

Analysis of the Judge's Decision Regarding Polygamy Permits from the Perspective of Maqāshid Al-Syarī'ah in the Toli-Toli Religious Court

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ABSTRACT

This article discusses the statutory provisions that regulate the requirements for polygamy permits intended to create public order, provide legal protection and guarantees for rights and obligations arising from legal relationships in terms of how important it is to obtain court permission for polygamy, formally the urgency of granting polygamy permits must be realized. Legal certainty, order, protection, and legal guarantees for marriage itself. Polygamy permit provisions are implemented to protect the interests, rights, and obligations arising from a marriage. The method used in this research is qualitative, with data collection techniques carried out through direct observation, in-depth interviews, and analysis of written documents. The results of this research show that the granting of the request for a polygamy permit was also due to the applicant's economic capabilities and the willingness and encouragement of the first wife for her husband to carry out polygamy. Thus, there would be no dharar that would be affected by the first wife, so granting the request for a polygamy permit is believed to be able to achieve benefits for all parties involved in the marriage so that the purpose of marriage, as in the provisions of Article 3 of the Compilation of Islamic Law is to create a household life in which Sakinah, mawaddah, and warahmah can be realized. So, it can be concluded that the decision of the Tolitoli Religious Court case number 318/Pdt.G/2022/PA.Tli is still in line with the maqashid as-shari'ah according to as-syatibi, namely protecting religion, soul, mind, property, and lineage.

ARTICLE INFORMATION

Keywords:

Judge's decisions,
polygamy permits,
sharia maqashid,
religious courts

1. Introduction

According to Sharia, the legal provisions for marriage vary and are not just one, and these provisions follow a person's condition (casuistically). Likewise, polygamy laws can also change according to a person's conditions. Islamic law, in principle, does not forbid (forbid) polygamy, but it also does not mandate polygamy. This means that in Islamic law, polygamy is an institution that is established as a solution to overcome specific problems in a family (household).

In Indonesia, monogamy is the principle of marriage. In Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage in article 3 paragraph (1), which reads, "In principle, a man can only have one wife and a wife can only have one husband."

The law allows a man to have more than one wife if he fulfills the requirements of several law provisions, is permitted by his religion, and obtains permission from the Religious Court. The permissibility of polygamy for men is stated in 3 paragraph (2), which reads, "The court can permit a husband to have more than one wife if desired by the parties concerned." Even though marriage law in Indonesia allows the practice of polygamy, the administrative procedures are not easy.

The granting of permission for polygamy by the court is closely related to the applicant's statement and the results of the examination of his first wife. The basis for the court's decision to allow polygamy is related to the status/behavior of the wife and husband. The court's basis for granting permission for polygamy is associated with the condition/behavior of the wife and husband. From the wife's point of view, these are 1) Infertility, 2) Physical aging, 3) Physically unfit for sexual intercourse, 4) Deliberately not trying to restore sexual rights, or 5) Mentally ill/crazy. Meanwhile, considerations from the husband's point of view are: 1) Economically able to support his wives and children, 2) Able to treat his wives fairly, 3) The marriage does not cause *al-dharar al-syar'i* (danger to religion and life). , body, mind, or property) of a wife who has previously been married, 4) The marriage will

not cause a decline in the dignity of the wives or other people related to the marriage, directly or indirectly.¹

The existence of statutory provisions that regulate the requirements for polygamy permits is intended to create public order, provide legal protection and guarantees for rights and obligations arising from legal relationships in terms of how important it is to obtain court permission for polygamy, formally the urgency of granting polygamy permits must be realized. Legal certainty, order, protection, and legal guarantees for marriage itself. Polygamy permit provisions are implemented to protect the interests, rights, and obligations arising from a marriage. Thus, formal requirements greatly determine the achievement of marriage goals as material law requires. Therefore, both material and formal provisions cannot be separated because both have the same influence in determining the legal position of marriage, especially in achieving the goals of marriage.

The urgency of permitting polygamy according to the provisions of the law is procedural in providing legal guarantees for the occurrence of the marriage so that its existence is formally juridically recognized. A marriage is materially valid if it is carried out according to religious provisions, and a marriage will only be recognized if it is carried out in accordance with the formal provisions. The formal legal provisions are the same as the material provisions for the validity of a marriage.

So, polygamous marriage is considered valid if it meets the material legal requirements, which have been carried out following the terms and conditions according to Islamic law, and has fulfilled the formal law, which is carried out after receiving permission from the court which allows polygamous marriages to be carried out.

Thus, it can be understood that the urgency of court permission for polygamy is very influential regarding the existence of marriage in legal recognition. Therefore, judges in adjudicating cases regarding applications for polygamy permits must try to provide justice for the parties by referring not only to the regulatory

¹ Ibid, 10.

provisions regarding polygamy permit procedures but also to a review of maqāshid al-syarī'ah theory.

Therefore, a judge must decide on a polygamy permit application by referring to maqāshid al-syarī'ah. This is done in the framework of how Islam can provide solutions to every problem that arises at any time and under any condition, especially regarding permits for polygamy.

This can be done if it follows the two principles of Islamic law, namely justice and benefit. Polygamy can be practiced when these two principles are fulfilled. Polygamy must be based on the desire of the perpetrator to create benefits for the family and also fulfill the requirements for realizing justice between the husband, wives, and their children. Thus, if polygamy is practiced simply to fulfill desires, mainly just to seek achievement and prestige in today's hedonistic and materialist society, and ignores the fulfillment of the two main principles in Islamic law, then, of course, polygamy is not justified.

Allah SWT most Wise establishes polygamy rules so there are no mistakes or blemishes. Islam does not require polygamy for men, nor does it require women and their families to accept marriage from married men. It needs to be emphasized that the purpose of establishing Islamic law is for the benefit of humanity. With principles like this, it is clear that the polygamy law is also for humanity's benefit. Polygamy aims to create a good family, not just to please the husband. From this principle, it can also be understood that if polygamy cannot bring benefits, it cannot be carried out. For this reason, Islam provides rules that can be used as a basis for implementing polygamy so that these benefits can be realized.

Of course, a detailed, comprehensive, and holistic understanding of the concept of maqāshid al-syarī'ah is a necessity and necessary because a partial understanding of what and how the concept of maqāshid al-syarī'ah will only leave religion on the brink of backwardness and alienation from the era and its adherents.

