Hearsay Evidence Admissibility: Due Process and Evidentiary Rules in Muslim Marriage Legalization (Isbat Nikah)

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Abstract

The hearsay evidence is still debated as valid witness evidence in Indonesian civil procedural law. Consequently, there is a disparity in judges’ decisions in handling religious civil cases when the evidence is from “hearsay witnesses.” A case in point is the decision on the application for marriage legalization issued by the Samarinda Religious Court, which received hearsay evidence, and the Samarinda Religious High Court, which rejected it. This paper intends to examine the judge’s considerations in accepting or rejecting hearsay evidence in marriage legalization applications to understand whether these considerations have used appropriate legal arguments per the principles of justice and legal certainty. As a normative-doctrinal legal study, this paper uses case law, statutory, and conceptual approaches in its discussion. It shows that the Samarinda Religious Court accepted hearsay evidence because they considered the exceptional circumstances of the marriage event that they wanted to prove. On the other hand, the Samarinda Religious Higher Court rejected the hearsay evidence because a “hearsay witness” could not be used in a contentious case. Even so, the two decisions have not provided clear legal arguments in accepting or rejecting the hearsay evidence. The development of procedural law jurisprudence in Indonesia opens up opportunities for its use in the evidentiary process to create justice and legal certainty for justice seekers.

Keywords: Hearsay Evidence, Muslim Marriage Legalization, Evidentiary Rules, Fairness, Legal Certainty.

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A. Introduction

In the practice of civil proceedings, it is common for judges to have differences in applying the rule of law with consideration for public interest based on justice and legal certainty. One of the differences is in terms of examination and receipt of evidence in the form of witnesses. There are often obstacles to proving cases at trial using witness evidence because the cases being tried occurred decades ago. As a result, it is challenging to present witnesses who have seen or experienced the legal events themselves, as illustrated in the case of an application for marriage legalization (isbat nikah) in Decision Number 1003/Pdt.G/2017/PA.Smd. the application was submitted by a wife whose husband died in 2016. Their marriage has occurred since 10 December 1989, so the proof is only “hearsay witnesses” who were accepted as evidence by the Samarinda Religious Court (after this PA Samarinda). However, when an appeal was filed against the Decision, the Samarinda Religious Higher Court (after this PTA Samarinda) explained that the “hearsay witnesses” were rejected as evidence in their decision Number 14/Pdt.G/2018/PTA.Smd.

In principle, hearsay evidence, known as testimoniun de auditu in Indonesian procedural law, is not justified in the law of evidence because the information presented is not based on personal experience. Article 171(1) Herzien Inlandsch Reglement (after this HIR) confirms that witnesses who are justified by the law are witnesses who have seen and experienced a legal event themselves. Hearsay Evidence is evidence that cannot be accounted for because it is deemed empty facts.

Several researchers have carried out legal research on hearsay evidence applications. Situmorang explains the legal position of hearsay evidence in proving criminal cases before and after the Constitutional Court’s decision Number 65/PUU-VIII/2010. According to him, hearsay evidence does not have a legal force that binds judges to formulate criminal case decisions. In another study, Makinara et al. argued that the evidence with “hearsay witnesses” in divorce cases justified by the judge was not following Islamic law. “Hearsay witnesses,” known in Islam as istifadhah witnesses, are only justified in cases of lineage, death, marriage, and property ownership.

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2 Hari Sasangka, Hukum Pembuktian dalam Perkara Perdata, (Bandung: Mandar Maju, 2005), p. 84.
Sururie’s research aligns with this research, but it focuses on divorce cases by comparing the first instance court’s decision, which accepted the “hearsay witnesses” as evidence, and the appeal court, which rejected them. The first-level judge who received the testimony of “hearsay witnesses” in divorce cases was justified by law because it was based on a juridical basis sourced from the Supreme Court Cassation Decision Number 308K/Pdt/1959 by classifying the hearsay evidence as the basis to form judges’ presumption.  

In general, the Religious Courts in Indonesia accept *de auditu* witnesses only for civil law of application cases. In the divorce case that submitted evidence of *de auditu* witnesses, the Panel of Judges of the Palangka Raya Religious Court constructed it as evidence of presupposition with objective and rational considerations. However, in the realm of criminal law, *de auditu* testimony is declared not following the category of witness testimony as referred to in Article 1 number (27) of the Criminal Procedure Code because such a witness does not have the power of proof as evidence in general.

In the case of the marriage *isbat* application, which also submitted evidence in the form of *de auditu* witnesses by the Malang Religious Court Judges, it was accepted as evidence, so the marriage *isbat* application to take care of retired widows was granted. It is different from this study, namely regarding the marriage *isbat* application submitted to obtain inheritance rights from the Petitioner’s late husband, who also submitted evidence of *de auditu* witnesses received a rejection by the Panel of PTA Samarinda Judges. However, previously the *de auditu* testimony was accepted as evidence by the PA Samarinda Judges.

The novelty this article is the studies mentioned above are still limited to explaining the judge’s assessment of the legal strength of the “hearsay witnesses” as evidence in both the criminal and civil realms. An important point in assessing “hearsay witnesses” as evidence is related to the judges’ caution in assessing and providing legal considerations on a case-by-case basis based on the evidentiary rules so that it can reflect the value of justice and legal certainty. It is hoped that with this study, it can be concluded whether hearsay evidence should be accepted in Islamic civil cases in the Religious Courts by considering its function to produce fair decisions. Furthermore, this

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study can serve as a basis for the Supreme Court to fill in the gaps in the procedural law regarding the use of hearsay evidence in the Religious Courts for cases of marriage legalization because the marriage event took place in the past. The Supreme Court currently issues many internal regulations in the form of a Supreme Court Circular (SEMA) to maintain the unity of law application and consistency of decisions in the Supreme Court.\(^\text{10}\) There is a lack of civil procedural law in Indonesia: it could be because the civil procedural law is still an old product (HIR), or it could be due to advances in information technology and knowledge.

