THE DYNAMIC PROBLEMS OF POLYGAMY CASES IN INDONESIA: THE SHOWCASE OF JURIDICAL AUTHORITY, IMPLEMENTATION OF CONTRA LEGEM AND FIQH ARGUMENTATIONS

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Abstract: One issue that remains a stumble block for modernization of Islamic family law is polygamy. In Indonesia, polygamy is restricted, but not completely forbidden. Husbands who have desires for polygamy should fulfill requirements before the court of justice. However, there is a tendency among judges of Islamic courts nowadays to grant permission for them to practice polygamy although not all of those husbands meet the requirements as outlined by the Marriage Law. The judges argue that according to Article 5 the Law No. 48 of 2009 concerning Judicial Authority they have the right and are obliged to deliver justice at all costs. Therefore, they grant permission for polygamy not only on the basis of the corresponding the Law No. 1 of 1974 on Marriage, but also on the authority of rechtsvinding, Islamic jurisprudence or fiqh as living law concept, and contra legem theory, a progressive implementation of legal value.
Keywords: polygamy, juridical authority, contra legem

Preliminary

Polygamy has always been a problematic issue in the field of family law, particularly in Muslim countries including Indonesia. This is due to the fact that polygamy, undeniably, is a problem that affects people's life especially those within the family scope.[1] Therefore, it needs attention as it also offers dynamics within reality. To give an illustration, marriage has consequences in terms of duties, rights, and obligations between parties within a household including husband, wife as well as children born within. The responsibility and consequences indeed need to be taken into consideration for a person to marry let alone to conduct polygamy. One's inability to fulfill the obligations does bring effect towards the life of those under his guardianship. It is also problematic and still stirs heated discussion because it is perceived as contradicting human rights and gender equity or fairness.[2]

In Indonesia, the debate has existed ever since the formulation of the family law.[3] Various opinions, needless to say, are contradicting between one and another, have led to heated debate that also stirs some religious sentiments within. Long story short, a quite unique approach, the compromise, then leads to what can be called as a win-win solution. On the one hand, Indonesian family law does not ban polygamy totally, which in this case other countries, usually the Western countries such as the United States and England or even a few Muslim countries such as Turkey or Tunisia do.[4] On the other hand, it also does not encourage polygamy nor does it let it become the common norm. Actually. Indonesia has stated clearly within the family law, particularly in Law No. 1 of 1974 concerning Marriage that monogamy is the

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[1] Nabiela Naily, "Perlindungan Perempuan Dan Anak Dalam Hukum Keluarga Di Dunia Islam" (Islamic Studies, UIN Sunan Ampel Surabaya, 2021).

[2] Ibid.

[3] Nabiela Naily, *Hukum Perkawinan Islam Indonesia*, 1st ed. (Jakarta: Prenadamedia Group, 2019).

[4] Naily, "Perlindungan Perempuan Dan Anak Dalam Hukum Keluarga Di Dunia Islam." See also Nabiela Naily and Kemal Riza, *Hukum Keluarga Islam Asia Tenggara Kontemporer: Sejarah, Pembentukan, dan Dinamikanya di Malaysia* (Surabaya: Lembaga Penelitian dan Pengabdian Masyarakat IAIN Sunan Ampel Surabaya, 2013).

principle or the nature of the marriage ideal within the framework of Indonesian Society or family law.[5]

Nevertheless, Indonesian family law still allows space for the practice of polygamy with conditions and regulations. This is then defined and called by academics as the principle of open monogamy (asas monogami terbuka).[6] There are procedures and mechanisms for a person to be able to conduct polygamy. In addition, polygamy can only be accepted if there are conditions that lead to the need for the practice. Consequently, permission for polygamy can only be given with the existence of the following conditions: a. his wife is unable to perform her duties as wife; b. his wife suffers from physical defects or an incurable disease; c. his wife is incapable of having descendants.[7] The details will be explained in the section on theories. What needs to be highlighted here is that the state is present. The state regulates polygamy as it perceives the need to govern the practice. Courts, more specifically the religious courts, along with the judges pose strategic positions.[8] The issue becomes more interesting since there are problems related to the fulfillment of conditions required for permission granting for polygamy. In some cases, the conditions, as described before, actually are not fulfilled.

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[5] "Law of the Republic of Indonesia Number 1 the Year 1974 Concerning Marriage," Article 3
(1) In principle in a marriage a male person shall be allowed to have one wife only. A female person shall be allowed to have one husband only.

[6] "Law of the Republic of Indonesia Number 1 the Year 1974 Concerning Marriage"; "Presidential Instruction Number 1 of 1991 Concerning the Compilation of Islamic Law," n.d.; Sam'un, "Asas Monogami Terbuka Dalam Perundang-Undangan Perkawinan Islam Di Indonesia," *Al-Hukama' : The Indonesian Journal of Islamic Family Law* 05, no. 1 (2015): 1–17..