Allah SWT. As a creator of the Shari'ah, he did not create laws and regulations on this earth without any aim or purpose, but these laws and regulations were made with a specific aim and purpose. The Shari'ah revealed by Allah aims to

realize the benefit of servants and avoid damage, both in this world and in the afterlife.

According to al-Syāthibi, the core aim of syarī'at (law) or maqāshid al-syāthi'ah is the benefit of humankind. In this regard, al-Syāthibi stated that:

إِنَّ وَضْعَ الشَّارِعِ إِنَّمَا هُوَ لِمَصَالِحِ الْعِبَادِ فِي الْعَاجِلِ وَالْآجِلِ² مَعَا²

This means: "Indeed, the syari' (shariah makers) aim to realize the benefit of their servants both in this world and in the afterlife simultaneously in enacting their laws."

Based on al-Syathibi's statements, it can be concluded that Maqashid al-Syari'ah includes aspects of human nature.

One of the Religious Courts in Indonesia that issued a decision on a Polygamy Permit is the Tolitoli Religious Court with decision number 318/Pdt.G/2022/PA.Tli. In this case, a study or research on the polygamy permit decision must be conducted.

This decision will be reviewed further in the theory of maqāshid al-syarī'ah. In the background description above, the researcher would like to raise the title "Analysis of Judge's Decision Number 318/Pdt.G/2022/PA.Tli Regarding Polygamy Permits in the Perspective of maqāshid al-syarī'ah (Study at the Tolitoli Religious Court)"

2. Literature Review

2.1 Definition of Polygamy

Linguists differentiate between the terms 'polygamy' and 'polygamy,' although there are those who consider them to be the same. Letymologically, the term polygamy comes from the Greek, namely polusl (many) and gunel (woman). It means a marriage between a man who marries many women simultaneously. The word polygamy also comes from Greek, namely from the words apolusl (many) and gamosl (marriage). So, polygamy is a multiple marriage. In the Big Indonesian Dictionary, polygamy is defined as a marriage system in which one party marries several members of the opposite sex at the same time. So, the term polygamy includes

² Abu Ishaq Al-Syatibi, *Al-Muwafaqat fi Ushul al-Syari'ah*, (Beirut: Dar al-Kutub al-Ilmiyah, 2004), juz 2, 9.

forms of marriage, polygamy, and polyandry, which are also the opposite of monogamy (marriage with one partner). Polyandry comes from the Greek words *polus* (many) and *andros* (man). Polyandril means a wife who has more than one husband at the same time.

Polygamy is a marriage in which one party (the husband) marries more than one wife at the same time, not during marriage but during family life. In contrast, monogamy is a marriage that only allows the husband to have one wife at a particular time.³

Because of that, here, the author uses the term 'polygamy,' which in our language is called 'honey, and in Arabic, it is called *ta'adudl al-lzaujah* and does not use the term polygamy. Because basically, Islam no longer implements a polyandry marriage system. However, in reality, polygamy tends to be defined as the marriage of one man to two or more wives at the same time, and this definition needs to be sorted out.

2.2 Polygamy in the Compilation of Islamic Law

In the Compilation of Islamic Law, the discussion regarding polygamy is discussed in articles 55-59. These articles read in full:

Article 55

- 1) Having more than one wife simultaneously, limited to four wives.
- 2) The main requirement for having more than one wife is that the husband must be able to act righteously towards his wives and children.
- 3) If it is impossible to fulfill the main conditions mentioned in paragraph (2), the husband is prohibited from marrying another person.

Article 56

- 1) Husbands who wish to have more than one wife must obtain permission from the Religious Court.
- 2) Submission of the permit application referred to in paragraph (1) is carried out according to the procedures regulated in Chapter VIII of Government Regulation No.9 of 1975.

- 3) A marriage solemnized with a second, third, or fourth wife without permission from the Religious Court has no legal force.

Article 57

The Religious Court only permits a husband who will marry more than one wife if: a. the wife cannot carry out her obligations as a wife; b. the wife has a physical disability or an incurable disease; c. the wife cannot bear children.

Article 58

- 1) Apart from the primary requirements mentioned in Article 55 paragraph (2), to obtain a religious practice permit, the conditions specified in Article 5 of Law number 16 of 2019 concerning amendments to Law number 1 of 1974 must also be fulfilled, namely: a . the wife's consent; b. There is certainty that the husband can meet the living needs of his wives and children.
- 2) Without prejudice to the provisions of Article 41 Letter b Government Regulation no. 9 of 1975, the consent of the wife or wives can be given in writing or verbally. Still, even if there is written permission, this consent is confirmed by the wife's verbal consent at the Religious Court session.
- 3) The consent referred to in paragraph (1) letter a is not required for a husband if his wife or wives cannot possibly be asked for their permission and cannot be a party to the agreement or if there has been no news from the wife or wives for at least 2 years or due to other reasons that need to be assessed by the Judge.⁴

Article 59

Suppose the wife does not want to consent, and the request for permission to marry more than one person is based on one of the reasons regulated in Articles 55, paragraphs (2) and 57. In that case, the Religious Court can determine the granting of permission after examining and hearing the wife concerned in court. Religious Court, and against this decision,

³ Al-Qamar Hamid, *Hukum Islam Alternative Terhadap Masalah Fiqh Kontemporer*, (Jakarta: Restu Ilahi., 2005) , 19.

⁴ Ibid.

the wife or husband can file an appeal or cassation.⁵

The provisions in the Compilation of Islamic Law above provide an understanding that polygamy can be carried out with several conditions. If these conditions cannot be fulfilled, then polygamy cannot be carried out.

2.3 Polygamy in Indonesian Legislation

The provisions for polygamy in Indonesia are regulated in Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning Marriage and the Compilation of Islamic Law. In Law Number 1 of 1974 concerning Marriage, it is known that Marriage in Indonesia adheres to the principle of monogamy; this is based on Article 3, which states that men may only have one wife and women may only have one husband; however in certain circumstances, polygamy is. The clause that allows a man to carry out polygamy in the Marriage Law is only an exception, so these articles contain reasons that will enable a man to carry out polygamy.

