

CONTEMPORARY ISSUES FACING THE CRIMINALIZATION OF POLYGAMY

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Abstract: *Contemporary Issues Facing the Criminalization of Polygamy.* According to *ushûl al-fiqh*, any act that disadvantages others is considered sinful. This is based on the principle that avoiding causing such disadvantages (*mafsadât*) is considered better than seeking advantages for oneself. Therefore, on the grounds that polygamy causes more disadvantages to wives and or children that it does advantages to those people, it can be categorised as a sinful act. In the *fiqh* context, polygamy is a *jarîmah ta'zîr* crime. But this is undermined by a lack of consensus about whether polygamy should be criminalised at all. Meanwhile, in the context of positive law in Indonesia, while the practice of polygamy is restricted the criminal sanctions for violating these restrictions are not clear. This article argues that polygamy is criminal both in terms of *fiqh* and positive law. However, in order for it to be properly stamped out, positive law needs to ensure that there are clear sanctions in place that directly correspond to acts of polygamy, such that the practice can be effectively criminalized.

Keywords: criminalization, polygamy, *ta'zîr*, *fiqh*

Abstrak: *Isu-isu Kontemporer Seputar Kriminalisasi dalam Poligami.* Dalam *ushûl al-fiqh*, setiap perbuatan yang dapat merugikan orang lain adalah berdosa. Hal ini didasari pada prinsip bahwa menghindari penyebab kerugian (*mafsadât*) dianggap lebih baik daripada mencari keuntungan untuk diri sendiri. Oleh karena itu, dengan alasan bahwa poligami menyebabkan kerugian lebih banyak bagi istri dan atau anak-anak—dan hal itu tidak mendatangkan keuntungan bagi mereka, maka itu dikategorikan sebagai sesuatu yang berdosa. Dalam konteks ilmu fikih, poligami termasuk dalam kejahatan *jarîmah ta'zîr*. Namun hal ini dirusak oleh kurangnya konsensus tentang apakah setiap poligami harus dikriminalisasi. Sementara dalam konteks hukum positif di Indonesia, praktik poligami membatasi sanksi pidana karena melanggar batas ini tidak jelas. Artikel ini berpendapat bahwa poligami adalah kejahatan baik dari segi fikih—pada beberapa kondisi luar biasa—maupun hukum positif. Namun agar hal tersebut mendapatkan legitimasi hukum dengan benar, maka hukum positif perlu memastikan bahwa ada sanksi yang jelas dan secara langsung pada tindakan poligami, sehingga praktik tersebut secara efektif dapat dikategorikan sebagai tindakan kriminal.

Kata Kunci: kriminalisasi, poligami, takzir, fikih

Introduction

Like a number of other predominantly Muslim nations, Indonesia has taken to reforming *fiqh* family law (*al-ahwâl al-syakhsyah*) on the grounds that it is no longer relevant to modern social conditions and therefore in need of change. One of the main problems in implementing these changes has been the issue of polygamy. According to Tahir Mahmood, of the countries that subscribe to *fiqh* family law, when it comes to their respective attitudes towards polygamy these countries can be broken down into three categories. One category is countries that have banned the practice

of polygamy, such as Turkey and Tunisia. Another category is countries in which the requirements to practice polygamy are not always so strict, such as Saudi Arabia, Iran, and Qatar.¹ The last category is countries that permit polygamy only under strict requirements, such as Pakistan, Egypt, Morocco, Indonesia and Malaysia. This attitude towards polygamy is generally most reflective of that of the Islamic world at large, however the requirements themselves vary from country to country. For instance, under family law introduced by the Ottoman Empire to Lebanon 1917, polygamy was allowed on the condition that the husband treat his wives justly. In Morocco, on the other hand, the right to

polygamy used to be determined by individual status.² There are also some countries with legal requirements that serve to restrict polygamy through disincentivising it, rather than directly restricting the practice. In Jordan, for instance, when a man gets married for the first time, his new wife has the right to ask him, as a condition of their marriage, to agree that if he marries again, she is entitled to file for automatic divorce.³ Morocco has a similar procedure in place.⁴

Cases of polygamy in Indonesia, on the other hand, are on the rise. Either the office for religious affairs (KUA) allows for polygamous marriage to legally take place, or it is carried out in secret. A club by the name of the global brotherhood, which according to its chairman M. Umar Nur has some 300 members across Indonesia and Malaysia, is especially devoted to championing polygamy, in the name of syariah. But there are also many Muslim religious leaders (*ulamas*), intellectuals and public figures, some of whom practice polygamy themselves, who also promote relaxing laws that restrict it, motivated by a variety of different reasons. Conversely, many women's groups and NGOs (Non Governmental Organizations) focusing on women's and children's rights object to polygamy. One verdict delivered by the state court of Ungaran which let a man marry as his second wife a girl who was at that time under the legal marital age triggered an especially angry reaction from these groups.

But just as contentious, at least according to proponents of polygamy, is when a husband with multiple wives is criminally sanctioned, on the grounds that polygamy can be classified as a criminal act, a classification based on the 1974 revision of marriage laws in Indonesia. The president received a draft listing new recommendations to revise these laws again in 2010 but up until now efforts have not been made to legislate them. Within this draft, chapters 143 to 153 discuss where marriage, legal and secret, second, third and fourth polygamous marriages, illegal divorce, adultery, marital irresponsibility, and acting as guardian for a marriage, should be criminal or not. Where deemed to be criminal, punishments vary from six months to three years prison and fines start at 12 million rupiah. But while this draft and the existing marriage laws in Indonesia treat polygamy as an act that can be categorised as criminal, whether the same can be said of syariah remains to be seen. And since, broadly speaking, it is Syariah that many proponents argue justifies polygamy, to evaluate whether or not those views are in fact justified, it too needs to be examined.

