POLYGYNY DISCOURSE FROM JURIDICA, SOCIOLOGICAL AND ONTOLOGICAL ASPECT

DISKURSUS POLIGINI DARI ASPEK YURIDIS, SOSIOLOGIS DAN ONTOLOGIS

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ABSTRACT

This article aims to examine polygyny discourse from juridical, sociological and ontological aspects. Using the doctrinal writing method with a conceptual approach and statutory regulations, it was found that: Polygyny discourse from juridical, sociological and ontological aspects will face the legality of polygyny which is accommodated in statutory regulations even though with strict requirements and meets asociological spec where the practice of polygyny has not been fully accepted by society. Both those who want polygyny and those who reject polygyny. Because for those who want to be polygynous, the existing arrangements are considered very difficult and half-hearted because the conditions that must be met to be polygynous are very difficult to fulfill. So to carry out polygyny, sometimes they violate the law by marrying in a serial manner. But for those who reject polygyny, this arrangement is considered to legalize polygyny even though it is only through a legal loophole opened as a result of certain conditions. Then also face aontological spec that will bridge the juridical and sociological aspects. Ontological aspects related to asas marriage law that confirmsIn a marriage, a man can only have one wife. A woman can only have one husband, so polygyny is a special condition that is opened with certain considerations to achieve the goals of marriage. The ontological aspect is also related to justice which is difficult to realize in polygyny.

Keywords   : Discourse, Marriage, Polygyny, Sociology of Law.

ABSTRAK

Artikel ini bertujuan untuk mengkaji wacana poligini dari aspek yuridis, sosiologis dan ontologis. Dengan menggunakan metode penulisan doktrinal dengan pendekatan konseptual dan peraturan perundang-undangan, ditemukan bahwa: Wacana poligini dari aspek yuridis, sosiologis dan ontologis akan berhadapan dengan legalitas poligini yang diakomodir dalam peraturan perundang-undangan meskipun dengan syarat yang ketat dan memenuhi spek asosiologis dimana Praktek poligini belum sepenuhnya diterima oleh masyarakat. Baik yang menginginkan poligini maupun yang menolak poligini. Sebab bagi mereka yang ingin berpoligini, pengaturan yang ada dinilai sangat sulit dan setengah hati karena syarat yang harus dipenuhi untuk berpoligini sangat sulit dipenuhi. Sehingga untuk melakukan poligini terkadang mereka melanggar hukum dengan menikah secara siri. Namun bagi mereka yang menolak poligini, pengaturan tersebut dianggap melegalkan poligini meski hanya melalui celah hukum yang terbuka karena syarat-syarat tertentu. Kemudian juga menghadapi spek aontologis yang akan menjembatani aspek yuridis dan sosiologis. Aspek ontologis berkaitan dengan hukum asas perkawinan yang menegaskan Dalam suatu perkawinan, seorang laki-laki hanya boleh mempunyai satu isteri. Seorang perempuan hanya boleh mempunyai satu suami, sehingga poligini merupakan suatu keadaan khusus yang dibuka dengan pertimbangan tertentu untuk mencapai tujuan perkawinan. Aspek ontologis juga berkaitan dengan keadilan yang sulit diwujudkan dalam poligini.

Kata Kunci : Wacana, Perkawinan, Poligini, Sosiologi Hukum.

I.   INTRODUCTION

Polygyny, something Locke[1] and Beethoven,[2] never did because they have never married in their entire lives. However, this article will not discuss the lives of these two influential figures in history. This article discusses polygyny from a legal sociology perspective.

The practice of polygyny has existed for centuries. History records that polygyny was also widely practiced by prominent men, such as kings, figures, nobles, including prophets. The issue of polygyny has always been a hot topic of discussion among scholars. The pros and cons regarding the law of doing so often color various mass media; either electronic or print. Polygyny is a

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[1] Michael H. Hart, One Hundred of the Most Influential Figures in History, 1978. Translated by Mahbub Junaidi, Dunia Pustaka Jaya, Jakarta, 1982.

[2] *Ibid.*

serious problem that is always scrutinized by feminist activists[3]. The strong current of the anti-polygyny movement, which is often voiced by feminist activists, is just one of several indications that they do not really understand the marriage law itself comprehensively.

Although regulations regarding polygyny are legally regulated in Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage and book 2 of the compilation of Islamic law with various strict conditions there is still resistance to polygyny. This stems from the many practices of polygyny in Indonesia which are carried out without the consent of the first wife, resulting in many problems occurring in the future.

