

Harm ‘*Darar*’ in Polygamous Marriage: Analyzing The Legal Framework in Malaysia and Indonesia

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Abstract

While polygamous marriages in Southeast Asia have been studied through various lenses, significant research gaps persist in understanding these practices within the Malaysian and Indonesian contexts. This study comparatively investigates the interpretation of ‘*darar shar’i*’, a requirement to contract a polygamous marriage in Malaysia and Indonesia. The study utilized doctrinal study on relevant legislation and case law accompanied by semi-structured interviews. The findings from the doctrinal study are supported by information acquired through semi-structured interviews with Sharia court judges in Malaysia that were selected using a purposive approach. The secondary data were assembled using the library research approach and later analyzed using the thematic and content analysis approach. This study discovers that Malaysia and Indonesia have minor differences in deliberating the concept of harm attached to polygamy application. This is attributed to the different conditions for allowing polygamy in both jurisdictions. The study also discovers that, unlike the other conditions of polygamy, the Syariah court has no specific guidelines in deliberating on the possibility of *darar shar’i* before it can grant permission to allow for polygamous marriage.

Abstrak

Meskipun perkawinan poligami di Asia Tenggara telah dikaji melalui berbagai sudut pandang, masih terdapat kesenjangan penelitian yang signifikan dalam memahami praktik-praktik ini dalam konteks Malaysia dan Indonesia. Artikel ini mengkaji secara komparatif tentang penafsiran ‘*darar shar’i*’ sebagai salah satu syarat untuk memasuki pernikahan poligami di Malaysia dan Indonesia dengan tujuan untuk membuat pedoman tentang penafsiran hukum atas konsep ‘*darar shar’i*’. Penelitian ini mengadopsi metode kualitatif yang memanfaatkan studi doktrinal dan wawancara semi terstruktur. Temuan dari studi doktrinal didukung oleh informasi yang diperoleh melalui wawancara semi-terstruktur dengan hakim pengadilan Syariah di Malaysia yang dipilih dengan menggunakan pendekatan purposif. Data sekunder dikumpulkan dengan menggunakan pendekatan penelitian kepustakaan dan kemudian dianalisis dengan menggunakan pendekatan analisis tematik dan isi. Studi ini menemukan bahwa Malaysia dan Indonesia memiliki sedikit perbedaan dalam mempertimbangkan konsep kerugian yang melekat pada penerapan poligami. Hal ini disebabkan oleh kondisi yang berbeda untuk membolehkan poligami di kedua yurisdiksi. Studi ini juga menemukan bahwa tidak seperti kondisi poligami lainnya, pengadilan syariah gagal dalam mempertimbangkan kemungkinan ‘*darar shar’i*’ sebelum dapat memberikan izin untuk mengizinkan pernikahan poligami.

Keywords:

Syariah court; Polygamous marriage; *Darar shar’i*; Indonesia law; Malaysia Law

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Introduction

Polygamous marriage is a marriage that can be interpreted in different ways depending on one's cultural, religious, and personal beliefs. From a legal perspective, polygamous marriage is a form of marriage that allows husbands to have multiple spouses at the same time. In many countries, including Indonesia and Malaysia, polygamous marriage is legal under certain conditions, usually based on religious rulings or cultural traditions. Although polygamous marriage in both countries is legal, there are many issues relating to polygamous marriage. From a religious perspective, polygamy is sometimes seen as a religious duty, particularly in Islam, where it is allowed under certain conditions. Studies from the Islamic contexts can be seen from the writing of Al-Krenawi (2014), who examines how Islamic jurisprudence shapes polygamy practices, noting variations in interpretation and implementation across Muslim-majority nations. In the Middle East, Al-Shamsi (2016) documents how religious justifications interplay with social and economic factors in polygamous family formation. Anthropological studies by Zeitzen (2018) reveal diverse African approaches to polygamy that include the West African traditions emphasizing extended family networks, Southern African practices linking cattle wealth to multiple marriages, and East African combinations of traditional and religious justifications.

Proponents of polygamy argue that religious texts sanction it and can help promote family stability and harmony (Razak et al., 2023). Polygamous marriages, practiced across various cultures and regions, have garnered significant scholarly attention. Legal scholars like Bedner (2010) examine how different nations approach polygamy regulation. For example, among Western nations, polygamous marriage is completely prohibited. At the same time, in many Muslim-majority countries, it is a regulated permission; in Africa, it is part of the customary law recognition. Some interpret polygamous marriage as a license to diminish women's status, but this represents a misunderstanding of the practice. Reports have seen that Muslim males misused this permission to exploit women in polygamous homes (Noor et al., 2017). This gave rise to a faction maintaining that monogamy represents the sole civilized marital arrangement and the solution to ongoing conjugal strife, disagreements, and other adverse effects commonly associated with polygamous relationships (Safiyanu, 2014). Cook and Kelly (2016) analyze polygamy through human rights frameworks examining gender equality considerations (Alamgir, 2014; Muslimin, 2015), children's rights, economic rights, and social protection mechanisms. Similar studies discussing the rights of the affected parties in a polygamous marriage emphasize how this marriage contributes to the increase of mental health problems among wives and children and destroys family dynamics (Al-Krenawi & Graham, 2016). Critics also argue that polygamy can reinforce gender inequalities by treating women as property and limiting their agency and autonomy (Mat Husin et al., 2024).

The primary purpose of polygamous marriage is to safeguard women's rights while addressing societal issues such as adultery, fornication, and various forms of non-heteronormative relationships that occur outside of marriage (Ghafoor & Elatrash, 2021). Various nations worldwide have taken steps to restrict polygamous marriage through legal measures. For instance, Tunisia has implemented a complete ban on polygamy, while Iran prohibits its citizens from engaging in multiple marriages simultaneously. Due to the widespread abuse and mistreatment of women in polygamous homes, Iraq, Syria, and Pakistan call for its outright prohibition. In Egypt, while polygamy faces neither prohibition nor formal regulation, men must disclose their marital status and obtain consent from current wives when entering into additional marriages. Muslims are excluded from the Marriage Ordinance in Sri Lanka because they do not have to register their practice of polygamy, which, in their opinion, causes polygamous households to neglect their legal obligations (Safiyanu, 2014).

