Legal Construction in Marriage Isbat Matters

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Abstract : *"Marriage Isbat*" is the determination of a marriage. The essence of the marriage certificate is the determination that a marriage has occurred and not the legalization of a marriage. The meaning of ratification and determination have different legal consequences. Interpreting *Marriage Isbat* by stipulation shows that the process of itsbat nikah is solely carried out for an administrative function. The theory of the rule of law and the theory of justice are the basis for analysis of the application of law as a legal construction in considering cases of consanguinity marriages, so a wise and appropriate juridical analysis and application of law is needed.

Keywords: *Determination of marriage, Theory of rule of law, Theory of justice*

1. INTRODUCTION

The institution of marriage is a sacred thing, because it is the first determinant of the formation of quality human beings from both science and faith. The marriage institution is also the forerunner to the creation of society as citizens who obey the rules or legislation for the benefit of the need for civil rights over it. The sanctity of marriage can be seen in the wedding procession, the order of which is to comply with the rules of each religion, comply with state regulations, there are even some people who associate it with fulfilling local customs, even though customs are not a principle matter in legitimizing a marriage, they also do not violate if a marriage follows the customs where the implementation is located. Another indicator of the sanctity of a marriage is that it aims to form a happy and prosperous family, this is the ideal for every married person.

The institution of marriage is protected by state regulations, in this case Law Number: 1 of 1974 as amended by Law Number: 16 of 2019 concerning Marriage. The formal and material requirements for both the subject and the object of marriage have been regulated by this law. However, because this law does not have an impact on the existence of a criminal element, so that not all people comply with it, there are people who carry out marriages that do not comply with the conditions set by the law, for example, marriages are not registered for certain reasons, even reasons that disclosed by perpetrators of unregistered marriages is an excuse that cannot be used as justification. It is very difficult for the competent party, in this case the marriage registrar, to record how many marriages have been carried out without being recorded.

Marriages without being recorded are often known as unregistered marriages and or private marriages. The mindset for the perpetrators of this marriage, both those who carry out the marriage and third parties who take part in the marriage, argue that it is legal according to religion, while if you need a marriage book, it is enough to apply for a certificate of marriage at the religious court office where you live. The pretext as a reason to carry out unregistered and or underhanded marriages is not an argument as justification for carrying out marriages, in fact, it tends to be that such marriages are problematic marriages.

Since Law Number: 24 of 2013 as amended by Law Number: 23 of 2006 concerning Population Administration, all Indonesian national colors must have a resident identity, and to obtain a resident identity, especially children who need a birth certificate of their parents must have a marriage certificate for people who do not have a marriage certificate, cannot arrange a child's birth certificate, even if a child's birth certificate is issued, then the child is written on the deed as the mother's child, which means the child is a child outside of marriage.

On the basis of this problem, a joint agreement was made between the Supreme Court and the Minister of Home Affairs and the Ministry of Religion, resulting in the issuance of Supreme Court Regulation Number: 1 of 2015 concerning Integrated Services for Circuit Courts of District Courts and Religious Courts/Syar'iah Courts in the Context of Issuing Marriage Deeds , Marriage Book, and Birth Certificate. This Supreme Court regulation is an emergency way to save marriages that do not have a marriage book. However, the public does not yet know much about the intent and purpose of this Court regulation, so it does not have an educational impact, instead, sirri marriages and private marriages are increasingly common, with the hope that they will file a marriage certificate. In fact, the intent and purpose of these regulations are only temporary and one time can be declared invalid.

Supreme Court Regulation Number: 1 of 2015 is a solution to marriages that have already taken place and do not have a marriage book with the intention that the Indonesian people have a resident identity. Misunderstandings by the public who understand that marriage certificates apply in general have an impact on generations who will carry out marriages without being recorded in the hope of waiting for confirmation from the religious court. This understanding is not desired by the Supreme Court

rule, because socialization, especially from the ministry of religion as a provider of information to the public, has not been maximized.

During the implementation of the marriage certificate, it turns out that there is a difference that is expected according to normative rules and the actual facts in society. The difference is that the couple who is going to consecrate is still bound by another marriage that has not been divorced, even among the marriage constituencies that have a marriage certificate with the previous partner. This problem is a crucial problem, namely between the need for civil rights to obtain a resident identity and juridical attachment to a previous marriage.

There are two areas of law that need to be analyzed carefully and decided by a judge wisely, because people who face this consider that a long marriage has been divorced even if not with a divorce decision through the court, if the judge initiates a second marriage while the couple is bound by the previous marriage. Previously, it was the same as having legalized polygamy under the hands, which would be contrary if it happened to a woman, so it was as if the woman had two husbands. The classic reason that is often found in such couples is not knowing where the previous partner is so they do not divorce, each of them has been married sirri or under the hand of the other partner.

