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Aqasid Al-Syari'ah Perspective In Polygamies: A Comparative Study Of Polygaming Rulesin Indonesia And Malaysia

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ABSTRACT

With a multimethodological approach, the discovery, reasoning and integration of Islamic law regarding polygamy in positive law in Indonesia and positive law in Malaysia is very urgent to be reviewed. Because Islamic law, which is shalih li kulli al-hal wa al-makan, must actually be integrated with positive law in Indonesia and Malaysia . Determination of legal understanding of the maqāsyid syarī'ah review of polygamy regulations in Indonesia and Malaysia must go through an interpretation process in the form of an in-depth understanding of Law Number 1 of 1974 and other regulations that apply in both countries. Thus, the public can find out the reasons ('illaṯ) and objectives that underlie the enactment of the law with the principles of ushul al-fiqh as the basis for making or determining the law. The many phenomena of polygamy in this Muslim-majority country should be a common concern. So it is not excessive when questioned about the extent to which the spirit of shari'ah has a significant effect on the life of the nation and state .

Keywords: Maqasid Al-Syari'ah, Polygamy, Indonesia, Malaysia

INTRODUCTION

An understanding of shari'a law is also understood by *maqāsid al-syarī'ah* , namely: a number of meanings or goals to be achieved by shari'ah in all or most of the legal cases. *Maqāsid al-syarī'ah* is also understood with the aim of shari'at, or the secret behind the promulgation of each law by the shari'at authorities. The author also understands that the essence and nature of Islamic law aims to benefit the people. Therefore, understanding towards *maqāsid al-syarī'ah*

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will be able to help understand religious texts *(al-nushush al-syar'iyyah)* and contextualize them in the realities of life (Mandzur, 1997: 712).

In the case of polygamy, for example, which is the focus of research in this study, it is still a controversial issue, which invites pros and cons. The anti-polygamy group discredits polygamy and identifies it with something negative. Polygamy violates the rights and oppresses women. Those who are pro polygamy think that polygamy contains elements of salvation, efforts to protect and respect for the existence and dignity of women (Djauli, et.al. 1991 : 256). In Indonesia, this controversy about polygamy also occurs. The Indonesian women's commission, for example, stated that rejecting polygamy was progress.

In addition, in academic circles, such as Siti Musdah Mulia, she loudly stated that polygamy is legalized cheating, because it hurts the wife even more. On the other hand, among the pros like Aisyah Dahlan, who published her research results in various lectures and the media, stated that polygamy was a necessity for women, especially towards the time of menopause. So polygamy is not only a need for men. In addition, contradictions also occur among those who are pro-polygamy in various ways, for example; whether polygamy is facilitated in its rules or tightened for various purposes. In addition, there are also those who question whether the existence of marriage is basically monogamous or polygamous . This debate proves that the issue of polygamy is still a hot debate among academics, human rights activists and other parties amidst the complexity of the dynamics of an increasingly complex society.

In the sense that the current implementation of polygamy rules is synchronized, it still requires a comprehensive and holistic study in synchronizing with the current polygamy rules. Whatever the rules that have been enforced, the magic must be able to provide benefits for the people. In the historical records of Islamic treasures, it is noted that at the time when the Prophet was still alive, there was debate over the explanation of Islamic law came directly from him as the recipient of revelation from Allah. All the problems faced by the ummah that required legal answers, could be resolved by the Prophet himself guided by revelation. Because at that time, Islamic law was still realistic and not theoretical in nature because it had not been formally recorded. Muslims only ask the Prophet about the law of various cases (Al-Haq, 1987 : 26).

After the death of the Prophet, the Companions began to be confronted with new facts (events) for which there were no concrete examples in the guidance of the Qur'an and the Sunnah of the Prophet. Therefore, they are forced to make ijtihad both individually and in collective deliberation (Al-Qathan, 1985 : 127). The history of *the istinbat* of Islamic law shows

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that the dynamics of Islamic laws took place after the death of the Prophet. The principles that were born in the Qur'an and the hadith of the Prophet require a comprehensive and holistic understanding. In the sense that the law must be able to answer the problems of the people by giving birth to positive legal justifications for society.

Law of the Republic of Indonesia Number 1 of 1974 indicates that there are still gaps in ensuring legal certainty in accordance with the reality of the Indonesian people. In Article 5, paragraph 1, for example, there are three conditions for polygamy for a husband, that *"a. the consent of the wife/wives; b. there is certainty that the husband is able to guarantee the necessities of life of his wives and their children. c. there is a guarantee that the husband will treat his wives and their children fairly.* This requirement requires study in the perspective of Islamic law. Because Islamic law only requires "fair" for a husband who wants to polygamy. In accordance with the text of the Qur'an contained in the letter an-Nisa' paragraph 3. In the sense that the three conditions set out in Article 5 paragraph 1 may not tightly close the husband 's right to practice polygamy.

