

The Dynamics of Family Law Reform in Asia and Africa (Portrait of Polygamy Regulations in Indonesia, Malaysia, Pakistan, Morocco and Tunisia)

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Abstrak: Salah satu reformasi hukum keluarga yang paling banyak digalakkan di negara-negara Muslim modern adalah isu poligami. Sampai saat ini, poligami dianggap sebagai bentuk diskriminasi dan marginalisasi perempuan, selain syarat kebolehan poligami karena syarat isteri tidak ditemukan secara eksplisit dalam nash atau pendapat ulama fikih tradisional. Penelitian ini menggunakan pendekatan deskriptif komparatif dengan menganalisis sejarah, dasar hukum, dan pandangan ulama madzhab tentang poligami, serta membandingkan penerapan peraturan poligami di negara-negara Asia dan Afrika (Indonesia, Malaysia, Pakistan, Maroko, dan Tunisia). Hasil penelitian menunjukkan bahwa pemikiran di balik aturan poligami yang ditetapkan di negara-negara Muslim modern di Asia dan Afrika tampaknya lebih dominan menggunakan metode reformasi ekstra-doktrinal. Hal ini tidak lepas dari tujuan reformasi hukum keluarga, upaya penyatuan hukum dalam masyarakat yang heterogen, tuntutan peningkatan status perempuan, dan merespon perkembangan masyarakat. Faktor latar belakang antara lain pengaruh penjajah, reinterpretasi terhadap nash dan madzhab yang dianut, dan faktor geopolitik lainnya.

Kata kunci: Reformasi Hukum Keluarga; Poligami; Asia dan Afrika.

Abstract: One of the most widely promoted family law reforms in modern Muslim countries is the issue of polygamy. Until now, polygamy is considered as a form of discrimination and marginalization of women, in addition to the conditions for the permissibility of polygamy because the wife's condition is not found explicitly in the texts or opinions of traditional fiqh scholars. This study utilizes a comparative descriptive approach by analyzing the history, legal basis, and views of Madhab scholars regarding polygamy, as well as comparing the application of polygamy regulations in Asian and African countries (Indonesia, Malaysia, Pakistan, Morocco, and Tunisia). The results show that the reasoning behind polygamy regulations set in modern Muslim countries in Asia and Africa seems to be more dominant using the extra-doctrinal reform method. This cannot be separated from the goals of family law reform, the effort to unify law in a heterogeneous society, demands to increase women's status, and respond to community developments. The background factors include the influence of the colonizers, reinterpretation of the texts and madhabs adopted, and other geopolitical factors.

Keywords: Family Law Reform; Polygamy; Asia and Africa

INTRODUCTION

The adjustment of Islamic law to social conditions in a territorial context is increasingly being heard. This is inseparable from the fallacy of the perception that

every Muslim has the right to interpret his religion according to his intellectual inclination and desires. As scientist, Anderson said there are two references to legal reform in the Islamic world. *First*, shari'a that is gradually increasingly neglected from daily life, such as trade law, criminal law, and other rules to further follow "foreign law". *Second*, family law that is considered sacral will undergo substantial changes by means of reinterpretation. One such effort in reconstruction of Islamic law the most prominent is in the field of family law. Because this can be used as a benchmark for the implementation and recognition or not of Islamic law in any country.¹

Discussions related to family law reforms in Muslim countries include polygamy with various rules, ranging from prohibitions, restrictions, narrowing of things, to those that the permissibility of polygamy on mild terms. But what is interesting to the author is about the reasons for polygamy due to the various circumstances of the wife. In neither the Qur'an nor the hadiths of the Prophet, there are explicitly provisions governing the reasons for polygamy due to various circumstances of the wife. Only Q.S an-Nisa explicitly mentions that polygamy is permissible under the condition that a man is handed over to him the management of the property of orphans in order to further queer from one woman to help him with the affair.²

In practice, polygamy received a mixed response. On the one hand, polygamy is rejected with a wide variety of arguments, both normative and psychological. It is even associated with gender injustice because it is considered a form of discrimination against women. On the other hand, polygamy is campaigned, because it is considered to have a firm normative backing and is seen as one of the alternatives to solve the phenomenon of cheating and prostitution.

Apart from that, polygamy is the problem most widely sanctioned by law by family law in modern Muslim countries. There are at least fifteen Muslim countries that have complicated and imposed legal sanctions on the issue of polygamy in their family laws. The fifteen countries, Tunisia is the country that strictly prohibits polygamy, by imposing prison sanctions or fines on the perpetrators.³

¹ Toha Andiko, "Pembaruan Hukum Keluarga di Dunia Islam: Analisis Terhadap Regulasi Poligami dan Keberanjakannya dari Fikih", *Jurnal Nuansa*. Vol. XII, No. 2 (2019), 294

