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Jl. Prof. KH. Zainal Abidin Fikri KM. 3.5 Palembang 30126 Telp. +62711362427
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Gender Analysis: of Polygamy Permit Based on the Reason of Benefit

Umi Supraptiningsih¹, Theadora Rahmawati², M. Mahrus Fauzi³,
Laily Zainab⁴

IAIN Madura, Indonesia

Email: umisupraptiningsih@iainmadura.ac.id

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Abstract: *Case Number 0779/Pdt.G/2019/PA.Pwt is interesting to discuss because in his case, the applicant's first wife allowed her husband to practice polygamy despite the fact that she can carry out her obligations as a wife, give birth, and she is not disabled or suffering from an incurable disease (as the conditions contained in the Compilation of Islamic Law). The purpose of this paper is to examine the maslaha of the first wife in allowing polygamy. This research is classified as normative legal research, with a case study approach and some literature reviews derived from laws and regulations, books, official documents, journals, and research findings. The data sources used in this research are primary, secondary, and tertiary data sources. This research shows that the judge's consideration is based on the main reason of the applicant, husband, for asking polygamy because his wife is deemed unable to fulfill his Biological needs regularly which only fulfill for once or twice per week. Because of this, the court argues that the applicant's proposal for polygamy has satisfied the provisions of Article 4 paragraph (2) letter A of Law No. 1 year 1974 concerning Marriage which is in line with the provisions of Article 57 letter A Compilation of Islamic. From the gender analysis, the decision did not show justice for the respondent, it was normal for biological relations to be fulfilled twice in one week, but the judge did not see the side of the applicant who experienced hypersex, however, the respondent still stated that he did not mind polygamy.*

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Introduction

Polygamy in social life remains a central concern, so it is not uncommon for someone who practices polygamy to be a topic of endless discussion. This is because in society, many people practice polygamy without understanding the purpose and goals of polygamy itself, so it tends to be only for the fulfillment of their desires. Society views that a man who practices polygamy lacks satisfaction with his wife. This is what makes polygamy something frightening for women. In the perception of Indonesian society, polygamy is still considered a deviant behavior from social norms compared to sexual

culture that occurs outside of marriage. So when a woman is polygamous, she confrontationally chooses divorce as a solution rather than being a co-wife (Warkum Sumitrrro et al., 2014).

What needs to be reconsidered is the reason why people practice polygamy, with the excuse that it is the Prophet's sunnah. It should be known that the verses of the Qur'an that regulate polygamy were revealed during continuous wars that befell Arab society. The Battle of Uhud, which claimed many Muslim lives, caused many wives to be left by their husbands, hence polygamy became an emergency solution (Jamaluddin et al., 2016).

Polygamy has been known long before the birth of Prophet Muhammad SAW. Every nation and people have known the practice without any specific boundaries and rules regulating it (Abdul Mutakabbir, 2019). Then Islam came with some regulations, so what Islam offers is more humane and more moral compared to what had happened before Islam (Shihab, 2018).

Polygamy in the Islamic world is very different from the previous practice (Siti Musdah Mulia, 2004). Islam only limits the number of women that can be owned by men (Hermanto, 2017). Many people think that it is Islam that brings the guidance of polygamy (Siti Musdah Mulia, 2004). In fact, Islam only allows a maximum of four wives, with very strict conditions. Before Islam came, the number of wives was not limited, causing many wives to be left behind due to the husband's inability to be fair.

Basically, the purpose of polygamy in Islam is to protect women (Jamaluddin et al., 2016) with several conditions contained in the Qur'an. The requirements that must be fulfilled for polygamy to be allowed are very heavy, so it is almost certain that they cannot be fulfilled (Surjanti et al., 2019). With the many conditions that need to be met when practicing polygamy, whether in the Qur'an or in several laws in Indonesia, it is only intended to minimize polygamy, considering the great and heavy responsibility that will be borne by the husband for his wives and children.

