

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

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Abstract: This article discusses the implementation of marriage *isbat* due to polygamy after the enactment of the Supreme Court Circular (SEMA) Number 3 of 2018. In the SEMA, the Supreme Court did not permit to ratify polygamous marriage *isbat*, but the decision of the Mataram Religious Court Number 634/Pdt.G /2018/PA.Mtr granted the application for polygamous marriage *isbat*. This paper aims to determine the *decidendi ratio* in the acceptance of the *isbat* of polygamous marriages. This research applies a statutory approach in a case. This study concludes that the Panel of Judges granted the case in decision Number 634 by ignoring SEMA Number 3 of 2018. Realizing justice and benefit for Siri's wife as heirs so that she can disburse her husband's pension TASPEN fund is seen as more beneficial by the Panel of Judges. In this way, her husband's pension TASPEN funds can be used to meet the living needs of the Petitioner and his family. The implication is that the decision can be called a legal breakthrough from the point of view of progressive law because it is based on the benefit that is considered more significant than following the material law of polygamous marriage.

Keywords: *polygamous marriage isbat; Justice; judge's decision*

Abstrak: Artikel ini membahas pelaksanaan *isbat* nikah akibat poligami setelah berlakunya Surat Edaran Mahkamah Agung (SEMA) Nomor 3 Tahun 2018. Dalam SEMA Nomor 3 Tahun 2018, Mahkamah Agung tidak lagi memberikan izin untuk pengesahan *isbat* nikah poligami, namun putusan No.634/Pdt.G/2018/PA.Mtr mengabulkan permohonan *isbat* nikah poligami. Tujuan penulisan ini untuk mengetahui *ratio decidendi* dalam pengabulan *isbat* nikah poligami, apakah putusan catat hukum atau sebagai terobosan hukum. Penelitian ini merupakan kombinasi penelitian hukum normatif dan penelitian hukum empiris dengan pendekatan perundang-undangan (*Statue Approach*) dan pendekatan kasus (*Case Approach*). Penelitian dilakukan meliputi penelitian kepustakaan dan

penelitian lapangan. Hasil penulisan ini adalah putusan perkara Nomor 634/Pdt.G/2018/PA.Mtr dikabulkan oleh Majelis Hakim dengan mengesampingkan SEMA Nomor 3 Tahun 2018. Putusan tersebut termasuk sebuah terobosan hukum dengan mencerminkan hukum progresif dengan mendasarkan kemaslahatan yang lebih utama ketimbang mengikuti hukum materiil yang mengatur tentang perkawinan poligami. Merealisasikan rasa keadilan dan kemaslahatan bagi isteri siri kedua sebagai ahli waris agar dapat mencairkan dana taspen pensiunan suami dipandang lebih maslahat oleh Majelis hakim. Sebab, dana taspen pensiunan suaminya tersebut dapat digunakan untuk mencukupi kebutuhan hidup Pemohon beserta keluarganya.

Kata Kunci: *isbat nikah poligami; keadilan; putusan hakim*

Introduction

The number of applications for marriage *isbat* that the Mataram Religious Court legalized from 2017 to 2019 shows a large number. In 2017, the number of applications for marriage *isbat* reached 513 cases, or 44% of the total number of cases submitted. The number of applications for marriage *isbat* increased to 550 in 2018. At the time of writing, from January to July 2019, the number of applications for marriage *isbat* had reached 203 cases.¹ This percentage indicates that the number of licenses to apply for *isbat* marriages are likely to continue to increase in the next few years.

One of the cases of marriage *isbat* in the Mataram Religious Court is the *isbat* marriage of polygamy in decision number 634/Pdt.G/2018/PA.Mtr (from now on in this article abbreviated as Decision No. 634). In this case, the Petitioner is the second wife of an unregistered marriage. The Petitioner's husband and his first wife passed away in October 2018. The parties appointed as the respondent were the children of the first wife and the second wife. The Mataram Religious Court granted the Petitioner's request to legalize his marriage.

¹ Interview with Lalu Jamaludin, Registrar at the Mataram Religious Court on July 1, 2019.

The above case contradicts the contents of the Supreme Court Circular Letter (SEMA) Number 3 of 2018 (from now on referred to as SEMA 3/2018) concerning the Implementation of the Formulation of the Results of the 2018 Supreme Court Chamber Plenary Meeting as a Guide to the Implementation of Duties for the Court. In point number 8 of SEMA, it is explained that the application for polygamous marriage *isbat* must be rejected even though it is for the benefit of the child. Decision No. 634 is interesting to examine more deeply to find out how the basis (*feitelijke gronden* and *rechtelijke gronden*) of the petition and how the legal considerations used by the judge to grant the petition. Based on juridical way, it is appropriate for a judge in resolving cases to refer to the rules issued by the Supreme Court. Still, no less intense the judge can exercise discretion in some instances he handles for reasons of justice. Therefore, the deviation from SEMA, in this case, must be based on specific considerations therefore, it is worth studying, despite the many studies on the *isbat* of marriage.

Fauzi explained the provisions of Article 2 paragraph (1) of Law Number 1 of 1974 and Article 7 paragraph (2) of the KHI used by the Magetan Religious Court Judges to ratify the application for polygamous marriage *isbat* as stated in the decision number 445/Pdt.G/ 2012/PA.Mgt.² Arif Bijaksana also mentioned that one of the considerations of the Koto Baru Religious Court judge in granting the *isbat* of polygamous marriages also referred to Article 7 paragraph (2) and paragraph (4) of the KHI.³ Meanwhile, Azizah, in her research, stated that the Panel of Judges approved the application for polygamous marriage *isbat* based on the benefits of both parties, the protection of the condition of the Petitioner's child who was born

² Ahmad Cholid Fauzi, "Kedudukan Hukum Itsbat Nikah Poligami Sirri," *Jurnal USM Law Review* Vol. 1, no. 1 (2018), pp. 94–105, <https://doi.org/http://dx.doi.org/10.26623/julr.v1i1.2234>.

