

LEGAL RECONSTRUCTION AND POLYGAMY PROBLEMS IN SHARIA MAQASHID AND POSITIVE LAW PERSPECTIVES

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ABSTRACT

Marriage in principle is for peace in society in which it forms a joint commitment in forming a common goal, some are monogamous or have one wife and some are polygamous, namely more than one wife. Polygamy is indeed allowed in Islam and Positive Law, but with conditions that must be met. The state also allows the practice of polygamy with conditions that must be met, not much different from religious rules. Therefore, if a person wishes to practice polygamy, he must understand the rules in religion and the state so that it is also recorded by the state. This study aims to determine legal reconstruction and polygamy problems in Sharia Maqhosid prespectives in West Java. The research method used is qualitative research. Polygamy taught in Islamic law is for good, not for damage by protecting religion, lineage, reason, property and self-esteem as a solution to social problems in society from these problems. It is positive because it sees phenomena and existing legal facts so that with maqoshid sharia it can make a meaningful contribution.

INTRODUCTION

Marriage is a form of legal effort in the relationship between men and women which aims to form a sakinah, mawaddah, wa rahmah family (Hudafi, 2020). Marriage law number 1 of 1974 Article 2 Paragraph 1 states that "Marriage is legal, if it is carried out according to the laws of their respective religions and beliefs." (Indonesia, 2004) in the article it can be interpreted that a marriage is legal if it has been married according to their respective religions and beliefs, the article can also be interpreted into a situation which because it has a very broad meaning including the occurrence of sirri marriages or underhanded marriages caused by because he is still under 19 years old, polygamy, elderly marriage and various other reasons as well as misyar marriage, namely marriage in an unusual manner which exists in several places in West Java (Simbolon, 2019).

The principle of marriage is polygamy until the arrival of Islamic law by giving restrictions in Polygamy is the marriage bond of a man marrying more than one woman up to a maximum of four (Umar, 2014), in the Qur'an explained in Surah An-Nisa verse 3. And if you are afraid that you will not be able to do justice to (the rights of) orphaned women (if you marry them),

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then marry (other) women that you like: two, three or four. Then if you are afraid that you will not be able to do justice, then (marry) only one or the slaves you have. that is closer to not doing wrong"(Surah An-Nisaa: 3). When Islam came, polygamy had become a custom and habit until the arrival of Islam through the Prophet Muhammad gave a radical change according to that verse, polygamy from infinity to a maximum of four ([Raziq & Faturrahman, 2020](#)),

In the verse it is contained that God gives a choice if he cannot do justice then one is enough, legally positive, namely the Marriage Law article 3 paragraph (2) article 4 and article 5, which contains licensing and requirements polygamy whose case is decided by the religious court.

Marriage and polygamy are regulated by law no. 1 of 1974 article I. paragraph (2) article 3 article 4 and article 5, from data on cases of marriage, divorce and polygamy reported by the West Java religious courts in 18 regencies and 9 cities From official data statistics on West Java religious court decisions for 5 years from 2018 to 2022 shows an alarming comparison between marriage and divorce where divorce annually is 10 times the number of marriages ([Statistics, 2022](#)).

From the number of divorces that occur, there is a pattern that shows the power of women being more dominant, this is indicated by the number of divorce cases which are higher than divorce divorces with a ratio of more than 70% or widows who will cause various social and economic problems in the community including the occurrence of polygamy. In the decisions of religious courts dealing with polygamy cases, there is no increase and even tends to decrease compared to the increase in divorce cases

The tendency for marital status in West Java will be a spike in single status either widows or widowers because of the significant comparison between marriage and divorce so that it will cause population problems , social and economic conditions, which will result in a population recession.

The current condition with the high rate of divorce compared to divorce divorces shows a phenomenon that positions women very much dominate in the occurrence of divorce, while in the Shari'a the wife asks for divorce is already very hated, let alone suing for divorce, psychologically it is already moral degradation of men as husbands results in high rates of depression and divorce victims in marginalized men and it is possible that in the end the population of women will be higher and women will n looking for a partner more so that a man who is successful and established will actually be his choice. While polygamy is not easy, in positive law it must meet strict requirements and heavy licensing while in the Shari'a polygamy is allowed with one condition, namely fairness.

