



REJECTION OF *ISBĀT* FOR POLYGAMOUS MARRIAGE: A PERSPECTIVE FROM CRITICAL LEGAL STUDIES

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ABSTRACT

This article examines the rejection of a polygamous marriage legalization request at the West Jakarta Religious Court through Decision Number 1548/Pdt.G/2019/PA.JB, utilizing a critical legal studies perspective. The research is grounded in a multidimensional theoretical framework, incorporating elements of critical legal studies and statutory interpretation, to scrutinize the judges' legal interpretations. Methodologically, the study employs a rigorous approach, combining qualitative analysis of judicial decisions with theoretical insights from legal studies. The findings reveal the judges' systematic interpretation of relevant legal provisions and highlight the tension between legal certainty, justice, and utility. The theoretical implications suggest a need for legal scholars and practitioners to reexamine prevailing paradigms and consider alternative frameworks that prioritize justice and social utility.

Keywords: *Isbāt* For Polygamous Marriage, Legal Interpretation, Critical Legal Studies, Judicial Decision-making, Legal Paradigms

ABSTRAK

Artikel ini mengkaji penolakan permohonan pengesahan pernikahan poligami di Pengadilan Agama Jakarta Barat melalui Putusan Nomor 1548/Pdt.G/2019/PA.JB, dengan menggunakan pendekatan Studi Hukum Kritis. Penelitian ini memanfaatkan kerangka teori multidimensi, termasuk Studi Hukum Kritis dan interpretasi undang-undang, untuk menganalisis bagaimana hakim menginterpretasikan hukum. Metodologi penelitian ini menggabungkan analisis kualitatif terhadap putusan pengadilan dengan wawasan teoretis dari kajian hukum. Hasil penelitian mengungkapkan interpretasi sistematis hakim terhadap ketentuan hukum yang relevan, serta menunjukkan ketegangan antara kepastian hukum, keadilan, dan kemanfaatan. Implikasi teoretisnya menunjukkan pentingnya bagi sarjana dan praktisi hukum untuk meninjau kembali paradigma yang ada dan mempertimbangkan kerangka alternatif yang lebih memprioritaskan keadilan dan kemanfaatan sosial.

Kata Kunci: *Isbāt* Nikah Poligami, Penafsiran Hukum, Studi Hukum Kritis, Pengambilan Keputusan Peradilan, Paradigma Hukum



INTRODUCTION

The provisions governing polygamy are encapsulated in Article 3 to 5 of Law 1 of 1974 and Article 56, paragraphs 1 and 3, of the Compilation of Islamic Law (KHI). Despite these regulations, polygamy remains prevalent in society for various reasons. Research by Mauliadi Nur reveals that unregistered polygamous marriages often occur due to a belief that polygamy is permissible without court approval and due to fear of the first wife's reaction, leading to clandestine unions (Nur, 2016). Similarly, in Desa Laden, Kabupaten Pamekasan, unregistered polygamy is practiced without the first wife's knowledge (Warits & Wahed, 2014). In Jakarta, out of 18 respondents, nine cited the absence of permission from their first wife and the court as the reason for their unregistered marriages (Mesraini, 2017). Syarifah adds that the bureaucratic complexities further drive unregistered polygamy (Syarifah, 2018).

The increase in unregistered polygamous marriages introduces several societal issues, ranging from potential family conflicts (Wijayanti & Khasanah, 2021) to the lack of legal protection for children born from these marriages (Inayah & Ismail, 2019). Some communities believe that the only way to protect children born from polygamous unions is to submit polygamous marriage certificates to the Religious Courts (Qohar, 2015). This belief has led to numerous applications for polygamous marriage recognition in Religious Courts (Muhajir & Uyun, 2021). A notable case for isbat (validation) of an unregistered polygamous marriage is the West Jakarta Religious Court's

decision Number 1548/Pdt.G/2019/PA. JB (hereafter referred to as Decision No. 1548).

In Decision No. 1548, the judges denied the petitioners' application for marriage isbat due to violations of polygamy and isbat rules. This refusal deprived the unregistered wife of rights to alimony and communal property. Moreover, the child from the unregistered marriage was only acknowledged as having a civil relationship with the mother, devoid of inheritance rights from the father. Ideally, the public expects judges to apply the principles of legal certainty, utility, and justice in their rulings (Supandriyo, 2019, p. 82). Judges operate within a broader interpretive framework, influenced by their paradigms, which can be categorized into positivistic and non-positivistic paradigms (Putro, 2011).

