

Counter Legal Drafting of the Islamic Law Compilation, A Gender Perspective

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ABSTRACT

Counter Legal Drafting Compilation of Islamic Law (CLD-KHI) is still a dilemma and has been a heated debate for years. There are many problems in it. This article analyzes the epistemological forms of CLD-KHI, the ones that are used as the methodological reference of its construction, considering their importance to the formulation of CLD-KHI. Using a juridical-normative analysis, it is found that the construction of the Compilation of Islamic Law (KHI) since its inception has brought various weaknesses. One of them is its discrimination against women. Hence, the making of CLD-KHI is to reject KHI because of the latter's considered discrimination against women. This paper finds out that the view of CLD-KHI about the recording of marriage and polygamy as a commandment is part of the CLD-KHI's efforts to protecting women.

Keywords: *Compilation of Islamic law, marriage, polygamy, counter legal drafting*

1. INTRODUCTION

The history of Indonesian-independent legal politics, the milestone of Islamic family law reform was first marked by the promulgation of marriage law, Law No. 1 of 1974 in the early half of the new order regime. Then, it was arranged Islamic Law Compilation through Presidential Instruction No. 1 of 1991. In 2003 the Indonesian Ministry of Religion submitted the Draft Law on Applied Religious Courts (RUPA HTPA) to the House of Representatives (DPR). This HTPA bill has perfected the KHI Presidential Directive (*Inpres*) material and upgraded its status from the Presidential Directive to Law. The existence of KHI, also in its legal substance is considered to be no longer sufficient in solving various complex social problems, one of which is discrimination against women.

To fight for these rights, the Indonesian Ministry of Religion in 2004 formed a Gender Mainstreaming Working Group (*PokjaPUG*) which contained proposals for changes in Indonesian family law, which were prepared with the perspective of democracy, pluralism, human rights and gender justice in the reality landscape to Indonesia. The concept then caused various controversies in the community. Opponents to this concept generally come from *shari'ah* formalization fighters, while supporters mostly come from groups who are fighting for gender equality and justice, human rights, democracy and pluralism. Most academics still appreciate this CLD-KHI concept, even though they only approve a number of these proposals.

The second controversy arose because the drafting of this draft was funded by the Asia Foundation, so that political issues also colored the debate, especially related to Western political interests to spread out liberalism and secularism. Thus, Islamic law is no longer merely

theological, but is a social political construct. It seems that CLD-KHI "failed" to convince the Government, the Parliament and most of the Islamic leaders, even worsening the relationship between liberal Islam and conservative Islam.[1]

In the methodological aspect, the KHI legal pattern still impresses the legal replica of the *fiqh* product of the efforts of the mufti of the past. The construction of KHI law has not been fully adjusted in the viewpoint of the Indonesian Islamic community, but rather adjustments from the Middle Eastern Jurisprudence and other Arab (Arabist) worlds. Therefore, the Counter Legal Draft Compilation of Islamic Law (CLD-KHI) was born which was compiled by the Gender Mainstreaming Team of the Indonesian Ministry of Religion, which was published on September 21, 2014. This team was chaired by Siti Musdah Mulia, towards the application of Islamic Law Compilation through Presidential Instruction No. 1 of 1991, which was considered to be the time to be renewed, reviewed and re-estimated in line with the demands of the times.

In fact, the history of Indonesia records that the effort to reform the KHI through CLD-KHI shows the dissatisfaction of some groups against the KHI formula. However, their efforts were in vain because they were considered contrary to Islamic teachings and finally recorded by the Ministry of Religion.[2]

The dissatisfaction is caused by the articles contained in KHI which are considered to elevate the dignity of women (gender bias), such as issues of marriage registration, divorce before the court, recording (licensing) of polygamy. Considering what is explained above, it is necessary to deepen the problem in order to synergize the values of gender equality and justice.

2. DISCUSSION

2.1. Marriage Registration

CLD-KHI assumes that the recording of marriage is a marriage commandment (article 6). The goal, in a gender perspective is actually to protect the women and children born legally protected. So for anyone who carries out an undocumented marriage, the marriage is illegal. Of course it is forbidden to marry, because one of the pillars is not fulfilled. According to the opinion of the writer, there is a good marriage registration principle, as stated above. It's just that the matter of marriage registration becomes a real commandment. There are strong normative-dogmatic reasons as arguments. It can't be, it is stated that the marriage pillar if there is no *naqli* argument and the *aqli* argument is the argument. According to the researchers, in fact there is a State's participation in requiring someone to register their marriages in accordance with the wishes of the gender protecting the dignity of women. However, researchers disagree with the understanding of CLD-KHI which makes marriage registration a part of the marriage pillar.

