

Public Debatable Position of Woman as Witnesses in Marriage The Perspective of Islamic and Constitutional Laws

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Submission date: 28-Oct-2019 02:12PM (UTC+0700)

Submission ID: 1201856581

File name: Marriage_The_Perspective_of_Islamic_and_Constitutional_Laws.docx (122.16K)

Word count: 8381

Character count: 42651

¹ Public Debatable Position of Woman as Witnesses in Marriage: The Perspective of Islamic and Constitutional Laws

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How to cite

¹ Burlian, P. (2018). Public Debatable Position of Woman as Witnesses in Marriage: The Perspective of Islamic and Constitutional Laws. [Italian Sociological Review, 8 (3), x-X] Retrieved from [link to article published on the journal website]

[DOI: 10.13136/isr.v8i3.XX]

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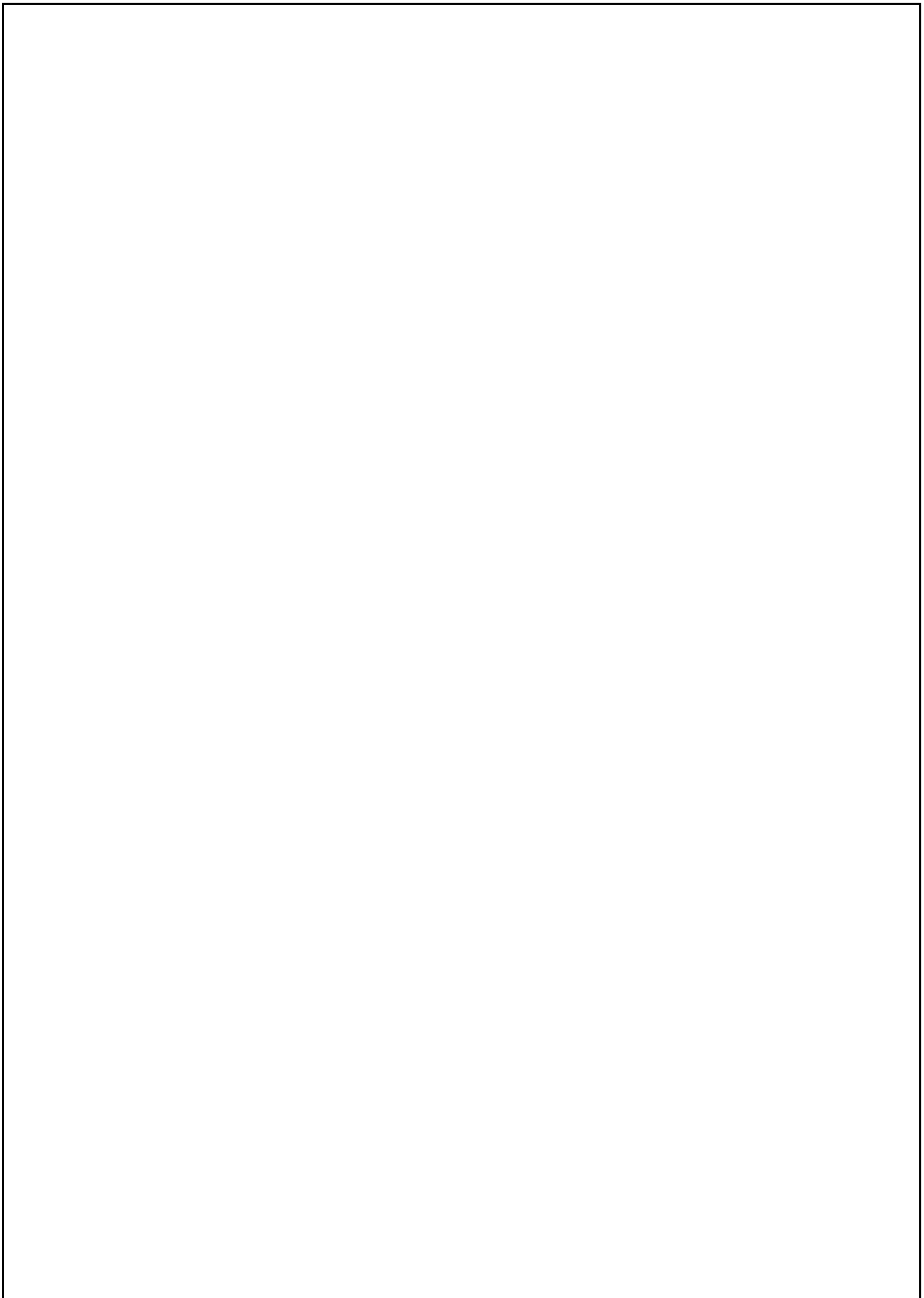
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3. Article accepted for publication

Date: July 2018

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Italian Sociological Review
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Public Debatable Position of Woman as Witnesses in Marriage: The Perspective of Islamic and Constitutional Laws

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Abstract

Position of women as witnesses in Islamic marriage procession is still debated until now. This paper sought the factors of women restriction roles as witnesses. Indonesia as a big country which has the majority devoted Moslems was selected for collecting data. This research compared the position of women as marriage witnesses in the Compilation of Islamic Law (CIL) and Indonesian Constitutional Law. The study found that the Indonesian Muslim community has two contradictive ideas on the role of women as witnesses in marriage; first, women have not been allowed to be witnesses not only in marriage process, but also in the divorce, and *hudud* (Islamic Law) system; second, women could be the witnesses, as long as the number of women as witnesses is doubled and accompanied by a man. Data found showed that there was no gap for women to be witnesses in a marriage. As stated in the 25th article of the Compilation of Islamic Law (CIL) of Indonesia which designates as the witnesses in the marriage ceremony are males. They are Muslim who are fair, adults (*Aqeeq/baligh*), uninterrupted memory and not deaf or hard of hearing. Therefore, this research recommends to renew the CIL, because in 25th article of CIL provides an opportunity for women to be marriage witnesses. It is expected the Central Government and law makers in Indonesia should consider the Judicial Review of CIL.

