

Conservatism on Islamic Legal Maxims: Judicial Interpretation of Polygamous Marriage at the Religious Courts of Mojokerto, Indonesia

Konservatisme dalam Kaidah Fikih: Interpretasi Yudisial pada Perkawinan Poligami di Pengadilan Agama Mojokerto, Indonesia

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Abstract: This article explores religious judges' interpretations of Islamic legal maxims through a content analysis of 30 verdicts that granted permission for husbands' polygamous marriages issued by the Religious Court of Mojokerto in Indonesia from 2020 to 2022. Despite governmental efforts to restrict polygamous marriage practices due to potential negative consequences, religious judges often grant permission to husbands, considering a balance between *maṣlaḥah* (public good) and *mafsadah* (harm). Employing a normative-philosophical approach, this article identifies two recurring Islamic legal maxims consistently applied by judges: "*dar'u al-mafāsīd muqaddamun 'alā jalb al-maṣāliḥ*" and "*idhā ta'ārada maṣḥadaṭānī rū'iyā a'ḥamuhumā ḍararan bi al-'irtikābi akhaffihimā*." However, their legal interpretations regarding *maṣlaḥah* and *mafsadah* reinforce the husband's interest in the case of polygamous marriage. Thus, the authors argue that the interpretations of these legal maxims in practice reflect a conservative perspective that strengthens patriarchal hierarchies. These findings highlight that Islamic legal maxims as legal principles within Islam have not yet effectively functioned as an instrument of protection for vulnerable groups, especially women and children.

Keywords: Legal Interpretation, Conservative Interpretation, Religious Courts, Islamic Legal Maxims, Polygamous Marriage.

Abstrak: Artikel ini menggali interpretasi kaidah fikih (*al-qawā'id al-fiqhiyah*) oleh para hakim agama melalui analisis konten terhadap 30 putusan izin perkawinan poligami suami yang dikeluarkan oleh Pengadilan Agama Mojokerto, Indonesia, pada tahun 2020-2022. Meskipun pemerintah telah membatasi praktik perkawinan poligami karena potensi dampak negatifnya, para hakim agama sering memberikan izin kepada suami dengan mempertimbangkan keseimbangan antara kemaslahatan dan kemudharatan. Dengan pendekatan normatif-filosofis, penelitian ini mengidentifikasi dua kaidah fikih yang secara konsisten diterapkan oleh para hakim agama: "*dar'u al-mafāsīd muqaddamun 'alā jalb al-maṣāliḥ*" dan "*idhā ta'ārada maṣṣadaṭānī rū'iyā a'ḏamuhumā ḏararan bi al-'irtikābi akhaffihimā*". Namun, interpretasi hukum yang mereka gunakan dalam konteks kemaslahatan dan kemudharatan cenderung memperkuat kepentingan suami dalam mengajukan izin perkawinan poligami. Dengan demikian, para penulis berargumen bahwa interpretasi kaidah fikih dalam praktik ini mencerminkan pandangan konservatif yang memperkuat hierarki patriarki. Temuan ini menyoroti bahwa penggunaan kaidah fikih sebagai prinsip hukum dalam Islam belum mampu berfungsi sebagai instrumen perlindungan bagi kelompok rentan, terutama perempuan dan anak-anak.

Kata Kunci: Interpretasi Hukum, Interpretasi Konservatif, Pengadilan Agama, Kaidah Fikih, Perkawinan Poligami.

A. Introduction

Several Muslim-majority countries, including Indonesia, have enacted legislative changes concerning polygamous marriage.¹ The Marriage Law No. 1 of 1974 mandates that a husband seeking a polygamous marriage must apply for permission from the religious court.² However, polygamous marriages often occur without obtaining official recognition from the government³ due to limitations in terms of reasons and administrative requirements.⁴ This phenomenon of unregistered polygamous marriages carries the potential for adverse effects,

¹ Euis Nurlaelawati, "Expansive Legal Interpretation and Muslim Judges' Approach to Polygamy in Indonesia," *Hawwa* 18, no. 2-3 (October 28, 2020): 295-324.

² "Marriage Law No. 1 of 1974," Article 4 paragraph (1).

³ See: Sam'ani Sam'ani et al., "Pragmatism of Polygamous Family In Muslim Society: Beyond Islamic Law," *Samarah: Jurnal Hukum Keluarga dan Hukum Islam* 7, no. 1 (March 31, 2023): 321-40; Agus Satory Mustaqim, "Polygamy Marriage Law without Court Permits in Indonesia," *PalArch's Journal of Archaeology of Egypt/Egyptology* 17, no. 7 (November 20, 2020): 16340-51.

⁴ Lutfiana Dwi Mayasari, Akmal Adi Cahya, and Ulfa Wulan Agustina, "Islamic Justice in Indonesia Polygamy Regulation on Asghar Ali Engineer's Perspective," *Al-Mazaahib: Jurnal Perbandingan Hukum* 9, no. 1 (September 12, 2021): 1-20.

particularly on women.⁵ While some polygamous marriages are harmonious, this practice also contributes to an increased divorce rate. In this context, women have taken legal action by filing for divorce to resist the dominance of localized interpretations by religious court judges who approve of polygamous marriage.⁶

Despite existing restrictions on polygamy in Indonesia,⁷ judges within religious courts frequently grant husbands permission for polygamous marriages.⁸ This scenario becomes evident through analyzing 30 verdicts from the Mojokerto Religious Court. In 23 of the 30 verdicts, judges consistently employed Islamic legal maxims (Indonesian: *kaidah fikih*) to approve polygamous marriage applications. Using Islamic legal maxims in these verdicts does not contravene the law; judges are encouraged to refer to specific principles within statutory regulations or unwritten legal sources, including Islamic legal maxims.⁹ Interestingly, the template for draft verdicts provided by the Religious Courts of Justice (Badilag) explicitly specifies primary Islamic legal sources that must be cited, such as the Qur'an, hadith, Islamic legal maxims, and the Compilation of Islamic Law (KHI).¹⁰ This incorporation of Islamic legal maxims aids judges in evaluating the potential benefits and drawbacks of polygamy permit applications.¹¹ For this reason, this study aims to delve into how the application of these Islamic legal maxims influences judges' verdicts and the subsequent impact on the dynamics of polygamous marriage practices in Indonesia.

