



UNREGISTERED POLYGAMY VALIDATION: Isbat Nikah, Polygamy Permit, and Due Process of Law in Indonesian Religious Courts

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Abstract: This article probes whether methods of validating unregistered polygamy in Indonesian Religious Courts have honored the due process of law. Judges have adopted two different methods in validating unregistered polygamy: first, by ordering concerned parties to apply for the issuance of a retroactive marriage certificate (*isbat nikah*), and second, by advising them to submit a polygamy permit application. Using the sociolegal approach in examining *Ratio Legis* and selected cases on unregistered polygamy validation across Indonesia, it finds that the existing methods have impacted protecting women's and children's rights and marriage law objectives. Opting for *isbat nikah* means perpetuating violations of the marriage law provisions and objectives, which restrict polygamy through court proceedings to be orderly administration and protect women's and children's rights. Meanwhile, requiring unregistered polygamists to remarry by applying for a polygamy permit could impact wives' rights who are married without registration and their children's. The 2018 Supreme Court's Circular prohibiting the Religious Court from accepting applications for *isbat nikah* of unregistered polygamy shows its tendency to the formal application of the marriage law provisions. Even so, judges adopt the contentious *isbat nikah* to legalize unregistered polygamy, mainly when the parties involved accept their polygamy and live peacefully. This bottom-up approach arguably better meets the principles of fairness because all legal rights owed to concerned parties are respected.

Keywords: Islamic family law; unregistered polygamy; isbat nikah; polygamy permit

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Introduction

THEY CAME TOGETHER to file a polygamy permit case at the Banjarbaru Religious Court. The husband wore a *thawb*, and his

two wives (the legal wife and the unregistered wife, wore *abayas* equipped with *niqabs* to get out of the car together. At the first hearing in July 2022, the panel of judges advised the couple to maintain the integrity of their household and discourage their intention to practice polygamy on a record. They were then sent to the mediation room before their trial continued as the Indonesian Civil Procedural Law required. Seeing that they did not understand legal remedies and the consequences of validating their unregistered polygamy, the judge mediator explained that polygamy permits were for those who were going to practice polygamy and were not already polygamous even though unregistered. For the condition of their polygamy, which is permitted by the first wife and looks harmonious, the judge mediator sees that they can apply for the issuance of a retroactive marriage certificate to courts (from now on *isbat nikah*) for their unregistered polygamy. They revoked the polygamy permit case after performing the *istikhara* prayer to seek God's help in weighing the pros and cons of their decision in advance. They then submitted a new application in early August 2022 to validate their unregistered polygamy.¹ This application was accepted based on the provisions of contentious *isbat nikah* in Indonesian marriage law. Interestingly, this policy was taken by judges of Banjarbaru Religious Court after the issuance of the Supreme Court Circular Letter Number 3 of 2018 (ID: *Surat Edaran Mahkamah Agung*, hereinafter SEMA 3/2018), which instructs that the validation of unregistered polygamy through *isbat nikah* must be declared unacceptable.

Unregistered marriages (ID: *nikah siri*) are marriages performed without the presence of the Marriage Registrar (*Pegawai Pencatat Nikah*, hereinafter PPN), so the marriages are not recorded in the Office of Religious Affairs (*Kantor Urusan Agama*, hereinafter KUA).² Unregistered marriages that have complied with the rules

¹ As told by a Judge of PA Banjarbaru to researchers to describe parties' behaviors and situation of pre-trial and the trial of unregistered polygamy validation case number 511/Pdt.G/2022/PA.Bjb and 311/Pdt.P/2022/PA.Bjb.

² Abdul Ghofur Anshori, *Hukum Perkawinan Islam: Perspektif Fikih dan Hukum Positif* (Yogyakarta: UII Press, 2011), 210; Zainuddin and Afwan Zainuddin,

and conditions stipulated in a religious law are legal as per Article 2(1) of Marriage Law Number 1 of 1974 (hereinafter UUP 1974). However, these marriages do not have legal force; the state cannot guarantee their rights because they do not have an authentic deed, namely a marriage certificate, that proves their marriage is legal according to the prevailing laws and regulations.

Unregistered marriages have become familiar with various motives: socio-economic, cultural, asymmetric information, and legal avoidance.³ Although national studies on unregistered polygamy are not available, their actual numbers may be striking. Nurmila claims that most polygamy in Indonesia is illegal.⁴ Nisa notes the increasing presence of online *nikah siri* agencies in Indonesia, facilitating unregistered marriages.⁵ On a micro level, Bedner and Huis find that for the entire district of Cianjur in the years 2006-2008, only eight persons officially obtained court permission for polygamous marriage, while 42 of the 120 interviewed women informants stated that the polygamy of their husband was the main reason for divorce. This figure contrasts sharply with the eight persons who obtained court permission to enter a polygamous marriage, considering that Cianjur has a population of 2.1 million.⁶ Previous studies have informed us that

Kepastian Hukum Perkawinan Siri dan Permasalahannya Ditinjau dari Undang-Undang Nomor 1 Tahun 1974 (Yogyakarta: Deepublish, 2017), 11.

³ Euis Nurlaelawati, "Pernikahan Tanpa Pencatatan: Isbat Nikah Sebuah Solusi?," *Musawa Jurnal Studi Gender Dan Islam* 12, no. 2 (July 1, 2013): 261-77, <https://doi.org/10.14421/musawa.2013.122.261-277>; Ramdani Wahyu Sururie, "Polemik Di Seputar Hukum Isbat Nikah Dalam Sistem Hukum Perkawinan Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 11, no. 2 (December 1, 2017): 233-46, <https://doi.org/10.24090/mnh.v11i2.1299>.

⁴ Nina Nurmila, "Polygamous Marriages in Indonesia and Their Impacts on Women's Access to Income and Property," *Al-Jami'ah: Journal of Islamic Studies* 54, no. 2 (December 14, 2016): 419, <https://doi.org/10.14421/ajis.2016.542.427-446>; Nina Nurmila, *Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia* (Routledge, 2009).

⁵ Eva F. Nisa, "The Bureaucratization of Muslim Marriage in Indonesia," *Journal of Law and Religion* 33, no. 2 (August 2018): 291-309, <https://doi.org/10.1017/jlr.2018.28>.

⁶ Adriaan Bedner and Stijn van Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia: A Plea for Pragmatism," *Utrecht Law Review* 6, no. 2 (June 4, 2010): 175-91, <https://doi.org/10.18352/ulr.130>.

unregistered polygamy adversely impacts the wives' and children's well-being.⁷ Bedner and Huis state that the first wives feel betrayed because polygamy was done without their blessings, while the second wives knew the first wives' existence.⁸ In addition, Nurmila argues that unregistered polygamy has caused a drain on the family resources to support the additional wives.⁹ However, none of these studies has specifically discussed how to officialize unregistered polygamy in Indonesia, which takes into account fairness for the wives and children involved in the marriage.

