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Philosophical Basis of Various Polygynous Requirements: Comparative Study of Family Law's Philosophy in Asia and Africa

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Abstract:

Polygyny is one of the objects to reform Islamic family law in modern Muslim countries. In addition to meeting the demands of the times, the renewal of polygyny regulations also aims to improve the position and protect women's rights. Most modern Muslim countries have renewed polygyny regulations by limiting and prohibiting polygyny accompanied by criminalization. This study utilizes a comparative descriptive method to compare the polygynous requirements in Indonesia, Morocco, Tunisia, Somalia, Turkey, and Pakistan from the perspective of the philosophy of Islamic law. The research findings show that the categorization of polygyny regulations in modern Muslim countries consists of: absolute prohibition of polygyny, permissibility with strict conditions, permissibility with weak conditions, obligation to seek court permission, and criminalization of polygyny. There are two main elements required for polygyny in modern Muslim countries: an internal element in the form of the condition of husband and wife and an external component in the form of the role of the court institution in granting polygyny permits. Thus, the philosophical basis of these differences is mostly caused by the diversity of *Madhabs* in each country that aimed to maintain their people's prosperity and to renew Islamic family law which brings a contemporary spirit especially the embodiment of equality and increase in the position of women.

Keywords: polygyny; family law; philosophy.



Introduction

A polygamy is a form of marriage in which one party marries several spouses during the same period of a marriage contract.¹ It is an issue that has been discussed intensely, particularly among Muslims. One of the reasons is the fact that the Quran legitimated the practice of Polygamy. Various interpretations were exposed to find the exact meaning of these verses.² Thus, it is essential to re-read the provisions and enforcement of polygamy in the modern era like today. Moreover, to avoid any superficial opinion in interpreting them. Besides the favorable virtue of polygamy, where The United Nation reported that this practice is worldwide accepted in 25 countries in Africa and 7 countries in Asia,³ some countries have finally imposed stricter polygamy requirements and some countries impose an absolute restriction on polygamy. Muhammad Roy Purwanto, et. al found that countries such as Indonesia, Pakistan, Maroco, and Somalia allow polygamy under strict condition.⁴

Nevertheless due to lack understanding of the basic core and the hikma of this practice i.e, justice and to preserve a harmonious, stability, and composure home life, dilemmas and problems are unavoidable. Those are amongst the reason why few countries such as Tunisia and Turkey completely restricted this practice. The research conducted by Bright Opoku Ahinkorah proves that there is a significant relation between polygyny and partner violence in household.⁵ Still on the same page, Ahinkorah collaborated with Abdul-Aziz Seidu, et. al. effectively proven that Intimate partner violence proposes marital disruption in sub-Saharan Africa.⁶ More research shown that intimate partner violence is due to the common practice of polygamy, although the wives in this family formation have wiser attitudes towards the violence.⁷ Meanwhile, reform of Islamic family law has become necessary for

¹Ministry of Education and Culture, "Kamus Besar Bahasa Indonesia" in <https://kbbi.web.id/poligami>, (accessed November 9, 2022, 20.03).

²Rahmin T. Husain et.al in their article stated various interpretations based on takhrij hadist approach. They found that polygamy only may be implemented when a husband and wives understand thoroughly the concept of justice and equality as basis of the issue. See Husain, Rahmin & Ahmad, Arifuddin & Kara, Siti & Alwi, Zulfahmi. (2019). Polygamy in the Perspective of Hadith: Justice and Equality among Wives in A Polygamy Practice. MADANIA: JURNAL KAJIAN KEISLAMAN. 23. 93. DOI:10.29300/madania.v23i1.1954

³Rahmanian, P., Munawar, K., Mukhtar, F. et al. Prevalence of mental health problems in women in polygamous versus monogamous marriages: a systematic review and meta-analysis. *Arch Womens Ment Health* **24**, 339–351 (2021). <https://doi.org/10.1007/s00737-020-01070-8>

⁴Muhammad Roy Purwanto, Tamyiz Mukharrom, M. Roem Syibly, et. al., Polygamy in Muslim Countries: A Comparative Study in Tunisia, Saudi Arabia, and Indonesia. <https://doi.org/10.2991/aebmr.k.210305.082>

⁵Bright Opoku Ahinkorah, Polygyny and intimate partner violence in sub-Saharan Africa: Evidence from 16 cross-sectional demographic and health surveys, *SSM - Population Health*, Volume 13, 2021, 100729, ISSN 2352-8273, <https://doi.org/10.1016/j.ssmph.2021.100729>.

⁶Seidu AA, Aboagye RG, Ahinkorah BO, Adu C, Yaya S. Intimate partner violence as a predictor of marital disruption in sub-Saharan Africa: A multilevel analysis of demographic and health surveys. *SSM Popul Health*. 2021 Jul 17;15:100877. doi: 10.1016/j.ssmph.2021.100877. PMID: 34381866; PMCID: PMC8334722.

⁷Dorcas Adewale, Nutifafa Eugene Yaw Dey, Kenneth Owusu Ansah, Henry Ofori Duah, Pascal Agbadi, The association between polygyny statuses of currently married and in-union women and attitude towards intimate partner violence against women in Ghana, *Social Sciences & Humanities*



modern society in various countries. Besides aiming to meet the demands and contextualization of the times, it also seeks to increase women's position and protection. In line with this goal, polygamy is used as one of the objectives for renewing family law. The requirement of polygamy is one of the most controversial topics of Islamic law reform. This is because, in several regulations, the requirement is that the wife can no longer carry out her obligations due to illness, infertility, or age. Hence, the institution of polygamy is often interpreted as a form of injustice and an attempt to exploit women for the biological needs of men. This article focus on the discussion of the justice as the main requirement for polygyny and the legal protection for women in polygynous requirements at Asia and Africa.

By utilizing a comparative descriptive method, this study compares the material requirements for polygyny in Indonesia, Tunisia, Turki, Somalia, Pakistan and Morocco. It also analyzes the concept of polygamy according to the perspective of Islamic legal philosophy, which is completed by the opinions of madhhab scholars, contemporary scholars, and Muslim scholars. Hopefully, this article can contribute ideas about the philosophical basis for renewing polygamy requirements in various countries. In addition, it is hoped that this will become an idea for studying the renewal of polygamy regulations that are more accommodating for fulfilling and protecting women's rights.

The discussion about the philosophical basis of polygamy requirements has been carried out by researchers. However, from the various existing studies, it is generally still partial on certain aspects related to the regulation of polygamy in modern Muslim countries from the aspects of health, culture and the concept of justice in Islamic law, so there is still a gap in studies related to this aspect of the justice as the main requirement for polygyny and polygyny and the legal protection for women in polygynous requirements at Asia And Africa.

