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Istihsan bi Al-Maslahah in the Cumulation of Divorce and Marriage Itsbat Lawsuits: Study of Decision of Bukittinggi Religious Court

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Abstract

The Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law in Indonesia have regulated the implementation of marriage. These provisions regulate legal marriage according to sharia, and must also be recorded by the Marriage Registration Officer of the local Religious Affairs Office. The existence of underhand / siri marriages in Islamic societies in Indonesia sometimes causes legal problems when there is a divorce in the Religious Court due to the absence of a marriage certificate. This study aims to analyze the istihsan bi al-mashlahah method which is one of the considerations of the Bukittinggi Religious Court Judge in Decision Number 452/Pdt.G/2022/PA.Bkt. The verdict granted a cumulative itsbat nikah divorce suit, but the marriage did not meet the statutory provisions and the Compilation of Islamic Law in Indonesia. The method in this research is a normative legal study with a case approach. Primary data is sourced from the Bukittinggi Religious Court Decision Number 452/Pdt.G/2022/PA.Bkt. The conclusion of this research is that the istihsan bi al-mashlahah method used by the judge in order to provide a solution by granting itsbat nikah solely for the divorce process of the plaintiff and the defendant, because of the benefit aspects that will be achieved, namely maintaining the soul (hifz al-nafs) and maintaining offspring (hifz al-nasl).

Introduction

Marriage is one of the basic needs for humans in an ideal society, because since birth, every individual has a fitrah to pair up as part of the sunnah that has been set by Him. Marriage is a physical and mental bond between a man and a woman as husband and wife with the aim of forming a harmonious, happy, and prosperous family.[1] Marriage is not just a personal relationship, but also has legal, social, and religious aspects.[2]

[1] Muhammad Hafiz, Sudianto Sudianto, dan Azhar Azhar, "Efektivitas Program Pusaka Sakinah Sebagai Preventif Dalam Meminimalisir Perceraian Pada KUA Kecamatan Stabat Kabupaten Langkat," *ALADALAH: Jurnal Politik, Sosial, Hukum Dan Humaniora* 3, no. 2 (14 Januari 2025): 33–43, https://doi.org/10.59246/aladalah.v3i2.1213.

[2] Winda Fitri, Shelvi Rusdiana, dan Windi Regina Anggia Putri, "Permasalahan Hukum Perkawinan Beda Agama Di Indonesia: Studi Komparatif," *Jurnal Hukum Media Justitia Nusantara* 14, no. 1 (10 Februari 2024): 53–70, https://doi.org/10.30999/mjn.v14i1.2938.

Marriage is considered a legal act if it fulfils the provisions of religious procedures and is registered as stipulated in Article 2 paragraphs (1) and (2) of Law Number 1 Year 1974 concerning Marriage. This provision confirms that in addition to being valid according to sharia, marriage must also be recorded by the Marriage Registration Officer of the local Religious Affairs Office.[3] If a marriage only fulfils the provisions in Article 2 paragraph (1) without official registration, then in the case of a dispute between husband and wife, they cannot obtain legal protection from the state. This is because the marriage is not recorded in the state administration. Therefore, itsbat nikah becomes very important to ensure the legal certainty of the marriage.

In the above problems with unregistered marriages which then lead to household conflicts, ultimately resorting to divorce, but one of the spouses will have difficulty applying for divorce to the Religious Court because they do not have proof of marriage. Article 7 paragraph (1) of the Compilation of Islamic Law in Indonesia confirms that marriage can only be proven by a marriage certificate, in paragraph (2) it is confirmed that if there is no proof of a marriage certificate, it can be submitted to the Religious Court for itsbat nikah, and paragraph (3) letter a confirms that itsbat nikah can be done in the context of divorce settlement.[4]

Itsbat nikah in the context of divorce settlements can be understood as allowing the combination of divorce with itsbat nikah. The merging of cases in court proceedings is known as cumulation. The cumulation of lawsuits (samenvoeging van vordering) is the incorporation of more than one legal claim in one lawsuit, or the merging of several lawsuits into one.[5] In principle, the claims filed with the court are independent, but in certain circumstances they can be combined because they are interrelated.

Regarding divorce lawsuits accumulated with marriage validation (itsbat nikah), previous studies have conducted studies such as the writings of Mulyadi, et al, Legal Analysis of the Authority of Religious Courts in Accepting the Cumulation of Lawsuits between Itsbat Nikah and Divorce According to the Religious Courts Law, researchers conducted research on Cibinong Religious Court Decisions Number 6787/Pdt.G/2023/PA.Cbn and Number 5168/Pdt.G/2023/PA.Cbn. Decision Number 6787/Pdt.G/2023/PA.Cbn, the Panel of Judges made a decision to reject the lawsuit. The Panel of Judges considered that in the process of carrying out the underhand marriage carried out by the parties, there was a legal defect because the provisions of Article 2 of Law Number 1 of 1974 concerning Marriage were not fulfilled. Meanwhile, Decision Number 5168/Pdt.G/2023/PA.Cbn, the Panel of Judges granted a divorce suit which was accumulated with itsbat nikah. The Panel of Judges considered that the marriage had been carried out in accordance with the laws and regulations.[6]

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3 Tengku Keizerina Devi Azwar, Utary Maharany Barus, dan Yefrizawati Yefrizawati, "Urgensi Pencatatan Perkawinan Pada Masyarakat Muslim Di Kelurahan Kampung Nangka, Binjai Utara," *Jurnal Ilmiah Penegakan Hukum* 9, no. 1 (30 Juni 2022): 1–13, https://doi.org/10.31289/jiph.v9i1.5781.

