

# THE CLOSURE OF *ISBAT* FOR POLYGAMOUS MARRIAGE ON LEGAL PURPOSE PERSPECTIVE

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**Abstract:** After attendance, the enactment of the Supreme Court Circular (SEMA) Number 3 of 2018 answers the legal vacuum over *isbat* for Polygamous marriage. But in practice, the SEMA confuses its implementation. This study aims to analyze the application of polygamous marriage law in SEMA number 3 of 2018 and the juridical implications for justice, expediency, and legal certainty. This research includes normative legal research with statutory and conceptual approaches. Gustav Radbruch's theory of legal purpose is used as his analysis knife. The study concluded that closing the door of *Isbat* for Polygamous marriage is not the right solution because marriage *isbat* is one way to obtain legal guarantees in the eyes of the state. The aggrieved subject of the SEMA was a polygamous wife who could not take legal action in seeking justice. Judging from Gustav Radbruch's theory, SEMA number 3 of 2018 has not met the elements of legal objectives. The provisions in SEMA number 3 of 2018 only accommodate the interests of children. The rights of polygamous wives should be prioritized because the benefits received are more significant than tightly closing the door of *isbat* for Polygamous marriage. It is necessary to review SEMA number 3 of 2018 to contain concrete values of justice, expediency and legal certainty for children and wives.

**Keywords:** *Isbat*, Polygamous Marriage, Gustav Radbruch

**Abstrak:** *Hadiranya SEMA Nomor 3 Tahun 2018 menjawab kekosongan hukum atas peraturan isbat nikah poligami secara siri. Namun dalam praktiknya, SEMA tersebut menimbulkan kebingungan dalam implementasinya. Tujuan penelitian ini adalah menganalisa penerapan peraturan isbat nikah poligami dalam SEMA 3/2018 serta implikasi yuridis terhadap kepastian dan keadilan hukum. Penelitian ini termasuk penelitian hukum normatif dengan pendekatan perundang-undangan dan pendekatan konseptual. Teori tujuan hukum Gustav Radbruch digunakan sebagai pisau analisisnya. Hasil penelitian menyimpulkan bahwa penutupan pintu isbat nikah poligami bukanlah solusi yang tepat, sebab isbat nikah adalah salah satu jalan untuk memperoleh jaminan hukum di mata negara. Subjek yang dirugikan atas diterapkannya SEMA tersebut adalah isteri poligami siri yang tidak bisa melakukan perbuatan hukum dalam mencari keadilan. Ditinjau dari teori Gustav Radbruch, SEMA 3/2018 belum memenuhi unsur-unsur tujuan hukum. Ketentuan dalam SEMA 3/2018 hanya mengakomodir kepentingan anak. Mestinya hak isteri poligami perlu diprioritaskan, karena kemanfaatan yang diterima lebih besar dibandingkan menutup rapat-rapat pintu isbat nikah. Perlu kiranya untuk mengkaji ulang SEMA 3/2018 sehingga mengandung nilai keadilan, kemanfaatan dan kepastian hukum yang konkrit bagi anak maupun isteri siri.*

**Kata kunci:** *Isbat*, Nikah Poligami, Gustav Radbruch

## Introduction

Unregistered polygamous marriages are polygamous practices without court permission. This form of polygamy is also known as *siri* polygamy or underhand polygamy. This marriage has no legal force because it is not by applicable regulations.<sup>1</sup> Provisions on polygamy are regulated in Articles 3 – 5 of Law Number 1 of 1974 on marriage (Law 1/1974) and 56 paragraphs 1 and 3 of the Compilation of Islamic Law (KHI).<sup>2</sup> Despite regulations, people still often practice serial polygamy for various reasons, ranging from religious dogma, the first wife not allowing it, to feeling that polygamy procedures are convoluted.<sup>3</sup>

*Siri* marriages can have legal force by requesting an injunction or incarcerating a marriage in a religious court. Historically, marriage was

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<sup>1</sup> Muhammad Muhajir and Qurratul Uyun, "SEMA Waiver Number 3 of 2018 in the Case of Isbat for Polygamous Marriage: Study of Legal Considerations of Judges in Decision Number 634/Pdt. G/2018/PA. Mtr," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 55, no. 2 (2021), 263–290.

<sup>2</sup> KHI paragraph 56, paragraph 1 explains that permission from a religious court is necessary for a person who intends to have more than one wife. Whereas Article 56, paragraph 3 explains that without the consent of the religious court, second, third, or fourth marriage will not have legal force

<sup>3</sup> Some people in Laden Village, Pamekasan Regency without the knowledge of the first wife, carry out the practice of underhand polygamy. Abd Warits and Abd Wahed, "Praktik Poligami Di Bawah Tangan Di Desa Laden Kabupaten Pamekasan," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial* Vol. 9, no. 2 (2014), 223–259, <https://doi.org/https://doi.org/10.19105/al-lhkam.v9i2.471>. Likewise, the cause of underhand marriage in DKI Jakarta from 18 (eighteen) respondents, nine of whom admitted that they did not get permission from the first wife, let alone from the court. Mesraini, "Praktik Perkawinan Bawah Tangan Di DKI Jakarta," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* Vol. 51, no. 2 (2017), 251–286, <https://doi.org/http://dx.doi.org/10.14421/asy-syir'ah.2017.512.251-285>. Sharifah, in his article, also mentioned the deviation of polygamy under the hand due to the convoluted system of regulation in the bureaucracy. Masykurotus Syarifah, "Implikasi Yuridis Poligami Bawah Tangan Perspektif UU No. 1 Tahun 1974 Tentang Perkawinan," *Jurnal Yustitia* Vol. 19, no. 1 (2018), 24–33, <https://doi.org/http://dx.doi.org/10.0324/yustitia.v19i1.404>. See also M. Idris Rumulyo, *Hukum Perkawinan Islam* (Jakarta: Bumi Aksara, 1999), hlm. 240. Mauliadi Nur's research also shows that the occurrence of polygamy under the hands is partly due to the religious view that polygamy is allowed without having to ask the court's permission and fear of the wife so that the marriage is carried out secretly. Muliadi Nur, "Poligami Tanpa Izin Pengadilan (Studi Kasus Pada Pengadilan Agama Manado)," *Jurnal Ilmiah Al-Syir'ah* Vol. 13, no. 1 (2016), <https://doi.org/http://dx.doi.org/10.30984/as.v13i1.3>. See also Dewi Anggraeni Wijayanti and Uswatun Khasanah, "Pernikahan Poligami Tanpa Izin Pengadilan Agama Dan Pengaruhnya Terhadap Kehidupan Rumah Tangga," *Al-Hukkam: Journal of Islamic Family Law* Vol. 1, no. 1 (2021), 53–66, <http://e-journal.iainpekalongan.ac.id/index.php/al-hukkam/article/view/4140>.

the authority of ecclesiastical courts aimed at those who carried out illegal marriages before the enactment of Law 1/1974 Jo—Government Regulation of 1975. Many decisions are still granted by the court's Panel of Judges after the enactment of Law 1/1974 using the provisions of KHI Article 7 paragraph 2, which states that marriages that a marriage contract cannot prove can be requested for marriage to the Religious Court.<sup>4</sup>

The community uses the loopholes of Article 7, paragraph 2 of the KHI, to legalize polygamous marriages. For example, in Decision Number 1512/Pdt.G/2015/PA.Smn. and Decision Number 190/Pdt.G/2004/PA.Smn.,<sup>5</sup> Decision Number

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<sup>4</sup> The decision of the Magetan Religious Court Number 445/Pdt.G/2012/PA/Mgt granted the application for a polygamous marriage certificate in line with the provisions of article 2 paragraph 1 of Law 1/1974 and article 7 paragraph 2 of the KHI. Ahmad Cholid Fauzi, "Kedudukan Hukum *Isbat* Nikah Poligami Sirri," *Jurnal USM Law Review* Vol. 1, no. 1 (2018), 94–105, <http://dx.doi.org/10.26623/julr.v1i1.2234>. One of the considerations of the judges of the New Koto Religious court in granting polygamous marriage is Article 7, paragraph 2 and paragraph 4 of the KHI. Arif Bijaksana, "Problematika *Isbat* Nikah Isteri Poligami Dalam Penyelesaian Di Pengadilan Agama," *Jurnal Ilmiah Hukum Dan Keadilan* Vol. 5, no. 2 (2018), 58–88, <https://ejournal.stih-painan.ac.id/index.php/jihk/article/view/118>.

