

## JURIDICAL REVIEW OF THE STATUS OF CHILDREN OF POLYGAMOUS MARRIAGES NOT APPROVED BY THE FIRST WIFE UNDER ISLAMIC LAW AND INDONESIAN LEGISLATION

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### ABSTRACT

**Abstract:** Polygamy without the consent of the first wife can have legal consequences regarding the marital status of polygamy between husband and second wife and the status of children born to the second wife as a result of sexual intercourse before marriage (pregnant marriage). The purpose of this research was to determine the status of polygamous and the legal status of children born from second wife that were not approved by the first wife. This research uses a normative juridical approach with analytical descriptive research specifications by conducting literature studies through laws, regulations, and interviews with relevant sources. The analytical method used is juridical qualitative. The result of this research show that the polygamous marital status between the Applicant and the second wife in a state of pregnancy without the consent of the first wife based on Islamic law and laws and regulations in Indonesia is a valid marriage if it meets the conditions, gets along, and there is no prohibition on marriage. The legal status of children born to the second wife in a polygamous marriage in a state of pregnancy that is not approved by the first wife, there is a difference between Islamic Law and the Marriage Law and the KHI. Islamic law uses the minimum gestational age parameter, which is 6 months. If the birth is less than 6 months, then the child is an adulterous child, so it is not confided to the father and uses the guardian of the judge as the guardian of the marriage. Meanwhile, the Marriage Law and IHL states that the status of the child is a legal child without a gestational age limit. The child can be declared to his father and the marriage guardian who can marry the child, namely wali nasab.

**Keywords:** Polygamous Marriage; Wife's Consent; Child Status

### Introduction

Basically, Indonesia adheres to the principle of monogamous marriage as stated in Article 3 of the Marriage Law. However, in order to provide legal order, the Marriage Law allows more than one wife. Polygamy is not a recommendation and must meet the conditions that have been accommodated in the applicable laws and regulations and take into account the restrictions on polygamy contained in Article 55 of the Compilation of Islamic Law (Pua et al., 2022). The ability to polygamy must still be required by doing justice to each of his wives. These fair conditions can be in the form of bread, night distribution, or mu'amalah. If a husband cannot do justice, he is

required to have only one wife. However, a husband who can do justice to his wife is only allowed a limit of four wives.

The urgency of polygamy without the consent of the first wife can have legal consequences regarding the marital status of polygamy between husband and second wife and the position of children conceived and born to the second wife as a result of sexual relations before marriage (Alidrus, 2023)

The existence of the provisions of the Law governing the consent of wives in polygamous marriages is intended to obtain order and legal certainty accompanied by legal guarantees and protection of all rights and obligations born from these legal acts (Ardhian et al., 2015). Thus, there is a need for clear legal provisions in order to protect parents against children in polygamous marriages. Therefore, the purpose of conducting this research is to determine the status of polygamous marriages and the status of children born in polygamous marriages from second wife.

### Research Method

The author of this study uses a normative juridical approach method that focuses on secondary data containing primary, secondary, and tertiary legal materials (Benuf & Azhar, 2020). This research is descriptive-analytical that provides a systematic description, review, and analysis of applicable legal rules associated with problems that include legal theory and positive law implementation practices (Adonara, 2015). This method aims to provide a view of the marital status of polygamy in a state of pregnancy without the consent of the first wife and the position of children born to the second wife in a marriage that is not approved by the first wife.

### Result And Discussion

#### **Polygamous Marital Status of Second Wife Not Approved by First Wife Based on Islamic Law and Laws and Regulations in Indonesia**

Article 53 paragraph (1) of the KHI as an anticipatory step, so that the prospective second wife can be married to the man who impregnated her. Meanwhile, in Article 53 paragraph (3) of the KHI when viewed in terms of marriage, the marriage can only be carried out once with the same person (JDIH BPK, 1991).

This is contained in Article 53 of the KHI which if further analyzed and combined with polygamous marriage, then the marriage is allowed to women in a state of pregnancy without any provision of the causes of pregnancy, for example, anything that causes a woman's pregnancy before a valid marriage can be a condition for the permissibility of the marriage as long as it meets the conditions of marriage. Thus, a polygamous marriage entered into by the Petitioner with the second wife on the grounds of impregnating her and/or even though the second wife's pregnancy was due to adultery, can still be married.

