Islamic Legal Traditionalism in the Consideration of Polygamous Validation (Analysis of Decisions on the Granting the Validation of Unregistered Marriage in Polygamy Cases After the Enactment of SEMA No. 3/2018)

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Abstract: After the enactment of SEMA No. 3/2018, the issue of unregistered polygamous validation has become a new polemic in religious courts. Decision No. 130/Pdt.G/2020/Ms.Bna and No. 311/Pdr.P/2022/PA.Bjb granted the application for unregistered polygamous validation, thus raising a question, what kind of legal considerations underlie the judges to oppose SEMA No. 3/2018? This study examines the consideration of granting the validation of unregistered polygamy by judges in the two decisions above to find out the typology of Islamic legal thinking in them. This research is a normative legal research with a case approach. The results showed that the judges used the legal doctrine of previous scholars as the basis for granting the application for the validation of unregistered polygamy, thus reflecting a traditional style of thinking. This thinking is evident when: 1) The judge based the validation of the applicant's second marriage only on the validity of the unregistered marriage; 2) The judge did not consider the conditions for the permissibility of polygamy due to emergency conditions; and 3) The judge also did not explore the potential power relations in the polygamy permit from the first wife which allowed for coercion. This research shows that the traditionalism of Islamic legal thought is used by judges to counter the policy of the Supreme Court Circular that has taken effect.

Keywords: Unregistered marriage, Polygamy, Tradisionalism, Supreme Court Circular, Decision


Kata kunci: Isbat Nikah, Poligami, Tradisionalisme, Surat Edaran Mahkamah Agung, Putusan

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INTRODUCTION

Muslim countries in the modern era have overhauled the regulations regarding the practice of polygamy, and Indonesia is no exception (Nurlaelawati, 2020). The 1974 Marriage Law requires that polygamy must be licensed by the Religious Court, as stated in Article 4 paragraph (1). However, many polygamous practices do not receive permission (Hadi et al., 2023), due to the difficult administrative requirements of polygamy in the law (Mayasari et al., 2021). This has led to the practice of unregistered polygamy mushrooming in the community while neglecting women's rights (Stijn Cornelis van Huis, 2021). Some polygamous marriages work well and are harmonious, but many contribute to the neglect of their wives.

Despite the problems, this does not mean that all polygamy practices are considered oppression for women. There are several cases that show that women also benefit from the practice (Sukiati & Mohd Roslan Mohd Nor, 2023). Such benefits do not eliminate the essence of gender discrimination in the practice of polygamy, because there are indeed many polygamous practices that harm women (Agadjanian & Ezeh, 2000). Problems surrounding polygamy are not only related to sociological aspects but also to law enforcement in granting polygamy permits. Although family law reform in Indonesia strictly limits the practice of polygamy, many judges oppose this rule. They are more inclined to choose conservative classical Islamic law doctrines as the basis for the permissibility of polygamy (Nurlaelawati, 2020). Over time, the practice of polygamy at the juridical level has been challenged by the presence of applications for unregistered polygamy validation.

Concerning the validation of unregistered marriages due to polygamy (isbat poligami), Supreme Court Circular (SEMA) No. 3/2018 has actually ordered Religious Courts to reject applications relating to it. As for the issue of the rights of children from an unregistered marriage, an application for the origin of the child can be filed. Despite the regulation, many judges in the Religious Courts still do not comply with SEMA No. 3/2018, including the two decisions that were the object of the study (See Table 1). Judges often consider a valid unregistered marriage as the legality of a polygamy license, in other words, marriage registration by the state is not considered a valid condition of marriage. When the conditions and pillars of marriage are fulfilled, even in an unregistered marriage, the judge grants it. Sometimes judges also use fiqh rules as support for granting validation of polygamy. Therefore, this study aims to see how the judge's consideration in granting unregistered polygamy.

