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## The Views Of The Indonesian Ulema Council Of North Sumatra Province On The Punishment Of Husbands Who Marry Without The Wife's Permission In The Criminal Code

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**Abstract:** This study aims to (1) find out the provisions of the punishment of husbands who marry without the wife's permission in the Criminal Code (2) find out the views of the Indonesian Ulema Council of North Sumatra Province on the punishment of husbands who marry without the wife's permission in the Criminal Code (3) the author's analysis of the views of the Indonesian Ulema Council of North Sumatra Province on the punishment of husbands who marry without the wife's permission in the Criminal Code. This research is designed with a qualitative method with the type of research of this thesis is field research. The result of the research is that a husband who marries without his wife's permission is a crime in the Criminal Code. In addition to being a crime, it is considered an unlawful act (*wederrechtelijk*) in the context of Criminal Law. The MUI of North Sumatra Province is of the view that the criminalization of husbands who marry without the wife's permission is permissible even though in Islam there is no sanction/punishment for husbands who marry *siri* (secretly) and without the knowledge of the wife. A husband who remarries without his wife's permission can cause more harm than good. The imposition of sanctions (punishment) is also permitted because it can be classified as *Ta'zir* and contains benefits because it is a policy to protect wives who feel harmed.

**Keywords:** Punishment, Husband, Married Without Wife's Permission, Criminal Code, MUI of North Sumatra Province.

### INTRODUCTION

In essence, humans are created in pairs between men and women. This is explained by Allah in his word which reads:

وَمِنْ كُلِّ شَيْءٍ خَلَقْنَا زَوْجَيْنِ لَعَلَّكُمْ تَذَكَّرُونَ (سورة الذاريات/ ٤٩ : ٥١)

*Meaning: “Dan segala sesuatu kami ciptakanberpasang-pasangan agar kamu mengingat (kebesaran Allah).”<sup>1</sup>*

The substance of this verse explains that the pairs in question are the union of two human beings between a man and a woman in a marriage bond. According to the language, marriage means union. It is also interpreted as a contract, but there are also those who interpret it as mixing. Ta'rif marriage is a contract that legalizes association by limiting rights and obligations and helping each other between a man and a woman who are not mahrams.<sup>2</sup>

The word marry means to marry, and marrying is the same as marrying which means making a husband. Thus the term marriage has the same meaning as marriage.<sup>3</sup> When viewed from the perspective of the Compilation of Islamic Law, marriage is a very strong contract to obey the commands of Allah and carrying it out is an act of worship.<sup>4</sup> Marriage is not only a very noble way to organize household life and offspring, but it can also be seen as a way to get acquainted between one people and another, and that introduction will be a way to convey help to one another.

Marriage certainly has a variety of objectives, one of which is to achieve physical and mental peace for both the husband and the wife. In addition, the purpose of Islam encouraging its people to marry is to form a family that is sakinah, mawaddah, and warahmah. As Allah has explained in surah Ar-rum verse 21 which reads :

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَآيَاتٍ لِقَوْمٍ يَتَفَكَّرُونَ (سورة الروم/ ٠٣ : ٢١)

*Meaning: “And among His verses is that He created for you wives of your own kind, that you may feel comfortable with them, and He made between you mawaddah and rahmah. Indeed, in such things there are signs for those who think”.<sup>5</sup>*

Actually, the bond of marriage is the strongest bond in human life and life, not only between husband and wife and their offspring, but between two families. From the good relationship between the wife and husband, love will transfer to all the families of both parties, so that they become one in all matters of helping each other in doing good and preventing all evil. In addition, marriage protects a person from the destruction of his lusts.

In Islam, marriage by having more than one wife is permissible. Islam allows polygamy with a limited number of women and does not require its followers to practice absolute monogamy in the sense that a man can only have one woman in any circumstances and situation. Islam basically adheres to the monogamy system by allowing limited polygamy. In principle, a man can only have one wife and vice versa, a wife can only have one husband.<sup>6</sup>

The Prophet said :

عن ابن عمر أن غيلان بن سلمة الثقفي اسلم وله عشر نسوة في الجاهلية فأسلمن معه فأمره النبي صلى الله عليه و سلم أن يتخيرن أربعاً منهن (رواه الترمذي)

*Meaning: “Ibn Umar reported that Ghailan bin Salamah Ats-Tsaqafi entered Islam and he had ten wives during the pre-Islamic era. Then they also converted to Islam with him then the Prophet ordered Ghailan to choose (keep) four of them”.<sup>7</sup>*

<sup>1</sup> Department of Religious Affairs, Al-Qur'an and its Translation (Semarang: Raja Publishing, 2018), Page. 522.

<sup>2</sup> Armia, Fikih Munakahat (Medan: Cv. Manhaji, 2015), p. 4..

<sup>3</sup> Husni M. Saleh, Fiqh Munakahat (Surabaya: Dakwah Digital Press, 2008), p. 1.

<sup>4</sup> Yustisia Library Series, Compilation of Islamic Law (Yogyakarta: Widyatama Library, 2006), p. 11.

<sup>5</sup> Department of Religious Affairs, Al-Qur'an and its Translation (Semarang: Raja Publishing, 2018), p. 406.

<sup>6</sup> Tihami And Sohari Sahrani, Fiqh Munakahat Complete Fiqh Nikah Study (Jakarta: Pt Raja Gravindo Persada, 2013), Page. 35

<sup>7</sup> Al-Tirmidzi, Sunan Al-Tirmidzi (Beirut: Dar Al-Kutub Al-Ilmiyyah), p. 1047

Islam does not close itself to the tendency of men to have many wives as it has been going on for a long time, and Islam does not close the possibility of polygamous men. The practice of polygamy has been a fact that occurred in society long before the Prophet Muhammad was sent. As is well known, Prophet Ibrahim married Siti Hajar in addition to Siti Sarah on the grounds that the first wife had not given offspring to Prophet Ibrahim.

The evidence used as the basis for the permissibility of polygamy is according to the Word of God in surah An-Nisa 'verse 3:

وَأِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي التَّيْمَانِ فَانكحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثَلِيًّا وَثَلَاثٌ وَرُبْعٌ ۚ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَلِكَ أَدْنَىٰ أَلَّا تَعْدِلُوا (سورة النساء/ ٤:٣)

*Meaning: "And if you fear that you will not be able to do justice to the rights of orphans (when you marry them), then marry any other woman you like: two, three or four. But if you fear that you will not be able to do justice, then marry only one, or a female slave whom you own. But if you fear that you will not be able to do justice, then marry only one, or a female slave whom you own."*<sup>8</sup>

This verse is a continuation of caring for orphans, which is then mentioned about the permissibility of having only four wives, because of the close relationship between caring for orphans and having more than one to four wives contained in this verse, so we will briefly explain the origin of the revelation of this verse. According to the tafsir, this verse was revealed in response to Urwah bin Zubair's question to Aisha, the Prophet's wife, about this verse.