² Q.S An-Nisa: 3

³ From fifteenth country, The Conditions (legislation) law family in modern Muslim countries about rule polygamy, get Classified become three categories: First, countries that same very forbid practice polygamy, like Turkey and Tunisia. Second, countries that Allows polygamy with requirement that relative tight (complicated), like Pakistan, Egypt, Morocco, Indonesia, Malaysia, Iran, Iraq, Somalia, Shia and Yemen (south), Jordan, Lebanon and India. Third, countries that Treat polygamy in a more loose, like Saudi Arabia and Qatar. See: Tahir Mahmood, *Personal Law in Islamic Countries: History, Texts and Comparative Analysis* (New Delhi: Academy of Law and Religion, 1987), hlm. 49-275; dan Tahir Mahmood, *Family Law Reform In The Muslim World* (New Delhi: The Indian Law Institute, 1972), hlm. 15-255; dan Muhammad Amin Summa, *Hukum Keluarga Islam di Dunia Islam* (Jakarta: PT. RajaGrafindo Persada, 2004), hlm. 178-183; dan Mardani, *Hukum Perkawinan Islam di Dunia Islam Modern* (Yogyakarta: Graha Ilmu, 2011), hlm. 109-114; dan J.N.D. Anderson, *Islamic Law in Modern World* (New York: New York University Press, 1959), diterjemahkan oleh Machnun Husein, *Hukum Islam di Dunia Modern* (Surabaya: Amarpres, 1990), hlm. 53-54.

Meanwhile, Indonesia is a country that restricts the practice of polygamy by setting quite strict requirements, namely alternative and cumulative requirements. Because basically the marriage law in Indonesia adheres to the principle of monogamy, namely a man can only have a wife and a woman can only have a husband. However, under certain circumstances, the court may give permission to a husband to have more than one wife if desired by the parties concerned.⁴

The author elaborates the various rules of polygamy in several countries in Asia and Africa, namely the countries of Indonesia, Malaysia, Pakistan, Morocco, Somalia, and Tunisia. These countries have different rules on the issue of polygamy. Starting from whether or not polygamy is allowed in the renewal of family law, as well as the cause of polygamy.

Research on polygamy in modern Muslim countries is not new, some of the research is Polygamy in Family Law in the Islamic World. The findings of this study state that the provisions that absolutely prohibit polygamy are a form of equalization of rights between men and women in the family. Meanwhile, the state that allows polygamy on the condition that it is tightened shows efforts to find common ground between legalizing polygamy on the one hand and efforts to protect women's rights on the other through strict polygamy requirements. Then, the article with the title Polygamy and Its Sanctions According to the Legislation of Modern States written by Muhibbuthabry⁵, compared the diversity of sanctions given to polygamous people in the countries of Indonesia, Tunisia, Pakistan, Egypt, Syria, and Malaysia.⁶ Examining the results of previous studies, it can be understood that this research is different from previous studies. Because in addition to discussing the comparison of polygamy requirements, this study also discusses the analysis and categorization of polygamy requirements based on Islamic law.

Using a comparative descriptive method, this study discusses and compares the material on polygamy requirements in Indonesia, Malaysia, Pakistan, Morocco and Tunisia. Then, it was analyzed with the concept of polygamy according to Islamic law. Based on these problems, the purpose of this study is so that readers can know and understand the history, legal basis, and views of Madzhab scholars on polygamy. In addition, it can also know and understand in particular related to the rules and whether or not polygamy is allowed in several countries in terms of Islamic law.

POLYGAMOUS STUDIES IN ISLAMIC LAW

History of Polygamy

Polygamy has been going on for a long time before the coming of Islam. The nations of Europe, Asia, and Africa have been practicing polygamy for a long time. Therefore, it is not true that there are accusations that Islam is the one that introduce to

⁴ Article 3 verse (1) and (2) Law No. 1 Th. 1974 about Marriage.

⁵ Lilik Andaryuni, "Poligami dalam Hukum Keluarga di Dunia Islam", *Jurnal Sipakalebbi*, Vol. 1, No. 1, 2013, 95-112.

⁶ Muhibbuthabry, "Poligami dan Sanksinya Menurut Perundang-Undangan Negara-Negara Modern", *Jurnal Ahkam*, Vol. 16, No. 1, Januari 2016, 9-21.

the rules on polygamy. It's just that the difference the Islamic religion limits polygamy within the limit of the maximum number of four wives.⁷

For about 1300 years, scholars have never dissented on the law of polygamy (*ta'addud al-zawjat*). Until the 18th century/ 13th H, all scholars agreed that polygamy was legally *mubah*. There are no pros and cons or disagreements about allowing polygamy among Muslims. Because in this case his ability is already based on the *qath'i* (definite) postulate. However, in the 19th century AD/ 14 H the secular western imperialists stuck their nails in the Islamic World. In the situation of the Islamic world gripped by the infidel ideology of the invaders, there appeared some modernists and liberalists who sued and rejected polygamy. Sayyid Ahmad Khan, for example, views that the principle of marriage in Islam is monogamy, while polygamy is an exception. Polygamy is not allowed except in rare circumstances and should be limited to exclusionary conditions only.