In analyzing the judges’ considerations in accepting or rejecting hearsay evidence, this paper relates it to the law of evidence and the principles of justice and legal certainty. This study explicitly describes the case of an application for marriage legalization that submits “hearsay witnesses” as evidence. There is an inconsistency between the judges at the first instance court and the appeal court in applying the law. For this reason, this paper examines the PA Samarinda Decision Number 1003/Pdt.G/2017/PA. Smd. Smd and the PTA Samarinda Decision Number 14/Pdt.G/2018/PTA. It refers to several laws and regulations and jurisprudence that mainly regulate the law of evidence using witnesses as evidence. Hence, it reveals the broad picture of the judges’ considerations in applying the law to hearsay evidence based on the evidentiary rules of civil procedural law.

**B. Discussion**

1. **Religious Court in Indonesian Legal System: Jurisdiction and Sources of Law**

   As part of the legal system, the judiciary plays a role in upholding law and justice. The Supreme Court as the administrator of judicial power, divides the judicial environment based on their respective jurisdictions, including the environment of the General Courts, Religious Courts, Military Courts, State Administrative Courts, and the Constitutional Court.\(^\text{11}\)

   The majority of the population in Indonesia is Muslim. Thus, the many processes of interaction experienced by the Islamic community in Indonesia are a representation of the magnitude of the role of the Religious Courts in solving various problems experienced by the Muslim community,\(^\text{12}\) especially in civil lawsuits. Article 49 of the Law on Religious Courts Number 3 of 2009 confirms that the Religious Courts have the authority to examine, decide and

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11 Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman Bab III Pelaku Kekuasaan Kehakiman Pasal 18.

settle cases of the first instance for people who are Muslim in the fields of marriage, inheritance, wills, grants, endowments, zakat, infaq, sadaqah, and sharia economics.\textsuperscript{13}

The sources of material law for the Religious Courts come from laws and regulations in the field of marriage (Marriage Law and its implementing regulations and \textit{Kompilasi Hukum Islam}) and other legislation following the jurisdiction of the religious courts that have been regulated in the form of legislation. However, in practice, the Religious Courts’ judges also often refer to unwritten sources of Islamic law (fiqh and Islamic legal theories) in compiling the legal considerations of their decisions.\textsuperscript{14} So in this article, we will also look at references to sharia and fiqh when judges consider the admissibility of hearsay evidence to produce decisions that reflect justice according to the judge handling the case.

In addition to the Religious Courts, there is a national judicial system for all Muslim citizens in Aceh, namely the Syar’iyyah Court. The Islamic Syar’iyyah Court in Aceh or the Syari’iyyah Makamah has a broader range of jurisdictions than the Religious Courts in Indonesia in general. The Syar’iyyah Court, as a special court, is not only authorized to settle cases in civil law (Muamalah), family law (Ahwal Al-Syakhshiyyah) cases but also in criminal law cases (jinayah), which are all based on Islamic law. and regulated in Aceh Qanun.\textsuperscript{15}

Previously, it was mentioned about the Supreme Court’s policy to fill the void of civil procedural law in the judiciary in Indonesia by making a Supreme Court Circular. This is because Indonesia’s civil procedural law still follows the updated Dutch procedural law or HIR, and, in particular, in religious courts, there are several other procedural laws in the Religious Courts Law and its derivative regulations. SEMA is the Supreme Court’s initiative to make legal rules as binding guidelines for judges on ideas or input from the lower courts (bottom-up), namely the Court of First Level and


Appeals, based on their legal needs. This is because SEMA is a means that guarantees legal unity and certainty. So, SEMA is not just a policy but a guideline that judges must follow.\textsuperscript{16}

The application of the Supreme Court chamber system has been in effect since SK KMA No. 142/KMA/IX/2011 in the fields of civil, criminal, state administration, and religion. The objectives of making SEMA include: maintaining the unity of law application and consistency of Supreme Court Decisions, increasing the professionalism of judges, and accelerating case settlement. SEMA is a policy as a Guide to the Implementation of Duties for Judges. The legal basis for SEMA is the Supreme Court Decree, not a law, but judges must follow SEMA in resolving cases. SEMA thus is a mechanism for forming a new law besides developing jurisprudence. However, the jurisprudence status in Indonesia is not as strong as in the Netherlands; it is simply persuasive.\textsuperscript{17}

With the existence of SEMA, the legal formation process becomes faster and more flexible, especially for urgent cases, and SEMA is the consensus of the Supreme Court Justices. Based on data from the Supreme Court Decision Directory, the prevalence of SEMA in various Decisions citing SEMA has increased since the establishment of SEMA, while the prevalence of jurisprudence since the existence of SEMA is stable. As many as 75\% of the decisions citing SEMA are divorce cases.\textsuperscript{18}

2. \textit{Testimonium de Auditu} in Indonesian and Islamic Legal System

\textit{Testimonium de auditu} is testimony or information heard from the statements of others. This information is known in the common law legal system as hearsay evidence.\textsuperscript{19} Yahya Harahap explained that the material requirements of witnesses as evidence based on Article 171 HIR 308 RBg and Article 1907 of the Civil Code are statements based on transparent sources of knowledge. In contrast, the source of knowledge justified by law must be experience, sight, or hearing directly from events related to the subject matter of the disputed case between the parties.\textsuperscript{20} The testimony of a witness originating from a story or information submitted to him by another person is outside the witness testimony category justified by Article 171 HIR and


\textsuperscript{17} Huis, “SEMA Hasil Pleno,” Webinar Peran Hasil Rapat Pleno Kamar Menuju Kesatuan Sikap Penerapan Hukum Dan Konsistensi Putusan.

\textsuperscript{18} Huis, “SEMA Hasil Pleno,” Webinar Peran Hasil Rapat Pleno Kamar Menuju Kesatuan Sikap Penerapan Hukum Dan Konsistensi Putusan.


Article 1907 of the Civil Code. Hence, witness testimony is only qualified as hearsay evidence because it is an indirect testimony. After all, eyewitnesses have not experienced, seen, or heard of the main events of the disputed case.\(^{21}\)

However, Yahya Harahap argues that the following variables must be considered when judging the status of hearsay evidence in judicial practice. First, it is generally rejected as evidence because, in principle, the * testimonium de auditu* cannot be accepted as evidence. Even the attitude of legal practitioners automatically rejects it without providing argumentative analysis and considerations. For example, the Supreme Court Decision Number 1842K/Pdt/1984 confirmed that all of the witnesses presented by the plaintiff consisted of “hearsay witnesses,” so they did not meet the requirements as witnesses with evidentiary strength and were therefore invalid as evidence.

