

Marlojong Custom Contribution in Marriage Dispensation Case at Panyabungan Religious Court

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Abstract

Judges at Panyabungan Religious Court explored the prevailing values in society by consulting traditional figures, also known as hatobangon. This is a common practice when a marriage is based on marlojong custom. This study aimed to examine the contribution of customary laws in marriage dispensation decision at Panyabungan Religious Court by using the legal approach and the socio-legal approach. The legal approach was used to analyze marriage dispensation verdict at Panyabungan Religious Court. The socio-legal approach was used to analyze the social interactions that occur between the Religious Courts and customary institutions. The results of this study indicated that traditional leaders play an important role in providing legal advice in society. In cases of underage marriages, usually hatobangon (traditional leaders) propose two options; unregistered marriage or marriage dispensation application. In the latter case, hatobangon play their role assisting in the marriage dispensation request. Well-educated or knowledgeable hatobangon typically recommend submitting a request for marriage dispensation to Panyabungan Religious Court. This hatobangon statement letter serves as one of the requirements for the judge's approval of marriage dispensation request. The contribution of customary laws reflects a manifestation of the prevailing Islamic values in society. Customary laws provide an alternative way to resolve marriage dispensation cases in the society and are used as an evaluation tool in stipulating a court decision. In addition, customary laws aid the public in understanding the inclusion of

the Islamic laws in the state laws, such as age limit for marriage.

1. Introduction

Indonesia as a legal state (*rechtsstaat*) does not just exist. It has numerous customary laws which serve as the embodiment of socio-cultural values originating from the local wisdom of the native Indonesian people.¹ Besides, people's daily life is also governed by *fiqh*, which has been passed down for so many generations that it has become customary laws.² Each country always has its own unique legal characteristics. These characteristics occur through the long course of the people's cultural history. In fact, every nation has a predominant identity that is distinct from that of other societies. The cultural history of a society gradually becomes an element in the formation of national legal system.³ Therefore, the national law is not born out of nothing; it is born out of the spirit of the people.

Customary laws, as stated by Soekarno, is the *personality in culture*.⁴ National awareness and legal awareness are preceded by cultural awareness, with legal independence seen as cultural independence. Therefore, to achieve Indonesian independence, an opportunity was needed to reopen cultural independence so it can blossom, grow, and bear fruit. Plurality is well-reflected in Indonesian legal system which consists of at least three legal systems; the customary legal system, the Islamic legal system, and the western legal system.⁵ These three legal systems have been implemented nationally in different ways. *First*, customary law has been in force in Indonesia long before Islamic law and western law appeared although exactly when it came into effect is unknown. It is believed that customary law emerged together with the appearance of the humans themselves. *Second*, Islamic laws came to be known since the arrival of Islam to

¹ Yanis Maladi, "Eksistensi Hukum Adat Dalam Konstitusi Negara Pasca Amandemen UUD 1945". *Jurnal Hukum dan Pembangunan*, Vol. 41 No. 3 (2011), h. 421-440.

² Muwardi Muzamil dan Anis Mashdurohatun, *Perbandingan Sistem Hukum (Hukum Barat, Adat, dan Islam)*. (Semarang: Madina Semarang, 2014), h. 59-62.

³ Oka Parwata, dkk. *Memahami Hukum dan Budaya* (Bali: Pustaka Ekspresi, 2016), h. 43-49.

⁴ Ali Fahrudin, *Nasionalisme Soekarno dan Konsep Kebangsaan Mufassir Jawa* (Jakarta: Litbangdiklat Press Kemenag, 2020), h. 324.

⁵ Mohammad Daud Ali, *Hukum Islam : Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia* (Jakarta: Raja Grafindo, 2014), h. 270.

Indonesia although there is no agreement on when it took place. Some believed it took place in the 7th century AD while some others proposed it happened in the 13th century AD. Even though there are differences in opinions, it can be said that the teachings of Islam have been practiced since its arrival.⁶ *Third*, the western legal system was introduced to Indonesia at the same time as the Dutch came to trade in the archipelago, even though over time their initial objective to trade turned into an intention to colonize.⁷ The development and the progress of Islamic laws were relatively hampered at this time. On the other hand, the Western legal system began to be enforced upon Indonesian society.⁸ After Indonesian independence, western law experienced a decline and gradually diminish when it conflicted with Islamic laws and customary laws.⁹

Long before positive law is relevant to customary law, Islamic laws have coexisted for many years with customary laws in Indonesia. Indeed, religion and culture in Indonesia influence each other and are always interesting to study. At least three things are always discussed. *First*, how religious law can affect the cultural development of a society. *Second*, to what extent culture or customary law influence a society's acceptance and implementation of their religious teachings. *Third*, what are the implications of their relationship to the aspects of people's lives.¹⁰ The harmonization of customary laws and Islamic laws has existed for a long time in our nation.¹¹ The relationship between the two is very familiar in society, especially for those who embrace Islam. This familiarity is reflected in the local proverbs found across the nation. For instance, an Acehese saying states, "*hukom ngon adat, lagee zat ngon sifeut*," meaning that Islamic laws and customary laws are impossible to separate from each other because they are closely interconnected, akin to the impossibility of disintegrating a substance from its properties. In the Minangkabau language, a saying goes *adat and syara' sanda menganda, syarat mengato adat memakai*, meaning customary laws and Islamic laws closely support each other because, in fact, the ultimate customary law is the Islamic law itself.¹² In Sulawesi, the saying *adat hula-hulaa to syaraa, syaraa hula-hulaa to adati* means customary laws are based on the Islamic law and the Islamic law are based on customary laws.¹³

⁶ Mohamad Daud Ali, *Hukum Islam : Pengantar Ilmu Hukum*, h.208.

