LEGALIZING UNREGISTERED POLYGNY IN INDONESIA:
THE DIFFERENCE OF METHODS AND THEIR IMPACTS

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Abstract: The duality of Islamic marriage validity i.e. state vs. Islam, has become one of the scourges for achieving the goals of family law reform in Indonesia. It is becoming an increasingly complex issue when it involves unregistered polygynous marriages. This article discusses the difference of methods in legalizing unregistered polygyny in the Religious Courts and their impacts. This study employs normative legal research and socio-legal approach to the decisions of the Religious Courts concerning the legalization of the unregistered polygyny. It finds that there are two different ways adopted by the Judges of the Religious Courts in legalizing the unregistered polygyny: first, by ordering the concerned parties to submit an application for a retroactive marriage certificate issuance to the Court (isbat nikah); or, second, by advising them to submit a polygyny permit application to the Court. The difference in resolving this marriage legality issue has resulted in decisions whose adverse impacts on the wives whom married to in an unregistered manner, i.e. the status of their rights to the joint property, as well as the children from the marriage regarding their status as children born in the wedlock. This article, thus, argues that the isbat nikah is better than the polygyny permit because it fulfills substantive justice and sharia principles in resolving the issue of legalizing unregistered polygynous marriages.

Keywords: unregistered polygynous marriages, legalization of unregistered marriages, polygyny permit

A. Introduction

Unregistered marriages (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).1 Unregistered marriages that have complied with the rules and conditions stipulated in the religious matrimony are legal marriage according to the religion.2 However, the marriages do not have legal force; the state cannot guarantee the rights of the unregistered marriage doers because they do not have an authentic deed, namely a marriage book that proves that their marriage is legal according to the prevailing laws and regulations.

Unregistered marriages have become a common phenomenon in society committed with various motives: socio-economic, cultural, asymmetric information, and legal avoidance.3 The unregistered marriage subjects assume that they are still able to get legal certainty by applying for a legalization of unregistered marriage to the Religious Court (Pengadilan Agama hereinafter PA). Such views sometimes have made the unregistered marriage an option for a husband who wants to have more than one wife, rather than following a polygynous procedure that has been regulated in legislation.4

The procedure for filing polygyny permits in legislation is very strict. A husband, if he wants to have more than one wife, must submit a polygyny permit application to the Religious Court5 by proposing the grounds justified by law as stipulated in Article 4(2) of Law No. 1

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2 Lihat Pasal 2 ayat 1 Undang-Undang Nomor 1 Tahun 1974.
4 Anshori, Hukum perkawinan Islam, h. 213.
5 Undang-Undang Nomor 1 Tahun 1974 Pasal 4 ayat (1) jo. Inpres Nomor 1 Tahun 1991 tentang Kompilasi Hukum Islam Pasal 56 ayat (1).
year 1974 of Marriage (Undang-Undang Perkawinan, hereinafter UUP) juncto Article 57 the Compilations of Islamic Law (Kompilasi Hukum Islam, hereinafter KHI), as well as the terms of polygyny in Article 5(1) of the UUP juncto Article 58(1) of the KHI. In addition, Book II which is the Guidelines for the Implementation of Tasks and Administration of Religious Courts (hereinafter Buku II),⁶ states that a husband who applies for a polygyny permit to the Religious Court, must also apply for the determination of joint property with his previous wife. In the absence of this application, the polygyny permit is declare inadmissible (Niet Ontvankelijk Verklaard, hereinafter NO).⁷ In addition to being verbally proven before the trial, it is also necessary to prove it in writing by attaching the documents as evidence of the provisions of polygyny requirements in the legislation.⁸

Seeing the strictest of polygyny permits procedure compared to that of the legalization of unregistered marriage, sometimes it makes husbands commit the unregistered polygyny, rather than performing official polygyny.⁹ This option has its legal consequences; for example, children born from the unregistered polygyny cannot have a birth certificate. To get the child birth certificate, it is necessary to show the parent’s marriage certificate. If they can not show it, then the child only has a legal relationship with his mother¹⁰ and the child will lose the right to inherit from his father.¹¹ Seeing the consequences of the law, they must record their marriage to obtain the marriage certificate.

When the subjects of the unregistered polygyny want to legalize their marriage to the Religious Court, there is a difference of opinion both from the judges and the clerks regarding the procedure to legalize it. Marriage law in Indonesia only regulates the procedures for legalizing the unregistered marriage; while the unregistered polygyny, which has overstepped two official procedures of marriage, namely the polygyny permit and the marriage registration, is not specifically regulated. As a result, there has been a difference of opinion among the judges about the way to legalize it: some considered that they should apply for a legalization of marriage. This is because they have performed a marriage without registering it, so that, the legalization of marriage (hereinafter isbat nikah) is the right method. Others argue that they must apply for polygyny permit first, because when a husband wants to marry to more than one wife (polygyny) he must get polygyny permit from the Religious Court. Consequently, the request to legalize the unregistered polygynous marriage could be granted, rejected, or declared inadmissible (NO) depending on which method the judge believed is valid. This condition of course negates legal certainty as well as simple, fast and low-cost principles applied in the Indonesian judiciary.¹²