The attacks on polygamy were part of the war of thought between Western imperialists who were Christians and had a capitalism-secular ideology on the one hand, and Muslims who believed in Islam as an ideology on the other. But unfortunately, this war of thought seems to have been won by the pagan Western imperialists, with the support of the liberal intelligentsia and the secular rulers. The evidence is that many Islamic countries prohibit or restrict polygamy. For example, Tunisia (Personal Status Law of 1957), Morocco (Law of 1958), Pakistan (Muslim Family Law Ordinance of 1961), Indonesia (Law 1/1974), and so on.⁸

Legal Basis of Polygamy

The concept of polygamy in Islam is with the restriction of four wives and with fair conditions. As for the basis for limiting polygamy in Islam, it is regulated in the letter An-Nisa verse 3:

وَإِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَاثَ وَرُبَاعَ ۗ
فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَٰلِكَ أَذَىٰ أَلَّا تَعُولُوا

"And if you are afraid that you will not be able to do justice to (the rights of) an orphaned woman (if you marry her), Then marry the (other) women whom you please: two, three or four. Then if you are afraid that you will not be able to do justice, Then (marry) only one, or the slaves you have. thus it is closer to not persecuting." (QS. An-Nisa : 3).

Meanwhile, *asbabun nuzul* this verse is when Urwah ibn Zubair asked Aisyah ra about the content of verse 3 of this letter of An-Nisa, then Aisyah replied:

⁷ Ahmad Azhar Basyir, *Hukum Perkawinan Islam*, Cet.9, (Yogyakarta: UII Press, 1999), 38

⁸ M. Shiddiq Al-Jawi, "Poligami dalam Tinjauan Historis, Politis, dan Normatif", *Jurnal Kajian Tsaqofah* (2009), 149-150

"O my sister's child, this orphan is in the care of his guardian. He mixed his property with his guardian's property, and then the guardian was attracted to his treasure and beauty. Then the guardian was about to marry her by giving a dowry not as usual given by others. Therefore they were forbidden to marry the orphaned women except by doing justice to him and giving the dower as applicable, and were commanded to marry the women else".⁹

When verse 3 of this letter of An-Nisa came down, the saints objected to becoming the guardians of the orphans. Then among them there was a man who had ten or delapan wives, so that he could not be able to do justice among them, and then came down verse 4 of the epistle of An-Nisa.¹⁰

In the Isnad imam Ahmad and At-Tirmidzi it is also narrated that when Ghailan bin Salamah Ats-Tsaqafi converted to Islam, while he had ten wives,¹¹ then the Prophet SAW told him to choose four the wife among them (and divorced the others):

وَعَنْ سَالِمٍ عَنْ أَبِيهِ رَضِيَ اللَّهُ عَنْهُ أَنَّ غَيْلَانَ بْنَ سَلَمَةَ أَسْلَمَ وَلَهُ عَشْرُ نِسْوَةٍ فَأَسْلَمْنَ مَعَهُ فَأَمَرَهُ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَنْ يَتَخَيَّرَ مِنْهُنَّ أَرْبَعًا. (رواه أحمد والترمذي وصححه ابن حبان والحاكم وأعله البخاري وأبو زرعة وأبو حاتم)¹².

"From Salim from his father, Ghailan bin Salamah converted to Islam and he had ten wives who also converted to Islam with him. The prophet SAW then told him to choose four wives among them (and divorce the others)."

As for the ushul fiqh paradigm, the law of polygamy can be explained by first digging into some lafaz or key words in verse 3 of surah al-Nisa', such as *fankihuu*, and *al-'adlu*. The word *fankihuu*, in science ushul fiqh is a word of command (*amr*), which means "then marry". According to the majority of experts in the science of fiqh and interpretation, that the general rule of "word of command" in the Qur'an, has implications of compulsory law and necessity (*ilzam*), unless there is an accompanying postulate or argumentation (*qaraa'in*) that requires the word command to be interpreted differently, besides compulsory.¹³

Thus, the word command in the Qur'an points to two legal implications. First, the word order that is not accompanied by *qaraa'in*, then it has mandatory legal implications. Secondly, the word command accompanied by *qaraa'in*, then it has legal implications of *mubah*. Because *fankihuu* is a form of the word command and means

⁹ Sayyid Quthb, *Tafsir Fi Zhilalil Qur'an, Volume 2* (Jakarta: Gema Insani, 2001), hlm. 275

¹⁰ Imam Jalaluddin Al-Mahalli dan Imam Jalaluddin As-Suyuti, *Tafsir Jalalain: Berikut Asbabun Nuzul Ayat Surat Al-Fatihah s.d. Al-Isra'* (Bandung: Sinar Baru Algensindo, 2008), hlm. 310

¹¹ Sayyid Quthb, *Tafsir*, hlm. 276

¹² Al-Hafidz Ibnu Hajar Al-Asqalani, *Bulughul Maram: Min Adillati Al-Ahkam* (Indonesia: Dar Ihya' Al-Kutub Al-Arabiyah, t.t.), hlm. 458

¹³ Muhammad 'Ali al-Sabuni, dalam *Rawa'i' al-Bayan Tafsir Ayat al-Ahkam Min al-Qur'an, Juz I* (Beirut: Dar Al-Fikr, t.t.), hlm. 334.

command, and has a *qarinah* that is in the form of fulfilling the just conditions, the law of polygamy in terms of the word *fankihuu* has legal implications.¹⁴

Although lafaz *fankihuu* can already be known for its meaning, the law of polygamy cannot be punished only by the approach of the meaning of lafaz *fankihuu*. Furthermore, the search for the word focuses on lafaz *al-'adlu* which means fair. In verse 3 of surah al-Nisa', the meaning of just is found in 2 (two) words, namely the word *al-'adlu* and the word *al-qisthu*. In other words, the word *al-'adlu* and the word *al-qisthu* have the same meaning that is just. According to M. Quraish Shihab, the word *al-'adlu* and the word *al-qisthu* are often synonymized and translated into Indonesian to be just.¹⁵

