



## Reconsidering Polygamy Law Through The Lens Of Substantive Justice: A Critical Analysis Of Islamic Family Law In Indonesia.

Adang Djumhur Salikin

Professor at UIN Siber, Sheikh Nurjati, Cirebon. Indonesia.

Email: [adjumhurs@uinssc.ac.id](mailto:adjumhurs@uinssc.ac.id).

### Abstract

**Background.** The urgency of this research lies in the persistent gap between normative legal provisions and the lived experiences of justice among women in polygamous marriages, as evidenced by mounting empirical data on economic disenfranchisement, psychological distress, and social stigmatization.

**Aims.** This article aims to critically examine polygamy law in Indonesia not merely from a legal-formal perspective but through the lens of substantive justice. It seeks to answer whether polygamy regulations (Marriage Law No. 1/1974 and the Compilation of Islamic Law) have produced tangible justice for all affected parties, particularly women and children, or merely serve as administrative procedures that legitimize patriarchal practices.

**Methods.** This research employs normative legal research with philosophical, statutory, and comparative approaches. The analysis draws upon substantive justice theories from critical legal studies and legal philosophy—particularly Gustav Radbruch's triadic theory of law (justice, certainty, utility), Satjipto Rahardjo's Progressive Law, and Asghar Ali Engineer's theory of substantive justice for the weak—as analytical tools to examine polygamy provisions and their implementation in Religious Courts.

**Result.** This research reveals a fundamental disparity between legal texts and the reality of justice. First, polygamy regulations (Articles 4 and 5 of Marriage Law No. 1/1974) remain highly procedural and have not addressed psychological and social justice dimensions for wives and children. The requirement of "justice" is only proven through written statements and the first wife's consent, without any mechanism to verify the husband's psychological capacity to be just. Second, judicial practice tends to be formalistic—if administrative requirements (wife's consent letter, income statement, police certificate) are fulfilled, applications are granted without a deeper examination of substantive justice.

**Conclusion.** The article integrates multiple theoretical frameworks: substantive justice theory, maqashid shariah, feminist jurisprudence, and comparative legal analysis. It provides concrete reform recommendations based on empirical evidence and successful models from other Muslim-majority countries, offering a blueprint for legal reform that balances religious validity with enforceable safeguards. The article also introduces the concept of "Legal System Ibuism" as a novel analytical framework for understanding systemic gender bias in Indonesian marriage law.



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**Keywords:** Polygamy, Substantive Justice, Islamic Family Law, Gender Justice, Progressive Law.

## INTRODUCTION

Polygamy has always been a hot discourse in the study of Islamic family law in Indonesia, triggering theological, juridical, and sociological debates that are never complete. On the one hand, Indonesia's positive law, as set forth in Law No. 1 of 1974 concerning Marriage and Law No. 16 of 2019 and the Compilation of Islamic Law (KHI) allow polygamy with very strict requirements, as an exception to the principle of monogamy. On the other hand, the practice of illegal polygamy (*nikah sirri*) is rampant in the community, while court decisions often only examine administrative requirements, without delving into the value of justice more deeply. Polygamy is a contemporary problem that is often considered a form of discrimination against women. Since the beginning of the 20th century, there has been a phenomenon of family law reform in a number of Muslim-majority countries triggered by various political, socio-cultural, and economic factors. Indonesia falls into the category of countries that allow polygamy with strict conditions, along with Malaysia, Pakistan, Egypt, and Morocco, while Tunisia and Turkey are among the countries that completely ban the practice of polygamy.

Empirical data show the complexity of this problem. Recent research reveals that 78% of wives in polygamous marriages have not experienced economic termination of access, and 89% have no legal avenues to claim alimony because they are burdened with complicated retroactive marriage legalization requirements. Even more worrying, 67% of polygamous permits in Java are implemented without the consent of the wife, and 72% of the practice of marriage in rural areas involves child marriage. As a result, 81% of wives are not recorded as suffering from loss of inheritance, and 54% of children experience social stigma.

This phenomenon shows the existence of anomalies in the legal system and the state bureaucracy. The practice of polygamy not only violates the formal legal principles of the state, but also betrays the values of substantive justice in Islamic law, especially in the aspects of the distribution of alimony, emotional justice, and the recognition of social and legal status for the second or more wives. The absence of preventive regulations and weak administrative sanctions reinforce a permissive culture, turning the law into a mere symbolic artifact with no transformative power.

Furthermore, it was found that there is a systematic inequality referred to as "Legal System Ibbism" in the policy of polygamy permits in Indonesia. Article 4 paragraph (2) letter c of the Marriage Law and Article 57 letter c of the Marriage Code allow the husband to practice polygamy,

if the wife is unable to bear children. This provision explicitly places the burden of reproduction on women, and ignores the possibility of infertility on the part of the husband, while denying other alternatives, such as adoption, reproductive technology, or foster care that is more humane and equitable. The study of polygamy in Indonesian Islamic family law has produced a significant body of literature, but it still leaves room for more in-depth exploration. Based on the mapping of the literature, there are at least three main clusters of previous research:

*First*, normative-fiqh studies. The research in this cluster focuses on the analysis of the conditions and pillars of polygamy in the perspective of classical and contemporary fiqh. These studies generally discuss the legality of polygamy from the perspective of Islamic law, including the debate about justice in QS. An-Nisa: 3 and how the scholars interpret it. Research by Yasmanto (2021), for example, examines the thoughts of Fazlur Rahman and M. Quraish Shihab on justice in polygamy. A study by Pradikta (2024) compares the views of Indonesian mufassir (Hamka and Quraish Shihab) on polygamy and its relevance to Indonesian legislation.

*Second*, socio-legal studies. This cluster highlights the practice of polygamy in society, the motives behind it, and the social impact it causes. Research by Sholihin and Koentjoro (2023), for example, examined the satisfaction of the second wife's marriage in serial polygamy among Orèng Kènèk. A study by Razak, Hashim, and Drani (2022) examined how first wives view polygamy in terms of family adaptation and cohesiveness. Research by Naseer, Farooq, and Malik (2021) examines the causes and consequences of polygamy as well as the coping strategies of wives in polygamous marriages.

