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OFFICE:
Faculty of Sharia IAIN
Asemanis Dua, Larangan Tokol, Tlanakan, Kabupaten Pamekasan, Jawa Timur, Indonesia 69371.
http: ejournal.iainmadura.ac.id/index.php/alihkam;
email: ihkam@iainmadura.ac.id

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Table of Contents

al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 15 No. 1 2020
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al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 15 No. 1 2020
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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	= ‘
ص	= sh	ي	= y
ض	= dl		

Untuk madd dan diftong

â	= a panjang	اَوْ	= aw
î	= i panjang	أَيْ	= ay
û	= u panjang	اِيْ	= iy

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State Marriage and Civil Marriage: The Role of State Policy on Interreligious Marriage in Central Java

Anthin Lathifah
Faculty of Shari'a and Law, State Islamic University Walisongo, Jl. Walisongo No.3-5, Tambakaji, Kec. Ngaliyan, Kota Semarang, Jawa Tengah 50185
Email: anthin_lathifah@walisongo.ac.id

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Abstract:

This article discusses interreligious marriage phenomenon in Central Java particularly in in Surakarta, Semarang and Jepara where policies of stakeholders on judicial system as well role of demographic officials and religious leaders heavily influence each other. Interestingly, the policies of State Court as authorized institution to legalize interreligious marriage vary among those three. The Surakarta State Court receives petition and allows interreligious marriage in contrast to Semarang and Jepara which deny this kind of petition. This difference comes from several factors, namely understanding of Indonesian marriage laws, religious understanding and role of religious leaders. In the context of state and civil society relations, interreligious couples whose petitions are rejected consider it unfair, while those with accepted petition also deem it the same since they consider their marriage as a civil marriage only which the state does not wish.

Keywords:
Interreligious Marriage; Civil Marriage; State Policy; Civil Rights

Author correspondence email: anthin_lathifah@walisongo.ac.id
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

Abstrak:

Artikel ini membahas tentang perkawinan beda agama di Jawa Tengah, khususnya di Surakarta, Semarang dan Jepara, tempat-tempat di mana kebijakan para pemangku kepentingan tentang sistem peradilan, peran pejabat demografik dan pemimpin agama saling mempengaruhi satu sama lain. Kebijakan Pengadilan Negeri sebagai lembaga yang berwenang menentukan perkawinan beda agama bervariasi dari satu daerah dengan daerah yang lain. Pengadilan Negeri Surakarta menerima petisi dan menetapkan perkawinan beda agama, berbeda dengan Pengadilan Negeri Kota Semarang dan Kabupaten Jepara yang menolak permohonan perkawinan beda agama. Perbedaan kebijakan tersebut dipengaruhi oleh beberapa hal, yaitu pemahaman tentang peraturan perundang-undangan perkawinan di Indonesia, pemahaman agama dan peran para pemimpin agama. Dalam konteks hubungan negara dan masyarakat sipil, pasangan antaragama yang permohonannya ditolak menganggapnya tidak adil; bahkan mereka yang permohonannya diterima juga menganggap itu tidak adil karena mereka menganggap perkawinannya hanyalah perkawinan sipil yang tidak diinginkan oleh negara.

Kata Kunci:

Pernikahan Beda Agama; Pernikahan Sipil; Kebijakan Negara; Hak Sipil

Introduction

Confirming validity of a marriage, Article 2 paragraph (1) of Marriage Law No. 1 of 1974 states that "marriage is lawful in accordance with religion and belief respectively".[1] Furthermore, the implemented regulation of marriage law called the Implementation of

[1]During the New Order, the recognized religions are Islam, Catholicism, Protestantism, Hinduism and Buddhism as stated on Presidential Instruction No. 14/1967 and the Decision of the Minister of Home Affairs in 1978. However, President Abdurrahman Wahid retracted both instruction and issued the Decree No. 6 of 2000 which recognized Confucianism as a religion. Therefore, the recognized religions in Indonesia now are six namely Islam, Christianity, Protestantism, Hinduism, Buddhism and Confucianism.

Regulation (Peraturan Pelaksanaan/PP) No. 9 of 1975 Article 10, paragraph (2) explains that "marital procedure is done according to the law of each religion and belief". This provision applies to all religions in Indonesia except Islam since it combines the law with the provisions of Compilation of Islamic Law (Kompilasi Hukum Islam/KHI).

For Muslims, Article 4 of Compilation of Islamic Law indicates that their marriage can be valid "if it is done according to Islamic law in accordance with article 2, paragraph (1) of Law No. 1 of 1974 on Marriage." Although Compilation of Islamic Law does not normatively mention the terms of Muslims for the groom and the bride, Indonesian ulemas in general require that both of them must be Muslim[2] although some of them allow Muslims to do interreligious marriage with non-Muslim.[3]

Normatively, the Compilation of Islamic Law prohibits interreligious marriage both between a Muslim man with a non-Moslem woman (article 40 KHI) and a Moslem woman with a non-Moslem man (article 44 KHI). Likewise, the Indonesian ulema mostly require bride and groom to be Muslim, [4] although some were of the opinion that Muslim and non-Muslim marriages could be performed based on the permissible marriage of Muslim men and women of the book.[5] Even administratively, Muslim and non-Muslim marriages are

[2]See the opinion of Ahmad Rofiq, *Hukum Perdata Islam Indonesia* (Jakarta: Raja Grafindo Persada), 2011. Similarly, the Fatwa of Indonesian Ulema Council No. 4 / Munas VII / MUI / 8/2005 in National Conference VII in 2005 contains as follow: 1. Interreligious marriage is unlawful and invalid; 2. Marriage of Muslim men with women of *ahli kitab* (people of the book) according to *qaul mu'tamad* is unlawful and invalid.

[3]Both Nurcholis Majid and Musdah Mulia allow interreligious marriage based on Surah al-Maidah: 3 that clearly allows Muslim to marry People of the book and does not prohibit marriage with them. For them, provision of marriages with non-Muslims is in the area of *ijtihad* that depends on the context. See Mun'im Sirry A. (Ed.) *Fikih Lintas Agama; Membangun Masyarakat Inklusif-Pluralis* (Jakarta: Paramadina, 2004),. 164.

[4]The Decree of The Indonesian Ulema Fatwa Council No. 4/ National Conference VII/MUI/8/2005 stipulated in the VII National Conference in 2005 contains as follows: 1. Interfaith marriages are *haram* and illegitimate; 2. The marriage of Muslim men to *ahl kitab* women, according to *qaul mu'tamad* is *haram* and illegal.

[5]As Nur Cholis Majid argues, Musdah Mulia who permits interfaith marriages is based on QS al-Maidah: 3 which directly permits Muslim marriages with *Ahli Kitab*

regulated in the Law No. 23 of 2006 concerning population administration.

Using those provisions, the state only recognizes marriages as legally governed by state-recognized religions; Islam, Catholicism, Protestantism, Hinduism, Buddhism and Confucianism[6]. Similarly, the state explicitly has no statement on the provisions of interreligious marriage unless prior to the Marriage Law No. 1 of 1974[7] although administratively, it sets its provisions in Law No. 23 of 2006 on the demographic administration.

Such circumstances, according to Ratno Lukito,[8] indicate the fact that since 1974, there was no definitive law on marriage between men and women of different religions in Indonesia and consequently, there exists legal vacuum condition. Relating to this, Mark Cammack[9] commented that in Indonesia, there is no legalized marriage for different religion so that this kind of marriage cannot be performed in Indonesia.

In the context of state's obligation to provide legal rights to its citizens, the void of interreligious marriage regulation becomes a problem since it contrasts to article 27 of the Constitution of 1945 which concedes that every citizen is equal before the law. Similarly, Article 28B of the Constitution states that "everyone has rights to build

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and in essence does not prohibit marriages with *Ahli Kitab*. For them, the terms of marriages with non-Muslims are *ijtihadi* areas which depend on the context. See Mun'im A. Sirry (Ed.) *Fikih Lintas Agama; Membangun Masyarakat Inklusif-Pluralis* (Jakarta: Paramadina, 2004),. 164.

[6]In the New Order government, government-recognized religion is Islam, Catholicism, Protestantism, Hinduism and Buddhism, as a presidential instruction No. 14/1967 and decision of the Minister of the Interior in 1978. However, president Abdurrahman Wahid retracted instruction and replaced it by Decree No. 6 of 2000 which recognized Confucianism as a religion, so the recognized religions in Indonesia there are six namely Islam, Christianity, Protestantism, Hinduism, Buddhism and Confucianism.

[7]Before the Law of Marriage No. 1 of 1974 dan Impelementation Regulation No. 9 of 1975, interreligious marriage has been governed on Staatsblad 1898 No. 158 and was categorized into mixed marriage.

[8]Ratno Lukito, *Hukum Sakral dan Hukum sekuler Studi tentang Konflik dan Resolusi Sistem Hukum di Indonesia* (Jakarta: Pustaka Alvabet, 2008),. 420-429

[9]Mark Cammack, Legal Aspect of Muslim-Non Muslim Marriage in Indonesia, in Gavin Willis et.al (Ed.) *Muslim-Non Muslim Marriage: Political and Cultural Contestation in Southeast Asia* (Singapore: ISEAS Publishing, 2009),. 102-103.

a family and continue their descendants through a legal marriage." It also contrasts to Law No. 39 of 1999 on Human Rights in article 10 paragraph (1) which describes "everyone has the rights to build a family and continue their descendants through legitimate marriage and free will". This contoversy even leads to a judicial review of Law No. 1 of 1974 Article 2 paragraph (1) submitted to the Constitutional Court with registration number 68/PUU-XII/2014, although the Constitutional Court finally rejected the petition on the reason that the Marriage Law does not violate the Constitution.[10]

Therefore, not only does this problem trigger formal and legal issues in which marriage validity depends on its accordance with provisions of religious and administrative systems, but also pose a political problem on whether the citizens' rights to perform a marriage depends on policy makers. From the perspective of state policy and the rights of civil society, this paper will examine how interreligious marriages occur in a practical level as a result of legal policy of stakeholders in Central Java namely at Surakarta, Semarang and Jepara.

Concepts on Legal Policy and Legal Justice

The word "policy" etimologically originates from English word "policy" or Dutch word "politiek". Terminologically, policy means a set of concepts or principles which form the basis for doing a job, leadership and how to behave.[11] Thus, the phrase of legal policy is synonymous with political law. Mahfudh furthermore says that political law is also a legal policy or legal direction that the state needs to enforce it in order to achieve its purposes by either creating a new law or replacing the old one.[12]

Meanwhile, Klein explains that policy is a conscious and systematic action using the ways that pursues political purposes. According to Carl J Fredrick[13], policy is an action proposed by

[10]See the decision of Judicial Review on reviewing Law No. 1 of 1974 on Marriage towards the Constitution of 1945 on case No. 68/PUU-XII/2014.

[11]See Hoorgerwerf, "Isi dan Corak-Corak Kebijakan" as cited by Adang Yesmil Anwar, *Pembaruan Hukum Pidana; Reformasi Hukum* (Jakarta: Grasindo, 2008),. 57.

[12]Moh. Mahfudh MD, *Membangun Politik Hukum*, *Menegakkan Konstitusi* (Jakarta: Rajawali Press, 2011),. 5

[13]See Klein and Carl J Fredrick as cited by Adang Yesmil Anwar, *Pembaruan…*,. 57.

someone, a group or a government in a particular condition by showing the obstacles and opportunities to implement its proposed policy in order to achieve its certain goals.

According to Birkland,[14] furthermore, the policy process is often associated with public policy that resembles several characteristics, namely: a) is created to respond some short problems that require attention, b) should be made for the sake of public interest, c) is oriented to national goals or interests as well as to solve problems, d) is ultimately made by the government although the idea might originate from the party outside of the government or as a result of interaction between government and non-government actors, e) is interpreted and implemented by community and people with different interpretations about the problems, solutions and motivation, and f) is a choice for the government to implement or avoid it. Birkland[15] also explains that a policy may be a law or a regulation or a set of laws or rules that become an issue and problem for a government.

According to Satjipto Rahardjo,[16] politic of law is an activity and a way to choose what to use in order to achieve certain social and legal objectives in the community. There are some fundamental questions in the study of the politics of law as follow: *First*, what are the goals to be achieved through the existing system?; *Second*, what and which ways are considered the best to use in achieving those objectives?; *Third*, when and how does the law need to change?; *Fourth*, may a standard and well-established pattern be formulated to assist in deciding the process of goal's selection as well as the way to achieve that goals? Thus, legal policy is a complete system of performance that involves the understanding and knowledge of its enforcers to operate and to enforce its provision by considering the sense of justice and benefit for society.

In addition, it is a policy which determines whether a legal or regulated provisions are strongly influenced by knowledge and

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[14]Thomas A. Birkland, *Introduction to the Policy Procces; Theory, Concepts and Models of Public Policy Making* (New York: M.E. Sharpe. Inc, vol.3, 2011),. 8-9

[15]Thomas A. Birkland, *Introduction to the Policy Procces,*. 9.

[16]See Sartjipto Raharjo's opinion as cited by Moh. Mahfudh, *Membangun Politik Hukum….,*. 14.

interests of its enforcement. Dery[17] said that analysis of a policy heavily relies on political process. Whether a policy might become a social problem or not, it depends on the agendas formulated through political processes.

In a similar tone, Yesmil Anwar[18] argues that the issues of legal policy are closely related to the integrity of law enforcement and its problems which can be politics, social or religious. It means that policy of law enforcement to determine solutions to the problems of law describes the range in which power of law enforcement runs towards a legal policy.

Relating to this, Mahfudh[19] explains that each legal policy is a product of political decisions and therefore in the reality *(das sein),* law manifests a crystallization of political thought among the stakeholders who interact each other and implying a correlation between the character of every legal product with the policies of political stakeholders. A democratic person will produce responsive or populistic laws, whereas an authoritarian will create orthodox or conservative legal policies.[20] It is contingent with Marzuki Wahid[21] who calls the Marriage Law No. 1 of 1974 as a political product of New Order or a school of *Fiqh Negara* (*Fiqh* State). Similarly, William Liddle[22] names it Soeharto Law for legal policies and its all political institutions created during Soeharto era.

In this sense, Foucault[23] also explains that the legal system and court are fields which are definitely linked with domination and power through subjugation. According to him, a law should not be shown by its established legitimacy, though in reality, it is always a process of conquest.

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[17]David Dery, *Problem Definition in Policy Analiysis*, Kansas: University Press of Kansas, 1984,. 5.

[18]See understanding the context on Adang Yesmil Anwar, *Pembaruan Hukum Pidana,*. 58.

[19]Moh. Mahfudh MD, *Pergulatan Politik dan Hukum di Indonesia,* Yogyakarta: Gama Media, 1999, 4

[20]Moh. Mahfudh, *Pergulatan Politik dan Hukum di Indonesia,*. 80

[21]Marzuki Wahid and Rumadi, *Fiqh Madzhab Negara Kritik atas Politik Hukum Islam di Indonesia* (Yogyakarta: LKiS, 2001).

[22]R. William Liddle, "Soeharto's Indonesia; Personal Rule and Political Institutions", in Pacific Affairs, Vol. 58, No. 1 (*Spring*, 1985),. 78 .

[23]Michael Foucoult, *Society Must be Defended* (New York: Martin Press, 2003).

Rawls[24] however says that a just law must be based on fairness and a sense of justice for the public, while one's obedience to the law determines to what extent the laws, institutions and policies are just. Not only be normative, justice is also at the level of procedural fairness. Rawls then proposes a distributive justice implying that justice must be distributed to all citizens of both majority and minority, although in the context of the differences between the majority and the minority, the first is more preferred based on the Rawls' principle on utilitarianism.

Thus, the knowledge and interests of each maker of law enforcement and its enforcer determine the birth of a law, though in the ideal level , it should aim to uphold public justice. In this sense, law enforcement in Indonesia also should normatively have the authority to determine law using the sense of justice.

The Rights of Civil Society

Mahfudh[25] says that neither Islamic nor secular, Indonesia is a state based on Pancasila (Five Pillars). It is thus impossible to govern rules on civil society by Islam or other religion. In reality, however, the state regulates issues related to religious communities, including the issue of marriage. It, for instance, regulates the validity of marriage based on provisions of official religion in Indonesia, which is limited only to six religions.

The problem arises when the policy of interreligious marriage which is not regulated in Indonesian marriage law seems contradictory to the national constitution, namely the 5th pillar of Pancasila on "social justice for all Indonesian people." Furthoremore, it is also contrary to the Constitution of 1945 section 28B which mentions the rights of citizens to establish a family and Law No. 39 of 1999 on Human Rights article 10 paragraph (1) which writes that "every person has the rights to build a family and continue their descendants through legitimate marriage and free will."

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[24]John Rawls, *A Theory of Justice*, *The Theory of Justice* (United States of America: Harvard University Press, 2003).

[25]Moh. Mahfud MD, *Membangun Politik Hukum Menegakkan Konstitusi* (Jakarta: PT. Raja Grafindo persada, 2011),. 281.

This becomes both problematic and contradictive because the state provides freedom and rights for every citizen to build a family and continue their descendants while on the other side, this permission is constrained by the provisions of the marriage law. It is also contradictive because according to the concept of Hans Kelsen on the Stufen theory,[26] law should be a hierarchy, where the legal provisions of marriage law must follow the provisions from the higher existing law. It becomes more contradictive since the state only considers a marriage valid when its settlement is performed and registered under one of the official religions namely Islam, Catholicism, Protestantism, Buddhism, Hinduism and Confucianism, which in fact is a legal product of governments laden with political interests.

According to Yudi Latif, Moh. Hatta and Supomo formulated the concept of the state and its obligations in providing protection to the citizens and their principal rights including civil and political rights such as national and social freedom (article 29 of the amended Constitution of 1945) and rights to get equality before law and government (article 27 paragraph(1). In fact, in addition to both rights, every citizen also has rights to social, economy and culture as accommodated in the Act of 1945. It also includes rights to work and to make a good living (article 27 paragraph 2), to defend the state (article 31 paragraph 1), to get education (article 31 paragraph 1), as well as economic rights and welfare (for the poor) in article 33 and 34.[27]

Furthermore, Latif classified those rights into three, namely civil and political rights, democratic rights and socio-economic-cultural as well as collective rights.[28] The first category, civil and political rights, include rights for life, freedom of religion or belief, freedom of speech and expression, and to participate in collective decision making (voting rights). It is all called the rights of a minimalist approach. Meanwhile the second category, the democratic rights, include rights for health, education, work and social security. These rights are

[26]Sandrine Baum, *Hans Kelsen and The Case for Democracy*, (ECPR Press, 2012),. 35.
[27]See the latest amendment of Constitution of 1945
[28]Yudi Latif, *Negara Paripurna: Historisitas, Rasionalitas dan Aktualitas Pancasila* (Jakarta: PT. Gramedia Pustaka Utama, 2012),. 190-193.

integration between civil rights and political rights. The third category, the economic-social-cultural and collective rights, include environmental protection of indigenous rights, economic and development, self-determination and so on.

Additionally, Kaelan[29] describes similar rights including the rights for life, personal freedom, property, freedom of conscience and religion, freedom to have and express thought, freedom to assemble and convene, as well as to work and to receive humanistic treatment. In relation to freedom of religion, Carillo de Albornoz, as Koshy[30] quoted, mentioned that religious liberty or freedom of religion has four main aspects namely liberty of conscience, liberty of religious expression, liberty of religious association, and liberty of religious institutionalization.

In the same context, Said Agil Husin Al Munawar[31] explains that every citizen has the same rights and obligations. Citizens' rights should be preserved and respected, while liabilities are charged to them and the state must pay attention to the human factor with all of their powers and abilities. Human rights in society and nation therefore includes: freedom of religion, of education and teaching, of thought both orally and writing, of having a house or place of residence, of association and assembly, the rights on protection and legal equality, equality of constitutional rights, protection of self and property , individual freedom which the state cannot contested it, and rights to have equal position in the government. According to him, both majority and minority have the same rights and obligations as citizens and there should be no preferred and discriminated group. To conclude, it appears that the right for marriage is fundamental for citizens as it is a part of civil rights that the state is supposed to guarantee it.

The Regulation on Interreligious Marriage in Indonsia

According to Marriage Law No. 1 of 1974, "marriage is a physically and mentally bond between a man and a woman as

[29]Kaelan, *Negara Pancasila*,. 390.
[30]Ninan Koshy, *Religious Freedom in Changing World* (Geneva: WCC Publication, 1992),. 22.
[31]Said Agil Husin Al-Munawar, *Fiqh Hubungan Antar Agama* (Jakarta: Ciputat Press, 2005),. 35-36.

husband and wife with intention of building a family or household that is happy and eternal based on the Divinity of the One God".

Marriage in Indonesia, before the birth of Marriage Law No. 1 of 1974, was regulated in several laws namely religious law, customary law and the West law. During the reign of the Netherlands, marriage was arranged in some rules according to the following grouping. *First,* Europeans followed the Civil Code *(Burgerlijk Wetboek/BW)*. *Second,* Chinese in general also followed BW with the exception of the Civil Registration and the events before marriage. *Third,* Arabs and Orientals outside Chinese followed their own customary law. *Fourth*, indigenous Indonesian followed customary law in which Christians followed Marriage Act of Christian, Java, Minahasa and Ambon *(Huwelijk Ordinance Christen Indonesiers Java, Minahasa an Amboina / HOCI)* based on Staatsblad No. 74 of 1933. Fifth, people who belong to none of the previous classes/groups followed mixed marriage rules.[32]

The provisions of mixed marriage were stipulated in Staatsblad 1898 No. 158. Its first chapter mentioned that "mixed marriages are marriages between people in Indonesia which are under different laws". Thus, mixed marriages are between two persons who are in Indonesia yet subjected to different laws including interreligious marriage as described in article 7 paragraph 2 that "differences of religion, race or origin are not an impediment to marriage."

However, the concept of mixed marriage contained in the Marriage Law No. 1 of 1974 has different coverage with Staatsblad 1898 No. 158. Article 64 of Marriage Law states that "what is meant by a mixed marriage in the Marriage Law No. 1 of 1974 is a marriage between two people in Indonesia which are subjected to different laws because of different nationalities in which one of the parties has Indonesian nationality".

As Subekti[33] explains, the birth of the Marriage Law No. 1 of 1974 symbolized the beginning effort of government to create uniformity of marriage law and eliminate its diversity. However, he believes that the provisions of Marriage Law has not set uniformity as

[32]Wirjono Prodjodikoro as cited by Khoiruddin Nasution, *Status Wanita di Asia Tenggara: Studi terhadap Perundang-undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia* (Jakarta: INIS, 2002),. 41.

[33]R Subekti, *Ringkasan tentang Hukum Keluarga dan Hukum Waris* (Jakarta: PT. Intermasa, 1990),. 2.

stipulated in Article 66 on "closing provision" which states that "the rules contained in the Civil Code, the Marriage Ordinance for Christian People of Indonesia (Staatsblad 1933 No. 74) and Regulation of mixed marriage (Staatsblad 1898 No. 158) are no longer valid in so far as regulated in the Marriage Law No. 1 of 1974."

The article 66 of Marriage Law obviously opens the opportunity to interpret some provisions that have not been explicitly regulated such as interreligious marriage. Since it has not been regulated, as the opinion of Bayu[34], the provisions relating to mixed marriages based on the religious difference still follow Staatsblad 1898 No. 158, arguing that there is no other provisions including Marriage Law No. 1 of 1974.

Concerning to this, Ratno Lukito[35] claims that the exclusion of interreligious marriage in the Marriage Law No. 1 of 1974 is a legal vacuum condition. It turns out that a Supreme Court's verdict, using human rights considerations, accepted a petition of interreligious marriage filed by Andy Vonny and Andrianus Pertus Hendrik Nelwan. As described in the legal considerations, the Supreme Court accepted their petition on interreligious marriage considering the constitutional rights of all citizens described in Article 27 of the Constitution of 1945 that every citizen is equal before the law.

Therefore, before the provisions of marriage on Marriage Law No. 1 of 1974, interreligious marriage has had its legal legitimation based on Staatsblad 1898 no. 158. It is obvious that Marriage Law has no provision on interreligious marriage since the law itself just recognizes and only declares the legitimation of intrareligious marriage as stated on Article 2 paragraph (1). Therefore, it makes sense if some argue that old provision such as Staatsblad 1898 No. 158 still has its own legitimation to justify interreligious marriage in Indonesia.

A problem emerges when the validity of a marriage as stated on article 2, paragraph (1) of Marriage Law No. 1 of 1974 is contrasted to the administrative provisions of interreligious marriage in Law No. 23 of 2006 on Demographic Administration. At glance, it seems that the

[34]Interview with Bayu, a clerk deputy at Surakarta State Court on November 14, 2013.
[35]Ratno Lukito, *Hukum Sakral dan Hukum Sekuler: Studi tentang Konflik dan Resolusi dalam Hukum di Indonesia* (Jakarta: Pustaka Alvabet, 2008),. 433

state allows interreligious marriage because it must be unregistered formally. However, unfortunately, interreligious marriage is only recognized as an administrative marriage registered in the Office of Population and Civil Registry instead of a marriage legitimized as a legally valid one though some religious understandings allow this type of marriage.[36] It is obvius, therefore, that the regulations of interreligious marriage are separated from normative validity on the Marriage Law with administrative rules in the law No. 23 of 2006 on the demographic administration and this makes interreligious marriage often referred to as a civil marriage.

Administration System and Its Mechanism towards Interreligious Marriage in Indonesia

Law No. 23 of 2006 on Demographic Administration describes the systematic order of people's important events, one of which is the event of marriage mentioned in Article 8 and 9 in addition to Article 34 and 35 which clarify the provisions of marriage registration. Article 34 states as follows: (1) A valid marriage under the provisions of law must be reported by the resident to the official agency where the marriage takes place 60 (sixty) days on the latest from the date; (2) Based on the report referred to number (1), Civil Registry officer records it on Marriage Act's register and publishes its Quoted Marriage Act. Afterward, Article 35 states that "the marriage registration referred to in Article 34 shall also apply to: (a) marriage determined by the court.

It is obvious from the above explanation that the critical events including marriages of couples outside Moslem communities are listed in the Office of Population and Civil Registry as described in the Article 8 of Law No. 23 of 2006. However, the elucidation of Article 9 paragraph (1) letter b mentions that the recording is performed after the civil records receives Court decision indicating that the person concerned has got a State Court's deicision.

Regarding to administrative registration in accordance with Indonesian Government Regulation No. 9 of 1975 on the

[36]As the permissibility of interreligious marriage in Confucianism, some Muslims also believe the same based on Surat al Maidah 5 that allows marriage between a Muslim and a woman of people of the book who keeps her dignity or those who strongly hold to the teachings of religion before Islam.

implementation of Law No. 1 of 1974 on Marriage Article 2 which describes the marriage registration, Civil registry's tasks are as below:

(1) To register marriages of those who perform its settlement according to Islamic teaching before the Registrar Officer based on Law No. 32 of 1954 regarding the record of Marriage, Divorce and Refer.
(2) To register marriage of those who perform its settlement according to their religion or belief (other than Islam) before the Registrar of Marriage Officer at the Office of Civil Registry as meant by various legislation on marriagge registration.

Meanwhile, mechanism of interreligious marriage registry in Indonesia as well as the provisions of Article 21 of Marriage Law No. 1 of 1974 are as follow:

1) Should the officer of marriage registrar find prohibition against the marriage according to the law, then he/she will refuse to accept the petition.
2) In case of rejection, the registrar will give a written statement of refusal accompanied by refusal reasons based on the request of one party who wishes to enter into the marriage.
3) By getting a letter of rejection mentioned above, the parties whose marriage plan is rejected have rights to apply to the Court at the area in which the marriage registrar rejected their submission
4) The court will shortly examine the case and will provide decision whether to strengthen the refusal or give an order so that the marriage can take place.
5) This provision loses its power when the barriers causing the rejection disappear and as a consequence, the party who wants to get marriadge can repeat the notice of their intent

Furthermore, after the State Court accepts the applicant's request of interreligious marriage, the applicants may register their petition to the Office of Population and Civil Registration.

The Policies of Implementing Interreligious Marriage

The implementation of interreligious marriage in Central Java, namely, Surakarta, Semarang and Jepara regency has different experience, especially in terms of providing legal license. This is mainly because different legal understanding of the law enforcers on interreligious marriage.

At Surakarta State Court, after the issuance of Marriage Law No. 1 of 1974, interreligious marriage was still prohibited. It recently changed after ratification of the Law No. 23 of 2006 in which the Court received totally 39 petitions of interreligious marriage from 2007 to 2013. The petition itself is firstly submitted when the applicants register the marriage to the Civil Registry Office. After the Office checks it, the applicant will typically get a rejection letter because of interreligious marriage prohibition based on the provisions of article 21 of Marriage Law No. 1 of 1974.[37]

The rejection letter from the Office of Civil Registry then becomes one of requirements for applying permission/license to the State Court. Furthermore, the Court examines the petition from either its formal or material requirements namely compliance with requirements, reason on the applicant and the spouse's will to build interreligious marriage, and explanation of witnesses from each family to ensure that both parents have allowed and approved their marriage plan. At first, the judge always advises the couples to get marriage with those with same religion by explaining the risks of interreligious one. However, if a couple has already had strong willingness to perform interreligious marriage, the judge can order a new examination to continue.[38]

Above statement is in line with description from Djoko (a subject of interreligious marriage and the first person to apply for interreligious marriage in 2007). In the process of his examination, the judge suggested him and SR (his wife) to marry under one religion

[37]Interview with Ms. EST, an officer who handled Interreligious Marriage Registration at the Office of Population and Civil Registration of Surakarta, dated 21 November 2013. Interview with Mr. Pramono, employees of the Civil Registry on November 14, 2013.

[38]Interview with judge Abdul Rohim of Surakarta State Court dated November 21, 2013. ABDR is also a judge who often deals with license application of interreligious marriage.

but both insisted to perform an interreligious marriage because both had studied the legal provisions of interreligious marriage from Law of Marriage and Law of Demographic Administration. The judge eventually explained the risks they might endure if the interreligious marriage took place. After examining the evidence and witnesses while inviting some expert's witnesses from Islam and Christian's section of Religious Ministry Affairs of Surakarta, the judge issued law consideration and eventually granted a license for the interreligious marriage. Thus, Djoko mentions that his marriage is only civil marriage instead of a religious one.[39]

However, when there found a lack of one of the conditions, the license application of interreligious marriage will not be granted. This happened to a case of petition submitted by LNW to Surakarta State Court with Number of Registration: 375 / Pdt.P / 2013 / PN. Ska. The Court refused his petition by reasoning that there was one incomplete requirement namely a rejection letter from the Office of Civil Registry. However, after LNW filed again and fulfilled its missed requirement, finally the Court granted him license of interreligious marriage at the Decision of Surakarta State Court No. 408 / Pdt.P / 2013 / PN. Ska.

Shortly after the provisions of Law No. 23 of 2006 on the Demographic administration ratified, from 2007 to 2013, all applications for interreligious marriage licenses submitted to the State Court of Surakarta were granted but one as mentioned before. Besides, there was a petition filed twice since its first submission was withdrawn by the applicant and graned on Decision of Surakarta State Court No. 65 / Pdt / 2012 / PN.Ska about revocation. However, after the applicant filed back and fulfilled all terms and conditions, the request was granted on the Decision of Surakarta State Court No. 237 / Pdt.P / 2012 / PN.Ska.

Besides fulfilling all terms and conditions, all application petitions was granted because the judge has discretion to enforce the law and provide legal remedies for the applicants.[40] Judge Ely[41] who granted some requests for interreligious marriage, for example, had

[39]Djoko is the first person to apply for interreligious marriage in the Surakarta State Court after Law No. 23 of 2006. It resulted the Decision of Surakarta State Court No. 111 / Pdt.P / 2007 / PN.Ska

[40]Interview with Judge Abdul Rohim, Surakarta State Court on November 21, 2013.

[41]Interview with judge Ely, Surakarta State Court on November 21, 2013.

some formal and material reasons such as: 1) as a legal protection for couples who want to get marriage and remain in their own religion, 2) for avoiding bad things to happen; 3) considering that getting marriage is the rights of every citizen. According to him, when the state legalizes marriages in overseas as the provisions of Article 56 paragraph (1) of Law No. 1 of 1974, the state actually makes legal dualism since Indonesia has its own regulations.

Additionally, in Surakarta, the role of religious leaders serve only as secondary, namely someone who offers religious guidance for prospective couples such as when they give statement as experts witness in Court's determination No. 65 / Pdt / 2012 / PN.Ska.[42]

The policy on interreligious marriage in Surakarta is different from those in Semarang and Jepara. In these two last cities, legal interreligious marriage has no opportunity to perform and this signifies that the State Court of Jepara and Semarang only interpret the validity of marriage based on the provisions of Marriage Law No. 1 of 1974 that it must be between the couples of one religion. As a result, this understanding suggests them not to receive any license application of interreligious marriage. Judge ST said that it is impossible to receive such application if the incoming request is not scheduled or rejected by the young clerks who rely their argument on Book II of the Code of Duties and Court Administration, Article 12 of the Case Request, especially Articles 12 and 13. It mainly states that the determination also cannot be accepted in lights of the request to certify that a document/act is legitimate".[43]

The policy of Semarang State Court to reject the interreligious marriage implies that it does not consider the provisions of article 21 of the Marriage Law No. 1 of 1974 explaining that the concept of marriage should accomodate the perception of the judge and some prohibitions. In such conditions, interreligious couples who want to perform marriage in Semarang should convert into his/her couple's religion for the sake of validity of their marriage. They must decide which spouse should temporarily convert his/her previous belief into their spouse's religion by changing religious identity on their identity

[42]See the excerpt of Surakarta State Court Decision No. 65/Pdt/2012/PN.Ska

[43]Interview with ST, a judge of Civil Code at Semarang State Court on November 27, 2013.

cards (Kartu Tanda Penduduk/KTP) to comply with the marriage administration. After the marriage gets legalization, they turn their religion back into their own original teachings and religious rituals. This, for instance, happened to a couple of SR who is a Muslim woman and her husband STF who is a Catholics. SR converted into her husband's religion and performed a marriage using Catholicism way. After the marriage, however, SR continued to perform her Islamic rituals.[44] The same is the case of SHD, a Catholics who converted into Islam when he wanted to marry MSY who is a Muslim woman. After the marriage settlement, he converted back into his Catholicism and until now both have had three children.[45]

Nevertheless, the Civil Registry Office of Semarang actually understands that registration procedures of interreligious marriage was stipulated in Law No. 23 of 2006. Unfortunately, as SRI[46] said, from 2008 to 2013, the Civil Registry only recorded one case of interreligious marriage dated on 27 February 2010, No. 3374.PK.2010.00204. SRI conceded that it was granted based on the decision given by the State Court of Tanjungkarang, No. 11 / Pdt.P / 2010 / PN.TK. dated on February 15, 2010.

The same thing happens in Jepara. Although a lot of interreligious marriage settlement has been performed, there found at least three models to classify.

