



## **CHAPTER II**

### **THEORETICAL FRAMEWORK**

#### **A. Concepts of Justice**

Justice is a fundamental concept in social life.<sup>1</sup> Everybody live by doing what they believe as the most just thing to do. Most human will fight for justice they believe. Therefore, court system is existed to facilitate them to get justice.

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<sup>1</sup> Joseph Sanders and V. Lee Hamilton, Justice and Legal Institutions in Joseph Sanders and V. Lee Hamilton, Handbook of Justice Research in Law, (New York: Kluwer Academic, 2002) p.3

Dewi Persik's case,<sup>2</sup> M. Insa's Case,<sup>3</sup> or Gemulo's Case<sup>4</sup> are examples how human will fight for their justice. Those cases also become evidences that what justice for some people is not justice for another.

Karen Lebacqz describes the concept of justice is like blind men's description over an elephant. Each of them hold different part of elephant's body, one of them hold the ear so he describes elephant as a thin creature, another one hold the feet so he describes elephant as large as tree-like creature, and everyone have their own description of elephant. That how the justice be understood by human and society.<sup>5</sup> Therefore, it is important to divine justice before beginning the discussion of justice on polygamy especially in Indonesia and Malaysia context.

Joseph Sanders and Lee Hamilton divide justice and discuss it into three chapters. First, retributive justice which concerns on punishment. Second, procedural justice which concerns on the method of policy or decision making.

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<sup>2</sup> Dewi Murya Agung was known by name of Dewi Persik is an Indonesian dangdut singer. She felt judged unjustly in her fighting case between her and Julia perez. While Julia perez was prisoned because of judge's decision, dewi persik also prisoned in the same case. She feel confused who is the right one, because both of them prisoned in same case. Therefore, she plan to do legal review (peninjauan kembali) to get her justice. See Merasa Tidak Adil, Dewi Persik Adukan Hakim Agung, <http://www.tribunnews.com/seleb/2014/02/19/merasa-diperlakukan-tidak-adil-dewi-perssik-adukan-hakim-agung> Accessed on March 12, 2014

<sup>3</sup> M. Insa was one of Constitutional Court's plaintiff on regulation number 1 year 1974. He thought that this regulation did not accommodate his right to marry more than one wife. Therefore, this regulation does not reflect justice especially in the view of Islamic justice. See Risalah Sidang Perkara Nomor 12/PUU-V/2007 Acara: Pemeriksaan Pendahuluan

<sup>4</sup> This case is another conflict over natural resources-in this case water source- between society and corporation. A corporation which feel loss by the act of society who refuse the building of corporation's hotel. Therefore, they sue society before the court. Society who also feel loss by the building of the hotel, has complain this building to several government institutions. Both of the side, fight for their own justice through every possible way. See Kuasa Hukum The Rayja: Laporan ke Polresta Batu "Stagnant", <http://www.detikmemo.com/2014/02/kuasa-hukum-rayja-laporan-ke-polresta.html> and Warga Gemulo Beri Dukungan Pada Pejuang Mata Air, <http://www.aktual.co/hukum/104648warga-gemulo-beri-dukkungan-pada-pejuang-mata-air> Accessed in March 12, 2014

<sup>5</sup> Karen Lebacqz, Six Theories of Justice translated by Yudi Santoso, (Bandung: Nusa Media) p.2

Third, Distributive justice which concerns on allocating rights, wealth, income, and love.<sup>6</sup>

## 1. Retributive Justice

Retributive justice refers to the concept of punishment. It will explore the retribution value which belonged to human. The discussion on retributive justice usually attempts to give a solution on how to punish the offender while it stop the cycle of revenge and keeps the victim's satisfaction.<sup>7</sup>

According to Durkheim, Retribution is a passionate reaction to the violation of rule, norm, or law that evokes a desire for punishment of the violator.<sup>8</sup> Neil Vidmar,<sup>9</sup> cited that retribution and revenge are the oldest, most basic, and most pervasive justice reactions associated with human social life.<sup>10</sup> In his essay, Neil provides a story which describe how the victim's satisfaction will be granted through punishment over wrong doer.

A professor is lecturing to his class. Near the end of the period a student raises his hand and asks a question. The professor responds by calling the student stupid for asking that question, draws attention to the fact that he has already flunked two tests, and asserts that perhaps his IQ is too low for adequate university performance. In addition, he makes an unflattering remark about the student's facial birthmark. The professor walks out of the room leaving the student and his classmates in stunned silence. The next morning the student and his classmates learn that

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<sup>6</sup> Joseph Sanders and Lee Hamilton, Justice and.. p.6-10

<sup>7</sup> Joseph Sanders and Lee Hamilton, Justice and..<sup>7</sup>

<sup>8</sup> Joseph Sanders and Lee Hamilton, Justice and..<sup>6</sup>

<sup>9</sup> Neil Vidmar is professor of psychology and law at Duke University. His concern is on several subject such as Social Science Evidence in Law, Negotiation and Mediation, Psychology of the Litigation Process, American Jury, Social and Psychological Context of Law (Law and Society), Conflict and Dispute Resolution, Social Psychology. He also has several publications such as book and article. One of his work which has translated into another language is his book world jury system published by oxford university press.

