

## FAIR PERCEPTION AS A CONDITION FOR POLYGAMY PERMIT APPLICATION AT MOJOKERTO RELIGIOUS COURT

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### Abstract

This article aims to describe the application for polygamy at the Mojokerto Religious Court, the administrative complexities, and the process for allowing husbands to practice polygamy. The judge can consider granting permission for polygamy proposed by the husband. The research method used is qualitative research with a descriptive-analytical approach. This research uses judge interview data, and then qualitative analysis is carried out using deductive methods. The results showed that hakim at the Mojokerto Religious Court interpreted fair polygamy as proportional, that is, having to adjust and place something according to its place. The husband, in terms of providing for his wives, pays attention to the needs of each wife. The factor or reason for the granting or rejection of the application for polygamy permission at the Religious Court is that the judge gets confidence that the husband will be able to act fairly with the judge's suspicion that is faced with evidence before the court. The evidence in the trial process includes letter evidence, statements of the applicant and respondent, and witness statements that will assess from the evidence the ability and readiness of the husband to polygamy.

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### Introduction

Polygamy has historical roots throughout human life itself. Before Islam came to the Arabian peninsula, polygamy was unlimited and even the absence of justice as a condition became a tradition for Arab society (Engineer, 2003). Islam came with the Sharia that it brought

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even though it did not directly eradicate this tradition, so Islam applies polygamy with a maximum restriction that husbands can have 4 (four) wives with strict requirements that are necessary to be fair to wives (Syamsuddin, 2018). These conditions are found in two verses of polygamy, Surah al-Nisa verse 3 and verse 129 (Rohmansyah, 2020).

In addition, discourse and discussion about polygamy occur among scholars who question justice which is an absolute requirement for polygamy (Faisol, 2017). Quraish Syihab's opinion on the issue of justice in practicing polygamy which views that justice is measured from the material aspect alone does not include immaterial (Shihab, 2012). This is in stark contrast to Fazlur Rahman's opinion that justice must also include material and immaterial love and compassion (Rahman, 2021).

Different responses to this issue by feminists view polygamous behavior as a form of injustice for women because only women feel the pain of being polygamous. Thus, Musdah Mulia argued that polygamy is *haram li ghayrihi*, that is haram because of the adverse effects and excesses it causes. She also claimed to have data showing that the practice of polygamy in society has caused very crucial problems and very large social problems (Mulia, 2004). Likewise, the high level of domestic violence, domestic rifts, and neglect of children as some of the effects of polygamy. According to Quraish Shibab, polygamy is similar to an emergency exit in an airplane, which can only be opened in certain emergencies (Shihab, 2012). The same thing was conveyed by Hasyim Muzadi, polygamy is like an emergency exit that is provided for those who need it (Sumardi, 2015).

Polygamy is a civil law act legalized in Indonesia and must be carried out based on applicable legal provisions as stipulated in Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law (KHI). This aims to bring benefits and maintain the integrity of the household from polygamy practices that are carried out unlawfully and harm one party (Duri, 2022). Arrangements related to polygamy are formally regulated in Law Number 1 of 1974 concerning Marriage, Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 and so is also regulated in the Compilation of Islamic Law for citizens of Muslim faith. Article 43 of Government Regulation Number 9 of 1975 confirms that if there are sufficient reasons for the husband as the applicant to have more than one wife, the court grants permission to the husband in the form of permission to marry more than one person (Sunaryo, 2010). Furthermore, Article 44 of Government Regulation Number 9 of 1975 states that recording employees are prohibited from registering the marriage of a husband who will marry more than one before the permission of the court as referred to in Article 43. Polygamy that takes place outside the marriage law usually takes place under the hand (marriage under the hand), aka not carried out before the Office of Religious Affairs (KUA). Usually, KUA officers will question whether there is no permission or determination from the court that allows the prospective husband to remarry. Marriage on this hand can be valid according to Islamic law, as long as the conditions and pillars of marriage are met. However, it has no legal force before the laws of Indonesia (Warni et al., 2018).

Permission or request for consent (Riyandi S, 2015) to the first wife is an absolute requirement in polygamy that is often an obstacle for husbands (Ainah et al., 2022). In Indonesia itself, polygamy is not solely a private matter, husbands who want to be polygamous must apply for permission to the Religious Court (Makka & Ratundelang, 2022) to be examined and decided by a judge (Doi, 2002), in this case the intervention of the Religious Court is involved. The urgency of the Court's permission to practice polygamy is very concerning the existence of marriage in legal recognition and community association. The philosophical values carried by the provisions of the law that require permission for polygamy are that the existence of marriage is: has no legal force because the marriage is considered to have never existed, so it does not

cause legal consequences; cannot be used as a basis for a legal-formal legal interest in any matter concerning the legal relationship of the marriage; cannot be used as the basis for all lawsuits to the Court for disputes arising from the marriage in the future; and cannot be used as a basis for claiming the rights of husband and wife including their children legally-formally in state life or social relations. Legal provisions related to polygamy stipulate the requirement that husbands who practice polygamy must be able to be fair to their wives (M. Y. Harahap, 2003).