Polygamy within 5 years of cases in religious courts has no progress and even tends to be very little compared to the events of marriage and divorce, as if polygamy is a big problem in family law and must be suppressed with the greatest severity in our positive law and in view of a serious crime equated with criminal law. Hidayat (2018) show that polygamy is needed by men for various reasons and is religiously allowed. If this condition continues, it will result in a high number of underhanded polygamists so that it will contribute to the reason for increasing the level of divorce due to being an extramarital affair and polygamy is considered a crime.

The practice of polygamy in the community, underhand marriage is a problem. which is very urgent so that the author needs to examine the factors that cause underhand polygamy, dig in depth about the motives of the perpetrators of polygamy and their views according to Maqoshid sharia. based on rational argumentation, namely considering the maslahah and mafsadah it causes. Whoever views the maslahah aspect, will tend to allow it as according to the opinion of the classical scholars, while those who view the mafsadah aspect will choose to forbid the opinion of some contemporary scholars. Meanwhile, fuqaha' who are doubtful about

the comparison of *maslahah* and *mafsadah* choose to suspend their opinion (*tawaqquf*) (Tohari, 2013). This study examines and considers according to *maqashid sharia*, namely the aspects of benefit and harm.

The author seeks to reconstruct the condition of the existence of polygamy in positive law/ legislation and in the compilation of Islamic law and its relevance to *Maqashid sharia*. The urgency in reconstructing the polygamy law is to provide legal certainty and justice for all people without exception and can solve problems in accordance with *Maqashid sharia*.

More specifically, the problem that becomes urgent in polygamy is regarding the article on the permit for polygamy through the decision of the Religious Court. The emergence of problems - problems include:

- 1) Polygamous perpetrators prefer to do it secretly which in the end the second wife tries to get an illegal marriage certificate and this is a problem in every area and becomes a criminal problem (Susanto, 2007).
- 2) The number of wife lawsuits, especially due to husbands who are bankrupt or economically established wives, this has an impact on the high number of well-established widows and widowers who are economically disadvantaged, especially because there are many regulations that strengthen the role of women such as the Law on Sexual Violence Crimes (Nurisman, 2022). Gender equality and become a problem economics globally (Bayuadhy, 2016).
- 3) Polygamy causes problems including unwanted implications and tarnishing the noble image of polygamous marriages (Elkarimah, 2018), which is the basis of public opinion that views polygamy as incompatible with human rights (Ardhian et al., 2015). Even though polygamous couples who follow the regulations The determination of marriage according to material and formal law does not encounter problems as faced by unhealthy polygamous couples. Their households are harmonious and happy as well as monogamous married couples (Ardhian et al., 2015).

METHOD

The research used a qualitative method, which is to describe carefully objectively and systematically compile what is in the field with an action research approach by examining a particular group that the author examines as ethnicity which is the object of research and the author himself is involved in the ethnicity being studied. This research uses field data (Empirical Research), namely by collecting data from books, journals and laws as primary data taken and data taken from the Subang district religious court, KUA and other officers such as *lebe* and data taken of the perpetrators of polygamy as an object of research (ethnic) which the author examines. Data Analysis The research that the author uses is a comparative analysis method, which is comparing objectively with objects and systematically compiling what is in the field by examining a certain group that the author examines as ethnicity which is the object of research and other objects that are equivalent in practice and law in order to to strengthen the theory that the author built.

RESULTS AND DISCUSSION

A. The Legal Position of Polygamy

Etymologically "polygamy" comes from two Greek words, namely "poly", which means many and "gamein" which means marriage (Syahfitri & Fahlia, n.d.). Therefore, according to the linguistic meaning, the meaning of polygamy is not distinguished whether a man marries many women or a woman marries many men or it can mean that the same number of male and female pairs enter into marriage transactions, all of which can be called polygamy.

In a socio-anthropological review, what is called polygamy does not differentiate the meaning, whether a man marries many women or conversely a woman marries many men. Here polygamy has two meanings:

- 1) Polyandry, namely marriage between a woman and several men.
- 2) Polygyny, namely marriage between a man and several women (Mustofa, 2018).