Several relevant studies serve as comparative material as well as can be used as reference material for this research argument, including research related to the concept of justice in polygamous marriage written by Wirdyaningsih entitled *The Concept of Justice According to the Philosophy of Islamic Law in Polygamous Marriages*,⁸ Sifa Mulya Nurani methothe *Law and Compilation of Islamic Law*,⁹ Sayyidah entitled *The Concept of Justice in Polygamy According to Islam*,¹⁰ Asman entitled *The Concept of Justice in Polygamy*,¹¹ Danu Aris Setyanto with the title *Polygamy in the Perspective of*

Open, Volume 4, Issue 1, 2021, 100207, ISSN 2590-2911,
<https://doi.org/10.1016/j.ssaho.2021.100207>

⁸Wirdyaningsih, " Konsep Keadilan Menurut Filsafat Hukum Islam dalam Perkawinan Poligami ",
Jurnal Hukum dan Pembangunan 48, no. 3 (2018): 612-629
<http://dx.doi.org/10.21143/jhp.vol48.no3.1752>

⁹Sifa Mulya Nurani, "Perspektif Keadilan dalam Keluarga: Telaah Konsep Adil dalam Poligami Menurut Undang-Undang dan Kompilasi Hukum Islam", *Ascarya: Jurnal Islamic Science, Culture, and Social Studies* 1, no. 1 (2021): 1-14
<https://moraref.kemenag.go.id/documents/article/99047180253297849>

¹⁰Sayyidah, Imas Kania, Amir Tengku Ramly, "Konsep Keadilan dalam Poligami Menurut Agama Islam", *Diversity: Jurnal Ilmiah Pascasarjana* 1, no. 1 (2021): 20-33 <http://dx.doi.org/10.32832/djip-uika.v1i1.4360>

¹¹Asman, "Konsep Keadilan dalam Poligami", *al-Maslahah* 15, no. 1(2019): 37-56
<https://jurnaliainpontianak.or.id/index.php/Almaslahah/article/view/1402>



Islamic Law Philosophy (Criticism of Marriage Law in Indonesia),¹² Endi Suhadi with the title *Viewed from a Philosophical Angle Against the Pros and Cons of Regulations Regarding Polygamy*,¹³ Mochamat Toyib and Sudirwan have also researched a similar topic entitled *The Concept of Fairness in Polygamy from the Perspective of Imam Syafi'i*.¹⁴

Wirduyaningsih found that the meaning of fairness in polygamous marriages is a concept of justice that is material and measurable, namely in the distribution of shift days, housing, living expenses, and clothing. Meanwhile, polygamy is challenging to implement if justice is emphasized on qualitative matters such as love and compassion. Then, Sifa states that the justice required by polygynous husbands for their wives is in the areas of living, *muamalah*, association, and distribution of nights. The justice demanded is an outward matter that humans can do, not justice in cases of love and affection. Sayyidah findings state that the main requirement for polygamy is justice. However, justice is required in material and measurable matters, namely living, clothing, shelter, and shift time. While, justice in love and compassion is not required.

A similar idea was also conveyed by Asman, which states that the required justice is in material matters, not about love and affection. The concept of justice has a philosophical meaning: polygamy must consider aspects of justice for human benefit. Then, research on the same topic has also been conducted by Danu, that polygamy must prioritize justice for wives and children, including livelihood and inner justice. In addition, it must also be worth protection. However, in the Indonesian context, the reasons for allowing polygamy in the Marriage Law are considered by some feminist figures to have not fulfilled justice. In addition, weak administration, absence of sanctions, and lack of public awareness have made all the philosophical meanings of polygamy in the Marriage Law difficult or even never realized.

Then, research was conducted by Endi that discusses the regulation of polygamy in Indonesia, which still has its pros and cons. On the other hand, polygamy can prevent harm from arising, but it can also have negative impacts, especially for women. Mochamat Toyib and Sudirwan have also researched that justice is the husband's obligation before and after polygamy, both in terms of material and immaterial aspects such as love and education for children and wives.

Likewise, comparing polygamy requirements in modern Muslim countries, there have been many previous research topics. For example, research conducted by Lia Noviana entitled *Status of Women in Modern Muslim Countries: Studies of Family Law in Tunisia and Indonesia*,¹⁵ Suud Sarim Karimullah entitled *Polygamy*

¹² Danu Aris Setyanto, "Poligami dalam Perspektif Filsafat Hukum Islam (Kritik Terhadap Hukum Perkawinan di Indonesia)", *Al-Ahwal* 10, no. 1(2017): 49-60 <https://doi.org/10.14421/ahwal.2017.10105>

¹³Endi Suhadi, "Ditinjau dari Sudut Filsafat Terhadap Pro dan Kontra Pengaturan Tentang Poligami", *Jurnal Hukum dan Keadilan* 8, no. 1 (2021): 117-136 <https://ejournal.stih-painan.ac.id/index.php/jihk/article/view/145/105>

¹⁴Mochamat Toyib dan Sudirwan, "Konsep Adil dalam Poligami Perspektif Imam Syafi'i", *Al-Wasith: Jurnal Studi Hukum Islam* 2, no. 1 (2017) 18-35 <https://jurnal.unugha.ac.id/index.php/wst/article/view/80/41>

¹⁵Lia Noviana, "Status Wanita di Negara Muslim Modern: Studi Terhadap Hukum Keluarga di Tunisia dan Indonesia", *Kodifikasia: Jurnal Penelitian Islam* 13, no. 2 (2019): 197-214 <http://dx.doi.org/10.21154/kodifikasia.v13i2.1832>



from the Perspective of Fiqh and Family Law in Muslim Countries,¹⁶ Janeko entitled *Exploratory Studies on Polygamy Laws in Various Muslim Countries*.¹⁷ Muhammad Roy Purwanto, et. al entitled *Polygamy in Muslim Countries: A Comparative Study in Tunisia, Saudi Arabia, and Indonesia*.¹⁸

Lia finding that one of the factors for reforming family law in Tunisia is the influence of France in their secularization efforts, the reinterpretation of the texts of the Quran and the increase in the status of women in Tunisia. On the other hand, the renewal of family law in Indonesia is motivated by the heterogeneity of the community and the effort of law unification. Then, Suud discusses the regulation of polygamy in Turkey, Tunisia, Indonesia, and Saudi Arabia. The research findings show that provisions prohibiting and imposing criminal penalties or fines for polygamy are progressive and have never been regulated in fiqh. This is considered to provide benefits for women in the household.

While Janeko explain that there are three categories of polygamy regulations in Muslim countries, namely: (1) Countries that prohibit polygamy, for example Tunisia and Turkey. (2) Countries that limit polygamy, for example, Indonesia and Malaysia. (3) Countries that allow polygamy freely, for instance, Saudi Arabia. Muhammad Roy et. al found that some countries have finally imposed stricter polygamy requirements and some countries impose an absolute restriction on polygamy, such as Indonesia, Pakistan, Maroco, and Somalia allow polygamy under strict condition.

Previous studies have discussed the regulation of polygamy in several countries and justice as the main requirement for polygamy. However, none of these studies have examined the justice as the main requirement for polygyny and the legal protection for women in Muslim countries at Asia and Africa. Based on previous research results, the researcher proposes that this research differs from previous research. Apart from discussing the comparison of polygynous requirements, this study also examines the analysis and classifications of polygamy requirements based on philosophy, jurisprudence, and the views of contemporary scholars. Thus, this study aimed to elaborate the basic philosophy of legal protection for women in muslim countries i.e equality, justice and preserving a healthy household due to the facts of intimate partner violences in polygamy marriage.

Result and Discussion

Polygyny Requirements in Islamic Law

Polygamy is a hot topic that is quite controversial in Islamic family law. This is due to the different interpretations of the related Quranic verse. Although the Ijma' of the Ulama regarding the law is permissible, some group of ulama in certain condition and situation might consider it inversely. Therefore the controversial will

¹⁶ Suud Sarim Karimullah, "Poligami Perspektif Fikih dan Hukum Keluarga Negara Muslim", *Maddika: Journal of Islamic Family Law* 2, no. 1(2021): 1-20. <http://ejournal.iainpalopo.ac.id/index.php/maddika>

¹⁷ Janeko, "Studi Eksplorasi Hukum Poligami di Berbagai Negara Muslim", *Ummul Qura* 10, no. 2(2017): 51-64 <https://ejournal.insud.ac.id/index.php/UQ/article/view/56>

¹⁸ Muhammad Roy Purwanto, Tamyiz Mukharrom, M. Roem Syibly, et. al., *Polygamy in Muslim ...*, <https://doi.org/10.2991/aebmr.k.210305.082>



always remain amongst the 'Ulama due to the mentioned reasons.¹⁹ Regarding the terms polygamy and polygyny, some opinions differentiate the meanings of the two terms; some ideas equate them. Literally, polygamy comes from the Greek words *apolus* (many) and *gamos* (marriage). It is also said that the word was taken from *polus* (many) and *gune* (woman).²⁰ Thus, polygamy can mean a marriage bond in which one party marries more than one member of the opposite sex.²¹

Meanwhile, monogamy is a marriage consisting of only one husband and one wife for a certain period. Thus, polygamy includes polygynous and polyandry marriages, as well as the opposite of monogamy. The term that will be used next is polygyny (*Ta'adud al-zaujah*) to emphasize the meaning of a man's marriage with several women.