[7] "Law of the Republic of Indonesia Number 1 the Year 1974 Concerning Marriage."

[8] Naily, "Perlindungan Perempuan Dan Anak Dalam Hukum Keluarga Di Dunia Islam"; MIA Elkarimah, "Telaah Poligami Perspektif Syahrur; KHI & Undang –Undang Perkawinan Indonesia," *Hukum Islam* 18, no. 1 (October 26, 2018): 133, https://doi.org/10.24014/hi.v18i1.5415.

This research employed data from mainly two sources, namely decisions of district religious court that granted polygamy requested by the petitioners. In addition, interviews with several judges of districts religious courts were conducted to further explore the issue. These data is then presented and analyzed using the theory of *contra legem*, *rechtsvinding* and *fiqh* as living law.

The paper tries to explore issues related to the implementation of family law, specifically in polygamy cases, in which alternative and cumulative conditions should be fulfilled, and how the judges approach the issue. The paper will first explain the regulation regarding polygamy in Indonesian family law followed by an explanation of judges and religious courts as well as the theory on authority or power of judges. After brief exposure to theories, the paper will explore the findings along with the analysis. This section will expose several cases shown by the court rulings in which the fulfillment of alternative conditions is still subject to questions. The analysis will focus on the reasons and arguments of the judges analyzed using relevant theories more specifically are as contra legem, the theory of rechtsvinding, and living law.

Polygamy, the Law and the Judge

Polygamy in Indonesia is given attention quite sufficiently indicated by quite thorough regulations governing the matter. The regulations can be found within the law of the Republic of Indonesia Number 1 of 1974 concerning Marriage, the government regulation of the Republic of Indonesia No. 9 of 1975 concerning the Implementation of Law of the Republic of Indonesia Number 1 of 1974 concerning Marriage and also within the Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law. In addition, there is also a special regulation that is specific for the Indonesian army, police, and civil servants, the Government Regulation Number 45 of 1990 concerning Amendments to Government Regulation Number 10 of 1983 concerning Marriage and Divorce Permits for Civil Servants. The

focus of this section is the ones contained in Law No. 1 of 1974 concerning Marriage and the Compilation of Islamic Law.

History of the formulation regarding the law governing polygamy matters in Indonesia is quite long and complex, let alone the history of polygamy in a broader context. The most relevant note to underline here is that polygamy in Indonesia is one aspect of family law matters that seems to be approached by a win-win solution and compromise between conflicting aspirations in Indonesian society. On the one hand, the principle held highly and deemed the ideal norm of marriage is monogamy. On the other hand, the law still regulated the room for the polygamy practice. The permission for a person to conduct polygamy is granted as long he fulfills requirements in the Law No. 1 of 1974 concerning Marriage.[9] So, within Indonesian family law, a person has to get permission from the court before he conducts polygamy. The regulation explains as follows

Article 4.

(1) If a husband desires to have more than one wife, as referred to in Article 3 paragraph (2) of this Law, he shall be required to submit a request to the Court of Law in the region in which he resides.

Further regulation than required the existence of conditions behind the need to do so. The so-called alternative conditions are explained as follows

(2) The Court of Law referred to in paragraph (1) of this article shall grant permission to a husband wishing to have more than one wife if:

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[9] "Law of the Republic of Indonesia Number 1 the Year 1974 Concerning Marriage."
Article 3 of Law number 1 of 1974 concerning Marriage
(1) In principle in a marriage a male person shall be allowed to have one wife only. A female person shall be allowed to have one husband only.
(2) A court of law shall be capable of granting permission to a husband to have more than one wife, if all parties concerned so wish

a. his wife is unable to perform her duties as wife;

b. his wife suffers from physical defects or an incurable disease;

c. his wife is incapable of having descendants.

From the above explanation, it is clear that monogamy actually is the ideal and desired form of marriage within Indonesian family law. Nevertheless, a person might be granted permission by the court to conduct polygamy within specific conditions. These are the focus of the analysis, the conditions called as alternative conditions. In addition to that, several other requirements need to be fulfilled. These later will be called the cumulative conditions. They are prescribed in the following article of law No.1 of 1974 concerning Marriage.