She replied: "O daughter of my sister, the orphans here mean orphan girls who are under the care of their guardians and have wealth mixed with their wealth and their beauty makes the caretaker of the orphan happy with them, so he wants to take them as wives, but does not want to give them a fair dowry."<sup>9</sup>

The fairness in question is fair treatment in serving wives, such as, clothing, place, turn, and others that are outwardly, Islam does allow polygamy under certain conditions. From the two verses above, it can be concluded that a Muslim man may marry only four women. However, if it turns out that he cannot be fair or even unjust if he has several wives, he should marry only one wife. The impossibility of man being able to be fair in material and love even though he really wants to and has tried his best.<sup>10</sup>

In terms of polygamy, there are no specific requirements for men to marry or have a second, third or fourth wife in Islam. However, he must be able to be fair to his wives. This means that marriage without the consent of the first wife is valid and permissible in Islam provided that the conditions and pillars of marriage are fulfilled.

Currently, in Indonesia, there are various rules that regulate the behavior of all citizens. One of them is the Criminal Code (KUHP). In the Criminal Code, there is an article that regulates criminal sanctions for every husband who marries without the permission of his wife. This means that when a husband marries for the second time, he must obtain the consent of the first wife. If the husband marries without permission, the consequence is a maximum imprisonment of 5 years. The regulation is contained in article 279 of the Criminal Code which reads:

Sentenced to imprisonment for up to 5 years:

- 1 Any person who marries knowing that his existing marriage constitutes a valid obstacle to his remarrying.

<sup>8</sup> Department of Religious Affairs, Al-Qur'an and its Translation (Semarang: Raja Publishing, 2018), Page. 97

<sup>9</sup> Tihami and Sohari Sahrani, Op.Cit., Page. 359

<sup>10</sup> Mardani, Islamic Marriage Law in the Modern Islamic World (Yogyakarta: Graha Ilmu, 2011), p. 87

2 Whoever marries, knowing that the existing marriage of the other party will become a legal obstacle for the other party to marry again.

Looking at this regulation, of course this is very different from the concept and requirements of polygamy in Islam because there is no legal argument that explicitly explains certain conditions for polygamy except for the conditions in surah an-nisa verse 3, namely being able to be fair. In addition, in Islam there are also no rules containing sanctions/punishments for husbands who marry or polygamy without the consent of their wives.

So that this often causes differences among the community in responding to the disparity between the provisions for punishing husbands who marry without their wife's permission in the provisions of the Criminal Code and Islamic Law, where there are no concrete rules / proofs that explain the sanctions / punishments for husbands if they commit polygamy without the consent of their wife's permission. Based on the above background, due to the ambiguity and different interpretations of the two articles, the author is interested in discussing and conducting deeper research.

## METHOD

The type of research used is field research, namely by collecting data directly down to the field doing research, which is in accordance with the places determined by the researcher. Field research is conducted because the study is developed through interpretation, namely using data at the research location. The nature of this research is qualitative. Namely research that is descriptive and tends to use analysis with an inductive approach and the main purpose of qualitative research is to develop notions, concepts, concepts that eventually become theories.<sup>11</sup> The approach used is a conceptual approach. The conceptual approach is used to analyze the views of the Indonesian Ulema Council on the punishment of husbands who marry without the wife's permission in the provisions of the Criminal Code. Using two legal materials, namely primary legal materials and secondary legal materials. Primary legal materials in this research are the Criminal Code and interviews. In this case, the author conducted interviews with the Indonesian Ulema Council of North Sumatra Province. As well as secondary legal materials used in this research are books, Al-Qur'an, Hadith, Fiqh books, Criminal Law. Data collection instruments consist of document studies and interviews (interviews) which are used to obtain information (data) from respondents by asking directly about the problem under study. In this study the authors conducted interviews at the Indonesian Ulema Council of North Sumatra Province consisting of the fatwa commission, the law, human rights and legislation commission and the women, youth and family commission. After the data is collected, the next step is to analyze the data, drawing conclusions from the data collected. In processing this data, the author uses a qualitative descriptive method, namely the method used for data that has been collected, then classified, arranged, explained, namely described in words or sentences used to describe the data collected.

## RESULTS AND DISCUSSION

### POLYGAMY: Concept and Legal Basis According to Islam

The term "polygamy" is of Greek origin, from the words "Poly" or "Polus" meaning "many" and "Gamein" or "Gamos" meaning "to marry or give in marriage". It comes from the word` etymology. Combining the meanings of the words, polygamy gives it one meaning "marriage of many". In colloquial language, polygamy means "the marriage of a man to more than one woman at the same time" practiced by a woman.<sup>12</sup>

<sup>11</sup> *Ibid.*, p. 6.

<sup>12</sup> Humaidi Tatapangarsa, *The Nature of Polygamy in Islam* (Surabaya: Usaha Nasional, 1981), p. 12. 12.

Therefore, a person is considered to be polygamous based on the number of wives he has at one time, not based on the number of marriages entered into. A husband who remarries after his wife dies is not considered polygamous because he only marries one woman at a time. Therefore, if a man has been married more than four times, but his last wife was only one, then he cannot be said to be polygamous. Polygamy is when a man has multiple wives at the same time.<sup>13</sup>

Polygamy is a phenomenon of life that occurs around us. Women's dignity is seen as a means to fulfill their sexual desires. Men who practice polygamy are committing acts of violence and even suppression of women's rights as a whole. In contrast, proponents of polygamy argue that polygamy is a legitimate form of marriage and has been practiced in all countries of the world for centuries. In many cases, polygamy actually elevates the dignity of women and keeps their morals from being tainted by the despicable and immoral acts that Allah SWT prohibits. Polygamy includes an element of redemption and a commitment to protect and respect the existence and dignity of women. Despite the above advantages and disadvantages, what society wants to achieve through polygamy is actually the same as the purpose of marriage itself.<sup>14</sup>

Fiqh literature terms polygamy with the term ta'addud al-zaujāt meaning many wives, based on terminology defined by the permissibility of marrying two, three, or four women, if they can be fair. Polygamy is limited by the scholars to four women only.<sup>15</sup> Basically, the principle of Islamic marriage is monogamous. This can be understood from verse (3) of Surah an-Nisa which states that Allah SWT gives the opportunity to marry up to 4 women, but this opportunity does not include a definite one.

In fact, the conditions are quite difficult for humans, only certain individuals can do it. Allah SWT accompanies the ability to do polygamy with the sentence, “if you are afraid or worried that you will not be able to be fair, then marry only one woman”. The word of Allah SWT Surat an-Nisa' (3) verse is always understood as the basis for the permissibility of polygamy. Based on this verse, fairness is the main requirement for men to be allowed to practice polygamy. As the legal basis for polygamy described in the verses of the Qur'an and Hadith.

The evidence used as the basis for the permissibility of polygamy is in accordance with the Word of Allah in Surah An-Nisa' verse 3.:

وَأِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي التَّيْمُنِ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَثَلِيَّتٌ وَثَلَاثٌ وَرُبْعٌ ۚ فَإِنْ خِفْتُمْ أَلَّا تَعْدِلُوا فَوَاحِدَةً أَوْ مَا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَلِكَ أَدْنَىٰ أَلَّا تَعْدِلُوا (سورة النساء/٤:٣)

*Meaning: “And if you fear that you will not be able to do justice to the rights of orphans (when you marry them), then marry any other woman you like: two, three or four. But if you fear that you will not be able to do justice, then marry only one, or a female slave whom you own. But if you fear that you will not be able to do justice, then marry only one, or a female slave whom you own.”<sup>16</sup>*

Before this verse was revealed, there was no limit to the number of wives a man could have. The appeal of this verse applies to the whole (al khithab li al-jami'). Therefore, this

<sup>13</sup> A. Rodli Maknum, Polygamy in Muhammad Syahrur's Interpretation (Ponogoro: Stain Ponogoro Press, 2009), p. 16. 16.