<sup>10</sup> Neil Vidmar, *Retribution and Revenge* in Joseph Sanders and Lee Hamilton, Handbook of Justice Research in Law, (New York: Kluwer Academic, 2002)p.31

within hours after the incident, the professor was accidentally sideswiped by a bus and suffered a broken arm and multiple bruises. Even though the bus incident was totally unconnected to the professor's violation of professional and interpersonal codes of behavior, it is likely that the target of the professor's attack, the other members of the class, and even some students who had already heard about the incident would feel a sense of satisfaction. In fact, each reader of the above scenario will probably assert that the professor suffered condign punishment.<sup>11</sup>

Although retribution and revenge are fundamental values of the emergence of punishment, it does not purpose only to satisfy the victim's satisfaction, it also purposes to have influences toward the offender and social group. Through punishment, it hopes to deter the offender, therefore it could change the offender behavior. Through punishment, it also become threat for society. Therefore, they will rethink when they want to do some crimes.

There are two major concepts according to retributive justice. First, retributivism which concern on what kind of work that will be punish and the importance to do the punishment to maintain the moral duty for victim. Second, Utilitarianism which concern on how the punishment will be drawn to the wrongdoer. Scholars classify the first concept as the backward-looking and the second concept as the forward-looking. While retributivism talks about how to satisfy the victim, utilitarianism talks about how the punishment institutions should work.<sup>12</sup>

Target	
Offender	Social Group

<sup>11</sup> Neil Vidmar, *Retribution and Revenge*...33

<sup>12</sup> Michael T. Cahill, "Retributive Justice In The Real World," *Washington University Law Review*, 85 (2007), p.817-815

Behavior Control	Deterrence; isolation elimination; reeducation of offender; restitution to Victim	General deterrence or threat; prevention of vengeance by victim or others; upholding morale of conformers; disavowal of act
Retribution	Change in offender's belief system vis-à-vis victim or societal rule; reaffirmation of private self-image of victim or surrogates; status degradation and differentiation of offender; assertion of power over offender	Vindication of societal rule; reestablish social consensus about validity of rule; diffuse release of psychological tension through social comparison processes; restore group cohesion and legitimacy

Table 3. A Classification of Purposes Underlying Punishment Reaction<sup>13</sup>

Therefore, punishment is not only to satisfy the victim. It also want to prevent another crime appearance. Punishment will help the emergence of social order. However, to prevent the vengeance of the offender, it must also satisfy the offender. Therefore, punishment may emerge as a tool to satisfy the victim and to threat the society from doing crime, but moreover

<sup>13</sup> Neil Vidmar, Retribution and Revenge...35,

it must make the acceptance from the offender. So, it will really stop the cycle of revenge and bring the social order.

## 2. Procedural Justice

Procedural justice is another branches of justice discussion which concerns on judging and policy making process. It discuss how to provide a good judgment over dispute and good policy for society. The acceptance of stakeholders on the dispute and society is the easiest indicator of good judgment and policy. Therefore, procedural justice research is concerned with people's reaction to decision of legal authorities, their acceptance of legal rules, and their assessment of the fairness of the procedure through which decisions are made and rules applied.<sup>14</sup>

Scholars said a decision is perceived as good by the people if they perceive that the procedure of judgment is fair. Moreover, even the outcome is negative, it is still be accepted by the people if they see the procedure is fair.<sup>15</sup> If fair is an important key for procedural justice, it will be important to define fair itself.

According to John Thibault and Laurens Walker,<sup>16</sup> fair procedures, in the eyes of a disputant, are procedures that allow the disputant to maintain an

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<sup>14</sup> Joseph Sanders and Lee Hamilton, Justice and..7

<sup>15</sup> Adam Lamparello, "Incorporating The Procedural Justice Model Into Federal Sentencing Jurisprudence In The Aftermath Of United States V. Booker : Establishing United States Sentencing Courts," *New York University Journal of Law and Liberty*,4 (2007) p.116

<sup>16</sup> Their research is put as the prime research that shows the important relation between fair decision making and the success of a reconciliation. Their studies are also important because it was the first study to show the capacity of procedure to increase acceptance of decision. Their research quoted by Tom R. Tayler and E. Alland Lind in their article "Procedural Justice", and Adam Lamparello "Incorporating The Procedural Justice Model Into Federal Sentencing Jurisprudence In The Aftermath Of United States V. Booker : Establishing United States Sentencing Courts,"

optimal level of control over what happens to him or her.<sup>17</sup> This phenomenon extended into general result that an opportunity for “Voice,” for a chance to tell one’s story, generally increased the perceived fairness of the procedure and of the outcome.<sup>18</sup>

Tom R. Tyler suggests several values that must be attended on procedure to get the acceptance of society. By the presence of those values, the procedure mostly perceived as fair by society. Those values are trust, standing, and neutrality.<sup>19</sup>

Tyler describes ‘trust’ as a belief by the disputant toward authorities that they will try to be fair in judgment process. This is because the perception of a motivation to be fair is crucial to people feeling about authorities.<sup>20</sup> Second, Standing is a feeling that he is viewed by authorities as a full-fledged member of society. This feeling will be increased through recognition, respect, polite treating.<sup>21</sup> Third, neutrality is a feeling that authorities are creating a “level playing field,” by engaging evenhanded treatment of all. Neutrality involves honesty, unbiased treatment, consistency, and factual decision-making.<sup>22</sup>

Adam Lamparello has identified several factors that researcher said contribute to perceptions that a process/procedure is fair and concomitantly likely to engender favorable valuations. First, the notion of consistency-similar treatment of similar case-is an integral component of a just process. Second, of

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<sup>17</sup> Tom R. Tyler and E. Alland Lind, Procedural Justice in Joseph Sanders and Lee Hamilton, Handbook of Justice Research in Law, (New York: Kluwer Academic, 2002)p.75

