



## SOCIAL JUSTICE AND HUMANITY ON POLYGAMOUS MARRIAGE AT THE RELIGIOUS COURT OF PASURUAN - INDONESIA

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**Abstract:** Polygamy can be granted if it meets one of the alternative conditions and the absolute cumulative condition. However, sometimes alternative terms are used as wrappers for other reasons to look ridiculous, such as humanity. This paper examines three polygamy rulings at the Pasuruan Religious Court in 2019 using the three Indonesia Women Ulama Congress (KUPI) fatwa approaches *ma'ruf*, *mubadalah*, and ultimate justice. The article finds that the reason for public justice is used to wrap up humanitarian reasons. In the *ma'ruf* approach, the standard of public justice as the basis for judges' consideration needs to be more precise because it does not refer to the global public experience. These standards are not in harmony with the decent logic of women in general. The *Mubadalah* approach ensures a balanced interpretation and interplay of public justice and humanity. The judge's reasoning for considering standards of public justice and humanity based on patriarchal paradigms deserves to be criticized. The ultimate justice approach illustrates that the judge's reasoning is not based on women's biological, sociological, and anthropological life experiences in the case of polygamy. Using justice and justifying humanitarian reasons in some polygamy rulings in the Pasuruan Religious Court does not yet have a solid basic legal paradigm.

**Keywords:** polygamy; humanity; public justice

**Abstrak:** Poligami dapat dikabulkan jika memenuhi salah satu syarat alternatif dan syarat kumulatif mutlak. Namun, terkadang syarat alternatif digunakan sebagai pembungkus

untuk alasan lain agar terlihat konyol, seperti alasan kemanusiaan. Tulisan ini mengkaji tiga putusan poligami di Pengadilan Agama Pasuruan pada tahun 2019 dengan menggunakan tiga pendekatan fatwa Kongres Ulama Perempuan Indonesia (KUPI): ma'ruf, mubadalah, dan keadilan hakiki. Artikel tersebut menemukan bahwa alasan keadilan publik digunakan untuk membungkus alasan kemanusiaan. Dalam pendekatan ma'ruf, standar keadilan publik yang menjadi dasar pertimbangan hakim perlu lebih tepat karena tidak mengacu pada pengalaman publik secara global. Standar ini tidak selaras dengan logika kepatutan perempuan pada umumnya. Pendekatan mubadalah memastikan interpretasi yang seimbang dan interaksi antara keadilan publik dan kemanusiaan. Alasan hakim dalam mempertimbangkan standar keadilan publik dan kemanusiaan yang didasarkan pada paradigma patriarki patut dikritisi. Pendekatan keadilan tertinggi menggambarkan bahwa nalar hakim tidak didasarkan pada pengalaman hidup perempuan secara biologis, sosiologis, dan antropologis dalam kasus poligami. Saat ini, penggunaan keadilan dan pembenaran alasan kemanusiaan dalam beberapa putusan poligami di Pengadilan Agama Pasuruan belum memiliki dasar paradigma hukum yang kokoh.

**Kata Kunci:** poligami; kemanusiaan; keadilan publik.



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## INTRODUCTION

The polygamy rules between fiqh and Indonesian positive law differ significantly. Fiqh provides conditions for practicing polygamy in the context of intra-mazhab and inter-mazhab. It differs from positive Islamic law, which only provides a single fiqh opinion. However, the absorption of fiqh schools in Indonesian positive law is based on more than just one particular school's doctrine and various schools. It is called intra-doctrinal reform.<sup>1</sup> The primary reason is which is the most beneficial and appropriate value to be applied in the context of Indonesian polygamy. It is where existing fiqh in Indonesia plays a role in designing Islamic Law,<sup>2</sup> including the polygamy law.

In Indonesia, polygamy becomes legal if the Religious Courts have permitted it. Although polygamy is not as common practice as in Saudi Arabia,<sup>3</sup> this provision is undoubtedly made to clarify the fulfillment of legal rights for women and children. Violating this provision is equivalent to creating new problems which the

<sup>1</sup> Sri Wahyuni, "Legal Transplant: Influence of the Western Legal System in the Muslim Countries," *Justicia Islamica: Jurnal Kajian Hukum dan Sosial* 19, no. 1 (2022): 32, <https://doi.org/10.21154/justicia.v19i1.2756>.

<sup>2</sup> M Noor Harisudin, "The Formulation of Fiqh Nusantara in Indonesia," *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan* 21, no. 1 (2021): 41, <https://doi.org/10.18326/ijtihad.v21i1.39-57>.

<sup>3</sup> Muhammad Roy Purwanto et al., "Polygamy in Muslim Countries: A Comparative Study in Tunisia, Saudi Arabia, and Indonesia," *Proceedings of the 2nd Southeast Asian Academic Forum on Sustainable Development (SEA-AFSID 2018)* 168 (2021): 435, <https://doi.org/10.2991/aebmr.k.210305.082>.

Religious Courts will eventually resolve. The male or female judges finally found a dilemma because they had to consider aspects of benefit that sided with women and children in the long-term context.

To guarantee this, in determining the application for a permit for polygamy, the judge must consider alternative and cumulative conditions. Alternative conditions include three requirements for the wife: when the wife cannot carry out her obligations as a wife, the wife is seriously ill or has a disability, and the wife cannot give birth to children. If any of these conditions are met, polygamy may be permitted. However, this condition only stands with others because it can be helpful if cumulative disorders support it, the agreement of the husband to guarantee the needs of the wife and children while being fair.

