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Maṣlaḥaḥ and Gender Perspectives on Granting Polygamy Permits: Study of the Enrekang Religious Court Decision Number 28/Pdt.G/2021/PA.Ek

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ABSTRACT

The provisions for granting polygamy permits include facultative and cumulative requirements. The application in Case Number 28/Pdt.G/2021/PA.Ek needs to meet the facultative requirements. However, in their decision, the panel of judges granted the quo request. Research is required to dissect the significance of the arguments used by the Petitioner and the considerations used by the judge by placing them in the spectrum of Islamic thought regarding polygamy to find their relevance to granting permits.

The approach used in this research is socio-legal. In this case, the maṣlaḥaḥ perspective in Islamic law and gender in social sciences will be used as theoretical tools to dissect the research object.

Based on the theory of maṣlaḥaḥ, it is understood that the considerations in the quo case do not represent the meaning and concept of maṣlaḥaḥ and instead tend to illustrate the mafsada in the choice of legal basis used. Meanwhile, considering benefits in the quo decision is used to legitimize polygamy. From the gender analysis, it is understood that the considerations used by the panel of judges reflect the logic of oppression against women and legitimize the site of pressure through the maṣlaḥaḥ argument. The choice of legal basis by the Panel of Judges in the quo case reflects the situation of oppression where natural resources are domesticated and controlled as a reproduction machine.

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1. INTRODUCTION

The legal status of polygamy has become an exciting subject of debate due to the intertwining of religion and modernity, which are struggling to fight over the significance of the meaning of the institution of polygamy. Polygamy is a concept that is known in several major religions in the world (1). Social history records the existence of polygamy in the religious traditions of Judaism, Christianity, Hinduism, Islam, and Arab society before Islam - which then received criticism along with modernity, marked by the ideas of democracy and equality (2).

On the Islamic side, the debate regarding the concept of polygamy emerged along with the contact of Islam with Western ideas. However, the upheaval of Western society must be acknowledged to have created a strong vibration in thought and renewal in the Islamic world after taqlid for centuries. This inevitably creates an upheaval in thinking about the institution of polygamy between groups that reject polygamy, accept it, and recognize it with certain restrictions and conditions.

This debate is not just at the level of religious thought but practically extends to state institutions. Indonesia, through Law Number 1 of 1974 concerning Marriage (UU Marriage), the Compilation of Islamic Law (KHI), and Government Regulation (PP) Number 9 of 1975 concerning the Implementation of the Marriage Law, has institutionalized the institution of polygamy. Even though it recognizes monogamy as a principle of marriage, as long as it meets specific provisions in the regulations above, polygamy can be

applied to the court. (3).

Against this reality, the civil society movement, which is committed to the issue of gender equality, has created the CLD-KHI (Counter Legal Draft-Compilation of Islamic Law) as a counter draft to the provisions of Islamic Law, which are deemed not to reflect gender justice. One of the provisions in the CLD-KHI regulates polygamy, which is firmly stated as an impermissible act (haram lighairihi).

Apart from that, the court's decision to grant the request for a permit for polygamy has practically received criticism in various arguments. This is not only due to the sensitivity of modern society to the issue of polygamy. Furthermore, granting permits for polygamy is often considered to exceed the restrictions explicitly stated in regulations regarding polygamy permits, such as the Marriage Law, KHI, and PP No. 9 of 1975. So, applying for a license for polygamy seems easy to grant in court. Several decisions show that the judge's legal considerations in granting permits for polygamy reflect misogynistic and sexist views.

At this stage, thoughts also flare up, which negate each other. On the one hand, there is the idea of equality between men and women, which wants to prevent polygamy. Meanwhile, the doctrine of polygamy in Islamic family law cannot be ignored at the opposite pole. The implications of such a struggle will determine the court's decision in polygamy permit cases.

One decision that has attracted attention is the Enrekang Religious Court Decision Number 28/Pdt.G/2021/PA.Ek. The basis used by the Petitioner as an argument is his feeling of loneliness and his relationship with another woman. At first glance, this argument needs to be included in the reasons for granting polygamy as stipulated in Articles 4 and 5 of the Marriage Law, Articles 55-59 KHI, and Article 41 PP No. 9 of 1975. However, in his decision, the judge granted the request for a polygamy permit.

