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PEDOMAN TRANSLITERASI

ا	= a	ط	= th
ب	= b	ظ	= zh
ت	= t	ع	= `
ث	= ts	غ	= gh
ج	= j	ف	= f
ح	= h	ق	= q
خ	= kh	ك	= k
د	= d	ل	= l
ذ	= dz	م	= m
ر	= r	ن	= n
ز	= z	و	= w
س	= s	ه	= h
ش	= sy	ء	= ‘
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Untuk madd dan diftong

â	= a panjang	اَوْ	= aw
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û	= u panjang	اِيْ	= iy

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Analysis of Legal Change for Women Traveling without *Mahram*: A Case Study of the Kingdom of Saudi Arabia Royal Decree No.M/134 of 2019

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Abstract:

This paper departed from the problem on why the government of Saudi Arabia changed its policy on women's rights in the public sphere through Royal Decree No. M/134 of 2019. It revoked the ban on women for traveling without male relatives (*mahram*). This is literally surprising because Saudi Arabia is famous of its prohibition for women to travel without *mahram* due to its patriarchal culture with the rigid division of roles between women and men. The phenomenon requires a comprehensive explanation on the reasons behind the Saudi government's decision in the current situation. This research explored the factors beyond the decision using feminism approach and analyzes the relationship between social change theory and legal reform. It found that the main factor of women's freedom to travel without *mahram* is undeniably driven by the influence of economic and social changes. Moreover, Saudi is very passionate to achieve their 2030 vision.

Keywords:

Gender Equality; Change of Law; Vision 2030; Royal Decree

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Abstrak:

Tulisan ini berangkat dari masalah mengapa pemerintah Arab Saudi mengubah kebijakannya tentang hak perempuan di ranah publik dengan menggunakan studi kasus Dekrit Kerajaan No. M/134 Tahun 2019 tentang pencabutan larangan perempuan bepergian tanpa mahram. Hal ini menjadi menarik karena Arab Saudi merupakan negara yang terkenal tidak memperbolehkan perempuannya bepergian tanpa kerabat laki-lakinya. Hal ini disebabkan oleh kondisi sosial masyarakat Arab Saudi sangat erat dengan budaya Patriarki yang mengonstruksi pemikiran tentang pembagian peran antara perempuan dan laki-laki. Melihat fakta demikian, diperlukan penjelasan secara menyeluruh untuk menjelaskan alasan di balik keputusan pemerintah Saudi dalam situasi saat ini. Penelitian ini menelusuri faktor-faktor yang menodong keputusan tersebut dibuat dengan menggunakan pendekatan feminism dan menganalisis hubungan teori perubahan sosial dengan pembaruan hukum. Faktor utama kebebasan perempuan bepergian tanpa mahram tidak dipungkiri didorong oleh pengaruh perubahan ekonomi dan sosial. Ini dikarenakan Saudi menginginkan Visi 2030 mereka tercapai.

Kata Kunci:

Persamaan Gender; Pembaruan Hukum; Vision 2030; Dekrit Kerajaan

Introduction

The issue of women's rights is one of the hottest debate topics in Saudi Arabia. It leads to a variey of interpretation from Saudi Arabia religios scholars. In fact, almost all of Saudi women's rights were disadvantaged due to oppression rules formulated by both local religious figures and the government. However, they preferred to keep silent and simply accepted the reality as it was considering that what they experienced was a consuequence of what they believe.[1]

Nevertheless, the recent efforts of Saudi Arabian government in the context of women have been somewhat loosen of. They begin to sympathize on women who had long been restricted by a variety of

[1]Anis Rosida, "Wacana Modernisasi dalam Tantangan Peradaban, Peran Perempuan Sebagai Tonggak Sejarah Arab Saudi," *Palita: Journal of Social-Religion Research* 3, no. 1 (2018): 81–96, https://doi.org/10.24256/pal.v3i1.195.. 82.

prohibition to access public sphere. This is clear, for example, from the lifting of a ban on driving for Saudi Arabian women by King Salman bin Abdul Aziz on September 26, 2017. The inauguration of this resolution really helped to resolve one of the old social dilemmas which became a big barrier for Saudi women to travel more freely outside the house. Therefore, most Saudi women consider the 2017 lifting as a symbolic victory over their hard work campaign since before the reign of King Salman bin Abdul Azis.[2]

After the 2017 lifting, Arabian Peninsula reexperienced another shocking yet interesting phenomenon by the issuence of a policy which opens women's access to several public roles. This occured at the same time when Saudi Arabia still refuses to implement a democratic system and maintain the kingdom in its monarchic system. The policy was then supported by the Saudi government's decision through King Salman bin Abdul Aziz Saud's issuencce of Royal Decree No. M / 134 dated 30 July 2019 amending the Royal Decree M / 24 of 28 August 2000. The amandment on the passport allows Saudi women to travel abroad without male guardians (later referred as *mahram*). It also enables them to get passports without the *mahram*'s consent.[3]

The decision is quite surprising to many parties, ranging from those who live within the territory of Saudi Arabia to international citizens. This is particularly because Saudi Arabia always gets the public eye for the treatment of its female citizens. Recently, the highlighted issue of Saudi Arabian women is mostly about some Saudi women who seek *asylum* abroad.[4] It was very much due to the recent royal decree published in the official royal weekly newspaper *Umm* al-Quran on Friday which stipulated that a Saudi passport must be issued to every citizen who applies for it while those over the age of 21 do not need any permission for traveling.[5]

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[2]Nimas Ayu Mujihastuti, "Analisis Perubahan Kebijakan Arab Saudi tentang Peran Perempuan di Ranah Publik: Studi Kasus Royal Decree No. M/85 Tahun 2017" (Universitas Airlangga, 2019), https://doi.org/10.1051/matecconf/201712107005. 2.

[3] سلمان بن عبد العزيز آل سعود, "مرسوم ملكي رقم (م/١٣٤) وتاريخ ٢٧-١١-١٤٤٠هـ," ٢٩/١١/١٤٤٠ العدد ٤٧٩٠, الصفحة ١٤, ٢٠١٩, https://perma.cc/9PHW-EG7D.

[4]BBC, "Saudi Arabia Allows Women to Travel Independently," bbc news, 2019, https://www.bbc.com/news/world-middle-east-49201019.

[5]سعود, "مرسوم ملكي رقم (م/١٣٤) وتاريخ ٢٧-١١-١٤٤٠هـ."

The root of the old prohibition lied in the royal insistence on gender segregation between women and men in addition to Islamic traditions about restriction for women to go traveling except with their husband or *mahram*. The Interpretation of this Islamic value later became a guideline for the legal system in Saudi Arabia and therefore limited women's activities in the public sphere. This inevitably impacted on various aspects of daily life. However, later on, in the midst of an oppressive situation under the valid laws and norms, fundamental and unsual changes occured in a patriarchal environment such as Saudi Arabia. For this reason, I think it is a big need to find out the driving factors beyond the emergence of changes in royal decree which then led to the lifting of ban on traveling without *mahram* for Saudi Arabia women.

Research methods

This study uses a qualitative approach to examine influencing factors on the changes in the Royal Decree of Saudi Arabia. Futhermore, it explores the factors using a feminism approach to the issue of women's rights and analyzes the relationship of theories on the influence of social change with the reform of Islamic law.

Saudi Women and Traveling Without Mahram

Since its establishment as a kingdom, Saudi has been a constitutional kingdom which regulated the prohibition for women to travel without *mahram*. This prohibition was also based on the jurists' decision regarding a hadith on the prohibition of women's traveling without *mahram*. It made very much sense, therefore, for Saudi Arabia as an Islamic law based country to prohibit women's abroad travel and own a passport. Under this policy, especially at the beginning of its establishment, Saudi kingdom was famous as the very conservative and fundamental ones in religious school.[6]

Among the hadith texts about traveling with *mahram* is as follows:

[6]Fatkhur Roji, "Kebijakan Ruang Publik Perempuan: Agenda Politik Double Interest Saudi," *International Journal Ihya' 'Ulum Al-Din* 19, no. 2 (2017): 271–84, https://doi.org/10.21580/ihya.18.1.1740., 276.

حَدَّثَنَا زُهَيْرُ بْنُ حَرْبٍ وَمُحَمَّدُ بْنُ الْمُثَنَّى قَالَا حَدَّثَنَا يَحْيَى وَهُوَ الْقَطَّانُ عَنْ عُبَيْدِ اللَّهِ أَخْبَرَنِي نَافِعٌ عَنْ ابْنِ عُمَرَ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ لَا تُسَافِرْ الْمَرْأَةُ ثَلَاثًا إِلَّا وَمَعَهَا ذُو مَحْرَمٍ و حَدَّثَنَا أَبُو بَكْرِ بْنُ أَبِي شَيْبَةَ حَدَّثَنَا عَبْدُ اللَّهِ بْنُ نُمَيْرٍ وَأَبُو أُسَامَةَ ح و حَدَّثَنَا ابْنُ نُمَيْرٍ حَدَّثَنَا أَبِي جَمِيعًا عَنْ عُبَيْدِ اللَّهِ بِهَذَا الْإِسْنَادِ فِي رِوَايَةِ أَبِي بَكْرٍ فَوْقَ ثَلَاثٍ و قَالَ ابْنُ نُمَيْرٍ فِي رِوَايَتِهِ عَنْ أَبِيهِ ثَلَاثَةً إِلَّا وَمَعَهَا ذُو مَحْرَمٍ

"Had told us [Zuhayr bin Harb] and [Muhammad bin al-Mutsanna] both said, had told us [Yahya al-Qaththan] from [`Ubayd Allah] had told me [Nafi'] from [Ibn `Umar] that the Messenger of Allah sallallaahu' alayh wa sallam said: "A woman cannot travel for three days unless accompanied by her mahram." And had told us [Abu Bakr ibn Abu Shafi'ah] have told us [`Abd Allah bin Numayr] and [Abu Usamah] -in other narrations- and had told us [Ibn Numayr] had told us [my father] of [`Ubayd Allah] with this isnad. And in his history, Abu Bakr is listed; "In the top three (days)." And he also said in his history, from his father; "Except when she is with her mahram."[7]

Specifically, there found no explanation on the causes or motives behind the emergence of this hadith or so called *asbāb wurūd*. However, according to Imam Badr Al-Dīn Abi Muhammad Mahmūd Ibn Ahmad al-'Ainī, this hadith occured when the wives of prophet's companions wanted to perform the *hajj* while their husband were still

[7]Muslim bin al Hajjaj bin Muslim bin Kausyaz al-Qusyayrī al-Naysaburī, *Shahih Muslim* (Dar Al Mughni, 1998). Hadith number 2381–2391. Muhammad bin Ismā`īl al-Bukhārī, *Shahīh al-Bukhāri* (Beirut: Dar Ibn Katsir, n.d.). Hadith number 1024, 1025, 1122, 1729, 1731, and 1858. Muhammad bin `Isa al-Tirmidzī, *Sunan al-Tirmidzī* (Riyadh: Maktabatu Al Ma'arif, n.d.). Hadith number 1089 and 1090. Abū Dāwud Sulaymān bin al-Asy'atsī Al-Sijistānī, *Sunan Abū Dāwud* (Makkah: International Ideas Home, 1999). Hadith number 1465, 1466, and 1467. Muhammad bin Yazīd Abū `Abd Allah, *Sunan Ibnu Mājah Vol 1* (Beirut: Dar Al-Fikr, n.d.). Hadith number 2889. Abū `Abd Allah Ahmad bin Muhammad al-Dzuhlī al-Syaybānī, *Musnad Imām Ahmad Bin Hanbal* (Beirut: Muassasah al-Risālah, 1995). Hadith number 1153, 1934, 4614, 4696, 6289, 6290, 11054, 11501. Mālik bin Anas, *Al-Muwaththā'* (Libanon: Dar Al-Ma'rifah, 2003). Hadith number 2973. `Abd Allah bin `Abd al-Rahman al-Darimī, *Sunan al-Darimī* (Riyādh: Daarul Mughni, n.d.). Hadith number 2678

at the battlefield. In line with it, Ibn Hazm also ensured that the context of this hadith was a war situation and therefore women needed accompanion from their husbands or *mahram* to go traveling.[8]

The above mentioned hadith can be viewed through, at least, two types of approach, namely textual and contextual understanding. The former shows that women are totally not allowed to leave the house without *mahram* accompaniment. Based on this approach, many scholars deliver opinions that women should not leave the house, even for *hajj* except with their *mahram* along with.[9]

However, the later approach takes the *rationes legis* values from the prohibition as an effort to understand the historical context. They consist of security and modesty. This drives to the the current contextualization which considers security and modesty of women's traveling without *mahram* are what really matter. Consequently, if the security is well guaranteed and women are culturally appropriate to travel by themselves, it would not be a problem.[10]

Under the power of the al-Saud regime since 1932 until the middle of 2019, the legitimacy of the Saudi Arabian monarchical power regarding prohibition on women's traveling without *mahram* was still in force. This combination of governmental interference and cultural elements significantly caused imbalanced power between Saudi Arabian men and women in various life aspects. For instance, women were limited to access the justice system so that any judicial matters they dealt with were entrusted to their male relatives as

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[8]Ahmad Fawaid, "Reinterpretasi Hadith tentang Mahram (Pendekatan Hermeneutika)," *Nur El-Islam* 3, no. 1 (2016): 176–95., 189.

[9]Atiyatul Ulya, "Konsep Mahram Jaminan Keamanan atau Pengekangan Perempuan," *Al-Fikr* 17, no. 1 (2013): 245–55., 251. Imam Ibnu Hajar, "Reinterpretasi Hukum Larangan Bepergian tanpa Mahram Bagi Perempuan," *Al-Manahij Jurnal Kajian Hukum Islam* VI, no. 1 (2012): 143–56. Maulidah Tri Utami, "Mahram Implications in Women's Travel," *Jurnal Hunafa: Studia Islamika* 16, no. 1 (2019): 88–110, https://doi.org/10.1017/CBO9781107415324.004.

[10]Ghufron Hamzah, "Reinterpretasi Hadith Larangan Melukis dan Larangan Perempuan Bepergian tanpa Mahram (Hermeneutika Fazlur Rahman)," *Jurnal Iqtisad: Reconstruction of Justice and Welfare for Indonesia* 6, no. 1 (2019): 73–92., 89. Holilur Rohman, "Reinterpretasi Konsep Mahram dalam Perjalanan Perempuan Pespektif Hermeneutika Fazlur Rahman," *Al-Hukama* 07, no. 02 (2017): 502–25. Ghufron Hamzah, "Reinterpretasi Hadith Larangan Perempuan Bepergian tanpa Mahram dan Larangan Melukis (Pendekatan Sosio-Historis Dan Antropologis)," *The Journal for Aswaja Studies* 1, no. 1 (2019): 23–33.

representatives. Another case was in education field in which women could not freely express their own opinion as a part of their human right. This limited acces inevitably impacted on what they wanted to do.[11]

Many cases showed that most of Saudi women who wished to continue their studies based on their interests and talents needed to go to universities abroad. In fact, its is a basic right for every individual to study depending on what they wish to take. However, the facts in Saudi Arabia showed that access to education was still based on gender segregation. This certainly restricted women's freedom in making choices for their own future.[12] The condition was unfortunately aggravated by the government regulations on the prohibition for their traveling without *mahram*. Before the ban was amended last 2019, Saudi women who wanted to travel must get accompanied by their *mahram* ranging from father, brother, grandfather, son, husband to uncle.

Before the amandment, this ultra-conservative country considered women traveling without *mahram* as a taboo. The assumption was based on the absurd belief that the activity is a symbol of promiscuity which spreads the sin to surrounding. Another assumption was the big possibility for women to put off the veil they wore when traveling alone. In addition to these two reasons, some men in Saudi Arabia still believed that allowing women to travel alone will lead to the traditional values reduction particularly on gender segregation.[13]

The existence of such rules and norms was a real indicator of putting women in a less important position than those of men. The prohibition on women's traveling associated with obligation to maintain their honor was actually an effort to put them as the main regulator of the family. This will then avoid them to build a good career and earn their own living. Another example was the regulation on the guardian's qualification which is exclusive for sons. Women,

[11]Rosida, "Wacana Modernisasi dalam Tantangan Peradaban, Peran Perempuan sebagai Tonggak Sejarah Arab Saudi.", 91.
[12]Mujihastuti, "Analisis Perubahan Kebijakan Arab Saudi tentang Peran Perempuan di Ranah Publik: Studi Kasus Royal Decree No. M/85 Tahun 2017.", 4.
[13]*Ibid*., 5.

therefore, were only considered as contributors without any authority in a Saudi family.[14]

However, eventually, in the mid of last 2019, Saudi Arabia issued a Royal Decree No. M/134 amending Royal Decree No. M/24 dated August 28, 2000 regarding passport and therefore allows Saudi women to travel abroad without *mahram*. The amendment also enables Saudi them to get passport without the *mahram*'s consent. Previously, article 2 of the Royal Decree No. M/24 instructed that passports can only be given to Saudi men while the amended Article 2 changes it into "a passport can be given to anyone with Saudi citizenship."

The new amendment also revoked article 3 of Royal Decree No. M/24 which required Saudi men to mention their wives, unmarried daughters, and young sons in their passports. The next article, namely article 4 Royal Decree No. M/24, instructed that a separate passport can be issued to those in guardianship. The amanded version, article 4 of the Royal Decree No. M / 134, meanwhile, meanwhile, stated that passports can be issued to those in guardianship and the orphans."[15]

In addition to those mentioned, other amendments were reported to have been ratified targeting the Royal Decree No. M/7 December 12, 1986 regarding the civil status. This aims to improve women's legal status as clear from the amanded article 30 of the Royal Decree No. M/7 enabling a Saudi woman resident to mention her name at the home address instead of their hubands' names. Likewise, article 33 amended from the same decree now allows women to report the birth of their newborn to the authorities for the birth certificates. Previously, only the newborn's father or closest male relatives aged 18 years old at minimum who could report a birth for getting the birth certificate.[16]

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[14]Gita Murniasih, Diah Handayani, and Taufik Alamin, "Proses Domestifikasi Perempuan dalam Budaya Arab (Analisis Framing Model Zhongdang Pan san Gerald M. Kosicki Dalam Film Wadjda)," *Mediakita* 2, no. 1 (2018): 1–16., 13.

[15]سعود, "مرسوم ملكي رقم (م/١٣٤) وتاريخ ٢٧-١١-١٤٤٠هـ."

[16]"Saudi Arabia: Law on Passports Amended to Allow Women to Travel Abroad Without a Male Guardian | Global Legal Monitor," accessed December 10, 2019, http://www.loc.gov/law/foreign-news/article/saudi-arabia-law-on-passports-amended-to-allow-women-to-travel-abroad-without-a-male-guardian/.

Despite the recent reforms, other parts of the guardianship system still exist. This includes obligation for women to get permission from their *mahram* before getting marriage, living alone, or leaving the prison after the arrest period. Women, furthermoe, still cannot legally inherite citizenship and give consent for their children to get married.[17]

Relating to this issue, Sebastian Usher, a BBC Arab affairs analyst, said that the decree was already the biggest step so far to dismantle the male guardianship system in Saudi Arabia. This potentially has a close relation with Saudi women's rights activists' long time struggle to remove restrictions on their lives, including their petition to the authorities demanding the changes[18] just after the first elections for women were held in last December 2015.[19]

Many Saudi women celebrated the joy of this decree by reporting it to the world through Twitter. One of wich was the leading influencer and talk show host Muna Abu Sulayman who wrote: "*A generation growing up completely free and equal to their brothers*."[20] Before, Muna vigorously criticized this ban as clear from her popular statement as follows:

> *"Maybe, the cancellation of some woman's dreams due to the travel barrier is a small disturbance for most people. However, it is actually a symbolic insult to broader concept of adult and accountability as well as the meaning of character".*[21]

In line with Muna, the first royal diplomat woman serving as Saudi ambassador to America, Princess Reema bint Bandar Al-Saud, was also happy with this change by saying:

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[17]"Saudi Arabia: Law on Passports Amended to Allow Women to Travel Abroad Without a Male Guardian | Global Legal Monitor."

[18]BBC, "Saudi Arabia Allows Women to Travel Independently."

[19]Cammelianne Typhano Rachmadie and Suryo Ediyono, "Reformasi Sistem Kebudayaan Di Arab Saudi Masa Pemerintahan Raja Abdullah (2005- 2015)," *Millati: Journal of Islamic Studies and Humanities* 2, no. 1 (2017): 41–64, https://doi.org/10.18326/millati.v2i1.41-64., 53.

[20]"Muna Abu Sulayman منى (@abusulayman) on Twitter," accessed December 11, 2019, https://twitter.com/abusulayman.

[21]"Saudi Arabia Extends New Rights to Women in Blow to Oppressive System - The New York Times," accessed December 11, 2019, https://www.nytimes.com/2019/08/02/world/middleeast/saudi-arabia-guardianship.html.

> "*I am elated to confirm that KSA will be enacting amendments to its labor and civil laws that are designed to elevate the status of Saudi women within our society, including granting them the right to apply for passports and travel independently*."[22]

Responding the situation, women activists praised the guardianship law changes but still demanded further policies. They demand the kingdom to allow Saudi women to marry themselves, live alone and get out from state facilities, such as shelters of domestic violence, without the consent of their *mahram*.[23]

However, other certain parties feel that they must be alert for the new reforms. Some conservatives in the country reacted negatively to these changes and told Reuters International news agency as follows "*Imagine if your daughter grows up and leaves you and doesn't return. Are you happy?*"[24] They are so afraid that women's freedom to travel abroad alone may lead them to build a career and settle down far away without returning to Saudi Arabia.

Analysis of Legal Changes in Saudi Women Traveling Without Mahram

The economic and social reform policies of Muhammad bin Salman inevitably affect on the position of conservative Saudi scholars. The most possible alternative to take is transforming into a more moderate way.[25] Moreover, most of those scholars have now been silenced while some of their old teachings are removed from official government's websites. Other parties who tend to oppose

[22]"Reema Bandar al-Saud on Twitter: 'I Am Elated to Confirm That KSA Will Be Enacting Amendments to Its Labor and Civil Laws That Are Designed to Elevate the Status of Saudi Women within Our Society, Including Granting Them the Right to Apply for Passports and Travel Independently. 1/4,'" accessed December 11, 2019, https://twitter.com/rbalsaud/status/1157110654089777153.

[23]"Saudi Arabia Extends New Rights to Women in Blow to Oppressive System - The New York Times."

[24]BBC, "Saudi Arabia Allows Women to Travel Independently."

[25]Mahmud Hibatul Wafi, "Diskursus Reformasi Arab Saudi: Kontestasi Kerajaan Saudi Dan Wahabi," *Journal of Islamic World and Politics* 2, no. 1 (2018): 228–39, https://doi.org/10.18196/jiwp.2113., 237.

Mohammed's social reforms remain silent either because of their respect on the monarchy or fear of being arrested for speaking out.[26]

For decades, Saudi scholars have promoted the strict separation between women and men while preaching that it is better for women to stay at home. The internalization of *fitnah* (slander), *khalwah (being in a lonely place with another sex)*, and *mahram* concepts is so strong in Saudi Salafi religious thought. Consequently, a woman was prohibited from traveling on a plane even if her relatives can take her to the airport and then other relatives will pick her up at the destination airport. This prohibiting *fatwa* of traveling was literally issued by Ibn Utsaimin citing the concept of *fitnah, khalwah* and *mahram*.[27]

In this case, a contemporary Islamic law scholar, Al-Qaradawi, mentioned that the law will continue to experience any renewal and reform. It is its nature to keep changing and even probably returning to the first origin as the time goes by. Therefore, the legal thought also needs renewal and reformulation along with the emergence of new social needs for *fatwa* and new legal considerations even though the legal text does not change. Since long time ago, the *fiqh* scholars had proposed that the law will apply along with its *'illat* (*al-ḥukm yadūr ma'a 'illatih*).[28]

Based on this, al-Qaradhāwī thought that women may travel without *maḥram* with logical reasoning, such as when safety aspect as the factor beyond the prohibition at the *hadīth* is well assured. At the time when the *hadīth* was spoken, the journey was commonly carried on camels, donkeys, or horses passing through barren deserts which were full of dangers and threats, such as wild animals, robbers, thieves and desert bandits. Meanwhile nowadays, traveling is so fast and safe that it raises women's self-confidence and eliminates concerns about their safety. Furthermore, al-Qaradhāwī supported his argument by mentioning the fact that Aisha, the wife of prophet, was

[26]"Saudi Arabia Extends New Rights to Women in Blow to Oppressive System - The New York Times."

[27]Faqihuddin Abdul Kodir, "Metode Interpretasi Teks-Teks Agama dalam Mazhab Salafi Saudi Mengenai Isu-Isu Gender," *Holistik* 13, no. 02 (2012): 137–65., 158.

[28]Badri Khaeruman, "Al-Qaradawi Dan Orientasi Pemikiran Hukum Islam Untuk Menjawab Tuntutan Perubahan Sosial," *Wawasan: Jurnal Ilmiah Agama Dan Sosial Budaya* 1, no. 2 (2016): 227–38, https://doi.org/10.15575/jw.v1i2.740., 237.

permitted by `Umar to go on the pilgrimage accompanied by Usman and `Abd al-Rahman bin `Auf and there found no other companion who denied `Umar's decision.[29]

This discussion shows that different perspectives on a specific concept in Islam have come to the gender issues and some parties still consider it as a taboo.[30] In fact, women's friendly law reform is a conscious, planned and sustainable determination in the framework of a legal system both in substantive and legal institutions. Certainly, it needs to approach the law from various life aspects so that it becomes visionary and operating as a responsive legal norm. As a consequence, the law will always go through evolutionary and revolutionary changes.[31]

It is worth for reconsideration, therefore, when a specific law is highly irrelevant such as the prohibition for women to access public areas, including work place, for the sake of avoiding the *fitnah.* The necessity of accompaniment either from *mahram* or husband for them to travel is also too difficult to apply in the current era because human needs are very complex. There must be a lot of wasted time, money and energy if every step of women needs such accompaniment. Moreover, the qualified men for the accompaniment who are supposed to be able to cope with any barrier and secure women from any trouble probably become the objects of any crime or other unexpected condition. This means that there is no guarantee that men will be able to maintain the safety of the women they watch over.[32]

On a certain specific case, it becomes unfair to blame women who "wander alone" for adultery or rape cases while ignoring involved men who can't control their desire in the public sphere. Thus, convicting *haram* and immoral for women's journey without *mahram* accompaniment does not solve the problem. Instead, it

[29]Badri Khaeruman, *Hukum Islam dalam Perubahan Sosial* (Bandung: Pustaka Setia, 2010)., 178-181.

[30]Nalom Kurniawan, "Hak Asasi Perempuan dalam Perspektif Hukum Dan Agama," *Jurnal Konstitusi* 4, no. 1 (2011): 153–74., 154.

[31]Zainal Arifin Hoesein, "Pembentukan Hukum dalam Perspektif Pembaruan Hukum (Law Making on the Perspective of Legal Reformation)," *Jurnal Rechtsvinding: Media Pembinaan Hukum Nasional* 1, no. 3 (2012): 307–27., 318.

[32]Zulfatun Ni'mah, "Fiqih Perubahan Untuk Perempuan (Upaya Menjawab Keusangan Dan Kekosongan Hukum Bagi Perempuan)," *MUWAZAH* 1, no. 1 (2009): 41–48., 46.

tarnishes the nature of humans to work and betrays the religious orders to seek knowledge (*al-'ilm*).[33]

Based on this, the renewal of Islamic legal thought becomes an inseparable part of the changing life process of a society. On the other hand, social changes from the classical period to the contemporary ones certainly require the changes in law. The social dynamics and Islamic law are interrelated in the making the changes.[34]

Related to this, al-Marāghī in his Qur'anic interpretation mentioned that the laws enactment is due to the human's interest, while the interests can be diverse depending on the different time and place. Therefore, if a law was promulgated at the specific time due to a certain need, it will be wise to replace it with more suitable one when the old need had gone or changed so that the 'newer' law can fit into the current condition.[35]

The winds of change for equality between women and men continue to blow in Saudi Arabia. Nowadays, women can even pursue careers as pilots and cabin crews. Saudi Arabia reforms itself to be modern and open. Regarding to this change, the Saudi wrote in their 2030 Vision that Islam is the main thing and remains the foundation of the way of life of both citizens and country. Additionally, Islam is the basic of all laws, decisions, actions and objectives of Saudi Arabia. However, it does not refer to conservative Islam anymore, but the moderate ones. It means the Islamic guidelines on the values of hard work, dedication, superority, the principles and values of moderation, tolerance, discipline, equality, and transparency as the whole values expected to be the cornerstones of the country's success.[36]

In connection to the drastic changes occuring in Saudi Arabia in the past four years, the name of Prince Mohammed bin Salman is often touted as a very important and influential figure. After being officially inaugurated as the Crown Prince, Mohammed bin Salman

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[33]Ni'mah, 46.

[34]Fathurrahman Azhari, "Dinamika Perubahan Sosial Dan Hukum Islam," *Al-Tahrir: Jurnal Pemikiran Islam* 16, No. 1 (2016): 197–221, https://doi.org/10.21154/al-tahrir.v16i1.322., 218.

[35]Ahmad Mushthafa al-Marāghī, *Tafsīr al-Marāghī Vol 1* (Mesir: Mustafa Al-Babi Al-Halibi, n.d.)., 187.

[36]KSA, "Vision 2030 Kingdom of Saudi Arabia," 2016, 1–85., 16.

published Vision 2030 as a goal or objectives that Saudi Arabia government wants to achieve. There are three main pillars of the Vision 2030. *First* is making Saudi Arabia as the center of all Arabs and other Islamic countries. *Second* is making Saudi Arabia a global investment/investor center. *Third* is optimizing the trade through geographical position among three continents (Asia, Europe and Africa).[37]

In an effort to transform into a more open country, Crown Prince Mohammed bin Salman also launched a plan in 2016 to change the economy in 2030. It aims to reduce the unemployment rate from 11.6% to 7% and increase women's participation in the workforce to 30% from 22%.[38] Eqbal Darandari, a female member of the Shura Council who had long campaigned to revoke the prohibition for women's travel without *mahram* really supports the Royal Decree No. M/134. She stated that the step is at the very right direction and is certainly in line with the September 2017 decision that gave women the right to drive.[39]

Enforcement of any country's policy will be certainly inseparable from the ruler's strategy in reaching the country's goal.[40] In this context, the royal political policy is a special agenda in influencing and facilitaing the birth of a certain policy. Meanwhile, the merge between the law and social change will lead into one of two functions. *First*, it can function as social control when the law serves as a means to maintain social stability. *Second*, it can also function as a means to change society or so called social engineering. In this case, the law is put as a means to modify social structure. This happens when social change comes lately than the legal change and will then bring society into a new order.[41]

Although this rule may seem minor, the impact can be quite extensive both in social and economic terms. In social perspective, for

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[37]*Ibid*.
[38]*Ibid*., 39.
[39]"Saudi Arabia: Law on Passports Amended to Allow Women to Travel Abroad Without a Male Guardian | Global Legal Monitor."
[40]Roji, "Kebijakan Ruang Publik Perempuan: Agenda Politik Double Interest Saudi.", 277.
[41]Gibtiah and Yusida Fitriati, "Perubahan Sosial Dan Pembaruan Hukum Islam Perspektif Sadd Al-Dzari'ah," *NURANI* 15, No. 2 (2015): 101–14., 109.

example, Saudi career women found their mobility becomes more complicated. Inevitably, every working day, they needed to provide special fees for accommodation to and from workplace especially if their *mahram* is unable to deliver them and pick them up. In addition to impaired mobility, Saudi women had a high degree of independence to their *mahram*. In other words, they couldn't enjoy any individual freedom. Meanwhile in terms of economy, the old regulation required much more costs for daily accommodation which also affected the unemployment rate and the economy of country. It becomes much clearer that gender segregation plays its role in the field of employment and the country's economy. This is also one of the main reasons why the number of career women in Saudi Arabia was still low.[42]

In addition to Vision 2030 and economic reasons, political observers have argued that Saudi Arabia's Decree No. M / 134 in 2019 also 'fixes' the image of the Saudi in the international level. This particularly relates to the some cases of Saudi prominent women activists who involved in women's rights campaigns yet was detained or had been abroad. Internationally, their efforts have received great attention. For many Saudis, both men and women, this situation makes the Crown Prince a hero. Outside the Kingdom, it alsohelps to renew the country's image after the issue of Jamal Khashoggi's murder, many arrested women, and those who sought *asylum* abroad. However, both Saudi Arabia hardliner conservatives and women's rights activists still have their suspicions on Mohammed bin Salman's motives on the changes. They assumed that it was all about the real proof of the continuous accumulation of his power in political, financial or cultural aspect.[43]

In his research, Roji, for example, concluded that the recent Saudi's government policy was actually a double interest politic. They are none other than to save the Saudi royal government itself in the midst of abundant oil wealth and various stringent economic contests. The Saudi government, according to him, will no longer rely on those mentioned because they can get economic input from a variety of

[42]Mujihastuti, "Analisis Perubahan Kebijakan Arab Saudi tentang Peran Perempuan di Ranah Publik: Studi Kasus Royal Decree No. M/85 Tahun 2017.", 5.
[43]BBC, "Saudi Arabia Allows Women to Travel Independently."

incomes, such as fuel tariffs, taxation rates and licensing rates issued by the kingdom. Other possible advantages are to maintain royal security both by diverting issues and planning a diplomatic stategy for international relations to strengthen the kingdom's resilience from various possible conflicts.[44]

On the other hand, a dissertation about changes in Saudi Arabian policy towards women mentioned about the leading international and non-international factors. It further assumed that the government's decision to change their policy was indeed due to the following factors: a) the pressure within Saudi Arabia itself, particularly Saudi women's activist agencies; b) the active participation of women parliamentary members in the process of policy making recommendations; c) the role of the new Crown Prince of Saudi Arabia, Mohammed bin Salman; and d) international condemnation of the Saudi government.[45]

Above all, this case clearly shows that the gender politics have really changed. Although it ran slowly, a sudden turnaround unpredictably occurs in Saudi Arabia. These all imply that the change is mostly a matter of time.[46] It began from the appointment of a woman Minister and Women's Shura Council, the organization of women's elections, women's legal access to stadiums, cinemas, music shows, car driving, to the most recent, namely traveling without *mahram*. It becomes so much obvious that the Saudi government has strong willingness to increase women's participation in civil society and support all types of organizations campaigning women's rights. Furthermore, these also imply a big expectation for women to drive the economic and religious narration as two most prominent leading factors for the advancement of both Saudi Arabia and Islam.

