

Review of Islamic Marriage Law and Gender Justice Towards SEMA Number 3 Of 2018 Concerning Rejection of Isbat Polygamy Cases in Religious Courts

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Abstract

Having more than one wife or polygamy in Indonesia is regulated in Law Number 1 of 1974 concerning Marriage. Marriages in Indonesia are also regulated in terms of registration. In society there is a phenomenon of husbands marrying more than one wife (polygamy) without being recorded by the Marriage Registrar. Because the legal status of the second, third or fourth wife is unclear if it is not recorded, an application for polygamous isbat is submitted to the court. However, there is SEMA regulation Number 3 of 2018 which prohibits polygamous isbat from being processed in court. Therefore, the aim of this research is to find answers to questions related to polygamous isbat procedures, analysis of Islamic marriage law regarding the rejection of polygamous isbat in religious courts and gender justice analysis regarding the rejection of polygamous isbat in religious courts. The research method used was content analysis, which used a data search method, namely literature study. From this research it was found that the marriage isbat procedure with polygamous isbat is different, the rejection of polygamous isbat in religious courts according to Islamic Marriage Law is not a new problem and the rejection of polygamous isbat in Religious Courts according to gender justice is divided into two versions, if viewed from the first wife's version it is fair gender, while for second or subsequent wives there is no gender equality.

Keywords: *Isbat, Polygamy, Gender Justice.*

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Introduction

Marriage (*nikah* or *zawaj*) in linguistic terms means *al-jam'u* and *al-dhamu*, which signify "union" or "gathering." The term *nikah* can refer to *'aqdu al-tazwij*, meaning the marriage contract, or to *wath'u al-zaujah*, which means conjugal relations with one's wife. A similar definition is also proposed by Rahmat Hakim, as cited by Tihami, (Tihami & Sohari, 2013, p. 7) The term *nikah* originates from the Arabic word *nikahun*, which is a *masdar* (verbal noun) derived from the past tense verb (*fi'il madhi*) *nakaha*. Its synonym is *tazawwaj*, which is translated into Indonesian as "perkawinan" (marriage). The term *nikah* is frequently used in the Indonesian language as it has been adopted and integrated into common usage.

The term *nikah* can refer to *'aqdu al-tazwij* (the marriage contract) or *wath'u al-zaujah* (conjugal relations with one's wife). A similar definition is also articulated by Rahmat Hakim, as cited by Tihami, (Tihami & Sohari, 2013, p. 7) The term *nikah* originates from the Arabic word *nikahun*, which is a *masdar* (verbal noun) derived from the past tense verb (*fi'il madhi*) *nakaha*. Its synonym is *tazawwaj*, and it is translated into Indonesian as "perkawinan" (marriage). The term *nikah* is also widely used in Indonesian, having been fully adopted into the language.

Another definition of marriage is found in the *Kompilasi Hukum Islam* (Compilation of Islamic Law, KHI), which states that marriage, according to Islamic law, is a solemn contract (*mitsaqan ghalidzan*) established to fulfill Allah's commands. Performing marriage is considered an act of

worship. (MKRI dan Kemenag, 1991, art. 2)

The definitions of marriage outlined above share similar meanings, but only lawful marriages are recognized under Indonesian law for establishing a family. A lawful marriage is one that is conducted in accordance with the laws of each party's religion and belief system. (Pemerintah Indonesia, n.d., art. 2) Thus, the validity of a marriage remains dependent on the religious laws adhered to by the individuals involved.