However, there are some scholars who distinguish the two words by saying that the word *al-'adlu* is applicable to both others and oneself, but that justice may not please either party. Whereas the word *al-qisthu* is to do justice between two or more people, and justice that makes both of them happy. However, since the application of the two words is in a line of sentences that have different contexts, of course, the meaning between the word *al-'adlu* and the word *al-qisthu* is different in meaning.¹⁶

Polygamy according to Madzhab Scholars

The madzhab scholars, namely Imam Hanafi, Imam Shafi'I, Imam Ahmad, and Imam Malik agreed that polygamy is permissible. This can be concluded if we examine the kitab *al-Fiqh 'Ala al-Madzahib al-Arba'ah* which discusses the distribution of living and overnight stay to the wives, (*mabahits al-qasm baina al-zawjat fii al-mabit wa al-nafaqah wa nahwihima*). Meanwhile, in the book of *Maratib al-Ijma'*, Ibn Hazm says that the scholars have agreed that if a Muslim marries a maximum of four women at a time, then the law is halal.

According to the fiqh perspective, polygamy in the fiqh books is called *ta'addud al-zawjat* which means many wives, actually no longer an issue. That scholars do agree on the ability of polygamy, even with various requirements. As-Sarakhsi declared the ability of polygamy and required that the perpetrators should do justice to the wives.¹⁷

Men who want to be polygamous according to fiqh scholars, have at least two conditions, namely having sufficient financial ability to finance all needs with the increase of wives and must treated his wives fairly. So, every wife should receive equal treatment in fulfilling marital rights as well as other rights.¹⁸ The scholars of the Sunnah have also agreed, that forbidden for a husband has more than four wives. The fifth

¹⁴ *Ibid*, hlm. 334

¹⁵ M. Quraish Shihab, *Tafsir al-Misbah: Pesan, Kesan dan Keserasian al-Qur'an*, Vol. II (Jakarta: Lentera Hati, 2006), hlm. 338.

¹⁶ *Ibid*, hlm. 338

¹⁷ Tihami dan Sohari Sahrani, *Fiqh Munakahat: Kajian Fikih Nikah Lengkap*, (Jakarta: Rajawali Pers, 2014), 360

¹⁸ Abdul Rahman Ghozali, *Fiqh Munakahat, cet. 1*, (Jakarta: Kencana, 2003), 130

marriage and so on is considered void and invalid, unless the husband has divorced one of the wives of the four and has expired his iddah.¹⁹

REGULATION OF POLYGAMY IN ASIA AND AFRICA

Indonesian country

The state of Indonesia is a country whose majority of the population is Islamic and adheres to the Imam Shafi'i school. Indonesia has a unique family law system, due to the mixing of Islamic law and customary law. Thus, under the rule of the Dutch East Indies and Japan, Indonesia enacted customary law modified with Islamic law. It has been regulated since 1882 with regulations on religious justice.²⁰

The Indonesian state itself makes it difficult to practice polygamy with the conditions contained in Law Number 1 of 1974 concerning marriage and Compilation of Islamic Law. In principle in a marriage, a man can only have a wife and a woman can only have a husband. This is regulated in article 3 paragraph 1 of Law Nomor 1 of 1974 concerning marriage. Thus, basically the Indonesian state adheres to the principle of monogamy. However, the court may give permission to a husband to have more than one wife if desired by the parties concerned. If the husband intends to be more than one wife, then he is obliged to apply in writing accompanied by the reasons referred to in articles 4 and 5 of Law Number 1 of 1974 concerning marriage juncto article 41 of PP RI Number 9 of 1975 concerning the implementation of Law Number 1 of 1974 concerning marriage, i.e. the existence of permission from Religious Court in the area where he lives, by bringing a quotation of the previous Marriage Certificate and other permits necessary.²¹

The Religious Court examined and sought the consent of the first wife either orally or in writing. The Religious Court only gives permission to a husband who will marriage more than one wife in the circumstances described in the marriage law on the alternative conditions of the wife.²² while the cumulative conditions are regulated in article 5 of Law Nomor 1 of 1974 concerning marriage.²³ If there is violate the provisions that have been regulated regarding polygamy, will be punished with a fine of up to 7,500 rupiah. Likewise, registrar employees who violate the provisions are punished with imprisonment for a period of three months or a fine of as high as 7,500 rupiah.²⁴

¹⁹ Abdul Rahman, *Penjelasan Lengkap Hukum-Hukum Allah Syari'ah*, (Jakarta: Rajawali Press, 2002), 192.

²⁰ Tahir Mahmood, *Personal Law in Islamic Countries*, (New Delhi: Academy of Law and religion, 1987), 205

²¹ UU Number 1 Year 1974 about marriage juncto PP RI Number 9 Year 1975 about implementation UU Number 1 Year 1974 about marriage

²² Wife do not get run his obligations as seorang wife, wife keep disabled body or disease that do not can Healed, Or wife do not get give birth descendents.

²³ that is the presence of assent wife or wives and the presence of Certainty that husband can Guarantee all necessity live for wife and Children Their. Besides that also must ada guarantee that Yes husband will Occurred Fair to for wife and cubs.