In Islam, polygyny is allowed based on Surah An-Nisa verse 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 ۚ ذَٰلِكَ أَدْنَىٰ ۖ أَلَّا تَعُولُوا

“And if you are afraid that you will not be able to do justice to (the rights of) orphaned women (if you marry them), then marry (other) women whom you like: two, three or four. Then if you are afraid that you will not be able to do justice, then (marry) only one person, or the slaves you have. That is closer to not doing wrong. (QS An-Nisa: 3).

This verse is supported by other hadiths, which textually constitute the legal basis for the permissibility of polygyny. However, the interpretation of Surah An-Nisa verse 3 requires a socio-historical perspective contextual according to the situation and conditions at that time (*Asbab an-nuzul*). The war has caused many widows and girls to be left behind by their husbands and fathers. So, according to Muhamad Arif Mustofa, the polygynous verse is not an absolute commandment but a suggestion that indicates a consideration of social values.²²

Meanwhile, according to M. Quraish Shihab, polygynous verses are often the object of misunderstanding about the contents of the verses. Even though the verse does not oblige polygyny or encourage it, he believed that the verse was revealed in connection with the attitude of some people who wanted to marry the rich and beautiful orphans under their care but were not willing to give them an appropriate dowry and did not treat them fairly.²³ In addition, M. Quraish Shihab believes this verse only states the permissibility of polygyny as a ‘small door’ that can only be opened by people with urgent needs accompanied by strict requirements.

In reality, fair polygyny is so difficult to practice because of the fact that not all men are able to meet the requirements of justice as Allah swt. said,

¹⁹ John L. Esposito, *Women in Muslim Family Law*, (New York: Syracuse University Press, 1982), hal. 92

²⁰ Muhibbuthabry, “Poligami dan Sanksinya Menurut Perundang-Undangan Negara-Negara Modern”, *Ahkam* 6, no. 1 (January 2016): 9-21 <http://dx.doi.org/10.15408/ajis.v16i1.2891>

²¹ Fathonah, “Telaah Poligini: Perspektif Ulama Populer Dunia (Dari Ulama Klasik Hingga Ulama Kontemporer)”, *Al-Hikmah: Jurnal Studi Keislaman* 5, no. 1 (Maret 2015): 13-38 <https://doi.org/10.36835/hjsk.v5i1.516>

²² Muhamad Arif Mustofa, “Poligami dalam Hukum Agama dan Negara”, *Jurnal Pemerintahan dan Politik Islam: Al-Imarah*, Vol. 2, No. 1, 2017, 47-58.

²³ M. Quraish Shihab, *Wawasan al-Qur'an, Tafsir Maudhu'i atas Pelbagai Persoalan Umat* (Bandung: Mizan, 1998), 201.



وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَلَا تَمِيلُوا كُلَّ الْمَيْلِ فَتَذَرُوهَا كَالْمُعَلَّقَةِ وَإِنْ تُصْلِحُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا

" And you will never be able to act fairly between your wives even if you really want to do so, (QS An-Nisa verse 129).

Leila Ahmed, the phenomenon of two polygynous verses, which at first glance are contradictory is assumed to be an attitude of dualism and a complex intrinsic element in polygynous verses.²⁴ On the one hand, the Koran allows polygyny on condition that it is able to act fairly. On the other hand, the Qur'an emphasizes that humans will not be able to act fairly. According to Rahman, this spirit underlies family law reform in Muslim countries.²⁵

Polygyny is also a discussion of both classical and contemporary scholars. According to classical fiqh literature, the ulama (*fuqaha'*) and exegesis scholars have declared *ijma'* that the law on polygyny is permissible with a maximum limit of four wives. The following is the view of the madhhab scholars on polygyny.

First, the Hanafi School. Al-Kasyani as one of the representative scholars of the Hanafiyah group, argues that polygyny is permissible on the condition that it is fair. According to the Hanafiyah scholars, this concept of justice includes external maintenance (clothing, food, and shelter) and inner (dividing sleep shifts) for wives. They argue that a fundamental and essential *syar'i obligation* for the husband is to act fairly in his physical and spiritual maintenance.²⁶

Second, the Maliki School. Imam Malik, Ibn Rushd, and Malikiyah scholars believe that polygyny is permissible on the condition that the husband must act fairly²⁷ with a maximum of four women. *Third*, the Shafi'i School. Imam Syafi'i explained that there are women who are forbidden to be polygynous for a specific time. That is polygyny between brothers and sisters, whether he is a servant or absolute independence at the same time. Likewise, the prohibition against marrying women with their aunts.

Meanwhile, regarding the maximum wife limit, Imam Syafi'i believes that a maximum of four women are independent. Meanwhile, women who are enslaved may be polygynous without restrictions. Concerning the concept of justice, Imam Syafi'i stated that polygynous husbands must distribute their turn equally to their wives by calculating the quantity.²⁸ In addition, the husband is obliged to have good intercourse with his wife, fulfill his obligations and accept each other's rights. Meanwhile, on the other hand, Imam Al-Nawawi stated that monogamous

²⁴Leila Ahmed, *Women and Gender in Islam, Historical Roots of a Modern Debate*, (London: Yale University Press, 1992), 63.

²⁵ Fazlur Rahman, "A Survey of Modernization of Muslim Family Law", *International Journal Middle East Study* 11, 1980, 451-451.

²⁶Abu Bakar bin Mas'ud bin Ahmad Al-Kasyani, *Bada'i al-Shana'i* (Beirut: Darul Kitab Al-'Arabi, 1982), juz 2, 333 as quoted by Fathonah, "Telaah Poligini:", 13- 38.

²⁷Ibn Rushd, *Bidayah al-Mujtahid fii nihayah al-Muqtasid* trans. Abu Ahmad Al-Majdi (Darul Fikr, (t.th)), juz 2, 110-112.

²⁸Al-Shafi'i, 6



marriage was punished as a sunnah to minimize injustice to the women he married.²⁹

Fourth, the Hambali School. Ibn Quddamah explained that the absolute requirement to be polygynous is to be fair.³⁰ Ibn Quddamah, Imam Al-Hajawi, Ibn Taymiyah, and Ibn Al-Qayyim explained that if the prospective wife gives conditions that she is not willing to polygynize, then if the future husband accepts it, the husband will later be prohibited from polygyny. If the husband remains polygynous, the wife has the right to file a divorce suit against her husband.

Muslim scholars and contemporary scholars also carry out studies on polygyny. Muhammad Abduh, one of the Al-Azhar scholars, argues that polygyny is a pre-Islamic tradition. Islam prescribes it because it aims to unite forces and consolidate the newly formed Muslim community. Meanwhile, nowadays, polygyny no longer plays a role and can be considered irrelevant. Abduh stated that the permissibility of polygyny is only under certain urgent and very forced conditions. For example, a wife cannot bear children. In addition, according to him, justice is an absolute requirement that must be fulfilled in polygyny. Muhammad Abduh saw polygyny as a source of social damage in Egypt then. Because causing quarrels between wives and divisions between children and other families. This can cause family breakdown and even psychological impact on their children. Thus Abduh believes that the practice of polygyny among Muslims in the early days of Islam is different from that of polygyny today.³¹

In line with M. Abduh, Rasyid Rida believes that the discussion of the polygyny verse focuses on caring for orphans and the prohibition of consuming their property arbitrarily, even through marriage. The scholars such as Sayyed Thanthawi, Hasanain Muhammad Makhluḥ,³² Mahmud Syaltut,³³ and Yusuf Al-Qardawi agree that the condition for polygyny is justice, namely justice that everyone, both rich and poor, can realize according to their respective abilities. So, it is not justice that exceeds the limits of human ability, and the most important thing is not to neglect other wives.³⁴

Al-Qardawi added that several considerations for the permissibility of polygyny are when the wife is infertile, the female population is more than the male, and the husband has high sexual needs.³⁵ Then, Muhammad Al-Ghazali believed that women have the freedom to accept or reject if they are to be polygynized by their husbands. If a wife is worried about polygyny by her husband, she is allowed to put forward conditions that she is not willing to be married in her marriage agreement. There is also an opinion from Athiyah Syaqaar, who explains that polygyny is permissible due to considerations of benefits for men, women, and

²⁹Al-Shafi'i, 6

³⁰Ibn Quddamah, Abdurrahmah, Al-Syarh Al-Kabiir and Al-Bhuty, Al-Hajawy, *Kasyaaf Al-Qanna fisyarh al-Iqnai'I* (Beirut: Darul Fikr, 1402 H), 339.

