

**ANALYSIS OF LEGAL CERTAINTY PRINCIPLE ON THE
VERDICT NUMBER 111/Pid.B/2020/PN Kka REGARDING
ILLEGAL POLYGAMY**

THESIS

BY:

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17210145



ISLAMIC FAMILY LAW DEPARTMENT

SHARIA FACULTY

STATE ISLAMIC UNIVERSITY MAULANA MALIK IBRAHIM

MALANG

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STATEMENT OF AUTHENTICITY

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In the name of Allah,

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

ANALYSIS OF LEGAL CERTAINTY PRINCIPLE ON THE VERDICT NUMBER 111/Pid.B/2020/PN Kka REGARDING ILLEGAL POLYGAMY

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

Malang, 12 November 2021

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MOTTO

“No chains can hold me.”

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

All praise is due to Allah SWT, who has given His grace and guidance to the author, so that this thesis entitled “Analysis of Legal Certainty Principle on The Verdict Number 111/Pid.B/2020/PN Kka Regarding Illegal Polygamy” can be finished. May Peace be Upon into The *Rasulullah*, Prophet Muhammad who has taught us guidance (*uswatun hasanah*) to do activity correctly in our life. By following him, may we belong to those who believe and get their intercession on the last day of the end. Amin.

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2. Dr. Sudirman, M.A., as the Dean of Syariah Faculty of The State Islamic University Maulana Malik Ibrahim of Malang;
3. Erik Sabti Rahmawati, M.A., as the Head of Islamic Family Law Department of Syariah Faculty of The State Islamic University Maulana Malik Ibrahim of Malang;
4. Risma Nur Arifah, S.HI, M.H, as my thesis supervisor. The writer thanks for her spending time to guide, direct, and motivate to finish writing this thesis;

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6. All lecturers at Syariah Faculty of the State Islamic University of Maulana Malik Ibrahim Malang who have provided learning to all of us. With sincere intentions, may all of their charity be part of worship to get the pleasure of Allah SWT;
7. Staff of Syariah Faculty of The State Islamic University Maulana Malik Ibrahim of Malang;
8. My Family, my father, mother, and sister who always giving an endless love, support, and guidance to the author;
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With the completion of this thesis report, the hope that knowledge which we have gained during our studies can provide the benefits of life in the world and the hereafter. As a human who has never escaped fault, the author is very hopeful for the forgiveness, criticism, and suggestions from all parties for future improvement efforts.

Malang, 10 November 2021

Writer,

A handwritten signature in black ink, appearing to be 'Zainur Rosyidin', with a stylized flourish at the end.

Zainur Rosyidin

SIN 17210145

TRANSLITERATION GUIDANCE

A. General

Transliteration is the transfer of Arabic script into Indonesian (Latin) writing, not Arabic translation into Indonesian. Included in this category are Arabic names from Arabs, while Arabic names from nations other than Arabic are written as the spelling of the national language or as written in the reference book. Writing the title of the book in the footnote and bibliography, still use the provisions of this transliteration.

B. Consonant

Arabic	Latin	Arabic	Latin
ا	Not symbolized	ض	dl
ب	b	ط	th
ت	t	ظ	dh
ث	ts	ع	‘
ج	j	غ	gh
ح	h	ف	f
خ	kh	ق	q
د	d	ك	k
ذ	dz	ل	l
ر	r	م	m
ز	z	ن	n
س	s	ه	h
ش	sy	و	w
ص	sh	ي	y

Hamzah (ء) which is often symbolized by alif, if it is located at the beginning of a word, then in its transliteration follows the vowel, it is not symbolized, but if it is located in the middle or end of a word, it is symbolized by the comma above (‘), turning around with a comma (‘) to substitute for the “ع” symbol.

C. Vocal, Long-pronounce, and Diphthong

Every Arabic writing in the form of Latin fathah vowels is written with “a”, kasrah with “i”, dlommah with “u”, while long readings are each written in the following way;

Vocal (a) long-pronounce = â for example قال becomes qâla

Vocal (i) long-pronounce = î for example قيل becomes qîla

Vocal (u) long-pronounce = û for example دون becomes dûna

Specifically, for reading ya’ nisbat, it should not be replaced with “i” but it should still be written by “iy” in order to describe the ya’ nisbat at the end. Likewise, for the diphthong, wawu and ya’ after fathah is written with “aw” and “ay”. Look the following example:

Diphthong (aw) = و for example قول becomes qawlun

Diphthong (ay) = ي for example خير becomes khayrun

D. Ta’ marbûthah (ة)

Ta’ marbûthah is transliterated with “t” if it is in the middle of a sentence, but if *ta’ marbûthah* is at the end of a sentence, it is transliterated using “h” for example الرسالة للمدرسة becomes *al-risalat li al-mudarrisah*, or if it is in the

middle of sentence. Sentences consisting of the composition of *mudlaf* dan *mudlaf ilayh*, then transliterated using t which is connected with the next sentence, for example *في رحمة الله* becomes *fī rahmatillâh*.

E. Auxiliary Verb and Lafadh al-Jalâlah

Auxiliary verb “al” (ال) written with lowercase form, except if it located in the first position, and “al” in lafadh jalâlah which located in the middle of two (*idhafah*) it remove from writing. Look at the following examples:

1. Al-Imâm al-Bukhâriy said ...
2. Al-Bukhâriy in muqaddimah of his book said ...
3. *Masyâ Allâh kâna wa mâ lam yasya' lam yakun.*
4. *Billâh 'azza wa jalla.*

F. Name and Indonesianized Arabic Word

In principle, every word that comes from Arabic must be written using a transliteration system. If the word is an Indonesian Arabic name or an Indonesianized Arabic language, it does not need to be written using a transliteration system. Consider the following example:

“... Abdurrahman Wahid, the former Indonesian President, and Amin Rais, former Chair of the MPR at the same time, have made an agreement to eradicate nepotism, collusion, and corruption from the face of Indonesian earth, one way through intensifying prayers in various government offices, but ...”

Look at the writing of the name “Abdurrahman Wahid”, “Amin Rais” and the word “salat” written using Indonesian language procedures that are

tailored to the writing of his name. Even if these words come from Arabic, they are Indonesian names and are Indonesianized, therefore they are not written by “Abd al-Rahman Wahid”, “Amîn Raîs”, and not written with “shalat”.

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ABSTRACT

Zainur Rosyidin, 17210145. Analysis of Legal Certainty Principle on The Verdict Number 111/Pid.B/PN Kka Regarding Illegal Polygamy. Thesis. Islamic Family Law Department. Syari'ah Faculty. State Islamic University Maulana Malik Ibrahim of Malang. Supervisor: Risma Nur Arifah, S.HI, M.H.

Keywords: *Legal Certainty Principle, Illegal, Polygamy*

One of the practices of illegal polygamy can be found in the verdict number 111/Pid.B/PN Kka. In that verdict, the defendant is proven to have held a second marriage with a woman even though he is still married to his wife and never asked for her permission to do it. The panel of judges decided that the defendant was found not guilty because the second marriage was never registered according to the prevailing laws and regulations so that the marriage was deemed to have never occurred. This is contrary to the provisions of laws and regulations, various court decisions that try similar cases, and the principle of legal certainty.

This study focuses on two objectives, the first is to describe the panel of judge's legal considerations in verdict number 111/Pid.B/2020/PN Kka; and the second is to study the verdict number 111/Pid.B/2020/PN Kka through the legal certainty principle.

This research is a normative legal research that applies a case study approach. The data in this study are the applicable laws and regulations and court decisions as primary data, then books, journals, and other sources as secondary data sources.

This research results that: 1) The Panel of Judges concluded in their legal considerations that a marriage is considered valid by the state if it is carried out according to the laws of each religion and belief, and is registered. Marriages that are only carried out according to religion and belief, but are not registered according to the applicable laws and regulations are considered by the state as an illegal marriage, so that the marriage is considered to have never occurred; 2) The consideration of the Panel of Judges related to the first element of "*whoever*" in Article 279 of Criminal Code reflects legal certainty principle because Muh. Khadafi as defendant is a person proven to have committed the crime and can be punished for his actions; 3) The legal considerations of the Panel of Judges to the second element of "*having a marriage while knowing that the marriage or existing marriages are a legal barrier to it*" in Article 279 of Criminal Code and the meaning of the conditions for the validity of marriage does not reflecting legal certainty principle because it has deviated from the provisions of applicable laws and regulations, jurisprudence, and theories of legal certainty principle.

ABSTRAK

Zainur Rosyidin, 17210145. Analisis Asas Kepastian Hukum Pada Putusan Nomor 111/Pid.B/2020/PN Kka Tentang Poligami Ilegal. Skripsi. Program Studi Hukum Keluarga Islam. Fakultas Syari'ah. Universitas Islam Negeri Maulana Malik Ibrahim Malang. Pembimbing: Risma Nur Arifah, S.HI, M.H.

Kata Kunci: *Asas Kepastian Hukum, Poligami, Ilegal*

Salah satu praktik poligami ilegal dapat ditemukan pada putusan nomor 111/Pid.B/2020/PN Kka. Dalam putusan tersebut, diperoleh fakta dalam proses persidangan bahwa Muh. Khadafi Alias David bin Hakri Usman (Terdakwa) mengadakan perkawinan kedua dengan seorang wanita padahal masih terikat perkawinan dengan istrinya dan tidak pernah meminta izin kepada istrinya untuk melakukan perkawinan tersebut. Majelis Hakim memutuskan bahwa Terdakwa dinyatakan tidak bersalah karena perkawinan kedua tersebut tidak pernah dicatatkan menurut peraturan perundang-undangan yang berlaku sehingga perkawinan tersebut dianggap tidak pernah terjadi. Hal itu berlainan dari ketentuan peraturan perundang-undangan, bermacam putusan pengadilan yang mengadili perkara serupa, serta asas kepastian hukum.

Penelitian ini berfokus kepada dua tujuan, yang pertama yaitu untuk menjabarkan pertimbangan hukum hakim dalam putusan nomor 111/Pid.B/2020/PN Kka; dan yang kedua adalah untuk menganalisis putusan nomor 111/Pid.B/2020/PN Kka melalui tinjauan asas kepastian hukum.

Penelitian ini merupakan penelitian hukum normatif yang menerapkan pendekatan studi kasus. Data dalam penelitian ini yakni peraturan perundang-undangan yang berlaku dan putusan-putusan pengadilan sebagai data primer, kemudian buku-buku, jurnal-jurnal, dan sumber lainnya sebagai sumber data sekunder.

Penelitian ini menghasilkan bahwa: 1) Majelis Hakim menyimpulkan dalam pertimbangan hukumnya bahwa suatu perkawinan dianggap sah oleh negara apabila dilakukan menurut hukum masing-masing agama dan kepercayaannya, dan dicatatkan. Perkawinan yang hanya dilakukan menurut agama dan kepercayaan, namun tidak dicatatkan menurut peraturan perundang-undangan yang berlaku dianggap oleh negara sebagai perkawinan yang tidak sah, sehingga perkawinan tersebut dianggap tidak pernah terjadi; 2) Pertimbangan hukum Majelis Hakim tentang elemen "*barangsiapa*" pada Pasal 279 ayat (1) KUHP telah mencerminkan kepastian hukum karena terdakwa merupakan orang terbukti melakukan tindak pidana dan dapat dipidana atas tindakannya tersebut; 3) Pertimbangan hukum Majelis Hakim pada elemen "*mengadakan perkawinan padahal mengetahui bahwa perkawinan atau perkawinan-perkawinannya menjadi penghalang untuk itu*" pada Pasal 279 Pasal (1) KUHP serta pemaknaan terhadap syarat keabsahan perkawinan tidak mencerminkan asas kepastian hukum karena telah menyimpang dari peraturan perundang-undangan, yurisprudensi, serta teori-teori asas kepastian hukum.

ملخص البحث

زين الراشدين, ١٧٢١٠١٤٥, تحليل أسس تحقق الحكم في الحكم رقم 111/Pid.B/2020/PN Kka عن تعدد الزوجات غير القانوني. البحث الرسالة. قسم الأحوال الشخصية. كلية الشريعة. جامعة الإسلامية الحكومية مولان مالك إبراهيم مالنج. مشرفة: رضى نور عفيفة, S.HI, M.H.

الكلمات الرئيسية: أسس تحقق الحكم, تعدد الزوجات, غير القانوني
كانت إحدى الممارسات من تعدد الزوجات غير القانونية في الحكم رقم 111/Pid.B/2020/PN Kka. هناك حقائق أن محمد القذافي دافيد بن حكري عثمان (المدعى عليه) تزوج ثانية من امرأة. رغم أنه لا يزال متزوجاً من زوجته الأولى ولم يطلب من زوجته الإذن بالزواج الثاني. قررت هيئة القضاة أنه غير مخطئ لأن الزواج الثاني لم يتم تسجيله وفقاً لقوانين الدولة، فاعتبر أن الزواج الثاني لم يحدث. وهذا يختلف عن القوانين وأحكام المحكمة المختلفة في قضايا متشابهة، وأسس تحقق الحكم.

