



Itsbat Marriage of Sirri Polygamy in Progressive Law Perspective, Case Study of Decision Number 5065/Pdt.G/2019/PA.Clp

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Abstract

A case concerning an application for itsbat marriage at the Cilacap Religious Court filed by a husband and his second wife. Their marriage was conducted siri without the knowledge of the first wife. This application was filed to obtain legalisation of their siri marriage so that it could be officially recorded, which has implications for the legality of children born from the marriage and other civil rights. The purpose of this research is to find out the considerations and factors behind a Judge granting a marriage isbat application. then the second objective is to analyse the results of Decision Number 5065/Pdt.G/2019/PA.Clp in terms of progressive law. This type of research is library research using a normative juridical approach using progressive legal theory. The conclusion in Itsbat Marriage Case in Decision Number 5065/Pdt.G/2019/PA.Clp is that the judge considers aspects of humanity, social justice, and benefits for all parties involved. From the aspect of substantive justice, the decision reflects an approach that takes into account the best interests of the child, harmony in the family, and the protection of women's rights. In the context of the judge's background, the granting of this decision may have been influenced by a deep understanding of the social and cultural values of the local community, as well as a broad understanding of religious norms relating to marriage. The judge may also have considered the urgency of protecting children's rights and the need to resolve family conflicts fairly and peacefully. As such, the granting of this decision demonstrates the judge's commitment to achieving substantive justice in accordance with the social, cultural and religious values of the community, while ensuring the protection of the rights of the individuals involved in the case.

Keywords: Itsbat Marriage, Sirri Polygamy, Progressive Law, PA Cilacap, Sirri Marriage.

Introduction

Marriage is an important thing in the reality of human life. With the existence of marriage, households can be upheld and fostered in accordance with religious norms and social life. In the heavenly religions, marriage has a very honourable place and is highly upheld by the rules set out in the holy book.

This is also the case in countries that uphold moral values, the issue of marriage is a very principle thing in a community life, and is highly respected by the rules of implementation so that the implementation of marriage is in accordance with the norms and principles that have been mutually agreed upon.¹

In the religion of Islam regulates individual relationships with very holy rules and makes them noble degrees, there are brotherly relations, there are friendly relations and even marital relations, marriage relations including polygamous marriages are certainly a very strong relationship in Islam *mitsaqon golidzon* to get to a household that is *sakinah, mawaddah warohmah* and gives birth to good offspring *durriyatan toyyibah*.²

Marriage according to Islamic law is a very strong contract or *mitssaqaan ghalidzan* to obey the commands of Allah SWT and carrying it out is an act of worship, marriage aims to create a household life that is *sakinah, mawaddah, and rahmah*.³ Meanwhile, according to Marriage Law No. 1 of 1974, marriage is a physical and mental 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 Almighty God, a valid marriage is a marriage that is registered in accordance with the provisions of the applicable legislation and is carried out according to the laws of each religion and belief.⁴

In Islam, marriage is basically based on the principle of monogamy as stated in the Qur'an:

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَّةَ وَرُبُعٍ ۖ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَلِكَ أَذْنَىٰ أَلَّا تَعُولُوا.

"And if you fear that you will not be able to do justice to orphaned women (if you marry them), then marry any other women you like: two, three or four. Then if you fear that you will not be able to do justice, then marry *only one*, or the slaves you own. That is closer to not doing wrong"⁵

Although Allah gives husbands the opportunity to have more than one wife with a maximum of four wives, this opportunity is followed by conditions that are quite difficult to fulfil except by certain people. A husband who believes that he is capable of fulfilling the conditions of polygamy and has the means to do so is one of the people permitted by religion to be polygamous. On

¹ H Abdul Manan, *Aneka Masalah Hukum Perdata Islam Di Indonesia* (Prenada Media, 2022). pp. 1-2.

² Ahmad Cholid Fauzi, *Kedudukan Hukum Itsbat Nikah Poligami Sirri*, Jurnal USM Law Review Vol 1 No 1 Tahun 2018, pp. 96.

³ Kompilasi Hukum Islam, *Masyarakat Perkawinan Campuran Indonesia (PerCa Indonesia)*. pp. 1-2

⁴ Law No 1 Year 1974

⁵ An-Nisa': 3

the other hand, a man who thinks only of his own needs without looking at the good and bad of his family, is only busy fulfilling his sexual needs and thinks that women are only a means and a tool to fulfil men's desires, Islam does not allow this kind of person to be polygamous.

This is in line with what is regulated in Law No. 1 of 1974 concerning marriage in article 3 paragraph (1), namely in principle in a marriage a man can only have one wife, a woman can only have one husband, and it is also explained in paragraph (2) that the court only gives permission to have more than one wife if desired by the parties concerned, the party concerned referred to in the article is the wife. Therefore, a husband who wishes to have more than one wife is required to seek the consent of the first wife. Indeed, the marriage process in Indonesia has been regulated in Law Number 1 of 1974 concerning Marriage. This regulation is a source of material law as well as formal law, although until now the process in the Religious Courts has not fully relied on this Law. One example is the issue of itsbat marriage. Itsbat Marriage is a marriage validation application submitted to the court to declare a marriage valid so that it has legal force.⁶

Furthermore, an application for itsbat marriage is submitted to the Religious Court by the parties to a marriage who cannot prove their marriage with a Marriage Certificate issued by a Marriage Registrar. The application for itsbat marriage is then processed by the Religious Court in accordance with the provisions of procedural law. The Administrative and Technical Manual for Religious Courts published by the Supreme Court in 2008 states that "The Religious Court can only grant an application for itsbat marriage, as long as the marriage that has been held fulfils the conditions and pillars of marriage in Islamic law and the marriage does not violate the marriage restrictions stipulated in Article 8 to Article 10 of Law Number 1 of 1974 jo. Article 39 to Article 44 of the Compilation of Islamic Law."⁷

Article 2 Paragraph (1) explains that marriage is valid if it is carried out according to the laws of each religion and belief.⁸ The article can be concluded that a marriage is considered valid if it fulfils the provisions of religious law, namely in accordance with the provisions of Fiqh for Muslims. So based on the above provisions it can be said that marriage registration is not a condition for the validity of marriage, because marriage is considered valid if it has been carried out according to religion and belief. Regarding the validity of a marriage, it is further emphasised in Article 4 of the Compilation of Islamic Law

⁶ Muhammad Husni Abdulah Pakarti, Iffah Fathiah, *Itsbat Nikah Sebuah Upaya Mendapatkan Mengakuan Negara* (Studi Pengadilan Agama Garut)", *Tahkim*, Jurnal Peradaban dan Hukum Islam. Vol.5 No.2 (Oktober, 2022)

⁷ Ninik Rahayu, Politik Hukum Itsbat Nikah, *Jurnal Musâwa*, Vol. 12 No 2 Juli 2013, pp. 280.