Criminalisation and Polygamy

In Bahasa Indonesia, the word 'criminality' originates from, and refers to, anything having to do with, the word 'crime', meaning an act of violation against the law. If an act is deemed to be as such, then it is a criminal act, committed by a criminal or criminals. To criminalise is to 'make criminal'. For Abdul Gani Abdullah, the definition of criminalisation applies to both acts and the perpetrators of those acts. He says it is "the process by which behaviors and individuals are transformed into crime and criminal, by legislation or judicial decision".⁵ In other words, an act can be made criminal where beforehand it was not deemed as such, and a person can be made a criminal—and thus subject to criminal sanction—for committing a criminal act. Generally, criminal law functions to regulate society to create public order and security. So if an act is judged to threaten those things, where beforehand it was not so judged, then that can serve as reason to criminalise it.⁶ Once an act is criminalised, the threat of punishment associated with committing it is established, thereby intending to deter people from doing it. In the case of polygamy in Indonesia currently punishments associated with it come in the form of going to jail or paying a fine, though how often such punishments materialise themselves remains to be seen.⁷

In English, a polygamous marriage means one in which the husband is simultaneously married to multiple wives. In Indonesian, however, a polygamous marriage can mean both that and a marriage in which it is the wife who is married to multiple husbands at the same time also.⁸ So long as there are multiple spouses, the marriage is polygamous. Indonesian breaks down polygamy into polygyny and polyandry, where the former refers to one male being married to more than one female and the latter switches around those genders.⁹ However most Indonesians just think of polygamy as referring only to polygyny, as it is understood in English. Monogamy, on the other hand, has the same meaning in English as it does in Indonesian: marriage between one male and one female only.

⁵ Abdul Gani Abdullah, *Kriminalisasi Kebijakan Dipandang dari Sudut Hukum Tata Negara*, (Varia Peradilan Majalah Hukum, Ikatan Hakim Indonesia, Tahun XXV No. 296 Juli 2010), p. 17.

⁶ Tim Penyusun Kamus Pusat Pembinaan dan Pengembangan Bahasa, Departemen Pendidikan dan Kebudayaan RI, *Kamus Besar Bahasa Indonesia*, Second Edition, (Jakarta: Balai Pustaka, 1997), p. 530.

⁷ Andi Hamzah, *Asas-Asas Hukum Pidana*, (Jakarta: Rineka Cipta, 1991), p. 5.

⁸ Tim Penyusun, *Kamus Besar Bahasa Indonesia*, p. 779.

⁹ Tim Penyusun, *Kamus Besar Bahasa Indonesia*, p. 779; Abdul Aziz Dahlan, Ed, *Ensiklopedi Hukum Islam*, (Jakarta: Ichtiar Baru van Houve, 1997), p. 1185.

² Tahir Mahmood, *Family Law Reform*, p. 37, 117.

³ Chapter 19 of Family Law of Jordan No. 61, 1977.

⁴ Tahir Mahmood, *Family Law Reform*, p. 80; 121.

Criminality in Syariah

To examine whether and if so how polygamy can be deemed criminal under syariah, at least two steps are needed. The first of these is to examine what syariah says about polygamy as it pertains to criminality, which means examining criminal law. The second is to examine the many different doctrines (*madzhab*), based on the Quran, Hadith, and Islamic jurisprudence (*fiqh*), in terms of which scholars develop different exegeses of these laws in order to judge how people ought to be punished if they break them. These two steps are required because the meaning of the content contained in the first one depends on understanding the sets of principles in the second, as they underpin how that content should be interpreted.

In Islamic jurisprudence, criminal law is divided into three main categories of crimes (*jarimah*), each of which is classified according to a different form of punishment (*'uqûbât*). The first category of crime is *hudûd* (meaning limitations, plural of *hadd*), which refers to a criminal act for which punishment is fixed, as prescribed by God in the Quran, for broader public wellbeing (*al-mashâlih al-'ammah*). The second is *qishâsh*, where the punishment, because it isn't specifically laid out by God, is determined by a syariah judge drawing on Islamic verse, and is supposed to fit the crime; this can include fines (*diyât*) and being stripped of the right to inheritance or a will.¹⁰ The third, *ta'zîr*, is where if a crime doesn't clearly correspond to Islamic verse, but is still deemed criminal, punishment for it is administered by a judge, but it is based on the claim of the state rather than that of God.

According to Wahbah al-Zuhaylî, many Islamic scholars agree that the crimes corresponding to *hudûd* punishment are (1) adultery, (2) accusing someone of committing adultery, (3) drinking alcohol, (4) stealing, (5) rebelling or waging war against Islam, (6) prostitution, (7) changing religion and (8) killing with the intention of impacting a *qishâsh* sanction. However, the *Hanafi* school of thought, the main *madzhab* in Islamic jurisprudence (though not in Indonesia), omit crimes (7) and (8) from that list.