Facing a case like this really requires a juridical analysis and application of law that must be wise and precise and this is where legal construction is needed in cases of marriage confirmation. Based on the description of the background above, the problem that will be studied is "To what extent is the legal construction in the determination of judges regarding marriage certificates.

2. RESEARCH METHOD

Research is a systematic, directed and purposeful scientific activity. Therefore, the material or information collected must be relevant to the problem at hand. This means that the data is related, relevant and accurate (Marzuki,2005). A method is a way of working or working procedures to be able to understand the object that is the target of the science concerned. The method is a guide for how a scientist learns and understands the steps he faces (Soerjono Soekanto and Sri Mamudji, 2007). In accordance with the substance of the problems of this research, this research is legal research . According to Peter Mahmud Marzuki that legal research is a process to find legal rules, legal principles, and legal doctrines to answer the legal issues at hand. This type of research is normative legal research to gain an in-depth understanding of the legal construction in the determination of Marriage Isbat.

3. RESULTS AND DISCUSSION

A. Definition of Marriage.

Marriage is: aqad between a male and female candidate to fulfill the needs of their kind according to what is regulated by the shari'a. [1]Aqad is an agreement from the woman or her representative and qabul from the prospective husband or his representative, so as to allow two people of different sexes to live together and look after their offspring based on the orders of Allah SWT. This is a realization of human nature, which cannot live alone in the sense that it is dependent and needs each other. Husband and wife life has been regulated in Islam through the provisions of household procedures which are bound by marital ties.

The household is very important for humans, the importance is that it is the smallest legal association, and is also the center of the pulse of social life. He is a living structure that can perpetuate generations. In fact, the household is a social realm that has been scaled down. In it was born and grew what is called power, religion, education, law and corporations. The family is a people who are unanimous, orderly and perfect and then seething with subtle feelings and a living soul is considered a spring of humanity and a lake of global brotherhood that will never run dry.

The first and foremost teacher is mother then father. These two people are in a household environment. If mothers and fathers are not good at educating their children and carrying out household duties, then society will be chaotic, naughty children will arise, homeless children who refer to society.

Marriage regulations in Islam are the perfect and best law, this is caused by several factors, including:

1. Men and women have the same rights, have human rights, property rights over their respective objects;
2. Marriage is based on consensual consent, even though the father and datuk have the right of guardian mujbir, but the marriage of their daughters is obligatory on sekufu and on the basis of the willingness of women it is very much needed;
3. Household life is not carried out by coercion, the husband can perform divorce, the wife can ask for khuluk and pasakh from the qadhi (judge), with certain conditions;
4. In Islamic marriage law, it is regulated as small as possible, where the rights and obligations of the husband and wife are strictly determined;
5. The state or government intervenes in matters of marriage.[2]

Because marriage is the starting point for the formation of a family whose goal is to achieve prosperity and happiness in life towards eternity, marriage itself is the starting point that determines whether two prospective husband and wife will fall into the trap of the devil's mud or vice versa.

[1]H. Mahmud Yunus, *Marriage Law in Islam* (Cet. VII; Jakarta Hidakarya Agung, 1977) h. 1

[2]*Ibdi.* , h. 339

If the marriage is carried out through an incorrect channel, not in accordance with religious regulations, then what happens is that the husband and wife fall into error throughout their lives while the illegal marriage has not been justified. Because marriage is a transaction between a man and a woman through a consent qabul to live as husband and wife by fulfilling the terms and harmony.

Marriage is a way chosen by God as a way for humans to have children, develop well and maintain their lives, after each partner is ready to play a positive role in realizing the goal of marriage. Men and women naturally have an attraction between one another to be able to live together, or logically it can be said to form a physical and spiritual bond with the aim of creating a harmonious, happy, prosperous and eternal family. This is not a necessity, so that people have an opinion or focus on mere intercourse, even though intercourse is a factor that is also important as a support or incentive in order to realize the desire to live together, whether to get offspring or just to fulfill biological needs or mere desires. Because it can also happen, that living together between people of different sexes was carried out without intercourse, although this is an exception. For someone who lives together, the power to have intercourse is not a condition that cannot but must exist, because this does not always exist. in all groups of people, such as people who are elderly. In this connection, Wirjono argued that it is permissible to marry two people who are elderly, and even to say that a marriage is called in ex tremis, when one of the parties is almost dead.[3]

The problem of marriage is not just fulfilling biological needs and human will but more than that, namely a bond or physical and spiritual relationship between a man and a woman. Thus, marriage is a legal bond to build a happy prosperous household and family where both husband and wife bear the mandate and responsibility, the wife will therefore experience a heavy psychological process, namely pregnancy and childbirth which require sacrifice. However, a successful marriage cannot be expected from those who are still immature both physically and mentally, but requires maturity and responsibility as well as physical and mental maturity. For that a marriage must be entered into with a mature preparation.

