



## Between Conservatism and Progressivism: The Young Penghulu in East Java's Legal Paradigm Addresses Disability Issues in Marriage

Mukhammad Nur Hadi<sup>1\*</sup>, Fahrudin Ali Sabri<sup>2</sup>, Ahmad Masum<sup>3</sup>

<sup>1,2</sup> UIN Sunan Ampel Surabaya, Indonesia

<sup>3</sup>Univeristi Islam Sultan Sharif Ali, Brunei Darussalam

[mukhammad.nur.hadi@uinsby.ac.id](mailto:mukhammad.nur.hadi@uinsby.ac.id)

\*Corresponding Author

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### Abstract

The legal knowledge of penghulu on disability issues determines how to implement laws that advocate for persons with disabilities. This paper traces the legal paradigm of seven Penghulus in East Java who were newly inducted in 2022 against several articles in the Compilation of Islamic Law (KHI) that touch on disability issues. Some of the themes tracked are marriage guardians (article 22), marriage witnesses (article 25), and polygamy (article 57). It is an empirical study using conceptual and philosophical approaches. This article finds that most young East Javanese penghulu still need an advocate interpretation paradigm because they read the articles authentically and grammatically, not sociologically or teleologically. The benefit (masalah) aspect of these articles is also considered to look more authentic. Therefore, the argument of advocates for the rights of persons with a human rights perspective is not widely involved. As a result, persons with disabilities who are guardians of marriage, witnesses of marriage, and wives can become victims of neglect of fundamental civil rights in marriage. It is where the conservative paradigm of the young penghulu comes into being strong and dominant. The existence of the progressive paradigm is also buried and framed in the current conservative paradigm. This finding is certainly an important note about how the government indirectly shapes the contestation of conservative and progressive paradigms in family law.

**Kata Kunci:** Legal Paradigm, Marriage, Penghulu, Disability

### Abstrak

Pengetahuan hukum penghulu terhadap isu-isu disabilitas menentukan bagaimana implementasi hukum yang advokatif terhadap penyandang disabilitas. Tulisan ini melacak paradigma hukum penghulu muda Jawa Timur yang berjumlah 7 penghulu terhadap beberapa pasal dalam Kompilasi Hukum Islam (KHI) yang menyinggung isu-isu disabilitas. Beberapa tema yang dilacak adalah wali nikah (pasal 22), saksi nikah (pasal 25), dan poligami (pasal 57). Kajian ini adalah yuridis empiris dengan menggunakan pendekatan



konseptual dan filosofis. Artikel ini menemukan bahwa mayoritas penghulu muda Jawa Timur belum memiliki paradigma interpretasi advokatif karena mereka membaca pasal-pasal secara otentik dan gramatikal, tidak secara sosiologis atau teleologis. Aspek masalah dari pasal-pasal tersebut juga dinilai terlihat lebih nyata. Oleh karena itu, nalar advokatif terhadap hak penyandang disabilitas dengan perspektif hak asasi manusia tidak banyak dilibatkan. Akibatnya, penyandang disabilitas yang menjadi wali nikah, saksi nikah, dan sebagai istri dapat menjadi korban pengabaian hak perdata yang asasi dalam perkawinan. Di sinilah paradigma konservatif penghulu muda tampil secara kuat dan dominan. Sementara eksistensi paradigma progresif juga terkubur dan terbingkai dalam arus paradigma konservatif. Temuan ini tentu menjadi catatan penting tentang bagaimana kontestasi paradigma konservatif dan progresif dalam hukum keluarga yang secara tidak langsung dibentuk sendiri oleh pemerintah.

**Kata Kunci:** Paradigma hukum, Penghulu, Disabilitas

### **Introduction**

Penghulus has a vital role to play in overseeing the development of Indonesian Islamic family law. Their attitude and decision towards a legal case are essential to how contemporary issues are resolved. The more diverse perspectives are used, the more options the problematic parties can choose from. Therefore, *penghulu* is not only burdened with overseeing the development of law but can also reposition, reconstruct, and even deconstruct a legal order when it is judged that it cannot bring benefits (*maslahah*). This argument is strengthened through several studies exposing how vital the role of *penghulu* is on crucial issues in society, both in thought<sup>1</sup> as well as in practice.<sup>2</sup>

In practice, the ability of *penghulu* to oversee and reform Islamic family law rests on the reasoning of legal interpretation of the legal text and the cases at hand. The *penghulu* also has a vital role in interpreting the law, besides judges. The difference lies in the scope and character of cases. Judges in the Religious Courts interpret broader cases, such as marriage, divorce, guardianship, inheritance, and endowments, containing a conflict character. Meanwhile, *penghulu* only focuses on marriage, marriage guardianship, and waqf with non-conflict and conflict characters. Therefore, the rational interpretation of *penghulu* is the key to directing how law can exist by regarding sensitive issues because, in essence, legal reinterpretation is scientific fairness and the demands of the times.<sup>3</sup>

Several important issues relate to *penghulu*: marriage guardians, witnesses, and polygamy. At this point, it is also essential to put forward other reasons why these three issues are important to study. These three issues are generally explored by researches using a

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<sup>1</sup> Maufur, ed., *Fikih Dan HAM: Best Practices Pengarustamaan Hak Asasi Manusia Dalam Kebebasan Beragama, Gender, Dan Hak Anak Di Lingkungan Kantor Urusan Agama (KUA)*, 1st ed. (Yogyakarta: Pascasarjana UIN Sunan Kalijaga, 2019). This book tells about the experiences of priests in responding to crucial issues of marriage in their work experiences. Not only that, this book also proves that the *penghulu* can present humanist and progressive reasoning both in the form of thought and practice

<sup>2</sup> Sahlan Habibi Siregar, "Peran Penghulu Dalam Upaya Meminimalisir Tingkat Perceraian," *Jurnal Analisa Pemikiran Insan Cendekia* 5, no. 2 (2022): 69–74.

<sup>3</sup> Jaenal Sarifudin, "Problem Kekerasan Dalam Rumah Tangga Dan Ketimpangan Relasi Keluarga," in *Fikih Humanis: Meneguhkan Keragaman, Membela Kesenjangan Dan Kemanusiaan*, Noorhaidi (Yogyakarta: Pascasarjana UIN Sunan Kalijaga Press, 2022), 297.

gender approach. Studies of marriage guardians and marriage witnesses often question women's rights as marriage guardians<sup>4</sup> to choose a partner independently,<sup>5</sup> and witness in marriage<sup>6</sup> as well as divorce.<sup>7</sup> Meanwhile, in polygamy studies, what is often revealed is injustice and psychological violence against wives and children,<sup>8</sup> not in the realm of how the conditions of wives with disabilities are respected, protected, and fought for without causing psychological harm.