This disagreement is the result of both parties having different definitions of the term *hadd*. Islamic scholars define the term as a type of punishment whose form and scale have been decided by Islamic law, that has been decided by God. Scholars from the *Hanafi* doctrine agree that the term refers to punishment that has been decided by God and it is expressed through unambiguous

verse, but rather than just being undeniable, its aim is to protect the public interest.¹¹ Because *Hanafi* scholars believe that crimes (7) and (8) do not sufficiently threaten the public interest, such crimes must also not warrant *hudûd* punishment.

The second category, *qishâsh*, concerns the following criminal acts: (1) killing intentionally, (2) killing semi-intentionally, (3) killing wrongly, (4) wrong ill-treatment. Punishment for these crimes is simply in the form of the perpetrator being dealt the same fate as he or she committed. The third, *ta'zîr*, is punishment for every crime that does not fall into the first two categories; in other words, crimes that are not decided by reference to Islamic law.¹² Among scholars belonging to *Mâlikî* and *Hanbalî* doctrines, some treat acts of espionage and heresy as *ta'zîr* crimes which are punishable by death.¹³

With regards to imprisonment, Islamic jurisprudence scholars (*faqih*) disagree about what crimes merit it. The *Hanafi* school of thought says that all acts of *ta'zîr* should result in imprisonment of some sort, though this view is not reflected by others. Al-Qarâfî, from the *Mâlikî* doctrine, says there are 8 criminal acts that can be sanctioned by imprisonment, including killing, escaping from slavery and falsely claiming bankruptcy. Scholars are in further disagreement about how the punishment of a fine should be applied to crimes. Where some consider the punishment of ridding someone of his or her property cruel, scholars Abû Yûsûf, Imam *Mâlik* ibn Anas, Imam Syâfi'î, and Imam *Ahmad* ibn *Hanbal* say such punishment is justifiable based on the practice of the prophet and his companions, the caliphs 'Umar ibn Khatthâb and 'Alî ibn Abî Thâlib.¹⁴ As for corporeal punishment, including lashing, scholars essentially agree that it is allowed, again based on the principle of the prophet and the caliphate, although there are differences of opinion in terms of provisions and scale.¹⁵

Criminal Law in Syariah in Relation to Polygamy

Based on the categorisation of crimes listed above,

¹¹ Wahbah al-Zuhaylî, *al-Fiqh al-Islâmî wa Adillatuh*, (Bayrût: Dâr al-Fikr, 2009), V, p. 714, 734.

¹² Wahbah al-Zuhaylî, *al-Fiqh al-Islâmî wa Adillatuh*, V, p. 719-723, and VI, p. 186.

¹³ Ibn Qayyim al-Jawziyyah, *Al-Thuruq al-Hukmiyyah fi al-Siyâsah al-Syar'iyyah au al-Firâsah al-Mardhiyyah fi Ahkâm al-Siyâsah al-Syar'iyyah*, Sayyid 'Imrân, ed. (al-Qâhirah: Dâr al-Hadîts, 2002), p. 226.

¹⁴ Wahbah al-Zuhaylî, *al-Fiqh al-Islâmî wa Adillatuh*, VI, p. 189; al-Jazâ'irî, *Kitâb al-Fiqh 'alâ al-Madzâhib al-Arba'ah*, (Bayrût: Dâr al-Kutub al-'Ilmiyya, 2005), V, p. 298; al-Mun'im al-Qî'î, *Nazhrâh al-Qur'an ilâ al-Jarimah wa al-'Iqâb*, (Al-Azhar: Dâr al-Manâr, 1988), p. 273.

¹⁵ Al-Jazâ'irî, *Kitâb al-Fiqh*, V, p. 299-230.

¹⁰ 'Abd al-Qâdir 'Awdah, *al-Tasyrî' al-Finâ'î al-Islâmî Muqâranan bi al-Qânûn al-Wadh'î*, (Bayrût: Mu'assah al-Risâlah, 1997), p. 663, 664-682.

polygamy can be treated as falling into the *ta'zîr* category. This is because it is not a crime that warrants *qishâsh* punishment, nor is it one for which the Quran specifically prescribes sanction, regardless of how *hudûd* is defined. The fundamental question is whether it can be regarded as a sin or evil, such that it can be punishable by *ta'zîr*. The conventional reading of *fiqh* as it relates to polygamy argues that the practice is legally permissible. 'Ali Quli Qara'i translates verse 3 chapter of al-Nisâ' [3] in the Quran, which is about polygamy, into English as follows:

If you fear that you may not deal justly with the orphans, then marry (other) women that you like, two, three, or four. But if you fear that you may not treat them fairly, then (marry only) one, or (marry from among) your slave-women. That makes it likelier that you will not be unfair.