³ Arif Bijaksana, "Problematika Istbat Nikah Isteri Poligami dalam Penyelesaian di Pengadilan Agama," *Jurnal Ilmiah Hukum Dan Keadilan* Vol. 5, no. 2 (2018), pp. 58–88, <https://ejournal.stih-painan.ac.id/index.php/jihk/article/view/118>.

under Sharia law, and there were no obstacles for both of them to marry.⁴

In contrast to the writings above, several decisions that rejected the application for polygamous marriage *isbat* were based on the consideration that in the KHI there were no rules regarding polygamous marriage *isbat*. There was only ordinary marriage *isbat*, namely the first marriage *isbat* as written by Dalimunthe,⁵ Aisyah,⁶ and Aguslin, at al.⁷ Whether it is granted or rejected, an application for polygamous marriage *isbat* is caused by confusion and uncertainty in the provisions of Article 7 KHI⁸ which causes problems.⁹ Some people even say that the position of polygamous marriage *isbat* between legal smuggling and legal breakthroughs.¹⁰ Existing studies on the *isbat* of polygamous marriages are studies conducted before the

⁴ Nur Azizah, "Analisis Putusan Hakim No. 0093/Pdt.G/2014 Terhadap Permohonan Itsbat Nikah Pasangan Suami Isteri PNS (Studi Kasus Di PTA Mataram)," *Skripsi*, Fakultas Syari'ah UIN Mataram 2014. See also Nurul Inayah and Syawaluddin Ismail, "Kajian Yuridis terhadap Putusan *Isbat* Nikah Poligami Pegawai Negeri Sipil," *Al-Mabhat: Jurnal Penelitian Sosial Agama* Vol. 4, no. 2 (2019), pp. 53–74, <https://ejurnal.iainlhokseumawe.ac.id/index.php/al-mabhats/article/view/472>.

⁵ Eko Permana Dalimunthe, "Analisis Terhadap Istbat Nikah Oleh Isteri Yang di Poligami Secara Sirri (Studi Putusan Mahkamah Syari'ah Nomor: 206/Pdt.G/2013/MS.Sgl)," *Thesis*, Universitas Sumatera Utara, 2016.

⁶ Siti Aisyah, "Pandangan Hakim terhadap Itsbat Nikah Poligami di Pengadilan Agama Bondowoso," *Skripsi*, Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2008.

⁷ Aguslin, Haerani Husainy and Budimah Budimah, "Bentuk Penetapan Hakim terhadap Permohonan Istbat Nikah pada Pengadilan Agama Donggala Kelas IB," *Jurnal Kolaboratif Sains* Vol. 1, no. 1 (2019), pp. 1929–1939, <https://doi.org/https://doi.org/10.31934/jom.v1i1.719>.

⁸ Mahmud Huda, "Yurisprudensi *Isbat* Nikah dalam Pasal 7 Kompilasi Hukum Islam," *Religi: Jurnal Studi Islam* Vol. 5, no. 1 (2014), pp. 43–71.

⁹ Mukhtaruddin Bahrum, "Problematisasi *Isbat* Nikah Poligami Sirri," *Al-Adalah: Jurnal Hukum dan Politik Islam* Vol. 4, no. 2 (2019), pp. 194–213, <https://doi.org/http://dx.doi.org/10.35673/ajmpi.v4i2.434>.

¹⁰ Adnan Qohar, "Itsbat Poligami Antara Penyelundupan dan Terobosan Hukum," <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/itsbat-poligami-antarapenyelundupan-dan-terobosan-hukum-oleh-drs-h-adnan-qohar-sh-mh-11-2>, accessed July 1, 2021.

enactment of SEMA 3/2018, which tightens the permit for legalization of the *isbat* of siri polygamous marriages.

This article focuses on discussing the legalization of the *isbat* of polygamous marriages at the Mataram Religious Court in Decision No. 634 after the entry into force of SEMA 3/2018. This study is intended to determine the *decidendi ratio* used by the Panel of Judges in deciding cases. Then from the legal arguments used by the Panel of Judges, it will be known whether the determination of the decision is legally flawed or is it a legal breakthrough?

This study is written in the progressive legal framework proposed by Rahardjo. According to Rahardjo, the essential thing about advanced law is that the law can enable humans to achieve a just, prosperous, and happy life.¹¹ Law for human means that people are the determining factor and point of legal orientation. The law is responsible for serving humans, not the other way around. In this context, Decision No. 634 points out the point of view of progressive law or as a response to a situation outside the law in the concept of responsive law.¹² Therefore, even though this paper is in the conception of juridical-normative research, it is still problem-oriented, considered outside the normative area.¹³ Case/problem orientation is used to understand and describes the legal reasons (*decidendi ratio*) judges used to arrive at their decisions.¹⁴

***Isbat* Marriage Polygamy before SEMA 3/2018**

Unregistered polygamous marriages are polygamous practices without court permission. This form of polygamy is also known as *siri* polygamy or underhand polygamy. Polygamy like this has no legal force because it is not by applicable regulations. The provisions regarding polygamy are regulated in Article 56 paragraph (1) and

¹¹ Satjipto Rahardjo, *Hukum Progresif: Sebuah Sintesa Hukum Indonesia* (Yogyakarta: Genta Publishing, 2009), p. 2; Satjipto Rahardjo, *Membongkar Hukum Progresif*, 3rd ed. (Jakarta: Buku Kompas, 2008).

¹² Mulyana W Kusumah, *Hukum, Politik dan Perubahan Sosial*, ed. Paul S Baut (ttp: Yayasan Lembaga Bantuan Hukum Indonesia, 1988), p. 11.

¹³ *Ibid.*, p. 21.

¹⁴ Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, 13th ed. (Jakarta: Kencana, 2017), p. 131.

paragraph (3) of the Compilation of Islamic Law (KHI).¹⁵ Even though there are regulations, people still often practice underhand polygamy for various reasons, for example, the assumption that the procedure for polygamy is complicated, it is difficult to get permission from the first wife, and there is an assumption that it does not require state involvement as long as it is by fiqh provisions.¹⁶

Underhanded marriages –unregistered- basically can have legal force by binding the wedding in the Religious Courts. Juridically, marriage *isbat* is the authority of the Religious Courts. Historically, it was aimed at those who carried out (unregistered) marriages before Law Number 1 of 1974. There are still many decisions that have been

¹⁵ KHI Article 56 paragraph (1) explains that permission from the religious court is required for someone who intends to have more than one wife. At the same time, Article 56 paragraph (3) explains that without the approval of the religious court, the second, third or fourth marriage will not have legal force.

