

## REFUSAL OF POLYGAMY PERMIT IN RELIGIOUS COURT DECISION: Criticism of Gender Justice Against Judge's Legal Reasoning

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**Abstract:** This research aims to find out the judge's considerations and analyze them using gender-based justice in the Madiun Regency Religious Court Decision Number 1512/Pdt.G/2022/ PA.Kab.Mn. Normatively, the permissibility of polygamy relies on the wife's consent and the husband's capacity for justice. In the context of this case, the problem started with the submission of an application for a polygamy permit which was carried out after the Petitioner married his prospective second wife. The Petitioner's argument that he was married before applying polygamy was considered an unlawful act. This research is doctrinal legal research with a case study approach, conceptual approach and statutory-regulatory approach. Data sources in this research are court decisions, statutory regulations, books, journals, and related research results. This research contributes to providing a conceptual basis for judges in making decisions on polygamy permit applications that are based on gender justice so that justice in society is created objectively.

**Keywords:** Judge Considerations, Polygamy, Gender Justice

**Abstrak:** Penelitian ini bertujuan untuk mengetahui pertimbangan-pertimbangan hakim serta menganalisisnya dengan menggunakan keadilan berbasis gender pada Putusan Pengadilan Agama Kabupaten Madiun Nomor 1512/Pdt.G/2022/PA.Kab.Mn. Secara normatif kebolehan poligami bertumpu pada persetujuan istri dan kemampuan suami untuk keadilan. Dalam konteks kasus ini, persoalan berawal dari pengajuan permohonan izin poligami yang dilakukan setelah Pemohon menikah dengan calon istri kedua. Argumentasi Pemohon yang telah menikah sebelum mengajukan permohonan poligami dianggap sebagai perbuatan melawan hukum. Penelitian ini merupakan penelitian hukum doktrinal dengan pendekatan studi kasus, pendekatan konseptual dan pendekatan peraturan-undangan. Sumber data pada penelitian ini berupa keputusan pengadilan, peraturan perundang-undangan, buku, jurnal, dan hasil penelitian terkait. Penelitian ini berkontribusi memberikan pijakan

konsep bagi hakim dalam menghasilkan keputusan permohonan izin poligami yang berpijak pada keadilan gender agar keadilan di masyarakat tercipta secara objektif.

**Katakunci:** Pertimbangan Hakim, Poligami, Keadilan Gender

## Introduction

Philosophically, marriage is based on monogamy, so a husband is not allowed to have more than one wife when he does not have a rational reason. This is also emphasized in Article 3, paragraph (1) of Law Number 1 of 1974: "In principle, in a marriage, a man may only have one wife. A woman may only have one husband".<sup>1</sup> Mark Cammack et al. mentioned that the law on marriage, including the regulation of polygamy, aims to reduce divorce and underage marriage.<sup>2</sup> The principle of monogamy is open-ended in that the government allows a husband to have more than one wife if desired, and under religious law. Notable exceptions based on religion and legal provisions regarding the permissibility of polygamy are given to a person with requirements that are not easy, namely for unique reasons and approval from a religious court. Polygamy is only allowed if there is an emergency.<sup>3</sup> For example, the wife turns out to be barren (unable to produce offspring), is affected by illness, and cannot fulfill her obligations as a wife.<sup>4</sup>

The development of polygamy in human history follows the construction of

society's thinking about women. When society underestimates the position and status of women, polygamy increases, whereas polygamy decreases in societies that view women's position and status as honorable. Thus, the development of polygamy has ebbed and flowed following the stereotype of women in the eyes of society.<sup>5</sup> The issue of polygamy in marriage law is a significant and controversial discourse, even concerning the issue of gender injustice.<sup>6</sup>

The presence of a societal stigma that often considers women to be weak and incompetent in public affairs emphasizes the position of women as subjects who often receive injustice.<sup>7</sup> One form of gender injustice in the practice of polygamy is *sirri* marriage. *Sirri* marriages are considered at odds with efforts to protect human dignity. According to Islamic law, performing a marriage in a *sirri* manner is valid if it fulfills the requirements of the pillars of marriage. However, from the legislative aspect, this marriage model does not have a complete legal basis because it has not been registered. So, legal consequences will arise, among others: First, the marriage is considered invalid. Second, the child only has a civil

<sup>1</sup> Pasal 3 Undang-Undang No. 1 Tahun 1974 tentang Perkawinan.

<sup>2</sup> Mark Cammack, Lawrence Young, dan Tim Heaton, *Legislating Social Change in an Islamic Society: Indonesia's Marriage Law in Indonesia, Law and Society*, ed. oleh Timothy Lindsey, (Sydney: Federation Press 2008), 294.

<sup>3</sup> Hamka Hasan et al., "Polygamy: Uncovering the Effect of Patriarchal Ideology on Gender-Biased Interpretation," *HTS Theological Studies* 78, no. 4 (2022): 1-9, <https://doi.org/10.4102/hts.v78i4.7970>.

