Reformulation of the Government Compilation of Islamic Law: Strengthening the Concept of Gender-Sensitive Regulations in Indonesia

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Abstract

The main purpose of this study is to find out the weaknesses in the application of the Compilation of Islamic Law in Indonesia, especially some of the provisions in it that tends to be gender biased; so that innovative ideas can be found to strengthen even the re-formulation of gender-sensitive legislation but still based on Shariah values and customary law. It is normative law research that uses a normative legal case study in the form of legal behavior products, among others by examining the Compilation of Islamic Law especially in the level of its implementation. The subject of the study is the Islamic marriage law which is conceptualized as the norm or rule that applies in the society and becomes the reference of behavior for every Indonesian citizen who embraced Islam.

Keywords: *Reformulation, Government Compilation, Islamic Law, Strengthening, Concept, Gender Sensitive Regulations*

A. Introduction

The main purposes of this paper are: firstly, to describe the recent issues on how the implementation of the Compilation of Islamic Law stimulating legal discrimination against Muslim women in Indonesia, secondly, to analyze the contents of the government compilation of Islamic law from the perspective of Muslim moderate, and lastly, to assess the probability of strengthening the concept of gender-sensitive regulations in the basis of Islam and *Adat* or custom values. According to S. Muzaffar Hussain, *Shari'ah* is essentially different from Western Law in three aspects;

firstly, *Shari'ah* is based on revelation while Western Law is the Lawyers' Law. Secondly, it is virtually indisputable, and lastly it has a wider scope compared to Western law, includes, public and private laws, as well as the international relationships; The Mohammedan Law courts, for instance, were convinced to prosecute in the case of "the Muslim litigants any matter of marriage, divorce, guardianship of minors, to *waqf*, family relationships, gift, succession, wheels, etc".¹

Abdur Rahman I. Doi (as cited by Mashhour), defined *Shari'ah* as: "the Path to be followed,"² referring to a set of legal restriction, as so-called Islamic *Shari'ah*.³ Also, Quran as the principal source of Islamic *Shari'ah*, governing two aspects of human relations; firstly, the relationship between human and God which is unthinkable and secondly, the relationship between human being in legal and social context (*fiqh*), which is open to dispute. Moreover, according to the conception of Islamic law, that its basic and legal framework is defined by Allah, the law not only regulates the relationships between human beings each other, and relationship between human being and things in the society; but also stipulated human relationship with God (Allah), human relationships with oneself, human relationships with things in society and the surrounding nature as well.⁴

Accordingly, it is crucial that other sources should supplement the Quran as the nature of the Quran is mostly concerning the universal moral doctrine and the procedure rather than strict obligations. Thus the hierarchy of Islamic *Shari'ah* is as follows:

1. The Holy Quran
2. *Sunna*, tradition which is derived from the Prophet Muhammad's behavior.
3. *Ijma*, the consensus among Muslim scholars
4. *Ijtihad*, according to Abdullahi Ahmed An- Na'im, as cited by Mushhour, "ijtihad in a broader context, is the elaboration and the explanation of the *Shari'ah* law," as well as a contextual interpretation of the Quran, in practice, by using human reasons.⁵ According to Daud Ali, *ijma'*, *qiyas*, *istidlal*, *maslahat mursalah*, *istihsan*, *istisab* and *urf* can be categorized as methods used in *ijtihad*.⁶

¹ Hussain S. Muzaffar, *Islamic Law and The Modern Age* (1997) XXII *Hamdard Islamicus* Abstract.

² Mashhour, Amira, "Islamic Law and Gender Equality- Could There be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt", *Human Rights Quarterly*, (2005), p.365.

³ *Ibid*.

⁴ Muhammad Daud Ali, *Hukum Islam: pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia*, Jakarta: Raja Grafindo Persada, (2007), p. 31.

⁵ *Ibid.*, p. 2

⁶ Muhammad Daud Ali, *Op.Cit.*, pp. 120-123

Whilst Quran and *Sunna* are divine in origin, the last three sources are based on the independent legal interpretation. Thus it can be argued that *Shari'ah* is essentially flexible.