4 Alfiyah Faizatul Arif, "Penyelesaian Kumulasi Perkara Isbat Nikah Dan Cerai Talak Dalam Putusan Nomor 0307/Pdt.G/2018/PA.Sby," *Masadir: Jurnal Hukum Islam* 4, no. 01 (18 Juni 2024): 804–16, https://doi.org/10.33754/masadir.v4i01.923.

5 Moh Jufri, Ishaq Ishaq, dan Martoyo Martoyo, "Implementasi Cita Hukum Dalam Putusan Isbat Cerai Pengadilan Agama Situbondo," *Al Qalam: Jurnal Ilmiah Keagamaan Dan Kemasyarakatan* 18, no. 4 (30 Juni 2024): 2935–56.

6 Mulyadi, Ani Yumarni, dan Hidayat Rumatiga, "Analisis Hukum Kewenangan Pengadilan Agama Dalam Menerima Komulasi Gugatan Antara Itsbat Nikah Dan Cerai Menurut Undang-Undang Peradilan Agama | Karimah Tauhid," 28 Agustus 2024, https://ojs.unida.ac.id/karimahtauhid/article/view/14387.

Riska Hermayanti, et al, Settlement of Cumulation Cases of Itsbat Nikah and Divorce Suits (Case Study of the Sidenreng Rappang Religious Court), one of the decisions studied was Decision Number 382/Pdt.G/2021/PA.Sidrap, the Panel of Judges stated that the lawsuit could not be accepted. The Panel of Judges considered that the marriage conducted by the parties was declared invalid, due to the non-fulfilment of the pillars and conditions of marriage. The guardian of the marriage in the marriage is the biological brother, while the father as the nasab guardian has no impediment as a marriage guardian.[7]

Adam Firdaus Habibi, et al, Analysis of Islamic Law in the Case of Cumulation of Isbat Nikah and Divorce (Study of Decision Number: 0369/Pdt.G/2021/PA.Bks.), The Panel of Judges of the Bekasi Religious Court in their decision granted the Plaintiff's claim. The Panel of Judges considered that an underhand marriage can be legalised because it fulfils the pillars and requirements of marriage according to statutory regulations and the Compilation of Islamic Law in Indonesia, so that the Plaintiff has legal standing to file a lawsuit, and the reasons for divorce can be considered.[8]

The difference in previous research, Decision of the Bukittinggi Religious Court Number 452/Pdt.G/2022/PA.Bkt on the case of a divorce suit accumulated with itsbat nikah. The interesting thing in this decision is that the marriage carried out by the husband and wife did not fulfil the requirements for marriage according to the laws and regulations and the Compilation of Islamic Law in Indonesia, but the Panel of Judges of the Religious Court continued to process the divorce by granting itsbat nikah and the divorce suit. One of the considerations in the decision made istihsan bi al-mashlahah as the basis for the Panel of Judges to grant itsbat nikah. Based on the above case, the author is interested in examining the case on the granting of a cumulative divorce suit for itsbat nikah for a marriage that does not fulfil the legal requirements of a marriage with the istihsan bi al-mashlahah approach.

This research is a normative legal study with a case study approach, namely research in the field of law that focuses on the formation of legal arguments in the context of cases or legal events that occur. The research data comes from the decision of the judge of the Bukittinggi Religious Court Number 452/Pdt.G/2022/PA.Bkt. This decision is considered to represent the judge's decision regarding divorce cases accompanied by itsbat nikah among Muslims, taking into account aspects of benefit. Data collection was conducted through documentation techniques. The analysis of the decision focuses on the aspects of the case sitting, legal considerations, the legal basis used by the judge in determining the decision, and the contents of the dictum of the decision. The data will later be analysed using the Istihsan Bi al-Mashalah perspective.

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7 Riska Hermayanti, Halim Talli, dan Muhammad Fajri, "Penyelesaian Perkara Kumulasi Gugatan Itsbat Nikah Dan Cerai Gugat (Studi Kasus Pengadilan Agama Sidenreng Rappang Kelas II)," *Qadauna: Jurnal Ilmiah Mahasiswa Hukum Keluarga Islam* 6, no. 1 (31 Desember 2024): 73–89, https://doi.org/10.24252/qadauna.v6i1.31050.

8 Adam Firdaus Habibi, Suprihatin Suprihatin, dan Muhammad Tsaqib Idary, "Analisis Hukum Islam Dalam Perkara Kumulasi Isbat Nikah Dan Cerai Gugat (Studi Putusan Nomor: 0369/Pdt.G/2021/PA.Bks.)," *Maslahah (Jurnal Hukum Islam Dan Perbankan Syariah)* 15, no. 1 (14 Juni 2024): 29–45, https://doi.org/10.33558/maslahah.v15i1.9752.including \"Nikah Siri.\" Nikah Siri refers to a marriage conducted secretly or, in other words, a marriage not registered according to the provisions of the Marriage Law. An exciting provision to examine in Law No. 1 of 1974 is Article 2, paragraph (2

Cumulation of Divorce Plaintiffs and Itsbat Nikah

The merger (cumulation) of lawsuits in one lawsuit in the Bukittinggi Religious Court is a lot, be it a cumulation of a divorce lawsuit with a hadhanah (child custody) lawsuit, a divorce lawsuit with a nafkah lawsuit, a divorce lawsuit with itsbat nikah, and there are still other lawsuit cumulations, as long as the cumulation has a mutual relationship. Lawsuit cumulation (samevoeging van vordering) is one form of case settlement method that is beneficial and effective for the parties in applying the principles of simple, fast and low cost justice.

Combination of lawsuits (cumulation), based on the decision of the Supreme Court of the Republic of Indonesia which later became a rule of law, requires [9]:

1. The merger of two/more civil lawsuits must have a close relationship with each other.
2. The merger of lawsuits does not violate the principles of simple, speedy and low cost justice.
3. The merger of lawsuits has benefits and provides ease of process and can avoid the possibility of several conflicting decisions.

