

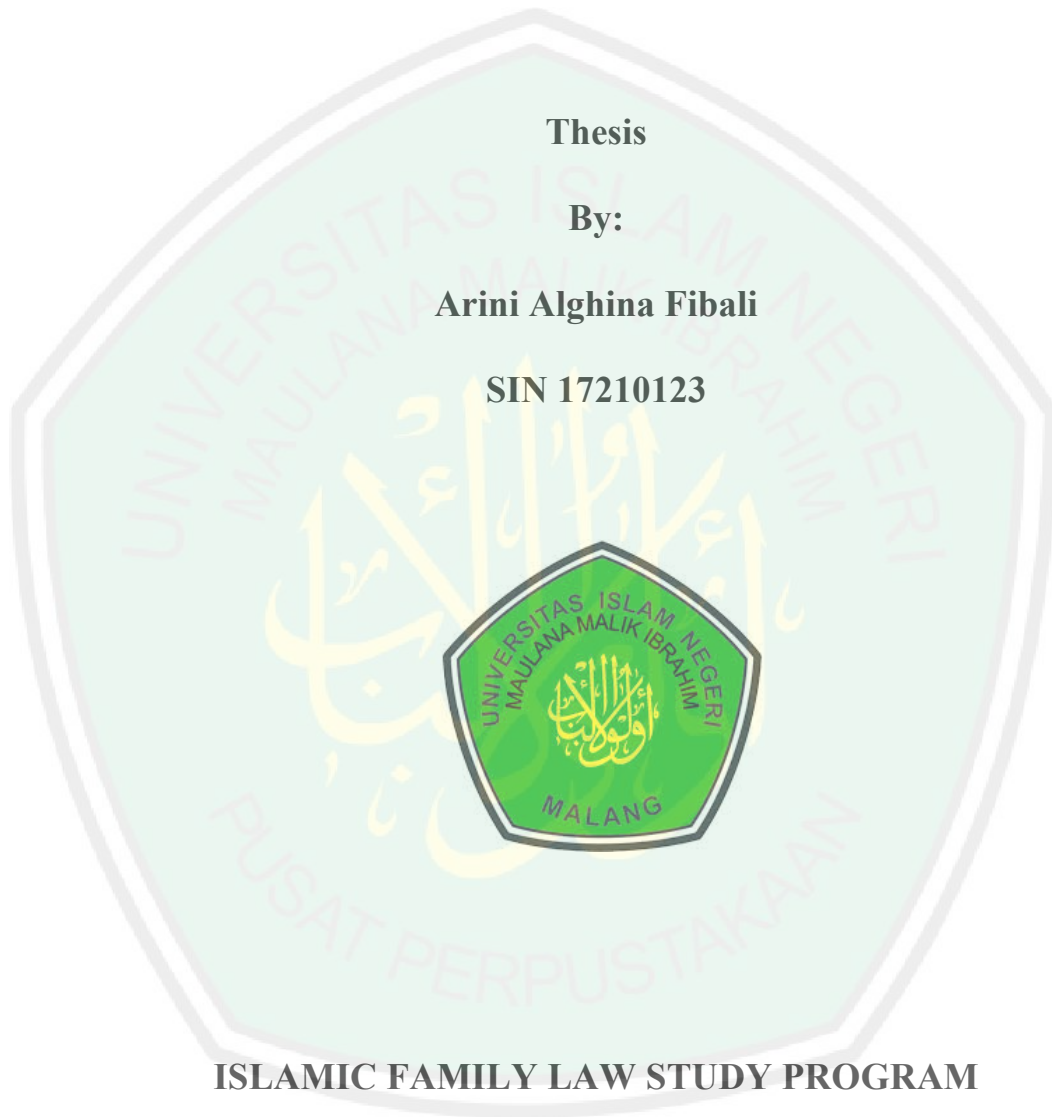
**THE VIEWS OF JUDGES AT MOJOKERTO RELIGIOUS
COURT ON THE AVERMENT OF POLYGAMOUS
MARRIAGE PERSPECTIVE OF AL-GHAZALI'S MASLAHAT**

Thesis

By:

Arini Alghina Fibali

SIN 17210123



ISLAMIC FAMILY LAW STUDY PROGRAM

SHARIA FACULTY

STATE ISLAMIC UNIVERSITY MAULANA MALIK

IBRAHIM MALANG

2020

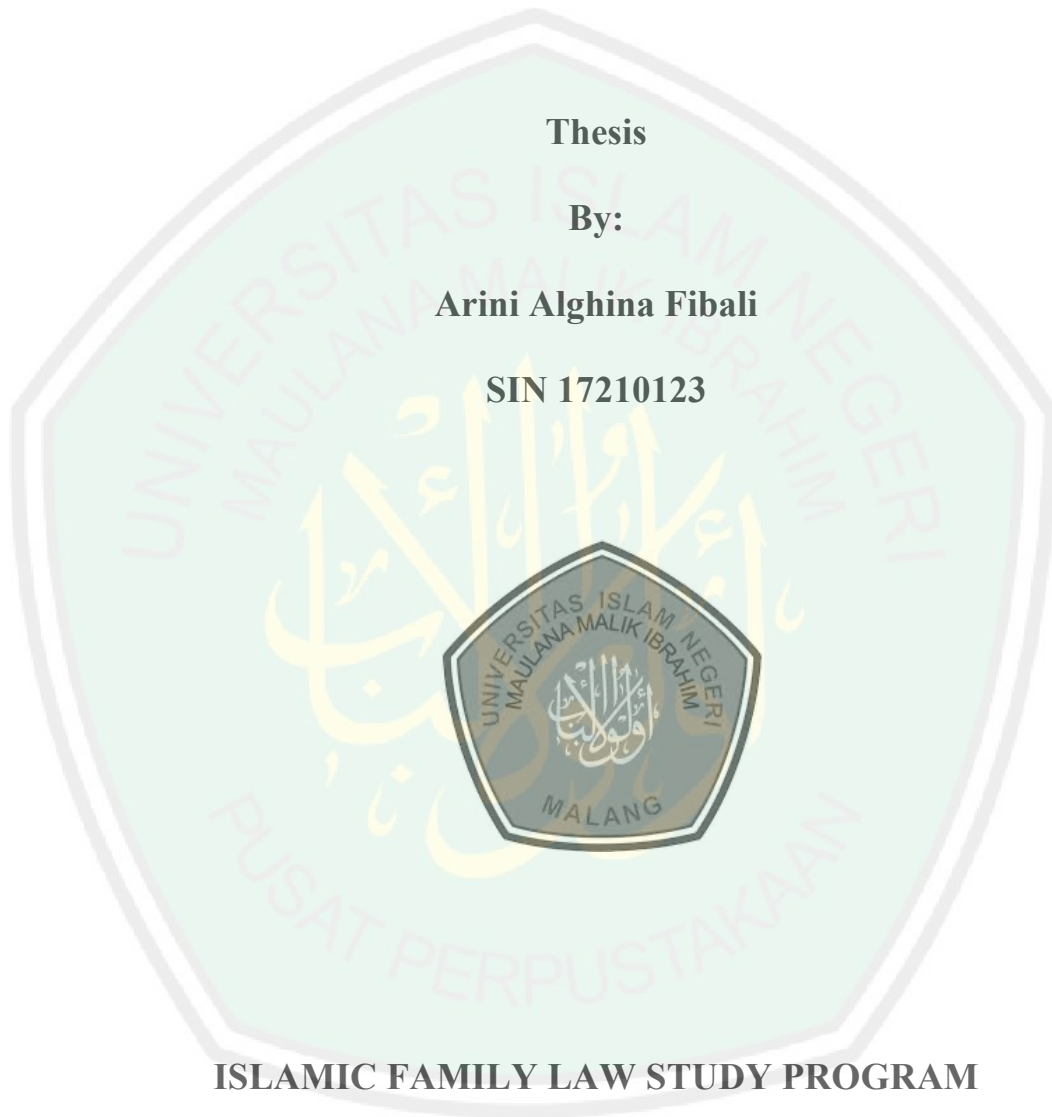
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IBRAHIM MALANG

2020

STATEMENT OF THE AUNTENTICITY

In the name of Allah,

With consciousness and responsibility toward the development of science, the writer declares that thesis entitled:

THE VIEWS OF JUDGES AT MOJOKERTO RELIGIOUS COURT ON THE AVERMENT OF POLYGAMOUS MARRIAGE PERSPECTIVE OF AL-GHAZALI'S MASLAHAT

Is truly writer's original work which can be legally justified. If this thesis is proven result of duplication or plagiarism from another scientific work, it as precondition of degree will be stated legally invalid.

Malang, 7 December 2020

Writer,



Arini Alghina Fibali

SIN 17210123

APPROVAL SHEET

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Department of Islamic Family Law, Syari'ah Faculty of The State Islamic
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THE VIEWS OF JUDGES AT MOJOKERTO RELIGIOUS COURT ON THE AVERMENT OF POLYGAMOUS MARRIAGE PERSPECTIVE OF AL-GHAZALI'S MASLAHAT

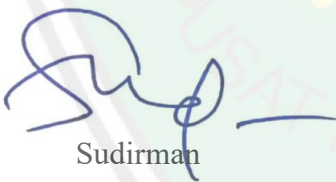
The supervisor stated that this thesis has met the scientific requirements to be
proposed and to be examined on the Assembly Board of Examiners

Malang, 23 Desember 2020

Acknowledged by,

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**THE VIEWS OF JUDGES AT MOJOKERTO RELIGIOUS COURT ON THE
AVERMENT OF POLYGAMOUS MARRIAGE PERSPECTIVE OF AL-GHAZALI'S
MASLAHAT**

Has been certified to pass with mark A (91)

Malang, 23 Desember 2020



Prof. Dr. H. Saifullah, S.H., M.Hum. 

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MOTTO

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً ۗ إِنَّ فِي

ذَٰلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

And among the signs of His power, He created for you wives of your own kind, so that you might be inclined and at ease with them, and he has put love and mercy between your (hearts): verily in that are signs for those who reflect

(Ar-Ruum Verse: 21)



ACKNOWLEDGMENT

Alhamdulillah *Rabbil Alamin*, Gratitude for His grace and guidance so that the writing of the thesis entitled "The View of Judges At Mojokerto Religious Court on the Averment of Polygamous Marriage Perspective Of Al-Ghazali's Maslahat" could be finished well. We offer prayers and greetings to the Prophet, *Sayyidina wa Maulana* Muhammad SAW, who gave us *uswatun hasanah* which guided us from the darkness era of the era of ignorance to an era full of knowledge and light of Islam. By always following him, may we be included in his people's ranks and belong to those who are fortunate to receive his intercession. Amen.

The author is aware that working on this Final Project / Thesis can be completed with all prayers, motivation, guidance, and assistance from various parties. Therefore, with great humility, the author would like to thank you profusely to:

1. Prof. Dr. Abdul Haris, M.Ag, as the Rector of Maulana Malik Ibrahim State Islamic University Malang.
2. Prof. Dr. H. Saifullah, SH. M.Hum, as Dean of the Sharia Faculty of the State Islamic University of Maulana Malik Ibrahim Malang.
3. Dr. Sudirman, M.A, as the Head of the Islamic Family Law Department, Sharia Faculty, Maulana Malik Ibrahim State Islamic University Malang.
4. Prof. Dr. Hj. Mufidah.Ch., M.Ag., as a lecturer guardian writer while studying at the Syari'ah Faculty of the State Islamic University of Maulana Malik Ibrahim Malang.

5. R. Cecep Lukman Hakim., Ph.D. , as lecture supervisor final assignment/thesis writer. Thank you for your time, knowledge, and guidance during the preparation of this final project. The author apologizes to him if all this time, it is troublesome and disturbs his time whenever the author experiences difficulties. May Allah SWT repay all of his kindness, and may he and his entire family always get health and happiness in this world and the hereafter.
6. All Lecturers and Staff of the Syari'ah Faculty of the State Islamic University of Maulana Malik Ibrahim Malang who have been sincere in teaching knowledge, educating, and guiding writers while studying at this campus.
7. All of my Family, my beloved mother who always support me in every single day of my life. And also my sisters, my brothers, grandpa, and my beloved grandma.
8. ICP Class 2017 and HKI D, thank you for being my companion in arms from the beginning to the end of the semester
9. All MSAA members who always support me in completing this thesis, especially for the family of four, the first floor of the USA'90 musyrifah, and Sinar BTS

With that, this thesis has been completed. The author is very aware that this final project/thesis still has shortcomings and is still far from perfect. Therefore it requires constructive criticism and suggestions for the writer. Hopefully, this final / thesis results can be of benefit to all readers and can be used as a reference in two disciplines.

With all the hope for His pleasure and mercy, the writer says prayers and hopes that all good deeds from all parties will receive the best reward and be bestowed with His taufiq and guidance. Amen.

Malang, 7 December 2020

Writer,

Arini Alghina Fibali

SIN 17210123



TRANSLITERATION GUIDENCE

A. Consonant

Arab	Latin	Arab	Latin
ا	A	ط	Th
ب	B	ظ	Zh
ت	T	ع	'
ث	Ts	غ	Gh
ج	J	ف	F
ح	H	ق	Q
خ	Kh	ك	K
د	D	ل	L
ذ	Dz	م	M
ر	R	ن	N
ز	Z	و	W
س	S	هـ	H
ش	Sy	ء	'
ص	Sh	ي	Y
ض	Dl		

B. Vocal, long-pronounce and dipthong

Vocal *fathah* = a

Vocal *kasrah* = i

Vocal *dlomah* = u

Long – vocal (a) = Â e.g. â قال become Qâla

Long – vocal (i) = Î e.g. î قيل become Qîla

Long – vocal (u) = Û e.g. û دون become Dûna

Diphthong (aw) = ءو e.g. قول become qawlun

Diphthong (ay) = ءي e.g. خير become Khayrun

C. Ta' marbûthah (ة)

Ta' marbûthah transliterated as “t” in the middle of word, but if Ta' marbûthah in the end of word, it transliterated as “h” e.g. الرسالة المدرسة become *al-risalat li al-mudarrisah*, or in the standing among two word that in the form of *mudlaf* and *mudla ilaih*, it transliterated as *t* and connected to the next word, e.g. الله في رحمة become *fi rahmatillâh*.

D. Auxiliary Verb and Lafdh al-Jalâlah

Auxiliary verb “al” (ال) written with lowercase form, except if it located it the first postion and “al” in laf dh jalâlah which located in the middle of two word or being or become *idhafah*, it remove from writing.

- a. Al – Imâm al – Bukhâriy said...
- b. Al – Bukhâriy in muqaddimah of his book said
- c. *Masyâ Allâh kâna wa mâ lam yasya' lam yakun.*

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ABSTRAK

Fibali, Arini Alghina, 17210123, 2020. Pandangan Hakim Pengadilan Agama Mojokerto Mengenai Isbat Nikah Poligami Perspektif Maslahat Al-Ghazali. Skripsi, Jurusan Hukum Keluarga Islam, Fakultas Syariah, Universitas Islam Negeri Maulana Malik Ibrahim Malang, Pembimbing: R. Cecep Lukman Hakim., M.A., Ph.D.

Kata Kunci: Isbat Nikah Poligami, Maslahat Al-Ghazali

Islam tidak melarang seorang suami memiliki istri lebih dari 1, sesuai yang dengan firman Allah An-Nisa ayat 3. Dalam perkara poligami, suami harus bisa bersikap adil kepada istri-istrinya. Melakukan poligami tentu harus menggunakan prosedur dan syarat yang telah disebutkan dalam Undang-Undang No.1 Tahun 1974 Tentang Perkawinan. Jika melakukan poligami dengan cara penyelundupan hukum melalui jalan nikah siri maka hal tersebut merupakan isbat nikah poligami.

Adapun tujuan penelitian ini yakni, pertama, mengetahui pandangan hakim Pengadilan Agama Mojokerto mengenai isbat nikah poligami. Kedua, mengetahui pandangan hakim Pengadilan Agama Mojokerto mengenai isbat nikah poligami perspektif maslahat Al-Ghazali.

Penelitian ini termasuk dalam jenis penelitian empiris dengan pendekatan kualitatif. Sumber data yang digunakan dalam penelitian ini yakni data primer dan data sekunder yang secara keseluruhannya mengenai isbat nikah poligami dan teori Maslahat Al-Ghazali. Metode pengumpulan data dalam penelitian ini terdiri dari wawancara dan dokumentasi. Sedangkan metode pengolahan data yang digunakan dalam penelitian ini yakni *editing, classifying, verifying, analyzing, and concluding*.