The consensus amongst Islamic scholars who believe that polygamy is allowed (*ibâhah*), according to al-Sâ'is and Ali Ahmad al-Jurjâwî, is that husbands are allowed up to and including four wives, but no more.¹⁶ This follows the example in the Hadith of Gailân ibn Salâmah al-Tsaqâfi, who was requested by the Holy Prophet to select and retain four of his ten wives before he could convert to Islam, and to divorce the rest. 'Ali Ahmad al-Jurjâwî, an Egyptian Al-Azhar scholar, states in his popular work "*Hikmah al-Tasyri' wa Falsafatuh*" (Wisdom and Philosophy of Islamic Law Legislation) that at the time of the Prophet Muhammad, if men with more than four wives were converting to Islam, then he would be asked to get that number down to four. A well-known example of this was Qays ibn al-Harîts, who prior to conversion to Islam had eight wives.¹⁷

The reason for this principle was that it was thought that having more than four wives would increase the likelihood that the marital rights one or some of them would be neglected. These rights included being treated as fairly as each of the other wives in terms of fair distribution of wealth in order to cover living costs, and fulfilling sexual responsibilities to each. However, the Prophet himself, who did have more than four wives, was an exception to this principle because he was assisted by Divine will.¹⁸

Meanwhile, another group of Muslim scholars from the Shi'a sect, based on the same instructions, argue that the maximum number of wives is nine.¹⁹ According

to them, "two, three, or four" is meant as cumulative, meaning two and three and four equals nine, rather than meaning two or three or four. Another school of thought, the Zhâhirî doctrine, says a man is allowed up to a maximum is up to eighteen wives.²⁰ So by some measures four wives is actually quite modest amount.

Views on Where and How Polygamy should be Criminalised

Amongst those who take the view that polygamy is legal, though polygamists can be criminalised if they don't practice it correctly, there is debate as to what conditions the husband should have to fulfil to his wives if he is to be allowed to practice polygamy.²¹ In his book *Nahwa Ushûl Jadîdah li Ushûl al-Fiqh al-Islâmî*, the Moroccan intellectual, Muḥammad Syahrûr, says that God actually allows encourages polygamy, so long as two conditions to be met: first, that the second, third and fourth wives are widows with children to look after; second, that there must be a desire to be compassionate towards those children. For Syahrûr, without fulfilling those two conditions a polygamous marriage is not justified. But the polygamous marriage that does fulfil those conditions is wise, insofar as it can arguably alleviate a variety of social problems experience by women. These include: (1) the widow being less inclined to commit a sin since she has a man to look after her; (2) the orphans having a doubly safe place to grow up and be educated in; (3) the presence of the mother to support her children is likely to be maintained if she has the support of a man.

Syahrûr continues that polygamy can also protect the children of that widowed wife or wives from becoming homeless and delinquent. While there are some institutions and shelters to accommodate for orphans, these can serve to alienate them from their mothers. This is not diminish the importance of such institutions in the community that house orphans, for they are crucial for those who have lost both their parents (or abandoned their children) so that they can be adopted later.²²

Quran commentators agree that another part of the Quran, in the verses of *Asbâb al-Nuzûl*, says that it is forbidden for men to marry widows just for the property that belongs to their children, which comes

¹⁶ Muhammad 'Ali al-Sâ'is, *Tafsîr Âyât al-Ahkâm*, (al-Qâhirah: Mu'assasah al-Mukhtâr, 2002), p. 202-203; and al-Jurjâwî, *Hikmah al-Tasyri' wa Falsafatuh*, (Bayrût: Dâr al-Fikr, 2007), II, p. 10.

¹⁷ Al-Jurjâwî, *Hikmah al-Tasyri' wa Falsafatuh*, II, p. 17.

¹⁸ Al-Jurjâwî, *Hikmah al-Tasyri' wa Falsafatuh*, II, p. 17-18.

¹⁹ Ibn Rusyd, *Bidâyah al-Mujtahid wa Nihâyah al-Muqtashid*, (Ba - rût: Dâr al-Fikr, 1995), II, p. 33.

²⁰ Al-Qurthubî, *al-Jâmi' li Ahkâm al-Qur'ân*, (al-Qâhirah), V, p. 17.

²¹ Ibn Rusyd, *Bidâyah al-Mujtahid*, p. IV, 221, and Wahbah al-Zuhaylî, *al-Fiqh al-Islâmî wa Adillatuh*, p. 189.

²² Syahrûr, *Metodologi Fiqh Islam Kontemporer*, Traslated by Sah - ron Syamsuddin dan Burhanudin, (Yogyakarta: elSAQ Press, 2004), p. 428-430.

with that marriage, who are living under their care. This is not fair for those children. As Allah says, “If you fear you will not be able to do justice to the children from that marriage, then I do not make such a marriage legitimate for you. Marry other women whose children you will be able to do justice to instead.” This message is contained in the history of Abû Bakr al-Tamâm, one of the narratives in these verses, and it is reiterated by the Prophet Muhammad, Abû Yaḥyâ, Sahl ibn ‘Utmân, Yaḥyâ ibn Zâ'idah, and Hisyâm ibn ‘Urwah. So those who permit polygamy emphasise the requirement that men be just to their wives and children. Without this requirement, men would be within their rights to exploit them, and thus disadvantage them. If there is any doubt that Muslim men cannot be fair, then marriage is to be restricted just to one wife, or with his female slave.²³

So far, scholars seeking a legitimate source of guidance about the question of whether polygamy should be criminalised today have selected this text in the Quran at the exclusion of all others. They have also chosen not to take into account the significance of the historical context in which it was written, or at least examine whether the same text suggests such a course of action, or contemplate whether such a consideration is reasonable regardless. Instead, this treatment, based on the historical practice of the Prophet and his followers, has led to the conclusion that polygamy is still not to be prohibited. Indeed, a more traditional interpretation of the text says that the obligation to do justice to one's wives, although important, just rests upon the goodwill of her husband (but traditional Islamic law also entitles women to ask for help or divorce if their husbands treat them badly). This view holds that while men are encouraged to be fair to their wives, in the end the latter spouse depends on trusting the goodness of the former.

