Dr. SANURI, S.Ag., M.Fil.I.

POSITIVATION OF ISLAMIC CIVIL LAW IN INDONESIA

(A Philosophical Approach)

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FOREWORD

In recent years, various issues, particularly those related to cases in the area of family law (*al-ahwal al-shakhshiyyah*), have become trending topic in various print and electronic mass media. Based on statistic data, the cases like high divorce rate, rise of underhand marriage practices, domestic violences, disputes over inheritance, child custody and others have increased sharply from year to year. This is a proof that there must be a big problem with the law enforcement system in Indonesia.

In addition, the facts about violation in the family law area in Indonesia also invite the attention of Islamic civil law scholars to find solution. A lot of activities, ranging from studies, seminars, discussions, research on family law problems have also been carried out both by practitioners and academics. This is done in order to conduct a review of the Islamic civil law system to be more effective and provide the principle of benefit for all parties.

On the other hand, from the economic aspect, Indonesia, with a majority Muslim country, has a high potential in boosting the nation's economy towards prosperity. The spread of *shari'ah* economic practices, *shari'ah* financial institutions, *shari'ah* products increasingly demand Muslim scholars to immediately take strategic steps together with the government in order to fortify the public from practices that are not in accordance with Islamic teachings. The direct involvement of the state in responding to the people's economic issues shows that the state must be present to determine the direction of development through clear and firm regulations.

Some concepts of micro economic empowerment for Muslim community can also be done through the effectiveness of *zakat, waqf, infaq*, and *shadaqah*. *Zakat* institutions in Indonesia, such as the National *Amil Zakat* Agency (BAZNAS) and the *Amil Zakat* Institution (LAZ), are example of the institutions that have been formed by the government under the auspice of the Ministry of Religion. This institution is spread in almost every level, namely at the national, provincial, city, and district level. These institutions are tasked for collecting, distributing, utilizing *zakat* for productive purposes in developing a more established economic level.

In the world of work, the increasing number of job seekers from among women also has potential for discrimination, crime, and unilateral actions by companies that are very detrimental to them. Therefore, there is a need for legal protection that provides security and comfort for woman workers. In the perspective of the objectives of Islamic law (*maqasid al-shari'ah*), maintaining their safety is a necessity for a country through existing institutions. The participation of the state in making clear, firm and authoritative regulations is a form of state responsibility to provide protection to the people.

Some facts of civil law in the area of family law, the Islamic business, *shari'ah* banking, and companies that employ women, need an order that is able to protect their rights, especially those who are victims. On the other hand, thoughts about Islamic civil law that are still scattered in the classic books of the Ulama. Therefore, it is very necessary to codify the Islamic civil law thinking of the Ulama in a standardized rule, namely the formal law which applies and has binding power. Codification and positivation of Islamic civil law into positive law in Indonesia, at least, has three fundamental reasons, namely historical factor, political factor, and sociological factor.

First is the historical factor. Historically, Islam entered the Archipelago in the first century of Hijriyyah or around the

seventh and eighth century AD. The inclusion of Islam in the Archipelago indicates that Islam with all its aspects, ranging from traditions, forms of worship, patterns of social life, and including the legal system also began to apply and continued to grow. During the Islamic kingdom in the Archipelago, the *mufti* and *qadhi,* who were appointed by the king, were tasked with handling matters in the field of marriage law, divorce, inheritance and all matters related to family law. Even criminal cases.

Second is political factor. From a political point of view, the civil law prevailing in Indonesia until today has not been completely separated from the influence of the Dutch East Indies era, which was created and formatted for a colonial society with norms adjusted to its era. As a nation that has been freed from the clutches of colonialism, it is fitting to have its own civil law book in accordance with the times, needs, and aspirations of an independent nation, and most importantly represent Islam as the most widely adopted religion. In addition, the National Islamic civil law is also intended as a manifestation of the spirit of nationalism that shows political and juridical sovereignty.

Third is sociological factor. Sociologically, there have been many changes in the order of life along with the changes in the mindset and culture of society in various walks of life. The theory of law for the indigenous population that was once imposed by the Dutch colonial government also alternated depending on changes in human thought patterns. Thus, Islamic civil law, as a rule of law that becomes the sign for the life of Muslim community, must also go hand in hand with these changes. For this reason, the reinterpretation, re-actualization, and positivation of Islamic civil law, sociologically, will actually prove that the law is not absolutely static, but dynamic and flexible.

In this book, the points relating to Islamic civil law which have become national civil law and the provisions of the Law that have the spirit as in the objectives of Islamic law (*maqasid al-shari'ah*), namely to provide maximum benefits for human life. Among the material covered in the following chapters are: the development of Islamic civil law in the Archipelago, marriage, polygamy, illegal or underhand-marriage and early marriage, contract marriage and interfaith marriage, asset in marriage, child custody and guardianship, divorce and legal consequences, referral mechanism and legal consequences, termination of employment (PHK) for female workers for reasons of marriage, pregnancy and childbirth, the elimination of domestic violence, mediation, management of *zakat, waqaf, shari'ah* economy, and *halal* product guarantee.

Writer

Dr. Sanuri, S.Ag., M.Fil.I.

CONTENTS

CHAPTER 1

ISLAMIC CIVIL LAW OF INDONESIA IN A HISTORICAL CHAIN

Historical records say that Islam began to enter Indonesia in the 7th century AD along with the rush of world trade traffic, particularly by Islamic traders from Arabia, Persia and Gujarat. The large waves of groups of traders then settled in a certain area and formed a new community. From this community, there was a good interaction with the local community or indigenous people while introducing the teachings of Islam in the Archipelago. Models of the spread of religion with acculturation, assimilation, marrying the indigenous women, trade cooperation, education, Sufism, and art are the most effective ways of changing the direction of the indigenous of Hinduism and Buddhism to become well aware of Islam as a religion that they believe to date when Indonesia as a Muslim majority nation.

History of Islamic Law in Indonesia

The existence of Islamic civil law[1] in Indonesia is, in fact, a result of a long distance dialogue in the history of the nation and

[1] Civil law is a law that aims to ensure certainty in the relationship between one person and another person both as member of society and object in society. Islamic Civil Law "is a part of Islamic law that has been valid in formal juridical or positive law in the Indonesian legal system, the contents of which are only part of the scope of *mu'amalah*, this part of Islamic law becomes positive law based on or because it is appointed by statutory regulations . Examples are marital law, inheritance, wills, grants, almsgiving and representation. Civil law (Islam) includes: (1) *munakahat*; regulate everything related to marriage, divorce, and its consequences; (2) *warathab*; regulate all matters relating to heirs, heirs, inheritance, and the distribution of inheritance. This Islamic inheritance law is also called *fara'id* science; (3) *mu'amalat* in a special sense, regulates material matter and right to object, human relations in

state for the people of Indonesia. The formal legal recognition of Islamic law as one of the positive legal systems in Indonesia is truly a brilliant achievement, especially for the Muslim community as the majority population. However, the achievement in this formal juridical aspect is certainly not as easy as turning a hand, but must go through various political, economic, social, and cultural dynamics that are very tiring because they are always in a binary position. A condition in which there are a lot of controversy between aspects of normative theological laws that are more theocentric in nature and positivistic humanist laws that are more anthropocentric.[2]

The meeting between the two currents that contradict each other precisely illustrates how Islamic law is a system of rule that is not monolithic, but it is able to collaborate with various ingredients without losing identity and substance as rule that originates from the God of the Universe. This also proves that Islamic law has universal character so that it still exists when it has to be tested by the development of increasingly sophisticated human thinking.

From political aspect, Islamic law actually exists and has been formally recognized as one of the prevailing legal systems of the government and has binding legal force. This is because historically, the development of Islamic law from the time of the Prophet Muhammad (peace be upon him/PBUH), the *Rashidun* Caliphate, the *Umayyad* Caliphate, and the *Abbasid* Caliphate became one of the main pillars to regulate the life of the nation and state. In other words, speaking about Islamic law also means talking about the politics of law that were developing at that

matters of buying and selling, renting, borrowing, lending, and so on. See Wati Rahmi Ria, *Hukum Perdata Islam; Suatu Pengantar*, (Lampung: AURA, 2018), 3.

[2] By Mohamed H Reda, *Islamic Commercial Law: Contemporariness, Normativeness and Competence,* (Laiden: BRILL, 2018), 81-85. See also Jürgen Renn, *The Globalization of Knowledge in History,* (Berlin: Epubli, 2012), 308.

time. How not, Islamic law will not be able to enforce if it is not supported by a strong and sovereign government system.

From economic aspect, Islam is a religion that is very concerned about the economic condition of its adherents. In the early days of Islam, economic activity received quite serious attention since it was an important pillar of the progress and strength of a country. On the other hand, to maintain the economic assets and wealth of a nation and society, it is necessary to have a legal certainty so as to create a security guarantee to continue developing an economy that is oriented towards achieving a decent life for its population. Starting from here, it is necessary to have a strong legal system to protect various economic-based activities.

From cultural aspect, Islamic law is a rule that upholds the values of justice, truth, equality. It views that every human being has a natural freedom (*fitrah*) that cannot be seized by anyone. Through these universal values, Islamic law tries to engage in dialogue and cultural compromise while prioritizing the basic values as the message of Allah (The Sacred and The Mighty/SWT). The ability to metamorphose through the concept of *'urf* (tradition) is a proof that, truly Islamic law can exist in diverse cultures and social backgrounds.[3]

The positivation of Islamic law in Indonesia, both criminal and civil, has actually been going on for a long time, even before the Dutch colonialism and several other European countries. Among the criminal laws that have been applied to Muslim

[3] Saim Kayadibi, *Istihsan: The Doctrine of Juristic Preference in Islamic Law* (Kuala Lumpur: Islamic Book Trust, 2012), 38-39. *'Urf* means something that is considered good and accepted by common sense. The word *'urf* is often equated with the word *adat*, the word *adat* comes from Arabic which means repetition or is done repeatedly. Therefore, something that has only been done once has not been called *adat*. While the term *'urf* in terminology, as stated by Abdul Karim Zaidah means something that is familiar to a society because it has become a habit and integrates with their lives in the form of actions or words. See Satria Effendi, M. Zein, MA, *Usul Fiqh,* (Jakarta: Kencana, 2005)

communities are rules about theft, murder, etc. that apply in the Islamic kingdom of Demak. Some examples of civil law in force, at that time, were about the law of marriage, inheritance, charity, endowment, and implementation of pilgrimage.[4]

The application of the two legal systems above further confirms that long before the European colonialist movement to various Asian region, Indonesian people were familiar with Islamic criminal and civil law as an alternative to the rules they used to resolve existing cases. In addition, this condition shows that the understanding of Indonesian people about Islamic law is not limited to theological normative but it is also at formal legal normative level. One important element of the implementation of Islamic law in Indonesia is the creation of a beautiful collaboration between Muslim scholars and government that occurs significantly and simultaneously in comparing a celestial rule into a joint commitment in the triangulation relationship between government, Muslim scholars, and people.

Historical Facts of Islamic Law and Archipelago Islam

Based on some historical records, there are some historical facts to prove that there are several kingdoms in the Archipelago that have constitutionally applied Islamic law as the official law of the kingdom. Among them are Sultan Pasai in Aceh, Pagar Ruyung, Paderi, Demak, Pajang Mataram, Banten, Malaka, Brunei (now Brunei Darussalam) on the Malay Peninsula and, Makassar. A.C. Milner noted that the kingdom of Aceh Darussalam and the Islamic Kingdom of Banten were two kingdoms of the Archipelago that were very strict in implementing Islamic law.[5] In 1651-1681, under the authority of

[4] Mark Beeson, Richard Stubbs, *Routledge Handbook of Asian Regionalism*, (London: Routledge, 2012), 228. See also Keat Gin Ooi (ed), *Southeast Asia: A Historical Encyclopedia, from Angkor Wat to East Timor*, (California: ABC-CLIO, 2004), 410-411.

[5] Sunarto, *Sejarah Peradaban Islam Indonesia*, (Jakarta: PT. Raja Grafindo Persada, 2007), 133-134.

Sultan Ageng Tirtayasa, Banten also had enacted the law of cutting off hands (*hadd*), left leg, left hand, and so on, for theft of 1 gram of gold and its multiple.[6] This illustrates that Islamic law, both criminal and civil law, has already existed and has been practiced as part of a legal system of the governance.

Even, when Sultan Iskandar Muda became king, he had punished stoning for his own son who was proven to have committed adultery with the wife of a royal officer. This is in accordance with the constitution of the kingdom of Aceh Darussalam "*Qanun Meukuta Alam*" which is sourced from *al-Qur'an* and *al-hadith*, that anyone committing a crime and depriving others of their rights, so he or she, indiscriminately, must get the same reply. The spirit of applying Islamic law that is so solid is a strong reason why he imposed stoning for his son. The principle that he adheres to is "*mate aneuk nak jirat, mate adat ho tamita*" (death of a child has a grave, but if the law is dead, where will we look for it).[7]

The next is the Islamic kingdom of Mataram. Based on historical records that Sultan Agung had also enacted the law of *qisas*[8] which was formulated from the classical books of the Imam Shafi'i school of thought specifically talking about *qisas*. According to the *Kuncen* (caretaker) of the Yogyakarta Palace, the Yogyakarta square, at that time, was functioned as a place of execution of stoning and cutting off the hands of adulterers or

[6] Ibid., 135, 142.

[7] A. Hasjmy, *59 Tahun Aceh Merdeka Di Bawah Pemerintahan Ratu,* (Jakarta: Bulan Bintang, 1977), 45.

[8] *Qishash* is an Arabic term which means "to cut off" or "to follow", i.e. to follow the action of the perpetrators of crime in retaliation for their actions. According to Islamic law, *qishash* is a balanced punishment for retaliation or intentional destruction or disappearance of the function of other people's limbs. Based on the above understanding, *qishash* can be divided into two, namely: (1) *qishas* of murder (which is a punishment for murderers); (2) *qishash* of limb (which is a punishment for the offender injuring, damaging or eliminating the function of the limbs).

thieves who had been proven guilty after going through court proceeding, where the king directly acted as a judge.

In addition to the Islamic criminal law system that once prevailed in the classical Archipelago, in trading activity, it also often used a type of currency that was popular among the Islamic kingdoms in the Middle East as the official currency of the Nusantara kingdom, such as *dinar* (gold) and *dirham* (silver). Sultan Iskandar Muda even issued a policy on prohibiting usury. During the reign of Sultan Muhammad Malik al-Zahir (1297-1326), Aceh also issued similar gold *dinar*. Besides representing the deep-rooted practices of Islamic teachings, this also shows the level of culture and technological development achieved at that time.

From the historical chain of Islamic law, it always gets its own place in the hearts of the people of Indonesia, although efforts to make Islamic law as a positive law always find a dead end, especially after independence. That is why Islamic legal experts continue to struggle to include some Islamic law as a source of positive law. Another consideration is that Indonesia, as predominantly Muslim, bases on the first principle of "God Almighty". Some examples of this can be mentioned as the Marriage Law (Law No. 1 of 1974, the Basic Law on Judicial Power (Law No. 14 of 1970) which was followed by the enactment of the Religious Courts Law (Law No. 7 of 1989), the Basic Law Agrarian Law (Law No. 5 of 1960), Principal Law of the Prosecutor's Office (Law No. 15 of 1961), and the Principal Law of Police (Law No. 13 of 1961).

Furthermore, in 1991 the Indonesian government imposed Compilation of Islamic Law (KHI) through Presidential Instruction (INPRES) No. 1 of 1991. This Compilation consists of three books. All of the books are part of Islamic civil law, namely book I about Marriage Law, book II on Inheritance Law, and book III on law on endowment (*perwakafan*). This Compilation is

the guideline of religious judge in examining and adjudicating matters which become their authority in the Religious Court.[9]

Process of Islamization in Indonesia

Before Islam came in Indonesia, the Indonesian people had held firmly to the belief that behind the regularity of the universe and human life, there should certainly be a power beyond the essence of nature and human control. The traditions of animism and dynamism in society increasingly find a point of clarity after the emergence of the earth religions such as Hinduism, Buddhism, and other beliefs. The doctrine of the earth religions teaches their adherents to believe in Gods and spirits who are believed to be the source of all strength and life. The values of spirituality offered by some earth religions seem to be linear with the character and style of belief and life of the Indonesian Archipelago, so that the development and influence of the two religions are stronger and able to gain deep sympathy among the people.

Islam, as a religion that upholds theologically monolithic teachings, is in the opposite zone from theological concepts of Hinduism and Buddhism. This is what makes Islam a bit of an obstacle to greeting the lives of Indonesian people. Through an economic and cultural approach, Islam has found angels about what and how to behave when dealing with traditions that are totally controversial.

The history records that Islam came and spread throughout most of the Archipelago through a propaganda that was carried out by many groups such as saints, scholars, traders, farmers and teachers. There are, at least, seven patterns of the spread of Islam

[9] The Compilation of Islamic Law (KHI) is a book of Islamic law which is formulated from various schools of thought in Islam and continues to be revised from time to time in accordance with the needs and development of science and technology. This book of Islamic law only applies to Muslims who are litigant in matters of marriage, inheritance, and representation.

in Indonesia, namely trade, marriage, education, *sufism*, art, politics, and propaganda. The seven propaganda media that were carried out massively with a cultural acculturation approach placed Islam capable of destroying the hearts of the Indonesian people. Slowly but surely a society that had originally embraced Hinduism and Buddhism was gradually displaced by the arrival of Islam. This is certainly a historical achievement of the Islamic propaganda that began to enter a new phase in Indonesia.[10]

The entry of Islam into Indonesia through trade occurred at an early stage was in line with the hectic sea trade traffic in the 7th century AD to the 16th century AD brought by Islamic traders from Arabia, Persia and Gujarat. The large waves of groups of traders then settled in a certain area and formed a new community. From this community they interact and assimilate with the local community or indigenous people while spreading the teachings of Islam in Indonesia.[11]

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[10] Robert Day McAmis, *Malay Muslims: The History and Challenge of Resurgent Islam in Southeast Asia,* (USA: Eerdmans Publishing Co., 2002), 24-25.

[11] According to J. Pijnapel, a Dutch scholar from the University of Leiden in the 19th century, said that there were three theories about the process of the arrival of Islam to Indonesia: (1) originating from *Gujarat,* a region in western India. Islam was first spread by *Gujarat* traders who had embraced Islam and traded to the east, one of which was Indonesia. This can be seen from the shape and style of the tombstone is the same as the shape of the headstone in *Kambay, Gujarat*; (2) the second theory is Arabic theory. This theory was introduced by one of Indonesia's scholars and writers, Buya Hamka. He said that the entry of Islam in Indonesia was first brought by the Arabs around the 7th century AD. According to Hamka, the early arrival of the Arabs was not influenced by the economic actors but rather the motivation to spread Islam. This *Makkah* theory was also conveyed by Hamka to refute the *Gujarat* theory of the entry of Islam in Indonesia; (3) the third is Persian theory. This theory was introduced by Hoesein Djajadiningrat, a historian from Banten. According to this theory, the arrival of Islam to Indonesia came from the Persian or Persian regions, now known as the Iranian state. This can be seen from the cultural similarities and traditions that developed between the Persians and Indonesians such as celebrating 10 *Muharram* or 1 *Suro* and

Many of the trade caravans that formed the new community were married to indigenous women. Before the marriage took place, the indigenous Muslim women had been asked to recite the *shahada* (two witnesses that there is no God but Allah and Muhammad is the Messenger of Allah) as a sign of accepting Islam as their religion. Through this marriage route, the Muslim community is getting bigger and gradually developing from a small community to become Islamic empires.

The spread of Islam through education was carried out through *pesantren* (Islamic boarding house), especially by the *kiai* (the leader of the *pesantren*). The more famous the *kiai* who teaches at a *pesantren*, the greater influence the *pesantren* in the community has. Some famous *pesantren* in Indonesia include Ampel Denta *Pesantren* that was nurtured by Sunan Ampel or Raden Rahmat, Sunan Giri *Pesantren* that was nurtured by Sunan Giri. Beside from being instructors at *pesantren*, *kiai* were also often asked to be advisors for kings or nobles.[12]

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calligraphy carving on tombstone used in many Islamic cemeteries. Arndt Graf, Susanne Schroter, Edwin Wieringa (ed), *Aceh: History, Politics and Culture,* (Singapore: ISEAS Publishing, 2010), 182.

[12] Islamic boarding school (*pesantren*) starts from religious teachers in mosques, palaces, or teach Sufism in hermitage. However, there is very little information about the origin of this institution. The oldest known *pesantren* that can be seen in its founding year is Tegalsari boarding school in Ponorogo, East Java. This pesantren was founded by Sultan Paku Buwono II in 1742. Furthermore, the educational institution was inaugurated in the 1800s. A traditional historical source, *Serat Centhini*, said that the embryo of the *pesantren* was found in Karang, Banten Province. This *Pesantern* was established around the 1520s. In *Serat Centhini*, a character named Danadarma is told. He claimed to have studied for three years in Karang, Banten. In addition, a character named Jayengresmi or Amongraga also studied the *Paguron* (college) of Karang under the guidance of an Arab teacher named Shaykh Ibrahim bin Abu Bakar, known as Ki Ageng Karang. From Karang, then he went to *Paguron* in East Java. See also for comparison Sumanto Al Qurtuby, *Saudi Arabia and Indonesian Networks: Migration, Education, and Islam,* (Bloomsbury Publishing)

The spread of Islam that is no less important is through sufism. Sufism is a teaching or a way to get closer to God. Sufism makes it easier for people who already have another divine basis to understand and accept the teachings of Islam. The meeting point between the teachings of sufism and some local beliefs that had already existed was in the aspect of a deep understanding of spirituality. Similarities in the transcendental aspect make Islam seem familiar for the local community and even they were easy to accept as a new teaching. Some figures in sufism in the Archipelago at that time included Hamzah Fansuri, Syamsuddin, Sheikh Abdul Shamad, and Nurdin al-Raniri.

In addition to the above methods, the spread of Islam in Archipelago is also seen in Islamic art, such as the legacy of building art, music, sculpture, language and literary arts. The result of these works of art can be seen in the buildings of ancient mosques in Demak, Banten, Cirebon and Aceh as symbolic manifestations of Islamic teachings had become an important part of the life of the Indonesian Archipelago.

Politically, a king, with his great power and influence, played an important role in the process of spreading Islam. The king's religion and beliefs was the main key to the people's religion and beliefs. This is a fundamental character of Indonesian society where they have high adherence to their king. Before colonialism, there were at least a number of the Archipelago kingdoms that had embraced Islam with all aspects of their laws that were legally valid for the royal family and the people. Among them were the kingdoms in Aceh, Minangkabau, Gowa Tallo, Kalimantan, Java, and several other regions.

A portrait of Islamic Law of Archipelago in the Pre-Dutch Colonial

Historians say that Islam entered the Archipelago in the first century *Hijriyyah* or around the seventh and eighth century AD. The inclusion of Islam in the Archipelago indicates that

Islam with all of its aspects, ranging from traditions, forms of worship, patterns of social life, and including the legal system began to apply and continue to grow.[13] Among the Archipelago regions that first became gateway into the Archipelago was the northern region of the Sumatra Island which was then used as a starting point for the preaching movement of Muslim migrants. Slowly, the propaganda movement then formed the first Islamic society in *Peureulak*, East Aceh. Politically, the development of an increasingly crowded Muslim community in the region led them to establish the first Islamic empire in the thirteenth century AD. This kingdom is known as Samudera Pasai (now Lhoukseumawe), which is located in the North Aceh region.[14]

The persistence of Muslim in carrying out propaganda to local population made Islam was able to develop rapidly in the Archipelago territory until a great force was formed in the form of the establishment of several Islamic empires. Among the kingdoms was Samudera Pasai Kingdom in Aceh. Not far from Aceh, there was the Sultanate of Malacca, then on the island of Java, there were the Sultanate of Demak, Mataram and Cirebon, then in Sulawesi and Maluku, there were the Kingdom of Gowa and the Sultanate of Ternate and Tidore. These considerable political powers then turned into the Sultanates which independently had the authority to establish and enforce Islamic law as positive law. The establishment of Islamic law as a positive law in each of the sultanates shows the position of Islam as an increasingly strong political force. These facts are proven by the existence of a number of *fiqh* (Islamic jurisprudence) works written by the scholars of the Archipelago around the 16th

[13] Ramly Hutabarat, *Hukum Islam dalam Konstitusi-konstitusi Indonesia dan Peranannya dalam Pembinaan Hukum Nasional, Pusat Studi Hukum Tata Negara Universitas Indonesia,* (Jakarta, Mei 2005), 61.

[14] Bagoes Wiryomartono, *Traditions and Transformations of Habitation in Indonesia: Power, Architecture, and Urbanism,* (Singapore: Springer, 2020), 40-43. See also Ramly Hutabarat, *Kedudukan Hukum Islam dalam Konstitusi-konstitusi Indonesia*, 61.

and the 17th centuries until the Dutch traders, in this case the VOC came to the Archipelago.[15]

Along with the style and character of thought that developed in each Islamic kingdom, it also had an impact on the style and character of the existing Islamic legal system. For example the kingdom of Samudra Pasai, which was founded around the middle of the 13th century AD, is more inclined to the *Shafi'i* school of thought. The Kingdom of Aceh also made the *Shafi'i* school of thought as the official school of thought of the kingdom. At least, there are several names of the major scholars who were born from the Archipelago and have inherited the Islamic legal system, namely Sheikh Abdul Ra'uf Singkel and Nuruddin Arraniri with his monumental work "*Sirathal Mustaqim*".[16] The book is used as a medium for the spread of Islam and as a guide for religious teachers and *qadhi* (judge), especially during the reign of Sultan Iskandar Muda.[17]

Moving on from the Sumatra and Aceh Island, in Java emerged several kingdoms such as the kingdom of *Mataram* led by Sultan Agung.[18] In this period, Islamic law began to live and

[15] Ibid., 61-62.

[16] Syekh Nuruddin Ar-Raniri, the Aceh-era mutfi of Sultan Iskandar Tsani, protected the people from the teachings of the philosophical Sufism of Sheikh Hamzah Fansuri and Sheikh Syamsudin Sumatrani, who previously had a stage in the era of Sultan Iskandar Muda. Strengthening aspect of the Syafi'i school of thought was stronger when the Indian-born cleric composed the *fiqh* book, *As-Shirath al-Mustaqim* as the first monumental work written by scholars in the Archipelago by following the Syafi'i school of thought. This 347-page work is written in classical Malay, Arabic-Malay, and carefully and tactically reviewed for non-Arabic beginners or in the language of the author. This book is the result of the press from Imam Nawawi's *Minhaj al-Thalibin*, Imam Zakariyya al-Anshari's *Minhajut Thullab*, *Hidayatul Muhtaj* of Ibnu Hajar, *'Umdatus Salik*, and some others as explained in the introduction to this book.

[17] Hasan, KN. Sofyan dan Warkum Sumitro, *Dasar-dasar Memahami Hukum Islam di Indonesia,* (Surabaya: Usaha Nasional, 1994), 18-19.

[18] The Kingdom of Mataram (Sultanate of Mataram) is an Islamic kingdom that stood in the land of Java in the 17th century. In its heyday, the Sultanate of Mataram controlled all of the land of Java and the surrounding area,

had a big influence in running the wheels of government. Slightly different from the kingdom or sultanate in Aceh, the kingdom of *Mataram* had certain style where a *Sultan Agung*, as head of state, also concurrently held the position of *qadhi* (judge) in the court of the Great Mosque *Serambi*. The case which was the authority of the *Serambi* Court is called "*qisas*" which was derived from the term of *qisas* in *al-Qur'an*.[19]

In addition to the Islamic kingdom of *Mataram*, there was the *Cirebon* kingdom, led by Fatahillah, a great Muslim scholar and one of the nine saints' figures. At this time, Islamic law developed rapidly, especially those relating to family laws. In the *Cirebon* kingdom there was also a religious court which deal with criminal acts (currently: subversive) and was guided by the norms set by the prince as religious leader in the kingdom. The magnitude of the influence of Sultan Fatahilah strengthened the position of Islamic law, which was able to shift Hindu and Buddhist customary law which had preceded it.

Furthermore, the Islamic kingdom of *Banjar* is as a continuation of the Hindu kingdom of *Dhaha* in South Kalimantan. This kingdom turned into an Islamic kingdom after Prince Samodera declared himself converted to Islam after overthrowing Prince Tumenggung from Dhaha with the help of Sultan Demak. The influence of Islamic law on the people in the Bandar Kingdom was quite strong. This is reflected in the existence of an *adagium* contained in the royal promise "*Pati Baraja'an Dika, Andika Badayan Sara*" that means, "I submit to the command of my Lord, because my Lord punishes the *shari'ah* law".

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including Madura except Batavia which was controlled by the VOC. Unlike other major Archipelago kingdoms based on maritime, the Sultanate of Mataram is based on agriculture.

[19] Hamka, *Sejarah Umat Islam,* (Jakarta: Bulan Bintang, 1976). See also the verse, meaning: "And do not kill the soul which Allah has forbidden, except by right. And whoever is killed unjustly - We have given his heir authority, but let him not exceed limits in [the matter of] taking life. Indeed, he has been supported [by the law]." (*Al-Qur'an. al-Isra*': 33)

The *mufti* and *qadhi*[20] who were appointed by the king were tasked to handling matters in the fields of marriage law, divorce, inheritance and all matters relating to family law, and even criminal cases. History records that the Banjar kingdom also applied the law of killing for apostates (out of Islam), the law of cutting off hands for thieves, and the law of detention for adulterers, which later became known as the Law of the Sultan Adam.

In South Sulawesi, a kingdom that first accepted Islam as the official religion of the kingdom was the kingdom of Tallo and the kingdom of Gowa. The development of Islamic law in this period had quite a strong influence. This is seen through political power in the royal structure placed *Parewa Shara'* (*shari'ah* official), which is the same as Parewa Adek (*adek* official) before the arrival of Islam. *Parewa Shara'* is led by a *kali* (judge). He is the highest official in Islamic law who is domiciled at the center of the kingdom. Administratively, the Islamic courts that exist at this time have been professionally managed, where the judges (*qadhi*) and the officials below get a salary from the alms of wealth, alms of *Eid al-Fitr* and *Eid al-Adha*, royal court, administration corpse and wedding arrangement. This happened during the reign of the king of Gowa XV (1637-1653) when Malikus Said came to power.

Islamic law also experienced rapid development during the time of Raja Ali Haji in Riau. At that time, the Islamic legal system and the judiciary have been neatly arranged where the Islamic judicial institution has the completeness of a court today.

[20] Mufti is an Islamic religious figure who has high scholarship and is recognized and has the authority to issue fatwas to Muslims. In some countries, the Mufti is directly appointed by the government of that country and his opinions are highly respected and referred to by the public. *Qadi* is a judge appointed by the government and has the obligation to make decisions based on Islamic law. Mufti is a person who has the breadth of knowledge of the religion then receives recognition from the community, and then *qadi* is someone who, because of his competence, is then appointed by the state to become a judge. Furthermore, if the fatwa of a mufti has no binding power, then that of *qadi* has a binding power.

The religious court consists of, the Royal Court in charge of resolving disputes in the kingdom and the Small Court in charge of handling any problems that arise in the community. Each court has three judges who handle criminal and civil cases.

Islamic Law in the Dutch Colonial Period

Before the Dutch established their power in the Archipelago as a colony, a Dutch Trade Organization in the East Indies, or known as the VOC came to the Archipelago.[21] The Dutch East Indies Trade Company (*Vereenigde Oostindische Compagnie* or abbreviated as VOC) established by the Dutch government on March 20, 1602 has a monopoly on all trading activities in Asia. Called the East Indies because there was also *Geoctroyeerde Westindische Compagnie,* which was a special trade alliance for the West Indies regions. This company is considered as the first multinational company in the world as well as being the first company to issue a share distribution system

Initially, the VOC was a trade union alliance. However, this trade agency obtained various special facilities from the Dutch government, such as being able to have an army and the right to negotiate with other countries. For Indonesians the VOC has a popular designation as "*kompeni*" or "*kumpeni*". This term is taken from the word "*compagnie"*, a company term in Dutch. But the Archipelago people were more familiar with the "*kompeni"* as a Dutch soldier because of its oppression and extortion to the people of the Archipelago. This trade mission then continued to become a political mission of colonization carried out by the Dutch to the kingdoms in Java, Sumatra, and Maluku.

[21] VOC is an abbreviation of *Vereenigde Oostindische Compagnie*, which is a trade union from the Netherlands that has a monopoly for trading activities in Asia. The purpose of the VOC was to monopolize trade in Indonesia and Asia. This company was formed to consolidate Dutch traders in order to compete with Portuguese, Spanish and British traders. Delphine Alles, *Transnational Islamic Actors and Indonesia's Foreign Policy: Transcending the State,* (London and New York: Routledge, 2016), 19-20.

As a trading joint venture on behalf of the Dutch government, the VOC could be said to have dual roles, namely to move on behalf of the organization and government so that it also had the authority to act on behalf of the Dutch law. In this region, he experienced obstacles because the basic character of the indigenous people was very inclusive from external elements including the European legal system. In relation to Islamic law, there was a compromise between the VOC and the natives, namely: first, the Islamic inheritance law applies to the adherents of Islam as recorded in the *Batavia Statute* which was established in 1642 by the VOC; secondly, there was an attempt to compile Islamic family law (*al-ahwal al-shakhshiyyah*) which had taken effect in the midst of society and this great program ended in 1760 with the term "Compendium Freije" (containing the principles of criminal and civil law of Islam); third, the movement of Islamic family law compilation also took place in several other regions, such as in Semarang, Cirebon, Gowa, and Bone.

To strengthen and establish its influence in Indonesia, the Netherlands needed to enforce the legal system that applied in their country and the natives. However, the Netherlands, through trade associations (VOC), began to realize that Muslims in Indonesia were the majority and were more inclusive from outside beliefs, thoughts and cultures. This made the Dutch have to think hard about how they were able to influence indigenous communities so that they would accept the Dutch legal system while still provided space for the natives to implement the existing Islamic legal system. Therefore, in broad outline, the development of Islamic law in Indonesia during the Dutch colonial period can be seen in two forms, namely: First, the tolerance of the Dutch to provide space for indigenous communities to practice Islamic law in the civil domain. Secondly, there is an effort by the Dutch to intervene Islamic law by confronting to customary law.

This recognition of Islamic law continued even before the transfer of power from the United Kingdom of England to the

Kingdom of the Netherlands. After Thomas Stanford Raffles served as governor for 5 years (1811-1816) and the Dutch regained control of the Dutch East Indies, it became increasingly apparent that the Dutch was trying hard to grasp the nails of its power in this region. But the effort was met with difficulties due to religious differences between the invaders and their colonizers, especially Muslims who were familiar with the concepts of *dar al-Islam* (state of Islam) and *dar al-harb* (state of war).[22] That is why the Dutch Government had tried various ways to resolve the problem. Among them were by (1) spreading Christianity to indigenous people, and (2) limiting the application of Islamic law to only spiritual aspects.

It can be concluded that the efforts to limit the application of Islamic law by the Dutch East Indies Government chronologically are as follows: (1) In the mid-19th century, the Dutch East Indies Government implemented Conscious Legal Politics; namely policies that consciously want to reorganize and change the legal life in Indonesia with the Dutch law; (2) Based on the memorandum delivered by Mr. Scholten van Oud Haarlem, the Government of the Netherland instructed the use of indigenous religious laws, institutions and customs in the

[22] The terms *dar al-Islam* and *dar al-harb/al-kufr* are terms in the books of *fiqh* and classical Islamic history. In fact, not a few contemporary scholars who still use the term to classify society based on belief/creed, Muslim or non-Muslim. According to Al-Maududi, stated that the State/community which did not apply the law of Allah was a ignorant society and was considered to have been infidels (territories/*dar al-kufr*). And those who accept the principles of the Islamic state are called Muslims, and those who do not accept are called non-Muslims. The status of *dar al-Islam* changes its status to *dar al-kufr/al-harb* if there are three things: 1) the law of infidels applies; 2) there is no sense of security for Muslims in the country; and 3) side by side with infidels who threaten the peace of Muslims. Mohammad Talaat Ghunaimi, *The Muslim Conception of International Law and the Western Approach,* (Netherland: Springer, 1968), 156. See also Sarah Albrecht, *Dar al-Islami Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslims in the West,* (Leiden: BRILL, 2018), 53.

matter of disputes among them, as long as they did not contradict the principles of decency and justice that were generally recognized.

The last clause then places Islamic law under the subordination of the Dutch law; (3) On the basis of a *reception* theory issued by Snouck Hurgronje, the Dutch Indies Government in 1922 then formed a commission to review the authority of religious courts in Java in examining inheritance cases (on the grounds that it had not been accepted by local customary law); (4) In 1925, changes were made to Article 134 Paragraph 2 of the *Indische Staatsregeling* (the same content as Article 78 of the Regulations by an ordinance. This weak position of Islamic law continued until nearly the end of the rule of the Dutch East Indies in Indonesian territory in 1942.

Pancasila: the Basis Ideology of Positivation of Islamic Law in Indonesia

In a book entitled "*Public Religion and the Pancasila-based State of Indonesia: An Ethical and Sociological Analysis*", a researcher about Indonesia, Benyamin Fleming Intan, said that as an ideology of living as a nation and state, *Pancasila* contains philosophical values which are very fundamental for the provision of the aspired national life. This means that all the rules of play in the life of the nation and state, ranging from social activities, economy, education system, political system, and even legal system should also lead to and oriented to the basic ideas of *Pancasila* that reflect paradigmatic values: (1) moral religious (divine morality); (2) humanity; (3) nationality; (4) democracy; and (5) social justice. Therefore, all forms of legislation in Indonesia must reflect the basic values as contained in the *Pancasila*.[23]

[23] Kevin Boyle, Juliet Sheen, *Freedom of Religion and Belief: A World Report*, (London and New York: Routledge, 1997), 202.

Based on the first principle of *Pancasila*, "God Almighty" and the second principle, "Humanity that is just and civilized", this means that law enforcement officers, perpetrators of crime, and victims of crime must be understood in the following frameworks: (1) has the same position before the law, namely as a human being (the principle of equality before law); (2) both have the duty as humans to develop and maintain the nature, and dignity of human being created by God (the principle of human dignity); (3) together have human rights that must be protected in civilized ways (the principle of humanity); and (4) whatever one's role and status, what needs to be noted is that he is no more in the fulfillment of the mandate of God Almighty (prinship worshipness/*ta'abbudi*).

The first principle of *Pancasila* initiates that the goal of law enforcement is not merely the need for nationality, but it comes from the spirit of monotheism or transcendence) and self-servitude (*ta'abbudi*) to God Almighty. One of the important ways is by placing every human being as a creature of God who has right, position, and the dignity of humanity which must receive proportional protection. This is where the function and duty of human to find and re-realize legal justice and moral justice. Therefore, the achievement of the value of justice requires benchmark aspired by the national community as well as those contained in the Criminal Procedure Code, namely justice based on the God Almighty.[24]

In the first principle of the *Pancasila,* the point of departure is actually the word "belief in one God". This illustrates and, at the same time, differentiates Indonesia from other countries. Indonesia places the word "divinity" in the first principle, certainly not without careful consideration and thought, but always looks and leads to the values and norms of history, culture, and beliefs that are very strong and diverse from

[24] M. Yahya Harahap, *Pembahasan Permasalahan Penerapan KUHAP, Penyidikan dan Penuntutan*, (Jakarta: Sinar Grafika, 2004), 20.

heterogeneous societies. The word "divinity" seems to remind all Indonesian people that God has good and perfect qualities and characters. With all the goodness and infinite perfection that is the benchmark for how we think, behave, and act in the context of imitating and grounding those values in the life of the nation and state, including being fair and transparent in law.

In the "etische" theory[25], it is said that the basic purpose of law is solely for the sake of realizing justice based on the principle of balance and equality. Although in its development, this theory is often clashed with how to make the rules of justice because God's justice is absolutely absolute, while human's justice is relative. However, at the very least, the rule of law in a country has the proper position of giving protection to society by treating each citizen with the right to work and a decent living for humanity and to giving legal standing to everyone.[26]

As stated in the fifth principle of the *Pancasila*, "social justice for all Indonesian people", that the state must be able to guarantee justice for all its citizens indiscriminately. The philosophical value of the fifth principle is that social justice is something that is basically a right that should be enjoyed by everyone. The presence of the government in the midst of community life is how to be able to become a mediator while providing certainty in all aspects of life for the realization of a devoted social justice.

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[25] Ethical theory (*etische* theory) put forward by Aristotle. This theory explains that the highest legal goal is to achieve justice. Aristotle then divided justice into 2 types, namely: (1) distributive justice, namely justice that gives each person a ration according to his services. The distribution is according to their respective rights). That is, this justice does not demand that every person get the same amount or not the equality, but the comparability based on one's achievements and services; (2) commutative justice, that is justice which gives each person the same amount of ration without remembering their respective services. This means that the law requires equality in obtaining achievements or something without taking into account their respective services.

[26] Ali Mansyur, *Aneka Persoalan Hukum: Masalah Perjanjian, Konsumen dan Pembaharuaan Hukum*, (Semarang: Unisula Press: 2010)

CHAPTER 2

THE THEORIES OF ISLAMIC LAW IN PRE-COLONIAL TO POST-INDEPENDENCE OF INDONESIA

The study of Islamic law, for Western scholars, is an interesting thing. Some of them objectively look at Islam and some are not objective by saying that Islam is the religion of slaves (*hagarism*) as accused by Jewish orientalis, Patrica Croen and Michael Cook. Other orientalists such as Rudolf Macuch, Carl H. Becker, A.J. Wensinck, I.K.A. Howard, Uri Rubin, Georges Vajda, C.S. Hurgronje, H. Lazarus-Yafeh, and others, they suspect that most of Islamic teachings, regarding *aqidah* and worship, are taken from the doctrines and traditions of Judaism or Christianity. There are at least five Orientalist's views on Islamic law: (1) Islamic law is nothing more than discourse; (2) Islamic law is very arbitrary and authoritarian; (3) there is no continuity between Ulama and the state: (4) Islamic law is chaotic; (5) Islamic law only ran for more than two centuries and then stagnated. And what are about the theory of Islamic law in Archipelago?

Islamic Law Among the Differences

One of the very interesting topics for reviewers about Islamic law in Indonesia is that it has a different style and form from those of countries as its epicenter. The journey of Islamic law in Indonesia is inseparable from a long process of propaganda and the spread of Islam. Starting from the spread of Islam, which originated from the Arabian Peninsula, the missionary effort continued to spread and enter into the

Archipelago through scholars who have capability to accommodate with various methods of cultural approaches.[1] The propaganda carried out by Muslim scholars both from outside and the Archipelago has massive implications for the culture of the Indonesian Muslim community through adaptation and assimilation to local customs and culture. From a long journey process of preaching, Indonesia is currently becoming the largest Muslim population in the world.

