



## The Criminalization of Polygamy in Indonesia's New Penal Code: Perspectives of Legal Certainty and Gender Justice

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### ABSTRACT

This study examines the criminalization of polygamy under Indonesia's new Penal Code, with particular emphasis on legal certainty and gender justice. The study is grounded in the normative tension between criminal law and marriage law in Indonesia, where polygamy remains conditionally permissible under marriage law but may give rise to criminal liability when legal requirements are violated. This research employed a normative legal method using statutory, conceptual, and case approaches. The legal materials consist of legislation, court decisions, and relevant legal scholarship. The findings indicate that the criminalization of polygamy under the new Penal Code still leaves room for legal uncertainty, particularly regarding the distinction between lawful polygamy and punishable conduct. Moreover, from the perspective of gender justice, the current legal framework has not yet provided optimal protection for women and children as vulnerable parties. Therefore, a comprehensive reconstruction of criminal law policy is required in order to establish a more coherent and human rights-oriented legal framework. Such reform is essential to achieving legal certainty and gender justice in the regulation and practice of polygamy in Indonesia.

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### INTRODUCTION

Polygamy remains one of the most contested issues in the Indonesian legal system, particularly because it is regulated differently under religious law, marriage law, and criminal law. Within the framework of positive law, Indonesia essentially adheres to the principle of monogamy, while still allowing limited polygamy under strict legal conditions. At the same time, developments in criminal law through the enactment of the new Penal Code introduce a new dimension to the regulation of polygamy, especially in relation to criminalization (Adhim et al., 2026; Bachri et al., 2023; Masferrer, 2025; Mu'minah, 2026). This development raises a fundamental question concerning the boundary between lawful polygamy and polygamy that may be subject to criminal sanctions. Such normative tension has the potential to generate legal uncertainty for the public, particularly for those directly involved and affected. Therefore, the criminalization of polygamy constitutes an important issue to be examined within the framework of modern criminal law (Jaman, 2020).

Normatively, the regulation of polygamy in Indonesia cannot be separated from the Marriage Law and the Compilation of Islamic Law, both of which provide limited legal legitimacy for the practice. In practice, however, many instances of polygamy fail to satisfy the legal requirements, such as the absence of the first wife's consent or court authorization. This condition gives rise to the possibility of criminal sanctions, as regulated under both the previous Penal Code and the new Penal Code. The situation illustrates an overlap between family law and criminal law that frequently gives rise to conflicting interpretations. In addition, weak

supervision of polygamous practices further exacerbates legal disorder in society. Accordingly, a comprehensive analysis of the legal construction governing polygamy in Indonesia is necessary (Azharuddin, 2024).

From the perspective of criminal law, criminalization constitutes a legal policy intended to protect certain legal interests through the imposition of penal sanctions. The criminalization of polygamy is particularly complex because it involves moral, religious, and individual rights dimensions. A number of studies indicate that polygamous practices often produce adverse consequences, especially for women and children (Lawson et al., 2015; Shaiful Bahari et al., 2021). These consequences include economic injustice, domestic violence, and the neglect of family rights. Accordingly, the criminalization of polygamous practices that violate legal requirements may be viewed as a means of legal protection. Nevertheless, the implementation of criminalization must still be guided by the principles of justice and proportionality in criminal law (Nurtsani & Kasmarani, 2023).

From the standpoint of gender justice, polygamy is often regarded as a practice that has the potential to create unequal power relations between men and women. Numerous studies suggest that women in polygamous marriages tend to occupy a more vulnerable social and economic position. In addition, children in polygamous families may also be exposed to unequal treatment in the fulfillment of their rights. This demonstrates that legal regulation concerning polygamy must take into account the protection of vulnerable groups. In this respect, gender justice constitutes an important benchmark for evaluating the effectiveness of a legal policy. Therefore, the analysis of the criminalization of polygamy must not only be normative in character, but must also consider its broader social implications (Febrianty et al., 2025).

