



CHAPTER III

ASGHAR ALI ENGINEER'S PERSPECTIVE ON POLYGAMY LAW OF INDONESIA AND MALAYSIA

A. Providing Justice In Family As The Role of Government

Before starting the discussion on Indonesia and Malaysia regulation of polygamy, this research will emphasize the role of government in this issue. This is due to the old debate whether family is private matter thus it is not governmental-issue or it is necessary for government to interfere with family matter. This sub-chapter will provide the fundamental role and position of the government and its importance regarding family matter particularly in the issue of polygamy. One question of John R. Bowen on his "Islam, Law, and Equality in Indonesia" is "can a muslim marry and divorce without the state?" In classical discussion, it will lead to another fundamental

question, what is the role of government in preserving family? This sub-chapter will try to answer this question based on Asghar Ali Engineer's view. In his book "Islamic State" he asserted that the biggest political product produced by the emergence of Islam is the governmental system which guarantee public safety and security.¹

Asghar sees that Islam which is represented by Rosulullah grown in the middle of dessert is without government/state. Makkah did not have a government, it only lead by an association of tribes chief called *mala'a*. This association will make decisions on people of Makkah. However, the decision must be recommended by all member of the association. Because Arabian live under their chief's order. If one chief on this association disagree with some decision, and the decision still being applied, he and his people/tribe will rebel and create chaos for another tribes. Moreover, these men hate if there are another powerful men around them, such as bizantium and sasanid imperium. They did not like being interfered thus they lost on their trading business. They collect property overstock, but they left nothing for their people. Therefore, they actually did not make public security, rather they create condition to achieve their own safety and prosperity.²

Rasulullah came in the middle of this situation. Obviously, he will be refused when he said that he came to reveal the divine revelation from God. Moreover, this revelation condemns the practice of property overstock like what have done by many trader and tribe chief. Thus, he is supported by several people of makkah especially from the marginal group such as poor and slave.³

¹ Asghar Ali Engineer, Islamic State Translated by Imam Mutaqin (Yogyakarta: Pustaka Pelajar, 2000)p.27

² Asghar Ali Engineer, Islamic State...p.20-21

³ Asghar Ali Engineer, Islamic State...30-31

Because of the unsupported condition in Makkah, Muhammad emigrates to Madinah where he asked to be judge-like to solve the conflict between Auz and Khazraj Tribe. In Madinah he creates a famous agreement “Madinah Charter” that become regulation-like for all Madinah citizen. In this town he starts to build a government or Islamic state. However, Asghar cites this state is not a theocracy as has announced by several groups. This state has grown in steps, Rasulullah did not force rushly every tribes to apply Islamic law.⁴

Based on those explanation, it seems that Islam was emerged to create social-justice among human. Islamic value was published to public, there are several reactions, there are Makkah people who refuse it and there are Madinah people who accept it. Muhammad, see the value that brought by Islam is easier to be propagated, applied, and maintenance if there are strong adherent.

The first seed to create state can be known by seeing the relation between madinah people and Muhammad. Later, in 17th and 18th two famous politician J.J. Rosseau and John Lock describe similar process on the emergence of a state or government. They agree that state was born to limit individual’s right for maintaining another individual’s right. Human has freedom, but without limitation, it will lead into chaos. State was born due to agreement of people to be bent down over one governance.⁵

Asghar has explained that Islamic State starts while rasululah lives in Madinah. He comes to this city to be judge between auz and khazraj tribe to settle conflict among both of tribes. It shows that people of auz and khazraj has agree to be bent down over

⁴ Asghar Ali Engineer, Islamic State...45

⁵ Very Junaidi, Mahkamah Konstitusi Bukan Mahkamah Kalkulator, (Jakarta: Themis Book, 2013) second edition, p.28-35

Muhammad's governance. Moreover, through Madinah Charter, Islamic State has begun to be legitimated. This charter becomes social-contract which Lock and Rosseau cite as the fundamental agreement to create state. As the leader of new state who brings Islamic Law from the divine revelation, Muhammad did not rushly force every tribe and person to apply Islamic Law. It rather emerge by considering situation and social necessary. Those law covering almost all aspect of human life. Such as marriage, punishment for crime, heritage, and ect. Therefore, the answer of Bowen's question according Asghar's perspective is that human or muslim can marry and divorce without state (there are no explicit requirements for the existence of state as legitimate-requirement of marriage in fiqh concept), However, if by the absence of state it will lead into chaos and social-injustice, then state must interfere and maintain social welfare and left out the chaos.