However, the combined patriarchal culture and patriarchal reading of Islamic teaching are reflected in conventional Islamic law.⁷ This situation perhaps stimulates men to be super ordinates women. Women are obliged to perform their submission to men in the form of law or tradition. The implementation of the government compilation of Islamic law in Indonesia's Religious for instance partially reflects the patriarchal interpretation of Islamic rules which is derived from conventional *fiqh*. It has encouraged some Muslim women who were involved in Gender Mainstreaming Working Group at Ministry of Religion, to formulate a gender-sensitive counter legal draft. This counter legal draft is concerned with such issues, for example, polygamy and women marrying without a *wali* (*father or brothers approval*). Even though the Ministry of Religion has rejected this counter legal draft, Muslim women's organizations are still struggling for the reformation of this law.

B. Discussion

1. Counter Legal Draft of the Government Compilation of Islamic Law; Law Reform to Fulfill Muslim Women's Rights in Indonesian Marriage Law

The ground of Indonesian Religious Court to proceed the cases is Law No. 7/ 1989 on The Religious Court. This regulation is mostly governing the function, responsibility and structural competency. It is a formal source of law, whereas Law No. 4/ 2004 jo. Law No. 4/ 1970 as the substantive law on Judicial Power, outlined four branches of the judiciary; General Court, Religious Court, Military Court, and Administrative Court. General courts include District Courts of First Instance, High Courts of Appeal, and the Supreme Court (*Mahkamah Agung*). Religious courts (*Pengadilan Agama*) established parallel with District Courts. Religious courts structured at two levels: First Instance in each district and Appellate Courts in all provinces. Appeals from religious appeals courts (*Mahkamah Islam Tinggi*) go to Supreme Court. Under Law No.1/1974 on Marriage, the Religious Court has a limited jurisdiction, in First Instance, over Muslim community in the matters of marriage, divorce, inheritance, reconciliation, and alimony,⁸ thus

⁷ Munir L. Zakiah, "Domestic Violence in Indonesia", 2 *Muslim World Journal of Human Rights* Abstract, (2005).

⁸ Art. 49 Marriage Law No. 1 on 1974

parties can apply to District Courts for the adjudication on the basis of Indonesian Civil Law which is derived from the Dutch law and *Adat* law.

In 1991, the Indonesian government passed the practice guideline for the judge in the Religious courts, as so-called the Government Compilation of Islamic Law (the Presidential Instruction No. 1/1991). This compilation governs some aspects of marriage matters, such as marriage guardianship, polygamy, a marriage contract, divorce, etc. Otherwise, Law No. 1/1974 on Marriage, a secular law, which is “placed restrictions and obligations on potentially polygamous men,”⁹ is the primary source of the marriage law in Indonesia. Both of these regulations are stimulating a controversy among feminists as it reflected a gender biased in some contents.

The failure of Suharto in 1998 which was followed by the May Tragedy-1998 (mass rape to ethnic china’s women), become a milestone in the Indonesian women movement to organize themselves and struggle to eliminate violence against women in all aspects, such as; physical violence, psychological violence, economic violence, and domestic violence. Some Muslims moderate have been organized themselves into national NGO, educational institutions, or advocacy groups, such as Islam Liberal Network and *Rahima*. Kathryn Robinson states that for these activists, as so-called Muslims Feminists, modernity is not:

*...equated with a decline in religious values, but rather an Islamic doctrine and values provide a basis for socially just and inclusive modernity as an alternative to the individualistic modernity of the West, which does not protect the rights of the weak.*¹⁰

The main agenda of this group is to struggle for law reform to eliminate legal inequality between men and women and to encourage a progressive understanding of Islam. A particular concern of this movement is to eliminate gender discrimination in the Marriage Law No. 1/1974 and the Government Compilation of Islamic Law, such as polygamy, marriage guardianship, prohibition of interfaith marriage, illegitimate children, etc. Thus, the launching of Counter Legal Draft of the Compilation of Islamic Law in October 2004 which is pioneered by Dr. Siti Musdah Mulia is a starting point for this movement.

According to Abd Moqsith Gazali, a member of Gender Mainstreaming Working Group at Ministry of Religion, there are some reasons to formulate the Counter Legal Draft of the Compilation of Islamic Law, such as 1). The contradiction between the Compilation of Islamic Law and the Principles of Equality in the Quran, 2). The contradiction between

⁹ Anonymous, “Interview with Kathryn Robinson: Secularization of Family Law in Indonesia”, *Harvard Asia Quarterly*, (2006), p. 1.