تركز هذه الدراسة على هدفين، الأول وصف الحثيات القانونية للقاضي في الحكم رقم 111/Pid.B/2020/PN Kka؛ والثاني تحليل الحكم رقم 111/Pid.B/2020/PN Kka من خلال مراجعة أسس تحقق الحكم.

هذا البحث هو بحث قانوني معياري يستخدم نهج دراسة الحالة. البيانات الواردة في هذه الدراسة هي القوانين واللوائح السارية في إندونيسيا وأحكام المحكمة، هذه هي بيانات أولية. ثم الكتب والمجلات ومصادر أخرى، وهذه هي مصادر بيانات ثانوية.

نتائج هذه الدراسة هي: (١) أن هيئة القضاة خلصت في الحثيات الحكم إلى أن الزواج الذي تعتبره الدولة صحيحاً هو زواج يتم وفقاً لقواعد كل دين ومعتقد ويتم تسجيله. الزواج الذي يتم فقط على أساس الدين والمعتقد ولكنه غير مسجل وفقاً لقوانين الدولة تعتبره الدولة زواجا باطلاً، لذلك يعتبر الزواج لم يحدث؛ (٢) تحتوي الحثيات الحكم لهيئة القضاة فيما يتعلق بعنصر "كل من" الوارد في المادة ٢٧٩ الفقرة (١) من قانون العقوبات على تحقق الحكم لأن المدعى عليه شخص ثبت أنه ارتكب جريمة ويمكن أن يعاقب عليه بجريمة؛ (٣) الحثيات الحكم لهيئة القضاة بشأن عنصر "عقد الزواج على الرغم من علمه أن حالته الاجتماعية تشكل عائقاً أمام الزواج" في المادة ٢٧٩ المادة (١)

من قانون العقوبات وتفسير شروط صحة الزواج أنه لا يحتوي على أسس تحقق الحكم، لأنه انحراف
عن القوانين والأنظمة وأحكام القضاء ونظريات أسس تحقق الحكم.

CHAPTER I

INTRODUCTION

A. Research Background

Referring to the 1945 Constitution of the Republic of Indonesia, the State of Indonesia is a state based on law.¹ As a state of law, thus all aspects in the field of statehood, society, including marriage, must be carried out with reference to the applicable law. Simorangkir stated that the state of law is a nation that applies the principle of legality where all state actions are carried out through, based on, and in accordance with the laws that apply to the country.² Statutory regulations as a written norm, in the context of the rule of law, becomes a basis for state administration which ranks first in the implementation and enforcement of laws in Indonesia.

As a state of law as intended, marriage in Indonesia is regulated in various regulations, such as Law Number 1 of 1974 concerning Marriage, Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning Marriage, Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, the Criminal Code, Circular Letter of Supreme Court (Surat Edaran Mahkamah Agung) Number 4 of 2016 concerning the Implementation of the Formulation

¹ Article 1 Paragraph (3) of 1945 Constitution (Undang-Undang Dasar Negara Republik Indonesia Tahun 1945).

² JCT Simorangkir, *Hukum dan Konstitusi Indonesia*, (Jakarta: Gunung Agung, 1983), 36.

of the Results of the Plenary Meeting of the Supreme Court Chamber of 2016 as a Guide to the Implementation of Duties for the Court, and others.

Ideally, a marriage must be carried out with due regard to the applicable regulations. One of the various principles in the marriage law referring to the opinion of M. Yahya Harahap is the awareness of the Indonesian people regarding religious law and beliefs and carried out in accordance with the marriage administration as regulated in the registration of marriages in Indonesia..³ This principle is in accordance with the provisions in Article 2 paragraph (1) of Law no. 1 of 1974 concerning Marriage, which states that marriage is legal, if it is carried out according to each religion and belief; and paragraph (2) states that every marriage is recorded according to the applicable laws and regulations.

Basically, marriage in Indonesia adheres to the principle of monogamy, as reflected in Article 3 of Law Number 1 of 1974 concerning Marriage which states that “*In Principle, a man may be married to one woman only. A woman shall be married to only one man.*”. However, the principle of monogamy is not absolute as regulated in the Civil Code which requires the principle of closed monogamy. The principle of open monogamy as required by the Marriage Law means that the state still gives permission for a husband to have more than one wife by complying with certain provisions.

³ Amir Nuruddin and Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia*, (Jakarta: Kencana, 2006), 51.

The regulation related to polygamous marriage, Article 3 paragraph (2) of the Marriage Law states that “*The court may permit to a husband to have more than one wife, if the parties concerned so wish.*” Furthermore, Article 4 paragraph (2) of the law describes the conditions that allow polygamy, including that the wife cannot carry out her obligations as a wife, the wife has a disability or an incurable disease, and the wife cannot give birth. In Article 5, it is stated regarding the conditions that must be met in submitting an application to the Court regarding the permission of polygamy, such as the consent of the wife/wives, the certainty that the husband is able to guarantee the necessities of life for his wives and their children, and guarantees of fair treatment to them.

Illegal polygamy is a practice that is contrary to the implementation of marriage as mandated by positive law. Criminal provisions related to the crime of illegal polygamy are contained in Article 45 paragraph of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, Article 279 of the Criminal Code, and letter a number (2) of the Circular Letter of the Supreme Court (SEMA) No. 4 Year 2016. It states that “*A marriage that carried out by a husband with another woman while the husband does not get the wife's permission to remarry, then Article 279 of the Criminal Code can be applied*”. Meanwhile, The Article 279 of the Criminal Code regulated:

- (1) *Threatened by a maximum imprisonment of five years:*
 1. *Whoever enters into a marriage knowing that the marriage or his existing marriages constitute a legal barrier to it;*
 2. *Whoever enters into a marriage knowing that the marriage or other parties' marriages are barrier to it.*

- (2) *if the person who commits an act based on paragraph (1) point 1 is hiding to the other party that the existing marriage is a legal barrier for that purpose, he shall be punished by a maximum imprisonment of seven years.*
- (3) *Revocation of rights based on Article 1 – 5 can be stated.*

However, the reality shows that there are many marriage practices in Indonesia which considered illegal, the term used is illegal, because those marriages are committed without following the positive law. In addition, illegal marriages are committed by ignoring two official institutions that have authority in the field of marriage in Indonesia, the first namely the Office of Religious Affairs (Kantor Urusan Agama) as an official institution for recording marriages, and the second, namely the Religious Court as the official institution that grants polygamy permission. Various illegal marriages as stated above, namely: unregistered marriage, illegal polygamy by doing another marriage with a woman without permission of his wife(s), underage marriage, marriage that is not in accordance with religious law, and other act of violations of positive marriage law in Indonesia. These kinds of practices are hard to be tracked by authorities because the marriage is not reported or without the knowledge from the authorities.⁴ Only cases that go to court can be counted. Meanwhile, we don't know the exact number of how many cases went unreported, or even unsolved.

In the directory of verdicts of the Supreme Court of the Republic of Indonesia, there are 67 cases of crimes of the origin of marriage in 2020 that

⁴ Muhammad Rachardi, "Akibat Hukum Perkawinan yang Tidak Dicatatkan Ketika Salah Satu Pihak Meninggal Dunia Menurut Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan dan Kompilasi Hukum Islam" *Premise Law Journal*, (2015): 3
<https://garuda.ristekbrin.go.id/documents/detail/1421974>

were decided by the District Court.⁵ Related to the cases of crimes of the origin of marriage, there were 3 cases decided by the Kolaka District Court in 2015, 2016, and 2020. Meanwhile, there were 10 requests in 2020 and 60 requests in 2019 for legalization of marriage (*itsbat nikah*) in Kolaka Religious Court.⁶ The application for legalization of marriage indirectly shows the practice of sirri marriage, although there are various other possibilities such as loss of marriage book, and others.

In Kolaka, Southeast Sulawesi, the practice of illegal marriage can be known in the verdict number 111/Pid.B/2020/PN Kka.⁷ In that verdict, several facts were obtained, such as: *First*, the defendant was married to a woman as evidenced by a copy of marriage book or excerpt from a marriage certificate; *Second*, the defendant then committed a second marriage with another woman even though he had not divorced his first wife; *Third*, the second marriage committed is an unregistered marriage and without a permission from his wife or from the court; *Fourth*, the defendant never asked permission from the first wife to have a second marriage; *Fifth*, the defendant was married by someone who does not have legal authority under the state law; *Sixth*, the defendant performed marriage based on lies that he is a widower.

⁵ Direktori Putusan Mahkamah Agung, accessed on 6 April 2021.
https://putusan3.mahkamahagung.go.id/search.html?q=&jenis_doc=putusan&cat=0964c9d934e32054cc598cc32dc8c29f&jd=&tp=&court=&t_put=2020&t_reg=&t_upl=&t_pr=

⁶ List of civil application cases in Kolaka Religious Court, Accessed on 6 April 2021.
http://sipp.pa-kolaka.go.id/list_perkara/search

⁷ Direktori Putusan Mahkamah Agung, accessed on 6 April 2021.
<https://putusan3.mahkamahagung.go.id/direktori/putusan/78c358145b31c532b133a010c580d077.html>

By that facts obtained, the prosecutor then demanded that the defendant be found guilty of violating Article 279 paragraph (1) of the Criminal Code because he was considered to have married knowing that the marriage or his existing marriages constitute a legal barrier to it. However, in its decision, the Judges at the Kolaka District Court decided that the defendant was not found guilty, because he was deemed not fulfilling the element of marriage crime as was accused on him. The Judges considered that although the second marriage of the defendant was done in religious law, it was not considered as a marriage that was legal or recognized by the state because it was never registered so that the marriage was deemed by the state to have never occurred.

The researcher urges to analyze this verdict because in this verdict, there are facts in the form of various marriage practices that are not in accordance with the positive law in Indonesia, namely unregistered marriage, doing marriage in front people who do not have the authority to marry, polygamy without wife's permission, et cetera as obtained in that verdict, but the defendant is considered non guilty.

In Article 3 paragraph (1) of Law Number 28 of 1999, it is stated that one of the general principles of state administration is the principle of legal certainty. In its explanation, the principle of legal certainty is a principle in a legal state that prioritizes the basis of legislation, propriety, and justice in every policy of the State Administrator. Therefore, questions arise in particular related to the principle of legal certainty in which the decision is not in line with other decisions examining similar cases and has the potential to cause legal

uncertainty, public doubts, and legal irregularities, especially regarding marriage law.

There are several other court verdicts that have been studied previously, such as verdict number 757/Pid.B/2011/PN Mks researched by Andi Agus Rakhmad Putra Jaya entitled: *“Tinjauan Yuridis Terhadap Tindak Pidana Menikah Lagi Tanpa Izin Dari Istri Sebelumnya Sebagaimana Yang Diatur Dalam KUHP”* which examines the implementation of the material criminal law on the crime of illegal polygamy without the previous wife's permission and to find out the judge's legal considerations in Verdict Number 757/Pid.B/2011/PN Mks. In the verdict, the defendant was found guilty of committing the crime of illegal polygamy which the previous marriage was an obstacle to remarrying, and sentenced to 7 months in prison. The defendant was sentenced as such because he was proven to have entered into a marriage without the permission of his wife/wives. In addition, the defendant admitted that he was still a single when he was about to marry his second wife, so that he could carry out the marriage as officially recorded at KUA Tallo.

Then another research by Rido Akbar entitled *“Pertanggungjawaban Pidana Pelaku Tindak Pidana Menyembunyikan Asal Usul Perkawinan”* which analyze Verdict number 728/Pid.B/2019/PN Pdg, Verdict Number 2924/Pid.B/2018/PN Mdn, and Verdict Number 1185/Pid.B/2017/PN Mdn. These three verdicts discuss the same problem, which is committing a marriage that the marriage or existing marriage is an obstacle to the current marriage and

results in a decision stating that the defendants are guilty of committing the crime.

Furthermore, there is another research entitled “*Penerapan Sanksi Pidana Terhadap Pelaku Tindak Pidana Asal-Usul Perkawinan Menurut Pasal 279 Ayat (1) Kitab Undang-Undang Hukum Pidana: Studi Kasus No. 830/Pid.B/2017/PN.Pdg*” by M. Yusuf, and Reza Okva Merwendi. The verdict discussed the case of an unregistered marriage carried out by the defendant with a woman even though the defendant was still married to another person and committing a second marriage without having permission from his previous wife. In the verdict the defendant was found guilty and violated the provisions of Article 279 of the Criminal Code and sentenced to imprisonment for 1 year and the sentence does not need to be served if the convict has not committed another crime during a probationary period of 6 months.

