



CHAPTER I

INTRODUCTION

A. Background of Study

In 19th century of Indonesia, public was surprised by several cases of polygamy. This is due to the involvement of several public figures and considered to be unhealthy practice of marriage. For instance, Case of syekh Puji,¹ Case of Aa gym,² and recently there is Aceng Case.³ Those cases become the trending topic on

¹ Pujiono Cahyo Widiyanto or Syekh Puji is an entrepreneur and the founder of miftahul jannah Islamic boarding school. He married Lutfiana Ulfa while she was 12 years old. His action condemned by the people especially by the women emancipation movement. This case does not contain just polygamy matter, it also contains marriage for under age issue. This case begin at 2008 and resolved in 2012 after the religious court of semarang give syekh puji permission to marry ulfa. See Pengadilan Agama Izinkan Syekh Puji Berpoligami, www.arahmah.com

² Abdullah Gymnastiar or Aa Gym is one of Indonesia Islamic speaker. He was condemned by his adherent because of his action to do a polygamy in 2006. He divorced his first wife and get her back. Therefore, at last he has more than one wife. See Aa gym: Poligami, Cerai, dan Rujuk news.detik.com

³ Aceng is the chief of garut district. He married with fanny octora while he married with nurohimah his first and legal wife. He married fanny only for four days and divorced her through short message service. This

Indonesian news media because those polygamous marriages were practiced by popular people and seen to produce bad impact and effects on the marriage, especially towards the existing marriage. Nassarudin Umar when he was asked for statement in constitutional court said there are increasing number of divorce. While in 2004 there were 813 divorces caused by polygami, in 2005 the case increased up to 879 and becomes 983 in 2006.⁴ In the same even, LBH APIK Jakarta announced that in 2005 there were 104 wives experienced domestic violence by her polygamous husband.⁵ In Malang district, at 2011 until 2013 there were decreasing and increasing amount of divorce caused by polygamy.⁶

	2004	2005	2006
Divorce Cases caused by polygamous marriage	813	879	983

Table 1. Divorce cases caused by polygamous marriage in National scale

	2011	2012	2013
Divorce Cases caused by polygamous marriage	222	76	79

Table 2. Divorce cases caused by polygamous marriage in Malang district

Indonesia has regulated the procedural administration to practice polygamy.

In Regulation number 1 year 1974 article 4, it regulates that husband is allowed to marry more than one wife under particular circumstances, 1) wife is not able to fulfill her obligation as wife, 2) wife's body disability and uncured illness, 3) wife's

case happened at 2013. See Skandal Nikah Kilat, Aceng Fikri Jadi Bupati Pertama yang dimakzulkan news.detik.com

⁴ Poligami Terbukti Menaikkan Angka Perceraian, www.hukumonline.com accessed at 19 February 2014

⁵ Putusan Mahkamah Konstitusi Perkara 12/PUU-V/2007 (Indonesian version)

⁶ Infoperkara.badilag.net accessed on 19 february 2014

barrent (sterile).⁷ Only by proving the existence one of those conditions husband would be able to get permission to marry more than one wife.

Similarly, Malaysia has limited the practice of polygamy through Act 303 year 1984. This Act is the fundamental or the base of Family Law in Malaysia. It was aimed at unifying and modernizing the personal and family law for muslims in Malaysia.⁸ To marry more than one wife, husband should be permitted by the judge. Judge would permit husband to practice polygamy if he is able to satisfy at least five conditions: the intended marriage must be 'reasonable and necessary'; the man must possess enough financial resources to support his family; his current wife must give her permission; the man must be capable of treating his wives equally; and the intended marriage may not harm the current wife or wives.⁹

However, polygamy is commonly lead to divorce, usually when economic support or emotions become problematic. It is unclear whether more husbands than wives, or more first than second wives, tend to seek divorce because of polygamy.¹⁰ Raihana Abdullah¹¹ cited that after the emergence of Act 303 year 1984 there is decreasing amount of polygamy.¹² Ironically, polygamy becomes very controversial when it was resulted injustice to wives and children.¹³

⁷ Regulation Number 1 year 1974 article 4

⁸ Adrew Harding, *Sharia and National Law in Malaysia* in Jan Michael Otto, *Sharia Incorporated : A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, (Leiden University Press, 2010) p. 502

⁹ Adrew Harding, *Sharia and National Law*.p.516

¹⁰ Miriam Koktvegaard Zeitzon, *Polygamy: A Cross-Cultural Analysis*, (New York: Berg, 2008) p. 85

¹¹ Raihana is lecturer at University of Malaya Malaysia. She has been known for her concern on polygamy. She has several writing on this subject such as *Poligami dalam Perundangan Islam*, *Poligami di Malaysia*, *A Study of Islamic Family Law in Malaysia*.