First is a category in which one party either temporarily or permanently converts to his/her spouse's religion so that they perform their marriage following the chosen one. It is, for instance, done by; 1) JD, a Muslim who converted to Buddhism before marrying JM, a female Buddhist,[47] 2) SMI, a Muslim who converted to Buddhism for the benefit of marriage with SDI, a Buddhist, 3) JV, a Muslim-turned Buddhist shortly before settling marriage with AND,

[44]Interview with SR at her house, Jangli Perbalan Timur Street, No. IV/127-A RT. 06 RW. 06 Ngesrep, Banyumanik, Semarang City on November 15, 2013.
[45]Interview with MSY at her house, Jatiluhur Timur Street, No. VIII/320 RT. 01 RW. 05 Ngesrep, Banyumanik, Semarang City on November 16, 2013.
[46]Interview with SRI, the section head of Marriage and Divorce at Office of Population and Civil Registry of Semarang City on November 28, 2013
[47]The case of religious submission prior to the marriage was told by a Buddhist monk who is a member of RAS FKUB Jepara on November 20, 2015.

a Buddhist, and 4) RJT, a Muslim who converted to Hindu to marry a Hindus, LS.[48]

Second is a category in which each party follows the procedures of each respective religion so that the performed marriage settlement programs use both religious teachings and rituals. It is, for instance, done by YS, a Catholics who married SF, a Muslim. Both got married with two religious ordinances of Islam and Catholicism then registered it at the Civil Registry Office under Chatolicism.[49]

In this category, religious leaders only play a role to provide religious solution for couples who want to perform an interreligious marriage. However, along with validity which happens twice (from each other religion), this kind of marriage normatively becomes a problem although it becomes the best solution because the couple feel it most suitable with their respective religions on the other hand. For the administrative side, they usually register their marriages by following one religious requirements only.

Third is a category which uses a preferred (other) religion out of their own religion based on their agreement. For instance, it happened to a marriage of a Chinese man with a Muslim woman whose license application of interreligious marriage was rejected by the Court. They finally chose a marriage based on Christianity[50] because Chinese religion had just been recognized as an official religion in Indonesia since the presidency of Gus Dur in 2000. Whereas in Islam itself, interreligious marriage is normatively not allowed as stated on the Fatwa (decree) of Indonesian Ulema Council and Islamic Law Compilation.[51] Choosing new religion therefore became logical solution as a middle way deemed to be the most convenient one.

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[48]See the evidence of statement letter written by RJT on the stamp Rp. 6000,-. It states that: Declare truthfully and with sincerity, without coaxing, I convert to the Hinduism. I make this statement in a healthy state of mind without any influence from any party. In doing so, the letter I made is to be used properly.

[49]Interview with a subject of interreligious marriage, YS on November 18, 2013

[50]Interview with Uto, a clerk of Jepara State Court on November 18, 2013. Utomo is also a witness to the marriage of a Chinese man and a Muslim woman who had trouble because the policy did not support, and eventually they got married in a Christian way.

[51]The Decision of the 2nd National Conference of Indonesian Ulema Council in Jakarta on May 26, to June 1, 1980 which was amended by Fatwa of Indonesian Ulema Council No. 4 / Munas VII / MUI / 8/2005 stipulated at the 7th National Conference

In short words, interreligious marriage in Jepara have never formally happened since the law enforcers just follow the Article 21 of Law No. 1 of 1974 which states that a marriage must go through the application for a license from the State Court and be subsequently registered in the Civil Registry Office. However, there exist three models of interreligious marriages as mentioned above.

Such conditions happen because the Court gives no opportunity for the parties to request a license for their interreligious marriage as the procedure stated on Article 21 of the Law of Marriage No. 1 of 1974. The Court has its own principle that marriage must be performed by a man and a woman who believe the same religion. It means that the Court just considers the provision of marriage from the aspect of its validity written in Article 2 paragraph (1) Law of Marriage No. 1 of 1974.

Thus, in addition to their own interests, the policy to implement interreligious marriage is strongly influenced by how and to what extent the stakeholders understand or consider the provisions on interreligious marriage. In this view, Mahfudh argues that state policies do affect the color of any existing law.[52] Similarly, Birkland[53] explains that among its characteristics, policy is created based on public interests.

To sum, serving as policy makers, all stakeholders agree that legal validity of marriage in Indonesia has been set in Marriage Law No. 1 of 1974. However, the breadth of views and belief of each greatly affects their understanding on provisions of interreligious marriage. Not only be it contained in the provisions of article 2, paragraph (1) Marriage Act No. 1 in 1974, its procedures are also explained in Article 21 of the Marriage Law No. 1 of 1974 concerning the legal order of interreligious marriage, the provisions of Staatsblad No. 158 of 1898 and Law No. 23 of 2006 on Demographic

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in 2005. See also the provisions of Article 40 and 44 Compilation of Islamic Law that becomes one of the material sources of Islamic law in Indonesia.

[52]Moh. Mahfudh MD, *Membangun Politik Hukum, Menegakkain Konstitusi* (Jakarta: Rajawali Press, 2011),. 5. See also Klein as cited by Adang Yesmil Anwar, *Pembaruan Hukum pidana; Reformasi Hukum* (Jakarta: Grasindo, 2008),. 57.

[53]Thomas A. Birkland, *Introduction to the Policy Procces; Theory, Concepts and Models of Public Policy Making* (New York: M.E. Sharpe. Inc, No. 3, 2011),. 8-9

administration including administration system of interreligious marriage.

On the other hand, opinion on interreligious marriage law provisions in Surakarta, Semarang and Jepara among informants of this research is as follows.

First is opinion that interreligious marriage is not regulated in the Marriage Law No. 1 of 1974 because it only regulates the same religion's marriage as defined in Article 2 paragraph (1) stating that "a marriage is valid when its settlement is performed according to the law of each religion and belief". In addition, the provision of Article 66 on Marriage Law is understood as the one which replaced the provisions on mixed marriages in the Staatsblad 1898 No. 158. For them, therefore, these provisions indicate that the state requires marriages between men and women of the same religion. Thus, an interreligious marriage is not valid. Among the informants who believe this opinion are the stakeholders in the Semarang and Jepara State Court.

Second is opinion that Article 2, paragraph (1) of Marriage Law has described the validity of marriage in Indonesia while considering what Article 66 of Marriage Law mentions that regulations in the Civil Code, the Marriage Ordinance for Christians in Indonesia (Staatsblad 1933 No. 74) and Mixed Marriages Regulation (Staatsblad 1898 No. 158) are no longer valid because it was renewed by the Marriage Law No. 1 of 1974 itself. Therefore, it further infers that interreligious marriage metioned in the Staatsblad 158 of 1898 is still valid simply because it is not clearly regulated in the Marriage Law No. 1 of 1974. Thus, in accordance with Article 66 and interpretation that interreligious marriage is included at the Law no. 1, it becomes valid right away. Similarly, the provision of Article 56 of the Marriage Law No. 1 of 1974 describes the possibility of Indonesian citizens to get married in overseas which as long as they comply with foreign rules where the marriage settlement takes place. As a result, it provides an opportunity for Indonesian people, especially for couples of different religions, to get marriadge in another country that allows religious marriage then go back to Indonesia to legalize it.

This opinion also relies on the administration system of marriage regulation among interreligious couples in Article 35 of Law No. 23 of 2006 stating that: "The marriage registration also applies to:

(a) marriages determined by the Court". Additionally, there exist another administrative provision on registering interreligious which was preceeded by legal license on interreligious marriage issued by the State Court in Article 21 of Law No. 1 of 1974. Among the informants who support this opinion are some judges in Surakarta State Courta and some officers at Surakarta, Semarang and Jepara Civil Registry Office.

In a bigger picture, the rule of interreligious marriage in Marriage Law is really ambiguous. In one hand, Article 2 paragraph (1) Marriage Law clearly states as follows: "marriage is lawful in accordance with our religion and belief." On the other hand, however, Article 21 outlines some steps a couple whose marriage is prohibited needs to do. Although there found no explicit explanation that the ban applies, among others for interreligious marriadge, each religion normatively considers the prohibition of interreligious marriage.

Normatively, the stakeholders understand that Article 2 paragraph (1) of Law No. 1 of 1974 orders the state to only legalize the same religion marriage. Some respective religious leaders, however, have different opinions on this issue in which some of them interprets that a marriage has to perform with couples of the same religion while some others interprets that a marriage can be valid between couples of different religions.

Some Islamic scholars who wrote the book *Fiqh Lintas Agama* (Interreligious *Fiqh*) such as Nurcholish Madjid, Komarudin Hidayat and Musdah Mulia, for instance, are a part of the second category. They believe that prohibition of interreligious marriage at the era of caliphate Umar was for political reasons instead of ideological. Therefore, according to them, interreligious marriage is actually allowed.[54]

Similarly, Catholicism, Christianity, Buddhism, Hinduism and Confucianism also have their own opinions. In Catholicism, for example, a Catholics is allowed to get married to a spouse from another religion as long as they both have been baptized and have promised to avoid polygamy or divorce during their marriage life. Furthermore, the signing of the marital form which has been

[54]Mun'im A. Sirry (Ed.) *Fikih Lintas Agama; Membangun Masyarakat Inklusif-Pluralis* (Jakarta: Paramadina, 2004),. 163

preprared will be attached to the permit application/dispensation. In this case, the non-Catholics spouse is asked to sign under the status of "knowing." However on educating children, the Church asks a Catholic spouse to do their utmost in Catholic way and try to baptize them.[55]

Meanwhile in Christianity, interreligious marriage must qualify some following requirements: a) the approval of both prospective couples, b) each bride or groom has no marital relationship with another person, c) the minimun requirement that at least, one of both is Protestant, d) the minimun requirement that at least, one of both is a member of the Church in which a mixed marriage settlement can take place while another one (a non-Protestant spuose) makes a statement that he/she has no objection to perform his/her marriage settlement in a Protestant church.[56]

Likewise, in Buddhism, interreligious marriage is also allowed according to the decision of the Supreme Sangha Indonesia as long as the marriage ratification is done in Buddhism way. In this case, a non-Buddhist bride/groom is not required to firstly convert to Buddhism. However at the marriage settlement, as a part of its rituals, he/she is required to say "in the name of the Buddha, Dharma and Sangha" which are the Gods of a Buddhist.

The same way goes on in the modern Hinduism. A Hindush reformer, Swami Vivekananda in India, pioneered very tolerant and contextual way of thinking that allows a Hindu to marry non-Hindus as long as it fits with so called *asmastuti* (the deepest heart). This furthermore closely relates to other terms known as *Istadevata,* namely the freedom to worship God in the most suitable way and *Adikara* which means the freedom to praise God in a way that suits us.[57] Likewise, in Confucianism, a Prophet of Confucianism, Prophet Kongzi, also states that interreligious marriage is not prohibited as long as there exist important harmony between heaven and earth, or men and women who get married.[58]

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[55]R. Hardawiryana, S.J., *Dokumentasi dan Penerangan KWI* (Jakarta: Obor, 1993),. 309-316

[56]Asmin, *Status Perkawinan Antar Agama* (Jakarta: PT. Dian Rakyat, 1986),. 41

[57]See Ahmad Baso and Ahmad Nurcholis (Eds.) *Pernikahan Beda Agama: Kesaksian, Argumen Keagamaan dan Analisis Kebijakan*, (Komnas HAM dan ICRP, 2005),. 213-215.

[58]Ahmad Baso and Ahmad Nurcholis (Eds.) *Pernikahan Beda Agama,.* 216-218

In addition to religious interpretations, another problem of interreligious marriage is when contrasted to articles explaining that the rights of citizens to get marriage is a basic right and recognized in Indonesian constitution, namely Article 28B of the 1945 Constitution. It states that "everyone has the rights to build a family and continue the descendants through legitimate marriage". Other than that, Article 28 E states that "everyone is free to believe in religion and to worship according to their religion ...". Furthermore, Article 29 paragraph (2) states that "the state guarantees the freedom of every citizen to profess their own religion."[59]

Thus, the different policies due to different legal interpretation of the law are a daily life problem, particularly in Semarang and Jepara. When a State Court rejects to permit interreligious marriage, it shows that its policy makers do not follow the order of law stated on Article 21 of the Marriage Law No. 1 of 1974. In fact, the Article 29 paragraph (2) of the Constitution of 1945 has mandated the policy makers to enforce justice in society, because society, as citizen, has the same rights to worship according to their own religion or belief.

Therefore, the policy makers should have broader understanding about the regulations of interreligious marriage so that they can provide a fair solution to the whole community including couples who want to perform interreligious marriage. In addition, laws on marriage should not contradict each other and have a chance to create different understanding starting from the rules in Pancasila as the state ideology, the Constituion of 1945, the Marriage Law No. 1 of 1974 , the Demographic Administration Law No. 23 of 2006 and others.

Interreligious Marriage: Between State Policy and Rights of Civil Society

A state, according to Rawls' concept, should ideally give a sense of justice for its people not only in normative level but also in the procedural ones. Thus, when the freedom to practice religion has been normatively specified in the Indonesian constitutional law, namely Article 29 of the Constitution of 1945, the issue of interreligious marriage should have been regulated in detail in Marriage Law No. 1

[59]See The Constitutional Court of the Republic of Indonesia.

of 1974. Policies of state stakeholders then exacerbate this condition by considering uncomprehensive understanding on the provisions of interreligious marriage.

The reality in Semarang and Jepara implies that the chosen policies have not yet reached the level of normative justice and procedural fairness. It appears on how the normative understanding of interreligious marriage has not been combined and balanced with other provision, especially Article 2 paragraph (1), Article 21 and Article 66 of Marriage Law No. 1 of 1974. Similarly, there found no effort to correlate the issue of interreligious marriage with the context of religious freedom as enshrined in Article 29 of the Constitution of 1945. Seemingly, the policy makers have failed to acknowledge relevancy of some related provision.

In the process of implementing interreligious marriage policy, this normative and narrow point of view greatly affects the implementation of interreligious marriage policy. Rejection on the license application of the Court clerks obviously shows how the policy makers procedurally give no sense of justice to the citizens who apply for interreligious marriage. Because of such policy, the Office of Civil Registry automatically will not record the marriage because there is no permission from the State Court. In fact, each Civil Registry Office in Jepara and Semarang has recorded only one case of interreligious marriage with licenses granted by the State Court outside both regions.

It is clear, therefore, that the understanding of interreligious marriage in Indonesia should not only rely on an article only while ignoring other relevant ones. It needs a broader point of view beginning from understanding on the fifth precept of Pancasila,"social justice for all Indonesian people", the Constitution of 1945, to the provisions of the laws and its related rules.

In Surakarta, on the other hand, the stakeholders seem to be more just. The State Court of Surakarta always integrates the provisions of Article 66 of Marriage Law No. 1 of 1974 with the understanding that the abscence of interreligious marriage provisions in the Marriage Law actually makes the rules remain valid by using the provisions of Staatsblad 1898 No. 158. Surakart judges also like to consider Article 29 of the Constitution of 1945 which explains the freedom of every citizen to believe in faith on one God Almighty as

their legal consideration. Besides that, the judges also take into consideration Article 8 (f) and Article 21 of the Marriage Law No. 1 of 1974.

Among others, such legal consideration can be found in the State Court Decision No. 90 / Pdt.P / 2011 / PN.Ska as follow:

1) Religious differences do not constitute a ban to build a marriage as mentioned at Article 8 (f) Marriage Law No. 1 of 1974 as well as Article 35 paragraph (a) of Law No. 23 of 2006 on Demographic administration which writes that the State Court has the authority to examine and decide on the issues of interreligious marriage;

2) A citizen has the rights to maintain his/her religious belief, including to build households with spouses of different religions in accordance with Article 29 of the Constitution of 1945 concerning the freedom to believe in faith on one God Almighty;

3) The Marriage Law No. 1 of 1974 Article 8 (f) governs the prohibition of marriage yet it does not explicitly regulate an interreligious marriage;

4) The Marriage Law No. 1 of 1974 Chapter XIV Article 66 states: "For marriage and everything related to marriage is based on this Law; therefore, by the enactment of this Law, the provisions stipulated in the Civil Code, HOCI Stbl. No. 74 of 1993 (Marriage Ordinance for Indonesian Christian), Mixed Marriage Regulation (*Regeling op de gemengde Huwelijke* Stbl No. 158 of 1898) and other regulations governing marriage as long as has been regulated in this Law, are declared to be invalid;

5) The No. 5 of general explanation of the Marriage Law No. 1 of 1974 says "to ensure legal certainty, the marriage and everything associated with it prior to the enactment of this law and is run according to the existing law, is considered valid. Similarly, if this law does not give any regulation on any specific thing, the existing provisions apply itself right away;

6) The Court considers that because the Marriage Law No. 1 of 1974 does not explicitly regulate an interreligious marriage in which the applicants insist on maintaining their religious beliefs, then the provisions of Stbl: 1898 No. 158 on the Rules of Mixed Marriage can be applied in the petition of the applicant;

The above Surakarta State Court's understanding went the same with the officer of Surakarta Civil Registry Office. The Office follows the provisions of Law No. 23 of 2006 which governs provisions of marriage documentation for non-Moslem couples, including an interreligious marriage that has received permission from the State Court. Apart of law enforcer's understanding, the role of religious leaders in an interreligious marriage only functions to providing confidence for those couples. From reality, it seems that the normative and procedural justice at Rawls' concept are more visible to occur in the implementation of marriages in Surakarta.

The different policy overshadowed by different understanding on the provisions of interreligious marriage at the State Court and the Office of Civil Registry in Semarang, Jepara and Surakarta indicates the existence of different interpretation among the law enforcers of the relevant regulations in Indonesia. In fact, the policy makers and law enforcers should firstly understand the legal basis of Pancasila and the provision in Article 29 paragraph (2) of the Constitution of 1945 which states "the State guarantees the freedom of every citizen to profess their own religion", Law No. 39 of 1999 on Human Rights (HAM) Article 10, paragraph (1) which explains "every person has the right to build a family and continue their descendant through legitimate marriage and free will", as well as related articles on interreligious marriage which are not explicitly described in Marriage Law No. 1 of 1974.

This all aims to make the state provide a sense of justice for the benefit of its people in order to get legality of interreligious marriage. As Said Agil Husin Al Munawar[60] explains, the citizen has the same rights and obligations to be maintained and respected by the state and other citizens. Similarly, the state has obligation to promote and realize the Rawlsian justice which does not only involve normative thing, but also relates to justice called distributive or procedural justice.

[60]Said Agil Husin Al-Munawar, *Fiqh Hubungan Antar Agama* (Jakarta: Ciputat Press, 2005),. 35-36.

Conclusion

The implementation of interreligious marriage in Central Java is different from one region to another. In Surakarta, the implementation begins when a couple from different religion applies for registering interreligious marriage to the Civil Registry Office. The Office then provides a rejection letter as the basis for the couple to apply for interreligious marriage license to the State Court. After the Court granted license to perform the marriage, then the Civil Registry Office will record that interreligious marriage.

It is different from what happens in Semarang and Jepara. In Semarang, interreligious couples cannot perform any marriage settlement and it has forced a temporarily religious subjugation of one spouse to his/her couple's religion for the sake of a legalized marriage. Jepara also experiences the same, even there is a model of interreligious marriage performed in two religious rituas, although they only register one religious marriage to the government. There also occurs a model of marriage that does not follow the religion of husband or wife; they choose another religion (outside what they both believe) and rituals they deem as the most convenient one. Conclusively, in addition to the different interpretation to the rules of interreligious marriages in Indonesia, those interreligious marriage policies closely relate to the religious understanding of its policy makers and law enforcers.

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Legal Protection for Disputing Parties through the Aceh Customary Court

Dahlia Darida
Universitas Syiah Kuala, Jl. Teuku Nyak Arif, Kota Banda Aceh, Aceh 23111
Email: dahliafaridash@yahoo.com

Hamid Sarong
Universitas Syiah Kuala, Jl. Teuku Nyak Arif, Kota Banda Aceh, Aceh 23111

Darmawan
Universitas Syiah Kuala, Jl. Teuku Nyak Arif, Kota Banda Aceh, Aceh 23111

Fitriah M. Suud
Universitas Muhammadiyah Yogyakarta, Jl. Brawijaya, Geblagan, Tamantirto, Kec. Kasihan, Bantul, Daerah Istimewa Yogyakarta 55183

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Abstract:

Article 13 paragraph (1) of the Aceh Qanun Number 9 of 2008 on the Development of Customary and Indigenous Life discussing customary disputes mentions that ideally, the customary court can solve customary disputes. However, sometimes, it can not solve all cases and provide legal protection for all disputing parties. This study aims to explain the process of resolving private disputes through the customary court and providing legal protection for the parties. This type of research was empirical juridical with qualitative analysis. The results showed that a dispute resolution process could be done through two models. *First* is through customary judicature using formalized procedures by involving customary instruments. *Second* is using positive law indicator by not providing legal protection for the parties. Certain parties will typically file a lawsuit again after getting the customary court's decision. This research suggests collaboration among the Government, the Police, and the Customary Assembly in consistently promoting the customary court and improving the quality of customary instruments.

Author correspondence email: dahliafaridash@yahoo.com
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Abstrak:

Pasal 13 ayat (1) Qanun Aceh Nomor 9 Tahun 2008 tentang Pembinaan Kehidupan Adat dan Adat Istiadat menegaskan bahwa idealnya, berbagai sengketa adat dapat diselesaikan melalui peradilan adat. Namun demikian faktanya, tidak semua kasus dapat diselesaikan dengan baik pun tidak semua pihak mendapat perlindungan hukum. Penelitian ini bertujuan menjelaskan proses penyelesaian sengketa perdata melalui peradilan adat dan perlindungan hukum bagi para pihak. Jenis penelitian ini adalah yuridis empiris dengan analisis kualitatif. Hasil penelitian menunjukkan proses penyelesaian sengketa dilakukan melalui dua model. *Pertama* adalah peradilan adat dengan prosedur yang telah diformalkan atau proses yang hanya melibatkan perangkat desa. *Kedua* adalah menggunakan indikator hukum positif dengan tidak memberikan perlindungan hukum para pihak terkait. Pihak-pihak tertentu biasanya akan mengajukan gugatan kembali setelah pembacaan putusan peradilan adat. Penelitian ini menyarankan adanya kerjasama berkelanjutan antara Pemerintah, Kepolisian, dan Majelis Adat dalam mensosialisasikan peradilan adat secara konsisten serta memberikan peningkatan kapasitas bagi perangkat adat.

Kata Kunci:
Perlindungan Hukum; Penyelesaian Sengketa;
Peradilan Adat; Aceh

Introduction

Throughout the history, the practice of customary law aims to ensure that all problems in society can get complete solution. Customary law resolves them thoroughly and answers all existing aspects or those may exist so that in the future, there will be no more unsolved similar problems. Related to this, Koesno stated that there are no problems that cannot be solved. For him, furthermore,

customary law aims to achieve safe, prosperous and peaceful society both between the engaging parties and community as a whole."[1]

From the point of view of its purpose, customary law is different from positive law. Positive law aims to provide legal certainty, while customary law is to restore balance in society. Based on this, responsive type of law is all that people need because it emphasis on legal objectives based on legal substance. It also puts the law as a response of social needs and public aspirations. In accordance to its open character, this type of law prioritizes accommodation to accept social changes[2] while the orthodox community tend to bring up forced customary laws (repressive). The repressive type of law aims to achieve order and obedience in maintaining the existence of the state, whereas autonomous law aims for oriented legitimation which adheres strictly to legal procedures.[3]

The concept of customary peace had existed before Islam particularly at the fifth year before Muhammad's prophety. It was the event of *Hajar al-Aswad* seizure after it was moved from its original place when the flood attacked Mecca. All leaders of Quraysh tribes scrambled to get right for putting back the *Hajar al-Aswad* and each of tribal chiefs felt that they deserved more than others. It is believed that *Hajar al-Aswad* is a gemstone whiter than snow sent down by Allah from the sky but it became black because of humans' sins or crimes.[4]

The peace agreement for the complicated problem was initiated by the first person who entered the Ka'bah. He was Muhammad bin Abdullah who had the title of Muhammad Al-Amin (the trustworthy Muhammad). He resolved the problem wisely by removing the turban that covered his head then opened it in front of the Ka'bah. Later, he put *Hajar al-Aswad* on the center of turban and

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[1] Moh Koesno, *Hukum Adat sebagai Suatu Model Hukum Historis,* (Bandung: Mandar Maju, 2002),. 11.

[2]Mohammad Jamin, *Peradilan Adat, Pergeseran Politik Hukum Perspektif Undang-Undang Otonomi Khusus Papua.* (Yogyakarta: Graha Ilmu, 2012),. 24-25.

[3]*Siswantoro Sunarso, Penegakan Hukum Psikotropika dalam Kajian Sosiologi Hukum,* (Jakarta: Raja Grafindo Persada, 2004),. 85.

[4]Yani Suryani, et al, *Tempat Bersejarah Umat Islam,* (Jakarta: Luxima Metro Media, 2014),. 35.

asked representatives of each tribe to hold the edges of the turban and put the stone back at the first place on Al-aswad.[5]

This event proved that peace which can solve problems in society is something that people can seek for. It also made it clear about Arabic tradition at that time in which Arabians were charismatic, held high position or were able to solve problems they coped with. Muhammad bin Abdullah was a charismatic person among the Jahiliyah Arabs before he became a prophet and was much highly respected by his companions, scholars, to traditional leaders.

Relating to this, nowadays in Indonesia, the province of Aceh is a special regional government. What makes it special is its customs and law which are blended with implementation of Islamic law and culture. In the field of law, Aceh applies the implementation of sharia law (Islamic law) and customary law which is relatively different from other regions in Indonesia. Customary law itself is a role model and an implementation of attitude or character (geist) of daily practices in society that is more ethnical or based on community groups. The characteristic and the form of customary law have traditional nuances, not written, and are sourced from their customs or habits,[6] including the existence of customaty institutions.

Aceh customary institutions have their own model and approaches that have been recognized by Indonesian government as an alternative way to resolve disputes or conflicts in society. Aceh Besar District, one of the districts in Aceh, in this case, always uses customary remedies in solving social problems in the society. The customary remedies are carried out whether in formalized customary courts by following standardized mechanisms and stages of resolution or only by involving village instruments (in Aceh called *Gampong*) so that the engaging parties can get solution.

Based on above description, it is interesting to discuss further on the the process of private dispute resolution through the customary court in Aceh Besar District. It is the aim of this paper in

[5]Sumarti M. Thahir, *23 Muslimah Kesayangan Rasulullah,* (Bandung: Alumni, 2002),. 52.

[6] Badruzzaman Ismail, *Bunga Rampai Hukum Adat,* (Banda Aceh: Majelis Adat Aceh, 2003),. 1.

addition to discussion on legal protection and acceptance of the disputed parties to the customary court's decision.

Research Method

The typology of this research was empirical juridical with a qualitative approach. This approach was carried out by examining the applicable legal provisions and investigating what really happens in the community. This aims to obtain comprehensive research result as a whole related to the private dispute resolution through Aceh customary courts.

The Theoretical Framework of Legal Protection and Legal Culture

Satjipto Raharjo said that legal protection aims to protect human rights when harmed by others. The protection is given to society so that they can get all the rights granted by the law. In other words, legal protection is a variety of legal efforts that must be given by law enforcement officials to provide a sense of security both mental and physical, from disturbances and various threats.[7] Relating to this, Phillipus M. Hadjon said:

> "Legal protection for society is as a preventive and repressive government action. Preventive legal protection aims to prevent disputes. It directs the government to be careful in making decisions based on discretion, while repressive protection aims to resolve disputes, including handling in judicial institutions"[8]

Legal protection is the protection given to the law so that it is not interpreted differently and not misused by law enforcement officers. It also means the protection provided by law against something.[9]As stated by Satijipto Raharjo, a law can be used to actualize protection that is not merely adaptive and flexible, but also predictive and anticipatory. Those who are weak and not socially, economically, and politically stable need the law to obtain social justice.[10]

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[7] Satijipto Raharjo, *Ilmu Hukum,* (Bandung, Citra Aditya Bakti, 2000),. 74.
[8]Satijipto Raharjo, *Ilmu Hukum*,. 29.
[9] Sudikno Mertokusumo, *Penemuan Hukum,* (Bandung: Citra Aditya Bakti, 2009),. 38.
[10] Satijipto Raharjo, *Ilmu Hukum*., 55.

Legal protection theory is a theory that studies and analyzes the form or purpose of protection provided by law to the subject.[11] The theory of legal protection in this study shows the effectiveness of customary law in which its apparatus provides legal protection to the society. This will ultimately have an impact on the society's participation in resolving the cases they face through customary dispute resolution or participating in carrying out the customary justice.

This theory has been stated by Lawrence Meir Friedman whose theory was a part of the legal system theory. One of the sub-systems in the legal system is the legal culture. Legal culture, according to Lawrence Meir Friedman, is a human attitude towards law and the legal system-beliefs, values, thoughts, and expectations.[12] The legal culture here is understood as values, thoughts, and expectations of methods or norms in the social life of the community. The legal culture of society shows the atmosphere of social thought and social forces that determine how the law is used, avoided, or abused.

Talking about legal culture, Soerjono Soekanto stated that legal culture (system) is the values that underlie applicable law in the form of something that is considered good (so that it is followed) and what is considered bad (so that it is avoided). Cultural factors are one of the important factors that can influence law enforcement in addition to the law itself, law enforcement, facilities, and society.[13]

Legal culture, on the other hand, is closely related to public legal awareness. The higher legal awareness of the community is, the better they will create a good legal culture which can change the mindset of the society regarding the law that they have understood so far. The level of society compliance with the law becomes indicator of the law function. For example, in Acehnese society, it is well known a term called *sayam* as explained by Aboe Bakar in Taqwaddin Husin, et al, as follow:

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[11]Salim HS dan Erlies Septiana Nurbani, *Penerapan Teori Hukum pada Penelitian Tesis dan Disertasi,* RajaGrafindo Persada, Jakarta, 2014,. 263.

[12]Lawrence M. Friedman, *Sistem Hukum; Perspektif Ilmu Sosial (The Legal System; A Social Science Perspective),* Penerjemah M. Khozim, (*Bandung:* Nusa Media, 2009),. 8.

[13]Soerjono Soekanto, *Faktor-Faktor yang Mempengaruhi Penegakan Hukum*, (Jakarta: Rajawali Pers, 2012),. 59-60.

> "*Sayam* is reconciling problems or disputes between the parties where one party or both parties are bleeding. The sanction for offenders is paying *diat* or fines for killing or injuring someone. The implementation of the *diat* among the people of Aceh is the same as the concept of the *diat* in Islamic criminal law (*diat* in Islamic shariah). There is an Acehnese expression called (*hadih maja*) that mentions *Luka ta sipat, darah ta sukat*."[14]

The expression above means that the wound and blood will be counted fairly so that the payment of *diat* will be the same as wounds or blood that comes out. The standardization is determined by the wisdom of the customary court assembly. Besides, there is an institution called *suloh* as an effort to resolve disputes peacefully. *Suloh* comes from the word *Sulh* in Arabic. *Sulh* etymologically means deciding or resolving disputes or making peace. The term was found in the *fiqh* literature relating to issues of transactions, marriage, war, and rebellion.

Terminologically, *sulh* is a contract determined to resolve disputes.[15] It functions to reconcile disputes in society. The sanction is in the form of *dam*, which is the feast by slaughtering chickens, goats, cows or buffaloes. The amount and type of material for the feast depends on the level of the consequences from an offense. For minor violations, the feast in resolving the dispute through the *suloh* institution is enough by providing drinks, food, and yellow sticky rice.[16]

Forgiving one another as a community habit is a culture of obedience to the living values in society. Societies that adhere to Islamic values also recognize the system of forgiveness because of awareness that humans are not free from mistakes. At one time, a person becomes a victim of another person's crime; at other times, that

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[14] Taqwaddin Husin, dkk, *Mukim di Aceh Belajar dari Masa Lalu untuk Pembangunan Masa Depan,* (Yogyakarta: Diandra Pustaka Indonesia, 2015),. 176.

[15]Fauzi Saleh, *Konsep Suluh dan Konstruksi Pendidikan Damai di IAIN Ar-Raniry: Kontribusi Kampus dalam Dakwah Perdamaian di Aceh,* (Banda Aceh: Yayasan Pena dan Ar-Raniry Press, 2007),. 5.

[16]Agus Budi Wibowo, "Budaya Damai dalam Masyarakat Aceh," http: //agusbwaceh. blogspot. co.id/2009/08/ budaya-damai-dalam-masyarakat-aceh.html, (accessed on 30 April, 2018).

person may be a violator or the perpetrators of crime against another person in society. Thus requires a positive contribution from customary leaders in managing their communities. Otje Salman Soemadiningrat stated that "customary law is social rules created and maintained by legal functionaries (a powerful and authoritative person) which applies and is intended to regulate legal relations in society".[17]

The Authority of Customary Courts and Dispute Resolution

The authority of customary instruments to resolve cases or problems in society through customary court is the attributive authority given by the set of rules as a legal basis. In connection with this, Taqwaddin Husin said:

> "The rights and authority of indigenous and tribal peoples are regulated in Law Number 11 of 2006 on the Government of Aceh, Aceh Qanun Number 9 of 2008 on the Development of Customary and Indigenous Life, Aceh Qanun Number 10 of 2008 on Customary Institutions, and Governor Regulation Number 60 of 2013 on the Implementation of dispute or customary dispute resolution. They become more operational due to the Letter of Joint Governor Decree, Aceh Regional Police Head, and Aceh Customary Assembly of 2012. Therefore, on the perspective of legal and formal, *Gampong* as a Customary Legal Society becomes the basis of authority that is legal and authoritative."[18]

The source of authority of the customary legal society and the customary apparatus derives from the law. Meanwhile, the legal basis for customary instruments to carry out customary court is based on the 1945 Constitution of the Republic of Indonesia.

In particular, Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that: "The state recognizes and respects the unity of customary law society along with their customary rights as long as they are still alive and fit with

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[17] Otje Salman Soemadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer.* (Bandung: Alumni, 2002),. 14.

[18] *Jurnal Kanun* Nomor 67, Tahun XVII (Desember, 2015), Taqwaddin Husin, Penyelesaian Sengketa/Perselisihan Secara Adat Gampong di Aceh,. 511.

society development as well as the principles of the Unitary State of Indonesia as regulated in the law."

Furthermore, Law Number 44 of 1999 on Administration of Special Privileges of the Province of Aceh in Article 3 paragraph (1) states that the privilege is an acknowledgment from the Indonesian Nation given to the regions because of the struggle and intrinsic values of the community that have been maintained for generations as spiritual, moral, and humanitarian foundation. Afterward, the Article 6, which is the article that specifically relates to the implementation of customary life, states as follow: "Regions can establish various types of regulation in their effort to empower, preserve, and develop customs and customary institutions in their regions which are imbued and compatible to Islamic Sharia."

More specifically, Law Number 11 of 2006 on the Government of Aceh, in Article 98 Paragraph (2) states that the resolution of social problems is carried out through Customary Institutions. It is explained more at the *Qanun* of Nanggroe Aceh Darussalam Province Number 4 of 2003 on the *wukim* Government which gives *mukim* authority to decide and enact laws, preserve and develop local custom (*adat*), enforce local peace, resolve and provide customary decisions on disputes and customary violations, empower law and other reliable evidence according to custom as well as resolving based custom cases.

Additionally, *Qanun* of Nanggroe Aceh Darussalam Province Number 5 of 2003 on *Gampong* Government emphasizes that duties and obligations of the *Gampong* government, together with Tuha Peut and Imum Meunasah as the judge of peace, are to resolve custom disputes, keep the customary preservation, maintain order and prevent any immoral acts in the society. As for Aceh *Qanun* Number 9 of 2008 on the Development of Customary and Indigenous Life, particularly Article 1 Number 10 states that "custom is the rules of living conduct and habits applied in society and used as a guide to live in Aceh." Furthermore, Article 1, paragraph 11, states that Customary Law is a set of unwritten provisions that live and develop in Aceh society and as a consequence, anyone who violates it will get sanctions."