Article 5

(1) In order for a request to be submitted to the Court of Law as referred to in Article 4 paragraph (1) of this Law, the following requirements shall be obtained:

a. The approval of the wife or wives

b. The assurance that the husband will guarantee the necessities of life for his wives and their children

c. The guarantee that the husband shall act justly regarding his wives and their children

The difference between the two categories of conditions is that the requirements in Article 4 paragraph (2) are alternative and hence the fulfillment of only one of them can be considered sufficient. Meanwhile, the requirements in Article 5 must be fulfilled in its entirety. Here, we can see the authority and responsibility born by the judges in cases of polygamy as they are the ones who assess relevant aspects, analyze the situation and condition per case, and then issue decisions. Moreover, there is also a context where judges can waive the absence of the approval

of the wife within a certain context and this is explained in Article 2 of Law No. 1 of 1974 concerning Marriage.[10]

Reflecting on the authority born by the judge, this section also tries to offer brief explanations of the judge and court. The explanation also will cover several important and relevant aspects related to the duty, authority, and role of the judge, especially the ones directly related to the dynamic problems of polygamy cases. Within the framework of the Indonesian legal system as outlined by the Law No. 48 of 2009 on Judicial Authority, court and judge is one of the cores of law enforcement and justice. It is stated in the Indonesian constitution that judicial power is an independent judicial power that has the authority and function to administer justice in order to uphold law and justice.[11]

The authority to exercise the power belongs to the Supreme Court and the Constitutional Court. The power also belongs to other judicial bodies under the Supreme Court: General court, administrative court, military court, and religious court.[12]

The issue on marriage including polygamy is the area of competence of the Religious court due to two reasons: this is a family matter and the parties are Muslims. In general, personal matters within the competence of the religious courts in Indonesia here include marriage, inheritance, as well as bequest (*hibah*) and will (*wasiat*). Within the marriage area, among aspects that need to be governed by the religious court is the request for polygamy permission, marriage age dispensation, prevention of marriage, and marriage annulment.[13]

[10] (2) The approval referred to in paragraph (1) under the letter a of this article shall not required of a husband if it is impossible to obtain the approval of his wife or wives and if she or they are incapable of becoming partner or partners to the contract, or if no information is available with respect to his wife or wives for the duration of at least 2 (two) years, or on account of other reasons requiring the Judgment of a Judge on the Court of Justice.

[11] "Article 24 Paragraph 2 of the 1945 Constitution,".

[12] Ibid.

[13] Abdul Manan, *Penerapan Hukum Acara Perdata Di Lingkungan Peradilan Agama* (Jakarta: Kencana Pernada Media Grup, 2012).

There is a religious court (usually called as PA) in each district while there is one high religious court (usually called as PTA) in each province.[14] This matter is governed within Law No. 50 of 2009 concerning the Second Amendment to Law Number 7 of 1989 concerning Religious Court.[15] The district court and high religious court function for different stages of the case as the district religious court is the court of first instance and the high religious court is the court for parties to appeal.[16]

The product of the judge in religious court can be in the form of sentence adversarial cases) and decision (for voluntary cases).[17] These legal decisions have to contain considerations and these too have to have a correct and valid legal basis:[18] Article 62 No. (1) Law No 7 of 1989 concerning Religious Justice states that every decision and sentence of a court, besides quoting the reasons and the legal basis, must also quote specific articles from the related regulations or unwritten legal sources which are used as a basis of the trial.[19] In examining as well as deciding on a case, a judge is deemed responsible for the decision as well as rulings made by him/her.[20]

The next question then is what are taken into consideration by judges in the process of decision-making. In addition to the existing positive or acting law and other regulations, judges actually also have to take the so-called 'living law' into the analysis. This aspect usually is then elaborated in the section of

[14] "Law Number 50 of 2009 Concerning the Second Amendment To Law Number 7 of 1989 concerning Religious Court," article 1

1. Religious court is court specific for muslims
2. The courts are district religious courts and high religious courts within the religious courts.

[15] Law Regarding the Republic of Indonesia Number 50 of 2009 Regarding the Second Amendment to Law Number 7 of 1989 concerning Religious Court.

[16] "Article 6 Law Number 7 the Year 1989 Concerning Religious Justice,".

[17] "Law Number 7 the Year 1989 Concerning Religious Justice."

[18] Ibid.

[19] Ibid.

[20] "Article 4 Joint Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia and the Chairperson of the Judicial Commission of the Republic of Indonesia Number: 047/KMA/SKB/IV/2009 - 02/SKB/P.KY/IV/2009 Concerning Guidelines for Enforcing the Code ," n.d.

legal consideration in short, the living law needs to be taken into consideration in their decision-making process.[21] This matter is governed by the Law Number 48 of 2009 concerning Judicial Power Article 5 stating as follows:[22]

Article 5

(1) Judges and constitutional judges are obliged to dig, follow, and understand the legal values and the sense of justice that lives in society.

