

WOMEN, ISLAM, AND MODERN FAMILY CONSTRUCTION IN THE PERSPECTIVES OF LEGAL PLURALISM IN INDONESIA¹

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Abstract: The Constitutional Court decision in 2010 on the recognition of Siri, an unofficial, unregistered marriage ignited debate in Indonesian society. Even though the main reason of the recognition of Siri is to protect children born from this marriage, allowing Siri marriage will broaden the legal spectrum in the Indonesian Marriage Law and potentially causes legal uncertainty for the perpetrators. It may be argued that the decision is to negotiate legal sources that affect the norms in the marriage law. Yet, this decision has the both positive and negative social impacts. The positive impact of the approval of Siri marriage is the children born from such practices will be able to obtain financial, biological, and psychological protection. The negative impact of the decision is that more Siri marriages in the community will lead to increasingly complex social and legal problems. If the women involved in the marriages have insufficient financial capacity and adequate knowledge, they will be very dependent on their husbands. In the event of a divorce, these women will face more serious psychological and financial problems after marriage.

Keywords: Constitutional Court, Women Rights, Marriage, Legal Pluralism in Indonesia

Abstrak: Keputusan Mahkamah Konstitusi tahun 2010 tentang pengakuan pernikahan Siri, yaitu pernikahan yang tidak resmi dan tidak terdaftar memicu perdebatan di masyarakat Indonesia. Meskipun alasan utama pengakuan pernikahan siri adalah untuk melindungi anak-anak yang lahir dari pernikahan ini, perizinan pernikahan siri akan memperluas spektrum hukum dalam Undang-Undang (UU) Perkawinan Indonesia, dan berpotensi menyebabkan keraguan hukum bagi para pelaku. Dapat dikatakan bahwa keputusan ini adalah untuk menegosiasikan sumber hukum yang mempengaruhi norma-norma dalam hukum perkawinan. Namun, keputusan ini memiliki dampak sosial positif dan negatif. Dampak positif dari persetujuan pernikahan siri yaitu anak-anak yang lahir dari pernikahan ini dapat memperoleh perlindungan secara finansial, biologis, dan psikologis. Sedangkan dampak negatif dari keputusan ini adalah semakin banyaknya pernikahan siri di masyarakat yang akan menimbulkan masalah sosial dan hukum yang semakin kompleks. Jika para wanita yang terlibat dalam pernikahan ini memiliki kapasitas keuangan dan pengetahuan yang tidak memadai, mereka akan sangat bergantung pada suami. Jika terjadi perceraian, para wanita ini akan menghadapi masalah psikologis dan keuangan yang lebih serius.

Kata Kunci: Mahkamah Konstitusi, Hak Perempuan, Perkawinan, Pluralisme Hukum di Indonesia

1. Introduction

¹ Presented in the National Seminar Program "Challenges in Developing Family Law in the Indonesian Constitution" Aceh Arraniry University, April 26th, 2018.

This paper will discuss the rights of women using comparative law in Indonesia and other Islamic countries around the world. More specifically, this article will examine women's rights in family law in Indonesia by analyzing regulations, court rulings, and traditions in Indonesia with a comparison of traditions in Muslim countries.² The issue of women's rights in family law is interesting to study because to date, many state regulations and community traditions limit the space for women in public and private area. This reality has encouraged women activists to support women to have a greater role in both the public and private space which have traditionally been dominated by men.³ Some efforts to improve the status of women include amending regulations, reforming state policies, and eliminating community traditions that discriminate against women's rights.

The paper will have two parts. The first part will examine women's rights through comparative perspectives in several countries, such as Pakistan, Egypt, Tunisia, Afghanistan, and Saudi Arabia. The comparative perspectives are useful to see the reality of women's rights in the heterogeneous Islamic world. This section will also analyze issues related to women under the law in Indonesia. Furthermore, the second discussion will focus on reviewing regulations related to family and court decisions and women's rights in family law. The paper concludes with further discussion and recommendations related to the protection of women in the family context.

