

The Use of Istifadhah Witnesses in Marriage Validation Cases in Indonesian Religious Courts

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ABSTRACT

This study discusses the use of istifadhah witnesses in marriage isbat cases in Religious Courts following the issuance of Supreme Court Circular Letter No. 10 of 2020 (SEMA). The study compares judges' considerations regarding the criteria for using istifadhah witnesses in such cases, both before and after the issuance of SEMA. The findings indicate that istifadhah witnesses provide testimony based on widely disseminated information within the community. Initially, the use of these witnesses was inadmissible as evidence in civil cases because istifadhah testimony was deemed contrary to Article 1907 of the Civil Code (KUHPerdara), which requires that witness testimony must be based on direct knowledge of the matter in question. Following SEMA, the use of istifadhah witnesses has been recognised in the validation of unregistered marriage cases involving marriages conducted long ago. The use of istifadhah witnesses, before and after SEMA, is positioned as preliminary evidence that requires corroborative evidence to support the judge's presumption. Judges consider several criteria for the use of istifadhah witnesses: first, the absence of living witnesses who can testify directly; second, the use of istifadhah witnesses must be supported by qarinah (indications or circumstantial evidence) that can reinforce the judge's presumption towards forming a conviction.

Keywords: evidence; istifadhah witness; marriage validation (isbat); religious court.

INTRODUCTION

The process of providing evidence or evidentiary process (*penyediaan bukti/pembuktian*) is a way to convince judges of the truth of an event because it will be the basis for the judge in making a decision that provides legal certainty.¹ It is a process in court that provides information about a case to strengthen the arguments put forward by one party or to refute the arguments of another party.² In an evidentiary process, evidence provides information that the judge will assess to determine which party has presented the most compelling proof of their argument. In other words, evidentiary efforts involve the litigants presenting legal evidence, both materially and formally, during the trial. This aims to convince the judge of the truth of the legal facts central to the case, allowing the judge to obtain factual certainty as a basis for decision-making.³

Evidentiary tools in Indonesian civil procedure law are regulated, among others, by the Civil Code (KUHPerdara) and the *Herzien Inlandsch Reglement (HIR)/Rechtreglement voor de Buitengewesten (RBG)*. According to Article 1866 of the Civil Code, Article 164 of the HIR, and Article 284 of the RBG, evidentiary tools in civil cases includes written evidence, witnesses, allegations,

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¹Sulaikin Lubis, *et. al. Civil Procedure Law for Religious Courts in Indonesia*, Kencana, Jakarta: 2018, p. 130.

² Juliati Br Ginting, "Civil Case Evidentiary Process", *The Juris*, Vol. 4 No. 1, 2020, p. 8.

³ Lilik Mulyadi, *Civil Proceduel Law According to Indonesian Judicial Theory and Practice*, Djambatan Publisher, Jakarta: 2002, p. 154.

confessions, and oaths.⁴ Written evidence, especially authentic deeds, has perfect evidentiary power and is binding based on Article 1870 of the Civil Code.⁵ In theory, written evidence holds the highest position among evidentiary tools in civil cases, followed by witness evidence. This differs from evidentiary tools in criminal cases where witness evidence is ranked first over written evidence, which ranks third.⁶ This distinction is clearly outlined in Article 184, paragraph (1) of Law Number 1 of 1981 concerning Criminal Procedure Law, which states that witness evidentiary tools holds the first position.

Although written evidence is the primary evidentiary tool in civil cases, there are occasions when a case lacks written evidence to prove the truth of a particular event or legal act. Therefore, other evidentiary tools, such as witnesses, must be submitted as substitutes. The presence of a witness must provide certainty to the judge in the trial regarding the events they personally saw, heard, or experienced. Additionally, the witness must not be one of the involved parties in the case.⁷ In Islamic law context, witness evidence is referred to as "*musyahadah*," which means witnessing with one's own eyes.⁸

To be an evidentiary tool, witnesses must cumulatively fulfill the formal and material requirements.⁹ Therefore, if one of the requirements contain defects, it may result in the witness evidence being invalid.¹⁰ The formal requirements for witness evidence are that the person is competent to be a witness, the witness's statement is presented at trial, the witness's confirmation is to resign as a witness if there is a blood or marriage relationship that is prohibited from testifying, the witnesses are examined one by one, and the witness takes an oath.¹¹ Several material requirements for witness evidence include the following: the statement (*keterangan*) of only one witness is invalid as evidence (a witness is not a witness, or *Unus Testis Nullus Testis*)¹²; statements by witnesses must be based on reasons and sources of knowledge; certain things are not valid as evidentiary tools (the personal opinion, suspicion, feelings, or impression of the witness); and testimony from witness are conformity to each other.¹³

One of the cases that falls under the absolute authority of the Religious Courts is marriage validation (marriage *isbat*). This type of case seeks to determine the validity of a marriage that was previously unregistered for various reasons, so it can be recognized as valid and officially recorded.¹⁴ The regulations regarding the possibility of submitting a marriage *isbat* to the Religious Court due to

⁴ Sudikno Mertokusumo, *Indonesian Civil Procedure Law*, Liberty Publisher, Yogyakarta: 2006, p. 150.