Interestingly, the theory of *rechtsvinding* (legal finding or legal discovery) which is acknowledged in civil tradition, is also related and interconnected with the concept of living law. *Rechtsvinding* can be described as efforts that need to be taken by judges to find the law for cases in which the existing regulations do not give clear and specific answers. It is the process of establishing law by judges or other law enforcement officials in the application of general regulations to concrete legal events and the results of legal findings become the basis for making decisions.[23]

Therefore, in carrying out his main duties to examine, assess, and then make a decision on a case submitted to him/her, a judge as a law enforcer must not reject a case on the pretext that the law on the case does not exist or is unclear.[24] It is a rule taken for granted that, as thinkers and practitioners of wisdom in the

[21] "Law Number 48 of 2009 Concerning Judicial Power," n.d.

[22] The other paragraphs explain further regarding the obligation of the judge related to integrity and code of conduct.

(2) Judges and constitutional judges must have sound integrity and personality, honest, fair, professional, and experienced in the field of law.

(3) The judges and constitutional judges are required to obey the Code of Conduct and Guidelines of Judge's Conduct.

[23] "Kementerian Hukum Dan Hak Asasi Manusia Republik Indonesia,", https://ditjenpp.kemenkumham.go.id/index.php?option=com_content&view=article&id=849:penemuan-hukum-oleh-hakim-rechtvinding&catid=108&Itemid=161&lang=en, accessed June 8, 2021.

[24] "Article 10(1)Law Number 48 of 2009 Concerning Judicial Power."

field of law and justice, judges are considered to know all laws also called as *ius curia novit* principle.[25]

Ius curia novit is a principle that views that "the judge knows the law" (the court knows the law). Therefore, a judge must determine what law should be applied to a particular case and how it will be applied.[26] As an organ of the court, the judge then must provide services to every seeker of justice by resolving disputes based on written law, and if they do not find written law, judges who are considered to understand all laws, are obliged to explore unwritten laws to decide cases based on the law as wise people with responsibility fully responsible to God Almighty, oneself, society, nation, and state.[27] This is usually understood as the *rectshvinding*. Issues of polygamy clearly have offered a variation in terms of cases which include reasons, legal facts, and so forth. Such complexity weighed with the interpretation of the judges towards many aspects, leads to the application of *contra legem* (contrary to the law).

Contra legem is a decision made by the judge that overlooks existing laws and regulations. This could mean two scenarios, first is a decision where the judges do not use existing law as the basis in the consideration, while the second kind is where there is even a conflict or contradiction with articles of the law as long as these articles of the law are not in accordance with the dynamic and development and sense of justice within society.[28]

The question then is whether polygamy cases can be categorized as such and hence allows or even oblige the judges to

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[25] The principle of ius curia novit views that every judge knows the law so he must try every case that is submitted to him, see Yuristyawan Pambudi Wicaksana, "Implementasi Asas Ius Curia Novit Dalam Penafsiran Hukum Putusan Hakim Tentang Keabsahan Penetapan Tersangka," *Jurnal Lex Renaissance* 3, no. 1 (2018): 86–108.

[26] M. Yahya Harahap, *Hukum Acara Perdata* (Jakarta: Sinar Grafika, 2005).

[27] Ibid.

[28] Luh Gede Siska Dewi Gelgel and I Made Sarjana, "Pelaksanaan Contra Legem Oleh Hakim Penjabaran Nilai Hukum Progresif," *Kertha Semaya : Journal Ilmu Hukum* 1, no. 10 (2013): 1–5.

'find' new law. Within the following section, the findings and analysis, there will be the elaboration of several cases as well as the data from interviews. Expectedly, we can identify the answer from that.

The Dynamic Problems of Polygamy Cases in Indonesia

In many cases, the fulfillment of either one let alone three of the requirements called as alternative requirements,[29] is problematic. Many cases where polygamy permission is granted actually are poor in terms of the fulfillment of alternative conditions. The reasons behind the request for permission are not within the scope of the three conditions. As mentioned previously, for a person to be granted permission to conduct polygamy, he has to file a petition to the court. Within the petition, he has to argue several aspects, and among the most important aspects are the reason behind his need to conduct polygamy and his capacity.

Several examples will be presented here. The presented cases here result from quite thorough research on around 30 decisions on polygamy. After some consideration, cases presented here are opted for the sake of variations. After the reviews, the variations then later will be put in categories proposed by the author.

