



BETWEEN ISLAMIC LAW AND HUMAN RIGHTS: AMBIGUOUS REGULATION REGARDING POLYGAMY IN INDONESIA

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Abstract

Indonesia's polygamy regulations, which allow men to practice polygamy and prohibit women from practicing polygamy, have the potential to violate human rights. Suppose the study of the theory of state responsibility, the assertion of gender equality must be supported in all aspects of life, especially in marriage. Indonesia has also ratified CEDAW as a national law that can be used as a guide. Therefore, the ratification of CEDAW has significant implications for Indonesia, which will immediately revise the polygamy requirements in the marriage law to prevent discrimination from continuing. It is because delaying the protection of human rights also means that the state cannot protect and respect women's rights and is considered reckless. Therefore, state delays can be viewed as a violation of human rights.

Keywords: *Polygamy, Human Rights, Women, Marriage.*



Introduction

The concept of equality is an essential part of the realm of human rights.¹ Equality can be interpreted as the absence of differences between individuals or particular groups, such as gender, skin color, race, religion, ethnicity, and others. International human rights instruments have placed equality in a high position. They are considered to have a close relationship with human rights, one of which has been regulated in the Universal Declaration of Human Rights (UDHR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).² Regulating the principle of equality through various international legal instruments will have consequences for a country that has agreed or even ratified it.³ On this basis, the state should guarantee equality against all forms of discrimination in recognizing, protecting, and fulfilling human rights.⁴

¹ Umi Salamah, "Polemik Poligami dalam Hukum Islam dan Tinjauan Hak Asasi Manusia," *Dimar* 17, no. 1 (2019): 136, DOI: 10.58577/dimar.v1i1.28.

² Salamah.

³ Wahyuningsih, "Prinsip Kesetaraan Gender dan non-Diskriminasi dalam Konvenan ICESCR dan ICCPR," *Jurnal Hukum Prioris* 2, no. 1 (2008): 20.

⁴ Sulistyowati Irianto, *Perempuan & Hukum: Menuju Hukum yang Berperspektif Kesetaraan dan Keadilan* (Jakarta: Yayasan Obor Indonesia, 2006), 87.

One form of discrimination against equality is the existence of gender differences that still occur in aspects of state life.⁵ Therefore, the author limits this paper by discussing gender equality in the practice of polygamy in Indonesia. Furthermore, polygamy in Indonesia is regulated in Article 3 paragraph (2) of Law Number 1 of 1974 concerning Marriage.⁶ If we examine the interpretation of this article, it means that polygamy is permissible, while the state has banned polyandry for women. So, this paper will focus on polygamy, which is faced with the principle of equality in CEDAW rules and Article 3 paragraph (2) of the Marriage Law. Furthermore, regarding the concept of state responsibility, a discussion will be made of the position of non-discrimination that Indonesia must guarantee as a country that has ratified CEDAW and implemented human rights principles.

Polygamy in Indonesian and International: Between Legal Reality and Practice

Polygamy is an essential issue in religion, customary law, and human rights law. When referring to the legal basis related to polygamy, there is a crucial issue: the primary point of the problem

⁵ Muntoha, "Islam, Gender, dan HAM," *Unisia* 33, no. 73 (July 2010): 18–19.

⁶ Article 3 paragraph (2) Law Number 1 of 1974 concerning Marriage.

that most Islamic countries must address.⁷ In the context of the scope of polygamy, Islamic countries respond to this in various ways, which the authors describe in the following table.

Table 1. Legislation Concerning Polygamy in Several Islamic Countries⁸

State	Polygamy Regulation
Brunei Darussalam	Allowed
Malaysia	Allowed
Morocco	Allowed
Syria	Judge's decision
Tunis	Forbidden

Based on the table above, it can be concluded that the rules regarding polygamy in other countries, such as Malaysia, Brunei Darussalam, and Morocco, have permitted the practice of polygamy. In contrast, Syria has more standardized judge decisions. It contrasts with Tunisia, which prohibits polygamy because it cannot be practiced in a civilized country.⁹

Indonesia, where most of its citizens are Muslims, has regulated poly-

gamy in several legal products, one of which is in the Marriage Law. The basic rule in the Marriage Law explains that men are not allowed to have more than one wife or vice versa.¹⁰ At the same time, Article 3 paragraph (2) of the Marriage Law requires polygamy by the Court through the agreement of both parties.¹¹ It means that Indonesia has adopted the principle of open monogamous marriage, which means it is only permissible for those ready and able to marry more than once, but this does not apply to women.