If you read the limitations of the provisions on polygamy, the arguments and rulings describe a mutually alienating relationship. For this reason, research is needed to dissect the significance of the ideas used by the Petitioner and the considerations used by the judge by placing them in the spectrum of Islamic thought regarding the concept of polygamy to find their relevance to granting the quo petition.

The approach used in this research is socio-legal. The socio-legal approach is an interdisciplinary approach that combines legal and social science methods. Thus, the research object can be studied more comprehensively. In this case, the maṣlaḥaḥ perspective in Islamic law and gender in social sciences will be used as theoretical tools to dissect the research object.

2. REVIEW OF THEORIES AND CONCEPTS

2.1. Maṣlaḥaḥ

In pre-modern Islamic thought, maṣlaḥaḥ was understood as a juridical term. Beirbeida, in the early centuries of the emergence of Islam, increasingly used term terms as "discretionary" reasoning to formulate laws to promote public interests. Meanwhile, in the 11th century, maṣlaḥaḥ became the preferred term to describe the good and public interest.

The word maṣlaḥaḥ is mufrad, and the plural is maṣalih, which means excellent or righteous (4). Maṣlaḥaḥ is etymologically an effort to take advantage and eliminate mafsadat. This is in line with the opinion of the fuqoha that eliminating mafsadat takes priority in eliminating maṣlaḥaḥ.

Meanwhile, al-Gazali does not understand maṣlaḥaḥ, as explained above. According to him, maṣlaḥaḥ, based on the scale of "taking benefits and eliminating harm," is a goal humans want to achieve, not a sharia goal. Furthermore, al-Gazali believes that the purpose of syara' is to protect religion, soul, reason, lineage, and property. Thus, according to al-Gazali, maṣlaḥaḥ aims to maintain or maintain the five objectives of the sharia.

It is recognized that the Islamic ulama believes in maṣlaḥaḥ. Some scholars interpret maṣlaḥaḥ based on sharia standards, as per al-Gazali. However, some scholars use reason as a measure of maṣlaḥaḥ. Aṭ-Ṭufī is one of the scholars who think about the supremacy of reason over texts in matters of interest to the muamalah. Aṭ-Ṭufī's opinions became controversial because he emphasized maṣlaḥaḥ above the Qur'an, Sunnah, and Ijma', which made him very different from his predecessors.

According to 'Izzuddīn bin 'Abdus Salām, there are two types of maṣlaḥaḥ, namely maṣlaḥaḥ in the essential sense, meaning happiness, joy, and so on, and maṣlaḥaḥ in the magazine mind, namely all forms that can give rise to maṣlaḥa ḥ necessary. Because of that, sometimes what can cause maṣlaḥaḥ is damage and destruction (5).

In other words, to realize true maṣlaḥaḥ, an intermediary is needed, which is called maṣlaḥaḥ magazine. However, the cause or intermediary for maṣlaḥaḥ does not always have to be maṣlaḥaḥ. Not surprisingly, damage and destruction can become a way to overcome more significant wear and destruction by impairing maṣlaḥaḥ, such as the law of qishas for murderers, the law of cutting off hands for thieves, and so on. In this way, it can be said that maṣlaḥaḥ is not always caused/mediated by maṣlaḥaḥ, but maṣlaḥaḥ can also be caused by mafsadat.

From the concept of 'Izzuddīn bin 'Abdus Salām above, Kamal Muchtar then summarizes the scope of the meaning of maṣlaḥaḥ as follows:

Maṣlaḥaḥ can mean benefit, practical, functional, flawless, good, pleasant, pleasant, happy, lucky, happy, successful in business. The opponent is mafsadat.

All causes that can give rise to maṣlaḥaḥ are maṣlaḥaḥ, and all causes that can give rise to mafsadat are mafsadat.

Mafsadat can sometimes give rise to maṣlaḥaḥ. Because of this, the causes that maṣlaḥaḥ can cause are sometimes in the form of maṣlaḥaḥ and sometimes in the form of mafsadat.