This article discusses the difference in the Indonesian Religious Courts’ methods in legalizing unregistered polygynous marriages and their impacts. It employs normative legal research and socio-legal approach to the decisions of the Religious Courts concerning the legalization of the unregistered polygynous marriage. The decisions studied by this article are obtained through the Directory of Decisions of the Supreme Court and observations of filing

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⁹ Nia DiNata, Berbagi Suami: Fenomena Poligami di Indonesia (Jakarta: Gramedia Pustaka Utama, 2006), h. 9.
¹⁰ Lihat Pasal 43 Undang-Undang Nomor 1 Tahun 1974 jo. Pasal 100 Kompilasi Hukum Islam.
¹¹ Lihat Pasal 186 Kompilasi Hukum Islam.
¹² Lihat Pasal 57 ayat (3) Undang-undang nomor 7 tahun 1989.
cases in the Religious Courts. To this ends, this article first discusses the absence of specific regulations regarding the legalization of marriage records and permits for polygyny in Indonesia as the root cause of this problem. Then, civil lawsuits for legalizing unregistered polygyny will be presented based on a survey of the decisions of the Religious Courts. The aspects to be explored in this section are the methods used by the judges (isbat nikah and / or polygyny permit), the frequency of filing cases so that they get a verdict, and the consequences for the justice seekers on this issue. Finally, this article will examine which of the two methods are more compliant with Sharia principles and laws in Indonesia, namely those that meet the principles of public utility (maslahah), justice, legal certainty, as well as fast, easy, and inexpensive judicial proceeding.

B. The Registration of Marriage and Polygyny Permit in Indonesia

The unregistered marriage, in the context of the community in Indonesia, is generally a marriage carried out by a man with a woman who is not registered to the marriage registrar so that the marriage does not have a marriage certificate. The marriage is carried out regardless of whether it has fulfilled the requirements of the religious matrimony or not. There is an assumption in the community that the unregistered marriage is valid as long as it fulfills the terms and conditions of marriage in the provisions of religion, so there is no need to register their marriage. Article 2(1) of the UUP states that a marriage is lawful if it is done according to the law of each religion and belief of the bride and groom. Article 2(2) of the UUP then adds that every marriage is recorded according to the prevailing laws and regulations.

There are two interpretations that are developing towards the provisions of Article 2(1-2) of the UUP. First, paragraph (1) and paragraph (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, paragraph (1) and (2) are one entity so that the validity of marriage is not only seen from a religious-normative view, but must be seen from the legal administration as well. Thus, the marriage is considered valid if it is done both as stipulated in the religious matrimony and recorded in the KUA.

After the constitutional court ruling on the Machica case, the interpretation of the first model was increasingly emphasized, i.e. fulfillment of religious matrimony requirements is what makes a marriage legal. Some of the Religious Court decisions related to legalization of unregistered marriage also show this. However, for a legal marriage complied with the religious matrimony has a legal impact from the state administration; the marriage must then be registered with the designated institution. For Islamic marriages, the existence of

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13 For example in Posbakum Pengadilan Agama Tenggarong.
17 Alfitri, Whose Authority …, p.
18 Ahmad Tholabi Kharlie, Hukum Keluarga Indonesia (Jakarta: Sinar Grafika, 2013), h. 191; See the Decision No. 1339/Pdt.G/2013/PA.Ngj (Pengadilan Agama Nganjuk 28 Agustus 2014); See the Decision No. 93/Pdt.G/2014/PTA.Mtr (Pengadilan Tinggi Agama Mataram 15 Oktober 2014).
unregistered marriage can be validated through the application for the legalization of marriage (isbat nikah) to the Religious Court as stipulated in Article 7(2) of the KHI.

The applications for isbat nikah submitted to the Religious Courts only pertain to a number of matters, 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 religious matrimony fulfilled; 4) the existence of a marriage that contracted before the enactment of the UUP and; 5) marriage carried out by those who do not have marital barriers according to the UUP.19

Only a few parties can submit such applications, namely husband and wife together, their biological children, marriage guardians or other parties who have interests.20 The decision of the isbat nikah application at the Religious Court is used to obtain the marriage certificate at the KUA. The unregistered marriage is then officially recorded in the state administration. The marriage certificate is useful for 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.21

The provision of isbat nikah is a solution provided by the state for people who do not have a marriage certificate.22 However, it cannot be denied that this solution have triggered the practice of unregistered marriage become unregistered polygyny.23 The unregistered polygyny is the marriage of a husband and his next wife(s) who is carried out clandestinely and kept secret from the public and the married registrar.

Indonesian Marriage law basically adheres to the principle of monogamy but it is not absolute. In an emergency situation, that is, in the case of a husband wanting to have more than one wife, it is permissible as long as the law of his religion permits.24 A husband is allowed to practice polygyny as long as it meets the requirements specified by the law. He must submit an application to the 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.25 The reasons for polygyny in this law are facultative or alternative, namely one of them can be chosen and if it can be proven, then polygyny can be granted from the Religious Courts.26 In addition, 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

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19 See Pasal 7 ayat (3) Kompilasi Hukum Islam
20 Abd Shomad, Hukum Islam: Penormaan Prinsip Syariah dalam Hukum Indonesia (Jakarta: Kencana, 2017), h. 282.
25 See dalam Pasal 4 ayat (2) Undang-Undang Nomor 1 Tahun 1974 jo. Pasal 56 ayat (1) Kompilasi Hukum Islam.
26 Buku II, h. 135.
ability to be fair to his wives and children. The terms of polygyny in this law are cumulative, i.e. all conditions must be fulfilled and can be proven in order to obtain polygyny permits from the Religious Courts.