A marriage that only relies on the power of love without being accompanied by proper preparation to continue the process of exploring life will experience many weaknesses, especially if love which is the basis of a marriage is only love that starts from simple thoughts and is colonized by emotional domination. So to enter a rational thought and be able to lay more solid foundations of a marriage, while marriage itself is an initial process of the embodiment of forms of human life.

Law number 1 of 1974 as amended by Law Number ; Article 1 of 16 of 2019 concerning marriage states that marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the belief in God Almighty.

In the elucidation of the article it states that as a country based on Pancasila, where the first precept is belief in the One and Only God, marriage has a very close relationship with religion/spirituality, so that marriage does not only have a physical/physical element, but also an inner/spiritual element. has an important role, forming a happy family with close relationships with offspring, which is also the goal of marriage, maintenance and education are the rights and obligations of parents.[4]

The definition of marriage in this article has the first elements of marriage, namely the physical and spiritual bond between a man and a woman as husband and wife, the two physical and spiritual bonds are intended to form a happy, eternally prosperous family (household), and the third is the birth bond. mind and the goal of eternal happiness is based on the belief in the One and Only God. [5]Law number: 1 of 1974 concerning Marriage became effective on October 1, 1975 and previously in Indonesia various marriage laws were applied for groups of citizens and various regions.

Regarding the definition of marriage, there are many different opinions. But this difference is actually not to show a real conflict between one opinion and another, this difference is only found in the desire of the formulators to include as many elements as possible in formulating the notion of marriage on the one hand and limiting the number of elements in the formulation. definition of marriage on the other hand. They limit the number of elements included in the formulation of the notion of marriage, and will explain other elements in the purpose of marriage. Although there are differences of opinion regarding the formulation of the meaning of marriage, from all the formulations put forward there is one element that is the commonality of all opinions, namely that marriage is an agreement between a man and a woman. The agreement here is not just any agreement such as a sale and purchase or lease agreement, but a sacred agreement to form a family between a man and a woman. Sanctity here is seen from the religious side of a marriage.

B. Definition of Marriage Isbat.

The isbat of marriage comes from the Arabic language which means stipulation, affirmation, determination, isbat means to confirm, determine (truth of something)[6]. According to fiqh, marriage means intercourse or mixing. [7]Based on this understanding, itsbat nikah is the determination of the marriage of a man and a woman as husband and wife which has been carried out in accordance with the provisions of the Islamic religion, namely that the conditions and pillars of marriage have been fulfilled. But marriages that occurred in the past have not been or were not registered with the authorized official, in this case the KUA (Office of Religious Affairs) official, namely the Marriage Registrar (PPN).

Itsbat (determination) is one of the authorities of the Religious Courts, whose products are voluntary, namely cases filed without any opposing party, so that the court's decision is bound to the case filer, so that it does not affect third parties, even though on the basis of the court's decision the claimant can use it to fulfill their civil rights. Initially, itsbat marriage was a solution

[3]Wirjono Prodjodikoro, *Marriage Law in Indonesia* (Bandung, Sumur, 1984) h. 7
[4] *Ibid.*, h. 84
[5]Joko Prakoso and I Ketut Murtika , *Principles of Marriage Law in Indonesia* (Cet. I; Jakarta, Bina Aksara, 1987) p.3
[6]Dictionary Compilation Team. *Big Indonesian Dictionary* (Jakarta: Balai Pustaka, 3rd Cet., 1990), 339
[7]Djamaan Nur., *Fiqh Munakahat* (Semarang: CV. Toha Putra, 1993), 1

to the enactment of the Marriage Law Number 1 of 1974 article 2 paragraph (2) which required the registration of marriages, because before that, many marriages were not registered, but their marriage certificates could be requested from the Religious Courts. The authority regarding itsbat marriage cases for the Religious Courts is reserved for those who carried out private marriages before the enactment of law number 1 of 1974.