Polygamy, which was initially intended to solve a social problem that existed in society and aimed to honor women, even brought the opposite reality, namely the emergence of new problems and even lowered the dignity of women (Faridl, 1999). Many things happen in society, where a husband who practices polygamy tends to favor his second or new wife, both externally and internally. This makes the first wife feel degraded, so it is not uncommon for her to file for divorce, because she feels there is no justice and no happiness in her household.

The concept of justice in polygamy is one of the main requirements stated in the Qur'an and Indonesian Law. The Religious Court must grant permission for polygamy in accordance with the Marriage Law and KHI (Islamic Law Compilation). However, in resolving a case, such as a polygamy permit, the judge, who is authorized to make the decision, certainly has his/her own considerations and criteria for granting the permit based on various reasons given by the applicant, since the judge is entitled to deepen, follow and understand the legal values in society without ignoring applicable regulations.

Studies on polygamy permits have been found in several forms of scientific works, including Shilfa Ayya Amalia's (2020) article on "Polygamy

Permit Application Due to the Desire to Have More Offspring from the Perspective of Maqashid Syari'ah (Study of Decision Number: 203/Pdt.G/2020/PA.Wsb)". In this study, Maqashid Syari'ah is used to analyze the judge's considerations in granting a polygamy permit based on the reason of wanting to have more offspring. Diana Ulfatun Khasanah's (2018) article on "Polygamy Permit Application Based on the Reason that the Second Wife is Already Pregnant from the Perspective of Sadd Adz Dzaria'h (Analysis of Decision in Kendal Religious Court Case Number 220/Pdt.G/2015/PA.Kdl)" uses the perspective of Sadd Adz Dzari'ah to analyze the judge's considerations in granting a polygamy permit based on the reason that the second wife is already pregnant. Muhammad Irfani Al-Khaqiqi's (2019) article on "Analysis of Maslahah Mursalah on Polygamy Permits in the Religious Court" uses Maslahah Mursalah as a study material to analyze polygamy permits in the Religious Court.

From the above articles, the difference in this study is the use of Gender Analysis to examine the judge's considerations in granting a polygamy permit in Decision Number: 0779/Pdt.G/2019/PA.Pwt. This paper aims to complement previous studies that overlook the judge's considerations in his/her decision regarding the rights of the first wife who has been obedient and the failure to fulfill the requirements for granting a polygamy permit but is willing to accept it for the benefit of the wife. Regarding this matter, there are two issues to be discussed. First, what are the judge's considerations for granting a polygamy permit based on Decision Number 0779/Pdt.G/2019/PA.Pwt? Second, what is the Gender Analysis of Decision Number: 0779/Pdt.G/2019/PA.Pwt Regarding Polygamy Permit with the Reason of Benefit? This paper argues that the Religious Court still grants permission for polygamy to the husband even if the first wife does not fulfill the legal requirements for granting the permit as stated in Article 57 of KHI and Article 58 (paragraph 1)

Research Methodology

This research employs the normative juridical research method, which is based on the legal norms found in laws and in society (Zainuddin Ali, 2014). In this research, the researcher uses two approaches. Firstly, the Analytical Approach, which is a methodology that breaks down legal materials to understand the implications contained in the terms used in regulations theoretically, as well as to understand their practical application and legal decisions. This is done through two assessments. First, the researcher tries to obtain other meanings contained in the regulations that are relevant to the research. Second, they attempt to adjust those terms in practice by examining legal decisions. Secondly, the Case Approach, which is intended to study the application of legal norms or rules applied in legal practice. Specifically, for predetermined cases, the study describes the influence of normative dimensions on the supremacy of law, as evidenced by case law number 0779/Pdt.G/2019/PA.Pwt examined in this research (Johnny Ibrahim, 2010). The normative legal research data is collected through literature research, which comes from legislation, books, official documents, publications, and research results (Johnny Ibrahim, 2010).

The data collection method used by the researcher includes Documentation Studies and Observations. In the documentation study covering the Purwokerto PA decision, the judge considered it as one of the primary legal sources. The processing and analysis of this legal material are juridical, as its processing and data analysis only involve secondary data consisting of primary, secondary, and tertiary legal materials. Therefore, in processing and analyzing legal material, it cannot be separated from various interpretations found in legal science.

