



ISLAMIC JUSTICE IN INDONESIA POLYGAMY REGULATION ON ASGHAR ALI ENGINEER'S PERSPECTIVE

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Abstract: *Indonesia has formulated the regulation of polygamy. Those regulations did not provide a contextual justice, especially towards women, at least if it viewed from some perspective. This research tries to measure the justice on those regulations on Asghar Ali engineer's perspective of justice. This article is library research which use a normative and qualitative approach along with triangulation as collecting data method. Based on this article discussion, we find a conclusion that Indonesia provides the women/wife a chance to participate in the session process. Indonesia arranged that the wife's agreement is one of requirement for husband to demand polygamy before the court. Therefore, in the view of Asghar, marriage law of Indonesia respect towards women if it regulation obeyed by the judge. In his view, justice for weak-side is the basis and fundamental teachings of Islam. The justice referred to him, is substantive justice, not just justice in the text.*

Keywords: *Polygamy, Indonesia, Asghar Ali Engineer, Islamic Justice.*

INTRODUCTION

In 20th century of Indonesia, public was surprised by several cases of polygamy. This is due to the involvement of several public figures and considered to be unhealthy practice of marriage. For instance, case of Arifin Ilham, of Aa Gym, and

recently there is paid Polygamy Courses.¹ Those cases became trending topic on Indonesia's news media, because those polygamous marriages were practiced by popular people and seen to provide bad impact and effects on the marriage, especially towards the existing marriage. Nassarudin Umar said there are increasing number of divorce. While in 2004 there were 813 divorces caused by polygamy, in 2005 the case increased up to 879 and becomes 983 in 2006.² In the same even, LBH APIK Jakarta announced that in 2005 there were 104 wives experienced domestic violence by her polygamous husband.³

Polygamy is commonly lead to divorce, usually when economic support or emotions become problematic. It is unclear whether more husbands than wives, or more first than second wives, tend to seek divorce because of polygamy.⁴ Ironically, polygamy becomes very controversial when it was resulted injustice to wives and children.⁵ In Blitar religious court, polygamy become one of the most reasons for filing the divorce in 2020. The majority are filed by wives who refuse polygamy. In 2019, Samarinda Religious Court showed data on the number of divorces due to polygamy. Manado Religious Court also reported many cases of divorce due to polygamy.

Indonesia has regulated the procedural administration to practice polygamy. In Regulation number 1 of 1974 article 4, it stated that husband is allowed to marry more than one wife under particular circumstances: *first*, wife is unable to fulfill her obligation as wife; *second*, wife's body disability and uncured illness; *third*, wife's barren (sterile).⁶ Only by proving the

¹ This course has been started since 5 years ago with the cost 3,5 million for mens and 1,5 million for women. However in this pandemic there is decreasing to 199.000 rupiah. In some posters which spread across several online media, it is explained that the course will be filled by skilled polygamy practitioners and the prospective bride who is ready for polygamy is prepared.

² Hukum Online, "Poligami Terbukti Menaikkan Angka Perceraian," in www.hukumonline.com accessed at 19 February 2021

³ Putusan Mahkamah Konstitusi Perkara no. 12/PUU-V/2007.

⁴ Miriam Koktvegaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (New York: Berg, 2008), p. 85

⁵ Raihana Haji Abdullah, *Poligami dalam Perundangan Islam*, p. 194

⁶ Regulation Number 1 of 1974 article 4

existence one of those conditions, husband would be permitted to marry more than one wife.

Based on those data, we conclude that polygamy in Indonesia is a problem that mostly will trigger another problem – for instance domestic violence, jealousy, economical problem- and lead the marriage into destruction. Therefore, it is true if Qasim Amin, one of Egyptian scholars explained that polygamy only lead wife to experience the pain. He said, there are two possibilities reaction shown by wife when her husband committed polygamy: *first*, she will love her husband but by jealousy and torturing her heart; *second*, she will stay because of her special interest toward her husband.⁷ According to some Muslim scholar, polygamy is a practice which is allowed by an interpretation of an-Nisa'(4): 4, “*And if you fear that you will not be fair dealing with the orphans, then marry of women as may agreeable to you, two, or three, or four, and if you fear you will not deal justly, then marry only one or what your right hands possess. That is the nearest way for you to avoid injustice.*”⁸

