

POLYGAMY IN INDONESIAN ISLAMIC FAMILY LAW

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ABSTRACT

There were four main aims of the emergence of Marriage Law No. 1 of 1974. First of all, to restrict or even abolish child marriage; secondly, to restrict polygamy; thirdly, to restrict the one-sided right of repudiation (talaq); and lastly, to establish equal rights for husbands and wives. In addition, the enactment (rule/Government Regulation/Peraturan Pemerintah [PP] No. 10 of 1983 was also at the request of Dharma Wanita (Official Sisterhood). Even though the number of wives of high-ranking officials of Dharma Wanita was small, they were quite influential. They claimed that their organization had received many complaints from members about their husbands' behaviour dealing with divorce, polygamy and lack of financial support. Consequently, they demanded a law to protect them from polygamy and divorce. This paper describes the status of polygamy in the Indonesian Islamic Family Law, in particular as it has been promulgated in Marriage Law No. 1 of 1974, Rule No. 9 of 1975, Rule No. 10 of 1983, and its comparison with other Islamic Family Law in the contemporary. The main sources of the research are Marriage Law No. 1 of 1974, Rule No. 9 of 1975, and Rule No. 10 of 1983. It is found that Indonesian Islamic Family Law is included in the group that restricts the possibility of polygamy with some variations.

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This group includes the majority of Muslim countries. Turkey, Tunisia and that Druze Sect in Lebanon, are the only countries which prohibit polygamy completely. Furthermore, concern for the application of laws and its effect to social life are still debatable among scholars. Some scholars view that it gives a positive effect, while others do not.

Keywords: *Polygamy, Indonesian Legislation, Islamic Family Law*

INTRODUCTION

There were four main aims for the emergence of Marriage Law No. 1 of 1974. First of all, it was to restrict or even abolish child marriage; secondly, to restrict polygamy; thirdly, to restrict the one-sided right of repudiation (*talaq*); and lastly, to establish equal rights for both husband and wife.¹

In addition, the enactment (rule/Government Regulation/*Peraturan Pemerintah* [PP] No. 10 of 1983 was also at the request of *Dharma Wanita* (Official Sisterhood).² Even though the number of wives of high-ranking officials of *Dharma Wanita* was small, they were quite influential. They claimed that their organization had received many complaints from members about their husbands' behaviour dealing with divorce, polygamy and lack of financial support. Therefore, they demanded a law to protect them from polygamy and divorce.³

The paper describes the status of polygamy in Indonesian Islamic Family Law as has been promulgated in Marriage Law No. 1 of 1974, Rule No. 9 of 1975, Rule No. 10 of 1983, and its comparison with other Islamic Family Law in the contemporary. For ease of comprehension, this paper is divided into four sections.

¹ Moh. Zahid (1994) "Dua Dasawarsa Undang-undang Perkawinan (Two Decades of Marriage Law)," *DIALOG: Jurnal Studi dan Informas Keagamaan*, Badan Penelitian dan Pengembangan Agama Depag., No. 39, Th. XVIII, Maret 1994, p.p. 33-40.

² Dharma Wanita is an organization that groups together the wives of civil servants.

³ Julia I. Suryakusuma (1996), "The State and Sexual in New Order Indonesia," in Sears, Laurie J. (ed.), *Fantasizing The Feminine in Indonesia*. Durham & London: Duke University Press, p.p. 103-104.

