

Disabled Women's Rights in Indonesian Islamic Family Law: A Mubadalah Perspective

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Abstract: This article examines gender discrimination against women with disabilities, this discrimination is due to the article on polygamy regulated in Islamic family law. The question to be answered is how are the rights of women with disabilities in Islamic family law in the perspective of mubadalah? Then what are the steps to fulfill the rights of women with disabilities in Islamic family law? The method of this article uses qualitative, the type of research article is library research, namely literature study, the approach is carried out normatively, which is focused on the Polygamy Article in Islamic Family law, the theory used is mubadalah. The results show that Islamic family law governing polygamy shows a gender-biased law that discourages women with disabilities. The article on polygamy is not in line with the values of equality in mubadalah theory. Recommendations, the polygamy article needs a judicial review to the Constitutional Court, changing the article to make it more equal between men and women.

Keywords: Disabled Women, Polygamy, Mubadalah

Abstract: Artikel ini mengkaji tentang diskriminasi gender terhadap perempuan disabilitas, diskriminasi ini disebabkan adanya Pasal tentang Poligami yang diatur dalam hukum keluarga Islam. Pertanyaan yang akan dijawab adalah bagaimanakah hak perempuan disabilitas dalam hukum keluarga Islam dalam perspektif mubadalah? Kemudian apa langkah pemenuhan hak perempuan disabilitas dalam hukum keluarga Islam? Metode artikel ini menggunakan kualitatif, jenis penelitian artikel adalah library research yaitu studi kepustakaan, pendekatan dilakukan secara normatif, yang difokuskan pada Pasal Poligami dalam hukum Keluarga Islam, teori yang digunakan adalah mubadalah. Hasil menunjukkan bahwa hukum keluarga Islam yang mengatur tentang poligami menunjukkan hukum yang bias gender yang mendiskritkan perempuan disabilitas. Pasal tentang poligami tidak sejalan dengan nilai-nilai kesalingan dalam teori mubadalah. Rekomendasi, Pasal poligami perlu ada judicial review ke Mahkamah Konstitusi, berubah Pasal tersebut agar lebih setara antara laki-laki dan perempuan.

Keywords: Disabled Women, Polygamy, Mubadalah

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Introduction

Protecting and upholding women's rights is the obligation of all parties. Especially the state, through the executive, judicial, and legislative branches. (Yoki Pradikta et al., 2024). Whether through policies, legislation, or all supportive measures. In the field of law, the 1945 Constitution should be the basic value for the formation of laws and regulations that are (hierarchically) below it. (Habib Shulton Asnawi, 2022). In this case, in general, the 1945 Constitution has protected and guaranteed women's rights. Article 27 Paragraph 1 of the 1945 Constitution, for example, states "*All citizens shall be equal before the law and government and shall uphold the law and government with no exceptions*". This constitution means that all citizens have equal rights before the law, including people with disabilities.

Indonesia's commitment to the protection of human rights (HAM), especially persons with disabilities, is contained in the legal regulation of Law No. 19 of 2011, this regulation is a great hope for persons with disabilities, especially women with disabilities, to obtain justice, equality and freedom from discrimination. However, even though normatively, international conventions and the Indonesian constitution have been firmly protected. However, in reality, the rights of persons with disabilities in Indonesia still experience discriminatory treatment and injustice. Specifically in this article, the rights of equality and justice for women with disabilities in the field of marriage, especially in the context of polygamy provisions. (Edwar et al., 2023).

In Law. No. 16 of 2019 concerning Amendments to Law. No. 1 of 1974 concerning Marriage, Article 4 paragraph 2 (points b and c) concerning the conditions of polygamy. Article 4 UUP paragraph (b) states that the court can grant permission to a husband who will polygamy on the condition that "*the wife gets a disability or an incurable disease*". The provisions of this article mean that when a wife has an accident and then suffers from a disability, the husband has legal regulations to apply for polygamy or divorce (by arguing against this article). (Habib Shulton A, Fatul Mu'in, 2020). However, the UUP does not apply the opposite clause. This does not mean that a wife will commit "*polyadry*", but the article does not contain the values of justice and equality between men and women. This is because the defect clause only applies to the wife and not vice versa. In fact, in society it is possible for a husband to suffer from infertility (unable to provide offspring) or experience physical disability due to accidents and so on. In this article, it can be seen that the UUP does not accommodate the conditions of justice for women with disabilities, all the reasons that allow husbands to polygamy are only seen from the perspective of the husband's interests, and do not consider the perspective of the interests of the wives.

