the Bandung Religious Court.

The Role of Judges in the Development of Marriage Law in Indonesia

Legal discoveries are very important things that are used as a reference or guide, in making decisions, whether they are temporary or permanent. Likewise, the panel of judges in making a decision so as not to be mistaken, of course it needs a process that is not short, and the panel of judges must consider it well, so that the decision does not harm one of the parties, therefore, the panel of judges in deciding a case, needs a legal basis, so that the decision issued by the panel of judges has legal force, and there are no legal defects.[20]

The legal basis for accumulation is contained in Article 66 paragraph (5) concerning religious justice which explains that "*an application for child control, child support, wife maintenance and joint property of husband and wife can be submitted together with the application for divorce or after the pledge of talaq is pronounced*". And article 86 paragraph (1) concerning religious justice which reads "*A lawsuit regarding child control, child support, wife maintenance, and joint property of husband and wife can be filed together with a divorce lawsuit or after the divorce decision obtains permanent legal force*". The merger of this lawsuit is also regulated in Law No. 7 of 1989 concerning Religious Justice jo. Law No. 3 of 2006, The accumulation of lawsuits in question is the accumulation of divorce lawsuits and marriage legalization. In article 86 used by the judge in resolving the case of accumulation of lawsuits in the Religious Court. According to article 86 of Law No. 3 of 2006 concerning Religious Justice, It is written that a

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[18] Kurniawan and Qohar, "Analisis Putusan Hakim Tentang Itsbat Contencius Pada Pengadilan Agama Gunung Sugih."

[19] David Tan, "Metode Penelitian Hukum: Mengupas Dan Mengulas Metodologi Dalam Menyelenggarakan Penelitian Hukum," *Nusantara: Jurnal Ilmu Pengetahuan Sosial* 8, no. 2 (2021); Sheyla Nichlatus Sovia Abdul Rouf Hasbullah et al., *Ragam Metode Penelitian Hukum*, *Jurnal Sains Dan Seni ITS*, vol. 6, 2017; Abraham Ethan Martupa Sahat Marune, "Metamorfosis Metode Penelitian Hukum," *Civilia: Jurnal Kajian Hukum Dan Pendidikan Kewarganegaraan* 2, no. 4 (2023).

[20] Siah Khosyi'ah and Aah Tsamrotul Fuadah, "Rechtvinding Tentang Waris Beda Agama Di Pengadilan Agama Kota Bandung," *Asy-Syari'ah* 21, no. 2 (February 17, 2020): 135–58, https://doi.org/10.15575/as.v21i2.4706.

lawsuit regarding child control, child support, wife maintenance and joint property can be filed jointly with a divorce lawsuit or after a decision with permanent legal force." Here there is a sentence "here there is a sentence " can be filed together', this can be a consideration for the judge whether to accept or reject the case of the accumulation of lawsuits.[21]

Basically, the merger of lawsuits is not regulated in either HIR or RBg. However, in practice, it is justified by jurisprudence. As for article 103 bRv, the prohibition on merging lawsuits is only limited to lawsuits between the right of control and the claim of property rights. It can be concluded that Rv allows the filing of a lawsuit, as long as the lawsuit is closely related. In its legal considerations, the panel of judges in deciding the case considered the explanation in the Book of "*Madza Hurriyatuz Zaujaeni fii ath athalaq"* that Islam chooses divorce when the household is considered to be shak or disharmonious and no longer useful advice on peace and the relationship between husband and wife has been lost (without a soul), because by continuing the marriage means punishing one of the wives or husbands in prison for a long time. This is a form of persecution that is contrary to the spirit of justice.[22]

The Panel of Judges is of the opinion that divorce is more beneficial and provides legal certainty than continuing the marriage, even continuing the marriage in the circumstances mentioned above is feared to bring a greater madlarat to the Plaintiff and the Defendant, while the madlaratan must be abolished, in accordance with qoidah fiqhiyah which means: "*Preventing damage (mudharat) must take precedence over taking a benefit*". Thus, it can be interpreted that the legality of divorce by filing a lawsuit for isbat nikah and divorce is allowed to prevent damage *(mudharat)* which must take precedence over taking a benefit". The essence of mashlahah itself has been in accordance with the determination of maqashid sharia, which consists of the elements of dharuriyatul khamsah: religion, soul, intellect, heredity and property. These five components form the unbreakable foundation and are closely associated with the sequence in which the value of *mashlahah*. So, the point is that the elements of the mashlahah values themselves are in line with the vision and mission of maqashid sharia.[23]