Hasil dari penelitian ini yakni: 1) Isbat nikah poligami yang diajukan di Pengadilan Agama Mojokerto dinyatakan tidak diterima sesuai dalam Surat Edaran Mahkamah Agung No.03 Tahun 2018. Sebab menurut hakim bahwa perkara tersebut terdiri dari 2 jenis perkara yakni Isbat nikah merupakan voluntair dan poligami merupakan perkara kontentius. Sehingga agar pernikahan siri poligami tersebut diakui oleh negara maka harus melakukan nikah ulang untuk melindungi hak-hak kebendaan istri. Berbeda dengan anak hasil dari pernikahan tersebut, apabila pernikahan siri poligaminya tidak disahkan maka hak-hak kebendaan dari ayahnya masih dilindungi dengan adanya putusan MK No.46 Tahun 2010. 2) Dengan tidak dikabulkannya perkara isbat nikah poligami oleh para hakim, hal tersebut apabila ditinjau menggunakan Maslahat Al-Ghazali dengan fokus pada 5 hal yakni *Hifdz al-Din, Hifdz al-Nafs, Hifdz al-Aql, Hifdz Nasab, dan Hifdz al-Mal*, itu sudah sesuai dengan kaidah fiqh sebab isbat nikah poligami ini mafsadatnya lebih banyak daripada maslahatnya.

ABSTRACT

Fibali, Arini Alghina, 17210123, 2020. The Views Of Judges At Mojokerto Religious Court On The Averment Of Polygamous Marriage in Perspective Of Al-Ghazali's Maslahat. Thesis, Department of Islamic Family Law, Sharia Faculty, State Islamic University Maulana Malik Ibrahim Malang, Supervisor: R. Cecep Lukman Hakim, M.A.,Ph.D.

Keywords: Averment Of Polygamous Marriage, Al-Ghazali's Maslahat

Islam does not prohibit a husband to have more than 1 wife, according to the word of Allah An-Nisa verse 3. In the case of polygamy, a husband must be able to be fair to his wives. Of course, doing polygamy must use the procedures and conditions mentioned in Law No.1 of 1974 concerning Marriage. If you practice polygamy by smuggling the law through unregistered marriage, it is called Averment of polygamous marriage. The submission of a Averment of polygamous marriage was declared not accepted.

This research aims to know the views of judges at the Mojokerto Religious Court on the Averment of polygamous marriage. Second, knowing the views of the Mojokerto Religious Court judges on the Averment of polygamous marriage Perspective Of Al-Ghazali's Maslahat.

This research is included in the type of empirical research with a qualitative approach. Sources of data used in this research are primary data and secondary data, which are all about the value of polygamy and the theory of Al-Ghazali's maslahat. Data collection methods in this reasearch consisted of interviews and documentation. While the data processing methods used in this study are editing, classifying, verifying, analyzing, and concluding.

This study's results are: 1) The polygamous marriage Averment filed at the Mojokerto Religious Court is declared not accepted in accordance with the Supreme Court Circular No. 3 of 2018. According to the judge, the case consisted of 2 types of cases, namely Averment marriage is voluntary and polygamy is a continuous case. So that in order for the unregistered polygamous marriage to be recognized by the state, it must be remarried to protect the material rights of the wife. In contrast to the child resulting from the marriage, if the Averment of polygamous marriage is not legalized, the father's material rights are still protected by the Constitutional Court decision No.46 of 2010. 2) If the judges do not grant the case of Averment of polygamous marriage, this is when reviewed using the theory of Al-Ghazali's maslahat with a focus on 5 things, namely *Hifdz al-Din*, *Hifdz al-Nafs*, *Hifdz al-Aql*, *Hifdz Nasab*, and *Hifdz al-Mal*, it is in accordance with the rules of fiqh because Averment of polygamous marriage has more mafsadat than the benefit.

ملخص البحث

فيبالي ، أربني ألغني، 17210123، 2020. وجهة القضاة محكمة الدينية موجوكيرتو يتعلق بإثبات تعدد الزوجات من نظرية مسلحة لإمام الغزالي. البحث الجامعي. قسم الاحوال الشخصية، كلية الشريعة، جامعة مولانا مالك إبراهيم الإسلامية الحكومية مالانج. المشرف: الدكتور رادين سيسيب لقمان حكيم، الماجستير.

مسلحة لإمام الغزالي

الكلمات الرئيسية: إثبات تعدد الزوجات، مقاصد الشريعة.

بحسب كلام الله في سورة النساء الآية 3، لا يمنع الإسلام على الزوج أن يكون له أكثر من زوجة واحدة. وفي حالة تعدد الزوجات، يجب على الزوج أن يكون عادلاً مع زوجاته. في تعدد الزوجات، يجب اتباع الإجراءات والشروط التي وردت في القانون رقم 1 لسنة 1974 عن شأن الزواج. إذا مارس تعدد الزوجات عن طريق تهريب القانون من خلال نكاح السر، فهو إثبات تعدد الزوجات.

أما أهداف من هذا البحث أولاً، لمعرفة آراء القاضاة من محكمة الدينية موجوكيرتو يتعلق بإثبات تعدد الزوجات. ثانياً، لمعرفة آراء القاضاة من محكمة الدينية موجوكيرتو يتعلق بإثبات تعدد الزوجات من نظرية مسلحة لإمام الغزالي.

تتضمن هذا البحث من أنواع البحث التجريبية بمنهج النوعية. مصادر البيانات المستخدمة في هذا البحث هي البيانات الأولية والبيانات الثانوية عن إثبات تعدد الزوجات ونظرية مقاصد الشريعة. تتكون طرق جمع البيانات في هذا البحث هو المقابلات والتوثيق. أما طرق معالجة البيانات المستخدمة في هذا البحث هو التحرير والتصنيف والتحقق والتحليل والاستنتاج.

نتائج البيانات من هذا البحث هو: (1) عدم قبول من إثبات تعدد الزوجات التي قد المقدمة في محكمة الدينية موجوكيرتو وفقاً لتعميم المحكمة العليا رقم 03 العام 2018. عند القاضي أن يكون المسألة إثبات تعدد الزوجات تنقسم إلى نوعين وهما إثبات تعدد الزوجات من المطّوع وإثبات تعدد الزوجات من مسألة المستمرة. يتم الاعتراف بزواج السر من تعدد الزوجات

حتى تقابل الدولة, ويجب أن يزاوج مرة أخرى لحماية الحقوق المادية للزوجة. على عكس بولد من تلك الزواج, إذا لم يتم نكاح السر من تعدد الزوجات, فإن الحقوق المادية للأب تظل محمية بموجب قرار المحكمة الدستورية رقم 46 العام 2010. 2) إذا لم يوافق القضاة على إثبات تعدد الزوجات, فسيتم ذلك المسألة بنظرية مسلحة لإمام الغزالي التي تركزها على 5 أمور وهي حفظ الدين, حفظ النفس, حفظ العقل, حفظ النسب, وحفظ المال, وكلها قد مناسب بأحكام الفقه, لأن هذه إثبات تعدد الزوجات لها أكثر مفسدته بنسبة المصلحته.



CHAPTER I

INTRODUCTION

A. BACKGROUND OF RESEARCH

Averment of marriage is a process of determining the marriage of husband and wife who have previously been married in sirri. The purpose of the Averment of marriage is to obtain a marriage certificate as proof of marriage's validity following Indonesia's prevailing laws and regulations. The marriage ritual can be performed if one of the partners has not married another person. Because the ceremony was formed under a legal marriage, it would become an Averment of polygamous marriage.

An Averment of polygamous marriage is the legalization of a unregistered marriage in the Religious Court, but one of the partners still has a legal partner before the law. So if they do Averment of marriage, there will be an Averment of polygamous marriage or polygamy smuggling. This becomes a separate way for men who want to do polygamy. Marriages that are not registered by the PPN indicate the smuggling of laws to facilitate polygamy without legal procedures and become problems in status, inheritance rights, or other rights over the property. The judge must be wiser in examining and deciding the application for polygamy marriage to aim that the Averment of marriage is not used as a tool to legalize the act of smuggling the law.¹

¹ Vide Pedoman Pelaksanaan Tugas Dan Administrasi Peradilan Agama Buku II Tahun 2013, 144.

In principle, in a marriage, a man only has one wife. A woman only has one husband, also.² The explanation is, it was stated that this law adheres to the principle of monogamy. This is in line with Allah's word in Surah An-Nisa verse 3 that Allah allows polygamy until four wives on the condition that they are fair to their wives. That is fair in serving the wife, such as living, shelter, clothing, turn, and outward things. If you can't do justice, then one wife is sufficient (monogamy).³

However, articles 3, 4, and 5 of Law No.1 of 1974 explain that polygamy can be implemented if the parties concerned want a polygamy process. So, these regulations often become the basis for a husband to practice polygamy. The most challenging polygamy requirements make those who want to do polygamy prefer to use the unregistered marriage route. From this unregistered marriage, then they proceeded to a request to establish their marriage through the Averment of polygamous marriage route. They chose this route compared to carrying out the polygamy procedure according to the Marriage Law provisions.⁴

The Averment of polygamous marriage is controversial because, on the one hand, the existence of the Averment of marriage is to help the community in resolving the problem of their unregistered marriage. On the other hand, it can also open up the practice of polygamy, because it seems as if polygamy can be compromised, which is needed and wanted just to have to legalize the marriage to The Religious Court by submitting a request for Averment of marriage. Finally, his

² Pasal 3 Ayat 1 Undang-Undang Nomor 1 Tahun 1974.

³ Abdul Rahman., *Fiqh Munakahat* (Jakarta: Prenadamedia Group,2019), 95.

⁴ Jaih Mubarak, *Modernisasi Hukum Perkawinan di Indonesia* (Bandung: Pustaka Bani Quraisy), 87.

marriage status became legal in the eyes of the state.⁵ Therefore it is necessary to think and study in-depth before and or establish law enforcement policies in providing alternative solutions to the problem of the need and legal certainty of unregistered marriage through averment of polygamous marriage To to prevent and eliminate the smuggling of the law, the process of submitting, examining and comp, letting the marriage request is guided by the Guidelines for Book II, especially the provisions in number 3 and 4 relating to the application for averment of marriage submitted unilaterally, the requirements are as follows that The process of examining a marriage permit submitted by a husband or wife is contingent by seating the wife or husband who did not apply to the Respondent, the product is in the form of a verdict and an appeal and, cassation can be sought against the said decision. If, in the process of examining the request for a marriage license, it is found that her husband is still in a legal marriage with another woman, then the former wife must be a partner in the case. If the applicant does not want to change his application by including his previous wife as a party, the application must be declared unacceptable.

However, in the Supreme Court Circular No.3 of 2018 from now oner abbreviated as SEMA No.3 of 2018) concerning Enforcement of the Results of the 2018 Supreme Court Plenary as a guideline for implementing the judicial office, part II of the Formulation of the Law on the Religious Chamber, letter A of Family Law, number 8 formulated "That the request for a polygamous averment marriage

⁵ Putusan Nomor 0093/Pdt.G/2014/PTA.Mtr, 5.

is based on a unregistered marriage, even though the reasons for the interests of children must be declared unacceptable. To ensure the child's interests, an application for the origin of the child can be submitted. "⁶

The issuance of SEMA Number 3 of 2018 states that applications for averment of polygamous marriage are not accepted based on unregistered marriage in any form without exception. This has become a new problem for people seeking justice on the averment of polygamous marriage. Because it is the same as closing the space for the community to obtain legal protection and certainty on this matter from the Religious Court.⁷ In the end, this is considered to be less solution for people who are litigating about averment of polygamous marriage.

The averment of polygamous marriage is also considered contrary to the theory of Al-Ghazali's *maslahat*. Classical scholars classify Al-Ghazali's *maslahat* based on the dimensions of necessity into 5 levels, namely *Hifz al-Dien* (protection of religious), *Hifz al-Nafs* (protection of life), *Hifz al-Mal* (protection of wealth), *Hifz al-'Aql* (protection of intellect), and *Hifz al-Nasl* (protection of generation). Some scholars added *Hifz al-'Ird* (protection of honor).⁸ In this study, these 5 levels become the main pillars in implementing the averment of polygamous marriage,

⁶ Surat Edaran Mahkamah Agung No.3 Tahun 2018

⁷ CikiBasir, Penanganan Perkara Permohonan Itsbat Nikah Poligamy Secara Sirri Dan Hubungannya Dengan Permohonan Asal Usul Anak Di Pengadilan Agama (Menyikapi Rumusan Hasil Rapat Pleno Kamar Agama Mahkamah Agung Dalam SEMA Nomor 3 Tahun 2018). (Palembang: Makalah di sampaikan dalam Diskusi Hakim Peradilan Agama- Wilayah PTA Palembang di Aula PTA 26 April 2019), 9

⁸ Muhammad Fauzudin Faiz, "Nikah sirri dalam tinjauan teori maqashidi (Upaya mencari pemahaman komprehensif berbasis maqashid syariah)" (IAIN Jember, 2015), http://lpm.iain-jember.ac.id/download/file/NIKAH_SIRRI_DALAM_TINJAUAN_TEORI_MAQASHIDI.pdf

which then becomes a theory to review the judge's views on averment of polygamous marriage.

The emergence of a new status for wives and children who are married to sirri with the existence of averment of polygamous marriage will be a particular problem for others (wives and children who are legally married, wife or children or polygamous husbands). Therefore, in taking a stand against the request for a polygamous marriage that is submitted to the Religious Court, the Religious Court will accept, examine and judge and resolve the case presented with consideration and in-depth study of case cases, according to the facts of the incident and for the sake of justice in society.⁹ Seeing the rules of SEMA No.3 of 2018 with the provisions contained in book II, it seems a contradiction. Therefore, this study is fascinating to examine concerning the Mojokerto Religious Court judges' views on the averment of polygamous marriage perspective of Al-Ghazali's maslahat.

B. Research Questions

1. What is the viewpoint of judges at Mojokerto religious court on the averment of polygamous marriage perspective of Al-Ghazali's maslahat?

C. Research Purpose

1. To find out judges' views at Mojokerto religious court on the averment of polygamous marriage perspective of Al-Ghazali's maslahat.

D. Benefits of Research

⁹ Adnan Qohar, *Isbat Poligami Antara Penyelundupan Dan Terobosan Hukum*, 22.

This research is expected to provide scientific contributions both theoretically and practically. The benefits include the following:

1. Theoretically, this research is expected to develop civil law science, especially on the issue of averment of polygamous marriage, especially concerning the judge's view on the averment of polygamous marriage perspective of Al-Ghazali's *maslahat*.
2. Practically, this research is expected to become a reference material by legal practitioners, the general public, or considerations in conducting research, especially on judges' views at Mojokerto Religious Court on the averment of polygamous marriage perspective of Al-Ghazali's *maslahat*.

E. Operational Definition

The purpose of an operational definition is to define what will be examined in this study. So that there is no misunderstanding, the researcher will provide several meanings of the terms contained in the title of this scientific paper, including:

1. Averment for a polygamous marriage : In the Islamic Law Compilation, it is explained that the averment of polygamous marriage is a stipulation, the validity of a marriage that is submitted to the Religious Court. Ratification of the marriage recognition is needed for those who have been married to *Sirri* for a long time, who need information with a valid certificate. To validate this acknowledgment, a statement is required.
2. Al-Ghazali's *Maslahat* : Imam Alghozali is of the view that *Maslahat* is only a method in making law and not as an argument or source of law. Therefore,

he made Maslahat as one of those who still depended on other, more important arguments, such as the Alquran, sunnah, and Ijma. If Maslahat contradicts the text, then it is completely rejected.

F. Structure of Discussion

To facilitate and direct the writing of this research proposal, there is a description of the systematic arrangement of the discussion, namely:

Chapter I is an introduction. In this chapter, the researcher will describe the research's content and purpose because the urgency of the study lies in this chapter. This chapter's content consists of the background, problem boundaries, problem formulation, research objectives, research benefits, operational definitions, and systematic discussion. This is the initial foothold in research so that the reader knows the direction of the study being aimed.

The next chapter is Chapter II, which contains Previous Research and Literature Review. This chapter describes the theories and concepts that underlie research and as a reference in analysis. Chapter II consists of *the first sub-chapter*, the religious court. *Second*, the duties and powers of the judge. *Third*, averment of polygamous marriage. *Fourth*, polygamy. *Fifth*, unregistered marriage. *Sixth*, averment for polygamous marriage. *Seventh*, Al-Ghazali's maslahat.

The next chapter is Chapter III, which is a research method. This chapter will explain the research methods used in this research, including the types and approaches of study, research locations, data sources, data collection techniques, data processing techniques, and data analysis techniques.

The next chapter is Chapter IV, which is the Exposure and Data Analysis. In the data exposure section, the researcher will first explain the research subject, namely the Mojokerto Religious Court Judge, on the averment of polygamous marriage. In this study, the object of research is averment of polygamous marriage. Furthermore, the judge's view on averment of polygamous marriage will be analyzed from the perspective of Al-Ghazali's maslahat. So that after all the information is obtained, the author will draw conclusions related to the suitability of the judge's views on the averment of polygamous marriage with the perspective of Al-Ghazali's maslahat.