Not only that, the judge must also pay attention to what kind of motivation was filed in the lawsuit for polygamy. Several typologies of reasons narrated by the applicant usually relate to theological, biological, medical, social, and economic aspects.<sup>4</sup> The judges must explore these various reasons to find the truth in the normative, sociological, and philosophical context of these reasons so that their decision does not appear to be a paradigmatic flaw. It is where the judge is required to issue a fair decision. The spirit of *ijtihad* that emerges is a demand not to be too partial to the interests of men so that it is in harmony with the nature of reforming Indonesian family law.

Many studies have been conducted on polygamy decisions. Specifically, the explanation of the previous research relates to the judgment or *ijtihad* of judges in applications for polygamy permits. Nuroniyah et al. examined the meaning of fairness in polygamous marriage at the Cirebon City Religious Court. They found that judges interpret justice as proportional, both outwardly and inwardly.<sup>5</sup> Kurnia and Lestari reviewed the judges' considerations at the Bantul Religious Court in rejecting an application for a polygamy license based on unregistered marriage.<sup>6</sup> Lahati traced polygamy permit decisions from 2013 to 2016 at the Limboto Religious Court. She concluded that in granting and accepting applications for polygamy permits, judges only focused on alternative and cumulative conditions when giving and accepting applications for polygamy permits.<sup>7</sup> Based on this description, the final study aligns with the focus of this paper. However, this article looks at judges'

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<sup>4</sup> Mukhammad Nur Hadi, Latifatul Islamiyah, and Cecep Soleh Kurniawan, "Conservatism on Islamic Legal Maxims: Judicial Interpretation of Polygamous Marriage at the Religious Courts of Mojokerto, Indonesia," *Journal of Islamic Law* 4, no. 2 (2023): 180, <https://doi.org/10.24260/jil.v4i2.1637>.

<sup>5</sup> Wardah Nuroniyah, Didi Sukardi, and Hifny Faqih, "Persepsi Hakim Mengenai Adil Sebagai Syarat Permohonan Izin Poligami Di Pengadilan Agama Kota Cirebon," *Mahkamah: Jurnal Kajian Hukum Islam* 3, no. 2 (2018): 258-72.

<sup>6</sup> Mustika Anggraeni, Dwi Kurnia, and Ahdiana Yuni Lestari, "Pertimbangan Hakim Terkait Penolakan Permohonan Poligami" 4, no. 1 (2022): 51-66.

<sup>7</sup> Teddy Lahati, "Ketidakadilan Gender Putusan Izin Poligami (Studi Putusan Pengadilan Agama Limboto Tahun 2013-2016)," *Jurnal Farabi (Pemikiran Konstruktif Bidang Filsafat Dan Dakwah)* 18, no. 2 (2018): 14-26.

considerations in discussing the concept of humanity and public justice in polygamy. Moreover, this paper traces polygamy rulings at the Pasuruan Religious Court.

This paper is a normative study examining three decisions on applications for polygamy permits at the Pasuruan Religious Court. Therefore, two approaches are used: the case approach and the philosophical one. In particular, the second approach is explored using three methods for the Indonesian Women's Ulama Congress (KUPI) fatwa: *ma'ruf*, *mubadalah*, and true justice. With this design, the main focus is the extent to which the judge's considerations represent justice by referring to socially based motives for polygamy.

## **REASONS FOR POLYGAMY IN FIQH AND MUSLIM FAMILY CODE IN INDONESIA**

Indonesia has various references in determining legal cases of polygamy. This condition is called legal pluralism. This fact becomes necessary because the government still recognizes unwritten laws as legal doctrines that deserve to be referred to and used as a source of legal determination. This diversity ultimately motivates the public to choose legal provisions that are more favorable but still legal for themselves, including in polygamy cases.

The provisions of fiqh in polygamy differ from Indonesian Positive Islamic Law, manifested in Law Number 1 of 1974 concerning Marriage (Marriage Law) and Compilation of Islamic Law (KHI). The standard requirements for polygamy in fiqh vary, while in positive law, it is in a single form. Fiqh creates certainty, but it is based on sects and interests. Positive Islamic law makes certainty because it adheres to a school of written law; the law is what has been written and not anything else.

Fiqh has emphasized that the principal and general form of marriage is monogamy, not polygamy. The practice of polygamy is only a choice of legal steps that can be taken when there is an urgent need for general and unique reasons. Thus, polygamy is an exception.<sup>8</sup> The known cause referred to here is when the number of women is greater than that of men, either in an everyday context or because of the impact of war, which has caused a significant reduction in the number of men. On this basis, women deserve to be saved from various dangers that worry them.<sup>9</sup> In the Indonesian context, this reason is doubted by Husein Muhammad. Referring to data from the Central Bureau of National Statistics, the number of women who are more than men is over 60 years and under 12 years. That is, they are women who are not in their productive period.<sup>10</sup>

Meanwhile, the particular cause referred to here is when the wife cannot give birth to offspring (*'aqimah*), the wife is sick, so she cannot carry out her obligations

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<sup>8</sup> Wahbah Az-Zuhayliy, *Al-Fiqhu Al-Islamiy Wa Adillatuhu* (Damaskus: Dar a-Fikr, 1985), vol. 7: 169.

<sup>9</sup> Az-Zuhayliy, vol. 7: 169.

<sup>10</sup> Husein Muhammad, *Poligami: Sebuah Kajian Kritis Kontemporer Seorang Kiai* (Yogyakarta: IRCiSoD, 2020), 61.

correctly, and the wife has a behavior that the husband does not expect.<sup>11</sup> The legal reasons that were built through the conditions above ultimately made polygamy law recommended (*mandub*)<sup>12</sup> because there is an intention or need that is justified and contains benefits such as continuing offspring and channeling the husband's affection and children.<sup>13</sup> However, the legal status of polygamy must be supported by solid evidence that the husband can act pretty.<sup>14</sup>

In Indonesian law, both the Marriage Law and KHI explain alternative and cumulative requirements. Polygamy can be permitted when one of the alternative requirements is fulfilled. However, the cumulative requirements are absolute requirements that the applicant must meet. Here, it is clear that the cumulative requirement is a crucial condition in determining whether polygamy is eligible to be granted.