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 viz. a statement of income per month, and a statement that can act fairly. In addition, there are also additional conditions, namely a statement from the prospective 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. Especially for Civil Servants, there are additional requirements, namely having to get permission from their superiors and the ability to finance the lives of his wives and children as evidenced by an income tax statement.

Seeing the severity of the conditions that must be met, unregistered polygyny has become an alternative choice for husbands who want to practice polygyny. There is a growing assumption in the community that there is a legal effort that can be made later to legalize the marriage, i.e. isbat nikah. However, they then face obstacles inlegalizing the marriage, due to legal uncertainty about the way to legalize the marriage. Law enforcers in the Religious Courts have different opinions regarding how to legalize it. Some parties 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. Others consider they apply for a polygyny permit, arguing that when a husband wants to have more than one wife, he must apply for a polygyny permit and obtain a permit from the Religious Court through a verdict.

These different methods result in the different decisions depending on who handles the case. This difference does not only occur in one Religious Court, but occurs in several Religious Courts throughout Indonesia based on a survey of the decisions of the Religious Courts through the Directory of Decisions and observations in the administration of legal assistance in Legal Aid Posts (Pos Bantuan Hukum hereinafter Posbakum) in the Religious Courts.

C. Civil Cases in Legalizing Unregistered Polygyny in the Religious Courts

Cases are obtained through search engines in the Supreme Court Directory Decision. Based on the keyword “isbat nikah poligami” 52 decisions are obtained. After reading them, it is found eight decisions that are relevant to this study. With the keyword “poligami siri”, 73 decisions are obtained. After reading them, it is found six decisions relevant to this study. The fourteen decisions are relevant because they discuss the unregistered polygyny. Apart from the Supreme Court Decision Directory, the authors also obtained information from the

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27 See dalam Pasal 5 ayat (1) Undang-Undang Nomor 1 Tahun 1974 jo. Pasal 55 ayat (2) dan 58 ayat (1) Kompilasi Hukum Islam.
28 Lihat Buku II, h. 136.
30 See dalam Pasal 10 ayat (3) huruf (b) dalam Peraturan Pemerintah Nomor 10 Tahun 1983.
32 See Pasal 7 ayat (2) Kompilasi Hukum Islam.
33 See Pasal 4 ayat (1) Undang-Undang Nomor 1 Tahun 1974.
Supreme Court employees about 5 similar cases that occurred in the East Kalimantan region. A total of 19 decisions became the object of this study (see the table 1 for the case register number).

In the first case group, the applicants were asked or filed for the legalization of their unregistered marriage through the application of the isbat nikah. Of the 11 decisions on isbat nikah requests that were reviewed: 5 cases were granted, 3 cases were rejected, and 3 cases were declared inadmissible (NO). As for the second case group, the doers of unregistered polygyny were asked to apply for polygyny permit to legalize their marriage. Of the 8 polygyny permit decisions reviewed: 4 cases were granted, 2 cases were rejected. Based on the case investigation by the panel of judges, the petition was granted due to the concerns of public utility (maslahah), justice, and in accordance with the provisions in the state laws and Islamic law (Islamic Jurisprudence hereinafter Fiqh). While the refusal or failure to accept the application is because it is not in accordance with the provisions in the legislation and Fiqh.

Meanwhile, the case is declared inadmissible (NO) when there was lack of procedural elements in the filing of his case.

Legal considerations given by the judge on the above decisions (Granted, Rejected, and NO) are in accordance with the formal and material provisions of the legislation in force in Indonesia. Legal problems arise when we examine the frequency of filing cases by the same applicant; in some cases, the applicants must file his case more than once with the different method of legalizing their unregistered polygyny to get the decision he wants (Granted) as explained by table 1. Granting these requests cannot be separated from the judges who examine the application which is keener to one method than the other.

An example of this is the request to legalize the unregistered polygyny which was submitted to the Samarinda Religious Court. The applicant initially applied for an Islamic marriage certificate with case number 1191 / Pdt.G / 2014 / PA.Sby. The case was rejected by the panel of judges in the trial; the assembly also suggested applying for a polygyny permit. Based on these suggestions the Applicant submitted the case for the second time through a polygyny permit application with case number 1453 / Pdt.G / 2014 / PA.Smd, but the case was declared inadmissible (NO) by the panel of judges. They argued that the request was unfounded because he applied for a polygyny permit to marry a second wife who had been married illegally. He was advised to apply for marriage certificate. The applicant re-submitted for the third time through an isbat nikah request with case number 376 / Pdt.P / 2014 / PA.Smd and obtained the desired result, namely the request was granted by the panel of judges. The difference in the decision on the first submission of the request with the second application is inseparable from the different judges in examining the application. Thus, in the third application (marriage certificate) the panel of judges is adjusted to the judges who have a tendency towards marriage certificate as a method for legalizing the unregistered polygyny. This condition is certainly not in accordance with the principles of justice, legal certainty, and a fast, easy, and low-cost judiciary adopted by courts in Indonesia.

