

Legality of Polygamy based on Positive Law in Indonesia in Order to Build a Prosperous Family

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Abstract. *This study aims to determine how the concept of polygamy that honors wives and children according to positive Indonesian law, and how the procedures for submitting polygamy in religious courts according to positive law. This is interesting to study because of the many illegal polygamy practices in Indonesia that have a negative impact on wives and children both legally and in terms of their welfare. This study uses a normative legal approach method, the research specifications used are descriptive analysis, the types and sources of data used in this thesis are qualitative while the data sources use secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Data collection methods use literature studies, and document studies. The data analysis method used is qualitative analysis. Based on the study, it is concluded that correct polygamy and honors women according to Positive Law in Indonesia is polygamy that is in accordance with the Law and the fulfillment of polygamy requirements. The practice of polygamy that forms a prosperous family requires many requirements and is not easy. Among them are requirements in accordance with the Qur'an and Hadith from the perspective of Ulama, in accordance with Positive Law in Indonesia. Due to the severity of the requirements that must be met, not everyone who can perfectly practice polygamy can form a prosperous family. For someone who will practice polygamy legally and achieve a prosperous family must think long before deciding to practice polygamy. A long path must be passed and fulfilled not only from the emotional side, but measured with clear indicators.*

Keywords: Family; Legality; Polygamy; Prosperous.

1. Introduction

The concept of ideal marriage in Islam is a marriage that is based on the concept of mutuality, where they must accept each other, support each other for the

common good. "The concept of marriage in Islam regulates equality and goodness for both parties, both men and women".¹²

According to the Marriage Law, Article 1 paragraph 1, marriage is the ideal basis for practicing polygamy. With this basis, polygamy is official and legal. Although polygamy in Islam is legal and has a 'permissible' law based on Islamic religious law. However, in the context of marriage law in Indonesia, polygamy is not explicitly regulated in the Marriage Law, Article 1 paragraph 1. Polygamy is further regulated by the provisions of applicable marriage law, such as the requirement for permission from the legal wife and the certainty that the husband is able to meet the needs of his family.³

In the Qur'an, Surah AnNisa verse 3 is interpreted by Al Maroghi that the permissibility of polygamy is a permissibility that is tightened and complicated and is allowed in emergency situations. So someone who wants to practice polygamy must have a strong sincerity. If the polygamy that is carried out will be bad, then it should be avoided. This is in accordance with the rule of *fiqh*, namely: *dar, er al mafasid muqoddamun 'ala jalbi al masholih*. Which means rejecting a disservice is preceded by bringing a benefit⁴.

The consequences of polygamous marriages can have both positive and negative impacts, some of these impacts have been studied by several previous researchers by taking several cases, including: Case studies that occurred in Pekanbaru conducted by Marisa Elsa in 2018 showed several negative impacts of a polygamous society, specifically from the side of the wife and children. From the wife's side, it can be concluded that the negative impacts of polygamy in general result in household disharmony, so that frequent quarrels arise, loss of mutual trust and care for each other, and the possibility of divorce. while from the child's side, the need for affection from the family, especially from the father, will be disturbed and feel lacking, especially naturally it can instill a sense of hatred in the child towards his father, as a result the child will become insecure and traumatized by a relationship related to marriage.⁵

Another case study was conducted by Nur Hikmah, Ahmad, and Rusnam in 2021 in Mowila District, South Konawe Regency, which provided conclusions about the positive impacts of legal polygamous marriages carried out by several families, concluding that with polygamy, housework that is usually done alone can now be

¹ Musda Mulia, *Islamic Views on Polygamy* (Published in collaboration with the Institute for Religious and Gender Studies, Solidaritas, 1999).

² Rodli Makmun, Evi Muafiah, and Lia Amalia, *Polygamy in the Interpretation of Muhammad Syahrur* (STAIN Ponorogo Press, 2009).

³ Indonesia, *Marriage Law* (Pustaka Widyatama, 2004).

⁴ Sheikh Ahmad Mustafa Maraghi, *Tafsir Al-Maraghi* (Dar al-Fikr, 2001).