Differences in judges' decisions are not uncommon. Although in criminal law, there is a principle of *Due Process of Law*, which means that every decision by law enforcement must be based on the provisions of the legislation so that legal certainty can be guaranteed.⁸ The researcher then wants to analyze the verdict from the perspective of the principle of legal certainty because there are significant differences between what is regulated in positive law in Indonesia and jurisprudence, and what was decided by the Judges in Verdict Number 111/Pid.B/2020/PN Kka on various legal facts obtained in the trial

⁸ Ahmad Habibi Maftuhkan, Anjar Setiawan, and Muhammad Abdul Aziz, “Keadilan, Kemanfaatan, dan Kepastian Hukum dalam Putusan Batal Demi Hukum Sistem Peradilan Pidana Indonesia” *Verstek Journal*, (2014): 122. <https://jurnal.uns.ac.id/verstek/article/download/38857/25730>

process. Based on the background as described above, this research is entitled “Analysis of Legal Certainty Principle on The Verdict Number 111/Pid.B/2020/PN Kka Regarding Illegal Polygamy”.

B. Problems Formulation

1. How is the judge's legal consideration in the Verdict Number 111/Pid.B/2020/PN Kka?
2. How is the analysis of legal certainty principle on the Verdict Number 111/Pid.B/2020/PN Kka regarding illegal polygamy?

C. Research Purposes

1. To describe the judge's legal considerations in Verdict Number 111/Pid.B/2020/PN Kka;
2. To analyze the Verdict Number 111/Pid.B/2020/PN Kka regarding illegal polygamy through a review of the principle of legal certainty.

D. Research Benefits

This research is expected to bring positive benefits and contributions both theoretically and practically. The hope of the benefits of this research, are:

1. Theoretical

The results of this research are expected to contribute ideas and knowledge about the principle of legal certainty, judges' legal considerations, as well as a positive legal review in Indonesia related to illegal polygamy.

2. Practical

The results of this study are expected to be a reference for law enforcers in the future so that they can apply the law as fairly as possible through appropriate applications that reflect legal certainty. In addition, it is also hoped that it can increase public awareness to carry out marriages by complying with applicable regulations so that violations and various adverse effects resulting from illegal marriages can be minimized.

E. Operational Definition

To help understand this paper and avoid differences in understanding of the keywords used, the researcher would like to describe of the keyword used:

Illegal Polygamy : A marriage committed by a man to a woman to be his second wife of more wives while the man is still in the previous marriage, which carried out by violating of the positive law of a country.

F. Research Methodology

Research methodology is a way of doing something by using the mind carefully to achieve a goal by taking notes, formulating, and analyzing to compiling a report.⁹ The research methodology can also be understood as a method used in collecting research data and comparing with predetermined standard measures.¹⁰ The researcher uses several research instruments as:

⁹ Cholid Narbuko and Abu Achmadi, *Metodologi Penelitian*, (Jakarta: Bumi Aksara, 2003), 1.

¹⁰ Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: Universitas Indonesia Press, 2012), 5.

1. Research Type

The type of research in this thesis is normative legal research in which is a research whose data is in the form of theories, concepts, and ideas.¹¹ Normative legal research can also be understood as legal research which is mostly taken from library materials that contain up-to-date scientific knowledge, or new understanding of known facts or ideas, which in this case includes act, government regulations, books, journals, and scientific papers.¹² Normative legal research is also a research that is oriented to solving legal problems or just wants to find how and where a legal problem is regulated by law.¹³

2. Research Approach

Based from the approach of this method, this research uses a case approach, which is intended to examine the cases that have become court decisions, both district and religious courts, which have permanent legal force.¹⁴ From this approach, this research will be focused on studying legal considerations and also analyzing judge's decisions related to the chosen theme with the applicable or positive law as a consideration. This research will discuss about illegal polygamy which can be found on the Verdict

¹¹ Saad Ibrahim, *Metodologi Penelitian Hukum Islam*, (Malang: UIN Malang, 2002). 10.

¹² Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajawali Press, 2006), 118.

¹³ William H. Putman, *Legal Research, Analysis and Writing*, (Australia: Thomson Delmar Learning, 2004), 26.

¹⁴ Tim Penyusun Pedoman Penulisan Skripsi Fakultas Syariah UIN Maulana Malik Ibrahim Malang, *Pedoman Penulisan Skripsi*, (Malang, 2019) 19.

Number 111/Pid.B/2020/PN Kka by analyzing it through the study of legal certainty principle.

3. Types of Data

In normative legal research, the data source used is secondary data sources, which are obtained from information that has been written in document form. This term is commonly referred to as legal materials that can be divided into:

a. Primary Legal Materials

Primary legal material is a source that used as main source in this research. The researcher using these primary legal materials such as:

1. Act No. 1 of 1974 concerning Marriage;
2. Criminal Code;
3. Circular Letter of Supreme Court Number 4 of 2016 concerning the Implementation of the Formulation of the Results of the 2016 Supreme Court Plenary Meeting as a Guide to the Implementation of Duties for the Court;
4. Verdict Number 111/Pid.B/2020/PN Kka;
5. Constitutional Court Decision Number 46/PUU-VIII/2010; and some other verdicts related to the crime of the origin of marriage.

b. Secondary Legal Materials

Secondary legal materials are supporting materials to sustain the primary legal materials. For secondary legal materials, researcher uses books, previous theses, scientific journals, and scientific papers related to the issue researched, such as:

1. *“Teori Hukum: Suatu Pengantar dengan Pendekatan Tematik”* by Isharyanto;

2. *“Pengantar Hukum Indonesia”* by Abintoro Prakoso;
3. *“Pengantar Hukum Indonesia”* by Mokhammad Najih, and Soimin;
4. *“Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum”* by Mario Julyano and Aditya Yuli Sulistyawan;
5. *“Pengantar Hukum Pidana”*, by Suryanto;
6. *“Psikologi Keluarga Islam Berwawasan Gender”*, by Mufidah Ch.
7. *“Hukum Islam Dinamika Seputar Hukum Keluarga Islam”*, by Aulia Muthiah; and other materials that related to this research topic.

c. Tertiary Legal Materials

Tertiary legal materials are supporting research data that is used to support the primary and secondary legal materials above. In this research, tertiary legal materials used are dictionaries, and encyclopedia.

4. Data Collecting Method

The data collection method is a systematic procedure or way to obtain the required data. To get the valid data, the researcher collects data and information with the help of various literatures in the library or online such as books, journals, scientific papers, thesis, etc.

5. Data Processing Method

To process the overall data obtained, it is necessary to have data management and analysis procedures in accordance with the approach used.

The data processing methods used in this research are:¹⁵

¹⁵ Koentjaraningrat, *Metode-Metode Penelitian Masyarakat*, (Jakarta: PT Gramedia Pustaka Utama, 1997), 270.

a. Data Checking

This process is checking the records of data to find out whether the records are good enough and can be immediately prepared for the purposes of the next process. The data under study is checked for the completeness and clarity of the meaning contained in it, its relevance to the research conducted and other data groups, so that the researcher gets an overview of the problem being researched.

b. Classification

Classification is classifying the data that has been obtained to make it easier to read the data according to the required needs. This stage aims to compile and systematize the data obtained so as to facilitate discussion.

c. Verification

Verification is the stage taken by researcher to obtain data and information which are needed to answer research problems. This stage is carried out so that the validity of the data can be recognized by readers.

d. Data Analysis

Data analysis is the stage of processing raw data originating from data sources to be reproduced in statement that is easy to understand. In this stage, the data is in the form of explanations of words or writings which are then analyzed and deciphered again into good and correct sentences, so that they are easy to read and be understood.

e. Conclusion

Conclusion is the stage where the researcher takes several points to draw answers to the questions in the problem formulation in the form of simple sentences.

G. Previous Research

Before researcher conducted research on the analysis of court decisions regarding illegal polygamy, there were several related studies that had been conducted by several previous researchers, such as:

1. “Tinjauan Yuridis Terhadap Tindak Pidana Menikah Lagi Tanpa Izin Dari Istri Sebelumnya Sebagaimana Yang Diatur Dalam KUHP” by Andi Agus Rakhmad Putra Jaya from the Faculty of Law Universitas Hasanuddin in 2014. This research focuses on implementation of material criminal law of the crime of remarrying to another woman without the permission of the previous wife in the Criminal Code by the prosecutor and to find out legal considerations by the judge in imposing criminal offenses against the perpetrator in Verdict Number 757/Pid.B/2011/PN Mks. This research applies a qualitative research method, with a case study approach. This research uses Verdict Number 757/Pid.B/2011/PN Mks as primary data, and doing interview with judges in Makassar District Court. This research finds out that the material criminal law of the crime of remarrying to another woman without the permission of the previous wife in the Criminal Code by the prosecutor is well-implemented by applying Article 279 of Criminal Code for the crime as mentioned. And the second, is that the judge’s

decision which stated that the defendant was found guilty was correct, by taking consideration of various types of evidence as well as the personal conviction of the judge.¹⁶

2. “Pertanggungjawaban Pidana Pelaku Tindak Pidana Menyembunyikan Asal Usul Perkawinan” by Rido Akbar from the Faculty of Law, University of North Sumatra in 2020. This study focuses on knowing the study of the criminal act of the origin of marriage, the factors causing and overcoming it, as well as criminal sanctions against the perpetrators of the crime through an analysis of Verdict Number 728/Pid.B/2019/PN Pdg, Verdict Number 2924/Pid.B/2018/PN Mdn, and Verdict Number 1185/Pid.B/2017/PN Mdn. This study applies a normative legal research method, using a statutory approach, an analytical approach, and a case approach. In collecting data, this research applies a literature study on various data sources used. This study discusses that the three verdicts discuss a similar problem, namely holding a marriage where the marriage or existing marriage is an obstacle to the current marriage and produces a decision that each of the defendants are guilty. In Verdict Number 728/Pid.B/2019/ PN Pdg, the defendant married a woman for the second time by saying that he was a single, and concealing that he still had a wife so that he could hold a formal marriage at the East Padang Religious Affairs Office (KUA). The marriage was also not carried out with permission from the wife so that the judge decided the

¹⁶ Andi Agus Rakhmad Putra Jaya, *Tinjauan Yuridis Terhadap Tindak Pidana Menikah Lagi Tanpa Izin Dari Istri Sebelumnya Sebagaimana Yang Diatur Dalam KUHP (Studi Kasus Putusan Nomor: 757/Pid.B/2011/PN Mks)*, Undergraduate Thesis (Makassar: Universitas Hasanuddin, 2014)

defendant was guilty and violated the provisions of Article 279 paragraph (2) of the Criminal Code and was sentenced to 10 months in prison. In Verdict Number 2924/Pid.B/2018/PN Mdn, the defendant who is a single is charged by a violation to the Article 279 of the Criminal Code by committing a *sirri* marriage with another woman which according to the marriage law in Indonesia, is still a wife to another man because they are not officially divorced. Based on the various facts revealed, the judges stated that the defendant was guilty and violated the provisions of Article 279 of the Criminal Code and was sentenced to 6 months in prison. While the Verdict Number 1185/Pid.B/2017/PN Mdn, discusses unregistered marriage that carried out by the defendant with a woman that has not been divorced by her previous husband according to the state law. In the verdict, the defendant was found guilty of violating Article 284 of the Criminal Code and sentenced to 6 months in prison. This study also discusses that the legal regulation of criminal acts of hiding the origin of marriage is based on various factors, including internal factors, such as biological, psychological, age, and other factors. while external factors include economic factors, education, and lack of attention from the family. To overcome these crimes, penal measures in the form of criminal acts are applied to the perpetrators, as well as non-penal measures in the form of preventive measures.¹⁷

¹⁷ Rido Akbar, *Pertanggungjawaban Pidana Pelaku Tindak Pidana Menyembunyikan Asal-Usul Perkawinan (Studi dengan Putusan No. 728/Pid.B/2019/PN Pdg, Putusan No. 2924/Pid.B/2018/PN Mdn, dan Putusan No. 1185/Pid.B/2017/PN Mdn)*, Undergraduate Thesis, (Sumatera Utara: Universitas Sumatera Utara, 2020)

3. “Penerapan Sanksi Pidana Terhadap Pelaku Tindak Pidana Asal-Usul Perkawinan Menurut Pasal 279 Ayat (1) Kitab Undang-Undang Hukum Pidana: Studi Kasus No. 830/Pid.B/2017/PN.Pdg” by M. Yusuf and Reza Okva Marwendi published in the Journal of Socio-Humanities Science in 2019. This research focuses on how the judge’s legal considerations in sentencing the origin of marriage criminal act in verdict number 830/Pid.B/2017/PN Pdg, and how to review the justice aspect of the decision. This research applies empirical normative research methods, using a normative juridical approach. This research uses Verdict Number 830/Pid.B/2017/PN.Pdg, Criminal Code, Law no. 48 of 2009 concerning Judicial Powers, as well as Law No. 1 of 1974 concerning Marriage as primary data sources, as well as conducting studies through papers, articles, and other written works as secondary data. This study resulted that the enforcement of the criminal law on the origin of marriage as handed down by the judge was based on looking at various things that incriminate the defendant such as the defendant's actions that harmed the victim, various facts found in the trial, and various things that eased the burden on the defendant such as the defendant being polite and acknowledging. his actions, and the defendant has family responsibilities for his three children. While related to the aspect of justice, the judge’s decision is considered to have fulfilled the sense of justice, it’s just that the criminal sanctions given

are considered too light because they do not provide a deterrent effect for criminals.¹⁸