Alternative terms are regulated in Article 4 paragraph (2) of Law Number 1 of 1974 concerning Marriage and Article 57 of the Compilation of Islamic Law. This requirement includes three things. *First*, the wife must be unable to carry out obligations. *Second*, the wife must be physically disabled or seriously ill, which cannot or is difficult to cure. *Third*, the wife must be in a condition unable to bear children. The cumulative conditions are regulated in Article 58 KHI in conjunction with Article 5 of Law Number 1 of 1974, where this condition emphasizes that the wife's consent and the husband's certainty are fair and able to guarantee the needs of the wives and children are the main conditions that must be realized.

### **THREE APPROACHES OF THE KUPI FATWA AS A PERSPECTIVE: CONCEPTS AND APPLICATIONS**

KUPI was born based on a humanitarian mission, especially for struggling women and children's rights. On this basis, monotheism was chosen as the fundamental value to strengthen the equal rights of women and children. This value then created eight other values that became the paradigm of the KUPI fatwa, namely mercy, benefit, equality, mutuality, justice, nationality, humanity, and universality.<sup>15</sup> In terms of realizing these values, three approaches were developed so that KUPI's fatwa products have a clear and focused orientation towards fulfilling women's and children's rights, namely the *ma'ruf*, *mubadalah*, and essential justice approaches.

*Ma'ruf's* approach is inspired by the mention of the sentence *ma'ruf* in the Qur'an 34 times. Badriyah Fayumi, the initiator of this approach, explained that the word *ma'ruf* in the Qur'an contains truth, goodness, and decency. These values are

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<sup>11</sup> Az-Zuhayliy, *Al-Fiqhu Al-Islamiy Wa Adillatuhu*, vol. 7: 169.

<sup>12</sup> Mustofa Al-Khin, Mustofa Al-Bugho, and Ali Asy-Syarbaji, *Al-Fiqh Al-Manhajiy 'ala Madhhab Al-Imam Ash-Shafi'iy* (Damaskus: Dar al-Qalam, 1992), vol. 4: 35.

<sup>13</sup> Az-Zuhayliy, *Al-Fiqhu Al-Islamiy Wa Adillatuhu*, vol. 7: 169.

<sup>14</sup> Al-Khin, Al-Bugho, and Asy-Syarbaji, *Al-Fiqh Al-Manhajiy 'ala Madhhab Al-Imam Ash-Shafi'iy*, vol. 4: 35.

<sup>15</sup> Faqihuddin Abdul Kodir, *Metodologi Fatwa KUPI: Pokok-Pokok Pikiran Musyawarah Keagamaan Kongres Ulama Perempuan Indonesia* (Cirebon: KUPI, 2022), 79-80.

openly known and accepted by the public because they are in harmony with human reason, ethics, character, and human nature.<sup>16</sup> Fayumi shares three basic ideas of *ma'ruf* in the Qur'an. First, *ma'ruf* is one of the principles of social relationships between individuals and groups. This concept requires that a relationship must be built based on general decency to create a harmonious social context so that the relationship between aspects of opinion, taste, and impressions of appropriateness can be appropriately maintained.<sup>17</sup> Second, *ma'ruf* is interpreted as a form of accommodation towards traditions accepted and practiced by the community. Here, *ma'ruf* functions to trace the extent to which the value of decency is deeply rooted in society and in harmony with the principles of Islamic law.<sup>18</sup> Third, *ma'ruf* functions as a guideline for contextualizing universal Islamic values at a practical level while still considering the value of the needs and feasibility of each person.<sup>19</sup>

Second, the *mubadalah* approach, a new approach initiated by Faqihuddin Abdul Kodir. This approach necessitates that men and women have important roles to complement each other and have the same position in carrying out and obtaining virtue.<sup>20</sup> This approach is capable of giving rise to criticism of legal practices and legal products, which are dominated by patriarchal reasoning.<sup>21</sup> Third, the process of essential justice. This approach is based on the real experiences of women, both biologically and socially, which differ from men. Therefore, the concept of goodness, benefit, and benefit for women must be positioned under women's life experiences, not men's.<sup>22</sup>

### **POLYGAMOUS MARRIAGE AT THE PASURAN RELIGIOUS COURT IN 2019**

We chose the polygamy permit rulings 2019 at the Pasuruan Religious Court based on the highest numbers from the previous three years and three years after. In 2016, the number of polygamy permits was only one and was granted. In 2017 and 2018, the number of cases increased to three yearly, and all were given. In 2019, the number of instances of polygamy permitted increased to five verdicts, and all of them also remained granted. Meanwhile, polygamy allows submitted in 2020 amounted to four and was also given. Unlike previous years, one was revoked out of four applications for polygamy permits, and the judges granted the rest. Likewise, in 2022, out of three applications filed, the petitioner withdrew one, and the judge gave the rest. It shows that judges have always accepted polygamy applications for

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<sup>16</sup> Kodir, 104.

<sup>17</sup> Kodir, 105.

<sup>18</sup> Kodir, 105.

<sup>19</sup> Kodir, 106.

<sup>20</sup> Kodir, 107; Faqihuddin Abdul Kodir, *Qira'ah Mubadalah: Tafsir Progresif Untuk Keadilan Gender Dalam Islam* (Yogyakarta: IRCiSoD, 2019), 59.