²⁴ Article 45 PP No. 9 Year 1975 about implementation UU Number 1 Year 1974 about marriage

The issue of polygamy is also a discussion in article 52 of the draft on the Material Law of Religious Courts year 2008 on the provision of marriage more than one, i.e. the parchment carried out with a wife secondly, thirdly, or fourth without the permission of the Court, so it has no legal force. Article 145 also stipulates a criminal provision, that any person who enters into a polygamous marriage without obtaining prior permission from the Court, will be punished with a maximum fine of Rp. 6,000,000.00 (six million rupiah) or a maximum sentence of 6 (six) months confinement.²⁵

Malaysia

Malaysian state members (55%) are predominantly Muslims by adhering to the Shafi'i school. Malaysian legislation has been subjected to two legislative challenges. First, namely in the years 1976-1980 which contained marriage and divorce. Second, it was implemented in 1983-1985 which was named the Islamic Family Law Act. This new law was implemented in 1983 in Kelantan, Negeri Sembilan, and Malacca. Then in 1984 it was held in Kedah, Selangor, and the Guild area, and in 1985 it was carried out in Penang.

Based on the Malaysian Marriage Law on whether or not a man can practice polygamy, there are three important things that must be considered, namely the requirements of polygamy, the reasons for whether or not a man can or whether or not polygamy, and the procedure. However, what distinguishes it from Indonesian legislation is that in Malaysia there is no penegasan about the principle of marriage, both monogamy and polygamy. From the three important things above, the author will limit the reasons used by the husband to the wife's situation for whether or not polygamy is allowed.

The basis for the court's consideration of whether or not to give permission to polygamy, is seen on the part of the wife and husband. The reasons on the part of the wife include infertility, physical disobedience, deliberately unwilling to restore the rights of copulation, unfit in terms of physicality for intercourse, and a crazy wife. Whereas the consideration on the part of the husband is that it is economically m ampu to bear the wives and children of offspring, striving to be fair among the wives, the marriage does not cause harm to the religion, life, mind, body, or property of the wife who has been married first, as well as p the marriage will not lead to a decrease in the dignity of wives or persons associated with marriage whether directly or indirectly.²⁶ The content of polygamy under the Malaysian Islamic Family Law (Federal Territories) Act 1984:

23. 1) A man, for the duration of the marriage shall not, except with the prior written permission of the Court enter into another marriage with another woman, and such a marriage without such permission shall not be registered under this Act. The Court

²⁵ Lia Noviana, "Status Wanita di Negara Muslim Modern: Studi Terhadap Hukum Keluarga di Tunisia dan Indonesia", *Jurnal Penelitian Islam*, Vol 13, No. 02 (2019), 9-11

²⁶Toha Andiko, "Pembaruan Hukum Keluarga...", 300

may if it is proved that the marriage is valid under the Sharak Law ordering it to be registered subject to section 123.

2) Subsection (1) applies to marriages in the Federal Territory of a man residing within or outside the Federal Territory and for marriages outside the Federal Territory of a man residing in the Federal Territory of a man residing in the Federal Territory.

3) The application for permission is filed with the Court in the prescribed manner and must be accompanied by a statement stating the reasons for which the proposed marriage was considered fair and necessary, the present income of the applicant, the particulars of his commitments and his ascertainable financial obligations, the amount of his dependents, including those who will be his dependents as the effect of the proposed marriage, and whether the consent or views of the existing wife or wife of the proposed marriage have been performed, is obtained.

4) At the time of receiving the application, the Court summoned the petitioner and his existing wife or wives to be present at the hearing of the requirement, which must be before the court, and the Court may grant the requested permission if satisfied. (letters a,b,c,d,e)

5) A copy of the application under subsection (3) and the statutory statement required by that paragraph shall be furnished with a summons on each of the existing wives.

6) Any party aggrieved by or dissatisfied with the decision of the Court may appeal against the decision in the manner provided for in the Administrative Act for appeal in civil matters.

7) Any person who performs a marriage contrary to subsection (1) shall promptly pay the entire amount of the dowry and the gift to the existing wife or wives, the amount of which if it is not paid, it can be returned as a debt.

8) The ceremonial procedure and registration of marriages under this section shall be similar in all respects to those applicable to other marriages performed and registered in the Federal Territory under the Federal Territory under the Act this.²⁷

Pakistan

Regarding polygamy in Pakistan itself, the Malaysia Family Law Ordinance 1961 has stipulated that a man who is still bound in a marital bond is prohibited from remarriage with another woman, after got a wife's permission and permission of the Arbitration Council. The trick is that a husband who wants to remarry another woman, then he must report his wishes to the Arbitration Board complete with the reasons and attached a letter permission of the wife as well as paying the specified amount of money. After the letter requesting permission from the husband's side was submitted, the Arbitration Board then asked for the names of a representative of the husband's family and a representative of the wife's family to sit as a member of the Arbitration Board. If

²⁷Law Of Malaysia: Islamic Family Law (Federal Territories) Act 1984, (2006), 21-22

the Arbitration Board then sees that there are clear, necessary and fair reasons, so as to approve the marriage proposal then permission is granted. Whoever violates these provisions, i.e. performing a marriage contract without the permission of the wife and the Arbitration Board, is punished with the penalty of the obligation to pay all outstanding dowry debts, and imprisonment for not more than one year or a fine of not more than 5000 Rupees or both.²⁸

According to the Muslim Family Laws Ordinance of Pakistan, 1961:

14. In considering whether another proposed marriage is fair and necessary during the continuation of the existing marriage, the Arbitration Board, without prejudice to its general power to consider what is just and necessary, paying attention to those circumstances, as follows: Infertility, physical weakness, physical incompatibility for conjugal relations, avoidance of the deliberateness of the decision for the return of the rights of the husband and wife, or the madness on the part of the existing wife.