Table 1 The Frequency of Submission of Application

<table>
<thead>
<tr>
<th>No</th>
<th>Freq.</th>
<th>Registry Number</th>
<th>Case Type</th>
<th>Court Level</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1 x</td>
<td>4914/Pdt.G/ 2011/PA.Sby</td>
<td>Polygyny permit*</td>
<td>1st instance (PA)</td>
<td>Granted</td>
</tr>
<tr>
<td>2</td>
<td>1 x</td>
<td>27/Pdt.G/ 2013/PA.Mlg</td>
<td>Polygyny permit</td>
<td>1st instance (PA)</td>
<td>Granted</td>
</tr>
<tr>
<td>No.</td>
<td>1st Instance</td>
<td>Case Number</td>
<td>Type of Application</td>
<td>Decision</td>
<td></td>
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<td>-----</td>
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<tr>
<td>3</td>
<td>1</td>
<td>611/Pdt.G/ 2013/PA.Pra</td>
<td>Polygny permit</td>
<td>Rejected</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>1134/Pdt.G/ 2013/PA.Bgl</td>
<td>Polygny permit</td>
<td>NO (Declared inadmissible)</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>1</td>
<td>1329/Pdt.G/ 2014/PA.Pas</td>
<td>Polygny permit</td>
<td>Granted</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>1</td>
<td>482/Pdt.G/ 2015/PA.Mpw</td>
<td>Polygny permit</td>
<td>Rejected</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td>1</td>
<td>97/Pdt.P/ 2013/PA.Sidrap</td>
<td>Legalization of unregistered marriage</td>
<td>Granted</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>1</td>
<td>164/ Pdt.G/ 2013/PA.Prob</td>
<td>Legalization of unregistered marriage</td>
<td>NO (Declared inadmissible)</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>1</td>
<td>1339/Pdt.G/ 2013/PA.Ngj</td>
<td>Legalization of unregistered marriage</td>
<td>Rejected</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>1</td>
<td>435/Pdt.G/ 2014/PA.Smd</td>
<td>Legalization of unregistered marriage</td>
<td>Rejected</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>1</td>
<td>350/Pdt.G/ 2015/PA.Krs</td>
<td>Legalization of unregistered marriage</td>
<td>Granted</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>1</td>
<td>229/Pdt.G/ 2015/PA.Dmk</td>
<td>Legalization of unregistered marriage</td>
<td>NO (Declared inadmissible)</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>2</td>
<td>1706/Pdt.G/ 2010/PA.Bdw</td>
<td>Legalization of unregistered marriage</td>
<td>NO (Declared inadmissible)</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>2</td>
<td>297/Pdt.G/2011/PTA.Sby</td>
<td>Legalization of unregistered marriage</td>
<td>Appeal (PTA)</td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>NO (Declared inadmissible)</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>2</td>
<td>663/Pdt.G/2014/PA.Bm</td>
<td>Legalization of unregistered marriage</td>
<td>Rejected</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>3</td>
<td>1191/Pdt.G/2014/PA.Smd</td>
<td>Legalization of unregistered marriage</td>
<td>Declared failed</td>
<td></td>
</tr>
<tr>
<td>17</td>
<td>3</td>
<td>N/A</td>
<td>Polygny permit</td>
<td>Revoked</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td></td>
<td></td>
<td>Polygny permit</td>
<td>Granted</td>
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</tr>
</tbody>
</table>
D. Can the Unregistered Polygyny be Legalized?

1. According to the Compilation of Islamic Law (KHI)?

To create order relating to marriage, there is Law Number 1 Year 1974 concerning Marriage (Undang-Undang Perkawinan or UUP) which is still valid until now replacing previous laws such as Law Number 22 Year 1946 and others. However, the UUP cannot fully solve problems in the community which continues to develop, one of which is the legalization of unregistered marriage. Therefore, other regulations were made to overcome this, especially the Law on Religious Courts and the Compilation of Islamic Law Indonesia (Kompilasi Hukum Islam Indonesia or KHI). For example Article 7 of the KHI, there is written "in the case of marriage cannot be proven by a marriage certificate, the isbat nikah can be submitted to the Religious Court".

What about the unregistered polygyny, can it be legalized because of its unique traits i.e. bypassing two legal processes: polygyny permit and marriage registration? Are the provisions in the KHI complete or clear enough to cover the uniqueness of this case? Basically, the monogamous marriage is the principle adopted in Indonesian marriage law. The principle of monogamy is that a husband is only allowed to have one wife. However, the principle is flexible, namely that a husband is allowed to have more than one wife as long as the provisions in the religion he believes allow. For Islamic marriage, a man who wants to have more than one wife must submit a polygyny permit application to the Religious Court in the area of his residence by fulfilling the alternative reasons for polygyny in the provisions of Article 4(2) of the UUP juncto Article 57 of the KHI and the cumulative terms of polygyny stipulated in the Article 5(1) of the UUP juncto Article 58(1) of the KHI.\(^{34}\)

Based on these provisions, the Religious Court must examine the polygyny permit application submitted by the husband to determine whether it has complied with the provisions of the law, both in writing and verbally in the trial.\(^{35}\) In addition, the polygyny permit application is required to submit an application for joint property between husband and wife as per in the KMA / 032 / SK / IV / 2006 concerning the Buku II. If the husband does not include this in, his application for polygyny permits is unacceptable.\(^{36}\) This is done to guarantee the rights of the wife to the joint-matrimony property.