⁵ M. Yahya Harahap, *Civil Procedure Law*, Sinar Grafika, Jakarta: 2019, p. 618.

⁶ Andi Hamzah, *Principles of Criminal Law*, Rineka Cipta, Jakarta, p. 55.

⁷ Siti Salwa, Yulia, Hamdani, "Implementation of Testimonium De Auditu Witness in Marriage Itsbat Case at the Bireuen Syar'iyah Court", *Suloh*, Vol.7 No.1, 2019, p. 128.

⁸ Roihan A. Rasyid, *Religious Courts Procedure Law*, Rajawali Press, Jakarta: 2022, p. 156.

⁹ M. Yahya Harahap, *Op. Cit*, p. 712.

¹⁰ Amrullah Bustamam, "Repudiation of Witness of *Testimonium de Auditu* as Evidence in the Verdict of the Aceh Sharia Court Number 7/JN/2021/MS.Aceh", *Legitimasi: Jurnal Hukum Pidana dan Politik Hukum*, Vol. 10 No. 2, 2021, p. 93-94.

¹¹ M. Yahya Harahap, *Op. Cit*, p. 713-729.

¹² Mohammad Nurul Huda, "The Importance of Evidentiary Tools in Proving with Minimal Witnesses", *Voice Justisia*, Vol. 1 No 1, 2017, p. 103.

¹³ *Ibid.*, pp. 730-743.

¹⁴ Meita Djohan Oe, "Marriage Isbat in Islamic Law and Legislation in Indonesia," *Pranata Hukum*, Vol 8, No 2, 2013, pp. 140-141.

an unregistered marriage are stipulated in Article 7 of the Compilation of Islamic Law (KHI). The procedure for submitting a marriage isbat at the Religious Court includes application submission, registration, summons, trial, and settlement. In most cases where written evidence is lacking, the common practice is to present witnesses known as *istifadhah* witnesses. *Istifadhah* witnesses are presented by the applicant if there are no witnesses who saw it directly who are still alive and there is no written evidence. Generally, an *istifadhah* witness is defined as someone who provides testimony based on widely known information among the public.¹⁵ A testimony that is not known to oneself, experienced by oneself, or heard by oneself regarding the truth of the marriage contract process, but the person knows from the community or based on the fact that the parties have lived together for a long time and the local community believes that the parties are a married couple.¹⁶ Testimony (*kesaksian*) that is not obtained directly but from another party is called *Testimonium de Auditu* in Latin.¹⁷

Initially, the use of *Testimonium de Auditu* or *istifadhah* witness was generally rejected as witness evidence because it did not meet the material requirements of a testimony.¹⁸ Then, the Supreme Court through Supreme Court Circular Letter (SEMA) Number 10 of 2020 confirmed the use of *istifadhah* witnesses or *Testimonium de Auditu* in marriage isbat or waqf pledge cases, which has long been the case in both voluntary and *contentiosa* cases. The testimony of witnesses who witnessed the marriage event directly is still prioritized. However, SEMA 10 of 2020 accommodates marriages that occurred a long time ago so that it is not possible to present witnesses who witnessed it directly. In practice at the Religious Courts, long before the existence of SEMA Number 10 of 2020, judges utilized *istifadhah* witnesses as evidentiary tools in marriage isbat cases. However, judges did not rely solely on *istifadhah* witnesses; there were also witnesses present during the unregistered marriage ceremony.

The introduction of Supreme Court Circular Letter (SEMA) Number 10 of 2020 on the Formulation of Law in Religious Chambers is viewed positively. However, there are still some unclear aspects regarding the use of *shahadah al-istifadhah* (*istifadhah* witness) in marriage isbat cases. These include the absence of regulations concerning the role of *istifadhah* witnesses in marriage isbat cases either as substitutes for witnesses present during past marriages or merely as supplementary evidence. Additionally, SEMA 10 of 2020 has not established criteria for judges in using *istifadhah* witnesses to resolve marriage isbat cases. This research is important to determine the position of *istifadhah* witnesses in marriage isbat cases in the Religious Courts and to identify the limits on the criteria for judges in using *istifadhah* witnesses before and after the publication of SEMA Number 10

¹⁵ Muhammad Fajar Al-Shiddiq, "The Position of the *Istifadhah* Witness in the *Contentiosa* Marriage Isbat Case at the Cimahi Religious Court", (Undergrad. Thesis UIN Sunan Gunung Djati Bandung, 2023), p. 43.

¹⁶ Abdil Baril Basith, "Practice of Proof in Petitions for Marriage Validation (Marriage *Itsbat*)", https://www.patalu.go.id/front.php?page=artikel&id_artikel=1 (accessed on 10 February).

¹⁷ Rohmat Arif, Fathurrahman Alfa, Syamsu Madyan, "Analysis of the Strength of Witness Evidential Tool *Testimonium de Auditu* in Divorce Cases at the Religious Courts of Malang City", *Jurnal Ilmiah Ahwal Syakhshiyah*, Vol. 2 No. 2, 2020, p. 25.

