

Marital Status of The Infertile Spouse in a Polygamous Marriage in Malaysia (Analysis Based on The Islamic Family Law Negeri Selangor in 2003 Section 23)

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Abstract

The local community's rationale is somewhat troubled by the polygamy of an infertile spouse. This demonstrates the husband's egotism because it is the husband who is to blame, not the wife, for the absence of it. However, the fact is that many polygamous activities are still practiced by regular spouses in defiance of Islamic law, and as a result, many women continue to suffer due to their husbands' egocentric behavior. This type of polygamy also begs the logical concerns of why infertile husbands opt to practice it and what factors the Selangor Sharia Court Judge takes into account when rendering decisions in polygamy cases involving infertile husbands. However, there are extremely few of these marriages. The judge's decisions that are directly related to the Selangor State Court and also related to the primary studies are standard books, books of propositions and hadiths, the al-Qur'an, and Enactments of the Islamic Family Law in Malaysia are used in this writing study as secondary sources, providing additional information to support this discussion.

Keywords: Polygamy, Islam, Infertility

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INTRODUCTION

Marriage makes a person have a partner. A man is incomplete without a woman, and vice versa, a woman without a man also feels that her life is incomplete. This "complementary" position should be understood and practiced by married couples in living their domestic life (Musawwamah, 2010). Marriage according to Islamic Law is marriage, which is a very strong covenant or *mitsaaqon gholiidzahan* to obey the commandments of Allah Almighty and carry them out as worship. Basically, a husband can only have one wife. A husband who wants to have more than one wife can be allowed if desired by the parties concerned (Ali, 2006). Polygamy is one of the most discussed and controversial marital issues. One side of polygamy is rejected with various kinds of arguments both normative, psychological and even always associated with gender injustice. On the other hand, polygamy is campaigned because it is considered to have a firm normative basis and is seen as an alternative to solve the phenomenon of cheating and prostitution (Nuruddin & Tarigan, 2019). Historians and anthropologists suggest that polygamy in its various forms existed in the early stages of human history, and that polygamy first appeared as a result of the enslavement of women and the attitude of a strong and wealthy people who turned women to fun, as servants and as symbols of greatness and splendor (Farhat, 2007).

There is no record that earlier religions forbade polygamy, since Prophet Abraham (pbuh) even it was legally permissible and practiced in religious life. Similarly, in the Arabs, polygamy is permissible unconditionally and without strings attached, even they practice it within infinite limits (Farhat, 2007). The fact is that Islam legalizes polymetalism, as happened during the time of the Prophet Muhammad (PBUH) when the Prophet Muhammad (PBUH) had more than one wife. However, most of these women were widows left dead by their husbands during the war. Indeed, marriage is not only intended to fulfill instincts and share material desires. More than that, there are various tasks that must be fulfilled, both in terms of psychology, and also society that must be his responsibility. Including other things that are desired by human instincts such as one of them wants to have offspring. From here it is not allowed to choose a wife only limited in terms of physical, to the exclusion of the other side. It must even maintain the goals as a whole and ensure the fulfillment of these goals (As-Subki, 2010). Polygamy, on the other hand, is a *rukhsah* marriage that can only be performed in very urgent circumstances. This ability is required for those who are able to do justice to wives, especially in the fields of bread, *muamalah*, association and division of nights. For prospective husbands who are unable to do justice, it is required to marry only one wife or for husbands who are able to do justice, polygamous marriages are allowed with a maximum limit of four wives only.

RESEARCH METHODS

This research uses qualitative research methods in order to explain the object to be studied (Sugiyono, 2012). Bogdan and Taylor describe the qualitative approach as a research strategy in creating descriptive data in the form of written and oral data through humans and the actions studied (Nugrahani & Hum, 2014).

In the method carried out in conducting this research, the natural state of the object, namely a researcher, is an important part. The data collection process is carried out in a combination, namely a combination of data analysis that has an inductive or qualitative nature and the evaluation of qualitative is very leading to the meaning of conclusions in general. The subject contained in qualitative research is an informant, namely someone who shares information in the form of data and is wanted by researchers about what will be researched (Moleong, 2018). Furthermore, in the process of collecting data in this study using the interview method. An interview is a meeting between someone and another person and exchanging opinions, information and ideas through questions and answers to find conclusions from the topic under study (Purnama & Sani, 2022). Semi-structured interviews were conducted by researchers based on interview guidelines that had been prepared (Effendy & Sunarsi, 2020). Through interviews, it is easier for researchers to understand further information from informants for researchers to interpret circumstances and events that cannot be known through observation or observation. (Sugiyono, 2012) Secondary data in this study is (library research), which is research conducted by collecting data and information with the help of various books



related to the problem to be discussed in this study (Soekanto, 2006). This research is normative-analytical, that is, research conducted on normative law. The normative law in question is a written positive law derived from codification or legislation.