There are physical and spiritual maṣlaḥaḥ, worldly and spiritual maṣlaḥaḥ, general and special maṣlaḥaḥ, material and spiritual, and so on.

2.2. Gender

According to Mansour Fakih, gender is a characteristic inherent in men and women that is socially and culturally constructed. Geindeir can also be understood as a cultural concept used to create balanced roles, behavior, mentality, and emotional characteristics between men and women in society.

From a gender point of view, the law is seen as a mechanism for the oppression of women, which aims to strengthen patriarchal domination. In fact, according to Catherine MacKinnon's view, quoted by Ian Ward, the law imposes explicit subjugation on women's dreams. According to Nikein Savitri's view, as quoted by Aditya Yuli Sulistyawan, the law is not neutral but reflects the dominant political philosophy. In this context, when men formulate the law, the law becomes a tool that maintains patriarchal domination.

Geindeir is a social practice that creates and maintains gender inequality and organizes unequal relations based on that inequality. This understanding underlines the creation of inequality and inequality in regional relations. Due to aspects of inequality, general inequality is reproduced through two interrelated processes, namely institutionalization and legitimacy. Institutionalization refers to the process in which social relations take on institutional characteristics. In the institution of marriage, for example, there is a belief in the meaning of gender relations, which is widely internalized and practiced within the family.

Meanwhile, legitimacy refers to the process by which inequality is allowed. That is, inequality is understood in a way that makes it appear fair and reasonable. Inequalities are then considered normal, accepted as acceptable, made desirable, or perhaps tolerated.

Furthermore, the central concept of gender studies in law is patriarchy. Thus, men's assumption of natural rights to control and power in various areas of life, including the family, has become a subject of analysis in gender and legal studies.

3. RESULTS AND DISCUSSION

The application for a polygamy permit is a case that is included in the type of substantive case. So that the husband who files the claim for a polygamy permit is seated as the Petitioner. Meanwhile, the wife who intends to undergo polygamy is placed as Teirmohon. The following describes the leading cases in the Einreikang Religious Court Decision Number 28/Pdt.G/2021/PA.Eik.

In legal considerations, the panel of judges explained that, in essence, the petition submitted by the Petitioner was to request permission from the Einreikang Religious Court so that the Petitioner could remarry the Petitioner's future second wife. The following are the reasons used by the Petitioner:

When the applicant left the applicant at home for an extended period, the applicant felt lonely and was not given attention because the applicant was very worried that he would commit acts prohibited by religious norms if the applicant did not carry out polygamy.

To the Petitioner's request, the Petitioner (wife) has provided an answer that provides all the arguments for the Petitioner's request and does not ignore the Petitioner's desire for polygamy. Likewise, based on the prospective second wife of the Petitioner, the person concerned stated that she had no intention of becoming the second wife of the Petitioner.

Describes the evidence of letters and witnesses and ownership of joint assets. The panel of judges then cited the intention of polygamy as a legal basis, namely Article 41 of Government Regulation 9 of 1975 concerning the Implementation of Law Number 1 of 1974. It was then explained that based on the Respondent's answer, the statements of the Petitioner's second wife, witnesses, and evidence P.1, to the point of P.7, the Petitioner's application for polygamy has met the requirements of article 41 of Government Regulation Number 9 of 1975 regarding the implementation of Law Number 1 of 1974 regarding marriage, then the Petitioner's application can be considered. Here are the considerations:

Considering that, from what has been considered above, the Panel of Judges has concluded that if the Petitioner is not permitted to remarry his prospective second wife, it is feared that the Petitioner will be accused of committing ma'shiyat which is prohibited by Islamic Sharia as well as the emergence of uncertainty in the legal relationship between The applicant is in love with his second wife and this will also give rise to a long-term conflict in the household between the applicant and the applicant which in turn will give rise to harm within the home itself.

The considerations above are strengthened by the rules of jurisprudence, which are then quoted in the reviews for the quo decision as described below.