<sup>14</sup> Reza Fitra Ardhan, Satrio Anugrah, Setyawan Bima, “Polygamy in Islamic Law and Indonesian Positive Law and the Urgency of Granting Polygamy Permits in Religious Courts”, Journal of Private Law, Vol. 3 No. 2 (December, 2015), Hlm. 101

<sup>15</sup> Supardi Mursalim, Rejecting Polygamy Studies on Marriage Law and Islamic Law (Yogyakarta: Pustaka Pelajar, 2007), pp. 16

<sup>16</sup> Department of Religious Affairs of the Republic of Indonesia, Al-Qur'an and its Translation (Semarang: Raja Publishing, 2018), pp. 97

repetition is obligatory for those who want to marry more than one woman, provided that the number of women he wants to marry is limited to no more than four women.

According to the Tarsil of Aisha R.A., this verse was revealed because she answered Urwa bin Zubair's question to Aisha the Prophet's wife about this verse. then answered him, "O son of my sister, what is meant by orphan here is an orphan girl who is in the care of a guardian where her property is mixed with his property."<sup>17</sup>

In surah An-Nisa verse 129 reads:

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَلَا تَمِيلُوا كُلَّ الْمِيلِ فَتَنزَرُوهُمَا كَالْمُعَلَّقَةِ وَإِنْ تُصْلِحُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا (سورة النساء/٤: ١٢٩)

*Meaning: "And you will never be able to be just between your wives, even though you are eager to do so, so do not be too inclined (to the one you love), so that you leave the other hanging. and if you make amends and preserve yourselves (from cheating), then surely Allah is Forgiving, Merciful."*

What is meant by "fair" is fair treatment of the wives, including in external matters such as clothing, housing, and turnover. Islam allows polygamy under certain conditions. From these two verses, it can be deduced that a Muslim man may only marry four women. However, if it turns out that he is unable to do justice, then he should marry only one woman. It is impossible for a man to be fair both materially and in love, despite his best efforts.<sup>18</sup>

Based on the hadith of the Prophet Muhammad SAW, the justice of a husband is very emphasized in the following matters:

عن أبي هريرة أن النبي صلى الله عليه وسلم قال : من كانت له امرأتان فمال إلى أحدهما جاء يوم القيامة وشقه مائل<sup>19</sup>

*Meaning: "Abu Hurairah RA reported that the Prophet SAW said: Whoever has two wives, then burdens one of them, then he will come on the Day of Judgment with his shoulders sloping." (Reported by Abu Daud, Tirmidhi, Nasa'i and Ibn Hibban).*

Aisha RA stated that the Prophet Muhammad divided his time fairly between his wives. The Prophet said:

اللَّهُمَّ هَذَا قَسَمِي فِيمَا أَمْلِكُ فَلَا تَلْمَنِي فِيمَا تَمْلِكُ وَلَا أَمْلِكُ؛ قَالَ أَبُو دَاوُدَ يَعْنِي الْقَلْبَ

*Meaning: "O Allah, this is what I can do, so do not reproach me for what you have that I do not have" (narrated by Abu Daud, Tirmidhi, Nasa'i and Ibn Hibban).*

From some of these regulations, both of which are found in QS. An-Nisaa' (4) verse 4, verse 129 as well as in the two hadiths above, it can be concluded that in Islam, polygamy is allowed on the basis of considerations of the benefit of human life. However, it is important to practice polygamy fairly. Allah has enacted laws for His slaves solely to bring happiness to them, both in this world and in the hereafter.

The marriage law that allows polygamy for more than one wife is actually optional and not obligatory. However, in this case, polygamy is only allowed if it fulfills the conditions that have been set, including:

1. Able to fulfill the needs of the wives and children financially.
2. Being able to act fairly towards the wives and their children. For those who are unable to fulfill these conditions, polygamy is not allowed.<sup>20</sup>

<sup>17</sup> Tihami and Sohari Sahrani, *Fiqh Munakahat Complete Fiqh Nikah Studies* (Jakarta: Pt Raja Grafindo Persada, 2013), p. 357

<sup>18</sup> Mardani, *Islamic Marriage Law in the Modern Islamic World* (Yogyakarta: Graha Ilmu, 2011), p. 87

<sup>19</sup> Hr Abu Daud, *Sunan Abi Daud*, (Beirut : Dar Al-Fikr, 1982), p. 249.

<sup>20</sup> Muhammad Fadhullah Suhaimi, *Marriage Law in Islam*, (Singapore: Dakwah Printing, 1990) Page. 31

From the brief explanation above, it can be concluded that the law of polygamy is permissible (mubah), not including sunat or wajib. This indicates that polygamy is permitted under certain conditions, such as when a wife is barren, a sick wife is unable to fulfill her husband's needs, or when the number of women increases. In this context, Islam offers the solution of polygamy on the condition that there is justice in running household affairs to create happiness.

### **Overview of the Indonesian Ulema Council of North Sumatra Province**

The North Sumatra Ulema Council was formed before the establishment of the National MUI. MUI North Sumatra was established on January 11, 1974, two-three years after the second general election in Indonesia (1971). The establishment of an organization named "Majelis Ulama" (there was no Indonesian at that time) was on the initiative of Medan Ulama leaders together with the Regional Government whose Governor at that time was Colonel Marah Halim Harahap as the first Governor of Batch 66 together with the Commander of Kodam II Bukit Barisan.<sup>21</sup> The initiatives that emerged were encouraged by the spirit of development declaration that began to be launched in the framework of the New Order development at that time. In a meeting of the formation of Majlis Ulama of North Sumatra (MUI-SU), the first ulama figure who was elected as Chairman was Sheikh H. Dja'far Abdul Wahab Tanjung, who was domiciled in Padang Sidempuan Tap. South, while the other chairmen were domiciled in Medan.

Cooperation and togetherness that runs and intertwined well in North Sumatra between the local government and the Commander, then MUI-SU was also given office facilities by the Governor of North Sumatra at that time H. Marah Halim Harahap in 1975 located on the street Majelis Ulama / Sutomo Ujung No. 3 which has been renovated several times, namely in 2008 during the leadership of Drs. Rudolf M Pardede, during the leadership of Gatot Pujjo Nugroho PTKU Building was inaugurated which was also attended by MUI Chairman Din Syamsuddin.

The presence of the education center built adjacent to the office of MUI North Sumatra is expected to be a motivation to produce many young scholars of North Sumatra for the community. Even in 2017 MUI North Sumatra has had a productive waqf entrepreneurship laboratory.