This study is grounded in Critical Legal Studies (CLS). CLS posits that the law is neither neutral, objective, nor autonomous. According to Robert M. Unger, each legal method leads to specific outcomes, implying that the choice of legal method by practitioners results in particular decisions. Furthermore, every legal system embodies certain social and political values (Ifdhal Kasim, 1999). Sarjipto Raharjo, as cited by Jazuni, argues that law-making inevitably reflects the interests of lawmakers, thus characterizing law as an instrument of political will (Jazuni, 2005; Muhajir, 2021).

CLS provides a critical analysis of the law by examining the relationship between legal doctrine and reality, expressing its critiques. Unlike liberal legal theorists, the CLS movement aims to contribute to political transformation with practical implications (Tahir, 2014). CLS proponents advocate for a

legal analysis that considers not only doctrinal aspects (internal relations) but also factors such as ideological preferences, language, beliefs, values, and political contexts in the formation and application of law (external relations) (Dennis Lloyd, 1973).

As revealed by Safa'at (2012), addressing legal issues or delegitimizing established legal doctrines according to the times involves seeking solutions to judge decisions that disadvantage the applicant. In the case of decision No. 1548, Critical Legal Studies (CLS) employs three methods: trashing, deconstruction, and genealogy. The trashing method challenges the antithesis of established legal thought, exposing contradictions and one-sided conclusions based on dubious assumptions. Deconstruction dismantles existing thoughts to reconstruct legal understanding. Genealogy uses historical interpretation to strengthen legal reconstruction, recognizing that history is often dominated by those in power.

Research on the validation (*isbat*) of polygamous marriages is extensive and can be categorized into four groups. The first category examines polygamous marriage petitions granted before the enactment of Supreme Court Circular No. 3 of 2018 (SEMA 3/2018). According to Ahmad Chozin Fauzi (2018), from an Islamic law perspective, polygamy is permissible if it meets the requirements and harmony of marriage as stipulated in Article 2, paragraph 1 of Law 1 of 1974, and Article 7, paragraph 2 of the KHI. Robith Muti'ul Hakim (2017) and Imam Mawardi (2021) indicated that the approval of polygamous marriage applications is contingent upon the first wife's

permission. Arif Bijaksana's research (2018) suggests that these applications are sometimes granted despite violating legal provisions, overlooking Article 4 of Law 1 of 1974 concerning polygamy.

The second category involves research on polygamous marriage petitions rejected before SEMA 3/2018. Eko Permana Dalimunthe (2016), Zahrotus Sofa (2018), Agustin et al. (2019), and Muhammad Roqib (2016) concluded that such rejections were due to violations of marriage registration rules, polygamy provisions, and the lack of consent from the first wife.

The third category looks at polygamous marriage applications accepted after SEMA 3/2018. In case number 3045/Pdt. G/2019/PA. Cbn, the Religious Court of Cibinong granted the validation request, considering the marriage met the requirements and had the first wife's consent. However, Rahmadini (2021) argues that decisions ignoring SEMA 3/2018 lack legal certainty. Conversely, Muhamad Muhajir and Qurratul Uyun (2021) see the decision in case number 634.Pdt.G/2018/PA.Mtr., which disregarded SEMA, as a legal breakthrough. This view is supported by Nasrulloh et al. (2021) and Alhaidar et al. (2023), who criticize SEMA 3/2018 for its adverse effects. They argue that the SEMA prevents wives in polygamous marriages from claiming their marital rights, as it effectively bans the validation of such marriages, leaving wives without a definite legal umbrella.

The fourth category addresses research on polygamous marriage petitions rejected after SEMA 3/2018. Mala Srinurmayanti (2021) noted that judges' rejections were

based on violations of polygamy regulations in line with SEMA 3/2018. Navila Ayu Rizky Apriliani (2020) explained that, based on *maṣlahah* analysis, the regulation aims to reduce the prevalence of secret polygamous marriages driven by personal desires rather than genuine emergencies.

This study differs from previous research by focusing on judges' legal interpretations of *isbat* rejections for polygamous marriages in Decision No. 1548 post-SEMA 3/2018, analyzed through the lens of Critical Legal Studies.