Moreover, various researches from the World Bank and other economic studies conducted in Bangladesh, Brazil, Canada, Ethiopia

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[44]Roji, "Kebijakan Ruang Publik Perempuan: Agenda Politik Double Interest Saudi."., 281.

[45]Mujihastuti, "Analisis Perubahan Kebijakan Arab Saudi tentang Peran Perempuan di Ranah Publik: Studi Kasus Royal Decree No. M/85 Tahun 2017.", 9.

[46]Siti Rohmah Soekarba, "Determinants of Patriarchy in the Middle East: Hope for the 2030 Vision in a New Saudi Arabia," in *2nd International Conference on Strategic and Global Studies (ICSGS 2018)*, vol. 365 (Atlantis Press: Advances in Social Science, Education and Humanities Research, 2019), 193–200., 199.

and the United Kingdom have strengthened the assumption about women's participation. Involving women in a country's economic activities is believed to give significantly positive effect because they will likely spend their income to increase family welfare such as for nutrition, health and education. Societies with greater gender equality which, among others, allow women to work in public sphere, tend to grow faster and more evenly. Lots of evidence have also showed that programs on poverty reduction, environmental sustainability, customers' choice, and decision-making on various beneficial and important topics for society can be fully succesful when the role of women can be equal to those of men.[47]

Conclusion

From the above explanation, it is clear that the social dynamics and Islamic law are interrelated in the changes occuring in Saudi Arabia. The changes in Islamic law can lead to social change as long as the Islamic law still becomes customary or positive law among society. Likewise, the social change also leads to the change of Islamic law. The emergence of of the Kingdom of Saudi Arabia Decree No. M/134 of 2019 concerning the freedom of women to travel without *mahram* was undeniably driven by the influence of economic and social change.

Enforcement of any country's policy, furthermore, will be inseparable from the ruler's strategy in reaching the country's goal. To examine the efforts of modernization, openness and moderate Islam in Saudi Arabia, one compatible issue to observe is on women and gender, particularly the old bad stigma of the country in treating its women citizens. Recently, Saudi government wishes that role of women will be worth as an influential agency to encourages social change in the existing structure.

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[47]Soekarba., 198.

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Marriage Settlement among Minority Muslim by *Datok Imam Masjid* in South Thailand

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Abstract:

Most of Thailand Moslem community live at the plateau of its South area. As the minority, they cannot perform sharia laws formally under official acknowledgment. Therefore, in practicing the law, particularly marriage settlement, they rely on the rules of *fiqh* school followed by each local *Datok Imam Masjid*. The *Datok* exists in every village even sub-village and is a delegation from the Committee of Islam at Province. However, The Committee does not arrange particular rules in the marriage settlement so that the practice is fully guided and handled by the *Datok*. This research uses qualitative approach through descriptive method. It finds that principles and requirements of marriage settlement are in line with common Islamic laws in the Qur'an and hadith. Most of South Thailand *Datok* serving as *penghulu* (staffs of marriage settlement) furthermore affiliate to Shafi'i school. However, as each *datok* has different views and beliefs on certain issues, the rules

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become too flexible such as the minimum age for the brides and bridegrooms or the existence of *walī* (Islamic guardian mainly from the family line) as the marriage requirement. Additionally, the marriage settlement with a newly converted Muslim and "free" polygamy are two big issues as there found no exact rule governing all the details. The settlement is also sometimes often hard to hold due to expensive request of *mahr* (dowry) which causes the high number of eloping cases.

Keywords:
Islamic Law; Marriage Settlement; South Thailand Moslem, *Datok*

Abstrak:
Sebagian besar Muslim Thailand hidup di daerah Selatan dataran tinggi. Sebagai minoritas, mereka tidak dapat mempraktikkan aturan syariah secara resmi yang diakui negara, termasuk dalam pernikahan. Oleh karenanya, pernikahan dilaksanakan berdasarkan peraturan mazhab fiqh yang diikuti masing-masing *Datok* Imam Masjid. *Datok* ini terdapat di setiap desa, bahkan kampung, dan merupakan utusan Komite Islam Provinsi yang berwenang mengurus berbagai urusan keagamaan. Karena Komite Islam Thailand sendiri juga tidak menetapkan aturan pasti tentang pernikahan, *Datok*-lah yang dalam praktiknya mengarahkan dan menangani urusan ini. Penelitian ini menggunakan pendekatan kualitatif dan metode deskriptif. Hasilnya menunjukkan bahwa prinsip dan rukun pernikahan *ala* Datok sudah sesuai dengan hukum Islam di Al-Qur'an dan hadist. Selain itu, sebagian besar *Datok* yang menjadi juru nikah diketahui bermazhab Syafi'i. Meski demikian, perbedaan pengetahuan dan sikap masing-masing *Datok* terhadap isu-isu tertentu menyebabkan longgarnya aturan dalam pernikahan, seperti usia minimal kedua calon mempelai dan keberadaan wali sebagai syarat pernikahan. Termasuk juga di antaranya adalah pernikahan dengan muallaf serta maraknya pernikahan poligami tanpa adanya batasan khusus. Selain itu, pelaksanaan

pernikahan seringkali terhambat oleh permintaan jumlah mahar yang tinggi sehingga menyebabkan banyaknya kasus kawin lari.

Kata Kunci:
Hukum Islam; Pernikahan; Muslim Thailand Selatan, Datok

Introduction

Marriage is a commitment to establish a legal relationship between a man and a woman for living together in a family, continuing offspring, preventing adultery, and keeping the peaceful condition of a society.[1] In this context, marriage settlement causes a legal relationship between a man and a woman as well as their relation with community, state, and also God. Religions urge marriage as it aims to create a prosperous world and in Islam, the rules of marriage settlement are well mentioned at the Qur'an and hadith.

Marriage is one of the *sunnah* practices of Prophet Muhammad pbuh for all Moslems around the world, including those as minority. Because the marriage aims to prevent adultery, its settlement requires certain principles and requirements. This becomes important because any lack of its principles and requirements will cause the marriage invalid.

Islam has been widespread all over the world since a few centuries ago. In general, Muslim communities in various countries can be categorized as follow; *First*, Muslim communities in Islamic states such as in Saudi Arabia, Iran, and Pakistan. *Second,* Muslim communities in non-Islamic states but being the majority of their population, such as in Egypt, Turkey, and Indonesia. *Third,* Muslim communities in non-Islamic states and being the minority, such as in Thailand, Philippines, and some European and African countries.[2]

The term minority refers to the community with different characteristics from the common society or the majority in a certain

[1] Abd. Shomad, *Hukum Islam: Penormaan Prinsip Syariah dalam Hukum Indonesia* (Jakarta: Kencana, 2010), 274.

[2] Cik Hasan Basri, *Peradilan Agama* (Jakarta: Raja Grafindo Persada, 1998), 19.

area or country.[3] The differences range from language, culture, ethnicity, religion, to other basic diversity which distinguish one and another. Thailand, in this context, is one of non-Islamic states with Buddhists as the majority. Moslems become one of the minority groups with about 4 % of its total population.[4]

Islam came to Thailand through Pattani and was brought by Arab traders who came to Malay for business. Initially, Islam was a dominant religion among Pattani's society (Al-Fathoni, now becoming a part of South Thailand) as also indicated by the change of kingdom style. It was the Nobels and the King who played a vital role in replacing the Hindu-Buddha style with an Islamic one. However, in 1902, Pattani Kingdom was successfully conquered by the government of Thailand and consequently, the kingdom becomes a South Thailand until nowadays. It has three provinces namely Yala, Narathiwat, and Pattani.[5] From that moment on, Islam has been increasingly widespread in several regions of Thailand.[6]

South Thailand consists of 14 provinces, namely Chumphon, Krabi, Nakhon Si Thammarat, Phang Nga, Phattalung, Phuket, Ranong, Satung, Songkhla, Surat Thani, Trang, Pattani, Yala, and Narathiwat. Most of South Thailand Muslims live in certain provinces of its area such as Pattani, Yala, Narathiwat, and Satun. Relating to this, The Royal Decree of 1902 on local government administration stated that "all of the laws and the rules must be based on the King agreement".[7]

The enactment of Islamic family and inheritance law in Thailand is still limited in most of aspects because the government only acknowledges the application at its four provinces with Muslim

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[3] Yusuf Qardhawi, *Fiqh Minoriti*, ed. Muhammad Hanif Hasan (Kuala Lumpur: SH. Noordeen, 2002), 5.

[4] M. Ali Kettani, *Minoritas Muslim di Dunia Dewasa Ini*, ed. Zarkowi Soejoeti (Jakarta: PT. Raja Grafindo Persada, 2005), 200.

[5] Bahriyatul Arif, "Pelaksanaan Syariah Islam Di Thailand," *Harian Jawa Pos*, June 2015.

[6] Nathan Porath, "Muslim Schools (Pondok) in the South of Thailand: Balancing Piety on a Tightrope of National Civility, Prejudice and Violence," *South East Asia Research* 22, no. 3 (September 1, 2014): 303–19, https://doi.org/10.5367/sear.2014.0217.

[7] Arif, "Pelaksanaan Syariah Islam di Thailand."

majority population as stated in the Rule of The Application of Islamic Law our Provinces 1946. It mentions that "Islamic family Law and inheritance shall be applied in the first-court in Pattani, Narathiwat, Yala, and Satun."[8] It was due to the choice of local people not to recognize themselves as the Thai Muslims and preferred as Malay Muslims instead. Therefore, the Thailand government provided them an autonomic right in religious affairs. This led them to think about formulating Islamic family Law and inheritance acts of Thailand.[9]

As a consequence, the Law and act are not valid for Muslims in other parts of Thailand. They usually do not have any specific rules for a marriage settlement because the Thailand government doesn't recognize any shariah law. In dealing with the marriage settlement, they rely on a specific *fiqh* school (*mazhab*). Meanwhile, to get legal acknowledgment, they must follow the state regulation.

The marriage settlements among Moslem communities in those several provinces of South Thailand are performed by each local *Datok Imam Masjid*. They were elected through voting[10] among members of each mosque and have the authority to hold marriage settlement among Muslim minority in Thailand while guiding the process. Meanwhile, The Islamic Center Committee acknowledged by the King of Thailand is the one that deals with administrative matters and marriage certificate issuance. The committee is under the management of *Sheikh al-Islam* or mostly known as *Chularajmontri* in the Thai language. His main duty is giving advice or direction for the

[8] Ramizah wan Muhammad, "The Dato Yuthitham and The Administration of Islamic Law in Southern Thailand. Islam, Syari'ah and Governance Background Paper Series" (Melbourne-Australia, 2011), 6.

[9] Waeburaheng Waehayee, "Konsep Wali Nikah Dalam Undang-Undang Hukum Keluarga Islam Thailand" (UIN Sunan Kalijaga Yogyakarta, 2008).

[10] Songsiri Putongchai, "What Is It like to Be Muslim in Thailand?: A Case Study of Thailand through Muslim Professionals Perspectives" (Exeter University Saudi Arabia, 2013), 176, It was stated in The Islamic Organization Administrative Act of 1997 that "members of each mosque choose their mosque committee.

King in carrying out administration relating to marriage registration, *zakat* payment, and mosque affairs.[11]

Interestingly, each local *Datok Imam Masjid* has different views on marriage settlement practice. The same goes on for the preferred *fiqh* school. This diverse view greatly influences the quality of marriage settlement practice in Thailand as a logical consequence of the election system. There is no specific qualification needed to be a *Datok* such as a broad perspective on marriage settlement, religious competency and other skills or knowledge related to the marriage settlement.

However, the majority of Thai Moslems are *Sunnī* with Syafi'i school even though other schools like Hanafi and Syiah still exist. At least, this is clear from the existence of various literature and Islamic Law books in Thailand's local educational institutions.[12]

So far, the four *Imām Madzhab* as the main references of *ijtihād* practice among worldwide scholars is those who lived in the golden age of Islam and not in any country with a Muslim minority. Thus, the compiled *fiqh* books mostly provide a solution in an ideal social condition where Muslim become the majority, live in a safe condition and are led by a pious Sultan with absolute Islamic sovereignty.[13]

In fact, many problems arise among Muslim as the minority ranging from law, economy, ethic, household conflict to marriage settlement because of limitation in many aspects to formally perform Islamic law. Furthermore, in the context of Thailand, the surrounding condition makes it hard to perform Islamic law because, among others, forbidden things in Islam culturally exist in Thailand such as interfaith marriage and same-sex marriage. Therefore, as a minority group, they must have Islamic life guidelines based on the shariah system appropriate with each condition and universally acceptable.[14]

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[11] Muhammad, "The Dato Yuthitham and The Administration of Islamic Law in Southern Thailand. Islam, Syari'ah and Governance Background Paper Series."

[12] Waehayee, "Konsep Wali Nikah Dalam Undang-Undang Hukum Keluarga Islam Thailand."

[13] Ahmad Sarwat, *Fiqih Minoritas* (DU CENTER PRESS, 2010), 1.

[14] Ahmad Sarwat, *Fiqih Minoritas*.

From this context, it is necessary to conduct a study on marriage settlement among the Muslim minority of South Thailand who can not legally perform it according to Islamic law. This paper aims to know the practice of marriage settlement among the Muslim minorities in South Thailand and analyze its Islamic law perspective.

Method

This research uses a qualitative approach through the descriptive-analytical method. In this case, the researcher became the key instrument or the data compiler using interviews and documentation. Therefore, the researcher's attendance has an important role to get valid data and information in line with the research purpose. As this is pure research, the researcher's identity is known by the subject. [15]

The researcher conducted this study for four months in South Thailand while doing Student Exchange. This made it possible for the researcher to get valid data from informants directly. Meanwhile, the research location was at the plateau of South Thailand, namely Chumpon, Ranong, Surat Thani, Pang-nga, Phuket, Krabi, Nakhon Si Thammarat, Trang and Pattalung. The area was selected as it is the home of most of Thailand Muslim and the absence of formal codified shariah law found in the area.

Mostly, the primary data is obtained directly from the community while the secondary is from the literature review.[16] The former came from the Thailand Islamic scholars serving as *penghulu* (staffs of marriage settlement) and other local public figures like Islamic teachers and local people.[17] Meanwhile, the secondary data was from documentation relating to marriage such as marriage law or *fiqh munākahah* ooks. Afterward, the data analysis is by using non-statistic analysis which consists of checking and organizing.

Marriage Settlement in Minority *Fiqh* among Muslim

[15] Kamarudin, *Pengantar Metodologi Riset* (Bandung: Angkasa, 1972). 78

[16] Soerjono Soekanto, *Pengantar Penelitian Hukum* (Jakarta: UI Press, 1986), 51.

[17] Duncan McCargo, "Autonomy for Southern Thailand: Thinking the Unthinkable?," *Pacific Affairs* 83, no. 2 (June 18, 2010): 261–81, https://doi.org/10.5509/2010832261.

Minority refers to a community with different characteristics from the majority. The differences vary from religion, language, to other basic diversities which distinguish one and another. Meanwhile, Muslim refers to Islam adherents. Thus, Muslim minority is a group of Muslim whose number is less than non-Moslem communities in a country or area.[18]

The apostasy or conversion cases of Muslim rarely occur in any Moslem minority country. However, when a Moslem community adopts non-Islamic cultures which later intttttfluence their Islamic identity, interfaith marriages number significantly increases. It has nothing to do with the increasing number of newly converted Muslim because it becomes the primary evidence of the social and cultural assimilation process instead.[19]

Religious difference between the future couple is the primary issue among the Moslem minority which possibly leads to difficulties to settle a marriage. A marriage between Moslem male and non-Moslem female (*musyrik* in the Qur'anic term or idolatrous) is prohibited in the Qur'an. The term refers to an idol worshiper like Quraisy infidels who believed in non-Abrahamic religion and Majus people who worshipped the fire. Their female community members are forbidden to be married to. However, this is not valid for *Ahl Kitāb* women (Jewish and Christians) because most of the prophet companions married them. Nevertheless, some scholars disagree with this because they categorize the Jewish and Christian as idolatrous communities who worship Jesus even three Gods at once.

Marriage Settlement among Moslem Minority in South Thailand

The Thai Muslim community is more diverse than the Malay Muslim community in Thailand. Even though realizing the ethnic diversity while still maintaining their religious tradition, most Thai Muslim speak in Thai and have assimilated with the Thai Buddhist community. Additionally, Muslims in each province of Thailand have experienced the same social interaction through education, media, market, and any public institution. Furthermore, they have also practiced Thai norms and culture besides their religious practices.

[18] Qardhawi, *Fiqh Minoriti*.
[19] Kettani, *Minoritas Muslim Di Dunia Dewasa Ini*.

The Thai Muslim community interacts with the government through religious bureaucracy led by *Chularajmontri* office, Central Islamic Committee, and Representative of Provincial Islamic Committee under the management of the Department of Home affairs. Their staff is elected through voting and serve to arrange and manage mosques as well as any local educational activities. Mosques and Islamic schools (boarding schools) have become the key institutions of social interaction among the Muslim community. They also become centres for activities on fasting month, *Eid al-Fitr* and *Eid al-Adha* prayers, *jumu'ah* prayer, corpse burial process, Qur'an recitation, marriage settlement, and other religious activities. A mosque committee also serves to manage *waqf* and deserves legal acknowledgment as well as subsidy from the government through Islamic bureaucracy and the Department of home affairs.[20]

The practice of marriage settlement in South Thailand is mainly based on Syafi'i school as what generally occurs in Indonesia.[21] However, it is handled by *Datok Imam Masjid* from the bride's home area as the staff of marriage settlement. Therefore, a Muslim should register themselves first to the *Datok* by submitting an ID Card. Then, he will ask the background of the brides, the bridegrooms, and their families to fulfill the marriage principles. The *Datok* will issue the 'unofficial' marriage certificate legalized by The Provincial Islamic Committee. Next on, the couple must register their marriage for the second time to the Registry Office for getting legal acknowledgment from the Thailand government.[22]

The registration of marriage through *Datok* is far easier. The couple only needs to submit their ID cards and there are no rules on the minimum age of both bride and bridegroom as the standard is *baligh* (religiously mature). However, the Registry Office in Thailand requires them to fulfill various requirements for the marriage registration such as the minimum age at 17 years old, birth certificate

[20] Malik Ibrahim, *Seputar Gerakan Islam Di Thailand: Suatu Upaya Melihat Faktor Internal Dan Eksternal* (Yogyakarta: Sosio Religia, 2012), 147–48.

[21] Zulkeflee, "The Head of the Religious Field at School and Khoteb in Trang," (2015), Direct interview, (26 July 2015).

[22] Husna Kepan, "The Wife of Khoteb Masjid of Muang Trang," (2015), Direct interview, (16 August 2015).

and family card. Additionally, a marriage certificate of the Provincial Islamic Committee is also available for second, third or fourth wives. On the contrary, a formal marriage certificate is only available for the first wife as the government neither acknowledges nor allows polygamy. The legal marriage certificate enables wives and children to get some facilities, such as allowance for a worker husband, social assurance, free health and education service for the state school as well as the requirement for job application.[23]

After submitting the ID card, the *Datok* will ask the rest of the marriage principles and requirements. The principles are in line with the common Islamic laws as stated in the Qur'an and hadith, which are the existence of the future next bride and bridegroom, *walī* (guardian) for the bride, two marriage witnesses, and the statement of *ijāb qabūl*. Meanwhile, the requirements are also similar to those in Indonesia, except for the minimum age for both. One of them is about the Muslim status for both. Thus, if one of them is non-Muslim, he/she must willingly convert to Islam first before the marriage settlement takes place.[24]

As for the guardian (*walī*), it mainly comes from the family line due to the priority arrangement in Syafi'i school. However, a woman has a right to choose a magistrate guardian in certain cases such as unwillingness, unreachable distance or the absence of family guardians.[25] Meanwhile**,** the marriage witness can be chosen by the staff of marriage settlement or from relatives of the couple. The requirements consist of; 1) psychologically healthy, 2) *bāligh* or religiously mature, 3) Muslim, 4) two men 5) having good eyesight and hearing.[26]

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[23] Jar Radeng, "Ustadzah Patthalung," (2015), direct interview, (24 September 2015).

.[24] Suwanee Makman, "The Child of Datok Imam Masjid of Muang Krabi," (2015), direct interview, (24 September 2015). See Nantawan Haemindra, "The Problem of the Thai-Muslims in the Four Southern Provinces of Thailand (Part Two)," *Journal of Southeast Asian Studies* 8, no. 1 (March 7, 1977): 85–105, https://doi.org/10.1017/S0022463400015666

[25] Zulkeflee, "The Head of the Religious Field at School and Khoteb in Trang."

[26] Zulkeflee.

Another main part is the *ijāb qabūl* process which must be done by the bridegroom with the guardian at the same time and place with clear and comprehensible pronunciation.[27] It usually takes place either in the bride's house or the mosque. The latter is typically chosen for unapproved marriage, polygamy, or a simple wedding ceremony.[28]

One thing mentioned in *ijāb qabūl* is the dowry. The bridegroom needs to give it to the bride before *ijab qabul* takes place. Besides, it needs to calculate the dowry very carefully to avoid any error in mentioning it at the *ijāb qabūl* process as the dowry is the absolute right of a married woman.[29] Generally, it is the bride or her family who determines the number or type of dowry, although a few cases show that it depends on the bridegroom consideration and decision.[30]

In general, Muslim marriage settlement in South Thailand looks similar to the practice in other areas. The difference lies in the marriage requirement as the more detailed explanation as follow:

First, there is no minimum age for the brides and the bridegrooms because the valid standard is *bāligh*. Islam suggests any mature and responsible person to get married. In any Muslim minority country, early marriage is even recommended to prevent any negative things such as promiscuity and moral decadence.

Second, women can choose a magistrate guardian (*wali hakim*) easily without considering the existence of *wali nasab* (family lineage guardian). This makes it easy to hold a marriage settlement as they wish to do.

Third, there is no specific requirement for two marriage witnesses as the consequence of a very minimum number of Muslim men around. Therefore, the witness can be either a just or a wicked person. *Fourth,* there found two-time marriage administration at Representative of Provincial Islamic Committee through *Datok Imam Masjid* and *Registry Office*. The former is for religious legality while the latter is for state acknowledgment to assure the right of Thai citizens.

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[27] Zulkeflee.
[28] Makman, "The Child of Datok Imam Masjid of Muang Krabi."
[29] Kepan, "The Wife of Khoteb Masjid of Muang Trang."
[30] Makman, "The Child of Datok Imam Masjid of Muang Krabi."

Apart from those differences, it is interesting to find that many unregistered marriages exist in South Thailand because the local people consider marriage certificates unimportant. Additionally, South Thailand marriage settlements are relatively simple yet much money-consuming for dowry and souvenirs given to the brides.

In the case of polygamy, the Thai government neither acknowledges nor allows the practice and consequently, it is only the first wife who gets the legal right and access. However, many Muslims build polygamy families in the absence of related specific rules. Moreover, some of them believe that Muslim in any minority country should choose polygamu for *syar'ī* reason, such as the higher number of women than those of men, preventing interfaith marriage, avoiding moral decadency and others.

Based on this perspective, a Muslim husband is required to either ask permission from his first wife or let her know about polygamy whether or not he gets the approval. Polygamy is considered legal as long as the woman (as the next wife) certainly knows that the man she will get married to is a married one. Most of the wives in South Thailand are workers or breadwinners and this makes it easier for any husbands who will do polygamy.

On the contrary to polygamy, the Thailand government allows interfaith marriage. Therefore, a Muslim who will get married to a non- Muslim, either Buddhist or others, needs to hold the marriage settlement in the City Hall because *Datok* does not allow interfaith marriage for Moslem although at the same time, he can't avoid anyone from doing it.[31] However, it is only a few Muslim who does interfaith marriage in addition to the fact that the number of interfaith marriage cases in South Thailand is less than the number of those in North Thailand.[32]

The blurred stand of *Datok* concerning interfaith marriage leads to the conversion to Islam because it is forbidden for Muslims to get married to the apostates (*murtad*). Unfortunately, a marriage settlement with a newly converted Moslem is not followed or preceded by any specific Islamic training to create a true Moslem.

[31] Zulkeflee, "The Head of the Religious Field at School and Khoteb in Trang."

[32] Radeng, "Ustadzah Patthalung."

Thus, any newly convert finds it hard to adapt to Islam and this potentially leads to back conversion. In this condition, *Datok* or another religious leader can not separate the married couple even though one of them has been already apostate.

Conclusion

Most of the marriage settlement practices in South Thailand follow Syafi'i school and are handled by *Datok Imam Masjid* as the local staff of religious affairs under the Provincial Islamic Committee which issue "unofficial" marriage certificate. Therefore, the marriage settlement must be registered again to Registry Office for getting an official marriage certificate. The principle and requirement of marriage settlement according to the *Datok* generally agree to common Islamic laws, such as the absence of minimum age for the future couple, prohibition for an interfaith marriage unless a conversion takes place beforehand, and the existence of guardian as well as witnesses. However, at other specific issues of marriage, such as polygamy and interfaith marriage, and the number of dowry, each *Datok* has different perspective and decision. Furthermore, certain issues such as interfaith marriage is legally allowed in Thailand while at the practice, most newly converted Muslems who get married to Muslims can not adapt to Islamic teaching then it leds them to a back conversion.

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Polygamy Marriage: Legal Culture, Optional Political Identity and Marital Status Dilemma (A Case Study in Pekalongan)

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Abstract:

Indonesian marriage law allows polygamy but with alternative and cumulative strict conditions. The novelty of this paper shows that the legal culture of polygamists is an important element that determines their optional political identity and marital status. This paper criticizes the legal culture in carrying out the polygamous marriages along with optional political identity and legal marital status of the actors. Qualitative research with the approach of social legal study was used to reveal the reality of polygamy among six couples. The findings and analysis show that the legal culture of the actors in either obeying or disobeying the rules of polygamy was subjective. However, the majority is diseobedient because they tend to break the rules, for instance by doing polygamy with *sirri* marriage. *Sirri* marriage is a political identity of life choice because of various considerations on both juridical and non-juridical ones. This condition has implications for the legal status dilemma of polygamous marriages. A marital status is considered legal only when the marriage is officially held and on the contrary, it is considered illegal in *sirri* condition. This polygamy marriage also has an impact on the legal status of the husband, wives and children in a family.

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Keywords:
Legal Culture; Legal Implications; Polygamy Marriage; Sirri Marriage; Optional Political Identity

Abstrak:

Hukum Perkawinan di Indonesia memperbolehkan poligami tetapi dengan syarat ketat yang bersifat alternatif dan kumulatif. Kebaruan paper ini tampak dari fakta bahwa budaya hukum pelaku poligami merupakan elemen penting yang menentukan politik identitas pilihan dan status perkawinannya. Paper ini akan mengkritisi budaya hukum para pelaku dalam melangsungkan perkawinan poligaminya berikut politik identitas pilihan serta status hukum perkawinan yang dijalani. Penelitian kualitatif dengan pendekatan *social legal studies* digunakan untuk mengungkap realitas perkawinan poligami yang dilakukan oleh 6 pasangan keluarga. Temuan dan analisis menunjukkan bahwa budaya hukum para pelaku dalam mentaati atau tidak mentaati aturan hukum poligami bersifat subjektif, dengan kecenderungan mayoritas bersifat negatif karena tidak mentaati aturan. Mereka memilih melakukan poligami dengan perkawinan *sirri*. Perkawinan secara *sirri* menjadi politik identitas pilihan hidup karena berbagai pertimbangan baik pertimbangan yuridis maupun non yuridis. Kondisi ini berdampak pada dilema status hukum perkawinan poligami itu sendiri. Status perkawinan dianggap sah jika dilakukan secara resmi dan begitu juga sebaliknya, tidak dianggap sah jika dilakukan secara *sirri*. Perkawinan poligami ini juga berimbas pada status hukum suami, para istri dan anak-anaknya dalam keluarga.

Kata Kunci:
Budaya Hukum; Dampak Hukum; Perkawinan Poligami; Perkawinan Sirri

Introduction

Article 3 paragraph (1) of Indonesia Law Number 1 of 1975 concerning marriage (hereinafter referred to as Marriage Law) mentions that the principle of marriage law is monogamy. However, polygamy with strict conditions is allowed based on the provisions of Article 3 paragraph (2), either categorized as alternative in Article 4 or as cumulative in Article 5. These legal provisions are basically

ambiguous[1] and therefore trigger legal uncertainty in its implementation. As a result, polygamy remains an issue that put people in dispute between pro and contra.[2]

Similar provisions also apply in Malaysia based on the Deed of Islamic Family Law (Allied Territories) of 1984[3] with a slight difference from those in Indonesia. Malaysian law requires a judge's decision and permission from the previous wife to perform polygamy. However, a Sharia court decision could replace the consent of wife.[4] Regulations on polygamy eventually lead to two groups; the pros and cons. Pros group relies their basic argument on the fact that Islam justifies polygamy as a part of *Sunnah* as well as an effort for avoiding immorality and empowering women.[5] Among others, supporters of this group are Puspo Wardoyo with his *Polygamy Award*[6] and the *Ikhwan Global Polygamy Club* chaired by Muhammad

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[1] The term monogamy was not absolutely used by Hotnidah Nasution. See Hotnidah Nasution in Nur Choirin YD, *Menyoal Ijin Poligami bagi Pegawai Negeri Sipil (Questioning Polygamy Permit for Civil Servants)*, Yin Yang Journal, STAIN Purwokerto Gender Study Center, Vol. 5 No.2 Jul-Dec 2010, 2010, 227-242. The term *open monogamy* was used by Hilman Hadikusuma, see Hilman Hadikusuma, *Hukum Perkawinan Indonesia (Indonesian Marriage Law)*, Customary Law, Religious Law, 4th edition, Mandar Maju, Bandung, 2011, 32. The term *gray monogamy* principle, meanwhile is used by another author. See in Shinta Dewi Rismawati, *Persepsi Poligami di Mata Perempuan Kota Pekalongan (Perception of Polygamy in the Eyes of Women in Pekalongan City)*, Muwazah Journal published by the STAIN Gender Study Center, Pekalongan, Vol. 6 Number 2 December 2014 Edition, 146-154.

[2]The debate over the pros and cons of polygamy can be seen in Nurhayati's article, "*Kontroversi Poligami (The Controversy of Polygamy)*", Tempo, XXXV No. 42 (December 2006), 108; and Rumadi, "*Momentum Reformasi Hukum Keluarga (Momentum for Family Law Reform)*", Koran Tempo, (Jakarta). The Edition of Wednesday December 13, 2006, A10

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[4] Raihanah Haji Abdullah, *Poligami di Malaysia (Polygamy in Malaysia),* Sharia Journal, Number 2, 1999, 167

[5] Puspo Wardoyo, *Poligami: Kiat Sukses Beristri Banyak (Pengalaman Puspo Wardoyo Bersama 4 Istri (Polygamy: Successful Ways with Many Wives (Puspo Wardoyo's Experience with 4 Wives)*, Bumi Wacana, Solo, 2003, 14-15.

