

DOI:<https://doi.org/10.24297/jssr.v16i.8882>

## The Model of Implementation Of Property Distribution After Divorce of Local Wisdom Perspective in Madura

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### Abstract

This study's purpose is to reveal and determine the implementation model of the distribution of marital property after divorce from the perspective of Madurese local wisdom. This research uses the empirical juridical method; according to Ronny Hanitijo Soemitro, a law that is empirically a symptom of society, on the other hand, can be studied as a variable (*independent variable*) which causes consequences on various aspects of social life. In social studies, the law is not conceptualized as an independent (*autonomous*) normative phenomenon, but as social institutions which are associated in real terms with other social variables. The results of this study are: a model for the implementation of post-divorce marital property distribution in the perspective of Madurese local wisdom, with the wisdom of distributing marital assets after divorce by distributing them into several models or forms as follows: (1) following the distribution model according to the positive legal arrangement of Indonesia, namely what is regulated in state law and is decided by the Religious Court, that the distribution of marital assets, namely widows or divorced widowers, each has the right to a half of the marital assets as long as it is not stipulated otherwise in other agreements in marriage. Meanwhile, based on the Article 37 of Law Number 1 the Year 1974 concerning the marriage, if the marriage breaks up due to divorce, marital assets is regulated according to their respective laws. Meanwhile, according to the Civil Code (*KUH Perdata*), Article 128, after the dissolution of marital assets, their marital assets are divided between husband and wife, or between their heirs, without question of which party the goods originated from. (2) the post-divorce model of the distribution of marital assets in the perspective of Madurese local wisdom is based on the wisdom of each individual soul or soul of a divorced husband and wife. The wisdom of each of these minds or souls is partly rooted in the Madurese community, which in this paper is called wisdom. As part of local wisdom in Madura, the distribution of marital assets is carried out by means of mediation (*abeq remember*) attended by community leaders.

**Keywords:** Divorce, Madurese local wisdom, Marital assets, Burgerlijk Wetboek, Islamic Law Compilation, Marriage Law.

### INTRODUCTION

The marriage is a statement of the will of the two people between a man and a woman as husband and wife in a bond to live together to form a family based on their respective religions or based on their respective beliefs. The statement of the will of the two people can be ascertained to be preceded by a fiancée bond according to the customs of each regions. Apart from the statement of the will, marriage is also a very sacred legal act because the essence of marriage is to declare a promise (*bond*) of faithful union before Allah SWT witnessed by the angels of Allah SWT and the witnesses (*people*) who witnessed the marriage. Because of a legal act, it will have legal consequences for the marriage. The legal consequence is the emergence of husband and wife rights and obligations that must be carried out during the marriage.

From one perspective of the marriage, it is as an instrument that creates a relationship between the two parties between the man and woman in the household as a husband-wife bond. From a relationship perspective, marriage creates a husband-wife relationship to work together peacefully in managing the household. From an Islamic perspective, marriage is an order of Allah and the Sunnah of the Prophet to build a legitimate offspring according to Islamic law and state law between the two parties.

According to perspective of each person's household life, the essence of household life is not that there is no conflict and runs well without any problems, but the differences of opinion are found, so that disputes between husband and wife lead to conflicts. This is due to differences in character, nature, habits, level of education as well as religious knowledge about the nature of marriage itself. Disputes that occur in domestic life between husband and wife are common, but not the least that lead to divorce, because both parties do not want to keep their household, the solution is legally divorced through a judge's decision in court. When divorced, a *varu* problem arises, namely regarding the distribution of marital property that requires resolution.

## LITERATURE REVIEW

In several positive Indonesian laws, what is meant by marriage has been formulated, Law Number 1 of 1974 concerning Marriage in Article 1 states that marriage is a physical and spiritual between a man and a woman as husband and wife with the aim of forming a family or household. is happy and eternal based on the Supreme Lordship. Beside that, Article 2 of the law states that marriage is legal if it is carried out according to the law of each religion and belief. Therefore, according to Articles 1 and 2, marriage is a physical and spiritual thing between a man and a woman as husband and wife with the main objective of forming a family or an eternal happy household without divorce in the future, and marriage is legal if it is based on respective religious laws and beliefs. If a marriage is carried out with different religions and different beliefs, then according to Article 2, it is invalid, because the basis or diction used is the equality of the laws of religion and belief of each.

Madurese as part of Indonesian society are known for being polite, friendly, tenacious, tough and various other social morality behaviors. Madurese are not negative, as is well known outside, that Madurese are *Carok doer and hard-tempered*, but actually Madurese maintain the values of self-respect / dignity. This characteristic is also known in other areas such as Siri '*Bugis Makassar*. As part of the Indonesian nation, these values are rooted in that they have been derived from the noble values of the ancestors who are preserved in the life of the nation and state, including the distribution of marital assets.

