

## **SOCIOLOGICAL INTERPRETATION BY RELIGIOUS COURT JUDGES**

### **Views of Bantul Religious Court Judges on the Husband's Financial Capability Requirement for Polygamy**

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#### **Abstract**

The legal substance in the Government Regulation on Marriage Law Implementation, particularly on financial requirements for polygamy, allows the emergence of ambiguous interpretations for judges. Article 41, paragraph C, of that regulation, does not specify how judges should assess the financial strength of a husband who intends to engage in a polygamous marriage. Likewise, the Bantul Religious Court judges (the party that granted the most polygamy permits in Yogyakarta Province in 2021) have a different perspective on the requirements for financial ability in polygamy. In this context, this study examines how Bantul Religious Court judges deal with this legal ambiguity in their decisions. This study examines 14 polygamy verdicts. This research finds that the concept of financial ability in the polygamy case is the judge's way of measuring the justice of the husband. Justice primarily refers to the husband's capability to provide an adequate financial portion of the fair share to their wife (in the future). To know the husband's financial ability, judges apply a holistic approach that rests on a sociological lens.

[Substansi hukum dalam Peraturan Pemerintah tentang Pelaksanaan Undang-Undang Perkawinan, khususnya tentang persyaratan keuangan untuk poligami, memungkinkan munculnya penafsiran ganda bagi hakim. Pasal 41 huruf C peraturan itu tidak mengatur bagaimana seharusnya hakim menilai kekuatan keuangan seorang suami yang hendak melakukan perkawinan poligami. Begitu pula dengan Hakim Pengadilan Agama Bantul (pihak yang paling banyak memberikan izin poligami di Provinsi DIY tahun 2021) memiliki pandangan yang berbeda tentang syarat kemampuan finansial dalam poligami. Dalam konteks tersebut, penelitian ini mengkaji bagaimana Hakim Pengadilan Agama Bantul menyikapi ambiguitas hukum tersebut dalam putusannya. Studi ini mengkaji 14 vonis poligami. Penelitian ini menemukan bahwa konsep kemampuan finansial dalam kasus poligami merupakan cara hakim mengukur keadilan suami. Keadilan terutama mengacu pada kemampuan suami untuk memberikan porsi keuangan yang memadai dari bagian yang adil kepada istri mereka (di masa depan). Untuk mengetahui kemampuan finansial suami, hakim menerapkan pendekatan holistik yang berpijak pada lensa sosiologis.]

### Keywords

Husband's financial capability, polygamy, Religious Court judges

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### Introduction

Unquestionably, financial prowess is highly recommended for Muslims, particularly for husbands who are responsible for providing for their families. In Muslim-majority nations,

the state, therefore, regulates the financial capability of polygamists. In Indonesia, Article 5 paragraph 1 letter b of Law Number 1 of 1974 stipulates that a husband who intends to engage in polygamy must be able to provide for his dependents financially. This rule is emphasized in Article 41 letter C of Government Regulation No. 9 of 1975 concerning the Implementation of Law Number 1 of 1974 Concerning Marriage.<sup>1</sup> This article regulates the husband's financial ability to polygamy. The husband's economic prowess is a guarantee that the husband can meet the various needs of his children and wives. The way for the judge to find out that the husband is financially competent is to examine the husband's income certificate, husband's income tax, or other documents that can be accepted by the court, as explained in Article 41 letter C Government Regulation No. 9 of 1975. However, the substance of the article is subjective because the article does not mention the objective limitation of financial capability referred to in the article.<sup>2</sup>

Bantul Religious Court is the party responsible for 14 decisions granting permission for polygamy, whereas in polygamy regulations there are requirements for financial ability. In addition, there were three judges who became informants, namely Dalhar Asnawi who decided 11 of 14 cases, then Arief Rahman who decided 8 of 14 cases, then Roni Fahmi who became Deputy Chairperson of the Bantul Religious Court. This paper discusses the understanding of these three judges regarding the husband's financial prowess requirements as one of the conditions for polygamy with a focus on the polygamy permit decision in 2021. In that year, Bantul Religious Court data showed that there were 16 applications for polygamy permits with 14 applications being granted and two being rejected.<sup>3</sup> Although juridically financial ability is a cumulative requirement for polygamy permits, several of these decisions do not make financial capability a requirement for polygamy permits. Therefore, this paper explains the arguments and attitudes of the Bantul Religious Court judges. Several articles on polygamy permits show that apart from high sexual appetite and

<sup>1</sup> Zedy Wulan Ayu Widhi Prameswari and Erni Agustin, "Indonesian Marriage Law Reform: The Way to Strengthen the Protection of Children's Rights against Child Marriage," *JSEHR* 2 (2018): 286, <https://doi.org/10.19184/jseahr.v2i1.5353>.