¹⁸ M. Yahya Harahap, *Op. Cit.*, p. 744.

of 2020. This is because the SEMA does not specify criteria limits for the use of istifadhah witnesses. Criteria limitations are needed to maintain the uniformity of legal application and consistency of decisions.

METHODS

This research is normative juridical research, which places law as a framework for a system of norms. The nature of this research is descriptive. Descriptive research is conducted to obtain an objectively clear picture of a condition or situation regarding the object being studied.¹⁹ The data collection technique for this research uses a literature study by reading materials obtained from the library, including books, journals, archives, and documents, to understand the existing theories and identify solutions to the research problems. This research is supported by field studies through interviews with sources, consisting of judges from the Yogyakarta Religious Court, to obtain data related to the use of istifadhah witnesses in marriage validation (*isbat*) cases based on SEMA Number 10 of 2020. Research data analysis is Qualitative analysis. Qualitative analysis is a method of research analysis that requires in-depth understanding.²⁰

DISCUSSION

Analysis of the Use of *Istifadah* Witnesses in Marriage *Isbat* Cases in Religious Courts based on SEMA Number 10 of 2020

Isbat nikah is a legalization of marriage made on the basis of an unregistered marriage by an authorized Marriage Registrar officer. Marriage registration is not included in the requirements for the validity of marriage in fiqh. The *ulama* at that time did not consider marriage registration as something important and beneficial. On the other hand, marriage registration is not prohibited in Islam, and even brings many benefits such as peace, legal certainty, and preventing the occurrence of monogamous or polygamous marriages that are fraudulent. The benefits in this case are classified as *mursalah* benefits because they take provisions that do not have previous provisions but require the benefits of the community. The existence of considerations of interest requires the registration of marriages as stated in Law Number 1 of 1974, Article 2 paragraph (2) and Article 5 paragraph (1) of the Compilation of Islamic Law. Article 5 paragraph (1) of the KHI clearly states "To ensure orderly marriages for the Islamic community, every marriage must be registered". Article 6 of the KHI regulates that marriages must be carried out in the presence of and under the supervision of a Marriage Registrar. The legal basis for marriage validation (*isbat*) is Article 7 paragraph (2) of the Compilation of Islamic Law (KHI), which states that marriages without a marriage certificate can be submitted for marriage *isbat* to the Religious Court. The Religious Court can grant a request for marriage *isbat*, as long as the marriage meets the requirements and pillars of marriage according to Islamic law and does not violate any marriage prohibitions. Applications for marriage *isbat* to the Religious Courts, based on Article 7 of the KHI, are related to marriages for resolving divorce, loss of

¹⁹ Jonaedi Efendi, Prasetijo Rijadi, *Metode Penelitian Hukum*, Kencana, Jakarta: 2022, p. 57

²⁰ Suteki, Galang Taufani, *Legal Research Methodology*, Raja Grafindo Persada, Depok: 2020.

marriage certificates, doubts regarding the validity of marriage conditions, marriages that occurred before the enactment of Law Number 1 of 1974 concerning Marriage (*Undang-undang Perkawinan*/Marriage Law/UUP), and marriages conducted by those who do not have obstacles to marriage according to the Marriage Law.

The process of examining a marriage validation (*isbat*) application submitted by both husband and wife is voluntary, and the outcome is in the form of a decree (*penetapan*). If the decree rejects the request for marriage *isbat*, then the husband and wife together or individually can file for cassation. Meanwhile, the process of examining a marriage *isbat* application submitted by only one spouse is contentious, with the non-applicant spouse being designated as the Respondent (*pihak termohon*). The outcome is in the form of a decision (*putusan*), and this decision can be appealed and taken to cassation. The marriage *isbat* application submitted by a child, marriage guardian, or other concerned parties must be contentious, with the husband and wife and/or other heirs being designated as Respondents (*termohon*). If the surviving spouse does not know of any other heirs besides themselves, the marriage *isbat* application is submitted voluntarily, and the outcome is in the form of a decree (*penetapan*). If the application is rejected, the Applicant can file for cassation.²¹

One of the court processes for a marriage *isbat* application that must be passed is the evidentiary stage. This stage in the Religious Courts uses Civil Procedure Law which refers to the provisions in Articles 164 HIR, 284 RBg and 1866 Civil Code (KUHPerdara).²² The evidentiary tools used in the evidentiary process in the Religious Courts is written evidence, testimony, allegations, confessions, and oaths.²³ In civil trials, there is a possibility that written evidence is not available, or that written evidence is available but does not meet the minimum threshold for providing evidence.²⁴ Written evidence that does not meet the minimum threshold is only valued as a preliminary form of written evidence.²⁵

The use of witnesses is permitted in all cases unless otherwise determined by law and is used to perfect the preliminary of the written evidence.²⁶ Witness testimony evidentiary tools has formal and material requirements that are cumulative. Therefore, if one of the formal or material requirements contains defects, it will result in the witness's evidence becoming invalid. According to their function, witnesses who serve as evidence at trial are different from witnesses as a legal requirement.²⁷ Witnesses as a legal requirement for marriage are two individuals who witness the marriage oath (*ijab kabul*) between the marriage guardian and the groom. If the marriage is registered by the marriage registrar officer, then the witnesses, as a legal requirement, are those who also sign

²¹ Supreme Court of the Republic of Indonesia, *Op. Cit.*, p. 154-155.