⁸ Article 2 Compilation of Islamic Law

which states that a marriage is valid if it is conducted according to Islamic law in accordance with Article 2 paragraph (1) of Law No. 1 of 1974 concerning Marriage.⁹ Meanwhile, the Compilation of Islamic Law states that in the event that a marriage cannot be proven by a marriage certificate, itsbat marriage can be submitted to the Religious Court.¹⁰ Furthermore, this becomes a problem in itself regarding the legality of marriage registration through the stipulation of isbat marriage.

Based on the phenomenon in the field, it was found that the Itsbat marriage case was included in the Religious Court environment even though the siri marriage occurred after the existence of Law No. 1 of 1974. This case relates to an application for isbat marriage at the Cilacap Religious Court filed by a husband and his second wife. Their marriage was conducted siri without the knowledge of the first wife. This application was filed to obtain legalisation of their siri marriage so that it could be officially recorded, which has implications for the legality of children born from the marriage and other civil rights. It is proven that the Cilacap Religious Court Decision Number: 5065/Pdt.G/2019/PA.Clp contradicts the existing rules, of course this is a separate highlight because the Judge granted itsbat marriage related to sirri polygamy.

If you look at the duties of judges, they are supposed to receive, examine, try and resolve every civil case submitted, and are obliged to help justice seekers. Therefore, judges need to be active to realise this. Judges are active in examining and resolving civil cases at the pre-trial stage or trial preparation stage.¹¹

In the conservative paradigm of legal discovery, the law and the judiciary are only to prevent the decline of morals and values, while in the progressive paradigm of legal discovery, the law and the judiciary are tools to make social changes. Progressive legal discovery, departing from the concept of progressive law, that the law is for humans, which includes the values of truth and justice which are the point of legal discussion, so that ethical factors and morality cannot be separated from the discussion. Thus, progressive legal discovery explicitly links the factors of law, humanity, and morality, so that the legal discovery carried out by the judge in the framework of carrying out his judicial duties, which in the end the judge will impose his decision.¹²

From the explanation above, the compiler feels the need to examine progressive legal theory on isbat marriage polygami siri in the Cilacap Religious

⁹ Faizah Bafadhal, *Itsbat Nikah Dan Implikasinya Terhadap Status Perkawinan Menurut Peraturan Perundang-Undangan Indonesia*, *Jurnal Ilmu Hukum*, 2014, pp. 2.

¹⁰ Article 7 paragraph (2) of the Compilation of Islamic Law

¹¹ Sunarto, *Peran Aktif Hakim Dalam Perkara Perdata*, (Jakarta: Prenada Media Group., 2014), pp. 2.

¹² Ahmad Rifai, *Penemuan Hukum oleh Hakim dalam Persepektif Hukum Progresif*, (Jakarta: Sinar Grafika, 2014), pp. 47

Court which aims to find out how progressive legal theory in realising justice in society, especially in the case of itsbat marriage in the Cilacap religious court. Therefore, the compiler raises the formulation of the problem, namely as follows: What is the background of the Judge granting the application for itsbat marriage in Decision Number 5065/Pdt.G/2019/PA.Clp regarding the application for isbat marriage for polygamy carried out siri? How is the progressive legal analysis of Decision Number 5065/Pdt.G/2019/PA.Clp on the application for polygamous marriage isbat conducted siri?

Research Methods

This type of research is library research, namely research on written data containing information and data obtained from literature and decisions from the Cilacap Religious Court which are used as study materials.¹³ Then in writing the data using qualitative analysis for the following reasons. Furthermore, this research uses a normative juridical approach, namely legal research that aims to find out how the law runs in a particular community environment.¹⁴ The object of research in this article is the Decision of the Cilacap Religious Court. The primary data source is obtained from the original source that contains all information related to this research, with the following data: Court Decisions, Compilation of Islamic Law, Supreme Court Circular Letter, Fiqh Book, Ushul Fiqh and Al-Qur'an. While secondary data is data obtained from other parties, not directly obtained by researchers from the subjects they research. This data is needed to support the results of research which includes literature which includes supporting books and other scientific works.

Definition of Itsbat Marriage

Itsbat marriage comes from two Arabic syllables, namely Itsbat and marriage. The word Itsbat is a masdar isim derived from the Arabic atsbata-yutsbitu-itsbatan which means determination or determination. This term was later absorbed into the term word in Indonesian. In the large Indonesian dictionary, the word Itsbat is defined as determining, namely in the form of determining the truth (validity) or determining the truth of something. Ahmad Warson Munawwir in the Arabic-Indonesian dictionary defines the term Itsbat as determination, closure and approval.¹⁵

Itsbat marriage according to the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number KMA/032 / SK / 2006

¹³ Sutrisno Hadi, *Metodologi Reseat*, (Yogyakarta: Andi Offset, 1990), pp. 9.

¹⁴ Muhammad Syahrur, *Pengantar Metodologi Penelitian Hukum Kajian Penelitian Normatif, Empiris, Penulisan Proposal, Laporan Skripsi Dan Tesis*. (Riau: DOTPLUS Publisher, 2022), pp. 8

¹⁵ Abd Basit Misbachul Fitri and Abdul Wahid Azza, "Nikah Bawah Tangan Dan Itsbat Nikah," *Salimiya: Jurnal Studi Ilmu Keagamaan Islam* 3, no. 3 (2022): 131-43.

concerning Guidelines for the Implementation of Duties and Court Administration is the validation of a marriage that has been held according to Islamic law, but not recorded by the KUA or the authorised PPN. Itsbat marriage also means a method or way of determining the validity of a marriage that has not been recorded at the local KUA, in accordance with the applicable legal provisions related to marital matters carried out in court. The Technical Manual for the Administration of Religious Courts 2010 explains that Itsbat marriage is a statement about the validity of a marriage that was held based on religion and not recorded by the authorised PPN.¹⁶

The Marriage Law in Article 64 explains that for marriages and everything related to marriages that occurred before this Law came into force which were carried out according to old regulations are valid. In this case, this includes the issue of Itsbat marriage. Then in Law Number 50 of 2009, concerning the second amendment to Law Number 7 of 1989, it is stated in Article 49 paragraph 2) what is meant in Paragraph 1 letter a are matters regulated under the applicable laws regarding marriage. Meanwhile, the explanation of Article 49 Paragraph (2) states that in one of the areas of marriage regulated in the Marriage Law, one of which is a statement about the validity of a marriage that occurred before the Law, about a marriage that is carried out according to other regulations.¹⁷

Legal Basis for Itsbat Marriage

To give legitimacy to marriage siri or unregistered marriages, an application for itsbat marriage is made to the religious court. Itsbat marriage, which is often referred to as marriage validation, is the authority of the religious court which is a voluntair case. A voluntair case is a petition case consisting only of the applicant. Therefore, voluntair cases are not referred to as cases because there are no opposing parties or no disputed legal objects.¹⁸

The institution of itsbat marriage / marriage validation contained in Law No. 1 of 1974 is only limited to the review of marriages that occurred before Law No. 1 of 1974, this can be seen in article 49 paragraph (2) of Law No. 50 of 2009 concerning Religious Courts, namely the field of marriage as referred to in paragraph 1 letter a, are matters regulated in or based on the applicable marriage law, while in the explanation of article 49 paragraph (2) it is said that one of the areas of marriage regulated in Law No. 1 of 1974 is "A statement regarding the validity of a marriage that occurred before Law No. 1 of 1974

¹⁶ Mahkamah Agung, "Pedoman Teknis Administrasi Dan Teknis Peradilan Agama, (Buku II)," Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2010. pp. 147.