[6] Kompas, Poligami Award: *Di Antara Dukungan dan Tantangan* (Polygamy Award: *Between Support and Challenges)*, 28 July 2003, http: // www. kompas.com/gayahidup/news.

Umar Nur.[7] Meanwhile, the representatives of cons group in Indonesia are *Coalition of Indonesian Women* (Kowani) and the Legal Aid Association of Indonesian Women for Justice (LBH).[8] Their basic argument mentions that polygamy is gender-biased, possibly leading to violation of the human rights in the sense of domestic violence[9] as well as greatly causing a divorce due to husband's injustice.[10] Additionally, Romli exposed the reality of abundance of poverty, misery and destruction of families because of polygamy.[11]

Based on the explanations above, the phenomenon of polygamy is still interesting to study at least for two reasons. *First,* is the fact that although there are many success stories of polygamy and it is currently being heavily campaigned, rejection of it is still widespread. *Second*, although the normative rules are the same, it turns out to be diverse in practice between the obedient and disobedient ones.

The studies on polygamy in Pekalongan City had been conducted, including those of Rismawati which revealed the perception of women in viewing polygamy practices. 50 female respondents stated that 33 people (73%) refused polygamy, but 12 people (27%) agreed with polygamy.[12] This result is different from the findings of Farah W. Mustafar which examined polygamy with female pilgrims of *Global Ikwan*. The pilgrims 100% agreed with polygamy on the grounds of God's destiny and the polygamy of "*murshid*".[13] Meanwhile, Trigianto, in his

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[7] See Ratna Batara Munti, *Demokrasi Keintiman Seksualitas di Era Global (Democracy of the Intimacy of Sexuality in the Global Era),* LKis, Yogyakarta, 2005, 134-135.

[8] Ratna Batara Munti, *Ibid*, 137

[9] Ratna Batara Munti, *Ibid,* 138.

[10] Raihanah Haji Abdullah, *Poligami di Malaysia (Polygamy in Malaysia),* Sharia Journal, Number 2, 1999, 167-183

[11] Dewani Romli, *Poligami Prespektif Gender (Gender Perspective Polygamy)*, Al-Adyan Journal of Interfaith Studies, Vol. 5, No. 1 (2010), 105

[12] Shinta Dewi Rismawati, " Persepsi Poligami di Mata Perempuan Kota Pekalongan (Perception of Polygamy in the Eyes of Women in Pekalongan City)," Muwazah was published by PSG STAIN Pekalongan, Vol. 6, No. 2, (December, 2014), 146-154.

13 Farah Wahida Mustafar dkk , Konsep Poligami Mengikut Perspektif Para Isteri dalam Jemaah Global Ikhwan Sdn. Bhd, Artikel Available July 2018. Farah Wahida Mustafar et al, *Konsep Poligami Mengikut Perspektif Para Isteri dalam Jemaah Global Ikhwan* (the Concept of Polygamy Following the Perspectives of Wives in the Global Congregation of the Ikhwan Sdn. Bhd), Article is Available in July 2018. www.Researchgate.Net./Publication/326225222_Konsep_Poligami_Mengikut_Prespektif_Para_ Istri_Dalam_Jemaah_Global_Ikhwan_Sdn_Bhd

research on the dispensation of polygamy for religious court judges in 2013, showed that there were eight cases of polygamy permit applications examined by the Pekalongan Religious Court. Seven of them were granted because they met applicable legal requirements.[14]

Other than that, regarding power relations in polygamy marriage communication, Wibowo, another researcher, showed that power relations in polygamous family communication are dominated by husband. This can be seen from the number of residents in the Gama Permai Housing complex in the West Pekalongan District with five polygamous families. One of them was carried out officially, while four others were performed informally or in *sirri*.[15]

The novelty of this paper is the use of *socio legal* perspective with a relatively new analysis instrument on the legal culture and optional political identity in the implementation of polygamy. This has not been conducted in previous studies. In this paper, we furthermore argue that the legal culture of polygamists in their marriages is an important element that determines the optional political identity and their marital status. The phenomenon of the one's obedience or disobedience to any laws is largely determined by his/her legal culture. Relating to this, Hart stated that "actually, law cannot be separated from social pressure. Therefore, to understand law and existing legal system, the perspective of people as the objects of legal norms must be considered. This condition requires internal and external legal approach".[16]

Thus, understanding the reality of polygamy is not enough by only reading the legal text, but also based on the reality of law in a society. Meaning of law in a certain community becomes important because of the effectiveness of the law. It is not only because of its good and complete legal substance and modern legal structure, but precisely also because of its legal culture.[17]

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[14] Ali Trigiatno, Ijin Poligami Di Kota Pekalongan (Polygamy Permit in Pekalongan City). Research Journal. Vol 5 Number 1, 2013, 27-39

[15] Brigitta Agni Wibowo, Relasi Kuasa dalam Komunikasi Keluarga Poligami (Power Relations in the Communication of Polygamy Families), (A Qualitative Analysis of Families with Polygamous Marriage Relations in Muslim Communities in Pekalongan City), downloaded from http://e-journal.uajy.ac.id/284/1/0KOM03630.pdf

[16]HLA Hart, *The Concept of Law*, Oxford University, Oxford, 1961, 86-87.

[17] Faisal, *Memahami Hukum Progresif (Understanding Progressive Law)*, Thafa Media, Yogyakarta, 2014, 23.

The study of the legal culture and optional political identity of polygamy family is important because a reality of polygamy is no longer depicted in black and white. It invites readers to understand the legal reality in a natural way. Legal culture, meanwhile, is a person's attitude towards law and the legal system related to perceptions, beliefs, values, thoughts, and expectations. It strongly relates to an atmosphere of social thought and power that determine how law is used, avoided, or abused. Furthermore, it mutually depends on public legal awareness; the higher legal awareness of the community, the better the created legal culture will be.[18]

Based on the arguments above, this paper questions how the legal culture of polygamist in Pekalongan City is and how the optional political identity of the polygamists in carrying out polygamous marriages and the legal status of their marriages are.

Research Method

The type of the research used here was *socio legal studies* with a tradition of qualitative research that describes in detail the working of legal texts (regulations and policies) on polygamy when dealing with the context of the community of Pekalongan City. The sources of the research data used primary and secondary data sources. The primary data sources were obtained directly from the field through a series of in-depth interviews with the informants and also observations. Then, the secondary data sources were in the form of primary legal materials consisting of legal regulations related to marriage from the general rules to the organic ones. The secondary and tertiary legal materials were from the books and library materials relevant to the investigated issue.

The number of key informants was six married polygamy couples, while supporting informants were the polygamists' family members (children and children in-laws), relatives and neighbors, the

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18. Lawrence M. Friedman, *The Legal System A Social Science Perspective*, Russell Sage Foundation, New York, 1975, 15, 194 and 223. See also Satjipto Rahardjo, *Sisi-Sisi Hukum di Indonesia (Legal Sides in Indonesia)*, Publisher, Kompas, Jakarta, 2003, 96. Compare Sulistyowati Irianto, *Perempuan di Antara Berbagai Pilihan Hukum (Woman Among Various Legal Options)*, Indonesian Obor Foundation, Jakarta, 2003, 287. Also read Daniel S. Lev, *Hukum Dan Politik Di Indonesia (Law and Politics in Indonesia)*, Institute for Economic and Social Research, Education and Information (LP3ES), Jakarta, 2000, 119.

officials in the field of marriage such as the officers of the marriage registry office in the Religious Affair Office (KUA) and the Registrar of Religious Courts. The instruments used were in the form of the list of interview questions, *check lists*, stationery, tape recorders, cameras, field notes and others. To get information, the author involved observation and in-depth interviews. The involved observations were through observing the legal culture of the polygamists in carrying out their marriages, their daily lives and so on. Meanwhile, the interviews were conducted with the key informants and supporting informants who were selected in a purposive way according to the established criteria.

The criteria included the polygamy marriage families held for more than two years, having children from their marriages, and carrying out the marriage both officially and informally (*sirri*). Any data obtained from key informants will then be developed following the principle of *snowball*.

Next on, to obtain the secondary data, the author used literary studies while to check credibility of the whole information and data, we used triangulation techniques with data sources and methods. The data analysis techniques used the interactive model of Mattew B. Miles and A. Michael Huberman which operates in three cycles of activity; data presentation, data reduction and withdrawal,[19] to make comprehensive and reflective analysis.

Finding and Discussion

1. Polygamy Marriage: Negative Legal Culture

Along with the rapid economic development of Pekalongan City known as the City of *Santri*,[20] Batik City,[21] and also the Creative

[19] Mattew B Miles dan A Michael Huberman, An Expanded Soucers Book, Qualitive Data Analysis, Sage Publications, 1992

[20] AM M Khafidz Ma'shum, *Persepsi dan Perilaku Ulama Pesisir Terhadap Bank Syariah (Studi Terhadap Pembentukan Persepsi dan Perilaku Utama Terhadap Bank Syariah Di Pekalogan (Perception and Behavior of Coastal Ulama Towards Islamic Banks (A Study of the Establishment of Perceptions and Main Behaviors of Islamic Banks in Pekalogan))*, Dissertation, UIN Sunan Kalijaga, Yogyakarta, 2017, 11

[21] Rita Rahmawati, *Teologi Buruh : Agama dan Sikap Pasrah Perempuan Buruh Sanggan Batik (Labor Theology: Religion and the Submissive Attitude of Sanggan Batik Workers)*, Research Journal, Vol. 11, No. 2, November 2014, P3M STAIN Pekalongan, 212-213. See also Triana Sofiani, *Perilaku Curang dalam Transaksi Bisnis Batik Di Kota Pekalongan (Cheating Behavior in Batik Business Transactions in Pekalongan City)*, The 3rd University

City of the World, the facts showed that polygamy in this region belongs to unsegmented people. It was not only among upper-middle class society (employers, teachers/lecturers, Civil Servants (PNS), Police/Indonesian National Armed Forces (TNI)), but also the lower economic class (pedicab drivers and garbage collectors).

However, it must be admitted that the number of polygamy in Pekalongan was not recorded clearly, although the Secretary of Pekalongan Religious Court stated that at least, at each of the last five years, five couples applied for the polygamy permission. Generally, they consisted of businessmen or civil servants.[22] Therefore, there is approximately 25 polygamy permit application in the past five years.

The data above shows that polygamy really exists and occurs in Pekalongan. Some of them are official and some others are through *sirri* mechanism. The author assumed that the actual number of polygamy was much higher than what was recorded, because mostly, polygamy are in *sirri* and unofficial ones. Moreover, Setiawati said about a high correlation between *sirri* and polygamous marriages.[23] This means that the higher number of the unofficial marriages are performed, the higher possibility of the polygamy family would be.

In the context of polygamy in Pekalongan City, the following data illustrates the profile of the perpetrators, mode, legal culture and status of polygamists' children:

Table 1:
Profile of Polygamy Couples, Marriage Type, Mode and Status of Children[24]

Husband/age/ occupation/ education	Wife I/age/ occupation/ education	Wife II/age/ occupation/ education/ status when	Type of marriage/ mode, reasons for	Child Status

Research Colloquium, 2016, ISSN 2407-9189, UMS, 2016, 197. Shinta Dewi Rismawati, *Ibid*., 255.

[22]. Interview with the Religious Court Secretary of Pekalongan City in his office on February 12, 2018.

[23] Effi Setiawati, *Pengalaman Perempuan dalam Menjalani Kehidupan Perkawinan Nikah Siri, Studi Kasus di Kecamatan Sumbersari Kabupaten Jember Jawa Timur (Women's Experience in Living the Life of Siri Marriage), Case Study in Sumbersari District, Jember Regency East Java*,, in Women's Journal, Considering Polygamy, No. 31, 2003, 40

[24]This data is the data that had been processed and analyzed by the author.

		married	**justification**	
MA/37/ private-delivery business/ High School	SN/41/ Civil servant-nurse/D.3/ 3 children	RP/19/ housewife/ Junior High School/ 1 child/ daughter	*Sirri*-unrecorded, no wife I's permit, doing *sunna,* forcing her to accept and threatening her for divorce and biological needs, family economic fulfilment, and for the sake of family good name and children	Not recorded in the family card, only name of mother mentioned in birth certificate
H. Mz/41/ private–batik business/ bachelor	Hj Is/39/ housewife/ bachelor/4 children	Hj Az/30/ housewife/ High School/ 2 child/ daughters	Officially-recorded, doing *sunna,* Wife I' s permission-and support, II wife's social status, hoping for the blessing of husband and Allah, and enough fulfullment of physical and spiritual needs.	Recorded in the family card, with the name of mother and father mentioned in birth certificate
H/65/ retired Civil servant/ Diploma	T/59/ private teacher/4 children/ 6 grandchildr	M/40/house wife/ Junior High / 3 children (1 from previous	*Sirri*-unrecorded/d oing *sunna,* no wife I's permission, forcing the	Not recorded in the family card, only name of mother

	en	marriage)/ widow	wife I, pregnant condition, biological needs of husband, economic fulfillment and social status for children and wife II.	found in birth certificate
R/47/ private –café business/ Bachelor	Mh/45/ housewife/ bachelor/3 children	As/26/ housewife/ High School/2 chidren (1 from previous marriage)/ widow	*Sirri*-unrecorded/Doing *sunnah,* No wife I and family's permission, forcing and threatening for divorce, willingness to have a a son, for a social status as a rich man, husband's biological needs, economic fulfillment, family's good names, scared with the stigma of widow and for the sake of children's future	Not recorded in the family card, only name of mother found in birth certificate
MK/50/ Civil Servant/	I/49/ housewife / bachelor	N/43/ Teacher-Civil Servant/	*Sirri*-unrecorded-doing *sunnah*,	Not recorded in the family

Master degree	/3 chidren	bachelor / 3 chidren (2 from previous marriage)/ widow	first wife permitted but the boss did not, the second wife is a civil servant so dealing with complicated bureaucracy, the reason of love, economic need fulfillment and keeping family good name, fear of widow stigma and for children's future.	card, only name of mother found in birth certificate
Jh/62/ worker-garbage collector/ Junior High School	Am/57/ housewife/ Elementary School / 4 children	H/37/ housewife/ Elementary School/3 chidren (2 from previous marriage)/ widow	*Sirri*-unrecorded-doing *Sunnah,* carrying out secret affair and husband's biological needs , economic need fulfillment and keeping family good name, fear of widow stigma and for children's future	Not recorded in family card, only name of mather in birth certificate

The above data shows that the polygamists in Pekalongan were quite diverse from the age, occupation, education, the second wife's status, number of children, mode, reasons or justification, as well as marital and child status. In terms of age, the husbands who performed polygamy range from 37 to 65 years old, and the first

wives range from 39 to 59 years old. Then, the ages of the young wife are between 19 and 43 years old. In general, the data also shows that the age of polygamists (both husband and wife) at the time of their marriage is classified as productive age. For the husbands, 40 years or older is the age of both economically and socially independent. This is in line with the opinion of Katkovsky W and Garlow stating that independence is a person's capacity to manage their own lives. Thus, the individual can determine and decide what he/she wants and can be responsible for the decisions,[25] including for doing polygamy.

The uncertainty on polygamy numbers among Pekalongan residents, basically, was strongly influenced by both non-legal and legal factors as well. The table 1 above clearly shows reasons and or justification of non-legal polygamy which varied from religious, economic, social, biological to psychological reasons. On the husband's side, the reason is mostly on religious tendency for implementing *sunnah*, avoiding adultery, fulfilling biological need, and confirming social status as rich men. Meanwhile, non-legal factors in wife's side are mostly about economic fulfillment, the escape from stigma status as widows, keeping the good name of the family, maintaing the future of children, fulfillment of biological needs and implementing *sunnah* as well. In Pekalongan, according to the data, only two women (H. Mz's wives) who said that getting married in a polygamy family is merely for the sake of God's blessing. In fact, the awareness of H, Mz's wives was inseparable from their intense interaction in *al-Syafi'iyah* recitation community. The wives did not refuse to be neither first nor second wife. This phenomenon is quite similar to the concept of women who follow the *Ihwan Global Congregation* on polygamy.[26]

Meanwhile, the legal factors are mainly on the normative rules of polygamy when the actors interpreted and obeyed or disobeyed the law. In this context, the legal culture of the actor in interpreting as well as either obeying or disobeying polygamy ultimately reflected whether their standing are positive or negative. A person's legal culture was strongly influenced by his/her interpretation on the normative values of any regulation. Relating to this, Supardi Mursalin mentioned that legal culture is very likely influenced by people's

[25] Katkovsky.W. & Garlow, L., *The Psychology of Adjustment and Competence*, Winthrop Publishers Inc, USA. 1986, 54

[26] Farah Wahida Mustafar et al, *Ibid*.

understanding on the Marriage Law and violations of the procedure that cause marriage cancellation by the judge.[27] In this context, the informant's understanding and ability to implement the legal provisions regarding polygamy becomes another important point.

The author argues that according to Indonesian Marriage Law, there are two requirements for polygamy, which are material and formal. Material requirements refer to essential requirements for polygamy to carry out. These conditions include the willingness of related parties, including the wives (Article 3 paragraph 2), the reasons allowing husbands to perform polygamy, mainly about the "dysfunction" of wife (Article 4 paragraph 2), the agreement of wives, a guarantee on husband's ability to fulfill the needs of wives and their children and the husbands' commitment of justice towards their wives and children (Article 5).[28] Meanwhile, formal requirements refer to those related to procedural and administrative materials to gain legitimacy from the state, including the issuance of polygamy permit (Article 56 KHI) and the settlement of application fee.

The formal requirements are a continuation after the fulfillment of material requirements, as they only relate to procedure and legality of polygamy. Between the two types of conditions, the material normative ones is the hardest requirement to fulfill, according to five out of six husbands (respondents). Consequently, *sirri* polygamy became their choice. Relating to the *sirri* marriage, Ramulyo defined it as a marriage of Muslims by fulfilling the pillars and conditions of marriage without formal registration of the marriage law.[29]

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[27] Supardi Mursalin, *Menolak Poligami: Studi Tentang UU Perkawinan dan Hukum Islam (Refusing Polygamy: A Study of Marriage Law and Islamic Law)*, Pustaka Pelajar, Yogyakarta, 2007, v.

[28] Shinta Dewi Rismawati, *Konstruksi Hukum Poligami di Indonesia (Prespektif Hukum Feminis) (Construction of Polygamy Law in Indonesia (Feminist Legal Perspective))*, Journal, Vol. 9, No. 2. 2017, 125-137

[29] M. Idris Ramulyo, *Suatu Perbandingan Antara Ajara Syafii dan Wasiat Wajib Di Mesir Tentang Pembagian Harta Warisan Menurut Islam,* Majalah Hukum dan Pembangunan, Nomor 2 Tahun XII, 2000, 23. M. Idris Ramulyo, *Suatu Perbandingan Antara Ajara Syafii dan Wasiat Wajib Di Mesir Tentang Pembagian Harta Warisan Menurut Islam (A Comparison Between Shafi'i Teachings and Mandatory Wills in Egypt Regarding Distribution of Inheritance According to Islam),* Law and Development Magazine, Number 2 Year XII, 2000, 23.

The strict rule of polygamy marriage leads people to exploit the legal loopholes and make it an excuse to carry out polygamy without following the law. People, therefore, tend to build a polygamous family by doing *sirri* and unregistered marriage. Likewise, a fact of difficulty in getting a wife's permission (oral or written) and the absence of sanctions for husbands who break the law make them easy to carry out any legal violations even criminal offenses. In this extent, Reynata enlisted some modes that a husband likes to use in doing polygamy. They consist of getting *sirri* marriage, faking the identity data, geting marriadge without a wife's permission and forcing her to give permission.[30]

In the context of Pekalongan, the husbands' mode of polygamy marriage were getting marriage without the permission of wives (3 cases), forcing the wives to give permission (3 cases), engaging in a secretful marriage (which the first wife doesn't know about) and getting *sirri* marriadge (5 cases). This makes it clear that the majority of polygamists' legal culture was negative as they ignored the legal provisions regarding polygamy, particularly because of difficulties in obtaining permission from the wives. The absence of wife's permission then impacts the same of the judge's stand in the religious court. It is also obvious that the negative legal culture is in line with low level of legal awareness among polygamy couples as well as the complicated procedure of polygamy marriage. As a consequence, this condition justifies the argument of Friedman[31] on the correlation between legal culture and legal awareness.

Regarding with the process of fulfilling the requirement, the authors believe that the degree of difficulty on legal provision fulfillment is subjective or depending on intention of each individual. A husband who unseriously intends to obey the rule will tend to think that the legal terms and procedures for polygamy are very difficult to fulfill and therefore *sirri* polygamy becaomes an alternative and vice versa. Irresponsibility or disobedience on the rule is clear from the type of marriage choices whether it is official or not. The majority of husbands said that for practical reasons, a marriage is sufficient to do through *sirri* procedure. The important thing to consider is the

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[30] See Vony Reyneta, *Kebijakan Poligami : Kekerasan Negara Terhadap Perempuan (Polygamy Policy: State Violence Against Women)*, Women's Journal, Considering Polygamy, Vol. 31, 2003, 10

[31] Lawrence W. Friedman, *Ibid.*

lawfulness of marriage based on religious teaching (*halāl*). This condition makes the law on polygamy ineffective because of low level of awareness and understanding of the actors. The almost same thing occurs in Madura where polygamy is typically through individual or *sirri* procedure and carried out without the consent even detection of the first wife.[32]

The diversity on either obeying or disobeying the rules of marriage law causes a variety of legal cultures on polygamy. In this talk, Rahardjo said that the legal culture of a nation or a person is determined by certain values serving as references in applying the law.[33] Meanwhile, Irianto mentioned that legal culture is a part of the social forces existing in a society which sustainably influence the operation of legal system on whether it is obeyed or disobeyed.[34] Furthermore, Friedman thought that the legal culture consists of ideas, values, attitudes and beliefs of a person to hold on in dealing with any legal system. He continued that the legal system can simply be described as a ship on the sea that sails with social force.[35] Therefore, legal awareness is a mental condition of a subject when he/she has to face a normative command in determining the choice of two-dimensional complete behavior, namely cognitive and affective dimension, regarding the law that he/she literally knows that it demands obedience.[36] Here, the authors believe that legal culture is a driving force that potentially encourages the operation of any legal system. As a driving force, the legal culture based on the values of meaning, perception, expectations, attitudes and behavior becomes the key that determines the effectiveness of any legal system.

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[32] Abd. Warits and Abd. Wahed, Praktik Poligami Di Bawah Tangan di Desa Laden Kabupaten Pamekasan (The Practice of Individual Polygamy in Laden Village, Pamekasan Regency), Al Ihkam Journal of Law and Social Institutions, Vol 9. No 2. 2014, 223-259

[33] Satjipto Rahardjo, *Sisi-Sisi Hukum di Indonesia (Legal Sides in Indonesia)*, Publisher, Kompas, Jakarta, 2003, 96.

[34] Sulistyowati Irianto, *Perempuan di antara Berbagai Pilihan Hukum (Woman among Various Legal Options)*, Yayasan Obor Indonesia, Jakarta, 2003, 287.

[35] See Lawrence M. Friedman, *Legal Culture and the Welfare State*, in Stewart Macaulay, Lawrence M. Friedman and John Stookey, *Law and Society Reading on the Social Study of Law*, WW Norton and Company, New York London, 1995, 269.

[36] Soetandyo Wignosoebroto, *Hukum, Paradigma dan Dinamika Masalahnya (Law, Paradigm and Problem Dynamics)*, 2002, Elsam, Jakarta, 373.

The data in table 1 above shows that the legal culture of the polygamists is quite diverse each others. Some of respondents obey and fulfill the provisions of polygamy as regulated in Marriage Law and other organic legal rules. One of them was H Mz who legally got married to his second wife considering the consent of the first wife, religious teaching as well as the nation law. Furthermore, he became surer to carry it out as he believed that he himself would be fair as suggested in religious teachings. For H Mz who worked as a businessman, the legal provisions he adhered to were Law No. 1 of 1974 concerning Marriage, PP No. 9 of 1975 and KHI (*Kompilasi Hukum Islam* or Islamic Law Compilation). In other word, H Mz's legal culture was positive. Meanwhile, the reason for his second marriage was mostly because of his encouragement to achieve the blessing of Allah SWT. In the other hand, his motivation to register his second marriage was to provide the legal protection on his marriage legal status and as well his wife and children. H Mz considered that the action was a fair act and as a representation of husband's responsiblity.

Meanwhile, the negative legal culture in polygamy marriage was shown by MA, H, R, Mk and Jn who did neither attend to nor obey the provisions of polygamy law for various reasons then chose to take *sirri* procedure. The main reasons for that choice were rational and pragmatic thinking; they did not want to get bothered because the conditions were complicated and difficult to fulfill. In addition, a polygamous husband was motivated by the following reasons: meeting biological needs, safeguarding the good name of his wife, the status of second wife as a civil servant (N) who, according to the law, is prohibited to be a second wife, not getting consent from the first wife, not hurting the first wife's feelings and her family, avoiding any Court complicated procedure, getting offspring, not committing immorality (adultery) anymore, and the lawfulness of polygamy according to religious teaching and state law.

The conclusion of this talk is that the legal culture of polygamists in Pekalongan City tends to be negative because of husbands' subjectivity in fulfilling the legal requirements and procedures for conducting polygamy. They claimed to have experienced the complexity and difficulty of meeting applicable regulations. This condition caused them to prefer polygamy marriage

in *sirri* with pragmatic and rational reasons according to their own consideration.

2. Polygamous Marriage: Identity Politic of Rational Choice

Table 1 above shows a variety of husbands' occupation. Most of them work in private sector or become entrepreneurs (MA, H. Mz and R), followed by civil servants (H and Mk) and laborers (Jh). On the other hand, the first wives are mostly housewives (Hj. Is, Mh, I and Am) followed by civil servants (SN) and private teachers (T). Likewise, occupation of the second wives were also dominated by housewives (Rp. Hj. Az, M, As and H) and PNS teachers (N). A husband who works as a private worker, businessman or civil servant with the working period about 15-20 years tend to be economically established and this economic efficacy may drive them to either formal or informal polygamy. This economic independence is then supported by a developing culture or belief in society; the value of a husband's success is clear from his economic life and the number of his wives. An informant said that the willingness to get social recognition as a rich man and the polygamy of the Prophet encouraged him for polygamy.[37]

The economic condition of husband is generally very different from those of wives, both first and second. There were indeed a few wives who work as civil servants, but most of them are housewife. Becoming a housewife makes them very dependent on their husbands as the main breadwinner of family. They become marginalized in economic sector and it leads them to very low access to family assets.[38] As a consequence, they did not have a strong bargaining power in family decision making and free access to family financial management. Furthermore, they are also unable to refuse their husbands' polygamous marriage. Relating to this, Dickson said that there found several reasons on why a wife accepts her husband's polygamous marriage, i.e: (a) to control their own desire, (b) to share responsibilities in household management with another wife, (c) to be more independent and not dependent on her husband, (d) to have a

[37] Interview with H. Mz, R and MA in their homes in July 2016

[38] Eva Kusuma Sundari, *Perempuan Menguggat (Claiming Woman)*, Lappera Pustaka Utama, Yogyakarta, 2004, 9

stronger dependency on the husband, and (e) because of fear from getting socially negative stigma.[39]

Sharing the same opinion with Dikson, Nurmila said that the economic dependence experienced by women on men is the cause of polygamous marriages. This pattern of dependency even often triggers family violence.[40] Meanwhile, Kinasih mentioned that generally, when women become widows, they tend to deal with the problem of economic hardship to support themselves and their children life. As long as they become widows, they tend to feel anxious because people will focus on every detail of them.[41] The authors agree with the opinion of Dickson and Nurmila that in terms of wife, economic factors and fear of stigma of widow status are the main reasons why they are willing to be both first and second wives. Therefore, in the context of Pekalongan, economic dependency and fear of being socially stigmatized as widows force the first wives to survive in the marriage as well as compel the second wives to get married to other woman's husband.[42] This is so advantagoeus for a husband because they will automatically have a strong bargaining power to control his wives and family. They will also be certainly dare to choose polygamy although common people still consider it as an extra-ordinary family.

In this era of globalization, the discussion of polygamy emerges in the midst of various forms of resistance to traditional family discourses. They range from a choice to be single, non-marital living together, single parents, infidelity, sexual freedom movements for Lesbians, Gay, Bisexuals and Transgender (LGBT) as well as gender equality. The typology of this nowadays social movement is different from that in the past which emphasized women emancipation. Advances in information technology development have accelerated the spread of information on how to shape personal identity politics together with the strengthening discourse of international human

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[39] C. Dickson, *Marriage and Family Problems*, West Publishing Company, Metropolis, 2007, 34.

[40] Nina Nurmila, *Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia, Routledge*, Taylor and Francis Group, London and New York, 2009, 117-130.

[41] Sri Endah Kinasih, *Perkawinan Kontrak di Masyarakat Kalisat (Contract Marriage in the Kalisat Community)*, Jurnal Perempuan No. 29, May 2003, 134

[42] Read Rita Serena Kolibonso, *Diskriminasi itu Bernama Kekerasaan Terhadap Perempuan (Discrimination Named Violence Against Women)*, Journal of Women 45, No. 45, 2006, 19.

rights.[43] In contrast to Cohen and Kennedy, Mc. Micheal said that in the era of globalization, the discourse of polygamy as a political choice of identity does not only belong to religious fundamentalists, but also a group who wants to express their return to the ease and security of traditional rules of behavior including maintaining pathriarcy as traditional family values.[44]

The group wants to restore the dominant power of men (husband) in controlling his wife and family under his arm. This is in line with what Anthony Giddens's statament that the independence (domination) of a person to choose polygamy is a part of social movement for identity politics called as politics of life choices or political struggles of alternative life choices[45] which are different from the existing ones. Giddens and Beck further asserted that the growth of social actors who are empowered or able to exercise his/her electivity in everyday life is an important component in a global culture as they tend to be relatively self-aware and knowledgeable. They seek to shape their own lives by redefining the world around them. Reflexivity refers to the qualities of *self-awareness*, *self-knowledge* and contemplation. It is the capacity that individuals have to depend on themselves critically.[46] Self-construction as a reflective project, meanwhile, is elemental part of the reflection of modernity in which an individual must find his/her own identity among a number of strategies and choices provided by abstract systems.[47]

In this context, the polygamous husbands mean those who have *self-awareness* about their position in a very dominant family relationship, *self-knowledge* about the requirements, polygamy procedures, as well as the economic and social conditions around them. The contemplation means that the husbands have thought carefully about the risks of polygamy. These considerations include

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[43] Robin Cohen dan Paul Kennedy, *Global Sociology*, Maxmillan Press Ltd, London, 2000, 290.

[44] Philip Mc. Michael, *Development and Social Change: A Global Prespective,* Pine Forge Press, California, 2000, 242.

[45]Anthony Giddens, *Runway World: How Globalization is Changing Our Lives*, Gramedia Pustaka Utama, Jakarta, 2001, 49

[46] Robin Cohen and Paul Kennedy, *ibid*., 36

[47] Anthony Giddens, *The Consequences of Modernity,* Poilty Press Ltd, Cambridge, 2004, 112

the motivation of polygamy, the economic (financial) conditions, the surrounding social life, the opportunities, and the risks that probably come in a polygamy family. The integration among three elements (*self-awareness, self-knowledge* and contemplation) finally encouraged them to be brave for having a different political identity from common husbands who are only monogamous.

The consideration process that integrates *self-awareness, self-knowledge* and contemplation with the opposite condition was also experienced by the wives both the first and second. The first ones made the decision (though initially forced) to accept their husbands' polygamy as a part of her obedience and a form of wife service. They realized that they could not afford their selves and their children economic needs when they had no income. They were also aware that over time, their ability to serve biological needs of their husbands will be limited. Meanwhile, the decision of the second wives to become a wife of a married man was based on the willingness to loose the status of a widow while they hoping that by becoming a second wife, there will be sufficient fulfillment needs for them and their children, including biological, social and psychological ones. From the facts above, it is clear that both husbands and wives of polygamy chose different identity politics from other common families because of their respective rationality and pragmatic considerations.

Into this extent, the authors agree with Mc. Michael related to the statement that polygamy is actually a discourse to restore patriarchal values.[48] This is evident from the mode and excuse for justifying a husband to choose polygamy in order to strengthen his dominant position in the relationship among the husband over his wife(s), children, and family. The husbands might use coercion, threat to divorce their first wife, pregnancy of the next second wife, fulfilling biological needs, and the absence of a son. Therefore, the first wife was in difficult position for either getting divorced or being a co-wife. With those two difficult choices, the first wives finally chose to be a co-wife by letting of their husbands' polygamy. The first wives chose their identity politics as the first wives or old ones, while the husbands chose their identity politics as the husbands of two wives (old and young wives) and heads of households from two families at once.

