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### THE JUDGE'S DECISION ON REJECTION OF POLYGAMOUS MARRIAGE PROPOSAL IN *SADD ADZ-DZARI'AH* PERSPECTIVE

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#### **Abstract:**

Polygamy is permitted in Islamic law and also in Indonesian marriage law when fulfilled the requirements. In decision number 280/Pdt.G/2020/PA.Sbh the application for a polygamy permit was rejected by the Judges, despite the fact that the first wife had granted permission for polygamy and the husband had met the polygamy requirements. As a result, the focus of this research is on discussing the Judge's considerations then analyzing them using *sadd adz-dzari'ah*. This is normative research using a case approach, and it is carried out by tracing, searching, and reviewing materials in the form of decisions, laws, books, journals, and other sources related to polygamy and *sadd adz-dzari'ah*. The Judges rejected the case because the application for a polygamy permit do not comply with Law number 1 of 1974, and Law number 9 of 1975. *Sadd adz-dzari'ah* states that whether the case is accepted or rejected, both contain *mafsadah*. The differences are in the *mafsadah's* quality; if the case is accepted, the *mafsadah's* quality is *qath'i*. Whereas if the case is rejected, the *mafsadah's* quality is *ghalib*. Closing the definite *mafsadah* takes precedence, so this case is better rejected based on the *sadd adz-dzari'ah* analysis because the quality of the *mafsadah* is lower.

**Keywords:** Polygamy Permits; *sadd adz-dzari'ah*; the psychology of the first wife.

#### **Introduction**

Polygamous marriage is regulated in Law number 1 of 1974 on marriage and Presidential Decree number 1 of 1991 on the Compilation of Islamic Law. In-Law number 1 of 1974 on marriage, marriage generally adheres to the principle of monogamy except when religious law specifies otherwise. While in the Compilation of Islamic Law article 55 paragraph 2, it is explained that polygamous marriage is allowed if it has met the requirements, the main requirement of polygamous marriage is that the husband able to be fair to his wives and childrens. This is in line with the Quran in An-Nisa' verse 3 : "And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hands possess [i.e.,

slaves]. That is more suitable that you may not incline [to injustice].”<sup>1</sup> And Quran in An-Nisa’ verse 129 : “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.[221] And if you amend [your affairs] and fear Allāh - then indeed, Allāh is ever Forgiving and Merciful.”<sup>2</sup> The principle of marriage in Islam is monogamy, as may be seen from these two verses. As stated in verse, the capacity to practice polygamy when the requirements are satisfied ensures the husband’s fairness to his wives. Although the requirements of fairness in terms of sharing love will not be feasible according to an-Nisa’ verse 129. Islamic law still permits polygamy as long as the spouses are treated fairly. Polygamy, according to Islam, is a sort of marriage that brings about *maslahah* when contrasted to other types of marriage that existed before the polygamy regulations. Polygamy is allowed if fulfill the following conditions; fairness and the limitation of just four wives. Polygamy is forbidden in Islam if these requirements are not met. With these two requirements, Islam has prioritized women’s rights in marriage.<sup>3</sup> Furthermore, Compilation of Islamic Law (KHI) requires the first wife’s consent to execute a polygamous marriage, which is distinct from Islamic law, which does not require the first wife’s permission.

However, many polygamous marriage practices in Indonesia do not follow the existing provisions, such as the case in the Sibuhuan Religious Court in 2020 with case number 280/Pdt.G/2020/PA.Sbh. In this case, the husband applied for polygamy because he wanted to have more children, and his first wife could no longer give birth to another child due to a cyst disease after giving birth their third child. In this condition, the husband’s reason for polygamy is in accordance with the alternative requirements for polygamy contained in article 4 paragraph 2 of Law number 1 of 1974 concerning marriage, that is the condition of the wife who has a cyst disease that cannot be cured and cannot give birth anymore. In addition, the husband has also obtained permission from the first wife to practice polygamous marriages. In this case, the husband has qualified to practice a polygamous marriage in article 5 paragraph 1 of Law number 1 in 1974 Jo. Article 58 Compilation of Islamic Law has obtained permission from the first wife. However, the case was rejected in the decision of the Sibuhuan Religious Court Judge with the consideration that the first wife was in a state of distress when giving polygamy permission to the husband, and the Judge analysis that the first wife had objected to polygamy. This was seen by the Judge from the attitude and statement of the first wife at the trial. The next Judge’s consideration is about the husband’s reason for wanting to have another child was not related with article 4 paragraph (2) of Law number 1 in 1974 because the husband had three children with his first wife.