Another definition of marriage is provided in the *Kompilasi Hukum Islam* (Compilation of Islamic Law, KHI), which states that marriage, according to Islamic law, is a solemn contract (*mitsaqan ghalidzan*) (Muhammad Sayyid Sabiq, n.d.; Syafi'i, Faiqoh, & Fronzoni, 2023) established to obey Allah's commands and is considered an act of worship. (MKRI dan Kemenag, 1991, art. 2)

The definitions of marriage mentioned above share similar meanings; however, only lawful marriages are recognized under Indonesian law for the purpose of forming a family. A lawful marriage is one that is conducted in accordance with the laws of each individual's religion and belief. (Pemerintah Indonesia, n.d.) The validity of a marriage remains dependent on the religious laws adhered to by the individuals involved. In Indonesian marriage law, a valid marriage is one that is recognized both religiously and juridically. Religiously, validity is achieved through the fulfillment of the essential elements and requirements of marriage, while juridical validity is ensured by registering the marriage. This is regulated under Article 2,

paragraphs (1) and (2) of Law No. 1 of 1974 on Marriage, which states:

1. A marriage is considered valid if it is conducted according to the laws of each party's religion and belief.
2. Every marriage must be registered in accordance with the applicable laws and regulations.

The Compilation of Islamic Law (Kompilasi Hukum Islam, KHI) also addresses marriage registration in Article 5, paragraph (1), which stipulates that to ensure the orderliness of marriage for Muslims, every marriage must be registered. Paragraph (2) further specifies that marriage registration is carried out by the Marriage Registrar, as regulated in Law No. 2 of 1946 in conjunction with Law No. 32 of 1954. Marriages conducted outside the supervision of a Marriage Registrar are not legally recognized, as stated in Article 6, paragraph (2) of the KHI.

In Indonesia, the legal strength of a marriage lies in its registration by the Office of Religious Affairs (KUA). Marriage registration is mandatory to ensure the rights and legal certainty of the parties involved. However, in recent times, many marriages go unregistered due to various reasons, such as the complexity of administrative requirements, underage marriage, extramarital pregnancy, financial constraints, and more. These unregistered marriages are often referred to as kawin siri.

Unregistered marriages significantly disadvantage women, as they lack authentic documentation (marriage certificate) recorded by the KUA. Consequently, such marriages are deemed legally invalid. As a result, children born from these unions only

have civil relations with their mothers and not with their fathers. Furthermore, neither the mother nor the children can claim maintenance rights or inheritance rights.

Article 7, paragraph (2) of the KHI explains that if a marriage has not been registered with a Marriage Registrar, the husband or any concerned party may file for marriage validation (*isbat nikah*) in a religious court. Juridically valid marriages can only be proven with a marriage certificate issued by the Marriage Registrar, as regulated in Article 7, paragraph (1) of the KHI. Article 7, paragraph (3) outlines the limited conditions under which *isbat nikah* can be requested in a religious court, such as:

1. The existence of a marriage aimed at resolving a divorce case.
2. The loss of a marriage certificate.
3. Doubts regarding the validity of one of the marriage requirements.
4. A marriage that occurred before the enactment of Law No. 1 of 1974.

Additionally, according to Article 7, paragraph (4) of the KHI, the application for *isbat nikah* can only be filed by those who have a vested interest in the marriage.

Marriage Validation (*Isbat Nikah*)

- a) The rules for marriage validation (*isbat nikah*) are established based on marriages conducted according to religious practices but not officially registered with an authorized Marriage Registrar (PPN).
- b) Marriage validation is governed by Article 2, paragraph (5) of Law No. 22 of 1946, in conjunction

with Article 49, point (22) of the explanatory notes of Law No. 7 of 1989, as amended by Law No. 3 of 2006 and further amended by Law No. 50 of 2009, as well as Articles 7, paragraphs (2), (3), and (4) of the *Compilation of Islamic Law* (Kompilasi Hukum Islam).

c) Article 49, point (22) of the explanatory notes of Law No. 7 of 1989, as amended by Law No. 3 of 2006, and Article 7, paragraph (3), letter (d) of the *Compilation of Islamic Law*, stipulates that only marriages conducted before the enactment of Law No. 1 of 1974 can be validated. However, Article 7, paragraph (3), letter (a) of the *Compilation of Islamic Law* allows the validation of marriages registered by the PPN, whether conducted before or after the enactment of Law No. 1 of 1974, if it serves the purpose of divorce proceedings.