The conditions for allowing a man to carry out polygamy are divided into two parts, namely first, alternative conditions as stated in Article 4 of Law Number 16 of 2019 concerning amendments to Law Number 1 of 1974 concerning Marriage, which explains that Religious Courts only provide permission for husbands who wish to engage in polygamy if the wife is unable to carry out her obligations as a wife, there is a physical disability or incurable disease in the wife. The wife is unable to bear children. Second, the cumulative requirements are stated in Article 5 of the Marriage Law, which states that a man who wants to practice polygamy must obtain permission from his wife. There is certainty that the husband can guarantee the needs of his wives and children, and there is a guarantee that the husband can act righteously towards his wives and children.⁶

The essence of premarital health guidance is a preventive measure to avoid health problems for yourself, your partner, and your offspring. Health checks are mandatory in the requirements for marriage registration. Other health checks can be done by prospective husband and wife, including blood type and rhesus tests, hemoglobin tests, hematology tests, examinations for other infectious diseases such as herpes, chlamydia, gonorrhea, hepatitis, and syphilis in prospective bride and groom couples, sperm examination for prospective grooms whether they are fertile or not, examination of Reproductive Tract Infections or Sexually Transmitted Infections, as well as chest x-rays and EKG (Electro Cardio Gram) to check heart and lung health. Also, men who want to practice polygamy must first apply for a polygamy permit from the Religious Court; if the Religious Court grants, in this case, permission to the man to practice polygamy, then the man will marry the second prospective wife, who, of course, has received permission from his first wife. The reasons that are usually used as the basis for the Religious Court to grant a request for polygamy based on the rules of law, in this case, Article 4 of the Marriage Law, are when the wife cannot carry out her obligations as a wife, has a physical disability or an incurable disease and the wife cannot produce offspring, so that the solution chosen is often to marry a second time, in this case, polygamy, having more than one wife at the same time.⁷

Based on the article above, the Marriage Law allows polygamy even for certain reasons. This explains that the principle adopted by the Marriage Law is actually not absolute monogamy but rather open or non-absolute monogamy. Polygamy is placed in emergency legal status or in extraordinary circumstances.⁸

The basis for considering whether or not a man is permitted to practice polygamy is, in addition to the reasons mentioned above, also looking at the husband's ability to

⁵ Ibid.

⁶ Undang-Undang Nomor 16 Tahun 2019 tentang Perubahan Undang-Undang Nomor 1 Tahun 1974 tentang Perkawinan.

⁷ Ibid.

⁸ Mardani, *Hukum Keluarga Islam di Indonesia*, (Jakarta: Kencana, 2017), Cet. Ke-2, 95-96.
e-ISSN: 2715-4580
p-ISSN: 2715-8268

act reasonably in appearance or not, based on Government Regulation Number 9 of 1975 Article 41 paragraph (3) this can be proven by showing a certificate of the husband's income signed by the treasurer where the husband works, or a certificate of income tax or it could also be another certificate that can be accepted by the court to be used as a guarantee or indication that the man can act reasonably towards his wives and can fulfill the needs of his wives and children, this is in line with the provisions written in Article 58 of the Compilation of Islamic Law.

2.4 Wisdom of Polygamy

Naturally, at birth, more male babies are born than female babies. However, in the course of human life, from birth to maturity and old age, the number of women is greater than that of men.⁹

With this, the risk of death is higher for men due to the influence of the harshness of the struggle and the large number of men's jobs that are at risk of death compared to women's jobs. Meanwhile, health experts are more interested in low endurance and the consequences of high stress for men.¹⁰

Furthermore, the next factor is that the economy is obtained by a person who supports and guarantees his family. For humans, wealth is a source of happiness. If there is wealth, everything can be bought, including thrones and women.¹¹

Islam is a religion that allows the practice of polygamy to occur, providing conditions that must be fulfilled for a man if he wants to practice polygamy. One of the things stated in Q.S An-Nisa/129 is that a man must be able to treat his wives fairly. This is a provision to avoid the negative impacts that occur in polygamy for both men and women.

The impact of polygamy will be explained first regarding the natural losses resulting from actions that violate slander and deviate from the teachings of Allah SWT.

The existence of the polygamy system and its provisions in Islamic teachings is a great gift for its preservation, namely avoiding dirty social actions and low morals in a society that recognizes polygamy.¹²

As for societies that prohibit polygamy, the following can be seen:

- a. Crime and prostitution spread everywhere, so there were more prostitutes than married women.
- b. Many children are born without a clear father due to acts outside Marriage. In America, for example, every year, more than two hundred thousand children are born out of wedlock.
- c. The emergence of various physical illnesses, mental disorders, and mental disorders.
- d. Resulting in mental collapse.
- e. Damaging a healthy relationship between a husband and his wife, disrupting their home life, and severing family ties so that they no longer consider everything valuable in the life of a husband and wife.
- f. Doubting the legitimacy of the offspring so that the husband is not sure that the children he is caring for and educating are his flesh and blood.¹³

This is strong evidence to show that polygamy, as taught by Islam, is the healthiest way to solve this problem and is the most suitable way for humans to use in their lives in the world.

Apart from that, the wisdom of allowing polygamy in Islam is that it is an emergency with conditions of being fair, such as:

- a. Husbands are allowed to obtain offspring from their second wife if the first wife cannot have children or is said to be barren.
- b. So that the husband can avoid committing adultery if his wife cannot have sex because she has an incurable disease.

⁹ Hasan Aedy, *Poligami Syari'ah dan Perjuangan Kaum Perempuan*, (Bandung: Alfabeta, 2007, 24.

¹⁰ *Ibid*, 24

¹¹ *Ibid*, 261

¹² Tihami, Sohari Sahrani. *Fikih munakahat, kajian fikih nikah lengkap*, Jakarta: Rajawali pers, 2014 Cet: 14, 360.

¹³ *Ibid*, 360-361.

