

JUSTICE VALUE IN POLYGAMY REGULATION OF INDONESIA AND MALAYSIA IN THE VIEW OF ASGHAR ALI ENGINEER

Akmal Adicahya
Student ID Number 10210057

Background of Study

Nassarudin Umar when he was asked for statement in constitutional court said there are increasing number of divorce. While in 2004 there were 813 divorces caused by polygamy, in 2005 the case increased up to 879 and becomes 983 in 2006.¹ In the same even, LBH APIK Jakarta announced that in 2005 there were 104 wives experienced domestic violence by her polygamous husband.² In Malang district, at 2011 until 2013 there were decreasing and increasing amount of divorce caused by polygamy.³

Indonesia has regulated the procedural administration to practice polygamy. In Regulation number 1 year 1974 article 4, it regulates that husband is allowed to marry more than one wife under particular circumstances, 1) wife is not able to fulfill her obligation as wife, 2) wife's body disability and uncured illness, 3) wife's barren (sterile).⁴ Only by proving the existence one of those conditions husband would be able to get permission to marry more than one wife.

Similarly, Malaysia has limited the practice of polygamy through Act 303 year 1984. This Act is the fundamental or the base of Family Law in Malaysia. It was aimed at unifying and modernizing the personal and family law for Muslims in Malaysia.⁵ To marry more than one wife, husband should be permitted by the judge. Judge would permit husband to practice polygamy if he is able to satisfy at least five conditions: the intended marriage must be 'reasonable and necessary'; the man must possess enough financial resources to support his family; his current wife must give her permission; the man must be capable of treating his wives equally; and the intended marriage may not harm the current wife or wives.⁶

¹ Poligami Terbukti Menaikkan Angka Perceraian, www.hukumonline.com accessed at 19 February 2014

² Putusan Mahkamah Konstitusi Perkara 12/PUU-V/2007 (Indonesian version)

³ Infoperkara.badilag.net accessed on 19 february 2014

⁴ Regulation Number 1 year 1974 article 4

⁵ Adrew Harding, *Sharia and National Law in Malaysia* in Jan Michael Otto, *Sharia Incorporated : A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, (Leiden University Press, 2010) p. 502

⁶ Adrew Harding, *Sharia and National Law*.p.516

However, polygamy is commonly lead to divorce, usually when economic support or emotions become problematic. It is unclear whether more husbands than wives, or more first than second wives, tend to seek divorce because of polygamy.⁷ Raihana Abdullah⁸ cited that after the emergence of Act 303 year 1984 there is decreasing amount of polygamy.⁹ Ironically, polygamy becomes very controversial when it was resulted injustice to wives and children.¹⁰

Justice in the modern Islamic law placed as one of the general purpose of Islam.¹¹ Human need justice, people will fight for justice, no body like to be threatened unjust. For Asghar Ali, justice is the representation of taqwa.¹² He stated oftenly in his books about the importance of justice. Futhermore, He said that world can be existed by justice and unbeliever, but not by unjust and Islam.¹³ Therefore, I as the researcher believe polygamy must be fulfilled by justice, and cannot be happened happily without justice.

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

Research Methodology

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

⁷ Miriam Koktvegaard Zeitzen, *Polygamy: A Cross-Cultural Analysis*, (New York: Berg, 2008) p. 85

⁸ Raihana is lecturer at University of Malaya Malaysia. She has been known for her concern on polygamy. She has several writing on this subject such as *Poligami dalam Perundangan Islam*, *Poligami di Malaysia*, *A Study of Islamic Family Law in Malaysia*.

⁹ Raihana Haji Abdullah, *Poligami dalam Perundangan Islam*, (Kuala Lumpur : Rancangan Pengajian Gender, 1998) p. 193

¹⁰ Raihana Haji Abdullah, *Poligami dalam Perundangan Islam*, p. 194

¹¹ Jasser Auda, *Maqasid Al-Shariah as Philosophy of Islamic Law*, (London: The International Institute of Islamic Thought, 2008) p.5

¹² Asghar Ali engineer, *Islam and Liberation in Theology* translated by Agung Prihantoro, (Yogyakarta: Pustaka Pelajar, 2009) p.58

¹³ Asghar Ali, *Liberation* 69

research.¹⁴ This research uses qualitative approach¹⁵ and will use deductive thinking model. Premise major in this research will be the theory of justice especially on polygamy in the view of Asghar Ali Engineer. The premise minor will be regulation number 1 year 1974 of Indonesia and Act number 303 year 1984 of Malaysia particularly in the matter of polygamy.

The data used in this research are categorized as secondary sources.¹⁶ In this research, Researcher uses several primary law data such as books written by Asghar and several research relating to polygamy. The data in this research will be proceed in two steps. Firstly, I classify characteristic in each of regulations (regulation number 1 year 1974 and act 303 year 1984) especially on the requirements of both of regulation. Finally, I will use deductive pattern of thinking to measure or describe how the justice in regulation-based on it's characteristic-in the view asghar ali engineer.