<sup>5</sup> Robith Muti'ul Hakim analyzed the two rulings of the polygamous marriage petition in the Sleman Religious Court from a normative juridical point of view. Juridically, whether or not the presence or absence of permission from the first wife accepts an application for a polygamous marriage certificate. According to the judge, the first wife's consent became a condition of polygamy. Normatively, judges only use *maqāṣid as-syar'iyyah* because no *naṣ* explains the necessity of a wife's permission for polygamous men. See Robith Muti'ul Hakim, "*Isbat* Nikah Poligami Siri Ditinjau dari Segi Yuridis-Normative (Studi Putusan Nomor 190/Pdt.G/2004/PA.Smn Dan Putusan Nomor 1512/Pdt.G/2015/PA.Smn.)", *Tesis*, UIN Sunan Kalijaga, 2017.

472/Pdt.G/2012/PA.Spg,<sup>6</sup> Decision Number 61/Pdt.G/2010/PA.KBR,<sup>7</sup>  
Decision Number 1339/Pdt.G/2013/PA.Ngj,<sup>8</sup> Decision Number  
206/Pdt.G/2013/MS.Sgl,<sup>9</sup> Decision Number

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<sup>6</sup> In this study, the application for polygamous marriage was granted by the Panel of Judges for obtaining permission from the first and second wives to annul the marriages of the petitioners. On a legal basis, the judge granted the application for polygamous marriage certificate Number 472/Pdt.G/2012/PA.Spg. because the marriage performed by petitioner I with petitioner II was deemed valid according to the religion of Islam, and the Panel of Judges granted the application for a marriage certificate because it had been fulfilled in Articles 4 and 5 of Law 1/1974. But in the judge's ruling, Imam Mawardi disagreed. According to the Imam, Article 4 paragraph (1) of Law 1/1974 has not been fulfilled to make a legal basis by the judge in granting the application. According to her, husbands who wish to have more than one marriage must obtain permission from the local Religious Court, whereas in case number 472/Pdt.G/2012/PA.Spg. the petitioners performed their marriage with Siri without prior permission from the court. This is not by Article 4 paragraph (1) of Law 1/1974. See Imam Mawardi, "Analisis Terhadap Putusan Nomor 472/Pdt. G/2012/PA. Spg Mengenai Isbat Nikah Poligami", *MASADIR: Jurnal Hukum Islam*, vol. 1, no. 1 (2021), 55–70.

<sup>7</sup> The Panel of Judges for decision number 61/Pdt.G/2010/PA.KBR granted the application for polygamous marriage by *contra legem* so as not to use Article 4 of Law 1/1974 regarding the provisions of polygamy. In addition, the conditions and pillars of marriage are met. According to Arif Bijaksana, the judgment granted by the Panel of Judges was not following the provisions of the court because judging from the evidentiary process carried out by the Panel of Judges where the written evidence (P1, P2, P3, and P4) submitted and examined by the Panel of Judges did not support the arguments presented by the petitioner. The written evidence submitted by the petitioner is more suggestive of proof of polygamy, while the statement submitted is a marriage certificate. Therefore, according to Arif, the Panel of Judges can be said to have committed legal smuggling by granting the petitioner's application because a judgment can be granted if the arguments submitted by the petitioner can be proved by the evidence submitted by the petitioner before the trial court. See Arif Bijaksana, "Problematika Istbat Nikah Isteri Poligami Dalam Penyelesaian di Pengadilan Agama", *Jurnal Ilmiah Hukum dan Keadilan*, vol. 5, no. 2 (2018), 58–88.

<sup>8</sup> Roqib, in his research, also mentioned the Nganjuk Religious Court Judges Panel for decision number 1339/Pdt.G/2013/PA.Ngj rejected the petitioners' application *isbat* for polygamous marriage because it was deemed to violate the polygamy provisions and did not get permission for marriage from the first wife, even though the first wife allowed the petitioners to perform the marriage series to cover the disgrace because the petitioner II had become pregnant out of wedlock. In the verdict of the case, Raqib disagreed because the Panel of Judges only used a juridical point of view. According to Raqib, the Panel of Judges should also pay attention to the child's rights from the marriage's result. See Mohammad Roqib, "Penolakan Istbat Nikah Siri Bagi Suami Yang Sudah Beristri", *Al-Hukama The Journal of Islamic Family Law*, vol. 6, no. 2 (2016), 422–448.

<sup>9</sup> Eko Permana concluded that the rejection of *isbat* for polygamous marriage by the Sigli Syar'iyah Court judges had three reasons. 1) marriage violates Article 14 of the KHI because witnesses, 2) do not attend the marriage contract violates Article 5 of the

1869/Pdt.G/2014/PA.Dmk,<sup>10</sup> Decision Number 615/Pdt.G/2019/PA.Mtr.,<sup>11</sup> Decision Number 634/Pdt. G/2018/PA. Mtr.,<sup>12</sup> and Decision Number 3045/Pdt. G/2019/PA. Cbn.<sup>13</sup>

Responding to the rampant application for polygamous marriage in the community, the Supreme Court (MA) held a plenary meeting of the Chamber to discuss legal issues that came to the fore in each Chamber, including in the Chamber of Religion. One of the results of the plenary

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Marriage Law on the conditions of polygamy, 3) because the applicant's deceased husband is a civil servant (Civil Servant), it violates the rules of Article 4 of Government Regulation (PP) No. 45 of 1990 concerning Marriage and Divorce Permits for Civil Servants. The Panel of Judges rejected the application to avoid legal smuggling and other legal smuggling opportunities in the community and protect the wife from the arbitrariness of a husband. See Eko Permana Dalimunthe, "Analisis Terhadap *Isbat* Nikah Oleh Isteri yang Di Poligami Secara Siri (Studi Putusan Mahkamah Syar'iah Nomor: 206/Pdt.G/2013/MS.Sgl)", *Tesis*, Universitas Sumatera Utara, 2016.

<sup>10</sup> The Panel of Judges rejected the petitioner's application because it did not comply with the existing rules even though a child had been born. The Panel of Judges is worried that if the application is granted, there will be a rampant number of similar cases in the community. See Zahratus Sofa, "Analisis Yuridis *Isbat* Nikah Perkawinan Poligami Yang Dilakukan Secara Siri Oleh Seorang Yang Berstatus PNS (Studi Putusan Pengadilan Agama Demak Nomor 1869/Pdt. G/2014/PA. Dmk)", *Skripsi*, Universitas Jember, 2018.

<sup>11</sup> Mala Srinurmayanti also explained that the judge of the Mataram Religious Court, in his judgment Number 615/Pdt. G/2019/PA. Mtr rejected the *isbat* for polygamous marriage. The judge considered that the application of *Isbat* for polygamous marriage was not following SEMA Number 3 of 2018." See Mala Srinurmayanti, "Analisis Yuridis Putusan Nomor: 615/Pdt. G/2019/PA. Mtr Tentang *Isbat* Nikah Poligami Atas Dasar Nikah Siri Kaitan Dengan SEMA Nomor 3 Tahun 2018", *Tesis*, Universitas Mataram, 2021.

<sup>12</sup> Muhammad Muhajir and Qurratul Uyun concluded that the judgment of case No. 634/Pdt.G/2018/PA.Mtr granting the application for polygamous marriage by setting aside SEMA was a legal breakthrough. The Panel of Judges set aside SEMA to provide justice and benefit to the wife as heir to disburse the funds of the retired husband's *taspen*. This was seen as more difficult by the Panel of Judges because, in this way, the husband's retirement funds could be used to provide for the living needs of his wife and family. See Muhammad Muhajir dan Qurratul Uyun, "SEMA Waiver Number 3 of 2018 in the Case of *Isbat* for Polygamous Marriage: Study of Legal Considerations of Judges in Decision Number 634/Pdt. G/2018/PA. Mtr", *Asy-Syir'ah: Jurnal Ilmu Syari'ah dan Hukum*, vol. 55, no. 2 (2021), 263–290.

<sup>13</sup> The Cibinong Religious Court granted the *isbat* for polygamous marriage because the marriage had met the terms and conditions of the marriage and the permission of his first wife. However, according to Rahmadini, the judgment that overrides SEMA 3/2018 is considered to have no legal certainty because it overrides the regulated polygamous marriage rules. See Rahmadini Septia Aikhiri, "Itsbat Nikah Bagi Poligami Sirri di Pengadilan Agama Cibinong Perspektif Teori Kepastian Hukum (Studi Putusan Nomor 3045/Pdt. G/2019/PA. Cbn)", *Skripsi*, Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta, 2021.

meeting of the Religious Chamber of the Supreme Court was regarding the application for a polygamous marriage certificate based on *siri* marriage and its relationship with the application for the child's origin in the Religious Court. These provisions are contained in the Supreme Court Circular Letter Number 3 of 2018 (SEMA 3/2018). In point A, number 8 of SEMA 3/2018, is explained that the application for polygamous marriage *isbat* must be rejected even though it is for the child's benefit.<sup>14</sup>

Based on the above explanation, there is a contradiction. On the one hand, the Supreme Court, through the Chamber of Religion, has determined in such a way that an application for a polygamous marriage based on a serial marriage filed with the Religious Court must be declared inadmissible (*niet ontvankelijke verklaard*). Still, on the other hand, by allowing the application for the child's origin from the polygamous marriage in series indirectly before establishing the validity of the child, the Religious Courts must first determine the validity of the union of both parents of the child.

