

The Use and Misuse of Maslaha by the Court in Granting Polygamy Permissions

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Abstract: The study examined a decision by a Religious Court (RC) on a case of request by a husband for a permission for polygamy. Using materials included in the text of the decision, the study examined the arguments of the court to grant the permission in the midst of refusal by the wife, while the husband and the wife ran a normal family and no physical defects of any kind was reported by either side. One of the arguments was evidently based on the concept of Maslaha, but interpreted in such a way to the extent that the court finally had to put aside the wife's explicit refusal and dismiss the ruling powers of certain laws to support the granting of a polygamy permission, showing the failure of the court to properly grasp the spirit of the concept of Maslaha in the perspective of women and human rights.

1 INTRODUCTION

The status of women in Muslim societies is generally seen as subordinate to that of men. The United Nations has taken a number of steps to improve the situation, including the adoption of the International Covenant on Civil and Political Rights (ICCPR), the Covenant on the Elimination of Discrimination Against Women (CEDAW), and the Covenant on the Rights of Child (CRC). Indonesia has ratified those three international instruments and some others into its legal system in order to help ensure the situation of Indonesia. The modernists and the optimists argue that such a subordination of women is now changing in developing Muslim nations such as Indonesia, but the conservatives argue the opposite. The latter referred to the fact that traditionalists continued to demonstrate their unfavorable or discriminatory attitudes towards women. Worse, still, such unfavorable attitudes are often shown by those who occupy modern institutions and are expected to play high roles in upholding gender equality such as the judges of the courts, in particular those of religious courts

This study examined a decision by the Religious Court (RC) of Garut, West Java, No. 265/Pdt.G/2011/PA-Grt of 2011 on a case of request

by a husband for a permission for polygamy, in which the permission was granted. This study examined arguments put forward by the court to grant the permission, including how much of Islamic law argument of Maslaha was interpreted and applied to the case, in spite of insisting refusals by the wife. Further, the study examined how those arguments were perceived from the perspective of human rights, especially women's rights. Such an examination would help understand the attitudes of RC's judges towards the principles of human rights in general and women's rights in particular. Women's rights are here defined as those inherently attached to their being human, equal to those of men, and are not necessarily parallel or reciprocal to the need for the distinction between socially constructed and naturally determined roles in society.

The study used materials included in the text of the court's decision as the primary sources as well as relevant laws and regulations. All materials were analysed by way of doctrinal legal studies, including the Usul al-Fiqh (the principles or the philosophy of Islamic Law) methodology, with some supplementary historical and sociological interpretations.

2 THE DESCRIPTION OF THE CASE

In the year of 2011 a husband, 43 years old, requested the RC of Garut, West Java, for a permission for polygamy. Since 1996 he had been happily married with a woman, 37 years old, and the couple already had three children. Both the husband and the wife admitted that everything in their marriage went normal and no physical defect was reported neither by the husband nor the wife. In fact, the wife was then being pregnant of their fourth child. But the husband claimed that he had been given a permission by the wife to get married with another woman, to which claim the wife apparently denied.

The court first undertook necessary steps to advice the husband to revoke his intention for a second marriage and, together with his wife, to consult an assigned mediator for reconciliations, but failed because the husband insisted on his request for a permission for polygamy. This brought the court to proceed with the case. The husband was represented by a lawyer, so was the wife. The wife said in the court that her husband had asked her for a permission of polygamy, but she never answered such a question nor agreed to that idea. Instead, she explicitly stated in the court that she objected to such an idea and would never give any permission to her husband to get married with another woman. The court later asked both sides if any of them would change their mind, to which they all responded and stood fast in their own positions, the husband with his request for a prmission for polygamy and the wife with her objection to giving away any permission for polygamy.

Based on a number of arguments that will be dicussed later, the RC finally decided to grant the husband a permission for polygamy, indeed, to the frustration of the wife. What were the arguments put forward by the court to uphold its decision and how much of Islamic legal argument was used, are worth examining.