From the description above, this article will explain the contradictions regarding polygyny betweenjuridical, sociological and ontological aspects[4]. On the one hand, polygyny is legal according to law, but on the other hand, some community groups reject polygyny, making it seem like there is a dilemma between these aspects.

II. METHOD

This paper is in the corridor of doctrinal research. which only uses secondary data. The legal research model is a comprehensive and analytical study of secondary legal materials. The approach to the problem uses a conceptual and statute approach.[5]The data were analyzed qualitatively by describing the data generated from the research into a systematic explanation form so that a clear picture of the problem under study could be obtained. The results of the data analysis were concluded deductively.

III. ANALYSIS AND DISCUSSION

In social anthropology, polygamy is a practice wedding to more than one husband or wife (according to the gender of the person concerned) at one time (as opposed to monogamy, where a person has only one husband or wife at a time).

There are three forms of polygamy, namely polygyny (a man has several wives at once),polyandry (a woman has several husbands at once), and group marriage(group marriage), namely a combination of polygyny and polyandry). These three forms of polygamy are found in history, but polygyny is the most common form.[6]

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[3] Feminism is a movement that fights for and demands gender equality between men and women.

[4] This ontological aspect will be partialed and concretized through the concept of principles and the concept of justice.

[5] Peter Mahmud (2005). Legal Research, Kencana Prenada, Jakarta, page xx.

[6] http://id.wikipedia.org/wiki/Poligini(free encyclopedia) accessed 29 September 2023.

In general, the dilemma that occurs regarding polygyny can be mapped through several aspects, namely juridical, sociological and ontological. The juridical aspect concerns the regulation of polygyny in positive law in Indonesia. The sociological aspect will map the close relationship between polygyny and the social interactions that respond to it, while the ontological aspect will bridge the juridical and sociological aspects. In this ontological aspect, the basic concepts and concepts of justice in polygyny will be mapped. The definition of polygyny itself is not regulated in Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage, while book 2 of the Islamic Law Compilation (KHI) concerning marriage law discusses polygyny in a separate chapter with the title having more than one wife.[7]

a. Juridical Aspect of Polygyny

Based on the positive legal context, regulations regarding polygyny in Indonesia are mapped in Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage and book 2 of the Islamic Law Compilation (KHI) concerning marriage law.

1. Based Polygyny Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage

Polygyny is not prohibited in Indonesia, this can be seen in Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage which is regulated in Article 3 paragraph (2) which states that the court can give permission to a husband to have more than one wife if the parties concerned wish. However, the law also provides conditions for polygyny to be carried out. These conditions are regulated in Article 4 paragraph (1). In the event that a husband will have more than one wife, as stated in Article 3 paragraph (2), then he is obliged to submit an application to the Court in the area where he lives. Article 4 paragraph (2) The court referred to in paragraph (1) only gives permission to a husband who will marry more than one wife if:

1) the wife cannot carry out her obligations as a wife.
2) the wife has a physical disability or an incurable disease.
3) the wife cannot bear children.

Apart from that, it is also necessary to pay attention to the provisions of Article 5 paragraph (1), that in order to submit an application to the Court, as intended in Article 4 paragraph (1), the following conditions must be met:

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[7] See chapter IX of book 2 of the compilation of Islamic law (KHI) regarding marriage law.

1) there is consent from the wife/wives.
2) the certainty that husbands are able to guarantee the living needs of their wives and children.
3) there is a guarantee that husbands will treat their wives and children fairly.

Referring to the conditions determined by this law, it can be argued that having polygyny legally is not an easy thing even though it is accommodated/allowed by legal regulations. The requirement to act fairly is primarily a barrier to the continuation of polygyny, because the concept of fairness should not be interpreted subjectively but must be viewed with an objective lens.[8]

2. Polygyny Based on the Compilation of Islamic Law (KHI)

The legal basis for the formation of the compilation of Islamic law (KHI) is the Presidential Instruction of the Republic of Indonesia number 1 of 1991 dated 10 June 1991 which was continued by the Decree of the Minister of Religion of the Republic of Indonesia number 154 of 1991 concerning the Implementation of Presidential Instruction number 1 of 1991.[9] The Compilation of Indonesian Islamic Law (KHI), especially book 2 on marriage law, which contains further regulations from the Marriage Law and is specifically intended for Indonesian citizens who are Muslim, of course requires the same serious requirements for practicing polygyny.