*Third*, the study of gender and feminism. This cluster critically criticizes the practice of polygamy from a gender justice perspective. Research by Amilia et al. (2024) reveals the gender politics behind masalah postulates and patriarchal tendencies in legal and judicial justification for polygamy. A study by Marita and Pramesti (2023) uses feminist legal theory as an analytical knife to examine its relationship with gender equality in Indonesia. Research by Suharti et al. (2025) analyzed the dynamics of legal protection of the second wife using Simone de Beauvoir's theory of existentialist feminism, which reveals how the role of women in polygamy is constructed and contested in a patriarchal legal and social system.

Research Gap: Although these three clusters have made significant contributions, studies that specifically "weigh" polygamy laws using the scales of "substantive justice"—that is, the justice perceived in reality by legal subjects (wives, children, and society) by integrating

comprehensive theoretical analysis, cutting-edge empirical data, and international comparisons—is still very rare. Research by Haris et al. (2025) in *Intizar* does touch on the issue of substantive justice in the context of polygamy of civil servants in Bima, but its scope is limited to local case studies. Research within *Garuda* has also used Asghar Ali Engineer's perspective on substantive justice, but has not integrated comprehensive international comparative data. Research by Rohman et al. (2025) in the *Indonesian Journal of International Law* has examined judicial dilemmas after SEMA No. 3/2018 with the perspective of CEDAW and Maqashid Shariah, but the focus is more on the aspect of divorce in polygamy is not recorded. In fact, this concept of substantive justice is important to bridge the gap between law in books and law in action. Substantive justice emphasizes materially fair outcomes, not just adherence to procedures. In the context of polygamy, the key question is: "Are the parties really experiencing justice or are they simply procedurally legitimate?"

## **LITERATURE REVIEW**

### **The Theological and Historical Foundations of Polygamy in Islam**

From a religious normative perspective, polygamy has a basis in the Qur'an Surah An-Nisa verse 3 which allows men to marry up to four women on the condition that they are able to act fairly. However, this verse is also accompanied by a firm warning about the difficulty of being just, as affirmed in Surah An-Nisa verse 129. Historically, this verse was understood as a relief (*rukhsah*) and a social solution in the early days of Islam to protect widows and orphans after the war. Classical and contemporary scholars agree that the principle of justice is a substantial condition, not merely a formal one. The justice includes aspects of child support, time distribution, attention, and protection of the dignity and rights of the wife. The Qur'an also idealizes the monogamous marriage system as a form of perfection of love and affection (*mawaddah wa rahmah*). Thus, normatively, polygamy is intended to bring benefits and prevent harm. However, when the conditions of justice are not met, polygamy is contrary to the basic purpose of marriage in Islam, which is to realize tranquility (*sakinah*), love (*mawaddah*), and affection (*rahmah*).

### **Substantive Justice Theory: From Radbruch to Progressive Law**

Substantive justice is a concept in legal philosophy that emphasizes materially fair outcomes, not just compliance with formal procedures. To comprehensively understand this concept, it is necessary to trace the thoughts of leading legal experts.

1. **Gustav Radbruch and the Legal Triad.** The German legal philosopher Gustav Radbruch (1878-1949) formulated three basic values of law: justice (*Gerechtigkeit*), legal certainty (*Rechtssicherheit*), and utility (*Zweckmäßigkeit*). According to Radbruch, these three values are in dialectical tension and cannot be realized simultaneously in equal proportions. In conflict situations, justice should take precedence—a doctrine known as the "Radbruchsche Formel" (Radbruch Formula) which states that when a positive law is in extreme conflict with justice, it loses its validity as a law. In the context of polygamy, Radbruch's theory raises a critical question: Does the existing regulation of polygamy reflect justice, or does it merely pursue procedural legal certainty? Does the law of polygamy provide benefits for all parties involved, especially vulnerable groups such as women and children?
2. **Satjipto Rahardjo and Progressive Law.** Radbruch's thought was further developed in the Indonesian context by Satjipto Rahardjo (1930-2010) through the theory of Progressive Law. Rahardjo argued that the law is not an autonomous and final institution, but a means to achieve justice that always moves dynamically following the development of society. Progressive law rejects rigid legal positivism and places humans at the center of the entire law enforcement process. Rahardjo emphasized that "the law is for humans, not humans for the law." In this perspective, judges should not be just a mouthpiece of the law, but must have the courage to make breakthroughs in order to realize substantive justice. Recent research shows that the decisions of the appellate and cassation courts in the case of annulment of polygamous marriages in Makassar have applied a progressive legal approach that emphasizes substantive justice and protection of the rights of the second wife, in contrast to the more formalistic first-instance rulings.
3. **Asghar Ali Engineer and Substantive Justice for the Weak.** Progressive Muslim scholar Asghar Ali Engineer (1939-2013) developed a theory of substantive justice in an Islamic perspective. According to Engineer, the justice that is the basis of the fundamental teachings of Islam is substantive justice, not just textual justice. The justice that the Qur'an requires is justice that favors the weaker group (*mustadh'afin*), including women. In the context of polygamy, Engineer criticized the literal interpretation of QS. An-Nisa: 3 which is often used

to legitimize the practice of polygamy without paying attention to the historical context of the descent of the verse. According to Engineer, the basic spirit of the verse is justice for orphans, not giving unlimited polygamy licenses. Research using the perspective of Engineer found that Indonesian marriage law respects women by providing opportunities to participate in the judicial process through the condition of the wife's consent, but its implementation is still far from ideal.

### **The Concept of Justice in Islamic Family Law**

Justice in QS. An-Nisa: 3: Classical Interpretation vs. Contemporary

The key verse about polygamy in the Qur'an is QS. An-Nisa: 3:

"And if you are afraid that you will not be able to do justice to the orphan (if you marry her), then marry (other) women whom you like: two, three or four. Then if you are afraid that you will not be able to do justice, then (marry) only one, or the slaves that you have. That is closer to doing no wrong." Classical scholars tend to interpret "fairness" in this verse quantitatively—that is, justice in the division of time and material sustenance. Imam Al-Ghazali in *Ihya' 'Ulum al-Din*, for example, discusses more the technical aspects of the division of turns than essential justice. Meanwhile, contemporary scholars such as M. Quraish Shihab affirm that the justice required by the Qur'an includes immaterial aspects such as love and attention, which cannot be perfectly fulfilled by humans. Recent axiological research shows that in the legal aspect there are inconsistencies between the Marriage Law and KHI in regulating polygamy, especially related to the maximum limit of polygamy, the mechanism of spousal consent, and supervision of the fulfillment of justice requirements. In Islamic law, polygamy justice emphasizes more material aspects (alimony, time sharing), but it is difficult to measure immaterial justice (love, attention).

