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Legal Conflict in Isbat Nikah of Polygamous: Perspective of SEMA Number 3 Year 2018 and its Implications for Biological Justice

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Abstract

This article examines the legal conflicts associated with marriage validation (isbat nikah) in the context of polygamous marriages, particularly in relation to the Supreme Court Circular Letter (SEMA) No. 3/2018 and its implications for biological justice. SEMA No. 3/2018 mandates the rejection of isbat nikah applications based on informal or unregistered marriages to uphold legal certainty. The study employs normative research methods, incorporating conceptual, statutory, case, and comparative approaches. The conceptual approach is utilized to explore theories of biological and procedural justice. The statutory approach analyzes relevant legal provisions, with a focus on SEMA No. 3/2018 and marriage law. The case approach provides an in-depth analysis of two pivotal court decisions: the Cilacap Religious Court Decision No. 0430/Pdt.P/2019/PA.Clp and the Supreme Court Decision No. 223/K/Ag/2020. The comparative approach evaluates how these cases illustrate differing applications of the law. Data are analyzed qualitatively and descriptively to uncover and understand disparities in the application of justice. The study critically assesses the implications of SEMA No. 3/2018 on biological justice, highlighting the need for not only legal recognition of marriages but also robust protection of all parties' rights. The findings reveal significant deficiencies in the current legal framework, advocating for a more nuanced approach that reconciles legal recognition with the protection of biological rights. The research offers comprehensive recommendations for policymakers and legal practitioners aimed at enhancing legal provisions for individuals in unregistered polygamous marriages. These recommendations emphasize the importance of fostering dialogue among legal experts and updating regulations to ensure both procedural and substantive justice. Theoretical implications suggest that procedural and biological justice may conflict in the realm of isbat nikah in polygamous marriages, necessitating a more integrated and holistic legal approach to achieve substantive justice for all involved parties.

Keywords: Polygamous Marriage Certificate, SEMA Number 3/2018, Biological Justice, Legal Disparity.

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Introduction

Marriage validation (*isbat nikah*) is the process of legitimizing a marriage that is not officially recorded or legally recognized by the state.¹ In the context of polygamy, this process becomes increasingly complex and controversial due to the involvement of multiple spouses.² While polygamy is permitted under Islamic law, it often conflicts with the principles of justice and legal standards in national legal systems.³ In Indonesia, the relevant regulation concerning the validation of polygamous marriages is the Supreme Court Circular Letter (SEMA) Number 3 of 2018. This Circular Letter was issued to guide courts in handling cases of marriage validation, including polygamous marriages. However, the implementation of SEMA No. 3 of 2018 has sparked significant legal conflicts and varying interpretations in practice.⁴ On one hand, SEMA aims to ensure that all marriages deemed valid under religious law are also recognized by the state. On the other hand, there are concerns that the application of this regulation may perpetuate injustice, particularly with respect to biological justice for all parties involved in a polygamous marriage. Biological justice refers to the fair consideration of individual biological rights, including reproductive rights and the well-being of children born from such marriages.⁵ In practice, biological justice is often overlooked in the marriage validation process, especially when validation is carried out solely to establish legal status without considering the psychological and social impacts on wives and children.⁶ This neglect raises academic debate about whether the regulation genuinely upholds justice for all parties involved in polygamous marriages and how the legal system can better reflect and balance individual rights with broader social interests.⁷

In Indonesia, the legal framework for validating polygamous marriages remains inadequate.⁷ This legal gap contributes to the increasing rate of divorces in the country. Among the divorce cases filed in religious courts, some involve claims where a spouse seeks divorce due to the husband having contracted a secret marriage (*nikah siri*) without the knowledge of the other spouse.⁸ In such cases, individuals attempt to obtain legal recognition of their marriages by first divorcing their existing spouse. Once the divorce is finalized, the husband registers the marriage with the secret spouse through the marriage validation process (*isbat nikah*) in the court.⁹

¹ Salman Abdul Muthalib, “Pengesahan Isbat Nikah Perkawinan Poligami: Kajian Putusan Nomor 130/Pdt.G/2020/Ms.Bna,” *El-Usrab: Jurnal Hukum Keluarga* 5, no. 2 (May 12, 2023): 224–38, <https://doi.org/10.22373/ujhk.v5i2.16040>.

² 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>.

³ Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (London: Routledge, 2020), <https://doi.org/10.4324/9781003086390>.

⁴ 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>.

⁵ Lela Tari and Iwan Nasution, “Analisis Putusan Pengadilan Agama Kandangan Nomor 51/PDT.G/2021/PA.KDG Tentang Isbat Nikah Poligami Perspektif Sema Nomor 3 Tahun 2018 dan Maqasid Syari’ah,” *UNES Law Review* 6, no. 2 (December 11, 2023): 5057–67, <https://doi.org/10.31933/unesrev.v6i2.1329>.

⁶ G. Keith Nedrow, “Polygamy and the Right to Marry: New Life for an Old Lifestyle,” *Memphis State University Law Review* 11 (1981 1980): 303.

⁷ Fahed Zurrofin Rozendana, Kasuwi Saiban, and Noer Yasin, “Isbat Nikah Pada Perkawinan Siri Poligami Tinjauan Perbandingan Hukum Positif Dan Maslahah Mursalah,” *Al-Abwal Al-Syakhsiyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 5, no. 1 (March 31, 2024): 67–76, <https://doi.org/10.15575/as.v5i1.31908>.

⁸ Murni Murni and Mega Naurin Nisa, “Permohonan Isbat Nikah Bagi Poligami Yang Tidak Dicatatkan,” *Rechtidee* 18, no. 2 (December 19, 2023): 106–27, <https://doi.org/10.21107/ri.v18i2.23794>.

⁹ Mukhammad Nur Hadi, Faridatus Suhadak, and Zuliza Mohd Kusrin, “Social Justice and Humanity on Polygamous Marriage at The Religious Court of Pasuruan - Indonesia,” *Justicia Islamica* 20, no. 2 (November 8, 2023): 281–300, <https://doi.org/10.21154/justicia.v20i2.7324>.

This phenomenon is exacerbated by the practice of informal divorces. Individuals who engage in informal divorces unilaterally pronounce divorce to their spouses, thus terminating their marital obligations and rights without filing a divorce petition with the court.¹⁰ Many of these individuals are motivated by concerns about the consequences of divorce, such as the risk of being dismissed dishonorably from their positions as Civil Servants (ASN) due to failure to follow the legal procedures for polygamy and divorce, the complexity of court procedures for divorce, or the desire to promptly end the marriage and remarry another partner.¹¹ Talak liar juga dapat dilakukan oleh orang yang sejak awal melakukan perkawinan poligami *sirri* (illegal). Mereka menganggap mentalak perempuan adalah hal yang mudah sebab perkawinan *sirri* tidak pernah dicatatkan secara hukum.¹² Informal divorces are also carried out by those who initially engaged in secret (illegal) polygamous marriages. These individuals may consider divorcing their wives to be a simple matter since the secret marriage was never officially recorded. This practice is particularly detrimental, especially to women. The difficulty of obtaining legal recognition for polygamous marriages is further compounded for ASN, who are required to set an example for society and adhere to legal regulations in their personal and professional lives. As public servants, ASN are expected to maintain a harmonious, prosperous, and happy family life to effectively fulfill their duties.¹³ Therefore, it is essential that ASN are not disrupted by family issues in the performance of their responsibilities.