⁷ Aqib Suminto, *Politik Islam Hindia Belanda*, Cet. II. (Jakarta: LP3ES, 1986), h. 199.

⁸ Andi Herawati, "Dinamika Perkembangan Hukum Islam" *Jurnal Shahabiah : Jurnal Pendidikan Studi Islam*, Vol. 4, No. 1 (2018), h. 1-8.

⁹ Sunaryati Hartono, dkk. *Analisa dan Evaluasi Peraturan Perundang-Undangan Peninggalan Kolonial Belanda* (Jakarta: BPHN, 2014), h. 164.

¹⁰ Nurrohman dkk, *Laporan Penelitian "Harmoni Agama dan Budaya di Jawa Barat: Studi Tentang Toleransi Kehidupan Beragama Melalui Kearifan Lokal Kampung Adat"*. (Bandung: UIN Bandung, 2015), h. 18.

¹¹ Sajuti Thalib, *Receptio a Contrario*. (Jakarta : Bina Aksara, 1985), h. 4.

¹² Hamka, *Hubungan Timbal Balik antara Adat dan Syara' di dalam Kebudayaan Minangkabau*" *Panji Masyarakat* Nomor 61/IV/1970, h. 10.

¹³ Lihat <https://warisanbudaya.kemdikbud.go.id/?newdetail&detailCatat=7060>. Diakses 20 Juli 2022 Jam 15.35 WIB.

However, several western writers intensely propagated that the elements of customary laws and Islamic laws are contradictory.¹⁴ This is not surprising because they deliberately used a conflict approach in linking the two legal systems with the purpose of dividing and easily conquering Indonesian society.¹⁵ At that time, the Dutch used this issue to weaken the stance of the Indonesian people. One good example of harmonization of customary laws and Islamic laws occurred after the Paderi War in the 19th century.¹⁶ A beautiful formulation of customary laws and Islamic laws was born, masterminded by Ninik Mamak and the religious scholars in 1833. The formula reads, “*Adat Basandi Syarak, Syarak Basandi Kitabullah, and Syarak Mangato Adat Mamakai.*” The saying refers to the two types of inheritance in the Minangkabau people; high inheritance and low inheritance. The formula was later called for to be adopted by judges in West Sumatra and Riau in 1968. After the national independence, the idea that Islamic law is complimentary to the customary laws started to develop. Since then, whenever there is a dispute, Islamic laws as the most perfect of all laws are used as a reference.¹⁷

In Mandailing, the same also happened. After years of contact with Islam, the local Mandailing culture began to blend with Islamic teachings,¹⁸ giving birth to the saying, “*ombar do adat dohot ugamo*”, which means custom and religion go hand in hand.¹⁹ This serves as the example of the harmonious relationship between religion and Mandailing custom. Even in the majority of Islamic societies, especially among the academics, customary laws can be accepted and implemented as long as they do not conflict with Islamic laws. As proposed in *receptio a contrario* theory, customary laws only apply if it does not conflict with Islamic laws.²⁰ This is confirmed in article 37²¹ of the marriage law, which allows religious courts to make a decision by taking into account customary laws as the

¹⁴ Saidin Ernas, ‘Pandangan Sonouck Hurgronje Tentang Islam Dan Implikasinya Terhadap Praktik Hukum Dan Politik Di Indonesia’, *Jurnal Dialektika: Jurnal Pemikiran Islam dan Ilmu Sosial*, 12.2 (2019), h. 130-142.

¹⁵ Laurensius Arliman, ‘Hukum Adat Di Indonesia Dalam Pandangan Para Ahli Dan Konsep Pemberlakuannya Di Indonesia’, *Jurnal Selat*, 5.2 (2018), h. 177-90. <<https://doi.org/10.31629/selat.v5i2.320>>.

¹⁶ Perang Paderi pada awalnya merupakan peperangan antara Adat dan Agama, namun pada akhirnya merupakan perlawanan antara adat bekerjasama dengan agama melawan Belanda (1803-1838). Lihat Muhammad Radjab, *Perang Paderi di Sumatera Barat (1803-1838)*, (Jakarta: Dikbud, 1945).

¹⁷<https://www.kompasiana.com/wahyudirahmat/54f891c2a33311db078b465f/islam-dan-minangkabau-dalam-perpaduan> (Penulis Mahasiswa Pascasarjana Universitas Andalas Padang).

¹⁸ Susan Rodgers, *Print, Poetics, And Politik: a Sumatera epic in the Colonial Indies and New Order Indonesia* (Leiden: KITLV Press, 2005), h. 105.

¹⁹ Muhammad Syukri Albani N, ‘Analisis Kompilasi Hukum Islam Tentang Tipologi Pelaksanaan Hukum Keluarga Islam di Mandailing Natal’. *Jurnal al Manahij: Jurnal Kajian Hukum Islam*. 9.1 (2016), h. 31-50. DOI : 10.24090/mnh.v9i1.2015.pp31-50.

²⁰ Sajuti Thalib, *Receptio a Contrario: Hubungan Hukum Adat dan Hukum Islam*, Cet. IV (Jakarta: Bina Aksara, 1985), h. 62.