The conditions for itsbat nikah are not explained in detail in the law, as is the case in classical and contemporary fiqh books. However, the terms of itsbat marriage can be analogous to the conditions of marriage. This is because itsbat nikah (marriage determination) 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 pillars of marriage, but this marriage has not been registered with the authorized official, namely the Marriage Registration Officer (PPN). So to get a determination (certification of marriage) must first submit a case for itsbat marriage application to the Religious Court.

C. Construction of Marriage Isbat Law.

In normative cases of marriage constituencies have no opponents, so the court's product is in the form of determining which matters are binding on the applicant in filing a case. In practice, the filing of a marriage confirmation case is filed by the husband as applicant I and the wife as applicant II, who are submitted through religious court officials who are regional according to their place of residence through one-stop integrated services (PTSP) in each court. After being registered, the case is heard by a panel of judges.

There is a difference between Law Number 1 of 1974 as amended by Law Number: 16 of 2019 concerning Marriage and the Supreme Court Regulation of the Republic of Indonesia Number. 1 of 2015 concerning Integrated Services for District Court Circuit Courts and Religious Courts/Syar'iah Courts in the Context of Issuing Marriage Certificates, Marriage Books, and Birth Certificates. The difference as referred to in article 64 of the Marriage Law states that; "For marriages and everything related to marriages that took place before this law came into force, which were carried out according to the old laws and regulations, are legal". This means that marriages that have not been registered before 1974 can then be submitted for marriage certificates to the religious court in the jurisdiction where they live. The purpose of this article is expressly stated in article 7 paragraph (3) of the Compilation of Islamic Law, that "marriage certificates that can be submitted to a religious court are limited to matters relating to:
(a). There is a marriage in the framework of divorce settlement;
(b). Loss of marriage book;
(c). There is doubt about whether or not one of the conditions of marriage is valid.
(d). The existence of marriages that occurred before the enactment of Law No. 1 of 1974 and;
(e). Marriages carried out by those who do not have marital obstacles according to Law Number. 1 of 1974
RI Supreme Court Regulation Number. 1 of 2015 seems to give the impression that it is too easy/easy to make a marriage certificate, one of the conveniences can be seen in article 11 number (5) which states that: "Examination of the application as referred to in paragraph (1) and paragraph (2) can be carried out by a single judge ". The convenience in the Supreme Court regulation can be understood as an emergency solution in connection with the existence of Law Number. 24 of 2013 as amended by Law Number: 23 of 2006 concerning Population Administration. Thus it cannot be applied to all cases of marriage confirmation.

The researcher divides into 2 (two) forms of marriage confirmation, namely marriage confirmation through an integrated process based on the Supreme Court rules and normative marriage registration which is submitted individually through the religious court. The prominent difference in the marriage certificate is that the integrated marriage certificate is heard by a single judge while the normative marriage certificate is heard by a panel of judges. marriage, the court's stipulation functions as a marriage book. Thus, the integrated marriage isbat line is a specification that cannot be generalized to other marriage reconciliation cases.

In the case of isbat marriage, even though normatively an unregistered marriage can submit an application for isbat marriage through the religious court, this is even though the purpose of the law and the rules of the Supreme Court as mentioned above are good, but in practice there are legal problems, namely legal subjects. those who apply for a marriage certificate are still bound by another marriage, the man and the woman have a wife or husband from a previous marriage and have not divorced even though they have been separated for quite a long time, they do not even know the condition of the husband or wife beforehand so having difficulty filing for divorce from a previous partner. The legal problem is that each husband or wife should first divorce and then register their second marriage based on the divorce certificate of the previous marriage. However, they did not do this for a variety of reasons, including not knowing the whereabouts of their previous husband or wife, another reason being that their partner had also married another. Legal problems like this if the judge considers and does not want to know about the previous marriage so he decides to determine the isbat for the second marriage without considering the status of the first marriage, then there will be a stipulation that is contrary to the actual situation.

In connection with these legal problems, judges are deemed to know the law (*ius curia novit or curia novit jus*) as emphasized in Article 56 paragraph (1) of Law Number 7 of 1989 concerning Religious Courts, stating that the Court may not refuse to examine and decide on a case which filed under the pretext that the law is unclear or unclear, but is obliged to examine and decide. This is also emphasized in Article 10 paragraph (1) of Law Number 48 of 2009 concerning Judicial Powers which states that the Court is prohibited from refusing to examine, hear and decide on a case filed on the pretext that the law does not exist or is unclear, but is obliged to examine and put him on trial. The legal vacuum appears in these legal problems, so this factor is the obligation of judges to apply formal and material laws to achieve justice.