RESULTS AND DISCUSSION

Definition of Polygamy, Legal Basis and Procedure of Polygamy

The word polygamy comes from Greek, which consists of the word *polus* which means many and *gamein* which means marriage. So polygamy is someone who has several wives at the same time. In Arabic polygamy is called *ta'diduz-zaujaat* (number of pairs). While in Indonesian polygamy is called marriage (Hakim, 2000)

However, the law of marrying a woman has been restricted by Allah S.W.T, not to marry more than four wives at once as Naqli's proposition which is used as a reference for the permissibility of polygamy among Muslims in the Qur'an An-Nisa verse 3:

وَأَنْ خِفْتُمْ أَلَّا تَقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثْنَىٰ وَثُلَّةَ ۖ وَرُبْعَ ۚ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَلِكَ أَدْنَىٰ أَلَّا تَعُولُوا (سورة النساء: 3)

And if you are worried that you will not be able to do justice to an orphan woman (if you marry her), then marry the (other) woman you like: two, three or four. But if you are worried that you will not be able to do justice, then (marry) only one, or any female servant you have. Such is the nearer that you will not commit tyranny. (Q.S An-Nisa': 4/3). The interpretation of the verse explains the ability of polygamy to the limit of 4 (four) wives. Furthermore, the verse provides that the permissibility applies on condition that it "do justice to them (wives and children)". The meaning of fair is to be fair in serving the wife, providing for the wife and children, the residence of the wife and children, clothing, turn in external matters. But if it cannot be fair, then only one wife is enough (monogamy). The point of doing fair is fair treatment in serving wives such as clothes, places, turns and others that are outward. Islam allows polygamy under certain conditions (Ghazaly, 2006a). In Islamic law, polygamy is permissible or permissible provided that the husband does justice to his wives.³ To guard against arbitrary acts, Islam provides conditions for doing justice in practicing polygamy. This requirement is quite a heavy requirement that not just any man can do (Saebani et al., 2011).

Based on the foregoing, Islam does not forbid a man to perform more than one to four marriages but on condition that it must take into account justice against wives and families so as not to commit tyranny. Just as marriage laws can take many forms, so can polygamy. The law is determined by a person's condition, not even his own condition but also regarding the condition and feelings of others. In this case it could be his wife or his wife's family (Sopyan, 2012). Allah Almighty allows polygamy for up to four wives on condition that they do justice to them. That is fair in serving the wife. If it cannot be fair, then only one wife is enough (monogamy) (Ghazaly, 2006b).

In Malaysia, the issue of marriage for Muslims falls under the jurisdiction of the Sharia Court. Each state was given the power to create and establish Islamic Family Law for its own state. In addition to having to comply with the Shari'a in conducting a valid marriage, a person who wants to enter into a polygamous marriage also needs to submit a supporting certificate (swearing) along with the reasons for his application to the Sayariah High Court to obtain an order of approval from the Court. The Court will further assess the reasons for the polygamy application and the details of the commitments incurred such as payment of alimony, debts, and so on. Such polygamous marriages are therefore protected under the law as contained in Section 23 (4) of the Act / Enactment of the Islamic Family Law of Selangor State Year 2003:

"The application for truth should be presented to the Court in accordance with the prescribed manner and should be accompanied by an *iqar* stating the reasons why the proposed marriage is said to be appropriate or necessary, the income of the applicant at that time, the details of his commitment and the appropriate financial obligations of his dependents, the number of his dependents, including those who will become his dependents following the

proposed marriage, and whether or not the consent or view of his wife or his existing wives has been obtained of his proposed marriage".

Implicitly the justice meant under Section 23 of the Enactment of the Islamic Family Law (Negeri Selangor) 2003 and other states in Malaysia is to have reserved the rights of wives as first, before the polygamy application is approved, the Shari'e Judge will summon the husband and wife first and the future or second wife to be heard and taken into account. Second, the judge heard the polygamy application behind closed doors in the Tinngi Syariah court so that the disgrace of all those involved would not be spread. Third, the right to be treated fairly in polygamy. Fourth, the right to make a request for dissolution or rebuttal if it is proven that the husband is unfit. Fifth, the right to get an initial guarantee of income and the right to get an initial guarantee of search property. If, on the basis of the wife's testimony, the Court is satisfied that the husband is qualified and able to practice polygamy, the Court may approve the legalization of the marriage or allow even if the existing wife disagrees. On the other hand, if the court feels that based on the testimony of this wife the court feels that if this husband is given permission to polygamy and will bring harm to the existing wife or his future wife, then the Court has the right to disapprove or dissolve the marriage of the husband who has taken place to be polygamous. Section 124 of the Selangor State Islamic Family Law of 2003 on Polygamy Without Court Truth: "If a man marries again at any time during his existing marriage without obtaining prior written permission from the Court, he is committing an offence and shall be punished with a fine not exceeding one thousand ringgit or imprisonment not exceeding six months or both such fine and imprisonment".