4. “Penyelesaian Poligami Ilegal Melalui Jalur Hukum Pidana Menurut Hukum Islam (Studi Kasus di Pengadilan Negeri Jantho” by Rauzatul Jannah, from the Sharia and Law Faculty, Universitas Islam Negeri Ar-Raniry Darussalam-Banda Aceh in 2019. This research focuses on studying the reasons why illegal polygamy cases are resolve through criminal law and how Islamic law resolves cases of illegal polygamy through criminal law that has been decided by the District Court of Jantho. This research applies field research methodology, and approached by qualitative approach and analyzed using normative-sociological research method. This research resulted that the cases of illegal polygamy were processed using criminal law in Jantho District Court as long as the articles that ruled about illegal polygamy remain in power or not changed by other law. Meanwhile, from the perspective of Islamic law, the illegal polygamy is still considered as legal marriage as long as it follows the religious law, it’s just the state sees it as legitimate if it fulfills state administration.¹⁹
5. “Tindak Pidana Dalam Perkawinan (Analisis Yuridis Terhadap Putusan Pengadilan Negeri Bangkinang Nomor: 341/Pid.B/2012/PN Bkn Menurut

¹⁸ M. Yusuf and Reza Okva Marwendi, “Penerapan Sanksi Pidana Terhadap Pelaku Tindak Pidana Asal-Usul Perkawinan Menurut Pasal 279 Ayat (1) Kitab Undang-Undang Hukum Pidana: Studi Kasus No. 830/Pid.B/2017/PN.Pdg”, *Jurnal Sains Sosio Humaniora*, no.2(2019). <https://online-journal.unja.ac.id/JSSH/article/download/12095/10704/32396>

¹⁹ Rauzatul Jannah, *Penyelesaian Poligami Ilegal Melalui Jalur Hukum Pidana Menurut Hukum Islam (Studi Kasus di Pengadilan Negeri Jantho*, Undergraduate Thesis, (Banda Aceh: Universitas Islam Negeri Ar-Raniry, 2019)

KUHP dan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan” by Paisal Armadon Harahap, from Sharia and Law Faculty, Universitas Islam Negeri Sunan Kalijaga Yogyakarta in 2017. This research focuses on analyzing verdict number 341/Pid.B/2012/PN Bkn through a study of judges’ legal consideration, the status of marriage legality, and criminal responsibility of perpetrators of illegal polygamy criminal act according to Criminal Code and Law no. 1 of 1974. This research applies a normative or library research methodology, and using normative-juridical approach. This research resulted that judges’ legal consideration which states that the defendant was proven to have carried out an illegal polygamous marriage but the act is not considered as a criminal act is wrong. This is reinforced by the decision at the cassation level which states that the panel of judges has not applied the law properly. A marriage is considered legal if it carried out by following religious law and that the marriage registration is seen as administrative necessity based on Article 2 Law No. 1 of 1974. In terms of criminal responsibility, the defendant should have been able to held accountable because he violated Law No.1 of 1974 and Article 279 of Criminal Code by holding a marriage with another woman while he is not legally divorced and is still bounded in a legal marriage with a woman.²⁰

The similarities between this research and the various studies mentioned above are that this research discusses the same theme, namely the

²⁰ Paisal Armadon Harahap, *Tindak Pidana Dalam Perkawinan, (Analisis Yuridis Terhadap Putusan Pengadilan Negeri Bangkinang Nomor: 341/Pid.B/2012/PN Bkn Menurut KUHP dan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan)*, Undergraduate Thesis, (Yogyakarta: Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2017)

analysis of cases of illegal polygamy in Indonesia in the perspective of positive law in Indonesia. While the difference between the researches above and this research is that this study examines verdicts related to illegal polygamy by referring to positive law in Indonesia and the principle of legal certainty. Similarities and differences between previous research and this research can be observed in the table below:

No	Title	Similarity	Difference	Research Originality
1.	Tinjauan Yuridis Terhadap Tindak Pidana Menikah Lagi Tanpa Izin Dari Istri Sebelumnya Sebagaimana Yang Diatur Dalam KUHP	Reviewing the law on illegal polygamy in the Criminal Law.	Focused on the implementation of the material criminal law on the crime of remarrying another woman without the previous wife's permission and to find out the judge's legal considerations in the Verdict Number 757/Pid.B/2011/PN Mks.	Focusing on the judge's legal considerations in Verdict Number 111/Pid.B/2020/PN Kka regarding illegal polygamy which is reviewed based on the principle of legal certainty.

2.	Pertanggungja waban Pidana Pelaku Tindak Pidana Menyembunyik an Asal Usul Perkawinan	Reviewing the law of illegal marriage, especially the crime of origin of marriage as regulated in the Criminal Code.	Focused on studying about crime of origin of marriage, the causal factors and their prevention, as well as criminal sanctions against the perpetrators of the crime through an analysis of Verdict Number 728/Pid.B/2019/PN Pdg, Verdict Number 2924/Pid.B/2018/PN Mdn, and Verdict Number 1185/Pid.B/2017/PN Mdn.	Focusing on the judge's legal considerations in Verdict Number 111/Pid.B/2020/ PN Kka regarding illegal polygamy which is reviewed based on the principle of legal certainty.
3	Penerapan Sanksi Pidana Terhadap Pelaku Tindak Pidana Asal- Usul Perkawinan Menurut Pasal 279 Ayat (1) Kitab Undang- Undang Hukum Pidana: Studi Kasus No. 830/Pid.B/2017 /PN Pdg	Reviewing the law on criminal acts of origin of marriage, especially illegal polygamy as regulated in the Criminal Code.	Reviewing the judge's legal considerations in imposing a sentence on the crime of marriage of origin in the verdict number 830/Pid.B/2017/PN Pdg, as well as how to review the justice aspect of the decision.	Focusing on the judge's legal considerations in Verdict Number 111/Pid.B/2020/ PN Kka regarding illegal polygamy which is reviewed based on the principle of legal certainty.

4	Penyelesaian Poligami Ilegal Melalui Jalur Hukum Pidana Menurut Hukum Islam (Studi Kasus di Pengadilan Negeri Jantho	Reviewing the law on criminal acts of illegal polygamy as regulated in the Criminal Code and Islamic Law	Focusing on studying the reasons why illegal polygamy cases are resolve through criminal law and how Islamic law resolves cases of illegal polygamy through criminal law that has been decided by the District Court of Jantho.	Focusing on the judge's legal considerations in Verdict Number 111/Pid.B/2020/PN Kka regarding illegal polygamy which is reviewed based on the principle of legal certainty
5	Tindak Pidana Dalam Perkawinan, (Analisis Yuridis Terhadap Putusan Pengadilan Negeri Bangkinang Nomor: 341/Pid.B/2012 /PN Bkn Menurut KUHP dan Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan)	Analyzing Verdict Number 341/Pid.B/2012/ PN Bkn According Criminal Code and Law No. 1 of 1974.	This research focuses on analyzing verdict number 341/Pid.B/2012/PN Bkn through a study of judges' legal consideration, the status of marriage legality, and criminal responsibility of perpetrators of illegal polygamy criminal act according to Criminal Code and Law no. 1 of 1974	Focusing on the judge's legal considerations in Verdict Number 111/Pid.B/2020/PN Kka regarding illegal polygamy which is reviewed based on the principle of legal certainty

H. Writing Systematics

So that this thesis can be well constructed and can be understood clearly by readers, this paper is arranged in a systematic writing consisting of

four chapters. These chapters are expected to make it easier for readers to follow and understand this research.

The first chapter is an introduction, which explains the background of the researcher in conducting this research, problems that arise based on this background and the objectives to be achieved in this study, the benefits that can be generated as a result of this research, research method used, previous research, and systematic discussion.

The next chapter is the second chapter. The second chapter contains an overview and related literature review of legal certainty principle and illegal polygamy ruled by the Islamic law and positive law in Indonesia.

The next chapter is the third chapter. This chapter discusses the judge's legal considerations and an analysis of it through a study of legal certainty principle in the Verdict Number 111/Pid.B/2020/PN Kka regarding illegal polygamy.

The last chapter is the fourth chapter. This chapter contains the conclusions of the analysis carried out, and the researcher's suggestions relating to the results of the study.

CHAPTER II

LITERATURE REVIEW

A. Definition of Polygamy

Etymologically, the word polygamy comes from Greek which consists of two words, namely *poli* or *polus* which means a lot, and *gamein* or *gamos* which means marriage. The combination of those words resulting term polygamy, which means “multiple marriages”.²¹ According to Kamus Besar Bahasa Indonesia (Indonesia Dictionary), polygamy is a marriage system that allows a person to have more than one wife or husband.²² Experts distinguish polygamy into two terms, polygyny and polyandry. Polygyny is a condition for a man who have more than one wife, while polyandry is a situation for a woman to have more than one husband.²³

In Indonesia, polyandry marriages are prohibited, because they are not in accordance with the laws of religions recognized in Indonesia. In addition, in everyday life, polygyny is better known and even equated with the term polygamy because polyandry is prohibited. So, it is very rare to find polyandry practices and only marriage of more than one wife is allowed. Therefore, this study uses the term polygamy in marriages carried out by a man and a woman as his second wife or more.

²¹ Bungaran Antonius Simanjuntak, *Harmonious Family, Upaya Membangun Keluarga Harmonis*, (Jakarta: Yayasan Putra Obor Indonesia, 2013), 166.

²² KBBI, accessed on 10 April 2021.
<https://kbbi.kemdikbud.go.id/entri/poligami>

²³ Mufidah Ch, *Psikologi Keluarga Islam Berwawasan Gender*, (Malang: UIN-Maliki Press, 2014), 199.

B. Polygamy in Islamic Law

Basically, marriage in Islamic law is monogamous. This can be understood from the word of Allah in the Qur'an Surah An-Nisaa' verse 3 which provides the opportunity to marry a maximum of 4 people but is followed by conditions that are actually quite heavy to do. Allah said:

وَأِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَّةَ
وَرُبْعَ ۖ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَٰلِكَ أَدْنَىٰ أَلَّا تَعُولُوا²⁴

Translation:

“And if you are afraid that you will not be able to do justice to the (rights) of an orphaned girl (if you marry her), then marry the (other) women that you like; two, three, or four. Then if you are afraid that you will not be able to do justice, then (marry) only one person, or the slaves you have. That which is closer to not persecuting.”²⁴

The verse is mostly understood as permissible for polygamy. Whereas, the verse implies the opposite meaning that if a person is not sure that he can be fair if he marries more than one wife, then he is ordered to marry only one wife. But if he really feels he can be fair, only then he is allowed to marry two, three, or four wives.²⁵

However, Ibrahim Hosen stated that justice or fairness as mentioned above, is not a condition of permissibility to practice polygamy. He stated that justice as a condition for polygamy is not legal requirement, but a religious condition. He gave an example of purification done before prayer, where prayer

²⁴ QS. An-Nisaa' ayat 3.

²⁵ Mufsir Husain Al-Jahrani, *Poligami Dari Berbagai Persepsi*, (Jakarta: Gema Insani, 2002), 98.

is invalid if someone was not purified first. Therefore, purification such as *wudhu* is a permissibility to do prayer so the prayer can be valid. Different from the purification as mentioned, justice can't be done before polygamy is implemented, so the justice is not a condition for permissibility to do polygamy, but an obligation after polygamy is implemented.²⁶

Furthermore, in the Surah An-Nisaa' verse 129 Allah said:

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

Translation:

*“And you will never be able to be equal (in feeling) between wives, even if you should strive [to do so]. So do not incline completely (toward one) and leave another hanging. And if you amend (your affairs) and fear Allah - then indeed, Allah is ever Forgiving and Merciful.”*²⁷

If it translated by neglecting the implied meaning, then the verse 129 makes polygamy in the verse 3 of surah An-Nisaa' is impossible to be implemented. Regarding this, many scholars have interpreted term “justice” as stated meant in the division of love and affection, which is impossible for man to share his love and affection to his wives equally. Justice that is obliged to share equally is in division of material matters, such as living, fulfilling biological needs, and others.²⁸

²⁶ Ibrahim Hosen, *Fiqh Perbandingan dalam Masalah Nikah, Thalaq, Rujuk, dan Hukum Kewarisan*, (Jakarta: Balai Penerbitan dan Perpustakaan Islam, 1971), 113.

²⁷ QS. An-Nisaa' verse 129.

²⁸ Abdul Rahman Ghazali, *Fiqh Munakahat*, (Jakarta: Kencana, 2003), 131-132.