Keywords: debatable position, witnesses, women, Compilation of Islamic Law (CIL), Constitutional Law.

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1. Introduction

The cases of restriction women roles have long been debated. Such women restriction permeates to all aspects of life; it is not only found in sociological context, even in the theological perspective. The restriction women position, associated with the patriarchal culture, has influenced every product of *fiqh* creation (Islamic Rules). Thus, a patriarchal culture to be an example of cultural *imitations* which made the theological interpretation of the texts of the Holy Qur'an and the Prophet's Instruction (Hadith) in the understanding of gender issues appeared. The case of gender study in Indonesia Moslem Society was selected as the topic of this research paper; it was concerning with the equality of women position as witnesses in marriage is still debatable. Additionally, most of Indonesian ethnic groups in Indonesia practice the patriarchal culture which could be in opposite idea of Islamic rules in particular cases.

Indonesian patriarchal system, in many ethnic communities, might not be influenced culturally by Islamic rules. So the presence of Islam, for some communities, has brought the liberation mission on the oppression and inferiority of women. For example, there are four types of marriage procession known prior to the Islamic intervention era in Asia; namely: (1) the ethnically marriage that began with a man asked for marriage to woman by giving a dowry; (2) the marriage of *istibdha*, a wife was ordered by her husband to interact with other man in order to get more children; (3) the marriage began after a woman was in pregnancy; several men would be chosen to be her husband; (4) the marriage was performed by a prostitute who was pregnant and she was able to point the man through the magic.

Unfortunately, at that time there were some parts of society, from various layers, did not consider the historical mission of the presence of Islam and its impact on Arab society. Some people saw the present values of society and science today. Islamic rules and knowledge had been developed and a lot of changes without considering its rooted historical process. As a result, one of the things that can be found today is the existence of misogynist tradition conception.

The restriction witness of women roles, particularly in the Islamic marriage procedures needed to know. The existence of witness is one of the conditions to the validity of marriage. Therefore, every marriage procession in Islamic law should present two witnesses; the function of the witnesses is to anticipate the possibility that may occur in the future (Ali, 2006). For example, in marriage disputes that had been submitted to the court, the witnesses could be invited to gather information in a court.

It was found two contradictory ideas about the witness of women: first, women should not be a witness in a marriage, divorce, and *huddud* cases; second, women are allowed as witnesses, as long as the number of witnesses is at least two women and accompanied by a man.

Previously data reviewed the patriarchal system has been framed by the *fiqh* (Islamic Rule), then it was attached into the positive law in Indonesia by perpetrators of interests and legal subjects. No wonder that many regulation products of law in Indonesia, arguably almost entirely passed not without depth reviews and debates. Whether the debate ranged from content of law, law enforcement must have an impact on the socio-cultural aspects, even the background of the legal products.

The case of law products in Indonesia took the public attention, for instance the Compilation of Islamic Law (CIL), it showed a case. It was issued through the Indonesian Presidential Instruction No. 1 of 1991. It should be beware in mind that the CIL is still widely studied both by academicians and by legal observers. The CIL case appeared due to socio-political factors; (1) CIL considered was cum to the coming of Indonesian New Order Government, which means the formation of CIL not purely from the efforts the government's interests alone and not in order to accommodate the needs of Muslims, (2). CIL presence was expected to refresh the Moslems after the heat of stress in the Old Order.

In the sociological context, the Compilation of Islamic Law is surely a political product. Besides the formulation of Islamic law, in the Indonesian legal system applicable (*ius constitutum*), the CIL was so called as a representation of the material substance of Islamic law decreed by the political authorities of the new order. While in the terms of content, there are many weaknesses in the articles of CIL; not only the contains that seemed to be broken down of the Marriage Law No. 1 of 1974, but the basics of the article is also entirely concluded from the books of *fiqh Syafiiyah* (School of Shafiate) which had been then used as references. It should be remembered that the *fiqh* was produced not in the vacuum spaces; but friction of social conditions, geographical location, political situation even when the mufti (Islamic Leader) of life, it was certainly influenced by the patterns of thought in the past.

In contrast, the Holy Qur'an, with the tracking of keywords testimony in many forms and variations of meaning, does not state any provision of testimony in marriage and the prohibition for woman to witness. The Holy-Qur'an moreover discusses the quantity of witnesses in different cases. Compared with the composition of the witness, the verse of Al-Baqarah (282) Holy Qur'an mentions: 'And get two witnesses of those men (among you). If there are no two men, then (be) a man and two women from the witnesses that you are blessing, in order to remind for each other.'

Thus, in the hadith of the Prophet is not found explicitly any sentence prohibits women's role as a witness because in marriage case, it has a certain number of witnesses, at least two men or one man and two women (Azis, Wahhab, 2011). Concerning with two hadiths, in related to witnesses, Ibn Hibban's book Sahih Ibn Hibban no. 1499 elaborates, as following:

Say to us, Umar bin Muhammad al-Hamdani of the original book, told us Yahya bin Said bin Sa'id al-Umawi told us Hafasy bin Ghiyas of Ibn Jurayj of Sulaiman bin Musa, from al-Zahri, from 'Urwah from Aisha that the Prophet said: 'there is no marriage without a guardian and two witnesses were fair, and if there is a wedding in addition (provided), then the marriage is cancelled, and if they differ, then the sultan is the guardian for those who do not have a guardian ...'

