

Legal Reconstruction of the Principle of Monogamy in Indonesian Law Number 1 of 1974 Based on Justice Value

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Abstract

One of the things that are protected for the benefit of humans is to maintain offspring. For this reason, Islam regulates marriage and forbids adultery, stipulates who should not be married, how marriage is carried out, what conditions must be met, and how is it legal so that the children that are born from that relationship can be considered legitimate and become legal descendants of their fathers. This study aims to analyze the position of the principle of monogamy in the Indonesian Law Number 1 of 1974 on Marriage by analyzing the application of the principle of monogamy in Law Number 1 of 1974 to reconstruct this law based on justice value. This research is a normative-legal type of research that is used to examine the function of a norm that lays the law as an instrument that regulates and controls society. The approach used in this research is conceptual, a statute approach, a philosophical approach, and a comparative approach. The analysis used in this research is descriptive-qualitative. The result shows that the marriage in Law Number 1 of 1974 which has been used so far has not fulfilled a sense of justice, especially for husbands who want to practice polygamy even though the wife has been permitted to do polygamy. Article 2 paragraph (2) provides special conditions for husbands who will have polygamy, namely permission from the court, even though permission from the first wife is already owned. This is certainly a burden for the husband because he has to deal with the court which of course requires time, money, and energy. In addition, the court's participation in granting permission for polygamy according to the author is a form of court intervention in other people's household affairs.

Keywords: Legal Reconstruction, Monogamy Principle, Justice-Based Marriage.

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INTRODUCTION

Indonesia's national marriage law adheres to the principle of monogamy. This, as regulated in Article 3 paragraph (1) of Law Number 1 of 1974 which states that in principle, a marriage a man can only have is to one wife only. In other words, marriage adheres to the principle of monogamy, and this can only be set aside if there is a situation such as where their spouse dies, and only then the spouse left behind can remarry.

Although the national marriage law adheres to the principle of monogamy, however, Law Number 1 of 1974 concerning Marriage provides the possibility for a husband to practice polygamy. Indonesia itself has a law on polygamy which is located in Article 3 (2) of Law no. 1 of 1974; Article 41 PP No. 9-1975 which states that polygamy is allowed if:

1. The wife cannot carry out her obligations as a wife,

2. The wife has a disability or disease that cannot be hidden,
3. The wife cannot bear children.

Based on article 3 paragraph [2] above, it is recognized that the principle of marriage that applies in Indonesia is the principle of monogamy but applied as relative monogamy which means it provides an opportunity for someone to practice polygamy with the terms and conditions applicable to the legislation, namely the terms and conditions alternative and cumulative and even then there are still many irregularities that are found where polygamy occurs illegally or outside of the existing mechanism.

If a husband has a wife who is still alive and his wife is included in what is written above, then the husband can have more than one adult woman by

submitting a written application to the court (Article 4 (1) of Law No. 1 of 1974 and Article 40 PP No. 9 Year-1975). This Law Number 1 of 1974 on Marriage and the KHI adhere to the permissibility of polygamy for husbands, although they are limited to only four wives. This provision is contained in Articles 3 and 4 of the Marriage Law and Chapter XI Articles 55 to 59 of the KHI. In the KHI, among other things, it is stated that the main condition for having more than one wife is that the husband must be able to treat his wives and children fairly (article 55 paragraph 2). In addition to these main requirements, other conditions must be met as stated in Article 5 of Law no. 1 of 1974, namely the wife's consent and the certainty that the husband can guarantee the lives of his wives and children.

To study polygamy with the principle of justice, it must be based on several things, namely: First: the normative basis of polygamy, namely in elaborating thoughts about polygamy, it will be seen how the principle of justice is desired in polygamy. Second, the practical basis of the principle of justice. In the perspective of psychology and the Qur'an, according to Puniman [1], justice is a part of morality that describes a social situation when norms about rights and eligibility are fulfilled. The basic value of justice is a form of respect for the dignity and rights attached to it.