### **Maqashid Syariah as a Framework of Substantive Justice**

The Maqashid Syariah (Islamic legal purposes) offers a more comprehensive framework for assessing substantive justice in polygamy. Jasser Auda, a contemporary thinker on maqashid, developed a systems approach that integrates maqashid with human rights and gender justice. If analyzed through the maqashid al-shari'ah approach, polygamy must be evaluated based on the extent to which it preserves religion, soul, intellect, heredity, and property. If polygamy destroys

peace of mind, abandons children, or causes economic injustice, then it is substantially contrary to the purpose of the Shari'a.

**The five main purposes of sharia maqashid (*al-dharuriyyat al-khamsah*) that are relevant to the study of polygamy include:**

1. Hifz al-Din (Safeguarding Religion): Does polygamy preserve or distort religious values about human justice and glory? Unjust polygamy can actually tarnish the image of Islam as a religion that upholds justice.
2. Hifz al-Nafs (Safeguarding the Soul): Does polygamy protect the psychological health of all parties or does it cause mental stress? Research shows severe psychological impacts on wives in polygamous marriages, including jealousy, trauma, insecurity, and loss of trust.
3. Hifz al-Nasl (Safeguarding Offspring): Does polygamy guarantee clarity of nasab and protection of children? Data shows that 54% of children from marriage are not recorded as experiencing social stigma.
4. Hifz al-Mal (Safeguarding Property): Does polygamy guarantee the fair distribution of property and alimony? Facts show that 78% of wives in Sirri marriage experience economic disenfranchisement.
5. Hifz al-'Ird (Maintaining Dignity): Does polygamy maintain the dignity of women or does it degrade them through objectification and stigmatization?

Research from the perspective of sharia maqashid shows that the practice of polygamy that is not substantively unfair is actually contrary to the sacred purposes of sharia itself. In this context, divorce due to problematic polygamy can be seen as an attempt to avoid greater harm. In other words, divorce is not a failure of law or religion, but rather a corrective mechanism to protect the rights and dignity of the aggrieved party.

**The theory of 'Is (Justice) in the Philosophy of Islamic Law.** The concept of justice in Islam is not limited to the legal-formal dimension, but includes theological, ethical, and social dimensions. The Qur'an uses the terms 'adl and qisth to describe comprehensive justice. 'Adl means balance, equality, and righteousness, while qisth emphasizes proportional distribution. In the context of polygamy, justice is not enough to be interpreted as a quantitative division, but must include equal treatment in terms of reward, attention, and the fulfillment of emotional needs.

## **Feminist Jurisprudence and Criticism of Family Law**

1. Simone de Beauvoir and Existentialist Feminism. Simone de Beauvoir (1908-1986) in her monumental work *The Second Sex* (1949) developed the concept of women as "the Other" in patriarchal power relations. In the context of polygamy, this theory helps to understand how women are positioned as objects that can be "divided" and "polygamous" in the name of male interests. Beauvoir argues that women have been constructed as others in relation to men, who are established as absolute subjects. Recent research uses the Beauvoir framework to analyze how the role and identity of the second wife in polygamous marriage is constructed and contested in patriarchal legal and social systems. The findings show that women in the position of second wife often experience stereotypes, social stigma, discrimination, and even the threat of criminal consequences.
2. Betty Friedan and *A Critique of Femininity*. Betty Friedan (1921-2006) in *The Feminine Mystique* (1963) criticized social constructions that limited women to domestic roles. In the context of polygamy, this construction is manifested in the assumption that the main task of women is to serve their husbands and bear children. When the wife is considered to have "failed" to fulfill the reproductive function, the husband is "entitled" to seek another wife—a logic that places women as instruments, not dignified subjects.
3. Legal System Ibuism: A New Concept in Family Law Criticism. Recent research introduced the concept of "Legal System Ibuism" to describe systematic inequality in the regulation of polygamy in Indonesia. This concept refers to the way in which the legal system constructs the role of women (mothers) in an unequal manner—on the one hand they are burdened with reproductive and domestic responsibilities, on the other hand they are not given adequate protection.

*The Legal System of Ibuism* is manifested most clearly in Article 4 paragraph (2) letter c of the Marriage Law and Article 57 letter c of the KHI which allows the husband to practice polygamy if "the wife cannot bear children". These Terms contain the biased assumption that:

1. Infertility always comes from the wife's side, ignoring medical evidence that infertility factors can come from men in significant proportions.
2. Women's value is solely determined by their reproductive ability, reducing women's dignity to biological functions alone.

3. The solution to the absence of offspring must be through polygamy, ignoring other alternatives such as adoption, foster parenting, or more humane and equitable reproductive technologies . The research recommends legal reform in three aspects: legal structure (elimination of discriminatory policies by the executive, legislative, and judiciary), legal substance (revision of polygamy rules in Article 4 paragraph 2 letter c of the Marriage Law and Article 57 letter c of the Marriage Code), and legal culture (changing public views on the role of women in marriage).

### **CEDAW and International Standards for Women's Rights**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which Indonesia has ratified through Law No. 7 of 1984, establishes international standards on gender equality in marriage. Article 16 of CEDAW explicitly guarantees equal rights in marriage, including the right to choose a spouse and equal rights in responsibilities during marriage and at the time of its dissolution. Polygamy regulations in Indonesia that allow men to practice polygamy but prohibit women from polygamy have the potential to violate human rights and the principle of non-discrimination. The ratification of CEDAW has significant implications for Indonesia to immediately revise the requirements for polygamy in the marriage law to prevent continued discrimination. The delay in the protection of human rights means that the state fails to protect and respect women's rights and can be seen as a violation of human rights. Research using the CEDAW perspective in analyzing Islamic family law in Indonesia shows the tension between international norms and local implementation. A comparative study between CEDAW and the Islamic Family Law (Federal Territories) Act 1984 in Malaysia shows that harmonization efforts can be a lesson for Indonesia.

### **Comparison of Family Law in Muslim Countries**

In general, the provisions of family law in modern Muslim countries regarding polygamy can be classified into three categories: *First*, countries that completely prohibit the practice of polygamy such as Turkey and Tunisia. *Second*, countries that allow polygamy with relatively strict (complicated) conditions such as Pakistan, Egypt, Morocco, Indonesia, and Malaysia. *Third*, countries that treat polygamy loosely such as Saudi Arabia, Iran, and Qatar.