Indonesian Islamic Family Law

Concerning the restriction of polygamy in Indonesian Islamic family law, as expressed in the Law of Marriage No. 1 of 1974, it is stated explicitly that the foundation of marriage is monogamy.⁴ However, the possibility of practising polygamy is still being acknowledged.⁵ The maximal number of wives is four.⁶

In order to engage in polygamy, as stated in Law No.1 of 1974 art. 3 (2) and the Compilation art. 56 (1), a husband must first of all get permission in advance from the Islamic court.⁷ Polygamy without permission of the Islamic court is not legally recognised and has no legal authority.⁸ In addition, civil servants must also seek permission from the chairman where he works.⁹

Furthermore, polygamy is only permitted if a husband is able to fulfill two sets of requirements: (1) alternative and (2) comprehensive requirements.¹⁰ Alternative requirements, as stated in Law of Marriage No. 1 of 1974, art. 4 (2), Regulation No. 9 of 1975, art. 41 (a), Regulation No.10/1983, art. 10 (2), and Compilation, art. 57, are as follows: (a) the inability of the current wife to fulfill her responsibilities as a wife; (b) when the current wife has a physical handicap or chronic sickness from which she will not recover; or (c)

⁴ It is declared in art. 3 (1),”principally a husband is only permitted to have one wife, and a wife is only permitted to have one husband.”

⁵ As stated in art. 3 (2) of the Law No.1/1974, “The court may give permission to have more than one wife to a husband if it is needed.”

⁶ As stated in the Compilation of the Islamic Law art. 55 (1), “To have more than one wife at the same time is permitted to a maximum of four.”

⁷ To quote Law No.1 of 1974 art. 3 (2) and the Compilation art. 56 (1), “a husband wants to have more than one wife has to get a previous permission from the Islamic court.”

⁸ To quote Compilation art. 56 (3), “Marriage to a second, third or fourth wife without permission from the Islamic court is not legally recognized.”

⁹ As stated in Government Regulation No.45 of 1990 art. 4 (1), “A male civil servant who wants to have more than one wife is obliged to secure permission from his chairman.”

¹⁰ To quote Regulation No.10 of 1983 art. 10 (1, 2 & 3): “Permission to marry more than one wife is only given to a husband who can fulfill at least one of the alternative reasons, and all of the comprehensive reasons, as stated in this art. 10 (2 &3).”

the current wife is barren.¹¹

Comprehensive requirements are as follows: (a) there must be written permission forthcoming from the existing wife; (b) a husband must be able to maintain all wives and children; and (c) a husband must furnish a written guarantee that he will be just to all his wives.¹² In addition, the permission of a wife (wives) has to be stated explicitly in the Islamic court.¹³

As far as proof of a husband's financial ability to undertake polygamy is concerned, a certificate from the office where he works, or from the tax office, or another source, must be provided to the court.¹⁴

The guarantee required of a husband that he will be just towards all his wives and children, is provided in a written contract.¹⁵

The procedure of entering a polygamous marriage, is as follows. First, a husband proposes his case to the Islamic court. Second, the Islamic court invites the wife or wives to come to the court to prove their permission, while at the same time the Islamic court investigates whether all other requirements have been fulfilled. If everything is in order, the Islamic court then gives permission to the husband to engage in polygamy. To quote Law No.1 of 1974

¹¹ To quote Law of Marriage No. 1 of 1974, art. 4 (2), Regulation No. 9 of 1975, art. 41 (a), Regulation No.10/1983, art. 10 (2), and Compilation, art. 57, "The court only gives permission to have more than one wife if (a) the wife has some disability preventing her from fulfilling her role as a wife, (b) there is a physical defects or permanent sickness in a wife that will not be able to recovered, (c) a wife has no child."

¹² As stated in the Law No.1 of 1974 art. 5, the Regulation No.9 of 1975 art. 41 b & c, the Regulation No.10 of 1983 art. 10 (3) and the Compilation art. 58 (1), "In order to propose polygamy to the Islamic court, a husband has to fulfill three requirements as follows: (a) there is a written permission from the existing wife (wives), (b) that he is sufficiently able to maintain his wives and children, (c) he furnished a written guarantee that he is able to do justice towards all wives."

¹³ To quote Government Regulation No.9/1975 art. 41 b, and Compilation art. 58 (2), "In the line of the Regulation No. 9 of 1975 art. 41b, all state: "permission from the wife can be written or oral, yet written permission has to be proven in the Islamic court."