[48] Philip Mc. Michael, *ibid.,* 242.

Related to Giddens' opinion, the authors also believe that polygamy is an optional identity politics that drives a person to be the center of attention because his lifestyle and life choice are different from those of general public. Gidden referred this phenomenon as patetic narcissism,[49] namely an orientation to self-satisfaction. Interestingly, it is not only a form of narcissistic defense against the threat from outside world due to individual's lack of control over it, but also a form of positive self adjustment into various kinds of global situations which influence everyday life[50] including, in this case, polygamy. In reality, the life pattern of a polygamous husband, of course, is different from the lifestyle of other husbands because he is required to share in many ways with his wives, children and family both in terms of quantity and quality.

A husband's choice for polygamy also leads to double risks, namely being praised and cursed at the same time. A polygamous husband is often praised as a man who is not afraid of his wife, an established and wealthy husband, a pious husband for following the *sunnah Rasul* and so on. On the other hand, he also got some negative stigmas, such as a selfish husband, a john, a husband of lust, a heart breaker, a violence actor in the household and so forth. The same occurs to the wives yet in different conditions and stigma, especially for the second wives who were considered as household destroyers or usurpers. This negative stigma has nothing to do with husband or wife's educational background whether they were highly or low educated. Moreover, based on husband's educational background, the respondents of this research were also diverse. There was one with master degrees (Mk), two (H. Mz and R) with bachelor background, one (H) with college degree, one (MA) who graduated from Senior High School (SLTA) and another (Jn) as Junior High School graduate. On the other hand, on the wife's side, one person (SN) graduated from College (D3), three (Hj. Is, T and I) as bachelor graduates, other three (Hj. Az, M and As) who graduated high school, and the last three (RP, Am and H) who graduated junior high school.

The authors assumed that husband's educational background which was dominantly secondary and higher educations, they

[49] Anthony Giddens, *Ibid.,* 162.
[50] *Ibid.*, 163.

typically knew about the legal requirements and procedures for polygamy and the necessity for recording their polygamous marriages in an authorized institution to make it legal. However, in reality, even though they knew the requirements and procedures for polygamy, they preferred marriage in *sirri*. This condition caused uncertainty in the number of polygamous marriages.

3. Legal Status Dilema in Polygamy

Marriage, as said by Suhanah, has sacred values because it is highly suggested in religious teachings.[51] Therefore, it can relate, the state regulates the marriage. Additionally, Scholten mentioned that marriage is a legal relationship between a man and a woman to live together eternally and is recognized by the state. Scholten continued that as an eternal relationship, marriage must last last forever in a lifetime be endorsed by the state. Therefor, for him, every marriage couple needs to obey any regulations set by the state.[52] This is mainly because marriage is basically not merely a private domain between individuals. Instead, it is a public domain so that it requires state intervention and as a consequence, every country has a rule or law regarding marriage.

In relation to this, Erna Karim assumed that marriage is a process that involves emotional, economic, social aspects and official recognition by the community through applicable law.[53] Meanwhile, according to Pamuji, is a public event with special social impact and affects other aspects of life such as economic, legal and even individual security aspects. With a multi-aspect impact, it is appropriate for the state to formulate policies in the field of marriage law,[54] such as the registration. Marriage registration actually has a

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[51] Suhanah and Fauziah, *Marriage Contract in Bogor Peak Area*, Multicultural and Multireligious Journal, Vol x, No. 4, Research and Development Center for Religious Life Research and Development Agency of the Indonesian Ministry of Religion, Jakarta, 2011, 889.

[52] Scholten, quoted from Prawirohamidjojo and Safioedin in the book FX Suhardana, *Civil Law I*, PT.Prenhallindo, Jakarta, 2001, 88.

[53] Erna Karim, *Divorce Approach in the Perspective of Sociology*, writing in The Book on the Sociology of Family Sociology, Editor of TO Irhomi, Indonesian Torch Institute, Jakarta, 2004, 135.

[54] Erna Karim, *Ibid*., 142.

tremendous impact because it determines the status of recognition of the marriage by the state[55]

In the context of Indonesia, marriage is considered legal when it meets the requirements such as the presence of prospective husband, prospective wife, marriage guardian, two witnesses and the consent granted.[56] Furthermore, Article 2 paragraph (2) of the Marriage Law says so: "Every marriage is recorded according to the applicable laws and regulations". It means that marriage is considered legal by the state only when it is registered by an official from the authorized institution, namely the marriage registrar in the religious affairs office (KUA; *Kantor Urusan Agama* in Indonesia) and the civil registry office. As a consequence, marriage settlement needs to take place in front of officers to get legal consideration as well as legal force. In relation to marriage registration, Amin mentioned the purposes of it namely; *first*, to provide marital status as legally valid both on religious and state laws. *Second*, to ensure the fulfillment of the needs as well as the rights of wife and children. *Third*, to be a basic right for a wife to sue her husband in any unexpected condition.[57]

The importance of marriage registration is regulated in Article 5 of KHI which says that in order to guarantee marital order for the Islamic community, every marriage must be recorded. It stresses that marriage registration is only for orderly administration instead as a legal requirement. However, this can't be ignored to make sure that the marriage itself and the parties involved could be well protected and recognized by the state. This is line with what Anshary said about the purpose of recording marriage. For him, it aims to create orderliness in the marriage administration for a good socciety in addition to ensuring the enforcement of rights and obligations for both husband and wife. He also thinks that it is a preventive political law of the state to lead its people in order to create orderliness and well-arranged life system. It is mainly because marriage life is quite

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[55] Aparna Polavarapu, *Gendered Dimensions of Marriage and Divorce Registration Laws in Africa,* Prepared for Data 2X, UN Foundation, July 28, 2016, 4

[56]RI Ministry, *Compilation of Islamic Law in Indonesia*of Religion, Directorate General of Islamic Institutional Development, Jakarta, 1999, 18.

[57] Maruf Amin in Sainul, *Urgency of Marriage Registration in Indonesian Laws*, http://download.portalgaruda.org/article.php?article=298364&val=6795&title=Urgency of Marriage Registration in Indonesian Laws

close to any irregularities even disputes between husband and wife. Therefore, the involvement of the authorities/ state in arranging marriages in the form of registration becomes a must.[58]

The proof marriage legality is clear from the issuance of an authentic deed namely the marriage certificate (marriage book) on behalf of the bride and groom. A marriage certificate plays is very important because it is the basis for marriage legal guarantees as well as a perfect authentic evidence to provide for any dispute or unexpected condition in the future. This certificate is owned by both husband and wife. Its presence as an official document has many benefits because it has direct implications on the private aspects (civil law) and public law aspects, especially population administration. Thus, the validity of a marriage is very dependent on its record in the administration which integrates to recorded status of the marriage in citizen administration.

In the context of polygamy in Pekalongan, there is only one valid marriage according to the state law because it met the legal requirements and mechanisms. It is marriage between H. Mz and his second wife named Hj. Az. On the other hand, 5 other marriages are considered invalid because it was held in *sirri* procedure. As a consequence of the legal culture of polygamy, the legal status of husband and wife are only applied to the couple H. Mz and Hj. Az, while the status for 5 other couples is invalid and considered illegal. For a legal marriage, it obtains a marriage certificate and a right to be registered in the citizeb administration as a family with a family card (KK; Kartu Keluarga). Therefore, 5 other couples do not get marriage certificates and are not considered as husband or wife or family. Neither do they have family cards.

Furthermore, Article 42 of the Marriage Law states that "a legitimate child is a child born in or as a result of a legal marriage". This means that legitimate children will receive legal recognition and protection from the state related to their rights and obligations. The legality proof of the state is through the issuance of birth certificates by mentioning the names of both parents and family cards.

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[58] M. Anshary MK, *Marriage Law In Indonesia*, Student Library, 2010, 18. See Ahmad Ghufran; Supraptiningsih, Umi;Ferdiant et al., "Empowering Pamekasan to Become a Child-Friendly Regency through Interpersonal Communication" (Atlantis Press, 2018), https://doi.org/10.2991/iccsr-18.2018.36.

Meanwhile, Article 43 Paragraph (1) states that "the children born out of wedlock only have a civil relationship with their mother and mother's family." This provision means that a child born from a polygamous marriage does not have a civil relationship with the father. Therefore, in the birth certificate, there is only the name of a mother. Likewise, there is no father's name on the family card.

The variety of legal culture practiced by informants performing their marriages had an impact on the variety of legal status for husbands, wives and children born in such marriages; some were considered legal but most of them were considered illegitimate. The name of wife in marriage certificate, the child's name on the husband's family card and the child's birth certificate mentioning the name of father and mother are an identification of a legal marriage. Meanwhile, if the second wife's name is not listed in the marriage certificate, the child's name can not be found on the husband's family card and the child's birth certificate only mentions the name of mother are possibly ascertained as unrecorded or illegal marriage.

An unregistered marriage has a very detrimental effect on wife and children. For wives, they are considered illegal because they do not have any marriage certificate as authentic legal evidence. As a result, they will not have any access of *gono gini* (shared) property when a divorce occurs because the marriage is considered never happen. Additionally, they do not have any legal right for a living cost and inheritance from the husband in the event of divorce or the death of husband. Apart from the legal impact, *sirri* marriage also causes social impacts for a woman. She will find it difficult to have social interaction because of her stigma as a mistress or living in the same house with a man without getting married (*kumpul kebo* in Javaness idiom).[59] The almost same condition occurs to the children of unrecorded polygamous marriage. Although the child is still entitled to a birth certificate and listed on the family card like other children, she/he must psychologically hurt due to the absence of father's name on the birth certificate and family card. Moreover, they will probably get stigmatized as a child out of wedlock, a child of adultery or illegitimate child. In the context of polygamy in Pekalongan, there were 6 children who did not have their father's name on their birth certificate.

[59]Nina Nurmila, *ibid.*, 161.

The clear information of a child identity has a big impact on his/her status in the marriage which then also correlates to the protection and fulfillment of their civil rights from the father. When the child is born from registered polygamous marriage, his/her legal status is a legitimate child which also means legal recognition and protection of his rights as well as obligations under the marriage law. On the other hand, children from unrecorded polygamy will not receive legal recognition and protection from the state. The civil rights include the right for the fulfillment of daily needs, marriage guardianship and also the inheritance from the father side. Weak protection of any children from *sirri* marriage is implied in the provisions of Article 55 paragraph (1) which says "the identity of a child can only be proven by an authentic birth certificate issued by authorized official". This birth certificate usually includes the name of the father and mother, but when the certificate of a child from an illegitimate marriage only includes the mother's name.

In Pekalongan context, according to the informants, especially the wife, regardless of the status of either legitimate or illegitimate child, the existence of children in the marriages became very important because they become strong bonds between the husbands and wives. The children could have a strong moral binding power for husbands to provide daily needs for families as well as a moral bond for the wives to survive in the polygamous marriage. This shares the same opinion with what Horowitz said that the presence of children can strengthen a marriage bond more. A married couple feels more satisfied in marriage by looking at the emotional and physical development of children. The presence of children has also encouraged intense communication between husband and wife because they feel experiences living together with their children. Thus, the presence of the children in the family can be seen as a main factor that benefits the parents in terms of psychological, economic and social.[60]

[60] A. Horowitz, Sons and Daughters as Cargivers to Older Parents: *Differences in Role Performances and Consequences,* The Gerontologist 25 (6), 1985, 612-617. Read also Parsudi Suparlan, *Kinship System, Family and Role of Men in Descendants,* in Anthropology news, Th XIII, No. 46 April-June, 1989. Compare also with Macine Zein and Stanley d. Eitzen, *Diversity in Families*, 2nd Edition, Harper-Collin, New York, 1990, 47

However, illegitimate status of the children for most informants (5 people) who became second wives did indeed become the dominant complaint. They always persuade their husbands to register the marriages, but their wishes were not granted and they can do nothing but surrender. Although psychologically and socially marginalized and underestimated in the society, they generally argue that as long as the husbands are still responsible for meeting the physical and spiritual needs of them and and the children and not sue for any divorce, they felt that it was enough. At the opposite, informants who are the first wives (5 people) said that their husband's unrecorded polygamy marital status made them feel relieved and benefited. Generally, they think that their husband's marital relationships with their second wives are not legal so that the second wives and their children are not entitled to excessively access the husbands' or their joint property. Meanwhile, according to the husbands, unrecorded marriages which then cause their second wives not recognized by the state are not a problem as long as the second wives did not object on it. As the husbands, they simply continue to serve as a head of family and are responsible for the fulfillment of physical and spiritual needs for their wives and children.

Conclusion

The legal culture of the polygamists in Pekalongan is basically subjective in relation to serious intention to obey the rules of polygamy. The fact shows that the majority of the polygamists' legal culture is negative because they prefer to ignore the rule rather than obey it for pragmatic and rational reasons. Most of the informants acknowledge the difficulty in fulfilling the material normative requirements and procedures regarding polygamous marriage as regulated in statutory regulations and consequently, *sirri* marriage eventually becomes the most desirable choice.

Polygamy becomes an optional identity politics to foster households which are different from common families which are mostly monogamous. The influencing factors on the optional identity politics are due to pragmatic and rational considerations ranging from factors to non-legal factors such as religion, economic, social and psychology. This optional identity politic finally attachs a negative stigma to both husbands and second wives.

The type of polygamy cultural practices impacts on the legal statuses of the marriages, husbands, wives, and children; only the first wife and her children are considered legitimate because they are legally recorded while others are illegitimate because not recorded. The evidence of the diverse legal culture of the polygamists is clear from the existence—or absence—of marriage certificate for married couples, the names of second wife and children on the husband's family card, and the names of the father on the child's birth certificate.

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The Acceptability of Active Judge Principle in Divorce *Talak* Cases of Religious Courts at Madura to Assure The Wife's Rights

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Abstract

In divorce *thalāq (talak)* trial, a wife as the defendant sometimes stays silent and surrendering probably because not knowing the rights she can struggle to get such as child living allowance, *iddah, mut'ah,* and joint property. Consequently, she may lose her rights because the judges cannot decide more than the divorce. The result of this study shows as follow; *first*, the judges in Religious Courts of Madura accept the active judge principle on divorce *thalāq* cases even though in limited use. The acceptability itself is based on a legislation which gives an *ex officio* right. *Second*, the implementation of active judge principle in divorce *thalāq* cases in fulfilling the wife's rights is through some ways. They consist of telling her any rights after divorce she can sue from the husband, asking her to concern on her rights during hearing process, always fulfilling her rights in its verdict (*ex officio*) due to her presence in the hearing and her status out of *nusyūz* condition, and also delaying the divorce pledge session for six months if the husband has not fulfilled the verdict yet.

Keywords:
Principle; Active Judge; Divorce Thalāq

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Abstrak:

Dalam persidangan cerai *thalāq* (*talak*) terkadang istri bersikap diam dan hanya pasrah dan kemungkinan tidak mengetahui tentang hak-hak yang dapat dituntut pada suami misalnya nafkah anak, nafkah `*iddah*, *mut'ah*, ataupun harta bersama sehingga istri dapat kehilangan hak-haknya karena hakim tidak boleh memutus lebih. Hasil penelitian menunjukkan bahwa, *pertama,* hakim di Pengadilan Agama wilayah Madura menerima prinsip hakim aktif dalam perkara cerai thalāq walaupun penggunaanya secara terbatas. Dasar akseptibilitas prinsip tersebut didasarkan pada peraturan perundang-undangan yang memberikan hak *ex officio.* Kedua, implementasi prinsip hakim aktif dalam perkara cerai thalāq untuk pemenuhan hak-hak istri adalah dengan memberikan penjelasan kepada istri tentang hak-hak istri pasca cerai yang dapat dituntut dari suami, menanyakan ketika istri diam selama persidangan terkenaan dengan hak-haknya, selalu memberikan hak- hak istri dalam putusannya *(ex officio)* selama istri hadir di persidangan dan tidak dalam keadaan *nusyūz,* serta menunda sidang ikrar thalāq maksimal enam bulan apabila suami belum memenuhi isi putusan).

Kata Kunci:

Prinsip; Hakim Aktif; Perceraian Thalāq

Introduction

Judicial institutions have an important and strategic role in a country and therefore in carrying out its duties and functions, it is bounded by a procedural law. In this context, Indonesian civil procedural law adheres to the passive judge principle[1] which puts the judges in a passive position for carrying out their duties and functions.[2] Most of jurists consider that they need to maintain this principle during examining and deciding the cases.[3]

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[1] As a comparison, the principle in procedural law of Administrative Courts is an active judge one considering that examined materials are at public law area. See Aju Putrijanti, "Prinsip Hakim Aktif *(Domini Litis Principle)* dalam Peradilan Tata Usaha Negara". *Jurnal Masalah-Masalah Hukum,* Vol. 42, No.3 (July 2013), 320.

[2] Sunarto, "Prinsip Hakim Aktif dalam Perkara Perdata". *Jurnal Hukum dan Peradilan,* Vol. 5 No. 2 (July 2016), 249.

[3] Tata Wijayanta, *et al.*, "Penerapan Prinsip Hakim Pasif dan Aktif serta Relevansinya terhadap Konsep Kebenaran Formal". *Mimbar Hukum,* Vol. 22 No. 3 (October 2010), 14.

However, as the time goes on, the principle of civil procedural law began to head for an active judge principle as regulated in Article 4 Paragraph (2) of Law Number 48 of 2009 concerning Judiciary Power. It states that the main functions of the judges are accepting, adjudicating, and deciding every case submitted. Further, they are also obliged to support any justice seekers and try to help overcoming obstacles and problems in order to achieve a simple, rapid, and low- cost trial.

The judges have a central position at the courts. Their main and basic function are as the law and justice enforcers due to their responsibilities to the almighty God.[4] Therefore, in solving any civil cases, they should know the event in dispute for details through careful examination and verification on both argumentation and evidence presented by involved parties at the hearing season. Their decision, at the end, needs to reflect law enforcement and fairness.

Among others, Religious Court at the first-level has an authority to handle and make decision on divorce cases among Muslims based on the principle of Islamic teaching. The cases can be either divorce initiated by wife (so called *cerai gugat)* or divorce *thalāq* from husband's initiative.[5] Relating to this, Law Number 1 of 1974 on marriage provides legal protection for a wife (later referred as defendant) due to her common lower position in economic, public access, and others compared to her husband (later referred as plaintiff). It is clear, for instance, from the procedure of divorce *thalāq* case in which the plaintiff has to file the case in the Religious Court at an area where the defendant lives.

According to data presented in Siadpa Religious Court website and its online version, the divorce cases in Religious Courts across Madura have same characteristics. The level of divorce rate significantly increases over the past few years with the largest age group between 21-30 years old. Meanwhile, the divorce couple's

[4] Hamza Baharuddin, "Fungsi hakim dalam Mendorong Terwujugnya Moral Justice Dalam Perspektif Islam". *Jurnal Masalah Masalah Hukum,* Vol. 43 No. 1 (January 2014), 67.

[5] M Syaifuddin and Tri Turatmiyah, "Perlindungan Hukum terhadap Perempuan dalam Gugat Cerai *(Khulu')* di Pengadilan Agama Palembang". *Jurnal dinamika Hukum,* Vol. 12 No. 2 (May 2012), 249.

occupations are farmers and housewives.[6] Particularly in divorce *thalāq* cases, most of defendants are uneducated housewives.

A preliminary research found many cases where the defendants were helpless in the examination process of divorce *thalāq* at the Religious Court. Some of them attended the hearing process but just kept silent, surrendering, and probably had no idea about their own rights to demand from the plaintiffs such as children living allowance, *`iddah, mut'ah*, and joint property. Otherwise, they had information about the rights but decided not to sue them because of their fear of the plaintiffs. Commonly, most of them taking this choice come from rural areas with low education level.[7] The condition will be typically different when those who understand their rights or are helped by an advocate because their lawsuit of living allowance will be detailed in a large amount.[8]

In examining and making adjudication on any civil case, including the divorce, the judges are prohibited to apply *ultra petitum partium* principle. Article 178 paragraph (3) HIR limits their authority and restricts them to formulate adjudication on any unrequested material or to exceed certain pursuit of related parties. Furthermore, their acces is limited by materials presented by the parties or so called *secundum allegata iudicare* principle.[9]

Consequently, if a defendant keeps silent during the hearing process without demanding her right, the judge will not give her the right she deserves in the dictum of adjudication. This situation is certainly disadvantagous for her. In fact, her presence on divorce *thalāq* trial implies an effort to obtain her rights accordance to applicable law instead of solely getting "a divorce certificate". Such situation can actually be prevented if the judges actively give

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[6] The data was based on the recapitulation of the cases, type of the cases, and the occupations in 2015 and 2016. Accessed on September 24, 2017.

[7] Interview with M. Syafi'i, the judge of Religious Court of Pamekasan, 3rd October 2017. Look Erie Hariyanto, "GERBANG SALAM: Telaah Atas Pelaksanaanya di Kabupaten Pamekasan," KARSA: Journal of Social and Islamic Culture 15, No. 1 (25 Maret 2012): 73–81.

[8] Eka Susylawati et.al. "Putusan Nafkah Istri Pasca Cerai Talak di Pengadilan Agama Pamekasan". *Al-Ihkam,* Vol. 8 No.2 (December 2013), 386.

[9] Elisabeth Nurhaini Butarbutar, "Kebebasan Hakim Perdata dalam Penemuan Hukum dan Antonomi dalam Penerapannya", *Mimbar Hukum,* Vol. 22 No. 1 (February 2011), 74.

information about the right that she deserves for during the trial, particularly at the stage of verification. In addition to provide both information and explanation, judges can also motivate her to demand their rights she deserves for.

However, to date, there still found a debate on whether the judges can do that considering common cases where the judges try hard to provide the defendant maximum protection yet the adjucation is canceled by the Court of Appeals or Supreme Court. These different interpretation and acceptance on the active judge principle as well as the lack of explanation on the concrete action under the category of judges' active attitude lead to distinction of verdict at such above mentioned situation. Thus, not all adjudication of divorce *thalāq* gives existential protection for the defendants' right.

Based on it, this study aims to describe and analyze the acceptability of the judges' active principle at Religious Courts of Madura in divorce *thalāq* cases. Additionally, it also examines the implementation of the principle on divorce *thalāq* cases for fulfillment the wives' rights in the Religious Courts of Madura.

Some previous studies with similar topics have already existed. *First* is a book entitled *Peranan Prinsip Hakim Pasif dan Aktif serta Relevansinya terhadap Konsep Kebenaran Formal* written by Tata Wijayanta, et al (the research of Faculty of Law of Gadjah Mada University 2009). *Second* is a dissertation of Faculty of Law of Airlangga University last 2012 under the title *Prinsip Hakim Aktif dalam Perkara Perdata* by Sunarto. They are similar in discussing the active judges principle in divorce cases. Nevertheless**,** this study focuses on implementation of the principle in the same case but for the sake of protecting the wives's right.

Furthermore, this study has its significant as it serves to evaluate the civil procedural law, especially the regulation of passive law. It is urgent for the law formulator, therefore, to reconsider the validity of passive judge principle in divorce *thalāq* cases. Likewise, the judges' role of Religious Court should be *conditio sine qua non* in providing legal protection of the wives' rights.

Research Method

Using a qualitative-descriptive-analysis approach, this study tries hard to reveal the original phenomenon through describing acceptability of the active judges principle as well as its implementation in divorce *thalāq* cases among Religious Courts at Madura. The approach was then integrated to sociological law studies in order to describe and empirically evaluate the process of law in the society.

This study takes place at Religious Courts of Madura from four districts, namely Bangkalan, Sampang, Pamekasan, and Sumenep. The primary data was from an interview with the judges, advocates, and citizens who get involved in in divorce *thalāq* cases. Meanwhile, the secondary was from the legislation related to the topic of this study.

Meanwhile, the research data was compiled using the interactive and non-interactive methods. The former was through depth interview and observation, meanwhile the later was was through analysis on judges' adjudication**.** Data analysis, on the other hand, referring to a process of tracking information and systematic arrangement of field notes, was through organizing data during and after data collection.

Additionally, this research uses credibility test through several techniques, namely depth observation, triangulation of source and method, checking member, peer checking, and tracking the suitability of the result.

Research Finding and Discussion

As a country of law, Indonesia puts the law as the main basic for the whole governmental matter as well as at the highest position.[10] As a consequence, any state institution must do the same in taking every action to support so called law supremacy. Both spirit and practice of law supremacy, however, should not ignore three ideas of law namely certainty, justice, and expediency.

[10] Jaenal Aripin, *Peradilan Agama dalam Bingkai Informasi Hukum di Indonesia* (Jakarta: Prenada Media Group, 2008), 1.

Religious Court is an institution under the management of the Supreme Court as juridically regulated by the Law number 7 of 1989 on Religious Court. It gives the Religious Court authority in accepting, examining, and making adjudication on cases among Moslem. Its most prominent and popular is handling marriage cases, especially for divorce cases that some people identify it as the divorce court.

Divorce is a part of marriage because there will be no divorce without any marriage. Marriage, on the other hand, refers to a shared life between a man and a woman as a spouse and divorce becomes the last part of marriage life which takes the spouse apart each others. Relating to this, article 115 of Islamic Law Compilation mentions that divorce can be legally performed only before the Religious Court after its failure to reconcile both parties. However, this article has not been fully valid yet because in *fiqh* regulation as a main reference for the most of Indonesian Moslem, there found no same regulation. Furthermore, any divorce satire can be probably counted as a divorce contract according to *fiqh* perspective. On ther hand, Law Number 1 of 1974 jo. Government Regulation number 9 of 1975 on Marriage, Law number 7 of 1989 on Religious Court, and Presidential Instruction Number 1 of 1991 on Islamic Law Compilation are those which regulate the procedures of divorce.

Those state laws mention that a husband who wants to divorce his wife should file a petition to the Religious Court in his residence. The petition contains the notice of his intention along with related reason as well as a request for the Court to hold a hearing process. The court council will then examine the petition and invite the spouse to come not more than thirty days after the submission for a legal examination as necessary.

If the divorce finally happens, it does not automatically remove the obligation of the plaintiff toward the children and the defendant, particularly for the living allowance. However, the fact shows that the matter of living allowance becomes the most common problem to happen, including in *`iddah* (post-divorce) period. Any divorce before the judge requires the plaintiff to give living allowance due to his capability.

Generally, the civil procedural law is absolute and therefore requires full obedience from judges, related parties, and everyone

with concern to a case in the hearing. The same goes on for the explained principles, especially for the judges who will adjudicate the case. One of the classic principles in civil procedural law is the passive judge.

This principle puts the judges at a passive position not only in waiting any submission or not determining the scope of case, but also in leading the hearing process. This is based on an assumption that any dispute comes from the willingness of related parties (to submit it to the Court) and therefore the judges should not interfere in litigation process. The series of hearing process, submission of evidence and others are handled by the related parties so that the judges only serve to control the process and make sure that the regulation of procedural law are well applied.

According to Sudikno Mertokusumo, the passive judges principle limits their authority to make adjudication on a specific case as submitted. Instead of the judges, it is the related parties who need to provide any proff *(verhandlungs-maxim)*.[11] Several reasons to support the passive judges principle according to Abdul Mannan, are: Because RV decides that all examination steps must be in writen version and Because in the process of hearing, related parties are required for a legal counsel accompaniment *(procedure stelling)*. [12]

Furthermore, Abdul Mannan said that the judges serve to lead the hearing through regulating, directing, and making the verdict. They have an active role to lead the process from the start until the end as well as to direct litigants to make the case clear. This clarity will enable them to examine, adjudicate and resolve the cases more easily.[13]

However, he also stressed that advice and explanation from the judges do not mean that they contravene the principle because the scope of dispute has been determined. In fact, they do that in order to make sure that the whole parties apply stipulated regulation well and

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[11] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia* (Yogyakarta: Liberty, 1994), 12.

[12] Abdul Mannan, *Penerapan Hukum Acara Perdata di Lingkungan Peradilan Agama* (Jakarta: Kencana Prenada Media Grup, 2006), 202-204.

[13] *Ibid*.

to achieve the principle of justice, legal certainty, and expediency.[14] However, the shifting principle from passive to active is inevitable. Among others, it is clear from some jurisprudential materials[15] including article 5 paragraph (1) of Law number 48 of 2009 concerning the judiciary power. It mentions that the judges are obliged to explore, follow, and understand the law values and justice virtue alive in the society. This no longer puts the passive principle as the only one reference for judges in formulating a fair verdict in adjudicating any case. The active judge principle has its main significance in enabling the judges as the chief of hearing in resolving the disputes effectively and fairly. Furthermore, it will make them easier to overcome any obstacles for justice seekers in carrying out a fair judiciary process.

Either normatively or empirically, those two principles need to be applied altogether in resolving civil cases at the courts. Nevertheless, it does not mean that both have interchangebly relation as they are equally fundamental due to their each own functions. The different function between both exists because as a private law, the civil law regulating individuals' interest has its limitation.

It makes very much sense on whether a judge uses either active or passive principle in the hearing process still becomes a dispute. Certainly, this refers to each judge's opinion and consideration and is very much influenced by any literature they read and academic association they affiliate to.

Normatively, there found no legislation ranging from Law number 48 on Judiciary power, H.I.R., R.Bg., to R.v. which explicitly explain the terms of both active and passive judge principle. Therefore, it is necessary to create the following related limitations;

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[14] Ahmad Ghufran; Supraptiningsih, Umi;Ferdiant et al., "Empowering Pamekasan to Become a Child-Friendly Regency through Interpersonal Communication" (Atlantis Press, 2018), https://doi.org/10.2991/iccsr-18.2018.36.

[15] Indonesian Supreme Court's verdict No. 964 K/Pdt/1986 December 1, 1988 in the case between Nazir T Datuk Tambijo and Asni Lawan Nazan alias Barokak Gelar Dt. Naro. The Supreme Court stated that the valid civil procedural law in Indonesia is informal and the validity of article 178 HIR (article 189 RBg) is not absolute. Therefore, in adjudicating civil cases, the judges might provide a verdict more than a lawsuit in the petition as long as it is not more than the posita lawsuit. See Lilik Mulyadi. *Hukum Acara Perdata Menurut Teori dan Praktek Peradilan Indonesia* (Jakarta: Djambatan, ed. 3, 2005), 18-20.

(1) Providing the involved parties equal opportunities to defend and maintain their rights (equal access rule). In other words, the judges adjudicate the case without discriminating people (impartiality) (article 4 paragraph 1 law number 48 of 2009 concerning judiciary power). (2) Helping the involved parties to overcome any obstacles as an effort to achieve a simple, rapid, and low-cost judiciary process (article 4 paragraph 2 law number 48 of 2009 concerning judiciary power).[16]

In divorce *thalāq* cases, the defendant deserves for several rights that she might demand them to the plaintiff as regulated in the legislation. The term "might" shows that the pursuit of rights is an alternative and optional. Therefore in this situation, the defendant has a choice to claim those rights or not. The rights she might demand include: Proper *mut'ah* (gift) from the plaintiff either money or properties except when the defendant is still in state of *qabla al dukhul* (having not had sexual interaction yet). Proper living allowance, *maskan* (shelter) and *kiswah* (clothes) during, the *'iddah* (post-divorce) period of a defendant, The rest of owed dowry if the defendant is still in state of *qabla al dukhul and* The cost of *hadhanah* (child-rising) to the children under 21 years old.

A defendant can claim these during the process of divorce *thalāq* petition or thereafter at the Religious Courts where the cases examination takes place. Procedurally, she might file a counterclaim to demand the plaintiff fulfilling his obligations while the amount granted by the judges should be based on a fair consideration between both. Other than in divorce *thalāq* cases, a defendant can also pursue them through divorce claim or as determined by the council of judges using their *ex-officio* right based on consideration of justice value.

A husband's obligations to provide living allowance after divorce is clearly mentioned in article 41 of Law number 1 of 1974 concerning marriage. It states that a consequence of the marriage termination because of divorce before the court is the obligation for a husband to give living cost for his ex-wife. Otherwise, the Court can simply determine the number of his obligation to the ex-wife.

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[16] M. Yahya Harahap, *Beberapa Permasalahan Peradilan dan Alternatif Penyelesaian Sengketa* (Bandung: Pustaka Rosdakarya, 1997), 67.

If the ex-husband does not fulfill the verdict of Court particularly regarding to his financial obligation, his action is referred as insubordination of the court decision. Article 196 HIR mentions that "if the defeated party is unwilling or negligent to discharge the decision peacefully, the winning party can submit a petition, either verbally or writenly, to a chief of court so he/she can execute the decision in prescribed time, namely within eight days at maximmum. In this case, the ex-wife can submit a petition to the chief of Religious court when coping with the same situation.