²¹ UU No. 1 Tahun 1974 tentang Perkawinan.

basis. Customary laws used are surely not those conflicting with Islamic laws but are those that are in harmony with the principles of Islamic laws.

There is an agreed principle that functions as a standard in the formulation of Islamic law. This principle reads *al 'adatu muhakamah*, meaning that custom can serve as a source of law. They are accepted, in essence, as long as they are not contrary to Islamic law.²² As illustrated above, there has been an effort to harmonize customary law and Islamic law (fiqh). Islamic law recognizes the existence of good custom, while customary law can be applied only if it does not conflict with Islamic law (fiqh).²³ In societal practice, it can be concluded that customary law and Islamic law (fiqh) have been integrated in matters relating to morality, behaviors, aqidah and worship. Although nowadays there has been an alignment of customary law and Islamic law (fiqh) in society, it does not mean that harmonization efforts have stopped. The problem nowadays is how far the harmonization of Islamic law (in addition to *fiqh*) such as *qanun* and *qadla*, both of which are part of national law, can be accepted by customary law as part of Islamic law that has to be implemented and is able to bring positive impact on the national and societal progress.

2. Research Method

The approaches used in this study were the *legal approach* and the *socio-legal approach*. The legal approach was used to analyze marriage dispensation decision at Panyabungan Religious Court. The socio-legal approach was used to analyze social interactions that occur between the religious court and customary institutions. This research is an empirical legal research, conducted in the real-life scene,²⁴ i.e. Panyabungan Religious Court and customary institutions. Empirical research is a careful investigation of a problem to find the right solution to the problem.²⁵ The primary data used was the 2019-2021 marriage dispensation decision at Panyabungan Religious Court and the results of interviews with traditional leaders in their working areas. The data was collected by using documentation and interview. The data was edited to match the various answers and then analyzed qualitatively, i.e. by describing or explaining the data obtained to show the extent of the contribution of customary law in the marriage dispensation case at the Panyabungan Religious Court.

3. Results and Discussion

The Role of Panyabungan Religious Court in Marriage Dispensation Cases

²² Abu Ishaq al-Syathibi, *al-Muwafaqat fi Ushul al-Syari'ah* (Kairo: t.pn,tt) Juz II, h. 297.

²³ Izzuddin bin Abdul Salam, *Qawa'id al-Ahkam fi Mashalih al-anam*, (tt: Dar al-Jail, 1980), h. 10.

²⁴ Soerdjono Soekanto, *Penelitian Hukum Normatif*, (Jakarta: PT. Raja Grafindo, 2003), h. 12

²⁵ J.Supranto, *Metode Penelitian Hukum dan Statistik*, (Jakarta: PT. Rineka Cipta, 2003), h. 1

Religious courts are government's means of exercising judicial power to resolve legal issues according to their authority.²⁶ Because the religious court only apply to Muslims, in deciding cases at religious courts references to Islamic law cannot be separated. As one of the national judicial institutions, this court has existed for a long time and has undergone several changes and developments. In the early days of Islam in Indonesia a dispute among Muslims was settled by someone who was considered to have profound Islamic knowledge. This also applies to solving problems such as the marriage contract of a woman without a *wali* (marriage guardian). A settlement like this is usually called *tahkim*.²⁷

In addition, religious courts are also part of the Indonesian national justice system which acts as one of the executors of judicial power. The institution which at that time was called *tahkim*, grew and developed along with the Indonesian Muslim community. The community's urgent need for the religious courts demonstrates a strong sociological support of the community in line with the rapid development of legal problems, both among Muslim communities who form the basis of the majority of Indonesia's population and individuals or legal entities that submit themselves to Islamic law. In upholding the rule of law, religious courts stand parallel to other courts in a one-roof system. The competencies mandated by the religious courts have experienced a significant expansion not only in private matters but also in other matters such as the sharia economy.²⁸

Regarding private matters, one of the areas under the authority of religious courts is to grant dispensation for marriage. Article 7 paragraph (2) states that "*In the event of deviation from the age requirement as referred to in paragraph (1), the parents of the male and/or the parents of the female may request dispensation from the court for reason of urgency by providing sufficient supporting evidence.*" "*For reason of urgency*"²⁹ can be interpreted as a situation with no alternative solution and a marriage is inevitable. Also, "*sufficient supporting evidence*" refers to a statement proving that the age of the bride and groom is still below the statutory provisions and a statement from health workers who support the parents' statement that the marriage is urgently needed. Apart from that, the court is also obliged to hear the opinion of both the bride and groom³⁰. According to PERMA (The Regulation of the Minister of Religious Affairs) Number 5 of 2019 article 16 letter (h), the granting of a marriage dispensation must be based on the spirit of preventing child marriage, moral considerations, religion, custom and culture,

²⁶ UU No. 50 Tahun 2009 tentang Perubahan Kedua atas UU No. 7 Tahun 1989 tentang Peradilan Agama.

²⁷ Zaini Ahmad noeh, *Sebuah Perspektif Sejarah Lembaga Islam di Indoensia , 1900-1942* (Bandung: Almaarif, 1980), h. 9.

²⁸ Lihat pasal 49 UU No 49 Tahun 2006 tentang Peradilan Agama.

²⁹ Undang-Undang Nomor 16 Tahun 2019 tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

³⁰ Penjelasan Undang-Undang Nomor 16 Tahun 2019 tentang Perubahan Atas Undang-Undang Nomor 1 Tahun 1974 Tentang Perkawinan.

psychological aspect, health aspect, and the resulting impacts.³¹ There are at least seven things that a judge must consider in giving a marriage dispensation decision, i.e. the spirit of preventing child marriage, moral consideration, religious consideration, customary and cultural consideration, psychological aspect consideration, health aspect consideration, and impact considerations.