⁵ Marisa Elsa, "The Impact of Polygamy on the Fulfillment of the Rights of a Legitimate Wife in Marriage Based on the Compilation of Islamic Law," *JOM Faculty of Law* 5, no. 1 (2018): 1–17.

done together (making it easier), in addition, most said that there was an increase in the lineage from the results of polygamous marriages. Several other things that have a positive impact are when the child and second wife can be well accepted by the first wife's family, thereby reducing the risk of trauma that may occur.⁶

This research becomes important by looking at polygamy based on the theory of Justice.⁷ The theory of legal certainty and the theory of welfare⁸. The Theory of Justice states that justice that must be created and presented by a husband to his wives is material justice, where a husband who wants to marry more than one is capable of justice in terms of food, clothing and shelter. This means that a husband may not differentiate between the first wife and the other wives in terms of providing a place to live, clothing and even food, so that it will create a prosperous family.⁹ The Theory of Legal Certainty states that the theory of legal certainty is: it will create legal certainty in terms of status for wives and their children, so that wives will have legal certainty and receive rights that are protected by the legal basis.¹⁰

Furthermore, polygamy that is correct and honors women according to positive law in Indonesia by using the theory of welfare, namely: in the Al-Quran, Surah An Nisa verse 3 which means "And if you fear that you shall not be able to deal justly with orphans (when you marry them), then marry (other) women of your choice: two, three or four. Then if you fear that you shall not be able to deal justly, then (marry) only one, or the slaves you possess. That is nearer to not committing injustice. " In Surah An Nisa verse 3, Islamic jurists agree that

⁶ Nur Hikmah, Ahmad Ahmad, and Rusnam Rusnam, "The Impact of Polygamy on the Welfare of Wives and Children from the Perspective of Maqasid Al-Syari'Ah: A Study in Mowila District, South Konawe Regency," *KALOSARA: Family Law Review* 1, no. 1 (2021), <https://doi.org/10.31332/.v1i1.2985>.

⁷ Zulfahmi Nur, "Justice and Legal Certainty (Reflections on the Study of Legal Philosophy in Imam Syâtibî's Legal Thought)," *Misykat Al-Anwar Journal of Islamic and Community Studies* 6, no. 2 (2023): 247, <https://doi.org/10.24853/ma.6.2.247-272>; Ah. Soni Irawan, "Problematics of Polygamy Law in Indonesia from the Perspective of KH. Abdul Syakur Yasin," *Al Maqashidi: Journal of Indonesian Islamic Law* 6, no. 2 (2023): 114–23, <https://doi.org/10.32665/almaqashidi.v6i2.2419>.

⁸ Dahlan Tamrin, "Philosophy of Islamic Law" (UIN Maliki Press, 2007).

⁹ SH Hyronimus Rhiti, *Getting to Know the Philosophy of Law* (PT Kanisius, 2018).

¹⁰ Asril, "The Existence of the Compilation of Islamic Law According to the Formation of Legislation," *Islamic Law* XV, no. 1 (2015): 28–45.

polygamy is permitted in Islamic law based on the Nash contained in Surah An Nisa verse 3.¹¹.

In polygamy there are benefits in the household, because polygamy is permitted by Islam, then polygamy has wisdom and benefits in the household including: First, guaranteeing better family honor because there is no hidden affair, Second, one solution for wives who are unable to provide good service without divorcing their wives. Third, saving husbands who have advantages in relationships so as to protect husbands from adultery and free sex. Fourth, saving women in a large population compared to men so that they are more honored to live in family life. Fifth, continuing offspring in an honorable way.

Therefore, this study aims to determine the concept of polygamy that honors wives and children according to positive Indonesian law. How is the procedure for submitting polygamy to a religious court according to positive law?

2. Research Methods

This study uses a normative legal approach method, the research specifications used are descriptive analytical. The types and sources of data used in this study are qualitative while the data sources use secondary data, secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Data collection methods using literature studies, and document studies, the data analysis method used is qualitative analysis.