Polygamy as a form of marriage is like two sides of a coin that cannot be separated, there are always parties who reject and support it. The word polygamy is synonymous with controversy both in Islamic law and in social reality.

Meanwhile, in the perspective of justice, the restriction on polygamy as adopted in the 1974 Marriage Law No. 1 of 1974 clearly shows that the law favors women as wives more than men as husbands. Meanwhile, the husband's interests receive less attention [2], even though the positive side of polygamous husbands is also quite a lot as the author described above. One of the reasons is that the permission from the first wife, which has been obtained, must also be ratified in front of the court, and this is an insult to the husband's sense of justice because the situation in court can cause the couple to be unable to express reasons, especially if the reasons are confidential or are a family disgrace. In addition, the court's involvement in determining whether or not a husband is allowed to practice polygamy even though he has obtained permission from the first wife can be considered as court intervention in other people's domestic affairs.

Justice in Islam can be seen in several aspects of life. Related to the topic of this research, the aspect that will be discussed is justice in the Islamic marriage system. Therefore, the author is interested in conducting research related to the legal reconstruction of the principle of monogamy in the Indonesian Law Number

1 of 1974 on Marriage. This problem is what urges the author to study it further in research with the main problem as follows:

1. How is the position of the monogamy principle in the Indonesian Law Number 1 of 1974 on Marriage?
2. How is the application of the monogamy principle in Law Number 1 of 1974 in Indonesia?
3. How is the reconstruction of Indonesian marriage law based on justice value?

METHOD OF RESEARCH

The type of this research is doctrinal-legal research that uses a construction paradigm. To answer the three legal issues above, the first problem uses an approach method that uses a legal approach (positive law) which is carried out to find and analyze the normative basis regarding the position of the principle of monogamy in the Indonesian Law Number 1 of 1974 on Marriage which is the authority from various law enforcement agencies [3]. In the second problem, a theoretical and philosophical approach to law is carried out to find theoretical and philosophical foundations regarding the urgency and *ratio legis* (legal reasons) of marriage using other principles besides monogamy in solving marital problems in Indonesia [4]. In the third problem, the conceptual approach and legal comparison are carried out to find the ideal conception of the ideal reconstruction of Indonesian marriage law based on justice for both men and women, as well as marriages that are lawful and free from immorality.

RESEARCH RESULT AND DISCUSSION

1. The Position of The Monogamy Principle in The Indonesian Law Number 1 of 1974 on Marriage

From a historical perspective before the birth of Law Number 1 of 1974 on Marriage, marriage law in Indonesia is still pluralistic, where each group in our society has its marriage law. Starting from the desire of Muslims in Indonesia to have their own written marriage law, the idea emerged to realize this desire.

In marriage law in Indonesia, one of the principles of marriage is the principle of monogamy. The principle of monogamy here is not absolute, it can even be said to only be directed to the formation of monogamous marriages by making it difficult and narrowing the use of polygamous institutions, and not eliminating the polygamous system [5].

Based on Law Number 1 of 1974 concerning Marriage, namely in Article 3 paragraph (1), it is said that in principle, a marriage a man can only have is to one wife and A woman can also only have one husband. However, this Marriage Law also opens the possibility for a man to have more than one wife (polygamy).

In Article 3 paragraph 2 of Law Number 1 of 1974 concerning Marriage, it is explained that the court can give permission for a husband to have more than

one wife if desired by the parties concerned and have strong reasons and are accepted by law.

Even further, the regulations regarding polygamy for followers of Islam are also contained in Presidential Instruction Number 1 of 1991, namely concerning the Compilation of Islamic Law, regulated in Articles 55 to 59. The contents of these articles are by the provisions in Islamic law, Law Number 1 of 1974 concerning Marriage and Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage. These provisions relate to the requirements, limitations, and procedures for applying for a polygamy permit to the Religious Court.

The requirements for applying to the court, as referred to in Article 4 paragraph (1) of the Marriage Law, must meet several conditions, namely:

- a. Consent of the wife or wives;
- b. Assurance that husbands can provide for the necessities of life for their wives and children; and
- c. Assurance that husbands will treat their wives and children fairly.