| No. | Nomor Putusan | Decision Number | Demans | Decision Result |
|-----|--------------|----------------|--------|----------------|}
| 1.  | Decision No. 130/Pdt.G/2020/ Ms.Bna | Applicant I was legally married to the Respondent in 1986. While still married, Applicant I was unlawfully married to Applicant 2 in 2014. | Applicants I and II requested the panel of judges to validate their unregistered marriage. | The judge granted the validation of the unregistered marriage of Applicants I and II. |
Previous research related to the validation of polygamy was written by Yasin. He concluded that the framework of benefit built in the consideration of polygamy validation is only assumptive, while the benefit of women regarding their rights is factual (Nasrulloh et al., 2021). More progressive than that, Fadhil in his interview with the judge found that the main consideration in the validation of polygamy by the judge was the permission of the first wife. Judges adhere to the rules of the 1974 Marriage Law and SEMA No. 3 of 2018 (Fadhil, 2023). The firmness of SEMA in prohibiting the validation of polygamous marriage is criticized by Hilda with Ibn Ashur's maqashid sharia. According to her, the regulation, although it seems to be in favor of the benefit, actually in its implementation does not provide guarantees of protection and legal certainty (Dinuria, 2022). None of these studies specifically highlighted the typology of judges’ considerations in granting applications for the validation of unregistered polygamy after the enactment of SEMA No. 3/2018. Therefore, this research fills the "space" in the topic.

This research aims to see the consideration of judges in granting the validation of unregistered polygamy after the enactment of SEMA No. 3/2018. The provisions of the SEMA indicate a prohibition for judges to accept the validation of unregistered polygamous marriage applications, then what kind of judge's consideration underlies the contradiction to the SEMA? In addition, this research also aims to see the typology of judges' considerations in the two decisions that are the object of research. The typology in question ranges in three types: traditional, moderate, and liberal (Muhammad Harfin Zuhdi, 2012). Traditional in this typology relates to the thoughts of previous scholars that are still used. Liberal focuses on open and plural thinking, thus allowing the interpretation of sacred texts that are sacralized. The moderate stands between the two, which is an alternative way of understanding the two extreme camps. This research explores the judges' interpretation of classical fiqh and state law so that the consideration of benefits should be aimed at implementing human rights without discriminating against certain sexes.

**METHODS**

This research is categorized as normative research with a case approach. The intended case approach refers to two granting of polygamous validation after the enactment of SEMA No. 3/2018. The decisions are Decision Number 130/Pdt.G/2020/Ms.Bna and 311/Pdr.P/2022/PA.BJ. This approach is used to understand legal developments related to polygamous marriage validation. Data collection was conducted through the study of legal documents, including two decisions on granting of polygamous validation application. Secondary literature related to the validation of unregistered polygamy, legal considerations, and typology of Islamic law. Data collection was carried out by studying these documents carefully and systematically. Data analysis
was conducted using the descriptive-analytical method. The description of the judge's consideration in granting the validation of unregistered polygamy was analyzed to identify the characteristics of the consideration.

Researchers also ensure data trust using triangulation techniques. Data triangulation in this study was carried out by comparing and confirming the findings obtained from the two main data sources, namely two polygamous validation decisions, as well as secondary literature related to the validation of polygamy, legal considerations, and typology of Islamic law. By comparing the information found from the two data sources, researchers can identify patterns or common themes that emerge, validate the results of the analysis, and gain a deeper understanding of the phenomenon under study.

RESULTS AND DISCUSSION

The Validation of Unregistered Marriage (Isbat Nikah) and its Relevance to the Validation of Unregistered Polygamy

*Isbat nikah* (the validation of unregistered marriage) is a combination of two words, namely *isbat* and *nikah*. Both phrases are derived from Arabic. "Isbat" has the meaning of postponement, determination, or confirmation. Meanwhile, "nikah" refers to a very strong bond or "mitsaqon gholidzon" between a man and a woman as husband and wife (Rosyidi, 2022). *Isbat nikah* is a religious affirmation of the validity of a marriage that was not originally recorded or has not been recorded for various reasons, as stated in Article 7 paragraph (2) of the Compilation of Islamic Law. *Isbat nikah* can be granted as long as the unregistered marriage has fulfilled the pillars and conditions according to Islamic law (Lubis et al., 2023).