RESEARCH METHOD

This study employs a hybrid methodology, integrating normative legal research with empirical legal research, utilizing both a statute approach and a case approach. The statute approach involves a thorough examination of all relevant laws and regulations pertaining to the legal issues under investigation. Concurrently, the case approach is employed to comprehend and elaborate on the legal reasoning (*ratio decidendi*) that judges utilize to arrive at their verdicts (Marzuki, 2017). Additionally, Critical Legal Studies is applied to enhance the analytical depth of the research.

RESULTS AND DISCUSSION

Judges' Paradigms in Deciding Cases

Judges employ varying mechanisms when deciding cases. According to Syamsudin (2011b), these differences arise from their thinking paradigms and value orientations, which include social and cultural factors, as well as diverse values of truth and religious justice (Alfiander, 2022). Consequently,

judges often hold different views when adjudicating cases (Asnawi, 2014, p. 181).

Judges' paradigms can be broadly categorized into two types: positivistic and non-positivistic (Asnawi, 2014, p. 182). The positivistic paradigm emphasizes the formal measures of legal texts (centric rule), while the non-positivistic paradigm integrates the legal text with a sociolegal context to explore the truth of the law (Werner, 2006; Irianto & Shidarta, 2009).

Legal positivism strictly separates legal and moral considerations (*das sein* and *das sollen*). H.L.A. Hart argues that legal studies should be descriptive, excluding moral evaluations. Similarly, Bentham and Austin contend that legal improvement can be achieved by dissociating law from morality (Bello, 2012). In this view, law is a command from lawmakers, and legalists assert that law equates to the written code (Darmodiharjo & Shidarta, 2006). This perspective glorifies written laws, making them the sole reference for judges (Rasjidi & Thania, 2004, p. 56; Soeroso, 2001). Judges, thus, are mere mouthpieces of the law, applying it mechanically and procedurally. While this approach ensures legal certainty, it also renders the law static and rigid (Rifai, 2014).

In contrast, the non-positivistic paradigm encompasses various schools of thought, including Natural Law, the Historical School, Legal Realism, Marxist Theory of Law, Progressive Law, Critical Legal Studies, and Feminism Legal Theory (Putro, 2011, p. 112). Judges are divided into textual and contextual types. Textual judges interpret the law narrowly, adhering strictly to the text, while contextual judges seek

substantive justice, viewing themselves as creators of justice rather than mere interpreters of the law (Ramadhan & Muslimin, 2022). Non-positivistic judges do not consider the law the only source of truth, instead, they formulate rulings by considering the socio-legal context and various juridical, psychological, and philosophical nuances before concluding (Asnawi, 2014, p. 82).

Syamsudin (2011b) identified three typologies of judge orientation: materialist, pragmatic, and idealistic. Materialist judges view cases as commodities for material gain. Pragmatic judges align with prevailing situations for personal benefit. Idealistic judges, on the other hand, aim to achieve justice and reject any form of bribery.

According to Satjipto Raharjo, as cited by Syamsudin (2011a), judges can also be categorized into two types: those who consult their conscience and seek articles to legitimize their moral judgments, and those who prioritize personal gain and seek legal articles to legitimize such decisions.

Judges face the challenging task of rendering definitive verdicts. Gustav Radbruch posits that an ideal judgment should embody the “*idee des recht*,” comprising justice (*gerechtigkeit*), legal certainty (*rechtsicherheit*), and legal expediency (*zweckmassigkeit*) (Mertokusumo, 2011; Sutyoso, 2012). Legal certainty is derived from legislative provisions, utility from the objectives of these provisions, and justice from the living law (Rahardjo, 2013).

Conflicts often arise among these three goals, particularly between legal certainty and

justice, or justice and benefit. Gustav Radbruch suggests prioritizing justice, followed by benefits, and finally legal certainty. This approach is deemed wiser than extreme positions like the Ethical Law School, which focuses solely on justice, the Utilitarian school on benefits, and Legal Positivism on legal certainty (Muslih, 2017).

In practice, it is challenging for judges to integrate these principles in a single decision. Therefore, judges must prioritize one principle over others. Sudikno Mertokusumo (2009) argues for a proportional application of these principles, advocating for case-by-case prioritization rather than a fixed hierarchy as proposed by Radbruch. This flexible approach allows judges to tailor their decisions to the specific circumstances of each case.