³¹Muhammad 'Abduh, *Al-Mar'ah fi al-Islam*, compiled by Muhammad 'Imarah (Kairo: Kitab al-Hilal, 1979), 34-37.

³²Hasanain Muhammad Makhluḥ, *Fatawa Al-Azhar, Ta'addud al-Zaujah*, accessed 20 September 2022 www.islamic-council.com

³³Mahmud Shaltut, *Al-Islam 'Aqidah wa Shari'ah* (Cairo: Daul Shuruq, 1992), 190.

³⁴Yusuf Al-Qardawi, *Malamih al-Mujtama' al-Muslim Allazi Nanshuduhu*, (Cairo: Darul Wafa', 1993), 353.

³⁵Al-Qardawi, 353



social society in general. For example, if it is associated with the emergence of problems and negative social behavior, such as adultery, pregnancies outside of marriage, abortion or disposal of babies, and the number of widows.³⁶

Then, Wahbah Al-Zuhaili argued that there were two conditions for the permissibility of polygyny: being fair to all wives and being able to provide for their wives and children. Accordingly, polygyny is an exception and is only an option when fulfilling the requirements accompanying an emergency interest. The causes of polygyny are divided into two, namely, general and special causes. The known cause is an effort to overcome the disproportionate number of the male population with the female population. So, Al-Zuhaili argues that polygyny is an emergency solution to solve the problem of moral degradation.

Meanwhile, specific causes include the wife being infertile or sick, so she cannot fulfill her obligations as a wife. There are significant disputes in the family, both between husband and wife and their families, the wife is sick or old, or because her menstrual period is very long. Meanwhile, Al-Zuhaili disagrees that polygyny is required to ask for permission from a judge because polygyny is related to the ability to act fairly, limited by urgency, needs, reasons, and problems that the Sharia justifies.

Meanwhile, Muhammad Syahrur, one of the Islamic thinkers from Syria, argues that polygynous verses contain the limits of legal determination, both qualitatively and quantitatively.³⁷ In terms of quantitative, namely the minimum and maximum limits, namely four wives. Meanwhile, the qualitative boundaries in question are related to whether the quality of the second wife is still a girl, a divorcee dies, or a divorcee is alive. This is very important because it can determine the permissibility of polygyny so that it does not deviate from the spirit of the verses of the Qur'an. Based on *Asbabun Al-Nuzul* polygynous verse, he believes that two conditions must be met: *First*, the first wife, second or third, is a widow with children. *Second*, there is concern about not being able to treat orphans fairly.³⁸ If these two requirements are not met, then the risk of polygynous law can be eliminated. Syahrur explained that polygynous law is a way out to solve social problems. Thus, the state has the authority to regulate whether or not polygyny occurs in its territory.³⁹

Along with the times, the movement to renew family law has become more massive. Polygyny is reforming Islamic family law in the modern Muslim world. As a result, polygyny regulations in modern Muslim countries increasingly lead to restrictions and prohibitions on polygyny. Tahir Mahmood believes that polygyny provisions in family law can be divided into six criteria: The absolute permissibility of polygyny and; Entry of polygyny as a reason for divorce. The need for permission from the court for polygyny; Restrictions through social control;

³⁶Athiyah Syaqaar, *Fatawa Al-Azhar*, accessed 20 September 2022 www.islamic-council.com

³⁷Muhammad Syahrur, *Nahwa Usul Jadidah lil fiqh al-Islamy, Fiqh al-Mar'ah* (Syrian: Darul Ahali li Tiba'ah wa al-Nashr wa-Nashr wa al-Tauzi', 2000), 301-307. as quoted by Fathonah, "Telaah Poligini", 13-38.

³⁸Syahrur, 13-38

³⁹Syahrur, 13-38



Absolute prohibition of polygyny; and the existence of criminalization for violators of polygyny regulations.⁴⁰

The Philosophical Basis of Justice as the Main Requirement for Polygyny

According to the Indonesian Dictionary, equality is an attitude that favors what is right, does not side with one of them, or is not one-sided and impartial.⁴¹ Justice is a comprehensive attitude representing an attitude, behavior, and actions that are appropriate and measurable, related to the balance of rights and obligations so that everything can be placed proportionally.⁴² The concept of justice is taught in the word of Allah Surah Al-Maidah, verse 8:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ ۚ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلَىٰ ٱلْأَ

تَعَدِلُوا ۚ اَعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَىٰ ۚ وَاتَّقُوا اللَّهَ ۚ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ

Meaning: "O you who believe, let you be those who always uphold (truth) for Allah's sake, bear witness fairly. And don't let your hatred of a people encourage you to act unjustly. Be fair, because fairness is closer to piety. And fear Allah, verily Allah is Aware of what you do. (QS. Al-Maidah verse 8)."

According to M. Quraish Shihab, in general, there are four concepts of justice: First, fair, which means the same, meaning equality in matters. Every husband is obliged to fulfill the rights of his wife. Equality for wives is the right of every wife, and pays attention to any causes related to her since the husband and each wife has their each own relationship. Thus, there is no difference between a virgin and a widow, old or new wife, young or old wife, beautiful or ugly. *Second*, fair means balanced, which is found in a group where several parts go towards a specific goal as long as each component meets the conditions and levels. Justice, in this sense, does not require equal levels and conditions for all units to be balanced. *Third*, fair means paying attention to individual rights and giving these rights to each owner. *Fourth*, justice is attributed to God. This fair concept means maintaining the fairness of the continuity of existence. Divine justice is, in principle, mercy and His goodness has the consequence that Allah's mercy does not last to be obtained as far as the creature can reach it.⁴³

Justice in the classical period departed from human behavior towards fellow human beings and the environment. One of the classic philosophers, Plato categorizes the meaning of justice in the individual (private) and state (general) realms. In a particular context, Plato defines justice as an act or action that is his

⁴⁰ Tahir Mahmood, *Family Law in The Muslim World* (New Delhi: The Indian Law Institute, 1972), 272-275.

⁴¹ Indonesian Language Dictionary Editorial Team, *Kamus Bahasa Indonesia* (Jakarta: Language Center of the Ministry of National Education, 2008), page 13.

⁴² Riyan Erwin Hidayat, Nawa Angkasa, Kelin Ama Relfi, "Implementasi Nilai-Nilai Keadilan dalam Keluarga Poligami", *Syakhsiyah: Jurnal Hukum Keluarga Islam* 2, no.1(2022): 17-37 <https://ejournal.metrouniv.ac.id/index.php/syakhsiyah/article/view/4996>

⁴³ M. Quraish Shihab, *Wawasan Al-Qur'an; Tafsir Ma'udui Atas Pelbagai Persoalan Umat*, (Bandung: Mizan, 2003), 114-116.



business without disturbing others.⁴⁴ Meanwhile, on the other hand, there is a relationship between individual justice and justice in general. The concept of individual justice must first be determined in the context of the state. Personal justice and state justice are based on harmony or harmony. Justice can be created if harmony among the elements that make up society in carrying out their roles.⁴⁵ So, every citizen must carry out these roles and tasks following their position and natural characteristics.