Scholars generally concur that authorizing polygamous unions should involve rigorous criteria to ensure wives' rights are adequately protected within such marriages (Shah &

Meerangani, 2021). Those who have financial instability will have less time to enjoy their spouse, lack of fairness; jealousy; social unrest; disunity; pitting co-wives against each other; physical, emotional and sexual abuse; stress and even economic challenges to the practice of polygamy; and are considered not able to provide justice to wives under Islam (Safiyanu, 2014). The interpretation of Safiyanu reflects the meaning of '*darar shar'i*' under the Islamic Law.

The summarized literature review reveals that while substantial research exists on traditional and cultural-based aspects of polygamous marriages, implications towards parties in a polygamous marriage, economic perspectives, feminism, and right-based discussions, significant gaps remain in understanding the religion-based discussion theory of '*darar shar'i*' as one-factor consideration before an application for a polygamy marriage is approved by the court. While polygamous marriages in Southeast Asia have been studied through various lenses, significant research gaps persist in understanding these practices within Malaysian and Indonesian contexts. There is also a lack of comparative research on Muslim-majority countries in showcasing whether there is coherence in the practice of religious rulings in the practice of polygamy. This research fills this gap by providing insights into the practice of Malaysia and Indonesia as Muslim-majority countries.

This study delved into the restrictions in entering a polygamous marriage, specifically the ability of the men to prove that the marriage will not cause '*darar shar'i*' to the wives and children of the polygamous marriage (Section 23(3)(d), Malaysia Islamic Family Law Act 1984). Although the concept of '*darar shar'i*' (Islamic harm) is broadly applicable across numerous aspects of Muslim life, no precise guidelines exist regarding its specific interpretation and scope in this context. This study critically looks into the Syariah court interpretation of the '*darar shar'i*' concept in deciding before a polygamous application in Malaysia and Indonesia. This research contributes valuable insights to the understudied field of polygamous marriage. It may serve as a reference for future scholars examining how Malaysia and Indonesia protect the rights of wives and children within polygamous unions.

Method

This study adopts qualitative methods using exploratory and fundamental approaches to laws governing polygamous marriage in Indonesia and Malaysia. This forms the foundation for the study. The researcher interviewed two sharia court judges and two sharia lawyers in Malaysia. Semi-structured interviews were conducted with one religious court judge and two legal practitioners to acquire data on the position of polygamy in Indonesia. Data from the library-based approach were later triangulated with data from the semi-structured interview. Both primary and secondary data from the library were analyzed using content, thematic, and comparative analysis. Data from the interviews were analyzed using textual and thematic analysis. Several themes and coding were used in the analysis, including the position of polygamous marriage in Indonesia and Malaysia, the court approach in addressing issues of polygamy, and deliberation on the concept of data share. This research employs a comparative approach to examine how '*darar shar'i*' is interpreted as a prerequisite for polygamous marriage in both Malaysia and Indonesia, intending to develop standardized guidelines for the legal interpretation of this concept.

An Overview of Polygamy in Malaysia and Indonesia

The study indicates that although Malaysia and Indonesia are similar in having a majority Muslim population, both have different legal systems that reflect the impact of colonization in the past. Indonesia's legal framework is a blend of three distinct legal traditions.

It incorporates civil law elements inherited from the Dutch colonial period, Islamic law that primarily governs family and religious affairs, and customary law (known as adat law), which consists of traditional rules and practices that vary among Indonesia's diverse ethnic communities. On the other hand, the Malaysian legal system is unique as it combines multiple sources of law, including English Common Law, Islamic Law (sharia), and customary law, other than the written sources of law. For matters of polygamous marriage, In Indonesia, polygamy is legally regulated under Law No. 1 of 1974 on Marriage, Government Regulation No. 9 of 1975, and Compilation of Islamic Law (KHI). There are special Rules for Civil Servants provided under Government Regulation No. 45 of 1990, where the husband must obtain permission from superiors. The requirements are more stringent, and the civil servant may face disciplinary actions for its violations.

In Malaysia, polygamous marriage is allowed for Muslims, and Muslim family laws are governed by the state. As such, the governance of polygamous marriage is administered by thirteen states and one Federal Territories. Although the requirements to apply for polygamous marriage are the same throughout all states, there are minor differences in the procedure. From the requirement perspective, it can be said that Indonesia and Malaysia follow the requirements under Islamic law accordingly. While Malaysia and Indonesia share common religious foundations in their approach to polygamous marriage regulation, their legal frameworks reflect distinct solutions to similar challenges. Malaysia's system emphasizes judicial discretion within a strictly religious framework, while Indonesia's integrated approach provides broader regulatory oversight.

Issues on Polygamous Marriage

Malaysia and Indonesia are predominantly Muslim countries, and polygamy is allowed under Islamic law, which is recognized as one of the legal systems in both countries. According to the 2010 Indonesian Population Census, only about 3 percent of married men in Indonesia have more than one wife. However, it is not easy to obtain accurate statistics on polygamous marriages in Indonesia, as many are not registered and are practiced informally.

Under Malaysian law, Muslim men can marry up to four wives, provided that they meet specific requirements. In the Islamic Family Law Act (Federal Territory) 1984 (IFLA) and other state Islamic family law legislations, specific prerequisites and criteria are established that courts must evaluate before permitting an individual to enter into a polygamous marriage arrangement. Courts must be satisfied that the husband is financially capable of supporting all wives and dependents, is able to treat all wives equally, and there exist valid grounds according to sharia (Islamic Law). However, there are slight differences in applying the first wife's requirement to consent (Section 23(4), IFLA). Additionally, he must obtain permission from a sharia court (Section 23(1), IFLA), which will consider other than financial ability, the potential harm to existing wives and children, and reasons for seeking additional wives. The legal framework governing polygamous marriage in Malaysia is fraught with inconsistencies and challenges as the jurisdiction to administer Islamic law is divided into thirteen states and one Federal territory ([Ninth Schedule, Federal Constitution of Malaysia; Yusof, 2019](#)).

Similarly, the legal basis for polygamous marriage in Indonesia is the Marriage Law of 1974, which allows men to take up to four wives if they meet specific requirements. Under the law, a man may take additional wives if he has the written consent of his first wife and if he can provide for all of his wives and children financially and emotionally. Additionally, he must seek permission from a court of law and provide evidence of his ability to meet these requirements ([Ridwan et al., 2024](#)).