Justice in the modern Islamic law placed as one of the general purpose of Islam.⁹ For Asghar Ali, justice is the representation of *taqwa*.¹⁰ He stated oftenly in his books about the importance of justice. Furthermore, he said that world can be existed by justice and unbeliever, but not by unjust and Islam.¹¹ Therefore, we believe that polygamy must be fulfilled by justice, and cannot be happened happily without justice. Indonesia has regulation regulated polygamy. After the emergence of regulation, there are changes of condition. The changing conditions does not satisfy several sides. Those sides said, that the regulations did not provide a contextual justice, especially

⁷ Qasim Amin, *Tahrir Al-Mar'ah*, 1899, translated by Samiha Sidhom Peterson, *The Liberation of women* (Cairo : American University Press), p. 83.

⁸ Sher Ali, *Holy Qur'an: English Translation* (UK: Islam International Publications, 2004), p. 82.

⁹ Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law* (London: The International Institute of Islamic Thought, 2008), p.5.

¹⁰ Asghar Ali engineer, *Islam and Liberation in Theology*, translated by Agung Prihantoro (Yogyakarta: Pustaka Pelajar, 2009), p.58.

¹¹ Engineer, *Liberation*. p. 69.

towards women, at least in their perspective. Therefore, this research wants to measure the justice on those regulations by Asghar's perspective.

Asghar is an International thinker of modern Islamic family law. He also known for his Idea of theology of liberation, he wrote book on the tittle women's right in Islam. In the first book he has the special chapter talks about justice. In his second book, he wrote about women's right and of course about Islamic justice toward women. He also has wrote special chapter about polygamy on Qur'an, women, and modern society. Asghar got some a honorable degree around Moslems. For about 4 decades, Asghar has to fight about peace and communal harmony around South/Southeast Asia. Besides, he earned some degree and achievement or appreciation, he also a prolific writer. By his attention to Socio-religious, which shown from his several books about about theology, gender, liberation, and actual discourse. Asghar's works can be classified into some categories such as social, contemporary Islam, history, Islamic feminism, Islamic politics, and sufism.

Islamic Justice on Asghar Ali Engineer's Perspective

There are several new concepts of islamic justice that are not popular as the classical concepts. One of those theory and interpretation made by Asghar lead to the concept theology of leiberation. In his famous work "Islam and Liberation Theology: essay on liberative elements in islam" he explained the importance position of justice in Islam. In his view, justice for weak-side is the basis and fundamental teachings of Islam.¹² Qur'an told human to behave justly and doing good. He quoted An-Nahl (16): 91 as his argument, "verily, Allah enjoins justice, and the doing of good to others and giving like kindred."¹³ He also emphasize that justice is the integral part of *taqwa* which said by Al-Maidah (5): 8, "Be always just, this is nearer to

¹² Engineer, *Islam and Liberation*. p. 57.

¹³ Ali, *Holy Qur'an*. p. 310.

righteousness.”¹⁴ Therefore, *taqwa* is not only a ritualistic concept, it rather be integrated with economic-social justice.¹⁵

Asghar Criticize the reducing concept of *taqwa* which caused by Umayyah and Abbasiyah government. Through those era, *muttaqin* and *muslihin* seen as someone who diligently prays, pay *zakat*, and doing *haji*. The concept of *muttaqin* and *muslihin* has no any relations with socio-economic and socio-politic behavior.¹⁶ Asghar asserted that the key word of justice concept in Qur'an were represented by two words, *al-'adl* and *al-qist*. In his view, *al-'adl* represent the value of equalization and levelling, while *al-qist* means distributions, honesty, and properly. He emphasize this value in every aspect of life especially in distributing goods and property. It shown by Qur'an in Al-Hasr (59): 7, “Whatever Allah has given to his messenger as spoils from the people of the towns is for Allah and for the near of kin and the orphans and the needy and the wayfarer, that it may not circulate only among those of you who are rich.”¹⁷

Therefore, Asghar cited the practice of pilling up property and money is bad and evil. This act causes the disturbance and social unbalance. Only by fair distribution of wealth, it will create social balance. Justice is not only about law, it must followed by distributive act. He emphasizes that Qur'an as Islamic guidance is a value-oriented declaration.¹⁸ Justice was divided by Asghar into several fields. It will be different justice concept that he offer in economic with the justice concept he offered in gender issue. While he emphasizes fair distribution in economic field, he emphasizes the importance of gender equality as the fundamental justice concept in men-women relationship.¹⁹

Divorced women shall wait concerning themselves for three courses; and it is not lawful for them that they conceal what

¹⁴ Ali, *Holy Qur'an*. p. 117.