Under civil law, an agreement with distressing conditions has no legal force, and this is in accordance with Civil Code article 1321, which provides that no agreement has force if provided in mistake or gained by force or fraud. According to Article 1324, Coercion arises when an action conveys the perception and might generate dread in a

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<sup>1</sup> Shahih International, “Quran surah An-Nisa’ 3 (QS 4:3) in Arabic and English Translation, “*Al-Quran English*, July 1, 2009, accessed June 17, 2022, <https://www.alquranenglish.com/quran-surah-an-nisa-3-q-4-3-in-arabic-and-english-translation#Sahih-International>

<sup>2</sup> Shahih International, “Quran surah An-Nisa’ 129 (QS 4:129) in Arabic and English Translation, “*Al-Quran English*, July 1, 2009, accessed June 17, 2022, <https://www.alquranenglish.com/quran-surah-an-nisa-129-q-4-129-in-arabic-and-english-translation#Sahih-International>

<sup>3</sup> Diana Ulfatun Khasanah, “Permohonan Izin Poligami Dengan Alasan Calon Istri Kedua Sudah Hamil Dalam Perspektif Sadd Adz-Dzari’ah”, (Undergraduate thesis State Islamic University Walisongo Semarang, 2018), <https://eprints.walisongo.ac.id/id/eprint/8903/1/skripsi%20lengkap.pdf>

rational person that he, his people, or his riches are in danger of substantial loss shortly. The age, gender, and status of the person in question must all be considered. However, this is not same with marriage law when the husband needs permission from his first wife to practice polygamy. Wives who will be polygamous indirectly feel melancholy due to factors other than their husbands or third parties. According to Lendri Nani Anggraini's dissertation titled "Psychological Condition of Wives Willing to Polygamy in Pal 7 Village, Bermani Ulu Raya District, Rejang Lebong Regency". The first wife felt obligated to accept polygamy since polygamy may hurt, cause quarrels, and harm the family. In this case, there was no disagreement among the informants; they all agreed that they permitted her husband to practice polygamy for too many reasons, forcing them to acquiesce while feeling compelled and resentful.<sup>4</sup> The wife's heartbreak when she sees her husband with another woman is impacted by her profound love for him and her feelings of inferiority, as though her spouse did so because he was unable to achieve his physical pleasure.<sup>5</sup> However, under the Marriage Law, the husband may practice polygamy with the first wife's permission, indicating that the Marriage Law's construction took into account the psychological characteristics of the polygamous wife. On the other hand, if the court rejects polygamy because of the wife's mental pressure, this becomes inconsistent when the Judge approves polygamy in other circumstances. As a result, this regulation is no longer valid. This matter is confirmed by Judge number 280/Pdt.G/2020/PA.Sbh denied permission for polygamy due to the wife's grief when providing consent. The same thing happened in case number 172/Pdt.G/2020/PA.Sbh decision. Even though he had gotten polygamy consent from his first wife, the Judge dismissed it because she felt betrayed and depressed, regardless of the Judge's other considerations.

The Sibuhuan Religious Court Judge's policy in deciding the case of polygamy authorization has various factors to examine. The Judge must evaluate the fairness and the advantages that will occur or avert damage while deciding a case. It is *sadd adz-dzari'ah* to prevent such damage from occurring. *Sadd adz-dzari'ah* refers to precautionary or preventative steps used to avoid the occurrence of anything unfavorable (worse thing). Meanwhile, according to Abdul Hamid, *sadd adz-dzari'ah* is the establishment of legislation prohibiting specific conduct that is generally authorized or banned to prevent the emergence of other prohibited activities.<sup>6</sup>

As a result, this article will delve deeper into the Judge's decision in case number 280/Pdt.G/2020/PA.Sbh used the *sadd adz-dzari'ah* perspective.

### **Method of Research**

This article uses a normative type of research (library research) using a case approach to study the application of marriage law regarding polygamy in legal practice. The legal materials used are sourced through the literature, including primary legal materials in the form of; Decision number 280/Pdt.G/2020/PA.Sbh, Law number 1 of 1974 concerning marriage, Law number 95 of 1975 concerning the implementation of the marriage law, and the Compilation of Islamic Law. The secondary legal materials

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<sup>4</sup> Lendri Nani Anggraini, "Kondisi Psikologis Istri Bersedia Dipoligami di Desa Pal 7 Kecamatan Bermani Ulu Raya Kabupaten Rejang Lebong", (Undergraduate thesis, Institut Agama Islam Negeri Bengkulu, 2021), [http://repository.iainbengkulu.ac.id/7343/1/LENDRI%20NANI\\_BKI.pdf](http://repository.iainbengkulu.ac.id/7343/1/LENDRI%20NANI_BKI.pdf)

<sup>5</sup> Herlina Fitriana dan Novia Suhastini, "Dinamika Psikologis Istri Pertama Yang Dipoligami", *Qawwam: Journal for gender mainstreaming*, no. 2 (2021): 31 <https://doi.org/10.20414/qawwam.v15i2.4153>

<sup>6</sup> Muhammad Takhim, "Saddu al-Dzari'ah dalam Muamalah Islam", *Akses : Jurnal Ekonomi dan Bisnis*, no. 1 (2019): 20 <http://dx.doi.org/10.31942/akses.v14i1.3264>

used are; books and journals related to research such as books and journals about polygamy and *sadd adz-dzari'ah*. The tertiary legal materials used are in the form of the Al-Qur'an, hadith, large Indonesian language dictionaries, encyclopedias or obtained through the internet and other news on the website.<sup>7</sup> In processing legal materials, this article describes several legal materials related to the discussion of polygamy permits using descriptive analysis techniques.