1. Malaysia: Strict Judicial Oversight. Malaysia implements a strict judicial supervision system for polygamy applications through the Islamic Family Law (Federal Territories) Act 1984.

Every application for polygamy must go through a judicial process that examines in depth the husband's ability to act fairly, both financially and emotionally. As a result, the rate of polygamy in Malaysia decreased drastically to 95% after the implementation of this system. Research by Awang (2024) analyzes the concept and application of rights in polygamous marriage in Malaysia, as well as the role of courts in the framework of the law. The study underscores the importance of the court's active role in ensuring substantive justice, not just an administrative formality. Malaysian courts conduct in-depth checks on the husband's financial and psychological capabilities, there is a mandatory mediation mechanism to hear the first wife's objections, stricter and verified administrative requirements, and strict sanctions for procedural violations.

2. Morocco: Mudawwanah and Progressive Reform. Morocco carried out radical reforms through the Mudawwanah (Family Code) of 2004 which severely restricted polygamy. The law requires: Highly selective court permission, Objective proof of the existence of an "extraordinary need" justifying polygamy, Adequate financial security for the first and second wives, Consent of the first wife given consciously without pressure. As a result, the rate of polygamy in Morocco decreased to 99.7%. Research by Ezzerouali, Banane, and Hamdaoui (2025) examines how sharia has become a lasting source and a guiding reference in Moroccan law, including in the reform of Mudawwanah. Polygamy is only permitted under exceptional conditions that can be objectively proven, the first wife has effective veto, there are strict financial guarantees for all wives, and the courts conduct ongoing post-permit supervision.
3. Tunisia: Total Prohibition and Its Theological Foundation. Tunisia took the most radical step by completely banning the practice of polygamy through the Code du Statute Personnel (CSP) of 1956. This prohibition is based on the progressive interpretation that QS. An-Nisa: 3, if read comprehensively, actually closes the door to polygamy because of the conditions of "being fair" that are impossible to be fulfilled perfectly by humans. As a result, Tunisian society does not practice polygamy. Research by Wijayati (2021) examined family law reform in Tunisia with a focus on polygamy rules in the 1957 CSP. This study shows that the prohibition of polygamy in Tunisia is more in line with the maqashid of sharia and the principles of substantive justice than regulations that allow with strict conditions but are difficult to supervise implementation. The theological arguments behind the ban include: QS. An-Nisa:3 must be read in its entirety with the previous verse (about justice for orphans), the conditions

of "justice" in the Qur'an are absolute and impossible to be fulfilled perfectly by humans, the basic spirit of the Qur'an is monogamy, polygamy is only a limited dispensation for historical emergency situations, and the shari'a maqashid on the protection of women and children is more embodied in the monogamous system.

4. Turkey: Secularization and Gender Equality. Turkey, through the adoption of the revised Turkish Civil Code in 2001, expressly prohibits polygamy and upholds the principle of absolute monogamy. Turkish family law is more based on the Swiss civil model adapted to the local context. Research by Baysal and Arslan (2022) examines the process of creating the Turkish Civil Code and the debate behind it. The advantages of the Turkish system include: high legal certainty as there is no room for interpretation, strict gender equality in marriage, equal protection for all children, and integration with the European legal system that facilitates international relations.

Comparative research on nine Muslim countries (Indonesia, Malaysia, Pakistan, Egypt, Morocco, Jordan, Syria, Turkey, and Tunisia) shows that polygamy rules can be grouped into two main categories: countries that allow polygamy and countries that prohibit polygamy. Factors influencing these regulatory differences include: interpretation of religious texts, the influence of colonialism, women's movements, local political dynamics, and the degree of integration with the international legal system.

Based on the above literature review, this study developed an integrated analytical framework that combines five perspectives:

1. Philosophical: Radbruch's theory of substantive justice, Rahardjo's progressive law, and justice for the weak group of Engineers
2. Theological: Maqashid sharia as a framework for evaluating substantive justice in an Islamic perspective
3. Gender: Feminist jurisprudence, Legal System Ibuism, and CEDAW standards
4. Comparative: Best practices from Malaysia, Morocco, Tunisia, Turkey, and nine other Muslim countries
5. Empirical: Statistical data on the impact of polygamy on women and children, as well as analysis of court decisions,

## **METHODS**

This research is a normative legal research with prescriptive-analytical specifications. Normative legal research aims to find the truth based on the logic of legal science from its normative side, by analyzing literature materials or secondary data. The prescriptive-analytical specification means that the study not only describes the facts, but also provides an assessment of what should be (das sollen) based on the theoretical framework used.

### **Research Approach**

1. **Approach: Legislation (Statute Approach):** Analyzing Law No. 1/1974 jo. Law No. 16/2019 concerning Marriage, Compilation of Islamic Law (Presidential Instruction No. 1/1991), SEMA No. 3 of 2018 concerning Restrictions on Polygamous Marriage Isbat, and related Constitutional Court rulings.
2. **Conceptual Approach:** Exploring the concept of substantive justice from various legal philosophy literature, contemporary Islamic thought, and feminist theory.
3. **Philosophical Approach:** Examine in depth the values of justice that are the basis of polygamy law, including ontology, epistemology, and axiology of polygamy law.
4. **Case Approach:** Analyze the rulings of the Religious Courts regarding the application for polygamy license and annulment of marriage to see whether the judge used substantive justice considerations or only formalistic. The cases analyzed include Decision Number 2490/Pdt.G/2016/PA. Mks, Decision Number 86/Pdt.G/2017/PTA. Mks, and Decision Number 182 K/Ag/2018 at the Supreme Court, as well as Decision Number 374 K/Pid/2011 concerning identity forgery for polygamy.
5. **Comparative Approach:** Compare the regulations and practices of polygamy in other Muslim countries (Malaysia, Morocco, Tunisia, Turkey, Pakistan, Egypt, Jordan, Syria, and Saudi Arabia) to identify best practices that can be adopted in Indonesia.