In the perspective of gender, the participation of the State in the process of marriage has existed since Indonesia's independence. As recorded in history, there is Law No. 22 of 1946 Article 1 paragraph (1) reads: "Marriage is carried out according to the Islamic religion, supervised by Marriage Registration Employees who are appointed by the Minister of Religion and or by employees appointed by him. Divorce and reconciliation conducted according to Islam, are notified to Registrar marriage".

While Article 3 paragraph (1) of Law no. 22 of 1946 reads: "Whoever conducting a marriage contract or marriage to a woman not under the supervision of a marriage registration employee as referred to in paragraph (2) Article 1 or his representative, is going to be fined as much as Rp. 50 (fifty rupiah)". Article 4 reads: "Things that may be punished as in Article 3 are seen as violations".

Subsequently, the marriage registration is then poured back into Law No. 1 of 1974 concerning Marriage, the implementation of which is effective since October 1, 1975. Article 2 paragraph (2) of Law no. 1 of 1974 states: "Every marriage is recorded according to the applicable laws and regulations". As for matters relating to the technical registration of marriages and institutions / agencies that are authorized to perform these tasks are explained in Government Regulation No. RI. 9 of 1975 Article 2 and 3 as follows: "The registration of marriage in the Compilation of Islamic Law in Indonesia is explained in Articles 5 to 7. In Article 5 paragraph (1) it is stated that the purpose of marriage registration is to ensure marital order for the Islamic community, and Article 6 paragraph [2] states that marriages which are not under Marriage Registration Employee (*PPN*) supervision are considered to have no legal force. While Article 7 paragraph (1) discusses a marriage certificate as proof of a marriage has

taken place, paragraph (2) in the case of a marriage cannot be proven by a marriage certificate, then the marriage confirmation (marriage determination) can be done by the Religious Court.

Normatively, marriage registration is in accordance with Islamic teachings, Surah al-Baqarah verse 282 which implies that every transaction needs to be recorded. Marriage which is a "transaction", and is *muamalah* it is necessary to record. As M. Quraish Shihab's statement, according to him, every word collected from the letters *dayn (dal, ya 'and nun)*, including the word "*tadayantum*" describes the relationship between two parties, one of which is higher up than the other. That is a reciprocal relationship or in other words as *mu'amalah*.^[3]

Ahmad Rofiq, a verse in the category of *madaniyyah* (*al-Baqarah*: 282 about recording transactions) suggests that authentic evidence is needed to maintain legal certainty. The editors clearly illustrate that the recording takes precedence over the testimony, which in marriage becomes harmonious.^[4]

Marriage registration regulations as stipulated in law No.22 of 1946 continue to be enshrined in UUP No.1 of 1974 which states that a marriage is considered valid if it is recorded before an official marriage registration according to the terms and conditions. The tradition of marriage registration, of course, is something new and strange in the Islamic family rules. The jurists always discuss the matter of testimony needed in the marriage contract testimony (*ijab kabul*), not discussing the need to record the marriage agreement on paper.^[5]

Marriage Registration in Perspective of Law Number 1 of 1974 Article 2 paragraph 2 and in KHI, there is Article 5 paragraph 1-2, in essence, in order to guarantee marital order for the Islamic community, every marriage must be recorded. The registration of the marriage as referred to in paragraph (1), will be carried out by the Registrar of Marriage as stipulated in Law No.22 of 1946 in conjunction with Law No. 32 of 1954.

When referring to KHI, the existence of rules in KHI does not only convey at the administrative level, but more than that, as stated in article 5 paragraph 1, namely to ensure the order of marriage for the Islamic community. Order here concerns *ghayat at-tasyri* ('the goal of Islamic law), which is to create benefit for society. Also, the clause mentioned in article 6 paragraph 2 which reads has no legal force, meaning that all marriages that are not recorded by the Registrar of Marriage are then the marriage is not recognized.