²² Article 54 Law Number 7 of 1989 on Religious Courts.

²³ Ihdi Karim Makinara, Jamhir, Sarah Fadhilah, "Testimonium De Auditu Witness in Divorce Cases According to Islamic Law", *El-Usrah*, Vol. 3 No. 2 (July-December 2020), p. 228.

²⁴ M. Yahya Harahap, *Op. Cit.*, p. 701.

²⁵ *Ibid.*

²⁶ M. Yahya Harahap, *Op. Cit.*, p 702.

²⁷ Roihan A. Rasyid, *Op. Cit.*, p. 160.

the marriage document. As a legal requirement, these witnesses can serve as evidence in the marriage isbat trial.²⁸

The formal requirements for witness evidentiary tools are that the person is competent to be a witness, the witness's statement is presented at trial, the witness's confirmation to resign as a witness if there is a blood or marriage relationship that is prohibited from testifying, the witnesses are examined one by one, and the witness takes an oath.²⁹ Several material requirements for witness evidence, among others, are the statement of only one witness is invalid as evidence (a witness is not a witness or *Unus Testis Nullus Testis*)³⁰, statements by witnesses must be based on reasons and sources of knowledge; certain things are not valid as evidentiary tools (the personal opinion, suspicion, feelings, or impression of the witness); and mutual agreement.³¹

Aside from witnesses who meet the formal and material requirements to have their testimony heard before the trial, the Religious Court also uses *istifadhah* witnesses as evidence in marriage *isbat* cases. *Istifadhah* witnesses are witnesses who give testimony based on news that is widely spread among the public, which in general civil procedural law is also called *Testimonium de Auditu*.³² Civil procedure law rejects the *Testimonium de Auditu* as witness evidence because it does not meet the material requirements as a witness.³³ The rejection of *Testimonium de Auditu* has a fundamental reason, as it is another person's statement which may contain the risk of error.³⁴ *Testimonium de Auditu* is generally rejected as an evidentiary tool based on Article 1907 of the Civil Code because the witness's statement is not based on direct experience, sight, or hearing regarding the subject matter of the case.³⁵ Based on Decree Number 66/Pdt.P/2018/PA.MS, Decree Number 1116/Pdt.G/2019/PA.Tgr, Decree 91/Pdt.P/2021/PA.Blu and Decree Number 9/Pdt.G/2022/PA.Sbh using *istifadhah* witnesses from the applicant's neighbors or friends of the applicant's parents.

The use of *istifadhah* witnesses in marriage *isbat* cases requires the judge to be careful in deciding. One way for the judge to ensure that the *istifadhah* witness is a witness who really knows about the existence of a marriage that took place in the past is for the judge to ask the *istifadhah* witness about the marriage requirements regarding whether the marriage between the bride and groom has been fulfilled or not. If the *istifadhah* witness in a marriage *isbat* case understands Islamic law, especially the requirements for the pillars of marriage, then his statement can be considered by the judge.³⁶ According to Harahap, *Testimonium de Auditu* in civil procedural law is justified as witness evidence as long as the direct witness involved in the legal event has died, and the *de Auditu*

²⁸ *Ibid.*, p. 161.

²⁹ M. Yahya Harahap, *Op. Cit.*, p. 713-729.

³⁰ Mohammad Nurul Huda, *Op. Cit.*, p. 103.

³¹ *Ibid.*, p. 730-743.

³² Roihan A. Rasyid, *Op. Cit.*, p. 168.

³³ M. Yahya Harahap, *Op. Cit.*, p. 744.

³⁴ Amrullah Bustamam, *Op. Cit.*

³⁵ *Ibid.*

³⁶ Based on the results of interviews with sources, Dr. H. Ahmad Zuhdi, S.H., M.Hum. on 07 June 2024, a judge at the Yogyakarta Religious Court.

witness's statement is a message from the perpetrator of the case or a direct witness involved in the legal event.³⁷

An example of the difficulty in proving a domestic violence (KDRT) case in a divorce trial is that the perpetrator often commits the act when alone with their spouse. In such cases, witnesses who have heard the victim's account of the domestic violence can be used to meet the evidentiary requirements of the divorce trial.³⁸ The testimony of *de Auditu* witnesses and the use of a single witness who is not a witness (*Unus Testis Nullus Testis*) in cases of domestic violence (KDRT) and morality allow for the expansion of the interpretation of Article 184 of the Criminal Procedure Code (KUHP).³⁹ This is also based on the Constitutional Court decision Number 65/PUU-VIII/2010 which allows *Testimonium de Auditu* statements in criminal cases.⁴⁰

