

OPEN MARRIAGE: RULES FOR FREE SEX BETWEEN COUPLES IN HETEROSEXUAL MARRIAGES ACCORDING TO ISLAMIC AND CONVENTIONAL LAW IN INDONESIA

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Abstract: This study analyzes the commitment to having sex in this open marriage to their marriage bond in terms of Islamic religious and conventional reviews. The purpose of this study is to identify whether the act of having sex outside the marriage bond is prohibited both religiously and legally. Even though the two parties had given each other permission. Research uses a conceptual approach and a statute approach which is the basis of the study. Statute Number 1 of 1974 concerning marriage, civil code (Burgerlijk Wetboek), criminal code (Wet van Strafrecht), and Islamic marriage law are the legal basis for this study. Overall, this research was carried out because open marriage is a Western cultural culture that is included in the Asian region, especially Indonesia. Where western culture does not agree with sex relations in marriage relationships in general but also does not approve of sex relations outside of marriage relations unilaterally.

Keywords: Open marriage, Islamic, Indonesian, Law

Introduction

Marriage is something very sacred for all individuals and is also worshiped in Islam. Marriage is a term in the jurisdiction of the Unitary State of the Republic of Indonesia (NKRI), especially in Civil Law. In the jurisdiction of Indonesia, it has regulated the matter of marriage, namely in Statute Number 1 of 1974 concerning Marriage. Marriage in Statute Number 1 of 1974 concerning Marriage is located in Article 1 which states that marriage is a physical and spiritual bond between a man and a woman as husband and wife to form a happy and eternal family (household) based on the One Almighty God (Central Government, 1974). The Republic of Indonesia itself only recognizes heterosexual marriage. This idea is ingrained in Indonesian culture and the legislation, there is no regulation regarding same-sex marriage. According to Stuart in Nadya and Irwansyah's research, heterosexuality is the majority of sexual orientation in Indonesian society. So that heterosexual marriages are common because they follow the norms and culture of the Republic of Indonesia (Shanaz & Irwansyah, 2021).

Globalization that is increasingly rampant in this world is not only in technology. Cultural globalization also affects marriage (Irfan, Syukurman, & Fikri, 2020). This is supported by the emergence of the term "abnormal marriage" in today's era. This abnormal marriage is a marriage that is carried out with legal purposes in the eyes of the law and only seeks profit from the status of the marriage. According to Nia Nianti in her thesis, abnormal marriages are divided into three forms, namely Cover Up Marriage, Lavender Marriage, and Open Marriage. This study took the case of Open Marriage. According to Meity Arianty in Nia Nianti's thesis, Open

Marriage is a marriage carried out by heterosexual couples where they allow each party to have sex with people other than their partners (Nianti, 2023).

This open marriage view is prohibited in the jurisdiction of the Unitary State of the Republic of Indonesia (NKRI) and also the Islamic religion. This is said to be adultery and is included in unlawful acts. In Article 27 of the Civil Code (Burgerlijk Wetboek), it is emphasized that at the same time, a man may only be bound by marriage with one woman and a woman with only one man (Pustaka Yustisia Editorial Team, 2019). Article 27 of the Civil Code (Burgerlijk Wetboek) is also clarified in Article 9 of Statute Number 1 of 1974 concerning Marriage, where a person who is still bound by marriage ties with another person cannot remarry, except in the cases referred to in Article 3 paragraph (2) and Article 4 of this Statute (Central Government, 1974).

This research was conducted because marriage is something sacred and has been regulated by law. This open marriage is a Western culture that entered the Republic of Indonesia. According to Matt Lundquist, a psychotherapist in a Tirto article, this open marriage does not completely free their partners and still determines the boundaries of the rules such as physical contact boundaries, emotional boundaries, third person boundaries, time boundaries with third people, honesty towards partners, and openness to changes in the rules (Erlia, 2023). Overall, this "Open Marriage" case is an unlawful act that ends in infidelity and adultery even though both parties have made a mutual agreement.