Polygamy according to the Big Indonesian Dictionary is a marriage bond in which one party has or marries several members of the opposite sex at the same time (Meiditya, 2018). In terms of polygamy, it means, the act of a man collecting in his dependents two to four wives and not more than four (Sanan, 2003).

Polygamy in Islamic terminology means the act of a man collecting in his dependents two to four wives, and no more than four (Hafidzi, 2017). Polygamy in this sense shows that those who want to have more than one wife must have contractual ties according to Islamic law and in accordance with state rules (Sanan, 2003).

B. History of polygamy

The concept of polygamy (ta'addud al-zaujāt) in fiqh is generally understood as a husband at the same time who gathers two to four wives. Polygamy can not be known with certainty the origin of its emergence. Since thousands of years ago, before the arrival of Islam, polygamy had become a tradition that was considered normal (Umar, 2014).

The practice of polygamy carried out by the Prophet Muhammad. very much different from polygamy that is happening today. Therefore, to be able to clearly understand the intent and purpose of the Prophet's practice of polygamy, it can be seen from the problems or reasons why he practiced polygamy. Among them:

First, the Messenger of Allah was sent to spread love and compassion to the whole world by Allah swt. In line with the word of God in QS. al-Anbiyā (21):107 (Means that We did not send you, but to (be) a mercy for the universe).

Second, the Messenger of Allah was sent to be a role model for mankind. This is explained in QS. al-Ahzab (33):21

Third, the Messenger of Allah was sent to protect and raise the dignity of women, orphans, slaves, and other oppressed people. This is in QS. al-Nisa 127

Fourth, the Prophet ordered his people to settle down to form a prosperous, happy family and grow a strong Islamic generation in the future. Not solely to channel their sexual nature (Cahyani, 2018).

Fifth, with the many revelations that were revealed to the Messenger of Allah. it is necessary to study so that the meaning contained is clear and exemplified in accordance with the meaning of the content. By knowing the implied meaning, it is clear the reasons behind the practice of polygamy by the Prophet.

The practice of polygamy of the Prophet Muhammad. clearly not based on a biological need, or simply for procreation. In the Prophet's marriage, polygamy that he did by marrying an elderly woman except Aisyah, and also polygamy was carried out not in normal conditions or situations, but in situations of jihad war, struggle and devotion whose main purpose enforce Islamic teachings (Cahyani, 2018). The polygamy practiced by the Prophet was even more than four wives, in the Qur'an also explicitly provides specifics and restrictions on polygamy of the Prophet, so as not to be imitated by Muslims carelessly (Wahyuninto, 2018).

Based on this kind of holistic discussion, we can understand the practice of polygamy Rasulullah more proportionally. By knowing the history of polygamy carried out by the Prophet Muhammad. along with the reasons and objectives that have noble principles, clearly very much different from the polygamy that develops in people's lives in general,

which forgets the element of justice in it as the main requirement in carrying out polygamy but prioritizes the fulfillment of biological desires (Hariyanto, 2016).

C. The provisions of Polygamy in the 1974 UUP

Article 3

- (2) The court may give permission to a husband to have more than one wife if the parties concerned want.

Article 4

- (1) In the event that a husband will have more than one wife, as referred to in Article 3 paragraph (2) of this Law, he is obliged to submit an application to the Court in the area where he resides.
- (2) The court referred to in paragraph (1) of this article only gives permission to a husband who will have more than one wife if:
 - a) the wife cannot carry out her obligations as a wife;
 - b) the wife has a disability or an incurable disease;
 - c) wife cannot bear children.

Article 5

- (1) To be able to submit an application to the Court as referred to in Article 4 paragraph (1) of this Law, the following requirements must be met:
 - a) there is the consent of the wife/wives;
 - b) there is certainty that the husband is able to provide for the necessities of life for his wives and children.
 - c) there is a guarantee that husbands will treat their wives and children fairly (Nomor, 1 C.E.).

D. The basic provisions of Polygamy in KHI

Article 55 of KHI:

- (1) Have more than one wife at the same time, limited only to four wives.
- (2) The main requirement is to have more than one wife, the husband must treat his wife and children fairly.
- (3) If the main conditions referred to in paragraph (2) cannot be fulfilled, the husband is prohibited from having more than one wife.