These three issues will find different sides when placed on the disability issue. It is because, in addition to the Compilation of Islamic Law (the KHI) being a vital reference for *penghulu*, the KHI also describes these three issues within the disability and non-disability framework. Also, tracking the position of this issue by looking at how the *penghulu* interprets these articles in the KHI is an essential point for measuring the extent to which the young *penghulu*'s advocative reasoning is present, which may differ from other regions, especially in East Java.

Several studies of Islamic law and disability have been conducted by several researchers. However, these studies do not touch on how the *penghulu* responds disability issues. Rispler-Chaim traced in detail the classic texts on disability, in the context of worship, jihad, marriage, and crime.<sup>9</sup> Kristina L. Richardson traced in detail how portrait of disability existed in the medieval Islamic World, focusing on important texts in the Ottoman and Mamluk dynasties.<sup>10</sup> In women issues, Turmusani's and Maftuhin's showed significant findings. Turmusani found that women with disabilities are subordinated in a variety of contexts where it is in line with the massive discrimination at that time generally faced by women.<sup>11</sup> Maftuhin found that although Nahdlatul Ulama and Muhammadiyah involved women with disabilities in the preparation of fatwas, their participation was limited. It impacts on the characters of *fiqh* disability that are friendly to women.<sup>12</sup>

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<sup>4</sup> Asnidar Astari, "Konsep Wali Nikah Dalam Kompilasi Hukum Islam Perspektif Gender" (Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2017).

<sup>5</sup> Kholifatul Fitria, "Hak Ijbar Wali Nikah Dalam Perspektif Gender" (Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2013).

<sup>6</sup> Shofa Aminah, "Studi Perbandingan Antara Mazhab Hanafi Dan Mazhab Syafi'i Tentang Saksi Perempuan Dalam Akad Nikah" (Institut Agama Islam Negeri Antasari Banjarmasin, 2016).

<sup>7</sup> Ahmad Zaini, "Epistemologi Hukum Islam Ibnu Hazm Tentang Saksi Perempuan Dalam Pernikahan: Kesenjangan 'Terbatas' Status Hukum Perempuan," *Tesis*, 2020, 1-137.

<sup>8</sup> Malpha Della Thalita, "Studi Kasus Keluarga Poligami Di Daerah Istimewa Yogyakarta" 16, no. 1 (2019): 184-97; Khoirul Abror, "Poligami Dan Relevansinya Dengan Keharmonisan Rumah Tangga (Studi Di Kelurahan Rajabasa Bandar Lampung)," *Al-Adalah* 13, no. 2 (2016): 227-38; Pradika Kusuma Fridayanto, "Implementasi Konsep Keadilan Terhadap Izin Poligami Karena Suami Hypersex" (Universitas Islam Negeri Walisongo Semarang, 2021); Noviriani Nur Islamiyah and Endang Supraptiningsih, "Tinjauan Dampak Psikologis Perkawinan Poligami Di Indonesia," 2013, 614-19.

<sup>9</sup> Vardit Rispler-Chaim, *Disability in Islamic Law* (Dordrecht: Springer, 2007).

<sup>10</sup> Kristina L. Richardson, *Difference and Disability in The Medieval Islamic World* (Edinburgh: Edinburgh University, 2012).

<sup>11</sup> Majid Turmusani, "Disabled Women in Islam: Middle Eastern Perspective," *Journal of Religion, Disability and Health* 5, no. 2-3 (October 1, 2001): 73-85, [https://doi.org/10.1300/J095v05n02\\_06](https://doi.org/10.1300/J095v05n02_06).

<sup>12</sup> Arif Maftuhin, "Islamic Law, Disability, and Women in Indonesia: The Cases of Nahdlatul Ulama and Muhammadiyah," *Journal of Disability and Religion* 27, no. 4 (2023): 1-15.

Studies on disability and *penghulu* paradigm, especially with regard to their paradigms, are rarely conducted. Generally, in examining the *penghulu* legal paradigm, researchers only highlight gender issues. Saputra traces the argument of the *penghulu* at the Yogyakarta City Office of Religious Affairs to the possibility of women becoming *penghulu*. His study shows that the *penghulus* are divided into two groups by arguing normatively and juridically. The first group views the potential of this opportunity because *fiqh* does not prohibit it either. The second group completely rejects this possibility because guardian judges in Indonesia must be male.<sup>13</sup> In tracing the *penghulu's* argument, Muyassaroh explored the views of the *penghulu* in Malang City regarding the possibility of a will be implemented. She found that most *penghulus* thought that wills could not be applied because positive law did not accommodate them.<sup>14</sup>

A similar study is the author's writing, which looks at how the *penghulu's* legal reasoning is towards marriage witnesses with disabilities in Malang City. The study found that *penghulus* in Malang City, in response to the issue of marriage witnesses with disabilities, still predominantly used *fiqh* reasoning. On the one hand, *fiqh* is dominantly seen as creating benefits for *penghulus*. On the other hand, *fiqh* is also projected to benefit the public by elaborating on sociological and technological developments. This dominant condition shows the point of uncertainty in synchronizing the *penghulu's* legal reasoning with the ideals of the city of Malang as an inclusive city in Indonesia.<sup>15</sup>

Based on the research findings above, this study is designed with a different reading concept and tries to complete the last study. The main object of this paper is the legal paradigm of young *penghulus* in East Java who have just been appointed in 2022, with a total of seven people scattered in several cities in East Java. This data is obtained through survey via Google Form. This empirical juridical study utilizes a conceptual and philosophical approach to explore the arguments of the *penghulus*. Deploying qualitative methods, this article traces the extent to which the *penghulu's* interpretation of the articles on marriage guardians, marriage witnesses, and polygamy is reasonable in disability issues. It also examines the extent to which the benefits aspects are considered in the reasoning of these interpretations, whether they prioritize protecting and fulfilling the rights of persons with disabilities or vice versa. Furthermore, that result will later be framed in a circle of contestation of conservative and progressive paradigms. Conservative paradigm shows how the *penghulu* tends to preserve the existing regulation which may not advocate rights of person with disabilities. While, progressive paradigm explains how the *penghulu* tries to protect, fulfill, and respect their rights by presenting the new interpretation.

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<sup>13</sup> Megi Saputra, "Penghulu of Women According to the Penghulu of the Yogyakarta City Religious Affairs Office," *Al-Ahwal: Journal of Islamic Family Law* 11, no. 2 (2020): 97, <https://doi.org/10.14421/ahwal.2018.11208>.

<sup>14</sup> Binti Sahlatun Muyassaroh, "Pandangan Penghulu Kota Malang Terhadap Kedudukan Wali Washi Dalam Pernikahan" (Universitas Islam Negeri Maulana Malik Ibrahim Malang, 2018).