¹⁷ *Ibid.*

¹⁸ Edi Gunawan and Budi Rahmat Hakim, "Pelaksanaan Itsbat Nikah Pasca Berlakunya Uu No. 1 Tahun 1974 Tentang Perkawinan Di Pengadilan Agama," *Syariah: Jurnal Hukum Dan Pemikiran* 18, no. 2 (2018): 258-83.

concerning Marriage is carried out according to other regulations". 1 Year 1974 is "A statement regarding the validity of a marriage that occurred before Law No. 1 Year 1974 on Marriage was executed according to other regulations."¹⁹

Article 7 paragraph (2) and paragraph (3) of the Compilation of Islamic Law states that:

paragraph (2). In the event that a marriage cannot be proven by a marriage certificate, itsbat marriage may be filed with a religious court. paragraph (3). The itsbat marriage that can be filed with the religious court is limited to matters relating to: a. The existence of a marriage in the context of the completion of a marriage; b. The disappearance of a marriage certificate; c. Doubts about the validity or otherwise of one of the conditions of marriage; d. The existence of a marriage that occurred before the enactment of Law No.1 of 1974. The existence of a marriage that occurred before the enactment of Law No. 1 of 1974. e. Marriages conducted by those who do not have a marriage impediment according to Law No. 1 of 1974.²⁰

In the practice of litigation in the Religious Courts, judges generally directly apply Article 7 Paragraphs (2) and (3) of the Compilation of Islamic Law (KHI) without testing the validity of KHI before the law. Thus, although the provisions of Article 7 Paragraph (3) letter a above are difficult to understand, the majority of Religious Court judges with a vague interpretation understand the provisions of Paragraph (3) letter a, as if it is a requirement to accept an application for itsbat marriage if it is filed with a divorce suit, even though the marriage was performed after the enactment of Law No. 1 Year 1974. Likewise, when judges understand the provisions of Article 7 Paragraph (3) letter e of the Compilation of Islamic Law. The position of the Compilation of Islamic Law when viewed from the hierarchy of legislation as stipulated in Article 7 of Law No. 10 of 2004 concerning the Order of Legislation, the Compilation of Islamic Law (Presidential Instruction No. 1 of 1991) is not included in the hierarchy of legislation, and its position is far below the law. The provisions of the Presidential Instruction must not conflict with the law. If the Presidential Instruction (KHI) contradicts the law or higher legal provisions, then the Presidential Instruction cannot be implemented. This is in accordance with the principle of "Lex Superior Dragot lex Inferior" (higher legal provisions override lower laws).²¹

For marriages conducted before the enactment of Law No. 1/1974 on Marriage, if an application for itsbat marriage is submitted to a religious court, the judge examining the application must carefully examine whether or not the

¹⁹ *Ibid.*

²⁰ Compilation of Islamic Law Article 7 paragraph (2) and paragraph (3)

²¹ E Al-Qadlaya, "Problematika Seputar Hukum Isbat Nikah Dalam Sistem Hukum Perkawinan Indonesia* Mardoni," *Jurnal Hukum Keluarga Islam P-ISSN 2809* (n.d.): 6681.

marriage requested to be itsbat-ised has fulfilled the terms and conditions of marriage as prescribed in Islamic law. If it is not proven during the examination that the marriage was conducted in accordance with the provisions of Islamic law, the judge is obliged to reject the application for itsbat marriage, even though it was filed in the context of divorce.²²

Purpose of Itsbat Marriage

Itsbat marriage aims to "legalise" marriage. If interpreted freely, itsbat means the determination of the truth of the existence of marriage. Indeed, the authority of itsbat marriage for the Religious Courts in its legal history is intended for those who performed marriages before the enactment of Law Number 1 Year 1974 concerning Marriage. The Marriage Law considers every marriage that occurred before the enactment of the Law to be valid, as confirmed in Article 64 of the Marriage Law which states that "For marriages and everything related to marriages that occurred before this Law came into force which were carried out according to old regulations, are valid. "This whitening policy seems to be applied considering that the Marriage Law since 1974 has established criteria for the validity of marriages, which in reality do not necessarily mean that marriages that occurred before 1974 follow these criteria. Following this logic, every marriage that was performed before 1974 but has not been registered gets "dispensation" from the state to obtain marriage registration through the itsbat marriage procedure in the Religious Court.²³

But then the authority of the Religious Court developed and expanded, that if a marriage cannot be proven by a marriage certificate that occurred before the enactment of Law No. 1 of 1974, then it can be submitted for itsbat marriage. KHI Article 7 reads in full as follows: (1) Marriage can only be proven by a marriage certificate made by a Marriage Registrar. (2) In the event that a marriage cannot be proven by a marriage certificate, itsbat marriage can be submitted to the Religious Court. (3) The itsbat marriage that can be filed with the Religious Court is limited to matters relating to: a. the existence of a marriage in the context of a divorce settlement; b. the loss of a marriage certificate; c. doubts about the validity or otherwise of one of the conditions of marriage; d. the existence of a marriage that occurred before the enactment of Law No. 1 of 1974; and e. marriages entered into by those who do not have a marriage impediment under Law No. 1 of 1974. (4) Those entitled to file an

²² Gunawan and Hakim, "Pelaksanaan Itsbat Nikah Pasca Berlakunya Uu No. 1 Tahun 1974 Tentang Perkawinan Di Pengadilan Agama."