¹⁶ The practice of underhand polygamy is carried out by some people in Laden Village, Pamekasan Regency, without the knowledge of the first wife. 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), pp. 223–259, <https://doi.org/https://doi.org/10.19105/al-ihkam.v9i2.471>. Likewise, the causes of underhand marriages 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), pp. 251–286, <https://doi.org/http://dx.doi.org/10.14421/asy-syir'ah.2017.512.251-285>. Syarifah, in her article, also mentions that illegal polygamy is caused by the regulatory system in the bureaucracy and the length of its management. Masykurotus Syarifah, “Implikasi Yuridis Poligami Bawah Tangan Perspektif UU No. 1 Tahun 1974 Tentang Perkawinan,” *Jurnal Yustitia* Vol. 19, no. 1 (2018), pp. 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), p. 240. Mauliadi Nur's research also shows that the occurrence of underhand polygamy 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 marriages are 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>. Read also Dewi Anggraeni Wijayanti dan 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), pp. 53–66, <http://e-journal.iainpekalongan.ac.id/index.php/al-hukkam/article/view/4140>.

granted by the Panel of Judges of the Religious Courts after the enactment of Law Number 1 of 1974 by using the provisions of the Compilation of Laws. Islam Article 7 paragraph (2), which states that if a marriage certificate cannot prove, the marriages can be asked for the marriage *isbat* to the Religious Court.¹⁷

Polygamy is strictly regulated in Indonesia's marriage law.¹⁸ Despite strict conditions imposed, polygamy is still widespread. Charlie's research provides information on polygamy case data at LBK APIK Jakarta that of the 48 recorded polygamous cases, there are 21 unregistered polygamous marriages and 19 cases of identity fraud. The same thing also happened in Aceh. Several factors that encourage the occurrence of unregistered polygamous marriages in Aceh are the difficulty of obtaining permission from the Syar'iyah Court and the complexity of the marriage process at the Office of Religious Affairs, the problem of getting consent from the first wife, and the existence of public recognition of polygamous marriages carried out through Qa'i.¹⁹

The rise of siri polygamous marriages is coupled with rules related to marriage *isbat*, which is the juridical basis for submitting applications for polygamous marriage *isbat*. In handling polygamous marriage *isbat* applications, Religious Court judges are ordered to be

¹⁷ Magetan Religious Court Decision No. 445/Pdt.G/2012/Pakai/Mgt granted the application for the *isbat* marriage of siri polygamy in line with the provisions of Article 2 paragraph (1) of Law No. 1 of 1974 and Article 7 paragraph (2) of the KHI. Ahmad Cholid Fauzi, "Kedudukan Hukum Itsbat Nikah Poligami Siri," *Jurnal USM Law Review* Vol. 1, no. 1 (2018), pp. 94–105, <http://dx.doi.org/10.26623/julr.v1i1.2234>. One of the considerations of the Koto Baru Religious Court judge in granting the *isbat* of polygamous marriages is Article 7 paragraph (2) and paragraph (4) KHI. Arif Bijaksana, "Problematika *Isbat* Nikah Isteri Poligami dalam Penyelesaian di Pengadilan Agama," *Jurnal Ilmiah Hukum Dan Keadilan* Vol. 5, no. 2 (2018), pp. 58–88, <https://ejurnal.stih-painan.ac.id/index.php/jihk/article/view/118>.

¹⁸ The rules of polygamy in Indonesia have been accommodated in Law no. 1 of 1974 (which consists of Article 3 paragraph (2), Article 4, Article 5, and Article 9), PP No. 9 of 1975 (ie Articles 40-44), PP No. 10 of 1983 in conjunction with PP No. 45 of 1990 (Article 4 and Article 15 paragraph (2)) and the Compilation of Islamic Law (Article 55-59).

¹⁹ Ahmad Tholabi Kharlie, *Hukum Keluarga Indonesia* (Jakarta: Sinar Grafika, 2013), pp. 222–223.

careful so that there is no legal smuggling and illegal polygamy, as has been regulated in Book II of Guidelines for the Implementation of Duties and Administration of Religious Courts.²⁰ However, in the procedure for submitting a marriage *isbat* in the book, different things are regulated, namely:

“If examining the application for itsbat marriage in numbers (2) and (3) above, it is known that her husband is still bound in a legal marriage with another woman. The previous wife can be made a party in the case. If the applicant does not want to change his application by including his last wife as a party, the application must be declared unacceptable.”²¹

Based on these guidelines, it can be understood that an unregistered polygamous marriage before SEMA 3/2018 can be submitted for an *isbat* as long as the previous wife is a party in the case. In other words, polygamous marriage *isbat* is allowed according to the old rules. It is not done by the regulation above, which ordered the examination of applications for *isbat* marriage to be careful so that there was no illegal polygamy due to siri polygamy. Therefore, the two rules regulated in the book contradict each other, resulting in the Religious Court judges experiencing disparities in deciding polygamous marriage *isbat* applications.

These decisions' disparity became a problem related to the *isbat* case for polygamous marriages. It is necessary to look at the mapping between the granted decisions and the rejected decisions to clarify this difference. For example, the decision given was the decision of the Sleman Religious Court Number 1512/Pdt.G.2015/PA.Smn,²² Decision Number 472/Pdt.

²⁰ Mahkamah Agung RI, *Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama: Buku II* (Jakarta: Direktorat Jenderal Badan Peradilan Agama, 2014), p. 143 Point e Discussion of marriage *isbat*.

²¹ *Ibid.*, p. 144 Point 4.

²² 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),” *Tesis*, Fakultas Syari'ah dan Hukum, UIN Sunan Kalijaga Yogyakarta, 2017.

G/2012/PA. Spg.,²³ Number 61/Pdt.G/2010/PA.KBR.²⁴ The decision that was rejected was the decision of the Sleman Religious Court Number 190/Pdt.G/2004/PA.Smn.,²⁵ Nganjuk Religious Court Number 1339/Pdt.G/PA.Ngj.,²⁶ Singli Syar'iyah Court Number 206/Pdt.G/2013/MS.Sgl.,²⁷ Demak Religious Court Number 1869/Pdt. G/2014/PA. Dmk.,²⁸ Mataram Religious Court Number 615/Pdt. G/2019/PA.Mtr.²⁹

Based on these decisions, it is clear that the *isbat* of polygamous marriages is still a problem in Indonesia, both for the community as justice seekers and for the judges of the Religious Courts who try the case. At the practical level, the *isbat* marriage rules, which are considered a solution to unregistered marriages, actually create legal uncertainty over other regulations, such as the rules for registering marriages and the rules for polygamy.