3 THE ARGUMENTS OF THE COURT

There was a number of arguments put forward by the court to uphold its decision of granting the permission for polygamy to the husband. The following are the summary of the arguments of the court:

1. The court had taken necessary steps to advise the husband to revoke his intention for polygamy, and to bring the couple into a reconciliation through a mediation, but failed because of the insistence of the husband on his request;
2. The husband had a legal standing to file the request for a permission for polygamy, because the husband had been legally married to the wife since 1996; a certificate of marriage was produced in the court;
3. The relationship between the husband and his prospective second wife had been taking place for sometime intensively. They often met in the workplace and other venues which made the man feared of falling into a sin violating the prohibitions of God, whiles he was in good health and financial conditions;
4. The husband had the economic capability of supporting two wives and his children, since he was a successful businessman in town, namely a contractor of building constructions with more than adequate earnings and wealth;
5. The wife in her reply to questions posed by the judges stated that she had refused to give any permission to her husband to undertake polygamous marriages on the ground that so far their marriage was in a normal condition with three children and that there was no physical nor psychological problems existing, and therefore, there was no legal grounds whatsoever for raising the need for polygamy; in fact, she was then being pregnant of her fourth child in the five years of their marriage.
6. Although the wife explicitly stated in the court of her refusal to give away to the husband any permission for polygamy, the court claimed that she had not given any reply to her husband as the latter raised the issue at home and kept herself silent which could be interpreted as an indication of agreement; whiles her explicit refusal was only stated in the court after she was accompanied by a lawyer;
7. The husband felt that his relationship with his prospective second wife was so strong and unstopable that he would divorce his existing

wife if his request for the permission for polygamy was denied by the court;

8. The wife, according to the observation of the court, deep down in her heart, was actually very much concerned with possible greater harms which would emerge out of a possible divorce, should that be the action taken by the husband, only because of the husband's desire to take a second wife;
9. The prospective second wife, upon her presence in the court, stated that she was ready to be the second wife merely because of her already deep relationship with her prospective polygamous husband, although she would have to quit her career from the local public service as a result; she also claimed that she was very much concerned with possible falling into sin with the man.
10. During their marriage, the couple did well economically that brought them to own three houses of residence, all located in the town of Garut, and all were furnished, in addition to a house which was still in instalment of 15 years; the couple agreed that these properties were their joint wealth legally earned during the marriage.
11. Based on the above mentioned arguments, particularly those of points 2, 4 and 10 on the list, the RC believed that the husband was physically and financially capable of supporting two wives.
12. The court saw that there was no legal impediments against the husband to get married with his prospective second wife according to the law, as stipulated in the Compilations of Islamic Law (CIL) Articles 39 to 44.
13. The court observed that the insistence and determination of the husband to request for a permission for polygamy was so strong and unstoppable that he would divorce his existing wife should such a request be denied by the court. The court, then, saw this as something that needed a special attention, because such a strong desire came from a person of full capability both physically and financially. According to the court, many men out there in society were just the opposite. They had only strong desires for polygamies, but incapable of

supporting them economically and financially resulted in the practice of unregistered polygamous marriages in society.

14. The court saw that the rulings that a permission for polygamy could only be granted on legal grounds as stipulated in the Article 41 of the Governmental Regulation (GR) No. 9 of 1975 and Articles 57 and 58 of the CIL were not imperative in nature. Instead, they must be seen comprehensively in the lights of their goal and philosophy. Those rulings, according to the court, were merely to protect all sides concerned that is the husband, the wife, the children, and their properties, from harms or damages (mafsadat) likely resulted from divorces triggered by denials against the desires of the husband for polygamous marriages. Therefore, if those rulings were taken strictly binding, they would not have any meaning and would cause damages and ruins to the existing marriage. In this context, the court referred to an Islamic legal maxim saying (in Arabic) "*Al darar yuzal*" meaning that harms must be avoided or eradicated, and another maxim saying (in Arabic) "*dar'u al mafasid muqaddam 'ala jalb al masalih*" meaning that harms or damages avoidance must be given priority over obtaining benefits. The court concluded that for the sake of the preservation of the existing marriage from a divorce, and the protection of the wealth of the household, and their avoidance from complete ruins resulted from a foreseeable divorce, the refusal of the wife to give away any permission to her husband for polygamy, as stated explicitly in the court, must be put aside.
15. Based on the fact that the request by the husband for a permission for polygamy was about to be granted, the court also made a decision to the effect that those existing properties earned during the marriage so far (three fully furnished houses and one house in instalment process) were to be the joint wealth of both the husband and the wife, and therefore, pursuant to the Article 97 of the CIL, they were to be divided equally among them, half of the portion each.