These data show that Islamic law and positive law in Indonesia have a dynamic character. This kind of view shows a deep awareness of the existence of Islamic law and positive law as rules that can solve various problems that arise in society. Society which is always developing and changing, has encouraged scholars and those holding authority in law to try to explore the contents of the rule of law. In Islamic studies it is called *ijtihad,* as the implementation of this view so that schools of law were born, as has become an important record in the history of the development of Islamic law *(tarikh al-tasyri')* (Zahrah, 1960: 141). In fact, some explained that the discourse on renewal of polygamy law in Indonesia had been carried out since 1974. This reform must always be carried out, bearing in mind that Indonesian society is predominantly Muslim, which requires legal certainty and fair legal certainty that does not close the rights of each individual tightly (Muhibbuthabry, 2016).

In order to obtain constructive and holistic data regarding polygamy laws, in the context of this study the authors compare the enforcement of polygamy laws in Malaysia. This is done because the majority of Malaysia's population is Muslim. However, it has different polygamy rules than Indonesia, even though the references to the legal construct are the same, namely the Koran and hadith.

Polygamy in Malaysia is a form of marriage for Malaysians with Perpatih and Temenggung customs. In a sense, polygamy is a form of marriage in Malaysia . However, law enforcement in

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each region is different. From several data analyzes that the authors found regarding the enforcement of polygamy laws in Malaysia, it was found that the Polygamy Law in Malaysia was in: Kelantan, Anakmen 6 of 2002; Silver, Enactment 6 of 2004; Kuala Lumpur, Deed 303 (Federal Territories) 1984; Selangor, Anakmen 2, 2003; Sarawak, Ordinance 43 of 2001, and; Sabah, Anakmen 8 of 2004. This shows that the rules for polygamy in Malaysia are more specific, according to the region, as shown in the previous data. These rules still prioritize the benefit of the legal user community (Harun, 1989: 7-11).

RESEARCH METHODS

This study uses a normative-juridical approach (Soekanto 1990: 15). This approach is used to see the effectiveness and urgency of the polygamy rules contained in the Law of the Republic of Indonesia Number 1 of 1974 and the polygamy rules in Malaysia. According to Peter Mahmud Marzuki juridical-normative is a process to find legal rules, legal principles, and legal doctrines to answer the legal issues at hand (Marzuki, 2007: 35). This legal research is based on a *hermeneutic paradigm* (Salim, 2010: 51-52) ..

This research is a library research. Research materials are taken from books and documents related to the object of research. The juridical-normative and phenomenological approaches are aimed at legal materials which are legal issues related to the substance of legal regulations and legal facts. Of course, the main sources of legal materials that will be studied are the Koran, hadith and books of Fiqh, fatwas of scholars and court decisions. Then added the sources of positive law that apply in Indonesia and in Malaysia.

THEORETICAL BASIS

Polygamy Discourse: An Overview of Definitions and Theory

Etymologically, polygamy comes from the *Greek* (Greek), which consists of two words, namely *polus* and *games* . *Polus* means many, while *games* means marriage, in which a man has more than one wife at one time (Shadily, 1984 : 2736). The definition above is in line with the definition put forward by WJS. Poerwadar Minta stated that polygamy is a man who has more than one wife (Minta, 1976: 354)

In the Big Indonesian Dictionary, polygamy means a marriage system in which one party owns or marries several members of the opposite sex at the same time (Depdiknas, 2002: 885). Whereas in *the Popular Scientific Dictionary,* polygamy is a marriage between one person and two

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or more people, but tends to mean the marriage of one husband to two wives or more (Partanto & Dahlan, 1994: 606).

According to Islamic teachings, the term polygamy is taken from the Arabic *Ta'addud Jauzah* which means having many more than one wife. Scholars of Islamic law have agreed that polygamy is the marriage of a man with more than one woman (Anis, *et.al.* , 1972 : 405).

In terminology, Siti Musdah Mulia defines polygamy as a marriage bond in which a husband marries more than one wife at the same time. Men who carry out this form of marriage are said to be *polygamous.* In short, Moch. Anwar emphasized that polygamy is having more than one wife One. This confirms that polygamy is a marriage bond, a husband with several wives as his life partner at the same time (Anwar, 1980: 149).