- c. A neglected wife has the opportunity to have a husband who aims to protect her, provide a living, and serve her biological needs.¹⁴

2.5 Legal Basis for Polygamy

The connection with the legal basis for polygamy is as follows:

1. Al-Qur'an, namely:

Allah says in Q.S. An-Nisa'/ 3 as follows:

وَأِنْ خِفْتُمْ أَلَّا تُقْسِطُوا فِي الْيَتَامَىٰ فَانكِحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مِمَّا مَلَكَتْ أَيْمَانُكُمْ ۚ ذَٰلِكَ أَدْنَىٰ أَلَّا تَعُولُوا

Meaning: "If you fear you might fail to give orphan women their due rights if you were to marry them, then marry other women of your choice—two, three, or four. But if you are afraid you will fail to maintain justice, then content yourselves with one or those bondwomen in your possession. This way, you are less likely to commit injustice."¹⁵

The meaning of the verse above explains that if a man feels that he cannot do justice to female children (orphans), then he looks for another woman. An explanation like the line in the verse above is not the result of an implicit understanding. The scholars agree that if a man is confident that he can do justice to orphans, then that man can be polygamous. But, if the man worries that it will not be fair, he is allowed to marry another woman.

Acting justly means giving equal treatment to one's household, which is external, for example, turn, place, clothes, etc. Polygamy is permitted in Islam with certain conditions. And this paragraph allows polygamy with a limit of four wives. But, if a husband is afraid of being disobedient to his wife if he remarries, then it is obligatory for the husband to simply marry a woman.¹⁶

In Q.S. IAn-Nisa/129, Allah SWT also said the following:

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَلَا تَمِيلُوا كُلَّ الْمِيلِ فَتَدْرُوهَا كَالْمُعَلَّقَةِ ۚ وَإِنْ نُصَلِحُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا

Meaning: "You will never be able to maintain emotional justice between your wives—no matter how keen you are. So, do not incline towards one and leave the other in suspense. And if you do what is right and are mindful of Allah, surely Allah is All-Forgiving, Most Merciful."¹⁷

The meaning of this verse emphasizes that justice cannot be realized if it is related to feelings of the heart and the emotion of love. The justice that must be realized is only about material justice, so a man who practices polygamy must be responsible for the welfare of all his wives and can provide justice over time to all his wives.

Suppose the verse seems contradictory regarding acting reasonably, regarding verse 3 in Surah An-Nisa. In that case, it is obligatory to act fairly, whereas verse 129 eliminates acting fairly. These two verses do not contradict each other because the thing required here is to do justice in external matters without human ability. Regarding acting fairly, fairness is omitted in these two verses in matters of love and affection.

Abu Bakar bin Araby believes that it is genuinely authentic that justice and love are beyond human capabilities. Love is only in the hands of Allah Almighty, and God can change it and turn it around according to His will. Likewise, in the relationship between husband and wife, sometimes a husband is passionate about one wife but not the other. In this case, if it is not intentional, the husband cannot be punished for sin because it is beyond his capabilities. Therefore, the husband is not forced to do it.¹⁸

The two letters above are the legal basis for polygamy and the principles of justice, which must be used as a basis for it.

¹⁴ Abdul Rahman Ghozali, "*Fiqh Munakahat*", (Jakarta: Kencana, 2003), 138.

¹⁵ Dikutip dari Al-Quran dan Terjemahan Kementerian Agama RI tahun 2012

¹⁶ Tihami dan Sohari Sahrani, *Fiqh Munakahat: Kajian Fikih Nikah Lengkap*, PT. Raja Grafindo Persada 2014, 359-360.

¹⁷ Ibid, Al-Quran dan Terjemahan Kementerian Agama RI tahun 2012.

¹⁸ Tihami dan Sohari Sahrani, *Fikih Munakahat: Kajian Fikih Nikah Lengkap*, Jakarta: Rajawali Press 2009, 363.

The form of justice that can be created in a family every day is not justice that is related to feelings and love tendencies in humans because, related to that, humans will not be able to provide such justice.

2. Islamic Basis for Polygamy Law Based on al-Hadith, namely:

أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ لَغَيْلَانَ ابْنِ أُمِيَّةَ لَتَقْفِيَّ وَقَدْ أَسْلَمَ وَتَحْتَهُ عَشْرُ نِسْوَةٍ أَخْتَرُ مِنْهُنَّ أَرْبَعًا وَفَارِقُ سَائِرَهُنَّ (رواه الترمذي)

Meaning: "From Ibn Umar r.a. that Ghailan bin Salamah As-Saqafi had converted to Islam when he was still Jahiliyah he had ten wives, his wives converted to Islam along with him, He was ordered by Rasulullah SAW, to choose four wives among them (of which six were divorced)." (H.R. Tirmidhi).¹⁹

3 Views of Ulama regarding Polygamy Law as follows:

1. Scholars of the Islamic School of Jurisprudence

a. Maliki School

Most of the Maliki ulama's books discuss the law on polygamy for slaves, the prohibition on having more than four wives, and the obligation to share overnight stays between wives. According to Imam Malik in the book *Al-Muwattha'* - which is the first book of jurisprudence to be written systematically - slaves in terms of polygamy are also the same as free people; both are allowed to have up to four wives because this verse is general. Even though currently there are no slaves, it must still be acknowledged that this opinion is more advanced than the opinion of other contemporary fiqh scholars in recognizing that the rights of slaves are the same as the rights of free people, making this opinion different from the opinion of most fiqh experts who say that slaves are only could marry two wives, because the rights of a slave were defined as only half those of a free person.²⁰

¹⁹ Muhammad bin Isa At-timidzi, *Al-Jami' Al-Kabir*, Penerbit Dar Al-Garbul Islami Cet. 1, jilid 2, 421.

²⁰ Iffatul Umniati dan Fathonah, *Poligami dalam Pandangan Ulama Klasik, Laporan Penelitian SIS*, (Kuala Lumpur, Sisters In Islam, 2008).