Results and Discussion

Polygamy is the practice of having more than one wife and must be bound by sharia law and in accordance with the rules of the country. The fact that sharia law allows polygamy indicates that it serves a particular purpose, namely to follow the rules of polygamy (Hafidzi, 2018). Islam has legalized polygamy as one solution to problems that arise within a household, such as the problem that arises when a husband and wife are unable to conceive, and the husband decides to practice polygamy to have children. Islamic law permits polygamy with a limit of four wives. He must have the ability and sufficient wealth to meet the needs of his additional wives. He must treat all his wives fairly and equally. Each treatment should be the same in fulfilling their marital rights and other rights. However, if a man feels that he cannot treat them fairly or he does not have the means to support them, he must restrain himself and have only one wife (Hadi Wibowo, 2019).

The permission for polygamy is a permission that is difficult and tightened, and it is allowed only in emergency situations that can only be done by those who really need it. In the fiqh principle "Dar'u al-mafasid muqaddamun 'ala jalbi al-mashalih" (preventing harm takes precedence over achieving benefits). This principle is intended to show how important it is to be careful in practicing polygamy. Meanwhile, the reasons that allow polygamy according to Al-Maraghi in Hadi Wibowo's writing are: 1) Because the wife is barren, while both of them or one of them really wants children. 2) If the husband has a high sexual ability, while the wife is unable to fulfill his needs. 3) If the husband has a lot of wealth to finance all the family's needs, ranging from the wife's needs to the children's needs. 4) If the number of women exceeds the number of men, which may be due to war. Or the large number of orphans and widows resulting from the war also allows for the practice of polygamy (Hadi Wibowo, 2019).

The permission for polygamy is only if the conditions that can guarantee the husband's justice towards his wives are fulfilled, namely fairness and balance in providing financial support, housing, rotation of nights, and meeting the needs of his wives. However, justice in love and affection cannot be fulfilled as indicated in Surah An-Nisa' verse 129 which reads:

"You will never be able to be fair and just as between women, even if it is your ardent desire, so do not be too partial and do not give all your attention exclusively to one of them so as to leave the other in a state of suspense. If you effect a reconciliation and are on your guard against evil,

then verily Allah is Oft-Forgiving, Most Merciful." (Abdul Hafid Dasuki, 1990).

Based on the verse, Islamic law in Indonesia cannot completely close the possibility of polygamy. However, what can be done is to strictly regulate the technical or procedural aspects of its implementation so that polygamy is carried out only when necessary, does not harm anyone, and does not result in abuse against the wives and children (Musawwamah, 2014).

Gender in Islam

Is a cultural concept that seeks to create differences in roles, behavior, mentality, and emotional characteristics between men and women that develop in society (Zaitunah Subhan, 2015). The roles assigned by society and culture (social construction) are related to a belief process (ideology) about how men and women are expected to think and act in accordance with social and cultural norms in their respective regions (Ikhlasiah Dalimoenthe, 2020).

The concept of gender is not a natural or inherent trait but the result of social and cultural constructions that have developed throughout human history. For example, women are gentle, emotional, and only suited to take on domestic roles, while men are strong, rational, and suitable for roles in the public sector. In other words, gender is a concept that describes the relationship between men and women that are considered to have differences according to social and cultural constructions that cover differences in roles, functions, and responsibilities (Zaitunah Subhan, 2015).

Discussion of gender can be understood as a discussion of the position of women and men in terms of access, roles, and control over sources of life, responsibilities, benefits, rights, and so on (Ikhlasiah Dalimoenthe, 2020). The Qur'an does not contain a word that is equivalent to the term gender. However, if gender refers to non-biological differences between men and women, including differences in function, role, and the relationship of roles between them, then a number of terms can be found for it, such as al-rajul/al-rijal and al-mar'ah/al-nisa', as well as al-dzakar and al-unsta (Muhammad Yunan Harahap, 2018).