Since its establishment in 1975 until now MUI North Sumatera has undergone 9 (seven) periods of management, and has organized eight times of Regional Deliberation (Musda). The nine management periods are as follows: Period I (1975-1980) was chaired by Sheikh H. Dja'far Abdul Wahab with daily chairman Sheikh H. Yusuf Ahmad Lubis and general secretary Drs. H. Abdul Djalil Muhammad. Before the end of his term of service, Sheikh H. Dja'far Abdul Wahab died and was continued by Sheikh H. Yusuf Ahmad Lubis. This management was not established through Musda, but through the deliberations of the scholars of North Sumatra. The election of management through Musda was only in the second period.

Period II (1980-1985) was chaired by Drs. H. Abdul Djalil Muhammad and H. Abdullah Syah, MA as general secretary. Period III (1985-1990) was chaired by Drs. H. Abdul Djalil Muhammad and H. Abdullah Syah, MA as general secretary. Before the end of his term of service, Drs. H. Djalil Muhammad passed away and was continued by Sheikh H.. Hamdan Abbas. Period IV (1990-1995) was chaired by Sheikh H. Hamdan Abbas and Drs.

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<sup>21</sup>[Http://Repository.Uinsu.Ac.Id/12277/1/Laporan%20penelitian%20peran%20mui%20sumatera%20utara%20dalam%20pemberian%20sertifikasi%20halal%20%28studi%20kasus%20rumah%20potong%20hewan%29%20by%20hery%20sahputra](http://Repository.Uinsu.Ac.Id/12277/1/Laporan%20penelitian%20peran%20mui%20sumatera%20utara%20dalam%20pemberian%20sertifikasi%20halal%20%28studi%20kasus%20rumah%20potong%20hewan%29%20by%20hery%20sahputra).

H.M. Saleh Harahap. Period V was chaired by H. Mahmud Aziz Siregar, MA and Drs. Muin Isma Nasution as secretary.

Period VI (2000-2005) was chaired by H. Mahmud Aziz Siregar, MA, and Drs. H.A. Muin Isma Nasution. Periods VII and VIII (2005-2010 / 2010 -2015) were chaired by Prof. Dr. H. Abdullah Syah, MA and Prof. Dr. Hasan Bakti Nasution as General Secretary, the 9th period was chaired by Prof. Dr. H. Abdullah Syah, MA dan Dr. H. Ardiansyah, MA as General Secretary.

The Indonesian Ulema Council of North Sumatra Province has the following vision, mission, orientation and role and function:

Vision: "The creation of good conditions of social life, nationality and statehood as a result of mobilizing the potential and participation of the Muslim Ummah through the actualization of the potential of ulama, zu'ama, aghniya' and Muslim scholars for the glory of Islam and the Muslim Ummah (izzul-Islam wa al-Muslimin) so that Islam can be realized which is full of grace (rahmat lil-alamin)."<sup>22</sup>

Mission: "To effectively mobilize Islamic leadership and institutions, so as to be able to direct and foster Muslims who are committed to Islamic faith, carry out Islamiyah sharia, and make ulama a role model in developing good character in order to realize a society that is khair al-ummah."

Orientation: Diniyah, irsadiyah, istijabiyah, hurriyah, ta'awuniyah, syuriyah, tasamuh, qudwah, addualiyah.

Role and Function: As the inheritor of the duties of the prophets (waratsat al-anbiya), as a fatwa giver (mufti), as a guide and servant of the ummah (ri'ayat wa khadim al ummah), as an al-ishlah wal-tajdid movement, as an enforcer of amar makruf and nahyi munkar, relations with outside.

### **Provisions for the Punishment of Husbands Who Marry Without the Wife's Permission in the Criminal Code**

Criminalization of husbands who marry without their wife's permission is found in 279 of the Criminal Code:

1. Shall be punished by a maximum imprisonment of five years
  - a. Any person who enters into marriage knowing that his existing marriage or marriages constitute a legal barrier thereto.
  - b. Any person who enters into marriage knowing that the existing marriage or marriages of the other parties are an obstacle thereto.
2. If the person who commits the act described in paragraph (1) item 1 conceals from the other party that an existing marriage is a legal obstacle thereto, he shall be punished by a maximum imprisonment of seven years.
3. Revocation of rights under articles No. 1-5 may be declared.

Based on the view of the Indonesian Penal Code, marriage without the knowledge of the wife's prior consent is a crime that must be sanctioned or punished. However, long before the sanction is given, several stages of the process must be preceded to arrive at the imposition of punishment from the Court examining the case. One of the most important is the fulfillment of the criminal elements both in general and specifically contained in Article 279 of the Criminal Code.

In general, the components of a criminal offense consist of the following things:

1. Elements of human action

In principle, a person can only be burdened with criminal responsibility not only because he has committed an outward behavior (outward conduct) that must be proven by

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<sup>22</sup> Mui North Sumatra, Profile of the Ulema Council of North Sumatra Province, (Medan: Secretariat of Mui North Sumatra, 2012), Page. 4



a public prosecutor. In criminal law, the outward conduct is known as *actus reus*, in other words, *actus reus* is an external element.<sup>23</sup> In legal literature, *actus reus* is often used as an equivalent of the word conduct for deviant behavior according to the eyes of criminal law. Or in other words, *actus reus* is paired with the word conduct. Meanwhile, in the legal literature it is said that *actus reus* consists of act and omission or commission and omission, where in both phrases, act is the same as commission. Therefore, the notion of *actus reus* does not only include act or commission, but also omission.

Sutan Remy Sjahdeini argues that it is more appropriate to give the equivalent of the word *actus reus* with the word behavior. According to him, behavior is a word equivalent of the word conduct in English which is widely used to refer to behavior that violates criminal provisions. Furthermore, *actus reus* should not be paired with the word act or action because the word is the equivalent of the word act in English. Commission is to perform certain acts prohibited by criminal provisions, and omission is not to perform certain acts that are required by criminal provisions to be performed. Behavior is broader in meaning than acts or actions, which are synonymous with act or commission.

The notion of behavior is not only limited to the meaning of action to do something but also includes not doing certain actions. With the above information, it can be concluded that not doing certain actions required by criminal provisions cannot be said to be an act or action or act or commission. However, it still includes unlawful behavior.<sup>24</sup>

## 2. Unlawful Nature (*Wederrechtelijk*)

Against the law means contrary to the law, or not in accordance with legal prohibitions or requirements, or attacking an interest protected by law. The term against the law itself is actually adopted from the term in civil law, namely “*onrechtmatigedaad*” which means an act against the law. The nature of the unlawful act of an act is of 2 (two) kinds, namely:<sup>25</sup>

### a. Formal illegality (*Formale wederrechtelijk*)

According to this opinion, what is meant by an unlawful act is an act that fulfills the formulation of the law, unless there are exceptions that have been determined in the law, for this opinion against the law means against the law, because the law is the law.

### b. The nature of against material law (*materielewederrechtelijk*)

According to this opinion, it is not necessarily an act that fulfills the formulation of the law that is against the law. For this opinion, the so-called law is not only the law (written law), but also includes unwritten law, namely the rules or facts that apply in society.