Islam legalizes a husband and wife as many as four people, restrictions on the number of wives are also accompanied by requirements. Justice to the wife is a requirement in polygamy, but if the husband is unable to treat her fairly, monogamy should be done. This can be seen in the Al-Quran sura al-Nisa' verse 3.

In a hadith history narrated by Imam Bukhari, Abu Dawud, Al-Nasai, and al-Tirmidi. Urwah bin Zubayr conveyed that regarding the revelation of the verse, Aisyah was asked about this verse, then Aisyah replied: The word orphan in the verse is an orphan girl whose wealth is mixed with her guardian's, and her guardian wants to polygamy the orphan, but the guardian does not give a dowry in full balanced, in quotes giving the same dowry as women in general. therefore , the guardian of an orphan in this context is prohibited from marrying her, unless the guardian treats her fairly and gives her a dowry. If you cannot act in balance, then the guardian should marry another woman (Abidin & Aminudin, 1999: 132).

As for the provisions and demands that must be carried out by a husband, he must act fairly between wives. According to asy-Shafi'i, justice is meant to be related to physical matters, for example visiting his wife at night or during the day. This demand is based on the Prophet's behavior in dealing with his wives, namely by dividing the night shift and providing a living, then praying. As for justice in the heart, according to ash-Shafi'i only Allah knows. Therefore, it is impossible for a man to be fair to his wife which is required in verse an-Nisa' (4): 129, related to the heart, said ash-Shafi'i. Thus the heart is indeed not possible to do justice. Meanwhile, the fair obligation that is demanded if a person has more than one wife is fair in physical form, namely in actions and words. Justice in physical affairs is also demanded by verse al-Ahzab (33): 50 al-Baqoroh (2): 228, and an-Nisa' (4): 19. The realization of the just nature required by the Quran, is

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also mentioned in surah Yunus (10): 67, and ar-Rum (30): 21 (Asy-Shafi'i : 172-173) .

Construct *Maqāshid al -Syarī ' ah* in Islamic Law

studies , one form of understanding of law is known as *maqāshid al - syarī'ah.* Etymologically _ *maqāshid al - syarī'ah* consists of two words, *namely māqashid* and *syarī'ah* . *Maqāshid* means intentionality or purpose, the word *maqashid* is the plural form of the word *maqsud* which comes from the syllable *qashada* which means to wish or intend. *Maqashid* means things that are desired and intended. Meanwhile, Syarī'ah literally means the way to the water source, which can also be interpreted as the way to the source of life (Munawwir, 1997: 712).

in terminology , *m aqasid al-shariah* are the objectives of Islamic sharia contained in each of its rules. Al-Syathibi revealed about sharia and its functions for humans as he stated in the book al-Muwafaqat, namely *" Indeed, the Shari'a was established with the aim of establishing (realizing) the benefit of mankind in this world and the hereafter"* . Al -Syatibi also stated , that: *" The laws are promulgated for the benefit of the servant "* (Al-Syatibi: 374).

In the Qur'an Allah SWT mentions several words " *shari'ah"* including: *"Then we make you above a Shari'a (regulation) of (religious) affairs, then follow the Shari'a and do not follow your desires. people who don't know."* (QS. Al-Jatsiyah: 18).

definitions of *maqasid al-shari'ah* have been put forward by contemporary scholars, such as those defined by Ibn Ashur and A'lal al-Fasi. According to Ibn Ashur, *maqashid al-shari'ah* are the meanings and wisdoms that are considered and maintained by *al-Syari'* (shari'a maker) in every form of determining the law. This does not only apply to certain types of law so that it includes all the characteristics, general purposes and meanings of Shari'a contained in the law and also includes legal meanings that are not taken into account as a whole but are protected in many forms of law (Assyrian, 2001: 49).

Meanwhile, Alal al-Fasi defines the objectives of the shari'ah and the secrets made by *al-Syari'* in each of the shari'a laws. On the other hand, Wahbah al-Zuhaili said that *maqâsid al-syarî'ah* are the values and goals *of syara'* which are implied in all or the largest part of its laws. These values and goals are seen as the goals and secrets *of the syarî'ah* , which are determined by *al-Syâri'* (the maker of the syari'at, namely Allah and the Prophet Muhammad) in every legal provision (Al-Zuhaili, 1986: 225).

Apart from differences of opinion in defining *maqâshid al-syarî'ah , the ushûl al-fiqh* scholars agree that *maqâshid al-syarî'ah* are the ultimate goals that must be realized by applying

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the syarî'at . The application of syarî'at in real life (the world), is to create benefit or good for creatures on earth, which then impacts on benefit or good in the hereafter (Darwis, 2012: 395).