Regarding the issue of fairness, Ibnu Rushd said that the obligation to be fair between wives has become a non-negotiable agreement of the ulama. In general, the issue of "justice" here shows that polygamy (both for free and for slaves), according to the views of Malikiyah ulama, is no different from the opinion of most other ulama, namely that polygamy is permissible. Still, the primary consideration is that it is necessary to keep being fair.

b. Hanafi School of thought

The Hanafi School interprets Q.S. al-Nisa verse 3 differently from general opinion. This opinion is represented by Abu Bakar Jassas Razi, who said in *Ahkam al-Qur'an* that the word orphan in this verse does not only mean a child whose father has died but also includes a widow whose husband has also died²¹

Al-Kasyani (W. 1191 AD)²² argued that polygamy is permissible, but the conditions must be fair. However, if someone is worried that he will not be able to do justice in terms of physical support (clothing, food, and shelter) and spiritual support (sharing shifts) for his wives, then Allah advises men to marry only one wife. Because being fair in life [both physically and spiritually] is an obligation of dharurah syar'i and is challenging. Dharurat means needs that must be met because they are essential and fundamental. Among the forms of fair treatment for several wives is that birth support related to material things (such as food, shelter, and clothing) must be the same. Both were given to free wives and slaves because these were primary needs. Husbands are also prohibited from replacing their mental support obligations with money. Likewise, his wife should not give money to her husband to get more shifts than other wives.

c. Shafi'i School of thought

Imam Syafi'i (d.204 H/820 M) did not discuss polygamy in his monumental fiqh book, *al-Umm*. He only discussed women who may or may not be polygamous and regarding the limit on the number of wives. According to Imam

²¹ Abu Bakar Jassas Razi, *Ahkam al-Qur'an*, Beirut : Dar al-Fikr 1993, Vol. 2, 57-58.

²² Abu Bakar bin Mas'ud bin Ahmad Al-Kasyani (W. 1191M) adalah salah satu representasi ulama Hanafiyah. Beliau adalah penulis buku *Bada'i' al-Shana'i fi Tartib al-Shara'i'*, buku fiqh yang ditulis dalam tujuh jilid.

Syafi'i, women who are not allowed to be polygamous absolutely at the same time are sisters, whether they are also slaves or free. Likewise, the prohibition of marrying between women and their aunts (ammah and kholah), as in the Hadith narrated by Abul Hurairah.

Meanwhile, regarding the number of wives permitted according to Islamic law, it is limited to four million, and this reason only applies to free women. Meanwhile, female slaves may be polygamized without any limits. However, throughout this study, Imam Syafi'i did not talk at all about the conditions that must be met by someone who wants to practice polygamy. However, in a particular chapter themed ,Kitab Ashrah al-Nisa', Imam Syafi'i talks about the issue of how a husband should treat his wife well, the obligations, and the way to take turns for a polygamous man. Imam Syafi'i also emphasized that both husband and wife have their rights and responsibilities. It is also said that a polygamous person must be fair in giving a visit quota to all his wives with a calculation based on quantity. There is no reason not to take turns with all wives, even if the wife is seriously ill, menstruating, or postpartum unless the wife gives her quota to another wife. This view can be interpreted as giving the impression of justice in gender relations, namely that husband and wife must respect each other.

Regarding the meaning of "ولن تستطيعوا أن تعدلوا بين النساء ولو حرصتم فلا تميلوا كل الميل فتذروها كالمعلقة" Imam Al-Syafi'i said: "Some of the scholars of interpretation explained: "And you will never be able to act justly between (your) wives...". (meaning: to act justly) in the feelings of the heart (feelings of love and inclinations of the heart) because Allah SWT forgives His servants for what is in their hearts."... therefore do not be too inclined (towards those you love)... meaning: do not follow your lustful desires by doing deeds (that deviate from the Shari'a).

Regarding this, the book Al-Muhadzabl by Imam Al-Shairazyl (one of the great scholars of the Shafi'i school of thought) mentions that Imam Syafi'il also has an opinion about the feeling of ,alla ita'ulul (تعولوا ألا) in Q.S. Al-Nisa/3, which according to him, so that the number of your families is not too many. This opinion differs from the general interpretation: "Do not commit oppression". According to Imam IAl-

Nawawi, what he meant (تعولوا ألا) is that "all of you must not do wrongdoing; if you do wrongdoing, then polygamy is haram". That's why, according to IAl-INawawi, the law of monogamy is a sunnah to avoid injustice towards the woman he marries. Abu al-Qasim Al-Syayramy also supports this opinion. Al-Syayramy said: "Monogamy is sunnah, especially in today's masses." This is because doing justice is complex.

d. Hambali School

In terms of line, Ibnul Taymiyahl (W.728 H/1328 AD) explained that polygamy is one of the privileges in Islamic law throughout the masses because it contains many lessons, on the other hand, both for men and women and social society in general. Meanwhile, the issue of monogamy became an essential concern for Ibn Quddamah. In line with Imam Al-Nawawi (Shafi'i school of thought), Ibn Quddamah also believes that monogamy is better because being fair is not an easy thing in polygamy. Meanwhile, being fair is mandatory for those who practice polygamy. In this regard, Ibnu Quddamah, together with Imam Al-Hajawi, Ibnu Taymiyah, and Ibnu Al-Qayyim, explained that if a prospective wife submits a condition not to be married, and the prospective husband agrees, then the husband cannot be polygamous. But if the husband does so, the wife has the right to file a lawsuit to dissolve the marriage. Likewise, suppose a man marries a woman from a family where marriage is not shared. In that case, this habit automatically becomes a condition that the husband, namely not polygamy, must fulfill. This opinion refers to the Hadith of the Prophet, which prohibited Ali ibn Abi Talib from marrying another woman after marrying his daughter.

e. Imam Al-Ghazali.

According to Imam Ghazali, polygamy is permissible because, in Marriage, there is no coercion; therefore, polygamy is acceptable as long as the wife or wives allow it so the husband can be polygamous. From here, the wife may refuse or will enable it.²³

²³ Edi Darmawijaya, "Poligami Dalam Hukum Islam dan Hukum Positif (Tinjauan Hukum Keluarga Turki, Tunasia, dan Indonesia)", *Gender Equality: Internasional Journal of Child and Gender Studies*, Vol. 11, NO. 11, (2015): 29-31.

4 Methodology

This research uses qualitative methods. In qualitative research, the theory is only a guide, so the research focus follows the facts in the field (Nurdin & Pettalongi, 2022; Nurdin, Stockdale, & Scheepers, 2016). Data was collected through direct observation, in-depth interviews, and written document analysis at the research location (Rusli, Hasyim, & Nurdin, 2021; Rusli & Nurdin, 2022). The object of this research is the religious court in the Toli Toli community in Pasangkayu. Interviews were conducted with several informants who were relevant to their job responsibilities and knew about the problems of this research. The results of the interviews were recorded and transcribed. The transcript results were consulted with participants to obtain approval (Nurdin, Scheepers, & Stockdale, 2022). The data analysis technique in this research uses deductive thinking techniques, which can be interpreted as research procedures that produce deductive data from interviews and field notes. Data analysis was carried out using thematic analysis from Strauss and Corbin (1998). Analysis begins with open coding, axial coding, and selective coding. The final result of data analysis is the themes found in the data.