In practice, there are many events that have not been regulated in laws or legislation, and even though they have been regulated, they are incomplete or unclear. Indeed, there is no law or legislation that is very complete or as clear as clear. The function of law is to protect human interests by regulating human activities. Meanwhile, human interests are very many and innumerable in number and type. In addition, human interests will continue to evolve over time. Therefore, unclear legal regulations must be explained, which are incomplete must be equipped with a way to find the law so that the legal rules can be

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[21] Marsha Aprilia Quisha et al., "Hukum Acara Perdata"; Asikin, *Hukum Acara Perdata Di Indonesia*.

[22] Rai Mantili and Sutanto Sutanto, "Kumulasi Gugatan Perbuatan Melawan Hukum Dan Gugatan Wanprestasi Dalam Kajian Hukum Acara Perdata di Indonesia," *Dialogia Iuridica: Jurnal Hukum Bisnis Dan Investasi* 10, no. 2 (2019), https://doi.org/10.28932/di.v10i2.1210.

[23] Ramdani Wahyu Sururie, "Polemik Di Seputar Hukum Isbat Nikah Dalam Sistem Hukum Perkawinan Indonesia," *Al-Manahij* 11, no. 2 (2017), https://doi.org/10.24090/mnh.v11i2.2017.pp233-246; Ramdani Wahyu Sururie, "Polemik Di Seputar Hukum Isbat Nikah Dalam Sistem Hukum Perkawinan Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 11, no. 2 (2017), https://doi.org/10.24090/mnh.v11i2.1299.

applied to the event. Thus, in essence, all cases require a method of legal discovery so that the legal rules can be applied appropriately to the event, so that the desired legal decision can be realized, namely one that contains aspects of justice, legal certainty, and usefulness.[24]

A judge has an obligation to uphold law and justice impartially. The judge in providing justice must first study the truth of the event submitted to him and then give an assessment of the event and relate it to the applicable law. After that, the judge can only make a verdict on the incident. A judge is considered to know the law so that he may not refuse to examine and adjudicate an event brought against him. This is regulated in Article 16 Paragraph (1) of Law No. 35 of 1999 jo. Law No. 48 of 2009, namely: "*The court shall not refuse to examine and adjudicate a case submitted on the pretext that the law does not exist or is unclear, but is obliged to examine and adjudicate it*".[25] Basically, judges must apply the laws in the laws and regulations. The existence of a law written in the form of legislation as a form of the principle of legality does indeed guarantee legal certainty. But the law, as a political product, is not easy to change quickly following societal changes. On the other hand, in today's modern, complex and dynamic life, the legal problems faced by society are increasingly numerous and diverse that demand immediate solutions.[26] If the judge does not find a written law, he is obliged to dig up the unwritten law to decide based on the law as a wise person and fully responsible to God Almighty, himself, society, nation and state. In addition, the judge's knowledge of the facts and events in the case he faces is the basis for making a verdict by applying the law he knows.[27]

A judge in finding his law is allowed to reflect on the jurisprudence and opinions of famous jurists (doctrines). Legal discovery, according to Sudikno Mertokusumo, is usually interpreted as the process of law formation by judges or other legal officers who are given the task of implementing the law or applying general legal regulations to concrete legal events. Furthermore, it can be said that legal discovery is a process of concretization and individualization of legal regulations (das sollen) that are general in nature by remembering certain concrete events (das sein).[28]

Paul Scholten stated that what is meant by legal discovery is something other than just the application of rules to events. Sometimes and even very often it happens that the

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[24] Muwahid -, "Metode Penemuan Hukum (Rechtsvinding) Oleh Hakim," *AL-HUKAMA'* 7, no. 1 (2017), https://doi.org/10.15642/alhukama.2017.7.1.224-248; "Metode Penemuan Hukum (Rechtsvinding) Oleh Hakim: (Sebuah Upaya Untuk Mewujudkan Hukum Yang Responsif)"; Muwahid, "Metode Penemuan Hukum (Rechtsvinding) Oleh Hakim Dalam Upaya Mewujudkan Hukum yang Responsif," *The Indonesian Journal of Islamic Family Law*, vol. 07, 2017; Mawar, "Metode Penemuan Hukum (Interpretasi Dan Konstruksi) Dalam Rangka Harmonisasi Hukum."