²³ Ninik Rahayu, "Politik Hukum Itsbat Nikah," *Musāwa Jurnal Studi Gender Dan Islam* 12, no. 2 (2016): 279-94.

application for itsbat marriage are the husband or wife, their children, the marriage guardian, and parties with an interest in the marriage.²⁴

This means that the form of itsbat marriage in legal construction is very "limited and restricted". Various itsbat marriage that emerged after the enactment of the Marriage Law used the limited opportunities in the KHI provisions above, especially in Article 7 (3e), which is as long as the marriages carried out by them do not have marriage barriers according to Law Number 1 of 1974. Thus, the regulation in KHI recognises the validity of marriage, if the pillars and conditions of marriage according to religion as stated in Article 2 (1) of Law Number 1 Year 1974 concerning Marriage have been fulfilled. In other words, the itsbat marriage opportunity opened by KHI remains closed to marriages that do not fulfil the requirements under the Marriage Law.²⁵

Terms of Implementation of Itsbat Marriage

Provisions regarding itsbat marriage are only found in statutory regulations, but are not found in classical or contemporary fiqh books. Therefore, the requirements for itsbat marriage can only be seen in the law. Itsbat marriage (determination of marriage) is basically the determination of a marriage that has been carried out in accordance with the provisions contained in Islamic law. That this marriage has been carried out legally, namely in accordance with the terms and conditions of marriage but this marriage has not been registered with the authorised official, namely the Marriage Registration Officer (PPN). So to get a determination (validation of marriage), you must first submit an application for itsbat marriage to the Religious Court. In Article 7 of the Compilation of Islamic Law as clearly stated that itsbat marriage can be done because it does not yet have a marriage certificate due to several things. Among these are marriages in the context of divorce settlements, loss of marriage certificates, doubts about the validity or invalidity of one of the conditions of marriage, marriages that occurred before the enactment of Law No. 1 of 1974 and marriages conducted by those who do not have marriage barriers according to Law No.1 of 1974 concerning Marriage. Itsbat marriage is carried out through the process of submitting an application from the parties concerned. Article 7 paragraph (4) of the Compilation of Islamic Law explains that those entitled to submit an application for itsbat marriage are husband or wife, their children, marriage guardians and parties with an interest in the marriage. From this explanation, it can be understood that for a couple who have entered into a legal marriage according to religion, and have difficulty in

²⁴ Mahmud Huda, "Yurisprudensi Isbat Nikah Dalam Pasal 7 Kompilasi Hukum Islam," *Religi: Jurnal Studi Islam* 5, no. 1 (2014): 43-71.

²⁵ Ramdani Wahyu Sururie, "Polemik Di Seputar Hukum Isbat Nikah Dalam Sistem Hukum Perkawinan Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 11, no. 2 (2017): 233-46.

proving their marriage, they must submit an application to have their marriage re-established through itsbat marriage.²⁶

Definition and Characteristics of Progressive Law

Progressive is a word that comes from a foreign language (English) whose origin is progress which means forward. Progressive is an adjective, so something that is progressive. Progressive law means progressive law. The definition of progressive is literally, *favouring new, modern ideas, happening or developing steadily*²⁷ (favouring towards new, modern ideas, events or steady development), or desiring to advance, always (more) progressing and increasing.²⁸ The term progressive law here is a legal term introduced by Satjipto Rahardjo, which is based on the basic assumption that law is for humans. Satjipto Rahardjo was concerned about the low contribution of legal science in enlightening the Indonesian nation, in overcoming crises, including the crisis in the legal field itself. For this reason, he proposed a solution to the problem with the idea of progressive law. The definition of progressive law itself is to change quickly, make a fundamental reversal in legal theory and praxis, and make various breakthroughs. The liberation is based on the principle that the law is for humans and not the other way around and the law does not exist for itself, but for something broader, namely for human dignity, happiness, welfare, and human glory.²⁹

The definition as stated by Satjipto Rahardjo means that progressive law is a series of radical actions, by changing the legal system (including changing legal regulations if necessary) so that the law is more useful, especially in raising self-esteem and ensuring human happiness and welfare. In a simpler way, he said that progressive law is a law that liberates, both in the way of thinking and acting in law, so that it is able to let the law just flow to complete its duty to serve humans and humanity. So there is no engineering or partiality in enforcing the law. According to him, the law aims to create justice and prosperity for all people.³⁰ Specifically, progressive law can be referred to as pro-people law and justice law. The concept of progressive law is that the law does not exist for its own sake, but for a purpose that is beyond itself.

²⁶ Khairuddin Khairuddin and Julianda Julianda, "Pelaksanaan Itsbat Nikah Keliling Dan Dampaknya Terhadap Ketertiban Pencatatan Nikah (Studi Kasus Di Kabupaten Bireuen)," *SAMARAH: Jurnal Hukum Keluarga Dan Hukum Islam* 1, no. 2 (2017): 319-51.

²⁷ Oxford Dictionary, "Oxford Learner's Pocket Dictionary" (New York: Oxford University Press, 2008). pp. 342.

²⁸ Pius A Partanto and M Dahlan Al Barry, "Kamus Ilmiah Populer," Surabaya: Arkola 37 (1994): 23. pp. 628.

²⁹ Satjipto Rahardjo, *Membedah Hukum Progresif* (Penerbit Buku Kompas, 2006). pp. 154.

³⁰ Satjipto Rahardjo and Khudzaifah Dimyati, *Ilmu Hukum: Pencarian, Pembebasan Dan Pencerahan* (Muhammadiyah University Press, 2004). pp. 17.

Therefore, progressive law leaves the tradition of *analytical jurisprudence* or *rechtsdogmatiek*.³¹

Characteristics of Progressive Law

The characteristics of Progressive Law To get the maximum legal objectives according to Satjipto Rahardjo, it is built with the term Progressive Law, which is dependent on human ability to reason and understand and human conscience to make legal interpretations that prioritise the moral value of justice in society. In addition, other ideas are that the law must be pro-people, pro-justice, aims for welfare and happiness, is based on a good life, is responsive, supports the formation of a legal state with a conscience, is carried out with spiritual intelligence and is liberating.³² There are several keywords that are worthy of attention when we want to raise the notion of progressivism, namely

- a) The law follows the development of society's aspirations (the law depends on the situation and conditions of society's regulatory needs);
 - b) The law must be in favour of the interests of the people and in the interests of justice;
 - c) The law aims to lead humans to prosperity and happiness;
 - d) Law is always in the *process* of change (*law as a process, law in the making*);
 - e) The law emphasises a better life as the basis for good law;
 - f) The law is of the responsive type;
 - g) The law encourages a public role;
- Law builds the rule of law with a conscience.³³

Progressive Legal Paradigm

Talking about progressive law may still be too foreign to the ears of the public who are still laymen of law and may also include those who have studied law, most likely the term progressive law is still not too familiar and has not been widely studied because the problem of progressive law is a new thing in the treasury of legal science in Indonesia, including in law faculties there are no courses on progressive law. However, in 2002 Prof Dr Satjipto Rahardjo communicated the idea of Progressive Law to the public. The idea arose from concerns about the deterioration of the law and the widespread public dissatisfaction with the performance of the law and the courts. The idea

³¹ Ellemmia Lorenza Pradana, "Pendekatan Hukum Progresif Dalam Studi Islam," *Jurnal Lentera: Kajian Keagamaan, Keilmuan Dan Teknologi* 22, no. 1 (2023): 54-62.