The combination (cumulation) of divorce and itsbat nikah here is a divorce suit filed with the Religious Court, but the parties are constrained by proof of marriage, meaning that the parties were previously married under the hand / siri, then there was a conflict in the household and wanted to divorce in court. In the absence of proof of marriage, the party files for divorce as well as submits an application for marriage validation (itsbat nikah), if the marriage is proven valid, the judge has a basis for divorcing both parties (husband and wife).

Itsbat nikah is a combination of the two syllables itsbat and nikah. In language, 'itsbat' comes from the word atsbata, yatsbitu, itsbatan, which means determination or determination.[10] In the Big Indonesian Dictionary, the word 'itsbat' is defined as the act of determining, which is a determination relating to the truth or validity of something.[11] Whereas nikah comes from the Arabic 'nikahun' the mashdar form of 'nakaha' which means gathering, pairing, which is then translated into Indonesian language as marriage.[12] In summary, isbat nikah is the legalisation of a marriage. In a broader sense, isbat nikah is an application to recognise the validity of a marriage between a man and a woman whose marriage is not regulated by the Code or has not been recorded in the state justice system.[13]

In the guidebook for the implementation of the duties and administration of the Religious Courts, isbat nikah, as stipulated in the Decree of the Chief Justice of the Supreme Court of

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9 Hulman Panjaitan, *Kumpulan Kaidah Hukum: Putusan Mahkamah Agung Republik Indonesia Tahun 1953 - 2008 Berdasarkan Penggolongan* (Jakarta: Prenada Media, 2016), hlm. 28.

10 Rita Khairani - dan Royan Bawono, "Analisis Hukum Tentang Isbat Nikah Menurut KUH Perdata dan KHI Indonesia:," *lentera* 4, no. 2 (11 September 2022): 67–82, https://doi.org/10.32505/lentera.v4i2.3960.

11 Iffah Fathiah, "Itsbat Nikah Poligami Perspektif Undang-Undang Perkawinan Dan SEMA No. 3 Tahun 2018," *Mawaddah: Jurnal Hukum Keluarga Islam* 1, no. 1 (2023): 21–47, https://doi.org/10.52496/mjhki.v1i1.2.then it is sufficient to carry out a marriage, including in polygamous marriages. This kind of marriage violates Article 2 paragraph (2

12 Wardah Toyibah, Viqie Ixbal Maulana, dan Muhammad Fauzi, "Synonyms Analysis of Nakaha and Zawaja in the Al-Qur'an," *Journal of Arabic Language Studies and Teaching* 2, no. 1 (30 Mei 2022): 82–104, https://doi.org/10.15642/jalsat.2022.2.1.82-104.

13 Rabith Madah Khulaili Harsya dkk., "Perlindungan Hak-Hak Sipil Anak Dalam Pelaksanaan Itsbat Nikah Di Pengadilan Agama Sumber," *HUKMY : Jurnal Hukum* 4, no. 1 (2 April 2024): 491–501, https://doi.org/10.35316/hukmy.2024.v4i1.491-501.

the Republic of Indonesia Number KMA/032/SK/2006, is a rule regarding the validation of marriages based on marriages that have been carried out religiously but not recorded by the authorised Marriage Registration Officer (PPN). Thus, isbat nikah can be interpreted as the re-establishment of marriage for couples who have been legally married according to religion but have not been officially recorded. If the application for isbat nikah is granted by a panel of judges, the couple will obtain a marriage certificate as authentic evidence of their marriage.[14]

Indonesian positive law (ius constitutum) provides space for unregistered marriages in accordance with applicable laws and regulations. One of the conveniences regulated in Indonesian law is the permissibility of validating unregistered marriages through itsbat nikah in the Religious Court or Syar'iyah Court. Itsbat nikah itself is a court decision based on the request of the relevant parties to determine the validity of an unrecorded marriage between a married couple.[15] The impact of giving space by legislation for unregistered marriages to be legalised by the court is the rise of underhand marriages or what is commonly referred to as nikah siri.

The Compilation of Islamic Law in Indonesia on itsbat Nikah provides limitations as stated in article 7 paragraph (3) relating to the existence of marriage in the context of divorce proceedings, the 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 impediments according to Law No. 1 of 1974;

In connection with itsbat nikah, the Supreme Court has issued Supreme Court Circular Letter (SEMA) Number 7 of 2012 concerning the Results of the Plenary Meeting of the Supreme Court Chamber which explains that in principle isbat nikah in the context of divorce can be justified, unless the marriage to be isbat is clearly in violation of the law. In principle, nikah sirri can be isbatised as long as it does not violate the law. The legal force of the determination of isbat nikah is the same as the legal force of the marriage certificate (Article 7 paragraphs (1) and (2) of the Compilation of Islamic Law).[16]

Departing from the above discussion, it can be understood that the Religious Court can grant an application for itsbat nikah as long as the marriage does not violate statutory provisions besides that it does not violate the provisions of Islamic law itself. Itsbat nikah is useful for realising justice for the whole community and provides an opportunity for couples whose marriages have not been registered to obtain marriage certificates, so that their marriages have legal force. This is important because children born from unregistered marriages can face unclear legal status, especially regarding the civil rights of their fathers, such as inheritance and guardianship rights. Itsbat nikah serves as valid legal evidence of the marriage that has taken place between husband and wife. The legal certainty provided can support the creation of a harmonious and prosperous household life (sakinah), thus bringing benefits to both parties.[17]

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[14] Dwi Tahta, "Proses Penetapan Itsbat Nikah Terhadap Perkara Contesious Dalam Perspektif Hukum Islam," *ATTAQWA: Jurnal Hukum Islam*, 9 Desember 2024, 39–47.