¹² Raihana Haji Abdullah, *Poligami dalam Perundangan Islam*, (Kuala Lumpur : Rancangan Pengajian Gender, 1998) p. 193

¹³ Raihana Haji Abdullah, *Poligami dalam Perundangan Islam*, p. 194

Based on those data, I as researcher conclude that polygamy in Indonesia and Malaysia is a problem that mostly will trigger another problem –for instance domestic violence, jealousy, economical problem- and lead the marriage into destruction. Therefore, it is true if Qasim Amin, one of Egyptian scholars has explained that polygamy only lead wife to experience pain. He said, there are two possible reactions shown by wife when her husband committed polygamy. First, she will love her husband but by jealousy and torturing her heart. Second, she will stay because of her special interest toward her husband.¹⁴

According to Islamic tradition, polygamy is a practice which is accepted by Qur'an.

And if you fear that you will not be fair dealing with the orphans, then marry of women as may agreeable to you, two, or three, or four, and if you fear you will not deal justly, then marry only one or what your right hands possess. That is the nearest way for you to avoid injustice (an-nisa':4)¹⁵

Justice in the modern Islamic law placed as one of the general purpose of Islam.¹⁶ Human need justice, people will fight for justice, no body like to be threatened unjust. For Asghar Ali, justice is the representation of taqwa.¹⁷ He stated oftenly in his books about the importance of justice. Furthermore, He said that world can be existed by justice and unbeliever, but not by unjust and Islam.¹⁸ Therefore,

¹⁴ Qasim Amin, *Tahrir Al-Mar'ah*, 1899, translated by Samiha Sidhom Peterson, *The Liberation of women*, (Cairo : American University Press) p. 83

¹⁵ Sher Ali, *Holy Qur'an : English Translation*, (UK : Islam International Publications, 2004) p. 82

¹⁶ Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law*, (London: The International Institute of Islamic Thought, 2008) p.5

¹⁷ Asghar Ali engineer, *Islam and Liberation in Theology* translated by Agung Prihantoro, (Yogyakarta: Pustaka Pelajar, 2009) p.58

¹⁸ Asghar Ali, *Liberation* 69

I as the researcher believe polygamy must be fulfilled by justice, and cannot be happened happily without justice.

Soerjono Soekanto said that law is the tool of social engineer.¹⁹ Therefore, researcher believes regulation number 1 year 1974 of Indonesia and Act 303 Year 1984 of Malaysia –as part of law- were intended to change the social condition of society. Both of them emerge based on holy purpose to bring justice into society.²⁰

Raihana Abdullah provides data of polygamy amount in several area of Malaysia several years after the emergence of Act 303 year 1984. Those data show the reduction of accepted polygamy by the court. However, Roslina Che Soh²¹ thinks that this regulation still need to be improved to guarantee the quality of justice towards wives.²² Similarly, Polygamy regulations in Indonesia have been criticized by scholars. For instance, Anik Farida said those regulations did not accommodate the principle of justice and need to be reregulated. Especially, regulation number 1 year 1974 does not provide the value of pluralism and women emancipation.²³

There is a pattern made based on those facts. First, Indonesia and Malaysia has made regulation regulated polygamy. Second, after the emergence of

¹⁹ Soerjono Soekanto, *Pokok-Pokok Sosiologi Hukum*, (Jakarta: Raja Grafindo Persada, 2007)p.121

²⁰ There are three purposes of law which has been accepted differently among scholars. Some scholars put justice as the only purpose of law. Those scholars are known by school of natural law. Some scholars put beneficial as the important purpose of law. Those scholars are known by school of realism. Another scholars put certainty of law as the important purpose of law. This idea is represented by school of positivism of law. There are another scholars which paired up between those three Ideas. Like utilitarianism which put certainty of law and beneficial as the purpose of law and abandoned justice. For more explanation see I Gede Dewa Atmadja, *Filsafat Hukum : Dimensi Tematis dan Historis*, (Malang : Setara Press, 2013) p. 16

²¹ She is lecturer on Islamic law subject at Islam Antarbangsa University Malaysia

²² Roslina Che Soh, *Penyeragaman undang-Undang Poligami* in Najibah Mohd Zin, *Undang-Undang Keluarga (islam)* , (Selangor: Darul Ehsan, 2007) p.64

²³ Anik Farida, *Menimbang Dalil Poligami : Antara teks, konteks, dan praktek*, (Jakarta: Balai Penelitian dan Pengembangan Agama, 2008) p. 123

regulation, there are changes of condition. Third, the changing conditions does not satisfy several sides. Those sides said that those regulations did not provide a contextual justice, especially towards women, at least in their perspective. Therefore, this research wants to measure the justice on those regulations by another perspective. In this case it chooses to use Asghar Ali engineer's perspective of justice.

