

**AN ANALYSIS OF THE SIDOARJO RELIGIOUS
COURT DECISION NUMBER 3776/PDT.G/2016/
PA.SDA CONCERNING ACCEPTANCE OF
POLYGAMY LICENSE WITH THE REASON
UNREGISTERED MARRIAGE**

THESIS

Submitted to the Faculty of Sharia and Law in Partial of the
Requirements for the Degree of Bachelor of Law in the
Department of Islamic Family Law



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**FACULTY OF SHARIA AND LAW
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MOTTO

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مِمَّا
وَتَلْتُمْ وَرَبِّعَ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَٰلِكَ أَدْنَىٰ
أَلَّا تَعُولُوا

“If ye fear that ye shall not be able to deal justly with orphans, marry women of your choice. Two, or three, or four. But if ye fear that ye shall not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable, to prevent ye from doing injustice.”

(QS. An-Nisa':3)

DEDICATION

The thesis is dedicated to:

My dear parents,

Slamet Fuadi and Parwanti, thank you for supporting me, in every my way they pray, in every my fall they take care, in every my tears they amuse, in every my dream they help. Abah Prof. Ibnu Hajar, M.Ed and Ummi Dr. Ummul Baroroh M.Ag, who always guide me today and forever. Love and all prayer always for my four most fabulous parents.

My beloved friend,

Alm. Luthfi Arwilata, if we must separate because of fate, I will try to be sincere because you are my hiraeth. I want to say that you are my favorite hello and my hardest goodbye.

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TRANSLITERATION ARABIC

Arabic Letter	Written	Arabic Letter	Written
ا	A	ط	ṭ
ب	B	ظ	ẓ
ت	T	ع	‘
ث	ṯ	غ	g
ج	J	ف	f
ح	ḥ	ق	q
خ	Kh	ك	k
د	D	ل	l
ذ	Ẓ	م	m
ر	R	ن	n
ز	Z	و	w
س	S	ه	h
ش	Sy	ء	‘
ص	Ṣ	ي	y
ض	Ḍ		

Vowel Letters:

ā = a long spelling

ī = i long spelling

ū = u long spelling

Diftong Letters:

au = أو

ai = أي

iy = إي

ABSTRACT

One of the marriage issues that is raised and debated in society is polygamy. The more complex problems that arise in society are related to the problem of polygamy, one of which is polygamy caused by a husband having an unregistered marriage with another woman. When viewed from Marriage Act Number 1 of 1974 Article 4 and Article 5, regarding the reasons for practicing polygamy, the reasons for having an unregistered marriage with another woman are not included in the reasons that can be justified or encourage the permission of polygamy. The problem formulation is considering the panel of judges at the Sidoarjo Religious Court and reviewing the *maslahah mursalah* regarding decision number 3776/Pdt.G/2016/PA.Sda.

The type of research used is library research. The primary source is case decision number 3776/Pdt.G/2016/PA.Sda and the secondary sources are in the form of interviews with judges and supporting books. Data collection using documentation and interview methods. The analysis technique used is analytical descriptive.

Based on the results of this study, the panel of judges at the Sidoarjo Religious Court in case number 3776/Pdt.G/2016/PA.Sda granted the Plea for a polygamy license because the unregistered marriage was not based on Article 4 paragraph (2) of Marriage Act Number 1 of 1974 but Article 5 paragraph (1) of Marriage Act Number 1 of 1974 and the rules of *fiqh* regarding *madharat*. Meanwhile, according to the perspective of *maslahah mursalah*, the decision on case number 3776/Pdt.G/2016/PA.Sda as a basis for consideration is not quite right, because polygamy is permissible, if in an emergency and in a really urgent situation. According to the author, the reason for polygamy is because they are already in an unregistered marriage is not an urgent situation.

Keywords: Polygamy License, Unregistered Marriage, Judge's Consideration.

ABSTRAK

Salah satu bentuk perkawinan yang sering menjadi topik perbincangan dan perdebatan di dalam masyarakat adalah poligami. Semakin kompleksnya permasalahan yang muncul di dalam masyarakat terkait dengan masalah poligami, salah satunya adalah poligami yang diakibatkan seorang suami telah menikah siri dengan wanita lain. Bila ditinjau dari Undang-Undang Nomor 1 Tahun 1974 Pasal 4 maupun Pasal 5, tentang alasan-alasan untuk melakukan poligami, alasan telah menikah siri dengan wanita lain bukanlah termasuk di dalam alasan-alasan yang dapat dibenarkan atau pendorong diizinkan izin poligami. Adapun rumusan masalahnya adalah bagaimana pertimbangan majelis hakim Pengadilan Agama Sidoarjo dan tinjauan masalah mursalah terhadap putusan nomor 3776/Pdt.G/2016/PA.Sda.

Jenis penelitian yang digunakan adalah library research. Sumber primernya adalah putusan perkara nomor 3776/Pdt.G/2016/PA.Sda dan sumber sekundernya berupa wawancara dengan hakim serta buku-buku penunjang. Pengumpulan data menggunakan metode dokumentasi dan interview. Teknik analisis yang digunakan adalah deskriptif analitis.

Berdasarkan hasil penelitian ini, majelis hakim Pengadilan Agama Sidoarjo pada perkara nomor 3776/Pdt.G/2016/PA.Sda mengabulkan permohonan izin poligami karena nikah siri bukan atas dasar pasal 4 ayat (2) UU No. 1 Tahun 1974 melainkan pasal 5 ayat (1) UU No. 1 Tahun 1974 dan kaidah fiqih tentang mudharat. Adapun menurut tinjauan masalah mursalah, putusan perkara nomor 3776/Pdt.G/2016/PA.Sda sebagai dasar pertimbangan kurang tepat, karena diperbolehkannya poligami, apabila dalam keadaan darurat dan dalam keadaan yang benar-benar mendesak. Menurut penulis, alasan berpoligami karena sudah menikah siri bukanlah suatu keadaan yang mendesak.

Kata Kunci: Izin Poligami, Nikah Siri, Pertimbangan Hakim.

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Firstly, praise Allah SWT, who has given me the strength to finish this thesis. Peace and salutation always be given to our Prophet Muhamad SAW, the last Messenger of God. That always be the best inspiratory forever. My thesis, “An Analysis of The Sidoarjo Religious Court Decision Number 3776/Pdt.G/2016/PA.Sda Concerning Acceptance of Polygamy License with The Reason Unregistered Marriage”, submitted to The Faculty Of Sharia And Law in partial of the requirements for the degree of the Islamic Family Marriage Law.

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And the end of this, no perfection in this world, especially my thesis as my own work. Sorry for every mistake and hopefully, my thesis will be useful for me and my readers.

Semarang, 15 June 2023

The Author



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CHAPTER I

INTRODUCTION

A. Background

One form of marriage that often becomes a topic of discussion and debate in society is polygamy because it invites controversial views. On the one hand, polygamy is rejected by fighters for women's rights with various normative and psychological arguments and is always associated with gender injustice. They argue that polygamy is permitted only under certain conditions with strict requirements of justice for all wives. In addition, there is an assumption that women are always the victims of polygamy. In other words, polygamy is the oppression of women because they have no better choice than to be married or divorced. On the other hand, polygamy has been campaigned because it is considered to have a firm normative backing and is seen as an alternative to solving the phenomenon of cheating and prostitution.¹

The word polygamy, etymologically, comes from the Greek, that is *polus*, which means many, while *gamos* which means marriage. When this word's meaning is combined, polygamy will mean a marriage of many or more than one. The marriage system is that a man has more than one wife at the same time, or a woman has more than one husband at the same time. As for terminology, polygamy can be understood as a situation in which a husband has more than one wife. A polygamous husband can have two, three, or four wives simultaneously.²

In a marriage, a man can only have one wife. A woman may only have one husband (Article 3 (1) of Marriage Act Number 1 of

¹ Abu Fikri, *Poligami yang Tak Melukai Hati*, (Jakarta: Mizan, 2007), 71.

² Rodli Makmum, dkk, *Poligami dalam Tafsir Muhammad Syahrur*, (Ponorogo: STAIN Ponorogo Press, 2009), 15.

1974). In his explanation that this law adheres to the principle of monogamy.³ This is also in line with Allah's Word in Surah An-Nisa' [4]: 3:

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مِمَّا
 وَتَلْتُمْ وَرُبِعًا فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَٰلِكَ أَدْنَىٰ
 أَلَّا تَعُولُوا

*“If ye fear that ye shall not be able to deal justly with orphans, marry women of your choice. Two, or three, or four. But if ye fear that ye shall not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable, to prevent ye from doing injustice.” (QS. An-Nisa’:3).*⁴

Based on the verse above shows that, in principle, Marriage in Islam is monogamous. It is permissible to practice polygamy if the conditions that guarantee the husband's justice to the wife are fulfilled.⁵

In Islam, there is a limit to the number of women who can be married, that is a maximum of four people. It is done to close the door, which can lead to various irregularities. Then, with the increase in the number of wives from four people, it is feared that various immoral acts will arise from them due to their inability to fulfill their rights.

Limiting four people is justice and moderation and protects wives from tyranny resulting from husbands having more than four

³ Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, (Jakarta: PT. Raja Grafindo Persada, 2015), 139.

⁴ Departemen Agama RI, *Al-Qur'an Karim*, (Bekasi: Cipta Bagus Segara, 2012), 77

⁵ Ahmad Rofiq, *Hukum Perdata*, 140.

wives. It is different from the customs of the Arabs during the time of ignorance and nations in the past, which did not limit the number of wives, and ignored some of them. However, this permissibility does not mean that every Muslim must marry more than one woman. In sociological reality in society, monogamy is more widely practiced because it is felt to be the most following human nature and is the form of marriage that most promise peace.

The reasons for the permissibility of polygamy are regulated in Article 4 of the Marriage Act, which reads as follows:

- 1) If a husband has more than one wife, as referred to in Article 3 paragraph (2) of this Marriage Act, then he is obliged to submit an Plea to the court in the area where he lives.
- 2) The court referred to in paragraph (1) of this article only permits a husband to have more than one wife if:
 - a) The wife cannot carry out her obligations as a wife;
 - b) The wife has a physical disability or an incurable disease;
 - c) The wife cannot give birth to children.⁶

Concerning Article 4 above, at least it shows that three reasons are used as the basis for applying for polygamy. First, the wife cannot carry out her obligations as a wife. Second, the wife gets a disability or an incurable disease. Third, the wife can not give birth to offspring.

Meanwhile, the conditions for practicing polygamy are contained in Article 5, paragraph (1) of the 1974 Marriage Act, that is:

- a) There is consent from the wife/wives;
- b) There is the certainty that the husband can guarantee the necessities of life for his wife and their children;

⁶ Pasal 4 Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

- c) There is a guarantee that husbands will treat their wives and children fairly.⁷

The difference between the requirements in Articles 4 and 5 is that in Article 4, they are called alternative requirements, which means that one must exist and can apply for polygamy. Meanwhile, Article 5 is a cumulative requirement that all husbands who practice polygamy must fulfill all of them.

In efforts for the smooth implementation of Marriage Act No. 1 of 1974, the government issued Peraturan Pemerintah (PP) No. 9 of 1975, which regulates the implementation provisions of the Act. Article 40 PP No. 9 of 1975 states that if a husband intends to have more than one wife, he must submit a written Plea to the court. Article 56 KHI also stipulates that a husband who intends to have more than one wife must submit a written Plea to the Religious Court, and then the Religious Court will decide whether the Plea is granted or rejected. This kind of request for permission is a form of contention or dispute.

Based on Article 44 PP No. 9 of 1975, Marriage Registrars are prohibited from recording the marriage of a husband who will have more than one wife before obtaining court permission. In addition, Article 57 of the Compilation states that the Religious Courts only permit husbands who will have more than one wife if:

1. The wife cannot carry out her obligations as a wife.
2. The wife has a disability or an incurable disease.
3. The wife cannot have children.

Another requirement, that is that contained in Article 58 KHI paragraph 2, is emphasized that without prejudice to the provisions of Article 41 letter b PP Number 9 of 1975, the consent of the wife or wives can be given in writing or verbally, but even if there has been a written agreement, this agreement confirmed with the verbal

⁷ Pasal 5 Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

consent of the wife in front of the Religious Court hearing. The more complex problems that arise in society are related to the problem of polygamy, one of which is polygamy caused by a husband having an unregistered marriage with another woman. When viewed from Marriage Act Number 1 of 1974 Article 4 and Article 5, regarding the reasons for practicing polygamy, the reasons for having an unregistered marriage with another woman are not included in the reasons that can be justified or encourage the permission of polygamy.⁸

Although cases of unregistered marriage cannot be used as an excuse for polygamy, cases of Pleas for polygamy licenses, as this occurred at the Sidoarjo Religious Court, there are cases of Pleas for polygamy licenses of this kind that were accepted and granted by the Sidoarjo Religious Court. However, several reasons exist for granting the polygamy license Plea. In this case, the reason the Judge granted was that the Petitioner and the prospective second wife had previously been married in an unregistered marriage and had children. In this case, as the party authorized to decide polygamy license cases, the Judge certainly has considerations and specific criteria in granting polygamy license cases. If viewed from the requirements for applying for a polygamy license, case number 3776/Pdt.G/2016/PA.Sda does not meet the alternative requirements stipulated in Article 4 of Marriage Act Number 1 of 1974 concerning Marriage, but Sidoarjo Religious Court still granted it.

The problems contained in the Judge's decision above are interesting to study. In this case, the author submits a thesis entitled **"AN ANALYSIS OF THE SIDOARJO RELIGION COURT DECISION NUMBER 3776/PDT.G/2016/PA.SDA CONCERNING ACCEPTANCE OF POLYGAMY LICENSE WITH THE REASON UNREGISTERED MARRIAGE"**

⁸ Ahmad Rofiq, *Hukum*, 142-143.

B. Research Question

Based on the background of the problems above, it can be identified the problems that arise, that is:

1. What are the judges' considerations in granting the decision of the Religious Court Number 3776/Pdt.G/2016/PA.Sda regarding granting permission for polygamy because they are married in an unregistered marriage?
2. What is the *maslahah* review of The Sidoarjo Religious Court Decision Number 3776/Pdt.G/2016/PA.Sda?

C. Purpose and Significant of Research

Research, in order to be directed and on target, must have a purpose. The objectives of this research are:

1. To determine the Judge's considerations in the Sidoarjo Court Decision Number 3776/Pdt.G/2016/PA.Sda regarding granting a polygamy license on the grounds of an unregistered marriage.
2. To analyze the *maslahah mursalah* perspective of the Sidoarjo Religious Court Decision Number 3776/Pdt.G/2016/PA.Sda.

The benefits of this research are:

1. As a contribution of information, thoughts, input material, and scientific discourse are expected to be useful for society and writers.
2. The author is studying to develop knowledge per the study program. Can contribute ideas to the development of legal science and enrich the study of Islamic legal theory.

D. Literature Review

To find out the validity of the research, the author will describe several theses with the same theme but different perspectives of discussion in this literature review. Because according to the author's observation, the scientific work that the author is researching does not have the same title, as some of these theses are:

1. Lintang Kurnia's thesis discusses the Analysis of the Judge's Decision Granting a Polygamy license for Having Impregnated a Second Wife Candidate. In his research, Lintang Kurnia only discussed Marriage Act Number 1 of 1974 concerning Marriage. From Lintang Kurnia's research, it can be concluded that the Judge gives a decision that has a basis that is used as a guideline for the decision/grant of the polygamy license, so the Judge's decision regarding the analysis of granting polygamy licenses is considered valid.⁹
2. Thesis by Ahmad Nahfani about Permission for Polygamy Because the Wife Does not Want to Increase Offspring (Judge Decision Study No.2031/Pdt.G/2015/PA.Dmk). In his research, the authors conclude that the basis for legal considerations is positive Marriage Act because the wife does not want more children. He was not following the Petitioner's reasons for applying for a polygamy license as regulated in the Marriage Act Article 4 (2) and the Compilation of Islamic Marriage Act Article 41. Based on Islamic Marriage Act, the decision stipulated by the panel of judges already conforms to the context of Islamic Marriage Act, and the results of the Marriage Act can be implemented because the husband can do justice to his wife; this refers to the Al-Qur'an Surat An-Nisa' verse 3.¹⁰
3. The thesis, written by Nurul Alifiah Isnani, discusses the Analysis of the Wife's Consent in Granting Polygamy licenses (Case Study of the Makassar Religious Court). The results of this study indicate that the implementation of granting permission for polygamy pays attention to the wife's consent given by the Judge at the Makassar Religious

⁹ Lintang Kurnia Zelyn, *Analisis Pengabulan Izin Poligami Dengan Alasan Telah Menghamili Calon Istri Kedua (Analisis Putusan Pengadilan Agama Ambarawa Nomor 0687/Pdt.G/2017/PA.Amb)*, Skripsi: UIN Walisongo Semarang, 2018.

¹⁰ Ahmad Nahfani, *Izin Poligami Karena Istri Tidak Mau Menambah Keturunan (Study Putusan Hakim No.2031/Pdt.G/2015/PA.Dmk)*, Skripsi: UIN Walisongo, 2017

Court. The wife's consent is one of the most critical conditions because it is with the wife's prior consent statement that the Judge can consider that the wife is pleased to allow her husband to practice polygamy. The statement letter was also the Judge's consideration that there would be no parties in the future, especially the previous wife's party, who would object.¹¹

4. A journal by Alyysa Arum Savitry discusses a Case Analysis of Polygamy Pleas Preceded by Unregistered Marriage Based on Marriage Act in Indonesia (Case Study of Decision Number. 840/Pdt.G/2015/PA.Ska). In her research, Alyysa Arum Savitry emphasized that in the decision, the Petitioner's wife had an eye defect (blindness) for the last three years, so the court decision could be considered valid because the requirements for polygamy in Article 4 of Marriage Act Number 1 of 1974 concerning Marriage have been fulfilled.¹²
5. A Journal by Aisyah titled "The Legal Concept of Procedure for Applying for Polygamy licenses at the Religious Courts Based on Positive Marriage Act in Indonesia.". This journal discusses the provisions and procedures for applying for polygamy licenses by positive Marriage Act in force in Indonesia.¹³
6. Al-Ahkam journal entitled "Polygamy and Gender Inequality in Marriage Act in Indonesia." By Nur Kholis, Jumaiyah, Wahidullah. This journal can be concluded into three main statements. First, Marriage Act

¹¹ Nurul Alifiah Isnani, *Analisis Terhadap Persetujuan Istri Dalam Pemberian Izin Poligami (Studi Kasus Pengadilan Agama Makassar)*, Skripsi: UIN Alauddin Makassar, 2014.

¹² Alyysa Arum Savitry, *Analisis Kasus Permohonan Poligami Yang Didahului Nikah Sirri Berdasarkan Hukum Perkawinan Di Indonesia (Studi Kasus Putusan No. 840/Pdt.G/2015/Pa.Ska)*, Privat Marriage Act Vol. VI No 2 Juli - Desember 2018.

¹³ Aisyah, *Konsep Hukum Prosedur Mengajukan Izin Poligami Pada Pengadilan Agama Berdasarkan Hukum Positif Di Indonesia*, Jurnal Ilmiah Advokasi, vol. 07, no. 1, Maret 2019.