¹⁴ To quote Regulation No. 9 of 1975 art. 41c, "the financial ability of a husband to maintain his wives and children may be proven by (i) a certificate of his salary from his office, or (ii) a certificate of his tax payments, or (iii) other sources which are acceptable to the Islamic court."

¹⁵ As stated in art. 41d of the Regulation No. 9 of 1975, "To guarantee the just treatment of a husband towards his wives and children, this can be proven by a written contract or declaration."

art. 4 (1) and Regulation No. 9 of 1975 art. 40, “A husband who wants to have more than one wife has to propose his case to the Islamic court where he lives.” Regulation No. 9 of 1975, art. 42 states, “Besides examining whether all the requirements are fulfilled, the Islamic court invites the existing wife to hear her permission.” Regulation No. 9 of 1975 art. 43 further states, “If all the requirements have been fulfilled, the Islamic court then permits the husband to engage in polygamy.” In addition, polygamy without the permission of the Islamic court can be a reason for stipulation (*fasakh*).¹⁶

When the entire procedure is completed, it is expected that (i) a husband has to treat justly and financially guarantee all his wives and children, (ii) the second and subsequent wives have no right to property acquired before marriage, and (iii) all wives have the same right to property acquired after the marriage contract.¹⁷

Those who do not follow these rules are in violation of the law,¹⁸ and thus can be punished by a fine of Rp. 7500.¹⁹ Furthermore, civil servants can be punished by (1) demotion by one degree, or (b) dismissal from their position, or (c) respected retired, or (d) simple retirement.²⁰

Questioning the application of the theory, as promulgated in a number of regulations, it states that even though Indonesia with its codified Islamic family law has tried to restrict theoretically the possibility of polygamy, man’s right to unrestricted divorce, and forced and child marriage, in moves that have sometimes strayed considerably from the traditional theory, the restriction do not always make much practical sense. It is cited that there were three main reasons for the failure in putting the Muslim family law of Indonesia into practice. First of all, the lack of understanding by women. To put it differently, lack of socialization of the new law.²¹ The majority of women do not realize that the contemporary Muslim family law aims to put them on an equal, if not superior, position to males. Women are always taught to live and think in accordance with Islamic religious beliefs, despite the discrepancies that the

¹⁶ Compilation, art. 71.

¹⁷ As stated in art. 26 (1) of Law No. 1 of 1974, “For a husband who is in polygamous relationship it is stipulated: (i) he must give a financial guarantee to all wives and children, (ii) that the second and subsequent wife does not have right of the property had already existed before, (iii) all wives have the same right to the property acquired after their marriage contract.”

¹⁸ Government Regulation No.9 of 1975 art. 45 (2).

¹⁹ Government Regulation No.9 of 1975 art. 45 (1).

²⁰ Government Regulation No. 45 of 1990 art. 15 (1) and art. 16.

²¹ Moh. Zahid (1994), *op.cit.*,” p. 38.

state law shows in contrast to these religious laws. The fact is that what is called religion is actually an interpretation of religious teaching according to seven centuries of middle eastern social history, more commonly called *fiqh*.

Secondly, lack of understanding by the traditionalist judges on Islamic teaching. It is very rare that a judge will try to interpret the *Qur'anic* verses, and the prophetic tradition in a way that is different to that which is generally applied in the Indonesian society. Most Indonesian judges refer rigidly and in an extremely narrow sense to the *fiqh*, without looking critically at the main sources of Islamic teaching: the Qur'an and the Prophetic tradition.

The last problem is what has been legislated in the domain of Muslim family law is more legal/formal rather than religious/cultural in perspective. The fact is that Indonesian society is more religious/cultural in outlook than the legal formal. Consequently, the law is applicable to those who benefit from the government only. Therefore, Muslim family law is extremely applicable only to public servants whose livelihood depend completely on the government benefits.

