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Jurnal Ilmu-Ilmu Ushuluddin

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A Legal Debate on Polygamy: Classical and Contemporary Perspectives

Sukring Syamsuddin

Universitas Haluoleo Kendari

Syamsuddin@gmail.com

Abstract

The Islamic texts concerning polygamy in the Qur'an, Hadith, and other sources are still in the state of mujmal which have no strict indication to the precise meaning and instruction. The argument can be debated in multi-interpretation frame. In practice, a lot of muslims tend to generalize the application of law of polygamy. It becomes an interesting issue for some Indonesian muslim due to its close relation to the tendency or desire of men to add his wife. Some of them even believe polygamy as one of the Prophetic way (sunnah). This view can historically be refuted, considering that the Prophet did polygamy after Khadijah, his first wife, died. Another fact is that all of the Prophet's wives are widows whose husbands died in the battlefield, except 'Aisyah. In addition, the marriage of the Prophet with these women is a part of the God's special order. In this case, polygamy is an exclusivity for the Prophet and it cannot be viewed as the Prophetic wagons to be applied by his followers. Here there is a difference in the perspective of classical and contemporary Muslim scholars concerning the issue based on their different views on the word of God in QS. al-Nisa' (4): 3. In principle, the Qur'an allows but does not advocate polygamy. It is in this perspective that some scholars are divided into those who absolutely allow, allow in emergency, those who have moderate understanding, and some who are strict to be conservative, based on their different analytical and methodological issues.

Keywords: *Legal Debate, Polygamy, 'Ulama*

Abstrak

Nash tentang poligami di dalam al-Qur'an, as-Sunnah dan sumber-sumber lain, sifatnya masih umum (mujmal). Dalilnya bisa diperdebatkan dengan multi tafsir, sehingga dalam praktiknya orang menggunakan hukum poligami secara "pukul rata." Terdorong ingin memberikan pemahaman yang lebih rinci. Poligami menjadi perbincangan menarik sebagian masyarakat Indonesia, menarik karena poligami merupakan salah satu kecederungan atau keinginan laki-laki untuk menambah isterinya. Sebagian pemahaman umat Islam berpendapat bahwa berpoligami merupakan sunnah Rasul. Poligami tidak bisa dikatakan sebagai sunnah Rasul. Sebab Nabi Muhammad saw berpoligami setelah Khadijah isteri Nabi meninggal dunia. itupun dari sekian isteri Nabi saw hanya 'Aisyah yang masih perawan selebihnya adalah janda-janda yang di tinggal mati suaminya dalam peperangan, dan perkawinan Nabi saw dengan wanita-wanita tersebut atas perintah Allah swt, poligami merupakan kekhususan bagi Nabi saw, jadi tidak boleh berdalih sunnah Rasul. Disinilah kemudian terjadi perbedaan perspektif ulama klasik dan ulama kontemporer tentang poligami yang didasarkan pandangan mereka terhadap firman Allah swt dalam QS. An-Nisa/4; 3. Pada prinsipnya al-Qur'an membolehkan tapi tidak menganjurkan poligami. Dalam perspektif inilah ada yang membolehkan, ada yang membolehkan secara darurat, ada yang moderat, ada yang ketat (prasyarat), dan yang konservatif masing-masing didasarkan pada kajian analisis dan metodologi yang berbeda-beda.

Kata Kunci: *debat hukum, Poligami, 'Ulama*

Background of Study

Islam is a comprehensive religion with a set of regulation on various aspects of human life in this world, embodied in the Qur'an and Hadith as the major source of Islamic doctrines. There is no difference of opinion about the certain or definite things (*qath'i*) in Qur'anic verses, but in the interaction with the holy book, there are also the uncertain nature (*dzanni*), in the sense that it opened itself to be understood contextually. In the other words, this related closely to the flexibility of interpretation (*tafsir*) of the Qur'anic verses. When these verses are touched by human thought in an interpretive effort, the conclusions they get are not absolute and always culminate in perceptual disputes. Historically speaking, such a dispute seems to be more dominant in coloring the history of Islamic legal thought on various aspects of the problems faced by the Muslims throughout the ages.

One of the issues which legal status is still widely discussed is polygamy. The discourse on polygamy will certainly not be separated from the Qur'an and Hadith of the Prophet as a primary source of Islamic law. However, Muslims do not have a uniform understanding concerning the interpretation of the Qur'anic verses and the Prophet's hadith on polygamy. This is a prolonged discussion involving classical *fuqaha*, scholars, intellectuals, up to contemporary Muslim scholars. The issue of polygamy has always been actual to be studied throughout the ages as part of the treasury of Islamic law.

The treasures of classical Islamic jurisprudence (*fiqh*) and the majority of contemporary *fiqh*, have generally shown the agreement of jurists regarding the permissibility of polygamy. It is based on QS. al-Nisa (4): 3, as follows:

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا
طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ فَإِنْ
خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ
ذَلِكَ أَذْنَىٰ أَلَّا تَعُولُوا

If you fear that you will not deal fairly with orphan girls, you may marry whichever [other] women seem good to you, two, three, or four. If you fear that you cannot be equitable [to them], then marry only one, or your slave(s): that is more likely to make you avoid bias.