Along with the rapid propagation of the Islamic movement in Indonesia, people began to be interested in making Islam as a means of spiritual journey that was originally going to bring them to a dream of life, namely the happiness of the world and the hereafter. In addition, the spirit of the spread of Islam certainly cannot be separated from the source of Islamic law, namely *al-Qur'an* as a holy book which is a guide in life for

[1] One of the ways of spreading Islam in Indonesia is through cultural approach. The teachings of Islam that are inculcated through this cultural instrument necessitate a mixture or the legacy of the old religions and existing beliefs, which flourished in society at that time, to be preserved then cleaned of the elements of *shirk*. The cleansing of the *shirk* element is an attempt to establish the concept of monotheism in Islamic teachings. One example is the culture of *wayang*. The time before, Puppet was a part of polytheistic religious rituals, but is later transformed into means of *da'wah* and the introduction of monotheistic teaching. This is an extraordinary creativity, so that people are becoming Muslim through this path. They feel safe with Islam, because it exists without threatening their tradition, culture and position. Another example is that one of the schools of thought that developed in Indonesia is a school which when taking conclusions of *fiqh* is adapted to the local context. One example is the implementation of *zakat fitrah*. Textually, *zakat fitrah* must be given in the form of wheat - according to the staple food in Saudi Arabia. However, our scholars have sought to replace wheat with rice in the implementation of *zakat fitrah*, because it is adjusted to the staple food in Indonesia. Elly Malihah, Tutin Aryanti, Vina Adriany, Hani Yulindrasari, Alicia Izharuddin (ed), *Research for Social Justice: Proceedings of the International Seminar,* (London: CRC Press, Routledge, 2020)

believers and even for all humans.[2] Besides *al-Qur'an*, the second source of Islamic law is sourced from what the Prophet Muhammad taught through his *sunnah*. These two sources of law are always the reference for the Muslim scholars to answer various new problems experienced by Muslims from time to time in accordance with the development of society.

In this context, *al-Qur'an* and *al-sunnah* are absolute sources of law, while the law referred to as *fiqh* is a product of *ijtihad* that is limited by time and space. This means that if the truth of *al-Quran* and *al-sunnah* is absolute, then the truth of *fiqh*, as a result of *ijtihad* of the Muslim scholars, is relative. In this case, Fazlur Rahman said that if *al-Qur'an* and *al-Sunnah* are texts, then *fiqh* is actually a mixture of legal opinions with the text itself. The combination of reason and humans with revelation creates Islamic jurisprudence (*fiqh*). It is the dialogical process among text, *ijtihad*, space and time that finally results a treasure in Islam called Islamic law.[3]

Viewed from material aspect, Islamic law includes: (1) civil law (*al-ahwal al-shakhsiyyah*) consisting of; marriage law (*munakahat*), inheritance law (*mawarith*), endowments (*waqf*), grants, charity, criminal law (*jinayah*), procedural law (*murafa'at*); (2) political law; (3) economic or commercial law; and (4) international law (*al-dualiyah*).[4] One thing that is quite interesting is that all Islamic legal materials sown from the Middle Eastern countries can be well received and even become a theoretical and practical foundation by the Archipelago community in carrying out the governance wheel which includes social, economic, political, and cultural aspect. Differences in belief, culture, and social setting

[2] Meaning: "This is the Book about which there is no doubt, a guidance for those conscious of Allah" (*al-Qur'an, al-Baqarah*: 2) and "Those are the ones who have exchanged guidance for error and forgiveness for punishment. How patient they are in pursuit of the Fire" (*al-Qur'an, al-Baqarah*: 175)

[3] Fazlur Rahman, *Islam and Modernity: Transformation of an Intellectual Tradition*, (Chicago: the University of Chicago Press, 1982), 5.

[4] Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, (Depok: Rajawali Pers, 2017), 6.

become a separate process as an Islamic legal entity that is able to take a position in the heart of the Archipelago community.

Departing from a long journey of Islamic law in the Archipelago is then considered as an embryo for the formation of civil law in Indonesia. Related to the validity of Islamic law among Indonesian people, various theories emerge, where each has its own characteristics. As for this matter, there are several kinds of theories, including *credo* or *shahadah*, *receptio in complexu* theory, *receptio exit* theory, *receptio a contario* theory, and *recoin* theory (*receptio contextual interpretario*).

Theory of *Credo* or *Shahadah*

The theory of *credo* or *shahadah* is a theory that Islamic law with its various aspects must be carried out for those who have pledged the two sentences of *shahadah* (witnessing that there is no God but Allah and Muhammad is the Messenger of Allah). This implementation is a logical consequence for anyone who has converted to Islam. This theory is derived from *al-Qur'an* and mentioned in chapter *al-Fatihah*: 5, *al-Baqarah*: 179, *Ali Imran*: 7, *al-Nisa'*: 13, 14, 49, 59, 63, 69, etc.[5]

Indeed the theory of credo has little similarity with the theory of legal authority[6] put forward by H.A.R Gibb in his book

[5] Meaning: "And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous" (*al-Qur'an*, *al-Baqarah*: 179), "It is He who has sent down to you, [O Muhammad], the Book; in it are verses [that are] precise - they are the foundation of the Book - and others unspecific. As for those in whose hearts is deviation [from truth], they will follow that of it which is unspecific, seeking discord and seeking an interpretation [suitable to them]. And no one knows its [true] interpretation except Allah. But, those firm in knowledge say, "We believe in it. All [of it] is from our Lord." And no one will be reminded except those of understanding" (*al-Qur'an*, *Ali 'Imran*: 7)

[6] Authority theory was introduced by Max Weber (1864 - 1920). Authority theory says that there is a tendency for a person to be obeyed on the basis of a belief in the legitimacy of his right to influence. Max Weber divides authority in society into three, namely: (1) Legal Authority (Legal-Rational

"The Modern Trend of Islam (1950)". According to the theory of legal authority, people who have declared themselves to be Muslims, then he must accept Islamic legal authority over them. Sociologically, people who are already Muslim accept the authority of Islamic law and they have high adherence to Islamic law.

This theory illustrates the existence of a mutualistic symbiotic relationship between Islam as a religion, Islam as a legal system, and people who believe in it. Or in other words, Islamic law exists in Islamic societies because they believe that Islamic law is sourced from God and the Messenger of Allah. Submission and obedience to the law that comes from lawmakers means submitting and obeying to Allah and His Messenger as a form of self-servitude.[7]

Jaih Mubarok, an expert in Islamic civil law, criticizes that one of the weaknesses of the legal authority theory is that this theory is more idealistic because it was built from a more humanistic European civilization of life. In contrast to the theory of credo which is built based on Islamic doctrine and its struggle with empirical social life in the trajectory of human life. H.A.R. Gibb himself acknowledged that the level of observance of Muslims towards Islamic law must vary, depending on the

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Authority) that is the authority that comes from legality or a certain regulation. (2) Traditional authority, the authority whose validity rests on customs. (3) Charismatic Authority is an authority whose validity stems from charisma or special qualities possessed by someone recognized by others. George P. Hansen, *Max Weber, Charisma, and the Disenchantment of the World*, (Chapter 8), (PA: Xlibris, 2001), 102. Weber explained that religion became the driving force or spirit of capitalism in carrying out all economic activities as well as the ethics and doctrines that developed in Europe at that time and even today. Read also. Dana Williams, *Max Weber: Traditional, Legal-Rational and Charismatic Authority*, (Ohio: The University of Akron, 2003), 1.

[7] It is as mentioned in *al-Qur'an*, meaning: "O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best [way] and best in result" (*al-Qur'an*, *al-Nisa'*: 59)

quality of understanding of Islamic teachings and to God, so that there are those who obey all aspects of Islamic law and those who adhere only to some aspects of Islamic law.

In line with the theory of H.A.R. Gibb, verily, the leading figures of Islamic school of thought like Imam Shafi'i has revealed the theory of non-territoriality and Abu Hanifah with the theory of territoriality when they explain the theory of international law (*fiqh siyasah dauliyyah*). The theory of territoriality of Abu Hanifah states that a Muslim is bound to carry out Islamic law as long as he is in the area that enforces Islamic law.[8] While the theory of al-Shafi'i of non-territoriality states that a Muslim is forever bound to carry out Islamic law wherever he is, both in areas that apply Islamic law and do not apply Islamic law. In the Indonesian context, both of the two theories offered by the leading figures of Islamic school of thought further strengthen the position of the truth of the theory of credo, even though there is actually a principle point of difference.

Theory of *Receptio in Complexu*

According to the theory of *receptio in complex*, for each resident, the law of each religion applies or in other words the applicable law is in accordance with the religious law of a person. For Muslims the Islamic law applies, so also for people of other faiths their religious law applies.[9] The embryos of this legal theory are thought-forming features of the laws of the Dutch scholars such as Carel Frederik Winter, a senior jurist on Javanese matters, and Salomon Keyzer (1823-1868) a linguist and cultural expert in the Indies.

From the thoughts of the two figures above, this theory was later put forward by Lodewijk Willem Christian Van Den Berg

[8] Muḥammad Ibn al-Ḥasan Shaybānī, *The Islamic Law of Nations: Shaybani's Siyar*, (USA: The Johns Hopkins Press, 1966), 52. See also Sarah Albrecht, *Dār al-Islām Revisited: Territoriality in Contemporary Islamic Legal Discourse on Muslim in the West*, (Leiden: BRILL, 2018), 58.

[9] Helen J. Nicholson, Sarah Biddulph (ed), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, (Leiden: BRILL, 2008), 200.

(1845-1927), an Islamic jurist, politician, advisor to the Dutch East Indies government for Eastern languages and Islamic law. With all of his expertise, Van Den Berg coined a legal theory that should be applied to the Javanese community in particular, and Indonesia in general, namely the *receptio in complexu* theory. This theory states that Islamic law as a whole applies to its adherents. So, based on this theory, the Dutch East Indies government in 1882 established a religious court aimed at citizens who embraced Islam.

This law then applied to all Indonesian people who were under the Dutch colonialism which, at the time, was based in Batavia. As the capital city, Batavia is the center of all government administration activities, including the religious court. Besides in Batavia as the center of government, the justice system also exists in several areas called resident. Each resident, led by a regent, fully has the responsibility to run the government and the law that apply to the community. To support this task, each resident is equipped with a number of police officers in completing criminal and civil cases occur.

These evidences are well recorded in historical records of the Dutch government, such as in the Batavian Statute or "Statute van Batavia" and it was renewed in 1766 under the name "*Nieuwe Bataviase Statuten*" (Statute of the New Batavia). This statute states "inheritance disputes between Muslim religious believers must be resolved using Islamic law, that is, the law used by ordinary people".[10] Therefore, D.W. Freijer was

[10] In 1610, the VOC central administrator in the Netherlands gave authority to the Governor General, Piere Bith, to make regulation in completing special cases which had to be adjusted to the needs of VOC employees in the areas under their control, besides he could decide civil and criminal cases. The regulations are made and announced come into force through "*plakat*". In 1642 the *plakat* was systematically compiled and announced under the name "Statute of van Batavia" and in 1766 it was renamed "*Niewe Bataviase Statuten*" (New Batavia Statute). The statute gave the authority of indigenous people to practice the applicable law in their religion, namely Islam. They gave the freedom of indigenous people to handle cases such as inheritance disputes,

assigned by the Dutch government to compile a compendium (summary book) on marriage law and inheritance in Islam and was enforced in the VOC colony known as the Compendium Freijer.[11]

Other evidences are the book of *Muharrar*[12] and *Pepakem Cirebon*[13] and regulations made by BJD Clootwijk for Bone and

divorce, marriage and others. This was taken by the VOC to avoid resistance from indigenous communities. Euis Nurlaelawati, *Modernization, Tradition and Identity: The Compilation of Islamic Law and Legal Practice in the Indonesian Court*, (Amsterdam: Amsterdam University Press, 2010), 44-47.

[11] The *Compendium Freijer* is an effort to promote the abstraction of Islamic law as one of the legal systems that have recognized the existence and rights of their lives in Indonesia that have been carried out. Since the beginning of the Islamic presence in the XIII century AD, the Islamic legal system has been implemented and developed within the Islamic community. Prof. Hamka presented the fact of the various works of Indonesian Islamic jurists. However, all these papers, still subject to jurisprudence. It is still a legal doctrine and system of Indonesian Islamic jurisprudence which is oriented towards the teachings of the Syafii school of thought.

[12] The book *al-Muharrar* or its full title *al-Muharrar fi al-Fiqh al-Shafi'i* is the book of *fiqh* which is the main reference in the al-Shafi'i school of thought. It is the work of *Shaykh al-Islam* al-Imam Abu al-Qasim Abdul Karim bin Muhammad bin Abdul Karim al-Rafi-'iy al-Qazwini (555-624H). Imam al-Rafi-'iy compiled the book of *al-Muharrar* by making a summary (*mukhtashar*) of the book of *al-Wajiz* by Imam Hujjah al-Islam Abu Hamid al-Ghazali (505 H).

[13] *Pepakem Cirebon* or also known as the *Jaksa Pepitu* is a book of law that applies in judicial institution in the sultanates of Cirebon that deals with civil and criminal matters. From the depth of its philosophy, the position of the *Jaksa Pepitu* was only given by Cirebon rulers to experienced and highly moral officials. In carrying out their duties to adjudicate cases, the prosecutors of *Jaksa Pepitu* do not use buildings (Cirebon language: gedong), terrace (*balai*) or mande in the palace but instead use the large square in the north of the prosecutor's office. They sit under a *beringin* tree as symbol of guarding which is the implementation of the sentence of *Candra Tirta Sari Cakra* (full moon that illuminates, holy and pure water, flower fragrance, thorough and wise). *Pepakem Cirebon* is currently kept in the *Kacirebonan* palace. The source of this law comes from local, Islamic and colonial sources. The Dutch colonial codified the book (since 1768), especially since the signing of the VOC and the Cirebon Sultanate. See also a more detailed explanation in the book written

Goa, South Sulawesi, the *Sabil al-Muhtadin* book in the Banjar sultanate, *Resolutie der Indische Regering* issued by the VOC on May 25, 1760, the statement of Solomon Keyzer (1823 1868) and Cristian van den Berg (1845-1927 AD) concerning the law of following one's religion, and the climax of the establishment of the *Priesterrad* Religious Court (Court of the Pastor) which was formed in each *landraad* area (district court).[14] Thus, it is clear that the position of Islamic law at that time was very strong and lasted approximately from 1602 to 1800 AD.

If traced in history, actually the thought of Islamic law has been developing in Indonesia since the beginning of the 13th century AD. This is evidenced by a report of Ibn Battuta (d.779 AH/1377 AD), Muslim wanderer from North Africa. In 746 AH/1325 AD, he visited the Pasai Ocean on a journey from Delhi to China. At that time, Samudera Pasai was ruled by Sultan Malik az-Zahir (1297-1326 AD), the son of Sultan Malikush Shaleh (d. 1297 AD). Based on observations, Ibnu Battuta concluded that religious practices and Islamic law under the Shafi'i school of thought had prevailed in the kingdom.[15]

This fact proves that the politics of the Dutch colonial government who realized that Islamic law was one of the pillars of power that could take the fight against the Dutch political policy and try to hegemony Islamic law within its power. Therefore, on the advice of the Dutch legal experts (Hurgronje and Van Vollenhoven), the Dutch changed their policy by stipulating that Islamic law applies if it has been adopted by customary law.[16]

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by Leonard Blussé, Femme S Gaastra, *On the Eighteenth Century as a Category of Asian History: Van Leur in Retrospect,* (New York: Routledge, 2012)

[14] Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, (Depok: Rajawali Pers, 2017), 12-13.

[15] Ibid.

[16] Euis Nurlaelawati, *Modernization, Tradition and Identity: The Compilation of Islamic Law and Legal Practice in the Indonesian Court*, (Amsterdam: Amsterdam University Press, 2010), 44-47.

In connection with this, in article 134 Paragraph (2) the *Indische Staatsregeling* (IS) is formulated: "In the event of a civil case between fellow Muslims, the Islamic judge will be settled if their customary law requires it and so far as not otherwise determined by an ordinance". According to Ismail Suny, this proves that the Dutch government's policy at that time actually wanted to hamper the implementation and development of Islamic law.[17] The Netherlands did not include *hudud* and *qisas* penalties in the field of criminal law, Islamic teachings concerning marital law and inheritance were complicated.[18]

The existence of the theory of *receptio in complexu* can be seen from the following evidence: (1) *Statu Batavia* 1642 which states that "inheritance disputes between indigenous people who are Muslim must be resolved by using Islamic law"; (2) In 1760, the VOC issued a similar regulation called the *resolutie der Indische Regeering*., such as: (a) The issuance of *Stbl*. No. 22 Article 13 of 1820 stipulates that the regent must pay attention to matters of the Islamic religion and to ensure that religious leaders can carry out their duties in accordance with Javanese customs as in matters of marriage, the distribution of heirlooms and the like; (b) Van den Berg drafted *Staatsblad* No. 152 of 1882 which contained the provisions that the indigenous people or the people of the colony had religious laws that applied to their environment; (c) Through *Stbl.* No. 152 of 1882 a religious court was formed under the name *Priesterraad*, whose authority was to settle matters between Muslims according to Islamic law; (d) In Article 75 RR (*Regeeringsreglement*) of 1855. Article 75 Paragraph 3 RR reads: "By the Indonesian judge, the religious law (*godsdienstige wetten*) and the habits of the Indonesian population should be enforced". It was at this time that the policy of the Religious Courts emerged besides the District Court which was

[17] Ismail Suny, *Hukum Islam dalam Hukum Nasional,* (Jakarta: Universitas Muhammadiyah, 1987), 56.

[18] Ahmad Rofiq, *Hukum Perdata Islam di Indonesia*, 19.

preceded by the compilation of a book containing the set of Islamic law.

Theory of *Receptie*

This theory was introduced by Islamic legal experts, Christian Snouck Hurgronje (1857-1936).[19] Starting from the *receptio in complexu* theory which says that the law in force follows a person's religion, Snouck Hurgroje's receptie theory says on the contrary that Islamic law is only accepted by the community and has legal force if it is truly accepted by customary law. This theory then became more popular, especially for the Dutch colonial than his predecessor, Van den Berg. the implication of this theory resulted in the slow development and growth of Islamic law compared to other institutions in the Archipelago.[20]

Snouck Hurgronje is widely known as one of the scholars who made Islam a separate discipline in the West. He is also known as one of the earliest figures who made Islamic law as one of the objects of study in Europe with a historical approach. Van Niel also described Snouck Hurgronje as an important figure who had quite extensive knowledge about the Archipelago (Indonesia). For more than seventeen years (1889-1906), he held special advisory position of the Dutch Colonial Government which was previously held by Van den Berg, whose task was, among other things, to give advice relating to the teachings of Islam and local cultures. Pros and cons of Snouck Hurgronje's thoughts to date have made his thinking able to give its own color to the development of the legal system in Indonesia.

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[19] Christiaan Snouck Hurgronje (born in Tholen, Oosterhout, February 8, 1857 died in Leiden, June 26, 1936 at the age of 79) was a Dutch scholar of Oriental culture and language and an Advisor on Indigenous Affairs for the colonial government of the Dutch East Indies (now Indonesia).

[20] Arskal Salim, Azyumardi Azra (ed), *Shari'a and Politics in Modern Indonesia,* (Singapore: Institute of Southeast Asian Studies, 2003), 78-79.

Based on the result of the Snouck Hurgronje's observations and analysis on the Indonesian Archipelago, the Muslim community are that: (1) although Islamic law is theoretically accepted but in practice, Islamic law is often violated; (2) in Islamic society, he said, Islamic law does not apply, what applies is customary law; (3) elements of Islamic law are included in the elements that exist in customary law; (4) in fact, Islamic law that applies in indigenous communities is not pure Islamic law but an acculturation process with customary law that has already taken place; (5) Islamic law does not need to be codified, because in addition to the modification of the law, it is something that is heresy (the renewal of the Islamic religion without reference to *al-Qur'an* and *al-Hadith*), it will also hamper the entry into force of customary law.[21]

While, the main points of the Snouck Hurgronje's thoughts on Islamic politics are: (1) regarding *ubudiyah* (worship) affairs; namely human relations with God, the Dutch East Indies government must grant the widest possible independence to Indonesian Muslims to do so; (2) in matters of *muamalah* (social relationship); namely regarding the relationship among humans in society, the Dutch East Indies government must respect the existing legal institutions, while opening opportunities for Muslims to gradually move toward the rules made by the Dutch; (3) matters relating to politic must be rejected;[22] The Dutch East Indies government must eradicate *Pan-Islamism's* ideals which want to open the door for foreign powers to influence Dutch government relation with Eastern people.

Another factor that made Snouck Hurgronje's theory widely known, even his suggestions were quite heard by the Dutch government, was because the theory was in line with the

[21] David K. Linnan (ed), *Legitimacy, Legal Development and Change: Law and Modernization Reconsidered.*

[22] Based on his observation and experience during research in Indonesia, Snouck Hurgronje said that the enemy of Dutch colonialism in Indonesia was not Islam as a religion, but Islam as a political doctrine.

political interest of the Dutch government to colonize Indonesia. Even the theory was supported by several other Dutch legal experts such as Cornelis van Vollenhoven (1874-1933) and B. Ter Haar. *Receptie* theory has overturned the previously known *Receptio in Complexu* theory. Van Vollenhoven supported the theory put forward by Snouck Hurgronje.[23]

Van Vollenhoven's support to that of Snouck Hurgronje was apparent from his view of the legal system in the Archipelago. He said that one of the obstacles in studying customary law in Indonesia was the mistaken belief that: (1) every religion must have a law and a religious community follows the religious law. Therefore, Pagan religion has Pagan law, Hinduism has Hindu law, Islam has Islamic law, Christianity has Christian law, and so on. The actual fact is contrary to the assumption above. The truth is that customary law still has a strong enough influence on the applicable legal system. He added that religious law does have an influence but is quite small and limited to certain aspects. He also criticized scholars who studied law in the Archipelago that they were trapped in the relevance of religion and the legal system of the Indonesian Archipelago, inseparable from one another.[24]

According to Sajuti Thalib, the transition from the theory of *receptio in complexu* to the theory of *receptie* lasted quite a long time. And during the transition period, the Dutch Colonial government had imposed a number of rules. After going through a long process with a number of these rules, finally issued Stbl. No. 221 of 1929, Article 134 (2) *Wet op de Staatsinrinchting van Ned. Indie* (IS), which later became known as

[23] Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts*, (Amsterdam: Amsterdam University Press, 2010), 47-49.

[24] Akh. Minhaji, *Islamic Law and Local Tradition: A Socio-Historical Approach*, (Yogyakarta: Kurnia Kalam Semesta Press, 2008)

a formal source for the adoption of the *receptie* theory proposed by Snouck Hurgronje.[25]

Theory of *Receptie Exit*

The most important aspect in Islam is theology. Theology teaches principles of faith, life and freedom of every human being both as individual and as part of social life. As an individual, he is born in a state of nature (holy) or has freedom as a human being, freedom for life, and freedom from all forms of slavery. These are the manifestation of God's gift that should be upheld. As part of social life, he has the same right to take role in the midst of society.

The theological doctrine, if brought into the realm of state life, means that every independent and sovereign state has right and authority to determine its own destiny without interference from other countries. One of the meanings of the independence of the state is that the Indonesian legal system must be free from the influence of any country including the Dutch's law. It is this spirit that inspired the birth of the *receptie* exit theory put forward by Hazairin.[26]

At the end of the Dutch government in Indonesia, which increasingly weakened and ended with the independence achieved by Indonesia, Snouck Hurgronje's policy, with his theory of *receptie*, got massive correction as well as strong criticism from Indonesian Muslims. These critics aim to reposition Islamic law as before it had already existed and

[25] Ibid.

[26] Hazairin was born in Bukittinggi, West Sumatra, Dutch East Indies on November 28, 1906, from a strict religious family of Persian descent. His father, Zakaria Bahar, was a teacher from Bengkulu and his mother was of Minangkabau descent. As a child, he moved to Bengkulu to begin his schooling at a *Hollands Indlandsche School*, or Dutch school for Native Indonesians. After graduating in 1920, he moved to Padang to study at a *Meer Uitgebreid Lager Onderwijs*, graduating in 1924. During the same period, he studied Arabic and *al-Qur'an* with his grandfather, expanding on his Islamic studies in his own time. https://en.wikipedia.org/wiki/Hazairin

applied to the people of the Archipelago. One of the theories of the Indonesian Muslims put forward by Hazairin is the *receptie* exit theory.[27] This theory is an exit to release the misunderstanding in *receptie* theory. This theory says that customary law is declared valid for Muslims if it does not conflict with Islamic law.[28]

According to Hazairin, after Indonesia's independence, although the transitional rule states that the prior law still applies as long as its spirit does not contradict the 1945 Constitution, all Dutch government regulations based on the *receptie* theory are no longer applying because their spirit conflict with the 1945 Constitution. *Receptie* theory must exit because it contradicts to *al-Qur'an* and *al-Sunnah* (living traditions) of the Prophet. The enthusiasm of Islamic leaders opposed the opinion of Christian Snouck Hurgronje by relying on the application of Islamic law to customary law continues to roll, especially when approaching the proclamation of Indonesian's independence. This effort was apparent with the birth of the Jakarta Charter on June 22, 1945.

The Jakarta Charter[29] is the Draft Opening of the Constitution of the Republic of Indonesia which was compiled

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[27] Abdurrahman Misno Bambang Prawiro, *Reception through Selection-Modification: Antropologi Hukum Islam di Indonesia*, (Yogyakarta: Deepublish Publisher, 2016). See also M.Sulaeman Jajuli, *Fiqh Madhzhab 'Ala Indonesia,* (Yogyakarta: Deepublish Publisher, 2016), 27-30.

[28] Sajuti Thalib, *Receptie a Contrario: Hubungan Hukum Adat dengan Hukum Islam,* (Jakarta: Bina Aksara, 1982), 65.

[29] *Piagam Jakarta* (the Jakarta Charter) is a historical document in the form of a compromise between Islam and the Nationalists in the Indonesian Independence Preparatory Agency (BPUPKI) to bridge the differences in religion and state. It is a charter or text that was compiled in a meeting of the Nine (9) Indonesian leaders on June 22, 1945. The nine figures were Ir. Sukarno, Drs. Mohammad Hatta, Mr. A A. Maramis, Abikusno Tjokrosujoso, Abdulkahar Muzakir, H. Agus Salim, Mr. Ahmad Subardjo, Wachid Hasjim, and Mr. Muhammad Yamin. The nine figures were then referred to as the Nine Committee. This committee compiled a text that was originally intended as a text for the proclamation of independence. But, eventually, it was used as the Preambulation (Preamble) of the UUD 1945. This text is called the Jakarta

by 9 Indonesian prominent figures, while 8 of them are Muslim. The existence of the Jakarta Charter is a struggle of Islamic leaders at that time that always fought for the enactment of Islamic law for Muslims. According to Muhammad Yamin, the charter is a political document which is proven to have an appeal to unite various ideas of state administrations on the basis of national unity in order to welcome the arrival of an independent and sovereign Indonesian state.

According to the *receptie* exit theory, the application of Islamic law does not have to be based or dependent on customary law. This is further emphasized by the enactment of Law No. 1 of 1974 concerning Marriage, which enforces Islamic law for Muslims, Law No. 7 of 1989 concerning Religious Courts, and also Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law in Indonesia.

The principal thoughts of Hazairin related to this are: (a) the *receptie* theory has been broken, invalid and exited from the state administration of Indonesia since 1945 with the independence of the Indonesian state and the entry into force of the 1945 Constitution; (b) in accordance with article 29 Paragraph 1 of the 1945 Constitution, the republic of Indonesia is obliged to establish Indonesian national law whose material is religious law; (c) religious law that enters and becomes Indonesia's national law is not only Islamic law, but also other religious laws. Religious law in the field of civil law and criminal law is absorbed into Indonesian national law based on *Pancasila.*[30]

Charter. The substance of the Jakarta Charter is to contain lines of rebellion against imperialism-capitalism and fascism, and starts the foundation for the formation of the State of the Republic of Indonesia as a sovereign source that emits the Proclamation of Independence and the Constitution of the Republic of Indonesia. Saifuddin Anshari, *Wawasan Islam: Pokok-Pokok Pikiran tentang Paradigma dan Sistem Islam*, (Jakarta: Gema Insani Press, 2004); see also Andree Feillard, *NU Vis a Vis Negara; Pencarian Isi, Bentuk dan Makna*, (Yogyakarta: LKiS Pelangi Aksara, 1999).

[30] Hazairin's thoughts are explained in detail in his book entitled "The Series of Laws". Marzuki Wahid & Rumadi, *Fiqh Madzhab Negara; Kritik atas Politik*

The *receptie* exit theory is what will continue to be developed later by Islamic legal experts in Indonesia. One of the figures is a student from Hazairin named Sayuthi Thalib. He wrote the book *Receptio A Contrario*: Relations of Customary Law to Islamic Law.

Theory of *Receptio a Contario*

Receptio a contrario Theory is a theory of Islamic law that ever existed in Indonesia after the *receptie* exit theory. This theory was put forward by an expert of Islamic law on post-independence. In this theory, Sayuthi Thalib said that the legal system that should apply to Muslims is Islamic law. This is a logical consequence from both the historical and social aspects of religion. New customary law is declared valid if it does not conflict with Islamic law.

The elucidation of the *receptio a contrario* theory as explained briefly above, in Afdol's view quoting Sayuthi Talib's, is as follows: (1) for Muslim, Islamic law is applicable; (2) this is in accordance with legal belief and ideal, inner and moral ideal; (3) customary law applies to Muslims as long as it does not conflict with Islamic law.[31]

The theoretical framework of that theory is the opposite of *receptie* theory. The difference between *receptie* exit theory and *receptio a contrario* theory lies in the starting point of its thought. The *receptie* exit theory, as stated by Hazairin, departs from the fact that since the independence of the Indonesian people, the basic state is *Pancasila* and the 1945 Constitution. Opening and understanding of article II of the Transitional Rules is to prioritize the basis and spirit of independence and not accept the

Hukum Islam di Indonesia, (Yogyakarta: LKiS Pelangi Aksara, 2011), 89-91. Read also Jazim Hamidi, Moch. Adi Sugiharto, Muhammad Ihsan, *Membedah Teori-teori Hukum Kontemporer*, (Malang: Universitas Brawijaya Press, 2013).

[31] Ibid. See also Abdurrahman Misno Bambang Prawiro, *Reception Through Selection-Modification: Antropologi Hukum Islam di Indonesia*, (Yogyakarta: Deepublish, 2016)

mere understanding of transitional rules. The basis for *receptio a contrario* theory is based on the fact that the independent of Indonesian state, in accordance with inner ideal, moral ideal and legal awareness of independence, means that there is a breadth to practice religious teaching and religious law.

Theory of *Recoin* (*Receptio Contextual Interpretario*)

This theory was coined by Dr. Afdol, a legal expert from Airlangga University, Surabaya. According to him, this theory is needed to continue the previous theories. The essence of *recoin* theory is the contextual interpretation of the textual verses of al-Qur'an. According to Afdol, this theory is based on the result of his research on Islamic inheritance, for example the division of inheritance between men and women. Men get twice share of women do. In other words, the female's part is half of that of the male.[32]

With the rational that the law of Allah for mankind must be fair, it is impossible for Allah to send down rule of law in favor of one of the groups, as well as the problem of inheritance between men and women. By using the textual interpretation of the verse rationally, it can be judged unfair. It is different if the verse is interpreted contextually. In certain cases, the verse can be interpreted that the portion of the inheritance of woman is, at least, half of the share of man. The contextual interpretation of the verses of Islamic law is called by Afdol with the *recoin* theory.

This theory basically has different terms, even though the substance is the same as the other thinkers', such as Hasbi Ash-Shiddiqi with Indonesian-style jurisprudence, Gusdur-style indigenization, Munawir Sadjali's re-actualization, or Fazlur Rahman's Hermeneutic.

[32] Ibid.

CHAPTER 3

ISLAMIC MARRIAGE LAW: EMBRYO OF POSITIVATION OF RELIGIOUS LAW IN INDONESIA

The formation and renewal of Islamic family law in Indonesia underwent a culmination point on January 2, 1974 marked by the enactment of Law No. 1 of 1974 concerning Marriage sourced from: (l) customary law; (2) Islamic law; (3) the book of Civil Law (*Burgerlijk Wetboek* or BW); (4) Ordinary Indonesian Christian Marriage Ordinance; and (5) mixed marriage regulations (*Regeling op de gemengde Huwelijks*).

Overview of Islamic Marriage Law in Indonesia

The law on marriage contains principles and legal basis for marriage which has been a guideline and has been applied to various groups in Indonesian Muslim society. Before Law No. 1 of 1974 was born, various marriage laws had applied to various groups of citizens and various regions, such as:[1]

1. For the original Indonesian Muslim apply religious law which has been disciplined in customary law;
2. For other Indigenous Indonesians, the customary law applies;
3. For indigenous Indonesians Christians, *Huwelijks Ordonnantie* Christen Indonesia applies (S. No. 74 of 1933);[2]
4. For Chinese Eastern Orientals and Chinese citizens of Chinese descent, the provisions of the Civil Code shall be slightly changed;

[1] The explanations sourced from Law No. 1 of 1974 concerning Marriage.

[2] Peter Mahmud Marzuki, *An Introduction to Indonesian Law*, (Malang: SETARA Press, 2012), 49-50.

5. For other Eastern Orientals and Indonesian citizens to other Eastern Orientals, their customary law applies;
6. For Europeans and Indonesian citizens of European descent who are equated with them apply the Civil Code.

The presence of Law No. 1 of 1974 concerning Marriage makes the marriage rules in Indonesia are same from Sabang to Merauke, applicable to all tribes, religions, races and groups in Indonesia without exception. This law consists of 14 chapters with a total of 67 articles that discuss matters regarding: the legal basis of marriage, conditions for marriage, marriage prevention, marriage cancellation, marriage agreements, marital rights and obligations, husband's and wife's property, property in marriage, termination of marriage and its consequent, the position of the child, the rights and obligations between parents and children, guardianship and discussing other provisions such as: proof of the origin of children, marriages outside Indonesia, mixed marriages and court. What is meant by the court in this case is the Religious Court for those who are Muslim and General Courts for those who are non-Muslim.

In Law No. 1 of 1974, there are principles regarding marriage which have been adapted to the development of the demands of the times, as follows:

1. The purpose of marriage is to form an eternal family.
2. Marriage is legal if done according to the law of each religion and belief and must be recorded according to applicable regulation.
3. This law adheres to the principle of monogamy, but if the religious law of the person concerned requires a person to have more than one wife, marriage can only be carried out if fulfilled certain conditions and decided by the Court.
4. This law is based on the principle that a husband and wife must have been adult to get married.

5. The purpose of marriage is to form a prosperous family; this law adheres to the principle of making it difficult to divorce and must be done before a Court.
6. The rights and positions of wife are balanced with those of husband.

The development of Islamic civil law in Indonesia is an achievement, not to say "a setback", in the field of the legal system which is inseparable from the influence of the legal politics that developed at that time. Politically, the Republic of Indonesia, which has gained its independence through a long and tiring struggle, wants the development of religious life in a balanced national and state life. Proportionality is to include religious teaching in the realm of national law. Because Muslims are the majority in Indonesia, it is appropriate that Islamic law has the dominance to fill spaces in the legal system in Indonesia, in addition to other laws, namely customary law and western law.

The emergence of Law No. 1 of 1974 concerning Marriage reflects the government's appreciation and concern for the principles of religious teaching, especially Islam. What has been known so far in Islamic law contained in *al-Qur'an, al-Sunnah,* and Jurisprudence books will not have legal power and legal authority if it is not supported or contained in the rules of the law. With the inclusion of law in book in the legislation means it will turn into a legal product that has a strong force to be carried out by citizens or commonly referred to as law in action. Changes in the status of Islamic law, from law in book into law in action are a proof that the government actually has considerable attention to the diversity and legal system professed.

Promulgation of Law No. 1 of 1974 concerning Marriage is a form of seriousness of the government to provide legal certainty for citizens especially those who are Muslim. Thus, all the rules relating to marriage and the consequences of marriage

for those who are Muslims must refer to the provisions stipulated in Law No. 1 of 1974. Material Law No.1 of 1974 is basically a collection of *munakahat* law contained in *al-Qur'an, al-Sunnah* of the Messenger of Allah, and books of classical and contemporary *fiqh* which have been successfully adopted by the national legal system from normative law (law in book/*das sollen*) become a written law (law in action/*das sein*) that has binding and coercive power to the people of Indonesia, especially Muslims.[3]

This law is greatly needed because marriage is a sacred thing and is glorified by the family that carries it out. Marriage is a combination of man and woman which not only meets physical needs but also fulfills spiritual need. More strictly marriage is a bond to justify the sexual relations between man and woman in the context of realizing family happiness which is filled with a sense of peace and affection in a way that is blessed by Allah SWT.

Islam, with all of its perfection, views marriage is as an important event in human life. Islam also views marriage as being a basic human need, it is also a sacred bond or a sacred covenant (*mithaqun ghalidhun*)[4] between man and woman. Besides that, marriage is the best mean to manifest love of fellow

[3] The relationship between *law in book* and *law in action* is like the relationship between *das sollen* and *das sein* which is always the opposite. *Das sollen* is a general rule of law, while *das sein* is a concrete event that occurs in society. *Das sollen* and *das sein* are found in legal research. *Das sollen* is a law expressed by legal experts in the theoretical level (law in the books), namely law in the form of ideals how it should be, whereas (*das sein*) is more to the law as a fact (in fact), namely the law that lives and develops proceed in the community (law in action). Suharto, Jonaedi Efendi, *Panduan praktis bila anda menghadapi perkara pidana: Mulai Proses Penyelidikan hingga Persidangan*, (Jakarta: Prenada Media, 2013), 7.

[4] The word *mithaqan ghalidhan* is translated by great agreement. This word is in *al-Qur'an* chapter *al-Nisa'* verse 21: "And how could you take it while you have gone in unto each other and they have taken from you a solemn covenan?"

human being from which it will preserve the regeneration process of social life.

The family is the smallest social group consisting of father, mother, children and dependents.[5] The family is a universal social institution. It means that it exists and is recognized by all social lives in the world. According to Abdul Wahab Kholaf, family law as *al-ahwal al-shakhsiyah* is a law relating to the units in the family and regulating their relationship with each other.[6]

History of Islamic Marriage Law in Indonesia

Broadly speaking, the history of the emergence of Islamic marriage law in Indonesia can be divided into two, namely during the Dutch colonial period and after the Dutch colonial. First is during the Dutch colonial period. When the Dutch entered Indonesia in 1596 through the *Verenigde Oost Indische Compagnie* (VOC),[7] the policies that had been implemented by the local Islamic kings were maintained in the areas of their rule. Thus, the legal position of the Islamic family was in the community and it was fully recognized by the VOC authorities. The VOC period ended with the entry of Britain in 1800-1811.

After British handed back their power to the Dutch government, the Dutch colonial government again tried to change and replace Indonesian law with the Dutch law. But seeing the reality that developed in Indonesian society, opinion emerged among the Dutch people who were pioneered by L.W.C. Van Den Berg that the law that applies to native

[5] Kamus Besar Bahasa Indonesia, https://kbbi.kemdikbud.go.id.

[6] Abdul Wahhab Khalaf, "*Ilmu Ushul Fikih*, Terj," *Halimuddin*, (1996), 41.

[7] *Vereenigde Oostindische Compagnie* (VOC) is a Trading Company or Dutch East Indies Company which was established on March 20, 1602. The VOC is a trade union from the Netherlands that has a monopoly for trading activities in Asia. Called the East Indies because there is also *Geoctroyeerde Westindische Compagnie* that is a trade alliance for the West Indies region. This company is considered as the first multinational company in the world as well as being the first company to issue a share distribution system.

Indonesians is the law of their religion, namely Islam. In this case, Cristian Snouck Hurgronje disagrees with this theory.[8] According to him, the law that developed in Indonesian society is not Islamic law, but customary law.

At that time, although, the authority of the *Penghoeluegerecht* (Religious Court) in the field of marriage was not abolished, the coming of this regulation was clearly very detrimental to Indonesian Muslims. If the teachings of Islam had become a custom in an area, then it would not certainly have been too many problems. A Muslim can still get married through *Penghoeluegerecht*. But what about a Muslim man or Muslim woman who lives in an un-religious environment or lives in an area where the majority of the population is non-Muslim.

The second is in the post-Dutch colonial era. In *Indesche Staatsregeling* (IS) Article 131 Paragraph 2 is written; "For the native and foreign Eastern Indonesian classes, if it turns out that their social needs want it, rules for Europeans (*Burgerlijk Wetboek*/BW/Civil Code) are declared to apply to them, both in full and with changes." Then in Paragraph 4 it says; "Native Indonesians and Foreign Easterners, as long as they have not been subjugated under a joint regulation with Europeans, are allowed to submit to the laws that apply for Europeans."[9]

A Muslim man and woman may marry using BW as a legal basis, while *Burgerlijk Wetboek* (BW)/Code of Civil Law itself does not regulate interfaith marriage laws, so it can be concluded that the existing laws were not protective of Muslims because they opened opportunities for the occurrence of interfaith marriages and apostasy through marriage, both for Muslim man and woman.[10]

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[8] Ahmad Rofiq, *Hukum Islam di Indonesia*, (Jakarta: PT Raja Grafindo, 2006), 52.

[9] Subekti, *Pokok-Pokok Hukum Perdata*, (Jakarta: PT Intermasa, 1987), 12.

[10] The probation to conduct the interfaith marriage are: "And do not marry polytheistic women until they believe. And a believing slave woman is better than a polytheist, even though she might please you. And do not marry polytheistic men [to your women] until they believe. And a believing slave is

At the beginning of 1937, the Dutch East Indies Government prepared a preliminary plan for the Marriage Ordinance recorded (*onwerpordonnantie op de ingeschrevern huwelijken*) with the main points as follows: "Marriage based on the principle of monogamy and marriage broke up because one of the parties died or disappeared for two years and divorce was decided by the judge". However, the draft ordinance was rejected by Islamic organizations because the contents of the ordinance contain things that are contrary to Islamic law.[11] Until the end of the colonial period, the Dutch East Indies government did not succeed in making law containing material law regarding marriage that applied to all Indonesians. The material legal regulation regarding marriage made and abandoned by the Colonial Government were only in the form of marriage law regulation that apply to certain groups of the people.

As for post-independence, even though independence had been achieved, the desire to have marriage law that applied to all Indonesian people had not yet been realized. Some marital law regulations from the Dutch Colonial government still applied for the Indonesian people according to their respective groups. Codification of their marriage law was rarely found difficult

better than a polytheist, even though he might please you. Those invite [you] to the Fire, but Allah invites to Paradise and to forgiveness, by His permission. And He makes clear His verses to the people that perhaps they may remember". (*Al-Qur'an, al-Baqarah*: 221) and "O you who have believed, when the believing women come to you as emigrants, examine them. Allah is most knowing as to their faith. And if you know them to be believers, then do not return them to the disbelievers; they are not lawful [wives] for them, nor are they lawful [husbands] for them. But give the disbelievers what they have spent. And there is no blame upon you if you marry them when you have given them their due compensation. And hold not to marriage bonds with disbelieving women, but ask for what you have spent and let them ask for what they have spent. That is the judgement of Allah: He judges between you. And Allah is Knowing and Wise". (*Al-Qur'an, Mumtahanah*: 10)

[11] Maria Ulfah Subadyo, *Perjuangan Untuk Mencapai Undang-Undang Perkawinan*, (Jakarta: Yayasan Idayu, 1981), 9-10.

problems. It was different from the Islamic group who did not have the codification of marriage law. The marriage law that was guided by the Islamic community was still scattered in several *fiqh* books of *munakahat* by the Muslim scholars from the Middle East, but the understanding of Indonesian Muslims towards the *fiqh* books of *munakahat* was often not synchronous, so that marriage cases arose like marriage before the age and forced marriage.