There have been some calls for reform of Malaysia's and Indonesia's polygamy laws, with some women's rights groups calling for greater legal protections for women in

polygamous marriages. These include requirements for men to provide equal support and rights to all of their wives and children, as well as the need for stricter regulation of polygamous marriages to prevent abuse and exploitation (Muslimin, 2015).

Polygamy also faces some extrinsic issues relating to the exploitation of women. Zain et al. (2023) highlight the rise of polygamy scams, exacerbated by document falsification and inadequate regulatory oversight. Huda et al. (2023) reveal that Malaysian men increasingly engage in cross-border marriages in Southern Thailand to legitimize polygamous unions, thereby circumventing local legal restrictions (Razak, 2025). This trend underscores a cultural acceptance of polygamy, albeit with significant repercussions for Malaysian women and men (Razak, 2025), who often face marginalization in these arrangements. The wife faces challenges if the marriage is not registered. Failure to register results in the non-recognition of the wife as a “legally wedded wife” under Malaysian law. The children will later inherit the problem as they will not be registered as children born into a marriage under Malaysian law.

For the people of Indonesia, polygamy is not celebrated and typically occurs in secrecy. This can be seen in a study by Darmawan et al. (2022) on marriage resilience based on cases decided in the religious court at Bener Meriah, Aceh. The study reported that from 2017-2020, there was only one application for polygamy marriage that was approved. The number did not reflect the actual number of polygamy marriages in that district as the polygamous research was not revealed. The Indonesian authorities impose penalties on government employees who take additional wives without obtaining consent from their first spouse. While polygamous marriages are addressed within Indonesian matrimonial legislation, the actual practice in Indonesian society often draws significant criticism. Many polygamous arrangements fail to adhere to fundamental marital principles, contributing to widespread negative perceptions of polygamy throughout the country (Astari et al., 2020).

***Ḍarar Shar'ī* as a Restriction of Polygamous Marriage in Islam**

Under Islamic law, polygamy acquires its authority from the Holy Quran (Noor et al., 2017). The implications of polygamous marriage extend beyond individual families, affecting societal norms and legal structures. Restricting a man to only one wife would go against the nature of some men; nevertheless, in protecting the rights of the wives, Islam imposes strict conditions on a man who wants to marry another wife (Shukor et al., 2012). He must demonstrate the capability to financially support and care for the entire family while treating all parties equitably and impartially (Yahya & Mahmud, 2020). The fourth chapter of the Quran (Surah al-Nisā'), in its third verse, permits Muslim men to marry up to four wives but subsequently cautions against taking multiple wives if a man cannot ensure equitable treatment among them (QS. al-Nisā, 4:3).

In the same surah, the Quran reminded the Muslims of the ability to do and retain justice, although one intends to do so (Surah al-Nisā, 4:129). According to Othman (2012), three-quarters of men in polygamous marriages fail to meet their obligations as providers and protectors. More than 80% of these husbands cannot sustain the required *naḥḥ* *ḥāḥ* (material and economic support) for themselves and their children.

The concept of *ḍarar* can be discussed from the concept of *maḥḥ*, which means ‘danger’, ‘crime’, ‘ugliness’, ‘damage’, and material and immaterial loss. *Maḥḥ* also means ‘disaster,’ ‘catastrophe,’ ‘sorrow,’ ‘distress,’ and ‘the means that cause it,’ both in worldly and hereafter life (Hashim et al., 2020). According to al-Ghazālī (2008), *maḥḥ* destroys the importance of the five *maqāḥ* *al-sharīah*, namely religion, soul, intellect, lineage, and property. Concerning polygamous marriage, the requirement that the intended marriage shall not cause *ḍarar* to the wives and immediate family is in line with the prevention of *maḥḥ*. In short, the polygamous marriage shall not cause, among others, sorrow or distress to the wives

and children. In deciding whether there will be *ḍarar* to the prospective marriage, the court will look into this consideration.

Generally, the concept of *ḍarar shar'ī*, according to the *fuqahā'*, is based on the principles of benefit and harm prevention in Islamic law, aimed at safeguarding the well-being of the Muslim community. The principle of benefit in Islam encompasses three main aspects: avoiding harm, bringing benefit, and emphasizing noble character (Mustapha & Junoh, 2022). The concept of *ḍarar* in Islamic law is a fundamental basis to ensure individuals' protection and welfare from harm. Examining the concept of *ḍarar shar'ī* also aligns with *maqāṣid al-shar'īah* (objectives of Islamic law), specifically the *daruriyyāt al-khamsah* (five necessities), which aim to preserve religion, life, lineage, property, and intellect (Hussin et al., 2023).

The concept of *ḍarar shar'ī* has evolved through time. Ibn Manzur (2003), also in *Lisan al-Arab*, states that harm or *ḍarar* refers to anything that causes damage or danger, which is the opposite of benefit and includes injury or hardship. Meanwhile, al-Shāṭibī (1991) defines *ḍarar* as an abuse that involves the five essential aspects of *maqāṣid al-shar'īah*.

In marriage, the concept of *ḍarar shar'ī* plays a vital role in protecting the family institution from any harm that could undermine harmony and justice in the marital relationship (Dimon, 2019). In this regard, *fuqaha* (Islamic jurists) generally interpret *ḍarar* as any action negatively affecting religion, self, children, intellect, property, and honor (al-Nadawi, 1994). This aligns with al-Shāṭibī's (1991) view that harm refers to mistreatment or abusive behavior by a husband towards his wife that impacts the five sharia interests (*daruriyyāt al-khamsah*): the protection of religion, life, lineage, property, and intellect. This definition shows that the concept of *ḍarar* is not limited to physical harm but also includes emotional and spiritual harm, which can affect a wife's well-being (Dimon, 2019).