³² H Deni Nuryadi and M H Sh, "Teori Hukum Progresif Dan Penerapannya Di Indonesia," *Jurnal Ilmiah Hukum DE'JURE: Kajian Ilmiah Hukum* 1, no. 2 (2016): 394-408.

³³ Slamet Prasetyo Sutrisno et al., "Upaya Hukum Luar Biasa Peninjauan Kembali Dalam Perspektif Hukum Progresif," *Jurnal Indonesia Sosial Sains* 2, no. 12 (2021): 2109-17.

received wide appreciation and the term progressive law is now widely used. In essence, the idea of Progressive Law wants to encourage the legal community to dare to make breakthroughs in running the law in Indonesia and not only be shackled by positivistic and legal analytical thinking. It is recommended not only for rule making, rule abiding, but rule breaking. The breakthrough does not mean anarchy, because there are still many ways, legal methods, legal theories and new paradigms that can be proposed to do the rule breaking.³⁴

The progressive legal paradigm campaigned by Satjipto Raharjo in principle stems from two basic components in law, namely rules and behaviour.³⁵ Progressive law departs from the basic assumption that law is for humans, not the other way round. Departing from this basic assumption, the presence of the law is not for itself, but for something broader and greater, which is why when problems occur in the law, it is the law that must be reviewed and corrected, not humans who are forced to be included in the legal scheme. The predicate of progressive law enforcement will be related to the ideology of the law enforcers themselves. How law enforcers view the law and the function of the law will affect the value and quality of legal products through the decisions they produce. Whether law enforcers view the law formally, or also see what is in *metayuridis*, or see the law in *holoyuridis* glasses, or see the law as inseparable from social relevance.³⁶

Progressive law also departs from the basic assumption that *law* is not an absolute and final institution, because *law* is always in the *process* of becoming (*law as a process, law in the making*). To illustrate that law is always in process, Satjipto Rahardjo describes it very interestingly as follows:

"Law is an institution that continuously builds and changes itself towards a better level of perfection. The quality of perfection here can be verified into factors of justice, welfare, concern for the people and others. This is the essence of 'law as a process, law in the making'. The law does not exist for the law itself, but for human beings."³⁷

Noting Satjipto Rahardjo's statement, it can be seen that to test (verify) the quality of the law, the benchmarks that can be used as guidelines include justice, and alignment with the people. Thus, when law enters the realm of law enforcement, for example, the entire process of working law enforcement instruments must be able to be returned to the question of whether it has

³⁴ "Paradigma Hukum Progresif - Pengadilan Negeri Palopo," accessed May 30, 2024, <https://www.pn-palopo.go.id/index.php/media-center/artikel/184-paradigma-hukum-progresif>.

³⁵ Satjipto Rahardjo, "Menuju Produk Hukum Progresif," *Discussion Paper at Undip Faculty of Law, Alumni, Semarang*, 2004.

³⁶ Dey Ravena, "Mencandra Hukum Progresif Dan Peran Penegakan Hukum Di Indonesia," *Syiar Hukum* 9, no. 3 (2007): 190-201.

³⁷ Satjipto Rahardjo, *Hukum Dalam Jagat Ketertiban (Bacaan Mahasiswa Program Doktor Ilmu Hukum Universitas Diponegoro)* (UKI press, 2006). pp. 87.

realised justice? Has it been oriented towards the interests of the people? The search for justice also symbolises the dynamics of life. Justice and truth are symbols of humanity. Thus, placing humanity as the beginning of law means placing humanity at the top of legal life. Humanity and justice become the goal of everything in our legal life. Therefore, the phrase "Law for Man" also means "Law for Justice", meaning that humanity and justice are above the law.³⁸

The Character of Progressive Legal Justice

The question of what exactly is progressive law and its position in the legal school of thought surfaced and developed in the Progressive Law Consortium which took place over two days in Semarang, 29-30 November 2013. The answer to the question gave birth to very varied views from legal scholars such as Suteki as Director of the Satjipto Rahardjo Institute said "It is not easy to answer progressive law per definition because it is a law that continues to develop. The late Satjipto called the quality of law as a *science* that is *always* undergoing formation (*legal science is always in the making*). Progressive law is a liberation movement because it is fluid and always restlessly searching from one truth to the next". Progressive law has indeed developed in such a way since Satjipto Rahardjo initiated it. The idea was first based on concerns about the low contribution of legal science in Indonesia to enlighten the nation out of the crisis, including the crisis in the field of law. For years, the Tjipians have been studying Satjipto Rahardjo's ideas and during that time questions have also arisen about how the characteristics, characters, basic elements, and various other questions about progressive law.³⁹

Answers to questions about the character of progressive law have been expressed by a number of legal experts in the consortium, including Professor of Law at Gadjah Mada University Yogyakarta who was also Deputy Minister of Law and Human Rights at that time, Denny Indrayana, elaborating progressive legal thoughts into 13 characters. However, what was conveyed included: "Progressive law is not only text, but also context. Progressive law positions certainty, justice and expediency in one line. Laws that are too rigid will tend to create injustice. Progressive law is not only obedient to bureaucratic procedural formalism but also material-substantive. But what is equally important is the character of progressive law that holds fast to conscience and rejects material servants". This view was sharpened by Professor of Parahyangan University Bandung, B. Arief Sidharta "The law must have a conscience". Then a lecturer at the University of Nusa Cendana Kupang, Bernard L. reminded that "Progressive law is law with the spirit of doing the best for society, nation and

³⁸ Dey Ravena, "Wacana Konsep Hukum Progresif Dalam Penegakan Hukum Di Indonesia," *Jurnal Wawasan Yuridika* 23, no. 2 (2010): 155-66.

³⁹ Marilang Marilang, "Menimbang Paradigma Keadilan Hukum Progresif," *Jurnal Konstitusi* 14, no. 2 (2017): 315-31.

state. Progressive law requires humans to be honest, dare to get out of the order is one way to search and liberate, because for Satjipto Rahardjo, progressive legal science is a type of science that is always restless to search and liberate", the same thing was also expressed by the former Chief Justice of the Constitutional Court, Moh. Mahfud MD admitted "Progressive law is difficult to make per definition. For a judge, progressive law is a law that rests on the conviction of the judge, where the judge is not shackled to the formulation of the law" especially if the law itself works only to damage the interests of mankind.⁴⁰

Progressive law is characterised by; "Firstly that the law is not in a stagnant position but rather it flows like *"panta rei"* (everything flows). Second, the character of progressive law is that "law is for humans". With this basic belief, progressive law positions the law not as the centre of human rotation, but rather it is humans who are at the centre of legal rotation. Third, progressive law refuses to maintain the status quo because of its anxiety to seek and continue to seek how and where justice is. Fourth, progressive law pays great attention to justice that lives in the soul of society or "justice that lives in the soul of the nation with the term *Volksgeist*" by *Carl von Savigny*.⁴¹