Based on this, a husband who wants to commit polygyny is required to submit a polygyny permit application to the Religious Court. Once the Religious Court grants the request and gives permission to the husband, then, the decision is used by the husband to marry the woman at the KUA to record the second marriage.

The problem is if the polygynous marriage was not recorded, viz. performed without registration. If referring to Article 7(2) of the KHI, the unregistered marriage can be legalized


\(^{36}\) *Buku II*, h. 136.
by state administration by applying for isbat nikah to the Religious Court. However, not all types of isbat nikah requests for are acceptable to the Religious Courts. The unregistered polygyny must comply with the rules of the religious matrimony. In other words, the fulfillment of the terms and the conditions of the religious matrimony determine the acceptance of the application for the unregistered polygyny legalization.

Other than these provisions, there is no explanation whatsoever regarding the order of marriages or the number of marriages. Hence, it can be concluded that the provision is general in nature, so that if it is associated with unregistered polygyny, the provision can be used to legalize this form of marriage. By using the legal interpretation, the provisions for legalizing unregistered marriage that have occurred in general and fulfilled the religious matrimony requirements can be used in particular case, i.e. the unregistered marriage, such as unregistered polygyny. This is what happened in the case number 376 / Pdt.P / 2014 / PA.Smd in the Samarinda Religious Court; the isbat nikah application is accepted because the unregistered polygyny fulfills the religious requirements in question.

Besides these provisions, the KHI also determines the following conditions where an isbat nikah application can be granted: first, when the isbat nikah application case is submitted to the Religious Court on the grounds that Article 7(3a) is in the context of divorce for marriage carried out in unregisteredly. The subject matter of this case is a divorce lawsuit, but because the marriage is unregistered, then the marriage needs to be legalized in advance by submitting the isbat nikah application to be combined with the divorce as the subject matter.

Second, because the marriage certificate is lost as per Article 7(3b) of the KHI. The marriage certificate is an authentic deed made and issued by a marriage registration institution, namely the KUA and the Civil Registry. A married couple who already have a marriage certificate, but their marriage certificate is lost or damaged or destroyed, they can request a copy of the marriage certificate at the KUA or Civil Registry where it is issued. However, if the missing marriage certificate does not have a copy at the marriage registration institution, because the stored document or file has been destroyed, the determination from the Religious Court is used instead of the marriage certificate.

Third, when there are the doubts of the validity of the marriage they have committed as per Article 7(3c) of the KHI. In this case, it is usually related to the terms and conditions of religious matrimony. This provision applies only to the unregistered marriage, not to the marriage that has been done with the supervision of the official of the KUA. This is because it is rare in the unregistered marriage that the terms and conditions of the religious matrimony have been executed perfectly, while the marriage contracted before the official of the KUA has fulfilled the terms and conditions. The officials have followed the standard of marriage procedure, so it is impossible that the officials are deliberately abandoning the religious matrimony rules. When there are terms and conditions that have not been fulfilled, the registrar of marriage refuses to perform the marriage.

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37 Asnawi, Hermeneutika Putusan Hakim, h. 24.
40 Lihat Suadi dan Candra, Politik Hukum, h. 62.
Fourth, for marriages that has been carried out before the enactment of the UUP year 1974 as per Article 7(3d) of the KHI. This is because before the enactment of this Law, the provision of regulated marriage in the previous legislation was still in refinement because it has not been in line with the situation at that time, especially the problem of recording the marriage.41

Fifth, for those who have got no obstacle to marry pursuant to the UUP as per Article 7(3e) of the KHI. The obstacle of marriage referred to in this provision is stipulated in Article 8 and Article 10 of the UUP. These provisions apply generally to all Indonesians. As for the Muslim community, the KHI has regulated about it in Articles 39-44.

Hence, it can be seen that the provisions in Article 7(3) of the KHI concern any marriage matters that can be applied for an isbat nikah to the Religious Courts. When analyzed, there are several provisions that explain clearly what they mean, and there are also some provisions that have interpretations therein. In the provisions of letters (a), (b), and (d), it can be clearly seen in what matters the isbat nikah can be done; in other words, the provisions are rigid and closed. Meanwhile, the provisions of letters (c) and (e) are elastic / flexible and open, with the aim of providing legal certainty and legal protection to the community. When a marriage cannot be legalized based on to the provisions of letters (a), (b), and (d), then, the marriage can still be legalized through the provisions of (c) and (e). The provisions in letter (e) are very broad in understanding because as long as the unregistered marriage fulfills the requirements of the religious matrimony and there is no prohibition on the couple to get married, then their marriage can be legalized. Based on this, it can be analogized as if the unregistered marriage in general can be legalized, then the particular unregistered polygyny can also be legalized, so far as the fulfillment of religious matrimony requirements is concerned.