Modernists, however, say that since this trust is likely to be violated, stricter requirements are needed.²⁴ Further, they draw upon other texts in the Quran that might call polygamy into question, pointing out that according to verse 129 in chapter al-Nisâ' [14] in the Quran, treating each wife fairly, without leaving any wife “hanging”, is impossible for the husband, even if he really wants to do so.

According to modernists, polygamy should only be practiced in very specific circumstances.²⁵ For

²³ Al-Thabari, *Jâmi' al-Bayân 'an Tâwîl Ayy al-Qur'an*, (Bayrût: Dâr al-Fikr, 1988), III, p. 236-237.

²⁴ Mohammad Zaki Saleh, “Trend Kriminalisasi dalam Hukum Keluarga di Negara-Negara Muslim”, presented in Annual Conference on Islamic Studies, Bandung, 26-30 November 2006), p. 25.

²⁵ Fazlur Rahman, *Tema-tema Pokok Al-Quran*, (Bandung: Penerbit Pustaka, 1996), p. 69.

Muḥammad ‘Abduh, while Allah does give men the option of marrying up to four women, this is based on the condition that they don't feel guilty taking the property of children orphaned by their father and don't feel that they can't be fair to all wives. Otherwise such an option is not necessarily advocated. If the level of doubt in the mind of the prospective husband is calculated to exceed half (*syâk*), polygamy is not permitted. At a quarter (*wahm*), the practice is arguable. Only at *zhan*, where there is a strong probability that justice will be done, is the practice tolerated.²⁶

‘Abduh explains that the phrase “but if you fear that you may not treat them fairly, then (marry only) one” suggests that monogamy reduces the likelihood of sin and injustice. This implies that such an environment is better than one in which the likelihood of those things is increased. Therefore, since these requirements are in place to try to achieve justice (where justice is defined by Allah as the what the heart feels towards one's spouse), and since if such requirements are not met a monogamous marriage is most likely to achieve justice, then it follows that if these requirements are not met monogamy is best and fairest.

Based on verses 3 and 129 in chapter al-Nisâ' [14] in the Quran, it can be argued that getting permission to practice polygamy is limited only to those who fulfil strict requirements. In any case, anything considered to be an emergency—i.e. in the case of marrying a widow—or otherwise, the husband should be trusted to provide an environment that is as fair as possible; anything less is not acceptable according to the Quran. ‘Abduh notes that no rational person would want to build a community on unfair marriage, such as polygamous marriage when the monogamous option is available and demonstrably fairer, as this would lead to hostility between spouses, leading to instability in that household, the very opposite of what the Quran says polygamy can in some circumstances achieve, instability which would threaten to spill over into the community and ultimately the society and the nation.²⁷

By looking at the adverse effects of polygamy in Egypt, ‘Abduh suggested to a contemporary of his, a lawyer, to formulate a law which promotes social welfare and wards off harm by taking into account the contemporaneous social context.²⁸ The Syrian intellectual Muhammad Rasyîd Ridhâ (1865-1935), a disciple of ‘Abduh, adds that because the essential definition of marriage is between one man and one

²⁶ Muhammad Rasyîd Ridhâ, *Tafsîr al-Manâr*, (Bayrût: Dâr al-Kutub al-‘Ilmiyyah, 1999), IV, p. 284.

²⁷ Muḥammad Rasyîd Ridhâ, *Tafsîr al-Manâr*, IV, p. 284-285.

²⁸ Muḥammad Rasyîd Ridhâ, *Tafsîr al-Manâr*, IV, p. 283.

woman, polygamy is a contradiction of that definition. Polygamy is only permitted during a state of emergency, such as a war. If polygamy causes more harm than good, then it can be judged as forbidden.²⁹

Ridhâ also sees polygamy as not a legal issue but a social one, whose justification needs to be considered from a multidimensional perspective. The first dimension includes identifying the nature of potential problems between men and women generally, the relationship between the two from the perspective of marriage, and the purpose of that relationship. The second has to do with the population of men and women, problems of domestic life, responsibilities of men and women to each other and for themselves independent of each other. The third is about the history of social development, how that affects how a historical laws should be reviewed, including taking into account how other societies' views towards marriage influence that of the Islamic world and how that world changes in and of itself. That information then affects the extent to which those laws are viewed as justified. The last dimension that needs to be reviewed is the Quran's treatment of polygamy, ascertaining if it is a matter of religion and is a necessity or just a dispensation allowed in emergencies under strict requirements.

Given that these dimensions inform contemporary standards of justice, Ridhâ concludes that in general monogamous marriages create the conditions for more good than harm more than do polygamous arrangements. Further, currently polygamy does not reflect the general portrait of human life, practiced as it is in limited quantities by a small minority of people, meaning that the standards of justice that these conditions inform similarly should not hold as a general rule.³⁰

Nevertheless, Ridhâ understands the case for polygamy, both individually and collectively. For example, at an individual level, if a husband's spouse is not blessed with the ability to give birth, the husband is advised to practice polygamy because otherwise he might be led to commit adultery. Polygamy essentially allows the husband to commit adultery, but legitimately rather than sinfully. At a collective level, when there is a population imbalance between men and women, which tends to occur during war, women are forced to work harder to support families, sometimes forced to threaten their safety with arduous work. Given also that the diminished supply of men isn't big enough to support every one of them, polygamy by the men who aren't at war helps to solve those economic challenges.