[25] Marsha Aprilia Quisha et al., "Hukum Acara Perdata"; Asikin, *Hukum Acara Perdata Di Indonesia*.

[26] Mawar, "Metode Penemuan Hukum (Interpretasi Dan Konstruksi) Dalam Rangka Harmonisasi Hukum."

[27] Vidya Khairina Utami, Artaji Artaji, and Hazar Kusmayanti, "Praktik Pemeriksaan Saksi Dengan Menggunakan Teleconference Pada Pengadilan Agama Demi Mewujudkan Asas Sederhana Cepat Dan Biaya Ringan," *Jurnal Sains Sosio Humaniora* 6, no. 1 (2022), https://doi.org/10.22437/jssh.v6i1.19428; Yasa and Iriyanto, "Kepastian Hukum Putusan Hakim Dalam Penyelesaian Sengketa Perkara Perdata."

[28] Mertokusumo, "Penemuan Hukum Sebuah Pengantar Edisi Revisi,"; Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, *Liberty*, vol. 47, 1996.

rules must be found, either by interpretation or by analogy or rec hsvervijining).[29] Meanwhile, according to John Z Laudoe, legal discovery is the application of provisions to facts and these provisions sometimes have to be formed because they are not always contained in existing laws.[30]

Judges are required to choose the legal rule to be applied, then interpret it to determine or find a form of behavior listed in the rule and also find the content of its meaning in order to determine its application, and interpret the facts found to determine whether the facts are included in the meaning of the application of the legal rule or not. Thus, through the settlement of concrete cases in the judicial process, legal discoveries can also occur.[31] Legal discovery is a complex process or series of activities, which basically starts from the judge examining and then adjudicating a case until a verdict is handed down in the case. The activities of judges are generally a series that cannot be separated from each other, but the momentum for the beginning of a legal discovery is after the concrete event has been proven or constituted, because that is when the concrete event that has been constituted must be sought or found by law.

Analysis of Judges' Legal Arguments in the Marriage Itsbat Case

In a trial, the judge will certainly investigate whether there is a legal relationship that really exists or not. This legal relationship must be proven in front of the judge, and it is the duty of both parties to the case to provide the necessary evidence, proving in the sense of justifying the legal relationship. So, in examining and adjudicating a case and then issuing a verdict, a judge must carry out three stages of action in the trial,[32] namely:

First, Configuring Stage. In this stage, the judge will constitute or see to confirm the existence or absence of an event submitted to him. To ensure this, proof is needed, and therefore the judge must rely on valid evidence according to the law, where in civil cases, as in Article 164 HIR/Article 284 RBg/Article 1866 of the Civil Code, namely written evidence, proof with witnesses, suspicions, confessions, and oaths. So, it will be possible to avoid shallow and rash conjectures or conclusions. For example: if in a civil case it is the litigants who are obliged to prove through the use of evidence. In this constatir stage, the judge's activities are logical, and the mastery of the law of proof for judges is needed at this stage.

Second, Qualifying Stage. At this stage, the judge qualifies by assessing the concrete events that have been considered to have actually occurred, including what legal relationship or how or finding a law for these events. In other words, qualifying means grouping or classifying the concrete event into a group or class of legal events (whether it is

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[29] N.E. Algra dan Van Duyvendijk, Mula Hukum, oleh J.C.T Simorangkir dkk., Bandung, Bina Cipta, 1983, hal 35

[30] Dhoni Yusra, "Politik Hukum Hakim Dibalik Penemuan Hukum (Rechtsvinding) Dan Penciptaan Hukum(Rechtsschepping) Pada Era Reformasi Dan Transformasi"; Christy, Wilsen, and Rumaisa, "Kepastian Hukum Hak Preferensi Pemegang Hak Tanggungan Dalam Kasus Kepailitan."

[31] Syarif Saddam Rivanie et al., "Perkembangan Teori-Teori Tujuan Pemidanaan," *Halu Oleo Law Review* 6, no. 2 (2022), https://doi.org/10.33561/holrev.v6i2.4; Slamet Widodo, "Perkembangan Sistem Hukum Indonesia Dan Adat Berdasarkan Pemikiran Filsuf Hukum"; Amran suadi, "Perkembangan Hukum Perdata Islam Di Indonesia," *Jurnal Yuridis* 2, no. 1 (2015).