*Isbat nikah* can simply be interpreted as the legalization of a marriage that was not previously recorded, but legal regulations require the registration of the marriage. Therefore, the relationship between *isbat nikah* and marriage registration (to obtain a marriage certificate) is interrelated, where the process of *isbat nikah* is regulated as part of the effort to obtain a marriage certificate. *Isbat nikah* in the context of Article 7 point 3 letter (a) of the Compilation of Islamic Law, which refers to marriage as part of the divorce settlement process, is not considered the main case. As a result, the application for *isbat nikah* is filed together with the divorce suit as a unit, where the priority is the divorce settlement (Fadilah, 2022). Thus, *isbat nikah* in this context falls into the category of a lawsuit application. If the application for *isbat nikah* is based on Article 7 number 1 letters (b), (c), (d), and (e), then the case is considered an application. Therefore, the decision of the Religious Court in this case can only be appealed, and cannot be appealed in cassation (Zainuddin, 2022).

However, Article 7 Paragraph (2) of the Compilation of Islamic Law (hereafter KHI) explains that if a marriage cannot be supported by a marriage certificate, then an application for *isbat nikah* can be submitted to the Religious Court. Furthermore, in paragraph (3) it is stated that the *isbat nikah* that can be submitted to the Religious Court is limited to matters relating to 1) The existence of a marriage in the context of a divorce settlement; 2) The disappearance of a marriage certificate; 3) Doubts about the validity or invalidity of one of the conditions of marriage; 4) Marriages that occurred before the enactment of Law No. 1 of 1974 Concerning Marriage, and; 5) Marriages conducted by those who do not have provisions that require marriage registration to fulfill state administrative requirements, as well as to ensure benefits for the community (Zainuddin, 2022).
Since the inception of the state, marked by the enactment of Law No. 22/1946, there have been regulations on the importance of order and legal certainty in the institution of marriage. Therefore, provisions were made regarding the obligation to record marriages by authorized officials. Although the issue of marriage registration has been socialized for quite a long time, as explained in Article 2 Paragraph (2) of Law Number 1 Year 1974 concerning Marriage and Articles 5 and 6 of the Compilation of Islamic Law, until now there are still obstacles in its implementation. One of the contributing factors is that some Muslim communities still maintain a conservative view of traditional law (fiqh) (Sugitanata, 2022).

In addition to juridical and sociological challenges, there are also idealistic challenges. These idealistic challenges include the development of various ideas, thoughts, and ideas that are often different from each other, some even contradictory. These differences arise in attempts to interpret various legal regulations and to explain or reveal practices that develop in society. Because of the very close relationship between unregistered marriage validation and marriage registration, at least two views can be identified. First, those who consider marriage registration to be a requirement for the validity of marriage, and second, those who believe that marriage registration is merely a general administrative matter that does not affect the validity of marriage in the general view of Muslims (Novera, 2021).

The group that believes that marriage registration is a valid condition of marriage includes academics and legal experts who have been following the marriage process under civil law, where the validity of marriage can only be proven by a marriage certificate following Article 100 BW (Burgerlijk Wetboek). They argue that a marriage is only considered valid after the registration or recording of the marriage has taken place. On the other hand, there is a group that argues that marriage registration is only an administrative matter, generally from among Muslims, and there are also many jurists who argue that marriage is considered valid not when registration or registration is carried out, but when *ijab* and *qabul* occur (Novera, 2021).

The view that marriage registration is only administrative has led to the practice of illegal polygamy in the community. Some people end up ignoring the administration of polygamy by marrying for the second time only armed with *ijab qabul*. As long as the conditions and pillars of marriage have met the provisions of fiqh, then they consider their second marriage to be in accordance with the corridors of Sharia (Fairuzaidan & Rahma, 2023). However, in order to obtain legal certainty for a particular purpose, they apply to the Religious Courts to legalize their polygamy through the isbat nikah scheme. SEMA No. 3/2018 actually prohibits Religious Courts from accepting such requests. However, not all judges implement the provision, in other words, some judges accept and even grant the validation of polygamy application with considerations of benefit, such as in decisions No. 130/Pdt.G/2020/Ms.Bna and No. 311/Pdr.P/2022/PA.Bjb.