Asghar never condemn for state interference on marriage as long as it will create welfare and social justice. Furthermore, he praises several states for their family law which accommodate human right and treat the marginal group equally. For instance, he praises several countries which restrict or forbid polygamy such as Pakistan, Libya, Lebanon, Iraq, and Jordania.⁶ He never condemn the interference of the state as long as it provides the true Islamic justice. In other hand, he criticizes an implementation of injustice regulation, especially toward marginal group (oftenly woman) such as Saudi Arabia.⁷

Indonesia regulates the marriage Law number 1 year 1974. Before this regulation promulgated, there are various draft offered by several groups. The process

⁶ Asghar Ali Engineer, The Qur'an Women...164

⁷ Asghar Ali Engineer, The Qur'an Women...163

of regulating this law proved the difficulty of creating marriage law on which women's groups, Christian, and muslim organizations to agree. Draft marriage law were written in the 1950s and introduced in parliament in 1958-59 without any result. A second round of bills and discussion, also without result, occurred in 1967-70. And in July 1973 a third round of debates began when a new marriage bill was submitted to parliament.⁸

There are two sides arguing on this issue, the Islamic orthodox and Islamic Modernist. The orthodox preferred to leave everything to the uncoded sharia, but in 1973 modernists succeeded in pressuring the government to propose a bill that would strengthen the position of women in many respects and expand state supervision. Orthodox groups rose up in sharp opposition to these proposals, and massive, heated demonstrations were held around the parliamentary premises. After physical and political intervention of the army, the parliament reached a compromise, replacing a number of the proposals by less far-reaching reforms (Butt 1999: 122-123). Some of the new provisions about divorce were, however, so ambiguously worded that after an initial reading, one was still left unsure as to whether they entailed a modernist or a conservative solution. In any case, the government was now able to proudly declare that a unified marriage law covered all of Indonesia, and that the colonial Mixed Marriage Ordinance of 1898 had been abolished.⁹

Aside from its several ambiguity, this regulation born from the effort of groups which want to create equality. Groups of Muslims fight for this regulation seeing the marriage and divorce-before the emergence of this regulation-as practiced in Muslim

⁸ John R. Bowen, *Islam, Law,...* 180

⁹ Jan Michael Otto, *Sharia and National Law In Indonesia dalam Sharia Incorporated: A Comparative Overview of The Legal System of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010) p.447

communities to be areas of particularly sharp gender inequality. This groups consider state legal intervention to be the only way to rectify these injustices. For instance, by the emergence of this law, husband could no longer pronounce his “I divorce you” to his wife out of the court and have it legally recognized. It have to be said before the court after several session by hearing the cause and the argument from both of parties.¹⁰

The interference of government through this regulation is another effort to bring social justice for society. It is similar to the role of Muhammad-as explained by Asghar as the leader of government in creating social justice. Muhammad revealed islamic value and law to improve social injustice occurred in his society. The government of Indonesia, has regulated marriage law in the shake of gender inequality.

Similar with Indonesia, Malaysia also adopted the idea of interfering family matter through government regulation. This idea was introduced by Syekh Muhammad Abduh who see that in modern world, a polygamous marriage lead to violence over wife. This is due to the abstract regulation and punishment of Islamic law such as “sin” and “reward”. Hence, society did not feel the direct effect of this punishment.¹¹

Because of this, Abduh suggested to regulate polygamy through government’s authority. By government’s authority it means through regulation and applied by the court. This method is legitimated through *sad al-zara’i* method. Through this method, court has right to restrict incompetent husband to marry more than one woman. Because of his incompetence, mostly husband will do violence things toward his wives. There

¹⁰ John R. Bowen, Islam, Law, and...178-181

¹¹ Raihana Abdullah, Poligami di Malaysia...169-170

are several countries which adopted this view such as Syria, Iraq, Iran, Jordan, Singapore, and Malaysia.¹²

The Islamic family law year 1984 is the result of the adoption of this idea. This act also intended to be the uniform of family law in every district in Malaysia. However, this attempt was seen by conservative elements to be too radical. As the result, there are three districts did not apply this act on their court.¹³

Seeing those explanation, it could be concluded the emergence of Family Law year 1984 is purposed to create social justice. There are no valid data of the violence in polygamous marriage. However, it has been known that polygamy is commonly expected to lead to divorce, usually when economic support or emotions become problematic.¹⁴ Therefore, it is the court duty to guarantee the quality of the husband. Hence, it will reduce the divorce on polygamous marriage.

Then, researcher can say that Malaysia government and Indonesia government have already take the role as the guardian of society. Both of governments did what has done by Muhammad as the leader of government to protect his society. Malaysia and Indonesia regulate those law to emerge the social justice among its society.

B. Polygamy Law In Indonesia in The View of Asghar

Indonesia is a country which adopted republic as the system of its governance.