Although in practice, polygamy occurs intending to overcome the problems in life experienced by women. However, the impact of polygamy also does not rule out the possibility of giving birth to new problems, such as disharmony in the relationship between the two parties, which impacts the psychology of each party, especially women. The main point of marriage is to create a relationship surrounded by serenity, love, and blessed by God. Referring to the case that occurred in the city of Langsa Aceh, with a relatively high level of polygamy, it turns out that polygamous families always experience quarrels. Although it is also possible, related cases of polygamy are included in the vortex of conflicts that rarely occur

⁷ N Nurhidayatuloh et al, "Forsaking Equality: Examine Indonesia's State Responsibility on Polygamy to the Marriage Rights in Cedaw," *Jurnal Dinamika Hukum* 18, no. 2 (2018): 183-193, DOI: 10.20884/1.jdh.2018.18.2.810.

⁸ Atik Wartini, "Poligami: Dari Fiqh hingga Perundang-Undangan," *HJSI* 10, no. 2 (2013): 237-268.

⁹ Wartini.

¹⁰ Article 3 paragraph (1) Law Number 1 of 1974 concerning Marriage.

¹¹ Article 3 paragraph (2).

in Indonesia.¹² In addition, based on research, there are dominant depressive symptoms, especially in women, due to polygamy. The characteristics of depression are emotions that are expressed with feelings with emotions that tend to be challenging to control.¹³

Problematic polygamy cases also occurred in Pamekasan, East Java, by not registering their marriage at the Office of Religious Affairs (KUA), called illegal polygamy. It proves that Islamic law is considered higher than state law.¹⁴ Much kiai practice polygamy as leaders of Islamic boarding schools in Probolinggo. Polygamy has been classified into two, namely legal polygamy, registered at the KUA, and sirri polygamy carried out without any interference from the state. Ironically, this incident lived and developed in Probolinggo. Therefore, based on the cases that have occurred, it can be concluded that polygamy tends to discriminate against women.

¹² Wilda Triana Sutandi, "Gambaran Simtom Depresi Pada Istri yang Dipoligami," *Neotic Psychology* 1, no. 2 (2011): 102-109.

¹³ Abd Warits & Abd Wahed, "Praktik Poligami di Bawah Tangan di Desa Laden Kabupaten Pamekasan," *Al-Ahkam* 9, no. 2 (2014): 223-259.

¹⁴ Ita Musarrofa, "Poligami: Antara Legalitas Formal dan Legalitas Budaya: Studi Kasus Praktik Poligami Kyai Pesantren di Probolinggo Jawa Timur," *Al-Mawarid* 14, no. 1 (2005): 198-211.

In international law, the state is the main component that holds rights and obligations that give rise to state responsibility. Provisions regarding state responsibility are regulated in the 1933 Montevideo Convention concerning the Rights and Duties of States, which regulate state jurisdiction.¹⁵ Through jurisdiction, the concept of state responsibility is born, which can be carried out by an institution called the state commission.¹⁶ Malcolm N. Shaw has divided the factors into specific characteristics of state responsibility:¹⁷ 1) There is a form of obligation born from international law. 2) There is an act that violates international obligations. 3) Any damage or loss due to unlawful acts or negligence.¹⁸ Suppose it is related to the Indonesian condition. In that case, there is ambiguity regarding which party can hold the state responsible for human rights violations and the state's efforts to be responsible, especially in the polygamy polemic. Based on this, it can be concluded that if the problem of polygamy contained in the Marriage Law is included in the realm of international violations, then efforts are needed that can be taken by victims to report these

¹⁵ Huala Adolf, *Aspek-aspek Negara dalam Hukum Internasional* (Jakarta: PT. Raja Grafindo Persada, 2002), 225.

¹⁶ Adolf, 265.

¹⁷ Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), 778.

