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THE PHENOMENON OF LIMITATION OF POLYGAMY IN THE PERSPECTIVE OF ISLAMIC LAW AND NATIONAL LAW IN INDONESIA

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Abstract

Purpose: Polygamy is an inseparable part of human history, has been practiced by most of the nations in the world. In Europe, Asia, Africa. Islam came down at a time when the practice of polygamy had no restrictions and regulations. Theoretical framework: Al-Qur'an Surah An-Nisa 'verse (3) is a form of restriction and regulation of polygamy in Islam. In Indonesia, restrictions and regulations on polygamy are contained in Law Number 1 of 1974 and its implementation. Design/methodology/approach: The method used consists of library research, with approaches: Historical, Philosophical and Juridical Norm and qualitative descriptive data analysis. Findings: This study found that the philosophy of restriction and regulation of polygamy aims to prevent the practice of polygamy carried out at will, which can lead to dire consequences (Sadd Adzari'ah) in the family. Research, Practical & Social implications: This is by the rules of fiqh; preventing harm that may arise takes precedence over taking benefits.

Keywords

Philosophical, Restrictions, Polygamy, National Law.

INTRODUCTION

Law Number 1 of 1974 concerning Marriage was born driven by elements of

society, especially from women's activists and women's organizations. They are concerned about the practice of polygamy that has occurred so far, which tends to be wild, too easy and at will. As a result, marriage cannot achieve the ideals of the marriage institution itself, namely the realization of the fabric of affection in the family that can give birth to good offspring (Brown, 2010). Therefore, they demand that polygamy be regulated and limited because the relatively loose regulation of polygamy causes people to make it easy and tend to do it at will.

Reforms in family law in Indonesia include the issuance of Law Number 1 of 1974 concerning Marriage, aiming to change the culture of society regarding marriage, one of which is the regulation and restriction of polygamy, so that the Indonesian people will respect the dignity of women more, which is directly proportional to respect for humanity, more respect for the institution of marriage, which has a complex impact on human life, relating to a Sakinah family, pious and pious offspring, an established socio-economic life. In this case, the reform of family law in Indonesia acts as a social engineering tool, namely law as a means of changing community culture (Nasution, 2005).

The principle of Indonesian marriage is monogamy, but polygamy is allowed if the religious court approves it (Chan, 2012). For a husband who wants to have polygamy, the conditions for obtaining permission are because the wife cannot carry out her obligations, namely because the wife is sick or has an incurable disability, and the wife cannot bear children. To apply for polygamy in court, the wife's or wife's consent must be obtained; the husband must ensure that he can meet his wife and children's needs and that the husband can provide justice.

The preparation of the Draft Law Number 1 of 1974 until it was accepted as law and promulgated in the state gazette experienced controversy in resistance from some Islamic community organizations and other Muslim communities and some fractions members of the House of Representatives (Ashsubli, 2016). Rejection occurred against articles that were not previously regulated in fiqh books, such as restrictions on marriage age, marriage registration, and rigid regulations regarding polygamy (Hermawati, 2015). The inclusion of these articles aims to change the behaviour of marriage in society to be more orderly and responsible so that the wisdom and purpose of marriage can be realized. In this context, the law functions as a means of changing society (Montazeri et al., 2016).

On the other hand, according to Imam Ghazali, the purpose of Islamic law is to realize the interests of humanity in this world and the hereafter. In syar'i terms, *maslahah* is to (1) maintain religious beliefs; (2) nourish the soul; (3) maintain intelligence; (4) maintain offspring; (5) maintain wealth (Tahir, 2020). Everything that can sustain the existence of these five things is classified as *maslahah*. On the other hand, anything that threatens the existence of these five things is considered *mafsadat*.

Based on this, the essence of Islamic law must realize the benefit with the indicators of the five main things in question (Hamim, 2021). Therefore, everything that has the potential to threaten religion, life, intellect, lineage, and property must

be prohibited. In this case, all human activities must be measured in the context of *maqashid ash-syar'i* (Inggriani & Nafik, 2015). The restriction and regulation of polygamy carried out by Islamic law as contained in the letter An-Nisa 'verse 3, which limits the number of women who are polygamous, as well as regulates and provides conditions that must be able to apply pretty, must be interpreted to realize the benefit and avoid harm (Nurchahaya et al., 2018). Such an understanding can also be used in interpreting the renewal of family law in Indonesia through legal codification. Namely Law Number 1 of 1974 concerning marriage, articles 3-4 and other regulations that contain regulating polygamy by requiring several things strictly and limiting the practice of polygamy. Thus, positioning polygamy only as an alternative to certain conditions can create benefits and avoid the harm that may arise from indiscriminate polygamy practices (Abdullah et al., 2015). Departing from this, it is exciting and essential to know and understand what benefits can be achieved and what harms can be prevented behind the regulation and restriction of polygamy in national law in Law Number 1 of 1974 and Islamic Law.