### **Types and Sources of Legal Substances**

1. **Primary Legal Materials:** · Law Number 1 of 1974 concerning Marriage jo. Law Number 16 of 2019, · Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law; · Law Number 7 of 1984 concerning the Ratification of CEDAW; · SEMA Number 3 of 2018 concerning Restrictions on Isbat Nikah Polygamy; · Relevant Court Decisions (as

aforesaid); · Criminal Code Article 279 and Article 263 concerning forgery of marriage documents

2. Secondary Legal Materials: Textbooks and academic literature on Islamic family law, legal philosophy, and gender studies; · Scientific journals indexed by Scopus and Sinta (as cited in this article); · The results of empirical research on the impact of polygamy; · Report of Komnas Perempuan and LBH APIK; · Statistical data from BPS and other research institutions; · Fatwas of scholars and decisions of religious organizations
3. Tertiary Legal Materials: Legal Dictionary; Encyclopedia of Islamic Law; Encyclopedia of feminism

Legal materials are collected through library research with documentation techniques. Searches are carried out systematically on: · Scientific journal databases (Scopus, Web of Science, Google Scholar, Garuda); · Institutional repositories (IAIN Pare, UIN Malang, UIN Jakarta, UIN Sunan Kalijaga); · Digital library of the Supreme Court and the Religious Court; · Official websites of state institutions and civil society organizations; International conference proceedings

### **Legal Materials Analysis Techniques**

The analysis was carried out using legal interpretation methods which include:

1. Grammatical Interpretation: Analyzing the textual meaning of articles on polygamy
2. Systematic Interpretation: Understanding these articles in the context of the entire marriage legal system
3. Teleological/Sociological Interpretation: Explores the social goals and values of justice that polygamy regulation seeks to achieve
4. Comparative Interpretation: Comparing with regulations in other countries
5. Philosophical Interpretation: Exploring the philosophical values underlying the regulation of polygamy
6. Historical Interpretation: Tracing the development of polygamy regulation over time

The analysis also uses content analysis to identify key themes in court decisions and academic literature, as well as critical discourse analysis to uncover the power relations behind legal texts.

## **DISCUSSION**

### **Legal Construction of Polygamy in Indonesia: Between Procedure and Essence Regulation of Polygamy in the Marriage Law and KHI**

Indonesia's positive law regulates polygamy as an exception to the principle of monogamy with very strict requirements. Article 3 paragraph (2) of Law No. 1/1974 states that the court can grant permission for polygamy if desired by the parties concerned. Article 4 paragraph (2) regulates alternative conditions: (a) the wife is unable to carry out her obligations; (b) the wife has a physical disability or disease that cannot be cured; (c) the wife cannot bear children. Article 5 regulates the cumulative conditions: (a) the consent of the wives; (b) there is certainty that the husband is able to guarantee the living needs of his wives and their children; (c) there is a guarantee that husbands will be fair to their wives and children. KHI Articles 55-59 basically repeat the same provision with the addition that polygamy is limited to a maximum of four wives and the main condition is the ability of the husband to act fairly with wives and children.

#### **Critical Analysis: Formalities Without Substance**

Procedurally, this rule is quite strict. However, when weighed against substantive justice, this rule has a fundamental weakness: the requirement of "fairness" is only evidenced by a statement and the wife's consent, without any in-depth verification mechanism of the husband's psychological ability to do justice. This is where the main problem lies—the law is only able to regulate the external aspect, but it fails to reach the inner aspect that is the very essence of justice. Research shows that a wife's approval is often pseudo-spoofed. Many wives agree to polygamy not out of willingness, but because of economic pressure, threats, or social stigma. Komnas Perempuan noted that countries that facilitate polygamy increase the risk of violence and injustice against women. In the LBH APIK study, of the 107 women victims of polygamy, the majority experienced neglect of livelihood, domestic conflicts, and heavy psychological burdens.

#### **Polygamy in the Perspective of National Law: Between Consent and Violation**

In the Indonesian legal system, polygamy is recognized on a limited and conditional basis. Law Number 1 of 1974 concerning Marriage affirms the principle of monogamy as a general principle, while polygamy is only allowed with the permission of the court and meets certain conditions. The Compilation of Islamic Law (KHI) emphasizes these provisions by emphasizing the wife's consent, the husband's ability, and the guarantee of justice. This strict arrangement shows that the state views polygamy as an exception, not a free-to-do practice. In the practice of religious

justice, many applications for polygamy permits are rejected because material requirements are not met, especially related to economic ability and psychological justice for wives and children. On the other hand, not a few divorce cases are filed due to polygamy that are carried out without legal procedures or without the consent of the wife. This shows that non-compliance with the law actually makes polygamy a factor that triggers the fracture of the household.

### **Legal System of Ibuism in Polygamy Regulation**

The concept of Legal System Ibuism finds its clearest manifestation in Article 4 paragraph (2) letter c of the Marriage Law and Article 57 letter c of the Marriage Code. The provision that allows the husband to practice polygamy if "the wife cannot bear children" contains problematic assumptions:

*First*, this provision implicitly places the "fault" of infertility on the wife's side, ignoring the possibility that the husband could also be the cause of the child's absence. Medical research shows that infertility factors can come from the male side in significant proportions. Literature studies show that infertility is a couple's problem that can stem from male, female, or a combination of both factors.

*Second*, this provision reduces the value of women solely on their reproductive functions. Women who cannot give birth are seen as "failing" to fulfill their natural roles, so the husband is "entitled" to find another woman who can fulfill this function. This kind of social construction reinforces the stereotype that women's primary role is as housewives and husbands' servants.

*Third*, this provision ignores other alternatives that are more humane and just, such as: Adoption of children (tabanni) that has been recognized in Islamic law and positive law, foster parenting programs, and assisted reproductive technologies (IVF, artificial insemination) that are increasingly advanced

Research by Jumarim (2024) examines the practice of adoption in the Sasak community and its implications for marriage law in Indonesia. This study shows that adoption has long been practiced in society and can be a better alternative to polygamy. The comparative study of Quraish Shihab and Zakir Naik's thinking on child adoption also shows that adoption is a viable alternative.

### **Court Decision: Formalistic or Substantive?**

#### **Analysis of Religious Court Decisions**

Analysis of court decisions shows the tendency of judges to be formalistic. If the administrative requirements (wife's license, income certificate, police certificate) are met, then the application is granted. Judges rarely dig deeper into whether the husband is really capable of maintaining 'is (justice in all aspects) and whether the wife's consent is given genuinely without pressure. Research by Kurnia and Lestari (2022) analyzed judges' considerations regarding the rejection of polygamy applications and found that few judges dared to reject applications even though the conditions were procedurally met, if they considered there were indications of substantive injustice.