⁵ Theresia Dyah Wirastris and Stijn Cornelis van Huis, "The Second Wife: Ambivalences towards State Regulation of Polygamy in Indonesia," *The Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (May 4, 2021): 246–68.

⁶ Mohamad Abdun Nasir, "Islamic Law and Paradox of Domination and Resistance: Women's Judicial Divorce in Lombok, Indonesia," *Asian Journal of Social Science* 44, no. 1–2 (January 1, 2016): 78–103.

⁷ Nina Nurmila, *Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia*, Women in Asia Series (London: Routledge, 2009), i.

⁸ Nurlaelawati, "Expansive Legal Interpretation and Muslim Judges' Approach to Polygamy in Indonesia," October 28, 2020, 295–324.

⁹ "Judicial Powers Law No. 48 of 2009," Article 50 paragraph (1).

¹⁰ Badan Peradilan Mahkamah Agung, "Standar Format BAS dan Format Putusan Pengadilan Agama/Mahkamah Syar'iyah," accessed May 29, 2023, <https://badilag.mahkamahagung.go.id/seputar-ditjen-badilag/seputar-ditjen-badilag/peradilan-agama-kini-punya-format-bas-dan-putusan-154>.

¹¹ Abdul Halim, "Izin Poligami dalam Bingkai Maqashid Syariah dan Hukum Progresif," *Al-Mazaahib: Jurnal Perbandingan Hukum* 8, no. 2 (2020): 95.

Prior research by various scholars has explored the tenets of Islamic jurisprudence within and outside religious courts. Analyzing 32 fatwas issued by Yūsuf al-Qaradāwī, Shaham discovered widespread use of Islamic legal maxims in contemporary contexts, ranging from politics and public policy to medicine and modern science. However, these maxims are less frequently employed in family law, women's ethics, bank interest, worship, and morals.¹² Within religious courts, Nurlaelawati observed that judges incorporate Islamic legal maxims to evaluate benefits and harms, leading to comprehensive legal interpretations extending beyond polygamy laws.¹³ In a study analyzing 384 religious court verdicts related to Sharia economics between 2016 and 2020, Taufiki et al. found that Islamic legal maxims were utilized as independent foundations to corroborate legal facts and written and unwritten Sharia principles.¹⁴ Regarding the Medan Religious Court's verdicts, Lubis identified two frequently used Islamic legal maxims.¹⁵ For example, in cases concerning marriage dispensation, Rizki found that judges at the Pacitan Religious Court often applied an Islamic legal maxim.¹⁶ Conversely, Zuhdi and Widyawati contended that judges are not obligated by regulations to utilize Islamic legal maxims in their legal deliberations.¹⁷ This article contributes to existing research by not only quantifying the frequency of Islamic legal maxim usage by judges but also focusing on their legal interpretation in various contexts, particularly within polygamy permit applications.

The article employs a normative-philosophical approach and relies on library research. The primary data for this study encompasses 30 polygamy permit

¹² Ron Shaham, "Legal Maxims (Qawā'id Fiqhiyya) in Yūsuf al-Qaradāwī's Jurisprudence and Fatwas," *Journal of the American Oriental Society* 140, no. 2 (2020): 448–49.

¹³ Euis Nurlaelawati, *Expansive Legal Interpretation and Muslim Judges' Approach to Polygamy in Indonesia*, 206.

¹⁴ Muhammad Taufiki, Rokani Darsyah, and Mahmud Ridha, "The Use of Maxims (al-Qawā'id al-Uṣūliyyah wa al-Fiqhiyyah) in Legal Argumentation of Sharia Economic Court Decisions in Indonesia," *Al-Ihkam* 17, no. 1 (2022): 165–88.

¹⁵ Dedi Mahruzani Nur Lubis, "Penggunaan Qawaid Fiqhiyyah dalam Putusan Hakim di Pengadilan Agama Medan," *Taqnin: Jurnal Syariah dan Hukum* 2, no. 1 (June 24, 2020): 1–15.

¹⁶ Muhammad Rizki, "Implementasi Kaidah Fiqhiyah dalam Perkara Dispensasi Kawin di Pengadilan Agama Pacitan" (Institut Agama Islam Negeri Ponorogo, 2023).

¹⁷ Syaifuddin Zuhdi and Rizki Widyawati, "The Islamic Legal Maxims in Consideration of Religious Court Judge," *Proceedings of the International Conference on Community Empowerment and Engagement (ICCEE 2021)* 661, no. Iccee 2021 (2022): 285.

verdicts from the Mojokerto Religious Court spanning the years 2020 to 2022. The authors obtained these verdicts through the Directory of the Supreme Court. The selection of the Mojokerto Religious Court is motivated by its ranking among the top ten courts with the highest number of polygamy license applications in East Java, Indonesia, in 2022. The primary focus of this article centers on identifying the frequently employed Islamic legal maxims by judges and delving into the extent to which their legal interpretations are connected to considerations of benefits and harms. Moreover, the study examines whether Islamic legal maxims play a significant role in safeguarding the rights of women and children within the context of polygamy permit cases.

B. Islamic Legal Maxim and Its Role in the Decision-Making of Religious Court Judges

The concept of Islamic legal maxims (Arabic: *al-qawā'id al-fiqhiyyah*) within the framework of Islamic law has been defined in various ways by different Islamic scholars. For instance, Al-Subkī defines Islamic legal maxims as overarching provisions applicable to branch law, guiding the determination of legal principles.¹⁸ In contrast, al-Zarqā views them as general legal foundations in concise statutory texts, encompassing fundamental principles on diverse legal matters.¹⁹ Meanwhile, al-Ghāzīy regards Islamic legal maxims as both general legal provisions (*qadhīyah kullīyah*) and predominant norms (*qā'idah aghlabiyyah*). When viewed as general provisions, these maxims encompass various branch legal regulations, covering a wide spectrum within the domain of branch legal principles.²⁰ Zakariyah provides a comprehensive definition, characterizing Islamic legal maxims as concise, universally applicable legal rules reflecting the essence

¹⁸ Tāj al-Dīn Abādu al-Wahhāb bin 'Alī bin 'Abdu al-Kāfī al-Subkī, *Al-Āshibah wa al-Nazā'ir* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1991), 11.