Meanwhile, Aristotle considered that justice could be created when people obey the law, because law is designed for people's happiness. That is, actions taken for the happiness of society are just. Thus, justice can be created if happiness is achieved for oneself and society.⁴⁶ Then, Aristotle's ideas were developed by Thomas Aquinas, who compiled the concept of thinking that justice is still related to morals and ethics. This is evidenced of his idea, which tends to create the general interest in a society rather than the validity of a regulation.⁴⁷ Thomas Aquinas divides the concept of justice into social and private justice. The idea of social justice is related to the relationship between human beings by giving what is due, with the aim of the common good.⁴⁸

Meanwhile, private justice is divided into distributive justice, commutative justice, and vindicative justice. Distributive justice is based on the distribution based on the services or rights of each. Distributive justice regulates relations between communities or relations between the state and individuals as part of society. It discusses how to distribute rights and obligations fairly and proportionally according to their role in society. Commutative justice is a kind of received justice by each member without considering each other's services, and emphasizes reciprocity through exchanges between two individuals. Meanwhile, vindicative justice is more directed to retaliation for criminal acts through appropriate penalties or fines.⁴⁹

In marriage law, justice is the main requirement for the permissibility of polygynous marriages. According to Law Number 1 of 1974 concerning Marriage, in Article 3 it is stated that the cumulative conditions for the permissibility of polygyny are: (1) There is assurance that the husband is able to guarantee the necessities of life for his wives and their children; (2) There is a guarantee that husbands will treat their wives and children fairly; (3) There is consent from the

⁴⁴Matthias Lutz-Bachmann, "The Discovery of a Normative Theory of Justice in Medieval Philosophy: On the Reception and Further Development of Aristotle's Theory of Justice by St. Thomas Aquinas", *Medieval Philosophy and Theology* 9, no.1(2000), 2.

⁴⁵Zakki Adhitya & Achmad, "Melacak Keadilan dalam Regulasi Poligami: Kajian Filsafat Keadilan Aristoteles, Thomas Aquinas, dan John Rawls," *Undang: Jurnal Hukum* 2, no. 2(2019) 409-431. <https://doi.org/10.22437/ujh.2.2.409-431>

⁴⁶Muchamat Ali Safa'at, "Pemikiran Keadilan (Plato, Aristoteles, dan John Rawls), <http://safaat.lecture.ub.ac.id/files/2011/12/keadilan.pdf>, accessed on 10 November 2022.

⁴⁷Achmad, "Melacak Keadilan dalam Regulasi Poligami: Kajian Filsafat Keadilan Aristoteles, Thomas Aquinas, dan John Rawls, 409-431.

⁴⁸Giovanni Aditya Arum, "Konsep Keadilan (Iustitia) Perspektif St. Thomas Aquinas dan Relevansinya bagi Pemaknaan Sila V Pancasila," *Lumen Veritatis: Jurnal Filsafat dan Teologi* 10, no. 1 (2019), 25. <https://doi.org/10.30822/lumenveritatis.v10i1.207>

⁴⁹Muhammad Erwin, *Filsafat Hukum: Refleksi Kritis terhadap Hukum dan Hukum Indonesia (Dalam Dimensi Ide dan Aplikasi)* (Jakarta: Rajawali Press, 2016), 302.



wife/wives⁵⁰ Then, this provision is clarified in article 64 of this regulation which states that "If a husband has more than one wife, either based on the old law or based on Article 3 paragraph: of this Law, the following provisions shall apply: (1) The husband is obliged to provide guarantees the same life to all his wives and children; (2) The second wife, and so on do not have joint property rights that existed before the marriage with the second or subsequent wife took place; (3) all wives have the same rights over joint assets that have occurred since their respective marriages.⁵¹

The rights and obligations of the husband and wife are also explained in article 31 of Law Number 1 of 1974:

(1) The rights and obligations of the wife are in balance with the rights and position of the husband in domestic life and association with living together in society;

(2) Each party has the right to take legal action;⁵² At the same time, article 33 states, "Husband and wife must love each other, respect each other faithfully and provide physical and spiritual assistance to one another."⁵³

Judging from the obligations stipulated in the regulation above, it can be seen that the concept of justice in polygyny which is required in positive law in Indonesia, includes the guarantee of equal life for wives and children and justice in the rights of joint property owned after marriage. When it is related to the rights and position of husband and wife in article 31, justice is interpreted by the existence of equal rights and position between the husband and each wife without distinguishing between young and old wives and others. Examining article 33 shows that in a polygynous marriage, the husband and each wife are required to love, respect, and help each other physically and spiritually. It means that the husband is obliged to be fair also in immaterial matters in the form of love and affection according to his ability to each wife.

Husbands' obligations to wives in polygynous households are also regulated in Presidential Instruction No. 1 of 1991 concerning Compilation of Islamic Law article 82 which states that, "Husbands who have more than one wife are obliged to provide housing and living expenses to each wife in a balanced manner. according to the size of the family that each wife bears, unless there is a marriage agreement."⁵⁴ Thus, it can be interpreted that justice in polygynous marriages, according to the Compilation of Islamic Law emphasizes the material aspect in the form of guaranteed living costs and housing.

According to Islamic law, polygyny must be fulfilled by husbands when they are going to have polygyny. Husbands are obliged to do justice to their wives in the areas of maintenance, *muamalah*, association, and distribution of the night. Between one wife who has the same rights as the other wife, both those that are non-material in nature such as the distribution of time to spend the night and joke around, as well as those that are material in the form of providing a living, clothing, and a place to live. Also, everything is material without distinguishing between rich

⁵⁰ Article 3 Law Number 1 of 1964 concerning Marriage.

⁵¹ Article 64 Law Number 1 of 1964 concerning Marriage.

⁵² Article 31 paragraph (1) and (2) of Law Number 1 of 1974 concerning Marriage.

⁵³ Article 33 Law Number 1 of 1974 concerning Marriage.

⁵⁴ Article 82 Presidential Instruction No. 1 of 1991 concerning Compilation of Islamic Law.



wives and those who are less from an economic standpoint and their offspring. The justice demanded is an outward matter that humans can do, not justice in matters of love and compassion.⁵⁵

However, some opinions state that the principle of justice is not just quantitative justice, such as material giving or the wife's turnover at night, but includes qualitative justice, namely love and affection. Because love is the foundation and main philosophy of domestic life, this view is supported by scholars who state that justice in polygyny is fair in all respects, both material and non-material matters. Husbands must also be fair regarding love, affection, living, housing, shifts to stay, and the like. Every wife has the right to get her rights from her husband in the form of intimacy in soul relations and maintenance in the form of clothing, food, shelter and so on. In polygyny, the wife's rights are equal to her husband's kindness, so fairness to the wife is obligatory.⁵⁶

According to Khoirul Abror, household harmony based on affection and love in polygynous marriages is difficult to achieve. Because no matter how sincere and fair a husband is, it cannot cover up the feeling of jealousy and envy in the heart of a polygynous wife, which sometimes appears in the wife's attitude and actions.⁵⁷ For example, wives are jealous and angry with young husbands and wives. Especially if you live in the same house, this cannot be avoided because whatever a husband does with another wife can be known in plain sight. If this happens continuously, it will become family problems and conflicts. This phenomenon shows that the philosophy of justice in polygynous households is not fully acceptable for wives. Wives only want their husbands to be fully owned, without sharing with other women.