Literature Review

A. General Overview of Open Marriage

Open Marriage is a form of marriage or marriage that refers to freedom between two parties with a long understanding of the relationship and without contra. According to Nira Nianti, Open Marriage or a husband-wife relationship is an act of agreement between two parties to have sex with another person or a third party (Nianti, 2023). Open Marriage has been around for a long time, and this open marriage has been discussed by the O'Neill brothers, namely Nena O'Neill and George O'Neill. This Open Marriage was discussed by them in 1984. According to Nena and George, open marriage is a form of honest and open relationship based on freedom and equality. This marriage also involves intellectual, commitment, and emotional elements from both parties which aim for each to grow as an individual in the marriage bond (O'Neill & O'Neill, 1984).

Open marriage is a foreign culture, especially Western culture. In Western culture itself, it accepts the existence of a third-person relationship in a household. This is expressed in Marilyn and Lawrence's book entitled *The Social History of the American Family*. In the book, it is stated that Western culture itself does not agree with sexual relations in marriage in general but also does not agree with sexual relations outside of marriage unilaterally. So people from Western cultures themselves have social issues and problems with this open marriage. However, over time and eras, this open marriage has been empirically rejected and stated as the least desirable by society (Coleman & Ganong, 2014). Although society does not agree with open marriage itself. Some groups or individuals still apply this open marriage in their marriage relationships.

B. General Overview of Adultery

Adultery is a term derived from the word adultery. In the Great Dictionary of Indonesian or KBBI adultery is defined as the act of sexual intercourse between a man who is married to a woman who is not his wife, or a woman who is married to a man who is not her husband (Language Development and Development Agency, 2018). This act of adultery has been regulated in the Criminal Code (Wet van Strafrecht) in Article 284 paragraph (1) number 1 letters a and b, where a man or woman who is married commits overspel even though it is known that Article 27 of the Civil Code (Burgerlijk Wetboek) applies to him (Pustaka Yustisia Editorial Team, 2019). Adultery itself is often associated with prostitution in Indonesian society. Prostitution itself is an act of contempt for human dignity where the perpetrators who do it use their bodies to seek profit. While adultery itself is an act based on mutual consent without seeking any profit at all (Amalia, 2018). Adultery and prostitution are different things, but both are reprehensible acts and both are sexual relations outside of marriage. So Indonesian society, which is a society that adheres to morals, manners, and ethics, labels this as the same act.

C. Special Review of the Principle of Monogamy and the Principle of Polygamy in Open Marriage

Marriage is carried out by a man and a woman which cannot be more. This is based on the principle of monogamy inherent in marriage, especially marriages carried out in Indonesia. The principle of monogamy is a principle that is a deep personal relationship between husband and wife as equals (Pua, Karamoy, & Setlight, 2022). The principle of monogamy has been affirmed in Statute Number 1 of 1974 concerning Marriage in Article 3 paragraph (1) which reads "Basically, in a marriage, a man may only have one wife. A woman can only have one husband" (Central Government, 1974). In article 3, it is strongly emphasized that in a marriage relationship, one is only allowed to have a husband or wife. However, in a marriage, a husband can have more wives if permitted by the legal wife. These provisions are regulated in Article 3 paragraph (2) in Statute Number 1 of 1974 concerning Marriage which reads "The Court, may permit a husband to have more than one wife if desired by the parties concerned" (Central Government, 1974). This is called Polygyny which is a term for a marriage that has more than one marriage bond and without any dissolution of marriage in it. (Ichsan, 2018). Open marriage is a form of marriage that refers to freedom between two parties with an understanding of a long relationship and without contra. Basically, applying the principle of monogamy in it. It can be seen that there is no marital relationship simultaneously in the marriage bond. So, if examined further the actions in the open marriage are carried out by a third person who comes from outside the marriage bond.