The unregistered marriage subjects assume they can still get legal certainty by applying for an *isbat nikah* to the Religious Court. Such views sometimes have made unregistered marriage an option for a husband who wants to have more than one wife rather than following a polygamy procedure set up by the legislation.¹⁰ The procedure for filing polygamy permits to Religious Courts in legislation is stringent. Besides the requirements of getting permission from a Religious Court to commit polygamy, an applicant must also complete the statutory requirements for polygamy, which include written permission from the previous wife, financial capability, the ability to do justice to his household both for income and time or attention (Art. 4(2) and 5(1) of UUP 1974 and Art. 57-58(1) of *Kompilasi Hukum Islam* (hereinafter KHI)). In addition to being verbally proven in the trial, it is also necessary to prove it in writing by attaching the documents as evidence of the provisions of polygamy

⁷ Nurmila, "Polygamous Marriages in Indonesia and Their Impacts on Women's Access to Income and Property," 427–46; Theresia Dyah Wirastri and Stijn Cornelis van Huis, "The Second Wife: Ambivalences towards State Regulation of Polygamy in Indonesia," *The Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (May 4, 2021): 246–68, <https://doi.org/10.1080/07329113.2021.1912579>.

⁸ Bedner and Huis, "Plurality of Marriage Law and Marriage Registration for Muslims in Indonesia," 185.

⁹ Nurmila, "Polygamous Marriages in Indonesia and Their Impacts on Women's Access to Income and Property," 441–42.

¹⁰ Anshori, *Hukum Perkawinan Islam*, 213; Nia DiNata, *Berbagi Suami: Fenomena Poligami di Indonesia* (Jakarta: Gramedia Pustaka Utama, 2006), 9.

requirements.¹¹ This option has legal consequences for the status and rights of women and children from unregistered polygamy. For example, children born from unregistered polygamy cannot have a birth certificate with their fathers' name on it because of the marriage certificate's absence of their parent. This condition can jeopardize the child's opportunity to earn a living and inheritance if the father does not want to take responsibility and denies it, as experienced by Machica in the landmark case of the Indonesian Constitutional Court Number 46/PUU-VIII/2010 and Supreme Court Number 329 K/Ag/2014, regarding the status of children born from unregistered polygamy.¹²

Marriage law in Indonesia only regulates the procedures for validating unregistered monogamy. In contrast, unregistered polygamy has overstepped two official marriage procedures: the polygamy permit and the marriage registration. Judges have different opinions about methods to officialize it. Since they have performed it unregistered, *isbat nikah* is the proper method according to this pool. Others argue that they must first apply for a polygamy permit because when a husband wants to marry more than one wife, he must get a polygamy permit from the Religious Court. Consequently, applications for validating unregistered polygamy could be granted, rejected, or declared inadmissible, depending on the method adopted by the judges.

Therefore, the Supreme Court then issued SEMA 3/2018, which prohibits judges from accepting applications for the *isbat nikah* of unregistered polygamy. The Supreme Court's Circular shows its tendency toward formally applying the marriage law provisions in Indonesia. Even so, religious court judges practice the contentious *isbat nikah* to legalize unregistered polygamy, mainly when the parties involved accept their polygamous marriage and live peacefully. If in *isbat nikah* mentioned earlier, the

¹¹ Beni Ahmad Saebani, *Perkawinan dalam Hukum Islam dan Undang-Undang: Perspektif Fiqh Munakahat dan UU No. 1/1974 tentang Poligami dan Problematikanya* (Bandung: Pustaka Setia, 2008), 91.

¹² Alfitri Alfitri, "Whose Authority? Contesting and Negotiating the Idea of a Legitimate Interpretation of Islamic Law in Indonesia," *Asian Journal of Comparative Law* 10, no. 2 (December 2015): 202-4, <https://doi.org/10.1017/asjcl.2016.1>.

application is a voluntary case where there is only the applicant; in contentious *isbat nikah*, there will be the applicant(s) and respondent(s) or plaintiff(s) and defendant(s). So, in the *isbat nikah* of unregistered polygamy, the applicant could be the husband or the unregistered second wife, while the respondent could be the first wife.¹³

Given the various methods and lack of specific regulations, this article probes whether methods of validating unregistered polygamy in Indonesian Religious Courts have honored the due process of law. Cases of unregistered polygamy validation are obtained through search engines in the Supreme Court Directory Decision. Based on the Indonesian keyword “*isbat nikah poligami*,” 52 decisions are obtained. Thirteen decisions that are relevant to this study were found after analyzing them. With the Indonesian keyword “*poligami siri*,” 73 decisions are obtained. After scrutinizing them, it is found that eight decisions are relevant to this study. The twenty-one decisions are relevant because they discuss unregistered polygamy validation. This list is undoubtedly not exhaustive due to the limitations of the Supreme Court decision directory, including the keyword search feature, which is not sensitive, and not all religious courts upload their decisions to the web. To support the cases based on this sampling (*uji petik*), we also obtained cases from in-depth interviews with several Religious Court judges in East Kalimantan and South Kalimantan as well as observations of case registration through Legal Aid Posts (*Posbakum*) within the Religious Courts in East Kalimantan.

This article first discusses the absence of specific regulations as the cause of differences in judges' methods of validating unregistered polygamy. Then, civil lawsuits for validating unregistered polygamy will be presented based on the sampling. This section explores the judges' methods, the frequency of filing cases to get a verdict, and the consequences for the justice seekers. Then, this article examines which of the two methods follows the

¹³ Mahkamah Agung RI, *Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama (BUKU II)*, Revisi 2014 (Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2014), 145, http://pta-palu.net/perpustakaan/index.php?p=show_detail&id=653.

due process of law to show that the issue of polygamy does not always mean a violation of the rights of women and children from previous marriages. The problem turns out to be more complex when religious awareness becomes the motivation for all of them to practice polygamy voluntarily. As a result, the fulfillment of the rights of women who become subsequent wives and their children cannot be set aside by marriage law in Indonesia.

Loophole in the Marriage Law and Absence of Unregistered Polygamy Validation Methods

In the Indonesian Muslim marriage context, unregistered marriage is carried out by a man and a woman without the marriage registrar's presence, so the marriage does not have a marriage certificate. There is an assumption in the community that unregistered marriage is valid as long as it fulfills the terms and conditions of Islamic marriage, so there is no need to register their marriage.¹⁴ Article 2(1) of UUP 1974 states that a marriage is lawful if done according to the law of each religion and belief of the bride and groom. Article 2(2) of UUP 1974 adds that every marriage is recorded according to the prevailing laws and regulations.

Two interpretations developed towards the provisions of Article 2(1-2) of UUP 1974. First, Articles (1) and (2) can be read separately so that, in this case, marriage registration is only a mere administrative requirement and does not cause a marriage to be invalid if it is not registered. Second, Articles (1) and (2) are one entity, so the validity of a marriage is not only seen from a religious-normative view. However, it must also be seen from the legal administration. The marriage is considered valid if done as stipulated in the holy matrimony and recorded in KUA.¹⁵

After the constitutional court ruling on the Machica case, the first model's interpretation was increasingly emphasized, i.e., fulfilling religious matrimony requirements makes a marriage

¹⁴ Alfitri, "Whose Authority?," 196.

¹⁵ Dwiyana Achmad Hartanto, "Local Wisdom Of Sedulur Sikep (Samin) Society's Marriage In Kudus: Perspective Of Law Number 1 Year 1974 On Marriage," *Jurnal Dinamika Hukum* 17, no. 2 (2017): 133, <https://doi.org/10.20884/1.jdh.2017.17.2.723>.

legal.¹⁶ However, for a religious marriage to have a legal impact, it must be registered with the designated institution, KUA for Muslims, and the Registry Office for non-Muslims. For Islamic marriages, the existence of unregistered marriage can be validated through *isbat nikah* to the Religious Court as stipulated in Article 7(2) of KHI, as shown by Religious Court decisions accepting the application for *isbat nikah* of unregistered marriages.