In general, marriage registration has several benefits. First, get legal protection. If at any time, the husband commits acts of violence and marginalizes women, then the wife can report the actions of the husband to the authorities with a record of authentic evidence that is a marriage book. If there is no marriage book, then the wife does not get legal protection because she has never been married. Included in this is protecting children born. If the marriage is not registered, then the legal protection of his wife and children is very weak. Children cannot inherit their parents' property because there is no authentic evidence that states they are the heirs of their parents, or other rights

in the implementation of state administration which must be fulfilled as proof of self.[6]

Second, facilitating the affairs of other legal actions related to marriage. The marriage certificate will help the husband and wife to do other needs related to the law. For example, want to perform the pilgrimage, marry his eldest daughter, the management of health insurance, and so forth. The implementation of unregistered marriages that are not performed in the presence of Marriage Registrar (PPN) results in the absence of protection and legal certainty of marital events that have been carried out. A child born from a marriage that does not have authentic proof also does not get public service because it does not have an official record of his two legitimate parents.

Third, as the formal legality of marriage before the law. A marriage that is considered legally legal is a marriage that is recorded by a Marriage Registrar (PPN) or appointed by him. Therefore, although religiously a marriage without PPN is recorded, it is basically illegal according to law.

Fourth, security is guaranteed. A marriage that is officially registered will be guaranteed security from the possibility of counterfeiting and other fraud. For example, a husband or wife wants to falsify their names contained in the Marriage Certificate for deviant purposes. Then, the authenticity of the Marriage Certificate can be compared with the copy of the Marriage Certificate that is available at the KUA where the person is married first. By registering a marriage that can be proven by a marriage certificate, and each husband and wife gets a copy of it, if a dispute arises between them or one of the parties is not responsible, then the other can take legal action to defend or obtain their respective rights, because with this deed the husband of the wife has authentic evidence of the legal actions they have done.[7]

Registration of marriage and prove it with a marriage certificate very clearly brings *maslahat* (goodness and benefits) for the establishment of the household and this is in line with the principles / rules of Islamic law that is *dar'ul masafid mugaddamun 'ala jallbil mashalih*, which means rejecting harm before priority rather than obtaining benefit.

So according to the author, the opinion of CLD KHI which states that marriage registration is a harmonious one, is too excessive. It should be just an obligation, so that if his obligations are not fulfilled he will obviously sin because he did not carry out his mandatory. This also remains the same as maintaining the existence of women before the law. And the inclusion of marriage is an obligation that is in accordance with the rules of Islamic law which reads *ma la yatimmul obligatory illa bihi fahuwa mandatory* which means an obligation will not be perfect without the existence of something else, something becomes mandatory. [8] And other rules, namely what is usually done by many people, is a law that must be practiced), and the existing law on marriage registration is a habit that has a good legal purpose.[8]

Thus, the existence of a marriage registration institution is an administrative requirement, in addition to its substance aimed at realizing public order, it has a very large scope of benefits for the interests and continuity of a marriage.

There are at least two benefits of marriage registration, namely preventive benefits and repressive benefits.[4]

2.2. Recording Polygamy

The recording of marriage in KHI is a guide, not a pillar, but CLD-KHI makes it a commandment in marriage. Meanwhile, polygamy, in KHI is allowed with several requirements as in articles 55-59, but in CLD-KHI's view it is stated that polygamy is unlawful *li ghairihi* (article 3). The prohibition of polygamy in CLD KHI's view is due to another factor, which is impartiality towards women. Usually women become victims of polygamy. And in the view of CLD KHI, men's justice to wives cannot be fulfilled. Then CLD KHI forbids the practice of polygamy. This is as the ideas of Muhammad Abdurrahman, who is known as always hold to the spirit of rationality, about the interpretation of polygamy. Data presented regarding justice in polygamy according to Muhammad Abdurrahman in research conducted by Salikin is justice in polygamy according to Muhammad Abdurrahman, namely treating his wives equally and impartially, both in material and non-material terms. He also believes that polygamy will bring harm to family members both his wives and children. Also according to him the consequences of polygamy will bring unfavorable effects on society which then penetrates the existence of a nation.[9]