<sup>21</sup> Kodir, *Qira'ah Mubadalah: Tafsir Progresif Untuk Keadilan Gender Dalam Islam*, 104.

<sup>22</sup> Kodir, *Metodologi Fatwa KUIPI: Pokok-Pokok Pikiran Musyawarah Keagamaan Kongres Ulama Perempuan Indonesia*, 111.

the past seven years. However, here, the author only takes three rulings in 2019 due to the reasons proposed: sympathy for the economic situation.

No	Year	Total of Verdicts	Verdicts Number	Noted
1	2022	3	1580/Pdt.G/2022/PA.Pas 1048/Pdt.G/2022/PA.Pas 0733/Pdt.G/2022/PA.Pas	Revoked Granted Granted
2	2021	4	1949/Pdt.G/2021/PA.Pas 1520/Pdt.G/2021/PA.Pas 0466/Pdt.G/2021/PA.Pas 0265/Pdt.G/2021/PA.Pas	Granted Revoked Granted Granted
3	2020	4	1922/Pdt.G/2020/PA.Pas <u>0495/Pdt.G/2020/PA.Pas</u> 0461/Pdt.G/2020/PA.Pas 0113/Pdt.G/2020/PA.Pas	Granted Granted Granted Granted
4	2019	5	<u>1804/Pdt.G/2019/PA.Pas</u> <u>1740/Pdt.G/2019/PA.Pas</u> <u>1522/Pdt.G/2019/PA.Pas</u> <u>1531/Pdt.G/2019/PA.Pas</u> <u>1021/Pdt.G/2019/PA.Pas</u>	Granted Granted Granted Granted Granted
5	2018	3	<u>1970/Pdt.G/2018/PA.Pas</u> <u>1296/Pdt.G/2018/PA.Pas</u> <u>0363/Pdt.G/2018/PA.Pas</u>	Granted Granted Granted
6	2017	3	<u>1560/Pdt.G/2017/PA.Pas</u> <u>0055/Pdt.G/2017/PA.Pas</u> <u>0177/Pdt.G/2017/PA.Pas</u>	Granted Granted Granted
7	2016	1	<u>1646/Pdt.G/2016/PA.Pas</u>	Granted

We reviewed three polygamy decisions at the Pasuruan Religious Court in 2019: 1531/Pdt.G/2019/PA.Pas, 1740/Pdt.G/2019/PA.Pas, and 1804/Pdt.G/2019/PA.Pas. The judges granted these three decisions, which were born for different reasons and contexts. However, on the other hand, at the same point, these decisions are regarding the same primary reason: sympathy for women's lives.

First verdict, 1531/Pdt.G/2019/PA.Pas. Tells of a 51-year-old husband's application for polygamy permission to his 49-year-old wife. They have been married for 30 years and have three children aged 28, 22 and 16. In a relatively mature marriage, the husband wants to remarry a woman the same age as his first child, 28 years old. The main goal of a polygamous husband is to feel sorry and help his future second wife. This sympathy is based on the economic condition of his second wife because there is no one to provide and take care of her necessities.

Second verdict, 1740/Pdt.G/2019/PA.Pas tells about the application for a polygamy permit for a husband and wife who are still relatively young. The

husband is 30 years old, and the wife is 27 years old. The age of their marriage is ten years old. That means both married relatively young; the husband was 20 years old, and the wife was 17. They also have two children. They are nine years old and one year old.

In contrast to the age of relatively young, which has entered a mature era, this couple's marriage is still considered to be entering a ripe age. Out of humanity, the husband then wanted to help a 20-year-old woman. The main reason is the same as in the first case: he feels sorry for his future second wife, supporting women's lives.

Third verdict, 1804/Pdt.G/2019/PA.Pas tells of the polygamy case of a 59-year-old husband against his 55-year-old wife. The age of marriage has stepped to 39 years, a mature age of marriage. During their marriage, they only had one child, who was 18 years old. However, the husband secretly entered an unregistered marriage with his second wife and has been blessed with two children, aged 28 and 27, respectively. That means there is a possibility that unregistered marriages are carried out based on the first marriage being unable to produce offspring. What is unique here, however, is that the reason is that the husband has sympathy for his future second wife. After all, no one can provide for her and care for her household.

### **JUDGE'S ARGUMENT AGAINST POLYGAMOUS MARRIAGE AT THE PASURUAN RELIGIOUS COURT**

How did the judges argue against these main reasons? There are several typologies of argument for the legal status of polygamy in the decisions of the Religious Courts, namely juridical, normative (*fiqh*), theological, and sociological arguments. The juridical statement outlines the judge's considerations based on favorable law rules. Normative arguments describe judges' considerations based on the opinions of *fiqh* books. The theological view shows how the judge includes the verse on polygamy in the decision. Lastly, sociological argumentation usually involves determining the benefit through *fiqh* rules. Other forms can involve different social sides, such as women's weak economy and weak protection. Based on this explanation, the writer observes that juridical, normative, and sociological are the three types of argumentations that stand out the most.

The juridical argument in this polygamy decision outlines alternative conditions and cumulative conditions. Alternative terms are regulated in Article 4 paragraph (2) of Law Number 1 of 1974 concerning Marriage and Article 57 of the Compilation of Islamic Law. These two provisions regulate alternative conditions, namely when the wife cannot carry out her obligations, the wife has a physical disability or an incurable disease, and the wife cannot give birth to children. The cumulative conditions are regulated in Article 58 KHI in conjunction with Article 5 of Law Number 1 of 1974. The cumulative conditions include the wife's consent and the husband's certainty that they are fair and can guarantee the wife's and children's needs. Uniquely, the judge only used the legal provisions governing alternative

conditions as information, not a means of execution. None of the wives met the alternative requirements in several of these decisions. Ultimately, the judge used the cumulative conditions to strengthen the granting of the polygamy permit application by ignoring the fulfillment of the alternative conditions. How the judge emphasizes the cumulative requirement as a vital requirement will be read in the following normative argument.