While in another hadith, narrated in the *Sabih Al-Bukhari*, gives an explanation that the women have an opportunity to be a witness, but their number at least two for one case;

It has been said to us Sa'id ibn Abi Maryam said, has told us Muhammad bin Ja'far said; preach to me Zaid Aslam son of 'Iyad bin Abdillah from Abi Sa'eed al-Khudri said, the Prophet came out at the time of Eid al-Adha and Eid to the place of prayer, then he passed a group of woman, he said: 'O! woman Please be more charity, because , I have seen most of the inhabitants of hell is a group of you'. Then the woman said: 'What causes it, ya Rasululllah (Prophet)?' He replied: 'you lot berate and ungrateful to husband, I do not see the lack of reason and religion are not 2vned by men other than you' she asked: 'What lacks sense and our religion' he replied: 'Is not the testimony of woman as half of the testimony of men?' he replied: 'yes O Rasululllah' and Rasululllah said: 'that is a shortage of mind, and not when menstruation, women do not pray and do not fast?' he replied: 'Yes O Rasululla' then he answered: 'That's less religion' (Al-Bukhari, 2005).

History transmission of Hadith indicates the roles of men and women are equal. Prophet himself imposed a woman as one of the mediator in educational transformation. In various assemblies' science, women present with men. In fact, if Islam messenger only with a man in a gathering, the woman did not hesitate to send messengers to the Prophet, to teach them at an agreed time. In the assembly, they often asked questions of womanhood. The reviews thoroughly to the traditions that restrict women to be witnesses, including in marriage among Moslem communities have been compulsory investigated.

The documents bases in the analysis and observation show that the Office of Religious Affairs (ORA) and Officer or Assistant Registrar of Marriage (OARM) determined only the men as witnesses. It is inseparable from the doctrine and implementation of positive law of CIL that guide them. Ironically, many men as witnesses do not close to couples who are being solemnly sworn or implied to be a priority as witnesses. On the other hand, a mother or sister of bride who has closeness emotionally can not be a witness because they understand the content of CIL. In fact, when referring to the context of the Holy Qur'an and Hadith as stated earlier, there is no explicit prohibition for woman to be witnesses.

Therefore, the author was interested in to raise the case of marriage witness that found in the 25th Article of the Compilation of Islamic Law (CIL), with the Holy Qur'an and Hadith approach. To get precise data about who has the rights as witnesses in a marriage procedue, the study of law reform was suitable. The witness is not only about gender, but also one's proficiency in performing the role. It should be avoided the position of the CIL, as a product of a state law that is supposed to protect the public's rights turned to constitutional rights and status. It needs to provide the women's rights, and delete the incompetent image of women as witnesses (in 25th Article of CIL). Based on the public debates, this research aimed:

1. To identify the juridical position of the witness in 25th Article in the perspectives of Indonesian Compilation of Islamic Law (CIL).
2. To investigate the position of women as a marriage witness in the perspective of the Holy Qur'an and Hadith (Prophet's Instruction).

To analyze the juridical position of women as marriage witnesses in the perspective of Indonesian Constitutional Law.

2. Previous studies and theoretical reviews

The previous studies about the restricted position of women as witnesses in Islam communities are including:

(Muhammad Isna Wahyudi, 2006); *Value Proof Woman in Islamic Law* views the gender in Islamic law, it arises because of the cultural dominance of past community that embraces patriarchal system, and then the text was understood with mixed gender-nature (sex). Based on the source material law in the Religious Courts, the witnesses of women approved have same value to the witness of men, especially in cases of divorce. However, in practice, not all religious courts 2 Indonesia enforce such terms. In the Religious Court of Yogyakarta, the testimony of two women equal to the witness of a man. But then, in 1994 in the Religious Courts approved that the witnesses of women

have the same weight to the witnesses of men. The similarity between the research of Muhammad Wahyudi to this research was its focus; highlight of the witnesses of women, but the research used Hermeneutics gender perspective approach and accompanied by field research to observe the application testimonies of women in the Religious Courts in their divorce case, while this study was focus on the position of the witnesses of women in 25th article of Compilation of Islamic Law (CIL).

Hanifa el-Adiba was departing from anxiety about Islamic concepts extracted from the Holy Qur'an and Hadith interpreted vary according to the type's epistemology scholars each given meaning and interpretation and teachings. Hanifa el-Adiba wrote the research with the title; *Women and Understanding of Religion (Reflections on Understanding of Religion in Context lack Adilan the Woman)*. In her writings, Hanifa examined the normative postulates as the basis of recognition and justice for women. The research found that the opinion of the postulates of religion were never a signal commitment to the removal of the dignity of women. The similarity between the research of El-Adiba and this research is both examining the position of women in the theory of Holy Qur'an and hadith, and used the same concept. But el-Adiba Hanifa's research highlighted the position of women in Islam in general, while this research was the more specific things that the witnesses of women in marriage based on CIL through the Qur'an and Hadith approach.

(Fatroyah, 2003) wrote *Testimonies of Woman in Perspective Marriage Hadith (Sunnah Living Study on Gender Activist and Religious Affairs Office Employees Malang)*. This study used field research with living Sunnah as an approach hadith directly compared with gender activists and Office of Religious Affairs (ORA) in the city of Malang. Interestingly from previous studies, those concluded that the women have the rights to be witnesses in the Islam marriage procedure.

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3. Research methods

3.1 Types of research

This research applied a normative legal research (juridical). A document analysis research took the arguments and reasons of science. It described the results of the analysis of CIL document which then reviewed through the Holy Qur'an and Hadith. The documents were discussed critically and depth to produce the interpretations.