And the last chapter is Chapter V as a closing. This chapter contains conclusions and suggestions which constitute the final series of research. Conclusions are short descriptions that answer the statement of the problem in chapter one. Besides, this chapter also provides suggestions for data analysis and exposure. Also, it contains the researchers' expectations to all those who are competent in this research so that their research can give the maximum contribution.

CHAPTER II

LITERATURE REVIEW

A. Previous Research

This previous research is useful for providing prior exposure related to similar studies that have been studied previously. The purpose of this previous research is to make it clear that this research has differences from the results of other studies, including the following:

1. Achmad Kurniawan¹⁰ with the title of his thesis "Averment Marriage in the Context of Polygamy (Study of the Ambarawa Religious Court Decision Number: 0030 / Pdt.G / 2012 / PA.Amb)." The results of the study of the students of the Ahwal Al-Asyakhsiyyah Study Program Jurusan Syari, Ah Salatiga State Islamic College in 2014 stated that after being analyzed by the author, the judges' primary considerations in determining the marriage request were because all the conditions and harmonious marriage of the applicant were not violated and were not there are indications of irregularities and abuse of the marriage. Furthermore, the panel of judges said that the reason could be attributed to the marriage they did not have a marriage impediment according to Law Number 1 of 1974. However, according to the author, in terms of State law, it is not correct, because it violates the provisions of Article 9 of the Marriage Law, which stipulates that: a person who is still married to another person cannot remarry, except in the cases mentioned in Article 3 paragraph (2) and Article (4) of this Law.

¹⁰ Achmad Kurniawan, *Isbat Nikah Dalam Rangka Poligami (Studi Putusan Pengadilan Agama Ambarawa Nomor: 0030/Pdt.G/2012/PA.Amb)*, Skripsi, (Salatiga: STAIN Salatiga, 2014).

The legal basis for the Majelis Hakim in legalizing marriage in the case of polygamy permit No.0030 / Pdt.G / 2012 / PA Amb is because marriage is legal if it is carried out according to the law of each religion and belief according to the provisions of Article 2 paragraph (1) of the Law Number 1 of 1974 so that every marriage that is carried out following the requirements of Article 2 paragraph (1) of the Law even though it is not carried out in front of a marriage registrar can still be considered a valid marriage which can later be ordained.

This type of research is a literature study, namely in the form of a decision study that the author obtained from the ambarawa religious court decision. The similarity of this research is that they both research the object discussed, namely the case of marriage in the context of polygamy. However, the location of the difference is that this study analyzes the Ambarawa Religious Court Decision Study Number: 0030 / Pdt.G / 2012 / PA.Amb, which uses fundamental analysis of judges' considerations and the legal basis for determining marriage averment. Whereas in the current research, namely analyzing the judges' views on the averment of marriage and the judges' opinions are then reviewed using the Al-Ghazali's *maslahat*.

2. Siti 'Aisyah,¹¹ Student of the Akhwal al-Syakhsiyyah Department, Syari'ah Faculty of the State Islamic University of Maulana Malik Ibrahim Malang in 2008 with the title of the thesis "The Judge's View of Polygamy Marriage Averment in Bondowoso Religious Courts." This study explains that the judge

¹¹ Siti 'Aisyah, *Pandangan Hakim Terhadap Itsbat Nikah Poligami Di Pengadilan Agama Bondowoso*, Skripsi, (Malang: UIN Malang, 2008)

granted the matrimony of polygamy in case No.67 / Pdt.P / 2007 / PA / Bows because every marriage must be registered to have authentic evidence. In this case, the defendant was also absent. The legal basis used by the panel of judge judges' panel KHI article 58 paragraph (3). The judge's the judge considersire marriage, 4 used with birth certificates for educational administrative equipment.

Meanwhile, on the unregistered marriage he procedure for averment Marriage Polygamy, according to the results of the author's interview with the Substitute Registrar at the judges, in this case, namely Mr. Asjikin, SH, is still the same as the averment of Marriage procedure because it is adjusted to the results of the Panel of Judges' decisions, which is equated with the procedure for filing for divorce. Because basically, the procedure for applying for a marriage certificate in Law no. 1 of 1974 and the compilation of Islamic Laws are not clearly regulated.

This research is a case study using a sociological-empirical approach. The similarities in this study with this new research are discussing the judges' views on polygamous marriage. However, what distinguishes this research is that it uses the judge's opinion to analyze polygamous marriage cases and procedures. Meanwhile, the new research is the judge's view on the averment of polygamous marriage as material for analysis. Also, it uses the theory of Al-Ghazali's *maslahat* as material to review the judge's views.

3. Robith Muti'ul Hakim¹² with the title of the thesis " Averment of Unregistered Polygamous Marriage Viewed From a Juridical-Normative Point of

¹² Robith Muti'ul Hakim, *Isbat Nikah Poligami Siri Ditinjau Dari Segi Yuridis-Normatif (Studi Terhadap Putusan No. 190/Pdt.G/2004/Pa.Smn dan Putusan No. 1512/Pdt.G/2015/PA.Smn Tentang Isbat Nikah Poligami Siri Di Pengadilan Agama Sleman)*, Tesis, (Yogyakarta: UIN Sunan Kaliaga, 2017).

view (Study of Decision No. 190 / Pdt.G / 2004 / Pa.Smn and Decision No. 1512 / Pdt.G / 2015 / PA.Smn About Averment of Unregistered Polygamous Marriage in the Sleman Religious Court). " The research of the students of the Islamic Law Study Program at the State Islamic University of Sunan Kalijaga in 2017 stated that the judges' judicial considerations were based on decision No. 190 / Pdt.G / 2004 / Pa.Smn, namely the court rejected the request because the husband did not get permission from the first wife. And in the Law, it is explained that it must comply with the provisions of Article 5 paragraph (1) of Law No.1 of 1974 jo. Article 58 paragraph (1) and (2) KHI, if you wish to apply for more than one wife. While in Decision No. 1512 / Pdt.G / 2015 / PA.Smn, the judge granted juridically because the applicant's wife had allowed the applicant to remarry, and the applicant was deemed capable of supporting both families.

Normatively, there is no text which states that a husband must ask permission from a wife. In decision No. 190 / Pdt.G / 2004 / Pa.Smn, the judge rejected the applicant's request because the statutory requirements were not fulfilled. The fate of women who are married unregistered is unclear and must be divorced according to Islamic law. Because if this is granted, then it will be a violation, and it includes legal smuggling. While in Decision No. 1512 / Pdt.G / 2015 / PA.Smn, the judge granted it because legally it has been fulfilled, namely getting the first wife's consent, and this is following *maqashid al-Syari'ah*.

The type of research used is field research, with the nature of the research being prescriptive, like giving directions or provisions and depending on the official requirements that apply. This study's similarity with the new research is to discuss

the problem of marriage averment using the theory of Al-Ghazali's *maslahat*. Whereas the location of the difference is that in this study, it looks from a juridical normative point of view on the 2 cases. In contrast, this new study looks at the judge's view of concerning polygamy, and that view is viewed from the perspective of Al-Ghazali's *maslahat*.

4. Agung Cahyono¹³ with the title of his thesis "Averment Polygamy According to the Judges of the Probolinggo City Religious Court (Comparative Study Case No.306 / Pdt.G / 2012 / PA.Prob and Case No.141 / Pdt.G / 2013 / PA.Prob). The student of the Al-Ahwal Al-Syakhsiyah Study Program at the Sharia Faculty of the State Islamic University of Maulana Malik Ibrahim Malang in 2018 stated that the basis for the consideration of the decision of the Probolinggo City Religious Court judge in accepting the application for polygamy averment case No.306 / Pdt.G / 2012 / PA. Prob, namely considering the child and wife's benefit from the marriage because this case has met the requirements and laws in religion. And Article 2 of the Marriage Law justifies all forms of marriage following their respective faiths. Meanwhile, the basis for considering the Probolinggo City Religious Court Judge in rejecting the application for polygamy averment case No. 141 / Pdt.G / 2013 / PA. Prob, namely violating the rules in PP No. 9 of 1975 that unlicensed, unregistered marriage and polygamy are a form of a law violation. The refusal of this case is to avoid legal violations that will be committed by the

¹³ Agung Cahyono, *Isbat Poligam Menurut Pertimbangan Hakim Pengadilan Agama Kota Probolinggo (Studi Komparatif Perkara No.306/Pdt.G/2012/PA.Prob dan Perkara No.141/Pdt.G/2013/PA.Prob)*, Skripsi, (Malang: UIN Malang, 2018).

community at a later date, by encouraging the public to enforce existing laws by refusing polygamy averment that is not preceded by court permission.

This type of research is empirical research (field research) with a qualitative approach, which is analyzed based on comparative studies. The similarity between this study and the new research is that both discuss the averment of polygamy marriage. But the location of the difference is that in this study comparing the differences and similarities related to judges' decisions and understanding of the averment of polygamy, while in this new study, it is seeing the judge's view of the averment of polygamy perspective of Al-Ghazali's *maslahat*.

5. Mukhtaruddin Bahrum,¹⁴ a journal entitled "Problematics averment Nikah Polygamy Sirri" states that judges are required to seek legal grounds and *ratio legis* that allows religious courts to accept cases of marriage request, even though the marriage requested for averment occurs because of *sirri* polygamy. There are several reasons why judges may not refuse cases of marriage requests. The first reason is the principle of *ius curia novit*, which binds judges so that judges are considered to know and understand marriage law. Besides, it is also related to the freedom of judges to find the law on a case that does not have a clear legal rule (*rechtsvacuum*) as regulated in the provisions of Article 5 Paragraph 1 of Law No. 48 of 2009 concerning Judicial Power and other reasons related to legal discovery (*rechtvinding*).

¹⁴ Mukhtaruddin Bahrum, *Problematika Isbat Nikah Poligami Sirri*, Jurnal Hukum dan Politik Islam, (Sulawesi Selatan: IAIN Bone, 2019).

Averment of polygamous marriage has both positive and negative sides. From the positive side, the marriage ritual is needed for the perpetrator of a sirri marriage to get legal guarantees (article 6 paragraph (2) KHI). Because with the stipulation of sirri polygamy, the perpetrator of sirri polygamy has a basis for obtaining a marriage book (article 7 paragraph 1 KHI). The legal guarantee in question will undoubtedly impact the improvement of the social status of the second wife in society, which used to be a sirri now officially. Besides, changes have also occurred in children's position and rights to joint property and inheritance before the law. Meanwhile, from the negative side, if polygamy sirri is granted and or the marriage is accepted, it means that you have acknowledged and justified an act that has deviated or violated the law. The indirect impact is that there is a negation (elimination/elimination) of the values intended to be protected by statutory provisions on the terms of polygamy. This means that legislators' efforts to preserve juridical, sociological, and philosophical values through the application of the conditions for polygamy are automatically eliminated by ratifying or legalizing the practice of polygamy without permission.

In the end, the Supreme Court no longer gave the green light for the ratification of the sirri polygamy based on Supreme Court Circular Letter (SEMA) No. 3 of 2018 concerning the enactment of the formulation of the results of the plenary meeting of the Supreme Court's chambers in 2018 as a guideline for the implementation of duties for the court (family law section number 8) which states that the request for polygamous marriage is based on sirri marriage even though because it is in the interests of the child it must be declared unacceptable . To ensure

the interests of the child, an application for the child's origin can be submitted. Therefore, the only solution for the perpetrator of sirri polygamy so that the marriage has legal force is to submit a polygamy application in the court after obtaining a decision to conduct a new marriage with the wife he has married in sirri.

This type of research is normative legal research, which refers to statutory regulations, which include; The 1945 Constitution of the Republic of Indonesia, the Law on Religious Courts, the Compilation of Islamic Law, and other laws and regulations relevant to this research. The similarity with this new research is that they both discuss the terms of polygamy marriage. The difference is that this study looks at the positive and negative sides of the existing polygamous marriage problems. In contrast, this new study examines the judges' views on isbat of polygamous marriage. The theory of Al-Ghazali's *maslahat* reviews this view.

Table 2.1

Previous Research

No	Researcher	Title	Similarity	Difference
1	Achmad Kurniawan (Thesis of STAIN Salatiga, 2014)	Averment Marriage in the Context of Polygamy (Study of the Ambarawa Religious Court Decision Number: 0030 / Pdt.G / 2012 / PA.Amb).	1. Research substance: Discusses the averment of polygamy marriage	1. Type of Research: Literature Study 2. Research Focus: Analysis of decision studies using the basis of judges' considerations and the legal basis for determining the averment of marriage
2	Siti 'Aisyah (Thesis of UIN Malang, 2008)	Judge's View of Polygamy Marriage Herbert	1. Research substance: Discusses the judges' views	1. Type of Research: Case Study (<i>case study</i>)

		at the Bondowoso Religious Court	on the averment of polygamy marriage	<ol style="list-style-type: none"> 2. Approach: sociological-empirical 3. Research focus: the judge's opinion is used to analyze cases and procedures for polygamous marriage 4. Research Location: Bondowoso Religious Court
3	Robith Muti'ul Hakim (Thesis of UIN Sunan Kalijaga, 2017)	Averment of Unregistered Polygamous Marriage Viewed From a Juridical-Normative Point of view (Studies Against Decision No. 190 / Pdt.G / 2004 / Pa.Smn and Decision No. 1512 / Pdt.G / 2015 / PA.Smn About Averment of Unregistered Polygamos Marriage in Religious Courts Sleman)	<ol style="list-style-type: none"> 1. Type of Research: field research 	<ol style="list-style-type: none"> 1. Research focus: normative juridical aspects of the 2 cases 2. Research Location: Sleman Religious Court 3. Research substance: Averment issues of marriage using the theory of Al-Ghazali's maslahat
4	Agung Cahyono (Thesis of UIN Malang, 2018)	Averment Poligam According to Judges of the Probolinggo City Religious Court (Comparative Study Case No.306 / Pdt.G / 2012 / PA.Prob and Case No.141 / Pdt.G / 2013 / PA.Prob).	<ol style="list-style-type: none"> 1. Type of Research: Empirical research (field research) 2. Research substance: Discusses the averment of polygamous marriage 	<ol style="list-style-type: none"> 1. Research focus: comparing differences and similarities related to judges' decisions and understanding of polygamy 2. Approach: a qualitative analysis based on comparative studies. 3. Research Location:

				Probolinggo City Religious Court
5	Mukhtaruddin Bahrum (Journal of Islamic Law and Politics, 2019)	Problematics of Marriage Polygamy averment Sirri	1. Research substance: Discusses the averment of polygamy marriage	1. Type of Research: Normative Law 2. Research focus: this study looks at the positive and negative sides of the existing polygamy marriage problems

B. Theoretical Framework

1. Religious Courts

The word judicial as a translation of "*qahda*," which means deciding, implementing, and finishing. Some state that, in general, the dictionary does not differentiate between court and court.¹⁵

In Islamic jurisprudence literature, justice is called *qadha*, which means to finish, as Allah says:

فَلَمَّا قَضَىٰ زَيْدٌ مِنْهَا وَطَرًا

"Whereas Zaid has completed his needs from Zainab"

(QS. Al-Ahzab: 37)¹⁶

There is also a meaning to fulfill, as Allah says:

فَإِذَا قُضِيَتِ الصَّلَاةُ فَانْتَشِرُوا فِي الْأَرْضِ

¹⁵ Erfaniah Zuhriah, *Peradilan Agama Indonesia Sejarah Pemikiran dan Relatif*, (Malang: Uin Malang Press, 2009), 1.

¹⁶ Kementerian Agama RI, *Al-Qur'an*, (Jakarta: Almahira, 2011), 423

"When the prayers have been fulfilled, the corners of the earth will be scattered" (Surah Al-Jumu'ah: 10)¹⁷

Besides the meaning of *completing* and *fulfilling* as above, the definition of *qadha* is unisex, which means *deciding on law or establishing a provision*. The religious court is also a court for people who are Muslim. ¹⁸In-Law No.7 of 1989 Article 2 concerning Religious Courts, it is stated that the Religious Courts are one of the implementers of Judicial Power for people seeking justice who are Muslim on certain civil cases.

So, in this case, it can be concluded that the court is the administrator of the judiciary, or in other words, the court is a judicial body that exercises judicial power to uphold law and justice. Therefore, the Religious Courts can be formulated as the power of the State in receiving, examining, judging, deciding, and settling some instances between Muslim people to uphold law and justice.¹⁹

The authority of the religious court in the field of marriage is meant as matters stipulated in Law No.1 of 1974 concerning Marriage. One of these powers, namely on permission to marry more than one wife, marriage dispensation, prevention of marriage, rejection of marriage by PPN, cancellation of marriage, and so on.²⁰

¹⁷ Kementerian Agama RI, Al-Qur'an, (Jakarta: Almahira, 2011), 553

¹⁸ Undang-Undang Peradilan Agama (UU RI No. 7 Tahun 1989), Jakarta: PT. Sinar Grafika, h. 3

¹⁹ Jaih Mubarak, *Peradilan Agama Di Indonesia*, (Bandung: Pustaka Bani Quraisy, 2004), 3.