Through a comprehensive evaluation by a judge, it is hoped that there will be maximum justice and legal benefits. A judge considers at least *śabat* (static) and *tataw wur* (dynamic) aspects at the same time. By combining these two criteria, justice will be achieved in law enforcement. Among the *śabat* values are moral, religious, customary and cultural values that live in society. Judges' respect for customary law is a manifestation of the constitutional mandate of the Republic of Indonesia, i.e. Article 18B paragraph 2 of the 1945 Constitution. Indonesian law is not only an embodiment of formal law, but more than that, Indonesia's legal state must be able to uphold the morality as stated in its constitution (moral design) in order to create a country that care for its people. Panyabungan Religious Court has issued many dispensations for marriage by taking into account the approval of local *hatobangon* (traditional institutions).³² A letter from the *hatobangon* or local traditional leader explaining that the bride and groom are in a state of urgency to be married becomes one of the judge's consideration in deciding the dispensation of marriage. Panyabungan Religious Court explored the prevailing laws in society as legal basis in granting marriage dispensation. Thus, we can see a harmonization between the state represented by Panyabungan Religious Court as the executor of judicial power and *Hatobangon* (traditional leaders) who represent the local community.³³

Harmonization between Islamic law, customary law and national law has a positive impact on the progress of the nation and state. The three systems actually have a common goal, but sometimes seeing a problem from a different point of view results in different decisions. The state wishes to prevent child marriage for the benefit of children, while the values embodied in society also wish to facilitate marriage for the benefit of the child. In fact, the state has been looking for an alternative way in this regard, but because awareness and understanding of Islamic law and positive law is still low, people are taking shortcuts. As was stated by the Head of Siabu Religious Court, only two out of ten people who wanted to marry underaged went to court, while the rest preferred to wait or carry out underhand marriage.³⁴

³¹ PERMA Nomor 5 tahun 2019 tentang Pedoman Mengadili Permohonan Dispensasi Kawin.

³² Lihat Putusan Pengadilan Agama Panyabungan terkait permohonan dispensasi, maka akan ditemukan hampir disemua putusannya mempertimbangkan surat keterangan dari hatobangon. Contoh putusan No. Nomor 1/Pdt.P/2020/PA.Pyb.

³³ Putusan Nomor 243/Pdt.P/2020/PA.Pyb

³⁴ Bapak Abdul Rohmat (kepala KUA Kec. Siabu), interview, Selasa 28 Juni 2022, Jam 10.00 WIB

After the changes to the marriage law in Indonesia, the number of marriage dispensations at the Religious Courts of Panyabungan increased from 2019-2021. The number of marriage dispensation applications increased by 122% from 2019-2020. We can see this in the following table:³⁵

Table 1. Number of Marriage Dispensation Applications for 2019-2021

No	Year	Amount	Accepted	Rejected	Revoked	Failed	Cancelled
1	2019	22	15	1	4	1	1
2	2020	49	43	-	2	4	-
3	2021	53	45	-	3	1	4
Total		124	103	1	9	6	5

If the goal is to reduce the number of marriages under the age of 19, it seems that the effectiveness of national marriage regulations is still far from expectations considering the fact that the number of applications for marriage dispensation continues to increase. This is the case for not only official marriages but also underhand marriages. The increase in marriage under the age of 19 years is caused by many factors. Some of them are due to the prevailing values in society (religion and custom) and promiscuity, as can be seen in the table below:

Table 2. Reasons for Filing a Marriage Dispensation Year 2019-2021³⁶

No	Reason for Dispensation	Amount
1	<i>Marlojong</i> (Mandailing Custom)	43
2	Fear of committing forbidden acts in Islam	38
3	Pregnancy	21
4	Loss of virginity	11
Total		113

Based on the table, we can conclude that one of the causes of the application for a marriage dispensation is the customs prevailing in the community such as *marlojong*. The customary values contained in this community require that the couple are bonded in marriage. Otherwise, the couple will be fined and sanctioned socially. This *marlojong* occurred because the man usually has visited the woman's house to show his good intentions to marry her, but the woman's parents do not approve for various reasons. Therefore, the customs provide a way out, i.e. by way of *marlojong*.³⁷ Since the customary law is viewed

³⁵ Data awal diperoleh dari PA Panyabungan.

³⁶ Data diperoleh dengan mendata satu persatu keputusan dispensasi kawin di Pengadilan Agama Panyabungan sejak 2019-2021.

³⁷ Bapak Haris, S. Ag., MH (KUA Kec. Tambangan dan Hatobangon Desa Pidoli Lombang), interview, Senin, 18 Juli 2022 jam 10.00 WIB

relevant to Islamic law, it is used as the basis for granting permission to marry. The large number of *hatobangon* who issue statement letter to prospective couples for judge's evaluation indicates that there is legal awareness that *qanuns* (laws) must be obeyed. In addition, this also indicates religious court's recognition of *hatobangon* (as a customary structure) as a body of both national and Islamic laws. However, many people still prefer to carry out underhand marriages because they believe that *qanuns* and religious court represent state law, rather than Islamic law. This dualism of understanding occurs due to a lack of public understanding of Islamic legal products, which results in imperfect harmonization of the legal system.