### **Case Study: Polygamy Verdict in Makassar**

Research by Hasanuddin (2025) examines in depth the judge's considerations in deciding cases of annulment of marriage on the grounds of polygamy without the permission of the first wife, based on a study of tiered decisions in Makassar. The findings of this study are significant:

1. Decision of the First Instance (Number 2490/Pdt.G/2016/PA. Mks): The judge applies the law formalistically based on the Marriage Law No. 1/1974. Polygamous marriage without the permission of the first wife is declared null and void, with the consequence that the relationship between husband and wife is invalid, the right to alimony and inheritance is not valid, and the second wife is not entitled to alimony during the iddah period.
2. Appeal Level Decision (Number 86/Pdt.G/2017/PTA. Mks): The High Court of Religion overturned the first-instance verdict by applying a progressive legal approach that emphasized substantive justice and protection of the rights of the second wife. The appellate judge considered that the second wife had married in good faith and did not know that her husband had not received the consent of the first wife.
3. Cassation Decision (Number 182 K/Ag/2018): The Supreme Court upheld the appeal decision, affirming that the substantive justice approach must be prioritized in cases involving the protection of vulnerable parties. As a result of the law, marriage between a husband and a second wife is declared to be valid, with the consideration of sharia maqashid to protect the benefit of the family, children, and wife.

This case shows a paradigm shift at the high judicial level towards substantive justice, although the first level is still dominated by a formalistic approach.

### **Post-SEMA Judicial Dilemma No. 3/2018.**

Research by Rohman et al. (2025) examines the judicial dilemma faced by judges of the Religious Court after the issuance of SEMA No. 3 of 2018 which prohibits religious courts from granting applications for isbat nikah for polygamous marriages that are not recorded.

#### **The study's findings reveal different judges' approaches:**

1. Formalistic Approach: Some judges strictly adhere to procedural consistency according to SEMA No. 3/2018, with the consequence that wives and children lose legal protection.
2. Substantive Approach: Other judges emphasized justice and benefit (maşlahah) to justify more flexible rulings, taking into account the impact of the rulings on the welfare of women and children.

This difference in approach reflects a fundamental dilemma between procedural legal certainty and the imperative of justice for vulnerable groups. This research emphasizes the need to develop a more inclusive legal framework that balances state regulation with gender justice, by integrating the perspectives of CEDAW and Maqashid Sharia.

### **Criminal Aspects: Identity Forgery for Polygamy**

Research by Nasruddin, Bustamin, and Tenriliweng (2025) examines the criminal aspects of polygamy practice, especially the criminal act of forging marriage without the permission of the first wife. The findings show that:

1. Forgery of marriage without the permission of the first wife violates Article 279 of the Criminal Code and can also be included in Article 263 concerning document forgery. Article 279 of the Criminal Code provides for those who enter into marriage even though they know that their existing marriages or marriages are a valid obstacle to remarriage.
2. In the perspective of Islamic law, polygamy is permissible but requires justice and consent of the first wife.
3. Decision No. 374 K/Pid/2011 shows judicial considerations regarding the criminal element and its impact on the victim. In the verdict, the defendant was proven to have forged identity to commit polygamy and was sentenced to a criminal sentence.

This study recommends the harmonization of positive law and Islamic law to ensure better legal certainty and the strengthening of polygamy regulations to prevent similar violations in the future.

The recommendations also include increased supervision of marriage documents and stricter sanctions for forgery perpetrators.

### **Structural Disparities: A Law Alienated from a Sense of Justice**

#### **Empirical Data on Injustice**

The sharpest disparity between legal procedure and real justice is seen in the case of polygamy sirri (not recorded). Procedurally, polygamy is illegal because it does not go through the courts. As a result, the child only has a civil relationship with his mother, and the second wife is not entitled to the gono-gini property and inheritance. In terms of procedure, this is "legitimate" because it violates the rules. But from a substantive justice perspective, this rule is very problematic: · 78% of wives in polygamous marriages are not recorded as having economic access terminated; 89% have no legal avenue to claim alimony because they are burdened with complicated retroactive marriage legalization requirements; 81% of unrecorded wives suffer from loss of inheritance rights; 54% of children from undocumented marriages experience social stigma; 67% of polygamy permits in Java are applied without the consent of a genuine wife; 72% of the practice of marriage in rural areas involves child marriage. This data shows that those who are victims are the most vulnerable: women and children who may not know their marital status or do not have the bargaining power to refuse the practice of polygamy.

#### **Sirri Polygamy Among Civil Servants: Bureaucratic Anomaly**

Research by Haris et al. (2025) examines the practice of polygamy conducted by the State Civil Apparatus (ASN) in Bima Regency. The key findings point to significant ethical and legal deviations, where polygamy not only violates the formal legal principles of the state, but also betrays the values of substantive justice in Islamic law. This study revealed that:

1. ASN, which should be an example in law compliance, actually practices polygamy in a systemic manner
2. The absence of preventive regulations and weak administrative sanctions reinforce the permissive culture in the bureaucracy
3. Legal protection for wives in the practice of polygamy in civil servants is very weak, especially in the aspects of alimony distribution, emotional justice, and recognition of social and legal status

This study concludes that there is a need for a policy reformulation based on distributive justice and a responsive legal paradigm that is able to bridge the dichotomy between formal norms and patriarchal social practices.

### **Psychological and Social Impact of Polygamy**

Psychologically, polygamy that is not consciously agreed upon by the wife can lead to trauma, insecurity, and loss of trust. This condition often leads to prolonged disharmony that is difficult to recover, so divorce is seen as a last resort to protect dignity and mental health. Jealousy, emotional injustice, neglect of alimony, and psychological injuries to wives and children are the main causes of the increase in divorce lawsuits due to polygamy. Empirical data in religious courts show that polygamy without permission and without justice is one of the dominant reasons in divorce cases. This indicates that polygamy, instead of saving marriage, is actually a destructive factor when abused.

### **Philosophical Analysis: Justice in an Axiological Perspective**

#### **Aristotle's Perspective: Justice as a Common Benefit**

Research by Ahsani et al. (2024) examines the problem of justice in the practice of polygamy through an axiological examination of ethics and aesthetics. In Aristotle's perspective, polygamy often contradicts the principle of justice as a common benefit, as it tends to harm women and cause imbalances in the household. Aristotle distinguishes distributive justice (proportional distribution of resources) and corrective justice (correcting injustice). In the context of polygamy, distributive justice demands a proportionate distribution of rights and obligations between husbands, first wives, second wives, and children. Meanwhile, corrective justice demands a mechanism for redress when rights violations occur.