Normative arguments are arguments involving fiqh norms or verses of the Koran. Of the four decisions, the researcher found that the judge only used the third verse of Surah an-Nisa. The fragments shown are: "*Then marry women (other) that you like two, three, or four, then if you are afraid that you will not be able to do justice, then just marry one.*" This verse is positioned to reinforce the previous judge's juridical argument. The narrative is unique. The judge explained that, generally, in various places, polygamy is considered an illegal phenomenon. This fact is regarded as reinforcement that polygamy is a practice that does not violate the law. The judge further emphasized that the Sharia recommends polygamy for economically capable people who can act pretty. The judge then uses the concept of public justice as a basis for this paragraph. Judges look that society feels that it is fair if polygamy is carried out by people who are financially capable and honest in meeting their needs, even though the wife is in good health and can give birth to offspring. This judge's interpretation is undoubtedly very contradictory to Syahrur's more critical interpretation. Syahrur saw that such verses should ideally be understood by looking at the context comprehensively. Therefore, he asserted that polygamy could be legalized if the second, third, or fourth wife was a widow and had orphans.<sup>23</sup>

The sociological argument is built by exploring Islamic legal maxims and social aspects. The first category, the pattern used, considers harm and benefit. The rule used by all decisions is only one, namely, *dar'u al-mafāsīd muqaddamun 'alā jalb al-maṣāliḥ*. This rule means that rejecting harm is more important than taking benefits. Here, the judges interpret this rule by juxtaposing two things. However, the highlighted interpretation of the rules is only the harmful side. The judges focused on the love relationship between the applicant and his second wife. If the application for polygamy is rejected, the relationship will continue in an illegitimate bond. Conversely, if the polygamy application is accepted, they can continue their relationship in a legal bind. At this point, assessing the second condition must be prioritized over the second condition. This description is clear enough to prove that the judge only focused on the context of the applicant's romantic relationship with his second wife-to-be.

The second category of argumentation patterns is built based on the applicant's main reasons and witness testimony in court against the applicant's concept of

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<sup>23</sup> Firman Nurdiansyah, "Pendapat Muhammad Syahrur Tentang Poligami Serta Relevansinya Bagi Rencana Perubahan KHI," *Al-Hukama: The Indonesian Journal of Islamic Family Law* 8, no. 2 (2018): 376, <https://doi.org/10.15642/alhukama.2018.8.2.354-378>.

sympathy. One decision did not mention sympathy as the main reason for proposing polygamy. The reason for sympathy as a motive for polygamy was found through evidence at a trial by the two witnesses in two decisions.<sup>24</sup> One other verdict, the reason for sympathy, was found to be the main reason for proposing polygamy.<sup>25</sup> Uniquely, in his two considerations, the judge linked the reason for the applicant's sympathy for the second-wife candidate. There was no one to provide a living for the sense of being worried about committing an act violating religious norms.<sup>26</sup> The sympathy motive found in this study is quite different when compared to the polygamy motive carried out by several husbands in Moroseneng, Klakah Rejo, and Surabaya. The practice of polygamy found in Moroseneng was to transform the second wives, who were originally commercial sex workers, into obedient women.<sup>27</sup>

### **POLYGAMY IN THE NAME OF SOCIAL JUSTICE AND HUMANITY**

The judges' decision at the Pasuruan Religious Court in 2019 above is interesting because the two arguments do not have a solid paradigmatic footing. The first argument relates to how the judge places a sense of public justice as an essential argument in accepting the application of the polygamy clause. The second argument relates to how judges protect the humanitarian interests put forward by the applicants, both on economic and other grounds.

In the first argument, the judge prioritized a sense of public justice. Public justice is categorized as a sense of justice that lives in society. It is based on Law Number 48 of 2009, which emphasizes that when trying a quo case, judges must explore, follow, and understand legal values and a sense of justice that lives in society. However, does culture feel that it is entirely fair when polygamy is permitted even if the wife's condition does not meet the alternative requirements? These are the questions that need to be answered in this section.

The judge involved a sympathy narrative with a human frame in the second argument. The judges put more emphasis on the condition of the second wife because there was no one to support or take care of the household. Here, the judges seem to describe that polygamy can be built based on mercy. The writers have also found this image in several Indonesian Islamic films, such as *Ayat-Ayat Cinta* and *Surga yang Tak Dirindukan*. In the second film, the practice of polygamy to save the lives of women and children is a form of protection for humanity.<sup>28</sup> However, does this picture represent society's narrative, or does it violate the essence of human

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<sup>24</sup> Putusan Nomor 1740/Pdt.G/2019/PA.Pas dan 1804/Pdt.G/2019/PA.Pas.

<sup>25</sup> Putusan Nomor 1531/Pdt.G/2019/PA.Pas.

<sup>26</sup> Putusan Nomor 1531/Pdt.G/2019/PA.Pas dan 1804/Pdt.G/2019/PA.Pas

<sup>27</sup> Mega Dwi Aprilia, "Motif Poligami Dengan Wanita Pekerja Seks Komersial Eks. Lokalisasi Moroseneng Perspektif Hukum Islam," *Al-Hukama: The Indonesian Journal of Islamic Family Law* 07, no. 02 (2017): 160.