In 1946 or exactly one year after Indonesian independence, the Government of the Republic of Indonesia established Law No. 22 of 1946 concerning the Registration of Marriage, Divorce and Referral (*rujuk*) that applied to the region of Java and Madura, then by the Indonesian Emergency Government in Sumatra, it was also declared to be applied for Sumatra. In 1954 through Law No. 32 of 1954 and Law No. 22 of 1946 it was declared valid for the whole of Indonesia.[12]

With the enactment of this law means: (1) the regulation of marriage registration, divorce and referral as regulated in *Huwelijksordonnantie S.* 1929 No. 348 jo. S. 1931 No. 467. *Vorstenlandsche Huwelijksordonnantie* S. 1933 No. 98 and *Huwelijksordonnantie Buitengewesten* S. 1932 No. 482 is no longer relevant to the current situation, so that new regulations must be made to perfect and meet the requirements of social justice; (2) that the making of the new regulation referred to above is not possible in a short time; (3) that while awaiting the new regulation, marriage registration, divorce and referral registration regulation must be held immediately to fulfill the most urgent needs.[13]

In 1958 a number of female parliamentarians under Soemari submitted a draft of the most important initiatives,

[12] Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institution*, (California: University of California Press, 1972), 85-86.

[13] Law Number 22 of 1946 concerning the registration of marriage, divorce and referral (*rujuk*) that applied to the region of Java and Madura.

including the requirement for conducting monogamy. The government, at that time, had reacted by proposing a plan that only regulated Islamic marriage, precisely from the traditional Islamic side there was doubt whether for Muslims the marriage law was needed or not. It is because they assumed the regulations which had been given by God, as revealed before, were intended for all ages and countries. The draft seems unlikely to be discussed. Members of the Islamic Party held resistance, especially against the principle of monogamy contained in the Draft.[14]

Until the end of the old order period, Indonesia did not have any legislation but demands for the immediate establishment of a marriage law continued to emerge, both from the government itself and from social organizations such as the Indonesian Women's Congress, the National Conference on Social Workers (1960), Family Welfare Conference (1960), and BP4 Central Conference (1962).[15]

During the New Order period, the 1967-1971 sessions Parliament (DPR-GR) re-discussed the marriage bill, namely:

1. The Islamic Marriage Bill came from the Ministry of Religion, which was submitted to the DPR-GR in May 1967.
2. The Basic Marriage Law Bill from the Ministry of Justice, which was submitted to the DPR-GR in September 1968.

The Catholic faction refused to discuss a bill concerning religious law. The bill also received resistance from Muslims such as all Islamic organizations and figures who had long been involved in matter relating to the religious field. Besides the bill proposed by the government to attract the attention of the wider community, especially Muslims, all levels of society are called

[14] Wila Chandrawila Supriadi, *Hukum Perkawinan Indonesia Dan Belanda*, (Bandung: Mandar Maju, 2002), 197.

[15] Asro Soisroatmodjo dan A. Wasit Aulawi, *Hukum Perkawinan Di Indonesia*, (Jakarta: Bulan Bintang, 1978), 9.

upon to pay attention to the bill because it turns out that most of the bill's material is considered contrary to Islamic teachings. Following are examples of conflicting bills:[16]

1. In the Draft Article 2 Paragraph (1) marriage is legal if it is performed in the presence of the marriage registrar, while the marriage is legitimate if the pillars and conditions are met, such as guardians, two witnesses, etc.
2. In Draft Article 11 Paragraph (2) differences due to nationality, ethnicity, country of origin, place of origin, religion/creed and descent, do not constitute a barrier to marriage. Whereas, in Islamic law, different religion and belief is obstacles to marriage.[17]

The Christian group also did not approve the transformation of religious legal norms into state legislative norms. This view is in accordance with the doctrine of the Church which adheres to the idea of separation between religious affairs (church) and state affairs. State affairs are governed by state law and religious affairs (church) are governed by religious law (church).

The debate over the marriage bill was extremely difficult, at which the discussion on the bill was a very hot topic for all groups of religious such as from Islam, Christianity, Community Organizations, Youth Organizations, Women's Organizations and high-level figures. They paid great attention before the bill

[16] The President's Mandate Number R.02/P.U/VII/1973 July 31, 1973 pertaining the Law of Marriage.

[17] The probation to conduct the interfaith marriage are: "And do not marry polytheistic women until they believe. And a believing slave woman is better than a polytheist, even though she might please you. And do not marry polytheistic men [to your women] until they believe. And a believing slave is better than a polytheist, even though he might please you. Those invite [you] to the Fire, but Allah invites to Paradise and to forgiveness, by His permission. And He makes clear His verses to the people that perhaps they may remember". (*Al-Qur'an, al-Baqarah*: 221)

was passed into law. Political turmoil arisen because of the difficulty of passing the bill into marriage law since the political elite in parliament had already known that the marriage law was related to the wider community. And if the marriage law was not right and was not coherent with the diversity of the nation, the marriage bill would be revised.

After experiencing changes to the amendments included in the working committee, the bill on marriage proposed by the government on December 22, 1973 was passed in the DPR-RI Plenary Session, as discussed in the fourth level above, to be ratified into law. On that day, the bill on marriage was passed by the DPR-RI after three months of deliberation.

The formation of a family law culture in Indonesia cannot be separated from contact with foreign cultures, which of course also carries the socio-politico-religious aspect of each of its carriers. In addition, the existence of differences dominated by foreign cultures has also created a new legal cultural identity (including Islam) that varies from one another. There are two intercultural contact models, namely the acculturation and enculturation model.

These two models are the main driving force, as according to Ahmad Tholabi, that culture in Indonesia is not shaped from the same unity, but has several distinctly different cultural forms. The style of diversity is caused by the physical conditions on which a society is different. However, this difference does not mean eliminating the existing unity in culture, but the basis of Indonesian cultural unity has existed since pre-Hindu times although there are also some local variations in it.[18]

As for the context of the meeting of the local family law culture with the Islamic family law culture, the early preachers, including, especially, the Islamic trustees throughout Indonesia, chose to apply the enculturation model as the main reference for Islam in their task of penetrating and Islamizing at the beginning

[18] Ibid., 4.

of their arrival to Indonesia.[19] However, this enculturation model in its journey was later abandoned by the successors of Islamic preachers. That is because they have seen and felt Islam in Indonesia has now been built perfectly in quantity even though the quality has not yet happened. Therefore, it is necessary to immediately establish a standard family law building that is binding for every Muslim in Indonesia, namely through the codification of *fiqh* in the Shafi'i school of thought on the order of the government. Such a process can be classified as the period of Islamic *makkiyyah* and *madaniyyah* model of the Archipelago.[20]

In the period of *makkiyyah*,[21] which was born in the 630's or the 7th century, it was a period where Hinduism and Buddhism were engrained and rooted in Indonesia, especially those in Sumatra and Java. In fact, the two regions became the main base for the development and emergence of the clergy of both religions. Among the kingdoms in question are the kingdom of *Sriwijaya* which is located in the southern part of the island of Sumatra and the kingdom of *Mataram*, *Majapahit*, and *Singasari* which are located on the island of Java.[22] But apparently Islam is able to penetrate the great wall of Hinduism and Buddhism, through harmonious contact between Islam and accommodating local culture (enculturation).

However, this does not mean that Islamic thinkers did not evaluate and criticize the stagnation of the science, because in the era of the 50's Hazairin and Hasbi Ash Shiddieqy emerged which

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[19] This *fiqh* model emphasizes the normative elements of Islam such as taken from *al-Quran, Sunnah, Ijma'* dan *Qiyas.*

[20] Ibid., 5.

[21] *Makkiyah* is a period in which the verses that came down to the Prophet Muhammad occurred before moving to Medina. Surah *Makiyyah* descended for 12 years, 5 months, 13 days, starting on 17 Ramadan (February 610 CE), when the Prophet was 40 years old.

[22] Arskal Salim, Azyumardi Azra (ed), *Shari'a and Politics in Modern Indonesia*, (Singapore: Institute of Southeast Asian Studies, 2003), 249. See also Ahmad Rajafi, "*Sejarah pembentukan …*, 6.

gave rise to new terms and theories about Islamic law that were more characteristic of Indonesia. Based on the spirit of renewal, in the 1970's a debate arose in the Parliament regarding the formulation of the marriage law which was proposed by the government, which was only adopted in 1974, under the name of Law No. 1 of 1974 concerning Marriage. If seen from the development of family law reforms that exist throughout the Muslim world, then in fact, Indonesia has been left behind in doing family law reforms.

Elements in Marriage Law

Marriage Law (UUP) No.1 of 1974 is a form of crystallization of various struggles and norms that exist in Indonesian society and began to be declared effective on October 1, 1975. There are various kinds of legal regulations or legal systems that apply to various groups of citizens and various regions governed by marriage law in Indonesia. The various types of marriage law include: (l) customary law, which is applied to native Indonesians; (2) Islamic law, which is applied to native Indonesians who are Muslim; (3) Civil Code (*Burgerlijk Wetboek* or BW) which is applied to people of European and Chinese descent with a few exceptions; (4) Indonesian-Christian Marriage Ordinance (*Huwelijks Ordonnantie vor de Christen Indonessers* or HOCI), which is applied to native Indonesians who are Christians; and the last is (5) Mixed Marriage Regulation (*Regeling op de gemengde Huwelijks*).[23]

1. Customary Marriage Law

Before Islam came, the people of the Archipelago had known a legal system that had traditionally been used in organizing their lives which came to be known as customary

[23] Wirjono Prodjodikoro, *Hukum Perkawinan di Indonesia,* (Bandung: Sumur, 1984), 14-15.

law. In the case of marriage, they also use customary law as an order that applies to indigenous peoples. Each custom can be different from one another depending on the area in which they live. Customary law sees that marriage is not only a matter of relation between man and woman that are intertwined in a marriage bond, but how marital ties become an inseparable part of the kinship system with other families. Even customary law sees that the purpose of marriage is not merely the formality of traditional rituals to obtain worldly happiness, but also has a spiritual purpose.[24] In general, the purpose of marriage according to customary law is to maintain and continue the survival and life of indigenous peoples in a variety of ways in accordance with their respective community and custom.

Some matters related to the age limit for a marriage, customary law does not provide specific restrictions. Therefore, marriages of children who are still under age often occur even though the two can only live together as husband and wife after *baligh* or adult. A customary marriage is generally preceded by an engagement between parents of the man and parents of woman with the intention of tying their children's marriage through the path of proposal of marriage.[25]

Whereas, with regard to property, customary law of marriage looks more at the aspects of how to obtain it, as follows: (l) luggage (*gono*), which remains the property of the party who obtained it. The property will return to the owner's family if the husband or wife dies without leaving the child; (2) income assets, i.e. assets obtained by each party prior to marriage, and the assets will remain their personal property

[24] Soepomo, *Bab-Bab tentang Hukum Adat,* (Jakarta: Pradnya Paramita, 1989), 55.

[25] Taufiqur Rohman Syahuri, *Legislasi Hukum Perkawinandi Indonesia,* (Jakarta: Prenada Media Group, 2015), 66.

during the marriage; and (3) joint assets, i.e. assets obtained during marriage (called *gono gini*) are carried out together.[26]

2. Islamic Marriage Law

In Islam, the law of marriage is part of the *muamalah* law since it regulates the relationship between human beings, namely husband, wife and relatives. Islamic marriage law is also called as *fiqh munakahat*, namely the provisions of *fiqh* law governing marriage in divorce, reconciliation, and family life issues. While the words of marriage contain two meanings, namely the first, "gathering" or "intercourse" (*al-wat'u*), and the second is a contract or agreement with a specific pronunciation between man and woman to live together as a couple husband and wife based on the provisions and ways that have been determined in Islam.[27]

Some principles of marriage, as contained in the sources of Islamic law, namely *al-Qur'an* and *al-Hadith* are as follows:

a. The purpose of marriage is to fulfill the instinctive demands that exist in human life, which is related between man and woman with the aim of realizing family happiness in accordance with the teachings of Allah and His Apostle.
b. The marriage is carried out based on the agreement or willingness of the two parties concerned, both between the two prospective husband and wife and between the parents of both parties.
c. The relationship between husband and wife is a partnership relationship in accordance with their

[26] Hilman Hadikusuma, *Sejarah Hukum Adat di Indonesia,* (Bandung: Alumni), 156.

[27] Peunoh Daly, *Hukum Perkawinan Islam,* (Jakarta: Bulan Bintang, 1988), 104.

respective function that has been mentioned in *al-Qur'an* (4: 34; 2: 187).[28]

d. Based on *al-Qur'an* (4: 3 and 4: 129)[29], in Islamic marriage law adheres to the principle of monogamy.
e. The existence of marriage is intended for ever and that is why in Islam does not want a divorce.
f. Marriage will be declared valid if it has fulfilled the pillars of marriage.
g. Marriage is forbidden, some of them have a family relationship, a marriage relationship.
h. There is an obligation to pay dowry which is charged to bridegroom and then given to wife (4: 4).[30]
i. A widow who wants to get married again must undergo a waiting period that is called *iddah*.

[28] Meaning: "Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband's] absence what Allah would have them guard. But those [wives] from whom you fear arrogance - [first] advise them; [then if they persist], forsake them in bed; and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand". (*Al-Qur'an, al-Nisa*: 34) and "…They are clothing for you and you are clothing for them. Allah knows that you used to deceive yourselves …" (*Al-Qur'an, al-Baqarah*: 187)

[29] Meaning: "And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those your right hand possesses. That is more suitable that you may not incline [to injustice]". (*Al-Qur'an, al-Nisa'*: 3) and "And you will never be able to be equal [in feeling] between wives, even if you should strive [to do so]. So do not incline completely [toward one] and leave another hanging. And if you amend [your affairs] and fear Allah - then indeed, Allah is ever Forgiving and Merciful" (*Al-Qur'an, al-Nisa*": 129).

[30] Meaning: "And give the women [upon marriage] their [bridal] gifts graciously. But if they give up willingly to you anything of it, then take it in satisfaction and ease". (*Al-Qur'an, al-Nisa*: 4)

3. *Burgerlijk Wetboek* Marriage Law

Burgerlijk Wetboek (BW) or better known as the Civil Code (KUHP) applies to Europeans, Chinese and foreigners, or to those who are subject to BW's regulations.

It is different from Islam, where marriage is arranged quite in detail because it is not only a matter of bonding two people to foster a family but also in order to carry out the commandment of God Almighty. Whereas, Burgerlijk Wetboek voor Indonesie (Indonesian Civil Code/BW) does not arrange marriage in detail as to what is in religion. BW regulates marriage limited to a civil relation only, ie marriage is only a physical bond. It does not enter religious elements or belief expressly, does not aim to get offspring. According to BW or the Civil Code, Article 1 of the law of marriage states that marriage are: (1) physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family based on a God Almighty; (2) marriage is not only an outward affair but also an inner affair; (3) the purpose of marriage is to form a happy family. The differences between marriages according to BW/Civil Code and Marriage Law Number 1 of 1974 are as follows:[31]

Matter	***Burgerlijk Wetboek voor Indonesie* (Indonesian Civil Code)**	**Law No. 1 of 1974**
The meaning of marriage	Only in civil relation, so it only concerns personal relationship	Besides regulating civil relation, it also regulates the relationship between

[31] M. Zamroni, *Prinsip-Prinsip Hukum Pencatatan Perkawinan di Indonesia*, (Media Sahabat Cendekia, 2018) read also Martin Basiang, *The Contemporary Law Dictionary*, (Jakarta: Gramedia Pustaka Utama, 2016)

	between a man and a woman	humans and God Almighty
Destination of marriage	The purpose of marriage is not stated	To form a happy and everlasting family (household) based on the God Almighty
Legal conditions of marriage	Prohibition of marriage without permission from parents	Prohibition of marriage includes prohibitions regulated in religion and prohibitions that exist in other regulations such as customary law
Marriage Registration	Marriage is carried out by Registrar for all groups	Marriage registration is carried out at the Civil Registry Office for non-Muslims and at the Marriage, Divorce and Referral Office for those who are Muslim.
Monogamy Principle	Adheres to the principle of absolute monogamy so that if there is a marriage in which one party is still in a marriage bond then the marriage that takes place then becomes null and void	Adheres to the principle of open monogamy and according to religious provisions which allow for polygamy with very strict conditions. These conditions are made so that there is no arbitrariness in polygamy that can harm either party
Approval	Approval between the bride and groom and the family is	Approval between the bride and groom and the family is reflected in the

	reflected in the request for permission to get married if the bride and groom want to get married	request for permission to get married if the bride and groom want to get married
Age limit	The age limit allowed for marriage is the age of 18 years for men and 15 years for women	Men have reached the age of 19 years and women have reached 16 years
Marriage Prohibition	The marriage ban that is determined by religion and other applicable regulations is also imposed. So that the marriage ban determined by each religion must be obeyed as well as the marriage ban determined by the customary law	The marriage ban that is determined by religion and other applicable regulations is also imposed. So that, the marriage ban determined by each religion must be obeyed as well as the marriage ban determined by the customary law
Waiting time	Marriage is forbidden between those who have broken up in the bond of a marriage. They can get married in a second time with a waiting period after 1 year	Women who break up their marriage cannot remarry with other men, but must wait until the waiting time runs out with the following conditions: (a) if the marriage is terminated due to death, the waiting

	from being recorded in the civil registry. Whereas for women whose marriages break up, the waiting time is 300 days	time is set at 130 days; (b) if the marriage is terminated due to divorce, the waiting time for those who are still menstruation is set to be 3 times pure (the end of being menstruation) with at least 90 days and for those who are not menstruation is set at 90 days; (c) if the marriage breaks up while the widow is pregnant, the waiting time is determined until until giving birth; (d) there is no waiting time for widow who breaks up her marriage due to divorce while between the widow and her ex-husband there has never been sexual intercourse; (e) for marriage that breaks up due to divorce, the waiting period is counted since the fall of the court decision which has permanent legal force whereas for marriage that breaks up due to death the waiting period is counted since the death of the husband

4. *Huwelijks Ordonnantie vor de Christen Indonessers* (HOCI) Law

Huwelijks Ordonnantie vor de Christen Indonessers (HOCI) or in the Indonesian called the Indonesian Christian Marriage Ordinance, is a law that applies to native Indonesians who are Christians both Catholic and Protestant in the regions of Java, Minahasa, and Ambon. On February 15, 1933 the ordinance began to be enacted and was recorded in *Staatsblad* 1933 No. 74, then underwent a change in 1936 with *Staatsblad* 1936 No. 607. After independence, *Staatsblad* 1936 No. 607 was finally contained in State Gazette 1946 No. 136 Based on *Staatsblad* 1936 No. 607. This ordinance came into force on January 1, 1937 for the regions of Java (and Madura), Minahasa, and Ambon. With these rules, Christians in the Batak, Toraja and Dayak regions for example, they do not apply this ordinance law.[32]

5. Mixed Marriage Rules

Regeling op de Gemengde Huwelijken or in Indonesian is called Mixed Marriage Regulation is a product of colonial law. After independence this law still applies to the Indonesian people, based on Article II of the transitional rules of the 1945 Constitution. The regulation was made to overcome the number of marriages that occur between people who are subject to different laws, such as native Indonesians entering into marriages with Chinese or European, Chinese and European, between Indonesians of different origin or different religions. On December 29, 1896 this regulation came into force, as contained in *Staatsblad* 1896

[32] Gavin W. Jones, *Chee Heng Leng, Maznah Mohamad* (ed), *Muslim-Non-Muslim Marriage: Political and Cultural Contestations in Souteast Asia*, (Singapore: Institute of South Asian Stidies Singapore, 2009), 103-105.

No. 158, and subsequently has undergone several additions or changes.[33]

[33] Hasbullah Bakri, *Pengantar Undang-Undang Perkawinan Umat Islam*, (Jakarta: Bulan Bintang, 1970), 30-31.

CHAPTER 4

COMPILATION OF ISLAMIC LAW: POSITIVATION OF ARCHIPELAGO ISLAMIC JURISPRUDENCE

The cognitive aspect of human has a very effective role in constructing a legal order from theocentric orientation to anthropocentric orientation. A logical consequence if Indonesian Muslim society has a codification of *fiqh* law with the taste of the Archipelago which formally has binding legal force. The presence of the Compilation of Islamic Law is a proof that, in fact, Indonesian Muslims, besides having a love of the Islamic legal system as a manifestation of devotion to Allah, this also proves that Islamic law is flexible, universal, and moderate.

Overview of the Compilation of Islamic Law

Legal positivation in the realm of social life is something that is even natural as a necessity when dealing with how to organize and provide legal certainty for community.[1] Thus, the existing law will have power and authority to be followed and obeyed by all components of society. Speaking of legal positivation, Islamic law is a construction, not far from other laws, that applies to Muslim communities. The difference is that if a positive law is based more on legal values, developing legal norms, legal facts, and human cognitive aspects of law, then the positivation of Islamic law, in addition to leading to the pillars above also leading to the highest legal sources namely *al-Qur'an* and *al-Sunnah* of the Prophet Muhammad.

[1] Amran Suadi and Mardi Candra, *Politik Hukum: Perspektif Hukum Perdata dan Pidana Islam serta Ekonomi Syariah,* (Jakarta: Prenada Media, 2016) and see also Abdul Ghofur Anshori, *Filsafat Hukum Hibah dan Wasiat di Indonesia,* (Yogyakarta: UGM Press, 2018), 91-93.

This legal construction which originates from transcendent values clearly distinguishes between Islamic law and others. In order for the theological transcendent values to turn into rules that can be compared to people's lives, there is a need for legal positivation in Indonesia. In the series of history in Indonesia, there have been many scholars of Islamic law who strive to make Islamic law a guiding and binding order for community, especially Muslims.

On the other hand, Indonesia is an Archipelago with a variety of ethnicities, cultures, languages and customs. That diversity shows that Indonesia is a very unique country and has a distinction from other countries. In terms of diversity, Indonesia also has a style and color that is different from the Islamic culture that exists in Islamic countries. As a majority Muslim country, Indonesia already has a civil law or Islamic family law that is patterned on the Archipelago. Among the laws governing family life is the Compilation of Islamic Law as a monumental product of Indonesian Muslims and has binding legal force. This is perhaps what distinguishes between Indonesia and other Muslim countries.

Internally, the spirit of contextualization of Islamic law, both civil and criminal Islamic law, also has a special place among contemporary Muslim scholars. A strong impetus will be the need for an evaluation of the classical epistemological and methodological *fiqh* construction is the main agenda, so that Muslims can become an important element and can take a significant role. Even An-Na'im sharpened again that the substantialisation and contextualization of Islamic law is now a necessity, he further wrote: "Once it is appreciated that *shari'ah* was constructed by its founding jurists, it should be possible to think about reconstructing certain aspects of *shari'ah*".

In the perspective of legal politics, the presence of the Compilation of Islamic Law as a guarantee of the implementation of Islamic religious law in state life has two very

dominant aspects, namely: first, the Compilation of Islamic Law applies specifically to Muslims. This requires the development of national law and legal unification as the implementation of Islamic religion adopted by the majority of the Indonesian population. In this case, the state must take part in providing legal certainty guarantees for people who have embraced to certain religion. Second, the formation of law proportionally based on the number must get priority. This means that the rights of certain groups in society to implement their religious law are not negotiable. Enforcement of the Compilation of Islamic Law for Muslim residents is a form of diversity in awareness of religious law in the unity of the Republic of Indonesia.

Positivation and internalization of Islamic law into positive law in Indonesia is a necessity. This has actually been awaited by Muslim community for a long time as regulated in Law No. 3 of 2006 that Islamic law in Indonesia is under the authority of the Religious Court. The authorities of the Religious Court are to examine, decide upon and settle cases at the first level between people who are Muslims in the field of marriage, inheritance, will, grant *waqf, zakat, infaq, sadaqah*, and *shari'ah* economics. In solving marital problems, Indonesia needs written family laws that can overshadow all problems arise.[2] Then the idea of the Compilation of Islamic Law as an effort in the context of looking for patterns of Indonesian jurisprudence or contextual jurisprudence came, so that it would not cause disparity in making decisions.

Codification of Islamic Jurisprudence into Positive Law

The codification of *fiqh* in positive law, as happened in Indonesia, is in the form of a compilation of Islamic law. The word "compilation" comes from a term in English and

[2] A. Basiq Djalil, *Peradilan Agama di Indonesia*, (Jakarta: Prenada Media, 2013), 139.

"compilatie" in Dutch, which means to put together, like collecting rules that are scattered everywhere into one book.[3] In the Big Indonesian Dictionary, this compilation means collections (about information lists, essays, etc.) that are arranged regularly. Compared from the perspective of language, compilation is the activity of collecting various books or writings on certain issues so that it is easier to find the materials needed. From some information above, it can be concluded that the compilation is an attempt to collect various sources of information in the form of papers, *fatwas*,[4] and legal thoughts from various literatures which are then put together with the aim to facilitate the search related to a legal problem.

The compilation of Islamic law or abbreviated as KHI consists of 3 books. Book I is about marriage, Book II is about inheritance, and book III is about *wakaf*. This division into three books is only a grouping of field of legal discussion, but the systematic framework of the original book remains the same, consisting of several chapters, and the chapters are composed of articles.

The preparation of the compilation of Islamic law began with the stipulation of material legal references on 18 February 1958 in the Religious Court through a Circular Letter from the Head of the Indonesian Religious Court Bureau Number

[3] Abdurrahman, *Komplasi Hukum Islam di Indonesia,* (Jakarta: Akademika Presindo, 1992), 9.

[4] The word fatwa is a term about opinion or interpretation on an issue related to Islamic law. Fatwa itself in Arabic means "advice", "answer" or "opinion". What is meant is an official decision or advice taken by an institution or individual whose authority is recognized, submitted by a *mufti* or cleric, as a response or answer to questions raised by fatwa applicants who have no attachment. Thus the requestor of the *fatwa* does not have to follow the *fatwa* content or law given to him. In religious life in Indonesia, the *fatwa* is issued by the Indonesian *Ulama* Council as a decision on *ijtihadiyah* or debatable issues that occurred in Indonesia to serve as a guide for the implementation of Muslim worship in Indonesia.

B/1.735.[5] There are approximately 13 *fiqh* books that are determined as references, namely *al-Banjuri, Fathul Muin with its explanations, Sharqawi 'ala al-Tahrir, Qulyubi/Muhalli, Fathul Wahab with its explanations, Tuhfah, Targhibul Mushtaq, Qawaninush Shar'iyah Lissayyid Shodaqoh Dahlan, Shamsuri Lil Fara'idl, al Fiqh 'alal Madzahibil Arba'ah*, and *Mughnil Muhtaj*.[6]

The use of the 13 books of jurisprudence, which originated from various schools of *fiqh* as a reference by the Religious Courts in making decisions, opens opportunity for chaos. That is very possible if there are parties who feel aggrieved by the judge's decision for using one of the books/opinions, then the party will ask questions and offer solution with one of the books/opinions that can be beneficial for him. Moreover, there are handbooks which are rarely used by judges as a reference basis. This is what often makes a dispute in choosing a book that is used as a reference among the judges of the Religious Court.

Codification of various opinions spread in the above literature is as proof of the seriousness of the Indonesian government and Muslim scholars in completing the grueling homework. The codification of Islamic law in the form of the Compilation of Islamic Law is a glorious interpretation of the Indonesian people uniting togetherness in making decision at the Religious Courts. In other words, the position of jurisprudence which was previously merely an alternative solution to problems has a binding and valid force for Muslims in Indonesia. The unique thing about this Compilation of Islamic Law is that it is not only sourced from classical books, but also elaborated with various thoughts, traditions, and legal norms of the Indonesian people.

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[5] Hikmatullah, *"Selayang Pandang Sejarah Penyusunan Kompilasi Hukum Islam di Indonesia"* within *Jurnal Ajudikasi* Vol 1 No 2 (Desember, 2017), 40.

[6] Circular of the Religious Court Bureau No. B/1/1735 dated 18 February 1958 concerning the Establishment of a Religious Court/*Shari'ah* Court outside of Java and Madura.

Before the Indonesian Law Compilation was recorded, the source of material law in the Religious Courts was Law No. 1 of 1974. In addition, the government also recommends using the believable books in deciding cases. The Religious Court is a court that is in line with other courts, which is contained in article 10 of Law No. 14 of 1970 concerning the Basic Provisions for Judicial Power. The Compilation of Islamic Law drafting was at the initiative of the Chief Justice of the Supreme Court at the time, namely Bustanul Arifin and the Minister of Religion through a Joint Decree in March 1985. The several considerations about the importance of the Compilation of Islamic Law are as follows:[7]

1. The validity of Islamic law in Indonesia must have clear laws and can be implemented by all people and law enforcement agencies.
2. The impact of non-uniformity of perception about *shari'ah*, such as: (1) non-uniformity in determining what is called Islamic law; (2) lack of clarity in carrying out *shari'ah*; (3) and not being able to use the roads and equipments available in the 1945 Constitution and other laws.
3. There are 3 countries that apply Islamic law in Islamic history, namely: (1) '*Alamfiri fatwa*; (2) *Majallah al-Ahkam Al-Adliah* in the Ottoman Empire; and (3) Islamic law codified in Subang, Indonesia in 1983.

The Bustanul Arifin's ideas were then agreed upon.[8] Then the Project Implementation Team was formed with the Joint

[7] Hikmatullah, *"Selayang Pandang Sejarah Penyusunan,* 40.

[8] Bustanul Arifin, his full name and title is Prof. H. Bustanul Arifin, S.H., he was born in Payakumbuh, West Sumatra, on June 2, 1929. Bustanul is one of the leaders in the renewal of Indonesian Islamic law. His ideas are well-known for the theory of the positivity of Islamic law or the promotion of Islamic law through state institutions that have the authority to legislate. This theory seeks to unify Islamic law from the *mujtahids* in formulating Islamic law through state institutions, namely legislative institutions. Thus, the renewal of Islamic law according to Bustanul Arifin is more focused on

Decree (*Surat Keputusan Bersama*) of the head of the Supreme Court of the Republic of Indonesia and the Minister of Religion of the Republic of Indonesia No. 07/KMA/1985, which made Bustanul Arifin the general leader. On July 22, 1991, the Compilation of Islamic Law was formulated and was followed up by the issuance of Presidential Instruction No. 1 of 1991. In consideration of the Joint Decree of the Chief Justice of the Supreme Court and the Minister of Religion dated March 21, 1985 No. 07/KMA/1989 and No. 25 of 1985 concerning the Appointment of Implementers of the Islamic Law Development Project through jurisprudence or known as the Compilation of Islamic Law project, it was stated that there were two reasons for this project being held by the government, namely:

1. That in accordance with the regulatory function of the Supreme Court of the Republic of Indonesia on the course of justice in all judicial environments in Indonesia, particularly in the Religious Court environment, it is necessary to hold a Compilation of Islamic Law which has so far made positive law in the Religious Courts.
2. That in order to achieve this purpose, in order to improve the smooth implementation of duties, synchronization and orderly administration in the project of building Islamic law through jurisprudence, it is deemed necessary to form a project team whose composition consists of Officials of the Supreme Court and the Ministry of Religion of the Republic of Indonesia.

Grassroots of the Compilation of Islamic Law

The legal position will be strong if it is supported by institutions and organizations that function as executor,

institutional Islamic law through the role of the bureaucracy as a locomotive of renewal of Islamic law thinking in Indonesia. Bustanul Arifin, *Pelembagaan Hukum Islam di Indonesia Akar Sejarah, Hambatan dan Prospeknya*, (Jakarta, Gema Insani Press, 1996), 60.

supervisor, check and balance. Roscoe Pound calls it "the law is a tool of social engineering'.[9] Likewise with the Compilation of Islamic Law as a book of law that applies to Muslim communities in Indonesia also requires institutions and organizations that aim to carry out and supervise. In this case, there are several institutions and organizations that are related to the effectiveness of Islamic Law Compilation for Indonesian Muslim communities, namely:

1. Religious Courts and judges. Religious Judges in Indonesia have working mechanism set out in Law No. 7 of 1989 concerning Religious Courts. In connection with the Compilation of Islamic Law which has been made as material law, the religious judges are required to be able to perform *ijtihad* to find the law in accordance with the case being handled.[10].
2. Indonesian *Ulama* Council (MUI). The Indonesian *Ulama* Council is expected to increase its role in conducting legal studies, giving legal edicts, and evaluating the effectiveness of a law in society. This function makes the Indonesian *Ulama* Council have a very strategic role in realizing the enactment of laws in accordance with society and religion.
3. Legal institutions and edicts of religious organizations. The legal institutions and *fatwa* in question are Islamic organizations such as *Nahdlatul Ulama*, *Muhammadiyah*, and others. The agency's role is to be more supportive in establishing Islamic law.
4. Higher Education Institutions. The role of the Higher Education Institution, in addition to overseeing and criticizing the implementation of the Compilation of Islamic Law, is also

[9] Nico Moons, The Right to housing in law and society, (New York: Routledge, 2018) see also Heru Susetyo, Patricia Rinwigati Waagstein, Akhmad Budi Cahyono (ed), *Advancing Rule of Law in a Global Context: Proceedings of the International Seminar,* (London: CRC Press, 2020), 198.

[10] Zainudin Ali, *Sosiologi Hukum,* (Jakarta: Sinar Grafika, 2006), 38.

expected to increase research activities in the field of Islamic Law.

5. Government Research and Study Institutions. Research and study institutions from the government, such as *LIPI*, the National Legal Development Agency, the Research and Development Agency of the Ministry of Religion and so on should have involved themselves in research activities and study of Islamic law issues on a national scale.
6. Mass Media. The mass media has an important role, namely to mediate scientific communication from various parties involved in the study and research of Islamic legal issues. In addition, the function of the media is for socialization and as a means of control over the implementation of the Compilation of Islamic Law in Indonesia.[11]

Significance of the Compilation of Islamic Law

The significance of the Compilation of Islamic Law for Indonesian Muslim Communities is to realize several important points, namely: (1) Completing the pillars of religious justice. In carrying out the function of justice, there are three pillars which become the power contained in Article 24 of the 1945 Constitution jo. Article 10 of Law No. 14 of 1970, namely a judicial institution that is organized based on the Act, the ruling organ, and legal advice as a reference; (2) equalizing the perception of judges in deciding a case, so that there is uniformity between one religious court and another; (3) provide legal certainty in a fast, careful, and accurate manner; and (4) eliminate the subjectivity of judge in handling Islamic civil cases.[12]

[11] Mahfud MD, *Pergulatan Politik dan Hukum di Indonesia*, (Yogyakarta: Gama Media, 1999), 259.

[12] Dadang Hermawan dan Sumardjo, "*Kompilasi Hukum Islam Sebagai Hukum Materiil pada Peradilan Agama*", within Jurnal Pemikiran Hukum dan Hukum Islam YUDISIA, Vol 6 No. 1 (June 2015), 31.

Reference of the Compilation of Islamic Law

There are five sources of references used in the Compilation of Islamic Law drafting, namely:[13] (1) Law on national legislative products contained in legislation such as Law No. 22 of 1946 jo. Law No. 32 of 1954, Law No. 1 of 1974, Law No. 7 of 1989, Government Regulation No. 9 of 1975, Government Regulation No. 28 of 1977; (2) Judicial products of the Religious Court, especially regarding with inheritance issues supported by the experience of legal interpretation, in anticipation of legal conflict between Islamic law and customary law; (3) The product of the explanation of the functionalization of Islamic teachings through legal studies conducted by tertiary institutions in this case is the State Islamic Institute with the subject in accordance with its distribution; (4) Records of legal opinions of the 20 people in Palembang, 16 people in Bandung, 18 people in Surabaya, 15 people in Banjarmasin, 19 people in Ujung Pandang, 20 people in Mataram; (5) Result of comparative studies in Morocco, Turkey and Egypt; (6) Opinions of the Indonesian religious scholars during the meeting with all participants from all over Indonesia on 2-6 February 1989 in Jakarta.

[13] Abdul Ghani Abdullah, *Pengantar Kompilasi Hukum Islam dalam Tata Hukum Indonesia,* (Jakarta: Gema Insani Press, 1994), 66.

CHAPTER 5

POLYGAMY: UNDERSTANDING, REGULATION, AND PRACTICE

The discourse on polygamy in Indonesia leaves various problems ranging from social, economic problems, especially education and psychology of children. On the other hand, the controversy about whether or not polygamy can be an issue that continues to roll like a fireball that is ready to burn dry grass. On one hand, the concept of polygamy is understood as a practice that has a religious dimension for husband who has ability to do justice, but on the other hand, it reinforces the notion that no human being is capable of doing justice. In many families, the practice of polygamy actually often triggers injustice, dissatisfaction, neglect of wife and children, and disputes that lead to divorce. To bridge the perpetrators of polygamy and to protect the parties who are the victims of the behavior of polygamy, the government presents provisions on polygamy contained in Law No. 1 of 1974 and Compilation of Islamic Law (KHI). Both aim to regulate so that there is no arbitrariness of the husband towards his wife so as to create a *sakinah, mawadah* and *rahmah* family.

Undestanding Polygamy

The term polygamy comes from the Greek language, "poli" or "polus" which means "many", and "gamein" or "gamos" which means "marriage". So, the word polygamy means marriage of more than one wife. In Islam, polygamy means marriage of more than one wife, namely two, three and maximal

four. Polygamy is a form of marriage in which a husband, at the same time, has more than one wife, namely two, three, and four.[1]

Historically, the practice of polygamy was mostly practiced by pre-Islamic societies in Arabia. In fact, almost all kings and royal authorities throughout the world practiced polygamy with several of their own cultures.[2] Among their motives for polygamy was merely venting their lusts, such as the consequences of war, human trafficking, prostitution and so on.[3] If in the pre-Islamic times the kings carried out polygamy by positioning women as objects of lust fulfillment, then Islam came to elevate women's status in a humane position.

Polygamy is not a practice born in Islam. Islam does not initiate polygamy. Long before Islam came, the polygamy tradition had become a form of practice of patriarchal civilization

[1] Khoiruddin Nasution, *Riba dan Poligami*, (Yogyakarta: Pustaka Pelajar Dengan Academia, 1996), 84.

[2] The practice of polygamy has been around for a long time. Even from the times of the Greeks, Romans and Arabian *jahiliyah*, men may be married to more than one or even dozens of women. The emperors of ancient Greece and Rome were known to have dozens of concubines. Likewise, in pre-Islamic times, in the Middle East, the practice of polygamy has long been done. Even, in Old Testament, concubine is legal and moral. Not only that, in the Asian regions as well, the practice of polygamy by kings and royal authorities is common. Once Islam came, it restricted only to four wives. Even then, a man must have a very heavy condition, namely fair. This is in *al-Qur'an* chapter *al-Nisa'*: 3: "And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or your right hand possesses. That is more suitable that you may not incline [to injustice]". More about the tradition of polygamy and concubine, it can be read in some books, such as: Junius P. Rodriguez, *The Historical Encyclopedia of World Slavery*, Volume 1; Volume 7 (California: ABC-CLIO, 1997), 182-183. See also Michael Gagarin, *The Oxford Encyclopedia of Ancient Greece and Rome*, Volume 1 (New York: Oxford University Press, 2010), 294-296. See also Beryl Rawson (ed), *A Companion to Families in the Greek and Roman Worlds,* (John Wiley and Son)

[3] Aisjah Dahlan, *Membina Rumah Tangga Bahagia, Cet 1.* (Jakarta: Jamunu, 1969), 69.

in almost all the worlds. Patriarchal civilization is a system of life that positions men as actors who have the right to determine all aspects of social, economic and political life. Women, in patriarchal culture, are seen as thing and merely for the pleasure of men. This civilization has long been entrenched not only in the Arabian Peninsula region, but also in many other ancient civilizations such as in Mesopotamia, Mediterranean and in almost all other parts of the world. Islam came to position women are equal to men. Allah's strong warning against those who position a woman or even kill her such as in *al-Qur'an*, chapter *al-Nahl*: 58-59).[4]

Like divorce, polygamy is something that many women fear. Polygamy is rejected with a variety of arguments like normative, psychological, and even always associated with gender injustice. Western writers often claim that polygamy is proof that Islamic teachings in the field of marriage are very discriminatory towards women. Actually Islam itself allows a person to practice polygamy under certain conditions and as an alternative to solving the family problem that lead to disharmony and even divorce by keeping woman in a humane position.[5]

In the view of almost Indonesians, polygamy is still considered a taboo practice, although theologically it is considered fairness. When people see polygamy as commendable, this does not mean that polygamy is a despicable act. Such an assumption is motivated by the existence of two different points of view.

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[4] Meaning: "And when one of them is informed of [the birth of] a female, his face becomes dark, and he suppresses grief. He hides himself from the people because of the ill of which he has been informed. Should he keep it in humiliation or bury it in the ground? Unquestionably, evil is what they decide". (*Al-Qur'an, al-Nahl*: 58-59)

[5] Amiur Nuruddin dan Azhari Akmal Tarigan, *Hukum Perdata di Indonesia*, (Jakarta: Perdana Media, 2004), 156.

First, it is the influence of culture and mindset of modern society. Polygamy is now seen as an act that is difficult to be accepted by a common sense. This is because an ideal marriage is composed of one husband and one wife. In addition, the practice of polygamy does not reflect the value of equality between man and woman. Second, it is a religious dogma. Islam recognizes the practice of polygamy as a natural and humane as long as the perpetrators are able to meet the "fair" conditions for his wives. This is found in *al-Qur'an* chapter *al-Nisa* verse 3.[6]

Basically, a man is only allowed to marry one wife. However, there is an understanding that a man can marry more than one woman on condition that he must be able to do justice. In addition, a man may have more than one wife can be allowed if it is desired by the parties concerned and the Religious Court has given permission, as mentioned in Article 3 Paragraph (2) of Law No. 1 of 1974. The basis for granting a polygamy permit by the Religious Courts is regulated in Article 4 Paragraph (2) of the Marriage Law (UUP) and also in Chapter IX of Compilation of Islamic Law (KHI) Article 57.

As for the requirements of polygamy, they are contained in Article 5 of Law No. 1 of 1974. In that article it is explained that the conditions must be met by a husband who will have more than one wife. The procedure of polygamy, according to Article 40 of Government Regulation No. 9 of 1974, states that "if a husband intends to have more than one wife, he has to submit a written request to the court. This is regulated further in Articles 56, 57, and 58 Compilation of Islamic Law.

Polygamy vs. Monogamy

Discussion about polygamy always invites pros and cons. Liberal Islamic groups see that polygamy is a practice in family law that violates human rights and is not in harmony with the

[6] Asghar Ali Engineer, *The Qur'an, Women and Society*, (Agus Nuryatno), (Yogyakarta: Lkis, 2003), 78.

noble aims of Islamic law. This should not be done by a Muslim because of the impossibility of someone being able to do justice. Feminists or gender activists also say that the practice of polygamy shows an act of superiority and hegemony of man against woman. They even protest the equality of rights and obligations in almost all walks of life, including if a man can divorce his wife, then woman should also have the right to divorce her husband. More extreme, if man can do polygamy then woman should also be able to do polyandry.

On the other hand, there is a group of people who understand that polygamy is a humanate thing, even a demand under certain conditions. To bridge the pros and cons about polygamy, the government is present with Law No. 1 of 1974 concerning Marriage. The law on marriage actually follows the principle of monogamy, where a man ideally only has one wife. However, in certain circumstances, it is allowed for husband to have more than one wife.[7] That means Indonesia does not adhere to the principle of absolute monogamy but open monogamy.

The rules on polygamy are explained in detail in Article 4 of Law No. 1 of 1974 and Article 57 of Compilation of Islamic Law. In this law, a husband is allowed to marry more than one wife at the same time. The provisions regarding the permissibility of polygamy are mentioned in Article 4 Paragraph 2 or Article 57 of the Compilation of Islamic Law, as follows: a wife is unable to carry out her obligations as a wife; (b) a wife has a disability or an incurable disease; and (c) a wife cannot give birth to offspring.