¹⁹ Aḥmad bin Muḥammad al-Zarqā, *Sharḥ al-Qawā'id al-Fiqhiyyah* (Beirut: Dār al-Qalam, 1989), 36.

²⁰ Muḥammad bin Aḥmad bin Muḥammad al-Burnū Abī al-Ḥarīṣ al-Ghāzīy, *Al-Wajīz fī Idhāḥ Qawā'id al-Fiqh al-Kulīyyah* (Beirut: Mu'assasah al-Risālah, 1996), 15.

and objectives of Islamic Law. They encapsulate overarching rules addressing their specific focal points.²¹

While interpretations of Islamic legal maxims may vary, their essence revolves around their general nature. Due to this general nature, interpreting these maxims need not delve into every detail,²² as this mirrors the essence of substantive legal frameworks.²³ Positioned as general legal principles, the hierarchy of norms, as outlined by Syamsul Anwar, aptly describes the place of Islamic legal maxims. Anwar categorizes Islamic legal norms into three tiers: *al-mabādī' al-asāsiyyah* or *al-qiyām al-asāsiyyah* (fundamental principles), *al-asās al-kulliyyah* (general principles), and *al-aḥkām al-far'īyyah* (specific legal norms).²⁴ Islamic legal maxims find their place in the second tier of this hierarchy. It aligns with the definition of Islamic legal maxims themselves, which possess versatile applications.²⁵ The consensus among scholars is that Islamic legal maxims constitute universal propositions capable of encompassing various branch cases.²⁶ Consequently, applying and interpreting Islamic legal maxims should ideally not conflict with fundamental principles, encompassing abstract norms such as justice, freedom, equality, interdependence, impartiality, humanity, and compassion.²⁷

The role of Islamic legal maxims in shaping the law is supplementary. This role materializes when these maxims serve as an auxiliary foundation, referring back to the two primary sources: the Qur'an and hadith.²⁸ Al-Nadawī underscores that scholars do not consider this principle the primary basis for legal

²¹ Luqman Zakariyah, *Legal Maxims in Islamic Criminal Law: Theory and Applications* (Leiden: Brill, 2015), 51.

²² Necmettin Kızılkaya, *Legal Maxims in Islamic Law: Concept, History, and Application of Axioms of Juristic Accumulation, Legal Maxims in Islamic Law* (Leiden: Brill, 2020), 43.

²³ Intisar A. Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: Ḥudūd-Avoidance in Cases of Doubt," *Islamic Law and Society* 17, no. 1 (2010): 67.

²⁴ Syamsul Anwar, "Teori Pertingkatan Norma dalam Usul Fikih," *Asy-Syir'ah* 50, no. 1 (2016): 162.

²⁵ Aḥmad bin Muḥammad al-Zarqā, *Sharḥ al-Qawā'id al-Fiqhiyyah*, 34.

²⁶ Kızılkaya, *Legal Maxims in Islamic Law*, 17.

²⁷ See: Mukhammad Nur Hadi, "Metode Ijtihad Kolektif Progresif di Indonesia sebagai Media Proyeksi Nalar Kemanusiaan," *Ma'mal* 4, no. 2 (2023): 161; Faqihuddin Abdul Kodir, *Metodologi Fatwa KUPI: Pokok-Pokok Pikiran Musyawarah Keagamaan Kongres Ulama Perempuan Indonesia* (Cirebon: KUPI, 2022), 161.

²⁸ Johan Efendi, "Kedudukan Kaidah Fikih dalam Ijtihad dan Relevansi dengan Kompilasi Hukum Islam (KHI)" 10, no. 2 (n.d.): 74.

determination. Instead, Islamic legal maxims serve as reinforcement or complement in the presence of a pertinent primary argument (*mubayyin*) in a case. Conversely, when the matter lacks clear guidance from the Qur'an and hadith, Islamic legal maxims can function as independent propositions (*taqrīr* or *taqnīn*).²⁹ In this capacity, they serve as autonomous principles in legal determination without necessitating reference to other primary sources. The Indonesian Ulama Council (Majelis Ulama Indonesia, MUI) has indeed utilized Islamic legal maxims as independent propositions.³⁰

Within the domain of Religious Courts, Islamic legal maxims serve as sources of material law. On February 18, 1968, Religious Bureau Letter No. B/1/735 underscored the encouragement for Religious Court judges to draw from various *fiqh* (Islamic jurisprudence) texts during case examination, decision-making, and case resolution. The application of Islamic legal maxims aligns with relevant *fiqh* texts. Thus, the position of Islamic legal maxims as sources of material law has been embraced by Religious Courts in their decision-making process since 1968.³¹ This designation is also explicitly mentioned in the Badilag verdict draft template issued on April 1, 2014. Judges are advised to incorporate Islamic legal maxims, alongside the Qur'an, hadith, and the KHI, into legal considerations.³² These four fundamental elements in legal considerations are the foundation for supplementary arguments. However, theological arguments remain critical in decision-making, including cases involving polygamy permits.³³

²⁹ Alī Aḥmad al-Nadawī, *Al-Qawā'id al-Fiqhīyah: Maḥmūmuha, Nashy'atuha, Tathawwuruha, Dirāstu Mu'allifātiḥā, Adillatuha, Muḥimmātuhā, Tathbīquḥā'* (Damaskus: Dār al-Qalam, 1994), 331.

³⁰ Moh Mundzir, "Metode Penetapan Fatwa Majelis Ulama Indonesia (Analisis Penggunaan Qawaid Fiqhiyyah sebagai Dalil Mandiri dalam Fatwa)" 2, no. 1 (2021): 16.

³¹ Salman Farisi, "Kedudukan Fiqh dan Undang-Undang dalam Pertimbangan Hakim pada Perkara Pembatalan Perkawinan di Pengadilan Agama Bogor Tahun 2016-2021" (Jakarta, Universitas Islam Negeri Syarif Hidayatullah, 2022), 14.

³² Agung, "Standar Format BAS dan Format Putusan Pengadilan Agama/Mahkamah Syari'iyah."

³³ Mhd Yazid, "Conservatism of Islamic Legal Arguments in Granting Marriage Dispensation at the Indonesian Religious Courts," *Al-Qisthu: Jurnal Kajian Ilmu-Ilmu Hukum* 21, no. 1 (2023): 1.