Based on the legal reasoning for the case of consanguinity marriage, it is necessary for the judge to make a legal construction in the case, by taking into account the theory of the rule of law and the theory of justice as an analytical knife in the hope that it will be able to provide true justice for justice seekers.

The term rule of law can be traced from the most ancient tradition of systematic thinking, namely the tradition of Greek thought, especially the tradition of statehood. In the history of Greek thought, the idea of a rule of law was not at all known as a complex idea as it is today. The idea of a rule of law, which was still simple at that time, was a response to the arbitrary actions of the kings against the Greek people. Plato, for example, criticized the king's arbitrariness towards his people for bringing Athens to decadence. As part of his critical project, Plato describes a state in the form of a republic led by rulers who rule based on good and commendable morals and have the art of governing based on law. [8]In contrast to Aristotle who thought that the existence of the state was solely aimed at regulating rulers and people so that they lived in harmony. Aristotle advocated a state order in the form of *politea* , namely a government based on the constitution as the best form of government.[9]

With the development of European society from a guild society pattern to a semi-feudal society, the idea of a rule of law also developed in both the Anglo Saxon and Continental European thought traditions. It was John Locke who lived in 17th century England who later developed the idea of a rule of law more advanced than his predecessors. For Locke, *the raison d'etre* of the state is to protect and guarantee the private property rights of its people. Because humans are willing to give up some of their freedom to submit to the state in order to create an order , the state is obliged to protect what belongs to its people by law. In the early century of enlightenment (*aufklarung*), the life of the state was partly written in a constitutional document called *chartula, charta* or *chartre* although it was still in a simple form. In this document it is recognized that the state guarantees the private property rights of its people and also recognizes the coercive nature of state power itself, for example in terms of collecting taxes, forming soldiers, producing money and so on.

Many experts say that John Locke succeeded in spawning a substantial constitutional thought because of his theoretical contributions. Locke's ideas are quite influential, for example in the principles of separate government power and the rule of law. These principles guarantee that the state may only act within the limits set by its own people. [10]Nevertheless, the development of Locke's thought cannot be separated from the needs of the surrounding community, some of whom are at the local level and have just started the small-scale industrialization stage. Under these simple conditions, the need for law for European governance at that time had not yet become the main focus of thinkers at that time.

The momentum of the French revolution in the 18th century has enabled a new state of mind way of thinking that the monarchy system has proven to be incapable of satisfying the life of the nation and therefore must be overthrown. The idea of a rule of law state began to change, from initially still supporting a monarchical government (which was partly constitutional) to turning towards supporting a democratic government. Among them are Julius Stahl and Montesqieu who support the idea of a democratic legal state. They view that the monarchy system has allowed the king to have absolute power that is almost unlimited so that it is vulnerable to taking away the freedom of citizens. Therefore, this system must be replaced by a democratic system that will provide protection for individual freedom and guarantee individuals from the arbitrary actions of the authorities.

The idea of a rule of law model of the French revolution spawned four important ideas, namely: (1) protection of human rights; (2) separation *of powers* ; (3) every government action must be based on law or formal legality; (4) the existence of an independent administrative court. [11]The idea of the state is motivated by the spirit of liberalism so that in its development, the idea of a rule of law is solely aimed at protecting the property rights and economic freedom of citizens who may be contrary to the elements of justice and social welfare.

Bernhard Limbong stated that there are two definitions of a rule of law state, which include:
"A rule of law in the formal (narrow, classic) sense and a rule of law in the material sense. A rule of law in the formal (narrow/classical) sense is a state whose only job is to protect so that there are no violations of public order and interests, as stipulated in written law (laws), that is, it is only tasked with protecting lives, property or rights. the basic rights of its citizens passively, not interfering in the economic sector or organizing people's welfare because what applies in the economic field is the principle of laissez faiesizeller. A rule of law in a material (broad or modern) sense is a state known as the welfare state, which is tasked with maintaining security in the broadest sense, namely social security and organizing general welfare, based on the principles of true and just law. so that the human rights of its citizens are really protected.[12]

Taking into account the definition above, a rule of law country can be distinguished from a rule of law state in the formal sense and a rule of law state in a material sense. The task of the rule of law in the formal sense is to protect the lives, property, human rights of its citizens, not to interfere in the economy, to organize people's welfare and to apply the principle of laissez faire laieizealler (liberal-style economy).[13]

The duty of a rule of law is to maintain security which includes social security, administering public welfare and based on true and just legal principles so that the human rights of its citizens are truly protected. [14]Indonesia is a state based on law (*rechtstaat*) and not based on mere power (*machtstaat*). The concept of a rule of law has now become a model for countries in the world, it can even be said that it is almost embraced by most countries in the world. The rule of law concept has been adopted