The implementing regulations contain provisions on how to inspect and grant permits. In examining the above matters, the court must summon and hear the wife in question. Court examination for this purpose is carried out by the judge no later than 30 (thirty) days after the receipt of the application letter and its attachments. If the court believes 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 [6].

It is different if the person who proposes polygamy is a civil servant (PNS), then the government regulations, in this case, are even stricter. Apart from being a husband must fulfill the requirements in Law no. 1 of 1974, PP No. 9 of 1975, and the Compilation of Islamic Law (KHI), He must also meet the special requirements and provisions stipulated in PP no. 10 of 1983 and PP No. 45 in 1990.

The legislature places strict limits on the dissolution of marriages other than death. According to Islam, the purpose of marriage is, according to Allah's command, to obtain legal offspring in society, by establishing a peaceful and orderly household and also preventing adultery to create peace and tranquility for the family and society [7].

The legitimacy of a legal act is determined by positive law in the field of marriage in Indonesia. According to Law no. 1 of 1974, marriage is a legal act that has legal consequences. Thus, whether or not a marriage is legal is determined by the provisions contained in Law no. 1 of 1974 concerning marriage. Marriage must be based on God Almighty. A marriage

must be valid by the religious law of each prospective husband and prospective wife (article 2 paragraph 1) of Law no. 1 of 1974 concerning marriage).

In addition, the marriage must be recorded according to the applicable legislation (Article 2 paragraph 2 of Law No. 1 of 1974 concerning marriage). This means that Indonesia adheres to the principle of religious marriage, as well as state marriage (civil marriage) as this means that the law is a representation of cultures that have lived throughout its people [8] and if it is related to the sound of article 2 paragraph 1 that the legal norms of each religion and belief of the prospective husband and wife.

By adhering to the principle of state marriage (Civil Marriage), then Law no. 1 of 1974 concerning marriage, also includes a juridical element, namely that carrying out a marriage must meet the requirements determined by the law (article 2 paragraph 2 to article 10 of Law No. 1 of 1974, concerning marriage in conjunction Chapter II, and Chapter II of Regulation No. Government No. 9 of 1975, concerning the implementation of Law No. 1 of 1974 concerning marriage).

As stated in Article 38 of Law Number 1 of 1974 on the basis or reasons for divorce states that: "*a marriage can be terminated due to a) death b) divorce and c) by a court decision*" Then, in Article 39 of the Islamic Law Compilation states that (1) a divorce can be made before a court session after the court concerned has tried and failed to reconcile the two parties. (2) To divorce, there must be sufficient reason that the husband and wife will not be able to live in harmony as husband and wife.

Article 114 of the Compilation of Islamic Law states that "a divorce due to divorce can occur due to *talaq* or based on a divorce suit." Doing a divorce as such must be accompanied by reasons that can be accepted by the recipient of the Special Court Institution of the Religious Courts, which has been regulated in the Compilation of Islamic Law in Article 116.

The implication of the enactment of the Marriage Law, divorce becomes difficult when there are no acceptable reasons. Therefore, it can be said that Law Number 1 of 1974 on Marriage was indeed prepared to strengthen the position of the principle of monogamy in marriage in Indonesia.

2. The Principle of Monogamy in Marriage and its Application Based on Law Number 1 of 1974 on Marriage

Marriage law in Indonesia adheres to the principle of monogamy, but this principle contained in Law Number 1 of 1974 concerning Marriage is not absolute. Polygamy has been known and implemented

by the community, especially the Muslims who make up the majority of the population in Indonesia. This means that the Marriage Law in Indonesia still allows a husband to practice polygamy[9].