Case 1

Decision Number 3765/Pdt.G/2019/PA.Sda.[30]

In this case, the petitioner proposed the fear of committing the sin of adultery as the reason for requesting polygamy permission. Ironically, legal fact shows that the wife is actually younger than the future second wife. In fact, the first wife and husband also

[29] Article 4 of the Law Number 1 of 1974 concerning Marriage

(2) The court referred to in paragraph (1) of this article only gives permission to a husband to have more than one wife if the wife is unable to perform her duties, suffers from physical defects or an incurable disease; or is incapable of having descendants

[30] "Directory of Decisions of the Supreme Court of the Republic of Indonesia, Decision Number 3765/Pdt.G/2019/PA.Sda., 2019," n.d.

already have one child from that marriage. This is a quite clearcut showcase since the alternative condition is clearly absent. Another factor playing behind the wife's approval, which also is taken into consideration by the judge, is the already existing relationship between the husband and the woman that lasted for a year. Within the legal consideration (*konsideran*), the judge quotes several points; the fulfillment of conditions for polygamy, and the fear of *zina* as the reasoning.

Case 2

Decision Number 1078/Pdt.G/2021/PA.Sda.[31]

In this case, there are similarities with the previous one. The petitioner proposed the fear of *zina* (adultery) as the main reason. Another fact that is quite commonly found is the existing relationship between the husband and the woman for one year. He, a 52 years old male, stated that he was very capable of performing polygamy and that he already had the agreement from his first wife. This case certainly is a quite clear showcase where the absence of alternative conditions is apparent. The first wife and the husband already had 5 children together.

This case offers quite interesting findings within the decision, specifically in the legal consideration. In this case, judges acknowledge that the alternative conditions as prescribed in the law actually are not fulfilled. The reason, fear from *zina*, is not relevant or in line with the three conditions of Article 4 of Law No 1 of 1974 concerning Marriage. Judges then shift their reference to the sharia, specifically the legal maxim: "When two wrongful acts meet, the remedy of the greater is sought by the doing of the less". This case also shows that the wife is not present in the court but the judges then refer to the wife's letter approving the husband to conduct polygamy. In addition, the judges seem to still gather and dig more in-depth by having assessments on the spot.

[31] "Directory of Decisions of the Supreme Court of the Republic of Indonesia, Decision Number 1078/Pdt.G/2021/PA.Sda., 2021," n.d.

Case 3

Decision Number 0402/Pdt.G/2016/PA.Sda.[32]

This case is a rather different case from the previous two. In this case, the reason behind the petitioner's request is that the woman (future second wife) was already 4 months pregnant. Unsurprisingly, the judges have to take this fact into consideration (*konsideran*). As stated in the section of consideration, the relationship between the two persons already existed and even lasted for around two years and the woman recently is expecting. The judges then quote the legal maxim similar to the previous two cases concerning *al-Asybah wa al-Nadzair* chapter 1 page 188 (When two wrongful acts meet, the remedy of the greater is sought by the doing of the less" When two wrongful acts meet, the remedy of the greater is sought by the doing of the less".

Yet, even though the problems, in this case, are more complicated than the above two and hence one might justify the judge's approaches using contra legem and reference to sharia as the living law, there is still another issue. Another difference found in this case is that the economic profile/capacity is actually subject to doubt. The monthly income is around three million and for the recent situation, this certainly can raise questions, especially considering the fact that the husband and the first wife already had three children. Within the previous two cases, the petitioner earns around 50 million per month (case 1) while the petitioner in case 2 earns around 150 million monthly.

Case 4

Decision Number 6186/Pdt.G/2020/PA.Sby.[33]

This case is another story opted by the authors for the sake of variation. In the case, the petitioner argues that his first wife always refuses to have sex on the grounds of being tired. In

[32] "Directory of Decisions of the Supreme Court of the Republic of Indonesia, Decision Number 0402/Pdt.G/2016/PA.Sda., 2016," n.d.

[33] "Directory of Decisions of the Supreme Court of the Republic of Indonesia, Decision Number 6186/Pdt.G/2020/PA.Sby., 2020," n.d.

addition, it is also argued that the first wife is rarely available, or refuses, to accompany the petitioner for work outside the city of their domicile. This case is a variant opted by the authors to show that there are indeed several cases where the reasoning seems to be relevant or made relevant to the prescribed alternative conditions. Moreover, the husband and the woman have already married in an unregistered marriage (*nikah siri*).

Interestingly, there is no affirmation or justification for the reasoning as being in line with the prescribed law governing the alternative condition. Rather, the judges quote the verse of Qur'an (An-Nisa' verse 3) to be one the arguments within the consideration.

Case 5

Decision Number 728/Pdt.G/2020/PA.Sby.[34]

This case is another variant purposely taken by the author to show that there is indeed a situation that can be categorized as the alternative condition. In this case, the wife has suffered and survived the uterine surgery that leads to complicated consequences. As argued by the petitioner, his wife could not perform her wife's duty (husband-wife intimate relationship) due to her condition. In addition, this also prevents her from carrying a future child. Meanwhile, in addition to having a healthy and quite strong and driving desire for intimacy, the husband also argues his desire to have another child amid the two they already had. Hence, the condition and the fear of committing adultery are correlated with each other.