3. Results and Discussion

3.1 The Concept of Polygamy That Honors Wives and Children According to Indonesian Positive Law

To practice polygamy, there are several requirements that must be met, including: 1. Permission from the Legal Wife. The applicant must have a statement of willingness from the first wife to accept another woman as part of her marriage. The second marriage will be officially legalized by the state when there is a letter of permission from the first wife. 2. Certainty of Support. A man

¹¹ HA Djazuli, *Fiqh Science: Exploration, Development, and Application of Islamic Law*. Revised Edition (Prenada Media, 2021).

who applies for remarriage must be mentally or financially stable and able to support the support of the entire family, including all wives and children born from his marriage. 3. Letter of Application. The applicant must submit a letter of application along with other files to the Religious Court closest to where he lives. The Religious Court will review all incoming files before granting permission.¹²

Article 1 of the Marriage Law regulates the definition of marriage, namely a marriage bond between a man and a woman based on the authority of the state in force in Indonesia, with the applicable customary conditions and procedures. However, this article does not explicitly mention polygamy. Overall, polygamy in Indonesia is not explicitly regulated in Article 1 paragraph 1 of the Marriage Law, but there are provisions of marriage law that apply to regulate the conditions and procedures for polygamy.¹³

In the Qur'an Surah An Nisa verse 3 is interpreted by Al Maroghi that the permissibility of polygamy is a permissibility that is tightened and complicated and is allowed in emergency situations. So someone who wants to practice polygamy must have a strong sincerity. If the polygamy that is carried out will be bad, then it should be avoided. This is in accordance with the rule of *fiqh*, namely: *dar, er al mafasid muqoddamun 'ala jalbi al masholih*. Which means rejecting a disservice is preceded by bringing a benefit.

The reality in society that is often faced is the existence of many problems in the household, one of which is the absence of offspring. This problem can have a significant impact on harmony in the household. Here is an analysis of this reality:¹⁴

1. The Problem of Not Having Offspring

-Significance of Offspring in Marriage:

Offspring have an important meaning in a marriage. The presence of children can strengthen the bond between husband and wife and form a more harmonious family. This is because children can be a meeting point and a source of happiness for husband and wife.

-Difficulty in having offspring:

¹² Sugianto Sugianto, Abdurohim Abdurohim, and Oriza Aditya, "Legal Reconstruction and Polygamy Problems in Sharia Maqashid and Positive Law Perspectives," *Journal of Social Science* 3, no. 5 (2022): 1046–55, <https://doi.org/10.46799/jss.v3i5.411>.

¹³ Indonesia, Marriage Law.

¹⁴ Misbahul Munir Makka and Tuti Fajriati Ratundelang, "Polygamy Without the First Wife's Permission and Its Impact on the Family," *Al-Mujtahid: Journal of Islamic Family Law* 2, no. 1 (2022): 34, <https://doi.org/10.30984/ajifl.v2i1.1937>.

However, not all couples can have children. This difficulty can be caused by various factors, such as health problems, older age, or genetic factors. This can cause disharmony in the household because the couple may feel dissatisfied with their circumstances.

2. Impact on Household Harmony

-Lack of harmony in the household

The absence of offspring can make harmony in the household less. Couples may feel dissatisfied with their circumstances and may experience conflict in adjusting to unexpected situations. This can cause tension and conflict in the husband-wife relationship.

-Couple's Efforts to Maintain Harmony

Even though they do not have children, a husband and wife can make efforts to maintain harmony in their household. They can surrender everything to Allah SWT and believe that children are a gift from Allah. Thus, they can continue to live in harmony and not focus too much on their shortcomings.

3. Other Factors Affecting Harmony

-Economic Factors: Economic factors can also affect harmony in a household. Economic problems can cause tension and conflict in a husband-wife relationship. Therefore, it is important for couples to have good communication and be able to solve problems together.

-Domestic Violence Factors. Domestic violence can also affect harmony in the household. This violence can cause psychological and physical trauma to the wife, making the husband-wife relationship less harmonious.

4. Legal Protection for Wives Who Are Victims of Violence

-Legal Protection for Wives Who Are Victims of Violence. Indonesia as a country of law based on Pancasila must provide legal protection to its citizens, including wives who are victims of domestic violence. The government must reformulate the pattern and strategy for implementing protection and services, and socialize the policy in the field.