3.2 Research approach

A qualitative design included the Statute and comparative approaches in the perspectives of Islamic and Indonesian constitutional laws.

3.3 Data sources

In legal research data resources obtained from the literature instead of the field, for the term that is known as legal (Marzuki, 2005).

3.3.1 Primary data

Primary data consisted of:

- a. Text of the Holy Qur'an and hadith regarding the testimony of woman in marriage.
- b. Compilation of Islamic Law (CIL), Presidential Decree No. 1 of 1991.

3.3.2 Secondary data

The legal data supported the primary data in research strengthen the explanation about this case. Among the secondary data in this study are books, theses, journals and documents to review the witnesses of women in marriage.

3.3.3 Tertiary data

Tertiary data provided the instructions or explanations of the primary and secondary data such as legal dictionaries, encyclopedias, and others.

3.4 Technique of collecting the data

The collection of legal materials involved the documentary techniques, archives or literature, such as books, papers, articles, magazines, journals, newspapers or the work of the experts who relating to the witnesses of women in marriage. In addition, the interview was also one of the techniques that supported the collection of legal materials documentary techniques as well as to obtain legal materials that supported the research.

3.5 Technique of processing the data

This study used the processing of legal materials; namely; the re-examination of the legal materials were derived mainly from its completeness, clarity of meaning, suitability, and its relevance to other groups. The next step was the coding that gave an account or sign stating the type of legal source material (literature, legislation, or documents), the copyright holder (the author's name, year of publication) and the order of formulation of the problem.

Furthermore, the reconstruction of materials: i.e., reorder legal materials on a regular basis, sequential, logical, so easily understood and interpreted and, the last step was a systematic legal material putting its legal materials in sequence in accordance to a systematic framework of the law discussion orderly.

3.6 Legal materials analysis method

In this study, the legal data collection was analyzed to obtain legal conclusions on the Content Theory basis. Additionally, Dworkin explicitly interpreted that the theory which legally has a content might be a derivation theory of law.

4. Findings and analysis

4.1 The analysis of 25th Article of CIL in the perspective of holy Qur'an

In 25th Article of Compilation of Islamic Law (CIL), it is stated that the person who could be designated as a witness in the Islamic marriage contract is a male Muslim who are *adheel* (just), *Aqeel* (mature), *baligh* (adult), uninterrupted memory and are not deaf or hard of hearing. In order to implement this provision, a form which was provided by the Religious Officers for the administration of registration of marriage is equipped with two columns of bio witnesses; requested a man as witness.

That article clearly requires the presence of two witnesses, men in the assembly contract marriage and there are no alternatives; if there are no two men witnesses; that both or one of them does not have the requirements as stated in 25th article of CIL or if there is only one man of eighteen qualified while in the chamber, there are also women who are Muslims, *Aqeel*, *baligh*, *Adheel*, and luminary of the potential scientific and piety. That is why, this article does not expressly provide opportunities for woman to be witnesses, even though the capacity of justice and maturity known better than those of men.

As stated before, there are a number of verses that talk about the witnesses in the Holy Qur'an. In many issues there is no single verse that forbids woman to be witnesses, more detailed information about the composition of the witness only. Holy Qur'an in Al-Baqarah verse 282, mentions the portion of woman given 2: 1 to be a witness in a cashless transaction and not otherwise prohibits women involved in the transaction of *muamalah* (transactions). At first, if many Moslem women did not have access to some social relations such as trade, those had been in social restrictions not

from Holy Quran. But from a prominent tribe and has a high degree in the public, like Khadijah bint Khuwailid (Chalil, 1993) had been actively in business. In contrast, the women in general might be engaged in the public, so to be witnesses.

Asghar Ali Engineer said that the witness given by one woman; being a woman again serves to remind if the first witness is forgotten and nothing more (Ali, 2003). According to Muhammad Quthub (2001) the witness of two women in Islam is equal to one man cannot be made final conclusions which proved that woman worse than men, because at the time an action is performed to the wisdom of guaranteeing testimony because the majority of women cannot and are not allowed to act independently. Even the witnesses of one woman could be approved if she was an expert (knows correctly) in the field of law (Djalil, 2012). So when the social structure has changed in which women have been able to compete with men, then women must be have an equal position. The witnesses of one woman can be equivalent to the witnesses of one man (Djalil, 2012). So that the provision of two women as witnesses equal a man in a transaction is not normative, but rather contextual.

Al-Qurtubi already agreed if this paragraph included the testimony in marriage has different provisions (Al-Qurthubi, 2007). Thus, Al-Qurtubi found this verse specifically for *Salam* transaction (purchase method of booking with payment in advance) and passed on the story of the community regards transactions in Medina; this verse later by consensus of the scholars are included for all transactions in the form of debt. In the interpretation book of *Tafsir*, al-Qurthubi argued that the word *min rijālikum* a statute that does not require interpretation of the testimony to be done by two males of Moslems. Therefore, the testimony is a will (Al-Qurthubi, 2007).

Thus, Ash-Syiddieqy (2000) found this paragraph has been linked with the existing provisions in the witnesses issue. In Holy Quran, at verse *Ath-Thalaq: 2* of the witnesses in divorce, it said the *Mimman tardhauna minasy* and verse *Al-Baqarah 282* mentions the meaningful witness included a person who has been approved or agreed to be a witness based on religion and justice. God equalized men and woman, therefore, God gave this witness to the willingness of the agreement of the people who were involved in the transaction. This verse does not give the sense that the testimony of woman alone is useless. Holy -Qur'an here was to explain about the condition of women at the time the its was revealed; in which woman did not interfere in matters *muamalah* (business trascation) (Ash-Shiddieqy, 2000).