**Typology of Islamic Thought**

The dichotomous-typological way of thinking is something that cannot be separated from humans. According to the sociological view, a phenomenon that occurs and is understood by humans can be mapped in specific typologies according to the timing of the emergence of the phenomenon. Concerning thinking, every thinker who is part of humanity has a certain distinction, whether in the form of methods, perspectives, or
approaches to understanding a phenomenon of the research object, allowing the results of the research to be different (Ali Wardi, 1989).

The dichotomization of thought can be called typology which means a method developed to classify topics and themes in certain scientific fields, thus forming a categorization that is different from others, it is also inevitable that there is a different categorization between one method and another method in one theme (M. Muki Ali, 2004). Regarding the typology of Islamic thought, there are three categories that represent the types of thought of Muslim scholars in the world, including in Indonesia. These typologies are traditional, moderate, and liberal (Muhammad Harfin Zuhdi, 2012). The explanation is below:

1. **Traditionalism**

   Etymologically, the term "tradition" comes from the English "tradition", which refers to the Latin root "tradition" derived from the verb "tradere", meaning "to hand over" or "to send". The word "traditio" has a similar meaning to the Greek term "paradosis" or the verb "paradidômi", which also describes the act of "handing over". In the Christian theological context, in both Latin and Greek, these terms are used to refer to the collection of teachings passed down and defended by the Church as part of the "Catholic faith" (Mircea Eliade, 1993).

   From the concept of "tradition" come terms such as "traditional", "traditionalist" and "traditionalism". The term "traditional" refers to something that is following customs, passed down through generations, or following in the footsteps of ancestors. It is commonly used in contexts such as traditional clothing, traditional dances, traditional ceremonies, and so on, which are consistently preserved and passed down from one generation to the next. On the other hand, the term "traditional" is often used in society to signify something that strikes a balance between traditional features and modern elements (Djafri et al., 2023).

   Some of the descriptions above show that traditionalist thinkers want to maintain established traditions. They insist that the thinking of the previous ummah, especially the ulama, has been completed and finalized, so there is no need to discuss it again. This group is slightly different from the fundamentalists who limit the "previous ummah" to the time of the khulafa ar-rasyidin, and reject all forms of modernity. Traditionalists accept modernity as part of the achievement of Islam's previous glory, which is an important sign of the value of the thought of the salaf as-shalih (Muhammad Harfin Zuhdi, 2012). In relation to Islamic law, this group maintains the status quo of the scholars and does not want to change the provisions of previous scholars regarding legal outcomes. Although they adopted modern developments, the legal results of the scholars remain the main concern, one of which is in the legal requirements of marriage in which there is no official registration from the state (Kori & Amran, 2021).

2. **Moderation**

   According to Imaarah, in the Islamic context, the term "moderate" has a very important and noble meaning, but it is often misinterpreted in practice. Moderatism is not the same as the common view that assumes that there is no firm and definite stance in dealing with complex problems and issues. Moderation is not about adopting a "wishy-washy" attitude or confusion in choosing between two opposing options. In Islam, moderation is not just a "new third way", but also a method of mediating
between two conflicting extremes, by rejecting an exaggeration on either side that would ultimately lead to siding with one of the two polar opposites (Muhammad Imarah, 1989).

The concept of moderation in Islam is a principle that requires every Muslim to be able to embrace and combine elements that can be synchronized in a harmony that is not antagonistic to both polar opposites (Aprilianto et al., 2022). Therefore, the moderation of Islamic thought can mean a thought that stands between two extreme camps that contradict each other by not taking sides with either of them. Its position is that of a mediator who offers an alternative and a solution to the "opposition" of the two camps.

3. Liberals

The struggle over the terminological definition of the word "liberal" continues to this day, especially when the word is linked to "Islam," which are essentially two diametrically opposed entities. The phrase "liberal Islam" is not only a contradiction in terms, it is absurd. "Islam" in its generic connotation emphasizes the concept of submission, which is the submission of a servant to Allah by following all His commands and avoiding all His prohibitions. On the other hand, the word "liberal" refers to the idea of freedom, which reflects liberation from all kinds of demands and commands. These two words have opposite meanings. Therefore, it is difficult to combine these two contradictory concepts (Islam and liberal) into one meaningful term (Muhammad Imarah, 1989).