The harmonization between the state legal system, the Islamic legal system and the customary law system that has occurred, even if minimal, must be maintained. Now, the next question is how to develop harmonization between the Islamic legal system and the customary law system in the national legal system in order to produce a positive impact on the progress of the nation and the state. Based on this, researchers feel interested in conducting research related to the harmonization of the legal system in Indonesia as well as an analysis of the contribution of Islamic law and local customary law to marriage dispensation decision at Panyabungan Religious Court.

The Contribution of *Marlojong* Custom to Marriage Dispensation Decision at Panyabungan Religious Court

Customary law also has a strategic contribution to judges' decisions on marriage dispensation at Panyabungan Religious Court. In addition to being a fixed court decision in marriage dispensation cases at Panyabungan Religious Court, the judges' decisions that are based on customary values are also a means of fostering customary law. The growing use of customary law in judges' decisions serves as an evidence of the shifts and growth of customary law. Customary law reflects the personality and soul of the nation. Some customary laws are still relevant as materials that shape the national legal system and some are no longer relevant.³⁸ Customary laws that can no longer be maintained will become extinct over time in accordance with the flexible and dynamic nature of customary law (no stats). Customary law develops and continues to develop to produce customary decisions, and customary decisions give rise to customary law.

A law that is contrary to the prevailing values and legal norms in society will surely be rejected. In Indonesia, the *living law* of the people is customary law. It can also be used as a source of law by judges if the law orders so.³⁹ Meanwhile, to analyze the position of customary law in the legal system, it is necessary to pay

³⁸ Ratna Winahyu Lestari Dewi, "Peranan Hukum Adat dalam Pembangunan Dan Pembangunan KUHP Nasional", Jurnal Perspektif, Vol. X No. 3 Edisi Juli (2005).

³⁹Sulastriyono dan Aristya, "Penerapan norma dan Asas-Asas Hukum Adat Dalam Praktik Peradilan Perdata", Jurnal Mimbar Hukum, Vol. 24 No. 1 Februari (2012).

attention to one of the schools in legal science, i.e. *sociological jurisprudence* presented by Eugen Ehrlich. The basic conception of Ehrlich's thought on law is referred to as *living law*.

Good and effective positive law is one that is in accordance with the *living law* of society and reflects the values that live in it. Ehrlich's message to legislators is that in making laws one should pay attention to what prevails in a given society. It is a fact and cannot be denied that the customary law that applies in Indonesia is a law that is in accordance with the values that live in its society. Therefore, in order for customary laws to be effective in society, in the formation of laws or *qanuns*, people's representatives who sit in the legislature must be able to explore and must accommodate legal awareness that lives in their society. The public legal awareness that has been formalized both in laws and *qanuns* can be used as a basis for maintaining order and harmony in their lives.

The recognition of unwritten law is rationalized or included in Article 18B paragraph (2) Amendment to the 1945 Constitution which states, "The state recognizes and respects customary law community units and their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Republic of Indonesia, regulated by law". In addition, it is also mentioned in *Penjelasan Umum* (the General Elucidation) of the 1945 Constitution number I that "...the Constitution is the written basic law, while in addition to the basic law the unwritten basic law also applies, i.e. the basic rules that arises and is maintained in the practice of administering the state even though it is not written."

The latest judicial power regulations, namely Law no. 48 of 2009 Article 5 paragraph (1) Law no. 48 of 2009 also emphasized: "*Judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society.*" Judges are the enforcer of decency, justice, public interest and public order. In this context, they must pay attention to the prevailing values in their society so their decision is in accordance with the law and the community's sense of justice. Even though *UU Kekuasaan Kehakiman* (the Law on Judicial Power) requires judges to pay attention to the values that live in society, they in practice do not always comply with this requirement. In fact, judges sometimes go against the prevailing values in the society for the purpose of providing justice. This is evident in the Supreme Court decision No. 1048K/Pdt/2012, which emphasizes that any local customary law that does not recognize women equal rights can no longer be defended.

The position of the customary law system in religious courts is one of the legal considerations. The customary law system is part of religious court system, and is part of Islamic legal system. Since customary law has been used in religious courts, it has therefore been recognized and does not violate Islamic law. This is in accordance with *the Receptie a Contrario Theory* which states that customary law only applies if it does not violate Islamic law. Integrating customary law communities is not a simple matter; it requires serious thought on the implications

of integrating various customary law systems, including in one in Mandailing Natal, into the national legal system.

Customary law has a structure that is not binding but is recognized in Mandailing Natal community. This community essentially consists of law-abiding citizens with their own customary law structure and regulations. Indeed, Mandailing community have several local bodies that serve to enforce their customary law system. The King, for instance, rather than being an absolute king as in a large kingdom, simply refers to someone who is customarily considered an elder with a respected position in the community, usually representing a small area in the region. The process of selecting a King is inseparable from the process of forming a village (*huta*); therefore, their authority is only limited to small areas due to the existence of a *Huta* (village). However, over time, many new villages without a *Huta* were created because the village formation process has changed. Even so, there are other elements that serve to enforce the customary law in each *huta*, such as *hatobangon* (plural form of *tobang*) and *dalihan na tolu*.