Related to the reasons of emergency that allow polygamy, according to Abdurrahman after summarizing the opinion of the fuqaha, at least there are eight states, such as:

- a. Wife is suffering from a dangerous and difficult disease be healed;
- b. The wife is proven to be infertile and it is confirmed that she is medically unable gave birth;
- c. The wife has memory illness;
- d. Older wife so she can't fulfill her obligations as wife;
- e. The wife has a bad character;
- f. Wife run away from home'
- g. When there was a huge number of women because of war
- h. The needs of a husband with more than one wife, and if not cause harm in his life and work.²⁹

C. Polygamy in the Positive Law in Indonesia

Basically, marriage in Indonesia is monogamous. This is stated in Article 3 paragraph (1) of Law No. 1 of 1974 concerning Marriage which stated that *"In principle a man may be married to one woman only. A woman shall be married to only one man"* And in the Article 9 of this Law stated that *"A person who is still married to another person can't remarry, except in the cases mentioned in Article 3 paragraph (2) and Article 4 of this Law"*. But then the Article 3 paragraph (2) implies that the principle as stated in the Article 3

²⁹ Amir Nuruddin and Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia (Studi Kritis Perkembangan Hukum Islam dari Fikih, UU No.1/1974 sampai KHI)*, (Jakarta: Kencana: 2004), 159.

paragraph (1) is not a close monogamy principle which rejects or prohibits all polygamy practices, but is the principle of open monogamy. The paragraph (2) of this article stated that *“The Court, may permit a husband to have more than one wife if the parties concerned so wish.”* In addition, Article 4 of Law No. 1 of 1974 concerning Marriage stated:

- (1) In the case of a husband will have more than one wife, as mentioned in Article 3 paragraph (2) of this Law, then it is an obligatory to submit an application to the Court at the area where he lived.*
- (2) The Court referred the paragraph (1) of this Article only gives permission to husband who will have more than one wife if:*
 - a. The wife cannot carry out her obligations as a wife;*
 - b. The wife has a disability or incurable disease;*
 - c. The wife cannot bear offspring.*

To submit an application to The Court as referred to in Article 4 paragraph (1) Law No. 1 of 1974 concerning Marriage, then the requirements as stated in Article 5 of this law should be fulfilled. The requirements are:

- a. There is agreement from the wife / wives;*
- b. There is certainty that the husband is able to provide all the living needs of his wives, and their children;*
- c. There is a guarantee that the husband will treat his wife fairly and their children fairly.*

Articles 4 and 5 of the Marriage Law both state requirements, but differ in their types. As for the requirements in Article 4 are alternative requirements, and as the conditions in Article 5 are cumulative requirements. Alternative requirements are requirements that if only one point out of several points in it is met, then the whole requirement is considered fulfilled. While the cumulative

requirements are requirements that must meet all the points contained in it so that these requirements can be considered fulfilled.³⁰

So, if there is a polygamy that departs from just one reason from several reasons -for example the wife cannot bear offspring- as stated in Article 4 paragraph 2 of the Marriage Law, then the Religious Court can grant polygamy permission to him, while all the requirements in Article 5 of the Marriage Law must be fulfilled and cannot be ignored even if only one.

D. Illegal Polygamy as a Criminal Act

Criminal acts have various different terms in the mention of actions committed by every human being for legal actions that result in sanctions or punishments. There are terms that mention a crime as a "criminal event", some say "delict", and some say "criminal act". But these terms have the same meaning about actions that give rise to sanctions or punishments. Thus, it can be understood that what is meant by a criminal act is a human act that fulfills the formulation of a law that is against the law and is carried out by a person who can be held accountable.³¹

The act against the law as regulated in law is composed of two elements, namely the objective and the subjective element. The subjective element is about accountability and *schuld* (error) both in meaning of *dolus* (intentionally) and in the sense of *culpa* (negligence). It means that the violation

³⁰ Dian Latifiani, "Implementasi Syarat Berpoligami Menurut UU No 1 Tahun 1974 (Studi di Kota Semarang)", *Masalah-Masalah Hukum Journal*, no.4(2013), 549. <https://media.neliti.com/media/publications/152643-ID-implementasi-syarat-berpoligami-menurut.pdf>

³¹ Mokhammad Najih dan Soimin, *Pengantar Hukum Indonesia*, (Malang: Setara Press, 2016), 173.

must be accountable to the offender. Only a person who can be held accountable can be blamed, if that person violates the criminal norm. a person who is less than perfect or ill (insane) can't be held responsible for their actions and therefore can't be blamed and punished.³²

While the objective elements of the criminal act are:³³

1. Action

Human actions are divided into positive actions and negative actions that cause an act of violating the law. Examples of positive actions are theft, murder, and so on. While examples of negative actions include not reporting to the authorities even though they know there is a conspiracy of treason, making other people in a miserable condition even though they are obliged to meet their needs, and so on.

2. Result

The result as intended is to damage or endanger the interests of the law, which according to the norms of criminal law must be punished. The result is something that immediately occurs with the action, for example in theft, the loss of an item immediately occurs with the act of taking the object, but there are also those whose results are separate from the action and occur after a certain period of time, sometimes occurring in different places and times. from a

³² R. Soesilo, *Pokok-pokok Hukum Pidana Peraturan Umum dan Delik-delik Khusus*, (Sukabumi: Karya Nusantara, 1984), 28.

³³ Abintoro Prakoso, *Pengantar Hukum Indonesia*, (Surabaya: Laksbang Pressindo, 2018), 120-121.

criminal act committed, for example an act of persecution against someone that results in the loss of someone's life.

3. Circumstance

Circumstance is the condition usually exist at the time of committing the act. For example, in the Article of 362 of the Criminal Code, the condition is “that the stolen property belongs to someone else” is a condition that exists at the time the act “took” was committed. And the situation may also arise after the act has been committed, for example in the Article 345 of the Criminal Code, the condition is “if that person kills himself” is the result that occurs after the incitement or persuasion of suicide is committed.

4. The attribute of being against the law and the attribute of being punishable.

An act is considered against the law if it is against the law. In some criminal law rules, the unlawful element is specifically described, for example in Article 362 of the Criminal Code which states that "possessing the item is against the law". The nature of being punishable means that the act must be threatened with a crime, by a certain criminal norm. The nature of being penalized can disappear if the unlawful act is carried out in conditions that liberate him.³⁴

³⁴ Andi Sofyan, and Nur Azisa, *Hukum Pidana*, (Makassar, Pustaka Pena Press, 2016), 101.

Regarding marriage, illegal polygamy is a marriage committed by ignoring applicable laws and also two official institutions that have authority in the field of marriage in Indonesia. The first, namely the Office of Religious Affairs (Kantor Urusan Agama) as an official institution for recording marriages, and the second, namely the Religious Court as the official institution that grants polygamy permission. As regulated in Article 2 paragraph (2) of Law Number 1 of 1974 Concerning Marriage, it is stated that “*Every marriage is registered according to the applicable laws.*” Regarding the registration of marriage, it is regulated in the Minister of Religion Regulation Number 20 of 2019 Concerning Marriage Registration. In the Article 20 paragraph (1) of that regulation, stated that “*The marriage contract is recorded in the Marriage Certificate by the Head of KUA District or Overseas Marriage Registrar*”. Meanwhile, regarding the polygamy permission, it is regulated in Law Number 1 of 1974 Concerning Marriage, Government Regulation Number 9 of 1975, and Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law.

In that laws and regulation, the Article 9 of Law No. 1 of 1974 concerning Marriage stipulates that “*A person who is still married to another person can’t remarry, except in the cases mentioned in Article 3 paragraph (2) and Article 4 of this Law*”. The Article 3 paragraph (2) stated that stated that “*The court can give permission to a husband to have more than one wife if desired by the parties concerned*”, and the Article 4 paragraph (1) stated “*In the case of a husband will have more than one wife, as mentioned in Article 3*

paragraph (2) of this Law, then it is an obligatory to submit an application to the Court at the area where he lived". In the Article 5, stated that one of the requirements to apply for court permission for doing polygamy, is a permission from wife or wives. Meanwhile, procedures related to the implementation of polygamy licensing by the Religion Court are regulated in Chapter VIII, Article 40 to 44 Government Regulation No. 9 of 1975. So, if a polygamous marriage is committed without the consent of Religious Court in the form of a permission to do polygamous marriage, it can be known that it is an illegal polygamy.

Thus, if a marriage is carried out in violation of the articles above, it can be categorized as a marriage that is not in accordance with positive law, or an illegal marriage. Criminal arrangements on marriage are regulated, one of which is in Article 279 of Criminal Code, that states:

- (1) Threatened by a maximum imprisonment of five years:*
 - 1. Whoever enters into a marriage knowing that the marriage or his existing marriages constitute a legal barrier to it;*
 - 2. Whoever enters into a marriage knowing that the marriage or other parties' marriages are barrier to it.*
- (2) If the person who commits an act based on paragraph (1) point 1 is hiding to the other party that the existing marriage is a legal barrier for that purpose, he shall be punished by a maximum imprisonment of seven years.*
- (3) Revocation of rights based on Article 1 – 5 can be stated.*

Referring to the division of law based on its nature, there are two characteristics in law, the first is imperative law, and the second is facultative law. Imperative or coercive is the law which under any circumstances must be applied because it is absolute coercion. While facultative law is the law that can be set aside if the parties concerned have made their own regulations in an

agreement.³⁵ The mention of the word “*whoever*” in Article 279 of Criminal Code indicates that the article is imperative which binds everyone and is not limited to certain legal subjects.

Indeed, it is not clearly stated about the *sirri* polygamy, polygamy without court permission, or polygamy without wife permission in those articles, but when referring to letter a number (2) of Supreme Court Circular Letter Number 4 of 2016 Regarding the Implementation of the Formulation of the Results of the 2016 Supreme Court Plenary Meeting as a Guide to the Implementation of Duties for the Court, stated that “*Whereas a marriage which is entered into by a husband with another woman while the husband does not have the wife’s permission to remarry, Article 279 of the Criminal Code can be applied;*”. From that regulation, it is clear that illegal polygamy especially polygamy without permission from wife or wives is in range of the regulation and that action is punishable by Article 279 of Criminal Code.

Based on the explanation of criminal acts and arrangements for illegal polygamy above, then the elements of criminal acts regulated in Article 279 must be elaborated. The elements are:³⁶

1. Subjective Element

a. Whoever

The element “*whoever*” is related to one’s existence as a legal subject.

This is related to a person’s ability to be held accountable before the

³⁵ Abintoro Prakoso, *Pengantar Hukum Indonesia*, 31-32.

³⁶ Andi Agus Rakhmad Putra Jaya, *Tinjauan Yuridis Terhadap Tindak Pidana Menikah Lagi Tanpa Izin Dari Istri Sebelumnya Sebagaimana Yang Diatur Dalam KUHP*, 27.

law. So that to fulfill the “*whoever*” element, a person must meet legal skills both in criminal law and in civil law.

2. Objective Elements

a. Committing a marriage

The element of “committing a marriage” means that the person or the subject of this activity acting an activity known as a marriage by going through a method or procedure that is regulated in both legal provisions and community habits.

b. Knowing that the marriage or his existing marriages constitute a legal barrier to a new marriage

This element means that the subject who enters into a marriage is aware that he is still bound by his previous marriage with another woman. According to the principle of legal fiction, when a statutory regulation has been promulgated, at that time everyone is considered to know and the provision is binding so that someone's ignorance of the law cannot absolve or forgive him from lawsuits.³⁷ In this case, the marriage is carried out by violating the marriage law in Indonesia

E. Legal Certainty Principle

In the formation of the rule of law, the main principle is built in order to create a clarity on the rule of law or known as principle of legal certainty. The idea related to legal certainty was originally introduced by Gustav Radbruch in his book entitled “*Einführung in die Rechtswissenschaften*”. He

³⁷ Abintoro Prakoso, *Pengantar Hukum Indonesia*, 122.

wrote that in law there are 3 basic values, namely: Justice, Usefulness, and Legal Certainty.³⁸ To these values, Radbruch teaches that a standard priority principle must be applied where the first priority is always “justice”, then “usefulness”, and finally “legal certainty”. But over time, due to the increasing of complexity of human life in the modern life, standardized priority principle as told by Radbruch is sometimes contradicts with legal purposes in certain cases. So that the application of the standard priority principle then changed to the principle of casuistic priority.³⁹ Meanwhile, Friedrich Von Hayek, stated that legal certainty is one of the main attributes of the supremacy of law aside of the other two attributes, which are generally applicable, dan equality.⁴⁰

Certainty is a definite condition, provision or determination. The law must contain certainty and justice. This certainty serves as a code of conduct, and is fair because the code of conduct must support an order that is considered reasonable. Only because it is fair and enforced with certainty, the law can carry out its function. Legal certainty is something that is in the normative studies, not sociology.⁴¹

Hans Kelsen stated that law is a system of norms. Norms are statements that emphasize aspects of "should" or *das sollen*, by including various rules about what must be done. The norms which are then set forth in

³⁸ Satjipto Raharjo, *Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 2012), 45.