For an unlawful act to occur, according to Hoffman, it must have four elements, namely:<sup>26</sup>

- 1) There must be a person who commits the act.
- 2) The act must be against the law.
- 3) The act must cause harm to another person
- 4) The act must be attributable to the wrongdoer.
- 5) The act is punishable by law

<sup>23</sup> Sutan Remy Sjahdeini, *Corporate Criminal Liability* (Jakarta: Grafiti Pers, 2007), page. 34

<sup>24</sup> Amir Ilyas, *Principles of Criminal Law Understanding Criminal Offenses and Criminal Liability as Conditions for Punishment* (Accompanied by Introductory Theories and Some Comments (Yogyakarta: Rangkang Education & Pukap Indonesia, Yogyakarta, 2012), Page 51. 51.

<sup>25</sup> Amir Ilyas, *Op Cit*, Page. 53.

<sup>26</sup> Hoffman in Juniver Girsang, *The Implementation of the Doctrine of the Nature of the Anti-Material Law in the Crime of Corruption in Connection with the Decision of the Constitutional Court of the Republic of Indonesia Number 3/Ppui/2006*, Dissertation, (Bandung: Padjajaran University Postgraduate Program, 2010), Page 116-117. 116-117.

A person's action can be considered a criminal offense, if the action is punishable by law. So in addition to the act being prohibited, it is also threatened with punishment. If the act is not threatened with punishment, then the act cannot be categorized as a criminal offense. This third element is closely related to one of the principles in criminal law, namely the principle of legality, which originates from Article 1 paragraph (1) of the Criminal Code.

Article 1 paragraph (1) of the Indonesian Criminal Code states: "No act can be punished, except on the strength of the criminal provisions in the legislation that has existed before the act occurred". In other words, a person can only be punished if his actions are described in the law.

The punishment referred to as contained in the Indonesian Criminal Code (KUHP) according to Article 10 consists of basic punishment, such as death penalty, imprisonment, confinement, fine, and additional punishment such as revocation of certain rights, deprivation of certain goods and announcement of the judge's decision.

3. The act is committed by a person who is capable of being held responsible 4.

The ability of a person to take responsibility for his actions is an important element in the application of punishment. If the perpetrator cannot take responsibility for his actions, then he cannot be punished. The ability to be responsible is a normal state of mind and has a person's mind in distinguishing between good and bad things. The normal state of mind is determined by the maker's intellect.

In addition, among the requirements for criminal responsibility are adulthood and sound mind. If the perpetrator is not yet an adult or is an adult but his mind is not sound, then he cannot be held criminally responsible. In the Criminal Code (KUHP) does not provide an understanding of the definition of responsibility. The Criminal Code only provides a negative formulation of the ability to be responsible as contained in Article 44 of the Criminal Code which reads:

- a. Any person who commits an act for which he cannot be held responsible by reason of defective reasoning or sickness of mind shall not be punished.
- b. If it is evident that he is not accountable for the act by reason of defective reasoning or sickness of mind, the judge may order him to be placed in a lunatic asylum for a period of one year for examination.<sup>27</sup>

The issue of whether or not a perpetrator is criminally responsible must be decided by a judge. This is a juridical not a medical understanding. Medical testimony is the basis of the judge's decision.

4. The act must occur due to the fault (schuld) of the perpetrator

Fault is closely related to a person's intention in committing an act. To be convicted, a person must commit a prohibited act accompanied by his intention. If a person commits a prohibited act, but in his heart there is absolutely no intention to commit the act, then here the element of fault is not fulfilled, and by itself he cannot be convicted.

The term fault is taken from the word schuld, which until now has not been officially recognized as a scientific term that has a definite meaning, but has often been used in writings. According to Wirjono Prodjodikoro, there are two types of fault, namely intent (opzet), lack of care (culpa).<sup>28</sup>

Meanwhile, Andi Hamzah argues that guilt includes three things, namely intentional, negligence (culpa), and can be accounted for. All three are subjective elements of the conditions of punishment, or if according to the monolistic school, including subjective elements of the offense. Intentionality is the will to act by knowing the necessary elements according to the formulation of the law.

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<sup>27</sup> R. Soesilo, *Op Cit*, p. 60

<sup>28</sup> Wirjono Prodjodikoro, *Op Cit*, p. 55.

The elements contained in Article 279 paragraph (1) of the Criminal Code, namely:

1. Subjective Elements, namely:

“Whoever”. This whoever mentions the person as a legal subject who can be held accountable before the law. The element of “Whoever” must fulfill legal capacity both in criminal law and civil law.<sup>29</sup>

2. Objective elements, namely :

a. Entering into marriage. This element mentions a husband who remarries another woman whose marriage is considered valid according to the law of each religion and belief as mentioned in point (a), but he consciously knows that he is in a marriage contract as referred to in Article 2 paragraph (2) of the Marriage Law..

b. Knowing of his existing marriages. This element mentions a husband who commits an act as mentioned in point (a), but he consciously knows that he is in an existing marriage as referred to in Article 2 paragraph (2) of the Marriage Law.

c. The existence of a legal impediment. This element states that the prospective bride and groom are already aware that the marriage they are about to enter into has a legal impediment, because the prospective husband is still in a legal marriage.

A person can be subject to criminal sanctions under this article when there are elements in the article. Emphasis on this element is discussed in paragraph two, which carries a higher prison sentence of seven years. Because in this paragraph there are procedural and administrative problems. The verse reads:

*If the person who commits the act described in paragraph (1) item 1 conceals from the other party that an existing marriage is a legal obstacle thereto, he shall be punished by a maximum imprisonment of seven years.*

In this paragraph there is an element of intent in committing a marriage crime. The purpose of the article is the same as paragraph 1 point 1, but the emphasis here is on concealing an existing marriage. In the implementation of polygamy can be carried out when obtaining permission from the court. So when the implementation of marriage there is a legal barrier but it is hidden, it can be punished with 7 years imprisonment.

In verse one, a valid marriage is performed and the barrier to the marriage is known. Unlike this paragraph, which is more concerned with concealing the status of a legal barrier and entering into a second marriage. The purpose of this article is to prohibit a person from hiding his marital status when he enters into a second marriage even though the previous marriage will hinder him. Because of the legal pluralism that exists in Indonesia, it anticipates the occurrence of marriages that are not in accordance with applicable laws.

Furthermore, both laws were originally intended to prevent unwanted sexual relations. Although as we all know, in practice there are also those who continue to defend that the existence of marriage at all costs is considered to have eliminated the evil nature of adultery. However, if we look at the effect on the previous spouse who was not aware of the marriage, the effect is the same, namely infidelity in the sense of unwanted actions against the previous spouse that are carried out secretly or with lies.<sup>30</sup>

### **Argumentation of the Indonesian Ulema Council of North Sumatra Province Against the Punishment of Husbands Who Marry Without Wife's Permission**

The Indonesian Ulema Council is a forum for Islamic scholars, scholars, and intellectuals to guide, foster, and protect Muslims in Indonesia. And the Indonesian Ulema

<sup>29</sup> Nadia Azkya, Muhammad Yogi Galih Permana, “Polygamy Without Wife's Permission in Article 279 Kuhp According to the Perspective of Islamic Jurisprudence”, Syntax Literate Journal, Vol. 7, No. 12, (December, 2022), Page. 19077.

<sup>30</sup> *Ibid.*, pp. 190

Council is an institution that has the capacity to issue legal views, fatwas, and matters relating to Islamic law in the current contemporary era.