<sup>15</sup> Mukhammad Nur Hadi, "Nalar Fikih Penghulu Di Kota Malang Dalam Saksi Nikah Tuli," *Inklusi* 8, no. 2 (2022): 169–84, <https://doi.org/10.14421/ijds.080206>.

## **The Intersection of Disability Issues in Fiqh**

Fiqh has various provisions regarding the rules for marriage guardians, marriage witnesses, and polygamy. This diversity of opinion can provide many alternatives to be selected as part of legal reasoning following the believed school of law. Here, the various arguments will be described, focusing on how fiqh regulates persons with disabilities about the three issues above.

### ***Marriage Guardian and Disability in Fiqh***

The issue of disability in marriage guardians is often associated with the legality of persons with visual disabilities. Al-Ghazali emphasized that marriage guardians with visual disabilities still have their rights as marriage guardians. He views that the purpose of marriage is not related to the disability condition of the marriage guardian with a visual disability.<sup>16</sup> Ash-Sharbani also said that a marriage guardian with a visual disability still has the right to become a marriage guardian.<sup>17</sup> This argument was agreed upon and justified by the Syafi'iyah scholars.<sup>18</sup> However, the description of Ash-Shirazi's argument is interesting to write here. Ash-Shirazi outlines two opinions on this case. First, marriage guardians with visual disabilities still get guardianship rights because it is based on the story of Prophet Shu'aib who married his daughter to Prophet Musa, while he was blind. Second, such marriage guardians are not permitted because the marriage guardian has the authority to determine the implementation of the marriage, and it can only be done perfectly if the marriage guardian does not have a blind disability.<sup>19</sup>

How did the scholars position the other two sensory disabilities, speech and deaf disabilities? For Ash-Sharbani, people with speech disabilities can still be marriage guardians. This right is still obtained if the marriage guardian can provide understanding in sign language or other instructions that the public can understand.<sup>20</sup> This opinion is certainly interesting if it is reconciled with the arguments of Muhammad Kholil, an Indonesian scholar from Bangkalan. In his book *as-Silah fi Bayan an-Nikah*, Muhammad Kholil argues that marriage guardians should not have speech disabilities. On the contrary, he stated that a man who is deaf and visual disability has rights to be a marriage guardian.<sup>21</sup> At this point, there is still no argument to accommodate the three conditions of sensory disability in totality.

### ***Marriage Witness and Disability in Fiqh***

The intersection of disabilities with marriage witnesses has a long debate. Two things that are highlighted are the ability to see and hear. First, regarding the ability to see,

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<sup>16</sup> Abu Hamid bin Muhammad bin Muhammad bin Muhammad Al-Ghazali, *Al-Wasit Fi Al-Madhhab* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2001), 3: 137.

<sup>17</sup> Muhammad ash-Sharbani Al-Khatib, *Al-Iqna' Fi Halli Alfazi Abi Syuja'* (Semarang: Thaha Putra, n.d.), 124.

<sup>18</sup> Taqiyyuddin Abi Bakar bin Muhammad Al-Hasni, *Kifayah Al-Akhyar Fi Halli Ghayah Al-Ikhtishar*, 7th ed. (Beirut: Dar al-Kutub al-'Ilmiyyah, 2013), 476.

<sup>19</sup> Abu Ishaq Ash-Shirazy, *Al-Muhadhab Fi Fiqh Al-Imam Asy-Syafi'iy* (Damaskus: Dar al-Qalam, 1996), 4: 120.

<sup>20</sup> Al-Khatib, *Al-Iqna' Fi Halli Alfazi Abi Syuja'*, 125.

<sup>21</sup> Muhammad Khalil bin Abdu al-Lathif Al-Bangkalaniy, "As-Silah Fi Bayan an-Nikah" (Surabaya, n.d.), 10.

Shafi'iyyah emphasized that a marriage witness must be able to see to determine the party to the contract other than just by sound. However, most scholars agree that marriage witnesses need not be able to see because the testimony in the marriage contract is in the context of speech. Therefore, if they can distinguish between the voices of the marriage guardian and the groom without any doubt, their testimonials can be acknowledged. Second, in the context of hearing ability, most fiqh scholars agree that the affidavit of a deaf person is not regarded as accurate. It is because the primary purpose of the testimony is to clarify the contract.<sup>22</sup>

### ***Polygamy and Disability in Fiqh***

Polygamy is the most sensitive subject of debate in any context, including disability issues. Polygamy rules to solve the humanitarian problems in the Arab world which excessively exploit women. In other words, the protection of humanity is one of the important points in the practice of polygamy because there is a main purpose behind it, namely to protect the assets and rights of orphans, which are often neglected due to the practice of polygamy. It seems logical that Syahrur then made fulfilling the requests of orphans one of the conditions that had to be met.<sup>23</sup> At this position, the concept of humanity in the context of polygamy is sometimes interpreted differently so that the bias in protecting humanity in practice can be avoided. In other words, the humanity sometimes violates the essence of humanity itself.<sup>24</sup>

In the issue of polygamy, the wife's disability, whether due to an incurable disease or infertility, causes polygamy to become *sunnah* (recommended), by regarding that the husband can act fairly. The reason is that there are benefits that are recommended to be fought for. This argument is strengthened by the stories of the companions of the prophet who had more than one wife.<sup>25</sup> Wahbah az-Zuhayliy categorizes the factors above as special factors. He further explained that the condition of the wife's infertility must be overcome immediately by allowing the husband to remarry. The goal is to realize happiness with the birth of a child while simultaneously pouring out his instincts of affection for the child.<sup>26</sup> At this point, it can be read that the point of interest built in Az-Zuhayliy's argument is the interests of men, not women, as parties with disabilities.

### **The Intersection of Disability Issues in Marriage in Indonesia**

As a product of legal positivism, the Compilation of Islamic Law has different nuances in regulating this study's three critical issues: marriage guardians, marriage witnesses, and polygamy. The KHI provides few legal choices like fiqh, which presents a variety of opinions to choose. The KHI only gives one legal perspective, which is undoubtedly considered public benefits by the drafters at that time. Of course, the legal perspective formed in the KHI is not

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<sup>22</sup> Wahbah Az-Zuhaili, *Ilmu Ushul Al-Fiqh Al-Islamiy* (Damaskus: Dar al-Fikr, 1986), 4: 138.

<sup>23</sup> Ahmad Rajafi, *Nalar Fiqh Muhammad Quraish Shihab, Istana Publishing*, vol. 53 (Yogyakarta: Istana Publishing, 2015), 69, <https://doi.org/10.5281/zenodo.3909325>.

<sup>24</sup> Mukhammad Nur Hadi, "Conservative Muslim on The Screen: The Narrative of Islamic Family Law in Indonesian Films" 18, no. 1 (2021): 140.

