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## **Cumulative Versus Alternative Conditions: A Study of Polygyny Permits in Indonesia From the Perspective of the Legal Certainty Principle**

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### **Abstract:**

This paper aims to examine the conflict of authority between the alternative and the cumulative conditions stipulated in Law Number 1 of 1974 concerning Marriage, especially under the polygyny permit section. In this normative study, the problem is focused on the alternative conditions that determine the cumulative conditions and the analysis took into account the critical legal studies and *adz-Dzari'ah* theories, revealing that the alternative conditions are not appropriate to be determinant that allows polygyny to take place. Instead, these conditions are supposed to be additional or optional. Conversely, the more appropriate condition as the polygyny permit determinant is cumulative. Similarly, in the analysis of the *adz-Dzari'ah* theory, when the alternative condition is the determinant, it will bring harm instead, meaning that it is included in the category *sadd adz-Dzari'ah* (prohibited or even forbidden). It is advisable to make the cumulative conditions the determinant of polygyny permits because it carries more benefits that allow for easier polygyny as it is included in the category *fath adz-Dzari'ah*. If there are requirements, they are still within reasonable limits that can be pursued. In addition, polygynous marriage can be performed before the Marriage Registrar witnessed by the first wife.

**Keywords:** alternative condition; cumulative condition; polygyny.

## Introduction

Primarily, the principle of marriage in the family structure is monogamy<sup>1</sup>-- a marriage in which a husband is married only to one wife. In reality, this monogamous marriage model is common simply because it represents human nature.<sup>2</sup> However, polygyny—a marriage involving more than one wife--also exists.<sup>3</sup> It is also known as a condition where a husband has up to a maximum of four wives at a time.<sup>4</sup> Modern Muslim countries such as Tunisia, Saudi Arabia, and Indonesia regulate this polygyny in separate rules (laws). Polygyny rules in those countries can be classified into three categories; first, countries that prohibit the practice of polygyny, such as Turkey and Tunisia; second, countries that allow polygyny with relatively strict conditions as Pakistan, Egypt, Morocco, Indonesia, and Malaysia; third, countries that relax the bans on polygyny practices like in Saudi Arabia, Iran, and Qatar.<sup>5</sup>

The existence of the different rules regarding polygyny arose from the fact that it is a sensitive and controversial issue inseparable from various opinions in society. Some feel that the image of polygamous families is controversial and heartbreaking, while others see it as a cause of loss of confidence for the wife. On the other hand, polygyny also triggers suspicion and jealousy felt by all family members, even to the point of emotional suffering related to affection, attention, and finances.<sup>6</sup> Polygyny today is no longer relevant to that

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<sup>1</sup>Emmanuel Olusanjo Bamgbade dan Timo Salovitta, “School Performance of Children from Monogamous and Polygamous Families in Nigeria”, *Journal of Black Studies*, no. 7(2014): 621. <https://doi.org/10.1177/0021934714544960>

<sup>2</sup>Imam Machali, “Poligami dalam Perdebatan Teks dan Konteks: Melacak Jejak Argumentasi Poligami dalam Teks Suci” *Jurnal Palastren*, no. 1(2015): 38-39. <https://journal.iainkudus.ac.id/index.php/Palastren/article/view/933>

<sup>3</sup>Mustafa Ozkan, Abdurrahman Altindag, Razmi Oto, dan Erin Sentunali, “Mental Health Aspects of Turkish Women from Polygamous Versus Monogamous Families” *International Journal of Social Psychiatry*, no. 3 (2006): 214. <https://doi.org/10.1177/0020764006067207>. Lihat juga

<sup>4</sup>Abdul Helim, *Menelusuri Pemikiran Hukum Ulama Banjar Kontemporer*, (Malang: Intelegensia Media, 2018), 25. Lihat juga Marzuki, “Poligami dalam Hukum Islam”, *Jurnal Civics: Media Kajian Kewarganegaraan*, no. 2(2005): 3. <https://journal.uny.ac.id/index.php/civics/article/view/4376>.

<sup>5</sup>Muhammad Roy Purwanto, Tamyiz Mukharrom, M. Roem Syibly, and Ahmad Nurozi, “Polygamy in Muslim Countries: A Comparative Study in Tunisia, Saudi Arabia, and Indonesia”, *Advances in Economics, Business and Management Research*, vol. 168(2021): 435. <https://doi.org/10.2991/aebmr.k.210305.082>.

Sumanto Al Qurtuby, “Between Polygyny and Monogamy: Marriage in Saudi Arabi and Beyond”, *Al-Jami'ah: Journal of Islamic Studies*, vol. 60, no. 1(2022): 29. <https://doi.org/10.14421/ajis.2022.601.29-62>; Ali Trigiyan, “Poligami di Tunisia; Studi Alasan Pelarangan Poligami”, *HIKMATUNA: Journal for Integrative Islamic Studies*, vol. 3, no. 1(2017): 41-57. <https://doi.org/10.28918/hikmatuna.v3i1.1051>; Farooq-e-Azam, Iram Rubab, Ambreen Salahuddin, and Ahmed Usman, “Polygamy in Islam: Cultural Pressures and Religious Justifications in Pakistan”. *Journal of Islamic Thought and Civilization*, 11, 2(2021): 246-257. <https://doi.org/10.32350/jitc.112.13>

<sup>6</sup>Iriani Ambar, “A Structural Equation Model for Polygamy Review in Islamic Education of Parepare City”, *Advances in Social Science, Education and Humanities Research*, vol. 231(2018): 672. <https://doi.org/10.2991/amca-18.2018.184>

at the time of the Prophet.<sup>7</sup> Nowadays, polygyny is closely related to male lust and desire,<sup>8</sup> working like a poison that can ruin the sustainability system of the household concerned.<sup>9</sup> However, polygyny does occur in society in contrast with the situation where the wife suffers from coercion and social pressure.<sup>10</sup>

Notwithstanding the problems that polygyny may bring, polygyny is recognized by law and mentioned in the sources of Islamic law. To ensure that polygyny is exercised with the spirit of the Quran and the Prophet's hadiths, polygyny must involve a judicial process at a Court. At least this process is intended to reduce negative assumptions about polygyny. Article 4, paragraph (2) of Law Number 1 of 1974 concerning Marriage sets forth one of the rules regarding polygyny implying that the court may grant permission for polygyny if the wife is unable to fulfill her duties as a wife, has a physical disability or an incurable disease or is unable to bear offspring. Article 5, paragraph (1) states that the application to the Court, as referred to in Article 4, paragraph (1), must meet the requirements as the wife's consent, the certainty that the husband can guarantee the needs of the wives and their children's lives, and assurance that the husband will treat his wives and children fairly.<sup>11</sup>