The use of *istifadhah* witnesses as presumptive evidentiary tool must not only be drawn based on the testimony but must be assisted from the source of the deed or objection submitted at the trial.⁴¹ Based on Article 1922 of the Civil Code, judges are given the authority to consider something to be established as presumptive evidentiary tool, provided it is done carefully and meticulously. *Testimonium de Auditu* is exceptionally recognized to obtain the truth of a case when the main witness who experienced, saw, and heard the event has passed away.⁴² *Testimonium de Auditu* exceptionally meets the material requirements for witness evidence if the witness provides testimony under an oath.⁴³ *Testimonium de Auditu* can stand alone to meet the minimum threshold of proof without requiring other evidence if the testimony is given by several *testimonium de Auditu* witnesses.⁴⁴

The shahadah al-istifadhah, another name for the witness of *istifadhah*, according to Islamic jurisprudence, which is generally rejected as evidence because it does not meet the material requirements, can have its testimony accepted in court due to the issuance of the Supreme Court Circular Letter Number 10 of 2020.⁴⁵ There are two court decisions that use *istifadhah* witnesses after the issuance of Supreme Court Circular Letter (SEMA) 10 of 2020, namely the Decision of the Bolaang Uki Religious Court Number 91/Pdt.P/2021/PA.Blu and the Decision of the Sibuhuan Religious Court Number 9/Pdt.G/2022/PA.Sbh.

³⁷M. Yahya Harahap, *Op. Cit.*, p. 746.

³⁸ Nedi Gunawan Situmorang, "The Legal Standing of Testimonium de Auditu as Valid Evidence Before and After Constitutional Court Decision No. 65/PUU-VIII/2010", *PALAR*, Vol. 6 No. 2 (Jul-Dec 2020).

³⁹ Ainal, Mardiah, *The Evidentiary Strength of Testimonium de Auditu and Unus Testis Nullus Testis*, <https://www.pt-nad.go.id/new/content/artikel/20230711101141199456115664ad2add390de.html> (accessed on 20 May 2024).

⁴⁰ Based on the results of interviews with sources, Dr. H. Ahmad Zuhdi, S.H., M.Hum. on 07 June 2024, a judge at the Yogyakarta Religious Court.

⁴¹ M. Yahya Harahap, *Op. Cit.*, p. 747.

⁴² *Ibid.*

⁴³ Ihdi Karim Makinara, Jamhir, Sarah Fadhilah, "Testimonium de Auditu Witnesses in Divorce Cases according to Islamic Law", *El-Ussrah*, Vol. 3 No. 2 (Jul-Dec 2020).

⁴⁴ *Ibid.*

⁴⁵ Based on the results of interviews with sources, Dr. H. Ahmad Zuhdi, S.H., M.Hum. on 07 June 2024, a judge at the Yogyakarta Religious Court.

In the Decision of the Bolaang Uki Religious Court Number 91/Pdt.P/2021/PA.Blu, the judge considered the use of two *istifadhah* witnesses because the marriage witnesses could no longer be presented. Based on the living law in the surrounding community that strongly adheres to Islam, it is not possible for a man and a woman to live together without a marriage bond for years. In the Decision of the Sibuhuan Religious Court Number 9/Pdt.G/2022/PA.Sbh, the judge of the Sibuhuan Religious Court also considered the testimony of two *istifadhah* witnesses because they found the legal fact that witnesses who directly observed the petitioner's *sirri* (unregistered) marriage were already difficult to find. Additionally, the judge considered the confessions from Respondents I, II, and III, who are the children of the petitioners for marriage validation (*isbat*). Based on Article 311 of the Rbg (*Rechtsreglement Buitengewesten*), it states that a pure and complete confession made before a judge constitutes perfect, binding, decisive, and compelling evidence.

The use of *istifadhah* witnesses in Marriage Validation (*Isbat Nikah*) Cases in Religious Courts has gained legitimacy based on Supreme Court Circular Letter (SEMA) Number 10 of 2020. Although the use of *istifadhah* witnesses is justified for validating marriages where the unregistered (*siri*) marriage occurred long ago (both in voluntary and contentious cases) based on the two decisions above, *istifadhah* witnesses are not used as the sole evidence because there is still evidence in the form of confessions from the petitioners and respondents. After the issuance of SEMA Number 10 of 2020, the judges' decisions tend to be uniform in assessing the use of *istifadhah* witnesses.⁴⁶ *Istifadhah* witnesses are used only as preliminary evidence.⁴⁷ The presence of *istifadhah* witnesses is positioned as supporting/supplementary evidentiary tool to strengthen the judge's suspicions, not as witness evidence as in Article 171 HIR and 1907 of the Civil Code.⁴⁸

Comparative Analysis of Criteria for Using *Istifadhah* Witnesses in *Isbat* Marriage Cases in Religious Courts Before and After SEMA Number 10 of 2020

A comparison of judges' considerations in using *istifadhah* witnesses as evidentiary tools in marriage validation (*isbat*) cases before and after the issuance of Supreme Court Circular Letter Number 10 of 2020 is written in the following table:

Table 1. Judges' Considerations on Using *Istifadhah* Witnesses in *Isbat* Marriage Cases Before Supreme Court Circular Letter Number 10 of 2020

	Decision/Decree Number	Judges' Consideration
Before SEMA 10 of 2020	Decree Number 66/Pdt.P/2018/PA.MS	1. Three witnesses fulfilled the formal requirements based on Articles 171-175 Rbg 2. One witness was not present (<i>istifadhah</i>) at the marriage ceremony.