¹⁰ *Ibid.*, p.3

the Compilation of Islamic Law and the Women Right's principles in CEDAW, and 3). The contradiction between the Compilation of Islamic Law and Indonesian Customary Law. Thus, the elimination of this contradiction is essentially urgent, to prevent gender discrimination.¹¹ Although the Ministry of Religion has rejected this counter legal draft; it is interesting to re-analyze this conception, especially in the issues of polygamy and marriage guardianship as these are the most crucial issues related to the implementation of *Shari'ah* into the Indonesian Marriage law.

Under the Compilation of Islamic Law, women, unless widow or divorcee, who wanted to enter into the marriage contract, are required to receive an approval from a marriage guardian as it is implied in Law No. 1/1974 on Marriage: "solemnised according to the laws of the respective religious and beliefs of each of the parties."¹² Thus Muslims are obliged by this law to fulfill the validity of the contract of marriage which is revealed in the article no. 14 of the Compilation of Islamic Law, marriage guardianship is essential in this matter. This rule is in contradiction with the principle of gender equality in both the Quran and CEDAW (The U.N. Convention on the Elimination of All Forms of Discrimination against Women) and should be revised by the government. However, some conventional Muslims argued that the regulation of this law is based on a consensus between *Ulamas* or the Islamic leaders and the *Adat* leaders and therefore, it is unchangeable. It is an irrational argument as the Quran contains two kinds of laws; firstly, related to the relationship between human and Allah which is unthinkable, and then secondly, related to the relationship between human being in the form of *Shari'ah* which is disputable.

About the issue of polygamy, the Marriage Law No. 1/1974 considered that the basis of marriage is monogamy. However, "it does not prohibit polygamy for those religions that allow it, such as Islam, Hinduism, and Buddhism."¹³ The Compilation of Islamic Law, as mentioned in article 55:1, is allowing polygamy with some restrictions; firstly, must be approved by existing wife or wives, and secondly, must obtain a judicial permission by gratifying such legal conditions, i.e. "proof of financial capacity, safeguards that husband will treat wives and children equally; and court inquiry into validity of reasons for wishing to contract polygamous marriage (e.g., existing wife or wives, physical disfigurement, infertility, incurable disease)".¹⁴

¹¹ Ghazali Abd. Moqsith, *Argumen Methodologis*, Kompas, (Jakarta), 24 December 2005

¹² Art. 6 Marriage Law No. 1 on 1974

¹³ *Ibid.*, p. 8.

¹⁴ As quoted by Kathryn Robinson from: article 5 Law No. 1 on 1974 of Marriage and article 55:2, 56 The Compilation of Islamic Law.

However, this restriction is stimulating the other issues, i.e., counterfeiting of marriage consent declaration from existing wife or wives, and *nikah sirri* or *sirri* marriage, which is legal in *Shari'ah* but unregistered in a legal document, and therefore illegal in the State Law. Currently, *Sirri* marriage gives rise to some social problems, such as the status of co-wives and children in this kind of marriage. About these issues, one can argue that the prohibition of polygamy in the Compilation of Marriage Law is inevitably important to prevent women from social marginalization and gender discriminations.

Nevertheless, the effort of Muslim feminists to propose the prohibition of polygamy leads to strong reactions from the proponents of polygamy. Puspowardoyo, a famous restaurateur from Jogjakarta, has been initiated the public campaign to promote the polygamy by presenting the Polygamy Awards for the successful polygamists and provides special menu items celebrating polygamy in his restaurants. He argued that polygamy is 'the Way of God' because the Prophet Muhammad is also polygamous. This argument is encountered by Muslim feminists who argued that polygamy is not the way of God, because it destructs the happiness of another person who is forbidden in Islam. Moreover, the practice of polygamy by the Prophet Muhammad was contextual to protect the widows and orphans of Muslim martyrs in the Battle of *Uhud* in the Prophet Muhammad's era. All of the Prophet Muhammad's wives, except Aisyah, were old widows; thus it is important to highlight that the concept of polygamy is contextually irrelevant to the current situation.¹⁵