Then, things that should be discussed is the use of the Arabic word *al-Rijal* (man). Nasaruddin Umar said this does not necessarily mean a man in the biological sense. A word *al-Rijal* in the above verse means men in the gender aspect is not the biological aspect, because not all men have the

testimony of the same quality. Boys under age, male servants, and abnormal man are not included in the qualifications of the witnesses; it does not qualify testimony in Islamic law. Similarly, the opinion of Abu Hayyan al-Andalusi in the books of tafsir al-Bahr al-Muhith, said al-Rijal and al-Nisa'/al-mar'ah (لم يكونا رجلين وامرأتان فإن) is the designation of the burden of social (gender), so that the sense they can be redeemed. So this discussion was not bearded and had the genital category (Faisol, 2012). A similar interpretation put forward by al-Tabari with Arabic word *min rijālikum* to interpret; 'free people among you' (At-tabari, 1989).

In the book *Mu'jam Maqaisy Koran*, Aisyah Radiallohu Anhu also called *Rajula* (Maleness), this is due to the nature and character of Ayesha has toughness, especially when he led the war jamal. Why culture does not use such language? The word root of *Rajula* or *Rijal* comes from the word meaning *rijlan* (ankle) or something out, because he became the backbone of the body and reflects the power, so it does not refer to the biological aspects, which in Arabic is used *dzakkar* (pallus) and *untsā* (power). In addition, Al-Baqah verse 282, it is said al-Rijal is male gender; it is also found in other letters, such as. Al-Nisa '(4): 34 are often used as the legitimacy of the superiority of men over woman, Holy Quran in Al-Ahzab (33): 4, Holy Quran in Al-Nisa '(4): 75, Holy Quran in al-Tawbah (9): 108, Holy Quran in. Al-A'raf (7): 46 and Shad (38): Law 62. 25th Article of Compilation of Islamic Law's testimony seemed to forget that the scratches of the History of Islam in which women who later acted as a witnesses in the case of greater than those of marriage contract. Mother of the Faithful Khadija al-Kubra was the first witness in Islam. The only witness to the martyrdom of the third Caliph Uthman bin Affan was his wife Nailah bint Al Qurafashah or Nailah bint Al Farafishah Al Kalbiyah (Bhutto, 2003).

Seeing the interpretation of the verse that involves aspects of *asbab al-nuzul* (background of revelation) of paragraph, of linguistic, of cultural and social history of the community around the fall of Holy-Qur'an, then the readings apparently did not appear in 25th Article of CIL composition, it strengthens their homogeneity in decision of CIL formation source material. The existence of a pre-requisite *Adheel* (just) and *Aqeel* (capability) attached to the witness actually a requirement dominant that there should be witnesses. God prefers the just character of the nature of science, because the fair is easy to learn what needs to be done. But for those who have knowledge but not fair, science can not show justice, then it can be specified that the nature of the fair include the ability to do things right, neutrality, reliable and honest. This means that the placement of gender is not fundamental issues such as

justice but, capabilities, and age (puberty) into the pre-conditions to be met each individual who acted as a witness in the marriage contract.

The alleged homogeneity and textual factor in raising resources the CIL materials were not denied. There are many interpretations of the pro-administration of woman's role in some aspects of both social and religious. Neither Qur'an nor it can be known that the relationship between men and woman; not patriarchal or matriarchal, nor inferior or superior, but there is a relationship of equality and harmony is no relationship between the two. The definition of equivalence relations in their obligations and rights and balanced between men and woman, for example, on the relationship between man and woman. In verse *Al-Abzab*: 35 as far as the remission (forgiveness) and reward, as well as verse *Al-Bara'ab*: 71. Similarly, concerns about sin and punishment in verse *Al-Maidah*: 38 and verse *Al-Nur*: 2. Through these verses, God does not distinguish the reward, forgiveness and punishment based on gender, which became the center of gravity, so the deeds that have been done. Those that are harmony in verse *An-Nisa*': 34; where a man becomes a leader for woman based on the advantages, there are two advantages in question: (1) the excess because of its characteristics and physical; (2) the advantages associated with the *Shari'a* (Islamic Law). Thus, Zamakhsyari declared a husband can govern and prohibit his wife because of the advantages that God gave him, not for reasons of habit, discrimination, or coercion and women get the right communication and a good relationship of husband.

Based on this exposure, the author concludes, in terms of legal source material forming of CIL and 25th article of CIL specifically, patterned homogeneous and revoked the rights of women to be able to be a witnesses in the marriage, given the progress of time, scientific developments and interpretation (*tafsir* of Holy -Qur'an comprehensively were ought to make an evaluation and assessment of the consideration to change the article. Operating as a referral source in the Office of Religious Affairs and the foundation decided Religious Court case for Muslims and Compilation of Islamic Law should be revised to accomodate the woman's rights. No longer a source of gender-bias of Islamic laws. A modern Muslim should not make an affirmation to patriarchal society blindly. Religion should not be as a justification for the norms of ethnic and gender differences in society.

4.2 The analysis of 25th Article of CIL in the perspective of Hadith

Based on the Hadith (Prophet's Instruction), the position of women as witnesses in marriage fall into three classifications. First, the presence of witnesses in the marriage contract is a prerequisite for the validity of the marriage, as narrated by Ibn Hibban following:

Say to us Umar bin Muhammad al-Hamdani of the original book, told us Yahya bin Sa'id bin Sa'id al-Umawi told us Hafasy bin Ghiyas of Ibn Jurayj of Sulaiman bin Musa, from al-Zahri, from 'Urwah from Aisha that the Prophet said: 'there is no marriage without a wali and two witnesses were fair, and if there is a wedding in addition (provided), then her marriage null and void, and, and if they differ, then the sultan is the guardian for those who do not have a guardian...