15. An application under subsection (1) of section 6 Permission to enter into another marriage during the continuity of the existing marriage shall be made in writing, shall state whether the consent of the existing wife or wife has been obtained for it, shall contain a brief affidavit of the reasons for which the new marriage is deemed to be just and necessary, shall be signed by the petitioner, and enclosed at the cost of one hundred rupees.²⁹

Morocco

In Muslim countries, polygamy is one of the most interest issues, because fundamentally Islamic law never establishes polygamous monasticism. Only few contemporary Muslim thinkers through the interpretation of *ijtihad* forbid polygamy for the current era. Referring to the Qur'an, every Muslim man can marry up to four women, provided that he must do justice. This provision is regulated in the family law in their respective countries. In articles 40 to 43 of the Moroccan Law, it is stated that polygamy is prohibited when it is feared that there is injustice between wives or when the wife establishes a ban on polygamy in the marriage agreement / requirement. Granting polygamy permission when: 1. If there is no sufficient reason to do so; 2. If the husband does not bring all the evidence that states that he is able to take care of the two families and the guarantee of all family rights, such as a living, a place of residence, and equality or equality in every facet of life.³⁰

According to The Moroccan Code of Personal Status, 1958:

30. (1) if it is feared that there is injustice among the wives, polygamy is not allowed.
(2) if the husband enters into a second marriage, and the wife does not forbid the deed in the marriage contract, Qady may consider whether the second marriage has

²⁸Farradilla A.S, "Poligami dalam Hukum Keluarga Islam di Indonesia, Pakistan, dan Somalia: Analisis Perbandingan Mengenai Peraturan Poligami", *Skripsi*, (Jakarta: UIN Syarif Hidayatullah, 2019), 67-68

²⁹West Pakistan Rules Under Muslim Family Laws Ordinance, (1961), 5

³⁰ Ahmad Tholabi Kharlie, dkk, *Kodifikasi Hukum Keluarga Islam Kontemporer: Pembaruan, Pendekatan, dan Elastisitas Penerapan Hukum*, (Jakarta: Kencana, 2020), 213

caused harm to the first wife; marriage with the second wife cannot be performed unless it is notified that the husband has married another woman.

31. The wife may establish a marriage agreement that her husband shall not marry a second woman with him, and if the husband violates that provision, he is entitled to demand the dissolution of his marriage.³¹

Tunisia

Tunisia's government is in the form of a Republic headed by a President with capital located in Tunis. The official religion of the Tunisian state is Islam which adheres mostly to the Maliki madzhab and partly Hanafi, therefore in civil matters, the two madhabs are both used. However, many of the various dynasties that once ruled Tunisia both foreign and native, Tunisia had different beliefs, such as the Fathimid Shi'a dynasty.³²

The success of the Tunisian government under the leadership of Habib Bourguiba to ban polygamy brought praise among gender activists in the Islamic world. In the case of polygamy, Tunisian law officially prohibits it through article 18, it is affirmed that having more than one wife is prohibited. Anyone who marries before their first marriage actually ends, will be subject to imprisonment for one year or a fine of 240,000 malims or both. The ban on polygamy in Tunisia can be concluded because of two things, namely regarding the institution of slaves and polygamy only applies during the development and transition of Muslims, but is prohibited during the developmental period or cultured society, and the condition of polygamy is the absolute ability to be able to do justice to wives. While historical facts prove, only Prophet Muhammad SAW can do it.³³

NASH'S INTERPRETATION IN POLYGAMY REGULATION IN ASIA AND AFRICA

Polygamy has been known for centuries before Islam was revealed, society has known and practiced polygamy, namely in Greece, Persia, Ancient Egypt, Jews and so on. The people of the Arabian Peninsula itself long before Islam had practiced unlimited polygamy. Then Islam came with a major change in polygamy, namely with the restriction of four wives and with fair conditions. As for the basis for limiting polygamy in Islam, it is regulated in the letter An-Nisa verse 3.

When verse 3 of this letter of An-Nisa came down, the saints objected to becoming the guardians of the orphans. Then among them there was a man who had ten or eight

³¹*Text of The Moroccan Code of Personal Status*, (1958), 2

³²Toha Andiko, "Pembaruan Hukum Keluarga di Dunia Islam: Analisis Terhadap Regulasi Poligami dan Keberanjakannya dari Fikih", 302.