2. Reinterpretation of the Concept of Polygamy and Marriage Guardianship in Islamic *Shari'ah*.

In the application of Islamic *Shari'ah*, women and men are considered equal in both mentally and morally. Women and men receive an equal reward or punishment for their good and bad deeds.¹⁶ The Quran says: (33:35):

Surely the men who submit and the women who submit, and the believing women, and the obeying men and the women, and the truthful men and the truthful women, and the patient men and patient women, and the humble men and the humble women, and the charitable men and the charitable women, and the fasting men and the fasting women, and the men who guard their chastity and the women who guard (their chastity), and the men who remember Allah

¹⁵ Utriza, Ayang, Poligami Bukan "Jalan Tuhan" (Tanggapan Balik untuk Tiar Anwar Bachtiar), *Kompas*, (Jakarta), 6 December 2004

¹⁶ Engineer A. Ali, *The Rights of Women in Islam*, (1992), p. 98

much and the women who remember – Allah has prepared for them forgiveness and mighty reward.

Thus it can be seen that the Quran equates both men and women in the context of moral responsibility and legal obligations. This concept can probably be extended to the area of marriage as well.¹⁷ Marriage in Islam, as stated by the majority of scholars on Islam, is like a contract. It is a consensus between two adult Muslims to live together in bonds of matrimony. Consequently, all the requisites of a valid contract must be fulfilled by both parties; firstly, the capacity to enter into a valid marriage contract both of mental health and puberty, secondly consent to be bound by the contract through “*Ejab-o-qabool*” or declaration and acceptance. The contract is annulled without the consent of one of the parties.¹⁸ Women, in this respect, have the rights to accept or refuse a marriage proposal.

According to the Islamic Jurisprudence, there are some matters of marriage; first, the marriage of a ‘*Bakirah*’ (a young unmarried girl) who is required to appoint a marriage guardian, and secondly, the marriage of ‘*Thayyibah*’ (a widow or a divorcee) who does not necessarily need a guardian. *Bakirah* as young unmarried women, as argued by Engineer, later on, is an inexperienced woman who probably needs advice and consideration from the elders to make the right decision. Although finally, she is the only one who can approve or disapprove, according to *hadith*, the Prophet’s vowed, her silence on being asked could be interpreted as her approval. In comparison, *Thayyibah* as a widow maybe has enough experience in such matters to make the right decision. According to *hadith*, a *thayyib* was given into marriage by her marriage guardian without her consent; therefore it was annulled by the Prophet once He knew it.¹⁹ Engineer states that:

Even for a *Bakirah*, there is no mention of a *wali* or marriage guardian in the Quran. It is a pre-Islamic practice which was incorporated into Islamic Jurisprudence later.²⁰ Thus it can be said that the role of guardian or *wali* is advisory rather than obligatory.

Moreover, the assumption about the inability of young unmarried women to make the right decision because the lack of experience is irrelevant as can be argued that based on the principle of the capacity to enter the valid contract; every men and women must be in the healthy condition both mental and physic, and have entered the puberty as well. Logically, every mature and healthy person can rely on their judgment.

¹⁷ *Ibid.*, p. 99

¹⁸ Sardar A. Shaheen, *Gender and Human Rights in Islam and International Law- Equal Before Allah, Unequal Before Man*, (2000), p. 152

¹⁹ *Ibid.*, p. 15

²⁰ *Ibid.*

Thus, there is no reason that young unmarried women are incapable to make the accurate decision because of inexperience in the matters of marriage.

Imam Abu Hanifah equated the contract of marriage to the contract of sale and purchase in general, where he focused on the perpetrators of the transaction that must be baligh, intelligent, mature, and in essence are those who can be involved in the transactions in a healthy and syar'i way. According to the Mazhab Hanafiah, all the arguments related to the prohibition of marriage without a guardian, are textually devoted to women who are not yet in the middle of the legal age, not sensible, were in bondage, and not mature enough to make decisions.²¹ There are some Hanafiyah arguments about the permissibility of a married woman without a guardian, among them are from hadith:

Indeed the Prophet Muhammad SAW said: Unmarried women are more entitled to themselves than their guardians.²²

Furthermore, another postulate from the story of the Prophet companion:

From Sahl bin, Sa'ad said: Sometimes a woman came to the Prophet then said: O Messenger of Allah! I surrender myself to you. Then a friend of the Messenger said: Marry me with her. Then Rasulullah SAW said: I marry you with her with what you have from the reading of Qur'an.²³

Then there is also the proposition of the verses of the Qur'an which is used as the basis of Hanafiah's arguments, including:

If you shall rise your wives, and shall perish, then do not (the guardians) prevent them from marrying again with their future husbands if there has been a willingness among them in a good way.²⁴

Imam Jashos from the Hanafiah, moreover, explains this verse in his book *Ahkamul Qur'an*:

And this verse means to some aspects of the permissibility of marriage that occur to women without the guardian and the permission of the guardian. The first is the handover of the authority of the contract to her without the requirement to obtain permission from her guardian, and secondly, the ban on the guardian to prevent his daughter when the two brides are mutually ridiculous.²⁵

Simply, the Quran ruled the normative statements while the *Shari'ah* breaks down the social practices.²⁶ However, the interpretation of the Quran in the social practices, in the end, was overlaid with feudal and patriarchal prejudice. After the death of the Prophet within the quarter of the century,

²¹ Al-Mausu'ah Al-Fiqhiyyah Al-kuwaitiyyah. 14/192

²² Hadith delivered by Muslim, Abu Daud, Tirmidzi, Nasai, and Malik in the al Muawatho'

²³ Hadith delivered by HR, Bukhari

²⁴ Al-Baqarah: 232

²⁵ Abu Bakar Ar-Rozy Al Jashos Al Hanafi. *Ahkamu-l-Qur'an*. 2/100

²⁶ *Ibid.*, p 15 and 109

Islamic society entered the feudalism era. This feudalism could influence the current concept of the rights of women in Islam which is stimulating the controversy around some issues adjacent to marriage itself, such as polygamy and the rights of Muslim women to refuse the practice of polygamy. Polygamy has always been a big issue in the Muslim community, related to the context of gender equality in the implementation of Islamic *Shari'ah*.

Interestingly, this is a debatable issue between Muslim communities itself rather than between the Muslim and non-Muslim community.

Nevertheless, this issue is implicitly developing a negative image of Islamic *Shari'ah* as a discriminatory law for Muslim women. The Quran, as the primary source in the hierarchy of Islamic Law²⁷, pointed out a ground for polygamy as mentioned in chapter 4:3 *Al-Nessa'* or Women:

If you deem it best for the orphans, you may marry their mothers - you may marry two, three, or four. If you fear lest you become unfair, then you shall be content with only one, or with what you already have. Additionally, you are thus more likely to avoid financial hardship.

Thus it is likely that polygamy in the Quran is an exception in a force majeure situation rather than a strict rule to obey. As argued by Engineer, permission for polygamy in the Quran is obviously to aid widows and orphans in the context of social awareness rather than a sexual gratification of men;²⁸ it is closely associated with Islamic history from the Prophet Muhammad's era. There was the deadly battle of *Uhud* which caused the death of a large number of Muslim giants, which in turn caused an increasing number of widows and orphans. Thus, some verses in *sura* or chapter *Al-Nessa'* were revealed to protect the widows and the orphans from physical and financial difficulties,²⁹ and therefore, polygamy is irrelevant to the current situation. Moreover, Quran (4:129) strictly required a capability of men to be fair in dealing with more than one wife³⁰, and it undoubtedly discouraged polygamy:

You can never be equitable in dealing with more than one wife, no matter how hard you try. Therefore, do not be so biased as to leave one of them hanging (neither enjoying marriage nor left to marry someone else). If you correct this situation and maintain righteousness, GOD is Forgiver, Most Merciful.

²⁷ *Ibid.*, p. 2 and 565

²⁸ *Ibid.*, p. 157

²⁹ Zehra F. Arat, *Women's Rights in Islam: Revisiting Quranic Rights, in Human Rights: New Perspectives, New Realities*, (2000), p. 80.