No. 1 of 1974 and its legislation, such as the KHI, are still far from the values of Pancasila, justice, and human values. The two political configurations in the production of the Marriage Act and the black-and-white understanding of religious texts contribute to the creation of injustice. Third, one of the Marriage Act's goals is justice, so discrimination must be abolished. Polygamy in Article 4, paragraph 2 of Marriage Act No. 1 of 1974 should be abolished or no longer valid so that the consequences of monogamy are absolute.¹⁴

E. Research Methodology

1. The Type and Research Approaches

A study can obtain complete, systematic and accountable information. So we need a research method to provide direction in conducting research. This research is based on legal research conducted with a qualitative approach. This qualitative approach aims to explore and build a proposition or explain the meaning behind reality.¹⁵

In this study, the authors used document research (library research), a form of research in which the data source was obtained from literature related to this subject and other literature.¹⁶ This research was conducted by collecting documents in the form of decisions and books related to the issues discussed in this study and then analyzed. The authors studied the Decisions Sidoarjo Religious Court Number 3776/Pdt.G/2016/PA to obtain this information. Sda concerning the Plea for a polygamy license with the reason of having an unregistered marriage with a prospective second wife.

¹⁴ Nur Kholis, Jumaiyah, Wahidullah, "Poligami Dan Ketidakadilan Gender Dalam Undang-Undang Perkawinan Di Indonesia", *Jurnal Al-Ahkam*, Vol 27, Nomor 2, (Oktober 2017), UIN Walisongo Semarang., 96

¹⁵ Burhan Bungin, *Metode Penelitian Kualitatif*, (Jakarta: PT Raja Grafindo Persada, 2001), 124

¹⁶ Usman Rianse dan Abdi, *Metodologi Penelitian Sosial dan Ekonomi Teori dan Aplikasi*, (Bandung: Alfabeta, 2012), 1.

While in this study using a normative juridical approach. Research in the form of applicable Marriage Acts seeks to find the principles or philosophical basis of these Marriage Acts, court decisions, legal theories, and opinions of leading legal scholars.¹⁷ The approach that the author takes is by approaching the problem under study based on a system of Marriage Acts and regulations that apply in Indonesia.

2. Resources and Legal Materials

a) Resources

1) Primary Resource

The primary data source is the original material that forms the basis for the researcher's first formal presentation of the research results.¹⁸ The primary data in this study is from interviews with one of the judges of the Sidoarjo Religious Court.

2) Secondary Resource

Secondary data is obtained from official documents, books related to the research object, and research results in the form of reports, theses, theses, dissertations, and Marriage Acts and regulations. The secondary data source here is Marriage Act No. 1 of 1974 concerning Marriage, Compilation of Islamic Marriage Act (KHI).

b) Legal Materials

1) Primary Legal Material

Primary legal material is binding legal material consisting of Marriage Acts and regulations and judges' decisions, which are related to the object of this research is The

¹⁷ Prof. Zainuddin Ali, *Metode Penelitian Hukum*, (Jakarta: Sinar Grafika, 2014), 105.

¹⁸ Iskandar, *Metodologi Penelitian Kualitatif*, Jakarta: Gau Persada, 2009, hlm. 117-118.

Sidoarjo Religious Court Decision Number 3776/Pdt.G/2016/PA.Sda.

2) Secondary Legal Material

Secondary materials are books and legal, scientific writings related to the object of this research.¹⁹ The secondary source of legal data in this writing is Marriage Act No. 1 of 1974 concerning Marriage, Compilation of Islamic Marriage Act (KHI), Government Regulation Number 9 of 1975 concerning Implementation of Marriage Act Number 1 of 1974 concerning Marriage.

3) Tertiary Legal Material

Tertiary legal materials are instructions or explanations regarding primary or secondary legal materials originating from dictionaries, magazines, newspapers, and others.²⁰

3. Data Collection Technique

The data collection method is essential in a study because this method is a strategy or method used by the author to collect data in his research. Collecting data in research is intended to obtain reliable materials, information, facts, and information. Data collection methods are techniques or methods used by researchers to collect data. The data collection techniques that the researchers will do are as follows:

a) Documentation

According to Bungin in Gunawan, documentation techniques are one of the data collection methods used in social research to trace historical data. Although it was rarely considered in qualitative research, the document technique has become an essential and inseparable part of

¹⁹ Prof. Zainuddin Ali, *Metode*, 106.

²⁰ *Ibid.*

qualitative research.²¹ The document referred to in this study is The Sidoarjo Religious Court Decision Number 3776/Pdt.G/2016/PA.Sda.

b) Interview

The interview is a method used by someone for a specific purpose trying to get information orally from informants by having direct conversations. The interview was conducted face-to-face, meaning that the researcher (interviewer) was dealing directly with the informant to ask what the informant wanted verbally, and the interviewer recorded the informant's answers. In this case, the informant is Dra. Hj. Hasniati D., M.H. judge from the Sidoarjo Religious Court.

4. Data Analysis Technique

Data analysis is the process of processing data that has been collected by grouping, making a sequence, manipulating, and condensing data so that it is easy to read.²² In this thesis, the writer uses a descriptive-analytical method. The descriptive-analytical method is an analytical technique that describes or describes the data collected as a whole as it is and then draws conclusions.²³

This method describes and systematically analyses the decisions and primary considerations of the Sidoarjo Religious Court judges in resolving cases of polygamy licenses that do not meet the requirements for polygamy.

F. System of Writing

Writing this thesis consists of five chapters, each with sub-chapters of the problem. So the author arranges it systematically as follows:

²¹ Imam Gunawan, *Metode Penelitian Kualitatif Teori dan Praktik*, (Jakarta: PT. Bumi Aksara, 2015), 175-178.

²² Moh. Nazir, *Metodologi Penelitian*, (Bogor: Ghalia Indonesia, 2014), 315.

²³ Burhan Bungin, *Metode*, 222.

CHAPTER I: This chapter contains an introduction, which describes the research background that underlies this discussion, and there is a formulation of the problem. Furthermore, there are research objectives and benefits, which aim to benefit from this research, then literature review, then research methods, including types and research approaches, data sources, data collection techniques and data analysis techniques, and writing systematics.

CHAPTER II: This chapter will discuss an overview of A. Polygamy (definition, Islamic legal basis, requirements, reasons for polygamy, and permission for polygamy in Indonesia) B. Unregistered Marriage. This chapter will discuss unregistered marriage's meaning, history, and overview. C. Judge's considerations, D. Maslahah Mursalah.

CHAPTER III: This chapter will discuss The Sidoarjo Religious Court Decision Number 3776/Pdt.G/2016/PA.Sda. Concerning the polygamy license decision, because he had an unregistered marriage with a second wife as the reason for polygamy, the results of an interview with PA Sidoarjo will be presented.

CHAPTER IV: This chapter will discuss the analysis of judge considerations in decision number 3776/Pdt.G/2016/PA.Sda. regarding polygamy licenses for unregistered marriage and Islamic Marriage Act Analysis of the impact of polygamy licenses for unregistered marriage in case Number 3776/Pdt.G/2016/PA.Sda.

CHAPTER V: Closing is the last chapter of this thesis which contains conclusions and suggestions as a follow-up to this research series—bibliography, which is used as a reference.

CHAPTER II

POLYGAMY, UNREGISTERED MARRIAGE, JUDGE'S CONSIDERATION, MASLAHAH MURSALAH

A. Polygamy

1. Definition

The word polygamy, etymologically, comes from the Greek, that is *polus*, which means *many*, while *gamos* which means *marriage*. When this word's meaning is combined, polygamy will mean a marriage of many or more than one. Marriage system that a man has more than one wife at the same time, or a woman has more than one husband at the same time.²⁴ The definition of polygamy, according to the Indonesian language, is a marriage system in which one party has or marries several members of the opposite sex at the same time.²⁵

As for terminology, polygamy can be known as a situation where a husband has more than one wife. A polygamous husband can have two, three, or four wives simultaneously.²⁶

Experts distinguish the term for a man with more than one wife with polygyny, which comes from the word *polus*, which means *many*, and *gone* means *woman*. In contrast, a wife with more than one husband is called polyandry, which comes from the word *polus*, which means *many*, *andros*, which means *man*.²⁷

In the general sense that applies to our society today, polygamy is defined as a man who marries or has more than

²⁴ M.A. Tihami dan Sohari Sahrani, *Fikih Munakahat (Kajian Fikih Nikah Lengkap)*, (Jakarta: PT RajaGrafindo Persada, 2009), 351.

²⁵ Tihamisohari, *Fiqh Munakahat*, (Jakarta: Rajawali Pers, 2010), 351.

²⁶ Rodli Makmun, dkk, *Poligami*, 15.

²⁷ Ali Imron, *Hukum Perkawinan Islam di Indonesia*, (Semarang: CV. Karya Abadi Jaya, 2015), 67.

one woman. According to the perspective of social anthropology (socio-anthropology), polygamy means a man married to many women or vice versa. Polygamy is divided into two types, that is:

- 1) Polyandry, that is marriage between a woman and several men.
- 2) Polygyny, that is marriage between one man and several women.

In its development, polygyny is rarely used. It can even be said that this term is no longer used in society, except for anthropologists. So that the term polygamy directly replaces the term polygyny with the notion of marriage between a man and several women, which is called polygamy. Furthermore, this word is used as the opposite of polyandry.²⁸

A person is said to practice polygamy based on the number of wives he has simultaneously and not the number of marriages he has ever had. A husband whose first wife dies and then remarries cannot be said to be polygamous because he only marries one wife at a time. So if a person has been married four times or more, but the last wife is one, he cannot be declared polygamous.²⁹

2. Legal Basis

In a marriage, a man can only have one wife. A woman can only have one husband. In his explanation, it was stated that this Marriage Act adheres to the principle of monogamy.³⁰ This is in line with the word of Allah in the letter An-Nisa '[4]: 3:

²⁸ Bibit Suprpto, *Liku-Liku Poligami*, (Yogyakarta: Al-Kautsar, 1990), 71- 72.

²⁹ Rodli Makmun, dkk, *Poligamil*, 16.

³⁰ Ahmad Rofiq, *Hukum Perdata*, 139.

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مِثْلِي
 وَثَلَاثَ وَرُبْعًا ۚ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَلِكَ آدَبُ
 الْأَعْمَالِ ۚ

“If ye fear that ye shall not be able to deal justly with orphans, marry women of your choice. Two, or three, or four. But if ye fear that ye shall not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable, to prevent ye from doing injustice.” (QS. An-Nisa’:3).³¹

It is also strengthened in Surah An-Nisa’ verse 129:

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَلَا تَمِيلُوا كُلَّ
 الْمِيلِ فَتَدْرُوهَا كَالْمَعْلَقَةِ ۚ وَإِنْ تَصْلِحُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ غَفُورًا
 رَحِيمًا

“Ye are never able to do justice between wives, even if it is your ardent desire: But turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air). If ye come to friendly understanding, and practice self-restraint, Allah is Oft-forgiving, Most Merciful.” (QS. An-Nisa’: 129)³²

The two verses above clearly show that the principle of marriage in Islam is monogamy. If the husband can guarantee to do justice to his wives, then polygamy is permitted. According to verse 129 above, especially in terms of sharing love, this cannot be done. However, Islamic Marriage Act

³¹ Departemen Agama RI, *Al-Qur’an Karim*, 77.

³² *Ibid*, 99.

does not close the door to the possibility of polygamy or having more than one wife, as long as the requirements of justice between the wives can be appropriately met.³³ In order to practice polygamy effectively and ensure the implementation is not arbitrary toward wives, Islamic Marriage Act in Indonesia needs to regulate and detail it.³⁴

Several narrations describe the restrictions on polygamy, including a history from Naufal ibn Muawiyah, who said: *"When I converted to Islam, I had five wives. Rasulullah said: "Divorce the one and keep the four."*³⁵ In another narration, Qaisibn Thabit said: *'When I converted to Islam, I had eight wives, I conveyed this to the Apostle, and he said: "Choose four of them."*³⁶

Similar narration from Ghilan Ibn Salamah Al-Tsaqafi:

حَدَّثَنَا هَنَّادُ قَالَ: حَدَّثَنَا عَبْدُهُ، عَنْ سَعِيدِ بْنِ أَبِي عَرُوبَةَ، عَنْ مَعْمَرٍ،
عَنْ الزُّهْرِيِّ، عَنْ سَالِمِ بْنِ عَبْدِ اللَّهِ، عَنْ ابْنِ عُمَرَ، أَنَّ غَيْلَانَ بْنَ
سَلَمَةَ التَّقْفِيَّ أَسْلَمَ وَلَهُ عَشْرُ نِسْوَةٍ فِي الْجَاهِلِيَّةِ. فَأَسْلَمَ مَعَهُ. فَأَمَرَهُ
النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَنْ يَتَخَيَّرَ أَرْبَعًا مِنْهُنَّ

"Hannād has narrated the hadith to us, he said: 'Abdah has narrated the hadith to us from Sa'īd bin Abī 'Arūbah, from Ma'mar, from al-Zuhrī, from Sālim ibn 'Abdullah, from Ibn 'Umar, in fact, Ghailān ibn Salamah al-Tsaqafi had converted to Islam, and he had ten wives in the time of ignorance, they also converted to Islam with him, then the

³³ Ahmad Rofiq, *Hukum Perdata*, 140.

³⁴ *Ibid.*

³⁵ Siti Musdah Mulia, *Islam Menggugat Poligami*, (Jakarta: Gramedia Pustaka Utama, 2007), 46.

³⁶ *Ibid.*

Prophet saw. told him to choose only four of them.” (HR. Tirmidhi).³⁷

The sources of polygamy Marriage Act contained in the Qur'an and hadith above clearly contain provisions for polygamy in Islam. As quoted by Rodli Makmun, According to Syahrur, polygamy must be linked to the issue of protecting orphans as mandated in the Qur'an. According to him, polygamy is legal as long as the orphan's needs are fulfilled to achieve his happiness and well-being. Therefore, when he wants to practice polygamy, a polygamist must marry a woman who has the status of a divorced widow with her husband or is divorced as his second, third or fourth wife. Nevertheless, what is more, important is that when the widows marry, their biological fathers have left them to die, so they become orphans.³⁸

Even though there are different opinions, the scholars' statement above leads to the same maximum number: the number of wives of four people. Regarding the maximum number of four wives, the Prophet Muhammad SAW explained the following:

حَدَّثَنَا أَحْمَدُ بْنُ إِبْرَاهِيمَ الدَّورِيُّ قَالَ: حَدَّثَنَا هَشِيمٌ، عَنْ ابْنِ أَبِي لَيْلَى،
عَنْ حُمَيْصَةَ بِنْتِ الشَّمْرَدَلِ، عَنْ قَيْسِ بْنِ الْحَارِثِ، قَالَ: أَسَلَمْتُ وَعِنْدِي
ثَمَانِ نِسْوَةٍ، فَأَتَيْتُ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَقُلْتُ ذَلِكَ لَهُ، فَقَالَ:
احْتَرِّ مِنْهُنَّ أَرْبَعًا

³⁷ Masiyan M Syam & Muhammad Syachrofi, “Hadis-Hadis Poligami (Aplikasi Metode Pemahaman Jadis Muhammad al-Ghazali)”, *Diroyah: Jurnal Hadis*, Vol. 4, No. 1, (Sep, 2019), 93.

³⁸ Rodli Makmun, *Poligami*, 7.

"Said Ahmad bin Ibrahim al-Durqi, said Hasyim bin Abi Laili from Hamidah bint Syamdal from Qais bin Haris said: 'I embraced Islam while I have eight wives. I complained about this to the Prophet; then he said: "Choose only four wives from them" (H.R. Ibnu Majah)³⁹

3. Reason for Polygamy

In principle, a man's marriage may only have one wife, so polygamy or a husband with more than one wife is permissible if the parties desire and the court gives permission.⁴⁰ The reasons guided by the court for granting permission for polygamy are emphasized in Article 4, paragraph 2 of Marriage Act Number 1 of 1974 concerning marriage. The court referred to in paragraph (1) of this article only permits a husband to have more than one wife if:

- a) The wife cannot carry out her obligations as a wife.
- b) The wife has a disability or an incurable disease.
- c) The wife cannot give birth to children.⁴¹

Concerning Article 4 above, at least it shows that three reasons are used as the basis for applying for polygamy. First, the wife cannot carry out her obligations as a wife. Secondly, the wife has a disability or incurable disease. Thirdly, she cannot bear children.⁴²

The reasons above are also contained in Article 57 of the Compilation of Islamic Marriage Act (KHI), that is: The Religious Courts only permit husbands who will have more than one wife if:

- a) The wife cannot carry out her obligations as a wife.

³⁹ Masiyan M Syam & Muhammad Syachrofi, "Hadis-Hadis Poligami (Aplikasi Metode Pemahaman Jadis Muhammad al-Ghazali)", *Diroyah: Jurnal Hadis*, Vol. 4, No. 1, (Sep, 2019), 94.

⁴⁰ Ahmad Rofiq, *Hukum Perdata* 140.

⁴¹ Pasal 4 Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

⁴² Mardani, *Hukum Keluarga Islam di Indonesia*, (Jakarta: Kencana, 2016), 96.

- b) The wife has a physical disability or an incurable disease.
- c) The wife cannot give birth to children.⁴³

If the reasons above are considered, they are related to the primary purpose of marriage, which will form a happy and eternal family or household based on belief in the One and Only God, or in the Compilation of Islamic Marriage Act (KHI) as known as *sakinah, mawaddah, and warahma*. When these three things are absent in a family, the emptiness and emptiness of life in a sweet and romantic household hits them.⁴⁴

There is an article that allows polygamy for specific reasons. It is clear that the principle adhered to by the Marriage Act is not the principle of absolute monogamy but is called open monogamy or non-absolute monogamy. Polygamy is placed in an emergency legal status or extraordinary circumstances. In addition, the institution of polygamy is not solely the full authority of the husband but is based on permission from the Judge (court).⁴⁵

4. Polygamy Conditions

Islam pays full attention to polygamy by limiting it with certain conditions, both in terms of the maximum number and other requirements, such as:

- a) The maximum number of wives allowed to be polygamous is four women. If one of them dies or gets divorced, the husband can find another replacement as long as there are no more than four people simultaneously. It is explained in QS. An-Nisa'(4):3.

⁴³ Abdurrahman, *Kompilasi Hukum Islam di Indonesia*, (Jakarta: Akademika Pressindo, 1992), 126.

⁴⁴ Ahmad Rofiq, *Hukum Perdata*, 140-141.

⁴⁵ Amiur Nuruddin, dan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia Studi Kritis Perkembangan Hukum Islam dari fiqih, UU No 1/1974 sampai KHI*, (Jakarta: Prenada Media, 2004), 162.

- b) Men can act pretty towards their wives and children, which involves external issues such as time distribution, income distribution, and other matters related to external interests. As for mental problems, humans cannot effectively do justice.⁴⁶

Based on Article 40 PP. Number 10 of 1975, a husband who intends to have more than one wife must submit a written Plea to the court where he resides. A written Plea is still made for the illiterate, but he does not include a signature in the Plea letter but puts his thumbprint.⁴⁷ Before practicing polygamy, the conditions for polygamy must be fulfilled, and this is regulated in Article 5 of Marriage Act Number 1 of 1974, that is:

- a) To be able to apply for polygamy to the court, as referred to in Article 4 paragraph (1) of this Marriage Act of 1974, the following conditions must be met:
- There is consent from his wife/wives.
 - There is certainty that husbands can guarantee the necessities of life for their wives and children.
 - The husband is guaranteed to treat his wives and children fairly.
- b) The consent referred to in paragraph (1) letter a of this article is not needed for a husband if it is impossible for his wife/wives to be asked for his consent and cannot become a party to the agreement or if there is no news from his wife for at least 2 (two) years, or for other reasons that need to be assessed by a court judge.

⁴⁶ M. Quraish Shihab, *M. Quraish Shihab Menjawab*, (Jakarta: Lentera Hati, 2010), 75-76.

⁴⁷ Bibit Suprpto, *Liku-Liku*, 153.