4 THE EXAMINATION OF THE ARGUMENTS OF THE COURT

The above arguments of the court seemed to cover many different layers: statutory, philosophical, Islamo-legal, logical, sociological, and even psychological arguments. It is time now to examine each of those arguments thoroughly according to the order of those points presented.

As to the first argument on the steps taken by the court to persuade the couple to settle their differences through a mediation prior to the judges' dealing with the case, were indeed correct steps to take. The only note to make here is that apparently those assigned to undertake the mediation was not capable enough of bringing a reconciliation to prevent the case from going forward. The failure of the mediation was exactly the ground for the judges to proceed further with the examination of the case.

As to the second argument on the legal standing of both the husband and the wife in the case was again a correct position to establish. But this was, indeed, only preparatory in nature for the judges to proceed with the examination of the case. It was not to be used for or against any of the two sides. It was simply saying that the filing of the request for polygamy was properly lodged.

As to the third argument on the fear of the husband of falling into sinful deeds because of his already strong relationship with his prospective second wife, the court seemed to have taken it for granted and seriously. All knows that a man in a desire of something would say anything to get what he wanted; and judges should not be easily described by such a "diplomacy". Further examination was needed and it was indeed difficult to prove that such a threat was true. Had such a sinful deed happened, one should not blame the court for it. Every mature person is responsible for his or her own deeds.

As to the fourth argument on the fact that the husband had economic and financial capabilities of supporting two wives and his children was probably the strongest point of those arguments of the court. Although there was no mention of the amount of money the husband earned monthly or yearly, the fact that the husband and the wife owned joint property of four houses was probably a good indication of the financial condition of the husband. But it must be qualified, that economic and financial conditions are not the whole story, they are indeed only parts of the

story. Other non-financial conditions for polygamy were meticulously laid down in the Marriage Law of 1974 and all of these conditions must be met simultaneously. In fact, modern judges should not put too much emphases on the financial capability but rather on the issues of justice, equality and women's rights.

As to the fifth and the sixth arguments on the statements by the wife that there was no legal ground for her husband to request for a permission for polygamy was probably the strongest argument by the wife not to give her husband a permission for polygamy, simply because their marriage was in a normal condition, no physical defect was reported by either side, and the couple had already three children. In fact, the wife was then being pregnant of the couple's fourth child. But all this would be put aside later by the court, in favour of granting the husband the permission for polygamy. First and psychologically this showed that the court's position was very much inconsiderate to a pregnant woman. How can a man be morally justified to walk out from the court room with a permit for polygamy in his hands, leaving her pregnant wife in the court room with all of the agony? Secondly, according to the Article 3 Point (2) of the 1974 Marriage Law, true it was the court which decided whether or not a permission for polygamy should be issued, but the Article 4 of the very Law qualified that such a permission could only be based on either of the following three possibilities: inability of the wife to perform her functions as a wife, or the presence of physical defects with the wife, or inability of the wife to bear a child, none of which existed. Further, the Article 5 of the 1974 Marriage Law clearly stated that a request for a permission for polygamy could only be filed by a husband to the court if there was already, among other things, a permission from the existing wife, which was not there either. Thirdly, the court failed to grasp the principles of marriage, which according to the Marriage Law of 1974 Article 3 Point (1), were monogamies, while polygamous marriages were only exceptions. Therefore, one should put priority on the former over the latter. It is true that the court may issue a permit for polygamy to a husband as stipulated in the Article 3 Point (2) of the Marriage Law, but only when all parties concerned are in favour of it. Here, the only party who was in favour of the requested polygamy permission was only the husband, alone. Fourthly, the court dismissed the legal importance of an explicit statement by the wife in the court, a form of human rights denial. In fact, the court played down the issue