The understanding can be explained that when a person submits an application for the origin of a child to a Religious Court, where the child whose origin is pleaded comes from a polygamous *siri* marriage, in his petition, the requested one can, among other things, be as to the validity of the child, where the petitioner (father and or mother) requests that the Religious Court declare the child valid as the child of the applicant. As for accepting and granting, and affirming the validity of a child in the case of an application for the origin of a child submitted, examined, and decided by the Religious Court, the judge of the Religious Court must inevitably first ascertain the legality or validity of the father's marriage to his mother. Religious Court judges are impossible, should not, and are not justified in granting or declaring valid the origin of an extramarital child, for example, an unfaithful child, or a child of the proceeds of a "*kumpul kebo*", *samen leven*, and others.

Several studies on the application of SEMA 3/2018 have been conducted. Nasrullah et al. analyzed the polygamous marriage debate in SEMA regarding al-Shatiby's mursalah masalah. According to Nasrullah et al., The presence of SEMA 3/2018, instead of intending to create masalah, actually ended up being a blunder. Because SEMA harms women (wives), wives who are polygamous *siri* cannot claim rights in their marriage. As a result of the prohibition of the *isbat* marriage of *siri*

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<sup>14</sup> Supreme Court Circular Letter (SEMA) No. 3 of 2018 concerning the Implementation of the Formulation of the Results of the 2018 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Duties for the Court, 16.

polygamy, the wife cannot get a definite legal umbrella.<sup>15</sup> Another study from Laina Shaiza analyzed the application of SEMA 3/2018 to clarify the status of children in judgment No. 143/Rev.P/2019/PA.Smg. Laina stated that the legal certainty of children is more appropriate if done by submitting the origins of children. This is because the legal certainty of the wife is also still questionable.<sup>16</sup> Unlike the previous research, Navilla Ayu Rizky Aprilliana explained that based on the analysis of *maṣlahah*, the regulation of *isbat* for polygamous marriage in SEMA 3/2018 is appropriate because it can reduce or limit the space for the rise of polygamous marriages from *siri* marriages which are only used by elements of lustful interests, not emergencies.<sup>17</sup>

Existing studies do not discuss in detail the ambiguity of the application of SEMA 3/2018. These studies only explain the legal consequences of the SEMA. Therefore, this article focuses on discussing the ambiguity of implementing SEMA 3/2018. This study aims to untangle the ambiguity of SEMA and find a middle ground to avoid confusing its implementation. This study uses the framework of Gustav Radbruch's legal theory. According to Gustav, the purpose of law includes three elements, namely justice (*gerechtigkei*t), certainty (*rechtsicherheit*), and legal expediency (*zweckmassigkeit*).<sup>18</sup> Each of these objectives has a position that has become permanent in legal construction. Legal certainty lies in the articles of legislation. The expediency of the law lies in the purpose for which the articles are made. While justice lies in the existing values of life (living law).<sup>19</sup> In this context, it can be known how SEMA 3/2018 represents certainty, justice, and legal expediency for society on polygamous marriage issues.

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<sup>15</sup> Muhammad Nasrulloh, M Fauzan Zenrif and R Cecep Lukman Yasin, "Isbat Nikah Poligami Ditinjau dari Masalah Mursalah Al-Shatiby: Studi SEMA Nomor 3 Tahun 2018," *Al-Qanun: Jurnal Pemikiran Dan Pembaharuan Hukum Islam* Vol. 24, no. 1 (2021), pp. 122–144, <https://doi.org/10.15642/alqanun.2021.24.1.122-144>.

<sup>16</sup> Laina Shaiza, "Implementasi Surat Edaran Mahkamah Agung Nomor 3 Tahun 2018 Terhadap Hak Anak Pada Permohonan Itsbat Nikah Yang Tidak Dapat Diterima (Studi Atas Penetapan Nomor 143/Pdt.P/2019/Pa.Smg)" (Universitas Negeri Semarang, 2020).

<sup>17</sup> Navilla Ayu Rizky Aprilliana, "Analisis Masalah Terhadap Ketentuan Isbat Nikah Poligami Atas Dasar Nikah Siri Dalam Surat Edaran Mahkamah Agung No. 03 Tahun 2018" (Uin Sunan Ampel Surabaya, 2020).

<sup>18</sup> Sudikno Mertokusumo, *Teori Hukum* (Yogyakarta: Universitas Atma Jaya, 2011), p. 23. Lihat juga Bambang Sutiyoso, *Metode Penemuan Hukum* (Yogyakarta: UII Press, 2012), 8.

<sup>19</sup> Satjipto Rahardjo, 'Mahkota Hakim Dalam Lensa Pakar', dalam Menyorot Mahkota Hakim Peradilan Agama, *Majalah Peradilan Agama*, Edisi 1 Mei 2013, 8.

This research is written and analyzed by normative legal research methods. This method is chosen because the object of the research study is regarding legal principles and principles, legal rules, legal theories, and doctrines from legal experts. A statutory and conceptual approach is used to sharpen the analysis. The statutory approach examines all laws and regulations related to the legal issue under study. The conceptual approach is carried out by understanding and reviewing the principles, principles, doctrines, theories, and legal philosophy of the development of legal science and the debate regarding the dichotomy and dualism of legal research methods.<sup>20</sup>

## Discussion

### SEMA's Position in Indonesian Legislation

The Supreme Court of the Republic of Indonesia has made many rules, including SEMA. The Supreme Court created the SEMA to be a judicial control. Moreover, the regulations formed by the Supreme Court certainly cannot be confused with those formed by the legislature. The Supreme Court can only create rules if the Act is unclear or unregulated.

Initially, SEMA was formed based on the provisions of Article 12, paragraph 3 of Law Number 1 of 1950 concerning the Composition, Power, and Path of the Indonesian Supreme Court Court. The Supreme Court is a judicial institution with authority to supervise the judicial institutions under its authority. The Supreme Court has the right to give warnings, reprimands, and instructions deemed necessary and valuable to these courts and judges, either by a separate letter or by circular.<sup>21</sup> However, in its development, because at that time, the law was still very few, the SEMA itself experienced a shift in function, where the SEMA was no longer just a supervisory tool but experienced an expansion of roles, including regulation, administration, and others.

Let's look at the subject of its users. SEMA can be classified into policy rules (*bleidsregel*) because it is usually shown to judges, clerks, and other positions in court. However, if we look more profound into the content, not all SEMA can be classified as policy rules (*bleidsregel*). For example, in SEMA No. 3 of 1963, the Supreme Court abolished several articles in the BW. By looking at this example, we must look further at the function of SEMA as a *beleidsregel* norm. The existence of *bleidregels* itself is a consequence of enacting the concept of a legal state. Policy

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<sup>20</sup> Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Cet 13 (Jakarta: Kencana, 2017), 131.

<sup>21</sup> M. Yahya Harahap, *Kedudukan Kewenangan Dan Acara Peradilan Agama (UU No 7 Tahun 1989)* (Jakarta: Sinar Grafika, 2009), 94-95.



regulations are products of a complimentary nature established by state administrative officials in the context of government tasks.<sup>22</sup>

Another nature of the rule of policy is that it is not directly binding on the law but has legal relevance. Policy regulations provide opportunities for how a state administrative entity exercises governmental authority (*beschiking bevoegdheid*). It is associated with government control based on discretionary use<sup>23</sup> because there is no place for policy regulation if this is not the case.<sup>24</sup>

Talking about the issue of SEMA can be used as a source of law when viewed from the basis for its formation based on the order of Article 79 of Law Number 14 of 1985 concerning the Supreme Court (from now on referred to as Law 14/1985) giving rule-making power authority to the Supreme Court. This authority is provided so the Supreme Court can resolve issues not regulated in detail in the Act. Of course, this authority is also actually based on the provisions of Article 10 of Law Number 48 of 2009 concerning judicial power in which there is a principle that judges cannot reject a case because there is no unclear law. To further understand the position of SEMA in the rule-making power function of the Supreme Court, we must also look at the explanation of Article 79 of Law 14/1985 on the Supreme Court itself.

"If there is a legal deficiency or void in a matter in the judiciary, the Supreme Court has the authority to make regulations as a supplement to fill the deficiency or vacancy. With this Act, the Supreme Court has the authority to determine the regulation of how a matter is resolved, which has not been or is not provided for in this Act. In this case, the regulations issued by the Supreme Court are distinguished from those drawn up by the framers of the Act. The administration of the judiciary for which this Act is intended is only part of the procedural law. Thus the Supreme Court will not interfere with and go beyond the regulation of the rights and obligations of citizens in general, nor will it regulate the nature, power, means of proof and its judgment or the sharing of the burden of proof."<sup>25</sup>

Looking at the explanation of Article 79 of Law 14/1985, the author argues that the regulation referred to in the description of Article 79 is not interpreted as a Supreme Court Regulation (PERMA).