Through the epistemology of *fiqh* approach, it is understood that the Qur'an essentially allows the practice of polygamy. The debate about its permissibility raises when talking about the conditions for polygamy that lead to dissent among Islamic scholars: some are more likely to be fundamental, some are more liberal, and some are moderate. From these differences, it can be concluded that the *fuqaha* set a primary and absolute requirement for men who wants to perform polygamy to be able to do justice (*al-'adl*). The pre-requisite becomes very important to note for every man to think carefully before practicing polygamy.

Regardless of the debate, in fact, polygamy is still practiced in Muslim societies. The pre-requisites to be fair as set out by the Qur'an are in fact questionable. Is it the justice to be in the sense of putting things in place?, or just equated with the justice of a leader in the practice of his leadership?. Despite all that, the practice of polygamy remains lawful. In Islamic law, as much as possible, it is better to a men to marry a wife until the end of life. The marriages taught by Islam must create an atmosphere of *sakinah*, *mawaddah*, and *rahmah*. This is very difficult to do if a man chooses a wife more than one women. Justice as a condition of creating harmony between wives, is very difficult to accomplish. This is to avoid the husband's abuse of his wife.

In fact, many monogamous families have also experienced a similar phenomenon. It is not denied that some polygamous families are found free from a number of negative excesses, they just enjoy the family life with *sakinah*, *mawaddah*, *warahmah* than those who do monogamy. The question that then becomes important to be raised here; "Is it true that the

thought of *fiqh* scholars who allow polygamy is conservative and gender biased as it doesn't voice a lot of women's interests?.

The pro-polygamy scholars seem to have been accused of being objective, in the sense of being "more pro-men" in viewing the issues in the Qur'an and the Prophet's Hadith, so that his justice is doubtful in his jurisdiction (*ijtihad*). However, those who counter polygamy have not understood Islamic law proportionally. If there is an opinion that states the existence of a theme in the Qur'an that is not final, does not the Qur'an refute this statement in Qs. al-Maidah [5]: 3, which asserts that the Qur'an is perfect? Does not this mean that the legal formulation of all themes of human life in the Qur'an is final?

This paradigm becomes a reference to a methodological aberration so that it becomes something interesting to be discussed. From the above perception, the authors argue, that in the paradigm of *tafsir*, there is the so-called textual and contextual interpretation; understand the verse as the sound of the text as it is, or interpret the verse contextually based on the condition and the culture of a developing society, but remains under the corridor of the text. Critical thinking would have to ask, can the conclusions of the *fiqh* scholars' disagreement on polygamy be brought to the methodology of *istinbāt al-ahkām* (law deduction)? To address this issue, in this article, the authors will examine the construction of the classical and contemporary scholarly thoughts related to this debate.

The Concept of Polygamy

The word polygamy is etymologically derived from Greek word *polus*, which means 'a lot' and *gamos* which means 'marriage', then polygamy means a marriage with many wives or more than one wife. Marriage system with many wives, a man who has more than one wife, and vice versa; a woman who has several husbands at the same time, are principally

called polygamy.¹ The Monogamy which is the antonym of polygamy is a marriage with a single wife which means a man married only to one woman. The definition of polygamy according to Indonesian language is "the marriage bond which one party marries several opposite sex at the same time or polygamy is the custom of a man who married more than one woman".² In more specific terms, this conception has two possible meanings; a man who married to many women which is also called Polygini in the study of sociology and Polyandry for a woman who marries more than one husband.

According to historians, polygamy was first performed by kings, state officials and the rich. They take some women, some are married and some are only used to vent their lusts due to war's effect. At that time, many girls were traded, taken as servants and then made as concubines and so forth. The more wealthier a man and the more higher his position, the more he gathers women. Thus, in a historical perspective, polygamy is a remnant of tradition during the period of slavery which has existed long before the year of Christ.³

Polygamy is one of the favorite issues which is commonly raised by women defenders who are polemicist against the Islamic doctrine. Polygamy is one of the major narration for them. They usually come up with the idea that the condition of women in Islamic societies is very apprehensive and in trouble, because there is no equal right between men and women. In Arabic word, polygamy is called *ta'didu/ta'addud al-zaujāt*. According to Islamic teachings, such marriages are permitted, but not recommended. Islam permits this practice on strict conditions. The presence of this condition is more likely to

¹ *Ensiklopedi Islam, Jilid 5* (Jakarta: Ikhtiar Baru van Hoeve, 1988), 75.

² Departemen Pendidikan dan Kebudayaan RI, *Kamus Besar Bahasa Indonesia* (Jakarta: Balai Pustaka, 2005), 639.

³ Aisjah Dahlan, *Membina Rumah Tangga Bahaqia, Cet 1* (Jakarta: Jamunu, 1969), 69.

limit the practice of women's election beyond the limits of the past, in addition to the position of polygamy which is regarded as an alternative solution in some critical and conditional cases.

The Interpretation of Qur'anic Verses on Polygamy

The Islamic Sharia through the Qur'an, establishes that a man may marry more than one woman but not exceed four. Discussion of polygamy in the Qur'an centered on Q.S. al-Nisa' (4): 3. Based on this verse, polygamy is basically permissible. This permissibility is accompanied by a condition to be fair, namely a similar treatment in serving the wives, as in giving clothing, residence, turns in the husband-wife (sexual) relationship, and the like. Islam allows polygamy under certain conditions. Before this verse was revealed, polygamy already existed, and was also practiced by prophets before Prophet Muhammad Saw.