Unfortunately, however, men don't usually see polygamy as a means for social good but rather one in which they can vent their biological desires, at the risk of harming the wellbeing of their wives and thereby their families at large. Therefore, Islam implies that the fairest family is the monogamous one, permitting polygamy only as a dispensation, not a suggestion, and let alone an obligation. Usually, polygamy is a deviation from the principles of marriage, able as it is to upset the peace of soul, love and affection (*sakīnah, mawaddah, rahmah*) which are the foundations and pillars of married life.³¹ In addition, permissible polygamy correlates only to a state of emergency, that is, when social order is already disrupted.³²

Another perspective but still in the same vein as that of Ridhâ and 'Abduh is Qâsim Amîn (1865-1908). In his book, *Tabrîr al-Mar'ah*, he argues that while it looks like verse 3 in chapter al-Nisa is saying that polygamy is permissible for everyone, this is a superficial reading. On second reading, he contends that implicit in the verse is a threat to all polygamists, in that the man who knows that he is unable to be fair to all his wives will fear doing this, so much so that he is compelled to not do it. By still going ahead and doing it his guilt alone would be punishment enough for failing to be fully just. Amîn believes that this means that the only men who get to practice polygamy would be confident enough to be fair to all his wives, meaning their polygamy wouldn't be a social problem because their household would be stable, and if they weren't able to live up to their confidence they would suffer the same overwhelmingly guilty fate as other polygamists, but the fear of that guilt is enough to sufficiently prevent that from occurring.³³

Muhammad 'Abîd al-Jâbirî, in his "*al-Dimuqrâthiyyah Huqûq wa al-Islam*", explains that by looking at the history of polygamy in Islam, it is clear that the practice is not justifiable according to Islam. He says that the tradition of polygamy predates Islam and was first practiced in the period of ignorance (*jâhiliyyah*). Not only that, there was no limit to the amount of wives the polygamist was allowed, nor were husbands required to look after them. Its sole justification was that men could satisfy their biological desires. Islam came to reject this morally void tradition, categorising it as an act of despotism, by introducing the wife limit. Even though now that provision seems generous, it does not change the fact that the spirit of polygamy does not belong to the Islamic tradition.³⁴

²⁹ Muḥammad Rasyîd Ridhâ, *Tafsîr al-Manâr*, IV, p. 286.

³⁰ Muḥammad Rasyîd Ridhâ, *Tafsîr al-Manâr*, IV, p. 291.

³¹ Muḥammad Rasyîd Ridhâ, *Tafsîr al-Manâr*, IV, p. 302.

³² Muḥammad Rasyîd Ridhâ, *Tafsîr al-Manâr*, IV, p. 291-293.

³³ Mohammad Zaki Saleh, "Trend Kriminalisasi", p. 30.

³⁴ Mahmud Muhammad Taha, *The Second Message of Islam*,

Musthafâ Ahmad al-Marâghî (d. 1952), former rector of Al-Azhar University Cairo Egypt also argues that permission for polygamy mentioned in verse 3 in chapter al-Nisâ' [4] is restricted to emergencies, when people are in desperate need. These include when (1) the husband's wife is infertile when they want children; (2) the husband has a very high libido which his wife is unable to serve; (3) the husband has property that is able to sustain all the needs of his would-be wife and his children, who need it; (4) the quantity of women is more than men due to war, so many orphans and widows need to be protected. In saying this though, Abduh concludes that fulfilling all the conditions of a fair polygamous marriage today, such as facilitating food, clothing, shelter, and love, is beyond human capability.³⁵

The views of those scholars fundamentally opposed to polygamy can be traced back to the proposals put in place by al-Syâthibî (d. H. 790), that constitute a prominent Mâliki *madzhab*. In the spirit of syariah, al-Syâthibî proposes that the immorality of acts should be determined in accordance with their respective advantages and disadvantages in society, instead of just in accordance with the Allah's commandments in and of themselves. The greater the disadvantage caused, the greater the sin it is.³⁶ Applying this principle to the issue of polygamy, for al-Syâthibî, makes it an act of immorality or sin.

In *fiqh* rules, it is clearly stated that disadvantages must be eliminated—"al-dharar yuzâl". This rule is based on the Hadith of the Prophet—"you should not do harm to yourself and others." Therefore, since polygamy can lead to disadvantages rather than advantages, it can be seen as a sin and thus categorized as a criminal act punishable by *ta'zîr*. The size of the *ta'zîr* punishment depends on the extent of the impact of the polygamy. The provisions concerning the type and size of *ta'zîr* must be formalised in legislation to have absolute authority. Muḥammad 'Abd al-Mun'im al-Qî'î says that the application of *ta'zîr* punishment must satisfy four criteria. First, it must be intended to protect the public interest, that for which the government is responsible. Second, its implementation must have a positive impact. If this is not achieved then sanctions should be replaced with whatever is thought to be able to do so until it is. Third, there must be a fit between the punishment and the offense. Fourth, there must be

no exceptions made to people for these punishments.³⁷ So a law that can prevent negative effects arising from abusing the practice of polygamy in the community is important for Muslims. In Indonesia, positive law, in the form of marriage law, based on the Marriage Law and the KHI, plays this preventative role.