The concept of gender in the Qur'an is the equality of position between women and men in all activities, especially in performing righteous deeds. The Qur'an gives the spirit of Muslims to increase their righteous deeds without any distinction of gender (Abd. Halim K, 2014). Islamic teachings firmly place women in an honorable position. Islam places women as beings who are no different from men in their human nature. The Qur'an has affirmed that whoever does righteous deeds, both men and women, Allah will give them a reward equal to what they have done. In Islam, the basic principles regarding human dignity, women's human rights, and equal opportunities to serve are clear and firm. Although there are natural biological differences, they are not a barrier to obtaining the same rights (Ermagusti, 2011).

Gender Equality Concept

In English, gender equality is known as the equality between genders. In the draft of the Gender Justice and Equality Law (RUU KKG), gender equality means equal conditions and positions for women to access, participate, control, and benefit from development in all aspects of life (Hajir Mutawakkil, 2014). The view of the Quran on human equality is that it does not distinguish between genders or ethnic groups, and emphasizes that honor is for those who are righteous, as described in Q.S. a-Hujurat (49): 13.

١٣ خَيْرٌ عَلَيْهِمُ اللَّهُ إِنَّ اتَّقَانَا اللَّهُ عِنْدَ أَكْرَمِكُمْ إِنَّ لِنَعَارِفُوا وَقَبَائِلَ شُعُوبًا وَجَعَلْنَاكُمْ وَأَنْتَى ذَكَرَ مِنْ خَلَقْنَاكُمْ إِنَّا الْبَاسُ بِأَيِّهَا

“O mankind, We have created you from male and female and made you peoples and tribes that you may know one another. Indeed, the most noble of you in the sight of Allah is the most righteous of you. Indeed, Allah is Knowing and Acquainted” (Abdul Hafid Dasuki, 1990).

The explanation of this verse is very clear that the excellence and honor of humans are not natural, but due to their effort to become righteous. Therefore, both men and women have the same opportunity in the sight of Allah. And surely Allah does not honor men because of their gender, nor does He belittle women because of their gender (Tutik Hamidah, 2011). Men and women have the same rights and obligations in fulfilling their roles as caliphs and servants. Regarding social roles in society, there are no verses of the Quran or hadiths that prohibit women from being active in them (Rusli, 2011). In realizing Allah's mercy in the form of the application of equality values in human life, especially in building a harmonious family, which is based on five principles: the principle of human dignity, the principle of equality relationship patterns, justice, the principle of love and mercy, and the principle of fulfilling the needs of a prosperous worldly and afterlife. In a harmonious family, each member respects, honors, and supports each other in achieving success and happiness, both physically and spiritually. With the principle of human dignity, one can avoid violence and injustice. Meanwhile, the principle of equality relationship patterns among family members, which is based on the equality of human values, encourages the emergence of a sense of understanding, tolerance, and respect for others, even if their status and age are different. Equality promotes a dialogical nature, mutual respect, and information exchange, thus fostering a sense of love and affection among family members (Siti Azisah, 2016).

The Benefit of Polygamy

Every matter that has been permitted by Islamic law surely contains benefits, and the benefits it contains are greater than its harms. Conversely, every matter that has been prohibited by Islamic law is believed to contain harms, and the harms it contains are greater than its benefits. This is what Allah, as the legislator (musyari), considers and takes into account. In the matter of polygamy, there is no doubt that Allah, as the legislator, has considered its benefits and harms, and ultimately allowed polygamy for those who need it and are capable of fulfilling its requirements.

If the benefit of the first wife lies in her existence as the queen of her household, with no one to rival her, and she feels that her benefit will be jeopardized by the presence of a rival wife, then the benefit of the husband lies in marrying another wife who can prevent him from committing the forbidden act of adultery (zina) or help him to have the offspring he desires, or for other reasons. Meanwhile, the benefit of the second wife is that she has a half of a husband, and she is protected and held responsible by her husband, rather than living alone or becoming a widow, or being poor for the rest of her life. The benefit of the community (ammah) lies in its ability to maintain its members by marrying them lawfully, so that each husband and wife is able to fulfill their responsibilities to the community, themselves, their spouses, and their offspring entrusted to them by Allah SWT (Irma Suryanti, 2016).