The applications for *isbat nikah* submitted to the Religious Courts only pertain to several matters as per Article 7(3) of KHI, namely: 1) the existence of a marriage in the context of the settlement of divorce; 2) loss of Marriage Certificate; 3) there is doubt about whether or not one of the conditions of holy matrimony fulfilled; 4) the existence of a marriage that contracted before the enactment of UUP 1974 and; 5) marriage carried out by those who do not have marital barriers according to UUP 1974.

Only a few parties can submit such applications, namely husband and wife, their biological children, marriage guardians, or other parties who have interests.¹⁷ The decision of the *isbat nikah* application at the Religious Court is used to obtain the marriage certificate at KUA. The unregistered marriage is then officially recorded in the state administration. The marriage certificate benefits all marital-related administrations such as children's birth certificates, children's school registration, hajj pilgrimage trips, access to banking credit facilities, and utilization of government social assistance facilities.¹⁸

The provision of *isbat nikah* is a solution the state provides for people who do not have a marriage certificate.¹⁹ However, this

¹⁶ Alfitri, "Whose Authority?," 203.

¹⁷ Abd Shomad, *Hukum Islam: Penormaan Prinsip Syariah dalam Hukum Indonesia* (Jakarta: Kencana, 2017), 282.

¹⁸ Alfitri Alfitri, "Legal Reform Project, Access to Justice and Gender Equity in Indonesia," *Indonesian Journal of International Law* 9, no. 2 (2012): 292–308; Hoko Horii and Theresia Dyah Wirastri, "Living in a Legal Limbo: Mechanisms to 'Fix' The Legal and Social Positions of Unregistered Children in Indonesia," *The Indonesian Journal of Socio-Legal Studies* 2, no. 1 (September 7, 2022), <https://scholarhub.ui.ac.id/ijsls/vol2/iss1/1>.

¹⁹ Dian Mustika and Siti Marlina, "Integrated Marriage Itsbat: Analyzing The Polemics Behind Its Implementation," *Mazahib Jurnal Pemikiran Hukum Islam* 18, no. 1 (July 2, 2019), <https://doi.org/10.21093/mj.v18i1.1344>; Lilik Andaryuni, "The

solution has triggered the practice of unregistered marriage to become unregistered polygamy.²⁰ Indonesian Marriage law adheres to the principle of monogamy, but it is not absolute. In an exceptional situation, such as a husband wanting to have more than one wife, it is permissible as long as the law of his religion permits. A husband can practice polygamy if he meets the requirements specified by the law. He must apply to a Religious Court to get permission to marry again for reasons justified by law, namely: the wife is no longer able to carry out her obligations as a wife; the wife has a disability or suffers from an incurable disease, or the wife cannot give birth to offspring (Article 4(2) of UUP 1974 and Article 56(1) of KHI)). The reasons for polygamy in this law are alternative; one can be chosen, and if it can be proven, then polygamy can be granted by the Religious Courts.²¹ Also, he must fulfill the conditions in the form of approval from his previous wife/wives, the ability to guarantee all the needs of wives and children, and the ability to be fair to his wives and children (Article 5(1) of UUP 1974 and Article 55(2) of KHI). The terms of polygamy in this law are cumulative, i.e., all conditions must be fulfilled and proven to obtain polygamy permits from the Religious Courts.²²

In the submission to the Religious Court, he must provide such written evidence as affidavits from a doctor or hospital, from the wife(s) viz. a statement of no objection to being combined, from the employer or local authority for self-employed viz. a statement of income per month, and a statement that can act reasonably. Besides, there are additional conditions, namely a statement from the second wife that they do not mind being the second wife and the subject matter of the joint property with the previous wife, as evidenced by the ownership documents.

Program of Circuit Isbat Nikah as the Embodiment of Access to Justice in Indonesia," *Mazahib Jurnal Pemikiran Hukum Islam* 17, no. 1 (June 30, 2018), <https://doi.org/10.21093/mj.v17i1.1054>.

²⁰ M. Nurul Irfan, "Kriminalisasi Poligami dan Nikah Siri," *AL-'ADALAH* 10, no. 2 (February 28, 2017): 131, <https://doi.org/10.24042/adalah.v10i2.248>.

²¹ Mahkamah Agung RI, *Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama (BUKU II)*, 135.

²² Mahkamah Agung RI, 136.

Especially for Civil Servants, there are additional requirements, namely having to get permission from their superiors (Article 4(1) of Government Regulation Number 10 of 1983 and Number 45 of 1990)) and the ability to finance the lives of his wives and children as evidenced by an income tax statement.

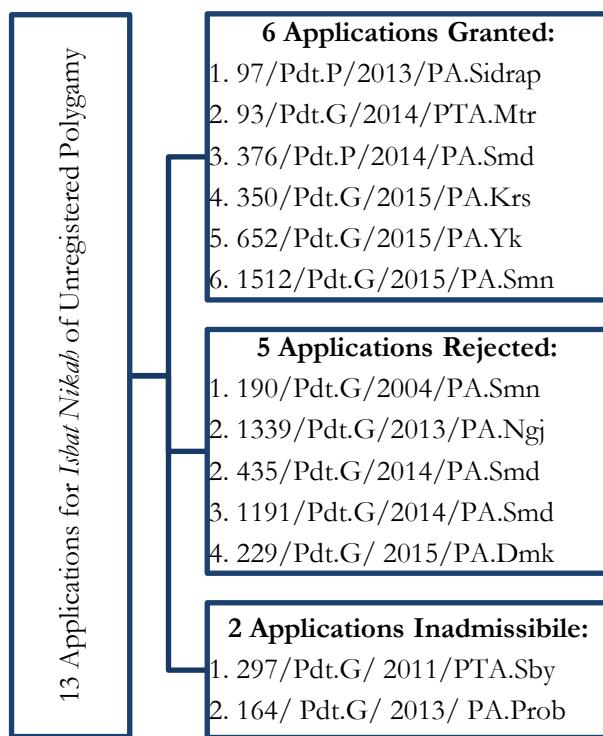
Religious Court judges have different opinions regarding how to officialize unregistered polygamy. Some consider they can apply for *isbat nikah* to legalize their marriage. The reason is that marriages that cannot prove their validity with a marriage certificate can then submit an *isbat nikah* application to the Religious Court (Article 7(2) of KHI)). Others consider applying for a polygamy permit, arguing that when a husband wants to have more than one wife, he must apply for a polygamy permit and obtain a permit from the Religious Court through a verdict (Article 4(1) of KHI)). These different methods result in decision disparity depending on who handles the case. This disparity occurs in several Religious Courts throughout Indonesia based on case sampling of their decisions.

Civil Cases in Legalizing Unregistered Polygamy in the Religious Courts

a. Before the 2018 Supreme Court Circular Letter: Isbat Nikah and/or Polygamy Permit?

Prior to SEMA 3/2018, which stated that judges might not accept *isbat nikah* applications for validating unregistered polygamy, Religious Court judges adopted two methods for validating them. The first method is *isbat nikah*. Of the 13 decisions on *isbat nikah* applications reviewed, six cases were granted, five were rejected, and two were declared inadmissible (NO), as described in Figure 1.