²³ 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), pp. 55–70, <https://doi.org/http://dx.doi.org/10.33754/masadir.v1i1.329>.

²⁴ Bijaksana, "Problematika Istbat Nikah Isteri Poligami dalam Penyelesaian di Pengadilan Agama."

²⁵ 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.)"

²⁶ Mohammad Roqib, "Penolakan Ithbat Nikah Siri Bagi Suami Yang Sudah Beristri," *Al-Hukama The Journal of Islamic Family Law* Vol. 6, no. 2 (2016), pp. 422–448.

²⁷ Eko Permana Dalimunthe, "Analisis Terhadap Istbat Nikah Oleh Isteri Yang Dipoligami Secara Sirri (Studi Putusan Mahkamah Syar'ah Nomor: 206/Pdt.G/2013/MS.Sgl)," *Tesis*, Program Studi Magister Kenotariatan Fakultas Hukum, Universitas Sumatera Utara, 2016.

²⁸ Zahratus Sofa, "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)," *Skripsi*, Fakultas Hukum Universitas Jember, 2018.

²⁹ 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*, Fakultas Hukum, Universitas Mataram, 2021.

Differences in the judges' decisions of the Religious Courts continue to occur because it is considered a legal vacuum related to the *isbat* case for polygamous marriages. This only got a bright spot after the Supreme Court issued SEMA 3/2018.³⁰ In the regulation, it is stated: "Application for itsbat polygamous marriage based on unregistered marriage, even though on the grounds of the interests of the child, must be declared unacceptable. For the benefit of the child, an application for the origin of the child can be submitted".

Based on these rules, anyone who practices sirri polygamy without the permission of the Religious Courts cannot apply for marriage ratification even though children have been born in the marriage.

***Isbat* Marriage: Ins and Outs Case No. 634**

Decision No. 634 is the decision of the Mataram Religious Court which granted the application for the *isbat* of siri polygamous marriages. If traced, this case was motivated when the second wife (the Petitioner) as the heir was unable to disburse her husband's taspen/retirement fund to meet the needs of herself and her children.³¹ On December 31, 1991, the Petitioner married the late A (as the Petitioner's husband) in the Dasan Agung Gapuk area,

³⁰ Supreme Court Circular (SEMA) No. 3 of 2018 concerning the Enforcement of the Results of the 2018 Supreme Court Plenary Chamber Meeting as a Guide to the Implementation of Duties for the Court. The SEMA concerning the results of the plenary meeting of the Supreme Court is the result of the whole discussion of the chambers, which the Supreme Court routinely conducts. The Supreme Court holds the full meeting of the chamber to respond to the development of legal issues in society, some of which have not been determined in the laws and regulations so that it often triggers disparities in the application of the law by judges in deciding a case. The Supreme Court chamber meeting results are then used as guidelines by judges in choosing new cases that were previously unclear or not regulated in the laws and regulations so that there is no disparity in applying the law to new possibilities.

³¹ A husband or wife whose spouse has died may apply for a contentious marriage *isbat* by making the other heirs the respondent. The legal product is in the form of a decision, and an appeal and cassation can be requested for that decision. Read Neng Djubaedah, *Pencatatan Perkawinan dan Perkawinan Tidak Dicatat menurut Hukum Tertulis di Indonesia dan Hukum Islam* (Jakarta: Sinar Grafika, 2010), p. 145.

Mataram City. The Petitioner's biological father became the guardian of the marriage and two witnesses with a dowry of Rp. 100.

At the time of the marriage, the Petitioner was a 33-year-old girl. Meanwhile, the husband of the Petitioner is 46 years old with one wife status. Between the two, there is no kinship relationship, marital kinship, and sexual relations, and both fulfill the pillars and conditions of marriage. There are no obstacles to marriage, both according to the provisions of Islam and applicable law in Indonesia. The Petitioner and the Petitioner's husband have 3 children. The Petitioner's husband died on October 14, 2018. The marriage of the Petitioner's husband with his first wife was blessed with 4 children. The first wife of the Petitioner's husband passed away on October 24, 2018.

Although the marriage of the Petitioner and the Petitioner's husband was carried out according to Islamic religious provisions, both of them did not register their wedding at the local Religious Affairs Office; as a result, both of them did not have proof of marriage that was recognized according to state regulations. Therefore, the Petitioner submitted an *isbat* marriage through the Mataram Religious Court so that the marriage of the Petitioner with the Petitioner's husband could be legalized to obtain legal recognition and could be registered at the local Religious Affairs Office to accept a marriage certificate as a condition for managing the disbursement of Taspen funds and for other legal purposes.

Legal Considerations of Judges in Case No. 634

The request for polygamous marriage *isbat* was granted by the Panel of Judges. The panel of judges decided the case on three grounds. *First*, the marriage of the Petitioner and the Petitioner's husband does not have any marital barriers, so that it can be used as a legal basis for the Panel of Judges to legalize their second marriage, as intended in Article 7 letter e of the KHI which explains that the marriage is carried out by a person who according to Law no. 1 of 1974 there is no prohibition on the application of marriage proposals. The judge used the legal basis to legalize their second marriage.

Second, as long as the pillars and conditions of marriage are fulfilled, there is no reason not to grant the marriage *isbat*. It is as regulated in Article 14 of the Compilation of Islamic Law, which states that it is obligatory to have the bride and groom, marriage

guardian, two witnesses, and pronounce consent and acceptance in marriage. *Third*, marriages need to be registered with the officers concerned to guarantee marriage order in the community. This provision is based on Article 2 paragraph (2) of Law Number 1 of 1974 concerning Marriage in conjunction with Article 34 paragraph (1) of Law Number 23 of 2006 concerning Population Administration in conjunction with Article 5 paragraph (1) and (2) Compilation of Islamic Law in conjunction with Article 26 points (1) and (4) of the Regulation of the Minister of Religion of the Republic of Indonesia Number 11 of 2007 concerning Marriage Registration.