¹⁵ Engineer, *Islam and Liberation*. p. 58.

¹⁶ Engineer, *Islam and Liberation*. p. 58.

¹⁷ Ali, *Holy Qur'an*. p. 658.

¹⁸ Engineer, *Islam and Liberation*. p. 61.

¹⁹ Engineer, *Islam, Women, and Gender Justice in What Men Owe to Women*, ed. C. Raines and Daniel C. Maguire (New York: State University of New York Press, 2001), p.111.

Allah has created in their wombs, if they believe in Allah and the last day; and their husbands have the greater right to take them back during that period, provided they desire reconciliation. And they (the women) have rights similar to those (of men) over them in equity; but men have a rank above them. And Allah is Mighty, wise” Al-Baqarah (2): 228.²⁰ Another verse said “Surely, men who submit themselves to God and women who submit themselves to Him, and believing women, and obedient men and obedient women and truthful men and truthful women, and men steadfast in their faith and steadfast women, and men who are humble, and men who give alms and women who give alms, and men who fast and women who fast, and men who guard their chastity and women who guard their chastity, and men who remember Allah much and women who remember Him-Allah has prepared for all of them forgiveness and great reward” Al-Ahzab (33): 35.²¹

Based recent explanation, it seem that justice in Asghar’s view is all about equality, non-exploitation, fair distribution, levelling, social balance, and weakly sided. Those values are the condition to create justice in every aspect, of course by differential emphasizing depends on the issue. Therefore, some actions could be seen as injustice if it breaks one or some of those values. Marriage must be built on the understanding of gender equality; it also determined social balance and anti/non-exploitation.

Polygamy on Asghar Ali Engineer Perspective

In his book “Women, Qur’an, and Modern Society,” he allocated one chapter to talk about polygamy. In this chapter he begin the discussion by describing the massif amount of refusal towards polygamy. While modern-industrial society demand more worker, women is the only solution. For them to work as

²⁰ In general translation this verse should be count as verse 228 of Al-Baqarah. However, Sher Ali put it as verse 229 of Al-Baqarah. Ali, *Holy Qur’an*. p.37.

²¹ In general translation this verse should be count as verse 35 of Al-Baqarah. However, Sher Ali put it as verse 36 of Al-Ahzab. Ali, *Holy Qur’an*. p. 491.

men, they must be treated and educated equally like men, thus, they start to learn gender equality and gender justice. Polygamy, started to be ruled formally and gradually limited by the government. After explaining those phenomenon, he emphasizes one of Islamic teachings is to create justice. Al-Qur'an condemns the injustice act such as discrimination, exploitation, and the disturbance of social balance. It has been suggesting and encouraging gender equality and gender justice. This was proved by the interpretation of An-Nisa (4) :3 which became the source of debate on polygamy issue.

Asghar discussed this verse based on several classical and modern interpreter of Al-Qur'an. At-Thabari, one of classical interpreter in Islam said that this verse was intended to respond the orphan guardian who want to marry this orphan girl for her belonging, although, she does not love him and treated improperly by him. He said that this verse was intended to respond the existence of husband who marry more than ten women and take the orphan's property to fulfill his wife's necessary. Furthermore, this verse was intended to emphasize the similarity between injustice toward wives and injustice toward orphan. This is due to the understanding on several Arabian that sin is only applied for an injustice action towards orphan and it did not apply for wives. However, for Thabari, this verse was not intended for allowing to marry several wives. It rather contains message for man or husband to treat his orphan child and wife justly.²²

Asghar also provided interpretation by Ar-Razi, who said that this verse was a respond for a husband of several women who also a guardian for several orphans. Due to his wives necessary, he took the orphan's property. Therefore, this verse came to forbid those kind of action. Moreover, in his view, doing *nawāfil* ritual is better than marrying more than one woman. Hence, marrying one woman and doing more *nawāfil* is the best choice for men in his view.²³

²² Asghar Ali Engineer, *The Qur'an Women and Modern Society*, ed. AgusNuryanto (Yogyakarta: LKiS, 2007), p.114.