The problems in this rule seem to only allow for polygyny with certain conditions, as stated in Article 4 paragraph (2). If one of these conditions is met, then it continues to fulfill the contents of Article 5, paragraph (1) of Law Number 1 of 1974. If these two articles are considered more, it seems that Law Number 1 of 1974 does not allow polygyny to take place in Indonesia. The rule in Article 3 paragraph (2) states that a court can permit a husband to practice polygyny if desired by the parties, but it seems difficult to implement. It is, however, complete nonsense for men to expect the conditions referred to in Article 4 paragraph (2) just to legitimate themselves to do polygyny. A husband must wait for the conditions where his wife is no longer able to carry out her obligations as a wife, suffers from a physical disability or an incurable disease, or cannot bear children in order to practice polygyny. That is, in terms of consistent adherence to the rules, polygyny seems to be a lurking fate that may or may not occur. Likewise, when the condition of a husband who has obtained permission from his wife as referred to in Article 5 paragraph (1), but the wife's condition is not as stated in Article 4 paragraph (2), the wife's consent allowing for polygyny is finally invalidated. The above two articles seem complicated to apply and

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<sup>7</sup>Agus Sunaryo, "Poligami di Indonesia (Sebuah Analisis Normatif-Sosiologis)", *Jurnal Studi Gender dan Anak*, no. 1(2010): 164. <http://ejournal.uinsaizu.ac.id/index.php/yinyang/article/view/265>

<sup>8</sup>Nadia A. Nasser-Najjab, "Polygamy, Family Law, and the Crisis of Governance in Palestine", *Journal of Family Issues*, no. 8, (2013): 1094. <https://doi.org/10.1177/0192513X13493279>. Lihat juga Alean Al-Krenawi, "Polygamy, Islam, and Marital Justice", *Psychosocial Impact of Polygamy in the Middle East*, (2014): 51. [https://doi.org/10.1007/978-1-4614-9375-4\\_3](https://doi.org/10.1007/978-1-4614-9375-4_3).

<sup>9</sup>Teten Jalaludin Hayat, "Marriage Affair in Islamic Law Antrhopolgy Perspective", *Mutawasith: Jurnal Hukum Islam*, no. 1(2021): 21. <https://doi.org/10.47971/mjhi.v4i1.303>

<sup>10</sup>Ertan Yilmaz dan Lut Tamam, "The Relationship Between Polygamy and Psychiatric in Turkish Women", *International Journal of Social Psychiatry*, no. 8(2018): 826. <https://doi.org/10.1177/0020764018814275>

<sup>11</sup>Kumpulan Kitab Undang-Undang Hukum KUH Perdata, KUHP, dan KUHP, (t.k: WIPRESS, 2008), 387-388. Also see Helim, *Menelusuri Pemikiran Hukum Ulama Banjar Kontemporer*, 26.



have not provided a solution for those who expect polygyny. Departing from this complexity, this research is more focused on the complexity of the two articles to obtain legal certainty. There have been several studies discussing a similar matter that also considered *adz-Dzari'ah* theory.

## Method

This normative legal research employed primary, secondary, and tertiary data.<sup>12</sup> The main objective is to examine the legal principles of positive law<sup>13</sup> formulated in written or unwritten forms.<sup>14</sup> Thus this study attempts to sort out the legal aspects of polygyny in alternative and cumulative conditions against the legal provisions of polygynous marriages in Indonesia. The approach used referred to legal philosophy. Materials related to alternative and cumulative conditions in Law Number 1 of 1974 concerning marriage were studied and analyzed based on Critical Legal Studies<sup>15</sup> and *adz-Dzari'ah* theory.

## Result and Discussion

### Alternative and Cumulative Conditions in Polygyny Permits

An alternative condition (also known as facultative) in a polygyny permit is the designation referred to in Article 4, paragraph (2) of Law Number 1 of 1974 concerning Marriage. The term alternative or facultative referred to in the article is that a husband can be permitted to do polygyny if the wife's condition, for example, is physically disabled or unable to carry out her obligations as a wife or can not bear children.<sup>16</sup> There are three alternatives in the article. If one of these conditions happens to the wife, a husband is permitted to practice polygyny. On the other hand, if the wife is in good health, not physically disabled, can carry out her obligations as a wife, and is productive in giving birth to offspring, there should be no other reasons that allow the husband to practice polygyny.

The cumulative condition in the polygyny permit is the designation referred to in Article 5, paragraph (1) of Law Number 1 of 1974 concerning Marriage. The cumulative referred to in the article means that the court can only grant permission for polygyny if all the requirements in Article 4 paragraph (2) and Article 5 paragraph (1) have been fulfilled.<sup>17</sup> Polygyny aims to prevent a man from committing adultery.<sup>18</sup> This term refers to an effort to prevent the emergence of disasters due to the uncontrollable lust that has overtaken someone and cannot be resisted by the power of godliness.<sup>19</sup> It is mentioned in other

<sup>12</sup>J. Supranto, *Metode Riset: Aplikasinya Dalam Pemasarannya*, (Jakarta: Rineka Cipta, 2006), 112-113. Also see Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif*, (Jakarta: RajaGrafindo Persada. 2003), 13-14.

<sup>13</sup>Bambang Sunggono, *Metodologi Penelitian Hukum*, (Jakarta: Raja Grafindo Persada, 2003), 27.

<sup>14</sup>Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI Press, 1996), 63.

<sup>15</sup>I Gede Arya Kusuma, Analisis Pasal 4 Ayat 2 Huruf a Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan Terkait Poligami, *Acta Comitatus: Jurnal Hukum Kenotariatan*, no. 1(2020): 72. <https://doi.org/10.24843/AC.2020.v05.i01.p06>

<sup>16</sup>Zaitunah Subhan, *Menggagas Fiqh Pemberdayaan Perempuan*, (Jakarta: el-Kahfi, 2008), 202.