³⁹ Lukman Santoso and Yahyanto, *Pengantar Ilmu Hukum*, (Yogyakarta: Trussmedia Grafika, 2014), 107

⁴⁰ Isharyanto, *Teori Hukum: Suatu Pengantar dengan Pendekatan Tematik*, (Yogyakarta: Penerbit WR, 2016), 101.

⁴¹ Dominikus Rato, *Filsafat Hukum Mencari: Memahami dan Memahami Hukum*, (Yogyakarta: Laksbang Pressindo, Yogyakarta, 2010), 59.

the form of a set of rules such as laws, then become a reference for the community to do something or not to do something. The existence of rules and the implementation of these rules then creates legal certainty.⁴²

Normative legal certainty is when a regulation is made and promulgated with certainty because it regulates clearly and logically. Clearly as stated earlier is that it does not cause doubt or multiple interpretations, and can be accepted by common sense. Clearly can also means that these regulations do not cause a conflict of norms. Legal certainty refers to the implementation of a clear, consistent, permanent, and consequent law which cannot be influenced by various subjective conditions.⁴³

According to Utrecht, legal certainty contains two meanings, among others, namely: First, the existence of general rules that make individuals know what actions may or may not be carried out; and Second, in the form of legal security for individuals and from government arbitrariness because with the existence of general rules, individuals can know what the State may charge or do against them.⁴⁴

From those views above, it can be understood that without legal certainty, there will be a bias and uncertainty which will eventually lead to the emergence of irregularities and injustices in law enforcement. In other words, there is a connection between legal certainty and justice. If justice is the purpose

⁴² Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, (Jakarta: Kencana, 2008), 158.

⁴³ C.S.T. Kansil, Engelen R, Palandeng, and Godlieb N Mamahit, *Kamus Istilah Hukum*, (Jakarta: Jala Permata Aksara, 2009), 385.

⁴⁴ Rommy Haryono Djojarahardjo, "Mewujudkan Aspek Keadilan Dalam Putusan Hakim di Peradilan Perdata", *Jurnal Media Hukum dan Peradilan* (2019), 94.

<http://repository.ubaya.ac.id/35512/>

of morals, then legal certainty is the purpose of positive law. in where there is no legal certainty, there is no justice. When justice is relative, then legal certainty becomes absolute.⁴⁵

In criminal law, there is a principle of *Due Process of Law*, which means that every decision by law enforcement must be based on the provisions of the regulation so that legal certainty can be guaranteed.⁴⁶ In deciding a case, judges are bound by Law No. 48 of 2009 concerning Judicial Power which in Article 53 states that:

- (1) In examining and deciding cases, judges responsible for the stipulations and decision he made.*
- (2) The stipulation and decision as referred to in paragraph (1) must contain the judge's legal considerations based on the right and correct reasons and correct legal basis.*

Therefore, it is obligatory for judges to seek the correct legal basis and proper legal considerations in order to produce a decision that is required by law. Proper legal considerations and correct legal basis will result in a decision that meets the principles of legal certainty and justice.

To get the right understanding and legal considerations, an appropriate legal interpretation is needed. Legal interpretation is a method of law discovery that provides a clear explanation of the text of the law so that the scope of the rules can be determined to the certain events. Interpretation by the judge is a necessary explanation leading to an implementation that is acceptable to the community regarding rule of law against certain events. The final purpose of

⁴⁵ Lukman Santoso and Yahyanto, *Pengantar Ilmu Hukum*, 64.

⁴⁶ Ahmad Habibi Maftuhkan, "Keadilan...", 122.

the explanation and interpretation of these rules is to realize or enforce the positive law.⁴⁷

In the method of legal interpretation, there are various kinds of methods, and one of those is systematic interpretation. Systematic or logical interpretation is an interpretation which connects a rule to another rule. Referring to Utrecht on his opinion regarding methods of legal interpretation, systematic interpretation is interpretation according to the existing system in the formulation of the law itself. This interpretation can also occur if one legal text and another legal text regulate the same provisions, so that they can be linked and compared with one another.⁴⁸

In the systematic interpretation, the law is seen by the judge as one unity, as a regulatory system. A rule is not viewed as regulations that stand alone, but as part of a single system. So, if the formulation or interpretation of a regulation is based on position of the rules within the whole regulatory system, then the judge carries out a systematic interpretation.⁴⁹

⁴⁷ Abintoro Prakoso, *Penemuan Hukum: Sistem, Metode, Aliran, dan Prosedur dalam Menemukan Hukum*, (Yogtakarta: LaksBang Pressindo, 2016), 99

⁴⁸ Afif Khalid, "Penafsiran Hukum Oleh Hakim Dalam Sistem Peradilan di Indonesia" *Al 'Adl Journal*, (2014): 17. <https://ojs.uniska-bjm.ac.id/index.php/aldli/article/download/196/189>

⁴⁹ Abintoro Prakoso, *Penemuan Hukum: Sistem, Metode, Aliran, dan Prosedur dalam Menemukan Hukum*, 121.

CHAPTER III

ANALYSIS OF LEGAL CERTAINTY PRINCIPLE ON VERDICT NUMBER 111/Pid.B/2020/PN Kka REGARDING ILLEGAL POLYGAMY

A. Case Overview of Verdict Number 111/Pid.B/2020/PN Kka

Verdict Number 111/Pid.B/2020/PN Kka is a verdict of the Kolaka District Court that adjudicates criminal cases with the usual examination procedure which examines Muh. Khadafi Alias David bin Hakri Usman (Defendant) who was brought to trial by the Public Prosecutor for committing a criminal act of holding a marriage even though he knew that his marriage or existing marriages were a legal barrier to it, as regulated and threatened with crime in Article 279 Paragraph (1) of Criminal Code. During the trial process, several facts of the trial were obtained from various evidences and statements of witnesses, including:

1. That it is true that Muh. Khadafi (Defendant) and Fitria Ibnu Hajar (witness) are husband and wife who have married in an Islamic marriage in Kendari on April 28, 2007 and have been registered in the Marriage Deed No. 150/01/V/2017 in the Religious Affairs Office of Baruga District, Kendari City;
2. That it is true that from the marriage of the Muh. Khadafi and Fitria Ibnu Hajar, the Defendant and the witness Fitria Ibn Hajar have been blessed with 4 (four) children;

3. That it is true that around January 2020, Muh. Khadafi and Fitria Ibnu Hajar separated their residences because they were not getting along;
4. That it is true that before Muh. Khadafi and Fitria Ibn Hajar separated their residence, Muh. Khadafi had known Feby Febiola (witness);
5. That the Defendant came to Kamaruddin (witness) and asked to be married in a religious way, and at that time Muh. Khadafi admitted to being a widower, while Kamaruddin did not know that Muh. Khadafi was still married to his first wife;
6. That on April 7, 2020, Kamaruddin married Muh. Khadafi to Feby Febiola in an Islamic marriage at the house of Kamaruddin in the Mongolo Village, Latambaga District, Kolaka Regency;
7. That the marriage was witnessed by two male friends of Muh. Khadafi while the guardian for Feby Febiola's was Feby Febiola's father;
8. That it is true that Muh. Khadafi married Feby Febiola without the permission of the Fitria Ibn Hajar as Muh. Khadafi's legal wife.

Against these various facts, the Defendant did not object. The Defendant also requested to be given leniency because the Defendant had been sentenced in another case and the Defendant regretted his action.

In his charge, the Public Prosecutor demanded that the Defendant be declared legally and convincingly guilty of committing a criminal act of holding a marriage even though he knew that his marriage or existing marriages were a legal barrier to that, as regulated and threatened with punishment in Article 279 Paragraph (1) number 1 of the Criminal Code. In addition, the Public Prosecutor

also demands that the Defendant be sentenced to imprisonment for 1 (one) year and 6 (six) months, and that the court fee is Rp. 5000,- (five thousand rupiahs) shall be charged to the Defendant.

The legal considerations from the Panel of Judges on the facts obtained during the trial process are that a marriage is considered valid by the state if it is carried out according to the laws of each religion and belief, and registered. Marriage which is only carried out according to religion and belief, without being registered in the legal authority is legally valid because it does not meet the requirements stated in Article 2 of Law Number 1 of 1974 concerning Marriage and the evidence of registered marriage is the existence of a Marriage Certificate that has been signed. Thus, even though the marriage between the Defendant and Feby Febiola had occurred religiously, based on the facts at the trial, it turned out that the marriage was never registered, so according to the Panel of Judges the marriage was not a marriage that was considered legal or recognized by the state, so that the marriage was deemed by the state to have never happened.

Therefore, the Panel of Judges decided among other things:

1. Stated that the defendant Muh. Khadafi Alias David Bin Hakri Usman mentioned above, was not legally and convincingly proven guilty of committing a crime as charged in the single indictment of the Public Prosecutor;
2. Freeing the Defendant from the prosecution's charge;

3. Restoring the rights of the Defendant in his ability, position, prestige, and dignity;
4. Charge court fees to the state.

B. Judge's Legal Consideration in Verdict Number 111/Pid.B/2020/PN Kka

Against the various legal facts above, the Panel of Judges is considering whether the Defendant can be declared to have committed a criminal act as he was charged with. The legal considerations of the Panel of Judges are:

1. That the defendant has been charged by the Public Prosecutor on a single charge as regulated in Article 279 Paragraph (1) number 1 of the Criminal Code whose elements are as follows:
 - (1) Whoever;
 - (2) Entering a marriage knowing that the marriage or existing marriages are a legal barrier to it

Regarding of those elements, the Panel of Judges considers as follows:

- (1) The element of whoever
 - a. Whereas what is meant by "*whoever*" is referring to a legal subject who is accused of committing a criminal act and can be held accountable for his actions. Considering, that in this case the defendant was brought before the trial whose identity was the same as the identity of the defendant in the Public Prosecutor's Indictment, namely Muh. Khadafi Alias David Bin Hakri Usman so there is no error in persona in this case;

- b. That the Defendant is brought before the trial and he is able to answer every question and there is no abnormality in himself, thus the Defendant is seen as a person who is physically and mentally healthy and aware of the actions he has committed, so that he can be held accountable for all his actions;
 - c. Based on this description, the Panel of Judges considered that this first element had been fulfilled.
- (2) The element of entering a marriage knowing that the marriage or existing marriages are a legal barrier to it.
- a. Before the Panel of Judges considers the second element, it will first be described regarding the marriage itself;
 - b. Since the enactment of Law Number 1 of 1974 concerning Marriage on January 2, 1974, it is as emphasized in Article 66, that for marriage and everything related to marriage, because of the enactment of this law, the provisions stipulated in the Civil Code (*Burgelijk Wetboek*), the Christian Indonesian Marriage Ordinance, the Mixed Marriage Regulations, and other regulations governing marriage to the extent that it has been regulated in this Law, are declared inactive;
 - c. That because the provisions regarding marriage and everything related to marriage that apply are Law Number 1 of 1974 concerning Marriage, according to the Panel of Judges the provisions on marriage referred to in the Criminal Code

must also refer to Law Number 1 of 1974 concerning Marriage;

- d. As stipulated in Article 2 of Law Number 1 of 1974 concerning Marriage, it is stated that marriage is legal if it is carried out according to the laws of each religion and belief. In addition, marriages must also be registered according to the applicable laws and regulations, and as stipulated in Article 2 paragraph (1) of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, it is stated that the registration of marriages carried out according to the Islamic religion are registered by the Registrar Officer as referred in Law Number 32 of 1954 concerning Registration of Marriage, Divorce, and Reconciliation;
- e. Whereas in Article 11 of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, it is also stated in essence that after the marriage takes place, the bride and groom, both witnesses, and Registrar Officer sign the marriage certificate, and by signing the marriage certificate, the marriage has been officially registered;
- f. Based on the description above, the Panel of Judges concluded that a marriage is considered valid by the state if it is carried

out according to the laws of each religion and belief, and is registered. Marriage which is only carried out according to religion and belief, without being registered with the competent authority is not legally valid because it does not meet the requirements specified in Article 2 of Law Number 1 of 1974 concerning Marriage and the evidence that a marriage has been registered is the existence of a Marriage Certificate that has been signed;

- g. From this conclusion, according to the Panel of Judges, that the marriage referred to in this second element to be considered valid and recognized by the state, the marriage must also be carried out according to the law of each religion and belief, and registered;
- h. That although the marriage between the Defendant and Feby Febiola took place religiously, based on the facts at the trial, it turned out that the marriage was never registered, so that according to the Panel of Judges the marriage was not a marriage that was considered legal or recognized by the state, so that the marriage was deemed by the state to have never happened;
- i. Because the state considers the marriage of the Defendant and Feby Febiola to have never happened, the Panel of Judges is of the opinion that this second element is not fulfilled.