Moreover, the justice obligatory for husbands is only physical justice, such as the distribution of living expenses, housing, etc. In contrast, justice in love and affection is not required because it is difficult for humans to do so. In fact, every wife certainly wants full love and affection from her husband, but not necessarily a polygynous wife. And the justice that every wife expects is not only in material terms but also in love and affection because love and affection which form a strong foundation in the household. Thus, it is still difficult for polygynous marriages to achieve justice for the wife.⁵⁸ This is because, in a polygynous family situation, the wife will be easily sensitive and aroused by feelings of jealousy, envy, and complaining at high levels; it can disturb the peace of the family and can endanger the integrity of the household.⁵⁹

Thus, the justice of a husband when he is polygynous is his ability to control his tendencies towards his wives, which in this case gives the time or turn to live for his wives and the ability to understand and respond to the feelings of his wives. A polygynous husband should be able to control and direct the tendencies of his wives with their strengths and weaknesses and understand, balance, and align between

⁵⁵Nurani, "Perspektif Keadilan dalam Keluarga, 1-21.

⁵⁶Zuraidah, "Keadilan dalam Keluarga Poligami", *An-Nisa'a* 8, no. 1(2016) 45-54 <http://jurnal.radenfatah.ac.id/index.php/annisa/article/view/837>

⁵⁷Khoirul Abror, *Polygamy and Its Relevance to Household Harmony: A Study in the Rajabasa Village, Bandar Lampung* (Lampung: LPPM, 2016), 118-123.

⁵⁸Abor, 118-123.

⁵⁹Zuraidah, "Justice in Polygamous Families, 45-54.



straight and crooked in each of his wives.⁶⁰ Therefore, the justice that is required to be realized in a polygynous family is to give equal rights to all wives, both in terms of dividing time, living both physically and spiritually, housing, clothing, needs and treatment of husbands towards their wives without any bias towards one of them.⁶¹

Philosophically, set of rules incorporated justice and any consequences come with it in terms of law in polygyny is to protect each individual from any form of injustice, unfairness. Normatively, Islamic sharia was sent down to mankind is to ensure and maintain the prosperity amongst them. Therefore, the regulation in those countries are vary to accommodate various conditions and situations might occurred in this very institution of a household with polygyny structure.

Polygyny in the Modern Muslim World

Every modern Muslim country has polygynous provisions that vary with different models of polygynous restrictions. The following are the terms and conditions for polygyny in several Muslim countries in Southeast Asia and North Africa.

First, Indonesia. In principle, Indonesia applies the principle of monogamy but is open in nature so that polygynous marriages are still possible. The permissibility of polygyny is contained in Law no. 1 of 1974 with strict requirements that include cumulative conditions and alternative terms. Article 5 paragraph (1) Law no. 1 of 1974 states that the cumulative requirements are regarding the husband's condition, which must be fulfilled when planning to have a polygyn, namely: (1) There is consent from the wives; (2) The husband is able to guarantee the fulfillment of the needs of his wife and children; (3) There is a guarantee that the husband will be able to do justice to his wife and children.⁶²

Meanwhile, Article 4 paragraph (2) of Law no. 1 of 1974 states that alternative conditions are related to the wife's condition, if one of which appears can be the reason for polygyny, namely: (1) The wife's inability to fulfill her obligations as a wife; (2) The wife has a physical disability or incurable disease; (3) There is an inability of the wife to give birth to offspring.⁶³

Article 4 paragraph (1) of Law Number 1 of 1974 states that a husband who wants to have a polygyn is obliged to ask permission from the court. The judge will examine whether there are reasons and conditions for polygyny. In addition, the judge must summon and hear the confession of the previous wife in court. Also, the court summons the prospective second wife to hear her approval and readiness to marry in a polygynous manner.⁶⁴

Second, Tunisia. Tunisia prohibits polygyny based on Article 18 of the *Code of Personal Status/Majalat al Ahwal al Syakhsiyyah No. 66 of 1956*, which explains: ⁶⁵(1) A husband is prohibited from having more than one wife. Anyone who remarries before the end of his first marriage is liable to imprisonment for one year, a fine of

⁶⁰Zuraidah, 45-54.

⁶¹Relfi, "Implementasi Nilai-Nilai Keadilan dalam Keluarga Poligami, 17-38.

⁶²Article 5 Law Number 1 of 1974 concerning Marriage.

⁶³Article 4 paragraph (2) Law Number 1 of 1974 concerning Marriage.

⁶⁴Article 4 paragraph (1) Law Number 1 of 1974 concerning Marriage.

⁶⁵ Khoiruddin Nasution, *Hukum Perdata Islam Indonesia dan Perbandingan Hukum Perkawinan di Dunia Muslim* (Yogyakarta: Academia, 2009), 289. See Family Law (*Code of Personal Status/Majalat al Ahwal al Syakhsiyyah No 66 of 1956*) Article 18.



240,000 malims or both. (2) Anyone who is married violates the provisions in Law no. 3 of 1957 relating to civil status rules and a second marriage contract while he is living with his first wife will be subject to the same punishment. (3) A person known to be married to another person shall also be subject to the same punishment.⁶⁶

Third, Turkey. Under Article 93 of the Turkish Civil Code (*Turkish Civil Code*) of 1926, Turkey prohibits polygyny. The husband is prohibited from remarrying unless he can prove before the court that the first marriage has ended, either due to death, divorce, or annulment of the marriage, then the second marriage is declared invalid by the court, on the basis that the person already has a valid marriage bond.⁶⁷

Fourth, Somalia. Family Law in Somalia allows polygyny with strict conditions. Article 13 of the Somali Family Law Act 1975 states: “ Men are prohibited from carrying out a second marriage without written permission from the District Court . In granting permission, the Court considers one of the following conditions: (1) The wife previously experienced infertility as evidenced by a doctor's statement. While her husband did not realize this infertility from the beginning of the marriage; (2) The wife previously suffered from a chronic and contagious disease that was difficult to cure based on a doctor's statement; (3) The wife is sentenced to imprisonment for more than two years; (4) The previous wife left the household for more than a year without a valid and proper reason; or (5) there are social interest considerations determined by the Minister of Justice and Religion .”⁶⁸

Fifth, Pakistan. Pakistan provides provisions for the permissibility of polygyny accompanied by prior permission from the Court (*Arbitration Council*) based on the Ordinance on Family Law of Pakistan 1961 (*The Muslim Family Laws Ordinance 1961*). Article 16 of *The Muslim Family Laws Ordinance 1961* contains the following regulations on polygyny:

(1) A man is prohibited from remarrying as long as his first marriage still binds him, unless he has received written permission from the Arbitration Council;

(2) The Arbitration Council, in granting permission regarding whether polygynous marriages are fair and proper, considers conditions including infertility; physical weakness; physical incompatibility for conjugal relations; the attitude of avoiding intentional rapprochement and infatuation with the existing wife.

(3) An application for a polygyny license is made in writing, including the wife's prior consent, a statement stating the reasons for the new marriage deemed fair and necessary, affixing the applicant's signature, and including a fee of 100 rupees. (4) A person who practices polygyny without a license can be jailed for up to one year or fined up to 5000 rupees or both. If the dowry is suspended, he must pay it properly. In addition, the previous wife has the right to file for divorce. If a second marriage occurs without the permission of the Arbitration Board, then the marriage is considered null and void and deemed not registered according to law.⁶⁹

⁶⁶ Article 18 of the *Code of Personal Status/Majalat al Ahwal al Syakhsiyyah No 66 of 1956* ,

⁶⁷ Article 93 of the *Turkish Civil Code* of 1926

⁶⁸ Article 13 of the Somali Family Law Act 1975.

⁶⁹ Miftahul Huda, *Hukum Keluarga: Potret Keragaman Perundang-Undangan di Negara-Negara Muslim Modern* (Malang: Setara Press, 2017), 98-101.