²⁰ Sufiarina dan Yusrizal, *Mahkamah Syari'ah Dan Pengadilan Agama Dalam Sistem Peradilan Indonesia* (Bandung: PT Refika Aditama, 2015), 69

Based on Law No. 14/1970, which was replaced by Law No. 4/2004 on the Principles of Judicial Power, the Religious Courts have received recognition as one of the four judicial institutions. With the promulgation of Law No.7 of 1989, the Religious Courts will be more stable in carrying out their functions. Even seekers of justice will find it easier and more concrete in dealing with religious courts.²¹ Subsequently, there is a renewal of the authority of the religious judiciary in Law No.3 of 2006, which is added in the field of shari'ah economics through amendments to article 49 in the form of marriage, inheritance, wills, grants, waqf, zakat, infaq, alms, and shari'a economics.²²

2. Duties and Authorities of Judges

Judges are officials who carry out the duties of judicial power. Court Judges are appointed and dismissed by the President at the Supreme Court's Chief Justice's recommendation.²³ The primary responsibilities of judges in the Religious Courts include:²⁴

- a. Accepting, examining, and adjudicating, and completing cases (conducting trials) by taking into account the following matters, namely constraining, qualifying proven events/facts, and constituting.
- b. Leading, guiding, and initiating the proceedings of the trial and supervising the making of trial minutes.²⁵

²² Sufiarina dan Yusrizal, *Mahkamah Syari'ah Dan Pengadilan Agama Dalam Sistem Peradilan Indonesia.....*, 71

²³ Musthofa, *Kepaniteraan Peradilan Agama*, 22.

²⁴ Ahmad Mujahidin, *Pembaharuan Hukum Acara Peradilan Agama*, (Bogor: Ghalia Indonesia, 2012), 54

²⁵ Ahmad Mujahidin, *Pembaharuan Hukum Acara Peradilan Agama*, 55

- c. Making decisions or decisions in cases handled by them originating from the results of the examination, which are entirely recorded in the trial minutes and based on the BAP.
- d. Reviewing case files
- e. Carry out other tasks on the orders of the head of the court, including:
 - 1) As clergy (for Religious Court judges), an oath of office
 - 2) Provide legal education
 - 3) Serving research for scientific purposes
 - 4) Other duties assigned to him
- f. Supervise the areas of cases, applications, and lawsuits

3. Averment Of Marriage

a. Definition

Averment of marriage is a combination of two words, namely "averment" and "marriage." The word averment which has the meaning of determination, realizing, determination.²⁶ Mengisbangkan means to raise, determine, determine (the truth of something).²⁷ While the language of marriage is *joining* (الضم), *sexual relations* (الوط), and also means a *contract* (عقد).²⁸ There are two possible meanings because the word marriage is found in the Qur'an. According to the positive law, it does contain these two meanings. At the same time, marriage is the inner and outer

²⁶ Ahmad Warson Munawwir, *Kamus al-Munawwir (Arab-Indonesia)*, (yogyakarta: Pustaka Progresif, 1997) 145.

²⁷ Tim Penyusun Kamus, *Kamus Besar Bahasa Indonesia*, cet. Ke-3 (Jakarta: Balai Pustaka, 1990), 339.

²⁸ Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia Antara Fiqh Munakahat Dan Undang-Undang Perkawinan*, (Jakarta: Kencana, 2006), 36.

bond between a man and a woman as husband and wife to form a family, a happy and eternal household based on the One Godhead.²⁹

Basically, the marriage ritual is the stipulation of a marriage between a man and a woman as husband and wife, which has been carried out following the Islamic religion's provisions, namely the fulfillment of conditions and harmonious marriage. However, the marriage has not been or has not been registered by the KUA or the PPN. According to Peter Salim, the word averment of marriage means the determination of the truth of marriage to be concluded. Note that the averment of marriage is the legalization of a marriage that has been carried out according to the Islamic religious law but is not recorded by the KUA or the authorized PPN (Decree of the Chairman of the Supreme Court of the Republic of Indonesia Number KMA / 032 / SK / 2006 concerning Guidelines for the Implementation of Court Duties and Administration).

Averment of marriage is a product of the Religious Court, in the sense that it is not a real court and is termed the *Jurisdiction of Volunteer*. It is said that it is not an actual trial because, in this case, there are only petitioners who ask to be stipulated about something, namely the determination of marriage. Volunteer cases are cases that are petition in nature and in which there are no disputes, so there are no opponents. Petition cases cannot be accepted unless there is an interest in the law to be desired.³⁰ Volunteer cases submitted to the Religious Courts such as:

- 1) Determination of guardians for the heirs who are unable to take legal action

²⁹ Kompilasi Hukum Islam, (Bandung: Nuansa Aulia, 2008), 80.

³⁰ H.A. Mukti Arto, *Praktek Perkara Perdata Pada Pengadilan Agama*, (Yogyakarta: Pustaka Pelajar, 2004), 41.

- 2) Determination of the appointment of a guardian
- 3) Determination of adoption
- 4) Marriage intent
- 5) Determination of guardian adhal

b. Legal Basis for Averment Marriage

According to Law No. 1 of 1974, a marriage that is carried out and being carried out according to the law of religion and belief is also obliged to register the marriage. It is explained in the regulation that a marriage is valid if it is carried out according to the said religion and belief. Besides that, it must be recorded according to the applicable regulations. Positive law in Indonesia does not place marriage registration as a condition or pillar of marriage. Still, according to Article 2 paragraph (2) UUP juncto Article 5 paragraph (1) KHI, to ensure orderliness of marriage for Muslims, the marriage must be registered.³¹

According to the provisions of Article 7 paragraph (3) KHI, it is stated that marriage averment submitted to the Religious Court is limited to matters relating to:³²

- 1) There is a marriage in the context of a divorce settlement;
- 2) Loss of marriage certificate;
- 3) There are doubts about whether or not a condition of marriage is valid;
- 4) Some marriages took place before the enactment of Law Number 1 of 1974;

³¹ Rio Satria, *Problematika Hukum Dalam Perkara Pengesahan Nikah Poligami*, 3

³² Sofiyah Laili, *Pandangan Hakim Pengadilan Agama Bangkalan Dan Tokoh Agama Kecamatan Kamal Terhadap Tingginya Angka Itsbat Nikah*, (Skripsi: UIN Malang, 2017), 36

- 5) Marriage is conducted by those who do not have a marriage impediment according to Law Number 1 of 1974.

Applying for a polygamous marriage averment based on unregistered marriage with the format as described above so far, technically, it is justifiable and at the same time possible to be accepted and granted by the Religious Court. This is following the book Guidelines for the Implementation of Duties and Administration of the Religious Courts or more popularly known as Book II Number 1-10. So that based on the above rules, it can be concluded that every marriage can only be proven by a marriage certificate, so a marriage that is carried out by unregistered, as long as it meets the above categories, can be submitted as an application for marriage validation to a religious court.

4. Unregistered Marriage

There are two understandings about the meaning of unregistered marriage in Indonesian society. First, if Siri is understood as a marriage contract that is not recorded in the marriage registrar, but the terms and conditions are in accordance with Islamic law. Second, siri marriage is defined as a marriage that is carried out without a legal guardian of marriage on the part of the woman.³³ Nikah siri means secret marriage, also known as underhand marriage. A siri marriage is a marriage that is carried out by a man and woman without notification to their parents who have the right to become a siri marriage guardian, carried out on the right conditions according to Islamic law. Only the parents of both parties were not informed, and neither of them asked for permission or asked for the parents' blessing.

³³ Mahmudin, *Hukum Perkawinan Islam*, (Bandung:Pustaka Setia, 2017), 145

An underhand marriage is carried out by a woman and a man without going through the correct process according to the marriage law. Underhand marriage is illegal, but according to Islamic law, the marriage contract is legal. When viewed from the perspective of Law number one of 1974, an illegal marriage is declared as a marriage that has not yet occurred and can be canceled. However, if a marriage is carried out under the hand, if it is carried out in accordance with the rukun and the terms and conditions, it can be reported directly to the registration officer for a marriage certificate to be made.³⁴

Wilian Suyuti Mustofa³⁵ explained that there are two types of indications that can be given.

1. A marriage contract performed by a man and a woman without the presence of a woman's parent or guardian. In this form of marriage, marriage will only be attended by a man and woman who will carry out the marriage Akkad, two witnesses, and a teacher or ulama who is getting married without receiving delegation from the woman who is entitled. In fact, the teacher or scholar in the view of Islamic law is not authorized to be a guardian of marriage because he is not a priority in the guardian of marriage.
2. A marriage contract that has met the requirements and harmony of a marriage that is legal in accordance with the provisions of Islamic law,

³⁴ Beni Ahmad Saebani, *Fiqh Munakahat*, (Bandung: Pustaka Setia, 2009), 84

³⁵ Zuhdi Masjfuq, *Masa'il Fiqhiyah*, (Jakarta: Toko Agung, 1999), 35

but is not registered according to the wishes of the marriage law in Indonesia.

Abdul Gani Abdullah said that marriage with elements here or not can be seen from three indicators, namely as follows: *First*, one legal subject of the marriage contract, consisting of a prospective husband, a potential wife, a marriage guardian and two witnesses. *Second*, is the legal certainty of the marriage, namely the attendance of a marriage registrar when the marriage contract is held. *Third*, Walimatul ursy, namely a condition created to show the wider community that between the two prospective husband and wife have officially become husband and wife.

The thing that is difficult to legalize and does not have a clear legal basis is the practice of unregistered marriage or underhand marriage carried out by some Muslims in the presence of Kyai, ulama, or ustadz. The confusion that occurs is as follows.

1. At the time the contract is carried out, the guardian of marriage is the kiayi or others, while there is no delegation of the right of the guardian of the marriage who is entitled to the kiayi. The marriage is not known by the legal guardian. This kind of contract is clearly invalid, whereas in Islamic teachings what is prioritized is the guardian of marriage.
2. At the time the marriage is carried out, there is no question whether the prospective wife is still married to the other or not.³⁶

³⁶ M. Ansyari M.K., Hukum Perkawinan di Indonesia, (Yogyakarta: Pustaka Pelajar, 2010), 29

As for the problem of marriage registration that is not carried out, it does not interfere with the legality of a marriage that has been carried out according to Islamic law because it only concerns administrative aspects. Only, if a case is not recorded, the husband and wife do not have authentic evidence that they are carrying out a legal marriage. Based on the juridical aspect, as a result, the marriage is not recognized by the government so that it does not have the legal force of no legal force. Therefore, the marriage is not protected by law and is even considered to have never existed. If viewed from the political and sociological aspects, not recording a marriage will have the following impact that if there is a Default on the marriage promise, the opportunity to break the marriage will be open freely without any legal consequences so that it affects the wife and children.

Registration of marriage officially has several benefits, namely as follows.

1. Safeguarding rights from vanity, both the rights of husband and wife and children in the form of advice, livelihoods, inheritance and so on. This official record is an authentic proof that cannot be done to get that right.
2. Resolving a dispute between a husband and wife or their guardian when they disagree because it could be that one of them will intrude on the right for personal gain and the other party does not have evidence because the witness is gone. Given this record, this cannot be denied.

3. If you are going to protect a marriage from an illegitimate marriage, because it will be examined in advance on the terms and conditions of marriage and its obstacles.

5. Polygamy

In terminology, a polygamy is a man having more than one wife or a man who has more than one wife, but it is limited to a maximum of four people.³⁷ Polygamy also comes from Greek, namely *polos*, *polus*, or *polys*, which means a lot, and *gamein* or *gamos* means marriage.³⁸ So, polygamy means multiple marriages or husbands who have multiple wives, or at the same time, a man is married to more than one wife.³⁹

Allah Most High allows polygamy for up to four wives on the condition that it is fair to them. That is fair in serving the wife, such as matters of living, shelter, clothing, turn, and outward things. If you cannot do justice, then one wife is sufficient (monogamy). As Allah says:

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

“And if you are afraid that you will not be able to do justice to (the rights) of an orphaned woman (if you marry her), then marry the (other) women that you like: two, three, or four. If you are afraid that you will not be able to do justice, then (marry) just

³⁷ Abdul Rahman, *Fiqh Munakahat*, 95

³⁸ M.A. Tihami dan Sohari Sahrani, *Fiqh Munakahat*, (Jakarta: Rajawali Press, 2010), 351

³⁹ Daminius Rato, *Hukum Perkawinan dan Waris Adat Di Indonesia*, (Yogyakarta: LaksBang Pressindo, 2015), 17.

one person, or the slaves you have. That which is closer to not doing the persecution.”⁴⁰

In connection with this problem, Rasyid Ridha said, as quoted by Masyfuk Zuhdi, that Islam views polygamy as carrying more risks/harm than benefits. Humans, according to their nature have jealousy, jealousy, and complaints.⁴¹

In-Law No.1 of 1974 concerning marriage, there is a basis for adopting the principle of monogamy. In some instances, namely, if both parties agree and have fulfilled the reasons and conditions that have been determined, polygamy is allowed. The reasons for allowing polygamy are:⁴²

- a) The wife cannot fulfill her obligations.
- b) The wife has a disability or incurable disease
- c) The wife cannot give birth

In essence, polygamy is an insult to women. Because no woman is willing to be combined as well as men. Psychologically all wives will feel hurt and in the form of internal conflicts in the family. Meanwhile, another form of the implication of polygamy is violence against women, in which the husband forces his will on the wife.⁴³

From the explanation of polygamous marriage, fundamental problems can be identified, namely:

- a) Protection of property for female orphans

⁴⁰ Kementerian Agama RI, Al-Qur'an, (Jakarta: Almahira, 2011), 55

⁴¹ Abdul Rahman, Fiqh Munakahat, 97

⁴² Rochatah Machali, Wacana Poligami DI Indonesia, (Bandung: PT Mizan Pustaka, 2005),

⁴³ Musdah Mulia, Pandangan Islam Tentang Poligami, (Jakarta: Yunani Purba, 1999), 50

- b) The existence of a chronology (limitation of the number of wives from unlimited to limited (4 people) and ending with monogamy
- c) The absolute requirement of polygamy is justice, and it is doubtful that justice can be done.⁴⁴

The three requirements clearly provide protection for women. But in reality, polygamous marriages are still widely practiced, even legitimized by law. On justice in polygamy, Syeikh Muhamad Abduh said, "Whoever contemplates the two verses of Surah An-Nisa 'about *ibahah* and' *adl*, of course, knows that the permissibility of polygamy in Islam is a problem narrowed down so that it seems as if he is just a step for those who really need it. Conditions can uphold justice and not commit fraud."⁴⁵

6. Averment Of Polygamous Marriage

Averment of polygamous marriage is a court decision or a petition case filed by the applicant to allow or ratify his second wife (polygamy) concerning his legal status, both concerning his rights, income, inheritance, and others.⁴⁶ As is well known so far in several areas of Religious Courts in Indonesia, such as in the Aceh region, it is customary to apply for a polygamous marriage based on unregistered marriage in the format described above. The request for marriage averment by the

⁴⁴ Machali, *Wacana Poligami DI Indonesia.....*, 85

⁴⁵ Muhammad Baltaji, *Poligami* (Solo: Media Insani Publishing, 2007), 96

⁴⁶ Mahkamah Agung RI, *Himpunan Peraturan Perundang-Undangan Tentang Peradilan Agama*, (Jakarta: Direktorat Jenderal Badilag, 2010), 544

local Religious Court / Syar'iyah Court is accepted, decided, and granted accordingly. The decision of the Shari'iyah Court to legalize polygamous marriage is accepted, obeyed, and implemented by the justice-seeking community as well as by the related government agencies, without causing any problems.⁴⁷

a) Averment of polygamous marriage according to positive law

Based on the guidelines for the duties of the religious court contained in the Guidelines for the Duties and Administration of the Religious Courts (Book II), if in the process of examining applications for marriage validation, it is known that the husband is still bound in a legal marriage with another woman, then the former wife must be a party in the case. If the applicant does not want to change his application by including his previous wife as a partner, the application must be declared unacceptable.⁴⁸

b) Averment of polygamous marriage according to Islamic law

In Islamic law, polygamous marriage is permitted on the condition that a polygamous husband can act fairly with his wives and have good goals in his marriage by prioritizing the benefit and not hurting his wife. Then the laws and conditions must be fulfilled in the form of a prospective husband and wife who will have a marriage, there is a guardian from the prospective bride, there are two witnesses, and the sighat of the marriage contract or Kabul's consent which is

⁴⁷ Bisri, Penanganan Perkara Permohonan Itsbat Nikah Poligamy Secara Sirri Dan Hubungannya Dengan Permohonan Asal Usul Anak Di Pengadilan Agama (Menyikapi Rumusan Hasil Rapat Pleno Kamar Agama Mahkamah Agung Dalam SEMA Nomor 3 Tahun 2018). 6

⁴⁸ Rio Satria, Problematika Hukum Dalam Perkara Pengesahan Nikah Poligami.4

pronounced by the prospective male candidate. As also stated in contemporary fiqh books in Indonesia.⁴⁹

7. Imam Al-Ghazali's Maslahah

Imam Alghozali is of the view that Maslahat is only a method in making law and not as an argument or source of law. Therefore, he made Maslahat as one of those who still depended on other, more important arguments, such as the Alquran, sunnah, and Ijma. If Maslahat contradicts the text, then it is completely rejected. In this case, he is very careful in opening the door of Maslahat so that it is not misused by the interests of human passions.⁵⁰

Al Maslahat in estimation means something that is good, feels delicious, therefore it causes pleasure and satisfaction and is accepted by common sense. The large Indonesian dictionary defines Maslahat as something that is good. In giving the definition to the word mas, at that time there was a different formula. Initially Imam Alghozali understood the Maslahat with *فهي عبارة في الأصل عن جلب منفعة أو دفع مضرة* (according to the origin brings benefits or rejects harm). Or briefly called: *جلب منفعة أو دفع مضرة* (*anything that brings benefits or rejects mudharat*). Imam Ghazali initially used that simple meaning. However, because "brings benefits and avoids harm" is a human intention or desire, not Allah's intention. At the same time, maslahat is the intention of Allah who made the law, Al-Ghazali made a new formula, namely: *المحافظة على مقصود الشرع* (*maintaining the goal of syara* '), while

⁴⁹ Agung Cahyono, *Isbat Poligami Menurut Pertimbangan Hakim Pengadilan Agama Kota Probolinggo*, (Skripsi: UIN Malang, 2016), 25

⁵⁰ Ahmad Munif Suratmaputra, *Filsafat Hukum Islam Al-Ghazali : Mashlahah Mursalah & Relevansinya dengan Pembaharuan Hukum Islam* (Jakarta: Pustaka Firdaus, 2002), 100

the purpose of *syara* 'in connection with his servant is to protect religion, soul, nature, descent, and property. These five goals are popularly known as *الأصول الخمسة* (*five principles*).