Unfortunately, not all of those living allowances can be available for the wives as defendants because most of them do not attend the divorce *thalāq* trial. This situation drives the court to decide the cases by *verstek* referring the absence defendants as those who relinquish their rights.

In fact, there exists general principle at any settlement of the cases in the court as the basic *fundamentum* as well as main guidelines in manifesting the whole soul and spirit of law. The principles of Religious Court are not much different from those in general courts. In applying the duties and functions, the Religious Court should pay attention to the essence of Law number 7 of 1989 jo. Law number 3 of 2006 and Law number 50 of 2009. One of the principles related to this research is the principle of justice seekers-help.

It mentions that the court must help the justice seeker by overcoming the obstacles in order to achieve the simple, rapid, and low cost judiciary process. On the basis of it, the judges serve not only to examine and adjudicate the cases, but also objectively give the best solution and assistance to the litigants while upholding the justice values since pre-trial hearing to the trial process.

Included in the principle is the active judges principle in assisting the justice seekers. In the civil procedural law, this principle seems to be contrary to the passive ones at glance. In fact, the basic roles of the judge in the active principle, among others, are directly conducting judicial examination of hearing process and delivering the official report orally.

In Madura, data from the official website district of Religious Court on divorce *thalāq* shows that most of defendants do not attend the hearing session so that the judges adjudicate the cases by *verstek.* Therefore, this research purposedly chose a few cases with their

attendance at the hearing processs to clearly observe the fulfillment of their rights in relation the implementation of active judges principle for women protection.

Selected sixteen divorce *thalāq* cases which were attended by the defendants show that the judges always provide them the rights either based on their claim or not. The differences exist at the types of rights they demand adjusted to plaintiff's economic capabilities and the state of defendants either they are in *nusyuz* (insubordination) condition or not.

In an interview session, the judges of Religious Courts in Madura stated that judges should be passive because divorce *thalāq* is a civil case. The principle becomes a guideline for the judges in adjudicating and deciding the cases because they are prohibited to determine more than what required in the lawsuit of the petition. However, some recent literature or journal articles of law confirmed that passive judge principle is actually attached to the active ones. The existence of active judge principle itself closely relates to article 4 paragraph (2) Law Number 48 of 2009 regarding Judiciary Power as *legitimatie* from the jurisdiction of the judges' activeness.

Relating to the mandate to provide the best assistance in overcoming obstacles for litigants at Religious Courts as stipulated under Judiciary Power Law, either HIR or Rbg also hints such mandate as regulated in Article 132 HIR/156 RBg. It mentions that if the chief considers it important to make the process run well, the council of judges shall advise both parties at the hearing. The Religious Courts in Madura have applied that mandate in providing services to the society all this time.

Unfortunately, in divorce *thalāq* cases, some defendants choose to keep silent and get looked down at the hearing. In this situation, the judges need to give thorough explanation regarding their rights, especially on living allowance. If they understand, the judges will then ask them regarding amounts and exact form of living allowances they demand. This cannot be categorized as an infraction of principle in civil procedural law because the law empowers the judge to use *ex-officio right* in providing provide the rights of wives, especially for living allowance in divorce *thalāq* case. Moreover, those who got the explanation on their rights will demand the living allowances so that the judges will fulfill it in the divorce verdict.

The silent defendants at the hearing process can be related to education or economic factor as well as the fear of the plaintiff. The dominant factor is education level since low education will drive them to feel afraid of hearing atmosphere or unconfident to speak up in demanding their rights. In this situation, the rigidly applied passive judges principle will potentially lead the defendants not to demand their rights due to their ignorance or willingness. As a consequence, they will not obtain their rights as well as an opportunity to demand them because the chance for claim will be expired after the verification step.

In another case, uneducated defendants often do not demand *mut'ah,* living allowances, *maskan,* and *kiswah* to plaintiffs at the hearing eventhough the plaintiff can afford them all. In such a case, there are different opinions among the judges of Religious Courts with their own different arguments and the legal basis. Some of them stipulate it using their *ex-officio* rights but the others ignore it. If the judges choose to apply passive judge principle and do not use their *ex officio* rights, the defendants might lose their rights and the verdict will be *dispositive.* It means that the verdict will allow the plaintiff to make first *thalāq raj'ī* (divorce with possibility of remarriage) to the defendant before the religious court hearing. However, it does not include the *kondemnatoir* point which obliges the plaintiff to pay the cost of *mut'ah* and *iddah* to the defendant.

Otherwise, if the judges apply active the judge principle, the defendants will obtain their rights in divorce *thalāq* cases although they do not submit any counterclaim regarding *mut'ah* and *`iddah* to the plaintiffs. This because the judges with their *ex officio* right can oblige the plaintiffs to discharge their obligation to the defendants.

Several legal bases exist to represent active judge principle and have been used by the judges of Religious Courts in Madura as follow: *First* is the article 41 letter c of law number 1 of 1974 concerning marriage. It mentions that during the hearing process of either divorce or divorce *thalāq* cases, the court might oblige the husbands in order to provide the living cost and/or determine their obligation to the wives. The term "might" means that the judges, as their consideration, may use or not use *ex officio* right to stipulate *mut'ah* and *iddah* in divorce *thalāq* cases.

Second is the article 24 paragraph (2) letter a of Government Regulation number 9 of 1975. It states that during the hearing process, either in divorce or divorce *thalāq* cases, the court might determine living cost of the wife that the husband needs to afford. *Third is the* article 149 letter a and b of Islamic Law Compilation. It regulates consequences of divorce *thalāq* in which the plaintiffs are obliged for obligation for; Providing reasonable *mut'ah* for the former wife either money or properties except if she is in state of *qobla al dukhūl.* Giving living allowance, *maskan,* and *kiswah* for the former wife during *`iddah* period except if divorce is *thalāq bā'in* (divorce with impossibility to remarry), *nusyūz,* or occuring during her pregnancy.

Fourth is equality before the law principle. Based on this, the judge needs to give fair treatment for involved parties before the trial, particularly in formulating the fair adjudication and providing equal rights to file a claim. In several Religious Courts, some plaintiffs make the petition or lawsuit under a professional guide, while defendants formulate their answer or counterclaim by themselves. For the sake of justice, all parties need to obtain equal substantive law (*equal uniformity*) as well as equal protection for their rights according to the provision of substantive law (equal protection of the law).[17]

Any divorce *thalāq* decision that only grants the request of the plaintiff without urging them to pay *mut'ah,* living allowance and such can still be justified according to the principle of the passive judge. Nevertheless, on the perspective of justice and expediency principles, it still leaves problems over the rights of the wife. This is particularly because a wife's attendance in the divorce *thalāq* trial implies her wishes that she could obtain her right not only a divorce certificate.

Practically, some ex-wives are still unsure even worried on whether her rights stipulated in dictum of divorce verdict will be well fulfilled by the ex-husband. This unnecessarily occurs because legislation literally urges the ex-husband as plaintiff to discharge his obligations to the defendants' rights after the divorce before stating the divorce *thalāq* pledge. If the plaintiff gets difficulties to do it, the

[17] A. Mukti Arto "*Pelayanan Prima Jasa Peradilan Membangun Kepercayaan Publik dan Jati Diri*", Varia Peradilan, Majalah Hukum, Tahun XXV No. 298, September 2010, Jakarta: IKAHI, 2010, 83.

divorce *thalāq* pledge settlement will be postponed. Later on, he will be given six months period at maximum after the verdict with a legal binding for the pledge of *thalāq* to fulfill the right. If there nothing occurs, the decision of divorce *thalāq* case loses its legal force and consequently, the husband must submit again his divorce *thalāq* case. This shows that the law has provided legal protection for women.

Conclusion

The judges of Religious Courts in Madura generally accept the active judge principle on divorce *thalāq* cases even though in the limited use. It is particularly due to the basic rule in civil procedural law to apply the passive one. The use of an active principle, among others, is clear from the issued verdicts which provide the defendants' rights as long as they are not in a state of *nusyūz.* This is literally based on the spirit to fulfill the wives' rights as stipulated at the law that judges have the *ex officio* right to provide them legal protection.

The implementation of active judge principle in the context of Madura is through some ways, namely explaining the defendants's rights after divorce which they can claim to the plaintiff, asking their wishes relating to their rights or providing what they deserve based on the *ex officio* when they stay silent during the hearing session. Further, the council of the judge can delay the pledge of *thalāq* for six months if the plaintiff can not fulfill the defendants' rights as mentioned at the court adjudication. This delay becomes a forceful instrument to fulfill the defendants' rights. After six months, the divorce *thalāq* verdicts have no legal binding anymore. The most common obstacle for the council of the judge in protecting the wives after divorce is when a case ends with *verstek.* It will automatically lead to unavailability to demand the wives' rights. Furthermore, the *verstek* verdict rarely drives them to make any *verzet* remedy.

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Distribution of *Poh Roh* Assets Due to A Divorce in Gayo Lues Society

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Abstract:

This research was conducted in Kuta Lintang Village, Blangkejeren Sub-district of Gayo Lues District. The aims of the research are to find out about shared-assets distribution after divorce through customary law, to observe the barriers of distributing shared-assets in Gayo Lues and to examine legal consequences of undistributed shared assets after a divorce in Gayo Lues. This research applied descriptive method with a normative juridical approach to obtain secondary data, sociological juridical approach, and field research. There found obstacles of shared-assets distribution in Gayo Lues Regency, such as a vague status of the *Poh Roh* assets, secret diversion of the sharing assets, and lack of knowledge about its distribution. Legal consequences of undivided joint assets after the marriage ended because of divorce are the vague status of the shared assets where the husband and wife can no longer separate between inheritance assets and *poh roh* assets; both of these assets

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might have been mixed. This results in the difficulty to separate inheritance assets and *poh roh* assets. In the cases when the assets actually belong to the wife but the husband holds the ownership paper of the assets, the wealth will be categorized as *poh roh* assets. However, it is quite difficult to determine the status of the assets when the husband has a bad faith and transfer or converse the wealth to the third party, common with movable objects.

Keywords:
Assets Distribution; Poh Roh; Jeuma Opat Institution; Gayo Lues

Abstrak:

Penelitian ini dilakukan di kampung kute lintang kec. Blangkejeren kabupaten Gayo Lues yang bertujuan untuk menjelaskan sistem pembagian harta *poh roh* akibat perceraian menurut hukum adat gayo lues, hambatan terhadap pembagian harta *poh roh* pada masyarakat Gayo Lues.Penelitian ini menggunakan metode deskriptif dengan pendekatan Juridis normatif (*legal research)* untuk mendapatkan data sekunder dan pendekatan *juridis sosiologis* serta juga melakukan penelitian lapangan (*Field research*). Sistem pembagian harta *poh roh* akibat perceraian dapat dilakukan dengan 2 (dua) cara yaitu dilakukan secara musyawarah mufakat dan dilakukan melalui *jeuma opat.* Proses perdamaian yang dilakukan oleh suami-isteri yang bercerai pada umummya dilaksanakan dengan cara musyawarah yang melibatkan kerabat keluarga dari kedua belah pihak. Sedangkan penyelesaian perselisihan melalui Lembaga *jema opat* lebih menekankan kepada aspek kekeluargaan dengan cara musyawarah untuk mufakat, sehingga tidak ada pihak yang merasa dikalahkan atau dimenangkan dan *jema opat* mengetahui tentang asal usul harta yang diperoleh selama mereka melangsungkan perkawinan, mana harta bawaan, mana harta warisan yang diperoleh dari ahli waris suami isteri dan mana harta poh roh, maka dengan mudah *jema opat* dalam hal membagi harta *poh roh*, jika terjadi perceraian karena telah mengetahui asal usul dari harta suami-isteri yang bercerai tersebut. Akibat Hukum Harta *poh roh* tidak dibagi Setelah Putusnya Perkawinan Akibat Perceraian di Gayo Lues yaitu kaburnya status harta *poh roh* tersebut artinya suami isteri tidak dapat lagi memisahkan mana harta bawaan dan mana harta *poh roh,* bahkan antara harta bawaan dengan harta *poh*

roh telah bercampur, sehingga sangat sulit untuk menentukan status harta dalam perkawinan

Kata Kunci:
Pembagian harta poh roh; lembaga jeuma opat; Gayo Lues

Introduction

Marriage is a very important thing for every individual. It facilitates them to form a family to survive until the couple separate each others because of death. Marriage is also a legal relationship between a man and a woman who have fulfilled marital conditions.[1] Meanwhile, the purpose of marriage according to article 1 of Law No. 1 of 1974 concerning marriage is to form a happy and eternal family based on the Almighty God.

A marriage that aims to form a happy and everlasting family requires a harmonious relationship between husband or wife and among family members based on the principle of mutual respect and love with the growth of care and affection. When a marriage has been carried out in accordance with the provisions of Article 2 of Law No. 1 of 1974 concerning marriages, it has been considered legitimate and as a consequence, there is a mixture of wealth. On the other hand, according to customary law in general, marriage in Indonesia is not only a "civil engagement" but also a "customary engagement" and at the same time a kinship and neighborly engagement.[2]

Based on the Civil Code Article 119,[3] since marriage takes place between a husband and a wife, there is a legal consequence of the unity or mixing between both parties' assets as long as it does not deviate on any marriage agreement. This means that a marriage enables the merging assets of husband and wife into one. Thus in a family, there is a wealth of shared property or what is often referred to as the *poh roh* assets.

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[1]Rien G. Kartasoepoetra, *Pengantar Ilmu Hukum Lengkap*, (Jakarta: Penerbit Bina Aksara,1988), 97.

[2]Hilman Hadikusuma, *Hukum Perkawinan Indonesia menurut Perundangan, Hukum Adat, Hukum Agama*, (Bandung: Mandar Maju, 2003), 8

[3]R.Soetojo Prawirohamidjojo et. aI., *Hukum Orang dan Keluarga*, Airlangga University Press: Surabaya, 2000, 53.

In marriages and households, in addition to the existence of permanent assets recognized as personal property of each, husband and wife generally also own the property from their joint livelihoods and was obtained during the marriage. However, on the way to create a happy and eternal household, events leading to any marriage termination sometimes happens. Based on Government Regulation Number 9 of 1975 compilation of Islamic law as a form of promoting Islamic law, there are 3 causes of divorce namely: The death of the husband or wife, Divorce *thalaq* and divorce due to a lawsuit and Court's decision

Divorce that comes up between a husband and a wife leads to, among other things, the division of *poh roh* assets. The legal consequences of divorce on the *poh roh* assets according to Article 37 of Law Number 1 of 1974 concerning Marriage has stated that "if the marriage is terminated due to divorce, the *poh roh* are regulated according to their respective laws". The respective laws mean religious law, customary law, or other applicable law. In the Marriage Law, it is not explicitly stipulated about how much each part of the husband and wife can get from the *poh roh* assets. Actually, the exact concept of *poh roh* assets in Islamic law is not explicitly found and written in both the Qur'an and the hadith.

In the Aceh community, paritcularly at the Gayo Lues Regency, marriage is considered a sacred thing because it is the first step for both husband and wife to live a new life. Therefore, it is very proper to find that in the process of carrying out the marriage, very diverse customary norms like what found in every tribe in Indonesia are alive. In the customary marriage of the Gayo Lues community, several forms of marriage are known:

1. *Julèn*. Etimologically, the word julèn means "sold", namely the bride has been "sold" to her husband's relatives. The wife seems to no longer belong to her parents and family. She doesn't live with her parents' family anymore. Instead, she moves to and lives in her husband's clan. Therefore, after the dowry is paid off, she can settle in the her husband's village or house. According to a research, this form of marriage is rarely used by the Gayo Lues community.
2. *Angkap* is the contrary of the former. It happens when a husband lives in his wife's clan because he cannot pay off his dowry so that he a very low status in the Gayo Lues

community because he is unable to bring his wife his village or house. However, this may happen because of other causes such as when the wife is the only child in her family so she does not want to be far from her parents. Another possibility is because parents of the girl really like to live with their son in law so that they marry the daughter in *angkap* way.[4] However, in most of cases, this marital type occurs because of husband's inability to fulfill the traditional demands of his prospective wife's parents out of obligations according to the Islamic provisions. The legal consequences of this marital type are based on the status of of *poh roh* assets possession. In *angkap* marriage in the Gayo Lues community, if the dowry has not been paid off and a divorce occurs between the two, the assets obtained during the marriage automatically become the wife's property.[5]

In a divorce occuring because of a mistake by either husband or wife, the assets obtained during the marriage may not be taken by the husband. Rather, it becomes property of the wife and child (ren). However, if a divorce occurs due to the death of, let say husband, the property automatically belong to his wife and children. On the contrary, if the wife dies, the control of property becomes the property of the children left behind, while the husband only deserve to usufruct it, not to inherite.[6]

Based on the results of interim studies conducted in both *juelèn* and *angkap* marriage, there are several related numbers and percentages recorded in 3 (three) villages in Blangkejeren District, Gayo Lues Regency. More details can be seen in the following table: [7]

Table 1.
Total Comparison of *Poh Roh* Distribution as a Result of Divorce at 3 (Three) Villages in Blangkejen Subdistrict, Lues Regency

[4]Het Gajoland en Zijne Bewoners. trans, Hatta Hasan AmanAsnah, *Gayo, Masyarakat danKebudayaannya Awal Abad ke-20,* Balai Pustaka, Jakarta, 1996, 29.
[5]*Ibid.*
[6]Interview with Datu (*Eyang*) Salim Wahab, a public figure and a historian of Gayo Lues society in the thesis of Robi Efendi Purba, *Tradisi Pernikahan Angkap Di Gayo Lues,* May 11, 2014.
[7]Safri Wali, *Rege Kampung* "Rikit Gaib," interview on December 12, 2018.

No	Village Name	Marriage						Divorce						Sp						Inf
		Julen			*Angkap*			*Julen*			*Angka*			*Julen*			*Angkap*			
		2016	2017	2018	2016	2017	2018	2016	2017	2018	2016	2017	2018	2016	2017	2018	2016	2017	2018	
1	Kuta lintang	7	6	8	8	9	8	-	1	-	2	-	1	-	1	-	1	-	1	In 2016, there occured one divorce but there was no division of poh roh *assets* because there was no asset.
2	Kuta panjang	4	5	4	7	6	6	-	-	1	1	-	1	-	-	1	1	-	1	
3	Rikit Gaib	3	5	7	8	8	7	-	-	1	2	-	-	-	-	1	2	-	-	
Jumlah		14	16	19	23	23	21	-	1	2	5	-	2	-	1	2	4	-	2	

Source: Primary Data

The table above shows that in the District of Gayo Lues, each villlage namely Kute Lintang, Kuta Panjang and Rikit Gaib carried out marriages both in private and *juelèn* manner. The table also mentions a comparison of the number of shared *poh roh* assets due to divorce in 3 (three) villages from 2016 to 2018. The amount of *poh roh* assets tdistribution due to divorce in the village of Kute Lintang and Rikit Gaib always increased every year. Kuta Panjang village number, on the contrary, decreased every year.[8]

The explanation above focuses on the distribution of *poh roh* assets after a divorce in the community in Gayo Lues Regency. Therefore, if a divorce occurs, there will be determination on which assets to become inheritance to the children and which others to distribute to both husband and wife. Determination of the *poh roh* assets distribution in the community of Gayo Lues Regency is due to the type of marriage, thse who will inherite the *poh roh* assets and its distribution.[9]

Based on description above, it is necessary to conduct a study entitled "*Distribution of Poh Roh assets as a Result of Divorce in Gayo Lues Community (Research Study in Blang Kejeren District Gayo Lues Regency)*". The problem in this study is the obstacles on the distribution of *poh roh* assets after a divorce in the Gayo Lues society.

[8]Safri Wali. *Reje* Kampung Rikit Gaib. Interview on November 26, 2018.
[9]Hurmada, a public figure of Blang Kejeren, interview on December 13, 2018.

This research can be reviewed with a variety of theories. One of which is the theory of legal pluralism which observes the law from various perspectives ranging from those created by the state, social, cultural, economic and political categories. In a limited context, the law is associated with state law, specifically legislation (lawbook). A number of anthropologists interpret the law as a normative reference which has a broad scope, alive and dynamically developing. It is not only limited to the state law, but also the legal system outside, including various relayed processes and figures within. The law does not merely contain normative matters of both permissible and impermissible things, but also cognitive matters.[10]

Interaction between the notion of law or even the concept of law between one and another is an interesting discussion of its own and it is often referred to as the study of legal pluralism. In a real life, legal pluralism is very helpful in explaining the existence of legal order made by the state. According to Griffiths,[11] the state of legal pluralism is highly developed and is proportional to the development of social pluralism because it is an embodiment of a pluralistic society that will create a plural legal system as well.

On the contrary, the imposition of legal centralism is a useless job because it is asocial. For Griffiths, one of forms of legal pluralism is divided into 2 (two) types, namely strong legal pluralism and weak legal pluralism. A situation can be called strong legal pluralism if each of the diverse legal systems is autonomous and independence from the state law. If the situation of legal pluralism depends on the existence of recognition from the state, it is called weak legal pluralism.[12] Another compatible theory is the dispute resolution theory which is an attempt to restore the relations of parties in a dispute to the original condition. With a good relationship, the parties in dispute can build harmony in both social and legal relations between one another.

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[10]Benda Beckmann, F & K, in Sulistyowati Irianto, *Hukum Yang Bergerak; Tinjauan Antropologi Hukum*, Yayasan Obor Indonesia, Jakarta, 2006, 13.

[11]John Griffiths, *Memahami Pluralisme Hukum, Sebuah Deskripsi Konseptual*, in Tim Huma, 2005, 116-118.

[12]Griffiths, J, Abdias et.al, *Potret Pluralisme Hukum dalam Penyelesaian Konflik Sumber Daya Alam; Pengalaman dan Perspektif Aktivis*, HuMa, Jakarta, 2007, 99

The dispute categorization is the classification of dispute types occuring in the midst of community such as land disputes, local election disputes, stock disputes and marital disputes. Observation on factors causing disputes, meanwhile, is an attempt to reveal things that cause another specific thing to happen as a consequence of the dispute. Another key concept, disputes resolution strategy, is an effort to find and formulate ways to end disputes that between the parties, such as by means of mediation, reconciliation, negotiations and so on. In the context of disputes resolution in the community, it is necessary to rely on laws and regulations governing dispute resolution as follow: Civil Procedure Code, Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution and Law Number 7 of 2012 concerning Handling of Social Conflicts

The dispute resolution theory was developed and put forward by Ralf Dahrendorf in the 1958s. It aimed specifially towards social structures and institutions. Dahrendorf believed that society has two faces, namely dispute and consensus. Laura Nader and Harry F. Todd Jr., meanwhile, mentioned 7 (seven) following ways in dealing with dispute:[13]

a. *Letting everything go*. This alternative is valid for those who get unfair treatment and are failed in seeking justice through any legal demands. He/she makes a decision to just ignore the problem and continues to build good relationships with related parties who treat him/her disadvantageously. This choice may relate to various possibilities, such as lack of information on how the proceed any legal complaint to the Court, lack of access to the judiciary institution or deliberately let everything go because of consideration or prediction that the loss would be greater than the benefits both materially and psychologically.
b. *Avoidance*. This may be taken also by those who feel disadvantaged. He/she chooses to reduce relationships warmness with those who do the harm u completely quit the relationship, particularly in a business interaction. By choosing this, the problems causing complaints are also ignored. This,

[13]Laura Nader & Harry F. Todd Jr, *The Disputing Process Law in Ten Societies*, New York: Columbia University Press, 1978, 9-11.

therefore, is literally different from the former as in the first solution (letting everything go), relationship continues well and the issue is considered done. While in this case, the disadvantaged party avoids the problem and this affects on the relationship.

c. *Coercion* (compulsion). This occurs when a party forces a solution to another party in unilateral way. Any coercive or threatening action usually uses violence and generally reduces the possibility of peaceful resolution.

d. *Negotiation*. This may take place when the two involved parties are the decision makers. Therefore, they decide to solve the dispute without any third party. Both parties try to convince each other, make their own rules and do not solve the problem using the existing rules.

e. Mediation. The prominent feature of this way is the existence of a third party whoo assists both parties in a dispute to find an agreement. The third party can be chosen by the two parties in the dispute or suggested by authorized party. No matter how the mediator is selected, both parties must agree that the service of a mediator is no other than an effort to find a solution. In a small community, it is very possible that a mediator also serves as an arbitrator and a judge.

f. Arbitration. This happens when both parties in a dispute agree to ask a third party (arbitrator) for an intermediary. Another agreement is that both will accept any decision of the arbitrator.

g. Adjudication. The last way is when a third party with authority to interfere in dispute resolution is out of any party's interest. The thir party also deserve to make decisions and enforce for its implementation.

These seven ways can be recategorized into three ways of dispute resolution, namely traditional, alternative dispute resolution (ADR) and court. The traditional way consists of letting everything go, avoidance and coercion. These three first ways cannot be found in legislation. Other form of disputes resolution using ADR are negotiation, mediation and arbitration. These three last mentioned methods exist in Law Number 30 of 1999 concerning Arbitration and

Alternative Dispute Resolution, while dispute resolution in court is known as procedural law.[14]

Another proper theory is the sociological jurisprudence theory. It mentions that the good law is in line with any law living in society. In other word, the law should reflect the values living in society. However, this theory should be distinguished from what we know as the sociology of law. The sociology of law, as described briefly in the previous section, is a branch of sociology that studies law as a social phenomenon. Sociological jurisprudence, meanwhile, is the study of a specific school in the philosophy of law which studies the mutual influence between law and society. As for sociology of law is a branch of sociology that studies the influence of society on law and the extent to which the existing phenomena in that society can affect the law while investigating the reverse effect of law on society. The most important thing is the beginning point of approach. If sociological jurisprudence approach starts from law to society, sociology of law begins its approach otherwise, from society to law.[15]

Research Method

This research uses descriptive method with normative juridical approach (legal research) to obtain secondary data. It also engages sociological juridical approach in conducting a field research other than statute, conceptual, and analytical approach . Aditionally, it also uses normative legal research methods because the focus of this study comes from the blurred norms. Meanwhile, to trace legal materials, it uses document study techning through qualitative analysis.

Finding and Discussion

Obstacles on Distribution of *Poh Roh* Assets as a Result of Divorce at Gayo Lues Lues Community

The problems in any society are very diverse ranging from the simplest to the most complex. This cannot be separated from the role of the customary institution in solving citizen's problems. Any dispute handled by the customary institution will involve a variety of

[14] *Ibid.*

[15]Pound, Roscoe in Lili Rasjidi, *Dasar- Dasar Filsafat dan Teori Hukum*, Citra Aditya Bakti, Bandung, 2012, 32.

both supporting and obstructing factors. The same happens in the context of *poh roh* assets distribution in the Gayo Lues community in which *Jema Opat Institute* plays a role as the institution to solve the dispute. As for the supporting and obstructing factors are as follow:

1. Supporting factors

a. Good faith from divorced husband and wife.
b. The clear status of the *poh roh* assets.
c. The implemented system based on deliberation.
d. Low cost and short time.

The following table shows more detail information about the supporting factors in:

Tabel 3.
Supporting Factors for the Distribution
of *Poh Roh* Assets through *Jeuma Opat*

No	Supporting factors	Respondents	Percentage
1.	Good will from divorced husband and wife	19	31,7
2.	The clear status of the *poh roh* assets	15	25
3.	The implemented system based on deliberation	14	23,3
4.	Low cost and short time	12	20
Total		60	100

Source: Primary data

The table above shows that the good faith of divorced husband and wife does determines distribution of *poh roh* assets process through the customary institution numbering 31.7%. Meanwhile, the clear the status of *poh roh* assets numbers 25% and the implemented system by Jeuma Opat reaches 23.3%. The factor of cost and short time onlu numbers 20%. This implies that the *poh roh* asset distribution through Jeuma Opat can only be done if the both divorced husband and wife agree to rely on the *Jeuma Opat* for the asset distribution without any coercion. It becomes impossible to divide the *poh roh* assets through Jema Opat if the divorced husband and wife do not

want the institution to solve their dispute. More complete information about those supporting factors are as follow:

a. **Good Will from Divorced Husband and Wife**.

Disputes resolution through traditional judiciary institution in Aceh has been practiced since the existence of Aceh Kingdom until today.[16] The existence of the institution is an urgent necessity for Aceh people as it grows and develops well in the area. It makes sense, therefore, to find Aceh people generally rely on it in dealing with any legal problems as an effort for getting justice. The same condition happens at Gayo Lues community where its people rely the dispute resolution on *Jeuma Opat*.

When it comes to the case of *poh roh* asset distribution through *Jema Opat,* good will from the divorced husband and wife is crucial to succeed the resolution process as quick as possible. Without the good will of two parties, the congregation cannot do much. The absence of good will, among others, is clear when either husband or wife do not attend the meeting. This will make it hard for *Jema Opat* to hold a discussion Jemaah one of the parties did not attend the meeting so that the Opat Jemaah could not hold a discussion particularly to determine how much each of both will get percentage of the total asset.[17]

Based on it, to make distribution of *poh roh* assets run well and quickly without too much time and money consumption, both parties must be cooperative in every step of the process. This becomes important because after the distribution of *poh roh* assets done, there is no more bound between them both marital tie and *poh roh* assets.

b. The Clear Status of *Poh Roh* Assets.

According to the meaning and purpose of marriage as clearly mentioned in Law No. 1 of 1974 concerning Marriage, the aim of marriage is not merely an agreement between a woman and a man to fulfill their life's needs. Likewise, it is not only a physical bond between a woman and a man, but also a phsychological ones. Therefore, every marriage must come up with the agreement of both.

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[16]Taqwaddin, Nurdin. "Pedoman Penyelenggaraan Peradilan Perdamaian Adat di Aceh," *Jurnal Ilmu Hukum Qanun*, 2010, 110.

[17]Reje Mude Gemasih, *Reje* Kampung Kuta Lintang Kecamatan Blang Kejeren, interview on December 2, 2018.

The physical bond becomes the build a happy and eternal family. In other words, a marriage should last a lifetime and it should not be easily broken because the marriage itself is based on a religious and divine teaching of The Only One God.[18]

In a process of creating a happy marriage family, the matter of property is unseparable both in the form of inheritance and *poh roh* assets. Therefore, separation among assets is important to facilitate the distribution process of *poh roh* assets in any unexpected condition, such as a dispute or divorce. However, in the Gayo Lues community, no one records and separates the assets they obtain during marriage.

The separation of assets is still clear at the beginning of a marriage. However, for an old marriage, status of their property sometime becomes blurred. This is different from any couple who, during their family life in harmony and peace, had made clear separation of their property, including the legal documents mentioning the name of husband or wife as the owner of certain assets. In fact, determination and separation of the property ownership status are very important to obtain clarity on the status of property when death of each or divorce happen at the future.

The clear status of property/asset in marriage is an important factor which can significantly help *Jeuma Opat* in the dispute resolution or distribution process of the *poh roh* assets belonged to a divorced husband and wife. This aims to make *Reje Kampung* knows in detail about properties of each divorced husband and wife because it is *Reje Kampung* who get involved in signing the transaction of assets obtained by the divorced husband and wife.

If a couple had already separated the assets between inheritance and *poh roh* since the beginning of their marriage and not mix them into one, the dispute can be quickly resolved. Furthermore, two meetings for the settlement of of poh roh assets division can be enough and this will make a divorced couple able to immediately manage the *poh roh* assets. It becomes more urgent when one of

[18] Verse 1 in Law No. 1/ 1974 mentions that marriage means physical and mental bond between a man and a woman. It means to create a happy and eternal family based on the Oneness of God. Eternal means that the end of marriage is death.

divorce couple relies his/her economic survival on the *poh roh* assets because of the absence of other income sources.[19]

c. The Implemented System based on Deliberation

The distribution of *poh roh* assets in Gayo Lues community through *Jeuma Opat* is based on the principle of deliberaion. In other word, distribution does not always mean the same portion in number between a divorced couple. Sometimes, the portion received by an ex-husband is not the same as those of ex-wife and vice versa. This is based on certain considerations and resulted from serious deliberations. If, for example, an ex-wife suffers an illness and requires a lot of money while she does not have another income, she will get more from her ex-husband.[20]

In dealing with distribution of *poh roh* assets or other social problems, *Jeuma Opat* always holds serious deliberation for the sake of village development. This system makes any decision made by *Jeuma Opat* considered fulfilling justice values criteria. In resolving *poh roh* distribution, for example, *Jeuma Opat* involves relatives of both divorced parties. This made the whole parties accept the decision willingfully as clear from the following examples:

AD and NN were a couple who had fostered household for 15 years but it could not last longer. In 2013, they got divorced illegally. During the marriage, they had obtained *poh roh* assets consisting of a car, a motorcycle and household equipments. In the distribution of *poh roh* assets, both parties agreed to resolve it through *Jeuma Opat.* At the *Jeuma Opat* meeting, it was decided that the car became property of the ex-husband while others beloned to the ex-wife.