<sup>2</sup> Khoiruddin Nasution, "Polygamy in Indonesian Islamic Family Law," *Jurnal Syariah* 16, no. 2 (2008): 25–40.

<sup>3</sup> Direktori Putusan Mahkamah Agung Republik Indonesia, "PUTUSAN PA BANTUL IZIN POLIGAMI PUTUS TAHUN 2021" (2021), <https://putusan3.mahkamahagung.go.id/direktori/index/pengadilan/pa-bantul/kategori/izin-poligami-1/tahunjenis/putus/tahun/2021.html>, accessed 21 January 2022

reasons to avoid adultery,<sup>4</sup> Financial ability is an important condition for polygamy permits.<sup>5</sup> Nurmila even pointed out how important financial ability is as a condition for polygamy has led to the practice of deceiving financial ability in polygamy applications to the Religious Courts.<sup>6</sup>

This study aims to find out how judges understand and respond to husbands' financial capabilities when applying for a polygamy permit. This article argues that from the perspective of legal interpretation in the tradition of legal reasoning, the Bantul Religious Court judges use a lot of sociological interpretation in determining the financial capability of a husband who applies for a license to polygamy. It is because of this sociological interpretation that several decisions regarding polygamy permits do not make the husband's financial prowess a condition for polygamy permits. The data is collected through an investigation of 14 verdicts completed by interviews. The document comes from a polygamy permit decision issued by the Bantul Religious Court for 2021. Meanwhile, interviews were conducted with three judges at the Bantul Religious Court. The article begins with the rules of financial prowess in legislation, followed by the attitude and views of the Bantul Religious Court judges regarding the husband's financial prowess. This paper ends with a conclusion that shows the important findings of the paper.

### **The Meaning of Financial Ability in Polygamy**

For Asnawi, the financial capability requirements outlined in Article 5 paragraph 1 letter b of Law No. 1 of 1974, and Article 41 letter C of Government Regulation No. 9 of 1975 are based on the existing norms, because if the article includes a special or nominal measure,

<sup>4</sup> Euis Nurlaelawati, "Islamic Justice in Indonesia: Family Law Reform and Legal Practice in the Religious Courts," *Asia-Pacific Research Center Bulletin* 9 (2013): 25, <https://rci.nanzan-u.ac.jp/asiapacific/en/journal/item/bn09.pdf>.

<sup>5</sup> Rijal Imanullah, "Poligami Dalam Hukum Islam Indonesia (Analisis Terhadap Putusan Pengadilan Agama No. 915/Pdt. g/2014/Pa. Bpp Tentang Izin Poligami)," *Ma'abib*, 2016, 104–27, <https://doi.org/10.21093/mj.v15i1.607>; Supardin Supardin and Kurniati Kurniati, "Pertimbangan Hakim Terhadap Pemberian Izin Perkawinan Poligami Menurut Undang-Undang Ri Nomor 1 Tahun 1974 Tentang Perkawinan (Studi Kasus Di Pengadilan Agama Sunguminasa)," *Jurnal Al-Qadau: Peradilan Dan Hukum Keluarga Islam* 8, no. 1 (2021): 101–16, <https://doi.org/10.24252/al-qadau.v8i1.19049>; Mela Handayani, "Permohonan Izin Poligami: Studi Putusan No. 1392/Pdt. G/2017/Pa. Srg," *Syaksia: Jurnal Hukum Perdata Islam* 19, no. 1 (2018): 83–122, <https://doi.org/10.37035/syaksia.v17i1.1119>.