The provisions on polygamy requirements stipulated in the UUP as mentioned are interesting to analyze from the perspective of mubadalah. To realize a country that is free from patriarchal values, of course, it must start from the regulation first. (Abdul Qodir Zaelani, Faisal Faisal, Mokhammad Samson Fajar, 2023). The revision of the above Article is an agenda that should be prioritized. But first, the government and the state must be able to free themselves from the patriarchal paradigm justified by religious dogma and customs. (Ibnu Elmi AS. Pelu, 2021).

Previously, there have been several studies on disability rights. Among them are research by (Afiyanah, 2020) This research is about the conditions of marriage for people with disabilities. The results of the study explain that for people with mental disabilities legally marriage remains valid in terms of pillars and there is no damage or must be canceled in terms of marriage requirements. Because for people with mental disabilities, be it the prospective bridegroom or the bride, there are no criteria that must be mentally healthy. Other research

by (Karwiyah et al., 2023) This research has relevance to Afiyanah's research, confusion in society makes the marriage contract as one of the pillars of marriage carried out with various forms of sign language methods. The results showed that the marriage contract by the bridegroom with disabilities is valid according to the Marriage Law and Islamic Law which is in line with the perspective of article 17 paragraph (3) of the Compilation of Islamic Law and fiqh. Other research by (Charisma, 2021) The results of this study show that Law Number 8 of 2016 concerning Persons with Disabilities explains that every person with a disability has the right to be protected, guaranteed security and obtain a prosperous life. It is true that polygamy is an option, but in any condition the husband still has to protect his wife, and one form of legal protection that can be done is to protect, provide support in the treatment process for wives who have bipolar, so that the gradually improving mental condition will have a good impact on household life, so it is likely that polygamy will not occur.

The above research focuses more on marriage practices for persons with disabilities. No research has been found that specifically examines the conditions of women with disabilities in the context of polygamy requirements, namely the wife's disability being a condition for the husband's polygamy. So the *gap analysis* of this article is different from previous research studies. The *novelty* of this article is women with disabilities from the perspective of mubadalah. The question to be answered in this article is how are the rights of women with disabilities in Islamic family law, especially the polygamy article from a mubadalah perspective? What steps or efforts to provide justice for women with disabilities in Indonesian Islamic family law?

Methods

The method used is qualitative. This type of article is *library research*. Researchers conducted a study through literature sources including previous research results, and scientific journals related to women's rights in the UUP. Then analyzed using the theory of mubadalah. The approach used is by means of normative analysis, the normative approach in this article is the article on the conditions for the permissibility of polygamous husbands. Other related supporting data sources are scientific journals related to the study of this article. Furthermore, data collection techniques through in-depth literature observation, literature that specifically regulates the rights of people with disabilities, by examining and reviewing literature sources regarding the rights of people with disabilities who experience discrimination in the field of marriage. The last is data analysis techniques, in this article using an inductive analysis mindset. Namely, the author reveals the facts of injustice for people with disabilities in the field of marriage, then analyzes them with the theory of mubadalah.

Results

Construction of Human Rights of Persons with Disabilities

Equality and justice are human rights, both men and women have the same rights in any aspect, and equality before the law is no exception. In the context of humanizing people *with* disabilities, the United Nations General Assembly adopted Resolution No. A/61/106 on the *Convention on the Rights of Persons with Disabilities* (CRPD). The resolution contains the rights of persons with disabilities and regulates measures to ensure the implementation of the convention. Given the importance of respecting, protecting, fulfilling and promoting the human rights of persons with disabilities, the Indonesian government signed the Resolution on 30 March 2007 in New York. Indonesia's commitment was further proven by ratifying the *Convention* which was then outlined in Law Number 19 of 2011 concerning the Ratification of

the Convention *on the Rights of Persons with Disabilities (CRPD)* and was passed on Tuesday, October 18, 2011.