Hatobangon are those considered capable and wise enough in resolving issues in society, especially marriage and household issues.⁴⁰ *Hatobangon* are directly elected by the local community through recognition as an experienced, elderly, and wise scholar. Apart from that, there are also *dalihan na talu* which consist of *Kahanggi*, *Anak Boru* and *Mora*. In order to arrive at a good decision, deliberations must involve *hatobangon* and *dalihan na tolu* since *hatobangon* are considered well-knowledgeable in customary law and religious law. In other words, *hatobangon* serve as a mediator and judge in the customary setting. In every *huta* there are always *hatobangon* whose number varies in each *huta*. *Hatobangon* are those highly respected and whose role is important in the community because they are the ones who provide advice for the community in all life problems including household disputes. In reconciling troubled couples, *hatobangon* can give a final decision in a divorce when reconciliation is not possible.

It can be concluded that *hatobangon* is an element of customary institutions that plays an important role in providing legal advice in the society. The higher the *hatobangon* education is, the more educated it will be in giving judgment. In cases of marriage dispensation, usually the *hatobangon* will recommend two alternative solutions; unregistered marriage or marriage dispensation application. Hence, *hatobangon* play their role in the application for marriage dispensation. A couple who are suggested to apply for a marriage dispensation usually will receive a statement letter issued by *hatobangon* stating that marriage is urgently needed because a violation of customary law, such as *marlojong*, has taken place.

Essentially, a customary law is an unwritten law, but it is recognized in a community. Even though it is unwritten, the community, especially those who are Muslims, are still guided by Islamic law, especially those of the Shafi'i school of

⁴⁰Rahmad Efendi, Laporan Penelitian: *Kewenangan Malim Kampung dan Hatobangon dalam Menyelesaikan Konflik Rumah Tangga Pada Masyarakat Tanjung Mompang Kec. Panyabungan Utara Mandailing Natal* (Medan: FASIH UINSU, 2020), h. 8.

law. *Fiqh* has been taught from house to house, mosque to mosque for centuries so that it becomes living values in the society. These values then become the basic reference in indigenous peoples. In terms of the age of marriage, customary law submits to *fiqh*. The customary law system does not have any written law; however, it does have a living law and has been passed down from generation to generation. Even so, the customary law system is still institutionalized although not structured. It is an incomplete law, therefore in its enforcement, it requires an Islamic legal system and positive law.

We can see the contribution of customary law in the marriage dispensation decision in the judges' considerations involving the *hatobangon*, as well as the customary law values that apply in society. One of them is *marlojong*, as stated by the witnesses, "the villagers object to their children not being married immediately since both of them have violated the prevailing custom in the community." When a *marlojong* takes place, it is very urgent for a marriage to take place because the applicant's child has brought his future wife to spend the night in his or her house and all the customary processes have been completed. The customary law is involved in marriage dispensation application at Panyabungan Religious Court. Those who violated customary law by, for instance, carrying out *marlojong*, must be married off immediately. Otherwise, the couple will be sanctioned and ostracized by their community. On the other hand, if this is allowed to continue, the application for marriage dispensation at the Panyabungan Religious Court will increase.

These two legal systems are indeed very influential on the social life of the community; therefore, these two systems cannot simply be ignored. Religious courts as an institution are always dynamic, ever-developing and ever-interacting with other legal systems. Changes that occur in a society are always used as material for interpreting laws and regulations. This enables the court to always able to follow and understand the legal values that live in the society. *Marlojong* marriage custom require that the couple ne marred off or be sanctioned and ostracized by their society. This is later supported by a statement letter from *hatobangon* that the two were in an urgent situation to get married immediately because they already live together and the woman has received a dowry from the man.

The increase in sexual promiscuity is a contemporary issue in the Islamic world that should not be ignored. It has caused major changes in premarital relationships between men and women, resulting in a high number of requests for marriage dispensation for reasons of custom and religion. Those who have dated at an early age are usually the most affected, ending up violating moral values, losing their virginity and being pregnant out of wedlock.

The number of *marlojong* cases is not as many as that of regular marriage. The head of Siabu Religious Court stated:

"Based on our findings, no marriage in Siabu in June 45 was caused by Marlojong. In May, two out of 78 marriages were caused by Marlojong. This marlojong marriage is no longer a trend because the percentage is small."

Marlojong custom is often recognized as a solution to the problem of dowry and parents' disapproval. He stated:

*"Marlojong marriage is considered to be a solution to a way to soften the guardian's stance and lower the dowry. There are also many cases when the couples already carried out marlojong, and in the end marriages were held at the wives' house, meaning that the women's parents have given their approvals. But there are also many who got married in the grooms' houses, but their guardians were still present."*⁴¹

Husnan Nasution, the head of Naga Juang District Religious Court also conveyed the same thing. He stated:

*"Marlojong usually happens because the couple cannot afford the dowry, or here usually called tuor. First, they go on a date because the couple are afraid that their parents won't approve of their relationship. Therefore, they chose to carry out marlojong. The purpose of this marlojong is to have the blessing of the parents and to lower the dowry."*⁴²

The spirit of preventing child marriage continues to be echoed, while promiscuity still continues. This surely results in the increase in fornication among teenagers. Therefore, the Islamic law system and the customary law system through religious courts serve to balance and provide opportunities for ideal child marriages. This is to minimize the number of fornications among adolescents. In their consideration, judges always use the values and principles of Islamic law to enforce justice in the society. In deciding a case with this rule, there are at least two things must be considered.⁴³ *First*, a judge will consider the case itself; what kind of case it is, where and when it happened, how it happened, why it happened and who is the perpetrator. *Second*, a judge will make legal considerations, especially on laws that are not explicitly stated in the Quran and Hadith; in this case, custom must be a legal consideration in deciding cases. Thus, we can conclude that there are several ways the substances of customary laws contribute in marriage dispensation decision. *First*, the substances of customary law serve as the embodiment of the prevailing Islamic law in society. *Second*, the substances of customary laws have made it easier to resolve cases in society. *Third*, the substances of customary law are used as an evaluation tool in establishing or deciding the law. *Fourth*, the substances of customary law make it easier for people to understand Islamic law and state law.