by saying that the explicit refusal of the wife in the court to give any permission for polygamy to her husband was only stated in the court after being accompanied by the lawyer, while at home she never did so when the husband raised the issue. The court clearly undermined the rulings of the Article 41 Point b of the Government Regulation No. 9 of 1975 which stipulated that all forms of the statement of the wife, made orally or in writing, on the presence or the absence of her agreement to a request of polygamy, must be spelled out or read out in the court. Thus, the court should have taken the statement of the wife seriously and based its consideration and decisions on those court's proceedings. This was unfortunate, however, for the court did not do what it should have done. The court also seemed to have belittled the proceedings of the court, which also meant belittling the role of the lawyers at the same time. All knows that judges, prosecutors, and lawyers are of equal positions as far as their roles of upholding justice are concerned.

As to the seventh argument of the court on the unstoppable nature of the relationship of the husband with his prospective second wife to the effect that he would divorce the existing wife should he be denied by the court of the permission for polygamy, was more like a threat to the court or to the wife. Evidently, the court took the threat seriously and proceeded accordingly resulting in a decision of granting the permission for polygamy. Had the court not taken the threat seriously, there would have been a number of possibilities. First, the husband might have gone to the court again and file his divorce case as a new case, since every divorce must be taking place in courts and in the front of judges, and he has to prove that he had legal grounds for it as laid down in the Article 19 of the GR No. 9 of 1975. According to the Article 19, there were six possible causes for a spouse to file a divorce case to the court: (1) either the husband or the wife is committed adultery, or addicted to such social pathologies as gambling and over drinking habits; (2) the absence of either spouse from the other for two consecutive years without the other's approval or knowledge of his or her whereabouts; (3) either of the spouses is convicted of five years or more of imprisonment; (4) either of the spouses is committed a violent and dangerous act against the life of the other; (5) either of the spouses is experiencing with some physical defects or inflicted with diseases that prevent him or her from performing his or her functions as a wife or a husband; and (6) continuous quarrels and conflicts

between the spouses that make it impossible for them to reconcile. Thus, it would not be a simple doing for the husband to establish a legal ground to file a divorce case to the court to prove his threat. It would have been a laborious work for him to do and he would have to start again from the square one. This might in turn discourage him from doing so. Secondly, the husband might eventually think of behavioural problems and depression that his children would likely experience once he divorced his wife, opening the possibility of abandoning the idea of polygamy altogether. Thirdly, for some independent wives, being divorced is probably preferable to being married to a polygamous husband. Educated and urban women are more likely to be of this category. Fourthly, for some weaker wives, being married to polygamous husbands might be preferable to being divorced and widows. Thus, there would have been at least four options available. However, the court had made things easy for the husband, since it directly took the fourth option for him. Why the court did not proceed with the other three options, instead?

As to the eighth argument on the observation of the court that deep down in the heart of the wife, there was actually a concern of possible greater harms that would emerge should the husband decide to divorce her, the court seemed playing some games here. The court was speculating about the wife's psychological state upon which it would later make a decision. It was indeed interesting to see that the court put priorities on its own speculations over facts presented by the wife's statement in the court. Normally, one would see Islamic judges apply the principles of making decisions based on evidences and facts, or even on oaths, not on speculations. Classical Islamic legal jurists said (in Arabic): "*Nahnu nahkum bi al zhawahir la bi al bawatin*," meaning we (judges) make decisions based on evidences and facts, not on speculations.

As to the ninth argument of the court on the willingness of the prospective second wife to get married with somebody's else husband, although for which she would have to quit herself from the career of local public service, one may ask if it was worth mentioning it in the document of the court's decision or even treating it as an argument anyway. She did not have any legal standing in the case. Once a permission for polygamy was granted, the husband practically could get married with any woman as long as there are no legal impediments between them.

As to tenth and eleventh arguments on the belief of the court that the husband had physical and financial capabilities of supporting a second wife, it was already noted earlier that this was probably the strongest argument of the court. Warnings have to be made, however, that this should not be the main basis for the granting of the permission for polygamy, since many other conditions have to be met simultaneously. Mention has been made of the Article 5 of the 1974 Marriage Law and the Article 41 of the GR No. 9 of 1975 that have laid out other conditions for a polygamy permission to be granted by the court in addition to physical and financial capabilities.