Polygamy is permitted in order to achieve benefits, because if polygamy is prohibited, a husband who is not satisfied with one wife may commit adultery. And if adultery is committed, it can lead to the destruction of his religion, the tarnishing of his honor or lineage, the loss of his life, and the inability to protect his wealth and intellect (Suratmaputra, 2017). In essence, the benefit of polygamy is nothing but the wisdom behind its permission.

The Concept of Gender Justice

Gender justice is a process and fair treatment towards both women and men. It is also a process towards achieving equality between women and men that leads to a positive relationship in their lives. Men and women are created to complement each other regardless of their strengths and weaknesses (Nuriyah et al., 2019).

The Qur'an provides several clear indications of the basic principles of humanity, namely: equality, justice, equality, tolerance, balance of democracy, and the enforcement of human rights. To achieve gender-just relationships, gender-based gaps and sexual division of labor between men and women should be eliminated in various areas of life, while considering their nature (Sumbulah, 2012).

Gender justice means eliminating fixed roles for men and women that lead to gender-based injustice. Gender differentiation or social roles themselves are not a problem as long as they do not cause injustice. However, fixed roles in both domestic and public areas mean viewing gender as the nature of men and women, which leads to discrimination, marginalization, subordination, and gender-based violence behavior (Sami Faidhullah, 2018).

Gender justice is a process to obtain a fair position, role, or position for both men and women to achieve gender justice through equal or different treatment of men and women based on their respective needs. One of the ideal goals of the Qur'an is the realization of justice in society. Justice in the Qur'an covers all aspects of human life, both as individuals and as a society. Therefore, the Qur'an does not tolerate any form of oppression based on ethnic groups, skin color, ethnicity, religion, or gender. The rights of justice include the right to life or *hifdzal hayah*, the right to religion or *hifdz al-din*, the right to think or *hifdz al-*

'aql, the right to means of life or *hifdz al-mal*, and the right to offspring or *hifdz an-nasl*. Specifically, these basic human rights can be further elaborated as the right to dignity, the right to justice, the right to be free from slavery, the right to knowledge, the right to food, and personal rights that include the right to develop one's own sensitivity and enjoy the generosity of Allah SWT (Siti Azisah, 2016).

Gender Analysis of Decision Number: 0779/Pdt.G/2019/PA.Pwt.

In the application for permission to practice polygamy, the applicant requested permission to practice polygamy because the respondent was unable to meet the applicant's biological needs regularly and could only do so once or twice a week. However, the judge's consideration in granting permission for polygamy is based on the fact that, according to the judge, the applicant's reason meets the requirements of Article 4 paragraph (2) letter a of Law Number 1 of 1974 on Marriage, which is also in line with Article 57 letter a of the Compilation of Islamic Law, which states that the wife is unable to perform her duties as a wife. Regarding the judge's assessment of the applicant's reason, which led the judge to conclude that the respondent was unable to perform her duties as a wife, the author believes that this assessment is very inconsistent with the actual situation. In reality, the wife has already fulfilled her duties as a wife, but the husband's situation is such that he cannot be satisfied with just one wife. The gender injustice in the judge's consideration lies in the continued gender bias in this polygamy permit decision. In this decision, the Panel of Judges judged that the respondent could not fulfill her duties as a wife because she could not meet the husband's biological needs regularly. With the applicant's condition (hypersexuality), the Panel of Judges still placed the respondent in a weak position. The Panel of Judges' assessment is very different from the gender equality found in the Qur'an (Lahati, 2018).

In Islam, the Qur'an describes sexual relations as one of Allah's pleasures and enjoyments. Sexual pleasure and desire are not only the rights of men but also of women, as stated in the verse "They are your garments and you are their garments." In this case, if a wife feels unable to serve her husband's sexual needs regularly every day, then the wife has the right to refuse it because it is beyond her ability. Therefore, in this case, the respondent gave her consent to the applicant to marry again because she could no longer fulfill the applicant's biological needs regularly. She could only do so once or twice a week, as evidenced by the Letter of Permission for Husband to Remarry and the Letter of Declaration of Willingness to Practice Polygamy. With this explanation in the Qur'an, it is clear that Islam places men and women equally, especially in the context of sexual relations (Khatimah, 2013).