The Perspective of Positive Law on Polygamy in Indonesia

The practice of polygamy in Indonesia has been strictly regulated in positive law. Law No. 1 of the 1974 Marriage Law champions the principle of monogamy. Article 3 paragraphs (1) and (2) of the Law state that marriage is based on the principle that a man should only have one wife and that a woman may only have one husband. However, a husband can ask the Court of Religious Affairs (PA) to be granted permission for polygamy, supposing he meets a certain number of the requirements as stipulated in articles 4 and 5 of the Law. In Article 4 Paragraph (2) these are if: (a) The wife cannot fulfil her obligations as wife; (b) The wife has become disabled or contracted an incurable disease; (c) The wife cannot bear offspring.

In conjunction with article 4 Paragraph (2), where just one of these claims needs to be made to apply for polygamy, the PA can only give permission for polygamy if all requirements set out in article 5 paragraph (1) have also been met, namely if: (a) There is approval to have another wife from the existing wife/wives; (b) There is certainty that the husband is able to provide life's necessities for his wives and their children; (c) There is a guarantee that the husband will do justice to his wives and children.

Furthermore, if a husband intends to have more than one wife he has to submit a written application to the court.

Polygamy is also discussed in KHI, a body of rules employed by the state administration intended to create order in society and to protect the interests of Muslim citizens, especially the rights of women in married life. In the Indonesian legal system, the KHI, whose authority and legitimacy are based on Presidential Instruction No.1 of 1991, is recognized as positive law. But the KHI, a New Order initiative, in trying to reconcile Islamic law with positive law following the struggle between the Islamic and secular interests (*siyâsah syar'iyah*),³⁸ is ultimately different to both. The rules set out in KHI on polygamy are contained in chapter IX in article 55,

Translated by Abdullahi Ahmed An-Na'im, (New York: Syracuse University Press, 1996), p. 140.

³⁵ Al-Marâghî, *Tafsîr al-Marâghî*, (al-Qâhirah: Musthafâ al-Bâb al-Halabî wa Awlâduh, 1974), IV, p. 180-181.

³⁶ Al-Syâthibî, *al-Muwâfaqât fî Ushûl al-Syarî'ah*, 'Abd Allâh Darrâz, Ed, (Bayrût: Dâr al-Kutub al-'Ilmiyyah, 2003), p. 227-228.

³⁷ Muḥammad 'Abd al-Mun'im al-Qî'î, *Nazhrâh al-Qur'ân ilâ al-Jarîmah wa al-Iqâb*, (Al-Azhar: Dâr al-Manâr, 1988), p. 273-274.

³⁸ Marzuki Wahid and Rumadi, *Fiqh Madzhab Negara: Kritik atas Politik Hukum Islam di Indonesia*, (Yogyakarta: LKiS, 2001), p. 213.

which says: (1) To have more than one wife at the same time is to be limited up to only four wives; (2) The main requirement in having more than one wife for husbands is to do justice to the wives and children; (3) If the main requirement specified in paragraph (2) cannot be met, the husband is banned from having more than one wife.

Article 56 says: (1) A husband who wants to have more than one wife must obtain permission from the Religious Court; (2) Submitting an application for permission referred to in paragraph (1) is carried out according to procedures set forth in chapter VIII of Government Regulation No. 9 of 1975; (3) Were separate marriages to be carried out by the second, third and fourth wives, without the permission of Religious Court, they would have no legitimacy.

If a husband undertakes a polygamous marriage under the hand (*sirrî*), his wife and any children born as a result of their relationship are not recognised as such, nor are they legally entitled to the inheritance of that husband or father. Children are also not entitled to a birth certificate. By acting outside of state rules (*uli al-amr*), a woman's claim to the title of wife in relation to a man, as well as their offspring's claim to the title of their children, are rendered invalid by the state. In turn, if a child's birth is not officially recorded, as a consequence of a *sirrî* polygamous marriage, then their very identity can't be officially traced back to their parents due to the lack of written evidence and is therefore also unofficial.

For Syahrûr, however, if a particular country does not explicitly prohibit polygamy, then those who commit it cannot be regarded as having committed adultery and therefore cruelty. If it is not prohibited, and therefore not cruel, then it cannot be considered forbidden (*al-mamnû*), because God only forbids cruelty. The problem for Indonesian Muslims is the absence of any definite distinction between the forbidden and the illegitimate, such that even though an act like polygamy may be considered illegitimate, it still may not necessarily be forbidden in the eyes of God because it is not prohibited. Until that point in time, its illegitimacy, unlike God's will, is not necessarily permanent but rather just depends on the current legislation that can be subject to change.³⁹

To solve this problem, and to realise of purpose of the law, that is to create a community where there is certainty, order and the means by which to exercise rights, the legislature should not hesitate to endorse a bill that explicitly criminalises perpetrators of polygamous marriages. Currently a polygamous marriage that does

not meet the requirements of article 2 paragraph (1) and paragraph (2) of the Marriage Law is deemed to not exist under the law at all, like the children and wives or *sisi* polygamous marriages.

Only if such an act is acknowledged by law can it be criminalised in the way that article 279 of Kitab Undang-Undang Hukum Pidana intends: (1) To be threatened with imprisonment of five years: (Penal Code 37-2); (a) whoever holds a wedding when he knows that his own existing marriage or marriages legally prohibit him from doing it; (b) whoever holds a wedding when he knows that the other party's existing marriage(s) prohibit that party from doing it; (2) When guilty of conduct in paragraph (1.1), if that person hides this information from other parties then he is liable to a maximum imprisonment of seven years; (3) Revocation of the rights as mentioned in section 35 number 1-5 can be dropped (KUHPerdota 27 ff., 60, 714, 199; Penal Code 436).