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<sup>22</sup> Hotma P. Sibuea, *Asas Negara Hukum, Peraturan Kebijakan, dan Asas Umum Pemerintahan yang Baik* (Jakarta: Erlangga, 2010), 101.

<sup>23</sup> Freedom to determine or choose.

<sup>24</sup> Philipus M. Hadjon, Sri Soemantri Martosoewignjo, dan Sjachran Basah, *Pengantar Hukum Administrasi Indonesia* (Yogyakarta: Gadjah Mada University Press, 2005), 152-153.

<sup>25</sup> Law Number 14 of 1985 concerning the Supreme Court.

Otherwise, it is defined as any form of law formed by the Supreme Court whose content contains or relates to regulations that fill legal vacancies in the procedural jurisdiction without exceeding and interfering with the arrangements regarding the rights and obligations of citizens and not regulating the power of the means of proof. So that the form of the Supreme Court's legal product referred to in Article 79 of law 14/1985 can be seen in the form of PERMA and SEMA. Thus, SEMA can be classified as a statutory and legally binding regulation as stipulated in Article 8, paragraph 2 of Law Number 12 of 2011.<sup>26</sup>

Article 8, paragraph 2 states that the laws and regulations, as referred to in paragraph (1), are recognized for their existence and have binding legal force as long as they are ordered by higher laws and regulations or formed based on authority." The reading of Article 8 paragraph 1 is "Types of Laws and Regulations other than as referred to in Article 7 paragraph (1) include regulations established by the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Financial Audit Agency, the Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions of the same level established by law or the Government by order of the Law, Provincial People's Representative Council, Governor, Regency/City Regional People's Representative Council, Regent/Mayor, Village Head or equivalent."

The historical birth of SEMA 3/2018 is in response to the rampant requests for polygamous marriage due to serial marriages in the community. In response to this phenomenon, the Supreme Court held a plenary meeting of the Chamber to discuss legal issues (questions of law) that came to the fore in each Chamber, including in the Religious Chamber. One of the results of the plenary meeting of the Religious Chamber of the Supreme Court of the Republic of Indonesia was regarding the application for polygamous marriage based on *siri* marriage and its relationship with the application for the origin of the child in the Religious Court, which was explained in the previous discussion.<sup>27</sup>

The necessity of the judges to adjudicate and apply the results of the plenary meeting of the Chamber of Religion as appropriate is none

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<sup>26</sup> Irwan Adi Cahyadi, "Kedudukan Surat Edaran Mahkamah Agung (SEMA) dalam Hukum Positif di Indonesia", *Kumpulan Jurnal Mahasiswa Fakultas Hukum*, vol. 1, no. 2 (2014), 14.

<sup>27</sup> Muhajir and Uyun, "SEMA Waiver Number 3 of 2018 in the Case of Isbat for Polygamous Marriage: Study of Legal Considerations of Judges in Decision Number 634/Pdt. G/2018/PA. Mtr."

other than that the decision of the whole panel of the Chamber of Religion has been contained in such a way in the SEMA. The birth of SEMA 3/2018 is an instrument that functions to realize the unity of legal application and consistency of decisions that must be enforced as a guideline in handling cases.<sup>28</sup> SEMA is issued as a form of MA guidance against the courts under it.<sup>29</sup> Thus, referring to the outcome of the plenary meeting of the Chamber of Religion, as long as the case file is in the form of an application for a polygamous marriage based on a *siri* marriage, the judge should have no choice but to declare it inadmissible (*niet ontvankelijke verklaard*). However, look at the procedures for filing marriage certificates in Book II of the Guidelines for Implementing Duties and Administration of Religious Courts. There will be a kind of contradiction between the two.

Letter f point 4 in Book II explains, "If in the course of examining the application for marriage in numbers (2) and (3) it is known that her husband is still bound in a valid marriage with another woman, then the previous wife can be made a party to the case. If the applicant does not want to amend his application by including his previous wife as a party, the application must be declared inadmissible."<sup>30</sup>

The provisions contained in Book II mentioned above very clearly accommodate the problem of *siri* marriage in general, which is plural in society, including polygamous marriage based on *siri* marriage as referred to in the formulation of the results of the plenary meeting of the Chamber of Religion. Based on these guidelines, it can be understood that a polygamous marriage can be filed for marriage as long as it seats the previous wife as a party to the case. That is, polygamous marriage is allowed according to the rules. This is not in line with the last government, which ordered the examination of marriage *isbat*

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<sup>28</sup> Adapted and extracted from several considerations there are SEMA Number 07 of 2012 dated September 12, 2012 and SEMA Number 3 of 2018 dated November 16, 2018.

<sup>29</sup> M. Yahya Harahap, *Kedudukan Kewenangan dan Acara Peradilan Agama* (Jakarta: Sinar Grafika, 2009), 94-95.

<sup>30</sup> Number (2) Examining the application for a marriage certificate submitted by the two husbands and wives is voluntary, and the product is an injunction. If the stipulation content rejects the application for a marriage certificate, then the husband and wife together, or the husband and wife can use each file an appeal. Number (3) The process of examining an application for a marriage certificate filed by one of the husbands or wives is contentious by positioning the wife or husband who did not apply as the respondent, and the product is in the form of a judgment and against the decision can be filed an appeal and cassation legal remedy. Mahkamah Agung RI, *Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama: Buku II* (Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2014), 155.

applications to be careful not to cause illegal polygamy due to *siri* polygamy.<sup>31</sup>

So far, the provisions in Book II are also judicial technical guidelines that religious courts must implement in handling cases related to marriage petitions filed for volunteer<sup>32</sup> or contentious.<sup>33</sup> This provision applies based on the Decree of the Chairman of MARI Number KMA/032/SK/IV/2006<sup>34</sup> dated April 6, 2006, which until now has never been declared revoked or invalid by the Supreme Court. Thus, the technical judicial provisions in Book II are still subject to review and exercise by the Religious Courts in dealing with polygamous petitions based on marriage.

The occurrence of ambiguity between SEMA 3/2018 and the provisions contained in Book II, which applies based on the Decree of the Chairman of MARI Number KMA/032/SK/IV/2006, dated April 6, 2006, resulted in the Religious Court judges experiencing disparities in deciding the case of *isbat* for polygamous marriage application. The discrepancy of the ruling then became a different problem related to the issue of polygamous marriage due to serial marriage.

### **Possible Granting of Application for Determination of Child Origins**

Proving the child's origin can only be done by showing a birth certificate (Article 55 of the Marriage Law, Article 103 KHI). If it cannot show that the child has a birth certificate, the case can be appealed to the Religious Court for determination. The authority of the Religious Court over the origin of children is regulated in the explanation of Article 49 letter (a) number 20 of Law Number 3 of 2006. That is the determination of the child's birth and the decision to adopt a child under Islamic law.

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<sup>31</sup> In letter (e), it is explained that to avoid legal smuggling and polygamy without procedure, the Religious Courts/Shari'a Courts must be careful in handling applications for marriage certificates.

<sup>32</sup> An application for a marriage certificate is voluntary if both husbands and wives file it as petitioners. The product is a designation. If the content of the stipulation rejects the application for a marriage certificate, then the husband and wife together, or the husband and wife can each file an appeal. See Mahkamah Agung RI, *Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama: Buku II*, 154.

<sup>33</sup> An application for a marriage certificate is contentious if filed by one of the husbands or wives by positioning the wife or husband who did not apply as the respondent party. The product is in the form of a judgment, and against the decision can be filed an appeal and cassation legal remedy. See Mahkamah Agung RI, *Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama: Buku II*, 154–155.

<sup>34</sup> Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia Number: KMA/032/SK/IV/2006 concerning the Implementation of Book II of the Guidelines for the Implementation of Duties and Administration of the Court, dated April 6, 2006.

Technically, the case of the child's origin application is a volunteer case because it must be filed and examined voluntarily. The resulting legal product is an injunction, not a judgment. However, the application for the child's origin may become a contentious case when there are parties to the respondent in the case. Whether filed by a volunteer or contentious, examining the child's origin application case must still follow the provisions of the applicable civil procedural law. Among other things, it must go through the evidentiary stage as is customary for examining civil cases.

Furthermore, the competent Religious Court will examine the child's origin based on valid evidence, such as witnesses, evidence of DNA test results, a confession from a father (*istilhaq*), his mother's oath, and other evidence. The Religious Court will render a judgment by determining that the child is the child of the father in question after it has been proven and ascertained who the child's father is. If the child is not proven due to a lack of evidence to give an injunction as to who the child's father is, then the court will provide a request that the child is the child of a mother and only rests with the mother and the mother's family.