### **Description of Case Number 280/Pdt.G/2020/PA.Sbh**

Decision in Dutch is called *vonnis* and in Arabic is called *al-qada'u*. The Judge's decision is a product of the Religious Courts because there are two opposing parties in one case, that is the Petitioner and the Respondent. The product of the court is usually termed *Jurisdictio contentiosa*, which is the product of the real justice.<sup>8</sup> In Article 10 of Law number 7 of 1989 explained that: "A decision is a court decision on a lawsuit based on a dispute". According to Elfrida R. Gultom, a Judge's Decision is a statement by a Judge as an authorized state official that is pronounced in court with the aim of ending or resolving a dispute between the parties, the decision is not only spoken by the Judge but also a statement that is set forth in written form. and then pronounced by the Judge at trial.<sup>9</sup> In deciding a case, the Judge does not need to always adhere to written rules alone, the Judge can resolve a case by paying attention to the laws that live in society or known as customary law. This aims to fill legal gaps in the Indonesian legal system.<sup>10</sup> The Judge in deciding cases must be in accordance with justice and Islamic values.

The case submitted is a case of a polygamy permit application which was submitted to the Sibuhuan Religious Court on November 9, 2020. The application for a polygamy permit was submitted by a husband (Petitioner) who is 40 years old and works as a farmer against a Respondent (wife) who is 37 years old and works as a housewife. The core case contains; that the Petitioner and the Respondent were married on March 12, 2005, according to the marriage certificate number: 284/24/XII/2005 dated December 1, 2005, from the Office of Religious Affairs of the District of Hutaraja Tinggi. After marriage, the Petitioner or Petitioner and the Respondent were blessed with two daughters and one son. Then, the Petitioner stated that he wanted to remarry (polygamous marriage) with a woman named Resna Dewi Pratiwi bint Ngadino or referred to as the prospective second wife who works as a Civil Servant (PNS).

Polygamy was carried out because the Respondent could no longer have children whereas the Petitioner wanted to have another child. Then the Respondent has stated that he is willing and does not object if the Petitioner remarries the prospective second wife of the Petitioner. The Petitioner has also stated that the Petitioner can meet the necessities of life and can treat his wives and children fairly in the future. The petition submitted by the Petitioner to the panel of Judges based on the case above is to permit the Petitioner to marry Resna Dewi Pratiwi bint Ngadino as a second wife.

The panel of Judges has tried to reconcile the Petitioner and the Respondent. The Petitioner and the Respondent have also gone through a mediation process with a legal mediator, but both efforts were unsuccessful. Due to the failure of mediation efforts, the

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<sup>7</sup> I Ketut Suardita, *Pengenalan Bahan Hukum*, (Jurnal: Universitas Udayana, 2017), 2

<sup>8</sup> Erfaniah Zuhriah, *Peradilan Agama Indonesia*, (Malang: Setara Press, 2016), 170

<sup>9</sup> Elfrida R Gultom, *Hukum Acara Perdata*, (Jakarta : Mitra Wacana Media, 2017), 99

<sup>10</sup> Syaiful Hidayat, "Studi Kontraksi Tugas dan Fungsi Hakim di Pengadilan Agama", *Tafaqquh*, no. 2 (2016): 11 <https://doi.org/10.52431/tafaqquh.v4i2.58>

trial continued by submitting an answer by the Respondent verbally, which in essence stated that the Petitioner and his prospective second wife had been married secretly since two months ago. In contrast, the Respondent could not have any more children because the Respondent had experienced cystitis after the third child was pregnant. By the doctor, it was declared that he could not have any more children. The Respondent was forced to permit polygamy because the Petitioner and the prospective second wife had been married secretly (*sirri*).

At the time of proof, the Petitioner has proven his arguments by submitting documentary evidence in the form of; photocopies of the ID cards of the Petitioners and Respondents (P.1 and P.2), the marriage certificate quotation number 284/24/XII/2005 (P.3). The three pieces of evidence have been matched with the originals by the panel of Judges and turned out to be by the originals, then given marks P.1, P.2, P.3 and initialled. However, the Respondent submitted all the evidence without being given duty stamp payment verified. The evidence is in the form of; a photocopy of a marriage certificate (T.1), photocopy of a polygamy permit statement (T.2), photocopy of an ID card (T.3), photocopy of a letter of sale and purchase of a piece of rubber plantation land (T.4), photocopy of the letter of compensation (T. 5). However, T.1 and T.3 can be matched with the original, which turns out to be by the original. All of the evidence submitted by the Respondent being marked by the panel of Judges is then initialled.

The case is the application for a polygamy permit has been decided by the Judge of the Sibuhuan Religious Court in case number 280/Pdt.G/2020/PA.Sbh with a decision; reject the Petitioner's application in its entirety. In the case decision number 280/Pdt.G/2020/PA.Sbh, the Judge legally considered that the Petitioner's application to have polygamy with a prospective second wife was because the Petitioner wanted to have more children. However, the Respondent could not because they had the cystic disease after having their third child. This reason does not match the alternative conditions for polygamy because it is a legal fact that the Petitioner and the Respondent have been blessed with 3 (three) children. Therefore, the Petitioner's reason for polygamy does not meet the provisions of Article 4 paragraph (2) of Law number 1 of 1974 concerning marriage in conjunction with Article 41 letter (a) Government Regulation number 9 of 1975 concerning the implementation of Law number 1 of 1974 concerning marriage, in conjunction with article 58 paragraph (1) Compilation of Islamic Law.