This problematic situation is exemplified by the Supreme Court Cassation Decision Number 223 K/Ag/2020. Chronologically, the petitioner's request for the validation of a secret polygamous marriage was initially denied by the Cilacap Religious Court, as evidenced by the Cilacap Religious Court Decision Number: 0430/Pdt.P/2019/PA.Clp.¹⁴ In summary, the petitioner submitted a request for polygamous marriage validation to the Cilacap Religious Court under Case Number 0430/Pdt.P/2019/PA.Clp on October 14, 2019. The Cilacap Religious Court rejected the petitioner's request on the grounds that the petitioner married the second wife on May 7, 2017, while the petitioner had only divorced the first wife on January 17, 2019. The judge concluded that the petitioner lacked standing in this case because he was required to obtain the consent of the first wife.

The decision of the first-instance court, however, left the petitioner dissatisfied. The petitioner argued that the secret marriage had lasted approximately two years and had produced two children. For administrative purposes and legal certainty, the petitioner sought to have the secret marriage officially recognized and recorded by the state. Consequently, the petitioner decided to file a cassation appeal to the Supreme Court, in accordance with the provisions of Civil Procedure Law, and the case was registered under Supreme Court Cassation Decision Number 223 K/Ag/2020. The Supreme Court's ruling in this case appears to be contradictory to the intent of

¹⁰ Wahid Wahidullah and Ricky Khoirul Umam, "Problematika Isbat Nikah Dalam Optik Perundang-Undangan," *JURIS (Jurnal Ilmiah Syariah)* 18, no. 2 (December 30, 2019): 103–15, <https://doi.org/10.31958/juris.v18i2.1409>.

¹¹ Nina Nurmila and Linda Rae Bennett, "The Sexual Politics of Polygamy in Indonesian Marriages," in *Sex and Sexualities in Contemporary Indonesia* (Routledge, 2014).

¹² Nelly van Doorn-Harder, "Polygamy and Harmonious Families: Indonesian Debates on Gender and Marriage" (Brill, 2013), https://doi.org/10.1163/9789004242920_004.

¹³ Hazar Kusmayanti and Nindya Tien Ramadhyanti, "Legitimacy Of A Sirri Marriages (Second And So On) By The Pair Of Civil Servants," accessed July 29, 2024, <https://jurnal.untag-sby.ac.id/index.php/dih/article/view/4512>.

¹⁴ Direktori Putusan Mahkamah Agung, "Putusan PA CILACAP 0430/Pdt.P/2019/PA.Clp" (Mahkamah Agung, November 4, 2019), <https://putusan3.mahkamahagung.go.id/direktori/putusan/c59b0b3c77c56d8d15f1936cd2116564.html>.

Supreme Court Circular Letter (SEMA) Number 3 of 2018.¹⁵ It is also understood that Supreme Court Circular Letter (SEMA) Number 3 of 2018 is a legal product issued by the Supreme Court as the authority responsible for formulating policies within the Religious Courts system regarding legal issues that lack existing regulations. Therefore, it is crucial to understand the philosophical reasoning of a judge who has the duty and responsibility to adjudicate cases. Law is not merely a static and rigid set of rules but must be dynamic to establish and maintain order in society.¹⁶ The perspective of biological justice requires judges to make decisions as fairly as possible according to societal expectations, while still ensuring legal certainty.

The court, as a form of justice institution for Indonesian society, must provide guarantees and legal certainty for its citizens. The law is expected to be curative in addressing societal issues.¹⁷ In this context, the issue of validating polygamous marriages (isbat poligami) is a critical concern that requires focused attention and efforts to resolve.¹⁸ Therefore, this research aims to explore in depth and with precision how to address the issues related to secret polygamous practices and how the law should respond to ensure societal guarantees and legal certainty through the validation of polygamous marriages. This will be achieved through a juridical analysis of Cilacap Religious Court Decision Number 0430/Pdt.P/2019/PA.Clp and Supreme Court Cassation Decision Number 223 K/Ag/2020, utilizing the perspective of biological justice.

The implications of Supreme Court Circular Letter (SEMA) Number 3 of 2018 on biological justice require in-depth analysis. It is crucial to ensure that the existing regulation not only legally recognizes marriages but also protects the rights of all parties involved. This analysis is also essential to understand the extent to which the regulation can resolve or potentially exacerbate existing legal conflicts. This article aims to examine the legal conflicts in the validation of polygamous marriages based on the perspective of SEMA Number 3 of 2018 and its implications for biological justice. The study is expected to provide comprehensive recommendations for policymakers and legal practitioners in addressing issues related to the validation of polygamous marriages, while ensuring the protection of the biological rights of all parties involved.

Method

This research employs a normative legal research approach. According to Peter Mahmud Marzuki, normative legal research focuses on the examination of legal rules, principles, and theories, but is not limited to the positivist legal science that emphasizes coherence. Coherence is a key issue in legal studies, and legal researchers are interested in determining whether an individual's actions comply with the law and whether these actions are legally appropriate.¹⁹ The research utilizes four distinct research approaches. These approaches include the Legislative Approach, the Case Approach, the Comparative Approach, and the Conceptual Approach. By

¹⁵ Direktori Putusan Mahkamah Agung, "Putusan MAHKAMAH AGUNG Nomor 223 PK/Pdt/2020" (Mahkamah Agung, Mei 2020).

¹⁶ Umi Supraptiningsih et al., "G Gender Analysis: Of Polygamy Permit Based on the Reason of Benefit: (Case Study of Verdict Number: 0779/Pdt.G/2019/PA.Pwt)," *Nurani: Jurnal Kajian Syari'ah Dan Masyarakat* 23, no. 2 (December 31, 2023): 365–76, <https://doi.org/10.19109/nurani.v23i2.16937>.

¹⁷ Wahidul Anam and Mubaidi Sulaeman, "Law, Ethics, and Hadith Ahkam: An Analysis of Fatwa MUI in the Perspective of Progressive Interpretation," *Samarab: Jurnal Hukum Keluarga Dan Hukum Islam* 8, no. 2 (2024): 1023–53, <http://dx.doi.org/10.22373/sjhk.v8i2.21594>.

¹⁸ Uci Sanusi and Miftah Faried Hadinatha, "Activating Unconstitutional Norms in Law: An Analysis of the Principle of Checks and Balances: Menghidupkan Norma Inkonstitusional Dalam Undang-Undang: Suatu Analisis Prinsip Checks and Balances," *Jurnal Konstitusi* 20, no. 2 (June 1, 2023): 300–317, <https://doi.org/10.31078/jk2027>.