As it is known, when a person submits an application for the origin of a child from a polygamous marriage to the Religious Court in the petition of his petition, it can be ascertained that it is concerning the validity of the child, where the petitioner (father and or mother) requests that the Religious Court declare the child valid as the child of the applicant (father and or mother).

To talk about the origin of a child is related to its validity in the perspective of Islamic law is to speak about *nasab* (lineage). Etymologically, *nasab* means descendant or relative.<sup>35</sup> Meanwhile, *nasab* is the legality of the closest family relationship based on blood ropes resulted from legal marriage,<sup>36</sup> marry *fāsīd*<sup>37</sup> or *syubhat* intercourse.<sup>38</sup>

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<sup>35</sup> Warson Munawwir, *Ahmad, Al-Munawwir Kamus Arab-Indonesia* (Surabaya: Pustaka Progressif, 1997), 1411.

<sup>36</sup> Ahmad Farraj Husain, *Ahkām Al-Ushrah Fi Al-Islām* (Beirut: Dar al-Jami'iyah, 1998), 248.

<sup>37</sup> A *fāsīd* marriage is performed in a state of defective legal condition. Establishing a *nasab* in a broken marriage (*fāsīd*) is the same as a valid marriage. *Fāsīd* marriages, such as the absence of a guardian in marriage (in the Hanafi school, the guardian is not included in the legal conditions of the wedding) and no witness or witness is a false witness. Wahbah Az-Zuhaili, *Fiqh Islam Wa Adillatuhu*, Abdul Hayyie Al-Kattani, Dkk. (Jakarta: Gema Insani, 2011), 7261.

<sup>38</sup> *Syubhat* means similarity, likeness, similarity, and obscurity. In legal studies, the term *syubhat* can be interpreted as a situation and condition of anonymity in a permitted event. This is because the legal provisions cannot be known for sure, whether they are

Therefore, in Islamic law, a person's *nasab* is recognized as valid by the *syara'* if it is based on a good marriage, *fasid* marriage, or *syubhat* intercourse. Only those three things determine the validity of a person's *nasab*.<sup>39</sup>

From the above analysis, it can be understood that in Islamic law, to declare the validity of a child's *nasab* about his parents, namely the father and mother, must first assess the legality or validity of the father's marriage with his mother whether the child is the result of a legal marriage, *fasid* marriage, or *syubhat* intercourse. Likewise, it should be applied in the case of an application for the origin of a child filed, examined, and decided by the Religious Court. To accept and grant and declare whether or not a child is valid in the case of an application for a child's origin, the Religious Court's judge must inevitably first ascertain the legality or validity of the father's marriage to his mother.

In other words, to declare the validity of the origin of a child as the child of the petitioner (father and or mother), in the legal considerations the judge must first declare the validity of the marriage of the father and mother or claim the child the result of the marriage of the *fasid* or intercourse of the parents. Religious Court judges are impossible, should not, and are not justified in granting or declaring valid the origin of an extramarital child, for example, an unfaithful child, or a child of "kumpul kebo", *samen leven* and the like. This is none other than because, in the perspective of Islamic law, determining the validity of a child's origin must be judged from the aspect of the reality of his *nasab*.

After the *nasab* the child is declared valid, for example, because of a legal marriage, a *fasid* marriage, or *syubhat* intercourse. Then the application for the child's origin submitted to the Religious Court is accepted and granted. In the determination of the Religious Court, legal considerations state the validity of the father's marriage to the child's mother. Doesn't this mean the Religious Courts indirectly legalized polygamous marriages performed in series? The determination of the application for the child's origin is an authentic deed that can be used as evidence for the validity of the marriage of the father and mother of the child concerned, which can undoubtedly be used in transactions or other legal interests.

At this point, there seems to be controversy or contradiction because it appears to have, on the one hand, decided that polygamous marriages based on serial marriages should not be legalized. While on

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in the halal or haram territory. Satria Effendi, "Makna, Urgensi Dan Kedudukan Nasab Dalam Perspektif Hukum Keluarga Islam," *Jurnal Mimbar Hukum* 42 (1999), 7-19.

<sup>39</sup> Andi Syamsu Alam and M. Fauzan, *Hukum Pengangkatan Anak Perspektif Hukum Islam* (Jakarta: Prenada Media Group, 2008), 186.

the other hand, it is permissible to apply for the child's origin from the polygamous marriage in the series. However, notwithstanding the controversy or contradiction, it must be asserted in this case that the limit of granting an application for the origin of a child in a Religious Court is only possible based on a valid marriage, or *fasid* marriage, or *syubhat* intercourse.

### **Legal Certainty and Justice for Wives who are Polygamous in SEMA 3/2018**

In addition to being regulated in the Marriage Law and KHI, polygamy provisions are also affirmed in Constitutional Court Decision No. 46/PUU-VIII/2010 (Constitutional Court Decision No. 46). The ruling explains that if a polygamous marriage does not meet the provisions of the KHI *junto* Marriage Law, then the marriage cannot be registered in the KUA, with various legal consequences in the form of not having valid marital status, not having inheritance rights status for the husband, wife and their children.<sup>40</sup> Thus, Constitutional Court Decision No. 46 confirms polygamy must be recorded in the Marriage Law and KHI procedures. Otherwise, the legal consequence is that rights cannot be entirely given. In line with Constitutional Court Decision No. 46, SEMA 3/2018 affirmed the case of polygamy that cannot be married.<sup>41</sup>

The birth of SEMA 3/2018 made the Religious Court have to reject the application for a polygamous marriage certificate based on *siri* marriage. It means that the judge must pass a judgment *niet ontvankelijke verklaard* (N.O judgment), i.e., a decision that the application is inadmissible because of defects. In this case, the flaw is that the religious courts do not have the authority to handle polygamous marriage cases based on serial marriage.<sup>42</sup>

The logical consequence of the authority of Religious Court judges to handle *siri* polygamy has an impact on the absence of a woman's chance of obtaining the endorsement of her *siri* polygamy. The risk is that

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<sup>40</sup> That the provisions related to the requirements and procedures for polygamous marriage stipulated in the Marriage Law apply to every Indonesian citizen and do not provide discriminatory treatment of specific persons or groups, including applicants. "Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010" (2010).

<sup>41</sup> Agung Ari Subagyo Nurul Hikmah, "Perlindungan Hukum Bagi Perempuan Terkait Praktik Poligami Siri Dalam Perspektif Hukum Islam," *LENTERA: Journal of Gender and Children Studies* 2, no. 1 (2020), 35–54.

<sup>42</sup> In legal terminology, this disability is termed a defect the *obscure libel ne bis in idem* which means defect for violating jurisdiction, both absolute and relative competence. See M Yahya Harahap, *Hukum Acara Perdata*, Cet Ke-4 (Jakarta: Sinar Grafika, 2016), 811.

women do not get a legal umbrella guaranteeing their lives. In addition to the difficulty of accessing state law, the biggest problem for polygamous wives lies in the entanglement of religious law. By religious law, the wife is required to perform her obligations, but legally the state does not get legal certainty.<sup>43</sup>

According to Rio Satria<sup>44</sup>, in the case of a Siri marriage polygamous wife who wants legal certainty, it is necessary to submit an application for a marriage certificate and apply for a polygamy permit as stated in Articles 3, 4, and 5 of Law 1/1974 on marriage. The procedure was taken because as long as the husband who was going to apply for a polygamous marriage certificate had not obtained a polygamy permit from the Religious Court, he was formally ineligible to apply for a marriage certificate.<sup>45</sup>

Unlike Cik Basir,<sup>46</sup> according to him, filing an application for a polygamous marriage isbat based on a serial marriage with the provisions in the application for a marriage isbat getting the first wife's consent is technically judicial is justified. At the same time, it can be accepted and granted by the Religious Court. Kasuistically, the application for marriage based on Siri marriage can be filed contentiously by presenting all interested parties, including wives, husbands, and polygamous wives, as parties to the application. Responding to and enforcing the cassowary handling of the polygamous marriage petition is nothing but making room for the settlement of the case in the Religious Courts even though it is only casuistic.<sup>47</sup> In this way, it is hoped that the polygamous wife will apply for a marriage certificate with the husband and wife first considered by the judge and can be granted so that the wife of Siri gets a marriage certificate and legal certainty from the state.

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<sup>43</sup> Muhammad Nasrulloh, M Fauzan Zenrif, and R Cecep Lukman Yasin, "Isbat Nikah Poligami Ditinjau Dari Masalah Mursalah Al-Shatiby (Studi SEMA Nomor 3 Tahun 2018)," *Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 24, no. 1 (2021), 122-144.

