

## Research Article

# Polygamy in the Perspective of Islamic Law and Indonesian Positive Law

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**ORCID**Ridwan Rusliadi: <https://orcid.org/0000-0001-9859-0085>**Abstract.**

The purpose of this article is to explore and analyze the legal basis for polygamy in both Islamic law and positive law in Indonesia. Polygamy refers to a man having multiple wives at the same time. In Islamic law, polygamy is permissible under certain conditions as stated in the Qur'an, specifically if the husband can treat all wives fairly.

The research aims to examine the perspective of polygamy in both Islamic law and Indonesian positive law. The method used in this research is a normative juridical approach with a descriptive research approach. Data obtained will be systematically organized for further qualitative analysis. The research findings indicate that the regulation of polygamy in positive law makes it challenging for husbands to practice polygamy, whereas Islamic law does not impose excessive obstacles. The conditions for the permissibility of polygamy according to Law Number 1 of 1974 are outlined in Article 4 paragraph (2) and Article 5 paragraph (1). The legal basis for granting polygamy permits is formally stipulated in Law Number 1 of 1974 concerning marriage, Article 3 paragraph (2) alongside Article 43 PP. 9 of 1975, and Presidential Instruction Number 1 of 1991 on KHI Article 56 paragraph (3).

It is essential for these two laws to be in harmony with each other to avoid conflicts and problems, especially in the context of marriage, particularly concerning polygamy.

**Keywords:** polygamy, Islamic law, positive law

## 1. INTRODUCTION

Law according to Vinogradoff law is a set of rules that are held and implemented by a society with respect to policies and the exercise of power over every human being and property. While Bellefroid argues that law is all the rules that apply in society, regulates the order of society and is based on the power that exists in that society.[1] Meanwhile, Hans Kelsen, who is an adherent of legal positivism, in his book *Reine Rechtslehre* state only recognizes law in positive form.[2]

According to Oxford English Dictionary, it is stated that the law is a collection of rules, legislation or customary law in a country or society that recognizes it as something that has binding force on its citizens. (Law is the body of rules, whether formally erected

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or customary, which a state of community recognizes as binding on its members of subjects).[3] The law itself has a permanent characteristic, namely the law is an organ of abstract regulations, the law is to regulate human interests, anyone who violates the law will be subject to sanctions in accordance with what has been determined.[3]

In terms of formation, the law can be in the form of written law, (statute law, writer law), namely the law made by an authorized agency or institution in a country and in its application it is often referred to as statutory regulations. Laws in written form are usually in the form of codification of certain types of law systematically so that they are easy to learn. In addition, there is also unwritten law (unstatute law, unwritten law), namely the law that lives in society, is not written but is enforced and obeyed by the community as written law. Written law applies in the Continental civil law, while unwritten law usually applies in the Common Law. In Indonesia, unwritten law is known as customary law.[4]

In order for the new law to be effective in the midst of people's lives, the change in law must pay attention to three provisions, namely first: the change in law is not done partially, but the change must be comprehensive, especially to doctrine, norms that are no longer in accordance with the law. conditions of the times, second: the change must also include the way it is applied. The static mindset in the way of applying the law should be abandoned, as well as in the ways of interpreting the law that do not see the development of the times, third: it must also be based on the rules (rules) that are in accordance with the philosophy of life of the Indonesian nation. In order for the updated rules (rules) to be obeyed by the community, the rules (rules) must contain sanctions and coercive power and for that they must be made by the authorized agency.[5]

In connection with the matters mentioned above, the legal changes implemented in Indonesia should be directed at creating more stable conditions, so that every citizen can enjoy the atmosphere and climate of order and legal certainty that is based on justice. It must also provide support and safeguards to development efforts to achieve prosperity, by conducting legal codification and unification of certain fields by taking into account the legal awareness that develops in society. For this reason, it is necessary to continue with steps to formulate legislation concerning the rights and obligations of citizens in the context of practicing Pancasila and the 1945 Constitution.[5]

According to Lawrence M. Friedman, law consists of three elements, namely legal structure, legal substance and legal culture. In simple terms, the legal structure is related to law enforcement institutions or institutions or can be said to be law enforcement officers. In terms of law, the legal system is a criminal unit, so the institution in charge of implementing it is manifested in a criminal justice system, which is essentially a system of power to enforce criminal law which consists of investigative power, prosecution

power, the power to adjudicate and pass decisions as well as the power to implement decisions/criminals by the implementing/executional bodies/apparatus. In the criminal law enforcement process, these elements are manifested in the institutions of the Police, Prosecutors and Courts.[6]