3. KMA/032/SK/IV/2006 as the Guidelines for Handling the Isbat Nikah Application

To prevent the legal avoidance in the case of unregistered marriage which turns out to be an unregistered polygyny, the process of filing, examining, and completing the isbat nikah cases must follow KMA / 032 / SK / IV / 2006 concerning Book II Guidelines for Implementation of Tasks and Administration in the Court (hereinafter Buku II). In connection with the application for an isbat nikah, letter (f) numbers 3 and 4 read:

(3) The process of examining the isbat nikah application submitted by either the husband or the wife is contentious by subjecting the wife or husband who does not submit an application as the Respondent's party, the product is in the form of a Decision which can be sought an appeal and cassation.

(4) If in the process of examining the application for the isbat nikah is known that the husband is still bound by a legal marriage with another woman, then the previous wife must be made a party to the case. If the applicant does not want to change his application by entering his previous wife as a party, the request must be declared inadmissible.42

From the passage number 3 can be clearly seen that when the application is filed by one of the parties, the other party who does not file a petition is the Respondent, so the application for marriage is contentious. Basically, the application for an isbat nikah is essentially voluntary when all parties submit the application together.

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41 Lihat Kharlie, *Hukum Keluarga Indonesia*, h. 165.
42 Buku II, h. 144.
As for the passage number 4, when the application for an isbat nikah in the Religious Court is known that the husband is still bound to a marriage with another woman, then the woman should be included as a party in the matter. When this is correlated with the passage number 3, the woman or former wife was made as the Respondent so that the isbat nikah application is contentious. When a husband does not include his previous wife as the party in his application, the application is declared inadmissible (NO).

Based on these provisions, it can be seen that the unregistered polygyny can be legalized in the Religious Court. However, because legalizing the unregistered polygyny imply validating its polygyny, this polygyny itself must comply with the statutory requirements beforehand. These provisions are the reasons for polygyny in Article 4(2) of the UUP juncto Article 57 of the KHI. In this regards, it is necessary to examine whether the marriage of the unregistered polygyny performed by the husband fulfills the reasons in the provision. In addition to this, the conditions of polygyny in Article 5(1) of the UUP juncto Article 58(1) of the KHI must also be examined, especially regarding permission from the first wife to allow the husband to remarry before the Religious Court can ratify the unregistered polygyny. Pursuant to the Book II concerning polygyny permit too, the applicant must submit a matter of the distribution of shared assets, so in the case of isbat nikah of the unregistered polygyny must propose the distribution of shared assets too.

The incorporation of the provisions of polygyny into the marriage law is to dispel the public's view that the procedural law is complicated. Merging several demands in one claim is permitted if the merger makes it easy to examine by the Court, as per the Supreme Court jurisprudence No. 1043 K / Sip / 1971, dated December 3, 1974 which gave birth to the rule "Civil and HIR Procedural Law do not regulate the problem of merging lawsuit; determining jurisprudence is permitted provided that it will not violate simple, fast, and low-cost judicial principles specified in the Law Number 14 of 1970 [concerning the Judicial Power]. This was left to the discretion of the judge who examined the lawsuit."

Based on the above, the unregistered polygyny can be legalized pursuant to the Article 7(2) and (3c and 3e) of the KHI, and KMA / 032 / SK / IV / 2006 concerning the Enactment of Book II as Guidelines for the Implementation of Tasks and Administration in the Court. Besides, in order to prevent the legal avoidance, Article 4(2) of the UUP juncto Article 57 of the KHI, Article 5(1) of the UUP juncto Article 58(1) of the KHI, and provisions in the Book II need to be fulfilled. The most important thing is that the unregistered polygyny must comply with the terms and conditions of the religious matrimony of Islam and does not have obstacles in marriage that have been regulated in legislation.

E. Isbat Nikah or Polygyny Permit: Law in the Book vs. Law in Action

It is a fact that there are some parties who think that legalizing the unregistered polygyny is by applying for a polygyny permit to the Court based on the provisions of Article 3(2) of the UUP juncto Article 55(1) of the KHI. Both provisions state that someone who wants to have more than one wife then submits an application to the Court. The difference of methods adopted by the Judges has resulted in the legal uncertainty regarding the settlement of the case. As explained above, it is possible that the polygyny permit application is handled by a panel of judges who tend to the opinion that the isbat nikah is the right method to legalize the unregistered polygyny (see cases number 16 and 17 in table 1). All of this happened because of the absence of specific regulations governing how to legalize the unregistered polygyny according to state law.

43 Buku II, h. 79.
44 Hulman Panjaitan, Kumpulan Kaidah Hukum Putusan Mahkamah Agung Republik Indonesia Tahun 1953 s/d 2008 Berdasarkan Penggolongannya (Jakarta: Kencana, 2014), h. 28.
Based on the principle of Ius Curia Novit, a judge is deemed to know all about the law against the case being examined.\textsuperscript{45} In giving a verdict, the judge is required to explore, follow, and understand the values that develop in the community in order to provide legal certainty based on justice for the community. This is mainly to anticipate the development of problems that have not been clearly regulated in legislation, such as the issue of legalizing the unregistered polygyny. The difference in the legalization method adopted by the judges between the isbat nikah and polygyny permit, of course, will have a different legal effect on the doers, especially for the wife(s) whom have been married to without registration and the children born from the marriage. Analyzing legal impacts that occur from the use of each method becomes a necessity to be able to conclude which method is better used in the future by the judges.