¹⁹ Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi* (Prenada Media, 2017).

employing these strategies, the researcher collects data from various perspectives on the topic under investigation.²⁰

The primary sources of legal materials for this study include the following: Law Number 1 of 1974 on Marriage; Presidential Instruction Number 1 of 1991 on the Compilation of Islamic Law; Supreme Court Circular Letter (SEMA) Number 3 of 2018 regarding Legal Formulation in Religious Courts; Cilacap Religious Court Decision Number 0430/Pdt.P/2019/PA.Clp; and Supreme Court Cassation Decision Number 223 K/Ag/2020. These primary legal sources are supplemented by additional materials such as interviews, books, journals, articles, and online resources. The qualitative data analysis in this research involves several steps: data collection, data editing, data verification, and conclusion drawing.²¹

Result and Discussion

Islamic and Indonesian Legal Perspectives on Polygamy

Polygamy in Islam refers to the practice of marrying multiple women simultaneously, but within specific limitations. Generally, the maximum number of wives allowed is four.²² However, some interpretations of the polygamy verse suggest a maximum of four or even nine wives.²³ Historical evidence appears to support the limit of four wives in a polygamous marriage, consistent with the Prophet Muhammad's prohibition against having more than four wives.²⁴ The basis for the permissibility of polygamy in Islam is found in the Qur'an, specifically in Surah An-Nisa, verse 3. The treatment of wives in terms of care, financial support, clothing, housing, and other material needs is linked to the requirement of fairness.

Polygamy is permitted under Islamic law, but only under certain conditions. It was practiced by prophets before Prophet Muhammad (peace be upon him). This verse further clarifies that polygamy is restricted to a maximum of four wives. Polygamy is not forbidden in Islamic law, as evidenced by Surah An-Nisa, verse 3, which states: "Marry those that please you of [other] women, two or three or four." This verse is considered the textual basis (*dalil naqli*) for the permissibility of polygamous marriages. Scholars agree that Surah An-Nisa, verse 3, was revealed as a form of protection granted by Allah SWT for orphans, ensuring that they are treated justly and their rights and properties are safeguarded, so they are not subject to exploitation.²⁵

Muhammad Abdurrahman posits that polygamy and orphans are related contexts. This is based on the Qur'an, which mentions that both women and orphans belong to groups frequently subjected to injustice (*al-mustadhab'afin*, or the oppressed).²⁶ Orphans often suffer from unfair treatment in terms of their care and the management of their property. Similarly, women often face injustice in the

²⁰ Rulam Ahmadi, *Metodologi Penelitian Kualitatif* (Yogyakarta: Ar-Ruzz Media, 2014), [//senayan.iain-palangkaraya.ac.id/index.php?p=show_detail&id=11966&keywords=](http://senayan.iain-palangkaraya.ac.id/index.php?p=show_detail&id=11966&keywords=).

²¹ Norman K. Denzin and Yvonna S. Lincoln, *The SAGE Handbook of Qualitative Research* (SAGE, 2011).

²² Arif Rohman, "Reinterpret Polygamy in Islam: A Case Study in Indonesia," SSRN Scholarly Paper (Rochester, NY, October 1, 2013), <https://doi.org/10.2139/ssrn.2258284>.

²³ Heather Johnson, "There Are Worse Things than Being Alone: Polygamy in Islam, Past, Present, and Future," *William & Mary Journal of Women and the Law* 11 (2005 2004): 563.

²⁴ Isnatin Miladiyah et al., "Biological Activity, Quantitative Structure-Activity Relationship Analysis, and Molecular Docking of Xanthone Derivatives as Anticancer Drugs," *Drug Design, Development and Therapy*, 2018, 149–58.

²⁵ Nina Nurmila, *Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia* (London: Routledge, 2009), <https://doi.org/10.4324/9780203878545>.

²⁶ Haifaa A. Jawad, "Women and the Question of Polygamy in Islam," in *The Rights of Women in Islam: An Authentic Approach*, ed. Haifaa A. Jawad (London: Palgrave Macmillan UK, 1998), 41–51, https://doi.org/10.1057/9780230503311_4.

practice of polygamy. However, verse 3 of Surah An-Nisa serves as a strong textual basis for the permissibility of polygamy.²⁷ M. Quraish Shihab, in his in-depth study of polygamy, asserts that its permissibility is subject to stringent conditions. According to his interpretation in *Tafsir Al-Misbah*, polygamy is only permissible for a man under conditions of necessity, where the circumstances compel him to practice polygamy.²⁸

Polygamy is a practice permitted in Islam, and Indonesia, as a nation with a Muslim majority, incorporates this allowance within its legal framework. However, the practice of polygamy in Indonesia is not without stringent conditions. Law Number 1 of 1974 regulates the implementation of polygamy to ensure that it is not misused and that the welfare of the family is maintained.²⁹ According to Article 4, paragraph (2) and Article 5, paragraph (1) of Law Number 1 of 1974, there are specific reasons and circumstances under which a husband may take more than one wife. Article 4, paragraph (2) stipulates that the court will only grant permission for polygamy if one of the following three conditions is met:

Firstly, polygamy may be permissible if the wife is unable to fulfill her marital obligations. This includes circumstances such as physical or psychological incapacity that hinders her from performing her responsibilities within the household. Secondly, polygamy may be justified if the wife suffers from a physical disability or an incurable illness. Such a condition may necessitate the husband's need for additional support from another wife to manage daily life and family care. Thirdly, polygamy is allowed if the wife is unable to conceive. In this context, the wife's inability to bear children may be considered a valid reason for the husband to seek another wife in order to continue his lineage.³⁰

In addition to these three conditions, Article 5, Paragraph 1 of Law Number 1 of 1974 outlines the procedural requirements for submitting a polygamy application to the Religious Court. The husband must provide evidence supporting the aforementioned reasons and fulfill additional criteria, such as obtaining the consent of the existing wife or wives and demonstrating financial capacity to support more than one household. The court also considers other factors, including the husband's moral character, the welfare of the wife and children, and the husband's ability to treat all wives and children equitably.³¹ In other words, although polygamy is permitted, the law aims to ensure that this practice is carried out with full responsibility and does not harm those involved. In its implementation, polygamy in Indonesia requires strict oversight by legal authorities to ensure that each application for polygamy meets all the requirements set forth by the law. This demonstrates that, while Islam permits polygamy, the state continues to regulate and limit this practice to maintain family harmony and welfare.³²

²⁷ Mohammed Bany Muhammad and Mohammed Yeasin, "Eigen-Cam: Class Activation Map Using Principal Components," in *2020 International Joint Conference on Neural Networks (IJCNN)* (IEEE, 2020), 1–7.

²⁸ Siti Asiyah et al., "Konsep Poligami Dalam Alquran: Studi Tafsir Al-Misbah Karya M. Quraish Shihab," *Fikri: Jurnal Kajian Agama, Sosial Dan Budaya* 4, no. 1 (June 27, 2019): 85–100, <https://doi.org/10.25217/jf.v4i1.443>.