In law, the terms Islamic law and positive law are known. Al-Quran and Islamic law literature does not mention the word Islamic law as one of the terms. What is in the Qur'an is the word shari'ah, fiqh, Allah's law, and the same root with it. The term Islamic law is a translation of Islamic law in Western literature. This term later became popular. As has been mentioned above, that Law comes from Arabic, the origin of the word "Hukm", the plural word "Ahkam" which means decision. From the origin of the word then emerged the word al-hikmah which means wisdom. This means that people who understand the law and then practice it in their daily lives are considered wise people.[7] Furthermore, Islam is a form of mashdar from the root word aslama-yuslimu-islamman which means submission and obedience and can also mean Islam, peace, and safety. However, the original sentence of Islamic lafadz is derived from the word salima-yaslamu-salaman-wa salamatan which means safe (from danger), and free (from defects).[8]

While positive law is a law that applies at a certain time (past or present) and in a certain place. These laws consist of written laws or judges' decisions as long as they are binding. Both Islamic law and positive law are both made to regulate human life.[9]

Marriage is one of the sunnah to achieve a harmonious life according to syar'i because it is a form of ta'abbudiyah (servitude) and obedience to every command.[10] Marriage is not only to unite two human couples, namely a man and a woman, but to tie a sacred covenant in the name of Allah that the bride and groom intend to build a sakinah, peaceful household filled with love and affection. To uphold the ideals of family life, marriage is not enough just to rely on the teachings of Allah in the Qur'an and as-Sunnah which are global in nature. However, marriage is also related to the law of a country that has fulfilled the pillars and conditions.[11]

Humanity is indeed tested in various ways in various aspects of life in order to know which of them is doing the best. Polygamy is a form of marriage in Islam that tests all couples (husband and wife) and forces them to think further about the feelings, needs and expectations needed by the community, not just in monogamous marriages. The test lies in one's ability to be generous, willing to help and patient with jealousy and various kinds of justice.[12]

Polygamy is an issue that is still controversial, inviting various perceptions of pros and cons. Anti-polygamy groups have made a number of accusations that discredit and identify polygamy with something negative. Their perception is that polygamy violates

human rights, polygamy is a form of exploitation and hegemony of men against women, as a form of oppression, tyrannical acts, betrayal and looking down on women and is a form of treatment. discriminatory against women. Another accusation is that polygamy is a form of harassment against the dignity of women, because it is considered a medium to satisfy lust. A man who practices polygamy means that he has committed acts of violence or even suppression of women's rights as a whole.[13]

Meanwhile, those who are pro-polygamy respond that polygamy is a legal form of marriage and has been practiced for centuries by all nations of the world. In many ways, polygamy actually elevates the dignity of women, protects morals so they are not contaminated by heinous and immoral acts that are prohibited by Allah SWT, such as the proliferation of places of prostitution, prostitution, women of the night who make a living by selling themselves, and immoral acts. others who actually degrade women's dignity and lead them to become slaves to the lust of the masher. Polygamy contains elements of salvation, efforts to protect and respect the existence and dignity of women. Apart from the pros and cons as above, actually what one wants to achieve from one's desire for polygamy is the same as the goals of marriage itself. To build the fundamentals of healthy polygamy, the role of polygamy permits is very crucial. Selective rules and conditions as well as procedures for granting polygamy permits must be consistently adhered to, so that polygamous couples can be more directed according to the purpose of marriage.[14]

Although Indonesia does not explicitly prohibit polygamy in its positive law, it is clear that it regulates and limits polygamy with strict rules and restrictions. This can be seen for example in Article 3 paragraph (1) of Law Number 1 of 1974 as amended by Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage which explains the principle of national marriage monogomy and Article 3 paragraph (2) regarding the requirements that are quite strict for people who will practice polygamy. Those who will practice polygamy must also pay attention to Government Regulation No. 9/1975. Especially for civil servants, they must heed the special provisions contained in Government Regulation No. 10/1983 concerning marriage and divorce permits for Civil Servants.

Based on the above background, the author is determined to take the title of the research "POLYGAMY IN THE PERSPECTIVE OF ISLAMIC LAW AND INDONESIAN POSITIVE LAW". Based on the background of the problem above, the writer identifies the following problems:

1. How is polygamy viewed from the perspective of Islamic law?

2. How is polygamy viewed from the perspective of Indonesian Positive Law?

## 2. METHOD

This study uses normative juridical law [15] is research that provides an understanding of the normative problems experienced by dogmatic law in its activities of describing legal norms, formulating legal norms (forming legislation), and enforcing legal norms (judicial practice).[16] The law is normative, which consists of the norms/rules written in the form of legislation set by the government authorities. There are two types of data in scientific research, namely primary data and secondary data.