Furthermore, article 35 in KUH Pidana says: (1) The rights of prisoners with the judge's decision may be revoked in accordance to this law, or any other general rule, as follows: 1) The right to hold office in general or a specific position; 2) The right to enter the Armed Forces; 3) The right to elect and be elected in elections held under the general rules; 4) The right to legal counsel or trustee upon court order, the right to be a trustee, guardian supervisor, supervisor, for people who are not their own children; 5) The right to exercise fatherly power, running custody or guardianship of the child itself.

Closing Remarks

It is clear that Islam justifies polygamy when there is an emergency in which a woman is regarded as better off being married polygamously than not at all. This justification for polygamy is often not considered by Western critics of the practice, regarding it as debasing women. But in defence of polygamy, at least the stable family environment afforded by it is better than partners cheating on their spouse with other men or women, some of whom are also married. Ahmad al-Jurjâwî, a scholar of the Al-Azhar doctrine in Cairo, Egypt, in his *Hikmah al-Tasyrî' wa Falsafatuh*, points out the rates of children born out of wedlock in countries that do not recognize polygamy. In France this figure is reportedly 30%, and in Brazil it is as high as 60%.⁴⁰ Since adultery is a sin, polygamy, for al-Jurjâwî, mitigates the danger of committing it, and that should be seen as a good thing when the French and Brazilian cases show that

³⁹ Syahrûr, *Metodologi Fiqh Islam Kontemporer*, p. 434.

⁴⁰ Al-Jurjâwî, *Hikmah al-Tasyrî' wa Falsafatuh*, II, p. 7.

adultery is rife without polygamy. Al-Jurjâwî also says that polygamy is the socially logical action for being a good, responsible, family man in an emergency situation, rather than just a legitimate means by which to exercise their lust.⁴¹ If he is not those things, monogamy without special dispensation is the right choice. A polygamous marriage can also be a reward for the wives. If their husband is from a dignified and wealthy family, this provides the opportunity of raising their own level of education and religious insight, an opportunity they may not have were it not for the acceptance of polygamy.

Nevertheless, basing polygamy on this principle implies that those permitting it believe it to be in the interests of that woman, even though she may think it not to be in her interests, and thus put her at a disadvantage. But regardless of whose best interests are at heart in permitting it, polygamy leads to negatives. This is the argument made by Musdah Mulia, a Indonesian Muslim and feminist. One negative is that polygamy legitimises under the hand marriages, can lead to psychological and economic negligence to wives and children, which in turn can lead to high rates of domestic violence. The risk of the transmission of venereal disease is also increased.

In short, for Mulia, polygamy has more objective disadvantages than it does advantages.⁴² For al-Syâthibî, a Mâlikî scholar, this means that polygamy can be viewed as sinful. If whether or not an act is sinful depends on whether or not it is advantageous or disadvantageous for society, then given that polygamy is generally disadvantageous, it is therefore sinful.⁴³ *Al-dharar Yuzâl* agrees, saying that since disadvantages should be eliminated—in accordance with *fiqh*—polygamy, in putting members of society at a disadvantage, also needs to be eliminated, and the way to do this is through *ta'zîr* punishment. Provisions to determine the size and type of the punishment, which should depend on that of the impact of the polygamy, need to be set in legislation so everyone can refer to them and accept their legitimate force.

As it stands at the moment, what the law says about polygamy in the Marriage Law and the KHI does not necessarily stop polygamy from occurring. Lack of clarity serves as an impediment to actually criminalising individuals who commit polygamy, and implementing *ta'zîr* correctly. The reason for this, Ratu Ayu Rahmi argues, can be explained systematically by looking at

the relationship between the goal of a law and the social process through which this goal is or is not achieved. He splits this relationship into four parts: first the recipient (the person for whom that law applies), second the message (the law itself), third the receiving apparatus (the means through which the recipient receives the message) and fourth the space between the message and the receiving apparatus, in which other information can interfere with the message.

In regards to polygamy, the recipient is often a citizen who does not know, or still considers, the national law (positive law) regarding marriage to be secondary to syariah. So in the case of polygamy, since religion outweighs country, they think it can be regarded as legitimate. The message is the provision in article 3 paragraph (2) and article 5 paragraph (2) Marriage Law which does not provide specific sanction for polygamy. The receiving apparatus is community leaders, and the space between it and the message is filled with the still strong influence of customary norms that affect the leaders, which then affects the recipient. For criminalising polygamy to work, all of these factors have to change, not just the law. But this process begins with establishing legal certainty by reformulating national marriage laws so that anything but monogamy is criminal, there is a specific punishment attached to each crime, and each punishment is clearly stated as such. []

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⁴¹ Al-Jurjâwî, *Hikmah al-Tasyrî' wa Falsafatuh*, II, p. 7.

⁴² Musdah Mulia, *Islam & Inspirasi Kesetaraan Gender*, (Yogyakarta: Kibar Press, 2007), p. 146-147.

⁴³ Al-Syâthibî, *al-Muwâfaqât fi Ushûl al-Syari'ah*, p. 227-228.

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