²⁹ Miski Miski et al., "Polygamy Mentoring in Indonesia: Al-Qur'an, Hadith and Dominant Discourse Resistance," *Millati: Journal of Islamic Studies and Humanities* 7, no. 1 (July 4, 2022): 15–32, <https://doi.org/10.18326/mlt.v7i1.7036>.

³⁰ Abdul Hakim, "Reasons for Polygamy and Its Impact on Muslim Family Life: Experiences of Polygamous Perpetrators in Babat, Lamongan, Indonesia," *Journal of Islamic Law* 3, no. 1 (January 31, 2022): 34–53, <https://doi.org/10.24260/jil.v3i1.529>.

³¹ Huma Ahmed-Ghosh, *Asian Muslim Women: Globalization and Local Realities* (SUNY Press, 2015).

³² Grace V. S. Chin, "State Ibuism and One Happy Family: Polygamy and the 'Good' Woman in Contemporary Indonesian Narratives," in *The Southeast Asian Woman Writes Back: Gender, Identity and Nation in the Literatures of Brunei Darussalam, Malaysia, Singapore, Indonesia and the Philippines*, ed. Grace V. S. Chin and Kathrina Mohd Daud (Singapore: Springer, 2018), 89–106, https://doi.org/10.1007/978-981-10-7065-5_6.

Law No. 1 of 1974 stipulates that the principle of marriage is monogamy, meaning that a man is only permitted to have one wife. However, this law also allows for polygamy under specific conditions. Polygamy is permitted if the court or authorized official grants permission after considering several factors. One of the primary conditions for allowing polygamy is obtaining consent from the first wife or existing wives. The court also considers the moral character of the wife, fertility issues, and other relevant factors. Additionally, the husband's financial capacity is a crucial consideration in the court's decision. Polygamy can lead to conflict if the husband does not possess sufficient financial means to support more than one wife.³³

Article 5 of Law No. 1 of 1974 outlines the procedure for submitting a polygamy application. To submit such an application to the Religious Court, several elements must be met in accordance with Article 4, paragraph (1) of this law. First, the wife must provide her consent. Second, the husband must fulfill his obligations to meet the needs of all his wives and children. Third, the husband is legally bound to treat his wives and children with respect. There are situations where the wife's consent cannot be obtained, such as when the wife cannot be asked for her consent due to specific reasons, or if the husband has not heard from his wife for at least two years. In such cases, the court may consider granting permission for polygamy without the wife's consent as stipulated in Article 4, paragraph (1), letter a.³⁴

Supreme Court Circular (SEMA) No. 3 of 2018

The Indonesian government enacted Law No. 1 of 1974 on Marriage and Government Regulation No. 9 of 1975 on the Implementation of Law No. 1 of 1974 as part of its effort to provide legal protection to all citizens, particularly in the field of marriage law. Effective from October 1, 1975, Law No. 1 of 1974 serves as the primary regulation guiding marriage practices in Indonesia. This law stipulates that all forms of marriage—whether first, second, third, or subsequent—must be conducted in accordance with the provisions set forth within it.³⁵

The application of the principle of *contrario sensu* (or *mahfum mukhālafah*) can be utilized to annul marriages that occurred after the effective date of this law if such marriages deviate from legal provisions. Examples of such deviations include informal marriages or unregistered polygamous marriages, which often fail to meet the established administrative and legal requirements.³⁶ Therefore, marriages that do not comply with the provisions outlined in Law No. 1 of 1974 must be considered null and void under the law. Such marriages should be rejected or, at the very least, declared invalid if a petition for marriage validation is submitted to the Religious Court, regardless of the grounds presented.³⁷

The Indonesian Supreme Court, through Circular Letter of the Supreme Court (SEMA) No. 3 of 2018, has clarified its stance on petitions for marriage validation (isbat nikah) involving

³³ Dri Santoso and Muhamad Nasrudin, "Polygamy In Indonesia And Its Relevance To The Protection Of Women And Children In The Perspective Of Islamic Law Philosophy," *Akademika : Jurnal Pemikiran Islam* 26, no. 1 (June 30, 2021): 121–36, <https://doi.org/10.32332/akademika.v26i1.2401>.

³⁴ Nur Faezah Musthaphar, Raihanah Hj Azahari, and Bahiyah Ahmad, "Sakīnah, Mawaddah dan Rahmah Dalam Perhubungan Suami Isteri: Analisis Literatur: Sakīnah, Mawaddah and Rahmah in Husband-Wife Relationship: A Literature Review," *Jurnal Syariah* 28, no. 1 (2020): 81–104.

³⁵ Khoiri Khoiri, "Gugatan Harta Bersama (Telaah Sema Nomor 3 Tahun 2018)," *Al-Abwal Al-Syakhsiyah: Jurnal Hukum Keluarga Dan Peradilan Islam* 2, no. 1 (March 30, 2021): 62–71, <https://doi.org/10.15575/as.v2i1.12173>.

³⁶ Muhammad Ihsan Fauzi, "Penanganan Perkara Permohonan Itsbat Nikah Poligami Secara Siri Berdasarkan Surat Edaran Mahkamah Agung Nomor 3 Tahun 2018," *Mutawasith: Jurnal Hukum Islam* 4, no. 2 (December 27, 2021): 75–88, <https://doi.org/10.47971/mjhi.v4i2.339>.

³⁷ Nisa, "The Bureaucratization Of Muslim Marriage In Indonesia."

polygamous marriages based on unregistered marriages (*nikah sirri*). This SEMA stipulates that petitions for validation of such polygamous marriages, even when justified by public interest considerations, cannot be granted by the Court. This decision is intended to uphold legal order and protect the rights of individuals who might be adversely affected by marriages that are not officially recorded.³⁸ Unregistered marriages, known as *nikah sirri*, which are conducted without official registration at the Religious Affairs Office (KUA), often lead to various legal and social issues. This practice results in unclear legal status of the marriage, affecting multiple aspects of life, including inheritance rights, child custody, and the legal status of children born from such marriages.³⁹ In the context of polygamy, unregistered marriages (*nikah sirri*) can exacerbate complexities, particularly regarding the protection of the rights of wives and children who may not receive adequate legal recognition.

The Supreme Court of Indonesia, through Circular Letter of the Supreme Court (SEMA) Number 3 of 2018, explicitly states that even if an application for the validation of a polygamous marriage is submitted on the grounds of public interest, the court cannot approve it. This indicates that polygamous marriages conducted secretly, without official registration and without meeting the requirements set forth by the Marriage Law, are not legally recognized. This decision is intended to uphold legal order and prevent abuse and infringement of individual rights, particularly those of women and children who are vulnerable to the consequences of unregistered marriages.⁴⁰ However, the Supreme Court also considers the best interests of the child in cases of child recognition requests. In this context, a child's recognition request may be considered even if the parents' marriage is not legally valid. Protection of children's rights is a priority recognized under both national and international law. Children born from unregistered marriages must still have their legal status acknowledged and their rights protected. This reflects human rights principles, emphasizing that every child is entitled to legal identity, protection, and recognition.⁴¹

This policy reflects the government's and judicial system's efforts to uphold marriage laws in an orderly and equitable manner, providing protection to all parties involved, particularly children. In enforcing marriage laws, the government aims to ensure that every marriage complies with applicable legal requirements, including official registration at the Religious Affairs Office (KUA). This is crucial for ensuring justice and order within society, as well as for safeguarding individual rights, especially those of women and children. Consequently, this policy underscores the government's and judicial system's commitment to enforcing marriage laws fairly and justly while protecting all parties involved, with a particular focus on children born from unregistered marriages. It also demonstrates the state's commitment to its role in ensuring justice and order in society, especially concerning family institutions.