According to Zuhdi, there are four categories of liberalism in Islamic thought. First, liberal Islam is based on the assumption that truth is relative, open, and plural. Thus, liberal Islam analyzes all forms of "texts" and interpretations of them that are considered the final authority. Second, in line with the previous view, liberal Islam questions religious orthodoxy that is considered rigid and critically evaluates it. Third, liberation theologians often advocate "liberation theology", which opposes all forms of oppression of human freedom, including freedom of religion or freedom from religion, and especially freedom of thought and expression. Fourth, liberals separate earthly and afterlife authority and religious and political authority. For them, religion does not have the "sacred right" to determine any form of public policy (Muhammad Harfin Zuhdi, 2012).

The Normativity of Judge Considerations

The judge's consideration is the framework or rationale used by the judge in making a decision on a case (ratio decidendi). The foundation of the judge's consideration is based on the opinions of doctrine, evidence, and jurisprudence. The judge's considerations must be structured in a logical, structured, interrelated, and complementary manner. Judges' considerations are concretely expressed in the form of analysis, argumentation, opinion, and conclusions of the judge (Juliando, 2016).

Judges as the main actors in the judicial process are always required to hone their conscience, moral intelligence, and professionalism in upholding law and justice in the form of their decisions. Judges' decisions must always be accountable to the Almighty and also to the community, especially to those who seek justice. One way to realize the vision of the Supreme Court of the Republic of Indonesia is through judges' decisions that are based on strong arguments. Judges' decisions that are not independent, suspicious of collusion, corruption, nepotism, and unprofessional, do not provide clarity of law and
justice, and decisions that cannot be implemented, can reduce public trust and damage the reputation of the judiciary (Alfarabi & Rumainur, 2023).

The primary task of judges is to apply legal rules to specific situations through decisions. This process begins with legal discovery. Legal discovery is necessary to resolve a legal issue based on legal principles or in a manner consistent with the law. Judges are tasked with matching concrete legal events with existing legal provisions, especially in the context of positive laws governing clear legal events. However, if the existing legal regulations are unclear, do not reflect the community's sense of justice, or are inadequate in protecting human rights, then legal discovery is done through interpretation. This interpretation involves an in-depth understanding of existing legal provisions and exploration of various legal sources derived from public legal consciousness or available legal theories so that a concrete legal event can be resolved appropriately and fairly (Syarif, 2015).

In making a decision in a case, judges need to consider three aspects, namely juridical, philosophical, and sociological considerations. The judge's juridical considerations include an evaluation based on the legal information revealed during the trial and the legal provisions that must be considered in the decision. This includes the judge's judgment in making the decision, considering factors that affect the outcome of a lawsuit or application, which must be submitted in writing and is an integral part of the judgment (Aina, 2020).

Judges' sociological considerations in case resolution involve an evaluation of the social context of the case, as well as the implications of the decision on society. This involves elements such as level of education, social environment, occupation, and the arguments put forward by the parties involved in the proceedings. The judge also needs to verify that the decision is in line with the prevailing norms in the community (customs) and meets the needs and expectations of the community. Thus, the sociological aspect is crucial in upholding justice in the judge's decision (Aina, 2020).

Judges' philosophical considerations in making decisions in civil cases include evaluating thoughts that emphasize the importance of justice for all parties involved in the dispute. This involves believing that the decision should be fair and in accordance with the principles of justice, as well as checking that the actions taken by the parties involved in the conflict are not contrary to the law and fulfill the established conditions. In addition, the judge also needs to verify that his/her decision does not violate the principles of justice and that the decision taken can benefit both parties involved in the conflict (Fitriyani, 2022).

**Judges' Considerations in Granting The Validation of Unregistered Polygamy**

Judges as representatives of God in the world are expected to be able to make decisions based on justice for the realization of the benefit of society. Siregar as quoted by Asnawi said that judges who want to make decisions must establish vertical communication with God, so that there is goodness based on "divine light" in every decision, and can be accepted by the justice-seeking community (Natsir Asnawi, 2020). In addition to realizing the theological relationship, judges must also be able to derive facts at trial as legal considerations. A well-integrated theological and humanitarian dimension can create a just verdict because it involves the elements of life as a whole.