<sup>4</sup> Zainal Abidin, Muhammad Safuan, dan Rafiqul Huda Siregar, "Poligami dalam Islam dan Keadilan Gender," *The International Journal of Pegon* :

*Islam Nusantara civilization* 8, no. 02 (27 Desember 2022), 27.

<sup>5</sup> Nehru, "Alasan Dalam Pengajuan Izin Poligami," *Sakina: Journal of Family Law* 2 No. 4, (29 Desember 2018), 2.

<sup>6</sup> Mukhammad Nur Hadi, Faridatus Syuhadak, and Zuliza Mohd Kusrin, "Social Justice and Humanity on Polygamous Marriage at The Religious Court of Pasuruan - Indonesia," *Justicia Islamica* 20, no. 2 (November 8, 2023), <https://doi.org/10.21154/justicia.v20i2.7324>.

<sup>7</sup> Yazid, "Relasi Suami Istri Dan Pelanggengan Patriarki (Nikah Misyar Dalam Perspektif Gender)," *Jurnal Ijtihad* 36 No. 1, (2020), 115.

relationship with the mother and the mother's family.

On the one hand, polygamy is rejected by various normative and psychological arguments and is even associated with gender injustice.<sup>8</sup> Regarding legal structure, Religious Court judges who hear cases of polygamy license applications have only adhered to existing legal norms and acted responsively and progressively. Nevertheless, polygamy conducted without court permission by taking a *sirri* marriage has mushroomed in society and is considered against the law. The desire for polygamy is hampered by the complicated rules of the polygamy law because it is urged by the situation of the prospective wife, who has been impregnated before the polygamy application is submitted to the court.<sup>9</sup>

Many researchers have conducted studies on polygamy, especially in the context of normative aspects and dimensions of gender equality, such as research written by Luthfi Ardiansyah,<sup>10</sup> Egga Dwi Ariyanti,<sup>11</sup> Roihatul Jannah,<sup>12</sup> and Elva Mahmudi.<sup>13</sup> The research discusses the issue of polygamy from a normative

perspective and its correlation with *sirri* marriage. Furthermore, in the research of Didi Sumardi,<sup>14</sup> Noer Yadi Izzul Haq,<sup>15</sup> and Wely Dozan,<sup>16</sup> the issue of polygamy is only seen from the framework of gender equality, so it has not explicitly addressed the dimension of justice.

Furthermore, Aurangzeb Alamgir's research examines the advantages, disadvantages, and obstacles that disproportionately affect women due to polygamy. Alamgir concluded that the practice of polygamy applied in society has a comparable possibility of gain and loss. The disadvantages of polygamy are that polygamous men have caused hardship and misery to women and children in their pluralistic families. According to research, 75% of polygamous husbands cannot take responsibility as providers and protectors of the family. More than 80% fail to provide their children with the necessary and material economic support.<sup>17</sup> Some people consider that the advantages of polygamy far outweigh the disadvantages. Proponents of polygamy claim that polygamy will protect them from social degradation and protect women from low moral values. The

<sup>8</sup> Fitri dan Mannas, "Penyelesaian Permohonan Izin Poligami Di Pengadilan Agama Dalam Kaitannya Dengan Kewenangan Hakim Dalam Menjatuhkan Putusan," *Jurnal Hukum Acara Perdata Adhaper*, 4 No. 1, (10 Oktober 2018), 3.

<sup>9</sup> Eti Mul Erowati, "Permohonan Ijin Poligami Tidak Sesuai Dengan Alasan Dan Syarat-Syarat Hukum Positif Indonesia," *Jatiswara* 33 No. 3, (29 November 2018), 363.

<sup>10</sup> Luthfi Ardiansyah, *Izin Poligami Setelah Pernikahan Sirri (Studi Putusan Nomor 0110/Pdt.G/2015/Pa.Lbt)*, *Undergraduate Thesis*, (Jakarta: Universitas Islam Negeri Syarif Hidayatullah, 2021), 52.

<sup>11</sup> Egga Dwi Ariyanti, *Penolakan Izin Poligami Terhadap Wanita Yang Dihamili Perspektif Mashlahah Mursalah (Studi Putusan Pengadilan Agama Purwodadi Nomor 3090/Pdt.G/2020/Pa.Pwd)*, *Undergraduate Thesis*, (Salatiga: IAIN Salatiga, 2022), 95.

<sup>12</sup> Roihatul Jannah, *Pertimbangan Hakim Pengadilan Agama Kabupaten Kediri Dalam Mengabulkan Permohonan Izin Poligami Perspektif Kompilasi Hukum Islam Dan Teori Mubādalāh: Studi*

*Putusan Nomor 2821/Pdt.G/2019/Pa.Kab.Kdr, Undergraduate Thesis*, (Malang: UIN Maulana Malik Ibrahim, 2022), 54.