The addition of crucial conditions is mainly found in article 58 paragraph (2), namely that the consent of the wife or wives can be given in writing or verbally, but even if there is written consent, this consent is confirmed by the wife's verbal consent at the Religious Court hearing.[10].

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[8] The concept of justice has not yet found a perfect explanation and is still giving rise to discourse from the era of Aristotle to John Rawls, all of whom have different but complementary concepts of justice.

[9] Judging from the form of its legal product, KHI is a policy regulation (beleids regel) and not a statutory regulation (wet geving). This concept is theoretically known in legal science as regulatory decisions (besluiten van algemene strekking). Since the issuance of Law number 10 of 2004 concerning the Formation of Legislative Regulations, which has now been replaced by Law Number 12 of 2011, improvements have been made between the types of legal products and the nature of norms. For regulations, the nature of the norms is general-abstract. Meanwhile, the nature of the provisions (beschikking) is concrete-individual. See PM Hadjon et all, Introduction to Indonesian Administrative Law, UGM Press. 1993 p. 151.

[10] The Religious Court as an institution that has the authority to determine polygyny permits for applications submitted, in principle the Religious Court is passive, so when there is an application for a polygyny permit from a man, the court will process it by accepting the registration and then summoning the parties, namely the applicant, then the applicant's first wife (wives) and the future wife to be married, as well as two witnesses who will all be presented in a trial that is open and open to the public. The court judge will see whether the existing facts are in accordance with what he requested, and whether the request has strong grounds in accordance with statutory regulations. If they fulfill the requirements as stated in the UUP, the judge will grant the request, but if not, the judge can also firmly refuse.

In addition, Article 59 states that In the event that the wife does not want to give consent, and requests permission to marry more than one person, the Religious Court can determine the granting of permission after examining and hearing the wife concerned at the Religious Court hearing, and against this decision the wife or husband can submit an appeal or cassation[11]. With this arrangement, if the court of first instance grants the husband's request for polygyny. The wife can take legal action by appealing or even cassating and it can be expected that it will take a very long time to obtain the court's permission.

b. Sociological Aspect of Pilygyny

A good legal rule must be generally accepted by society. That is the regulatory purpose and function of law[12]desired can be achieved well. To harmonize and understand the phenomena of law and society, it can be seen through aspects of legal sociology[13] and sociological legal science.

Alvis S. Johnson in his book entitled sociology of law conceptualizes sociology of law as part of the sociology of the human soul which fully examines the social reality of law, starting from real things and observations of outward manifestations, in effective collective habits (organizations). standards, daily customs and innovative traditions or habits) and also in the basic material (spatial structure and demographic density of legal institutions). Sociology of law interprets these customs and material manifestations of law based on their core understanding, while inspiring and permeating them, at the same time changing some of them (customs and material manifestations of law). Sociology of law starts specifically from certain previous patterns of legal symbols, such as organizing law, procedures and sanctions, to appropriate legal symbols, such as the flexibility of regulations and the spontaneity of law.[14]

Furthermore, according to Soerjono Soekanto, legal sociology is a branch of science that analytically and empirically analyzes or studies the reciprocal relationship between law and other social phenomena.[15] Referring to the two definitions of legal sociology put forward by the two experts above, the

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[11] Marriage and Compilation of Islamic Law, Pustaka Yustisia, Yogyakarta, Cet II, 2009, p.69.

[12] Roscoe Pound conceptualized the function of law as: Law functions as a tool of social control (Law as a tool of social control), Law functions as a tool of social mechanisms (Law as a tool of social engineering), Law functions as a tool of social empowerment (Law as a tool of social empowerment).

[13] The birth of the study of legal sociology cannot be separated from legal philosophy and legal theory. Compare the concept of legal sociology (sociological of law) with sociological legal science (sociological jurisprudence).

[14] Look Alvis S. Johnson, Sociology of Law. Rineka Cipta Publisher. Jakarta. 1994.

[15] See Soerjono Soekanto. Introduction to Sociology of Law. Bharata Publishers. Jakarta. 1997. Compare with Soerjono Soekanto. Fundamentals of Sociology of Law. PT Raja Grafindo Persada. Jakarta. 1988.

perspective of legal sociology must be put forward in understanding polygyny as something that is accepted by some communities and not accepted by others.