## 3. RESULTS and DISCUSSION

### 3.1. Polygamy is viewed from the perspective of Islamic law

The word polygamy comes from the Greek, from the word poly which means many and gamien which means marriage, if combined it will mean a lot of marriages.[17] Compare with [18] In Arabic polygamy is called ta'adud al-zaface. Polygamy is defined as marriage carried out with several partners at the same time. Thus polygamy is not limited to only men, but also women.

The specific term that refers to the marriage of a man with several women is polygyny and that which refers to marriage between a woman and several men is polyandry. The definition of polygamy that applies in society is that a man marries many women. According to the Islamic view, polygamy has the meaning of more than one marriage, with a general limitation that is allowed only up to four women..

The principle of marriage in Islamic law is monogamy. This can be seen from the interpretation of the Qur'an Surah Annisa, verse 3 (QS[IV]: 3), which states that "And if you worry that you will not be able to do justice to the (rights of) orphaned women (when you marry her). ), then marry (other) women whom you like: two, three or four. But if you are worried that you will not be able to do justice, then (marry) only one, or the female slave you have. That is closer so that you do not do wrong." (Q.S Al-Nisa: [4]:3).

From the description above, it appears that in principle the principle of marriage in Islamic law is monogamy. This can be seen in the words "you should only marry a woman". However, from these words, it appears that the principle of monogamy is only a suggestion. In this case, Islamic law does not prohibit polygamy, but stipulates conditions that polygamy must be fair. The next question that arises is what is the meaning of

fairness in the perception of Islamic law? In assessing the meaning of justice, there is no agreement on the meaning of justice that can be used as a definition. Many theories about justice have been developed by legal philosophers. From the theory of justice developed by Plato and Aristotle, to the contemporary theory of justice developed by Rawls and Hart. Of all these theories, there is nothing in common about the notion of justice. In deviation from the principle of monogamy, the meaning of justice becomes very important, because it is a benchmark for the permissible deviation from the principle of monogamy. In fact, injustice in the deviation of the principle of monogamy, can cause someone to do wrong. In Islamic law, acts of persecution are not justified, and therefore a sin.[19]

Although Islamic marriage law is based on monogamy, polygamy is not completely prohibited. In some circumstances, there may be deviations from the principle of monogamy. However, deviations from the monogamy principle must meet several conditions, including:

1. (a) Aims to take care of orphans In discussing Q. IV:3, it should not be discussed independently, but must be related to other provisions in the Qur'an, considering that the contents of the Qur'an are an inseparable unit. In discussing this Q.IV:3, it is necessary to relate it to Q.IV: 127 which reads: "They ask you, O Muhammad, regarding certain women (who may be married besides the existing wife as referred to in Q.IV: 3). Say, O Muhammad, that certain woman is a woman who has something to do with the orphan." Based on the above description, not all women can be used as the second wife (and so on) of a man. In this case, if a man will be polygamous, then the woman he will marry must be the mother of the orphan, where the marriage is basically to protect the orphan. So in the concept of Islamic law, in polygamy, a man cannot marry a single woman. In polygamy, he can only marry the mother of an orphan.
- (b) Limitation on the Number of Wives. In polygamy, Islamic law limits the number of wives that can be married. It is said that a man can marry 2, 3 to 4 women at the same time. In this case, the maximum number of women who can be married at the same time is 4 people.
- (c) Will be able to be fair between his wives. In polygamy, a man must be able to do justice to his wives. This condition is very important, because the fulfillment of these conditions is the main element in polygamy based on Islamic law.
- (d) There should be no sibling relationship between his wife and the wife he will marry. Based on Surah Annisa verse 23, it is said that women who want

to become wives should not be women who are sisters... in the sense of brothers, not only brothers and sisters, but also only brothers and sisters. fact, the interpretation is extended to the point.

(e) where polygamy is permissible. Regarding women who may be married, there are two opinions, namely:

2. Mother of orphans. The opinion which says that a woman who is allowed to marry a man who will be polygamous is the mother of this orphan, based on Q.IV: 3 which is connected with Q.IV: 127. prof. Hazairin adheres to this object by saying that polygamy by a man can only be done between his existing wife and the mother of an orphan who is being cared for by the man:
3. a man who will be polygamous may be with any woman, not necessarily the mother of an orphan. In relation to Q. IV:3 with Q.IV: 127, the orphan in question is the woman who is married. Based on the above description, although polygamy is possible, there are special conditions that must be met. In this case, the requirement for polygamy is not a light condition. Thus, based on Islamic law, polygamy should be avoided because the act of polygamy is closer to acts of persecution and acts of persecution are sins.