<sup>28</sup> Mukhammad Nur Hadi, "Conservative Muslim on The Screen: The Narrative of Islamic Family Law in Indonesian Films" 18, no. 1 (2021): 140.

values themselves? This section will also answer it using the three main approaches to the KUPI fatwa.

First is a *ma'ruf* approach. An essential point in applying this approach is the meaning of decency and appropriateness, that the public understands and follows the public's logic. Is the sense of social justice and sympathy for women following the norms of public decency? The second is *mubadalah*. Does the judge's acceptance of the permit for polygamy with a narrative of social justice and humanitarian aid reflect balanced justice for men and women? The third is ultimate justice. Does the concept of judging social justice and protecting the sympathy of the applicant reflect the actual value of justice based on women's experiences?

In discussing the sense of social justice in polygamy, tracing the perceptions and experiences of the public towards the practice of polygamy is essential to determine the concept of social justice to find the meaning of factual justice in polygamy. There is quite a lot of tracking of perceptions, views, or public responses to polygamy. Rismawati once tracked how women in Pekalongan viewed the practice of polygamy. Most women reject polygamy with the main narrative that polygamy may cause domestic violence.<sup>29</sup> On a larger scale, social justice in polygamy is considered by many women in Manado to be not factual. Taroreh and Rajafi discovered this when they examined the perceptions of women in Manado who are members of several organizations such as *Badan Kontak Majelis Taklim (BKMT)*, *Aisyiah*, *Wanita Serikat Islam*, *Fatayat NU*, dan *Kerukunan Wanita Islam (KWI)*. They found that these women tend to think that polygamy is currently more dominated by mere sexual desire, potentially creating harm rather than benefits.<sup>30</sup> Romli found interesting facts about women in the Consultative Council of Women's Islamic Organizations in Lampung Province. Some of the women's organizations traced include *Muslimat*, *Fatayat*, *Aisyiyah*, *KPMDI (Korp Perempuan Majelis Dakwa Islamiyah)*, *HTI (Hisbut Tahrir Indonesia)*, *Salimah (Organisasi Perempuan PKS)*, *NA (Nasiyatul Aisyiyah)*, *al-Wasliyah*, *BKMT (Badan Kontak Majelis Taklim)*. Romli found that although 30% of women reject polygamy because they worry their husbands will not be fair, the majority agree with polygamy with suitable conditions.<sup>31</sup> In this position, we may conclude that many women think polygamy is unfair and hurts women.

Tracking polygamous women's experiences has also been carried out quite a lot. Oktasari traces the experiences of polygamous women in Sagulung District, Batam City. She concluded that women often feel that their physical and spiritual needs are not fully met. Protection against them and their self-actualization is not

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<sup>29</sup> Shinta Dewi Rismawati, "Persepsi Poligami Di Mata Perempuan Pekalongan," *Muzawah* 6, no. 2 (2014): 262.

<sup>30</sup> Nusri Taroreh and Ahmad Rajafi, "Persepsi Pimpinan Badan Kontak Majelis Taklim, Aisyiah, Wanita Syarikat Islam, Fatayat NU, Dan Kerukunan Wanita Islam Di Kota Manado Tentang Poligami," *ADHKI: Journal of Islamic Family Law* 1, no. 2 (2019): 137.

<sup>31</sup> Dewani Romli, "Persepsi Perempuan Tentang Poligami (Studi Pada Badan Musyawarah Organisasi Islam Wanita Indonesia Provinsi Lampung)," *Al-'Adalah* 13, no. 1 (2016): 125-26.

fulfilled.<sup>32</sup> Regarding the polygamy case in Rajabasa, Bandar Lampung and Abrori emphasized that the polygamous family in Rajabasa was not harmonious, both with the first and second wives. Not only that, but their children's rights are also not fulfilled because parents' attention to their children is not optimal.<sup>33</sup> Farid and Hidayat traced the practice of polygamy by Kiai in Madura to prove social justice. By interviewing ten informants, he found that women who were polygamous by Kiai in Madura experienced psychological violence. This violence was established through their resistance, both openly and secretly. Closed resistance creates conflict between wives, such as demanding separation of the house, showing jealousy, and going against the husband's orders. Open resistance is carried out by suing for divorce in the religious court or taking over the role of the first wife.<sup>34</sup>

On the other hand, some data confirms that polygamy is accepted and supported by women. Researching polygamous families in the Special Region of Yogyakarta, Thalita found that polygamous middle-class Muslim families practice physical and spiritual justice well. Women get guaranteed religious functions and guaranteed economic tasks at the same time.<sup>35</sup>

The description of some of the study findings above shows that the public expresses two concepts of justice. First, polygamy justice is not fully realized, so it often hurts women, both in the context of thought and practice. Second, polygamy justice is manifested quite well in polygamous marriages. However, the data above are more dominant in the first concept of social justice. At this point, it can be said that the idea of public justice differs from that of judge justice. Public opinion regarding social justice in the context of polygamy is justice that does not hurt women. The positive impact of polygamy justice is not felt by women today. Therefore, it is unsurprising that Rohman believes that polygamy was only practiced in the early era of Islam, specifically after the Uhud war.<sup>36</sup>

Here, using the *ma'ruf* approach, the value of decency or appropriateness of the social justice norm of polygamy is inconsistent with the public's sane logic. That means the judge does not recognize the sense of justice that grows and lives in a society of polygamy. The experiences of polygamous women that are scattered in various research data are not understood by judges as factual justice. In other words, judges build justice based on their perspective as a judge, especially when they prioritize this value without paying attention to whether the wife has met the

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<sup>32</sup> Megawati Oktasari, "Persepsi Perempuan Yang Dipoligami (Studi Komunikasi Interpersonal Pada Masyarakat Kecamatan Sagulung Kota Batam)" (Institut Ilmu Al-Qur'an Jakarta, 2022), 153.