Figure 1. *Isbat Nikah* as the Method of Unregistered Polygamy Validation

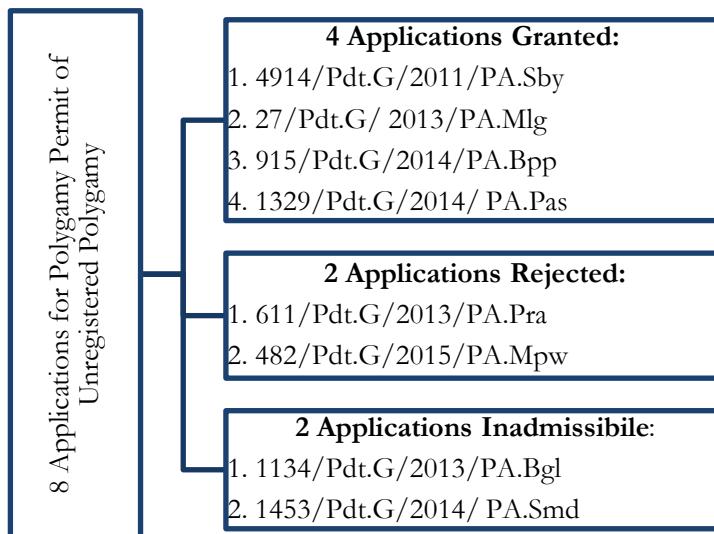


PA: a Religious Court of First Instance

PTA: a Religious Appeal Court

As for the second method, the unregistered polygamists were asked to apply for a polygamy permit to officialize their marriage. Four cases were granted, and two were rejected. The petition was granted due to public utility (*maslaha*), justice, and following state and Islamic laws (Islamic Jurisprudence, hereinafter *Fiqh*). The application was rejected because the marriage contract contravenes the legislative provisions and *Fiqh*. Meanwhile, the case was declared inadmissible (NO) when there was a lack of procedural elements in filing their cases. A summary of the eight cases is in Figure 2.

Figure 2. Polygamy Permit as the Method of Unregistered Polygamy Validation



The judge's legal considerations on the above decisions (Granted, Rejected, and Declared Inadmissible) have followed the formal and material laws in force in Indonesia. For example, in the case 190/Pdt.G/2004/PA.Smn, the Court rejected the application for a polygamy permit because the applicant, as the husband, did not receive permission from his first wife. Meanwhile, marriage law in Indonesia requires the permission of the first wife to be able to have polygamy as per Article 5(1) of the 1974 UUP and Article 58(1-2) of KHI.

In case number 1512/Pdt.G/2015/PA.Smn, the same Court accepted the husband's application for unregistered polygamy *isbat nikah* even though the applicant's reasons for remarrying did not meet the requirements for permitted polygamy justified by law, namely: the wife is no longer able to carry out her obligations as a wife; the wife has a disability or suffers from an incurable disease, or the wife cannot give birth to offspring (Article 4(2) of UUP 1974 and Article 56(1) of KHI)). Because the applicant's first wife had permitted him to remarry and the applicant was

economically capable of supporting his two households and acting reasonably, the Court accepted the *isbat nikah* application for the unregistered polygamy he had previously committed. The judge believed that the application fulfilled the intent of Article 5(1) of the 1974 UUP and Articles 55, 56, and 58 of the KHI.

Legal problems arise when we examine the frequency of filing cases by the same applicant. In some cases, the applicants must file their case more than once using a different method of legalizing their unregistered polygamy to get the desired decision, as explained in Table 1. Granting these requests cannot be separated from the judges who examine the application, which is keener on one method than another.

Table 1. The Frequency of Applications for Unregistered Polygamy Validation

Freq.	Registry Number	Case Type	Decision
1x	4914/Pdt.G/2011/PA.Sby	Polygamy Permit	Granted
1x	27/Pdt.G/ 2013/PA.Mlg	Polygamy Permit	Granted
1x	611/Pdt.G/ 2013/PA.Pra	Polygamy Permit	Rejected
1x	1134/Pdt.G/ 2013/PA.Bgl	Polygamy Permit	NO (Declared Inadmissible)
1x	1329/Pdt.G/ 2014/PA.Pas	Polygamy Permit	Granted
1x	482/Pdt.G/2015/PA.Mpw	Polygamy Permit	Rejected
1x	190/Pdt.G/2004/PA.Smn	<i>Isbat Nikah</i>	Rejected
1x	97/Pdt.P/2013/ PA.Sidrap	<i>Isbat Nikah</i>	Granted
1x	164/ Pdt.G/2013/PA.Prob	<i>Isbat Nikah</i>	NO
1x	1339/Pdt.G/2013/PA.Ngj	<i>Isbat Nikah</i>	Rejected
1x	435/Pdt.G/2014/ PA.Smd	<i>Isbat Nikah</i>	Rejected
1x	350/Pdt.G/ 2015/PA.Krs	<i>Isbat Nikah</i>	Granted
1x	1512/Pdt.G/2015/PA.Smn	<i>Isbat Nikah</i>	Granted
1x	229/Pdt.G/2015/PA.Dmk	<i>Isbat Nikah</i>	NO
2x	1706/Pdt.G/2010/PA.Bdw	<i>Isbat Nikah</i>	NO
	297/Pdt.G/ 2011/PTA.Sby	<i>Isbat Nikah</i>	NO
2x	663/Pdt.G/2014/PA.Bm	<i>Isbat Nikah</i>	Rejected
	93/Pdt.G/2014/PTA.Mtr	<i>Isbat Nikah</i>	Granted
2x	183/Pdt.G/2014/PA.Bpp	Polygamy Permit	Declared failed

Freq.	Registry Number	Case Type	Decision
	915/Pdt.G/ 2014/PA.Bpp	Polygamy Permit	Granted
3x	1191/Pdt.G/2014/PA.Smd	<i>Isbat Nikah</i>	Rejected
	1453/Pdt.G/ 2014/ PA.Smd	Polygamy Permit	NO
	376/Pdt.P/ 2014/ PA.Smd	<i>Isbat Nikah</i>	Granted
3x	N/A	Polygamy Permit	Revoked
	N/A	Polygamy Permit	Revoked
	652/Pdt.G/2015/PA.Yk	<i>Isbat Nikah</i>	Granted

Source: Case Sampling of the Directory of Supreme Court Decisions and Observation in the Religious Courts

An example is the application for the unregistered polygamy validation submitted to the Samarinda Religious Court. The applicant initially applied for an *isbat nikah* (case number 1191/Pdt.G/2014/PA.Smd). The judges rejected the application and suggested applying for a polygamy permit. Based on these suggestions, the Applicant submitted the case for the second time through a polygamy permit (case number 1453/Pdt.G/2014/PA.Smd), but the judges declared the case inadmissible. They argued that the request was unfounded because he applied for a polygamy permit to marry a second wife he had married unrecorded. He was advised to apply for the *isbat nikah* again. The applicant resubmitted for the third time through an *isbat nikah* application (case number 376/Pdt.P/2014/PA.Smd). He obtained the desired result, i.e., the application was granted. The difference in the decision on the first and the second applications is inseparable from the different judges examining them. Thus, in the third application, the judges were adjusted to ones who tend towards *isbat nikah* to validate unregistered polygamy.

b. After the 2018 Supreme Court Circular Letter: Isbat Nikah and not Polygamy Permit?