Judge’s Legal Interpretation in the Case of Rejection of Polygamous Marriage

Decision No. 1548, issued by the West Jakarta Religious Court, rejected an application for polygamous marriage due to the nature of the Siri (unregistered) marriage involved. The origin of the case stemmed from a desire to obtain legal recognition for the marriage of the petitioners and to manage the issuance of a birth certificate for their child.

The case commenced on April 15, 2012, when the petitioners had an Islamic wedding in Depok, with the marriage guardian being the second uncle of the applicant, due to the death of the applicant’s biological father. The ceremony was attended by two witnesses, and the dowry was the holy book of the Qur’an. At the time, the second petitioner was a 35-

year-old woman, while the first petitioner, a 44-year-old man, was already legally married to the respondent, with their marriage duly recorded at the Office of Religious Affairs (KUA) in South Jakarta. However, the couple had not been blessed with children. Subsequently, the first petitioner entered into a Siri marriage with the second petitioner, resulting in the birth of a child on November 12, 2012. Despite this, the petitioners did not obtain a marriage certificate from the KUA, prompting them to apply to the West Jakarta Religious Court for legal recognition of their marriage and the issuance of their child's birth certificate.

In analyzing Decision No. 1548, researchers utilized the theory of legal interpretation, a method of legal discovery as outlined by Aripin (2008). The Panel of Judges employed a systematic or logical method of interpretation, viewing the law as an interconnected system rather than in isolation (M. S. Mertokusumo & Pitlo, 1993, p. 45). This method involves correlating one article with other relevant articles or laws, and reviewing the explanatory notes to fully understand the legal intentions (Asikin, 2012).

In this case, the Panel of Judges considered several legal provisions related to polygamy. Article 9 of Law No. 1 of 1974 states that a person who is still married to another person cannot remarry, except as regulated in Article 3 paragraph (2) and Article 4 of the law. Additionally, Article 40 of Government Regulation No. 9 of 1975 (PP 9/1975) requires a husband seeking to have more than one wife to submit a written application to the court. Article 7 paragraph (3) letter e of the Compilation of Islamic Law

(KHI) further stipulates that marriage can only occur if it does not violate Law No. 1/1974. The judges concluded that Law No. 1/1974 and PP 9/1975 prohibit polygamous marriages without court permission, and thus, such marriages cannot be filed with the court (Article 7 of the KHI).

The Panel of Judges also referred to SEMA 3/2018, which clearly states that applications for the validation (isbat) of polygamous marriages should be rejected, even for the civil benefit of the child. The interests of the child can be ensured through other legal means regarding the child's origin.

In addition to the judges' written considerations, the author conducted an interview with the judge who handled the case. The judge explained that the application was rejected to prevent an increase in the validation of polygamous marriages in the future, particularly in major cities. This precaution aims to avoid legal smuggling through illegal polygamy and to uphold public compliance with regulations. Therefore, the Panel of Judges decided to reject the application to maintain the consistency of polygamy regulations..

Rejection of Isbat for Polygamous Marriage: A Perspective of Critical Legal Studies

From a judicial system perspective, judges play a crucial role not only as enforcers of law and justice but also as state officials tasked with the noble duty of upholding the rule of law and ensuring legal certainty and societal benefit through their court decisions. Therefore, the principles of certainty, justice, and expediency must be of paramount

concern to judges when adjudicating cases (Aripin, 2008, p. 464).

Judges, in deciding cases, are always faced with the principles of legal certainty, justice, and utility. Sudikno Mertokusumo (2009) emphasizes the need for a compromise in applying these principles, suggesting that judges should adopt a case-by-case approach rather than strictly following Gustav Radbruch's prioritization principle (Rifai, 2014, p. 132). The judicial process involves balancing between the points of justice, legal certainty, and utility (Rifai, 2014, p. 133).

In rejecting the isbat for polygamous marriage, it appears that judges adopt a positivistic paradigm. Positivists believe that positive law provides legal certainty by clearly delineating what is forbidden and allowed. Thus, justice must first be codified into positive law (*ius constitutum*) to be considered legitimate. Compliance with positive law is deemed fair, and its violation is deemed unfair (Putro, 2011, p. 272). Consequently, in cases involving polygamous isbat marriage, judges tend to prioritize legal certainty over justice, limiting their freedom to navigate between these poles based on logical considerations (Wantu, 2012).