As mentioned above, this case shows a clear existence of alternative conditions and that is the inability to perform the wife's duty. Further review on the decision, especially in the section of legal consideration (*konsideran*) also finds that the judges highlight this fulfillment of the alternative conditions. It is stated that the petitioner's case has met the requirements in the Law No 1 of 1974

[34] "Directory of Decisions of the Supreme Court of the Republic of Indonesia, Decision Number 728/Pdt.G/2020/PA.Sby., 2020," n.d.

concerning Marriage Article 4 (2). This is certainly a quite good showcase. On the other side, the cumulative conditions are also claimed to be fulfilled with the wife's approves, present in court to state the approval and the husband's economic capacity. This is surely still added with the assurance of the capacity in being just within their polygamous marriages.

Other than those cases described above, there are still many other similar cases. One point that is quite common to be found is the legal fact that the petitioner has already had a long relationship with the future second wife. Admittedly, a variation of other legal facts exists and this includes, for example, the wife being distant, the wife being quite ill, and the economy of the future wife needs help and support. Still, the main idea or argument actually is similar. Interestingly, based on reviewing several decrees and strengthened by data gained from the interviews, there are actually cases where the alternative condition exists. Some are claimed to be the reasons while in other cases they seem to be overlooked. In the author's opinion, the variation can be put into at least three categories. The first category is the types of cases in which the alternative condition, as prescribed by Indonesian family law, clearly shows to exist. This can be shown in cases where the wife suffers from illness and so forth. The second category cases in which the alternative condition does not appear clearly or cases where the reasoning behind the petition seems to not accord with the prescribed alternative condition in the family law. Meanwhile, there actually is a situation that can be argued as in line or relevant with the prescription of the alternative condition and hence it is easier to be justified. The third category, admittedly, is the one in which there is clearly no indication of the need as prescribed by the law be it the wife's illness or the other two. This last category, in the author's words, is the category that needs serious attention especially perceived from the gender perspective. In addition, the third category also can be argued to be the hindrance of the realization of the principle of monogamy which is held highly by the Indonesian family law. Nevertheless, since this is a subject to

other discussions, the question then is more about the juridical analysis to the dynamics of the polygamy problems.

Several judges explain that decisions that seem to be undermining the required existence of either one or all of the alternative conditions actually are not very problematic. They argue that their decision, despite the risk of not fully adhering to the regulations regarding the alternative conditions within the family, actually are justified. The arguments are mostly related to the juridical authority to make a contra legem decision and the importance of referring to the living law. So, the first point argued is that they are obliged to receive cases and give legal answers in form of decisions to every case with no exception.[35] This means that even if the case does not show clear reasoning about the alternative condition, they still have to also take the cases and give legal certainty.[36] Judges have to meet three principles and functions of law and they are legal certainty, utility, and fairness. In addition, 3 aspects have to be taken into consideration within the process of decision-making: the philosophical, sociological, and juridical aspects.[37] The three principles and these three aspects then resulted in quite complex consequences within how judges approach and interpret the case. This complexity is what makes it interesting to be elaborated.

The decisions granting permission for polygamy in such cases, in their opinions, are in line with the aim of law and that is to give legal certainty and utility. As argued by one of the judges, "*If we do not grant them the decision, we actually abandon them and leave them in a chaotic situation*".[38] The opinion is actually interesting since one might argue decision that needs to be issued does not necessarily have this regard, they also argue the importance of

[35] "Moh. Jumhari, Interview, Surabaya, 20 April 2021" (Surabaya, n.d.).
[36] Ibid.
[37] "Adeng Irawan, Interview, Surabaya, 1 June 2021" (Surabaya, n.d.).
[38] Ibid.

sociological consideration. According to the judges, polygamy is a sociological phenomenon or a reality that needs to be accepted as a living fact. Furthermore, cases presented to them vary and sometimes are complex with other additional issues such as the existing long-term and 'close' relationship between the petitioner and the woman (to be the second wife).[39] As claimed by one of the judges, wisdom to be able to execute the role in delivering justice and the utility of law is crucial. "If we are presented with such cases, what good can come out from us rejecting or refusing the request. Not only is legal certainty being risked, the legal benefit also then is not being realized".[40] This is in line with the theory of *contra legem* and living law. Judges make decisions that seem to differ from what are prescribed in the positive law with assessment and consideration aiming at realizing the end goal of law which is the good and just solution for the parties involved.[41]

About this matter, Article 6 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power does stipulate that: "Judges and constitutional judges are obliged to explore, follow and understand legal values and a sense of justice that lives in society. Furthermore, in the explanation of the article, it is also stated that "This provision is intended so that the decisions of judges and constitutional judges are following the law and a sense of justice".[42]