2. Women and Family in Comparative Perspectives

The discussion of women in the Indonesian context and all the rights attached to them cannot be separated from the long history of the country's traditions, laws, and religious beliefs. Tradition and religion are two sources that have been used to justify discrimination against women. The issue of discriminatory treatment is common for women in the countryside where they endure more complex issues such as poverty and strict cultural and religious norms.

Until now, Indonesia continues to make improvements and developments related to the protection and recognition of women. For example, Indonesia has ratified the 1984 Convention on the Elimination of All Discrimination against Women (CEDAW) and is part of the few countries that have national commissions on the protection of women (*Komnas Perempuan*).⁴ Still, the current situation of women in Indonesia generally is still unequal to men because of the application of Marriage Law that allows men to have polygamous marriage. Additionally, there are hundreds of regulations in regional level that discriminate against women or "potentially" manipulated by the government to persecute them.⁵ The regulations on prostitution, Muslim clothings, and family enacted by some districts around Indonesia are listed as some laws which discriminate against

² According to Nasim Hasan Shah, a country that has a majority Muslim occupation or is entirely Muslim is not synonymous with an Islamic state. The meaning of an Islamic state in this paper is a country that applies Islamic law as the highest source of law in the constitution and national legislation. See full review at Ron Shaham, 'The Rhetoric of Legal Disputation' (2015) 22 *Islamic Law and Society* 114.

³ Rachel Rinaldo, 'Muslim Women, Moral Visions: Globalization and Gender Controversies in Indonesia' (2011) 34 *Qualitative Sociology* 539, 543.

⁴ Some other countries that have commissions related to women's rights are India (National Commission on Women) and South Korea (Women's Human Rights Commission).

⁵ See for a more detailed information at Komnas Perempuan (Organization : Indonesia), *Atas nama otonomi daerah: pelembeagaan diskriminasi dalam tatanan negara-bangsa Indonesia: laporan pemantauan kondisi pemenuhan hak-hak konstitusional perempuan di 16 kabupaten/kota pada 7 provinsi.* (Komnas Perempuan 2010).

women.⁶ The enactment of these laws potentially bring about a critical obstacle for women to achieve substantive equality between women and men because women would face more complex discrimination from society and the state.

The enactment of discriminatory laws and the existing of patriarchal tradition in many occasions bring about severe restrictions on some women's rights, especially in private spaces such as the family.⁷ Women are still often seen by some communities as a source of social problems, and therefore restrictions must be placed on their rights. For example, some argue that women's bodies are sexual objects, and therefore are prohibited from wearing conspicuous clothing when they become brides because they can attract men's attention.⁸ In addition, the requirements for polygamy marriage regulated in Law Number 1 of 1974 also discriminate against women and show male superiority in family law in Indonesia. For example, the Marriage Law allows man to marry other women if his current wife cannot fulfil her duties as a wife, has physical defects or incurable disease and infertile.⁹ This norm never explains the possibility for the woman to divorce her husband if he is ill, physically or mentally, or infertile.

The existing Marriage Law that allows polygamous marriage also indicated that the ratification of the CEDAW by Indonesia in 1984 still cannot lift the protection of women rights in Indonesia. In other word, Indonesia only succeeded to ratify the human rights instrument but has not been able to eliminate discriminatory treatment against women because negative stereotypes of equal rights between women and men persist. The increased number of discriminatory laws against women also indicates that Indonesia disobeyed the international standard of human rights fulfilment which requires all state parties to amend or modify their national regulation in order to meet the

The basic norms of human rights and the history of the founding of the Indonesian nation cannot be separated from the role of women. For more than seven decades, several important sectors of government have been entrusted to women such as, head of province, city and district governments, ministeries and let alone president. After the enactment of Regional Autonomy Law in 1999, more women undeniably have equal political rights with men which means this recognition of women rights in bureaucracy sector demonstrates women in Indonesia have actively been involved in building the country. Some affirmative laws were also enacted to lift up women to have equal status to men. For example, since 2003, Indonesia introduced Election Law which guarantees 30% quota for women in parliament. Even though the realisation of the law has not yet fulfilled women rights in the politics, the innitiative to protect women should be respected.