<sup>13</sup> Elva Mahmudi, "Pengabulan Izin Poligami Dikarenakan Telah Menikah Sirri (Studi Kasus Terhadap Putusan Pengadilan Agama Pariaman)," *Jurnal Ilmiah Al-Hadi* 7 No. 2, (21 Juli 2022), 117.

<sup>14</sup> Didi Sumardi, "Poligami Perspektif Keadilan Gender," *ADLIYA: Jurnal Hukum dan Kemanusiaan* 9 No. 1, (2015), 198.

<sup>15</sup> Noer Yadi Izzul Haq, "Asas Monogami Perkawinan Pada Izin Poligami Di Pengadilan Agama Jakarta Selatan Perspektif Gender Dan Hukum Progresif," *Undergraduate Thesis*, (Jakarta: Universitas Islam Negeri Syarif Hidayatullah, 2020), 128.

<sup>16</sup> Wely Dozan, "Fakta Poligami Sebagai Bentuk Kekerasan Terhadap Perempuan: Kajian Lintasan Tafsir Dan Isu Gender," *An-Nisa : Jurnal Studi Gender Dan Anak* 13 No. 1, (5 Februari 2023), 747.

<sup>17</sup> Aurangzaib Alamgir, *Islam and Polygamy: A Case Study in Malaysia. Procedia - Social and Behavioral Sciences* 114, (2014), 892.

most common argument is that Muslim women should share a husband rather than live as a widow.<sup>18</sup>

Other research that specifically discusses polygamy and its relevance to the protection of women and children is discussed by Dri Santoso and Muhammad Nasrudin. To protect the rights of wives and children, the study concluded that polygamy carried out clandestinely by marrying *sirri* is vulnerable to abuse and harm to women and their children. If examined in depth, the benefits of rules regarding polygamy are made in line with the rules of Shara' for the sake of public interest (*maslahah*). If, in practice, it causes many social problems, the provisions regarding the permissibility of polygamy will be canceled through the principles contained in *saddu ad-zariyat*. This strengthens the argument that the prohibition of polygamy is essentially an effort to protect women and children because the Qur'an also explicitly prohibits polygamy whenever there is a risk of injustice. Polygamy should not be allowed in society if it involves injustice and abuse to suppress the various evils that may occur.<sup>19</sup>

Regarding the discourse of polygamy, it is interesting to look at one of the decisions of the Madiun Regency Religious Court regarding the submission of a polygamy permit application as outlined in Decision Number 1512/Pdt.G/2022/PA.Kab. Mn.<sup>20</sup> The subject matter of this case is that the Applicant and the Respondent were husband and wife married on March 16, 1991, recorded at the Office of Religious Affairs of Tenggara Subdistrict, Kutai Regency, according to the quotation of Marriage Certificate Number 799/49/III/1991 dated March 15, 1991. After marriage, the Applicant and

Respondent resided at the Respondent's house in Jatisari Village, Geger District, Madiun Regency, until now. The Applicant and the Respondent have been living as husband and wife and have been blessed with three children, namely T (31 years old), L (26 years old), and J (14 years old). Then, after running the household for approximately 28 (twenty-eight) years, in February 2019, the Applicant entered into a marriage in *Sirri* with a woman named D (27 years old) and had a child from the *sirri* marriage.

At the time of the marriage, the Applicant did not seek the consent of the Respondent as his legal wife because he was worried that the Respondent would not want to be honeyed or disagreed with the Applicant's desire to marry the woman. The Respondent herself did not know when the Applicant married D because she had never been introduced to him before. The Respondent only learned of the marriage between the two in November 2022 at the time of the Respondent's birthday because the Applicant told her directly and felt forced to accept and agree to the Applicant's desire for polygamy because the Applicant had married the woman. Because there had been a marriage between the Applicant and his wife-to-be before the case was registered, the Panel of Judges considered that the Applicant's reasons in his petition contradicted each other. On the one hand, the Applicant stated that he would remarry (polygamy), but on the other hand, acknowledged that the Applicant had married his wife-to-be. This resulted in the Applicant's petition contained in the petition and the facts proven before the court being incompatible and suffering from formal defects.

The specificity of this case lies in the

<sup>18</sup> Alamgir, hlm. 893.

<sup>19</sup> Dri Santoso dan Muhamad Nasrudin, "Polygamy In Indonesia And Its Relevance To The Protection of Women And Children In The Perspective

of Islamic Law Philosophy," *AKADEMIKA: Jurnal Pemikiran Islam* 26 No. 1, (30 Juni 2021), 131.