<sup>17</sup>Dian Latifiani, "Implementasi Syarat Berpoligami Menurut UU No. 1 Tahun 1974: Studi di Kota Semarang", *MMH*, 2 (2013), 553.

<sup>18</sup>Muhammad Yusuf Qardhawi, *Al-Halal wal Haram Fil Islam*, (Beirut: Darul Fikri, 1995), 235.

<sup>19</sup>Departemen Agama RI, *Tuntunan Keluarga Sakinah Bagi Usia Nikah: Seri Agama*, (Jakarta: Dirjen Bimas Islam dan Penyelenggaraan Haji, 2007), 37.

sources that the purpose of polygyny is to produce offspring, especially when the husband is fertile and the wife infertile. Therefore, to avoid divorce and in terms of the condition where the wife fails to meet the requirements as a wife, the husband can do polygyny. In other words, polygyny is applied to maintain the integrity of the family without divorcing a wife when she cannot carry out her functions as a wife or the wife suffers from a disability or an incurable disease. Another goal is to avoid and save the husband from adultery and other moral crises. The thing that needs attention is that, on the other hand, the purpose of polygyny is to salvage women from moral crises, considering that the population of men outweighs that of women.<sup>20</sup>

Polygyny, as mentioned in Q.S. an-Nisa [4] verse 3<sup>21</sup>, was initially related to the property of orphans. If this guardian of the orphan cannot act justly or manage himself due to his interest in the orphan's wealth, then if he marries her, it should not be to spend the orphan's wealth. When the time comes, she should marry someone else. Even if this guardian finds the right woman to marry, including women under his guardianship (after giving the rights of women under his guardianship perfectly), then he may marry them in a polygynous manner while still complying with the terms and conditions (such as waiting period, provision of sustenance, residence, and other necessary materials). However, this verse also states that choosing a monogamous marriage is the best way.<sup>22</sup> In this verse, the phrase "*fankihu ma thaba lakum*"--a word of command to marry the women they like--is not an obligation. Polygyny is basically categorized as *mubah* (optional and permissible). In addition, Allah has revealed the meaning of "woman" by using the word "*maa*", which is usually used to denote the meaning of "something that does not make sense", and Allah does not use the phrase "*man thaaba*" (with the word "*man*" which means who).<sup>23</sup> M. Quraish Shihab stated in his book Tafsir Al-Misbah that mentioning two, three, or four means that it needs to be underlined that polygyny is not a recommendation because this verse only provides a place for those who wish to practice it. This verse implies that polygyny is not a recommendation nor is it an obligation. Instead, polygyny should be deemed a solution to a condition that requires polygyny to take place.<sup>24</sup>

Muhammad Syahrur<sup>25</sup> acknowledged the validity of polygyny, as confirmed in the letter an-Nisa [4] verse 3. Syahrur considered that in viewing the verse as a *hududiyah*

<sup>20</sup>Abdurrahman Al-Ghazali, *Fikih Munakahat*, (Jakarta: Kencana Prenada Media Group, 2006), 21.

<sup>21</sup>Departemen Agama RI, *Al-Qur'an dan Terjemahnya*, (Jakarta: Proyek Pengadaan Kitab Suci Al-Qur'an, 1995), 61.

<sup>22</sup>Syaikh Asy-Syanqithi, *Tafsir Adhwa'ul Bayan*, translated by Fathurazi, (Jakarta: Pustaka Azzam, 2006), 618-619.

<sup>23</sup>Syaikh Asy-Syanqithi, *Tafsir Adhwa'ul Bayan*, 619.

<sup>24</sup>Quraish Shihab, *Tafsir Al-Misbah: Pesan, Kesan, dan Keserasian Al-Qur'an*, (Ciputat: Lentera Hati, 2000), 324-325. Lihat Syaikh Imam Al-Qurthubi, *Tafsir Al-Qurthubi*, translated by Ahmad Rijali Kadir, (Jakarta: Pustaka Azzam, 2008), 43.

<sup>25</sup>Muhammad Syahrur. Born in Damascus, Syria on April 11, 1938, Muhammad Syahrur's thoughts came into contact with and were influenced by the thoughts of Hegel and Marxism when he was studying for the Master and Doctoral Program at the University of Ireland in the field of specialization in soil mechanics (*al-handasah al-turbah*) and foundation engineering (*al-handasah al-asasah*). Even though Muhammad Syahrur's educational background is in the field of engineering, especially land engineering, he is very interested in





verse, then the verse can contain limitations on the determination of the law, both in terms of quantitative legal determination (*hudud al-Kamm*) and qualitative legal limits (*hudud al-Kayf*). According to Muhammad Syahrur, this verse falls into the theory of *al-had al-a'la* and *al-had al-adna*. If included in this theory, then quantitatively, polygyny can be justified in the context of marrying a woman with a minimum limit of 1 (one) and a maximum of 4 (four). Qualitatively, the first wife does not look at whether she is still a virgin or a widow, but the second and subsequent wives must be widows. Second, this limitation must be considered simultaneously in the practice of polygyny.<sup>26</sup> In holding a monogamous marriage regulated by the domicile, the domicile law is also authorized to regulate monogamous and polygynous marriages.<sup>27</sup>

### **Conflict of Alternative versus Cumulative Conditions in Polygyny Permits Alternative versus Cumulative Conditions from the Perspective of *Critical Legal Studies* Theory**

There are two written requirements for practicing polygyny based on Law Number 1 of 1974 concerning Marriage. They seem to be interrelated to fulfill. First, in terms of the alternative condition,<sup>28</sup> polygyny is allowed if the wife is physically disabled, cannot carry out her obligations as a wife, and cannot give birth (Article 4 Paragraph 2 of Law Number 1 of 1974 concerning Marriage). Second, in terms of the cumulative condition,<sup>29</sup> based on the previous article, permission for polygyny can be granted if the husband has obtained written or oral consent (in court) from the current wife. Then the husband also guarantees and can act equitably in meeting the needs of his wives and children (Article 5 Paragraph 1 of Law Number 1 of 1974 concerning Marriage).<sup>30</sup> Another provision states that in