¹⁸ Shaw.

violations.¹⁹ Ideally, the Constitutional Court is the only appropriate institution to adjudicate human rights.²⁰

The Concept of Non-Discrimination and State Responsibility in the Practice of Polygamy: Between Indonesian Law and CEDAW

The principle of non-discrimination has been regulated in Article 1 of CEDAW with the phrase "all forms of discrimination against women"²¹ as a marker. Therefore, the author compares the Marriage Law and the CEDAW regulations regarding polygamy and obtains the results of three aspects of the differences between the two. First, there are distinctions, limitations, and exceptions in Article 4 of the Marriage Law, which states "[...] to have more than one wife." In addition, Article 4 paragraph (2) also emphasizes that the reasons considered by the Court to approve the existence of polygamy are only focused on the wife.²²

The second aspect, discrimination can be in part or whole. In the context of partial discrimination, as in Article

31 of the Marriage Law regarding the composition of rights or equal position between wife and husband.²³ However, in polygamy, they clearly do not have equal rights. It is reflected in the statement of exceptions for husbands who wish to have more than one wife because discrimination can be classified through three aspects which are sometimes only partially found. However, even if only partially, this can be included in acts of discrimination.

The third aspect is discrimination against women for recognition and a sense of safety.²⁴ One form of polygamy discrimination against women is the formation of regulations related to women's rights.²⁵ When examined through the hierarchical concept of laws and regulations, the rules on the Marriage Law occupy the third level after the 1945 Constitution of the Republic of Indonesia and the TAP MPR with implementing regulations for Government Regulation (PP) Number 9 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage. The step that the state should pursue is to change the law by adjusting the CEDAW rules. It aims to minimize discriminatory practices experienced by women.²⁶

¹⁹ Nurhidayatulloh et al, "Forsaking Equality," 187.

²⁰ Nurhidayatulloh

²¹ Article 1, International Convention on Elimination of All Forms of Discrimination Against Women (ICEDAW/CEDAW).

²² Sanyoto, "Implementasi Poligami Antinomi antara Individual Right dan Social Right," *Jurnal Dinamika Hukum* 8, no. 1 (2008): 51-55. DOI: 10.20884/1.jdh.2008.8.1.31.

²³ Article 31 paragraph (2) Law Number 1 of 1974 concerning Marriage.

²⁴ Nurhidayatulloh et al, "Forsaking Equality," 189-190.

²⁵ Nurhidayatulloh, 189.

²⁶ Human Rights Committee, "General Com-

The discourse on the theory of state responsibility is closely related to the polemic on human rights violations which positions the state as a violator of certain individual rights.²⁷ Thus, it should be necessary to establish a complaint mechanism related to human rights violations that have befallen citizens to obtain protection. On this basis, CEDAW requires the state to recognize women's rights and protect and provide access to complaints of violations.²⁸ It is in line with the concept of state responsibility in the international world which stipulates provisions related to state obligations through legislative, executive, and judicial institutions.²⁹ According to Malcolm N. Shaw, this concept is supported by the theory of state responsibility, according to Malcolm N. Shaw, which states that specific indicators should assess a state's actions against human rights violations.³⁰

ment 18, Nondiscrimination (Thirty-seventh session, 1989)," *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc.HRI/GEN/1/Rev.1 at 26 (1994)," <http://hrlibrary.umn.edu/gencomm/hrcom18.htm>.

²⁷ Nurhidayatulloh et al, "Forsaking Equality," 191.

²⁸ Christanugra Philip, "Tanggung Jawab Negara terhadap Perlindungan Hak Asasi Manusia Menurut Hukum Internasional," *Lex Administratum* 4, no. 2 (2016): 35, <https://ejournal.unsrat.ac.id/v3/index.php/administratum/article/view/11293>.

²⁹ Philip.

³⁰ Nurhidayatulloh et al, "Forsaking Equality," 192.

Therefore, the state is the party that must be responsible for discrimination against women in the practice of polygamy in Indonesia. The provisions on polygamy in Indonesia have consequences by making the state responsible for human rights violations. It is because there is discriminatory behavior against women and negligent behavior that causes harm in the context of international law, so it is absolutely the responsibility of the state.³¹ Hence, Indonesia should protect it through revisions to legal products adjusted to the human rights principles in the teachings of non-discrimination in CEDAW.³²

Conclusion

Regulations regarding polygamy in Indonesia that allow men to practice polygamy and prohibit women from polyandry have the potential to violate human rights. If we examine the theory of state responsibility, the emphasis on equality between women and men must be upheld in all aspects of life, especially marriage. Moreover, Indonesia has ratified CEDAW as a national law that can be used as a guideline. Thus, ratifying CEDAW has consequences for Indonesia to immediately revise the requirements for polygamy in the Marriage Law so that discrimination does not occur continuously. Because

³¹ Nurhidayatulloh.