Asghar is an International thinker of modern Islamic Family Law. He also has been known for his Idea of theology of liberation, he also wrote book on the tittle women's right in Islam. in the first book he has the special chapter talks about justice. In his second book, He wrote about women's right and of course about Islamic justice toward women. He also has wrote special chapter about polygamy on Qur'an, women, and modern society. There are another writings belong to him that talked about justice, women, and polygamy. Therefore, using his idea of justice, especially towards women and polygamy, this research will be able to enrich the study of family law particularly on polygamy in the view of international perspective. Hopefully, it could be another sources for legislators if they want to improve the current regulation.

B. Statement of Problem

What is the Islamic Justice which provided by regulation of polygamy of Malaysia and Indonesia in the view of Asghar Ali Engineer?

C. Objective of research

This research aims to describe, analyze, and divine the Islamic justice on polygamy provided by regulation in Malaysia and Indonesia in the view of Asghar Ali engineer

D. Benefits of Study

1. This research will be another scientific writing concern on polygamy in modern era. It will also enrich the study of polygamy especially in the view Islamic law and justice. Student or lecturer can make this research as a comparison for another article concerning on polygamy. For an Indonesianist²⁴ and Malaysianist²⁵, this research will be a help to see how polygamy seen from international perspective. Hopefully, This study will enrich the study concerning on south east asia issue and help world to understand this region (south east asia)
2. This research will help practisioners or legislator when the divine what kind of improvement they must provide on regulation of polygamy. Because, this research will analyze the regulations in the view of Aghar and hopefully will be able to suggest points to provide justice on trough the regulations.

E. Research Methodology

1. Type of research

²⁴ Non-Indonesian scientist who concerning his work on issue of Indonesia

²⁵ Non-Malaysian scientist who concerning his work on issue of Malaysia

This research focuses on regulation number 1 year 1974 of Indonesia and Act 303 year 1984 of Malaysia particularly concerning polygamy. Therefore, this research is a normative research.²⁶

Normative research is a research which the objects are literal. This kind of research also known as library research. In research of law, there are two major paradigm of approaches. First, normative paradigm which divine law as the same as the regulation. Therefore, statue approach, comparative approach, historical approach are dominating for scholars who see law as regulation. Second, empirical approach which see law as the living value on society. Therefore, the evectivity of law and scientific-law was used as the approach on this group.

2. Research Approach

This research uses qualitative approach²⁷ and will use deductive thinking model. For an example:

- Premise Major :
 - Polygamy is allowed by Asghar if there are medical prove of wife's barren and in the condition of war
- Premise Minor:

²⁶ See Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta : Kencana, 2010) and Amiruddin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajawali Pers, 2010)

²⁷ Qualitative approach means for exploring and understanding the meaning individuals or groups ascribe to a social or human problem. The process of research involves emerging questions and procedures, data typically collected in the participant's setting, data analysis inductively building from particulars to general themes, and the researcher making interpretations of the meaning of the data. The final written report has a flexible structure. See John W. Cresswell, *Research Design : Qualitative, Quantitative, And Mixed Method Approach*. (New Delhi: SAGE Publication, 2009) p.1

- Regulation number 1 year 1974 of Indonesia allow husband to practice polygamy if wife is barren
- Conclusion :
 - Regulation number 1 year 1974 of Indonesia has same side concept of asghar's concept of polygamy

It will consider several points and data before applying the silogism method.²⁸ Premise major in this research will be the theory of justice especially on polygamy in the view of Asghar Ali Engineer. The premise minor will be regulation number 1 year 1974 of Indonesia and Act number 303 year 1984 of Malaysia particularly in the matter of polygamy.

3. Data Sources

The data used in this research are categorized as secondary sources.²⁹ In this research, Researcher uses several primary law data :

- a. Regulation number 1 year 1974 of Indonesia
- b. Act 303 year 1984 of Malaysia

The reasercher Also uses secondary data :

- a. Asghar's Article/Book :
 - 1) Pembebasan Perempuan (Indonesian Translation of Qur'an, Women and Modern Society)

²⁸ Silogism is consisted of two statements and one conclusions. The validity of conclusion depend on the validity of two statements. If the two statements are right, then it can be guarantee that the conclusion is right. See Jujun S. Suriasumantri, Filsafat Ilmu: Sebuah Pengantar Populer. (Jakarta: Pustaka Sinar Harapan, 2001) p.49