As happened at the mentioned case settlement process, Jeuma Opat always involves relatives of both sides to make win-win decision so that each party can accept it willingfully. This procedure can also recover broken family relations after the divorce. Thus, the settlement through *Jeuma Opat* is not merely to obtain portion of each divorced parties, but to also to rebuild a broken relationship like before the divorce.

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[19]Safri Wali. *Reje* Kampung Rikit Gaib. *Interview on* November 26, 2018.
[20]Zulfikar, a local public figure at *Kampung* Rikit Ghaib, *interview on* December 01, 2018.

d. Low Cost and Short Time.

Resolving the problem of *poh roh* assets distribution through the Syar'iyah Court takes relatively long time and big cost. The long period of inspection process the big amount of costs to pay make a divorced couple reluctant to choose Shariah Court. Additionally, the whole parties will loose much energy during the process. The *poh roh* assets, meanwhile, become displaced because no one takes care of it during the settlement process.

According to Duski, the settlement of this case through the Syar'iyah Court must take at least 6 months. Related parties who live far from the area which the Syar'iyah Court lies must pay a lot of money. Meanwhile, the settlement through *Jeuma Opat* takes 2 weeks at maximum. The meeting place, on another hand, is at the house which a husband and wife lived in before the divorce. This can significantly decrease the cost. Therefore, the settlement through *Jeuma Opat* is better than the Syar'iyah Court particularly because both ex-couple can save costs, time and energy. Besides that, it removes hostility between them two because the decision of *Jeuma Opat* reflects a sense of justice.

2. Obstructing Factors

As explained earlier, the function of *Jema Opat* is to solve every problem in the community, including the settlement process of dispute on *poh roh* assets distribution. In serving this specific role, there are still some obstacles that Jeuma Opat copes with. Those are, among others, as follow:

a. Unclear status of *poh roh* assets.
b. Secret transfer of *poh roh* assets ownership.
c. Lack of knowledge about the distrubution of *poh roh* assets.

More detail information is availale at the following table:.

Tabel 4.
Obstacles for Settling the Distribution of *Poh Roh* Assets.

No	Obstacles	Respondent	Percentage
1.	Unclear status of the *poh roh* assets.	18	30%
2.	Secret transfer of *poh roh* assets ownership	25	41,7%

3.	Lack of knowledge about the distrubution of *poh roh* assets	17	28,3%
Total		60	100

Source: Primary data

The table above clearly shows that the most dominant factor in resolving disputes by *Jeuma Opat* is the secret transfer of poh roh assets numbering 41.7%. It is far much higher than the unclear status of poh roh assets with 30% and the lack of knowledge about the distribution as much as 28.3 %. More detail explanation is available below:

a. Uncelar Status of the *Poh Roh* Assets

In normal condition when a married couple live in harmony and peace, the ownership of any property, including *poh roh* assets is generally never questioned. Both parties never wonder on who gets the *poh roh* assets or whose name is mentioned at the ownership legal document even though there has been a mixture of inheritance with *poh roh* assets. In the Gayo Lues community, legal ownership status is usually attached to a husband's name. A new problem will arise when households begin to split or even into a divorce either through the Syar'iyah Court or outside of it.

In most of cases of this condition, the distribution of *poh roh* assets becomes a difficult problem which possibly lead into any conflict because each of the divorced couple claims their rights to *poh roh* assets. Even in a few cases, the status of asset is totally unclear and this makes it very hard to divide the assets through Customary Institutions or those conducted by families or relatives of both sides. Another almost same condition is when the *poh roh* assets have been mixed with assets from inheritance. For example, sometimes, the wife's inheritance asset has been administred in the name of the husband because her parents gave it before the marriage took place and the ownership document is made after the marriage. Other common cases is on the inheritance assets which was sold to buy other assets. In this condition, the newly purchased assets look like *poh roh* assets because it was purchased during the marriage as it becomes more obvious in this following case:

A.W. got married to M Z. in 1998 and was officially divorced in 2012 with divorce deed No. 057/A/2012/MS-Bkj dated February 16,

2012. During the marriage, the couple had collected *poh roh* assets ranging from movable objects to fixed objects (landfield). However, according to the ex-wife, the property was a *poh roh* asset and on the contrary, the ex-husband claimed it as an inherited asset because it came from his parents' grant. The land in dispute is not only spacious because a house had been built on it. Dispute resolution of the asset status does becomes a problem for the divorced couple husband and wife and this potentially obstruct the settlement process.

Another problem happens when one of both had owned any asset before the marriage took place or so called *beru* or *bujang* assets. After the marriage, the asset was sold to purchase other assets and therefore, the newly purchased asset is partially derived from the *bujang* assets as well as from *Poh Roh* assets. This makes the asset status unclear and certainly can make it diffcult for *Jeuma Opat* to formulate decision of *poh roh* assets distribution. All the explanation and case studies above show that the clear status of property in a marriage is very important. This aims to avoid disputes over the distribution of *poh roh* assets in a case of divorce.

b. Secret Transfer of *Poh Roh* Assets Ownership

In any case when a couple has failed to build and maintain a household so that it leads to a split or divorce, a husband might secretly transfer the *poh roh* assets to other types, especially movable objects or uncertified land. In other words, he wants to get more control on the *poh roh* assets by setting the object excluded at the objects to share between two.[21]

Otherwise, he might secretly made the *poh roh* assets as a collateral for getting a debt from a third party without the consent of his wife and this happened before the household broke up. Therefore, at the time of the marriage breakup due to divorce, the debt was charged to the divorced husband and wife.[22] Some of the *poh roh* assets ownerships are deliberately made attached to other names (other than the couple) without the consent of his wife although they both know that the asset was obtained during the marriage. Setting this, the husband always

[21]Iskandar, *Reje* Kampung Kute Panjang Kecamatan Blang Kejeren, *interview* on Decmber 04, 2018. He shared the same statement with those delivered by Safri Wali, *Reje* Kampung Rikit Gaib, Rikit Gaib Sub-District.

[22]Iskandar, *Reje* Kampung Kute Panjang, *interview on* December 05, 2018

avoids to say that the asset is a part of *poh roh* in order it would not be shared between two. In other words, he does not recognize that the asset is *poh roh* putting the reason that all *poh roh* assets obtained during the marriage comes from his business.[23]

This mode of *poh roh* asset secret transfer is another obstacle faced by *Jeuma Opat* in settling the distribution of the assets. Therefore, it cannot be immediately completed before *Jema Opat* conducts an investigation.[24] Moreover, it also becomes more complicated as the secret transfer is sometimes done by a jobless ex-wife considering that she must fulfill her economic needs.

For various reasons, the secret transfer of *poh roh* assets by one of both parties possibly happened before the distribution had occured. In this condition, if the one who transfers or sells it confesses what he/she did, then the sold/transferred asset will be considered as his/her portion.

To sum, the good will of both parties will significantly determine either the success or failure of *Jeuma Opat* in settling the asset distribution. In other words, divorced husband and wife must honestly admit which asset comes from inheritance which others come from *poh roh* assets. If the originial status of each asset can be clear, it will be easy for *Jeuma Opat* to complete the distribution of *poh roh* assets so that divorced husband and wife can quickly manage and use their respective parts, particularly if one of parties relies heavily on the *poh roh* assets for economic life.

c. Lack of Knowledge about *Poh Roh* Assets.

Each party of a divorced husband and wife sometimes emphasizes their ego to take ownership of *poh roh* much more than those shared to another. For example, a husband works as a civil servant while a wife is a housewife. Because the *poh roh* asset is mostly obtained from salary of working as a civil servant, the ex-husband feels like he deserves much more than his ex-wife to control and

[23]Safri Wali, *Reje* Kampung Rikit gaib, *interview* December 12, 2018.

[24]*Sidik Sasat* is such a local investigation on any problem in the society. This makes it easier for *Jema Opat* to solve any problem because it gives accurate information on the origin of problem. *Sidik sasat* is done by *Petue* (a member of *Jema Opat)* who serve to investigate what goes in the society (*jirim kisim*). *Petue* needs to know the problem in detail from the perspective of customary law or local people law

manage the asset.[25]At the time of deliberation through *Jeuma Opat*, those who feel this way usually deliver their willingness in front of the *Jeuma Opat* to get what they want.[26]

It is another obstructing factor that *Jeuma Opat* deals with in settling the distribution of *poh roh* assets. Furthermore, this might also cause failure of *Jeuma Opat* effort for the settlement. If one of the parties stubbornly does not want to put aside his wishes in the settlement process, *Jeuma Opat* will usually delegate the process to the Syar'iyah Court.

So far, Gayo Lues people never refuse or complain the decision made by *Jeuma Opat* particularly the divorced husband and wife. Therefore, this problem was never submitted to the the Syar'iyah Court. In other words, every settlement of the distribution of *poh roh* assets through *Jeuma Opat* can be completed. Whereas, those proposed to the Syar'iyah Court are the cases when settlement through deliberation among relatives of the two parties can not work well.

In addition to the obstacles mentioned above, it is important to note that decision of *Jeuma Opat* cannot be used as a basis to change the ownership name from a party to another at the administrative document especially for properties like certified land. Transfer of ownership rights on certified land must be made through an authentic deed issued by a notary or PPAT (land deed certificate maker; *Pejabat Pembuat Akta Tanah*). Therefore, decision of the customary institution must be set forth in the authentic deed by a notary.

Conclusion

Obstacles to the distribution of *poh roh* assets in Gayo Lues community are unclear status of poh roh assets, the secret transfer of *poh roh* assets and lack of knowledge about it. These factors obstruct Jeuma Opat to deal with the distribution of assets. Moreover, any effort of Jeuma Opat on this sometimes fails.

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[25]Safri Wali, *Reje Kampung* Rikit Gaib, Rikit Gaib Sub-district, *interview on* December 13, 2018. The same thing was mentioned by *Taratan Uhra Mukim* Kuta Lintang, Kecamatan Subdistrict. See Al Makin, "Unearthing Nusantara's Concept of Religious Pluralism: Harmonization and Syncretism in Hindu-Buddhist and Islamic Classical Texts," *Al-Jami'ah: Journal of Islamic Studies* 54, no. 1 (2016)

[26]Safri Wali, Rege *Kampung* Rikit Gaib, *interview* on December 13, 2018.

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The Settlement of Sharia Banking Dispute based on Legal Culture as a Practice of Indonesian Islamic Moderation

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Abstract:

Islamic banking and religious courts have a very close-knit network. Both Islamic banking serving as Islamic financial intermediation institution and religious courts as special courts with authority to resolve the dispute of Islamic banking similarly stressed on applying the sharia principles in the operation. They are expected to sinergically rely on sharia principles. The philosophical basic of religious courts' authority in dispute settlement of sharia banking is to create a harmony between the execution of contract and material law based on the principles of *sharia* with religious courts as an institutiton for Moslem justice-seekers so that the disputes can be resolved wholly (*kafâ'ah*) and consistently (*istiqâmah*) through court rulings upholding the culture of law. The meeting of values of *sharia* and culture living in society produces harmony in terms of Islamic banking dispute settlement.

Keywords:
Dispute Settlement; Sharia Banking; Culture of Law

Abstrak:

Keberadaan perbankan syariah dan peradilan agama memiliki keterkaitan yang sangat erat. Perbankan syariah sebagai lembaga

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intermediasi keuangan syariah dan peradilan agama sebagai lembaga peradilan khusus yang mempunyai kewenangan ablosut menyelesaikan sengketa perbankan syariah sama-sama menekankan menerapkan prinsip-prinsip syariah dalam operasionalnya. Perbankan syariah dan peradilan agama diharapkan dapat bersinergis dengan berpegang pada prinsip syariah. Dasar filosofis Kewenangan peradilan agama dalam penyelesaian sengketa perbankan syari'ah adalah agar terciptanya keselarasan antara pelaksanaan akad dan hukum materiil yang berlandaskan prinsip-prinsip syariah dengan lembaga peradilan agama yang memang merupakan wadah bagi pencari keadilan yang beragama Islam sehingga sengketa perbankan syariah dapat diselesaikan secara *kafā'ah dan istiqāmah* melalui putusan pengadilan yang mengedepankan budaya hukum. Pertemuan nilai syariah dan budaya yang hidup dalam masyarakat menghasilkan harmoni dalam penyelesaian sengketa perbankan syariah

Kata Kunci:
Penyelesain Sengketa; Perbankan Syariah; Budaya Hukum

Introduction

Article of 24 and 25 in 1945 Law about implementation of judicature mentioned that in order to enforce the law and justice, an independent judicial power was established. The Supreme Court oversees the judiciary in general, religious, military and state administrative courts.[1] In addition to the Judicial Power Law, the Law of the Supreme Court also contributed to the justice system, namely: Act No. 3, 2009 about the Second Amendment on the Act No. 14, 1985 on the Supreme Court (hereinafter referred to as the Law of the Supreme Court)

When the religious courts had not yet been under the Supreme of Court management, it was called the religious court at the first level, while appellate is called High Religious Court. Before, both were different in name. "The different names were then put together by the Minister of Religion Affair's Decision Letter No. 6 of 1980, on

[1]Taufiq Hamami, *Peradilan Agama dalam Reformasi Kekuasaan Kehakiman di Indonesia* (Jakarta: Tatanusa, 2013), 17-18.

January 28, 1980 into the name the Religious Court for the first level and the High Court of Religion for the appellate".[2]

Prior to the enactment of the Religious Courts Law, the authority of religious courts throughout Indonesia is on the marriage law, as stated in Article 63 paragraph (1) of the Marriage Law. It mentioned that religious courts are competent in the areas of marriage for Moslem citizens. However, article 63 paragraph (1) was mitigated by paragraph (2) stating that any religious court decision must be confirmed by the state court.

It means that to be able to do execute the verdict, religious courts need to get auhority from the state courts or so called (*executoir verklaring*). One of reasons for this is because at that time, religious courts had not had any confiscation staffs like those of state courts. Among others, this implied that before the law of religios court had been enacted, the religious court had not been in the same position as other courts.

Therefore, the enactment of the Law of Religious Court had also created a governing entity within the framework of religious courts and national legal order. "Moslems which is a part of Indonesian population are given the opportunity to obey Islamic law as a part of divine teachings of their religion".[3]

Last 2006, as one of four institutions under the management of the supreme court, religious court got additional and strategic authority, which is ability to adjudicate any disputes. This was preceded by the ratification of Religious Courts Law.

> *The amendments to the Religious Courts Act was motivated by the emergence of new legislation, namely Law No. 4 of 2004 on Judicial Power as an organic law on Article 24 of the Constitution of 1945 Post-Amendment with the one-stop system (one roof system).* [4]

Historically, religious court had long been existed in Indonesia even before the Dutch government went into the archipelago. It kept growing and going on in accordance with the rhytm of governments'

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[2]Erfaniah Zahriah, *Peradilan Agama Indonesia: Sejarah Pemikiran dan Realita (*Malang: UIN Maliki Press, 2009), 26

[3]Mohammad Daud Ali dan Habibah Daud, *Lembaga-lembaga Islam di Indonesia,* (Jakarta: Raja Grafindo Persada, 1995), 120.

[4]Mardani, *Hukum Acara Perdata Peradilan Agama*, (Jakarta: Sinar Grafika, 2007), 65.

policies in each period. The important milestone of religious courts development was signed by the publication of religious courts law, the Law on Islamic Banking and strengthened by the Constitutional Court Decision No. 93/PUU-X/2012 about Elucidation of Article 52 Paragraph (2) of the Law of Islamic Banking as the legal basis for religious courts authority to resolve disputes in the sharia economic field.

The dispute of resolution processes in the religious court in fact still found some problems. A real example is the lack of procedural law specific of religious courts, so the use of law applicable in general court can not be avoided. The existence of the law becomes much more urgent when the dispute over the Islamic banking had been held by religious court while the businessmen are not only Moslems.[5]

The development of religious courts, together with the growth of Islamic banks as part of an Islamic economic system, began to emerge in the mid-20th century. It was signed by the establishment of Mit Ghamr Local Saving banks in Egypt. However, due to the political situation at that time, the bank was taken over by the National Bank Of Egypt and the Central Bank of Egypt the in 1967 then operated usury based banking system. Later on in 1972, a non-usury based banking system was reintroduced through the establishment of the Nasser Social Bank in Egypt.

Another milestone for the development of sharia bank was founded by the Islamic Development Bank (IDB) in Jeddah in 1975 initiated by member countries of the Organization of the Islamic Conference (OIC). IDB later played an important role in meeting the needs of Moslem countries funds for development. Finally, the establishment of IDB motivated many countries to set up Islamic financial institutions. As a result, at the late 1970 's and early 1980-90s decade, Islamic banking have sprung up in Egypt, Sudan, the Gulf countries, Iran, Pakistan, Malaysia, Bangladesh, and Turkey.[6]

In Indonesia, it is fair to say that the emergence of Islamic banking was too late compared to other countries with dominant

[5]Erie Hariyanto, "Kedudukan Bank Syariah dalam Sistem Perbankan di Indonesia" in Iqtishadia: Jurnal Ekonomi dan Perbankan Syariah STAIN Pamekasan, Vol. 3 No. 2 Desember 2016, 214

[6]Abdullah Saeed, *Menyoal Bank Syari'ah*. (Jakarta: Paramadina), 2004, 16.

Moslem population. The big number of Indonesian Moslem (± 85% of 237 million Indonesian) provides a good opportunity for Islamic banking sector's rapid progress. "Through presenting alternative financial instruments and banking to customers of Indonesian Moslems, the government was getting serious in giving attention to the growth of Islamic banks in Indonesia".[7]

Following the emergence of sharia banks in other countries, a discussion of the sharia bank as the economic pillar of Islam took place in the early 1980s. "Concretely, in 1991, there formed a Deed of Establishment of Muamalat Bank of Indonesia as a result of the national congress of the Indonesian Ulama Council in 1990 about the plan of establishment of Islamic banks in Indonesia".[8]

The Indonesian Sharia Bank was officially introduced in 1992 in line with the enactment of Law No. 7 of 1992 concerning banking (hereinafter referred to as the Banking Act). The emergence of this legislation indicates the agreement among Indonesians to implement a dual banking system in Indonesia. This stage was also the phase of introduction to banking system.[9]

The banking law does not explicitly mention the existence of the so-called sharia bank. There are only two chapters to rely upon, namely article 6 letter (m) concerning the scope of general banking and article 13 letter (c) regarding to the scope of rural banks (b*ank perkreditan rakyat*). Both two mention the same content, which is "providing financing for customers based on the principle of profit sharing in line with conditions set out in government regulations".[10]

The activity of Islamic banking is mainly on carrying out both conventionally and sharia principle based business activities in providing services in payment traffic. "This relates to the legislation mentioning that sharia banking gets much opportunities to run business activities, including enabling conventional commercial banks

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[7]Bank Indonesia, *Panduan Investasi Perbankan Syariah Indonesia*, (Jakarta: Bank Indonesia, 2007), 9.

[8]Muhammad Syafi'i Antonio, *Bank Syari'ah Wacana Ulama dan Cendikiawan*, (Jakarta: Tazkia Institut, 1999), 278.

[9]Karnaen Perwataatmadja, *Bank dan Asuransi Islam di Indonesia*, (Jakarta: Kencana, 2005), 1-3

[10]Abdurrahman, *Eksistensi Perbankan Syari'ah dalam Pembinaan Ekonomi Umat dalam Prospek Bank Syariah di Indonesia*, (Bandung :PPHIM, Bandung, 2005), 26

to open branch offices with sharia principle based system".[11] Meanwhile, the principles of sharia means the rule of Islamic law based on the agreement between the bank and other parties for storage, financing business activities, or other activities in accordance with the sharia law. It is clear, therefore, that Indonesia applies two banking systems, i.e., conventional system and provisions of the sharia of Islam principle based system.

Legal certainty is felt much more influencing for both observers and users of Islamic banking services after the Promulgation of Law No. 21 of 2008 concerning Islamic banking (hereinafter referred to as Islamic Banking Act). Since then, Islamic banking becomes one of solutions of national economy in which serves as one of leading factors in national stability. The whole national problems can be fixed firstly from sharia-based economy.

The Islamic banking activity is firmly regulated in the Banking Act in conjunction with Law mentioning the Islamic Banking Sharia. For instance, banking means an institution performing either commercial or sharia based activities in providing services of payment traffic. It is also mentioned that shari'ah banks have extensive opportunities to run business activities, including those for conventional commercial bank to open a sharia branch office. Based on data from OJK (Otoritas Jasa Keuangan), until 2015, there were 2,881 branches of Islamic banking.[12]

Islamic banking grows and develops as an alternative to conventional banking practices. Critics of the concept of conventional banks are not in refusing its function as a financial intermediary. Instead, it is about other characteristics, such as the elements of usury, gambling (*maysīr*), uncertainty (*gharar*) and false (*bāthil*). As an alternative to replace those mentioned, Islamic traditional contract is

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[11]On the basis of the Banking Act, then stood Shariah Bank Mandiri and some comventional banks opening branches of Shariah such as BNI, BRI, Bank IF, Bank Bukopin, Bank Danamon, BPD Jabar and so forth. Even, there found a a foreign bank opened sharia branch, ie HSBC Bank. See, Hasanuddin, "Penyelesaian Sengketa dalam Perbankan Syar'ah", paper presented at the Seminar on Islamic Banking as A Means of Empowerment organized by the Economic Democracy, BPHN Departemen Kehakiman dan HAM in cooperation with FH Universitas Andalas Padang, Kanwil Departemen Kehakiman and HAM West Sumatra Province June 29-30, 21

[12]www.ojk.go.id. Accessed on April 10, 2016.

used. Therefore philosophically, Islamic banks are banks with activities free from usury.[13] This is in line with God's word in Q.S Al-Baqarah [2]: 275:

. . .وَأَحَلَّ ٱللَّهُ ٱلۡبَيۡعَ وَحَرَّمَ ٱلرِّبَوٰاْۚ . . . ٢٧٥

"*…Allah has permitted trading and forbidden usury..*" (QS. Al-Baqarah [2]: 275). [14]

The traditional Islamic contract, according to Muhammad Syafii Antonio, consists of: "Deposits, profit sharing, leases both operating and financial, and fee-based on service covering *al-wakalah, al-kafâlah, al-hiwâlah, al-rahn*, and *al-qardl"*.[15]

Moslem's enthusiasm on the Islamic banking was in harmony with the development of Islamic economics in the legal field. Among others, it was signed by the birth of legislation such as Law No. 3 of 2004 on Bank of Indonesia and the Act Number 10 of 1998 on the amendment of Law No. 7 of 1992 about banking, Law No. 19 the Year 2008 regarding State Securities Sharia and Law 21 of 2008 on banking sharia. The aforementioned regulations are further strengthening Islamic economic activities up to present times.[16]

In the next process, the rise of Islamic business activities cannot avoid any dispute among involved parties. The dispute generally finds the settlement in both litigation in the courts and non-litigation through alternative dispute resolution. Certainly, each has advantages and disadvantages, yet the more important thing is how to settle any disputes with a quick, simple and light cost in accordance with Islamic principles. Therefore, the implementation of sharia principles in Islamic banking business activities and role of the court are both expected to escort the process using *kâffah* (at whole) and *istiqâmah*

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[13]Amir Machmud, *Bank Syariah: Teori, Kebijakan dan Studi Empiris di Indonesia*, (Jakarta: Erlangga), 2010, 4.

[14]Departemen Agama RI, *Al-Qur'an dan Terjemahnya,* (Jakarta: J-ART, 2005), 48.

[15]Muhammad Syafi'i Antonio, 2007, *Bank Syariah dari Teori ke Praktik*, 10nd edition, (Jakarta : Gema Insasani Press and Tazkia Cendikia), 83. See also M. Natsir Asnawi, *Menyoal Kompetensi Peradilan Agama dalam Menyelesaikan Perkara Ekonomi Syari'ah*, (Jakarta: Media Badilag 2011), 4

[16]Afdol, *Legislasi Hukum Islam di Indonesia*, 115. See also Muhammad, 2005, *Sistem dan Prosedur Operasional Bank Syariah*, Yogyakarta, UII Press, 18 and Muhammad Djakfar, *Hukum Bisnis*, (Malang - UIN-Malang Press 2009), 37

(consistent) concepts through court decisions to create justice, solidarity, and equity in economic activity.

The Islamic banking arrangement is based one the government's awareness and policy in regulation making process, particularly on the management of Islamic banking compared to conventional ones.[17] Related to this, each of Islamic and conventional banking has regulation with clear limits. For example, conventional banks can found a Sharia based branch but it needs a separation (spin-off) from the conventional aircraft within a certain time.[18]

Principally, political law has two dimensions. *First* is the basic policy which becomes the main reason for enacting certain legislation. *Second* is the purpose or reason behind the enactment. The second becomes interesting to discuss further because typically, those with authorities like to use any legislation as a political instrument.

The existence of Islamic banking and religious courts has a very close relationship. Islamic banking as a financial intermediary and religious courts as a special judicial institution with absolute authority equally emphasize to apply Islamic principles in their operation. Both are expected to synergize each other while maintaining the Sharia concepts of *kāffah* (wholeness) and *istiqāmah* (consistency).

Juridically, the existence of both religious courts and sharia banking in Indonesia has a very strong legitimacy. However, within certain limits, they still serve as "alternative options". The most major issues on this are as follow. *First* is public stigma that sharia banking still has not fully implemented shari'ah guides in the practice and their exclusive customers among the Moslem only. *Second* is the authority to settle any Islamic banking dispute which only belong to Religious Court. In fact, religious court is generally cconsidered as those concerning with divorce ceases as if it is not competent to resolve sharia banking disputes.

The aforementioned stigma makes much sense at least from two factors. *First*, the existence of sharia banking in Indonesia's business is

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[17]Mohamed Ariff, "*Islamic Banking: A Southeast Asian Perspective*", in Mohamed Ariff (ed.), Islamic Banking in Southeast Asia (Singapore: Institute of Southeast Asian Studies, 1988), 210.

[18]Muhammad Ramadhan, *Politik Hukum Perbankan Syariah di Indonesia*, MIQOT Vol. XL No. 2 July-December 2016, 273.

relatively new compared to the conventional banking. *Second*, religious court as the only court to settle any sharia banking disputes still tends to resolve other types of cases such as divorce. There are a very few Islamic banking disputes resolved in the religious courts.

Principles for the Islamic Banking Settlement

In Islamic law, the settlement of disputes can be through three ways. First is *ishlāh/shulh* (peace making). *Ishlāh* literally implies resolving any quarrels or disputes. Its definition, furthermore, is mentioned in the formulation of Islamic law as follow: "A type of contract (agreement) to resolve any fight (dispute) between two parties". Peace making is highly recommended because it can avoid any broken relationship between the parties as well as any hostility. The suggestion for making peace among dispute involved parties is found in the Glorious Qur'an, *Sunnah*, and *ijmā'*.[19]

Each of parties involved in this peace making process is mentioned *mushālih*, while the object of dispute is referred to *mushālih 'anhu*. As for any action of one party to another for the purpose of resolving the dispute is called *mushālih 'alayhi*. Islamic teaching does suggests a peace making process because its existence between or among those in dispute could anticipate any break of social bond or so called *silaturrahim*. The teaching is well delivered in the Qur'an, hadith even *ijmā'*.

In this context, the peace making process has specific principles to properly resolve the dispute at the main point(s). Among others, it consists of fairness in making any decision related to the dispute so there will be no party who think of getting aggrieved. Another principle is kinship, and the next is win-win solution through making the dispute issue exclusively confidential for related parties. The last one, eventually, is resolving issues comprehensively in fair togetherness.[20]

On the other hand, there also found some principles of sharia economy law in Islamic economic dispute resolution taken from *fiqh mu`āmalah*. They are Islamic economic system and the economic

[19]Nurul Ichsan, *Penyelesaian Sengketa Perbankan Syariah, dalam Jurnal* Ahkam: Vol. XV, No. 2, Juli 2015, 232.
[20]*Ibid*.

system of sharia law. The former means a *fiqh mu`āmalah* which consists of rules or the working mechanism which govern any economic effort made of individuals or legal economic entities. Meanwhile, the later refers to a *fiqh mu`āmalah* as a normative law that governs the economic rules.[21]

The nature and characteristics of sharia economic law cannot simply be examined solely from its methodology. It is mainly because in the terminology of Indonesian Islamic law, there recognized three legal forms, i.e Islamic law, customary law, and the West law. Each is an independent legal form with different methods for further study purpose.

The foundational differences among Islamic, customary and the Wes Laws are not only in the sense of both origin and materials of the law, but also components included in the legal research field. If Islamic law contains vertical and horizontal dimensions because it was born from both divine revelation and realities, customary and the West law are almost entirely based from tradition and rational thinkings. On the basis of it, the main principles of Islamic banking dispute settlement, among others, are as follow:

1. Eliminating parochialism/Not giving too much burden
   This principle is very clear in the process of establishing Islamic law. Generally, each established law needs to show that its existence and role are nothing but to provide convenience and relief. It is basic human nature to dislike any burden that limits the right for freedom. They also like to pay attention carefully on the law. Meanwhile, in obeying the law, their own choices lead them to choose whether they are able to do so.
   On the basis of it, Sharia economic law is enforced in accordance with the nature of human and not solely based on the will of Allah. This aims to make everyone intentionally leads themselves on tolerance, equality, independence and *amar ma'rûf nahy munkar*. The enactment of Islamic law is not stiff (rigid). Instead, it can can adapt to any situations and conditions flexibly. Therefore, a fiqh

[21]Deni K Yusuf, *Model Upaya Hukum Penyelesaian Sengketa Ekonomi Syariah*, Laporan Penelitian (Bandung: UIN SGD Bandung, 2014), 43-45

basic rule says, "any change of law is affected by situations and conditions, and by the time and place".[22]

2. Minimizing the Burden
   The principle of minimizing the burden in the Islamic law is not only intended to fulfill any needs and events requiring legal provisions. Furhtermore, Islamic law is not only to respond these issues at the time, but rather as guidance to deal with any new problems in the future. Although people have different abilities in responding to the enactment of Islamic law, the main consideration is to minimize the burden, as it is clear at the following:
   "*It is allowed to do any mu'âmalah activities unless there is an evidence saying it as forbidden* ". *Based on the rule, there is nothig to do with any statement mentioning that Islamic law is incriminating. Instead, the elasticity of Islamic law will relieve all the law burdens*".[23]
3. Establishing the Law Gradually
   The gradual establishment of Islamic law is the main principle which had occured at the prophet era. It is believed that every binding law establishment has a historical background and reasons for its enactment. The philosophy of the gradual process is to make easier in identifying both essence and material of the legal matter as well as strengthen the understanding appropriate to the circumstances.
4. Paying Attention to People Benefit
   Islamic law's legal provisions have specific reasons, argument and purposes for the sake of human benefit. Generally, the argument is much more about interpersonal relationship as a manifestation of human relationships with their creators. The establishment of Islamic law is mainly based on three joint principals. *First,* the laws are set to fulfill the needs of law. *Second*, the laws are established by a certain authority with the specific privelege and forcing power for public. *Third,* the laws are established in accordance with the human ability levels to obtain the

[22]Ibnu Qayyim al-Jauziyah, *I'lam al-Muwaqqin, jilid III*, (Beirut: Dar al-Fikr, s.a), 14.
[23]A. Jasuli, *Pengantar Ilmu Fiqh*, (Jakarta: Radjwali Press 1994), 20-23.

benefit appropriate to the objectives of Islamic law (*maqâshid al-sharia*).

5. Creating Well-Spreaded Justice
   The principle of justice is actually the main foundation for the law enforcement. People are equal before the law, and Islamic law provides strict punishment for any rule breakers without exception. Among the legal principles to consider in implementing the law are as follow. *First* is enacting justice for the sake of human rights. *Second*, the law aims for welfare and prosperity of society. *Third*, the law enactment is accordance with the proportionality and the ability level of each person. *Fourth*, any violation of the law should be punished fairly and wisely. *Fifth*, it needs to foster a belief that every unlawful activities are those against the provisions of Allah and His Messenger.[24]

The Philosophy of Islamic Banking Dispute Resolution

Islam also recognizes the existence of legal justice or justice under law.[25] Justice is an unseparable term in legal terminologies because it is the substance of the law itself. As a consequence, the implementation of law needs to get adjusted to the purpose of law established in God's revelation. However, justice can be relative because according to the laws, it is determined by the rules of a formal/procedural and social customs regulations. The more any formal rules are enacted, the more it possibly creates a real injustice when the decision is contrary to the "spirit" of the law. Therefore, there found a specific term called substantive justice to describe any justice in line with the spirit of the law.[26]

The substantive justice is an internal part of the law. It contains unsures of justice which underlie a statement on any action whether it is right or wrong or so called *halāl* and *haram* in Islamic terminologies. Based on this, any obligation needs to reflect justice from God's will while any prohibition should be unfair thing/action from the

[24]Hasbi Ash- Shiddiqie, *Fakta Keagungan Syariat Islam*, (Jakarta: Bulan Bintang, 1982), 25-26.
[25]Masjid Khadduri, *Teologi Keadilan dalam Perspektif Islam*, (Surabaya: Risalah Gusti , 1999), 135.
[26]Ibid. 136.

perspective of the purpose of law, which is for the sake of general interest and common goodness (*maslah̲ah*) that need protection.