Under the polygamy context, al-Shāṭibī (1991) interpreted *ḍarar* to include abuse towards the wife that may threaten her life, lineage, wealth, and mind of a wife. This comprehensive explanation made by al-Shāṭibī is not foreign within the context of abuse towards a wife in a polygamous marriage (Nurcahaya et al., 2017). Quranic scholars have interpreted the concept of *ḍarar* through multiple dimensions across different verses, encompassing *al-huznu* (grief), fear, horror, distress, illness, poverty, and hardship. In light of this understanding, Islamic jurisprudence establishes a financial obligation upon husbands to provide for their wives, recognizing that failing to fulfill this duty would cause harm to the wife. The duty arises as soon as the marriage is completed and ends through death or separation (Santoso & Nasrudin, 2021; Muda et al., 2017).

According to al-Dardir (al-Dusuqī, n.d.), a wife has the right to request a divorce due to harm when her husband acts against Islamic teachings, such as abandoning her without a valid reason or insulting her and her family. The Shāfi'ī and Ḥanāfi schools of thought hold that although injury or harm can damage a marital relationship, it is not the sole reason to permit divorce (al-Shirbinī, 1998). Instead, they emphasize alternative solutions before considering divorce as a resolution. This approach is evident through the authority given to judges to alleviate harm without resorting to divorce, such as by instructing the husband to improve his behavior or imposing disciplinary actions if orders are not followed (Tengku Muda et al., 2021). Zanariah (2019) provides a thorough explanation in her work that emotional suffering inflicted upon a wife constitutes one of the elements that can result in *ḍarar shar'ī* (legal harm) to her. She further highlights that emotional *ḍarar* differs from physical *ḍarar* in that it cannot be concretely demonstrated through visible physical effects or medical documentation (Dimon, 2019). In the Malaysian case of Nor Azroha Azizan vs. Mohamad Faizal Nor (2015) 42(2) JH 259, The court determined that emotional *ḍarar* can manifest through verbal expressions, failure to acknowledge the wife's status, imposing financial limitations, excessive physical control, and other comparable circumstances. In the case of Aisyah Abdul Rauf vs W Mohd Yusuf W Othman (1991) 7(2) JH 152, the judicial body upheld the wife's appeal. It rejected

the husband's request to enter into a polygamous marriage arrangement, despite his apparent financial capacity, due to his failure to satisfy other essential prerequisites for polygamy. In the legal context, Raihanah Abdullah (1997) states that any actions that can cause harm to the household, particularly the wife as the victim, fall under the meaning of *darar*. Section 2 of the Islamic Family Law Enactment (State of Selangor) 2003 interprets it as follows:

“Darar shar’i” means harm, according to what is normally recognized by sharia, affecting a wife in respect of religion, life, body, mind, dignity, or property;”

In this context, examples of actions considered *darar shar’i* include a husband physically abusing his wife, neglecting her maintenance, failing to provide any support, treating her poorly, or exploiting her in immoral ways. Therefore, a wife who experiences *darar shar’i* is entitled to protection under Islamic law and legislation (Tengku Muda et al., 2021).

Emotional abuse refers to a husband’s deliberate actions to affect the wife’s mental and emotional well-being, such as social isolation, continuous verbal assault, humiliation, and intimidation that undermine her dignity (Dimon, 2019). Thus, the concept of *darar shar’i* in Islamic law emphasizes the importance of protecting wives from any form of physical or emotional abuse that could endanger their well-being. It outlines the rights of wives to be protected and respected and empowers the law to act (Hussin & Fauzi, 2023).

Legal Framework Governing Polygamy in Malaysia and Indonesia.

Generally, both Malaysia and Indonesia practice Islamic law in governing polygamous marriage. Where the basis to allow for polygamous marriage is the same, the primary references are the Al Quran and Hadith; the practice and execution differ due to the cultural interpretation of Quranic authorities applied by both countries. The following table (Table 1) summarizes the findings.

Table 1.
Comparative Analysis of Malaysian and Indonesia Law on Polygamy

Categories	Malaysian Law	Indonesian Law
Sources of law	The Law of Polygamous Marriage is provided by Islamic Family Law, which is administered by the state.	The Law of Polygamous Marriage is regulated by Law No.1 of 1974 (Marriage Law) and <i>Kompilasi Hukum Islam</i> (KHI).
Provision related to matrimonial offenses in a polygamous marriage	There are several provisions for penalties related to polygamous marriage : Section 123, IFLA(Federal Territories) 1984 (Polygamy without Court's permission) Section 127, IFLA(Federal Territories) 1984 (III-treatment of wife) Section 128, IFLA(Federal Territories) 1984 (Failure to give proper justice to wife)	For the general public, there is no provision for sanctions/penalties if the conditions for polygamy are violated. Provisions relating to the strict control of practicing polygamy among the civil servants, military, and police. Article 4 of Government Regulation 45/1990 Civil servants who do not report their second/ third/ fourth marriage within one

		year from when the wedding took place are subject to severe disciplinary penalties. Article 15 Government Regulation 45/1990
Court Permission for polygamy	Polygamy is allowed in Islamic Family Law with prior permission in writing of the Court. Section 23 (1), IFLA(Federal Territories) 1984	Indonesian marriage law is based on monogamy, but the court can permit polygamy application if alternative conditions are met. Article 1- 5, Law No.1 of 1974 & Article 55-59, KHI
Requirements for applying polygamy	Four requirements to be fulfilled Section 23(4) (a)-(d), IFLA(Federal Territories) 1984:	Polygamy applications must fulfill alternative and cumulative conditions. Article 4(2) Law No.1 of 1974 & Article 57 KHI <u>Cumulative conditions:</u> Article 5(1) Law No.1 of 1974 & Article 58 KHI
The wife's consent for polygamy	The wife's consent is not stated in the provision. A Wife's consent or view is mentioned in Section 23(3) of IFLA that a husband is required to get his wife's consent or view when submitting the form for application to the court. However, the wife's consent is not the determining factor for the court to allow polygamy.	The wife's consent is stated in the provision. Article 5(1) Law No.1 of 1974 & Article 58 KHI
Provision of the "Ḍarar Shar'ī"	There is a legal provision on the interpretation of "Ḍarar shar'ī." Section 2, IFLA (Federal Territories) 1984 The element of preventing Ḍarar shar'ī is one of the requirements to be fulfilled in allowing the polygamy application. Section 23(4) (d), IFLA(Federal Territories) 1984	There is no specific provision on the interpretation of "Ḍarar shar'ī." The element of preventing Ḍarar shar'ī is related to the provision on the cumulative requirements that need to be met for polygamy application. Article 5, Law No.1 of 1974 & Article 58 KHI