²³ *Ibid.*, p. 115.

Asghar also noted several issues related to polygamy. First, oftentimes polygamy is legitimated in the name of prevention of insulting towards women. This is due to the large amount of women in the world. This argument was refused by Asghar, he said there are nothing of Qur'anic verse which say that polygamy is preventing a sexual abuse. Second, He criticized the act of several classic Muslim's interpreter which dominated by their masculinity. They forget the essential value of Qur'an which attached justice on every aspect of life thus included gender justice. Therefore, He asserted polygamy is not a solution for preventing prostitution. Prostitution is not made or caused by the large amount of women, it rather caused by poverty.²⁴

Asghar criticizes "the orthodox" for their frozen mind, that causes a temporal value becomes permanent. He describes this "frozen mind" by explaining the changing condition of justice concept by the time being. In the medieval period the very understanding of the concept of justice was different from what it is today. He said that our era is not a condition of society if equality of all humans irrespective of sex, race and creed is not ensured. In classical or medieval, discrimination between one and another human being on any ground, including the sexual one, will be perceived quite natural and non-violative of the concept of justice. Even slavery was thought to be natural and in keeping with the principles of justice. In fact, if a slave ran away from the master it was thought to be an unjust act. Concept of justice may be changed, but its importance can be denied in every period.²⁵

The Qur'an was certainly mindful of what was just in the era when it was revealed and what ought to be just in the transcendental sense. There are Qur'anic verses in polygamy issue: *first*, polygamy was revealed by Qur'an as protection towards widows and orphans of battle of Uhud. However, the verse on polygamy (4:3) is preceded by a verse that emphasizes sexual equality (4:1). There is also reference to justice for orphans and widows. Therefore, polygamy is permitted provided one marries widows and orphans (and not just any woman). And when

²⁴ Engineer, *The Qur'an Women*. p. 123.

²⁵ Engineer, *Islam, Women, and Gender*. p. 124.

one was permitted to marry more than one woman, there had to be true justice for all the wives. More importantly, another verse states that even if you desire to do justice to all your wives, you cannot do it (4:129). Asghar said, this verse implicate that polygamy is as good as not permissible.²⁶

Polygamy Law In Indonesia: Asghar Ali Engineer's Perspective

Indonesia is a country which adopted republic as the system of its governance. It also known as the third democratic country in the world. In International relationship, this country is a member of ASEAN (Association of Southeast Asian Nations). In legal system, Indonesia adopts the Dutch, Therefore it is not really surprising that Indonesian legal system is a part of civil law system.²⁷

Indonesia also known as the biggest Muslim country in the world. The Indonesian Muslim's are generally followers of the the Shafi'i school of Islamic law. Before the advent of Islam in the twelfth century no common family law was followed in Indonesia. In each of the island-Indonesia has more than 17.000 islands-people had their own customs and usages. Their local customs represented "norms of social behavior of small isolated communities." Islam came as a unifying factor in the social life on the island.²⁸ Therefore, Islam has great influence over all social-aspect such as daily-behaviour, fashion, Family, and Law. Marriage Law number 1 of 1974 is another prove of this influence. This regulation become the primary regulation related to marriage in Indonesia. Polygamy is one point that regulated on this regulation.

Polygamy in Indonesia regulated on regulation number 1 year 1974 and Compilation of Islamic law. This research only talk about regulation number 1 year 1974. Because this regulation is the primary law sources in Indonesia to determine the permission

²⁶ *Ibid.*, p. 125.

²⁷ Peter Mahmud Marzuki, *An Introduction to Indonesian Law*, 2nd edition (Malang: Setara Press, 2012), p. 26.

²⁸ Tahir Mahmood, *Family Law Reform in The Muslim World* (New Delhi: The Indian Law Institute, 1972), p.192.

of polygamy. To be more specific, there are several articles in this regulation related to polygamy. Indonesia marriage principle is monogamy but it also accommodate the possibility to marry more than one women or well known by polygamy. Polygamy is allowed if the demander demands the permission of polygamy before the court. The court only able to give the permission if the demander fulfill several excuses. In article 4 verse (2) of Marriage Law, there are three excuses for husband to demand polygamy before the court: *first*, the wife cannot fulfill her duties as a wife; *second*, the wife is physically disabled or incurably ill; *third*, the wife cannot give birth.