In connection with the granting of polygamous validation in Decision No. 130/Pdt.G/2020/Ms.Bna and No. 311/Pdt.P/2022/PA.Bjb, the judge used the arguments
of unregistered marriage validation, so that the arguments apply generally. The consideration of granting unregistered marriage validation uses the basis of Article 7 paragraph (3) of the Compilation of Islamic Law which reads "marriages conducted by those who do not have marriage impediments according to Law Number 1 of 1974." The conditions for granting the validation of unregistered marriage are the absence of marriage impediments stipulated in Law No. 1 of 1974 concerning Marriage, so these two cases fall within the criteria of the article and are entitled to be granted.

Another reason that was taken into consideration was that the terms and conditions of the unregistered marriage had been fulfilled. The judge referred to the provisions of Article 2 paragraph (1) which reads "Marriage is valid if it is conducted according to the laws of each religion and belief." In decision No. 311/Pdr.P/2022/PA.Bjb, the judge quoted legal doctrine from the Book of Bughyatul Mustarsyidin, which reads "If evidence has been submitted that can corroborate the applicant's allegations, regarding the existence of a marriage relationship with someone, then the application regarding the existence of the marriage is established." As for decision No. 130/Pdt.G/2020/Ms.Bna, cites a legal opinion from the book I'anatuth Thalibin volume IV: "Regarding the recognition of marriage with a woman, it must be able to mention the validity of the marriage first, such as the presence of a guardian and two witnesses. With legal considerations, the polygamous marriage that has been carried out is recognized by the judge with an isbat nikah decision."

Juridically, the validity of unregistered marriage validation does not stand alone. There is SEMA No. 3/2018 which guides Religious Courts not to accept isbat nikah from polygamy cases. About the interests of the child, the applicant can apply for the origin of the child in another application. SEMA is a Supreme Court Circular Letter intended for courts under the Supreme Court, so it is internal (Arifin, 2021). Hierarchically, SEMA is not included in the category of Legislation in Article 7 paragraph (1) of Law No. 12/2011 on the Establishment of Legislation. Because of its policy nature, the existence of SEMA is indeed guiding and provides policy direction for administrative implementation (Fajarwati, 2017). Therefore, judges do not pay attention to SEMA because there is no order from the legislation regarding its mandatory implementation in every case.

The validation of unregistered marriage which is related to polygamy should not only consider articles of law that are only related to isbat nikah, however, it has the consequence of dragging polygamy articles into consideration. Decision No. 130/Pdt.G/2020/Ms.Bna takes Article 5 of the Marriage Law, Article 41 letters b, c, and d of Government Regulation No. 9 of 1975, and Article 58 of the Compilation of Islamic Law into consideration. These articles are cumulative requirements that must be met by the applicant if he wants to carry out polygamy. Polygamy can be submitted to the Religious Court if there is consent from the wives, assurance of fair treatment to the wives and children, and assurance of the fulfillment of the needs of the wives and children. These conditions have been met by the applicant, so the judge granted the polygamy application.

The judge in his consideration included Article 4 paragraph (2) of the Marriage Law as the basis for granting the validation of unregistered polygamy. A polygamy license is only issued by the court if the wife is unable to carry out her obligations, the wife has an incurable medical illness, and the wife cannot bear children. Unfortunately, these conditions were not fully implemented by the court, because the wife did not
experience such problems in her evidence. This condition makes judges only apply the conditions of polygamy partially, not thoroughly, because they do not care about Article 4 paragraph (2) of the Marriage Law.

Sociologically, the judge's consideration refers to concerns about the possibility of adultery committed by the husband with the new wife. Consideration of adultery colors the consideration of granting isbat nikah polygamy, even specifically, decision No. 311/Pdr.P/2022/PA.Bjb provides social reasons. The occurrence of adultery in the context of positive law will worsen the image of both parties in the community because the community will negatively label unregistered polygamous marriages. Therefore, in order to avoid negative views from the community, polygamous marriages should be granted. The avoidance of negative stigma in the community is indeed one of the considerations in isbat nikah, as Mualy said (Mualy, 2011). However, this condition is different from the validation of unregistered polygamy, because the consideration of benefits should not only be based on the husband and his new wife but must also consider the first wife.