³⁸ Fathiah, "Itsbat Nikah Poligami Perspektif Undang-Undang Perkawinan dan SEMA No. 3 Tahun 2018."

³⁹ Ita Wardatul Janah, "Implikasi Kasasi Sebagai Upaya Hukum Terakhir Pada Pengadilan Hubungan Industrial (Studi Surat Edaran Mahkamah Agung Nomor 3 Tahun 2018 Tentang Pemberlakuan Hasil Rumusan Pleno Kamar Mahkamah Agung)," *JURNAL RECTUM: Tinjauan Yuridis Penanganan Tindak Pidana* 5, no. 1 (May 5, 2023): 1345–52, <https://doi.org/10.46930/jurnalrectum.v5i1.3152>.

⁴⁰ Rudi Nuruddin Ambary, "Perkawinan Poligami Yang Berkeadilan," *Al-'Adalah* 10, no. 1 (February 28, 2017): 73–86, <https://doi.org/10.24042/alah.v11i1.285>.

⁴¹ Siti Ummu Adillah, "Analisis Hukum Terhadap Faktor-Faktor Yang Melatarbelakangi Terjadinya Nikah Sirri Dan Dampaknya Terhadap Perempuan (Istri) Dan Anak-Anak," *Jurnal Dinamika Hukum* 11 (2011): 104–12.

The Concept of Biological Justice

The philosophical foundation of biological justice is a normative entity committed to guiding humanity towards a life that is just, prosperous, and fulfilling. In this framework, law serves as a tool to achieve these ends, rather than an end in itself.⁴² According to progressive legal thought, substantive justice should take precedence over procedural justice. This means that judges should not only base their decisions on the specific provisions of the law but also apply the values embodied in Pancasila, the Code of Judicial Ethics, and the Law on Judicial Power. Law, when upheld by judges of character and integrity, consistently honors moral values, with conscience acting as the driving force, motivator, and regulator of this liberating paradigm.⁴³

The paradigm of biological justice emphasizes that the law should serve the interests of humanity, allowing judges the freedom to explore and establish the appropriate format, principles, and actions necessary to realize justice in the cases they adjudicate.⁴⁴ Amran Suadi argues that legal justice cannot stand alone as an isolated condition. He asserts that justice, as a value, is relative and dependent on its context, akin to the biological metabolism in the blood or the intrinsic value of the law itself. There are four processes of biological justice within the human organism that can be likened to biological mechanisms: the reaction to stimuli in specific conditions, the interaction with the environment, the metabolic processes, and the ability to produce outcomes from these processes.⁴⁵

The concept of biological justice is also reflected in the Qur'an, as discussed by Jimly Asshiddiqie in his book "The Constitution of Social Justice." He categorizes justice into four distinct forms: the state of balance, equality and the rejection of all forms of discrimination, the safeguarding of individual rights and the granting of rights to those entitled, and the preservation of rights necessary for the continuation of existence.⁴⁶ However, judicial decisions often seem to deviate from the intended purposes of law and justice, leaving society with a sense of dissatisfaction. Law should not be applied merely to satisfy the literal requirements of statutes, a notion referred to by Roscoe Pound as "rule bound" or adherence to the text of the law.⁴⁷ Instead, the law must incorporate rational sociological values that emphasize the utility and benefit of legal decisions.⁴⁸ In the enforcement of the law, three critical elements must be considered: legal certainty, utility, and justice. A sound judicial decision should effectively balance these three components.⁴⁹

Legal certainty emphasizes the strict enforcement of laws or regulations in accordance with their precise wording. The sociological value, or utility, underscores that the implementation of law

⁴² Jana Singer, "Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption," *Maryland Law Review* 65 (2006): 246.

⁴³ Kathryn Robinson, "Regulation of Muslim Marriage in Indonesia: Political Challenges Across the Public/Private Divide," in *In Tandem – Pathways towards a Postcolonial Anthropology | Im Tandem – Wege zu einer postkolonialen Ethnologie*, ed. Mirjam Lücking, Anna Meiser, and Ingo Rohrer (Wiesbaden: Springer Fachmedien, 2023), 189–208, https://doi.org/10.1007/978-3-658-38673-3_11.

⁴⁴ Piaternella Van Doorn-Harder, "Controlling the Body: Muslim Feminists Debating Women's Rights in Indonesia," *Religion Compass* 2, no. 6 (2008): 1021–43, <https://doi.org/10.1111/j.1749-8171.2008.00105.x>.

⁴⁵ Amran Suadi, "Peranan Peradilan Agama Dalam Melindungi Hak Perempuan Dan Anak Melalui Putusan Yang Memihak Dan Dapat Dilaksanakan," *Jurnal Hukum dan Peradilan* 7, no. 3 (December 18, 2018): 353–74, <https://doi.org/10.25216/jhp.7.3.2018.353-374>.

⁴⁶ Jimly Asshiddiqie, *Konstitusi Keadilan Sosial: Serial Gagasan Konstitusi Sosial Negara Kesejahteraan Sosial Indonesia* (Jakarta: Kompas, 2018), <https://cir.nii.ac.jp/crid/1130000795860598528>.

⁴⁷ Roscoe Pound, "Law in Books and Law in Action," *American Law Review* 44 (1910): 12.

⁴⁸ Hans Kelsen, "What Is the Pure Theory of Law?," in *Law and Morality* (Routledge, 2005).

⁴⁹ Roscoe Pound, *New Paths of the Law: First Lectures in the Roscoe Pound Lectureship Series* (The Lawbook Exchange, Ltd., 2012).

should benefit society. Since law exists for humanity, its application must not cause unrest or dissatisfaction within the community. The philosophical element, or justice, highlights that the ultimate goal of law is to achieve justice—providing a sense of fairness to society, even though the concept of justice is inherently subjective and individualistic.