At the next developments, under the influence of Greek philosophers, especially Plato and Aristotle, early Moslem thinkers like Ibn Hazm and Ghozali argued that "the ultimate goal of the law is happiness in the world and hereafter."[27] Meanwhile, according to Islamic principles, "relating to social relationshop, those who are commited for fairness need to enact the principles of freedom, equality, tolerance, and brotherhood."[28]

The principles of brotherhood and equality are the the most fundamental basic in social interaction. Moreover, they are more important than the principle of freedom because freedom on each individual should be implemented in an atmosphere of togetherness and brotherhood and the spirit of tolerance not only as a moral basis but also a religious obligation. Based on this, the Islamic banking contract require whole parties to respect and uphold the rights of others. Related to this, the principle of fairness also has implications for the demand of justice in the economic system of a real society.

The vital and central value of justice in a society led Ibn Taymiya to say so: "If any worldly affair is governed by justice, people will be physically and spiritually healthy even though they have rulers with bad morality. If it is governed by tyranny, society will collapse regardless of personal mistakes of rulers which become their own responsibilities in the hereafter. The worldly affairs will be well done by justice even if there is no religion. On the contrary, it will collapse because of injustice even if accompanied by Islam".[29]

Based on the notions mentioned above, justice according to Islamic perspective is the fairness ringht from the motive/ intention/goodwill, processes and objectives. Justice also contains universal basic principles. It is a natural demand of human social life in modern times. In spite of its universality, the real implementation of justice would necessitate consideration on the demands of space

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[27]*Ibid*. 140.

[28]Morris Ginsberg, *Keadilan dalam Masyarakat*, (Yogyakarta: Mandiri, 2003), 142.

[29]Erie; Suyudi Mohammad Hariyanto, "View of Jual Beli Benda Wakaf Untuk Pembangunan Masjid Istiqlal Di Desa Palengaan Daja Pamekasan," accessed December 2, 2019, http://jurnalfsh.uinsby.ac.id/index.php/aldaulah/article/view/665/531

and time. This shows that the modern era is different from agrarian era and therefore, failure to understand the terms of this difference will result in failure in efforts to apply the justice itself.

History records that wherever Moslems live, there certainly found a judicial institution. Since the era of the Prophet Muhammad which Islam began to grow and develop, the forerunner of the judicial system was already founded. Later on, at the era of companion, the judiciary institution had even been found even with very simple form.

The existence of Islamic banking can fulfill various needs of community without any doubt on whether it is allowed to use banking service from Islamic perspective. It is mainly because the criticism of Islamic banking system against conventional banking is not in terms of its function as an intermediary financial institution, but the existence of prohibited elements in its operation.

Islamic Banking, therefore, is a bank running its business based on sharia principles. According to the type, it consists of Islamic banks and sharia finance bank. Thus, Islamic bank is a bank conducting its business activities based on Islamic principles. The principles are based on *fatwa* issued by authoritative institutions in formulating *fatwa* in the field of sharia. The principles contains two meanings, namely the principles of Islamic law in banking activities and the general principles of Islamic law. However, the later does not solely refer to a pure *fiqh mu`āmalah*, but the principles of Islamic law based on the *fatwa* issued by the authoritative institution.

A context of the most recent modern times puts people in a big tug between two great ideologies namely capitalism and socialism. Moslems seek their own identity with an Islamic based ideology. It is all mentioned at and supported by the sources of Islamic teachings, especially The Quran as a guide in the discussion on Islamic banking dispute resolution at the religious courts.

Conclusion

The philosophical basis of the authority of religious court in sharia banking dispute resolution is to create harmony between the implementation of the agreement and the substantive law. It is based on Islamic principles and conducted through religious court which provides a venue as well as service for Moslems justice seekers in

dealing with Islamic banking disputes to resolve it wholly (*kafā`ah*) and continuously (*istiqāmah*).

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Polygamy in the Text of the Qur'an, Hadith and Bible: Theory Systems Approach of Jasser Auda

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Abstract:

Polygamy is one of the most controversial public issues particularly in the context of Islamic law (sharia). Some people often consider it as something frightening. In fact, the Qur'an, the Hadith and the Bible had mentioned about it. This paper aims to describe a range of views on polygamy according to the text of the Qur'an, Hadith and Bible. The method is library research and descriptive-analytic approach as well as historical sociology. Meanwhile, the approach of this research is theory system of Jasser Auda. The findings of this study are: polygamy in the context of Islamic law in the Qur'an and Hadith is allowed as long as the the wives and children's needs are well maintained both economically and socially. Otherwise, it becomes unlawful consideraing the usul fiqh rules between the aspect of kindness (*mashlahah*) and the aspect of danger (*madharrah*). This is different from the Bible which implied that polygamy is free choice to take without limitations on numbers of wives and the related rules of it.

Keywords:
Polygamy; Qur'an; Hadith; Bible

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Abstrak:

Perbedaan pendapat yang sering muncul di ranah publik dan menjadi salah satu isu terkini dalam konteks hukum Islam (syari`ah) adalah poligami. Poligami sering disalahpahami oleh sebagian orang sebagai sesuatu yang menakutkan, namun pendapat yang lain boleh dengan dasar Alquran, hadis Nabi bahkan bible. Tulisan ini bertujuan untuk menjelaskan beragam pandangan tentang poligami menurut teks al-Quran, teks Hadis dan teks Bible. Metode yang digunakan adalah library research dan pendekatan deskriptif-analisis serta sosiologi-historis. Sedangkan teori adalah teori pendekatan sistem Yaseer Auda. Hasil temuan dari penelitian ini adalah: poligami dalam konteks hukum Islam dalam seperti al-Quran, hadis menggambarkan kebolehan poligami dengan syarat memperhatikan aspek keadilan terhadap isteri dan anaknya dengan memenuhi kebutuhannya sehari-hari baik dari aspek ekonomi maupun sosial. Apabila hal tersebut tidak dipenuhi maka poligami hukumnya menjadi haram dengan memperhatikan kaidah ushūl fiqh yakni aspek kebaikannya (*mashlahah*) dan aspek madaratnya atau bahaya (*madharrah*). Hal ini berbeda dengan teks bible yang terkesan bahwa poligami itu bebas tanpa batas bilangan dan aturan.

Keywords:

Poligami; Al-Qur'an; Hadits; Bible

Introduction

Polygamy always becomes a hot topic to talk among common people, scholars, intellectuals, academics and celebrities. It seems as a scourge or something unfair for women that makes women all over the world oppose polygamy practice considering that men can not do fairness. The opposition happened since the 1910-1921's until today.[1] Indonesian legislation in the article 3 No. 1/ 1974 mentioned that a husband can only have a wife. Some argued that the law is not

[1] Untung Yuwono, "Ketika Perempuan Lantang Menentang Poligami," *Jurnal Wacana* 10, no. 1 (2008),. 1–25.

absolute because another article mentioned that a husband may have more than a wife.[2]

In 19th century, there occured a big mass action against polygamy by Anglosaxionism in the United States and Canada calling the practice as a criminal act.[3] According to the Western understanding, polygamy contain elements of structural inegaliterism both theoretically and practically.[4] However, some scholars allow polygamy for reasons that it becomes a perfect solution to prevent society from adultery.[5] Moreover, the Old Testament, Book of Samuel II, implied that polygamy is permitted and there is no related prohibition with it.[6]

Polygamy is becoming a serious problem and is quite exhausting theme yet still always attracts the attention of academics. Among others, Mansur wrote about the deconstructed exegesis of polygamy based on dialectic between text and context.[7] His writing emphasized the subordination and historical aspects of polygamy that he came to a statement that marriage should be in monogamy while polygamy is a temporary solution and therefre not advisable in Islam. Furthermore, U Abdurrahman discussed the exegesis of Muhammad Abduh on *Surah an-Nisā'*: 129 about polygamy.[8] According to him, polygamy should be done only in two terms, namely being fair and the situation of an infertile wife.

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[2] Hotnidah Nasution, "Pembatalan Perkawinan Poligami di Pengadilan Agama (Tinjauan Dari Hukum Positif)," *Jurnal Cita Hukum* 1, no. 1 (2013),. 137.

[3] Margaret Denike, "The Racialization of White Man's Polygamy," *Hypatia* 25, no. 4 (2010),. 852–874.

[4] Thom Brooks, "The Problem with Polygamy," Philosophical Topics 37, no. 2 (2018) ,. 109-122.

[5] Nasaruddin Umar, *Fikih Wanita untuk Semua* (Jakarta: Serambi Ilmu Semesta, 2011),. 97.

[6] Old Testament of the Samual II, 5:13 "David took more concubines and wives from Jerusalem, after he came from Hebron and were born to David more sons and perempua".

[7] Mansur, "Dekonstruksi Tafsir Poligami: Mengurai Dialektika Teks dan Konteks," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 1, no. 1 (2008),. 31–64, http://ejournal.uin-suka.ac.id/syariah/Ahwal/article/view/01103.

[8] U. Abdurrahman, "Penafsiran Muhammad 'Abduh terhadap Alquran Surat Al-Nisâ' Ayat 3 dan 129 tentang Poligami," *Al-'Adalah* 14, no. 1 (2017),. 25, https://doi.org/10.24042/adalah.v14i1.1139.

Additionally, Abdul Helim wrote on polygamy in the perspective of Banjarnesse scholars.[9] According to them, polygamy is allowed on the condition that the number of wives should not exceed four by virtue of the and the certainty to be fair among the wives. Abd. Moqsith, another scholar, examined polygamy in the Qur'an in his article.[10] He mentioned that there found several opinions on polygamy according to scholars of Tafseer. *First* is that polygamy is allowed with nine wives at maximum. *Second*, polygamy is permissible in emergency situations, namely the barrent wife or specific disease she suffers. *Third*, polygamy can only be practiced at the time of the Prophet Muhammad and therefore nowadays, the condition is different.

In a broader scope, Imam Machali researched polygamy in the text and context by tracing back the arguments in the sacred texts.[11] He then concluded that the argument about polygamy is generally divided into four; *First*, polygamy is an order of the syari'a. *Second*, polygamy is not a part of the law. *Third*, polygamy should be connected to the understanding of socio-community consideration. *Fourth,* polygamy can only be made to the orphans and widows to protect them.

Above description shows that polygamy still bceoms an interesting debate to study. However, researches on polygamy generally associate with the opinion of both classical and contemporary exegesis only without addressing the appropriate bit of *maqāsid as-Syarī'ah* aspects. Therefore, the author believes that study on polygamy using *maqāsid as-Syarī'ah* approach is the novelty of this paper. More specifically, the problem that this paper observes is on the polygamy in the perspective of the Qur'an, the Hadith and the Bible using *maqāsid as-Syarī'ah* theory of Jasser Auda.

Research Method and Theoretical Framework

[9] Abdul Helim, "Poligami dalam Perspektif Ulama Banjar," *Islamica Jurnal Studi Keislaman* 12, no. September (2017),. 50–79.

[10] Abd Moqsith, "Tafsir atas Poligami dalam Al-Qur'an," *KARSA* 23, no. 1 (2015),. 133–149.

[11] Imam Machali, "Poligami dalam Perdebatan Teks dan Konteks: Melacak Jejak Argumentasi Poligami dalam Teks Suci," *PALASTREN* 8, no. 1 (2015),. 35–56.

This paper aims to discuss the practice polygamy using both descriptive-analytic and sociology-historical approach. Meanwhile, theoretical framework *maqāsid as-Syarī'ah* theory of Jaseer Auda with a system approach.[12] The approach was made to resolve the legal or *fiqh* issues found in the community in order to give benefit for people. According to Amin Abdullah, the approach is essentially the entire methodology of ijtihad u*ṣūl fiqh* consisting of linguistic and rational perspectives.[13]

The system approach consists of the following: *First*, the approach of *al-Idrākiyyah*/cognisition, which uses logic or reasoning to understand divine revelation. *Second,* the approach of *al-kulliyyah*/wholeness, which is a holistic and impartial Islamic law approach. *Third*, the approach *al-Infitāḥiyyah/ openness,* which is open and compatible to interact with other social sciences and culture in observing the problems found. *Fourth*, hierarchical approach, which is a general type of approach with systematic and decomposition methods. *Fifth*, the multidimensionality approach which seeks to combine the seemingly contradictory arguments of the Qur'an and hadith text. *Sixth*, purposiveness approach (*al-maqāṣidiyyah*) based on the Qur'an and the hadith as well as ijtihad qiyās, istiḥsān and others.[14]

Meanwhile, the operational steps of the research method as well as the theoretical framework are: *First*, describing and explaining polygamy in the Qur'an, hadith, and Bible. *Second*, analyzing using the Jaseer Auda's *maqāṣid as-Syarī'ah* theory of systems approach to the Islamic law. As mentioned before, the later step is through cognisition, wholeness, general, multidimension using a variety of disciplines such as religious, social and cultural, and the *maqāṣidi* (aim) approach.

Polygamy in the Qur'an, Hadith and Bible

a. Definition of Polygamy at Glance

[12] Jasser Auda, *Membumikan Hukum Islam melalui Maqasid Syariah* (Bandung: Mizan Pustaka, 2015),.12.

[13] *Ibid,*. 13.

[14] *Ibid*., 14.

Polygamy in Indonesian dictionary means a marriage system where a person marries several persons from the opposite sex at the same time.[15] In Greek, polygamy comes from the word "poly" or "polus" which means a lot. Meanwhile, the word "gamein" or "gamaus" means getting marriage or marriage. Therefore, polygamy is a marriage system involving more than two persons and even unlimited. This definition does not limit polygamy to the men, but also women who marry several men at the same time.[16] Therefore, it means a marriage between one person with two or more people, such as a husband with two wives or more.[17]

b. Polygamy in the Qur'an

The Qur'an explicitly provides information about men marrying more than a woman with the condition that he could be fair as follows:

وإن خفتم ألا تقسطوا في اليتامى فانكحوا ما طاب لكم من النساء مثنى وثلاث ورباع فإن خفتم ألا تعدلوا فواحدة أو ما ملكت أيمانكم ذلك أدنى ألا تعولوا

"If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly (with them), the only one, or (a captive) that your right hand possess, that will ne more suitable, to prevent you from doing injustice," (QS. An-Nisā' [4]: 3)".[18]

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[15] Departemen Pendidikan dan Kebudayaan, *Kamus Besar Bahasa Indonesia* (Jakarta: Balai Pustaka, 1989).

[16] Hasan Shadily, *Ensiklopedi Indonesia* (Jakarta: Ichtiar Baru Van Hoeve, 1984),. 2736.

[17] Pius A Partanto and M. Dahlan Al Barry, *Kamus Ilmiah Populer* (Surabaya: Arkola, 1994),. 606.

[18] Departemen Agama RI, *Al-Quran dan Terjemahnya* (Bandung: Diponegoro, 2006),. 77.

Textually, this verse confirms the legality of polygamy with four women as the maximum limit and the condition for the men to be fair. *Sabab al-nuzūl* (context of revelation) of this verse is as mentioned by Imam al-Bukhāri[19] where he narrated from Urwah ibn Zubayr. Urwah once asked Aisha about the verse and Aisha answered: O, the son of my sister, this verse speaks of orphans who were in the house of a guardion as the manager of their property.

In this condition, the orphan's wealth and beauty stunned the guardian that he intended to marry her by giving her unfair dowry like what he gave to others. This verse avoids him to do so except when he can do justice because the highest *sunnah* for women is dowry. As the alternative, they were ordered to marry a good woman other than the orphan. People then asked for a *fatwa* to the Prophet after the revelation of this verse and Allah revealed the following verse (Surat an-Nisā' verse 127):ويستفتونك في النساء etc,.[20]

The statement explicitly mentioned that the revelation of the verse was due to a beautiful orphan with much wealth under the protection of a guardian who later wanted to marry her by giving unfair d7owry. The condition to be fair applies to all (non-slave) women because Allah will not give any difficulties to His creatures. According to the Shafi'i school, if a man wants to practice a fair polygamy to follow Prophet's *sunnah,* he should not exceed to marry more than four women.[21] This verse specifically talks about the free (non-slave) men because he can marry a woman with his own money as long as he does not marry two sisters at the same time.[22]

The Qur'an really emphasizes an obligation to be fair among wives or otherwise, a man is only allowed to marry a

[19] Muḥammad bin Ismā'il bin Ibrāhīm bin al-Mughīrah al-Ju'fi Al-Bukhāri, *Ṣaḥīḥ Al-Bukhāri*, vol. 3 (Beirūt: Dār al-Ṭūq al-Najaḥ, 1422),. 140.

[20] Muḥammad Ali As-Ṣabūnī, *Rawāi' al-Bayān: Tafsīr Ayāt al-Aḥkām min al-Qur'ān* (Beirūt: Al-Maktabah al-'Aṣriyah, 2005),. 393.

[21] Imāduddīn Abu al-Fidā Ismā'īl bin Kaśīr Al-Dimasqi, *Tafsīr Qur'ān Al-Aẓīm* (Kairo: Muassasah al-Qurṭubah, 2000),. 207.

[22] Muhammad bin Idris As-Syāfi'i, *Al-Umm*, vol. 3 (ttp.: Dār al-Wafa, 2001),. 145.

woman only. The revelation of verse closely related to a bad purpose of a man in practicing polygamy. Therefore, a man with good purpose and real commitment to be fair among wives could marry four women at maximum as a solution for coping with his desire and willingness.[23] This view is corroborated by the Qur'an Surat al-Nisa 'verse 129 as follows:

ولن تستطيعوا أن تعدلوا بين النساء ولو حرصتم فلا تميلوا كل الميل

فتذروها كالمعلقة وإن تصلحوا وتتقوا فإن الله كان غفورا رحيما

"Ye are never be able to be fair and just between women, even it is your ardent desire: But turn not away (from a woman) altogether, so as to leave her (as it were) hanging (in the air). If ye come to a friendly understanding, and practise self-restraint, Allah is Oft-forgiving, Most Merciful." (QS. an-Nisā' [4]: 129)".[24]

The Qur'an puts an alternative to avoid a husband from doing bad deeds through a strong commitment for being fair although it can't be totally at whole as mentioned at the above verse. The God does not give difficulties for His servants and therefore, He allows polygamy practice by setting the maximum number. However, if a man worries that he will not be fair, the he is obliged to only marry a wife. Being fair here means giving the same portion for food, clothes, home and staying at night.[25] This opinion is corroborated by Abu al-Jazā'iri by mentioning that such behavior is closer to be fair among women in a polygamy marriage.[26]

Most of Islamic scholars agree that polygamy is legal in condition that a husband must be fair in providing both physical and non-physical necessities in spite of his natural characteristic to get inclined to a wife. However, efforts to be

[23] Sa'ad Abdul Wahid, *Tafsir Al-Hidayah: Ayat-Ayat Syari'ah* (Yogyakarta: Suara Muhammadiyah, 2004),. 166.

[24] Departemen Agama RI, Al-Quran dan Terjemahnya,. 99.

[25] Sayyid Sābiq, *Fiqh Al-Sunnah* (Beirūt: Dār al-Fikr, 2008),. 509.

[26] Abu Bakar Jabir Al-Jaza'iri, *Aisar al-Tafāsir Li Kalam al-'Ali Al-Kabir* (Al-Madīnah al-Munawwarah: Maktabah al-'Ulūm wa al-Hikām, 2008),. 435.

fair must continue along with strong belief that God will not make anything difficulte as He is the giver to His creatures.

c. Polygamy in The Hadith Text

Polygamy in the hadith are found in some hadith compilation books with different wordings but the same meaning. One of which is a hadith narrated by Aḥmad bin Ḥanbal as follows:

عن سالم عن أبيه أن غيلان بن سلمة الثقفي أسلم وتحته عشر نسوة فقال له النبي صلى الله عليه وسلم إختر منهن أربعا (رواه أحمد)

"From Sālim, from his father that Ghailān bin Salamah al-Ṡaqafi converted to Islam and he had ten women (who became his wives), then the Prophet said to him: choose four among them". (HR. Aḥmad)".[27]

Another hadith used وعندى ثمان نسوة wording and was sourced from al-Asadi, a Prophet companion, informing that he had eight women as wives.[28] Ibn Majah reported that Qais bin al-Ḥāriṡ had eight wives while Ghailān had ten.[29] On the other hand, Imam Aḥmad bin Ḥanbal mentioned that Ghailān had ten women وتحته نسوة عشر along with *amr* or imperative *ihktar* (choose) and *khuż* (take) wording[30] while Imam Malik in the book of al-Muwaṭṭā 'mentioned the story of Ghailān with ten wives نسوة عشر وعنده with *amr* or instruction to resist (*amsik*) and divorce *(fāriq)*.[31]

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[27]Aḥmad bin Ḥanbal, *Musnad Al-Imām Aḥmad Bin Ḥanbal*, vol. 8 (Beirūt: al-Muassasah al-Risālah, 2001),. 251.

[28] Abū Dāwud Sulaimān bin al-Asy'aṡ al-Sijistāni, *Sunan Abī Dāwud*, vol. 2 (Riyāḍ: Bait al-Afkār al-Dawliyyah, n.d.),. 239.

[29] Abu Abdillah Muḥammad bin Yazīd Al-Qazwīni, *Sunan Ibnu Mājah*, vol. 1 (Beirūt: Dār al-Iḥyā' al-Kutub al-Arabi, n.d.),. 628.

[30] Ḥanbal, *Musnad Al-Imām Aḥmad bin Ḥanbal*,. 251, vol. 9,. 69 dan vol. 9,. 393.

[31] Imam Mālik, *Muwaṭṭā' Al-Imām Mālik*, vol. 4 (Beirūt: Muassasah Zāyid bin Sulṭān Āli Nahyān, 2004),. 844.

The hadith of polygamy can be found in hadith compilation books as in the following table:

No.	Hadith Compilation Books	Number	Keywords
1	Sunan Abi Dāwud	2243	إختر منهن أربعا
2	Sunan Ibnu Mājah	1952	إختر منهن أربعا
		1953	خذ منهن أربعا
3	Musnad Imam Aḥmad bin Ḥanbal	4631	إختر منهن أربعا
		2057	خذ منهن أربعا
4	Sunan Al-Bayhaqi	14 219	إختر منهن أربعا
5	Al-Mu'jam al-Kabīr al li Ṭabrāni	13 221	إختر منهن أربعا
6	Sunan al-Dāruquṭnī	100	إختر منهن أربعا

		94	خذ منهن أربعا
7	Ṣaḥīḥ Ibnu Ḥībbān	4156	إختر منهن أربعا

Based on these wordings, a man should not do polygamy with more than four wives. This is due to the story of Ghailan with ten wives and Qais with eight who were commanded to divorce their wives and chose four out of eight and ten. These hadiths, therefore, show that polygamy with four wives at maximum is permitted by the Prophet Muhammad.

In Arab's Jahiliyah era, polygamy was the right solution for married couples in solving economic problems. A wife and children used to work the garden to support the family income. They could only rely on the plantation for their livelihood and as the solution, the husband had to marry to a wealthy woman.[32] Islam does not legalize such action no matter how poor a person is since he still needs to try finding *halal* money without having to marry again for the sake of economic. Ghailān is an example of an (old) infidel who did polygamy during the Jahiliyah period. His marriage was legal until he finally converted to Islam and was not ordered to renew a marriage contract except that it was forbidden to gather wives in a single house and have more than four wives at the same time.[33]

Contextually, polygamy in the era of the Prophet was regulated when he saw Ghailan with ten wives then he ordered him to divorce some and kept the rest (four women). Furthermore, the history records that the Prophet had nine

[32]Rohmansyah, Rohmansyah "Analisa Pendekatan Bahasa dan Historis terhadap Poligami dalam Hadis Nabi," *Kalimah* 17, no. 1 (2019),. 59–74.

[33] Muḥammad Abdurraḥmān bin Abdurraḥīm Al-Mubārakfūri, *Tuḥfat al-Aḥwaẓi Bi Syarḥ Jāmi Al-Tirmiżī*, vol. 4 (Beirūt: Dār al-Fikr, n.d.),. 233.

wives and this was his specialty which does not apply to his people. Additionally, the specialy does not mean an excuse that the Qur'anic verse mentioning polygamy to two, three and four actually shows nine as the maximum number by adding the numbers altogether. Moreover, the letter *wawu* in that verse means *takhyīr* (choice), so it gives a chance for a Muslim to have two, three or four wives with the condition of being morally and materially fair according to Islamic rule. Thus, the Prophet's words are in accordance with the Qur'an's *nāṣ* and it even, becomes *taqyīd* (limitation) towards *khabar* (guide) of Qur'an.[34]

[34] Wahbah Al-Zuhaili, *Al-Tafsir al-Munīr al-Aqīdah fi asy-Syarī'ah wa al-Manhaj* (Damasqus: Dār al-Fikr, 2009),. 329.

d. Polygamy in the Bible Text

Polygamy is an old deed since the very old time. It was told about the polygamy of King Solomon with 700 wives and 300 concubines as mentioned in the Old Testament.[35] This shows that the Bible did not condemn polygamy. Otherwise, it allows polygamy along with prohibition for a man to marry his wife's sister.[36] However, a statement in Talmud forbids polygamy with more than four wives.[37] Other than what mentioned in the Bible, around the sixteenth century, the Jewish people in Europe also carried out polygamy, including those in the East, although it was prohibited at the Israeli Civil Law.[38]

As for the New Testament, according to Father Eugene Hillman in his book *Polygamy Reconsidered,* there found no clear explanation on legality of polygamy. Jesus never forbade his people to do polygamy. Hilman then added that the church in Rome prohibited polygamy as their effort to create harmony with the Greco-Roman culture which justifies the practice of monogamy but strangely allows men to have concubines and prostitutes. Hilman postulated with the words of St. Augustine: "In our time, in order to be in harmony with the customs of the Romans, it is no longer justified to have more than a wife".[39] Based on this, the African churches remind its people that the prohibition of polygamy is not merely a valid Christian rule, but a Roman custom.

Irena Handono, a Christologist which is a Moslem convert as well as the owner of the Irena Center confirmed that no Christians believe about the married of Jesus and his offspring considering that how God could have a wife and children. This part of Jesus' history seems to be covered up so that any Muslims who find that will be surprised to know about the children of

[35] The Old Testament Samuel 5: 13.

[36]Lev Old Testament. 18: 18.

[37] Leonard J. Swidler, *Women in Judaism: The Status of Women in Formative Judaism* (Metuchen: Scarecrow Press, 1976),.144-148.

[38] Lesley Hazleton, Israeli Women: The Reality behind the Myths (New York: Simon and Schuste, 1977),. 44-45.

[39] Eugene Hillman, *Polygamy Reconsidered: African Plural Marriage and the Christian Churches* (New York: Orbis Books, 1975),. 140.

Jesus. However, it was told that the married Jesus is Jesus as a human being instead of as the Prophet.

The marriage of Jesus was supported by a Professor who stated that Jesus had got married twice. His marriage ceremony can be seen in the New Testament telling that when Jesus was in Bethany at the house of Simon the leper and was sitting and eating, came a woman, Mary Magdalen, carrying a marble jar filled with expensive and pure nard oil. After breaking the jar's neck, she poured the oil on Jesus' head.[40] Mary then took half a cattel of expensive pure nard oil, anointed Jesus' feet and wiped them with her hair; and the smell of the oil spread throughout the house.[41]

Although this scene implied that relationship of Jesus and Mary Magdalene was special, the church denied this incident and vilified Mary Magdalene as a sinful woman over the centuries.[42] In the same gospel of Luke 7, verse 38 stated clearly about the marriage of Jesus as follows: "While crying, she went and stood behind Jesus at His feet, then wet His feet with tears and wiped them with her hair, then kissed His feet and oiled them with the perfume."This church's claim was later denied by Prof. Theiring by stating the argument that Jesus once had more than a wife based on his findings in the following part of Treaty of Philip:

"There are three people who always walk with Jesus, namely Maria, his mother, and Maria, his mother's sister, and Magdalene, referred to his partner. The couple of the Savior is Maria Magdalena. (He loves) her more than his other students and often kisses her in the mouth. The other students asked him: "Why do you love her more than us?" And the Savior answered: "Why don't I love you like I do to her?" (59, 6-12; 63, 32- 64, 5).

[40] New Testament of Marcus 14: 3
[41] See New Testament Book of Johannes 12:3.
[42] See the New Testament, Luke 7: 37

Polygamy in the Christian tradition is indeed prohibited.[43] However, Old Testament allows it without any restrictions on the number of women. Another part of the Old Testament, namely the Book of Kings at the chapter 1 verse 11 says that King Solomon once loved countless women from Moab, Ammon, Edom, Sidon and Hittite. The same thing is found at the chapter 11 verse 3 mentioning that Jesus had seven hundred wives and three hundred concubines which drew his hearts from the God. Furthermore, the Book of Samuel in chapter 5 verse 13 said that David took several concubines and wives from Jerusalem after he came from Hebron which gave him sons and daughters.

The information polygamy is further found at Deuteronomy chapter 21 verse 15. It tells about a man with two wives. One is loved and another is not. Then, both gave birth to sons and the first born was from the unloved wife. This clearly shows that Bible does not prohibit and even allows polygamy as it was practiced by the noble one, namely Jesus as the savior and the good example.

Analysis on Polygamy in the Qur'an, Hadith and Bible Text: Jaseer Auda's Theory of *Maqasid al-Shari'ah*

To get a closer look and to eliminate confusion about polygamy in the context of the Qur'an, Hadith, and the Bible, the author uses the theory of *maqāṣid as-syarī'ah* of Jaseer Auda, known as the system approach theory, as follows.

a. Cognitive approach (ratio/reasoning)

Polygamy is considered as a solution for disharmony family condition due to the wife's infertility and/or venereal diseases. This allows a husband to marry another woman. On the other hand, the practice of polygamy will potentially cause new problems leading to another family disputes because it is painful for women and only helpful temporarily. In such condition, a cognitive approach is needed to resolve unfair polygamy because it is more likely to stand for men and lower the dignity of women.

[43]See New Testament of Corinthians, 7:27, "*If you have a wife, do not seek to end the marriage. If you do not have a wife, do not seek to get married.*

Rationally, family problems must be resolved in a kinship way without first having to take further and hurried action like polygamy. Therefore, both parties will get the goodness and benefits even though polygamy is textually permitted in the Qur'anic, Hadith and Bible texts. In this extent, Islam teaches deliberation in solving any problems and on the other hand, understanding of the Qur'an and hadith must be based on the surrounding circumstances or the context.

The Qur'an does not require people to take polygamy as the only absolute solution to solve family problems. It even emphasizes the fairness in terms of both material and biological aspects, because farirness or *tawazun* in the family is an absolute need. However, in another verse, the Qur'an emphasizes that people will not be fair among the wives even if they try hard for that. It is mainly because humans, the wrong and forgetful doers which, are different from the infallible Prophet and the Angels with forever submission and obedience to Allah. It is natural for mankind to practice unfair deeds because of the evil lusts inside themselves while, as the Qur'an said, "lust is indeed to send man to badness".

The problem of polygamy led a response from the famous *fiqh* expert, Wahbah al-Zuhaili. He said that it comes to tyranny when a husband does not behave fairly to his wives in the division of biological relations and the provision of income. Therefore, to eliminate the potential of tyranny, having a monogamy is preferable. He added that limitation numbers of wives is a fair way to keep women away from the tyranny of a husband with more than a wife. This is clearly different from the Jahiliyah Arabs' custom who practiced polygamy as they wished without considering the maximum limit and ignoring fairness among wives.[44] Therefore, rationally, in practicing polygamy, a husband must pay attention to the negative rather than the positive impacts of it. This is particularly because educating and fostering a wife (and children) is not an easy thing to do and the

[44]WahbahAz-Zuhaili, *Al-Fiqh Al-Islāmi Wa Adillatuhu*, vol. 9 (Damaskus: Dar al-Fikr, 1984),. 158.

burden will be multipled by having more than a wife even though Allah allows polygamy with some certain condition.

b. Wholeness approach (comprehensive/impartial)

This approach is particularly relevant to the issue of polygamy as a controversial topic among scholars. Those who support polygamy would allow the practice and otherwise, those who do not do would surely prohibit it. Therefore, there needs a comprehensive understanding on the verses of the Qur'an, Hadith and Bible while considering various other aspects such as social, economy and culture developing both in the past and present time.