Interpretation of “<i>Ḍarar Shar’ī</i>” by the court decision	The interpretation of “<i>Ḍarar Shar’ī</i>” is based on the provision in Section 2, IFLA(Federal Territories) 1984, <i>Ḍarar shar’ī</i> means harm, as understood in Islamic law that affects a wife’s religion, life, body, mind, behavior, or property. “<i>Ḍarar shar’ī</i>” that can affect the wife with respect to the property. In the case of <i>Ainisram bin Ramli vs. Norliah Misnan</i> (2017) 1 SHLR 47, “<i>Ḍarar shar’ī</i>” that can affect the wife with respect to life, body, mind, and morals. In the case of <i>Zambri bin Idrus vs. Zaiti Akhtar bt Omar</i> (2017) 4 SHLR 12 There would be no issue of <i>Ḍarar shar’ī</i> in the case where the wife consented to the husband practicing polygamy. As illustrated in the case of <i>Mohd Izudin b Mohd Illias vs. Rozeta Hassan</i> (2013) 3 ShLR 59 and the case of <i>In Re Ruzaini Bin Hassan</i> (2002) 15 JH 79.	<i>Ḍarar shar’ī</i> in the sense of danger in the world and the hereafter so that the judge permits polygamy because it prevents the risks of immorality it causes. <i>Ḍarar shar’ī</i>, which means damage (<i>mafsadah</i>) and the opposite of <i>maṣlahah</i>. In the case No: 2202/Pdt.G/ 2015/ PA.Kdl,
Similarities	Court permission is required to apply for polygamy. The element of preventing <i>Ḍarar shar’ī</i> is a critical factor for the court in determining the permissibility of polygamous marriages.	

Sources: Law and Provision Related to Matrimonial Offenses in a Polygamous Marriage

Sources of Law and Provision Related to Matrimonial Offenses in a Polygamous Marriage

Malaysia's legal structure for polygamous marriage operates under a dual system, with Sharia Courts holding exclusive jurisdiction over Muslim family matters (Article 121(1A), Federal Constitution). This court has the power to hear cases related to divorce, child custody, and marriage, including polygamous marriages. The primary legislation is the Islamic Family Law (Federal Territories) Act 1984 and State Islamic Family Legislation, which establishes the fundamental requirements for polygamous unions. The Federal Constitution positions the jurisdiction to govern Islamic matters under the state list, making the governance of Islamic-related matters, including polygamous marriage, under state jurisdiction. Each state maintains its own Syariah Court system, leading to variations in interpretation and implementation across territories ([Samah et al., 2023](#); [Ninth Schedule-State List, Federal Constitution](#)). For example, in Terengganu (under the Administration of Islamic Family Law Enactment 1985), a man only needs the sharia judge’s permission to enter into a polygamous marriage. However, in other states—such as under the Islamic Family Law Enactments of Selangor (2003), Kelantan (2002), and the Federal Territories (1984) — stricter requirements apply. These include the mandatory presence of the husband, his current wife, the intended wife, her *wali* (guardian), and other relevant parties before such permission is granted ([Yusof, 2019](#); [Afdhal et al., 2021](#); [Halim & Pratama, 2020](#)).

In Perlis, under the Islamic Family Law Enactment 2006, only the applicant's presence is required to apply for polygamy. However, entering into a polygamous marriage without the Sharia High Court's permission is considered an offense and is punishable under Section 123 of the Act (Afdhal et al., 2021). Such a marriage cannot be officially registered unless it is proven to have been conducted in accordance with sharia. The men can be prosecuted for two offenses under the state Islamic family laws. The first is committing a marriage contract without permission, which carries a maximum penalty of RM2,000 or one year in imprisonment. The man can also be charged under Section 125 of the Islamic Family Law Act (Federal Territory) 1984 without permission, which carries a maximum penalty of RM5,000 or three years in prison.

As part of the procedure, the man must apply to the Syariah High Court and submit a declaration outlining why the proposed marriage is considered just and necessary. He must also provide details of his current income, existing responsibilities, and financial obligations and liabilities (Section 23(3) of the Islamic Family Law Act (Federal Territory) 1984). Section 23. (1) provides: *No man, during the subsistence of a marriage, shall, except with the prior permission in writing of the Court, contract another marriage with another woman nor shall such marriage contracted without such permission be registered under this Act: Provided that the Court may if it is shown that such marriage is valid according to sharia order it to be registered subject to section 123.*"

Polygamy marriage in Indonesia is regulated by the Marriage Law of the Republic of Indonesia No. 1 of 1974 (Marriage Law). Essentially, Article 1 of Law No. 1 of 1974, as amended by Law No. 16 of 2019 on Marriage (commonly referred to as the Marriage Law), defines marriage as a physical and spiritual union between a man and a woman as husband and wife, aimed at building a happy and lasting family (household) founded on the belief in the one and only God (Halim & Pratama, 2020; Afdhal et al., 2021). Based on these provisions, Indonesian marriage law is based on monogamy (Rizki et al., 2020). Article 3(1) of the Marriage Law upholds monogamy, stating that a man may have only one wife and a woman only one husband.

However, the Marriage Law provides an exception, as in Article 3, paragraph (2) of the Marriage Law, in which the court can permit a husband to have more than one wife if the parties wish to do so. In Article 4 paragraph (2) of the Marriage Law, it is further explained that a husband may be permitted to take another wife if the court is satisfied that his current wife is unable to fulfill her marital duties, suffers from a disability, or incurable illness, or is unable to have children.