In addition to seeing the judge's considerations in the decision, the author directly interviewed the judge who handled this case. One member of the Panel of Judges said:

“It was granted because, yes, like that, there is no dispute. When examined, everything is legal; there are witnesses of all kinds. So there's no obstacle. Even though the marriage is unregistered, it is by Islam, there are witnesses, there are guardians, and there is dowry. Here it is our duty, whether it is preventive or not, it is our duty to accept the case of marriage ratification, and we take it if the conditions for the pillars of marriage are fulfilled. Continue if we don't get him; where else are you going? It's something like that; the important thing is that the conditions for the pillars are met.”³²

To see the point of view of other judges, the author interviewed other judges who did not handle Case No. 634 to gain insight that can be compared with the legal considerations of the judge overseeing the case. The judge gave the following arguments:

“His surviving child needs to be saved, by what? By tying the knot to have a marriage book. If we don't make the marriage part, the child will be neglected. If the child is neglected when he has rights, what about Allah? The only way is to get married. Perhaps that is the basis for the consideration of the Panel of Judges so that the application for legalization of this marriage is granted. In addition, the most important thing is

³² Interview with Mr. Hafiz, Judge at the Mataram Religious Court on July 17, 2019.”

that the rights of the living need to take precedence over the rights of the dead.”³³

Based on the results of the interviews above, the authors found a similarity, namely that the two judges whom the authors interviewed agreed that the application for *isbat* marriage in case No.634 needed to be granted, although for different reasons.

One of the factors that must be considered so that the judicial power can implement its power freely and independently is the independence of judges.³⁴ Judicial independence means that judges have the freedom to make decisions, but this freedom must be by applicable law. The aim is to control the principle of freedom of judges so that judges will not make arbitrary decisions because every judge's decision must be believed to be correct (*res judicata pro veritate habetur*).³⁵ However, everyone can make mistakes, and mistakes, including the judge, cannot escape this.

Three things guide judges in making decisions, namely, the existence of legal certainty, justice, and expediency. Judges are required to harmonize these three things in making decisions, even though this is very difficult to do.³⁶

In the decision we examined, the judge used various considerations to grant the request. Article 7 paragraph (3) letter (e) KHI is used because the marriage between the Petitioner and the Petitioner's husband (deceased) does not prevent marriage according to Marriage Law No. 1, the Year 1974.³⁷ In addition, the Panel of

³³ Interview with Ahmad Abidin, Judge of the Mataram Religious Court on July 24, 2019.”

³⁴ A. Mukti Arto, *Penemuan Hukum Islam Demi Menwujudkan Keadilan: Penerapan Penemuan Hukum, Ultra Petita dan Ex Officio Hakim Secara Proporsional* (Yogyakarta: Pustaka Pelajar, 2018), p. 284-285.

³⁵ *Ibid.*, p. 305–306.

³⁶ Fence M Wantu, “Kendala Hakim dalam Menciptakan Kepastian Hukum, Keadilan, dan Kemanfaatan di Peradilan Perdata,” *Mimbar Hukum-Fakultas Hukum Universitas Gadjah Mada* Vol. 25, no. 2 (2013), pp. 205–218, <https://doi.org/https://doi.org/10.22146/jmh.16092>.

³⁷ The obstacles are 1) Blood ties in a straight line of descent or descent; 2) A sideways hereditary relationship, namely blood relations with siblings, with parents' siblings, and with grandparents; 3) Sexual relations, namely relationships

Judges also uses Article 14 of the KHI, which contains the pillars of marriage, as material for consideration. The posts of marriage are: 1) prospective husband, 2) prospective wife, 3) marriage guardian, 4) two witnesses, and 5) consent and acceptance. In the case of marriage, the pillars and conditions are the main things that must hold because if these pillars and conditions are not met, then the marriage cannot be declared valid.

The final consideration of the Panel of Judges is based on Article 2 paragraph (2) of Law Number 1 of 1974 in conjunction with Article 34 paragraph (1) of Law Number 23 of 2006 concerning Population Administration in conjunction with Article 5 paragraph (1) and (2) Compilation of Laws Islam in conjunction with Article 26 paragraphs (1) and (4) of the Regulation of the Minister of Religion of the Republic of Indonesia Number 11 of 2007 concerning Marriage Registration; with the reason that marriage order is guaranteed for the Islamic community, every marriage must be registered by a Marriage Registrar. The considerations above are the considerations listed in the decision file.

In addition to some of the considerations described above, the judge thinks several factors are also considered to enable the applicant to fulfill the Petitioners' petition reasonably. These considerations The authors get from interviews with judges who refer to Law no. 23 of 2002 concerning Child Protection. The law defines child protection as an action that guarantees and protects children and their rights to enable them to live, grow, develop and participate optimally by human nature and obtain protection from violence and discrimination.

In addition, based on the results of the judge's interview, the results of the interview with the Petitioner obtained data that the purpose of concluding the marriage was so that the pension funds could be disbursed. Children of the first wife cannot withdraw

with parents-in-law, stepchildren, daughter-in-law, and mother/stepfather; 4) Relationships arising from breastfeeding, namely breastfeeding parents, breastfed children, nursing siblings, and aunts/uncles; 5) Having a relationship with the wife or as an aunt or niece of the wife if a husband has more than one wife; 6) Having a relationship is prohibited from marrying according to his religion or other applicable regulations.”

pension funds because they are constrained by the age limit as stipulated in Article 18 paragraph 4 of the Law of the Republic of Indonesia Number 11 of 1969 concerning Employee Pensions and Employee Widows/Widower Pensions³⁸ and Circular Letter of the Minister of Finance and Head of the State Civil Service Administration Number 19/SE/1980 concerning Changes in the Age Limit for Children of Civil Servants Who is Entitled to Receive Family Allowances.³⁹ However, the pension fund must be disbursed because the Petitioner is only a housewife and therefore has no income. The applicant also still has children who must be supported and paid for by the school. The Taspen Fund is the last hope to solve the family's financial problems.⁴⁰

SEMA 3/2018 Deviations in Case No. 634: Progressive Law Implementation

The Supreme Court of the Republic of Indonesia is one of the organizers of judicial power in Indonesia as stated in Article 24 paragraph (2) of the 1945 Constitution, which states that "Judicial power is exercised by a Supreme Court and judicial bodies under it in the general court environment, environment of religious courts, military courts, state administrative courts, and by a Constitutional Court". Duties as the organizer of judicial power, the Supreme Court is given the authority by law to make a regulation that functions as a vacancy filler or complements the lack of rules on procedural law to facilitate the administration of justice.⁴¹

³⁸ Children (children) who are entitled to receive a widow's pension or part of a widow's pension according to the provisions of paragraph (1) or paragraph (2) of this article are children (children) who at the time of the death of an employee or employee-pension recipient: a. has not reached the age of 25 years or b. do not have their income, or c. unmarried or never married.