Article 56 of KHI:

- (1) A husband who wants to have more than one wife must obtain permission from the Religious Court.
- (2) The application for the permit referred to in paragraph 1 is carried out according to the procedure as regulated in Chapter VIIIPP No.9 of 1975
- (3) Marriages with a second, third or fourth wife without permission from the Religious Courts do not have legal force.

Article 57 of KHI

- (1) The wife cannot carry out her obligations as a wife.
- (2) The wife has a disability or an incurable disease.
- (3) The wife cannot bear children.

Article 58 of KHI

- (1) In addition to the main requirements as stated in Article 55 paragraph (2), in order to obtain a Religious Court permit, the conditions specified in Article 5 of Law No.1 of 1974 are also met, namely:
 - a) There is the consent of his wife/ wives.
 - b) There is certainty that the husband is able to guarantee the necessities of life for his wife and children.
 - c) There is a guarantee that husbands will treat their wives and children fairly. The consent of his wife/ wives is not required if it is impossible for his wife/wife to ask for her consent and cannot be a party to the agreement, or if there is no news from his wife for at least 2 (two) years, or for other reasons that require an assessment from the wife on court judge
- (1) Without prejudice to the provisions of article 41 letter b of Government Regulation No. 9 of 1975, the wife's or wives' consent can be given in writing or orally, but even if there is written consent, this agreement is confirmed with the wife's verbal consent at a court hearing Religion.
- (2) The consent referred to in paragraph (1) letter a is not required for a husband if it is impossible for his wife and wives to ask for their consent and cannot become a party to the agreement or if there is no news from his wife or wives for at least 2 years or for other reasons that need to be judged by the judge.

Article 59 of KHI

In the event that the wife does not want to give consent, and the application for permission to marry more than one person is based on one of the reasons stipulated in Article 55 paragraphs (2) and 57, the Religious Courts may determine the granting of permission after examining and hearing the wife who (Nomor, 1 C.E.).

Since the time of the Messenger of Allah, the Companions, Tabi'in, the period of ijtihad and after that, most of the Muslims understand the two akhkam verses, namely the surah- Nisâ' verses 3 and 129 are as follows (Hartama et al., 2016):

- (1) The command of Allah SWT, "then marry (other) women you like", is understood by fi'il amar (command word) fankihû as an ibâhah command (permissible), not obligatory. This option indicates that you have the right to more than one, but it is recommended that you keep one if you cannot. Linguists and commentators also agree that the verse has a permissible limit (Hafidzi, 2017).
- (2) The principle of justice is not only seen from the readiness and ability from an economic point of view (subsistence), but is able to fulfill and please his wives and not behave unjustly. If this is the case, then it is better to have only one wife. As Allah says, "Then if you are afraid that you will not do justice, then (marry) only one, or the slaves you have" (Yanggo & Subhan, 2006).
- (3) The understanding of the fair conditions is that if there is a concern that they cannot act fairly in fulfilling the rights of wives who marry more than one, then the principle of monogamy is mandatory. If he continues to force himself, then he is a sinner even though his marriage is still valid (Al-Qasir, 2004).

The view of Jumhur Ulama', which explains that verse 3 in Surah An-Nisa' above came down after the Uhud war, when many Islamic fighters (mujahideen) died on the battlefield. As a consequence, many orphans and widows are left behind by their fathers and husbands. As a result, many orphans are neglected in their lives, education, and future (Khoiruddin, 1996).

In addition, the contemporary Indonesian commentator M. Quraish Shihab explains that the verse above does not require polygamy or recommend it, he only talks about the permissibility of polygamy, which is a small door that can only be passed by people who really need it and with conditions that are not light. Thus, the discussion of polygamy in the view of the Qur'an should not be viewed in terms of ideals, or good and bad (Asiyah et al., 2019). However, it must be viewed from the point of view of legal stipulation in various conditions that may occur (Shihab, 2002). It is allowed because of the relief or in the language called *rukhsah*. In line with this, Sayyid Qutb explained that the leniency allowed in religion is always synonymous with things that are very urgent. This also applies to the law that allows polygamy accompanied by certain conditions such as fairness in providing a living and others (Purwanto, 2019).

