

Polygamous Marriage: A Comparative Study of Islamic Law and Civil Law in the Distribution of Inheritance

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Abstract

Polygamous marriage is the marriage of a man with more than one woman at the same time. In polygamous marriages, inheritance disputes become a problem that often occurs. This is due to injustice in the distribution of inheritance and lack of understanding and knowledge of the law. The division of inheritance in polygamous marriages under Islamic law is based on the Compilation of Islamic Law Article 94 as well as in Surah An-Nisaa verse 12. While in the division of polygamous marriage inheritance in civil law is based on article 852a of the Civil Code, where in the division of heirs if the marriage is the second or subsequent marriage, and from the marriage that used to have a child or offspring of the child, the husband / wife must not inherit more than the distmayed part received by one of the children and the husband / wife part should not be more than 1/4 of the heir's inheritance.

Keywords: Comparison, Polygamy, Inheritance.

Introduction

Marriage is an essential problem for human life, because besides being a means to provide a family, marriage is also a human nature to meet their sexual needs. Actually, marriage not only contains elements of human relations with humans, but also as a civil relationship, and on the other hand, marriage also contains elements of sacredness, namely human relations with their God. ¹ Basically, in Law Number 1 of 1974 concerning Marriage

¹ Wasman dan WardanNuroniyah, *Hukum Perkawinan Islam di Indonesia Perbandingan Fiqih dan Hukum Positif*, (Jakarta. Teras. 2011), 2



adheres to the principle of monogamy, which is a principle that explains that in Basically a man can only have one wife and a woman can only have one husband. However, this principle of monogamy is not absolute, meaning that it is only a direction to the formation of monogamous marriage by narrowing the use of polygamy institutions and not completely abolishing the polygamy system.

Polygamy is one of the problems that will not be consumed by the times. Because this problem has existed since the time before the arrival of Islam until modern times, even polygamy is known as one of the problems of society by the nations of the world because this problem always arises in the life of society.² For more than one wife, provided that the number of wives at the same time is limited to only 4 people. The conditions that must be met are that the husband must be able to act fairly with his wife and children, but if the husband cannot fulfill then the husband is prohibited from having more than one wife, besides that the husband must first get permission from the Religious Court, if without permission from the Religious Court then the marriage does not have legal force.³

Talking about the distribution of inheritance, means talking about faraidh or inheritance and it also means talking about the transfer of property from the deceased to the living.⁴ In Indonesia, there are several legal sciences that study inheritance law, namely; civil inheritance law, Islamic inheritance law, and customary inheritance law. All branches of inheritance law have different legal rules regarding the basis and principles of inheritance law itself in accordance with the branch of inheritance law. The existence of these three branches of inheritance is a result of its historical development, and is influenced by the plurality of Indonesian society consisting of various tribes, races, and religions. Plurality refers to the social system embraced by each group. Of the three branches of inheritance, each does not directly refer to a certain form of society structure, where the branch of inheritance science applies, because the branch of science can be found in

² A. Tihanni dan Sobari Sabrani. *Fikih Munakahat Kajian Fikih Nikah Lengkap*, Cet II (Jakarta : Rajawali Press. 2010), 35

³ Zainul Fanani, *Implementasi Pembagian Harta Bersama Dalam Perkawinan Poligami*

⁴ Amir Syariffudin, *Garis-Garis Besar Fiqh*, (Jakarta: Prenada Media, 2003), 137

various forms of social structure or in one form of arrangement The community can be found in more than one branch of inheritance science.⁵

1. Polygamy Marriage According to Islamic Law and the Civil Code

Polygamous marriage in Islamic law is a marriage that is carried out by one of the parties (the husband) marrying several (more than one) wives at the same time. Islam does not prohibit a person from polygamy, but only with 4 wives and it is not permissible to increase more than that number.⁶ The law of polygamy in Islamic law is mubah. Polygamy is allowed as long as there is no persecution of the wives. If there is a concern about the possibility of persecution and to escape from the feared possible sin, it is recommended that it be sufficient to have only one wife.⁷

Although in Islamic law polygamy marriage is allowed, the husband who wants to practice polygamy must have the right reason. According to Amir Syarifuddin, the reason for polygamy in Islam is if the man is strong in his orgasm, if there is a husband who really wants to have a while the wife is barren, if the wife suffers from a disease so that she is unable to serve her husband, if in society there is a number of women who exceed the number of men.⁸

Islam does not require men to be married to more than one wife. However, if he wants to do it, it is allowed. Usually the polygamy system will not be used except in urgent circumstances.⁹ In polygamous marriage, the conditions of justice were put forward by the imams of the madhhab, namely Imam Shafi' I, Hanafi, Maliki, and Hambali. In their opinion, a husband may have more than one wife but it is limited to four wives. This ability has a condition, namely being fair to wives both in terms of alimony and turn.¹⁰ The priests also advised that if

⁵ Abdul kadir Muhammad, *Hukum Perdata Indonesia*, (Bandung: Citra Aditya Bakti2000), 267