1. Fatwa Commission of the Ulema Council of North Sumatra Province (Drs. H. Ahmad Sanusi Luqman, Lc, MA)

Question: What is the view of the Fatwa Commission of the Indonesian Ulema Council of North Sumatra Province regarding the punishment of husbands who marry without their wives' permission?

Argumentation:

“Well, in Islam polygamy is permitted but sometimes it can also be prohibited. When is polygamy allowed and when is polygamy prohibited? Well, the first polygamy is allowed if the husband fulfills the conditions, which include being able to be fair, namely fairness (nafkah) not fairness in the body. Then, if this fairness requirement is not met, then this kind of polygamy is not permitted. Looking at the context of polygamous marriage in Indonesia, if a husband wants to remarry (polygamy), it is required to obtain the consent of the previous wife. If he does not get permission, then the wife can report it to the police. Then, even if the wife does not get permission, the marriage is valid according to religion but not valid according to the government. Now the problem is that if the wife sues her husband, this is not explicitly regulated in Islam, but it is implicitly regulated. It is impossible for Islam not to have a solution to every problem. If there were no solutions or rules, it would seem that Islam is lacking, but that is not possible. Islam is able to answer all problems, whatever problems will occur in the future that did not exist at the time of the apostle, there are answers, but these answers may not be in writing. Explored through the Al-Quran and the prophet's hadith about what the sanctions are. In Islam itself, there are 3 (three) punishments to be applied, namely Qishos, Hudud, and then Ta'zir. Qishos is clear, Hudud is clear, but Ta'zir is unclear. In my opinion perhaps, even if the law is issued, the sanction or punishment is categorized as ta'zir. Ta'zir means sanctions or punishments that are not found in either the Qur'an or Hadith. For example, a person may be exiled from his place of residence for a number of years, depending on the conditions of the verdict imposed or other penalties in accordance with what is regulated in the laws that apply in a place. Therefore, Haddah is not regulated and Qishos is not regulated. If the punishment of a husband who marries without his wife's permission can be categorized as Ta'zir. Ta'zir is a law that does not exist in the Qur'an and Hadith but Islam allows it. Then consequences arise, for example, if the husband is a civil servant, he can be fired. If he is fired, who will feed his family, such as his children. So it's like eating a simalakama fruit. If the wife does not sue (report), she will suffer mental harm (eat her heart), if sued the wife will also suffer losses. Unless the wife is rich, it's a different story because she is not bound by her husband's livelihood. So, whatever problems occur in Islam, even though it is not regulated explicitly in the Qur'an and Hadith, but in Islam itself there is something called ta'zir, which is leaving all decisions to the judge (court).”

Question: So, in Islam there is no punishment for a husband who marries without his wife's permission, but in state law there is a punishment. Is this punishment legal or approved in the view of the Indonesian Ulema Council?

Argumentation:

“Agreed and allowed, because that is the rule in the state in Indonesia, because this Indonesian state is not an Islamic state. We who live in the Indonesian state with the ideology of Pancasila must follow these regulations. The regulation was made to provide a deterrent effect because in the view and conditions of the current era it could be detrimental to the wife and include oppressing the wife mentally. The criminal law that applies in Indonesia is a Dutch law. Sometimes the Dutch law is in line with Islamic law, and sometimes it is not. Sometimes they are in line but not the same (substance). But both have punishments. That is, in this case we follow the rules enacted by the government.

Because the purpose of this sanction is also to provide protection to the wife so that there is no arbitrary action that has a detrimental effect on the wife.”

Question: In MUI's view, the punishment of husband who marries without wife's permission is permissible. What is the basis that makes MUI allow it?

Argumentation:

“In looking at this context, we see whether marriage without the wife's consent has *maslahat* or *mafsadat*. If the *maslahat* is there but the *mafsadat* is greater, then leaving the *maslahat* is prioritized over taking the *mafsadat*. For example, there is a man who has a high need for *biologos* (hyper sex), so getting married or polygamy is beneficial for him. But on the other hand, there are effects to *mudharatan* or *mafsadat* that arise, such as in terms of *nafkah*, for example, with polygamy, economic support for the family is not fulfilled. If the husband's income is mediocre, it will cause harm or destitution to the first wife. Another *mafsadat* is that after entering into a marriage without the wife's consent, when the husband goes to prison, for example, who will provide for the first or second wife. If they have children, who will provide for them and pay for their livelihood and school fees. This is the *mafsadat* that arises when a husband marries without his wife's permission as a result of her reporting him to the police/court. Based on this, the following rule applies:

درء المفساد مقدم علي جلب المصالح

It means: “Avoiding the evil takes precedence over taking the good.”<sup>31</sup>

2. Rusmini, M.A (Head of Women, Youth, and Family)

Question: What is the view of the Indonesian Ulema Council (Majelis Ulama Indonesia) Chairperson for Women, Youth, and Family on the Criminalization of Husbands Who Marry Without the Wife's Permission in the Criminal Code?

Argument:

“When it comes to this criminalization, first we look at the licensing side first. Maybe we can look at the license in terms of *mafsadah* and *maslahat*. Which one brings more *maslahat* whether with permission or without permission. So if I see that a husband does not ask permission, then surely the woman will feel hurt and feel betrayed if she does not ask permission from her wife. But if the story is that the husband asks the wife for permission, then the wife can think about accepting or rejecting with all the risks. This means that if the woman refuses, it means that her responsibilities are even heavier, she has to support herself, and she also has to take care of her child. So the risk has been considered beforehand and she can either refuse or accept. But if it is without permission, then automatically from the spiritual side the woman feels hurt and betrayed. So if there is a man who marries first and then asks permission from his wife, that is not good. This is because the conditions in Indonesia are different, even though religiously the responsibility of the household in terms of livelihood is the responsibility of the husband, but there are not a few women who work. In fact, sometimes the work of women is heavier than men, if the wife is not appreciated, in a family already called *Mitsaqon Gholizho* her husband cheats by remarrying without the wife's permission, the woman will feel a very big heartache. So because in terms of maintenance, not all of it comes from the man who is responsible for bearing all the needs of the family, then the woman must be respected by the husband. So if we see, which is greater between *maslahat* and *mafsadat*? In our opinion, the *mafsadat* is greater or more than the benefit if not with the wife's permission. So the *ushul* rule says:

درء المفساد مقدم علي جلب المصالح

It means: “Avoiding the evil takes precedence over taking the *maslahat*”

<sup>31</sup> Ahmad Sanusi Luqman, Chairman of the Fatawa Commission of Mui North Sumatra, May 21, 2024

That rejecting the evil is better than attracting the good, when looking at the permission to remarry to the wife by the husband. And why did this law emerge? This is because there are so many men marrying everywhere, so Law No. 1 of 1974 was enacted, which stipulates that permission must be obtained from the wife to remarry. So in our opinion, in terms of maslahat and mafsadat, the mafsadat is greater than the maslahat. Therefore, the punishment will be more severe, so it is appropriate for the woman to be asked for her opinion before the man remarries. So in our opinion, we agree with the criminalization of husbands who marry without the wife's permission because the current situation and conditions are indeed different between classical fiqh and contemporary times today. So looking at the psychological condition of women, if there is a husband who asks permission to remarry, the woman will see a situation such as if there is a man whose sexual libido is higher while the wife may be giving birth, postpartum, or there is no longer able to then it is permissible for the wife to give permission to the husband to remarry. There are even wives who find a mate for their husbands to marry, and the wife feels that she is unable to serve. So, in order for the wife to make her husband happy by giving permission for the husband to remarry, the husband should be given permission to remarry.”