<sup>6</sup> Nina Nurmila, "Polygamous Marriages in Indonesia and Their Impacts on Women's Access to Income and Property," *Al-Jami'ab: Journal of Islamic Studies* 54, no. 2 (2016): 427–46, <https://doi.org/10.14421/ajis.2016.542.427-446>.

the legal disparity arises. This is because husbands who earn less than the nominal amount stipulated in the regulations cannot practice polygamy (whatever the reason). Likewise, if the husband has an income above nominal, then he can practice polygamy (whatever the reason). While the financial prowess requirement is a cumulative requirement that must be met.<sup>7</sup> This view is based on the meaning of legal substance so that it is in line with the intention of legal culture to reduce the imbalance between the nature of law and existing legal facts.<sup>8</sup> It means that polygamy can be done by anyone if the conditions and reasons are met, regardless of whether or not they are financially capable. Another opinion was conveyed by Rahman and Fahmi. They argue that financial prowess is one of the instruments to know the justice of a husband because fair sentences contained in the law are general and only as norms that are very difficult to measure.<sup>9</sup>

### **Financial Ability as the Secondary Requirement for Polygamy**

In order to determine the husband's financial ability, some judges look beyond Article 41, Point C of government regulations. For them, they must also consider the cost of living in certain regions, the Regional Minimum Wage, and family conditions for polygamy, such as whether the prospective second wife has children or not, as well as her social standing.<sup>10</sup> This can be determined by examining the number of children born to the first wife, the second wife, and so on. The second wife is the potential for future income (after polygamy), which can be determined based on whether she also works or the husband has another job or is currently serving as what he might be promoted to in the future, etc.<sup>11</sup> These three views have come out of stagnation in addressing a legal fact. Judges understood the regulations from a sociological point of view. This is done by interpreting a substance by the objectives of legal culture to reduce the gap between the positive nature of law and legal facts.<sup>12</sup> After extracting information, we found that financial ability requirements were not the main consideration for the judges of the Bantul Religious Court

<sup>7</sup> Interview with Dalhar Asnawi, Hakim Pengadilan Agama Bantul, Yogyakarta, 10 March 2022.

<sup>8</sup> Jazim Hamidi, *Hermeneutika Hukum: Sejarah, Filsafat, & Metode Tafsir* (Universitas Brawijaya Press, 2011).

<sup>9</sup> Interview with Arief Rahman, Hakim Pengadilan Agama Bantul, Yogyakarta, 10 March 2022.

<sup>10</sup> Interview with Arief Rahman dan Dalhar Asnawi, Hakim Pengadilan Agama Bantul, Yogyakarta, tanggal 10 Maret 2022.

<sup>11</sup> Interview with Roni Fahmi, Wakil Ketua Hakim Pengadilan Agama Bantul, Yogyakarta, 10 March 2022.

<sup>12</sup> Hamidi, *Hermeneutika Hukum: Sejarah, Filsafat, & Metode Tafsir*.

in granting permission for polygamy. Two important points are the main considerations for the Bantul Religious Court Judge in granting permission for polygamy, namely: (1) the wife's permission is the main factor in permitting polygamy; and (2) the emergency situation is the main factor in granting permission for polygamy.

In polygamy, the wife's permission is included in the cumulative requirements section and this is the main point in granting permission for polygamy. Anawi has the view that if a wife has given up her husband to remarry then why should she be prevented, whatever the reason?<sup>13</sup> This opinion is in line with the opinion of Gus Dur (Abdurrahman Wahid) quoted by Mulia who said that in polygamy the wife is always the subject, therefore whether polygamy is permissible or not depends on the wife.<sup>14</sup> However, this opinion is not in line with the ideals of Law No. 1 of 1974. This law states that the marriage system in Indonesia adheres to the principle of monogamy, not polygamy. This opinion seemed to loosen polygamy because the judge did not know in detail that the wife's permission was truly from the wife or the husband's intervention in the wife. Ideally, if the wife's permission needs to be considered, it does not mean that the wife has given permission, so polygamy is given permission. It is necessary to carry out further research regarding the reasons for the husband wanting to remarry.<sup>15</sup>

In contrast to Asnawi, for Rahman and Fahmi, the most crucial circumstance that should be taken into consideration is an emergency, whether this situation occurs to a wife or to-be wife.<sup>16</sup> So that financial prowess is not the tenet of consideration, because financial needs can be looked for together, that is why before granting permission for polygamy the judges also examine who is the candidate for a second wife, how many dependents the husband has, and who works. If the financial capability is prioritized in an emergency, then it is feared that this emergency will cause other, even greater harm.<sup>17</sup>

<sup>13</sup> Interview with Dalhar Asnawi, Hakim Pengadilan Agama Bantul, Yogyakarta, 10 March 2022.