It also known as the third democratic country on the world. In International

¹² Raihana Abdullah, Poligami dalam perundangan islam in Gender, Budaya, dan Masyarakat, (Kuala Lumpur: Rancangan Pengajian Gender, 1998) p.190-191

¹³ Malaysia is a federal country which lead by one leader called 'yang dipertuan agung'. However, every district or state in malaysia has their own 'sultan'. They have full authority in religious matters. See more at C.S.T. Kansil and Christine S.T. Kansil, Perbandingan Hukum Administrasi Negara, (Jakarta: Rienka Cipta, 2010)p. 143-154

¹⁴ Miriam Koktvedgaard Zeitzen, Polygamy...85

relationship, this country is a member of ASEAN (Association of Southeast Asian Nations). In legal system, Indonesia adopts the Dutch, Therefore it is not really surprising that Indonesian legal system is a part of civil law system.¹⁵

Indonesia also known as the biggest muslim country in the world. The Indonesian muslims are generally followers of the the shafi'i school of Islamic law. Before the advent of Islam in the twelfth century no common family law was followed in Indonesia. In each of the island-indonesia has more than 17.000 islands-people had their own customs and usages. Their local customs represented "norms of social behavior of small isolated communities". Islam came as a unifying factor in the social life on the island.¹⁶ Therefore, Islam has great influence over all social-aspect such as daily-behaviour, fashion, Family, and Law. Marriage Law number 1 year 1974 is another prove of this influence. This regulation become the primary regulation related to marriage in Indonesia. Polygamy is one point that regulated on this regulation.

Actually, polygamy in Indonesia regulated on regulation number 1 year 1974 and Compilation of Islamic law. This research only talk about regulation number 1 year 1974. Because this regulation is the primary law sources in Indonesia to determine the permission of polygamy. To be more specific, there are several articles in this regulation related to polygamy. This sub-chapter will divide the explanation on this discussion into several titles.

1. Excuses of polygamy

¹⁵ Peter Mahmud Marzuki, An Introduction to Indonesian Law, (Malang: Setara Press, 2012) 2nd edition, p.26

¹⁶ Tahir Mahmood, Family Law Reform in The Muslim World, (New Delhi: The Indian Law Institute, 1972) p.192

Indonesia marriage principle is monogamy but it also accommodate the possibility to marry more than one women or well known by polygamy. Polygamy is possible to do if the demander demand the permission of polygamy before the court. The court only able to give the permission if the demander fulfill several excuses. In article 4 verse (2) Marriage Law, there are three excuses for husband to demand polygamy before the court. First, the wife cannot fulfil her duties as a wife. Second, the wife is physically disabled or incurably ill. Third, the wife cannot give birth.

Prof. Ahmad Rofiq claims that those excuses are really understandable and made based on the primary purposes of the marriage. In his view, if those excuses happened on a family, it will cause chaos, emptiness, and ruin the romance of marriage. For instance, if wife cannot fulfill her duties as wife such as doing biological relation with her husband, it will cause unbalance in marriage. This is also applied if wife has physical disabled or incurably ill. It is also same if the wife cannot give birth. In his view, it is understandable if husband want to marry another women to get child. Because family without child is not perfect.¹⁷

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

Belum ada kemauan dalam hal revisi UU Perkawinan meski sudah sangat mendesak. Revisi ini dibutuhkan untuk memastikan perlindungan hukum untuk mencegah perkawinan anak dan perkawinan paksa pada perempuan, menghilangkan alasan sah perceraian yang diskriminatif terhadap

¹⁷ Prof. Dr. H. Ahmad Rofiq, M.A., Hukum Perdata Islam di Indonesia, (Jakarta: Raja Grafindo Persada, 2013)p. 140-141

kelompok disabilitas, dan menegakkan asas monogamy, dan memutus stereotip peran laki-laki (kepala keluarga) dan perempuan (pendamping) di dalam perkawinan yang berimplikasi kepada relasi tidak seimbang di dalam berbagai aspek kehidupan perempuan di dalam keluarga dan perkawinan.¹⁸

Through those quote, it was described the opinion of women commission for human right toward marriage regulation. In their view, marriage regulation number 1 year 1974 has with in several articles that provide inequality, discrimination, uncertainty of legal protection, and did not enforce the principle of monogamy.

One of excuses that allowed for demanding polygamy is the wife is physically disabled or incurably ill. Women commission uses word discrimination to describe this excuses for being legally allowed for demanding divorce. By using analogical method, this excuses is seems to be another discrimination toward women when it applied as excuses for polygamy.

One principle of Islamic teaching in the view of Asghar Ali Engineer is to be sided and applying justice toward the marginal and weak-group.¹⁹ Commonly women in this era labeled as weak side, they reputed as lower class under men. Even in Islamic tradition, several tradition of the prophet legitimate this view. For instance, prophet's tradition that say "if possible and allowable, I will order women/wife to bow in front of her husband". It is also applied for them who had physical disability. They treated as imperfect creature. Their disability is treated as anomaly and an abnormal. This regulation, or these excuses put this two variables as one article that allowing husband to demand polygamy before the court.

¹⁸ Laporan Independen Institusi Nasional Hak Asasi Manusia, (Jakarta: Komnas Perempuan, 2012)

¹⁹ Asghar Ali Engineer, *Islam and Liberation*...57

Asghar emphasizes the importance for being sided toward marginal and weak group. It is really not just to put their biological different condition as an excuse to do polygamy. There is prophet tradition said “if you did not like her, then be patient, because there are may be something you did not like, but Allah create it for good”.²⁰ If every women can be divorced by her husband, or have to accept that her husband is marrying another women, because of her disability, then this is another form of discrimination, and psychological violence towards women. Moreover, in the view of Asghar, polygamy is only allowable in certain abnormal condition, such as war and epidemic.²¹ Therefore this regulation is an injustice excuses toward women, particularly to whom has physical disability.