As long as the marriage takes place, there are marital assets. Sayuti Thalib argues that marital assets is wealth obtained during marriage outside of gifts or inheritance. This means that assets obtained by them or individually during the marriage.<sup>1</sup>

## MATERIAL AND METHOD

This research uses the empirical juridical method, according to Ronny Hanitijo Soemitro, law that is empirically a symptom of society, on the one hand can be studied as a variable (*independent variable*) which causes consequences on various aspects of social life.<sup>2</sup> In social studies, law is not conceptualized as an independent (*autonomous*) normative phenomenon, but as social institutions which are associated in real terms with other social variables.

While the data in this study are primary data and secondary data, and data collection techniques are carried out by interviewing respondents to obtain answers about divorce and the amount of property owned by married couples who have divorced. Meanwhile, secondary data is carried out through library research, namely by reading and analyzing library materials, legislation, or divorce documents as well as articles from electronic media related to existing legal issues.

## RESULT AND DISCUSSION

### 1. The Model of the Distribution of Marriage Assets according to Indonesian Positive Law

<sup>1</sup> Sayuti Thalib, *Indonesian Family Law*, Jakarta, UI Press, 1986, p. 89

<sup>2</sup> Ronny Hanitijo Soemitro, *Legal and Jurimetric Research Methodology*, 4th Printing, Jakarta, Ghalia Indonesia, 1990, p. 34

The implementation of the model for distribution of post-divorce marital assets in the perspective of Madurese local wisdom, with the wisdom of distributing marital assets after divorce, is divided into several models or forms as follows:

1. Following the distribution model according to the positive legal arrangements of Indonesia, namely what is regulated in state law and is decided by the Religious Court.
2. The Madurese Local Wisdom Model itself

To analyze the research results of the first model, one must depart from the Compilation of Islamic Law, the law number 1 Year 1974 concerning the marriage, and the Civil Code. To start this analysis, it departs from the provisions of Article 85 of the Compilation of Islamic Law (KHI) which emphasizes that the existence of marital assets in a marriage does not preclude the existence of property belonging to each husband or wife.

From the Article of 86 of the Compilation of Islamic Law states that:

1. Basically there is no mixing between the husband's assets and the wife's assets because of marriage.
2. Wife's property remains the wife's right and is fully controlled by her, likewise the husband's property remains the right of the husband and is fully controlled by her.

In addition, at Article 87 of the Compilation of Islamic Law states that:

1. The inheritance of each husband and wife and the property obtained by each as a *hasiah* or inheritance is under their respective control, as long as the parties do not specify otherwise in the marriage agreement.
2. The husband and wife have the full right to take legal actions on their respective assets in the form of a gift or present, *sodaqah* or others. In addition, Article 88 of the Compilation of Islamic Law (KHI) emphasizes that if a dispute occurs between husband and wife about marital assets, the settlement of the dispute is submitted to the Religious Court. Whereas Article 89, the husband is responsible for safeguarding marital assets, the wife's property and his own assets. And Article 90 the wife is also responsible for safe guarding the marital assets and her husband assets.

The next at Article 91 of the Compilation of Islamic Law (KHI) states that:

1. The collective assets as referred to in Article 85 above can be in the form of tangible or intangible objects.
2. The tangible collective assets may include immovable objects, movable objects and securities.
3. The intangible collective assets can be in the form of rights or obligations.
4. Collective assets can be used as collateral by one party with the approval of the other party.

Article 92 Compilation of Islamic Law (KHI) states that husband or wife without the consent of other parties are not allowed to sell or transfer marital assets.

Furthermore, Article 93 of the Compilation of Islamic Law (KHI) states that:

1. Responsibility for the debt of the husband or wife shall be borne by their respective assets.
2. Liability for debts incurred for the benefit of the family is borne by marital assets.
3. If the marital assets are insufficient, this shall be borne by the husband's assets.
4. If the husband's assets are not available or sufficient, this will be borne by the wife's assets

Then, Article 94 of the Compilation of Islamic Law (KHI) states that:

- 1) Marital assets from the marriage of a husband who has more than one wife, each separately and independently.
- 2) Ownership of marital assets from the marriage of a husband who has more than one wife as mentioned in paragraph 1 is counted at the time the second, third, or fourth marriage contract takes place.

The next Article 95 of the Compilation of Islamic Law (KHI) states that:

- 1) Without prejudice to the provisions of Article 24 paragraph (2) letter c of government regulation Number 9 of 1975 and Article 136 paragraph (2), a husband or wife can ask the Religious Court to seize collateral for marital assets without a request for divorce, if one of them commits an act that is detrimental and endangers common property such as gambling, drunkenness, wastefulness, and so on.
- 2) During the confiscation period, marital assets for the benefit of the family may be sold with the permission of the Religious Court.