<sup>14</sup> Siti Musdah Mulia, *Islam Menggugat Poligami* (Jakarta: Gramedia Pustaka Utama, 2004).

<sup>15</sup> Arif Rohman, "Reinterpret Polygamy in Islam: A Case Study in Indonesia," *Rohman, Arif. (2013). Reinterpret Polygamy in Islam: A Case Study in Indonesia. Int J Hum & Soc Sci Inv* 2, no. 10 (2013): 68–74, <https://doi.org/10.2139/ssrn.2258284>.

<sup>16</sup> Interview with Arief Rahman, Roni Fahmi, Judges of Bantul Religious Court, Yogyakarta, 10 March 2022.

<sup>17</sup> Interview with Roni Fahmi, Wakil Ketua Hakim Pengadilan Agama Bantul, Yogyakarta, 10 March 2022.

Based on the opinions above, if the requirement of financial prowess is the first step to finding out the husband's normative justice,<sup>18</sup> then financial prowess should be the main consideration in the case of polygamy permission. Apart from that, according to legal experts, to build a good and correct legal argument, one must look at the legal system and principles that apply. Meanwhile, Indonesia adheres to the principle special law overrides a general law which means that a specific rule takes precedence over a general rule. If seen from its nature, Article 5 Paragraph 1 letter B marriage law is *lex generalis* (general rules) while Article 41 Point C Government Regulation No. 9/1975 is *lex specialis*. This is because Article 41 Point C is the implementation rule of Article 5 Paragraph 1 letter B of Marriage Law No 1 of 1974.<sup>19</sup> Article 41 Point C Government Regulation No 9 1975 should have been the main consideration for judges in granting permission for polygamy.

### **The Decisions and Considerations of Bantul Religious Court Judges Regarding Financial Ability Requirements**

The legal attitude of the Bantul Religious Court Judge regarding financial capability can be seen in his decision in granting permission for polygamy. In 2021, there are 14 decisions that grant permission for polygamy which are grouped into four. First, decisions follow the provisions of the reasons but ignore the financial ability requirements. The judge's legal attitude in this category is reflected in the decision Bantul Religious Court Number 304/Pdt.G/2021/Pa.Btl. Based on this decision, the arguments used by the judges are in a way understanding a rule by using more than one legal discipline<sup>20</sup> namely *ushul fiqh* (Islamic legal theory). If we look at the facts,<sup>21</sup> it turns out that two facts make the case difficult to decide because on the one hand, it fulfills the alternative requirements (the wife is unable to serve) but on the other hand it does not meet the cumulative requirements (not financially capable). Therefore, this is where the judge's knowledge of *ushul fiqh* is applied. The most frequent principle applied by the judges is 'if two harms are together, then take the lesser harm'. In this case, the judge seemed to be in a dilemma. On the one hand, if polygamy is

<sup>18</sup> Interview with Arief Rahman.

<sup>19</sup> Yusrizal, Hamid Sarong, and Iman Jauhari, "Penggunaan Instrumen Hukum Poligami Di Lingkungan Peradilan Umum Dan Kaitannya Dengan Asas Monogami Dalam Peraturan Pemerintah Nomor 9 Tahun 1975," *Jurnal Ilmu Hukum* 4, no. 2 (2016).

<sup>20</sup> Hamidi, *Hermeneutika Hukum: Sejarah, Filsafat, & Metode Tafsir*.

<sup>21</sup> Hamidi.

permitted, there is fear that it later cause new problems, namely economic constraints because the husband is not financially capable. But on the other hand, if this is not permitted, it triggers the emergence of adultery due to the wife no longer being able to serve her husband. Therefore the judge concluded that not being allowed a polygamous husband would cause even greater harm, namely adultery.