There are disparities in the decisions of Religious Court judges in cases of validating unregistered polygamy. The absence of definitive provisions regarding the validation method has caused injustice and legal uncertainty for the parties involved in the marriage. The Supreme Court attempts to overcome this loophole

through jurisprudence²³ in the form of a Circular Letter.²⁴ The Circular is SEMA 3/2018, which concerns formulating the 2018 Supreme Court Chamber Plenary Meeting results as guidelines for implementing Religious Court duties. It contains instructions that applications for *isbat nikah* of unregistered polygamy, even for the reason of the child's interests, must be declared unacceptable. An application for the child's origins can be submitted to the Religious Court to ensure the child's interests are fulfilled.

Based on the observation and documentation of integrated *isbat nikah* services²⁵ in East Kalimantan for 2022 and 2023, Religious Court judges have implemented the SEMA 3/2018. The Courts apply this rule when dealing with applications for *isbat nikah* of unregistered polygamy.²⁶ Interestingly, some unregistered marriages whose *isbat nikah* applications were rejected are polyandry. The case in point is in Tanah Grogot Religious Court. The applicant is a woman who was officially married but was abandoned by her husband for a long time without clarity regarding her status: married or divorced. The woman then remarried another man without registration. At the same time, the

²³ Simon Butt and Nicholas Parsons, "Judicial Review and the Supreme Court in Indonesia: A New Space for Law?," *Indonesia*, no. 97 (2014): 55–85, <https://doi.org/10.5728/indonesia.97.0055>.

²⁴ Latifatul Fajriyyah and Alfitri Alfitri, "Hearsay Evidence Admissibility: Due Process and Evidentiary Rules in Muslim Marriage Legalization (Isbat Nikah)," *Fiat Justicia: Jurnal Ilmu Hukum* 16, no. 3 (October 4, 2022): 273–74, <https://doi.org/10.25041/fiatjusticia.v16no3.2464>.

²⁵ Integrated services are a series of activities carried out together and coordinated at a particular time and place between the District Court or Religious Court/Sharia Court, the Population and Civil Registration Service of the Regency/City, the KUA in mobile services to provide marriage validation services (*isbat nikah*) and other cases by the authority of the District Court and marriage confirmation by the authority of the Religious Court/Sharia Court and to fulfil the registration of marriages and birth registration (The Supreme Court Regulation or PERMA 1/2015).

²⁶ Alfitri Alfitri, "Pengesahan Poligami Siri di Indonesia: Tinjauan Hukum dan Masyarakat," Laporan Penelitian (Samarinda: Lembaga Penelitian dan Pengabdian kepada Masyarakat (LPPM), UIN Sultan Aji Muhammad Idris Samarinda, 2022); The Report of Integrated *Isbat Nikah* Samarinda Religious Court year 2022, The Report of Report of Integrated *Isbat Nikah* of Sangatta Religious Court year 2022, The Report of Integrated *Isbat Nikah* of Tanah Grogot Religious Court year 2022 and Disdukcapil of Tanah Grogot year 2021.

status of her first marriage was still active according to the law because there had been no divorce through a trial at the Religious Court. The woman thought they were divorced because they had been separated for a long time. In 2018, her second marriage produced one child. When the KUA/Ministry of Religious Affairs, Religious Courts, and the Population and Civil Registry Service of Tanah Grogot opened registration for integrated *isbat nikah*, she applied. However, her application for an *isbat nikah* was rejected because, according to the law, her status was still considered to be that of the wife of her first husband.²⁷ The second marriage, which could not be legalized through the *isbat nikah* on 6 October 2022, was remarried at KUA Batu Engau. It turned out that the woman's first husband had died, so her status was divorced by death. KUA Batu Engau remarried her second marriage based on the death certificate from the Civil Registry office.²⁸

SEMA is a policy from the Supreme Court that aims to overcome problems that arise when handling cases in court.²⁹ In this study, the problem is the need for more methods for validating unregistered polygamy in Religious Courts. After the birth of SEMA in 3/2018, religious court judges only sometimes used it to solve this problem. The unregistered polygamy case number 511/Pdt.G/2022/PA.Bjb and 311/Pdt.P/2022/PA.Bjb at the Banjarbaru Religious Court, South Kalimantan, is a case in point. This couple (the husband, legal wife, and unregistered wife) came together to file a case at the Banjarbaru Religious Court.

The following narration is excerpted from interviews with a Banjarbaru Religious Court judge to describe the parties' behaviors, judges' perceptions, pre-trial situations, and the trial of unregistered polygamy validation. These elements are

²⁷ The Report of Integrated *Isbat Nikah* of the Tanah Grogot Religious Court year 2022; interview with Penghulu of KUA Batu Engau, Tanah Grogot, 6 and 19 October 2022.

²⁸ Interview with Penghulu of KUA Batu Engau, Tanah Grogot, 19 Oktober and 10 November 2022.

²⁹ H. P. Panggabean, *Fungsi Mahkamah Agung dalam praktik sehari-hari: upaya penanggulangan tunggakan perkara dan pemberdayaan fungsi pengawasan MA*, Cet. 1 (Jakarta: Pustaka Sinar Harapan, 2001), 144.

instrumental in the sociolegal approach adopted in this study.³⁰ The couple exited the car together and headed to the service center in Banjarbaru Religious Court, *Pelayanan Terpadu Satu Pintu* (one-door integrated service), aka PTSP. They then received information and registration services regarding the case they would submit. Due to their limited understanding of the law, this couple submitted a lawsuit letter to the Court through the Court's legal aid post (*Posbakum*) to register a polygamy permit case with the Banjarbaru Religious Court.

At the first trial, all parties were present; the husband, legal wife, and unregistered wife came to the Court in July 2022 to attend the trial. In the usual procedure for polygamy permit cases, the judges advised the couple to maintain the integrity of their first household and abandon their intention to apply for a polygamy permit to legalize their unregistered second marriage. Because this peaceful effort was unsuccessful, the panel directed them to a mediation room a judge panel member facilitated.

Following applicable procedural law based on PERMA 1/2016 concerning Mediation Procedures in Court, all civil lawsuits must undergo mediation, including polygamy permit cases. After mediation, the parties stated that they would withdraw the case because they knew that the legal impact of a polygamy permit was different from an *isbat nikah* for their unregistered polygamy. If the panel of judges grants the polygamy permit, they must remarry before the marriage registrar of KUA. However, if they apply for an *isbat nikah*, they officially declare their unregistered marriage. KUA only needs to record the Religious Court's decision on the *isbat nikah* and then issue a marriage certificate for their polygamy.

The couple then asked the mediator judge for time to *istikhharah* prayer, whether to continue with the polygamy permit or *isbat nikah*. After that, the couple agreed to withdraw the case. The trial continued after receiving a report from the mediator judge regarding the parties' wishes to withdraw the case. It confirmed the revocation on 27 July 2022 (case number 511/Pdt.G/2022/PA.Bjb). The judges confirmed that the legal

³⁰ Alfitri, *Islamic Law and Society in Indonesia: Corporate Zakat Norms and Practices in Islamic Banks*, 1st ed. (Abingdon, Oxon: Routledge, 2022), x-xi.

impacts of polygamy permits and *isbat nikah* were different, as mentioned by the mediator judge. Moreover, the parties have no dispute or problem regarding the polygamy that has been carried out. When registering and undergoing trial at the Religious Court, the three of them seemed close because, religiously, a polygamy relationship existed between the three of them.