1) Protection of Religion (*hifdz al-din*)

Islam safeguards rights and freedoms. And the first freedom is freedom of belief and worship. Every religious adherent has the right to his religion and mazhab. Religion or diversity is vital to human life and, therefore, must be preserved.⁵¹ He should not be forced to leave him to go to another religion or sects, nor should he be pressured to convert from his faith to Islam. The basis for this right is according to the word of Allah:

لَا إِكْرَاهَ فِي الدِّينِ ۚ قَدْ تَبَيَّنَ الرُّشْدُ مِنَ الْغَيِّ

"There is no compulsion to (enter) religion (Islam), actually the correct path is clear rather than the wrong path." (Surah Al-Baqarah (2): 256)⁵²

أَفَأَنْتَ تُكْرِهُ النَّاسَ حَتَّىٰ يَكُونُوا مُؤْمِنِينَ

"So do you (want) to force people so that they become the ones who accept everything?" (QS. Yunus (10): 99)⁵³

⁵¹ Amir Syarifuddin, *Ushul Fiqh 2* (Jakarta: Kencana, 2014), 233

⁵² Kementerian Agama RI, *Al-Qur'an*, (Jakarta: Almahira, 2011), 46

⁵³ Kementerian Agama RI, *Al-Qur'an*, (Jakarta: Almahira, 2011), 553

On the interpretation of the first verse, Ibn Kathir revealed, "Don't force someone to enter Islam. In fact, the arguments and evidence for this are obvious and straightforward that a person should not be forced to convert to Islam."⁵⁴

In this case, the Al-Qur'an still rejects all forms of coercion, because people who are instructed by Allah, then he will open and illuminate the eyes of his heart, then that person will convert to Islam with evidence and *hujjah*. So it is clear that Islamic tolerance in its good interactions, soft muamalah, and tolerance in the problem of great human feelings, namely with kindness, grace, and generosity. This is something that is needed in everyday life.⁵⁵

In *hifdz al-din* also discusses privacy and social rights for each individual according to sharia. The human rights that are most true and which are always emphasized by the texts in Islamic law are rights related to the person and his life in society.⁵⁶ The arguments of *syara* ' oblige the implementation of human rights guarantees and make the government accountable to the people, also oblige the government to pay attention to the affairs of all people who are under its control, protect, protect their rights, and do justice to them, both Muslims and non-muslims.

These arguments also demand law enforcement from the government to prevent mutually persecuting the people or even the government from persecuting the people themselves.

⁵⁴ Jauhar, Maqasid Syariah,.... 1

⁵⁵ Jauhar, Maqasid Syariah,.....6

⁵⁶ Jauhar, Maqasid Syariah ,....14

وَإِذَا حَكُمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ

"And (ordered you) when establishing the law among men so that you will determine it fairly." (Surah An-Nisa (4): 58)⁵⁷

إِنَّ اللَّهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَنِ وَإِيتَائِي ذِي الْقُرْبَىٰ وَيَنْهَىٰ عَنِ الْفَحْشَاءِ وَالْمُنْكَرِ
وَالْبَغْيِ ۗ يَعِظُكُم لَعَلَّكُمْ تَذَكَّرُونَ

"Verily, Allah commands (you) to be just and do good, to give to your relatives, and Allah forbids from vile acts, Munkar and enmity. He teaches you so that you can take lessons." (QS. An-Nahl (16): 90).⁵⁸

From the Qur'an arguments above, we can clearly know that the government's responsibility for guaranteeing human rights for all matters and giving (conveying) these rights to them and preventing mutilating between them is something that has already been very clear.⁵⁹

2) Protection of Life (*hidz al-nafs*)

The first and foremost right that is considered by Islam is the right to life, where this right is a sanctified right, and its glory cannot be destroyed.⁶⁰

⁵⁷ Kementerian Agama RI, Al-Qur'an,....87

⁵⁸ Kementerian Agama RI, Al-Qur'an,....271

⁵⁹ Jauhar, Maqasid Syariah,....18

⁶⁰ Jauhar, Maqasid Syariah,....22.

صُنِعَ اللَّهُ الَّذِي َ أَنْفَعُ كُلَّ شَيْءٍ َ إِنَّهُ خَيْرٌ ِمَّا تَفْعَلُونَ

"(That is) the deed of Allah which firmly makes everything;
verily Allah knows best what you are doing. " (Surah An-Naml (27):
88)⁶¹

The soul or life is the essence of everything because everything in this world rests on the soul. Therefore, the existence of the soul must be maintained, and its quality improved to *jalbu manfaatin*.⁶² Apart from that, there are also verses from the Al-Qur'an which prohibit humans, in the context of *daf'u mafsadah*, to destroy themselves or others or throw themselves into damage because doing so is contrary to the obligation to take care of themselves. In destroying himself, there is a prohibition from Allah, for example, the Word of Allah in Surah Al-Baqoroh verse 195 which reads:

وَلَا تُلْقُوا بِأَيْدِيكُمْ إِلَى التَّهْلُكَةِ

"Do not drop yourself into destruction."⁶³

Obviously, Allah's wisdom in creating humans with the nature that He created for humans, then He makes, perfects the events and makes them (body structure) balanced, in whatever form He wants, He arranges the body. So, it is not

⁶¹ Kementerian Agama RI, Al-Qur'an,.....390

⁶² Amir Syarifuddin, *Ushul Fiqh 2*.....,235

⁶³ Kementerian Agama RI, Al-Qur'an,.....30

surprising that the human soul in the law of Allah is very glorified, must be cared for, guarded, maintained, not confronting it with the sources of damage/destruction.

3) Protection of Intellect (*hifdz al-aql*)

Intellect is the source of *himah* (knowledge), the rays of guidance, the light of the heart's eyes, and the medium of human happiness in the world and the hereafter.⁶⁴ Intellect is called *عقل* (bondage) because it can bind and prevent its owner from doing bad things and does not teach evil. Intelligence is also an essential element for human life because it distinguishes human nature from other God's creatures. Therefore, Allah instructs humans to always take care of it. All forms of action that lead to its form and perfection are good deeds or *Maslahat* in the context of *jalbu manfa'ah*. One form of improving the quality of the mind is studying or studying. Found in the Alquran a sign from Allah that encourages people to learn.⁶⁵ Among them are His words in the letter Al-Mujadilah verse 11:

يَرْفَعُ اللَّهُ الَّذِينَ ءَامَنُوا مِنْكُمْ وَالَّذِينَ أُوتُوا الْعِلْمَ دَرَجَاتٍ

"Allah increases those who believe among you and those who are known to some degree."⁶⁶

When the Merciful perfects one's mind, then one's intellect and needs are perfect. This is where Islam instructs us to guard our intellect, prevent all forms of persecution directed at it, or that can cause damage and loss of reason to respect and glorify them, and to realize all the public benefits which are the foundation of

⁶⁴ Jauhar, *Maqasid Syariah*,....93.

⁶⁵ Amir Syarifuddin, *Ushul Fiqh 2*....,236

⁶⁶ Kementerian Agama RI, *Al-Qur'an*,.....543

human life, namely by maintaining religion, safeguarding them. Soul, guarding descendants and protecting property.

Safeguarding and protecting reason can be carried out by guarding between reason itself with tests and disasters that can weaken and destroy it or become a tool and intermediary for its damage. Often Islam reminds us of its value and existence, lauds those who use their intellect and abilities to pay attention to noble beings. Allah says:

وَتِلْكَ الْأَمْثُلُ نَضْرِبُهَا لِلنَّاسِ ۚ وَمَا يَعْقِلُهَا إِلَّا الْعُلَمَاءُ

"And these parables We made for men, and no one understands it except knowledgeable people. (Surah Al-Ankabut (29): 43).⁶⁷

The Quran denounces those who waste their minds not to think, pay attention and contemplate; those who do not take advantage of the ability (reason) given by Allah (through which Allah glorifies them) to respond to the power of the Creator. They do not subject their intellect to the sphere of life for which they were created, nor to exploit the wealth, natural resources, and power already available for individual happiness.⁶⁸

4) Protection of Property (*hifdz mal*)

Treasure is one of the core needs in life, which humans cannot be separated from. Therefore, in the context of *jalbu manfa'ah*, Allah ordered to create and maintain the property.⁶⁹ As found in the word of God, namely:

⁶⁷ Kementerian Agama RI, Al-Qur'an,.....399

⁶⁸ Jauhar, *Maqasid Syariah*,....96

⁶⁹ Amir Syarifuddin, *Ushul Fiqh 2*, 238

الْمَالُ وَالْبَنُونَ زِينَةُ الْحَيَاةِ الدُّنْيَا

"Treasure and children are adornments of life."⁷⁰

People are motivated to seek wealth to maintain their existence and semi-increase material and religious enjoyment. He must not stand as a barrier between himself and his property. However, all of these motivations are limited by three conditions: the assets are collected lawfully and used for legal things. From these assets, the rights of Allah and the community where he lives must be issued.⁷¹

The way to earn these assets is by working and inheriting, so one cannot eat other people's property in a vanity way. Allah says:

وَلَا تَأْكُلُوا أَمْوَالَكُمْ بَيْنَكُمْ بِالْبُطْلِ وَتُدْخِلُوا بِهَا إِلَىٰ أَحْكَامٍ لِّتَأْكُلُوا فَرِيقًا مِّنْ أَمْوَالِ النَّاسِ

بِالْإِثْمِ وَأَنْتُمْ تَعْلَمُونَ

"And do not eat part of the wealth among you in an immoral way and (do not) bring (the affairs) of that property to the judge, so that you can eat a portion of the property of the other person by (sinning) even though you know."⁷²

Thus the verses of the Koran cover the problem of property from all aspects, so that wealth can be a source of enjoyment and happiness for the community, away from jealousy, greed, and exploitation so that trust and tranquility

⁷⁰ Kementerian Agama RI, Al-Qur'an,.....301

⁷¹ Jauhar, Maqasid Syariah,....167

⁷² Kementerian Agama RI, Al-Qur'an,.....29

can dominate society. We do not believe that any political or economic thought can cover all the problems of wealth described in Islam.⁷³

5) Protection of Generation (*hifdz al-nasab*)

Nasab is the foundation of kinship in the family and the support that connects its members, so Islam pays great attention to protecting the lineage from anything that causes mixing or insulting the scripture's glory. Nasab is a *gharizah* or instinct for all living things, with which the continuation of human life takes place. To maintain a righteous family, God wants humans to marry.⁷⁴

This concern is evident in most of the ways used to safeguard and protect honor, as well as in many other fields, especially in terms of ignoring the five rules or corrupt systems established in much present-day *shari'a*, namely the adoption system, the method for giving recognition to biological children, the method of confessing, the *khulu'* system (removal of the nasab of a biological child), and the system of losing a woman's line after marriage. In this case the researcher will discuss 2 methods, namely:

a) Recognition system for biological children

This system decides not to connect a child's lineage with his legal father unless the father is willing to clearly and willingly acknowledge the child's origin is related to him. However, Islam combats this system because it insults the honor of marriage, obscurity of lineage and, arbitrary discrimination between children. There is a hadith stipulated,

⁷³ Jauhar, *Maqasid Syariah*,....174

⁷⁴ Amir Syarifuddin, *Ushul Fiqh 2* (Jakarta: Kencana, 2014), 237

الْوَلَدُ لِلْفِرَاشِ وَلِلْعَاهِرِ الْحَجَرُ

"The child belongs to the bed (husband and legal relationship), while for those who commit obscenity is prevented."⁷⁵

These are the strongest arguments that show Islamic concern for the protection of honor and lineage and provide the right direction for both parties when opposing or conflicting.

- b) The *Khulu* 'System (Removal of the nasab of the biological child) and the System of Confessing the biological child.

The system of Removal of the nasab of the biological child is a system that allows a family head to remove the lineage of one of the original members of his family from his dependence or security and to cut ties with the family so that the victim becomes an expelled person and is a stranger in all aspects.

The System of Confessing the biological child is a system that allows a family head to collect foreigners into his family and make that person a member of his family by fulfilling the rights and obligations of his original family member.⁷⁶

Islam indeed recommends these two systems because they cause the mixing of lines, weaken blood relations, and destroy the family's foundations. This relationship is not subject to human volition and passions. Islamic Sharia does not exclude anything from this rule, but under two conditions; one of which requires kinship not based on blood relations, while the other allows this type of rule to

⁷⁵ Jauhar, Maqasid Syariah,....151

⁷⁶ Jauhar, Maqasid Syariah,....158

benefit both the individual and the public. *First*, it appears in the system of *Maula Al-Atq* (Master of liberated slaves). *Second*, this Islamic rule appears in the slave masters system of slaves; The Islamic Sharia permits this rule for non-Arabs.⁷⁷

Through this relief, Islam wants to realize justice and protect the weak in the communities they live in. Therefore, Islam does not allow this rule but for non-Arab people whose lines are unknown. And people whose lineage is clearly from non-Arab circles also do not need it because they are still under the protection of their family, and nationalizing or imparting themselves to their families will cause a mixture of lineage and the obscurity of the principles that are the basis of kinship rules.⁷⁸

⁷⁷ Jauhar, Maqasid Syariah,....160

⁷⁸ Jauhar, Maqasid Syariah,....161

CHAPTER III

RESEARCH OF RESEARCH

A. Type of Research

The type of research used in this research is empirical research, which is research that examines and analyzes the work of law in people's lives that always interacts and relates to social aspects.⁷⁹ on this explanation, this research uses field research where the data collection comes directly to the research location through interviews. This research's primary source is the Mojokerto Religious Court judges' views on the Averment of polygamous marriage in terms of Al-Ghazali's *maslahat*. The researcher immediately went to the research location, namely the Mojokerto Religious Court to find out the judges' opinions, which then the results of the research in the field would be reviewed by researchers using the Al-Ghazali's *maslahat*. This is because the judge's view becomes research material to analyze the law, which is seen as patterned community behavior in people's lives that always interacts and relates to social aspects.

B. Research Approach

The approach used in this study is qualitative. Qualitative research is research that is intended to understand the phenomena experienced by research subjects.⁸⁰ The researcher will involve the Mojokerto Religious Court judges on the

⁷⁹ Bambang Sunggono, *Metodologi Penelitian Hukum* (Jakarta: PT Raja Grafindo Persada, 2003), 43.

⁸⁰ Lexy J. Moleong, *Metode Penelitian Kualitatif* (Bandung: PT. Remaja Rosdakarya, 1999), 6.

Averment of polygamous marriage as informants in this study. The qualitative data obtained will be reviewed using the theory of Al-Ghazali's *maslahat*.