The articles above indicate that it is permissible for a husband to carry out polygamy in emergency or extraordinary circumstances when a wife is unable to carry out her obligations, disability and cannot give birth. But this does not mean that the

[7] Titik Triwulan Tutik dan Trianto, *Poligami Perspektif Perikatan Nikah, Telaah Kontekstual Menurut Hukum Islam danUndang-undang Perkawinan No. 1 Tahun 1974*, (Jakarta: Prestasi Pustakaraya, 2007), 50.

authority for conducting polygamy is entirely in the hand of husband, but there is a mechanism that must be obeyed by husband. This mechanism is specifically discussed in Law No. 1 of 1974 and the Compilation of Islamic Law.

When is Polygamy Allowed?

As explained above that under certain conditions a husband may choose between sticking to the principle of monogamy or polygamy. When a husband is more inclined to do monogamy as an option, then that is what is meant in the Law. But when a husband is determined to do polygamy, then there are legal requirements and reasons that must be met as a consequence of the principle of open monogamy.

The terms and reasons for allowing a person to carry out polygamy are explained in Article 5 of Law No. 1 of 1974, namely: (1) approval from wives; (b) there is certainty that husband is able to guarantee the necessities of life of his wives and children; (c) there is a guarantee that husband will be fair to his wives and children.

Whereas in Article 55 of the Compilation of Islamic Law, the terms and reasons for polygamy are: (1) having more than one wife at the same time, limited to four wives; (2) the main requirement for having more than one wife, husband has to be able to be fair to his wives and children; (3) if the main conditions mentioned in Paragraph 2 cannot be fulfilled, husband is prohibited from being married to more than one person.

In addition to the provisions in the articles above, the polygamy mechanism can only be carried out if it has obtained permission from the court. This is a logical consequence of the dialogue between the principle of monogamy and the prohibition of polygamy, so that, a husband should not just do polygamy without permission from the court. If that happens, then the marriage has no legal force. While male civil servant who want to perform polygamy is required to obtain prior

permission from officials, and female civil servant is not allowed to become second, third, or fourth wife.[8]

In Islam, the key of permitting polygamy or not is depending on fairness. Fair is the deciding word for a husband to marry more than one wife. With regard to fair condition, Asghar Ali explained the kind of fair that must be fulfilled by man who will perform polygamy, namely: guaranteeing to use the property of orphan and widow properly, guaranteeing to provide justice to all wives in material matters, and to provide love for all wives justly.[9]

Asghar Ali said that in *al-Qur'an* itself, it is explained "there is no power in man to treat his more than one wives fairly, even if you want to do it". It is because Asghar underlines that justice is not only in material matters but in immaterial matters that are beyond human capability. This opinion strengthens some Muslim scholars who reject polygamy because of the impossibility of someone to do justice. Allah SWT provides fair condition because actually what is desired by *shari'ah* law is monogamy.

Procedures for Submitting Polygamy

The procedures of polygamy are detailed in Article 40, 41 and 42 of Government Regulation No. 9 of 1975. Article 40 explains "If a husband intends to have more than one wife, he is required to submit a written application to the court". And Article 41 explains "The court then examined about: (a) the presence or absence of reasons that allow a husband to conduct polygamy; (b) whether or not there is an agreement from the wife, both oral and written consent, if the agreement is an oral agreement, it must be stated before a court hearing; (c) whether

[8] Khoiruddin Nasution, *Status Wanita di Asia Tenggara :Studi terhadap Perundang-Undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia*, (Jakarta: INIS, 2002), 107.

[9] Asghar Ali Engineer, *The Qur'an … ,* 121.

or not there is ability of husband to guarantee the necessities of life for his wives and children by showing his fair conduct; (d) the presence or absence of guarantees that husband will be fair to their wives and children with statement or promise from husband made in the form stipulated for that.[10]

As for Article 42, it is explained that the court must call wives for clarification and testimony. This refers to Article 3 where the court gives permission for conducting polygamy if it is desired by the parties concerned. Whereas in Article 56 of the Compilation of Islamic Law explains that: (1) a husband who wants to have more than one wife must obtain permission from the Religious Court; (2) submitting an application for a permit intended in Paragraph 1 is carried out according to the procedure as regulated in Chapter VII of the Government Regulation. No. 9 of 1975; (3) a marriage made with a second, third or fourth wife without permission from the Religious Court does not have legal force.

Such a rigid law governing the mechanism of polygamy shows that the government, with the marriage law, wants to bridge the parties who are pros and cons so they bend the best solution in the worst conditions. With regard to a wife who does not give permission for more than one wife, the Religious Court can take over. This is done after hearing the wife's explanation or testimony at the trial. This court's decision can be appealed by both wife and husband.

Polygamy: Positive Law vs. Theology

In Islam, the truth of *al-Qur'an* and *al-Sunnah* as sources of law is absolute, while the level of truth of interpretation upon the two sources of law is relative. Absolute truth of *al-Qur'an* and *al-Sunnah* is to prove that they are not a holy book made by human but the word of Allah SWT to organize human life in the world. Whereas the relative interpretation of Muslim scholars is that

[10] Amiur Nuruddin dan Azhari Akmal Tarigan, *Hukum* …, 164-165.

they want to position the cognitive aspect of human at a level below revelation. Placing both in a linear position is a mistake.

In the context of polygamy procedures, between positive law and Islamic doctrine, is like the position of God's law and human's interpretation, between absolute and relativity. There are at least three important things in terms of polygamy procedures, namely: First is ambiguous. Positive law gives considerable authority to the court about whether or not someone can carry out polygamy. This seems to make the court's permission a legal condition of marriage (polygamy). If so, then it is not in line with those in the law which states that a marriage is legal if it is done according to the respective religious law.

Meanwhile, in Islamic law itself, it is not listed court's permission as a condition and pillar of marriage. In his book, Daud Ali also stated that the court's permission must not be considered as a legal condition of a second marriage, sufficient as an administrative condition that must be fulfilled in order to protect woman and children.

Second is wisdom. With regard to the substance of permissibility of polygamy which is misunderstood. Some figures allow the practice of polygamy on the ground that *al-Qur'an* allows it. In fact, according to him, polygamy contains its own wisdom. While some other figures allow polygamy with strict conditions and in an emergency. Some even say that polygamy is unlawful. In the wisdom perspective, polygamy can be something that is increasingly unclear.

Third is quantitative vs. quantitative. In *al-Qur'an*, fair is the main requirement for someone to do polygamy. According to Muslim scholars, fair is understood in a quantitative and qualitative way. The meaning of fairness as a quantitative requirement for the permissibility of polygamy is very interesting to be discussed, especially legal experts and commentators. Some *fiqh* scholars understand fair in the category of material that can be calculated (quantitative). According to

this group, it is quantitatively fair and measurable and can be applied because its form can be seen, such as material justice, livelihood, fulfillment of children's rights and others.

The second meaning is qualitative justice. Modern scholars, such as Abduh, Asghar Ali, and Amina Wadud, interpret fair in term of quantity. According to Abduh the fairness prescribed by *al-Qur'an* is qualitatively just like love, attention, fulfillment of biological need that cannot be measured. Therefore, if a person cannot be fair, man may not marry more than one wife because it will cause chaos in the household. Fair in this sense is what seems to be unable to be fulfilled by a husband. Implicitly, this indicates that Islamic law in term of polygamy follows the principle of monogamy.

In positive law, both Law No. 1 of 1974 and the Compilation of Islamic Law understand the word fair in a quantitative and measurable way. The meaning contained in these two positive laws seems to want to bridge the dispute between quantitative justice and quantitative justice. The establishment of the principle of open monogamy is proof that Indonesia's positive law allows polygamy under certain conditions and strictly prohibits polygamy under certain conditions.

Polygamy in Marriage System

Polygamy is a global socio-historical phenomenon and generally applies to human. In Indonesia, the discourse of polygamy itself began to enter the public realm since the 19th century.[11] One of the figures and national heroes of the century, Kartini, was one of the many Indonesian women who felt that there were aspects of life that seemed to have disappeared in the practice of polygamy. He felt that how polygamy had forced her to live in discomfort, injustice, confinement, and several other psychological burdens. Therefore it is natural if Kartini calls

[11] Alicia Izharuddin, *Gender and Islam in Indonesian Cinema*, (Singapore: Springer, 2017), 160.

polygamy as "extraordinary crime". In a letter dated August 23, 1900 to his best friend, Stella Zeehandelaar, he wrote: "Is it not natural that I myself hate, look down on marriage, if the results demean women and abuse women in such a way?[12]

According to Onghokham's notes, the Dutch government began to more closely monitor the sexual life and marriage of the regents or government officials since Governor General Daendels declared them as employees of the Dutch East Indies. Moreover, since 1870 and towards the 20th century, the Netherland has become increasingly concerned about the sexual life and family of civil servants. "Wilhelmina began demanding moral control over sexuality and corruption which often originated from sexual activities", Onghokham wrote in "Power and Sexuality" published in Prisma, July 1991. "Finally, if the colonial government tried to bring order to the institution of the marriage of civil servants, for example concerning polygyny or sex, the arrangement then is not just based on religious morality but the interests of salary man".[13]

Around the beginning of the 20th century, the Dutch government formed a fact-finding team in order to extract information from the natives by interviewing nine Indonesian women, all from high society. The interview aimed to find out the cause of disruption to the level of welfare of the population of Java and Madura. The interview recommended that "polygamy is a social phenomenon that has the potential to disturb the comfort and order of a married life". The Dutch government rank by interviewing women at the time was appropriate considering those who were always the object of

[12] Kurniawati Hastuti Dewi, *Indonesian Women and Local Politics: Islam, Gender and Networks in Post-Suharto Indonesia*, (Singapore: Kyoto University Press, 2015), 28-30. See also Kartini (Raden Adjeng), *Letters of a Javanese Princess*, (New York: University Press of America, 1985).

[13] Rere Azizah, *Complex Oppression Towards Sanikem as Depicted in Toer's 'Earth of Mankind'* (Jermany: GRIN Verlag, 2010), 17. She wrote "nyai/istri saat itu hanya seperti seorang budak" (a wife at that time was like a slave)

polygamy and the target of mental anxiety. Therefore, some people questioned like Dewi Sartika called polygamy a "social disease". Just like Dewi Sartika, Siti Soendari said that polygamy is "love cannot be shared equally", which actually does not need to happen.[14]

When polygamy began to spread in the public and political sphere, there was controversy among Indonesian feminists. Some of them support with the argument that polygamy is something natural. Moreover, theologically, polygamy is allowed by religion, of course, with certain conditions that must be fulfilled. Among those on this line was Sitti Moendjijah, a representative of the Aisijjah organization, in 1928. In her speech, she openly supported polygamy. Although in this case, internally Muhammadiyyah itself has quite sharp differences regarding polygamy.[15]

In the 1950s, the issue of polygamy re-emerged after seeing the phenomenon that divorce rates rose sharply due to polygamy, especially in Java and Madura. To respond to this social phenomenon, the Government established the Marriage Commission through the Ministry of Religion in 1950. The Commission drafted a Marriage Law which among others states that marriages must be based on like or no coercion, and polygamy is permitted with strict conditions.

But surprisingly, the government issued Presidential Decree (Keppres) Number 19 of 1952, one of which was to provide twice the benefits for retirees who have two wives. Amelia Fauzia and Oman Fatturahman in "About Islamic Women: Discourse and Movement of Work" wrote that the government's decision was certainly a severe blow to women activists who were struggling against polygamy. He also wrote that Masyumi, the Indonesian Islamic Youth Movement (GPII),

[14] Kurniawati Hastuti Dewi, *Indonesian Women and Local Politics: Islam, Gender and Networks in Post-Suharto Indonesia.*

[15] http://apostrop.blogspot.co.id/2013/02/sekilas-sejarah-kontroversi-poligami-di.html

and Muslimat NU supported the Presidential Decree. While Perwari refused because they considered the decision had an impact on the rise of polygamy and wasted state's money. On December 17, 1953, to coincide with Perwari's Anniversary, a number of organizations held large-scale demonstrations demanding the immediate revocation of the Presidential Decree and the ratification of the Marriage Law.[16]

According to Julia I. Suryakusuma in "Seksualitas dalam Pengaturan Negara", besides being an indicator of "integrity", sexual behavior, such as polygamy and having a mistress, has economic implications that can lead to corruption, which is already abundant in government. This is again a reason to maintain a "clean" image. The existence of the Government Regulation No. 10 of 1983, in whatever form, gives the state right to regulate the marital and sexual lives of its civil servants. The Government Regulation No. 10 of 1983, then, changed into Government Regulation No. 45 of 1990.[17] Its existence became a public debate when Susilo Bambang Yudhoyono, the President of Indonesia, hoped the Government Regulation No. 45 of 1990 expanded not only applies to civil servants but also state and government officials, even the whole community. Women's groups oppose including asking for a revision of the Marriage Law.[18]

In the judicial review session of Law No. 1 of 1974 concerning Marriage held at the Constitutional Court (MK), the Government presented divorce statistics which said that the number of divorce due to polygamy increased each year. The government, represented by the Director General of Islamic Community Guidance of the Ministry of Religion, Prof.

[16] Ibid.

[17] NM. Wahyu Kuncoro, *Tip Hukum Praktis: Solusi Cerdas menghadapi kasus keluarga*, (Jakarta: RAIH ASA SUKSES, 2010), 47-48.

[18]http://apostrop.blogspot.co.id/2013/02/sekilas-sejarah-kontroversi-poligami-di.html

Nasaruddin Umar, revealed that the records of the Religious Courts throughout Indonesia showed that in 2004, there were 813 divorces due to polygamy.[19] A year later, that number rose to 879 and in 2006 jumped to 983. This data shows that polygamy is actually the cause of divorce, resulting in wives and children displaced, said Nasyaruddin before the trial.[20]

According to the REPUBLIKA report, divorce rates in Indonesia continue to increase from year to year. According to a statement from the Ministry of Religion, delivered by the Head of the Sub-Directorate of Anwar Saadi, that based on data in 2009, the number of people who were married was 2,162,268. In the same year, there was a divorce rate of 10%, 216,286 events. Meanwhile, in the following year, namely 2010, the number of marriages in Indonesia was 2,207,364. Divorce events in that year increased by three percent from the previous year to 285,184 events. In 2011, there were 2,319,821 marriages while 158,119 events were divorced. "Next in 2012, the number of marriages that occurred was 2,291,265 incidents while divorced amounted to 372,577," Anwar said. In the latest data collection in 2013, the number of marriage events declined from last year to 2,218,130 events. But the divorce rate increased to 14.6 percent or 324,527 events.[21]

According to data sourced from the Head of Research and Development Center for Religious Life of the Ministry of Religion, Muharam Marzuki, quoted from the website kemenag.go.id, Wednesday, January 20, 2015, he said that

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[19] Bungaran Antonius Simanjuntak (ed), *Harmonious Family: Upaya Membangun Keluarga Harmonis*, (Jakarta: Yayasan Pustaka Obor Indonesia, 2013), 152.

[20]http://www.hukumonline.com/berita/baca/hol17440/poligami-terbukti-menaikkan-angka-perceraian

[21] Khaerul Umam Noer (ed.), *PROSIDING PKWG SEMINAR SERIES: Kebijakan Kesehatan dan Pelibatan Komunitas dalam Menurunkan AKI/AKB di Indonesia*, (Jakarta: Pusat Kajian Wanita dan Gender Universitas Indonesia, 2015), 96-98.

"Divorce rates in Indonesia in the past five years show a figure that continues to increase". Of the two million married couples, there are as many as 15 to 20% divorced. Meanwhile, the number of divorce cases decided by the Religious High Court throughout Indonesia in 2014 reached 382,231. If compared to 2010, this number has increased by 251,208 cases.

The National Commission on Violence against Women (*Komnas Perempuan*), Mariana Amiruddin, reported that divorce cases in Indonesia experienced a significant increase from year to year. In 2015 there were 11,207 divorce cases. That number increased sharply in January 2016 which reached 352,070 cases. According to *Komnas Perempuan*, the high divorce rate is divided into three categories, namely divorce with proposal from wife, divorce by husband, and polygamy. Of the 352,070 cases processed, 305,535 cases (87%) have received a decision (divorce certificate). From 352,070 divorce cases that entered the Religious Court, there were 252,587 cases of divorce with proposal from wife, divorce by husband 98,808, polygamy permit of 675.

Mariana added that of the 33 provinces in Indonesia, divorce rates were highest in Java. The three highest provinces are East Java (21,599), West Java (15,711), and Central Java (13,831). At the national level and in most provinces, the category of no harmony occupies the largest number compared to other categories. The "no harmony" category meant here is domestic violence (domestic violence). Every year, *Komnas Perempuan* receives 5-10 complaints related to domestic violence as a mistress's wife or official wife who experiences violence because her husband has a mistress. So, women are always the victims.[22] The Secretary of the National Commission for Women, Mahardhika Mutiara Ika Pratiwi said that the phenomenon of a

[22] Ratna Batara Munti, *Demokrasi keintiman: seksualitas di era global*, (Yogyakarta: PT LKiS Pelangi Aksara, 2005), 75. See also the footnote within the book of Gaudzillah, *Serat Kembang Raya: Antologi Puisi Esai*, (Jakarta: PT Jurnal Sajak Indonesia, 2014), 75-76.

mistress wife or a marriage of a form of oppression against women is increasing sharply.

From Polygamy to Commoditization of Women

United Nations (UN) in one of the 3 Palermo Protocol defines Human Trafficking as "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs. The consent of a victim of trafficking in persons to the intended exploitation set forth [above] shall be irrelevant where any of the means set forth [above] have been used".[23]

According to the report of the USA Embassy and Consulate in Indonesia on the official website, they state that Indonesia is one of the countries in the world that contributes high numbers in case of human trafficking.[24] According to their data, there are around 1.9 million of the 4.5 million Indonesians working

[23] Anna Ochoa O'Leary, *Undocumented Immigrants in the United States: An Encyclopedia of Their Experience*, (California: ABC-CLIO, 2012), 348-350.

[24] According to the Palermo Protocol in Paragraph three, the definition of transaction activity includes: recruitment, sending, transferring, collecting or accepting people, carried out under threat, or using force or other forms of coercion such as kidnapping, trickery or deception, abuse of power, abuse of position vulnerable, using the giving or receiving of payment (profits) so that conscious consent is obtained (consent) from people who hold control over others for exploitation purposes. Willem van Schendel, Lenore Lyons, Michele Ford (ed.), *Labour Migration and Human Trafficking in Southeast Asia: Critical Perspectives*, (New York: Routledge, 2012), 74-75.

abroad, most of them are women. Their position is very vulnerable to exploitation especially since they do not have documents or have lived beyond the residence permit limit. The number of Indonesian migrant workers trapped in forced labor, including being caught in debt bondage, both in Asia, the Middle East and on fishing vessels, is quite significant. Among the destination countries for labor migration from Indonesia is Malaysia, with more than 1.9 million registered official and unofficial figures. The destination of Saudi Arabia ranks second.

In addition, the number of Indonesian citizens who have been identified as victims of human trafficking is spread in almost neighboring countries, such as Asia and in the Middle East, South Korea, the Pacific Islands, Africa, Europe (including the Netherlands and Turkey), and South America. Of that number, female is again the most and is often the victim of sex trafficking, especially in Malaysia, Taiwan and the Middle East. Difficulties from immigrants to get official travel documents make them prefer shortcuts. This is certainly very difficult for them when they reach the destination country. Such conditions also force them to occupy positions that are weak in bargaining power, so they often get marginalized treatment.

Human trafficking, which on average is a group of children and women from the country of origin of Indonesia, turns out not only to occur abroad, but many cases of human trafficking transactions also occur within their own country. As in mining operations in Maluku, Papua and Jambi, Bali, Batam, Riau Islands province, and in West Papua provinces in previous years. Many reports show an increasing number of students and high school students who use social media to recruit and persuade other students, including those under the age of 18 years, to work in the domestic sector and commercial sex. Usually victims are often recruited with the lure of job offers in restaurant, factory, or domestic worker but are actually made into commercial sex worker.

Based on data made by the USA Foreign Country Department on Trafficking in Persons in 2011, the Ministry of Women's Empowerment also confirmed that estimate and there were even about 20 percent of Indonesian workers (TKI) working abroad becoming victims of human trafficking. According to data from the Ministry of Women's Empowerment, there are currently 6.5 million to 9 million migrant workers working abroad. Based on data from the International Migration Organization (IOM), 70% of the human trafficking mode in Indonesia originates from sending migrant workers illegally abroad. While the regions that are estimated to be the center of recruitments are Java, Bali, Kalimantan, and Sulawesi, with destinations in Asia, the Middle East and Europe. UNICEF estimates that around 100,000 women and children in Indonesia are trafficked every year for commercial sexual exploitation in Indonesia and abroad. Around 30% of prostitute women in Indonesia under the age of 18 years and 40,000-70,000 children are victims of agency exploitation.[25]

The high number of trafficking in person (minors and women) is now very alarming, even ranking in the top 5 in the world. One of the causes of the increasingly human trafficking is the profit gained by the perpetrator is very high. According to the United Nations, human trafficking is the third largest criminal company in the world, generating around 9.5 million US dollars in annual tax, and one of the most profitable criminal companies and is closely related to money laundering, drug trafficking, document falsification, and people smuggling.[26]

Seeing the rampant phenomenon of child trafficking that occurs both broadly and domestically, the Indonesian

[25]http://nasional.kompas.com/read/2017/03/29/19382151/menyikapi.perdagangan.manusia See also Willem van Schendel, Lenore Lyons, Michele Ford (ed.), *Labor Migration and Human Trafficking in Southeast Asia: Critical Perspectives* (New York: Routledge, 2012), 74-75.

[26] Anna Ochoa O'Leary, *Undocumented Immigrants in the United States: An Encyclopedia of Their Experience*, (California: ABC-CLIO, 2012), 348-350.

government has done many things. There are at least four laws that have been made specifically to save the nation's generation, namely the Child Welfare Act, the Human Rights Act, the Child Conservation Act, and the Criminal Law Act. However, the implementation of these laws often face obstacles when dealing with the mindset of Indonesian people who consider children and women are social groups that can be used for commercial and domestic purposes. This shows that the level of commoditization of women in Indonesia is still not well resolved.

In addition to the aforementioned laws, the government has also supplemented with several other rules such as Law No. 37 of 1997 concerning Foreign Relation. This law can be used to protect Indonesians who are ensnared in cases of human trafficking abroad and the Law No. 21 of 2007, concerning the Eradication of Trafficking in Persons. Article 1 of Law No. 21 of 2007 affirms, "trafficking in person is the act of recruiting, transporting, collecting, transporting, transferring, or accepting someone with the threat of violence, use of force, abduction, confinement, forgery, fraud, abuse of power or vulnerable position, debt bondage or payment or payment benefits, so as to obtain the agreement of the person in control of that other person, whether carried out within the state or between countries, for the purpose of exploitation or to cause the person to be exploited".[27]

Based on data from the National Police Headquarter database, as published in the REPUBLIKA.CO.ID news, JAKARTA, there were 194 cases of Criminal Trafficking in Person (TPPO) in 2016, with details: 120 female victims, 21 male victims, and 53 children. This was also confirmed by the Head of

[27] This definition is derived from the definition made by the 2000 United Nation protocol. See Anna Ochoa O'Leary, *Undocumented Immigrants in the United States: An Encyclopedia of Their Experience* (California: ABC-CLIO, 2012), 348-350.

the Public Information Section (*Kabagpenum*) National Police Commissioner, Martinus Sitompul at the National Police Headquarter. He added that trafficking in people is the second largest crime in the world after narcotics.[28] This data is certainly far smaller than the number of victims released by the annual report of the USA embassy in Indonesia. However, this phenomenon shows that law enforcement in Indonesia has not reached the maximum and effective point.

Most who are often the object of human trafficking are people who are easily persuaded by the false promises of the traffickers. Some traffickers use manipulation tactic to deceive victims, including intimidation, seduction, alienation, threat, kidnapping and the use of illegal drugs.[29] Many impacts caused by the existence of trafficking are not only detrimental to the country but also to victims of trafficking. According to Jose Ferraris, as representative of UNFPA, said that "human trafficking consists of various forms, including coercion in commercial sexual exploitation, prostitution of minor, debt bondage or forced labor and so on". Some of the factors that cause this human trafficking are: (1) poverty (economic problems); (2) lack of education and information; (3) lack of parental care.[30]

[28] http://www.republika.co.id/berita/nasional/hukum/16/12/09/ohwysd361-selama-2016-194-orang-jadi-korban-perdagangan-manusia

[29] Willem van Schendel, Lenore Lyons, Michele Ford (ed.), *Labor Migration and Human Trafficking in Southeast Asia: Critical Perspectives* (New York: Routledge, 2012), 50.

[30] Ibid.

CHAPTER 6

CONTROVERSIAL MARRIAGES

Controversial marriage often appears in the community. The term indicates that there is something which is not linear among Islamic law, state, and one's interpretation of the validity of marriage. The emergence of underhand marriage phenomena, early marriage, interfaith marriage, contract marriage and others is a result of human understanding of diverse revelations. As people who have religion and live in a country, following one of them is not enough. Therefore, there must be a meeting point between the two so as to create a problem in domestic life. The presence of Law No. 1 of 1974 and the Compilation of Islamic Law is the answer to the above problem.

Underhand Marriage

The conversation about marriage is indeed something interesting, particularly, when it comes to several types of controversial marriages in Indonesia. It is said to be controversial because there are gaps between religious teaching, interpretation of this teaching, and the effect caused. Controversial can also mean a marriage that is not in accordance with the customs of the local community. In essence, when substantial values in marriage are not fulfilled, it will have controversial consequences in the midst of a religious society like Indonesia. One of the controversial marriages is underhand marriage.

The term of underhand marriage is a term that is often used by the community to describe a marriage procession that is carried out not in accordance with the guidance or has adverse

consequences for both parties. However, the term "underhand marriage" referred to in a positive legal perspective is a marriage without a record in the authorized agency or institution, namely the office of religious affairs that has been appointed by the government through legislation. Underhand marriage emerged after the entry into force of the Marriage Law effectively in 1975.

According to the classical *fiqh* law, underhand marriage is quite varied. But the majority of the classical Muslim scholars are of the opinion that as long as the terms and conditions of marriage are fulfilled, the marriage is valid. This happened because at that time (read: the classical era), the order of social life was still quite simple, so it did not require recording. However, at this time, where the development of science and technology, economy, population, social order is getting neater, then marriage registration is a necessity. In fact, most contemporary Muslim scholars say it is mandatory. This opinion is certainly not without reason, because when a marriage is under the hand, even though it is legally valid in *fiqh*, it continues then the next question is what if a divorce occurs? What about the fate of the children of the marriage? How will anyone give legal certainty if one of them misappropriates? What about the distribution of inheritance? These are the questions that must be answered in the existing legal system.

There are several terms to describe underhand marriage like secret (*sirri*) marriage.[1] Underhand marriage can be

[1] The case of *sirri* marriage and under age marriage is not new. In a census conducted by a Non-Governmental Organization (NGO) Empowering Women Heads of Families (*Pekka*), 25 percent of the people in Indonesia conduct *sirri* marriage and *adat* marriage in 2012. This means that this marriage is not registered. This census was conducted in 111 villages from 17 provinces. There are a number of provinces where the marriage rate is above 50 percent. In NTT there are 78 percent, Banten 65 is percent, and NTB is 54 percent. While the result of research from the Ministry of Religion Research and Development Agency and the Ministry of Religion in nine districts in

interpreted as a marriage that is not registered at the relevant agencies, but carried out according to their respective religions and beliefs. Secret (*sirri*) marriage is a marriage that is conducted secretly without being known by people from among the neighbors. Both, underhand and *sirri* marriage are legitimate in the view of the classical jurisprudence although there are many factors that must be considered to determine whether such marriages are still considered legitimate or should shift to illegitimate at this time.[2]

There are many factors that encourage people to do underhand marriage, both with fellow Indonesian or with foreigner. Most people believe that marriage is considered legal according to Islamic law if it meets the marriage standards and conditions of marriage, even though the marriage is not officially registered. What needs to be reviewed is whether the current marriage is only sufficient with legal status without having legal power or not recognized by the state.[3]

Law No. 1 of 1974 Article 2 Paragraph (2) states that "each marriage is recorded according to the applicable laws and regulations". This illustrates for us, that each marriage under the hand has an obligation for the bride and groom (husband and wife) to register their marriage in the Office of Religious Affairs

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Indonesia, many people do *sirri* marriages and underage marriages because of the community's stigma of the status of a spinster. Of the nine districts, among them, East Java, West Java, NTB, South Kalimantan and Yogyakarta. https://www.republika.co.id/berita/dunia-islam/fatwa/17/07/31/oty0hr313-nikah-di-bawah-tangan-apa-hukumnya

[2] Susan Ann Spectorsky, *Women in Classical Islamic Law: A Survey of the Sources*, (Leiden: BRILL, 2010), 78-79. See also Joseph Lowry, Shawkat Toorawa (ed), *Arabic Humanities, Islamic Thought: Essays in Honor of Everett K. Rowson,* (Leiden: BRILL). See also Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia*, (Jakarta: Kencana, 2007), 56.

[3] Burhanuddin, *Nikah Siri: Menjawab Semua Pertanyaan Tentang Nikah Siri*, (Yogyakarta : Medpress Digital, 2012), 18.

(KUA) for Muslim or the Civil Registry Office (for non-Muslim) where they are married. Not registering a marriage does not mean that the marriage is not legal in Islam, but is not legally valid in Indonesia.[4]

The purpose of marriage registration is to realize marital order in the community. Especially to protect the rights and obligations of the wife as a result of the law caused by the existence of marriage ties, which involve property, inheritance, child custody, living, and so on. Marriage, which is conducted according to their respective religion by the prospective bride but not registered at the Office of Religious Affairs or at the Civil Registry Office, will cause harm to the parties, husband, wife, and children born from such marriage. So, in such a marriage, its danger is greater than its benefit.

In Law No. 1 of 1974, concerning Marriage, does not contain explicitly the article that describes underhand marriage, but this is combined with the meaning contained in Article 2 Paragraph 2 of Law No. 1 of 1974 concerning the Obligation to Register Marriage. The registration of marriage for Muslims, is expressly explained in the Compilation of Islamic Law Article 5, namely: (1) in order to guarantee marital order for the Islamic community, each marriage must be recorded; (2) the registration of the marriage as referred to in Paragraph 1 shall be carried out by the Registrar of Marriage as stipulated in Law No. 22 of 1946 jo. Law No. 32 of 1954.

Whereas, Article 6 of Law No. 1 of 1974 describes the technical implementation, namely: (1) to meet the provisions of Article 5, each marriage takes place before and under the supervision of a Registrar of Marriage; (2) marriage conducted outside the supervision of the Registrar of Marriage has no legal

[4] Ahmad Basyir, *Hukum Perkawinan Islam*, (Yogyakarta: Kencana, 1977), 10.

force.[5] Marriage registration is needed to be regulated because without registration a marriage has no legal power and is not recognized by the state. The consequence is that if one party neglects his obligations, the other party cannot take legal action, because they don't have valid and authentic proof of the marriage they have done. Such things are contradictory to the purpose of marriage.

The factors that cause underhand marriage often occur because of adultery, marital contract (*mut'ah*), polygamy, and settlement far from cities (*polosok*, villages). The legal consequences arising from an underhand marriage will clearly have impact not only on the couple concerned but also on their offspring, including: (1) marriage is considered never to have happened by the state; (2) children from underhand marriage only have a civil relationship with mother and mother's family; (3) his wife and children are not titled to live and inheritance and property if a divorce occurs.

Early Marriage

In Indonesia, early marriage is clearly regulated in Law No. 1 of 1974. The law states that the marriage age limit is 19 years old for man and 16 years old for woman, as in Article 7, marriage is only permitted if man is 19 years old and woman is 16 years old.[6] From the contents of Law No. 1 of 1974, it can be understood

[5] Abdurrahman, *Kompilasi Hukum Islam*, (Jakarta : 1985), 21.

[6] The House of Representatives endorsed the revision of the Marriage Law and amended the minimum threshold for marriage; both men and women must have turned 19 years old. Previously, the minimum marriage for men was 19 years and women 16 years. One reason for revising the age limit for marriage is Constitutional Court Decision No. 22/PUU-XV/2017. One of the considerations of the Constitutional Court in the ruling is "However, when the difference in treatment between men and women has an impact on or impedes the fulfillment of the basic rights or constitutional rights of citizens, both included in the group of civil and political right and economic,

that early marriage is a physical bond between man and woman as husband and wife who do not meet the conditions determined by law or applicable law.

The principle adopted in Law No. 1 of 1974 is that the prospective husband or wife must have been truly mature physically and spiritually. This is very necessary in order to be able to get married and can solve various problems arise in the family. In order that marital goals can be achieved, able to solve various family problems, avoid divorce, get healthy offspring, have independence of life and so on, it is then limiting the age of marriage to the minimum limit is very necessary.

The law provides a minimum age limit for someone who is going to get married. It aims to maintain the health of husband, wife and descent. Because of its relationship with the future, where the family is to form a happy and eternal family (*sakinah, mawaddah wa rahmah*). With the provisions of the law is trying to prevent or reduce divorce rate at a young age. Article 7 Paragraph (2) of Law No. 1 of 1974 states that "in the case of irregularities, there is Paragraph (1) of this Article may request dispensation from the court, as a legal effort to find a way out if there are problems regarding an urgent marriage or an emergency.

The spirit of creating a harmonious and ideal family and the purposes of marriage are clearly stated in the Compilation of Islamic Law (KHI) in Article 15, namely: (1) for the benefit of the family, marriage can only be conducted by brides who have reached the age specified in Article 7 Law No. 1 of 1974 that the prospective husband is at least 19 years old and the prospective

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educational, social and cultural right, which should not be distinguished solely based on gender reason, this distinction is clearly discrimination". MK MEDIA, *Majalah Konsitusi Mei 2017: Perda Kabupaten Kota*, Nomor 123, Mei 2017. See also MK MEDIA, *Majalah Konsitusi Juni 2017: PENDIDIKAN ADVOKAT Gandeng Perguruan Tinggi Hukum*, No. 124, Juni 2017

wife is at least 16 years old; (2) for prospective brides who have not reached the age of 21 years must obtain permission as stipulated in Article 6 Paragraph (2), (3), (4), and (5) of Law No. 1 of 1974.

Regarding to the age limit for getting married, Hoffman and Rudangta say that the ideal age for getting married is 20-30 years old for woman and 25 years old for man. At that age, a man or woman is considered to have matured to get married. Biological and psychological maturity will also greatly support the ability to care for children, including being able to reduce the risk of giving birth to a child with a disability or death.[7]

Basically, Islamic law does not clearly regulate the age limit of marriage. *Al-Qur'an* only implies that a person who is going to get married must be a strong and capable. Indirectly *al-Qur'an* and *al-Hadith* admit that maturity is very important in a marriage. Adult age in Islamic law is determined by physical signs such as the age of 15 (fifteen) years old for man, and menstruation for woman which is a minimum of 9 (nine) years old. From these provisions, finally, the scholars agreed that a father may (*mubah*) marry off his young daughter.[8]

Factors that encourage early marriage include: first, the existence of free promiscuity that is more urgent among young people. Second, the existence of sexual urges for young children causes forced marriage. Third, the families who still uphold tradition and culture in the community. Fourth, the economic needs. Fifth, because of the influence of the fast development of science and technology, it can stimulate someone to get married.[9]

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[7] Sarwono Sarlito, *Teori-Teori Psikologi Sosia,* (Jakarta : Cv. Rajawali, 1991), 3.

[8] Ibid., 247.

[9] Eddy Fadlyana, Shinta Larasaty, "Pernikahan Usia Dini Dan Permasalahannya" *within* Jurnal Of Sari Pediatri, Vol. 11, No. 2 (Agustus 2009), 137-138.

Some things that need to be anticipated related to early marriage are:[10] (1) reproductive health will be disrupted. Pregnancy at the age of less than 17 years old can increase the risk of medical complications, both for mother and child. Pregnancy at a very young age turns out to increase maternal mortality and morbidity; (2) patriarchal culture has the potential to position woman as a complement to man's live and often gives birth to violence for woman;[11] and (3) conflicts that lead to divorce due to a lack of sense of responsibility towards the family's future and lack of understanding of the roles that each has.

Contract Marriage

Contract marriage (*mut'ah*) comes from the word *matta'a-yumatti'u-matta'an* which means to use, to have fun, to enjoy.[12] Contract marriage is a marriage that carried out for a certain time by giving something in return in accordance with the agreement and ending in the allotted time without the existence of divorce. At the beginning of Islam, the practice of contract marriage was permitted. The Messenger of Allah (PBUH) allowed contract marriage when some of his companions were traveling (on the way) or when they went to fight the enemy (war). Not a single history says that the Prophet allowed contract marriage when the companions were at home i.e. not traveling.

[10] Yuspa Hanum, Tukiman, "Dampak Pernikahan Dini Terhadap Kesehatan Alat Reproduksi Wanita" within Jurnal Of Keluarga Sehat Sejahtera, Vol. 13, No. 26 (Desember 2015), 39-40.

[11] Mubasyaroh, "Analisis Faktor Penyebab Pernikahan Dini Dan Dampaknya Bagi Pelakunya" within Jurnal Of Pemikiran Dan Penelitian Sosial Keagamaan, Vol. 7, No. 2 (Desember 2016), 407.

[12] Ibnu Fiyan Afifi, "Tinjauan Yuridis Mengenai Kawin Kontrak Serta Akibat Hukumnya Terhadap Istri Dan Anaknya" within Journal of Unnes Law Vol. 3. No. 1 (Juni, 2014), 22.

Historically, contract marriage was inherited from the traditions of pre-Islamic societies. This tradition is to protect the women in the tribe. During Islam, contract marriage underwent several legal provisions. That is permitted twice (i.e. before the *Khaibar* war and during the conquest of Mecca) and twice banned (during the *Khaibar* war and 3 days after the conquest of Mecca) and for the duration, marital contract was being forbidden forever.

Requirements to enter into a contract marriage are not bound as a legal condition of a marriage that is of a permanent. It can be carried out by presenting two witnesses, or without two witnesses, in front of the guardian or in otherwise, as long as the woman agrees and accepts it. According to Ja'far Murthada Al-Amili, requirements that must be fulfilled in contract marriages are *baligh*, understanding, there is no *shari'ah* obstacle for the marriage to take place, such as having a *nasab* (family relationship), a sibling, still being the wife of someone else, or being his wife's sister as which has been explained in *al-Qur'an*.

Temporary marriage or contract marriage does not need to be recorded or attended by witnesses. The husband is not obliged to provide daily needs for his wife. However, the wife has an obligation to obey her husband in sexual matters. The purpose of contract marriage is merely sexual pleasure, while the purpose of permanent marriage is to form a happy, eternal family (*sakinah mawaddah warahmah*).[13] The majority of Muslim scholars agree that contract marriage is a prohibited act and there are no differences regarding the law of contract marriage, except those among the *Shiite* who still allow it. Contract marriage is a

[13] Meaning "And of His signs is that He created for you from yourselves mates that you may find tranquillity in them; and He placed between you affection and mercy. Indeed in that are signs for a people who give thought". (*Al-Qur'an, al-Ruum*: 21)

prohibited marriage because it is temporary and contrary to the basic purpose of marriage in terms of time restriction.[14]

In a contract marriage, a woman is a person who is often a victim and always underestimated. Men act as they wish with the women they marry because there is no record. What often happens to women is physical and sexual violence and women are faced with various risks or responsibilities after the contract marriage ends. Therefore, contract marriage should not be done based on the rules of *ushul fiqh* which means "refusing harm is more prioritized than attracting benefit".

Another thing related to contract marriage is the status of the child. When a child is born from a marriage, then he will have other legal consequences in a marriage. The legal consequences of a child resulted from the legal marriage have been regulated in Law No. 1 of 1974 concerning the Position of Child. Article 42 states that legitimate children are those who were born in or as a result of a legal marriage. Then Article 43 states "children born out of wedlock only have a civil relationship with their mother and mother's family" while children born as a result of contract marriage are considered as children out of wedlock and do not have *nasab* and national civil relation to their biological father.

Interfaith Marriage

Lately, interfaith marriage often occurs. Some Muslim scholars allow but the majority of the Muslim scholars forbid. To get a proper understanding, we will first explain the definition of interfaith marriage. There are, at least, two types of interfaith marriage, namely: first, marriage with non-Muslims (polytheists) and second, marriage with the people of the scripture.

[14] Khairil Ikhsan Siregar, "Nikah Mut'ah Dalam Perspektif Al-Qur'an Dan Hadis" within Jurnal Studi Al-Qur'an, Vol. 8, No. 1 (2012), 20.

Between non-Muslims and the people of the scripture is the same at first glance. But both have fundamental differences. The two categories clearly contain a distinction which has consequences in different laws. Non-Muslims are people who deny the existence of Allah SWT (worship idols). While, the people of the scripture are those who adhere to one of the *samawi* religions, that has a holy book, like the *Torah*, the *Psalms*, and the *Gospel*. Actually marriages in different religions have three categories, namely:[15]

a. A non-Muslim man with Muslim woman

Understanding of non-Muslim according to Sheikh Muhammad Abduh is all activities that are contrary to religious teachings and religious goals. The point does not refer to one religious group, but includes a number of religions with all forms of belief and ritual variations. Muslim scholars agree that Muslim woman should not (*haram*) be married by non-Muslim man, both from the group of polytheist (idol worshiper) or the people of the scripture. This prohibition is based on chapter *al-Baqarah* verse 221.[16] The prohibition of marriage in chapter *al-Baqarah* verse 221 applies for man and woman who are Muslim to marry people who are not Muslim.

[15] Ali Mutakin, "Implementasi Maqasid Syari'ah Dalam Putusan Baths Al-Masa'il Tentang Perkawinan Beda Agama" within Journal of Bimas Islam, Vol. 9, No. 2 (April, 2016), 299-301.

[16] Meaning: "And do not marry polytheistic women until they believe. And a believing slave woman is better than a polytheist, even though she might please you. And do not marry polytheistic men [to your women] until they believe. And a believing slave is better than a polytheist, even though he might please you. Those invite [you] to the Fire, but Allah invites to Paradise and to forgiveness, by His permission. And He makes clear His verses to the people that perhaps they may remember". (*Al-Qur'an, al-Baqarah*: 221).

According to the majority of Muslim scholars, the prohibition of Muslim woman marrying polytheist man, as in chapter *al-Baqarah* which does not mention the people of the scripture, does not mean it is permissible for the man of the scripture to marry Muslim woman. While Muhammad Ali as-Shabuni, the verse prohibits the guardians from marrying the woman whom he is responsible for with the polytheists man. What is meant by polytheists here are all people who are not Muslim, they are including idolatry, Magi, Jews, Christians and people who are apostates from Islam.[17]

b. Muslim man with polytheist woman

The scholars agree that Muslim man is prohibited to marry polytheist (idol worshiper) woman. This ban is like an unlawful of Muslim woman marries to polytheist man. In chapter *al-Baqarah*, it is explained that unlawful for Muslim to marry polytheist, both man and woman. That is because between Muslim and polytheist there is a very fundamental difference about the issue of belief that cannot be reconciled, namely between the One God and idols as creature.