<sup>18</sup> Joseph Sanders and Lee Hamilton, Justice and..7

<sup>19</sup> Tom R. Tyler and E. Alland Lind, Procedural Justice...75

<sup>20</sup> Tom R. Tyler and E. Alland Lind, Procedural Justice...76

<sup>21</sup> Tom R. Tyler and E. Alland Lind, Procedural Justice...75-76

<sup>22</sup> Tom R. Tyler and E. Alland Lind, Procedural Justice...76



equal importance is the concept of neutrality-that “those carrying out the procedure must be impartial and neutral....those involved should believe that the intentions of third-party authorities are benevolent, that they want to treat people fairly and take the viewpoint and needs of interested parties into account. Third, individuals who are likely to be affected by particular decision should have a voice and representation in the process. Finally, dispute should be resolved in a manner bespeaking transparency and openness.”<sup>23</sup>

The conclusion of those description is that fair on procedural justice concept similar to the principle of transparency, accountability, and participatory. In court field, there are principal of “hearing every side” or it is known as *audi et alteram partem*. Jeremy Bentham as quoted by Emerson has cited that where there is no publicity there is no justice. Publicity is the very soul of justice.<sup>24</sup> Therefore, if there are transparency, accountability, and participatory in judgment and decision making process, it can contribute to build the feeling of ‘trust’, ‘standing’, and ‘neutrality’ in judgment and decision making process.

### 3. Distributive justice

While there are questions of how would we allocate things as rights, wealth, income, and love, those are questions of distributive justice.<sup>25</sup> Because of there are different things to allocate, so there are many concepts of

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<sup>23</sup> Adam Lamparello, *Incorporating The Procedural Justice*...118

<sup>24</sup> Emerson Yuntho, *Keterbukaan Informasi di Pengadilan in Kebebasan Informasi Milik Siapa?* (Jakarta: ICW, 2010) p. 142

<sup>25</sup> Joseph Sanders and Lee Hamilton, *Justice and*..8



distributive justice. It would be a mistake to think that a single distributive concept apply for each situation.<sup>26</sup>

There are several concept of that has great influence on the discussion of distributive justice. Concept of Utilitarianism was introduced by several scholars such as Jeremy Bentham, John Stuart Mill, Henry Sidgwick and G.E. Moore. As quoted by Karen Lebaqz, the essential concept of utilitarianism theory can be found on John Stuart Mill's Book 'Utilitarianism'.<sup>27</sup>

Utility, or the greatest happiness principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain and the privation of pleasure.<sup>28</sup>

Karen explains based on those sentences by John Stuart Mill, that the purpose of life in the view of utilitarianism are the happiness. Therefore, to measure the rightness of some work, utilitarianism see it by the influences of the work to bring happiness.<sup>29</sup> A work perceived good by the people if most of them perceive that work produce happiness for them. In the concept of utilitarianism of distributive justice, an allocation could be seen as justice if the distribution can bring much happiness.<sup>30</sup>

Karen gives an example from Richard B. Brandt's book 'Toward a Credible Form of Utilitarianism', a utilitarianist will face a paradox when the greatest happiness is to spend the reward of their job for charity rather for their

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<sup>26</sup> Joseph Sanders and Lee Hamilton, Justice and..9

<sup>27</sup> Karen Lebaqz, Teori-Teori Keadilan...14

<sup>28</sup> John Stuart Mill, Utilitarianism. (The Floating Press, 2009) p.14

<sup>29</sup> Karen Lebaqz, Six Theories of Justice...14-15

<sup>30</sup> Karen Lebaqz, Siz Theories of Justice...15

family. In the same way, he must cancel the worker payment if the greater happiness can be granted by giving the money –which actually for worker payment- for charity.<sup>31</sup> Through those example I could say that utilitarianism prefer to ignore rights if by ignoring those rights will bring into greater happiness.

Another theory of distributive justice is introduced by John Rawls. He said that the fairest principle of allocative justice are those we would choose if we were not to know our own station in life. This condition was termed by a ‘veil of ignorance’.<sup>32</sup> By being in that condition, Rawls believes human will divide everything fairly. Because they don’t know who they are, what is their individual special needs, then they will choose to distribute every sources fairly. Moreover, they will agree to allocate more sources for the weakest because they afraid they will be the one who is weak. This is due their lack of knowledge of their condition.<sup>33</sup>

I shall maintain instead that the persons in the initial situation would choose two rather different principles: the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.<sup>34</sup>

Based on those concepts, I can understand why Karen said that justice are like an elephant which is described by several blind men. Justice

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<sup>31</sup> Karen Lebaqz, Six Theories of Justice...26

<sup>32</sup> Karen A. Hegtvedt and Karen S. Cook, Distributive Justice: Recent Theoretical Developments and Applications in Josphe Sanders and Lee Hamilton, Handbook of Justice Research in Law, (New York: Kluwer Academic, 2002) p.93

<sup>33</sup> Karen Lebaqz, Six Theory of Justice...50-58

<sup>34</sup> John Rawls, A theory of justice, (Cambridge: Harvard University Press, 1971) p.15

will not be the same in each case, especially in different field. There are retributive justice concept for bring into just punishment. There are procedural justice concept to help judgment and decision making process result a just decision and judgment. There are also concepts of distributive justice to lead the allocation process. Those concepts are different to each other, and every concept have several branches concept. Based on those differentiation, I can conclude, there are no absolute justice. It is similar to Hans Kelsen said, as quoted by I Dewa Gede Atmadja that the norms which are actually used as standards of justice vary from individual to individual and often mutually irreconcilable. For example, whereas the liberal regards freedom as the idea of justice (that is believes in norm that everybody ought to enjoy freedom) the socialist see the idea in equality (that is believes in the norm that everybody ought to enjoy same economic welfare). When these two ideals are found to be incapable of simultaneous realization, the liberal prefers equality at the cost of freedom. A social order that is just from the liberal's point of view is unjust from the socialist point of view.<sup>35</sup> Therefore, justice for me is not always justice for everybody. It is depend on our understanding and believes. It is more a political discussion, but always be the basic for legal discussion. Furthermore, legal regulation or law is the product of politic.