Aceh Qanun Number 10 of 2008 on Customary Institutions, in Article 1 Number 9, mentions that Customary Institution is a

customary social organization formed by a certain customary legal society. It also has a specific territory, assets, and right as well as authority to regulate, manage, and resolve problemsor disputes relating to Acehnese customs.

In line with taht, Aceh Governor Regulation Number 25 of 2011 on General Guidelines for Administering *Gampong* Government, in Article 1 Number 18 states that the customary Institution is a customary social organization formed by a particular customary legal society which has its assets the right and authority to regulate, manage, and settle disputes or problems related to Acehnese customs. In addition to it, Article 5 also mentions general guidelines for the administration of *Gampong* government, including dispute resolution according to customary law. The Appendix of the Governor Regulation also explains that one of Tuha Peut Gampong's tasks is to resolve disputes in the society with the *geuchik* and customary leaders.

This traditional practice also triggers response from the local government as clear at The letter of Joint Decree of the Governor of Aceh, the Aceh Regional Police Chief, and the Chairperson of Aceh Customary Assembly Number 198/677/2011 / Number: 1054 / MAA / XII / 2011 /Number: B / 121 / I / 2012. It is on the implementation of the *Gampong* and *Mukim* Customary Courts or other related names in Aceh. Following is is a part of the official letter;

> To create security, order, harmony, and peace in the society as efforts to reach prosperity and justice at *Gampong* and *Mukim* in Nanggroe Aceh Darussalam, the Customary Court Institution can function as an institution that solves customary cases or disputes as a Peace Courts institution.

This joint decree gives detail explanation as well as understanding that the disputes found at the level of *Gampong* and *Mukim*, as long as it comes from small problems as regulated in Articles 13, 14, 15 *Qanun* No. 9 of 2008, must be resolved in advance through the *Gampong* and *Mukim* customary courts. Any minor problems in society do not necessarily become cases to resolve legally through formal legal channels. Police officers, therefore, provide the opportunity for disputing parties to resolve the problems beforehand through *Gampong* or *Mukim* customary court.

Mentioned regulations above have provided strong foundation for carrying out customary court in Aceh. One of Aceh's

traditional instruments is *Geuchik* in *Gampong* which has implemented and maintained customary law in resolving disputes that within the society.

A dispute or conflict is a social problem directly related to the law and therefore requires integral solution. Considering that humans are social creatures, dispute resolution must take into account and uphold human values.[19] Related to private disputes in society, Article 13 paragraph (1) of the Aceh *Qanun* Number 9 of 2008 on the Development of Customary and Indigenous Life regulates custom disputes mention as follow.

> The custom disputes includes domestic disputes, disputes in family relating to *faraidh* (inheritance distribution), disputes between residents, disputes over property rights, dispute over *sehareukat* assets, customary violations of livestock, agriculture, and forests, disputes at sea, disputes in the market, and other disputes that violate custom values.

If those mentioned disputes can be resolved by deliberation and customary 'procedure', it will provide peace and restore balance in society. This is exactly what the concept of customary court expects as its basic concept is actually the root of restorative justice. The main element of restorative justice—which is also the characteristic of customary law—sdsds is the willingness and participation of victims, perpetrators, and society in making betterment on what had happened.[20]

[19]Yuzna Zaidah, *Penyelesaian Sengketa Melalui Peradilan dan Arbitrase Syari'ah di Indonesia*, (Yogyakarta: Aswaja Pressindo, 2015),. 3-5.
[20]*Jurnal Kriminologi Indonesia*, Vol. 6 Nomor II (Agustus 2010), Eva Achjani Zulfa, Keadilan Restoratif dan Revitalisasi Lembaga Adat di Indonesia,. 190.

The Process of Dispute Resolution through Customary Court

The dispute resolution through customary court requires all parties to respect how the *Gampong* and *Mukim* customary court holds the process. In resolving the cases, the *Gampong* or *Mukim* customary court can give a verdict based on customary law norms and customs prevailing in the local area. It is clear here, therefore, that the living law in a society can be different from others.

The *Gampong* and *Mukim* customary courts process are attended by parties and witnesses. They are also open for public except for certain cases which custom and propriety consider it improper to be open. Decisions of *Gampong* and *Mukim* customary courts are final and binding. They cannot even be submitted again in general or other courts.[21] Additionally, every customary court process of *Gampong* and *Mukim* was made a note in writing, signed by the chairman, members of the assembly and two disputing parties. The carbon copies of the document are delivered to the District Police Chief, Sub-District, and the Aceh Customary Assembly (MAA) in the district.[22]

The *Gampong* and *Mukim* Customary Court Assembly and procedures for disputes resolutions are written in Aceh *Qanun* No. 9 of 2008 and Aceh's Governor Regulation Number 25 of 2011 on General Guidelines for *Gampong* Government Administration. The administration of the *Gampong* and *Mukim* Customary Courts prohibits any decision that imposes bodily sanctions such as imprisonment, bathing with dirty water, shaving hair, cutting clothes, and other forms of sanction contrary to Islamic values. This applies for perpetrators in criminal justice process.

Meanwhile in a process of private dispute resolution, the emphasize is on the consensus agreement between disputing parties. Customary elders tend to be passive although they actually serve as mediators who are suppossed to help delivering the wishes of both parties. The customary judge, on the other hand, is prohibited to

[21]Responden 4, a customary elder of *KeMukiman* Piyeung, *Interview,* 22 March 2019 in Aceh Besar.

[22]Informant 1, the chief of Aceh Customary Board (Majelis Adat Aceh or MAA) Kabupaten Aceh Besar, *Interview*, 22 April 2019 in Aceh Besar.

impose his/her will on one party or both[23] because it is the disputing parties who know more about the problem-solution at hand as well as the one who will implement the verdict taken or agreed in the customary problem-solving process.

It is also important to note that cases solved at the *Mukim* level are what cannot be completed at the *Gampong* level. The Government of Aceh and Regency/City Government foster and oversee the implementation of customary *Gampong* and *Mukim* court in Aceh. The Head of Regional Police, the Chair of the MAA, and all of their staffs are also obliged to provide guidance, development, and supervision on customary law and customary court administration to ensure the compatibility to the rules and principles of customary law at the local community. In addition to it, the Government of Aceh and the Regency/City Government can help with administrative funding for the administration of the *Gampong* and *Mukim* Traditional Courts.

Legal Protection and Acceptance of Disputing Parties on the Customary Court Decision

Customary law will be well preserved when it can regulate various matters relating to society life association. In Aceh Besar, The Customary Court is engaged in solving private cases including land disputes, marriages, inheritance, and joint property (*gono-gini/seuhareukat* assets). Serving this role, it gives legal protection for disputing parties based on customary law in order to provide peace and balance in the society. After the problem gets resolved through The Customary Court, society typically accepts both parties like before. Both are considered like people who are just born without anything to do with any problem. Everything happened in the past can be simply forgotten or ignored.[24] Those parties go back to the normal life in peace. This is approperiate to what Sanusi said that the Customary Court does not recognize any justice concept and the resolution it made does not aim to find justice. Instead, when a

[23]Informant 2, local public figure at Aceh Besar District, *Interview*, 24 April 2019 in Aceh Besar.
[24]Responden 1, a customary elder of *Gampong* Ujong Keupula, *Interview,* 7 March 2019 in Aceh Besar.

dispute gets, it intends more to restore the balance and harmony of human relations in the society.[25]

Meanwhile, the acceptance of disputing parties on the Customary Court decisions in civil cases in Aceh Besar Regency has two categories. *First* is when the parties accept it very well and *second* is when there found no agreement and as a consequence, the decision of customary resolution is annuled through a lawsuit/legal effort to the Court. The good acceptance at the first category above generally occurs in the type of joint property disputes such as a case between an ex-husband and wife in Gampong Empetrieng, Darul Kamal District. Whereas, the second category tends to occur in the resolution of land disputes, such as a case between residents in Meunasah Ujong Keupula in Seulimeum District, a case of a resident with Gampong Iboeh Tunong elder in Seulimeum District, and a case at Piyeung Village in Montasik District.

There also found one of parties which refused the agreement formerly made by both in the customary resolution as what occured in Lampeuneun Village, Darul Imarah District. Initially, two parties had reached an agreement in deliberations to voluntarily—without any coercion—share the disputed land object equally. However, after the decision was mentioned verbally in the peace agreement, one of the parties denied it and refused to sign the peace agreement formulated by village apparatus in the peace agreement document.

Customary society used to obey customary leaders like how they adhere to a judiciary-based deliberation and consensus-system. However, in today's society, people begin to be disobedience to customary elders and this makes it difficult for the customary law to be applied. In the past, community prioritized the public interest rather than those of individuals or groups. Nowadays, customary society does not fully trust the customary court and this leds to some annulition cases of the customary decision without considering social sanctions in the community.[26] The same thing also happened in Piyeung Village, where the elders did not solve the problems as it is suppossed to be. The disputing parties wanted the elders to bring

[25] Sanusi Has, *Dasar-Dasar Planology,* Menara: Medan, 1977,. 34.
[26]Responden D, a defendant on the land dispute at *Gampong* Lampeuneun, Darul Imarah, 14 March 2019 in Aceh Besar.

them together in order to get the problem resolved. However, The *Mukim* elders made a decision on the dispute in which one of the parties loses its rights as the typical decision in the general court justice.[27]

The customary court decision is the result of deliberation and this aims to achieve peace between two disputing parties. The meccanism of deliberation does not give any punishment. Instead, it aims to restore the situation and recover it like before as if there was no problem or dispute between parties. Meanwhile, the location in which the traditional justice process and the deliberation step takes place was generally suggested by the Customary Assembly. Otherwise, it will be decided in a deliberation forum held to consider goodness of both parties and society at general. In the Aceh customary method, it is called "*adat koh rebong, koh purih law*" (customary problem can be solved by deliberation, but those that have been processed by legal process must be enforced).[28]

In a case of joint assets, the parties accepted the decision made by the customary court in Empetrieng Village, Darul Kamal Subdistrict, Aceh Besar District sincerely and gracefully because the customary court judges did not impose the decision. Furthoremore, the decision was made by considering the parties' opinions, wishes and agreement.[29] Acehnese people assume that any event, whether it was good or bad, was essentially an inevitable destiny. Therefore, each party must be grateful for all the good and bad that had happened. In the context of disputing parties, they particularly feel grateful because their opinions were respected and this makes them easy and sincere to accept customary court decision right away.

The customary court becomes an alternative solution for parties who litigate any legal problem when the general courts are often full of cases. It is also the most appropriate choice to take in settling any minor cases, especially individual ones. The customary court decision is based on deliberation of two parties in order to

[27]Responden C, a plaintiff on the land dispute at *KeMukiman* Piyeung, *Interview,* 22 March 2019 in Aceh Besar.
[28]Informant 1, the chief of Aceh Customary Board (Majelis Adat Aceh or MAA) *Interview*, 22 April 2019 in Aceh Besar.
[29]Respondent A, a plaintiff of joint assets dispute, *Interview,* 14 March 2019 in Aceh Besar.

achieve justice and peace between both. When an important decision is finally reached, the parties will typically carry it out as the decision is taken consciously, freely and independently with no coercion from anyone.

Beforeward, they also agree on each stage of judicial process as they rely on the village elders to solve the problem. They fully entrust the *Gampong* elders to determine the whole steps to take during the process so that the defendant is finally willing to make peace with the plaintiff. Additionally, with his/her own intiative, the defendant will give the plaintiff's rights as agreed before the *Gampong* elders as the customary court executive.[30]

Both parties are considered at the same position as citizens with moral responsibilities in social life. Both are also responsible to sincerely obey the customary court's decision as they are also obliged for maintaining the decision. Moreover, before the customary court issues the decision, the parties have been actively involved in each stage of decision making so both sides can get along well like before.[31]

However, resolving land disputes to the general court is still important to get a legal force. This is the final step that the parties take after going through the customary court process without a decision because of different opinions.[32] This attitude of the parties in resolving the case aims to resolve the problem, reconnect the 'bent' *silaturrahmi* (harmonious relationship), and restore balances in the society.[33]

There are several reasons on why Aceh Besar people chose to resolve their personal problems through customary courts. One of which is because with the customary court, they will keep maintaing a good relationship with family members so that family relationship becomes more harmonious. Another reason was the issue of the expensive cost to resolve dispute in the general court. Fifty percent of local people work as farmers and they will typically mind to pay

[30]Respondent B, a defendant of common property dispute, *Interview,* 14 March, 2019 in Aceh Besar.
[31]Responden 3, a customary elder of *Gampong* Empetrieng, *Interveiw,* 14 March 2019 in Aceh Besar.
[32] Responden 1, a customary elder of Gampong Ujong Keupula, *Intereview,* 7 March 2019 in Aceh.
[33]Responden 2, a customary elder of *Gampong* Iboeh Tunong, *Interview,* 7 March, 2019 in Aceh Besar.

expensive fees that can reach up to one million rupiahs. Besides, they are also lack of understanding on how to submit cases to the court.

Conclusion

Based on discussion above, it is clear that authority of the Aceh Customary Court comes from the mandate of the Law and the *Qanun* (Regional Regulation) which seek to formalize customary court. Subsequently, a joint agreement was formed among the Customary Assembly, the Regional Government, and the Police to create synchronization in the implementation of customary court in resolving legal issues in the society. The process of dispute resolution through customary courts happened upon the initiative of disputing parties to resolve their problems by involving village elders. Legal protection and acceptance of disputing parties on the customary court's decision in dispute resolution are justice that restores the balance in society which was formerly disturbed due to the dispute. The parties typically accept the decision of the customary court because it fits with their wishes as well as initiative. However, it is also possible for the parties to submit legal proceedings to the general court if they feel unsatisfied with the decision of the customary court, especially in the case of property right dispute.

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The Meaning of Happiness and Religiosity for Pre-Prosperous Family; Study in Manado, Bandar Lampung, and Yogyakarta

Ahmad Rajafi
Institut Agama Islam Negeri Manado,
Jl. Dr. S.H. Sarun dajang Kawasan Ringroad I, Kota Manado
Email: ahmad.rajafi@gmail.com

Naili Adilah Hamhij
Universitas Islam Negeri Raden Intan Lampung, Jl. Letnan Kolonel H Jl. Endro Suratmin, Sukarame, Kec. Sukarame, Kota Bandar Lampung

Suyatno Ladiqi
University Sultan Zainal AbidinTerengganu, Kampung Gong Badak, 21300, Terengganu, Malaysia

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Abstract:

Based on research conducted in 2017, this article wants to explain the correlation between happiness and religiosity for pre-prosperous families. The research took place in Manado, North Sulawesi Province, Bandar Lampung, Lampung Province, and Yogyakarta. The study wanted to prove a popular assumption that religious pre-prosperous people are typically not happy. It found a positive and significant relationship between happiness and religiosity in pre-prosperous families in Yogyakarta, but not in Manado and Bandar Lampung. The highest level of happiness is in Yogyakarta while the highest level of religiosity is in Manado. This difference occurs because the concept of happiness for religious pre-prosperous families in Manado, Yogyakarta and Bandar Lampung has different points of view and uniqueness.

Author correspondence email: ahmad.rajafi@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

Keywords:
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Abstrak:

Artikel hasil dari penelitian di tahun 2017 ini ingin menjelaskan tentang korelasi kebahagiaan dengan religiusitas bagi keluarga miskin. Locus penelitian berada di Kota Manado Propinsi Sulawesi Utara, Kota Bandar Lampung Propinsi Lampung, dan Kota Yogyakarta di Propinsi Daerah Istimewa Yogyakarta. Penelitian ini menjadi penting karena adanya asumsi di masyarakat bahwa orang yang miskin mesikipun religius dipastikan tidak Bahagia. Hal ini terpatahkan dengan hasil penelitian ini yang menunjukkan menunjukkan bahwa terdapat hubungan yang positif dan signifikan antara kebahagiaan dan religiusitas pada keluarga miskin di Yogyakarta, tetapi tidak di Kota Manado dan Bandar Lampung. Tingkat kebahagiaan tertinggi ada di Kota Yogyakarta sementara tingkat religiusitas tertinggi ada di kota Manado. Perbedaan tersebut terjadi karena keluarga pra-sejahtera di tiga kota tersebut memiliki pandangan yang unik dan berbeda.

Kata Kunci:
Kebahagiaan; Religiusitas; Keluarga; Miskin

Introduction

Manado is a religious city with various nicknames such as the City of Thousand Churches, the City of Prayer, and so forth. Therefore, it is easy to find a variety of well-organized religious activities such as what popular as *mapalus*. It is mutual cooperation in which people raise food from each household then distribute it to those who need it. Serving as a minority, Moslems in Manado also engage in this activity.

Likewise, the city of Bandar Lampung also seems religious as clear from some religious symbols in public places, such as a welcoming gate that reads two *shahada* (Islamic confession), the central government's gateway that reads the names of God, and even the government's monthly agenda called *tablîgh akbar* (a great mass

Islamic teaching) with some national preachers. The last agenda aims to provide religious knowledge intake to the community.

Meanwhile, besides known as the city of students, Yogyakarta also shows religious values through Javanese customs. The values are found in most of the kingdom's routine activities such as *labuan* ceremonies, *sekaten*, *nguras enceh, bekakak, grebek muludan* and so on. All aim to strengthen the community's religious values because strong religious motivation is required to restore Islamic community.[1]

However, the fact that those three cities are quite intense in showing their religious identity does not mean the prosperity of their people as such. Data at BPS (*Badan Pusat Statitik*; Central Bureau of Statistics) even shows that underprivileged people in Manado in 2014 amounted to 286,498 people. It then rose to 313,236 people in 2015 and rose again at 2016 to 334,732 people.[2] Bandar Lampung is also the same. Every year, it experiences an increase in the number of poor people. It had 359,948 poor people at 2011, 392,642 people at 2012, and 429,146 people at 2013.[3] Uniquely, the poverty rate at Yogyakarta goes up and down. It had 32,060 people at 2016, 32,200 people at 2017, and 29,750 people at 2018.[4]

The data shows a gap between religious values and prosperity. There are at least three basic assumptions on why this happens; *The*

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[1]Idi Warsah et al., "Muslim Minority in Yogyakarta: Between Social Relationship and Religious Motivation," *Qudus International Journal of Islamic Studies* 7, no. 2 (2019): 374, https://doi.org/10.21043/qijis.v7i2.6873; Ahmed M Abdel-Khalek, "Religiosity, Health and Happiness: Significant Relations in Adolescents from Qatar," *International Journal of Social Psychiatry* 60, no. 7 (2014): 657, https://doi.org/10.1177/0020764013511792.

[2]BPS North Sulawesi, "Garis Kemiskinan Di Kota Manado, 2004-2015," Blog, *Badan Pusat Statistik Kota Manado* (blog), August 18, 2017, https://manadokota.bps.go.id/statictable/2017/08/18/202/garis kemiskinan-di-kota-manado-2004-2016.

[3]BPS Bandar Lampung, "Garis Kemiskinan 2010-2014," Blog, *Garis Kemiskinan Kota Bandar Lampung 2010-2013* (blog), December 6, 2019, https://bandarlampungkota.bps.go.id/statictable/2015/12/08/16/garis-%20kemiskinan%20kota-bandar-la%20BPS.

[4]BPS Yogyakarta, "Tabel Kemiskinan Kota Yogyakarta," 6 Desember 2019, https://jogjakota.bps.go.id/dynamictable/2019/01/08/32/tabel-kemiskinan kotayogyakarta.html.

first is government's programs and policies in eradicating poverty which needs to be based on various studies from several perspectives and disciplines, one of which is the study of family psychology.

The second is a common assumption that generally, underprivileged families enjoy their situation. They are considered to feel accustomed to their living conditions while feeling "happy" on it. Therefore, no matter what the government's programs and policies are, it will not work well to change the condition. In the psychological term, this is called by *learned helplessness.*

In short, learned helplessness leads people to be over self-confidence and makes them think that any effort they do will not result in anything good. Scientific studies show that in dealing with difficult situations and hard challenges, some people turn out to "learn" to be helpless. This "learning" process makes them give worse performance than what they could do.[5]

In fact, according to Quraish Shihab,[6] when someone gets lazy, he hurts himself because Allah has certainly guaranteed sustenance for all his creatures, including "*dabbah*" (reptiles), which alsomeans "to move". However, this guarantee only applies for those who are always on the move to gain sustenance from Allah. It is not for people who do nothing and hope for other people's help.[7] In another verse, Allah reminds us to always go forward because He will not change any situation of certain people until they make changes and improvements themselves.

The third is another public perspective that in Islam, the pre-prosperity condition is a divine test or trial as well as destiny. Some people even consider poverty as a test of faith so that they have to be positive thinking to God Almighty.[8] This mindset encourages gratitude and happiness with what they have although they are lack

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[5]Michael T. Bixter, "Happiness, Political Orientation, and Religiosity," *Personality and Individual Differences* 72 (2015): 8, https://doi.org/10.1016/j.paid.2014.08.010.

[6]Muhammad Quraish Shihab, *Wawasan Alqur'an: Tafsir Maudhu'i Atas Berbagai Persoalan Umat*, 14th ed. (Bandung: Mizan, 1996), 443.

[7]Shihab, 443.

[8]Syarif Imam Hidayat, "Kemiskinan Dalam Perspektif Masyarakat Desa Tertinggal Yang Religius" (Disertasi, Malang, Universitas Brawijaya, 2011), 2.

of many things. They further think that happiness is felt by themselves even in a hard economic condition in which other people will think it as very vulnerable ones.

In this talk, religiosity is one of the influencing factors on someone's happiness. The above-mentioned mindset makes them accustomed to keep doing nothing, being reluctant, and helpless to try anything. This phenomenon indirectly implies that religion teaches poverty. Some people assume that poverty has something to do with certain religious understanding well spread in Indonesia, namely Sufism, whereas, the Qur'an has clearly stated the synergy between the wordly will and the will of the hereafter.[9]

Additionally, Abu Hurairah has also narrated a hadith from the Messenger of Allah about a strong believer who is better (in Allah's eyes) compared to the weak ones. To be a strong believer, one needs to work hard and be active so that the power of faith can well correlate to physical and financial strength.[10]

The explanation above confirms that this research will be among the first steps in formulating happiness concept based on the different cultural perspectives in some Indonesian regions, especially the City of Manado, the City of Bandar Lampung and the City of Yogyakarta. It focuses, however, on the concept of happiness for pre-prosperous Muslim families.

A sampling of Muslim families becomes important because pre-surveys on a few months in 2016 (January to September 2016) show how Moslem underprivileged families in the cities of Manado, Bandar Lampung, and Yogyakarta were quite largely spread. Those three cities are well known in their regional development program with the concept of religiosity.

Method

This research uses a mixed-method that tries to synergize quantitative and qualitative ones. It aims to obtain research data that is complete and valid as well as reliable and objective. The mix also enables researchers to avoid each quantitative and qualitative

[9]Al-Quran, al-Qasshash [28]: 77

[10]Mohammad Irhan, "Etos Kerja Dalam Perspektif Islam," *Jurnal Substansia* 14, no. 1 (April 2012): 19.

method's disadvantages.[11] The technique used in this mixed-method is the concurrent model so that the researcher can assemble the data found from one research method to another by scaling first to produce quantitative data then proceeding with the interview to produce qualitative data. The object research of this study and the cities are chosen based on several variable criteria.

Data Presentation

Data obtained from a sample of 234 people from 3 cities in Indonesia, namely Manado, Yogyakarta and Bandar Lampung shows that the overall happiness scale has 11 as the lowest value while the highest is 36. The standard deviation is 5.091 and the mean is 27.82. Meanwhile, the religiosity lowest scale isl;k,p'/ 72 and the highest is 108 with 7154 as the standard deviation and 95.71 as the mean. Following is the distribution table:

Table 1
Description of Statistics

	Happiness	Religiosity
N Valid	234	234
Missing	0	0
Mean	27.82	95.71
Median	29.00	95.00
Std. Deviation	5.091	7.154
Minimum	11	72
Maximum	35	108

In grouping happiness, values was made in three models namely high, medium, and low. Calculation of value grouping is as follows:

Table 2
Happiness Score Category

Category	Score	Frequency	Percentage

[11]Sugiyono, *Metode Penelitian Kombinasi (Mixed Methods)* (Bandung: CV. Alfabeta, 2011), 48.

High	25-35	196	84 %
Medium	13-24	35	15 %
Low	1-12	3	1 %
Total		234	100%

The table above shows that the number of respondents with high level of happiness is 196 people (84%), 35 people (15%) at moderate level and 3 people (1%) at low level. This explains that respondents with high level of happiness get the highest score. Whereas the aspect of religiosity, which is categorized as high, medium, and low categories produces answers as follows:

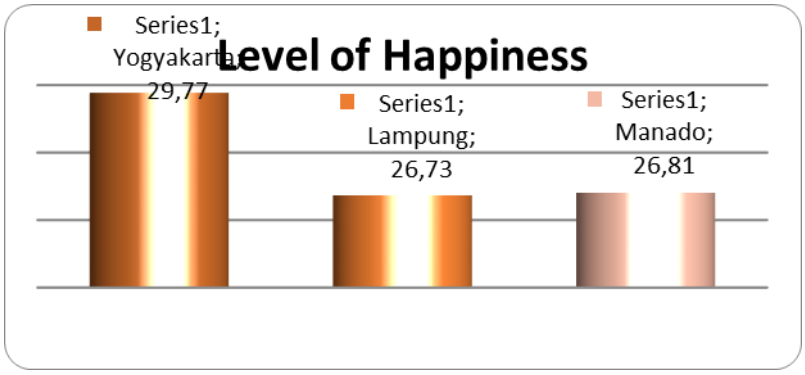
Table 3
Religiosity Score Category

Category	Score	Frequency	Percentage
High	73-108	233	99,6 %
Medium	37-72	1	0,4 %
Low	1-36	0	0 %
Total		234	100%

The table above explains that respondents with a high level of religiosity are 233 people (99.6%), moderate religiosity with 1 person (0.4%) and there found no one at all (0%) with low level of religiosity. This also emphasizes that the majority of respondents are at a high level of religiosity.

1. Happiness Scale Measurement Result

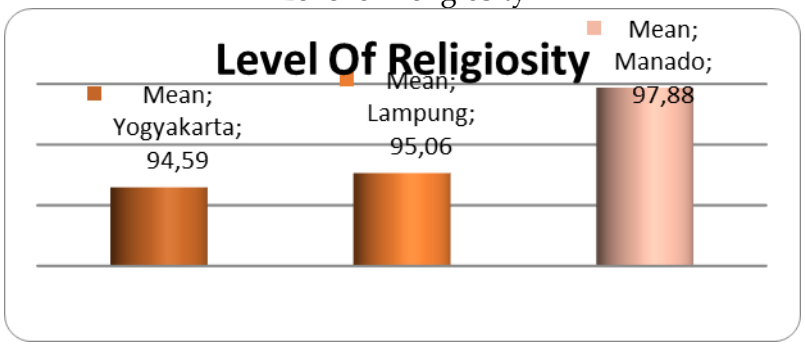
Diagram 1
Level of Happiness



The table above shows that the highest level of happiness is in the city of Yogyakarta with 29.77 as the mean, while the lowest is in the city of Lampung with a mean of 26.73.

2. Religious Scale Measurement Result

Diagram 2
Level of Religiosity



The table shows that the highest level of religiosity is in Manado with a mean of 97.88 while the lowest is in Yogyakarta with a mean of 94.59.

3. Correlation Test Between Happiness and Religiosity of Pre-Prosperous Families

Hypothesis test statistical analysis in this study uses the Pearson Product Moment correlation formula while the calculation uses the SPSS program version 13.0. The result is as follows:

Table 4
Hypothesis Testing

City	r	R Square	F	Sig.	Information
Yogyakarta	0.497	0.247	26.519	0.000 < 0.01	Significant
Lampung	0.159	0.025	2.539	0.114> 0.05	Not Significant
Manado	0.208	0.043	2.209	0.144> 0.05	Not Significant

- Religiosity is positively correlated with happiness in Yogyakarta, Lampung and Manado.
- Religion can significantly predict happiness in Yogyakarta with F = 26,519 and P <0.01.
- Religiosity can predict happiness by 24.7%.
- Religiosity cannot predict happiness in Lampung and Manado.

Correlation of Happiness with Religiosity

A religious person has a firm belief which leads and guides everything he/she does to be God Almighty-oriented. In Islam, this concept is known as *tawakkal*, which means the surrender of all affairs to Allah. Those with *tawakkal* will religiously conduct any wordly activities by beginning and ending their work with prayer while wishing the harmony between their will and God's will. This will eventually create a bighearted mind to accept any divine destiny that God has fated.

Furthermore, this attitude will create mental strength in coping with life and its challenges. For religious groups, this kind of religious value can even be a savior in dealing with various problems and crises. Religious belief can also shows high spiritual values which

leads to positive thinking mindset to avoid them from blaming any fate they have.

This reason is in line with the research result which shows that people with low economic levels (pre-prosperous) are still able to enjoy their lives and feel happy for what they have. The main basis for their happiness comes from their attitude and religiosity. Religiosity is a solution for underprivileged people to continue surviving and living their lives while surrendering to Allah Almighty.

Self-surrender to the Almighty and belief on the existence of an external element outside human being which determines life destiny greatly helps underprivileged people to manage their negative emotions or prejudice. Instead, this will lead them to continual gratitude under any conditions. Therefore, they keep getting closer to Allah as being aware that religiosity is the basic capital to get worldly happiness.

Happiness Concept of Religious Pre-Prosperous Families in Manado

Based on data from the measurement scale in the previous discussion, it is known that correlation between happiness and religiosity in Manado people is at a significance level of 0.05. This explains that the correlation is insignificant, although the religiosity scale level in Manado shows the highest number. In another word, when a person experiences an increase in his/her religiosity, it is not necessarily an increase in happiness right away. Therefore, religiosity cannot predict happiness among Manado people.

Furthermore, on the previous happiness scale, it was also found respondents who felt happy even though their economic standard was not good with a percentage of 26.81%. With such assessment, a happy person actually will get used to manage his/her personality in a positive framework and therefore be able to create happiness for themselves and others while negating any unhappiness.

This study makes it clear that no significant relationship between happiness value and religiosity level. This means that happiness is not always influenced by religiosity even though religious factors are one indicator in creating happiness for each individual. In essence, happiness will exist along with a sense of security and comfort within oneself even in the pre-prosperous

condition. Being comfortable amid in poverty, in other words, can even create happiness.

In the context of Manado with its plural people, local wisdom and religious values do exist and live. However, at the implementation level, Manado people nowadays are very difficult to synergize the values of wisdom and religion. The concept of *sitou timou tou* which means "we live to support others" is a very strong social norm born from ancestors of the *toar lumi muut* land. However, at the level of implementation today, they prefer another concept that is pragmatic and materialistic and reads; "it is ok for getting lose in rice as long as winning in action".

For some Manado's people, physical appearance is the most important thing. It is even considered more important than food at home. This is what drives many underprivileged Manado families to feel comfortable and happy amid their poverty. In other words, culturally, underprivileged Manado people are accustomed to living with poverty and this makes them not want to try hard to improve their standard of living. In addition to it, the pseudo-hedonist or prestigious lifestyle of most underprivileged Manado families leads them to have less productive habits (being passive or relying on fate) and wasteful in spending a small amount of income. As a result, they do not feel poor even though others see them as the poors.

Therefore, the phenomenon of poverty in Manado is in line with what is called by Nasikun "cultural poverty".[12] It is a type of poverty born from cultural behavior of one's life using the mindset which accepts everything right away without any slightest enthusiasm to move forward for improving quality of life and economic aspect. It instead leads to the attitude of laziness, wastefulness, and always expecting help from others.

Happiness Concept of Religious Pre-Prosperous Families in Bandar Lampung

[12]Nasikun, *Isu dan Kebijakan Penanggulangan Kemiskinan*, Diktat Mata Kuliah (Yogyakarta: Program Magister Administrasi Publik Universitas Gadjah Mada, 2001), 12.

The data on the happiness scale in Yogyakarta, Bandar Lampung and Manado shows that the level of happiness of religious pre-prosperous families in Bandar Lampung is the lowest with a mean of 26.73. The highest level belongs to religious pre-prosperous families in Yogyakarta with a mean of 29.77 which was then followed by Manado with a mean of 26.81.

While for the scale of religiosity, the level of underprivileged families in Bandar Lampung City is in the second position with a mean of 97.88. The highest level of religiosity is in Manado with a mean of 97.88, while the lowest is in Yogyakarta with a mean of 94.59.

The research data above illustrates the insignificant relationship between the level of happiness and the level of religiosity in Bandar Lampung amounting to 0.159 and the significance (p) = 0.000; (p <0.05). This shows that religiosity is not positively correlated with happiness in Bandar Lampung. In other words, the level of religiosity of most underprivileged families in Bandar Lampung cannot predict their level of happiness. This means that if there is an increase in a person's religiosity, it will not necessarily mean an increase in his/her happiness as well.

There are at least four factors that cause high poverty rates in Bandar Lampung as follow:

1. The low quality of human resources. Most the pre-prosperous people from job clusters as farm laborers, scavengers, construction workers, and small traders have elementary school education backgrounds and have no other skills. Neither do they have any production resources, both land ownership and production tool, as well as network access and capital. They want to work as a more prospective worker, let alone be civil servants. However, they seem not eligible for those more promising jobs.
2. Availability of job vacancies. They admit that they want a more prospective job. However, no one accepts employees with unclear skills and low educational backgrounds.
3. Equality factor. Both interviews and observations show that most of them do not have their production land as well as elucidation or training experience.

4. Structural factors. Government programs to improve underprivileged people's welfare only foster an attitude of dependency.

The description above shows that the typology of poverty in Bandar Lampung is categorized as a type of absolute poverty as well as structural ones. It turns out that the majority of pre-prosperous families in Bandar Lampung know that they are classified as underprivileged due to economic inability and lack of economic resources ownership. Besides, the low quality of human resources as a result of low education and lack of skills becomes another main reason which leads them to keep being comfortable with the poverty they deal with.

This is further exacerbated by poverty alleviation government programs which have not been effective particularly for long-term period. This is because the Bandar Lampung government is still using an economic growth strategy with a top-down approach. Thus, physical development programs become a priority instead of a more sustainable ones for people's economic growth.

Happiness Concept of Religious Pre-Prosperous Families in Yogyakarta

According to Compton, every individual has different methods in defining and making happiness based on their respective culture and affordability.[13] Javanese society, including Yogyakarta, for example, has high cultural values and is rich in life philosophy. One of the living cultural contexts in Javanese society is the togetherness of a family. Therefore, it is easy and reasonable to find a single house with a lot of heads of families. This is based on an assumption that living together will eradicate any family difficulties and make it easy for all family members to feel happy.

Meanwhile, Herusatoto[14] mentioned that sincerity (*nrimo* in Javanese concept) has become the main capital for Javaness people and has been entrenched in organizing their lives to enlive happiness

[13]W.C. Compton, *Introduction to Positive Psikologi* (USA: Malloy Incorporated, 2005), 33.

[14]B. Herusatoto, *Simbolisme Jawa* (Yogyakarta: Ombak Yogyakarta, 2008), 82.

of their own. This leads them to an attitude to always accept whatever God positively gives them. They will feel satisfied with any divine fate that God has set for them. Whatever occupation they have, in this context, they will be happy for that without putting any negative thoughts.