<sup>44</sup> He is a Judicial Judge of the Law and Public Relations Bureau of the Supreme Court.

<sup>45</sup> Rio Satria, "Problematika Hukum Dalam Perkara Pengesahan Nikah Poligami," *PTA Bandar Lampung*, 2019.

<sup>46</sup> He is a Judge within the Religious Court who currently serves as the Chairman of the West Jakarta Religious Court.

<sup>47</sup> Cik Basir, "Penanganan Perkara Permohonan Isbat Nikah Poligami Secara Siri Dan Hubungannya Dengan Permohonan Asal Usul Anak Di Pengadilan Agama (Menyikapi Rumusan Hasil Rapat Pleno Kamar Agama Mahkamah Agung Dalam Sema Nomor 3 Tahun 2018)," *Mahkamah Agung RI*, no. April 2019 (2018), 1-15.



Mukhtaruddin Bahrum<sup>48</sup> also views the legal solution polygamists can pursue, namely marriage certificates, as stipulated in Article 7 of the KHI. In the practice of marriage, the panel of judges examines whether the conditions are met and ensures that there is no prohibition on marriage. Suppose you are concerned about attempts to smuggle the law into the practice of *isbat* for polygamous marriage. In that case, it can be minimized by several applications, including a) announcing the marriage *isbat*, b) filing an absolute marriage *isbat* by stating clear reasons and interests, c) filing an application for marriage *isbat* in the form of content, d) if there is a party who is aggrieved by the application for marriage *isbat* then it can apply for annulment of marriage with a record that the application for marriage *isbat* has been terminated by Religious Courts.<sup>49</sup>

Some of the above legal remedies are expected to guarantee legal certainty for polygamous wives. In addition, state law (Marriage Law, KHI, and SEMA 3/2018) should provide solutions that can make it easier for the community, including Siri polygamy, to access legal protection and certainty, especially for women. The state must be present to protect women against polygamy in the form of ease in a polygamous marriage.

### **Regulation of Isbat for Polygamous Marriage in SEMA 3/2018 Perceptive Legal Theory Gustav Radbruch**

Polygamy is still an exciting topic to discuss but not attractive to practice. In society, the community still practices polygamy for various reasons. Mauliadi Nur's research shows how the religious doctrine dominate public perspective toward polygamous marriage. He stated that the religious doctrine allowed polygamy without the court's permission and, even, fear of the wife so that the marriage is carried out secretly.<sup>50</sup> Some people in Laden Village, Pamekasan, also carry out the practice of underhand polygamy without wife permission.<sup>51</sup> Based on 18 respondents in Jakarta Province, nine of them admitted that they did not get permission from the first wife to second marriage, let alone from the

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<sup>48</sup> He is a Judge within the Religious Court who now serves as chairman in the Sungguminasa Religious Court.

<sup>49</sup> Mukhtaruddin Bahrum, "Problematika Isbat Nikah Poligami Sirri," *Al-Adalah: Jurnal Hukum Dan Politik Islam* 4, no. 2 (2019), 194–213.

<sup>50</sup> Muliadi Nur, "Poligami Tanpa Izin Pengadilan (Studi Kasus Pada Pengadilan Agama Manado)," *Jurnal Ilmiah Al-Syir'ah*, vol. 13, no. 1 (2016).

<sup>51</sup> Abd Warits dan Abd Wahed, "Praktik Poligami Di Bawah Tangan Di Desa Laden Kabupaten Pamekasan," *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial*, vol. 9, no. 2 (2014), hlm. 223–259.

court.<sup>52</sup> Syarifah's research also mentioned that the deviation of the underhand polygamy was due to a convoluted bureaucratic regulatory system.<sup>53</sup>

One of the legal paths polygamous wives can take to make their marriages considered valid is to perform of *isbat* for polygamous marriage. However, applications for polygamous marriage certificates have become increasingly difficult to accept after being issued SEMA 3/2018. Therefore, the SEMA issued by the Supreme Court needs to be reviewed, especially in terms of justice, certainty, and legal expediency.

According to Gustav Radbruch, in realizing the objectives of the law, it is necessary to use the principle of priority of the three fundamental values that are the objectives of the law. This is because legal justice often clashes with expediency, legal certainty, and vice versa. Among the three values of the law's purpose, there must be a sacrifice when a collision occurs. Therefore, the principle of priority used by Gustav Radbruch must be implemented in the following order: 1) legal justice, 2) legal expediency, and 3) legal certainty.<sup>54</sup>

Justice is understood as equality.<sup>55</sup> Radbruch correctly emphasizes that it is not yet said 'who is to be treated as equal and who as unequal'.<sup>56</sup> Justice determines only 'the form of what is right'.<sup>57</sup> And at this point, Radbruch takes a step fraught with consequences for his system: 'In order to gain the content of law, a second notion must be added, expediency.

'Expediency' is generally understood as speaking to the suitability of a means for realizing a purpose. Expediency in Radbruch's philosophy is something altogether different. It refers not to means but to purposes, and not to just any purpose but only to purposes that are 'capable of absolute value'.<sup>58</sup> Three kinds of such purposes are said to exist: 'individual human personalities, collective human personalities, and human artefacts'.<sup>59</sup> The question of whether and how, on this basis, the

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<sup>52</sup> Mesraini, "Praktik Perkawinan Bawah Tangan Di DKI Jakarta", *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum*, vol. 51, no. 2 (2017), 251-286.

<sup>53</sup> Masykurotus Syarifah, "Implikasi Yuridis Poligami Bawah Tangan Perspektif UU No. 1 Tahun 1974 Tentang Perkawinan", *Jurnal Yustitia*, vol. 19, no. 1 (2018), 24-33.

<sup>54</sup> Muhammad Erwin, *Filsafat Hukum: Refleksi Kritis Terhadap Hukum* (Depok: PT RajaGrafindo Persada, 2013), 123.

<sup>55</sup> Gustav Radbruch, "Legal Philosophy (First Publ. 1932), Trans. Kurt Wilk," in *The Legal Philosophies of Lask, Radbruch, and Dabin* (Cambridge: Harvard University Press, 1950), 74.

<sup>56</sup> *Ibid.*, 75.

<sup>57</sup> *Ibid.*, 91.

<sup>58</sup> *Ibid.*, 92.

<sup>59</sup> *Ibid.*, 92.

content of justice can be determined shall be considered in the context of the purpose triad, which consists of these three purposes.

The third element of the idea of law, legal certainty, compensates for the weaknesses of the first two elements. These weaknesses are epistemic. Here one can speak of the problem of practical knowledge. Practical knowledge concerns what is obligatory, forbidden, and permitted and what is good and bad. If this could be known in law in all cases with scientific discernibility,<sup>60</sup> the principle of legal certainty would play a relatively minor role. The determinations of positive law would not be real determinations. They would have only a declaratory character. The real field of legal certainty would no longer rest on the field of determination but on that of enforcement.

Each of these objectives has a permanent position in legal construction. Legal certainty lies in the articles of legislation. The expediency of the law lies in the purpose for which the articles are made. While justice lies in the existing values of life (living law).<sup>61</sup> Therefore, it is not uncommon for us to get a clash between legal certainty and justice. In a conflict between justice, legal certainty, and expediency, Sudikno recommends prioritizing justice. His recommendations is relevant to justice conceptualized by Plato. He declared that justice is the supreme virtue harmonizing all other virtues.<sup>62</sup>

The application of SEMA 3/2018 in terms of legal justice aspects, the level of justice lies only in the interests of children. The contents of the SEMA only accommodate children's rights to obtain a legal umbrella, while polygamous wives do not get a clear legal umbrella. At the same time, in handling the child's origin application, the Religious Courts must first look at the relationship status of the father and mother. Then to legalize the validity of the husband and wife relationship, the Religious Court also needs to grant the application for a marriage certificate from the spouse of the *siri* polygamous wife, so that the legal status of the polygamous wife is clear. In the eyes of state law, the vagueness of the status of the polygamous wife gives her no legal protection rights. Even problems will arise when the marriage is legal according to Islamic law but not registered in front of the registrar of marriages; this can hurt polygamous wives because the law is not fulfilled. It can be seen that the value of justice contained in SEMA 3/2018 has not accommodated all

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<sup>60</sup> *Ibid.*, 116.

<sup>61</sup> Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung RI, "Menyorot Mahkamah Hakim Peradilan Agama," *Majalah Peradilan Agama* (Jakarta, 2013).

<sup>62</sup> Bambang Sutiyoso, *Metode Penemuan Hukum: Upaya Menemukan Hukum Yang Pasti Dan Berkeadilan* (Yogyakarta: UII Press, 2012), 15.

parties, especially polygamous wives, to get legal guarantees from the state.