In *Tafsir al-Manar*, explicitly Muhammad Abdurrahman and Rasyid Ridha did not agree with the practice of polygamy in society. Although polygamy is normatively permissible (under certain conditions), given the conditions that are difficult to realize (justice among wives), polygamy is actually not desired by the Qur'an. The form of monogamous marriage is actually the purpose of marriage, because a monogamous marriage will create an atmosphere of peace and affection in the family.[10]

While according to Amina, this verse describes the treatment of orphans, in which some male guardians have the responsibility to manage the assets of female orphans, but most of them cannot do justice to them (orphans). Then the verse (4: 3) is a recommended solution to prevent abuse from doing unfairly to orphans. On one hand the Qur'an limits the number to only four people. On the other hand there is an economic responsibility to support the wife will be able to compensate for the mixing of the assets of orphans through management responsibilities. This is what is often forgotten by supporters of polygamy, namely that the existence of this verse is in the context of fair treatment of orphans. Amina believes that there are several reasons for polygamy that are gender biased, even those reasons clearly do not exist in the verses of the Koran as the main source in obtaining polygamy itself. These reasons are: First, economic (financial) reasons. Second, the wife is infertile or cannot give offspring. Third, to meet the high sex needs of men (hypersexes).

Regarding to these reasons, Amina argues that in the context of economic problems such as unemployment, a man who financially should take care of more than one wife, again this mindset assumes that all women are

financial burdens, reproductive agents, not producers. In today's world there are many women who do not have or need male support, for one thing, it is now unacceptable that only men can work, do work, or become work outside the home, paid work is only based on productivity. Productivity in turn is based on various factors, and gender is only one of them. Thus polygamy is not a simple solution to a complex economic problem.[11]

In the opinion of the author, the recording of polygamy is part of the protection of women. However, the prohibition of polygamy due to partial cases is then generalized to be *haram*, as the opinion of the researcher mentioned above. Because there is wisdom behind polygamy carried out by the prophet as follows:

Wisdom that we can learn from the practice of polygamy of the Prophet, divided into 4 parts, namely the wisdom of *ta'limiyyah* (wisdom of teaching), the wisdom of *tasyri'iyyah* (wisdom of *shari'ah*), the wisdom of *ijtima'iyyah* (social wisdom), and the wisdom of *siyasiyyah* (wisdom of *tasyri'iyyah* (wisdom of *shari'ah*), wisdom of *ijtima'iyyah* (social wisdom), and wisdom of *siyasiyyah* (wisdom of *tasyri'iyyah* political).

1. Wisdom of Education: The aim of Muhammad's polygamy is to produce professional mother-educators who teach women about the laws of Islamic religion which are Hanif, especially about laws relating to feminine issues such as menstruation, post-partum, janabah, taharah, and others.
2. Wisdom of Sharia: The wisdom of the Shari'a in the practice of polygamy Rasulallah peace be upon him. Aimed at eliminating some of the custom's jahiliyah, such as being an adopted child having the same status as a biological child. The Arabs before Islam often made adopted children who were not their own blood become biological children in the law of inheritance, marriage, divorce, and others.
3. Social Wisdom: The marriage of the Messenger of Allah with part of his wife was intended to strengthen social relations (community) with each other based on Islamic orders (such as with Abu Bakr as-Siddiq and Umar ibn Khattab), to strengthen Arab family ties, and to spread and launch Islamic da'wah into the environment more diverse social.
4. Political Wisdom: In essence, the marriage of a family member with a particular family member will form a family bond that brings love between the two parties. Based on these considerations, the Messenger of Allah entered into a marriage with his wives. He

married some of his wives to soften their hearts in order to expedite the missionary journey and the establishment of the Islamic State.[12]

In addition, the existence of polygamy with various rules, one of which is fair, is an act taken by the apostle in correcting the total practice of polygamy that is barbaric and has been directed by exemplifying a happy monogamous marriage with Khadijah, a woman he respects.[13]

Then the opinion of the author, the prohibition of polygamy because there are other factors are not in line with the spirit of Islamic law. Islam allows a married man up to four wives on the condition that the husband must be able to do justice to all his wives. Allah says in Sura An-Nisa '(4) verse 3:

"And if you are afraid that you will not be able to apply justly to (rights) orphaned women (if you marry her), then marry the (other) women that you like: two, three or four. Then if you fear that you will not be able to do justice, then (marry) only one, or slaves that you have. Thus it is closer to not persecuting".