Approval from the wife to the husband who wants to remarry can be given verbally or unwriting. If consent is to be given verbally, it must be said in person before the court hearing per Article 41 PP No. 9 of 1975, while written consent is done in a letter signed by the wife or wives.⁴⁸ To determine the extent to which a husband's ability to guarantee the necessities of life for his wives and their children can be proven by:

- a) A statement regarding the husband's income is signed by the treasurer where he works, whether they work as Civil Servants or private legal entities such as factories, private schools, private universities, service bureaus, and other business entities, which receive wages or salaries at any time.
- b) Income tax certificate. The size of the income tax shows the size of the wealth the man owns.
- c) Other certificates can be accepted by the court, such as land and building tax (PBB) statements on land and buildings owned by the man, land certificates, and other securities.⁴⁹

Whether there is a guarantee that the husband will treat his wives and their children fairly is evidenced by the existence of a statement or promise made by the husband, which in form of making it is determined for this purpose based on Article 41 PP. Number. 9 of 1975.⁵⁰ To distinguish the requirements in Articles 4 and 5, in Article 4, they are called alternative requirements, which means that one must exist and can apply for polygamy. Meanwhile, Article 5 is a cumulative requirement that all husbands who practice polygamy must fulfill all of them. Another alternative requirement besides Article 4 is Article 57 KHI.

⁴⁸ Amiur Nuruddin, dan Azhari Akmal Tarigan, *Hukum Perdata*, 155.

⁴⁹ *Ibid.*

⁵⁰ Bibit Suprpto, *Liku-Liku*, 154.

In addition to the alternative conditions in Article 57 KHI, which must be included in the permit for polygamy, there must also be a cumulative requirement, that is in Article 58 KHI, which reads:

- a) In addition to the main requirements that must be mentioned in Article 55 paragraph (2), in order to obtain a permit for the Religious Courts, the conditions specified in Article 5 of Marriage Act No. 1 of 1974 must be met, that is:
 - There is the wife's consent.
 - There is the certainty that the husband can guarantee the necessities of life for his wives and their children.
- b) Without prejudice to the provisions of Article 41 letter b of Government Regulation (PP) No. 9 of 1975, the consent of the wife or wives can be given in writing or orally, but even if there has been written consent, this agreement is confirmed by the wife's verbal consent at the trial of the Religious Court.
- c) The consent referred to in paragraph (1) letter a is not needed for a husband if the wife or wives cannot be asked for their consent and cannot become parties to the agreement or if there is no news from the wife or wives for at least two years or for other reasons that need to be assessed by a judge.⁵¹

B. Unregistered Marriage

1. Definition

Unregistered marriage is a marriage that fulfills the pillars and conditions of marriage but has not been registered at the sub-district Office of Religious Affairs (KUA) for those who are Muslim. Unregistered marriage is performed by Muslims worldwide, fulfilling both the pillars and the

⁵¹ Abdurrahman Al-Jaziri, *Kitab Al-Fiqh 'Ala Mazahib Al-Arba'ah*, terj. Chatibul Umam, Juz IV, (Jakarta: Darul Ulum Press, 1994), 127

conditions of marriage, but the Marriage Registrar (PPN) does not record it. Both the man and the woman are married for the umpteenth time. Therefore the marriage is registered with the Marriage Registrar (PPN).⁵²

Unregistered marriage, according to Marriage Act Number 1 of 1974 concerning Marriage, is an invalid marriage because this same-sex marriage is a deviation from the provisions of Marriage Act Number 1 of 1974 concerning Marriage, that is the provisions in Article 2 paragraph (2) concerning registration of marriages. Whereas the legal consequences for a child are his status as a child out of wedlock and because he only has a civil relationship with his mother and his mother's family, and at any time his father can deny the existence of the child, besides that he is not entitled to a living, educational expenses and his father's inheritance.

2. History of Unregistered Marriage

Unregistered marriage or unregistered marriage, which developed in the Islamic tradition of Arab countries during the Prophet Muhammad SAW period, is related to functions and sanctions. In Umar's perspective, the definition of unregistered marriage is based on the case of a man and a woman. It means the requirements for the number of witnesses have not been met. If witnesses are not complete even though someone has already come, this kind of marriage, according to Umar, is considered unregistered.⁵³

According to Abu Hanifah, if the witnesses have been fulfilled, they are ordered by the person getting married to keep the marriage they witnessed secret. According to Imam Malik, unregistered marriages must be *faskh* because an announcement is a condition for marriage. The presence of

⁵² Neng Jubaidah, *Pencatatan dan Perkawinan Tidak Tercatat Menurut Hukum Islam Tertulis di Indonesia dan Hukum Islam*, (Jakarta: Sinar Grafindo, 2010), 345.

⁵³ Amiur Nuruddin, dan Azhari Akmal Tarigan, *Hukum Perdata*, 180.

witnesses is only a compliment. According to Abu Hanafiah and Syafi'i, this kind of marriage is not a unregistered marriage because the function of the witness itself is an announcement. Therefore if it has been witnessed, there is no need for a special announcement. Thus it can be concluded that the meaning of unregistered marriage is related to the witness function.⁵⁴

3. Unregistered Marriage Perspective of Positive Marriage Acts

Unregistered marriage emerged after the promulgation of Marriage Act Number 1 of 1974 concerning Marriage and the issuance of Government Regulation Number 9 of 1975 concerning the Implementation of Marriage Act Number 1 of 1974 concerning Marriage. Those regulations mention that each marriage must be registered according to religious provisions. This unregistered marriage is usually carried out in the presence of religious leaders by carrying out rituals or the like, which are considered valid according to religion and public beliefs.⁵⁵

Etymologically the word *siri* comes from Arabic, which means *secret*. In the Indonesian dictionary, the word *siri* is paired with the word *sir*, which means *secret* or *hidden*.

According to Idris Ramulyo, S.H., unregistered marriage is: A marriage performed by Indonesian Muslims, fulfilling both the pillars and conditions of marriage but not being registered with the Marriage Registrar, as regulated and determined by Marriage Act Number 1 of 1974.⁵⁶

Idris Mulyono, S.H., perhaps means that by unregistered marriage, it is a marriage that is carried out clandestinely or secretly. As for unregistered marriage in fiqh books, the term unregistered marriage is not known. This term is popular locally in marriage fiqh in Indonesia. Unregistered

⁵⁴ *Ibid.*, 180-181.

⁵⁵ Hilman Hadikusuma, *Hukum Perkawinan Indonesia*, (Bandar Lampung: Mandar Maju, 1990), 110.

⁵⁶ Idris Ramulyo, *Tinjauan Beberapa Pasal Undang-Undang No.1 Tahun 1974 dari Segi Hukum Perkawinan Islam*, (Jakarta: Ind-Hill-Co, 1990), 22.

marriage in the context of society in Indonesia is often referred to in two senses, that is:

- a) Marriages carried out secretly, without inviting outsiders other than the two families of the bride and groom, then do not register their marriage with the Office of Religious Affairs (KUA) for Muslims and the Civil Registry Office for non-Muslims, so their marriage does not have formal legality in Marriage Act Positive in Indonesia as regulated in Marriage Act Number 1 of 1974 concerning Marriage.
- b) As long as the pillars and conditions are met according to religious Marriage Act, the marriage is valid, and the wife and her offspring are entitled to an inheritance if her husband dies, but the marriage does not have legal force in the eyes of the state or *standy in judicio*.⁵⁷

The absence of official disability and publication, according to Islamic jurisprudence, cannot result in the annulment or invalidity of a marriage. Official disability stipulated in Marriage Act Number 1 of 1974 is administrative. However, recording in the form of a marriage certificate is intended to help maintain and solve various problems that may occur due to marriage. Likewise, publications such as holding a walimah (wedding reception/party) are instrumental so that the general public knows that certain men and women are legally husband and wife, in addition to avoiding slander. For this reason, according to Islam, having a walimah in a marriage is recommended, even in a straightforward form.⁵⁸

⁵⁷ Abdul Shomat, *Hukum Islam Penormaan Prinsip Islam dalam Hukum Indonesia*, (Jakarta: Kecana. 2010), 309.

⁵⁸ Abdurrahman Al-Jaziri, *Kitab Al-Fiqh*, 278.

C. Judge's Consideration

In deciding a case, a judge must have a basis so that the resulting basis can be accounted for the litigants, the community, the state, and Allah SWT. In Indonesia, a judge must fulfil the material and formal legal bases in deciding a case submitted to the court. The basis of material Marriage Act is the Marriage Act that contains the rules of interests and relationships in the form of orders and prohibitions.⁵⁹ According to Mackenzie, several theories or approaches can be used by judges in considering the imposition of a decision in a case, that is as follows:⁶⁰

1. Balance Theory

The theory of balance is the balance between the conditions determined by the Marriage Act and the interests of the parties involved or related to the case.

2. Art Approach Theory and Intuition

The decision-making by the Judge is the discretion or authority of the Judge. As a discretion, in imposing a decision, the Judge will adjust to the situation in a civil case. The Judge will look at the condition of the litigants, that is the plaintiff and the defendant, or the defendant or the public prosecutor in a criminal case. In making a decision, the Judge uses an artistic approach, more determined by instinct or intuition than the Judge's knowledge.

3. Theory of Scientific Approach

The starting point of this science is that the process of issuing decisions must be carried out systematically and with great care, especially with previous decisions, to ensure the consistency of the Judge's decisions.

4. Experience Approach Theory

⁵⁹ Fahad Asadulloh, *Pertimbangan Hakim Dalam Mengabulkan Izin Poligami*, (Kediri: STAIN Kediri, 2011), 34.

⁶⁰ Ahmad Rifai, *Penemuan Hukum*, (Jakarta: Sinar Grafika, 2010), 102.

A judge's experience can help him deal with the cases he faces every day.

5. Ratio Decide Theory

This theory is based on a fundamental philosophical foundation that considers all aspects of the subject matter in dispute and then seeks legislation relevant to the subject matter in dispute as a legal basis for imposing a decision. The Judge's considerations must be based on a clear motivation to uphold the Marriage Act and provide justice for the litigants.

6. Wisdom Theory

The Judge must decide pretty and follow the applicable rules in deciding a case.

In E. Utrecht's book, citing Van Apeldoorn's opinion, the Judge must:⁶¹

- a) Adapting Marriage Acts to concrete factors and concrete events in society.
- b) Add Marriage Acts if necessary.

D. Masalah Mursalah

1. Definition of Masalahah

Maslahah in Arabic has dual meaning. The first is goodness and benefit or interest. Literally speaking, the meaning of *aslaha* in Arabic is to do something that is good, beneficial, or to repair something. In colloquial Arabic, things that contain maslahah means that those things are filled with goodness. The second meaning of the word maslahah is an action of public interest. This meaning is symbolic (*majazi*) to the word maslahah. In Arabic, business contains maslahah (goodness) and seeking knowledge is a maslahah (benefit) because both things are in man's best interest.⁶²

⁶¹ E. Utrecht dan Moch Saleh Djindang, *Pengantar dalam Hukum Indonesia*, (Jakarta: Sinar Harapan, 1980), 204.

⁶² Abdul Wahhab Khallaf, *Ilmu Ushul Fiqh*, terj. Moh. Zuhri dan Ahmad Qarib (Semarang: Dina Utama, 1994), 139.

From the terminology aspect, several ulama have given various definitions of *maslahah* according to an approach of their choice. The first is that *maslahah* refers to the protection of the higher objectives of *shariah*. According to the definition by al-Ghazali, *maslahah* is anything that preserves the requirements and objectives of *shariah*. The higher objective of *shariah*, according to him, is to defend religion, life, lineage, intellect, and properties. He further states that all things that can protect and preserve these five things are called *maslahah*. Contrarily, anything that can undermine these five things are called *mafsadah* and rejecting *mafsadah* also falling under *maslahah*. This definition by al-Ghazali therefore does not fit the literal definition of *maslahah*.⁶³

The second definition clearly shows that it is based on wisdom behind the Marriage Act or its implications. According to Zayn al-Abidin al-Abd, this particular definition of *maslahah* is garnered from a large number of *usul fiqh* scholars towards *illah*. An example of *maslahah* according to this definition is the process of ownership via the Islamic legal ruling of sale and hire purchase. The third definition is more literal, which is ‘goodness’. As per the definition stipulated by Izzuddin al-Salam, *maslahah* is divided into two parts. The first is *maslahah* which is tangible and real such as happiness and enjoyment from things such as delicious food, contentment, and good health. The second part is *maslahah* which is symbolic in nature, for example the source of happiness and enjoyment such as business and farming.⁶⁴

All three of these definitions have been referred to and debated by scholars, classical and contemporary ulama in their discussions on *maslahah*. These definitions provide insight into the implications of discourse regarding the determination of Islamic legal ruling. If the definition provided by Izzuddin

⁶³ Noel J. Coulson, *A History of Islamic Marriage Act*, (Edinburgh: Edinburgh University Press, 1978), 144.

⁶⁴ *Ibid.*

al-Salam is upheld, the esteemed scholar would have no qualms in saying that *maslahah mursalah* can be applied a method of determining Islamic legal ruling. However, if al-Ghazali's definition is referred to, *maslahah mursalah* cannot be applied for this purpose. This is because his definition falls outside the context of the debate on *maslahah*, where his focus is in the context of *maqasid*.⁶⁵

2. Clasification of Maslahah

- a. *Maslahah dharuriyyah*, which means goodness or benefit that becomes a basic necessity in mankind's life. If these basic necessities are not attained, man's life will be destined for ruin. These necessities encompass five things, which are, religion, life, intellect, lineage and properties. Examples of *maslahah dharuriyyah* are things such as food, clothing and ownership of possessions.
- b. *Maslahah hajjiyyah*, which are benefits that make life easy and convenient for mankind. The execution of *maslahah hajjiyyah* must be in accordance to the framework of *maslahah dharuriyyah*. If this type of benefits are not attained, there will be difficulty in fulfilling the five abovementioned elements of *dharuriyyah*. Examples of this type of *maslahah* include the necessity to hunt, sale and purchase transactions and renting. If these things are not compelled by Islamic Marriage Act, man's life will become difficult and arduous.

⁶⁵ M. Nazir Alias, dkk, "The perspective of *Maslahah Mursalah* and *Maqashid Shariah* as Methods of Determining Islamic Legal Ruling", *Turkish Journal of Computer and Mathematics Education*, Vol. 12, No. 2 (April, 2021); *Semantic Scholar*, 2995-2996.

- c. *Maslahah tahsiniyyah*, which are benefits that can improve man's quality of life so he may live it in a comfortable manner. The status of this type of benefit is the lowest, where its absence will not cause real detriment to man's life. For example, cleansing oneself from a state of impurity, washing away dirt before performing an act of worship, or covering the *awrah* during *salah* (prayer). This means that an individual who is confined to a space where he or she cannot take ablution or cover their *awrah*, is still obliged to perform *salah*, despite not being able to fulfil the conditional requirements of *salah*.⁶⁶

3. Types of *Maslahah*

The benefits of humans in this life are very many and varied, as it is for the good of humans, but some others are only thought to be for the good of humans. In this case, *maslahah mursalah* consists of three kinds:

- a. *Maslahah mu'tabarah*: *Maslahah* which is acknowledged by Islamic Marriage Act through specific legal text or evidence. *Maslahah* in this category are based on reference to specific legal text or evidence in the Qur'an and Sunnah such as the compulsory prayers, fasting during Ramadan, zakat and the Hajj pilgrimage. In other words, all of Allah's commands contain *maslahah*. Islam spreads *maslahah* on mankind, which is not limited to this world, but extends to the afterlife as well. In fact, scholars posit that *maslahah* in the afterlife is the foundation of *maslahah* in this world, based on the belief that this life is temporary and the next life is eternal. Therefore, the scholars take the view that all divine Marriage Act coming from Allah and bestowed upon mankind does not divide these two *maslahah*. The fulfilment of Allah's commands by mankind will yield good

⁶⁶ *Ibid.*

consequences even in this world, before the afterlife begins. Similarly, the negative consequences of ignoring Allah's commands will also be felt in this world before the eternal world.

- b. *Maslahah mulghah*: *Maslahah* in this category is prohibited by Islamic legal text because of its dangerous nature, although some people may see these things as having good in them. Some examples are committing suicide, usury and consuming alcohol. Islamic Marriage Act forbids these things so that mankind can protect itself from its dangers.
 - c. *Maslahah mursalah*: that is considered reasonable by the mind in line with the objectives of the Shari'a in establishing Marriage Act, but there is no shara' guidance against it. For example, traffic regulations with all the signs. In such regulations, no specific argument regulates it in the Qur'an and the Sunnah of the Prophet. However, regulations like this align with the objectives of the Shari'a, which in this case is to preserve life and property.⁶⁷
4. Conditions of *Maslahah Mursalah*

Abdul Wahhab Khallaf explained several requirements for functioning *maslahah mursalah*, that is:

- a. Something considered beneficial must be in the form of essential benefits, that is those that will bring benefits or prevent *madharat*, not in the form of mere conjecture by only considering the existence of benefits without looking at the negative consequences they cause. For example, the latter is the assumption that the right to impose divorce is in the hands of women, not in the hands of men, which is a false benefit because it is contrary to the provisions of the Shari'a, which emphasizes that the right to impose divorce lies in the hands.

⁶⁷ *Ibid.*, 2998.

- b. Something considered beneficial should be in the form of public interest, not personal interest.
 - c. Something considered *maslahah* does not conflict with strict provisions in the Qur'an or the Sunnah of the Prophet or conflict with *ijma'*.⁶⁸
5. Prosperity and Position of *Maslahah Mursalah*

Among the *ulama* of the *ushul madhhab*, there are indeed differences of opinion regarding the position of *maslahah mursalah* and blasphemy in Islamic Marriage Act, both those who accept and those who reject, among others:

The *Syafi'iyah* *ulama* and *Hanabillah* *ulama* believe that *Maslahah Mursalah* cannot be used as proof of *shari'a* and an argument for Islamic Marriage Act. There are several arguments put forward by them, including:

- a. *Maslahah* is justified by *shara'* or Islamic Marriage Act, some are rejected, and some are disputed or not rejected and not justified. *Maslahah mursalah* is included in the category of disputed *maslahah*. The attitude of *maslahah mursalah* as *hujja* means basing the determination of Islamic Marriage Act on something doubtful and taking one of the two possibilities without supporting arguments.
- b. The attitude of making *maslahah mursalah* a proof tarnishes the sanctity of Islamic Marriage Act by following lust under the pretext of *maslahah*. In this way, there will be many determinations of Islamic Marriage Act based on the interests of lust. It is because the world continues to advance, and new things will appear, which are viewed as *maslahah* by lust, even though, according to *shara'* they bring *mafsadah*. Strictly speaking, the determination of Islamic Marriage Act is based on lust.
- c. Islamic Marriage Act is complete and perfect. Making *maslahah mursalah* proof of establishing Islamic

⁶⁸ Satria Effendi M.Zein, *Ushul*, 139-140.