The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities. In addition, this convention was formed based on consideration of the principles of the UN Charter which recognizes, promotes, and protects the inherent dignity and inalienable equal rights of all members of the human race as the basis of freedom, justice and peace in the world. (Habib Shulton Asnawi, 2012).

The concept of human rights protection is strengthened in the Universal Declaration of Human Rights (UDHR) 1948, in which it is stated that rights and freedoms need to be owned by everyone without discrimination, including not discriminating based on gender, men and women have the same degree. (Saparinah Sadli, 2000). In addition, the Indonesian Constitution also contains specific human rights provisions in Chapter XA, which consists of Articles 28 A through 28 J. (Sefriani, 2012). (Sefriani, 2012).

The CRPD in principle is an effort to uphold the dignity of humanity, especially people with disabilities in the world. This exaltation of human dignity is inseparable from the concept of protection of human rights. Human rights are rights that humans have solely because they are human. Human beings have them not because they are given to them by society or based on positive law, but solely based on their dignity as human beings. (Jack Donnelly, 2003).

The CRPD is the first human rights instrument to comprehensively address the needs of people with all types of disabilities. Indonesia ratified the CRPD based on the obligation of state parties to ensure the protection of human rights and fundamental freedoms of all disabled persons without discrimination. Some provisions of the Convention related to the civil rights of persons with disabilities must be realized immediately. However, the economic, social and cultural rights of persons with disabilities, including the provision of access in various fields, can be realized gradually in accordance with the availability of national resources.

The commitment of the Indonesian government to the protection of human rights, especially persons with disabilities, as stipulated in the legal regulations of Law No.19 of 2011, is certainly a great hope for persons with disabilities to obtain legal recognition, public services, justice, equality and freedom from discrimination. The Convention states that persons with disabilities are people who have physical disabilities, intellectual disabilities, psychiatric errors, sensory disabilities, such as hearing and speech impairments, and visual impairments (Source: Law No. 19/2011 on the Ratification of the *Convention on the Rights of Persons with Disabilities*).

There are several important points related to the ratification of the Convention. *First*, it recognizes that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of every person. *Secondly*, persons with disabilities must have the opportunity to be actively involved in decision-making processes regarding policies and programs, including those directly related to them. *Third*, the importance of accessibility to the physical, social, economic and cultural environment, health and education, as well as information and communication, which enables persons with disabilities to fully enjoy all human rights and fundamental freedoms.

Polygamy Article is Gender Biased Against Women with Disabilities

In the national context, the issue of protection of citizens' rights / human rights is very important in law, the law as law must protect the rights of citizens (Risdianto, 2017). However, sometimes it is the law that violates human rights, especially the rights of women with

disabilities. The law is Law. No.1 Year 1974 concerning Marriage (UUP) (Habib Shulton Asnawi and M. Anwar Nawawi, 2022).. Is the UUP still relevant to be used today. Even scholars argue that a re-reading, even a revision of the UUP is needed because some of its contents no longer accommodate the needs of Indonesian society which is increasingly critical, pluralist, and dynamic as well as the interests of building a society that is egalitarian, democratic and upholds human rights values. (Mulia, 2014).

There are many assumptions that the existence of the UUP actually hampers efforts to build a civil society in this country. In fact, a number of studies on women and law in Indonesia have concluded how marginalized the position of women is. (Faridah Junida Maudian, A. Muslimin, 2023). The issues contained in the UPP make it clear that religion and the state have "*conspired*" to marginalize women, (especially in this paper women with disabilities). This indication clearly proves that gender inequality in the relationship between men and women in Indonesia is still very strong. (Habib Shulton Asnawi, 2011).

The marginalization of women with disabilities in the field of marriage is partly due to the application of Article 4 of the UUP on the conditions for the permissibility of polygamy for husbands. Article 4 paragraph 2 (points b and c) reads: The court only gives permission to a husband who will have more than one wife if: (b) *The wife gets a disability or disease that cannot be cured*; and (c) *The wife cannot give birth to offspring*. (Ismail, 2020).