Polygamy is also described in the Prophet's hadith such as a hadith regarding the husband's injustice towards his wives, the Prophet said:

عن أَبِي هُرَيْرَةَ أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَى وَسَلَّمَ قَالَ:
مَنْ كَانَتْ لَهُ امْرَأَتَانِ فَمَالَ إِلَى إِحْدَاهُمَا جَاءَ
يَوْمَ الْقِيَامَةِ وَشِقَّةُ مَائِلٍ (رواه ابوداود والترمذی
والنسائی وابن حبان)

Abu Hurairah ra. narrated, Indeed the Prophet, peace be upon him, said: "Whoever has two wives, then he inclined to one of them, then he will come on the Day of Judgment with a slanted shoulder".⁴

In the interpretation of al-Tabari on the above verse, it is said that God emphasizes for men to be fair both to the rights of orphans and to the rights of women he marries. Thus, this does not mean that this verse shows the permissibility of polygamy up to four wives

⁴ Muḥammad Nāsir al-Dīn al-Albānī, *Sahih Sunan al-Tirmizi, kitab nikah* (Jakarta: Pustaka Azam, 2006), 210.

with no strict condition. The requirement is very difficult, not to say impossible, to be fulfilled by every man.⁵ The conditions, as mentioned by Abdul Halim Abu Syuqqah in his book "Liberation of Women", are as follow. (1) No more than four wives, as mentioned in Qs. al-Nisa (4): 3. (2) Being able to provide livelihood for his wives and children and those who are under his responsibility. (3) Being able to nurse his wives and children well, and (4) being able to do justice.⁶

Unlike al-Tabarī, al-Rāzī adds that the fragment of the verse which reads "if you are afraid of not being able to be just" as a condition, and "marry the women you love" as a permission. Thus, there should be a clear explanation of how the actual relationship between the permissibility of marrying the preferred women and the conditions mentioned above.⁷

According to al-Rāzī, to answer that relation, there are four explanations among the *mufassir* (Qur'anic exegetes); *First*, It relates to a guardian who was attracted by the beauty and property of a female orphan and intended to marry her, but he was reluctant to pay the dowry. It is mentioned in the following narration.

'Urwa bin Zubayr asked Aisha (the wife of Prophet), "what does the word of God 'If you fear that you will not deal fairly', means?" Aisha replied: "O my nephew! this verse concerns the orphaned woman in her guardian's care and the guardian is interested in the treasure and the beauty of this orphan. So, he intends to marry her by giving the lowest dowry, and then he mingles in a bad way." Therefore, God says, if you fear that you will persecute orphans when you marry them, then marry other women you like. Aisha went on to

⁵ Nurjanah Ismail, *Perempuan dalam Pasungan: Bias Laki-Laki dalam Penafsiran* (Yogyakarta: LKiS, 2003), 214.

⁶ Abdul Halim Abu Syuqqah, *Kebebasan Wanita (Jilid 1)* (Jakarta: Gema Insani, 2000), 388-89.

⁷ Fakhruddīn al-Rāzī, *Mafaatih al-Ghaib* (Beirut: Darul Kutub, 2000), 139.

say: “Then someone asked the fatwa on the Prophet about the women after this verse was revealed. God then revealed this verse (Q.S al-Nisa: 127). “They ask you [Prophet] for a ruling about women. Say, ‘God Himself gives you a ruling about them. You already have what has been recited to you in the Scripture about orphan girls [in your charge] from whom you withhold the prescribed shares [of their inheritance] and whom you wish to marry, and also about helpless children— God instructs you to treat orphans fairly: He is well aware of whatever good you do”. What is meant by “ what has been recited to you in the Scripture” is that first verse, that “If you fear that you will not deal fairly with orphan girls, you may marry whichever [other] women seem good to you”.⁸

Second, the existence of those who practice polygamy but do not give the rights of their wives and do not treat them fairly;⁹ *Third*, A man who does not want to be a guardian, on the one hand, for orphan girls, and he wants to marry her, on the other hand, but he is afraid of not being fair to the rights of orphans while he is also afraid from the sin of adultery (*zina*), then he should marry other women who are allowed for him;¹⁰ *Fourth*, There is a man who practices polygamy and protects the orphans but he is unable to provide for their wives, so they take the property of the orphaned children for their wives. When a man cannot do justice to orphans’ wealth because of many wives, it is forbidden to practice polygamy. This based on Ikrimah’s narration below.

It is narrated from ‘Ikrimah that he said: “There is a man who has many wives, and he also protects the orphans. When he spends his personal possessions for his wives and turns out to be inadequate, because of many needs, the orphans’ treasures are taken to support them. Allah says that if

you are afraid of not being able to do justice to the wealth of orphaned children, because of many wives, it is forbidden for you to marry more than four wives, so that you are free from the fear. If you are still afraid of four wives, marry a wife. Remember, the maximum limit (at most) is four women, and the minimum limit is one, and be warned between the two. God also says that if you are worried about four women, then marry three women, if you are worried about three women then marry two women, if you are worried about two women, then marry one women. This interpretation is much closer, as if God warned a man with multiple wives, perhaps he would fall like a guardian who took the orphan’s treasures in his care, to cover a lot of the needs because he had many wives.¹¹

Based on the above explanation, both al-Thabāri and al-Rāzī, understand the verse in relation with the injunction to justice against orphans and also the necessity of fair treatment of married women. Al-Tabari says that if you are afraid of not being able to do justice to the orphans, as well as to other women you love, then don’t marry them even one. But it is enough that you marry the slaves you have, for marrying his own slaves is more likely to avoid misappropriation (wrong treatment to women).