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Islamic issues, especially in Islamic discourse. This concern is expressed in several of his works, such as *al-Kitab wa al-Qur'an Qira'ah Mu'asirah* (1990), *Dirasah Islamiyyah Mu'asirah fi al-Daulah wa al-Mujtama'* (1994), *al-Islam wa al-Iman: Manzumat al-Qiyam* (1996), *Nahwa Usul Jadidah li al-Fiqh al-Islami* (2000), and *Tajiff Manabi' al-Irhab* (2008). Muhammad Syahrur said that readers of the Qur'an are positioned in two models; First, they are positioned like a friend in the early Islamic period. In historical records, they were taught the Koran directly by the Prophet Muhammad; Second, they are positioned as a friend who had just died by Muhammad saw as their prophet. With this position, an understanding will be built that is always relevant in any context and dimension. Muslihin, "Muhammad Syahrur's Short Biography", 03 September 2019, accessed on 28 January 2022 <https://www.referensimakalah.com/2019/09/biografi-singkat-muhammad-syahrur.html>

<sup>26</sup>Tamyiz Muharram, "Kritik Konsep Poligami dalam Draft Komplekasi Hukum Islam (KHI) Perspektif Muhammad Syahrur", *Jurnal Al-Mawarid: Jurnal Hukum Islami*. Vol. 15(2006): 91. <http://portalaruda.fti.unissula.ac.id/index.php?ref=browse&mod=viewarticle&article=331549>

<sup>27</sup>J. L. R. Davis, "Capacity To Contract A Polygamous Marriage", *Federal Law Review*, no. 4(1971): 296. <https://doi.org/10.1177/0067205X7300500205>

<sup>28</sup>The word "alternative" means a choice between two or more. This word can also mean another path one can choose from something. However, over time, the word "alternative" is also often accompanied by other adjectives so that it has a slightly different meaning. For example, rock (a type of music) and medicine. Achmad Mudlofir, "Meaning of Alternative Words and Examples of Their Application in Sentences", 15 August 2021, accessed on 13 January 2022, <https://www.caraprofesor.com/arti-kata-alternatif-dan-contohnya/>

<sup>29</sup>In Online KBBI ku.mu.la.tif [a] is concerned with accumulation; additive; occurring from increasingly growing parts; piling up: numerical; data-. Wilma Wumduya, "Cumulative Meanings, significance, understanding, and definition": Kamus Besar Bahasa Indonesia (KBBI) Online", 17 February 2017, accessed on 13 January 2022, <https://artikbbi.com/kumulatif/>

<sup>30</sup>Zaitunah Subhan, *Menggagas Fiqih Pemberdayaan Perempuan*, 202.

alternative requirements, a husband must consider his wife's condition and whether it fulfills one of the mentioned criteria. Furthermore, if one of the conditions meets the requirements, a husband can make an application letter to the Religious Court to obtain a polygyny permit. However, the application can be followed up if all the cumulative requirements are met.

Based on the description, legal deconstruction in the validity of the terms of polygyny is required to allow for tangibility in the matters set out in the Article.<sup>31</sup> The conditions for a polygynous marriage are based on the monogamous marriage system, where proponents of the *feminist* proposed by Luce Irigaray argue that women have the same symbolic order as men.<sup>32</sup> The tendency of alternative terms for polygyny over *feminism* is definitely an effort to prevent polygyny that exclusively considers the moral side of justice. In legal politics, justice is only considered an empty factor such as the *suum cuique*<sup>33</sup> or *tautologi*<sup>34</sup>—meaningless, where one person's actions must be determined only by principles that will bind everyone.<sup>35</sup> This tendency cannot be used as a basic reference for *legal* requirements for polygyny certainly because the legal principles of marriage in Indonesia are (possibly) inconsistent with their validity. Lon Fuller, known as the father of the revival of *natural law theory*, admits that not all ruling legal products (positive law) in the form of legislation/regulation are consistent with the moral principles inherent in the "inner morality" of law.<sup>36</sup>

This basis is a substantial reason why the alternative conditions for polygyny cannot be a legal force for the main requirement of polygyny based on the principle of inner morality. It is like the legal requirements for polygyny in Article 4, paragraph 2 of Law Number 1 of 1974 concerning Marriage as a hope of the husband's morals for his wife to be disabled physically or she does not carry out her obligations to achieve the legal validity of polygyny. Duncan Kennedy, Karl Klare, Kelman, Morton Horwitz, and Roberto M. Unger, who express Critical Legal Studies theory, assume that law may fail in its role to

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<sup>31</sup>Akhyar Yusuf Lubis, *Postmodernisme: Teori dan Metode*, (Jakarta: RajawaliPers, 2014), 42.

<sup>32</sup>Akhyar Yusuf Lubis, *Postmodernisme: Teori dan Metode*, 50.

<sup>33</sup>Sir Paul Vinogradoff developed the *cuique tribue* in his work entitled 'Common Sense in Law' in 1913. Vinogradoff quoted the definition of justice from Domitius Annianus Ulpianus (d. 223 AD), a Roman jurist who was among the most productive. This definition is more often found copied in the original, "*Honeste vivere, alterum non laedere, suum cuique tribuere.*" Re-reading Vinogradoff's quotations and comments on this definition opens up further understanding of the classical topic that this paper seeks to address. *Honeste vivere* explains that justice is an honorable individual life, *alterum non laedere* represents respect for the rights of others that are agreed upon publicly, and *suum cuique* is respect for the rights agreed upon privately. This heteronomous aspect is then more prominent, so that terminological justice has always been identified with social justice. Shidarta, "Justice According to Ulpianus", *Binus University*, 03 November 2014, accessed on 21 January 2022, <https://business-law.binus.ac.id/2014/11/03/keadilan-menurut-ulpianus/>

<sup>34</sup>In Online KBBI *tautologi/tau-to-lo-gi/* pengulangan gagasan, pernyataan, atau kata yang berlebih dan tidak diperlukan. <https://kbbi.web.id/tautologi>, accessed on 21 January 2022 08:32 WIB.

<sup>35</sup>Jimly Asshiddiqie dan M. Ali Safa'at, *Teori Hans Kelsen tentang Hukum*, (Jakarta: Konstitusi Press, 2012), 18.