Muslims in Indonesia as citizens have constitutional rights to practice their religion, as stipulated in Article 29 of the 1945 Constitution which states that *"The state guarantees the independence of every citizen to embrace their religion and to worship according to their religion and beliefs."*

The application of the strict monogamy principle in marriage based on Law Number 1 of 1974 concerning Marriage means that a husband may only have one wife and a wife may only have one husband. The implementation can only be carried out by referring to Law Number 1 of 1974 concerning Marriage, especially Chapter 1 Article 3 paragraph (2) Article 3 paragraph (2) The court may permit a husband to take more than one wife if desired by the parties involved concerned.

When viewed in Law Number 1 of 1974 on Marriage in Article 4, it seems very complicated and strict as the complexity of the procedure and the strict requirements for polygamy have led to the practice of polygamy outside the law.

Rules for a husband who will practice polygamy are also regulated in Government Regulation no. 9 of 1975 Articles 40 to 43, as implementing regulations of the marriage law, Furthermore, in the case of examination by the court, it will be matched through a court summons to the wife whose consent is asked for by her husband who wants to be polygamous, as emphasized in Article 42 paragraph (1) that in committing examination of matters in Articles 40 and 41, the court must summon and hear the wife in question. If the court believes that there is sufficient reason for the applicant to have more than one wife then the court will give their permission.

After obtaining court permission, the husband's second marriage can only then be held. The formal requirements or procedures for the implementation of marriage for having more than one wife are the same as the procedures for implementing marriage for the first time. If the court's permission for polygamy is not obtained, then the husband cannot carry out a second marriage and so on, in Article 44 of Government Regulation no. 9 of the year 1975 it is stated that *"Registration employees are prohibited from registering the marriage of a husband who will have more than one wife before permission from the court as referred to in Article 43 is obtained."*

From the articles above, it can be concluded that in principle in matters of marriage, Indonesia applies the principle of monogamy, and polygamy is

only justified if the husband submits an application to the court and it has been declared correct by the court judge, in addition to all the requirements and reasons that have been submitted by complying with the applicable laws and regulations under Law Number 1 of 1974 concerning Marriage and Government Regulation no. 9 of 1975 concerning the Implementation of Law Number 1 of 1974. On the other hand, if the submitted conditions and reasons by the husband regarding his application for polygamy are not fulfilled, the application will automatically be rejected. Thus, if one wants to practice polygamy, their marriage is automatically declared to be contrary to the applicable law.

In general, the reasons for an annulment of a polygamous marriage are as follows:

- a. There is no permission or approval from the wife/wives to marry again or to take more than one wife. Article 5 paragraph (2) of Law Number 1 of 1974: *"The consent referred to in paragraph (1) letter a of this article is no longer needed for a husband if his wife/wives cannot be asked for their consent and cannot be a party to the agreement. or if there is no news from his wife for at least 2 (two) years, or for other reasons that need to be assessed by a court judge"*.
- b. There is no permission from the Court to have more than one wife. Although adhering to the principle of monogamous marriage, having more than one wife is not prohibited, as long as carrying out the provisions and conditions regarding polygamy as regulated in Article 3 paragraph (2), Article 4 paragraph, Article 4 paragraph (2), and Article 5 paragraph (1) letters a, b, c of Law Number 1 of 1974.

What is meant by marriage according to Indonesian law, as currently adheres to at least 3 different laws (Customary Law and Islamic Law, Civil Law, and the Marriage Law) differs from each other. According to the Civil Code, marriage is defined as an alliance/bondage between a woman and a man which is recognized as valid by state laws/regulations which aim to organize an eternal unity of life. While Law no. 1 of 1974 article 1 defines marriage as an inner and outer bond between a man and a woman as husband and wife to form a happy and eternal family based on the One Godhead. This difference in the formulation will certainly have an impact on the pattern of application.

The same condition also applies to the validity of a marriage. In the Civil Code, the validity of a marriage is if the conditions according to the law are fulfilled as stated in article 26 of the Civil Code which states that the law views marriage only in civil relations. In this case, only juridical factors are considered. While in Law no. 1 of 1974 Article 2 states that marriage is legal if it is carried out according to the laws of each religion and belief. Marriage Law No. 1 of 1974, apart

from paying attention to juridical elements, also specifically pays attention to the elements: biological, sociological, and sociological.