Five days later, this couple registered an *isbat nikah* to validate the unregistered polygamy that had been carried out (case number 311/Pdt.P/2022/PA.Bjb). Although the motive for polygamy was not revealed, it was found that the first wife stated that this polygamy was based on religious orders. The wife wants to observe religious orders through the practice of polygamy and is willing to be married. Even more surprising to the judges was that the first wife was the one who looked for a woman to be a second wife so that her husband could marry her without registration. The wife provides full support in this polygamous marriage even though the legal wife has no shortcomings, such as being barren or unable to carry out her obligations as a wife. This *isbat nikah* case examination was carried out over three trials.

The judges granted the *isbat nikah* application on 30 August 2022. One of the considerations used was the *isbat nikah* rules in Article 7(2-3) of KHI. They also used Article 5 of Law Number 48 of 2009 concerning Judicial Power, which states that judges must explore the laws that live and develop in society. In the judge's understanding, polygamy is a norm that is accepted and practiced by Muslims in Indonesia and, therefore, must be recognized by the state. Article 229 of KHI states that judges must pay serious attention to the values that exist in society in resolving cases submitted so that their decisions follow a sense of justice. Moreover, the Respondent's willingness to participate in polygamy is the basis for granting an *isbat nikah* of unregistered polygamy. Finally, the judges refer to the Decree of the Chief Justice of the Supreme Court Number KMA/032/SK/IV/2006 concerning the Implementation of Book II of Guidelines for the Implementation of Duties and Administration of the Court (hereinafter, Book II), page 144 number (4). The Decree states that if, while examining the *isbat nikah* application, it is known that her husband is still legally married to another woman, the previous

wife must be a party (aka contentious *isbat nikah*). The petition must be declared inadmissible if the Petitioner does not want to change his petition by including the previous wife as a party. In case number 311/Pdt.P/2022/PA.Bjb, the Respondent, as the Petitioner's first wife, gave permission and was willing to attend the trial, so the petition was granted. The joint assets between Petitioner I and the Respondent were also determined in the decision as per the Book II requirements.

The same legal considerations can be found in accepting applications for the contentious *isbat nikah* of unregistered polygamy in case number 3045/Pdt.G/2019/PA.Cbn. of Cibinong Religious Court of West Java province in 2019 and 175/Pdt.G/2013/PA.Kla. of Kalianda Religious Court of Lampung province in 2013.

Even though SEMA is a policy, it has legal relevance and contains instructions for administering justice.³¹ As a result, judiciaries must implement it to achieve the desired goals.³² In the context of polygamy, it is the orderly administration of its implementation and justice and legal certainty for the parties involved. The prevalence of SEMA in various decisions citing SEMA has increased, while the prevalence of jurisprudence since the existence of SEMA has been stable. In fact, according to Huis, as many as 75% of decisions citing SEMA are cases in the category of Civil Religion (divorce).³³ Based on a survey by Putra and Syahr, 90.18 of the judges were respondents who used SEMA to consider and decide cases.³⁴ However, in the case of unregistered polygamy validation, there is an act of activism by judges who follow the principle of due process of law, namely guaranteeing a fair legal process that gives a person the opportunity to know the process

³¹ H. R. Ridwan, *Diskresi dan Tanggung Jawab Pemerintah*, Cetakan pertama (Yogyakarta: FH UII Press, 2014), 145; Panggabean, *Fungsi Mahkamah Agung dalam praktik sehari-hari*, 144.

³² H. R. Ridwan, *Hukum Administrasi Negara* (Jakarta: RajaGrafindo Persada, 2006), 181–82; Ridwan, *Diskresi dan Tanggung Jawab Pemerintah*, 145.

³³ Fajriyyah and Alfitri, "Hearsay Evidence Admissibility."

³⁴ Sri Gilang Muhammad Sultan Rahma Putra and Zulfia Hanum Alfi Syahr, *Tingkat Kepatuhan dan Implementasi terhadap Hasil Rapat Pleno Kamar Mahkamah Agung oleh Hakim di Pengadilan*, Cetakan ke-1 (Rawamangun, Jakarta: Kencana, 2021), 20–21.

and have the opportunity to be heard as to why his or her rights to life, liberty, and property have been confiscated or eliminated.³⁵

Contentious *Isbat Nikah* and Due Process of Law

Due process of law is a constitutional guarantee that confirms that the law is not enforced irrationally, arbitrarily, or without certainty.³⁶ Similarly, the rights of women and children guaranteed by the Constitution include the right to have a family and continue the lineage; the right to survival, growth, and development; the right to recognition, guarantee, protection, and certainty of fair law and equal treatment before the law; the right to welfare.³⁷ All these rights are related to married life, including polygamy. Each polygamy household requires recognition before the law through a marriage certificate. This includes unregistered polygamy that the first wife approves and the household functions as a family. As a result, the wives and children involved in the marriage, for example, are guaranteed their rights to child support and maintenance by law.

The actual number of polygamy in Indonesia is quite significant but is not known for sure because they often occur unrecorded. According to Nurmila and Bennet, the estimated number of polygamy in Indonesia could reach 4,800,000³⁸, and

³⁵ Charles M. Hough, "Due Process of Law: To-Day," *Harvard Law Review* 32, no. 3 (1919): 218–33, <https://doi.org/10.2307/1328129>; Harry Groves, "Due Process of Law: A Comparative Study," *Marquette Law Review* 45, no. 2 (January 1, 1961): 257–71.

³⁶ Atip Latipulhayat, "Editorial: Due Process of Law," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 4, no. 2 (2017): i–iv.

³⁷ Hamidin Hamidin and Alfitri Alfitri, "Safeguarding Women's Constitutional Rights in the Judicial Reviews of Marriage Law on the Minimum Married Age Limit," *Mazahib Jurnal Pemikiran Hukum Islam*, July 12, 2021, 103–42, <https://doi.org/10.21093/mj.v20i1.3307>; Muhammad Alwi Al Maliki, J. M. Muslimin, and Asmawi Asmawi, "Equality of Rights and Courts: Constitutional-Based Arguments on the Fixed-Standard of Minimum Age for Marriage in Lights of Maqāshid al-Syāriyah," *Mazahib Jurnal Pemikiran Hukum Islam* 20, no. 2 (2021): 285–320, <https://doi.org/10.21093/mj.v20i2.3645>.

³⁸ Nina Nurmila and Linda Rae Bennett, "The Sexual Politics of Polygamy in Indonesian Marriages," in *Sex and Sexualities in Contemporary Indonesia* (Routledge, 2014), 70; Lilawati Kurnia and Nurbaiti, "Online Halal Dating: AyoPoligami and the Contestations of Polygamy as the 'New Normal' in

the majority are not recorded. Of this number, not all of them are necessarily disharmonious, and the first wife rejects their existence³⁹ Alternatively, marked by domestic violence.⁴⁰ From the three cases above, it turns out that there is a reality of unregistered polygamy that functions as a family. Denial of their rights does not align with the principle of due process of law.