## **B. Islamic Justice**

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<sup>35</sup> I Dewa Gede Atmadja, *Filsafat Hukum : Dimensi Tematis dan Historis*, (Malang: Setara Press, 2012)p.80

Another concept of justice was introduced by the Islamic scholars. The translation of Al-qur'an, translated by Yusuf Ali translating 'justice' word from several Arabic words. I could find several words representing justice in Arabic language in his translation. The First word is '*wasathon*' in Al-Baqarah verse 143 which he translated into word 'justly'.

Thus have we made of you an ummah *justly* balanced that ye might witnesses aver nations, and the messenger a witness over yourself; and we appointed the qiblah to which thou was used, only ti test those who followed the messenger from those who would turn on their heels...<sup>36</sup>

The second word is '*ma'ruf*' in Al-Baqarah verse 234 which he translated into word 'a just and reasonable'.

If any of you die and leave widows behind, they shall wait concerning themselves four months and the days; when they have fulfilled their term, there is no blame on you if they dispose of themselves in a *just* and reasonable manner. And Allah is well acquainted with what ye do<sup>37</sup>

The third word is '*aqsatu*' or derived from '*qistun*' at his translation on Al-baqarah verse 284 which he translated it into 'juster'.

Disdain not to reduce to writing (your contract) for a future period, whether it be small or big; it is juster in the sight of Allah, more suitable as evidence, and more convenient to prevent doubts among yourselves.<sup>38</sup>

The fourth word which is translated by Yusuf into just is '*adl*' in An-Nisa' verse 3.

If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice two, or three, of four; but if ye fear that ye shall not be able to deal justly (with them). Then only one or (a captive) that your

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<sup>36</sup> Abdullah Yusuf Ali, The Meaning of The Holy Qur'an, (Beltsville : Amana Publications, 2004) p.58

<sup>37</sup> Abdullah Yusuf Ali, The Meaning of .....p.96

<sup>38</sup> Abdullah Yusuf Ali, The Meaning of .....p.118

right hands possess. That will be more suitable, to prevent you from doing injustice.<sup>39</sup>

The translation of justice which provided by Yusuf different by the translation provided by Sher Ali. Using the same verse as I provided before, it appears word 'just' did not used by Sher to translate '*wasatan*'. He translate '*wasatan*' into exalted and not just. In translating *ma'ruf*, he uses word 'fair' rather than word 'just'. In translating '*aqsatu*', Sher Ali did not use 'juster', he used 'equitable' to translate this word. Finally, they agree to use word justice to translate word 'adl' in An-Nisa verse 3. So, for now, I like to assume that justice is *adl* in the English version and *adl* is justice in the Arabic version.

Abdul Baqiy listed that there are 15 times *adl* and it is derivational word has been mentioned in Al-qur'an.<sup>40</sup> While Oxford Dictionary describes justice as right and fair behavior or treatment,<sup>41</sup> *adl* was described by Ibnu Mundzir as everything that reside on it is place, and did not provide injustice (*ma qoma fin nufusi annahu mustaqimun, wa huwa diddul jauri*).<sup>42</sup> Raghib Al-Ishfahani said that *adl* means equality (*musawah*). This meaning can be replaced depends on the previous word. He also divided into two kinds, first is *adl Muthlaq* that can be knowledge by mind. He said this kind of *adl* is represented such as replying the kindness of somebody by similar or more kindness. Second, *adl bissyar'I* such as *qisas*, and *jinayat*.<sup>43</sup>

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<sup>39</sup> Abdullah Yusuf Ali, The Meaning of .....p.184

<sup>40</sup> Muhammad Abdul Baqiy, Mu'jam Al-Mufahros lil Alfadzil Qur'an Al-Karim, (Beirut : Dar Al-Ma'rifat, 2009) p.672

<sup>41</sup> Jonathan Crowther, Oxford Advanced Learner's Dictionary Of Current English, (Oxford : Oxford University Press, 1995) p. 645

<sup>42</sup> Jamaludin Ibnu Mundzir Al-Anshoriy, lisanul 'arab, (Beirut : Darus Sodar, 1414 H) Vol 11 p.430

<sup>43</sup> Muhammad ma'ruf bil raghib al-ishfahani, al-mufradatu fi gharibil qur'an, (Beirut: Dar Qalm, 1416 H) Vol 1 p. 556

Quraish Shihab said that justice in Al-qur'an is represented by *adl*, *qishtun*, and *mizan*. In his view, *adl* which mean equal is imposing the existence of two or several side. While *qishtun* means 'proper part' did not impose the existence of two or different side. It seems that *qishtun* is more general than *adl*. Therefore, when Qur'an order somebody to treat justly for himself, it uses *qishtun* to represent justice (An-Nisa : 135). Obviously *mizan* means a tool to measure, but sometimes it can be interpreted as justice.<sup>44</sup>