d) *Isbat nikah* for resolving divorce cases is not processed separately but is integrated into the divorce ruling. To prevent legal manipulation and unauthorized polygamy, the Religious Court (*Pengadilan Agama*) or Sharia Court (*Mahkamah Syar'iyah*) must exercise caution when handling *isbat nikah* applications. (Direktori Jenderal Badan Peradilan Agama, 2010)

Regarding marriage in Indonesia, a husband wishing to marry more than one wife (polygamy) must comply with Article 4 of Law No. 1 of 1974 on Marriage, which states that a husband seeking to take another wife must file a request with the court. The court may grant permission only if the following conditions are met:

1. The wife is unable to fulfill her duties as a wife.
2. The wife has a physical disability or an incurable illness.
3. The wife cannot bear children.

In addition to these procedures, there are specific requirements for a husband seeking to practice polygamy, including:

1. Obtaining consent from the current wife/wives.
2. Providing assurances that the husband can meet the living needs of all wives and their children.
3. Guaranteeing that the husband will treat all wives and children equitably.

Polygamy Permission

- a. Law No. 1 of 1974 on Marriage adopts the principle of monogamy, except when otherwise determined by the religious laws adhered to by the parties. A Muslim husband wishing to have more than one wife is required to submit a request for polygamy approval to the Religious Court (*Pengadilan Agama*) or Sharia Court (*Mahkamah Syar'iyah*) in accordance with the conditions stipulated in Articles 4 and 5 of Law No. 1 of 1974.
- b. To ensure that the granting of polygamy approval by the Religious Court/Sharia Court does not conflict with the principle of monogamy embraced by Law No. 1 of 1974, the following guidelines must be adhered to when examining and deciding polygamy approval applications:
 1. The application for polygamy approval must be contentious,

- with the wife positioned as the respondent.
2. The reasons for polygamy approval, as outlined in Article 4, paragraph (2) of Law No. 1 of 1974, are facultative, meaning that if one of the conditions can be proven, the Religious Court/Sharia Court may grant approval.
 3. The requirements for polygamy approval, as stipulated in Article 5, paragraph (1) of Law No. 1 of 1974, are cumulative, meaning that the Religious Court/Sharia Court can only grant approval if all the conditions are fulfilled.
 4. Joint property in cases where the husband has more than one wife is regulated in Article 94 of the *Compilation of Islamic Law* (KHI). However, this article may result in inequities, as it can harm the first wife under certain circumstances. Therefore, it must be interpreted as described in point 5 below.
 5. Property acquired by the husband during his marriage to the first wife is considered joint property belonging to both the husband and the first wife. Property acquired during the husband's marriage to the second wife, while he is still married to the first wife, is considered joint property of the husband, the first wife, and the second wife. The same applies to marriages involving third and fourth wives.
 6. The provisions regarding joint property in point 5 do not apply to property specifically allocated to the second, third, or fourth wives (such as houses, household items, or clothing), provided it does not exceed one-third of the joint property acquired during those marriages.
 7. In the event of the division of joint property due to death or divorce, the distribution is calculated as follows: the first wife receives half of the joint property acquired during her marriage, plus one-third of the joint property acquired during the marriage with the first and second wives, plus one-quarter of the joint property acquired during the marriage with the first, second, and third wives, and so forth.
 8. Property acquired by each wife (first, second, third, and fourth) is considered joint property with the husband, except for gifts or inheritance acquired independently.
 9. When applying for polygamy approval, the husband must also submit an application for the determination of joint property with the current wife/wives. If the husband fails to do so, the wife or wives may file a counterclaim for the determination of joint property.
 10. If the husband does not include a request for joint property determination in the polygamy application and the wife does not file a counterclaim, the polygamy application should be declared inadmissible. (Direktori Jenderal Badan Peradilan Agama, 2010, p. 141)

In practice, there are cases where husbands marry multiple wives without following these procedures, resulting in unregistered marriages. These marriages lack legal recognition, affecting the legal status of both the marriage and the children born from it. Such cases are referred to as unregistered polygamy.