As something that can be done, access to polygyny is regulated withinLaw Number 1 of 1974 concerning Marriage which applies generally and book 2 of the Islamic Law Compilation (KHI) concerning marriage law which applies to Muslims.However, this arrangement has not been fully accepted by the community. Both those who want polygyny and those who reject polygyny. Because for those who want to be polygynous, the existing arrangements are considered very difficult and half-hearted because the conditions that must be met to be polygynous are very difficult to fulfill. So to carry out polygyny, sometimes they violate the law by marrying in a serial manner. But for those who reject polygyny, this arrangement is considered to legalize polygyny even though it is only through a legal loophole opened as a result of certain conditions.

Hart stated that the existence of a legal system is a social phenomenon that always presents two aspects, which we must pay attention to so that our view of it is realistic. These aspects include attitudes and behavior that take the form of recognition of the rules and also simpler attitudes and behavior in the form of mere obedience or silent acceptance.[16]Because recognition that is manifested in attitudes and behavior means that a legal rule can be accepted by society and has reached its complete form in a sociological aspect.

c. Ontological Aspect in Polygyny

The ontological aspect in relation to polygyny will bridge the juridical and sociological aspects that have been explained previously, and this aspect cannot be separated from philosophical studies. One way to search for truth is to philosophize[17]and ontology is a field of philosophy[18]. To map ontological aspects in relation to polygyny, it will be partialed through the principles of law and justice. For this reason, we must first understand the legal principles of marriage which form the basis of polygyny, or in other words the basic nature of marriage

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[16] HLA Hart, Legal Concepts, Nusamedia, Bandung, 2009, p. 311.

[17] There are 4 ways to search for truth: 1. Through habit (knowledge), the nature of truth cannot be tested because it is subjective. 2. Through science, the nature of truth can be tested because it is objective. 3. Through philosophy and its medium of contemplation (radical self-reflection), the nature of truth is speculative. 4. Through religion, the nature of truth is absolute and can/cannot be tested. Yuswanto, legal theory lecture 1 on 25 September 2010, MH Unila. 2010.

[18] Searching for philosophical truth, there are three important areas that must be understood well, namely: 1. Ontology (about the essence) which questions what and how science is, the nature of science or scientific truth. 2. Epistemology (about how to gain knowledge), namely what is the source of human knowledge, the means to achieve knowledge and the procedures for using these means. 3. Axiology (about the value or usefulness of knowledge), namely what norms are actually adhered to in exploring, developing and applying knowledge. HS Tisnanta et al, Legal Philosophy, 2003 Bandar Lampung. Unila press, p. 2.

itself. An understanding of polygyny must be placed on a basic perspective regarding the legal principles of marriage which will be used as a basis for testing (toetsing ground) for the suitability of the practice of polygyny so that it does not violate the fundamental values and legal principles on which marriage is based.

The idea of legal principles as fundamental rules of judgment in a legal system can be found in the works of many legal theorists. Paul Scholten, for example, describes (provides a definition) of legal principles as follows: "The basic thoughts contained in and behind each legal system are formulated in statutory regulations and judge's decisions relating to the provisions and individual decisions can be seen as elaborating it." From this definition, it is clear that the role of legal principles as meta-rules relates to legal rules in the form of rules of behavior. However, the question is whether legal principles should be viewed as a strong or weak form of metarule.[19]mAccording to Satjipto Rahardjo, legal principles contain ethical demands, are a bridge between regulations and social ideals and the ethical views of society.[20]

The legal principle of marriage is the basic basis of polygyny. These principles are set out inArticle 3 paragraph (1) of Law number 1 of 74 which states, In principle, in a marriage, a man can only have one wife. A woman can only have one husband. If we refer to the substance of the principle of marriage, we can understand that polygyny is a special condition that is opened with certain considerations[21]to achieve marital goals.[22]

In accordance with this context, Muslim scholars and intellectuals today do not understand polygyny as a recommendation. According to them, polygyny is a small door that is only opened by the Koran at certain times, for example if the first wife is sick so she cannot carry out her functions as a wife, or the wife is barren while the husband really longs for children.[23]

After discussing aspects of legal principles in polygyny, it is also necessary to examine aspects of justice in polygyny. Aristotle differentiates justice into types of distributive justice and corrective justice. The first applies in public law, the second in civil and criminal law. Distributive and corrective justice are both susceptible to problems of equality or equality and can only be understood within their framework. In the area of distributive justice, what is important is that equal rewards are given for equal achievements. In the

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[19] JJH Bruggink, Reflections on Law, PT Citra Aditya Bakti, Bandung, 1996, pp. 120-121.

[20] Satjipto Rahardjo, Legal Studies, Bandung: Alumni. 1986. p. 85.