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

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

²⁰ Asghar Ali Engineer, *The Right of Women...*171

²¹ Asghar Ali Engineer, *The Right of Women...*147

have test tube bay or not. Similarly adoption is also not permissible in Shari'ah law. Here is some bind for a conscientious Muslim. One can say in such case (i.e. when it is medically certified that wife, and not husband, is barren) husband could be permitted to take second wife. The other alternative is to remain childless. Some might prefer that way. Only when a wife is proved to be medically unfit for conceiving the husband perhaps could seek her permission (without using coercion in any form) to take second wife and provided, he is capable of doing equal justice to both of them, as required by the Qur'an.²²

However, it is interesting to present the fundamental concept of marriage according to Asghar. In his view, Asghar see marriage as another normal contract between man and women. It is not a sacred contract such as marriage in Christian or Hindu that did not allow divorce between husband and wife. Therefore, it is fundamentally allowable to divorce or to marry another women based on agreement between both of husband and wife. Because marriage is mere contract between men and women, than to do anything as long as it is based on agreement and did not contradict with Islamic law is allowable. Divorce and polygamy did not happened because of his wife disability, or because of the wife is forced by the husband to accept it, but it can be happened because of the agreement between both of husband and wife. Hence, divorce is *adghadl mubahat* (the most legal action that hated by God)²³ and polygamy is good as good as not permissible,²⁴ both of them cannot be happened except in extra ordinary condition.

2. Requirements of Polygamy

²² Asghar Ali Engineer, Polygamy in Islam, <http://www.csss-islam.com/iis-archive93.htm> accessed on 5th November 2013

²³ Asghar Ali Engineer, The Right of Women...170

²⁴ Asghar Ali Engineer, Islam, Women, and...125

Regulation number 1 year 1974 regulates in its article 5 the requirement that must be fulfilled by the husband to demand the permission of polygamy before the court. In its first verse said that to be able to demand the permission, husband must able to fulfill several requirements. 1) the wife must give her consent, unless this is not possible, or the court does not deem it necessary; 2) 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; 3) the man must declare that he will give his wives and children a fair and equal treatment.

In the view of procedural justice, the first verse of this article is providing justice toward disputants. In the matter of polygamy case, they are the wife and the husband. By demanding wife agreement, the court give the wife the chance to react about her husband intention for marrying another women. This article guarantee the participant of the wife in the process of her husband polygamy application. As John Tibault and Laurens Walker has explained, fair procedure is procedures that allow the disputant to maintain an optimal level of control over what happens to him or her.²⁵ If her husband marry another women, it will cause indirect or direct effect towards her. Economical effect, psychological effect, or another possible effect.

In Asghar view, this article has applied his fundamental concept of marriage. In his view, marriage is merely contract between men and women. Therefore, every action that related to the marriage must be discussed and based on

²⁵ 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

the agreement between husband and wife. Hence, this article literally has accommodate justice for both of them.

In the second and third point on this first verse, the guarantee of capability being fair and providing financial necessary have to be proved. In Asghar view, those points are a way to guarantee the capability for being justice toward his wives. Moreover, if there are certain condition such as war and epidemic that allow the husband to do polygamy, he have to prove his ability to act justly toward his family.²⁶

These verse also guarantee the principle of distributive justice. By proving his financial abilities, at least the husband could guarantee his capability for giving his wives and children financial happiness. There will be no complain on financial field. By declaring that he will treat each of his wife equally, he will give his family trust and psychological happiness. However, if these requirements can't be fulfilled or did not create the happiness towards family, then it is really impossible for being just in marriage. As John Stuart Mill said, the principle of distributive justice is to allocate happiness.²⁷

Seeing those explanation, it seems that the regulation of polygamy in Indonesia for some article has accommodate Islamic justice, and some articles has discriminate women. Particularly, in the first and second point of verse two in article four. By legalizing the lack of women as the excuse for demanding polygamy, this regulation put men superior rather then women. Women must be

²⁶ Asghar Ali Engineer, Polygamy in Islam, <http://www.csss-islam.com/iis-archive93.htm> accessed on 5th November 2013

²⁷ John Stuart Mill, Utilitarianism. (The Floating Press, 2009) p.14

perfect, and men can have another women if he fills that women can't fulfill his desire or demand. Although, prophet has said "if you did not like her, then be patient, because there are may be something you did not like, but Allah create it for good".²⁸

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

C. Polygamy Law in Malaysia in The View Of Asghar

Malaysia is an Islamic country located at south-east asia. It is a federal countries applying representative governance. Malaysia is consisted by 13 states, there are states led by sultan, king, or governor.²⁹ In religious matters, every state have their authority. However, Malaysian governance try to unify family law in all states through

²⁸ Asghar Ali Engineer, *The Right of Women...* 171

²⁹ C.S.T. Kansil and Christine S.T. Kansil, *Perbandingan Hukum Administrasi Negara*, (Jakarta: Rieneka Cipta, 2010)p. 143-144