The concept of gender equality is a significant consideration in contemporary scholarship. Gender equality implies that men and women enjoy equal status and have the same opportunities to fully realize their human rights and potential across all areas of life. According to USAID, gender equality allows both men and women to equally enjoy socially valued goods, opportunities, resources, and the benefits of development.

Research on *isbat nikah* and unregistered polygamy has been conducted previously, including Mukhtaruddin Bahrum's article, "Problematika Isbat Nikah Poligami Sirri," published in *Al-'Adalah: Jurnal Hukum dan Politik Islam* (IAIN Bone). Bahrum explores the positive and negative aspects of *isbat nikah* for unregistered polygamy, differing from this study, which examines *isbat polygamy* through the lens of gender equality.

Similarly, Ninik Rahayu's article, "Kesetaraan Gender dalam Aturan Hukum dan Implementasinya di Indonesia," discusses gender equality in the broader context of Indonesian legal frameworks. This article, however, focuses specifically on gender equality in reviewing the rejection of *isbat polygamy* applications in Religious Courts.

Research Method

The method used in this study is content analysis with a normative legal research approach (*juridic normatif*), as it examines the law based on its textual provisions. According to Abdulkadir Muhammad empirical legal approach or legal sociology research, namely an approach that studies law in reality, both in the form of attitudes, assessments, behavior, which are related to the problems studied and which are carried out by conducting research in the field. The Empirical Approach does not contradict written positive law (legislation) as secondary data, but from real behavior as primary data obtained from field research locations (field research).

The data collection method is based on a literature study, reviewing Law No. 1 of 1974 on Marriage, Law No. 7 of 1989 on Religious Courts, and Supreme Court Circular No. 3 of 2018 regarding the Implementation of the Results of the 2018 Plenary Meeting of the Supreme Court as Guidelines for Court Tasks as primary data. Secondary data is derived from books on *fiqh* and gender equality, and tertiary data from dictionaries.

Results and Discussion

Procedure for *Isbat Nikah* in Religious Courts

As mentioned earlier, *isbat nikah* is a legal process to obtain the legitimacy of a marriage that is not registered, so that through *isbat nikah*, an unregistered marriage can be recognized as legally valid, similar to a registered marriage. The same applies to unregistered polygamy, where the husband and his second, third, or fourth wives can apply for *isbat nikah*

regarding their marriage. The procedure for applying for *isbat nikah* for unregistered polygamy is to submit a petition to the Religious Court (*Pengadilan Agama*) where the petitioners reside. In such cases, the wife or wives become the respondents.

Isbat nikah for unregistered polygamy has not been specifically regulated under Law No. 1 of 1974 on Marriage, nor in Law No. 16 of 2019 which amends Law No. 1 of 1974, nor in Law No. 7 of 1989 on Religious Courts, nor in Law No. 50 of 2009, which amends Law No. 7 of 1989 on Religious Courts. However, the Supreme Court issued Supreme Court Decree No. KMA/032/SK/IV/2006 regarding the Implementation of the Court Task and Administration Guidelines, which regulates the following:

1. *Isbat nikah* petitions can be filed by either the husband and wife, one of the spouses, their child, a marriage guardian, or any party with an interest in the marriage, at the Religious Court/Mahkamah Syar'iyah within the jurisdiction of the petitioner's residence. The petition must include clear and concrete reasons for the application.
2. The examination process for the *isbat nikah* petition filed by both spouses is voluntary, and the outcome is a decree. If the decree rejects the petition, either the husband and wife together, or individually, may file for cassation.
3. If the *isbat nikah* petition is filed by one spouse, it is contentious, with the non-petitioning spouse as the respondent. The outcome will

be a ruling, and the ruling can be appealed or subject to cassation.