<sup>25</sup> Mustofa Al-Khin, Mustofa Al-Bugho, and Ali Asy-Syarbaji, *Al-Fiqh Al-Manhajiy 'ala Madhhab Al-Imam Ash-Shafi'iy* (Damaskus: Dar al-Qalam, 1992), 4: 35.

<sup>26</sup> Az-Zuhaili, *Ilmu Ushul Al-Fiqh Al-Islamiy*, 7: 180.

a single school of *fiqh*, although the KHI eventually create a single school of thought. However, it is the eclectic pattern chosen by the government. Therefore, considering which opinions are strong and which are not in *fiqh* studies is not the main guideline. The only benefit is used as a basic guideline by considering the dominant paradigm of Islamic law in Indonesian society.<sup>27</sup>

In its development, after running for three decades, the KHI received much criticism. Several studies show the criticism is quite massive. Some criticized the KHI's chosen reform methodology.<sup>28</sup> Some criticize the issue of distribution of assets, such as the portrait of Islamic patriarchal inheritance<sup>29</sup> and distribution of joint property.<sup>30</sup>

Based on the findings, few highlight the disability issues that intersect with the KHI, especially in these three main issues. Most studies focus on discussing gender and feminism in Islamic family law. Therefore, it is essential to reiterate to what extent these three issues intersect with disability. Marriage guardians are regulated explicitly in five articles, namely articles 19, 20, 21, 22 and 23. Article 19 emphasizes marriage guardian as a pillar of marriage. Article 20 explains who has the right and obligation to become a guardian. Article 21 regulates the order of lineage guardian and what to do when there is a conflict of authority within the same degree of lineage guardian. Article 22 governs the shift of rights to be a marriage guardian. Article 23 outlines when a judge guardian (*wali hakim*) can replace the position of a biological guardian. At this position, only article 22 deals with disability issues. This article explains that the rights of a marriage guardian can shift to another marriage guardian at the next level due to disabilities, namely speech disability and deafness, or old age, such as being old and seriously ill. If it is associated with concepts in *fiqh*, of course, this opinion is in tune with most *fiqh* scholars.

Next, marriage witnesses are regulated in three articles: 24, 25, and 26. Article 24 confirms marriage witnesses as a marriage pillar. Articles 25 and 26 control the conditions for becoming a marriage guardian. Here, only Article 25 pertains to the issue of disability. It is because article 25 restricts persons with hearing or deaf disabilities from being witnesses in marriage.

Where does the polygamy rule in the KHI intersect with the disability issue? Polygamy is regulated in Chapter IX under the title "Having More Than One Wife" (*Beristri Lebih Dari Satu*). The editorial choice of this title is unique because there are indications to avoid excessive public responses, especially negative ones. This chapter includes five articles; 55, 56, 57, 58 and 59. Article 55 regulates the main requirements for polygamy. Article 56

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<sup>27</sup> Imron Rosyadi, *Rekonstruksi Epistemologi Hukum Keluarga Islam* (Jakarta: Kencana, 2022), 32.

<sup>28</sup> Marzuki Wahid and Rumadi, *Fiqh Madzhab Negara: Kritik Atas Politik Hukum Islam Di Indonesia*, 2nd ed. (Yogyakarta: LKiS, 2011); Marzuki Wahid, *Fiqh Indonesia: Kompilasi Hukum Islam Dan Legal Draft Kompilasi Hukum Islam Indonesia Dalam Bingkai Politik Hukum Islam Indonesia*, 1st ed. (Bandung: Penerbit Marja, 2014); Wardah Nuroniyah et al., "Kritik Metodologis Terhadap Pembaruan Hukum Perkawinan Dalam Kompilasi Hukum Islam," *Mahkamah: Jurnal Kajian Hukum Islam* 1, no. 1 (2016): 33-47.

<sup>29</sup> Defel Fakhyadi, "Patriarkisme Hukum Kewarisan Islam: Kritik Hukum Waris Islam Dan Kompilasi Hukum Islam," *Hukum Islam* 21, no. 1 (2021): 25.

<sup>30</sup> Elimartati and Elfia, "Kritik Terhadap Kompilasi Hukum Islam Tentang Ketentuan Harta Bersama Dalam Perkawinan," *Juris: Jurnal Ilmiah Syariah* 19, no. 2 (2020): 231-43, <https://doi.org/10.31958/juris.v19i2.2283>.

confirms the procedure for licensing polygamy to the Religious Courts. Article 57 explains when the Religious Courts can grant permission for polygamy. Article 58 outlines the conditions for supporting polygamy. Article 59 describes when a party or husband can make an appeal or cassation regarding the stipulation of a polygamy permit from the Religious Courts. Based on the several articles above, only article 57 pertains to the issue of disability. The report explicitly states that polygamy can be permitted if the wife has a physical disability or an incurable disease and cannot bear children. These two conditions are related to the category of physical disability.

### ***Penghulu and Interpretation Authority on Compilation of Islamic Law***

History records that the *penghulu* has a significant role in controlling and directing the discourse of Islamic law in society. *Penghulu* is an institution of clergy that has been formed since the first Islamic empire arrived in Java. This institution was filled by the *Wali Songo* (nine scholars) when the control of da'wah was in their hands. In fact, before *Wali Songo*, several people had served as *penghulus*. In Sultan Hanyakrakusuman's era, the *penghulu's* status was increasingly prestigious. Scholars were placed in two places; as high royal advisors and judges at the Islamic Religious Court, which was chaired by the *penghulu*.<sup>31</sup>

When the Islamic Mataram kingdom was split into *Kasunanan*, *Kesultanan*, *Mangkunegaran*, and *Pakualaman*, the *penghulu* still existed as *kepengulon*, which was held by courtiers and headed by *Penghulu Ageng*, who was based in the Palace. The position of *penghulu* is also found in various regencies under the authority of the *Kasunanan*, *Kesultanan*, *Mangkunegaran*, and *Pakualaman*. This position also remains occupied by the clergy. Until the Dutch occupied Java, the position of *penghulu* still existed but was changed with a new face, where, in the end, Dutch narrowed the authority of *penghulu*, both in the execution and interpretation of a rule.<sup>32</sup> Regardless of the efforts to reduce the *penghulu's* authority, the main task of *penghulu* in this era remains with the courts.<sup>33</sup>

The authority of the *penghulu* in the early Javanese Islamic era was limited to matters of marriage, divorce, inheritance, waqf, and zakat and other Islamic civil and criminal matters.<sup>34</sup> However, this authority was eventually narrowed down by transferring part of that authority from the *kepengulon* (religious raad) to the *landraad* (state court).<sup>35</sup> Although the authority has been reduced, regardless his position as a judge in religious cases, the *penghulu* is also positioned as a mufti or adviser to Islam, as Hasan Mustapa did in Priangan.<sup>36</sup> This position is given to assist the government in handling customary cases in the

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<sup>31</sup> Ibnu Qoyim Isma'il, *Kiai Penghulu Jawa: Peranannya Di Masa Kolonial* (Jakarta: Gema Insani Press, 1997), 65.