Furthermore, from a comparative law perspective, the regulation of polygamy varies considerably across jurisdictions. Some countries expressly prohibit polygamy and classify it as a criminal offense, whereas others continue to permit it under certain conditions. Indonesia belongs to the latter category, allowing polygamy on a limited basis subject to strict legal supervision. In practice, however, violations of these legal requirements remain common and continue to generate legal disputes. These differences demonstrate that the regulation of polygamy is strongly influenced by the social, cultural, and religious values prevailing in each country. Therefore, the study of the criminalization of polygamy in Indonesia should also be situated within a broader comparative legal context (Meidina, 2023).

The urgency of this research is underscored by several factors. First, the enactment of the new Penal Code creates an immediate need for legal clarity and interpretation to guide law enforcement and public behavior. Second, the persistent practice of unregistered polygamous marriages continues to generate legal disputes and social injustice, particularly affecting women and children. Third, Indonesia's commitments to gender equality and human rights, including international obligations, demand that its legal framework provide effective protection against discriminatory practices. This research addresses these urgent needs by providing a systematic analysis of the criminalization of polygamy and its implications for legal certainty and gender justice.

The novelty of this research lies in its integrated analysis of the criminalization of polygamy under the new Penal Code, combining perspectives of legal certainty and gender justice within a comprehensive normative framework. Unlike previous studies that have

examined specific aspects of polygamy regulation or isolated provisions of the new Penal Code, this research provides a systematic analysis of how criminal law and marriage law interact in regulating polygamy. The study contributes to legal scholarship by developing a framework for analyzing the criminalization of polygamy that balances legal certainty with gender justice, offering practical recommendations for legal reform and policy development.

Based on the foregoing discussion, this study aims to analyze the criminalization of polygamy under Indonesia's new Penal Code, with particular emphasis on legal certainty and gender justice. It also seeks to identify the normative issues arising from the dualism between marriage law and criminal law. In addition, this study evaluates the extent to which the existing legal framework is capable of protecting women and children. By employing a normative legal approach, this research is expected to contribute to the development of legal scholarship, particularly in the fields of criminal law and family law. The findings are also expected to serve as a basis for formulating legal policies that are more responsive and just. In this way, the present study is significant both theoretically and practically in the context of legal reform in Indonesia (Anizar, 2023).

## **METHOD**

This study employed a normative legal research design focusing on the analysis of legal norms governing the criminalization of polygamy under Indonesia's new Penal Code. The research applies three approaches, namely the statutory approach, the conceptual approach, and the case approach. The statutory approach is used to examine various regulations related to polygamy in both criminal law and marriage law. The conceptual approach is employed to analyze key legal concepts, including criminalization, legal certainty, and gender justice. Meanwhile, the case approach is utilized to review court decisions relevant to the practice of polygamy and its legal implications. By combining these approaches, this study seeks to provide a comprehensive analysis of the legal issues under examination.

### **Population and Sampling Technique**

In normative legal research, the population of the study consists of all legal norms related to the regulation of polygamy within the Indonesian legal system. This population includes statutory regulations, court decisions, as well as legal doctrines and scholarly opinions. The sampling technique used in this study is purposive sampling, namely the selective identification of legal materials based on their relevance to the research focus. The primary legal materials include Indonesia's new Penal Code, the Marriage Law, and the Compilation of Islamic Law. In addition, relevant court decisions concerning polygamy cases are used as analytical materials. Through this technique, the selected legal materials are expected to be sufficiently representative and capable of supporting the objectives of the study.

### **Research Instruments and Procedures**

The principal instrument used in this study is document analysis of legal materials relevant to the research topic. The research procedure begins with the collection of primary, secondary, and tertiary legal materials through library research. Primary legal materials consist of statutory regulations and court decisions, while secondary legal materials include books, scholarly journal articles, and previous research findings. These materials are then classified according to their themes and their relevance to the research focus. The analysis is conducted systematically using legal interpretation methods, including grammatical, systematic, and

teleological interpretation. Through this procedure, the study is expected to generate an in-depth understanding of the legal construction of the criminalization of polygamy.