Analyzing judges' decisions through Gustav Radbruch's framework of three fundamental legal values—justice (philosophical), legal certainty (juridical), and social benefit (sociological)—reveals potential conflicts among these values. Justice can sometimes be at odds with utility or legal certainty. To address this, Radbruch proposed a priority doctrine that places justice first, followed by utility and legal certainty (Muslih, 2017, p. 144).

In decision No. 1548, the judge prioritized legal certainty over justice and expediency by rejecting the isbat application for polygamous marriage. This decision clarified the legal status of the petitioners' marriage but was deemed unfair. According to Radbruch, this standard order does not align with legal decency. Legal norms should balance ideal values (justice) and societal reality (custom), incorporating both philosophical and sociological elements to ensure legal certainty and utility (Muslih, 2017, p. 143).

Critical Legal Studies (CLS) challenges the objectivity and neutrality of law as advocated by Legal Positivism. Roberto M. Unger argues that each legal method reflects specific socio-political values, and the chosen method will influence legal outcomes. CLS criticizes the objectivism and formalism of legal positivism, asserting that the law is influenced by politics, morals, culture, and daily customs, contrary to the notion of law as an autonomous system (Putro, 2011, p. 134).

In decision No. 1548, adherence to Legal Positivism led the judge to favor statute and legal certainty. However, CLS posits that claims to legal certainty are false because laws and their interpretations are subjective and variable. The judge's strict adherence to positive law without considering broader societal and moral implications resulted in an unjust decision regarding the isbat for polygamous marriage (Chotban, 2020).

Contradictions within the regulations themselves exacerbate this issue. On one hand, the isbat for polygamous marriage is prohibited under Article 9 of Law No. 1 of

1974, Article 7 KHI paragraph (3), and SEMA 3/2018. On the other hand, Book II allows for polygamous marriage petitions as long as the previous wife is included as a party (Mahkamah Agung RI, 2014). This inconsistency creates ambiguity and disparity in judicial decisions regarding isbat for polygamous marriages.

The ambiguity between SEMA 3/2018 and the provisions of Book II, which remains in effect based on the Decree of the Chairman of MARI, leads to inconsistent rulings in religious courts regarding isbat for polygamous marriages. This discrepancy underscores the need for judges to look beyond formalistic legal interpretations and seek justice substantively. Judges should not be constrained by “what the law says” but should be open to achieving justice, even if it means deviating from formal procedures when necessary (Rahardjo, 2007).

The goal of decision No. 1548 appears to backfire, as it prevents wives in polygamous marriages from claiming their rights and obtaining legal certainty. A solution might be requiring a polygamy permit before applying for marriage endorsement, aligning with Articles 3, 4, and 5 of Law No. 1/1974. Without such a permit, applications for marriage endorsement are formally ineligible.

In conclusion, the regulations prohibiting polygamous marriage should be re-evaluated. If the legitimacy of children born from these marriages can be legalized, then the isbat for polygamous marriages should also be granted to ensure justice, utility, and legal certainty for all parties involved.

CONCLUSION

From the study results, it can be concluded that, first, decision No. 1548 represents a clear and non-complex case. The legal interpretation used by the judges in this determination is a systematic interpretation. The judges relied on Article 9 of Law No. 1 of 1974 on polygamy without the court’s permission, Article 7 paragraph 3 of the KHI, and SEMA 3/2018, which collectively rejected the application for a polygamous marriage.

Second, from the perspective of critical legal studies, the judges did not make legal breakthroughs using a positivistic paradigm. They adhered strictly to existing regulations, considering them sufficient to resolve the issues at hand. By rejecting the application for a polygamous marriage certificate, the judges prioritized legal certainty over the values of justice and expediency. This refusal resulted in Siri’s wife not being entitled to claim financial support or common property, and the child born from the Siri marriage only had a civil relationship with the mother and no inheritance rights from the father.

Based on these findings, the study provides several recommendations. Firstly, judges should ensure that their legal considerations encompass not only juridical aspects but also philosophical and sociological aspects. Secondly, it is crucial to maintain the welfare and civil rights of children resulting from such marriages. Lastly, for couples intending to enter into polygamous marriages, it is imperative to follow the procedures stipulated by law to maintain marital order in society and protect the rights of husbands, wives, and children.

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