³⁰ See *The Quran* 4:129

Hence, one can argue that widespread implementation of the concept of polygamy among Muslim men today is based on cultural interpretation, not the basic spirit of the Quran itself. Polygamy gradually becomes a rule in the feudal system as a consequence of the marginalization of women in this system. The interpretation of the Quran in this system therefore, is influenced by a patriarchal way of thinking as can be seen from the argument of Shaikh Mohammed bin Sirin and Shaikh Abubakr bin al-Arabi that the equitability of men to their wives, in the Quran, is only partial in the context of love and sexual interaction which is uncontrolled by men. As long as men can provide sufficient foods, clothes and comfortable residents to his co-wives, it can be assumed to be.³¹ This argument is completely biased and seems like a permissive argument to allow polygamy while stereotyping women as inferior in both social and economic. As quoted by Mahmudul Haq from Muhammad Abduh, “a great late nineteenth-century theologian of Egypt”³²:

*Since the proviso immediately following—if you fear that you cannot be equitable and just with all then (marry) only one—is given so much stress that the permission to contract four contemporaneous marriages becomes practically ineffective.*³³

Thus, it can be highlighted that polygamy is contextual, according to the Quran, while monogamy is normative.³⁴ Practically, in some countries with a predominantly Muslim population, polygamy is strictly prohibited, and the practice of polygamy is explicitly stated as contrary to law. In Tunisia, a Personal Status Code was adopted in 1956, which prohibits polygyny.³⁵ Under Article 18 of the Personal Status Code, any man who contracts a polygynous marriage is punishable with one year of imprisonment, a fine of 240,000 Tunisian francs.

Furthermore, according to Article 21, a polygynous marriage is considered irregular and thus could be nullified by spouses, as well as guardians, mothers, or the legal department. Turkey similarly banned polygamy as stated in its reformed Civil Code.³⁶ Lebanon, also, according to

³¹ See Ali S. Sardar, *Gender and Human Rights in Islam and International Law- Equal Before Allah, Unequal Before Man?*, (2000), p. 75

³² Quoted in: Engineer A. Ali, *The Rights of Women in Islam*, (1992), p. 157

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ U.S. Department of State, “Republic of Tunisia,” July 2004.

³⁶ Women for Women’s Human Rights. “Turkish Law Recognizes Women, Men as Equals.” 13 January 2002. <http://www.wwhr.org/?id=770>

the 1948 Law About Personal Status for the Druze Sect (Article 10), stipulated polygyny as an unlawful act.³⁷

3. Marriage Law for Muslim Community in Indonesia; the Combination of Islamic *Shari'ah* and *Adat* Law (Customary Law)

In general, the Indonesian legal system derived from the Roman-Dutch law, *Adat* Law or Customary Law and Islamic *Shari'ah* as most of the Indonesian archipelago were under the Dutch colonial rule as of 17th century. Under the colonial government, the population was divided into Europeans, Natives, and Foreign Oriental. Therefore, the separated tribunals were established for these communities based on cultural and linguistic criteria. *Adat* implemented for natives as far as the statute did not replace it. *Sharia'ah* which was introduced in the 13th century was implemented under the 1882 Royal Decree, establishing a Priest Court in Java and Madura. The jurisdiction of this court was limited only in the matters of marriages, inheritance, and *waqf* between Muslims.

Furthermore, the government of the Nederland Indies stated that the implementation of *Shari'ah* should with concern to '*a reception theory*' which implied that *Shariah* rules are valid only to the extent that *adat* had assimilated them. According to Daniel S. Lev, this is the *adatrechtspolitik* that implied a political understanding of how to cope with Islam expansion, as he was quoting Vollenhoven, the great Dutch scholar in *adat Recht (adat law)*, "the destruction of *adat* law will not pave the way for our codified law, but for social chaos and Islam."³⁸

However, Kathryn Robinson assumed that *Adat* law modified Islamic *Shari'ah* before the state adopted it and as a result, in some extents, creating a positive atmosphere for gender equality in the matters of marriage. Despite her strong analysis of the advantages of this cultural interaction for women's legal opportunities,³⁹ there were some weaknesses as she partially wrongly assumed that:

*Under Islamic law, women's rights in initiating divorce are very limited, but Indonesia has incorporated the ta'lik, or provisional divorce, into the marriage contract, so that the groom undertakes certain vows at the time of the nikah (marriage contract) and if he fails in these, the wife has grounds for divorce.*⁴⁰

³⁷ Woodrow Wilson International Center for Scholars, Middle East Program, "Best Practices" Progressive Family Laws in Muslim Countries, August 2005. Accessed at: <https://www.wilsoncenter.org/sites/default/files/Best%20Practices%20%28English%29.pdf>

³⁸ S. Lev, Daniel, *Colonial Law And The Genesis Of The Indonesian State*, (1985), p. 66.