The use of the isbat nikah method to legalize the unregistered polygyny is more in line with the principle of justice as well as simple, fast, and low-cost judiciary. Once the unregistered polygyny legalized by the Religious Court, the child born from the marriage becomes a legitimate child because he/she was born from a legitimate cause, i.e. the legalized marriage.\textsuperscript{46} The parent, who did the unregistered polygyny, will then get a marriage certificate from the KUA. In the deed, the unregistered polygyny date will be written on the marriage certificate as the date of the marriage, so that the child automatically becomes a legitimate child. In other words, the parties only submitted one request to the Religious Court once to legalize two things: first, the event of the marriage; second, the child born to the marriage.

When the parties submit a polygyny permit application to the Religious Court, however, the parties will submit two different applications. When applying for a polygyny permit, the court will only examine the subject of the matter, namely permission for polygyny. Consequently, the previous unregistered polygyny was considered never to occur, even though the marriage had children. After the court gave permission to the husband to remarry, the parties would remarry at the KUA, so the marriage date recorded in the marriage certificate was the most recent marriage, not the previous date of the unregistered polygyny. This results in children being born into marriage being considered illegitimate children\textsuperscript{47} because the legitimate marriage is the latest marriage. Further result, the child only has a civil relationship to his mother's line.\textsuperscript{48} The parties, thus, will submit an application back to the court to request the origin of the child in order to have a civil relationship with his father as well. In other words, the parties submit two requests and of course pay the down payment fees twice because they twice submit a request. This of course negates the simple, fast, and low-cost judicial principle.

The principle of simple, fast and low-cost are among the most important principles in the judiciary and an implementation of procedural law to provide access to justice to the justice seekers. The simple principle has the purpose that in organizing a civil lawsuit, it must be carried out with a definite and simple mechanism. The fast principle has the purpose that the trial is carried out by taking into account reasonable time. The low cost means that the costs arising from the case must be feasible and as much as possible accessible to the community.\textsuperscript{49}

\textsuperscript{45} M. Yahya Harahap, \textit{Hukum Acara Perdata: Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan} (Jakarta: Sinar Grafika, 2015), h. 821.

\textsuperscript{46} See Pasal 42 Undang-Undang Nomor 1 Tahun 1974 jo. Pasal 99 Kompilasi Hukum Islam.

\textsuperscript{47} This is because a legitimate child is a child born in or as a result of a legitimate marriage. See Pasal 42 Undang-Undang Nomor 1 Tahun 1974 jo. Pasal 99 Kompilasi Hukum Islam.

\textsuperscript{48} See Pasal 43 Undang-Undang Nomor 1 Tahun 1974 jo. Pasal 100 Kompilasi Hukum Islam.

There is also an impact on assets when there was a difference between the marriage certificate and polygyny permit, especially for the first wife and second wife. The assets referred to here are joint-matrimony property and inheritance. Joint-matrimony property or often used with the term gono-goni property are assets obtained by husband and wife while living a household life. When the parties submit an isbat nikah, the second wife who is married illegally will get his full rights to the common property, because the unregistered marriage has been recognized by the state as a legitimate marriage based on the determination of the court. Whereas if applying for a polygyny permit, the unregistered wife will lose her right to shared assets and she cannot claim them.

A hypothetical case, namely A and B, were officially married and were recorded in the KUA in 2000, while living their household they acquired assets in the form of 3 ha of land. Then in 2003, A and C married without registration and, after living the household, got assets in the form of land 6 ha. Then, in 2006 the parties wanted to legalize their marriage. When the parties propose an isbat nikah, then the 3 ha of land becomes joint-matrimony property between A and B, while the 6 ha of land becomes joint-matrimony assets among A, B, and C. However, it is different when the parties apply for the polygyny 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, this is because the unregistered marriage of A and C is considered never to occur. Only in 2006 that the marriage is considered to have occurred between A and C based on polygyny 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 heirs of the deceased, the joint-matrimony property must be given to his wives first.

Hence, it can be concluded that legalizing the unregistered polygyny by means of isbat nikah is giving more benefit (maslahah) than harm (mafsadah). Benefit will not only be available when sought, but also by rejecting the harm. This is in line with the canon of fiqh: "refusing damage is preferred to attracting benefit." This rule is often used by Religious Court judges in giving decisions for justice to realize the maslahah. Not infrequently the judges try to find the law and give decisions by harmonizing the Shari'ah law with the applicable legislation, so that no violations occur or at least slightly deviate from the legislation for the benefit and justice or known as the doctrine of contra legem.