It can be concluded that the problem of not having children can cause a lack of harmony in the household. However, husband and wife can make efforts to maintain harmony by submitting everything to Allah SWT and believing that children are a gift from Allah. Other factors such as economics and domestic violence can also affect harmony in the household. Therefore, it is important for couples to have good communication and be able to solve problems together, as well as get adequate legal protection if they experience domestic violence.

In this conclusion, it can be seen that the absence of offspring can be one of the problems in a household that affects harmony. However, with the right efforts and adequate legal protection, a husband and wife can still live harmoniously even though they do not have children.

The solution for couples who do not have children is very complex and requires deep attention. Here is a detailed analysis of several options that can be taken, including adopting a child, having your own children through IVF, and practicing polygamy.¹⁵

1. Raising Children

-Advantages of Adopting a Child include being a good solution for couples who do not have children. Adopted children can provide the same happiness and purpose in life as having your own child. In addition, adopting a child can also help strengthen the bond between husband and wife, because they can work together to care for and educate the child.

-Disadvantages of Adopting Children. However, not all couples want to adopt children. They may have the desire to have their own children or have other reasons that make them not want to adopt children. In addition, the process of adopting children also requires a lot of time and money, so not all couples can do it.

2. Using IVF

Using IVF can be a quicker and easier solution than adopting a child. Couples can choose the gender and age of the baby they want. IVF can also help couples who do not have time to care for a baby from the start, because the IVF is already born and ready to be taken. However, IVF also has disadvantages. The cost of adopting an IVF baby can be very expensive, so not all couples can allow it. In addition, the IVF adoption process also requires approval from the authorities and must meet the requirements that have been set.

3. Divorcing Wife

Divorcing a wife can be the easiest solution for couples who do not have children. They can marry someone else and have their own children. Divorcing a wife can also help couples find greater happiness and more in line with their desires. However, divorcing a wife also has its drawbacks. Divorcing a husband and wife can cause psychological trauma for one or both parties, especially if they have children together. In addition, divorcing a husband and wife also requires a long and complex process, so not all couples can do it.

¹⁵ Hikmah, Ahmad, and Rusnam, "The Impact of Polygamy on the Welfare of Wives and Children from the Perspective of Maqasid Al-Syari'Ah: A Study in Mowila District, South Konawe Regency."

4. Practicing Polygamy

Practicing polygamy can be a solution for couples who want to have their own children but do not want to divorce their wives. Polygamy can help couples to have their own children without having to leave their wives. Polygamy can also help strengthen the bond between husband and wife, because they can work together to care for and educate their children.¹⁶ However, practicing polygamy also has its drawbacks. Polygamy is often considered unfair to the wife and children, because it can cause disharmony in the household. In addition, the process of practicing polygamy also requires permission from the religious court and the KUA, so not all couples can do it.

It can be concluded that the solution for husband and wife who do not have children depends greatly on the desires and abilities of each partner. Adopting a child, using IVF, divorcing a wife, and practicing polygamy all have their own advantages and disadvantages. Therefore, it is important for couples to have good communication and be able to solve problems together. They must also consider goodness and justice in making decisions that will affect their lives and their children's lives in the future.

In conclusion, it can be seen that there is no one best solution for all childless couples. Each couple must consider their own needs and desires and choose the solution that best suits their situation.

The reason polygamy in Indonesian society is often feared is due to several complex factors, even though polygamy is clearly stated and protected by law. Here is a detailed analysis of why polygamy is still a problem in Indonesia¹⁷:

1. Lack of Understanding and Implementation of the Law

Many people do not fully understand the requirements for polygamy that have been stipulated in Law Number 1 of 1974 concerning Marriage. They may think that polygamy can be done without permission, because not everyone understands that polygamy must be done with notification and permission from the first wife and other wives if any. Although the law is clear, its implementation is still lacking. Religious courts and KUA do not always conduct strict examinations, so many cases of polygamy are not legal because no permission is given.

2. Criticism and Controversy

¹⁶ Rita Faura, "Religion of Class Ia Padang" 5, no. 2 (2021): 198–209.