3.1. Maṣlaḥaḥ Criticism

Before analyzing it based on maṣlaḥaḥ, it should be seen that there are two arguments for the application used by the Petitioner. Firstly, Teirmohon leaves Peimohon for a long time. This causes the applicant to feel lonely. The emergence of a sense of loneliness and lack of attention handled by the Petitioner gives rise to the Petitioner's concern about doing things prohibited in religion if polygamy is not permitted. Second, in his petition, the Petitioner argued that the Petitioner had a relationship with a woman, and this relationship was known to the Petitioner.

The Respondent fully acknowledges the above legal facts, which are considered proven. Then, the panel of judges explicitly used the maṣlaḥaḥ argument in its considerations. That eliminating damage is more critical than bringing goodness. The logic in his considerations posits that polygamy is a "cure for two diseases," namely selfishness and violation of religious norms (adultery). At the same time, these rules of jurisprudence become a tool to balance the Petitioner's desire for polygamy.

The Petitioner's argument in his posita does not meet the facultative requirements in the definition of polygamy as cited in the consideration of the decision. It needs to be explained that the limitations of polygamy consist of facultative and cumulative conditions. To be able to apply for a polygamy permit, you must fulfill one of the facultative requirements in Article 4, paragraph 2, and meet the cumulative requirements in Article 5, paragraph 1 of the Marriage Law.

Normatively, the application is discussed in Decision Number 28/Pdt.G/2021/PA.Eik needs to meet the facultative requirements as specified. Interestingly, the judge accepted the maṣlaḥaḥ argument. So, what is the significance of the ideas used by the Petitioner in the posita, and how is maṣlaḥaḥ interpreted so that the quo request becomes worthy of being granted?

If analyzed further, the first argument presented by the Petitioner regarding the Petitioner leaving him for an extended period can be drawn in the context of its relationship to the wife's obligations as regulated in Article 83 paragraph 2 of the KHI, which requires that the wife manage the daily household needs as best she can. -good. This is related to Article 4 paragraph (2) letter a of the Marriage Law - as a facultative condition, which is a condition for granting a polygamy permit, namely that the wife cannot carry out her obligations as a wife.

However, in Decision Number 28/Pdt.G/2021/PA.Eik, there was not a single argument from the judge that reminded me of the above articles. In its decision, the panel of judges stated Article 41 of Government Regulation Number 9 of 1975 as the legal basis that has been fulfilled for granting permits for polygamy so that it does not become clear which facultative requirements have been fulfilled. What's worse, after considering the benefit argument, the panel of judges pointed to Article 4, paragraph (2) letter c of the Marriage Law as a condition that had been fulfilled.

This article means that the wife cannot give birth to children. If what is intended as a condition that has been fulfilled is because the wife cannot give birth to children, then this negates the fact that Meireika was blessed with 4 (eight) children from her marriage. Meanwhile, if what is meant is not being able to give birth to offspring for the fifth time, is this thing worthy of being said to be unable to give birth to offspring? And if what is meant is giving birth to offspring for the fifth time at the age of the last century, practically polygamy is not the answer, wouldn't marriage to a second prospective wife be dangerous if it was aimed at giving birth to offspring?

Teirmohon (58 years) and his second wife-to-be (48 years) are far beyond the safe age for giving birth. Pregnancy and childbirth at this age carry very high risks, which can harm the mother and the unborn child. In short, both of them are too old to give birth, with the risk of death being 2-5 times higher than giving birth at 20-29 years old.

If the risk of old age pregnancy with its various bets is not considered in the name of maṣlaḥaḥ, then what is understood by the panel of judges regarding maṣlaḥaḥ needs to be reinterpreted. This is because what is intended to be aimed at (the goal of granting permission for polygamy; giving birth to offspring) conflicts with the argument previously stated that avoiding immorality/mafsadat is more essential/prioritized than achieving maṣlaḥaḥ.

Moreover, there was nothing in the evidence, either letters or witnesses, which stated that the Respondent could not give birth to offspring. Also, the evidence in the trial must prove that Article 4 paragraph (2) letter c of the Marriage Law (cannot give birth to offspring) can be applied in the quo case. Also, there is no legal argument in the decision that explains the relationship between the Petitioner's statement and the legal basis used by the judge.

In fact, with a century past that age, there is no guarantee that his marriage to his prospective second wife can produce children. Remembering, age is one of the leading infertility factors in men.