E. *Maqosyid sharia*

Maqashid Sharia in Legal Establishment Responding to the pros and cons of the regulation of polygamy permits in the UUP, the theory used in studying this problem is the theory of maqashid syar'iyah (teleological Islamic law) which examines Islamic law based on certain objectives to be pursued. achieved by the shari'ah, namely for the benefit of mankind (limashalih al-'ibad). This theory was coined by al-Juwani which was later developed by his famous pupil, Imam al-Ghazali, and then the development of the peak of this theory was carried out by Imam ash-Syatibi (Yudian, 2006).

These philosophers of Islamic law agree that there are five main interests regarding human beings that must be protected, and the protection of these five core values is the goal of Islamic law. Ash-Syatibi divides maqashid or mashalih into three, namely mashalih daruri (primary interest), haaji (secondary interest), and tahsini (tersir). It is called primary benefit because this maqashid or mashalih cannot be avoided to support the benefit of the hereafter and the world. The five primary interests are: (1) protection of religiosity (hifdzuddin), protection of human life/spirit (hifdz-nafs), protection of reason (hifdzul-'aql), protection of family/descendants or social (hifdzun- nasl), and protection of assets (hifdzul-mal) (Anwar, 2007).

Based on the description of the regulation on polygamy permits as described above, it can be understood that these regulations, both through the UUP and KHI, refer to the purpose of marriage, namely forming a family or a happy and eternal household based on the One Godhead, or in the KHI formulation, which is sakinah, mawaddah and rahmah. This goal is in line with the objectives to be achieved from a legal stipulation which in Islamic legal literature is known as maqashid al-syari'ah, as described above that one of the five main interests (mashlahah dlaruriyah) is the interest of protecting the family/ descendants (hifzun nasl).

Hifdz ad din including sirri marriages are not registered at the Office of Religious Affairs. According to Islamic law, the marriage is considered valid by some because it has met the criteria for the validity of the marriage, namely the consent, qabul, two brides, guardians and two witnesses. Siri marriage is still often used as an alternative to anticipate promiscuity between non-mahram men and women who are psychologically, morally and materially, not ready to marry formally (Widodo & Fitria, 2010).

Hifdz nasl To get offspring because a barren wife cannot give birth to children. Or because the wife is too old and has broken her period. In choosing a wife, Islam likes women who can give birth to children rather than those who are sterile, even though their physical characteristics are more attractive. This is explained by the Prophet with his words which mean, "Black women who have seeds are better than beautiful women who are

barren (Mustofa, 2018). The right to get equal opportunities in the field of education (according to the principle of *hifdz al-'aql* guarding reason) *hifdz nasl* (maintenance of offspring) or in other terms called *hifdz al-'irdh* (maintenance of honor) all of which are included in the category of *dharuriy* (Budiman, 2018).

Hifd and *nafs* the purpose of marriage that is *sakinah*, *mawaddah* and *rahmah*, should require careful preparation. mature, and that maturity can be formed with the maturity of the soul. This effort can also be said as a form of realizing *maqasid ash-syari'ah*, *hifdz an-nafs* (protecting, protecting the soul) (Chakim, 2014). *Hifd al mal* property is not everything, but it is not denied without wealth as a living, it is not allowed in polygamy and as the main condition (Azmilhuda, 2016).

CONCLUSION

In Reinforcing Problems in Polygamy in Indonesia, which is a form of marriage, this is justified both in the perspective of *Maqosid Syariah* and in Positive Law. That polygamy is a part of marriage, it is based on the regulation on polygamy permits, it can be understood that the regulation, both through the UUP and KHI, refers to the purpose of marriage, namely to form a happy and eternal family or household based on the One Godhead, or in the KHI formulation, *sakinah*, *mawaddah* and mercy. These objectives are in line with the objectives to be achieved from a legal determination.

The importance of understanding the theory of *maqosid Syariah* to solve various legal problems, especially regarding the terms and permits for polygamy, has been justified in Indonesia for the renewal of marriage law in Indonesia by incorporating Islamic legal values into national legalization, both marriage laws and Islamic law compilati

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