**Islamic Legal Traditionalism in Judges' Considerations: Neglect of the First Wife's Rights**

Based on the judge's consideration above, there are three reasons for granting isbat nikah polygamy. First, the unregistered marriage conducted with the second wife has fulfilled the pillars and conditions of marriage. Second, there was polygamy permission from the first wife through written evidence at the court session. Third, the proof of unregistered polygamy validation is following the procedures and applicable laws. The selection of articles for legal considerations also tends to be the same, namely articles relating to unregistered marriage and polygamy in the Marriage Law jo PP No. 9 of 1975 and the Compilation of Islamic Law. However, the provisions of SEMA No. 3/2018 were not considered by the judges as a Supreme Court policy regulation that should be guided.

The presence of the Supreme Court Circular Letter is a separate concern in the hierarchy of laws and regulations. SEMA cannot be said to be a statutory regulation but only has the status of an internally binding policy regulation. Therefore, SEMA is not included in the hierarchy of laws and regulations according to Law No. 12/2011 on the Establishment of Laws and Regulations. However, the existence of provisions contained in SEMA does not mean that they are ignored, (Utang Rosidin & Elan Jaelani, 2023). although judges may refrain from using SEMA on the grounds that there is greater justice in the matter (Fauziyah Putri Meilinda et al., 2023). The existence of SEMA No. 3/2018 is part of the elaboration of polygamy and unregistered marriage validation articles which are often misused to legitimize the validation of unregistered polygamy. Therefore, the position of SEMA No. 3/2018 is not considered to contradict the Compilation of Islamic Law and the Marriage Law, rather it explains how the relevant articles are properly implemented.

The neglect of a regulation in a decision is closely related to the doctrine of progressive law. Although not explicitly mentioned, the implementation of progressive law is very visible, characterized by very strong sociological considerations through the abandonment of text normativity. Progressive law in Indonesia was popularized by Satjipto Rahardjo. The birth of progressive legal discourse was influenced by the attachment of judges to laws and regulations or the like, making it difficult for them to make decisions that contain the values of justice and humanity (Rahardjo, 2011). In Islamic law, there is also the term *maqasid sharia*, which in Ibn Qayyim's definition is
the purpose of enacting Islamic sharia in the world on the basis of benefits for humanity (Ridlo & Muhajirin, 2022). As with the two decisions above, the value of humanity in sociological considerations is seen when judges see the validation of unregistered polygamy as a way to avoid the husband's potential adultery with his new wife.

One of the most interesting things in the two decisions above is that there is no consideration of the first wife's interests. Indeed, both decisions cite written documents regarding the wife's willingness to be polygamous. However, this is not necessarily a sign that the wife fully approves of her husband's polygamous behavior. Permission from the first wife is not always based on sincerity, and in some cases, there are power relations that cause women's willingness to be polygamized not based on their principles. Farid found that some polygamy practices in Madura tend to "force" wives to accept their husbands with other women. Women finally agree to their husbands' polygamy after hegemony with the lure of stereotypical "piety" for wives who are willing to be polygamous (Mohtazul Farid, 2017). These power relations should be explored more deeply by judges in court.

Polygamy in the above decision reflects a partial view. This means that the granting of polygamy does not consider the rights of the first wife as a victim of infidelity. Such conditions often occur in Islamic polygamy discourse. Yazid in his research revealed that the polygamy discourse presented by preachers on YouTube tends to only consider the benefits of the husband, while the issue of the rights of the first wife and her children is rarely questioned (Yazid, 2023). In fact, justice in polygamy is related to that, as if justice is the next part after the enactment of a polygamous marriage contract because, after all, polygamy in the view of classical fiqh remains a part of Islamic law that cannot be opposed (Sabirin, 2021).

The ease of polygamy marks the traditionalism of Islamic law. Traditionalist thinkers want to maintain the established traditions of the past. They insist that the thoughts of the previous community, especially the ulama, have been completed and finalized, so there is no need to re-discuss them (Muhammad Harfin Zuhdi, 2012). A distinctive feature of the traditionalism movement is the rejection of the reinterpretation of Islamic teachings with liberal and progressive approaches. This movement tends to maintain established interpretations and social systems. In general, traditionalism refers to a school that rejects all forms of modern, liberal, or progressive interpretations of Islamic teachings and tends to uphold religious doctrines, orthodoxy, and traditions without a critical attitude toward them.