³⁹ Children of Civil Servants have the right to disburse family allowances with conditions; they are less than 21 years old, have never been married, have no income of their own, and are dependent on their parents. Then the age of 21 years can be extended until the age of 25 years if the child is still in school/course/college.

⁴⁰ Interview with Patimah (Petitioner) in Mataram City. July 25, 2019.

⁴¹ A Mukti Arto, *Peradilan Agama dan Sistem Ketatanegaraan Indonesia* (Yogyakarta: Pustaka Pelajar, 2012), p. 38.

Article 79 of Law number 14 of 1985 concerning the Supreme Court jo. Law Number 5 of 2004 concerning Amendments to Article 79 of Law Number 14 of 1985 concerning the Supreme Court states "The Supreme Court can further regulate matters needed for the smooth administration of justice if there are matters that have not been sufficiently regulated in the Act. -Invite this". In this article, the function of the MA rule-making power originates. The Supreme Court has the power to make regulations to resolve cases that are not regulated by law or when there is a legal vacuum. Of course, this authority is also based on Article 10 of Law Number 48 of 2009 concerning Judicial Power, which states that judges may accept a case because the law does not yet exist or is unclear.

The Supreme Court made legal breakthroughs by holding a Plenary Chamber Meeting, which resulted in formulations in the form of formulations of the criminal chamber, civil chamber, religious chamber, and military chamber. Regarding the issue of the *isbat* of polygamous marriages based on unregistered marriages, the Supreme Court issued SEMA 3/2018 concerning the Implementation of the Formulas of the Results of the 2018 Supreme Court Plenary Meeting as a Guide to the Implementation of Duties for the Court, which was enforced in November 2018. It is stated that "Application for polygamous marriage *isbat* based on unregistered marriage, even though it is for the sake of the child's interest, must be declared unacceptable. To ensure the interests of the child, the origin of the child can be submitted."

Then, to what extent should the formulation of the results of the plenary meeting of the Religious Chamber in SEMA 3/2018 be applied and guided? Formally, the case submitted as an application for polygamous marriage *isbat* on a marriage registered to have no choice but to be declared by the judge as unacceptable. (*niet ontvankelijke verklaard*).⁴² Although in reality, most of the contents of the Supreme

⁴² Cik Basir, "Penanganan Perkara Permohonan Itsbat Nikah Poligami secara Sirri dan Hubungannya dengan Permohonan Asal Usul Anak di Pengadilan Agama (Menyikapi Rumusan Hasil Rapat Pleno Kamar Agama MA Dalam SEMA Nomor 3 Tahun 2018)" (Palembang: Paper presented in the Discussion of Religious Court Judges in the Palembang Religious High Court Area, 2019), <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/penanganan->

Court Circular serves as a policy regulation (*beleidsregel*), because the basis for its formation is the order of Article 79 of the Supreme Court Law, this SEMA can be classified as a statutory regulation and legally binding as regulated in Article 8 paragraph (2) of Law Number 12 of 2011 concerning the Establishment of Legislation.⁴³

The clause in SEMA 3/2018 above clearly states that the marriage *isbat* of polygamous marriages based on unregistered marriages must be declared unacceptable. There is no room for unregistered polygamy to be legalized. The author understands that the results of the Religious Chamber Meeting, which decided that the application for ratification of polygamous marriages must be declared unacceptable even for any reason because polygamous marriages carried out in series have violated legal provisions *isbat* of polygamous marriages will result in legal smuggling. In this case, a polygamy permit is a formal requirement in an application for ratification of polygamous marriages. As long as the husband who applies for polygamous marriage *isbat* has not obtained polygamy permission from the court, he is not formally eligible to apply for polygamous marriage *isbat*. Thus, the Panel of Judges must expressly declare the Petitioner's petition cannot be accepted (*niet ontvankelijke verklaard*). However, not receiving the application for ratification of the polygamous marriage does not prevent the parties from applying for the origin of the child. After the Panel of Judges declares that the application for ratification of marriage is unacceptable, the parties may re-apply the application for the child's origin to the court. As stipulated in this SEMA, the SEMA can submit the child's origin for the child's benefit. Determination of the birth of the child can be given by the court as long as there is recognition and it can be proven that the child is the biological child of the mother and father.⁴⁴

perkara-permohonan-*isbat*-nikah-poligami-secara-siri-dan-hubungannya-dengan-permohonan-asal-usul-anak-di-pengadilan-agama-oleh-drs-cik-basir-s-h-m-h-i-3-5.

⁴³ Irwan Adi Cahyadi, "Kedudukan Surat Edaran Mahkamah Agung (SEMA) dalam Hukum Positif di Indonesia," *Kumpulan Jurnal Mahasiswa Fakultas Hukum* Vol. 1, no. 2 (2014).

⁴⁴ Siti Ummu Adillah, "Implikasi Hukum dari Perkawinan Siri terhadap Perempuan dan Anak," *PALASTREN: Jurnal Studi Gender* Vol. 7, no. 1 (2016), pp. 193–222, <https://doi.org/http://dx.doi.org/10.21043/palastren.v7i1.1011>.