[15] Salman Abdul Muthalib, "Pengesahan Isbat Nikah Perkawinan Poligami: Kajian Putusan Nomor 130/Pdt.G/2020/Ms.Bna," *El-Usrah: Jurnal Hukum Keluarga* 5, no. 2 (12 Mei 2023): 224–38, https://doi.org/10.22373/ujhk.v5i2.16040.

[16] Kepaniteraan Mahkamah Agung Republik Indonesia, *Kompilasi Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Republik Indonesia* (Jakarta: Sekretariat Kepaniteraan Mahkamah Agung, 2023), hlm. 59.

[17] Umar Faruq, "Isbat Nikah Persperktif Maqosid Syariah," *Jurnal Hukum, Politik Dan Ilmu Sosial* 2, no. 2 (2023): 231–48, https://doi.org/10.55606/jhpis.v2i2.3644.

Divorce or talak in Arabic comes from the word al-ithlaq, which means to release or leave. Talak is defined as the act of releasing the marriage bond or the end of the marriage relationship.[18] Talak can also be interpreted as the end of the marriage bond or the termination of the marriage contract through the utterance of talak or other lafaz that has a similar meaning. [19] Based on the above understanding, it can be understood that divorce is the end of a marriage bond between a legal husband and wife by using the word talak or the like.

In positive law in Indonesia related to divorce can only be done in front of a court session after there is a strong reason that the husband and wife's household can no longer get along, this has been confirmed in the provisions of Article 39 paragraphs (1) and (2) of Law Number 1 of 1974 concerning Marriage, Article 65 of Law Number 7 of 1989 concerning Religious Courts, and Article 115 of Presidential Instruction (Inpres) Number 1 of 1991 concerning the Compilation of Islamic Law in Indonesia.

In Indonesian legislation, there are two forms of divorce filed by parties to the Religious Court, namely divorce filed by the husband is called divorce, while divorce filed by the wife is called cerai gugat.[20] Cerai Talak, according to the provisions of Article 66 paragraph (1) of Law Number 7 of 1989, is an application for divorce submitted by the husband to the Court so that a hearing to witness the pledge of divorce is held. This divorce is imposed by the husband in front of the Religious Court after the Religious Court has issued a decision granting permission to pronounce the divorce, the divorce imposed by the husband is divorce raj'i (article 118 of the Compilation of Islamic Law in Indonesia) or divorce bain sughra in accordance with the provisions of article 119 paragraph (2) letter a of the Compilation of Islamic Law in Indonesia, namely divorce that occurs qabla al-dukhul, or divorce bain kubra as stipulated in article 120 of the Compilation of Islamic Law in Indonesia. Cerai Gugat, according to the provisions of Article 73 paragraph (1) of Law Number 7 Year 1989, is a divorce suit filed by the wife to the Court. This divorce is imposed by a judge based on a court decision, the divorce is talak bain sughra or talak bain kubra as stipulated in articles 119 and 120 of the Compilation of Islamic Law in Indonesia.

Istihsan bi al-Mashlahah

Istihsan bi al-mashlahah is part of the discussion of istihsan in ushul fiqh. Istihsan is a masdar form of the word 'istahsana' which means considering something as a good thing, or in other words, running or looking for something better with the aim of being used as a guide because of the command to do so.[21] *Istihsan is also a method of Islamic legal reasoning which means looking for goodness or benefits in determining the law.* [22]

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18 Sayyid Sabiq, *Fiqh al-Sunnah*, Juz II (Bairut: Dar al-Kitab al-'Arabi, 1977), hlm. 241.

19 Wahbah al-Zuhaili, *Al-Fiqh Al-Islamiy wa Adilatuh*, Juz. VII (Bairut: Dar al-Fikr, 1985), hlm. 356.

20 Zulkarnain, *Hukum Komtetensi Peradilan Agama: Pergeseran Kompetensi Peradilan Agama dalam Hukum Positif di Indonesia* (Jakarta: Prenada Media, 2021), hlm. 129.

21 Darliana Darliana dkk., "Pembaharuan Hukum Islam Di Indonesia (Pendekatan Metode Istihsan)," *Jurnal Al-Ahkam: Jurnal Hukum Pidana Islam* 4, no. 1 (30 Maret 2022): 1–14, https://doi.org/10.47435/al-ahkam.v4i1.851.

22 Abdul Kholik dan Mustofa Mustofa, "Istihsan," *Al-Syakhsiyyah: Jurnal Hukum Keluarga Islam Dan Kemanusiaan* 5, no. 2 (14 Desember 2023): 181–90.

Scholars of ushul fiqh differ in defining istihsan, al-Syatibi defines istihsan as:

الأ خذ بالمصلحة جزئية في مقابلة دليل الكلى[23]

"Using juz'i interests as a substitute for kulli arguments"

This definition means that a mujtahid should determine the law based on general arguments. However, under certain conditions, if there is a specific benefit, the mujtahid can determine the law without adhering to the existing general propositions, but rather consider more specific benefits or interests.[24]

Istihsan according to Ibn Subki:

عدول عن الدليل الى العادة المصلحة[25]

Shifting from the use of a legal evidence (dalil) to customary practice (adat) due to considerations of public interest (kemaslahatan).

The meaning of istihsan according to al-Thufi:

اجود تعريف للإ ستحسان ان العدول بحكم المسالة عن نضائرها لدليل شرعي خاص[26]

The best definition of istihsan is the shifting of a legal ruling in a particular case based on a specific shar'i (Islamic legal) evidence.

The meaning of istihsan according to al-Ghazali:

ما يستحسنه المجتهد بعقله[27]

Something that is considered good by the reasoning of a mujtahid (Islamic jurist).

From the various definitions of istihsan above, it can be understood that istihsan is the use of goodness (public interest or kemaslahatan) in determining a legal ruling.