Then the panel of Judges legally considered that based on the provisions of Article 5 letter b of Law number 1 of 1974 concerning Marriage in conjunction with Article 58 letter b of the Compilation of Islamic Law, The Religious Courts only give permission to a husband who will have more than one wife if approval is obtained for polygamy from the first wife. However, the Respondent or the first wife acknowledged with a clause on the Petitioner's argument that the Respondent has given permission for polygamy because according to the Respondent the permission was forced to be given because the Petitioner has been married unregistered (*sirri*) with a second wife. Thus, the Judge considered that the Respondent had objected to polygamy. Then, based on the provisions of article 4 paragraph (1) of law number 11 of 1974, That permission to have more than one wife should be applied for before the second Marriage is carried out and must be submitted to the Religious Court at the place of residence of the Petitioner, while in the quo case there has been a unregistered polygamous marriage (*sirri*) between the Petitioner and the prospective second wife so that permission to have more

than one wife (polygamy) requested by the Petitioner is no longer relevant for asking for permission.

Therefore, based on the legal facts and legal considerations mentioned above, the panel of Judges thinks that the Petitioners' reasons are not proven and have no legal basis, and violate the provisions of Law number 1 of 1974 article 3 paragraph 2, Article 4 paragraphs 1 and 2 in conjunction with Article 40 of Government Regulation number 9 of 1975, Article 56 paragraphs 1 and 2 of the Compilation of Islamic Law, for which the Petitioner's application should be declared rejected.<sup>11</sup>

### **The Judge's Decision on Case Number 280/Pdt.G/2020/PA.Sbh in the *Sadd adz-dzari'ah* perspective**

Polygamy etymologically is derived from the Greek language, which is a combination of the two words *poly* and *pollus* meaning many and the words *gamein* and *gamos* meaning marriage. Therefore, polygamy can be defined as multiple marriages<sup>12</sup>. Meanwhile, in terms of polygamy, it is a condition when a man marries two or more women at the same time. In Islam, polygamy is a marriage performed by a man with two or more women with a limit of four women only. Polygamy is actually allowed in Islamic teachings. This ability is found in An-Nisa' verse 129 : "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.[221] And if you amend [your affairs] and fear Allāh - then indeed, Allāh is ever Forgiving and Merciful."<sup>13</sup> From the verse above, it can be seen that polygamous Marriage is allowed because it is not allowed to marry more than four (4) wives, and the husband must be able to act fairly. These two conditions are absolute conditions that the husband must meet if he wants a polygamous marriage. If one of these conditions is not met, the husband cannot do polygamy. According to Quraish Shihab, the permissibility of polygamy is a small emergency door that is only done when it is needed in conditions that are not light. Allah does not allow polygamy without limitations that allow for the benefits and rejects the damage (*mafsadah*) which may cause.<sup>14</sup> However, in case number 280/Pdt.G/2020/PA.Sbh, the Petitioner's application for a polygamy permit was rejected by the panel of Judges even though the polygamy was permissible in law.

Therefore, it will analyze using *sadd adz-dzari'ah* method. *Adz-dzari'ah* in terms of *Ushul Fiqh* has the meaning of something that becomes a media or *wasilah* to arrive at something related to *syara'* law, both haram and halal.<sup>15</sup> *Sadd adz-dzari'ah* method is a prevention effort so that something bad or negative doesn't happen. This is in line with the objectives of *syara'* or *maqashid shari'ah* because *maqashid shari'ah* is to realize the benefit and avoid all kinds of damage, both in this world and in *sadd adz-dzariah* the hereafter. *Sadd adz-dzari'ah* is a method used as a law taking in the form of a prohibition on doing an act which is allowed to cover or prevent the occurrence of evil. In the context of the methodology of Islamic legal thought, *sadd adz-dzari'ah* can

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<sup>11</sup> Salinan Putusan Pengadilan Agama Sibuhuan Nomor : 280/Pdt.G/2020/PA.Sbh

<sup>12</sup> Marzuki, *Poligami Dalam Hukum Islam*, Jurnal Pendidikan Kewarganegaraan dan Hukum, Universitas Negeri Yogyakarta, 2

<sup>13</sup> Shahih International, "Quran surah An-Nisa' 129 (QS 4:129) in Arabic and English Translation, "AL-Quran English, July 1, 2009, accessed June 17, 2022, <https://www.alquranenglish.com/quran-surah-an-nisa-129-q5-4-129-in-arabic-and-english-translation#Sahih-International>

<sup>14</sup> Azwarfajri, "Keadilan Berpoligami dalam Perspektif Psikologi", *Jurnal Substantia*, no. 2(2011): 162 <https://www.jurnal.ar-raniry.ac.id/index.php/substantia/article/download/4820/3108>