<sup>20</sup> Dokumen Penetapan Pengadilan Agama Kabupaten Madiun Perkara Nomor 1512/Pdt.G/2022/PA.Kab.Mn.

fact that the application for a polygamy license was made after the Applicant had married his second wife, meaning that what the Applicant did was a non-procedural act of polygamy and did not have permanent legal force. The application for a polygamy license should have been submitted before marriage with the second wife-to-be and done with the permission of the first wife. In this case, the authors would like to take a closer look at the considerations and final decision of the judge in resolving the case and analyze it using the perspective of gender justice as a study material.

This research is doctrinal legal or normative juridical research in which research is conducted on judicial decisions or statutory norms by examining library materials and secondary data.<sup>21</sup> The approaches used in this research are the Case Approach, the Statutory Approach, and the Conceptual Approach, which is carried out by identifying and understanding all legal concepts in the form of doctrines and views where this research uses a gender justice perspective.<sup>22</sup>

### Polygamy Construction and Gender Justice in Family Law

The term polygamy comes from the Greek *poly* or *polus*, which means many, and *gamein* or *gamos*, which means marriage.<sup>23</sup> This definition can be understood as polygamy is a marriage in which one party (husband) marries more than one wife simultaneously.<sup>24</sup> This means the wives

remain the husband's responsibility, are not divorced, and are still valid as their wives. Apart from polygamy, there is also the term polyandry. Polyandry is a marriage characterized by one party (wife) having multiple husbands simultaneously.<sup>25</sup> Polygamy in Islam is defined as more than one marriage, with a limit of up to four women allowed.<sup>26</sup> However, some understand the verse on polygamy with a limit of more than four and even more than nine wives. Of course, such differences occur because of differences in interpretation of the verse al-Nisa 4:3. Understanding the limit of four seems more common and is better supported by historical evidence.<sup>27</sup> The restriction on polygamy is intended to prevent future harm and to enable the husband to be fair.

In the applicable regulations in Indonesia, the issue of polygamy is regulated in Law No. 1 concerning Marriage of 1974 Article 3 paragraph (2), Article 4 paragraph (1), Article 4 paragraph (2), Article 5 paragraph (1), Article 5 paragraph (2), Article 65 paragraph (1).<sup>28</sup> Then, in Presidential Instruction Number 1 of 1991 concerning Book I of the Compilation of Islamic Law (KHI), the rules regarding polygamy are regulated in Article 55 paragraph (1), Article 55 paragraph (2), Article 55 paragraph (3), Article 56 paragraph (1), Article 56 (2), Article 56 paragraph (3), Article 57, Article 58 paragraph (1), Article 58 paragraph (2), and Article 58 paragraph (3).<sup>29</sup>

<sup>21</sup> Steven M. Barkan, Roy M. Mersky, and Donald J. Dunn, "Fundamentals of Legal Research," 2009.

<sup>22</sup> Ani Purwati, *Metode Penelitian Hukum Teori Dan Praktek* (Surabaya: Jakad Media Publishing, 2020), 86.

<sup>23</sup> Iffah Qanita Nailiya, *Poligami: Berkah ataukah Musibah? Mengungkap Alasan-Alasan Nabi Melarang Ali Berpoligami* (Yogyakarta: DIVA PRESS, 2016), 15.

<sup>24</sup> Yuliatin Yuliatin, "Judges Considerations in Canceling Polygamous Marriages in Religious Courts," *Al-Risalah: Forum Kajian Hukum Dan Sosial Kemasyarakatan* 22, no. 2 (December 31, 2022): 179-87, <https://doi.org/10.30631/alrisalah.v22i2.1244>.

<sup>25</sup> Pusat Bahasa Departemen Pendidikan Nasional, *Kamus besar bahasa Indonesia* (Jakarta: Pusat Bahasa, 2008), 1199.

<sup>26</sup> Khoiruddin Nasution, "Polygamy in Indonesian Islamic Family Law," *Jurnal Syariah* 16, no. 2 (May 1, 2008): 25-40.

<sup>27</sup> Nina Agus Hariati, "Regulasi Poligami di Indonesia Perspektif M. Syahrur dan Gender," *Asy-Syari'ah: Jurnal Hukum Islam* 7 No. (2), (25 Juni 2021), 191.

<sup>28</sup> Law No 1 of 1974 Concerning Marriage.

<sup>29</sup> Perpustakaan Nasional RI, *Himpunan Peraturan Perundang-Undangan Yang Berkaitan Dengan Kompilasi Hukum Islam Dengan Pengertian Dalam*



The word "gender" can be interpreted as differences in roles, functions, statuses, and responsibilities of men and women caused by (construction of) social culture embedded for generations through socialization. Thus, gender is the result of an agreement between humans that is not natural. Therefore, gender varies from place to place and from time to time. Gender is not natural. It can change and can be changed from one human to another depending on the time and local culture.<sup>30</sup>