³³Lia Noviana, "Status Wanita di Negara Muslim Modern: Studi Terhadap Hukum Keluarga di Tunisia dan Indonesia", 9

wives, so that he could not be able to do justice among them, and then came down verse 4 of the letter An-Nisa.³⁴

In the ushul fiqh paradigm, the law of polygamy can be explained by first digging into some lafaz or key words in verse 3 of surah al-Nisa', such as *fankihuu*, and *al-'adlu*. The word *fankihuu*, in ushul fiqh is a word of command (*amr*), which means "then marry". According to the majority of experts in the science of fiqh and interpretation, that the general rule of "word of command" in the Qur'an, has implications of compulsory law and necessity (*ilzam*), unless there is an accompanying postulate or argumentation (*qaraa'in*) that requires the word command to be interpreted differently, besides compulsory.³⁵

Thus, the word command in the Qur'an points to two legal implications. First, the word order that is not accompanied by *qaraa'in*, then it has mandatory legal implications. Secondly, the word command accompanied by *qaraa'in*, then it has legal implications of *mubah* or may. Because *fankihuu* is a form of the word command and means command, and has a *qarinah* that is in the form of fulfilling the just conditions, the law of polygamy in terms of the word *fankihuu* has legal implications.³⁶

Although lafaz *fankihuu* can already be known for its meaning, the law of polygamy cannot be punished only by the approach of the meaning of lafaz *fankihuu* alone. Furthermore, the search for the word focuses on lafaz *al-'adlu* which means fair. In verse 3 of surah al-Nisa', the meaning of just is found in 2 (two) words, namely the word *al-'adlu* and the word *al-qisthu*. In other words, the word *al-'adlu* and the word *al-qisthu* have the same meaning that is just. According to M. Quraish Shihab, the word *al-'adlu* and the word *al-qisthu* are often synonymized and translated into Indonesian to be just.³⁷

However, there are some scholars who distinguish the two words by saying that the word *al-'adlu* is applicable to both others and oneself, but that justice may not please either party. Whereas the word *al-qisthu* is to do justice between two or more people, and justice that makes both of them happy. However, since the application of the two words is in a line of sentences that have different contexts, of course, the meaning between the word *al-'adlu* and the word *al-qisthu* is different in meaning.³⁸

From the discussion related to polygamy in the five countries above, it seems that there are many interesting things that we can know through the rules of polygamy based on the provisions of Islamic law. Some countries, namely Indonesia, Malaysia, Pakistan and Morocco allow polygamy but there are certain restrictions or reasons,

³⁴ Imam Jalaluddin Al- Mahalli dan Imam Jalaluddin As-Suyuti, *Tafsir Jalalain: Berikut Asbabun Nuzul Ayat Surat Al-Fatihah s.d. Al-Isra'* (Bandung: Sinar Baru Algensindo, 2008), hlm. 310

³⁵ Muhammad 'Ali al-Sabuni, dalam *Rawa'i' al-Bayan Tafsir Ayat al-Ahkam Min al-Qur'an*, Juz I (Beirut: Dar Al-Fikr, t.t.), hlm. 334.

³⁶ *Ibid*, hlm. 334

³⁷ M. Quraish Shihab, *Tafsir al-Misbah: Pesan, Kesan dan Keserasian al-Qur'an*, Vol. II (Jakarta: Lentera Hati, 2006), hlm. 338.

³⁸ *Ibid*, hlm. 338

namely the condition of the wife to be polygamized and the condition of the husband who will be polygamous, while Tunisia itself prohibits polygamy absolutely.

According to Tahir Mahmood there are at least six forms of control over polygamy in the muslim world, first; emphasizing the provisions of the judiciary as set forth in the Qur'an, secondly; gives the wife the right to include an anti-polygamy statement in the letter of the marriage agreement, third; must obtain the permission of the judiciary, fourth; the right to explain and control from the institution of marriage to the party to be polygamous, fifth; absolutely forbids polygamy, and sixth; providing criminal sanctions for violators of polygamous rules.³⁹

The discussion is related to the issue of reasons for polygamy due to various kinds of wife circumstances, so four countries other than Tunisia also tend to agree on the grounds that wives cannot have sexual relations. From some of the rules regarding the reasons for polygamy set by each of these countries, it may give rise to two interpretations that may be contradictory or can also complement each other. First, it seems that gender bias still colors the pattern of fiqh embraced and understood by scholars involved in the making of Islamic family law. This is seen in the plain and completely unbalanced mention of the reasons for disability in women because there is no mention of defects in men. Second, we can also understand that the determination of the reasons for polygamy is due to the wife's circumstances in order to maintain the integrity of the household and at the same time close the wife's disgrace, help the wife to keep her life's needs guaranteed, and to keep the husband and wife's family relationships established.

Meanwhile, the criminalization of polygamy in Tunisia, apart from the factor of secularism, there is also a reinterpretation of nash, namely Surat an-Nisa' verses 3 and 129 whose understanding is attributed. Verse 3 describes the ability of polygamy on fair terms, while verse 129 describes the impossibility of a husband being able to do justice among his wives even though he desperately wants them. This is what underlies Tunisia's strict ban on the practice of polygamy and even classifies it as criminalization.⁴⁰

More briefly, here is a comparison column of such countries in accordance with the regulations of their Act:

No	Country Name	Regulation
1	Indonesia (Law Number 1 of 1974 concerning Marriage and KHI)	<ul style="list-style-type: none"> ● In principle a man can only have a wife and a woman can only have a husband. Polygamy permit if eligible: ● Cumulative Terms: <ul style="list-style-type: none"> a. The wife cannot perform her obligations as a wife; b. The wife gets a disability or incurable disease; c. The wife cannot bear offspring.