Article 53 paragraph (2) of the IHL confirms that the marriage can be carried out without the need to wait for the birth of a child in its row. That is, if the pregnancy has been known, both by the pregnant woman and the man who impregnated her, then the woman can be immediately married. Although the age of the fetus in the womb is or has not approached the time of birth. Thus, the marriage becomes a valid marriage and there is no need for a repeat marriage (Safitri et al., 2022).

The author argues that the non-recurrence of the marriage refers to the sanctity of the marriage itself and not to protection from any form of adultery until pregnancy occurs. Thus, Article 53 of the IHL shows that the marriage has legality in positive law. This became the basis for the KUA of Tangerang Regency to carry out polygamous marriages on the grounds that they had impregnated a prospective second wife.

The implementation of polygamous marriage between the Applicant and the second wife is permissible as long as the conditions and pillars of marriage have been fulfilled as stipulated in the Marriage Law, in the form of (Muhammad Ali, 2023):

1. Obtain the consent of the bride and groom;
2. Obtain permission from both parents, guardians, or courts for prospective brides who have not reached the age of 19;
3. The minimum age for the bride and groom, both male and female parties who will hold the wedding is 19 years;
4. For prospective brides who have not reached the age of at least they can get married after obtaining permission from the court.

In the event that these requirements have not been sufficiently used to analyze the marriage law for the performance of the marriage. Thus, the search can be continued for marital obstacles in the Law. Marriage is prohibited between two people, namely (Safitri et al., 2022):

1. Blood-related in a straight down or upward lineage;
2. Blood relations in the sideways lineage, that is, between siblings, between one and one parent's siblings, and between one and a grandmother's brother;
3. Temporary relations, namely in-laws, stepchildren, daughters-in-law, and mothers or stepfathers;
4. Related milk, namely milk parents, milk children, milk siblings, and milk aunts or uncles;
5. Have sex with the wife or as an aunt or niece of the wife. In the case of a husband with more than one wife;
6. Those who are related by their religion or other applicable regulations are prohibited from marrying.

Referring to the requirements of marriage, Article 6, Article 7, and Article 8 of the Marriage Law, the marriage of pregnant women may be carried out. This is because

pregnant women are not included, both in the requirements of a valid marriage and the obstacles to marriage (JDIH BPK, 2019).

Polygamous marriages in pregnancy are permissible as long as they are subject to the legal conditions of marriage and are not given special records even without the consent of the first wife (Muhammad Ali, 2023). However, as part of the purpose of marriage, both in the KHI and the Marriage Law, a husband who wants to practice polygamy first asks his wife for opinions and/or permission so as not to be hurt. In addition, the wife's permission is necessary because it is closely related to the position of the wife as an equal partner and as a legal subject in the marriage that must be respected for her dignity and dignity.

Articles that regulate the reasons, conditions, and procedures for polygamy as an effort and guarantee the fulfillment of the rights of wives and prospective wives and as part of the obligation of polygamous husbands to realize the purpose of marriage (Susanto, 2007)

Under Islamic Law, the first wife's permission requirement in polygamous marriages is not regulated. Islamic law only stipulates that a husband who wants to be polygamous must act just as described in Sura An-Nisa verse (129) (The author's interview with Nuryani as The Head of the Tangerang Regency Religious Affairs Office on 19 June 2023). Therefore, fair behavior in polygamous marriages has various meanings that have a close relationship with the husband's ability to provide living expenses to his wife and/or future wife and children who will be born or have existed in order to form a happy and eternal family based on the One True Godhead.

Polygamous marriage between the Applicant and the second wife for impregnating her can be known by examining the marriage file, which is contained in the health certificate from the doctor provided, both the clinic and the local Public health center where the bride lives which aims to provide information regarding the health condition of the bride-to-be who wants to carry out the marriage.

Employees of the Office of Religious Affairs in giving bride courses (sustain), and advice before the wedding to the Applicant and the bride-to-be will be assisted to perform repentance by saying istighfar and promising not to do the same act and are not allowed to have conjugal relations before *ijab qabul* is performed. In addition, the father as a parent and/or guardian of marriage will accompany his child. Thus, shari'a and in accordance with the provisions of the Law have been fulfilled, so that the marriage can be carried out.

**Valid Status of Children Born to Second Wife in Polygamous Marriage Not Approved by First Wife Based on Islamic Law and Laws and Regulations in Indonesia**

The status of children born in polygamous marriages without the consent of the first wife according to Islamic Law, because Islamic law regulates the relationship of nasab as a very important element and is closely related to matters of marriage, the obligation to provide for, the relationship of mahram, the guardian of marriage and so on (Hanifah, 2019).