Sitting of the Case Decision Number 5065/Pdt.G/2019/PA.Clp) Concerning Itsbat Marriage

The subject matter of this decision is a case concerning an application for isbat marriage polygamy. The application for isbat marriage was filed by Applicant I (Husband), aged 42, Muslim, self-employed, residing in Cilacap Regency. And Petitioner II (Second Wife), 27 years old, Muslim, housekeeping, residing in Cilacap Regency. In this case the Plaintiffs are fighting the Respondent (First Wife), 38 years old, Muslim, housekeeper, residing in Cilacap District. Furthermore, this case was registered on 02 October 2019 at the Registrar of the Cilacap Religious Court with register number: 5065/Pdt.G/2019/PA.Clp.⁴²

The chronology is that the first applicant and the respondent were legally married on 24 January 2005. During the marriage Applicant I and Respondent had lived in harmony as husband and wife and had not been blessed with a child. After his marriage to the Respondent, Applicant I remarried to Applicant II on 23 June 2018 with the marriage guardian of Applicant II's biological father and two witnesses to the marriage, namely Witness I and Witness, which marriage was carried out siri/underhand at a place in Cilacap Regency, so that

⁴⁰ "Menggali Karakter Hukum Progresif," accessed May 30, 2024, <https://www.hukumonline.com/berita/a/menggali-karakter-hukum-progresif-lt529c62a965ce3/>.

⁴¹ Marilang, "Menimbang Paradigma Keadilan Hukum Progresif."

⁴² Decision of PA Cilacap Number: 5065/Pdt.G/2019/PA.Clp, pp, 1.

the marriage of the Applicants was never recorded at the Office of Religious Affairs of Central Cilacap District, Cilacap Regency. During the marriage Applicant I and Applicant II lived in harmony as husband and wife with one child who is now one year old.⁴³

Because the marriage between Applicant I and Applicant II was conducted siri, the Applicants never received a Marriage Certificate Excerpt from the Marriage Registrar of the Religious Affairs Office of Central Cilacap Sub-district. Based on this reason, the Applicants applied to the Cilacap Religious Court for isbat marriage to obtain a Marriage Certificate Excerpt and to apply for a child's birth certificate.

What is requested is as follows:

- a) Grant the Applicant's Request.
- b) Determining that the marriage between Applicant I and Applicant II which took place on 23 June 2018 is valid according to law.
- c) Establish 1 (one) child of Applicant I and Applicant II named; Child born in Cilacap, 09 May 2019, as a legitimate child born from a legal marriage between Applicant I and Applicant II.
- d) Order the Plaintiffs to report the Stipulation of Marriage/Istbat marriage which has permanent legal force, to the Office of Religious Affairs (KUA) of Central Cilacap District, Cilacap Regency, so that it is recorded/registered for that purpose.
- e) Determine court costs according to applicable legal provisions.⁴⁴

Trial Process

On the day of the hearing, the first applicant, second applicant and respondent appeared in person at the hearing. At the hearing the Panel of Judges attempted to reconcile the parties, but was unsuccessful. Then the Panel of Judges ordered the parties to carry out a mediation process with the mediator Drs. Noer Rahman who had been appointed by the Panel of Judges. Based on the mediator's report on 04 November 2019, it is known that the mediation did not reach an amicable agreement because the Plaintiffs remained in their petition. Therefore, the trial proceeded to examine the merits of the case.⁴⁵

Then at the next hearing, the Respondent gave a written answer on 27 November 2019, in which the Respondent confirmed the arguments and denied some of the arguments of the Petitioners' petition, and gave additional oral testimony, basically that the Respondent did not know about the marriage of the Petitioners because it was carried out secretly. The Respondent only found

⁴³ *Ibid.*

⁴⁴ Decision of PA Cilacap Number: 5065/Pdt.G/2019/PA.Clp, pp, 2.

⁴⁵ *Ibid.* pp 3.

out about it two weeks after the marriage of the Plaintiffs took place. After the marriage of the Petitioners, the relationship between the 1st Petitioner and the Respondent continued to run normally and the 1st Petitioner tried to be fair. Although the Respondent felt hurt and betrayed, she did not object to the marriage of Applicant I and Applicant II being legalised. In response, the Applicants stated that they had no objection, and the second Applicant stated that he was ready and respected the Respondent as the first wife of the first Applicant. After the process of answering the questions posed by the Panel of Judges, the Panel of Judges declared that it was sufficient and the trial proceeded to the next stage of evidence.⁴⁶

Evidentiary Process

To substantiate their arguments, the Applicant has submitted written evidence and witnesses as follows:

a) Proof of Mail

Photocopy of the identity card of the first applicant's name, 3301221608780003, issued by the DINDUKAPIL office of Cilacap district, photocopy of the identity card of the second applicant's name, 3301224809930002, issued by the DINDUKAPIL office of Cilacap district, photocopy of the identity card of the respondent's name, 3301226603820002, issued by the DINDUKAPIL office of Cilacap district, A photocopy of the Marriage Certificate of Applicant I and Respondent No. 84/84/I/2005, issued by the Marriage Registrar of the Religious Affairs Office of Central Cilacap District, Cilacap Regency on 24 January 2005, a photocopy of the Marriage Report made and signed by the biological father of Applicant II and two witnesses on 23 June 2018, and a photocopy of the Birth Certificate issued by a midwife named Siti Djoeharijah, AM. Keb, from the Independent Field Practice Office, Cilacap, dated 09 May 2019. All photocopies of the aforementioned letters have been examined, stamped, sealed, and matched with the originals.⁴⁷

b) Witness Evidence

In the process of evidence, the Plaintiffs had presented 2 (two) witnesses who had sworn and testified. The witnesses were friends of Applicant I and the biological father of Applicant II who testified that Applicant I and Applicant II had married religiously on 23 June 2018 with a dowry of Rp. 500,000,- and the witness as a friend of Applicant I knew that Applicant I had a wife 3 days

⁴⁶ *Ibid*

⁴⁷ Decision of PA Cilacap Number: 5065/Pdt.G/2019/PA.Clp, pp, 5.

before Applicant I and Applicant II were married. The Witnesses also testified that there was no relationship between the Applicant II and the Respondent, whether by blood or by consanguinity.⁴⁸

Basic Considerations of Judges in Case Decision No. 5065/Pdt.G/2019/PA.Clp)

In deciding the case of this polygamous marriage isbat application, the Panel of Judges granted the Petitioner's request to have his marriage legalised, with legal considerations including:

- a) That in this case Applicant I, who is still bound in a legal marriage with the Respondent, has made the Respondent a party to this polygamous marriage isbat case, in accordance with the provisions of Book II of the 2013 Revised Edition of the Guidelines for the Implementation of Court Duties and Administration.
- b) The Respondent, who was present at the hearing, provided written answers and additional oral testimony that she was not aware of the marriage between the first Applicant and second Applicant. Although the Respondent felt hurt and betrayed by the first Applicant, the Respondent did not object to the Panel of Judges declaring the polygamous marriage of the Plaintiffs valid.
- c) The letter evidence submitted by the Plaintiffs from P.1 to P.6 is in accordance with the original and can be considered as preliminary evidence in this case. And the witnesses presented by the Plaintiffs have provided testimony which formally and materially has the value of evidentiary force and can be accepted as valid evidence.
- d) Based on the *a contrario* interpretation of Article 7 paragraph (3) letter a that divorce that can damage a marriage can be filed for isbat marriage, then on the contrary, isbat marriage filed to perpetuate the marriage and protect the nasab of children's descendants is much more maslahat and should be accepted.
- e) At the time of the marriage the Plaintiffs did not have any impediments to marriage according to Law No. 1/1974 nor did they violate the provisions of shar'i law. However, the marriage of the Plaintiffs was conducted without obtaining a polygamy licence from the court. However, during the trial the Respondent as the previous wife did not object to the marriage of the Petitioners being legalised by the Panel of Judges.⁴⁹

⁴⁸ *Ibid.* pp. 7.

⁴⁹ Decision of PA Cilacap Number: 5065/Pdt.G/2019/PA.Clp, pp, 1-21

Judge's Decision in Case No. 5065/Pdt.G/2019/PA.Clp)

Based on several legal considerations that have been described, the Panel of Judges of the Cilacap Religious Court decided this petition as follows;

- a) Grant the petition of the Plaintiffs.
- b) Establish the validity of the marriage between Applicant I (Applicant I bin Mawiredja) and Applicant II (Applicant II) which took place on Wednesday 23 June 2018 in Tritih Wetan Village, Jeruklegi District, Cilacap Regency;
- c) Determine that the child named Anak binti Petitioner I born in Cilacap on 09 May 2019 is the legitimate child of Petitioner I (Petitioner I) and Petitioner II (Petitioner II);
- d) Order the Plaintiffs to report the Stipulation of Marriage Validation which has permanent legal force to the Office of Religious Affairs of Central Cilacap District, Cilacap Regency so that it is recorded in the list provided for it;
- e) Order the Plaintiffs to submit a copy of the Decision to the Office of the Population and Civil Registry of Cilacap Regency to be recorded in the register provided for that purpose in order to issue a Birth Certificate for the child of the Plaintiffs, named Child binti of the 1st Plaintiff;
- f) Charged the Plaintiffs to pay court costs in the amount of Rp 666,000, - (six hundred sixty six thousand rupiah).⁵⁰

Legal Analysis of the Factors Behind the Judge Granting Itsbat Marriage Case Decision Number 5065/Pdt.G/2019/PA.Clp

Decisions in isbat marriage cases often involve a variety of considerations that go beyond the mere application of existing laws and regulations. Judges, in carrying out their duties, must pay attention to various factors that can affect substantive justice for the parties involved. This analysis will examine the factors behind the Judge in making a decision in the isbat marriage case in Decision Number 5065/Pdt.G/2019/PA.Clp, which goes beyond the formal legal rules.⁵¹ Namely as follows:

1. Social Factors

a) Best Interest of the Child

The judge considered the best interests of the child as an important factor in this decision. Children from siri marriages are often in a vulnerable position due to the lack of legality. By legalising siri marriages, judges ensure that children have legitimate rights,

⁵⁰ Decision of PA Cilacap Number: 5065/Pdt.G/2019/PA.Clp, pp, 1-21

⁵¹ *Ibid.*

including birth certificates and access to public services such as education and healthcare.

b) Family Harmony

The judge also considered the importance of maintaining harmony within the family. Legalising a siri marriage can help reduce internal conflict and provide clarity of legal status for all family members, including first and second wives.⁵²

2. Human Factors

a) Sense of Substantive Justice

Judges try to achieve substantive justice by taking into account the needs and concrete situations of the parties. In this case, although the second marriage was entered into without the knowledge of the first wife, substantive justice may have been achieved by giving legal recognition to the siri marriage and the child born from it.

b) Recognition and Protection of Women's Rights

Judges may consider protecting the rights of women, including first and second wives. By legalising a siri marriage, the judge is providing better legal recognition and protection to the second wife, who may have previously been in a vulnerable position.

3. Cultural Factors

a) Social and Religious Customs

In the cultural and religious context of Indonesia, siri marriages, although not officially recorded, are often recognised and accepted by the local community. Judges may take these social and religious customs into consideration in making their rulings, with the aim of providing a decision that is more relevant and acceptable to the local community.

b) Social Norms

The prevailing social norms in the community, including the community's views on polygamy and siri marriage, may influence the judge's judgement. Judges may endeavour to strike a balance between legal and social norms to reach a just and acceptable decision.⁵³

4. Practical Factors

a) Legal Certainty

One important factor is providing legal certainty for the parties involved. By legalising siri marriages, judges provide clarity of legal status that can help reduce uncertainty and potential conflict in the future.

⁵² *Ibid.*

⁵³ *Ibid.*

b) Administrative Efficiency

By issuing decisions that legalise siri marriages, judges also help to improve administrative efficiency, especially in terms of civil registration. This makes it easier for the parties to organise the necessary official documents, such as children's birth certificates.

5. Mediation and Reconciliation Factors

a) Mediation Process

Prior to the judgement, the judge had attempted mediation between the parties. Although the mediation was unsuccessful in reaching an amicable agreement, this process demonstrated the judge's intention to reach a fairer and more amicable settlement. Consideration of the outcome of this mediation may have influenced the judge's decision.

b) Reconciliation Efforts

The judge may consider reconciliation efforts between the parties, with the aim of reducing tension and conflict. By legalising a siri marriage, the judge seeks to create a more harmonious environment for all parties involved.⁵⁴

In making a decision in the isbat marriage case in Decision Number 5065/Pdt.G/2019/PA.Clp, the judge not only considers the applicable rules and laws, but also various social, humanitarian, cultural, practical factors, as well as mediation and reconciliation efforts. This consideration reflects a progressive legal approach that prioritises substantive and contextual justice, as well as the relevance of legal decisions to the social and cultural realities of society.⁵⁵ Thus, this decision is expected to provide greater benefits and more holistic justice for all parties involved.

Progressive Law Analysis on the Benefit Aspect of Itsbat Marriage Case in Decision Number 5065/Pdt.G/2019/PA.Clp

Progressive law focuses on usefulness and substantive justice, legal contextualisation, and the practical impact of a decision.⁵⁶ In isbat marriage cases, especially in Decision Number 5065/Pdt.G/2019/PA.Clp, it is important to analyse the usefulness of the decision, both in terms of law and its impact on society. The analysis of usefulness in the perspective of progressive law is as follows:

1. Child Benefit

Legality and Civil Rights of Children: This ruling gives legal status to children from siri marriages, enabling them to obtain official birth

⁵⁴ *Ibid.*

⁵⁵ Soehartono Soehartono, "Developing Judges' Thinking in Resolving Disputes," *Yustisia* 3, no. 1 (n.d.).