They also justify their decisions by saying that the risk resulting from rejection in polygamy cases is very high. They fear that the husbands will fail to control themselves and fall into the big sin, of adultery. In addition, some also argue that the risk is not

[39] "Mubarok, Interview, Surabaya, 05 September 2021," n.d.
[40] Ibid.
[41] Rogaiyah, "Putusan Contra Legem Sebagai Implementasi Penemuan Hukum Oleh Hakim Di Peradilan Agama (Studi Kasus Putusan Kasasi Nomor 16 K/AG/2010 Dan Putusan Kasasi Nomor 110 K/AG/2007)"," *Qiyas* 3, no. 2 (n.d.); Abdul Halim and Ijtihad Hakim, "Ijtihad Hakim Dalam Penerapan Konsep Contra Legem Pada Penetapan Perkara Di Pengadilan Agama," *Legitima* 1, no. 2 (2019): 1–17; Umar Rojikin, "Penerapan Asas Contra Legem Pada Kasus Izin Poligami Di Pengadilan Agama Cianjur" (UIN Sunan Gunung Djati Bandung, n.d.).
[42] Ahmad Rifai, *Penemuan Hukum Oleh Hakim : Dalam Perspektif Hukum Progresif*, 3rd ed. (Jakarta: Sinar Grafika, 2014).

only limited to adultery but also to the unregistered marriage. In other words, those whose requests are rejected have a high risk of conducting an unregistered marriage or usually known as '*Nikah Siri*'.[43] One judge explains as follows "*We understand that the reason actually is not there if we refer to the reasoning in line with the law, the alternative conditions. In many cases, the wife is still healthy, and able to perform the duties. They also have children. Still, once the mediation does not succeed, we can see the petitioner is fully and strongly committed to the marriage (the polygamous marriage he petitioned for: author). In other words, He will do whatever it takes. So, we see it in a positive perspective and think, well it already is a good gesture of the husband to proceed with the case to the court. It is an act of a gentleman since he does not take the shortcut; nikah siri (unregistered marriage)*".[44]

Moreover, there are indeed many cases where the husband actually has already conducted the unregistered marriage before his petition to the court. Again, the judges feel the need to grant the permission as they see it will bring more benefit for all parties involved. If they are already married (within unregistered marriages) and moreover if there is a child or soon-to-be-born child, then it is difficult. The decision is crucially important and needed for the realization of legal certainty and utility for the parties.[45]

In other cases, unfortunately, the woman is already expecting. Judges then find that the permission needs and has to be granted for the sake of legal certainty and here is not exclusively limited to the parties that already existed, the husband and the soon-to-be wife, but also to the unborn child. These are cases in which the judge sees the gap within the existing law that calls for

[43] "Mubarok, Interview, Surabaya, 05 September 2021"; Nabiela Naily, *Recent Polemics on the Status of Women and Children Outside Registered Marriage in Indonesia: Muslim Reponses towards MK's Decision No. 46/PUU-VII/2010* (Bangkok: Thai Research Fund, 2014).

[44] "Zefry, Interview, Surabaya, 1 January 2021," n.d.; Naily, "Perlindungan Perempuan Dan Anak Dalam Hukum Keluarga Di Dunia Islam."

[45] "Moh. Jumhari, Interview, Surabaya, 20 April 2021."

the act of legal discovery. Legal discovery is usually interpreted as the process of forming a law by a judge, or other legal apparatus, assigned to apply general legal regulations to concrete legal events. So, legal discovery can be said as a process of concretization and individualization of general legal regulations (*das sollen*) by remembering certain concrete events (*das sein*).[46]

Here, it is worth reminding that the judges are bound to accept every case with no exception. Article 14 Law No. 14 of 1970 states that "*Judges not to refuse to try cases submitted to them with incomplete reasons or unclear laws that regulate them but are obliged to try them".* This is with risks that the cases presented challenge them with the complexity that seems to indicate the vacuum or unclarity. Admittedly, judges acknowledged that they have to judge based on the law, as stipulated in Article 20 AB and Article 22 AB.[47] Yet, if there is a vacuum in the rule of law or the rules are not clear, then the solution is actually regulated in Article 27 of Law No. 14 of 1970 states: "Judges as enforcers of law and justice are obliged to explore, follow and understand the legal values that live in a society".[48] This means that a judge must have the ability and activeness to find the law (*recht vinding*).