The legal reasoning that judges follow when deciding a case is the legal reasoning that has always existed. Judges interpret a rule through the application of multiple legal disciplines.<sup>22</sup> From *maslahah's* point of view judge's decision is seen by weighing the damage caused by the decision. If it is not permitted, it is feared that the husband will commit adultery because the wife is unable to serve him, but if permitted, there is fear that it will cause new problems, namely family economic shocks. So the damage is between the fear of adultery and economic shocks. The adultery is heavier or more damaging than financial inadequacy. This is because adultery is unlawful while poverty has no law, indeed there is a hadith that says that poverty is close to disbelief,<sup>23</sup> however, poverty can be overcome even poverty will bear sweet fruit if faced with patience. Apart from that, many people questioned the validity of this hadith.<sup>24</sup> So that in the decision of this category, the judge's decision contains a benefit because it is not out of or in line with the stipulations of Islamic law. Indeed, there is no detailed argument that says that polygamy is only allowed if there is an emergency for the wife, but there is also no argument that prohibits this ruling, that is what is called *maslahah mursalah* which can be used as a basis for consideration in making Islamic law.<sup>25</sup>

Second, decisions that adhere to the provisions of the reasons and consider financial resources. The second category consists of decisions whose justifications comply with statutory regulations and financial capability requirements, in the sense that they satisfy both cumulative and alternative requirements. The reasoning and legal arguments constructed by the judges of the Bantul Religious Court are based on existing regulations,

<sup>22</sup> Hamidi.

<sup>23</sup> Abu Bakar Ahmad bin Husin Al-Baihaqi, *Syur'ba al-Iman*, vol. 5 (Beirut: Dar al-Kitab al-Ilmiyah, 1990), h. 267. No hadis. 6612.

<sup>24</sup> Abi 'Ula Muhammad Abdurrahman Ibn Abd Rahim Al-Mubarakfuri, *Tuhfatu al-Ahwazi, Syarah Jami' al-Tirmidzi*, vol. 7 (Beirut: Dar al-Kutub al-Ilmiyah).

<sup>25</sup> Ahmad Munif Suratmaputra and Dr KH, *Filsafat Hukum Islam Al-Ghazali: Masalah Mursalah & Relevansinya Dengan Pembaharuan Hukum Islam* (Pustaka Firdaus, 2002).



specifically Marriage Law No. 1 of 1974 and Government Regulation No. 9 of 1975. The judges examine the sources of law used to decide a case in order to create a combination of integral legal sources. Furthermore, the judge has also conducted regular research on the existing facts, starting with asking for acknowledgment of the wife's permission both in writing and verbally, checking the husband's income in the form of a payslip or other, checking health certificates if the wife is chronically ill or the wife is infertile, taking an oath to the husband if he can do justice, asking for witness statements and other things that can be accepted as evidence and real facts. After all have been done, the judge applies the existing regulations, namely by permitting the husband to do polygamy.<sup>26</sup>

The legal considerations used by judges already contain benefits. This is because this decision does not harm any party and the judge has tried his best *ijtihad*. The judge has carried out various ways seriously and pays attention to the husband's financial ability. Let us take an example decision of Bantul Religious Court Number 916/Pdt.G/2021/Pa.Btl where the judge permission is on the basis that the wife is no longer able to serve her husband and the husband's income is around 20 million rupiahs. With an income of 20 million husbands are already financially capable because the cost of living in the Bantul area is relatively low.

From the perspective of *maslahah* (benefit), the above decision is right on target because the permission for polygamy is given because of *rukhsah* (leniency), an emergency.<sup>27</sup> In addition, the wife's permission is already known by the judge. It can be concluded that the wife does not mind if her husband remarries. What is no less important is that the husband is financially sufficient to pay for the needs of his children and wife. This decision was carried out carefully, not based on the lust and psychological situation of the judge at that time. The benefit factor that is no less important is that a decision must meet juridical requirements. Because a decision that does not meet the juridical requirements will lose its value as a decision. Juridical requirements imply that a decision

<sup>26</sup> Arief and Shidarta, "Karakteristik Penalaran Hukum Dalam Konteks Keindonesiaan" (Universitas Katolik Parahyangan, 2004); B. Arief Sidharta, "Meuwissen Tentang Pengembangan Hukum, Ilmu Hukum, Terori Hukum, Dan Filsafat Hukum" (Bandung: Refika Aditama, 2013).

<sup>27</sup> Iim Fahimah, "Poligami Dalam Perspektif Ushul Al-Fiqh," *JURNAL ILMIAH MIZANI: Wacana Hukum, Ekonomi, Dan Keagamaan* 4, no. 2 (2018): 99–110, <https://doi.org/10.29300/mzn.v4i2.1014>.

must have a legal basis, provide legal certainty, and provide legal protection.<sup>28</sup> This is because the law is a draft prepared by experts and involves many parties so it can be said that the regulations regarding polygamy are *ijma'* or consensus.