4. If, during the examination of the *isbat nikah* petition, it is found that the husband is still legally married to another woman, the prior wife must be included as a party in the case. If the petitioner refuses to amend the petition by adding the prior wife as a party, the petition must be dismissed.
5. This procedure continues as outlined in subsequent points.
6. Any party with legal interests who is not a party to the case, as described in points (3), (4), and (5), and where the petition has been decided by the Religious Court/Mahkamah Syar'iyah, may file a lawsuit to annul the marriage that has been validated by the Religious Court/Mahkamah Syar'iyah.

However, in 2018, the Supreme Court issued Supreme Court Circular (SEMA) No. 3 of 2018, regarding the implementation of the results of the 2018 plenary meeting as guidelines for court tasks. The circular regulates *isbat nikah* for polygamy as follows:

"Polygamy isbat nikah petitions based on unregistered marriages (nikah siri), even if for the sake of the children's welfare, must be declared inadmissible. To protect the interests of the children, a petition for the origin of the child can be filed."(Mahkamah Agung Republik Indonesia, n.d.)

In this regard, the procedure for *isbat nikah* for unregistered polygamy becomes unclear, as it is uncertain whether the panel of judges will accept the case or not. If the KMA (Supreme Court Decree) is applied,

the panel of judges in the Religious Court must accept, process, and decide the *isbat nikah* case for polygamy. However, if the SEMA (Supreme Court Circular) is applied, the panel of judges in the Religious Court must not accept the case.

As explained above regarding *isbat nikah* for polygamy, there are two possibilities when a petition is submitted to the court: it may either be processed or rejected. However, it is clear that the regulations surrounding polygami (Pemerintah Indonesia, n.d., arts. 4 & 5) serve as the basis for determining whether the polygamy is valid or not. According to SEMA, any case related to *isbat nikah* for polygamy must be rejected by the Religious Court.

Legal Review of Islamic Marriage Law Regarding the Rejection of *Isbat Poligami* in the Religious Court

Islamic marriage law does not specifically regulate *isbat nikah* for polygamy in the Religious Court, as in Islamic marriage law, a marriage is considered valid as long as the required conditions and pillars are fulfilled.

Polygamy in Islamic marriage law is a permissible option for men, allowing them to marry more than one wife, as explicitly mentioned in the Qur'an. However, this option is not automatic and cannot be implemented without meeting a critical condition: **justice**.

Justice, in the context of Islamic marriage law, does not only refer to equal treatment of the wives but also requires that each wife can accept and experience this justice in a manner that is nearly identical. Thus, the application of justice in this regard is more challenging than in other matters.

Furthermore, *isbat poligami* is not regulated within Islamic marriage law because *isbat* itself is related primarily to administrative order, not directly to the validity of the marriage. Therefore, according to Islamic marriage law, polygamy does not need to be validated (*isbat*) as long as it fulfills the conditions and pillars of marriage.

Gender Equality Review of the Rejection of *Isbat Poligami* in the Religious Court

Before conducting a gender equality review of polygamy, it is essential to first discuss how to identify a case from a gender perspective, as outlined in the textbook by Prof. Nina Nurmila. In the course on Gender Equality in Family Law, there is a process for identifying whether a law or regulation is fair or not. This involves carefully examining the text of the relevant regulation related to the case at hand and comparing it with indicators of gender injustice. The gender equality indicators, as outlined by Prof. Nina Nurmila in the Gender Equality lecture, include access, control, participation, and benefits. Conversely, the indicators of gender injustice are discrimination, subordination, marginalization, stereotyping, double/multiple burdens, and violence.

Legal Review of Islamic Marriage Law on the Rejection of *Isbat Poligami* in the Religious Court

As previously explained, the *isbat nikah* for polygamy is closely linked to the regulations of polygamy itself. In Article 4 of Law No. 1 of 1974 on Marriage, a husband wishing to marry more than one wife must apply for polygamy permission from the Religious Court, which may grant

permission only if the following conditions are met:

1. The wife is unable to fulfill her duties as a wife.
2. The wife has a physical disability or an incurable illness.
3. The wife cannot bear children.