The divisions (or types) of istihsan are as follows[28]:

1. Istihsan bi al-nash: Deviating from the original ruling based on explicit textual evidence (nash).
2. Istihsan bi al-ijma': Deviating from the original ruling based on consensus (ijma').
3. Istihsan bi al-mashlahah: Deviating from the original ruling based on the goodness (public interest or kemaslahatan) to be achieved.
4. Istihsan bi al-dharurah: Deviating from the original ruling and switching to another ruling due to necessity (darurah).

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23 Abi Ishaq al-Syatibi, *Al-Muwafaqat*, Juz I (Mesir: Dar Ibnu Affan, 1997), hlm. 33.
24 Amrullah Hayatudin, *Ushul Fiqh: Jalan Tengah Memahami Hukum Islam* (Jakarta: Amzah (Bumi Aksara), 2021), hlm. 64.
25 Taj al-Din Abd al-Wahab bin Ali al-Subki, *Jam'u al-Jawami' fi Ushul al-Fiqh* (Libanon: Dar al-Kotob al-Ilmiyah, 2003), hlm. 110.
26 Hayatudin, *Ushul Fiqh*, hlm. 65.
27 Abu Hamid Muhammad bin Muhammad al-Ghazali, *Al-Mustashfa* (Bairut: Dar al Kutub al-Alamiyah, 1993), hlm. 171.
28 Helmi Basri, *Fiqih Nawazil: Empat Perspektif Pendekatan Ijtihad Kontemporer* (Jakarta: Prenada Media, 2022), hlm. 66.

5. Istihsan bi al-'urf: Deviating from the original ruling due to the influence of customs or traditions that have been established for a long time.

The authority (kehujjahan) of istihsan as part of the application and renewal of Islamic law can be seen from several scholarly opinions. Scholars from the Hanafiyah, Malikiyah, and Hanbalah schools consider istihsan as a source or evidence of law. Meanwhile, scholars from the Syafi'iyah school reject istihsan as a source or evidence of law.[29]

The Reason the Judge Granted the Divorce Lawsuit Combined with the Itsbat Nikah Petition in Case Decision Number 452/Pdt.G/2022/PA.Bkt

The Decision of the Bukittinggi Religious Court Number 452/Pdt.G/2022/PA.Bkt is a case of divorce lawsuit combined with a petition for itsbat nikah (legalization of marriage). The main issue in this case is that the Plaintiff and Defendant entered into an unregistered marriage on May 2, 2010, at Jl. S. Parman No. 225 E, Ulak Karang, Padang City. The marriage was conducted in front of a local religious leader named Buya Rauf, who also acted as the marriage guardian (wali nikah) because the Plaintiff was born out of wedlock. The witnesses in this marriage were Edirman and Budi, and the dowry consisted of a set of prayer tools given in cash. Since early 2014, the household of the Plaintiff and Defendant began to experience disharmony due to frequent conflicts. The main causes of the conflict were that the Defendant was often known to have a special relationship with another woman, committed domestic violence, and was irresponsible in providing financial support for the Plaintiff and their children's needs. The peak of the conflict occurred in February 2017, when the Defendant again committed domestic violence, causing the Plaintiff to decide to leave the shared residence. Up to now, the Plaintiff and Defendant have lived separately for five years[30]

Regarding the issue of itsbat nikah, the Panel of Judges considered that the marriage between the Plaintiff and Defendant did not meet the marriage requirements based on the prevailing laws and regulations, where the Plaintiff's marriage guardian (wali nikah) should be a legal guardian (wali hakim), while Buya Rauf was not a legal guardian. Therefore, the Panel of Judges declared the Plaintiff's marriage as fasid (defective). The Panel of Judges held the view that the marriage between the Plaintiff and Defendant was formally flawed and thus could not be registered according to the law, so the Plaintiff's petition for itsbat nikah was rejected.

The rejection of the itsbat nikah petition by the Panel of Judges in their decision, according to the researcher, is in accordance with the applicable laws and regulations. Law Number 1 of 1974 concerning Marriage does not explicitly regulate the wali hakim (judge guardian). The provisions regarding wali hakim are clearly regulated in the Regulation of the Minister of Religious Affairs of the Republic of Indonesia Number 30 of 2005 concerning Wali Hakim, as well as in the Compilation of Islamic Law in Indonesia. These regulations emphasize that if the prospective bride does not have a wali nasab (lineage guardian) or if her wali does not meet the requirements, such as being mafqud (missing), ghaib (unknown whereabouts), or adhal (refusing to give permission without

[29] Lahaji dkk., "Diskursus hukum Islam di Indonesia," *Buku-Buku karya dosen IAIN Sultan Amai Gorontalo* 1, no. 1, diakses 24 Maret 2025, https://journal.iaingorontalo.ac.id/index.php/buku/article/view/3437.

[30] Direktori Putusan Mahkamah Agung RI, "Putusan Nomor 452/Pdt.G/2022/PA.Bkt," diakses 8 Maret 2025, https://putusan3.mahkamahagung.go.id/direktori/putusan/zaed1ef0c2e6eec88b59313932343532.html.

a valid reason), then the marriage can be conducted with a wali hakim[31]. The Minister of Religious Affairs Regulation states that the wali hakim is the Head of the local Office of Religious Affairs (Kantor Urusan Agama).

In the decision, although the Panel of Judges rejected the Plaintiff's petition for itsbat nikah, the Panel also gave another consideration regarding the itsbat nikah, where the itsbat nikah was granted solely for the divorce process and does not have other legal consequences. Granting itsbat nikah is a way to free a wife from oppression and injustice by her husband. The Panel of Judges based their consideration on Supreme Court Regulation Number 3 of 2017 concerning Guidelines for Adjudicating Cases of Women Facing the Law. The protection provided by this regulation is to liberate a wife from the grip of her unlawful husband.