4. Results and Discussion

4.1 Analysis of Judges' Legal Considerations Regarding Polygamy Permits

In the legal considerations of the Tolitoli Religious Court judge in granting permission for polygamy, it was that the Petitioner's request to practice polygamy had at least two legal elements or pillars that had to be fulfilled, namely:

1. legal relationship between the Petitioner, Respondent, and the Petitioner's Prospective Wife.
2. There are reasons or conditions for polygamy.

The first legal element is the legal relationship between the Petitioner, Respondent, the Petitioner's Prospective Wife, and the parents of the Petitioner's Wife. Based on the statements of the Petitioner, the Respondent, the Petitioner's

Prospective Wife, and the parents of the Petitioner's Wife, which is linked to witness statements, it has been proven that the Petitioner, the Respondent, the Petitioner's Prospective Wife are other people, not related by blood (mahram), nor are they blood relatives.

The legal considerations regarding the Respondent allowing the Petitioner to remarry (Polygamy) are as follows:

The Respondent already knows the applicant's future wife quite well, so the applicant confidently seeks approval from the Respondent to be allowed to remarry the applicant's future wife, the requirement for the wife's consent as in Article 5 of Law Number 16 of 2019 cannot be applied absolutely. Therefore, the second legal element must be fulfilled: the reasons or conditions for polygamy. Considered as follows:

1. That the Qur'an, as the primary legal basis in Islam, does not mention several reasons for polygamy, as stated in article 4 of Law Number 16 of 2019 jo. Article 57 Compilation of Islamic Law, except for the requirement to treat one's wives somewhat as in Q.S. an-Nisa verse 3, which reads:

وَلَنْ تَسْتَطِيعُوا أَنْ تَعْدِلُوا بَيْنَ النِّسَاءِ وَلَوْ حَرَصْتُمْ فَلَا تَمِيلُوا كُلَّ الْمِيلِ فَتَنزَرُوهُمَا كَالْمِغْلَقَةِ وَإِنْ تُصْلِحُوا وَتَتَّقُوا فَإِنَّ اللَّهَ كَانَ غَفُورًا رَحِيمًا

Translate : "You will never be able to maintain emotional justice between your wives—no matter how keen you are. So, do not incline towards one and leave the other in suspense. And if you do what is right and are mindful of Allah, surely Allah is All-Forgiving, Most Merciful."

2. That the requirement for a guarantee that the husband will act pretty in Islam has been stated in Article 5, paragraph 1 c of Law number 16 of 2019, even further emphasized in Article 55, paragraph 2 of the Compilation of Islamic Law, which states that the husband must be able to act fairly towards his wife. And children are the primary requirement.
3. To harmonize the concept of Islamic law with Law number 16 of 2019, article 59 of the Compilation of Islamic Law states that it will be fair to one's wife and children, not

only as a primary requirement but also as one of the reasons for practicing polygamy, which reads as follows:

"If a wife does not want to give consent and requests to marry more than one wife based on one of the reasons regulated in Article 55 paragraphs 2 and 57, the Religious Court can determine the granting of permission after examining and hearing the wife concerned."

4. That the basis of the Petitioner's petition is that the Petitioner is requesting permission to have polygamy with his prospective Second Wife because the Petitioner's Prospective Second Wife has hidden because her parents have divorced, and the Respondent has also agreed to the Petitioner's petition. The Petitioner's reasons are not included in the alternative conditions, which are reasons for allowing polygamy.
5. That because the Petitioner's reasons are not included in the alternative requirements for being permitted to practice polygamy, the Panel of Judges does not necessarily have to reject the Petitioner's request for permission. Still, it must first explore further the purpose of the polygamy that the applicant will carry out and how The benefits of *mursalat* (*syar'ireasons*) for polygamy are for the Petitioner, Respondent, and the Petitioner's prospective second wife.
6. The purpose of Marriage, as stipulated in Article 3 of the Compilation of Islamic Law, is to create a household life that is *sakinah*, *mawaddah*, and *warahmah*. The provisions in this article must, of course, also apply in a polygamous marriage, which starts from a solid contract or *mitsaqan galizan* to obey Allah's commands, and carrying them out is an act of worship. The Petitioner argued that he wanted to help his future second wife, who was living alone because her parents had divorced. This reason was not motivated by mere passion. Still, there was a sociological aspect to raising the dignity and status of a woman living alone with her parents, who were divorced and had lived with each other.

7. Whereas the Panel of Judges is *contra legem* with the alternative condition that a husband is permitted to engage in polygamy as determined by the law by prioritizing the *mursalat* benefit of the Petitioner, the Respondent, and the Petitioner's prospective second wife, so the Panel of Judges believes that this alternative condition must be set aside.

Looking at the legal considerations of the decision of the Tolitoli Religious Court, which has set aside alternative conditions, namely: 1) The wife cannot carry out her obligations as a wife, 2) The wife has a physical disability or an incurable disease, 3) The wife cannot give birth to offspring. And grant the request for a polygamy permit by looking at it from the perspective of *mashlahah* (benefits) and *mafsadat* (damage) in granting the request for a polygamy permit. By basing the argument on the verse Q.S. an-Nisa: 3 and the *Fiqhiyyah Qaidah* regarding rejecting damage taking precedence over extracting benefits, the judge considers that the request for a permit for polygamy, which does not meet the requirements, should still be granted.

4.2 Review of Maqasyid Sharia on Granting Polygamy Permits

Before carrying out a *maqâshid al-syarî'ah* analysis of the Polygamy permit Number 318/Pdt.G/2022/PA.Tli, it is necessary to explain *ta'lil al-syarî'ah* (the law of enforcing the law) according to Imam Al-Syatibi's view. Al-Syatibi wrote the meaning of *illat*:

العلة هي المصلحة أو المفسدة التي راعاها الشارع في الطلب كحفا أو فعلا

Meaning: 'Illat is the benefit taken into account by sharia' by ordering work or preventing it."