[8]Plato, *The Republic* , London: Penguin Press, 2007

[9]Hotma P. Sibuea, *Principles of the rule of law, Policy Regulations and General Principles of Good Governance* , Jakarta: Erlangga, 2010, p. 18

[10]Reza AA Wattimena, *Beyond the Classical State of Law Locke Rosseau Habermas* , Jakarta: Kanisius, 2011, p. 20

[11]Hotma P. Sibuea, *op. cit* , p. 29

[12]Bernhard Limbong, *Land Acquisition for the Development of Law Enforcement Compensation Regulations* , quoted by H. Salim HS in his book entitled: *Application of Legal Theory in Dissertation and Thesis Research* , 2019 PT. RajaGrafindo Persada. matter. 3

[13]Dody Nur Andriyan, *Laisser Faire* . Reonasi Magazine, March 24, 2009

[14]H. Salim HS, Application of Legal Theory in Dissertation and Thesis Research, 2019 PT. RajaGrafindo Persada. matter. 3

by all countries as a concept that is considered the most ideal. The essence of a rule of law state is principally related to the idea of the supremacy of law which is juxtaposed with the idea of people's sovereignty. The rule of law limits power over state administrators, in this case the government, the law can provide access to all Indonesian people as a whole, so that legal certainty, justice and expediency become a guideline for the government in carrying out its functions and duties.

The litigation process for a case ultimately wants to get a fair decision. The verdicts are: "For the sake of justice based on belief in the One and Only God", and specifically for the absolute authority of the religious courts, the decisions are added with the sentence "bismillahirahmanirrahim". In fact, these ira-ira already contain elements of justice.

This is in line with the theory of justice presented by Aristotle that law can only be determined in relation to justice. [15]Aristotle in the development of his theory stated that ontologically the theory of justice is a firm and continuous will to give whoever is due, the legal obligation is to live honorably, not to injure others, and to give to whoever is due. [16]What is very important from his view is the opinion that justice must be understood in terms of equality. This is a manifestation of Plato's opinion regarding the theory of justice, namely that justice is "giving each man his due". [17]But Aristotle made an important distinction between numerical equality and proportional equality. The numerical similarity of each human being as a unit. This is what is now understood as equality, namely when saying that all citizens are equal before the law. Proportional equality gives each person what is his right in accordance with his abilities, achievements and so on.

From this distinction, Aristotle presents many controversies and debates about justice. Aristotle distinguishes distributive justice, namely justice that applies to public law and corrective justice, namely justice that applies to civil and criminal law. Distributive and corrective justice are equally vulnerable to the problem of equality and can only be understood within their framework. In the area of distributive justice the important thing is that equal rewards are given for equal achievements. In the second, what matters is that inequalities caused by, for example, breaches of agreements, are corrected and eliminated.

Distributive justice according to Aristotle focuses on distribution, honor, wealth and other goods that can be obtained equally in society. What Aristotle had in mind was the distribution of wealth and other valuables based on the prevailing values among citizens. Distribution in accordance with the value of goodness, namely the value of society.

On the other hand, corrective justice focuses on correcting something that is wrong. If a violation is violated or a mistake is made, then corrective justice seeks to provide sufficient for the aggrieved party, if a crime has been committed, then the appropriate punishment must be given to the perpetrator. Injustice will result in disruption of equality that has been established or has been formed. Corrective justice is tasked with rebuilding that equality. The description shows that corrective justice is the area of justice while distributive justice is the government's field.[18]

Aristotle stressed the need to make a distinction between verdicts that base justice on the nature of the case and those based on general and customary human nature, and verdicts based on certain views from certain legal communities. This difference is not the same and or cannot be mixed up with the positive law stipulated in the law and customary law. The last two differences can be a source of consideration that only refers to certain communities, while other similar decisions, even in the form of legislation, are still natural laws if obtained from the direction of general human nature.[19]

Aristotle's theory of justice was developed by Thomas Aquinas by placing the idea of justice within a contextual framework, namely justice is a virtue that is generally accepted and functions to achieve good for everyone. [20]The development by Thomas Aquinas can be understood that the justice inherent in the judicial process is formal justice as the end result of the judicial process. If contextually justice is goodness in placing rights on anyone, then a dispute over rights can be put in place if it is through a court decision. Rights that are in dispute will not be possible to place without going through a judicial process, unless there is an agreement on the rights dispute, together and the agreement is not against the rules.