According to Rasyid Ridha, what is meant by polytheist woman who is not permitted to be married in chapter *al-Baqarah*: 221 is only Arab polytheists during the time of the Prophet.[18] The prohibition to marry polytheist woman was also followed by the advice to marry slave. It is clear that the context is that of the polytheists of the time of the Prophet, and now there are no more slaves. So, it can be understood

[17] Nur Asiah, "Kajian Hukum Terhadap Perkawinan Beda Agama Menurut Undang-Undang Perkawinan Dan Hukum Islam" within Jurnal Hukum Samudra Keadilan, Vol. 10, No. 2 (Juli-Desember 2015), 221.

[18] Ahmadi Hasanuddin Dardiri, "Pernikahan Beda Agama Ditinjau Dari Perspektif Islam Dan Ham" within Jurnal Khazanah, Vol. 6, No.1 (Juni 2013), 106.

that the prohibition to marry polytheist woman indiscriminately, whether they are from Arab or not.

c. Muslim Man with Woman of the Scripture

Marriage between Muslim man and woman of the scripture is permissible. According to majority of Muslim scholars, the permeability of Muslim man to marry woman of the scripture belong to a separate group that is different from the polytheist group even though it is still in the category of unbeliever. But most of the Muslim scholars suggested not marrying woman of the scripture.[19]

Muslim scholars differ in view of interfaith marital law related to Muslim man who marries non-Muslim woman from the group of woman of the scripture. First, it is possible to intermarry between Muslim man and woman of the scripture. Secondly, it is not permissible for Muslim man to marry woman of the scripture as it is not allowed for Muslim woman to marry man of the scripture.

In Law No. 1 of 1974 Article 2 Paragraph (1) states: "marriage is legal, if it is carried out according to the law of each religion and belief". In this case, it can be seen that there is no marriage outside the law of each religion and belief. Then the prohibition of interfaith marriage is clarified in the Compilation of Islamic Law Article 40 Letter c, while the prohibition of interfaith marriage for woman is regulated in Article 44.[20]

Article 40 Letter c states "It is forbidden to have a marriage between a man and a woman because of certain circumstances: a woman who is not a Muslim". Article 44 also states "A Muslim woman is prohibited from entering into a

[19] Quraish Shihab, *Tafsir Al-Misbah*, (Ciputat: Lentera Hati, 2006), 444.
[20] Ibid., 6.

marriage with a man who is not Muslim". Article 61 states "Not being *kafa'ah* (not being the same level within the social strata) cannot be used as an excuse to prevent marriage, except not being *kafa'ah*[21] due to religious difference (*ikhtilaf al-din*)". Normatively, the prohibition on marrying between those with different religion has been clear, because it is in line with the provisions of *al-Qur'an*. According to Quraiys Shihab Marriage with different religions is illegitimate, both according to religion and state.

[21] *Kafa'ah* is an Arabic which means "equal". In *fiqh* term, *kafa'ah* is a partner, equal, or harmonious. According to Abd. Rahman Ghazali, *kafa'ah* or *kufu* means equal, balanced, or in harmony/conformity, similar, equal or comparable. In the context of marriage, *kafa'ah* is the balance and harmony between the prospective wife and husband so that each candidate does not find it difficult to carry out the marriage. Or a man is *equal* to his future wife, equal in position, equal in social level and degree in character and wealth. *Kafa'ah* in marriage is a factor that can encourage the creation of happiness of husband and wife and better guarantee the safety of women from failure or the shock of the household. *Kafa'ah* is recommended by Islam in choosing a prospective husband/wife, but does not determine the validity of marriage. *Kafa'ah* is a right for women or guardian. Because a marriage that is out of balance, harmonious will cause ongoing problems, and it is likely to cause divorce, therefore, it may be canceled. Tihami dan Sohari Sahrani, *Fikih Munakahat: Kajian Fikih Nikah Lengkap,* (Jakarta: Rajawali Press, 2009), 57.

CHAPTER 7

JOINT ASSET IN MARRIAGE

Basically, Islamic law does not regulate joint asset in detail. However, Muslim scholars and the Indonesian *Ulama* Council categorized joint assets into *shirkah* asset, that is, asset collected during marriage and must be distributed proportionally in the event of divorce. Joint asset in marriage or *gono gini* (Javanese) is asset obtained by a husband and a wife during a marriage. While asset obtained before marriage in the form of inheritance, will, grant, or gift are inherited assets and are in the possession of each. Marriage assets are regulated in Law No. 1 of 1974 Chapter VII Articles 35-37. Whereas, in the Compilation of Islamic Law, it is regulated in Articles 85-97, and in the Civil Code it is regulated in Article 119.

Joint Assets in Positive Law of Indonesia

In positive law of Indonesia, joint asset is expressly regulated in Law No. 1 of 1974 Articles 35-37. In that article, it is explained that property obtained during marriage becomes joint property or asset. Each as a gift or an inheritance is under the control of each other as long as the parties do not specify the others. Regarding joint asset, a husband or wife can act to do something or not to do something about the joint property with the agreement of both parties. It is also stated that husband and wife have full right to carry out legal action regarding their property if the marriage is broken due to divorce, then the joint property is regulated according to their respective law.

Article 36 Paragraph 2 of Law No. 1 of 1974 Jo. Article 87 Paragraph 2 of the Compilation of Islamic Law states that a husband and a wife have full right to carry out legal action

against each other's personal assets. They are free to determine the assets without interfering husband or wife to sell, to give or to pledge. Also no legal assistance is needed from husband to take legal action on her personal property. There is no difference in legal ability between husband and wife in controlling and taking action on their personal property. The law does not distinguish between the ability to take legal action against the husband's and the wife's personal assets.

Article 37 of Law No. 1 of 1974 is explaining about the status of property if the marriage is broken because of divorce. Joint asset is regulated according to their respective laws. Some points contained in this article are as follows: First, the distribution of joint asset is done based on religious law if it is a living legal awareness in regulating the divorce mechanism. Second, the distribution rule will be carried out according to customary law, if it is a legal awareness that lives in the community concerned.[1]

Whereas, the Compilation of Islamic Law Articles 85 and 86 states that joint property does not rule out the possibility of property belonging to each husband or wife obtained before they get married. The Compilation of Islamic Law, basically, follows the principle that there is no mixing between husband's property and that of wife due to marriage.[2] Meanwhile, in the conception of customary law regarding joint asset in Indonesia, many principles are found that each husband and wife has right to control their own property and this applies as before they became husband and wife.

[1] M. Yahya Harahap, *Pembahasan Hukum Perkawinan Nasional Berdasarkan Undang-Undang Nomor 1 Tahun 1974, Peraturan Pemerintah Nomor 9 Tahun 1974*, (Medan: Zahir Tranding, 1975), 125.

[2] Abdul Manan, *Aneka Masalah Hukum Perdata Islam di Indonesia,* (Jakarta: Kencana, 2014), 105.

Regarding joint asset in the legislation in Indonesia, there are four kinds of family property (*gezimsgood*) in marriage, namely:

1. Assets obtained from inheritance, both before and after they enter into a marriage. This treasure in Central Java is called *gawan* good, in Betawi it is called business good, in Banten it is called *sulur* good, in Aceh it is called *tuha* treasure or *pusaka* treasure, in Nganjuk it is called *perimbit* property.
2. Assets obtained from the results of their own efforts before they became husband and wife. Such wealth in Bali is called *guna kaya* property, in South Sumatra the property of husband and wife was distinguished before marriage. The husband's property is called *pembujang* property and that of wife is called penantian property.
3. Assets which are obtained together by husband and wife during the marital periode. This treasure in Bali is called *druwe gebru*, in Java it is called gono gini treasure, in Minangkabau it is called *saurang* treasure, in Madura it is called *ghuma-ghuma*, and in South Sulawesi it is called *cakkar* treasure.
4. Property obtained by the bride and groom at the time of the marriage is carried out belongs to husband and wife during the marriage.

From the explanation about the asset in the marriage described above, the author concludes that: (1) joint assets is the asset obtained by husband and wife during the marriage that originated from inheritance, gift, or grant; (2) joint asset is asset obtained by husband and wife during a marriage that takes place outside of inheritance, gift or grant.

Joint Asset in Islamic Law

In Islam, joint property is wealth obtained by husband or wife during marriage in the form of movable or immovable property. Both, husband and wife are entitled to have joint

property despite the fact that only husband who works or vice versa or the result of their work. Included in joint assets are all assets obtained from the business of husband and wife together or the business of one of them regulated in a marriage agreement. In the event of divorce, each party of the wife and husband is entitled to half (one half) of the joint assets. In contrast to inheritance, Islam sees that the property obtained by husband or wife before the marriage takes place is the authority and property of each of them unless there is an agreement for the fusion of their assets become the property of both.[3]

In Islamic law, a husband is obliged to provide for his children and his wife from the husband's own assets.[4] In general, Islamic law does not see joint property. Islamic law views the separation between husband's property and wife's property. What is gained by husband is his property, and vice versa, what is obtained by wife is her property. However, Islamic law strongly encourages mutual understanding between husband and wife in managing personal property in order not to damage the husband-wife relationship that leads to divorce.

According to M. Yahya Harahap, citing the opinion expressed by Muhammad Syah, that joint livelihood of husband and wife should be included in the study of *mu'amalah*, but apparently not specifically discussed in this study.[5] This might be because, in general, the authors of the books of *fiqh* are Arabs who do not know of joint livelihood of husband and wife.

[3] Sayuti Thalib, *Hukum Kekeluargaan Indonesia,* (Jakarta: UI Press, 1986), 89.

[4] Tihami and Sohari Sahrani, *Fikih Munakahat: Kajian Fikih Nikah Lengkap,* (Jakarta: Rajawali Pers, 2010), 180.

[5] Besse Sugiswati, "Konsepsi Harta Bersama dari Prespektif Hukum Islam, Kitab Undang-Undang Hukum Perdata dan Hukum Adat" within *Prespektif,* No. 3, Vol.XIX (September, 2014), 204.

Therefore, the problem of joint livelihood of husband and wife is including partnership or can be called *shirkah*.[6]

Islamic law also holds that property obtained by a husband in a marriage becomes the husband's right, whereas the wife is only entitled to the livelihood given to her. However, *al-Qur'an* and *al-Hadith* do not provide strict provisions that the asset obtained by husband during marriage is fully the husband's rights. Uncertainty in *al-Qur'an* and *al-Hadith*, according to Ahmad Azhar Basyir, means that the wife is directly entitled to the property. Based on this, then the real problem of joint property is a legal area that has not been thought in Islamic law. Therefore, it is open for Islamic jurists to conduct *ijtihad* with the *qiyas* (legal reasoning) approach.[7] From this, it shows the flexibility of Islamic law to be able to accommodate various existing rules.

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[6] *Shirkah* in Arabic means mixing or interaction. It could also be interpreted as sharing something between two or more people according to existing customary law. While in the terminology of Islamic jurisprudence, *shirkah* is a business partnership to take right or operate. In *al-Qur'an*, *Shirkah* is mentioned in chapter *al-Nisa*': 12 (And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt. And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth. But if they are more than two, they share a third, after any bequest which was made or debt, as long as there is no detriment [caused]. [This is] an ordinance from Allah, and Allah is Knowing and Forbearing). There are two types of *shirkah*: (1) freehold *shirkah* (*shirkatul amlak*) is a union between two or more people in possession of one of the goods with one of the reasons for ownership, such as buying and selling, grant or inheritance; (2) transactional *shirkah* (*shirkatul uqud*) is a cooperation agreement between two people who are allied in capital and profits. Whereas in the case of joint property between husband and wife is included in the category of transactional *shirkah*.

[7] Besse Sugiswati, "Konsepsi Harta Bersama dari Prespektif Hukum Islam, Kitab Undang-Undang Hukum Perdata dan Hukum Adat", 204.

The head of the central MUI fatwa commission said that shared assets can be equalized or classified into *shirkah* assets, that is, assets collected during marriage and must be distributed proportionally in the event of divorce. Shared assets can be betrayed by the *shirkah* because it is understood that the wife can also be counted as a working partner or partnership, even though they do not work in the real sense. That is, wives who work in the sense of taking care of the household, such as cooking, washing clothes, caring for children, cleaning the house and other domestic work are also considered as work activities whose role cannot be underestimated.

Joint asset is defined as asset generated by a couple during a marriage, then joint asset can be categorized as *shirkah muwafadhah* or *shirkah abdan*. *Shirkah muwafadhah* is a form of partnership between two parties conducting business activities, while a third party as capital provider. While *shirkah abdan* is a form of partnership of two or more parties, each of whose members conducts business activities, but does not provide capital.[8]

Based on the Compilation of Islamic Law, assets in a marriage are regulated in Articles 85 to 97 of book I (one). The formulation of the articles has been approved by Islamic legal experts in Indonesia to take *shirkah abdan* as the basis for the formulation of the rules of joint assets. The framers of the Compilation of Islamic Law approached from the pathway of the *shirkah abdan* and customary law. This approach does not conflict with the ability to make *'urf* as a method of Islamic law and in line with the rule of "*al-'adah al-muhakkamah*" (customary can be a law).[9]

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[8] Besse Sugiswati, "*Konsepsi Harta Bersama ...*, 210.

[9] Abdul Manan, *Aneka Masalah …*, 111. According to Abdul wahab khalaf, the words *al-'urf* and *al-'adah* are meaningful. *Al-'urf* is something that is known by many people and done by them, from the words, deeds or something left behind. This is also called *al-'adah*. And in the language of Islamic jurists, there is no difference between *al-'urf* and *al-'adah*. See also

Islamic law does not recognize the mixing of the husband's property with the wife's property. Each party is free to regulate their own property and is not allowed interference of one of the parties in the arrangement. The interference of one party is only an advice, not a determinant in managing the personal property of the husband or wife. The provisions of Islamic law are very realistic, because in fact, the mixing of husband's and wife's property into joint property creates many problems and difficulties that require special rules to solve them. Even though Islamic law does not recognize the mixing of personal assets into joint assets between husband and wife, it is recommended that mutual understanding between husband and wife in managing these personal assets. This is to avoid damage to the husband and wife relationship that leads to divorce.[10]

Abdul wahab khalaf, *'Ilm Usul al-Fiqh*, (Beirut: Dar al-Kitab al-'Ilmiyyah, 1971), 67-68.

[10] Ibid., 112.

CHAPTER 8

DIVORCE AND CHILD CUSTODY

When the marriage bond ends in divorce, whether caused by *khulu'* (proposal of divorce from wife)[1] or dies, then the legal act will affect to those who will be entitled to care for the children born from the marriage, whether the mother and family from the line of mother or father or family from the line of father. The Muslim scholars have different views about it, but in general, they base their opinions on the principle of *maslahah* (benefit), namely who is the most capable of giving benefit to children in terms of physical and spiritual health as well as education and so on. In positive law, the rules are regulated in Law No. 1 of 1974 Article 45 Paragraph 1 and 2 and Article 49 Paragraph 1 and in the Compilation of Islamic Law, it is regulated in Article 156 Letter a, b, and c.

Divorce in Islamic Law

Divorce is basically a legal event which will cause and eliminate right and obligation. Divorce, according to customary

[1] *Khuluk* is divorce that is dropped because of the desire and insistence on the part of the wife. It is prescribed by way of *khuluk*, namely the wife is able to pay the price of an agreement between herself and her husband, based on the standard of the given dowry. So, *khuluk*, according to Islamic law, is permissible if it meets the requirements. In addition, there must be an agreement between the two parties, husband and wife regarding the nominal of ransom. This agreement also shows that in the *khuluk* contract, there must be willingness on the part of the husband to accept the ransom, and the ability of the wife to pay the ransom. However, with a note, the nominal price of the ransom may not exceed the dowry of the marriage. Mustafa al-Khin dan Musthafa al-Bugha, *Al-Fiqh al-Manhaji 'ala Madzhab al-Imam al-Syâfi'I,* (Surabaya: Al-Fithrah, vol. IV, 2000), 127.

law, is an extraordinary event, a social and juridical problem in most areas.[2] Divorce, in the term of jurisprudence, is called "*talak*" or "*furqah*", which is to break agreement, whereas *furqah* means divorce. Both words are used by jurisprudents as a term that means divorce between husband and wife. In term of Islamic law, divorce can mean; (1) eliminating marital ties or reducing the attachment by using certain words; (2) breaking the marriage ties and ending the marital relationship; (3) relinquish the marriage bond by saying divorce or its equivalent words.[3]

Divorce suit by husband can be filed with the reasons set out in the explanation of Law No. 1 of 1974 concerning Marriage Article 39 Paragraph (2) as follows:

a. One of the two parties commits adultery or becomes a drunkard, compactor, gambler and others who are difficult to cure;
b. One of the two parties leaves the other for 2 (two) consecutive years without permission to the another party and without a valid reason or for any other reasons against its will;
c. One of the two parties is sentenced of 5 (five) years in prison or a heavier sentence after the marriage took place;
d. One of the two parties commits atrocities or severe maltreatment which endangers the other party;
e. One of the two parties has a bodily disability or illness that results in being unable to carry out their obligation as husband or wife;
f. Between husband and wife, there are continual disputes and quarrels and there is no hope of living in harmony again in the household.

[2] Ali Afandi, *Hukum Waris, Hukum Keluarga, Hukum Pembuktian Menurut Kitab Undang-Undang Hukum Perdata,* (Jakarta: Bina Aksara, 1984), 143.

[3] Zuhri Hamid, *Pokok-pokok Hukum Perkawinan Islam dan Undang-Undang Perkawinan di Indonesia*, (Yogyakarta: Bina Cipta, 1988), 73.

Article 209 of the Civil Code of Indonesia says various reasons that can result in divorce, consisting of:

1. Adultery
2. Leaving a place of residence in bad intention
3. Punishment with a sentence of five years in prison or with a more severe sentence, pronounced after marriage
4. Severely injuring or torturing, done by husband or wife against his wife or her husband, so as to endanger the lives of those who have been injured or abused, resulting in dangerous injuries

Whereas, Article 41 of Law No. 1 of 1974, concerning marriage, states that the consequences of a marriage due to divorce are as follows:

a. Whether mother or father remains obliged to care for and educate their children, solely based on the interests of the child, when there is a dispute regarding the control of children, the court gives its decision;
b. The father is responsible for all the maintenance and education costs to the child needs; when the father, in fact, cannot fulfill these obligations, the court can determine that the mother also bears the cost;
c. The court can require the ex-husband to provide living expenses and/or determine an obligation for the ex-wife.

Child Custody in Islamic Law

In Islamic law, custody is called *hadanah.* Etymologically, *hadanah* is derived from the word *al-hidn*, which means rib, which is to gather into rib. Then the word *hadanah* is used as a term of parenting. Interpreted so because a mother, who is caring for or holding her child, often, puts on one side of the ribs or in the lap

of the side of the mother's ribs.[4] Meanwhile, according to Wahbah Zuhaili, *hadanah* is to educate and care for people who have not been able to be independent in handling their personal affairs, such as how to solve their own affairs, arrange food, drink, clothing, sleeping, bathing, cleaning, washing clothes and so on. People who cannot be independent are those who have not yet reached the age of being, children, intelligence disorder, and crazy people.[5] About *hadanah,* Wahbah Zuhaili said:

> The jurist are in agreement that support for close family members consisting of the children and the children of children (grandchildren) is determined according to what is sufficient to their needs, including bread and other foods, drink, clothing, shelter, and breastfeeding if he still breastfeeds. It is based on the resources of the person and the custom in the area because the obligation is on the necessity. The Prophet said to Hindun, "you may take from the property of Abu Sufyan if you feed them from it justly." As such, maintenance is measured by the level of the need. If the child were in need of an assistant (servant) who would help the child with his needs, then the father is obligated to provide as assistant because it fulfills the needs of the child concerned.[6]

In the dictionary of law, Sudarsono explained that *hadanah* is caring for and educating someone who has not been *mumayyiz* (adult) or lost his intelligence, because they cannot fulfill their own needs.[7] In the term of *fiqh,* there are two different words that are often meant for the same meaning, namely the word *kafalah*

[4] Wahbah al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuh*, (Damsyiq: Dar al-Fikr, Vol. VII, 1989), 717. See also Kamal Muchtar, *Asas-asas Hukum Islam Tentang Perkawinan*, 126.

[5] Wahbah Zuhaili, *Al-Fiqh al-Islami wa Adillatuh*, 718.

[6] Ibid., 828.

[7] Sudarsono, *Kamus Hukum*, (Jakarta: Rineka Cipta, 1992), 433.

and *hadanah*. The second meaning in the simplest sense is nurture. In a more complete sense, it is the care for children who are still young after the breakup of marriage.[8]

According to al-Shan'ani, what is meant by *hadanah* is to care for someone (child) who cannot be independent, educate and care for him to avoid anything that can damage and bring danger to him. Child care is basically the responsibility of both parents. This includes a variety of things, such as economic problems, education and everything about the child's basic needs. In Islam, economic responsibility rests on the shoulder of the husband as the head of the household, although it does not rule out the possibility of the wife being able to assist the husband in bearing these economic obligations. Therefore, the most important thing is cooperation and help between husband and wife in looking after and delivering children to adulthood.[9]

According to Satria Efendi, the term *hadinah* and guardian have close meaning. *Hadanah* is interpreted with the task of looking after and caring for and educating infants or young children from birth to being able to do simple things, such as eating alone, dressing alone and being able to distinguish between those that are beneficial and dangerous for themselves. When measured by age, then until he is seven or eight years old. In the period before that, children generally have not been able to regulate themselves and have not been able to distinguish which are beneficial and dangerous for him.

Thus, *hadanah* is the care and education of young children who have not been able to take care of their own affairs. *Hadanah* is done after divorce until they are able to be independent in facing the reality of life. Regarding who has the most right to

[8] Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, (Jakarta: Prenada Media Group, 2006), 327.

[9] [9] Al-Shan'ani, *Subul al-Salam*, vol. 3, (Kairo: Dar Ihya al-Turats al-'Arabi, 1960 M), 227.

hold the *hadanah* right, the Muslim scholars differ in their opinion in determining who has the right to *hadanah*.

The scholars of the Hanafi school of thought state that *hadanah* is the right of *hadin* (caregiver). Therefore, he has the right to waive his right even without compensation. If the gift is a right other than a caregiver, surely it will not be separated by the release. He cannot be forced to carry out care if he does not want to exercise his right. Instead, he has right to force the child to be cared for, if the child refuses to be cared for by him.

Some of the jurists argued that *hadanah* is a child's right. If the child relinquishes the right, then the right will be released. Caregivers can be forced to take care if they do not want to carry out their obligations. Conversely, if a child does not want to be cared for by a caregiver, then the caregiver cannot force the child to be cared for by him.

Muhaqqiqin[10] Muslim scholars believe that *hadanah* is related to three rights: the right of the caregiver, the right of the child, and the rights of the father or person occupying his position. If there is a possibility to compromise all three, then it must be done. However, if there is a conflict, the children's right must take precedence over other rights. Foster children are entitled to receive care from caregiver because they need care, guidance, and lessons that are indispensable in dealing with the realities of life in the future. Likewise, the mother and father are entitled to the care of their children, because they are the people who most want the happiness and benefit of the child in the future.[11]

The three opinions above contains several consequences as follows: (1) the caregiver mother can be forced to perform the obligation of *hadanah* if there is no other; (2) the caregiver mother

[10] According to Ibn 'Arabi, *Muhaqqiqin* scholars are those who have a fairly high knowledge and are more oriented to the search for the essence of God's truth, or commonly referred to as the Sufis.

[11] Wahbah al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuh*, 718-719. See also Kamal Muchtar, *Asas-Asas Hukum Islam Tentang Perkawinan*, 141.

may not be forced to perform the obligation of the gift, if there are other people who can do so on condition that the child being cared is not in danger; (3) if a woman commits *khulu'* to her husband then the right of *hadanah* to a child is still in the hand of the mother; (4) father is not permitted to take children from the mother of the owner of the right of *hadanah*, then give them to others except for reasons that can be accepted according to the *shari'ah*; (5) if the woman who is breastfeeding is not a woman who has right of *hadanah*, then she must carry out breastfeeding activity in front of her, so that her parental right is not lost.[12]

With regard to whom among the father or mother who is more entitled to perform the duties of the children's *hadanah*, there are several narrations in the Prophet's *hadith* which indicate the following: (1) if the children have not reached the age of *tamyiz*, then the mother has the most right to care. This is based on the history of Abu Dawud from Abdullah Ibn Amr, that there was a woman reporting to the Messenger of Allah, that the ex-husband who had divorced her intended to take a child who was in her care. The Prophet resolved this problem by stating that the woman had more right to care for her child until she married someone else.[13] (2) If the child is able to meet his own needs, in the sense of being a *mumayyiz*, then he is allowed to choose between his mother and father.[14]

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[12] Wahbah al-Zuhaili, *Al-Fiqh al-Islami wa Adillatuh*, 718-719.

[13] Abu Dawud, *Sunan Abu Dawud*, vol. II, (Libanon: Dar al-Kutub al'Ilmiyyah, 1996), 525.

[14] This is consistent with the Prophet's *hadith* narrated by Imam Ahmad and four other *hadith* priests namely Abu Dawud, al-Tirmizi, al-Nasa'i and Ibn Majah. Abu Hurairah narrated that a woman reported that a former husband who had divorced her took a child under her care. The three of them: mother, father and child were then presented before the Apostle. Then he told the child to choose one of his mother or father. The child, in the end, took her mother's hand. Jalaluddin al-Suyuti, *Sharh Sunan an-Nasa'i*, (Beirut: Dar al-Kutub al-'Ilmiyyah, vol. V, 1988), 185-186.

The sequences of the holders of the *hadanah* right are based on the benefit in term of caregivers from the line of mother as follows: Hanafiyah: mother, mother's mother, mother's father, biological sister, mother's sister, daughter of biological sister, daughter of sister's father, sister, and *asabah* in the order of inheritance. Malikiyah: mother, grandmother of mother, sister of mother, grandmother and so forth, sister, father's sister, daughter of brother, the person whom given the will, and the most important *asabah*. Shafi'iyyah: Mother, mother's mother, father's mother, sister, mother's sister, daughter of brother, daughter of sister, sister of father, and all *asabah* heirs who have *mahram* (relative) relation and can inherit as Hanafiyyah.[15]

Meanwhile, if the child does not have any of the aforementioned female relatives, then the right of *hadanah* is transferred to the men according to the order of the heirs of the *asabah* relatives namely father, grandfather and so on, the brother and sister and their children and so on down, their father's brother and children according to the Hanafiyyah and those honed in the Shafi'i school of thought. However, if they do not exist, then the right of *hadanah* will turn to *zawil arham*.[16]

Guardianship in Islamic Law

The term of guardian is used for a person who carries out care of children from the end of the *hadahah* period until he is intelligent, or until marries for a daughter. Thus, the guardian's duty is to connect and perfect the children's education that has begun during the time of the *hadanah* and is responsible for the survival and care of the child until he is of age and is able to stand on his own. Guardian also means a person who is given the authority to look after the assets of a child and deliver the child to adulthood.[17]

[15] Wahbah Zuhaili, *Al-Fiqh al-Islami wa Adillatuh*, 722.

[16] Ibid., 723.

[17] Satria Effendi M. Zein, *Problematika Hukum Keluarga Islam Kontemporer*, (Jakarta: Prenada Media, 2004), 220.

Abu Zahrah divides the guardianship of the children since he was born into 3 parts, namely: (1) trusteeship of the child's basic education, namely *hadanah;* (2) the guardianship of self-protection of children, which lasts from the age of the child over the age until he is old. This part also applies to crazy people, mentally retarded people, unmarried women (virgin) and widow who is feared unable to look after herself; and (3) guardianship of children's property, which applies to children, madmen, mentally retarded people, wasteful people, forgetful people, and weak people.[18]

Child Custody in Positive Law of Indonesia

In Article 45 Paragraphs 1 and 2 of Law No. 1 of 1974, concerning Marriage, explains that one of the obligations that must be done by both parents for their children. The Articles are: (1) both parents are required to maintain and educate their children well and (2) the parental obligation referred to in Paragraph 1 of this article apply until the child marries or can stand alone, whichever obligation continues even the marriage between the two parents broke up.

The article emphasizes one of the obligations of husband and wife, namely caring for and educating children until they can be independent in facing the reality of life. This obligation is not only limited when they are still bound in marriage, but also charged to parents when they have broken the marriage ties. This problem in the classical *fiqh* literature is known as *hadanah*. In Law No. 1 of 1974 Article 49 Paragraph 1, concerning Marriage, states: "One or both parents may be revoked of authority over a child or more for a specified time at the request of another parent, family from a straight line up and adult sibling or authorized

[18] Muhammad Abu Zahrah, *Tanzim al-Islam li al-Mujtama'*, (Mesir: Dar al-fikr al-'Arabi), 88.

official, with a decision of the court in matters: (1) he neglects his obligations to his child; (2) he behaves badly.

The article was later strengthened by the Compilation of Islamic Law Article 156 Letter c which states: "if the *hadanah* holder turns out to not be able to guarantee the physical and spiritual safety of the child, even though the cost of living and support has been fulfilled, then on the request of the relative concerned, the Religious Court can transfer the *hadanah* right to the other relatives who have the *hadanah* right".

Whereas, in Article 156 of the Compilation of Islamic Law (KHI) Letter a and b have confirmed the general provisions agreed upon in the *fuqaha* relating to who has the *hadanah* right to children. Letter a of the article states: children who have not been *mumayyiz,* they have right to get a *hadanah* from their mother, while the letter b states: children who have been *mumayyiz*, they have right to choose a *hadanah* from their father or mother. The Compilation of Islamic Law also regulates the order of the right to perform *hadanah* if the mother has died. In Letter a of the article, there is a continuation: unless the mother has passed away, then her position is replaced by: (1) straight-up women from the mother; (2) father; (3) women in a straight line up from the father; (4) the sister of the child concerned; (5) relatives of women in line to the side of the mother; (6) relatives of women according to the side lines of the father.

This sequence is different from the order of the four schools of thought above. However, it has many similarities with the order that exists in the Shafi'i school of thought and the Hanbali school of thought. The difference is the Compilation of Islamic Law puts the position of father directly under the women straight line up from mother. Compilation of Islamic Law does not wait until the end of the caregiver from the side of women to give custody to father. This is a realistic ordering system and further guarantees benefits for children.

As for the conditions of caregivers, Abu Zahrah noted several conditions that must be fulfilled by the caregivers. These conditions are as follows: (1) independent; (2) puberty; (3) sensible; (4) having ability to manage all the affairs of the children they care for; (5) trustworthy from the point of self-care and moral; (6) not lapsed; (7) not to place foster children in other than relatives; (8) not married to others from relative due to *mahram* relationship. Thus, his *hadanah* right is not lost if he is married to a relative who has a *mahram* relationship. So that, the child, who is cared for, will grow up in an atmosphere full of affection and away from hatred.[19]

The articles of the marriage law and the Compilation of Islamic Law do not regulate the issue of religious differences between caregivers and foster children. But, both of them put a strong pressure on the second condition, namely the trustworthiness of caregivers in the matter of care and the moral education of foster children. The Religious Court is authorized to revoke the right of *hadanah* from unsafe mandate holders, either in taking care of the daily needs of foster children or because he behaves so badly that it is feared that will affect the behavior of the child.

In the matter of religious differences, the Religious Court needs to consider whether these religious differences have an impact on the benefit for foster children or not. If the difference is proven to damage the child's self, then the court can establish, that caregivers are seen as not trustworthy. Borrowing the opinion of Abu Zahrah, the right of *hadanah* can be revoked from him and then transferred to other relatives who have *hadanah* rights as well.

Causes of the *Hadhanah* Right Disconnect

A holder of *hadanah* right will lose that right if he does certain things. In the opinion of Malikiyah, which is mostly

[19] Muhammad Abu Zahrah, *Ahwal al-Shakhshiyyah*, 476-477.

agreed upon by other jurists, there are four reasons that invalidate the right of *hadanah*, namely; (1) if the caregiver is traveling very far or to an area that is very concerned about her safety without taking the child in care so it is not possible to visit the child on that day. This is agreed upon by three other schools of thought; (2) if the caregiver suffers from insanity, leprosy or *barash*. This opinion is agreed upon by Hanabilah; (3) if the caregiver shows a despicable character does not pay attention to the religious issues of foster children and does not provide protection to him so that the benefit of the children is neglected. This is agreed by other *fuqaha*; (4) if the caregiver mother is married to another man.[20]

Limitation of Child Custody Period

Basically, the exercise of *hadanah* right will end when the fostered child reaches an age and he has been able to be independent without the need for help from women. The end of the *hadahah* for boys starts when they are able to eat alone, drink alone, and wear their own clothes. As for girls, this right of *hadanah* ends when they reach puberty, that is, when they have menstruated. The Muslim scholars are of the opinion that the limitations on the period of *hadanah* are: (1) from the time the baby is born to the age of *mumayyiz*. During this period, parenting is generally left to the mother as the guardian of child care and education; (2) from the age of *mumayyiz* until he is adult. At this time, child care is left to the father as the guardian of the child's self-trust (*wakalah*).

Article 45 Paragraph (2) of Law No. 1 of 1974 stipulates that the obligation of both parents in caring for and educating their children is until they can stand on their own. Moreover, Article 47 Paragraph (1) confirms that children, who are not yet 18 years old or unmarried, remain under the authority of their parents as

[20] Wahbah Zuhaili, *Al-Fiqh al-Islami Wa Adillatuh*, 730-731.

long as they are not deprived of their authority. And Paragraph (2) stated that the parents represent the child regarding all legal actions inside and outside the court. This article is related to guardianship of the child.

Article 48 states that parents are not allowed to transfer right or pawn permanent property owned by their children that are not yet 18 (eighteen) years of age or have never entered into a marriage, unless the child's interest wish it. This article relates to guardianship of child property. Articles regarding guardianship of the child and guardianship of the child's asset indicate the age of 18 years old. While the guardianship of the care and education of children does not include the age of 18 years old. This is a deliberate marriage act to sort out and differentiate the deadline of the three trusts. Therefore, we can analogize the deadline of the *hadanah* to two other forms of trusteeship, namely 18 years.

The Right to Visit Children under the Care of Other Parties

The scholars from among the Hanafi school of thought argue, if the child is under the care of the mother, then the father may see him by bringing to a place that allows the father to see every day. If the child is cared for by his father, because the mother's right of abortion has been aborted or due to the expiration of the birth period, then the mother may see him by bringing to a place where it is possible to see every day. The maximum limit is one week.

The scholars from among the Maliki school of thought argue that mother is entitled to see her children who are still very small once a day and she can see her children who have grown up once a week. The right of mother is the same as that of the father in seeing children before they reach the age of learning. After entering the age of education and teaching, father has right to accompany his child to study for all the times.

The scholars from the Shafi'i school of thought believe that if a child is already *mumayyiz*, he can choose his father, and then his mother may visit him. However, father may forbid his daughter from visiting her mother in order to protect her. Preferably, the mother prefer visits the daughter. Father must not prohibit the visit of mother to her children, both men and women. However, the visit cannot be too long. He may choose between giving his mother a chance to enter his house and inviting his child to leave the house in order to meet his mother. If the child, both male and female, gets sick, then the mother is more important to take care of him or her, because mother is more patient than father. Treatment can be done both at father's home and mother's home as long as his father allows.

The scholars from among the Hanabilah school of thought are in line with the Shafi'yyah, that if the child chooses his father, then he is under his care, both in the daytime and at night. Father must not forbid his mother to visit him or take care of him. If he chooses his mother, then he is beside her at night and next to his father in the afternoon to teach and educate him. Whereas, a daughter must be under the care of her father until she marries. One of the parents may not forbid another to visit the child, because it means breaking the bonds of *silaturrahim*, with the condition that the visit is not long. If the child is sick, then the mother has more right to care for him at the father's house.[21]

Fees for *Hadanah*

Another thing that is no less important with respect to *hadanah* is whether caregiver get wages for *hadanah* services as people who work have the right to wages from their work. In this case, there are some opinions of the Muslim scholars, as below:

First, majority of *fuqaha* is of the opinion that a caregiver for a child, both his own mother and others, is not entitled to receive wage, because the mother has already earned a living from his

[21] Ibid.

father if she is still officially his wife. Thus, if other than the mother needs a place to stay or a maid to cook or wash, then all costs for those needs must be provided.

Secondly, the scholars from among the Hanafi school of thought are of the opinion that a child caregiver is not entitled to get a *hadanah* reward if she is still bound by marital relations as a wife or is still undergoing the *iddah* period, both from *raj'i* divorce or *bain* divorce.[22] She is not also entitled to breastfeeding wage because both are obligations stipulated by religion, while the income she receives on the sidelines of marriage and *iddah* period is sufficient for the cost of *hadanah*. Thus, if the *iddah* period has ended, the mother has right to get reward for *hadanah* because the meaning of the wage has shifted to wage for the work she does. As for the child caregiver is not from his own mother, and then she is entitled to get a reward for her childcare work.

The Compilation of Islamic Law Article 156 Letter d stipulates that all costs related to these rights are the responsibility of the father according to his ability, at least until the child can take care of himself (21 years old). In fact, both parents are still obliged to provide maintenance costs to their children even though they are deprived of their authority in accordance with Article 49 Paragraph (2) of the Marriage Law.

[22] *Raj'i* divorce is a divorce by a husband with divorce 1 (one) and divorce 2 (two). While, *ba'in sughra* divorce (small) is divorce caused by a wife either by *fasakh* or *khuluk*.

CHAPTER 9

RECONCILIATION IN MARRIAGE AND LEGAL CONSEQUENCES

The concept of reconciliation in marriage is sufficiently discussed in *al-Qur'an*, *al-Hadith*, and positive law in Indonesia. The existence of the reconciliation in a marriage shows that there is still a chance several times for husband, who has divorced his wife, to rebuild a household by taking lessons from the past events. In Islam, this reconciliation mechanism is found in *al-Qur'an* chapter *al-Baqarah*: 228 and 231 and the opinions of Muslim scholars. In positive law, the reconciliation is regulated in the Compilation of Islamic Law (KHI) in Chapter XVIII Articles 163 – 168 No. 3 of 1975.

Concept of Reconciliation (*Rujuk*)

The word reconciliation in marriage means return. In Islamic legal term, the jurists introduce the term of reconciliation refers is in relation with the law of marriage. According to Indonesia Dictionary, it is the return of the husband to his barred wife, namely divorce one or divorce two, when the wife is in *iddah* period.[1] The Muslim scholars from among the Hanafi school of thought defines reconciliation of marriage by maintaining existing property right without compensation within the *iddah* period, or continuing the husband and wife relationship while she is still in the *iddah* period due to the *raj'i*

[1] Tihami and Sohari Sahrani, *Fikih Munakahat: Kajian Fikih Nikah Lengkap*, (Jakarta: Rajawali Pers), 327.

divorce.[2] While according to majority of the Muslim scholars, the reconciliation (*rujuk*) is to return the barred woman, in addition to *ba'in* divorce, to the marriage as long as the woman is still in the *iddah* period without a new contract. This concept of reconciliation only applies to women who are undergoing the *iddah* period of *raj'i* divorce.[3]

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[2] In Islamic law, there are 3 types of divorce, namely *raj'i* divorce, *ba'in sughra* divorce (small divorce) and *ba'in kubra* divorce or divorce 3 (three). The differences between the three are: (1) *raj'i* divorce is a divorce by a husband with divorce 1 (one) and divorce 2 (two). With the status of *raj'i* divorce, the husband may reconcile or return to the wife as long as his wife is still in the *iddah* period without having to have a new marriage contract. However, if the desire to reconcile after the *iddah* period is over, then a new marriage contract must be held. (2) *ba'in sughra* divorce (small) is divorce caused by a wife either by *fasakh* or *khuluk*. In this condition, the husband may not reconcile to the wife during the *iddah* period and the husband may return to the wife after the *iddah* period has ended with a new marriage contract; (3) *ba'in kubra* divorce (divorce three) is a divorce in which the husband is not allowed to reconcile or return to his wife even though the *iddah* period is over except after the wife has married another man and a few moments (months / years) then the second man divorced her. The argument about divorce is *al-Qur'an*, chapter *al-Baqarah*: 228-229: "Divorced women remain in waiting for three periods, and it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the Last Day. And their husbands have more right to take them back in this [period] if they want reconciliation. And due to the wives is similar to what is expected of them, according to what is reasonable. But the men have a degree over them [in responsibility and authority]. And Allah is Exalted in Might and Wise" (*Al-Qur'an, al-Baqarah*: 228) and "Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers". (*Al-Qur'an, al-Baqarah*: 229)

[3] Amir Nuruddin dan Azhari Akmal Tarigan, *Hukum Perdata Islam di Indonesia,* (Jakarta: Kencana, 2012), 264.

So, reconciliation in marriage is to restore the full legal status of the marriage after the *raj'i* divorce which is carried out by the ex-husband to his ex-wife in the *iddah* period with a particular saying. In other words, reconciliation occurs when a husband and a wife have committed divorce and it is not divorce three.[4] From this formulation, it can be concluded that when a divorce takes place between husband and wife despite its status is a *raj'i* divorce, but basically, such kind of divorce results in a prohibition of sexual relation between the two. Therefore, although the ex-wife is in the period of *iddah*, he has right to refer to his ex-wife. To justify returning to his ex-wife to be his wife again, it must be with the statement of reconciliation spoken by the ex-husband in question. With a statement of reconciliation, the ex-husband is lawful to return to his ex-wife because their marital status returned to normal.[5]

The Legal Basis of Reconciliation in Marriage

The legal basis for this reconciliation is found in *al-Qur'an* chapter *al-Baqarah*: 231 and 228. It is not justified that the ex-husband uses the right to refer to it with a bad purpose, such as referring his wife only to harm her or play around to her. The case like this often occurs in society, where the husband who refers to his wife behaves worse because he only wants to abandon his wife and hang a wife to not be married by someone else. This is an act that is hated by Allah as in verse *al-Baqarah*: 231:

> And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms, and do not keep them, intending harm, to transgress [against them]. And whoever does that has certainly

[4] Tihami dan Sohari Sahrani, *Fikih Munakahat,… ,* 328.

[5] Ibid.

> wronged himself. And do not take the verses of Allah in jest. And remember the favor of Allah upon you and what has been revealed to you of the Book and wisdom by which He instructs you. And fear Allah and know that Allah is Knowing of all things. (*Al-Qur'an, al-Baqarah*: 231)

If the husband drops his divorce when his wife is menstruating, then the husband is obliged to refer his wife back, because divorce during menstruation is not in accordance with Islamic law or is called *bid'i* divorce.[6] This provision is in accordance with the *hadith* from Ibn Umar R.A. that he mentally waived his wife during menstruation, and then Umar asked the Prophet, then, the Messenger of Allah said to Umar to order his son to refer his wife. Thus, the husband's legal status to reconcile to his wife depends on the motives and goals and according to whether or not the way to do divorce with the guidance of the Prophet's tradition. The law of husband's reconciliation to his ex-wife has several types, namely:[7]

1. *Wajib* (obligatory), for a husband who barks one of his wives before he completes his time distribution of divorced wives.

[6] *Bid'i* divorce is divorce that occurs under the prohibited conditions. For example, a husband drops divorce or for the first time with the three times divorce, divorces his wife when she is menstruating or postpartum, divorces his wife in pure/clear condition and has already had a sexual intercourse with her, meanwhile, the wife's condition is unclear whether she is pregnant or not. *Bid'i* divorce with three times of the word divorce in one time is forbidden to be married before the woman married another man. "And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah . These are the limits of Allah, which He makes clear to a people who know." (*Al-Qur'an, al-Baqarah*: 230)

[7] Mustofa Hasan, *Pengantar Hukum Keluarga*, (Bandung: CV Pustaka Setia, 2011), 208.