2. Because one of the elements of Article 279 Paragraph (1) number 1 of the Criminal Code is not fulfilled, the Defendant must be declared not legally and convincingly proven to have committed a criminal act as charged in a single indictment so that the Defendant must be acquitted of the indictment;
3. Because the Defendant is acquitted of the indictment, the Defendant's rights must be restored in his ability, position, dignity and worth;
4. Because the Defendant is acquitted, the cost of the case is charged to the state;
5. Taking into account Article 191 Paragraph (1) of Law Number 8 of 1981 concerning the Criminal Procedure Code and other relevant laws and regulations.

C. Analysis of Legal Certainty Principle on Verdict Number 111/Pid.B/2020/PN Kka

The first element, namely "*whoever*" related to the subjective element of legal action. The subjective element related to criminal acts discusses responsibility and guilt, both errors in the sense of intentional (*dolus*) and errors in the sense of negligence (*culpa*). It means that the violation must be held accountable to the perpetrator who is considered capable of being responsible for his actions.⁵⁰ Simons stated that the ability to be responsible can be interpreted as a psychological state in such a way that justifies the application

⁵⁰ R. Soesilo, *Pokok-Pokok Hukum Pidana Peraturan Umum dan Delik-delik Khusus*, 28.

of sentencing efforts. Furthermore, he stated that a person is considered capable of being responsible if he has a healthy mental condition, namely:⁵¹

1. He is able to know or realize that his actions are against the law;
2. He is able to determine his will according to his consciousness.

Meanwhile, Van Hamel stated that the ability to be responsible is a psychological state and maturity (intelligence) that leads to three abilities, among others:⁵²

1. The ability to understand the value of the consequences of one's own actions;
2. The ability to realize that the act is not allowed;
3. The ability to determine his will over his actions.

In addition to the ability to be responsible, the subjective aspect is also related to the element of error. The aspect of the error is an act that someone did wrongly, so that the perpetrator's mistake resulted in a criminal incident. The element of error arises from the intention or will of the perpetrator, it is also known that the act is prohibited by law and is threatened with punishment.⁵³

In connection with the subjective elements above, there were facts obtained during the trial process that the Defendant was a subject who had indeed committed a criminal act as he was charged with, namely committing the act of marriage without obtaining permission from his wife. Regarding the ability to be responsible, the Panel of Judges stated that the Defendant was

⁵¹ Suyanto, *Pengantar Hukum Pidana*, (Yogyakarta: Deepublish, 2018), 78.

⁵² Suyanto, *Pengantar Hukum Pidana*, 78.

⁵³ Mokhamad Najih dan Soimin, *Pengantar Hukum Indonesia*, 173-174.

someone who was healthy and physically aware of the actions he had committed so that he could be held accountable for all his actions. This is based on the fact that the Defendant is able to answer every question and there is no abnormality in him. Thus, the consideration of the Panel of Judges related to the element of "*whoever*" is appropriate and reflects legal certainty because the Defendant is a person who committed the crime and can be punished for his actions.

The second element in Article 279 of the Criminal Code is the element "*entering a marriage knowing that the marriage or existing marriages are a legal barrier to it*". The Panel of Judges considered that this element was not fulfilled, because the Defendant's marriage was invalid which the state considered to have never happened. The Panel of Judges gave their considerations by referring to Article 2 of Law Number 1 of 1974 concerning Marriage. In addition to this article, the Panel of Judges considered that marriages must be registered according to the laws and regulations as stated in Article 2 paragraph (1) of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, which implementation is regulated in Article 11 of the same Government Regulation. The Panel of Judges concluded based on these articles, that a marriage is considered valid if it fulfills two conditions, namely according to the law of each religion and belief; and recorded.

This contradicts the facts obtained during the trial process that the Defendant was legally married in the presence of Kamaruddin (witness). The second marriage did by the Defendant was committed by ignoring applicable

laws and also two official institutions that have authority in the field of marriage in Indonesia. The first, namely the Office of Religious Affairs (Kantor Urusan Agama) as an official institution for recording marriages, and the second, namely the Religious Court as the official institution that grants polygamy permission. There are also facts of legal violations against the provisions of Article 2 paragraph (2), Article 4, and Article 9 of Law Number 1 of 1974 concerning Marriage; Article 40 of Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage; and fulfill the provisions in Paragraph a number (2) Supreme Court Circular (Surat Edaran Mahkamah Agung) Number 4 of 2016 regarding the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber of 2016 as a Guide to the Implementation of Duties for the Court; and Article 279 of the Criminal Code.

Regarding the validity of marriage, it is regulated in Article 2 of Law Number 1 of 1974. The article stated:

- (1) Marriage is legal, if it is carried out according to the law of each religion and belief;*
- (2) Each marriage is recorded according to the applicable laws and regulations.*

In connection with this article, there is a Constitutional Court Decision Number 46/PUU-VIII/2010 concerning the judicial review of Article 2 and Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage which the Judge considered that the main issue in the norm tested is about the legal

meaning of marriage registration in Article 2 of Law Number 1 of 1974. In relation to this problem, the Panel of Judges referred to the General Explanation of Law Number 1 of 1974 number 4 letter (b) which stated that:

“That a marriage is valid if it is carried out according to the laws of each religion and belief; and in addition, every marriage must be recorded according to the applicable laws and regulations. The recording of each marriage is the same as recording important events in a person's life such as births, deaths which are stated in certificates, an official certificate which is also included in the register of records.”

Referring to that explanation, the Panel of Constitutional Judges stated that marriage registration is not a factor that determines the validity of marriages, and that registration is an administrative obligation that is required by law.⁵⁴

Conducting judicial review of laws is one of the powers of the Constitutional Court as regulated in Article 10 paragraph (1) of Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court which states:

- (1) The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final for:*
- a. Examining the law against the 1945 Constitution of the Republic of Indonesia;*
 - b. To decide on disputes over the authority of state institutions whose authorities are granted by the 1945 Constitution of the Republic of Indonesia;*
 - c. Decide on the dissolution of political parties; and*
 - d. Deciding on disputes about the general election results.*

Regarding the explanation of the word "*final*" in the article, in the Elucidation of Article 10 paragraph (1) of Law Number 8 of 2011 it is explained

⁵⁴ Dio Permana Putra, "Makna Pasal 2 Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Terkait Syarat Sah Perkawinan Ditinjau dari Perspektif Sejarah dan Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010", *Jurnal Hukum*, (2015), 13-14.

<http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/1102/1097>

that “*The decision of the Constitutional Court is final, that the decision of the Constitutional Court immediately has permanent legal force from the moment it is pronounced and there are no legal remedies that can be taken. The final nature of the decision of the Constitutional Court in this Law includes the final and binding legal force.*” There are three powers in the Constitutional Court Decision, namely:⁵⁵

1. Binding Power

The binding power of the decisions of the Constitutional Court is different from decisions in ordinary courts which only cover the litigants. The decision of the Constitutional Court is valid and binding for all parties, both litigants, namely the applicant, the government, legislative institutions, and related parties who are allowed to enter the case process, as well as all people, state institutions, and legal entities within the territory of the Republic of Indonesia. The decision of the Constitutional Court is *erga omnes*, which is aimed at everyone.

2. Proving Power

Article 60 of the Law on the Constitutional Court stipulates that the content of paragraphs, articles and/or parts of laws that have been tested cannot be requested for re-examination. Thus, the existence of a Constitutional Court decision that has tested a law is an

⁵⁵ Rian Van Frits Kapitan, “Kekuatan Mengikat Putusan Constitutional Review Mahkamah Konstitusi Terhadap Mahkamah Agung”, *Jurnal Masalah-Masalah Hukum*, no. 4(2015), 515.
<https://media.neliti.com/media/publications/148641-ID-kekuatan-mengikat-putusan-constitutional.pdf>

evidence that can be used and that a definite force has been obtained (*gezag van gevisde*).

3. Executorial Power

The decision of the Constitutional Court has executorial power, this means that the Constitutional Court acts as a legislator in which the resulting decision applies as law. The decision of the Constitutional Court has been deemed realized by the announcement of the decision in the State Gazette as regulated in the Law on the Constitutional Court.

Referring to this explanation, then the legal considerations of the judges of the Constitutional Court related to the interpretation of the validity of marriage in Article 2 of the Marriage Law mentioned above, should be used as a reference by the Panel of Judges of the Kolaka District Court considering the nature of the Constitutional Court Decision is binding and applies to everyone. The nature of the decision of the Constitutional Court which is final and binding which includes all persons or *erga omnes*, has the consequence that the explanation related to the validity of marriage includes all parties and state institutions which in this case is the Court. Thus, ordinary court judges are obliged to review legal considerations in decisions of the Constitutional Court as one of the state's high court institutions. So that consistency in the interpretation of an article in a law can be maintained and legal certainty can be created.

The equal perception of judges in applying the law in court will create legal certainty. The realization of legal certainty will prevent or avoid differences and inconsistencies in decisions. The application of the same legal standards to the same case as the case that has been decided previously will create an order because the public can predict the legal product that will be produced. With this consistent decision, a sense of justice and legal certainty can be realized.⁵⁶

If jurisprudence is faced with the freedom of judges in deciding cases, judges are not only independent institutionally but also personally independent as stipulated in Article 24 of the 1945 Constitution of the Republic of Indonesia. The position of jurisprudence or previous court decisions that have permanent legal force are not an intervention on the freedom of judges. The use of jurisprudence is analogized by Shetreet with the activities of a judge who goes into the library and consults with others regarding his case.⁵⁷ Thus, jurisprudence can be seen as a guideline or reference for applying the same legal standard to the same case, which is not absolutely binding, but must be considered by judges in resolving similar cases.

In the trial process regarding the review of Law Number 1 of 1974 on the Decision of the Constitutional Court Number 46/PUU-VIII/2010 above, the House of Representatives (Dewan Perwakilan Rakyat) stated that in order to

⁵⁶ Ade Rizky Fachreza, "Yurisprudensi dan Kemerdekaan Hakim Dalam Kaitannya dengan Konsistensi Putusan Dalam Peradilan Indonesia", *Lembaga Kajian & Advokasi Independensi Peradilan*, 24 June 2016, accessed on 24 October 2021, <https://leip.or.id/yurisprudensi-dan-kemerdekaan-hakim-dalam-kaitannya-dengan-konsistensi-putusan-dalam-peradilan-indonesia/>

⁵⁷ Simon Shetreet, *Judicial Independence*, (Netherlands: Martinus Mijhoff Publisher, 1985), 643

guarantee civil rights and obligations arising from legal marriages, every marriage need to be registered. The state has the obligation to provide legal certainty to parties related to marriage. Marriage registration is a norm related to administrative requirements with the aim of ensuring order and legal certainty of marriage law.⁵⁸ To realize the guarantee of legal certainty, it is required to have a marriage registration which aims:

1. To create order in the administration of marriage;
2. Guarantees to obtain certain rights (obtaining a birth certificate, making an Identity Card, making a Family Card, and others);
3. Provides protection against marital status;
4. Provide certainty on the legal status of the parties bound in the marriage bond such as husband, wife, and children;
5. Provide protection for civil rights caused by marriage.

There are several other first instance court decisions dealing with similar cases related to crimes of origin of marriage. For example, in Verdict Number 351/Pid.B/2019/PN Jth, the Panel of Judges considered that a marriage that was not registered considered as a marriage that have occurred, so that a marriage without the wife's permission and not being registered was declared a criminal act of holding a marriage even though the parties knew that the marriage or existing marriages were a legal barrier to it.⁵⁹

⁵⁸ Rachmadi Usman, "Makna Pencatatan Perkawinan dalam Peraturan Perundang-undangan Perkawinan di Indonesia", *Jurnal Legislasi Indonesia*, no.3(2017), 259-260.

<http://eprints.ulm.ac.id/4581/1/43-96-1-SM5.pdf>

⁵⁹ Direktori Putusan Mahkamah Agung, accessed on 10 October 2021

<https://putusan3.mahkamahagung.go.id/direktori/putusan/61bd428a6c893589b54c690ebba6b18e.html>

In addition, there is also Decision Number 830/Pid.B/2017/PN Pdg which tried cases of illegal polygamous marriages without the permission of the wife carried out by the Defendant, the Panel of Judges considered that the marriage was considered to have occurred and complied with the provisions of Article 279 of the Criminal Code even though the marriage was carried out in *sirri* way or without being registered in accordance with the applicable laws and regulations. The Panel of Judges refers to Paragraph a number (2) Supreme Court Circular (Surat Edaran Mahkamah Agung) Number 4 of 2016 which in states that “*A marriage carried out by a husband with another woman while the husband does not get the wife's permission to marry again, then Article 279 of the Criminal Code can be applied*”. The Panel of Judges also referred to the Supreme Court's Decision Number 937 K/Pid/2013, in which the rule of law states that marriage is considered to exist even if it is not recorded. Verdict Number 830/Pid.B/2017/PN Pdg was later strengthened by Decision Number 655 K/Pid/2018 at the cassation level which also stated that the defendant was legally and convincingly proven to have committed the crime of “*conducting a marriage even though he knew of the marriage or marriages which already exists as a legal barrier for that*” even though the marriage occurred in a serial manner or was not registered in accordance with the applicable laws and regulations.⁶⁰

⁶⁰ M. Yusuf dan Reza Okva Marwendi, “Penerapan Sanksi Pidana Terhadap Pelaku Tindak Pidana Asal-Usul Perkawinan Menurut Pasal 279 Ayat (1) Kitab Undang-Undang Hukum Pidana: Studi Kasus No. 830/Pid.B/2017/PN.Pdg”... 267-268.