The theory of justice according to John Rawls is the basic structure of society, all social, political, legal and economic institutions; because the arrangement of social institutions has a fundamental influence on the prospects of individual life. [21]The composition of social institutions is a structure in society which consists of rights and obligations for society. Such a structure is different from the formal structure of government, society develops according to the habits it experiences, so that the view of justice will be different, society will use measuring instruments according to their habits towards the concept of justice. It is those who least have the opportunity to achieve prospects for wealth, opinion and authority, it is they who must be given special protection. Rawls teaches a theory of the principles of justice as an alternative to the theory of utilitarianism as proposed by Hume Bentham and Mill. Rawls argues that in a society governed by the principles of utilitarianism, people will lose self-esteem, besides that service for the sake of common development will disappear. Rawls also argues that this theory is actually tougher than what is considered normal by society.[22]

According to Rawls, situations of inequality must be given rules in such a way as to benefit the weakest sections of society the most. This happens if two conditions are met, namely first, a situation of inequality guarantees a maximum minimum for the weakest group of people. This means that the social situation must be such that the highest possible profit is generated for

[15]LJ Van Apeldoorn, Inleiding Tot De Stude Van Nederlandse Recht, translated by Oetarid sadino with the title Introduction to Law, 1982 PT. Pradnya Paramita, p. 11

[16]Budiono Kusumohamidjojo, *op. cit.* , matter. 272

[17]The Liang Gie. *Theories of Justice* . 1979 Yogyakarta, super, p. 22

[18] *Ibid* ., p. 26

[19] *Ibid* ., p. 27

[20] *Ibid* ., p. 273

[21]Damanhuri Fatah, *The Theory of Justice According to John Rawls* , TAPIs Journal Vol.9 No.2 July-December 2013 p. 33

[22] *Ibid.* , matter. 35

the lower group of people, the two dissimilarities are tied to positions that are open to everyone, meaning that everyone is given equal opportunities in life. Based on this description, all differences of race, skin, religion and other differences that are primordial must be rejected.

Rawls emphasized that justice enforcement programs with a populist dimension must pay attention to two principles of justice, namely firstly giving equal rights and opportunities to the widest possible basic freedoms for everyone, secondly being able to rearrange the socio-economic inequalities that occur so as to provide benefits that are reciprocity for everyone, both from fortunate and disadvantaged groups.[23]

Thus, the principle of difference demands that the basic structure of society be arranged in such a way that the gap in prospects for obtaining the main things of welfare, income, authority is for the benefit of the most disadvantaged people. This means that social justice must be fought for two things, namely first to correct and improve the condition of inequality experienced by the weak by presenting empowering social, economic and political institutions. Second, each rule must position itself as a guide for developing policies to correct the injustices experienced by the weak. Justice as the main foundation that must be realized through existing laws, upholding justice with a populist dimension must provide equal rights and opportunities.

On the basis of the two theoretical descriptions above, in constructing the law on marriage constituencies, especially on marriage constituencies based on Number: 1 of 2015 concerning Integrated Services for Circuit Courts of District Courts and Religious Courts/Syar'iah Courts in the Context of Issuing Marriage Certificates, Marriage Books , and Birth Certificates, in which in practice there are at least two forms of cases, namely the first case the parties who apply for isbat are still bound by a previous marriage, not yet divorced and have a marriage certificate and the second case is bound by a previous partner but the previous marriage was a marriage not recorded. In both cases, if it is filed normatively, that is, without going through an integrated certificate, it is almost certain that the application for isbat will be rejected, while if it is filed in an integrated way, then the isbat application may be accepted and may be rejected.

In this case, the judge must be able to apply it by interpreting material law in order to give a fair determination. If adjudicating an application for isbat while both or one of them is bound by another marriage and has a marriage book, then the judge must be able to construct legal considerations, with the factor of consideration seeing whether the previous marriage said taklik divorce or not, if it turns out that someone said taklik divorce, then the judge first to consider the taklik of divorce in which case the taklik of divorce states that if you leave your wife for three consecutive months and the wife objects, then one divorce falls. The minimum limit of three months is a reference to be able to accept a marriage certificate application. In practice what happens is separation for approximately five years, so the time of separation is also a major consideration, because separation is no longer carrying out husband and wife obligations, so formally because there is a marriage book, they are bound by the previous marriage, but de facto have lived separately, in fact each has been living with another partner.