### **Validity and Reliability**

The validity of this study is ensured through the use of credible and relevant legal sources related to the research topic. In addition, source triangulation is applied by comparing various primary and secondary legal materials in order to ensure consistency in the data. The reliability of the study is maintained through the consistent application of systematic and structured methods of legal analysis. The interpretation of legal norms is undertaken with reference to generally accepted legal principles. Furthermore, expert opinions are used as comparative references to strengthen the arguments developed in this study. Accordingly, the findings are expected to demonstrate a high degree of academic reliability.

### **Scope and Limitations**

The scope of this study is limited to an analysis of the criminalization of polygamy from the perspective of Indonesian criminal law, particularly under the new Penal Code. It does not examine in depth the sociological or empirical dimensions of polygamy practices in society. In addition, the study is confined to Indonesian positive law and does not undertake a detailed comparative analysis of other legal systems. Another limitation lies in restricted access to all court decisions relevant to polygamy cases. Nevertheless, the study seeks to provide a comprehensive analysis based on the legal materials available. Within these limitations, the findings are expected to remain relevant and to contribute to the development of legal scholarship.

## **RESULTS AND DISCUSSION**

The regulation of polygamy within the Indonesian legal system reflects a complex relationship between criminal law and marriage law. Law Number 1 of 1974 on Marriage, particularly Article 3 paragraph (1), affirms the principle of monogamy, while Article 3 paragraph (2) allows polygamy under certain conditions. These provisions are further elaborated in Articles 4 and 5, which require court authorization and the consent of the wife. On the other hand, the new Penal Code under Law Number 1 of 2023 concerning the Criminal Code retains the principle of criminalizing marital practices that violate legal provisions. This situation demonstrates a dual regulatory framework that may generate legal uncertainty. Such dualism constitutes the starting point for analyzing the construction of the criminalization of polygamy in Indonesian criminal law (Siregar et al., 2021; Santoso & Nasrudin, 2021).

Under the new Indonesian Penal Code, provisions on criminal offenses related to marriage are stipulated in Article 402, which governs marriages conducted in violation of applicable legal provisions. This article essentially reformulates Article 279 of the previous Penal Code, which regulated polygamy. The provision affirms that a person who enters into a marriage while still legally bound by a valid existing marriage may be subject to criminal sanctions. In the context of polygamy, this norm becomes relevant when the practice is carried out without fulfilling the legal requirements prescribed by law. Accordingly, not all forms of polygamy can be classified as criminal offenses, but only those that contravene applicable legal provisions. This raises an important question regarding the normative boundary between lawful polygamy and punishable conduct (Analiansyah et al., 2024; Oktarina, 2022).

This regulatory framework indicates that the criminalization of polygamy under the new

Penal Code is conditional in nature. In other words, polygamy constitutes a criminal offense only when it is practiced without fulfilling the administrative and substantive requirements established by law. This is consistent with the principle of *ultimum remedium* in criminal law, according to which criminal sanctions should serve as a last resort. In practice, however, ambiguity often arises in the application of this norm. Such ambiguity may lead to disparities in judicial decisions. Therefore, a consistent interpretation of the legal norms governing polygamy is essential (Alfitri et al., 2024; Rohmadi, 2024).

From the perspective of legal certainty, the dualism between marriage law and criminal law gives rise to significant legal problems. On the one hand, marriage law permits polygamy under specific conditions; on the other hand, criminal law imposes sanctions for violations of those conditions. This situation may create confusion among the public regarding the applicable legal boundaries. Legal certainty, as a fundamental principle of the rule of law, requires clarity, consistency, and predictability in legal regulation. Therefore, harmonization between these two legal regimes is of critical importance. Without such harmonization, the potential for normative conflict will persist (Purwanto et al., 2021; Trigiyaningrum et al., 2023).