<sup>15</sup> Djazuli dan I. Nurol Aen, *Ushul Fiqh Metodologi Hukum Islam*, (Jakarta: PT Raja Grafindo), 271

be interpreted as an earnest effort from a *mujtahid* to establish the law by looking at the legal consequences that arise, by inhibiting something that mediates the damage. *Sadd adz-dzariah* in Islamic law can be used as a method of extracting law. Malikiyah and Hanabilah scholars use *sadd adz-dzariah* as a method of extracting their law, while Hanafiyah and Shafi'iyah priests only use *sadd adz-dzariah* on some cases. Zahiriyah scholars also reject *sadd adz-dzari'ah*, but Ibn Hazm uses *sadd adz-dzari'ah*. He uses *sadd adz-dzari'ah* for things that will definitely bring to *mafsadah*. In this case there are definitely *mafsadah* if the case accepted or rejected. Polygamy is allowed in Islam and also in Indonesian law but in this case the polygamy had been prohibited by the Judge. So that, this case is appropriate to be analyzed using *sadd adz-dzari'ah*. Islamic law regulates human behaviour that has been done and what has not been done. This does not mean that Islamic law tends to restrict freedom. But because it is, one of the goals of Islamic law is to realize the benefit and avoid damage (*mafsadah*). If an act that has not been carried out is strongly suspected of causing damage (*mafsadah*), then the things that lead to the act are prohibited. Every action has two sides: the encouraging side and the objective or goal side, which becomes the *natijah* (conclusion/consequence) of the deed. If his *natijah* is good, then everything that leads to him is good, and he must do it. If his *natijah* is wicked, then anything that supports him is likewise wrong and is prohibited.<sup>16</sup> When viewed from the legal level, the legal provisions against *wasail* are much lighter than the legal provisions in the *maqashid*. Apart from that, the basis for accepting *sadd adz-dzariah* as a method of taking the law is a review of the consequences of an act.

The case number 280/Pdt.G/2020/PA.Sbh has three provisions put forward by the panel of Judges in their legal considerations so that the case is not accepted in its decision;

*First*, Regarding alternative requirements. In this case, the husband's reasons when applying for polygamy were not by the provisions contained in article 4 paragraph 2 of Law number 1 of 1974 in conjunction with article 41 letter a Government Regulation number 9 of 1975 concerning the implementation of law number 1 of 1974 concerning Marriage in conjunction with article 58 paragraph 1 of the Compilation of Islamic Law, that is; (1) The wife cannot carry out her obligations as a wife; (2) Wife has a disability or an incurable disease; (3) The wife cannot bear children. The reason for the husband as the Petitioner is that the Petitioner wants to have another child. However, the Respondent, as the first wife, can no longer fulfil the Petitioner's request because the Respondent has a cyst disease and was sentenced to be unable to give birth again by a doctor. Meanwhile, the Petitioner and the Respondent already have three 3 children. Therefore this case was not accepted by the Judge because the reason for polygamy did not match the alternative conditions;

*Second*, Regarding the cumulative requirements. As written in the law number 1 of 1974 Article 5 paragraph 1, that is; (1) The existence of consent from the wife or wives; (2) There is a certainty that the husband can guarantee the necessities of life for his wife and their children; (3) There is a guarantee that husbands will treat their wives and children fairly. Regarding the application for a polygamy permit in the case, the husband as the Petitioner has obtained permission from the first wife, the Respondent, to carry out a polygamous marriage. However, this could not be proven because the polygamy permit brought by the Respondent to the court was not stamped and was duty

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<sup>16</sup> Intan Arafah, "Pendekatan *Sadd adz-dzari'ah* Dalam Studi Islam", *Al-Muamalat*, no. 1(2016): 78 <https://journal.iainlangsa.ac.id/index.php/muamalat/article/download/1443/1201/>

stamp payment verified, so the evidence could not be accepted. However, the Respondent stated verbally that he had agreed to his husband's polygamous Marriage at the trial. However, the Respondent also explained that the Respondent was forced to permit because the Petitioner and the prospective second wife had been married in an unregistered. Therefore, after observing the Respondent's answer and attitude at the trial, the Judge considered that the Respondent had objected to being co-opted. In essence, there are no women who are willing to be polygamous. Psychologically, all wives will feel hurt when they see their husbands having sex with other women. This problem usually triggers the breakdown of a family. This psychological impact not only impacts the wife's psyche but also the impact on the children, especially for their mental development;