Second, it is constructed as a judge’s presumption. Judges can construct a hearsay testimony as presumptive evidence as long as it is considered objectively and rationally. As emphasized in the Supreme Court Decision Number 308K/Pdt/1959 that * testimonium de auditu* cannot be used as direct evidence, but the testimony can be applied as presumptive evidence (*vermoeden*) so that it can be used as a basis for proving something.\(^{22}\)

Finally, it is exceptionally admitted that an urgent situation to find the truth in the litigated case requires a justification rule by recognizing the hearsay testimony as extraordinary evidence. The exception is accepted if the key witness who knows an event had died but has explained everything related to the event in question before he died as stipulated in the Supreme Court Decision Number 239K/Sip/1973 dated 23 November 1975, which confirmed the application of “hearsay witnesses” with the consideration that there is no longer any written evidence to support a case. There is no witness testimony witnessing a legal event, only information obtained from generation to generation.\(^{23}\) Thus, the information provided by the “hearsay witnesses” is indirectly a message from a person directly involved in a disputed event. So a judge can accept and consider it exceptionally based on the quality of the testimony of the “hearsay witnesses.”

In criminal and civil procedural law, witnesses are included as evidence in the Indonesian legal system. In the civil procedural law, it is stipulated in Article 164 HIR or 283 *Rechtreglement voor de Buitengewesten* (Dutch; translated as HIR for outside Java and Madura regions; after this RBG), which explains that the evidence in civil cases consists of written evidence, evidence with witnesses, suspicions, confessions, and oaths. In comparison, the evidence in criminal cases is regulated in Article 184 of the Criminal Procedure Code, which consists of witness statements, expert statements,

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\(^{21}\) M. Yahya Harahap, *Hukum…*, p. 661.


letters, instructions, and the defendant’s statements. A witness is a person who provides information for the investigation, prosecution, and trial regarding a criminal case he/she has heard, seen and experienced.24

The term witness in criminal procedural law has expanded based on the Constitutional Court Decision 65/PUU-VIII/2010. Accordingly, witnesses of criminal cases regulated in Article 1(26-27), 65, 116(3)-(4), 184(1a) of the Criminal Procedure Code are contrary to the 1945 Constitution as long as it is not interpreted as including “a person who can provide information in the context of an investigation, prosecution, and trial of a criminal act which he has not always heard of, he has seen and experienced himself.” Thus, it can be interpreted that everyone who knows the occurrence of a crime must be heard as a witness for the sake of justice and the balance of investigators dealing with suspects/defendants.25

Then, in an article reviewing the Constitutional Court’s Decision Number 65/PUU-VIII/2010, Suprantio explained that the Constitutional Court’s decision does recognize the testimony of “hearsay witnesses” in criminal justice. This is an effort to protect the rights of suspects and defendants, which is the main principle in criminal procedural law. Thus, there is an opportunity that the “hearsay witnesses” will no longer be denied. Considering the importance of this Constitutional Court decision, investigators, public prosecutors, and judges should conduct their obligations to observe the due process of law by adhering to human rights principles.26

Hearsay evidence is a testimony that comes from the knowledge and experience of others. Testimonium de auditu in Islamic Courts is known as istifadhah witnesses, witnesses who are not present in person when a legal event occurs.27 It is just that in the meaning of istifadhah witnesses, it is broader, as Ibn Qayyim’s opinion, which defines syahadah al-istifadhah as testimony that comes from news that has been widely spread, so it has a solid and accurate value. Even judges are allowed to decide cases based on istifadhah witnesses. Because the presence of istifadhah witnesses can be used to find accurate facts that can dismiss accusations in court, even some scholars such as Imam Shafi’i, Ulama Hanabilah, and Sayyid Sabiq agree with this. Wahbah Zuhaili restricts receiving istifadhah witness testimony only in cases of marriage, lineage, death, the husband’s actions against his wife, and the

24 Article 1 number 26 of the Criminal Procedure Code
position of a qadhi. Thus, receiving the testimony of istifadhah witnesses in the Islamic Courts system, especially in marriage legalization. The concept of istifadhah in Islamic law is vital because the practice of Religious Court judges in considering the law is also not always subject to positive law in Indonesia. They often refer to traditional Islamic law sources (sharīa, fiqh, and legal maxims).

3. Samarinda Religious Court’s Decision Number 1003/Pdt.G/2017/PA.Smd

a. Issue, Rules, and Arguments

A second wife whose husband died in 2016 submits an application for marriage legalization at PA Samarinda because their marriage in 1989 was not recorded. The Applicant claims that the implementation of their marriage contract on 10 December 1989, in Samarinda, has followed Islamic law as it was contracted with her marriage guardian (her biological father). At that time, the Applicant was a widow while her husband was a widower. However, because their marriage took place several decades ago, it was challenging to present witnesses of the marriage. The Applicant and her two children (Respondents I and II) presented several witnesses who only heard stories from other people who performed the Applicant’s marriage contract with her late husband.

Not only in the form of “hearsay witnesses” presented as evidence but also in other written evidence such as ID cards, birth certificates, and other authentic documents, which are considered to explain that it is true that the Applicant and her late husband are married. Five “hearsay witnesses” were presented: the first witness was a midwife who claimed to have known the Applicant and her husband for 23 years as they handled the delivery of the Applicant’s second child. The Applicant’s older brother was the second witness, who found out about the Applicant’s marriage three days later based on a story from his father (the Applicant’s marriage guardian). The third witness is her brother-in-law from the Applicant’s husband since 1990. The fourth witness is an employee of the Applicant’s husband, who has lived in the Applicant’s house since 1990. The fifth witness is the aunt of Respondent I and II (the Applicant’s siblings), who knows about the marriage based on the

28 Ihdi Karim Makinara et.al, _El-Ussrah..._, p. 239.
30 The legalization of marriage proposed by the wife or husband, one of whom has died, must be in the form contentious cases by positioning the heirs as the opposing party. See, Mahkamah Agung RI Direktorat Jenderal Badan Peradilan Agama, _Pedoman Pelaksanaan Tugas dan Administrasi Peradilan Agama Buku II_, 2011, p. 149.
31 Samarinda Religious Court’s Decision Number 1003/Pdt.G/2017/PA.Smd, pp. 21-23.
story of their father. Thus, none of the five witnesses directly witnessed the marriage contract between the Applicant and her late husband but based only on the story, and it was hearsay evidence. Then, the five witnesses also testified that there was never a divorce between the Applicant and her late husband.