2. *Haram* (unlawful/prohibited), if the reconciliation is by the purpose to hurt his ex-wife.
3. *Makruh* (disapproved), if divorce is better and beneficial for both (husband and wife).
4. *Jaiz* (allowed/neutral), this is the original law of reconciliation in marriage
5. *Sunnah* (recommended), if the husband's intention is to improve the situation of his wife, or the reconciliation is more beneficial for both (husband and wife).

In the existing legislations in Indonesia, the issue of reconciliation is not regulated in Law No. 1 of 1974 and in the Government Regulation No. 9 of 1975 but in the Compilation of Islamic Law, Chapter XVIII Articles 163-166. In Article 163 of the Compilation of Islamic Law it is stated that: (1) a husband can refer or reconcile to his wife in the period of *iddah*; (2) referrals can be made in the following cases: (a) marriage termination due to divorce, except divorce that has fallen three times or divorce has been dropped by *qabla al-dukhul* (before having sexual intercourse); (b) the termination of a marriage based on a court ruling for reasons or reasons other than adultery and *khulu*'.

Whereas, in the Compilation of Islamic Law Article 164: "A woman in *iddah* of the *raj'i* divorce has the right to file an objection against the wishes of her ex-husband before the Marriage Registrar witnessed by two witnesses". And Article 165: "Referral or reconciliation made without the consent of the ex-wife can be declared invalid by the decision of the Religious Court". And Article 166: "The reconciliation must be proven by the quotation book of the reconciliation registration and if the evidence is lost or damaged, so that it cannot be used again, duplicate may be requested from the issuing agency".

Requirements and Pillars of Reconciliation

Reconciliation can occur as long as the wife is still in the *iddah* period of the divorce with some requirements as follows:

1. Witness for reconciliation. *Fuqaha* have different opinion about the existence of witnesses in the reconciliation. Imam Malik believes that the witnesses in the referral are recommended, while Imam Shafi'i obligates.
2. Reconciliation to wife with the words or having a sexual intercourse to his wife. Regarding with how to refer, there are also differences of opinion. The first opinion is from Imam Malik who said that the reconciliation by association is considered legitimate if intended by husband to refer. The second opinion is stated by Imam Abu Hanifah who questions the reconciliation with association due to tend to be unclear in intention.
3. Both parties are sure that they can live together again in a harmonious household. If both of them are not sure they can get back to life in a harmonious household, then the reconciliation is invalid. And the reconciliation without being sure that they can live better is *makruh* (disapproved).
4. The wife has been interfered with (*ba'da dukhul*/after having sexual intercourse). If the divorced wife has never been interfered with, then it is not legal to reconcile, but they must have a new marriage contract.
5. Wife has been divorced twice. If the wife has been divorced three times, then it is not valid to reconcile. This is as explained in *al-Qur'an*, chapter *al-Baqarah*: 230.[8] If the husband wants to reconcile to his wife, then the wife must first marry someone else and then the second husband divorces her. Then the first husband may refer to her back.

[8] Meaning: "And do not marry polytheistic women until they believe. And a believing slave woman is better than a polytheist, even though she might please you. And do not marry polytheistic men [to your women] until they believe. And a believing slave is better than a polytheist, even though he might please you. Those invite [you] to the Fire, but Allah invites to Paradise and to forgiveness, by His permission. And He makes clear His verses to the people that perhaps they may remember". (*Al-Qur'an, al-Baqarah*: 230)

6. The divorced wife is in the period of *iddah* of *raj'i* divorce. If divorced take place because of *fasakh* or *khulu* or a divorced wife has never been interfered with, then the referral must be remarried.

Regarding with the pillars of reconciliation, it can occur as long as the wife is still in the *iddah* period of the divorce and has fulfilled some pillars, as follows:

1. There is a husband who reconciles or is his representative
2. There is a wife who is reconciled and has been interfered with
3. Both parties (ex-husband and wife) love one another
4. With a statement of *ijab* and *qabul* such as saying the words of reconciliation, for example: "I reconcile you today," or "I have reconciled my wife named … on this day ", etc.

Procedures of Reconciliation

The procedures for reconciliation have been regulated in the Minister of Religion Regulation of the Republic of Indonesia No. 3 of 1975 concerning Obligations of the Marriage Registrar and Working Procedures of Religious Court in Implementing Marriage Law for Muslims, and then it is strengthened in the Compilation of Islamic Law Articles 167, 168, 169. In the Minister of Religion Regulation of the Republic of Indonesia, reconciliation is referred to Article 32, 33, 34, and 38. Article 167 of the Compilation of Islamic Law states:

1. Husband, who wants to refer to his wife, comes together with his wife to the Marriage Registrar (PPN) or PPN's assistant which occupies the husband's and wife's residence by bringing a determination regarding the occurrence of divorce and other required certificates. But, in Article 32 (1) of the Minister of Religion Regulation of the Republic of Indonesia No. 3 of 1975 only mentions PPN or the Assistant Registrar of Marriage, Divorce, and Reconciliation (P3NTR) which dominates the wife's place of residence).

2. The reconciliation is made with the agreement of the wife before the Marriage Registrar (PPN) or PPN's assistant.
3. The Marriage Registrar (PPN) or PPN's assistant checks and investigates whether the husband, who will reconcile, meets the conditions of referring according to the law of *munakahat* or not. Whether the referral to be carried out is still in the *iddah* period of *raj'i* divorce or not, Whether the woman to be referred is his wife or not.
4. After that, the husband says and each concerned along with witnesses sign the Referral Registration Book.
5. After the referral is carried out, the Marriage Registrar (PPN) or PPN's assistant advises the husband and wife about the laws and their obligations relating to the referral (reconciliation). It is mentioned in Article 32 Paragraph (2), (3), (4) and (5) Minister of Religion Regulation No. 3 of 1975.

Furthermore, after the referral is carried out, it is more technical in nature which becomes the task and authority of the Marriage Registrar (PPN) or the Assistant Registrar of Marriage, Divorce, and Reconciliation (P3NTR). In this case, the Compilation of Islamic Law, Article 168 states:

1. In case the referral is made before the Assistant Registrar of Marriage, Divorce, and Reconciliation (P3NTR), the list of referral is made in duplicate, filled and signed by each concerned along with witnesses, a document is sent to the Marriage Registrar (PPN) that occupies it, accompanied by the necessary statements to be recorded in the Reconciliation Registration Book and the others are saved.
2. Delivery of the first sheet of the referral list by the Assistant Registrar of Marriage, Divorce, and Reconciliation (P3NTR) is done in no later than 15 days after the referral is made.
3. If the first sheet of the reference list is lost, the Assistant Registrar of Marriage, Divorce, and Reconciliation (P3NTR) makes a copy of the second sheet list with the official report

on the causes of the loss. It is regulated in Article 33 of the Minister of Religion Regulation of the Republic of Indonesia No. 3 of 1975.

The next is mentioned in Article 169 of the Compilation of Islamic Law (KHI) which describes other administrative steps, as follows:

1. The Marriage Registrar (PPN) shall make a statement regarding the occurrence of the referral and submission to the Religious Court at the place where the divorce took place. The statement is used to take care of and retrieve the Marriage Certificate Quotations of each concerned after being given a note by the Religious Court in the space provided in the Marriage Certificate Quotation that the person concerned has referred or reconciled.
2. The note referred to in Paragraph 2 contains the place where the referral occurred, the date of the referral was pledged, the number and the date of the Quoted Reference Registration Book and the registrar's signature. And it is regulated in Article 34 of the Minister of Religion Regulation of the Republic of Indonesia No. 3 of 1975.

Just as a marriage can only be proven by a marriage certificate, then in a reference is too. This is intended to realize legal and administrative order, whose estuary is to realize justice in society. In the terminology of *fiqh*, this kind of legal innovation is built on the basis of the *mashlahah* (benefit for the people) to build a law to realize benefits that are not regulated by the texts, whether governing or prohibiting.[9]

[9] Ahmad Rofiq, *Hukum Perdata Islam di Indonesia,* (Jakarta: Rajawali Pers, 2013), 258.

CHAPTER 10

TERMINATION OF EMPLOYMENT (PHK) FOR FEMALE WORKERS FOR MARRIED, PREGNANT, AND CHILDBIRTH REASONS

A frequent issue in the business world is the termination of employment either unilaterally by the company or workers. Often this unilateral termination leaves a new problem namely the taking of rights that should be accepted by workers as severance pay. Moreover, to mention the issues related to woman workers, who naturally have limitations compared to male workers, such as marriage, pregnancy, and childbirth. They often do not get humane treatment from the companies that employ them. By seeing the importance of protecting the rights of woman workers, the government through the Regulation of the Minister of Labor Number: Per-03/Men/1989, prohibits of termination of employment for woman workers who are married, pregnant, and giving birth.

Understanding the Termination of Employment

Among the very vital component in a company is employment. The more prosperous the labors of the company, this shows the greater and professional management the company has. The role played by labors is not small in a company. Their share will be crucial in determining the direction of the national development. Therefore, treating the labor properly and humanely, from home industries to large companies, will have potential to achieve the development goals of a nation. Thus, one side of labors' or laborers' live is

guaranteed. On the other hand, production activities will be better.[1]

However, based on the facts, the normative rights of workers are often underestimated by companies even the achievement of their rights is far from feasible. This fact can be seen in terms of wage of labor, there are wages that are still under the provincial minimum wage (UMP),[2] facilities in the workplace that are not appropriate, do not provide work leave, employ pregnant women, pay less attention to comfort and safety while at work. And the thing that is the most detrimental to workers is the frequent termination of work relationship unilaterally. Of course, these are points that need attention by many, especially the role of government in providing legal certainty.

Specifically, talking about female workers is a separate topic where they have different specifications from male workers. There are certain areas and parts of a job that women cannot. There are certain conditions where female workers cannot or is obstructed in carrying out their duties. For example, the condition of pregnancy and childbirth is a natural factor that is always attached to female workers. The most important thing related to the specifications of female workers, it is necessary to

[1] Susan Blackburn, *Women and the State in Modern Indonesia*, (New York: Cambridge University Press. 2014)

[2] The Government of Indonesia has put in place a new mechanism for determining minimum wages, as stipulated in the Government Regulation (PP) No. 78/2015 about Wages. Through the Government Regulation on Wages, the Government introduced a new formula which would later be used to set the Minimum Wage every year, starting in 2016. The new formula requires that minimum wages be adjusted annually based on accumulated inflation and economic growth. The determination of the Minimum Wage is based on: (1) the number of days per week determined: 5.0; (2) the number of hours per week determined: 40; (3) the minimum wage is calculated with the provisions of 40 hours/week. This is based on Law 13/2003 Article 77 Paragraph (2) which explains as follows: (a). 7 hours per day and 40 hours per week for 6 working days a week; or (b). 8 hours per day and 40 hours per week for 5 working days a week.

have special protection for them without having to harm both the company and workers.

In statutory regulations, the rights of woman workers have been guaranteed by the law and several other regulations. Women have equal rights to work and get proper treatment. In fact, many are found in several companies that require women to resign voluntarily when she is married, pregnant and giving birth. When the woman begins to marry and even becomes pregnant and gives birth, she is forced to submit a resignation. Though married, pregnant and giving birth is an outward nature for woman's reproductive function. This forced resignation often occurs because women who are married, pregnant and giving birth are considered unable to carry out their work maximally, so that it shall interfere the company productivity.

Of course, it would be very different between resigning and resting. Many cases where they are told to resign which means there is no consequence severance that should be their right. Many companies do this for financial reasons and company losses. Yet, according to statutory regulations, every company that employs workers must be responsible for the rights of workers in accordance with applicable regulations. This is a fact that often happens in the field. Therefore, there need to be a double regulation that maneuvers their rights fulfilled humanely.

Regulation of the Ministry of Labor Number: Per-03/Men/1989

Regulation of the Ministry of Labor Number: Per-03/Men/1989 is a regulation that specifically addresses the prohibition of termination of employment for female workers who are married, pregnant and giving birth. This regulation has several main materials, namely: prohibition for company or

entrepreneurs, obligations of company, exclusion of obligations, transitional rules, and sanctions for company that violates.[3]

Prohibition for the company to terminate employment for female workers because they are married, pregnant, and giving birth in certain work relationship in certain time or not in certain time, is extremely needed. The company must plan and carry out the transfer of duties to female workers without prejudice to their rights for the company. It is because the nature and type of work does not allow the employment of pregnant and childbirth workers. If the company does not carry out this obligation, then the company is obliged to give leave outside the responsibility of the company until the right of pregnancy and maternity leave arises in accordance with Article 13 of Law No. 1 of 1951. The duration of leave outside the responsibility of the company is given on the basis of an agreement between the company and the workers.

The company must also provide pregnancy or maternity leave in accordance with applicable regulation. In this case, the company must re-employ them in the same place and position without reducing their rights before. In the transitional period, before the regulation had been established regarding company regulation or collective work agreement that have been agreed and governing termination of employment for women, these regulations had had remained in effect until the specified deadline. For a new collective work agreement, the company must obey and implement the provision of the ministerial regulation. The company which violates these provisions is threatened with a sentence of 3 years in prison or a fine of one hundred thousand Rupiah, in accordance with Article 17 of Law No. 14 of 1969 concerning the basic provisions concerning labor.

[3] Agustinus Supriyanto, "Kesenjagan Perlindungan Pekerja Wanita Menurut Konvensi Perserikatan Bangsa-Bangsa Dalam Peraturan Perundang-Udangan Indonesia" within *Jurnal of Mimbar Hukum*.

The criminal threat is too mild for the company, so that, many companies often make these deviations.

Models of Termination of Employment

One of the legal requirements for a transaction in *muamalah* is the existence of a contract from both parties. If the conditions are not fulfilled, it means that the *muamalah* transaction is canceled. Also included in the case of contract termination, it must be done by both parties. In the case of termination of employment unilaterally, it is also not permissible in Islam. Moreover, those who have to cancel are the companies that have control over the workers. In positive law in force in Indonesia, termination of employment must be done in accordance with applicable mechanism and regulation. There are, at least, four models of termination of employment, namely:[4]

1. **Termination of employment by law**

   The employment relationship is broken or ends automatically and the company does not need to stipulate the termination of employment from the competent authority. Termination of employment by law occurs because: the employee is still on the trial, the employee submits an application for resignation in writing of his own volition without any pressure or threat, the employee has reached retirement age according to company regulations, the employee dies.[5]

2. **Termination of Employment for Workers.**

   Termination of employment can take place for workers with some reasons that workers disagree with the employer's

[4] Muchamad Taufiq Dan Zainul Hidayat, "Kajian Hukum terhadap Perselisihan Pemutusan Hubungan Kerja secara Sepihak pada Perusahaan" within *Jurnal Of Wiga*, Vol. 2, No.2, (September 2011), 82.

[5] Ibid., 116.

behavior. In Article 20 Paragraph (1) of the Decree of the Minister of Labor Number: Per 150/Men/2000 explaining the allowance of workers to terminate work relation unilaterally in the condition of: (1) the employer abusing and insulting workers; (2) employer persuades or orders workers to commit acts that are contrary to the law; (3) if the employer has made three consecutive attempts or not paid wages on the agreed time; (4) employer neglects obligation that has been promised to workers; (5) the employer does not give work properly to workers whose wages are proportional to the results of their work; (6) employer orders workers to carry out work outside of what is promised; (7) employer provides work that endangers the life, safety, health and moral of workers, while the work is not known at the time the employment agreement is made.

3. Termination of Employment by Employer or Company.

Termination of employment by employer is due to violation or mistake made by workers or other factors. If the employer wants to terminate the work agreement for a certain time, then the employer must ask permission from the committee for the completion of the agreement to terminate the employment relationship. This needs to be done so that employer does not arbitrarily terminate employment for several reasons, namely: (1) workers make serious mistake; (2) workers who have not been able to do work for 6 months because they have been involved in criminal case concerning complaint from employer; (3) there has been a change in status, merger, consolidation, change in company ownership; (4) the company closes due to continuous loss; (5) the company is bankrupt; and (5) workers, who for five or more consecutive working days, without written information, which is equipped with valid evidence, have been summoned by the employer twice appropriately.

4. **Termination of Employment before Court.**

   Termination of employment by a civil court is usually at the request of the employer or worker concerned. Termination of employment occurs because of important reasons, such as reasons for urgency, personal circumstance, changes in work condition.

Protection for Labor

1. Economic protection or social security.

   Economic protection or labor social security is a protection for workers in the form of monetary compensation as a substitute for a portion of lost income or reduced service. As a consequence of events experienced by workers, such as work accident, illness, pregnancy, old age and death. There are several types of workers' social security namely: work accident, death, old age insurance and health care insurance.
2. Protection of occupational health

   Occupational health protects workers from work events or conditions that are detrimental to their health and moral. The emphasis in an employment relationship shows that all workers, who do not have an employment relationship with employer, do not get social protection.[6]
3. Technical protection or work safety

   Work safety is included in the technical protection for workers, so that, they are safe from hazards that can be caused by working tools or work materials. Female workers have the same rights as male workers to obtain these three types of protection. Protection can be in the form of economic protection, social protection, and technical protection. Particularly for female workers, there is a special protection

[6] Zainal Asikin, *Dasar-Dasar Hukum Perburuhan*, (Jakarta: Raja Grafindo Persada, 2009), 96.

that is the function of reproduction as a form of technical protection related to occupational safety or health.[7]

According to Soepomo, labor protection is divided into 3 (three), namely economic protection, social protection, and technical protection, as below:

1. Economic protection, i.e. protection related to efforts to provide workers with sufficient income to meet their daily needs for themselves and their families.
2. Social protection, i.e. protection for workers in the form of work health insurance, freedom of association, and protection of the right to organize. This social protections cover the protection of female and children workers in terms of work time, rest time, and leave.
3. Technical protection, i.e. protection for workers in the form of work safety and security. This technical protection is related to occupational safety and health. That is labor protection which aims to prevent workers from any hazards that might arise in the workplace, whether caused by tools or materials worked out of an employment relationship.

Regarding to female workers, who almost dominate the domestic sector, factory workers, home industry workers; they have great potential and high responsibility in determining the national development. With some limitations attached to woman workers both physically and psychologically, special protections are needed, including:[8]

1. Prohibition of working at night

   Article 76 of the Republic of Indonesia Law No. 13 of 2003 states that women who are less than 18 (eighteen) years

[7] Kartasapoetra, *Pokok-Pokok Hukum Perburuhan*, (Bandung Armico, 1982), 43-44.

[8] Edytus Adisu, *Hak Karyawan Atas Gaji Dan Pedoman Menghitung*, (Jakarta: Praninta Offset, 2008), 65-66.

old, and pregnant women according to the doctor's statement are dangerous to the health and safety of their womb and themselves if they have to work at night. If female workers who are pregnant are subject to work at night by the company, then the company is obliged to provide nutritious food and drinks, maintains decency and security while at work, and provides pick-up and delivery for female workers' transportation. This is in line with the decision of the Minister of Labor and the Minister of Transmigration of the Republic of Indonesia No: kep-224/men/2003 regarding the obligations of employer who employs female workers.

2. Termination of employment due to pregnancy

   Ministry of Labor Regulation No. 03/Men/1989 states that there is a prohibition on termination of employment for female workers for these reasons, such as: (1) married female workers; (2) female workers are pregnant; (3) female workers give birth. The prohibition is a form of protection for female workers according to their nature and dignity. When women get married, become pregnant and give birth, it does not become the basis for company to force women to resign or terminate employment.

3. Transfer of duties without prejudice

   Employer is obliged to plan and carry out the transfer of duties for female workers without reducing their rights for company that because of the nature and type of work are not possible to employ women due to marriage, pregnancy and childbirth. If the company is unable to transfer, then the company is obliged to provide maternity leave. And after giving birth, the company must re-employ the women in the same place and position without reducing their rights.

4. Pregnant and childbirth leave

   Pregnant women workers are most vulnerable to company discrimination because work agreement often

contains the obligation to propose resignation for women who are pregnant. The coercion of termination of employment by the company to female workers who are pregnant is based on the fact that female workers who are pregnant can hamper the productivity of the company.[9]

The maternity leave for woman workers is 1.5 months before giving birth and 1.5 months after giving birth according to the doctor or midwife's calculations. Woman workers who have miscarriages are entitled to leave or 1.5 months of rest or according to the certificate of the obstetrician or midwife. This is explained in Law No. 13 of 2003 concerning Employment. The mechanism for taking maternity leave can be agreed between the worker and the employer. With the above provisions, it is clear that women, from pregnancy to birth, have special rights guaranteed by law.[10]

Consequences of termination of employment

In the Decree of the Minister of Labor No. 150 of 2000, there are provisions concerning the rights of workers due to termination of employment by the company, including:[11]

1. Severance pay, i.e. payment in the form of money from employer to worker as a result of termination of employment, the amount of which is adjusted to the length of the years of service (Article 22).
2. Years of service or service fees, that is award from employer to worker whose amount is related to the length of the years of service (Article 23). This applies to unilateral termination of employment

[9] Evy Savitri Gani, "Hak Wanita dalam Bekerja" within *Jurnal Of Tahkim*, Vol. Xii, No. 1, (Juni 2016), 118.

[10] Ibid., 219.

[11] Ibid., 84.

3. Compensation money, i.e. money from employer to worker in lieu of rights that have not been taken such as annual break, long break, transportation cost, medical facility, housing facility and other matters determined by the Regional Committee or the Central Committee as due to termination of employment (Article 24).

Woman Workers and Gender Mainstreaming

Gender equality in the frame of the global gender mainstreaming agenda increasingly spread in almost all layers of the world society. There are almost no countries that do not discuss and are affected by gender equality programs. Like a fireball, gender mainstreaming really inspires many people, especially women who have been assumed as victims of the cognitive aspect of human in gender itself. Women who initially only occupied private and domestic spaces, were limited to areas not far from the home environment, especially only as a chain of reproductive cycles, so now they are getting a breath of fresh air to emerge from male domination in all areas of life in the social, political, and economic spheres, and public spaces.[12]

In its current development, the gender equality agenda wants to place women in linear position and role as men. Some formal and informal roles that were initially only dominated by men have now shifted to women. Many jobs and professions that previously could only be done by men such as being factory worker, parking attendant, bank employee, mayor, minister, legislator, even the president, and so on, now all these professions become open spaces that can also filled by women.

Shifting the role of women from limited to infinite areas is actually also a chain of progress in various fields, especially in the field of information technology and industry. As a result, the area of work for women outside the home has become more

[12] Anan Amer, *Hermeneutics and Honor: Negotiating Female "public" Space in Islamic/ate Societies*, (USA: Harvard CMES, 1999).

extensive and those who work outside also have experienced a drastic increase. Economically, the phenomenon of increasing the number of working women is expected to be able to increase the level of family and community welfare in a better direction. Although the number of women workers shows an increasing number, in fact, this number still cannot match or even exceed the number of male workers. Among the contributing factors is that the majority of Indonesian people are more inclined to the patriarchal system (family heads are men).

On the other hand, some problems that are often faced by women and their potential cannot be developed optimally, including: (1) The wage gap between female and male workers is still high, namely 22.26% for the non-agricultural sector and 38.93% for the agricultural sector (BPS, 2014). That is, for the same type of work and qualification, women only receive 77.74% of men's wage in the non-agricultural sector, and 61.07% of men's wage in the agricultural sector; (2) Women still dominate the number of workers with family/unpaid labor status; (3) Woman workers carry a double burden between work and household affairs; (4) Woman entrepreneurs still experience difficulties in registering their business and getting access to finance.[13]

In the Indonesian Coalition Seminar on Population and Development in Jakarta, Minister of Women's Empowerment and Child Protection, Linda Amalia Sari Gumelar said that patriarchal culture which was more dominant for Indonesian people actually gave non-free movement, not to say it inhibited, toward women. One of the benchmarks that can be used to measure the level of success of gender equality is the Human Development Index program, especially the Gender

[13] Loaded in the document of Millennium Challenge Account-Indonesia Mengentaskan Kemiskinan melalui Pertumbuhan Ekonomi. See also Arskal Salim, *Serambi Mekkah yang Berubah*, (Tangerang: Pustaka Alvabet, 2010), 140-141.

Development Index (GDI). The variables used to measure the index are education, health, and economy.[14]

In the context of increasing the level of life of the people of a nation, World Bank President, Jim Yong Kim, stated that currently, gender equality is very urgent because women also have skill that is sometimes not necessarily possessed by a man. Not to mention the number of women now constitutes 40% of the global employment rate, and 43% for the agricultural sector workforce. In addition, more than half of the people studying in tertiary institutions are women, and a third of developing countries now have more female students than male students. These statistic, at least, prove that there is a great potential for women. If a country is able to maximize this potential by providing various training and opening jobs, then there will be much that women can do in order to improve family life.[15]

Based on information released by the Central Statistics Agency (BPS) that the work gap between men and women still often occurs here and there. In February 2017, it was noted that the Labor Force Participation Rate (TPAK) was still dominated by men. Head of the Central Statistics Agency, Suhariyanto, said that the TPAK for men in February 2017 was 83.05%, down compared to the same period last year which was 83.46%. While the female TPAk is only 55.04%, but it increased compared to the same period last year of 52.71%. But compared to the same period last year, female TPAK increased by 2.33% points, while male TPAK actually decreased by 0.41% points, Suhariyanto said at a press conference at the Central Statistics Agency, Central

[14]http://astrinur09.mhs.narotama.ac.id/2012/08/12/karir-perempuan-dalam-kesetaraan-gender/

[15] For example in Brazil, when income is managed by the mother compared to the father, the chance for children to survive is 20 times greater, in Ghana, by ensuring that female farmers have the same access as male farmers to fertilizer and agricultural materials. The others will yield 17% higher yields. see http://astrinur09.mhs.narotama.ac.id/2012/08/12/karir-perempuan-dalam-kesetaraan-gender/

Jakarta, Friday, May 5, 2017. Although data on labor disparities between men and women are not absolute and real can be used as a benchmark for improving the welfare of a society, but, at least, this data can be used as a foothold of the government in making policies, especially those related to gender equality.[16]

As the most responsible party for the conditions that are happening in society, the Indonesian government has made several regulations to reduce unemployment, provide equal access, eliminate discrimination against certain groups, especially gender discrimination where men are more priority than women. Among the regulation that has been made by the Indonesian government is Labour Law which is derived from Article 27 of the 1945 Constitution. This law aims to prohibit discrimination, including discrimination of gender.

At the practical level, how to operationalize Article 27 of the 1945 Constitution, in addition to the Labour Law, the government also makes Government Regulation No. 8 of 1981 concerning Wage Protection. The Government Regulation stressed that the stipulation of wage of workers, employees and laborers was not permitted for discrimination between men and women. The determination must be based more on work volume, rationality of competency and skill possessed by the workforce. This regulation indicates that the state is responsible for various gender inequality problems that occur.

In Law No. 13 of 2003 concerning Minister of Labor in Article 6 has also regulated the prohibition of discrimination in obtaining employment and occupation, although in this provision no further elaboration on the limit of discrimination is given. Actually, terminology can be given beforehand on several matters concerning discrimination and gender equality itself.[17]

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[16] https://bisnis.tempo.co/read/news/2017/05/05/090872547/Angkatan-Kerja-Februari-2017-Meningkat-Sebanyak-13155-Juta-Orang

[17] Nur Hidayat Sardini, *60 Tahun Jimly Asshiddiqie Sosok, Kiprah, dan Pemikiran,* (Jakarta: Yayasan Pustaka Obor Indonesia, 2010), 140-142.

Discrimination actually includes a broad understanding of differences, not only in gender but also in SARA (ethnicity, religion and race) even in differences in political view.

The issue of gender equality as mentioned in Presidential Instruction No. 9 of 2000 includes equal right to participate in political, economic, social, cultural, national defense and security activity, and equality in enjoying the fruit of development. In carrying out economic activities, male and female workers have the same opportunity to obtain position, and there is no discrimination for the same type of work. Equality of wage and placement of workers related to gender equality are two interesting issues to discuss, because in the phenomenon that occurs both of these have not been fully implemented by the companies.

The Indonesian government seems to be serious in effort to improve the welfare of the community and reduce the gap occurs, especially between men and women. In the Law of the Republic of Indonesia No. 13 of 2003 concerning the Minister of Labor, especially Article 5 states that "Every worker has the same opportunity without discrimination to obtain work". This Law No. 13 of 2003 shows the government's high commitment to provide equality in employment opportunities without discrimination for both men and women.[18]

The same opportunity to get a job without discrimination applies to all Indonesian people in various aspects, namely political, economic, social right and so on. However, various regulations by invitation that have been made by the government to provide certainty to get the same employment opportunities have not run according to theory. In practice, it still leaves some homework that must continue to get serious attention. for example, as a result of the patriarchal system which is still a frame of Indonesian society, it is still often found that there is discrimination of women where they lack access to

[18] Ibid.

develop their potential in the political sphere. In the field of legislative candidate, the quota for women is only 30%, while the rest is the quota for men. These are all phenomena that show there is still segmentation of the labor market between men and women.

In addition to inequality in the political sector, at the level of workers in companies and factories, the competence and skill of female workers are still considered to be unable to compete with those of men. Even though the company has an internal law regarding woman workers and how the result of production can benefit them, making arbitrary and unilateral decision by the company to women under certain conditions such as marriage, pregnancy and/or childbirth, are arbitrary and forms of gender injustice. In the Regulation of the Ministry of Labor No. Per.03/Men/1989 expressly regulates the Prohibition on Termination of Employment (FLE) for female workers, with the following reasons: (1) female workers are married; (2) female workers are pregnant; (3) female workers give birth.[19]

In addition to the above facts, the form of discrimination and gender injustice, especially for women, are not only theological and natural issue, but also the issue of appreciation for the work produced by women. In a strategic position, there are still many companies that place men even though their managerial skill are not better than women. This shows that there are still serious problems with the role of women in economic aspect as well as gender-based labor market segmentation. Law No. 39 of 1999 Article 3 Paragraph (3)

[19] This phenomenon often occurs not only in the formal sector but also in the informal sector such as factory workers, companies, supermarket employees, shops and so on. Even in this informal sector women often get less proper treatment, especially in conditions such as menstruation leave and maternity leave. See also Edytus Adisu, *Hak Karyawan Atas Gaji & Pedoman Menghitung*, (Jakarta: Niaga Swadaya, 2008), 63.

expressly states that "Everyone has right to protection of human rights and basic human freedoms, without discrimination".[20]

In addition to several issues that plagued women, the big agenda, gender mainstreaming in Indonesia also still left some social, economic and political problems. In the context of protecting labor right and wage which are equal to men, it needs special attention. For example there are still many Indonesian Woman Workers (TKW) working abroad who feel that their basic rights have not been fully fulfilled. Not to mention the number of immoral cases such as sexual harassment to rape, physical violence, postponement of wage and so on are a series of problems that they must experience. Ironically, on the other hand, migrant workers abroad are one of the important pillars in sustaining the national economy as "Foreign Exchange Heroes".[21]

[20] http://www.hukumpedia.com/lesta/kesetaraan-gender-bagi-pekerja-perempuan

[21] Christopher Torchia, Lely Djuhari, *Indonesian Slang: Colloquial Indonesian at Work*.

CHAPTER 11

ELIMINATION OF DOMESTIC VIOLENCE

Almost every day, we can watch news about domestic violence through printed and electronic media. This problem seems to have become a part of our daily life. The shape depends on who is more dominant in the family. However, the most often victims are those who are physically weaker, namely women, children, and helpers, although this condition is not often reversed. Family violence that occurs can be in the form of physical, psychological, sexual abuse and family neglect. To anticipate the high number of domestic violence, the government is present with Law No. 23 of 2004 about the Elimination of Domestic Violence.

Gender Relation and Domestic Violence

Discussion on domestic violence has recently become more and more widely discussed by many group of the people, especially gender activists and those who have been the victims of such act. In response, the government did not remain silent, in 2004, the Indonesian government drafted a law on the elimination of domestic violence passed into Indonesian Law No. 23 of 2004. This discourse is actually not a stranger to activists and observers of women's issues, because the problem of domestic violence has surfaced along with the emergence of concerns about women's issues

The term "domestic violence" is used to describe the open or closed behavior and the offensive or defensive behavior, which accompanied by the use of force to others. Law No. 23 of 2004 defines domestic violence is an act against a person,

especially women, which results in physical, sexual, psychological, and/or neglecting of the household including threat to commit act, coercion or deprivation of liberty unlawfully in the law in household scope. Most of the victims of the domestic violence are women (wives), children, and helpers where the perpetrators are husbands, although there are also the victims who are just the opposite, or people who are subordinated in the household. Perpetrators or victims of domestic violence are people who have blood relationship, marriage relationship, nursing relationship, guardianship with their husband, children, and even domestic helpers who live in a household.

Domestic violence includes (a) physical violence, i.e. every act that causes physical injury to death, (b) psychological violence, i.e. any behavior in the form of an attitude or speech that results in fear, loss of self-confidence, trauma, loss of the ability to act and feelings of helplessness toward women, (c) sexual violence, that is every act related to sexual harassment to force a person to have sexual relation without the consent of the victim or when the victim does not want to and or have sexual relation in unfair ways or the victim is disliked and or alienates (isolates) from his sexual need, (d) economic violence, which is any act that restricts people (women) from working inside or outside the home to produce money and or goods or allowing the victim to work for exploitation or abandon family members.[1]

In the tradition of Indonesian society, the relation between men and women, which then results in domestic violence, is built through several reasons, including: (1) from physical aspect, men have more power than women do. With physical strength, there is a tendency for men to commit violence against women and, at the same time, women are powerless to face; (2) in patrilineal

[1] Achie Luhulima (ed.), *Pemahaman Bentuk-bentuk Tindak Kekerasan Terhadap Perempuan dan Alternatif Pemecahannya* (Jakarta: Kelompok Kerja "Convention Wacth" Pusat Kajian Wanita dan Jender Universitas Indonesia, 2000), 11.

society system, by placing men in the position of being in control of domestic life, it tends to make forced and authoritarian action; (3) economically, men are generally those who work to support their families while women tend to stay at home. This causes men to act arbitrarily because he feels that he is the one who works.

But based on the facts, domestic violence has a variety of forms depending on who is dominant in the family. The tendency is that violence against women and children can occur from the treatment of a husband to his wife, from a father or mother to his son and daughter, or from his sister or brother to his sister. The causes of the violence are very diverse, such as the wife's dependence on her husband, the wife's independence, and others.

Domestic Violence and Gender Public Inequality

Biological differences between human male and female occur through a very long process. Therefore, the formation of gender differences is caused by many things, including being formed, strengthened, socialized, and even constructed socially and culturally through religious teaching and state institutions. Through this process, it is finally considered to be a "God's provision" as if it were an absolute theological.

Gender stratification has divided the work role of women and men, namely women in the domestic sectors and men in the public sectors. Society sees the interest of women as domestic workers (woman domestic labors) and this brings a logical consequence in the form of exploitation of sexual division of labor. This happens because the hierarchy and women's work in the household is considered not productive work. The implications of this division of labor are stereotypes, inequality

and the presence of violence.[2] Forms of injustice that arise in gender issues include:

First; Marginalization. Marginalization often occurs in the economic field. For example, many women only get not very good jobs in term of salary. The job security or the status of the work they get is not adequate. This happens because very few women get educational opportunity. Marginalization can occur in home, workplace, community, and even by country that have sources of belief, tradition/habit, government policies, and assumption of science and technology.

Second; Subordination (giving priority), the assumption that women are weak, unable to lead, whiny and so forth, results in women becoming subordinate after men.

Third; Stereotype (bad image) is a bad view toward women. For example, women who come home late at night are prostitute, bitche and various other bad designations. Forms of subordination sometimes arise from stereotypes in social interaction. The stereotype, which states that good women are thosewho must be able to become wives and housewives, is basically a statement derived from patriarchal ideology which has become an idielogical hegemony legitimized in cultural norms. Stereotypical statements that tend to subordinate women to not being too active in the public sphere are indeed lacking resistance from feminists themselves.[3]

Fourth; Violence (violence), namely physical and psychological attack. Women is the most vulnerable party to violence, which is related to the marginalization, subordination and stereotypes above. Rape, sexual harassment, pornography,

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[2] Lies M. Marcoes Natsir and Johan Hendrik MeUlaman, *Wanita Islam Indonesia dalam Kajian Tekstual dan Kontekstual*, (Jakarta: INIS, 1993), 140.

[3] Robert Melton and Talcott Parson, from functionalists, they much talk about the consensus of ideology as a value that serves to maintain the pattern of gender relations in the social structure. Read Brigitte Holzner and Ratna Saptari, *Perempuan Kerja dan Perubahan Sosial, Sebuah Pengantar Studi Perempuan,* (Jakarta: Grafiti, 1997).

and robbery are examples of the most violence experienced by women.

Fifth; The workload is excessive, namely the heavy and continuous tasks and responsibilities of women. For example, a woman, besides serving her husband (sex), pregnant, giving birth, breastfeeding, also has to look after the house. Besides that, sometimes he also makes a living (at home), which does not mean eliminating the duties and responsibilities above.[4]

Domestic Violence in Positive Law of Indonesia

Regulation on violence contained in the Law on the Elimination of Domestic Violence, Article 1 Paragraph 1, is a product of the act that is sown, not to say adopted, from the spirit contained in Article 1 of the International Declaration on the Elimination of Violence against Women in 1993.[5] In that article it is stated about actions categorized in act of domestic violence, namely: "every action based on gender differences results in or may result in women's physical, sexual or psychological misery or suffering, including the threat of certain action, coercion or deprivation of liberty arbitrarily which happens in public or in private life. "

Whereas, in Article 1 Paragraph 1 of the International Declaration on the Elimination of Violence against Women in 1993 is stated that "domestic violence is every act committed against a person especially women, which results in physical, sexual, psychological, and/or misery or neglect of the household including threats to commit act, coercion, or deprivation of liberty unlawfully within the scope of the household".

The two meanings above seem clear that there is a tendency that the objects of acts of violence in the household are wives,

[4] http://pramareola14.wordpress.com/2009/03/10/memahami-arti-gender

[5] Achie Luhulima (ed.), *Pemahaman Bentuk-bentuk Tindak Kekerasan Terhadap Perempuan dan Alternatif Pemecahannya*, 51-52.

children, servants, and people who have physical, psychological, and economic dependence where the most perpetrator are men or husbands. Based on the Law on the Elimination of Domestic Violence Article 5 that types of violence can be in the form of: (1) physical violence, such as hitting, slapping, strangling and so on; (2) psychological violence, such as shouting, swearing, threatening, harassing and so on; (3) sexual violence, such as taking actions that lead to sexual solicitation/urge such as touching, kissing, forcing sexual relations without the consent of the victim and so on; (4) violence of a financial dimension, such as taking victim's money, holding or not providing fulfillment of financial needs and so on; (5) spiritual violence, such as demeaning beliefs of the victim, forces the victim to practice certain ritual.[6]

The Elimination of the Domestic Violence in Law No. 23 of 2004 is actually a rule that accommodates a variety of cases that are developing in society. Before this law, the meaning of violence was limited to physical violence. The meaning is then extended, not just physical violence, but also includes physical violence, psychological violence, sexual violence and economic violence or family neglect. In the perspective of Islamic legal philosophy, the meaning contained in this law shows the spirit of creating greater *maslahah*[7] for the safety and health of victims so as to create a family that is safe, peaceful, and mutually respectful.

As for the right of victims of violence, the law provides an explanation that they are entitled to have: (1) protection from the family, police, prosecutors, courts, advocates, social institutions or other parties; (2) health services; (3) special handling related to the confidentiality of the victim; (4) assistance from social workers and legal assistance in the examination process, and (5) spiritual guidance services.

[6] Ibid., 11.

[7] Ibid.

Punishment and Fines for Perpetrators of Domestic Violence

Domestic violence is not just a case that occurs in a particular area or region. This case is, indeed, a problem of throughout the world with a variety of models and shapes. Statistics data from the government show that the more advanced the development of science and technology and the greater the number of population in a particular region, the more complex and varied the violence that occurs. Through the law on the Elimination of Domestic Violence No. 23 of 2004, the government is fully responsible for preventing domestic violence. Because this is hard work, an active role for the community is needed. With effective cooperation between the government and the community, the rate of violence can be reduced.

Domestic violence is a criminal offense. The sanctions for perpetrators of the act of domestic violence as applicable provision are:

1. Every person, who commits an act of physical violence within the scope of the household as referred to Article 5 Letter a, is sentenced to a maximum imprisonment of 5 (five) years or a maximum fine of Rp. 15,000,000.00 (fifteen million Rupiahs).
2. In the case of act as referred to Paragraph (1) resulting in victim getting ill or seriously injured shall be sentenced to a maximum imprisonment of 10 (ten) years or a maximum fine of Rp 30,000,000.00 (thirty million Rupiahs).
3. In the case of the act referred to Paragraph (2) resulting in the death of the victim, shall be sentenced to a maximum imprisonment of 15 (fifteen) years or a maximum fine of Rp. 45,000,000.00 (forty-five million Rupiahs).
4. In the case of act as referred to Paragraph (1) committed by a husband against a wife or, in otherwise, which does not cause illness or obstruction to carry out occupational position or livelihood or daily activity, shall be liable to a maximum

imprisonment of 4 (four) months or a maximum fine of Rp. 5,000,000.00 (five million Rupiahs).

Tracking the Emergence of Domestic Violence

Based on the literatures and the analysis of the experts on cases of economic, physical, psychological, and sexual violence against informants, there are four causes of such violence:

First is the economic independence of the wife. Meiyenti's research in 1999 found that the wife's dependence on her husband in the economic field, because the wife's status does not work, is a factor that encourages husband to act what he will, even to make a mistake to his wife. This often happens because husband feels as a person in charge of property and family, so he does arbitrary actions.[8]

Second, it is infidelity of husband with another woman. Another ideal woman factor is often the cause of husbands to take reckless actions. He even did not hesitate to do violence to his wife, resulting in physical injury and even death. The wife who rebukes her cheating husband does not get a good reception; instead she got cursed, beaten, and so forth.[9]

Third, it is family intervention. The interference of the family members from husband or wife or even neighbors often makes thing worse. Because the misunderstanding among them can potentially lead to marital conflict which results in violence.[10]

Fourth, it is misunderstanding about religious teaching. Incorrect understanding of religious teaching is another factor that causes violence against women. For example, *al-Qur'an*, chapter *al-Nisa*: 34, and chapter *al-Baqarah*: 223 are often misunderstood and used as a legitimate justification for violence committed by husband.[11]

[8] Fathul Jannah, dkk., *Kekerasan terhadap Istri*, (Yogyakarta: LKiS, 2003), 50.
[9] Ibid., 54.
[10] Ibid., 57
[11] Ibid., 61.

Impacts of Domestic Violence

The impacts of domestic violence are quite varied. First is the impact of physical violence: (1) severe injury; (2) not being able to carry out daily tasks; (3) passed out; (4) severe injury to the victim's body and/or wound that is difficult to heal or cause death; (5) losing of one of the five senses; (6) getting defective; (7) suffering from paralysis; (8) disrupting of thinking power for over 4 weeks; (9) the death of a woman's womb; (10) the death of the victim; (11) minor injury; (12) pain and physical injury that are not included in the category of weight; (13) performing repetition of mild physical violence can be included in the type of severe violence, and so on.