Asbâb al-nuzûl from this verse, is explained in the history of Aisha r.a Rasulullah's wife when answering Urwah bin Zubair r.a. about the word of God "And if you fear that you will not be able to do justice to the (rights) of orphaned women (if you marry her), then marry the (other) women that you like", Aisyah r.a. answer:

"Oh my nephew, this verse concerns orphans, he is in the care of his guardian and his property has been mixed with his guardian's property. The guardian is interested in the property and beauty of the child, so he wants to marry her without paying dowry fairly, as is the payment of dowry with other women. So he was forbidden to marry orphans unless he was fair to them and he gave them a proper dowry and he was encouraged to marry another woman he liked".[14]

Ibn Jarir al-Tabari strongly agreed with the opinion that the meaning of the verse above An-Nisa's verse 3 is a concern that a guardian is unable to do justice to the property of orphans. So if you are worried about orphans, you should also be worried about women. Then do not marry them except with women who you believe can do justice, one to four people. Conversely, if there are fears of not being able to do justice when polygamy, then it is enough to marry a wife.[14]

Therefore, in regulations in Indonesia, the practice of polygamy is regulated so that articles which do not support the spirit of justice in the relations of women and men in the issue of polygamy between the existence of a protected invention. As in article 3 paragraph (2) of Law No.1 of 1974 which reads: "The court can give permission to the husband to marry more than one wife if desired by the parties concerned". Still in Law No.1 of 1974 article 4 paragraph (1) and (2) which reads: "in the case of a husband will have more than one wife, as stated in article 3 paragraph (2) of this law, then he obliged to submit an application to the Court in their area of residence".

Law No.1 of 1974 article 4 paragraph (2) reads "The court referred to in paragraph (1) of this article only gives permission to a husband who will have more than one wife if:

- The wife cannot carry out her obligations as a wife;
- The wife gets a disability or an incurable disease;
- Wives cannot give birth to offspring."

Law No.1 Year 1974 article 5 paragraph (1) reads "To be able to submit an application to the Court, as referred to in Article 4 paragraph (1) of this Law, the following conditions must be fulfilled:

- There is an agreement from the wife / wives;
- There is certainty that husbands are able to guarantee the necessities of life of their wives and children;
- There is a guarantee that husbands will be fair to their wives and children ".[15]

This law is supported by the Compilation of Islamic Law in article 55 paragraph (1), which reads "having more than one wife at a time, limited to four wives" (2), which reads "the main condition for having more than one wife , the husband must be able to be fair to his wives and children "and (3) which reads" if the main conditions mentioned in paragraph (2) are impossible to fulfill, the husband is prohibited from having more than one wife "

Article 56 Paragraph (1) reads: "A husband who wishes to marry more than one person must obtain a permit from the Religious Court" paragraph (2) reads: "Submitting an application for permission referred to in paragraph (1) is carried out according to procedures as regulated in Chapter VIII of the Regulation Government No.9 of 1975 "paragraph (3) reads:" a marriage conducted with a second, third, or fourth wife without permission from the Religious Court, has no legal force "

Article 57 The Religious Court only gives permission to a husband who will have more than one wife if:

- The wife cannot carry out her obligations as a wife;
- The wife gets a disability or an incurable disease;
- The wife cannot give birth to offspring.

Article 58 Paragraph (1) KHI reads: "In addition to the main conditions mentioned in Article 55 Paragraph (2), to obtain a permit from the Religious Court, the conditions stipulated in Article 5 of Law No.1 / Th 1974 must also be met. (2) reads: "without prejudice to the provisions of article 41 letter b PP. No.9 of 1975, the consent of the wife or wives can be given in writing or by order, but even though there has been written agreement this agreement is affirmed by the wife's oral consent at the Religious Court hearing "

In terms of the procedure of proceedings in the Religious Court, the forms of divorce are divided into 2 parts, namely:

Article 59 reads: "in the event that the wife does not want to give consent, and requests for permission to marry more than one person based on one of the reasons provided for in articles 55 paragraphs (2) and 57, the Religious Court may determine the granting of permission after checking and hearing the wife concerned at the hearing of the Religious Court, and to this determination the wife or husband can submit an appeal or appeal".[15]