This *Hadith* shows the position of the witness in the wedding and also provides a basis for denying the existence of scholars *Syafiyah* women become witnesses. Indeed, the textual tradition is totally alienated from the woman opportunity to testify in a marriage concerning the validity of the marriage. But if we explore it carefully, the word implies public testimony that implies men and women in it. As the writer already explained at the beginning this discussion, that this tradition by groove between teachers and students found to be a disconnect (*munqathi*) which started from Hafs bin Ghiyas who did not have a student, named Sa'id bin Yahya until the *sanad* last, there was no continuity. Symbols used hadith transformation was sighat transmission 'an (ع) *Hadith*, so called by tradition *mu'an'a* in which the transmission with the transmission symbol' an expression that was not expressly indicated their attendance (*Liqa*) by Shaykh.

Actually, a ban on women as witnesses actually stated in history presented by Abu 'Ubaidah, also called Abu' Ubaid course. The prohibition of women as a witnesses in three cases, namely *hudud*, *thalak*, and marriage. This history was very popular among the group that found woman did not use their testimony in marriage. Even many people who assumed it as *Hadith*. This history was presented by Abu 'Ubaid and today many people think that this history was the *hadith* of the Prophet. This history formed the basis for *Shafi'ites* School, in contrast, most *Hanabilah* school was rejecting the testimony of women in marriage. This history was listed in three books, among others *Fiqh al-Sunnah* Sayyid Sabiq, *Mathālib Uli al-Nuha fi Syarh ghayab al-Muntaha* works Musthofa bin Sa'id bin 'Abduhu al-Suyuti, al-*Ahadith al-Fi Tahqiqi* erred works Jamaluddin Abu al-farj Abdurrahman, and in the book of *Sunan al-Kubra lil Bayhaqi* without the word marriage.

Third is the *hadith* about the value of women's testimony equal to a half of men one. This *Hadith* listed in several books of *hadith* among other standards contained in the *Sahih al-Bukhari*, *Sahih Muslim*, *Sahih Sunan Abi Dawood*, *Saheeh Sunan at-Tirmidhi*, and *Saheeh Sunan Ibn Majah*.

Based on the quality of the traditions that have been described in the previous section, then the entire track of *sanad* that existed between the narrator with other narrators interconnected or continuous (*muttashil*) as well

as the quality of the narrators *thiqah*, although not all at the highest level *ta'dil*, then the authors conclude that the chains of the *hadith* is free from elements *syadz* and *'illat*. In honor, tradition Holy Quran, is a tradition which has links with the verse in *Al-Baqarah* – 282. In one sentence in that paragraph mentioned the excess males compared to females so that the testimony of two women is weighted testimony of one man. Based on this provision, according to Ibn Hazm there was a history that has been authentically reported that *Shuraih* famous in his day a judge had authorized the testimony of two women beside a man in an affair freeing of slaves.

Similarly *Asy-Sya'biy* never accepted a testimony of man and two women in matters of divorce and actions hurt others inadvertently. But he did not allow the testimony of the women in the act of deliberate wounding, or in other criminal offenses. *Lyas bin Mu'awiya* reported to have received the testimony of two women in a divorce matter. *Muhammad bin Sirrin* narrated that *Shuraih* authorized four women as witness to a man in a business related to a woman's dowry.

The act was presented to the Caliph *Umar bin Khattab* with the testimony of four women. Caliph validated the testimony of four women and decided to divorce the husband and wife. The opinion of *Sufyan ibn 'Abi Uyainah of Thalq* (divorce) of a woman had a woman invited a man to fornicate with her last child was killed after fornicating. The four women testified to the deeds and *Ali bin Abi Talib* validated their testimony. Thus, *Umar bin Khattab* has endorsed the testimony of women together men in matters of divorce and remarriage. In other history, 'allowed the testimony of women in all matters' was recorded. It has been strengthened by the *hadith* in *Sahih al-Bukhari* no. 298.

4.3 The women witnesses equal to a half of man?

Based on the some reports, it is clear that there was no thing that could strengthen the ignorance of the testimonies of women that actually existed in Islamic law and had ben used in many ways; including marraiage contract. According to the authors of *Hadith, Na Holy Quran 'aql'* which was narrated in the 5th books of *hadith* above, it has several dimensions, such as:

Based on *ash'abul wurud*, the *hadith* is addressed to the women of Medina who gathered at the Prophet's stairs. Based on the words of the Prophet 'you lot cursed and ungrateful husband', it is most likely that they are talking about the evils of others and the contents of their household. So with that in the history of Muslim delivered. Prophet called upon them to multiply alms and seek forgiveness, then the Prophet warned them by saying that they were the majority of the dwellers of the Hell Fire

The position of Prophet in delivering this tradition was a community leader who adjusted attitude, guidance and instructions in accordance with the conditions and culture that he encountered. In this case he was certainly right and in accordance with the conditions of the community. But for other people they might learn the values contained in the instructions and guidance. Those were to be applied in accordance with the conditions of each society.

It noted that the habit seemed to be deeply rooted among the people of Medina. The Prophet never intended to prohibit these practices, but many people who objected, so he allowed the friends to continue doing so, subject to fulfilling the rights of way. These rights are mentioned Prophet whom are subjecting the eye, refraining from hurting others, answering meetings, advocating a *ma'ruf* (good deeds) and forbid what is wrong (HR. Imam al-Bukhari, Muslim, Abu Dawud from Abu Sa'id al Khudri in Bazz, 1990). Under these circumstances it can be concluded that this tradition focused on certain groups with intention on what they were doing.