From the social aspect particularly in a family circle, it is clear that children need attention from both parents. When the father practices polygamy, however, his attention should not only focus on the wives, but also the children. Children are an asset and next successor of their parents that they have right to get love, education and proper facilities. It becomes very ironic, therefore, when a husband only focuses his attention to the wife and ignore her children. Such condition must become a concern of the husband so he will share joy, attention and time also with the children.

Therefore, the problem of polygamy needs a comprehensive look because it relates to the social, educational and economic aspects of the family. Polygamy is a hard work to do other than fulfilling the sexual needs.

c. Open system approach

The use of this approach intends to apply Islamic law while considering modern scientific aspects such as social and cultural science. Hence, the case of polygamy needs an overview on the the social and cultural condition of Arab society at that time. The motivation to practice polygamy among Arabian people was mainly coming from wives who wanted their husband to remarry another woman due to the economic factor. Generally, this occured in a family which only relied the livelihood on farming and the husband could not fulfill the family needs well. To add the family income, a husband remarried a rich woman with aiming that his living needs can be fulfilled. This situation is logically unacceptable considering the difficulties for a poor

husband to marry a rich woman particularly in paying the cost of wedding. In fact, it was the situation at that time at Arabia that a saying mentioned that the man has been bought by a rich woman.

However, it is different from the perspective of both the Qur'an and Hadith of the Prophet which put polygamy as a solution to the wifes' infertility instead of the sexual motivation. In this case, therefore, the one who can pratice polygamy is a husband with this situation. This was experienced by Ibrahim *alaihi salam*. Siti Sarah, his first wife, could not give an offspring that Ibrahim asked for her permission to marry SitiHajar. From the second marriage, Ibrahim got a child named Ismail *alaihi salam*. Meanwhile, the Prophet Muhammad as the last prophet practiced polygamy because of the humanity since he marryied widows whose husbands were killed in the battlefield instead of the fulfillment of his sexual desire as some people misunderstand about.

These social and cultural factors need serious consideration so that the practice of polygamy is not solely due to the physical ability and momentary willingness, but the consideration of related aspects. Some people consider polygamy as a scourge because they only see empirical things without understanding what polygamy actually is, such as the requirements and other related things. Therefore, it is necessary to dig up deeper and understand religion, especially the Qur'an and hadith text while integrating it with social-humanities perspective.

On the other hand, nowadays Christians do not accept polygamy and even forbid it forever to show the loyalty of a married couple. This seems contradictory with the Bible they believe in because the Bible tells about polygamy in which a husband is free to have more than four to hundreds of wives.

d. Multidimensional approach

Qur'anic verses on polygamy need to compare with a variety of theorem in order to provide benefits to humankind as a whole. This becomes important as the permissibility of polygamy in the Q.S. An-Nisā' verse 3 seems to contradict to Q.S. An-Nisā' verse 129 because the former states that men may practice polygamy on the condition of behavin fairly. However, the later

mentions that humans can not actually do it even if they try hard exerting all their abilities both physically and materially.

This contradiction can be related to other verses about three types of lust that humankind have, namely *nafs al-muṭmainnah, nafs al-lawwāmah* and *nafs al-ammārah*. First is *nafs al-muṭmainnah* as mentioned in Q.S. Al-Fajr verse 27 and It means a calm soul leading to to goodness. Second is *nafs al-lawwamah* as mentioned in Q.S. Al-Qiyāmah verse 2 which means a despicable soul according to IbnKaṡīr. Third is *nafs al-ammārah* as mentioned in Q-S Yūsuf verse 53 which leads people to the badness.[45] Based on this, those who want to practice polygamy must consider any possible impacts to happen and influence the family condition. It makes sense, therefore, if Q.S. An-Nisā' warns people to be careful in taking action because they actually have three lusts that may lead to death if they cannot control them well as The Qur'an at Surah Al-Baqarah verse 195 mentions; "do not plunge yourself into destruction".

e. Approach *Maqāsidi* (aim).

This last approach is very important to determine and direct anything toward the goodness in both world and hereafter. Polygamy as the subject of public discussion should be seen from the objectives of the *Shari'a* particularly from the origin of the marriage purpose. Marriage is regulated not only to fulfill sexual desire but more importantly, to establish a *sakīnah, mawwaddah* and *raḥmah* family. In the perspective of Islamic law, the purpose of marriage is to maintain offspring *(hifẓ al-nasl)* in order to protect the children from negligence of clothing, food and shelter needs.

Therefore, if polygamy can maintain and carry out the objectives of Islamic law well, it becomes permissible although it still becomes a question whether men can be consistent in looking after their wives and children fairly. This consideration is needed to get balanced perspective and proper action to take. Hence, polygamy must be viewed more from its disadvantage aspect rather than its advantage like the rules of ushulfiqh, *"żar'u al-mafāsid muqaddamun ala al-Jalbil al-maṣāliḥi"* (avoiding the

[45]Al-Dimasqi, *TafsīrQur'ān Al-Aẓīm*., vol. 4., 393.

disadvantages is more important than taking the advantages), and other rules, *al-Muḥāfaẓahala al-qadīmi al-ṣāliḥi wa al-Akhżu bi al-Jadīd al-Aṣlaḥi"* (keeping the old good while taking a better new one).[46]

Conclusion

Islamic legal concept, particularly the Qur'an and Hadith allows polygamy under the condition of being fair namely baheving fairly among the wives and children according to a husband's capability. In addition, a husband must pay attention to the *maṣalaḥah* (advantages) and *maḍarat* (disadvantages) aspects, mainly on whether polygamy leads to goodness or badness based on to the purpose of marriage i.e. establishing a *sakīnah mawaddah* and *raḥmah* family. Therefore, a man who wants to practice polygamy must pay attention to all supporting and related social and economic aspects. Polygamy might be unlawful when those aspects are not fulfilled according to the rules of Islamic law. This is different from the Bible which does not mention any underlying reasons for the permissibility of polygamy and its requirements. This makes polygamy practice in the concept of Christian law seems to be free without any limits and protecting rules.

[46]JasserAuda, *Membumikan Hukum Islam melalu Maqasid Syariah*., 15.

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Legal Awareness of Maduresse Nahdliyin: A Partnership Study between BMT (Baitul Mal wa at-Tamwil) Nuansa Umat East Java and MWC NU (Majelis Wakil Cabang Nahdlatul Ulama) Tlanakan Pamekasan

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Abstract:

Building people's legal awareness, including in the economic sector, requires appropriate steps and strategies. This study examines the importance of partnership in building legal awareness on Moslem's economic sector. It captures a partnership story between BMT Nuansa Umat East Java and MWC NU Tlanakan Pamekasan in developing legal awareness specifically among *nahdliyin* or NU followers. The focus covers the concept and implementation of legal awareness in the partnership between both as well as the benefit from the partnership. The study used a descriptive qualitative method while its data collection techniques included observation, interviews and documentation. Respondents of this study consist of leaders of BMT NU and the head of MWC NU. Based on this research's findings and analysis, it is clear that the partnership type between BMT NU and MWC NU is *syirkah* (cooperation). This model is found to successfully internalize cultural, professional and mutual legal awareness among *nahdliyyin*.

Keywords:
Legal Awareness; Partnership; BMT Nuansa Umat; MWC NU

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Abstrak:

Penelitian ini mengurai pentingnya kemitraan dalam membangun kesadaran hukum ekonomi umat Islam. Secara khusus, ia memotret pola kemitraan antara BMT Nuansa Umat Jawa Timur dengan MWC NU Tlanakan Pamekasan dalam mengembangkan kesadaran hukum di kalangan warga *nahdliyin*. Fokusnya adalah pada konsep dan implementasi kesadaran hukum dalam kemitraan dua pihak tersebut serta manfaat dari kemitraan antar keduanya. Penelitian ini menggunakan metode deskriptif kualitatif dengan teknik pengumpulan data meliputi observasi, wawancara dan dokumentasi. Responden dalam penelitian ini terdiri dari pimpinan BMT NU dan ketua MWC NU. Berdasarkan temuan dan analisis dalam penelitian ini, dapat disimpulkan bahwa jenis kemitraan usaha yang dijalankan antara BMT NU dengan MWC NU adalah persekutuan (*syirkah*). Dengan kemitraan model ini, kesadaran hukum yang berbasis kultural, professional, dan kesalingan dapat ditanamkan dengan baik.

Kata Kunci:

Kesadaran Hukum; Kemitraan; BMT Nuansa Umat; MWC NU

Introduction

Legal awareness is a specific topic under the law as its big concept. It refers to independent awareness of the law according to the context or locus in which people live in. In the context of Indonesia, there found a variety of law types covering customary, Islamic, positive and such. Therefore, legal awareness in Indonesia can relate to a type of variety or even more.

Previous researches mentioned that legal awareness actually means a belief or conviction to seek and find peace in life. This theory commonly uses two indicators, which are regularity *(Regel mating)* and decision *(beslissigen)*.[1] It implies that legal awareness contains consistency and the shared vision and mission for extraordinarily

[1] Purbacaraka and Purnadi Soekanto, *Renungan Tentang Filsafat Hukum* (Jakarta: Alumni, 1985), 9.

obeying the law among individuals or groups as the objects of law. In a simpler word, legal awareness is not only formal or scientific knowledge. Instead, it is the attitude or behavior of those who hold it.

Legal awareness, on another perspective, is individual or collective's perception of the law, both written and unwritten, which can be either true or false according to the valid or the desired law. For example, although Islamic and customary law does not have a formal (written) form within the national (or positive) law, both are often used for making any lawfully valued decision. Legal awareness furthermore closely relates to the growing and developing values in a society. Instead of leading people to obey the law because of coercion, it guides them for obedience based on their own awareness that the law is in line with the existing values of their everyday life.

In relation to this, East Javanese people, especially Maduresse, have different and distinctive characteristics compared to people of other regions. They have high adherence to Islam and most of them are affiliated as *Nahdlatul Ulama* followers or *nahdliyin* with strongly embedded cultures of pesantren. This is clear, among others, from their loyal obedience to the figure of *kiai* as their spiritual leader. In addition to serving as *pesantren* leaders, there also found structural *kiai*s with a strategic positions in *Nahdlatul Ulama* Branch Regional Council (MWC; Majelis Wakil Cabang) in each region.

MWC NU, moreover, does not only deal with spiritual aspects of Muslim or *nahdliyyin,* but also on other important aspects, such as economic. Therefore, a microfinance company called BMT NU (*Baitul Mal wa at-Tamwil* Nuansa Umat) of East Java (later mentioned as BMT NU), for instance, has established a partnership with MWC NU Tlanakan Pamekasan (later mentioned as MWC NU) through a scheme called KSPPS (*Koperasi Simpan Pinjam dan Pembiayaan Shariah; Cooperation of Saving, Loan and Shariah Financing*) to build and develop its own existence. This shares the same insight with some experts mentioning the partnership as another method of introducing self while approaching the (future) customers by creating two-way communication. The Partnership enables the mutually beneficial

relationships between customers and the company to develop customer satisfaction.[2]

Building an economic partnership is not an easy thing to do because it requires a good image between stakeholders and the company. However, many companies keep choosing the partnership strategy to achieve the goals they have set. It ranges from small to large companies and from manufacturing companies to savings, loan and finance-based companies such as BMT NU. It turns out as a very good choice to build a partnership with MWC NU to expand its customer base.

Based on the mentioned background, it is fascinating to examine this partnership from the perspective of legal awareness, mainly on how *nahdliyyin* apply their legal awareness in business and cultural institutions. The research problem of this article, therefore, are as follow: 1) How is the legal awareness concept in the partnership between BMT NU and MWC NU? 2) How does the partnership between BMT NU and MWC NU implement legal awareness?? 3) What are the advantages of a partnership between BMT NU and MWC NU?

Research Methods

This is a descriptive qualitative research using observation, interview, and documentation as data collection techniques. Respondents in this study were leaders of BMT NU and the the chairman of MWC NU. Meanwhile, secondary data comes from supporting materials in books, reports, journals, internet, papers, articles, or literature studies relevant to BMT NU's partnership with MWC NU.

The Concept of Legal Awareness in the Partnership of KSPPS BMT NU and MWC NU

Every time BMT NU East Java establishes new branch offices, it always collaborates and makes a partnership with the local MWC

[2] Husnia Hanny, "Pengaruh Relationship Marketing Terhadap Kepuasan Dan Loyalitas Nasabah Pada PT. Prudential Life Assurance Cabang Jember," n.d., 3, http://repository.unej.ac.id/handle/123456789/63784.

NU in order to build several common concepts of both as mentioned below:

First is the concept of ideological unity. Both cannot be separated from each other in both ideology and struggle path. BMT NU itself was established in 2004 with NU standing for *Nahdlatul Ulama*. However, administrative procedure taking place in 2009 did not allow the use of "*Nahdlatul Ulama*" as a business institution name because it has been registered as a mass organization. As an alternative, the abbreviation was replaced by *Nuansa Umat* for not totally omitting the NU.

Ideology is very crucial in the context of legal awareness as it becomes a fundamental element of its definition as consciousness on how the law is supposed to be.[3] One of its indicators is sufficient knowledge on the law itself. For example, a man believing in religion must have understood his religious teaching and been aware that every part of it comes from God's law. In Islam, this is called *taqwa* which means the attitude of obeying all God's commands and avoiding all of His prohibitions. Accordingly, positive law must also be considered as a part of God's law so that devotion and obedience can directly become the foundation for building legal awareness. This is the thing that *the nahdhiyyin* community really aims to by making the partnership between the two institutions.

Second is the concept of structural and cultural development. MWC NU, in this context, is a structural NU institution that represents local people's characteristics and is under the leadership and management of their local community's leaders. Therefore, when BMT NU builds a partnership with MWC NU, the former actually utilizes the legitimation and trust of local people who are formally and culturally affiliated to NU. Moreover, MWC NU routinely socializes and promotes BMT NU to the community that impresses people with very good image of BMT NU. It is obvious, therefore, that in addition to business partnership purpose, the merger aims to contribute to the empowerment of NU followers through the local MWC NU.

[3] Yasona Laoly, "Kesadaran Hukum Dan Terwujudnya Keadilan Bagi Seluruh Rakyat Indonesia," 2019, 3 Delivered in public lecture of Nurul Jadid University, March 27th .

This second concept is quite interesting in relation to legal awareness because understanding the law is one of its indicators.[4] Understanding the law means mastery of the content and purpose of a particular type of law, either written or not, as well as its benefits for the whole related parties. This literally shows that *nahdhiyyin* has both structurally and culturally understood the concept of legal awareness through the business goals and empowerment in the partnership.

Third is the concept of partnership or relationship marketing. This concept is a marketing strategy with strong relevance with efforts to enhance the good image of BMT NU. It can give benefit for all parties such as people's interest to use KSPPS BMT NU services due to social and structural bond among BMT NU, MWC NU, and the community. Additionally, BMT NU can provide attractive rewards or prizes for customers while keeping social relationships among one another stable. These additional values can be the main factors to motivate local people to choose BMT NU as a preferable financial institution. The main purpose of partnership or relationship marketing is to maintain existing customers/members and add new fellows. As a consequence, the big number of customers will then impact the profitability of BMT NU and make the customers unlikely to move to another financial institution.

Apart from it, the main objective of any Islamic financial institution transaction is customer satisfaction while partnerships or relationship marketing puts the goal to turn people into customers as its long-term goal.[5] The partnership is furthermore the main key in improving and maintaining any business.[6] In this case, customer satisfaction plays a vital role in BMT NU that it needs further improvement ahead to reach the customers' loyalty level and to keep the institution's image well maintained. Practically, the good image of BMT NU is driven by customer satisfaction as it will encourage other people or future customers to make transactions at BMT NU. This needs serious concern and attention to not let any customer move to

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[4] Soerjono Soekanto, *Beberapa Permasalahan Hukum Dalam Kerangka Pembangunan Di Indonesia* (Jakarta: Yayasan Penerbit UI, 1982), 140.

[5] Lizar Alfansi, *Financial Service Marketing* (Jakarta: Salemba Empat, 2010), 130–32.

[6] Lizar Alfansi, 130–32.

other financial institutions in the midst of nowadays tight competition of financing institutions. One of the relevant strategies is by designing the scheme of sustainable transactions that customers will keep using the service of BMT NU more and more.

In the terminology of the law, the concept of partnership is actually a manifestation of the legal attitude in which people tend to accept the law because they respect it as something beneficial providing obedience. Through the concept of partnership or relationship marketing, *nahdhiyyin* have found a concept of legal awareness and is reflected in their legal attitudes.

Implementation of Legal Awareness in the Partnership between BMT NU and MWC NU

The partnership between BMT NU and MWC NU is generally based on the MUI DSN *Fatwa* No 114/DSN-MUI/IX/2017 concerning *syirkah*, namely a culturally and professionally based partnership strategy. The cultural strategy is based on the distinctive spirit of NU while professional aspect is clear from mutual responsibilities and authority to manage and make progress for BMT NU. This type of cultural and the professional based partnership relying on the fatwa is crucial in implementing the legal awareness as it will formally arrange both written and unwritten regulation in implementing the legal awareness. This is mainly because the existence of this regulation is among the main indicators in the theory of legal awareness.[7]

More specifically, the type of business partnership between both is called *syirkah abdan* or *syirkah a'mal* which means cooperation in expertise. It usually occurs when some parties agree to make their work as joint capital so that any pay they get after working for an employer will be shared with one another.[8] Based on this scheme, BMT NU and MWC NU agree to do business by sharing both management responsibilities and the profit according to the initial agreement. To run the business well, both BMT and MWC NU

[7] Soerjono Soekanto, *Beberapa Permasalahan Hukum Dalam Kerangka Pembangunan Di Indonesia*, 57.

[8] A. Djazuli, *Kitab Undang-Undang Hukum Perdata Islam (Majallat Al-Ahkam Al-Adliyah)* (Bandung: Kiblat Press, 2002), 310.

identify influencing factors to attract customers, namely Madurese people with *nahdliyyin* as its majority.

They consider Madurese local wisdom which is believed as one of the factors beyond legal awareness. Some of the local wisdom are clear from wise words that Madurese keep maintaining and relying on, such as "*bing-rambinganna kor'an: (scarp of the Koran),*" *manggu 'ka karsana Alla* "*(subject to Allah's will),*" and *abhântal syahadât, asapo' iman, apajung Islam*, "(making two *shahadat* (divine confession) as a pillow, faith as a blanket, and Islam as an umbrella). Those show the ideal figure of Madurese who sticks to Islamic teaching in every detail of their daily activities.[9] Another important and popular wise word is *buppa, 'babbu, guru, rato* (father, mother, teacher, king or government) which shows the hierarchy of obedience, loyalty, and respect of whom Madurese will give priority to, particularly relating to religious matters.[10] Madurese religiosity is also clear from the common expression for religious teachings breakers. Society will label them using proverbs *ta 'noro' sarē'at* (disobeying *sharia*) or *ta 'anabi* (excluded from the Prophet's followers due to the ignorance).

This religious attitude plays a very important role in guiding people's activities as well as the decision they make. More specifically, according to Kotler and Keller, the factors beyond customers' decision on any product or service they choose are cultural, social, personal, and psychological. Therefore, those factors must be taken into account to determine the business strategy for attracting more and more buyers and or customers.[11] BMT NU relies on this principle in strengthening its existence by paying very much attention to the religious characteristics of the Madurese people. It avoids any financial activities which tend to deviate religious teaching, such as

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[9] Mien Ahmad Rifai, *Manusia Madura (Pembawaan, Perilaku, Etos Kerja, Penampilan, Dan Pandangan Hidupnya, Seperti Diceritakan Peribahasanya)* (Yogyakarta: Pilar Media, 2007), 165.

[10] A. Sulaiman Shadik, *Kearifan Lokal Madura (Pesan-Pesan Mulia Dari Leluhur)* (Bidang PNFI Nilai Budaya Dinas Pendidikan Provinsi Jawa Timur, 2010), 37.

[11] Philip Kotler dan Kevin Lane Keller, *Marketing Management* (New Jersey: Prentice Hall, 2012), 166.

the system of usury while replacing it with profit-sharing and trading system.

The partnership with MWC NU is clearly another strategy to create the image of BMT NU as an Islamic financial institution that avoids any unlawful transaction. As a consequence, the reality of law[12] becomes better because individuals assume that their membership at BMT NU is a part of their obedience to Islamic teaching. To some extent, the partnership actually displays so-called spiritual marketing on the basis of openness, mutual trust, and responsibility to comply with of Islamic teaching principle with each own job. BMT NU is responsible for providing business service while focusing on management and supervision, while MWC NU focuses on socialization and promotion of BMT NU's service to *nahdliyyin* community through any religious supervision agenda. Additionally, BMT NU is also responsible for empowering *nahdliyyin* and the structural NU officers by allocating 10% of the net profit and 10% of the annual BMT NU CSR which is divided at at RAT (Rapat Anggota Tahunan; annual member meeting) event.[13]

BMT NU furthermore puts itself as an Islamic-based financial institution that functions as the mediator to mobilize funds from the public then channeling them back to people in need. It creates its own image as a sharia principle-based the institution accentuating the characteristic of interest-free, usury-free, complying with Islamic provision, as well as a commiting for people and NU's welfare.[14] To promote this, the role of MWC NU as the mediator and legitimacy builder is very much urgent.

In the context of legal awareness, this characteristic is called the legal pattern describing a person who complies with any regulations in his/her community. It becomes the most important indicator as it

[12] Yasona Laoly, "Kesadaran Hukum Dan Terwujudnya Keadilan Bagi Seluruh Rakyat Indonesia," 4.

[13] Hamid Zubair, "MWC NU Partnership" Direct interview on April 11 2018. Masyhudi, "KSPPS BMT NU Partnership" Direct interview on April 12 2018.

[14] Sutan Remy Sjahdeini, *Perbankan Islam* (Jakarta: PT Pustaka Utama Grafiti, 2007), 1.

can clearly display whether and how regulation applies in society and furthermore measure the legal awareness level in.[15]

The Benefits of Partnership between BMT NU and MWC NU

The partnership between BMT NU and MWC NU is a symbiotic mutualism. It provides advantage and satisfaction for both parties altogether. Due to MWC NU's legitimacy, outreach and promotional strategies, BMT NU gets an image-building even enhancement that makes local people put their trust to be its customers. On the other hand, the cooperation enables MWC NU to get much chance for empowering *nahdliyyin* both culturally and structurally. This is obvious, among others, from the annual program of BMT NU which provides compensation for the orphans, the economically weak, the poors, the indigents, the widows, and the elderly. In addition, MWC NU can also empower itself from 10% of the annual net profit of BMT NU which it routinely gets.

In the long term goal, any partnership aims to provide customers the value which will then lead to their long-term satisfaction.[16] This occurs the same to the partnership between BMT NU and MWC NU as the main key of marketing is through developing a deep and long-lasting relationships with people and organizations which either directly or indirectly influence a company's marketing activities. Moreover, this type of marketing partnership aims to build amutually satisfying long-term relationships with key customers in order to build and maintain business. Another goal of marketing relationship is to put a greater emphasis on maintaining old and loyal customers.[17]

As a representative of the local NU community, MWC NU's initial choice on a certain financial institution to merge with will make it stay as long as it receives values more than what its competitors offer. This happens the same for *nahdliyyin* because as long as they get

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[15] Otje Salman, *Kesadaran Hukum Masyarakat Terhadap Hukum Waris* (Bandung: Alumni, 1993), 40–42.

[16] Ali Hasan, *Marketing Bank Syariah* (Bogor: Ghalia Indonesia, 2010), 304.

[17] Philip Kotler dan Kevin Lane Keller, *Manajemen Pemasaran Transl. Bob Sabran*, 13th ed. (Jakarta: Erlangga, 2008), 21–23.

benefits and quality service commensurate with the trust they put on (money, risk, and time they invest), they will continue to maintain a good relationships with BMT NU. Sometimes these benefits are even stronger in keeping the customers stay or recruiting the new ones than any attributes attached to, either through the services or products they offer.

Potentially, a financial institution likely gets the following benefits from relationship-based marketing:

1) Increasing purchases. Reichheld and Sasser concluded that customers tend to buy goods or use services more each year after they have had a good relationship with a particular company. Once they are satisfied with the company's products or service, they will do more business;

2) Timeline management to get the benefit. Although some types of customers, such as students, do not bring any direct benefits, a company still needs to maintain a good relationship with them due to their future potential. When they work and earn money, they will likely become loyal customers because they have known the company's products from an early age;

3) Cost reduction. There are a lot of start-up costs for attracting new customers, such as advertisement, promotion, and operational costs of setting up new accounts. According to Clutterback, these costs are sometimes higher than the revenue and can be five times greater than the cost for maintaining old customers. Relationship marketing can make the step for maintaining the old customers and recruiting the newer ones far easier;

4) Opportunities to build across generation relationship. Harrison concluded that among children or students, one of the key factors in choosing a bank is parental influence. It means that maintaining a relationship with one of a family member will affect other family members to take the same choice in the future;

5) The positive impact of word of mouth. When a future customer finds that a product or service is complex and difficult to evaluate, he/she usually seek information from friends or relatives to determine which service provider to choose. Loyal and satisfied customers are likely to recommend a company's products or services they are satisfied with. Their recommendations are more effective

than paid advertising and certainly can reduce the cost of recruiting new customers.

6) Employee retention. Zeithaml and Bitner mention that the indirect impact of a relationship marketing strategy is the ability for a company to retain their employees as they can build and maintain their customer base. Employees will like to work for companies with loyal customers.[18]

Based on those benefits, companies are supposed to make various efforts to build and maintain the partnership, mainly by keeping the old customers stay while recruiting the new ones. Relating to this, Zeithaml and Bitner mentioned various reasons why people stay on their choice in a certain financial institution—even though they get offers from its competitors as follow:

First, people feel comfortable with the existing relationship they have built with the institution;

Second, people know what to expect;

Third, the institution has a good relationship with other elements of financial institutions;

Fourth, people are confident to get good service every time they have special requests.

Apart from those reasons, Grinner (et al.) emphasizes that people would get various benefits from long-term relationships they build with any service provider, including financial institutions. These following factors could be other influencing reasons why customers choose to stay at their initial choice;

1) *Confidence benefit*: This is indicated by customers' trust in a service provider, their reduced anxiety, and a sense of comfort because they know what to expect. Most of them will not turn into other service providers especially when they have invested a significant amount of both material and non-material things in maintaining the relationship. Among others benefits, this one is considered as the most important one;

2) *Social benefits:* It comes only when the relationship between customers and service providers lasts long enough so that they know each other quite well. In this level of the situation, customers are less

[18] Philip Kotler dan Kevin Lane Keller, *Manajemen Pemasaran Transl. Bob Sabran*.

likely to switch to other service providers even though they promise better value;

3) *Special treatment:* This benefit is only available when the relationship has been going on for a long time. The special treatment takes form in a discounted price, a more attractive price offer, or more preferential treatment. [19]

Those all theories on concepts and implementation of the legal awareness as well as the benefits of the partnership make it clearer that BMT NU and MWC NU need to maintain relationsip they have built. This results not only in increasing benefit for both but also, and more importantly, to build a society with high legal awareness while establishing the values of existing local wisdom.

Conclusion

The discussion and analysis lead to the following conclusions: *First*, several concepts of legal awareness in the partnership between MWC NU and BMT *NU* are ideological unity, cultural development, and relationship marketing. *Second*, the type of partnership between both is *syirkah* or cultural and professional based partnership while the legal awareness implementation is clear from consideration on Madurese local wisdom through spiritual marketing system in which two institutions support each other. *Third*, the partnership is mutualism symbiosis in which both can get and provide satisfaction to each other. BMT NU gets its good image enhanced, while MWC NU likely gets *nahdliyyin* both culturally and structurally empowered.

[19] Lizar Alfansi, *Financial Service Marketing*, 130–32.

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It aims primarily to facilitate scholarly and professional discussion over current developments on Islamic jurisprudence

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4. The manuscript article writing guidelines and template can be downloaded at the home page of *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* website and are available in MS Word (*.doc/*.docx) format.
5. The manuscript online submission procedure is available at online submission guidelines in the next part.

6. Any inappropriate manuscript with *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* writing guidelines will get returned to the author before the reviewing process.
7. The manuscript should contain several aspects of a scientific article as follows: (a) the title of the article, (b) the author's name (no academic title), (c) the affiliated author's address, (d) the author's email (e) the abstract and the keywords, (f) the introduction, (g) the method (h), the research findings and discussion (i), the conclusion (j), the references.
8. The subtitles included in the discussion part (*Introduction, Methods, Finding and Discussion, and Conclusion*) should be numbered in the Arabic order starting from one. The subtitles are written in the bold and title case format. It uses the left text alignment without underline. The next expanded subtitles should be in bold and sentence case format using the left text alignment and the numbering format level two.
9. The manuscript can be in either English or Arabic with the standard language. The body of the paper must be elaborated between 6500 - 7.000 words (maximum) including abstract, references, and footnotes, written in Book Antiqua Style, size: 11, line spacing: single. The article is on B5-sized papers (176x250 mm) with custom margins as follows: left 40 mm, right 30 mm, bottom 30 mm, and top 40 mm.
10. The words from uncommon or foreign languages are in Italic format. Each paragraph starts 11 mm from the left side border and there is no space among paragraphs. All numbers are written in Arabic numbering format except for the new sentence.
11. The tables and figures are placed in the text group. Each figure and table must be given a title and be numbered in Arabic format. The figure attachment should be guaranteed well printable (font size, resolution, and line space are clearly seen). The figure, the table, and the chart

should be placed in the center between text groups. If it has a bigger size, it can be placed in the center of the page. The table should not contain vertical lines, while horizontal lines are allowed only for the important point.

4. The Guidelines for the Manuscript Body Text

The title of the manuscript: The title should be informative and be written both briefly and clearly. It cannot diverse multi interpretations. It has to be pinpoint with the issues that will be discussed. The beginning word is written in the capital case and symmetrically. The article title does not contain any uncommon abbreviation. The main ideas should be written first and followed then by their explanations. The article title should be written within twelve words, 13pt-sized font, with the bold selection and in the center text format. Meanwhile, the abstract has to be within 250 words maximum and followed by four to five keywords.

Introduction: The introduction must contain (shortly and consecutively) a general background and a literature review (state of the art) as the basis of the brand new research question, statements of the brand new scientific article, main research problems, and the hypothesis (if any). In the final part of the introduction, the purpose of the article writing should be stated. In the scientific article format, it does not allow to write down the references as in the research report. They should be represented in the literature review to show the brand news of the scientific article.

Method: The method aims to solve problems, including analytical methods. The methods used in the problem solving of the research are explained in this part.

Discussion and Result: Discussion and Result must be written in the same part. They should be presented continuously starting from the main result until supporting results and

equipped with a discussion. Figures and tables (if any) should be put in the same part of this section and should be actively edited by the editors.

Conclusion: This is the final part containing conclusions and pieces of advice. The conclusions will be the answers to the hypothesis, the research purposes, and the research discoveries. The conclusion should not contain only the repetition of the results and discussions. It should be the summary of the research results as the author expects in the research purposes or the hypothesis. The advice contains suggestions associated with further ideas from the research.

Bibliography: All the references that are used in the article must be listed in this part. In this part, all the used references must be taken from primary sources (75% from all the references) that were published in the last ten years. Each article should have at least ten references.

5. The Guidelines for Literature Reviews, Citations, and References

Author may cite several articles from *Al-Ihkam: Jurnal Hukum dan Pranata Sosial*. All the presented data or quotes in the article taken from other author articles should attach the reference sources. The references and literature review should use a reference application management Mendeley The writing format in *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* follows the format applied by *Chicago Manual Citation Style:17th Ed.*

6. The Online Submission Manuscript Guidelines

The manuscript text submission must be through these following steps:

1. Firstly, the author should register as either an author or reviewer (checking role as author or reviewer) in the "*Register*" bottom.
2. After the registration step is completed, log in as author then click on the "New Submission" column. The article submission stage consists of five stages, namely: *(1). Start, (2). Upload Submission, (3). Enter Metadata, (4). Upload Supplementary Files, (5). Confirmation.*
3. In the "*Start*" column, choose Journal Section (Full Article) and check all the checklists.
4. In the "*Upload Submission*" column, upload the manuscript files in MS. Word format.
5. In the "*Enter Metadata*" column, fill in with all of the author data and affiliation, including the journal title, abstract, and indexing keywords.
6. In the "*Upload Supplementary Files*" column, the author is allowed to upload supplementary files, the statement letter, or any other else.
7. In the "*Confirmation*" column, click "*Finish Submission*" if the data entered are all correct.

If the author has difficulties in the submission process through the online system, please contact *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* editorial team at email: alihkam@iainmadura.ac.id.

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