Referring to the explanation above, it can be seen that in fact the legal products and regulations in Indonesian legal system are related to one another. The relationship between one regulation and another is described in the theory of systematic legal interpretation. Systematic legal interpretation is an interpretation that connects a rule with other rules. Referring to Utrecht's theory on the methods of legal interpretation, systematic legal interpretation is interpretation according to the existing system in the formulation of the law itself. This interpretation can also occur if one legal text and another legal text regulate the same provisions, so that they can be linked, compared, or as an explanation for other regulations.⁶¹

In a systematic interpretation, the law is seen by judges as a unit, as a system of regulation. A rule is not seen as a stand-alone regulation, but as part of a single system. So, if the formulation or interpretation of a regulation is based on the position of the regulation in the entire statutory system, the judge carries out a systematic legal interpretation.⁶²

In Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, it is stated that "Judges and Constitutional Justices are obliged to explore, follow, and understand legal values and a sense of justice that live in society." Thus, in deciding cases, judges are obliged to explore laws and regulations from various legal sources, both materially and formally. Sources

⁶¹ Afif Khalid, "Penafsiran Hukum Oleh Hakim Dalam Sistem Peradilan di Indonesia" *Al 'Adl Journal*, (2014): 17.

<https://ojs.uniska-bjm.ac.id/index.php/aldli/article/download/196/189>

⁶² Abintoro Prakoso, *Penemuan Hukum: Sistem, Metode, Aliran, dan Prosedur dalam Menemukan Hukum*, 121.

of law are anything that gives rise to rules that have coercive power, it means that the violation of law results in real consequences. These various sources of rules include laws, jurisprudence, treaties, customs, and doctrines.⁶³

In Verdict Number 111/Pid.B/2020/PN Kka it can be seen that the Panel of Judges assess the validity of the marriage using Article 2 of the Marriage Law and Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage. Whereas, Judges are required to look for other legal sources besides that law. The decision of the Constitutional Court and other court decisions mentioned above are several legal sources in the form of jurisprudence which should also be used by judges in interpreting the validity of marriages so that legal product harmony occurs and legal certainty can be created.

When referring to Article 2 paragraph (1) of the Marriage Law which states that the validity of marriage is determined by religious law and the beliefs of the prospective bride and groom, the Judge must also review the validity of marriage from the perspective of Islamic *Fiqh*. In Islamic *fiqh*, there are several conditions and pillars of marriage for a marriage to be valid. Jumhur Ulama states that a marriage has five pillars, namely: the existence of a prospective husband; the presence of a prospective wife; the presence of a marriage guardian; the presence of two witnesses; and there was *ijab* and *qabul*.⁶⁴ The Compilation of Islamic Law also describes the terms and pillars of marriage in

⁶³ Mokhammad Najih dan Soimin, *Pengantar Hukum Indonesia*, 52.

⁶⁴ Aulia Muthiah, *Hukum Islam Dinamika Seputar Hukum Keluarga*, (Yogyakarta: Pustaka Baru Press, 2017), 62.

Articles 14 to 38. Thus, it can be concluded that in the Islamic *fiqh* as well as the articles in the Compilation of Islamic Law as mentioned, it is not stated that marriage registration is a condition that determines the validity of marriages.

In Verdict Number 111/Pid.B/2020 PN Kka, the Panel of Judges also did not conduct a review of the Circular Letter of Supreme Court (Surat Edaran Mahkamah Agung) Number 4 of 2016 concerning the Implementation of the Formulation of the Results of the Plenary Meeting of the Supreme Court Chamber of 2016 as a Guide to the Implementation of Duties for the Court which in letter a number (2) stated that *“A marriage carried out by a husband with another woman while the husband does not get the wife's permission to marry again, then Article 279 of the Criminal Code can be applied”*. Meanwhile, Article 279 of Criminal Code stated that:

- (1) *Threatened by a maximum imprisonment of five years:*
 - 1. *Whoever enters into a marriage knowing that the marriage or his existing marriages constitute a legal barrier to it;*
 - 2. *Whoever enters into a marriage knowing that the marriage or other parties' marriages are barrier to it.*
- (2) *if the person who commits an act based on paragraph (1) point 1 is hiding to the other party that the existing marriage is a legal barrier for that purpose, he shall be punished by a maximum imprisonment of seven years.*
- (3) *Revocation of rights based on Article 1 – 5 can be stated.*

In fact, it was obtained from the trial process that the second marriage carried out by the Defendant had met the criteria as stipulated in the two articles. The second marriage of the Defendant at least met the criteria for a marriage carried out by the husband with another woman while the husband did not get his wife's permission to remarry.

Therefore, referring to the theory of systematic legal interpretation above, this verdict does not reflect legal certainty because the Panel of Judges does not explore the legal basis governing a case with a thorough and in-depth study, and tends to ignore various norms and jurisprudence that should be viewed as a unity or system in the regulation and law enforcement in court.

When the polygamous marriage did by the Defendant viewed from the alternative requirements and the cumulative conditions of polygamy as stated in Articles 4 paragraph (2) and Article 5 of the Marriage Law, then the polygamous marriage carried out by the Defendant did not meet all the elements of the alternative requirements, as well as the cumulative requirements of polygamy.

The alternative requirements as in the Article 4 paragraph (2) are: *The wife cannot carry out her obligations as a wife; The wife has a disability or incurable disease; The wife cannot bear offspring.* There was obtained a fact from the trial process that the Defendant never asked permission from the Regular Court for doing polygamy marriage and his wife does not meet any this these requirements. So, these requirements are not fulfilled.

While the cumulative requirements from Article 5 of Marriage Law are: *There is agreement from the wife / wives; There is certainty that the husband is able to provide all the living needs of his wives, and their children; and there is a guarantee that the husband will treat his wife fairly and their children fairly.* As stated above that cumulative requirements are requirements that must meet all the points contained in it so that these requirements can be

considered fulfilled.⁶⁵ From the first cumulative requirement, namely the agreement from the wife / wives, there was a fact obtained in the trial process that the Defendant never ask his wife to do a second marriage. It shows that the Defendant did not fulfilling the cumulative requirements for doing a polygamous marriage as regulated in Article 5 of Marriage Law.

In addition, if studied through the perspective of legal causality, a marriage that is not registered actually still has legal consequences for the perpetrators. This is based on the meaning contained in Article 2 paragraph (1) of Law Number 1 of 1974 concerning Marriage which states that “*Marriage is legal, if it is carried out according to the law of each religion and belief*”. So, if a legally valid marriage has been carried out even though it is not registered under state law, then new legal consequences will automatically arise for the husband and wife, for example:⁶⁶

1. There is a gift of dowry from the husband to the wife;
2. Sexual relation between husband and wife become halal;
3. The emergence of the rights and obligations of husband and wife;
4. Children born from such marriages are legitimate children;
5. Father has the right to be the guardian of marriage for his daughter;
6. The emergence of mutual inheritance rights between family members;

⁶⁵ Dian Latifiani, “Implementasi Syarat Berpoligami Menurut UU No 1 Tahun 1974 (Studi di Kota Semarang)”, *Masalah-Masalah Hukum Journal*, no.4(2013), 549. <https://media.neliti.com/media/publications/152643-ID-implementasi-syarat-berpoligami-menurut.pdf>

⁶⁶ Idris Ramulyo, *Hukum Perkawinan Islam Suatu Analisis dari Undang-Undang Nomor 1 Tahun 1974 dan Kompilasi Hukum Islam*, (Jakarta: PT Bumi Aksara, 2004), 122-123.

7. There is an opportunity to apply for marriage legalization in the Religious Courts; and so on.

If the theory of legal causality is associated with the legal product of Verdict Number 111/Pid.B/2020/PN Kka, there are various legal uncertainties, especially for the bride and groom and the parties involved in the case. The marriage, which the Panel of Judges considers never happened, will cause legal uncertainty, for example: uncertainty about the marital status of the two parties, both male and female after this decision, whether they are husband or wife, or not; uncertainty about the status of the dowry property that has been given by the man, whether it should be returned, or not; uncertainty about whether or not there is an opportunity to apply for marriage legalization in a religious court, and so on.

As stated by Hans Kelsen, norms that have formal legal force become a reference for society to do something or not to do something. In other words, it also becomes a reference for the community to understand the meaning of a regulation.⁶⁷ From the various explanations above, the meaning related to the validity of marriage has been explained, namely that marriage is legal if it is carried out according to the laws of each religion or belief. The different interpretation carried out by the Panel of Judges in Verdict Number 111/Pid.B/2020/PN Kka which states that marriage is legal if it is carried out according to the law of each religion or belief and is registered according to the laws and regulations, resulting in uncertainty about the meaning regarding the

⁶⁷ Peter Mahmud Marzuki, *Pengantar Ilmu Hukum...* 158

validity of marriage. This of course raises doubts in society, especially in taking references to assess the validity of a marriage.

Referring to the various decisions, legal sources, as well as the above theories, it can be understood that a marriage that is carried out without going through a recording procedure, of course, must still be considered as a valid marriage and factually considered to have occurred. With regard to formal juridical power, that marriage is included in a marriage that violates the law because it does not comply with the mandate of the legislation which requires every married couple to register their marriage in accordance with the applicable laws and regulations. Violation of the marriage registration does not have an impact on the validity of the marriage that has been held.

In Article 53 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power, it is regulated that a decision must contain the judge's legal considerations based on appropriate and correct legal reasons. The incompatibility of legal considerations on the validity of marriages as stated in various laws and regulations as well as jurisprudence Constitutional Court decisions and other court decisions, creates legal uncertainty for law enforcement related to illegal polygamy crimes.

Thus, the legal considerations of the Panel of Judges in Verdict Number 111/Pid.B/2020/PN Kka are related to the second element in Article 279 of the Criminal Code, namely the element of *“having a marriage while knowing that the marriage or existing marriages are a legal barrier to it”* and the meaning of the conditions for the validity of marriage does not reflect legal

certainty because it has deviated from the provisions of applicable laws and regulations, jurisprudence, and legal certainty principle theories as explained above.

CHAPTER IV

CLOSING

A. Conclusion

Based on the analysis of Verdict Number 111/Pid.B/2020/PN Kka through a study of the theories concerning legal certainty principle, applicable laws and regulations, as well as various court decisions as jurisprudence, the researcher concludes that:

1. The Panel of Judges concluded in their legal consideration that a marriage is considered valid by the state if it is carried out according to the laws of each religion and belief, and registered. Marriages which are only carried out according to religion and belief, without being registered in the legal authority are legally invalid because it does not meet the requirements stated in Article 2 of Law Number 1 of 1974 concerning Marriage and the only evidence of registered marriage is the existence of a Marriage Certificate that has been signed. Thus, even though the marriage between the Defendant and Feby Febiola had occurred religiously, it turned out that the marriage was never registered so according to the Panel of Judges the marriage was not a marriage that was considered legal or recognized by the state, so that it was deemed by the state to have never happened.

2. The consideration of the Panel of Judges related to the first element of "*whoever*" in Article 279 of Criminal Code reflects legal certainty principle because Muh. Khadafi as defendant is a person proven to have committed the crime and can be punished for his actions.
3. The legal considerations of the Panel of Judges to the second element of "*having a marriage while knowing that the marriage or existing marriages are a legal barrier to it*" in Article 279 of Criminal Code and the meaning of the conditions for the validity of marriage does not reflecting legal certainty principle because it has deviated from the provisions of applicable laws and regulations, jurisprudence, and theories of legal certainty principle.

B. Suggestion

The researcher recommends to law enforcements, especially in court practices related to crimes of origin of marriage, to always applies the legal basis and legal considerations that reflect the principle of legal certainty. This will realize the principle of legal certainty and avoid legal uncertainty that can result in irregularities, ambiguity, and legal conflicts.

The researcher also recommends to further researchers to further deepen the analysis and use two main attributes of the legal basic principles as stated by experts above, such as "Justice" and "Usefulness" in order to be able to deepen and make the scientific studies especially related to cases of illegal polygamy in Indonesia become more comprehensive. Aside from those two

principles, further researchers are also recommended to study this verdict with other perspective or interpretation related to the study of judge's legal consideration.

The researcher also recommends to all people, to always obey the law or regulations in every activity, especially in marriage practices. The purpose of this is to minimize the victims who are harmed by actions that violate the law and create a society that is aware and obeys the law. It also intended to create legal order and to realize legal certainty in the lives of Indonesian nation.

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