The Panel of Judges also based their considerations on the provisions of Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, which emphasizes that judges and constitutional judges must issue decisions in accordance with the law and a sense of justice for society. The Panel also referred to the Qur'anic verses al-Baqarah: 185 (Allah intends ease for you and does not intend hardship), al-Baqarah: 286 (Allah does not burden a soul beyond its capacity), and al-Hajj: 78 (Allah never places hardship in religion for you), as well as a hadith of the Prophet Muhammad (peace be upon him) narrated by Abi Sa'id ibn Sinan al-Khudri and recorded by Ibn Majjah and al-Daraqutni: It is not permissible to do things that cause harm.

The Panel of Judges also grounded their consideration on the Islamic legal methodology using istihsan bi al-mashlahah (juristic preference for public interest), and the fiqh principles "المَشَقَّةُ تَجْلِبُ التَّيْسِيْرَ" (difficulty brings ease) and "وَ كُلُّ مَحْظُوْرٍ مَعَ الضَّرُوْرَةِ بِقَدْرِ مَا تَحْتَاجُهُ الضَّرُوْرَةُ" (everything forbidden is allowed in an emergency, but only to the extent necessary to remove the emergency).

The granting of the itsbat nikah became the basis for the Panel of Judges to consider the Plaintiff's divorce lawsuit. In the decision, the Panel of Judges granted the Plaintiff's divorce claim because it was proven that there was discord and quarrels resulting in the Plaintiff and Defendant living separately for five (5) years. The grounds for the Plaintiff's divorce fulfilled the requirements of Article 19 letter f of Government Regulation Number 9 of 1975 in conjunction with Article 116 letter f of the Compilation of Islamic Law in Indonesia.

Analysis of the Court Decision from the Perspective of *Istihsan bi al-Mashlahah*

The Decision of the Bukittinggi Religious Court Number 452/Pdt.G/2022/PA.Bkt concerns a divorce lawsuit combined with a marriage legalization (itsbat nikah), in which the marriage did not comply with the provisions of the prevailing laws and regulations, as previously explained. The requested itsbat nikah involved unmet marriage requirements, particularly related to the marriage guardian (wali nikah). The bride-to-be was a child born out of wedlock and was married by a buya (religious leader) who acted as her wali nikah.

In Islamic law, a child born out of wedlock does not have a legal lineage (nasab), financial support rights (nafaqah), inheritance rights, custody, or guardianship rights in relation to the biological father. These rights are only obtained from the mother. Civil relations themselves

[31] Hasmalina Hasmalina dan Via Nurjannah, "Wali Hakim: Perspektif Hukum Islam Terhadap Proses Pelaksanaannya Di Kantor Urusan Agama," *Al-Ahkam: Jurnal Syariah Dan Peradilan Islam* 1, no. 1 (28 Juni 2021): 46–60.

arise from the existence of a nasab relationship, which, as previously explained, is a bond that determines a person's origin based on blood ties.[32] The Compilation of Islamic Law (Kompilasi Hukum Islam) does not use the term 'child of adultery' (anak zina), but rather uses the term 'child born out of wedlock' (anak yang lahir di luar perkawinan or anak luar kawin). Such a child holds the same status as one born from a relationship between a man and a woman without a valid marital bond. This includes a child born to a woman without a lawful marriage to the man who impregnated her, or a syubhat child except in cases where the child is acknowledged by the syubhat father.[33]

A child born out of wedlock does not have a legal lineage (nasab) to the biological father, but rather to the mother. Therefore, the biological father cannot act as the marriage guardian (wali) for the child. Ibn Rushd stated:

واتفق الجمهور على أن أولاد الزنا لا يلحقون بآبائهم إلا في الجاهلية على ما روي عن عمر بن الخطاب[34]

> The majority of scholars hold the view that a child born out of wedlock cannot be attributed in lineage (nasab) to the biological father. However, an exception is made for children born during the pre-Islamic period (jahiliyyah), as narrated from Sayyidina Umar ibn al-Khattab (may Allah be pleased with him).

With regard to a child born out of wedlock, such a child does not have a guardian (wali). In the case of a girl who has no marriage guardian, the authority or the government assumes that role. This is in accordance with the saying of the Prophet Muhammad (peace be upon him:

عن ابن عباس عن النبي - صلى الله عليه وسلم - قال: "لا نكاحَ إلّاّ بوليّ والسلطانُ وليُّ من لا وليَّ له"[35]

A hadith narrated by Ibn Abbas states that the Prophet Muhammad (peace be upon him) said: 'There is no valid marriage without a guardian (wali). If a woman has no guardian, then the ruler (sultan) shall act as her guardian.' (Narrated by Ahmad)

The above hadith, when connected to the governmental system in Indonesia, implies that the marriage guardian (wali nikah) for a child born out of wedlock is the Minister of Religious Affairs, as the official under the President who holds the authority to administer governmental affairs in the field of religion.[36] In relation to this matter, the Minister of Religious Affairs of the Republic of Indonesia has issued Regulation of the Minister of Religious Affairs Number 30 of 2005 concerning Wali Hakim (Judicial Guardian), in which the Head of the Office of Religious Affairs (Kantor Urusan Agama) acts as the wali hakim for a woman who does not have a marriage guardian, based on a direct appointment from the Minister of Religious Affairs.

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32 Muhammad Hajir Susanto, Yonika Puspitasari, dan Muhammad Habibi Miftakhul Marwa, "Kedudukan Hak Keperdataan Anak Luar Kawin Perspektif Hukum Islam," *Justisi* 7, no. 2 (15 Juli 2021): 105–17, https://doi.org/10.33506/js.v7i2.1349.