When looking at these reasons for allowing polygamy, it becomes clear that they discriminate against the wife (female), especially the second and third conditions: "The wife has a physical disability or incurable illness" and "The wife cannot bear children." These conditions emphasize that no woman can choose to be a perfect or disabled woman, healthy or ill, or capable or incapable of bearing children.

Furthermore, these reasons for polygamy focus solely on the condition of the wife, which may be seen as an example of subordination. The husband's condition could also be a valid reason for permitting polygamy, such as setting a minimum income for the husband. Indeed, Article 5 of the Marriage Law states certain mandatory conditions for a husband wishing to marry more than one wife, such as obtaining the wife's consent, ensuring the needs of the wives and children are met, and guaranteeing fair treatment towards all wives and children. These conditions fulfill gender justice indicators of control and participation, as the wife is given the option to approve or disapprove of her husband's polygamy.

Now, what happens when we review *isbat nikah* from the perspective of gender justice? First, if we look from the perspective of the first wife, indicators of gender justice such as Access, Control, Participation, and

Benefit can be felt. The first wife has access because the rejection of *isbat nikah* polygamy according to SEMA allows her to give her consent or refusal regarding her husband's intention to marry another. She has control over the decision, as she holds the authority to approve or deny her husband's desire to marry another woman. She also has participation in the process since she is granted the power to approve or disapprove of the polygamy, and she benefits from the SEMA No. 3 of 2018 regarding the rejection of *isbat nikah* in the Religious Court.

On the other hand, the second wife, who is already in an unregistered marriage (*nikah sirri*), cannot experience Access or Participation due to the rejection of *isbat nikah* in the Religious Court. This situation results in gender injustice, as the second wife is denied legal certainty about her marriage.

Isbat nikah for polygamy is related to marriage registration in Indonesia, which, according to the Marriage Law, must be officially registered. *Isbat nikah* differs from *isbat nikah* for polygamy because the former is simply related to the conditions and pillars of marriage, which must generally be fulfilled without requiring the first wife's consent. In contrast, *isbat nikah* for polygamy must involve the consent of the first wife or any previous wives.

Therefore, the legal view of Islamic marriage law differs from the concept of marriage registration. According to Islamic marriage law, as long as the marriage fulfills the conditions and pillars, it is valid, even if not registered. The same applies to polygamy: if the conditions and pillars

of the marriage are met, the polygamy is valid as well.

From the perspective of gender justice, equality is supposed to fulfill the aspects of Access, Control, Participation, and Benefit. When reviewing the rejection of *isbat nikah* for polygamy based on these aspects, two versions emerge, as two women are involved in the polygamous practice.

For the first wife or previous wife, the aspects of gender justice are fulfilled because she experiences Access, Control, Participation, and Benefit through SEMA No. 3 of 2018. However, the second or subsequent wives are deprived of Access and **Benefit** because their requests for *isbat nikah* will be rejected.

Thus, a difference arises between Islamic marriage law and gender justice, but this issue can be regulated in accordance with the laws and regulations in Indonesia.

Conclusion

From the results and discussions above, it can be concluded that It must be underlined that the confirmation of polygamy is different from the permit for polygamy and the confirmation of marriage. The procedure for *isbat nikah* in the Religious Court, according to SEMA No. 3 of 2018, cannot proceed, or in other words, must be rejected, as it differs from *isbat nikah*. The rejection of *isbat nikah* for polygamy in the Religious Court, when viewed through the lens of Islamic Marriage Law, is not problematic because, under Islamic Marriage Law, a polygamous marriage is valid if the marriage is conducted properly. However, when viewed from the perspective of gender equality, the rejection of *isbat nikah* for polygamy fails to meet the indicators of gender

justice, particularly Access and Participation for the second wife. Therefore, the rules for rejecting *isbat nikah* for polygamy in the Religious Court fulfill the indicators of gender justice for the first wife, but not for the second or subsequent wives.

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