Based on the description above, it can be concluded that the application of the principle of monogamy as regulated in Law Number 1 of 1974 provides a narrow space for men to have more than one wife. This is because to apply the principle of monogamy is a problem because it is considered contrary to the 1945 Constitution of the Republic of Indonesia Article 29 paragraph (2) which reads, "*The state guarantees the independence of every resident to worship according to his religion and belief*". Meanwhile, men who have more than one wife (polygamy) are allowed in Islam. Therefore, narrowing the opportunity for polygamy for men through regulations related to marriage is the best way to apply the principle of monogamy in Indonesian marriage law.

3. The Reconstruction of Indonesian Marriage Law Based on Justice

The regulation of polygamy was known before the arrival of Islam, both in highly civilized and underdeveloped societies. Because of that polygamy is very commonly known in every period and various nations. Before the arrival of Islam, marriage was carried out without boundaries, sometimes even without regulated ties [10].

Law Number 1 of 1974 on Marriage has been applied to Indonesian Muslims since 1974. This law contains the Indonesian version of marriage procedures, which means other parts of this law contains matters related to the will of the Indonesian government even though it is in Islam Law is not required.

As previously stated, there are several articles in Law Number 1 of 1974 on Marriage relating to polygamy. According to the author, these articles need to be reconstructed because they cause injustice from a male perspective. These articles are Article 3 paragraph (2), Article 4 paragraph (1) and (2), and Article 5 paragraph (1) of Law Number 1 of 1974 on Marriage.

Legal reconstruction means the process of rebuilding or re-creating or reorganizing the existing legal structure, legal substance, and legal culture to be better and function properly.

As previously stated, in the Marriage Law no. 1 of 1974 Article 3 paragraph (2), Article 4 paragraphs (1) and (2), and Article 5 paragraph (1) needs to be reconstructed because these articles create a sense of injustice for husbands who want to carry out polygamy practice even though the husband already got permission from the first wife, however, the law requires that the permit be ratified by the court for the permit obtained. The forms of reconstruction are as follows:

- a. Article 3 paragraph (2) needs to be reconstructed into "*A wife may permit a husband to have more than one wife if agreed by each husband and wife*". According to the author, the granting of court permission for a husband who will practice polygamy has narrowed the space for polygamy for the husband, even though the husband has obtained permission from his first wife and it's their right.
- b. Article 4 paragraph (1) and paragraph (2) are to be deleted. Because the reconstruction of article 3 paragraph (1) eliminates the issuance of a permit from the court, then Article 4 paragraph (1) and (2) is deleted.
- c. Article 5 paragraph (1) is deleted. Because the reconstruction of article 3 paragraph (1) eliminates the issuance of a permit from the court, then Article 5 paragraph (1) and (2) is deleted.

Law Number 1 of 1974 on Marriage was made on the legal basis of the 1945 Constitution of the Republic of Indonesia as the highest law in Indonesia, namely Article 5 paragraph (1), Article 20 paragraph (1), and Article 29, in addition to the People's Consultative Assembly Number IV/MPR/1973. Therefore, other laws under it must be in line and not against the Constitution. Thus, it can also be concluded that the marriage law is in line with or not against the constitution and TAP MPR as other sources of law.

Indonesia as a country where the majority of the population is Muslim in matters of marriage adheres to the principle of monogamy. For that through Law no. 1 of 1974 Indonesia strictly regulates the practice of polygamy, both for civil servants and the general public. Article 3 paragraph (1) of Law no. 1 of 1974 states that a man can only have one wife, and a woman can only have a husband. Although this Marriage Law provides an exception where a husband can have more than one wife, it is accompanied by reasons and certain strict conditions, both material and formal requirements, including permission from the court. Article 3 paragraph (2) of the Marriage Law states, "*The court may permit a husband to have more than one wife if the parties concerned wanted it*". Other articles are Article 4, Article 5, and Article 65 in conjunction with Government Regulation Number 9 of 1975 in conjunction with the Compilation of Islamic Law which also regulates alternative and cumulative conditions for husbands who wanted to practice polygamy.