In addition to the alternative requirements mentioned above, in applying for more than one wife, the husband must meet the cumulative needs as follows (Article 5 paragraph (1) of the Marriage Law) that includes the agreement from the wife/ wives; a certainty that the husband can provide for the living needs of his wives and children and a guarantee that the husband will treat his wives and children fairly. The conditions for polygamy in Indonesia are callous as stipulated in the Marriage Law and its Implementing Regulations. However, if they violate the polygamy regulation, the sanctions are not mentioned. In Indonesia, Islamic norms have been codified into state family law, and applications for polygamy are handled by State 'Religious Courts' (*Pengadilan Agama*). Indonesia takes a more integrated approach, combining civil and religious law through Article 3(2) of the Marriage Law and Article 56(1) of the Compilation of Islamic Law. The *Pengadilan Agama* (Religious Courts) operate at both district and provincial levels, creating a hierarchical system of religious jurisprudence that works alongside civil courts (Nasution & Muchtar, 2024; Idri, 2009). Indonesian regulations, while similar in principle, emphasize explicit consent from existing wives, a maximum limit of four wives, proof of financial and emotional capability, and a clear justification for

additional marriages (Wahyudi, 2018). Under Indonesian law, Article 3 section (2) of the Marriage Law provides that:

“The court may authorize a husband to have more than one wife if desired by the parties concerned.”

Another legal source for polygamy is provided under Article 56, section (1) of the Compilation of Islamic Law, which provides:

“Husbands who wish to have more than one wife must obtain permission from the Religious Court.”

Indonesia maintains stricter regulatory controls through its integrated legal system. The country's approach explicitly prohibits polygamous marriages for non-Muslims while allowing customary practices to exist alongside legal frameworks. This creates a more nuanced system of recognition and regulation (Ridwan et al., 2024). For non-Muslims, polygamous marriages are not recognized under Indonesian law. Non-Muslims who wish to enter into polygamous relationships can do so through customary or traditional practices, but these marriages are not legally recognized.

Although their approaches differ, both legal systems incorporate measures to protect women's rights. Malaysian law emphasizes the right of existing wives to be heard in court proceedings. However, consent might not be compulsory, protection against unauthorized marriages, equal maintenance rights, and property division safeguards. On the other hand, Indonesian law focuses on the substantial consent requirements from existing wives, a precise financial protection mechanism, children's rights from all marriages, and equal treatment provisions.

Court Permission and Requirements for Polygamy

In Malaysia, the Sharia High Court may grant permission for polygamy if it deems the proposed marriage just and necessary. This includes situations such as the existing wife's sterility, physical incapacity, refusal to resume marital relations, or mental illness. The court must also be satisfied that the husband has sufficient financial means to support all current and future wives and dependants in accordance with sharia. Additionally, the court will assess the presence of any elements of *ḍarar shar'ī* (harm).

This is demonstrated in several Malaysian Syariah court cases, such as Aisyah Abdul Rauf v. W Mohd Yusuf W Othman (1991) 7(2) JH 152, where the Court ruled that all conditions under Section 23(4) hold equal weight and must be individually proven. In Ainisram bin Ramli v. Norlia Misnan (2017) 1 SHLR 47, the Court affirmed that the plaintiff bears the burden of establishing all four requirements stipulated under Section 23(5) of the Islamic Family Law (State of Selangor) Enactment 2003 (EUKIS 2003). Non-fulfillment of any of these conditions would warrant the dismissal of the application.

According to the Indonesian Marriage Law, husbands who wish to have more than one wife must obtain permission from the Religious Court (Nasution & Muchtar, 2024). Article 4(1) of the Marriage law provides, *“If a husband desires to have more than one wife, as referred to in Article 3 paragraph (2) of this Law, he shall be required to submit a request to the Court of Law in the region in which he resides”*. A subsequent marriage conducted without the approval of the Religious Court holds no legal validity, as stipulated in Article 56 of the Compilation of Islamic Law (KHI). Consistent with the provisions of the Marriage Law, Article 57 of the KHI states that the Religious Court will only grant permission for a husband to enter

into a polygamous marriage under specific circumstances—namely, if the wife is unable to fulfill her marital duties, suffers from a disability or an incurable illness, or is unable to bear children. Some authors mentioned that judges in the Religious Courts were not inclined to favor women's rights in their interpretation of the reasons for polygamy (Mhd Yazid, 2023).

The Wife's Consent for Polygamy

In Indonesia, (Article 5 paragraph (1) of the Marriage Law) requires the husband to get the agreement from the wife/ wives to enter into a polygamous marriage. Article 58 KHI also refers to Article 41 letter b Government Regulation No. 9 of 1975 concerning the Implementation of Law No. 1 of 1974 concerning Marriage (after this referred to as Government Regulation 9 of 1975), which states that the consent of the wife or wives can be given in writing or orally. However, even if there is written permission, this agreement is confirmed by the wife's oral consent at the Religious Court hearing. The provisions of Article 43 of Government Regulation No. 9 of 1975 state that: *“If the Court believes that there is sufficient reason for the applicant to have more than one wife, the Court will issue a decision in the form of permission to have more than one wife.”*

The consent of the wife or wives shall not be required in instances where it is not feasible to obtain their approval or involve them as parties to the agreement, such as when the wife's whereabouts have been unknown for a minimum period of two (2) years, or under other circumstances that warrant judicial assessment by a judge, in accordance with Article 5 paragraph (2) of the Marriage Law. Recent developments show that Malaysian courts are more protective of wives' interests. In cases where husbands contract polygamous marriages without permission, courts have upheld existing wives' rights to claim compensation (*ta'wīd*) and to petition for divorce under the principle of *ḍarar* (harm). This approach, seen in cases like *Nor Bee v Ahmad Shanusi* (2020), demonstrates the courts' efforts to balance religious rights with protecting women's interests.

The judicial treatment of polygamous marriages in Malaysia and Indonesia reveals complex intersections between religious law, gender equality, and women's rights. While both countries attempt to regulate polygamy through legal frameworks, their court decisions often reflect inherent gender power imbalances. Malaysian Sharia Courts' handling of polygamy applications demonstrates both progress and limitations in addressing gender justice. While courts require proof of financial capacity and fair treatment, these requirements primarily focus on material conditions rather than addressing fundamental power asymmetries. The requirement for existing wives' consent, while seemingly protective, often places women in difficult positions where social, religious, and family pressures may compromise their actual ability to refuse permission. The case of *Aishah Abdul Rauf v Wan Mohd Yusof Wan Othman* (1991) 7 (2) JH 152 highlighted how courts sometimes prioritize procedural compliance over substantive gender equality, focusing more on whether proper permission was obtained than on the broader implications for women's rights.