Islamic family law year 1984. Until 2010, only Kelantan, Trengganu and Perak which did not adopt this regulation entirely, particularly polygamy.³⁰

The basis of polygamy in Malaysia is Islam. In the history of Malaysia, polygamy and concubinage were largely confined to the ruling classes and were considered luxuries of the great. This pattern has continued into recent times throughout the region, where polygamy tends to be associated with the aristocracy. Another group traditionally practicing polygamy are members of the rural elite, comprising schoolteachers, religious specialist, landed and titled farmers, and local political leaders who may take in pretty but poor young girls as their second wives.³¹

However, polygamy is commonly expected to lead to divorce. Polygamy also lead to the wives and children violence. Those happened because of the lack of economic condition, lack control of emotion, and the absence of law.³² The last cause is acknowledged by the government and they hope that problem can be solved by creating the law.

As has been explained in the first sub-chapter of this chapter, the Idea of regulating family law, particularly polygamy was came from Syekh Muhammad Abduh. This idea was adopted by several countries including Malaysia.

1. Procedure and Requirements

In Islamic family law year 1984 article 23 section 1 explained that there is no man, during the subsistence of marriage, shall, except, with the prior permission

³⁰ Andrew Harding, *Sharia and National Law in Malaysia in Sharia Incorporated: A comparative Overview of The Legal System of Twelve Muslim Countries in Past and Present*, ed. Jan Michiel Otto (Leiden University Press, 2010) p.503

³¹ Miriam Koktvedgaard Zeitzén, *Polygamy A Cross...* 69-70

³² Miriam Koktvedgaard Zeitzén, *Polygamy: A Cross-Cultural Analysis*, (New York: Berg, 2008) p. 85 and Rihanah H. Abdullah, *Poligami di Malaysia*, (Jurnal Syariah 5, Vol 2) p. 169

in writing of the court contract another marriage with another woman nor shall such marriage contracted without such permission be registered under the act

At section 4, explained reasons for the court to grant the demand of husband for polygamy. 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;d) that the proposed marriage would not cause *darar syarie* to the existing wife or wives.

In the a point, court will grant the demand for polygamy if the husband could prove that the marriage is just and necessary. The example of necessary polygamy are in the condition of wife has issues on her sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity.

In Asghar's view, polygamy only can be happened if there are certain critical condition such as war and epidemic. He aslo accept wife sterility as reason for husband to do polygamy. This regulation accommodate the issue of sterility. However, Asghar did not accept another reason except those three conditions. Asghar never mention any reason for doing polygamy based on the disability of the

wife except in the issue of sterility. Although, he emphasizes to choose another possible choice such as test tube baby, adoption, or just stay childless.³³

Husband also has to prove his mean and ability to support all his wives and dependants, as point b said. Point c said, husband also has to prove that he could treat all his wives equally. Those treatment are determined based on hukum syara'. In the "interpretation" section on this regulation (Islamic Family Law), hukum syara' means Islamic law according to any recognized madzhab. These points are related to the emergence of distributive justice. By fulfilling this requirements, the court will not be hesitate of the husband ability to allocate his wives necessary, at least her necessary in the view of her madzhab.

At the d point, this regulation force the husband to prove that his polygamy will not harm the wives based on *darar syara'*. *Darar syara'* means harm, according to what is normally recognized by Islamic law, affecting a wife in respect of religion, life, body, mind, moral and property. Obviously, this regulation want to guarantee the quality of wife's life did not change or reduced drastically after her husband marry another women.

2. Penalties

After showing the means to emerge distributive justice by verifying the husband ability, this regulation also try to emerge justice in term of retributive justice. Article 123 is explained that there are punishments for husband who marry another women without the court's permission.

Any man who, during the subsistence of a marriage, contracts another marriage in any place without the prior permission in writing of the Court

³³ Asghar Ali Engineer, Polygamy in Islam, <http://www.csss-islam.com/iis-archive93.htm> accessed on 5th November 2013

commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both.

This article threatens all the husband in Malaysia, if they contract another marriage without court's permission, they will have to pay one thousand ringgit or with six moth imprisonment. Those two kind of punishment, can be applied together in the same time and same offender. This threat definitely was purposed to prevent husband marry without court permission.

Using Michael T. Cahill table of retribution or punishment purpose, it could be analyzed that this article want to change the offender's belief about polygamy, particularly if he believes that his marriage towards another women is not the government's business. Therefore, he will know that he could not do any marriage at random and without court's permission. This regulation is society's alert for not doing marriage without court's permission. Moreover, this regulation may considered as how far the government want to maintenance prosperity for its citizen.