C. Research Location

This research was conducted at the Mojokerto Religious Court, which is located at Jalan Pra Soldier Kulon No.17, Margelo, Pra Soldier Kulon, Kec. Soldier Kulon, Mojokerto City, East Java 61326. Mojokerto Religious Court was formed based on Stablat 1882 Number 152. At that time, the name was still the *Kepenghuluan Bureau*. Then there was a change in the name and jurisdiction, and location of the Mojokerto Religious Court based on Government Regulation Number 45 of 1957.

The researchers conducted research at the Mojokerto Religious Court because, at the Mojokerto Religious Court, there was a decision on the polygamous marriage averment, granted by the judges' panel. After all, it was through the procedures stated in the existing regulations. And when submitting it, it turns out that the party already has a legal wife.

D. Data Sources

The type of data can be seen from the source, it can be distinguished between data obtained directly from the community and data obtained from library materials.⁸¹ As for getting the right data or answers in discussing this thesis and following the problem approach used in this study, the types of data used in this study are:

⁸¹ Sarjono Soekarto, *Penelitian Hukum*, 11.

1. Primary Data Sources

Primary data is data obtained directly from the results of interviews or observations made. In this research, the researcher will interview several judges of the Mojokerto Religious Court on the averment of polygamous marriage, which is then reviewed by the theory of Al-Ghazali's *maslahat*, which is the primary source of research.

2. Secondary Data Sources

Namely, data sources can help analyze and understand primary data sources in the form of essential documents.⁸² Those are related to the discussion or research on averment of polygamous marriage. In this research, secondary data sources are Supreme Court Circular No. 3 of 2018 on averment of polygamous marriage, Book II, Al-Ghazali's *maslahat*, scientific books, and other books related to averment of polygamous marriage.

E. Technique of Data Sources Collection

The data collection method is used as a fundamental technique in collecting data that has been obtained from the data sources obtained. In this study, the data collection used were:

1. Interview

The interview's form was directional interviews, which were conducted independently but were still bound by the main points of the interview.⁸³ This

⁸² Amirudin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: Rajawali Grafindo Persada, 2004), 171.

⁸³ Abu Achmadi dan Cholid Narkubo, *Metode Penelitian* (Jakarta: PT Bumi Aksara, 2005), 85.

interview aimed to obtain direct information on the judges' views at the Mojokerto Religious Court on polygamous marriage.

In this research, the writer will interview the Judge of the Mojokerto Religious Court on the judges' views on this research, including:

Table 3.1

Informants from The Judges at Mojokerto Religious Court

No	Name	Position
1.	Dr. Hj. Nurul Maulidah, S.Ag., M.H.	Vice Chairman
2.	Drs. Abdullah Shofwandi, M.H.	Judge
3.	Drs. AH. Fudloli, M.H	Judge

2. Documentation

Documentation aims to obtain data directly from the research site, including relevant books, regulations, activity reports, photographs, documentary films of relevant research data.⁸⁴ This method is used to find out information related to the existence of cases of polygamous marriage.

F. Data Analysis

Data obtained from interviews and documentation, then processed using the method:

⁸⁴ Abdurrahman Fatoni, *Metodologi Penelitian dan Teknik Penyusunan Skripsi*, (Jakarta: Rineka Cipta, 2006), 105.

1. *Editing*

The data obtained is checked whether there are still deficiencies and whether the data is following the problem.⁸⁵ The researcher's focus is on the views of the Mojokerto Religious Court judges on the averment of polygamous marriage, where the author will double-check the results of the interview and eliminate writing errors made when conducting interviews.

2. *Classifying*

Classifying is the process of grouping data originating from interviews with research subjects, direct observation, and recording in the field or observations.⁸⁶ The results of the interviews with the judges will be classified according to their discussion in analyzing the data.

3. *Verifying*

Verifying is the process of correcting, validating, confirming, or negating a proposition (argument, possibility, or proposal design) and proving the truth.⁸⁷ The authors look for data that can validate the field's information at this stage, with the primary source being libraries or books. The author does it by reading, taking notes, and quoting various literature, laws, regulations, books, mass media, and other written materials related to averment of polygamous marriage.

⁸⁵ Abdulkadir, Muhammad, *Hukum dan Penelitian* (Bandung: Citra Aditya Bakti, 2004), 134.

⁸⁶ Lexy J. Moleong, *Metode Penelitian Kualitatif* (Bandung: PT. Remaja Rosdakarya, 1993), 104-105.

⁸⁷ Hendro Darmawan dkk., *Kamus Ilmiah Populer Lengkap* (Yogyakarta: Bintang Cemerlang, 2013), 498.

4. *Analysing*

Analyzing is the stage of analyzing the data obtained, which is associated with the object of the problem under study. At this stage, the researcher outlines the views of the Mojokerto Religious Court judges on the Isbat of polygamous marriage. Then the results of the analysis of the judge's opinions will be reviewed by the researcher using the Al-Ghazali's *maslahat*, especially at the *al-Dharuriyyah* level.

5. *Concluding*

That is making conclusions on the data that has been processed in advance.⁸⁸ This conclusion is the answer to the problem formulation on the views of the Mojokerto Religious Court judges on the averment of polygamous marriage and the judge's views from the perspective of Al-Ghazali's *maslahat*.

⁸⁸ Juliansyah Noor, *Metodologi Penelitian*, (Jakarta: Prenada Media, 2011), 33.

CHAPTER IV

DISCUSSION OF RESEARCH FINDINGS

A. Exposure to Research Location Data

1. History of the Mojokerto Religious Court

The Mojokerto Religious Court has existed since 1882, namely based on Stablat 1882 number 152. At that time, the name *Kepenghuluan* was still one with the Resident / Regent and occupied one of the rooms in the Regency Hall called the heritage room. And who was the Chairman / Head of the Chief at that time was K.H. Zulkifli this lasted until 1892, and in 1892 its chairperson was held by *Kyai Abdullah* until the colonial period. At that time, the Mojokerto Religious Court was still in the *Pendopo* Environment of Mojokerto regency, and in 1916 the Chair of the Mojokerto Religious Court was held by *Kiyai Abu Bakar* until 1932, in 1933 there was another change of Chair from *Kiyai Abu Bakar* to *HM. Solomon*. Then in 1942 (Japanese era), the location / *Kepenghuluan Office* / Religious Court moved from the heirloom hall of the Mojokerto Regency pavilion to the North Porch of the *Jami 'Al-Fatah Mojokerto Mosque*. In this place, the Religious Courts continued to carry out their duties until the independence period.

The enactment of Law Number 7 of 1989 Mojokerto Religious Court continues to occupy an office located on *Jalan R.A. Basuni No. 21 Mojokerto* is located in the same complex as the Department of Religion of Mojokerto Regency. The Religious Courts still occupy the office consisting of the Convention Hall and the Official House as described above until now. Then in 1985, the Mojokerto Religious Court received land given from the regional government of Mojokerto

Municipality with an area of approximately 2000 m² located on Jalan Raya Prasatria Kulon No. 17 Sub-district Pra Soldierkulon, Mojokerto Municipality and as among them the official house of the Mojokerto Religious Court was built, then in 1999 and 2000 the Mojokerto Religious Court office was built. Since March 1, 2001, the Mojokerto Religious Court has occupied the new office.

Then in 2007, based on the Decree of the Administrative Affairs Board of the Supreme Court of the Republic of Indonesia Number: 25 / S-Kep / BUA-PL / V / 2007 dated 24 May 2007, the Mojokerto Religious Court Building was removed because the Mojokerto Religious Court building was deemed no longer suitable as a building. An authoritative court and then a new building for the Mojokerto Religious Court Phase I was built with DIPA funds Number: 0199.0 / 005-01.0 / XV / 2007 dated 31 December 2006 and the allocation of funds was IDR 1,524,000,000, - then continued construction in phase II of the fiscal year 2008 with funds from DIPA Number: 0199.0 / 005.01.0 / XV / 2008 dated December 31, 2007, with a fund allocation of Rp. 1,120,000,000, -

2. Address

Address: Jl. Raya Prasatria Kulon No.17, Prasatria Kulon, Mojokerto City

No Phone: +62321 321097

Email: pamojokerto@yahoo.com

Working Hours: Monday-Thursday 07.30-16.00 and Friday 07.00-16.00

3. Authority

The Mojokerto Religious Court, the court of the first instance, has the duty and authority to examine, decide, and settle cases filed by justice seekers. Based on

Article 49 of Law Number 7 of 1989 concerning Religious Courts as amended by Law Number 3 of 2006 and the second amendment to Law Number 50 of 2009, the Religious Courts as elements of administering the State Government are one of the executors of Judicial power for the people. Seekers of justice who are Muslim, the Religious Courts have the duty and authority to examine, decide, and settle cases at the first level among people who are Muslim, in the field of:

- a. Marriage
- b. Inheritance
- c. Will
- d. Grants
- e. Waqf
- f. Zakat
- g. Infaq
- h. Sadaqah
- i. Shari'ah economics.

The duties and powers of the Religious Courts are a strength to provide optimal legal services to justice-seeking people who are in the jurisdiction of the Mojokerto Religious Court, which is predominantly Muslim.

The Religious Courts are also one of the 3 Special Courts in Indonesia. It is said that the Special Court is due to the Religious Courts adjudicating certain civil cases and on certain groups of people. In the Organizational Structure of the Religious Courts, there are Religious Courts and High Religious Courts, which are directly in touch with case settlement at the first level and appeals as a manifestation

of judicial power's function. Judicial power within the religious court is exercised by the Religious Courts and the High Religious Courts.

Other duties of the Religious Courts are:

- 1) Provide information, considerations, and advice on Islamic law to government agencies in their jurisdictions when requested.
- 2) Carry out hisab and rukyatul hilal.
- 3) Carry out other service duties such as research/research services, supervision of legal advisors, and so on.
- 4) Completing applications for distribution of inheritance outside disputes between people who are Muslim.

In accordance with Article 102 Article 49 of Law Number 7 of 1989 concerning Religious Courts, it is stated that "The Supreme Court further regulates the duties and responsibilities, the organizational structure and work procedures of the Registrar's Office of the Court."

B. Exposure to Research Data

1. The View of Judges at Mojokerto Religious Court on the Averment of Polygamous Marriage

The following description of the interview results with judges at Mojokerto Religious Court about their view about averment of polygamous marriage:

a. Dr. Hj. Nurul Maulidah, S.Ag., M.H.

The interview process with the researcher was conducted on December 22, 2020 at the Mojokerto Religious Court. The researcher

asked about her views on the Averment of Polygamous Marriage. She said:

“There is no legal protection for children and wives from unregistered marriages, so they do not have legal standing. It is not a gender bias/tendency because so that it is not done arbitrarily by men. Because women are weak and economic needs, depend on men. So that reason is used for men to carry out a polygamous unregistered marriage. The averment of polygamous marriage in any way that cannot be used. If the second wife wants to get legal protection, she must remarry her husband by polygamy and do it according to existing regulations. Only after the marriage book is issued can we propose the origin of the child. Submitting the origin of the child only checks the validity of the siren marriage if it does not meet the formal requirements, then the dictum of stipulating that child is declared valid because in Law No.1 of 1974 Article 42 states that a legitimate child is a child born in or as a result of marriage. Legitimate. If a polygamy permit is refused, then the child still gets legal protection. The Constitutional Court Decision No. 46/2010 states that children outside of marriage are served by mothers and can prove their biological father according to science so that their civil rights are not lost. Whereas for a wife who is married to a unregistered, if her polygamous permission is refused, she will be protected. However, she is still wrong and violates the rules. So that the wife's civil rights do not get legal protection.”⁸⁹

From the results of the interview with Ms. Nurul that in a siri marriage the most disadvantaged are women and children, on whatever basis those who are disadvantaged are the birth of the child and the status of women So that if there is a polygamy nikat case, the judges will declare not accepted. To propose the origin of their child they can remarry through a polygamy license. And from the results of the remarriage they can submit the origin of the child with the existing

⁸⁹ Nurul, *wawancara*, (Mojokerto, 26 November 2020)

marriage book. And if the polygamy permit is refused, the wife from the result of the polygamous marriage will not be able to get her material rights. This is different from the position of the material rights of children resulting from siri polygamous marriages which are still protected by the Constitutional Court Decision Letter No.46 of 2010.

b. Drs. Abdullah Shofwandi, M.H.

The interview process with the researcher was conducted on December 22, 2020 at the Mojokerto Religious Court. The researcher asked about her views on the Averment of Polygamous Marriage. He said:

"If allowed to continue, averment of polygamous marriage will be able to destroy the legal order. With all the legal consequences of the second wife, if it is not legalized, it will not get anything. Meanwhile, the child can obtain inheritance rights Women still lose money if they practice illegal polygamy, so they don't need to do it so that new problems don't arise. Most of the people who signify their polygamous marriage are related to their assets, not their marital status. Most of it His second wife and child have no legal consequences, so they are considered non-existent according to the law because the marriage was not legalized. And if the marriage is not procedural, we usually don't grant it so that there are no new legal problems. If the marriage is legal according to religion, we can legalize it, but the legalization as a child is from there a and b. We are not saying as the son of husband and wife. Because if it is written the children of husband and wife, it means that the husband and wife are recognized. This is done to protect the civil rights of the child. As with fasid marriages, fasid marriages do not diminish the position of their children, but since when was the fasid discovered and after that the marriage could not be continued, for example: marrying a mahrom, since it was known that both were mahroms, the marriage was immediately terminated but the child was still their child. both. In PA Mojokerto on average polygamy permits are granted. This is in violation of the law. If you obey the law, judges in any religious court will not grant

permission for polygamy so that the judge's guidance is the old wife."⁹⁰

The results of the interview stated that if polygamy isbat married continuously, it would damage the legal system. Most cases of polygamy marriage Isbat are rejected because they see more of the impact of the new law that arises. His second wife and child have no legal consequences so it is considered unfair according to law because the marriage was not legalized. So that in order to obtain the material rights of the wife and children, they must remarry through a polygamy permit and on average the polygamy permit at the Mojokerto Religious Court is granted. If it is not granted, the recognition of the child's origin can be compared with the fasid's marriage which states that the child is from Mr. A and Mrs. B, not from husband A and wife B. So that with this the material rights of the child get protection.

c. Drs. AH. Fudloli, M.H

The interview process with the researcher was conducted on December 22, 2020 at the Mojokerto Religious Court. The researcher asked about her views on the Averment of Polygamous Marriage. He said:

In the religious court there is no polygamous marriage format because Isbat nikah is voluntary and polygamy is contentious. Once there was someone who filed it because the religious court was not allowed to reject the case so when the registration was accepted, but if you adhere to SEMA, the case is not accepted, not rejected because the two are different. The case cannot be

⁹⁰ Abdullah, *wawancara*, (Mojokerto, 26 November 2020)

accepted because it does not meet the formal requirements, while the rejected case cannot prove the argument for the lawsuit. Because Isbat Nikah is specifically for marriages that are not tied to other marriages because the impact will have an effect on the inheritance. The procedure is to apply for polygamy first so that the assembly considers the unregistered marriage does not exist and performs a new marriage because averment of polygamous marriage is the same as 1 submission with 2 purposes, it means the same as cutting a compass. After that they can apply for propose the origin of the child. Judges generally grant permission for polygamy because the first wife's permission is not the main requirement, the judge will look at several aspects such as financial adequacy, heredity and justice. This is because coming to the religious court to issue a polygamy permit is deemed to be of good faith. Because considering the benefits and disadvantages, especially if you are married in a siri and have children, the panel of judges will grant and suggest proposing the origin of the child."⁹¹

The results of the above interview can be concluded that the submission of polygamy marriage was declared not accepted by the Mojokerto Religious Court because the two cases were different. Isbat marriage is a voluntary case and polygamy is a continuous matter. So in this case Mr. Fudholi has the same opinion as Mr. Abdulloh that an alternative way to this case is to apply for a polygamy permit and to remarry so that he can propose the origin of the child using a new marriage certificate. And in this case, the Mojokerto religious court on average granted permission for polygamy in this case.

⁹¹ Fudholi, *wawancara*, (Mojokerto, 26 November 2020)

2. Analysis of the View of Judges at Mojokerto Religious Court on the Averment of Polygamous Marriage.

Averment of polygamous marriage is the legalization of a marriage by a unregistered husband and wife, but the man already has a legal marriage relationship with his first wife. In fact, the law is stringent, that marriages that can be ordained are those that were carried out before Law No.7 of 1989. The Marriage Law in Article 64 explains that marriage and everything related to marriage that occurred before this law came into effect was implemented. According to the old regulations, it was legal. In this case, this includes the issue of marriage. Then in Law Number 50 of 2009, on the second amendment to Law Number 7 of 1989 mentioned in Article 49 paragraph (2) referred to in Paragraph 1 letter, a are regulated matters based on the law concerning marriage in force.