33 Sukaynah Q. A. Rizal, Donna Okthalia Setiabudhi, dan Susan Lawotjo, "Perbandingan Kedudukan Wali Nikah Bagi Anak Di Luar Nikah Menurut Perspektif Hukum Islam Dan Hukum Positif Di Indonesia," *Lex Privatum* 11, no. 4 (5 Mei 2023), https://ejournal.unsrat.ac.id/v3/index.php/lexprivatum/article/view/47917.

34 Ibn Rusyd, *Bidayah al-Mujtahid wa Nihayah al-Muqtashid*, Juz IV (Kairo: Dar al-Hadits, 2004), hlm. 142.

35 Ahmad bin Muhammad bin Hanbal, *Musnad Imam Ahmad bin Muhammad bin Hanbal*, Juz. 3 (Kairo: Dar al-Hadits, 1995), hlm. 38.

36 "Website Kementerian Agama RI," diakses 4 Februari 2025, https://2017.kemenag.go.id/home/artikel/42941.

In the case of Decision Number 452/Pdt.G/2022/PA.Bkt, the marriage conducted by the parties with a buya (religious leader) acting as the marriage guardian (wali nikah) is not in accordance with the Prophet's hadith and the Minister of Religious Affairs Regulation. The buya in question is not an official appointed by the government, and therefore, the marriage does not meet the legal requirements for marriage as stipulated by the prevailing laws and regulations.

The wali hakim, who is an official authorized to perform marriages, may only act in certain conditions, including the following[37]:

1. Has no lineage relationship (nasab).
2. Does not meet the criteria to serve as a wali aqrab (closest guardian) or wali ab'ad (more distant guardian).
3. The guardian is traveling a distance of more than 92.5 km.
4. The guardian is imprisoned or whereabouts are unknown.
5. The guardian is 'adhal (refuses without valid reason).
6. The guardian is in a state of ihram (ritual consecration for Hajj or Umrah).

The judge in the decision took a different view of the itsbat nikah submitted in the divorce suit, the judge actually considered granting the itsbat nikah for the purpose of deciding the divorce between the husband and wife. One of the judge's considerations uses the istihsan bi al-mashlahah method. Istihsan bi al-mashlahah which is part of the discussion of istihsan itself, before discussing istihsan bi al-mashlahah as one of the basic considerations of the judge in his decision, in this discussion it is necessary to find out the validity of istihsan as one of the methods of legal istinbat. Scholars from the Hanafi, Maliki and Ahmad bin Hambal schools of thought argue that istihsan is a proposition of shara', while those from al-Syafi'yah, Zahiriyah, Mu'tazilah and Shi'ah reject the use of istihsan as a proposition of shara' with the view that the use of istihsan is influenced by lust, with the method of using pure reason to oppose the law that has been established by shara'.[38]

The acceptance of istihsan as a proposition of shara' is due to: 1). Istihsan is used as proof because the results of research into a case and the determination of its law show that its provisions are contrary to the results of qiyas or general rules that apply, 2). Making QS. Al-Zumar verse 55 and QS. Al-Baqarah verse 185 as a basis that confirms the command to follow the good things that have been revealed by Allah, and Allah wants ease rather than difficulty, 3). Prophetic Hadith that confirms something that is considered good by Muslims will be good with Allah (HR. Ahmad bin Hambal).[39]

The rejection of istihsan as a proposition of shara' is due to: 1). We are commanded to obey Allah and His Messenger, namely through the Qur'an and Hadith. Meanwhile, istihsan is not included in both, because it does not come from the Qur'an or Hadith, 2). Shari'a is the text or content of the text, while istihsan is not one of them, 3). The Prophet's words are not based on his personal judgement (istihsan), because what is meant here is not that the Prophet considers something good according to his personal opinion. Because, the Prophet did not convey something

[37] Revi Inayatillah, "Status Keabsahan Wali Nikah Menurut Hukum Islam," *Acta Diurnal: Jurnal Ilmu Hukum Kenotariatan* 8, no. 1 (30 Desember 2024): 82–98, https://doi.org/10.23920/acta.v8i1.2159.

[38] Abdul Latip dkk., *Ushul Fiqih dan Kaedah Ekonomi Syariah* (Medan Sunggal: Merdeka Kreasi Group, 2022), hlm. 105.

[39] Romli, *Studi Perbandingan Ushul Fiqh* (Jakarta: Prenada Media, 2021), hlm. 159.

based on his own desires or lusts, 4). The Prophet reprimanded a companion who used istihsan, as in the case when a companion killed an enemy who had said two sentences of shahada, the companion thought that the shahada was only because of fear of his sword, 5). A mujtahid who uses istihsan means relying more on reason or ratio alone in determining the law.[40]

In this case the Judge gave the view that the Plaintiff as a wife whose position was in limbo if her divorce was not decided, because of her attachment to a siri marriage (underhand marriage) with her husband, and had been separated from her home for 5 (five) years, and to escape the injustice of her husband and the position of a wife was oppressed if the Court did not end the marriage by divorce. The application for itsbat nikah is solely to finalise the divorce and has no legal effect on anything other than that.