Interpretations of gender in social construction are based on patriarchal thought patterns. Society assumes that male superiority has a higher position than women. In this context, the relationship between husband and wife, when viewed from a gender perspective, finds its significance. In a society that considers men as superior subjects to women, the pattern of husband and wife relations can be unfavorable to women. The existence of gender differences that give birth to a role in gender itself does not cause significant problems. However, women's gender roles that are considered traditional, such as nurturing, caring, educating, and so on, are considered inferior to men's gender roles. This difference causes problems, namely injustice arising from different roles between men and women. This makes women's equality weak in the social life of the community when compared to men.<sup>31</sup>

One of the crucial issues concerning the relationship between men and women in society is gender injustice. Various things between men and women, such as religious, socio-cultural, and state factors, have

historically shaped gender differences. From this process, gender differences are often considered a nature that comes from God's provisions that cannot be changed anymore, which causes gender injustice in society.<sup>32</sup>

The relevant gender injustice manifests in various forms. First, there is the marginalization of women (especially economic impoverishment). Second, the subordination of one sex, generally to women. Third, negative labeling (stereotypes) of certain genders leads to discrimination and injustice. Fourth, violence against a particular sex, generally against women. Fifth, more extended and more workloads (double burden). All manifestations of gender injustice above are interrelated and highly socialized so that they become social constructions and are then understood to be nature.<sup>33</sup>

The concept of gender justice can be traced from the development of the theory of justice, which is divided into two types: distributive justice and commutative/corrective justice. Distributive justice balances the value of contribution and compensation, rights and obligations, duties and responsibilities, and reward and punishment. Commutative/corrective justice provides equal value, rights, and obligations without differentiating between gender, social status, ethnicity, etc. In certain aspects, Islam provides the position and position of men and women as equal and equal (commutative justice). In this case, the Qur'an, as the primary and first basis in Islam, shows the existence of gender equality. Among others, it views men and women equally in the aspect of humanity

*Pembahasannya* (Jakarta, 2011); Theresia Dyah Wirastri and Stijn Cornelis van Huis, "The Second Wife: Ambivalences towards State Regulation of Polygamy in Indonesia," *Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (2021): 246–68, <https://doi.org/10.1080/07329113.2021.1912579>.

<sup>30</sup> Herien Puspitawati, *Konsep, Teori Dan Analisis Gender*, (Bogor: PT. IPB Press 2013), 1.

<sup>31</sup> Husein Muhammad, *Fiqh Perempuan*, (Yogyakarta: IRCiSoD, 2019), 6.

<sup>32</sup> Fitriyani, *Pertimbangan Hakim dalam Putusan Perkara Nusyuz Perspektif Keadilan Gender*, (Jakarta: Publica Indonesia Utama 2022), 36.

<sup>33</sup> Kholis, Jumaiah, dan Wahidullah. "Poligami Dan Ketidakadilan Gender Dalam Undang-Undang Perkawinan Di Indonesia," *Jurnal Al-Ahkam*, 27 No. (2), (1 Desember 2017), 199.

Q.S al-Hujurat 49:13, in carrying out obligations and avoiding religious prohibitions Q.S al-Taubah 9:71, carrying the burdens of faith Q.S al-Buruj 85:10, receiving rewards and sins Q.S al- Nisa' 4:124, al-Nahl 16: 97 and Ghafir 40: 40, etc. However, in other aspects, Islam provides distributive justice between men and women regarding their respective duties and responsibilities, for example, in terms of the status of women as witnesses, the amount of women's share in inheritance, and the opportunity for women to become head of the family/state, etc. Thus, Islam is very fair in positioning women as witnesses. Thus, Islam is very fair in positioning men and women. Equalizing men and women in all roles, positions, social statuses, professions, duties, and rights is equal to violating nature. Undeniably, there are fundamental differences between men and women, even if we look at them with the naked eye.<sup>34</sup>

Muhammad Khalid Masud explains that in Islam, there are divisions regarding the status and rights of women, ranging from polygamy and divorce rights to gender equality. More and more scholars and jurists consider gender equality as a fundamental principle of Islam and reject discrimination based on gender, which then reflects changes in social perceptions of gender over time.<sup>35</sup>

Gender equity is a condition of being fair to women and men through cultural processes and policies that remove role barriers for women and men. USAID's definition states, "Gender Equity is the process of being fair to women and men. To ensure fairness, measures must be available

to compensate for historical and social disadvantages that prevent women and men from operating on a level playing field. Gender equity strategies are used to gain gender equality eventually. Equity is the means; equality is the result.<sup>36</sup>

Three aspects run contrary to the concept of gender justice. First, a man can marry several women, while a woman can only marry one man. Secondly, marrying a second wife can occur for pleasure, while the first wife is positioned as the one in control who is responsible for the family. In this case, the first wife is not allowed to marry another man unless she divorces her legal husband first. Third, the significant age difference between the first wife and the other wives born from different generations causes differences in status, prestige, and family status in the eyes of the community, making gender equality impossible to achieve justice.<sup>37</sup>