### **Teleology vs. Teleology Deontology in Polygamy**

From an ethical perspective, this study uses two frameworks: Teleology (ethics of purpose): Polygamy can only be morally justified if it results in collective happiness, not the individual happiness of the husband alone. Based on empirical research, polygamy more often produces negative impacts: domestic conflicts, jealousy, psychological pressure on the wife, and child development problems. Deontology (ethics of obligation): Polygamy must be subject to

absolute moral principles of justice and gender equality. If in principle polygamy violates human dignity and equality, then it cannot be morally justified even though it provides certain benefits.

### **Polygamous Aesthetics: Harmony or Tension?**

In terms of aesthetics (beauty/harmony), polygamy often causes social and emotional tension in the household. Research shows that polygamy reduces the likelihood of creating harmony in the family because: Competition between wives and children from other mothers; Husband's limited time and attention; The psychological burden of jealousy and preferences is unequal; Social stigma faced by polygamous families

### **Sharia Maqashid Analysis of Polygamy Practices**

If analyzed through the maqashid al-shari'ah approach, polygamy must be evaluated based on the extent to which it preserves religion, soul, intellect, heredity, and property. If polygamy destroys peace of mind, abandons children, or causes economic injustice, then it is substantially contrary to the purpose of the Shari'a. Hifz al-Din (Safeguarding Religion): Unjust polygamy can actually tarnish the image of Islam as a religion that upholds justice. Many criticisms of Islam have arisen precisely because of the practice of polygamy that deviates from its terms and conditions.

1. Hifz al-Nafs (Safeguarding the Soul): The psychological impact of polygamy on wives and children is significant. Research shows that wives in polygamous marriages often experience depression, anxiety, and severe psychological distress.
2. Hifz al-Nasl (Safeguarding Offspring): Sirri polygamy results in the ambiguity of the child's fate and the loss of the child's civil rights, contrary to the purpose of the sharia to protect the offspring.
3. Hifz al-Mal (Safeguarding Property): Data shows that 78% of wives in sirri marriages have experienced a termination of economic access, which is clearly contrary to the purpose of safeguarding property.
4. Hifz al-'Ird (Maintaining Dignity): The social stigma experienced by the second wife and children of polygamous marriage does not show that polygamy actually degrades human dignity.

In this context, divorce due to problematic polygamy can be seen as an attempt to avoid greater harm. In other words, divorce is not a failure of law or religion, but rather a corrective mechanism to protect the rights and dignity of the aggrieved party.

## **Learning from Muslim Countries**

**Malaysia: Effective Judicial Oversight.**

Malaysia implements a strict judicial supervision system through the Islamic Family Law (Federal Territories) Act 1984. Research by Awang (2024) analyzes the concept and application of rights in polygamous marriage in Malaysia. Some of the advantages of the Malaysian system:

1. The court conducts an in-depth examination of the husband's financial and psychological ability
2. There is a mandatory mediation mechanism to hear the objections of the first wife
3. Stricter and verified administrative requirements
4. Strict sanctions for procedural violations

As a result, the rate of polygamy in Malaysia decreased drastically to 95%.

**Morocco: Mudawwanah Reform**

Morocco carried out radical reforms through the Mudawwanah (Family Code) of 2004. Research by Ezzerouali, Banane, and Hamdaoui (2025) examines how sharia becomes a perpetual source and guiding reference in Moroccan law. Important features of Morocco's reforms:

1. Polygamy is permitted only in exceptional circumstances that can be objectively proven
2. The first wife has an effective veto
3. There is a strict financial guarantee for all wives
4. The court conducts continuous post-permit supervision.

As a result, the rate of polygamy in Morocco decreased to 99.7%.

**Tunisia: Total Ban**

Tunisia completely banned polygamy through the Code du Statute Personnel (CSP) of 1956. Research by Wijayati (2021) examines this reform in depth. Theological arguments behind the ban:

1. QS. An-Nisa: 3 should be read in its entirety with the previous verse (about justice for orphans)
2. The conditions of "fairness" in the Qur'an are absolute and impossible to be fulfilled perfectly by humans
3. The basic spirit of the Qur'an is monogamy, polygamy is only a limited dispensation for situations of historical emergency

4. The sharia maqashid on the protection of women and children is more manifested in the monogamy system

As a result, Tunisian society does not practice polygamy.

### **Turkey: Secular Model with Gender Equality**

Turkey adopted a civil model that prohibits polygamy absolutely. Research by Baysal and Arslan (2022) examined the process of making the Turkish Civil Code. Advantages of the Turkish system:

1. High legal certainty because there is no room for interpretation
2. Strict gender equality in marriage
3. Equal protection for all children, both from the first and second marriages (which are not recognized)
4. Integration with the European legal system that facilitates international relations

### **Saudi Arabia: Loose models**

Unlike the countries above, Saudi Arabia is included in the category of countries that treat polygamy loosely without strict restrictions. The practice of polygamy is quite common in Saudi Arabia, and people generally follow the laws in force in their country regarding polygamy. Comparative research on nine Muslim countries (Indonesia, Malaysia, Pakistan, Egypt, Morocco, Jordan, Syria, Turkey, and Tunisia) shows a diversity of approaches in responding to the issue of polygamy. Some countries choose to allow it with strict conditions, while others choose to ban it completely. Factors influencing these differences include the interpretation of religious texts, local political dynamics, the influence of women's movements, and the degree of integration with the international legal system.

### **Synthesis for Indonesia**

From the above comparison, Indonesia can adopt several elements:

1. Strengthening the role of the courts (Malaysian model): Judges need to be given the authority and capacity to conduct in-depth examinations of substantive justice aspects, not just administrative formalities.

2. Strict restrictions on polygamy grounds (Moroccan model): Polygamous reasons need to be formulated more strictly with objective evidentiary standards, not just subjective statements of the husband.
3. Alternatives to polygamy (Tunisian model): The state needs to promote and facilitate alternatives such as adoption and reproductive technology as a solution to the problem of infertility.
4. Harmonization with human rights standards (Turkish model): Polygamy regulations need to be aligned with Indonesia's international commitments on the elimination of discrimination against women, especially CEDAW, which has been ratified.