From a gender justice perspective, the criminalization of polygamy has significant implications for the protection of women and children. Polygamous practices that do not comply with legal requirements often result in injustice toward women. Women in polygamous marriages tend to occupy a more vulnerable position, both economically and socially. In addition, children in polygamous families may also experience inequality in the fulfillment of their rights. Therefore, the criminalization of polygamy may be viewed as an effort to protect vulnerable groups. Nevertheless, the effectiveness of such protection still requires further assessment (Yulinda et al., 2025; Rohmadi, 2024).

In practice, many cases of polygamy are carried out without fulfilling legal requirements, such as obtaining court authorization or the consent of the first wife. These practices are often conducted through unregistered marriages (*nikah siri*), which generate various legal problems. In this context, Article 2 paragraph (2) of the Marriage Law, which requires marriage registration, becomes particularly important. Failure to comply with this provision may result in the marriage being denied legal recognition. Moreover, such practices may also give rise to criminal consequences for the perpetrators. Therefore, law enforcement against illegal polygamous practices needs to be strengthened (Azharuddin, 2024; Oktarina, 2022).

However, the imposition of criminal sanctions on polygamy must also take into account the principles of justice and proportionality. Not every violation of polygamy regulations should be addressed through a criminal law approach. In certain cases, administrative or civil law mechanisms may be more appropriate. This is in line with the principle of subsidiarity in criminal law. Therefore, a balanced criminal law policy is needed in regulating polygamy. Such a policy must provide legal protection without creating new forms of injustice (Fajar & Jaelani, 2021; Doi et al., 2024).

In the context of legal reform, the new Penal Code is expected to provide greater legal certainty than the previous code. In practice, however, several provisions still require further interpretation. This issue is particularly evident in determining the boundary between administrative violations and criminal offenses. Such uncertainty may lead to differing interpretations among law enforcement officials. Therefore, clear interpretive guidelines are necessary for the implementation of these provisions. Without such guidance, the objectives of

legal reform cannot be achieved optimally (Anizar, 2023; Meidina, 2023).

From the perspective of criminal law policy, the criminalization of polygamy must be situated within a broader framework of protecting legal interests. These interests include the protection of the family institution, women's rights, and children's welfare. Therefore, criminalization policy must be designed comprehensively and grounded in the principle of justice. In addition, such policy must take into account the social and cultural values that prevail in society. In this way, law functions not merely as an instrument of social control, but also as a means of achieving justice. This approach is essential to ensuring the effectiveness of law in practice (Jaman, 2020; Febrianty et al., 2025).

Based on the foregoing analysis, it can be concluded that the criminalization of polygamy under the new Penal Code continues to face several challenges. These challenges include legal uncertainty, normative conflict, and limitations in the protection of vulnerable groups. Accordingly, a more comprehensive legal reconstruction is required. Such reconstruction must include harmonization between criminal law and marriage law. In addition, the perspective of gender justice must be strengthened in the formulation of future legal policy. In this manner, the objectives of law in promoting justice and legal certainty can be more effectively achieved (Siregar et al., 2021; Nurtsani & Kasmarani, 2023).

## **CONCLUSION**

Indonesia's new Penal Code, particularly through Article 402, criminalizes polygamy that fails to meet the strict requirements set by the Marriage Law and the Compilation of Islamic Law confirming that polygamy is not banned outright but tightly regulated yet this overlap between marriage law and criminal law creates ongoing ambiguity about where lawful polygamy ends and criminal conduct begins, leading to legal uncertainty and inconsistent enforcement, which is why clearer harmonization between the two legal regimes is needed to secure legal certainty as a core rule-of-law principle. From a gender justice standpoint, criminalizing non-compliant polygamy helps protect women and children from the economic, social, and psychological harm such practices often cause, but this approach must not be applied excessively: criminal law should remain a last resort (*ultimum remedium*), complemented by preventive and educational measures rather than relying on punishment alone. Overall, the study concludes that criminalizing polygamy under the new Penal Code still needs refinement through clearer legal norms to prevent multiple interpretations, stronger integration of gender justice into policy, better-trained law enforcement, and wider public legal education so that Indonesia's legal system can strike a more effective balance between legal certainty, social values, and human rights protection.

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