The Controversy Surrounding Religious Court Decisions on Polygamous Marriage Validation (Isbat Nikah) in Indonesia

The decision of the Cilacap Religious Court, Case Number 0430/Pdt.P/PA.Clp, originated from a petition for the validation of an unregistered polygamous marriage (nikah sirri) filed by Petitioner I and Petitioner II. This petition was submitted on October 7, 2019, to the Cilacap Religious Court Clerk's Office under Case Number 0430/Pdt.P/2019/PA.Clp. In their petition, the petitioners stated that they had conducted a religious marriage (sirri) on May 7, 2017. The marriage was performed with the biological father of the petitioner acting as the marriage guardian and in the presence of two male witnesses. All the necessary requirements and pillars of marriage were fulfilled by Petitioner I, including the provision of a dowry and the performance of the marriage contract (ijab kabul) in the presence of the guardian and witnesses.⁵⁰

Petitioner I stated that he had divorced his first wife according to religious procedures and was in the process of formalizing the divorce at the Religious Court. Petitioner I and his first wife had been living separately since January 17, 2019. At the time of the unregistered marriage (nikah sirri), Petitioner II was single with no legal impediments to marriage. This marriage had lasted for approximately two years, and they had been blessed with two children. However, throughout the marriage, Petitioners I and II had not registered their marriage with the North Cilacap Office of Religious Affairs (KUA). Consequently, they sought to officially register their marriage to have it recognized under the law. They also faced difficulties in obtaining birth certificates for their two children from the Sleman Regency Civil Registry Office in Yogyakarta, as there was no authentic proof of the marriage. Therefore, they requested a marriage validation from the Cilacap Religious Court in accordance with Article 2, paragraphs (1) and (2) of the Marriage Law.⁵¹

The petitioners' requests in their application included the following: to grant the petitioners' application; to declare the marriage between Petitioner I and Petitioner II, which took place on May 7, 2017, as legally valid; to recognize the first and second children as legitimate offspring of the petitioners; to order the North Cilacap Office of Religious Affairs (KUA) to officially register the marriage in its registry book; and to impose all costs arising from this case in accordance with the applicable legal provisions. Alternatively, they requested that the Chief Judge of the Cilacap Religious Court deliver a judgment that is fair and just.⁵²

The court considered that the substance of the case concerned the marriage between Petitioner I and Petitioner II, which took place on May 7, 2017, and for which they sought legal validation (isbat). This marriage was conducted according to the religious requirements for a valid marriage but was not officially registered with the North Cilacap Office of Religious Affairs (KUA) as required by law. The court examined the application for isbat nikah and the submitted evidence, including the Divorce Certificate dated January 17, 2019. However, at the time of the unregistered

⁵⁰ Ahmad Sofyan Aji Sudrajad, "Rechtvinding isbat poligami perspektif the biological justice theory (analisis yuridis penetapan PA. Cilacap No. 0430/Pdt.P/2019/PA.Clp dan putusan Mahkamah Agung No. 223K/Ag/2020)" (masters, UIN Syekh Ali Hasan Ahmad Addary Padangsidimpuan, 2023), <https://etd.uinsyahada.ac.id/9601/>.

⁵¹ Sudrajad.

⁵² Mahkamah Agung, "Putusan PA CILACAP 0430/Pdt.P/2019/PA.Clp."

marriage (nikah sirri) with Petitioner II, Petitioner I was still legally married to his first wife. The official divorce between Petitioner I and his first wife was finalized on January 17, 2019, meaning that Petitioner I should have involved his first wife in the application for polygamous marriage validation. The failure to do so rendered the petition incomplete, constituting an error in persona. Furthermore, as a Civil Servant and lecturer, Petitioner I was obligated to comply with Article 4, paragraph (1) of Government Regulation No. 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants, which requires civil servants to obtain permission from their superiors to engage in polygamy.⁵³

The court determined that Petitioner I should have obtained permission from his first wife, given that they were still legally married at the time of the unregistered marriage with Petitioner II. Permission to engage in polygamy must comply with the provisions of Article 5, paragraph (1) of the Marriage Law and Article 56, paragraph (1) of the Compilation of Islamic Law. The absence of consent from the first wife and the lack of authorization from the superior or relevant authority meant that Petitioner I's unregistered polygamous marriage contravened legal regulations. The court concluded that there was a legal circumvention in this case.⁵⁴

The Religious Court of Cilacap ruled that the petitions from Petitioners I and II could not be accepted, as the relief sought in their application was not granted. The legal consequence of this decision is that Petitioners I and II are unable to register their marriage with the Office of Religious Affairs in Cilacap. Furthermore, the Petitioners cannot acquire their legal rights as citizens because they lack a marriage certificate. A marriage certificate is a crucial authentic document that establishes the legality of a marriage and is necessary for administrative and bureaucratic purposes. It also serves as a means for the holder to obtain legal certainty and comprehensive legal protection from the state.

The judge's consideration in the ruling is firmly based on Government Regulation Number 10 of 1983, Article 4, paragraph (1), which states: "A male civil servant who wishes to have more than one wife must first obtain permission from the relevant official." This provision underscores that a civil servant/ASN cannot engage in polygamous marriage without prior authorization from the designated official or superior. Procedurally, the request for polygamous marriage permission must be submitted in writing to the appropriate authority as stipulated in Article 5. Additionally, the application for permission must clearly state the reasons for the polygamy, in accordance with the requirements set forth in Article 4, paragraph (5).⁵⁵

Officials authorized to grant permission for a civil servant (ASN) seeking to engage in polygamy must base their decisions on the provisions outlined in Article 10, paragraph (2) of Government Regulation Number 10 of 1983. This regulation imposes stringent conditions for granting such permission, which align with the requirements specified in Article 4, paragraph (2) of the Marriage Law. Article 5 of the Marriage Law outlines the alternative conditions under which a man may be permitted to practice polygamy, based on specific circumstances related to his wife or wives. According to Article 4, paragraph (1), a request for polygamous marriage permission must be submitted to the local Religious Court. The polygamy permission regulations under Government Regulation Number 10 of 1983 are consistent with the provisions of Article 5 of the

⁵³ Lakoni Lakoni, M. Ardiansyah, and Masayu Nila Juwita, "Reconstruction of Marriage and Divorce Law for Civil Servants," *SMART: Journal of Sharia, Tradition, and Modernity* 3, no. 1 (July 30, 2023): 55–68, <https://doi.org/10.24042/smart.v3i1.16979>.

⁵⁴ Mahkamah Agung, "Putusan PA CILACAP 0430/Pdt.P/2019/PA.Clp."

⁵⁵ Wirastri and van Huis, "The Second Wife."