There is a problem in using maṣlaḥaḥ in quo cases, which appears to be misused. As previously explained, there are at least two differences in opinion regarding maṣlaḥaḥ, namely, between the supremacy of sharia goals and the dominance of reason. Regarding the power of Sharia goals, the provision of permits for polygamy, as defined in this research, actually conflicts with Sharia goals, namely the protection of the

soul and offspring. So, these two things should be the priority considerations based on the framework of the maṣlaḥaḥ proposition.

Meanwhile, regarding the supremacy of reason, considering the panel of judges above actually undermines common sense because it negates scientific sources and aims at reproduction. Marriage is only seen as an institution seeking to produce as many offspring as possible without considering the situation and condition of oneself and one's partner.

According to 'Izzuddīn bin 'Abdus Salām, there are two types of maṣlaḥaḥ, namely maṣlaḥaḥ in the essential sense, meaning happiness, joy, and so on, and maṣlaḥaḥ in the magazine mind, namely all forms that can give rise to maṣlaḥa ḥ necessary. In other words, to realize true maṣlaḥaḥ, an intermediary is needed, which is called maṣlaḥaḥ magazine. However, the cause or intermediary for maṣlaḥaḥ does not always have to be maṣlaḥaḥ.

In case 28/Pdt.G/2021/PA.Eik, if we examine it in light of the maṣlaḥaḥ framework proposed by 'Izzuiddīn, it will become quite problematic, considering that the reasons put forward above also give birth to a greater understanding of the soul and nature. Even in the Meisir context, Muihammad Abduih believes polygamy harms the Islamic community in Meisir because it causes children to be left behind in terms of economics, education, health, and social aspects.

This means that permission for polygamy based on the husband's self-righteousness and his relationship with other women does not allow it to be intuitively categorized as a primary purpose leading to a valid marriage. This is because the arguments presented and the judge's considerations lead to a misleading conclusion. So, does polygamy resemble maṣlaḥaḥ majazi?

The intuitive possibility of placing him (permission by the Court) in the position of maṣlaḥaḥ majazi is even more problematic because it is one of a series of conditions related to polygamy in the household. So polygamy leads to many problems in the family (which should be essentially maṣlaḥaḥ). Various studies indicate polygamy impacts family health, financial issues, children, and so on. Thus, it can be said that the Petitioner's argument and the considerations of the judicial panel of judges are in contrast to maṣlaḥaḥ.

The maṣlaḥaḥ proposition implied in poetic considerations is an intuitive bridge to clarify the gap between the application for permission for polygamy and the opinion of poetry that denies the application. Because normatively, the application for a polygamy permit in case 28/Pdt.G/2021/PA.Eik does not contain the intuitive requirements for facultative polygamy. Thus, it appears that maṣlaḥaḥ is used as a decoration for the Petitioner's argument so that it seems intuitively granted. In the end, the meaning of maṣlaḥaḥ in considering the panel of judges is no more than a tool used to legitimize polygamy intuitively but rather as a tool of juridical analysis as it should be.

3.2. Situations of Oppression and Legitimacy

Poetry in gender studies is positioned as a legal product that reflects the dominant political philosophy, namely patriarchy. In this section, the judge's considerations will be analyzed to reveal their specifics in Islamic thought regarding the issue of polygamy. So, it can be explained how ideological resilience is reflected in the consideration of poetic advice that makes applying for polygamy permits impossible. Although the references taken by the panel of judges in deciding a quio case have been somewhat exceeded, some things can be analyzed.

In its considerations, the panel of judges stated, "...If the Petitioner is not permitted to remarry with his future wife, it is feared that the Petitioner will be accused of committing ma'shiyat, which Islamic Sharia prohibits...".

The above judicial considerations, at a glance, illustrate the competence of the panel of judges towards the household of the Petitioner and the Respondent. In conditions like this, the consideration of the board of judges appears as a neutral consideration. However, gender studies always carry out exposure to everything neutral. The reason behind this is that it is believed that there is an unintended situation of oppression.

Regarding the consideration, which contains the concerns of the panel of judges, the essential thing highlighted is the recognition of the argument in the Petitioner's post, which states the same thing: concerns about adultery. Based on interviews with the assembly's chairman, the main reason for denying the polygamy permit was admitted to be based on matters regarding the Petitioner's actions that violated the law (adultery). So, this kind of mafsadat should be intuitively avoided.