Marriage Act means indirectly not acknowledging the character of the completeness and perfection of Islamic Marriage Act. Islamic Marriage Act is not complete and perfect, but something is lacking. Likewise, viewing *maslahah mursalah* as evidence will impact differences in Islamic Marriage Act due to differences in conditions or situations.⁶⁹

The second group says that *maslahah mursalah* is a source of Marriage Act and proof of sharia. The Maliki madhhab and Imam Ahmad Ibn Hanbal share this opinion. The reasons for this group are:

- a. According to this group, as explained by Abu Zahrah, the Companions had compiled the Al-Qur'an in one *Muhshaf*, which was done because they were worried that the Al-Qur'an might be lost. It did not exist at the time of the Prophet, and there was no prohibition. The collection of the Qur'an in one manuscript, solely for the sake of benefit. Furthermore, in practice, the Companions have used *maslahah mursalah* for which no evidence forbids or orders.
- b. The friends have used *maslahah mursalah* by the shara's objectives, so it must be practiced according to that purpose. If it is ruled out, it means that the purpose of the shari'a has been set aside, and such a thing is null and void. Therefore, adhering to *maslahah* is a miracle because this is one of the main principles that stand alone and does not come out of other principles instead, there is a meeting point.
- c. According to Zaky al-Din Sya'ban, the Marriage Act's real purpose is to realize the benefit and prevent damage from occurring in human life. Furthermore, there is no doubt that the benefit will continue to change with changing circumstances and the

⁶⁹ Asmawi, *Perbandingan Ushul Fiqh*, (Jakarta: Amzah, 2013), 132-134.

environment. If the benefit is not scrutinized and is not responded to with appropriate provisions except only fixated on the existence of arguments that acknowledge it, then the benefit will undoubtedly disappear from human life, and the growth of the Marriage Act will stop. Even though the attitude that does not pay attention to the development of benefit is not in line with the aim of the shari'a, that is realizing benefit and rejecting damage in human life.⁷⁰

6. Legal Status of Maslahah Mursalah

According to ushul ulama, some ulama use the term *maslahah mursalah* with the word *al-munasib al-mursal*. Some use *al-istislah* and some who use the term *al-istidlal al-mursal*. Although these terms look different, they have one purpose, each of which has a different perspective. Every Marriage Act established based on *maslahah* can be viewed from three aspects, that is:

- a. Look at the *maslahah* contained in the case in question. For example, making a marriage certificate complements the current administration of the marriage contract. The marriage certificate has benefits, but these benefits are not based on the argument that shows the importance of making the marriage certificate. *Maslahah* viewed from this side is called *maslahah al-mursalah*.
- b. Following the objectives of *shara'* (*al-wasf al-munasib*), which requires the existence of a legal provision in order to create a benefit. For example, the marriage certificate contains characteristics following the objectives of *shara'*, that is to maintain hereditary status, but particular arguments do not indicate the nature of this conformity. This is what is called *al-munasib al-mursalah*.

⁷⁰ *Ibid*, 231-233.

- c. Unique propositions indicate the process of determining the Marriage Act on a problem. In this case, it is the determination of a case recognized as valid by one of the shara's objectives. Such a process is called *istislah* (defining a problem).⁷¹

⁷¹ Rachmat Syafe'i, *Ilmu Ushul Fiqh*, (Bandung: CV Pustaka, 2010), 118.

CHAPTER III

DESCRIPTION OF THE SIDOARJO RELIGION COURT DECISION NUMBER 3776/PDT.G/2016/PA.SDA

A. Profile of Sidoarjo Religious Court

1. History of Sidoarjo Religious Court

Religious Courts existed before the arrival of the Dutch Colonial Government because Islam had lived and developed since the time of the Islamic Kingdoms in Indonesia, such as Demak, Kudus, and Aceh. Religious Courts were founded in the mosque environment with the assistance of a person who mastered Islamic Marriage Act called the penghulu. The existence of the Religious Courts began to shift and was not even recognized after the Dutch Government issued staatsblad 1937 Number 116, which reduced the authority of the Religious Courts. Even the decisions of the Religious Courts had to be confirmed more Previously by the District Court, and it was only limited to marriage and inheritance.

After Indonesia's independence, Religious Courts began to be recognized after Marriage Act Number 14 of 1970. The authority of the Religious Courts was strengthened after the issuance of Marriage Act Number 7 of 1979, but as an institution, the Religious Courts were under the Ministry of Religion. After the issuance of Marriage Act Number 4 of 2004 concerning judicial powers, amendments to Marriage Act Number 14 of 1970 and updated with the issuance of Marriage Act Number 48 of 2009 and Marriage Act Number 5 of 2004 were then updated with Marriage Act Number 3 2009 concerning the Supreme Court.

In the early history of the Sidoarjo Religious Court, formerly under the supervision of the Ministry of Religion and in the same scope as the KUA, previously, there was no Religious Court. KUA in Sidoarjo is located near Sidoarjo Square. However, after the promulgation of Marriage Act No. 4 of 2004 concerning judicial power, the Religious Courts

were taken over by the Supreme Court, and since then, the Religious Courts and KUA have carried out their respective functions. The Sidoarjo Regency Religious Court was formed based on the Ordonatic sadblat 1882-152 concerning the Religious Courts on the Islands of Java and Madura, and then there was a change in the jurisdiction of the Religious Courts.⁷²

2. Sidoarjo Religious Court Organizational Structure

The Organizational Structure of the Sidoarjo Religious Court refers to Marriage Act Number 7 of 1989 concerning Religious Courts, Decree of the Chief Justice of the Supreme Court Number KMA/004/II/92 concerning the Organization and Work Procedure of the Registrar of the Religious Courts and the High Religious Court, KMA Number 5 of 1966 concerning Organizational Structure of the Judiciary, and Supreme Court Regulation Number 7 of 2015 concerning the Organization and Work Procedure of the Registrar and Secretariat of the Judiciary.

Chairman	Dr. Hj. Hasnaya H. Abd. Rasyid, M.H
Vice Chairman	Drs. Mustafa, M.H
Judges	Drs. Rusli M, M.H Dra. Hj. Nur Fadhilatin Dra. Hj. Imas Salamah, M.H Drs. Hj. Hasniati D, M.H Drs. H. Imam Syafi'i, S.H., M.H Ridwan, S.H

⁷² Sejarah Pengadilan Agama Sidoarjo diakses pada <https://pa-sidoarjo.go.id/profil-pengadilan/sejarah-pengadilan> pada tanggal 30 Oktober 2022 pukul 22.50 WIB

Drs. A. Khoiron, M.Hum
 Drs. H. Arifin, S.H, M.H
 Drs. H. Ilmi
 Drs. Siti Muarofah S, S.H
 Drs. Imam Shofwan, M. Sy
 Drs. M. Shohih, S. H, MH
 Drs. H. Muhidin, M.H
 Dra. Hj. Nurul Qalbi, M. HES
 Drs. Moh. Muchsin, M.Sy
 Drs. Akramudin, M.H
 Drs. H. Husni Mubarak
 Drs. Abd. Rauf
 Drs. Muhlis, S.H, M.H
 Drs. Hj. Farhanah, M.H

Secretary	Aryl Zabarrespati, S.E
Head of IT Planning and Reporting	Heru Santoso, S.H.I
Head of General Affairs and Finance	Moch. Afif Afandi, S. Kom
Head of Personnel and Ortala Subdivision	Kholid Hendra Irawan, S. H

Library Administration	Dra. Hj. Rosdinar
Human Resource Analyst	Lia Safitri, S.IAN
Computer Institution	Hasan Muda Afghani, S.T
First Staffing Analyst	Wildana Mahmuda, S.Sos
Court Clerk	Drs. Abdullah Faqih, M.H.
Junior Court Clerk Plea	Hj. Nurul Islah, S. H
Junior Court Clerk Marriage Actsuit	Moh. Nurholis, S.H
Junior Court Clerk Marriage Act	Muhammad Ali Said,S.HI, M.H
Case Register Administrator	Ayu Wulandari, A.Md
Alternate Court Clerk	Hamim, S.H Ninik Sa'adah, S.Si, S.H Andri Dwi Perwitasari, S.H Abdusyukur, S.Sos, S.H Miftahul Husnah, S. H Aida Shofiyati, S.H, M.KN Deni Setiadi, S.H Wieta Mutiara A, S.H

Afni Vina Afifah, S.H

Siti Hauroh Z, S.H.I, M.H

Hadi Winoto, S.H

Bailif

Suhartono

The primary duties and functions of the position in the Sidoarjo Religious Court as the First Class Class I Religious Court are:

- a. The chairman is fully responsible for the implementation of the duties and functions of the Sidoarjo Religious Court, both internally and externally, provides guidance, supervision, and thoughts on the implementation of the duties of the Sidoarjo Religious Court, evaluates reports regarding the handling of cases carried out by Judges and Substitute Registrars, then sends reports and the results of the evaluation in person periodically to the High Religious Court and the Supreme Court, Continuing SEMA. PERMA, and letters from the Supreme Court or the High Religious Court relating to case Marriage Act to Judges, Court Clerks, Deputy Court Clerks, Junior Court Clerks, Alternate Court Clerks, and Bailiffs, carry out oversight of the behavior of Judges and Court Clerk Officials inside and outside service.
- b. The Deputy Chairperson has the task of carrying out the Chairperson's duties in the absence of the Chairperson and carrying out the tasks delegated by the Chairperson to him together with the Chairperson, leading and being responsible for carrying out the duties of the Sidoarjo Religious Court properly and smoothly.

- c. The Judge has the task of setting the day of the trial, examining and adjudicating the case files given to him, and expressing opinions in deliberations. The Judge must sign the decisions pronounced in the trial, is responsible for the preparation and correctness of the trial minutes, and signs them before the subsequent trial.
- d. The Court Clerk has the task of leading, providing support in the technical and administrative fields of cases and completing letters related to cases, and has the function of:
 - implementing coordination, coaching, and supervising the implementation of tasks in providing support in the technical field;
 - implementation of administrative management of Plea cases;
 - implementation of administrative management of Marriage Actsuit cases;
 - implementation of case administration management, case data presentation, and case transparency;
 - implementation of financial administration in the technical and financial program of cases determined based on Marriage Acts and regulations, mutation, evaluation, and administration of the Clerk's Office;
 - implementation of mediation;
 - technical clerkship and cadetship technical development; and
 - implementation of other functions assigned by the Head of the Class I Religious Court (Supreme Court Regulation Number 07 of 2015, Article 116).
- e. The Deputy Clerk of Pleas is carrying out case administration in the field of Pleas, and has the function of:
 - carrying out examinations, reviewing the completeness of Plea case files;
 - carrying out the registration of the Plea case;
 - implementation of the distribution of cases that have been registered to be forwarded to the Chairperson of the Panel of Judges based on the Appointment of the Panel of Judges from the Chairperson of the Class I Religious Court; -

- implementation of receiving back case files that have been terminated and minuted; - Implementation of notification of the contents of the first level decision to the parties who are not present; - the delivery of notification of decisions at the level of appeal, cassation and review; - implementation of services for requests for copies of the decision on the case Plea; - carrying out the receipt and delivery of the case file being appealed for cassation and review; - implementation of supervision of the notification of the contents of the legal remedy decision to the parties and conveying the relationship of submission of the contents of the decision to the Supreme Court; - implementation of storing case files that do not yet have permanent legal force; - implementation of submission of case files that have permanent legal force to the Junior Clerk of Marriage Act; - implementation of administrative affairs of the clerk's office, and; - implementation of other functions given by the Court Clerk.
- f. The Deputy Clerk of Marriage Actsuits is carrying out the task of carrying out case administration in the field of Marriage Actsuits, and has the function of: - carrying out examinations, reviewing the completeness of Marriage Actsuit case files; - carrying out the registration of Marriage Actsuits; - implementation of the distribution of cases that have been registered to be forwarded to the Chairperson of the Panel of Judges based on the Appointment of the Panel of Judges from the Chairperson of the Class I Religious Court through the Registrar; - implementation of receiving back case files that have been terminated and minuted; - Implementation of notification of the contents of the first level decision to the parties who are not present; - implementation of services for requests for a copy of the decision on

- a Marriage Actsuit; - carrying out the receipt and delivery of case files filed for appeal, cassation and review; - implementation of the notice of statement of appeal, cassation and judicial review to the party accused of appeal, the defendant of cassation and the Respondent of judicial review; - implementation of supervision over the notification of the contents of the legal remedy decision to the parties and conveying the relation of the delivery of the contents of the decision to the High Religious Court and the Supreme Court; - implementation of consignment acceptance; - implementation of the receipt of the request for execution; - implementation of storing case files that do not yet have permanent legal force; - implementation of submitting case files that already have permanent legal force to the Junior Clerk of Marriage Act; - implementation of administrative affairs of the clerk's office; and - performance of other functions assigned by the Court Clerks.
- g. Clerk Junior Marriage Act has the task of carrying out the collection, processing, and presentation of case data as well as reporting, and has the functions of: - carrying out the collection, management, and presentation of case data; - implementation of the presentation of case statistics; - Implementation of Hisab Rukyat coordinated with the Regional Office of the Ministry of Religion; - implementation of the preparation and delivery of case reports; - implementation of arrangement, storage, and maintenance of case archives; - implementing cooperation with the Regional Archives for safekeeping of case files; - carrying out the preparation, management, and presentation of materials related to case transparency; - the implementation of collecting complaints from the public, and; - implementation of other functions

- assigned by the Court Clerks; (article 123) - in addition to carrying out the task of managing the information desk and complaints.
- h. The secretary has the responsibility to provide general administration/secretarial services to all elements within the Sidoarjo Religious Court, is responsible for the implementation of administrative activities, Personnel Sub-Division, General and Finance Sub-Division, Planning, Information Technology and reporting Sub-Division, as well as household affairs other offices, is responsible for office order, employee discipline, holds regular meetings with structural officials and with all employees who are under them. Handling papers, compiling archives, and fostering the administration of Personnel, General Affairs, and Finance, as well as Planning, IT, and Reporting at the Sidoarjo Religious Court.
 - i. The Personnel, Organization, and Administration Sub-Section has the task of carrying out some of the tasks in managing and fostering the administration of Personnel at the Sidoarjo Religious Court, formulating staffing facilitation policies based on applicable Marriage Acts and regulations.
 - j. The General and Finance Sub-Section has the task of carrying out some of the tasks in the field of Administrative Affairs and Archives and formulating policies on facilitating the implementation of financial management and inventory assets of State Property, besides having duties in managing, implementing and reporting finances at the Sidoarjo Religious Court and formulating policies facilitating the implementation of management based on the applicable Marriage Acts and regulations.
 - k. The Planning, Information Technology, and Reporting Sub-Section have the task of preparing planning, program and budget implementation

materials, management of information technology and statistics, and implementation of monitoring, evaluation, documentation and reporting. (Supreme Court Regulation Number 07 of 2015, Articles 324 to 326).

1. The Substitute Registrar assists the Judge in determining trial days, determinations of confiscation of collateral, making minutes of proceedings that must be completed before the subsequent trial, making other stipulations, and typing judgments/trial decisions.
- m. Bailiff / Substitute Bailiff carries out all orders given by the Chairperson of the Court, the Chairperson of the Session, and the Registrar. Deliver announcements, reprimands, and notification of court decisions according to procedures based on statutory provisions, carry out confiscation by order of the head of the court and look at the location carefully regarding the boundaries of the confiscated land and its legal documents, make the minutes of confiscation and submit official copies to interested parties, including the National Land Agency in the event of a land confiscation according to Government Regulation Number 10 of 1961 jo. Articles 198-199 HIR. Bailiffs also record payments of third-party deposit money and make minutes of the event.⁷³

3. The Vision And Missions Of The Sidoarjo Religious Court
The Sidoarjo Religious Court has Vision and Missions as follows:

Vision

The realization of the Great Sidoarjo Religious Court

⁷³ Struktur Organisasi Pengadilan Agama Sidoarjo diakses di <https://pa-sidoarjo.go.id/profil-pengadilan/struktur-organisasi> pada tanggal 30 Oktober 2022 pukul 22.54 WIB

Missions

- a. Maintain the independence of the Sidoarjo Religious Court.
 - b. Providing equitable legal services to justice seekers.
 - c. Improving the leadership quality of the Sidoarjo Religious Court.
 - d. Increase the credibility and transparency of the Sidorajo Religious Court.⁷⁴
4. Principal Duties and Functions of the Court
- a. Principal Duties of Sidoarjo Religious Court

The Sidoarjo Religious Court has the same primary duties as the main duties of other religious courts. As mandated in Article 49 of Marriage Act Number 7 of 1989 concerning the Religious Courts as amended by Marriage Act Number 3 of 2006, it states that: "Religious courts have the duty and authority to examine, decide, and resolve cases at the first level between people who are Muslim in the field."

- 1) Marriage, which covers:
 - a) Permit to have more than one wife;
 - b) Permission to enter into a marriage for a person under the age of 21 (twenty-one) years if parents, guardians, or relatives in a straight line have differences of opinion;
 - c) Marriage dispensation;
 - d) Prevention of marriage;
 - e) Rejection of marriage by Marriage Registrar;
 - f) Marriage annulment;
 - g) Claims for negligence on the obligations of husband and wife;
 - h) Divorce by divorce;

⁷⁴ Visi dan Misi Pengadilan Agama Sidoarjo diakses di <https://pa-sidoarjo.go.id/profil-pengadilan/visi-misi-pengadilan> pada tanggal 30 Oktober 2022 pukul 23.00 WIB

- i) Divorce suit;
 - j) Settlement of joint assets;
 - k) Mastery of children;
 - l) The mother can bear the costs of caring for and educating the child if the father, who should be responsible, does not comply;
 - m) Determination of the obligation to provide living expenses by the husband to the ex-wife or the determination of an obligation for the ex-wife;
 - n) Decisions about whether a child is legal or not;
 - o) Decision on the revocation of parental authority;
 - p) Revocation of guardian power;
 - q) The appointment of another person as guardian by the court if the powers of a guardian are revoked;
 - r) Appointment of a guardian in the case of a child under the age of 18 (eighteen) years whom both parents leave;
 - s) Imposition of compensation obligations for the child's property under his control;
 - t) Determination of the origin of a child and determination of adoption based on Islamic Marriage Act;
 - u) The decision regarding the refusal to provide information to enter into a mixed marriage;
 - v) Statement regarding the legality of marriages that occurred before Marriage Act Number 1 of 1974 concerning Marriage and carried out according to other regulations.
- 2) Inheritance;
 - 3) Will;
 - 4) Grants;
 - 5) Waqf;
 - 6) Zakat;

- 7) Infaq;
- 8) Sadaqah; And
- 9) Shari'ah economy, which includes:
 - a) Islamic banking;
 - b) Shari'ah microfinance institutions.
 - c) Sharia insurance;
 - d) Sharia reinsurance;
 - e) Sharia mutual funds;
 - f) Shari'ah bonds and medium-term shari'ah securities;
 - g) Sharia securities;
 - h) Sharia financing;
 - i) Shari'ah pawnshops;
 - j) Islamic financial institution pension funds; And
 - k) Shari'ah business.

b. The Function Of The Religious Court

In carrying out its primary duties, the Sidoarjo Religious Court has the following functions:

- 1) The function of adjudicating (judicial power), that is examining and adjudicating cases that fall under the authority of the religious courts in their respective jurisdictions.
- 2) Oversight function, that is to supervise the duties and behavior of judges, clerks/ secretaries, and all staff, and to implement general administration. Supervision is carried out periodically by the Field Supervisory Judge.
- 3) The function of coaching is to provide direction, guidance, and instructions to its staff regarding judicial technical duties, administration of justice, and general administration.
- 4) Administrative function, that is providing administrative services for court clerks for cases of the first level as well as confiscation and execution, cases of appeal, cassation and review, and other judicial administration. Moreover, provide general

administrative services to all elements within the Religious Courts (staff, finance, and general).

- 5) The function of advice, that is providing information, considerations, and advice on Islamic Marriage Act to government agencies in their jurisdiction, when requested as regulated in Article 52 paragraph (1) of Marriage Act Number 7 of 1989 concerning Religious Courts.

Other functions, that is services for legal counseling, research/research and others, as stipulated in the Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia. Number: KMA/004/SK/II/1991 and Regulation of the Supreme Court of the Republic of Indonesia Number 7 of 2015 concerning the Organization and Work Procedure of the Registrar and Judicial Secretariat

In addition to this authority, Article 52 A of Marriage Act Number 3 of 2006 states that the Religious Courts give the testimony of the new moon sightings in determining the beginning of the month in the Hijriyah year.