Ahmad Rofiq claims that those excuses are really understandable and made based on the primary purposes of the marriage. In his view, if those excuses happened on a family, it will causes chaos, emptiness, and ruin the romance of marriage. For instance, if wife cannot fulfill her duties as wife such as doing biological relation with her husband, it will cause unbalance in marriage. This is also applied if wife has physical disability or incurably ill. It is also same if the wife cannot give birth. In his view, it is understandable if husband want to marry other women to get child, because family without child is not perfect.²⁹

This regulation and this argument has been criticized by many sides. Women commission for human right condemns and demands the reform of this regulation. In their annual report and noted at 2012, they emphasize the need to reform marriage law:

“Belum ada kemauan dalam hal revisi UU Perkawinan meski sudah sangat mendesak. Revisi ini dibutuhkan untuk memastikan perlindungan hukum untuk mencegah perkawinan anak dan perkawinan paksa pada perempuan, menghilangkan alasan sah perceraian yang diskriminatif terhadap kelompok disabilitas, dan menegakkan asas monogamy, dan memutus stereotip peran laki-laki (kepala keluarga) dan perempuan (pendamping) di dalam perkawinan yang berimplikasi kepada relasi

²⁹ Ahmad Rofiq, *HukumPerdata Islam di Indonesia* (Jakarta: Raja Grafindo Persada, 2013), pp. 140-141.

tidak seimbang di dalam berbagai aspek kehidupan perempuan di dalam keluarga dan perkawinan.”³⁰

Through those quote, it was described the opinion of women commission for human right toward marriage regulation. In their view, marriage regulation number 1 year 1974 has within several articles that provide inequality, discrimination, uncertainty of legal protection, and did not enforce the principle of monogamy. One of excuses that allowed for demanding polygamy is the wife is physically disabled or incurably ill. Women commission uses word discrimination to describe this excuse for being legally allowed for demanding divorce. By using analogical method, this excuses is seems to be another discrimination toward women when it applied as excuses for polygamy.

According to Engineer, the Qur'an equates both the sexes in terms of moral responsibility and rewards and punishments. Biological otherness, according to the Qur'an, does not mean unequal status for either sex.³¹ One of Islamic principle teaching in the view of Asghar Ali Engineer is to be sided and applying justice toward the marginal and weak-group.³² Commonly women in this era labeled as weak side, they reputed as lower class under men. Even in Islamic tradition, several tradition of the prophet legitimates this view. For instance, prophet's tradition that say "if possible and allowable, I will order women/wife to bow in front of her husband." It is also applied for them who had physical disability. They treated as imperfect creature. Their disability is treated as anomaly and an abnormal. This regulation or these excuses put this two variables as one article that allowing husband to demand polygamy before the court.

Asghar emphasizes the importance for being sided toward marginal and weak group. It is really not just to put their biological different condition as an excuse to do polygamy. There

³⁰ Laporan Independen Institusi Nasional Hak Asasi Manusia (Jakarta: KomnasPerempuan, 2012).

³¹ Asghar Ali Engineer, *The Rights of Women in Islam* (United States: St. Martin's Press, 1996), p.44.

³² Engineer, *Islam and Liberation*. p. 57.

is prophet tradition said “if you did not like her, then be patient, because there are may be something you did not like, but Allah create it for good.”³³ If every woman can be divorced by her husband, or have to accept that her husband is marrying other women, because of her disability, then this is another form of discrimination, and psychological violence towards women. Moreover, in the view of Asghar, polygamy is only allowable in certain abnormal condition, such as war and epidemic.³⁴ Therefore this regulation is an injustice excuses toward women, particularly to whom has physical disability.

For the third verse, “if the wife cannot give birth”-excuses, in his article on Institute of Islamic Studies, Asghar seem to be in a pinch to accept this kind of excuses. He noted the permission can be given if the wife is medically proven to be barren. Husband also must be proven to be able to treat the wives justly. Finally, He also offered several solution such as test tube babies, adoption, or just live childless.