Indonesian courts have shown varying degrees of gender sensitivity in polygamy cases. The Marriage Law No. 1 of 1974 and its judicial interpretation reflect attempts to protect women's interests while maintaining patriarchal structures. The Constitutional Court's decision in Case No. 12/PUU-V/2007 upheld restrictions on polygamy but primarily through the lens of administrative regulation rather than gender equality. In this case, the court deliberated on the conditions and requirements of polygamy regarding the consent of the wife and the court. The court decided that if there is no such consent, it shall be possible to file an objection to or cancellation of a marriage.

However, some Indonesian judges have demonstrated more progressive approaches. In several cases, the Religious Courts have denied polygamy applications even when wives consented, recognizing that consent might be coerced or given under duress.

Courts Approaches on *Darar Shar'ī*

The polygamy law in Malaysia prioritizes the condition that proposed marriages do not cause *darar shar'ī* to wives, and this is in line with the application of the polygamy law in Indonesia. One of the conditions for polygamy is that there is an obligation to grant permission from the first wife (Afdhal et al., 2021; Yusof, 2019). This is intended by the legislators as a preventive measure so that the polygamous marriage in question does not cause *darar shar'ī* to the wife or children in the future (Santoso & Nasrudin, 2021). *Darar shar'ī*, as defined in Section 2 of the Islamic Family Law Act (Federal Territory) 1984, Malaysia, denotes harm that is acknowledged as such based on the accepted interpretations and principles of Islamic law. In Aisyah Abdul Rauf vs. W Mohd Yusuf W Othman (1991) 7 (2) JH 152, in its ruling, the Board of Appeal overturned the lower court's decision to grant the husband's application for polygamy, thereby allowing the wife's appeal. The Board emphasized that the burden of proof lies with the husband to demonstrate his capacity to fulfill the stringent legal and moral requirements prescribed under Islamic family law, particularly the obligation to treat all wives equitably, as mandated by both the Quran and statutory law. Upon review, the Board found the evidence presented to be insufficient in establishing that the husband could guarantee equal treatment among his current and prospective wives.

In the case of Ainisram bin Ramli vs. Norliah Misnan (2017) 1 SHLR 47, the Court held that even though section 23(5) of the Islamic Family (Selangor) Enactment 2003 (EUKIS 2003). In this case, the wife has been sick for seventeen years. The court allowed the husband's application for polygamy after taking into consideration that the couple has had no marital relationship in the past 17 years because the wife has been sick.

There have also been instances where the Syariah Court approved applications for polygamy, notwithstanding objections raised by the existing wives. For example, in Shafri bin Jamaluddin v. Kuning binti Kassim [2006] JH XV(II), the court granted the husband's request for polygamy and, as part of its ruling, ordered him to provide monthly maintenance in the amount of RM1,500.00 for his wife and children.

In the case of Ainisram bin Ramli vs. Norliah Misnan (2017) 1 SHLR 47, in determining the presence of *darar shar'ī*, the court examined the *qarīnah* (circumstantial evidence) pertaining both to past occurrences and the potential future implications of the marriage. The court held that the husband did not make a financially sound plan by providing the necessary food, clothing, and lodging needs for the wife. The court also held that the applicant's three children were still young and required his attention. This must be given priority over other matters.

The court emphasized that the legal provisions on the application for polygamy are intended to ensure justice in polygamous households as required by the Quran. This is based on *fiqh*: "*Avoiding harm takes precedence over bringing good*" that carries the meaning that if a particular action ends in both good and harm, then it is preferable first to thwart harm.

In HI vs. MA (2019 3 SHLR 23), the wife contended that the proposed marriage would tarnish her reputation and dignity, thus causing *darar shar'ī* to her. Similarly, in Zambri Idris v Zaiti Akhtar (2017) 4 SHLR 12, the application for polygamy was denied because the intended marriage was likely to cause harm (*darar*) to the defendant, the children, and a third party. According to the defendant, the intended marriage caused her psychological suffering and disturbed her children's education. The plaintiff and defendant frequently fought over

polygamy. The defendant was additionally embarrassed since the plaintiff openly revealed his relationship with the third person and publicly stated his intention to practice polygamy.

This study indicated that discontented wives were given the liberty to appeal against the Syariah Court's permission for the husband's polygamy application. In the case of *Ayisha Begum Abdul Kadir vs. Maideen Nainamusa* 2004 CLJ (Sya) pp. 46-57, the appellant successfully challenged her husband's capability to provide maintenance and fair treatment to both wives, and the court allowed her appeal eventually.

In another case of *Rajamah Mohamad vs. Abdul Wahab Long* 2004 CLJ (Sya) pp. 233-241, the appellant argued that the husband tendered false monthly income during the hearing of the application for permission to practice polygamy. The court accepted the wife's appeal on the husband's non-fulfillment of the required conditions imposed for polygamy application.

In cases where a wife consented to the application of her husband to contract another marriage, the court will not deliberate the *ḍarar shar'ī* requirement. In short, the consent of the wife negates *ḍarar shar'ī*. This can be seen in the case of *Zuraimi Mustafa vs. Mazliza Mat Amin* (2013) JH 37(1) 129; a defendant's wife consented to his husband to practice polygamy, and no issue of *ḍarar shar'ī* was raised. In the case of *Mohd Izudin b Mohd Illias vs. Rozeta Hassan* (2013) 3 ShLR 59, the defendant's wife consented to the second marriage, and the Syariah High Court (Kuala Lumpur) was satisfied that there was no impede for the Plaintiff to marry his prospective second wife. However, in the case of *In Re Ruzaini Bin Hassan* (2002) 15 JH 79, though the defendant's wife gave consent to the Plaintiff's husband to practice polygamy, the Syariah Court rejected the application. The reason was that the husband had insufficient means to support more than one wife.

In some religious court decisions in Indonesia, judges still allow a husband to do polygamy, even without the permission of the first wife, or the judge still enables a husband to do polygamy, even though he does not fulfill any of the alternative or cumulative requirements stipulated by the marriage law. The following discussion is based on the analysis done on several decisions of religious courts in Indonesia regarding the meaning of *ḍarar shar'ī* in the *ratio decidendi* of judges in refusing or granting permission for polygamy.