2.3. Divorced Before the Court

According to Islamic doctrine, divorce can be done on the basis of 'hamam, which is a determination and through careful consideration and due to reasons that are emergency and intent. Normatively the Prophet Muhammad said that a halal divorce would take place. A Hadith from Ibn Umar and narrated by Abu Daud and Ibn Majah states that something that is lawful but hated by Allah is divorce, namely the termination of marriage.[16] In Indonesia, the Religious Court is a forum for Muslims who want to seek justice and legal certainty which is expected to be able to provide satisfaction and tension in the midst of Islamic society, which includes marriage, inheritance, endowments, endowments, grants and others. In addition, the Religious Courts in implementing certain civil laws are in accordance with Islamic rules and norms. Regarding cases submitted by justice seekers on possible matters, the judge must first seek peace (reconciliation), to avoid lest after the judge decides the case there is someone who feels disadvantaged. However fair the judge's decision is, the loser will feel unsatisfied.[17]

Specifically for the Religious Courts, based on orders from Law No. 3 of 2006, Article 49 states that the Court has the duty and authority to examine, decide, and settle cases in the first instance among people who are Muslim in the fields of marriage, inheritance, wills, grants, zakat, donation, alms, and sharia economy, and according to article 52 (a) the Religious Court gives evidence of rukyat hilal in determining the beginning of the Islamic month. Then the results of the National Working Meeting in Batam in 2006, the adoption of children and the legal consequences for people who are Muslims also become the authority of the Religious Court.[17]

In terms of the procedure of proceedings in the Religious Court, the forms of divorce are divided into 2 parts, namely:

1. Divorce "Talak": Divorce "talak" is the breakup of marriage on the will of the husband for a certain reason and his will is stated with a certain greeting.[18]. It cannot be said verbally and also in writing, because the power of delivery both through speech and in writing is the same. The difference is that if divorce is delivered by speech, then divorce is known after the speech of divorce

is delivered by the husband. While the oral delivery of divorce is known after the writing is read, this opinion is approved by the majority of scholars.

2. Claims for Divorce: A divorce is a claim filed by the wife against her husband to the court on the grounds and asks the court to open the trial, and divorce on the basis of this divorce is due to a court decision. The divorce procedure. The lawsuit has been regulated in Government Regulation No. 9 of 1975 article 20 to article 36 jo. Article 73 to Article 83 of Law No. 7 of 1989. In Islamic law divorce is called khulu divorce'. Khulu 'comes from the word khal'u al-shaub, meaning to take off clothes, because women are men's clothing and vice versa men are women protectors. Jurisprudence gives the meaning of khulu 'ie divorce from the woman with the ransom given by the wife to the husband.[19]Divorce before the Court between KHI and CLD KHI seems to be the same. In CLD KHI pasa 56 it is stated (1) divorce is a husband's pledge before the Religious Court session which states the termination of marriage in the manner referred to in article 69. (2) khuluk is a wife's pledge before the Religious Court stating the marriage breakup in the manner referred to in Article 69. While Article 69 states that a person who is going to divorce his / her spouse submits an application, both verbally and in writing to the Religious Courts in the area where the party to be divorced resides with reasons and requests a hearing for that purpose.

3. CONCLUSION

Based on the above analysis, it can be concluded that the existence of a marriage registration institution is an administrative requirement, in addition to its substance aimed at realizing public order, it has a very large scope of benefits for the interests and continuity of a marriage. There are at least two benefits of marriage registration, namely preventive benefits and repressive benefits. These benefits have brought justice to women.

In regulations in Indonesia, the practice of polygamy is regulated so that articles which do not support the spirit of justice in the relations of women and men in the issue of polygamy between the existence of the invention are protected. As in article 3 paragraph (2) of Law No. 1 of 1974, the existence of recording polygamy is part of the protection of women. However, the prohibition of

polygamy is due to partial cases which are then generalized into haram.

Divorce before the Court between KHI and CLD KHI seems to be the same. In CLD KHI pasa 56 it is stated (1) divorce is a husband's pledge before the Religious Court session which states the termination of marriage in the manner referred to in article 69. (2) *khuluk* is a wife's pledge before the Religious Court stating the marriage breakup in the manner referred to in article 69.

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