Section 124 above has provided for polygamous marriage which has not been through the formal application of any Sharia High Court of any country. Marriage is a responsibility and trust from Allah SWT to the husband. However, when marrying a second wife and most husbands still keep their marriage a secret from the first wife and family, the position of the second wife will not be respected by the husband and the local community. His deeds are like a man who raises mistresses, even the second wife can be called a destroyer of people's households. As an example, the Prophet (peace be upon him) never kept his marriage a secret with the women he married. A man who keeps his marriage a secret from his first wife is irresponsible by not obeying Islamic law and the laws of the country.

Understanding Azoospermia (Infertile Husband)

Every couple who sails the ark of marriage certainly expects the presence of the light of the eye, which is a descendant of Allah S.W.T. However, some cases that occur are known that it is not the wife who is infertile but vice versa. The husband passed azoospermia in the marriage period with his first wife.

Azoospermia is a condition in which no sperm is found in semen at the time of ejaculation. Azoospermia is a sperm disorder that affects 1 in 10 men who experience fertility problems. Among local people, infertility due to a wife is a familiar matter. However, nowadays more and more azoospermia applies to the husband. The wife is said to be barren when her ovaries cannot release her eggs and then cannot be fertilized. When infertility from the husband due to the sperm produced is bad or the sperm cannot be produced so that it cannot fertilize the results of the wife's egg. Even so, sexual function still works normally, it's just that it can't have offspring because fertilization does not occur. For example, the characteristics of infertility for couples who are not pregnant are after 12 months of marriage, who have had sexual intercourse without using contraceptives, and women under 34 years old.

The law of origin of polygamy held by Jumhur Ulama' is a must. According to Imam As-Shafi'e as in the book Al Fiqhul Manhaji by Dr. Mustafa Khin, Mustafa Bugho and Dr. Ali Syarbanji explained that the law of polygamy was originally mandatory, but this law can change according to the circumstances of either circumcision, makruh or haram.

His makruh is polygamous if done just for fun while the husband himself doubts his ability to be fair to his wives in terms of external and inner sustenance. This is because polygamy is not forced and may be the result of the marriage will be detrimental to the wives because they cannot treat them fairly. The Prophet S.A.W. once said:

"دَعَا مَا يَرِيْنُكَ إِلَى مَا لَا يَرِيْنُكَ "

It means: "Leave the things that doubt you to the things that doubt you not." (Hadith narrated by al-Tirmizi and al-Nasai)

If a man who wants to practice polygamy feels jealous or feels that he is unable to do justice to his wives, either because of poverty or he is not sure that he can control his passions and prejudices, the current polygamy law is forbidden because it will harm others.

In this study, according to the Hanafi school, Shafie'i and Maliki for the case of husbands who experience azoospermia is not included in major defects (al 'Uyyub) as in fact major male defects are divided into two, namely the truncated penis (al-jabb) and the impotence (al 'unnah). While Ibn Qayyim extends al-Uyub's meaning to anything that reduces the achievement of the purpose of marriage, it is given broad leeway rather than restricted. As Umar al-Khattab ordered a man who wanted to marry a woman while she was certified barren (azoospermia), related his defect to the woman. Ibn Qayyim's opinion is used because it is in accordance with the development of the times where cases of azoospermia show an increasing trend of male azoospermia. But first, husbands with azoospermia are given the opportunity to get treatment for at least a year and it is up to the decision of the judge or the next qadhi.

The judge's judgment allowed polygamy on the grounds that the husband was infertile.

For example, the case examined by the author in the Selangor Syariah Court and the Selangor Syariah Court allowed polygamy applications for infertile husbands with case number 10600-012-0237-2016. The first petitioner named Mohd Fadzli bin Ishak and the second applicant Fairus bint Shuib had their marriage at the Islamic Religious Council of Songkla, Southern Thailand.

The first applicant has been confirmed to have contracted azoospermia at the time of marriage with the first wife. The first wife never asked the Shari'ah Court for fasakh, even though the first petitioner's residence with the first wife was near the front of the Sharia Court. The petitioner reasoned that his wife did not provide proper service to the applicant. So a few years ago the petitioner who was still a husband for the first wife had met the second wife who was a widow of two children and then sent to continue until marriage. Later, the first applicant and the second applicant had their marriage held at the Islamic Agama Council of Songkla Province, Thailand.