Ikhlas or *nrimo* will further automatically omit all forms of envy on other people's success. Their living mindset mentions that everything is predestined by God and the promised fortune will never run away from its owner or those who are fated for. This particularly applies to income and livelihood. However, this attitude sometimes leads to the negative impact such as making someone too relaxed in life and less willing to work harder.

Such a way of thinking is sometimes contradictory to how the external parties see their situation. For them, pre-prosperous life is something negative and is considered to make no happiness at all. However, for those who experience it themselves, their life is a happy one due to a mindset that physical welfare or property is only entrusted from God so that they can't bring it to after death life.

This is what most respondents of this study told on how they try to enjoy life without feeling or forcing themselves to get something more. They keep doing this even though they live in an improper places with a slum atmosphere, narrow houses, even altogether with some family heads in a single crowded house.

This life choice is easy to find among people in Yogyakarta. Respondents from some of the Palace Servants (*Abdi Dhalem*) even told how they feel very grateful and happy for what they do and get in daily life. They called it as priceless and immeasurable value even though they got a "wage" that other people think was very unheard of worth. The main principle they believe and rely on is devotion so that when the King gives them land to occupy like a gift, they feel as a servant who gained much more trust from the King.

This is clear from the results of data analysis using product moment analysis techniques from Pearson which shows a correlation coefficient (rxy) of 0.497 and significance (p) = 0.000; ($p < 0.01$). This means a significant positive relationship between religiosity and happiness among underprivileged people who live in Yogyakarta. It accentuates that the higher religiosity of a person is, the higher their happiness will be.

It is obvious that there found an effective connection between the variables of happiness with religiosity by 24.7%. Meanwhile, theological beliefs significantly have a positive relationship with subjective well-being and contribute a slightly more number, namely 24.2% to life satisfaction which then followed by happiness as a short-term positive effect.

Furthermore, interviews with 100 heads of underprivileged Islamic families spreading across several sub-districts in Yogyakarta found that what makes happiness for them are as follow:

1. Living together with the Family

   There is a Javanese proverb saying "*mangan ora mangan sing penting ngumpul*" (having meal or not is not important as long as we are together) which reflects how the Javanese community always wants to live together with their family. They will feel much more comfortable living like that in a place or environment in which they were grown up.

2. Health

   Another common adage among the Javanese community is *sing penting waras* or the most important thing is being healthy. A healthy body enables people to get what they want. They believe that as long as God has provided health, it means happiness right away because without health, a person would not be able to work and get income and when this happens, there will be nothing to eat and the family will not be happy. Therefore, they always pray for health. Moreover in Javanese culture, all earthly creatures such as trees, rocks, oceans, and so forth are considered to provide many benefits that require them to be grateful through a celebration of gratitude.

The various description above shows how underprivileged families in Yogyakarta are also able to get the value of happiness in their lives. Their achievement of happiness is much influenced by the values of religiosity. Religiosity becomes a positive tool to heighten their life expectancy through values of self-reliance or self-surrender to what God has fated for them.

Those with a high degree of self-surrender to God Almighty will trust on the existence of external help from unpredicted ways and agents. This attitude will manage their life very well while removing

any apathetic tendency and making poverty affect nothing in their life. They will be grateful for that and keep doing it as time goes by and consequently, this makes them look happy all the time.

The phenomenon of poverty in Yogyakarta uncovers the attitude of self-surrender among most of its pre-prosperous families. Poverty indicator is mainly clear from very low work income due to less productive works such as serving as courtiers, laborers, builders, and scavengers. This is made worse by the unfair distribution of resources which leads to various forms of discrimination and helplessness situation of underprivileged families in various ways. This is further in line with Nasikun's hypothesis which emphasizes the existence of structural poverty in which when a father is poor, all of his descendants will be typically poor as well.

Conclusion

There found a positive and significant relationship between happiness and religiosity in underprivileged families in Yogyakarta, but not in Manado and Bandar Lampung. The highest level of happiness is in Yogyakarta while the highest religiosity level is in Manado. The concept of happiness of religiosity among pre-prosperous families in Manado, Yogyakarta and Bandar Lampung are different from each other with a unique way and outlook. It is found that even though in pre-prosperous condition, religious families can find happiness with their concept of happiness. Each subject has different views, for example about being together with family members and doing devout worship. Almost all subjects define happiness as being together with family and devout worship.

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The Implementation of *PERMA* Number 3 of 2017 Concerning the Guidelines for Dealing with Women's Cases on Laws as an Effort of Women Empowerment in The Judiciary in Madura

Siti Musawwamah
Syariah Faculty, IAIN Madura, Jl. Raya Panglegur, Km. 04 Tlanakan, Pamekasan 69371
Email: mamahtaufiq@yahoo.com

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Abstract:

Women empowerment in the judiciary institution had actually been sought since the moment of rule enforcement on reasons for divorce and implementation of (valid) divorce before a court hearing. This policy is an affirmation of legal renewal in the UUP (marriage law) and KHI (Compilation of Islamic Law) as well as an entry point for the law protection on women through the guarantee of legal certainty and opportunity to fight for their rights in divorce decisions, including right of gaining *nafkah māḍiyah* (past/indebted), *nafkah 'iddah*, *nafkah mut'ah*, shared assets, *haḍānah* (child custody) and childcare costs. The problem relates to the execution of the judiciary decision as it deals with some problems. One of which is the fact that there found no rule regarding with mechanism/method as well as the time limit for the implementation, while the divorce pledge would be expired within 6 months after the decree of pledge permission. Accordingly, the Supreme Court's policy to issue PERMA number 3 of 2017 concerning the guidelines for dealing with women's cases in law shows its significance. Using a qualitative research design, this

Author correspondence email: mamahtaufiq@yahoo.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

paper aimed at describing the implementation of PERMA number 3 of 2017 in religious courts in Madura, identifying constraints in its implementation, and explaining in detail the solutions to overcome the constraints. The results of this study are expected to be beneficial as an attempt to empower women by removing all barriers they cope with. Furthermore, it also enables them to gain access to justice without any discrimination in the justice system particularly in the religious court system at all levels, namely the first level, appeal, and cassation.

Keywords:
PERMA Number 3 of 2017; Women Empowerment; The Judiciary

Abstrak:
Pemberdayaan perempuan di lembaga peradilan sesungguhnya sudah diupayakan sejak penormaan tentang alasan-alasan perceraian dan pelaksanaan (keabsahan) perceraian di depan sidang pengadilan. Kebijakan ini merupakan penegasan kebaruan hukum dalam UUP (Undang-Undang Perkawinan) dan KHI (Kompilasi Hukum Islam) sekaligus menjadi pintu masuk upaya perlindungan hukum terhadap perempuan, yaitu adanya jaminan kepastian hukum dan kesempatan untuk memperjuangkan hak-hak mereka dalam putusan perceraian, meliputi hak untuk mendapatkan nafkah *māḍiyah* (nafkah lampau/terhutang), nafkah*'iddah*, *mutʿah*, bagian harta bersama, *haḍānah* (hak asuh anak) dan biaya pengasuhan anak. Problemnya adalah terkait eksekusi putusan, dalam praktiknya banyak mengalami kendala karena ketiadaan aturan tentang mekanisme/cara dan batas waktu pelaksanaannya, sementara waktu ikrar talak dibatasi maksimal 6 (enam) bulan setelah ditetapkan hari sidang tentang izin ikrar talak. Pada posisi inilah kebijakan Mahkamah Agung menetapkan PERMA Nomor 3 Tahun 2017 Tentang Pedoman Mengadili Perkara Perempuan Berhadapan dengan Hukum

menampakkan signifikansinya. Dengan menggunakan desain penelitian kualitatif tulisan ini bertujuan mendeskripsikan penerapan PERMA Nomor 3 Tahun 2017 di lembaga Peradilan Agama se wilayah Madura, mengidentifikasi kendala penerapannya, dan menjelaskan secara rinci atas solusi mengatasi kendala penerapannya. Hasilnya diharapkan dapat memberdayakan perempuan dengan menghapus segala hambatan bagi perempuan memperoleh akses keadilan dan membebaskan dari segala bentuk diskriminasi dalam sistem peradilan termasuk sistem peradilan agama di semua tingkatan, yaitu tingkat pertama, banding dan kasasi.

Kata Kunci:
PERMA No. 3 Tahun 2017; Pemberdayaan Perempuan; Lembaga Peradilan

Introduction

On July 17, 2017, the Supreme Court of the Republic of Indonesia known as MARI had stipulated "pro-women" regulation in the form of Supreme Court Regulation Number 3 of 2017 concerning guidelines for adjudicating women's cases on the law (PERMA—Peraturan Menteri Agama, The Ministry of Religious Affair's Rule—Number 3 of 2017).[1] The legal mandate of this regulation is MARI's commitment to empowering women in the judiciary through removing all of their obstacles, enabling them to gain access to justice and freeing them from any type of discrimination in the justice system including those in the first level of religious justice system, appeal and cassation.

As commonly known, in many legal cases, women are still inferior to men. For example, in divorce cases, women generally do not get enough legal protection due to the lack of certainty on post-

[1] "PERMA Nomor 3 Tahun 2017 Tentang Pedoman Mengadili Perkara Perempuan Berhadapan Dengan Hukum," 2018, Accessed on June 10, 2018.

divorce rights they and their children deserve.[2] The condition remains the same unless they file a reconvention lawsuit (counter-retribution) in divorce cases or accumulation (merging of claims) in divorce suitcases. If the judges do not use their ex-officio rights (rights inherent in the office of judge), women will even be the losers after the divorce verdict because they have to take responsibility for their survival and their children while the men (husbands) are free from any obligations.[3]

Another problem relates to the execution of divorce decision as there found no rules about method and time limit for its implementation[4] while at the same time, the divorce pledge is limited to six months at maximum after the trial day on the approval of divorce pledge as stipulated in Article 131 paragraph (4) of KHI as follows:

> "If the husband does not declare the divorce pledge within six months since the decision of the Religious Court regarding the permission of the divorce pledge for him to have permanent legal force, then the husband's right to pledge the divorce becomes invalid and the marriage ties remain intact"[5]

The deadline for divorce pledge gives a big dilemma for women who file reconvention claims against their husbands. Although the Court might grant all or some parts of a lawsuit for their and their children's rights, the husbands remain the determining factor. Husbands who do not get well committed to the deadline of the divorce pledge will abuse it to punish the wives by not carrying out the divorce pledge until the six months expires. As a result, the verdict was declared null and void by law while the

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[2] Ahmad Tholabi Kharlie, "Modernisasi, Tradisi, Dan Identitas: Praktik Hukum Keluarga Islam Indonesia," *Studia Islamika* 18, no. 1 (2011): 167–99, https://doi.org/10.15408/sdi.v18i1.444.

[3] Siti Musawwamah et al, "Penelitian Sosio-Legal Penyelesaian Kasus KDRT Di Pengadilan Agama Wilayah Madura," 2015, 147.

[4] Syaiful Annas, "Masa Pembayaran Beban Nafkah Iddah Dan Mut'ah Dalam Perkara Cerai Talak (Sebuah Implementasi Hukum Acara Di Pengadilan Agama)," *Al-Ahwal* 10, no. 1 Juni (2017): 2.

[5] "Kompilasi Hukum Islam" (1991), See article 131 paragraph 4.

marriage is considered to be still officially intact as if a divorce process had never taken place.

That situation puts the wives in a big difficulty and dilemma between *de facto* that they do not live in a marriage institution anymore as husband and wife and on the other hand, *de jure* that they do not divorce because their marriage has not been declared broken. The choice often becomes complicated between surviving an unmarried marriage and getting divorced by taking initiative to file for divorce suit with the risk of not obtaining their and their children's rights because the husbands will certainly not attend to the court and finally the verdict is made in verstek.

The problem remains serious for women hitherto. A case shows how hard it was for a wife who was divorced by her husband while he did not pledge for divorce declaration until the deadline of six months. They lived apart as they have divorced; the husband lived alone and the children lived with the wife.

Dealing with this, the wife persisted not filling for divorce suit to the court because she did not want to lose her and children's rights along with her husband's arrogance. The uncertain-or hanging up-position of marital status lasted for two years and finally ended when the husband took the initiative to file for divorce again because he needed legality of the single status as a requirement of carrying out a marriage with another woman.[6]

The same problem has also been experienced by a wife with three daughters who got divorced by her husband on the charge of always being jealous and accusing him of having an affair with another woman. In the court, the wife could reveal the fact that her husband did not only have an affair with another woman but also got married through *sirri* (unofficial) ones and got a daughter. Realizing that she had to support the children by herself, the wife demanded her and the children's rights up to the cassation level.

[6]The first divorce pledge was through a decision no: 092/Pdt.G/2015/PA.Pmk while the appeal verdict was no: 0032/Pdt.G/2016/PTA.Sby while the second divorce was on the decision no: 0173/Pdt.G/2018/PA.Pmk.

Unfortunately, the husband did not comply with the cassation decision by not declaring the divorce pledge until the deadline of six months. As a result, the verdict was null and void by law while the marriage remained intact. After two years, the husband filed for divorce again while the wife, due to her persistence in fighting for her and her children's rights, found her demand granted by the judges at the cassation panel in the form of *nafkah madliyah* for five years, *nafkah'iddah*, *mut'ah*, and *nafkah* for three children.[7]

Those two cases show how big a dilemma for women is as the common condition often puts the status of divorce at risk. If the husband does not declare the divorce pledge until the deadline of six months, the divorce process will be considered never happen before even though in reality, both have long been separated. In other words, maintaining the fulfillment of post-divorce rights is a difficult choice for women because it implies the divorce status and survival of herself and her children. In this position, the implementation of PERMA number 3 of 2017 shows its significance to empower women in the judiciary, namely eradicating the injustice for them either because what their husbands do or the how legal system is gender biased as it is fully not in favor of women.

As a follow-up to PERMA number 3 of 2017, the Supreme Court has issued a Supreme Court circular number 1 of 2017 concerning the implementation of the results of the Supreme Court plenary meeting in 2017 (SEMA Number 1 of 2017). Its letter C (1) mentions that in the framework of PERMA number 3 of 2017 and to provide legal protection for women's rights after divorce, the method of payment can be explicitly written in the decision with the sentence "paid before the pledge of divorce" unless the wife wants otherwise.

The studies on the Supreme Court regulation on guidelines for adjudicating women in law cases (PERMA number 3 of 2017)

[7]The first divorce pledge was through decision of Pamekasan Religious Court number : 0233/Pdt.G/2011/PA.Pmk and cassation decision number: 559K/AG/2012, while the second divorce was through Pamekasan Religious Court: Number: 0209/2014/PA.Pmk.

have not been much conducted since it is a relatively new issue in legal research. Precisely as stated before, this "pro-woman" regulation was only adopted on July 17, 2017 and aims to remove women's obstacles to gain access to justice and free them from any forms of discrimination in the Indonesian justice system in including those on the religious court at all levels, first level, appeal and cassation. Even so, several related previous studies are available as follow:

First, a library research on *maslahah* (advantageous) analysis of PERMA number 3 of 2017 concerning the guidelines for adjudicating women's law cases. It aims to find out the background of the establishment of the PERMA and analyze it based on *maslahah* theory. Results of the study concluded that the establishment of the PERMA closely relates to the practical fact that the Indonesian justice system was still full of discrimination and gender stereotypes. Therefore, the PERMA can be interpreted as a form of partiality to women as it aims to eliminate all forms of discrimination and legal dysfunction of women's rights enforcement.

In the *maslahah* perspective, the "pro-women" regulation is categorized as a *maslahah hajiyah* because women dealing with law cases or become litigants need it to facilitate their legal processes and assure sustainability of their lives. Without the good implementation of the PERMA, women will find many problem as it will materially and non-materially give them negative impact.[8]

Second, a research on the effect of PERMA number 3 of 2017 concerning the divorce cases in Kediri Religious Court before and after the stipulation of the PERMA. The study aims to identify the differences in divorce decisions before and after the stipulation of the PERMA as well as to find out any existing obstacles to the PERMA's implementation in deciding divorce cases at Kediri

[8] Silmi Mursidah, "Analisis Maslahah Terhadap PERMA No. 3 Tahun 2017 Tentang Pedoman Mengadili Perkara Perempuan Berhadapan Dengan Hukum" (UIN Sunan Ampel Surabaya, 2017),Accessed on August 15, 2018.

Religious Court. Using the juridical-normative (doctrinal) research methods, the study found these following points:

First is the fact about differences decision of the divorce petition after the stipulation of PERMA. This is clear from the existence of an order to pay *nafkah iddah*, *mut'ah* and *madliyah* before the declaration of divorce pledge. Meanwhile, in the divorce suit decision, there found no differences after enactment of the PERMA.

The Second is about the constraints to implementing the PERMA which relates to a paradigm of judges in interpreting the concept of wives' *nusyuz* (betrayal) which results in nullification of the wives' right after divorce. Another constrain is the factual conditions of certain disputing parties, especially the husband with a low economic level which makes the judge find it difficult to determine the payment of the settlement obligations after the divorce.[9]

Third, a study on the role of the Religious Court in protecting the rights of women and children through friendly and implementable decisions written by Amran Suadi, the judicial chairperson of the Indonesian Supreme Court. This study concluded that in response to the lack of realization of the divorce verdict including the fulfillment of wives and children's right after the divorce and as an effort to protect women and children, the Indonesian Supreme Court has made a new policy at RAKERNAS 2017 held in Bandung to issue SEMA Number 1 of 2017 concerning the imposition of the results of the 2017 Supreme Court's Plenary Meeting as a guideline to implement the duties for the judiciary institution.

One of its important results is the establishment of the rules that in the framework of implementing PERMA number 3 of 2017 and protecting the rights of women after divorce, the payment of obligation due to divorce, especially *iddah, mut'ah*, and *nafkah madliyah* can be explicitly included in the verdict with the sentence "paid before the pronouncement of divorce pledge". However, a

[9] Nauval Rikza, "Pengaruh PERMA No. 3 Tahun 2017 Terhadap Perkara Perceraian Di Pengadilan Kabupaten Kediri" (Universitas Muhammadiyah Surakarta, n.d.), Accessed on August 15, 2018.

divorce pledge can still be implemented if the wife does not mind when the husband does not pay the obligation at the time. This provision becomes legal protection for the Religious Court to make decisions that protect women because in some cases, implementation of the divorce pledge tends to ignore women's position and situation.[10]

The mentioned previous studies show that this research corroborates the research findings of the position of the PERMA that the MARI's policy can serve as legal protection for Religious Courts to make decisions that protect women (and children) by fulfilling the benefit (*maslahah hajjiyah*) for women dealing with law cases. It mainly eradicates women's obstacles to gain access to justice and equality in the justice system. For this reason, this research focuses to identify the implementation strategies, obstacles and disclosing solutions to the application of the PERMA number 3 of 2017 on Religious Courts in the Madura.

Method

Using a qualitative research design,[11] this study aims to describe the implementation strategy of PERMA number 3 of 2017 in Religious Court institutions in Madura to identify obstacles to its implementation and to explain the solutions in detail. The primary data are interview results from judges who have received, examined, and decided women's cases dealing with the law, while secondary data are divorce documents, divorce claims, wife's living claims, children's livelihood claims, *mut'ah* and *hadlonah*. Research data were collected using interactive methods through in-depth interviews and participatory observation, while the non-interactive method was directed at analyzing the contents of documents.[12]

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[10] Amran Suadi, "Peranan Peradilan Agama Dalam Melindungi Hak Perempuan Dan Anak Melalui Putusan Yang Memihak Dan Dapat Dilaksanakan," *Majalah Hukum Varia Peradilan Tahun XXXIII. No. 390 Mei 2018* (Jakarta, 2018), 22.

[11] Zainuddin Ali, *Metode Penelitian Hukum*, 4th ed. (Jakarta: Sinar Grafika, 2013), 105.

[12] Johnny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif*, 6th ed. (Malang: Bayumedia Publishing, 2012), 272.

The use of interviews, observations, and documentation as data collection techniques intend to obtain holistic and integrative data about the focus of research. Data analysis is the process of systematic information tracking and regulation of field notes and is carried out through data organizing activities during and after the collection of research data in the field.[13]

The checking process of validity and interpretation of the data aims to obtain valid research findings. For this purpose, a credibility, dependability, and data confirmability test were performed. Checking the validity of the data aims to prove that the recorded data is by the existing conditions and actual occurrence. Particularly in qualitative research, the validity of the data aims to meet the criteria of the emic truth value of the research information and findings.[14]

Discussion and Result

The investigation on divorce cases in a court hearing in the Religious Courts at Madura is not conducted rigorously by questioning the exact cause of disputes between husband and wife that lead to filing for divorce. This is mainly because the Court applies the concept of a broken home. No matter what the cause of the split is, the panel of judges considers mostly the consequences and a fact that the spouse's household has failed in achieving the goal of marriage to establish a happy and eternal household or *sakinah, mawaddah* and *rahmah*.

Therefore, the panel of judges thinks it is not important to know on whoch one makes the mistakes and what causes the disputes or quarrels. For the panel of judges, the most important thing is to know the real situation that the household of the disputing parties (the applicant and the respondent or the plaintiff

[13] Zainuddin Ali, *Metode Penelitian Hukum*.

[14] Lexy J Moleong, *Metodologi Penelitian Kualitatif* (Bandung: Remaja Rosdakarya, 1990), 188.

and the defendant) has been broken or separated and there found no possibilities for recovery. [15]

Additionally, the references for examining and deciding divorce cases are legal references commonly referred to in the Religious Courts, namely UUP Article 39 (2) which mentions: "To conduct a divorce, there must be sufficient reasons and condition in which husband and wife can't live in harmony anymore", PP Article 19 (f) jo KHI Article 116 (f) which red; " Between husband and wife, there found continual disputes and quarrels and therefore it can't be expected for them both to live the household life in harmony "and Jurisprudence of MARI Number: 38K / AG / 1990 dated October 5, 1990 which says: "If the Judge is certain that the broken heart of both becomes the cause of the household breakup, then the purpose of article 19 (f) PP number 9 of 1975 has been fulfilled and consequently, the only way to take fairly is divorce.

Even so, in some divorce cases, the panel of judges also referred to other laws such as Law number 35 of 2014 concerning amendments to Law number 23 of 2003 on child protection. This implies that within certain limits, the panel of judges also referred to other laws besides the commonly referred one in Religious Courts. In other words, panel of judges in Madura Religious Courts has begun to be open on the development of new laws related to their field of work, such as enacting PERMA number 3 of 2017 under legal considerations. Following are description on research focus(es) namely implementation of PERMA number 3 of 2017 in Religious Courts at Madura, its implementation constraints and solutions.

1. The Implementation Strategy of PERMA number 3 of 2017 in the Religious Court at Madura

[15] Narendra Subramanian, "Islamic Norms, Common Law, and Legal Reasoning: Muslim Personal Law and the Economic Consequences of Divorce in India," *Islamic Law and Society* 24, no. 3 (2017): 254–86, https://doi.org/10.1163/15685195-00243p03.

The research finding shows that several judges as informants in this study had implemented the strategy of PERMA number 3 of 2017. This includes as follow:

First, at the initial stage of trial, after the mediation was declared unsuccessful, the panel of judges explained the rights of wife and child(ren) after divorce. However, this only happens if the disputing parties come to the hearing process because if they don't and therefore are represented to the lawyer, the explanation is skipped. After all, it was commonly understood. The explanation is very useful for both because the husband will pay the obligations and he will receive it. Moreover, in court practice, most the wives generally do not understand their and their children's rights after divorce. Likewise, this explanation will be useful to make the husband prepared in fulfilling the obligation so that the divorce process does not drag on and take too much time.[16]

Second, the judge actively engages in the trial process even though one of the basic principles of civil procedure requires them to be passive. This particularly happens in dealing with a silent wife who does not talk much. In this condition, the judge typically helps to explain both her position and rights to give her support and courage in claiming her and her children's right at the answer stage of the trial. This change of judge's attitude finds its relevance or legitimacy at PERMA number 3 of 2017 saying that he/she serves as an "enforcer of justice" instead of a "case breaker" in the court hearing.[17] In specific, article 8 paragraph (2) PERMA number 3 of 2017 mentions that the judge is encouraged to be active in the trial in the sense that he/she needs to explain and make the wife understand her rights after the divorce which can be prosecuted in the trial in accordance to applicable procedural law.

The provision of PERMA number 3 of 2017 seems to deviate from another provision of the civil procedural law which puts the judge at a passive position according to "ultra petita" doctrine.

[16] Sulhan Fadlil, "The Chief of Sumenep Religious Court," (n.d.), Direct interview on May 16, 2019 at 10.00.

[17] Khoiruddin Nasution, "Peran Kursus Nikah Membangun Keluarga Sejahtera," *AHKAM:Jurnal Ilmu Syariah* 15, no. 2 (March 2016), https://doi.org/10.15408/ajis.v15i2.2862. 34

However, Article 119 HIR/Article 143 RBg mentions that in certain conditions, the judge is supposed to be active in settling civil disputes, for example when the chair of judges panel advises the plaintiff or the attorney on requirements to make the suit accepted. Additionally, Article 130 HIR/Article 154 the RBg also confirms that the judges must first be active in reconciling engaging parties while Article 132 HIR/Article 156 RBg requires them to also play an active role to inform both parties as well as provide an explanation on a right to make a counter-claim justified by the law and a right to submit evidence in court.

Relating to this, Mukti Arto, the judge of the Indonesian Supreme Court, said that it is possible to distort the doctrine of "ultra petita" to provide legal protection and justice for women and children in divorce cases. He took an example from a divorce case because of a husband's mistakes which destroy the household's harmony. In this case, to provide legal protection and justice for the wife, the husband must give proper *nafkah mut'ah* and *nafkah 'iddah* as the punishment for what he did. If the wife does not ask for it, the panel of judges under the *ex officio* can determine it as the husband's obligation and the wife's right based on the provisions of Article 41 letter c UUP.

Additionally, if *hadhanah* of an immature child belongs to his/her mother, the father might provide *nafkah* through the mother as his punishment as well. In other words, for the sake of the protection and economic survival of the child, the panel of judges under the *ex officio* may require the father to bear the cost of the child's livelihood based on the provisions of Article 156 (f) KHI.

Third, the judge generally uses his/her legal mandate, namely the *ex officio* right, to determine the wives and children's rights in decisions assured by regulation and law. Unfortunately, practical use of the *ex officio* rights is still restricted for specific cases in which the wives do not want a divorce because they still love the husbands and for the sake of their children.[18] The legal mandate is based on Article 41 of the UUP mentioning that divorce has some

[18] Aminah, "A Judge in Sampang Religious Court," (n.d.), Direct interview on June 17, 2019 at l 10.00.

following legal consequences to carry out by both ex-husband and ex-wife because of the termination of marriage due to their separation:

a. Both are still obliged to take care of and educate their children for the children's good. Any dispute on the childcare right will be subject to the court to decide.
b. Fathers are still responsible for all maintenance and education costs of their children. If they are unable to do that, the court can decide to engage the ex-wife (mothers) in paying the costs;
c. The court may require the ex-husband to afford the living cost of the ex-wife and/or determine his obligation for this purpose.

A more detailed description of Article 41 of the UUP is found in Article 149 KHI. It regulates that in any marriages which break up due to divorce, the ex-husbands are obliged to:

a. Give proper *mut'ah* to his ex-wife either money or property unless the ex-wife is still virgin (having no sexual intercourse during the marriage or *qabla al-dukhul*);
b. Give living (*nafkah)*, shelter (*maskan*), and clothing (*kiswah*) to the ex-wife during the *'iddah* period unless the ex-wife has been under *bā'in* divorce or *nusyūz* and not pregnant;
c. Pay off the owed dowry either entirely or partially or if the wife is still a virgin, (having no sexual intercourse during the marriage or *qabla al-dukhul*), it counts half of the dowry's common values.
d. Pay the cost of childcare (*haḍānah*) before the children reach 21 years old.[19]

Formulation of legal rights for wives and children after divorce is designed to guarantee for protecting their rights because in many cases, they frequently become victims. The affirmation of divorce validity before the court hearing, for instance, is a clear sign of legal protection for the wife because this avoids her husband

[19] Kompilasi Hukum Islam.

being too dominant or arbitrary in proposing divorce. Besides, wives are also possible to submit and defend their rights, including the rights of their children because, in most of the divorce cases, children live with and are cared for by their mothers.

Substantially, the provision of Article 41 of the UUP and article 149 of KHI stipulate direct obligations that a husband needs to fulfill on his ex-wife and children after divorce. Therefore, the judge can apply the provision even though the wife does not file any lawsuit. In legal terms, the procedural power of the judge is called *ex officio* right, namely an attached and exclusive right for judges to determine the husband's obligations even without any claim from the wife as another party.

Unfortunately in a practical way, the *ex officio* rights are often restricted and consequently, the court's decision only functions to decide a case without really solving the problem. In a divorce case when a husband files a suit to divorce his wife while the wife does not submit for her and children's rights in the reconciliation lawsuit, for example, the divorce decision only includes aspects of legal certainty regarding termination of the marriage. It excludes the aspects of divorce justice and expediency.[20]

For some wives who are not accustomed to work and earn money, the situation puts the sustainability of their and their children's lives at risk. Likewise, if they serve as the plaintiffs in a divorce case without submitting cumulative rights, the condition will remain the same; the divorce verdict only fulfills the main claim on the marriage termination without any certainty of protection of post-divorce rights for herself and her children. As a consequence, it is the wife who will assume all obligations on the children's rights, while the husband is free from any obligations. In this context, the court can be categorized as having impunity

[20] Siti Musawwamah, "Perlindungan Hak-Hak Perempuan Dan Anak Pada Putusan Perceraian Di Pengadilan Agama Pamekasan Tahun 2012-2014" (UIN Sunan Kalijaga Yogyakarta, 2019), 12.

(negligence) to husbands who neglect their obligations on their wives and their children.[21]

For all of these reasons, now is the right momentum for judges to apply PERMA number 3 of 2017 in legal considerations namely providing legal breakthroughs through several aspects. One of the most urgent things is determining the payment period for women and children's rights after divorce to facilitate the benefits as clear in certainty, usefulness, and justice for women.

Fourth, the delay of the divorce pledge if it expires the maximum time of 6 months while the husband has not paid the obligations to his wife and children. This is based on the provision of Article 131 paragraph (4) KHI. However, this strategy of delay does not aim to protect women because as explained earlier in certain cases, the norm is even misused by irresponsible. In another word, the norm can be a "boomerang" for some wives and therefore must be implemented carefully and meticulously.[22]

Those are some strategies for enacting PERMA number 3 of 2017 in 4 (four) Religious Courts in Madura according to the judges who engaged as informants in this study. Practically, however, those strategies still find difficulities in both technical and non-technical constraints.

2. The Constraints on the Implementation of PERMA number 3 of 2017 in Religious Court at Madura.

From the perspective of law enforcement, this is a study on the operation of the law. Therefore, identifying the constraints of its implementation becomes very urgent, especially to find out some factors that influence its effectiveness. This research finds that the constraints on the implementation of PERMA number 3 of 2017 include as follow:

[21] Siti Musawwamah, "Perlindungan Hak-Hak Perempuan Dan Anak Pada Putusan Perceraian Di Pengadilan Agama Pamekasan Tahun 2012-2014."

[22] Fadlilah, "A Judge in Bangkalan Religious Court," (2019) Direct interview on June 24, 2019 at 09.00.

First, in a divorce suitcase, the wife generally only demands a principal claim, namely the breaking of marriage ties or divorce, while the husband typically does not attend the trial so the verdict is finally made in a verstek manner. In this position, the wife has lost her rights after divorce, except the right of the child (child living) which can be determined using *ex officio* right of judges.

However, this only applies when the husband works as a public servant. The purpose of determining children's right in the decision intends to evidence that the judge stands by the protection of children. Additionally, it will also be used as authentic evidence before the treasurer of salary payments. In other word, PERMA number 3 of 2017 has not been seriously implemented in divorce cases.[23]

Second, in a divorce case, likewise, usually the wife does not attend the trial even though she has been invited properly and lawfully. Based on the principle of civil procedure law, if the respondent is not present at the trial, the case will be terminated in verstek and the respondent is automatically deemed to have accepted the court's decision.

Third, the husband's economic capability sometimes becomes another obstacle in implementing PERMA number 3 of 2017. Practically, although the panel of judges has estimated a husband's ability on the nominal amount of payment for his ex-wife and children, it cannot always be carried out right away and this leads to the postponement of the pledge hearing divorce.[24]

Fourth, some cases in which the right to claim is filed after the process of the defendant's response. If there found a change in the lawsuit (addition or subtraction) to the main claim, it is supposed to be submitted before the panel of judges read the answer of the defendant. Conversely, if it is submitted after the reading of the answer session, it must obtain the defendant's approval. This provision is based on the Guide Book on the Implementation of Duties and Administration of the Religious

[23]Fadlilah.

[24]Umniyah, "A Judge in Pamekasan Religious Court," (n.d.), Direct interview on 15 June, 2012 at 10.00.

Court, book II, revised edition of the year 2013 which mentions that: "the changes in a lawsuit made after an answer from the defendant must be with the defendant's approval". The problem arises as not all women who litigate in the judiciary know the standard procedure.[25]

Fifth, derivative (technical) regulation of PERMA number 3 of 2017 uses the diction "can" as stated in SEMA Number 1 of 2017 letter C (1): "in implementing PERMA number 3 of 2017 and providing legal protection for women's rights after divorce, the method of payment can be included in the ruling with the sentence "paid before the pledge of divorce" unless the wife wants otherwise." This implies that the normative provision tends to be compromise instead of imperative. In another word, the court may either include or exclude the method of payment in the divorce ruling decision. This normative provision seems to "not seriously" guarantee the legal certainty regarding payment of post-divorce rights before the divorce pledge.

Sixth, a quite serious issue in the implementation of PERMA number 3 of 2017 is a judge perspective and knowledge factor. An interview to a judge reveals that not all judges follow the development or dynamics of the new law in the court, including the applicability of PERMA number 3 of 2017 which contains guidelines for adjudicating women law cases. Therefore, it makes sense if there still found few decisions which have adopted the mandate of the PERMA. This, according to the judge, is because nowadays, there only a few workshops held to update the judge's knowledge and insight.[26]

Identification of various constraints on the implementation of PERMA number 3 of 2017 confirms the validity of Lawrence M. Friedman's legal effectiveness theory which states that the effectiveness of law and law enforcement depends on three legal elements, namely, the substance of the law, the structure of law, and the culture of law (legal culture). The truth of this theory has

[25]Nurul Hakimah, "A Judge in Sampang Religious Court," (n.d.), Direct interview 15 June 2019 at 16.00.

[26]Aminah, "A Judge in Sampang Religious Court."

also been agreed upon by Indonesian legal experts including Soerjono Soekanto, Achmad Ali, and Romli Atmasasmita.

Furthermore, more detailed description of three elements that greatly affect the effectiveness of law is described as follows: Substance, namely the entire rule of law, legal norms, and legal principles, both written and unwritten including court decisions; Structure, which is the entire legal institution and its officials, such as the court and its judges, police institutions, and the others; Legal culture, namely opinions, beliefs, habits, ways of thinking and behaving of both law practitioners and society about law and various relevant phenomena.[27]

3. The Solution to Overcome Constraints in the Implementation of PERMA number 3 of 2017 in the religious courts in the Madura.