Meanwhile, al-Rāzī argues that if a man is afraid of doing justice to the orphans, then he should marry other women as much as he likes, two, three, and four and he should not marry more than four wives, in order to escape these worries. But if he still worried for not being fair among four wives, then a wife is better for him. Then al-Rāzī warned that the maximum limit of polygamy is four wives, and a minimum is one women, whereas between the two limits (two or three wives) is optional with the requirement of being fair.¹²

Islamic teachings permit polygamy when it

⁸ al-Rāzī, 139.

⁹ al-Rāzī, 139.

¹⁰ al-Rāzī, 139.

¹¹ al-Rāzī, 139.

¹² Ismail, *Perempuan dalam Pasungan: Bias Laki-Laki dalam Penafsiran*, 218.

comes to justice and strictly prohibits or “forbid” polygamy if it causes anxiety, pain and suffering of a wife caused by her husband’s inequality. Being fair to wives is a binding obligation in the consciousness of husbands.¹³ The majority argue that this verse reflects the reality of the position of women and orphans who left behind by their parents and husbands. Riffat Hasan explains that this is the *azbabunnuzul ‘am* (macro) of Qur’anic verses on polygamy. According to al-Wahidi, the *asbabunnuzul khass* (micro) of the verse deals with someone who marries an orphan girl, but he was unable to do justice.¹⁴

Based on the above description, marriage of more than one wife is a *rukhsah* (concession/exception to general law), which means that the permit is limited to the emergency condition. Meanwhile, this condition is divided into two kinds, namely, individual emergency (*fardiyyah*) and social/collective emergency (*ijtima’iyah*). Among these conditions is when a wife has a disease that is difficult to be cured or she is infertile, so that she could not perform sexual relations with her husband. Another situation is the number of widows who have orphans, so they need husbands who are able to protect them and the condition when the number of men is fewer than the women. However, the initiative to polygamy is not solely determined by the husband, but with the approval of the first wife. According to Islamic scholars, the implementation of the *rukhsah* can be done along with the condition of being fair among the wives.¹⁵

Q.S. al-Nisa (4): 3 is often interpreted in conjunction with verse 129, in the same chapter (*surah*), to speak the importance of justice requirement in polygamous marriage. The

¹³ Abu Isya Muhammad bin Suah, *Sunan Turmudzi* (Beirut: Dar al-Fikr, t.t.), 279.

¹⁴ Ahmad al-Wahidi, *Asbab al-Nuzul* (Beirut: Maktabah al-Isaqafah, 1989), 81–82.

¹⁵ Ibrahim Hosen, *Fiqh Perbandingan Masalah Perkawinan* (Jakarta: Pustaka Firdaus, 2003), 145.

interpretation of the two verses often leads to controversy. There are two opinions as sources of reference by classical and contemporary scholars in interpreting verse 3 as a tool to legitimate polygamy. Verse 129 says that no man can do justice even he tries to achieve it. Therefore, the consequence is the prohibition of polygamy with the disability of fulfilling justice as the legal cause (*‘illat*), ie. to avoid cheating or injustice, meaning that the prohibition is an *‘azimah* (the opposite of *rukhsah*). However, some classical scholars allow polygamy within the limits set out in the Qur’an as a *rukhsah* for those who can fulfill the requirement of doing justice with the reasons of emergency.¹⁶ Muhammad Abduh also considered that polygamy is permissible if the husband can do justice, but if he is hesitant to be fair, then just marry one woman only.¹⁷

Al-Qurtubi says in his *Tafsir*:

“(In this verse) Allah Swt. tells the incapacity of human to be fair among his wives, that is equalize the tendency of the heart in love, intimacy, and interest. (In this verse) Allah explains the human condition that they are not able to master; the tendency of their hearts to some of their wives more than others. Therefore, the Messenger of Allah (peace and blessings of Allah be upon him) said (in his prayer), ‘O Allah, this is my division (against my wives) which I am capable of, so don’t You reproach me in the matter that You have and I don’t have’.¹⁸ Then Allah forbids ‘therefore, do not be overly inclined (to whom you love)’, Mujahid says, ‘(The meaning of this verse is) do not intentionally do bad (persecution against your wives), but be fair in dividing

¹⁶ Hosen, 145.

¹⁷ Mudofar Badhri, *Panduan Pengajaran Fiqih Perempuan di Pesantren* (Yogyakarta: Yayasan Kesejahteraan Fatayat, 2002), 137.