The Mojokerto Religious Court is a court located in the Mojokerto, East Java, area that understands the situation and condition of the community wanting to apply for a polygamy permit for certain reasons as a condition for practicing polygamy so that an in-depth study is needed on the opinion of judges within the Mojokerto Religious Court in viewing the conditions of fair behavior as a condition for applying for a polygamy permit. From the above problems, the author needs to conduct an in-depth study of the perception of the Mojokerto Religious Court judges in interpreting and interpreting fairness as a condition for applying for a polygamy permit and what are the factors or reasons for accepting or rejecting a polygamy permit application at the Mojokerto Religious Court.

### **Research Method**

This research is an empirical legal research that aims to determine the perception of fairness according to the judge of the Mojokerto Religious Court as a condition for applying for a polygamy permit. Using an analytical descriptive approach, the author elaborates and describes how the perception of fairness according to the judge of the Mojokerto Religious Court is a condition for applying for a polygamy permit. After that, the author analyzes the problem using written library data taken from libraries and other relevant sources. The authors use interviews and documentation as data collection methods. The interview was conducted by conducting face-to-face meetings to conduct questions and answers to sources or respondents to answer the problems studied, namely digging up information about the perception of fairness as a condition for applying for polygamy permits, according to the judge of the Mojokerto Religious Court (Nizar, 1999). This article also uses documentation which is a method of data collection, collecting information from the necessary data and obtained from credible and valid sources. The types of information generated from the documentation process include letters or official documents, meeting results, articles, media, proposals, and clippings, that are considered necessary and following the research study.

This article uses primary data sources and secondary data. Primary Data is data collected and obtained directly by the author in the research field, namely the Mojokerto Religious Court to determine the perception of fairness according to the judge of the Mojokerto Religious Court. Interviews with several judges will be conducted by the author to obtain information about the perception of fairness that is a problem in this study. The secondary data is taken from the literature to work on primary data by using library research methods. After the data collection process has been carried out, the author uses descriptive-analytical to describe the facts objectively so that with this analysis similarities and differences can be found to solve the problem under study. Thus, relationships and symptoms can be established to analyze research problems (Soejono, 1999).

## Results and Discussions

### **Fair Perception According to Mojokerto Religious Court Judge as a Condition for Polygamy Permit Application**

According to the judge of the Mojokerto Religious Court as a condition for submitting or applying for a polygamy permit, it was obtained by the author from the interview. This is data that is described descriptively by the author to describe the problem under study. Fair, according to the judge of the Mojokerto Religious Court, is judged based on balance proportionally without requiring equality of levels and conditions. This kind of fairness in polygamy is judged proportionately which means eliminating social jealousy among wives. Fairness is not defined as equal fulfillment of the needs of wives because not all wives have the same needs. This means that husbands who are going to practice polygamy must apply justice proportionately to create a balance to fulfill both the material and non-material rights of their wives.

The Mojokerto Religious Court uses grammatical interpretation of laws and regulations or uses grammar as a method or way of interpreting laws and regulations according to the terms of words (terminology) contained in laws and regulations. This means referring to the meaning of words or terms used in laws and regulations. The judge tries to interpret and interpret a word that is commonly used in common everyday language. By using the method of interpretation word for word and then describing clearly and proportionately in families that practice polygamy, this proposition can eliminate social jealousy among wives. If so, then the wife will obtain rights according to her rights or give according to her needs and needs to avoid the husband's tyranny against his wives.

According to the Qur'an, Surah al-Maidah verse 8 affirms that the substance of justice in polygamy is faith and piety in Allah Almighty in the heart of the husband which affects his attitude towards his wives as well as towards his children (Lestari & Halim, 2020). This has been affirmed in Surah al-Maidah verse 8 which essentially explains that justice is closer to piety to Allah. In this context, justice is always associated with a form of piety and faith in Allah Almighty. The verse has affirmed and warned that in the establishment of justice, one should not be influenced by hatred towards a race or group which can eventually lead to tyranny. In principle, the meaning and essence of justice is not only the formal aspect but also the material aspect. The enforcement of justice is an obligation for humans to Allah Almighty. The meaning of fair according to the judge at the Mojokerto Religious Court is divided into 2 (two) forms. *First*, it is fair in the form of material that can be assessed according to its size and level. In this context, for example, the first wife lives in the countryside, while the second wife lives in the city, groceries are certainly more expensive in the city than in the countryside and then the husband provides more for the second wife who lives in the city. This is not allowed to make a significant distribution of income (prominent) to cause jealousy among his wives.