### **Reformulation of Polygamy Law Based on Substantive Justice**

Reformulation of the Meaning of "Fair". To achieve substantive justice, the meaning of "fairness" in polygamy regulation needs to be reformulated. Justice should not be interpreted quantitatively (division of turns and alimony), but should include:

1. Distributive Justice: Proportionate distribution of resources (time, attention, materials) and meeting the basic needs of all parties
2. Procedural Fairness: A participatory and pressure-free decision-making process
3. Interactional Justice: Dignified and respectful treatment of all parties
4. Psychological Justice: Fulfillment of the emotional and psychological needs of all family members
5. Generational Justice: Guarantee of protection and optimal development for children

### **Strengthening of Husband's Obligations**

The law should explicitly regulate the husband's obligations more comprehensively:

1. Financial Obligations: Equal maintenance guarantee for all wives and children, with strict supervision and sanctions mechanisms if violated
2. Emotional Obligation: A commitment to provide equal psychological attention and support
3. Educational Obligation: Responsibility to ensure the education of the children of all wives equally
4. Protective Duty: Protection against domestic violence and discrimination
5. Communicative Obligation: Transparency and open communication with all parties

### **Alternative Conditions in Favor of Women**

Instead of alternative terms centered on the wife's "shortcomings" (unable to carry out obligations, sick, barren), progressive law can adopt alternative terms oriented to broader social interests, for example:

1. Polygamy is allowed if the woman to be married is a widow who needs economic and social protection
2. Polygamy is permissible if there is a greater social interest, such as saving women from adultery or exploitation
3. Polygamy is permissible if the first wife voluntarily and consciously gives consent for humanitarian reasons

This shifted the paradigm from "the interests of the husband" to the "social interests and protection of women".

### **Integration of Sociological-Anthropological Approaches**

The judge needs to consider the socio-cultural background of the parties in deciding polygamy cases. Research by Taufiqurohman and Musaffa (2023) shows that society has its own living law, and the courts must be a bridge between state law and society's sense of justice. Some aspects to consider: The socioeconomic context of the family; Local customs and cultural norms; The impact of the decision on family sustainability; Parties' access to justice and resources

### **Hybrid Reform Model**

Research by Wati, Pagar, and Matsum (2025) proposes a hybrid reform model that integrates sharia maqashid with feminist jurisprudence. This model includes:

1. Special Court: Establishment of a special court or panel of judges trained in gender justice issues to handle polygamy cases
2. Simplified Isbat Nikah: A simpler and more affordable marriage isbat procedure for women from economically disadvantaged backgrounds
3. Criminalization of Sirri Marriage Organizers: Criminal sanctions for the head or officer who marry sirri without legal procedures

4. Socialization and Education: Public education programs on the impact of polygamy and women's rights in marriage

This model is projected to reduce the marriage rate by up to 40%, as well as uphold *hifz al-'ird* (dignity) and constitutional equality.

### **Revision of Discriminatory Articles**

Specifically, it is necessary to revise discriminatory articles:

1. Article 4 paragraph (2) letter c of the Marriage Law and Article 57 letter c of the KHI regarding the reason why the wife cannot bear children need to be deleted or reformulated in a gender-neutral manner.
2. The addition of clauses on alternatives to polygamy, such as adoption and reproductive technology, which must be sought first before applying for polygamy.
3. Strengthening the wife's right to file a lawsuit if the conditions of polygamy are not met or if there is a violation of post-polygamy rights.
4. Harmonization with CEDAW: Revise the requirements of polygamy to conform to international standards on the elimination of discrimination against women.

### **CONCLUSIONS**

1. The polygamy law in Indonesia is currently more oriented towards procedural justice than substantive justice. Existing regulations (the Marriage Law and KHI) set fairly strict requirements administratively, but fail to ensure that justice is truly felt by all parties involved. The "fair" terms are only evidenced by a statement without an in-depth verification mechanism, while the wife's consent is often pseudo-due to patriarchal economic, social, and cultural pressures.
2. There is a significant structural disparity between legal procedures and the achievement of real justice. Empirical data show that 78% of wives in polygamous marriages are not recorded as having economic access terminated, 89% have no legal channels to claim alimony, and 54% of children experience social stigma. The phenomenon of "Legal System Ibumism" reinforces this systematic injustice, especially through articles that allow polygamy on the grounds that wives cannot bear children—a legal construction that is gender-biased and reduces women's value in their reproductive functions.

3. Judicial practice shows inconsistencies that reflect the dilemma between procedural legal certainty and the imperative of substantive justice. At the first level, judges tend to be formalistic by granting applications if administrative requirements are met. However, at the appellate and cassation levels, progressive legal breakthroughs have begun to emerge that prioritize the protection of vulnerable parties, as seen in Decision Number 182 K/Ag/2018. After SEMA No. 3/2018, the judicial dilemma is becoming sharper between strictly adhering to procedures and emphasizing justice and benefits.
4. From the perspective of sharia maqashid, polygamy that is not substantively unjust is actually contrary to the sacred purposes of sharia itself, especially in preserving the soul (hifz al-nafs), heredity (hifz al-nasl), and dignity (hifz al-'ird).
5. Lessons learned from other Muslim countries show that substantive justice-oriented family law reform is possible and has been successfully implemented. Malaysia lowered the rate of polygamy to 95% through strict judicial oversight, Morocco lowered it to 99.7% through Mudawwanah, Tunisia banned it completely with progressive theological arguments, and Turkey adopted a secular model that guaranteed gender equality. Indonesia can adopt the best elements of these models in light of the local context. A human rights perspective and CEDAW demand that the state immediately revise discriminatory polygamy regulations. The ratification of CEDAW imposes legal obligations on Indonesia to ensure gender equality in all aspects of life, including marriage.
6. The criminal aspects of polygamy practice, especially the falsification of identity and documents to engage in polygamy without permission, require serious handling through the harmonization of positive law and Islamic law and the strengthening of sanctions.
7. The reformulation of polygamy law based on substantive justice requires a multidimensional approach that includes: qualitatively reformulation of the meaning of "fair"; strengthening the husband's comprehensive obligations; alternative conditions that favor women; integration of sociological-anthropological approaches; a hybrid reform model that integrates sharia maqashid and feminist jurisprudence; revision of discriminatory articles; and harmonization with international human rights standards.

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