While the elucidation of Article 49 Paragraph (2) states that one of the areas of marriage regulated in the Marriage Law which consists of 22 items, one of which is a statement on the validity of a marriage that occurred before the law, concerning marriage which is carried out according to other regulations.⁹²

But the fact is that after the enactment of the law, there is still the practice of unregistered marriage, then if it is submitted to a religious court, the panel of judges is based on Article 7E of the KHI (that marriages can be ordained in the Religious Courts are marriages performed by those who have no obstacle to

⁹² Mahkamah Agung, Pedoman Teknis Administrasi dan Teknis Peradilan Agama, (Buku II), Jakarta, 2010, hlm.147

marriage according to the law. Law No.1 of 1974).⁹³ So, there are still many legalized marriages after the existence of Law No.7 of 1989.

that In a unregistered marriage, the most disadvantaged are women and children, on whatever basis those who are disadvantaged are also the birth of children and the status of women. As said by Bu Nurul as Deputy Chairman of the Mojokerto Religious Court as follows:

Based on Bu Nurul's explanation, we can see that in an unregistered marriage, women are the most disadvantaged parties. Based on the juridical aspect, as a result, unregistered marriages are not recognized by the government, so that they do not have legal force (*no legal force*).⁹⁴ Therefore, marriage is not protected by law and is even considered to have never existed. In this regard, other judges also have the same opinion, as is the view of Pak Abdullah:

Based on Pak Abdullah's explanation, we can conclude that if it is not ordained in a polygamous unregistered marriage, then the wife will not get a legal umbrella or material rights. Meanwhile, it is still possible for children to reach their material rights. This is in line with the Constitutional Court decision No. 46 of 2010 states that children born out of wedlock have a civil relationship with their mother and their mother's family as well as with a male as their father, which can be proven based on science and technology and / or other evidence by law to have blood

⁹³ Pasal 7 D dan E Kompilasi Hukum Islam

⁹⁴ Bunyamin dan Agus Hermanto, Hukum Perkawinan Islam, (Bandung:Pustaka Setia, 2017), 149

relations, including civil relations with their father's family.⁹⁵ So that her civil rights are not lost even though her polygamous unregistered marriage is not ordained.

In the Mojokerto Religious Court, most cases of averment of polygamous marriage were rejected, coupled with the dismissal of SEMA, because they saw more of the impact of the new law that had arisen. This was revealed by Pak Abdullah as follows:

The explanation from Mr. Abdullah can be concluded that when someone applies for a polygamous marriage request, the Mojokerto Religious Court cannot accept it because the case does not meet formal requirements and also in religious courts, there is no polygamous marriage averment format because averment of marriage is *voluntair* and polygamy is *contentious*. Averment of marriage is also reserved for marriages that are not tied to other marriages or monogamous marriages because the impact will have an effect on inheritance.

The SEMA explains, "That the request for a averment of polygamous marriage is based on a unregistered marriage, although the reasons for the interests of children must be declared unacceptable. To ensure the interests of the child, an application for the origin of the child can be submitted."⁹⁶ From the article's explanation, the judge was of the opinion that when he was going to propose the origin of the child, he had to legalize the marriage first. Because one of the requirements to propose the origin of the child is a marriage book.

⁹⁵ Putusan MK No. 46 tahun 2010

⁹⁶ Surat Edaran Mahkamah Agung No.3 Tahun 2018

The explanation from Bu Nurul above can be concluded that if the second wife wants to get legal legality, she must conduct a new marriage with her husband by applying for a polygamy permit and remarrying. So that in this case, the unregistered marriage that has been carried out is not considered. It is useful for protecting inheritance and common property. So that the first wife and the second wife have the same position in heritage. Pak Fudholi also believes that:

The opinion of Mr. Fudholi can be concluded that the polygamous marriage averment has quite a lot of effects if it is said to violate SEMA and impact the inheritance. If there is a divorce, the property will be confused. Then polygamy must be proposed so that it is clear the second wife's assets, namely after the official marriage of the second wife and husband. Regarding the origin of the child (AUA), the State protects by proposing the child's origin so that for the legality of the child, there is legal protection. If there is no marriage book, then it is not applying for the child's origin but requesting averment for marriage.

From Bu Nurul's opinion, it can be analyzed that a husband and wife can apply for AUA if they have married them according to Law No.1 of 1974 Article 42 that a child in a legal marriage means that the husband and wife get married and then give birth to a child. Whereas the child or the result of a legal marriage, namely the mother and father of unmarried marriage, is then stated that the child is the result of a legal marriage. Mr. Fudholi also confirmed that the definition of a child's origin, namely children born before their parents' official marriage, therefore AUA will not be accepted without a new marriage from a unregistered polygamous partner. If the legal marriage does not exist, then the Judge cannot determine that it is the child of

Petitioner 1 and Petitioner 2. A polygamy permit must be applied first. Because if you are going to serve your father and mother, there must be an official marriage first.

In the SEMA, it is explained about the child's origin. There must be a legal marriage that cannot be done before the official marriage is established because it is not clear who the child is attributed to, so it requires a marriage certificate to recognize the child. However, there is no difference between applications for the origin of children resulting from legal marriages and fasid marriages in the civil registry. It is different with Pak Abdullah's opinion that the AUA ratification can be done in 2 ways.

In Pak Abdullah's opinion, it can be concluded that to protect the child's civilization can be done in 2 ways, namely applying for AUA by showing proof of a marriage certificate and also if there is no proof of a marriage certificate, in its determination, it says that the child is the child of Mr. A and Mrs. B does not use the words of the children of husband A and wife B. This opinion is the same as the fasid's marriage. Fasid's marriage does not diminish the child's position, but since when did the fasid know it, and after that, the marriage could not be continued.⁹⁷

The three judges' explanation above can be concluded that when someone submits a case, averment of polygamous marriage will be declared not accepted by the Religious Court. The explanation of the averment of polygamous marriage in SEMA is that when you apply for AUA, you must first legalize the marriage by applying for a polygamy license and re-marrying if the polygamy permit application

⁹⁷ Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia*, (Jakarta:Kencana, 2006), 99

is granted. However, the problem is what if the polygamy permit is rejected. This problem, the researcher asked the speakers.

According to the explanation from Pak Fudholi and Pak Abdullah as the Judge of the Mojokerto Religious Court, it was stated that the average judge granted polygamy permits because the permission of the first wife was not the primary requirement. The judge would look at several aspects, such as financial adequacy, descent, and justice. This is because coming to the religious court to issue a polygamy permit is deemed to be of good faith. Because considering the benefits and disadvantages, especially if you are married in a unregistered and have children, the panel of judges will grant and suggest proposing the child's origin. However, unlike Pak Fudholi and Pak Abdullah, according to Bu Nurul's statement, if a polygamy permit is refused, then the child still gets legal protection.

With the issuance of SEMA, there will be no fear of smuggling the law if you do polygamy without using the conditions in Law No.1 of 1974 articles 3 and 4 when he wants to legalize his son's residence. Only then did he legalize the marriage so that SEMA is quite useful because it protects all parties, both the first wife and the second wife. SEMA is not binding, but to prevent disparity in decisions or differences in decisions between judges. That is, the Supreme Court has made efforts so that the public can interpret justice with the same perception. So that in cases filed in different religious courts, the verdict is the same. So that people are not confused by this legal certainty. In accordance with the existence of legal objectives, namely justice, benefit, and legal certainty.

So that in this case, the SEMA rules are used as a signpost for the judges in carrying out their duties. Although judges have the principle of *La bouche de la loi* (judges are not mouthpieces of the law), judges have the right to interpret laws and apply them in their decisions. This is the judge's freedom. Norms bound judges. They may deviate from the norm as long as there is apparent consideration, and turning from the law is also permissible. Still, some norms must be followed if they do not follow the norms, there must be careful consideration. Therefore, it is seen from the treatise of Law No.1 of 1974 that how the state protects women in the form of polygamy regulations, Perma No.3 of 2017, namely women dealing with the law, this is a form of the Supreme Court's efforts to protect women and children who are born.

3. Analysis of the View of Judges at Mojokerto Religious Court on the Averment of Polygamous Marriage Perspective Al-Ghazali's Maslahat

Imam Al-Ghazali defines al-maslahat which is briefly called: جلب منفعة أو دفع مضرة (*anything that brings benefits or rejects mudharat*). Imam Ghazali initially used that simple meaning. However, because "brings benefits and avoids harm" is a human intention or desire, not Allah's intention. At the same time, maslahat is the intention of Allah who made the law, Al-Ghazali made a new formula, namely: المحافظة على مقصود الشرع (*maintaining the goal of syara* '), while the purpose of *syara* 'in connection with his servant is to protect religion, soul, nature, descent, and property. These five goals are popularly known as الأصول الخمسة (*five principles*).⁹⁸

⁹⁸ Amir Syarifuddin, *Ushul fiqh*, 232

From here, the writer will analyze Al-Ghazali's *maslahat* through *maslahat*, which is divided into 5 main points, in terms of:

a. Protection of Religion (*hifdz al-din*)

That is the same as being obedient to the government. The government prohibits and does not practice polygamous marriage based on existing regulations. Meanwhile, the existing rules that have been regulated, namely SEMA No.3 of 2018. SEMA said that averment of polygamous marriage is not accepted. It is in line with sharia-based on obeying the government.

يَا أَيُّهَا الَّذِينَ ءَامَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنْكُمْ

"O you who believe, obey Allah and obey the Prophet (Him), and ulil amri among you." (An-Nisa: 59)⁹⁹

In Ulil Amri, the law is mandatory as long as there are no things that deviate from or are contrary to the law or public benefit. Meanwhile, whether or not the acceptance of the averment of polygamous marriage is not justified is in accordance with the law and accordance with legal procedures. Legal procedures tend not to bypass legal processes. When her marriage was not legal, then she had to legalize her marriage first. If she wanted to do polygamy, then she had to get polygamy permission from the judge then she got married. She is not directly bypassing the law by using a polygamous unregistered marriage.

It is the same as what Pak Fudholi said that applying for polygamous marriage is the same as cutting a compass, namely 1 submission with 2 objectives.

⁹⁹ Kementerian Agama RI, Al-Qur'an,.....87

The unregistered nya had not been followed up previously, and his polygamy had not been followed up. If the averment of polygamous marriage is legalized, then it contains mafsadat. So the judge's view is appropriate and does not conflict with the applicable laws or regulations.

The review of the shari'a on religion returns to the purpose of marriage, that marriage is to preserve the religion of Allah or the Shari'a of Allah and to follow the prophet's sunnah. As the Hadith of the Prophet:

يَا مَعْشَرَ الشَّبَابِ مَنِ اسْتَطَاعَ مِنْكُمُ الْبَاءَةَ فَلْيَتَزَوَّجْ

"O young men, who among you has a ba'ah, then let's get married" (H.R. Al-Bukhori)¹⁰⁰

That a man who is indeed unable to provide for his physical and mental well-being, dowry, and so on is advised not to marry. Meanwhile, here the husband who is definitely doing the marriage of polygamy unregistered must have problems in his livelihood or dowry so that the Shari'a does not recommend it.

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ ۖ فَلَا تَمِيلُوا كُلَّ الْمَيْلِ فَتَذَرُوهَا كَالْمُعَلَّقَةِ

"And you will not be able to do justice between your wives every now and then, even though you really want to do so, so don't be too inclined (to those you love)"¹⁰¹

¹⁰⁰ Amir Syarifuddin, *Ushul fiqh*, 241

¹⁰¹ Kementerian Agama RI, Al-Qur'an,99

A person who is a unregistered polygamist must tend to be wrong with the aspects of his birth and income so that it is not recommended to be justified if he has two or more wives in these conditions.

b. Protection of Life (*hifdz al-nafs*)

In addition to the right to maintain physical life and life, there are also defending things that affect the right to life, life, or physical rights. Marriage aims to improve generations.

تَزَوَّجُوا الْوُدُودَ الْوُلُودَ فَإِنِّي مُكَاثِّرٌ بِكُمْ الْأُمَّمَ

"Marry a fertile and loving woman. Indeed, I am proud of the number of my people (on the Day of Resurrection) "

This is also related to *hifdz nasab*. On the other hand, marriage also aims to create a family that is *sakinah mawadah wa rahmah*. *Sakinah mawadah wa rahmah* is very influential on the psychology of husband and wife. The psychology will later make sense to the mind and soul.

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً

وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ

"And among the signs of His power, He created for you wives of your own kind, so that you might be inclined and at ease with

them, and made Him among you a sense of love and affection. In fact, in this, there are signs for people who think. "¹⁰²

The name Sakinah must have a good life. According to Rasyid Ridho, sakinah is the soul's attitude that arises from an atmosphere of calm and is the opposite of inner turmoil and confusion.¹⁰³ From this explanation, it means that the peace of a family can be said to be Sakinah if the husband and wife have a vanity or a calm heart. So that it does not create conflict or complement each other. When the husband and wife perform a unregistered marriage, it must have the potential to cause conflict so that this is not in accordance with the purpose of the marriage, namely sakinah mawadah wa rahmah. Getting married aims to escape from hellfire.

قُوا أَنْفُسَكُمْ وَأَهْلِيكُمْ نَارًا وَقُودُهَا النَّاسُ وَالْحِجَارَةُ

"Take care of yourself and also take care of your family from the fire of hell, whose fuel is human and stone" (At-Tahrim: 6)¹⁰⁴

When there is a marriage contract, the husband is obliged to guide his family, both his wife and children, to a good or right path so that they do not plunge the family into the consequences of the afterlife. When the husband is in line with the Shari'a, there is no such thing as a husband giving rise to madhorot or mafsadat in his own family. The ideal husband in the Indonesian context is he who wants to take care of the marriage process until it is complete, the process of his child is

¹⁰² Kementerian Agama RI, Al-Qur'an,.....406

¹⁰³ Zaitunah Subhan, *Membina Keluarga Sakinah*, (Pustaka Pesantren:Yogyakarta, 2004), 69

¹⁰⁴ Kementerian Agama RI, Al-Qur'an,.....560

complete without saving negative or negative sides. Getting married isn't to cause trouble.

وَلَا تُلقُوا بِأَيْدِيكُمْ إِلَى التَّهْلُكَةِ

"Do not drop yourself into destruction" (Al-Baqarah: 195)¹⁰⁵

The destruction here can be from the dhohir side, namely eliminating or wasting the wife's rights. It will automatically have an impact on physically or psychologically. Polygamy unregistered, namely wasting the rights of the wife, both income and dowry, which cannot be guaranteed by the government so that it will be troublesome for the wife. So that he cannot apply for the right to divorce, the right to support, and so on.

وَمَنْ يَفْعَلْ ذَلِكَ عُدُونًا وظُلْمًا فَسَوْفَ نُصَلِّيهِ نَارًا ؕ وَكَانَ ذَلِكَ عَلَى اللَّهِ يَسِيرًا

"And whoever does this by violating his rights and persecution, then We will one day put him in hell. That is easy for Allah." (QS. An-Nisa: 30)¹⁰⁶

In the letter, it explains the violation of rights. Therefore automatically, the husband is wasting the rights of the married wife to polygamy unregistered so that the consequences are tortured.

c. Protection of Intellectual (*hifdz al-aql*)

¹⁰⁵ Kementerian Agama RI, Al-Qur'an,.....30

¹⁰⁶ Kementerian Agama RI, Al-Qur'an,.....84

Maintaining reason impacts a person's mindset, the right to freedom of opinion, and the right to know something or add insight to improve his condition. With reason, humans can understand the commands and prohibitions conveyed by Allah SWT. Marriage is one of them. When someone is married, the husband has an obligation to be fair, especially when he is already polygamous. When the husband cannot be fair, it can affect a wife's psychological state. If the wife is psychologically disturbed then she tends to act negatively. Yet, the function of reason is to distinguish between rights and vanity.

العقل نورٌ في القلبِ، يُفَرِّقُ بِهِ بَيْنَ الْحَقِّ وَالْبَاطِلِ

"Intellect is the light in the heart that distinguishes between things that are haq and things that are vanity."¹⁰⁷

Therefore, human reason will get comfort, peace, tranquility, and peace both as individuals or groups. Because in this case, justice must be implemented to protect the psychologically the wife who commits a polygamous marriage. The prohibition or not being granted the averment of polygamous marriage is in accordance with *hifdz al-aql* because to minimize the potential for badness. Therefore the Shari'a closes the way to negative things.

d. Protection of Generation (*hifdz al-nasab*)

¹⁰⁷ Jauhar, *Maqashid Al-Syari'ah*,93

Nasab is identical to a family because, without family, there will be no decrease in nasab. Islam advises Muslims or their creatures not to be celibate because celibacy will not preserve offspring.