Method

This research is normative legal research. According to Eka and Cynthia, normative legal research is legal research that places law as a building block of a norm system. Where the norm system consists of principles, norms, rules of law, court decisions, and also doctrines (Sihombing & Hadita, 2022). According to Bairagi and Munot in the book entitled "Scientific Research Methodology" by Andrew and friends, research is a systematic investigation to obtain new knowledge from existing facts (Pakpahan et al., 2021). This research uses a conceptual approach and a statute approach as the basis for the research.

The data source in this study uses secondary data supported by three supporting library materials, namely primary, secondary, and tertiary legal materials collected using literature study techniques. Data analysis was carried out by analyzing the thinking of open marriage where both parties give their partners the freedom to have sex with a third person or a person outside the

marriage bond. Where Statute Number 1 of 1974 concerning Marriage, the Civil Code (Burgerlijk Wetboek), the Criminal Code (Wet van Strafrecht), and Islamic Marriage Law as the legal basis in this study.

This study was conducted because basically, open marriage is a Western cultural culture that entered the Asian region, especially Indonesia. Where western culture does not agree with sex in a marriage relationship in general but also does not agree with sex outside a marriage relationship unilaterally (Coleman & Ganong, 2014). This Open Marriage also involves intellectual, commitment, and emotional elements from both parties which aim for each to grow as an individual in the marriage bond (O'Neill & O'Neill, 1984). This study analyzes the commitment to having sex in this open marriage towards their marriage bond from an Islamic and conventional perspective. The purpose of this study is to identify the act of having sex outside of marriage is prohibited both religiously and legally. Although both parties permit each other.

Result and Discussion

A. Open Marriage (Open Relationship) According to Islamic Law

Open marriage is a form of honest and open relationship based on freedom and equality (O'Neill & O'Neill, 1984). Open marriage is often done by Western culture where they call this open marriage as polygamy or non-monogamy. In Tristan Taormino's research, the commitment in this open marriage is often related to sex outside of marriage. Even in Western culture, this open marriage is done for adolescents who have not yet been married. Usually, these couples have polygamous relationships both before and after marriage. The couple will be bound by non-consensual polygamy where they have sex with their main partner but also have sex with someone outside of marriage (Taormino, 2008).

Open marriage is an unhealthy marriage relationship. Even though they are often harmonious, they can result in illness or divorce. In the Islamic religion, marriage is only carried out by a man and a woman. This is explained in the Qur'an in surah An-Nisa' verse 1 which says:

"O man, fear your Lord who created you from oneself (Adam) and He created from him his partner (Eve). From both of them, Allah multiplied many men and women. Fear Allah who in His name asks of one another and (maintain) family relationships. Indeed, Allah is always watching over you." (Q.S. An-Nisa'/4:1)

Marriage in the Islamic religion holds the principle of monogamy in it. However, in Islam, it is not prohibited to practice polygamy provided that the wife permits the polygamous act. This was done by Rasullah S.A.W, where Rasullah S.A.W married his slave girl to free her from slavery. This is known as Wali Maula, who is the guardian who marries his slave, namely his own master. Allah S.W.T does not prohibit the act of marriage with one's slaves based on mutual consent and mutual consent (Ja'far, 2021). Polygamy itself also has its prohibitions where the limit for polygamy is only four. So, if you want to enter into a fifth marriage, you are obliged to divorce one of the four and wait for the "iddah to be completed" (Hermanto, 2016).