³⁹ *Ibid.*, p. 8

⁴⁰ *Ibid.*

One can agree that the modification of Islamic *Shariah* by the *Adat* law in some respects may create a greater opportunity for Muslim women to obtain their legal rights. However, the assumption about the limited rights of women to initiate divorce under Islamic law seems like inaccurate argument, as there are some Islamic Jurisprudences which is proof that under the Islamic *Shariah*, Muslim women have a variety of rights to divorce, such as: “repudiation of marriage with an obligation to return her *mahr* or dower (*khula*’); delegation of the power of divorce by husband to wife when any condition of the marital contract is violated, and this can be included by the parties in the marital contract (*Talaq-i-Tafwid*)⁴¹; and lastly, “the rights of women to divorce on grounds, such as, the disappearance of husband, non payment of maintenance, imprisonment of the husband for a long-term, impotency, etc.” It requires the legalization of the judicial authority (*qadi* or the judge) but does not require the obligation to return the *mahr* or dower.⁴² Thus, it can be said that the Indonesian government adopts the mechanism of *ta’lik* from the Islamic jurisprudence.

Nevertheless, the mechanism of as so-called ‘*kaweng lari*’ in Ternate (North Maluku), perhaps can be an accurate model on how the assimilation of Islamic *Shari’ah* and *Adat* law creates a legal opportunity for women in the matters of marriage. It is an alternative solution for Muslim women to obtain a marriage approval from her marriage guardian by using *khotib* or *penghulu*’s and *khadi* or the judge’s authority as the negotiator and mediator as well. This procedure is usually taken by the couple or only by a woman if: a marriage guardian, in maximum three times continually, refuses a marriage proposal, or if a woman is pregnant and her boyfriend refuses to marry her.

Penghulu will inform a marriage guardian about this situation, while a woman is protected in *penghulu*’s house. Next, the dialog will be held between a marriage guardian and *penghulu* to negotiate some requisites that have to be fulfilled by a man or his parents, such as dower. Finally, this process will be continued by *kadi* or the *Shari’ah* judge to facilitate a dialog between parties to meet a final decision. If the parties failed to achieve the consensus and a marriage guardian still disapprove a marriage proposal, the process may continue to a contract of marriage with the approval of *kadi* or the *Shari’ah* judge. This mechanism is legitimated by the state and established side by side with the formal mechanism in the Religious Court. Considering a progressive interpretation about the condition to appoint a marriage guardian in the matters of marriage, as argued by Engineer in the previous explanation about the validity to enter a marriage contract, *wali* or a

⁴¹ See Engineer A. Ali, *The Rights of Women in Islam*, (1992), pp. 136-139

⁴² *Ibid.*, p. 141

marriage guardian is the alteration of pre-Islamic practice and Islamic jurisprudence. It is never mentioned in the Quran.⁴³

Related to the issue of polygamy, one can argue that a strict regulation in Indonesian Civil Marriage Law of 1974 to prevent the practice of polygamy in Indonesia, is actually in the spirit of progressive interpretation of Islamic *Shari'ah* as argued in the above section on "Reinterpretation of the Concept of Polygamy and a Marriage Guardian in Islamic *Shari'ah*," that polygamy is contextual, according to the Quran, whereas monogamy is normative.

Moreover, the practice of polygamy is mainly because of a patriarchal interpretation of Islamic *Shari'ah*, as Hamka, a great novelist, and leader of reformist Islam criticized the attitude of some religious actors as so-called *Penghulus* and *Ulamas* in *Minangkabau* (West Sumatra) culture:

*Nevertheless in Minangkabau adat does not give power to women who wish to progress. Penghulus and ulamas like to have lots of wives, without constraints, so that they might vent their lusts. When he's satisfied the wife is divorced and replaced with a younger one. In shorts it's common in Minangkabau to have more than one wife, to divorce the old and marry the young; co-wives fighting have become commonplace, and no longer strange.*⁴⁴