²⁹ Secondary sources is literal or library document. In the study or research of law, there are clasifications of secondary data. First, primary law data such as Norm, Basic Regulation, ect. Second, secondary law data such as regulation plan, or research related ti regulation, ect. Third, thirdly law data such as ensiklopedia, dictionary of law, ect. See Soerjono soekanto, pengantar penelitian hukum, (Jakarta: UI Press, 1942) p.52-52

- 2) Teologi Pembebasan (Indonesian Translation of Islam and Liberation Theology)
 - 3) Hak-Hak Perempuan dalam Islam (Indonesian Translation of The Rights of Women in Islam)
 - 4) Devolusi Negara Islam (Indonesian Translation of Islamic State)
 - 5) Gender and Islamic Justice
 - 6) Polygamy in Islam
- b. Proceeding and Decision of Constitutional Court of Indonesia number 12/PUU-V/2007
 - c. Research of Polygamy :
 - 1) Anik Farida, Menimbang dalil poligami : antara teks, konteks, dan praktek
 - 2) Raihana Haji Abdullah : Polygamy di Malaysia
4. Collecting data method

This research use triangulation³⁰ as collecting data method. Therefore, it provides more valid and valuable data.
 5. Processing Data

The data in this research will be proceed in two steps. Firstly, I classify characteristic in each of regulations (regulation number 1 year 1974 and act 303 year 1984) especially on the requirements of both of regulation. Finally, I will

³⁰ Triangulation is a method to collect the data using several collecting data method and combine those methods and the existing data. See Sugiyono, Metode Penelitian Kuantitatif, Kualitatif, dan R&D, (Bandung: Alfabeta, 2011) p. 224

use deductive pattern of thinking to measure or describe how the justice in regulation-based on it's characteristic-in the view asghar ali engineer.

F. Previous Research

Study of Islamic family law in Malaysia was provided by Prof. Raihana Abdullah one lecturer at academy of Islamic studies at university of Malaya. In the study named **“A Study of Islamic Family Law in Malaysia: A Select Bibliography”** She divides the development of Islamic law in Malaysia into three periods.

First period, pre-independence, which characterized by significant role of Malaysian custom within muslim society. Second, post-independence to the mid-1980s, which shown by the discussion between Islamic scholar and the beginning of Islamic law legislation. Third, from the mid-1980s to the present day, this period has shown a rapid development in the promulgation of Islamic family law. There are many studies and researches produced on this period.³¹

Study of polygamy in Malaysia is provided by Nor Muhammad, lecturer at university of Melaka. By the title **“Reform of the Polygamy Law and Policy in Malaysia: An Empirical Study”** He expand many problems of polygamy in Malaysia. He cites that the amendment of 1984 act brings another possible risk for injustice toward family especially women and children. It based on the changing sentence of polygamy requirement. From “just and necessary” into “just or necessary”. Therefore, current husband in malaysia can marry more than one girl

³¹ Raihana Muhammad, A Study of Islamic Family Law in Malaysia: A Select Bibliography, International journal of legal information , 35 (2007) p. 516

as far as he has the ability to be just or able to prove the wedding is necessary. This condition is supported by the federal system of Malaysia which allows each state to have their own condition and procedure.³²

Therefore, Muhammad suggests to do several changes in Malaysian law especially in Islamic law. First, to unify Malaysian family law. Second, to apply that family law strictly. Third, to make tighter and more comprehensive family law. Fourth, to organize training programmes for both men and women with respect to marriage. Fifth, to educate Malaysian people more fully about Islam. Sixth, To follow the Islamic Laws and principles more strictly.³³

Both of researches do not compare the regulation with modern concept of polygamy. The researcher believe, through the transformation of space and time, there will be change in social value and law. Through comparative process between those regulation and modern concept of polygamy, I hope as researcher I can find the weakness of every regulation. Therefore, I can find which point that have to be improved or revised.

G. Structure of Discussion

Chapter I

Introduction

This chapter will discuss the background and purposes of the research. It will describe the problems which

³² Noor Muhammad, Reform of the Polygamy Law and Policy in Malaysia: An Empirical Study, web journal of current legal issue, (2012)p.7

³³ Noor Muhammad, Reform, p.8

make the reasearcher is interested and emerged this reasearch.

Chapter II

Review of Related Literature

This chapter will discuss about the several theoretical concepts and expert's thought according to the topic.

Those concepts and thoughts will be used as tool of analysis in this research.

Chapter III

Finding and Discussion

This chapter will provide the data. Also the analysis will be found in this chapter

Chapter IV

Findings and Conclusion

It will describe the reasearcher conclusion over the analyzed data.