Considering that this case is contentious, the opposing parties of Respondent III-VII, who are the children of the first wife of the Applicant’s late husband, submitted several pieces of written evidence to refute every argument put forward by the Applicant and her two children. Likewise, Respondent VIII, the third wife of the Applicant’s late husband, vehemently denied the arguments filed by the Applicant. However, all evidence submitted by Respondents III-VIII was rejected by the Panel of Judges because the evidence could not be proven, even if some were only for the personal interest of the opposing party.

Concerning the evidence submitted, the Panel of Judges granted the Applicant’s request by accepting the Applicant’s acknowledgment that the marriage had been carried out based on Islamic law. Hence, the requirement of Article 2 (1) of the Marriage Law has been fulfilled. They also refer to the provisions in the books of fiqh, e.g., Tuhfah on the fourth chapter on page 133, and Mughni Muhtaj volume II on page 140, saying “the acceptance of marriage acknowledgment from a woman who has reached puberty.” Similarly, Fathul Mu’in Volume III, on page 45, is also cited, saying that the confession of a woman related to her marriage with a man who acknowledges the marriage even though her marriage guardian does not confirm it is still declared acceptable because the recognition of the truth of marriage is the right of husband and wife.

Besides accepting the Applicant’s confession, the Samarinda PA Panel of Judges also received “hearsay witnesses” statements directly, like witnesses in general, because there was a match between witness statements and written evidence. It supported the Applicant’s confession at trial. Although, in the legal principle, evidence that witnesses who provide information based on their visions and experiences are justified by law as stipulated in Article 171 HIR and 1907 of the Civil Code. Thus, the “hearsay witness” is a witness outside the legal provisions. However, if we look at the number of “hearsay witnesses,” which consists of 5 (five) people, the “hearsay witnesses” can be used as evidence whose strength value reaches the minimum provision limit.

33 Samarinda Religious Court’s Decision Number 1003/Pdt.G/2017/PA.Smd, pp. 45-46.
34 Samarinda Religious Court’s Decision Number 1003/Pdt.G/2017/PA.Smd, p. 58.
35 Samarinda Religious Court’s Decision Number 1003/Pdt.G/2017/PA.Smd, p. 43.
on proof without the help of other evidence, because more than an Applicant submits it.\(^{36}\)

This argument is justified because it is applied in legal considerations in the Jurisprudence of the Supreme Court Decision Number 239K/Sip/1973, which gives a decision by accepting and justifying the application of “hearsay witnesses” with the consideration that it is difficult to find witnesses who are directly involved in an event or due to the death. Witnesses who know firsthand what happened,\(^ {37}\) as in the case of marriage legalization. The previous witnesses could not be relied on, and some had even died. Thus, only the stories passed down from generation to generation can be expected to reveal the legal facts that there has indeed been a marriage between the Applicant and her late husband. Theoretically, a judge may construct a hearsay testimony as to his/her presumption as long as it is considered objectively and rationally per the Supreme Court Decision Number 308K/Pdt/1959 that the *testimonium de auditu* cannot be used as direct evidence. However, the testimony may assist the judge forms presumption (*vermoeden*) to be used as a basis to prove something.\(^ {38}\)

Based on evidence examination in the trial, several facts were revealed between the Applicant, a widow, and the Applicant’s husband, a widower, that there is no marriage prohibition against them, both in terms of Islamic law or state law. Other facts are: the Applicant’s biological father served as her marriage guardian during the Islamic marriage contract; two witnesses attended it, and there was a dowry of a set of prayer equipment. The Applicant’s marriage was blessed with two daughters, and until the death of the Applicant’s husband, there had never been a divorce between the two, so the Panel of Judges legalized the Applicant’s marriage. Hence, the Applicant and her two children (Respondents I and II) were entitled to inherit property rights.

b. The Application of Hearsay Evidence in PA Samarinda Decision

The acceptance of “hearsay witnesses,” which indirectly ignores the provisions of Article 171 HIR, 308 RBg, and 1907 of the Civil Code applied by the PA Samarinda Judges, reflects the concept of progressive law, as stated by Satjipto Rahardjo that the essence of the formation of law is for humans.\(^ {39}\) Laws made by the community and intended for the community must also be implemented and enforced by fulfilling justice and community welfare elements. The quality of law that is realized based on the ability of legal actors


will support the needs and interests of the community. A high sense of empathy for the people is the basic foundation that must be embedded in the conscience of every legal actor, in this case, the Panel of Judges. Thus, the judges must interpret every legal provision by adjusting the situation and the right conditions without waiting for the new legal provisions to change the old provisions.

Concerning the application of “hearsay witnesses,” there are no specific legal rules regarding the permissibility of receiving hearsay evidence. However, the Jurisprudence of the Supreme Court Decision Number 308K/Pdt/1959 above and the Supreme Court Decision Number 239K/Sip/1973 justifies the judges to accept statements from “hearsay witnesses” exceptionally as evidence of valid witnesses and can be considered. So presumably, it is sufficient to fulfill the values of justice and legal interests for the litigants, especially the Applicant and their children (Respondents I and II). Moreover, it aims to achieve maslahah and fulfill the litigants’ legal interests so that this application can be justified and valid from a legal point of view.

By looking at the provisions of criminal law, there is an expansion of the meaning of testimonium de auditu in the Constitutional Court Decision Number 65/PUU-VIII/2010. It recognizes “hearsay witnesses” in criminal justice as a form of protection and fulfillment of the rights of suspects and defendants. Criminal and civil law has different objects; criminal law focuses on material or legal events, while civil law focuses on formal law or information explaining an event. However, it is not prohibited for judges in civil proceedings to digest the intent and purpose of expanding the meaning of hearsay evidence in the Constitutional Court’s decision to fulfill the litigants’ rights. As in the case of the application for marriage legalization, the Applicant can only submit evidence in the form of “hearsay witnesses.”