D. Woman Position on Indonesia And Malaysia Polygamy Law In The View of Asghar

After explaining regulation of polygamy, I would like to discuss the women position in those regulations, particularly in polygamy matter. It is important to determine what is the role of woman in both of regulations. Because women is commonly labeled as the one who will suffer from the practice of polygamy. Qasim Amin, one of Egyptian scholar 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 husband.³⁴

1. Women in Indonesia Polygamy regulation

After seeing article four of marriage law number 1 year 1974 which contains three excuses of polygamy, it shown that this regulation put women in unrespect position. This regulation put women like a good for trade and husband as the purchaser. When the product is broken, the purchaser can buy another product, without determining the first product condition. Legalizing the disability of wife as the excuse to demand polygamy is same like buying new product because of the old one's lack. Therefore, it is not surprising if the women commission for human right protested for this regulation.³⁵

In fact, at the article 5 of this regulation, there are requirement for husband to get the permission or agreement of his demand for polygamy. Literally, the husband will never able to marry another women without the agreement of his wife. In asghar's concept of marriage, this regulation really give women equal place to decide what is gone a happened on her marriage. This point put women in the same position with men, that he can marry another women without discussing and get her wife permission. For asghar, marriage is a mere contract that neither husband

³⁴ Qasim Amin, Tahrir Al-Mar'ah, 1899, translated by Samiha Sidhom Peterson, The Liberation of women, (Cairo : American University Press) h. 83

³⁵ Laporan Independen Institusi Nasional Hak Asasi Manusia

nor wife have larger authority on it. However, this point is contradicted by another point in the same article.

Persetujuan yang dimaksud pada ayat (1) huruf a pasal ini tidak diperlukan bagi seorang suami apabila isteri/isteri-isterinya tidak mungkin diminta persetujuannya dan tidak dapat menjadi pihak dalam perjanjian, atau apabila tidak ada kabar dari isterinya selama sekurang-kurangnya 2 (dua) tahun, atau karena sebab-sebab lainnya yang perlu mendapat penilaian dari Hakim Pengadilan.³⁶

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

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

This regulation want to give women an important position in the issue of polygamy. She can agree or disagree and her choice become an important requirement in the process. However, there are several gap in the regulation that can be manipulated or used by husband to get the permission without his wife’s agreement. This regulation must be improved and revised for creating an equal relation between men and women.

2. Women in Malaysian Polygamy Regulation

³⁶ Indonesian Marriage Law number 1 Year 1974 Article 5 verse (2)

In section 4 article 23 point a, it was said that husband allowed to get permission if he has proven that the marriage is just and necessary. The meaning of necessary on this point is if the wife is has sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity. Those requirements treat women like unloving thing that can't have another function except biological function. When she can't get child, than her husband allowed to marry another women. When she has physical disability, her husband may marry another women. Moreover, when she did not obey her husband order to do sexual relationship, her husband may made it as his excuses to demand polygamy before the court.

Women seen as an object for biological benefit, her role as social creature did not acknowledge. She is put on inferior position before the man. When she can't satisfy her husband, he may take another women. No wonder if Qasim Amin said that polygamy is mostly led to unhappiness. By the existence of happiness, it indicates the existence of distributive injustice in polygamy.

From three excuses for polygamy accommodated by Asghar, two causes were came from the outside of husband and wife. Polygamy is allowed determined the social condition. Asghar accepts polygamy only in the time of war or an epidemic. Asghar only accept the sterility of wife as excuse for polygamy that came from the inside of wife. In fact, he suggest to do another possible option to get baby.

Islamic Family Law Act year 1984 guarantee participation of the wife on the session procedure. In section 5 article 23 of this regulation, the court will summon the existing wife to hear her explanation. This explanation related to the

application submitted by her husband to the court which attached with in her agreement or opinion.

Section 3 on article 23 said:

An application for permission shall be submitted to the Court in the prescribed manner and shall be accompanied by a declaration stating the grounds on which the proposed marriage is alleged to be just and necessary, the present income of the applicant, particulars of his commitments and his ascertainable financial obligations and liabilities, the number of his dependants, including persons who would be his dependants as a result of the proposed marriage, and whether the consent or views of the existing wife or wives on the proposed marriage have been obtained.

Section 5 on article 23 said:

A copy of the application under subsection (3) and of the statutory declaration required by that subsection shall be served together with the summons on each existing wife.

Seeing this regulations, it shows the intentions of the court to provide fair procedure to guarantee procedural justice by giving the wife chance to explain her opinion before the court. John Tibault and Laurens Walker said fair procedures, in the eyes of a disputant, are procedures that allow the disputant to maintain an optimal level of control over what happens to him or her.³⁷ This phenomenon extended into general result that an opportunity for “Voice,” for a chance to tell one’s story.³⁸ Therefore, by letting wife to tell what she feels before the court, will give her feeling of justice. However, her explanation did not have strong role. If the four requirements has been fulfilled in the view of judge, than he will get the permission.³⁹

³⁷ Tom R. Tyler and E. Alland Lind, Procedural Justice in Josphe Sanders and Lee Hamilton, Handbook of Justice Research in Law, (New York: Kluwer Academic, 2002)p.75

³⁸ Joseph Sanders and Lee Hamilton, Justice and..7

³⁹ Raihana Abdullah, Polygamy di Malaysia...173

This regulation really give women or wife a little space to speak up and control her marriage. Her lack of things can be legal argumentation for husband to get the permission from the court. She can speak and tell the court her opinion, feelings, and disagreement for her husband marriage, but it did not has big influence except the judge see it as big problem.