C. Mapping Reasons for Permitting Husband's Polygamy: Theological, Biological, Economic, and Medical

Among the 30 verdicts the Mojokerto Religious Court rendered concerning applications for husbands' polygamy permits from 2020 to 2022, 23 verdicts incorporate Islamic legal maxims as integral components of the legal considerations. Nevertheless, all petitions for husbands' polygamy permits submitted to the Mojokerto Religious Court were endorsed by the judge, supported by various justifications. The authors categorize these justifications into four distinct groups: theological, biological, economic, and medical rationales (refer to Table 1). Biological reasons hold prominence in these categories, manifesting across various contexts within all four categories. Theological reasons follow in the second position, trailed by economic and medical considerations in the latter position. This observation underscores that authorizing polygamy within religious courts predominantly hinges on religious interpretations tailored to validate the husband's interests. This trajectory deviates from the original intention of the institution of polygamy, which initially aimed to safeguard women's rights.

First, biological reasons are evident in seven verdicts rendered by the Mojokerto Religious Court. In 2020, three verdicts elucidate the desire to expand one's progeny; one verdict rests on the premise of granting a polygamy permit due to the wife's failure to fulfill her duties, further substantiated by the intention to procreate; another verdict centers on the aspiration for a male offspring.³⁴ In 2021, the factor of wives frequently experiencing fatigue, thus unable to satisfy their husband's sexual needs, comes into play.³⁵ In 2022, two verdicts consider the husband's pronounced need for sexual satisfaction (hypersexuality), which diverges from the wife's capacity, and one verdict hinges on the aspiration for more children.³⁶ Across all these considerations, the incentive to have children

³⁴ See: "Mojokerto Religious Court Verdict No. 2392/Pdt.G/2020/PA.Mr," "Mojokerto Religious Court Verdict No. 2959/Pdt.G/2020/PA.Mr," "Mojokerto Religious Court Verdict No. 0544/Pdt.G/2020/PA.Mr."

³⁵ "Mojokerto Religious Court Verdict No. 2637/Pdt.G/2021/PA.Mr."

³⁶ See: "Mojokerto Religious Court Verdict No. 1402/Pdt.G/2022/PA.Mr," "Mojokerto Religious Court Verdict No. 2253/Pdt.G/2022/PA.Mr," "Mojokerto Religious Court Verdict No. 2448/Pdt.G/2022/PA.Mr."

does not constitute the predominant catalyst for husbands seeking permission for polygamy. According to the authors' assessment, the overarching motivation appears more intertwined with fulfilling the husband's sexual desires. Consequently, the rationale of bearing children in a polygamous permit seems more to legitimize the husband's sexual inclinations.

Table 1
Reasons for Husband's Polygamy Permit at the Religious Court of
Mojokerto from 2020 to 2022

No.	Reason	Detailed Reasons	Verdict Number
1.	Biological	Desire for numerous children, aspiration for sons, wife's inability to meet sexual needs, and husband's hypersexuality	2392/Pdt.G/2020/PA.Mr, 2959/Pdt.G/2020/PA.Mr, 2448/Pdt.G/2022/PA.Mr, 0544/Pdt.G/2020/PA.Mr, 2637/Pdt.G/2021/PA.Mr, 1402/Pdt.G/2022/PA.Mr, 2253/Pdt.G/2022/PA.Mr
2.	Theological	Wife's incapability to fulfill duties, affection between husband and prospective polygamous wife, and fear of adultery	0424/Pdt.G/2020/PA.Mr, 1941/Pdt.G/2020/PA.Mr, 2735/Pdt.G/2020/PA.Mr, 2321/Pdt.G/2022/PA.Mr, 2299/Pdt.G/2020/PA.Mr, 0903/Pdt.G/2022/PA.Mr
3.	Economy	Intention to financially assist prospective widowed wife with children, avoidance of slander, and wife's inability to conceive	0297/Pdt.G/2020/PA.Mr, 1039/Pdt.G/2021/PA.Mr, 2856/Pdt.G/2021/PA.Mr, 1538/Pdt.G/2021/PA.Mr, 1999/Pdt.G/2020/PA.Mr
4.	Medical	Wife's inability to conceive and wife's mental disorders	0044/Pdt.G/2020/PA.Mr, 2211/Pdt.G/2020/PA.Mr, 0944/Pdt.G/2021/PA.Mr, 1892/Pdt.G/2021/PA.Mr, 2729/Pdt.G/2021/PA.Mr

Source: Data processed by the authors.

Second, theological reasons manifest in six verdicts from the Mojokerto Religious Court. In 2020, three verdicts alluded to instances where the wife cannot discharge her responsibilities. Additionally, one verdict confirms the mutual affection between polygamous husbands and prospective wives, coupled with

concerns about potential involvement in adultery.³⁷ In 2022, two verdicts take cognizance of situations where the wife cannot fulfill her obligations and wherein an emotional attachment exists between the husband and the prospective polygamous wife, evoking apprehensions about adulterous scenarios.³⁸ Among the four verdicts that list the reasons for the wife's inability to manage her household duties, two cases unveil that the husband contracted an unregistered marriage with the second wife. In the initial instance, the husband had practiced *nikah sirri* (secret marriage) for seven years,³⁹ while in the subsequent case, the duration extended to 20 years.⁴⁰ These findings suggest that the wife's inability to execute her housewifely duties concerning polygamy permits is predominantly linked to the legitimacy of *nikah sirri*.

Third, economic reasons are evident in five verdicts made by the Mojokerto Religious Court. Economic reasons were seldom presented as the sole basis for these verdicts. Rather, they were combined with other rationales, including theological and biological explanations. Two of these five verdicts solely relied on economic grounds – providing financial support to prospective widowed wives with children. In two other instances, economic and theological reasons were combined, wherein financial assistance was extended to widowed wives with children and to prevent potential slander between polygamous husbands and prospective wives. A different verdict combined three motives: economic support for a polygamous wife-to-be, theological considerations to evade potential slander from an illicit relationship, and medical grounds where the wife cannot conceive.⁴¹

Fourth, medical reasons feature in five verdicts the Mojokerto Religious Court rendered. In four cases, husbands invoked their wives' inability to bear

³⁷ See: "Mojokerto Religious Court Verdict No. 0424/Pdt.G/2020/PA.Mr," "Mojokerto Religious Court Verdict No. 1941/Pdt.G/2020/PA.Mr," "Mojokerto Religious Court Verdict No. 2735/Pdt.G/2020/PA.Mr," "Mojokerto Religious Court Verdict No. 2299/Pdt.G/2020/PA.Mr."