Yahya Harahap concludes that two factors make “hearsay witnesses” can be justified as evidence. First, the witness involved in an incident directly litigated had died, while there was no written statement explaining the incident. Second, the information presented by the witness de auditu is a message from people who have directly seen and experienced the litigated events. Thus, these two factors can represent the reasons for receiving the statements of “hearsay witnesses” in the legal considerations of the Samarinda PA Panel of Judges.

Then, looking at the three “hearsay witnesses” who received statements not based on stories from the Applicant’s late father but explained what he believed because he had known the Applicant and the Applicant’s late husband for a long time, thus knowing the daily lives of the Applicant and his late husband. Even from a sociological point of view, it is based on community tradition that if there is a couple who has lived together for decades, even though they do not know for sure when and how the marriage contract will be carried out, then it is undoubtedly a legal husband and wife couple. Such is
the case with the Applicant and her husband, who have been married since 1989.

Thus, *testimonium de auditu* is not always accepted or rejected as evidence. Judges must examine hearsay testimonies regarding whom the information was obtained and the condition of the person receiving the information to be assessed with certainty regarding the hearsay evidence strength. At least, with the presence and statements of witnesses who heard the stories from generation to generation, it can help judges assess and find the truth in the issues being tried.

c. Hearsay Evidence Acceptance and Due Process of Law in PA Samarinda Decision

Based on the application of the law carried out by the Samarinda PA Judges, who accept evidence in the form of “hearsay witnesses,” it would be necessary to review its suitability with the law of evidence in civil proceedings. In general, every rule of law in civil proceedings against evidence deemed relevant will undoubtedly be accepted by judges unless the evidence falls within a scope that is not specified in law or is made an exception by court policy. Hence, there are five principles in terms of evidence that must be considered, including:

*First*, the principle of *probandi neccesitas incumbit illi qui agit* means that any party who sues or argues for a legal event must prove it in court. In case Number 1003/Pdt.G/2017/PA.Smd, the Judges have applied the principle that the litigants have submitted written evidence and witnesses to strengthen the arguments presented to the Panel of Judges. Although the witnesses presented by the Applicants, Respondents I and II, are “hearsay witnesses,” this is not something that deviates from the principle of *probandi neccesitas incumbit illi qui agit*. The judge must assess whether the evidence is accepted, provided that the things explained in the trial align with the evidence presented. Therefore, the application of evidence, in this case, follows this principle.

*Second*, the principle of *audi et alteram partem* or hear the other side, namely the principle that requires judges to act reasonably by listening to statements submitted by both parties to the case, either in writing or orally, as a form of proof of the arguments put forward. As in this case, the Panel of Judges has applied the same legal rules for submitting evidence that can support the things being requested or denied in the trial without providing any limitations or criteria for the evidence submitted.

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The Panel of Judges granted the Applicant’s request due to the confession the Applicant gave in the trial, which was then linked to any evidence submitted, including evidence from the statements of “hearsay witnesses.” The Judges’ acceptance of “hearsay witnesses” did not provide an argument regarding the classification of “hearsay witnesses,” which can be applied to the evidence in this case. On the other hand, the attitude of legal practitioners who reject “hearsay witnesses” also does not provide a precise analysis or argument.\(^{44}\) So, based on this, in terms of receiving “hearsay witnesses” statements, the Judges should provide argumentative analysis and considerations to fulfill justice for the opposing party (Respondents III-VIII) who objected to the Judges’ acceptance of *testimonium de auditu*.

The decision formulated by the Judges must consider legal principles in order to create justice and legal certainty. They are (1) balancing law enforcement with the community’s legal interests; (2) basing decisions on systematic and rational thinking; (3) using instinct on the judge’s legal knowledge in determining the decision outcome; (4) basing decisions on the judges’ experience in solving various legal problems faced; (5) using wisdom to formulate legal and public justice decisions.\(^{45}\)

In order to apply these theories in finding a legal basis, PA Samarinda Judges need to provide legal considerations that are located as the essence of the decision by presenting analysis, arguments, and legal conclusions from the case being tried. In providing an analysis of legal considerations, it is necessary to consider the law of evidence. It starts from the fulfillment of formal and material requirements for a piece of evidence, then questions which evidence reaches the minimum limit of proof, which arguments are proven to be accurate, and the extent to which the litigants submit the strength of the evidence.

Looking at PA Samarinda Judges’ decision to accept “hearsay witnesses,” it can be understood as an effort to perpetuate the values of justice and legal certainty in every decision it formulates. This is because the judge is the only party who can assess the strength of the evidence submitted by the parties at trial, which aligns with the legal principle that requires the judge to collect and evaluate all evidence submitted to him.\(^{46}\) Therefore, the principle of *audi et alteram partem* is still not fully fulfilled in upholding the value of justice by the PA Samarinda Judges in this decision, especially for the opposing party who did not obtain clear legal information regarding their reasons for accepting “hearsay witnesses” (he Applicants and Respondents I-II).

*Third*, the principle of *ius curia novit*, i.e., the judge is considered to know the law of every case brought to him. When referring to the provisions of

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\(^{44}\) M. Yahya Harahap, *Hukum…*, p. 664.


Article 16(1) of Law Number 48 of 2009 concerning the Principles of Judicial Power, a judge cannot refuse to examine and try a case on the pretext of unclear legal rules. In this case, each party seeking justice is charged with proving a legal event while the judge assesses the legal force, which in the application of each of these principles must take into account the principles of justice and legal certainty.

In examining and adjudicating every case before him, a judge must have a broad view of the law so that the judge does not apply the law textually. The judge’s caution in assessing any evidence presented to him/her is necessary. A good judge is a judge who can make and create a law based on instinct, broad knowledge, and high integrity to realize justice and legal certainty contained in his/her decision. Thus, it is necessary to explain written and unwritten legal provisions in decisions to strengthen the basis for judges’ realization of justice and legal certainty. In particular, in this decision, there is a situation or condition that explains that a normative provision that regulates an event is absent or that the normative provisions conflict with the norms that live in society. This is considered the embodiment of judges in enforcing the law to create legal certainty, consistency, and prediction of the applied law. So the law discovery by judges is needed to realize justice in their decisions guided by evidentiary law and principles of justice.