In the view of Asghar, this regulation may contradict with the principle of marriage itself. Marriage according to him is mere contract that no one more powerful than others. The husband is not the boss of the wife. They decide every marriage problem through discussion and both side agreement. No one rule the marriage, the couple rule it together.

E. Islamic Justice in National Regulation: Comparison of Polygamy Law in Indonesia and Malaysia

This sub-chapter will compare between two regulations in specific issue. It will help me to divine the special quality of each regulation and which point is lacking from Islamic justice, particularly in matter of polygamy.

First point to divine is the excuses of both regulation to allow polygamy. Marriage law in Indonesia put three excuses for polygamy. First, the wife cannot fulfil her duties as a wife. Second, the wife is physically disabled or incurably ill. Third, the wife cannot give birth. Malaysia did not put it as excuses, but rather said as “just and necessary”. Necessary means that the wife has sterility, physical infirmity, physical unfitness for conjugal relations, wilful avoidance of an order for restitution of conjugal rights, or insanity. Both of regulations accept the wife’s biological disability as excuses

for polygamy. Those regulations seems like seeing women as a biological object that can be replaced by another women if the existing one is already broken. It did not show the value of Islamic justice in asghar's view. For asghar, everybody has their disability, to respond on this issue, asghar quoted the prophet's tradition "if you did not like her, then be patient, because there are may be something you did not like, but Allah creates it for good".⁴⁰

Both of regulation also accommodate the sterility of wife as legal reasoning for husband to demand polygamy. Asghar accepts this excuse unwillingly. He acknowledge this excuse but he also offered several choices rather polygamy if the excuse is because of women's disability to be pregnant. For instance, he suggest the couple to do test tube baby, or adoption, or just live without child.

Both of regulation demand the husband to prove his ability to provide justice towards his family. In Islamic family law Malaysia, article 23 section 4 point b, c, and d, ordered husband to prove that he is able to support as required by hukum syarak all his wives and dependants. He also has to prove his ability to treat all his wives equally and to prove that this marriage did not harm in the term of darar syarie for wives. In marriage law number 1 year 1974 of Indonesia, article 5 verse (1) point b and c, ordered the husband to prove his ability and certainty that the wives and children on his guardian will get their needs. The husband also has to prove his ability to act just toward his wives and children. Both of regulations has accommodate ability of justice as the husband's requirement if he want to marry another women. In the view of Asghar, This regulation has put the most important requirement for polygamy. In many of his writings, Asghar

⁴⁰ Asghar Ali Engineer, The Right of Women...171

unwillingly accept polygamy, he said that polygamy only happened on certain condition such as war, epidemic, and women sterility. However, it still require another important requirement which is being justice.

And when one was permitted to marry more than one woman, there had to be true justice for all the wives. If one could not meet the demands of justice for all wives, then one must marry only one.⁴¹

Therefore, if the husband want to marry more than one women, it have to be done at the condition of war, epidemic, or because of his wives sterility. The husband also have to be able to provide justice towards all his wives. Moreover, in asghar's thought, the second or third wives could not be anybody. She must be a widow or orphans.⁴²

No regulations between both of countries that limited polygamy only for widows and orphans. Both of regulations did not regulate anything about criteria of women that the husband should marry for the second or third or fourth wives. For Asghar, the second, the third, and the fourth wives should be a widow or orphans. It is related to the verse of polygamy in an-nisa: 3 which revealed as the protection for the orphans and widows.

It was seen as a protective measure in some circumstances (there were large numbers of war widows and orphans to be taken care of as many men perished fighting in the battle of Uhud)⁴³

Another point to divine is the participant or the role of women in the permission process of demand for polygamy. In Malaysia, in the article 23 section five, the wife

⁴¹ Asghar Ali Engineer, Islam, Women, and...125

⁴² Asghar Ali Engineer, Islam, Women, and...125

⁴³ Asghar Ali Engineer, Islam, Women, and...125

will be summoned to explain her point of view of her husband will to marry another women. She may agree or she may disagree. Her opinion is one of many causes that will be considered by judge before permitting the husband to marry another women. Still this regulation put the wife's opinion only for consideration. In Indonesian Marriage law, the permission of wife is an important requirements that must be fulfilled by the husband to get court permission.

Article 5(1) three other requirements of a more procedural nature:
the wife must give her consent, unless this is not possible, or the court does not deem it necessary;
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; and the man must declare that he will give his wives and children a fair and equal treatment.⁴⁴

Seeing from procedural justice concept, both of regulations give the wives an opportunity to "voice" and taking part to determine her marriage condition. She could agree or disagree, her opinion in Malaysia become judge's consideration. Hence, she could disagree, but the judge may permit the husband to do polygamy. She could agree, but the judge may forbid her husband to marry another women. In Indonesia, wife's agreement is one requirement that must be fulfilled by the husband. Literally, it is impossible for the husband to get the permission if the wife did not agree for his polygamy. Literally, Indonesia polygamy law gives the wife more space and role to determine her marriage in term of her husband polygamy.