Following the main tasks and functions of the Sidoarjo Religious Court, it has established a general policy as a guideline for implementing tasks to achieve organizational goals. By paying attention to the blueprint of the Supreme Court of the Republic of Indonesia and Bureaucratic Reform as outlined in 8 (eight) areas of change, the Sidoarjo Religious Court establishes policies with a priority scale to support the realization of the vision and mission, which include:

- 1) Technical Functions

Implement the policies of the Supreme Court of the Republic of Indonesia, including:

- a) Republic of Indonesia Supreme Court Regulation Number 1 of 2014 concerning Guidelines for Provision of Legal Services for Disadvantaged Communities in Court;
 - b) Republic of Indonesia Supreme Court Circular Number 02 of 2014 concerning Settlement of Cases at Courts of First Instance and Appellate Level in 4 (four) Judiciary Environments;
 - c) Republic of Indonesia Supreme Court Regulation Number 1 of 2016 concerning Mediation Procedures in Courts.
- 2) Case Administration Management
- Improving timely settlement of cases and minutes by streamlining information technology in the court administration. Implementing the Republic of Indonesia Supreme Court Circular Letter Number 01 of 2014 concerning Electronic Documents as a Complementary Request for Cassation and Judicial Review.
- 3) Human Resource Management
- Human Resource capacity building by carrying out the following activities:
- a) Routine coaching;
 - b) Carrying out Workplace Training related to the implementation of primary duties and functions;
 - c) Supervision by Field Supervision Judges;
 - d) Job Evaluation;
 - e) Involve judges and staff for training, technical guidance, or outreach;
 - f) Carry out role model selection:
- 4) Financial Management
- Financial management is carried out from planning and implementation to budget/financial reporting by optimizing information technology,

that is the Plea of RKA-KL, SAS, SAIBA, e-Rekon, and KOMDANAS.

5) Asset Management

Management of BMN by carrying out proposals for the status of use of BMN, deletion of BMN that has been heavily damaged, administration of BMN by utilizing the SIMAK BMN Plea, and inventory Pleas.

6) Information Disclosure

Developing a website as a public information medium by completing a menu of information the public needs.⁷⁵

5. Cases of Plea for Polygamy licenses at the Sidoarjo Religious Court

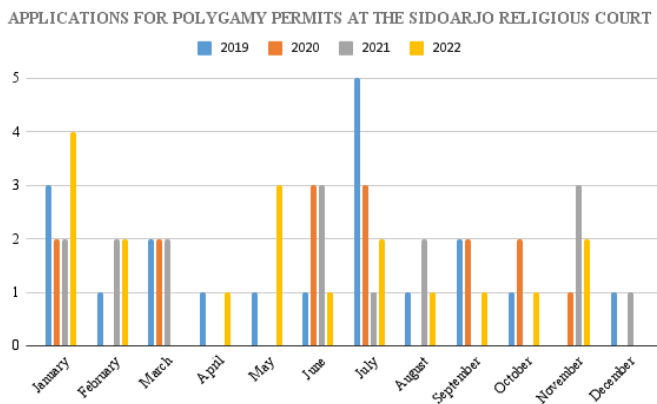


Figure 3.1
The Number Of Pleas For Polygamy License At The Sidoarjo Religious Court From 2019-2022

⁷⁵ Tugas Pokok dan Fungsi Pengadilan diakses di <https://pa-sidoarjo.go.id/profil-pengadilan/tugas-pokok-dan-fungsi-pengadilan> pada tanggal 30 Oktober 2022 pukul 23.06 WIB

Based on Figure 3.1, it can be seen that the number of cases filing for polygamy licenses at the Sidoarjo Religious Court in the last four years shows an increase in cases in 2019, totaling 19 cases, with the most submissions being in July. Then the number of cases filing for polygamy licenses decreased in 2020 to 15. For 2021 and 2022, 34 cases of Pleas for polygamy licenses at the Sidoarjo Religious Court.

B. Description of the Sidoarjo Religious Court Decision Number 3776/Pdt.G/2016/PA.Sda

1. Introduction

The Sidoarjo Religious Court has examined and tried civil cases at the first level and has passed a decision in the polygamy license case with case number 3776/Pdt.G/2016/PA.Sda, which is the author's research object. The Plea for a polygamy license was registered at the Registrar's Office of the Sidoarjo Religious Court on November 21 2016. The Petitioner, as the Petitioner party, is 30 years old, is Muslim, works as a private employee, and resides in Sidoarjo Regency. Whereas the Respondent was born on the 29th year, is Muslim, works as a housewife, and resides in Sidoarjo Regency.

The Petitioner was married to the Respondent on August 11, 2006, recorded by the Marriage Registrar of the Religious Affairs Office of Kemlangi District, Mojokerto Regency, based on the Marriage Certificate. After their marriage, the Petitioner and the Respondent lived in the home of the Petitioner's parents in Sidoarjo Regency for ten years, and have lived in harmony as husband and wife and have been blessed with two children aged nine years and 2.5 years. Until now, the Petitioner and the Respondent have lived in harmony in one house.

The Petitioner wishes to remarry or polygamy because he is already in an unregistered marriage with the Petitioner and already has children. The Petitioner already has an unnamed second wife. She is a sMuslim education private

employee, 27 years old, residing in Dusun Sidoarjo Regency, and now a virgin. The Petitioner and his future wife have been in a relationship for five years since 2011 and then agreed to continue this relationship to a legal marriage level. Between the Petitioner and the prospective second wife and between the Respondent and the prospective second wife, there is no prohibition against marrying, either because of blood relations, marriage, or breastfeeding. The Petitioner also does not currently have four wives.⁷⁶

The Petitioner stated that he could meet the needs of his wives and children because the Petitioner's job is a private employee and has an average monthly income of Rp. 4,000,000.- (four million rupiah). The Petitioner also stated that he was able to treat his wives fairly. The Respondent agrees and has no objection if the Petitioner remarries or polygamy with the second wife. During their marriage, the Petitioner and the Respondent already owned joint property, which was a movable property, that is 1 Mega Pro motorcycle in 2001, that is the Petitioner. In the decision, the Petitioner requested that the Chairperson of the Sidoarjo Religious Court render a decision whose verdict was:

- a) Grant requests the Petitioner's honor;
- b) Permitted the Petitioner to take another wife with a woman named the Petitioner's Second Wife Candidate;
- c) Stipulates that the joint assets listed in posita points 5, 1 are joint assets between the Petitioner and the Respondent;
- d) Burden the Petitioner to pay the costs of this case by the applicable regulations.

The second wife of the Petitioner also provided information. In comparison, the prospective second wife of the Petitioner knows the Petitioner and the Respondent and knows that the Respondent is the wife of the Petitioner. The

⁷⁶ Putusan Perkara Nomor 3776/Pdt.G/2-16/PA.Sda, 1-7.

second wife of the Petitioner promised to position herself as the second wife of the Petitioner reasonably and fairly. The second prospective wife of the Petitioner knows that during the marriage bond between the Petitioner and the Respondent, they acquired assets in the form of 1 Mega Pro motorcycle in 2001 a/n the Petitioner. For this reason, the prospective second wife of the Petitioner stated that he would not interfere with the claim of the assets of the Petitioner and the Respondent.⁷⁷

2. Legal Considerations

In decision number 3776/Pdt.G/2016/PA.Sda, regarding the polygamy license case, it is stated that the intent and purpose of the Petitioner's Plea are as described in the arguments above.

Based on the provisions of Article 49 Paragraph (2) of Marriage Act Number 7 of 1989 concerning the Religious Courts as amended by Marriage Act Number 3 of 2006 and the second amendment by Marriage Act Number 50 of 2009, this case is a marriage case between persons people who are Muslim, then it is the absolute authority of the Religious Courts. The Petitioner and the Respondent are domiciled in the jurisdiction of the Sidoarjo Religious Court. Following Article 4 Paragraph (1) of Marriage Act Number 1 of 1974, this case becomes the relative authority of the Class IA Sidoarjo Religious Court.

Furthermore, the parties between the Petitioner and the Respondent were present at the trial, and then the Panel of Judges attempted to reconcile through a mediator but was unsuccessful. Therefore this case must be resolved through a judge's decision, and the subject matter of the Petitioner's petition is because he is already in an unregistered marriage with the Petitioner's future wife and already has children in the marriage. As the conditions for marrying the prospective

⁷⁷ Putusan Perkara Nomor 3776/Pdt.G/2016/PA.Sda, 7-10.

second wife have been fulfilled, the Petitioner requests the Sidoarjo Religious Court to grant permission to the Petitioner to practice polygamy with the Petitioner's Second Potential Wife.

After the Panel of Judges studied the material of the Petitioner's petition, the Panel of Judges considered that practicing polygamy would certainly bear madharat (risk) and even negative impacts. However, the Panel of Judges considered that the risks faced by the Petitioner and the Respondent were more outstanding if the Petitioner was not allowed to practice polygamy. If there were two things that both contain madharat (risk), then the lighter mudharat (risk) is chosen, which is following the principles of fiqh in the book al-Asbah An-Nadzair Juz I page 188, which reads:

إِذَا تَعَارَضَ مَفْسَدَتَانِ رُوْعِيَّيَ أَعْظَمُهُمَا بِإِزْتِكَابِ أَخْفَاهُمَا

If you are faced with two mafsadah, you should guard against working on the larger mafsadah by working on the lighter mafsadah.

Based on the facts and legal considerations mentioned above, the panel of judges believes that the Petitioner's petition is quite reasonable and meets the requirements for having more than one wife and therefore the Petitioner's petition can be granted.

This case is included in the field of marriage, so according to Article 89 Paragraph (1) of Marriage Act Number 7 of 1989 concerning the Religious Courts which was amended by Marriage Act Number 3 of 2006 and the second amendment by Marriage Act Number 50 of 2009, all the costs of this case shall be borne by the Petitioner.

3. Verdict

- a) Grant the Petitioner's Plea.
- b) Determine and permit the Petitioner to remarry (polygamy) with a woman (Second Wife Candidate).

- c) Determine that a 2001 Mega Pro motorcycle a/n (the Petitioner) is the joint property between the Petitioner and the Respondent.
- d) Charge the Petitioner to pay the costs of this case in the amount of Rp. 261,000.00 (two hundred and sixty-one thousand Rupiah).⁷⁸

⁷⁸ Putusan Perkara Nomor 3776/Pdt.G/2016/PA.Sda, 16.

CHAPTER IV
ANALYSIS OF THE SIDOARJO RELIGION COURT
DECISION NUMBER 3776/PDT.G/2016/PA.SDA

A. Analysis of Judge Considerations in Acceptance of Polygamy License Decision Number 3776/Pdt.G/2016/PA.Sda

In practicing polygamy, a person must obtain permission from the Religious Court and must also be resolved by the Religious Court based on the authority of the Religious Courts Article 4 paragraph (1) of Marriage Act Number 1 of 1974 concerning marriage, article 40 of Government Regulation Number 9 of 1975 concerning implementation Marriage Act No. 1 of 1974 concerning marriage and article 56 paragraph (3) Compilation of Islamic Marriage Act. Following the provisions of the Compilation of Islamic Marriage Act article 56 paragraph 3, marriage with more than one wife must obtain permission for polygamy from the local Religious Court so that it has legal force so that the obligations and rights of the husband and wife can be fulfilled.⁷⁹ The panel of judges for the Plea for a polygamy license Number 3776/Pdt.G/2016/PA.Sda considered that the Petitioner had fulfilled the formal requirements of a Plea to apply for a polygamy license from the Sidoarjo Religious Court.⁸⁰ The formal requirement does not violate the authority to adjudicate the Religious Courts' relative competence and absolute competence. In this case, the case for the Plea for a polygamy license Number 3776/Pdt.G/2016/PA.Sda meets relative competence, that is that the Petitioner is domiciled in Sidoarjo and submitted the Plea at the Sidoarjo Religious Court. The absolute competence of the Religious Courts, that is the Sidoarjo Religious Court, has the power to adjudicate polygamy license cases.

⁷⁹ Amiur Nuruddin dan Azhari Akmal Tarigan, *Hukum*, 154

⁸⁰ Putusan Perkara Izin Poligami Nomor 3776/Pdt.G/2016/PA.Sda, 11.

In Marriage Act Number 1 of 1974 Concerning Marriage, the court can grant permission for polygamy to the Petitioner must complete at least three cumulative requirements as well as one of the alternative requirements, including:

The cumulative requirements are:

1. The wife/wives give permission.
2. There is a guarantee that a husband can meet his wife's and children's life needs.
3. The guarantee is that a husband can apply as fairly as possible to his wife and children.⁸¹

Alternative requirements are:

1. The wife is unable to carry out the obligation.
2. The wife has a physical disability or illness that is impossible to cure.
3. The wife cannot give children.⁸²

Several theories of judges' consideration put forward by Mackenzie, the theory of art approach and intuition, are by this research and can be used by judges in considering the imposition of a case decision. In his explanation, the theory of art approach and intuition is the discretion or authority of the Judge. As a discretion, in imposing a decision, the Judge will adjust to the circumstances in a civil case. The Judge will look at the condition of the litigants, that is the Petitioner and the Respondent. In making a decision, the Judge uses an artistic approach, more determined by instinct or intuition than the knowledge of the Judge.⁸³

In the theory of art and intuition approach, following the polygamy license case number 3776/Pdt.G/2016/PA decision.Sda, the Judge decided to grant the polygamy license case with several

⁸¹ Pasal 5 ayat 1 Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

⁸² Pasal 4 ayat 2 Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

⁸³ Ahmad Rifai, *Penemuan*, 102.

considerations that the Petitioner was able to be fair to his two wives, and the Respondent allowed the Petitioner to polygamy. It is done to avoid more significant madharat and for family integrity.

In the polygamy license case number 3776/Pdt.G/2016/PA.Sda, the Panel of Judges examined the reasons put forward by the Petitioner where in the case, the Petitioner applied for a polygamous permit because the Petitioner and his prospective second wife were married in an unregistered marriage and were blessed with a child. The Judge's consideration granted the Petitioner's request. The Petitioner applied for permission to have more than one wife (polygamy) against the Respondent because the Petitioner and his second wife-to-be were married in an unregistered marriage and had one child.⁸⁴ The Respondent has agreed and is willing if the Petitioner takes another wife with another woman. It is evidenced by evidence P.9, that is the statement of the Respondent, which was delivered orally during the trial. The Petitioner acts reasonably towards his wives as evidenced by evidence P.8, that is a statement that he can act pretty towards his two wives. The Petitioner has the ability, in terms of material, to meet the needs of his two wives. It is evidenced by P.7, the Petitioner's monthly income letter.⁸⁵ The panel of judges considers that the risk faced by the Petitioner and the Respondent is more significant if the Petitioner is not allowed to practice polygamy and if there are two things that both contain mudharat (risk).⁸⁶

The Plea for a permit to polygamy in case number 3776/Pdt.G/2016/PA.Sda has been granted by the Panel of Judges of the Sidoarjo Religious Court using the legal basis of Article 5 paragraph (1) of Marriage Act Number 1 of 1974 concerning cumulative requirements in the provisions of Article 5 paragraph (1) of Marriage Act Number 1 of 1974 regarding marriage to jo.

⁸⁴ Putusan Perkara Nomor 3776/Pdt.G/2016/PA.Sda, 11.

⁸⁵ *Ibid*, 12.

⁸⁶ *Ibid*, 15.

Article 58 paragraph (1) Compilation of Islamic Marriage Act. The Respondent has obtained permission from the Respondent to remarry. In this case, the Respondent was present at the trial to explain to the panel of judges so that the Sidoarjo Religious Court could grant permission to practice polygamy because it had fulfilled the cumulative requirements stipulated in Article 5 paragraph 1 of Marriage Act Number 1 of 1974 concerning marriage as follows:

1. Willingness (permission) from the first wife

The panel of judges may request proof of willingness to polygamy from the Respondent in writing or unwriting. The Judge did this to avoid falsifying the approval letter from the first wife to practice polygamy. The wife is presented before the trial to express her willingness directly in front of the trial. The polygamy license case number is 3776/Pdt.G/2016/PA.Sda that based on evidence P.9 and the Respondent's verbal statement at trial, he agreed and was willing if the Petitioner married or added another wife with another woman, and the Respondent was willing to be married.

2. The ability to meet the needs of his wife and children

Before practicing polygamy, the main requirement is to meet his wife's and children's needs. Therefore, the Judge made sure in advance by looking at how much income the husband (Petitioner) owned by the Petitioner in the form of a statement of income. Case number 3776/Pdt.G/2016/PA.Sda, by looking at the Petitioner's monthly income as evidence P.7, the Petitioner can meet the needs of his two wives. It is known that the Petitioner has an average monthly income of Rp. 4,000,000.- (four million rupiah).

3. A guarantee to be able to treat his two wives fairly and their children

The Judge asked for the guarantee letter to be fair to the wives and children with the aim that one day if the Petitioner commits irregularities in his marriage, the wife can sue him in

court. In the polygamy license case number 3776/Pdt.G/2016/PA.Sda, based on evidence P.8, the Petitioner states that the Petitioner can treat his two wives fairly.

The polygamy license plea in decision number 3776/Pdt.G/2016/PA.Sda does not fulfill the alternative requirements as a reason to practice polygamy. It only fulfills the cumulative requirements. According to the author, the reason why the Petitioner wants to practice polygamy is that he has married the prospective second wife, violating the provisions of Article 4 of Marriage Act Number 1 of 1974 concerning Marriage, Article 41 of Government Regulation Number 9 of 1975 concerning Implementation of Marriage Act Number 1 of 1974 concerning Marriage, and Article 57 Compilation of Islamic Marriage Act.

Article 4, paragraph 2 of Marriage Act Number 1 of 1974 concerning Marriage, the court referred to in paragraph (1) of this article only permits a husband who will have more than one wife if the wife cannot carry out her obligations, has a disability or an incurable disease, and unable to bear offspring.⁸⁷ Article 41 of Government Regulation Number 9 of 1975 concerning the Implementation of Marriage Act Number 1 of 1974 concerning Marriage, the court then examines whether or not there are reasons that allow a husband to remarry, the wife cannot carry out her obligations as a wife, has a disability or an illness that incurable, and unable to bear offspring.⁸⁸ According to the Compilation of Islamic Marriage Act, the Religious Courts only permit a husband who will have more than one wife if he is unable to carry out his wife's obligations, has a disability or an incurable disease, and is unable to bear children.⁸⁹

⁸⁷ Pasal 4 ayat 2 Undang-Undang Nomor 1 tahun 1974 tentang Perkawinan.

⁸⁸ Pasal 41 Peraturan Pemerintah Nomor 9 Tahun 1975 tentang Pelaksanaan Undang-Undang Nomor 1 tahun 1974 tentang Perkawinan.

⁸⁹ Pasal 57 Kompilasi Hukum Islam.

In the decision for a polygamy license Plea number 3776/Pdt.G/2016/PA.Sda, the reason used by the Petitioner and the second wife-to-be for having an unregistered marriage, is irrelevant for someone practicing polygamy. It is because in order to practice polygamy, there are limitations and conditions for practicing polygamy, as explained in Article 4 of Marriage Act Number 1 of 1974 concerning Marriage, Article 41 of Government Regulation Number 9 of 1975, and Article 57 of the Compilation of Islamic Marriage Act. According to the article above, it is clear that a polygamous husband is permissible if, in a condition where the wife cannot carry out her obligations as a wife, the wife has a disability or an incurable disease, and the wife cannot give birth to offspring.

Regarding alternative requirements, in the decision on the case for a polygamy license Plea number 3776/Pdt.G/2016/PA.Sda, it is clear that the Petitioner's main reason is that the Petitioner and the prospective second wife are already married in an unregistered marriage. According to the author, the reasons put forward by the Petitioner are less relevant and not strong enough to be used as a reason to obtain permission from the court to practice polygamy, and this reason is not the main reason for applying for a polygamy license. This reason is not contained in the applicable Marriage Act.