<sup>32</sup> Isma'il, 65.

<sup>33</sup> Fariska Dwi Purbaningrum, "Penghulu-Penghulu Keraton: Peran Dan Konferensi Penghulu Bidang Agama, Hukum, Pendidikan Di Kasunanan Surakarta Dan Mangkunegaran Tahun 1936-1947" (Universitas Islam Negeri Raden Mas Said Surakarta, 2022), 84.

<sup>34</sup> Isma'il, *Kiai Penghulu Jawa: Peranannya Di Masa Kolonial*, 66.

<sup>35</sup> Isma'il, 116.

<sup>36</sup> Fahmi Moh. Ansori, "Peran Hasan Mustopa Dalam Lembaga Penghulu Di Priangan Masa Kolonial Belanda (1895-1918 M)" (Universitas Islam Negeri Sunan Kalijaga Yogyakarta, 2018), 72.



landraad.<sup>37</sup> The authority of the *penghulu*'s interpretation of Islamic civil law issues has solid historical roots because the *penghulu* is also a judge. However, the strength of his authority in interpreting the law and the *penghulu*'s work was intervened by the government, which was finally maintained until independence.<sup>38</sup>

Indonesia issued a regulation that explicitly regulates the work of the *penghulu*. Code of the Minister for Administrative Reform (Permenpan) Number: PER/62 /M.PAN/6/2005 Concerning the Functional Position of the *Penghulu* and his Credit Score, describe position of *penghulu* and what must be done in detail. Article 1 confirms that the *penghulu* supervises marriages or reconciliation according to the Islamic religion. This task is clarified in Article 4, which is related to the planning of *penghulu* activities, supervision, recording, service, counselling and marriage counselling or reconciliation. *Penghulu* also monitors violations of the provisions of marriage or reconciliation. Other essential tasks related to developing thought are providing legal fatwa services and studying Islamic family law issues through regular discussions, such as *bahtsul masail* (discussing Islamic legal issues).

### Young *Penghulu*'s Interpretation of Disability Issues in Marriage

This data was obtained from a survey of young *penghulus* in East Java via Google Forms. The data targeted are 13 *penghulus* appointed in 2023 as State Civil Apparatus (ASN). However, only seven *penghulus* were willing to fill out the form. These *penghulu* are positioned in cities such as Bojonegoro, Probolinggo, Lumajang, Jember, Ngawi, Lamongan, Situbondo and Blitar. These *penghulus* are referred to as young *penghulas* because their current age ranges from 24 to 36 years. The details are as follows:

Table 1. *Penghulus* and their Institution

| No | Name | Age | Institutions               |
|----|------|-----|----------------------------|
| 1  | DH   | 25  | KUA Solokuro, Lamongan     |
| 2  | AM   | 36  | KUA Kasreman, Ngawi        |
| 3  | FDA  | 25  | KUA Banyuputih, Ngawi      |
| 4  | IQB  | 24  | KUA Trucuk, Bojonegoro     |
| 5  | MU   | 27  | KUA Panti, Jember          |
| 6  | ARF  | 28  | KUA Krejengan, Probolinggo |
| 7  | BY   | 27  | KUA Bakung, Blitar         |

Three critical issues discussed were about strengthening the rights of persons with disabilities in marriage guardians, marriage witnesses, and polygamy. These three issues are explored through several articles in the KHI. Simply, their reading patterns are the main object of this study. Therefore, the explanation will be divided into small sub-chapters based on this theme by assembling their answers into one related narrative.

### *Marriage Guardian*

Two things are being asked and discussed here. First, are the requirements for marriage guardians the ability to see, hear, and speak, or marriage gurdians just fulfill one of

<sup>37</sup> Isma'il, *Kiai Penghulu Jawa: Peranannya Di Masa Kolonial*, 72.

<sup>38</sup> Hadi, "Nalar Fikih Penghulu Di Kota Malang Dalam Saksi Nikah Tuli," 82.

them? Second, does Article 22 regulating the shift of the rights of a deaf marriage guardian to the next marriage guardian, contain beneficial values, or is it discriminatory? Two questions triggered various reasons or perspectives on the young *penghulus* as the new legal practitioners.

To the first question, three groups emerged. In the first group, the three *penghulus* answered that “it could be one”. In the second group, two *penghulus* responded “yes”. In the third group, two *penghulus* answered “no”. Here, only two *penghulu* did not view physical disability as a problem in guardianship.

I will elaborate on their argument from the predominant answer: the *penghulu* who answered “it could be one of the three conditions”: eyes, mouth and ears. DH views these conditions are not important to be an issue as long as other essential requirements, such as being male, Muslim, mature, and intelligent, are met. ARH focuses on the ability of marriage guardians to understand their intentions to the public. FDA provides more specific specifications for the permissibility of disability conditions. This restriction applies to visual and hearing disabilities. Meanwhile, speech disabilities are considered a problem. Being able to speak without being accompanied by the ability to see or hear will make it difficult for the *penghulu* and the public because they cannot receive information in two directions, so this condition can be considered as not fulfilling the legal requirements of being a guardian of marriage.

For the second question, the first group presented quite exciting answers. DH considers that this article is beneficial and, at the same time, proves that Islamic law is always present in facilitating conditions. FDA provided a solution that strengthens DH's argument. He believes that the benefit of Article 22 above lies in its legal purpose because the article was written to provide legal clarity for guardians of persons with disabilities who cannot communicate and receive information, ideally, not to discriminate against these marriage guardians. The important note is that as long as marriage guardians can provide information, even though they have speech and deaf disabilities, their right to be marriage guardians must still be fought for. ARH assesses the opposite. He considered the article discriminatory. It is just that he was unable to explain what marriage guardians with speech and deaf disabilities received as forms of discrimination.

The second group, which requires that the guardian must be free from conditions of blindness, speech and deaf disabilities, have arguments that are almost similar to the first group but with a different emphasis. In the first question, BY assessed the KHI as the primary reference. Therefore, any disability condition should not be present in a marriage guardian. By emphasizing the importance of conveying information, AM viewed that it was difficult for guardians with speech and deaf disabilities to provide accurate information. It is different from guardians who are blind disability. However, he argued that it would be better if the rights of marriage guardians were given to the next degree of marriage guardian when the marriage guardian has three disability conditions.

How did this group respond second question? BY emphasized that what was written in the KHI already contained beneficial values. AM gave an answer that strengthened the first *penghulu*. The benefit of article 22 above lies in efforts to avoid all possibilities that will affect the validity of the marriage. It is because the ability to communicate is essential to

produce information that is understandable by the public, and it seems complicated to arise from the condition of guardians who have speech or deaf disabilities, as often happens to guardians who are old and vulnerable.