³⁸ See: "Mojokerto Religious Court Verdict No. 2321/Pdt.G/2022/PA.Mr," "Mojokerto Religious Court Verdict No. 0903/Pdt.G/2022/PA.Mr."

³⁹ "Mojokerto Religious Court Verdict No. 0903/Pdt.G/2022/PA.Mr."

⁴⁰ "Mojokerto Religious Court Verdict No. 0424/Pdt.G/2020/PA.Mr."

⁴¹ See: "Mojokerto Religious Court Verdict No. 1039/Pdt.G/2021/PA.Mr," "Mojokerto Religious Court Verdict No. 0297/Pdt.G/2020/PA.Mr," "Mojokerto Religious Court Verdict No. 2856/Pdt.G/2021/PA.Mr," "Mojokerto Religious Court Verdict No. 1999/Pdt.G/2020/PA.Mr."

children as the rationale.⁴² On the other hand, in one verdict, the reason was linked to the wife's unstable mental condition or mental disorder.⁴³ In this example, the husband intended to divorce his wife due to her condition, but the judge recommended shifting the case from divorce (*talāq*) to pursuing a polygamous marriage permit. This move aims to protect the wife from the detrimental effects of divorce.

These four reasons husbands utilize to secure polygamous marriage permits are not unprecedented. For example, in the context of hypersexuality as a reason, Pradika dissected the application of the concept of justice in religious court judges' verdicts. He uncovered that judges' legal arguments were grounded in Article 4 paragraph (1) of Marriage Law No. 1 of 1974 and Article 57 of KHI. Judges also leaned on Islamic legal maxims to prioritize averting harm over pursuing interests. In this context, the judge weighed the potential harm that could arise in the future if the request for a polygamous marriage permit was reduced, such as the risk of infidelity by the petitioner. The judge further pondered the readiness of the prospective polygamist to treat his wives and offspring equitably.⁴⁴

In a separate study, Wahyuni scrutinized polygamy permit applications prompted by wives' incapacity to fulfill their husbands' sexual needs. She argued that the judges' evaluations of these cases did not align with the stipulations outlined in Article 4, paragraph (1) of Marriage Law No. 1 of 1974 and Article 57 of KHI. Wahyuni also highlighted the application of Islamic legal maxims, particularly "*dar'u al-mafāsīd muqaddamun 'alā jalb al-maṣāliḥ*." Judges interpreted this maxim to emphasize forestalling potential harms that could arise if the permit was denied, such as the potential for adulterous relationships between husbands and prospective polygamous wives. In this light, the judges showed more concern for avoiding reprehensible behavior than for safeguarding the interests of the first wife. Wahyuni contended that the reasons used as prerequisites for obtaining

⁴² See: "Mojokerto Religious Court Verdict No. 0944/Pdt.G/2021/PA.Mr," "Mojokerto Religious Court Verdict No. 1892/Pdt.G/2021/PA.Mr."

⁴³ "Mojokerto Religious Court Verdict No. 2729/Pdt.G/2021/PA.Mr."

⁴⁴ Pradika Kusuma Fridayanto, "Implementasi Konsep Keadilan terhadap Izin Poligami Karena Suami Hypersex" (Universitas Islam Negeri Walisongo Semarang, 2021), 114.

polygamy permits tend to hold women accountable, including issues related to women's biological functions.⁴⁵

D. Judge's Legal Arguments: Normative and Theological Perspectives

The authors have identified two primary types of legal arguments judges employ when deciding cases related to husbands' polygamy permits at the Mojokerto Religious Court: normative and theological arguments. The second argument is rarely used among these two legal arguments. The normative perspective is the primary legal argument, grounded in various positive legal regulations. Judges often reference specific articles, such as Article 5 of Marriage Law No. 1 of 1974 and Article 58 of the KHI. These articles outline the conditions relevant to polygamy, including prerequisites like obtaining the first wife's consent, ensuring equitable treatment of all wives, and financially supporting the family. This juridical argument is pivotal and consistently appears in verdicts regarding husbands' polygamy permits.

Furthermore, judges frequently reference Article 4, paragraph (2) of Marriage Law No. 1 of 1974, Article 1, letter a of Government Regulation No. 9 of 1975 related to the Implementation of Marriage Law No. 1 of 1974, and Article 57 of the KHI. These articles delineate the conditions under which a polygamy permit may be granted, encompassing scenarios such as a wife's inability to fulfill her marital obligations, a wife suffering from an incurable ailment or disability, and a wife incapable of conceiving children. These three conditions are presented as alternatives, implying that the husband must satisfy at least one for the judge to authorize a polygamy permit. However, in certain cases scrutinized by the authors, verdicts did not satisfy these three alternative conditions. Nonetheless, judges still sanctioned polygamous unions on the grounds that encompassed aiding the future economic prospects of the prospective polygamous wife, augmenting progeny count, establishing affection between the man and the intended polygamous wife, and avoiding adultery and defamation.

⁴⁵ Sinta Wahyuni, "Permohonan Izin Poligami Karena Ketidakpuasan Pelayanan Kebutuhan Seksual" (Institut Agama Islam Negeri Purwokerto, 2019), 48–54.

The second argument is rooted in a theological perspective. This argument emerges when the judge turns to the Qur'an, *fiqh* texts, and Islamic legal maxims. A verse frequently invoked by judges in their legal argument is Verse 3 of Sūrat al-Nisā' from the Qur'an. The judge interprets this verse literally to substantiate the validity of polygamous marriages under the condition that the husband maintains equitable treatment among up to four wives. Additionally, the judges draw upon the viewpoints of Shaykh Ibrahim al-Bajuri, as documented in his work, specifically in juz 2, page 334.⁴⁶ The stance put forth by al-Bajuri is employed by judges as an authoritative foundation, bestowing irrevocable legal recognition. In this context, this recognition pertains to the acknowledgment of the reasons posited by the husband in his application for a polygamy permit, which encompasses theological, biological, economic, and medical reasons. This theological argument bolsters the principle embedded in positive law that upholds the validity of the defendant's admission as admissible evidence.⁴⁷

Utilizing the theological argument in connection with al-Bajuri's views is not consistently present in all judicial verdicts. Within the realm of theological reasoning, this argument contributes to reinforcing permissions for polygamy in cases where the wife is unable to fulfill her marital duties,⁴⁸ where there exists an emotional connection between the man and the prospective polygamous wife, and in concerns related to adultery.⁴⁹ Based on biological reasoning, this argument is invoked to fortify polygamy permits for husbands desiring offspring,⁵⁰ those with heightened sexual needs,⁵¹ and instances where the wife's fatigue due to work impacts her ability to serve her husband.⁵² In economics reasoning, this argument surfaces to bolster polygamous permits when supporting widowed candidates for

⁴⁶ "Mojokerto Religious Court Verdict No. 1941/Pdt.G/2020/PA.Mr."