The verses in the article relating to the reasons that allow husbands to practice polygamy are only seen from the perspective of the husband's interests, and do not consider the perspective of women's human rights, especially women with disabilities.

Why is the Article on Polygamy in Islamic family law, referred to as a gender-biased Article, because in drafting the UUP the sources taken are sourced from sharia law, (Islamic law or fiqh), where sharia law or fiqh is very thick with patriarchy. Admittedly or not, that fiqh views color a lot in the preparation of Marriage Law in Indonesia. These fiqh views are generally derived from classical fiqh books so it is not surprising that the content contains conservative fiqh views. The discussion of marriage in the fiqh books shows the differences between men and women so explicitly.

Although the UUP is intended to elevate the dignity of women, when looking at the substance of Article 4, there is a fundamental *ambivalence* and re-emphasizes the subordination of women (wives) to men (husbands). Seeing this fact, the opinion that the UUP is a response from the government, in this case aimed at changing the legal status of women, is not entirely true. (Mahmudah et al., 2022).

Discussion

Polygamy Provisions in Islamic Family Law from the Perspective of Mubadalah

In Islam, the concept of equality is "*mubadalah*". *Mubādalāh* means "to replace, change and exchange". The concept and word *mubadalah* has been mentioned 44 times with different forms and meanings. *Mubādalāh* means interchangeability (*mufa'alah*), and cooperation between two parties (*musyarakah*), or in other words, replacing each other, changing each other, or exchanging each other. *Mubādalāh* when translated into Indonesian means "interchangeability" which means "reciprocity". From the various meanings above, *mubādalāh* is then used as a perspective in relations between two parties that contain the spirit and principle of reciprocity. (Faquhuddin Abdul Kodir, 2019)

One of the legal bases for *mubādalāh* is found in Q.S. Al-Hujurat [49]:13, in this verse it is explained that Allah has created different humans, both different in gender, ethnicity, nation. the purpose is solely to be able to know each other. In this verse Allah explicitly states that the most noble human being on the side of Allah is the most pious human being. This

means that the degree of human glory does not lie in his gender, the color of his skin, his tribe, his wealth, his position or the high rank he holds. But what is judged is the most pious human being. The concept of mubadalah can be applied in daily life in various aspects of life, such as social, national, household, economic and spiritual relations. (Agus Hermanto, 2024)

The *mubadalah* framework, as a paradigm that in any aspect between men and women have the same rights of equality and justice. Including in legal regulation. Laws are not made for the benefit of one particular individual, group or gender, all citizens have equal rights before the law.

However, in Indonesian Islamic family law, the provisions regarding the permissibility of polygamous husbands as stipulated in the UUP indicate gender bias. The article in Islamic family law in question is the provision of Article 4 of the UUP regarding the conditions for the permissibility of polygamy for husbands. Article 4 paragraph 2 (points b and c) reads: The court only gives permission to a husband who will have more than one wife if: (a) the wife has a disability or illness that cannot be cured; and (b) the wife cannot bear offspring.

The paragraphs in the article relating to the reasons that allow husbands to practice polygamy are only seen from the perspective of the husband's interests, and do not consider the perspective of women's human rights at all. Particularly Paragraph (b), which specifically states "the wife is physically disabled", this phrase is for women with disabilities. Why is it said to be gender biased, because in community life, what is said to be disabled is experienced by men (husbands). For example, if the husband gets a disability or an incurable disease, or the husband is barren, can a wife remarry? Or for example, there is a provision that allows the wife to file a divorce petition to the court if the husband is disabled.

Whereas it is clear that, accidents or events that then result in disability are not a wish that is expected, especially women. However, when a wife experiences things that are not expected and then results in disability for her husband under the pretext of the legal provisions set out in Article 4 of the UUP, the husband has the right to apply for polygamy / divorce. But there is no provision otherwise. The provisions of Article 4 of the UUP clearly show the subordinate position and injustice of women with disabilities compared to men and of course women with disabilities are weak before the law.