Sixth, Morocco. Polygyny in Morocco is regulated in the *Moroccan Code of Personal Status Year 1958* Articles 30 and 31, which state:

- (1) Polygyny is not permitted if the husband does not treat his wives fairly;
- (2) The husband who intends to have polygyny must notify the previous wife and the prospective wife that he is already a husband.
- (3) The court has the authority to consider whether the polygynous marriage causes harm to the previous wife, even though the previous wife has given her consent;
- (4) Women are allowed to include a divorce certificate in the form of a prohibition for husbands to have polygyny when the marriage ceremony is concluded. If the husband violates it, the wife can sue her husband for divorce in court ;
- (5) If a polygynous marriage causes suffering to the first wife, the court has the authority to dissolve the marriage even though there is no divorce decree;⁷⁰ (6) The husband must act fairly if he has more than one wife. The wife has the right to sue her husband for divorce if her husband is unfair.⁷¹

Comparative Analysis and Categorization of Polygynous Requirements in Modern Muslim Countries

Every modern Muslim country has different regulations regarding polygyny, especially in determining polygynous requirements for both husband and first wife. Referring to the concept of polygyny in fiqh, the scholars of the four schools of thought agreed to stipulate two conditions for polygyny, namely a maximum number of four women and a husband who can act fairly in providing for his wives.

In practice, the requirements for polygyny have now undergone significant development. This can be seen from the variations in polygynous requirements set by Muslim countries due to the renewal of Islamic family law in the modern era. Not only requiring a maximum of four women with the ability to act fairly for husbands, but polygynous regulations have also stipulated various conditions for both husband and wife conditions towards limiting polygyny or permissibility with strict conditions, and some even prohibit polygyny.

The development of progressive polygyny regulations, apart from being a result of family law reform, is also an effort to realize an increase in the position and protection of women's rights.⁷² According to Tahir Mahmood, the provisions on polygyny in family law can be divided into six criteria, namely: absolute permissibility of polygyny, the inclusion of polygyny as a reason for divorce, the need for permission from the court for polygyny, restrictions through social control, the absolute prohibition of polygyny, and criminalization for violators of the rules about polygyny.⁷³

The polygynous regulations in the Muslim countries studied can be categorized according to the polygynous regulatory criteria from Tahir Mahmood's perspective as follows.

⁷⁰ Articles 30 and 31 of the *Moroccan Code of Personal Status*, 1958.

⁷¹ Nasiri, "Perkawinan di Maroko", *Syaikhuna: Jurnal Pendidikan dan Pranata Islam* 8, no. 1(2017): 14-38 <http://ejournal.kopertais4.or.id/madura/index.php/syaikhuna/article/view/3063>

⁷² Lia Noviana, "Status Wanita di Negara Muslim Modern, 197-214.

⁷³ Mahmood, *Family Law in The Muslim World*, 272-273.



Tahir Mahmood's Perspective Polygynous Regulation Categorization	
Regulatory criteria	Country
Absolute polygyny permissibility	-
Entry into polygyny became the reason for the divorce	Morocco
The need for court permission for polygyny	Indonesia, Somalia, Pakistan
Restrictions through social control	Somalia
Absolute prohibition of polygamy	Tunisia and Turkey
There is criminalization for violators of the rules regarding polygyny	Tunisia and Pakistan

Products of modern family law renewal also adopt the opinions of contemporary *muftis*, *mujtahids* and *fuqaha'*. For example, Al-Qardawi added that several considerations for the permissibility of polygyny are in a situation where the wife is infertile, the female population is larger than the male, and the husband has a high sexual appetite.⁷⁴ Then, Muhammad Al-Ghazali believed that women have the right to accept or reject if their husbands are polygynous. If a wife is afraid of being polygynous, the wife has the right to include the prohibition of polygyny in her marriage agreement. Yusuf Al-Qardawi's opinion was also adopted as a requirement for a wife's condition allowing her husband to polygyny. Likewise, the opinions of Muhammad Al-Ghazali allow polygyny to be included in the marriage agreement.

If analyzed according to the views of the contemporary scholars mentioned above, the categorization of regulatory requirements for polygyny in several modern Muslim countries is as follows.

Criteria for Polygyny Requirements According to Contemporary Ulama			
No.	Cleric Contemporary	Polygynous Requirements	Adopting Countries
1.	Muhammad Abduh	-Absolute Condition: Justice	Indonesia, Somalia, Pakistan, Morocco
		-Forcing circumstances: Wife can not give birth to offspring (sterile)	Indonesian, Somali
2.	Sayed Thanthawi, Hasanain Muhammad Makhluaf, Mahmud Syaltut,	-Justice	Indonesia, Somalia, Pakistan, Morocco,
3.	Yusuf Al-Qardawi	-Justice	Indonesia, Somalia, Pakistan, Morocco,

⁷⁴Andaryuni, 95-113.



		- The wife is barren	Indonesian, Somali
		-The population of women is more than men	-
		-Husband has a high sex drive	-
4.	Muhammad Al-Ghazali	- Wife's approval	Indonesia, Pakistan, Morocco,
5.	Athiyah Syagar	-Consideration of benefits for men, women, and/or the general public	Somalia, Morocco
6.	Wahba Al-Zuhaili	- Husband is able to do justice	Indonesia, Somalia, Pakistan, Morocco,
		- Able to support his wife and children	Indonesia, Somalia, Pakistan, Morocco
		-Common cause: male population is less than female (emergency solution)	-
		-Wives cannot give birth to offspring	Indonesia, Somalia
		- Wife is sick or old and unable to carry out her obligations	Indonesian, Somalia
		-There is a dispute in the family	-
7.	Muhammad Syahrur	- Quantitative limit: maximum number of four women	Indonesia, Somalia, Pakistan, Morocco.
		-Qualitative Boundary: The prospective wife is a widow with children.	-
		-Determination/permission from the government/court regarding whether or not polygyny is permissible	Indonesia, Somalia, Pakistan, Morocco.

The table data above shows several categorizations of polygyny regulations, especially the requirements for the permissibility of polygyny in modern Muslim countries, which are as follows.

First, the absolute prohibition of polygyny. Turkey and Tunisia have an absolute ban on polygyny in their family laws. This renewal was carried out by reinterpreting *nash texts* to answer social and economic needs even though they departed from the doctrines of the schools of thought that the two countries adhered to. The prohibition of polygyny is based on a new interpretation of QS An-Nisa verse 3 that the justice required in polygyny is not only a matter of subsistence but also with a sense of love and compassion. This reinterpretation is based on the

needs and demands of the times. Meanwhile, all schools basically allow polygyny as long as they can act fairly. Thus Turkey and Tunisia adopted policies that came out of the opinion of the Hanafi and Shafi'i schools that they professed or what is commonly called *extra doctrinal reform*.

Second, it allows polygyny under strict conditions. Indonesia, Somalia, Pakistan, and Morocco, provide polygyny permissibility with strict conditions. In general, it requires justice and ability for the husband, there is an emergency situation for the wife, it requires the wife's consent, and there is a role for the court/judge in granting permission for polygyny. The provisions on polygyny in several of the countries above show an attempt to find common ground between legalizing polygyny on the one hand and efforts to protect women's rights on the other by setting strict conditions for the permissibility of polygyny.⁷⁵ These provisions seek to narrow the opportunities for polygyny to occur. The style of renewing polygyny provisions in the countries above is *siyasa syar'iyah* or *takhshish al-qadla*. *Siyasa syar'iyah* is the ruler's policy to establish regulations that benefit the wider community and do not violate shari'ah provisions. *Takhshish al-qadla* is the authority of the authorities to limit the judiciary's authority.⁷⁶

Third, the obligation to obtain permission from the court. According to the opinions of some of the scholars above, only Muhammad Syahrur stated the need for a stipulation from the government in terms of polygyny licensing. Meanwhile, other contemporary scholars do not mention court permission as a requirement for polygyny. This can be interpreted that the polygyny permit from the court is a breakthrough in the renewal of polygyny regulations in the context of limiting the permissibility of polygyny. Court institutions and judges can represent the government in this case. That is, the court judge has the role of considering, examining, and determining the polygynous permit for the husband after examining all the applications, reasons, and evidence that convinces that the husband is worthy and proper to have a polygyn. The requirements for a polygynous permit from the court are adhered to by the countries of Indonesia, Somalia, Pakistan and Morocco.