The reality of fulfilling the rights of Indonesian women is very different from women in other majority Muslim countries who still face threats, violence and discrimination from the state and society. For example, in Saudi Arabia, the first access to school for women was given in 1955, while access to higher education for women newly available in 1970 and until now women still need approval from the male (*mahram*) to do business

⁶ For regulation on family, see for instance Banjarmasin City Law No 2/2018, West Java Province Law No. 9/2014, Central Java Law No. 2/2018. For regulation on prostitution, see for instance Pasuruan District Law No. 3/2017, Kendari City Law No. 9/2017, Pangkal Pinang District Law No. 2/2018. For regulation on Muslim clodings, see for instance Aceh Law No. 11/2002, Muko Muko District Law No. 5/2016, Takalar District Law No. 2/2006.

⁷ 'Discriminatory Laws Hold Indonesian Women Back, World Bank Report Finds' (*Jakarta Globe*, 10 September 2015) <<http://jakartaglobe.id/news/discriminatory-laws-hold-indonesian-women-back-world-bank-report-finds/>> accessed 16 April 2018.

⁸ Moh Yasir Alimi, 'Rethinking Anthropology of Shari'a: Contestation over the Meanings and Uses of Shari'a in South Sulawesi, Indonesia' [2017] *Contemporary Islam* 1.

⁹ Nina Nurmila, 'Polygamous Marriages in Indonesia and Their Impacts on Women's Access to Income and Property' (2016) 54 *Al-Jami'ah: Journal of Islamic Studies* 427, 432.

and divorce.¹⁰ Furthermore, women in Saudi Arabia also obtained an identity card in 2001 on the condition that the identity card is only used to resolve disputes related to inheritance.¹¹

Women in Pakistan also faced a bleak period in the era of President Zhia-ul Haq (1977-1988) because Zhia argued that women who work outside their own homes are Western and anti-Islamic. President Zhia also set a regulation which states that women are the property of men and therefore, the husband can do anything to his wife.¹² Aside from these discriminatory traditions, there are still many women in Pakistan who currently face *forced marriages*. They are forced to live in the threat of unwanted husbands without being able to fight the law since as a wife; she is the property of the husband who has full authority over her.¹³ Other restrictions on women's rights also occurred in Afghanistan in the era of the Taliban regime (1996-2001). The regulations would certainly be a setback for Islam because in the era before Islam, women in Saudi Arabia could ask for the help of their tribe when getting harsh treatment from their husbands.¹⁴

In Egypt, the rise of hardline Islam in the early 1980s to the 1990s also had an impact on the practice of marital recognition where interfaith marriages that were previously legal became illegal.¹⁵ The development and practice of intellectuality, which is considered to endanger the establishment of the majority in all aspects is considered blasphemy or even apostasy in religion (Islam). The issue, for example can be seen in the decision of Egypt High Court who judged the case of Nasr Hamed Abu Zaid in 1994. This case said that Ibtihal Younis, a wife of Abu Zaid, must divorce her husband because the court believed that the interpretation of Abu Zaid by criticizing the model interpretation of Islamic law have resulted in his apostasy.¹⁶ Zaid critics on the implementation of Islamic law, particularly about chopping off the hands of thieves and polygamous marriage was seen by judges as the door of Zaid to become an apostate. In Islamic law believed by the majority, an apostate Muslim naturally loses the right to become an heir and *vice versa*.

The reality and restrictions on women's rights in Saudi, Pakistan, Afghanistan and Egypt can not be used as a reference to see the reality of fulfilling women's rights in the Muslim world because several other Muslim countries also continue to reform their national laws. Tunisia, for example, after the 'Arabic Spring' continues to reform national laws that are considered contrary to the Tunisian Constitution of 2014. For example, Tunisia revoked Islamic inheritance law, which is considered to discriminate against women's rights in the country.¹⁷ Constitution of Tunisia 2014 is a part of the results of the Arabic Spring Revolution, which also has an impact on the revoke of interfaith

¹⁰ Deutsche Welle (www.dw.com), 'Women's Rights in the Islamic World | DW | 27.09.2017' (*DW.COM*) <<http://www.dw.com/en/womens-rights-in-the-islamic-world/a-40714427>> accessed 16 April 2018.