The third group, which doesn't mind the guardian's disability, has interesting answers and arguments. Regarding the first question, MU explained that the requirements for marriage guardians have nothing to do with disabilities because as long as the marriage guardian is a Muslim, male, mature, intelligent, independent, and just, the marriage contract is valid. IQB has a different argument. The main point for IQB's argument is the belief of the public or parties involved in the marriage contract regarding the validity of the marriage contract with marriage guardians with disabilities. Therefore, IQB considered persons with disabilities eligible to become marriage guardians even though, in one condition, the marriage guardian can choose another option, by representing guardianship through writing.

MU and IQB arguments bring up a unique perspective regarding the second question. MU expressly stated that it does not agree with the transfer of marriage guardian rights in Article 22. For him, persons with physical disabilities are still categorized as *mukallaf-ahliyyah*, so the reason for disability is inappropriate as the main factor in transferring their guardianship rights. IQB instead provides a compromise answer. On the one hand, people with speech and deaf disabilities can still become guardians regarding their ability to provide information and understanding. On the other hand, transferring the rights of marriage guardians due to severe physical disabilities is the best choice as a form of caution so that the validity of the marriage is maintained while at the same time bringing benefits.

### ***Marriage Witness***

Two questions are also raised regarding the issue of marriage guardians. First, are the requirements for a marriage witness the ability to see, hear, and speak or just is one of them fulfilled? Second, does Article 25, which regulates the limitation of the rights of deaf marriage witnesses, contain beneficial or discriminatory values? The *penghulu's* answer in this section differs from the previous issue. Discriminatory answers are more dominant here than in the first issue.

Towards the first question, the *penghulus* was divided into three groups. The first group, two *penghulus*, answered that they could be one. The second group of four *penghulus* responded "yes". In the third group, one *penghulu* answered "no". Here, it can be seen that the dominant *penghulu* did not agree to grant the deaf witness the right to be a marriage witness.

The first group argues with quite accommodative narratives that still need to be built strong enough. In the first question, DH saw that the witness with one of the disabilities above might still understand the marriage contract. Unfortunately, he could not describe how witnesses understood and received information. FDA provides various possibilities. If the witness has a visual disability, he can understand the marriage contract through hearing. If the witness has a speech disability, he can appreciate the marriage contract by witnessing it first-hand and by hearing it. If the witness is deaf, he can testify through his experience of seeing.

In second question, DH considers that Article 25 presents a beneficial aspect. The restrictions imposed by the KHI are not discriminations. FDA also considers Article 25 already contains beneficial value because the witness must also be able to hear what he witnessed. If there is a language interpreter at the time of the marriage ceremony where the deaf witness can understand and testify how the lips of husband and marriage guardian move, his right to be a witness remains.

The second group, which firmly rejects deaf witnesses or witnesses with other disabilities, has various arguments. IQB confirms that there is no sequence of rights in marriage witnesses as marriage guardians. Therefore, looking for witnesses based on the KHI is the best choice. BY also agrees with this argument because the witness plays an essential role in determining the validity of the marriage contract. Two other ideas, AM and ARH, further strengthen the two previous opinions. They confirmed that the witness must be able to prove what he saw and heard when necessary. If he cannot do so, his right to be a marriage witness is void. Here, all the *penghulus* of this group agree that the limitation on the rights of deaf marriage witnesses in Article 25 contains beneficial values, precisely and in general.

The third group, represented only by MU, rejects the limitation on the rights of deaf marriage witnesses in Article 25. Unlike several other *penghulus*, his opinion is consistent in rejecting restrictions on the rights of persons with disabilities, both in the issue of marriage guardians and marriage witnesses. The requirements for a marriage witness are the same as a marriage guardian: male, Muslim, mature, intelligent, independent, and justice. However, he still thinks that witnesses who are “deaf” seem troublesome because they have difficulty understanding the marriage contract. In other words, he emphasizes that the article bring benefits.

### ***Polygamy***

On the issue of polygamy, the *penghulu* has the same opinion. When they are asked about whether polygamy is permissible if the wife has a disability, including chronic or incurable illness, or cannot bear children, they answered yes. Some base their arguments on the original law of polygamy, *mubah* (permissible), without considering the condition of the wife’s disability as stated by DH, BY, AM, and ARH. MU revealed that polygamy is permissible because of the wife’s disability condition, which is a more beneficial path. FDA answered this question by looking at three critical lessons from polygamy because of these conditions; to have children, to keep the family without divorcing the first wife, and to protect the husband from adultery. Unlike the others, IQB considers polygamy permissible because it is a standard rule.

Their interpretation of article 57 showed discriminatory opinions and in one hand confirmed benefits of that article. Most *penghulus* considered that article 57 creates benefits. FDA revealed that these benefits would be realized if polygamy was carried out with the principle of essential justice so that the right to support and protection for wives with disabilities were fulfilled. Even though, on the one hand, it seem hurts the first wife, other more real benefits, such as avoiding adultery, are more important to pay attention to. The concept of benefit is also agreed upon by several other *penghulus*, such as DH, AM, MU, and ARH. BY even revealed that such polygamy seeks to realize *maqashid sharia*, protecting

offspring (*hifd an-nasl*). IQB gives a different emphasis on the meaning of discrimination. He emphasized that the potential for discrimination in polygamy cannot be avoided. However, this discrimination disappears when the wife has given permission.

Based on the description above, most of the *penghulus* interpreted the article authentically, not teleologically or sociologically. Even though some use a teleological interpretation, that interpretation is ultimately biased and wrapped up in a non-advocative grammatical understanding. One can also read the distribution of benefit values from their performance of the three articles above. The following table can at least trace the direction of the tendency of *maslahat* from the interpretation of the *penghulus*, whether benefit was born within a conservative-discriminatory or progressive-advocative framework.

**Table 2. *Penghulu's* Views on Benefit Values of Articles Concerning on Disability Issues in the KHI**

| No. | Name | Marriage Guardian |    | Marriage Witness |    | Polygamy |    |
|-----|------|-------------------|----|------------------|----|----------|----|
|     |      | Benefit Values    |    |                  |    |          |    |
|     |      | Yes               | No | Yes              | No | Yes      | No |
| 1   | DH   | v                 |    | v                |    | v        |    |
| 2   | FDA  | v                 |    | v                |    | v        |    |
| 3   | AM   | v                 |    | v                |    | v        |    |
| 4   | IQB  | v                 | v  | v                |    | v        |    |
| 5   | MU   |                   | v  |                  | v  | v        |    |
| 6   | ARH  | v                 |    | v                |    | v        |    |
| 7   | BY   | v                 |    | v                |    | v        |    |

The table above shows that interpretations of Articles 22, 25 and 57 are dominated by conservative paradigm. The *penghulus* was impressed to see that the article was already presented in an ideal package and did not need to be interpreted in a more actual way. Even the diction used in the article is still used again in analyzing. This means that the young East Java *penghulus* still do not understand the essential concepts in disability studies even though this issue is inherent in their work as practitioners of Islamic family law.