As for barrenness there seems to be some weight in taking another wife to procreate, as procreation is one of the objectives of marriage. But, in our society often blame is foisted on woman for failing to give birth to child. Man can also be barren and man often is. Unless it is medically tested one should not rush to the conclusion that woman is barren and hence man should take another wife to have children. Only and only when it is proved that a wife has medical problem in giving birth to a child or is completely barren she could be responsible for lack of child. Perhaps then there could be some justification for taking second wife. But thanks to modern scientific advances there are other possibilities: test tube babies. May be there is no *ijma'* so far about Islamic validity of test tube baby.

We will have to leave it to the conscience of the persons concerned whether they would like to have test tube bay or not. Similarly adoption is also not permissible in Sharia law. Here is some bind for a conscientious Muslim. One can say in such case (i.e. when it is medically certified that wife, and not husband, is

³³ Engineer, *The Right of Women*. p. 171.

³⁴ *Ibid.*, p. 147.

barren) husband could be permitted to take second wife. The other alternative is to remain childless. Some might prefer that way. Only when a wife is proved to be medically unfit for conceiving the husband perhaps could seek her permission (without using coercion in any form) to take second wife and provided, he is capable of doing equal justice to both of them, as required by the Qur'an.³⁵

However, it is interesting to present the fundamental concept of marriage according to Asghar. In his view, Asghar see marriage as another normal contract between man and woman. In Islam, marriage is known with a contract between two equal partners. It is not a sacred contract such as marriage in Christian or Hindu that did not allow divorce between husband and wife. Therefore, it is fundamentally allowable to divorce or to marry another women based on agreement between both of husband and wife. Because marriage is mere contract between men and women, than to do anything as long as it is based on agreement and did not contradict with Islamic law is allowable. Divorce and polygamy did not happen because of his wife disability, or because of the wife is forced by the husband to accept it, but it can be happened because of the agreement between both of husbands and wife. Hence, divorce is *abghad al-mubāḥāt* (the most legal action that hated by God)³⁶ and polygamy is good as not permissible,³⁷ both of them cannot be happened except in extra ordinary condition.

Regulation number 1 year 1974 stated in article 5 the requirement that must be fulfilled by the husband to demand the permission of polygamy before the court. In its first verse said that to be able to demand the permission, husband must able to fulfill several requirements: *first*, the wife must give her consent, unless this is not possible, or the court does not deem it necessary; *second*, the man must prove that he is able to financially maintain his wives and children, with a declaration from his employer, the

³⁵ Asghar Ali Engineer, *Polygamy in Islam*, in <http://www.csss-islam.com/iis-archive93.htm> accessed on 5th November 2020.

³⁶ Engineer, *The Right of Women*. p. 170.

³⁷ Engineer, *Islam, Women*. p. 125.

tax agency, or otherwise; *third*, the man must declare that he will give his wives and children a fair and equal treatment.

In the view of procedural justice, the first verse of this article is providing justice toward disputants. In the matter of polygamy case, they are the wife and the husband. By demanding wife agreement, the court gives the wife the chance to react about her husband intention for marrying another women. This article guarantees the participant of the wife in the process of her husband polygamy application. As John Tibault and Laurens Walker has explained, fair procedure is procedures that allow the disputant to maintain an optimal level of control over what happens to him or her.³⁸ If her husband marries other women, it will cause indirect or direct effect towards her. Economical effect, psychological effect, or another possible effect.

In Asghar view, this article applied his fundamental concept of marriage. In his view, marriage is merely contract between men and women. Therefore, every action that related to the marriage must be discussed and based on the agreement between husband and wife. Hence, this article literally has accommodated justice for both of them. In the second and third point on this first verse, the guarantee of capability being fair and providing financial necessary has to be proved. In Asghar view, those points are a way to guarantee the capability for being justice toward his wives. Moreover, if there are certain condition such as war and epidemic that allow the husband to do polygamy, he has to prove his ability to act justly toward his family.³⁹

These verses also guarantee the principle of distributive justice. By proving his financial abilities, at least the husband could guarantee his capability for giving his wives and children financial happiness. There will be no complaining on financial field. By declaring that he will treat each of his wives equally, he will give his family trust and psychological happiness. However,

³⁸ Tom R. Tyler and E. Alland Lind, *Procedural Justice in Joseph Sanders and Lee Hamilton, Handbook of Justice Research in Law* (New York: Kluwer Academic, 2002), p.75.