Referring to the status of children born from polygamous marriages in the context of the second wife having become pregnant first, then after the establishment of the marriage there are two possibilities, namely (Judiasih et al., 2020):

- a. If the child is born more than six months after the legal marriage of both parents, then the intention is to the husband who has married his mother;
- b. If the child is born less than six months after the legal marriage of both parents, then the child is sent to his mother.

Points (a) and (b) above are a combination of two verses, namely Surah Al-Ahqaf verse (15) and Surah Al-Luqman verse (14). The scholars combined the two verses above and agreed that the minimum time of pregnancy, which is 6 (six) months (The results of the author's interview with Mr. Ues Nawawi Gofar as Chairman of the Indonesian Council of Tangerang Regency on April 13, 2023, 2023). This is in line with the opinion of Imam Shafi'I, that: "Whoever marries a woman and has not interfered with her or has interfered with her after the contract, and the woman gives birth to a child before six months from the time of the contract and not from the time of the mixing, then the child is not related to a man who marries unless the mother gives birth after more than six months (Anam, 2019)."

Referring to the above does not allow Islamic law to be violated or ignored. Thus, the status of the child born from the marriage is adultery because the marriage entered into by the Petitioner with the second wife shows that conception had taken place before the marriage contract and then after that the marriage took place (Jarbi, 2019).

Based on applicable laws and regulations, Article 53 of the KHI does not explain the status of children born from such a pregnant marriage. When combined with Article 99 KHI and Article 42 of the Marriage Law which states that a legal child is a child born in or as a result of a legal marriage.

The provisions of these articles indicate that the child has a legal sexual relationship with the man who married her. This is because the child conceived by the second wife before marriage was finally declared a legitimate child because it was born after the marriage between the Petitioner and the second wife. Neither the KHI nor the Marriage Law regulates the minimum age of pregnancy, either in its articles or in its explanations.

Based on the description above, legal consequences for sexual relations, determination of marriage guardians, and so on. Regarding the determination of marriage guardians, there are differences of opinion in determining marriage guardians. The difference is due to differences in the thoughts of the Head of the Office of Religious Affairs in understanding the Marriage Law and IHL with fiqh ([The author's interview with Muhammad Ali as The Marriage Ceremonies of The Tangerang Regency Religious Affairs Office in 2023](#)). According to Muhammad Ali as the head of the Tangerang Regency Religious Affairs Office in 2023, the guardian of the judge was declared the guardian of the marriage based on a joint decision of the Tangerang Regency Religious Affairs Office.

As per Article 13 paragraph (3) of Permenag Number 20 of 2019 concerning Marriage Registration, there is no clear and detailed provision regarding the determination of a judicial guardian for girls resulting from polygamous marriages (pregnant marriages) between the Applicant and the second wife (JDIH BPK, 2019). The absence of such provisions creates legal uncertainty for the parties concerned. Thus, the Office of Religious Affairs refers to Islamic Law.

There is a difference between Islamic Law and the Marriage Law and the IHL regarding the status of children born from the marriage of the Applicant and the second wife. The provisions for the status of the child in Islamic law (Shafi'i school) have a minimum gestational age limit of 6 (six) months from the marriage contract.

This will cause kinks and legal uncertainty for the community, because it will disrupt the civil relationship of children, both the relationship between nasab and marriage guardians. Marriage will occur with an improper marriage guardian will result in the façade or defect of the marriage.

### Conclusion

Polygamous marital status between the Applicant and the second wife without the consent of the first wife based on Islamic law and laws and regulations in Indonesia is a valid marriage. Polygamous marriages in pregnancy are allowed as long as they meet the legal conditions of marriage, the annex to the court decision stating the granting of the application for permission to polygamy and not given special records even without the consent of the first wife.

The legal status of a child born to a second wife in a polygamous marriage in a state of pregnancy that is not approved by the first wife, there is a difference between Islamic law and the Marriage Law and the KHI. Islamic law (mazhab syafi'i) uses a minimum gestational age limit, which is 6 (six) months. Meanwhile, the Marriage Law and IHL states that the status of children born from such marriages is legal as long as they are born in a legal marriage bond. Thus, the child can be declared to his father and the marriage guardian who can marry the child, namely wali nasab.

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