Fourth, the criminalization of polygyny. One of the provisions that is quite interesting from polygyny regulations in modern Muslim countries is the existence of criminalization or criminal penalties in cases of violations of polygyny regulations. This provision is quite a bold and interesting breakthrough. This is because there are no sect doctrines or opinions of contemporary scholars who discuss criminal penalties for violating polygynous provisions. Therefore, the criminalization of polygyny is referred to as an *extra doctrinal reform* of all schools of thought that are adhered to by most people in modern Muslim countries. The countries that criminalize polygyny regulations are Tunisia and Pakistan.

Based on the results of the analysis and categorization of polygynous requirements in various modern Muslim countries in the Asian and African regions, it can be understood that there have been efforts to narrow and tighten the occurrence of polygyny in the modern era with the existence of various polygynous requirements stipulated through the family law of each country. This is in line with the philosophical basis of justice in polygynous marriages that the required justice

⁷⁵Andaryuni, 95-113.

⁷⁶Andaryuni, 95-113.



should not only be material justice such as distribution of income, shelter, living expenses, clothing, and overnight shifts, but also includes justice in giving attention, affection, and love and intimate relationship with wives. Because if only material justice is fulfilled, while justice in terms of affection cannot be realized, it will cause injustice to the wives. In fact, every wife instinctively wants fair treatment, especially regarding affection, love, and attention from her husband in a polygynous marriage. When juxtaposed with the various polygynous requirements in modern Muslim countries in the Asian-African region, especially those that restrict the permissibility of polygyny, this is considered to be more accommodating to women's interests. Tightening the permissibility of polygyny means efforts to prevent the occurrence of polygyny which is carried out without urgent reasons and arbitrary polygyny. Thus, this can protect wives from becoming victims of unfair polygyny.

Legal Protection For Women In Polygynous Requirements at Asia and Africa

The protection of women in family law in Morocco can be seen from the provision that marriage must be with the permission of the guardian and the prospective bride, so that in principle it prohibits forced marriages. Apart from that, in the regulation on the limitation of polygyny, women have the right to include a divorce decree which prohibits polygyny. If violated, the wife has the right to file for divorce. Family law reform in Morocco has experienced a long discourse between feminists and traditionalists. Feminists want family law reform that accommodates increased fulfillment of women's rights. Meanwhile, traditionalists tend to think that family law must be maintained according to sacred texts.⁷⁷ After the renewal conflict finally resulted in a side for women's rights as seen from two indicators. First, the product of the 2004 Family Law has the spirit and consistency of the struggle to build equality in husband and wife relations in household management which is contained in international agreements and conventions regarding increasing the position of women. Second, King Muhammad VI's support for the 2004 Family Law reform resulted from the reinterpretation of sacred texts to accommodate the current realities and needs of society in line with universal values and equality.

Meanwhile in Tunisia, as a very progressive Muslim country, it provides protection for women with regulations prohibiting and criminalizing polygyny. Then, in Somalia the protection of women in family law is manifested by the obligation to register marriages, divorce must be before the court, fulfillment of women's rights after divorce, distribution of inheritance 1: 1 between men and women, and regulations restricting polygyny strictly by requiring wife's condition, permission from the Religious Court, as well as consideration of social interests. Turkey provides protection for women with an absolute ban on polygyny. In addition, there is also the obligation to register marriages, the husband's obligation to fulfill women's rights after divorce, and the division of inheritance 1: 1 between men and women. Then, Pakistan provides regulations to protect women with the obligation to register marriages and criminalize them, criminalize underage marriages, and limit polygyny with strict requirements.

⁷⁷Budi Juliandi, Fauzun Jamal, Saifuddin Herlambang, "Mudawwanah Al-Ushrah dan Pemihakan Terhadap Hak-hak Perempuan di Maroko," *Proceedings Ancoms 2017*, 122-130.



The existence of regulations prohibiting and limiting polygyny in modern Muslim countries is a form of implementation of giving women the right to refuse polygyny.⁷⁸ This examines the impact of polygyny in the modern era which is seen as a form of discrimination, marginalization and exploitation of women.⁷⁹ In general, with the renewal of Islamic family law in the above countries, especially in the regulation of restrictions and prohibitions on polygyny, there is a mission to renew Islamic family law which brings a contemporary spirit that does not have to be the same as the past in order to accommodate the aspirations and demands of the times, especially the embodiment of equality and increase in the position of women.⁸⁰

At least there are several meanings that can be understood in reforming polygyny regulations, namely: (1) There is transparency and equality in the household, so that there is no monopoly on leadership by men so that they are allowed to marry other women freely. However, there is a collective leadership that reflects cooperation and togetherness to determine life attitudes in order to manage family life. This is a form of eliminating discrimination and subordination of women in the household, where women have the right to manage the household including the rejection of polygyny.⁸¹ (2) In addition to the restriction and prohibition on polygyny, there is also a divorce procedure that must be carried out legally in a court of law accompanied by argumentation, rationality, and carried out before the court. This is to guarantee justice and legal certainty so that women's rights post-divorce can be guaranteed.⁸²

Conclusion

Polygyny is normatively permitted in the Qur'an, however in its application, socio-historical considerations and existing conditions are needed. Because it is a subject of discussion in the field of Islamic family law, polygyny is one of the materials for legal renewal in modern Muslim countries. Several modern Muslim countries, especially in Southeast Asia and North Africa, have renewed polygyny regulations. These reforms lead to restrictions and even the prohibition of polygyny in the modern era with various considerations. Turkey and Tunisia are countries that absolutely prohibit polygamy. Meanwhile, Indonesia, Morocco, Somalia, and Pakistan are countries that limit polygyny with certain requirements. The requirements for the permissibility of polygyny in various modern Muslim countries have included justice and a maximum limit of four women, as was the opinion of the madhhab scholars. However, the country sets other conditions that are more stringent and progressive. The research findings show that in general the requirements for polygyny in several modern Muslim countries include two main

⁷⁸Masnun Tahir, "Perempuan dalam Bingkai Hak Asasi Manusia dalam Hukum Keluarga Islam" *Musawa* 15(no.1), 2016, 55-69. <http://ejournal.uin-suka.ac.id/jurnal/volume/MSW>

⁷⁹Masnun Tahir, 55-69

⁸⁰Anis Hidayatul Imtihanah, "Pembaharuan Hukum Keluarga Islam di Tunisia Menuju Konsep Syari'ah Modern Abdullah Ahmad An-Na'im," *Jurnal Lentera: Kajian Keagamaan, Keilmuan dan Teknologi*, 16(no.2), 2017, 105-118. <https://ejournal.staimnglawak.ac.id/index.php/lentera/article/view/278>

⁸¹Moh. Dahlan, *Abdullah Ahmad an-Na'im: Epistemologi Hukum Islam* (Yogyakarta: Student Library, 2009), 238-239.

⁸²Anis Hidayatul Imtihanah, 105-118



elements, namely: *First*, internal elements, namely elements that come from husband and wife. Husbands are required to be able to act fairly. Meanwhile, the wife must have an emergency condition which makes the reason for the propriety of polygyny for the husband. For example, the wife is sick, the wife is missing and crazy, so she is unable to fulfill her obligations as a wife, or the wife is barren. *Second*, external elements, namely elements that come from outside the family, namely the role of the court institution. Court judges have an important role in granting permission for polygyny to husbands. This is important as a sign of the legality of polygyny legally, also considering the feasibility and appropriateness of the husband to have polygyny. In addition, the judge also plays a role in weighing the benefits that will be obtained if polygyny is permitted. Not only for the husband but also for the family and the previous wife.

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