According to the first wife's statement, "I didn't allow my husband to marry another one because we had been married for 8 years and we had done fertility tests, it turned out that my husband was infertile and the doctor advised us to undergo fertility treatment." Because the first wife did not consent to the husband being polygamous, the first petitioner had arranged his second marriage at the Songkla Islamic Religious Council, Thailand. However, an unlawful marriage of the Court is an offence under Section 124 of the Islamic Family Act of Selangor to pay a fine not exceeding RM 1000 or in jail for not more than six months.

The marriage was granted by using the Wali Hakim who served as Naib Khadi Shari'e in Songkla Region and as a certified marriage attendant because the second wife's biological father had died. The marriage was also witnessed by two Thai witnesses. In the application for polygamous marriage registration, the first applicant and the second wife have provided strong statements and evidence that the marriage is valid and follows the marriage pillars as prescribed.

Therefore, all the marriage pillars in this marriage will be examined in addition to the evidence presented to the Court will be considered in determining its validity according to the Sharak Law before the recognition of the law is given. According to the petitioner, this marriage was carried out because the applicant was married to the first wife but had no children, while the deficiency was found in the husband. However, the first petitioner presumed that he tried with the second wife and took care and expected a miracle from the Almighty to give his own offspring with the second wife.

As referred to the provisions of the Islamic Family Law Section 11 and Section 109, the Enactment of the Selangor Islamic Family Law (EUUKIS) 2003 has provided that: Section 11 "a marriage is invalid unless sufficient are sufficient all the necessary conditions under the Sharaq Law to make it valid". Section 109 "A Muslim marriage performed outside the State of Selangor, other than a marriage married in an Embassy, High Commission or Malaysian Consul Office under section 24 shall be recognised as valid for all purposes of this Enactment if:

1. the marriage was performed in the manner prescribed or permitted by the law of the place where it was performed;
2. Each of the parties had, at the time of his marriage, the capacity to marry under the laws of his or her place of residence; and
3. If one of the parties is a resident in the State of Selangor, both parties have the ability to marry under this Enactment.

Both of the above provisions require that a marriage especially one performed outside the State of Selangor should be valid according to Sharak Law, then it is recognized under the law.

After the court has examined the application and documents marked to the court and considered the arguments and reasons:

1. Mahkamah mengizinkan permohonan poligami ini berdasarkan Seksyen 23 (2) Enakmen Undang-undang Keluarga Islam (Negeri Selangor) 2003.
2. Mahkamah juga mensabitkan pernikahan pemohon pertama dan pemohon kedua yang telah dilakukan di Majelis Agama Wilayah Songkla adalah sah menurut Syarak.
3. Mahkamah juga memerintahkan pernikahan ini didaftarkan di Pejabat Agama Islam Daerah yang berbidangkuasa kasus tersebut dibawah Seksyen 124.

Therefore, the research on the application for permission for polygamy for the second marriage case for azoospermic husbands is related to the legalization of polygamous marriages and has been considered by the competent judge by the marriage that has taken place with the second wife in Songkla Region of Thailand is valid according to sharak.

CONCLUSION

However, the Qur'an does not prevent polygamous marriages because polygamy also has good and benefit in society, especially to solve some things. Polygamy in Sharak Law and Law is permissible but it must meet the conditions set by the Sharia Court. Although polygamy is permissible, it is not something that all Muslim men should do. This is because to perform a polygamous marriage must be capable and meet the requirements of polygamy as in the verse of the Qur'an Surat an-Nisa' verse 4 and polygamous marriage is protected in Section 23 of the Enactment of the Islamic Family Law of Selangor State Year 2003. Polygamous marriages for husbands with azoospermia are not considered arbitrary, husbands are advised to take care with the first wife, this is because of more modern times. Many hospitals and alternative medicine places outside the hospital that help increase sperm to be healthier. For example, the husband continues to seek treatment, eating meat that is special for health, young coconut, honey and maintaining a balanced diet. Sometimes it can be cured and then given offspring on its own. If you have two wives and are given rezki, the second wife is pregnant young, keep trying with the first wife to get children because if treated then the husband is free from infertility, but the first wife also experiences high stress, then it is also difficult to have children because of the health of the first wife as well. As we know, polygamous marriages that are not guided by the Shari'a will invite failure in the household because of tyranny towards the wife and shirking responsibilities as the head of the family. For husbands, the author's means is to think rationally in advance in everything about polygamous marriages that are directly involved or those who still continue to live monogamously because there are many things that need to be considered. With what has happened there have been many negative beliefs and responses for women about this problem of polygamous marriages. Behind the aspects of polygamous marriage, sincerity between one another and justice are expected to be realized, especially by the husband. If there is mutual trust and understanding between the two in harmony with the demands of Islam, then the original goal of marriage will be achieved, which is to form a family *sakinah mawaddah wa rahmah*.

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