¹⁸ Hadits ini adalah hadits yang lemah diriwayatkan oleh Abu Dawud (no. 2134), al-Tirmidzi (no. 1140), al-Nasa’i (no. 3943) dan Ibnu Majah (no. 1971), dinyatakan lemah oleh Abu Zur’ah, Abu Hatim, al-Nasa’i dan Syaikh al-Albani dalam *Irwa’ al-Ghalil* (7/82).

the nights and giving the livelihood, because this includes the matters that human beings can do".¹⁹

Ibn Kathir says in his *Tafsir*:

"The meaning (verse above) is: 'O people, you will never be able to be fair (equalize) among your wives in all aspects, because even if you divide their turn each night, but there must be a difference in the love (in the heart), the desire of lust in the intimate relationships, as Ibn 'Abbas has described, 'Ubaidah as-Salmaani, Hasan al-Bashri, and Dhahhak bin Muzahim'".²⁰

The interpretation of the word *ankihu* in verse 129 has the meaning of command, but it does not indicate that polygamy is a mandatory, but merely a permitted thing (*mubah*). Al-Syafi'i in *Ahkam al-Qur'an*, mentions that this verse requires the ability to give a living to wife and children, so the word *alla ta'ulu* means "you need not bother to bear the livelihood of the wife if you only have one". But if a person performs the polygamous marriage, the burden of living is more heavier. Verse 129 shows that being fair in sharing love is difficult, consequently, the husbands should not abandon their former wives. Still, he has to treat her in a good way as same as the younger. The good and just treatment for the wives is highly recommended by the prophet. He always prayed: "O God, this is justice that I am capable of, do not harm me because of something You can afford but I can't".²¹

In conscience, no one knows the statement of Justice except his own person and God. QS. al-Nisa (4): 4²², describes monogamous marriage and the purge of marriage from the temporary

¹⁹ Syaikh Imam Al-Qurthubi, *Tafsir Al-Qurthubi* (Pustaka Azzam, 2007), 387.

²⁰ Ismā'il ibn 'Umar Ibn Kathīr, *Shahih tafsir Ibnu Katsir* (Pustaka Ibnu Katsir, 2006), 784.

²¹ Mustafa al-Siba'i, *Mengapa Poligami*, trans. Muhammad Muhson (Jakarta: Azan, 2002), 61.

²² Translation: "Give women their bridal gift upon marriage, though if they are happy to give up some of it for you, you may enjoy it with a clear conscience".

elements of passion and the things that give rise to discord, to be fair in arranging time for wives, and to give a living and to be gentle in speaking with them. The realization of justice is described in Q.S. Yunus (10): 67²³, which is preferring the relationship of men and women in the household based on tranquility.

Juridical Platform of Polygamy Based on The Indonesian Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*)

The provisions of the articles on polygamy, as set out in Chapter IX of the KHI (Compilation of Islamic Law), show that the conditions are not only substantial but also formal. *First*, article 55 which contains a substantial requirement of polygamy attached to a husband, that is, the fulfillment of established justice. It sounds as follows:

- 1) Having more than one person at a time, limited to only four wives.
- 2) The primary requirement is to have more than one wife, the husband must be able to deal justly with his wives and children.
- 3) If the main condition mentioned in paragraph (2) is not possible, the husband is prohibited from having more than one wife.

This requirement is the essence of polygamy, because from here emerge the disagreements in the law of polygamy. It is also insisted that if justice cannot be fulfilled, then a husband is prohibited to perform polygamous marriage. *Second*, section 56 which reads:

Husbands who wish to marry more than one women shall obtain permission from the Religious Courts.

- 1) Submission of the application of the License referred to in paragraph (1) shall be conducted in accordance with the

²³ Translation: "It is He who made the night so that you can rest in it and the daylight so that you can see there truly are signs in this for those who hear".

procedures as regulated in Chapter VIII of Government Regulation No. 9 Year 1975.

- 2) Marriages with second, third or fourth wives without the permission of the Religious Courts, have no legal force.

Article 56 above is a formal requirement of polygamy that must be fulfilled by a husband. This regulation is made as legal protection for polygamous marriages. In a state of law, all affairs of religious relations must be known by the authorized institution namely the Religious Court (*Pengadilan Agama/PA*).

Third, section 57, which reads:

The Religious Courts only grant permission to a husband who will having more than one wife if:

- 1) A wife cannot perform her duties as a wife;
- 2) A wife gets a body defect or an incurable disease;
- 3) The wife cannot bear offspring.

Article 57 above is a substantial requirement attached to a wife that is the real conditions that becomes a logical reason for a husband to perform polygamy.

Fourth, article 58 which reads:

- 1) In addition to the main conditions mentioned in Article 55 paragraph (2), to obtain the permission of the Religious Courts, a husband has also also to met the conditions set forth in Article 5 of Law No. 1, Year 1974, namely: (a) the approval of previous wife; (b) the certainty that the husband is able to guarantee the livelihood of their wives and childrens.
- 2) Without prejudice to the provisions of article 41 section b, of the Government Regulation no. 9 of 1975, the consent of a wife or wives may be given in writing or verbal form, but even if there has been a written consent, this agreement is affirmed with the oral consent of the wife at the trial of the Religious Courts.

- 3) The agreement referred to in paragraph (1) a is not required for a husband if his wife or wives are unlikely to be asked for approval and can not be a party to the agreement or if no news from his wife or his wives is at least 2 years or due to other reasons that need to be judged by the Judge.

Article 58 above is a formal requirement played by a wife in response to a husband who wants to polygamize herself by involving the authorized institution. These rules are the anticipation of maintaining good relationships within the polygamous family.

Fifth, article 59 which reads:

In the case of a wife who refuses to give consent and permission to the husband to have more than one person under one of the reasons set forth in Article 55 paragraphs (2) and 57, the Religious Courts may determine the grant of permission after examining and hearing the wife concerned in the trial of the Religious Courts, and to this determination, the wife or husband may file an appeal.

The chapter 59 above explains the attitude of the Religious Courts to act in the face of polygamy cases from husbands and wives who maintain their opinions. Thus, the provision of polygamy in the KHI (*Kompilasi Hukum Islam*) is not contrary to the spirit of the Islamic religious texts (*nass*).