The *Hadith Matan* explained that a woman's testimony is valued twice as male witness. In the Holy Quran, verse Al-Baqarah verse 282 stated the reason why the weight of the testimony of woman so weighted, is because *An tadzilla ihdāhumā fa tudzakkirā ihdāhumal ukhrā*, the nature of being forgotten as a reasonable human nature. This means that the shortage is not a technical but a substantial nature (Ilyas, 2003).

Lack of reason and religious factors in the Hadith; the lack of religion factor for woman menstruation is the nature of woman given by God which the woman has a privilege it is to bear children. Thus God is the Most Just not possible to give the nature of the woman with the God reduces the value of humanity. Regarding the religious nature of woman by taking into account the decline because verse *An-Nisa* '(4) of paragraph 32, this paragraph deals with the nature: 'And do not be jealous of what God gave you sebahagian more than sebahagian others. (Because) for men there is a portion of what they earn, and for woman (also) there is a portion of what they have earned, and ask Allah of His bounty portion. Indeed, Allah knows everything.'

As-Suyuti narrated three *asbab al-nuzul* (background of revelation) that behind the verse. First, there were women who wanted to join Jihad in part in order to receive the same reward as men. Secondly there were women who respond to the words of men who want to overbid any reward at the top of the women, and then women asked for their sins in the afterlife about half as heavy sins of male provisions. Thirdly there were women who wanted to go for *Jihad*, and questioned the heritage provisions, so the verse came down. It is recognized that there are actions that only done by men like *Jihad* and there are deeds that can only be done by women such as pregnancy, childbirth and breastfeeding. Holy Qur'an sees this as the specificity and advantages for each

other. Thus, it is clear that Holy Qur'an does not see the nature of women's lack of reason and religion and do not admit the nature of men instead (Ilyas, 2003).

In the case of conflict between tradition and the Holy Qur'an, the provisions of Holy Qur'an should be preferred to follow. Abu Hanifah expressly stated that the traditions that are contrary to the Holy Qur'an should be rejected, because unnatural disregard the law of the Holy Qur'an caused by a tradition that turns even the partial aim of the hadith is authentic. It is the same as ever conducted A'ishah rejected the story conveyed Abu Hurairah that the Prophet said 'real people died of torture because of the cries of his family' for reasons that the content of this hadith is contrary to the Koran 'a guilty person does not bear the sins of others' (Holy Quran, verse *al-An'am*: 164). Al-Ghazali asserted that the way in which the Faithful Umm al-are the basis for measuring the authentic narrations through the verses of the holy Qur'an.

4.4 The position of women as witness in perspective of Constitutional Law

Based on the regulation for the witnesses of women in marriage exposed in the perspective of the Qur'an and Hadith that has been described above clearly explained that there is no explicit prohibition in the Qur'an, the women become witnesses. So is the Hadith opportunities to witness although women in the composition of two women along with the men, but does not eliminate the position of woman as stipulated in 25th article of CIL. In a study of 17th Constitutional Law, it was obvious that the protection of women's rights of equality before the law, recognized in the constitution written Indonesia, namely the Law of 1945 Article of 28D stated that 'Everyone has the rights to recognition, security, protection, and legal certainty and equal treatment before the law.' In this article, the term 'everyone' which means that the same treatment before the law applies to everyone, men and women, without distinction of gender.

In addition, in 27th article paragraph (1) also stated that 'All citizens are equal before the law and government and shall abide by the law and the government, without exception'. In 27th Article paragraph (1) also used the term 'every citizen', which means the position of the law and the government does not recognize the distinction of sex and gender.

4.5 Renewal of Islamic Law in Indonesia

Based on the mentioned above, then surely women can be as witnesses, both in terms of the analysis of al-Quran-Hadith and especially in the eyes of

Constitutional Law. Therefore, there should be reform in Islamic law in Indonesia, in this case specifically for CIL were analyzed with 25th Article of CIL space as a way of opening opportunities for women to witness a marriage in Indonesia.

3

4.6 Deconstruction of 25th Article of Compilation of Islamic Law

From the descriptions of the author, it is clear that neither al-Quran-Hadith nor the Indonesian constitution in this space for the women to be able to witness the marriage. Thus, indeed do need deconstruction or renewal of the 25th article of CIL to accommodate women witnesses the marriage. This is according to Abdul Manan in his book Law Reform Islam in Indonesia is one of the efforts to reform the most dominant Islamic law, which is done through legislation, in this case is the renewal of CIL (Manan, 2006).

There are several reasons why the author offered this solution; there should be a deconstruction Article, remembering a rule, in this case is CIL that coming out by Presidential Decree No. 1 of 1991, its formation should refers to the foundation of formation of legislation, namely juridical, sociological and philosophical basis. Legally, any legal product must have a legally valid basis (*Juridische gelding*). The legal basis is very important in making legislation. That these regulations must not conflict with the higher rules (*lex superior derogat lex inferior*) and prioritize sources of law in its establishment. In this regard, the establishment of CIL in the history rooted in the *mu'tabarab* 13 fiqh and jurisprudence judge courts that are substantially the *fiqh*, which leads to *Shafi*. Thus, do not be surprised if 25th Article of CIL eliminated the right of women to be witnesses. Another opinion, as Hanafi Imam, who allowed the woman bear witness to the marriage because in the realm of *mu'amalah* (*transaction*). Also the opinion of contemporary scholars, with space for women to be witnesses, not only skill, even if women have a level of intelligence and professionalism, it is now there a chance ratio of women's witnesses the same as men (Ilyas, 2006). Likewise, Indonesian is based on the 1945 Constitution clearly made no difference between men and women in the law, or when referring to the Human Rights Act, it is clear that everyone, both men and women has no discrimination.