Minangkabau is one of the biggest Muslim regions in Indonesia with 9 % of the married men involved in polygamy, whereas in Central Java,⁴⁵ the center of Javanese culture, "the Princess might have between seven and 77 wives and co-wives (*selir*)"⁴⁶ Thus, polygamy is the universal phenomena, legitimate or illegitimate, in every culture rather than a normative value of one specific religion. Moreover, during the nineteenth century while the ideal European concept of monogamy became a good model for other communities, the practice of extramarital relations of European soldiers (barracks concubine) and the cohabitation between Europeans and *Nyai* (the indigenous women), became the crucial issues for the state official, as much as the issues of polygamy, early marriage, arranged marriage and divorce in the Indigenous population itself.⁴⁷

C. Conclusion

1. Conclusion

⁴³ *Ibid.*, p.33 and 107

⁴⁴ Hadler, Jeffrey, *Home, Fatherhood Succession: Three Generations of Amrullahs in Twentieth-Century Indonesia*, (1998), p. 126.

⁴⁵ *Ibid.*, p.34

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, pp. 187-188

The Indonesian legal system is derived from The Roman-Dutch system, the Islamic *Shari'ah*, and the Customary Law. The assimilation of these systems creates a complex Civil Law system which is patriarchies in some aspects. The implementation of the government compilation of Islamic law in Indonesia's Religious, for instance, is partially reflecting the patriarchal interpretation of Islamic rules which is derived from conventional *fiqh*. This compilation governs some aspects of the marriage matters for Muslims, such as marriage guardianship, polygamy, a marriage contract, divorce, etc.

Under the Compilation of Islamic Law, Muslim women, unless widow or divorcee, are required to fulfill the validity of the contract of marriage which is revealed in the article no. 14 of the Compilation of Islamic Law, marriage guardianship is essential in this matter. As argued by some moderate scholars in Islam, it is not mentioned in the Quran. It is a pre-Islamic practice which was incorporated into Islamic Jurisprudence later on and followed by some *Shari'ah* judges as a precedent, and so the marriage guardianship is advisory rather than obligatory. Also, based on the spirit of progressive interpretation of Islamic *Shari'ah*, it can be concluded that polygamy is contextual, according to the Quran, whereas monogamy is normative. As quoted by Mahmudul Haq (from Muhammad Abduh), "a great late nineteenth-century theologian of Egypt,"⁴⁸ "Since the proviso immediately following—if you fear that you cannot be equitable and just with all then (marry) only one—is given so much stress that the permission to contract four contemporaneous marriages becomes practically ineffective."⁴⁹

Considering the above arguments, one can argue that the reformation of Islamic Marriage Law in Indonesia is essential, particularly on the issue of marriage guardianship and polygamy as these are the most crucial issues related to gender equality in the legal system. For example, the restriction of polygamy maybe can prevent polygamy, however, it can also stimulate the other problems, such as a counterfeiting of marriage consent declaration from existing wife or wives, and *nikah sirri* or *sirri* marriage, which is legal in *Shari'ah* but unregistered in legal document, and therefore, is illegal in the State Law. *Sirri* marriage gives rise to some social problems, such as the legal status of co-wives and children. Thus the prohibition of polygamy in the Compilation of Marriage Law is inevitably important to prevent women from social marginalization and gender discriminations, whereas the legitimacy of marriage without *wali* or marriage guardianship is also vital to create a positive atmosphere for gender equality in the matters of marriage.

⁴⁸ Quoted in: Engineer A. Ali, *The Rights of Women in Islam* (1992) 157.

⁴⁹ *Ibid.*

Lastly, it can be concluded that as the primary source of Islamic Law, the Quran is governing two aspects of human relations; firstly, the relationship between human and God which is unthinkable and secondly, the relationship between human being in legal and social context (*fiqh*), which is open to dispute. However, it is crucial that other sources should supplement the Quran as the nature of the Quran is mostly concerning universal moral doctrines and procedures rather than strict obligations.

2. Recommendation

A wide interpretation of justice and gender equality of the Quran to create justice, equality, and friendship is urgent. In this respect, the acceleration of religious and *Adat* values is inevitable to create more acceptable concepts of social justice and gender equality.

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