In the decision for a polygamy license Plea number 3776/Pdt.G/2016/PA.Sda, the authors found that one of the considerations the panel of judges took in granting the polygamy license was the consideration of risk (mudharat). The panel of judges considered that the risk faced by the Petitioner and the Respondent was more significant if the Petitioner was not allowed to practice polygamy and if two things contained risk (mudharat). The judges considered that granting the Petitioner's request would provide justice for the first wife and the second wife-to-be. It is guaranteed by the Petitioner agreeing to do justice to his two wives. However, the authors consider that this decision does not provide justice. The Judge should have seen the background of the

Petitioner applying for a polygamy license. When examined more deeply, there was legal smuggling in which the Petitioner had an affair, married the prospective second wife for five years, and was blessed with a child. The permission given by the first wife is just a formality to fulfill the requirements.

B. Analysis of Maslahah Mursalah on the Impact of Granting Permits for Polygamy Case Number 3776/Pdt.G/2016/PA.Sda

Islam pays excellent attention to the rights and arrangements related to polygamy because polygamy involves one party and one party to another. Islam allows polygamy with a limited number of women and does not require its followers to carry out absolute monogamy because a man can only have a wife with a woman under any circumstances. have a wife and vice versa wife only has a husband.⁹⁰

The legal basis for polygamy is contained in the word of Allah in surah An-Nisa verse 3.

وَإِنْ خِفْتُمْ أَلَّا تَقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَّةَ وَرُبْعَ ۚ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَلِكَ أَدْنَىٰ ۖ أَلَّا تَعُولُوا ۗ

*“If ye fear that ye shall not be able to deal justly with orphans, marry women of your choice. Two, or three, or four. But if ye fear that ye shall not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable, to prevent ye from doing injustice.” (QS. An-Nisa’:3).*⁹¹

⁹⁰ Rodli Makmun, dkk, *Poligami*, 16.

⁹¹ Departemen Agama RI, *Al-Qur’an Karim*, 77.

The consideration of the Panel of Judges in Decision Number 3776/Pdt.G/2016/PA.Sda regarding the permissibility of polygamy is based on paragraph 3 of the An-Nisa letter, which reads:

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ
وَتِلْكَ وَرُبْعًا فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ذَٰلِكَ أَدْنَىٰ
أَلَّا تَعُولُوا ۗ

“If ye fear that ye shall not be able to deal justly with orphans, marry women of your choice. Two, or three, or four. But if ye fear that ye shall not be able to deal justly (with them), then only one, or that which your right hands possess. That will be more suitable to prevent ye from doing injustice.” (QS. An-Nisa’:3).⁹²

The verse above does not oblige polygamy or recommend it. It only talks about the permissibility of polygamy (emergency charity) and that it is an emergency exit that can only be passed by people who are in dire need with conditions that are not light. Ulama sees the fair conditions for the permissibility of polygamy as a legal requirement. In the sense of the word, when there is justice, there is a Marriage Act permissibility of polygamy, and when there is no justice, there is a Marriage Act prohibiting polygamy.⁹³

The Judge's next consideration is weighing masalah mursalah. Masalah mursalah is establishing law in matters not mentioned in the Qur'an or al-Sunnah at all, considering the benefit

⁹² Departemen Agama RI, *Al-Qur'an Karim*, 77.

⁹³ Mahmuddin Bunyamin, “Penafsiran Ayat-Ayat Poligami Dalam Al-Qur'an”, *Al-Dzikra*, Vol.9 No. 2, (December, 2015), UIN Raden Intan Lampung, 60.

or interests of human life which adheres to the principle of benefiting and avoiding damage.⁹⁴

In the Plea for a polygamy license number 3776/Pdt.G/2016/PA.Sda, the Judge, looked at the advantages and disadvantages. If there are two things that both contain madharat, then the lighter madharat is chosen.⁹⁵ By rule:

إِذَا تَعَارَضَ مَفْسَدَتَانِ رُوعِيَّيَ أَعْظَمُهُمَا يَأْزِتْكَابِ أَخْفَاهُمَا

If you are faced with two mafsadah, you should guard against working on the larger mafsadah by working on the lighter mafsadah.

The arguments listed above are a benchmark in deciding a case, that is choosing the milder madharat between two things containing madharat. This rule explains that if several benefits cannot be combined, the more significant benefit will take precedence because there is additional goodness, and Allah SWT loves it.⁹⁶ Meanwhile, if some of these maslahahs can be collected and all can be obtained, then that is more prioritized. On the other hand, if there are several mafsadat (terrible deeds) that one has to take, then the lightest mafsadat is chosen. Meanwhile, if all of these mafsadat can be avoided, then that is what is expected.

Then maslahah can be classified in the following terms:

1. Maslahah dharuriyah is maslahah that is related to basic human needs in this world and in the hereafter, that is maintaining religion, soul, intellect, offspring, and property.
2. Maslahah hajiyah is maslahah whose form does not directly fulfill the five basic needs (dharuri) but indirectly

⁹⁴ Drs. Muin Umar. dkk, *Ushul Fiqh*, (Jakarta: IAIN Jakarta, 1985), 146.

⁹⁵ Putusan nomor 3776/Pdt.G/2016/PA.Sda, 15

⁹⁶ Dr. Firdaus, M.Ag, *Al-Qawaid Al-Fiqhiyyah: Membahasa Kaidah-Kaidah Pokok dan Populer*, (Padang: Imam Bonjol Press, 2015), 70.

goes in that direction in terms of making it easy to fulfill the needs of human life. If it is not fulfilled in human life, it does not directly cause damage to the five essential elements, but indirectly it can indeed cause damage.

3. Masalahah tahsiniyyah is a masalahah whose human life needs are not up to the level of dharuri or hajiyah. Nevertheless, these needs must be met to give perfection and beauty to human life.⁹⁷

According to the author, based on the judge's consideration of the polygamy permit case number 3776/Pdt.G/2016/PA.Sda the granting of a polygamy permit on the basis of the applicant's polygamy is inappropriate. When viewed in the context of masalahah mursalah, if the reasons above do not include urgent conditions, so they do not include masalahah dharuriyat.

According to the author, granting permission for polygamy in case number 3776/Pdt.G/2016/PA.Sda on the grounds that unregistered marriage is included as masalahah tahsiniyah. Unregistered marriage does not violate religious rules, but this reason is not a reason that polygamy is permissible, because the permissibility of polygamy is given with limitations in the form of terms and objectives. When the husband experienced an emergency situation in which conditions polygamy was needed as a last resort.

In retrospect, the main reason the Petitioner applied for a polygamy permit was because the Petitioner was physically and mentally capable of polygamy. So this is not in accordance with the polygamy emergency as stated by Quraish Shihab. According to him, polygamy is like opening an emergency door on an airplane flight, only certain times and certain people can only open it.⁹⁸

⁹⁷ Amir Syarifuddin, *Ushul Fiqh*, Jilid 2 (Jakarta: Kencana, 2008), 372.

⁹⁸ Mahfudin, Galuh Retno Setya, "Asas Monogami dalam Surat An-Nisa' Ayat 3 (Studi Pemikiran M. Quraisy Shihab)", *Jurnal Hukum Keluarga Islam*, Vol. 03, No. 02, Oktober, 2018

Likewise with polygamy, polygamy can be done if it's an emergency and only certain people can practice polygamy with conditions that must be completed.

In the polygamy permit case number 3776/Pdt.G/2016/PA.Sda it is clear that the reason put forward by the applicant as the reason is because of unregistered marriage, according to the author the reasons put forward by the applicant are less relevant and are not the main reason in applying for a polygamy license. And also the use of Maslahah as a basis for consideration is inappropriate, because polygamy is permissible, in an emergency and in a really urgent situation. Meanwhile, according to the author, the reason for polygamy because of unregistered marriage in decision number 3776/Pdt.G/2016/PA.Sda is not a condition or urgent situation.

CHAPTER V

CLOSING

A. Conclusion

Based on the above description of the research results and discussion of polygamy licenses at the Sidoarjo Religious Court with Number 3776/Pdt.G/2016/PA.Sda, the authors can draw the following conclusions:

1. This polygamy license was granted based on the Petitioner's unregistered marriage to the second wife, not based on Article 4 paragraph (2) of Marriage Act Number 1 of 1974 concerning marriage which is an alternative requirement in applying for a polygamy license. Moreover, another reason for granting this polygamy license is to consider both parties' benefits. Judging from the principles of fiqh, which are legal considerations and also the legal basis of Article 5 paragraph (1) of Marriage Act Number 1 of 1974 as a cumulative requirement, this Religious Court Decision has fulfilled the requirements that there has been permission from the first wife if the husband is going to practice polygamy, there is legal certainty that husbands can guarantee the necessities of life for their wives and children. There is a guarantee that husbands will treat their wives and children fairly.
2. The perspective of *maslahah* in the case of polygamy plea Case Number 3776/Pdt.G/2016/PA.Sda, its use as a basis for consideration is inappropriate, because polygamy is permissible, if in an emergency and in a really urgent situation. According to the author, the reason for polygamy is because they are already married in an unregistered marriage is not an urgent situation. That reason is not included in the *maslahah dharuriyat* level, but only up to *maslahah tahsiniyat*. According to the author, if this decision is granted, the judge approves unregistered marriage as a reason for polygamy.

B. Recommendations

Based on the above decision issued by the Sidoarjo Religious Court regarding polygamy licenses, the authors would like to provide the following suggestions:

1. For people who want to do polygamy to consider the positive and negative sides in deciding to do polygamy. It is so as not to cause problems in the future, bearing in mind that the main requirement for practicing polygamy is fairness.
2. Judges should be more careful in deciding a case for a polygamy license and should be careful in taking the legal basis used as a basis in deciding a case to be handled in order to ensure a sense of justice and benefits for the parties.

C. Closing

Praise the presence of Allah SWT for all the favors and gifts to his servant. One of them is the author's favor so that he can complete this scientific work. In this case, the author realizes this work is far from perfect. Therefore, the authors expect criticism and suggestions that are very useful for the perfection of this scientific work. Furthermore, hopefully, this thesis can be helpful for all, aamiin.

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APPENDICES

Appendices 1: Supervisors Appointment Letter



KEMENTERIAN AGAMA REPUBLIK INDONESIA
UNIVERSITAS ISLAM NEGERI WALISONGO SEMARANG
FAKULTAS SYARI'AH DAN HUKUM

Jl Prof. Dr Hamka Km. 02 Kampus III UIN Walisongo Semarang 50185 Tlp. (024) 7601291, (024) 7624691, Faksimili (024) 7601291, Website: www.fsh.walisongo.ac.id

Nomor : 6100/Un.10.1/D.1/PP.00.05/11/2022 Semarang, 03 November 2022
Lamp. : -
Hal : Penunjukan Menjadi Dosen Pembimbing Skripsi

Kepada Yth.
Sdr. Drs. Mohamad Sholek, M.A
Dosen Fakultas Syari'ah dan Hukum UIN Walisongo
di Semarang

Assalamu 'alaikum wr. wb

Sehubungan dengan pengajuan proposal skripsi mahasiswa tersebut di bawah ini:

Nama : **Syafrina Hamadah**
NIM / Jurusan : **1902016084/Hukum Keluarga Islam**
Judul Skripsi : **Analysis of The Decision of The Sidoarjo Religious Court Mu,ner 3776/2016/PA.SDA Concerning Acceptance of Polygamy Licence With The Reason of Married Sirri**

Maka, Dekan Fakultas Syari'ah dan Hukum UIN Walisongo Semarang mengharap kesediaan Saudara untuk menjadi Pembimbing I penulisan skripsi mahasiswa tersebut, dengan harapan:

1. Topik yang kami setuju masih perlu mendapat pengarahan Saudara terhadap judul, kerangka pembahasan dan penulisan.
2. Pembimbingan dilakukan secara menyeluruh sampai selesainya penulisan skripsi.
Untuk membantu tugas Saudara, maka bersama ini kami tunjuk sebagai Pembimbing II :
Ahmad Zubaeri, MH

Demikian, atas kesediaan Saudara diucapkan terima kasih Demikian, atas kesediaan Saudara diucapkan terima kasih.

Wassalamu 'alaikum wr. wb.

A.n. Dekan,
Wakil Dekan II



Tembusan disampaikan kepada Yth.:

1. Dekan
2. Pembimbing
3. Mahasiswa yang bersangkutan

Appendices 2: Research Letter



KEMENTERIAN AGAMA REPUBLIK INDONESIA
UNIVERSITAS ISLAM NEGERI WALISONGO SEMARANG
FAKULTAS SYARIAH DAN HUKUM
 Jalan Prof. Dr. H. Hamka Semarang 50185
 Telepon (024)7601291, Faksimili (024)7624691, Website : <http://fsh.walisongo.ac.id>.

omor : B-740/Un.10.1/K/PP.00.09/1/2023 25 Januari 2023
 Lampiran : 1 (satu) Bendel Proposal
 Hal : Permohonan Izin Riset

Yth.
ketua Pengadilan Agama Sidoarjo
 di Tempat

Assalamu'alaikum Wr. Wb.

Diberitahukan dengan hormat, bahwa dalam rangka pelaksanaan Tri Dharma Perguruan Tinggi, mahasiswa kami :

N a m a : Syafrina Hamadah
 N I M : 1902016084
 Jurusan : Hukum Keluarga Islam

sangat membutuhkan data guna penulisan skripsi yang berjudul:

***"Analysis of The Decision of The Number 3776/2016/PA.Sda Concerning
 Acceptance of Polygamy License With The Reason of Married Sirri"***

Dosen Pembimbing I : Drs. H. Mohammad Solek, M.Ag
 Dosen Pembimbing II : Ahmad Zubaeri, M.H

Untuk itu kami mohon agar mahasiswa tersebut diberi izin untuk melaksanakan penelitian, wawancara, dan atau mendapatkan salinan dokumen di wilayah/lembaga/instansi yang Bapak/Ibu pimpin selama 3 (tiga) bulan sejak diizinkan.

Sebagai bahan pertimbangan bersama ini kami lampirkan :

1. Proposal Skripsi
2. Fotocopy Identitas Diri (Kartu Mahasiswa)

Demikian atas kerjasama Bapak/ Ibu, kami sampaikan terima kasih.

Wassalamu'alaikum Wr. Wb

an Dekan,
 Kabag Tata Usaha

 Abdul Hakim

Tembusan :
 1. Dekan Fakultas Syariah dan Hukum UIN Walisongo (sebagai laporan)

CONTACT PERSON:
 Syafrina Hamadah
 (+62 858-0202-8859) Whatsapp
 (+62 878-9663-1913) Telpon Seluler

Appendices 3: Research Letter From Sidoarjo Religious Court



PENGADILAN AGAMA SIDOARJO

Jl. HASANUDDIN No. 90 ☎ (031) 8921012

Fax (031) 8963153 SIDOARJO 61215

www.pa-sidoarjo.go.id - info@pa-sidoarjo.go.id

Nomor : W13-A16/854/PB.00/3/2023

Sidoarjo, 02 Maret 2023

Sifat : Biasa

Perihal : Pemohonan Izin penelitian

Kepada Yth.
Dekan Fakultas Syariah dan Hukum
Universitas Islam Negeri Walisongo
Di Semarang

Sehubungan dengan Surat Saudara Nomor B-7410/Un.10.1/K/PP.00.09/I/2023 tertanggal 25 Januari 2023 perihal sebagaimana tersebut pada pokok surat, dengan hormat kami sampaikan bahwa mahasiswa berikut:

Nama : Syafrina Hamadah
NIM : 1902016084
Program : SI
Prodi : Hukum Keluarga Islam

Telah melaksanakan pengumpulan data/penelitian untuk penyusunan Disertasi di Pengadilan Agama Sidoarjo dengan Judul "ANALYSIS OF THE DECISION OF THE NUMBER 3778/Pdt.G/2016/PA.Sda CONCERNING ACCEPTANCE OF POLYGAMY LICENSE WITH THE RASON OF MAERRIED SIRRY".



Tembusan

1. Ketua Pengadilan Agama Sidoarjo
2. Arsip



Appendix 4: Court Decision of Sidoarjo Religious Court Number 3776/Pdt.G/2016/PA.Sda



Direktori Putusan Mahkamah Agung Republik Indonesia
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PUTUSAN

Nomor 3776/Pdt.G/2016/PA.Sda



DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA

Pengadilan Agama Sidoarjo yang memeriksa dan mengadili perkara tertentu pada tingkat pertama dalam persidangan majelis Hakim telah menjatuhkan putusan dalam izin poligami antara :

PEMOHON, umur 30 tahun, agama Islam, pekerjaan Karyawan swasta, tempat kediaman di Kabupaten Sidoarjo, dalam hal ini memberikan kuasa kepada Mansur, SH, Advokat yang berkantor di Perumahan Florencia Regency CF-10 Gebang Sidoarjo berdasarkan surat kuasa khusus tanggal 17 November 2016 yang terdaftar di Register Kepaniteraan Pengadilan Agama Sidoarjo tanggal 21 November 2016, selanjutnya disebut sebagai **Pemohon**;

m e l a w a n

TERMOHON, umur 29 tahun, agama Islam, pekerjaan Karyawan swasta, tempat kediaman di Kabupaten Sidoarjo, selanjutnya disebut sebagai **Termohon**;

- Pengadilan Agama Sidoarjo;
- Telah membaca dan mempelajari berkas perkara yang bersangkutan;
- Telah mendengar keterangan pihak yang berperkara dan para saksi serta memeriksa bukti-bukti lain di muka sidang;

DUDUK PERKARA

Bahwa Pemohon dalam surat pemohonannya tertanggal 21 Nopember 2016 yang didaftarkan di Kepaniteraan Pengadilan Agama Sidoarjo, Nomor 3776/Pdt.G/2016/PA.Sda, telah mengajukan permohonan izin poligami dengan uraian/alasan sebagai berikut:

Hlm.1 dari 17 hlm. Putusan No. 3776/Pdt.G/2016/PA.Sda.

Disclaimer

Kepaniteraan Mahkamah Agung Republik Indonesia tidak bertanggung jawab atas keakuratan informasi yang terdapat dalam putusan pengadilan yang diterbitkan oleh pengadilan ini. Informasi yang terdapat dalam putusan pengadilan ini tidak dapat dijadikan sebagai dasar hukum untuk mengajukan permohonan atau tindakan hukum lainnya. Informasi yang terdapat dalam putusan pengadilan ini tidak dapat dijadikan sebagai dasar hukum untuk mengajukan permohonan atau tindakan hukum lainnya. Informasi yang terdapat dalam putusan pengadilan ini tidak dapat dijadikan sebagai dasar hukum untuk mengajukan permohonan atau tindakan hukum lainnya.