Similar findings have been found by Mehdi (1994) proposed three main reasons for this failure, even though her comments apply more to the case of Pakistan. Firstly, quoting Pearl and Patel (?), Mehdi maintains that the reforms were more of a political nature. Consequently, people lost confidence. Second, by quoting Pearl again, Mehdi argues that people who oppose the restriction of polygamy, divorce and enforced marriage, is only classified illegal but are not invalid. Thirdly, quoting Esposito, Mehdi states that, the population, both leaders and followers are still traditionalists in their thinking and are ignorant of the law. Consequently, it is extremely hard to accomplish reform.²²

However, Gavin W. Jones (?) maintains that the number of polygamy is decreasing in South-East Asia. The decrease, according to Jones, is due to three main reasons. First is the higher level of education of both men and women. Second is the influence of ideas promoted by women's organizations. Finally it is the combination participation of women in the workforce since, as the matter of fact, that some of polygamy practice was due to financial support.²³

²² Rubya Mehdi (1994), *The Islamization of the Law in Pakistan*. Surrey: Curzon Press Ltd., p. 198.

²³ Jones, Gavin W. (1994), *Marriage and Divorce in Islamic South-East Asia*. Oxford, Singapore and New York: Oxford University Press. p.p. 280-281.

Comparative Study

Comparing Muslim countries, it can be seen that most Muslim countries restrict the practice of polygamy, with some even prohibiting it altogether.²⁴ Elizabeth H. White (1974) stated explicitly that the study valid until January 1, 1974, cites Albania, Soviet Central Asia, Turkey and Tunisia as countries which have forbidden polygamy.²⁵ Noel Coulson and Doreen Hinchsliffe (?), on the other hand, identified Tunisia, Israel, Turkey and the Soviet Union as falling into this category. To quote:

Apart from a decree issued in 1962 by the Aga Khan that forbade the practice of polygamy so far only Tunisia, Israel, Turkey and the Soviet Union have prohibited it altogether and have declared polygamous marriages contracted subsequent to the prohibition to be void.²⁶

Mueller, who concentrated in his study on Egypt, Iraq and People's Democratic Republic of Yemen (PDRY), cites the latter as another Muslim country prohibiting polygamy, except in very specific circumstances, such as when a wife is barren or in the case of critical disease, and then only with the court's special consent.²⁷

²⁴ Mahmood Tahir (1972), *Family Law Reform in the Muslim World*. New Delhi: n.p.; Mahmood Tahir (1987), *Personal Law in Islamic Countries*. New Delhi: Times Press. Both books show the reform of Islamic Family Law in Muslim Countries. A majority of Muslim countries allow polygamy with the permission of the Islamic Court. Some require the consent of a wife, while other permit polygamy while retaining the right of a wife to be divorced. See Mahmood Tahir (1995), *Statutes of Personal Law in Islamic Countries: History, Texts and Analysis*, Revised Edition. Delhi: ALR., p.p. 173-174.

²⁵ White, Elizabeth H. (1978), "Legal Reform as an Indicator of Women's Status," in Beck, Lois and Keddie, Nikki, *Women in the Muslim World*. Cambridge, Massachusetts: Harvard University Press, p. 60. It is cited on the table that these countries are included those abolition of polygamy.

²⁶ Coulson, Noel and Hinchsliffe, Doreen (1978), "Women and Law Reform in Contemporary Islam", in Beck, Lois and Keddie, Nikki, *Women in the Muslim World*. Cambridge, Massachusetts: Harvard University Press, p. 40.

²⁷ Muller, Eric (1985), "Revitalizing Old Ideas: Development in Middle Eastern Family Law", in Fernea, Elizabeth Warnock, *Women and Family in the Middle East: New Voices of Change*. Austin: University of Texas Press, p. 227.