<sup>36</sup>I Dewa Gede Adjudja dan I Nyoman Putu Budiarta, *Teori-Teori Hukum*, (Malang: Setara Press, 2018), 19.



answer the problems.<sup>37</sup> This theory proves that behind the law and social order, there are political interests that come as something neutral. Actually, it is full of certain interests that are culturally, racially, gender-biased, and even economically driven.<sup>38</sup> The political interests of the basic law of alternative conditions are set forth in Article 4 Paragraph 2, 1974 concerning the Marriage Law, where the Article sounds uncertain about the permissibility of polygyny because it sounds like wishing to practice polygyny is equal to wishing a wife to suffer from a physical disability to grant the practice of polygyny. This situation can be compared to the alternative Article as follows article 4 : (1) In the case that a husband has more than one wife, as in Article 3 Paragraph 2 of this Law, he is obliged to submit an application to the court in the area where he reside; (2) The court referred to in paragraph (1) only gives permission to a husband who wishes to have more than one wife if: a) The wife cannot carry out her obligations as a wife; b) The wife has an incurable disability/disease; c) The wife cannot give birth to offspring (barren/menopause).<sup>39</sup>

The provision in the article above seems to indicate that filing a request to the Religious Court for a polygyny permit requires the person concerned to face at least one of the three alternative conditions that the wife suffers from. These alternative conditions imply that polygyny is less likely to take place as if the disability of a wife were expected in order that cumulative conditions apply. It is what Critical Legal Studies theory suggests that law seems to fail to play its role in addressing the existing problems. The theory rejects the difference between a theory and a practice and also between facts and values, representing the characteristics of liberalism.<sup>40</sup> The Trashing Method (disposal/cleaning) is used to break and reject legal thoughts so that when viewed from the theory of Critical Legal Studies, alternative requirements cannot be used as the basic fundamental for the legality of the permissibility of polygyny.<sup>41</sup>

Not only from the theory of *Critical Legal Studies* on the deviation of polygyny requirements, but Muhammad Syahrur, as quoted by Tamyiz Muharram in his journal entitled *Criticism of the Concept of Polygamy in the Draft Complications of Islamic Law (KHI) From Muhammad Syahrur's Perspective*, criticized the scholars over *al-had al-adna* (maximum limit position) in polygyny, and based on the excerpt of QS. An-Nisa' [4] verse 3 in the section “فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً” the scholars argue that marriage is monogamous and is only allowed in an emergency in which the wife is sick, physically weak, and fails to perform her obligations. According to Muhammad Syahrur, this view is unsatisfactory because, in principle, no single verse prohibits the practice of polygyny. Some scholars allow polygyny freely without considering qualitative boundaries, so from this opinion, it is clear that polygyny is a form of the hegemony of men over women.<sup>42</sup>

Attention to the provisions of whether polygynous practices are allowed or not becomes very significant so as not to deviate from the spirit of the Quranic text. In this

<sup>37</sup>Indra Rahmatullah, “Filsafat Hukum Aliran Studi Hukum (Critical Legal Studies); Konsep dan Aktualisasinya dalam Hukum Indonesia”, *Jurnal 'Adalah: Buletin Hukum dan Keadilan*, no. 3(2021): 2. <http://journal.uinjkt.ac.id/index.php/adalah/article/view/21393>

<sup>38</sup>Indra Rahmatullah, “Filsafat Hukum Aliran Studi Hukum (Critical Legal Studies)” : 5.

<sup>39</sup>Kumpulan Kitab Undang-Undang, 388.

<sup>40</sup>Indra Rahmatullah, “Filsafat Hukum Aliran Studi Hukum (Critical Legal Studies)”, 2-3.

<sup>41</sup>Indra Rahmatullah, “Filsafat Hukum Aliran Studi Hukum (Critical Legal Studies)”, 3.

<sup>42</sup>Tamyiz Muharram, “Kritik Konsep Poligami dalam Draft Kompleksasi Hukum Islam (KHI) Perspektif Muhammad Syahrur”, 91-92.



case, Muhammad Syahrur tried to elaborate the logic of the Qur'an by paying attention to the linguistic structure contained in a verse. First, he discusses two keywords in the verse. From an etymological point of view, the two words are قسط (*Qasatha*) and عدلة (*'Adalah*). In Arabic, the pronunciation of each word carries its potential paradoxical meaning, where قسط (*Qasatha*) is a synonym for the word عدلة (*'Adalah*), both of which have different connotations, and the meaning of justice in the word قسط (*Qasatha*) is seen from one way or no comparison while "enforcing justice". The word عدلة (*'Adalah*) carries the meaning of fairness between two parties مسوي بين طرفين مختلفين (*musawa bain tharafain mukhtalifain*).<sup>43</sup>

Therefore, to achieve enforceability and legal certainty, the provisions written in the alternative terms of Article 4 paragraph (2) 1974 of the Marriage Law do not seem to be used as a reference for permits for polygyny. For that matter, the cumulative requirements contained in Article 5 paragraph (1) should be the legal basis as a reference for polygyny. Alternative conditions are only additional or side requirements and even reinforcement in adding the primary condition, namely the cumulative condition.<sup>44</sup> Even if the wife's condition is not as in the alternative requirements, when the wife has allowed polygyny to take place either verbally or in writing, the alternative conditions should not be a barrier to polygyny. The judges at the court should also focus more on the existence of the permit or the cumulative conditions because then all other requirements do not apply if the cumulative conditions are fulfilled.

As a matter of fact, in practice, these alternative conditions do not seem to be applied as written in Law Number 1 of 1974. The legal facts implied in the decision of the East Jakarta Religious Court Number: 717 Rev. G/2012 PAJT indicate that alternative conditions are not used as the primary condition for polygyny. In this decision, an applicant (husband) applies for a polygyny permit. In the household, the applicant and the respondent (first wife) are well-connected and have been blessed with five children. However, on their marriage journey, the applicant secretly remarried another woman as his second wife, and they are blessed with one child from this *sirri* (unregistered) marriage, leaving permanent legal force to the status of a child born from the secret marriage. Since then, the applicant has asked permission from the respondent so that his polygyny is recognized by law. The respondent also gave approval with which the East Jakarta Religious Court granted the applicant's request so that the applicant's marriage to his second wife could be registered at the Office of Religious Affairs (KUA). The granting of this request was because the applicant was able to meet the needs of more than one wife. He runs a business and has a relatively sufficient monthly income to live with his two wives and children, and the applicant has been treating his wives fairly. Law no. 1 of 1974 concerning Marriage, Article 5 Paragraph (1), and the Compilation of Islamic Law Article 58 Paragraph (1) also indicate that the application made by the applicant has fulfilled the conditions allowing for polygyny. In other words, a polygyny permit should also be

<sup>43</sup>Tamyiz Muharram, "Kritik Konsep Poligami dalam Draft Kompleksi Hukum Islam (KHI) Perspektif Muhammad Syahrur", 92-93.