¹¹ *ibid.*

¹² Afshan Jafar, 'Women, Islam, and the State in Pakistan' (2005) 22 *Gender Issues* 35, 45.

¹³ Ed Husain, 'Ed Husain: Frustrated Love, Forced Marriage ... and Rape' *the Guardian* (20 August 2008) <<http://www.theguardian.com/commentisfree/2008/aug/20/islam.religion>> accessed 19 April 2018.

¹⁴ Jeri Altnu Sechzer, "Islam and Woman: Where Tradition Meets Modernity": History and Interpretations of Islamic Women's Status' (2004) 51 *Sex Roles* 263, 267.

¹⁵ 'Professor Nasr Hamed Abu Zaid: Modernist Islamic Philosopher Who Was' (*The Independent*, 14 July 2010) <<http://www.independent.co.uk/news/obituaries/professor-nasr-hamed-abu-zaid-modernist-islamic-philosopher-who-was-forced-into-exile-by-2025754.html>> accessed 18 April 2018.

¹⁶ *ibid.*

¹⁷ The Associated Press, 'Tunisian Plan to Improve Inheritance, Marriage Rules for Women Rattles Muslim Traditionalists' *Haaretz* (13 September 2017) <<https://www.haaretz.com/middle-east-news/tunisian-womens-rights-plan-rattles-muslim-traditionalists-1.5450397>> accessed 2 April 2018.

marriage ban in 2017 in the country. These two fundamental reforms complement the Tunisian national regulation which banned polygamy since 1956, so it made Tunisia and Turkey (banning polygamy since 1926) as two leading Muslim countries in recognizing and protecting the equal rights of women to men.¹⁸ Polygamy, in various forms, is a form of exploitation by men against women based on interpretations of masculinity of men against the Al Quran and Hadith, and therefore the polygamy is also opposed by many Islamic Law experts.¹⁹

It should be noted that there has been an effort from countries in the Muslim world to reform their laws. Some countries seemed fail to do so while some others succeeded to modernise their laws. For example, reformations related to the recognition of women's rights were carried out in Afghanistan after the fall of the Taliban regime, one of them was to amend the Afghanistan Constitution in 2004. The constitution resulted in an amendment containing norms of recognition and protection of women's rights even if its implementation it is still imperfect.²⁰ Even the Afghanistan Constitution can be categorized as a "protective" constitution²¹ against women's rights because they succeeded in eliminating discriminatory norms against women that were previously established by the Taliban. Afghanistan after the Taliban also established the Ministry of Women and succeeded in placing 11% of women in Loya Jirga (a kind of People's Consultative Assembly).²² The most crucial issue in Afghanistan until now is that there are still many early marriage practices that often force women not to go to school, live in poverty due to economic dependence, risky pregnancy and domestic violence.²³

3. Modernization of Family Law in Indonesia

In Indonesia, some laws, whether in the form of legal legislation or unwritten traditions,²⁴ also are part of a patriarchal system that impacts women. The existence of a patriarchal legal system does not only limit the rights of women that often occur in public

¹⁸ 'Tunisian Women Free to Marry Non-Muslims' *BBC News* (15 September 2017) <<http://www.bbc.com/news/world-africa-41278610>> accessed 19 April 2018. See also George Sadek, 'Tunisia: Government Lifts Ban on Inter-Religious Marriages | Global Legal Monitor' (19 September 2017) <<http://www.loc.gov/law/foreign-news/article/tunisia-government-lifts-ban-on-inter-religious-marriages/>> accessed 19 April 2018.

¹⁹ See for example Samia Rahman's opinion on Samia Rahman, 'Samia Rahman: Polygamy Is Rare and Unpopular in the Muslim World' *the Guardian* (November 21st 2008) <<http://www.theguardian.com/world/belief/2008/nov/21/islam-polygamy-do-not-want>> accessed April 21st 2018.

²⁰ See commentary on amending the constitution in Afghanistan and women's rights in Niaz A Shah, 'The Constitution of Afghanistan and Women's Rights' (2005) 13 *Feminist Legal Studies* 239.