Despite the fact, when the doers of unregistered polygyny legalize their marriage by way of isbat nikah, it does not just bring the benefit as described above, but it also creates the harms, i.e. the violation of the provisions in Article 2(2), 4 of the UUP juncto Article 57 of the KHI, and Article 5 of the UUP juncto Article 58 of the KHI. Meanwhile, if the isbat nikah application is denied, then the state can not guarantee and protect the rights of the unregistered wife of and children born from the marriage, so that they do not receive state protection and legal certainty, especially in the state administration. As per the canon of Fiqh above, it would be fair to win the guarantee and protection of the rights of the wives and children born from the marriage even though doing this means breaching the law. The harm, i.e. legal breach, is an object of law that is only administrative, while protecting the basic

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51 Harahap, *Hukum acara perdata*, h. 130.
52 Nashr Farid Muhammad Washil dan Abdul Aziz Muhammad Azzam, *Qawaid Fiqhiyyah* (Jakarta: Amzah, 2009), h. 21.
54 Fauzan, *Kaidah Penemuan Hukum Yarisprudensi Bidang Hukum Perdata*, h. 42.
55 See the Decision No. 350/Pdt.G/2015/PA.Krs (Pengadilan Agama Kraksaan 19 Maret 2015).
rights of wives and children as legal subjects is preferred over an administrative object of law.\textsuperscript{56} Also, the state has an obligation to be responsible for protecting, upholding and advancing human rights including the rights of wives and children as a result of unregistered marriage.\textsuperscript{57} Based on that, a judge needs to consider the impact of his/her verdict; it should bring utility (maslahah) and prevent or reject the harm (mafsadah) and thereby giving legal certainty.

The unregistered polygyny can be legalized as the unregistered marriage in general, but the former must comply with the rules of religious matrimony in Islam. They are the existence of prospective bride and groom, the guardian, two witnesses, and consent (ijab and qabul).\textsuperscript{58} The fuqaha states: "In the marriage admission of a woman, it must be submitted the validity of the marriage and the terms, i.e, the presence of guardian and witnessed by two fair witnesses".\textsuperscript{59} Likewise, "the only person who claims to be married, in the most authentic opinion is absolutely not sufficient enough; yet, he must explain: I marry him with the presence of true guardian and be witnessed by two just witnesses and by the bride’s consent, if the consent is indeed implied ".\textsuperscript{60}

Hence, a marriage is considered valid when fulfilling the terms and conditions of the religious matrimony. Besides, there is a need for recognition from the man and woman who carry out the marriage, because the recognition especially said in the trial is considered valid and is strong evidence in the provisions of Article 311 and 313 Rbg, 174 HIR, and 1925 Civil Code. Therefore, to obtain legal certainty based on justice, legalizing unregistered polygyny marriages in the Religious Courts is better done by the isbat nikah than that of the polygyny permits.

**F. Concluding Remarks**

Based on a study on the verdicts of the Religious Courts throughout Indonesia regarding the legalization of unregistered polygyny, there are differences in methods in the case. There are two ways to apply for marriage and application for polygyny permits. The difference in the method for legalizing the unregistered polygyny is due to the absence of statutory provisions that are clear and detailed in legalizing this kind of marriage. As a result, judges disagree with the use of legislation particularly on the polygyny permit and the isbat nikah to settle the matter. It is necessary for a legal finding to resolve the problem in order to create a legal certainty in legalizing the unregistered polygyny, so that the rights of husbands, first wife, second wife and children born from the marriage can be protected. The isbat nikah application is a method that better meets the principles of justice, legal certainty, as well as simple, quick, and affordable judiciary in Indonesia, when compared with the polygyny permit application. However, in order to avoid legal avoidance, the unregistered polygyny sought for an isbat nikah must comply with the terms and conditions of the religious matrimony.

\textsuperscript{56} See the Decision of Pengadilan Agama Kraksaan 19 Maret 2015 pada h. 14; Rhona K.M. Smith dkk., *Hukum Hak Asasi Manusia* (Yogyakarta: PUSHAM UII, 2008), h. 40.

\textsuperscript{57} Smith dkk., *Hukum Hak Asasi Manusia*, h. 53; Baderin, *Hukum Hak Asasi Manusia dan Hukum Islam*, h. 156.

\textsuperscript{58} See Pasal 14 Kompilasi Hukum Islam.


\textsuperscript{60} Anwar, *Dasar-Dasar Hukum Ilsami dalam Menetapkan Keputusan di Pengadilan Agama*, h. 43.

The question, then, arises if the terms and conditions of the religious matrimony are not met: is it still possible to legalize its existence by means of an isbat nikah? The answer to this question will be very closely related to how the state and justice enforcers harmonize the demands of human rights and the provisions of Islamic law. Observing the divergent decisions of the Religious Courts in the case of Child Parentage application, isbat nikah applications from non-religious-matrimony-compliant unregistered polygyny will be decided unfavorably to the applicants by the Courts (see Case number 297/Pdt.G/2011/PTA.Sby, 164/Pdt.G/2013/PA.Prob, 1339/Pdt.G/2013/PA.Ngj, and 229/Pdt.G/2015/ PA.Dmk). Hence, food for thought for the next studies: is it now the time for Indonesia to have a civil marriage besides the (religious) marriage in order to safeguard the rights of women and children?

DAFTAR PUSTAKA