<sup>44</sup>Nadir, "Filsafat Hukum dan Dekonstruksi Critical Legal Studies Sebuah Paradigma Pembaruan Hukum Dalam Menggugat Eksistensi Dominasi Asumsi Kemapanan Hukum", *Jurnal Yustitia Fakultas Hukum Universitas Madura Pemekasan*, no. 2(2019): 161. <http://dx.doi.org/10.0324/yustitia.v20i2.690>



declared by the wife, not only restricted to the conditions that the wife fails to perform her obligations as a wife, that she suffers from a physical disability or an incurable disease, or that she cannot give birth. This implied necessity is highlighted, considering that the Marriage Law still gives access to polygyny, but it only regulates the terms and conditions. In practice, the Religious Courts also issue permits for polygyny quite a lot. This kind of law phenomenon shows that the Marriage Law still opens the way for a husband to have more than one wife as long as the cumulative requirements are met.<sup>45</sup>

### Alternative versus Cumulative Conditions in *Adz-Dzari'ah* Perspective

As stipulated in the Marriage Law, the imposition of new cumulative conditions can be carried out if one of the alternative conditions is met. This provision is specifically set forth in Law Number 1 of 1974, especially Article 5. The existence of this enforcement is tantamount to prohibiting polygyny, especially for husbands who have wives in a condition not stated in Article 4, paragraph (2) of the Law. If this is viewed from the critical legal studies perspective, there is a major problem or a deviation from the rules which impacts the legal uncertainty of polygyny permits. Therefore, it is not an exaggeration when the law regarding polygyny permits in Indonesia is seen as a flaw. This view departs from the provisions that permit polygyny in Article 3 paragraph (2), Article 4 paragraph (1), and Article 5 paragraph (1) of Law Number 1 of 1974 concerning Marriage. On the other hand, the provision in Article 4 paragraph (2) seems to hinder polygyny with its requirements that rarely occur or uncertain waiting times.<sup>46</sup> According to the critical legal studies previously discussed, if a husband can fulfill the cumulative conditions, the right to practice polygyny is widely open, and the judge can continue the trial with the applicable provisions. Therefore, the alternative conditions should depend on the cumulative conditions, not the other way around. Examined from the *adz-Dzari'ah* point of view, of course, polygyny law also has implications. Previously, the meaning of *adz-Dzari'ah* is explained as an intermediary that can convey something or a particular purpose<sup>47</sup> that can be either beneficial or detrimental.<sup>48</sup>

An intermediary that conveys toward benefit is allowed or even required, while an intermediary that conveys toward harm is prohibited or forbidden. In *adz-Dzari'ah*, it is the result or impact of an act (legal effect). Based on the case, *adz-Dzari'ah* has two possibilities.<sup>49</sup> *Adz-Dzari'ah* that conveys goodness is called *fath adz-Dzari'ah* (it may even require implementation), while what conveys harm refers to *sadd adz-Dzari'ah* (the

<sup>45</sup>Nur Kholis, Jumaiyah, dan Wahidullah, "Poligami dan Ketidakadilan Gender dalam Undang-Undang Perkawinan", *Jurnal Al-Ahkam Universitas Islam Nadhlatul Ulama (UNISNU): Jepara*, no. 2(2012): 206. <http://doi.org/10.21580/ahkam.2017.27.2.1971>

<sup>46</sup>Also see Nurhasanah, "Kritik Terhadap Hukum Poligami di Indonesia (Telaah Pasal 3, 4, dan 5 UU No 1 Tentang Perkawinan)", *Jurnal Marwah: Jurnal Perempuan, agama, dan gender*, no. 3(2013): 197. <http://ejournal.uin-suska.ac.id/index.php/marwah/article/view/523>

<sup>47</sup> Ibn al-Qayyim Al-Jauziyah, *I'lam al-Muwaqqi'in an Rabb al-'Alamin*, Vol. IV (Riyadh: Dar Ibn al-Jauzi, 1423 H), 553. Wahbah al-Zuhayli, *Ushul al-Fiqh al-Islami*, Vol. II (Damaskus-Suriah: Dar al-Fikr, 2001), 902. Husayn Muhammad Mallah, *al-Fatwa: Nasy'atuha wa Tathawwuruha – Ushuluha wa Tathbiqatuha*, Vol. II (Beirut: al-Maktabah al-'Ashriyah, 2001), 531.

<sup>48</sup> 'Abd al-Karim Zaydan, *Al-Wajiz fi Ushul al-Fiqh* (Beirut-Lebanon: Mua'assasat al-Risalah, 1998), 245. Muhammad Zakariya al-Bardisi, *Ushul al-Fiqh* (Kairo: Dar al-Tsaqafah, t.th), 354.

<sup>49</sup> Zaydan, *al-Wajiz fi Ushul*, 245.

implementation is not allowed or even forbidden).<sup>50</sup> It is similar to alternative conditions versus cumulative conditions. Whether alternative conditions determine the existence of cumulative conditions (the presence or absence of cumulative conditions depends on the alternative) or conversely, whether cumulative conditions determine the existence of alternative conditions (the presence or absence of alternative conditions does not affect cumulative conditions), both, when examined based on *adz-Dzari'ah* theory, are also between two legal possibilities as well as *sadd adz-Dzari'ah* or as *fath adz-Dzari'ah*.

### Alternative Conditions as the Determinant of Cumulative Conditions

When viewed from Articles 4 and 5 of Law Number 1 of 1974 concerning Marriage, it seems that the spirit that seems legible is an alternative requirement as a determinant of the presence or absence of cumulative conditions because Article 5 paragraph (1) has a dependency on Article 4 paragraph (1) which then paragraph (1) is more specified by Article 4 paragraph (2). That is, notwithstanding the permission given by the wife to the husband to practice polygyny and while the wife is healthy and able to perform her obligations, this permission given does not meet the requirements, causing the rejection of the application. The examination according to the *adz-Dzari'ah* theory indicates that the above rule appears to have the potential for causing a bad thing, unkindness, and even harm. If the result is like those mentioned, then the alternative terms as a determinant of the cumulative conditions are included in *sadd adz-Dzari'ah* or prohibited and forbidden.