The clause in Article 4 of the UUP regarding husbands being allowed to be polygamous if the wife gets a disability or an incurable disease is contrary to the values of mubadalah. Why is that, because the UUP does not apply the opposite phrase. This does not mean that a wife will commit "polyadry", but the article does not contain the values of justice and equality between men and women. Because in the Article the phrase disability only applies to wives and not vice versa. In fact, in society it is possible for a husband to suffer from barrenness (unable to provide offspring) or experience physical disability due to accidents and so on. It can be said that Article 4 of the UUP does not contain mubadalah values, because the premise of the Article reads "the wife gets a disability or an incurable disease" and there is no phrase "if the husband gets a disability". Although in domestic life, sometimes husbands also experience disability (barren) or cannot provide offspring in the sense that the husband's sperm quality is not good.

When referring to *Maḥmū* mubāḍalah related to the issues of relations between men and women with disabilities related to Article 4 of the UUP, it is known as the fiqh mubāḍalah rule formulated in the following sentence: "What is *maslahat* (good) for one of the sexes must be brought in for both and what is *mudarat* (bad) for one of them must also be kept away from both". (Ismail et al., 2020) This means that, if the wife gets a disability, it also means that the

man is likely to get a disability too. A more specific meaning is, if the wife is physically disabled, then the husband is also very likely to be in a position of physical disability.

When referring to CRPD Article 3 on General Principles Point (b) states the principle of "*non-discrimination*" and Point (g) the principle that states "*equality between men and women*". The purpose of this convention is: to promote and protect and ensure equal rights and fundamental freedoms for all persons with disabilities (including women with disabilities), as well as respect for the dignity of persons with disabilities as an *inherent* part of their *dignity*.

The legal provisions that have been regulated in Article 4 paragraph 2 (points b and c) of the UUP are not only contrary to the rights of disabilities as regulated in the CRPD, but also contradict the *International Convention on the protection of women's rights*, namely the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW). (Habib Sulthon Asnawi., 2023).

The formulation of the Article on the conditions of polygamy as above, is clearly not in accordance with the provisions of Article 15 of the CEDAW Convention which states that countries are obliged to give women equal rights with men before the law. This clearly contradicts the principle of the CEDAW Convention on the principle of Non-Discrimination. However, Law. No. 1 of 1974 concerning Marriage until now, has not undergone legal reform (Amendment). In fact, the Marriage Law if examined more deeply (Article 4 concerning the conditions of polygamy) subordinates women, and if the marriage law is not immediately reformed or amended, then what happens is a violation of human rights, especially the rights of women with disabilities.

Efforts to Fulfill the Rights of Women with Disabilities in Islamic Family Law

Article 4 as described above. The portrait of difables above is a small example that illustrates how a difable person is often cornered when proceeding before the law. Therefore, not many difables dare to bet on resolving their cases before the law, because the end of the process is often ironic and painful. There are several examples of cases involving difables as victims, defendants and or parties in civil cases, and the legal process always weakens the position of difables. (Habib Shulton Asnawi et al., 2022)..

Discrimination against difables who are in conflict with the law generally stems from biased legal texts related to the position of difables. On the other hand, law enforcers still live with a very positivistic-legalistic perspective, rigid in applying difables as humans who have equal rights before the law. For progressive and responsive law enforcers, legal texts that have the potential to encourage *unfair* trials will definitely be re-read and contextualized for the fulfillment of difable rights to obtain fair and non-discriminatory trials.

Moreover, legal texts that lead to disability discrimination are legal products that emerged several centuries ago, while currently there are various human rights legal texts that command non-discriminatory legal processes, fair trials and the right of people with disabilities to enjoy legal capacity on the basis of equality. (Afiyanah, 2020). Law enforcers should change from a very orthodox (positivistic) perspective to become progressive and responsive law enforcers. (Firdawaty et al., 2023).. In this way, it is hoped that people with disabilities will no longer be positioned as weak parties and will no longer be considered as parties with legal incompetence. Therefore, in an effort to restore the rights of women with disabilities in the field of Islamic family law, the progressive legal approach is the right choice and a necessity in the interpretation and application of the law, especially the interpretation of Article 4 of the UUP.