Question: In MUI's view, especially in Women, Youth, and Family Division, the punishment of husband who marries without wife's permission is allowed. What is the basis that makes MUI allow it?

Argumentation :

“Talking about this punishment is basically not regulated in Islam, but it may be legalized because of the evolving conditions of the times”. There is a fiqhiyyah rule that states:

لا يَنكُرُ تَغْيِيرَ الْأَحْكَامِ بِتَغْيِيرِ الْأَمْكَنةِ وَالْأَزْمَنَةِ وَالْأَحْوَالِ

Meaning: “It should not be denied that the laws change in accordance with changes in place, time and circumstances.”

That basically the law (fiqh) itself is formed by “adjusting” to the conditions of the community, and not the community that adjusts the law, this can be shown that the law appears as a response to the behavior and kinds of problems in human life. Laws will change along with the development of society as well as differences in space and time. If the nash (Al-qur'an and Al-hadith) does not regulate or explain in detail and clearly, then a legal transformation is needed and even make a new law which is certainly in the standardization of the rules of the nash. This form of change is so that Islamic law can apply shalih likulli zaman wal makan, although the method or method used in making laws is different, but the same goal is benefit (social justice).”<sup>32</sup>

### 3. Legal, Human Rights, and Legislation Division of the Indonesian Ulema Council of North Sumatra Province

In connection with the disposition of the Chairman of MUI North Sumatra to the Fatwa Commission, the Law, Human Rights and Legislation Commission and the KPRK Commission of MUI North Sumatra, about the explanation of the thesis research of Muhammad Zaid Anshari Nasution, in connection with the letter of Prof. Dr. Nurussakinah Daulay, M.Psi, Deputy Director of Postgraduate Program at the State Islamic University of North Sumatra No. B.0522/PS.WD/PS.III/PP.00.9/05/2024, dated May 03, 2024, hereby given Legal Opinion from the Legal Division/Commission of MUI North Sumatra, among others:

The explanation/opinion given by the Law Commission is a view in terms of Positive Law that applies in the Unitary State of the Republic of Indonesia, while in terms of Islamic Law in a kaffah manner, of course, the Fatwa Commission has more authority

<sup>32</sup> Rusmini, Head of Women, Youth, and Family, May 21, 2024.

to gather first because the title of the thesis to be presented is the view of the Indonesian Ulama Council of North Sumatra Province regarding the Criminalization of Husbands who marry without the permission of their wives, of course the view according to Islam.

In principle, marriage law in Indonesia adheres to the principle of open monogamy, where a man can only have one wife and a woman can only have one husband. However, a husband may have more than one wife or polygamy if he meets certain requirements, namely obtaining permission from the Court, which one of the conditions for granting such permission is the consent of the legal wife except in special conditions. Special conditions where the consent of the wife is not required when the husband is going to polygamy are if the wife cannot be asked for her consent and cannot be a party to the agreement, or if there is no news from the wife for at least 2 (two) years, or for other reasons that need to be assessed by the Court Judge.

a. Criminal Penalties for Husbands Who Polygamy Without Wife's Permission.

In the Criminal Code, the act of a husband who enters into a polygamous marriage without the permission of the Court is a criminal offense as stipulated in Article 279 of the Criminal Code which reads:

- 1) Shall be punished with a maximum imprisonment of 5 (five) years:
  - a) "Whoever enters into a marriage knowing that his existing marriage or marriages are an obstacle to its validity."
  - b) "Any person who enters into a marriage knowing that his marriage or the marriages of others constitute a valid obstacle thereto."
- 2) If the person who commits the act under paragraph (1) point (1) conceals from the other party that the existing marriage is a legal barrier to this, he shall be punished by a maximum imprisonment of 7 (seven) years.
- 3) In the new Penal Code, namely Article 402 of Law No. 1 of 2023, which will only take effect 3 years from the date of enactment, namely in 2026, unauthorized polygamy is regulated in which explains:
  - a) Shall be punished with imprisonment for a term not exceeding 4 (four) years and 6 (six) months or a maximum fine of category IV, any person who:
    - (1). Solemnizes a marriage, knowing that an existing marriage constitutes a legal barrier to the solemnization of such marriage, or
    - (2). Performs a marriage, knowing that the existing marriage of the other party constitutes a legal barrier to the performance of such marriage.
  - b) If any person as referred to in paragraph (1) subparagraph a conceals to the other party that the existing marriage constitutes a legal barrier to the performance of such marriage, he shall be punished with imprisonment for a term not exceeding 6 (six) years or a maximum fine of category IV, (category IV fine according to the above article is Rp. 200,000,000.- (two hundred million rupiah)

b. Jurisprudence of Criminal Verdicts on Polygamy without Wife's Permission

As an example and/or jurisprudence that can be guided by the criminal case law for husbands who remarry, we can refer to the decision of the Indonesian Supreme Court (MARI) No. 1311K/PID/2000. In this case, it was found that the defendant, who was already married, remarried for the second time without the permission of his first wife. For his actions, the Panel of Judges stated that the defendant had been proven legally and convincingly guilty of the crime of "committing a marriage, while his existing marriage is a legal obstacle for him to remarry" with a prison sentence of 4 (four) months.

Legal Arrangement of Polygamy without Wife's Permission in the Compilation of Islamic Law. That in the Compilation of Islamic Law (KHI) also regulates the prohibition of husbands who marry without the permission of their wives, among others, is regulated in Chapter IX concerning more than one wife, among others stating:

Article 55:

- (1). Being married to more than one person at the same time, limited to four wives.
- (2). The main condition for having more than one wife is that the husband must be able to be fair to his wives and children.
- (3). If it is not possible to fulfill the primary condition mentioned in paragraph (2), the husband is prohibited from having more than one wife..

Article 56:

- (1). Husbands who wish to have more than one wife must obtain permission from the Religious Court.
- (2). The application for permission referred to in paragraph (1) shall be made in accordance with the procedures as set out in Chapter VIII of Government Regulation No. 9 of 1975.
- (3). A marriage contracted with a second, third or fourth wife without the permission of the Religious Court shall have no legal force.

Article 57: The Religious Court only grants permission to a husband who will have more than one wife:

- (1). The wife is unable to perform her duties as a wife;
- (2). The wife is physically disabled or has an incurable disease;
- (3). The wife is unable to bear offspring.

Article 58:

- (1). In addition to the main conditions mentioned in Article 55 paragraph (2), in order to obtain the permission of the Religious Court, the conditions specified in Article 5 of Law No. 1 of 1974 must also be met, namely:
  - a. The consent of the wife;
  - b. There is certainty that the husband is able to guarantee the living needs of the wife and their children;
- (2). Without prejudice to the provisions of Article 41 letter b of Government Regulation No.9 of 1975, the consent of the wife or wives may be given in writing or orally, but even if there is written consent, this consent shall be confirmed by the wife's oral consent at a session of the Religious Court.
- (3). The consent referred to in paragraph (1) letter a is not required for a husband if his wife or wives cannot be asked for their consent and cannot be a party to the agreement or if there is no news from his wife or wives for at least 2 years or for other reasons that need to be assessed by the Judge.