¹⁷ Hijrah Lahaling and Kindom Makkulawuzar, "The Impact of Polygamous Marriage on Women and Children," *Al-Mujtahid: Journal of Islamic Family Law* 1, no. 2 (2021): 80, <https://doi.org/10.30984/jifl.v1i2.1742>; Makka and Ratundelang, "Polygamy Without the Permission of the First Wife and Its Impact on the Family."

Polygamy is often considered unfair to wives and children. People who do not understand or disagree with polygamy may judge that polygamy is a form of gender violence or exploitation of wives. Polygamy also has controversy in Islamic law. Some scholars may have different interpretations of the conditions for polygamy, so people can be confused about what is allowed and what is not.

3. Social and Economic Factors

Polygamy is often done for social reasons, such as wanting to have many children or wanting to show social status. People who have this social need may be more likely to practice polygamy without considering the conditions that have been set. On the other hand, economic factors can also influence the decision to practice polygamy. People who have high economic needs may be more likely to practice polygamy to fulfill sexual needs and to have many children who can help in earning a living.

4. Lack of Legal Protection

Illegal polygamy can cause unrest in families and lack of legal protection for wives and children. They do not have adequate access to legal aid and protection from the government. It can be concluded that polygamy in Indonesia is still a problem due to the lack of understanding and implementation of the law, criticism and controversy from the community, social and economic factors, and the lack of legal protection for wives and children. Therefore, there needs to be an improvement in the legal and government systems to ensure that the rights of wives and children are protected fairly. In this conclusion, it can be seen that illegal polygamy not only violates the law, but also has an impact on the lives of wives and children. Therefore, it is important to improve the understanding and implementation of the law, as well as ensure that the rights of wives and children are protected fairly.¹⁸

Ultimately, the impact of legal polygamy will provide legal certainty or legal protection.¹⁹The main criticism of polygamy is that it is often unfair to wives and children. Reproduction becomes the primary reason for a man to remarry, which can lead to gender inequality and less protection for wives and children.²⁰Although polygamy is legal, achieving a prosperous family through polygamy is very difficult to implement. Although Indonesian law allows polygamy, criticism of this system shows that legal protection for children and

¹⁸ Nasaiy Azis, Rispalman, and Tika Anggraini, "Polygamy in the Perspective of Tafsir Al-Ahkām and Islamic Law: An Examination of the Gayo Luwes Community in Aceh, Indonesia," *Samarah* 7, no. 3 (2023): 1682–1707, <https://doi.org/10.22373/sjkh.v7i3.20021>; Makka and Ratundelang, "Polygamy Without the First Wife's Permission and Its Impact on the Family."

¹⁹ Supardan Mansyur and Ita Surayya, "Sirri Polygamy Marriage in Indonesia Wife and Children Problems in Sirri Polygamy" 7, no. 1 (2022).

²⁰ Sugianto, Abdurohim, and Aditya, "Legal Reconstruction and Polygamy Problems in Sharia Maqashid and Positive Law Perspectives."

wives is still lacking. Therefore, there needs to be a revision and improvement in the law to ensure that the rights of wives and children are protected fairly.

3.2. Procedures for Submitting Polygamy to Religious Courts According to Positive Law

Describe the research results and discussion

The procedure for submitting a polygamy application to the Religious Court according to positive law is in Article 40 of Government Regulation (PP) Number 9 of 1975, namely that a husband who wishes to have more than one wife is required to submit a written application to the Religious Court.²¹

In Chapter VIII of Government Regulation Number 9 of 1975 is the procedure for submitting an application for a husband who wants to have more than one wife. If a husband marries more than one wife without obtaining permission from the court, then the marriage has no legal force.

According to Article 42 of PP Number 9 of 1975, the procedures for carrying out inspections are:

- 1) In conduct an examination regarding the matters in articles 40 and 41, the court must summon and hear the wife concerned.
- 2) The court examination will be carried out by the judge no later than 30 (thirty) days after receipt of the application letter and its attachments.

If a wife does not give permission or approval for one of the reasons set out in Article 55 paragraph (2) and Article 57, the court can determine the granting of permission after examining and hearing from the wife concerned in a religious court hearing, and in this decision the husband or wife can submit an appeal or cassation (Compilation of Islamic Law Article 59).