Aside from the use of word to show it in qur'an, justice itself has been acknowledge by Islamic scholars as one of fundamental value of islam. Jasser Auda, one of recent Islamic scholar cited that justice is one of Islamic purposes. He said that maqasid shariah has been the fundamental value of islam for years, while world has changed, maqasid shariah did not change. In his view, the concept of maqasid shariah is need to be reformed. Because the old concept did not cover several values which has been accepted as good by human such as justice, non-discrimination, non-exploitation, and ect<sup>45</sup>. Maqasid shariah has been only divided into three levels darurah, hajjiyah, and tahsiniyah. First, *darurah* (necessities) levels is described as the fundamental needs which human can be died without it. In ubudiyah field, this is the level where the adherent only do the prayer or ritual to avoid sin gain for a basic reward. Second, *hajiyah* (Needs) levels is described as the higher level rather than darurah. It is shown by praying together (sholatul jama'ah) while the lower level or darurah was shown by just praying. Third,

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<sup>44</sup> Quraish Shihab, wawasan al-qur'an : Tafsir maudhi'I atas pelbagai persoalan umat, (Bandung : Mizan, 1996)p. 112

<sup>45</sup> Jasser Auda, Maqasid Shariah as Philosophy of Islamic Law, (Wahington: The International Institute of Islamic Thought,2008) p.3-6



*tahsiniyah* (luxurious) level is described as the highest and luxurious level of human needs. For instance, praying together which is led by *hafidzul qur'an* (the keeper of Al-qur'an), or eating a delicious food which full of vitamin and nutrition. The necessities were considered essential matters for human life itself. There is also a general agreement that the preservation of these necessities is the objective behind any revealed law. Purposes level of needs are less essential for human life, and purpose at the level of luxurious are 'beautifying purposes'.<sup>46</sup>

Jasser Auda quoted contemporary theory of maqasid based on the scope of ruling they cover into three levels. First, general maqasid which covers throughout the entire body of the Islamic law, such as the necessities and needs levels in the traditional concept of maqasid and newly proposed maqasid, such as justice and facilitation. Second, Partial maqasid which covers certain chapter of the Islamic law, such as the welfare of children in family law, preventing criminals in criminal law, and preventing monopoly in financial transactions law. Third, specific maqasid are the intents behind specific scripts or rulings, such as the intent of discovering the truth in seeking a certain number of witnesses in certain court cases and the intent of feeding the poor in banning muslim from storing meat during Eid days.<sup>47</sup>

Based on those explanations, I could emphasize that Islam acknowledge justice as an important value. Al-qur'an has mentioned justice in various words and explained the fundamental position of justice in Islam. Many scholars have been acknowledge justice as one of fundamental value in Islam. Moreover, current

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<sup>46</sup> Jasser Auda, *Maqasid Shariah*...3-4

<sup>47</sup> Jasser Auda, *Maqasid Shariah*...5



scholars classified justice as one of another Islamic purposes. Therefore, it is relevant to study Islamic law<sup>48</sup> based on the value of justice.

## 1. Islamic Justice in the view of Asghar Ali Engineer

There are several new concepts of Islamic justice that are not popular as the classical concepts. One of those theories made by Asghar Ali Engineer. His theory and interpretation lead to the concept of theology of liberation.

### a) Bibliography

Asghar Ali Engineer is one of the leading Muslim liberation theologians who heads a center for Islamic studies in Bombay, India. He is recipient of the prestigious Indian New Leader Awards for Communal Harmony.<sup>49</sup> He was born on March 10<sup>th</sup> 1940 in Rajasthan, Udaipur in the middle of a family affiliated to Syi'ah Isma'iliyah. His father, Sheikh Qurban Husain is one of the religious leaders in Dawoodi Bohra Community.<sup>50</sup> Through his father, Asghar learned Islamic knowledge such as theology, tafsir, hadith and fiqh. He is one of the rebellions that refuse the absolute authority of his religious leader Sayyidina Muhammad Burhanuddin. Asghar led the reformist to rebel against the authoritarianism and leader rigidity. He also promotes the necessity of liberal interpretation method to accommodate the individual rights, human dignity and humanity. Because of his rebellion, he was attempted to be killed several times. He was awarded by the University of

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<sup>48</sup> As Jasser said, this term has been used synonymously for fiqh, shariah, qanun, and urf. Therefore, when this research said Islamic law, it refers to those terms.

<sup>49</sup> John C. Raines and Daniel C. Maguire, *What Men Owe to Women*, (New York: State University of New York Press, 2001) p.287

<sup>50</sup> Dawoodi Bohra is one of the communities in Syiah emerged in India. See more detail at <http://www.dawoodi-bohras.com/>

Calcuta as Doctor of Literature for his effort of movement and publications on religious peace and women study on Islamic perspective. He also participated in resolving religious conflicts between communities. Therefore, he was awarded National Communal Harmony Award.<sup>51</sup>

He was occupied for several prestigious position such as vice president of people's union for civil liberties, choef of centre for development studies, chief of committee for communal harmony, chief and the founding of centre for study of society and secularism and ect. He also severally asked to attend as lecturer in many countries such as America, Canada, England, Malaysia, Indonesia, Pakistan, and Ect.<sup>52</sup>