Marriage Law, which stipulates that a man intending to enter into polygamy must obtain consent from his wife or wives, and provide assurances that he can treat all wives fairly and fulfill their financial needs, as well as those of his children. Article 5, paragraph (2) of the Marriage Law provides an exception to the requirement for permission if it is not possible to obtain consent from the wife or wives due to the absence of communication for at least two years, or for other reasons that have been considered and evaluated by the judge.⁵⁶

In this case, the judge concluded that the polygamous marriage sought by the petitioner (Petitioner I) should have been approved by the first wife, as at the time the marriage validation petition was submitted to the court, Petitioner I was not yet legally divorced and the divorce proceedings with the first wife were still ongoing. Consequently, Petitioner I was required to meet the cumulative condition of obtaining written permission from the first wife before seeking judicial validation for his marriage to the second wife (Petitioner II). Petitioner I stated during the case proceedings that he had long been living separately from his first wife due to a religious divorce. However, the judge could not consider Petitioner I's claim of a religious divorce, as it involved an unregistered (sirri) marriage that is not recognized legally. Therefore, Petitioner I's status with his first wife remains as husband and wife until a formal court ruling on their divorce is issued. From the perspective of the Compilation of Islamic Law, the judge's consideration is also supported by the stipulations that polygamy can only be performed with permission from the Religious Court (Article 56, paragraph (1) of the Compilation of Islamic Law). Article 2 of the Compilation of Islamic Law outlines that the procedure for applying for polygamy must be conducted according to Government Regulation Number 9 of 1975, Chapter VIII, Articles 40 through 44, which regulates the requirements for having more than one wife.⁵⁷

Based on the legal analysis of the judge's considerations in the Religious Court Decision No. 0430/Pdt.P/2019/PA.Clp, it is evident that the ruling aligns with the principles and requirements of legal certainty. The judge's reasoning in Decision No. 0430/Pdt.P/2019/PA.Clp also adheres to the directives outlined in Supreme Court Circular Letter No. 3 of 2018, which prohibits the validation of polygamous marriages based on unregistered (sirri) marriages, even if the application is made for the benefit of the children.⁵⁸ The decision of the Cilacap Religious Court adheres to these provisions to curb attempts by individuals to circumvent the law. Such circumvention includes efforts to establish a marriage by first conducting an unregistered (sirri) marriage. The judge's consistent application of Supreme Court Circular Letter No. 3 of 2018 in the ruling demonstrates an effort to uphold legal certainty, ensuring that the public considers the legal consequences of their actions. Furthermore, it reinforces and clarifies that the procedure for validating an unregistered marriage must be conducted in accordance with the relevant legal regulations.⁵⁹

However, in Decision No. 223/K/Ag/2020, the Supreme Court judge partially granted the petitioners' request by validating the marriage between Petitioner I and Petitioner II. Other aspects

⁵⁶ Ipandang Ipandang, "The Phenomenon Of Polygamy Of Civil Servants (Pns) In Al Maqashid Al Sharia Perspective: Analysis Study Of Government Regulation No 45 Of 1990 In Konawe Southeast Sulawesi," *Akademika: Jurnal Pemikiran Islam* 26, no. 1 (June 16, 2021): 75–90, <https://doi.org/10.32332/akademika.v26i1.3203>.

⁵⁷ Ah Kholish Hayatuddin Desti Widiani, "Socio-Juridical Analysis on Polygamy Requirements in the Compilation of Islamic Law (KHI)," *Al'Adalah* 19, no. 1 (June 20, 2022): 195–222, <https://doi.org/10.24042/adalah.v19i1.10266>.

⁵⁸ Mahkamah Agung, "Putusan MAHKAMAH AGUNG Nomor 223 PK/Pdt/2020."

⁵⁹ Lathifah Munawaroh, Ahmad Munif, and Ahmad Rofiq, "Disharmony of Sirri Marriage Registration Regulation on the Family Card (Analyzing The Ministry of Interior Affairs' Regulation No. 9/2016)," *Fiat Justitia: Jurnal Ilmu Hukum* 17, no. 1 (March 29, 2023): 93–108, <https://doi.org/10.25041/fiatjustitia.v17no1.2851>.

of the petition were not granted or were rejected by the Court. Consequently, Petitioner I and Petitioner II are now able to register their marriage with the North Cilacap Sub-District Office of Religious Affairs (KUA). The legal effect of this decision is that the marriage of the petitioners is legally recognized. The status of Petitioner I's wife and children is thus legitimate, and they are entitled to receive a marriage certificate as official proof of the marriage. Additionally, the petitioners are required to fulfill their rights and obligations as spouses according to the relevant laws.

Although the marriage between Petitioner I and Petitioner II was initially conducted as an unregistered (sirri) polygamous marriage, this did not prevent the court from considering and granting the petition. This decision contrasts with Supreme Court Circular Letter No. 3 of 2018, which prohibits the validation of unregistered polygamous marriages, even for the benefit of children. Conversely, the Supreme Court emphasized the importance of prioritizing the welfare of the petitioners' children resulting from the marriage, thus necessitating the granting of the petition. This reasoning aligns with the considerations detailed in the Supreme Court's Decision No. 223/K/Ag/2020.⁶⁰

The judge's consideration also affirmed the legality of the marriage between Petitioner I and Petitioner II, given that at the time of the cassation application, Petitioner I had officially divorced his first wife and was legally a widower. This determination effectively overrides the lower court's opinion, which had stated that the first wife must be involved in granting permission for polygamy. The researcher believes that the Supreme Court judge aimed to implement the principle of legal utility in this decision, as the validation of the marriage was based on the welfare of the children. Therefore, if the court grants the petition for marriage validation, the decision can address the juridical, utilitarian, and justice aspects for the petitioners.

Legal Disparities between the Considerations of the Cilacap Religious Court and the Supreme Court

Polygamy and unregistered marriages (nikah sirri) are recognized under Islamic law but are legally invalid if not registered according to statutory regulations. The requirement for marriage registration aims to ensure legal certainty and protection, maintain order, and uphold societal discipline. Adherence to applicable laws is crucial, as non-compliant polygamous practices can disadvantage the parties involved, particularly women. Strict regulations concerning polygamy, including obtaining consent from the first wife and relevant authorities, are designed to safeguard women's rights and ensure fairness. Without official registration, the wives in unregistered polygamous marriages lack adequate legal guarantees and protection.⁶¹

In Decision Number 0430/Pdt.P/2019/PA.Clp, the Cilacap Religious Court rejected the petition for legal validation of the unregistered polygamous marriage based on Supreme Court Circular Number 3 of 2018, which emphasizes procedural justice and legal certainty. This decision prioritizes the rights of the first wife and seeks to prevent unregistered polygamous marriages. Conversely, in Decision Number 223/K/Ag/2020, the Supreme Court granted the petition based on a humanitarian-juridical consideration, focusing on the best interests of the children and substantive justice. The Supreme Court did not rely on Supreme Court Circular Number 3 of 2018

⁶⁰ Mahkamah Agung, "Putusan MAHKAMAH AGUNG Nomor 223 PK/Pdt/2020."