METHODS

This study uses a legal norm approach, namely the applicable laws and regulations. Approach with laws and regulations to comprehensively determine the regulation used related to the issues studied, whether there is consistency, difference or conformity between one legal norm and another (Christiani, 2016). The juridical approach is based on a normative approach where research is in the form of an *in concreto* legal discovery effort that can be applied to resolve a particular legal case and analyse various laws and regulations (Noho, 2019).

The nature of this research is prescriptive or based on applicable regulations. Researchers will describe the problems that occur based on the laws and regulations relevant to the restrictions on the polygon in national law (Tacconi et al., 2019). The problems answered will provide a conclusion that will be the common thread of the formulation of the problem in the study. In addition, researchers can provide recommendations or input from the results obtained in the research conducted.

RESULT AND DISCUSSION

The Concept of Marriage in the Framework of Islamic Law

Marriage is an act that is commanded by religion and is the Sunnah of the apostle (Kelsay, 1994). Because by getting married, humans can channel their natural desires correctly and channel the potential for love and affection between men and women. The purpose of marriage in the Qur'an as stated in the Surah Ar-Rum Verse (21):

Meaning: And among the signs of His power, Allah has created for you a

wife/husband of your kind, so that you are inclined and feel at peace with him and made between you compassion, verily in that are signs for people who think (Fauzi et al., 2020; Sofyan & Monirah, 2021).

Based on the verse above that marriage aims to form a *sakinah* family, *mawaddah warahmah*. According to Quraish Shihab *Sakinah*, it means calm as opposed to shock. Meanwhile, the meaning of *mawaddah*, *warahmah*, *Mujahid* and *Ikrimah*, defines *mawaddah* as a pronoun for marriage which means having intercourse and *rahmah* as a pronoun for children (Suryani & Kadi, 2020). With marriage, a husband-and-wife relationship is legal and gives birth to a child. Quraish Shihab defines *mawaddah* as a person who can ignore his love for himself for the sake of his love for his partner. The meaning of *mawaddah* is like the word *grace*; the difference is that *grace* is aimed at weak and hopeful people, while *mawaddah* also applies to those who are more robust.

Thus, as stated in *Ar-Rum* verse (21), the core purpose of marriage is the establishment of love between husband and wife in the household, which affects peace and peace in the family so that they can give birth to pious and pious offspring. Regarding the purpose of marriage, we can see in Law Number 1 of 1974; marriage is an inner and outer bond between a man and a woman as husband and wife to form a happy and eternal family based on the one and only God (Sukadana et al., 2018).

There are similarities between the purpose of marriage in the *Qur'an* and the purpose of marriage as stated in the Act, namely, to form a happy family because a happy family created by love and affection is the foundation for a more expansive life. Family life affects the life of society and the life of the nation.

A *sakinah mawaddah warahmah* is an ideal form of the family; members in it feel peaceful and secure, rights and obligations run in balance so that family functions can run well (Pongoliu, 2017). Happiness, harmony, and goodness of family members will have a role in realizing the peace and goodness of the surrounding community (Herawati, 2016). However, the fact is that not all households can create peace and harmony in the family; families face many obstacles and challenges, failure to overcome these obstacles and challenges causes the breakdown of the household and the destruction of the family (Iseselo et al., 2016).

Based on the preceding, marriage as a way of forming a family must be regulated. Marriage arrangements include conditions for marriage, especially about the age at marriage, dowry, guardians, witnesses, marriage registration, knowledge of husband-and-wife rights, ability to take care of children, restrictions, and determination of polygamy requirements.

Philosophical Aspects of Restricting Polygamy in National Law

Restrictions on the number of polygamous women in Law Number 1 of 1974 and Islamic Law, basically aim those marriages carried out can create peace in the household and be a form of protection for women, which means protecting human

dignity (Cammack et al., 2015). Unlimited polygamy as practiced by nations in the pre-Islamic world, including by the Romans and Greeks, the Chinese and Indians, ancient Java, and pre-Islamic Arabs, is a portrait of marriage based on sexual desire male ego in the form of wealth as well as power. This positions women as victims, and their dignity is abused. Restrictions on polygamy are made so that women's rights and dignity are protected, as well as the future of their children (Mancini, 2012).

While the regulation of polygamy, both in Law Number 1 of 1974, and Islamic law, in the form of imposing conditions and reasons for its substance, is that the marriage is by the nature and purpose of marriage itself, namely the formation of a family that is *sakinah mawaddah warahmah*, as a forum for preparing children. Who are pious and pious, who can socialize with strong ethical values of morality to positively affect the surrounding community?

The regulation of polygamy in Islamic law and law in the form of inclusion of conditions can apply so that polygamists can treat their wives and children fairly. This is so that the marriage does not harm and even causes victims to his wives and children so that it tarnishes the sanctity of marriage and is contrary to the essence of the purpose of marriage itself.

The inclusion of polygamy requirements must be based on the wife's permission in law number 1 of 1974; this is so that polygamy that is carried out does not get challenges from both the wife and other family members so that polygamy that is carried out on one side causes pleasure from her new husband and wife. However, the impact the result is damage to the long-established family with the former wife. The inclusion of the requirements for ability in the economic field in the law, this is because it relates to the responsibility for living for his wives and children, both for food, clothing, and housing. It is necessary for domestic life.