Textuality and Contextuality of the Islamic Law *Istinbāt Method*

To obtain holistic and philosophical data in *istanbāt* Islamic *law ,* textual and contextual studies in understanding the texts of the Qur'an and hadith , which are the main sources in determining Islamic law, is a must . This study needs to be done to reflect between the text and reality. The text will have no meaning in people's lives , if no interpretation or interpretation is carried out. Attempts to interpret the text with this reality give birth to two logics in reflecting text and reality, namely interpretation that starts from text to reality and interpretation that starts from reality to text. In the context of this research which analyzes *istinbā t* law, textual and contextual studies are the first steps in *explaining istinbāt* law from the Qur'an and hadith. The priest of the fiqh school of thought explained that there are three schools of thought adopted by fiqh scholars in carrying out legal *istinbāṭ* .

First, schools or groups that only take zahir nash textually and ignore the essence of the universal goals of Shari'a. Yūsuf al-Qardhāwi, who adopted from the schools of David al-Zhahiri, explained that taking legal sources from the texts of the Qur'an and hadith does not use takwil. He does not use, explore and analyze the law with ' *illat.* 'Abd al-Hayy al-Farmawi in his work *al-Bidāyah fī al-Tafsīr al-Maudhū'i,* also confirms this explanation. In an explanation of his work, he explained that the interpretation of the Koran must start from reading, researching, and studying the text of the Koran, to produce views or attitudes of the Koran regarding certain themes. The insights contained in the Qur'an are disseminated to the community as a guide for moving towards a better future *(min al-nashsh ilā al-wāqi').* He also emphasized that the perfection of religion and the perfection of life's journey can only be achieved by understanding religious knowledge originating from the Qur'an and hadith (Al-Qardawi, 1999: 95) .

Second, the flow that only pays attention to and prioritizes the benefit and objectives of the Shari'a as a whole, and does not pay attention to the textuality of the texts *,* as well as the laws of the Qur'an and hadith . This flow is more likely to follow the steps of 'Umar ibn al-Khatāb which ignores the text and prioritizes legal issues. According to Qardāwi, they are a secular group who do not want to follow the correct sharia doors (Al-Qrdawi, 1999 M: 96).

Third, a moderate group that pays attention to the texts of the Qur'an and hadith, both textually and contextually which is in harmony with the goals of universal syariat . This flow also

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does not ignore these two things, and makes both of them into a synergistic and balanced unit that strengthens each other. The author assumes that maybe this school is a reflection of the Muslims as an attitude of true Islamic scholars, who follow the dynamics of legal problems that occur.

RESEARCH RESULTS AND DISCUSSION

Polygamy Law in Indonesia as stated in Law no. 1 of 1974 and other regulations as well as the enactments that apply in Malaysia have become a constructive marriage law in both countries. Therefore, all citizens of the two countries must follow the rule of law in the field of polygamy. Constitution Marriage No. 1 of 1974 as well as other regulations in Indonesia and the enactments that apply in Malaysia , are religious in nature. Religious teachings that are absorbed more dominantly in the Marriage Law are Islamic law, and Islamic law which is included in the Marriage Law in Indonesia and Malaysia's Enekmen is fiqh munakahat. Because it is part of Islamic law, the values or objectives of Islamic law or *maqas hid al-shari'ah* such as *hifz al-din, hifz al-'aql, hifz al-nafs, hifz al-ansl, and hifz al- malls,* are inherent in the Indonesian Marriage Law and other elements in Malaysia .

From the perspective of the regulatory implications of the Marriage Law No. 1 of 1974 and other marriage regulations in Indonesia and the delights of marriage in Malaysia, seen from the *maqāṣid al-sharī'ah* in the practice of marriage law *(law in action),* the researcher found that Article regarding polygamy cannot be practiced optimally or is problematic in practice according to necessity. This law was actually formulated as an offer of a way out so that the universal values of regulation of marriage law (*maqashid al-shari'ah*) could be properly practiced by Indonesian and Malaysian citizens. This Marriage Law applies in Indonesia normatively and the enactments that apply in Malaysia are also legally-formal. Normatively, this marriage law is part of Islamic law which has social sanctions if the law is violated. In this case there are those who view that marriage is a worship that regulates human relations with God. So that compliance with the law depends on the awareness of the Muslim community's faith itself, and its implementation is left to the conviction of the individual concerned. Juridically-formally, this Marriage Law is part of Islamic law which regulates relations between humans and human relations with others. Indonesian marriage law which is legally valid should have legal sanctions if the law is violated, because it has become positive law.