The acceptance of “hearsay witnesses” by the PA Samarinda Judges was considered to have provided justice and certainty for the Applicants and their children (Respondents I-II). It can even be seen that accepting the “hearsay witnesses” was an act of prudence by the judge in considering the evidence presented to them. The Applicant’s marriage went on for decades until her husband died, but the Applicant is still not entitled to receive recognition of her rights as a legal wife in the eyes of the law, including the inheritance rights for her and her two children (Respondent I-II). Indeed, all judges’ decisions in resolving legal issues cannot be intervened by any party even though the judges do not explain the legal basis for accepting “hearsay witnesses.” However, this case has fulfilled the ius curia novit principle because judges know the law and the gaps in justice in formulating their decision.

Fourth, the principle of nemo in propria causa testis esse debet means that the litigating parties cannot witness the disputed case alone. The evidence used in the case follows this principle because the witnesses presented are other people who are not part of the litigation parties. However, the statements of witnesses presented by the Applicants, Respondents I-II are only based on

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49 Achmad Ali and Wiwie Heryani, Asas…, p. 64.
stories from other parties directly involved in the Applicants’ marriage with her husbands.

Fifth, the *ultra ne petita* is a principle that limits judges to grant only based on what the litigating party demands or it can be interpreted that the judge is passive in civil proceedings. 50 This principle has also been implemented by the PA Samarinda Judges, who granted the Applicant’s main petition to legalize her marriage to obtain inheritance rights from her late husband.

Based on the description of the five principles in evidentiary law, it can be seen that, in general, these principles have not been fully observed in legal considerations by the PA Samarinda Judges due to insufficient and unclear analysis and legal arguments in assessing the statements of “hearsay witnesses” (the Applicants and Respondents I-II) as legal evidence. Hence, the opposing party (Respondents III-VIII) appealed against PA Samarinda’s decision to grant the Applicant’s marriage legalization.

4. Samarinda High Religious Court Decision Number 14/Pdt.G/2018/PTA.Smd

a. Issue, Rules, and Arguments

Because the PA Samarinda granted the Applicant’s request to declare the marriage valid between the Applicant and her husband, the Applicant and his two children were entitled to inherit from her late husband, Respondents III – VIII objected to the decision by filing an appeal to the PTA Samarinda. They argue that none of the five witnesses presented by the Applicant and Respondents I-II witnessed firsthand the implementation of the marriage contract between the Applicant and her husband. These witnesses are strongly suspected of having given fabricated information to defend the legal interests of the Applicants. 51 So, according to the Appellants, the marriage of Applicant/Appellate I should not be granted.

Based on this, the PTA Samarinda Judges in their Decision Number 14/Pdt.G/2018/PTA.Smd considered that the PA Samarinda decision had been wrong in applying the law, especially accepting the testimony of “hearsay witnesses” as evidence. They disagreed with the PA Samarinda Judges’ considerations and reasoned that the statements of “hearsay witnesses,” referred to as *istifadah* witnesses, could not be applied in contentious cases. Likewise, according to the PTA Samarinda Judges, other evidence submitted by Applicant/Appellate I was deemed irrelevant and had no power to prove the arguments. Then the evidence must be rejected and does not need to be reconsidered. 52
Istifadah is a testimony from news spread widely, so it has a solid and accurate value. Hence, judges are allowed to apply istifadah in deciding cases. According to Ibn al-Qayyim, applying the istifadah witness can be used to uncover facts and avoid accusations of fraud from either the judge or the witness.\textsuperscript{53} Wahbah Zuhaili also explained that the application of istifadah could be applied to several civil law cases, such as marriage, lineage, death, the husband’s actions against his wife, and the position of a qadhi.\textsuperscript{54} Although from the several interpretations of the scholars, there is no explanation regarding the prohibition of the application of istifadah witnesses in disputed cases. The PTA Samarinda Judges’ refusal of “hearsay witness,” if associated with the legal provisions of a pure civil law procedure, is a manifestation of Article 171 HIR, 308 RBg, and 1907 of the Civil Code. These provisions explain that witnesses who are justified in civil proceedings see, witness, and consciously experience the legal event being sued.\textsuperscript{55} So it is true that the existence of the “hearsay witness” was rejected as evidence.

As emphasized in the Supreme Court Decision Number 308K/Pdt/1959, the testimonium de auditu cannot be used as direct evidence but as evidence of judges’ presumption (vermoeden) in proving something. On a case-by-case basis, however, judges can construct testimonium de auditu as evidence of judges’ presumption as long as it is considered objectively and rationally. Alternatively, it can also be done by accepting “hearsay witnesses” in an exceptional manner based on the Jurisprudence of the Supreme Court Number 239K/Sip/1973, which received statements from “hearsay witnesses” directly by emphasizing several factors. These factors include the fact that there were no more witnesses involved in the incident personally and directly, or, in other words, the party directly involved has died.\textsuperscript{56} So, the thing explained by the witness is based on the message from the parties involved in an event.

Based on the refusal of the PTA Samarinda Judges against the evidence from Applicant/Appellate I, the written evidence submitted by the comparative parties is stated following the matters explained in court. The PTA Samarinda Judges accepted the evidence formally and granted the appeal by canceling the previous PA Samarinda decision. The Applicant/Appellate I now apply the cassation to the Supreme Court because they objected to the PTA Samarinda decision Number 14/Pdt.G/2018/PTA.Smd.


\textsuperscript{54}Ihdi Karim Makinara et.al, El-Usrah..., p. 239.


\textsuperscript{56}M. Yahya Harahap, Hukum..., p. 662.
b. The Application of Hearsay Evidence in PTA Samarinda Decision

The PTA Samarinda Judges refuse entirely to hear and accept the testimony of *istikfadhah* witnesses, especially by stating that such witnesses cannot be applied in contentious cases. This application aligns with the provisions of civil procedural law as per Article 1907 of the Civil Code and 171 HIR, which requires a witness to give his testimony at trial based on his vision and experience. A more appropriate term to be combined with this provision is *testimonium de auditu*, not *istikfadhah* witness. The term *istikfadhah* witness has a broader meaning. Based on the views of Islamic jurists mentioned above, *istikfadhah* witnesses are witnesses who have strong values and can be applied by judges in marriage cases. In the Islamic justice system, there is no prohibition against using *istikfadhah* witnesses as evidence. Thus, it is allowable for judges to accept the testimony of *istikfadhah* witnesses as evidence in the case of marriage legalization. Moreover, there is no explanation or discussion of a specific nature of *istikfadhah* witnesses that cannot be applied in contentious cases.