Email : kepaniteraan@mahkamahagung.go.id Telp : 021-384 3348 (ext 318)

Halaman 1



Direktori Putusan Mahkamah Agung Republik Indonesia
putusan.mahkamahagung.go.id

1. Bahwa Pemohon dan Termohon telah menikah pada tanggal 11 Agustus 2006, dihadapan Pegawai Pencatat Nikah pada Kantor Urusan Agama Kecamatan Kemlagi Kabupaten Mojokerto dengan kutipan akta nikah No.365/54.V/III/2006.
2. Bahwa setelah melangsungkan perkawinan Pemohon dan Termohon telah hidup bersama sebagaimana layaknya suami istri dan hidup bersama di rumah orang tua Pemohon di Kabupaten Sidoarjo.
3. Bahwa selama perkawinan Pemohon dan Termohon telah dikaruniai 2 (Dua) orang anak, yaitu:
 - Anak Kandung I Pemohon dan Termohon umur 9 tahun
 - Anak Kandung II Pemohon dan Termohon umur 2,5 tahun
4. Bahwa Pemohon akan menikah lagi disebabkan karena:
Bahwa Pemohon sudah menikah siri dengan calon istri ke-2 yang bernama: **Calon Istri Ke Dua Pemohon**, umur 27 tahun, Agama Islam, Pekerjaan Karyawan Swasta Pendidikan
5. Bahwa Pemohon dengan Termohon semasa hidupnya telah memiliki harta bersama berupa:
Barang bergerak:
 1. 1 buah sepeda motor Mega Pro tahun 2001 a/n Pemohon (Pemohon)
6. Bahwa Pemohon disamping punya harta juga mempunyai penghasilan yang cukup, sebagai karyawan swasta yang berpenghasilan minimal perbulan Rp. 4.169.000,00
7. Bahwa Termohon tidak keberatan bila Pemohon beristri lagi, berdasarkan surat pernyataan yang dibuat oleh Termohon pada tanggal 29 April 2016
 - Bahwa calon istri Pemohon tidak ada hubungan nasab apapun tetapi orang lain.
 - Bahwa calon isteri Pemohon berstatus Perawan.
 - Bahwa Termohon bersedia dimadu.
 - Bahwa Pemohon siap berlaku adil terhadap kedua istrinya apabila kelak sudah menjadi suami istri.
 - Bahwa Pemohon adalah termasuk orang yang mampu untuk mencukupi keperluan istri-istrinya.

Hlm.2 dari 17 hlm. Putusan No. 3776/Pdt.G/2016/PA.Sda.

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Halaman 2



Direktori Putusan Mahkamah Agung Republik Indonesia
putusan.mahkamahagung.go.id

Bahwa atas dasar alasan-alasan tersebut, Pemohon mohon kepada Pengadilan Agama Sidoarjo, untuk berkenan memanggil dan memeriksa Pemohon dan Termohon, selanjutnya menjatuhkan putusan sebagai berikut:

PRIMER

1. Mengabukan pemohonan Pemohon;
2. Memberi ijin kepada Pemohon (**PEMOHON**) untuk beristri lagi dengan seorang perempuan bernama **Calon Istri Ke Dua Pemohon**;
3. Menetapkan bahwa harta bersama yang tercantum dalam posita poin 5, 1 adalah harta bersama antara Pemohon dan Termohon;
4. Membebankan kepada Pemohon untuk membayar biaya perkara ini sesuai dengan peraturan yang berlaku.

SUBSIDER

Atau apabila Pengadilan berpendapat lain, mohon putusan yang seadil-adilnya.

Bahwa pada hari sidang yang telah ditentukan Pemohon dan Termohon hadir di persidangan dan Majelis Hakim telah berusaha mendamaikan kedua belah pihak namun tidak berhasil;

Bahwa Majelis Hakim telah memerintahkan kepada para pihak untuk menempuh mediasi, namun berdasarkan surat pemberitahuan dari Drs.ZAKWAN DAMAN.SH.MH, Mediator pada Pengadilan Agama Sidoarjo tertanggal 22 Desember 2016 pokoknya menyatakan mediasi antara para pihak telah gagal;

Bahwa selanjutnya pemeriksaan dilanjutkan dengan membacakan surat pemohonan Pemohon yang isinya tetap dipertahankan oleh Pemohon;

Bahwa atas pemohonan Pemohon tersebut, Termohon menyampaikan jawaban yang pada pokoknya sebagai berikut:

- Bahwa Nama Termohon, umur 29, Agama Islam, alamat di Kabupaten Sidoarjo, dalam perkara ini sebagai Termohon;
- Bahwa Termohon sudah mengerti yaitu Pemohon mengajukan Permohonan izin untuk menikah lagi dengan calon istri kedua bernama Calon Istri Ke Dua Pemohon, umur 27 tahun, Agama Islam, pekerjaan Karyawan Swasta, status perkawinan perawan, tempat tinggal Dusun Kabupaten Sidoarjo;

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- Bahwa Termohon siap memberikan jawaban secara lisan saja pada persidangan hari ini;
- Bahwa Termohon dengan Pemohon adalah pasangan suami isteri sah yang menikah pada tanggal 11 Agustus 2006;
- Bahwa Selama membina rumah tangga dengan Pemohon Termohon bertempat tinggal bersama di rumah orang tua Pemohon di Desa Pekarungan Kecamatan Sukodono Kabupaten Sidoarjo;
- Bahwa Setelah menikah Termohon dengan Pemohon sudah melakukan hubungan suami isteri dan sudah dikaruniai 2 anak bernama Anak Kandung I Pemohon dan Termohon, umur 9 tahun dan Anak Kandung II Pemohon dan Termohon umur 2,5 tahun;
- Bahwa Pemohon dengan Calon Istri Ke Dua Pemohon sejak 2011 telah menjalin hubungan selama 5 tahun dan kemudian bersepakat untuk melanjutkan hubungan tersebut kejangk perkawinan yang sah;
- Bahwa Termohon mengakui bahwa Pemohon sudah menikah sirri dan mempunyai anak dengan calon isteri Pemohon;
- Bahwa Termohon setuju Pemohon menikah dengan calon isteri kedua bernama Calon Istri Ke Dua Pemohon tersebut;
- Bahwa Termohon, Pemohon dan calon isteri kedua Pemohon (Calon Istri Ke Dua Pemohon) tidak ada hubungan darah, sesusuan atau mushoharoh dan tidak ada larangan yang dapat menghalangi sahnya pernikahan baik menurut syariat Islam maupun peraturan perundang-undangan yang berlaku;
- Bahwa Pemohon mampu memenuhi kebutuhan hidup isteri-isteri dan anak-anak Pemohon dengan baik karena Pemohon memiliki pekerjaan sebagai Karyawan swasta dengan penghasilan setiap bulan rata-rata sebesar Rp. 4.000.000,- (empat juta rupiah);
- Bahwa Termohon tidak khawatir diperlakukan tidak adil oleh Pemohon justru Termohon yakin Pemohon sanggup dan mampu berlaku adil diantara isteri-isteri dan anak-anak Pemohon;
- Bahwa Pemohon dan Termohon selama dalam ikatan perkawinan telah memperoleh harta yaitu 1 buah sepeda motor Mega Pro tahun 2001 a/n

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Pemohon (Pemohon) dan Termohon setuju harta tersebut ditetapkan sebagai harta bersama Pemohon dan Termohon;

Bahwa atas jawaban Termohon tersebut, Pemohon menyampaikan replik secara lisan yang pada pokoknya bahwa Pemohon membenarkan jawaban Termohon;

Bahwa terhadap replik Pemohon tersebut, Termohon menyampaikan duplik yang pada pokoknya tetap pada jawabannya;

Bahwa calon istri kedua Pemohon dalam persidangan memberikan keterangan sebagai berikut :

1. Calon istri kedua Pemohon bernama Calon Istri Ke Dua Pemohon, umur 27 tahun, agama Islam, pekerjaan Karyawan Swasta, status perkawinan perawan, tempat tinggal Kabupaten Pasuruan;
2. Calon Istri Ke Dua Pemohon kenal Pemohon dan Termohon adalah suami istri dan sudah dikaruniai 2 anak bernama Anak Kandung I Pemohon dan Termohon, umur 9 tahun dan Anak Kandung II Pemohon dan Termohon umur 2,5 tahun ;
3. Calon Istri Ke Dua Pemohon dengan Pemohon telah menjalin hubungan selama 5 tahun ;
4. Calon Istri Ke Dua Pemohon dengan Pemohon bersepakat untuk melanjutkan hubungan tersebut kejangk perkawinan yang sah;
5. Calon Istri Ke Dua Pemohon, Pemohon dan Termohon tidak ada hubungan keluarga, sesusun maupun semenda dan juga tidak terdapat larangan yang dapat menghalangi sahnya pernikahan baik menurut syariat Islam maupun peraturan perundang-undangan yang berlaku;
6. Pemohon hendak menikah lagi dengan Calon Istri Ke Dua Pemohon karena sebelumnya telah menikah siri dan telah mempunyai anak 1, oleh sebab itu Calon Istri Ke Dua Pemohon menerima dan siap memenuhi keinginan dan tujuan Pemohon menikah sebagai istri kedua;
7. Istri pertama Pemohon (TERMOHON) telah menyetujui rencana perkawinan Calon Istri Ke Dua Pemohon dengan Pemohon dan Calon Istri Ke Dua Pemohon berjanji akan menempatkan diri sebagai istri kedua Pemohon dengan baik dan adili;

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8. Calon Istri Ke Dua Pemohon tahu selama dalam ikatan perkawinan Pemohon dan Termohon telah memperoleh harta berupa 1 buah sepeda motor Mega Pro tahun 2001 a/n Pemohon (Pemohon), Untuk itu Calon Istri Ke Dua Pemohon menyatakan tidak akan mengganggu gugat harta Pemohon dan Termohon tersebut;

Bahwa untuk meneguhkan dalil pemohonannya, Pemohon telah mengajukan bukti surat berupa :

1. Fotokopi Kutipan Akta Nikah Nomor 365/54/III/2006 tanggal 11 Agustus 2006 yang dikeluarkan oleh PPN pada KUA Kecamatan Kemlagi Kabupaten Mojokerto, bermaterai cukup sesuai dengan aslinya (P-1);
2. Fotokopi Kartu Tanda Penduduk atas nama Pemohon, Nomor 3515140502860002, tanggal 04 April 2012, yang dikeluarkan oleh dinas Kependudukan dan Catatan Sipil Kabupaten Sidoarjo, bermaterai cukup sesuai dengan aslinya (P-2);
3. Fotokopi Kartu Tanda Penduduk atas nama Termohon, Nomor 3515145010860001, tanggal 08 April 2012, yang dikeluarkan oleh dinas Kependudukan dan Catatan Sipil Kabupaten Sidoarjo, bermaterai cukup sesuai dengan aslinya (P-3);
4. Fotokopi Kartu Tanda Penduduk atas nama calon isteri Pemohon, Nomor 3514115406890001, tanggal 24 Agustus 2012, yang dikeluarkan oleh dinas Kependudukan dan Catatan Sipil Kabupaten Pasuruan, bermaterai cukup sesuai dengan aslinya (P-4);
5. Fotokopi Kartu Keluarga atas nama Pemohon, Nomor 3515142501099227, tanggal 11 November 2014, yang dikeluarkan oleh dinas Kependudukan dan Catatan Sipil Kabupaten Sidoarjo, bermaterai cukup sesuai dengan aslinya (P-5);
6. Fotokopi Kartu Keluarga atas nama calon isteri Pemohon, Nomor 3514110212110009, tanggal 14 Februari 2012, yang dikeluarkan oleh dinas Kependudukan dan Catatan Sipil Kabupaten Sidoarjo, bermaterai cukup sesuai dengan aslinya (P-6);
7. Fotokopi Surat Keterangan Nomor 470/16/404.7.10.2/2016 tanggal 16 Nopember 2016 yang dikeluarkan oleh Kepala Desa Pekarangan,

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- Kecamatan Sukodono Kabupaten Sidoarjo, bermaterai cukup sesuai dengan aslinya (P-7);
8. Fotokopi Surat Pernyataan atas nama Pemohon tanggal 29 April 2016, bermaterai cukup sesuai dengan aslinya (P-8);
 9. Fotokopi Surat Pernyataan atas nama Termohon tanggal 29 April 2016, bermaterai cukup sesuai dengan aslinya (P-9);
 10. Fotokopi Surat Pernyataan atas nama Calon Istri Ke Dua Pemohon tanggal 29 Nopember 2016, bermaterai cukup sesuai dengan aslinya (P-10);

Merimbang, bahwa selain bukti tertulis sebagaimana tersebut di atas, Pemohon juga telah menghadirkan saksi di muka sidang sebagai berikut :

Saksi I : Nama SAKSI I, umur 53 tahun, agama Islam, pekerjaan ibu Rumah Tangga, tempat tinggal di Kabupaten Sidoarjo, didalam sidang saksi memberikan keterangan diatas sumpah yang pokoknya adalah sebagai berikut :

- Bahwa Saksi adalah ibu mertua dari Pemohon;
- Bahwa Saksi mengetahui Pemohon dan Termohon suami istri yang menikah pada tahun 2006;
- Bahwa Saksi tahu selama dalam pernikahan Pemohon dengan Termohon tinggal dan membina rumah tangga di dirumah orang tua Pemohon di Desa Pekarangan Kecamatan Sukodono Kabupaten Sidoarjo;
- Bahwa Saksi tahu selama dalam pernikahan Pemohon dan Termohon sudah hidup seperti layaknya suami isteri dan sudah dikaruniai 2 anak bernama Anak Kandung I Pemohon dan Termohon, umur 9 tahun dan Anak Kandung II Pemohon dan Termohon umur 2,5 tahun;
- Bahwa Saksi mengetahui Pemohon mengajukan Permohonan izin untuk menikah lagi dengan calon istri kedua bernama Calon Istri Ke Dua Pemohon, umur 27 tahun, Agama Islam, pekerjaan Karyawan Swasta, status perkawinan perawan, tempat tinggal di Kabupaten Pasuruan;
- Bahwa Pemohon dengan Calon Istri Ke Dua Pemohon sejak 2011 telah menjalin hubungan selama 5 tahun dan kemudian bersepakat untuk melanjutkan hubungan tersebut kejangk perkawinan yang sah;

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- Bahwa Saksi tahu bahwa Pemohon mengajukan izin poligami karena Pemohon sudah menikah siri dengan calon istri Pemohon dan sudah mempunyai anak dalam pernikahannya tersebut;
- Bahwa Saksi tahu karena mendengar sendiri dari Termohon bahwa Termohon setuju atas pernikahan Pemohon dengan calon istri keduanya bernama Calon Istri Ke Dua Pemohon tersebut.
- Bahwa Saksi tahu Termohon, Pemohon dan calon istri kedua Pemohon (Calon Istri Ke Dua Pemohon) adalah orang lain, tidak ada hubungan mahram, sesusuan atau mushoharoh dan tidak ada larangan yang dapat menghalangi sahnya pernikahan baik menurut syariat Islam maupun peraturan perundang-undangan yang berlaku;
- Bahwa Saksi melihat Pemohon bekerja sebagai Pemohon Karyawan swasta dengan penghasilan setiap bulan rata-rata sebesar Rp. 4.000.000,- (empat juta rupiah), sehingga ada jaminan bahwa Pemohon mampu memenuhi kebutuhan hidup isteri-isteri dan anak-anak Pemohon dengan baik;
- Bahwa Saksi melihat selama ini Pemohon bersikap baik kepada Termohon dan anak-anaknya juga dalam pergaulan ditengah-tengah masyarakat. Pemohon juga taat beribadah dan tidak pernah melakukan perbuatan tercela;
- Bahwa Saksi mengetahui selama berumah tangga Pemohon dan Termohon memperoleh harta berupa 1 buah sepeda motor Mega Pro tahun 2001 a/n Pemohon (Pemohon) ;

Saksi II : Nama SAKSI II, umur 65 tahun, agama Islam, pekerjaan wiraswasta, tempat tinggal di Kabupaten Mojokerto, didalam sidang saksi memberikan keterangan diatas sumpah yang pokoknya adalah sebagai berikut :

- Bahwa Saksi adalah ayah calon isteri dari Pemohon;
- Bahwa Saksi mengetahui Pemohon dan Termohon suami istri yang menikah pada tahun 2006;
- Bahwa Saksi tahu selama dalam pernikahan Pemohon dengan Termohon tinggal dan membina rumah tangga di rumah orang tua Pemohon di Desa Pekarangan Kecamatan Sukodono Kabupaten Sidoarjo;

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- Bahwa Saksi tahu selama dalam pernikahan Pemohon dan Termohon sudah hidup seperti layaknya suami isteri dan sudah dikaruniai 2 anak bernama Anak Kandung I Pemohon dan Termohon, umur 9 tahun dan Anak Kandung II Pemohon dan Termohon umur 2,5 tahun;
- Bahwa Saksi mengetahui Pemohon mengajukan Permohonan izin untuk menikah lagi dengan calon istri kedua bernama Calon Istri Ke Dua Pemohon, umur 27 tahun, Agama Islam, pekerjaan Karyawan Swasta, status perkawinan perawan, tempat tinggal di Kabupaten Pasuruan;
- Bahwa Pemohon dengan Calon Istri Ke Dua Pemohon sejak 2011 telah menjalin hubungan selama 5 tahun dan kemudian bersepakat untuk melanjutkan hubungan tersebut kejangkang perkawinan yang sah;
- Bahwa Saksi tahu bahwa Pemohon mengajukan izin poligami karena Pemohon sudah menikah siri dengan calon istri Pemohon dan sudah mempunyai anak dalam pernikahannya tersebut;
- Bahwa Saksi tahu karena mendengar sendiri dari Termohon bahwa Termohon setuju atas pernikahan Pemohon dengan calon istri keduanya bernama Calon Istri Ke Dua Pemohon tersebut.
- Bahwa Saksi tahu Termohon, Pemohon dan calon istri kedua Pemohon (Calon Istri Ke Dua Pemohon) adalah orang lain, tidak ada hubungan mahram, sesusuan atau mushoharoh dan tidak ada larangan yang dapat menghalangi sahnya pernikahan baik menurut syariat Islam maupun peraturan perundang-undangan yang berlaku;
- Bahwa Saksi melihat Pemohon bekerja sebagai Pemohon Karyawan swasta dengan penghasilan setiap bulan rata-rata sebesar Rp. 4.000.000,- (empat juta rupiah), sehingga ada jaminan bahwa Pemohon mampu memenuhi kebutuhan hidup isteri-isteri dan anak-anak Pemohon dengan baik;
- Bahwa Saksi melihat selama ini Pemohon bersikap baik kepada Termohon dan anak-anaknya juga dalam pergaulan ditengah-tengah masyarakat. Pemohon juga taat beribadah dan tidak pernah melakukan perbuatan tercela;

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- Bahwa Saksi mengetahui selama berumah tangga Pemohon dan Termohon memperoleh harta berupa 1 buah sepeda motor Mega Pro tahun 2001 a/n Pemohon (Pemohon) ;

Bahwa atas keterangan para saksi tersebut, Pemohon menyatakan tidak keberatan dan membenarkan adapun Termohon juga membenarkan;

Bahwa meskipun Majelis telah memberikan kesempatan yang cukup, Termohon menyatakan tidak mengajukan bukti;

Bahwa Pemohon telah menyampaikan kesimpulannya yang pada pokoknya tetap mempertahankan permohonannya sedangkan Termohon menyatakan tetap pada jawabannya;

Bahwa untuk mempersingkat uraian putusan ini maka hal-hal yang termuat dalam berita acara persidangan perkara ini dinyatakan sebagai bagian yang tidak terpisahkan dari Putusan ini;

PERTIMBANGAN HUKUM

Menimbang, bahwa maksud dan tujuan permohonan Pemohon adalah seperti diuraikan tersebut di atas;

Menimbang, bahwa pada hari sidang yang telah ditentukan Pemohon dan Termohon hadir di persidangan dan Majelis Hakim telah berusaha mendamaikan kedua belah pihak namun tidak berhasil;

Bahwa Majelis Hakim telah memerintahkan kepada para pihak untuk menempuh mediasi, namun berdasarkan surat pemberitahuan dari Drs.ZAKWAN DAMAN.SH.MH, Mediator pada Pengadilan Agama Sidoarjo tertanggal 22 Desember 2016 pokoknya menyatakan mediasi antara para pihak telah gagal;

Menimbang, bahwa perkara ini termasuk dalam bidang perkawinan yang dilaksanakan berdasar Hukum Islam, maka berdasarkan Pasal 1 angka 37 Pasal 49 huruf (a) dan penjelasannya angka (1) Undang-Undang Nomor 3 Tahun 2006 tentang perubahan pertama Undang-Undang Nomor 7 tahun 1989 tentang Peradilan Agama, perkara *a quo* menjadi kewenangan absolut Pengadilan Agama;