³⁹ Engineer, *Polygamy in Islam*, <http://www.csss-islam.com/iis-archive93.htm> accessed on 5th November 2020.

if these requirements can't be fulfilled or did not create the happiness towards family, then it is really impossible for being just in marriage. As John Stuart Mill said, the principle of distributive justice is to allocate happiness.⁴⁰

Based on those explanations, it seems that the regulation of polygamy in Indonesia for some article has accommodated Islamic justice, and some articles have discriminate women. Particularly, in the first and second point of verse two in article four. By legalizing the lack of women as the excuse for demanding polygamy, this regulation put men superior rather than women. Women must be perfect, and men can have other women if he fills that women can't fulfill his desire or demand. Although, prophet has said "if you did not like her, then be patient, because there are may be something you did not like, but Allah create it for good."⁴¹

For third point of this verse, Asghar accept it unwillingly. He can understand the reason of husband to marry other women because of her wife barren. However, he suggests to do test tube baby, or adopting child, or just being childless. If the husband and wife agree to do polygamy, he still demanded to prove his capability for being justice. This requirement has been accommodate by article five of marriage law. Hence, in my view, by removing the excuses that discriminate women or legalizing polygamy based on her lack of capability, and stretching the procedural prove of wife agreement and husband capability, this regulation could accommodate Islamic justice more than the present regulation.

Woman Position On Indonesia Poligamy Law Based Asghar Ali Engineer's Perspective

After explaining regulation of polygamy, we would like to discuss the women position in those regulations, particularly in polygamy matter. It is important to determine what is the role of woman in regulations. Because women is commonly labeled as the one who will suffer from the practice of polygamy. Qasim

⁴⁰ John Stuart Mill, *Utilitarianism* (The Floating Press, 2009), p.14.

⁴¹ Engineer, *The Right of Women*. p. 171.

Amin, one of Egyptian scholar explained that polygamy only lead wife to experience pain. He said, there are two possible reactions shown by wife when her husband committed polygamy. First, she will love her husband but by jealousy and torturing her heart. Second, she will stay because of her special interest toward husband.⁴²

After seeing article four of marriage law number 1 of 1974 which contains three excuses of polygamy, it shown that this regulation put women in unrespect position. This regulation put women like a good for trade and husband as the purchaser. When the product is broken, the purchaser can buy another product, without determining the first product condition. Legalizing the disability of wife as the excuse to demand polygamy is same like buying new product because of the old one's lack. Therefore, it is not surprising if the women commission for human right protested for this regulation.⁴³

This case has implemented in the decision number 38/Pdt.G/2020/PTA.Yk. This decision is one of the decision which is actually applied the cumulative requirements as stipulated in Article 5 paragraph (1) of Law Number 1 of 1974. Although the wife gave permission, but it was proven that the wife did not experience some disease and was proven to be able to provide offspring, so the polygamy application was rejected by the judge.⁷¹ That case strengthen Engineer's perspective that both man and woman are equal parties. Neither man enjoys any privilege above woman nor does woman above man. A woman has every right to stipulate any condition she likes provided of course, it doesn't violate *hudūdullah*⁴⁴ (limits set by God). She can stipulate any reasonable condition including the delegate right to divorce (*talaq tafwiz*) under this delegate rights to divorce, if she is displeased with any act of her husband (including his taking another wife) she can divorce herself on his behalf. As far as

⁴² Amin, *Tahrir Al-Mar'ah* translated by Samiha Sidhom Peterson, *The Liberation of women* (Cairo: American University Press, 1899), h. 83.

⁴³ Laporan Independen Institusi Nasional Hak Asasi Manusia.

⁴⁴ Hasna Safarina Rasyidah, *Asghar Ali Engineer's Concept On Women Liberation (An Islamic Response)*, in Hasna SR-Naskah Publikasi.pdf (ums.ac.id), accessed march 2021.