<sup>33</sup> Khoirul Abror, "Poligami Dan Relevansinya Dengan Keharmonisan Rumah Tangga (Studi Di Kelurahan Rajabasa Bandar Lampung)," *Al-Adalah* 13, no. 2 (2016): 227.

<sup>34</sup> Mohtazul Farid and Medhy Aginta Hidayat, "Perlawanan Perempuan Pesantren Terhadap Poligami Kiai Di Madura," *Edukasi Islam* 10, no. 2 (2021): 1008, <https://doi.org/10.30868/ei.v10i02.1805>.

<sup>35</sup> Malpha Della Thalita, "Studi Kasus Keluarga Poligami Di Daerah Istimewa Yogyakarta" 16, no. 1 (2019): 184.

<sup>36</sup> Arif Rohman, "Reinterpret Polygamy in Islam: A Case Study in Indonesia," *International Journal of Humanities and Social Science Invention* 2, no. 10 (2012): 73.

alternative requirements. It proves that the judges have injured the concept of social justice that was created for them and, at the same time, violated human considerations in their ideal vision.

In perspective, *mubadalah*, the concept of social justice and protection of humanity by judges must create a balanced vision. The idea of justice referred to by the judge is still built on one leg. That is, the concept of social justice created by judges does not consider justice in the perception of women as polygamous parties. Likewise, on considerations of sympathy because of women's financial problems, which the author calls protection for humanity. Here, the judges do not question the humanitarian reasons as a far-fetched reason because neither the Marriage Law nor the KHI mentions humanitarian reasons as proposed by the applicants. The reason for helping women was ultimately wrapped up in a narrative of social justice in public perception.

Thus, judges at this point still maintain patriarchal justice, not reciprocal justice, which protects men as well as protects women. In practice, judges must create laws that care and side with women and children. If justice appears within a reciprocal framework, the granting of the request is ideally rejected. It will protect men from the potential to create discrimination and violence against women. Vice versa, women will get essential justice because they are protected from discrimination in polygamy. True justice, based on women's life experiences, is well realized at this point.

At this point, the essential justice in the polygamy licensing decision can be traced through experience with various perspectives, such as biological, sociological, and anthropological. Many studies say that polygamy tends to ignore the fulfillment of women's and children's livelihood rights. Majidah found that in Temboro and Kuwon, polygamous men did not provide the maximum for their families.<sup>37</sup> Rohmatulloh also found the same thing in Linggar.<sup>38</sup> Ridho and Abdullah even emphasized that polygamy has implications for family harmony. Wives and children will experience violence psychologically and physically. In addition, income is not divided evenly due to minimal income.<sup>39</sup> This finding is, of course, an essential record of why the religious court still granted his polygamy request even though he did not meet the cumulative requirements. Therefore, it is not surprising that women file for divorce because of the negligence of their husbands after

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<sup>37</sup> Muthi'ani Uswatul Majidah, "Pemenuhan Nafkah Pada Keluarga Poligami Perspektif Hukum Islam (Studi Kasus Di Desa Temboro Dan Desa Kuwon Kecamatan Karas Kabupaten Magetan)" (Institut Agama Islam Ponorogo, 2020), 81.

<sup>38</sup> Muhammad Rifqi Rohmatulloh, "Pemberian Hak Nafkah Istri Oleh Suami Yang Poligami (Studi Kasus Pada Pasangan Y Dan W Yang Poligami Di Desa Linggar Kecamatan Rancaekek)" (Universitas Islam Negeri Sunan Gunung Djati Bandung, n.d.).

<sup>39</sup> Moh Nailor Ridho and Kudrat Abdillah, "Implikasi Poligami Terhadap Kerukunan Keluarga Di Kecamatan Pragaan Kabupaten Sumenep," *An-Nawazil* 5, no. 1 (2023): 1-29.

polygamy on their wife's maintenance.<sup>40</sup> These findings clearly illustrate that polygamy does not represent true justice, especially for women and children.

At this point, the judges' *ijtihad* at the Pasuruan Religious Court in the three cases of polygamy does not represent protection for women and children. In the name of public social justice, which is vague and has no standards, and in the name of humanity towards women, judges have shown that polygamy can be realized without having to consider the negative impacts of polygamy, which are already numerous in social reality. Judges who are supposed to feel the side of humanity and social justice are unable to realize both in the case of polygamy.

Within the *Maqashid* framework, the polygamy decisions above failed to produce *Maqashid* social values.<sup>41</sup> *Maqashid* is only interpreted within a narrow framework and one perspective. The holistic character of *maqashid*, as introduced by Jasser Auda, is not shown in the consideration. Therefore, the *maqashid* presented in the decisions needs a progressive and advocative nuance. Even though judges who repeatedly handle polygamy cases do not carry out the same interpretation of the meaning of justice in various polygamy cases, the New readings of patients with new perspectives can ideally be explored holistically to discover and create social justice and human values. It needs to be done so that the life of women as objects and men as subjects of polygamy can achieve the mission of life with the spirit of actual benefit.<sup>42</sup> The judge's efforts to predict the negative and positive impacts of polygamy are not based on women's experiences. Based on *ma'alatul af'al* theory, to predict accurately and reach the point of truth, a mujtahid or judge can rely on experience.<sup>43</sup>

The fact that judges are more concerned with social justice and humanity under the mask of patriarchal reason is essential in constructing judges' legal reasoning. The Pasuruan Religious Court's efforts prove that judges do not have a sense of partiality and concern for women. Therefore, at this point, what causes discrimination in a polygamous marriage is not only polygamists but also judges. Judges have a significant role in creating spaces for injustice in polygamous marriages because, in the judges, polygamy can be carried out in the context of Indonesian law. Here, the judges indirectly display their *ijtihad* reasoning, which cannot be separated from the hegemony of masculinity. The product of hegemony seems to be a relevant norm in practice.