The aim of SEMA 3/2018 is to prevent 'illegal' polygamous marriages.⁴⁵ In Indonesia, polygamy is not prohibited, but if it is to be carried out, it must meet the requirements of polygamy as regulated in Article 4 of Law Number 1 of 1974. It must apply for a polygamy permit to the court with the conditions determined as handled in Article 5 paragraphs (1) and (2) of Law Number 1 of 1974. Then, polygamous marriages carried out serially can be said to be a violation of two rules in the marriage legislation, namely the provision of court permits for polygamous marriages as regulated in Article 3 paragraph (2) and registration of marriages as regulated in Article 2 paragraph (2) of the Marriage Law. Thus the existence of this SEMA strengthens the rules of polygamy in Law Number 1 of 1974 so that parties who want to find loopholes in polygamy can be prevented.⁴⁶

About this problem, ideally, the judge upholds the results of the formulation of the Chamber of Religion regarding the *isbat* of polygamous marriages based on the siri marriage. The judges had to apply the results of the plenary meeting of the Religious Chamber as it should be because the decision had been published in such a way in the form of SEMA.⁴⁷ The formulation of the Chamber of Religion contained in SEMA itself is an instrument that functions to realize the

⁴⁵ Mukhtarudin Bahrum said that if the application for polygamous marriage *isbat* is accepted, it means admitting and justifying an act that violates the law. Another impact is the negation of the values protected by the statutory provisions regarding polygamy requirements. Therefore, based on SEMA No. 3 of 2018, the Supreme Court no longer gives the green light for the ratification of siri polygamy. See Mukhtaruddin Bahrum, "Problematika *Isbat* Nikah Poligami Sirri," *Al-Adalah: Jurnal Hukum Dan Politik Islam* Vol. 4, no. 2 (2019), pp. 194–213, <https://doi.org/http://dx.doi.org/10.35673/ajmpi.v4i2.434>.

⁴⁶ Khiyaroh, "Peran Pleno Kamar Agama Mahkamah Agung dalam Mencapai Tujuan Perundang-Undangan Keluarga Indonesia," *Abkam: Jurnal Hukum Islam* Vol. 8, no. 2 (2020), pp. 311–332.

⁴⁷ Cik Basir, "Penanganan Perkara Permohonan *Isbat* Nikah Poligami Secara Sirri dan Hubungannya dengan Permohonan Asal Usul Anak di Pengadilan Agama (Menyikapi Rumusan Hasil Rapat Pleno Kamar Agama MA dalam SEMA Nomor 3 Tahun 2018)" (Palembang: Paper presented in the Discussion of Religious Court Judges in the Palembang Religious High Court Area, 2019), <https://badilag.mahkamahagung.go.id/artikel/publikasi/artikel/penanganan-perkara-permohonan-isbat-nikah-poligami-secara-siri-dan-hubungannya-dengan-permohonan-asal-usul-anak-di-pengadilan-agama-oleh-drs-cik-basir-s-h-m-h-i-3-5>.

unity of law application and consistency of decisions needed as guidelines in handling a case.⁴⁸ This means that the content of SEMA itself is based on progressive law..

This means that the law is in the status of law in the making in the legal sense as a process and project.⁴⁹ Indeed, the principle is that judges should not be shackled in the mindset of "what the law says" but open themselves and their hearts to find justice. Rahardjo emphasized the importance of legal mobilization that relies on human resources in law to dare to interpret progressively rather than being shackled to the rule of law.⁵⁰ In other words, progressive law pays more attention to substantive justice. In progressive law optics, a law enforcer must dare to make legal breakthroughs (rule-breaking), if normative regulation is seen as unable to create justice.⁵¹

If the judge prioritizes material justice, it does not mean that the judge must ignore the law. Still, when the legal framework is incomplete or unclear, the judge needs to encourage or make legal discoveries to provide a sense of justice and benefits for those who seek it.⁵² On the other hand, if the formulation of the law is clear and

⁴⁸ SEMA Number 3 of 2018 concerning the Implementation of the Formulas of the Results of the Plenary Meeting of the Supreme Court in 2018 as Guidelines for the Implementation of Duties for the Court.

⁴⁹ Satjipto Rahardjo, *Biarkan Hukum Mengalir: Catatan Kritis Tentang Pergulatan Manusia dan Hukum* (Jakarta: Buku Kompas, 2007), pp. 39 - 47.

⁵⁰ *Ibid.*, p. 24.

⁵¹ Ari Wibowo, "Mewujudkan Keadilan Melalui Penerapan Hukum Progresif," in Mahrus Ali, *Membumikan Hukum Progresif* (Yogyakarta: Aswaja Pressindo, 2013), p. 9.

⁵² According to Sudikno Mertokusumo, legal discovery is the process of making laws by judges or other legal entities authorized to apply rules or apply general legal norms to specific legal issues. In general, the discovery regulation can be made through two methods, namely the interpretation and construction method. The interpretation method is a way to find a law that clearly explains the legal text so that the scope of the rule of law can be applied to a particular legal case. The judge's interpretation is an interpretation that must lead to the enforcement of legal provisions regarding specific events that are acceptable to the community. Meanwhile, the legal construction method is used by judges when facing a legal vacuum (*Rechts vacuum*) or a legal vacuum (*wet vacuum*) because in principle judges should not refuse to settle cases because the law does not exist or has not been established. But in reality, the judge cannot determine which method of legal

consistent with substantive legal principles, judges must be guided by the applicable procedural law to formulate justice while at the same time guaranteeing legal certainty.⁵³

Second, procedural justice, namely the external aspects of the law through which justice can be achieved. This aspect can be called formal justice. The originator of this theory is Imam Shafi'i and his followers.⁵⁴ Procedural justice is distinguished from distributive justice (fairness in the distribution of rights or resources) and retributive justice (fairness in decision making). Listening to the opinions of all parties before making a decision is considered appropriate, even though the requirements of distributive justice or retributive justice are not met.

From the description above, it can be said that maintaining the benefit is part of legal protection.⁵⁵ Therefore, judges who can make decisions should decide cases to maintain the benefit. Law Number 48 of 2009 concerning Judicial Power Article 2 paragraphs (2) and (3) emphasizes that the freedom to uphold justice is not absolute because the task of judges is to maintain law and justice based on Pancasila so that decisions made reflect the sense of justice of the Indonesian people.

discovery will be used for progressive legal discovery because each case or case has a different form and characteristic or nature, so the judge will use the method of legal discovery that is by the case he is facing. See Achmad Rifai, *Penemuan Hukum oleh Hakim: Dalam Perspektif Hukum Progresif*, 4th ed. (Jakarta: Sinar Grafika, 2010), pp. 21-95.

⁵³Abū Hāmid al-Gazālī, *Al-Mustasyfā Fī 'Ilm al-Uṣūl* (Beirut: Dār al-Kutūb al-'Ilmiyah, 1983), pp. 139-140. In Islam, this kind of justice was popularized by al-Gazālī, Najamuddīn at-Ṭūfī and Muhammad ahir bin 'Āsyūr under the concept of *maslahah mursalah* as a legal goal (*maqāṣid ash-syarī'ah*). Abū Ishāq al-Syātībī, *Al-Muwāqāt Fī Uṣūl al-Syarī'ah* (Beirut: Dār al-Fikr, n.d), pp. 25-37.