The Islamic religion itself only allows monogamy and polygamy. So open marriage in the Islamic religion itself is prohibited. Open marriage in Islam is an act of adultery. Adultery is a term that comes from the word fornication. In the Big Indonesian Dictionary or KBBI, Zina is defined as the act of sexual intercourse between a man who is married to a woman who is not his wife, or also a woman who is married to a man who is not her husband (Language Development

and Development Agency, 2018). The prohibition against adultery itself has been confirmed in the Al-Qur'an surah Al-Isra' verse 32 and surah An-Nur verse 2 which reads:

"Do not approach adultery. Indeed (adultery) is a cruel act and the worst way." (Q.S Al-Isra'/17: 32)

"The adulteress and the adulterer, lash each of them with a hundred stripes and let not pity for them prevent you from (carrying out) the religion (law) of Allah if you are believers in Him. Allah and the Last Day. Let a group of the believers witness their punishment." (Q.S An-Nur/24: 2)

Open marriage is said to be prohibited in marriage according to Islam because the perpetrators of this open marriage have sex with people outside of marriage. Although the perpetrators of this open marriage are equally committed and allow their partners, both husband and wife. So, the perpetrators of this open marriage are very far from the teachings of Islam.

B. Open Marriage (Open Relationship) According to Indonesian Conventional Law

The jurisdiction of the State of Indonesia itself, marriage is based on the principle of monogamy which is stated in Statute Number 1 of 1974 concerning Marriage. This is stated in Article 3 paragraph (1) which states that in a marriage a man may only have one wife. A woman may only have one husband (Central Government, 1974). So open marriage according to the jurisdiction of the State of Indonesia has deviated greatly. This Open Marriage can be said to be an unlawful act. In civil law, this open marriage is said to be Misfeasance. Misfeasance is an act that is done wrongly, where the act is an obligation and has the right to do it. While in criminal law, this open marriage is said to be against the law when the act carried out is an act that is prohibited by law (Sari, 2020).

Open marriage can also be said to be a criminal offense against morality in the jurisdiction of the State of Indonesia. This is regulated in Article 284 paragraph (1) which explains that a man and a woman who commit overspel will be threatened with a maximum of nine months (9 months) in prison even though there is already a marriage bond (Pustaka Yustisia Editorial Team, 2019). This open marriage in the State of Indonesia itself is not regulated in any jurisdiction. Open marriage in Indonesia can be said to be an affair, betrayal, and adultery in a marriage bond. If someone commits an open marriage, there are only two choices, namely practicing polygamy or carrying out a divorce. Strictly speaking, in the State of Indonesia, open marriage is considered a criminal offense against morality that commits adultery and can be threatened with imprisonment.

Conclusion

In Islam, marriage is a sacred bond between a man and a woman to build a harmonious family according to religious teachings. Islamic law emphasizes the principle of monogamy, although it allows polygamy with certain conditions, such as the wife's consent and the husband's ability to act fairly. Open marriage, which allows couples to have sexual relations with a third party based on mutual agreement, is contrary to Islamic teachings. This practice is considered adultery, which is a heinous act and against religious law. In the Qur'an, the prohibition of adultery is emphasized in Surah Al-Isra' verse 32 which reads "And do not come near adultery. Indeed (adultery) is a heinous act and an evil way.

The law in Indonesia also rejects the practice of open marriage. Based on Statute Number 1 of 1974 concerning Marriage, the principle of monogamy is the main principle in a marriage relationship. Article 3 paragraph (1) states that a man may only have one wife, and a woman may only have one husband. Although there are provisions that allow polygamy, this can only be done with the consent of the wife and permission from the court, as regulated in Article 3 paragraph (2). The practice of open marriage not only violates the principle of monogamy but also contradicts Article 27 of the Civil Code (*Burgerlijk Wetboek*), which states that a man may only be bound by marriage to one woman and vice versa. In the context of criminal law, open marriage is considered a criminal offense against morality. This is regulated in Article 284 of the Criminal Code (*Wet van Strafrecht*), which states that adultery committed by a married man or woman is punishable by imprisonment for nine months.

In this context, open marriage not only violates religious rules but also contradicts Islamic moral values that place honor and loyalty as the main pillars of marriage. Even though open marriage couples give each other permission, the act is still seen as a major sin because it involves sexual relations outside of a legitimate marriage bond. Islam views marriage as a way to maintain self-honor and avoid immoral behavior. Therefore, any form of practice that violates these values, including open marriage, is unacceptable.

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