In the following we will look more clearly at the cases of Turkey, Tunisia and the People's Democratic Republic of Yemen (PDRY), including other countries and their policies regarding polygamy.²⁸

The case of Turkish, the Civil Code of 1926 prohibited bigamy altogether and asserted that a bigamous marriage is liable to annulment unless the first marriage has been dissolved.²⁹

The Tunisian Code of Personal Status of 1956,³⁰ which was then followed by Law No. 40 of 1957, was extended to cover all of Tunisia,³¹ and has been amended four times (in 1962, 1964, 1966 and 1981),³² with the Qur'an (4):3 as the legal basis for prohibiting polygamy.³³ According to article 18 of the code, a plurality of wives is prohibited. Any person who, being already married and before the marriage is lawfully dissolved, marries again, shall be liable to imprisonment for one year or a fine of 240,000 francs, or both, even if the second marriage is invalid on other grounds.³⁴

²⁸ Some other countries, such as Albania, Soviet Central Asia and Israel, is not put in account since the text of the law could not be founded.

²⁹ Mahmood Tahir (1995), *op.cit.* p. 248. To quote the Turkish Civil Code of 1926, art. 93, "A person wanting to remarry must prove that his or her earlier marriage stands dissolved by the former spouse's death or by divorce or annulment." Art. 112, "A marriage is void if (i) either party is already married at the time of marriage, (ii) either party is of unsound mind, or (iii) the parties are within prohibited degrees of marriage." See Tahir Mahmood (1995), *op.cit.* p. 217.

³⁰ This Personal Status is originally called *Mejella* 1956. See Fati Ziai (1997), "Personal Status Codes and Women's Rights in the Maghreb," in Mahnaz Afkhami and Erika Friedl, *Muslim Women and the Politics of Participation: Implementing the Beijing Platform*. Syracuse: Syracuse University Press, p. 74.

³¹ Mayer, Ann Alizabth (1995), "Reform of Personal Status Laws in North Africa: A Problem of Islamic or Mediterranean Laws," *Middle East Journal*, Vol. 49, No. 3 (Summer 1995), p. 433.

³² El Alami, Dawoud and Hinchcliffe, Doreen (1996), *Islamic Marriage and Divorce Laws of the Arab World*. London, the Hague, Boston: Kluwer Law International, p. 239.

³³ Pearl, David and Menski, Werner (1998), *Muslim Family Law*, third edit. London: Sweet & Maxwell, p. 242 (8-17). See also White (1978), *op.cit.*, p. 58.

³⁴ To quote, "Polygamy is prohibited. Any man who marries while he is already married before the bond of his previous marriage is dissolved shall be punished by one year in jail and by a fine in the amount of two hundred and forty thousand francs, or by one of the two penalties. This shall apply even if the new marriage is not contracted in accordance with the provisions of the law." See El Alami and Hinchcliffe (1996), *op.cit.*, p. 242.

In using the Shari‘a as its basis, especially the holy Qur’an (4):3, in prohibiting polygamy, Pearl sees the Tunisians as wanting to be modern, while retaining an Islamic framework.³⁵ Therefore, abolition of polygamy in the case of Tunisia, according to Pearl, was a response to modern social needs.

In the former 1978 Family Law of North Yemen (*Qanun al-Usrah*),³⁶ more famously known as the Democratic Republic of Yemen, bigamy was forbidden to any man who could not do equal justice to more than one wife.³⁷ Similarly, in the former Family Law of South Yemen of 1974, enacted by the national legislature on January 5, 1974,³⁸ it stated that a married man wanting to marry again had to obtain prior permission from the court.³⁹

³⁵ Pearl and Menski (1998), *op.cit.*, p. 242 (8-17).

³⁶ Mahmood Tahir (1995), *op.cit.*, p. 47.

³⁷ *Ibid.*, p. 248. Furthermore, art. 51 stipulated, “If a person has two or more wives and is incapable to provide maintenance and residence to them, all of them can seek dissolution of marriage. The court shall then given him the option of retaining one of them and divorcing the other or others; and if he refuses to do so it shall dissolve the marriage of the wife who so desires.” To quote the North Yemen Family Law of 1978, art. 9, “It is permissible for a man to have four wives if he is capable of doing justice, if he is not so capable of doing so only one marriage is permitted.” See *Ibid.*, p. 183-184.