[32] Marsha Aprilia Quisha et al., "Hukum Acara Perdata."

theft, persecution, adultery, gambling, or transfer of rights, unlawful acts, and so on). If the event has been proven and the legal regulations are clear and firm, then the application of the law will be easy, but if the law is not clear or unclear, then the judge will no longer have to find the law alone, but more than that he must create the law, which of course must not contradict the whole system.

Third, Inner Constituting Stage. In this stage, the judge establishes his law on the event and gives justice to the parties concerned (the parties or the defendants). The justice decided by the judge is not the product of the judge's intellect, but the spirit of the judge himself, as stated by Sir Alfred Denning, a famous United Kingdom judge. In adjudicating a case, the judge must determine the law in consequence of a certain event, so that the judge's decision can become a law (*judge made law*). Here the judge uses syllogism, which is to draw a conclusion from the major premise in the form of the rule of law and the minor premise in the form of the act/action. If you look carefully, the description of the process or method of discovery of law can be observed by starting at the qualification stage by assessing concrete events that are considered to have actually occurred or finding laws for these concrete events, by grouping or classifying these concrete events into groups or groups of legal events.[33]

Judges discover the law through available legal sources. In this case, it does not adhere to the view of legism that only accepts law as the only law and source of law. On the other hand, here, judges can find the law through legal sources, namely customary laws, treaties, jurisprudence, doctrines, religious laws, and even legal beliefs embraced by the community. In Article 5 Paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, judges and constitutional judges are obliged to explore, follow, and understand the values of law and the sense of justice that live in society. To find a law or regulation that is unclear, it must be explained first, while incomplete laws and regulations must be completed first so that it can later be applied in the event.[34]

Achmad Ali distinguishes the method of legal discovery into two, namely the interpretation method and the construction method. The difference between the two methods, according to Achmad Ali, is in the interpretation, interpretation of the text of the law, still adhering to the sound of the text. Meanwhile, in construction, the judge uses his logical reasoning to further develop a legal text where the judge no longer adheres to the sound of the text, but on the condition that the judge does not ignore the law as a system.[35]

In the practice of the Judge of the Religious Court in West Java to handle the application for the accumulation of isbat nikah and divorce after the enactment of the UUP, the judge used the ratio of legis to find a legal basis that allows the religious court to accept the case of itsbat nikah even though the marriage requested for isbat occurred after the

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[33] Asikin, *Hukum Acara Perdata Di Indonesia*; Maulindayani Maulindayani, "Eksistensi Dalam Pembaruan Hukum Acara Perdata Di Indonesia," *Ikatan Penulis Mahasiswa Hukum Indonesia Law Journal* 1, no. 1 (2021), https://doi.org/10.15294/ipmhi.v1i1.49859.

[34] Sheila Kusuma Wardani Amnesti, "Tinjauan Yuridis Kumulasi Gugatan Cerai Dan Itsbat Nikah Di Pengadilan Agama Magelang," *Amnesti Jurnal Hukum* 1, no. 1 (2019).

[35] Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis Dan Sosiologis)*, *Toko Gunung Agung*, vol. 7, 2002; Y P Sinambela, "Disparitas Putusan Hukuman Mati Terhadap Pelaku Tindak Pidana Peredaran Gelap Narkotika," *Jurnal Ucyp Vol. 3 No*, 2019.

enactment of the Marriage Law. There are at least two reasons for the Religious Court in the PTA Bandung area, and the Religious Court in general, namely being able to accept and decide the case of marriage marriage after the enactment of the Marriage Law. First, related to the principle of ius curia novit, namely that the judge is considered to be familiar with the law of itsbat nikah, and the principle of the freedom of the judge to find his law on a problem or case where there is no legal regulation (rechtsvacuum). Second, a sociological approach that encourages judges to analyze a case with a sociological approach to law and make a teleological interpretation (sociological interpretation) of other regulations that have to do with the problems faced so that the law does not stagnate, but develops following the development of society or in accordance with the living law in society.[36]

According to Purnadi Purbatjaraka and Soerjono Soekanto, as stated by Ahmad Rifai, judges have free discretion, their feelings about what is right and what is wrong is the real direction to achieve justice.[37] It was stated that the doctrine of free law (freirechtslehre) gives judges free will in decision-making. The judge can determine his decision without having to be bound by the law. Indonesia as a country that adheres to the teachings of free law, gives freedom to judges to explore the legal values that live in society to be used as the basis for making decisions.[38]

Seeing the function and role of the Judge to explore the law that lives in society due to the incompleteness of laws and regulations to meet all legal events or legal demands, then by applying the teachings of Cicero ubi societas ibi ius (where there is a society, there is a law), then the legal void is seen as never existing, with the reasioning of every society has a mechanism to create legal rules if the official law is inadequate or not exist.[39] It can be said that this mindset is what directs the Yogyakarta Religious Court Judge to be able to accept the case of isbat nikah application for marriage that took place after the enactment of the Marriage Law.