*Third*, Regarding the procedure of polygamy. The procedure for granting polygamy permits is regulated in Article 40 of Government Regulation number 9 of 1975, which states that "*if a husband intends to have more than one wife, he is obliged to submit a written application to the Court*". Article 56 of the Compilation of Islamic Law has also explained the procedure for polygamy; (1) "Husbands who wish to have more than one wife must obtain permission from the Religious Courts. (2) The permit application submission referred to paragraph 1 is carried out according to the procedure as stipulated in chapter VIII of PP number 9 of 1975. (3) Marriages with a second, third or fourth wife without permission from the Religious Courts have no legal force". Polygamous marriages can be carried out if they have obtained permission from the competent Religious Court. Whereas in this case the Petitioner has been married unregistered (*sirri*) with a prospective second wife for two months before applying for a polygamy permit to the Sibuhuan Religious Court. Of course, this has violated the provisions regarding the polygamy procedure contained in Government Regulation number 9 of 1975 and Article 56 of the Compilation of Islamic Law. And the application for permission for polygamy by the Petitioner with the second wife becomes irrelevant to ask for permission because there has been a marriage between the Petitioner and the prospective second wife three months before this case was decided. So the procedure that the husband should take is the application for its bat or the determination of polygamous Marriage to the local Religious Court

Then, it will be analyzed from two points of view; if case number 280/Pdt.G/2020/PA.Sbh is accepted or rejected; (1) if case number 280/Pdt.G/2020/PA.Sbh is accepted, When viewed from the Petitioner's motive for polygamy, it is to want to have another child. At the same time, the Respondent can no longer fulfil the request of the Petitioner because the Respondent was sentenced to have cystitis by a doctor after giving birth to a child they are third. The purpose or motive of the Petitioner is actually one of the wisdom of polygamy, avoiding cheating or adultery. With polygamy, it will avoid acts that are not recommended by religion. When viewed from the impact, receiving this polygamy permit by the Judge can lead to several possibilities of mafsadat that will occur, such as disruption of the psychological condition of the first wife, because when giving permission, the wife is already in a state of stress with the condition of her husband. He has carried out a unregistered polygamous marriage (*sirri*). This psychological disorder occurs not only in the first wife but also in their children because they see the disharmony of their parent's household. Psychologically, the wife will feel hurt when she sees her husband having sex with other women. There are at least two factors that make a wife feel this way; (a) Because of the encouragement of a deep sense of loyal love for her husband; (b)



Because the wife feels inferior as if her husband is polygamous because he cannot fulfil his biological satisfaction. Feelings of inferiority are increasingly becoming a psychological problem, especially if they are under pressure from family. In addition, the damage (*mafsadah*) that will arise is internal conflicts within the family, either between wives, between wives and stepchildren or between children with different wives. There is a sense of unhealthy competition between wives caused by feelings of jealousy and envy. This happens because usually, husbands pay more attention to young wives than old wives.<sup>17</sup> In addition, the acceptance of the application for a polygamy permit which has been carried out the unregistered polygamy (*sirri*) in this case by the Judge, seems as if the Judge allows and legitimizes a similar case so that people think that this case can be accepted by the Judge, thus increasing cases of unregistered polygamy (*sirri*) among the community; (2) if case number 280/Pdt.G/2020/PA.Sbh is rejected. the application for a polygamy permit is not accepted or rejected, it gives rise to several *mafsadah*, that the husband's reason for doing polygamy is to want to have more children, so if the husband is prohibited from doing it According to Quraish Shihab, completely closing the door to polygamy which has been opened by Islamic law will lead to the rise of unregistered marriage (*sirri*) or even the presence of mistresses or even further to the emergence of acts that lead to the practice of prostitution.<sup>18</sup> However, in this case, the husband has carried out a polygamous marriage with the prospective second wife in a unregistered polygamous marriage (*sirri*), so the fear of falling into adultery is inappropriate because the relationship between the husband and the prospective second wife is legally Islamic even though it is not registered in state law. Thus, the damage (*mafsadah*) that will arise is regarding the status of the second wife in her position as a second wife in state law, such as not being entitled to a living from her husband, not being considered a legal wife because the husband has legal freedom so that it allows the husband to deny his Marriage and second wife can be divorced anytime and anywhere because according to Islamic law, the talaq handed down by the husband is valid. Then there is no legal protection for the second wife in the event of violence in their household.<sup>19</sup> as well as the position or clarity of the status of the offspring of their children who will be born from the unregistered polygamous marriage (*sirri*) is not clear. In addition, the madharat that will arise is in the form of a conflict between husband and first wife due to the first wife's confession at trial because when she gave her husband's polygamy permit, she was under pressure so that the panel of Judges rejected her husband's request for polygamy permission. It could even be that her husband divorced his first wife to marry a prospective second wife legally. However, incidents like this are rare. Because during the research, the author only found one case like this, in the thesis written by Diana Ulfatun Khasanah. In that case, the husband's polygamy permission was rejected by the panel of Judges, even though the second wife was pregnant, so the husband married the second wife in a unregistered polygamous marriage (*sirri*). After the prospective second wife gave birth, the husband divorced the first wife in order to marry his second wife legally.