³⁸ *Ibid.*, p. 50.

³⁹ *Ibid.*, p. 247. To quote the Family law of 1974, art. 11, “(a) A bigamous marriage shall not be permissible except with the written consent of the district court having jurisdiction. The court cannot permit such a marriage unless one of the following reasons is proved: (i) barrenness of the wife, confirmed by medical certificate, not known to the husband at the time of marriage; or (ii) affliction of the wife with a disease of a chronic or contagious nature medically certified to be incurable. (b) The written consent given by the court shall be operative if no appeal is preferred against it to the higher court within one month from its date.” See *Ibid.*, p. 187.

Both countries united to form a single Yemeni nation on May 22, 1990.⁴⁰ The present Personal Status Law is the newest of the codified laws, and was issued in 1992, following the reunification. Personal Status Law No. 20 of 1992 (Republic Decree),⁴¹ stipulates certain requirements to engage in polygamy.⁴²

However, neither the old nor the new laws of Yemen prohibited polygamy as those of Turkey and Tunisia did, but rather imposed restrictions on it. This is also true of the majority of Muslim countries. Another law that prohibits the polygamy is Law of 24 Shabat 1948 Pertaining to Personal Status for the Druze Sect in Lebanon.⁴³

The Syrian Law of Personal Status of 1953 (Presidential Decree No. 59 of 1953), which was amended by Law No 34 of 1975,⁴⁴ was an early attempt to restrict polygamy. Article 17 of the Code empowered the judge (*qadi*) to refuse a man permission to take another wife if he was already married to another woman, or if it was established that he was not in a position to support two wives.⁴⁵ Therefore, financial ability was an important criteria for polygamous marriage.⁴⁶ Syrian law did not however declare such a marriage invalid if a man simply ignored the law and entered into a *nikah* with another woman. Furthermore, the status of children from such a marriage were safeguarded according to another provision.⁴⁷

⁴⁰ *Ibid.*, p. 51.

⁴¹ El Alami, Dawoud and Hinchcliffe, Doreen (1996), *Op.cit.*, p. 249.

⁴² As stated in art. 12, “(1) A man shall be permitted to marry up to four wives provided he has the ability to treat them equitably, otherwise only one. (2) He may make a contract with another wife upon fulfillment of the following conditions: a. that there is some lawful benefit, b. that the husband has the financial means to support more than one wife, c. that the woman is aware that the man who wishes to marry her is married to another woman, d. that a wife is informed that her husband wishes to take another wife.” See *Ibid.*, p. 251.

⁴³ To quote, art. 10 of Law No. 24/1948, “Polygamy is prohibited and a man shall not be permitted to have two wives at the same time. If he does so the marriage to the second woman shall be void.” See *Ibid.*, p. 173.

⁴⁴ *Ibid.*, p. 215.

⁴⁵ To quote art. 17 of the law, “A judge may refuse permission for a man who is already married to take another wife unless he has a lawful justification and is capable of providing maintenance for both.” See *Ibid.*, p. 218.

⁴⁶ Pearl and Menski (1998), *op.cit.*, p. 241 (8-15).

⁴⁷ *Ibid.*, p. 242 (8-16).

In the Moroccan Code of Personal Status of 1958,⁴⁸ the ultimate decision on polygamy lies not with the court or any other official body, but with the wife or wives concerned. Article 30 (1 & 2) on the Impediments of Marriage states: (1) If any injustice towards the wives is feared, plurality of wives is not permitted. (2) Where a husband contracts a second marriage, and the wife had not stipulated against such an act in the marriage contract, the *qadi* may consider whether the second marriage has caused any injury to the first wife; marriage with a second wife shall not be contracted unless she is informed that the husband is already married to another woman. According to article 31, a wife may stipulate in the marriage contract that her husband shall not marry a second woman along with her, and if the husband violates such a stipulation she will have the right to seek dissolution of her marriage.⁴⁹