The meaning of due process of law is not only in the form of formal application of laws or regulations (which are formulated reasonably) but also contains guarantees of the citizen's right to freedom. The definition is then translated into legal norms in Law Number 48 of 2009 concerning Judicial Authority. The provisions of due process of law are as follows: the court shall adjudicate according to the law with no distinction between people (viz. equality before the law) as per Article 4(1).⁴¹ By not accepting the application for an *isbat nikah* of unregistered polygamy that the first wife approved, it means that the Religious Court is ignoring the rights of the wife and their children to be recognized before the law along with the rights arising from the marriage. The provision of contentious *isbat nikah*, which may be used to validate unregistered polygamy as long as the husband as applicant places the first wife as respondent in his application, has been regulated in the revision of Book II since 2009, long before SEMA 3/2018.

If analyzed, the ratio *Legis* of SEMA 3/2018 is to regulate the implementation of polygamy so that it follows the provisions of marriage law, i.e., permission from the legal wife, which is determined through a trial in a Religious Court by fulfilling

Indonesia," in *Gender, Islam and Sexuality in Contemporary Indonesia*, ed. Monika Arnez and Melani Budianta (Singapore: Springer Nature, 2024), 106, https://doi.org/10.1007/978-981-99-5659-3_6.

³⁹ Wirastri and van Huis, "The Second Wife."

⁴⁰ Nurmila, "Polygamous Marriages in Indonesia and Their Impacts on Women's Access to Income and Property"; Nurmila, *Women, Islam and Everyday Life*; Alfitri Alfitri, "Protecting Women from Domestic Violence: Islam, Family Law, and the State in Indonesia," *Studia Islamika* 27, no. 2 (August 3, 2020): 273–307, <https://doi.org/10.36712/sdi.v27i2.9408>.

⁴¹ There are still three other legal norms on due process of law in the judicial authority law. Still, they are more related to criminal trials, namely the norm of evidence (Article 6(2)), the norm of writ (Article 7), and the norm of presumption of innocence) Article 8(1).

cumulative requirements related to financial ability and acting reasonably (Article 5(1) of UUP 1974 and Article 55(2) of KHI) and alternatives related to the wife's ability to carry out her role (Article 4(2) of UUP 1974 and Article 56(1) of KHI). One Religious Court judge who was involved in a meeting of the Supreme Court's Religious Chamber in Jakarta stated that:

*The original purpose was to maintain legal order. Suppose the *isbat nikah* of unregistered polygamy is allowed. In that case, there will be many cases like that [carried out by the community], the same as the *isbat nikah* application for *nikah siri* [triggered by the rise in unregistered marriages]. However, the unregistered polygamy validation is even more complicated because two women [are involved] in the marriage, right? One way to regulate it is to return it to its **basic norm** [i.e., polygamy permit]; hence, let them apply for a polygamy permit so that there is legal awareness from the community.⁴²*

Moreover, SEMA 3/2018 also aims to protect the rights of a legitimate wife and her children from unregistered polygamy carried out by the husband arbitrarily, namely without the consent of the first wife and then in the course of his polygamy, the husband is unfair in the distribution of sustenance and attention. Even so, assuming all unregistered polygamy is an arbitrary action and then denying legal recognition of its existence through *isbat nikah* has ignored the principle of due process of law concerning equality before the law.

Returning to the '**basic norm**' mentioned in the interview above means that if a man wants to practice polygamy, then he must first apply for a polygamy permit from the Religious Court. This requirement needs to be revised for unregistered polygamists, whose marriage is permitted by the first wife (or even fully supported by the first wife by finding a second wife for her husband, as in the case above). This is because when the parties apply for a polygamy permit to the Religious Court, they will submit two separate applications. When applying for a polygamy permit, the Court will only examine the main case,

⁴² Interview with the Head of the Tenggarong Religious Court, 31 May 2022.

namely the polygamy permit. As a result, previously unregistered polygamy is considered to have never occurred, even though the marriage has produced children. After the Court allows the husband to remarry, the parties will remarry at KUA so that the marriage date recorded on the marriage certificate is the last, not the previous date of the unregistered polygamy. Then, the father must submit a parentage application for children born from the marriage so that they have a civil relationship with their father. In other words, when applying, the parties pay the court costs twice, including attorney's fees. Things are different if *isbat nikah* is used to validate them. After the Religious Court validates the unregistered polygamy, the child born from the marriage becomes a legitimate child because he was born from a legitimate cause, namely a legitimate marriage (Article 42 of UUP 1974 and Article 99 of KHI). Parents who practice unregistered polygamy will receive a marriage certificate from KUA. In the certificate, the date of unregistered polygamy will be listed on the marriage certificate as the date of marriage so that the child automatically becomes a legitimate child. In other words, the parties only submit one application to the Religious Court to validate the marriage and the child born. As a result, the polygamy permit as the method for validating unregistered polygamy approved by the legitimate wife eliminates the principle of simple, fast, and low-cost justice. It is an essential principle in the trial and implementation of procedural law to provide justice to those seeking justice. It ensures that civil lawsuits are carried out at a reasonable procedure, time, and cost.⁴³

There was also an impact on joint-matrimony assets and inheritance for the wives, given its validation method. Joint-matrimony property, often used with the term *harta gono-goni*, are assets obtained by husband and wife while living a household life (Article 35(1) UUP 1974, Article 9 of KUH Perdata). When the parties submit an *isbat nikah*, the second wife, who is married unregistered, will get her full rights to the marital property because the state has recognized her unregistered polygamy as legitimate based on the Court's determination. If applying for a

⁴³ Natsir Asnawi, *Hukum Acara Perdata: Teori, Praktik, Dan Permasalahannya Di Peradilan Umum Dan Peradilan Agama* (Yogyakarta: UII Press, 2016), 28.

polygamy permit, the unregistered wife will lose her right to shared assets and cannot claim them.⁴⁴

Suppose A and B were officially married and recorded in the KUA in 2000. During the marriage, they acquired assets in the form of 3 ha of land. In 2003, A and C married without registration and, after living in the household, got assets inland 6 ha. Then, in 2006, the parties wanted to legalize their marriage. When the parties propose an *isbat nikah*, the 3 hectares of land become joint-matrimony property between A and B. The 6 hectares become joint-matrimony assets among A, B, and C. However, it is different when the parties apply for the polygamy permit. The land assets of 3 ha and 6 ha will become joint assets only between A and B, while C does not have shared assets because the unregistered marriage of A and C is considered never to occur. In 2006, the marriage was considered between A and C based on polygamy permits from the Court. The same implication applies to the issue of inheritance when the husband dies. Before the inheritance is distributed to all the deceased's heirs, the joint-matrimony property must be given to his wives first.

Although *isbat nikah* as the method for validating unregistered polygamy approved by the legal wife seems to provide more benefits in terms of time and trial costs and fulfillment of the rights of the wife and children, it also creates the long-term impact of breaching the marriage law, i.e., (Articles 2(2), 4, and 5 of UUP and Articles 57-58 of KHI related to the official procedure for polygamy). Suppose the Religious Court can validate unregistered polygamy. In that case, it gives the impression to the public that it is permissible to do so without legal procedures (permission from the Religious Court and registration at the KUA). The public will believe they can still get legal certainty by applying for an *isbat nikah* to the Religious Court.⁴⁵ This condition will make the legal objectives of regulating polygamy, i.e., administrative order and

⁴⁴ M. Yahya Harahap, *Hukum Acara Perdata: Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan* (Jakarta: Sinar Grafika, 2015), 130.