Following Marriage Law No. 1 of 1974 and Government Regulation No. 9 of 1975 is a benefit because the concept of *mas}lahah* does not stand alone but there are supporting arguments from texts, even though they are not mentioned in particular. For example in the Bantul Religious Court Decision Number 916/Pdt.G/2021/Pa.Btl. in which the judge permits polygamy because the wife is no longer able to serve her husband. If permission is not granted, it is feared that will lead to adultery. Biological needs can be categorized as primary needs. If this needs is not fulfilled because the wife is no longer able to serve her husband, it is feared that the husband will look for another woman to satisfy his biological needs. In this context, the decision seems to contain a benefit because the judge prioritizes closing the path of harm rather than achieving benefit. Another example is Bantul Religious Court Decision Number 696/Pdt.G/2021/PA.Btl. On the grounds of infertility, the judge allows a husband to remarry. If permission is not granted, then the judge has hampered one of the goals of marriage, namely to have offspring.

The reasons such as the wife being sterile, unable to serve her husband, and unable to carry out her obligations are the reason for the permission granted. If permission is not granted, the judges are afraid that hardship in their marriage life occurs such as divorce. Because all alternative reasons or conditions for polygamy are also listed in the article on reasons for divorce.<sup>29</sup> A barren wife can be divorced; a sick or disabled wife can also be divorced; as well as a wife who cannot carry out her obligations is also an indicator of the acceptance of a divorce. The three reasons for polygamy can be the cause of disputes between husband and wife which are included in the category of reasons for divorce. Meanwhile, the judges always bare in mind the principle of taking less risk 'if you meet two harms, then take the lightest harm'. In this category, some of the decisions above are

<sup>28</sup> A Mukti Arto and Mencari Keadilan, "Kritik Dan Solusi Terhadap Praktik Peradilan Perdata Di Indonesia," *Yogyakarta: Pustaka Pelajar*, 2001; A Mukti Arto, *Penemuan Hukum Islam Demi Mewujudkan Keadilan: Penerapan Penemuan Hukum, Ultra Petita Dan Ex Officio Hakim Secara Proporsional* (Yogyakarta: Pustaka Pelajar, 2018).

<sup>29</sup> Rachel Rinaldo, Eva F Nisa, and Nina Nurmila, "Divorce Narratives and Class Inequalities in Indonesia," *Journal of Family Issues*, 2022, 0192513X231155657, <https://doi.org/10.1177/0192513X231155657>; Atun

following the concept of benefit and the judge's argument does not depart from the concept of Legal Reasoning because the cumulative and alternative conditions have been met. It is said to contain benefits because there are arguments that support it, one of which is An-Nisa verses 59.<sup>30</sup>

The third category is decisions whose reasons are not following laws and regulations but is financially capable, in the sense that they do not meet the alternative requirements but meet the cumulative requirements. An example of this category is verdict number 273/Pdt.G/2021/Pa.Btl, in which the judge permitted polygamy because the husband wanted to have more children. His (first) wife had three caesareans and could not give birth again, while the husband was financially capable. This decision is not following the concept of legal reasoning because the judge did not conduct a review of legal sources and did not see the existing legal facts,<sup>31</sup> as well as ignored the history of polygamy rules.<sup>32</sup> Legal norms regarding polygamy stipulate that one of the alternative conditions for polygamy is that the wife cannot give birth, while the fact that his wife can give birth to even three children but the husband wants to increase the number of offspring. This reason is not included in the category of alternative conditions. Even though a husband is financially capable with an income of 20-25 million, it does not mean that he immediately is permitted to do polygamy. According to the history of its legislation, Marriage Law No. 1 of 1974 was made to limit unregistered polygamy.<sup>33</sup> In this decision, the inconsistency of the judges in deciding a case appears. In the interview, the three judges agreed not to make financial conditions the main requirement, but in this case, it can be seen that the judge permitted the husband where the alternative conditions were not met while the cumulative conditions

Wardatun and Bianca J Smith, "Woman-Initiated Divorce and Feminist Fiqh in Indonesia: Narrating Male Acts of Nushūz in Marriage," *Ulumuna* 24, no. 2 (2020): 266–95, <https://doi.org/10.20414/ujs.v24i2.416>.

<sup>30</sup> Al-Ghazali, *Al-Mustashfa Min Ilm Al-Ushul*, Jilid I (Beirut: Dar al-Fikr), 141.