Customary laws consist of cultural values that comply with Islamic law; therefore, all applicable cultures will continue to exist after being adjusted to the values of Islamic law. Many local cultures play a role in facilitating the implementation of Islamic law in Mandailing Natal. One that plays a role in

⁴¹ Bapak Abdurrohmat Nasution (KUA Kec. Siabu), interview, hari Selasa, 12 Juli 2022.

⁴² Bapak Husnan Nasution (KUA Kec. Naga Juang), interview, hari Jum'at 08 Juli 2022.

⁴³A. Dzazuli, *Kaidah-Kaidah Fikih: Kaidah-Kaidah Hukum Islam dalam Menyelesaikan Masalah-Masalah yang Praktis* (Jakarta: Kencana, 2014), h. 80.

marriage dispensation is *marlojong*. Customary values that are still alive in this community are used by judges as one of the considerations in making a dispensation decision. This is in accordance with Article 17 point a PERMA Number 5 of 2019 concerning Guidelines for Adjudicating Applications for Marriage Dispensation, which stipulates that “Judges, in stipulating applications for marital dispensation consider the protection and children’s best interests in statutory regulations and unwritten laws in the form of legal values, local wisdom, and a sense of justice that prevail in society.”

Event in the customary law system in this discussion is *marlojong*. If a couple carry out *marlojong*, they must be married off immediately. Husnan Nasution as the head of Naga Juang District Religious Court stated:

“Usually when a woman is taken by a man to his house, it’s considered a disgrace because she might be viewed as licentious. *Marlojong* is just carried out to lower costs. It happened a lot of when I was stationed at Batang Natal.”⁴⁴

The problem is if the *marlojong* perpetrator is under the age of 19, the local KUA (*Religious Affairs Office*) will definitely reject the marriage request. Thus, the parents of the prospective husband or wife will submit a request for dispensation to Panyabungan Religious Court. The majority of the people in Mandailing Natal are Muslim; therefore, in traditional ceremonies the influence of Islam is profound. It can be said that Mandailing customary law is one that has adapted to Islamic law. In Mandailing traditional ceremonies any provisions considered contrary to Islam have been abandoned.⁴⁵ Because there is an customary philosophy that says *Hombar do adat dohot Ibadat*, which means that customs and religion cannot be separated; custom cannot conflict with Islam. A marriage ceremony, although not carried out according to religious law, is still always accompanied by a marriage ceremony according to local custom. This shows that the two legal systems are interrelated.⁴⁶

According to Sayuti Talib in his theory named *Receptie a Contrario*, customary law only applies if it does not conflict with Islamic law. If the customary law does not conflict with Islamic law, it will automatically become Islamic law for the Muslim communities. In accordance with the rule of *al-adatu muhakah* (custom is taken in to account in establishing law), what is considered good and right by humans in general (*al-’adah al-’ammah*) is done repeatedly so that it becomes a habit that can be used in establishing law.

Marlojong is a component of the prevailing customary law system in Mandailing Natal and the surrounding area. *Marlojong* marriage is used as a way to get married. This was initiated because the parents or guardians do not approve of the man chosen by their daughter. Before the woman leaves the house, she first looks for a friend (*pandongani*) who is willing to accompany her in her *Marlojong*

⁴⁴ Bapak Husnan Nasution, interview, hari Jum’at 8 Juli 2022 jam 10.00 WIB.

⁴⁵ Pandapotan Nasution, *Adat Budaya Mandailin*, h. 2

⁴⁶ Pandapotan Nasution, *Adat Budaya Mandailing*, h. 2

marriage. This *pandongani* are *bujing-bujing* (female adolescents), who will stay in the man's house with the *marlojong* woman as long as all her customary and religious affairs have not been completed. In carrying out a *marlojong* marriage, the woman first leaves any item as a sign that her departure is with the intention of getting married. This item, called 'partinggal', is placed somewhere easy to spot in the woman's parents' house, usually in her bedroom in the form of *Abit Partinggal* (when the item left is a blanket) or "*Baju partading*" (when the item left is clothes), *Pandok-dok* (notification), or a letter.

When the woman arrived at the man's house, the joy and generosity of the man's parents in welcoming the arrival of the prospective bride 'boru' was evident, accompanied by fear for the woman's parents. The surrounding people then gather to begin a customary process. Among the crowd are *kahanggi*, *anak boru*, *hatobangon*, *rajaniadat*, and village heads. After all those invited have gathered at the man's house, *boruna's* children or the rich people in the village will discuss a way out. After everyone has agreed that the couple have indeed violated the customary law and the matter must be resolved immediately, the groom's family and relatives prepare the gift to visit the bride's house and complete all religious requirements.

After completing all the customary requirements, the couple still need to complete the same religious requirements as those in regular marriage. Even though elopement has become a common phenomenon in society, it is still an act that violates the rules in consummating marriage. These rules are custom that has been passed down from generation to generation. Marriage conducted in secretive fashion is often not registered so that it is illegal, especially regarding the registration of marriages.