Second, severe psychological violence is in the forms of control, manipulation, exploitation, abuse, humiliation, prohibition, coercion and social isolation (by degrading or insulting action like speech, stalking, violence, threat of physical, sexual, and economic violence) where each of which can result in severe psychological suffering in the form of one or more of the followings: (1) sleeping or eating disorder or drug dependence or sexual dysfunction, one of which is severe and/or chronic; (2) post-traumatic stress disorder; (3) severe impaired bodily function (such as sudden paralysis or blindness without medical indication); (4) severe depression or self-destruction; (5) mental disorder like loss of contact with reality such as schizophrenia and/or other psychotic forms; and (6) suicide.

Third, mild psychic violence can be in the forms of control, manipulation, exploitation, abuse, humiliation, prohibitions, coercion, social isolation, stalking, physical abuse, sexual abuse, and economic abuse, which each can result in mild psychological suffering in one or several of the following: (1) fear and terror; (2) a feeling of helplessness, loss of self-confidence, loss of ability to act; (3) sleeping or eating disorder or sexual dysfunction; (4) mild bodily dysfunction (for example, headache, indigestion

without medical indication); and (5) phobia or temporary depression.

Fourth, severe sexual violence, such as: (1) sexual harassment by physical contact like touching, touching sexual organs, forcibly kissing, embracing and other actions that cause disgust, terrored, humiliated and feel controlled; (2) forced sexual relation without the consent of the victim or when the victim does not want to; (3) forced sexual relation by being disliked, degrading, and or painful; (4) forced sexual relation with other people for the purpose of prostitution and or certain purposes; (5) the occurrence of sexual relation in which the offender uses the victim's dependency position that should be protected; and (6) sexual acts with physical violence with or without the aid of tool that cause illness and injury.

Fifth, severe economic violence, namely acts of exploitation, manipulation and control through economic means in the form of: (1) forcing victim to work in an exploitative way including prostitution; (2) prohibiting victim to work but neglecting him/her; and (3) taking without the knowledge and without the consent of the victim, confiscating, and or manipulating the victim's property.[12]

[12] Soka Handinah Katjasungkana, *Memutus Rantai Kekerasan,* 5. See also https://id.wikipedia.org/wiki/Kekerasan_dalam_rumah_tangga

CHAPTER 12

MEDIATION PROCEDURES IN THE COURT

Divorce rates in Indonesia are increasingly showing graph that continue to creep up. To reduce the divorce rate, there is a legal remedy in the form of mediation, namely an effort to reconcile between the parties who litigate before the trial process in the case of divorce between husband and wife continues. In this case, a judge is obliged to mediate. If not, then a judge has violated the provisions of the legislation. In detail, the mediation process has been regulated in the Supreme Court Rules No. 1 of 2016 concerning the Mediation Process in the Court.

Introduction to Mediation

The term "mediation", in English dictionary, means a dispute resolution involving a third party, which is then called mediator. He is a person who has an intermediary function.[1] In general, in the Big Indonesian Dictionary, it is stated that what is meant by mediation is the process of involving a third party in settling a dispute as an advisor.[2] Not much different, mediation in legal terminology is a third party or mediator who interferes in the settlement of the case.[3] However, this third party acts as advisor and does not have authority in making matters.[4]

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[1] John Echols and Hasan Shadily, *Kamus Inggris Indonesia*, (Jakarta: Gramedia Pustaka Utama, 2003), 377.

[2] Tim Penyusun Kamus Pusat Pembinaan dan Pengembangan Bahasa, *Kamus Besar Bahasa Indonesia*, (Jakarta: Balai Pustaka, 2000), 640.

[3] I.P.M. Ranuhandoko, *Terminologi Hukum Inggris Indonesia,* (Jakarta: Sinar Grafika), 339.

[4] Syahrizal Abbas, *Mediasi dalam Hukum Syariah, Hukum Adat, dan Hukum Nasional,* (Jakarta: Kencana Prenada Media Group, 2011), 2-3.

In many cases, mediation by a judge does not significantly affect the desire of both parties to continue the divorce proceeding, because they only carry out the mandate of the law formally. Therefore, in many writings and viewpoints from Indonesian Muslim scholars, that what is called a third party should not only limited to a judge who handles the case, but it can come from other parties outside the court, such as community leaders, one of the families who has a great influence, traditional leaders, scientists or certain institutions desired by the litigants. In the view of contemporary Muslim scholars, mediation from outside the court has precisely a considerable influence in cancelling divorce.

Since the enactment of Law No. 3 of 2006, the authority of the court becomes more complex because the number of cases to be resolved is increasing, but that does not mean that it will affect the performance of the Religious Court in handling incoming cases. In handling cases, the Religious Court has an inherent principle of simple, fast, and low cost. These principles can be realized by applying mediation. So, if mediation is applied and is successful, it means that it is easy for justice seekers, during the court proceeding, to be ascertained and quickly resolved by deliberation between the parties who are truly in accordance with both parties. This form of settlement is quite effective.

Bearing in mind, the sound of the Supreme Court Rules No. 2 of 2003 was revoked with the Supreme Court Rules No. 1 of 2008 concerning Mediation Procedures in the Court, emphasized that the integration of mediation into the judicial process in the court could be an effective instrument in overcoming the possibility of a case build-up in the court. This revocation was due to the number of piles or arrears on the case in the Supreme Court, which encouraged Bagir Manan as the head of the Supreme Court (at that time) to establish mediation as a way to reduce cases in the judiciary, especially in the Supreme Court. Then because it was considered imperfect, the Supreme Court

Rules was perfected again with the issuance of the Supreme Court Rules No. 1 of 2008. It was expected that the issuance of the Supreme Court Rules No. 1 of 2016 could answer the weaknesses of the Supreme Court Rules Number 1 of 2008.[5]

In the perspective of philosophy of Islamic law, in fact, the spirit of mediation is for the benefit of both parties not to hold a divorce, so that, the purpose of marriage is to rebuild a *sakinah, mawaddah, warahmah* family will be created. This spirit of *maslahah* is the basis of a judge to mediate to save the family ties. Normatively, mediation has many benefits, such as settlement through mediation can shorten the litigation settlement time, alleviate the financial economic burden, and no less important is reducing the psychological burden that will affect the various attitudes and activities of the litigants.[6]

Mediation in Supreme Court Regulation No. 1 of 2016

According to the Supreme Court Rules No. 1 of 2016, mediation is a way of resolving conflicts through a negotiation process to obtain the agreement of the parties assisted by the mediator. There are stages that must be followed by a mediator in mediating parties who are litigants. The stages of mediation according to the Supreme Court Rules No. 1 of 2016 are, namely:

First, the pre-mediation stage: the first hearing, both parties are present and the judge requires them to go through the mediation process. For this reason, the judge delays the trial process for 30 working days. The task of another judge is to explain the mediation procedure to the parties. Then, the parties choose the mediator from the list of names that are available on the first trial day or at the latest 2 working days. If within that

[5] Maria S.M. Purba, "*Rekonstruksi PERMA No.1 Tahun 2016 sebagai Alternatif Penyelesaian Sengketa di Pengadilan*" within Jurnal Hukum Samudra Keadilan Vol. 13 No.1 Januari-Juli 2018, 21.

[6] Bagir Manan, "*Mediasi Sebagai* Alternative *Menyelesaikan Sengketa*" within Majalah Hukum *Varia Peradilan* No. 248 juli 2006, 9.

period the parties cannot choose the desired mediator, the chief panel of judges immediately appoints a judge not the principal investigator to carry out the mediator's function.[7]

Second, the mediation process stage: after the parties appoint the mediator they want, then each party can submit a case resume to the mediator judge within a maximum of 5 days. The mediator has an obligation to declare that the mediation has failed if the one or the two parties have consecutively twice not attended the mediation meeting according to the agreed schedule for no apparent reason.[8]

Third, Mediation reaches an agreement: in a condition where the mediation function succeeds in producing a peace agreement from both parties, it must be formulated in writing and signed by the parties and the mediator. Then the parties turned back to the judge to announce the peace agreement and then it was strengthened by the form of a peace deed.[9]

Fourth, Mediation does not reach agreement: if mediation does not reach an agreement between the two parties, then the mediator must declare in writing that the mediation process has failed. If mediation fails, the statement and acknowledgment of the parties in the mediation process cannot be used as evidence in the trial process.[10]

Effectiveness of the Supreme Court Rules No. 1 of 2016 to Divorce Cases

The high divorce rate in Indonesia has recently become one of the government's serious concerns. For this reason, the Coordinating Minister for Human Development and Culture, Muhadjir Effendy, will make new regulations on requiring bride and groom to attend pre-marital class. Muhadjir rates, the

[7] Article 17-23 of the Supreme Court Rules No. 1 of 2016.
[8] Article 24-28 of the Supreme Court Rules No. 1 of 2016.
[9] Article 29-31 of the Supreme Court Rules No. 1 of 2016.
[10] Article 32 of the Supreme Court Rules No. 1 of 2016.

program are expected to be able to reduce the divorce rate. Because, many couples still have a minimum understanding of marriage. After attending this class, the couple will get a certificate that is a condition for registering their marriage. Based on data from the Central Statistics Agency (BPS), both the number of marriage and divorce in Indonesia from 2015 to 2017 has increased. From these data, we can estimate, one divorce will occur in every five marriages.

Based on data quoted by AFP on the website of the Supreme Court (MA), in 2018 there were 419,268 divorced couples. Of that amount, most of the divorces result from the wife who proposed a *khulu'* to the court for her husband. The divorce from women reached 307,778 cases. While, there were 111,490 husbands cases. The amount above is a divorce carried out on the basis of the marriage of a Muslim couple. This does not include non-Muslim couples who did divorce in the public court. In addition, Religious Court throughout Indonesia also provide marriage dispensation of 13,251 requests. Marriage compensation is given to children who want to get married or are under the age required by the law of marriage (16 years for woman and 19 years for man).

For cases in East Java In 2018, the number of marriages in East Java increased by around 8 thousands, from 331,250 to 339,797. On the other hand, the increase also occurred in divorce rates i.e., from 84 thousand to 88 thousand cases. But what's interesting about the high divorce rate is the cause. The Central Bureau of Statistics (BPS) data on East Java of 2018 said 38,109 divorce cases or 43.51 percent were caused due to ongoing quarrel. Then, the second factor is economic condition (36.67 percent). In the third level is leaving one party (14.38 percent). Meanwhile, divorce due to domestic violence amounted to 1,455 (1.66 percent). Other causes of less than a thousand cases include

adultery, forced marriage, conversion, and gambling. For divorce due to polygamy in East Java is totaling 197 cases.[11]

By looking at the divorce rate trend that is increasing from year to year, both on a regional and national scale. So, there are big questions that must be answered by the court community about the effectiveness of mediation and the role of judge in suppressing divorce rate. Do the procedure and implementation of mediation run according to what it should be or not? In theory, with mediation, divorce rates should decline. But the fact is the opposite. This is where the mediator's function really determines the success rate of mediation even though the plaintiff, the defendant, and the families of both also have a significant share in the mediation process.[12]

According to Lawrence Meir Friedman, whether or not successful law enforcement depends on: the substance of the law, the structure of the law, and the culture of the law. According to him, as quoted by Mardjono Reksodipuro, the legal substance is about norm and regulation as well as the legal structure of law which includes: (1) the executive body; (2) legislative; (3) judiciary; (4) related institutions such as the Attorney General's Office, Police, Courts, Judicial Commission. While the legal culture includes: (1) people's views and assumptions about legal awareness; (2) habit and behavior of the community regarding the thinking of value and expectation of the applicable legal system. In other words, legal culture is the climate of social thought about how the law is applied, violated or implemented.

From several studies that have been conducted, it appears that mediation has not succeeded in reducing the case buildup. In other words, the implementation of mediation as an alternative dispute resolution has not been successful, both to

[11]https://kumparan.com/kumparannews/kami-membandingkan-jumlah-pernikahan-dan-perceraian-di-indonesia-1sKM5fAHafr

[12] BBS TV Official, *Lintas Berita Siang: Mediasi Sulit Tekan Angka Perceraian.*

reduce the accumulation of cases and to fulfill a sense of justice. It is because it will be fulfilled if the dispute is resolved naturally. In many cases, the process of mediation only fulfills the formal requirements of a trial without seeing what the essence of mediation itself really is. Of course, this is not as easy as it says. The lack of effectiveness of mediation, not to say failure, saves many factors, including the demand for judges who handle cases to immediately settle incoming cases, while, on the other hand is the number of cases is increasing.

The legal structure of the Court Regulation No. 1 of 2016 includes parties, mediators, and advocates. In this case, the parties who lack understanding related to mediation are a major factor in the failure of mediation. Likewise, the lack of knowledge of the parties about the benefit and goodness of dispute resolution through mediation is one of the causes of mediation failures. Good faith is also an important factor in the success of the mediation process, so that, a win-win solution agreement occurs. If the parties do not want to see their need and only pursue profit, then peace through mediation will be difficult to achieve.

But, usually, the good faith of the parties does not exist because the parties still lack understanding about mediation, the benefits of mediation, and the legal consequences of mediation. They also do not understand about the legal consequences if the dispute is resolved by mediation or litigation. Therefore, it should also be stated to the parties that good relation going forward between the parties if the dispute is resolved through mediation. It is because in mediation, no party is defeated or won. But the dispute is resolved by deliberation.

In term of mediator, in accordance with Article 13 of the Court Regulation[13] No. 1 of 2016, explains that each mediator is

[13] "Ministerial Regulation" is specifically regulated in Law No. 12 of 2011 concerning the Formation of Legislation Article 8 Paragraph (1) of Law No. 12 of 2011, which confirms: "Types of legislation other than those referred to in

required to have a mediator certificate while the number of certified mediators is limited, this also affects the implementation of mediation in court, it is also an obstacle to the success of mediation. Therefore, in order to empower the Supreme Court Rules No. 1 of 2016 (PERMA), the number of mediators must be increased, followed by mediator service providers. This will be easy if the mediator does not only come from internal court but can also come from outside the court such as community leaders, traditional leaders, Muslim scholars, religious leaders who have capabilities and have gone through a rigorous selection process.

From the aspect of legal culture, actually Indonesian people have met the components that exist in the legal culture; it's just that the level of implementation of which has not been maximized. Legal culture is the human attitude toward law and the legal system, beliefs, values, thoughts, and expectations. Legal culture is an atmosphere of social thought and social power that determines how law is used, avoided or misused. Legal culture consists of the law itself, law enforcement, facilities, society, and culture. Legal culture is also closely related to public legal awareness. The higher the legal awareness of the community, the better their legal cultures will be.

Article 7 Paragraph (1) include regulations established by the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Board, Judicial Commission, Bank Indonesia, Minister, council, institution, or commission of the same level established by Law or Government by order of the Law, Provincial Regional Representative Council, Governor, Regency/City Regional Representative Council, Regent/Mayor, Village head or equivalent". Although the above provisions do not explicitly mention the type of legislation in the form of "Ministerial Regulation", the phrase "... regulations established by ... minister ..." above, reflects the existence of Ministerial Regulation as one type of statutory regulation. Thus, Ministerial Regulation after the enactment of Law No. 12 of 2011 continues to be recognized.

CHAPTER 13

MANAGEMENT OF *ZAKAT* AND *WAQAF*

As a country with the largest Muslim majority population in the world, Indonesia has considerable potential to prosper its adherents through the empowerment of *zakat* (alms) and *waqaf* (endowment). But the fact is that inadequate human resources coupled with a weak managerial system are obstacles in achieving that dream. The coming of Law No. 23 of 2011 concerning *Zakat* Management and Law No. 41 of 2004 concerning *Waqaf* Management are evidences of government interference and concern for Muslims. Both of these laws are also regulations to regulate the practice of *zakat* and *waqaf,* which in fact, have become the practices in daily life, so that both become pillars of good micro economic growth.

Zakat and *Waqaf* as Economic Instruments of the Community

Zakat and *waqaf* are part of a very important Islamic pillar. In addition, *zakat* (alms) and *waqaf* (endowment) are two economic instruments of the people so that, people help each other in the good and live in the establishment. *Zakat* and *waqaf* are a form of worship to Allah through social care. One of the forms of worship to get closer to Allah SWT relating to property is *zakat* and *waqaf*. In term, *zakat* is fertility, purity and blessing. Whereas according to the terminology, *zakat* is a certain amount of assets required by Allah SWT to be given to people who are entitled to receive *zakat* (*mustahiq*) mentioned in *al-Qur'an*.[1] In the

[1] Ja'far, *Zakat Puasa dan Haji*, (Jakarta: Kalam Mulia, 1985), 1. Some verses as the legal basis of the obligatory of paying *zakat* are such as: "Take, [O, Muhammad], from their wealth a charity by which you purify them and cause

understanding of Law No. 23 of 2011 stipulates that *zakat* is a property that must be issued by a Muslim or business entity to be given to those entitled to receive it in accordance with Islamic law.[2]

The term *waqaf*[3] is derived from the word *waqafa-yaqifu* which means stop. According to Muslim scholars, *waqf* is a form of *sunnah* (the living traditions of Prophet Muhammad SAW) with the aim of getting closer to Allah SWT through donating his wealth to benefit the people, usually in the form of property or money to be used. Whereas, in the sense of Law No. 41 of 2004 concerning *Waqaf,* stipulates that *waqaf* is a legal act of *waqif* to separate or surrender a portion of his property to be used forever

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them increase, and invoke [Allah's blessings] upon them. Indeed, your invocations are reassurance for them. And Allah is Hearing and Knowing" (*Al-Qur'an, al-Taubah:* 103) and "And establish prayer and give *zakah* and bow with those who bow [in worship and obedience]". (*Al-Qur'an, al-Baqarah*: 44). While the legal basis of the obligatory of paying *zakat* according to the Prophet's tradition is "Islam is built on five things: the true testimony that there is no God but Allah and in fact, Muhammad is the messenger of Allah, performing prayers, paying *zakat*, *hajj* and fasting *Ramadan*." (Narrated by Bukhari Muslim)

[2] The Law of the Republic of Indonesia No. 23 of 2011 concerning Management of *Zakat* Article 1 Paragraph 2.

[3] In *al-Qur'an* there is no explicit find of a verse that mentions *waqaf* law, but in general, it is ordered to spend property for good in the way of Allah (*infaq fi sabilillah*). *Waqaf* includes *Infaq fi sabilillah*. Because of that, the basis of this *waqaf* law is referring to the generality of the verses of *al-Qur'an* about *Infaq fi sabilillah* as follows: "Never will you attain the good [reward] until you spend [in the way of Allah] from that which you love. And whatever you spend - indeed, Allah is Knowing of it". (*Al-Qur'an, Ali 'Imran*: 29) and also "O you who have believed, spend from the good things which you have earned and from that which We have produced for you from the earth. And do not aim toward the defective therefrom, spending [from that] while you would not take it [yourself] except with closed eyes. And know that Allah is Free of need and Praiseworthy." (*Al-Qur'an, al-Baqarah*: 267) and also the Prophet's tradition such as "When Adam's son died, his deeds were cut except for three cases; *jariyyah* charity, useful knowledge, and pious children who pray for their parents" (Narrated by Muslim).

or for a certain period in accordance with the provisions for the purposes of worship or public welfare according to *shariah* law. So, what needs to be underlined in the concept of *waqaf* is ownership of the object of *waqf* is the right of many people to be used for the benefit of the people.[4]

In addition, to having the *ta'abbudi* dimension (one's self-servitude to Allah SWT), *zakat* also has a social and economic dimension for Muslims. From a social perspective, *zakat* and *waqaf* are a form of communication between rich and poor people. Helping each other between the rich and the poor will further reduce the distance between the two, so as to create an atmosphere of life that is safe, comfortable, and full of kinship. From the economic dimension, *zakat* and *waqaf* are facilities that have been proven to be very effective in empowering micro-economics and low-level society. With the professional distribution of *zakat*, those who are starving or even those who do not have enough capital to establish business can be supported from *zakat* money collected from Muslim wallets. Once again, this would like to reiterate that true Islam is a religion that is not only thinking about ritual worship to God, but also social worship that involves the fate and survival of many people.

As a religious practice that has a social dimension and is being practiced in daily life in Indonesian Muslim communities, Indonesia, which is predominantly Muslim, specifically regulates *zakat* and *waqaf* in Law No. 23 of 2011 and Law No. 41 of 2004. Along with the development of mindset and community life that is increasingly advanced and complex, the two laws are always undergoing revision to become more effective and

[4] The Indonesian Ministry of Religion, Law No. 41 of 2004 concerning Endowment aAticle 1 Paragraph (1) and Government Regulation No. 42 of 2006 concerning the Implementation of Law No. 41 of 2004, (Jakarta: Direktorat Jenderal Bimbingan Masyarakat Islam, 2007),3.

efficient. *Zakat* law, namely the Law No. 38 of 1999 became Law No. 23 of 2011, while the *waqaf* is of the Government Regulation No. 28 of 1977 perfected with the issuance of Law No. 41 of 2004 concerning Endowment and the Government Regulation No. 42 of 2006 concerning its implementation.

History and Composition of Law No. 23 of 2011

The practice of *zakat* for the people of Indonesia is in line with the development of Islam from the time of the Islamic kingdoms until today. This long history proves that the existence and obedience of Muslim communities to the concept of *zakat* and *waqaf* have been tested by a chain of events that have occurred in Indonesia ranging from the Islamic kingdom in the Pasai Ocean, the Dutch colonial period, the independence period, the old order, the new order to the reform period. As part of the pillars of Islam, *zakat* has a very strong position even though the state does not interfere.

However, along with the development of the times, where more and more Muslims and the awareness to practice religion is also increasingly high, the government sees that this is a high potential for populist-based economic growth and development. Therefore, there needs to be a regulation that provides a legal umbrella for this practice so that the spirit of *zakat* is able to be realized in a free, good, and effective way.

Efforts to formalize *zakat* institution with clear regulation began to lead to a point of clarity with the issuance of the government regulations or laws.[5] During the New Order era, in accordance with President Suharto's recommendation in his remembrance when commemorating the *Isra' wa Mi'raj* at the State Palace on October 22, 1968, the *Amil Zakat, Infaq,* and *Sadaqah* Agency (BAZIS) was formed, which was pioneered by the Regional Government of DKI Jaya. Since then, successive *amil*

[5] Depag RI, *Pedoman Zakat*, (Jakarta: Badan Proyek Peningkatan Zakat dan Wakaf, 2002), 284.

zakat institutions have been formed in various regions such as in East Kalimantan (1972), West Sumatra (1973), West Java (1974), Aceh (1975), South Sumatra and Lampung (1975), South Kalimantan (1977), and South Sulawesi and West Nusa Tenggara (1985) and followed by the establishment of a community-formed *amil zakat* institution.[6]

On December 12, 1989 the Minister of Religion issued an Instruction No. 16 of 1989 on the Development of *Zakat, Infaq*, and *Sadaqah* instructing all ranks of the Ministry of Religion to assist religious institutions that conduct *zakat, infaq*, and *shadaqah* management to empower *zakat* funds for social, economic activities, and Islamic education. Subsequently, in 1991, a Joint Decree of the Minister of Religion and the Minister of Home Affairs No. 29 and 47 of 1991 regarding the Development of the *Amil Zakat, Infaq*, and *Sadaqah* Agency was subsequently followed up with the Instruction of the Minister of Religion No. 5 of 1991 concerning the Guidelines for Technical Coaching of the *Amil Zakat*, and *Shadaqah* Agency, and Minister of Home Affairs Instruction No. 7 of 1988 concerning General Coaching of the *Amil Zakat, Infaq*, and *Sadaqah* Agency.[7]

The development of the law on *zakat* in Indonesia continues to be perfected for improvement. In 1999, *zakat* was officially entered into the realm of positive law in Indonesia with the issuance of Law No. 38 of 1999 concerning *Zakat* Management. The birth of this law provides a conducive and effective climate for the management of *zakat*. But Law No. 38 of 1999, as a

[6] In the 1990's three types of *zakat* management institution have emerged. First is the *Zakat* Management Agency of the Local Government. Second is *Zakat* Management Institution which was established by BUMN such as BAMUS (1986), IAZ YAUMIL, PT Bontang LNG (1986). Third is *Zakat* Institutions which was established by civil society (private) such as the *Al-Falah* Social Fund Foundation (1987), *Dompet Dhuafa* Republika (1993), *Rumah Zakat* Indonesia (1998).

[7] Fakhruddin, *Fiqh dan Manajemen Zakat di Indonesia*, (Malang: UINMalang Press, 2008), 246.

regulatory and institutional framework for *zakat*, is considered far from perfect and sufficient to be able to accommodate new problems that arise related to the development and growth of *zakat* management.

This law is seen as not providing a framework for good governance, so that, there are no legal offenses to prevent the misuse of Islamic social funds and provide adequate protection for *zakat* payers. Anticipation of vulnerabilities to abuse of very large *zakat* funds also needs to be addressed. Along with the post implementation of Law No. 38 of 1999 which allegedly still leaves a crucial problem regarding misuse and inadequate management, then the discourse of amending the law on the management of *zakat* has strengthened along with the strengthening of government control efforts. In the end, the Law No. 38 of 1999 is replaced by Law No. 23 of 2011.[8] In this Act, the broad outline can be described as follows;

First, in the contents of Law No. 23 of 2011 stated that there are two *zakat* institutions in Indonesia recognized by law, namely the National *Amil Zakat* Agency (BAZNAS) and the *Amil Zakat* Institution (LAZ). BAZ is formed by the government under the auspice of the Ministry of Religion, and is spread in almost every level at the national, provincial, district/city, to sub-district level. In contrast to BAZ, the *Amil Zakat* Institution (LAZ) is an institution formed by the community whose task is to collect, distribute, utilize *zakat*. In carrying out its duties and functions, BAZNAS, Provincial BAZNAS and district/city BAZNAS can form UPZ at government agencies, state-owned enterprises, regionally-owned enterprises, private companies, and the Rrepublic of Indonesia representative abroad and can form UPZ at the sub-district, or other names, and other places.

[8] Wahyu Sukmo Aji, "Kebijakan Hukum Pidana Dalam Undang–Undang Nomor 23 Tahun 2011 Tentang Pengelolaan Zakat" within Jurnal Universitas Muhamadiyah Surakarta, (Februari, 2018), 2.

Second, in the Law No. 23 of 2011 demands an active role from the Governor/Mayor/Regent to the Minister in the formation of BAZNAS, for example Article 15 Paragraph 2: it is explained that the Provincial BAZNAS is formed by the minister on the governor's proposal after receiving BAZNAS consideration. Article 15 Paragraph 3: it is explained that the BAZNAS Regency/city is formed by the minister at the proposal of the regent/mayor after receiving BAZNAS consideration. Article 15 Paragraph 4: is regulated if there is no proposal from the Governor or Regent and Mayor regarding the establishment of Provincial, Regency, City BAZNAS, the minister may form Provincial, Regency, City BAZNAS. Likewise, Article 10 of the Appointment of a BAZNAS Member is appointed by the President on the proposal of the Minister and also Article 18 relating to licensing in the formation of LAZ.[9]

Third, LAZ arrangement is more complex to regulate licensing procedures and requirements. LAZ formation must obtain permission from the Minister or the official appointed by the Minister. Permit as referred to in Paragraph 1 is only granted if it meets the minimum requirements: (1) it is registered as an Islamic community organization that manages the fields of education, preaching, and social affair; (2) in the form of a legal entity; (3) gets a recommendation from BAZNAS; (4) has *shari'ah* supervisor; (5) has technical, administrative and financial capability to carry out its activities; (6) non-profit; (7) has a program to utilize *zakat* for the welfare of the people; and (8) willing to be regularly audited based on the principles of *shari'ah* and finance.

Fourth, Law No. 23 of 2011 contains: (1) sanctions and criminal provisions not regulated in previous legislation (Law No. 38 of 1999); (2) in Law No. 38 of 1999 does not regulate administrative sanctions, whereas in Law No. 23 of 2011, there

[9] The Law of the Republic of Indonesia No. 23 of 2011 concerning Management of *Zakat* Article 15

are administrative sanctions namely (Article 36) for violations of Article 19, 23 Paragraph (1), Article 28 Paragraph (2) and (3), as well as Article 29 Paragraph (3), and criminal provisions (Article 39).

History and Composition of Law No. 41 of 2004

Just as *zakat* has a social dimension, *waqaf* is also a form of worship that has a social dimension in term of the use of *waqaf* objects. An item that has been represented for specific needs and activities, then the item must be used in accordance with the intention of the endowment agent/perpetrator and cannot be owned again by the endowment agent. For examples, endowment for mosque, educational institution, Islamic boarding school, and cemetery are the types of *waqaf* that mostly recognized by the community. Historically, the practice of *waqaf* has been existing since Islam became a socio-political force with the establishment of several Islamic empires in the Archipelago since the end of the 12th century AD with the discovery of new historical evidence that there was at the beginning of the 16th century to the present time.[10]

By looking at the facts that developed in the Archipelago society about the widespread practice of *waqaf,* the Dutch East Indies government made written rules about *waqaf* in 1905. The laws and regulations concerning *waqaf* continued to grow in line with the dynamic of development in response to the needs of Muslims in the Archipelago. This can be seen from one of the authorities of the Religious Court (*Priesterraad*), which was established based on *Staatsblad* No. 152 of 1882, namely resolving *waqaf* disputes. The regulation was followed by a Circular of the Secretary of the Governor of June 4, 1931 No. 125/3, Circular of the Governor, December 24, 1934 No. 3088/A as contained in the 1934 *Bjiblad* Number 13390.

[10] Rahmat Djatnika, *Wakaf Tanah*, (Surabaya: Al-Ikhlas, 1982), 20-24.

The strength of this circular made by the Dutch government is only to reinforce what was stated in the previous circular; Circular of the Governor's Secretariat on May 27, 1935 No. 1273/A as contained in *Bjiblad* 1935 No. 13480. In this Circular, a number of affirmations on the procedure for *waqaf* were given. In addition, this Circular Letter also states that each representative of *waqaf* must be notified to the regent so that the regent can consider or examine general rule or local regulations that have been violated.[11]

The rules on *waqaf* continue to change and improve along with the change of government from the era of Dutch rule until the period of Indonesian independence. In the post-independence era, the legal basis of *waqaf* is the duty of the Department of Religion which handled matters of *waqaf*, namely the Government regulation No. 33 of 1949 jo. The Government Regulation No. 8 of 1980, and based on the regulation of the Minister of Religion No. 9 and No. 10 of 1952. According to these regulations, land ownership is the authority of the Minister of Religion which in its implementation is delegated to the Head of the Office of Religious Affair (KUA). The duty of the Minister of Religion or the appointed official is to supervise, examine, and record the land endowment in accordance with the aims and objectives of Islam.

As a measure of order, the Central Office of the Religious Affairs Department issued a Circular Letter dated December 31, 1956, No. 5. This Circular includes recommendation for land endowment in written ways. In connection with a joint decree between the Minister of the Home Affair and the Minister of Agrarian Affairs dated March 5, 1959 No. Pem.19/22/23/7; SK/62/Ka/59P, the ratification of the endowment of land which was originally the regent's authority was transferred to the Head of Agrarian Supervisor. The subsequent implementation is

[11] Muhda Hadisaputra and Amidhan, *Pedoman Praktis Perwakafan*, (Jakarta: Badan Kesejahteraan Masjid, 1990), 6.

regulated by the Letter of the Agrarian Bureau to the Agrarian Bureau Center on February 13, 1960 No. Pda. 2351/34/II.[12]

The history of *waqaf* continues to develop along with the rate of changing times with various relevant innovations, such as the form of endowment of money, endowment of Intellectual Property Rights (IPR), and others, which in the end with many improvements, then issued Law No. 41 of 2004 concerning Endowments and the Government Regulation No. 42 of 2006 concerning its Implementation.

Endowment, in Law No. 41, there are some new things compared to endowment stipulated in Government Regulation No. 28 of 1977 concerning land ownership endowment. In Law No. 41, it regulates not only the *waqaf* of property, but also the representation of all objects, both movable and immovable objects. This is stated in Article 16 Paragraph (1), whereas in Paragraph (2) it is stated that immovable objects as referred to in Paragraph (1) Letter a include:[13]

a. land ownership is in accordance with the provision of the applicable law and regulation both those that have been and those that have not been registered;
b. building or part of building consisting of land as referred to in Letter (a)
c. plant and other objects related to the soil;
d. land ownership to apartment units is in accordance with the provision of the applicable law and regulation;
e. other immovable objects in accordance with the *shari'ah* provision and applicable law and regulation.

The composition of Law No. 41 of 2004 in general is as follows: First, this law seeks to make a legalization of *waqaf* of land by giving land certificate to those which have not yet have

[12] Ibid.

[13] The Law of the Republic of Indonesia No. 41 of 2004 concerning Management of *Waqaf*

certificate. This land certification is very important even though in traditional *fiqh* law, endowment is considered valid to state verbally on the basis of trust. In practice, a person endows a plot of land to a religious figure or community leader to be used in religious and social affairs. In the provisions of this Law, endowment is submitted to one of the religious leaders who is later appointed as *nazhir.* This is because in the practice of traditional *waqaf* often causes problem in the next day. Many of the *waqaf* land eventually become a problem for the *nadhir's* heirs or become an object of a dispute between the parties concerned.[14]

Secondly, in the case of *waqaf* objects that have no longer valuable or have depreciation of functions and are not in accordance with the interests of the public, then these *waqaf* objects may be exchanged with other objects that have greater value and benefit. The exchange of *waqaf* objects must be carried out with the permission of the Minister of Religion of the Republic of Indonesia. The mechanism for exchanging *waqaf* objects in detail is regulated in the Government Regulation No. 28 of 1977 Chapter IV part one, Article 11 Paragraph (2) and reaffirmed in Law No. 41 of 2004 Chapter IV Article 41. Based on the two statutory regulations above, *waqaf* objects may be optimally empowered for the public interest by way of exchange. This rule certainly changes the understanding of the majority of scholars who follow the opinion of Imam Shafi'i that *waqaf* objects may not change, both in form and function. However, by using the principle of *maslahah*, the government takes an opinion that allows to change, to replace, and to move the object and function of *waqaf*.

Third, the mechanism of certification and qualification of *nazhir* becomes very dominant. Some of the qualifications of a *nazhir* are: the level of public trust in them, having good managerial ability, oriented to the public interest, not intending

[14] Sam'ani, "Paradigma Baru Perwakafan Paska UU No. 41 tahun 2014 tentang Wakaf" within Jurnal STAIN Pekalongan, 2011, 8.

to take over the object of *waqaf* into private property and others. The importance of *nazhir* certification is highly emphasized in this Law because there are many cases where the *waqaf* objects have become a private property or even become a dispute over the *nazhir's* heirs.

Fourth, the statement or contract made by the prospective *waqif* (a person who gives *waqaf*) is directed to the form of *waqaf* contract in general without any specific mention as has happened. Thus the *nazhir* can manage and empower according to the specific needs and public needs without being bound by the wishes of the *waqif*. Among those that often incriminate *nazhir* is the endowment intended for certain purpose in accordance with the wish of *waqif*, so he does not have authority to improvise *waqaf* objects in accordance with existing circumstance.

Fifth, the expansion of the *waqaf* objects. Before the existence of Law No. 41 of 2004 concerning *Waqaf*, the *waqaf* arrangement only involved the endowing of immovable objects which were more widely used for consumptive purposes like mosque, Islamic school, cemeteries and others. But now *waqaf* has been developed on movable objects that have productive value such as cash *waqaf*, share, and other securities as stipulated in the *waqaf* law. Many people consider that the expansion of *waqaf* objects is a result of progressive *ijtihad* with modern managerial capabilities.

Sixth, the qualification of a *nazhir* can be an individual, as explained in the third point and can also be in the form of organization, institution, and legal entity. This is emphasized based on the experience of the many frauds committed by individual *nazhir*. In the provisions of the new *waqaf* law, *nazhir's* professionalism is highly emphasized, including restrictions on *nazhir's* tenure. The *nazhir* will also get appropriate rights as those of worker professionally amounting to 10% of the management of *waqaf*.

Seventh, the empowerment, development, and coaching to related parties. The *Waqaf* Law No. 41 of 2004 emphasizes the importance of empowering and developing *waqaf* property which has the potential to develop people's economy in accordance with Islamic *shari'ah*. Therefore, the Law mandates that a national *waqaf* institution be immediately formed, called the Indonesian *Waqaf* Board (BWI). The establishment of BWI aims to carry out the national management administration, improve the professionalism of the *nazhir*, and develop *waqaf* objects.[15]

Zakat-Waqaf and Micro Economic Empowerment

Poverty is a global problem faced by all countries in the world including Indonesia.[16] According to data from the Central Statistics Agency (BPS), in 2014 Indonesia's poverty rate was 27.73 millions or around 10.96 percent of Indonesia's population as a whole.[17] This poverty rate is predicted to continue to increase

[15] Ibid., 9.

[16] According to the World Bank, the basic causes of poverty are: (1) failure of ownership, especially land and capital; (2) limited availability of basic necessities, facilities and infrastructure; (3) development policies that can be urban and sectorial; (4) there are differences in opportunities between members of the community and the less supportive system; (5) there are differences in human resources and differences between the economic sectors (traditional economy versus modern economy); (6) low productivity and level of capital formation in society; (7) life culture that is associated with one's ability to manage natural resources and the environment; (8) the absence of clean and good governance; (9) management of natural resources that are excessive and not environmentally sound.

[17] BAPPENAS defines poverty as a condition where a person or group of people, men and women, are unable to fulfill their basic rights to maintain and develop a dignified life. The basic rights of the community include, the fulfillment of food needs, health, education, employment, housing, clean water, land, natural resources and the environment, a sense of security from the treatment or threat of violence and the right to participate in socio-political life, both for women and men. Several approaches used by BAPPENAS

in 2015 if there is an increase in fuel price. Therefore, it requires proper analysis, accurate policies, and maximum efforts from all components of the nation to get out from the cycle of poverty.

The *maqasid al-shari'ah* scholars agreed to put "protecting wealth" at last. This does not mean that the role of "protecting property" is not very important, because without this aspect, it would be very difficult to realize the other four aspects. The arguments of the *maqasid al-shari'ah* scholars are directly proportional to the spirit of *al-Qur'an*, chapter *al-Talaq* verses 2-3[18] and chapter *al-A'raf* verse 96.[19] The implicit understanding of the two verses is that material possessions and materially decent lives are automatically achieved if the piousness of the individual is established, namely the continuity of religion, life safety, descent safety, and intellectual and educational development.

Along with the above spirit, Islamic economy is an alternative to solving the problem of poverty in Indonesia. Islamic Economy is an economic system that is supported by the values of faith, namely a belief that property naturally belongs to God. Humans are given full authority to manage as well as possible for the benefit of life in the world and the hereafter. This

include; the basic need approach, the income approach, the basic capability approach and the objective and subjective approach.

[18] Meaning: "And when they have [nearly] fulfilled their term, either retain them according to acceptable terms or part with them according to acceptable terms. And bring to witness two just men from among you and establish the testimony for [the acceptance of] Allah. That is instructed to whoever should believe in Allah and the Last day. And whoever fears Allah - He will make for him a way out" and "And will provide for him from where he does not expect. And whoever relies upon Allah - then He is sufficient for him. Indeed, Allah will accomplish His purpose. Allah has already set for everything a [decreed] extent". (*Al-Qur'an, al-Talaq*: 2-3)

[19] Meaning: "And if only the people of the cities had believed and feared Allah, We would have opened upon them blessings from the heaven and the earth; but they denied [the messengers], so We seized them for what they were earning." (*Al-Qur'an, al-'Araf*: 96)

is what is mandated by *al-Qur'an*, chapter *al-Hadid* verse 7. In addition, Islamic economy is also based on *shari'ah* which requires the perpetrators of property management according to Islamic *shari'ah* rules. All the rules revealed by Allah SWT in the Islamic economic system lead to the achievement of the benefit, goodness, prosperity, and virtue of human and eliminate danger, crime, misery, and loss on human life. In addition, the Islamic economy does not require excessive exploitation of both natural resources and human resources without regard to the balance of the ecosystem.[20] In this case 'Allal al-Fasi said:

> The highest goal of Islamic law is to preserve the ecosystems that exist in the universe so that the sustainability of life in it is maintained. This cannot be achieved except through; (1) human wisdom as a caliph on earth; (2) encouraging people to do right based on morality and integrity; (3) always take a step forward; (4) protecting natural resources; (5) and planning for the good of all.[21]

Shortly, Islamic economy is an economic system that is more directed at achieving world and hereafter happiness. *Al-Qur'an*, chapter *al-Baqarah* verse 29[22] states that everything on earth is created for humans while still paying attention to social aspects in a balanced way, as also mandated in chapter *al-Isra*'

[20] Mohamed Aslam Haneef, *Contemporary Islamic Economic Thought: A Selected Comparative Analysis*, (Kuala Lumpur: Ikraq, 1995), 54-55. See also Holger Weiss, *Social Welfare in Muslim Societies in Africa*, (Swedia: Nordic Africa Institute, 2002), 42.

[21] Ibid.

[22] Meaning: "It is He who created for you all of that which is on the earth. Then He directed Himself to the heaven, [His being above all creation], and made them seven heavens, and He is Knowing of all things". (*Al-Qur'an, al-Baqarah:* 29)

verse 29[23] that the management of asset must not be miser and wasteful. This principle is also mentioned in *al-Qur'an*, chapter *al-Nisa'* verse 6[24] states that the principle of not being stingy and wasteful.

According to Yusuf Qardhawi, there are three main pillars that form the foundation of Islamic economy, namely monotheism (transcendent), moral, and balance. It is these three pillars that distinguish between socialist and capillary economic systems that are beginning to appear fragile by time selection. In line with Yusuf Qardawi, Muhammad Umer Chapra gave a description that the principle of monotheism in the Islamic economic system does not merely offer distinction to others, but it is a reflection of the high and low of one's faith. Thus, it will affect the worldview implemented in the form of individual and social shift, personality, attitude, behavior, lifestyle, and how to respond to resources and the environment.[25]

Morally, a Muslim will place social interest above individual interest or, in other terms, than just a partial problem (*maslahah al-khassah*) to universal maslahah (*maslahah al-'ammah*). While the principle of balance leads one to realize that freedom of action, freedom of ownership, freedom of gaining welfare are

[23] Meaning "And do not make your hand [as] chained to your neck or extend it completely and [thereby] become blamed and insolvent". (*Al-Qur'an, al-Isra':* 29)

[24] Meaning: "And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor - let him take according to what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as Accountant". (*Al-Qur'an, al-Nisa'*: 6)

[25] Muhammad Umer Chapra, *The Islamic Vision of Development in the Light of Maqasid Al-Shariah*, (Herndon: International Institute of Islamic Thought, 2008), 48-51.

not absolute, but are limited by the freedom of others. The integration of these three principles is then called justice.

One of implementation of the Islamic economic systems that can be an alternative to reduce poverty is *zakat, infaq*, and *sadaqah* (ZIS). Based on a survey of the *Amil Zakat* Agency (BAZNAS) and the Bogor Institute of Agriculture (IPB) in 2011, the potential for *zakat* in Indonesia, which is predominantly Muslim, is Rp. 217, 3 trillion. This amount will certainly be very potential to reduce poverty in Indonesia. The spirit of *zakat, waqf, shadaqah*, and *infaq* in Islam is potential alternative to address the crucial problem of the nation as mentioned in chapter III, namely: (1) *zakat* management aimed to improving education and skill that are still low; (2) professional management of *zakat* will give hope to the weak economic community to be able to survive in the midst of the owners of capital; and (3) professional management of *zakat* will create wider employment opportunities. Thus, the poverty rate can be suppressed.