Reflecting on the *testimonium de auditu* by the PTA Samarinda Judges, they argueably have applied legal positivism, namely the school of legal thoughts that make the function and authority of judges in solving problem-focused and fixated on the provisions of the written legislation alone. Accordingly, a judge does not have the right and authority to interpret the law. The fairness of a law is determined by the legislative power, whereas legislative power comprises ordinary human beings having a high position on the side of the law but not on the side of humans or even on the side of God. It is common sense that humans are prone to fallacies and errors. Every human knowledge in assessing the truth of a legal event is conjecture (*dzanni*); no matter how high the quality of closeness with the Lord, the results of these thoughts are still limited and even wrong. Therefore, if justice simply rests on legislative power, justice will be at risk.

In the *testimonium de auditu* refusal, the PTA Samarinda Judges reason with the concept of *istikfadhah* witness in Islamic law. This measure does not align with the application of *istikfadhah* witnesses, as per Sayyid Sabiq’s opinion. Sabiq maintains that it is permissible to give testimony based on news that has spread according to Syafi’i scholars in cases of lineage, birth, death, guardian, guardianship, waqf, dismissals, marriage and matters related to it, determination of justice, narration defects, wills, about *baligh*, stupidity, and one’s ownership. Based on this, there is no emphasis that the *istikfadhah* witness only applies to a case involving disputes.

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Therefore, the PTA Samarinda Judges need to consider Jurisprudence Number 308K/Pdt/1959, which constructs *testimonium de auditu* as a judge’s suspicion, or Jurisprudence Number 239K/Sip/1973, which accepts hearsay evidence directly because witnesses’ testimonies are stated as hereditary messages. Of the parties involved in the legal event in question. It can even be done by following the line of thinking contained in the Constitutional Court Decision Number 65/PUU-VIII/2010, which in the realm of criminal law, expands meaning to “hearsay witnesses” in the interest of the rights attached to the defendant. So, if in the case of this application for marriage legalization. The PTA Samarinda Judges should pay attention to the rights of the Applicant/Appellate I to obtain justice and legal certainty regarding her marriage, even if only by presenting “hearsay witnesses” to support each of her arguments.

c. Hearsay Evidence Acceptance and Due Process of Law in PTA Samarinda Decision

The refusal of PTA Samarinda Judges to the evidence of “hearsay witnesses” or *istifadhah* witnesses submitted in this case necessitates us to examine its compatibility with the civil proceedings evidentiary rules as follows:

First, the principle of *probandi neccesitas incumbit illi qui agit* gives litigants equal rights to prove their claims or objections in court. In applying this decision, the PTA Samarinda Judges accept or reject their claims by considering the litigants’ arguments and evidence. Based on case analysis, the principle has been fulfilled in the evidence examination of this appeal case.

Second, the principle of *audi et alteram partem* or hear the other side, namely the principle that requires judges to act reasonably by listening to statements submitted by both parties to the case, either in writing or orally, as a form of proof of the arguments put forward. In other words, this principle requires judges to be fair in giving the burden of proof to the litigants. Reflecting on Roscoe Pound’s theory of justice, Judges must distinguish several interests to defend each party’s rights in obtaining justice, namely personal interests such as marriage, public interests relating to state rights, and social interests related to life need to pay attention to morals. Thus, in achieving justice, Judges must balance these three interests to deserve to be declared a fair rule. Pound’s theory of justice is related to the progressive legal concept introduced by Satjipto, which reads that laws have great potential for launching social changes in a planned manner. By prioritizing the purpose of provisions not based on legal texts as long as it is for the fulfillment of justice in the administration of law, achieving legal goals is greater than the authority

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of the law itself. Often, the formulations in legal articles are ambiguous, providing a gap for law enforcers to add or interpret the legal rules based on the space and time they face.\textsuperscript{63} 

Pound’s theory of justice is also in line with John Rawl’s justice, who revealed that justice is defined as a form of equal rights balanced at every level of society, called the concept of the original position.\textsuperscript{64} Thus, in order to reflect the justice based on Pound and Rawl, especially in the case of the application for marriage legalization at the appeal level, the PTA Samarinda Judges must apply the concept of progressive law by considering Jurisprudence No. 239K/Sip/1973 in accepting and making consideration of the witnesses submitted by the parties. Alternatively, it can also apply Jurisprudence Number 308K/Pdt/1959, which qualifies the evidence of “hearsay witnesses” as evidence of the judge’s presumption.

If we look at the practice of criminal proceedings, which discuss the testimony of “hearsay witnesses,” there is a Constitutional Court Decision Number 65/PUU-VIII/2010 concerning Judicial Review of Law Number 8 of 1982 concerning the Criminal Procedure Code. It decides that a person can provide information to implement investigations, prosecutions, and trials of criminal cases that do not always hear, see and experience themselves.\textsuperscript{65} Hence, in urgent situations or in the sense of a legal event that has occurred for decades while no written evidence explains the event, the evidence from information sourced from hereditary stories is a necessity to find the truth so that the judge can even consider it for the fulfillment of the values of justice.

Looking back at the PTA Samarinda’s rejection of istifadhah witnesses because they cannot be applied to contentious cases, there is a conflict with the application of istifadhah witnesses based on Sayyid Sabiq’s opinion, which permits testimony based on the news that has been received spread according to the Syafi’iyyah scholars mentioned above.\textsuperscript{66} In general, there is no statement explaining whether or not the marriage case in question is contentious. Because the term used by the PTA Samarinda Judges is istifadhah witness and not testimonium de auditu, the principle of audi et alteram partem is still not fully fulfilled in the Judges’ consideration.

Third, the principle of ius curia novit states that judges are considered to know the law of every case brought to them. This principle is supported by Article 16(1) of Law Number 48 of 2009 concerning the Principles of Judicial Power which determines that a judge cannot refuse to examine and try a case


\textsuperscript{65} Nedi Gunawan Situmorang, \textit{PALAR…}, p. 117.