#### b) Theory of Justice

In his famous work "Islam and Liberation Theology: essay on liberative elements in islam" Asghar explained the importance position of justice in Islam. In his view, justice for weak-side is the basis and fundamental teachings of Islam.<sup>53</sup> Qur'an told human to behave justly and doing good. He quoted An-Nahl: 91 as his argument. "Verily, Allah enjoins justice, and the doing of good to others and giving like kindred.." <sup>54</sup>. He also emphasize that justice is the integral part of taqwa. It shown by Al-Maidah: 8, "...Be always just, this is nearer to righteousness.." <sup>55</sup> Therefore, taqwa is

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<sup>51</sup> Akhmad Haries, Poligami dalam perspektif asgahr ali engineer dan relevansinya dengan konteks Indonesia, Mazahib, 2 (December, 2007)p.163

<sup>52</sup> Akhmad Haries, Poligami...164

<sup>53</sup> Asghar Ali Engineer, Islam and Liberation...57

<sup>54</sup> Sher Ali, Holy Qur'an...310

<sup>55</sup> Sher Ali, Holy Qur'an...117

not only a ritualistic concept, it rather be integrated with economic-social justice.<sup>56</sup>

Asghar Criticize the reducing concept of 'taqwa' which caused by Umayyah and Abbasiyah government. Through those era, muttaqin and muslihin seen as someone who diligently pray, pay zakat, and doing haji. The concept of muttaqin and muslihin has no any relations with socio-economic and socio-politic behavior.<sup>57</sup>

Asghar asserted that the key word of justice concept in qur'an were represented by two words, *adl* and *qist*. In his view, *adl* represent the value of equalization and levelling, while *qist* means distributions, honesty, and properly. He emphasize this value in every aspect of life especially in distributing goods and property. It shown by Qur'an in Al-Hasr: 7, "Whatever Allah has given to his messenger as spoils from the people of the towns is for Allah and for the near of kin and the orphans and the needy and the wayfarer, that it may not circulate only among those of you who are rich..."<sup>58</sup>

Therefore, Asghar cited the practice of pilling up property and money is bad and evil. This act causes the disturbance and social unbalance. Only by fair distribution of wealth, it will create social balance. Justice is not only about law, it must followed by distributive act. He emphasize that Qur'an as Islamic guidance is a value-oriented declaration.<sup>59</sup>

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<sup>56</sup> Asghar Ali Engineer, Islam and Liberation...58

<sup>57</sup> Asghar Ali engineer, Islam and Liberation...58

<sup>58</sup> Sher Ali, Holy Qur'an...658

<sup>59</sup> Aghar Ali engineer, Islam and Liberation...61

Justice was divided by Aghar into several fields. It will be different justice concept that he offer in economic with the justice concept he offered in gender issue. While he emphasizes fair distribution in economic field, he emphasizes the importance of gender equality as the fundamental justice concept in men-women relationship.<sup>60</sup>

“And the divorced women shall wait concerning themselves for three courses; and it is not lawful for them that they conceal what Allah has created in their wombs, if they believe in Allah and the Last Day; and their husbands have the greater right to take them back during that period, provided they desire reconciliation. And they (the women) have rights similar to those (of men) over them in equity; but men have a rank above them. And Allah is Mighty, wise” (Al-Baqarah: 228)<sup>61</sup>

“Surely, men who submit themselves to God and Women who submit themselves to Him, and believing women, and obedient men and obedient women and truthful men and truthful women, and men steadfast in their faith and steadfast women, and men who are humble, and men who give alms and women who give alms, and men who fast and women who fast, and men who guard their chastity and women who guard their chastity, and men who remember Allah much and women who remember Him-Allah has prepared for all of them forgiveness and great reward” (Al-Ahzab: 35)<sup>62</sup>

Those verses are the argument of the needs of gender equality to create gender justice. Moreover, it is always fundamental to favor the less

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<sup>60</sup> Asghar Ali Engineer, Islam, Women, and Gender Justice in What Men Owe to Women edited by John C. Raines and Daniel C. Maguire, (New York: State University of New York Press, 2001)p.111

<sup>61</sup> In general translation this verse should be count as verse 228 of Al-Baqarah. However, Sher Ali put it as verse 229 of Al-Baqarah. See Sher Ali, Holy Qur'an...37

<sup>62</sup> In general translation this verse should be count as verse 35 of Al-Baqarah. However, Sher Ali put it as verse 36 of Al-Ahzab. See Sher Ali, Holy Qur'an...491

powerful groups of society, and women in a patriarchal social structure also belong to this category.<sup>63</sup> “And we desired to show favour unto those who had been considered weak in the earth, and to make them leaders and to make them inheritors of our favours.”<sup>64</sup>

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

### **C. Polygamy**

It is natural for men and women to love each other. It is marriage that united both of them. However, it was normal for men or women to love and marry more than one men and one women. It was shameful for king or men to marry or behaving just one women. In other hand, modern society begins to understand the principle of gender equality thus they against those tradition.

Muslim society as one of religious community argued in differences about the permission of polygamy. First group is the community which allow polygamy absolutely. This group was represented by majority of classical and middle (era)

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<sup>63</sup> Asghar Ali, Islam, Women...111

<sup>64</sup> In general translation this verse should be count as verse 5 of Al-qhasas. However, Sher Ali put it as verse 6 of Al-Qhasas. See Sher Ali, Holy Qur’an...447

ulama. Second group is allowing polygamy through some requirements and certain conditions. Quraisy Shihab, Asghar Ali Engineer, and Amina Wadud are the representation of this group thus they give several requirements and conditions for committing polygamy. Third group forbidding polygamy absolutely such as Al-Haddad and Druze community in Lebanon.<sup>65</sup> Every groups have their own argumentation but this explanation will be focused on explaining the concept of polygamy which conducted by Asghar.