⁵⁶ Siti Malikhatun Badriyah, *Sistem Penemuan Hukum Dalam Masyarakat Prismatik* (Sinar Grafika, 2022). pp. 15.

certificates. This is very important as birth certificates are the basis for various civil rights, including education, health, and identity. Long-term Impact: With legal recognition, the child will have the same access as other children born from legally registered marriages. This ensures that the child does not experience discrimination or barriers in accessing his or her basic rights.

2. Benefit to the Second Wife

Legal Recognition and Protection: The legalisation of a siri marriage gives legal recognition to the second wife, which enhances her legal status and provides legal protection. This includes financial rights, inheritance, and social status recognised by the state. **Security and Stability:** With legalisation, the second wife can feel more secure and stable in her marriage, reducing the uncertainty and vulnerability often experienced by couples in siri marriages.

3. Benefit to the First Wife

Recognition of Rights and Position: Although the first wife feels betrayed, the legalisation does not diminish her rights as a first wife. Progressive laws ensure that the first wife's rights are still honoured and protected, including financial and emotional rights. **Balance and Justice:** With this ruling, there is an attempt to create balance in polygamous households, ensuring that substantial justice is applied by considering the rights and feelings of all parties involved.

4. Benefit to the Community

Indeed, this Judgment helps to reduce the conflict and legal uncertainty that often arises from siri marriages. With legal validation, the marriage becomes more transparent and officially recognised, which in turn reduces the potential for future disputes. The judgement may also raise public awareness about the importance of officially recording marriages. This encourages other couples to follow the correct legal procedures, ultimately strengthening the legal and administrative system in society.

5. Beneficence in the Legal System

This decision can set a precedent for similar cases in the future, providing guidance for judges and courts in handling isbat marriage cases. This helps to create consistency and fairness in the application of the law. The judgement could also encourage policymakers to evaluate and improve regulations relating to siri marriage and isbat marriage, to provide better protection for all parties involved.

In the progressive legal analysis of the benefits of Decision Number 5065/Pdt.G/2019/PA.Clp, it is clear that this decision provides various significant benefits for children, second wife, first wife, society, and the legal system as a whole. The progressive legal approach emphasises the importance of achieving substantive justice, which is relevant to the social and cultural

context of society. By providing legal recognition and protection to all parties involved, this decision helps to create a more holistic and humane justice. The benefits resulting from this decision not only provide concrete solutions for the parties involved, but also contribute to the strengthening of the legal system and increasing public awareness of the importance of official marriage registration.

Analysis of Justice in the Perspective of Progressive Law in Decision Number 5065/Pdt.G/2019/PA.Clp) on Socio-Cultural Aspects

Progressive law is a legal approach that focuses on substantive and contextual justice, not just textual formal justice.⁵⁷ This approach considers the social, cultural, and real needs of society in achieving more holistic and humane justice. This approach promotes contextualisation and relevance of law to social and cultural realities, and prioritises human welfare and benefit over rigid legal certainty.⁵⁸ The following is an overview of the Analysis of Justice in a Progressive Law Perspective, which is as follows:

1. Aspects of Justice for Children

One of the main purposes of this isbat marriage application is to obtain a birth certificate for a child from a siri marriage. In a progressive legal perspective, the best interests of the child should be the top priority. Children should not be disadvantaged by the legal situation of their parents. A decision that legalises a siri marriage gives legality to the child, ensures his or her civil rights are recognised, and protects the child's best interests. This is in line with the principle of substantive justice which places the interests of the child above any formal rules that may impede.

2. Aspects of Justice for the First Wife

The first wife in this case felt betrayed because the second marriage was entered into without her knowledge. However, after knowing and reflecting on the situation, she did not object to the legalisation of the husband's marriage to the second wife. Progressive law considers it important to take into account the feelings and rights of the first wife. The legalisation of the second marriage must be balanced with the recognition of the first wife's role and feelings, and ensuring that her rights are protected. This includes financial, emotional and social rights that may be affected by the second marriage.

⁵⁷ Soehartono, "Mengembangkan Pemikiran Hakim Dalam Menyelesaikan Sengketa."

⁵⁸ Romli Atmasasmita, "Teori Hukum Integratif: Rekonstruksi Terhadap Teori Hukum Pembangunan Dan Teori Hukum Progresif," 2012.

3. Aspects of Legal Protection for Second Wives

Second wives, who are involved in siri marriages, are often in a vulnerable position without adequate legal protection. By legalising these marriages, the second wife gains a legitimate legal status, which provides legal protection equivalent to that of an officially recorded marriage. Progressive law emphasises the need to protect all individuals who may be in vulnerable situations, and provide justice that ensures that their basic rights are respected and protected.

4. Mediation and Peaceful Resolution

The Panel of Judges in this case had sought mediation as the first step to reaching an amicable agreement. Mediation is an approach that is very much in line with progressive legal principles, as it allows all parties to voice their interests and concerns in a more conducive and non-confrontational atmosphere. Although the mediation did not reach a full agreement, it demonstrated a commitment to resolving the conflict peacefully and fairly. This reflects progressive legal values that emphasise dialogue, understanding and humane resolution.

Conclusion

From the description and analysis in the previous chapters of the itsbat marriage case in a sirri marriage in Decision Number 5065/Pdt.G/2019/PA.Clp from the perspective of progressive law, the author can draw the following conclusions:

1. In making a decision in the isbat marriage case in Decision Number 5065/Pdt.G/2019/PA.Clp, the judge not only considers the applicable rules and laws, but also various factors, namely as follows: 1) Social factors: Best interests of the child, Family Harmony, 2) Humanitarian factors: sense of substantive justice, recognition and protection of women's rights, 3) Cultural factors: social and religious customs, social norms 4) Practical factors: legal certainty, administrative efficiency, 5) Mediation and reconciliation factors. These considerations reflect a progressive legal approach that prioritises substantive and contextual justice, as well as the relevance of legal decisions to the social and cultural realities of society. Thus, this decision is expected to provide greater benefits and more holistic justice for all parties involved.
2. The decision in Itsbat marriage case number 5065/Pdt.G/2019/PA.Clp reflects the application of progressive law that prioritises substantive justice and usefulness in a social and cultural context. This decision provides tangible benefits to the children, the second wife, and the wider community, while maintaining balance and justice for the first wife, as well as recognition and protection of Women's Rights. This approach demonstrates that law is not only about formal legal certainty,

but also about achieving relevant and humane justice, which is in accordance with the social and cultural dynamics of society. As such, this judgement not only provides a concrete legal solution, but also contributes to the strengthening of the legal system and public awareness of the importance of official marriage registration.

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