After legal justice, Radbruch put the practicality of the law in second place. Expediency can be interpreted as happiness. A good law is a law that can benefit every subject of law. The law is for humans, so applying the law or law enforcement must help or benefit society.<sup>63</sup> The legal expediency, if it is connected with the content of SEMA 3/2018 concerning the marriage of polygamous wives and the submission of the origin of children, it can be seen that SEMA only provides benefits to the interests of the origin of children. Referring to Law Number 23 of 2002 concerning child protection, Alenia 4 states that this law provides a responsibility to parents, families, communities, governments, and the state as a series of activities carried out on an ongoing basis for the protection of children's rights. This deed intends to realize the best life for the child. Based on the mandate of the child protection law, the child's right to a future life must be fulfilled so that if a polygamous wife has children to provide legal protection guarantees, an application for the origin of the child is submitted to the Religious Court.

The submission of an application for the origin of a child to the Religious Court is explained in Article 103, paragraph 2 of the KHI, that the Religious Court may issue an injunction regarding the origin of a child after conducting a thorough examination based on valid evidence.<sup>64</sup> The authority of the Religious Court over cases of child origin is regulated in the explanation of Article 49 letter (a) number 20 of Law Number 3 of 2006. Technically, the case of the child's origin application is voluntary because it must be filed and examined voluntarily, and the product is a determination, not a verdict.<sup>65</sup> The value of legal expediency is only obtained in determining the child's origin, but for polygamous wives, Siri does not get legal expediency in the content of the SEMA.

The third order of Radbruch's theory of legal purpose is legal certainty. According to Radbruch, there are two kinds of legal certainty:

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<sup>63</sup> The public expects benefits in the implementation of the law. Expediency here can also be interpreted as happiness. In its target, the community will obey the law without the need to be forced with sanctions if, indeed, the community feels the benefits. See: Tata Wijayanta, "Asas Kepastian Hukum, Keadilan Dan Kemanfaatan Dalam Kaitannya Dengan Putusan Kepailitan Pengadilan Niaga," *Jurnal Dinamika Hukum* 14, no. 2 (2014), 216–226.

<sup>64</sup> Direktur Pembinaan Badan Peradilan Agama Islam, "Instruksi Presiden R.I. Nomor 1 Tahun 1991 Kompilasi Hukum Islam Di Indonesia" (2000).

<sup>65</sup> Basir, "Penanganan Perkara Permohonan Isbat Nikah Poligami Secara Siri Dan Hubungannya Dengan Permohonan Asal Usul Anak Di Pengadilan Agama (Menyikapi Rumusan Hasil Rapat Pleno Kamar Agama Mahkamah Agung Dalam Sema Nomor 3 Tahun 2018)."

legal confidence by law and legal certainty in or from the law. A law that successfully guarantees a lot of legal certainty in society is valuable. Legal certainty because the law gives another legal task, namely legal justice, and the law must remain helpful. The achievement of legal certainty in the direction of the law is as much as possible in the law.<sup>66</sup> The value of legal certainty or legality ensures that the law can act as a regulation that must be followed.<sup>67</sup>

SEMA 3/2018 has come to a legal vacuum regarding regulating polygamous marriage debates. However, the presence of SEMA only provides legal certainty regarding the origin of their children by applying determination of the origin of children to the Religious Court. The legal certainty for polygamous wives is not accommodated in the SEMA. According to the author, SEMA 3/2018 must provide a solution to their marriage because the relevant parties have desired the marriage. Suppose the solution offered to polygamists is in the form of an application for marriage endorsement. In that case, the husband must apply for a polygamy permit before applying for marriage endorsement, as stipulated in Articles 3, 4, and 5 of the law 1/1974. The polygamy permit is a condition of the application for marriage legalization. As long as the husband who is about to apply for the legalization of polygamous marriage has not obtained a polygamy permit from a religious court, he is formally ineligible to apply for marriage endorsement.

If the other solution is to repeat the marriage, what is recognized by law is a new marriage, not a previous one.<sup>68</sup> Meanwhile, if you perform a new polygamous marriage, you must have the last wife's and the court's permission, as the polygamy procedure is. The problem of polygamous marriage is due to the difficulty of approval from the first wife and the court. Based on these events, the author argues that the presence of SEMA 3/2018 is still a severe problem because it cannot solve the problem but instead causes new issues.

According to the authors, it should have been reviewed by SEMA on 3/2018. The SEMA must be strict with *siri's* wife and children. In that case, the application *isbat* for a polygamous marriage should also be granted so that justice, expediency and legal certainty can be guaranteed for the polygamous wife and her child born from the marriage.

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<sup>66</sup> Muhammad Ridwansyah, "Mewujudkan Keadilan, Kepastian Dan Kemanfaatan Hukum Dalam Qanun Bendera Dan Lambang Aceh," *Jurnal Konstitusi* 13, no. 2 (2016), 278, <https://doi.org/10.31078/jk1323>.

<sup>67</sup> Kamarudiana, *Filsafat Hukum* (Jakarta: UIN Jakarta Press, 2018), 5.

<sup>68</sup> Rio Satria, "Problematika Hukum Dalam Perkara Pengesahan Nikah Poligami."

## Conclusion

The presence of SEMA 3/2018 still presents a severe problem. In addition to the ambiguity in its application, SEMA 3/2018 cannot solve the problem but instead causes new issues. Polygamous wives cannot apply for marriage certificates carried out in series so as not to get justice, expediency and legal certainty. From the perspective of Gustav Radbruch's legal objectives, SEMA 3/2018 has not met these elements. The provisions in SEMA 3/2018 only accommodate the justice, expediency and legal certainty of children. The right of polygamous wives in terms of marriage *isbat* needs to be prioritized because the benefits received are more significant than the door to marriage *isbat* closed tightly. Therefore, the SEMA must be revised to prioritize the value of justice, expediency, and legal certainty for polygamous wives and their children.

## Bibliography

- Ahmad Farraj Husain. *Ahkām Al-Ushrah Fi Al-Islām*. Beirut: Dar al-Jami'iyah, 1998.
- Aikhiri, Rahmadini Septia. "Itsbat Nikah Bagi Poligami Sirri Di Pengadilan Agama Cibinong Perspektif Teori Kepastian Hukum (Studi Putusan Nomor 3045/Pdt. G/2019/PA. Cbn)." Fakultas Syariah dan Hukum UIN Syarif Hidayatullah Jakarta, 2021.
- Alam, Andi Syamsu, and M. Fauzan. *Hukum Pengangkatan Anak Perspektif Hukum Islam*. Jakarta: Prenada Media Group, 2008.
- Aprilliana, Navilla Ayu Rizky. "Analisis Masalah Terhadap Ketentuan Isbat Nikah Poligami Atas Dasar Nikah Siri Dalam Surat Edaran Mahkamah Agung No. 03 Tahun 2018." Uin Sunan Ampel Surabaya, 2020.
- Az-Zuhaili, Wahbah. *Fiqih Islam Wa Adillatuhu*. Abdul Hayyie Al-Kattani, Dkk. Jakarta: Gema Insani, 2011.
- Bahrum, Mukhtaruddin. "Problematika Isbat Nikah Poligami Sirri." *Al-Adalah: Jurnal Hukum Dan Politik Islam* 4, no. 2 (2019): 194–213. <https://doi.org/http://dx.doi.org/10.35673/ajmpi.v4i2.434>.
- Basir, Cik. "Penanganan Perkara Permohonan Isbat Nikah Poligami Secara Siri Dan Hubungannya Dengan Permohonan Asal Usul Anak Di Pengadilan Agama (Menyikapi Rumusan Hasil Rapat Pleno Kamar Agama Mahkamah Agung Dalam Sema Nomor 3 Tahun 2018)." *Mahkamah Agung RI*, no. April 2019 (2018): 1–15.