Although the panel of judges has determined the rights of wife and children in the divorce decision as well as the method of payment in accordance with the mandate of SEMA number 1 of 2017 letter (c) by including the words "paid before the pledge of divorce", the practice is still very dependent on both husband and wife. If the husband can afford all the rights of his ex-wife and children on the day of trial, the pledge of divorce can be carried out right away and the divorce is declared valid according to the law. Conversely, if he cannot do that on the day of trial, the pledge hearing is postponed until a maximum time limit of 6 months unless the wife wishes otherwise. In this context, the wife has a right to change the decision of post-divorce rights by reducing the nominal amount or even freeing the payment at all.

Those choices may seem difficult but there must be a firm stand so that the wife will not be in an uncertain marital status because the husband does not pay for her rights until the time limit of the pledge. If that happens, the wife will be much disadvantaged because she will cope with dilemmatic position. In *de facto* aspect, she has lived separately from the husband but in *de jure*, the

[27]Lawrence M. Friedman, *Sistem Hukum Perspektif Ilmu Sosial*, ed. M. Khozin (Bandung: Nusamedia, 2013), 240.

marriage has not been terminated because the husband does not declare the divorce pledge yet until the time is up.

Dealing with this, the common solution that the judge takes is to retain the Divorce Deed if the husband does not pay for it on the day of trial but is considered able to afford it. This can happen if the wife agrees on the divorce pledge reading despite the postponement of her right's payment.

Following is an example of a decision that has enacted the PERMA.

Decision Number: 0217 / Pdt.G / 2019 / PA.Spg.

In its legal considerations, because the plaintiff's petition was granted, the plaintiff was permitted to declare divorce pledges on the defendant before the hearing of Religious Court at Sampang after the decision was legally binding. Based on article 41 letter (c) of the UUP, *ex officio* enables the court to require the ex-husband in providing living expenses and or determine an obligation for the ex-wife.

In accordance with Article 149 letters (a and b) jo. Article 152, 158 letters (b) KHI, the ex-husband must: (a) give the appropriate *mut'ah* to his ex-wife, either in the form of money or objects, except if the wife is in the condition of *qabla dukhul*, (b) provide *nafkah*, *maskan* and *kiswah* to his ex-wife during the *iddah* period. The obligation to give *mut'ah* aims to reduce the burden of the defendant's suffering as a wife due to the divorce based on Al Baqarah verse 241:

وَلِلْمُطَلَّقَاتِ مَتَاعٌ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ

> "And for divorced women is a provision according to what is acceptable - a duty upon the righteous" (QS. Al-Baqarah: 241).

Therefore, based on Article 160 KHI, the giving of *mut'ah* is made fit to suitability and ability of the husband. According to consideration of the panel of Judges on the plaintiff's occupation as ahead of the village while the defendant had accompanied him serving the role for 27 years and because the divorce granted is *raj'i*, the defendant has the right to obtain *nafkah iddah* from the plaintiff.

Furthermore, the Assembly also considers it appropriate and reasonable if the plaintiff is sentenced to pay *iddah* cost to the defendant. In accordance with the facts at the hearing and occupation of the husband, the panel of judges determines the *mut'ah* and *iddah* cost with the following details: Rp. 4,500,000.00 (four million five hundred rupiah) for *nafkah iddah*; Rp. 1,500,000.00 (one million five hundred thousand rupiah) for *mut'ah*.

The panel of judges also stated that after the plaintiff's petition of divorce was granted and had permanent legal force, he will have the right to declare the divorce pledge on his wife without applying execution to the Court. The panel of judges also considered it fair if the wife automatically obtained her rights (*nafkah mut'ah and iddah*) at the time of the divorce pledge declaration without applying to execution to the Court. The legal argument is based on General Explanation number 7 of Law Number 7 of 1989 concerning Religious Courts which states "The Marriage Law aims to protect women in general and wives in particular" and the QS Al -Baqarah (2): 229 as follows:

الطَّلاَقُ مَرَّتَانِ فَإِمْسَاكٌ بِمَعْرُوفٍ أَوْ تَسْرِيحٌ بِإِحْسَانٍ

> "Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment".[28]

The interpretation of (تَسْرِيحٌ بِإِحْسَانٍ) in the *Al-Maraghi* commentaries book is:

المالية لها حقوقها يؤدى

> "Giving material rights to the wife".[29]

Based on those reasons, to enact justice and for the sake of ensuring the defendants' rights *(mut'ah* and *nafkah iddah*) get paid, the panel of judges seems it necessary to punish the plaintiff to pay

[28] Departemen Agama RI, *Alquran Dan Terjemahnya* (Jakarta: Proyek Pengadaan Kitab Suci Al-Qur'an, 1985), 55.

[29] Ahmad Mustofa Al-Maroghi, *Tafsir Al-Maraghi* (Beirut: Dar Al-Kutub Al-Alamiyah, 1971), 169.

mut'ah and *nafkah iddah* according to legal considerations "shortly before declaring the divorce pledge".

The mention of the phrase "shortly before declaring the divorce pledge" is mandated by PERMA number 3 of 2017 concerning the certainty of payment method on the wife's rights after divorce. It is an effort of the panel of judges to empower women in the judiciary. Considering its ratification process, PERMA number 3 of 2017 is not a completely new regulation because in several MARI's National Work Meetings known as Rakernas, the partisanship commitment on women always becomes a discussion theme as well as decision.

For example, RAKERNAS of 2010 in Balikpapan ratified policies regarding legal reference in deciding marital disputes involving women and children in addition to the commonly used law in the Religious Courts (PA) consisting of Law number 1 of 1974 concerning marriage (UUP), Government Regulation Number 9 of 1975 (PP) concerning UUP Implementation, and Compilation of Islamic Law (KHI). It requires the judges of Religious Courts to seriously consider the provision in Act Number 23 of 2004 concerning the Elimination of Domestic Violence (PKDRT Law) and Law Number 23 of 2002 concerning Child Protection.

Furthermore, in the RAKERNAS of 2012 in Jakarta, a decision was made that in examining, adjudicating and deciding a case, the judges had to be responsive and progressive instead of positivistic. The existence of PERMA number 3 of 2017 can therefore be said as a policy that reinforces the previous policies and evidence that the Religious Court has tried various policies to strengthen women's empowerment.

Normatively, efforts on women's empowerment have been sought since the enforcement of divorce declaration rules before the Religious Court hearing. The formulators of the UUP and KHI had determined principles of the divorce through a judicial institution in Article 39 of the UUP paragraph (1) jo Article 115 KHI jo Article 65 of Law Number 7 of 1989 concerning Religious Courts (UUPA) stating that "the divorce can only be conducted before a trial of the court after the court tried but failed to reconcile the two parties".

Furthermore, the marriage dispute legal service mentioned that a divorce lawsuit filed by a wife must be filed at her residence (Article 73 paragraph 1 of the UUPA) while a husband who will file for divorce must submit his divorce petition to the court in his wife's residence (Article 66 paragraph 1 2 UUPA). More specifically, Article 41 (c) of the Indonesian Law in conjunction with Article 149 KHI also gives the *ex officio* authority to the court to be able to require the ex-husband to provide living expenses for his ex-wife through *mut'ah, iddah*, an owed dowry, and living cost for the child whom the mother takes care of.

Unfortunately, the regulation still copes with some constraints in its implementation due to the absence of rules regarding the mechanism or method and the deadline for payment. For this reason, PERMA number 3 of 2017 serves as a solutive regulation to overcome the problem of enforcing women's empowerment policies in the judiciary.

Conclusion

The study concludes that the implementation of PERMA number 3 of 2017 is an effort to empower women in Religious Court institutions. The implementation of the PERMA begins at the initial stage of the trial after mediation is declared unsuccessful. Judges actively explains the rights of wife and children to provide support to the wife and oblige the husband prepared for fulfilling his obligation. In certain circumstances, the judge uses his legal mandate to determine the rights of wives and children in *ex officio* or delaying the divorce pledge until it runs out of the time. Meanwhile, the constraints to implement the are the absence of the defendant in a trial which leads to the verstek verdict, husband's economic ability, wife's ignorance on the procedure for filing claims, judges' perspective problems and problems of derivative (technical) regulation of the PERMA which uses the diction "able". This tends to compromise instead of normative or imperative.

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Resistance Strategies of Madurese Moslem Women Against Domestic Violence in Rural Society

Fahruddin Ali Sabri
Faculty of Ushuluddin and Dakwah, IAIN Madura,
Jl. Raya Panglegur, Km. 04 Tlanakan, Pamekasan 69371
Email: didin021@gmail.com

Arif Wahyudi
Faculty of Ushuluddin and Dakwah, IAIN Madura,
Jl. Raya Panglegur, Km. 04 Tlanakan, Pamekasan 69371

Fatekhul Mujib
Charles University, Prague, Opletalova 38, 110 00 Staré Město, Ceko

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Abstract:

Although regarded as weak, helpless and vulnerable to violence, some rural Madurese women are no longer silent and passive in coping with domestic violence they experience. This study aims to identify the survivors' experiences and choices they made as resistance strategies to reduce or end the violence. The focus was on whether the choices fit with *sharia* teaching. The study uses empirical legal research and anthropological theory of law and *fiqh* approach to analyze data. It finds that women who try to take a dispute resolution process show their active attitude and courage to speak up any injustice, discomfort or disagreement in their domestic life. Some of their strategies fit with *shariah* teaching while others do not so. However anthropologically, their choice to stop the violence is for the sake of maintaining their marital relation. In the legal sub-culture, they have well-considered potential profits and losses as well as the needs or interests they want to get.

Author correspondence email: didin021@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

Keywords:
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Domestic Violence; Islamic Legal Maxim

Abstrak:

Meskipun pada awalnya dianggap sebagai manusia yang lemah, tidak berdaya dan rentan mengalami kekerasan, peberapa perempuan Madura yang tinggal di pedesaan sudah tidak lagi menunjukkan sikap diam dan pasif dalam menghadapi kekerasan dalam rumah tangga. Studi ini bertujuan untuk mengidentifikasi apakah pengalaman dan pilihan-pilihan strategi perlawanan yang dibangun para penyintas KDRT sesuai dengan ajaran syariah atau tidak serta mengidentifikasi keefektifan strategi perlawanan dalam mengurangi maupun mengakhiri kekerasan. Studi ini berjenis penelitian hukum empiris dan menggunakan teori antropologi hukum serta pendekatan kaidah fiqih untuk menganalisis data. Ketika mereka berusaha untuk melakukan proses penyelesaian KDRT, hal demikian menunjukkan sikap aktif sekaligus menunjukkan keberanian untuk menyuarakan ketidakadilan, ketidaknyamanan maupun ketidaksepakatan dalam menjalani kehidupan rumah tangga. Strategi perlawanan yang mereka lakukan ada yang sesuai dengan syariat Islam dan ada yang bertentangan. Namun secara antropologis, mereka memiliki pilihan untuk menghentikan kekerasan dengan latar belakang kepentingan dan kekuasaan untuk mempertahankan hubungan pernikahan. Dalam perspektif sub-budaya hukum, mereka telah mempertimbangkan untung rugi, kebutuhan maupun kepentingan apa yang ingin didapatkan.

Kata Kunci:
Strategi Perlawanan; Sub Budaya Hukum;
Kekerasan Dalam Rumah Tangga; Kaidah Fikih

Introduction

Every existing law and legal must have provided surveillance and measures on violence against women. The number of reported domestic violence cases in Indonesia increases every year. It reached 5,114 in the last 2019.[1] A year before, divorce cases due to domestic violence in Pamekasan Religious Court were 77 and Sumenep with 53.[2]

The numbers clearly show that domestic violence against women does still occur in Madura. Domestic violence victims should get shelter from legal structures to protect them from any further violence. State and society must actively participate to make conflict resolution between victims and perpetrators. Moreover, the victims are always in a weak and helpless conditions in their household relationships.[3]

Women, elderly, children, the poor, persons with disabilities, prisoners, minority groups, domestic refugees, migrant workers and their children, including those without official citizenship documents or any companion, indigenous people,[4] homosexuals and people with HIV/AIDS[5] are vulnerable to violence. The violence can be through discriminatory and inhumane treatment, as well as the access restriction on their basic human rights.

This study aims to identify and uncover experiences as well as choices of resistance strategies developed by survivors of domestic violence in protecting their human rights. It will show whether the strategies fit with sharia teachings or not. Additionally, this also

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[1]Komnas Perempuan, "Korban Bersuara, Data Bicara Sahkan Ruu Penghapusan Kekerasan Seksual Sebagai Wujud Komitmen Negara Catatan Kekerasan Terhadap Perempuan Tahun 2018" (Jakarta, 6 Maret 2019), 11.

[2]Unpublished data.

[3]Badriyah Khaleed, *Penyelesaian Hukum KDRT: Penghapusan Kekerasan dalam Rumah Tangga dan Upaya Pemulihannya* (Yogyakarta: Pustaka Yustisia, 2015), 51.

[4]HAM Komnas, "Laporan Tahunan Komnas HAM 2016: Pemenuhan Hak Kelompok Minoritas dan Rentan di Indonesia," *Jakarta: Komnas HAM*, 2017, 13.

[5]Ingrid Nifosi-Sutton, *The Protection of Vulnerable Groups under International Human Rights Law* (New York: Routledge, 2017), 54.

wants to identify the effectiveness of the strategies to reduce or end the violence. The study involves four respondents who live in rural areas with a wide variety of education and income level.

Practically, this study aims to educate domestic violence victims in choosing effective resistance strategies without ignoring religious norms. It also shows how both state and non-state actors should intensely communicate with the victims so that they can know the real complaints and experiences to draft a strategic index category in order to reduce and eradicate domestic violence in Madura. These important actors should be proactive in service instead of passive and simply waiting for the victims to come.

Several studies have shown that victims of domestic violence in rural areas have carried out several resistance strategies to resolve the problem. One of them discussed the perceptions of American rural women who put up a fight against perpetrators in dealing with domestic violence. They did it by carrying out verbal attacks, holding back the tears, and threating of divorce even asking the court to decide on divorce.[6] Some others fight the perpetrators by running away, distracting, protesting, quietly accepting, and seeking help.[7]

These strategies sometimes seem to fail in eradicating domestic violence cases because of obstacles in traditional gender roles and social control in rural settings. However, victims typically think that they do the right thing with their own strategy especially by considering the existence of women's institutions in the village.[8] This study will look at the same problem through a different perspective namely Islamic legal maxim to reveal whether the resistance strategy of the victims fits with Islamic sharia rules.

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[6]Kim M Anderson, Lynette M Renner, and Tina S Bloom, "Rural Women's Strategic Responses to Intimate Partner Violence," *Health Care for Women International* 35, no. 4 (2014): 423–41.

[7]Amir Mohammad Sayem and Mohammad Aftab Uddin Khan, "Women's Strategic Responses to Intimate Partner Violence: A Study in a Rural Community of Bangladesh," *Asian Social Work and Policy Review* 6, no. 1 (2012): 23–39.

[8]Thelma Riddell, Marilyn Ford-Gilboe, and Bevery Leipert, "Strategies Used by Rural Women to Stop, Avoid, or Escape from Intimate Partner Violence," *Health Care for Women International* 30, no. 1–2 (2009): 134–59.

When a victim begins to be pretty sure to fight the violent perpetrators, she will simultaneously try hard to avoid them. She will typically fight back to reduce or even reject the violence from those who usually play a dominant role[9] in their domestic relations. The situation in which the victim is eventually able to avoid violence varies one another. Usually, the resistance is only known by the victim while others, including the husband or the perpetrator, do not realize her action as a form of resistance. She might secretly borrow a bottle of milk or a slice of bread from her neighbor so that she can avoid asking him for money. This aims to maintain her honor and ensure her safety.[10]

The resistance can take three strategies namely internal, external and interpersonal. Internal resistance is chosen by a victim who tries to defend themselves, get revenge and challenge the financial control of the perpetrators.[11] Meanwhile, the external is for those who try to access both informal assistance from friends or family and formal one from the state or non-state social organization.[12] Interpersonal resistance is taken by victims who can engage their interaction with the perpetrators such as threatening to fight or leaving the perpetrator.[13] These three resistance strategies can also be responses to reject and fight the violence they experience.

In the history of culture, every society experiences any disputes among individuals within. They usually have several ways to resolve it depending on the internalized culture of each. Some may do it thrung *lumping it* (leaving a case without any settlement which means

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[9]James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven and London: Yale University Press, 1985), 295.

[10]Mandy Morgan and Tony Mattson, "Dignity, Diversity, and Resistance: A Bicultural, Community-Led Approach to Transforming Social Responses to Domestic Violence in Aotearoa New Zealand," *Australian Community Psychologist* 29, no. 2 (2018), 8.

[11]Margaret Abraham, *Speaking the Unspeakable: Marital Violence Among South Asian Immigrants in the United States* (New Brunswick, New Jersey and London: Rutgers University Press, 2000), 138.

[12]Abraham, 133.

[13]Noelle M St Vil dkk., "A Qualitative Study of Survival Strategies Used by Low-Income Black Women who Experience Intimate Partner Violence," *Social Work* 62, no. 1 (2017): 63–71.

acceptance without any demand), *avoidance* (avoiding, evading or moving away), *coercion* (coercing forcefully), *negotiation, mediation* (deliberation facilitated by a mediator), arbitration (arbitration/taking over to a third party as a problem solver) and *adjudication*.[14]

Practically, the community has two choices in dispute resolution, namely through court and non-court. This shows that anthropologically and sociologically, traditional societies use several methods in resolving disputes without physical violence such as using fists, sticks, or poison arrows. Settlement of disputes benefits the community to uncover injustice, discomfort or disagreement in living their daily lives. More than that, dispute resolution can be an entry point to tighten relations among community members to achieve lasting harmony.[15]

The dispute resolution in society can be through either voluntarily or involuntarily depending on the intention of involved parties. The voluntary can take negotiation and mediation strategy, while involuntary is through arbitration and adjudication. Negotiations is particularly preferred as it offers of free bargaining principle in which parties are free to determine their interests and power, while adjudication is highly constrained by legal rules and principles.[16]

Research Method

This is an empirical legal research because it examines the phenomenon of human religious life in general. Usually, its common approach is historical-empirical instead of doctrinal-normative.[17] Additionally, it uses a qualitative approach as the research procedure

[14]Laura Nader dan Harry F. Todd, Jr., "Introduction: *The Disputing Process*" in Laura Nader and Harry F Todd, *The Disputing Process: Law in Ten Societies* (New York: Columbia University Press, 1978), 8-10.

[15]Jerome T Barrett dan Joseph Barrett, *A History of Alternative Dispute Resolution: The Sory of a Political, Social, and Cultural Movement* (San Francisco: John Wiley & Sons, 2004), 2.

[16]Martin Shapiro, *Courts: a Comparative and Political Analysis* (London: University of Chicago Press, 1981), 6.

[17]Amin Abdullah, "Relevansi Studi Agama-Agama dalam Milenium Ketiga". In Amin Abdullah, *Mencari Islam: Studi Islam dengan Berbagai Pendekatan* (Yogyakarta: Tiara Wacana, 2000), 1.

to produce descriptive data both written and oral resulted from people and observed behavior. This approach leads to research findings out of statistical procedures or other forms of calculation.[18] The approach is directed mostly to the comprehensive data about the background of each interviewee. Therefore, both individuals and organizations are not included at the variable or hypotheses, but as a part of a wholeness.[19]

This study uses the anthropological theory of law. To avoid ethnocentrism bias, it pays attention to *emic* (perspective of observed part) and *etic* (perspective of the researcher).[20] The selection of this method aims to interpret the behavior, actions, and speech, as well as a thick description of related events. Furthermore, it records experiences of domestic violence victims in fighting against the violence they experienced. The research took place at Pamekasan Regency.

The primary data of this research is from interviews and observations on domestic violence cases, particularly a case with a victim's resistance experience. Meanwhile, secondary data consists of relevant notes relevant to the focus of study, data from research results, journals, archives, personal documents, and various other related literature. This study focused on 4 respondents with a purposive sampling method aiming to enable in-depth analysis of women's experiences in resisting the violence they experienced.

The interview technique of this research is semi-structured narrative. The data from both interviews and observation is then analysed using techniques offered by Matthew B. Miles and A. Michael Huberman. Researchers do the analytical process interactively and continuously until the end of process to ensure its sufficiency. The analytical process itself has three steps, namely: data reduction, data presentation and concluding/verification. This series of cyclical process and interactions take place at the time before,

[18]Anselm Strauss dan Juliet Corbin, *Dasar-dasar Penelitian Kualitatif* (Yogyakarta: Pustaka Pelajar, 2003), 4.
[19]Lexy J. Moleong, *Metodologi Penelitian Kualitatif* (Bandung: Remadja Karya, 1989), 4.
[20]Jhon W Cresswel, *Penelitian Kualitatif dan Desain Riset* (edisi bahasa Indonesia) (Yogyakarta: Pustaka Pelajar, 2015), 134.

during, and after proportional data collection to build general insight called analysis.[21]

Discussion and Result

The victims committed several actions in the response to domestic violence they experience as well as resistance strategies to the violence perpetrators. They put up a fight as stated in more detail in the following interview result:

1. NMH is a housewife who lives in Palengaan Subdistrict, Pamekasan Regency. She got wedded in the local civil registry office or KUA (Kantor Urusan Agama). She recounted her experience of violence and resistance as follows:

> "My husband is a freelance worker. Sometimes he does farm and sometimes he works as a construction worker. I do not have my income. Every day I do housework such as sweeping the floor, preparing food, and washing clothes. He rarely helps the household chores. We often fight each other because of trivial matters. When this occurred, my husband liked to beat me and made fun of me. At the beginning of my marriage, I tried to obey him but now, I do not longer do that because we get separated. My face was bruised from multiple-times hit, but more than that, I feel hurt, a feeling of being hung up by our marital status, miserable, and stressed.
>
> Once a while, when he hit me, I shouted for asking help from neighbors and relatives as they were willing to listen to my stories and complaints about the violence I experienced. Another time, I also had fought him back by throwing plates at him. As a result, he did not hit and scold me as often as before. I decided to come back to my parents'

[21]Matthew B Miles dan A Michael Huberman, *Analisis Data Kualitatif* transl. Tjetjep Rohendi Rohidi (Jakarta: Penerbit Universitas Indonesia, 1992), 16-21.

> house. I told them about my problem but I did not do the same for my parents-in-law.
>
> A few of my neighbors empathized with my domestic violence experience, but most of them tend to be ignorant because they considered domestic violence as a private thing of household. Even though I only graduated from junior high school and had studied at an Islamic boarding school, I never visit to any *dukun* or *kyai* (Islamic priest) when dealing with my household problems. Likewise, I did not tell my community leaders, head of the Neighborhood Association or *Rukun Tetangga*, or the Police about what I experience in domestic life".[22]

2. AMN is a mother who works as a teacher with a monhtly income IDR. 500,000. She lives in Palengaan Subdistrict, Pamekasan Regency. She got a bachelor in education and got wedded at the local civil registry office or KUA. She recounted her experience of violence and resistance as follows:

> "My husband has a permanent job, but he never helped me to do any housework. However, I was always available for sexual intercourse if he asked me because I think it's my obligation as a wife. I was once beaten by my husband because of a trivial problem and I got my face turned bluish. My husband thinks I am chatty. He also often made fun of me. As a result, I often got panicked and the house felt like a prison. I got divorced but did *ruju'* (coming back to the old relationship) because of shameless for becoming a widow.
>
> When the violence occurred, I once returned to my parents' home for a month. I filed for divorce but

[22] NMH, Pamekasan, direct interview, (31 Juli 2019)

> retracted the lawsuit afterward. Now I rarely experience any violence from my husband anymore. In the end, I need to be patient and accept it as a woman's nature. Although I am a university graduate, I have consulted with a *dukun* and he said that I was affected by *pelet*. He gave me a spell to read as same as the kyai whom I also consult with and gave some prayers to read".[23]

3. WSH is a housewife who lives in Proppo District, Pamekasan Regency. She is an elementary graduate and got wedded at the local civil registry office or KUA. She recounted her experience of violence and resistance as follows:

> "My husband does not have any permanent job, but he often wanders and simply goes outside. If he goes to work, he also does it outside. He never helps me with housework. I do not have my income. At the beginning of marriage, we fought a lot. I got married through match making process without any love and affection. I once quarreled with him by exchanging hits with each other. My left leg had a stab wound and scars until now. My cheek had also been hit by sickles while my feet and back got bruised bluish. I suffered physically and mentally. I fought back for violence I experience hoping that my husband would stop doing it, but he keeps it. Sometimes, I simply did nothing because of fear of being disobedient like when I was thrown from the house to the outside terrace.
>
> Although I get violence, I do not want to be separated from him. I always back down my ego, keep being patient while wishing that my husband would treat me better. I once ran away to my parents' house and lived there for about 1 month.

[23] AMN, Pamekasan, direct interview, (28 Juli 2019)

> To deal with this violence, I then went to the *dukun* who suggested me to mix my menstrual blood into his drink. As a result, he no longer behaves rudely without any suspicion for the changes he had experienced. I did all this so that I could still maintain my household".[24]

4. EPS is a woman who works as an employee with Rp. 1,000,000 to Rp. 1,500,000 monthly income. She lives in Pegantenan District, Pamekasan Regency with a bachelor's education and got wedded at the local civil registry office or KUA. She recounted her experience of violence and resistance as follows:

> "My husband has a permanent job and so do I. However, I handle all household matters without his help. I began to complain about his habit of being grumpy, prying up my past, exaggerating trivial problems and such. When this happens, he often hit my face until it got bruised. I reported this incident to the police because I felt scared, ashamed, and hurt. However, he kept doing it.
>
> I am not comfortable with his treatment so I then returned to my parents' home and got separated for 3 months. At that time my husband and my family had a conversation about the continuation of the household but there was no agreement. Finally, I chose to sue him in the Pamekasan Religious Court. This is my last step to end my suffering. Moreover, when I was beaten, my young child had seen the incident and it drove me traumatized. I have never been to the *dukun* or kyai to consult with".[25]

Discussion

[24]WSH, wife of JML, Pamekasan, direct interview, (11 April 2019)
[25]EPS, Pamekasan, direct interview, (1 Agustus 2019).

Physical domestic violence can result in bleeding, injury, battered and another wound as well as lead to further violence such as intimidation; insulation and totalitarian control on all the whole aspect of the victim's life. It covers sexuality; material needs; relationships with family, children and friends; and occupation which then cause high dependency; prolonged trauma;[26] fright; loss of self-confidence; loss of ability to act; a sense of helplessness; severe psychological suffering; and depressed.[27]

Wives with domestic violence experience generally suffer physical injuries such as bruising, broken bones and chronic disorders that affect their daily functioning.[28] In the above explanation, the data illustrates how they suffered bruises, stab wounds, slashed cheeks exposed to sickles, legs and back bruised bluishly. More than that, they suffer psychologically because they feel threatened both physically and mentally.

The findings of this study describe several strategies that those wives employed in protecting their rights. They actively tried to reduce the control and violence of husbands through a series of actions. In short word, they are active in dealing with this case. They dared to put up a fight against their husbands through actively opposing violence, using their resources and strategies, reducing it when it happens, and even ending the suffering. Instead of a passive action, this shows strength and courage. Practically, they use three resistance strategies namely internal, external and interpersonal as ways to end suffering.

Internal Resistance Strategy

The wives use an internal resistance strategy when they are emotionally frustrated. They typically do it through a religious and

[26]Tamara L Kuennen, "Analyzing the Impact of Coercion on Domestic Violence Victims: How Much is too Much," *Berkeley J. Gender L. & Just.* 22 (2007): 2, 1.

[27]Albert R Roberts, *Handbook of Domestic Violence Intervention Strategies: Policies, Programs, and Legal Remedies* (New York: Oxford University Press, 2002), 230-232.

[28]Gina Dillon et.al., "Mental and Physical Health and Intimate Partner Violence against Women: A Review of the Literature," *International Journal of Family Medicine* 2013 (2013).

personal trust approach. AMN, for example, tried this by reciting prayers she got from *kyai* whom she consulted with. She fully believess that the prayers would bring inner peace in coping with the violence she experienced.

The Strategy of External Resistance

A wife will typically seek support from outside parties when unable to resolve the violent experience in her internal circle. However, she is still very dependent on the sources of both formal and informal support. This study clearly shows that those wives seek support from parents, siblings, neighbors and police officers. They expect that the support of those parties to talk with their husbands can stop the violence. In some cases, this strategy works but in others, it does not do so.

NMH, for instance, once asked her neighbors and relatives for help to get emotional support. She got comfortable when they were willing to listen to her stories and complaints. She trusted her neighbors and siblings over her parents-in-law, parents, heads of the Neighborhood Association or *Rukun Tetangga*, and the police. As a junior high school graduate, she has no income as well as experience and large access to existing formal institutions and therefore, she chose to talk to informal institutions. Her strategy works well and her husband stops committing domestic violence.

Meanwhile, AMN who studied at Islamic Boarding Schools and universities resolved her violent experience by consulting with *kyai* as a religious figure. However, when she felt that it hadn't worked well, she also consulted with a shaman who later told her that she was under the control of *pelet* 'sent' by her husband. She consulted with both parties to help surviving in the hard condition as well as resolve the violence she experienced. The choice that AMN took shows that she tended to use religion and truth as a form of resistance to the violence she experienced and disagrees with. Reciting the prayers from *kyai* is her effort to surrender her whole affairs to God in addition to find inner peace. She believes that God will determine the best for her between getting divorced and maintaining the household. Until this research is completed, AMN still maintains her marriage relationship.

In addition to prayers from *kyai,* AMN also got spells to recite from the shaman. Furthermore, she also went to Religious Court as a formal institution to file for divorce although, at the end, she chose to withdraw the lawsuit simply for the sake of maintaining the household. She did it because of a myth about the shameless of the stigma of a widow that she wanted to avoid. This strategy also works well in reducing the domestic violence committed by her husband.

Another story comes from WSH who also chose to visit a shaman. She hoped that she and her husband would keep maintaining the household even though she experienced domestic violence. As an elementary graduate who never studied at Islamic boarding schools, she finally chose to use a mystical mantra and ritual that the saman suggested, namely by immersing her menstrual blood to her huband's drink. This reflects her submission as well as a response on her emotional condition with domestic violence experiencing. This strategy was also successful in stopping violence from her husband.

Both NMH and WSH are in the same psychosocial condition due to their educational level and the absence of income which make them vulnerable to any domestic oppression.[29] They both have experienced violence and cruelty in their household that they finally decided to take a step to end their suffering. They consulted the shaman to succeed in their mission. On the other hand, the shaman will still get patients' visits as long as the state does nothing in the neighborhood.

The different story is clear from EPS who used formal rather than informal institutions to stop the violence she experienced. She did it through a formal institution namely the Pamekasan Resort police to keep herself away from her husband while filing for divorce to the Pamekasan Religious Court. "I have to do this to get rid of my heart-brokenness and I was successful in convincing the Religious Court to decide the divorce on Decision Number: 0447/Pdt.G/2017/PA.Pmk. This strategy shows that the wife has also succeeded in stopping violence from her husband.

[29]Michele Harway dan James M O'Neil, *What Causes Men's Violence against Women?* (London: Sage Publications, 1999), 236-237.

Interpersonal Resistance Strategies

This study shows the existence of interpersonal strategies carried out by NMH, AMN, WSH and EPS to stop the domestic violence they experienced. They left home where they lived with the violent perpetrators and returned to their parents' houses. They assumed that leaving the husbands either temporarily or permanently is a way to gain inner peace and physical security.

When NMH, AMN and WSH decided to temporarily leave home then finally come back there again, they hoped their husbands could stop the violence. This strategy is one of the supporting factors beyond the success of those wives in reducing violence. However, in the case of EPS, she decided to leave her husband permanently because he had done something very cruel to him. This particularly shows that the wife had reflected on herself and realized that the violence could not be reduced or finished. Thus, EPS considered that leaving home is the only way to end her suffering.

An important note in this finding is the emergence of several resistance strategies that the wives employed to cope with the totalitarian power of husbands in the household. They fought against human rights violations that their husbands committed through resistance response to show their discomfort in domestic relations. They did it for maintaining their existence and empowering themselves.[30]

Additionally, these three resistance strategies illustrate the bravery of Madurese women to protect their human rights either offensively or defensively. Offensive resistance, for example, is clear from the case of WSH who aggressively attacked by immersing her menstrual blood in her husband's drinks and countering the hit. Meanwhile, NMH responded to the violence of her husband by throwing a plate at him and EPS decided to report the violence to the Police and Religious Courts. As for defensive resistance was obvious from the decision of all respondents to leave home where they live with the husbands. These three strategies illustrate the presence of inconvenient situations in household life.

[30]Naomi Hossain, "Security and the Pathways of Women's empowerment: Findings from a Thematic Synthesis of the Pathways of Women's Empowerment Research," *IDS Working Papers* 2012, no. 406 (2012): 1–48.

Additionally, Madurese who lives in rural and urban areas also believes in mysticism or something unseen. This is particularly true for some mystical purpose in attacking enemies, warding off magic and treating it. If they come to a *kyai*, the *kyai* will give them an amulet with Islamic nuance, while if they come to a shaman, the shaman will give them a fetish with heresy.[31]

In this context, Madurese have similarities with those in Java because they believe in mystical things. Assimilation and acculturation between local culture and Islam influence the way they live. It is undeniable that the non-Islamic teachings have come first and been adhered to before Islam. Cultural and Islamic rituals are interrelated with one another and therefore, these non-Islamic traditions are still visible even though the community has adopted and converted to Islam.[32]

In a patient's visit, a shaman will typically give them salt as a medium to help them curing the diseases they suffer. However, sometimes, the medium is also used for resolving cases that the patients deal with, such as domestic life problems, infidelity and trade fraud. Some shamans even believe that the salt only functions in recovering physical ailments as well as resolving household trouble.[33] This study shows how a wife used menstrual blood immersion in her husband's drink according to the advice of a shaman in which she found successful.

The belief of mysticism contradicts the nature of Madurese who is typically devout in living Islamic life. They manifest their obedience to religious teachings at the phrase: "*bhuppa ', bhabhu', ghuru, and rato*" (father, mother, teacher and government leader).[34] Islamic teachings are considered well enough to contribute to the formation of

[31]A Latief Wiyata, *Carok; Konflik Kekerasan & Harga Diri Orang Madura* (Yogyakarta: LKIS Pelangi Aksara, 2002), 217.
[32]Ali Nurdin, "Komunikasi Magis Dukun (Studi Fenomenologi Tentang Kompetensi Komunikasi Dukun)," *Jurnal ASPIKOM* 1, no. 5 (2012): 383–402.
[33]Ali Nurdin, *Komunikasi Magis Fenomena Dukun di Pedesaan* (Yogyakarta: LKiS Pelangi Aksara, 2015), 115.
[34]Latief Wiyata, *Carok; Konflik, Kekerasan& Harga Diri Orang Madura*.

Madurese cultural values.[35] However practically, some people neither fully understand nor enlive these values in Madurese society.

The choices of resistance strategy that the wives take in dealing with this violence, according to principles of *fiqh*, are categorized into two, namely lawful and unlawful. The former consists of reciting a prayer from *kyai*, leaving home, repaying blows and filing for divorce.