The interpretation of the law should use the framework of legal progressivism / progressive law as stated by Satjipto Rahardjo which calls for the law to return to its basic philosophical meaning, namely law for the benefit of humans, not the other way around. The law is tasked to serve humans, not humans serving the law (Rahardjo, 2009). (Rahardjo, 2009). Law does not exist for itself but for something broad, namely for human dignity, happiness, welfare and human glory (Rahardjo, 2009). (Rahardjo, 2006) This is the philosophy of progressive law as an effort to dismantle the positivistic-legalistic interpretation of law. The progressive legal approach was initiated by Satjipto Rahardjo, which is a long struggle of thought and frustration with the application of the legal system in Indonesia which is always static, corrupt, full of violations of human rights and has no structural alignment with the laws that live in society. Law in Indonesia has lost its social base, its multicultural base and is enforced centrally in the building of the legal system. The law is then imposed, enforced and applied with structural violence by law enforcement officials. (Aulia, 2018).

This progressive legal paradigm is very much in line with the political line of the 1945 Constitution. Exploring a sense of substantive justice is one of the messages of the 1945 Constitution which emphasizes the principle of upholding justice in the judicial process. So what law enforcement must do is not merely legal certainty, but fair legal certainty. More concretely, this is manifested in the *irah-irah* of court decisions. It is written there, the decision is made "*For the Sake of Justice Based on God Almighty*" not "*For the Sake of Legal Certainty Based on the Law*." This is a strong basis that justifies judges making decisions to uphold justice even if they are forced to violate formal provisions that hinder justice.

For the judiciary, the morality of judges is absolutely necessary to keep the decision truly a tool to achieve justice. On that basis, for judges, the law enforcement process should not be reduced to the supremacy of written law, let alone the supremacy of the words in the law, but the supremacy of justice. However, this does not mean that judges can arbitrarily violate or bypass the provisions of the law. In the event that the law has regulated definitively and is deemed fair, then the judge is still obliged to adhere to the law. The emphasis here is on the principle that based on the legal system and constitution in Indonesia, judges are allowed to make decisions that depart from the law if the law deters them from their conviction to uphold justice. (Mahfud, 2012).

The law enforcement process remains and must be based on the law but does not necessarily surrender to the shackles of the law for the sake of justice. Law enforcers must have the courage to do *rule breaking* and get out of the routine of applying the law, not stopping at running the law as it is, but taking creative action, *beyond the call law*. For this reason, every judge must have the moral seriousness to uphold the rule of law as a guiding tool towards justice. This is in line with the concept of the Indonesian rule of law (Mahfud, 2010).

Conclusion

The clause in Article 4 of the UUP regarding husbands being allowed to polygamy if the *wife gets a disability or an incurable disease* is contrary to the values of mubadalah. Because in the Article, the phrase disability only applies to the wife and not vice versa. In fact, in society it is possible for a husband to suffer from barrenness (unable to provide offspring) or experience physical disability due to accidents and so on. The article on polygamy does not reflect the values of equality between men and women. Because of the Article, all phrases from (Paragraphs a, b and c) all read "if the wife", so that the polygamy article in Islamic family law seems very gender biased, as if women or wives are the source of all problems of domestic life. One of the efforts to fulfill the rights of women with disabilities in Islamic family law, then

legal experts, legal practitioners, legal academics should also use the framework of thinking using progressive legal understanding as stated by Satjipto Rahardjo who calls for the law to return to its basic philosophical meaning, namely law for the benefit of humans, the law is tasked with serving humans, not humans serving law. This means that the UUP, especially Article 4, needs and must be amended, solely as an effort to protect the rights of women, especially those with disabilities. What's more, the State of Indonesia is a "State of law" and the concept of the State of law is the guarantee of protection of the human rights of its citizens. Protection of human rights is the mandate of Pancasila and the Indonesian Constitution (UUD 1945). Thus, any form of exclusion, restriction, discrimination, subordination, violation of rights must be eliminated.

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