Second, Fair is non-material in a form that cannot be judged such as affection, love, and care for each of his wives. Husbands should not be unfair by being more inclined to one wife than to another. In the case of the distribution of turns that must be equal between the wives, if the first wife is 3 (three) days then the second wife is also 3 (three) days. Also, in the aspect of meeting the needs of his wives, he should not be inclined and prominent to one of the wives. Fair in this form is usually difficult for husbands to do. Therefore, fairness is so important in polygamy that it is used as one of the conditions for applying for a polygamy permit in the Religious Court. This requirement has indeed been regulated in Law Number 1 of 1974 and has also been affirmed in Surah al-Nisa. Fairness is an important aspect of polygamy because the process of polygamy is prone to cause social jealousy among wives if the husband is unable to

act fairly. If the husband can do justice then it will be able to close the injustice he made.

### **Factor or Cause of Acceptance and Rejection of the Polygamy Permit Application by the Judge at the Mojokerto Religious Court**

A review of the reasons for the judge who has been interviewed by the author in granting the application for polygamy permission has been regulated and stipulated by law including Article 55 paragraph (1) of the Compilation of Islamic Law (KHI). Polygamy rules allow husbands to marry a maximum of 4 (four) wives. If the husband wants to remarry, then one of his 4 wives must be divorced. Thus there is no marriage with a fifth wife, if it occurs then it is considered null and void. The application for a polygamy permit must be made in the religious court where the applicant resides as confirmed in Article 4 paragraph (1) of Law Number 1 of 1974 jo. Article 40 of Government Regulation Number 9 of 1975 and Article 56 paragraph (1) of the KHI (Santoso & Nasrudin, 2021). If a person wants to practice polygamy, he must meet the requirements as specified in Article 4 paragraph (2) and Article 5 paragraph (1) of Law Number 1 of 1974 concerning Marriage.

In addition, it is also considered the aspects of *maslahat* and *mafsadat* (Khalaf, 1978) for families who practice polygamy. The reason for permission to practice polygamy must be based on legal considerations obtained by the panel of judges during the trial, namely in the form of suspicion and conviction of the judge by hearing the statements of the applicant, respondent, and witnesses. In the evidentiary process in the polygamy permit application hearing, the Judge will hear from the applicant (husband), whether the applicant is prepared to be fair in the family that practices polygamy and whether the husband can accept the logical consequences in the future if the wives do not get along. Likewise, the respondent as a wife is ready to divide her rights and accept sincerely and willingly if the husband has two wives. Similarly, the judge hears the testimony of witnesses whether the husband in his daily life behaves and has good morals so that it is impossible to injure the rights of the wife, then whether the husband can do justice in financial matters or the distribution of material income (Jaman, 2020).

Permission for polygamy will be denied by the judge if the facts of the trial show that the wife was coerced and the case of the wife's affidavit of consent to polygamy is forged by the husband. Witness statements are needed before the court as an effort by the judge to assess and know how the daily life of the husband and wife. As much as possible the judge obtained data that the attitude and morals of the person concerned (husband) who would practice polygamy were really good and commendable in the environment in which he lived (Wirastri & Van Huis, 2021).

The method of interpretation used in interpreting laws and regulations first begins with an interpretation according to words and grammar (grammatical), interpretation according to history (historical), and sociological interpretation. The sociological interpretation is an important interpretation for judges if it is remembered that many laws are drafted and made long before the time they are used. In giving a decision on the permission for polygamy, the judge considers the law by looking at the arguments in the *posita*, *petitum*, and evidence in the trial (K. Harahap, 2022).

The form of proof as a condition for granting permission for an application for polygamy is to consider the economic aspect in the form of the husband's pay slip where the husband works. With this evidence, the panel of judges can obtain information and assess the husband's ability to meet the needs of his wife (Nurlaelawati, 2020). However, some husbands do not have proof of salary slips or income certificates, so the husband can submit witnesses who can testify under oath that it is true that the husband will be able to meet the needs of his wives.