⁶ Nur Hayati, Poligami Dalam Perspektif Hukum Islam Dalam Kaitannya Dengan Undang-Undang Perkawinan. Dalam *Jurnal Lex Jurnalica*. Vol. 3 No. 1 April 2005

⁷ Mahmud Syaltut, *Aqidah Islam Wa Syari'ah*, (Mesir: Dar Al-Qalam, 1996)

⁸ Amir Syarifudin. *Hukum Perkawinan Islam di Indonesia: Antara FiqhMunakahat dan UndangUndang Perkawinan*, (Jakarta: Kencana, 2007), 87

⁹ Syaikh Mutawalli As-Sya'rawi, *Fiqh Perempuan Muslimah*, (Jakarta: Sinar GrafikaOffet, 2009), 184

¹⁰ Masjfuk Zuhdi. *Masail Fiqhiyyah*, (Jakarta: CV. Haji Masagung, 1989), 12

A husband has more than four wives, so the law is haram. The fifth and subsequent marriages are considered null and void, unless the husband has divorced one of the four wives and has expired his iddah. On the issue of limiting more than four wives, Imam Shafi I argued that this has been shown by the Sunnah of the Prophet PBUH as an explanation of the word of Allah, that apart from the Prophet no one is allowed to marry more than four women.¹¹

Article 27 of the Civil Code states that at the same time A man is only allowed to have one woman as his wife, a woman only one man as her husband. Meanwhile, Article 28 of the Civil Code contains the principle that marriage requires freedom of consent between prospective husband and wife. Law Number 1 of 1974 regulates the issue of marriage which is intended for all Indonesian people regardless of ethnicity, origin, and religion.¹² It should be noted that in article 4 it is an alternative, which means that one must exist to be able to perform polygamy, while in article 5 it is cumulative, where all the requirements must be met by the husband who is going to commit polygamy. The husband who will be polygamous is required to submit a written application to the Religious Court, then the Religious Court will give a decision whether the application is accepted or rejected.¹³

Although in the Marriage Law adheres to the principle of monogamy, but in its implementation this principle does not apply absolutely. In the Marriage Law in Indonesia, polygamy is still allowed with very strict requirements, and only certain people can do it.¹⁴ The enactment of polygamy is actually based on the context of emergency law or extraordinary circumstance. Moreover, polygamy is not only the authority of a husband but on the double permission, namely the court and the first wife.¹⁵

¹¹ Muhammad Shahrur. Terj. Sahiron Syamsuddin dan Burhanuddin. *Metodologi Fiqih Islam Kontemporer* (Yogyakarta: Elsaq), 428

¹² Bibit Suprpto, *Liku-Liku Poligami*, (Yogyakarta: Al-Kautsar, 1990), 152

¹³ Sidi Ghazalba, *Menghadapi Soal-Soal Perkawinan*, (Jakarta: Pustaka Antara, 1975), 10

¹⁴ M. Anshary, *Hukum Perkawinan di Indonesia: Masalah-Masalah Krusial*, (Yogyakarta: Pustaka Pelajar, 2010), 89

¹⁵ Yahya Harahap. *Hukum Perkawinan Nasional*, (Medan: Zahir Trading Co Medan, 1975), 26

2. Arrangement of Inheritance Distribution of Polygamy Marriage Perspective Islamic Law and KUH Perdata

Basically, inheritance issues are always the same as transfers related to property ownership, rights and responsibilities from heirs to heirs.¹⁶ Islamic law considers that property in a marriage or shirkah is property obtained either from each other or simultaneously during the marriage bond, which is then called joint property, regardless of whose property belongs to and on whose behalf. In the distribution of inheritance, the size and size of the number of shares for each heir is clearly in the Qur' an and it can be concluded that there are 6 parts in the distribution of inheritance, namely: there are parties who get the 1/2, 1/4, 1/8, 2/3, 1/3, and 1/6 shares.¹⁷ In Islamic inheritance, the joint property of polygamous marriage is contained in the Compilation of Islamic Law Article 94:

"The common property of a husband who has more than one wife, then each property is separate and independent. The ownership of joint property from the marriage of a husband who has more than one wife as mentioned in paragraph (1), is calculated at the time of the second, second, or fourth marriage contract"

Al-Qur" an Surah An-Nisa verse 12 also mentions inheritance in polygamous marriages:

"And your share (husband/wife) is one-half of the property left behind by your wives if they have no children. If they (wives) have children, then you will get 1/4 of the property left after the fulfillment of the will they made or after the debt is paid. Wives get 1/4 of the property you leave if you don't have children. If you have children, then wives get 1/8 of the property left (after the fulfillment of the will made or after paying off your debts). If a person dies, either leaving behind a child but has a brother (a mother) or a sister (a mother), then for each of the two brothers 1/6 of the property. However, if the brothers and sisters are more than one, then they are together in the 1/3 part after fulfilling their will or after paying their debts without trouble (heirs). This is the provision of Allah the All-Knowing, the All-Sustaining."