Therefore, it can be understood from article 30 (2), of the Moroccan code that a marriage contract for second and subsequent marriages shall not be drawn up until the new wife has been informed that the husband is already married.⁵⁰ In 1993 there was a reform introduced dealing with the polygamy problem, stating that the existing wife should be informed that her husband is intending to take another wife.⁵¹

The Iraqi Law of Personal Status of 1959 restricted polygamy in a way similar to the Syrian law. In Article 3 it is declared, that it is not permissible for a man to marry more than one woman without authorization of a judge, who will not grant such permission unless he is satisfied that the husband can fulfill three conditions: (1) financial ability to support the family, (2) some lawful

⁴⁸ The Personal Status is originally called Mudawana 1959, and had been reformed in 1993. Unfortunately, it could not be founded the new text of the law. See Fati Ziai (1997), *op.cit.*, p. 74.

⁴⁹ Pearl and Menski (1998), *op.cit.*, p.p. 242-243 (8-18). To quote, “(1) If it is feared that wives will not be treated equitably, polygamy shall not be permitted. (2) A woman whose husband takes a co-wife and who has not stipulated her right of choice may bring her case to the judge so that he may took into the harm which has affected her. Marriage may not be contracted with a second wife unless she has been informed that the man who wishes to marry her is already married to another woman.” Article 31, “A woman has the right to stipulate in the marriage contract that her husband should not take any co-wives, and that if the husband does not comply with that to which he has bound himself the wife shall have the right to demand that the marriage be terminated.” See El Alami and Hinchcliffe (1996), *Ibid.*, p. 203.

⁵⁰ Pearl and Menski (1998), *op.cit.*, p.p. 242-243 (8-18).

⁵¹ *Ibid.*, p.p. 242-243 (8-19).

benefit derives from the marriage, (3) there is no fear of any unequal treatment among wives.⁵² In Iraqi law, the chronic sickness or barrenness of the first wife is a valid ground for polygamy.⁵³

The Jordanian Law of Family Rights 1951, now called the Jordanian Law of Personal Status, was amended in 1976 and yet it does not have much to say about polygamy. The only discussion about polygamy is limited to the possibility of making a stipulation in a marriage contract that a husband should not take co-wives.⁵⁴

The Somalia Family Law of 1975 features a regulation similar to that of Indonesia in dealing with polygamy. It stipulates that a man may receive permission from a court to contract a second and subsequent marriage if, and only, if: “(i) his wife cannot carry out her conjugal duties, or (ii) his wife becomes crippled or terminally ill, or (iii) his wife cannot give him children, and (a) his present wife or wives give him permission, (b) his ability to support all his wives and children is certain, and (c) his ability to be fair to all his wives and children is certain.”⁵⁵

Interestingly, Morocco and Lebanon both allow the insertion of a stipulation (*ta'liq talaq*) by a wife into the marriage contract that her husband

⁵² *Ibid.*, p. 243 (8-20). To quote article 3 (4-6), (4), “Marriage with more than one woman shall not be permitted except with the permission of a judge (the *Qadi*) and for such permission to be given the following two conditions must be fulfilled: (a) The husband must have the financial ability to support more than one wife, and (b) There must be some lawful benefit.” (5), “If a lack of equity between the wives is feared, polygamy shall not be permitted; the assessment of this shall be left to the judge.” (6), “Any man who makes a contract of marriage with more than one woman in breach of the provisions of paragraphs 4 and 5 shall be punished by a prison sentence which shall not exceed one year, or by a fine not exceeding one hundred *dinars*, or both.” See El Alami, Dawoud and Hinchcliffe, Doreen (1996), *op.cit.*, p. 66.

⁵³ Pearl and Menski (1998), *op.cit.*, p. 243 (8-20).