⁴⁵ Nurmila, *Women, Islam, and Everyday Life*; Nurmila, "Polygamous Marriages in Indonesia and Their Impacts on Women's Access to Income and Property"; Wirastri and van Huis, "The Second Wife"; DiNata, *Berbagi suami*.

protection of the rights of women and children, challenging to be realized in Indonesia.

Based on the analysis of the decision and observation of mediation of cases in the Religious Court, the dilemma related to validating unregistered polygamy is the first wife's objections to the marriage.⁴⁶ Granting the application for *isbat nikah* of this kind of unregistered polygamy would undoubtedly hurt the first wife's feelings of justice because they felt they had been betrayed by the husband and the second wife he married without her blessing. Suppose the first wife does not want to approve the unregistered polygamy and asks for a divorce. In that case, it certainly does not matter because the mechanism is there, and the material rights of the first wife and children could be met from the divorce provision later.

The conditions are certainly different from the contentious *isbat nikah* provisions in Book II (2009 edition and 2013 revised edition) because their existence aims to prevent legal avoidance in the case of an unregistered marriage which turns out to be unregistered polygamy which the legal wife does not approve. Based on Book II (pages 209-210, edition 2009; pages 154-155, revised edition 2013), which regulates the process of filing, examining, and completing the *isbat nikah* cases, it is stated that reviewing the *isbat nikah* application submitted by either the husband or the wife is contentious by subjecting the wife or

⁴⁶ Cases in point are unregistered polygamy that ended in divorce at the Samarinda Religious Court. Researchers mediated both cases in the mediation room in 2022. The first case is divorce case No. 1584/Pdt.G/2022/PA.Smd. The plaintiff wanted to divorce his wife because of ongoing disputes that could not be resolved. The plaintiff's reason was that the wife demanded too much economic money while he was unemployed (57 years old). In mediation, it was revealed that the husband had remarried another woman without her knowledge. The wife wanted to reconcile with her husband if she divorced the woman. Meanwhile, the husband wanted to keep his unregistered wife and did not want to provide maintenance for his legal wife after the divorce. The second is divorce case lawsuit No. 1667/Pdt.G/2022/PA.Smd. The plaintiff finally decided to divorce her husband, who had been practicing polygamy without her knowledge and permission since 2018. The husband had also not returned home for two years because his workplace was far from home (but he lived with his second wife there). Although her husband begged her to stay with a promise to be fair, her wife no longer believed him because he had betrayed her.

husband who does not apply to the Respondent's party; the product is in the form of a decision which can be seeking an appeal and cassation. Furthermore, if in the process of examining the application for the *isbat nikah*, it is known that a legal marriage still binds the husband with another woman, then the previous wife must be made a party to the case. The request must be declared inadmissible if the applicant wants to keep his application the same by not entering his previous wife as a party. This means that the keyword of the condition of unregistered polygamy is the **good faith** of the parties involved, namely, the wife first knowing the polygamy plan that will be carried out and giving permission to the husband to do it. However, they do polygamy without registering it for various reasons: religious understanding that there is no obligation to register marriage, assumptions about the length and difficulty of fulfilling the administrative requirements for polygamy permits in Religious Court, or the reinforcement of the stereotype that men's high sexual desires must be fulfilled through the path that is following Islamic law (polygamy) rather than falling into adultery.

Unfortunately, judges will no longer be allowed to use this contentious *isbat nikah* later. The revision of Book II as a guideline for implementing the duties and administration of Religious Courts was completed in 2018. This revision is because the last revision of Book II in 2013 was deemed no longer appropriate to current needs due to the many new norms regulated in several regulations, both Laws, Government Regulations, Supreme Court Regulations, and Supreme Court Circulars. One of the revised materials is the application for *isbat nikah*, which includes the provisions of SEMA 3/2018; consequently, Religious Court judges must declare that *isbat nikah* of unregistered polygamy is unacceptable, and the perpetrators must apply for a polygamy permit (page 131). The 2018 Revision of Book II has yet to be implemented because the Supreme Court has not issued a Decree on its implementation. When this revision of Book II officially applies in Religious Courts, and judges want to follow these provisions, the guarantee of due process of law for parties involved in unregistered polygamy will be ignored.

A judge must explore, follow, and understand the values that develop in society in giving a verdict to provide legal certainty for a society based on justice. Religious Court judges often use this rule in making just decisions to realize the public utility (*maslaha*).⁴⁷ Not infrequently, the judges try to find the law and make decisions by harmonizing *Sharia* with the applicable law so that no violations occur or at least slightly deviate from the legislation for public utility and justice (aka *contra legem* doctrine).⁴⁸ Hence, judges should not stop at the provisions of the revised Book II regarding *isbat nikah* alone in deciding cases of unregistered polygamy validation but should also pay attention to a fair legal process for the parties involved.

Conclusion

Based on a study of the Religious Courts' verdicts throughout Indonesia regarding unregistered polygamy validation, there are differences in methods of handling them: *isbat nikah* vs polygamy permit. The Supreme Court aims to overcome the problems through policies (SEMA) and internal regulations (PERMA or KMA), compiled in Book II, which serves as a guideline for implementing the duties and administration of Religious Courts. Unfortunately, the policies and internal regulations of the Supreme Court still overlap and often conflict with each other. In this context, a conflict exists between SEMA 3/2018 and KMA/032/SK/IV/2006 concerning implementing Book II in its revised editions of 2009 and 2013. The latest revision of Book II in 2018, still suspended awaiting the latest Supreme Court Decree, will prohibit the Religious Court from accepting applications for *isbat nikah* of unregistered polygamy. This shows its tendency to the formal application of the marriage law provisions and denying the reality of polygamy that functions in society.

All these complicated problems stemmed from the government's ambiguous attitude in regulating marriages in Indonesia. On the one hand, the government introduced

⁴⁷ Jonaedi Efendi, *Rekonstruksi Dasar Pertimbangan Hukum Hakim* (Jakarta: Prenada Media, 2018), 110.

⁴⁸ M. Fauzan, *Kaidah Penemuan Hukum Yurisprudensi Bidang Hukum Perdata* (Jakarta: Prenada Media, 2014), 42.

bureaucracy in marriage by requiring marriage registration. On the other hand, the government still recognizes marriage by religion only. Nisa believes the condition of being trapped between the validity of marriage versus the legality of marriage is a real test that will be difficult for the government to pass because of the difficulty of reconciling the government agenda, viz. social order and human rights, but with its complicated bureaucracy and accommodation towards diverse Muslim voices related to marriage and the rise of piety.⁴⁹ Despite this, the provision of contentious *isbat nikah* in Indonesia's family law is the best option for concerned parties to validate their unregistered polygamy, which functions as a family. It abides by the due process of law and, at the same time, respects legal pluralism among Indonesian Muslims. Furthermore, it promotes human rights values better, especially for women and children involved in this marriage.

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⁴⁹ Nisa, "The Bureaucratization of Muslim Marriage in Indonesia," 308–9.

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