God teaches Muslims to pray as clear in al-Baqarah (2): 186

وَاِذَا سَاَلَكَ عِبَادِيْ عَنِّيْ فَاِنِّيْ قَرِيْبٌ ۗ اُجِيْبُ دَعْوَةَ الدَّاعِ اِذَا دَعَانِۙ فَلْيَسْتَجِيْبُوْا لِيْ وَلْيُؤْمِنُوْا بِيْ لَعَلَّهُمْ يَرْشُدُوْنَ

> *And when My servants ask you, [O Muhammad], concerning Me - indeed I am near. I respond to the invocation of the supplicant when he calls upon Me. So let them respond to me [by obedience] and believe in Me that they may be [rightly] guided.*

Meanwhile, other resistance strategies are unlawful because they are not following the Shariah norms, such as a wife who immersed her menstrual blood in her husband's drink. Although she considered it successful, *fiqh* jurisprudence prohibits such practice.

الضررلا يزال بمثله أو بالضرر.[36]

> *One harm cannot be removed by another harm*

Despite the prohibition in Islamic jurisprudence, anthropologically, she had taken a choice to stop the violence she experienced. She aimed to maintain the marriage relationship despite having to do the disgusting thing. In a legal system that includes legal substance, legal structure and legal culture, this legal culture has an incision namely legal sub-culture. It is a factor with a high degree of

[35]Mien Ahmad Rifai, *Manusia Madura: Pembawaan, Perilaku, Etos kerja, Penampilan, dan Pandangan Hidupnya Seperti Dicitrakan Peribahasanya* (Yogyakarta: Pilar Media, 2007), hlm. 347.

[36]Shâlih bin Ghânim al-Sadlân, *al-Qawâ'id al-Fiqhiyyah al-Kubrâ* (al-Riyâdl: Dâr Balinsiyah, 1417 H), 512.

relevance in discussing case resolution which contains the profit and loss, the needs or interests of what the whole parties want to obtain.[37]

This study shows the legal sub-culture of a wife who experienced household violence. She took this resistance strategy to succeed in her mission according to her intentions and goals. The same went on for those who aimed to maintain domestic relations despite having to leave the house temporarily or permanently, countering a blowback, going to a *kyai* or shaman, or reporting to the police and the Religious Court to sue for her husband's divorce.

Madurese community still chooses voluntary dispute resolution through negotiation and mediation.[38] Disputants typically use free bargaining negotiations to struggle for their mission and power in the household. They sought to determine their way of life without State interference. They think that the state will usually apply rigid and win-lose rules in resolving domestic violence.

To this extent, rural and urban communities have different approaches as well as patterns in resolving the case. Rural community usually settles the case through family consultations or village justice institutions, particularly if the disputants come from the same ethnic group. However, sometimes, they settle the case to the State Court for the sake of showing their prestige. If the disputants are from the different ethnic groups, they will ask the help of a mediator from the state apparatus.[39]

Meanwhile, at the same ethnic dispute, those who live in urban areas tend to solve it by referring to local habits rooted in the social system. They usually ask help from a mediator from a regional leader assisted by religious or informal leaders. They prioritize the peace for the very first but if it fails and the case led to much hostility, they will submit it to the State court.[40]

Any Muslim disputant should pay attention to the Islamic teaching on how to treat victims humanely. Allah's Messenger (may

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[37]Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russel Sage Foundation, 1975).
[38]Shapiro, *Courts: A Comparative and Political Analysis*, 6.
[39]SulistyowatiIrianto, *Perempuan di Antara Berbagai Pilihan Hukum* (Jakarta: Yayasan Pustaka Obor Indonesia, 2003), 46.
[40]Irianto, 47-48.

peace be upon him) gave warning to his followers to stay away from acts of violence and hostility that can damage relations in both social and domestic environment as following;

عَنْ أَبِي هُرَيْرَةَ أَنَّ رَسُولَ اللَّهِ –صلى الله عليه وسلم– قَالَ: إِيَّاكُمْ وَالظَّنَّ فَإِنَّ الظَّنَّ أَكْذَبُ الْحَدِيثِ وَلاَ تَحَسَّسُوا وَلاَ تَجَسَّسُوا وَلاَ تَنَافَسُوا وَلاَ تَحَاسَدُوا وَلاَ تَبَاغَضُوا وَلاَ تَدَابَرُوا وَكُونُوا عِبَادَ اللَّهِ إِخْوَانًا.[41]

> Abu Hurairah (May Allah be pleased with him) said: Allah's Messenger (may peace be upon him) said, "Beware of suspicion, for suspicion is the worst of false tales. Do not look for other's faults. Do not spy on one another, and do not practice *najsh* (means to offer a high price for something to allure another customer who is interested in the thing). Do not be jealous of one another and do not nurse enmity against one another. Do not sever ties with one another. Become the slaves of Allah, and be brothers to one another.

Furthermore, Allah's Messenger (may peace be upon him) also forbade a husband to beat his wife as found in the following hadith:

عَنْ عَائِشَةَ قَالَتْ مَا ضَرَبَ رَسُولُ اللَّهِ –صلى الله عليه وسلم– شَيْئًا قَطُّ بِيَدِهِ وَلاَ امْرَأَةً وَلاَ خَادِمًا إِلاَّ أَنْ يُجَاهِدَ فِي سَبِيلِ اللَّهِ وَمَا نِيلَ مِنْهُ شَىْءٌ قَطُّ فَيَنْتَقِمَ مِنْ صَاحِبِهِ إِلاَّ أَنْ يُنْتَهَكَ شَىْءٌ مِنْ مَحَارِمِ اللَّهِ فَيَنْتَقِمَ لِلَّهِ عَزَّ وَجَلَّ.[42]

> A'isha (May Allah be pleased with her) reported that Allah's Messenger (may peace be upon him) never beat

[41]Abû al-Husayn Muslim bin al-Ḥajjâj al-Naysabûrî, *Al-Jâmi' al-Shahîh Muslim* (Bayrût: Dâr Ihyâ' al-Turâth al-'Arabî, tt.), Jilid VII, 10.
[42]Muslim bin al-Ḥajjâj al-Naysabûrî, Jilid IV, 1841.

> anyone with his hand, neither a woman nor a servant, but only, in the case when he had been fighting in the cause of Allah and he never took revenge for anything unless the things made inviolable by Allah were made violable; he then took revenge for Allah, the Exalted and Glorious.

Additionally, Allah's Messenger (may peace be upon him) also condemned a husband who beat his wife as found in the following hadith:

عَنْ عَبْدِ اللهِ بْنِ زَمْعَةَ ، عَنِ النَّبِيِّ صلى الله عليه وسلم قَالَ : لاَ يَجْلِدُ أَحَدُكُمُ امْرَأَتَهُ جَلْدَ الْعَبْدِ ثُمَّ يُجَامِعُهَا فِي آخِرِ الْيَوْمِ[43].

> Narrated by `Abdullah bin Zam`a: The Prophet said: "None of you should flog his wife as he flogs a slave and then has sexual intercourse with her in the last part of the day".

The religious teaching above shows how Islamic *sharia* cares for the victims of violence and therefore, Muslims are obliged to love one another, take care, and avoid any acts of violence, hostility, persecution, humiliation, dropping honor, berating, abusing, stigmatizing or bullying. Perpetrators of domestic violence should no longer seek legitimation for doing the violence mainly from religious teaching.

The state, on the other hand, must be serious in campaigning prevention and taking the measure of domestic violence. It cannot simply stand while waiting for the victims to report the violence they experience. Instead, they should be proactive to prevent domestic violence through a variety of approaches, such as strengthening individual knowledge and skills, promoting public education, fostering coalitions and networks, changing organizational practices

[43]Muhammad bin Ismâ'il Abû Abdullah al-Bukhârî, *al-Ṣahîh al-Bukhârî* (al-Qâhirah: Dâr al-Sya'b, 1987), Jilid VII, 42.

and influencing policies and laws.[44] The seriousness of the state, afterward, must be well supported by awareness of society not to justify any violent act on the excuse of religion and culture.

Conclusion

Victims of domestic violence in Madura have shown their courage by carrying out some conscious and active strategies to protect their human rights. The experience of victims in carrying out this strategy deserves appreciation because women are no longer subordinated to men. They have sought to protect themselves internally, externally and interpersonally. The four cases of domestic violence show how few victims of domestic violence reported violence experience to formal institutions. Some of them felt more comfortable to choosing informal institutions. This research suggests that the State establish an anti-violence institution at the village/ *kelurahan* level to prevent, reduce and stop violence against wives. However, this institution must synergize with the community and religious leaders so that the resolution of violence is not only before the court but also based on local wisdom.

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[44]Rachel Davis, Lisa Fujie Parks, and Cohen, *Sexual Violence and the Spectrum of Prevention: Towards a Community Solution* (Enola PA: National Sexual Violence Resource Center, 2006), 7.

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Istighlâlu Barâati al-Ikhtirâ' fî al-Qânûn al-Indûnîsî Dirâsah Fiqhiyah Taqwîmiyah

Husnul Haq
International Islamic University Malaysia, Malaysia-53100
Email: husnulbojonegoro@gmail.com

Arif Ali Arif
International Islamic University Malaysia, Malaysia-53100

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Abstract

Patent has a prominent place in people's nowadays lives as it becomes the main mover of their advancement as well as a barometer of a nation's development and treasure. Countries with a huge percentage of patents occupy higher position and get stronger political influence than others. Therefore, the worldwide countries have agreed to conduct agreements to protect the patent through so called Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Indonesian's signing on the agreement was then followed by a legal cover in the field of patent through Law number 13 of 2016. This study aims to examine the concept of exploitation in the Indonesian Law using Islamic jurisprudence as the evaluative instrument. It focuses on how far the congruity between both in portraying the patent and punishment for its exploitation is. We use analytical and critical method as well as comparative ones. The careful study on this law and Islamic jurisprudence including its principles and purposes makes it clear that both agree on patent as a part of wealth and property and therefore, it needs protection as well as rules on punishment for the aggressors. Both also share the same opinion on patent exploitation rules whether personal exploitation or through a license contract. However, Islamic jurisprudence has established procedures for patent exploitation and one of which is that it should not harm others.

Author correspondence email: husnulbojonegoro@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

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ملخص البحث

تتمتع براءة الاختراع بالمكانة المرموقة في حياة الناس؛ إذ إنها تشكل المحركة الأساسية لعجلة التقدم، وتصبح مقياسا لتقدم الدول وغناها. فالدول التي تمتلك نسبة هائلة من البراءة تحتل مكانة رفيعة بين سائر الدول، ويكون لها نفوذ سياسي في مواجهة الدول الأخرى. ولذلك اتفقت دول العالم على عقد الاتفاقيات لحمايتها، وعلى رأسها اتفاقية الجوانب المتصلة بالتجارة من حقوق الملكية الفكرية (TRIPS). ولما وافقت دولة إندونيسيا على التوقيع على هذه الاتفاقية كان لا بد لها من توفير الغطاء القانوني في مجال براءة الاختراع من خلال قانون رقم ١٣ لسنة ٢٠١٦. وبعد النظر الدقيق إلى هذا القانون، والتتبع للفقه الإسلامي وأصوله ومقاصده، يرى البحث أن القانون الإندونيسي والفقه الإسلامي يتفقان على اعتبار براءة الاختراع مالاً وملكاً، ومن ثم يتفقان على ضرورة حمايتها وإيقاع العقوبة على المعتدي عليها، كما يتفقان على جواز استغلالها سواء كان استغلالا شخصيا أو من خلال عقد الترخيص، إلا أن الفقه الإسلامي وضع ضوابط لاستغلال البراءة، أهمها ألا يؤدي الاستغلال إلى الإضرار بالآخرين.

الكلمات المفتاحية:

استغلال، براءة الاختراع، القانون الإندونيسي، الفقه الإسلامي.

المقدمة

يحتل الاختراع مكانا مرموقا في الحياة الاقتصادية، إذ إنه يشكل المحرك الأساسي لتقدم الدول ورفاهيتها، بل ويصبح معيارا لتقدم الدول وغناها، بعد أن كان المعيار في ذلك كثرة أو قلة امتلاك الثروات الطبيعية.

والتفاوت بين الدول في امتلاك الاختراع أدى إلى تقسيم دول العالم إلى ثلاث مجموعات، وهي: الدول المتقدمة، والدول التي تحت التطور، والدول المتخلفة. فالدول المتقدمة هي التي تمتلك النسبة الكبيرة من الاختراع في شتى الميادين، كأمريكا واليابان. والدول التي تحت التطور هي التي تمتلك النسبة المتوسطة من الاختراع، وتسعى إلى امتلاك المزيد منه، كالهند وإندونيسيا. وأما الدول المتخلفة فهي التي لا تمتلك إلا النسبة الضئيلة منه، كالسودان وبنغلادش.

وليس من المبالغة في القول بأن امتلاك النسبة الهائلة من الاختراع كان السبب الرئيسي في تمتع الدول المتقدمة بالمكانة الرفيعة بين سائر الدول، بالإضافة إلى النفوذ السياسي التي تملكه تلك الدول في مواجهة الدول الأخرى. وخير شاهد على ذلك هو اليابان، حيث إنها هزمت في الحرب العالمية الثانية، ودُمِّرتْ جراء إلقاء قنبلة في هيروشيما وناجازاكي، ورغم ذلك فإنها أنتجت في وقت قصير العديدَ من الاكتشافات الجديدة كأساس لنمو وتطور الصناعة والتجارة التي تهيمن على أسواق العالم، لذلك أصبحت اليابان بلدة ذات قوة اقتصادية عالمية.

والأهمية المتزايدة للاختراعات دفعت دول العالم – بما فيها إندونيسيا – إلى الاهتمام بها، ووضع النظام القانوني لحمايتها من خلال نظام براءة الاختراع. ولا تكتفي بحمايتها بالقانون الداخلي، بل لجأت وبادرت إلى الانضمام إلى الاتفاقيات

الدولية، أهمها اتفاقية الجوانب المتصلة بالتجارة من حقوق الملكية الفكرية؛ وذلك لضمان حماية اختراعاتها خارج حدود الدولة.

على أن حماية براءة الاختراع ترتب حقوقا لصاحبها، وهي الحق في استعمالها واستغلالها واستثمارها والتصرف فيها؛ بيعا كان التصرف أو إجارة أو رهنا أو نحوها. وتكمن مشكلة البحث في أن القوانين الوضعية أباحت استغلال براءة الاختراع، وأن الفقه القديم لم يبين أحكام استغلالها، بل ولم يتناول قضية براءة الاختراع بالبحث والدراسة. ومن ثم يسعى البحث إلى استجلاء أحكام استغلال براءة الاختراع في القانون الإندونيسي والفقه الإسلامي.

مفهوم براءة الاختراع وصورها وشروطها

الاختراع (Invention) لغة: إيجاد شيء لم يكن موجودا من قبل.[١] فالكهرباء اختراع، والسيارة اختراع، والطائرة اختراع، وهكذا.[٢]

والاختراع قانونا هو: فكرة لمخترع تتم ترجمتها إلى نشاط معين لحل مشكلات معينة في مجال التكنولوجيا، ويمكن أن تكون منتجاً (Product)، أو طريقة الإنتاج (Process)، أو تحسين وتطوير المنتج أو طريقة الإنتاج.[٣]

وأما براءة الاختراع فهي: حق استئثاري تمنحه الدولة للمخترع على اختراعه في مجال التكنولوجيا لمدة معينة، والذي يمكنه بموجبه استغلال اختراعه بنفسه أو موافقته على الآخرين باستغلاله.[٤]

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[1] <https://kbbi.web.id/invensi.html> (Accessed on 21 October 2019).

[٢] الموسوعة العلمية الميسرة، (لبنان: مكتبة لبنان، ط ٢، ١٩٨٥م).، ٢٠٣.

[٣] المادة ٢/١ من قانون براءة الاختراع الإندونيسي رقم ١٣ لسنة ٢٠١٦.

[٤] المادة ١/١ من قانون براءة الاختراع الإندونيسي.

وعرفها خاطر لطفي بقوله: براءة الاختراع هي رخصة الحماية القانونية التي يمنحها المشرع للمخترع على اختراعه، والتي تثبت ملكيته له، وتخوله دون غيره الحق في استغلاله، والتصرف فيه بجميع طرق الاستغلال والتصرف طوال مدة الحماية التي نص عليها القانون.[٥]

ويتبين من التعريفين السابقين لبراءة الاختراع أمور:

١- إن براءة الاختراع تثبت ملكية المخترع على اختراعه، كما تثبت له حق احتكار واستغلال اختراعه بجميع طرق الاحتكار والاستغلال.

٢- إن براءة الاختراع تخول صاحبها حق منع الآخرين من استغلال اختراعه واستثماره دون الموافقة منه.

٣- إن ملكية براءة الاختراع مؤقتة بحيث تسقط بعد مدة قانونية معينة، بعكس الملكية في طبيعتها التقليدية.

وأما صور الاختراع فقد ذكرتها المادة ٢/١ من قانون براءة الاختراع الإندونيسي أن الاختراع يمكن أن يكون في شكل المنتج (Product)، أو طريقة الإنتاج (Process)، أو تحسين وتطوير المنتج أو طريقة الإنتاج. وذلك على النحو التالي:

١- المنتجات الصناعية الجديدة

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[٥] خاطر لطفي، *موسوعة حقوق الملكية الفكرية* (القاهرة: شركة ناس للطباعة، ط ١، ٢٠٠٣م).، ١٦ .

ويقصد بذلك: أن يتوصل الاختراع إلى وجود منتج صناعي جديد، له خصائص معينة تميزه عن غيره من الأشياء المماثلة له.[٦]

ومن صور المنتجات الجديدة: الآليات كالسيارات والطائرات والقطارات، والأجهزة كالهواتف والثلاجات والتلفزيونات،[٧] والتركيبات كتركيبات الأدوية والتركيبات الكيميائية.[٨]

٢- الطريقة الصناعية الجديدة

يختلف الاختراع في هذه الصورة عن التي قبلها. فالاختراع في الصورة الأولى يتولد عنه منتج صناعي جديد، بينما في هذه الصورة يتولد عنه ابتكار طريقة جديدة لإنتاج شيء موجود من قبل. فالاختراع هنا ينصب على الطريقة الجديدة للإنتاج، والتي لم تستعمل من قبل للوصول إلى هذه النتيجة.[٩]

ومن صور الطريقة الصناعية الجديدة اختراع طريقة جديدة لصنع الأحبار أو الأدوية أو المناديل،[١٠] أو ابتكار طريقة جديدة لقياس سرعة الرياح أو درجة الحرارة.[١١]

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[٦] حساني علي، *براءة الاختراع: اكتسابها وحمايتها القانونية بين القانون الجزائري والقانون المقارن* (الأزاريطة: دار الجامعة الجديدة، ط ١، ٢٠١٠م).، ٥٨.

[٧] صلاح زين الدين، *الملكية الصناعية والتجارية* (عمان: دار الثقافة للنشر والتوزيع، ط ٣، ١٤٣٣هـ/٢٠١٢م).، ٢٦.

[8] Suyud Margono, *Hak Milik Industri: Pengaturan dan Praktik di Indonesia* (Bogor: Penerbit Ghalia Indonesia, 2011)., 133.

[٩] لطفي، *موسوعة حقوق الملكية الفكرية*.، ١٦ .

[10] Margono, *Hak Milik Industri*, p. 133; Khoirul Hidayah, *Hukum Hak Kekayaan Intelektual* (Malang: Setara Press, 1st Edition, 2017)., 75.

[١١] زين الدين، *الملكية الصناعية والتجارية*.، ٢٨.

٣- التعديلات والتحسينات والإضافات

يقصد بهذه الصورة: كل تعديل أو تحسين أو إضافة يرد على اختراع تمّ منح براءة الاختراع عنه. وإنما تمنح البراءة عن كل ذلك إذا ما توافرت فيه الشروط التي يفرضها القانون لمنح البراءة، وهي الجدة (Novelty)، والمنطوية على الخطوة الإبداعية (Inventive Step)، والقابلية للتطبيق الصناعي (Industrial Applicability).[١٢]

ومن أمثلة ذلك: وجود اختراعين إثنين؛ اختراع أصلي توصل إليه المخترع الأول وصدرت عنه البراءة، واختراع آخر توصل إليه شخص آخر غير المخترع الأول وتضمن هذا الاختراع تحسينا أو تعديلا أو إضافة للاختراع الأول. وفي هذه الحالة يستحق الأخير براءة الاختراع على هذا التحسين أو التعديل أو الإضافة، إذا ما توافرت فيه الشروط الثلاثة السابقة.[١٣]

وقد سجل العالم الأمريكي جيروم ليميلسون براءة اختراع بتاريخ ١٣ فبراير ١٩٩٠ عن اختراع قسطرة (Catheter) طبية لعلاج مرض القلب والشرايين، وهو عبارة عن قسطرة بالونية يتم إدخالها داخل الشريان بواسطة جهاز التشغيل، وعندما تصل القسطرة إلى موضع الضيق أو الانسداد، يقوم الطبيب بالضغط على سائل في البالونة يؤدي إلى نفخها، وبالتالي يؤدي إلى توسعة موضع الضيق بالشريان.[١٤]

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[12] Dian Nurfitri & Rani Nuradi, *Pengantar Hukum Paten Indonesia* (Bandung: Penerbit P.T. Alumni, 1st Edition, 2013)., 34-35; Indonesian Patent Law, article 3/1.

[١٣] لطفي، *موسوعة حقوق الملكية الفكرية*.، ٢٣.

[١٤] المرجع نفسه.، ٢٤.

إلا أن مجرد سحب البالونة من الشريان يتضيق الجدار مرة ثانية، ويعود الضيق أو الانسداد. لذلك تقدم عالم آخر ميخائيل درور بطلب تسجيل براءة اختراع جديدة في ٧ أبريل ١٩٩٢، يتضمن تجهيز القسطرة السابقة بوضع مستحضر طبي (عقار الهيبارين) داخل غشاء مثبت على السطح الخارجي للبالونة، وينفصل هذا العقار ويوضع على الجدار الداخلي للشريان بمجرد نفخ البالونة بتقنية ميكانيكية دقيقة. وقد اعتبر القضاء الأمريكي هذا الاكتشاف الجديد، وإن كان بمثابة تحسين للاختراع الأول.[١٥] ويستلزم أن يتوافر في الاختراع شروط معينة حتى تمنح عنه البراءة، وبالتالي يتمتع بالحماية القانونية، ويثبت لمالكه حق استغلاله والتصرف فيه ومنع الآخرين من استغلاله إلا بإذنه.

يمكن استخلاص الشروط اللازم توافرها في الاختراع من نص المادة الثالثة من قانون براءاة الاختراع الإندونيسي، إذ جاء فيها أنه: "تمنح براءة الاختراع كما هو المشار إليه في المادة الثانية الفقرة أ عن كل اختراع جديد، ومنطوي على خطوة إبداعية، وقابل للتطبيق الصناعي."

يعالج النص السابق الشروط اللازم توافرها في الاختراع حتى تمنح عنه البراءة، وهي:

١- أن يكون جديدا (Novelty)

ويراد بجدة الاختراع: أن يكون الاختراع – وقت قبول طلب البراءة (Filling Date)[١٦] – غير مُساو للتقنية الأخرى التي تم اكتشافها والتعريف بها.[١٧] وبلغة

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[١٥] لطفي، *موسوعة حقوق الملكية الفكرية*.، ٢٤-٢٥.

[١٦] يقصد بوقت قبول طلب البراءة: تاريخ قبول طلب البراءة لدى المسجل، وذلك بعد توافره للحد الأدنى من شروط الطلب.

Margono, *Hak Milik Industri*., 151.

أخرى، أن لا يكون الاختراع قد سبقه أحد في الكشف عنه أو استعماله أو التعريف به.[١٨]

ويقصد بالتقنية التي تم التعريف بها: التقنية التي تم الإعلان عنها في إندونيسيا أو خارجها، سواء كان الإعلان بالكتابة أو باللسان أو بالعرض أو بالاستخدام أو غيرها من الوسائل التي تمكن الخبير من استعمال وتنفيذ الاختراع قبل تاريخ قبول طلب البراءة.[١٩]

ولا يعتبر الاختراع جديدا متى تم الإفصاح عنه أو التعريف به كتابيا، أو شفهيا، أو من خلال العرض، قبل تاريخ القبول بطلب البراءة.[٢٠]

٢- أن ينطوي على خطوة إبداعية (Inventive Step)

يعتبر الاختراع منطويا على الخطوة الإبداعية عندما لا يمكن لذي خبرة في مجال الهندسة التنبوء به والتصور عنه قبله.[٢١] وقد مثّل المشرع اختراعا لا يمكن التنبؤ به قبله بما إذا تقدم شخص بطلب براءة الاختراع عن فرشاة أسنان يمكن نزع رأسها ووضع رأس الحلاقة محله بحيث يمكن استخدامها للحلق.[٢٢]

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[17] Yuswanto, *Memahami Paten*., 19; Indonesian Patent Law, article 5/1.

[١٨] ريم سعود سماوي، *براءات الاختراع في الصناعات الدوائية* (عمان: دار الثقافة للنشر والتوزيع، ط ١، ٢٠٠٨م).، ٩٩.

[19] Hidayah, *Hukum Hak Kekayaan Intelektual*., 71; Indonesian Patent Law, article 5/2.

[20] Marni Emmy Mustafa, *Prinsip-prinsip Beracara dalam Penegakan Hukum Paten di Indonesia Dikaitkan dengan TRIPS's-WTO* (Bandung: Penerbit P.T. Alumni, 1st Edition, 2016)., 54.

[21] Nurfitri & Nuradi, *Pengantar Hukum Paten Indonesia*., 35; Indonesian Patent Law, article 7/1.

[٢٢] شرح قانون براءة الاختراع، المادة ٧/١.

ولايعتبر الاختراع منطويا على الخطوة الإبداعية إذا كان مجرد جمع لعناصر صناعية قديمة، أو مجرد اكتشاف عن شيء موجود في العالم، أو مجرد الاستعمال الجديد لشيء قديم. ولعل الغرض من وضع هذا الشرط هو استبعاد الاختراعات قليلة الأهمية التي يصل إليها التطور العادي للصناعة.[٢٣]

٣- أن يكون قابلا للتطبيق الصناعي (Industrial Applicability)

إن جدة الاختراع وانطواءه على خطوة إبداعية لا يكفيان لكي تمنح عنه البراءة، بل لا بد أيضا من قابليته للتطبيق الصناعي. ويعد الاختراع قابلا للتطبيق الصناعي متى أمكن تطبيقه في الصناعة،[٢٤] وذلك عن طريق استعماله أو استغلاله أو استثماره في أي مجال من المجالات الصناعية المتعددة، سواء كان ذلك في الصناعات الإنتاجية أو الصناعات النقلية أو الصناعات الزراعية وما إلى ذلك.[٢٥]

فإذا كان الاختراع في شكل المنتج فلا بد من إمكان إنتاجه بشكل واسع ومتكرر وبنفس الجودة. وأما إذا كان في شكل الطريقة فلا بد من إمكان استعمالها وتطبيقها عمليا في أي مجال من المجالات الصناعية المتنوعة.[٢٦]

ولا تمنح البراءة عن الإبداعات الجمالية (الفنية)، أو المخططات، أو القواعد والطرق لممارسة الأنشطة الذهنية أو الألعاب أو الأعمال التجارية، أو القواعد والأساليب التي تحتوي على برامج الكمبيوتر، أو طرق عرض المعلومات، لأن مجال كل ذلك نظري بحت، ولا يمكن تطبيقه في مجال الصناعة.[٢٧]

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[23] Hidayah, *Hukum Hak Kekayaan Intelektual.*, 72.

[24] Yuswanto, *Memahami Paten.*, 19; Indonesian Patent Law, article 8.

[٢٥] زين الدين، *الملكية الصناعية والتجارية.*، ٢٨.

[26] Nurfitri & Nuradi, *Pengantar Hukum Paten Indonesia.*, 35.

[27] Hidayah, *Hukum Hak Kekayaan Intelektual.*, 72.

٤- أن يكون مشروعا

يقصد بمشروعية الاختراع: عدم وجود مانع قانوني يمنع تسجيل الاختراع. فالقانون قد يمنع تسجيل الاختراع لاعتبارات معينة، وهي:

أولا: الطرق أو المنتجات التي ينشأ من إعلانها أو استعمالها أو تطبيقها إخلال بالقانون أو الدين أو النظام العام أو الآداب؛[٢٨] كاختراع آلة للعب القمار، أو جهاز لتزييف النقود.[٢٩] فكل هذه الأمثلة لا يمنح عنها براءة الاختراع.

ثانيا: طرق تشخيص، وتمريض، وعلاج، وجراحة الإنسان أو الحيوان؛[٣٠] فلا يجوز منح البراءة لمن يخترع وسيلة جديدة لمعالجة السمنة أو لمنع الحمل.[٣١] وأما السبب في استبعاد هذه الطرق من الحصول على البراءة هو عدم قابليتها للاستغلال الصناعي، فضلا عن أنها تهدف لحماية الصحة البشرية والحيوانية.[٣٢]

ويلاحظ، أن هذا الحظر يقتصر على طرق التشخيص والتمريض والعلاج والجراحة، دون أن يشمل الأدوات والأجهزة والمواد والمنتجات الدوائية مما له علاقة بالطب.

ولنا أن نتسائل؛ لماذا يقتصر الحظر على طرق التشخيص والتمريض والعلاج والجراحة، دون أن يشمل الأدوات والأجهزة والمواد المستخدمة في مجال الطب،

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[٢٨] المادة ٩ من قانون براءة الاختراع.

[٢٩] سعيد بن عبد الله بن حمود المعشري، *حقوق الملكية الصناعية* (الأزاريطة: دار الجامعة الجديدة، ط ١، ٢٠١٠م).، ٩٤.

[٣٠] المادة ٩ من قانون براءة الاختراع.

[٣١] لطفي، *موسوعة حقوق الملكية الفكرية*.، ٢٩.

[٣٢] المرجع نفسه.

كما لا يشمل المنتجات الدوائية؟ أليس الحظر من منح البراءة عن تلك الطرق يقوم —كما قالوا – على أهداف إنسانية لحماية الصحة البشرية والحيوانية،[٣٣] وهذه العلة نفسها متوفرة أيضا في الأدوات والأجهزة والمواد الطبية والمنتجات الدوائية.

على أن منح البراءة عن الأدوات الطبية والمنتجات الدوائية يؤدي إلى زيادة الأسعار بسبب ارتفاع القوة الاحتكارية لصاحب البراءة.[٣٤] ففي الهند، حدثت كارثة صحية قومية نتيجة إنفاذ اتفاقية تريبس في هذا البلد، والتي قضت بمنح البراءة عن المنتجات الدوائية، حيث يستطيع ٣٠% فقط من السكان أن يشتروا الأدوية الحديثة.[٣٥] وهكذا. فأين الأهداف الإنسانية، إذن؟؟؟

على أن الباحث يرى أنه لا بأس بمنح البراءة عن الأدوات الطبية والمنتجات الدوائية شريطة ضمان اتفاقية تريبس وحكومات كل بلد توافرَ تلك الأدوات والمنتجات في الصيدليات والمستشفيات، وقيامها بمراقبة أسعارها حتى يمكن للمحتاجين شراؤها.

ثالثا: النظريات العلمية، والطرق الرياضية؛[٣٦] فلا يجوز منح البراءة عن كل ذلك، لأن مجالها نظري بحت ولا يمكن استغلالها في عالم الصناعة. ولكن يمكن حمايتها تحت ظل حق التأليف إذا ما توافرت فيها الشروط اللازمة لذلك.[٣٧]

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[٣٣] لطفي، *موسوعة حقوق الملكية الفكرية.*، ٢٩.

[٣٤] نصر أبو الفتوح فريد حسن، *حماية حقوق الملكية الفكرية في الصناعات الدوائية* (الأزاريطة: دار الجامعة الجديدة، ط ١، ٢٠٠٧م).، ١٠٩.

[٣٥] حسن، *حماية حقوق الملكية الفكرية في الصناعات الدوائية.*، ١٠٩.

[٣٦] المادة ٩ من قانون براءة الاختراع.

[٣٧] زين الدين، *الملكية الصناعية والتجارية.*، ٤٠.

رابعا: الكائنات الحية، عدا الكائنات الدقيقة (Microorganisms).[٣٨] ويقصد بالكائنات الحية ما يشمل الناس والنباتات والحيوانات؛ فلا يجوز منح البراءة عنها.[٣٩]

واستثنى القانون عن نطاق هذا الحظر الكائنات الدقيقة، وهي الكائنات الحية الصغيرة جدا، والتي لا يمكن رؤيتها إلا بالميكروسكوب؛ كالفيروسات (Viruses) والبكتريا (Bacteria) والفطريات (Fungi) والطحالب (Algae) والخمائر (Yeast).[٤٠] ومن المعروف أن هذه الكائنات تستخدم كثيرا في صناعة الأغذية والأدوية.[٤١]

ودعنا نتساءل: لماذا استثنت القوانينُ واتفاقيةُ تريبس الكائناتِ الدقيقة عن نطاق هذا الحظر، بحيث أجازت منح البراءة عنها؟ أليست الكائنات الدقيقة داخلة في مسمى الكائنات الحية التي لا يجوز منح البراءة عنها؟

على أن الدول المتقدمة تستغل غموض معنى الأحياء الدقيقة، وتتوسع في تفسيرها ليشمل جميع أنواع الخلايا الحية ومكوناتها أو أجزاء هذه الخلايا.

فلا بد من الاقتصار على المعنى الصحيح للكائنات الحية، حتى تستبعد من الحماية القانونية كل الكائنات الحية، فيما عدا ما تدخل الاختراع في صفاته عن طريق الهندسة الوراثية.[٤٢]

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[٣٨] المادة ٩ من قانون براءة الاختراع.

[39] Hidayah, *Hukum Hak Kekayaan Intelektual.*, 73.

[40] Mustafa, *Prinsip-prinsip Beracara dalam Penegakan Hukum Paten di Indonesia Dikaitkan dengan TRIPS's-WTO.*, 79.

[٤١] لطفي، *موسوعة حقوق الملكية الفكرية.*، ٣٢.

[٤٢] محمد حسن عبد المجيد الحداد، *الآليات الدولية لحماية حقوق الملكية الصناعية وأثرها الاقتصادي: دراسة مقارنة بالشريعة الإسلامية* (المحلة الكبرى: دار الكتب القانونية، ط١، ٢٠١١م).، ٣٣٢.

خامسا: الطرق التي تكون في أساسها بيولوجية لإنتاج النباتات أو الحيوانات، عدا الطرق غير البيولوجية (Nonbiology) أو الطرق البيولوجية الدقيقة (Microbiology).[٤٣] ويقصد بالطرق البيولوجية لإنتاج النباتات والحيوانات: عملية التلقيح والإخصاب والتهجين التي هي من الوسائل الطبيعية لإنتاج النباتات والحيوانات؛ فلا تمنح عنها البراءة.[٤٤]

وأما الطرق غير البيولوجية فيقصد بها: الطرق التي لا تستند على الوسائل الطبيعية في إنتاج النباتات والحيوانات، بينما يقصد بالطرق البيولوجية الدقيقة: تلك التي تستند على استخدام الكائنات الدقيقة في إنتاج النباتات والحيوانات.[٤٥]

التكييف القانوني والفقهي لبراءة الاختراع

تناول القانونيون موضوع براءة الاختراع عند الكلام عن حقوق الملكية الفكرية عامة، وحقوق الملكية الصناعية خاصة، مما يُشعر أن براءة الاختراع داخلة ضمن ما يسمى بمفهوم المال والملكية. ولأجله، يرى الباحث ضرورة بيان مفهوم هذين المصطلحين وبُعد كل منهما في براءة الاختراع.