In addition, inequality in women caused by gender injustice is influenced by several factors, namely the patriarchal culture that has long been embedded in society, political factors that are not entirely in favor of women, economic factors where exploitation of women often occurs, and factors of interpretation of gender-biased religious texts.<sup>38</sup> The existence of gender inequality and injustice has led to the emergence of several feminist theories as a tool to dissect gender injustice and inequality. Feminists emphasize that polygamy is an abuse and humiliation of women's dignity. Psychologically, wives will feel disturbed and psychologically hurt to see their husbands having relationships

<sup>34</sup> Iwan Kartiwan, Keadilan Gender Dalam Perspektif Islam Dan Peraturan Perundang-Undangan Bidang Perkawinan, <https://badilag.mahkamahagung.go.id/artikel/> accessed on 23 February 2023.

<sup>35</sup> Muhammad Khalid Masud, *Gender Equality and the Doctrine of Wilāya dalam Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition*, ed. oleh Lena Larsen dkk, (New York: I.B Tauris Bloomsbury Publishing 2013), 127.

<sup>36</sup> Puspitawati, "Konsep, Teori dan Analisis Gender," 6; Maria Platt, *Marriage, Gender and Islam in Indonesia : Women Negotiating Informal Marriage, Divorce and Desire* (Taylor and Francis, 2017).

<sup>37</sup> Miriam Koktvedgaard Zeitzen, *Polygamy: A Cross-Cultural Analysis* (New York: Routledge 2020).

<sup>38</sup> Amartya Sen, "The Idea of Justice: A Response," *Philosophy & Social Criticism* 41, no. 1 (January 1, 2015): 77-88, <https://doi.org/10.1177/0191453714553501>.

with other women.<sup>39</sup>

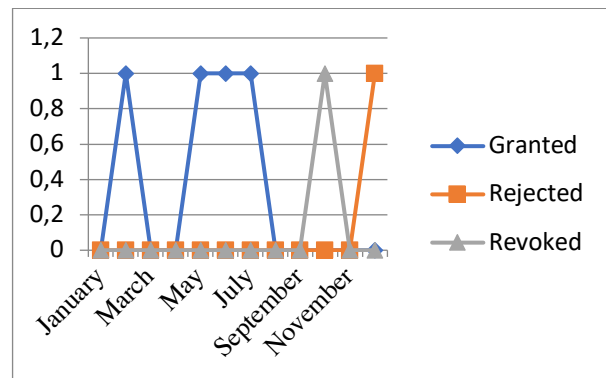
In recent years, social changes in Muslim societies have called for new approaches, especially regarding gender equality. One approach with an interpretive method that looks at the lawmaker's intent within the overall legal system is *Maqasyid Sharia*, which contains history and social norms and develops an understanding of legal concepts and doctrines. Abu Ishaq al-Shatibi discussed *maqasid sharia* and *maslahah* as a common good that provides insight into Islamic reasoning.

There are three levels of *maslahah* as a method of legal reasoning. *First*, the concentric level shows that norms are the subject of discussion in Islam and the application of these norms in their proper place. *Second*, the level that shows the norms of law and custom are treated as law. *Third*, the level refers to social and cultural norms, which differ depending on the society.<sup>40</sup>

### Gender Justice Analysis on the Refusal of Polygamy Permit Decision Number 1512/Pdt.G/2022/PA.Kab.Mn.

Based on the author's search from the Directory of Decisions of the Madiun Regency Religious Court, data on the submission of Polygamy Permit Applications at the Madiun Regency Religious Court shows that there were a total of six polygamy permit applications in 2022, which can be seen in the following graph:

**Picture 1.** Submission of Polygamy Permit Applications at the Madiun Regency Religious Court in 2022<sup>41</sup>



This research was raised from a case in register number 1512/Pdt.G/2022/PA.Kab.Mn on December 1, 2022, and determined on December 22, 2022. The case of the application for a polygamy permit began with Applicant P (56 years old) and Respondent M (50 years old) getting married on March 16, 1991, recorded at the Office of Religious Affairs of Tenggarong Subdistrict, Kutai Regency, as recorded in the quotation of Marriage Certificate Number 799/49/III/1991 dated March 15, 1991. The Applicant and Respondent have resided in the Respondent's house in Jatisari Village, Geger District, Madiun Regency until now and have been blessed with three children, namely T (31 years old), L (26 years old), and J (14 years old). After living in the household for thirty-one years, the Applicant intends to remarry a woman, D (27 years old), residing in Jatisari Village, Geger District, Madiun Regency.

The applicant had proposed to D to be the applicant's second wife and was even married to D and had a child from the marriage. The Applicant married D in February 2019 before the case was registered. However, at the time of the *Sirri* marriage, the Applicant did not seek the consent of the Respondent as his legal wife because he was worried that the Respondent would not want to be honeyed or disagreed

<sup>39</sup> Eri Prima, *Kritik Feminisme Terhadap Aturan Poligami Di Indonesia*, Thesis, (Jakarta: Universitas Islam Negeri Jakarta 2010), 110.