There are several legal reasons to corroborate that alternative conditions as determinants of cumulative terms are in the *sadd adz-Dzari'ah* category. They are:<sup>51</sup> Complicating polygyny. It must be admitted that polygyny must be regulated by law. This is none other than so that the polygyny practiced is included as procedural polygyny and with objective measures. However, if the articles mentioned above are still contradictory, unclear, or mutually exclusive, and even contain conflict, rules like this can be categorized as complicating polygyny. In comparison, it seems that these rules bring more benefits than harm. One of the rules of fiqh mentions “درء المفسد أولى على جلب المصالح”<sup>52</sup> that refusing damage takes precedence over taking benefit, which means that the polygyny rule is not in line with the spirit of this fiqh rule; Determination of reasons is too complicated. It results in almost no excuse for polygyny. It must be admitted that in every legal policy, there must also be requirements. Mentioned in one of the sayings of the Prophet Muhammad “المسلمون على شروطهم إلا شرطاً حرم حلالاً أو أحل حراماً (رواه الترمذي)”, Muslims must carry out the conditions that have been agreed upon except for conditions that prohibit what is lawful or allow what is forbidden. Requirements that match the criteria are very important to be implemented,

<sup>50</sup> Mallah, *al-Fatwa: Nasy'atuha*, Vol. II, 531. Abu Zahrah, *Ushul al-Fiqh* (Kairo: Dar al-Fikr al-'Arabi, t.th), 228-229.

<sup>51</sup> Compare with W. E. Buckley, “Polygamy”, *Notes and Queries*, no. 312(1873): 500, <https://doi.org/10.1093/nq/s4-XII.312.500k/>. Also see Alfred Owen Aldrigede, “Population and Polygamy in Eighteenth-Century Thought”, *Journal of the History of Medicine and Allied Sciences*, no. 2(1949): 129. <https://doi.org/10.1093/jhmas/IV.2.129>.

<sup>52</sup> Ali Ahmad an-Nadwi, *al-Qawa'id al-Fiqhiyah: Mafhumuha Nasy'atuha Tathawwuruha Dirasah Mu'allafatiha Adillatuha Muhimmatuha Tathbiqatuha* (Damaskus: Dar al-Qalam, 2000), 207.



those allowed are people who are eligible and meet the requirements. However, it seems that the conditions specified above cannot be fulfilled just through human effort. Precisely what determines here is the fate or destiny of a husband. If he has a wife not belonging to the condition stated in Article 4 paragraph (2), his hopes for polygyny will vanish because he is not eligible for a polygyny practice. In other words, even though the cumulative conditions can be fulfilled but the wife's condition does not match the alternative conditions, polygyny cannot take place. Requirements like this do not seem to lead to something good, even though every policy drawn up by the government should bring benefit for at least some of the people. Therefore, the determination of these alternative terms does not seem to be in line with one of the fiqh rules “تصرف الإمام على الرعية منوطاً بالمصلحة”.<sup>53</sup>

This can happen because the existence of cumulative conditions depends on alternative requirements. The result is none other than as described in this discussion. If this happens, many polygyny practices may be exercised outside the supervision of PPN. As it is happening in society, many marriages are not registered. Of course, among these people, there are polygamous couples who are married without supervision. Such a situation is recognized as bringing badness because more and more people practice undocumented polygyny. There is also an impact on society or the person doing polygyny in terms of the rights that cannot be protected. Children from this practice are not recognized as legitimate children from legal marriages by law. Likewise, the wife cannot prove that she is a legal wife. In addition, a husband also experiences the impact. For example, at one point he could not claim to be the heir of this marriage because there was no proof that he was the husband. From a legal point of view, it also experiences a similar impact that the implementation of the law is ineffective. Therefore, this condition deserves to be called harm. In Islamic law as in the rule of fiqh, “الضرر يزال”<sup>54</sup> the harm must be removed. If the above rules are still maintained, they are contrary to the fiqh rule so the determination of alternative conditions to the cumulative conditions is in the *sadd adz-Dzari'ah* category.

Polygyny is done without the knowledge of the first wife.<sup>55</sup> If the position of cumulative conditions still depends on alternative conditions, other impacts will also arise, both for husbands and wives, including the law of polygyny itself. At least there will be a polygyny practice without the wife's permission or knowledge of the wife, and it is even carried out wildly and unrestrictedly. For example, if a husband sees his wife's condition not as stipulated in Article 4 paragraph (2) while he needs to practice polygyny, it is almost certain that the husband considers that he does not need to ask permission from his first wife to do polygyny. This consideration is most likely to be taken by the husband because rather than causing problems with the wife for asking permission, which the wife may not necessarily give, also the wife's condition is still prime so that it is not included in the category of alternative conditions. It leads to the thought believing that it is better to do polygyny without the permission or the knowledge of the first wife. Such a polygyny

<sup>53</sup> 'Azat 'Abdul al-Du'as, *al-Qawa'id al-Fiqhiyah ma'a al-Syarh al-Mujaz* (Damaskus: Dar al-Tirmidhi, 1989), 107.

<sup>54</sup> Muhammad 'Utsman Syibir, *al-Qawa'id al-Kulliyah wa al-Dhawabith al-Fiqhiyah fi asy-Syari'ah al-Islamiyah* (Yordania: Dar al-Nafa'is, 2006), 163.

<sup>55</sup> Compare it with Haris Hidayatullah, “Adil Dalam Poligami Perspektif Ibnu Hazm”, *Religi: Jurnal Studi Islam*, no. 2(2015): 218. <http://journal.unipdu.ac.id/index.php/religi/index>



practice is deemed to be serious harm. In this condition, often the wife and children of this marriage are certainly shocked and could hardly accept it because they did not expect the polygyny to happen in their family. On the other hand, harm also occurs to the wife and children from the second or subsequent marriages. This includes the rights of husbands with second and subsequent marriages that cannot be protected. The next serious harm is when polygyny is carried out without limits involving more than four wives, which is also seen as contrary to religion. Particularly polygyny that complies with a limited number of a maximum of four wives, for certain people, is a necessity. Mentioned in one of the fiqh rules “الحاجة تنزل منزلة ضرورة عامة كانت أو خاصة”<sup>56</sup>, the position of polygyny for certain people occupies a very important category. Therefore, if maintaining the alternative condition that is more determinant in granting polygyny permits, including determining the cumulative conditions, the regulation is considered contrary to the fiqh rule.