However, according to the research conducted by Ratna Batara Minti and Hindun Anisah, it is stated that there is a problem in the practice of polygamy cancellation through polygamy permit. Apparently, the judge of the religious court still allows the husband to perform polygamy even if his wife does not allow. It is said that basically, the approval of a wife is not something that absolutely must be obtained. If a wife refuses to give her consent and the judge finds out that the wife is unable to perform her duties as a wife, then the judge has the right to allow her husband to do polygamy.

Even according to Mukti Arto, a judge may grant a husband's request for polygamy, although there is no reason whatsoever, because the wife has given his consent.

Debate of Classical and Contemporary Islamic Scholars on Polygamy

In historical records, polygamy has been existed before Islam. Islam has allowed the practice of polygamy, but it limits up to four wives, on condition that they have to be fair. Although it is allowed by the literal meaning of the Qur'anic verses, the practice of polygamy remains controversial, where the pros and cons emerge in the social life of Muslim community. The Islamic public sphere are divided into four groups in addressing the practice of polygamy. *First*, those who agree on polygamy but do not carry out or do not dare to prosecute. *Second*, those who absolutely do not agree to do polygamy. *Third*, those who on the surface refuse polygamous marriage, but they secretly perform it. *Fourth*, those who disagree with polygamy but are tolerant to those who do it.

The Perspective of Classical Scholars

Until the 18th century AD (13th AH), there were no pros-cons and great controversy regarding the permissibility of polygamy, almost all of Islamic scholars agree that polygamy is allowed (*mubah*), due to its legitimation based on the *qat'i* (definite) proposition.²⁴ For about 1300 years, almost all of Islamic scholars never differed in polygamy law (*ta'addud al-zawjat*). The leadings of the four schools of law, Imam Abū Hanīfah, Imam Mālik, Imam Shafī'i, and Imam Ahmad, agree that polygamy is allowed. This can be seen in their opinions in *al-Fiqh 'ala al-Mazāhib al-Arba'ah* on the discussion of the distribution of living and arranging a turn to

²⁴ Abdurrahīm Fāris Abū Lu'bah, "*Syawaib al-Tafsīr fī al-Qarni al-Rabī 'Asyara al-Hijri*", *Doctoral Dissertation* (Beirut: Jami'ah Beirut al-Islamiyah Kulliyah al-Syari'ah li Dar al-Fatawa Lubnan Idarat al-Dirasat al-Ulya, 2005), 306.

visit the wives (*al-qism*).²⁵

According to the majority of Islamic scholars, the meaning of the letter *wau* in the phrase *wa tsulatsa wa ruba'a* means "or" not "and", ie. "two, three or four", while its original meaning is "two-two, three-three, and four-four". This is in fact deviating from the original meaning, because it contains *qarīnah* to abandon the original meaning of the *wau* of *masna*, *tsulatsa*, *ruba'a*. It can also be used as a *bayan* (explication) if the verse is considered as *mujmāl*, due to the existence of another interpretation regarding the permissibility that can exceed four wives for people who do not recognize *mafhum 'adadi*.²⁶ This is based on narration of al-Syafī'i from Ibn Umar that Gailān bin Sālamah al-Ṣaqāfi, a companion of the prophet who converted to Islam with ten wives. The Prophet then ordered to choose four of them. This is a proposition for the permissibility of polygamy. The number four referred to the maximum limit for a man who wants to do polygamy.²⁷

Therefore, al-Syafī'i has formulated the conditions below for a husband who wants to perform polygamy. *First*, a man must have sufficient funds to fulfill various purposes with the increase of married wife. *Second*, a husband should treat his wife well and justly. Every wife should be treated equally in fulfilling the right of marriage as well as other rights.²⁸

According to al-Syafī'i, what is meant to be fair is when a wife gets the turn, the husband must be in her room, even though she closes the door and rejects him. The husband is obliged

²⁵ Abdurrahmān al-Jazīry, *al-Fiqh 'ala Al-Madzāhib al-Arba'ah*, vol. 4 (Beirut: Dārul Fikr, 1996), 206–207.

²⁶ Muhammad Andalusia, *Ruh al-Ma'ani fi Tafsir al-Qur'an* (Beirut: Dar al-Kutub, 2001), 401.

²⁷ Asep Nurdin, *Hadis-hadis Tentang Poligami (Studi Pemahaman Hadis Berprespektif Jender)* (Yogyakarta: UIN Sunan Kalijaga, 2003), 70. "event-place": "Yogyakarta", "author": [{"family": "Nurdin", "given": "Asep"}], "issued": {"date-parts": [{"2003}], "locator": "70"}, "schema": "https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}.

²⁸ Abu Idris al-Syafī'i, *al-Umm* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1993), 67.

to sleep at the door at that time. Al-Syafi'i also mentioned that the husband must start rotating their wives by doing a lottery, unless the whole wives are willing if their husband chooses one of them randomly. In addition, in determining the duration of stay, al-Syafi'i allows the husband to spend two or three nights for each wife.³⁰ The same is said by Malik who argues that those who do polygamy are only allowed as many as four wives and this applies to non-slave husbands (*al-hurr*). Ahmad bin Hanbal also mentions the maximum limit of a polygamous marriage up to four wives and must be practiced by doing justice between the wives, such as the division of the turn to the wives and it is not allowed to lean only to a wife.