²¹ Niaz A. Shah distinguishes three types of regulations related to the rights of vulnerable groups (women), namely neutral, protective and discriminatory regulations against the rights of vulnerable groups such as women. What is meant by protective regulation is the existence of regulations that specifically recognize and protect the rights of vulnerable groups such as women. See full at *ibid*.

²² Rina Amiri, Swanee Hunt and Jennifer Sova, 'Transition Within Tradition: Women's Participation in Restoring Afghanistan' (2004) 51 *Sex Roles* 283, 283.

²³ Heather Barr, 'Will Afghanistan Follow Through on Promise to End Child Marriage?' *Human Rights Watch* (20 April 2017) <<https://www.hrw.org/news/2017/04/20/will-afghanistan-follow-through-promise-end-child-marriage>> accessed 19 April 2018.

²⁴ According to Article 18B paragraph (2) of the 1945 Constitution, the state and all institutions attached to it must also recognize unwritten laws as long as they are still alive and do not oppose to the principles of the Republic of Indonesia as one of the state's efforts to respect the unity customary law community unit and their traditional rights. The provisions of Article 18B paragraph (2) are reaffirmed in Article 28I paragraph (3) of the 1945 Constitution, in which the state and all institutions attached to it recognize, respect and protect the cultural identity and rights of indigenous peoples as long as they are in line with the times and human civilization.

spaces, such as regulations related to pornography²⁵ but also in private areas such as family law. One phenomenon that is often discussed concerning the different treatment of men and women is the husband's right to polygamy if his wife is considered unable to carry out her "function" as a wife.²⁶ Other problems in Indonesia concerning women's rights are related to *Siri* marriage and the status of children born from marriages, and cross faith marriages that are considered taboo in society.

Indonesia has long had complex regulations relating to the rights of women and children in the national family law system. The combination of law originating from religion, community traditions, and law influenced by Dutch colonial law both strengthens several women's positions in the family and limit their rights. For example, women under the common Marriage Law can divorce their husbands for several reasons²⁷ Contrastingly, this provision does not exist in Islamic law.²⁸ On the other hand, the permissibility of polygamy has an impact on the rise of *Siri* marriages which causes the complexity of *Siri* marriages and women. The regulations and traditions would not only hurt women but also children born of the marriages not approved by the state.

Indonesia has tried to improve the national legal system related to marriage to be more egalitarian, where women are positioned equally with men. The first policy to protect women in the family was passed under the Suharto regime in 1973 The law is categorized into an effort to protect women's rights with the initial purpose being to reduce polygamy marriages, early age marriage, and divorce.²⁹ The early age marriages access to education for many young women while divorce often causes many widows to experience economic problems.

The Marriage Law also intended to unify marital-related regulations which were previously still divided into three parts amongst Dutch law, customary law, and Islamic law. Before the ratification of the Marriage Law, marriages based on customary law were problematic because they were generally unwritten and therefore contained legal uncertainty between the parties, while Islamic law on marriages often reduced women's rights.³⁰ About five years before the submission of the law, the Supreme Court released Regulation Number 12 on June 1968 stating that all Indonesian citizens have the same

²⁵ One example is Lilis Lindawati, a factory worker who was arrested by the Tangerang City Peace and Order Apparatus for finding cosmetic tools in her bag and unable to show professional proof cards from her workplace so that Lilis was considered a prostitute. The reason for his arrest was based on Tangerang City Regulation No. 8/2005 concerning Prohibition of Prostitution. See the news on Liputan6.com, 'Release: I am Not a Prostitute' (*liputan6.com*) <<https://www.liputan6.com/news/read/118650/lilis-my-not-polits>> accessed April 16th 2018.