⁵⁴ As stated in article 19 of the Law, “If the contract contains a condition which is beneficial to one of the parties and which does not conflict with the aims of marriage and which does not make obligatory something which is unlawful and if this registered in the contract document it must be observed in accordance with the following: 1. If the wife stipulates with regard to her husband a condition which is beneficial to her, which is not unlawful and which does not affect the right of any other person, such as if she stipulates that he should not take her out of her country, that he should take no co-wives,....” See El Alami and Hinchcliffe (1996), *op.cit.*, p.p. 83-84.

⁵⁵ Pearl and Menski (1998), *op.cit.*, p. 245 (8-25)

will not take a second wife. If he does, it can be a ground for divorce.⁵⁶ Pakistan has reformed its Muslim Family Law with the Muslim Family Law Ordinance (MFLO) 1961. The following is stated regarding polygamy in Section 6:

(1) No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance. (2) An applicant for permission under sub-section (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee and shall state the reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto. (3) On receipt of the application under sub-section (2) the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant subject to such conditions, if any, as may be deemed fit, the permission applied for. (4) In deciding the application the Arbitration Council shall record its reasons for the decision and any party may, in the prescribed manner, within the prescribed fee, prefer an application for revision to the Collector concerned and his decision shall be final and shall not be called in question in any Court. 5. Any man who contracts another marriage without the permission of the Arbitration Council shall: (a) Pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid shall be recoverable as arrears of land revenue: and (b) On conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.⁵⁷

In the case of India, there has been no direct legislative reform to that nation's code of Muslim Personal Law in the area of polygamy.⁵⁸ The only protection against subsequent polygamy for Indian Muslim women at the time would appear to be a stipulation in the marriage contract that a husband shall not take a second wife.⁵⁹ In India, furthermore, divorce proceedings can be instituted on the grounds of polygamy, based on non-maintenance or

⁵⁶ Coulson and Hinchsliffe (1978), *op.cit.*, p. 40.

⁵⁷ Pearl and Menski (1998), *op.cit.*, p. 259 [8-56].

⁵⁸ *Ibid.*, p. 247 [8-31], (255 [8-48]).

⁵⁹ *Ibid.*, p. 248 [8-34].

inequitable treatment.⁶⁰

Pearl discovered as well many instances of cases in India in which woman successfully refused to be co-wife, leading him to conclude that while Indian law offered a number of remedies, yet where rights were at stake, the basic right of a husband to practice polygamy remained intact.⁶¹ The reason why India did not make a serious attempt to regulate polygamy was probably due to the fact that only very few Indian Muslims actually practiced polygamy. Therefore, the existence of polygamy was largely ignored by the law. The initiative for reform was left to the community, ideally with the consent of *'ulama*.⁶²

Yet, even though legally there was no specific statute protecting Indian women, Indian law offers exactly the same remedies as other Muslim countries where the personal law is rapidly being reformed. In fact, the existence of other regulations designed to protect the disadvantaged also work in favour of women faced with a polygamous husband.⁶³

To conclude, therefore, Turkey, Tunisia⁶⁴ and that Druze Sect in Lebanon are the only countries which prohibit polygamy totally, whereas other countries only restrict the possibility of polygamy with some variations.

CONCLUSION

To conclude, Indonesian Islamic Family Law is included in the group that restricts the possibility of polygamy with some variations. This group seems to be majority of Muslim countries. While Turkey, Tunisia and that Druze Sect in Lebanon, are the only countries which prohibit polygamy completely. Furthermore, concern with the application of laws and its effect to social life is still debatable among scholars. Some scholars view that it gives a positive effect, while some others are in contrast.

⁶⁰ *Ibid.*, p. 249 [8-34]), and 253 [8-40]).

⁶¹ *Ibid.*, p. 252 [8-40]).

⁶² *Ibid.*, p. 254 [8-45]).

⁶³ *Ibid.*, p. 255 [8-48]).

⁶⁴ As also maintained by Esposito. See Esposito, John L. (1982), *Women in Muslim Family Law*. Syracuse: Syracuse University Press, p.p. 92-93.

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