### **3.2. Polygamy is viewed from the perspective of Indonesian Positive Law.**

In Article 49 of Law Number 7 of 1989 which has been amended by Law no. 3 of 2006 and the second amendment with Law Number 50 of 2009 states that "The Religious Courts have the duty and authority to examine, decide, and resolve cases at the first level between people who are Muslim in the fields of: marriage, inheritance, wills, grants, endowments. , zakat, infaq, shadaqah, and sharia economics.

In the explanation of Article 49 in the second paragraph, it is also explained that what is meant by "between people who are Muslim" is "including people or legal entities that automatically submit themselves voluntarily to Islamic law regarding matters that are the authority of the Religious Courts in accordance with the provisions of this article". Then in the explanation of letter a of this article it is stated that what is meant by "marriage" is "things that are regulated in or based on the applicable law regarding marriages carried out according to the Shari'ah", which include "permission to have more than one wife". "

Permission to have more than one wife (a term commonly used is polygamy permit), in the explanation of article 49 the second paragraph as stated above is included in the

scope of the definition of marriage, and of course becomes the absolute authority of the Religious Courts as long as the legal subjects are Muslims and marriages carried out according to Islamic law. On the basis of the authority granted by the law as described above, the Private Law Court Vol. III No. 2 July-December 2015 103 Religion has absolute authority to examine and decide cases of polygamy permit applications submitted to it.

The reasons and conditions for polygamy determined by law can be found in Article 4 paragraph (2) and Article 5 paragraph (1) of Law Number 1 of 1974, namely: Article 4 paragraph (2) The court referred to in paragraph (1) of this article only gives permission to a husband who will have more than one wife if:

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

Article 5 paragraph (1)-In order to submit an application to the Court as referred to in Article 4 paragraph (1) of this law, the following conditions must be met:

4. There is an agreement from the wife/wives;
5. There is certainty that the husband is able to provide for the necessities of life for his wives and children;
6. There is a guarantee that husbands will treat their wives and children fairly.

Permission for polygamy by the Religious Courts can be granted if the husband's reasons have fulfilled alternative reasons in accordance with the provisions of Article 4 paragraph (2) and the cumulative conditions contained in Article 5 paragraph (1) of Law Number 1 of 1974 as mentioned above.

The formal juridical provisions that form the legal basis for granting polygamy permits are regulated in Law No. 1/1974 on marriage, in conjunction with Government Regulation No. 9/1975 Presidential Instruction No. 1/1991 on the Compilation of Islamic Law. Law Number 1 of 1974 Article 3 paragraph (2) junto Article 43 Government Regulation no. 9 of 1975, states that "The court can give permission to a husband to have more than one wife if the parties concerned want". In addition, in Article 4 paragraph (1) it is stated "in the event that a husband will have more than one wife, as referred to in Article 3 paragraph (2) of this Law, then he is obliged to submit an application to the Court in the area where he lives" (Ministry of Religion of the Republic of Indonesia. 1997).

Government Regulation Number 9 of 1975 stipulates the provisions for the implementation of the granting of polygamy permits in article 43 which states that "if the Court



is of the opinion that there is sufficient reason for the applicant to have more than one wife, the Court shall give its decision in the form of permission to have more than one wife”.

Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law provides a legal basis for granting polygamy permits through Article 56 paragraph (3) which states that "Marriage performed with a second, third or fourth wife without permission from the Religious Courts, has no legal force". The provisions contained in the Compilation of Islamic law are essentially Islamic law, which in a narrow sense is local fiqh with Indonesian characteristics.

It is said so because the Compilation of Islamic Law is extracted from the sources and arguments of Islamic law through an *ijtihad* and contemporary legal thought. The purpose of the Compilation of Islamic Law is the unification of Islamic law that is applied to Muslims according to the legal conditions and needs of the Indonesian Islamic community. The unification of Islamic law is carried out based on the legal thoughts of Islamic jurists about the need for the transformation of Islamic law into positive law, so as to create uniformity in the implementation of Islamic law in overcoming problems in the life of Muslims in the field of *mua'amalah*. [20]

## 4. CONCLUSION

Implicitly, the Qur'an allows polygamy, but does not specify any conditions explicitly, except only giving a warning "Are you sure that polygamy will be able to be fair, because fairness is very difficult. Meanwhile, the conditions for the permissibility of polygamy according to Law Number 1 of 1974 are contained in Article 4 paragraph (2) and Article 5 paragraph (1). The formal juridical provisions that form the legal basis for granting polygamy permits are regulated in Law Number 1 of 1974 concerning marriage, Article 3 paragraph (2) junto Article 43 PP. 9 of 1975, Presidential Instruction Number 1 of 1991 on KHI Article 56 paragraph (3).

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