Itsbat of Marriage as a Catalyst for Marriage Law Reform in Indonesia

There are four legal discoveries through legal construction methods known so far, which are as follows:[40] *First*, Argumentation Method Per Analogium (Analogy). Analogy is a method of legal discovery where the judge searches for the general essence of a legal event

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[36] Salam, "Analisis Hukum Hak-Hak Nasab Anak Luar Nikah Menurut Putusan Mahkamah Konstitusi Nomor 46/PUU/VIII/2010"; Kurniawan and Qohar, "Analisis Putusan Hakim Tentang Itsbat Contencius Pada Pengadilan Agama Gunung Sugih."

[37] Rifai, *Penemuan Hukum Oleh Hakim Dalam Perspektif Hukum Progresif*; Ferdy Rizky Adilya, "Putusan Hakim Pidana Yang Berkeadilan Substantif Melalui Pendekatan Hukum Progresif Dalam Perspektif Penologi," *Aktualita (Jurnal Hukum)* 1, no. 2 (2018), https://doi.org/10.29313/aktualita.v1i2.4006.

[38] Pakarti and Fathiah, "Itsbat Nikah Sebuah Upaya Mendapatkan Mengakuan Negara (Studi Pengadilan Agama Garut)."

[39] Fadhlin Ade Candra and Fadhillatu Jahra Sinaga, "Peran Penegak Hukum Dalam Penegakan Hukum di Indonesia," *Edu Society: Jurnal Pendidikan, Ilmu Sosial dan Pengabdian Kepada Masyarakat* 1, no. 1 (2023), https://doi.org/10.56832/edu.v1i1.15; Miswardi, Nasfi, and Antoni, "Etika, Moralitas Dan Penegak Hukum," *Menara Ilmu* 15, no. 2 (2021).

[40] Marsha Aprilia Quisha et al., "Hukum Acara Perdata."

or legal act, both those that have been regulated by law and those that have not yet been regulated. As a type of construction, it is often used in the field of civil law, and this will not cause problems, while its use in criminal law is often debated among jurists. This construction is also called *an* "*analogy*" which in Islamic law is known as "*qiyas*". This model of legal construction is used when the judge has to make a decision in a conflict for which there are no rules, but the event is similar to that regulated in the Law.[41] For example, in the case as mentioned in Article 1756 of the Civil Code which regulates currency *(goldspecie).* Are banknotes included in the regulations? By analogy or analogy, the currency is interpreted to include paper money. In Indonesia, the use of analogy argumentum method, or a new analogy is limited in the field of civil law, has not been agreed upon by legal experts to be used in the field of criminal law.

Second, Metode *Argumentum A'Contrario.* This type of interpretation is a way of interpreting the law that is based on the conflict of understanding between the problem at hand and the problem regulated in an article of the Law. From the starting point of the resistance to denial (understanding), a conclusion can be drawn that the problems faced are not contained in the article in question or in other words are outside the article. According to Zaenal Asikin, "argumentum *a contrario* means using reasoning against the Law which is based on the opposite understanding of the concrete event at hand."[42] Another simple example is what is meant by "halal causa or permissible cause" in Article 1320 of the Civil Code. To interpret this, it is necessary to seek the opposite understanding. The opposite meaning of "halal cause" is found in Article 1337 of the Civil Code which regulates "prohibited causes", namely causes that are contrary to the law, morality, and public order.

Third, *Rechtsservijnings* (Refinement of the Law). Sometimes laws and regulations have a scope that is too general or very broad. That is why it is necessary to refine the law so that it can be applied to a certain event. In the refinement of the law, new exceptions or deviations from general regulations are formed. In this case, regulations that are general in nature are applied to special legal events or in accordance with social reality. Thus, the event can be resolved fairly and in accordance with the conditions of reality that exist in society.[43] Judges in connecting the text of the law with a concrete event they are trying are obliged to use their thoughts and reason. to choose which method of discovery is most suitable and relevant to apply in a case. Judges must be observant and have high professionalism in applying the method of legal discovery. If a judge can use the relevant legal method and in accordance with the expectations in the case he is examining, then the verdict that is born will have the value of justice and benefits for justice seekers.