Al-Syatibi further said:

العلة هي المصالح الشرعية التي تعلقت بها الأوامر والمفاسد التي تعلقت بها النواهي

Meaning: "Illat is all sharia benefits which depend on all commands and all forms of *mafsadah* which depend on all prohibitions."²⁴

Thus, Syatibi's definition of *illat* at explains that *illat* at is what leaves a mark, namely that

²⁴ Abu Ishaq Al-Syatibi, *Al-Muwafaqat fi Ushul al-Syarî'ah*, (Beirut: Dar al-Kutub al-Ilmiyah, 2004), juz 1, 265.

which contains wisdom, which causes the existence of law.

al-Syatibi also said that the enactment of a law is for the benefit of servants both in this world and in the afterlife. As for Ta'lil (the illat law), it applies to all laws in detail. This is proven by the existence of texts containing the meaning of the prescribed law because there is illat, both globally and partially.

So it can be understood that the law exists because of the 'illat, and the law does not exist because of the absence of the 'illat. This is following the rule which states:

الحكم يدور مع العلة وجودا وعدما

Meaning: "The law revolves around and its 'illat (reason), existing and not existing."²⁵

The enactment of a law based on 'illat must have a goal, namely to benefit humankind. In reality, there is a relationship between 'illat and the objectives of sharia,' which are the objectives of legal enactment, which can be understood according to reason and some which cannot be understood by reason.

Based on the definition of illat by Imam as-Syatibi above, a legal conclusion can be drawn regarding polygamy permits in the decision of the Tolitoli Religious Court Number 318/Pdt.G/2022/PA.Tli is in line with the accompanying 'illat, namely:

- 1) The applicant and his prospective second wife love each other and are in a serious relationship so that it is feared that it will cause slander in society;
- 2) There is concern about adultery;
- 3) There is concern that the Petitioner will marry in an unregistered manner, which will cause more significant harm.

Illah-illah mentioned above are dharar, where dharar is the antonym or opposite of benefit. So, if granting the Petitioner's request for permission to practice polygamy will provide mashlahah for the survival of the Petitioner and his prospective second wife, then refusing the Petitioner's request for permission to practice polygamy is considered dharar. Dharar is a person's position at a limit where he will perish or almost perish if he does not consume something that is prohibited. Dharar is a disease and even a form of difficulty that determines

human existence because if it is not resolved, it will threaten religion, life, lineage, reason, and wealth.

In connection with the application of illat to polygamy, permits granted by the Tolitoli Religious Court from the perspective of maqâshid al-syari'ah according to Imam as-Syatibi.

Imam as-Syatibi divides the maqâshid in Al-Muwafaqat fi Ushul al-Syari'ah into two essential parts, namely the meaning of the shari' (qashdu ash-syari') and the meaning of *themukallaf* (qashdu al-mukallaf). Imam as-Syatibi said:

المقاصد ينظر إلى قسمين: أحدهما يرجع إلى قصد الشارع، والآخر: يرجع إلى قصد المكلف. فالأول يعتبر من جهة قصد الشارع في وضع الشريعة ابتداءً، ومن جهة قصده في وضعها للتكليف بمقتضاها، ومن جهة قصده في دخول المكلف تحت حكمها

This means: "The goals of the Shari'a in Maqashid al-Syariah, according to al-Syatibi, are viewed from two parts and first, based on the goals of God as the creator of the Shari'a and second, based on the goals of humans burdened with the Shari'a. On the initial goals, which relate to the objective aspect, God determines the principles of the teachings of the Shari'a. From this aspect, God aims to establish them so that they can be understood, so that humans burdened with the Shari'a can implement them, and secondly so that they understand the essence of the wisdom of the Shari'a."²⁶

First Part Qashdu As-Shari'

The first part of Imam as-Syatibi explains:

النوع الأول: قصد الشارع في وضع الشريعة. النوع الثاني: قصد الشارع في وضع الشريعة للإفهام. النوع الثالث: قصد الشارع في وضع الشريعة للتكليف بمقتضاها. النوع الرابع: قصد الشارع في دخول المكلف تحت أحكام الشريعة

This means: "First, Allah's basic aim in determining the shari'ah; second, Allah's purpose in establishing the shari'ah to provide understanding; third, Allah's purpose in establishing the shari'ah for commands that must be implemented; fourth, Allah's purpose in establishing the shari'ah to bring humans into Sharia law."²⁷

²⁶ Abu Ishaq Al-Syatibi, *Al-Muwafaqat*, *ibid*, juz 2, 219.

²⁷ Ahmad Ar-Raisuni, *Nazhariyatul Maqashid 'inda al-imam as-syatibi*, *ibid*, 144-145

²⁵ Al-Sarkhasi, *Ushul al-Sarkhasi*, juz 2, (Beirut, Darl al-Kitab al-Ilmiyah, 1993). 182

Allah's primary aim in establishing this category of shari'ah is closely related to the content and essence of maqâshid al-shari'ah, which aims to explain Allah SWT's obsession with human benefit.²⁸

In this case, Al-Syatibi divides it into three levels: dharuriyah, hajiyah, and tahsiniah. In the first level, namely dharuriyah, Imam as-Syatibi said:

فَأَمَّا الضَّرُورِيَّةُ: فَمَعْنَاهَا أَنَّهَا لَا بُدَّ مِنْهَا فِي قِيَامِ مَصَالِحِ الدِّينِ
وَالدُّنْيَا، بِحَيْثُ إِذَا قُودَتْ لَمْ تَخْرُجْ مَصَالِحَ الدُّنْيَا عَلَى اسْتِقَامَةٍ بَلْ
عَلَى فَسَادٍ وَتَهَارُجٍ وَقَوْتِ حَيَاةٍ، وَفِي الْأُخْرَى قَوْتِ النَّجَاةِ
وَالنَّعِيمِ، وَالرُّجُوعِ بِالْخُسْرَانِ الْمُبِينِ.

Meaning: "As for Dharuriyah, it must exist for the benefit of religion and the world to be realized. If this is not fulfilled, it will cause damage to life and even death, and there will be no luck, enjoyment, and return to Allah in real loss."²⁹

According to Al-Syatibi, five things are included in the dharuriyah category: maintaining religion, maintaining the soul, maintaining offspring, maintaining wealth, and maintaining the mind.