⁴⁶ Based on the results of interviews with sources, Dr. H. Ahmad Zuhdi, S.H., M.Hum. on 07 June 2024, a judge at the Yogyakarta Religious Court.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

		<p>The legal basis for <i>testimonium de auditu</i>:</p> <ol style="list-style-type: none"> 1. Doctrine of M. Yahya Harahap 2. Wahbah Zuhaili's opinion, who is a fiqh scholar, on the use of <i>istifadhah</i> witnesses 3. Doctrine of Abdul Manaf on the use of <i>istifadhah</i> witnesses 4. Considering the results of the National Working Meeting (<i>Rakernas</i>) of the Supreme Court of the Republic of Indonesia in 2007 and the Regional Working Meeting (<i>Rakerda</i>) of the Jambi High Court in 2014 regarding the case-by-case use of <i>istifadhah</i> witnesses as evidentiary tools 5. Considering the statements of the three witnesses that are in accordance with each other thus the witnesses' compliance with Article 309 Rbg
Decision	Number	<ol style="list-style-type: none"> 1. One <i>istifadah</i> witness is a neighbor of the Petitioner and Respondent 2. One witness who was present at the ceremony was the family of the Petitioner and Respondent 3. Other pieces of evidentiary tools are the confessions of the parties regarding marriage <p>Legal basis for <i>testimonium de auditu</i>:</p> <ol style="list-style-type: none"> 1. accepting one <i>istifadah</i> witness because it is difficult to find a witness who saw the marriage contract procession directly because it happened so long ago, 2. The Book of Subulus-salam Juz (Volume) IV about 26 events that can be proven by witnesses of <i>istifadah</i>, one of which is marriage 3. Using judge's judicial presumptions
1116/Pdt.G/2019/PA.Tgr		

Source: Secondary Data 2024, Processed by author(s)

Based on Table 1 above, it can be observed that the use of *istifadhah* witnesses in marriage *isbat* cases before the enactment of SEMA No. 10 of 2020 tended to complement evidence that already met the minimum requirements for admissible evidence (e.g., in the case of Decision No. 66/Pdt.P/2018/PA.MS, there were already three witnesses who met the procedural legal requirements, along with the parties' admissions). In other *isbat nikah* cases, *istifadhah* witnesses were intended to complete the required evidence when the existing witness testimonies did not meet the minimum number of witnesses (e.g., in Decision No. 1116/Pdt.G/2019/PA.Tgr, there were only

witnesses who testified to the unregistered marriage of the parties, along with additional evidence in the form of the parties' admissions).

Table 2. Judges' Consideration in Using *Istifadhah* Witnesses in Marriage Validation Cases After Supreme Court Circular Letter Number 10 of 2020

	Decision/Decree Number	Judges' Consideration
After SEMA 10 of 2020	Decree 91/Pdt.P/2021/PA.Blu	<ol style="list-style-type: none"> 1. Two <i>istifadah</i> witnesses because the marriage witnesses could no longer be present 2. The applicant's confession of an unregistered marriage that occurred in the past <p>The legal basis for <i>testimonium de auditu</i>: The prevailing law in the community is Islamic law, which is very strong, making it impossible for a man and a woman to live together for years in that environment.</p>
	Decision Number 9/Pdt.G/2022/PA.Sbh	<ol style="list-style-type: none"> 1. The respondents' confessions are pure and complete confessions that have perfect, binding, decisive, and compelling evidentiary strength based on Article 311 of the Rbg. 2. Two <i>istifadhah</i> witnesses, because the witnesses who directly observed the marriage of the petitioner and the late Mudzakir are difficult to present due to the fact that they have passed away. <p>Legal basis for <i>testimonium de auditu</i>:</p> <ol style="list-style-type: none"> 1. The judges' used the opinion of <i>fiqh</i> scholar Wahbah Zuhaili and other <i>fiqh</i> scholars regarding <i>istifadhah</i> witnesses. 2. The Judges' used the doctrine of M. Yahya Harahap 3. Abdul Manaf regarding the use of <i>testimonium de auditu</i> witnesses and <i>istifadhah</i> witnesses. 4. The judge's considerations took into account the jurisprudence of the Supreme Court 239K/Sip/1973, 5. The results of the National Working Meeting of the Supreme Court of the Republic of Indonesia in 2007 and the Regional Working Meeting of the Jambi High Court in 2014 regarding the use of <i>istifadhah</i> witnesses case-by-case as evidence, 6. Consider the Supreme Court Circular Number 10 of 2020 regarding the use of <i>istifadhah</i> witnesses that can be justified for marriage isbat events that occurred in the past.