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<sup>40</sup> Nasa'y Aziz and Nor Syahida Binti Ahmad Ramlan, "Ketidakadilan Suami Yang Berpoligami Dalam Memberi Nafkah Sebagai Alasan Cerai Gugat (Analisis Putusan Mahkamah Syariah Bentong Pahang Nomor Kasus Mal No.04300-76-0217)," *Gender Equality* 1, no. 2 (2015): 95-114.

<sup>41</sup> Jasser Auda, *Wanita Dan Masjid* (Jakarta: Amzah, 2015), 25.

<sup>42</sup> Faqihuddin Abdul Kodir, *Sunnah Monogami: Mengaji Al-Qur'an Dan Hadis* (Yogyakarta: Ummah Sinaw Mubadalah, 2021), 40.

<sup>43</sup> Helmi Basri, *Toeri Maalatul Af'al: Solsui Problematikan Kontemporer Dalam Bingkai Maqashid Syari'ah* (Jakarta: kencana, 2021), 28.

The judges' arguments for the three cases above are interesting if they are drawn into a typology of responses to the practice of polygamy in Indonesia, as described by Nina Nurmila: textualist, semi-textualist, and contextualist. Textualists argue that polygamy is permissible even if it has value for the benefit of the public because it can help the needs of widows and orphans. Semi-textualists say that polygamy is only permitted when there is certainty of justice for the wife and children and with a limit of four wives. It aligns with Law No. 1 of 1974 and the Compilation of Islamic Law. Contextualists believe polygamy should not be practiced because it is difficult for a person to ensure justice for his wives and children.<sup>44</sup>

Based on the typology above, judges provide in two ways: textualists and semi-textualists. The textualist position is read when the judge involves a narrative of economic protection and women's lives as well as consideration of the public's sense of justice in granting permission for polygamy. The semi-textualist position arises when the judge is accompanied by emphasizing the husband's justice if he wants to do polygamy, both physically and mentally, in permitting the request for polygamy. This second position is similar to the opinion of Huzaemah Tahido.<sup>45</sup> This fact further confirms that the primary purpose of the law is to protect the existence, identity, and dignity of human beings and their future. Has not been reached optimally. The portrayal of reasoning above actually created a living law and was born without an essential mission of benefit. Therefore, new approaches to producing law must have a beneficial and humane dimension.<sup>46</sup> It is where the relevance of the three KUPI fatwa approaches is used as a unique reference for judges or other legal interpreters in reading polygamy cases so that the considerations used are based on experience and are not paradigmatically flawed.

## CONCLUSION

The polygamy cases at the Pasuruan Religious Court in 2019 were motivated by sympathy. This motive is referred to as a humanitarian motive because polygamy is considered a practice capable of saving women's lives from the hassle of managing the family's financial burden, which women bear independently. Uniquely, in decisions, this motive sometimes appears at the beginning of the polygamy permit application or is known through witness testimony. However, the explanation was found that humanity was seen as a legal reason for the petitioners, and the judges did not seem to refuse. Instead, the judge framed this reason because of a sense of

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<sup>44</sup> Nina Nurmila and Linda Rae Bennett, "The Sexual Politics of Polygamy in Indonesian Marriages," in *Sexuality, Culture and Health Series*, ed. Linda Rae Bennett and Sharyn Graham Davies (New York: Routledge, 2015), 73.

<sup>45</sup> Euis Nurlaelawati, *Expansive Legal Interpretation and Muslim Judges' Approach to Polygamy in Indonesia*, *Hawwa*, vol. 18, 2020, 199, <https://doi.org/10.1163/15692086-12341380>.

<sup>46</sup> Kodir, *Sunnah Monogami: Mengaji Al-Qur'an dan Hadis*, 20.

justice in the eyes of the public. It is where the judge positions humanity as a tool to open the door to polygamy.

This concept of humanity and a sense of public social justice from the perspective of the KUPI fatwa approach does not represent actual human values. In the *ma'ruf* approach, the interpretation of social justice and protection of humanity in accepting polygamy is not in line with the common perception of the population, especially the perception of a specific group of people, including women's perception, toward polygamy. Women's experiences are not given much insight into *ijtihad* reasoning. As a result, the judge goes against the common logic of women regarding polygamy, although, on the other hand, the minority of women support polygamy. Here it is, in the lens of the *mubadalah* approach, judges do not realize the values of factual justice based on women's experience. The judge is only present as a justification for men's interests in polygamy, not protecting women. When drawn to an essential justice approach, judges do not read women's experiences in a biological, sociological, or sociological context so that justice conceptualized in polygamy decisions does not create a progressive new interpretation of justice but a conservative interpretation that is not advocative of fulfillment and protection of women's rights. Although regarding social justice is essential, considering social justice that violates the logic of women's general justice is also a problem where this is ideally not worth considering.

At this point, the authors recommend some issues. *First*, building a paradigm for the protection of women and children for judges is especially important in cases of polygamy. Therefore, academics and practitioners have a significant role in reconstructing their *ijtihad* reasoning. *Second*, positioning women's experience as part of the judge's *ijtihad* process is ideally absolutely formulated to produce legal products that are balanced and of broad benefit value. Therefore, the enrichment of sources of *ijtihad* in decisions should ideally be directed at exploring research-based references to women.

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