The Tolitoli Religious Court number 318/Pdt.G/2022/PA.Tli made the decision to permit polygamy viewed from the aspect of the level of dharuriyyat, as mentioned by Imam Al-Syatibi as follows:

a) Maintaining Religion (Hifz ad-Din)

The decision of the Tolitoli Religious Court, which granted the request for a permit for polygamy to maintain religion, can be seen from the perspective that Marriage is worship and to protect the Petitioner from immorality, adultery, and immoral acts that are prohibited. Furthermore, Marriage is considered half of religion (nishfu ad-din).

Rasulullah SAW says:

إذا تزوج العبد فقد استكمل نصف الدين فليترك الله
في النصف الباقي وفي رواية فقد احرز نصف
دينه

Meaning: "When a servant marries, it means he has perfected half his religion. So fear Allah for the remaining half" (HR. Baihaqi)³⁰

The meaning of "din/religion" in the word "nishf dihihi" means morals and self-respect.

It is also confirmed that from a marriage law perspective, marriage laws vary according to a person's circumstances.

للنكاح أحكام متعددة، وليس حكماً واحداً، وذلك
تبعاً للحالة التي يكون عليها الشخص

This means: "Marriage has different laws, not just one. This follows a person's condition (casuistically)."³¹

From this information, it can be understood that the laws on Marriage or polygamy will vary according to a person's conditions and are specific, so the laws cannot be generalized.

In this case, the Petitioner, in applying for a permit for polygamy, may be sentenced to mandatory punishment because the Petitioner is deemed to be able/capable of polygamy and fears that he will fall into adultery as per the results of the judge's examination at the trial at the Tolitoli Religious Court. The granting of permission for polygamy, in this case, excludes alternative conditions and refers to the benefits and harms or maqashid asyariah based on the fiqh rules used:

دَرْءُ الْمَفَاسِدِ أَوْلَى مِنْ جَلْبِ الْمَصَالِحِ

Meaning: "Preventing damage takes precedence over bringing about good."

In another rule of jurisprudence it is stated:

الضَّرُّ يُزَالُ

Meaning: "That harm must be eliminated."

Polygamy that has actual and correct Sharia objectives and is based on maqashid Sharia will achieve the preservation of life, improve the quality of worship and avoid immorality, and can

²⁸ Abdul Jalil, *Maqashid al-Syariah al-Syathibi* (Sebuah Upaya untuk menyingkap Tujuan Asasi Formulasi Hukum Islam), *Al-Ihkam Jurnal Hukum dan Pranata Sosial*, Vol. VI No. 1 Juni 2011, Jurusan Syari'ah STAIN Pamekasan, 34.

²⁹ Abu Ishaq Al-Syatibi, *Al-Muwafaqat fi Ushul al-Syari'ah*, *ibid*, juz 2, 17.

³⁰ Al-Baihaqi, *as-sunanul kubra*, dar al-kutub al-ilmiyah, 2003, *cet. 3*, (2/175).

³¹ Sa'id Musthafa Al-Khin dan Musthafa Al-Bugha, *Al-Fiqhul Manhaji 'ala Madzhabil Imam as-Syafi'i*, Surabaya, Al-Fithrah, 2000, juz IV, 17).

create prosperity in building a *sakinah*, *mawaddah warahmah* household.

Apart from that, the granting of polygamy permission by the Tolitoli Religious Court stated that the Petitioner would be fair. Law Number 1 of 1974 concerning Marriage also contains a regulation stating that the husband must be guaranteed that he will treat his wives and children fairly (Article 5 Paragraph 1 point c).

This also shows that the conditions for fairness in polygamy are absolute. The terms and conditions in article 5, paragraph 1, point c read: "There is a guarantee that husbands will treat their wives and children fairly." In this article, it can be understood that the regulation of polygamy determined by the state is an implementation of religion, namely with the hope of creating justice, benefit, and achievement of these goals.

This means that granting permission for polygamy by the Tolitoli Religious Court requires that it be fair and that it follow the *maqashid* of Sharia, the initial goal of which is the benefit of the world and the hereafter, so if justice is fulfilled in the practice of polygamy, it will bring polygamy to the benefit of the afterlife, in this case, belief in the last day in Islam is part of from the pillars of faith.

5 Conclusion

In the Implementation of Judge's Decision Number 318/Pdt.G/2022/PA.Tli Regarding Polygamy Permits at the Tolitoli Religious Court, the process before the decision in the trial occurs, the applicant meets the requirements, namely applying for a polygamy permit. The applicant must fulfill the criteria, namely photocopy of the applicant's and respondent's ID cards, photocopy domicile (if required), photocopy of marriage certificate, photocopy of family card, photocopy of income or wealth list, statement letter from husband that he can act fairly, statement letter from wife who wants to be married, letter of application for permission for polygamy (if you make it yourself) include softcopy of the letter application/claim on Flashdisk/cd when

registering and all photocopies of the letter must be leges/stamp 10,000,- at the Post Office.

The Petitioner's reasons for applying for a polygamy permit are not included in the alternative conditions, which are the reasons for being permitted to practice polygamy, so the panel of judges in granting the request for a polygamy permit in case number 318/Pdt.G/2022/PA.Tli referred to *mashlahat mursalat* (*syar'i* reasons) for Petitioner, Respondent, and prospective second wife and the alternative requirements required in the Marriage Law and the Compilation of Islamic Law. Let's look more closely at the *Mashlahah Mursalat* referred to in the decision of the Tolitoli Religious Court. It is to dig further into the purpose of polygamy by approaching the aspects of *mashlahah* and the harm it will cause. So, granting the request for a polygamy permit is a way to eliminate harm. It is believed that if it is not given, it is feared that the applicant will not be able to maintain his honor, so he may fall into adultery or enter into an unregistered marriage, which will also have an impact on more significant harm.

Apart from that, the granting of the request for a polygamy permit is also due to the Petitioner's economic capabilities and the willingness and encouragement of the first wife for her husband to carry out polygamy. Thus, no *dharar* will affect the first wife, so granting the request for a polygamy permit is believed to be beneficial for all parties involved. In Marriage, the purpose of Marriage, as in the provisions of Article 3 of the Compilation of Islamic Law, is to create a household life in which *Sakinah*, *mawaddah*, and *warahmah* can be realized. So, it can be concluded that the decision of the Tolitoli Religious Court case number 318/Pdt.G/2022/PA.Tli is still in line with the *maqashid as-syari'ah* according to *as-syatibi*, namely protecting religion, soul, reason, property, and lineage.

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