⁴⁷ "Kitab Undang-Undang Hukum Perdata (Civil Law Code)," Articles 1923-9128.

⁴⁸ See: "Mojokerto Religious Court Verdict No. 0424/Pdt.G/2020/PA.Mr," "Mojokerto Religious Court Verdict No. 1941/Pdt.G/2020/PA.Mr," "Mojokerto Religious Court Verdict No. 2321/Pdt.G/2022/PA.Mr," "Mojokerto Religious Court Verdict No. 2735/Pdt.G/2020/PA.Mr."

⁴⁹ See: "Mojokerto Religious Court Verdict No. 0903/Pdt.G/2022/PA.Mr," "Mojokerto Religious Court Verdict No. 2299/Pdt.G/2020/PA.Mr."

⁵⁰ "Mojokerto Religious Court Verdict No. 2448/Pdt.G/2022/PA.Mr."

⁵¹ See: "Mojokerto Religious Court Verdict No. 2253/Pdt.G/2022/PA.Mr," "Mojokerto Religious Court Verdict No. 1402/Pdt.G/2022/PA.Mr."

⁵² "Mojokerto Religious Court Verdict No. 2637/Pdt.G/2021/PA.Mr."

polygamous marriages with existing children,⁵³ alleviating the financial conditions of potential polygamous wives, and preventing accusations of adultery.⁵⁴ Concerning medical reasoning, this argument arises exclusively to strengthen polygamy permissions in cases where a wife cannot conceive.⁵⁵

Additionally, theological arguments are intertwined with applying Islamic legal maxims. Judges frequently invoke two Islamic legal maxims: “*dar’u al-mafāsīd muqaddamun ‘alā jalb al-maṣāliḥ*” and “*idhā ta’ārada maḥṣadaṭānī rū’iya a’ḍamuhumā ḍararan bi al-’irtikābi akhaffihimā*.” These principles find their origin in *al-Āshibah wa al-Naḍā’ir*, authored by al-Subkī.⁵⁶ Judges employ these maxims to balance the negative and positive consequences of granting a polygamy permit. However, these theological arguments, entailing the usage of Islamic legal maxims, do not hold the central stance but rather serve a supplementary role. They complement the juridical argument instead of existing independently as propositions.

E. Conservative Interpretation of Islamic Legal Maxims: Prioritizing Men’s Interests

Among the 30 verdicts rendered by the Mojokerto Religious Court between 2020 and 2022 on husbands’ applications for polygamy permits, only 22 verdicts incorporate Islamic legal maxims into the legal decision-making process. In these cases, the judges employ two Islamic legal maxims to evaluate potential benefits and harms for all parties involved regarding husbands seeking polygamy permits. The first Islamic legal maxim is “*idhā ta’ārada maḥṣadaṭānī rū’iya a’ḍamuhumā ḍararan birtikābi akhaffihimā*” (when two harms conflict, the lesser harm must be chosen), while the second is “*dar’u al-mafāsīd muqaddamun ‘alā jalb al-maṣāliḥ*”

⁵³ See: “Mojokerto Religious Court Verdict No. 0297/Pdt.G/2020/PA.Mr,” “Mojokerto Religious Court Verdict No. 1039/Pdt.G/2021/PA.Mr.”

⁵⁴ See: “Mojokerto Religious Court Verdict No. 1538/Pdt.G/2021/PA.Mr,” “Mojokerto Religious Court Verdict No. 2856/Pdt.G/2021/PA.Mr.”

⁵⁵ See: “Mojokerto Religious Court Verdict No. 0944/Pdt.G/2021/PA.Mr,” “Mojokerto Religious Court Verdict No. 1892/Pdt.G/2021/PA.Mr,” “Mojokerto Religious Court Verdict No. 2211/Pdt.G/2020/PA.Mr.”

⁵⁶ Tāj al-Dīn Abādu al-Wahhāb bin ‘Alī bin ‘Abdu al-Kāfī al-Subkī, *Al-Āshibah wa al-Naḍā’ir* (Beirut: Dār al-Kutub al-’Ilmiyyah, 1991).

(prioritizing the avoidance of harm over seeking benefits). These three Islamic legal maxims are consistently employed by judges when adjudicating cases exhibiting their respective characteristics.

In terms of frequency, the first Islamic legal maxim is invoked in most instances, specifically in 20 cases. This principle is typically applied in situations grounded in biological considerations, such as when husbands seek polygamy permits to sire more offspring⁵⁷ and contend with heightened sexual desires, rendering their first wives incapable of fulfillment.⁵⁸ This maxim is similarly applied in cases involving medical reasons, like instances where wives cannot bear offspring,⁵⁹ suffer from diabetes,⁶⁰ or exhibit mental disabilities.⁶¹ Furthermore, this principle is applied in several cases concerning theological aspects, including secretive polygamous marriages,⁶² wives' inability to fulfill their duties,⁶³ and mutual affection between men and prospective polygamous wives striving to adhere to religious norms.⁶⁴

Conversely, most judges employ the second Islamic legal maxim in merely two verdicts. This principle is applied in circumstances wherein a biological basis is evident, such as wives' incapacity to bear children,⁶⁵ husbands' desires for more progeny,⁶⁶ or wives' neglect of their roles due to work commitments.⁶⁷ Quantitatively, the discrepancy in applying these two Islamic legal maxims underscores the greater pertinence and clarity of the first maxim when addressing polygamy cases as opposed to the second maxim.

⁵⁷ "Mojokerto Religious Court Verdict No. 2448/Pdt.G/2022/PA.Mr."