²⁶ See article 4 of Law Number 1 of 1974 concerning Marriage

²⁷ The wife may file for divorce to her husband on conditions that (1) the husband leaves her for a minimum of six months, (2) the husband does not provide money for three months in a row (3) or the husband is abusive. This requirement is known as *Talik talak* in the Marriage Law. See June S. Katz and Ronald S. Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems' (1975) 23 *The American Journal of Comparative Law* 653, 659

²⁸ In India, a man can even divorce his wife only by saying talaq three times in a time when this practice is no longer applied in the Islamic world. See the case of Arshiya divorced by her husband by saying talaq three times in Michael Safi, "Talaq" and the Battle to Ban the Three Words That Grant India's Muslim Men Instant Divorce' (*the Guardian*, October 20th 2016) <<http://www.theguardian.com/world/2016/oct/20/talaq-and-the-battle-to-ban-the-three-words-that-grant-indias-muslim-men-instant-divorce>> accessed April 21st 2018. This is not enough evidence to make a large claim like an entire practice across India. Please take this out.

²⁹ Mark Cammack, 'Islamic Law in Indonesia's New Order' (1989) 38 *The International and Comparative Law Quarterly* 53, 53.

³⁰ See June S Katz and Ronald S Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems' (1975) 23 *The American Journal of Comparative Law* 653, 656-657.

right to initiate divorce where this right has been previously applicable only in the rules of Christian marriage.³¹

During the 1970s in Indonesia, state policy legally recognized and improved the rights of women in Indonesia, even though this effort gained tremendous resistance in government and society. The process of the Marriage Law submission was rejected by the Ministry of Religion and the PPP faction (Islamic party) along with the majority of Muslims. What is contested by these groups Article 2 paragraph (1) which they consider to deny the religious values of marriage and turn it into an administrative marriage.³² In addition, the registration of marriage as one of the legal requirements for marriage is considered as an attempt by the New Order regime to reduce the power of Islam in Indonesia.

Since then, marriage law reform has rarely happened again. Marriage Act is still practised by people in various ways which often harm women and children. Although there is already a provision for "registration" as one of the legal requirements for marriage, many women are still willing to or are forced to marry in *Siri* way. Also, children who are born from this marriage process still do not get appropriate rights. The implementation of the Marriage Law does not optimally prohibit marriages not following the norms in the Marriage Law because the Act is not followed by fine.

After the Reformation era, the efforts to recognize and protect the rights of women and children born from *Siri* marriages reappear through the judicial review of Article 43 of Law Number 1/1974 concerning Marriage. The decision of the Constitutional Court (MK) Number 46 / PUU-III / 2010 testing the article received mixed reactions from the community when the Constitutional Court acknowledged that children born from a *Siri* marriage must have a kinship to both parents. This is a recognition and protection of children born to women who have a *Siri* marriage.

On the other hand, the Constitutional Court's decision states that there is no longer an "illegitimate child" term³³ for those who are born from women. Furthermore, men's relationships without "legal marriage procedures" by the state is seen as a victory for women in Indonesia. In addition, the law also protects the basic rights of children born from an illegal relationship, such as *Siri* marriages. It should also be understood that the Constitutional Court's decision aims to respond to a large number of women who were married under Islamic law³⁴ without marriage documents, so their status does not have a strong legal basis.

Furthermore, the impact of the Constitutional Court's ruling is also to protect Indonesian women from women trafficking and perpetrators of *misyar* marriage (contracts) that have become increasingly prevalent in Indonesia.³⁵ The majority of

³¹ ibid 659.

³² ibid 661.

³³ The interpretation related to illegitimate children is derived from the existing norms in Article 42 which states the status of a legitimate child is born from a legal marriage.

³⁴ Following the Fatwa of the Indonesian Ulema Council (MUI), *Siri* marriages are legally religious if they meet the requirements and pillars of Islamic law even though they are not officially recorded in the authorized state agencies with one condition for fostering households. See further explanation in Nafilah Abdullah, 'READING TO MARRIAGE UNDER THE HANDS (NIKAH SIRRI) IN INDONESIA' (2013) 12 *Musāwa Journal of Gender and Islamic Studies* 63.