Researchers can provide several considerations in deciding cases of isbat marriage which is a form of legal construction in solving problems in isbat marriages, these considerations are for the case of isbat application Number: 312/Pdt.P/2022/PA.Gtlo, as follows:

Considering, that the marriage of applicant I and applicant II was not recorded which should be suspected because both applicant I and applicant II were bound by previous marriages, this was the main factor so that the marriage was not recorded, but the intellectual disability factor for both of them was considered to be very minimal so they did not know the solution to the legal problems faced by both, the marriage of applicant I and applicant II as long as it is not resolved legally, then insofar as both of their marriages are in a problematic state and both are considered capable of completing this marriage certificate;

Considering, that based on Article 55 paragraph (1) of Law Number 7 of 1989 it states that the Court may not refuse to examine and decide on a case filed on the pretext that the law is unclear or unclear, but is obliged to examine and decide on it.

Considering, that on the basis of the aforementioned article, judges are required to be able to understand the law that lives in society "law in action" and must be able to make laws through decisions and determinations "judge made in law" this is in accordance with the legal principle, namely Lex *posterior derogat legi priori* that the new law (lex posterior) overrides the old law (lex prior);

Considering, that if this principle is correlated with the problems of this case, then through the method of applying historical law, the judge can interpret the facts in the trial both applicant I and applicant II have long separated from their respective spouses, then both of them were married unregistered, thus de facto In the household of applicant I and the previous spouse as well as applicant II and the previous marriage, rights and obligations were not established, so that the meaning and purpose of marriage, although formally formed because there is a marriage certificate, but the juridical value does not have a strong bond, then by using this legal principle it is on and based on article 34 of Law Number: 1 of 1974 paragraph (3) jo article 77 paragraph (5) of the Compilation of Islamic Law states that if a husband or wife neglects their respective obligations they can file a lawsuit with the court. This article is in line with the legal principle of "istishab" (law against something with a previous condition, until there is a law that changes the situation) and the rule of ushul fiqh which states:

الصل بقاء ما كان على ما كان

It means :

The law of origin (in something) is to determine it according to what was there before."

The meaning of this rule is that all provisions that existed in the past, both positive and negative, will always exist as long as nothing changes them;

Considering, specifically, that applicant I and applicant II will remain in a juridical state with the previous marriage as long as there is no stipulation that the marriage does not exist, then specifically this stipulation is also based on the Supreme Court

[23]John Rawls. *A Theory of Justice* , translated by Uzair Fauzan and Heru Prasetyo under the title Theory of Justice, 2006 Yogjakarta, Student Library. matter. 23

Regulation of the Republic of Indonesia Number: 1 of 2015 concerning Services Integrated Circuit Court of District Court and Religious Court/Shari'ah Court in the Context of Issuing Marriage Certificates, Marriage Books and Birth Certificates, the old marital status of applicant I with a marriage certificate issued by the religious affairs office of North Kota District should be declared as having no legal force binding, as well as the old marital status of applicant II with a marriage certificate issued by the religious affairs office of the Telaga District, Gorontalo Regency, should be declared as having no binding legal force;

Considering, that this casuistic nature is specific in nature which cannot be generalized to similar cases in normative isbat applications so that this consideration only applies to isbat cases with the nature of cases limited to integrated isbat hearings with the aim of protecting one's own benefit as referred to in ushul fiqh "maslahat mu' be patient";

Considering, that based on the above considerations, it has a beneficial value for Applicant I and Applicant II and even helps protect the legality of the children of Applicant I and Applicant II. In addition, human interests are more measurable and controllable. moral (Moral Justice) and social justice (Social Justice) are expected to be formed with the determination of this isbat;

The legal construction as mentioned above applies to isbat cases that are filed in an integrated manner, if they are submitted normatively with a panel of judges, then the case may not necessarily be granted, this is in line with the intent and purpose of the Supreme Court regulations as explained above. Regarding the legal problems mentioned above, in fact the Supreme Court regulation should state the validity limit, because considering the impact of education on the public who do not understand the purpose of the regulation will become a bandwagon not to register marriage registration, then the function of marriage registration officers will increasingly lose their jobs, it is even possible that the number of marriages has decreased because people prefer unregistered marriages and then apply for unified marriage certificates, even though the purpose of the Supreme Court regulation is not for future marriages but for past marriages.

4. CONCLUSION

The theory of rule of law and the theory of justice is the basis as a tool for analysis of the application of law as a legal construction in considering cases of consanguinity marriage. Supreme Court Regulation Number: 1 of 2015 concerning Integrated Services for District Court Circuit Court and Religious Courts/Syar'iah Courts in the Context of Issuing Marriage Certificates, Marriage Books, and Birth Certificates, should include the validity period because it is temporary in connection with the issuance of the Law Number. 24 of 2013 as amended by Law Number: 23 of 2006 concerning Population Administration.

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