⁵⁸ See: "Mojokerto Religious Court Verdict No. 2253/Pdt.G/2022/PA.Mr," "Mojokerto Religious Court Verdict No. 1402/Pdt.G/2022/PA.Mr."

⁵⁹ See: "Mojokerto Religious Court Verdict No. 0044/Pdt.G/2020/PA.Mr," "Mojokerto Religious Court Verdict No. 0944/Pdt.G/2021/PA.Mr," "Mojokerto Religious Court Verdict No. 2211/Pdt.G/2020/PA.Mr."

⁶⁰ "Mojokerto Religious Court Verdict No. 1892/Pdt.G/2021/PA.Mr."

⁶¹ "Mojokerto Religious Court Verdict No. 2729/Pdt.G/2021/PA.Mr."

⁶² See: "Mojokerto Religious Court Verdict No. 0424/Pdt.G/2020/PA.Mr," "Mojokerto Religious Court Verdict No. 0903/Pdt.G/2022/PA.Mr," "Mojokerto Religious Court Verdict No. 2735/Pdt.G/2020/PA.Mr."

⁶³ "Mojokerto Religious Court Verdict No. 1941/Pdt.G/2020/PA.Mr."

⁶⁴ "Mojokerto Religious Court Verdict No. 2321/Pdt.G/2022/PA.Mr."

⁶⁵ "Mojokerto Religious Court Verdict No. 0544/Pdt.G/2020/PA.Mr."

⁶⁶ "Mojokerto Religious Court Verdict No. 2392/Pdt.G/2020/PA.Mr."

⁶⁷ "Mojokerto Religious Court Verdict No. 2959/Pdt.G/2020/PA.Mr."

In terms of terminology, the first Islamic legal maxim implies that when two competing potential hazards emerge, precedence should be accorded to mitigating the more significant harm, even if it entails implementing the less risky action. This rule is an extension of the fundamental principle in Islamic legal maxims, namely “*al-ḍararu yuzāl*” (avoiding harm takes precedence). ‘Abd al-Salām notes that the benefits far outweigh the harms in numerous instances.⁶⁸ Al-Qarāfī acknowledges that *maṣlaḥah* (public interest) and *mafsadah* (harm) often coexist.⁶⁹ Al-Qarāfī contends that these two facets are inherently intertwined. Herein lies the necessity of prioritizing the most impactful implication to attain legal objectives.⁷⁰ Consequently, *mafsadah* must be evaded while *maṣlaḥah* is pursued.⁷¹ Within this study’s context, the principle of the Islamic legal maxim necessitates that judges opt for the lesser of two identified harms.

Judicial judges uniformly interpret this Islamic legal maxim in various cases involving husbands’ polygamy permits. They identify two potential *mafsadah* (harmful outcomes) in granting polygamy permission. Firstly, there are potential hardships that wives and children may endure due to reduced time with their husbands due to polygamous marriages. Secondly, the risk of violating religious norms through illicit polygamous practices could potentially culminate in infidelity and divorce. Within this context, judges view the first potential harm as less severe than the second, as the first marriage bond can be sustained while upholding the wife’s and children’s rights. In contrast, the second potential harm is perceived as more substantial due to its contravention of religious norms. This data indicates that judges tend to prioritize safeguarding religious norms over the interests of women and children.

Judges’ interpretation of this Islamic legal maxim reflects a patriarchal cultural perspective. For instance, in cases of secretive polygamy (*poligami sirri*),

⁶⁸ ‘Izz al-Dīn ‘Abd al-Salām, *Qawā'id al-Kubrā al-Mausūm bi Qawā'id al-Ahkām fī Islāhi al-Anām* (Damaskus: Dār al-Qalam, 2000), 14.

⁶⁹ Shihāb al-Dīn Abū al-'Abbas Aḥmad ibn Idrīs al-Qarāfī, *Sharḥ Tanqīh al-Fuṣūl fī Ikhtisār al-Maḥṣūl fī al-Uṣūl*, ed. Tāha ‘Abd al-Rauf Sa’ad (Beirut: Dār al-Fikr, 1973), 81.

⁷⁰ Al-Shātibī, *Al-Muwāfaqāt fī Uṣūl al-Sharī'ah*, ed. Muḥammad ‘Abd Allāh Darrāz (Beirut: Dār al-Kutub al-'Ilmiyyah, 2003), 20–1.

⁷¹ Aḥmad bin Muḥammad al-Zarqā, *Sharḥ al-Qawā'id al-Fiqhiyyah*, 201.

judges seem lenient in applying polygamy rules. They overlook the interests and rights of the first wives and children, who are most affected by such practices. Rather than protecting and advocating for their rights, the judges facilitate unregistered marriages by granting polygamy permits to husbands. In this scenario, the judges fail to convey an interpretation of Islamic legal maxims that safeguard women and children as potential victims. This finding resonates with Nurlaelawati's conclusion that judges deviate from polygamy regulations.⁷²

Meanwhile, the second Islamic legal maxim stems from the overarching principle "*al-ḍararu yuzāl*" (avoiding harm takes precedence). This maxim asserts that avoiding harm must take precedence over seeking benefit. This maxim applies when conflicts arise between *mafsadah* and *maṣlahah* in a case, and the former does not outweigh the latter. The basis for this maxim lies in Sūrat al-An'ām verse 108. The unique context of this verse resides in the initial perception that insulting the gods of disbelievers bears benefit. However, subsequent revelations revealed that disbelievers also insult Allah, leading to the prohibition of the practice due to its greater real harm.⁷³ Additionally, this maxim is supported by a hadith emphasizing avoidance of what the Prophet Muhammad forbade and adherence to his commands to the best of one's ability.⁷⁴

In practice, judges consistently interpret the second Islamic legal maxim, following a consistent narrative pattern across various cases involving husbands' polygamy permits. They acknowledge that husbands' reasons for seeking polygamy permits do not meet the alternate criteria stipulated by law. Nonetheless, they are more inclined to grant polygamous marriages than permit continued illegal polygamous practices that pose potential long-term harm. In this context, their focus centers more on safeguarding men's interests, as if husbands would suffer most from permit refusal. For example, in justifying polygamy

⁷² Euis Nurlaelawati, "Problematika Isbat Nikah: Dualisme Kepentingan dan Perlindungan terhadap Perempuan dan Anak dalam Legalisasi Poligami Siri," in *Membela Hak-Hak Masyarakat Rentan: HAM, Keragaman Agama, dan Isu-Isu Keluarga*, ed. Noorhaidi Hasan (Yogyakarta: Pascasarjana UIN Sunan Kalijaga Press, 2021), 93.