Evidence in civil procedural law, namely allegations used by judges in the form of conclusions drawn as a result of examination at trial by taking into account important, thorough, certain, and relevant matters about each other. The aspects of *maslahat* and *mafsadat* that will arise in the future are always considered by the judge before deciding to reject or accept an application for a polygamy permit. When viewed from the requirements for permission to practice polygamy, namely if the wife has a disability or disease that cannot be cured as confirmed in Article 4 (2) of the Marriage Law. It is even more regrettable that many applications for permission for polygamy can be granted only by fulfilling the cumulative conditions, even though there are absolutely no alternative conditions as referred to in Article 4 (2) of the Marriage Law. In general, the judge considered that as long as the wife allowed her husband to practice polygamy, this was sufficient consideration for the judge to grant the application for permission for polygamy. In this case, the judge tries to fix the principles believed in examining polygamy cases, such as the conditions that must be met when the husband will commit polygamy and the judge also examines alternative reasons, not only statements at the trial, but also expert statements or statements of competent parties. In the problem of the wife's infertility, this must be based on the obstetrician's statement (Naseer et al., 2021). If this is done, then the decision to grant the application for polygamy permission for the husband will be even more severe and strict. The principle of Monogamy and polygamy is a way for an emergency to be implemented properly (Ja'far et al., 2020).

### **The Concept of Fairness in Polygamy According to Positive Law in Indonesia**

Taking into account Law Number 1 of 1974 concerning Marriage in article 5 (1) point c it is stated that: "there is a guarantee that husbands will do justice to their wives and children". Article 40 of Government Regulation Number 9 of 1975 states that "if a husband has a mask to have more than one wife, then he must submit a written application to the court". In addition, KHI is also explained in part IX which is explained in articles 55-59 regarding having more than one wife. The adoption of the principle of monogamy in the provisions of Article 3 paragraph 1 of the Marriage Law reflects the priority of applying the principle of monogamy in every marriage. However, in the case of certain conditions and emergencies, polygamy is possible based on strict reasons and very onerous requirements. It is also intended to respect the views of some Muslim communities that allow polygamy on the condition that they must be able to act fairly. The provision that allows polygamy in Article 3 paragraph 2 of the Marriage Law is not intended as a form of harassment, discrimination, and superiority of men. This cannot be used to generalize that polygamy must be discriminatory, a form of oppression of husbands against wives (Widiani, 2022).

Article 4 of the Law states that a husband will have more than one wife if, the wife is unable to perform her duties as a wife, the wife has a disability or incurable disease, and the wife cannot bear children. Given the sound of articles allowing polygamy even for certain reasons, it is clear that the principles adopted are not principles of absolute monogamy but are called open monogamy. Polygamy is placed in the status of emergency law, besides the institution of polygamy is not solely the full authority of the husband but based on permission from the judge (court) (M. Y. Harahap, 2003).

Indonesian legislation seems to be trying to respect wives proven, that for husbands who will practice polygamy, husbands must first obtain the consent of the wives. On the other hand, the role of the Religious Court in legalizing the practice of polygamy is decisive and can even be said to be the only institution that has the authority to allow polygamy. Regarding the requirements for polygamy, as stipulated in Article 4 paragraph (1) of Law Number 1 of 1974 concerning Marriage, states that a person who wants to marry more than one person must apply

for polygamy to the local court (Kamran, 2020). Furthermore, Article 5 paragraph (1) explains the conditions that must be met to be able to submit a permit application, namely:

- a. There is consent from the wife;
- b. There is certainty that husbands can provide for the necessities of life of their wives and children;
- c. There is a guarantee that the husband will do justice to his wives and children.

Article 4 of the Marriage Law. Given the sound of articles allowing polygamy even for certain reasons, it is clear that the principles adopted are not principles of absolute monogamy but are called open monogamy. Polygamy is placed in the status of emergency law, besides that, the institution of polygamy is not solely the full authority of the husband but based on permission from the judge (court). Meanwhile, according to the KHI, the provisions for wives of more than one person are stated in Chapter IX from articles 55 to 59 (Rohmadi et al., 2022).

## Conclusion

From the results and discussion in the research, it can be concluded that first, the Judge of the Mojokerto Religious Court interpreted fair in polygamy as proportional, that is, it must adjust and place something according to its place. The husband in terms of providing for his wives by paying attention to the needs of each wife. With this kind of fairness that is proportional, the husband will see the needs of each wife that will be met. Besides being fair in the gift of affection, love, and care to wives, the husband should not stand out in giving it to one of his wives. Second, the factor or reason for the granting or rejection of the application for polygamy permission at the Religious Court is that the judge has confidence that the husband will be able to act fairly with the judge's suspicion that is faced with evidence before the court. The evidence in the trial process includes letter evidence, statements of the applicant and respondent, and witness statements that will assess from the evidence the ability and readiness of the husband to polygamy. Similarly, the judge can decide whether or not the applicant is eligible to obtain a polygamy permit, by weighing the benefits and customs that will arise from this polygamy.

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