<sup>31</sup> Arief and Shidarta, "Karakteristik Penalaran Hukum Dalam Konteks Keindonesiaan."

<sup>32</sup> Nina Nurmila, *Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia* (Routledge, 2009); Muhammad Isna Wahyudi, "Women Dealing with The Law in Religious Courts," *AHKAM: Jurnal Ilmu Syariah* 18, no. 2 (2018): 305–20, <https://doi.org/10.15408/ajis.v18i2.7491>; Agustina Nurhayati, "Politik Hukum (Legislasi) Hukum Keluarga Di Saudi Arabia," *Ijtima'iyya* 7, no. 1 (2014): 61–81; Sumanto Al Qurtuby, *BETWEEN POLYGYNY AND MONOGAMY Marriage in Saudi Arabia and Beyond1*, *Al-Jami'ah*, vol. 60, 2022, <https://doi.org/10.14421/ajis.2022.601.29-62>.

<sup>33</sup> Z Koen, "Tanda Dan 10 Alasan Laki-Laki Ingin Berpoligami," *Yogyakarta: Penerbit Galang Press (Anggota IKAPI)*, 40AD.

fulfilled. However, this case was allowed by the judge because the decision contained the name Dalhar Asnawi who made the wife's permission his main consideration.<sup>34</sup>

The decision above is not following the steps contained in Legal Reasoning. The judges did not see that Marriage Law No. 1 of 1974 was formed to limit polygamy and adhere to the principle of monogamy.<sup>35</sup> While it has been explained in the previous chapter that one of the steps in building legal reasoning is good is to read a rule with a historical lens.<sup>36</sup> Before 1974, illegal polygamy was often found in society. A husband easily remarries either knowingly or without the wife's consent. The polygamy procedure at that time was limited to reporting the polygamous marriage to the Office of Religious Affairs for registration. This is caused by the absence of the enactment of a rule governing polygamy. The enactment of Marriage Law No. 1 of 1974, substantially changed the situation by limiting illegal polygamy to be orderly and following the law.<sup>37</sup>

In the concept of the benefit of this decision, it does not contain damage (*mafsadah*), but if the judge is too early making the decision. Based on the wife's permission and with their financial capabilities, they immediately permit the husband for non-emergency reasons. This undermines the considered concept of polygamy *rukhsah* (permitted due to emergency). Furthermore, examples are the decisions of Bantul Religious Court Number 1100/Pdt.G/2021/Pa.Btl and Number 309/Pdt.G/2021/Pa.Btl. The two decisions are relatively the same in that the judge permits the husband to practice polygamy because he already has close ties with other women and the husband is financially competent. From these two decisions, the legal arguments developed by the judges have not been out of the concept that the husband and the second wife candidate have already loved each other even though it is not included in the category of Article Paragraph 2 Letters a, b, and c of Marriage Law No 1 of 1974 and it is not following the concept *rukhsah*. The conditions and reasons for polygamy cannot be separated, both are complete legal substances and cannot be compromised unilaterally. Besides that, legal arguments the judge has not

<sup>34</sup> Theresia Dyah Wirastri and Stijn Cornelis Van Huis, "The Second Wife: Ambivalences towards State Regulation of Polygamy in Indonesia," *The Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (2021): 246–68, <https://doi.org/10.1080/07329113.2021.1912579>.

<sup>35</sup> Yusrizal, Sarong, And Jauhari, "Penggunaan Instrumen Hukum Poligami Di Lingkungan Peradilan Umum Dan Kaitannya Dengan Asas Monogami Dalam Peraturan Pemerintah Nomor 9 Tahun 1975."

<sup>36</sup> Jazim Hamidi, *Hermeneutika Hukum*, Cet. I (Yogyakarta: UII Press, 2005), hlm. 53.

reflected a benefit because the decision is contrary to the law of polygamy according to Islamic law. In Islam, the status of polygamy sometimes has the status of *rukhsah* permitted in an emergency. While the reasons contained in this decision are not an emergency.<sup>38</sup>

However, if the husband's reason is preventing adultery, this is not an emergency that causes the husband to be allowed to practice polygamy. However, the judge's considerations collided with two circumstances, namely on the one hand the husband was afraid of adultery, but on the other hand, the first wife felt disadvantaged because she was being married for no apparent reason. If the reasons for husbands are afraid of falling into adultery, then by looking at the concept *saddudz dzari'ah* (preventing harm) polygamy should be allowed. The closeness of the husband as a cause or a way to commit adultery makes polygamy permissible for him.<sup>39</sup> However, the closeness between the husband and the other woman runs without cause or is deliberately sought. Because the connotation of adultery tends to be sexual relations, the first wife is still able to serve her husband's sexual needs. Therefore, the reason for having closeness to other women does not cause harm because this harm can be eliminated by loving or having sex with his wife.