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There are similarities and differences between the laws governing polygamy in Indonesia and Malaysia. In the case of permits for polygamy, laws and regulations in Indonesia and Malaysia both require a license from the Religious Court/Shari'ah Court to practice polygamy. Several states in Malaysia accommodate polygamous marriages that have been carried out without the permission of the Syari'ah Court to be legalized and the perpetrators are still subject to sanctions (penalties). Things like this are not found in the marriage law in Indonesia. As for the requirements for polygamy, the laws and regulations in Indonesia and Malaysia are in principle the same , that is, they both respect the rights of wives so that polygamy must be subject to strict conditions; namely in the state of the wife being barren, physically disabled, unable to carry out her obligations as a wife. Besides that, it is coupled with other requirements , namely the husband's ability to provide a living, be fair and have the wife's permission. In Malaysia, conditions related to Maqasid Syari'ah are included, namely not endangering the wife's religion, life, body, mind and property. Things like this do not explicitly exist in the rules of marriage law in Indonesia. As for the aspect of sanctions for violating polygamy in Indonesia, it is regulated by the obligation to pay a fine of Rp. 7,500 while in Malaysia it is punishable by a fine and or imprisonment . Besides that, in Indonesia, civil servants (PNS) who violate polygamy rules are given sanctions up to dismissal. This kind of thing doesn't exist in Malaysia. Although the laws on polygamy in Indonesia and Malaysia have similarities and differences. However, these laws and regulations are able to reflect and bring Islamic law in its own characteristics into law in Indonesia and Malaysia. The goal is to realize *maqasid al-shari'ah* (goals of Islamic law), taking into account the goal of a legal state that is binding on all citizens of Indonesia and Malaysia.

The values of Islamic law or *maqasid al-shari'ah* are translated into objective conditions so that they can be accepted by all parties in the deed. In other words, an act is called objective if non-Muslims view the act as a natural act, not a religious act, even though Muslims still view it as a religious act. The objectification of Islamic marriage law functions to make the actions regulated in the law Marriage in Indonesia and enekmen in Malaysia can be perceived by citizens as something natural (appropriately), not as a religious act .

The objectification of Islamic law actually offers a way out universal values marriage law and polygamy (*maqas hid al-shari'ah*) can be applied and practiced according to necessity in objective conditions. So that the polygamy law that has been formulated can be well practiced by citizens of Indonesia and Malaysia . However, the objectification that has been attempted and carried out so far , seems to be difficult to put into practice, because this objectification operates

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in a narrow area, only applies to Indonesian and Malaysian Muslims . Basically, Law no. 1 of 1974 and the Enekmen are the results of *the 'ijtihad' of Indonesian* and Malaysian legal experts in the field of marriage law. So that the legal pluralism of polygamy that is enforced becomes invalid by itself. Certain articles in this Law and Enenkmen remove doubts about accepting the fact that Islamic law has directly become a source of law without having to be accepted by the customary law of the peoples of the two countries . What is an important note is the Marriage Law Number 1 of 1974 and the Enclosures which were compiled from the *inherent* embryos of Islamic Law in it *maqas hid al-shari'ah* is an ideal regulation of the Law of Poligamki *(law in book)* which has become the law of Indonesia and Malaysia .

That polygamy has been defined as permissible in Islamic law with its various benefits. Making it too difficult to practice polygamy, let alone prohibiting it can also bring harm to humans, on the other hand, it greatly facilitates polygamy, especially without being regulated in such a way in a polygamy law, it can also have negative effects that are not in accordance with Maqasid *Shari'ah* . So regulating polygamy with the aim of minimizing and if possible eliminating the negative effects of polygamy so that benefits are realized for all parties, especially for wives, children and husbands is appropriate according to *Maqasid Shari'ah.*

CLOSING

Polygamy rules in Indonesia and Malaysia are contained in several laws and amendments, including Law no. 1 of 1974 concerning Marriage, PP. No. 1 of 1975 concerning Implementation of Law no. 1 of 1974, Law. No. 7 of 1989 concerning the Religious Courts, PP No. 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants, Presidential Instruction of the Republic of Indonesia Number 1 of 1991 concerning the Compilation of Islamic Law, Deed of the Family Law (Confessional Territories) of 1984 No. 303 Section 23 Polygamy, All Laws and these amendments discuss the requirements/procedures for polygamy, permission for polygamy, and penalties for polygamy violations. In maqashid sharia, the rules for polygamy in both Indonesia and Malaysia as referred to can be reviewed from a legal perspective and its implementation, all of which are to bring about maslahah both from the side of the husband who is going to practice polygamy and from the side of the wife who is going to do polygamy.

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