[21] Article 4 paragraph (2)Law number 1 of 1974The court only gives permission to a husband to marry more than one wife if: the wife is unable to carry out her obligations as a wife; the wife has a physical disability or an incurable disease; the wife cannot bear children.

[22] Article 1 of Law number 1 of 1974 conceptualizes the purpose of marriage as being to form a happy and eternal family (household) based on the belief in the Almighty God.

[23] M. Quraish Shihab. M. Quraish Shihab Answers-1001 Islamic questions that you should know. Lentera Hati Jakarta 2008. p. 547.

second, what matters is that inequalities caused by, for example, breaches of agreements, are corrected and eliminated.

According to Aristotle, distributive justice focuses on distribution, honor, wealth and other goods that can be equally obtained in society. Putting aside the mathematical "proof", it is clear that what Aristotle had in mind was the distribution of wealth and other valuables based on the values prevailing among citizens. A fair distribution may be a distribution that is in accordance with its goodness, namely its value for society.[24]In the context of polygyny, distributive justice, which is public in nature according to Aristotle, applies and can be used as a benchmark for justice in the practice of polygyny, but according to the author, the nature of justice is not completely fair because the justice shown does not represent a completely fair context. A husband who has several wives[25]It will be seen as fair by society if it is able to provide goodness in a material context. However, for other fair contexts it will only raise question marks.

In the broader context of justice, John Rawls in his book a theory of justice explains the theory of social justice as the difference principle and the principle of fair equality of opportunity. The essence of the difference principle is that social and economic differences must be arranged so as to provide the greatest benefit to those who are most disadvantaged.

John Rawls further emphasized that a justice enforcement program with a popular dimension must pay attention to two principles of justice, namely, first, providing equal rights and opportunities for the broadest basic freedoms as broad as equal freedom for everyone. Second, being able to reorganize the socio-economic disparities that occur so that they can provide reciprocal benefits for everyone, both those from fortunate and disadvantaged groups.[26] Rawls's theory applies to a wider scope such as justice in state administration, but from the explanation of this theory of social justice, its connection to the concept of justice in polygyny is that the word "fair" is only defined in terms of concrete, materialistic things.

Justice can only be understood if it is positioned as a condition that is intended to be realized by law. Efforts to realize justice in the law are a dynamic process that takes a lot of time. This effort is often dominated by

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[24] Carl Joachim Friedrich, Historical Perspective Legal Philosophy. Nuansa and Nusamedia. Bandung 2004, p. 24.

[25] Law number 1 of 1974 does not set limits for a man to be polygynous, meaning that a man can have as many wives as he can afford. However, in Article 55 paragraph (1) Book 2 of the KHI, restrictions are set, namely: Having more than one wife at the same time is limited to four wives.

[26] See John Rawls, A Theory of Justice, London: Oxford University press, 1973, which has been translated into Indonesian by Uzair Fauzan and Heru Prasetyo, Theory of Justice, Yogyakarta: Student Library, 2006.

forces fighting within the general framework of the political order to actualize it.[27]

One can regard justice as an absolute idea or reality and assume that knowledge and understanding of it can only be gained partially and through very difficult philosophical efforts. Or one may think of justice as the result of a general religious or philosophical view of the world in general. If so, one could define justice in one sense or another of this view.[28]

If it is very difficult to understand justice, let alone do justice. For this reason, polygyny should be understood as a final option when a marriage can no longer achieve its essential goals.

IV. CONCLUSION

As a conclusion to what has been discussed, it can be concluded that the polygyny discourse from the juridical, sociological and ontological aspects will face the legality of polygyny which is accommodated in statutory regulations even though with strict requirements and meets asociological spec where the practice of polygyny has not been fully accepted by society. Both those who want polygyny and those who reject polygyny. Because for those who want to be polygynous, the existing arrangements are considered very difficult and half-hearted because the conditions that must be met to be polygynous are very difficult to fulfill. So to carry out polygyny, sometimes they violate the law by marrying in a serial manner. But for those who reject polygyny, this arrangement is considered to legalize polygyny even though it is only through a legal loophole opened as a result of certain conditions. Then also face aontological spec that will bridge the juridical and sociological aspects. Ontological aspects related to asas marriage law that confirmsIn a marriage, a man can only have one wife. A woman can only have one husband, so polygyny is a special condition that is opened with certain considerations to achieve the goals of marriage. The ontological aspect is also related to justice which is difficult to realize in polygyny.

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