The fourth category is decisions that are not following the reasons for polygamy and ignores financial capabilities. In other words, decisions that do not meet the alternative and cumulative requirements. Decision Bantul Religious Court Number 112/Pdt.G/2021/Pa.Btl and Number 585/Pdt.G/2021/Pa.Btl is among the examples. These two decisions have the same in common, namely the permit for polygamy because the second wife has become pregnant out of wedlock, while in terms of the husband's financial ability, he is incompetent. From a juridical perspective, this decision is not following existing laws and regulations because of both cumulative and alternative requirements. However, the arguments built by the judge are carried out by looking at various aspects, legal, social, moral or religious, economic, and psychological aspects. In these decisions, the judge uses a moral or religious aspect, in which the second wife's

<sup>37</sup> Yusrizal, Sarong, And Jauhari, "Penggunaan Instrumen Hukum Poligami Di Lingkungan Peradilan Umum Dan Kaitannya Dengan Asas Monogami Dalam Peraturan Pemerintah Nomor 9 Tahun 1975."

<sup>38</sup> Euis Nurlaelawati, "Expansive Legal Interpretation and Muslim Judges' Approach to Polygamy in Indonesia," *Hanna* 18, no. 2–3 (2020): 295–324, <https://doi.org/10.1163/15692086-12341380>.

<sup>39</sup> Muhammad Abu Zahrah, *Usbul Fiqih* (Jakarta: Pustaka Firdaus, 2016), 71.

condition is already pregnant out of wedlock. If the marriage between the two is not immediately conducted, they worry that they will dissolve in adultery which violates religious norms. These conditions made it obligatory for the two couples to marry and there was no argument preventing them from getting married. Of course, the judge's decision is not intended to guarantee adultery, but other things are more important, namely, protection for the prospective baby, as found in the study of *maqasid ash-shari'ah* that is *hifzun nasl*.<sup>40</sup>

Polygamy is based on considerations of the dangers posed by being denied a polygamy permit and the benefits that can be obtained if the application is denied. If the court does not grant permission for polygamy to the husband, the woman is always anxious that it may affect the health of the fetus she is carrying, and she feels obligated to protect human life from the time of the fetus, both medically and legally. Similarly, although the law states that the status of the child is still that of the child of both parents, it will become a separate moral burden for the child if he has not had a father since early childhood.<sup>41</sup>

## Conclusion

The concept of financial capability serves as a criterion for measuring the normative justice of husbands. Financial capability is the guiding evidence for measuring the justice of husbands. Regarding financial capability, this should be the case; the law contains no nominal limit, which is a form of policy-based justice. Regarding the limitation of financial ability, the judge employs a holistic approach based on the sociological perspective of a particular area, including the cost of living in a certain area, the basic salary in a certain area, the social status of the family and family circumstances, and the condition of the prospective second wife. Therefore, financial capability limits are flexible. Even though the financial capability is a cumulative legal requirement, this condition is waived if there are circumstances that allow the husband to remarry. Even financial capability is not the primary requirement; it is merely a supporting condition.

<sup>40</sup> Nurul Inayah, "Penetapan Dispensasi Nikah Akibat Hamil Di Luar Nikah Di Pengadilan Agama Yogyakarta Tahun 2010-2015 (Analisis Hukum Acara Peradilan Agama)," *Al-Ahwal: Jurnal Hukum Keluarga* 10, no. 2 (2017): 178–93, <https://doi.org/10.14421/ahwal.2017.10206>.

<sup>41</sup> Bianca J Smith, "Sexual Desire, Piety, and Law in a Javanese Pesantren: Interpreting Varieties of Secret Divorce and Polygamy," in *Anthropological Forum*, vol. 24 (Taylor & Francis, 2014), 227–44, <https://doi.org/10.1080/00664677.2014.947918>.

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