- Bijaksana, Arif. "Problematika *Isbat* Nikah Isteri Poligami Dalam Penyelesaian Di Pengadilan Agama." *Jurnal Ilmiah Hukum Dan Keadilan* 5, no. 2 (2018): 58–88. <https://ejurnal.stih-painan.ac.id/index.php/jihk/article/view/118>.
- Cahyadi, Irwan Adi. "Kedudukan Surat Edaran Mahkamah Agung (SEMA) Dalam Hukum Positif Di Indonesia." *Kumpulan Jurnal Mahasiswa Fakultas Hukum* 1, no. 2 (2014).
- Dalimunthe, Eko Permana. "Analisis Terhadap *Isbat* Nikah Oleh Isteri Yang Di Poligami Secara Sirri (Studi Putusan Mahkamah Syari'ah Nomor: 206/Pdt.G/2013/MS.Sgl)." Universitas Sumatera Utara, 2016.
- Direktorat Jenderal Badan Peradilan Agama Mahkamah Agung RI. "Menyorot Mahkota Hakim Peradilan Agama." *Majalah Peradilan Agama*. Jakarta, 2013.
- Direktur Pembinaan Badan Peradilan Agama Islam. Instruksi Presiden R.I. Nomor 1 Tahun 1991 Kompilasi Hukum Islam di Indonesia (2000).
- Effendi, Satria. "Makna, Urgensi Dan Kedudukan Nasab Dalam Perspektif Hukum Keluarga Islam." *Jurnal Mimbar Hukum* 42 (1999): 7–19.
- Fauzi, Ahmad Cholid. "Kedudukan Hukum *Isbat* Nikah Poligami Sirri." *Jurnal USM Law Review* 1, no. 1 (2018): 94–105. <https://doi.org/http://dx.doi.org/10.26623/julr.v1i1.2234>.
- Hadjon, Philipus M, Sri Soemantri Martosoewignjo, and Sjachran Basah. *Pengantar Hukum Administrasi Indonesia*. Yogyakarta: Gadjah Mada University Press, 2005.
- Harahap, M. Yahya. *Kedudukan Kewenangan Dan Acara Peradilan Agama (UU No 7 Tahun 1989)*. Jakarta: Sinar Grafika, 2009.
- Harahap, M Yahya. *Hukum Acara Perdata*. Cet Ke-4. Jakarta: Sinar Grafika, 2016.
- Kamarudiana. *Filsafat Hukum*. Jakarta: UIN Jakarta Press, 2018.
- Laina Shaiza. "Implementasi Surat Edaran Mahkamah Agung Nomor 3 Tahun 2018 Terhadap Hak Anak Pada Permohonan *Isbat* Nikah Yang Tidak Dapat Diterima (Studi Atas Penetapan Nomor 143/Pdt.P/2019/Pa.Smg)." Universitas Negeri Semarang, 2020.
- Mahkamah Agung RI. *Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama: Buku II*. Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2014.

- Marzuki, Peter Mahmud. *Penelitian Hukum Edisi Revisi*. Cet 13. Jakarta: Kencana, 2017.
- Mawardi, Imam. "Analisis Terhadap Putusan Nomor 472/Pdt. G/2012/PA. Spg Mengenai Isbat Nikah Poligami." *MASADIR: Jurnal Hukum Islam* 1, no. 1 (2021): 55–70. <https://doi.org/http://dx.doi.org/10.33754/masadir.v1i1.329>.
- Mertokusumo, Sudikno. *Teori Hukum*. Yogyakarta: Universitas Atma Jaya, 2011.
- Mesraini. "Praktik Perkawinan Bawah Tangan Di DKI Jakarta." *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 51, no. 2 (2017): 251–86. <https://doi.org/http://dx.doi.org/10.14421/asy-syir'ah.2017.512.251-285>.
- Muhajir, Muhammad, and Qurratul Uyun. "SEMA Waiver Number 3 of 2018 in the Case of Isbat for Polygamous Marriage: Study of Legal Considerations of Judges in Decision Number 634/Pdt. G/2018/PA. Mtr." *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 55, no. 2 (2021): 263–90.
- Muhammad Erwin. *Filsafat Hukum: Refleksi Kritis Terhadap Hukum*. Depok: PT RajaGrafindo Persada, 2013.
- Munawwir, Warson. *Ahmad, Al-Munawwir Kamus Arab-Indonesia*. Surabaya: Pustaka Progressif, 1997.
- Nasrulloh, Muhammad, M Fauzan Zenrif, and R Cecep Lukman Yasin. "Isbat Nikah Poligami Ditinjau Dari Masalah Mursalah Al-Shatiby: Studi SEMA Nomor 3 Tahun 2018." *Al-Qanun: Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 24, no. 1 (2021): 122–44. <https://doi.org/https://doi.org/10.15642/alqanun.2021.24.1.122-144>.
- . "Isbat Nikah Poligami Ditinjau Dari Masalah Mursalah Al-Shatiby (Studi SEMA Nomor 3 Tahun 2018)." *Jurnal Pemikiran Dan Pembaharuan Hukum Islam* 24, no. 1 (2021): 122–44.
- Nur, Muliadi. "Poligami Tanpa Izin Pengadilan (Studi Kasus Pada Pengadilan Agama Manado)." *Jurnal Ilmiah Al-Syir'ah* 13, no. 1 (2016). <https://doi.org/http://dx.doi.org/10.30984/as.v13i1.3>.
- Nurul Hikmah, Agung Ari Subagyo. "Perlindungan Hukum Bagi Perempuan Terkait Praktik Poligami Siri Dalam Perspektif Hukum Islam." *LENTERA: Journal of Gender and Children Studies* 2, no. 1 (2020): 35–54.



- Putusan Mahkamah Konstitusi No. 46/PUU-VIII/2010 (2010).
- Radbruch, Gustav. "Legal Philosophy (First Publ. 1932), Trans. Kurt Wilk." In *The Legal Philosophies of Lask, Radbruch, and Dabin*. Cambridge: Harvard University Press, 1950.
- Rahardjo, Satjipto. "Mahkota Hakim Dalam Lensa Pakar, Dalam Menyorot Mahkota Hakim Peradilan Agama." *Majalah Peradilan Agama* 1 (2013): 4–11.
- Ridwansyah, Muhammad. "Mewujudkan Keadilan, Kepastian Dan Kemanfaatan Hukum Dalam Qanun Bendera Dan Lambang Aceh." *Jurnal Konstitusi* 13, no. 2 (2016): 278. <https://doi.org/10.31078/jk1323>.
- Rio Satria. "PROBLEMATIKA HUKUM DALAM PERKARA PENGESAHAN NIKAH POLIGAMI." *PTA Bandar Lampung*, 2019.
- Robith Muti'ul Hakim. "Isbat Nikah Poligami Sirri Ditinjau Dari Segi Yuridis-Normative (Studi Putusan Nomor 190/Pdt.G/2004/PA.Smn Dan Putusan Nomor 1512/Pdt.G/2015/PA.Smn." UIN Sunan Kalijaga, 2017.
- Roqib, Mohammad. "Penolakan Ithbat Nikah Siri Bagi Suami Yang Sudah Beristri." *Al-Hukama The Jurnal of Islamic Family Law* 6, no. 2 (2016): 422–48.
- Rumulyo, M. Idris. *Hukum Perkawinan Islam*. Jakarta: Bumi Aksara, 1999.
- Sibuea, Hotma P. *Asas Negara Hukum, Peraturan Kebijakan, Dan Asas Umum Pemerintahan Yang Baik*. Jakarta: Erlangga, 2010.
- Sofa, Zahratus. "Analisis Yuridis Itsbat Nikah Perkawinan Poligami Yang Dilakukan Secara Siri Oleh Seorang Yang Berstatus PNS (Studi Putusan Pengadilan Agama Demak Nomor 1869/Pdt. G/2014/PA. Dmk)." Universitas Jember, 2018.
- Srinurmayanti, Mala. "Analisis Yuridis Putusan Nomor: 615/Pdt. G/2019/PA. Mtr Tentang Isbat Nikah Poligami Atas Dasar Nikah Siri Kaitan Dengan SEMA Nomor 3 Tahun 2018." Universitas Mataram, 2021.
- Sutiyoso, Bambang. *Metode Penemuan Hukum: Upaya Menemukan Hukum Yang Pasti Dan Berkeadilan*. Yogyakarta: UII Press, 2012.
- . *Metode Penemuan Hukum*. Yogyakarta: UII Press, 2012.
- Syarifah, Masykurotus. "Implikasi Yuridis Poligami Bawah Tangan Perspektif UU No. 1 Tahun 1974 Tentang Perkawinan." *Jurnal*

*Yustitia* 19, no. 1 (2018): 24–33.  
<https://doi.org/http://dx.doi.org/10.0324/yustitia.v19i1.404>.

Warits, Abd, and Abd Wahed. “Praktik Poligami Di Bawah Tangan Di Desa Laden Kabupaten Pamekasan.” *Al-Ihkam: Jurnal Hukum Dan Pranata Sosial* 9, no. 2 (2014): 223–59.  
<https://doi.org/https://doi.org/10.19105/al-lhkam.v9i2.471>.

Wijayanta, Tata. “Asas Kepastian Hukum, Keadilan Dan Kemanfaatan Dalam Kaitannya Dengan Putusan Kepailitan Pengadilan Niaga.” *Jurnal Dinamika Hukum* 14, no. 2 (2014): 216–26.

Wijayanti, Dewi Anggraeni, and Uswatun Khasanah. “Pernikahan Poligami Tanpa Izin Pengadilan Agama Dan Pengaruhnya Terhadap Kehidupan Rumah Tangga.” *Al-Hukkam: Journal of Islamic Family Law* 1, no. 1 (2021): 53–66. <http://e-journal.iainpekalongan.ac.id/index.php/al-hukkam/article/view/4140>.