³² Nurhidayatulloh.

by delaying it based on the purpose of protecting human rights, also means that the state is unable and not serious about protecting and fulfilling women's rights. Thus, the state's procrastinating behavior can be seen as a practice of human rights violations.

Bibliography

- Adolf, Huala. *Aspek-Aspek Negara dalam Hukum Internasional*. Jakarta: PT Raja Grafindo Persada, 2002.
- Shaw, Malcolm N. *International Law*. Cambridge: Cambridge University Press, 2008.
- Warits, Abd & Abd Wahed. "Praktik Poligami di bawah Tangan di Desa Laden Kabupaten Pamekasan." *Al-Ihkam* 9, no. 2 (2014): 224-259. DOI: 10.19105/ihkam.v9i2.471.
- Nurhidayatulloh, N, F Febrian, Achmad Romsan, Annalisa Yahanan, Martinus Sardi, and Fatimatuz Zuhro. "Forsaking Equality: Examine Indonesia's State Responsibility on Polygamy to the Marriage Rights in Cedaw," *Jurnal Dinamika Hukum* 18, no. 2 (2018): 182-193. DOI: 10.20884/1.jdh.2018.18.2.810.
- Philip, Christanugra, "Tanggung Jawab Negara terhadap Perlindungan Hak Asasi Manusia Menurut Hukum Internasional." *Lex Administratum* 4, no. 2 (2016): 33-39. <https://ejournal.unsrat.ac.id/v3/index.php/administratum/article/view/11293>.
- Musarrofa, Ita. "Poligami: Antara Legalitas Formal dan Legalitas Budaya: Studi Kasus Praktik Poligami Kyai Pesantren di Probolinggo Jawa Timur." *Al-Mawarid: Jurnal Hukum Islam* 14, no. 1 (2005): 198-211. <https://journal.uui.ac.id/index.php/JHI/article/view/2816>.
- Muntoha, Muntoha. "Islam, Gender, dan HAM." *Unisia* 33, no. 73 (2012): 17-35. DOI: 10.20885/unisia.vol33.iss73.art3.
- Nurhidayatulloh. "Dilema Pengujian Undang-Undang Ratifikasi oleh Mahkamah Konstitusi dalam Konteks Ketetapanegaraan RI." *Jurnal Konstitusi* 9, no. 1 (2012): 113-134. DOI: 10.31078/jk915.
- Sanyoto. "Implementasi Poligami Antinomi antara Individual Right dan Social Right." *Jurnal Dinamika Hukum* 8, no. 1 (2008): 51-55. DOI: 10.20884/1.jdh.2008.8.1.31.
- Irianto, Sulistyowati. *Perempuan dan Hukum: Menuju Hukum yang Berperspektif Kesetaraan dan Keadilan*. Jakarta: Yayasan Obor Indonesia, 2006.
- Wartini, Atik. "Poligami: Dari Fiqh hingga Perundang-Undangan." *Hunafa: Jurnal Studia Islamika* 10, no. 2 (2013): 237-268. DOI: 10.24239/jsi.v10i2.29.237-268.
- Salamah, Umi. "Polemik Poligami dalam Hukum Islam dan Tinjauan Hak Asasi Manusia." *Dimar: Jurnal*

Pendidikan Islam 1, no. 1 (2019): 131-147. DOI: 10.58577/dimar.v1i1.28.

Wahyuningsih. "Prinsip Kesetaraan Gender dan Non Diskriminasi dalam Konvenan ICESCR dan ICCPR." *Jurnal Hukum Prioris* 2, no. 1 (2008): 19-27. DOI: 10.25105/prio.v2i1.324.

Sutandi, Wilda Triana. "Gambaran Simtom Depresi pada Istri yang Dipoligami." *Neotic Psychology* 1, no. 2 (2011).

Indonesia Law Number 1 of 1974 concerning Marriage.

CEDAW. "Text of the Convention on Elimination of All Forms of Discrimination against Women," Adopted and opened for signature, ratification, and accession by General Assembly resolution 34/180 of 18 December 1979. Accessed October 23, 2023. <https://www.un.org/womenwatch/daw/cedaw/cedaw.htm>.

UN Human Rights Committee (HRC). *CCPR General Comment No. 18: Non-discrimination*, November 10, 1989. Adopted at the Thirty-seventh Session of the Human Rights Committee. Accessed October 23, 2023. <https://www.refworld.org/docid/453883fa8.html>.