Menimbang, bahwa dalam permohonannya Pemohon menyatakan tempat tinggal Pemohon berada diwilayah hukum Pengadilan Agama Sidoarjo,

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maka berdasarkan Pasal 4 ayat (1) Undang-Undang Nomor 1 Tahun 1974 perkara *a quo* merupakan kewenangan relatif Pengadilan Agama Sidoarjo;

Menimbang, bahwa Pemohon mendalilkan telah menikah dengan Termohon berdasarkan Hukum Islam kemudian Pemohon mengajukan permohonan agar Pengadilan Agama Sidoarjo memberi izin kepada Pemohon untuk menikah lagi (poligami), oleh karenanya berdasarkan Pasal 39 Undang-undang Nomor 1 tahun 1974 tentang Perkawinan Jo Pasal 73 ayat (1) Undang-Undang Nomor 7 tahun 1989 tentang Peradilan Agama, Pemohon mempunyai *legal standing* untuk mengajukan permohonan izin poligami tersebut;

Menimbang, bahwa berdasarkan pertimbangan-pertimbangan tersebut dan karena permohonan Pemohon telah memenuhi syarat fomal suatu permohonan maka terhadap petitem permohonan Pemohon angka 1 yang meminta Pengadilan menerima permohonan Pemohon secara formal dapat diterima untuk diperiksa;

Menimbang, bahwa yang menjadi pokok permohonan Pemohon adalah oleh karena syarat-syarat untuk menikah dengan calon istri kedua telah dipenuhi maka Pemohon memohon Pengadilan Agama Sidoarjo memberi izin kepada Pemohon untuk menikah lagi (poligami) dengan Calon Istri Ke Dua Pemohon karena Pemohon sudah menikah siri dengan calon istri Pemohon dan sudah mempunyai anak dalam pernikahannya tersebut;

Menimbang, bahwa atas permohonan Pemohon tersebut Termohon memberikan jawaban yang pokoknya membenarkan bahwa syarat-syarat untuk menikah dengan calon istri kedua telah dipenuhi oleh Pemohon sehingga Termohon tidak keberatan Pengadilan Agama Sidoarjo memberi izin kepada Pemohon untuk menikah lagi (poligami) dengan Calon Istri Ke Dua Pemohon. Termohon kemudian menyatakan bahwa alasan Pemohon mengajukan poligami karena Pemohon dan calon isteri sudah menikah siri dan mempunyai anak;

Menimbang, bahwa dengan demikian pengakuan Termohon tersebut termasuk pengakuan berkwalifikasi yang berdasarkan pasal 176 HIR Jo. Pasal 163 HIR serta dengan memperhatikan prinsip menegakkan kebenaran dan keadilan (*to enforce the truth and justice*) dan juga untuk memenuhi ketentuan

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Pasal 76 Undang-undang nomor 7 tahun 1989 Jo. Pasal 22 Peraturan Pemerintah nomor 9 tahun 1970, Majelis berpendapat bahwa Pemohon wajib membuktikan dalil pemohonannya;

Menimbang bahwa untuk membuktikan dalil-dalilnya Pemohon telah mengajukan alat bukti tertulis yakni Bukti P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9 dan P-10 serta saksi I dan saksi II yang selengkapny akan dipertimbangkan lebih lanjut;

Menimbang bahwa bukti P-1, P-2, P-3, P-4, P-5, P-6, P-7, P-8, P-9 dan P-10 adalah akta otentik yang dikeluarkan oleh pejabat yang berwenang, bermeterai cukup dan cocok dengan aslinya, oleh karena itu akta tersebut berdasarkan pasal 165 HIR / 1868 KUH Perdata, memiliki nilai pembuktian sempurna dan mengikat ;

Menimbang bahwa keterangan saksi 1 dan saksi 2 Pemohon mengenai sesuatu yang dilihat sendiri dan atau dialami sendiri serta saksi-saksi tersebut memenuhi syarat-syarat formal sebagai saksi berdasarkan Pasal 76 Undang-undang nomor 7 tahun 1989 tentang Peradilan Agama jo Pasal 171 HIR dan Pasal 22 Peraturan Pemerintah nomor 9 tahun 1975, maka keterangan saksi tersebut bernilai sebagai alat bukti yang sah dan dapat diterima sebagai alat bukti;

Menimbang, bahwa calon istri kedua Pemohon bernama Calon Istri Ke Dua Pemohon memberikan keteangan yang pada pokoknya menyatakan bersedia dan siap untuk menjadi istri kedua Pemohon dengan baik dan adil, selain itu antara dirinya dengan Pemohon maupun Temohon tidak terdapat larangan yang dapat menghalangi sahnya pernikahan baik menurut ketentuan syariat Islam maupun peraturan perundang-undangan yang berlaku dan calon istri kedua Pemohon juga mengetahui bahwa selama dalam ikatan perkawinan, Pemohon dan Temohon telah memperoleh harta berupa 1 buah sepeda motor Mega Pro tahun 2001 a/n Pemohon (Pemohon), untuk itu calon istri kedua Pemohon menyatakan tidak akan mengganggu gugat harta Pemohon dan Temohon tersebut;

Menimbang, bahwa atas dasar tuntutan yang dikemukakan Pemohon dan berdasarkan bukti-bukti yang diajukan Pemohon, Majelis Hakim akan

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Ditawar

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mempertimbangkan tuntutan Pemohon sebagaimana terurai dalam surat pemohonan Pemohon petitem angka 2 sebagai berikut :

Menimbang, bahwa berdasarkan bukti P.1 serta berdasarkan keterangan saksi I dan saksi II yang saling bersesuaian, telah terbukti bahwa Pemohon dan Termohon adalah suami istri yang menikah berdasarkan Hukum Islam, oleh karenanya maka terbukti secara sah menurut hukum bahwa Pemohon dan Termohon adalah suami istri;

Menimbang, bahwa berdasarkan pengakuan Termohon, keterangan saksi I dan saksi II yang saling bersesuaian, telah terbukti bahwa setelah menikah Pemohon dan Termohon tinggal bersama di dirumah orang tua Pemohon di Desa Pekarungan Kecamatan Sukodono Kabupaten Sidoarjo dan telah hidup layaknya suami istri dan sudah dikaruniai 2 anak bernama Anak Kandung I Pemohon dan Termohon, umur 9 tahun dan Anak Kandung II Pemohon dan Termohon umur 2,5 tahun ;

Menimbang, bahwa berdasarkan pengakuan Termohon, bukti P-3 s/d P-7, keterangan saksi I dan saksi II serta keterangan calon istri kedua Pemohon yang saling bersesuaian, telah terbukti hal-hal sebagai berikut :

1. Bahwa Pemohon dengan Calon Istri Ke Dua Pemohon telah menjalin hubungan selama 5 tahun dan kemudian bersepakat untuk melanjutkan hubungan tersebut kejangk perkawinan yang sah;
2. Bahwa alasan Pemohon hendak menikah lagi adalah karena Pemohon sudah menikah siri dengan calon istri Pemohon dan sudah mempunyai anak dalam pernikahannya tersebut;
3. Bahwa rencana perkawinan Pemohon dengan calon isteri kedua Pemohon (Calon Istri Ke Dua Pemohon) tersebut telah mendapat persetujuan Termohon;
4. Bahwa antara Pemohon, Termohon dan calon istri kedua Pemohon (Calon Istri Ke Dua Pemohon) tidak terdapat larangan yang dapat menghalangi sahnya pernikahan baik menurut syariat Islam maupun peraturan perundang-undangan yang berlaku;
5. Bahwa Pemohon mampu memenuhi kebutuhan hidup isteri-isteri dan anak-anak Pemohon dengan baik dimana Pemohon memiliki pekerjaan sebagai

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Karyawan swasta dengan penghasilan setiap bulan rata-rata sebesar Rp. 4.000.000,00 (rupiah);

6. Bahwa Pemohon sanggup dan mampu berlaku adil diantara isteri-isteri dan anak-anak Pemohon;
7. Bahwa selama dalam ikatan perkawinan Pemohon dan Temohon telah memperoleh harta bersama baik bergerak maupun tidak bergerak berupa 1 buah sepeda motor Mega Pro tahun 2001 a/n Pemohon (Pemohon) dan calon isteri kedua Pemohon (Calon Istri Ke Dua Pemohon) telah mengetahui hal itu serta tidak akan mengganggu gugat harta bersama Pemohon dan Temohon tersebut;

Menimbang, bahwa meskipun telah diberikan kesempatan yang cukup Temohon menyatakan tidak mengajukan bukti, oleh karenanya maka dalil bantahan yang dikemukakan Temohon dinyatakan tidak terbukti;

Menimbang, bahwa berdasarkan fakta-fakta tersebut diatas Pemohon telah memenuhi syarat untuk mendapatkan izin beristri lebih dari seorang sebagaimana diatur oleh Pasal 4 dan Pasal 5 Undang-Undang Nomor 1 Tahun 1974 tentang perkawinan jo. Pasal 55 s/d Pasal 58 Kompilasi Hukum Islam;

Menimbang, bahwa berdasarkan fakta-fakta hukum tersebut diatas pemikahan Pemohon dengan calon isteri kedua Pemohon bernama Calon Istri Ke Dua Pemohon juga telah memenuhi syarat dan ketentuan sebagaimana diatur oleh Pasal 6 ayat (1), Pasal 7 ayat (1) dan Pasal 8 s/d Pasal 10 Undang-Undang Nomor 1 Tahun 1974 tentang perkawinan jo Pasal 16 ayat (1) dan Pasal 18 Kompilasi Hukum Islam;

Menimbang, bahwa kehendak Pemohon untuk melakukan poligami tentu akan menanggung *mudharat* (resiko) bahkan dampak negatif, namun Majelis Hakim menilai bahwa resiko yang dihadapi oleh Pemohon dan Temohon lebih besar jika Pemohon tidak diizinkan melakukan poligami, dan jika ada dua hal yang sama-sama mengandung *mudharat* (resiko), maka dipilih *mudharat* (resiko) yang lebih ringan, hal mana sesuai dengan kaidah fikih dalam kitab al-Asbah An-Nadzair Juz I halaman 188 yang berbunyi;

إذا تعارض مفسدتان روعي اعظمهما ضرراً بارتكاب أخيهما

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Artinya: "Apabila dihadapkan pada dua mafsadah maka supaya dijaga jangan sampai mengerjakan yang lebih besar mafsadahnya dengan cara mengerjakan mafsadah yang lebih ringan"

Menimbang, bahwa Majelis Hakim perlu mengutip firman Allah dalam Qs. An-Nisa' ayat 3 yang berbunyi:

فَانكحوا ما طاب لكم من النساء مثنى وثلاث ورباع فإن خفتم أن لا تتعدوا فواحدة

Artinya: " Dan jika kamu takut tidak akan dapat berbuat adil terhadap (hak-hak) perempuan yang yatim (bilamana kamu mengawininya), maka kawinilah wanita-wanita (lain) yang kamu senangi dua, tiga, empat kemudian jika kamu takut tidak akan dapat berlaku adil, maka (kawinilah) seorang saja";

Menimbang, bahwa berdasarkan fakta-fakta dan pertimbangan hukum tersebut tersebut diatas, Majelis berpendapat bahwa permohonan Pemohon cukup beralasan dan telah memenuhi syarat untuk beristri lebih dari seorang dan karenanya permohonan Pemohon dapat dikabulkan;

Menimbang, bahwa terhadap permohonan Pemohon mengenai penetapan harta bersama Majelis berpendapat bahwa berdasarkan pengakuan Termohon, bukti P-1 s/d P-7, keterangan saksi I dan saksi II serta keterangan calon istri kedua Pemohon yang saling bersesuaian, telah terbukti bahwa selama dalam ikatan perkawinan Pemohon dan Termohon telah memperoleh harta baik bergerak maupun tidak bergerak berupa 1 buah sepeda motor Mega Pro tahun 2001 a/n Pemohon (Pemohon) dan calon isteri kedua Pemohon (Calon Istri Ke Dua Pemohon) telah mengetahui hal itu serta tidak akan mengganggu gugat harta bersama Pemohon dan Termohon tersebut;

Menimbang, bahwa berdasarkan KMA/032/SK/IV/2006 tentang Pemberlakuan Buku II Pedoman Pelaksanaan Tugas dan Administrasi Pengadilan Edisi Revisi 2010 bahwa pada saat permohonan izin poligami suami wajib pula mengajukan permohonan penetapan harta bersama Pemohon dan Termohon yang bertujuan untuk melindungi hak Termohon serta untuk mempermudah pembagian harta bersama jika terjadi perselisihan dikemudian hari;

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Menimbang, bahwa sesuai ketentuan Pasal 35 ayat (1) Undang-Undang Nomor 1 Tahun 1974 bahwa harta benda yang diperoleh selama perkawinan menjadi harta bersama, dengan demikian harta tersebut dapat ditetapkan sebagai harta bersama Pemohon dan Termohon;

Menimbang, bahwa berdasarkan pertimbangan-pertimbangan tersebut di atas, Majelis Hakim berpendapat permohonan Pemohon tentang penetapan harta bersama dinyatakan terbukti dan beralasan hukum, oleh karenanya permohonan Pemohon patut dikabulkan;

Menimbang, bahwa oleh karena perkara ini masuk dalam bidang perkawinan, maka sesuai Pasal 89 ayat (1) Undang-undang Nomor 7 Tahun 1989 sebagaimana telah diubah dengan Undang-undang Nomor 3 Tahun 2006 dan perubahan kedua dengan Undang-undang Nomor 50 Tahun 2009, biaya perkara dibebankan kepada Pemohon;

Mengingat, semua pasal dalam peraturan perundang-undangan dan hukum Islam yang berkaitan dengan perkara ini;

M E N G A D I L I

1. Mengabulkan Permohonan Pemohon;
2. Menetapkan, Memberi izin kepada pemohon (PEMOHON) untuk menikah lagi (poligami) dengan seorang perempuan bernama (CALON ISTRY KE DUA PEMOHON);
3. Menetapkan sebuah sepeda motor Mega Pro tahun 2001 a/n Pemohon (PEMOHON) adalah harta bersama antara Pemohon dan Termohon;
4. Membebaskan kepada Pemohon untuk membayar biaya perkara ini sebesar Rp. 261.000,00 (dua ratus enam puluh satu ribu Rupiah).

Demikian putusan ini dijatuhkan pada hari Kamis tanggal 22 Desember 2016 Masehi bertepatan dengan tanggal 23 Rabiulawal 1438 Hijriyah dalam sidang permusyawaratan Majelis Hakim Pengadilan Agama Sidoarjo oleh kami Hj. Siti Aisyah, S.Ag., M.HP. sebagai Ketua Majelis, H. M. Sholik Fatchurozi, S.H. dan Dra. Hilyatul Husna masing-masing sebagai Hakim Anggota, putusan mana dibacakan pada hari itu juga oleh Majelis tersebut dalam sidang terbuka

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untuk umum dengan dibantu oleh Dini Aulia Safitri, S.H. sebagai Panitera Pengganti, dengan dihadiri oleh Pemohon dan Termohon.

Hakim Anggota,

Ketua Majelis,

Ttd.

Ttd.

H. M. Sholik Fatchurozi, S.H.

Hj. Siti Aisyah, S.Ag., M.H.P.

Ttd.

Dra. Hilyatul Husna

Panitera Pengganti,
Ttd.

Dini Aulia Safitri, S.H.

Perincian Biaya Perkara:

Pendaftaran	Rp	30.000,-
Panggilan	Rp	170.000,-
Biaya Proses	Rp	50.000,-
Redaksi	Rp	5.000,-
Meterai	Rp	6.000,-
Jumlah	Rp	261.000,-

(dua ratus enam puluh satu ribu rupiah)

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Appendices 5: Script of Interview

Informant : Dra. Hj. Hasniati D., MH.
Agency Name : Sidoarjo Religious Court
Day, Date : Thursday, 2 March 2023
Place : Judge's Room

Q: Apa pendapat ibu mengenai putusan ini?

A: Saya lihat putusan ini sudah menikah siri kemudian mengajukan permohonan poligami. Pada umumnya, saya melihat beberapa perkara seperti ini disini. Sebenarnya ini adalah penyeludupan hukum. Kalau mau diisbatkan nikah kan tdak boleh karena dia istri kedua tidak ada izin dari pengadilan untuk menikahi istri kedua. Jadi, untuk menyelamatkan istri kedua ini, pemohon mengajukan izin poligami. Jadi dalam pemeriksaan seolah-olah hakim tidak melihat kepada nikah sirinya.

Q: Apa pertimbangan hakim dalam memutuskan perkara ini?

A: Hakim memutuskan perkara ini menitiberatkan pada alasan apa yang diajukan dalam permohonan poligami. Izin poligami kan ada persyaratannya untuk bisa diterima. Pada pokoknya terletak pada wanita itu sendiri sebagai ibu rumah tangga.

Q: Walaupun syarat pasal 4 ayat 2 tidak terpenuhi pada istri?

A: Iya. Alasan pokok untuk mengabulkan permohonan izin poligami terdapat pada istrinya. Kemudian yang kita pertimbangkan juga adalah azas kemudharatan. Pada umunya, ada beberapa suami yang memiliki seks yang tinggi dan istri tidak mampu melayani suaminya maka suami boleh mengajukan permohonan izin poligami selama istri mengizinkan. Jadi kita tidak

terfokus pada perempuan itu tidak bisa melaksanakan tugasnya. Namanya juga kita mengadili perkara hukum keluarga. Bagaimana cara kita untuk menyelamatkan keutuhan keluarga tersebut.

Q: Dalam perkara ini, calon istri kedua sudah memiliki anak hasil dari nikah sirinya. Lalu bagaimana perlindungan hukum pada anaknya?

A: Ada yang namanya permohonan asal-usul anak. Jadi, ketika pernikahannya sudah sah secara hukum agama dan negara, maka mereka bisa mengajukan permohonan tersebut. tapi perlu diketahui bahwa tidak semua permohonan ini bisa langsung dikabulkan. Hakim perlu memeriksa apakah nikah sirinya sesuai dengan rukun perkawinan.

Q: Bagaimana cara hakim menilai kemudharatan pada perkara ini?

A: Kemudharatannya yang dimaksud ini adalah kemudharatan yang akan didapatkan oleh calon istri dua dan anaknya. Jika permohonan ini tidak dikabulkan maka besar juga kemudharatan yang akan ditanggung oleh kedua pihak. Maka dari itu, selama istri rela dimadu lebih baik poligami daripada harus berpisah dengan calon istri kedua.

Q: Apa pendapat ibu mengenai kasus ini agar tidak banyak terjadi lagi di Pengadilan Agama Sidoarjo yang mana kasus ini terlihat seperti penyeludupan hukum?

A: Kita harus ada penyuluhan hukum pada masyarakat, terutama perempuan jangan mau untuk menikah siri. Ketika ada seorang laki-laki yang suka padanya dan sudah beristri, lalu ada perselingkuhan diantaranya. Itu awal mula adanya pengajuan izin poligami. Banyaknya perselingkuhan juga menjadi faktor banyaknya permohonan izin poligami.

Appendices 6: Interview Photos



CURRICULUM VITAE

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Educational Background :

- a. Elementary School : SD N 1 Pliken
- b. Junior High School : SMP N 2 Sokaraja
- c. Senior High School : SMA N 2 Purwokerto
- d. University : Bachelor of Islamic Family Law UIN Walisongo Semarang

Organization
Experiences

1. Committee of UKM Justisia
2. Committee of UKM Teater
Asa
3. Volunteer of American Corner
UIN Walisongo

Thus this curriculum vitae, I made truthfully and I hope it can be used properly.

Semarang, 15 June 2023



Syafrina Hamadah
1902016084