On the other hand, such as in the Zāhirite school of law, it is explained that polygamy may be performed up to nine wives. Their argumentation is based on the use of "*wau*" in the verse, which holds the original meaning to add numbers, therefore, "*masna*, *tsulatsa* and *ruba'a*" cannot be interpreted by the original meaning, "two-two, three-three and four-four". Here, the letter "*wau*" is interpreted by "two plus three plus four equals to Nine". This is in accordance with the behavior of the Prophet who has a nine wives, a *qarinah* which indicates the meaning of "*masna*, *tsulasa*, *ruba'a*" as the *sunnah* of apostles that should be followed. They even assume that if a man has less than nine wives, then he is then considered to not following the *Sunnah*. The Khawarij group even argues polygamous marriage can be performed up to 18 wives. They translate "*masna*" as "two-two", to show repeatedly twice, "*tsulatsa*" is "three-three" equals six and "*ruba'a*" is "four-four" equals eight, and the total number is eighteen.²⁹

Likewise, we can see in the previous discussion, some opinions of Islamic scholars especially the al-Tabarī or al-Rāzī who said

²⁹ Al- Jashshash, *Ahkām al-Qur'an* (Beirut: Dār al-Kitāb al-Islāmiyah, t.t.), 19.

that polygamy is permissible as long as the husband can fulfill its requirements. The other scholars who intensely discusses polygamy is al-Jashshash who has the same opinion related to the permissibility of polygamy. This permissibility is also accompanied by the condition of the ability to do justice among wives, including materials, such as shelter, livelihood, clothing and the like, and non-material needs, such as compassion, tendency and the like. al-Jashshash notes, that the ability to do justice in the field of non-material is very hard to be applied.³⁰ Similarly, al-Zamakhsyārī states that polygamy is permissible. He even presents a view that states the limit number of married women is nine, adding two plus three plus four, equals nine.³¹

The classical Islamic scholars (*fuqaha*) argue that God permits marrying four women. According to them, although the permission is obtained on condition that is impossible to be fulfilled; justice in affection, feelings, love and the like, however, as long as the ability to do justice in the field of living and accommodation can be fulfilled, the permission for polygamy becomes something that can be obtained. The reason they propose to support this idea is that the prophet himself once said of his inability to do justice in the essential sense.³²

The Perspective of Contemporary Scholars

The study of contemporary Islamic scholars on polygamy, is not much different with the classical accounts. The views of contemporary scholars are based more on the conditions and situations of the developing age. Among the scholars who talk about polygamy is Sayyid Qutb who says that polygamy is a *rukhsah*. Because it is a *rukhsah*, polygamy can only be

³⁰ Jashshash, 50.

³¹ Al- Zamakhsyari, *Tafsir al-Kasyaaf*, vol. I (<http://www.altafsir.com>, t.t.), 373.

³² Khoiruddin Nasution, *Riba dan Poligami; Sebuah Studi atas Pemikiran Muhammad Abduh* (Yogyakarta: Pustaka Pelajar, 1996), 99.

done in a state of emergency that is really urgent. This permissibility is still required to be able to do justice to the wives. The justice required here includes in the areas of living, *mu'amala*, and division of the turn. As for the prospective husband who can not do justice, it is required to marry only one wife.³³

In contrast to Sayyid Qutūb, Mohammed Abduh hardly opposed polygamy as it being considered as a source of destruction in Egypt. He firmly stated that it is impossible to educate the Egyptians with a good education, as long as polygamy is still widely practiced.³⁴ Abduh once issued an informal *fatwa* for the Egyptian government to ban polygamy outside of an emergency condition. He also argued that in principle, the core of marriage in Islam is monogamy, not polygamy. Polygamy is forbidden because it causes *darar* (danger) such as conflict between wife and family member, and it is only allowed in emergency condition only.³⁵ While M. Syahrur argues, that polygamy is allowed with confidence to do justice to the orphans. This means that the second, third, and fourth wife must be a widow who has orphaned children.³⁶

For some Islamic thinkers, polygamy is also considered to bring some problems. As mentioned by Rashid Rida, there are three main issues within polygamy: *First*, Islam does not oblige or advocate polygamy, but rather shows the lack of polygamist who are free from the forbidden injustice. The wisdom contained here is to inform those who want to practice polygamy to think carefully about their will and to look to justice that must be done in the future.³⁷ *Second*, Islam does not necessarily

³³ Sayyid Qutb, *Tafsīr fī Zilalil al-Qur'an*, vol. IV (Beirut: Dār al-Kutūb al-'Ilmiyah, 1961), 239.

³⁴ Muhammad Rasyid Ridha, *Panggilan Islam Terhadap Wanita* (Bandung: Pustaka, 1996), 50.

³⁵ Rasyid Ridha, 57.

³⁶ Muhammad Nashirudin, Sidik Hasan, *Poros-poros Ilahiyah Perempuan Dalam Lipatan Pemikiran Muslim* (Surabaya: Jaring Pena, 2009), 249.