وَأَنْكِحُوا الْأَيْمَىٰ مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ

"... marry those who are single among you and those who are good among your servants ..." (QS.An-Nur: 32)¹⁰⁸

Islam to strengthen the protection of the text is supported or maintained by the hadith *تَزَوَّجُوا الْوُدُودَ الْوُلُودَ فَإِنِّي مُكَاثِّرٌ بِكُمْ الْأُمَّمَ*. Where it is in accordance with the advice of the Prophet Muhammad to improve and reproduce offspring. On the other hand, Islam also forbids humans to have offspring by committing adultery. As contained in Surah Al-Israa 'verse 32:

وَلَا تَقْرُبُوا الزَّوْجَىَٰ إِنَّهُ كَانَ فَحِشَةً وَسَاءَ سَبِيلٌ

"And do not approach adultery. Actually, zin aitu is a heinous act and is a bad step."¹⁰⁹

To avoid adultery, the only way is to get married, but Islam also requires or has full attention to the child's lineage status. A clear text is born from an exact family. Unclear family or fasid marriages have an impact on unclear nasab status. Like the following hadith of the prophet

¹⁰⁸ Kementerian Agama RI, Al-Qur'an,.....573

¹⁰⁹ Kementerian Agama RI, Al-Qur'an,.....369

الْوَلَدُ لِلْفِرَاشِ ، وَلِلْعَاهِرِ الْحَجَرُ

"The child born belongs to the owner of the bed (husband), and the adulterer gets a loss."

From the above hadith, it can be concluded that the mother ordains the child, and the person who commits adultery will get a stone (stoning). Therefore, according to the Shari'a, the status of the result of a child for adultery is attributed to the mother. Not accepting or not granting the averment of polygamous marriage is clearly aimed at maintaining the lineage. Because when unregistered polygamy is legalized, the averment is accepted while the unregistered marriage has not been legalized and the polygamy has not received permission. It is not justified by sharia. When it is not justified by sharia, then the status of the lineage is still doubtful. There is no certainty. The prohibition or not the granting of the averment of polygamous marriage is in accordance with the *hifdz nash*.

e. Protection of Wealth (*hifdz al-mal*)

Assets related to marriage tend to support or dowry the wife's rights, which must be fulfilled by the husband. When a marriage has occurred, the husband is obliged to provide a dowry and a living. A dhohir's livelihood, namely possessions, both clothing, food, and shelter. When the marriage starts from an unclear marriage, the wife's rights status is also unclear.

Polygamy of unregistered in Indonesia is very clear that if the wife is not guaranteed a marriage, her rights are not guaranteed. Therefore he cannot claim a living, the right to support his wife, child support, and a dowry because the marriage is not valid according to law or law. Even though the only way a wife can ask for

or claim her rights in court. When unregistered polygamy is not justified or granted, it is a preventive measure to avoid property or avoid wasted property rights that are in line with maslahat.

يَا أَيُّهَا الَّذِينَ ءَامَنُوا لَا تَأْكُلُوا أَمْوَالِكُمْ بَيْنَكُمْ بِالْبَاطِلِ إِلَّا أَنْ تَكُونَتْ

"O you who believe, do not eat each other's wealth in an evil way, except by way of commerce that is consensual among you."

(QS.An-Nisa: 29)¹¹⁰

The above argument explains that it is not permissible for someone to eat his property that does not belong to his vanity. If it is related to the problem of polygamous marriage, that is, the husband still has living support for the wife that must be fulfilled. And it is not fulfilled, so the status cannot be specified. This also applies to income. That a wife has the right to support that must be given, whether during the marriage or after marriage, divorce, or divorce. If she is pregnant, during the Idah period, she is provided with a living until she gives birth. Therefore it can be seen that unregistered polygamy marriage, if not ordained, can eliminate the rights of a wife so that in this case, the judge's opinion and government regulations are in accordance with the Islamic Shari'ah.

From the explanation of the five Maslahat's, the fiqh rules also clearly state that, in fact, not granting the averment of polygamous marriage brings Maslahat and rejects mafsadat. Since in the case of polygamy marriage averment the mafsadat is more than the benefit, it is in line with the following rules:

¹¹⁰ Kementerian Agama RI, Al-Qur'an,.....80

درء المفاسد مقدم على جلب المصالح

"Leaving obedience must take precedence rather than taking advantage."¹¹¹

Because this polygamy series is characteristic, not everyone does it. There is very little to do. Then the statistical problem must be suppressed as much as possible, which affects the general issue in line with the rules of *المصلحة العامة مقدمة على المصلحة الخاصة*. This rule explains that in the event of a clash between the maslahat of the people or the general public and the benefit of the individual or special people, what is considered is the benefit of the general public or the crowd.¹¹²

So that maslahah, which is general in nature, must take precedence over maslahat, which is specific or characteristic. Because safeguarding the marriage, safeguarding the rights of the wife, and protecting the child's rights are already included in the general benefit compared to unregistered polygamy, which is a matter of personal rights only. In order not to be spared from adultery, to satisfy the rights of lust are personal rights so that they must be put second, and what must be given priority is the public benefit.

¹¹¹ Jaih Mubarak, *Kaidah Fiqh Sejarah dan Kaidah Asasi*, (Jakarta: PT Raja Grafindo Persada, 2003), 63

¹¹² Amir Syarifuddin, *Ushul Fiqh 2*,....243

CHAPTER V

CLOSING

C. Conclusion

1. The opinion of the Mojokerto Religious Court Judge on the averment of a polygamous marriage, namely that in the Religious Court there is no format for cases of polygamous marriage. So that an alternative way for people who have practiced a polygamous unregistered marriage is to apply for a polygamy permit at the Religious Court. Only then do they remarry, and when the marriage book comes out, can they propose the origin of the child. Because one of the requirements to apply for the child's origin is to submit a marriage book. Because when they don't do remarry, the wife will not be able to get her material rights. In contrast to the children resulting from the polygamous marriage series. In the Constitutional Court decision No.46 of 2010 . That Argument will analyze with the maslahat of Imam Al-Ghazali namely Protection of Religion (حفظ الدين) Islam does not easily allow its people to have polygamy. Because Islam really upholds the values of justice in his family. Government regulations on polygamous marriage are considered to be in accordance with Islamic law by not granting the request. The opinion of the judges also stated that the judge would not grant cases using this format. Therefore, because averment of polygamous marriage, many mudhorot, therefore there are regulations that prohibit polygamy in this way. Obeying *Ulil Amri* is obligatory as long as there are no things that deviate or contradict the law or the public benefit.

Protection of Life (حفظ النفس) in this case is related to the averment of a polygamous marriage, namely the creation of a Sakinah family of mawaddah wa rohmah. When the husband and wife perform a unregistered marriage, they must have the potential to cause conflict so that this is not in accordance with the purpose of the marriage, namely sakinah mawadah wa rahmah. Protection of Intellect (حفظ العقل) is related to one's psyche. If the husband carries out a unregistered polygamy marriage and it turns out that he cannot use it or when applying for unregistered polygamy is rejected by the Religious Court, it is indirectly in accordance with the opinion of the judges that the wife whose marriage is not legalized will not get her material rights. Protection of Nasab (حفظ النسل) Nasab is synonymous with family because, without family, there will be no decline in the lineage. In a polygamous unregistered marriage, the nasab will be mixed up. Therefore the judge was of the opinion that he immediately remarried by applying for a polygamy permit so that he could apply for the origin of the child. So that it will be clear who the child's lineage is related to. If this lineage's derivation is clear, the child's material rights will also become clear. Protection of assets (حفظ المال) in relation to marriage tends to support or dowry, the rights of the wife, which must be fulfilled by the husband. When a marriage has occurred, the husband is obliged to provide a dowry and a living. But the problem is that if the unregistered marriage is not legalized, then the wife's rights will also not be recognized by the state. So, in this case, the judge's opinion with the existing regulations on

the prohibition of unregistered polygamy marriage merely wants to protect the wife's material rights because the material rights of children are still protected by the Supreme Court decision No.46 of 2010.

D. Suggestion

In connection with the results of this study, the author will provide several suggestions and inputs that need to be considered, both by individuals, communities, and the government involved in determining policies as follows:

1. The Supreme Court has been very protective of women. There are a lot of laws and regulations made to protect women. Judging from this, one of Law No.1 of 1974 states that how the state protects women with polygamy rules, Perma No.3 of 2017, namely women against the law, is a form of the Supreme Court's efforts to protect women and children who are born. Therefore, for the wife who is to be married by her husband, she doesn't want to because wives who do unregistered marriages will not get legal legality or legal pay.
2. To women activists, try to advocate for the community not easily to carry out unregistered marriages. Not to authorize religion with existing regulations, but after all, we are in a state of law. If it is only based on Fiqh, then problems will arise in the future and will befall the children who are born. For this reason, fortify women not to be susceptible to seduction to do a unregistered marriage even though it is a monogamous marriage or unregistered polygamy. Because there is no power whatsoever that a woman can hold when bound by a unregistered marriage.

BIBLIGRAPHY

1. Books

- Abdulkadir, Muhammad. *Hukum dan Penelitian*. Bandung: Citra Aditya Bakti, 2004.
- Achmadi, Abu dan Cholid Narkubo. *Metode Penelitian*. Jakarta: PT Bumi Aksara, 2005.
- Al-Mursi Husain Jauhar, Ahmad. *Maqashid Syariah*. Jakarta: Amzah, 2009.
- Al-Qaradhawi, Yusuf. *Fiqh Maqashid Syariah*. Jakarta: Pustaka Al-Kautsar, 2007.
- Arto, H.A. Mukti. *Praktek Perkara Perdata Pada Pengadilan Agama*. Yogyakarta: Pustaka Pelajar, 2004.
- Asafri. *Konsep Maqashid Syari'ah Menurut Ash-Shatibi*. Jakarta: Raja Grafindo Persada, 1996.
- Asikin, Zainal dan Amirudin. *Pengantar Metode Penelitian Hukum*. Jakarta: Rajawali Grafindo Persada, 2004.
- Auda, Jasser. *Membumikan Hukum Islam Melalui Maqashid Syariah*. Bandung: Mizan Media Utama, 2015.
- Baltaji, Muhammad. *Poligami*. Solo: Media Insani Publishing, 2007.
- Darmawan, Hendro. *Kamus Ilmiah Populer Lengkap*. Yogyakarta: Bintang Cemerlang, 2013.
- Fatoni, Abdurrahman. *Metodologi Penelitian dan Teknik Penyusunan Skripsi*. Jakarta: Rineka Cipta, 2006.
- Ikbar, Yanuar. *Metode Penelitian Sosial Kualitatif Panduan Membuat Tugas Akhir/Karya Ilmiah*. Bandung: PT Refika Aditama, 2012.
- J. Moleong, Lexy. *Metode Penelitian Kualitatif*. Bandung: PT. Remaja Rosdakarya, 1999.
- Jauhar, Ahmad al-Mursi Husain. *Maqashid Syariah*. Jakarta: Amzah, 2009.
- Jaya Bakri, Asafri. *Konsep Maqashid Syari'ah Menurut al-Syatibi*. Jakarta: PT RajaGrafindo Persada, 1996.

- Machali, Rochatah. *Wacana Poligami DI Indonesia*. Bandung: PT Mizan Pustaka, 2005.
- Marzuki. *Metodologi Riset*. Yogyakarta: PT Prasetya Widia Pratama, 2000.
- Mubarok, Jaih. *Modernisasi Hukum Perkawinan di Indonesia*. Bandung: Pustaka Bani Quraisy.
- Mujahidin, Ahmad. *Pembaharuan Hukum Acara Peradilan Agama*. Bogor: Ghalia Indonesia, 2012.
- Mulia, Musdah. *Pandangan Islam Tentang Poligami*. Jakarta: Yunani Purba, 1999.
- Mulyana, Deddy. *Metodologi Penelitian Kualitatif*. Bandung: Remaja Rosdakarya, 2004.
- Noor, Juliansyah. *Metodologi Penelitian*. Jakarta: Prenada Media, 2011.
- Qohar, Adnan. *Isbat Poligami Antara Penyelundupan Dan Terobosan Hukum*.
- Rahman, Abdul. *Fiqh Munakahat*. Jakarta: Prenadamedia Group, 2019.
- Rato, Daminikus. *Hukum Perkawinan dan Waris Adat Di Indonesia*. Yogyakarta: LaksBang Pressindo, 2015.
- Soekamto, Soerjono. *Pengantar Peneltian Hukum*. Jakarta : Universitas Indonesia Press, 2006.
- Sunggono, Bambang. *Metodologi Penelitian Hukum*. Jakarta: PT Raja Grafindo Persada, 2003.
- Syarifuddin, Amir. *Hukum Perkawinan Islam Di Indonesia Antara Fiqh Munakahat Dan Undang-Undang Perkawinan*. Jakarta: Kencana, 2006.
- Syarifuddin, Amir. *Ushul Fiqh 2*. Jakarta: Kencana, 2014.
- Tihami, M.A. dan Sohari Sahrani. *Fiqh Munakahat*. Jakarta: Rajawali Press, 2010.
- Zuhriah, Erfaniah. *Peradilan Agama Indonesia Sejarah Pemikiran dan Relatif*. Malang: Uin Malang Press, 2009.

2. Regulations

Law Number, 1 of 1974.

Law Number, 30 of 1950.

Putusan Nomor 0093/Pdt.G/2014/PTA.Mtr, 5.

Supreme Court Circular No.3 of 2018.

Supreme Court Of The Republic Of Indonesia. *Compilation Of Legislation Concerning Religious Courts*. Jakarta: Directorate General Of Badilag, 2010.

Vide Guidelines for the Implementation of Duties and Administration of the Religious Courts Book II of 2013.

3. Internet

http://lpm.iainjember.ac.id/download/file/NIKAH_SIRRI_DALAM_TINJAUAN_TEORI_MAQASHIDI.pdf

4. Research and Thesis

‘Aisyah, Siti. “Pandangan Hakim Terhadap Itsbat Nikah Poligami Di Pengadilan Agama Bondowoso”, Undergraduate thesis, Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2008. [http:// etheses.uin-malang.ac.id/4231/1/04210064/](http://etheses.uin-malang.ac.id/4231/1/04210064/)

Bahrum, Mukhtaruddin. “Problematika Isbat Nikah Poligami Sirri” Jurnal Hukum dan Politik Islam. Sulawesi Selatan: IAIN Bone, 2019.

Basir, Cik. “Penanganan Perkara Permohonan Itsbat Nikah Poligamy Secara Sirri Dan Hubungannya Dengan Permohonan Asal Usul Anak Di Pengadilan Agama (Menyikapi Rumusan Hasil Rapat Pleno Kamar Agama Mahkamah Agung Dalam SEMA Nomor 3 Tahun 2018)”, (Palembang: Makalah di sampaikan dalam Diskusi Hakim Peradilan Agamaise-Wilayah PTA Palembang di Aula PTA 26 April 2019),2.

Cahyono, Agung. “Isbat Poligami Menurut Pertimbangan Hakim Pengadilan Agama Kota Probolinggo”, Undergraduate thesis, Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2016. [http:// etheses.uin-malang.ac.id/ 5249/1/10210042/](http://etheses.uin-malang.ac.id/5249/1/10210042/)

Irwan Adi Cahyadi, “Kedudukan Surat Edaran MA (SEMA) dalam Hukum Positif di Indonesia”, Undergraduate thesis, Universitas Brawijaya Malang, 2014. [http://hukum.studentjournal.ub.ac.id/ 564-593-1-PB/](http://hukum.studentjournal.ub.ac.id/564-593-1-PB/)

- Kurniawan, Achmad. "Isbat Nikah Dalam Rangka Poligami (Studi Putusan Pengadilan Agama Ambarawa Nomor: 0030/Pdt.G/2012/PA.Amb)", Undergraduate thesis, Salatiga: STAIN Salatiga, 2014. <http://e-repository.perpus.iainsalatiga.ac.id/517/1>
- Laili, Sofiyah. "Pandangan Hakim Pengadilan Agama Bangkalan Dan Tokoh Agama Kecamatan Kamal Terhadap Tingginya Angka Itsbat Nikah", Undergraduate thesis, Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2017. <http://etheses.uin-malang.ac.id/154376044/>
- Muti'ul Hakim, Robith. "Isbat Nikah Poligami Siri Ditinjau Dari Segi Yuridis-Normatif (Studi Terhadap Putusan No. 190/Pdt.G/2004/Pa.Smn dan Putusan No. 1512/Pdt.G/2015/PA.Smn Tentang Isbat Nikah Poligami Siri Di Pengadilan Agama Sleman)", Tesis, Universitas Islam Negeri Sunan Kaliaga Yogyakarta, 2017. <http://digilib.uin-suka.ac.id/25124/1/1420310065/>
- Satria, Rio. *Problematika Hukum Dalam Perkara Pengesahan Nikah Poligami*. 2019.

APPENDIXES

- **Process of Interview with Judge at Mojokerto Religious Court**



Picture with Dr. Hj. Nurul Maulidah, S.Ag., M.H.



Picture with Drs. Abdullah Shofwandi, M.H.



Picture with Drs. AH. Fudloli, M.H

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