⁷³ Muḥammad bin Aḥmad bin Muḥammad al-Burnū Abī al-Ḥarīṣ al-Ghāzīy, *Al-Wajīz fī Idhāḥ Qawā'id al-Fiqh al-Kulīyyah*, 265.

⁷⁴ Abd al-'Azīz Muḥammad 'Azzām, *Al-Qawā'id al-Fiqhīyah* (Cairo: Dār al-Ḥadīth, 2005), 205.

permits for procreation, they appear to endorse the notion that men possess the legitimate right to channel their individualistic and sexual desires, even if this adversely affects women and children's psychological well-being. Consequently, they disregard the potential adverse consequences of polygamous practices,⁷⁵ focusing on the potential harm to husbands rather than wives and children. Judges expand their interpretation of Islamic legal maxims by accommodating reasons for husbands' polygamy permits that diverge from applicable regulations. This alignment resonates with Nurlaelawati's discovery that judges tend to stretch the legal parameters of polygamy through interpretations of Islamic legal maxims.⁷⁶

Furthermore, judges also adopt conservative interpretations of Islamic legal maxims in their verdicts. This conservative approach aligns with the desire to uphold and perpetuate the patriarchal culture ingrained in classical *fiqh* tradition. In contrast to the narrative advanced by women-led Campus Da'wah activists promoting polygamy,⁷⁷ judges, as state representatives, employ this conservative approach in their legal rulings. Ideally, a judge's verdict should serve as a tool for social engineering,⁷⁸ surpassing mere compliance with formal requirements. Hence, judges' expansion of the interpretation of Islamic legal maxims underscores the failure of regulations to transform polygamy law into a social engineering instrument due to the diverse perspectives that surface.⁷⁹

Though debates regarding *maṣlaḥah* determination persist, it is vital to acknowledge that the conservative interpretation of Islamic legal maxims has reinforced conservatism within Islamic family law.⁸⁰ Consequently, efforts to

⁷⁵ Khoirul Abror, "Poligami dan Relevansinya dengan Keharmonisan Rumah Tangga (Studi di Kelurahan Rajabasa Bandar Lampung)," *Al-Adalah* 13, no. 2 (2016): 227–38.

⁷⁶ Nurlaelawati, *Expansive Legal Interpretation and Muslim Judges' Approach to Polygamy in Indonesia*, 206.

⁷⁷ Muhammad Faried Nabil, "Narasi Poligami di Kalangan Muslimah Aktivis Dakwah Kampus di Yogyakarta: Konservatisme dalam Hukum Keluarga Islam," *Al-Ahwal* 12, no. 1 (2019): 79.

⁷⁸ Shobirin, "Kompetensi Peradilan Agama dalam Interpretasi Hukum Keluarga Islam di Indonesia," *Ziswaf* 2, no. 1 (2015): 81.

⁷⁹ Theresia Dyah Wirastri and Stijn Cornelis Huis Van, "The Second Wife: Ambivalences towards State Regulation of Polygamy in Indonesia," *The Journal of Legal Pluralism and Unofficial Law* 53, no. 2 (2021): 21.

⁸⁰ See: Yulmitra Handayani, "Hukum Perkawinan Islam di Ruang Digital: Bias Gender dalam Wacana Hukum Perkawinan di Instagram" 14, no. 2 (2021): 113–32; Muhammad Jihadul Hayat,

present and interpret legal principles supporting marginalized groups in their pursuit of equality are hindered by judicial interpretation. Despite recognizing benefits and *mafsadah* within the context of husbands' polygamy permits, judges predominantly prioritize men's interests, thereby contradicting Indonesia's foundational monogamous marriage framework. Nurlaelawati underscores the necessity of comprehending the long-term implications of benefits and *mafsadah* within secretive polygamous contexts. According to her, judges must fully grasp the significance of universal Islamic values.⁸¹ Judges should internalize these values through practical interpretations derived from Islamic legal maxims.

F. Conclusion

The analysis and discussion revealed four significant points that exemplify the intricacy of interpreting Islamic legal maxims in a case involving a husband's polygamy permit at the Mojokerto Religious Court. First, Islamic legal maxims are pivotal in shaping judges' legal interpretations, displaying their adaptable nature as supplementary guidance and a primary foundation for legal adjudication. Second, the verdict's assessment of polygamy's rationale underscores the prevalence of biological factors, proving the dominance of men's sexual interests over other considerations. Third, despite their uniform application, judges' interpretations of Islamic legal maxims tend to lack contextual differentiation in various cases. Fourth, the patriarchal slant in interpreting Islamic legal maxims in the Religious Court reinforces a validation of men's interests as paramount, often relegating women to objectified and disadvantaged positions.

Furthermore, it is imperative to note that a conservative construal of Islamic legal maxims may impede the advancement of Islamic family law in Indonesia. Such an interpretation tends to perpetuate the status quo, disregarding viewpoints favoring inclusivity and gender parity. This stance diverges from the direction pursued by the Supreme Court and the Ministry of Religion, which seeks

"Preaching Islamic Legal Rules on Screen: Conservatism on Islamic Family Law in Digital-Based Dakwah Program Mamah dan AA Beraksi," *Al-Jami'ah: Journal of Islamic Studies* 60, no. 2 (2022): 427–66; Mukhammad Nur Hadi, "Conservative Muslim on The Screen: The Narrative of Islamic Family Law in Indonesian Films" 18, no. 1 (2021): 133–45.

⁸¹ Nurlaelawati, "Problematika Isbat Nikah," 100.

to promote the progressive evolution of Islamic family law in the country. Hence, judges within Religious Courts need to embrace a more progressive interpretation of Islamic legal maxims. It necessitates consideration of broader contextualization of dimensions encompassing *maṣlaḥah* and *mafsadah*, enabling legal verdicts to incorporate more excellent equilibrium and justice within familial dynamics. This paradigm shift towards an enhanced interpretation has the potential to facilitate a family law framework aligning with contemporary ideals of fairness and inclusiveness.

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