³⁷ Rasyid Ridha, *Panggilan Islam Terhadap Wanita*, 55.

prohibit polygamy, but it is also not too lax. The consideration is the characters and habits of men who have strong will in various fields and are usually dissatisfied with only one wife and the demands of some men's on the offspring when his wife is old or due to the existence of other causes that make her unable to get pregnant.³⁸ *Third*, the issue is positioned by Islam in the law of *mubah* (something that merely allowed) with the previously mentioned terms and conditions which must be carefully considered both in terms of danger and benefit. Polygamy will bring benefits for those who practice it, when all the Islamic laws pertaining to it are fulfilled.³⁹

Some Critical Remarks

The debate over polygamy will not be completed and finished as long as the applied method of *istinbat al-ahkam* (law deduction) is also different. The statement of the Qur'an which does not declare the finality of polygamy law becomes the root of difference among the classical and contemporary scholars. In general, the scholars expressed the permissibility of polygamy, despite their variations of being strict and moderate, with the precondition to be fair among the wives. The justice required includes obligations that are material and non-material.

The scholars agree on the obligation to be fair in material and fulfilling livelihood, although they differ in determining the amount and level. However, the scholars do not strictly require the non-material obligations for the husband. In the study of Islamic law, the vast majority of classical scholars provide the ample opportunities for the implementation of polygamy practices. While on the other hand, they do not touch the issues of qualification and arrangement in the operationalization of polygamy.

In another perspective, the permissibility of polygamy which is regulated in marriage

³⁸ Rasyid Ridha, 55.

³⁹ Rasyid Ridha, 55.

regulation, is not only related to justice or the ability to give livelihood as the explanation of the classical *fiqh*. However, this has more to do with the obstacles to the so-called “healthy marriage”. This kind of thinking has actually no material reference in *fiqh*, although philosophically, it can be understood in terms of the concept of *istislah* which is more developed in the Maliki school of thought.

Muhammad Abduh’s view that prohibits polygamy can be understood in the condition of Egyptian society. At that time, marrying Egyptian women regardless of responsibilities has become commonplace. It ignores women’s rights which then leads to negative excesses in the family. The same thing is also said by Sayyid Qutūb who views polygamous behavior should be based on urgent and emergency needs.

Based on the scholars’ views on the pros and cons of polygamy studies, a mapping can be made into three groups; *First*, Those who tend to be soft. This group is spearheaded by some schools of law, such as the Zāhirites, those who allow the marriage in the number of more than four; *Second*, Moderate group. This group limit the permissibility of polygamy to four wives as the maximum number. Among the arguments presented by this group is the case of a Prophet’s companion, Gāilān al-Šaqafiy. When he converting to Islam, he had ten wives and the Holy Prophet ordered to choose four wives and to divorce the rest;

Third, Groups that tend to be tight. This group actually agrees that polygamy is permitted, but it must meet the preconditions offered by the Qur’an. However, according to this group, these preconditions are very difficult to meet by today husbands. This is primarily in the case of non-material context, such as a matter of love that can not be shared equitably, because a husband’s sexual inclinations will be higher to a younger one. Therefore, the door of permissibility for polygamy has also become

very difficult to be opened up.

On the other hand, Muslims should not sufficiently understand the legality of polygamy, but they are also obliged to understand the Islamic law on the nature and purpose of marriage, so the polygamy becomes a solution and not a source of trouble in the household. Therefore, those who choose to engage in polygamy, should know the reasons and causes behind the practice as follow:

- 1) The underlying reason for someone to do polygamy.
- 2) The original law of the permissibility of polygamy.
- 3) Principles of benefit to be obtained by polygamy; whether it is greater or less than its loss and dangers. The husband has to know that polygamy is permissible if there is a certain cause and to expect certain benefits.

In the frame of Islamic Jurisprudence, some scholars argue that polygamy has five variations of law. *First*, polygamy becomes a mandatory (*wajib*), if the reasons and benefits are real and very acceptable. The acceptability of reasons here relates to the context of Sharia, for example, polygamy is linked to the spread of Islamic preachers whose benefits are attracting many people to the path of faith. *Secondly*, the law of polygamy becomes recommended (*sunnah/mandub*), if one of the causes and benefits of polygamy is “very acceptable”, while some other causes are categorized as “acceptable”. For example, just as in the number one example, but the number of people to be preached is very small, but they have a good quality for the smoothness of Islamic da’wa. *Third*, the law of polygamy becomes merely allowed (*mubah*) with some reasons, for example, a husband has long married, but his wife is barren, or the wife suffered from illness and cannot meet the biological needs of husband. The benefit of the polygamy in this case is to obtain offspring. *Fourth*, polygamy becomes *makruh*

(disliked/discouraged) when one of the causes or benefits of polygamy is “unacceptable”, for example, the motivation of polygamy to take the wife’s property. *Fifth*, polygamy becomes forbidden (*haram*), if the causes and benefits are “unacceptable”, such as the above example, in addition to the polytheistic status (*musyrikah*) of the woman to be married.

Conclusions

God has informed us about the stance of Islamic Shari’a on polygamy. Such information is contained in Q.S. al-Nisa (4): 3, which is correlated with Q.S. al-Nisa (4): 129 and several hadiths of the Prophet which explain the practice of the Prophet’s polygamy. In this perspective, Islamic Shari’a basically allows polygamy on conditional basis. Islam allows polygamy when it is needed by a husband for several reasons justified by the Islamic Shari’a. A husband must be able to fulfill all the requirements and responsibilities of his polygamous family. The difference of opinion among classical and contemporary scholars on polygamy lies in the perspective difference. All hold on to the same proposition and no one of them forbid polygamy. This permissibility is in line with the views of the Qur’an and the hadith about the prerequisites to do justice for those who perform polygamy.

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