In his book “Women, Qur’an, and Modern Society”, he allocated one chapter to talk about polygamy. In this chapter he begin the discussion by describing the massif amount of refusal towards polygamy. While modern-industrial society demand more worker, women is the only solution. For them to work as men, they must be treated and educated equally like men thus they start to learn gender equality and gender justice. Polygamy, started to be ruled formally and gradually limited by the government.

After explaining those phenomenon, he emphasizes one of Islamic teachings is to create justice. Al-qur’an condemns the injustice act such as discrimination, exploitation, and the disturbance of social balance. It has been suggesting and encouraging gender equality and gender justice. This was proved by the interpretation of An-nisa’:3 which became the source of debate on polygamy issue.

Asghar discussed this verse based on several classical and modern interpreter of Al-qur’an. At-Tabari, one of classical interpreter in Islam said that

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<sup>65</sup> Akhmad Haries, Poligami dalam Perspektif...158

this verse was intended to respond the orphan guardian who want to marry this orphan girl for her belonging although she does not love him and treated improperly by him. Thabari also said that this verse was intended to respond the existence of husband who marry more than ten women and take the orphan's property to fulfill his wife's necessary. He also said that this verse was intended to emphasize the similarity between injustice toward wives and injustice toward orphan. This is due to the understanding on several Arabian that sin is only applied for an injustice actions towards orphan and it did not apply for wives. However, for Thabari this verse was not intended for allowing to marry several wives. It rather contains message for man or husband to treat his orphan child and wife justly.<sup>66</sup>

Asghar also provided interpretation by Ar-Razi, another famous interpreter on Qur'an. Ar-Razi said that this verse was a respond for a husband of several women who also a guardian for several orphans. Due to his wives necessary, he took the orphan's property. Therefore, this verse came to forbid those kind of action. Moreover, in his view, doing nawafil ritual is better than marrying more than one woman. Hence, marrying one woman and doing more nawafil is the best choice for men in his view.<sup>67</sup>

Asghar also noted several issues related to polygamy. First, oftentimes polygamy is legitimated in the name of prevention of insulting towards women. This is due to the large amount of women in the world. This argument was refused by Asghar, he said there are nothing of Qur'anic verse which say that polygamy is

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<sup>66</sup> Asghar Ali Engineer, *The Qur'an Women and Modern Society*, Translated by Agus Nuryanto (Yogyakarta: LKiS, 2007)p.114

<sup>67</sup> Asghar Ali Engineer, *The Qur'an Women...*115



preventing a sexual abuse. Second, He criticized the act of several classic muslims interpreter which dominated by their masculinity. They forget the essential value of Qur'an which attached justice on every aspect of life thus included gender justice. Therefore, He asserted polygamy is not a solution for preventing prostitution. Prostitution is not made or caused by the large amount of women, it rather caused by proverty.<sup>68</sup>

Asghar criticizes "the orthodox" for their frozen mind thus causes a temporal value becomes permanent. He describe this "frozen mind" by explaining the changing condition of justice concept by the time being. In the medieval period the very understanding of the concept of justice was different from what it is today. He said that our era is not a condition of society if equality of all humans irrespective of sex, race and creed is not ensured. In classical or medieval, discrimination between one and another human being on any ground, including the sexual one, will be perceived quite natural and nonviolative of the concept of justice. Even slavery was thought to be natural and in keeping with the principles of justice. In fact, if a slave ran away from the master it was thought to be an unjust act. Concept of justice may be changed, but its importance can be denied in every period.<sup>69</sup>

The Qur'an was certainly mindful of what was just in the era when it was revealed and what ought to be just in the transcendental sense. It has been shown by Qur'an in polygamy issue. At first, Polygamy was revealed by Qur'an as protection towards widows and orphans of battle of Uhud. However, the verse on

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<sup>68</sup> Asghar Ali Engineer, The Qur'an Women...123

<sup>69</sup> Asghar Ali Engineer, Islam, Women, and Gender...124

polygamy (4:3) is preceded by a verse that emphasize sexual equality (4:1). There is also reference to justice for orphans and widows. Therefore, polygamy is permitted provided one marries widows and orphans (and not just any woman). And when one was permitted to marry more than one woman, there had to be true justice for all the wives. More importantly, another verse states that even if you desire to do justice to all your wives, you cannot do it (4:129). Asghar said, this verse implicate that polygamy is as good as not permissible.<sup>70</sup>

Therefore, according to Asghar, polygamy may be just in the prophet era or when the verse related to it was revealed. However, by the time being and based on the modern way of Qur'anic reading and interpretation, it is not polygamy, but rather monogamy is purposed by Qur'an. This is due to the Qur'ani characteristic which He named by Ideologic-Pragmatic.<sup>71</sup> It accommodate the present value, but also suggest what ought to be. Hence, polygamy is the last choice which required certain condition such as war and illness.<sup>72</sup>

#### **D. Polygamy law in Indonesia**

Indonesia applied the principle of monogamous marriage. However, there are several regulations related to polygamy in Indonesia such as Marriage Act 1/1974, 1991 compilation of Islamic Law, Government Regulation 10/1983 (amended as GR 45/1990), ect.<sup>73</sup> As explained by Jan Michiel Otto and A. Muktie

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<sup>70</sup> Asghar Ali Engineer, *Islam, Women, and Gender*...125

<sup>71</sup> Asghar Ali Engineer, *The Qur'an Women*...112

<sup>72</sup> Asghar Ali Engineer, *Women's Rights in Islamic Law*...