In the case of the Bengkalis Religious Court Judge Decision No. 0307/ Pdt.G / 2017/ PA.Bkls, the court interprets *ḍarar shar'ī* to mean a sense of danger that includes danger in the world and the hereafter. Therefore, the judge permits polygamy because it prevents the dangers of immorality it causes, one of which is falling into adultery, for example. The relationship between the Petitioner and the Petitioner's wife-to-be is so close that if this situation prolongs, immorality will befall them; therefore, giving the Petitioner permission to marry his prospective wife is a solution that is *maṣlahah* for all parties. This is in accordance with the Islamic legal maxim (*qawā'id al-fiqhiyyah*) "*Idhā ta'āraḍa maḥsadatāni rū'iya a'ḍamahuma ḍararan birtikābi akhāfahumā*" which means that if there are two equally harmful cases, then it must be safeguarded by a greater degree of harmfulness, by working on a lighter danger.

In the Sidoarjo Religious Court Decision No. 1821 / PDT.G / 2013 / PA.SDA, the judge, used the jurisprudence principle: "Leave something that leads to danger or *muḍarāt* to seek for benefit." In this decision, where the case of the prospective second wife was already pregnant, the Judge looked at other considerations, that is, social developments and the Law's development. If a child born without a father is exposed to greater harm, then the child becomes an official child of a valid marriage (Kurniawan, 2019). The decision ratio of Sidoarjo judges is in line with the considerations of the Kota Baru Religious Court panel of judges No. 158/ Pdt.G/ 2011/ PA.KTB and two Council Judges Decision of the Curup Religious Court in the same year, i.e., No. 142/ Pdt.G/ 2013/ PA CRP and Case No. 542/ Pdt.G/ 2013/ PA CRP. Even though most Indonesian people are Muslims, some do not understand the law related to the rules of association in Islamic law. The rule of "rejecting the damage takes precedence over attracting kindness" is what prompted the Kendal religious judges to refuse permission for

polygamy because the prospective second wife was pregnant during the application. The consideration of the panel of judges in Decision No. 2202/Pdt.G/2015/PA.Kdl further protects the wife's rights from scandals committed by husbands with other women. From a sociological point of view, the opinion of the Kendal Religious Court Judge reflects the value of benefits, that is, providing lessons for single women not to have a relationship with a man who is married. The potential damage to the existing wife's happiness will be a barrier to a request for polygamy to the court.

Courts face significant challenges when addressing polygamous marriages in both jurisdictions, where such unions are legally recognized and only allowed to Muslims. The legal treatment of these marriages requires carefully balancing competing principles, including protecting vulnerable parties, maintaining legal certainty, and respecting religious and cultural practices. Courts have developed approaches to protect the interests of multiple wives while allowing for polygamous unions. Principles attached to *ḍarar shar'ī* have been used in these approaches, as stated in the cases above. Courts in countries like Indonesia, where polygamy is legally regulated but restricted, have developed frameworks requiring proof of first wife's consent and demonstrable financial capacity to support multiple households (Nurmila, 2009). This approach attempts to balance religious freedom with women's rights and social stability. Malaysian courts have increasingly focused on protecting wives' rights while maintaining legal certainty. In the case of Fathul Bari Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors (2012) 4 MLJ 281, the Federal Court addressed the balance between a husband's right to polygamy and the state's authority to regulate such marriages through statutory conditions.

In summary, the interpretation of *ḍarar shar'ī* in the Malaysian Sharia and Indonesian courts was based on the guidelines provided in the Quran and Sunnah. However, in deliberating what amounts to *ḍarar* court applies its discretionary prioritizing benefit for all, especially the wives and children. Decisions sometimes are different from one case to another. Shariah Courts in Malaysia often consider the aftermath of polygamous marriage, looking into the possibility of harm to all wives and children, and the Indonesia Religious Court looks into the repercussions and harm of not allowing polygamous marriage other than implications towards wives.

Polygamous Marriage on Civil Servant

If polygamy performers are the state civil servants, the Indonesian National Military or the Indonesian National Police as the state apparatus is deemed obliged to provide good examples for society and should not commit acts categorized as *ḍarar shar'ī* to their wife and children by practicing polygamy as stated in Article 1 point 3 of Law No. 5 of 2014 concerning State Civil Apparatus. Meanwhile, special provisions governing marriage permits for civil servants to have more than one wife (polygamy) are contained in Article 4 of Government Regulation 45 of 1990, which reads:

- (1) A male civil servant with more than one wife must obtain prior permission from the official.
- (2) Female civil servants cannot become second/third/fourth wives.

An official who receives a request for permission to have more than one wife is obliged to pay close attention to the reasons stated in the letter requesting permission and consider the superior of the civil servants concerned, which is mentioned in Article 9 paragraph (1) of Government Regulation No. 45 of 1990. While Article 10 paragraph (4) Government Regulation No. 10 of 1983 states that other conditions must be met to be able to practice polygamy, namely permission to marry more than one wife is not granted by the official if the act contradicts the teachings/ religious regulations of the civil servant concerned; the

polygamous marriage does not meet at least one of the alternative conditions and the three cumulative conditions; the marriage is contrary to the prevailing laws and regulations. Article 15 of Government Regulation No. 45 of 1990 stipulates that civil servants who fail to report their second, third, or fourth marriage within one year from the date of the wedding are subject to severe disciplinary penalties, as outlined in Government Regulation No. 30 of 1980, the Disciplinary Regulations for Government Employees.

Conclusion

Polygamous marriage, while permitted in Islam, is often subject to misuse and misinterpretation, diverging from its original intent as outlined in Islamic teachings. In response, Islamic law imposes stringent conditions to ensure such marriages are entered responsibly and justly. This study highlights that, although the Syaria Court considers various conditions, there remains an insufficient emphasis on evaluating the potential for *ḍarar sharʿī* (legitimate harm) to the wife. The analysis further confirms that the welfare and rights of existing wives are a central concern in polygamy applications. Given the increasing number of reported cases involving the abuse of wives and children in polygamous households, it is recommended that courts place greater focus on the assessment of *ḍarar sharʿī* alongside considerations of justice, equity, and financial capability. To strengthen this approach, further empirical research is necessary to identify the common factors that contribute to *ḍarar sharʿī* within polygamous marriages. Such findings would not only enrich the legal understanding of polygamy in the context of Islamic family law but also offer valuable insights for policy development and legal reform aimed at safeguarding the rights and well-being of affected family members.

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