Previous Research

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

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

¹⁴ See Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta : Kencana, 2010) and Amiruddin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajawali Pers, 2010)

¹⁵ Qualitative approach means for exploring and understanding the meaning individuals or groups ascribe to a social or human problem. The process of research involves emerging questions and procedures, data typically collected in the participant's setting, data analysis inductively building from particulars to general themes, and the researcher making interpretations of the meaning of the data. The final written report has a flexible structure. See John W. Cresswell, *Research Design : Qualitative, Quantitative, And Mixed Method Approach*. (New Delhi: SAGE Publication, 2009) p.1

¹⁶ Secondary sources is literal or library document. In the study or research of law, there are classifications of secondary data. First, primary law data such as Norm, Basic Regulation, ect. Second, secondary law data such as regulation plan, or research related ti regulation, ect. Third, thirdly law data such as ensiklopedia, dictionary of law, ect. See Soerjono soekanto, *pengantar penelitian hukum*, (Jakarta: UI Press, 1942) p.52-52

federal system of Malaysia which allows each state to have their own condition and procedure.¹⁷ Therefore, Muhammad suggests to do several changes in Malaysian law especially in Islamic law.

Polygamy 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 the theology of liberation.

In his book “Women, Qur’an, and Modern Society”, Asghar allocated one chapter to talk about polygamy. In this chapter he begins the discussion by describing the massive amount of refusal towards polygamy. While modern-industrial society demands more workers, women are 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 phenomena, 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 interpreters of Al-qur’an. At-Tabari, one of classical interpreters in Islam said that this verse was intended to respond the orphan guardian who wants to marry this orphan girl for her belonging although she does not love him and treated improperly by him. Tabari also said that this verse was intended to respond the existence of husband who marries more than ten women and takes the orphan’s property to fulfill his wife’s necessities. He also said that this verse was intended to emphasize the similarity between injustice towards wives and injustice towards orphan. This is due to the understanding on several Arabians that sin is only applied for an injustice action towards orphan and it did not apply for wives. However, for Tabari this verse was not intended for allowing to marry several wives. It rather contains a message for man or husband to treat his orphan child and wife justly.¹⁸

¹⁷ Noor Muhammad, Reform of the Polygamy Law and Policy in Malaysia: An Empirical Study, web journal of current legal issue, (2012)p.7

¹⁸ Asghar Ali Engineer, The Qur’an Women and Modern Society, Translated by Agus Nuryanto (Yogyakarta: LKiS, 2007)p.114

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.¹⁹

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 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.²⁰

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.²¹

Comparison of Polygamy Law in Indonesia and Malaysia

This 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.

¹⁹ Asghar Ali Engineer, The Qur'an Women...115

²⁰ Asghar Ali Engineer, The Qur'an Women...123

²¹ Asghar Ali Engineer, Islam, Women, and Gender...124

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”.²²

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 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.

²² Asghar Ali Engineer, The Right of Women...171

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.²³

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.²⁴

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)²⁵

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 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

²³ Asghar Ali Engineer, Islam, Women, and...125

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

²⁵ Asghar Ali Engineer, Islam, Women, and...125

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.²⁶

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.

Juctice 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 an optimal level of control over what happens to him or her.²⁷ 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 selam-lamanya 5 tahun:

- (1) Barangsiapa yang kawin sedang diketahuinya, bahwa perkawinannya yang sudah ada menjadi penghalang yang sah baginya akan kawin lagi

²⁶ Jan Michael Otto, *Sharia and National Law*...p.467

²⁷ Tom R. Tyler and E. Alland Lind, *Procedural Justice in Jospeh Sanders and Lee Hamilton, Handbook of Justice Research in Law*, (New York: Kluwer Academic, 2002)p.75

- (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 lagi²⁸

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

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.

²⁸ Indonesian Book of Criminal Law article 279

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.

Conclusion

Indonesia and Malaysia provide Islamic justice towards its society through regulation. Both of countries regulate several requirements to demand polygamy. In Asghar's perspective, Islamic family law year 1984 provides justice by demanding the husband to prove his ability to act justly. It also give chance for the wife to talk her opinion before the court. However, this regulation did not treat wife and husband equally. It indicates by the existence of one requirement that allowed husband to do polygamy if the wife has disability. Indonesian Marriage law number 1 year 1974 has similar way to provide justice. It demands the husband to prove his ability to act justly. Moreover, wife's agreement is one of requirement for husband to demand polygamy before the court. However, similar to Malaysia, this regulation did not treat husband and wife equally. Therefore, according to Asghar, Marriage Law of Indonesia provides justice more than Islamic Family Law of Malaysia.

Indonesia and Malaysia give the women/wife chance to participate in the session process. Malaysia will summon the wife to ask her opinion. While Indonesia made the wife's agreement as requirement for husband to demand polygamy before the court. Therefore, in the view of asghar, Marriage Law of Indonesia has more respect towards women rather Islamic Family Law of Malaysia.