Source: Secondary Data 2024, processed by author(s)

Based on Table 2 regarding the use of *istifadhah* witnesses after the enactment of SEMA No. 10 of 2020, it is evident that *istifadhah* witnesses can be utilised in marriage *isbat* cases even in the absence of other evidence apart from the admissions of the parties. Here, it is apparent that judges' considerations are influenced by Islamic procedural law concerning the application of *istifadhah* witnesses, wherein *syahadah istifadhah* is deemed valid testimony and serves as one of the factors for judicial decision-making. In criminal cases, scholars (*fuqaha*) permit the use of *syahadah istifadhah* in any matter.⁴⁹ Given that *syahadah istifadhah* is allowed in criminal cases, where procedures and evidence are regarded as more detailed and stringent, it is unsurprising that its application is permitted in civil cases within Religious Courts. An example of the difficulty of proving in a divorce trial for Domestic Violence (KDRT) is because the party committing the KDRT often does the act when alone with their spouse. In this case, a witness who heard the story from the victim of KDRT can be used to fulfill the evidence for the divorce trial. The testimony of a Testimonium de Auditum witness and the use of one non-Witness (*Unus Testis Nullus Testis*) in cases of KDRT and morality allows for an expansion of the meaning of Article 184 of the Criminal Procedure Code (KUHAP). This is also based on the decision of the Constitutional Court Number 65/PUU-VIII/2010 which allows testimony of Testimonium de Auditum in criminal cases. In addition, based on an article written by the Judge of the Pengadilan Tinggi Banda Aceh, it states that in certain cases that are intended to protect the interests of vulnerable groups, especially women, children and the disabled who are victims, the principle of *Unus Testis Nullus Testis* can be exceeded by the judge. The action was taken solely for the best interests of the victim. Likewise, Testimonium De Auditum can also be accepted for the same reasons as the Constitutional Court Decision Number 65/PUU-VIII/2010 which recognizes the testimony of witnesses Testimonium De Auditum in criminal trials. This aligns with the definition of *syahadah istifadhah* in Islamic law, which refers to testimony regarding a matter widely known and accepted by the local community as true, despite the witnesses not having directly seen or experienced it themselves.

Law is required to provide solutions to all disputes and problems that occur in society.⁵⁰ Indonesia, as a country with a majority Muslim population, aligns with the need for dispute resolution based on Islamic law.⁵¹ This situation is facilitated by the state through the institution of the Religious Courts. The Religious Courts are courts for people who are of the Islamic faith (Article 1 of Law Number 50 of 2009 concerning Amendments to Law Number 7 of 1989 on Religious Courts). Based on Article 49 of Law Number 3 of 2006 concerning Amendments to Law Number 7 of 1989 on Religious Courts, the Religious Courts are responsible for examining, deciding, and resolving cases at

⁴⁹ Muhammad Idzhar, Sabnah, "Comparative Study: The Position of Testimonium de Auditum in Indonesian Courts", *Qonun: Jurnal Hukum Islam dan Perundang-Undangan*, Vol. 8 No 1, 2024, p. 35-66.

⁵⁰ Based on the results of interviews with sources, Dr. H. Ahmad Zuhdi, S.H., M.Hum. on 07 June 2024, a judge at the Yogyakarta Religious Court.

⁵¹ Latifatul Fajriyyah, Alfitri, "Hearsay Evidence Admissibility: Due Process and Evidentiary Rules in Muslim Marriage Legalization (*Isbat Nikah*)", *Fiat Justisia Jurnal Ilmu Hukum*, Vol. 16, No. 3, 2022, p. 272.

the first level between people of the Islamic faith in the fields of marriage, inheritance, wills, grants, endowments, *zakat*/alms, donations, charity, and sharia economics.⁵²

There are many problems whose solutions are not listed in statutory regulations.⁵³ Therefore, judges, especially Religious Court judges, must refer to the *maqashid sharia*.⁵⁴ *Maqashid sharia* are the goals of sharia intended by Allah in every law he has established to realize the benefit of humans.⁵⁵ Judges are given discretion in deciding cases to apply material law in the enforcement of formal law. This discretion allows judges, in their considerations, to not only rely on statutory regulations but also to engage in legal discovery of norms that are applicable in the local community, as well as doctrines from legal scholars and Islamic jurists.⁵⁶

Based on research that compares judges' considerations in the use of *istifadhah* witnesses, differences were found in how judges interpret the phrase "occurred a long time ago" in Supreme Court Circular Letter (SEMA) Number 10 of 2020. In the Bolaang Uki Religious Court Decision Number 91/Pdt.P/2021/PA.Blu, the judge granted the marriage isbat using *istifadhah* witnesses for a marriage that occurred 22 years ago, in 2002. In the Sibuhuan Religious Court Decision Number 9/Pdt.G/2022/PA.Sbh, the judge granted the marriage isbat using *istifadhah* witnesses for a marriage that occurred 38 years ago, in 1986. In the Muara Sabak Religious Court Decision Number 66/Pdt.P/2018/PA.MS, the judge granted the marriage isbat for a marriage that occurred one year after the sirri marriage took place. This shows that there are no specific criteria or time frame for when a sirri marriage can be considered "occurred a long time ago" and thus allowed to use *istifadhah* witnesses. The interpretation of "occurred a long time ago" may also refer back to Article 7 paragraph (3) letter d of the Compilation of Islamic Law, which concerns marriages that occurred before the enactment of Law Number 1 of 1974 on Marriage. The phrase "has occurred a long time" should be given a certain time limit to provide legal certainty.