The limitation and regulation of polygamy are basically to avoid the harm caused by polygamy itself. Muhamad Abduh mentioned the harm of polygamy: polygamy contains evil; if a husband and two wives inhabit a house, jealousy and enmity arise, enmity spreads to their children, hostility between individuals spreads to hostility society, thus creating a fragile society (Jaman, 2020).

Based on the description above, the limitation and regulation of polygamy serve to prevent crime. Because if it is not restricted, men will follow biological impulses without considering the consequences, then what happens is the practice of illegal marriages, polygamy at will; many women and children become victims (Nour, 2006). So that the purpose of marriage to form a *sakinah mawaddah warahmah* family as contained in the Qur'an will not be realized, then what happens is a broken family, a broken household (Nurhadi & Dalimunthe, 2019).

From a broken household and a broken family, the ideal functions of a family, such as sexual regulation, reproductive function, socialization function, maintenance function, the function of placing children in society, satisfying individual needs, social control function, cannot work as a result. The family is not a part of creating a peaceful and peaceful society; it can affect chaos in society.

The requirement for a guarantee to apply relatively both in Law Number 1 of 1974 and Islamic law aims to maintain the behaviour of polygamous husbands so that they are impartial or biased towards those who are younger and more beautiful or other factors that can affect husband acts unfairly to his wives and children. Because justice is the essence of religion, family members can avoid jealousy by acting and acting reasonably. This can cause shock in the family so that the purpose of family formation as mandated in the Qur'an is not achieved.

The philosophy of limiting and regulating polygamy in law number 1 of 1974 and Islamic law is part of the effort to prevent the harm that arises in the practice of polygamy. This is by the qa'idah fiqh, preventing harm that may arise takes precedence over taking benefits.

Unrestricted and unregulated polygamy, as happened in the pre-Islamic era, reflects a society's point of view that demeans women's dignity. Because women are seen as despicable and weak creatures, even worse, women are seen as goods that can be traded or objects of other vile behaviour. Therefore, the limitation and regulation of polygamy is a form of effort to elevate the dignity of women, which means to elevate the dignity of humanity.

The restriction and regulation of polygamy in Islamic law is a form of effort to change the culture of polygamy carried out by human beings throughout the world in general and in the Arabian Peninsula, which previously did not recognize restrictions and regulations. This polygamous behaviour treats women in a standard way who does not recognize women's rights as human beings. More than that, the practice of polygamy that has no rules and no limits leads to forming a family that is not by the provisions of Islamic law. The presence of Islamic Shari'a changes society's culture for the better by limiting the number of women who can be married in one period to a maximum of four. Rules accompany this in the form of guarantee conditions that apply pretty. Changes in the practice of polygamy, which have no limits and rules, causing harm, to the practice of polygamy, which is limited in number and accompanied by specific conditions to produce benefits. Based on this, Islamic law has functioned to change the culture of society (Law as Tool of Social Engineering) (Manullang, 2020).

Likewise, legal reform in Indonesia as contained in Law Number 1 of 1974 and other implementing regulations in the form of narrowing down the practice of polygamy, amid society who considers this an absolute right of men, is changed to require court permission, accompanied by strict requirements, is an effort to change the behaviour of polygamous culture to be more responsible. In this context, the law not only functions as a tool that creates legal certainty but also functions as a means of changing society (Law as a tool of social engineering).

Restriction and regulation of polygamy aim to prevent and or stem the practice of polygamy, which is carried out at which will cause dire consequences, not only an insult to the dignity of women, moreover, it creates a family that is not by the goal of forming one's own family, namely a peaceful and peaceful family (Haneef & Razak, 2017). The philosophy of limiting and regulating polygamy in the

study of ushul fiqh is known as the Sadd adz dzari'ah method, which inhibits the possibility of harm (Fitri, 2020).

On the other hand, sociologically, the family's existence dramatically determines the community's life, a good family can affect the good of society and vice versa, a good society affects the good of the family. Restrictions and arrangements for polygamy are carried out so that the marriages carried out can achieve the ideal goals as described above. Based on this, the limitation and regulation of polygamy can be helpful as an opening in realizing the purpose of marriage.

CONCLUSION

The philosophy of limiting and regulating polygamy to prevent harm, in the study of ushul fiqh, is known as the Sadd Adz-dzari'ah method, which inhibits the possibility of harm. This is by the qa'idah fiqh, preventing harm that may arise takes precedence over taking benefits. On the other hand, the restrictions and regulation of polygamy to open the benefits in creating a sakinah family, mawaddah wa rahmah, in ushul fiqh is known as the method: fath Fath Adz-dzari'ah, (opening benefit). The restriction and regulation of polygamy, both in law number 1 of 1974 and in Islamic law, is an attempt to change the polygamous culture of society, especially the polygamous culture of the Arab community before Islam and the practice of polygamy at will. This is by the function of law as a means of changing the culture of society (The Law as a Tool of Social Engineering).

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