Furthermore, Article 96 of the Compilation of Islamic Law (KHI) states:

- 1) In case of death divorce, then half of the marital assets becomes the right of the spouse who lives longer.
- 2) The distribution of marital assets for a husband or wife whose wife or husband is missing must be postponed until there is certainty of true death or legal death based on a decision of the Religious Court.

If paying attention to the provisions of Article 97 of the Compilation of Islamic Law (KHI), it is very clear that it determines the share of marital assets, namely a widow or divorcee, each of them is entitled to a half of the marital assets as long as it is not stipulated otherwise in other agreements in marriage. This means, if the marriage agreement states that the marital assets obtained during the marriage take place, and in the event of a divorce, then the marital assets are divided into two parts.

In the jurisprudence of the religious court it is also explained that marital assets is property obtained during the marriage period in connection with the law of marriage, both through the intermediary wife and through the husband. This property is obtained as a result of the works of the husband and wife in relation to marriage.

According to customary law, marital property is property owned by husband and wife in the marriage bond, whether obtained before the marriage takes place (*property / inheritance*) or property obtained during the marriage bond, which is the result of the work of each husband. wife or property obtained from gifts / grants or gifts as well as inheritance. Therefore, a very general principle that applies to customary law in Indonesia is that regarding the assets of one's own relatives which come from a gift or inheritance, the property remains the property of one of the husband or wife whose relatives grant or inherit the property to him.

According to Abdul Manan, marital assets are assets obtained during the marriage bond without question being registered in anyone's name.<sup>3</sup>

In the compilation of Islamic Law that applies in the environment of the Religious Courts, marital assets are referred to as assets in marriage or *syirkah*, which are assets obtained either individually or with husband and wife during the marriage bond and hereinafter referred to as marital assets, without question. registered under anyone's name (Article 1 paragraph (1)).<sup>4</sup>

In Islamic jurisprudence perspective, some scholars consider marital assets to be *syirkah* assets. It includes *syirkah*, but according to our understanding, it is not a contract *syirkah* (*syirkah uqud*), such as *syirkah abdan*, *syirkah inan* and *syirkah mudharabah*, but a *syirkah* of ownership (*Syirkah Milk / Syirkah Amlak*). The definition of this ownership circuit is joint ownership of an item in the between two or more people, which occurs because of one of the reasons for ownership (such as buying and selling, grants, wills and inheritance or because of a mixture of assets which is difficult to sort and differentiate. This ownership *syirkah*, for example, is that one party gives a grant an asset to 2 (two) people, then both of them receive

<sup>3</sup> Abdul Manan, *Various Problems of Islamic Civil Law in Indonesia*, Jakarta, Kencana, 2006, p. 108-109

<sup>4</sup> Isetyowati Andayani, "The Existence of Hart Aperk Marriage in Marriage Problems", in the Perspective Journal Volume X, Number 4, October Edition, 2005, p. 360

it, then the ownership of that property in Islamic Fiqh is called ownership *syirkah* (*syirkah ownership / syirkah amlak*).<sup>5</sup>

The assets of the marriage according to the Islamic Law Compilation (KHI) regarding assets in marriage, that regarding marital assets and inheritance (belonging to each husband and wife), is not clearly defined, but is implied in Article 85 of the Islamic Law Compilation which acknowledges the existence of marital assets and property of each husband and wife.<sup>6</sup>

If we examine Article 91 of the Compilation of Islamic Law (KHI) at the beginning, what is considered marital assets is the property of husband and wife that has economic value and legal value, that is, has utility value and there are legal rules that regulate it. Marital assets can be in the form of tangible objects which include movable and immovable objects and marital assets can be in the form of securities and marital assets can be in the form of intangible objects in the form of rights and obligations.

In the case of debt accountability, both husband and wife debt, the bias is borne by their respective assets. Meanwhile, for debts made for the benefit of the family, it is borne by marital assets. However, if it is marital assets insufficient, then it is borne by the husband's assets. If the husband's assets do not exist or are insufficient, this will be borne by the wife's assets.<sup>7</sup>

All properties acquired by a husband and wife during their marriage becomes marital assets. According to Article 1 letter f of the Islamic Law Compilation (KHI), it confirms that assets in marriage or *syirkah* are assets that are obtained either individually or jointly with husband and wife while the marriage is in progress, and hereafter referred to as marital assets without question being registered or obtained on whose behalf, husband or wife.

Furthermore, to analyze the distribution of marital property in the perspective of Law Number 1 of 1974 concerning Marriage, it must depart from the provisions of Article 35 of Law Number 1 of 1974 concerning Marriage, namely:

- 1) Assets acquired during the marriage become marital assets.
- 2) The inheritance of each husband and wife and the property which is acquired as a gift or inheritance, is under their respective control as long as the parties do not determine otherwise.