Justice is something very important; the ideology of the Indonesian nation, namely Pancasila and the 1945 Constitution, also makes justice a component in it to be implemented in the life of the nation and the state. In ideology we can see in the 5th (five): "Social justice for all Indonesian people," and in the 1945 Constitution there is in the preamble to the 1945 Constitution. Therefore, the judge must also, when deciding a case, not forget the main

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41 Manan, "Penemuan Hukum Oleh Hakim Dalam Praktek Hukum Acara di Peradilan Agama."

42 Santoso Lukman and Yahyanto Yahyanto, "Pengantar Ilmu Hukum," *Setara Press*, 2016; Dian Aries Mujiburohman, *Pengantar Ilmu Hukum*, *Pt RajaGrafindo Persada*, 2023.

43 Lukman and Yahyanto, "Pengantar Ilmu Hukum"; Mujiburohman, *Pengantar Ilmu Hukum*.

foundation, namely justice. Marriage is a human right for every citizen who has met the requirements to carry it out, therefore marriage must be based on good faith for both parties, with good intentions and good faith, it is hoped that the marriage will last and get the pleasure of Allah and have the value of worship. That marriage is a human right for every citizen, in Article 28 b paragraph (2) of the 1945 Constitution in the second amendment. In the article, it is stated that:[44]

1. Everyone has the right to form a family and continue the offspring through legal marriage.
2. Every child has the right to survival, growth, and development and the right to protection from violence and discrimination.

On the basis of justice and equality of rights, the Religious Court, like other courts, has the main task or main task of receiving, examining, adjudicating and resolving every case. The court is prohibited from rejecting a case because the law is unclear or does not yet exist, all cases must be processed according to applicable rules, as is the case with isbat nikah cases. The Religious Court is obliged to receive, examine and adjudicate applications for isbat nikah accompanied by divorce that has been registered in accordance with applicable regulations. It is at the trial stage that the judge will decide whether the application for isbat nikah accompanied by the divorce is granted or rejected.

This emphasis on the principle of justice means that judges must consider the living law, which is a custom and the provisions of the law that are not written. In justice, a sense of justice must be distinguished according to individuals and communities. In addition, justice from certain communities is also not necessarily the same as the sense of justice of other communities. So in considering the decision, the judge must be able to describe all these things when the judge chooses the principle of justice of a certain society, for example, as the basis for making a verdict.[45]

Conclusion

The results of the study show that the legal discovery of the judge at the Religious Court in the PTA area of West Java in the case of the accumulation of marriage and divorce is a judge's decision as jurisprudence regarding the case he faces, which is adjusted to the conditions and circumstances that occur. These findings indicate that this decision is based on legal discovery theories that are allowed to be used by judges to avoid legal voids that are enforced either by making new laws or replacing old laws as a basic policy for the upholding of justice to enforce national laws in accordance with Pancasila and the goals of the state of Indonesia. Overall, this study highlights the importance of the role of judges in shaping

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[44] Nur Jaya Zainuddin, "Jaminan Kepastian Hukum Dalam Perkawinan Melalui Isbat Nikah," *Riau Law Journal* 2, no. 2 (2018); Zainuddin and Jaya, "Jaminan Kepastian Hukum Dalam Perkawinan Melalui Itsbat Nikah (Studi di Pengadilan Agama Makassar Kelas IA)."

[45] Rifai, *Penemuan Hukum Oleh Hakim Dalam Perspektif Hukum Progresif*; Noor Rahmad and Wildan Hafis, "Hukum Progresif dan Relevansinya Pada Penalaran Hukum Di Indonesia," *El-Ahli : Jurnal Hukum Keluarga Islam* 1, no. 2 (2021), https://doi.org/10.56874/el-ahli.v1i2.133; Adilya, "Putusan Hakim Pidana Yang Berkeadilan Substantif Melalui Pendekatan Hukum Progresif Dalam Perspektif Penologi."

jurisprudence that is dynamic and responsive to the times. The legal discovery in the case of marriage has made a significant contribution to efforts to reform marriage law in Indonesia, especially in terms of marriage law, so that there is no legal void in the case that occurs. Based on the findings of this study, it is suggested that efforts to reform the marriage law need to continue to be carried out to ensure that the protection of individual rights, especially women, in marriage institutions is protected by the state.

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