In Article 43 of PP Number 9 of 1975, namely if the judge's decision at the final level of the trial that has permanent legal force is not obtained in the permit for polygamy, then the Marriage Registrar/Civil Registrar is not allowed to register the marriage of a husband who will marry more than one wife before the court permit that must be obtained by them. (Government Regulation Number 9 of 1975 Article 43).

In Article 41 of PP Number 9 of 1975, a husband who wants to have more than one wife is obliged to submit a written application to the court, then the court will examine the matter.²²:

²¹ Faura, "Class Dia Padang Religion."

²² Faura.

- 1) There is whether or not there are reasons that allow a husband to remarry, namely: that the wife cannot carry out her duties as a wife, that the wife has a physical disability or an incurable disease, that the wife cannot bear children.
- 2) whether or not there is consent from the wife, either oral or written consent, if the consent is oral, the consent must be stated in court.
- 3) whether or not the husband is able to guarantee the living needs of his wives and children by showing: a certificate of the husband's income signed by the treasurer at the place of work, a certificate of income tax, other certificates acceptable to the Court
- 4) whether or not there is a guarantee that the husband will treat his wives and children fairly with a statement or promise from the husband made in a form determined for that purpose.

In Article 42 and 43 of Government Regulation Number 9 of 1975 it is stated that the court in conducting an examination regarding the above matters must summon and hear the wife concerned. And the Court Examination for that purpose is carried out by the Judge no later than 30 (thirty) days after receipt of the application letter and its attachments, if the Court is of the opinion that there is sufficient reason for the applicant to have more than one wife, then the Court will issue a decision in the form of permission to have more than one wife.

After receiving permission to marry more than one person from the Religious Court, the next step is to notify the Registrar Officer at the place where the marriage will be held to carry out the marriage in accordance with PP No. 9 of 1975 article 3 paragraph (1), notification to the Registrar's Staff is made at least ten (10) working days before the marriage takes place.

In articles 5 to 9 of Government Regulation Number 9 of 1975, namely the procedures for registering marriages. In article 5, namely in the notification to the Registrar Officer, it contains the following: name, age/belief, occupation, place of residence of the prospective bride and groom and if one or both have been married, the name of the previous husband or wife is stated, then in article 6 of PP No. 9 of 1975 paragraph (1) the Registrar Officer must examine the marriage requirements whether these requirements are met and there are no obstacles to marriage according to the Law.

Next, the Registrar examines several files in accordance with Article 6 paragraph (2), including:

1. Extract of birth certificate or birth recognition letter of the prospective bride and groom. In the event that there is no birth certificate or birth recognition letter, a certificate stating the age and origin of the prospective bride and groom can be used, given by the Village Head or equivalent.

2. Information regarding the names, religion/beliefs, occupation and place of residence of the parents of the prospective bride and groom.

4. Conclusion

Correct polygamy and honoring women according to Positive Law in Indonesia is polygamy that is in accordance with the Law and the fulfillment of the requirements of polygamy. The practice of polygamy that forms a prosperous family requires many and not easy conditions. Among them are conditions in accordance with the Qur'an and Hadith from the perspective of Ulama, in accordance with Positive Law in Indonesia. Due to the severity of the conditions that must be met, not everyone who can perfectly practice polygamy can form a prosperous family. For someone who will practice polygamy legally and achieve a prosperous family, they must think long and hard before deciding to practice polygamy. A long path must be traversed and fulfilled not only from an emotional perspective, but measured with clear indicators. Actually, polygamy is one alternative solution to forming a harmonious family, where disharmony in the household is caused by the absence of offspring. By practicing polygamy legally, the rights that will be received by the wife and children are protected by State Law. This has an impact on family welfare. The severity of the requirements for polygamy makes Indonesian society still view the practice of polygamy negatively. With the strict requirements for legal polygamy, a man who wants to practice polygamy must consider all aspects. Among them is the aspect of justice. This means that the husband must be fair to one wife and the other wives in terms of food and clothing. From the aspect of responsibility, the husband must be committed to the responsibility of providing for his wives and their descendants.

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