Furthermore, the second consideration of the judge is because the applicant and his potential second wife already have a love relationship, and the applicant has even proposed to her, and the proposal was accepted by the family of the applicant's potential second wife. Thus, the Panel of Judges granted permission for polygamy for fear of acts that are not permitted by Islamic law. Granting permission for polygamy in this case will undoubtedly provide justice and benefit to the applicant and the respondent. As explained

above, the principle of justice in family equality begins with being fair to oneself, followed by being fair to one's partner, children, parents, and relatives. Being fair to oneself means being able to meet one's needs and rights, whether they are physical, emotional, spiritual, or social, in a balanced and good way. Being fair to the family means treating and fulfilling the rights of all family members well and fairly. In this case, the respondent has the right to refuse to have sex because she feels unable to do so. Meanwhile, the applicant has the right to apply for polygamy for the sake of continuity and prosperity which contains benefits and blessings for both worldly and afterlife (Siti Azisah, 2016). Meanwhile, the benefits of granting permission for polygamy can be explained as follows:

The benefit to the Applicant is that by granting permission for polygamy, the Applicant is saved from the act of adultery, because the Applicant and the second wife-to-be are acquainted and even have a love relationship, and with this situation, it is very possible for adultery to occur between the Applicant and the second wife-to-be. The benefit to the Applicant can be categorized as a necessity (*dharuriyah*), which is a need or protection that must exist and be realized for the benefit of humanity's religion and world. If this need is not fulfilled, it will threaten the existence of religion and the world. This protection includes five components: protecting religion, soul, offspring, intellect, and property. Just like if the court does not grant permission for polygamy, and the Applicant and the second wife-to-be fall into adultery, the Applicant cannot maintain his religion, his soul and intellect may be damaged because of his sinful acts, his offspring may be threatened, and even his property cannot be well-maintained. Islamic law realizes the protection of these five components with certain Sharia obligations or prohibitions of certain legal forms. In this case, the prohibition is against the act of adultery (Rohman, 2019).

The second benefit is the benefit to the Second Wife-to-be and her family. The benefit to the second wife-to-be and her family can also be categorized as a necessity (*dharuriyah*), by granting permission for polygamy, she can be saved from the act of adultery, so that her religion and her family's honor can be preserved. The benefit to the second wife-to-be is also categorized as a need (*hajiyat*) which, if not fulfilled, will not threaten her safety but will cause difficulties. *Hajiyat* is intended to eliminate difficulties or to maintain the five basic components. In other words, things that humans need to make life easier and more comfortable and to reduce the burdens that must be borne in living their lives. In this case, the second wife-to-be will have a protector (husband), so she will not have difficulty in maintaining those five components (Kurniawan, 2021).

The last benefit is the benefit to the Respondent. By granting permission for the husband to practice polygamy, the Respondent is saved from the threat of *nusyuz* because he is unable to fulfill the Applicant's biological needs regularly beyond his capabilities. Thus, he will not have difficulties in running his household. This can be categorized as a necessity (*dharuriyah*) and a need (*hajiyat*) (Kurniawan, 2021)."

Conclusion

Gender analysis of this decision and the benefit which is a benefit for the Respondent, by giving permission to the husband to carry out polygamy, the Respondent saved himself from the threat of nusyuz because he was deemed unable to routinely fulfill the Petitioner's biological needs beyond his own. Gender injustice in the judge's consideration lies in the existence of gender bias in the polygamy permit decision. In this decision, the Panel of Judges considered that the defendant could not fulfill her obligations as a wife because she could not fulfill her husband's biological needs on a regular basis. Given the applicant's condition (hypersexuality), the Panel of Judges still placed the defendant in a weak position. The Panel of Judges' assessment is very different from the gender equality found in the Koran. It is hoped that there will be further research that can truly provide justice from a gender perspective.

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