³⁹ Tahir Mahmood, *Family Law Reform in the Muslim World*, (New Delhi: The Indian Law Institute, 1972), hal. 272-275.

⁴⁰ Nasr Hamid Abu Zayd, *Dekonstruksi Gender: Kritik Wacana Perempuan dalam Islam, Terjemahan Dawair al-Khauf: Qiraah fi Khitab al-Mar'ah* (Yogyakarta: SAMHA, 2003), hal. 264

		<ul style="list-style-type: none"> ● Alternative Terms : <ul style="list-style-type: none"> a. There is consent from the wives/ wives; b. There is a certainty that the husband is able to guarantee all the necessities of life of his wives and children; c. There is a guarantee that the husband will do justice to his wives and children.
2	Malaysia (Islamic Family Law (Federal Territories) Act 1984)	<p>Consideration of the permissibility of polygamy on the part of the wife :</p> <ul style="list-style-type: none"> a. Barren; b. physical infirmity; c. unfit in physical terms to have intercourse; d. deliberately unwilling to restore the rights of copulation; e. crazy wife. <p>Consideration of the permissibility of polygamy on the part of the husband:</p> <ul style="list-style-type: none"> a. economically capable; b. fair; c. the marriage does not cause harm to religion, life, body, reason, and property; d. does not cause a decrease in the dignity of wives. <p>Criminalization of polygamy with a fine of 1000 ringgit/confinement max. 6 months or both. Except for Serawak which lists the maximum fine penalty. 3000 ringgit or a maximum of 2 years imprisonment.</p>
3	Pakistan (West Pakistan Rules Under Muslim Family Laws Ordinance, 1961)	<p>Polygamy is allowed with prior permission from the Court (Arbitration Council), provided that:</p> <ul style="list-style-type: none"> a. Barren wife; b. b. Physical weakness; c. c. Sick wives resulting in the destruction of the object of marriage; d. d. The wife intentionally avoids the rapprochement of the husband and wife's relationship; e. e. Crazy wife <p>Those who violate this rule can be punished by:</p> <ul style="list-style-type: none"> a. Paying the entire dowry to the wife/wives either in cash or suspended, and otherwise it is considered as arrears/debts; b. maximum imprisonment of one year or a maximum fine. 5000 rupees or both.
4	Maroko (Text	If a man wants to be polygamous, he must inform the

	of The Moroccan Code of Personal Status, 1958)	<p>future wife that he already has the status of a husband.</p> <p>a. A woman, at the time of performing a marriage contract, may include a ta'lik talaq that prohibits the future husband from being polygamous. If it is violated then the wife has the right to file a divorce lawsuit with the court.</p> <p>b. Although there is no statement of a woman as above, if the marriage of the two causes the first wife to be injured then the court can dissolve their marriage.</p>
5	Tunisia (The Tunisian Code of Personal Status, 1956)	<p>a. Absolutely prohibit polygamy, and punish persons who violate the rules of polygamy with imprisonment for one year or a fine of 240,000 malims or both;</p> <p>b. For whoever is married then violates the rules contained in Law Number 3 of 1957 which relates to civil rules and the second marriage contract, while he is still bound by marriage with the first wife, will be subject to the same punishment;</p> <p>c. For whoever intentionally marries a person who is subject to punishment under unofficial provisions, he may also be subject to the same punishment.</p>

CONCLUSION

From the discussion above, we can see that the five countries that are the focus of the study in this paper have made significant family law updates. The states of Indonesia, Malaysia, Pakistan and Morocco, seem to agree on the ability of polygamy, while the State of Tunisia prohibits it absolutely. Regarding the issue of reasons for polygamy due to various kinds of wife circumstances, then 4 countries other than Tunisia also tend to agree on the grounds that the wife cannot have sexual relations.

From the various reasons for polygamy set by each of these countries, it turns out that it can give rise to two interpretations that may be opposites or can also complement each other. First, it seems that gender bias still colors the pattern of fiqh embraced and understood by scholars involved in the making of Islamic family law. This is seen in the plain and completely unbalanced mention of the reasons for disability in women because there is no mention of defects in men. Second, we can also understand that the determination of the reasons for polygamy is due to the wife's circumstances in order to maintain the integrity of the household and at the same time close the wife's disgrace, help the wife to keep her life's needs guaranteed, and to keep the husband and wife's family relationships established. Because if the wife who is disabled or can no longer afford to have sexual relations is divorced by her husband, it will certainly cause a lot of suspicion that can open the wife's disgrace and can also embarrass her family. Likewise,

if the wife has no income while she is barren or crazy, of course, if the husband divorces her, the wife will be wasted and threatened by her life needs.

In addition, stigma and negative views on widowhood due to divorce that develop in the assumptions of society in general can also make these women more depressed and psychologically tormented. As for the methods commonly used for the renewal of family law in various Muslim countries, more specifically for the issue of polygamous reasons due to the state of the wife as already mentioned above, it seems that it is more dominant to use the method of *extradoctrinal reform* and a little with *intra-docrinal reform*, even then each with different modifications and pressures.

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