¹⁶ Muhammad Daud Ali, *Asas Hukum Islam*, (Jakarta: Rajawali Press, 1990), 129

¹⁷ Suhrawardi K. Lubis dan Komis Simanjuntak, *Hukum Waris Islam*, (Jakarta: Sinar Grafika, 2008), 34



The law of inheritance in the Civil Code is regulated in Book II of the Civil Code Civil. The articles that regulate inheritance law in the Civil Code amount to 300 articles starting from articles 830 to 1130 of the Civil Code.¹⁸

In the Civil Code, there are 4 groups of heirs, namely the first group, namely the family in a straight line down which includes husbands/wives or children who are left behind or who live the longest. The second group is the family in a straight line upwards, which includes parents and siblings, both male and female, and their descendants. The third group, namely grandparents or other ancestors. (Article 853 of the Civil Code). The fourth group, namely relatives in the sideways line to the sixth level. (Pasal 861 KUHPerdara).¹⁹

In civil law, the inheritance of polygamy is based on Article 852a Criminal Code. Therefore, based on Article 852a of the Civil Code, the share for the wife is equal to the child and the amount must not exceed the smallest amount obtained by the child.

Laura Nader and Todd expressed their opinion about the existence of 3 phases in a dispute, namely pre-conflict, conflict, and dispute stage. In the pre-conflict stage, it refers to a situation or situation where a person or group feels an injustice and makes a complaint. The conflict stage is a condition where the parties are aware and aware of the existence of dissatisfaction and then the party who feels aggrieved informs the dissatisfaction to the party who violates their rights. The dispute stage is the stage where the conflict is declared in front of the general public or by involving a third party.²⁰

When social relationships are considered important to a person, then the person will make every effort to maintain the relationship. The efforts themselves include: finding a solution by means of negotiation or settlement by means of intermediary (deliberation) that will result in a compromise settlement or even avoid disputes. In the patrilineal system, what is considered important and valuable is the relationship between a man and the son of his wife. This makes a woman's access to inheritance dependent on her ability to raise her son in the interests of kinship.²¹

¹⁸ Efendi Purangin, *Hukum Waris*, (Jakarta: Raja Grafindo Persada. 1997), 3

¹⁹ Surini Ahlan Sjarif dan Nurul Elmiyah, *Hukum Kewarisan Perdata Barat Pewarisan Menurut Undang-Undang*. Edisi Pertama, 87-92

²⁰ Ihromi, T.O., *sebuah Bunga Rampai Antropologi Hukum*, (Jakarta: Yayasan Obor Indonesia, 1993), 46

²¹ Ibid

The provisions regarding the distribution of inheritance are based on the conditions that accompanying the marital relationship, as in the case of death, divorce, or other matters. Government Regulation No. 9 of 1974 concerning the Implementation of Law No. 1 of 1974 concerning Marriage Article 4 paragraph (2) states that, during the course of the inheritance distribution lawsuit at the request of the plaintiff and the defendant, it can be determined who is entitled to receive inheritance and how much share is received by each heir in a polygamous marriage. In addition to the distribution of inheritance through the court, the implementation of inheritance distribution can also be carried out with the agreement of the heirs in polygamous marriages. This means that the parties who become heirs agree to distribute the inheritance based on their agreement. In this division of inheritance, it actually has a better value than the distribution of inheritance through the court. The division of inheritance through this agreed deliberation will not cause resentment between each other and the relationship between the heirs will also not be severed.²²

Supreme Court Decision No. 37 K/AG/1995 dated 28 September 1995 states that, if there is an agreement between the parties to settle the matter of common property amicably, the settlement must be based on a fair and equitable division of the agreement and peacefully binding on the parties to the agreement. Thus, the distribution of polygamy inheritance according to the Civil Code is carried out.

Conclusion

In the distribution of inheritance, the amount of shares for each heir is clearly in the Qur' an and it can be concluded that there are 6 parts in the distribution of inheritance, namely: there are parties who get the 1/2, 1/4, 1/8, 2/3, 1/3, and 1/6 shares. In Islamic inheritance, the joint property of polygamous marriage is contained in the Compilation of Islamic Law Article 94. The Qur' an Surah An-Nisa verse 12 also mentions inheritance in polygamous marriages. The articles that regulate inheritance law in the Civil Code amount to 300 articles starting from articles 830 to 1130 of the Civil Code. In the division of inheritance under civil law, no heir can be forced to leave the inheritance undivided, the division of inheritances

²² Siti Musdah Mulia, *Islam Menggugat Poligami*, (Jakarta: PT Gramedia. 2005), 8



Inheritance can be claimed at any time. In civil law, the heirs of polygamy is based on Article 852a of the Civil Code. In filing a lawsuit, a plaintiff should make a list of inheritances and evidence that the property being sued is inheritance, which means that the property is not the inheritance of the other wife and the property must be proven to be joint property or the property was obtained during the marriage and mentioned in the lawsuit submission (posita) which is then mentioned in the request for the division of property in the lawsuit file (petitum). Government Regulation Number 9 1974 concerning the Implementation of Law Number 1 of 1974 concerning Marriage Article 4 paragraph (2) states that, during the course of the inheritance distribution lawsuit at the request of the plaintiff and the defendant, it can be determined who is entitled to receive inheritance and how much share is received by each heir in a polygamous marriage.

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