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<sup>17</sup> Herlina Fitriana, Novia Suhastini, "Dinamika Psikologis Istri Pertama Yang Dipoligami (Studi Kasus Pada Suku Sasak Nusa Tenggara Barat)", *Qawwam: Journal For Gender Mainstreaming*, no. 2(2021): 31 <https://journal.uinmataram.ac.id/index.php/qawwam/article/download/4153/1848>

<sup>18</sup> Azwarfajri, "Keadilan Berpoligami dalam Perspektif Psikologi", *Jurnal Substantia*, no. 2(2011): 164 <https://www.jurnal.ar-raniry.ac.id/index.php/substantia/article/download/4820/3108164>

<sup>19</sup> Ayu Wulandari, "Dampak Perkawinan Poligami Secara Sirri Terhadap Keutuhan Rumah Tangga", (Undegraduate thesis, Universitas Islam Negeri Sulthan Thaha Saifuddin Jambi, 2020), <http://repository.uinjambi.ac.id/7234/1/wtr-AYU%20WULANDARI.pdf>

From some of *mafsadah*, it can be seen that if case number 280/Pdt.G/2020/PA.Sbh is accepted, it will cause more *mafsadah* which is sure to occur and the time it occurs immediately when the case is accepted, the disruption of the psychological condition of the wife who is depressed because her husband doing polygamy which is confirmed when in the court, the wife feels pressured when giving permission, and there is no woman who does not feel sad and depressed when her husband does polygamy, even though she allows her husband to be polygamous. In addition, polygamy will also cause psychological burdens on children, such as the lack of attention from their father, who are busy taking care of their wives.<sup>20</sup> Besides that, the child's psychological condition will also be disturbed by seeing his mother sad and depressed polygamous by his father. In addition, if the Judges acceptance the application for a polygamy permit which has been carried out the unregistered polygamy (*sirri*) in this case, it seems that the Judges allows and legitimizes a similar case, so that people think that this case can be accepted by the Judge, thus the cases of unregistered polygamy (*sirri*) will increase in society. While *mafsadah* that will arise if this case is rejected is more in impact of unregistered polygamous marriage (*sirri*). Such as the absence of legal protection for the second wife in the event of domestic violence and the absence of protection of the wife's rights in this case, such as a living, gonorrhoea property, can be divorced anytime and anywhere. Even so, *mafsadah* is a possibility that will happen, and it is not sure to happen.

The several *mafsadah* that will arise will then be analyzed regarding the quality of *Sadd adz-dzari'ah*. According to Imam al-Syathibi, the quality of *mafsadat* is divided into four types: (1) The actions carried out lead to definite *mafsadat* (*qath'i*). Like someone digging a well at someone else's door at night, the house owner does not know it. The evil form of this act can be ascertained, the fall of the house owner into the well, and that can be ascertained because the house owner did not know that the well was at the door. Acts like this are prohibited, and if it turns out that the owner of the house fell into the well, then the hole digger is subject to punishment because the act was done intentionally to harm other people; (2) Actions that can be done because they rarely lead to evil. Such as digging a well in a place that usually does not give harm or selling a type of food that usually does not give harm to people who eat it. Acts like this remain on the original law, permissible (permissible); (3) The actions taken are likely to lead to evil. Like selling weapons to the enemy because it is very likely that the weapon will be used for war or killing, alternatively, like selling grapes to liquor producers because the wine being sold may be processed into liquor. Acts like this are prohibited because there is a strong suspicion (*zhann al-Ghalib*) that these actions lead to evil; (4) Actions that are initially allowed to be carried out because they contain benefits, but it is also possible for the act to lead to harm. Such as the case of buying and selling, which is called *bay'u al-'ajal*, buying and selling at a price higher than the original price because it is not in cash. For example, a person buys a vehicle for thirty million rupiahs on credit. Suppose the vehicle purchased on credit for thirty million rupiahs is resold to the seller (the creditor) at a cash price of fifteen million rupiahs. In that case, it is as if the goods being traded do not exist. Meanwhile, the seller (the

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<sup>20</sup> Ayu Wulandari, "Dampak Perkawinan Poligami Secara Sirri Terhadap Keutuhan Rumah Tangga", (Undegraduate thesis, Universitas Islam Negeri Sulthan Thaha Saifuddin Jambi, 2020), <http://repository.uinjambi.ac.id/7234/1/wtr-AYU%20WULANDARI.pdf>

creditor) is just waiting for the profit from paying the vehicle on credit. So buying and selling like this is not allowed because it tends to be usury.<sup>21</sup>

In Case Number 280/Pdt.G/2020/PA.Sbh, when viewed from the aspect of *mafsadah* quality. So in terms of if the case is accepted, the quality of *mafsadah* is starch (*qath'i*), and that has already happened, the feeling of the wife being depressed when permitting polygamy to her husband. If viewed from the side, if the case is rejected, the quality of the *mafsadah* is *Ghalib* (ordinary) because *mafsadah* does not directly occur to the second wife (not necessarily the case). That is like the absence of legal protection for the second wife in the event of domestic violence if viewed based on the decision in case number 280/Pdt.G/2020/PA.Sbh, there is no quarrel between the Petitioner and the prospective second wife, *mafsadah* is uncertain (*Ghalib*) will occur. Therefore, based on the quality of the *mafsadah*, what is avoided is the one that has the quality of definite *mafsadah* (*qath'i*) because the scholars agreed to forbid it without a difference of opinion. Meanwhile, in terms of the quality of *Ghalib*, the scholars disagree (*ikhtilaf*), meaning that there is still a prohibition, but there are differences of opinion.