CHAPTER 14

COMPILATION OF *SHARI'AH* ECONOMIC LAW (KHES)

Currently, the study on *shari'ah* economy is worldwide. On the other hand, cases on *shari'ah* Islamic disputes have increased dramatically. Due to the fact, the idea towards the codification of *shari'ah* economic law as a legal consideration of a judge in deciding *shari'ah* disputes is becoming stronger. The idea, even, leads to the codification of Islamic economic law into the framework of the national legislative system. Seeing that the *shari'ah* economic potential in Indonesia is quite prospective, the government, in this case the head of the Supreme Court, formed the Compilation of *Shari'ah* Economic Law (KHES) drafting team based on the Decree No. KMA/097/SK/X/2006 dated October 20, 2006, chaired by Prof. Dr. Abdul Manan, S.H., S.I.P., M. Hum. In 2006, Law No. 7 of 1989, concerning Religious Court, amended by Law No. 3 of 2006. The law talks about the authority of the Religious Court in resolving disputes expanded. The Religious Court is given new authority to resolve Islamic economic disputes.

Overview of the Compilation of *Shari'ah* Economic Law

Monzer Kahf, in his book "The Islamic Economy", explains that *shari'ah* economy is part of interdisciplinary economy. That is, the study of *shari'ah* economy does not stand alone but is supported by good and deep mastery of the Islamic sciences and

supporting sciences.[1] Muhammad Abdullah Al-Arabi defines Islamic economy as an economic activity in the form of *muamalah* that uses the values of the substance of *al-Qur'an* and *al-Sunnah* as the basis and direction for the economic activity. M.A. Mannan defines Islamic economy as a social science that studies people's economic problems that are inspired by Islamic values.[2]

The term *shari'ah* economy is only known in Indonesia.[3] While in other countries, the term is known as Islamic economy (*al-iqtishad al-islami*) or science of Islamic economy (*'ilm al-iqtishad al-islami*). *Shari'ah* economy is different from conventional economy that are developing today. If the Islamic economy is an economic activity that is sown from the values of the Islamic religion contained in *al-Qur'an* and the practice of the Prophet Muhammad's life particularly about *muamalah*, then the conventional economy is built from the liberal and secular values

[1] Al Arif, M. Nur Rianto dan Euis Amalia, *Teori Mikroekonomi: Suatu Perbandingan Ekonomi Islam dan Ekonomi Konvensional*, (Jakarta: Kencana. 2010), 7.

[2] M.A. Mannan, *Ekonomi Islam: Teori dan Praktik*, (Jakarta: PT. Intermasa, 1992), 15.

[3] In Indonesia, the concept of Islamic economy began to be recognized in 1991 along with the establishment of Bank *Muamalat* and then followed by other financial institutions. Starting from a long discussion between the members who have concern in the field of *shari'ah* economy, then on Monday, March 26, 2001, a "*Shari'ah* Economic Community" (*Mujtama' al-Iqtishad al-Islamiy*) was declared based on Deed No. 03 dated 22 February 2010 and updated in Deed No. 02 April 16, 2010 and has been approved by the Minister of Justice and Human Rights of the Republic of Indonesia based on Decree No. AHU-70.AH.01.06, dated May 25, 2010 concerning Ratification of the Association and has been included in the additional state news No. 47 dated April 14, 2011. Members of the "*Shari'ah* Economic Community" are individuals, financial institutions, educational institutions, study institutions and business entities who interested in developing the Islamic economy. Muhamed Zulkhibri, Abdul Ghafar Ismail, Sutan Emir Hidayat (ed), *Macroprudential Regulation and Policy for the Islamic Financial Industry: Theory and Application,* (Switzerland: Springer, 2016), 214-215. See also Masdar Hilmy, *Islamism and Democracy in Indonesia: Piety and Pragmatism*, (Singapore: Institute of Southeast Asian Studies, 2010), 143-144.

that well developed in Western society. Secularism means separating religious norms and values from economic life.[4] However, in actual practice, economic activity is always bound to the values and norms that are developing in society.

The Compilation of *Shari'ah* Economic Law is a codification or collection of several legal rules relating to economic practices or *muamalah* between one or more people with another person or other parties with certain objects and times that have been determined together. In addition, the Compilation of Islamic Law is also compiled based on universal values that are extracted from *al-Qur'an* and *al-Sunnah* which are the source of Islamic law. In this contemporary era, fiqh issues that arise are not only limited to the laws relating to worship, but social, political, and economic problems. In this economic area, many practices that did not exist before, such as online buying and selling, professional alm, endowment service, endowment object, banking product and others, now come into existence. Contemporary problems are in need of a firm answer in an applicable legal rule. Then the presence of the Compilation of Islamic Economic Law is a solution to these problems.

Like the Compilation of Islamic Law (KHI), the Compilation of *Shari'ah* Economic Law (KHES) also has a similar function which is not a source of formal law (such as the 1945 Constitution, Law, PERPU, PERDA, etc.), however, its presence is very important for the legal paradigm in Indonesia, especially for Muslims. In addition, the Compilation of *Shari'ah* Economic Law can also be used as a legal consideration for a judge in deciding legal cases related to *shari'ah* disputes.[5] So, the scope of

[4] Khursid Ahmad (ed.), *Studies in Islamic Economics,* (Leicester: The Islamic Foundation, 1983), xii-xvii.

[5] *Shari'ah* economic dispute is a conflict between one or more parties of economic activity, where the economic activity is based on *shari'ah* principles and *shari'ah* economic law teachings. In the case of Islamic economic disputes can be resolved through litigation and non-litigation. (1) The litigation route

the Compilation of *Shari'ah* Economic Law is *shari'ah* economic law, *shari'ah* business law, and includes *Shari'ah* Financial Institutions.

Background of the Compilation of *Shari'ah* Economic Law is related to the authority of the Religious Court which was previously only on marriage, divorce, inheritance, child custody and others that exist in the family law area (*al-ahwal al-shasiyyah*). This authority has been regulated in detail in Law No. 7 of 1999 concerning Religious Court. The rule was then changed by the presence of Law No. 3 of 2006 which talked about expanding the authority of the Religious Court which was entitled to handle *shari'ah* disputes that occur in the community. The Compilation of *Shari'ah* Economic Law is a form of internalization of Islamic law into positive law in force in Indonesia.

Basically, economic law is the law that regulates state activities in the economic field. Then the Compilation of *Shari'ah* Economic Law also regulates legal entity and individual who form a core part of a country's economic activities. Therefore, it is appropriate if there is an effort to positivate or internalize Islamic law into the rules that apply in a binding manner divided by Muslim communities.

As for some of the problems relating to Islamic economy, namely: Islamic banks, Islamic financial institutions, Islamic insurance, Islamic mutual funds, Islamic bonds and *shari'ah* medium-term securities, Islamic securities, Islamic legal securities, *shari'ah* financing, *shari'ah* pawnshops, retire funds of the *shari'ah* financial institutions, and *shari'ah* businesses. In the Compilation of *Shari'ah* Economic Law, there are divisions of chapters or books that can be used as a reference when trying to find the law of a case, the Compilation of *Shari'ah* Economic Law consists of 4 books and 790 articles. The distribution is: (1) Book I is concerning Legal and *Amwal* (wealth) subjects consists of

is through the Religious Court and (2) the non-litigation route is through deliberations, namely BASYARNAS.

Article 1 to Article 19; (2) Book II is concerning the Contract consists of Article 20 to Article 667; (3) Book III is concerning Zakat and Grants (*hibah*) consists of Article 668 to Article 727; (4) Book IV is on *Shari'ah* Accounting consists of Article 728 to Article 790.

History of the Compilation of *Shari'ah* Economic Law

Indonesia recognized the Islamic economy or *shari'ah* economy[6] in the 1990's, along with the establishment of Bank *Muamalah* as the first Islamic bank in Indonesia. As a new bank that emerged in the midst of the hustle and bustle of the conventional banking system at that time, Bank *Muamalah* was able to prove its existence in the midst of the economic crisis that hit Indonesia in 1998.[7] This condition made the government and society's trust stronger that Islamic Banks or Bank *Muamalah* was an alternative prospective to bring Indonesia back from the prolonged economic crisis.

In line with the high public trust in the existence of Bank *Muamalah*, public legal awareness related to economic practices in accordance with *shari'ah* values has also increased. This condition can be seen from the increase in awareness of Islamic law through the tendency of regulations and provisions that breathe Islamic values and are oriented towards the protection of the rights of Muslim. On the other hand, the academic world

[6] Islamic economy or *al-istiqhad al-islami* is a social science that studies the economic activities of the people who are imbued with Islamic values contained in *al-Qur'an* and *al-Sunnah*. Among these values is that Islam strongly opposes the practices of exploitation by capital owners against the poor and prohibits the accumulation of wealth in a handful of people. This is what distinguishes between *shari'ah* economy with conventional economic systems such as capitalist economy, socialist economy and others.

[7] "Perbankan Syariah Tahan Banting Hadapi Krisis Global", Republika.Co.Id, 26 September 2011 Diakses Di http://www.republika.co.id/berita/ekonomi/keuangan%20/11/09/26/ls3sl0-perbankan- syariah-tahan-banting-hadapi-krisis-global

(campus) captures this signal as a golden opportunity to conduct studies, seminars, workshops, symposiums, trainings, and comparative studies to several other regions to further strengthen the steps of *shari'ah* economic law. So, at this time, almost all universities, both private and public, have opened study programs or *shari'ah* economic department. Based on data from the government, people who are interested in continuing their study in Islamic economic major are always full. This proves that Islamic economy has a strong magnet to win the hearts of the people.

The more widespread Islamic economy-based studies, it also has an automatic impact on the legal aspects. It is relation to whether the economic concept which is booming in society already has adequate legal instruments or it is merely a classical Islamic legal concept. Like lately, disputes in the field of *shari'ah* economy have been increasingly discussed by the wider community, especially in Indonesia. Economic experts predict that the conversation of wich will be increasingly crowded with the presence of Islamic products, Islamic banking, Islamic banking financial institutions, non-banking Islamic financial institutions, buying and selling online and so on. By seeing more and more people using *shari'ah*-based economic services and activities, the more it shows the existence of Islamic economy is in a promising and prospective position.

As a new economic system that is active in Indonesia, even in the world, the Islamic economy is a new economic system that can be an alternative in the future national development. Many economists also predict that the Islamic economy will experience rapid progress in the future. Although, previously, many people saw that the Islamic economy was always seen as different from conventional economy because so far what had taken place in Indonesia was conventional economy. But now, that view has changed with the spread of *shari'ah* economic practices. Even so, both are always related to contracts (agreements) of the parties

involved. From this practice, the parties see that the contract in the Islamic economy is able to promise comfort, security, and trust.

One of the Indonesian legal products that has a very important value for Indonesian Muslims is Law No. 7 of 1989 concerning Religious Court. Along with the rapid development in the world of *shari'ah* business, the government considers it very necessary to make new regulations related to these practices. Then the competence of the Religious Court, which was only limited to the family law area as stipulated in Law No. 7 of 1989, is felt to be revised again. The result of the revision of the law gave birth to Law No. 3 of 2006. This law adds the authority of the Religious Court to handle *shari'ah* civil cases that occur in Islamic society.

When Law No. 3 of 2006 was passed in March 2006, it turns out that the law has not been supported by adequate material laws. Even if there is, the material law is still in the form of raw materials such as *muamalah fiqh* which can be found in the classical books or half-baked material laws, namely the *fatwa* of the National *Shari'ah* Council of the Indonesian Ulama Council (DSN-MUI). These fatwa become references for Bank Indonesian (BI) to draw up Regulations or Circular Letters. Seeing this, the Supreme Court (MA) realized the need to process these materials into positive law, so that, they could be applied in the Religious Court. For short-term programs, at least the Compilation of *Shari'ah* Economic Law (KHES) is required to follow in the footsteps of the existing Islamic Law Compilation (KHI).

Seven months after Law No. 3 of 2006 was passed, the Chief Justice of the Supreme Court, Bagir Manan ratified Decree Number: KMA/097/SK/X/2006. The Decree dated October 20, 2006 was a follow-up to the group working meeting of religious civil of the Supreme Court on August 4, 2006. With the Decree, Bagir Manan formed the Compilation of *Shari'ah* Economic Law Preparation Team chaired by Chief Justice Prof. Abdul Manan.

This team has a term of office until 31 December 2007. This means that in two months the deadline will arrive. The initial step taken by the Drafting Team was to adjust the mindset (united legal opinion) in Solo, 21 to 23 April 2006 and in Yogyakarta 4 to 6 June 2006.[8]

In fact, in 1994, Indonesia had a *Shari'ah* Arbitration Board (*Basyarnas*) but apparently, it was not able to provide legal certainty and accommodate the form of *shari'ah* irregularities that occurred, so that, an effort to positive the *shari'ah* economic law began to find a bright spot after the Law No. 7 of 1989 was revised into Law No. 3 of 2006 concerning Religious Court. Law No. 3 of 2006 expands the authority of the Religious Court in accordance with the legal development and needs of Muslims in Indonesia today. With the expansion of that authority, now, the Religious Court does not only have the authority to settle disputes in the field of marriage, inheritance, will, grant, *waqaf*, and *shadaqah*, but also handles requests for adoption and settling disputes in *zakat*, *infaq*, and other disputes of property and civil rights between fellow Muslims, and the Islamic economy.[9]

In order to carry out their duties, the drafting team of the Compilation of *Shari'ah* Economic Law accommodates various parties who have adequate capacity regarding *shari'ah* economy. Among the experts who were asked to contribute their thoughts were: (1) Islamic economic experts from both universities and practitioners; (2) National *Shari'ah* Council-Indonesian Ulama Council (DSN-MUI); (3) National *Shari'ah* Arbitration Board (*Basyarnas*). This institution, which was since 1994, has had the authority to resolve Islamic economic disputes through arbitration. *Basyarnas* began to realize his position after the

[8] Abdul Manan, *Abdul Manan Ilmuwan Dan Praktisi Hukum: Kenangan Sebuah Perjuangan*, (Jakarta: Kencana, 2016), 10-15. Read also Pusat Pengkajian Hukum Ekonomi Syariah (PPHIM), *Kompilasi Hukum Ekonomi Syariah*, (Jakarta: Kencana, 2017).

[9] Badilag, *Undang-Undang Peradilan Agama*, (Jakarta: Sinar Grafika, 2002), 7.

Religious Court was given the mandate to resolve Islamic economic disputes through litigation. In detail, the steps or stages that have been taken by the Team are:

1. Adjusting the mindset (united legal opinion) in the form of a seminar on Islamic economy at the *Sahid Kusuma* Hotel in Solo on April 21-23, 2006 and at the *Sahid* Hotel in Yogyakarta on June 4-6, 2006. This initial step needs to be taken bearing in mind that those who are affiliated with the team are experts with diverse scientific backgrounds.
2. Looking for an ideal format (united legal frame work) in the form of a meeting with Bank Indonesia in order to seek input on everything that applies to Bank Indonesia on the Islamic economy and the extent of guidance that has been carried out by Bank Indonesia on Islamic banking. This step is needed as a benchmark for the validity of the object to be discussed, whether it is considered very necessary or just an alternative that is not so urgent.
3. Carrying out library research adjusted to the division of the four groups above. This study is in order to see the composition of the draft of the Compilation of *Shari'ah* Economic Law from various aspects, ranging from classical *fiqh* which has been existing both in Indonesia and in Islamic countries. The study of the classical jurisprudence was also supported by relevant contemporary sciences. The drafting team has conducted studies on a variety of contemporary economic literatures written by Islamic economic law experts and written by conventional economic law experts, both from domestic and foreign countries. In order to complete the literature review, the team of the Compilation of *Shari'ah* Economic Law has conducted a comparative study to the Kuala Lumpur International Islamic University (UII) Islamic Economics Center, Kuala Lumpur *Takaful* Center, Islamic Financial Institutions, and the Banking Dispute Resolution Institute in Kuala Lumpur Malaysia. Comparative studies

were also carried out at the Islamic Economic Law of the International Islamic Studies Center (UII) of Islamabad, Federal *Shariah* Court of Pakistan, Mizan Bank of Islamabad Pakistan, Islamic Banks of Pakistan, and several Islamic financial institutions in Islamabad Pakistan.

4. Stage of processing and analysis of materials and data that have been collected. The Draft of the Compilation of *Shari'ah* Economic Law (KHES) compiled in the first phase totaling 1015 articles was carried out over four months. Then there were more discussions about the contents of the draft material of the Compilation of *Shari'ah* Economic Law (KHES).[10]

The books that are used as references in the Compilation of *Shari'ah* Economic Law (KHES) are classic jurisprudence books which are elaborated with several books, fatwa, and related contemporary sciences, including:

1. *Al-fiqh al-Islami wa Adhilatuhu*, by Wahbah al-Zuhaili
2. *Al-fiqh al-Islami fi Thaubihi al-Jadid*, by Mustafa Ahmad al-Zarqa
3. *Al-Mu'amalat al-Madiyah wa al-Adabiyah*, by Ali Fikri
4. *Al-Wasith fi Sharh Al-Qanun al-Madani al-Jadid*, The work of abd al-Razaq Ahmad al-Sanhuri
5. *Al-Muqaranat al-Tashri'iyyah baina al-Qawaniin al-Wadh'iyah al-Madaniyah wa-al-Tashri 'al-Islami,* The work of Sayyid Abdullah al-Husaini
6. *Durar al-Hukam; Sharah Majallat al-Ahkam*, by Ali Haidar
7. The National *Shari'ah* Council Fatwa Association
8. Bank Indonesia Regulations Regarding Banking
9. Statement of Financial Accounting Standards (PSAK) Number 59 dated May 1, 2002 concerning Islamic Banking.

[10] Abdul Manan, *Abdul Manan Ilmuwan Dan Praktisi Hukum: Kenangan Sebuah Perjuangan*.

The data collected by the team can be immediately processed and analyzed as it should, the team made a Compilation of *Shari'ah* Economic Law (KHES) by reviewing books and literatures. The team itself was divided into sub-teams tasked with compiling KHES topics in the statutory language.[11] After all the presentation teams had synchronized between one chapter and another, the discussion was carried out several times through joint discussions between the consultant team and the team from the Supreme Court of the Republic of Indonesia. Through a variety of processes, on July 15, 2008 a concise draft was concluded.[12]

From these stages, a Compilation of *Shari'ah* Economic Law was born according to the decision of the Supreme Court of the Republic of Indonesia No. 2 of 2008 concerning *Shari'ah* Economic Law Compilation. The material of the Compilation of *Shari'ah* Economic Law consists of 4 books consisting of 796 articles, namely:

1. Book I: about the subject of laws and assets (*amwal*) which consists of 3 chapters with 19 articles;
2. Book II: concerning the covenant which consists of 29 chapters with 655 articles;
3. Book III: about *zakat* and grants which consists of 4 chapters with 60 articles;
4. Book IV: about *shari'ah* accounting which consists of 7 chapters with 62 articles.[13]

Based on the materials available, it can be concluded that the Compilation of *Shari'ah* Economic Law is a spectacular work in the field of *fiqh muamalah* or Islamic *fiqh* in Indonesia. Thus,

[11] Mahkamah Agung, *Kompilasi Hukum Ekonomi Syariah*, (Jakarta: Kencana, 2009), 264.

[12] Abdul Mugits, *Kompilasi Hukum Ekonomi Syariah*, 145.

[13] Mardani, *Hukum Islam: kumpulan peraturan tentang hukum Islam di Indonesia*, (Jakarta: Kencana, 2014), 44-46.

this magnum opus is valid as a reference for judicial legal considerations in handling *shari'ah* civil cases or *shari'ah* disputes. This great work can also be regarded as an Indonesian-style *muamalah fiqh* book compiled in the form of a *qanun* (modern legislation) as a guide for doing business in Indonesia. On 10 September 2008, the Compilation of *Shari'ah* Economic Law (KHES) was set and declared officially valid for Indonesian society on the same day.

KHES: From Islamic Jurisprudence to Islamic Civil Law

The presence of the Compilation of *Shari'ah* Economic Law (KHES) received a warm welcome and appreciation from the people of Indonesia, especially Muslims. The commotion of the drafting team in carrying out the task of making a material rule of Islamic economic law also deserves appreciation. On the other hand, Islamic business people also think that the magnum opus in Indonesian legislation is a new chapter in providing legal certainty and trust, so that, the prospect for Islamic business is going forward and getting better.

The birth of Law No. 3 of 2006 concerning amendments to Law No. 9 of 1989 concerning Religious Court has brought great changes to the position and existence of Religious Court in Indonesia. In addition to the authority that has been granted in the field of Islamic Family Law, Religious Court is also given the authority to settle cases in the field of *shari'ah* economy which include *shari'ah* banking, *shari'ah* microfinance institutions, *shari'ah* insurance, *shari'ah* reinsurance, *shari'ah* mutual funds, *shari'ah* bonds, and *shari'ah* medium term securities, Islamic securities, Islamic financing, Islamic pawnshops, Islamic financial institution pension funds, and Islamic business.

As a consequence of the increased authority of the Religious Court, there are several things that become the task of the Supreme Court of the Republic of Indonesia subsequently, namely establishing several policies, among others: (1) making

improvements to the physical facilities in the form of infrastructure of the Religious Court. The facilities are related to the physical building and all matters relating to the equipment needed; (2) increasing the human resources of the Religious Court by conducting collaboration with several universities, conducting studies, training for Religious Court's officials, especially judges in the field of Islamic economy; (3) establishing formal and material law as a guide for judges in examining, adjudicating, and deciding *shari'ah* economic cases; (4) meeting the systems and procedures so that cases involving Islamic economy can be carried out simply, easily and at low cost. The four Supreme Court policies above are the main pillars of judicial power in carrying out the judicial function mandated by Article 24 of the 1945 Constitution jo. Law No. 4 of 2004 concerning Judicial Authority.[14]

The position of the Compilation of *Shari'ah* Economic Law (KHES) has become increasingly clear with the existence of the Supreme Court Regulation No. 02 of 2008. The regulation discusses the mechanism and practice of the Compilation of *Shari'ah* Economic Law in the Religious Court. More specifically, in Article 1 No. 1 Regulation of the Minister of Religion of the Republic of Indonesia No. 02 of 2008 states that Judges in the Religious Court in charge of examining, adjudicating, and completing cases relating to *shari'ah* economy must refer to regulation that comply with principles, provisions, and the rules of the Compilation of *Shari'ah* Economic Law.

[14] Mardani, "Kedudukan Kompilasi Hukum Ekonomi Syariah di Indonesia" within Jurnal Islamic Economics & Finance (IEF) Universitas Trisakti, 04 Mei 2010.

CHAPTER 15

HALAL PRODUCT ASSURANCE

The Law has mandated the state to provide protection and guarantee regarding the legality of products consumed and used by the public. Assurance regarding *halal* products should be carried out in accordance with the principles of protection, fairness, legal certainty, accountability and transparency, effectiveness and efficiency, and professionalism. The mandate is mentioned in Article 4 of Law No. 33 of 2014 concerning *Halal* Product Assurance (JPH), it is "Products that enter circulate and trade within the territory of Indonesia must be *halal*-certified". The provisions of this law would only been effective after five years after being promulgated since 17 October 2014 or taking effect 17 October 2019.

Introduction to *Halal* Product Assurance

The 1945 Constitution of the Republic of Indonesia mandates the state to guarantee the independence of each resident to embrace their respective religions and to worship according to their own religion and belief. One of the government responsibilities to the people is to guarantee certainty, comfort, and protection in worshiping and speaking out. Legal protection can take into account the certainty of the quality of products (food and beverages) that circulate in the midst of society, especially for Muslim communities. In addition, food and beverages as well as products that are consumed and traded must be avoided from ingredients or methods of processing products that are not permitted by Islamic law.

Of the many considerations about the real condition of the Indonesian people, especially the large number of products circulating and being consumed by the wider community, it is considered to be very important for the Indonesian people to issue rules in the form of Law No. 33 of 2014 concerning *Halal* Product Assurance. This law specifically regulates products that are truly "*halalan toyyiban*" for consumption by consumers, especially those who are Muslims. In addition, the act also regulates non-*halal* (unlawful)[1] products to make consumers feel safer.[2]

Theologically, *halal* and good food (*halalan tayyiban*) is good and healthy food for one's physical and mental growth in accordance with medical and *shari'ah* rule. Some Muslim scholars interpret it as food that contains tastes for everyone to consume and do not harm the physical and intellect. There are also those who interpret it as healthy, proportionate and safe food.[3] For Muslims, eating *halal* and *tayyib* food is not just a physical requirement, but more than that, it is a form of one's

[1] Meanwhile, among the verses of *al-Qur'an* that talk about the prohibition of eating unclean, dirty, and disgusting food are mentioned in the chapter *al-Maidah*, as follows: "Prohibited to you are dead animals, blood, the flesh of swine, and that which has been dedicated to other than Allah, and [those animals] killed by strangling or by a violent blow or by a head-long fall or by the goring of horns, and those from which a wild animal has eaten, except what you [are able to] slaughter [before its death], and those which are sacrificed on stone altars, and [prohibited is] that you seek decision through divining arrows. That is grave disobedience. This day those who disbelieve have despaired of [defeating] your religion; so fear them not, but fear Me. This day I have perfected for you your religion and completed My favor upon you and have approved for you Islam as religion. But whoever is forced by severe hunger with no inclination to sin - then indeed, Allah is Forgiving and Merciful." (*Al-Qur'an, al-Maidah*: 3)

[2] Law No.33 of 2014 concerning Guarantee of *Halal* Products

[3] Diana Candra Dewi, *Rahasia Dibalik Makanan Haram,* (Malang: UIN Malang Press: 2007), 4.

self-devotion to Allah SWT as Allah said in chapter *al-Baqarah* verse 168.[4]

For Muslims, the term *halalan tayyiban* is very familiar because the two words are mentioned in *al-Qur'an* chapter *al-Baqarah* verse 168.[5] The concept of *halalan tayyiban* is also a subject of discussion by many experts from various aspects. According to Mu'jam al Wasith, *halal* in terms of food and non-food are goods that are not prohibited and may be eaten or used. In addition, consuming these items is also unlawful by religion. *Haram* (unlawful) can be seen from two aspects: (1) materially *haram* because it is declared to be unlawful by the *shari'ah*, such as pig, carcasses, and blood; (2) non-materially *haram* such as how to buy, obtain or process the goods. And the word *thayyib* means delicious, good, healthy, serene, and foremost. This means that the *thayyib* is "not dirty or not damaged in terms of material (expired), and not also mixed with unclean". *Thayyib* also means "inviting taste in order want to eat it and it does not endanger the physical, mind and soul". *Thayyib* food is healthy, which has adequate, balanced, and proportional nutrition for the health condition of the people who consume it.

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[4] Meaning: "O mankind, eat from whatever is on earth [that is] lawful and good and do not follow the footsteps of Satan. Indeed, he is to you a clear enemy." (*al-Qur'an, al-Baqarah*: 168)

[5] Allah's command for believers to eat *halal* and hygienic food (*halalan thayyiban*), at least, mentioned in the five chapters in *al-Qur'an*, as follows "O mankind, eat from whatever is on earth [that is] lawful and good and do not follow the footsteps of Satan. Indeed, he is to you a clear enemy." (*Al-Qur'an, al-Baqarah*: 168) and "And eat of what Allah has provided for you [which is] lawful and good. And fear Allah, in whom you are believers." (*Al-Qur'an, al-Maidah*: 88) and "Eat then of the lawful and good (things) which you have acquired in war, and keep your duty to Allah. Surely Allah is Forgiving, Merciful." (*Al-Qur'an, al-Anfal*: 69) and "Then eat of what Allah has provided for you [which is] lawful and good. And be grateful for the favor of Allah, if it is [indeed] Him that you worship." (*Al-Qur'an, al-Nahl*: 114) and "…"Eat from the good things with which We have provided you." And they wronged Us not, but they were [only] wronging themselves." (*Al-Qur'an, al-A'raf*: 160)

New Phase of *Halal* Product Assurance in Indonesia

Halal Product Assurance Agency (abbreviated as BPJPH) is one of the supporting elements in the Ministry of Religion of the Republic of Indonesia which is under and is responsible to the Minister of Religion in charge of carrying out the implementation of *halal* product assurance in accordance with statutory provisions. The Policy Assessment and Development Agency (BPPK) are led by the Head of the BPJPH Agency. *Halal* product assurance is held based on the provisions of Law No. 33 of 2014 concerning *Halal* Product Guarantee and its derivative regulations. The birth of *Halal* Product Assurance (JPH) is legal certainty on the *halal* status of a product as evidenced by *halal* certificate.[6] *Halal* certificate is an acknowledgment of the *halal* status of a product issued by the *Halal* Product Assurance Agency (BPJPH) based on a written *halal* fatwa issued by the Indonesian Ulama Council (MUI).[7]

Meanwhile, the *halal* label is a sign of *halalness* of a product to provide legal certainty and comfort for consumers. For Muslims, the status of *halal* food is a priority because it is a command from religion that Allah commands those who believe to eat *halal* (lawful) food and *tayyiban* (highly nutritious). There is also what is referred to as the *Halal* Inspection Agency (LPH), which is an institution that carries out inspection and/or testing of the *halal* product. This institution directly gets a mandate from the government through the law to conduct an inspection of products in Indonesia.

Under the leadership of President Susilo Bambang Yudoyono, the Organization of *Halal* Product Assurance (JPH) will enter a new phase. Starting October 17, 2019, the *Halal* Product Assurance, which was previously under the authority of

[6] Article 1 Paragraph 5 of Law No. 33 of 2014

[7] Article 1 Paragraph 10 of Law No. 33 of 2014

the Indonesian Ulama Council MUI),[8] namely the Indonesian Ulama Council's Food, Drugs and Cosmetics Study Agency (LPPOM MUI), will turn into government authority through a board formed directly by the government. The board in question is the *Halal* Product Guarantee Agency (BPJPH) which in its implementation continues to work with the Indonesian Ulama Council. This change of authority is detailed in Law No. 33 of 2014

BPJPH as an institution under the auspice of the Ministry of Religion as a stake holder in the operation of *halal* product assurance certainly cannot work alone. For this reason, said the Minister of Religion of the Republic of Indonesia, it is very necessary to have a good synergy and cooperation relationship with other parties who have the capacity to carry out the halal product assurance for the wider community, especially Muslims. The Minister of Religion, Lukman Hakim Saifuddin, emphasized that his party has been ready to carry out the mandate to hold *halal* product assurance. "In accordance with the mandate of the Law, we have been preparing for the last two years, exactly since the formation of BPJPH in 2017". Starting October 17, 2019, the Religious Ministry stated readiness to carry out the mandate of the law after signing the MoU on the Implementation of *Halal* Certification Service (PLSH)) for products that must be *halal*-

[8] Ulama play a big role in *halal* certification in Indonesia. When the Indonesian people were uneasy about the issue of pork fat in 1989, the government asked the Indonesian Ulama Council (MUI) to reassure the public, especially on food, medicine and cosmetics. To strengthen the position and role of the MUI, the government made Law No. 33 of 2014 concerning Halal Product Guarantee. The role of the MUI so far has been auditor certification, accreditation of the *Halal* Examination Institution (LPH), recognition of the Foreign *Halal* Certification Institute (LSHLN), *halal* standards and *halal* fatwa. Read Stewart Fenwick, Blasphemy, *Islam and the State: Pluralism and Liberalism in Indonesia,* (New York: Routledge, 2017), 88-97. See also Febe Armanios, Bogac Ergene, *Halal Food: A History,* (New York: Oxford University Press, 2018)

certified, at the office of the Vice President of the Republic of Indonesia, Jakarta.

As for the MoU, there are eleven leaders of the relevant ministries/state institutions that are directly involved together with the Indonesian Ulama Council MUI). The parties are: (1) Minister of Religion; (2) Minister of Health; (3) Minister of Agriculture; (4) Minister of Foreign Affairs; (5) Minister of Research; (6) Technology and Higher Education; (7) Minister of Finance; (8) Minister of Communication and Information Technology; (9) National Police Chief; (10) Head of BPOM; (11) Head of BSN; and (12) General Chair of the Indonesian Ulama Council (MUI). The involvement of a large number of state ministries/institutions show that the issue of food is a very crucial problem for all humans while also showing that the government has serious attention to this problem because it concerns the physical and spiritual health of the Indonesian people.

Halal Certification: Voluntary to Mandatory

In some Islamic countries or Muslim majority countries such as Malaysia, Brunei Darussalam, and some countries in the Middle East, or even in non-Muslim countries (such as America, Japan, Korea, Singapore and others), *halal* product assurance is done voluntary by religious social institutions or organizations over the authority given by the state to them.[9] That also happens in Indonesia, where the *halal* product assurance (for more than 30 years) has been under the authority of the Indonesian Ulama Council (MUI). The birth of Law No. 33 of 2014 drastically

[9] Johan Fischer, *Islam, Standards, and Technoscience: In Global Halal Zones* (Roudledge) read also Paolo Pietro Biancone and Silvana Secinaro, "The Halal Tourism: A Business Model Opportunity" within Ahmad Jamal, Kevin Griffin, Razaq Raj (ed), *Islamic Tourism: Management of Travel Destinations*, (London: CABI, 2019), 192-197. Read also Yunes Ramadan Al-Teinaz, Stuart Spear, Ibrahim H. A. Abd El-Rahim (ed), *The Halal Food Handbook*, (USA: John Wiley and Sons, 2020), 207-212.

changed the direction of control from the MUI to the Ministry of Religion. A change from voluntary principle to mandatory implementation carried out by the government.

The total reform in the *halal* product certification agency according to the Minister of Religion is a step forward as mandated by the Law. He added that the guarantee of *halal* products is not a form of state discrimination against socio-religious organizations in religious life. In fact, the implementation of *halal* product assurance by the government is a form of the presence of the state in carrying out the mandate of the constitution. The presence of the state in this large task is evidence of the participation and seriousness of the state in the framework of providing legal certainty for products that are fit and safe for consumption by Muslim communities.

The shift of authority from LPPOM MUI to BPJH or the shift from voluntary to mandatory invites pros and cons. MUI sees that the transfer of authority is hurting the legal certainty in the community. Historically, the role of LPPOM through a struggle and sacrifice of the Ulama in the framework of providing protection and certainty about the *halal* status of all products for Indonesians who have worked and trusted since 30 years ago must move away. Several legal efforts were made by the Indonesian Ulama Council in questioning the shift. LPPOM MUI, together with approximately 31 leaders of the provincial LPPOM MUI throughout Indonesia, sent a judicial review of Article 5, Article 6, and Article 47 Paragraph (2) of the JPH Law to the Constitutional Court (MK). However, the government also argued that based on the mandate of the law, the government must be present in providing legal certainty to the public. And this shift is certainly not absolute, but the government continues to collaborate by involving the Indonesian Ulama Council proportionally and professionally.

Law No. 33 of 2014 concerning *Halal* Product Assurance

Law No. 33 of 2014 is about the present of the government to guarantee legal certainty about the guarantee of *halal* products in Indonesia. Law No. 33 of 2014 concerning *Halal* Product Assurance was passed by President Susilo Bambang Yudhoyono in Jakarta on October 17, 2014. Law No. 33 of 2014, concerning *halal* product assurance, came into force from the enactment on October 17, 2014 by the Ministry of Law and Human Rights of the Republic of Indonesia, Amir Syamsudin, in Jakarta. The law was promulgated in the 2014 State Gazette of the Republic of Indonesia Number 295. Explanation of Law No. 33 of 2014 concerning the *Halal* Product Assurance promulgated in the Supplement to the State Gazette of the Republic of Indonesia No. 5604. Some important points are set out in Law No. 33 of 2014 is about:

First, provide *halal* guarantee in term of product ingredients. Product ingredients declared as *halal* are materials derived from raw material of animals, plants, microbes, and materials produced through chemical processes, biological processes, or genetic engineering processes. In addition, the *Halal* Product Process (PPH) is also determined, which is a series of activities to ensure the *halalness* of the product which includes the supplying of materials, processing, storing, packaging, distributing, sailing and presenting of the product.[10]

Second, regulate the right and obligation of business actors with *halal* materials to list *halal* label. Whereas business actors producing products from materials derived from prohibited materials are obliged to state explicitly non-*halal* information on product packaging or on certain part of products that are easily seen, read, not easily erased, and are an inseparable part of the product.

Third, in order to provide public service, the government is responsible for organizing *halal* product assurance, the

[10] Article 17 Paragraph 1 of Law No. 33 of 2014

implementation of which is carried out by the *Halal* Product Assurance Agency (BPJPH). In exercising its authority, BPJPH works closely with relevant ministries and/or institutions, the Indonesian Ulama Council (MUI), and the *Halal* Examining Agency (LPH).

Fourth, Article 6 of Law No. 33 of 2014 explains that in the implementation of JPH, BPJPH is authorized to: (a) formulate and determine JPH policies; (b) establish JPH norms, standards, procedures and criteria; (c) issue and revoke *halal* certificate and *halal* label on products; (d) register *halal* certificate on foreign products; (e) socialize, educate and publish *halal* products; (f) accredit LPHs; (g) register the *halal* auditors; (h) supervise JPH; (i) provide guidance for *halal* auditors; and (k) cooperate with domestic and foreign institutions in the field of organizing JPH.

Fifth, the procedures for obtaining *halal* certificates are: (1) submission of *halal* certificate application conducted by business actors to BPJPH; (2) subsequently, BPJPH checks the completeness of the documents; (3) inspection and/or *halal* product testing conducted by LPH; (4) LPH obtains accreditation from BPJH in collaboration with MUI; (5) the determination of the *halal* product is carried out by MUI through the MUI's *halal* fatwa session in the form of a decision to determine the *halal* product signed by MUI; (6) BPJPH issues *halal* certificate based on the decision to determine *halal* products from MUI.

Sixth, the cost of *halal* certification is borne by business actors applying for *halal* certificate. In order to expedite the implementation of *halal* product assurance, the law instructs the government from the central to the regions, namely the state revenue and expenditure budget, regional revenue and expenditure budget, companies, social institutions, religious institutions, associations, and communities to facilitate the cost of *halal* certification for micro and small businesses.

Seventh, in order to guarantee the implementation of *halal* product assurance, BPJPH conducts supervision on LPH which

includes: (1) the validity period of *halal* certificate; (2) *halasness* of product; (3) inclusion of *halal* label; (4) inclusion of non-*halal* information; (5) separation of location, place and mean of processing, storing, packaging, distributing, sailing, and presenting between *halal* and non-*halal* products; (6) the existence of the *Halal* Product Process and/or other activities related to JPH.

Eighth, to ensure law enforcement against violations of this Law, administrative sanctions and criminal sanctions are determined.

Purpose of Law of the *Halal* Product Assurance

Every rule made must have goals and objectives to be achieved. The goal, of course, is to provide maximum benefits to the people, in this case, business people and consumers who have sovereignty. The objectives and targets to be achieved by Law No. 33 of 2014 Article 3 are as follows: (a) providing comfort, security, safety, and certainty of the availability of *halal* products for the public in consuming and using products; (b) increasing the added value for businesses to produce and sell *halal* products.

While in Law No. 33 of 2014 Article 3 Paragraph (b), it is explained that the purpose of the *halal* product assurance law is to increase added value for businesses in producing and marketing *halal* products. Seeing the article above, the existence of *halal* certification, besides aiming to provide protection for Muslim consumers, also has an economic objective that will benefit the industrial world. Among these objectives are:[11]

1. The population of Indonesia is more than 200 million people. Of that number, there are around 87% of the populations who are Muslim. This is a huge potential for the world market to sell *halal* products. If the domestic products lose this moment, then in the near future, they will be unable to compete with

[11] Muhammad Djakfar, *Hukum Bisnis Membangun Wacana Integrasi Perundangan Nasional Dengan Syari'ah,* (Malang: UIN Malang Press, 2013), 238.

the products from outside. At present, Muslim consumers in some regions have a tendency to be attracted to foreign products because they have read the market. Therefore, almost all foreign products entering Indonesia have registered with the *halal* certification institutions.

2. Because the domestic *halal* production system is not yet popular in the country, imported products such as foods, beverages, medicines, cosmetics and other *halal* products will pose a threat to the competitiveness of domestic products, both in local, national and free market.
3. The increasing public awareness of the importance of consuming and using *halal* products is a challenge that must be responded by the government and Indonesian businesses.[12]
4. Of the approximately 1.5 million producers of foods, beverages, medicines, cosmetics and other products, less than one thousand use *halal* label and *halal* certification. This condition is quite alarming because they sell products in the midst of a predominantly Muslim community without *halal* label.

From the explanation above, it can be concluded that the application of *halal* certification and labeling has several benefits: (1) providing guarantees and protections for Muslim consumers; (2) providing certainty and business opportunities for business actors; (3) meeting the demands of the global market so that, Indonesian producers can compete in the world of trade both at home and abroad; (4) providing comfort in the spiritual aspect,

[12] For example, the domestic market has now been flooded with foreign products labeled as *halal*. This is because the production actors from abroad know that Indonesia has high economic potential. Coupled with the majority of Indonesian society are devout and consumptive Muslims, so they are very easy to accept them. However, it is very ironic, when Indonesian products that are exported to several Muslim-majority countries cannot be accepted simply because they do not include the *halal* label or the quality of *halal* certification is still under the world standard.

that consuming *halal* food, drinks and products contains the value of one's self-servitude to Allah SWT.

General Provisions Regarding Halal Product Assurance

To comprehend Law No. 33 of 2014 comprehensively requires quite a hard effort because the law has many articles and sub-articles. Therefore, there are a number of keywords to understand and to distinguish between those that fall into the areas of consumers, producers, and those that fall into the areas of policy makers and government, including:

1. Product is a good and/or service related to foods, beverages, medicines, cosmetics, chemical products, biological products, genetic engineering products, as well as used goods that are used or utilized by the community.
2. *Halal* product is a product that has been declared *halal* in accordance with Islamic law.
3. *Halal* Product Process, hereinafter abbreviated as PPH, is a series of activities to guarantee the *halalness* of the product including the supply of materials, processing, storing, packaging, distributing, sailing and presenting of the product.
4. Material is an element used to make or produce a product.
5. *Halal* Product Assurance, hereinafter abbreviated as JPH, is legal certainty on the *halal* status of a product as evidenced by a *halal* certificate.
6. *Halal* Product Assurance Agency, hereinafter referred to as BPJPH, is an institution established by the government to administer JPH.
7. The Indonesian Ulama Council, hereinafter abbreviated as MUI, is a forum for deliberation by Ulama, Islamic religious leaders, and Muslim scholars.
8. *Halal* Examining Institution, hereinafter abbreviated as LPH, is an institution that carries out inspection and/or testes the *halalness* of the product.

9. *Halal* Auditor is a person who has ability to carry out inspection on the *halalness* of the product.
10. *Halal* Certificate is recognition of *halal* status of a product issued by BPJPH based on a written *halal* fatwa issued by MUI.
11. *Halal* Label is a sign of *halalness* of a product.
12. Business actor is an individual or business entity in the form of a legal entity or not a legal entity conducting business activities in the territory of Indonesia.

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POSITIVATION OF ISLAMIC CIVIL LAW IN INDONESIA

(A Philosophical Approach)

Positivation of Islamic Civil Law in Indonesia is a very reasonable matter. There are, at least, three fundamental reasons, namely historical factor, political factor, and sociological factor. Historically, Islamic civil law is a rule that has rooted and has been applied in the historical trajectory of the Indonesian Archipelago. Politically, the ideology of the Indonesian nation is Pancasila, particularly the first principle "The Almighty God", means all aspects of life as a nation and state are supposed to originate from the noble philosophical values of the Pancasila. And sociologically, the majority of Indonesian people from the past to nowadays are Muslim.

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