The primary legal consideration of the Majeilis Judges in granting permission for polygamy to the Petitioner is intuitively to avoid legal violations in both national and Islamic courts, ... The Majeilis Judges want to prevent mafsadat in poetry.

Furthermore, what is meant by imafsadatan by the Panel of Judges here is the crime of adultery, which the Petitioner can commit if permission for polygamy is refused. Here, it appears that the logic of the panel of judges in denying the polygamy application is quite confusing. For this reason, if a husband is worried about committing adultery with another woman's dream, then the result is that they will marry each other. There seem to be no other alternatives that can intuitively overcome this problem. Even though, in psychology, falling in love is beyond human control, having a relationship with someone is genuinely human's passion.

Filling in love is not logical, but balancing romantic relationships is rational. We can choose and intuit rationally with whom we will balance our preferences.

So, even if the Petitioner has fallen in love several times with women other than his wife regarding adultery, it is in the control of the Petitioner. The postulated concerns are a technical issue of how the Petitioner positions himself in the social environment. Instead of thinking this way, the panel of judges lost the logic of the Petitioner's helplessness in the face of intimate love and relationship.

So, this is precisely why the intuitive facultative conditions for permitting polygamy do not contain subjective things. This matter is further exacerbated by the choice of legal basis used in the consideration where the argument presented by the Petitioner is in line with Article 4 paragraph (2) letter c UiUi Marriage, namely that the wife cannot give birth to the exact birth.

The marriage between the applicant and the applicant has been blessed with four (4) children. As if what is meant by consideration is whether the wife should give birth to another child. From a gender and point of view, this is a situation of oppressive oppression because it places the wife as a child-rearing machine. The mastery of knowledge is domesticated and controlled as a reproduction machine.

The above considerations suggest what Amy S. Wharton revealed, Poetry 28/Pdt.G/2021/PA.Eik organizes inequality based on inequality through a process of legitimacy. Legitimacy refers to the process by which inequality is allowed. That is, inequality is understood in terms of how it is created, which appears fair and reasonable. An imbalance of personality is considered normal and accepted as something that can be taken.

In the context of quo matters, the legitimacy process involves the postulates of immorality and imafsadatan. Through consideration of maṣlaḥaḥ, the granting of permits for polygamy is legitimized so that what appears as if the Petitioner's reasons are worthy and reasonable. It is as if the betrayal committed by the Petitioner against the institution of marriage—because he committed an affair with another woman—became something that could be understood and condoned as normal.

From this analysis, the ideological spectrum described by the panel of judges can be understood where consideration reflects the position of interpretation towards polygamy as a natural issue. And, indirectly, there is a confrontation with gender ideology. It would not be surprising if the logical consequences of such a position gave birth to poetry that ignored the Petitioner's request.

4. CONCLUSION

The arguments for applying for a polygamy permit in Peirkara 28/Pdt.G/2021/PA.Eik needs to meet the intuitive requirements for granting a polygamy permit. However, if this is true, the judge wants to apply Article 4 paragraph (2) letter c Marriage Law, which incidentally does not reflect the Petitioner's argument. The current panel of judges postulates that intuitive maṣlaḥaḥ frames its legal considerations so that the statements in the petition appear significant for the household conditions and correlate with the petition's granting.

From a maṣlaḥaḥ perspective, the judge's consideration regarding benefit cannot determine the meaning of benefit. Considering a quo maṣlaḥaḥ as a means of legitimizing polygamy. This is because the choice of legal concerns led to a consequence aimed at the faith rather than the welfare.

Meanwhile, from the general analysis, it is understood that the considerations used by the panel of judges reflect the logic of oppression towards the person, as well as the legitimacy of the situation of such oppression through the maṣlaḥaḥ argument. The choice of legal basis in Article 4 paragraph (2) letter c Marriage Law, namely that the wife cannot give birth to the child, reflects the oppression of marriage because it places the wife as the child's birth machine where natural resources are domesticated and controlled as a reproduction machine.

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