³⁵ *Misyar* marriages, in general, are the Middle East foreigners who come to Indonesia. They chose to make a *misyar* marriage in Indonesia because it was considered cheaper than marrying women in their country. This trend tends to increase every year, thereby threatening the status of children and women who are married by foreigners. See reviews related to *misyar* marriage trends and the reasons for 'Not Applicable for Marriage Costs, Saudi Men Choose Contracts Marriage' (*Republika Online*, 30 October 2015)

foreigners from Middle East countries decided to prefer *misyar* marriages because they could negotiate with their prospective wife regarding their respective rights and obligations.³⁶ They also assume that they have no longer responsibilities after the completion of the contract marriage so that children born from marriages are generally a responsibility of the women. Unfortunately, Indonesian women who are married in *misyar* marriages do not understand that their prices (dowry) are too low or too cheap for groom. Thus, this marriage trend tends to increase every year. The Saudi Gazette, in 2017 for example, reported that about 64% of Asian women were married to Arabian men because of the cost of marrying Asian women was cheaper than the cost of marrying Arabian women.

People, who disagree with the Constitutional Court's decision, state that marriage is only valid based on religious criteria. However, they negate the registration procedure in the official state institutions which thus negatively impacts the inability of children and wives to claim their rights under Indonesian law. This opinion is in line with Judge Maria Farida Indrati where she states "marriage according to certain religions and beliefs cannot directly guarantee the fulfilment of the rights of wives, husbands, and/or children who born of the marriage".³⁷ Judge Maria argues that the registered marriages would be needed to protect the interests of the parties involved in the marriage, especially children and wives.³⁸

The decision of the Constitutional Court to approve children born from *Siri* marriages was used to strengthen the decision of the Constitutional Court No. 12 of 2007 that rejected the application for judicial review of the requirements for polygamy marriages contained in the Marriage Law. The Constitutional Court Decision No. 12 reinforces the requirements of polygamy in the Marriage Law even though these requirements are not available in the Qur'an and the Hadith. The Constitutional Court is on the opinion that the Marriage Law in Indonesia contains the principle of monogamy. Therefore, the Constitutional Court agrees that the state must impose strict conditions for men who intend to carry out polygamy to protect the rights of women who are and will be married.³⁹

4. Conclusion

The two Constitutional Court decisions indicate that the Constitutional Court tends to negotiate legal sources that affect the norms in the Marriage Law. The approval of *Siri* marriage is identical to the practice of polygamy marriage which is known in Islam. Admitting the *Siri* marriage is similar to making the legal spectrum in the Marriage Law broader and potentially causing legal uncertainty for the perpetrators. On the other hand, the application of polygamy requirements is also 'impressed' to minimize the influence of Islamic law in the Marriage Law.

These decisions have positive and negative social impacts. The positive impact of the approval of *Siri* marriage is that more children are born from *Siri* marriages. So, their rights to obtain financial, biological, and psychological needs in legal procedures will be increasingly protected. The negative impact of the decision it will lead to increasingly

<<http://republika.co.id/berita/internasional/timur-tengah/15/10/30/nx1a2x366-not-strong-cost-marriage-men-saudi-select-marriage-contract>> accessed 4 April 2018.

³⁶ Samar Al-Mogren, 'Misyar as a Last Resort' *Saudigazette* (7 March 2016) <<http://saudigazette.com.sa/article/150252/Misyar-as-a-last-resort>> accessed 4 April 2018.

³⁷ *Decision Number 46/PUU-III/2010* (Constitutional Court) 39-40 paragraph 6.1.

³⁸ *Putusan Nomor 46/PUU-III/2010* (Mahkamah Konstitusi) 40.

³⁹ *The Decision of the Constitutional Court Number 12/PUU-V/2007* (Constitutional Court) 97.

complex social and legal problems. Moreover, if the women as perpetrators of marriages do not have sufficient financial capacity and adequate knowledge, they will be extremely dependent on their husbands. In the event of a divorce, these women will face more serious psychological and financial problems after marriage.

Can the two Constitutional Court's opinions be considered to reflect progressive and modern law related to the approval and fulfilment of women's rights in the family? If compared to the model of marriage in the Western world, the issues related to women's rights in the Marriage law are different. However, compared to the existing marital traditions in the Islamic world, the Marriage Law and the two Constitutional Court opinions are more progressive in protecting women's rights. The perspectives of the Constitutional Court which seemed to find a win-win solution because Indonesian law related to marriage contains several legal sources. State policies related to the implementation of marriage law are also not single and rigid but very contextual. Both of them often bring up the opposite of reality. Therefore, legal efforts are needed to continue to approve and protect women's rights.