Justice in procedure indicates by the existence of fair procedure. Fair procedures, in the eyes of a disputant, are procedures that allow the disputant to maintain

⁴⁴ Jan Michael Otto, Sharia and National Law...p.467

an optimal level of control over what happens to him or her.⁴⁵ marriage law of Indonesia gives more optimal level of control for wife rather Islamic family law in Malaysia.

In Asghar view, marriage is a contract that both of wife and husband have to discuss anything before taking some decision. No one superior than other, husband is not superior of wife. They decide everything through discussion and agreement. Therefore, if the husband want to do polygamy, it must be consulted to his wife. However, Asghar said polygamy is as good as not permissible.

Islamic Family Law of Malaysia punish polygamy marriage without the permission of the court by payment and imprisoning. While marriage law of Indonesia did not regulate anything about husband who marry another women without court's permission. Malaysia seems to keep its court's decision by preparing such punishment if there are an offender over court decision. Indonesia did not regulate such punishment in its marriage law. Similar regulation may be found at book of criminal crime of Indonesia article 279.

Dihukum penjara selama-lamanya 5 tahun:

- (1) Barangsiapa yang kawin sedang diketahuinya, bahwa perkawinannya yang sudah ada menjadi penghalang yang sah baginya akan kawin lagi
- (2) Barangsiapa yang kawin, sedang diketahuinya, bahwa perkawinan yang sudah ada dari pihak yang lain itu akan menjadi halangan yang sah bagi pihak yang lain itu akan kawin lagi⁴⁶

Imprisoned for five years:

- (1) Anyone who marry while he/she knows that her/his existing marriage will be a legal obstacle for him/her to marry
- (2) Anyone who marry, while he/she knows that the existing marriage from his/her partner will be a legal obstacle for his/her partner to marry

⁴⁵ 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

⁴⁶ Indonesian Book of Criminal Law article 279

This regulation cited that anyone who marry another men/women while there are existing marriage that could be legal obstacle, could be imprisoned for five years. It did not regulate just polygamy without court's permission, it also punish another women who marry another men while she marry with another men. Unfortunately, this regulation is apart by marriage law of Indonesia. Hence, Islamic family law of Malaysia still be the just.

Islamic family law of Malaysia year 1984 contains the distributive, procedural, and retributive justice aspect. It gives women chance to join and gives her opinion on court. This point shows procedural justice on this regulation. It also order the husband to prove his ability to treat his family equally and fulfill their needs. This became the indicator of the existence of distributive justice. This regulation also provide several punishment for the offender of this regulation, particularly for who does polygamy without court's permission. It shows the retributive justice point on this regulation.

Indonesian marriage law number 1 year 1974 gives women prestigious place as the one who will gives the permission of her husband to marry another women or not. Her agreement is one of requirement that must be fulfilled by her husband to get court's permission. It has more control rather the role of wife in Malaysia. Procedurally, this regulation is more just than Malaysia, in term of wife role. This regulation also order the husband to prove his ability to act just and his ability to provide his family's needs. Similar to Islamic Family Law of Malaysia, this became the indicator of the enforcement of distributive justice. Unfortunately, marriage law of Indonesia did not equipped by punishment for the offender. Therefore, this regulation, literally did not provide retributive justice.

Islamic Family Law of Malaysia treat women inferior than men. It is not what Asghar's thought as the relation between men and women especially in marriage. It gives wife chance to talk before the court. Asghar said, every decision on marriage must be made based on agreement between husband and wife. Through the court, wife will be able to say her opinion and her agreement with her husband.

Similarly, marriage law of Indonesia treat women inferior than men. Therefore, it is not the Islamic justice told by Asghar. However, this regulation gives more chance for wife to control her marriage rather just being the object. Her agreement became important requirement for husband to demand polygamy before the court.

To make it easier to understand, it will be transformed all those explanation into simple table below:

	Marriage Law number 1 year 1974 of Indonesia	Islamic Family Law year 1984 of Malaysia	Asghar Ali Engineer
Equality	Polygamy happened because of wife's disability	Polygamy happened because of wife's disability	Polygamy happened because of social condition such as war and epidemic. Only wife's sterility that could be causes from wife
Wife's Role	Her agreement becomes one requirement for	Her opinion becomes judge determination	She could refuse his husband's will. Because

	demanding polygamy before the court		they are partner in contract (marriage)
Distributive Justice	Husband must prove his ability	Husband must prove his ability	Husband must prove his ability
Procedural Justice	Wife's agreement as requirement	Wife's opinion as consideration	Wife's agreement as requirement
Retributive Justice	-	There are punishment for husband who marry without court permission	-

Table 4. Comparison of Polygamy in Justice Issue

Finally, for asghar, Polygamy is only happened in certain condition. It is more socially forced rather because of wife's disability. The future wife also have to be widow and orphan not anyone. Husband also has to prove his ability to treat his family justly. However, for Asghar, polygamy is as good as not permissible.