⁵⁴Muhammad bin Idrīs Al-Sāyfi'ī, *Ar-Risālah*, vol. 1 (Kairo: Muṣṭafā Bāb al-Halabi, 1968), p. 493.

⁵⁵Zaenudin Mansyur, "Implementasi Prinsip Keadilan dalam Hukum Perjanjian Syari'ah," *Ayy-Syari'ah* Vol. 22, no. 2 (2020), pp. 159-178, <https://doi.org/https://doi.org/10.15575/as.v22i2.8870>.

Based on the *ius curia novit* principle, the judge is considered to understand and understand the case submitted to him.⁵⁶ Therefore, the judge has the right to decide which law will be applied based on the core problem in the dispute.⁵⁷ Judging from the objectives to be realized in Case number 634, what the Panel of Judges did was based on the benefits considered more appropriate to put forward than following the material law governing polygamous marriages (SEMA 3/2018). The waiver of SEMA 3/2018 in the decision was based on the fact that the first wife of the Petitioner's husband had died, so there was no conflict with either the first wife or with their children. Even during his lifetime, the relationship between the Petitioner and the first wife was harmonious, as were the first wife's children. They accept the presence of the Petitioner as a second wife.⁵⁸ This indirectly shows that the first wife allowed her husband to remarry. It's just that at that time, the marriage of the Petitioner and the Petitioner's husband was not registered at the Office of Religious Affairs.

In addition, marriage registration is carried out to meet the demands of the state, namely to ensure order for the Islamic community. In the end, the petitioners for *isbat* marriage who applied did so because they did not get services from the state. As in the case of Decision No. 634, which used marriage *isbat* because the employee in charge of disbursing Taspen funds was not willing to serve because the conditions for disbursement were not met. The requirements for the distribution of widow/widower pension funds are explained in Article 21 of the Law of the Republic of Indonesia Number 11 of 1969 concerning Employee Pension and Employee Widow/Widower Pension as follows: 1) Death certificate or a copy ratified by the authorities; 2) A copy of the marriage certificate legalized by the

⁵⁶This principle only applies in civil cases because civil law has an open system. In criminal cases, the focus of legality teaches that no act can be punished except by the strength of the criminal rules in the legislation that existed before the act was committed. Criminal law adheres to a closed system (*close system*).

⁵⁷M Yahya Harahap, *Hukum Acara Perdata tentang Gugatan, Persidangan, Penyitaan, Pembuktian, Dan Putusan Pengadilan*, 2nd ed. (Jakarta: Sinar Grafika, 2008), p. 821.

⁵⁸ Interview with P (Applicant) in Mataram City on July 25, 2019.

authorities; 3) List of family compositions legalized by the authorities containing the names, dates of birth and addresses of those concerned; 4) Decision letter that stipulates the rank and final salary of the deceased employee.⁵⁹ The Petitioner cannot show a copy of the marriage certificate from these conditions, which is legalized by the authorities. Since getting married and having three children, the Petitioner has never thought about registering a marriage. However, after the *taspen* funds needed cannot be disbursed, the applicant must inevitably submit an application for marriage *isbat* as a condition for paying the pension funds.

The granting of the petition in Decision Number 634 is considered more beneficial by enabling the Applicant to withdraw pension funds. If the court does not legalize the marriage, even though the Petitioner is a legally legal wife, the Petitioner's rights as a wife are meaningless, namely the right to receive pension benefits for her deceased husband. The presence of SEMA 3/2018, instead of intending to create *maslahah*, 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* polygamy, the wife cannot get a definite legal umbrella.⁶⁰ According to the author, the decision of the Panel of Judges is in line with the rules of *dar al-mafāsīd muqaddam 'alā jalb al-maṣālih* (avoiding mandatory damage takes precedence over efforts to achieve benefit).⁶¹

The waiver of SEMA 3/2018 is also based on the facts of the trial that the Panel of Judges made the principle of benefit a priority by seeing that the rights of the living need to be prioritized over the

⁵⁹ Law of the Republic of Indonesia Number 11 of 1969 concerning Employee Pension and Employee Widow/Widower Pension.

⁶⁰ 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>.

⁶¹ Djazuli, *Kaidah-Kaidah Fikih*, p. 11.

rights of those who have died.⁶² The verdict shows progressive law with its legal breakthrough. Judges are progressive by always believing that the law is designed to provide protection and justice to realize benefit and fairness. Because the law will not be helpful if it does not benefit the community. The decision seeks to discover a sense of justice. According to the author, this is by the rules of *taṣarraf al-imām 'ala ar-ra'iyah manit bi al-maṣlahah* (a leader's policy towards his people must be based on the benefit of the people).⁶³

This rule emphasizes that the policy of the leader (judge) must be based on justice and the welfare of the people, not following the desires or desires of the group. At least policies (decisions) oriented towards the community's benefit, benefit, and justice must be implemented, organized, assessed, and evaluated for their progress. On the other hand, policies that cause damage and harm the people must be eliminated and rejected.⁶⁴ So it is only natural that the Panel of Judges grants the *isbat* of polygamous marriages in this case because it brings more benefit.

Conclusion

Application for polygamous marriage *isbat* in case No. 634 granted. The Panel of Judges is based on the provisions of Article 2 paragraph (2) of the Marriage Law and Article 7 paragraph (3) letter (e) and Article 14 of the Compilation of Islamic Law. The ruling overrides SEMA 3/2018. This waiver is based on the principle of prioritizing benefit. The judge views that benefit is more appropriately prioritized than material law. The judge's discretion, in this case, is an effort to realize the benefit of the second wife whose husband has died. The use in question is the interest of the second wife to disburse her husband's pension fund to meet their own needs and the needs of their children born from unregistered polygamous marriages. The judge's decision to set aside material law and switch to the wife's benefit, in this case, reflects progressive direction. This means that

⁶² Interview with Mr. Hafiz, Judge at the Mataram Religious Court on July 17, 2019.”

⁶³ Djazuli, *Kaidab-Kaidab Fikih*, p. 15.

⁶⁴ *Ibid.*, p. 148.

judges dare to act progressively by believing that the law is designed to provide protection and justice to realize the benefit. In this case, it benefits the wife and children born from the unregistered polygamous marriage.

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