<sup>73</sup> Jan Michiel Otto, *Sharia and National Law in Indonesia in Sharia Incorporated: A Comparative Overview of The Legal Systems of Twelve Muslims Countries in Past and Present* (Leiden University Press: 2010)p. 467

Fadjar, the procedure for obtaining permission for a polygamous marriage is laid down in articles 4 and 5 of the act, and articles 40-44 of GR 9/1975. In short, the man must submit a written application. The religious Court will only give permission if it finds that one out of three substantive condition is met, a) the wife cannot fulfil her duties as a wife, b) the wife is physically disabled or incurably ill, c) the wife cannot give birth. In addition, the law mentions in article 5(1) three other requirements, a) the wife must give her consent, unless this is not possible, or the court does not deem it necessary, b) the man must prove that he is able to financially maintain his wives and children, with a declaration from his employer, the tax agency or otherwise, c) the man must declare that he will give his wives and children a fair and equal treatment.<sup>74</sup>

There are particular regulation for civil servant about polygamy. Government Regulation 10/1983 forbids polygamous unions between two civil servants altogether. Civil servants who want to enter into a polygamous marriage with someone who is not state-employed must obtain written permission from his or her superior. For these types of marriage, another specified procedure is prescribed.<sup>75</sup>

Indonesian law condemns and provides system to punish the offender of those regulations. In GR 9/1974 article 45 regulated that there are punishments for the offender of particular articles in the same regulation. One of those article obliged marriage registrar to analyze and check the status of registrant, does he/she

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<sup>74</sup> Jan Michiel Otto, *Sharia and National Law*...467 see more at A. Mkhie Fadjar, *Tentang Hukum dan Sekitar HUKum Perkawinan di Indonesia*, (Malang: Brawijaya, 1994)p.6

<sup>75</sup> Jan Michiel Otto, *Sharia and National Law*...468

has fulfilled the requirements. One of those requirement is to have court permission for man who want to marry more than one woman. Therefore, a marriage registrar who registered a couple which the husband still in marriage with another woman and did not get the permission from the court to marry more than one women can get punished. On the other hand, there are no punishment for unpermitted polygamous husband.<sup>76</sup>

Indonesia has several regulations relating polygamy. However, the highest regulation is Act 1/1974. Another regulation is the explanation and tactical application of this act.

#### **E. Polygamy Law in Malaysia**

The emergence of polygamy law in Malaysia can't be separated with the growing of modern interpretation, especially interpretations with the spirit of woman emancipation. One of those interpretations was introduced by syekh Muhammad Abduh. He said that it is court's responsibility to assure a well healthy polygamy. This is due to large amount of violence that happened on polygamous marriage. Through procedural permission of court for polygamy, it is hoped that polygamous marriage will be led by capable husband.<sup>77</sup>

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<sup>76</sup> Government Regulation number 9 year 1974 article 45. See more at Jan Michiel Otto, Sharia and National Law...468

<sup>77</sup> Rihanah H. Abdullah, Poligami di Malaysia, (Jurnal Syariah 5, Vol 2)p. 169

Polygamy in Malaysia has been regulated through the family law enactment 1984 article 23 particularly section 4 which regulate the requirements.<sup>78</sup> There are four requirements to get the permission of polygamy by the court.<sup>79</sup>

- (a) that the proposed marriage is just and necessary, having regard to such circumstances as, among others, the following, that is to say, sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity on the part of the existing wife or wives;
- (b) that the applicant has such means as to enable him to support as required by Hukum Syarak all his wives and dependants, including persons who would be his dependants as a result of the proposed marriage;
- (c) that the applicant would be able to accord equal treatment to all his wives as required by Hukum Syarak; and
- (d) that the proposed marriage would not cause *darar syarie* to the existing wife or wives.

Those requirements must be fulfilled all and not only one or two. The fulfilment of those requirements are the absolute determination for judge to give somebody permission of polygamy. Hence, even wife permits her husband to polygamy but he did not fulfilled those requirements, there will be no permission given by the court.<sup>80</sup>

Malaysia provides several punishment for those who did unpermitted polygamous marriage. At article 123 in the same enactment, it plainly said that any man, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the court commits an offence and shall

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<sup>78</sup> Andrew Harding, *Sharia And National Law In Malaysia* in Jan Michiel Otto, *Sharia Incorporated: A Comparative Overview of The Legal Systems of Twelve Muslims Countries in Past and Present* (Leiden University Press: 2010)p. 516

<sup>79</sup> Enactment Number 303 Year 1984 Article 23 section 4

<sup>80</sup> Raihanah H. Abdullah, *Poligami*...173

be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.<sup>81</sup>

Despite these limitations, it must be noted that the regulations in various states have largely hollowed out the intent and purpose of the original 1984 Law. The decision to approve of a polygamous marriage is made by the muslim judge. The Islamic family law enactment is not very detailed in Kelantan and no mention is made of punishing polygamy lacking approval from the judge.<sup>82</sup> These different occur due to the autonomous of each government in the matter of religion regulation. However, still the enactment 303 year 1984 has been the center and national model for each government family law.

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<sup>81</sup> Enactment Number 303 Year 1984 Article 123

<sup>82</sup> Andrew Harding, Sharia And National Law...516