Van Apeldoorn stated a judge in his duty to form a law must pay attention to and be firmly based on the following principles:[49]

1. Adjusting the law with concrete facts
2. May also add to the law if necessary.

This is basically the logic framework among the judges that have significantly influenced how the judges approach the dynamic of polygamy problems presented. The living law that is mostly used as the other reference in most of the judges' legal

[46] Sudikno Mertokusumo, *Penemuan Hukum, Sebuah Pengantar* (Yogyakarta: Liberty, 2007).
[47] "Law Number 14 of 1970 Concerning Main Provisions of Judicial Power," n.d.
[48] Ibid.
[49] Ibid.

considerations is argumentation using *fikih* (Islamic jurisprudence) and *qa'idah fiqhiyah* (islamic legal maxim). They are commonly found in several decrees. Maxim that are often quoted are as follows: they fear is adultery while the other risk, which is deemed to be lesser in terms of madharat, is the risk of disharmony within the family.[50] The argumentation using Islamic legal maxim as references need a more in-depth analysis, and might be elaborated in another paper. This paper focuses on showing how judges are quite familiar with and confident in using Islamic law (read: *fiqh* texts and or maxim) within the legal consideration.

" one point is that we actually serve the function of law to the people and even though one might argue that there is a problem related to the law implementation, to us as the religious judges in religious courts, our references are not limited to positive law; fiqh or Islamic law also is the reference.[51] Moreover, it is their understanding that polygamy is the right of man guaranteed by religious text.[52] This understanding and acceptance then, in the later stage, will ease the conflicting ideas on the issue and lead to granting permission for polygamy.

In sum, from the sociological point of view, polygamy is a phenomenon that needs a solution and hence judges have played roles in addressing the problem. From a philosophical point of view, the justice that needs to be delivered by the judges is claimed to be realized by the decisions. Admittedly, the juridical aspect is acknowledged to be the subject for questions. Still, there is a justification for using the logic framework as explained above.

It is important to note though that judge still deem the cumulative conditions a must and non-negotiable to be fulfilled in its entirety. This is actually also used as their argument that the court permission given even with the absence of alternative conditions is not problematic once the case has already fulfilled the

[50] Ibid.
[51] "Moh. Jumhari, Interview, Surabaya, 20 April 2021."
[52] "Mubarok, Interview, Surabaya, 05 September 2021."

requirements of cumulative conditions; the approval of the wife , as well as the capacity of the husband, be it in terms of maintenance and fairness toward all the wives and children.[53] They even emphasize the problem and negative repercussions of rejecting polygamy petitions cases where the cumulative conditions are fulfilled, regardless of the absence of alternative conditions. The utility or '*kemanfaatan*' of the law is not achieved as the parties involved are in need and actually. This is also due to the fact that problems and the dynamics of the debates between husband and first wife are already resolved within their internal household before then being brought to the court. This is indicated by the wife's approval. The rejection will not only deny them the benefit of the law. Instead, they are facing hindrances and this actually contradicts the function of the law and judge: serving society in upholding the law and justice. Concerning this, Bagir Manan stresses the importance of skills and methods of applying the law. They are traits that must be mastered by judges in carrying out their duties of judicial power. This is due to two reasons. First is that Laws are never complete; Law is an abstract institution and can only be applied fairly by using certain implementation methods. Second is that a judge plays a very strategic role and is not playing the role as merely the agent of the acts; instead, he/she is the agent of justice.[54]

Conclusion

Polygamy has always been a problematic and challenging issue in Indonesia. The issue actually is correlated with many aspects, including sociological, religious interpretation, gender, as well as law. The paper has shown that within the Indonesian legal system, Judges do encounter dilemmas in cases of polygamy due to problems in the fulfillment of alternative conditions. Still, they granted the permission due to several considerations. From a

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[53] Ibid.

[54] Bagir Manan, *Menjadi Hakim Yang Baik* (Jakarta: Mahkamah Agung-RI, 2007).

juridical perspective, it is clear that judges base their attitudes on several bases. First is the obligation to accept, try, and decide every case while cases are often problematic and indicate an extent of unclarity. This then, at the second stage, encourages them to perform the legal discovery. In this regard, the living norms and law as well as the sense of justice within society also have to be taken into their consideration. These all then will justify their decisions that might seem to overlook the existing law, specifically related to alternative conditions, and this is called *contra legem*.

Aside from the juridical analysis, it is important to note that the issue still poses several challenges, questions, and wisdom, especially considering the fact that the spirit brought by the lawmakers is the principle of monogamy. Even if this principle is still with compromise as the practice is still allowed, the rules including the conditions both the alternative and cumulative are the ones that are supposed to keep the balance and control. In addition, the issue also is interconnected with gender, human rights and even child rights that need more serious reviews and analysis in the future. This could not be any truer if we consider the risk of the trend *of contra legem* in most cases of polygamy, if this is continuous and massive, will bring the new trend of polygamy being the new common norm.

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