١- المال وبُعدُه في براءة الاختراع

جاء تعريف المال في المادة ٤٩٩ من القانون المدني الإندونيسي، فتنص على أن المال هو: "كل شيء وكل حق يمكن أن يكونا محلين للملك." ويتبين من

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[٤٣] المادة ٩ من قانون براءة الاختراع.

[44] Mustafa, *Prinsip-prinsip Beracara dalam Penegakan Hukum Paten di Indonesia Dikaitkan dengan TRIPS's-WTO.*, 79.

[٤٥] صالح فهد دحيم العتيبي، *استثمار براءة الاختراع في النظام القانوني السعودي* (الجيزة: مركز الدراسات العربية للنشر، ط ١، ١٤٣٧هـ/٢٠١٦م).، ٤٦-٤٧.

هذا التعريف، أن مفهوم المال يتناول الأشياء والحقوق التي تصلح أن تكون محلا للملك.

ويتنوع المال باعتبارات مختلفة إلى أنواع. فهو باعتبار شكله ينقسم إلى مادي وغير مادي،[٤٦] وباعتبار إمكان نقله وعدمه ينقسم إلى منقول وغير منقول (عقار).[٤٧] وينقسم المنقول إلى منقول بطبيعته كالكرسي،[٤٨] ومنقول بحكم القانون كبراءة الاختراع.[٤٩]

والجدير بالذكر هنا، أن القانون المدني الإندونيسي رغم تناوله أحكام الأموال، إلا أنه لم يتعرض لبيان أحكام براءة الاختراع وموقعها من مفهوم المال. ومع ذلك، فإنه يستوعبه، وجهة استيعابه راجعة إلى نظرته إلى معنى المال. فمفهوم المال فيه يشمل المال المادي والمعنوي. وبراءة الاختراع تعتبر من الأموال المعنوية (Intangible).[٥٠]

٢- الملكية وبُعدُها في براءة الاختراع

عرفت المادة ٥٧٠ من القانون المدني الإندونيسي الملكيةَ أو حقَّ الملكية بأنها: "الحق في التمتع بفائدة المال، وفي التصرف فيه بحرية كاملة، بشرط أن لا يتعدى حدود القوانين أو الأنظمة العامة المقررة من قبل السلطة المختصة، وأن لا

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[٤٦] المال المادي هو: أن يكون له حيز مادي محسوس، كالأراضي والمباني والمركبات والمواشي. وأما المال غير المادي فهو: ما لم يكن له حيز مادي محسوس، كالحقوق.

Abdul Kadir Muhammad, *Hukum Perdata Indonesia* (Bandung: PT. Citra Aditya Bakti, 1st Edition, 2014)., 129.

[٤٧] المادة ٥٠٣ من القانون المدني الإندونيسي.

[48] Indonesian Civil Code, Article 509; Muhammad, *Hukum Perdata Indonesia.*, 130.

[49] Hidayah, *Hukum Hak Kekayaan Intelektual.*, 2.

[50] Yuswanto, *Memahami Paten.*, 2.

يعارض حقوق الآخرين، مع الأخذ في الاعتبار إمكانية إلغاء هذا الحق للمصلحة العامة، بناءً على أحكام القوانين، وبدفع التعويضات."

فالملكية تمنح صاحب المال حقا في التمتع به والتصرف فيه بجميع التصرفات القانونية شريطة عدم الإخلال بالأحكام القانونية أو الأنظمة العامة، أو عدم الاعتداء على حقوق الآخرين.

وهناك أسباب لكسب الملكية، أهمها: الالتقاط؛ كأن يلتقط مالا في الطريق ولم يعرف مالكه. ومنها: التسليم؛ كأن يسلم البائع المبيع إلى المشتري. ومنها: الميراث؛ كأن يرث مالا من أبيه الميت. ومنها: الاختراع؛ كأن يخترع شخص تلفازا أو محمولا.[٥١]

وتأسيسا على ما سبق، يمكن الاستنتاج بأن القانون المدني الإندونيسي يقضي بحماية حقوق الملكية على الأموال، مادية كانت أو معنوية، منقولة كانت أو غير منقولة مالم تخالف القانون والآداب العامة. ولما ثبت أن براءة الاختراع مال، وأن المال قابل للتملك، ثبت أن براءة الاختراع مما يقع تحت التملك.[٥٢]

وفي نهاية المطاف، توصل الباحث إلى أن براءة الاختراع تعد مالا. ولما كانت الأموال يجري فيها الاختصاص والملك، فإن براءة الاختراع مال وملك، في القانون الإندونيسي

وبناء على ذلك، فقد منح القانون الإندونيسي الحماية القانونية لبراءة الاختراع المسجلة، ومدتها عشرون سنة تبدأ من تاريخ قبول الطلب،[٥٣] كما منح

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[51] Indonesian Civil Code, article 584 and article 1977/1&2, Muhammad, *Hukum Perdata Indonesia.*, 142-143.

[52] Margono, *Hak Milik Industri: Pengaturan dan Praktik di Indonesia.*, 8.

[٥٣] المادة ٢٢/١-٢ من قانون براءة الاختراع الإندونيسي.

لصاحبها الحق في استغلال الاختراع موضوع البراءة وصنعه وإنتاجه وبيعه وتصديره، أو منح ترخيص للغير بذلك لقاء عوض معلوم.[٥٤]

وأما الفقه الإسلامي فلا بد من بيان مفهوم المال والملك، واستجلاء علاقة كل منهما بمفهوم براءة الاختراع غاية التعرف على مدى انطباق معناهما على براءة الاختراع.

١- المال وعلاقته ببراءة الاختراع

لقد اختلف الفقهاء في تعريف المال اختلافا ظاهرا. وهذا الاختلاف ناشئ عن اختلافهم في تحديد مناط مالية الأشياء، هل هو مقصور على الأعيان فقط، أم يشمل المنافع والحقوق؟[٥٥]

ذهب جمهور الحنفية إلى أن المال لا يكون إلا عينا، فعرفوا المال بأنه: "ما يميل إليه الطبع، ويمكن ادخاره لوقت الحاجة".[٥٦] ومقتضى هذا التعريف: أن المال لا يكون إلا عينا، حتى يتمكن إحرازه وادخاره. ويترتب على ذلك، أن المنافع والحقوق لا تعتبر أموالا عندهم.[٥٧]

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[٥٤] المادة ١/١٩ والمادة ٧٦ من قانون براءة الاختراع الإندونيسي.

[٥٥] أحمد سحيمي بن يحيى بن بويونج، *الحقوق المقررة للفرد في الابتكار؛ دراسة فقهية مقارنة مع القانون الوضعي* (رسالة مقدمة للحصول على درجة الماجستير من جامعة القاهرة سنة ١٩٩٧م)،. ٩٧.

[٥٦] محمد أمين بن عابدين، *رد المحتار على الدر المختار شرح تنوير الأبصار*، تحقيق عادل أحمد عبد الموجود وعلي محمد معوض (الرياض: دار عالم الكتب، ط ١، ١٤٢٣هـ/٢٠٠٣م)، ج ٧،. ١٠.

[٥٧] يوسف القرضاوي، *فقه الزكاة* (بيروت: مؤسسة الرسالة، ط ٧، ١٤٢٣هـ/٢٠٠٢م)،. ١٥٧.

وذهب جمهور العلماء من المالكية والشافعية والحنابلة إلى توسيع مفهوم المال ليشمل الأعيان وغيرها من المنافع والحقوق، إذا توفرت فيها شروط المالية. وقد عرف الإمام الشاطبي – من المالكية – المال بأنه: "ما يقع عليه الملك، ويستبد به المالك عن غيره إذا أخذه من وجهه".[٥٨]

وعرفه الإمام الزركشي — من الشافعية — بقوله: "ما كان منتفعا به، أي مستعدا لأن ينتفع به، وهو إما أعيان أو منافع".[٥٩] كما عرفه الإمام منصور البهوتي الحنبلي بقوله: "ما يباح نفعه مطلقا أي في كل الأحوال أو يباح اقتناؤه بلا حاجة.[٦٠]

ويستنتج من التعريفات السابقة أن المنظور إليه في مالية الأشياء عندهم ليس هو عينية الشيء، بل منفعته، فمناط المالية، إذن هو "المنفعة" لا "العينية".[٦١]

والذي يبدو للباحث ترجيح رأي جمهور العلماء الذي يوسع دائرة المال لتشمل الأعيان وغيرها من الحقوق والمنافع، ما دام قد تحقق فيها صفة المالية. والقول بأن المال ينحصر في الأشياء المادية يخالف الواقع المعاصر، إذ إن هناك أشياء غير مادية ولكنها تعتبر أموالا نفيسة ذات قيمة غالية في عرف الناس، مثل براءة الاختراع.

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[٥٨] إبراهيم بن موسى الشاطبي، *الموافقات في أصول الشريعة*، ضبط وتعليق: أبي عبيدة مشهور بن حسن آل سلمان (الجيزة: دار ابن عفان للنشر والتوزيع، ط ١، ١٤٢١هـ)، ج ٢.، ١٧.

[٥٩] محمد بن بهادر الزركشي، *المنثور في القواعد* (بيروت: دار الكتب العلمية، ط ١، ١٤١٩هـ)، ج ٣.، ٢٢٢.

[٦٠] منصور بن يونس البهوتي، *شرح منتهى الارادات* (بيروت: عالم الكتب، ط ٢، ١٩٩٦م)، ج ٢.، ٧.

[٦١] سعدي حسين علي حبر، *الخلافات المالية وطرق حلها في الفقه الإسلامي* (عمان: دار النفائس، ط ١، ١٤٢٣هـ/٢٠٠٣م). ٢٢.

ومما يعضد ما قاله الباحث من مالية براءة الاختراع أن هناك فرقا واضحا في السعر السوقي بين الاختراعات التي تحميها البراءات وبين التي لا تحميها.[٦٢]

الدواء المبتكر Patented Drug	**السعر (قرص واحد)**	**الدواء الجنيس Generic Drug**	**السعر (قرص واحد)**
أموكسان (Amoxan)	٤,٤٨٠ روبية	أموكسيسيلين (Amoxicillin)	٥٨٧ روبية
أماريل (Amaryl)	٧,٨٧٧ روبية	غليميبيريد (Glimepiride)	٢,٠٣٩ روبية

ويتبين من الجدول أن سعر الدواء المبتكر (الدواء الذي تحميه البراءة) أغلى بكثير من الدواء الجنيس (الدواء الذي انتهت مدة حمايته)، مع أنهما يُستخدمان لعلاج نفس المرض، مما يدل على مالية براءة الاختراع.

٢- الملكية وعلاقتها ببراءة الاختراع

عرف الإمام القرافي الملكية بأنها: حكم شرعي مقدر في العين أو المنفعة يقتضي تمكن من يضاف إليه من انتفاعه بالمملوك، والعوض عنه من حيث هو كذلك.[٦٣]

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[62]<https://doktersehat.com/perbedaan-obat-generik-dan-obat-paten/>, <https://www.k24klik.com/> (Accessed on 09th January 2020).

[٦٣] أحمد بن إدريس القرافي، *أنوار البروق في أنواع الفروق* (القاهرة: مطبعة إحياء الكتب العربية، ط ١، ١٣٤٦هـ)، ج ٣، ٢٠٨.

ويبدو من هذا التعريف أن الملك أو الملكية يتناول العين والمنفعة، كما أن الملك أعم من المال حيث يشمل المال والمنفعة.[٦٤]

وقد تناول الفقه الإسلامي الأشياء التي لا يجوز أن تكون محلا للملك، والأشياء التي يجوز أن تكون محلا للملك. وأما الأشياء التي لا يجوز أن تكون محلا للملك فهي: الأعيان التي لا تشتمل على منفعة معتبر بها شرعا، كالذباب.[٦٥] والأعيان والمنافع المحرمة شرعا، كالميتة.[٦٦] والأشياء التي يتعلق بها حق الله تعالى، كالأموال الموقوفة، أو يتعلق بها حق الكافة؛ كالسكك الحديدية.[٦٧]

وأما غير هذه الأعيان والمنافع من الأموال فإنها قابلة للتمليك والتملك.[٦٨] وعلى هذا، فمحل الملك في الفقه الإسلامي واسع جدا ليشمل الأعيان والمنافع التي لا تلغيها الشريعة الإسلامية. وقد قرر الباحث سابقا أن براءة الاختراع حق مالي متقرر يشتمل على منفعة غير ملغاة شرعا، فهي إذن صالحة للتمليك والتملك.

وأخيرا، يمكن أن نستخلص أن القانون الإندونيسي والفقه الإسلامي يتفقان على أن براءة الاختراع مال، ولما كانت الأموال يجري فيها الملك والاختصاص والاستئثار، فإن براءة الاختراع إذن مال وهي قابلة للتمليك والتملك.

ولأجل ذلك، فإن الفقه الإسلامي يحمي براءة الاختراع ويوقع العقوبة على المتعدي عليها، كما أثبت حقا لصاحبها في تملكها واستغلال الاختراع موضوع

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[٦٤] النشمي، *الحقوق المعنوية: بيع الاسم التجاري في الفقه الإسلامي*.، ٢٣٣٤.

[٦٥] العبادي، *الملكية في الشريعة الإسلامية*، ج ١، ٢٤٠-٢٤١.

[٦٦] عبد الله مختار يونس، *الملكية في الشريعة الإسلامية ودورها في الاقتصاد الإسلامي* (الإسكندرية: مؤسسة شباب الجامعة، ط ١، ١٤٠٧هـ/١٩٨٧م).، ١٢٦.

[٦٧] وهبة الزحيلي، *الفقه الإسلامي وأدلته*، ج ٤، ٥٧-٥٨.

[٦٨] العبادي، *الملكية في الشريعة الإسلامية*، ج ١، ٢٤٦.

البراءة، وذلك لأن مقتضى الملك جواز الانتفاع بالمملوك، يقول القرافي: (الملك حكم شرعي مقدر في العين أو المنفعة يقتضي تمكن من يضاف إليه من انتفاعه بالمملوك والعرض عنه من حيث هو كذلك).[٦٩]

استغلال براءة الاختراع في القانون الإندونيسي والفقه الإسلامي

يعطي القانون صاحب براءة الاختراع حقا استئثاريا في استغلال الاختراع موضوع البراءة، وحقا في منع الغير من استغلاله. ويمكن رد حالات استغلال الاختراع إلى ما يلي:

١- الاستغلال الشخصي

تقدم البيان بأن الاختراع قد يكون في شكل المنتجات الصناعية، كالسيارة والطائرة والدواء، وقد يكون في شكل الطرق الصناعية، كطرق صنع السيارة وطرق صنع الطائرة. وأما المنتجات الصناعية فيمكن لصاحب البراءة الاستفادة منها بصنعها أو استخدامها أو بيعها أو تصديرها أو تأجيرها أو عرضها للبيع أو التأجير، بيد أن الطرق الصناعية يمكن الاستفادة منها باستعمالها في إنتاج وصنع المنتجات ونحوهما.[٧٠]

والجدير بالذكر أن حق صاحب البراءة في استغلال اختراعه حق محدود من حيث الزمان والمكان. أما من حيث الزمان فقد حدد القانون بأن مدته عشرون سنة تبدأ من تاريخ قبول الطلب، ولا يجوز تمديدها لمدة أكثر.[٧١] وبعد ذلك، يخرج

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[٦٩] القرافي، *أنوار البروق في أنواع الفروق*، ج ٣، ٢٠٩.

[٧٠] المادة ١/١٩ من قانون براءة الاختراع الإندونيسي.

[٧١] المادة ١/٢٢-٢ من قانون براءة الاختراع الإندونيسي.

الاختراع من دائرة استغلال صاحبه ليدخل دائرة الإباحة (Public Domain)، بحيث يجوز لأي أحد الاستفادة منه، دون أن يعتبر ذلك تعديا على حق صاحب

وأما من حيث المكان فقد حدد القانون أن يكون حق الاستغلال في نطاق دولة إندونيسيا، ولا يمتد إلى خارجها مالم يقم صاحبها بتسجيل اختراعه تسجيلا دوليا. وكذلك ألزم صاحبَ البراءة أن يصنع المنتجات أو يستخدم الطرق في إندونيسيا، غاية دعم نقل التكنولوجيا أو جلب الاستثمارات، أو توفير فرص العمل.[٧٣]

وكما يمنح القانون صاحب البراءة حقا في استغلال اختراعه، كذلك يمنحه حقا في منع الغير من استغلال الاختراع موضوع البراءة إلا بإذنه. فلا يجوز للغير استغلال الاختراع بأية طريقة؛ بالصنع أو الاستخدام أو البيع أو التصدير أو التأجير أو نحوها، دون الرجوع إلى صاحب البراءة.[٧٤]

ومع ذلك، لا يعتبر اعتداء على هذا الحق ما يقوم به الغير من استعمال الاختراع لأجل التعليم، أو البحث، أو التجربة، أو التحليل، طالما أن الاستعمال لا يضر بصورة غير معقولة بمصلحة صاحب البراءة، ولا يكون لغرض التجارة.[٧٥]

٢- عقد الترخيص

قد لا تتوافر لصاحب البراءة إمكانات لازمة للاستفادة من البراءة بنفسه، فيلجأ إلى منح الغير ترخيصا لاستغلال الاختراع موضوع البراءة،[٧٦] ويسمى بالترخيص

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[72] Margono, *Hak Milik Industri*, 160.

[٧٣] المادة ٢٠/١-٢ من قانون براءة الاختراع الإندونيسي.

[74] Yuswanto, *Memahami Paten*, 29.

[٧٥] المادة ١٩/٣ من قانون براءة الاختراع الإندونيسي.

الاختياري (Optional License).[٧٧] ومقتضى هذا الترخيص أن يسمح صاحب البراءة استغلال الاختراع من قبل شخص آخر، لمدة معينة، مقابل عوض معلوم.[٧٨] ويسمى صاحب البراءة بـ "المرخِّص" (Licensor) بينما يسمى الشخص المسموح له باستغلال الاختراع بـ "المرخَّص له" (Licensee).[٧٩]

وكما أن الاستغلال الشخصي محدود من حيث الزمان والمكان، فكذلك يتحدد الترخيص بمدة معينة وفي داخل ولاية جمهورية إندونيسيا.[٨٠] وفي حالة الترخيص الاختياري، يبقى للمرخص حق في استغلال اختراعه، مالم يتفق المرخص والمرخص له على خلاف ذلك.[٨١]

وقد وضع القانون الإندونيسي شروطا لصحة عقد الترخيص الاختياري، وهي:

١- أن يكون العقد مكتوبا ومنشورا في مكتب المديرية العامة للملكية الفكرية؛ فلا يكون نافذا في حق الغير إلا بعد إجراء هذا القيد والنشر عنه.[٨٢]

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[٧٦] نعيم أحمد نعيم شنيار، *الحماية القانونية لبراءة الاختراع في ظل قانون حماية حقوق الملكية الفكرية: دراسة مقارنة بالفقه الإسلامي* (الإسكندرية: دار الجامعة الجديدة، ط١، ٢٠١٠م)،. ٢٧٥.

[77] Purwaningsih, *Hukum Paten*, p. 189; Indonesian Patent Law, article 76, paragraph 1& 3.

[78] Margono, *Hak Milik Industri*, 162-163.

[٧٩] زين الدين، *الملكية الصناعية والتجارية*، ١٢١.

[٨٠] المادة ٧٦/١و٣ من قانون براءة الاختراع الإندونيسي.

[٨١] المادة ٧٧ من قانون براءة الاختراع الإندونيسي.

[82] Margono, *Hak Milik Industri*, 166; Indonesian Patent Law, article 79, paragraph 1& 2.

٢- أن لا يشتمل العقد على أحكام تضر بالمصلحة الوطنية، أو على قيود تعرقل قدرة الشعب الإندونيسي على نقل وإتقان وتطوير التكنولوجيا.[٨٣]

وهناك نوع آخر من الترخيص، وهو ما يسمى بالترخيص الإجباري (Compulsory License). ويقصد به: الترخيص الذي تمنحه سلطات الدولة لنفسها أو للغير باستغلال الاختراع في حالات معينة وبشروط خاصة وبتنظيم قانوني معين، دون الاعتداد بموافقة صاحب الاختراع من عدمه.[٨٤]

فكان لكل ذي شأن أن يقدم طلبا إلى الوزير المختص لمنح الترخيص الإجباري له. ويمكن رد حالات منح الترخيص الإجباري باستغلال الاختراع إلى ما يلي:

أ- إذا لم يقم صاحب البراءة باستغلال الاختراع (تصنيع المنتج أو طريقة تصنيعه) في إندونيسيا لمدة ٣٦ شهرا من تاريخ منح البراءة.

ب- أن يقوم صاحب البراءة أو المرخص له باستغلال الاختراع بشكل أو طريقة تضر بمصلحة المجتمع.

ج- أن يكون صاحب البراءة لا يستطيع استغلال اختراعه إلا باستخدام اختراع آخر سبق منح البراءة له.[٨٥]

وأما استغلال براءة الاختراع في الفقه الإسلامي فنقول بأن الفقه الإسلامي قد جعل أساس الحماية هو المالية؛ فمتى ثبتت المالية ثبتت الحماية. وقد بيّن

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[٨٣] المادة ٧٨ من قانون براءة الاختراع الإندونيسي.

[٨٤] لطفي، *موسوعة حقوق الملكية الفكرية*، ٩٥-٩٦.

[85] Yuswanto, *Memahami Paten*, 66, Indonesian Patent Law, article 82/1.

الإمام الغزالي أن من مقاصد الشريعة حفظ المال.[٨٦] فالشريعة حفظت المال من ناحية إيجاده بإلزام الكسب، وشرع المعاملات المالية من بيع وشراء ونحوهما، ومن ناحية المحافظة عليه بتحريم الغش والربا وأكل أموال الناس بالباطل.[٨٧]

ومع ذلك، يبدو للباحث أنه لا مانع من اشتراط تسجيل الاختراع لتوافر الحماية عليه؛ لأن التسجيل يعتبر توثيقا للحقوق حتى لا تضيع. وقد أمرنا سبحانه وتعالى بكتابة الديون، حفظا للمال من الضياع والتعدي عليه. قال تعالى: ﴿يَا أَيُّهَا الَّذِينَ آَمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُسَمًّى فَاكْتُبُوهُ﴾. (البقرة: ٢٨٢)، بل وقد أكد بعض الفقهاء المعاصرين أمثال الشيخ محمد تقي العثماني أن تسجيل الاختراع عند الجهة المختصة في الحكومة يعتبر شرطا لماليته.[٨٨]

والمال بطبيعته قابل للتملك والتمليك،[٨٩] وقد أثبتنا أن البراءة مال، فهي إذن قابلة للتملك والتمليك، وبالتالي ثبت لصاحبها حق التصرف، لأن التصرف

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[٨٦] أبو حامد محمد بن محمد الغزالي، *المستصفى في علم الأصول*، تصحيح محمد عبد السلام عبد الشافي (بيروت: دار الكتب العلمية، ١٤٢٠هـ/٢٠٠٠م).، ١٧٣.

[٨٧] وهبة الزحيلي، *الوجيز في أصول الفقه* (دمشق: دار الفكر، ط ١، ١٤١٩هـ/١٩٩٩م).، ٢٢٠.

[٨٨] محمد تقي العثماني، بيع الحقوق المجردة، "*مجلة مجمع الفقه الإسلامي*"، العدد الخامس، الجزء الثالث، ١٤٠٩هـ/١٩٨٨م.، ٢٣٨٥.

[٨٩] المرجع نفسه، ج ١، ٢٤٤.

يثبت بحصول الملك.[٩٠] والتصرف عند الفقهاء يشمل الاستعمال والاستغلال ونقل الملكية.[٩١]

وقد ذكرنا سابقا أن الاستفادة من الاختراع قد تكون بالاستغلال الشخصي، أو من خلال عقد الترخيص.

١- الاستغلال الشخصي

أكد الباحث سابقا أن ملكية براءة الاختراع تقتضي جواز التصرف في الاختراع، والتصرف يشمل الاستعمال والاستغلال ونقل الملكية. وعلى هذا، أجاز الفقه الإسلامي لصاحب البراءة استغلال الاختراع محل البراءة، سواء بالبيع أو الصنع أو الإنتاج أو التأجير أو التصدير أو عرضه للبيع أو نحوها، شريطة أن يتقيد بقيود، وهي:

القيد الأول: أن يحسن المالك الانتفاع والتصرف في أمواله؛ فلا يفسدها ولا يضيعها ولا ينفقها فيما لا منفعة فيه؛ فلا تبذير ولا تقتير ولا إسراف،[٩٢] قال الله تعالى: ﴿وَالَّذِينَ إِذَا أَنْفَقُوا لَمْ يُسْرِفُوا وَلَمْ يَقْتُرُوا وَكَانَ بَيْنَ ذَلِكَ قَوَامًا﴾ (الفرقان: ٦٧). فيجب على مالك براءة الاختراع أن يحسن الانتفاع والتصرف في البراءة.

والقيد الثاني: أن يقوم المالك باستثمار أمواله بأنواع الطرق المشروعة؛ فلا يجوز تعطيلها.[٩٣] فقد روي عن عمرو بن شعيب: أن النبي صلى الله عليه وسلم

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[٩٠] عز الدين عبد العزيز ابن عبد السلام، *قواعد الأحكام في مصالح الأنام* (بيروت: دار الكتب العلمية، ط ١، ١٤٢٠هـ/١٩٩٩م)، ج ٢، ٤.

[٩١] العبادي، *الملكية في الشريعة الإسلامية*، ج ١، ٢٧١.

[٩٢] المرجع نفسه، ج ٢، ٨٤.

[٩٣] المرجع نفسه، ج ٢، ١١١.

أقطع ناسا من جهينة أرضا، فعطلوها وتركوها، فأخذها قوم آخرون، فأحيوها، فخاصم فيها الأولون إلى عمر بن الخطاب، فقال: لو كانت قطيعة مني، أو من أبي بكر لم أرددها، ولكنها من رسول الله صلى الله عليه وسلم. وقال: من كانت له أرض، فعطلها ثلاث سنين، لا يعمرها، فعمرها غيره، فهو أحق بها.[٩٤] فهذا الحكم من عمر دليل على لزوم استثمار المال وتعميره. فيتعين على مالك البراءة أن يستثمرها ويستغلها لتلبية حاجاته المختلفة وحاجات المجتمع المتنوعة، بجميع الطرق المباحة، ولا يتركها دون استثمار.

والقيد الثالث: أن يلتزم المالك بالقواعد التي وضعها الشرع لاستغلال واستثمار الأموال. وقد رسم الشرع طريقة استغلال واستثمار الأموال، والتي تقوم على مبادئ تحريم الغش والخداع والتغرير والربا والاحتكار، كما تقوم على مبدأ السماح بالمنافسة المشروعة الهادفة إلى تحسين الإنتاج وعدم التحكم بالأسواق. وكذلك رسم الشرع موضوع الاستغلال والاستثمار، وهو أن لا يكون محرما شرعا.[٩٥]

وبناء على هذا، فاستغلال واستثمار براءة الاختراع لا بد من أن يسيرا على ما رسمه الشرع في استغلال واستثمار الأموال عامة، سواء ما يتعلق بطريقة الاستغلال والاستثمار أو بموضوعهما.

والقيد الرابع: أن لا يؤدي استعمال الأملاك والتصرف فيها إلى الإضرار بالآخرين. فقد روي عن ابن عباس رضي الله عنهما قال: قال رسول الله صلى الله

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[٩٤] عبد الله بن يوسف الزيلعي، *نصب الراية لأحاديث الهداية*، كتاب إحياء الموات (بيروت: مؤسسة الريان، ط ٢، ١٤٢٤هـ/٢٠٠٣م)، ج ٤، ٢٩٠-٢٩١، حديث رقم: ٧٥٢٥.

[٩٥] العبادي، *الملكية في الشريعة الإسلامية*، ج ٢، ١٢٧-١٢٨.

عليه وسلم: ‹لاَ ضَرَرَ وَلاَ ضِرَارَ›.[٩٦] فالضرر: إلحاق مفسدة بالغير مطلقا، والضرار: مقابلة الضرر بالضرر. فالحديث نص في تحريم الضرر؛ لأن النفي بلا الاستغرافية يفيد تحريم كل أنواع الضرر.[٩٧] وعلى هذا، يشترط في استغلال البراءة والتصرف فيها أن لا يؤدي ذلك إلى الإضرار بالآخرين.

٢- عقد الترخيص

إن عقد الترخيص باستغلال البراءة لا يخرج عن كونه عقدا يلتزم بموجبه صاحب البراءة بسماح للغير استغلال الاختراع لمدة معينة مقابل أجر معلوم، فهو إذن نوع من الإيجار؛ لأنه بمثابة تنازل صاحب البراءة عن استغلال الاختراع إلى المرخص له.[٩٨] والإجارة في الفقه الإسلامي عبارة عن عقد على منفعة مقصودة معلومة قابلة للبذل والإباحة بعوض معلوم.[٩٩]

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[٩٦] أحمد بن حسين البيهقي، *السنن الكبرى*، باب لا ضرر ولا ضرار (دمشق: دار الفكر، د.ت)، ج ٦، ٦٩-٧٠.

[٩٧] محمد صدقي بن أحمد البورنو، *الوجيز في إيضاح قواعد الفقه الكلية* (بيروت: مؤسسة الرسالة، ط ٤، ١٤١٦هـ/١٩٩٦م)، ج ٢، ٢٥١-٢٥٢.

[٩٨] زين الدين، *الملكية الصناعية والتجارية*، ١٢٢.

[٩٩] محمد بن محمد الخطيب الشربيني، *مغني المحتاج إلى معرفة معاني ألفاظ المنهاج*، تحقيق: علي محمد معوض وعادل أحمد عبد الموجود (بيروت: دار الكتب العلمية، ط ١، ١٤٢١هـ/٢٠٠٠م)، ج ٣، ٤٣٨.

وقد وضع الفقهاء ضابطا لما يجوز استئجاره، قال الماوردي: "كل عين صح الانتفاع بها مع بقائها صحت إجارتها،"[١٠٠] وذكر النووي: "كل عين ينتفع بها مع بقاء عينها، منفعة مباحة، مملوكة، معلومة، مقصودة، تضمن بالبدل، وتباح بالإباحة."[١٠١] وجاء في المغني: "عين ينتفع بها منفعة مباحة مقصودة، مع بقاء عينها."[١٠٢]

وبناء على الضابط السابق، يتضح أنه يشترط في المعقود عليه، الذي هو المنفعة، كونه متقوما، معلوما، مباحا، مقدور الاستيفاء. وبراءة الاختراع لها منفعة مباحة، فيجري عليه ما يجري على منافع الأعيان سواء بسواء.[١٠٣] وإذا ثبت أن براءة الاختراع لها منفعة معتبرة شرعا، فإنه يصح إيراد عقد الإجارة عليها باستغلالها لمدة معلومة لقاء عوض معلوم،[١٠٤] من خلال عقد الترخيص.

وعلى هذا، يجوز إيراد عقد الترخيص الاختياري على براءة الاختراع باستغلال الاختراع موضوع البراءة لمدة معينة مقابل أجر معلوم، لأنه نوع من عقد الإجارة المشروعة في الفقه الإسلامي.

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[١٠٠] علي بن محمد الماوردي، *الحاوي الكبير*، تحقيق: علي محمد معوض وعادل أحمد عبد الموجود (بيروت: دار الكتب العلمية، ط ١، ١٤١٤هـ/١٩٩٤م)، ج ٧، ٣٩١.

[١٠١] يحيى بن شرف النووي، *روضة الطالبين*، تحقيق: عادل أحمد عبد الموجود وعلي محمد معوض (الرياض: دار عالم الكتب، ط ١، ١٤٢٣هـ/٢٠٠٣م)، ج ٤، ٢٤٧.

[١٠٢] عبد الله بن أحمد بن قدامة، *المغني*، تحقيق: عبد الله بن عبد المحسن التركي وعبد الفتاح محمد الحلو (الرياض: دار عالم الكتب، ط ٣، ١٤١٧هـ/١٩٩٧م)، ج ٨، ١٢٦.

[١٠٣] النشمي، *الحقوق المعنوية: بيع الاسم التجاري*، ٢٣٤٤.

[١٠٤] الشهراني، *حقوق الاختراع والتأليف في الفقه الإسلامي*، ٣٩٩.

وأما الترخيص الإجباري فإن الشريعة الإسلامية أقرت الملكية الفردية، فلا يجوز لأحد الاعتداء عليها، قال رسول الله صلى الله عليه وسلم: «لا يحل مال امرئ مسلم إلا بطيب نفس منه».[١٠٥]

إلا أن استعمال الأفراد لحقوقهم يرتبط بما تلزمه الشريعة من قيود على هذا الاستعمال بما يحقق الصالح العام الذي يعتبر صالحا للفرد في الوقت نفسه. ومن بين تلك الحقوق ملكية براءة الاختراع، فهي مقيدة بقيود حتى يمكن التنسيق بين حقوق الأفراد، أصحاب البراءات، وبين مصالح الناس. وإذا تعارضت المصلحة العامة مع المصلحة الخاصة، ولا يمكن الجمع بينهما، قدمت المصالح العامة.[١٠٦]

والترخيص الإجباري يدخل في هذا الباب على اعتبار أنه ما شرع في القانون إلا لمواجهة تعسف صاحب البراءة في استغلال الاختراع، وذلك باستغلاله بشكل يضر بمصلحة المجتمع، أو لحل عدم قيام صاحبه باستغلال الاختراع خلال مدة ٣٦ شهرا (٣ سنوات)، أو لوجود حاجة ملحة تتمثل في صنع المنتجات الصيدلانية لمعالجة الناس. وعليه، فإن حماية المجتمع من الفوضى والانهيار تتطلب التضحية بالمصلحة الخاصة، ضمانا لتحقيق المصلحة العامة.[١٠٧]

ومن الجدير بالتنويه، إن في الفقه الإسلامي مسائل ترجع أساسا إلى تقديم المصحلة العامة على المصلحة الخاصة. فقد أجاز الشرع لولي الأمر إجبار التاجر

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[١٠٥] أحمد بن الحسين البيهقي، *السنن الكبرى*، باب من غصب لوحا فأدخله في سفينة أو بنى عليه جدارا (القاهرة: دار الحديث، ط ١، ١٤٢٩هـ/٢٠٠٨م)، ج ٦، ١٢٢، حديث رقم: ١١٥٤٥.

[١٠٦] الحداد، *الآليات الدولية لحماية حقوق الملكية الصناعية وأثرها الاقتصادي*، ٣٧١-٣٧٢.

[١٠٧] المرجع نفسه، ٣٧٢.

المحتكر على بيع ما يفضل عن قوته وعياله؛ دفعا للضرر عن الناس،[١٠٨] كما أجاز التسعير بمشورة أهل الخبرة به، إذا غلا السعر؛ تحقيقا للمصلحة العامة.[١٠٩]

وقد وردت قاعدة "يتحمل الضرر الخاص لدفع الضرر العام".[١١٠] أي يتحمل ضرر الحجر على صاحب البراءة من استغلال اختراعه أو تقييد حقه في الاستغلال لدفع ضرر انتشار الوباء والمرض والفوضى والفساد في المجتمع نتيجة تعسفه في استعمال حقه، أو منعه من استغلال الاختراع لمدة محددة مع حاجة الناس إليه، أو نقصان المنتجات الصيدلانية لمعالجة المجتمع.