### **Navigating Legal Paradigm and *Maslahah* of the *Penghulu's* Interpretation**

This section will further analyze the reasoning and benefits (*maslahah*) of the *penghulu's* interpretation. The description will be based on two opposite categories of legal paradigms, conservative and progressive, to see how far the *penghulus* present their rationale for taking sides with persons with disabilities.

The conservative legal paradigm places law as an established product. The values of benefit, justice, and the benefit of law remain relevant, so there is no need to make changes or even interpret them differently from the text of the law. This paradigm also appears by strengthening legal texts with other legal texts, which are also statically interpreted and interpreted. Simply put, this paradigm is born from textual interpretation, which can be authentic and grammatical interpretations.

Several things guide the progressive legal paradigm. First, the humanist perspective becomes the main character in interpreting law to create universal justice and welfare. Second, the product of interpretation or pattern of interpretation seeks to reject the legal establishment (status quo). Third, interpreting legal texts does not rely on classical legal texts considered final values but also on context.<sup>39</sup> Thus, the paradigm of progressive law creates a paradigm of liberation.<sup>40</sup>

Guided by the two types of paradigms above and referring to the description of the *penghulu's* interpretation of the arguments, the legal paradigm that stands out from the young East Java *penghulus* against the three articles in the KHI; 22, 25, and 27, is conservative. This argument is based on several important points representing how the *penghulu* continues to try to reinforce the text of the article. Not only that, another indication is through the choice of diction used when giving arguments, especially those that intersect with a disability perspective.

I will start with the first textual interpretation. In the issue of marriage guardians and marriage witnesses, the majority of *penghulus* prefer to continue to reinforce the provisions of this article. The main arguments used are the ability to convey information on persons with disabilities and the completeness of information from persons with disabilities. Whatever the conditions, the majority believe that the power of the marriage guardian to convey and receive information, as well as ensure the correctness of the information manually when the marriage contract, is an absolute requirement in determining the validity of the marriage contract. Likewise, on the issue of marriage witnesses, most of the *penghulus* also considered it that way. Here, most *penghulus* understand that marriage guardians and marriage witnesses with disabilities have limitations in this regard. People with visual disabilities are unable to witness and prove phenomena directly. People with speech disabilities and deafness are weak in understanding the meaning of the conversation in the marriage contract. The auxiliary media mentioned are only sign language or written media. How assistive technology works for marriage guardians and marriage witnesses with speech disabilities and deafness is not much discussed.

The same thing also happened to the issue of polygamy. Young *penghulus* in East Java interpreted Article 57 the KHI on polygamy conservatively. The various conditions that allow for polygamy in the article are believed to be legal steps, even with the exclusion of the psychological condition of the wife who has a disability, either due to an acute illness or infertility.

How did the *penghulu* display the benefit value that they idealize in their conservative interpretations? Based on the above arguments, benefits do not appear reciprocally. The gift that was fought for in the *penghulu's* interpretation of the issue of marriage guardians and marriage witnesses was more to the public benefit. Meanwhile, individual benefits leading to the fulfilment of the legal rights of persons with disabilities are ignored. In fact, if referring to the concept of legal competence (*ahliyyah*), persons with

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<sup>39</sup> Malthuf Siroj, *Hukum Islam Progresif*, Nucl. Phys. (Yogyakarta: Penerbit Pustaka Ilmu, 2021), 13.

<sup>40</sup> Mukhammad Nur Hadi, "Metode Ijtihad Kolektif Progresif Di Indonesia Sebagai Media Proyeksi Nalar Kemanusiaan," *Ma'mal* 4, no. 2 (2023): 160.

sensory disabilities referred to in the article on marriage guardians and marriage witnesses still have the right to obtain their rights, not to be shifted or replaced. It is because legal prowess only relies on intellectual abilities, not physical disabilities.<sup>41</sup>

In contrast to the two issues above, the benefit is only directed to the husband's side in the issue of polygamy. Benefit for the wife is hardly talked about much. The *penghulu*'s argument about protecting the husband from adultery is proof of how patriarchal benefit is. Meanwhile, the value of the benefit that leads to the first wife's side is not highlighted much. Is not taking care of a wife who is acutely ill more important than satisfying sexual interests for a moment but hurting the wife's psychology? Is not trying to have children with the help of modern medical technology also better than polygamy, which can cause new conflicts in the household? The answers to these questions are not much addressed or even raised in their interpretations. At this point, what *penghulu* declared show the same line toward judge's argument using Islamic Legal Maxims to support their patriarchal legal paradigm.<sup>42</sup> Therefore, in this part, either *penghulu* or judge has the same arguments to respond this issue and at the same time they show their position as practitioners to challenge the legal inclusive which is tried to be developed by the government as well as the academicians.

Next, the choice of diction in interpreting is also an important highlight. Most *penghulus* still use the diction used in the articles of the KHI, especially on the issue of marriage guardians and witnesses. The words "*tuna*" (impairment) and "*cacat*" (impairment), are still often found in the description of their interpretation. Only one *penghulu*, MU, has explicitly used the word disability several times. The frequent use of the words "*tuna*" and "*cacat*" indicates that most young *penghulus* do not understand the best choice of words when discussing disability issues. Their awareness of how to interpret articles from a disability perspective has not emerged.

An important implication of this choice of words is their tendency towards strengthening the legal rights of persons with disabilities. Negative words, such as "*tuna*" and "*cacat*", used by the *penghulu* to refer to persons with disabilities, represent a conservative and non-accommodating legal paradigm. This is because negative words are present in the medical paradigm (medical model), which positions persons with disabilities as a group that is hampered in their activities and must be cured first. Various experts have criticized this paradigm. However, it turns out that this paradigm still resides in the legal reasoning of young *penghulus*. This is different from the social paradigm (social model), which places them as a group constrained by social factors or public perception.<sup>43</sup> If the medical model makes them the wrong party, the social model is in the opposite position. People with disabilities are not bad. The wrong party is a society that views them

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<sup>41</sup> Abdul Wahab Al-Khallaf, *Ilmu Ushul Al-Fiqh* (Beirut: Dar al-Kutub al-'Ilmiyyah, 2010), 105.

<sup>42</sup> Mukhammad Nur Hadi, "Conservatism on Islamic Legal Maxims: Judicial Interpretation of Polygamous Marriage at the Religious Courts of Mojokerto, Indonesia," *Journal of Islamic Law* 4, no. 2 (2023): 172-96, <https://doi.org/10.24260/jil.v4i2.1637>.