<sup>40</sup> Masud, *Gender Equality and the Doctrine of Wilāya*, 146.

<sup>41</sup> Decision Directory of the Madiun Regency Religious Court, <https://putusan3.mahkamahagung.go.id/direktori/> accessed on 10 February 2023.



with the Applicant's desire to marry the woman. The Respondent knew that the Applicant had remarried in November 2022 because the Applicant informed her directly. Still, the woman had never been introduced to the Respondent. Hence, the Respondent felt forced to accept and agree to the Applicant's desire for polygamy because the Applicant had married the woman.

Because there had been a marriage between the Applicant and his wife-to-be before the case was registered, the Panel of Judges declared that the Applicant's request for polygamy could not be accepted (*NO/Niet Onvanthkelijk Verklaard*). The panel of judges considered that the Applicant's reasons in his petition contradicted each other. Namely, on the one hand, the Applicant stated that he would remarry (polygamy), but on the other hand, acknowledged that the Applicant had married his prospective wife. Thus, the arguments regarding the marriage would be erased by the marriage that the Applicant and his prospective wife had carried out.

The Judge's decision in resolving this case was based on the following considerations: *First*, based on the answers of the Applicant and Respondent before the court, it turned out that at the time of the *sirri* marriage, the Applicant was the husband of the Respondent and did not first obtain a polygamy permit from the religious court as prescribed in Article 4 paragraph 1 of Law Number 1 of 1974 concerning marriage jo. Article 56, paragraph 1 of the Compilation of Islamic Law. *Second*, the Applicant was still married to the Respondent but continued to marry his prospective wife, whom he had previously married for approximately 3 (three) years before the application was submitted. Therefore, the attitude of the Applicant and his prospective wife could not be justified by law because it contained intent or at least a tendency against the law so that legal protection could not be given.

*Third*, there is a contradiction between the legal facts and the basis for the application, so the Panel of Judges thinks that the Applicant's application is unclear (*obscure libel*) and has no legal basis, so it does not meet the formal requirements of an application, therefore in order not to set a bad precedent in the community about the institution of polygamy permits in religious courts, and so that people are more careful and/or do not ignore the rules set by law, the applicant's application must be declared inadmissible (*NO/Niet Onvanthkelijk Verklaard*).

To ensure justice, we should first understand the various forms of justice, one of which is justice, according to Aristotle. Aristotle suggests five types of actions that are categorized as fair. *First*, Commutative Justice is justice that emphasizes the equality people receive regardless of their services and without distinguishing between them. *Second*, Distributive Justice is the justice of a person according to the services that have been given by emphasizing the balance between what is given and what is received. *Third*, Natural Justice is a person's natural justice by giving something according to what others give us. *Fourth*, Conventional Justice is when a citizen has obeyed all the rules that have been issued. This form of justice emphasizes the rules that apply in society. *Fifth*, Remedial Justice is justice aimed at restoring a situation or status to its proper condition caused by behavioral errors or legal actions.<sup>42</sup>

In addition, according to Notohamidjodjo, there is also a division of justice, which is divided into two, namely, Creative Justice (*Justicia Creative*) and Protective Justice (*Justicia Protective*). Creative Justice is justice that gives freedom to everyone to be creative according to their creativity. Meanwhile, Protective Justice is justice that protects everyone, namely the protection needed in society.<sup>43</sup>

Furthermore, in realizing justice when

<sup>42</sup> Syaikh, *Isu Keberlakuan Hukum Sengketa Kewarisan*, (Yogyakarta: Penerbit K-Media, 2018), 14.

<sup>43</sup> Darji Darmodiharjo dan Shidarta, *Pokok-Pokok Filsafat Hukum: Apa Dan Bagaimana Filsafat Hukum*

determining a decision, the judge's adherence to a procedure will result in procedural justice, where procedural justice itself is interpreted as the process of carrying out / enforcing a material law. In this case, procedural justice is closely related to formal law. A decision will be useless if it only prioritizes procedural justice without being balanced with substantive justice. Substantive justice is a form related to formal law (all rules governing interests and relationships that are both commands and prohibitions). There are clashes between the fulfillment of procedural justice on the one hand and substantive justice on the other. There must be clear solutions and options, and judges must decide with legal arguments that can be accounted for.<sup>44</sup>