Bibliography

Alimi MY, 'Rethinking Anthropology of Shari'a: Contestation over the Meanings and Uses of Shari'a in South Sulawesi, Indonesia' [2017] *Contemporary Islam* 1

Al-Mogren S, 'Misyar as a Last Resort' *Saudigazette* (7 March 2016) <<http://saudigazette.com.sa/article/150252/Misyar-as-a-last-resort>> accessed 4 April 2018

Amiri R, Hunt S and Sova J, 'Transition Within Tradition: Women's Participation in Restoring Afghanistan' (2004) 51 *Sex Roles* 283

Barr H, 'Will Afghanistan Follow Through on Promise to End Child Marriage?' *Human Rights Watch* (20 April 2017) <<https://www.hrw.org/news/2017/04/20/will-afghanistan-follow-through-promise-end-child-marriage>> accessed 19 April 2018

'Discriminatory Laws Hold Indonesian Women Back, World Bank Report Finds' (*Jakarta Globe*, 10 September 2015) <<http://jakartaglobe.id/news/discriminatory-laws-hold-indonesian-women-back-world-bank-report-finds/>> accessed 16 April 2018

Husain E, 'Ed Husain: Frustrated Love, Forced Marriage ... and Rape' *the Guardian* (20 August 2008) <<http://www.theguardian.com/commentisfree/2008/aug/20/islam.religion>> accessed 19 April 2018

Jafar A, 'Women, Islam, and the State in Pakistan' (2005) 22 *Gender Issues* 35

Katz JS and Katz RS, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems' (1975) 23 *The American Journal of Comparative Law* 653

Komnas Perempuan (Organization : Indonesia), *Atas nama otonomi daerah: pelembagaan diskriminasi dalam tatanan negara-bangsa Indonesia : laporan pemantauan kondisi*

pemenuhan hak-hak konstitusional perempuan di 16 kabupaten/kota pada 7 provinsi.
(Komnas Perempuan 2010)

Mark Cammack, 'Islamic Law in Indonesia's New Order' (1989) 38 *The International and Comparative Law Quarterly* 53

Nurmila N, 'Polygamous Marriages in Indonesia and Their Impacts on Women's Access to Income and Property' (2016) 54 *Al-Jami'ah: Journal of Islamic Studies* 427

Press TA, 'Tunisian Plan to Improve Inheritance, Marriage Rules for Women Rattles Muslim Traditionalists' *Haaretz* (13 September 2017)
<<https://www.haaretz.com/middle-east-news/tunisian-womens-rights-plan-rattles-muslim-traditionalists-1.5450397>> accessed 2 April 2018

'Professor Nasr Hamed Abu Zaid: Modernist Islamic Philosopher Who Was' (*The Independent*, 14 July 2010)
<<http://www.independent.co.uk/news/obituaries/professor-nasr-hamed-abu-zaid-modernist-islamic-philosopher-who-was-forced-into-exile-by-2025754.html>> accessed 18 April 2018

Sadek G, 'Tunisia: Government Lifts Ban on Inter-Religious Marriages | Global Legal Monitor' (19 September 2017) <<http://www.loc.gov/law/foreign-news/article/tunisia-government-lifts-ban-on-inter-religious-marriages/>> accessed 19 April 2018

Sechzer JA, "'Islam and Woman: Where Tradition Meets Modernity": History and Interpretations of Islamic Women's Status' (2004) 51 *Sex Roles* 263

'Tunisian Women Free to Marry Non-Muslims' *BBC News* (15 September 2017)
<<http://www.bbc.com/news/world-africa-41278610>> accessed 19 April 2018

Welle (www.dw.com) D, 'Women's Rights in the Islamic World | DW | 27.09.2017' (*DW.COM*) <<http://www.dw.com/en/womens-rights-in-the-islamic-world/a-40714427>> accessed 16 April 2018

Putusan Nomor 46/PUU-III/2010 (Mahkamah Konstitusi)