The tightening of polygamy was supported by Ali Trigiyanto [11] in his statement that the existence of the 1974 Marriage Law was an effort for women to be able to get a legal umbrella as a step to regulate polygamous marriages that were previously so loose that they were complicated by cumulative conditions.

Tightening can also be in Government Regulation no. 9 of 1975 in Chapter VII concerning having more than one wife, Article 41 states as a legal

institution that is obliged to examine the requirements of applicants for polygamy permits regarding reasons, verbal consent from the wife stated in front of the court is guaranteed to be fair to their wives and the last task for the court in Article 43 to decide whether or not a husband who wants to practice polygamy will be appropriate or not. In addition, in the Book of the Criminal Code (KUHP) Book One Chapter XIII concerning crimes against origin and marriage from Article 277 to Article 280. Article 279 paragraph 1 point 1 reads: "Whoever enters into a marriage knowing that the marriage is or his existing marriages are a legal barrier to that".

The procedure for polygamy in the Marriage Law no. 1 of 1974 is also detailed by Government Regulation no. 9 of 1975 concerning polygamy procedures at the Court. Government Regulation No. 10 of 1983 concerning marriage and divorce permits for Civil Servants, especially those who carry out polygamy permits, was renewed by Government Regulation no. 45 of 1990, essentially very procedural and too long.

As the author stated that Article 3 Paragraph (1) of Law no. 1 of 1974 states that a man may only have one wife, and a woman may only have a husband, and Paragraph (2) which states that the court may permit a husband to have more than one wife if both parties wish to. This party concerned needs to be reconstructed because of the inconsistency with the 1945 Constitution, especially Article 29 paragraph (2) which states "The State guarantees the independence of every resident to worship according to that religion and belief." Internal discrepancies also occur in the law, namely Article 2 paragraph (1) of the Law states, "Marriage is legal if it is carried out according to the law of each religion and belief."

In Islam, the conditions for a valid marriage do not include permission from the court to practice polygamy. There is only permission from the first wife, both in writing and verbally. Therefore the author believes that permission from the court as one of the conditions for polygamy is an added thing, which does not exist in Islam, besides it can also be said that the court has interfered in the affairs of people practicing their religion. This creates a sense of injustice for Muslims, especially for men who want to carry out their religious teachings in the field of marriage, especially in the right to polygamy, because polygamy is not something that is prohibited in Islam.

CONCLUSION

1. Monogamy is one of the principles of marriage applied in Indonesia. The position of this principle is very strong because it has been included in the Indonesian Law Number 1 of 1974 on Marriage where in Article 3 paragraph (1) of this Law states that "In Principle, a man can only have one wife,

and a wife can only have one husband". However, the marriage of a husband with more than one wife or polygamy even though it is desired by both parties can only be carried out if certain strict conditions are met, both material, formal, and other special conditions.

2. The application of the monogamy principle in Law Number 1 of 1974 which has been carried out so far in Indonesia is not absolute, but only directs the formation of monogamous marriages by making it difficult and narrowing the use of polygamous instruments, because polygamy has been known and implemented by the community, especially the Muslims who make up the majority of the population in Indonesia since this religion first spread in Indonesia. Thus, it can be said that theoretically, Indonesian Law Number 1 of 1974 on Marriage still allows a husband to practice polygamy.
3. The procedure for polygamy needs to be reconstructed because of the inconsistency with the 1945 Constitution, especially Article 29 paragraph (2) which states "The State guarantees the independence of every resident to worship according to that religion and belief." Internal discrepancies also occur in the law, namely Article 2 paragraph (1) of the Law states, "Marriage is legal if it is carried out according to the law of each religion and belief." This is certainly a burden for the husband because he has to deal with the court which of course requires time, money, and energy. In addition, the court's participation in granting permission for polygamy according to the author is a form of court intervention in other people's household affairs

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