Article 59:

In the event that the wife does not want to give consent, and the application for permission to have more than one wife is based on one of the reasons stipulated in Article 55 paragraph (2) and 57, the Religious Court may determine the granting of permission after examining and hearing the wife concerned at the Religious Court hearing, and against this determination the wife or husband may file an appeal or cassation.

After reviewing the legal problem, about the law and about the legal basis both in the Criminal Code, Jurisprudence of the Supreme Court of RI, and the Compilation of Islamic Law, and associated with the title as mentioned above which will be researched by Mr. Muhammad Zaid Anshari, the Legal Division / Commission gave an explanation to the Chairman of the MUI of North Sumatra Province that the view of the MUI of North Sumatra Province seen from the point of view of Positive Law, Jurisprudence and KHI is: "Every husband who commits and/or intends to commit polygamy must first ask permission from his wife and/or wives and permission from the Religious Court. If this is violated, the husband can be reported to the police in connection with alleged criminal offenses as stipulated in the articles mentioned above".



### **The author's analysis of the views of the Indonesian Ulema Council of North Sumatra Province regarding the punishment of husbands who marry without their wife's permission in the Criminal Code.**

The author has received answers to the arguments given by the views of the Indonesian Ulema Council of North Sumatra Province, represented by the Fatwa Division, the Chairperson of the Women, Youth, and Family Division, and the Law, Human Rights, and Legislation Division, who are of the view that it is permissible or approves of the criminalization of husbands who marry without their wives' permission. The main reason is because if the husband marries without the wife's permission, it causes mafsadat or harm.

The misfortune that arises in this case is the inability of the husband to be fair to either the first or second wife. By not being able to be fair, it affects the unstable and disrupted primary needs of the family which leads to destitution. Fairness is the main requirement for polygamy in Islam, so in the Compilation of Islamic Law it is also required to be able to be fair.

The judge sees and looks at the husband's economic condition whether he is financially capable (nafkah), if he is then the judge allows polygamy. Therefore, the regulations in Indonesia itself stipulate that there must be permission from the wife and the court to marry (polygamy). On the other hand, a husband who marries without his wife's permission will cause inner disappointment for the wife. That is, when the wife finds out that her husband is remarrying without her knowledge, it will certainly cause heartache. With this, it will affect family harmony and quarrels so that a Sakinah, Mawaddah, Warahmah family is not achieved. The importance of openness of husbands who want to remarry is an important thing that must be considered.

Islam does not recognize punishment for husbands who marry without their wives' permission, but looking at the context of today's times is different from the times during classical times. During the classical Islamic era, husbands who were polygamous were people who were capable and mature in terms of material support for the family. But looking at the conditions of today's times, husbands who want to be polygamous may be capable in terms of biological needs but not yet capable in terms of material (nafkah).

As a result, many polygamous women are neglected. Therefore, the existence of criminal law that regulates the punishment of husbands who marry without their wife's permission is to protect women's rights so that they do not feel betrayed and oppressed. Thus, the current criminal law considers a husband who marries without his wife's permission as a crime that will be sanctioned with a prison sentence.

The imposition of this criminal sanction is for the sake of benefit and avoiding kemafsadatan or harm. Although Islam does not regulate the punishment of husbands who marry without their wife's permission, Islam recognizes the term Ta'zir. Ta'zir is a punishment that is not regulated in the nash Al-Qur'an or Hadith, the punishment in ta'zir is left to ulil amri (government) against a crime.

Ta'zir is allowed in Islam, because it aims to protect the rights of individuals who are detrimental or disruptive to the public good. In this case, the punishment of a husband who marries without his wife's permission can be categorized or classified as Ta'zir in the perspective of Jinayah (Islamic Criminal Law).Majelis Ulama Indonesia Provinsi Sumatera Utara memandang pemidanaan suami yang menikah tanpa izin isteri ini diperbolehkan untuk menghindari kemafsadatan/kemudharatan. Sesuai kaidah fiqh yang mengatakan:

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*It means: "Avoiding kemafsadatan takes precedence over taking maslahat"*

According to the author, the existence of punishment for husbands who marry without the wife's permission in the Criminal Code is a policy that contains benefits. According to the

author, there are 2 benefits from the existence of article 279 of the Criminal Code in the context of contemporary times. First, is the Preventive policy. With the presence of this regulation, it provides confirmation / signs to husbands to be more careful when they want to conduct a sirri marriage (secretly) without the knowledge of the wife.

These signs are intended so that every husband who wants to remarry prioritizes openness by the husband to the wife and through procedures permitted in legal provisions. In this sense, remarriage (pologami) is not only to fulfill / vent the husband's lust (biological needs), but must also be accompanied by other considerations such as being able to be fair and obtain permission from the wife and the court.

Second, is the Repressive policy. When the husband violates the provisions of Article 279 of the Criminal Code, the wife has the right to report the husband's behavior that harms the wife as a result of marrying secretly (without permission). When the wife reports the husband's actions to the police, it indicates that the wife has been harmed by the evil actions committed by the husband. Based on this, the husband must be responsible and willing to accept the consequences (punishment) that will be received based on a court decision.

## CONCLUSION

A husband who marries without his wife's permission is a crime in the Criminal Code. Apart from being a crime, it is considered an unlawful act (*wederrechtelijk*) in the context of Criminal Law. Thus, a husband who remarries another woman secretly and without the knowledge of his previous wife is prohibited. If a husband intentionally remarries by hiding a previous legal marriage and it is an obstacle for him to remarry based on the law, then the wife can and has the right to report the husband to the police by fulfilling the subjective elements and subjective elements. The punishment for husbands who violate this is contained in Article 279 of the Criminal Code paragraphs 1 and 2 with a maximum penalty of 5 (five) years to 7 years imprisonment. Majelis Ulama Indonesia Provinsi Sumatera Utara berpandangan bahwa pemidanaan husbands who marry without their wives' permission are allowed even though in Islam there are no sanctions/punishments for husbands who marry sirri (secretly) and without their wives' knowledge. A husband who remarries without his wife's permission can cause more harm than good. The imposition of sanctions (punishment) is also permitted because it can be classified as Ta'zir and contains benefits because it is a policy to protect wives who feel harmed. According to the author, the imposition of sanctions (punishment) for husbands who marry without the wife's permission is a relevant policy with the aim of being a signpost for husbands who want to remarry in order to prioritize openness to their wives if they want to remarry (polygamy), this openness aims so that the wife does not feel harmed and does not hurt the wife's feelings so that it is categorized as a crime in the perspective of criminal law. Then in addition to being open to the wife, by law a husband also asks permission from the court so that the court can obtain permission and see whether a husband is able and economically feasible to polygamy. If a husband who wants to be polygamous goes through these two stages, there is no longer any harm and unlawful acts in the provisions of criminal law. Article 279 of the Criminal Code aims to protect legal wives both in state law and religious law..

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