\textsuperscript{66} Siti Salwa et.al, \textit{Suloh…}, p. 19.
on the pretext of unclear legal rules. The Judges determined that the “hearsay witnesses” could not be accepted in the case of disputed marriage legalization that could seem legitimate, even though it impacted the previous decision. The PTA Samarinda Judge’s measures align with legal practitioners who reject “hearsay witnesses” as evidence but do not give argumentative analysis and considerations. In fact, in preparing legal considerations, it must be argumentative-juridical so that decisions are avoided from lack of consideration. In a sense, legal considerations become clear and sufficient to explain every legal provision the judge applies, both written and unwritten.

The main problem of accepting testimonium de auditu rests on the value of the evidence’s strength. Thus, the judge is not only focused on whether or not such witnesses are allowed but also on accepting it first and then considering the quality and evidentiary value of the testimony. Thus, in this case, judges need to consider several aspects in their decisions: philosophical aspects, applicable legal provisions, legal principles, and the legal culture in society. Based on these four aspects, it can be used to reduce or even prevent intervention from other parties to fulfill non-legal personal interests in formulating a court decision to fulfill justice and legal certainty. Law and justice are two related things, so they cannot be separated in terms of law enforcement by judges. This statement aligns with Gustav Radbruch’s statement that the law is a desire accompanied by a conviction to serve justice. If the law intentionally denies justice, such as providing legal provisions without careful consideration and even contrary to human rights, then there is no obligation to obey such laws.

In order to provide legal considerations in the decision, the judge will first conduct an analysis of each piece of evidence and the arguments submitted. This is to comply with Article 178(1) HIR, 189 RBg, and 19 of Law Number 48 of 2009 concerning Judicial Power which explains that judges must convey considerations of the case being examined and are obliged to present particular articles applied in the decision. Likewise, judges must also present objective and rational arguments to resolve the case in an objective decision.

A judge’s consideration is clear and sufficient; in a broad sense, it can be understood that a clear and sufficient scope covers all parts of the proposed arguments from the plaintiff/applicant and the defendant/respondent. Therefore, the judge’s decision must reflect the freedom and activity of the judge to break away from normative provisions. Judicial activism is the act of

68 Ahmad Mujahidin, Pembaharuan…, p. 340.
70 Dedy Muchti Nugroho, Varia…, p. 43.
71 Dedy Muchti Nugroho, Varia…, p. 44.
72 M. Yahya Harahap, Hukum…, p. 810.
judges independent of the law’s provisions, defined as judges’ actions in deciding cases based on other policies or decisions in the same case.\textsuperscript{73} The application of the principle of \textit{ius curia novit}, which is clearly illustrated in Article 16 (1) of Law Number 48 of 2009 concerning Judicial Power, reveals that judges, as part of the court organs, are considered to know and understand the law, so they are obliged to serve the justice seekers who plead with them. If judges cannot find a written law, they must find it in an unwritten one.\textsuperscript{74} So based on this description, it can be concluded that the principle of \textit{ius curia novit} has not been fully fulfilled in the proof of the appeal of this case.

\textbf{Fourth}, the principle of \textit{nemo in propria causa testis esse debet} means that the litigating parties cannot witness the disputed case alone.\textsuperscript{75} This principle has been appropriate in the evidence in this case because the witnesses presented are other people who are not part of the litigation parties but know that the marriage took place even though it is based on stories from other parties involved in the marriage of the Applicant/Appellant I.

\textbf{Fifth}, the \textit{ultra ne petita} principle, which is a principle that provides limits for judges to grant only based on what the litigating party demands, or it can be interpreted that in civil proceedings, the judge is passive.\textsuperscript{76} This principle has also been carried out following the things carried out by the PTA Samarinda Judges, who granted the main argument of the Appellant’s request to refuse to ratify her marriage in order to obtain inheritance rights from her late husband by canceling the previous decision Number 1003/Pdt.G/2017/PA.Smd.

Based on the five legal principles of proof, the application of evidence in marriage legalization has not been fully fulfilled. Several things must concern the PTA Samarinda Judges by considering the factors that are the reference for rejecting the testimony de auditu as evidence. Meanwhile, the key witness who saw and experienced the legal event had died without leaving any notes explaining the incident but only telling other people who, in this case, were used as “hearsay witnesses.” Then, the “hearsay witnesses” did not only obtain information from the parties involved in performing the marriage contract. However, some of them have known the Applicant and her late husband for a long time. They know their daily life as a long-married couple, even though they do not know when the marriage is carried out and how legal it is. From a sociological perspective, a couple who has lived for decades, followed by the birth of children, is undoubtedly believed to be a married couple like Applicant/Appellant I and her husband.

Because \textit{testimonium de auditu} is not always accepted or rejected as evidence, judges must be careful and observant in examining it. They must

\begin{thebibliography}{99}

\bibitem{73} Dedy Muchti Nugroho, \textit{Varia…}, p. 39.
\bibitem{74} M. Yahya Harahap, \textit{Hukum…}, p. 821.
\bibitem{75} Achmad Ali and Wiwie Heryani, \textit{Asas…}, p. 64.
\bibitem{76} Achmad Ali and Wiwie Heryani, \textit{Asas…}, p. 65.
\end{thebibliography}
examine whom the information was obtained from and the condition of the person receiving it so that it can be assessed with certainty in terms of strength with the evidence of “hearsay witnesses.” At least, with the presence and statements of witnesses who heard the stories from generation to generation, it can help judges assess and find the truth in the problems being tried.

C. Conclusion

Evidence used at PA Samarinda and PTA Samarinda do not meet the due process of law. This is because the Judges’ legal considerations are unclear in providing analysis and arguments regarding the acceptance or rejection of “hearsay witnesses.” However, the decision that best reflects the value of justice and legal certainty is Decision Number 1003/Pdt.G/2017/PA.Smd. It has considered “hearsay witnesses” evidence as a manifestation of the PA Judges’ prudence in assessing the “hearsay witnesses” testimony. Acceptance to apply or not testimonium de auditu as evidence by the Judges should be preceded by providing analysis and legal arguments that clearly outline the criteria for the acceptance or rejection. Therefore, every decision formulated by the judge can realize the fulfillment of the values of justice and legal certainty for the litigants. Finally, to avoid discrepancies in hearsay evidence, it is necessary to reform the civil procedural law to accommodate its application for suitable cases. Moreover, one way to do this is to regulate the position and application of hearsay evidence in Islamic civil cases by making a Supreme Court Circular (SEMA) so that the resulting decisions better reflect justice and legal certainty.

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