Islamic legal traditionalism in this area is related to the legal considerations used by judges in the above decision which tend to facilitate polygamy cases and have a bias towards men. In Nabil's view, based on his observations, the conservatism or traditionalism of polygamy law is related to the perpetuation of polygamy culture by avoiding criticism of the nash of polygamy because there are standard Sharia rules regarding it (Nabil, 2020). This is almost similar to the pattern of granting polygamy in the object of the decision, namely with consideration of the validity of unregistered marriage and partial application of articles that support the validity of polygamy in a patriarchal culture, even though the previous polygamy was illegal. In addition, traditionalism is seen when judges do not explore the interests of the first wife in the practice of polygamy.
The illegality of unregistered polygamy in the Indonesian legal framework is evidenced by the existence of criminal regulations against it. Article 279 of the Criminal Code states that anyone who enters into a marriage while there is another valid marriage that prevents it is punishable by seven years. The emergence of criminal penalties for unregistered polygamy shows that marriage in Indonesia is based on the principle of monogamy. According to Ropiah, the main principle in the Marriage Law is monogamy, but it also does not rule out the principle of open monogamy (polygamy) with the presence of the provisions in Article 3 (Ropiah, S., 2011). However, what needs to be underlined is that the principle of polygamy in the Marriage Law has strict restrictions so as not to become a mischief.

Legal traditionalism can be recognized based on the citation of previous scholars' opinions in the consideration of the decision. Decision No. 311/Pdr.P/2022/PA.Bjb used legal doctrine from the book Bughyatul Mustarsyidin, while decision No. 130/Pdt.G/2020/Ms. referred to I'anatuth Thalibin. Interestingly, the arguments from the opinions of previous scholars only relate to the validity of marriage in the validation of unregistered marriage cases. This is interesting on the grounds that previous scholars did not strictly limit polygamy cases so that someone could easily do it. Unlike today, polygamy has been strictly regulated in interrelated articles in the Compilation of Islamic Law. These provisions are contained in articles 55 to 59 of the KHI. Article 57 limits polygamy cases only as an "emergency door" when there are several diseases or disorders experienced by the wife.

The strict conditions for the enactment of polygamy characterize the moderate enforcement of Islamic law. One of the moderate laws related to polygamy was conveyed by Abduh. In his view, polygamy which is not practiced responsibly is considered a disaster for society. Therefore, he tried to reflect on the verses that provide the possibility for men to have more than one wife, with certain conditions set. If these conditions, such as fairness and so on, were not met, according to Muhammad Abduh, the man should not be allowed to marry another woman. He linked verse 3 of Surah An-Nisa' with verses 127 to 129 of the same Surah. For him, polygamy was regarded as an emergency exit that could only be entered into if something happened that could jeopardize the continuity of marital and family life (Prasetyo et al., 2023).

CONCLUSION

The characteristics of traditionalism in Islamic law, which are characterized by taking the doctrine of previous scholars, color the judge's consideration in granting the validation of unregistered polygamy after the enactment of SEMA No.3/2018. The ease of granting only by looking at the validity of the second marriage that was carried out unregistered makes the culture of polygamy more lasting in the enactment of Islamic law. In addition, judges do not consider the emergency conditions for the validity of polygamy, in the form of the wife's incapacity. The "voice" of women in polygamous power relations that tend to place them in coercion was also not explored in depth by the judges. The traditionalist character of Islamic law reflected in the two decisions was used by judges to oppose the provisions of SEMA No. 3/2018.

Given the complexity of the polygamy issue, it is important to ensure that any decision reflects a holistic understanding of women's experiences in polygamous relationships. In addition, judges need to carefully consider the balance between traditional values and moderate spirit in Islamic law, as well as pay special attention to
the analysis of Article 4 paragraph (2) of the Marriage Law. By strengthening this approach, it is hoped that judges can make a positive contribution to the evolution of Islamic law towards gender equality and the protection of women's rights.
REFERENCES


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