وفي حالة منح الترخيص الإجباري لمنع صاحب البراءة من استغلال اختراعه لمدة ٣٦ شهرا (٣ سنوات)، فقد ورد في الفقه الإسلامي ما يقاربه، بحيث جاء في البناية ما نصه: "ومن حجر أرضا ولم يعمرها ثلاث سنين أخذها الإمام ودفعها إلى غيره."[١١١]

وقد روي عن عمرو بن شعيب: أن النبي صلى الله عليه وسلم أقطع ناسا من جهينة أرضا، فعطلوها وتركوها، فأخذها قوم آخرون، فأحيوها، فخاصم فيها الأولون إلى عمر بن الخطاب، فقال: لو كانت قطيعة مني، أو من أبي بكر لم

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[١٠٨] عبد الله بن محمود الموصلي، *الاختيار لتعليل المختار*، تحقيق الشيخ شعيب الأرنؤوط وصاحبيه (دمشق: دار الرسالة العالمية، ط ٢، ١٤٣١هـ/٢٠١٠م)، ج ٤، ١٣٢.

[١٠٩] المرجع نفسه.

[١١٠] الزركشي، *المنثور في القواعد*، ج ١، ٣٤٩؛ الزرقا، *المدخل الفقهي العام*، ج ٢، ٩٩٥.

[١١١] محمود بن أحمد العيني، *البناية شرح الهداية*، تحقيق: أيمن صالح شعبان (بيروت: دار الكتب العلمية، ط ١، ١٤٢٠هـ/ ٢٠٠٠م)، ج ١٢، ٢٨٨.

أرددها، ولكنها من رسول الله صلى الله عليه وسلم. وقال: من كانت له أرض، فعطلها ثلاث سنين، لا يعمرها، فعمرها غيره، فهو أحق بها.[١١٢]

ومن ثم، يرى الباحث أنه يحق لولي الأمر أن يقوم بمنح الغير الترخيص الإجباري باستغلال الاختراع، في حالة عدم قيام صاحبه باستغلال الاختراع لمدة ثلاث سنوات بدون عذر قهري، مما يعوق دفع عجلة التنمية الصناعية ونقل التكنولوجيا، فضلا عن غلاء الأسعار لعدم تحقق التناسب بين الطاقة الإنتاجية وبين احتياجات السوق.

خاتمة

توصل البحث إلى النتائج والتوصيات الآتية:

أولا: النتائج

١- يرى الباحث جواز منح براءة الاختراع عن الأدوات الطبية والمنتجات الدوائية شريطة ضمان اتفاقية تريبس وحكومات كل بلد توافرَ تلك الأدوات والمنتجات في الصيدليات والمستشفيات، وقيامها بمراقبة أسعارها حتى يمكن للمحتاجين شراؤها.

٢- يتفق القانون الإندونيسي والفقه الإسلامي على أن براءة الاختراع مال. ولما كانت الأموال يجري فيها الملك، فإن براءة الاختراع إذن مال، وهي قابلة للتملك.

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[١١٢] الزيلعي، *نصب الراية لأحاديث الهداية*، كتاب إحياء الموات، ج ٤، ٢٩٠-٢٩١، حديث رقم: ٧٥٢٥.

٣- يتفق القانون الإندونيسي والفقه الإسلامي على جواز استغلال براءة الاختراع من قبل صاحبها، سواء كان استغلالا نفسيا أو عن طريق عقد الترخيص للغير باستغلالها، إلا أن الفقه الإسلامي وضع قيودا لاستغلال البراءة، أهمها: أن لا يؤدي الاستغلال إلى الإضرار بالآخرين.

ثانيا: التوصيات

١- اضطلاع الجامعات والكليات المعنية بعقد مؤتمرات وندوات ومحاضرات لاستجلاء أهمية حماية براءة الاختراع في عالم الاقتصاد والتجارة، وكشف أحكام استغلالها في القانون الإندونيسي والفقه الإسلامي.

٢- قيام وزارة قانون وحقوق الإنسان والجهة المعنية بتوعية الناس بحماية براءة الاختراع وحرمة التعدي عليها، وجواز استغلال براءة الاختراع للغير عن طريق عقد الترخيص.

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The Implementation of Islamic Value Absorption in Regional Regulations on Districts at Madura

Agung Ali Fahmi
Fakultas Hukum Universitas Trunojoyo Madura Jl. Telang Kamal Bangkalan
Email: agungalifahmi@trunojoyo.ac.id

Muwaffiq Jufri
Fakultas Hukum Universitas Trunojoyo Madura Jl. Telang Kamal Bangkalan

Ansori
Fakultas Hukum Universitas Trunojoyo Madura Jl. Telang Kamal Bangkalan

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Abstract:

In Madurese society, the existing *sharia* and/or *sharia* nuanced Regional Regulations is believed to cause a lot of conflict. This is particularly because Indonesia itself is not a religious state in a formal way. Therefore, it is necessary to know how the legal politics on values absorption or *Sharia* legal provisions in Madura Regional Regulations is. This study is a normative legal research. It includes a conceptual, statutory, and case approach. The finding shows that the application and/or absorption of *Sharia* in Madura are due to attached religious values in societies' daily life. The research found that the application and/or absorption of the Islamic values in Madura regional legal products have two types. *First* is direct absorption and/or application of regional legal products in the form of *Perda* or *Perbup*. Second is indirect yet substantial absorption and/or application of Islamic legal values to regional legal products.

Author correspondence email: agungalifahmi@trunojoyo.ac.id
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

Keywords:
Islamic Value; Regional Regulation; Madura

Abstrak:

Di Madura lahir beberapa Peraturan Daerah Syari'ah dan/atau bernuansa syari'ah. Padahal Indonesia bukan negara agama. Karena itu, munculnya Peraturan Daerah seperti itu yang diyakini akan banyak menimbulkan konflik dalam masyarakat, maka perlu untuk diketahui bagaimana politik hukum penyerapan nilai atau ketentuan hukum syariah dalam Peraturan Daerah Kabupaten se-Madura. Jenis penelitian yang digunakan dalam kajian ini ialah metode penelitian hukum normatif, dengan pendekatan konsep (*conseptual approach*), pendekatan perundang-undangan (*statute approach*), dan pendekatan kasus (*case approach*). Temuannya adalah penerapan dan/atau penyerapan hukum syariah di wilayah pemerintahan daerah se-Madura, terjadi dikarenakan masyarakat Madura dalam kehidupan sehari-hari memegang teguh ajaran agama. Maka setelah dilakukan penelitian bahwa Penerapan dan/atau penyerapan nilai hukum Islam dalam produk hukum daerah di Madura terbagi atas dua jenis; *Pertama*; penyerapan dan/atau penerapan secara langsung pada produk hukum daerah, baik berupa Perda ataupun Perbup. *Kedua*, penyerapan dan/atau penerapan nilai hukum Islam pada produk hukum daerah tidak secara langsung berwujud produk hukum syariah, tetapi secara substansial, materi yang dimuat dalam produk hukum tersebut telah menyerap nilai-nilai hukum Islam di dalamnya.

Kata Kunci:
Nilai-nilai Islam; Peraturan Daerah; Madura

Introduction

The establishment and implementation of *sharia* law in Madura are mainly because Madurese people have long been upholding Islamic values in their daily life in addition to their strong social

relationship.[1] This is also supported by the spirit to establish Madura Province which also grows from strong religious awareness of Madurese people in all levels.[2] For instance, in last 2011, around 1,032 mosques and 5,187 *musholla* (prayer room) in Pamekasan were built on *waqf* land from people. They become not only places to worship God, but also for educational and economic activities as well. This reality shows that Madurese have the strong religiousity.[3]

Nowadays, the development of Islamic law absorption in districts of Madura is clear, among others, from the following facts; *First*, in Pamekasan district, a No. of Islamic nuance Regional Regulations (*Perda*) have been applied. Those regulations include the Regulations on the Islamic Community Development Movement (*Gerbang Salam*), the Prohibition of alcohols as well as prostitution, regulation to cover up '*aurat* in formal schools and obligation for students to have ability in reading the Quran. According to the old Regent, Syafi'i, these local regulations are Pamekasan people's aspirations in which the central government officially approved aftwerd. They aim at developing mental and moral of Pamekasan's people without any discrimination.[4]

Second, in Bangkalan district, since November 2018, the regional government has been drafting Regional Regulations to establish Bangkalan as a city of *Dzikir* and *Sholawat*.[5] This is a concrete step

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[1] Yanwar Pribadi, "Religious Networks in Madura (*Pesantren*, Nahdlatul Ulama and *Kiai* as the Core of *Santri* Culture)", *Al-Jami'ah*, Volume. 51, No. 1, (2013 M/1434 H), 2

[2]Agung Ali Fahmi. "Peluang Hukum Propinsi Madura", *Jawapos,* 06 Oktober 2016 : https://www.jawapos.com/opini/06/10/2016/peluang-hukum-provinsi-madura. (accessed on 21 March 2019).

[3] Agung Ali Fahmi, Misbahul Munir and Yahya Suryawinata. *Optimalisasi Fungsi Masjid Melalui Sertifikasi Wakaf Tanah dan Penguatan Organisasi Takmir sebagai Peningkatan Empati Sosial serta Ekonomi Masyarakat dalam Menangkal Radikalisme Agama di Pamekasan*. (Proceeding on Seminar Nasional Budaya Madura I, Madura Dalam Kacamata Sosial, Budaya, Ekonomi, Agama, Kebahasaan dan Pertanian. Puslit Budaya dan Potensi Madura, LPPM UTM 2014).

[4] Mas, "Bupati-DPRD Kompak Pertahankan Perda Syariah", *Globalnews*, 24 Juli 2016 : http://global-news.co.id/2016/06/bupati-dprd-kompak-pertahankan-perda-syariah/. (Accessed on 21 March, 2019).

[5] Eko/mas, "Susun Perda Dzikir dan Sjolawat, Ra Latif : Yang Penting Kita Bisa Mengaplikasikannya", www.bangkalankab.go.id, 28 November, 2018 : http://www.bangkalankab.go.id/v5/dat_berita.php?nart=1349/Susun_Perda_Kota_

starting from an idea to maintain religious thoughts in Bangkalan City in order to make it integrated in daily life of their people. This cannot be separated from pesantren culture such as *sarong* and *kopyah*, Qur'an recitation in *mushalla*, etc. Before, through Bangkalan Regent Decree No. 188.45 / 148 / 433.013 / 2015 on August 28, 2015 which was issued in an event attended by government and Islamic scholars, Bangkalan officially declared itself as a city of *dzikir* and *shalawat*. This certainly strengthened the impression of religious community in the city.

Third, in 2018, the Faculty of Islamic sciences at the University of Trunojoyo Madura along with the Suramadu Regional Management Board, compiled and recommended the design of the development of Madura Islamic tourism. It recommended the government to draft an Islamic Tourism Regulation.

Another example to illustrate religiousity of Madurese people is one of factors beyond the failure of the Suramadu Bridge Development Management Board (BPWS) program on Madura's industrialization. It was believed that the different perceptions about the meaning and scope of this program really mattered. The jargon of industrialization was generally rejected because the Islamic scholars worried that its negative consequences would cause moral deterioriation, the growth of prostitution, gambling and other disobedience which potentially damage Madurese's religiousity.[6] However, this challenge is increasingly severe considering that since Suramadu was made free on October 27, 2018,[7] it has been opening up

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Dzikir_dan_Sholawat,_Ra_Latif:_Yang_Penting_Kita_Bisa_Mengaplikasikannya. (Accessed on 21 March 2019). See also, Ahmad Faisol, "Ulama Desak Legislatif Sahkan Bangkalan Dzikir dan Sholawat", *surabaya.tribunnews.com,* 24 August 2015 : http://surabaya.tribunnews.com/2015/08/24/ulama-desak-legislatif-sahkan-perda-bangkalan-dzikir-dan-shalawat. (Accessed on 21 March 2019).

[6] Agung Ali Fahmi, Uswatun Hassanah and Yahya Suryawinata. "Resolusi Penolakan Daerah Terhadap Badan Pengelolaan Suramadu Pasca Jembatan Surabaya-Madura dalam Perspektif NKRI. 2015. Seminar Nasional Industrialisasi Madura. Fakultas Teknik Universitas Trunojoyo Madura.

[7] Ghinan Salman, "Resmi Dgiratiskan, Jembatan Suramadu Jadi Non Tol", *regional.kompas.com,* 28 October, 2018 : https://regional.kompas.com/read/2018/10/28/07453791/resmi-digratiskan-jembatan-suramadu-jadi-jalan-non-tol. (Accessed on 21 March, 2019).

extraordinary economic growth opportunities for Madurese people or vice-versa.[8]

The mentioned dynamics of legal formation seem to be in line with the development of regional autonomy which enables local governments to regulate all local matters into Regional Regulations (*Perda*). This especially applies on regional regulations regarding regional taxes and retribution. On the other hand, some local people want to implement *sharia*-based laws in their regions and this inevitable leads to a controversy.[9] Those who agree with this opinion think that the Sharia Regional Regulation is expected to be a solution for accelerating regional development without losing the local identity and religiosity. Meanwhile, those who disagree think that it will only trigger national disunity due to discrimination to the minorities.

The implementation of various provisions and absorption on Islamic law values in governmental sector is an indicator on religious right in Indonesia. It assures individual's rights to determine, believe, and practice religion as a core part of human rights that nothing or no one can reduce it for any reason. Therefore, the existence of this right obliges government to respect, protect, and fulfill citizens' right as a manifestation of state's recognition on the human rights principles and values as also ratified in international agreements.[10] However, it still becomes important on how a statutory regulation should not create discrimination and anxiety of minority groups.[11] This is mainly because the essential purpose of *sharia* implementation is to maintain

[8] Agung Ali Fahmi, "Suramadu Gratis, Awal Kebangkrutan Ekonomi Madura?". *www.jawapos.com*, 28 October, 2018 : https://www.jawapos.com/jpg-today/28/10/2018/suramadu-gratis-awal-kebangkrutan-ekonomi-madura. (Accessed on 21 March 2019).

[9] Mohammad Alim, "Perda Bernuansa Syariah dan Hubungannya dengan Konstitusi", *JURNAL HUKUM,* VOL. 17, NO. 1 (Januari, 2010),. 120

[10] Ansori, et al. Penyelesaian Konflik Aliran Keagamaan Berbasis Nilai Kearifan Lokal (Studi Kasus di Wilayah Madura), Fakultas Hukum Universitas Brawijaya and based on Surat Perjanjian Nomor: 05/PKK-FHUB/PEN/2016.

[11] Agung Ali Fahmi. *Implementasi Jaminan Hukum HAM atas Kebebasan Beragama Di Indonesia.* 2011. Jogjakarta: Interpena,. 23.

and protect the dignity of humanity which is oftenly referred as *maqâshid al-syarî'ah* in Islamic studies.[12]

Therefore, the religious freedom in Indonesia is so important that it needs to ensure that everyone can carry out religious services and values without having to establish any Islamic or theocratic state.[13] Moreover, this guarantee is affirmed in the 1945 Constitution, Article 28 E (1); Article 28 I (1); Article 29 (2); and Article 31 (5). It also got along in Article 18 of Law No. 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights).[14] In addition to it, regional enthusiasm for developing its areas based on local potential, including people values, was perfectly facilitated by Law No. 23 of 2014 concerning Regional Government.[15]

Furthermore, religious freedom was not mainly born from universal human rights concept. It is mainly on Indonesian cultural traditions namely a spirit of harmony, peace and respect for differences. This is clear from the fact that in the ancient times, there found no conflict among religions in the entire archipelago. History even records that in the golden age of Majapahit, the government gave freedom to its citizens to believe in any religion and carry out religious activities without pressure from anyone.[16] As a consequence, both absorption and implementation on Islamic law values need to always in line with Pancasila, the 1945 Constitution, and NKRI (Unitary State of the Republic of Indonesia) values.

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[12] Muwaffiq Jufri, "Nuansa Maqhasidu al-Syari'ah dalam Undang-undang No. 39 tahun 1999 tentang Hak Asasi Manusia", : *e-journal.metrouniv.ac.id* : http://e-journal.metrouniv.ac.id/index.php/istinbath/article/view/735 (Accessed on 21 March 2019).

[13] Implementasi Kebebasan Beragama Menurut UUD Republik Indonesia Tahun 1945. *Thesis*. 2010. Jakarta: Program Magister Hukum Kenegaraan. Fakultas Hukum. Universitas Indonesia.

[14] Undang-Undang Nomor 12 tahun 2005 tentang Pengesahan International Covenant On Civil And Political Rights (Kovenan Internasional Tentang Hak-Hak Sipil Dan Politik) Lembaran Negara Republik Indonesia Tahun 2005 Nomor 119.

[15] Undang-Undang Nomor 23 Tahun 2014 tentang Pemerintah Daerah. Lembaran Negara Republik Indonesia Tahun 2014 Nomor 244.

[16] Muwaffiq Jufri, "Perbandingan Pengaturan Hak Kebebasan Beragama antara Indonesia dengan Majapahit", *Jurnal Konstitusi*, Volume 14 No. 2 (Juni 2017),. 398.

This research then becomes important due to its novelty as it is still rare to find researches in analyzing the absorption of Islamic value and implementation of *sharia* regulation in Madura. Moreover, this research focuses on the politic of law beyond the regulation. As mentioned by Padmo Wahyono, politic of law is the basic law policy of government which have been and are still valid extracted from living values in society and aiming to achieve visions of a state.[17]

Research Method

This study used a normative legal research method with conceptual, statutory and case approaches. The main legal materials were the 1945 Constitution of the Republic of Indonesia; UU No. 12 of 2011 concerning Formation of Regulations and Rules; UU No. 39 of 1999 concerning Human Rights; UU No. 12 of 2005 concerning Ratification of the ICCPR; and the PNPS Act of 1965.

In addition to those, secondary and tertiary legal materials consisted of analytical materials such as scientific books, journal articles, proceedings, website contents, and legal dictionaries. All those sources of law were then analyzed using prescriptive-analytic analysis techniques to find answers related to the development of the implementation and/or absorption of Islamic legal values to regional legal products in Madura.

Legal Politics of Islamic Law Absorption in Madura Legal Products

Discussion on the implementation Islamic law (*sharia*) to legal products at both national and regional legal products continues to be an interesting theme for debate. Until now, this theme remains to emerge in the midst of incessant issues related to formalization of values and/or the content of Islamic law in national positive law.[18] In fact, the spreading issues are no longer at the level of legislation but have been regarded to the state form such as the issue of Islamic State of Indonesia (NII) and *khilafah* concept by Hizbut-Tahrir.

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[17] Padmo Wahyono. *Indonesia, Negara Berdasarkan atas Hukum* Cet. II,. 1986. Jakarta: Ghalia Indonesia,. 160.

[18] Eri Hariyanto, "Gerbang Salam; Telaah atas Pelaksanaannya di Kabupaten Pamekasan", *Jurnal Karsa*, Vol. 15 No. 1. (August 2009),. 73-74.

Madura is an island whose population is predominantly Moslem. It becomes academically interesting, therefore, to analyze the form of Madura local legal products regarding to the implementation and/or absorption of Islamic values as well as legal values. The study limits its scope to identify the clustering on those *syar'i* legal products" on whether they only cover materials on *`ubûdiyah* and social community or also on *mu`âmalah* in the context of the Indonesian law.

According to the law political perspective, the regulation that the authority had ratified must be based on local people's values. Maduresse people, in this context, have strong social-religious background in implementing Islam. Therefore, implementation of Islamic values based doctrine becomes inevitable to ensure its enactment among local people after the issuance of any law legality. .

Sharia-Nuanced Regional Legal Products in Pamekasan

This district has long time applied some regional legal products reflecting Islamic beliefs as well as Islamic law values. In the past few years, this area had even affirmed its identity as an area of "Gerbang Salam"[19] that seeks to mobilize and build Islamic nuances in society both within the scope of government and in terms of society interaction.[20] Among others, those legal products are; Regional Regulation No. 18 of 2001 concerning Prohibition of Alcoholic Beverages. This *Perda* is a follow-up action after the establishment of the Institute of Islamic Sharia Study and Application (LP2SI) as an effort to implement the Islamic *sharia* in Pamekasan. LP2SI itself was established by local government while its member consisted of a No. of '*ulama*, leaders of Pamekasan Islamic boarding schools (*pesantren*) as well as religious figures affiliated to several Islamic organizations such as NU, Muhammadiyah, Al-Irsyad, Persatuan Islam (Persis) and Sarekat Islam (SI).[21]

[19] Maimun & Ainul Haq, "Melacak Motivasi dan Efektivitas Peraturan Daerah Bernuansa Syariah di Pamekasan", *Al-Ihkam*, Volume 13, Nomor 2, (Juni 2018), 128.

[20] *Ibid*,. 148.

[21] Abd A'la, et al, "Islamism in Madura: From Religious Symbolism to Authoritarianism", *Journal Of Indonesian Islam*, Volume 12, Number 02, (December 2018), 168.

Regional Regulation No. 18 of 2004 concerning the Prohibition on Prostitution. This Regional Regulation aims to strengthen the commitment to define Pamekasan as a *Gerbang Salam* city. Furthoremore, it is also an official attitude of regional government in eradicating all practices of prostitution. The idea of this *Perda* came from consideration to convince people on very big disadvantages of prostitution that will impact on the quality of people's lives. Article 5 (2) on violations of this Perda even threatens the subject with imprisonment for a maximum of 6 (six) months.

Regional Regulation No. 7 of 2008 concerning Management of *zakat*, *Infaq* and *shadaqah*. This regulation aims to provide facilities for local people in fulfilling their religious obligations in terms of *zakat*, *infaq* and *shadaqah*. In the other words, the this rule was intended to increase obligation fulfillment on *zakat*, *infaq*, and *shadaqah* in Pamekasan. It also focuses on the management of sustainable *zakat* funds by turning it into capital as an effort to create a prosperous society.

Regional Regulation No. 5 of 2010 concerning Grants for *Hajj* Operational Costs. This aims to provide legal legitimacy to manage pilgrimage funds for outstanding employees and community leaders who are proven to have made many contributions to Moslem community development as the Gerbang Salam mission. Regional Regulation No. 4 of 2014 concerning Al-Qur'an Reading Skills for Muslim Students. This regulation was issued to motivate children at their early ages to read the Qur'an properly and correctly. It then requires each level of educational institutions to provide an extracurricular program to train their students for good and correct Qur'anic recitation while setting the long term goal to create knowledgeable learners who devote to God Almighty.

Regional Regulation No. 5 of 2014 concerning Control on Activities during Ramadhan Month. The existence of this regulation aims to glorify the greatness of Ramadhan as the most precious month for Moslems. This controlling step also heads for creating peaceful and comfortable atmosphere for fasting people. The interesting thing about this *Perda* is its coverage not only on regulation of restaurants and entertainment places, but also provisions that the Qur'anic recitation forum (*tadarus*) on the mosque loudspeaker must not exceed midnight.

Regional Regulation No. 14 of 2014 concerning Management of Hotels, Lodging and Boarding Houses. The issuance of this *Perda* aims to provide guidance to the lodging business owners in order to support local tourism development programs without breaking any

socially and religiously established rules. The objectives of this *Perda*; Creating Pamekasan as a religious area, strengthening the image of Pamekasan as the city of education, culture, services and commerce with a global orientation while upholding cultural values, morality and local wisdom, protecting interest of the whole parties and creating security, peace and order as well, Encouraging development of local tourism industry.

Regional Regulation No. 1 of 2017 concerning Implementation of Social Order. The issuance of this regulation is to assure social order in people's daily life activities relating to the existence and attitude of certain groups such as beggars, street children, buskers, homeless people, and immoral people. Regional Regulation No. 3 of 2017 concerning Implementation of *Madrasah Diniyah* which serves as an implementation of the Gerbang Salam program as an effort to create Pamekasan religious community. Specifically, it provides religious knowledge for students who only attend public education institutions. It is expected that this type of students can get balanced knowledge and qualified in religious understanding.

Regional Regulation No. 3 of 2015 concerning Practice of Entertainment and Recreation Bussiness. It is as follow up step responding the mushrroming and fast development of entertainment industry which potentially leads to immoral practices and violates local propriety traditions. Article 6 (3a) mentioned that every entertainment spot and tourism destination must uphold living religious and propriety values as well as tradition by providing some following facilities; Proper facilities for ritual ablution and cleansing, available facilities to worship easily, *halal* food and drinks, safe, comfortable and conducive atmosphere and facilities for both family and business purposes, art, cultural performances and attractions suitable with living religious norms, customs and culture, and moral values, assurence on healthy and clean sanitation as well as environment.

Regent Regulation No. 14 of 2016 concerning Karaoke Entertainment Business. This regulation is a follow-up step following the issuance of Regional Regulation of Pemekasan No. 3 of 2015 concerning the Practice of Entertainment and Recreation Bussiness. It aims to provide legal certainty on the existence of karaoke business so that it can comply with both living social norms and religious values.

The regulation requires several important things in Pamekasan karaoke business provider including; No criminal or immoral activities ranging from gambling, immoral acts, drug trafficking and use, alcoholic beverages consumption, to others thing violating living legal rules and tradition, bright and permanent lighting, airtight karaoke room with visible glass doors, lady companions with polite dress and proper appearance, commitment to close the service during religious holidays, especially in Ramadhan, full responsible on available lady companions.

Regent Regulation No. 300 of 2009 concerning the Establishment of *Gerbang Salam* as preaching model and strategy. This aims to make *Gerbang Salam* program as sustainable movement in order to build religious society while maintaining local characters. This regulation further explains vision, mission, goal, objectives, and implementation of *Gerbang Salam* programs. This also contains official definition and main interpretation on the *Gerbang Salam* in a legal product. Some of the main programs in the movement include; Building an Islamic family, building and developing an Islamic education system, building and developing social systems of Islamic civilized society, making design and implementating the development program on Islamic governmental officers, building an Islamic based social and economic life social and islamic-based economy while avoiding any form of economic systems contrary to Islamic values.

Sharia-Nuanced Regional Legal Products in Sampang

Even though Sampang does not openly declare itself as a "*sharia* district" as Pamekasan, several local legal products substantially reflect Islamic teaching. The Deputy Secretary of *Pengurus Cabang Nahdatul Ulama* (PCNU) Sampang, Fahrur Rozi, explained that the enactment of positive legal regulations gives peace of mind and comfort while avoiding away any potential behaviors violating Islamic values.[22]

Fahrur Rozi further mentioned that the most important thing on a local regulation is its substance which leads to the process of building people's proseperity. He reasoned that ensuring civil rights

[22] Interview with H. Fahrur Rozi, the vice chairman of PCNU Sampang in PCNU office, Juli 10, 2019.

in people's daily lives is essential in Islamic legal system. Even, Imam Ghazali in his monumental book, *Ihyâ' `Ulûm al-dîn*, emphasized that civil rights of citizenship are the main idea of Islamic *sharia* system which he popularly called it as *maqashid al-shari'ah*. This concept emphasizes that the main purposes of the enactment of Islamic law is to focus on:[23]

a. *Hifdz al-nasl*; the guarantee of human rights in the field of descendent lineage to not make it randomly mixed or confusing.
b. *Hifdz al-nafs*, the guarantee of human rights particularly the right to live a life and maintain souls which anyone should not take it away for any reasons.
c. *Hifdz al-`aql*, the guarantee of human rights in terms of freedom of thought and expressing the idea.
d. *Hifdz al-dîn*, the guarantee of human rights in terms of belief in religious values and freedom in performing all forms of religious rituals and traditions.
e. *Hifdz Mâl*, the guarantee of human rights in terms of property confirming that Islam is never aside to the concept of wealth.

Apart from discussion above, 1 (one) regional legal product in Sampang reflects Islamic nuance. It is the Sampang Regent Circular Letter No. 451 / 024.1 / 434.013 / 2019 concerning suggestion to pray congregationally for all governmental officers and all Sub-District Heads in Sampang. In his introduction, the Regent affirmed that the existence of this letter aims to increase the belief to Allah among Sampang officers and Sub-District Heads.

In addition, Sampang has drafted a regional regulation on *Madrasah Diniyah* which is considered to be the most important part in maintaining Islamic values living in community's daily lives. The regulation also gives a significant effect especially in day-to-day activities for students to maintain the concept of living in harmony with Islamic values.

[23] Muwaffiq Jufri, "Nuansa Maqhasidu al-Syari'ah dalam Undang-undang No. 39 tahun 1999 tentang Hak Asasi Manusia", : *e-journal.metrouniv.ac.id* : http://e-journal.metrouniv.ac.id/index.php/istinbath/article/view/735 (Accessed on 21 March, 2019).

Sharia-Nuanced Regional Legal Products in Sumenep

Just like in Sampang, it is also difficult to find any *sharia*-based legal products in Sumenep. According to Ananta Yuniarto, The Head of Legal Affairs of Sumenep Regional Representative Council (DPRD), the only *sharia*-based legal product in Sumenep regency is *Perda* No. 7 of 2002 concerning the Sharia Rural Bank (BPR) Sumekar.

Eventhough Sumenep does not have many *sharia* regulations; some local regulations indirectly reflect Islamic values. One of them is *Perda* No. 3 of 2002 concerning Public Order. This regulation contains a No. of regulatory nomenclature which are very accordance with Islamic values, such as prohibition of doing actions which potentially disturbs people's comfort, prohibition of illegal racing on the highway, prohibition on using alcoholic beverages, and other forms of regulations that relate to Islamic nuance.

In other words, these *Perda* are substantially in accordance with Islamic values. *Perda* No. 3 of 2002 has even absorbed beliefs, values, and provisions of Islamic law into regional regulation materials. Thus, labeling any local legal products under the name "*sharia*" seems to no longer needed because the most important thing is the substance and implementation instead of any attached *sharia* label.

Sharia-Nuanced Regional Legal Products in Bangkalan

Since long time ago, Bangkalan has been well known for its mastery on Islamic classical science. In the era of the 1800s, this district was once a reference for Islamic scholarship. Several famous *ulama* and the founders of Islamic boarding schools (*pesantren*) in Java are the alumni of *Pesantren* Kademangan led by a prominent scholar namely KH. Muhammad Kholil bin Abdul Latif or popularly called "*Shaykhona Kholil*" and "*Mbah Kholil*".

Relating to the *shariah* regional regulation in Bangkalan, its embryo had just arisen in the past 4 years.[24] It is very interesting to find a fact that Bangkalan was planning a Regional Regulation on the Implementation of *Sharia* Tourism. However, the discussion on this took much time because of continual polemic between those who agree and those who disagree on the regulation. The dispute was

[24] Interview with KH. Makki Nashir, the chair of PCNU Bangkalan, conducted on July 7, 2019.

especially on the existence of the term *sharia* which triggered debate on whether it applies for Muslims or the whole community.

Helmy Boymia, one of drafting experts of this regulation mentioned that the important thing in regional regulation on *Sharia* Tourism is to capture Islamic values and customs of Bangkalan then formulate them in general regulation which applies to all Bangkalan people. As a consequence, the word *sharia,* is eventually agreed to get removed.[25]

Another effort to absorb Islamis values in Bangkalan regional regulation is also clear from the plan to change the name of Bangkalan from the "City of *Santri*" to the "City of *Dhikr* and *Shalawat*." This came true when the Regional Government officially declared Bangkalan as *the City of Zikr and Shalawat* along with local leaders of *pesantren* and Islamic organizations on August 28, 2015. The declaration was then followed up by a plan of regional government and the representative council of Bangkalan (DPRD) to issue a Regional Regulation on the "City of *Dzikir and Shalawat*" as a commitment of the declaration.[26] According to the Chairman of NU Bangkalan, K. Makki, the new name of Bangkalan is a reflection of Islamic values as the foundation in everyday life.[27]

Furthermore, DPRD Bangkalan explained that the change of name actually goes along with the change of era which is actually inevitable. In this globalization era in which human civilization moves continuously and influences human life, its enormous impact is clear especially on the development of cultural values including those in Bangkalan. Bangkalan people who used to uphold cultural values such as togetherness, family harmony and religious values are mentioned to begin to shift these noble values.

Some recent phenomenons, moreover, reflect moral degradation of Bangkalan people such as viral pornographic videos, a woman's half-nude photo taken in Paseban Park, even at the level of local

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[25] Interview with Mr. Helmi Boymia, a lecturer of Fakultas Hukum UTM Bangkalan, conducted on July 7, 2019.

[26] Ant Jurnalis, "*Bangkalan Dideklarasikan sebagai Kota Dzikir dan Shalawat*", news.okezone.com, 28 Agustus 2015 : https://news.okezone.com/read/2015/08/28/519/1203923/bangkalan-dideklarasikan-sebagai-kota-zikir-dan-shalawat. (Accessed on 12 July, 2019).

[27] Interview with KH. Makki Nashir, the chair of PCNU Bangkalan, conducted on July 7, 2019.

government bureaucracy. It is reported that one of DPRD Bangkalan members committed obscene acts against his stepdaughter. Other cases also occured and this implies that modernism as a necessity in this era does not only lead to constructive changes but also deconstructs the existing social order. Into some extent, it even degrades social behavior of those who were once very pious and submissive to religious values.

On another hand, religious nuance in Bangkalan is still obvious. This could be seen in Bangkalan people daily lives which still get strongly attached to the culture of *pesantren* such as *sarong* and *kopyah*, reciting the Qur'an in *langgar* (Muslim small prayer room), and recitation of *shalamat*.

Therefore, the role of regional government is very important in realizing Bangkalan's goal as "The City of *Dhikr* and *sholawat*. This is particularly urgent to make the new name not merely as image building instrument or pseudo religious claim. Instead, it is supposed to show strong willingness and seriousness of both Bangkalan government and people to deal with nowadays challenges particularly in dealing with social and moral issues. Among others, turning the slogan into a living value system that really guides religious behavior in Bangkalan can be affirmed through Islamic local regulations while considerting the specific local wisdom of Bangkalan people.

In addition to the aforementioned plan, Bangkalan also plans a new Regional Regulation on Polygamy to be proposed in 2020. The urgency of regulating polygamy in local legal products aims as a preventive effort to avoid fornication among Bangkalan people. The existence of this initiative causes variety of responses particularly on the urgency of regulation. People are grouped into two, namely pro and contra responding this plan.[28]

Conclusion

Based on aforementioned explanations, the application and /or absorption of Islamic legal values in regional legal products in Madura have two types:

[28] ina/pin, "*Legislator Usulkan Pembentukan Perda Poligami*", kabarmadura.id, 5 Agustus 2019 : https://kabarmadura.id/legislator-usulkan-pembentukan-perda-poligami/. (Accessed on July 7, 2019).

First is direct absorption and/or application of regional legal products. This takes form in regional regulations or district regulations. In Pamekasan, there found several regional legal products including Regional Regulation No. 18 of 2001 concerning Prohibition of Alcoholic Beverages; Regional Regulation No. 18 of 2004 concerning Prohibition of Prostitution; Regional Regulation No. 7 of 2008 concerning Management of Zakat, Infaq and Sadaqah; Regional Regulation No. 5 of 2010 concerning Operational Costs for Hajj; Regional Regulation No. 4 of 2014 concerning Al-Qur'an Reading Skills for Muslim Students; Regional Regulation No. 5 of 2014 concerning Control of Activities in the Month of Ramadan; Regional Regulation No. 14 of 2014 concerning Hotel, Lodging and Boarding House Managements, and several other regional legal products.

Second is indirect absorption and/or application of the Islamic law values in regional legal products. Different from the previous, this substantially imports Islamic values in the legal products such as the Regulations No. 3 of 2002 concerning Public Order in Sumenep.

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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.

FACULTY OF SHARIA
INSTITUT AGAMA ISLAM NEGERI (IAIN) MADURA

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