Elopement is commonplace in society, but it is always faced with various problems. Frequently, the marriage is only carried out after several weeks or after one month because of the dowry bargaining process and the costs required from both sides of the family. When marriage is eventually held, many *walis* (lawful guardians) are reluctant to participate in the marriage and instead ask a *qadi* to marry them off while close relatives from the family are still there. This in essence is the same as the application for a *wali adhal* in religious courts.⁴⁷ *Wali adhal* occurs due to the reluctance of a blood-related guardian, either the father or a male family member who is in line with the father, to attend as a marriage guardian for the bride who wishes to carry out the marriage. Contemporarily, when a woman wants to get married but does not get an approval from her parents or guardians, she can apply for an *adhal* guardian to the religious courts. In the past, this was not viable. Therefore, *marlojong* was a customary solution that could be an option. If

⁴⁷ Muhamad Hasan Sebyar, & A. Fakhruddin. (2020). Pengambilalihan Wewenang Wali Nasab Dalam Perkara Wali Adhal Perspektif Pluralisme Hukum (Studi Kasus Pandangan Hakim dan Tokoh Masyarakat Kabupaten Pasuruan). *ADHKI: JOURNAL OF ISLAMIC FAMILY LAW*, 1(2), 73-91. <https://doi.org/10.37876/adhki.v1i2.19>

parents still hold firmly that marriage must be with their consent, then it is possible that a marriage based on sincere intentions will be cancelled.

What is the position of *marlojong* custom law in Islamic law? According to *Al-Saqaf*, the guardian is one of the five elements or pillars that must exist in a marriage. There are five pillars in marriage. *First*, there is a male guardian from the father's side. *Second*, there are two male witnesses. *Third*, there are grooms and brides. *Fourth*, there is *ijab*. *Fifth*, there is *qabul* (acceptance or consent).⁴⁸ The Malikiyyah, Syafi'iyyah, and Hanabilah scholars agree that a guardian is one of the elements that determines the validity of a marriage. Meanwhile, the Hanafiyyah believe that the presence of a guardian is obligatory when the prospective bride is immature or mentally disabled. Hanafiyyah scholars argue that a reasonable and matured woman, whether a girl or a widow, has the right to marry herself on the condition that the bride and groom are equal or *kafa'ah*. If they are not equal, the guardian has the right to cancel the marriage.

It is stipulated in article 23 of the Compilation of Islamic Law that a *wali hakim* may act like a family guardian if the family guardian is absent or unable to be present, nowhere to be found, or *adhal* or reluctant. When the family guardian is not willing to become a marriage guardian, the judge's guardian has the right to replace the position of the family guardian in marrying off a woman. This can happen if there has been a religious court decision that the guardian has refused to participate (*adhal*).

In *marlojong* case, even though the woman's parents are reluctant to marry her off, they will reluctantly agree to the marriage because of the customary law in force. What's more, this customary law has been in effect and approved by religious leaders since Islam came to the land of Mandailing Natal, and to the present day, it is still being preserved. It's just that sometimes parents still have a feeling of disappointment and are reluctant to become guardians in the marriage, slightly different from the *adhal* guardian who replaces a family guardian because he does not want to be the guardian. In a *marlojong* marriage, the woman's parents appear to be reluctant to serve as a guardian, because the couple are already in love with each other. The existence of *marlojong* marriage in Islamic law, especially in marriage dispensation decisions, illustrates that custom is a source of Islamic law. Custom that has become Islamic law such as *marlojong* is a prevailing law in society and has been tested by sources of Islamic law from generation to generation and received its legality from the Muslim community. In addition, this customary law resolves one problem, i.e. one related to the *adhal* guardian. A couple who carried out *marlojong* must be married off even if the guardian is reluctant because customary law requires that a *marlojong* woman be married off and returned to her parents' house.

It can be concluded that the culture of customary law has completely absorbed Islamic law. If a customary law conflicts with Islamic law, there will be an immediate objection from society. Customary law culture has begun to accept

⁴⁸Alwi al-Saqqaf, *Fath al-Mu'in* (Beirut:Dar al-Fikr,tt), h. 300.

Islamic legal institutions and Islamic law established by the state as a solution to solving problems in society although there are still many who have not fully accepted Islamic law as stipulated by courts and other institutions. However, every year the level of public trust is increasing. The existing customary law culture facilitates the process of understanding *fiqh* in the context of the Republic of Indonesia.

4. Conclusion

The contribution of customary law is evident in the role of traditional leaders in making legal considerations in society. The more educated *hatobangon* (local traditional leaders) are, the more mature they will be in making a decision. In cases of marriage dispensation, usually the *hatobangon* will recommend two alternatives; unregistered marriage or applying for a marriage dispensation. In this case, *hatobangon* contributes in the application for marriage dispensation. Highly educated or experienced *hatobangon* usually recommend submitting a marriage dispensation application to Panyabungan Religious Court. The contribution of customary law is also an evidence of the embodiment of prevailing Islamic law in society. Customary law has made it easier to resolve marriage dispensation cases in society and is used as a evaluation tool in stipulating or deciding laws. In addition, customary law makes it easier for people to understand Islamic law applied by the state. Customary law has completely absorbed Islamic law; if a customary law conflicts with Islamic law, there will be an immediate objection from society. Customary law culture has begun to accept Islamic legal institutions and Islamic law established by the state as a solution to solving problems in society although there are still many who have not fully accepted Islamic law as stipulated by courts and other institutions. However, every year the level of public trust is increasing. The existing customary law culture facilitates the process of understanding *fiqh* in the context of the Republic of Indonesia.

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