<sup>43</sup> Ro'fah, "Mengikis Bias Normalisme Dalam Fikih: Upaya Menuju Fikih Ramah Difabel," in *Flkih (Ramah) Difabel*, ed. Ro'fah (Q-Media, 2015), 13.

discriminatively. It is a form of social exclusion, which is an acute social problem.<sup>44</sup> Therefore, ideally, all persons with disabilities should be treated and given equal opportunities. Efforts must be made to achieve equal access to the media.

How did the *penghulu*'s interpret articles using progressive paradigm? The authors only found one *penghulu*, MU, and that was only on two issues: marriage guardians and marriage witnesses. Meanwhile, on the issue of polygamy, the *penghulu* is trapped in a patriarchal benefit narrative. Although he tries to reason progressively, there are still indications of discriminatory reasoning and normalism bias. It can be seen when MU interprets the marriage witness article. On the one hand, he disagrees with the limitation of the legal rights of deaf marriage witnesses. On the other hand, he also uses the diction "*tuna*", not deaf or people with disabilities or hearing disabilities, which is more friendly in terms of editorial and meaning. Finally, it can be stated that the progressive paradigm is wrapped in a conservative paradigm.

The contestation between progressive and conservative paradigms in interpreting the articles on marriage guardians, marriage witnesses, and polygamy in the KHI was finally won by the conservative paradigm. This victory is nothing new as founded by the author to the *penghulu* in Malang City<sup>45</sup> and Halili Rais to the *penghulu* in the Special Region of Yogyakarta in which the conservative paradigm also won the contestation<sup>46</sup>. Therefore, this article completed as well as affirmed what has been found by previous research. The writer's hope for a fresh idea of young *penghulus* in East Java is answered through this study, confirming that conservatism still dominates the majority's legal reasoning. At this point, the author emphasizes that efforts to realize progressive legal ideas in family law issues must be rechallenged by the legal paradigm of family law practitioners, *penghulu*.

The dominance of the conservative paradigm impacts on efforts to create a moderate and inclusive paradigm of Indonesian Islamic family law. *Penghulu* as the practitioner and the guardian of Islamic family law has an important role to create and maintain the moderate and the inclusive legal paradigm for persons with disabilities. Moreover, this fact actually violates Islamic legal ethics which shows positive ethics towards people with disabilities.<sup>47</sup> It is because Islamic law always views and places persons with disabilities in an equal position. The protection and fulfillment of their rights is a non-negotiable command as a manifestation of humanist Islamic law. Therefore, ignoring and subordinating this role is tantamount to going against the grand narrative of the Religious Affairs Ministry that highly upholds inclusivism.

Otherwise, when progressive paradigms dominate the *penghulu* paradigm, inclusive responses and fresh ideas will emerge where the *penghulu* is required to protect, respect, and fulfill the rights of persons with disabilities. The *penghulu* will consciously really consider the

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<sup>44</sup> Mark Sherry, "The Promise of Human Rights for Disabled and the Reality of Neoliberalism," in *Disability, Human Rights and the Limits of Humanitarianism*, ed. Michale Gill and J. Chatty Schlund-Vials (New York: Routledge, 2016), 18.

<sup>45</sup> Hadi, "Nalar Fikih Penghulu Di Kota Malang Dalam Saksi Nikah Tuli."

<sup>46</sup> Halili Rais, *Penguhulu Di Antara Dua Otiritas Fikih Dan Kompilasi Hukum Islam* (Yogyakarta: Penerbit Lingkaran, 2020).

<sup>47</sup> Mohammed Ghaly, "Disability in the Islamic Tradition," *Religion Compass* 10, no. 6 (June 2016): 149–62, <https://doi.org/10.1111/rec3.12202>.



variety of rights they ideally get, starting from the smallest part such as how the *penghulu* calls them with the special term. Progressivism will lead the *penghulu* to a flexible practice of *ijtihad*. The *penghulu* wrapped in progressive legal reason will predominantly prefer to abandon texts that are static and not in favor of persons with disabilities. Thus, true justice is the main goal even though it must negotiate or even break the legal text so that the interaction between law and society is absolutely necessary<sup>48</sup> in order to create advocative law. At this point, however, the *penghulu* can be the law maker as the judge on all three issues as well as presents the inclusive law. The spirit to give birth to an inclusive legal character reflects the fresh character of *ijtihad* which places the values of justice, equality, human rights, pluralism, and other global ethics as a priority.<sup>49</sup> At the same time, this way will further demonstrate that the transformation of the Islamic family law towards persons with disabilities is worthy of revision by involving persons with disabilities in order to create *fiqh* that is truly based on their factual experiences.

At this point, the role of the Ministry of Religious Affairs as the main institution that is administratively and substantively able to direct and intervene in the paradigm of the upstream is again challenged. Thus, the legal paradigm battle is actually not formed naturally, but indirectly it is developed systematically. It is because the party responsible for creating the battle of legal paradigm, the Ministry of Religion, as the commander of the legal paradigm of the *Penghulu*, only provides a few facilities for the *Penghulu* to build an inclusive progressive paradigm.

## Conclusion

East Java's young *penghulus* display a conservative paradigm on three issues; marriage guardian, marriage witness, and polygamy. This paradigm arose because the *penghulu* statically interpreted the legal text, the KHI. The *penghulu* only emphasized and strengthened what the KHI had formulated. Not only that, the usefulness values in that article are also considered relevant. In the end, the rights of persons with disabilities were reduced and weakened as a result of the *penghulu's* textual interpretations. On the other hand, in interpreting the KHI, the *penghulu* still uses words that tend to discriminate against persons with disabilities, not editorials that are inclusive and advocative.

At this point, it can be understood that this condition is a gap that needs to be resolved by the Ministry of Religion in building a humanist perspective for the *penghulu*. Thus, ideal references that are often used in dealing with various marriage issues are not limited to *fiqh*, the KHI, and other regulations, such as Regulations of the Minister of Religion (PMA) or Decrees of the Minister of Religion (KMA), which tend to be *fiqh* oriented, but also from a disabled perspective. In this way, the *penghulu's* progressive paradigm towards disability issues can be formed. Obstacles to the development of advanced family law can slowly be overcome.

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<sup>48</sup> Suad Fikriawan, Syamsul Anwar, and Misnen Ardiansyah, "The Paradigm of Progressive Judge's Decision and Its Contribution to Islamic Legal Reform in Indonesia," *Al-Manahij: Jurnal Kajian Hukum Islam* 15, no. 2 (2021): 258, <https://doi.org/10.24090/mnh.v15i2.4730>.

<sup>49</sup> YUSDANI YUSDANI, "Islamic Law and Contemporary Challenges from Fresh *Ijtihad* Point of View," *Jurnal Hukum Islam* 20, no. 1 (2022): 116, <https://doi.org/10.28918/jhi.v20i1.5991>.

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