The various interpretations of the phrase "has occurred a long time ago" lead judges to consider specific criteria before using *istifadhah* witnesses. The main criterion for judges in using *istifadhah* witnesses for marriage isbat cases is that the witnesses present at the sirri marriage must be confirmed as the only witnesses or interpreted as no longer having contemporaries who are still alive. Additionally, judges must still rely on qorinah or postulates that can support the evidence and lead to judicial presumption. Therefore, *istifadhah* witnesses cannot stand alone as evidence. *Istifadhah* witnesses are still positioned as "circumstantial evidence", which requires additional evidence to become a strong basis for judicial presumption.⁵⁷

⁵² Linda Firdawaty, "Analysis of Law No. 3 of 20026 and Law No. 50 of 2009 concerning the Power of Religious Courts", *Al-Adalah*, Vol X, No. 2, 2011, pp. 213-220.

⁵³ Based on the results of interviews with sources, Dr. H. Ahmad Zuhdi, S.H., M.Hum. on 07 June 2024, a judge at the Yogyakarta Religious Court.

⁵⁴ Based on the results of interviews with sources, Dr. H. Ahmad Zuhdi, S.H., M.Hum. on 07 June 2024, a judge at the Yogyakarta Religious Court.

⁵⁵ Ahmad Jalili, "Maqashid Sharia Theory in Islamic Law, *Teraju: Jurnal Syariah dan Hukum*, Vol. 3, No. 2, 2021, p. 11.

⁵⁶ Based on the results of interviews with sources, Dr. H. Ahmad Zuhdi, S.H., M.Hum. on 07 June 2024, a judge at the Yogyakarta Religious Court.

⁵⁷ Based on the results of interviews with sources, Dr. H. Ahmad Zuhdi, S.H., M.Hum. on 07 June 2024, a judge at the Yogyakarta Religious Court.

Civil procedural law, particularly in Religious Courts, has evolved not only to realize material law but now also to seek formal truth. The pursuit of formal truth aims to uphold accuracy and justice in accordance with the functions of the judiciary. In marriage validation (*isbat*) cases, formal truth relates to the validity of marriages that occurred in the past. Judges validate the legitimacy of the marriage being *isbat* by inquiring about the marriage's essential elements and requirements. Judges ask about the marriage guardian, witnesses, and dowry because there are cases in practice where the marriage *isbat* did not correctly use a guardian or female marriage witnesses.⁵⁸ Based on Article 25 of the Compilation of Islamic Law (KHI), those who can be appointed as witnesses must be Muslim men who are just, mature (*aqil baligh*), not mentally impaired, and not deaf.

The criteria for using *istifadhah* witnesses accepted by the judge are in line with the Supreme Court Decision Number 239/K/Sip/1973, which considers that direct witnesses are no longer available due to having passed away and that there is no documentary evidence.⁵⁹ Supreme Court Circular Letter Number 10 of 2020 is a regulation that exceptionally governs the use of *istifadhah* witnesses in marriage validation cases (*isbat nikah*) that occurred a long time ago, to maintain uniformity in legal application and consistency in decisions at the Religious Courts, particularly in marriage *isbat* cases.

CLOSING

The use of *istifadhah* witnesses after the enactment of SEMA No. 10 of 2020, it is evident that *istifadhah* witnesses can be utilised in marriage *isbat* cases even in the absence of other evidence apart from the admissions of the parties. Judges, in determining the criteria for using *istifadhah* witnesses in marriage *isbat* cases, both before and after the Supreme Court Circular Letter (SEMA) Number 10 of 2020, consider that the witnesses present at the unregistered (*siri*) marriage must be verified as the only witnesses or, in other words, as the only surviving contemporaries. Additionally, judges must use corroborative evidence (*qorinah*) or postulates that support and strengthen the judge's inference. SEMA Number 10 of 2020 is a regulation that exceptionally governs the use of *istifadhah* witnesses in marriage *isbat* cases that occurred long ago, in order to maintain consistency in the application of law and judicial decisions in the Religious Courts, particularly concerning marriage *isbat* cases.

Judges are expected to include Supreme Court Circular Letter (SEMA) Number 10 of 2020 as one of their considerations, as this Circular Letter provides exceptional regulations regarding the use of *istifadhah* witnesses in marriage *isbat* cases. This is to ensure consistency in the application of the law and the coherence of judicial decisions. In addition, The phrase "has occurred a long time" should be given a certain time limit to provide legal certainty.

⁵⁸ *Ibid.*

⁵⁹ M. Yahya Harahap, *Op. Cit.*, p. 746.

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