Engineer's knowledge goes, no other legal system, let alone any other religion, gives her such far reaching right.⁴⁵

In fact, at the article 5 of this regulation, there are requirement for husband to get the permission or agreement of his demand for polygamy. Literally, the husband will never able to marry another women without the agreement of his wife. In Asghar's concept of marriage, this regulation really give women equal place to decide what is gone a happened on her marriage. This point put women in the same position with men, that he can marry another women without discussing and get her wife permission. For Asghar, marriage is a mere contract that neither husband nor wife have larger authority on it. However, this point is contradicted by another point in the same article.

“The agreement on the verse 1 point (a) will not be necessary if the wife/wives are impossible to be asked and are not able to be party on the agreement, or there was no news from her at least for two years, or because any other causes that must be judged by the judge.”⁴⁶

The point which put women as an absolute party to give permission for his husband to marry other women is cut out by this point. Using the second point, the husband can claim that his wife is not able to be the party of the agreement. Although, she did not give the permission. The husband also able to claim that his wife was missing for years. Furthermore, he can negotiate the judge and make the court give the permission using the argument of “any other causes that judged by the judge.”

The same case happened in Boyolali Religious Court. That is the decisions of Boyolali religious court number 1015/Pdt.G/2013/PA.Bi where the husband cannot give some prove of permission the first wife on the pretext that the wife is disappeared. However, the request was rejected, because The accumulative requirements were unfulfilled. In this case, the application of polygamy was submitted by under the pretext to

⁴⁵Asghar Ali Engineer, *Islam and Liberation Theology* (India: Sterling Publisher, 1990), p.173.

⁴⁶ Indonesian Marriage Law number 1 of 1974 Article 5 verse (2).

help the future second wife but cannot prove other accumulative requirements in the panel of judges.

However, the equality in the term of women rights to refuse polygamy it must be accompanied by the strong wish from the judge in judgments. There were some cases where the judge have no power to refuse the application of polygamy because applicant has did the *sirri* marriage before. The permission of the first wife didn't obtain and the juridical reason to do polygamy were also unfulfilled but the request was still allowed. This case has been recorded in the decision of religion court number 89/Pdt.G/2020/PA.YK.⁴⁷ If refer to SEMA number 2 in 2019, in this decision said the action of the respondent was some of criminal sanction because the second marriage which has done before didn't got some permission from the first wife. The Cases of inconsistency in the application of polygamy law are also found in decision Number 73/Pdt.G/2020/PA.YK. Where the polygamy is allowed because of *sirri* marriage. The first wife have to give the permission out of the necessity because the second wife is pregnant about 8 months. The first wife have proven in good condition and has properly functioning reproductive organ. Accumulative requirements are not met but polygamy is allowed.

Therefore, according to Asghar, polygamy may be just in the Prophet era or when the verse related to it was revealed. However, by the time being and based on the modern way of Qur'anic reading and interpretation, it is not polygamy, but rather monogamy is purposed by Qur'an. This is due to the Qur'anic characteristic which he named by Ideologic-Pragmatic. It accommodate the present value, but also suggest what ought to be. Hence, polygamy is the last choice which required certain condition such as war and illness. So granting polygamy permission when the accumulative conditions are not met as in the above decision is certainly contrary to the values of human equality. This regulation wants to give women an important position in the issue of polygamy. She can agree or disagree and her choice becomes an important requirement in the process. However, there are several gap in the regulation that can be

⁴⁷Putusan Pengadilan Agama Yogyakarta No. 89/Pdt.G/2020/PA.YK.

manipulated or used by husband to get the permission without his wife's agreement. This regulation must be improved and revised for creating an equal relation between men and women.

CONCLUSION

Indonesia provides Islamic justice towards its society through regulation. In Asghar's perspective, Indonesian Marriage law number 1 year 1974 has provided justice if the regulation obeyed by the court. It demands the husband to prove his ability to act justly. Moreover, wife's agreement is one of requirement for husband to demand polygamy before the court. Indonesia give the women/wife chance to participate in the session process. Indonesia made the wife's agreement as requirement for husband to demand polygamy before the court. Therefore, in the view of Asghar, Marriage Law of Indonesia has more respect towards women. But, in the fact there are many case happened in Indonesia. A lot of husband doing the polygamy without wife agreement. So, justice in the text of this law needs to be proven by good implementation. It takes comprehensive cooperation between law enforcers in granting polygamy permits. Because the justice referred to by Asghar Ali Engineer is substantive justice, not just justice in the text.

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