Analysis of the concept of justice by Amartya Sen, which defines the realization of freedom in terms of process and opportunity/capability.<sup>45</sup> The process aspect in achieving freedom is prioritized in decision-making, namely the absence of coercion from anyone and by anything in determining something that is considered good. In this case, the discrepancy in realizing freedom can be seen from the actions of the Applicant who had deliberately married his second wife in order to obtain the consent of the first wife. Then because of this insistence, the Respondent in this situation did not get freedom in determining his wishes because he was coerced by an outside party. Then in the aspect of capability or the ability to achieve what is desired, the Respondent in this case has not fully realized the right to individual freedom to achieve good for himself. The Respondent's efforts in fighting for his rights are considered lacking and have eroded his capabilities. The Respondent stated in court that: "I have

never been introduced to the Applicant's future wife, and I was only told by the Applicant in November 2022 on my birthday. The Applicant said that one day there would be a court summons, I wanted to remarry, and already had a child with the prospective wife. At that time my heart was hot and I finally agreed to be polygamized by the applicant". From this statement, it is evident that the Respondent had lost the ability to prevent the Prevent the Applicant from committing polygamy because of External pressure, namely the birth of a child from The Respondent had lost the ability to prevent the Applicant from committing polygamy due to external pressure, namely the birth of a child from the Applicant's illegitimate marriage with his second wife.

If we observe the judge's consideration in the application for a polygamy permit in Decision Number 1512/Pdt.G/2022/PA.Kab.Mn. According to the perspective of gender justice, namely the reason for submitting the application, which is based on the reason that the Applicant has married *sirri* with a second prospective wife so that the Respondent is forced and resigned to accept the Applicant's desire for polygamy, as well as the attitude of the Applicant who did not ask for the Respondent's consent as a legal wife because he was worried that the Respondent did not want to be honeyed or disagreed with the Applicant's desire to marry a second prospective wife, this was not in line with the concept of gender justice. The reasons put forward by the Applicant did not appear to consider the interests of the Respondent as the legal wife to defend her rights as a woman who was doubled up. These reasons only apply to the Applicant's interests as the perpetrator of polygamy. As

Indonesia, (Jakarta: Gramedia Pustaka Utama, 1995), 158.

<sup>44</sup> Hasnati, *Sosiologi Hukum: Bekerjanya Hukum di Tengah Masyarakat*, (Yogyakarta: Absolute Media, 2021), 171.

<sup>45</sup> Sunaryo, "Amartya Sen tentang Teori Keadilan John Rawls: Kritik Pendekatan Komparatif atas Pendekatan Institusionalisme", *Respons: Jurnal Etika Sosial* 23, No. 01 (Juli 2018), 24.

in the theory of gender justice, polygamy on the grounds of being married illegally is not an *urgent* matter that can be used as a fundamental reason for polygamy. Seeing the condition of the Respondent, who does not have a physical disability, barren, or unable to perform the obligations as a wife, has indirectly denied the provisions of polygamy that have been regulated in the law, where most polygamists who have high sexual appetite use *sirri* marriage as an excuse that it is better to polygamy than committing adultery.

Nevertheless, in making a decision, a judge must be careful by using considerations from various aspects. The Respondent's statement allowing the Applicant to engage in polygamy was not simply used as the judge's primary benchmark in making a decision. The Respondent's statement as a litigant involved in decision-making by considering her rights and position as a woman shows that there is justice and no difference in gender status. The Applicant's actions, which deliberately married first with a prospective second wife, are considered contrary to the concept of gender justice, where the willingness of both parties to make decisions for polygamy is crucial to consider for the sake of future life.<sup>46</sup> Therefore, the judge prevented any harm that might arise if this polygamy application was granted. The judge's decision to reject this application was intended so that no other individuals used similar reasons to apply for polygamy.

## Conclusion

From the results of the above research, it was found that (1) The consideration of the Madiun Regency Religious Court judge in rejecting the application for a polygamy permit in Decision Number 1512/Pdt.G/2022/PA.Kab.Mn. was

motivated by several things, including the Applicant's concern that the Respondent would not allow polygamy for fear that the Respondent would disagree/did not want to be married, the statement that the Applicant had married *sirri* with a prospective second wife, and the incompatibility of the Applicant's application where on the one hand the Applicant wanted polygamy but on the other hand the Applicant had married *sirri*. (2) Analysis of the judge's consideration using the perspective of gender justice in rejecting the polygamy petition case follows the concept of polygamy regulated in the legislation. The importance of the Respondent's involvement as a litigant who plays a role as a woman and a wife in decision-making is realized through the rejection of the polygamy permit application in case Number 1512/Pdt.G/2022/PA.Kab.Mn. (3) The researcher contributes that we better understand the aspects used as considerations by judges in reaching decisions on polygamy applications and forms of gender justice in similar cases so that society can be more objective and create a sense of justice for all parties. In addition, researchers also provide recommendations, namely *first*, to judges to continue to consider the interests of both parties and not burden only one of the parties to create benefits for both. *Second*, if they want to apply for polygamy, polygamists should not be selfish and still consider the rights of others to avoid chaos in the future.

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<sup>46</sup> Amartya Sen, "Values and Justice," *Journal of Economic Methodology* 19, no. 2 (2012): 101–8, <https://doi.org/10.1080/1350178x.2012.683601>.

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