Case number 280/Pdt.G/2020/PA.Sbh is a polygamy permit case which is a permissible act but can be an intermediary for the occurrence of evil, whether with intentional or unintentional purposes. In this case, polygamy did not aim to create new conflicts but was based on the Judge's consideration. The first wife objected to polygamy because she felt pressured to be the root of new problems if her husband's permission for polygamy was accepted. The damage that will inevitably occur is the wife's psychological disturbance, which is evidenced by the wife's feeling of being depressed or forced when giving permission. At the same time, the psychological condition must be maintained and considered, which is by the objectives of the *Shari'a* (*maqashid shari'ah*), *hifd al-nafs*. Based on the *qaidah* of *Ushul fiqh*, when there are two *mafsadahs* that collide, then the choice is the *mafsadah* that is lighter or less.<sup>22</sup> In this case when this case is accepted and when this case is rejected both give rise to *mafsadah*, but when this case is accepted will give rise to more *mafsadah* and have a heavier quality of *mafsadah*. So closing this *mafsadah* is very necessary. So that in this case the possibility of *mafsadah* is chosen which is less and which has a lighter quality of *mafsadah*, that is, this case is rejected.

From *Sadd adz-dzari'ah*'s analysis of case number 280/Pdt.G/2020/PA.Sbh, this article further strengthens the Judge's opinion who rejected the case regarding the polygamy permit. This is in accordance with the *sadd adz-dzari'ah* principle, which is a method of extracting preventive laws or preventing misconduct. And *mafsadah* that often arises is when the case for a permit application for polygamy is received. So, *mafsadah* should be avoided, by refusing the application for a polygamy permit.

So, The refusal of this polygamy permit case has shown that the law is consistent in maintaining the objectives of *shari'ah* (*maqashid sharia*), obtaining benefit and rejecting the damage that will be caused. The wife's consent requirement is to prevent damage to their household caused by the wife's heartache when she finds out her husband has committed polygamy without her knowledge. However, in this case,

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<sup>21</sup> Nasrun Haroen, *Ushul Fiqh*, 162

<sup>22</sup> Al-Manhaj, "Kaidah Ke-33 : Jika Ada Kemaslahatan Bertabrakan, Maka Maslahat Yang Lebih Besar Harus Didahulukan", Al-Ilmu : *Qawaid Fiqhiyah* accessed 17 Juni 2022, <https://almanhaj.or.id/4072-kaidah-ke-33-jika-ada-kemaslahatan-bertabrakan-maka-maslahat-yang-lebih-besar-harus-didahulukan.html>

the wife's psychological condition has been depressed by her husband's condition, having done a polygamous marriage with someone else, so the negative impact of polygamous marriages is visible.

### **Conclusion**

From the analysis of case number 280/Pdt.G/2020.PA.Sbh, it can be concluded; The Judge's considerations in deciding the polygamy permit case are summarized in three primary considerations. *First*, regarding the reason the husband wants to remarry, that is wanting to have more children, it is not by the alternative requirements for polygamy as stated in Article 4 paragraph 2 of Law Number 1 of 1974. *Second*, regarding the first wife's permission, which was given because she was stressed, the Judges Judged that the first wife had objected to the marriage. Therefore, the application for a polygamy permit does not meet the cumulative requirements for polygamy contained in article 5 paragraph (1) of Law number 1 of 1974. *Third*, regarding the procedure for polygamy by article 40 of Government Regulation number 9 of 1975, before carrying out polygamous marriages, permission must be asked from the Religious Court first. However, there was a *sirri* between the Petitioner and the prospective second wife. So, the Judges considered that the application for a polygamy permit was no longer relevant.

By the *sadd adz-dzari'ah*, the *mafsadah* will be inflicted on this case, whether this case is accepted or rejected. However, the difference between the two is in the quality of *mafsadah*. If this case is accepted, the quality of *mafsadah* is *qath'i*; a disruption of the first wife's psychology (depressed) and also their children's psychology, The Judge's decision appears to tolerate the practice of unregistered marriage, which has the potential to increase the number of unregistered poygamous marriage in society. By law, this is strictly prohibited without any difference of opinion. Then if this case is rejected, the quality of the *mafsadah* is *Ghalib* (general or ordinary), the absence of legal protection for the second wife in the event of domestic violence and the absence of protection of the wife's rights, such as a living, gonorrhoea property, can be divorced anytime and anywhere, the status of the offspring of their children who will be born from the unregistered polygamous marriage is not clear. This is legally prohibited, but there are differences of opinion (*ikhtilaf*). If this case is accepted, the *mafsadah* that are raised are more and have a heavier quality than if this case is rejected. and closing the *mafsadah* that are more and heavier is given priority, so that what is chosen is the *mafsadah* that is lighter and less, that is, the rejection of this case. So this analysis, in essence strengthens the Judge's decision to reject case number 280/Pdt.G/2020/PA.Sbh, because of its *mafsadah qath'i* avoided first than the quality of the *mafsadah ghalib* (general, ordinary).

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