Based on the explanation of the points above, it can be explained more if the cumulative condition still depends on the alternative condition, or in other words, the cumulative condition does not become an independent condition or the alternative condition is more decisive in the polygyny permission. Thus, it refers to a shortcoming, badness, or harm that is very likely to happen, thereby making alternative conditions a determinant of cumulative conditions included in the category *sadd adz-Dzari'ah*. The fiqh rule states in “مأذى إلى الحرام فهو حرام”<sup>57</sup> that what leads to something forbidden is forbidden, so making alternative conditions a determinant of cumulative conditions is deemed forbidden.

### Independence of Cumulative Conditions and Elimination of Alternative Conditions

If alternative conditions as determinants of cumulative requirements fall into the *sadd adz-Dzari'ah* (forbidden) category, then the step taken is to make a cumulative condition an independent condition. Whatever the wife's conditions are, if she allows her husband to practice polygyny, it can be immediately processed and even approved by the court. With the independence of the cumulative condition, the alternative condition is automatically not needed and deserves to be eliminated. According to *adz-Dzari'ah* theory, the independence of cumulative requirement can lead to goodness, utility, or benefit. It is called so because the alternative and cumulative conditions attract each other's authority. In this section, the alternative condition is deemed to have failed. The failure can be seen from the explanation regarding the non-achievement of alternative conditions as solutions. When alternative conditions are considered unsuccessful in bringing the benefit, the opposite is that cumulative conditions can lead to goodness, utility, or benefit. In other words, only by making a cumulative requirement independent, the benefit of polygyny permits can be achieved. It seems to be in line with one of the fiqh principles, “مالايتم الواجب“

<sup>56</sup> Muhammad Shidqi ibn Ahmad al-Burnu, *al-Wajiz fi Idhah Qawa'id al-Fiqh al-Kulliyah* (Riyadh: Mu'assasah ar-Risalah, 1982), 149.

<sup>57</sup> A. Djazuli, *Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam dalam Menyelesaikan Masalah-Masalah yang Praktis* (Jakarta: Kencana Prenada Media Group, 2007), 32.



إلا به فهو واجب<sup>58</sup> implying that the attainment of benefit is not perfect if the cumulative condition is not made independent, then that independence is essential. In the *adz-Dzari'ah* theory, the attainment of benefit as described can be categorized as *fath adz-Dzari'ah*.

It means *fath adz-Dzari'ah* with the independence of the cumulative requirement, seen as having a beneficial value in making polygyny easier,<sup>59</sup> which is fundamentally permissible according to the law. Besides, conditions that seem complicated and far-fetched and even seem to close off all possibilities for polygyny as in the alternative terms can be minimized or even eliminated in the permit to polygyny. In this way, when a husband has obtained permission from his wife to practice polygyny and has also received approval from the court, it is almost assured that polygyny will be carried out in the presence of a Marriage Registrar (PPN). If it is done, it is also ensured that polygyny is known by the first wife. On the other hand, it must also be acknowledged that no matter how permission is obtained from the wife, as a human, there may be broken hearts, either from the first wife herself or from her children. Such a situation is often acceptable and common, but it is bitter and bad simply because it causes harm. However, even though there is harm in making a cumulative condition independent, the harm faced is not as substantial as the harm in making the alternative condition a determinant of the cumulative condition. In one of the fiqh rules “إذا تعارض مفسدتان روعي أعظمهما ضررا بارتكاب أخفهما”<sup>60</sup> if two harms are contradicting with each other, then take the lesser harm. If it is related to this problem, then either the cumulative condition is independent or the alternative condition is the determinant of the cumulative condition, both of which equally contain harm. However, the harm of the cumulative condition independence is smaller than the harm of making the alternative condition the determinant. Therefore, based on the fiqh rules, the decision taken is the lesser harm which in this case is the independence of the cumulative condition.

## Conclusion

Based on the results of the study that have been carried out, especially through critical legal studies theory, in order to achieve enforceability and legal certainty, the alternative condition in Article 4 paragraph (2) of 1974 concerning the Marriage Law cannot be used as a reference for polygyny permits. Indeed, it is the cumulative condition as Article 5 paragraph (1) that should be the legal basis of polygyny reference. The alternative condition should only be an additional or side condition or even just as reinforcement in adding the primary condition, the cumulative condition. Even if the wife's conditions do not meet the requirements of the alternative conditions after she has given permission for polygyny, either verbally or in writing, the alternative condition should not be a barrier. The judges at the court should also focus more on the existence of the permit or the cumulative condition because all other conditions do not apply if the cumulative condition has been fulfilled.

<sup>58</sup> Tajuddin 'Abd al-Wahhab ibn 'Ali ibn 'Abd al-Kafi as-Subki, *al-Asybah wa an-Nazha'ir*, Vol. II (Beirut-Lebanon: Dar al-Kutub al-'Ilmiyah, 1991), 88.

<sup>59</sup>See Aurangzaib Alamgir, “Islam and Polygamy: A Case Study in Malaysia”, *Journal Procedia-Social and Behavioral Sciences*, Vol. 114(2018): 892. <https://doi.org/10.1016/j.sbspro.2013.12.803>.

<sup>60</sup> Shalih ibn Ghanim as-Sadlan, *al-Qawa'id al-Fiqhiyah al-Kubra wama Tafarra' anha* (Riyadh: Dar Balansiah, 1417), 527.

Furthermore, through *adz-Dzari'ah* theoretical studies, both the alternative and the cumulative conditions are equally in between the two possible laws as *sadd adz-Dzari'ah* or *fath adz-Dzari'ah*. The use and maintenance of alternative conditions as determinants of the cumulative condition can result in several harms. For example, complicated access to polygyny may lead further to the likelihood of uncontrollable polygyny without the supervision of the Marriage Registrar and the wife's knowledge. Based on these harms, the alternative conditions that determine the cumulative conditions are in the *sadd adz-Dzari'ah* category, which includes prohibited or forbidden. On the contrary, if the cumulative condition becomes independent and does not depend on alternative conditions, it actually contains benefits. The practice of polygyny is still permissible, and although there are requirements, they are within acceptable limits. In addition, it is almost certain that the wedding ceremony will take place in the presence of a Marriage Registrar and the knowledge of the first wife.

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