As to the twelfth argument on the fact that there were no legal impediments for the husband to get married with his prospective second wife, was certainly not worth also making it an argument for the case, as noted earlier. In fact, such an examination of possible legal impediments was the task of Marriage Registrars prior to or at the time of the solemnities of a marriage, as stipulated in the Article 6 Point (1) of the GR No. 9 of 1975. The Article said that the local Marriage Registrar, upon receiving the note of the intention of marriage, undertakes investigations to ensure whether or not all the conditions have been met and whether there are legal impediments to marriage between those intending marrying parties.

As to the thirteenth argument of the court, it is interesting to note that the determination of the husband to get the permission for polygamy, while he was in good physical and financial conditions, was apparently to be applauded by the court. In fact, the court, using a sociological argument, referred to the practice of unregistered polygamies in society. A question arises here if there was any need for the court to include such a statement in its consideration. The court was asked only to make a decision on whether or not to give a permission to the husband for polygamy, but it went as far as to applaud the determination of the husband for polygamy. Why was it necessary for the court to do so?

As to the fourteenth argument of the court, it was probably the core of the argument as far as Islamic law was concerned. Based on the speculation of the court on the concern of the wife should a divorce was to take place mentioned earlier, the court went on to dismiss the ruling powers of the Article 41 of the GR No. 9 of 1975. It said that the Article was neither imperative nor binding. It bluntly argued that one should not follow the rules strictly. This is indeed a strange argument and an interesting position of the

court to be, namely dismissing rules and regulations and arguing not to follow them. If judges are not following the rules, who will be? Certainly, all those rules were made to make polygamous marriages difficult to take place. The logics is, then one should avoid polygamous marriages from happening altogether. However, the logics of the court seemed the opposite, namely since legal grounds for polygamy were difficult to establish, then do not follow the rules and put them aside. The court was quick to support its arguments by using an Islamic legal maxim saying "al darar yuzal," meaning harms must be avoided or eradicated, but to the court the maxim seemed to mean difficulties must be put aside in the sense that difficulties of establishing legal grounds for polygamy must be put aside. Here the maxim of *Maslaha* had been shifted by the court to serve the husband, not the wife. To amplify its argument, the court also quoted another Islamic legal maxim saying "*dar'u al mafasid muqaddam 'ala jalb al Masalih*," meaning avoiding harms must be given priority over gaining benefits. It seemed that for the court, the granting of the permission of polygamy was an avoidance of harms. What was the harm in the case then? According to the court, the harm was a possible divorce, or more correctly the threat of divorce by the husband. This was indeed an imaginative divorce. The question is what about the harm that already accrued to the wife, namely the feeling of a pregnant wife being betrayed by the husband? Was there any consideration of the principle of the best interest of the child in the womb? This did not seem to matter to the court. What mattered to the court was if the husband did not get any permission to fulfill his desires for polygamy. Here the gender assertiveness of the court was questionable. In other words, the women's rights or the human rights assertiveness of the court was questionable.

As to the fifteenth argument, the court was correct to decide that properties owned by the couple during the marriage was their joint wealth and had to be divided equally between them, showing the court's gender equality perspectives.

5 CONCLUSIONS

The above examination shows that the concept of Maslaha was used by the court in its arguments to grant a permission for a polygamous marriage as indicated among other things by the quotations of two Islamic legal maxims. The problem was that such a Maslaha argument was apparently shifted by the court

to serve the interests of the intending polygamous husband rather than to alleviate the agony of the pregnant wife, proving the ill-assertiveness of the court to women and human rights issues. In other words, the concept of Maslaha was used and misused by the court.

The examination also proved that the court was willing to negate the value of the proceeding of the court and dismiss the ruling powers of certain laws and regulations claiming their being unimperative and not strictly binding, just to be in line with its own interpretations and speculations of the case. Ironically, this was not within the corridors of Rechvinding (legal innovation) discussed in some textbooks of legal research methodology. But court's decisions are always on the winning side, indeed, irrespective of the injustices they impose. *****

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