⁶¹ Tae Yun Jung, "Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia Nina Nurmila, New York: Routledge, 2009, 197 Pages," *Asian Journal of Women's Studies* 17, no. 1 (March 2011): 132–41.

as the legal basis but rather considered the context of the interests and benefits at the time the petition was filed. This decision reflects a new legal approach that emphasizes humanitarian principles, such as the well-being and happiness of individuals.⁶²

Proposition for Implementing Polygamy Determinations in the Cilacap Religious Court Ruling and the Supreme Court's Cassation Decision

This analysis identifies the differing perspectives between the Cilacap Religious Court judges in Decision Number 0430/Pdt.P/2019/PA/Clp and the Supreme Court judges in Decision Number 223/K/Ag/2020, particularly in the application of justice principles. The Cilacap Religious Court judges emphasize legal certainty by adhering to strict procedural requirements. They rejected the request for marriage validation because the petitioner violated regulations concerning polygamy permissions for civil servants. This decision is seen as upholding procedural justice, protecting the rights of the first wife, and preventing disorder caused by unregistered polygamous and unofficial marriages.⁶³

In contrast, the Supreme Court judges emphasized substantive and humanitarian justice, taking into account the petitioner's divorced status and the negative impact of rejecting the request on the petitioner's children. They underscored the importance of human rights and the need for legal protection for all parties involved. This decision focuses more on the legal benefits, particularly for the children, and accommodates biological justice that prioritizes human welfare. The Supreme Court's ruling reflects a more progressive and humanitarian approach, despite being contrary to Supreme Court Circular Letter Number 3 of 2018. This indicates a legal flexibility in pursuing broader justice. Both decisions reveal a fundamental divergence in legal approaches: one is procedural and legalistic, while the other is substantive and humanitarian.⁶⁴

The differing approaches between the Cilacap Religious Court judges and the Supreme Court judges highlight the significance of context and perspective in the administration of justice. The Cilacap Religious Court judges placed greater emphasis on adherence to existing legal procedures, prioritizing legal certainty to prevent social disorder and protect the rights of the first wife. Their decision was based on the principle that the law must be enforced consistently and without exception, especially in cases involving clear regulatory violations such as those concerning polygamy and unregistered marriages.⁶⁵ On the other hand, the Supreme Court judges adopted a more flexible and humanitarian approach, taking into account broader interests, including the rights of children and substantive justice. They sought to balance legal certainty with the practical benefits for the parties involved, particularly the children who might be affected by the decision. The Supreme Court's ruling emphasized that the law should serve greater humanitarian goals and not merely focus on procedural formalities.⁶⁶

An approach that fosters the development of jurisprudence to be more adaptive and responsive to the real needs of society is crucial within the context of evolving law. Supreme Court Decision No. 223/K/Ag/2020, despite being perceived as contrary to SEMA No. 3/2018, illustrates that the law does not need to be static and can evolve according to context and situation.

⁶² Mahkamah Agung, "Putusan MAHKAMAH AGUNG Nomor 223 PK/Pdt/2020."

⁶³ Lakoni, Ardiansyah, and Juwita, "Reconstruction of Marriage and Divorce Law for Civil Servants."

⁶⁴ Widiani, "Socio-Juridical Analysis on Polygamy Requirements in the Compilation of Islamic Law (KHI)."

⁶⁵ Ali Trigiyatno et al., "Comparative Analysis of the Polygamy Regulations in Indonesia and Morocco," *DIKTUM: Jurnal Syariah Dan Hukum* 21, no. 1 (July 10, 2023): 34–48, <https://doi.org/10.35905/diktum.v21i1.4885>.

⁶⁶ Mahkamah Agung, "Putusan MAHKAMAH AGUNG Nomor 223 PK/Pdt/2020."

This highlights the importance of judicial discretion in exploring and applying the most appropriate legal principles to achieve substantive justice. Adaptive and responsive laws are capable of accommodating social, economic, and cultural changes within society. The evolution of jurisprudence in alignment with societal needs ensures its relevance and effectiveness. This approach enables the law to stay current and not become obsolete, thereby meeting societal expectations for justice and legal certainty. Supreme Court Decision No. 223/K/Ag/2020 exemplifies how variations in the interpretation and application of the law can reflect the dynamic nature of legal discovery by judges. Judges must consider diverse aspects and contexts that may not be fully addressed by existing regulations.

Static laws risk becoming outdated and failing to address evolving societal changes and developments. A dynamic legal framework allows for greater flexibility in responding to emerging issues and providing more suitable and equitable solutions. Judicial discretion to explore and identify applicable legal principles is crucial for achieving substantive justice—justice that transcends mere legal texts to incorporate societal values of fairness. Independent and autonomous judges are better positioned to offer creative and innovative interpretations of the law, resulting in decisions that are more just and contextually relevant.

Jurisprudence, particularly through precedent-setting court decisions, plays a critical role in the evolution of the legal system. When judges render innovative and responsive rulings, they not only address the specific issues at hand but also contribute to the formulation of new legal principles. Such adaptive decisions can guide subsequent courts, fostering consistency and long-term legal certainty. However, while judicial independence is essential for impartiality and creativity, it also presents challenges, including the potential for inconsistencies in rulings. These inconsistencies can result in legal uncertainty and confusion among the public and legal professionals.⁶⁷ To maintain judicial independence while adhering to established legal principles and justice values, an effective mechanism is essential. Ensuring substantive justice requires that legal decisions be not only procedurally fair but also substantively equitable. This entails a comprehensive understanding of the specific circumstances and needs of the parties involved in the case. Judges must take into account social, cultural, and economic contexts during the decision-making process, ensuring that their rulings genuinely reflect the justice sought by society.⁶⁸

An adaptive and responsive approach to the development of jurisprudence holds substantial potential to enhance the law's relevance and effectiveness in addressing societal needs. Despite challenges such as potential inconsistencies and legal uncertainties, judicial freedom in interpreting and applying the law is a crucial factor in achieving substantive justice. Over time, dynamic jurisprudence can reinforce the legal system and substantially contribute to the realization of genuine justice.⁶⁹ In conclusion, these two decisions exemplify divergent approaches to law enforcement: one characterized by a strict adherence to procedural norms, and the other by a more flexible, humanistic perspective. Both approaches fulfill important and legitimate roles within their respective contexts, reflecting the evolving legal dynamics in Indonesia. Judges must persist in balancing legal certainty with the tangible benefits to society, striving to achieve the ultimate objectives of law: justice and societal well-being.

⁶⁷ Sanusi and Hadinatha, "Activating Unconstitutional Norms in Law."

⁶⁸ Pound, "Law in Books and Law in Action."

⁶⁹ Kelsen, "What Is the Pure Theory of Law?"

Conclusion

The findings of this study reveal significant differences in the legal approaches to validating secret polygamous marriages between the Cilacap Religious Court and the Supreme Court. The Cilacap Religious Court rejected the petition for the validation of a secret polygamous marriage based on Supreme Court Circular Letter (SEMA) Number 3 of 2018, which emphasizes legal certainty and procedural justice, particularly to protect the first wife. In contrast, the Supreme Court granted the petition based on principles of substantive justice and benefit, or *mashlahah*, which involve protecting marriages and offspring in accordance with Islamic law. The Supreme Court's decision, derived through legal discovery (*rechtvinding*), demonstrates that the law can evolve to meet broader and more inclusive justice needs.

This disparity reflects how legal interpretation can vary based on the context and approach of each court. Future research should further explore differences in legal implementation across various judicial levels and their impact on substantive and procedural justice. Analyzing the social impact of court decisions on the involved parties, especially the first wife and children from secret polygamous marriages, is also crucial. Additionally, in-depth interviews with judges at various levels could provide insights into their perspectives on marriage law enforcement. Lastly, research into the application of *mashlahah* principles in Indonesian marriage law could assist in developing more equitable and inclusive legal policies.

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