Second, sociological foundation (*sosiologische gelding*) means to reflect the reality of life in industrial society, the law should be in accordance with the realities that exist in the industrial society. These facts form the needs or demands or problems encountered. If we are faced with the contemporary sociological conditions, clearly found different from the conditions of woman in early Islam to that of present. Now, a woman is able to have a higher education, public office and have integrity in solving public problems.

Third, the philosophical foundation related to 'rechtsidee' (ideals of law) that grows from the value system of society, so that the law is expected to have the aspiration of society. Related to this philosophical foundation, CIL is present for the purpose of uniformity in the legal basis for the Religious Courts; especially for 25th article of CIL and Religious Affairs Office (RAO) in the basis for marriage record. Only in the philosophical study, it revealed this enforcement had not been in accordance with the principles of substantive law must prioritize justice (equality before the law).

4.7 Revision or Judicial Review

The Compilation of Islamic Law has the same legal position as it was a presidential decree. So power existence forced and made it bounded for every citizen. That's why, in national law, the hierarchy of President Instruction, although not included in Law No. 12 of 2011 on the Establishment of legislation, remained signing the codes of law which have the power of positive law. In the hierarchy of legislation of the Republic of Indonesia based on Law No. 12 of 2011, as follows:

1) The Constitution of the Republic of Indonesia in 1945; 2) Decree of People's Consultative Assembly; 3) Law of Government Regulation in Lieu of Law; 4) Regulation of the President; 5) Provincial Regulation; and 6) Regulation Regency/City.

Although, based on the provision, does not mention the Presidential, but the Presidential position is aligned with the regulation. Due to Indonesian Law No. 10/2004, President just set two things. First, the making of Presidential Decree should refer to the provisions in the Law 10/2004. Second, the decree in which the material contains further arrangements read as a Presidential Regulation. Thus, a position equivalent to Presidential Decree was clear, if the material had been arranged in the charged setting. So it could have been and the Presidential Decree in this category, whose consequences were both forms of legislation could only be made if it was ordered by the legislation.

Refer to President Decree, the reform of Compilation of Islamic Law or the deconstruction of 25th Article of CIL, must use the method of changes in laws and regulations by using analysis of law principles. According to Purnadi Purbacaraka and Soerjono Soekanto, some of the principles in legislation, namely:

- a. The law does not apply retroactively (non-retroactive). This principle relates to a power environment (*tijdsgebied*). Act in principle was made for the purposes of the future. However, the use of the Act there is an exception in the things that are special as in Article 1 (2) Criminal Code.

- b. The principle of hierarchy levels (*lex superiori derogate lex inferiori*), means that some lower legislations contents must not conflict with the content of the legislation those of higher ones.
- c. Legislation which is specifically ruled out the laws of a general nature (*lex derogate lex generalis*), means that a provision be set up in general may be waived by the more specific provisions governing the same things.
- d. The new legislation put aside the previous laws (*lex posteriori derogate lex priori*), means that the laws that apply new cancelation of previous legislation, or the same things.
- e. Law must not be contested, means that a law cannot be tested by anyone except by its own constituent (legislative and executive reviews) or body authorized to test such as judicial review.
- f. *Welvaarstaat* principle, Act as a means to the maximum extent possible to reach the spiritual and material well-being for communities and individuals, through renewal or preservation.

If those theoretical principles of law above practiced, then the Compilation of Islamic law of Indonesia was fall into the inviolability, unless the deconstruction of the chapter and verse. It can only be amended by the President himself as the executive reviewer. Or it could be through the Constitutional Court to have the judicial review. Two of these alternatives might be a right way to amend article 25 of Indonesian's CIL.

5. Conclusions

Based on the above analysis and interpretations, the concluded sentences made as followings:

1. In the 25th Article of Indonesian's *Compilation of Islamic Law* clearly does not provide the opportunity for women as witnesses in a marriage contract. The presence of the witness is only given to men with no tolerance as the sound of the chapter, stated 'that can be designated as a witness in the marriage contract is a male Moslem, *Adheel* (just), *Ageel* (mature), *baligh* (adult), uninterrupted memory and not deaf or hard of hearing', this was a result of the influence of jurisprudence *Shafi* whic was growing in Indonesia. It was then used as the basis of this article issued. In contrast, procedurally formation, the existence of CIL of the phenomenon of State in the New Order impure formation of the efforts, the government's interest was solely to accommodate the needs of Moslem community at that Rezime.

2. In the perspective of the Holy Qur'an, it was not explicitly found the position of women in marriage witnesses. Only, referring to the verse *al-Baqarah*: 282, then women's testimony is allowed; by the composition of one man equal to two women. In this verse, clearly it covers the transactions which may be a reference to remember marriage as *muamalah*, which the contract transaction must also have witnesses to be recorded and become evidence (if disputed in the future in the law). On the other hand, in the perspective of Hadith, also has no restriction for women to be witnesses, if there is general rule and not a forbidden, it was known as *idea*, not *tradition*. And even in another hadith, referred to Bukhari, with a valid chain of transmission, women may be a witnesses, despite the harmony of the composition of two women is equal to one man. In this case, the Holy Qur'an and the Hadith make an equal standing and composition not so different. The habitual practice in the past gave the biological differences.
3. In the perspective of Constitutional Law, women gain rights in legal certainty, not least the rights to be witness in a marriage. Therefore, there are no differences between men and women in Indonesian Constitution. And even in 1945 Indonesian Constitution, it clearly had given a *fair legal certainty and equal treatment before the law*. Similarly, the Human Rights Act, makes every person, without any discrimination, has the right to obtain justice by submitting an application, complaints and lawsuits.

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