The istihsan bi al-mashlahah method used by the judge is to provide justice, expediency and legal certainty to this case. Judges in making decisions must pay attention to the name of legal justice, legal benefits and legal certainty. Legal justice which is a balance and equality in the sense that everyone is entitled to fair treatment without discrimination or preferential treatment, and has the same right to legal protection and defence before the court.[41] Legal expediency must be able to provide real benefits to all levels of society or create happiness. This means that every regulation made should favour the interests of the community in order to create mutual benefits and welfare.[42] Legal certainty is that the law must be applied clearly and firmly in society, which means that there is certainty that the law is actually carried out, the rights stipulated in the law can be obtained by the entitled parties, and every legal decision can be implemented properly.[43]

In addition, the legal system in Indonesia which adheres to legal realism-plus or rechtsvinding-plus requires every judge to prioritise the realisation of public justice. Community justice, judges act as diggers and formulators of legal values that live in the community, so that judges must go into the community to get to know, feel, and be able to dive into the feelings of law and the value of justice that lives in society.[44]

In using the istihsan bi al-mashlahah method, the benefit that will be achieved by the Judge in his decision on this case is an effort to prevent harm, the need for aspects of benefit in maintaining the soul (hifzh al-nafs), a wife (Plaintiff) who entered into a siri (underhand) marriage if her divorce could not be granted would have difficulty remarrying with another man who could bear her nafkah in order to ensure her soul. Another aspect of benefit is preserving offspring (hifzh al-nasl), a wife (Plaintiff) if she is not given the space to break away from her husband (Defendant), then the Plaintiff will enter into a siri marriage again and that will affect the status of children resulting from the next siri marriage, and this will lead to acts of polyandry in a siri (underhand) so that it will affect the nasab of her child.

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40 Basiq Djalil, *Ilmu Ushul Fiqih: 1 & 2* (Jakarta: Kencana, 2014), hlm. 161.

41 Ade Azharie, "Pemanfaatan Hukum sebagai Sarana untuk Mencapai Keadilan Sosial," *Lex Aeterna Law Journal* 1, no. 2 (29 Juni 2023): 72–90, https://doi.org/10.69780/lexaeternalawjournal.v1i2.20.

42 Ernawati Huroiroh dan Vera Rimbawani Sushanty, "Telaah Perspektif Filsafat Hukum Dalam Mewujudkan Kepastian, Keadilan, Dan Kemanfaatan Hukum Di Indonesia," *Jurnal Legisia* 14, no. 2 (3 Juli 2022): 191–203, https://doi.org/10.58350/leg.v14i2.198.

43 Siti Halilah dan Mhd Fakhrurrahman Arif, "Asas Kepastian Hukum Menurut Para Ahli," *Siyasah : Jurnal Hukum Tata Negara* 4, no. II (22 Desember 2021), https://ejournal.an-nadwah.ac.id/index.php/Siyasah/article/view/334.

44 Edi Rosman, *Fiqih Politik Hukum Islam Di Indonesia (Kontekstualisasi Siyasah Syar'iyah Dalam Rekaman Historis dan Pemikiran)* (Ponorogo: BuatBuku.com, 2018), hlm. 166.

Through consideration of the benefits carried out by the Judge of the Bukittinggi Religious Court in this case, the Bukittinggi Religious Court granted the divorce claim cumulating itsbat nikah with the amendment[45]: 1) Declare that the Defendant, who has been officially and properly summoned to appear in court, is not present, 2) Grant the Plaintiff's claim by way of divorce, 3) Declare the validity of the marriage between the Plaintiff and the Defendant solely for the purpose of the divorce proceedings between the Plaintiff and the Defendant, 4) Declare the Defendant divorced from the Plaintiff, 5) Charge the Plaintiff to pay court costs in the amount of Rp. 430,000.00 (four hundred and thirty thousand rupiah).

Ijtihad conducted by the Judge of the Bukittinggi Religious Court in order to answer the case, if the legal breakthrough is not done it will cause mudharat, namely the destruction of the order of life. The destruction of the order of life will continue unhealthy marriages (polygamy under the hands and polyandry wildly), so that the status of children from these unhealthy marriages becomes uncertain. So the use of istihsan in this case is in the interests of maslahat and in an effort to avoid fading. The judge's decision is in line with the purpose of Islamic law itself for the benefit of the people. al-Syatibi asserted that Shari'a was established for the purpose of realising the benefit of mankind in this world and the hereafter, and the laws were made for the benefit of the people.[46]

In the case above, the judge has made it clear that the purpose of granting a divorce claim for the marriage of a husband and wife who do not fulfil the marriage requirements according to the laws and regulations and the Compilation of Islamic Law in Indonesia, the acceptance of the marriage is only for the purpose of divorce and has no legal impact on anything else, meaning that the basis of the itsbat nikah cannot be used by the husband and wife after divorce as the basis for a claim for joint property, or a claim for nafkah due to divorce such as nafkah madhiyah (owed), nafkah iddah, mut'ah, maskan and kiswah.

Conclusion

The case in the Decision of the Bukittinggi Religious Court Number 425/Pdt.G/2022/PA.Bkt is a divorce lawsuit combined with a request for itsbat nikah, where the marriage of a married couple does not fulfil the requirements for marriage according to the provisions of laws and regulations and the Compilation of Islamic Law in Indonesia. The Bukittinggi Religious Court still granted the application for itsbat nikah and the divorce suit. One of the considerations of the Judge is istihsan bi al-mashalah. The aspects of benefit that need to be achieved in this case are hifh al-nafsh (maintaining the soul) and hifz al-nasl (maintaining offspring). The harm that will be caused if this case is not resolved by the Religious Court, a wife (Plaintiff) will have difficulty in remarrying another man legally, and there will be an act of polyandry in the wild so that it will affect the nasab of the siri marriage. The efforts made by the Judge of the Bukittinggi Religious Court are a legal breakthrough so that the purpose of the law can be realised in providing benefits to the people, because Judges are obliged to explore the laws that live in the midst of society in order to provide justice, benefit and legal certainty.

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45 Direktori Putusan Mahkamah Agung RI, "Putusan Nomor 452/Pdt.G/2022/PA.Bkt."

46 Abidin Nurdin dkk., "Tujuan Hukum Islam Untuk Kemaslahatan Manusia: Penerapan Kaidah Fiqhiyah Dalam Bidang Ekonomi Dan Hukum Keluarga," *El-Usrah: Jurnal Hukum Keluarga* 5, no. 1 (11 Agustus 2022): 41–55, https://doi.org/10.22373/ujhk.v5i1.14665.

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