Furthermore, Article 36 of Law Number 1 of 1974 concerning Marriage states:

- a. Regarding marital assets, husband or wife can act with the agreement of both parties.
- b. Regarding the respective assets, husband and wife have the full right to take legal actions regarding their assets.

When viewed from Article 35 of Law Number 1 of 1974 concerning Marriage, the marital assets consist of marital assets, inheritance, gift assets, and inheritance. Collective assets are assets acquired by husband and wife during marriage (*wealth seeking*). This collective asset if the marriage breaks up (*divorced or divorced*) is regulated according to their respective laws (*customary law, religious law and other laws*). *Carryah* assets are assets that each husband and wife bring into the marriage relationship, perhaps the result of their own efforts, and possibly gifts or inheritance that each husband and wife acquire before or after marriage. Assets, gifts, and inheritance are still in the control of each other, if not determined otherwise and the *instanti* comes from customary law in force in Indonesia.<sup>8</sup>

Then Article 37 of Law Number 1 Year 1974 Concerning Marriage, if a marriage breaks up due to divorce, marital assets are regulated according to their respective laws. This means that the respective laws are religious law, customary law and other laws.

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<sup>5</sup> Ibid, p. 360-361

<sup>6</sup> Ibid, p. 361

<sup>7</sup> H. M. A. Tihami, *Fiqh Munakahat: Study of Complete Marriage fiqh*, Jakarta, RajaGrafindo Persada, 2009, p. 179

<sup>8</sup> Hilman Hadikusuma, *Indonesian Marriage Law According to Legislation, Customary Law, Religious Law*, Bandung: Mandar Maju, 2007), p. 114

The status of the marital property depends on the form of the marriage that occurs, local customary law and the situation of the indigenous peoples concerned, whether the community is still strong in maintaining the patrilineal, matrilineal, or parental / bilateral lineage, or is it adhering to religious law, or is it advanced and up to date with the times . In a patrilineal society, there is basically no separation of marital assets and inheritance (gifts / inheritance). All assets that are included in the marriage bond become marital assets or collective assets controlled by the husband as the head of the family / household. All legal acts relating to marital assets must be known and controlled by the husband, the wife may not act alone on her assets without the husband's consent.<sup>9</sup>

Then the distribution of marital assets in the perspective of the Civil Code (KUHPPerdata), then in the Civil Code (BW) regarding Marital assets according to the law and its management, is regulated in Chapter VI Articles 119-138 which consists of three parts, namely: First part regarding marital assets according to law (Articles 119-123). The second part deals with the management of marital assets (Articles 124-125). The third part is about the dissolution of marital assets and the right to escape from it (Articles 126-138).<sup>10</sup>

To analyze the distribution of marital assets from the perspective of the distribution of marital assets from the perspective of the Civil Code (KUHPPerdata)

#### Article 119

"Since the time the marriage takes place, according to the law there is a comprehensive marital assets between husband and wife, as long as there are no other provisions in the marriage agreement. Marital assets, as long as the marriage progresses, may not be eliminated or changed with an agreement between husband and wife ".

## **2. The model of the Distribution of Marriage Assets in the Perspective of Madurese Local Wisdom**

The implementation model for the distribution of marital property after divorce in the perspective of Madurese local wisdom, the second is a model of Madurese local wisdom itself. Madura as a separate island is part of the Unitary Republic of Indonesia (NKRI) and is an integral part of East Java Province and has not yet become a separate province separated from East Java province. Viewed from a religious perspective, from several religions that exist and are adhered to in Indonesia, the average Madurese community is Muslim. This is marked by places of worship such as mosques and the large number of Islamic boarding schools on Madura Island. The Islamic boarding school is a place or forum for the Madurese community to study Islam at the Islamic boarding school. From a government perspective, Madura Island consists of 4 (four) existing Kabuapetan governments, namely: from the west side of Bangkalan Regency, Sampang Regency, Pamekasan Regency and Sumenep Regency to the east. Of the four districts, the most Islamic boarding schools are located in Pamekasan Regency.

The post-divorce model of the distribution of marital property in the perspective of Madurese local wisdom is based on the wisdom of each individual soul or soul of a divorced husband and wife. The wisdom of each of these minds or souls is partly rooted in the Madurese community, which in this paper is called wisdom. This is based on the empirical facts of the divorce case.

The divorce case between husband and wife, namely Mn and Az, which occurred in 1992. From their marriage both were blessed with a daughter named RJ who was 2 (two) years old. During the divorce, the child custody was taken care of by the wife, Az. During the marriage, the results of the work of the two of them have been able to produce the purchase of a paddy field, cow and bicycle. In addition, both of them also manage the assets as the inheritance of each husband and wife, namely Mn and Az in the form of gifts and inheritance from their parents.

It is customary among the Madurese community that when children are married and do not live with their parents, children who get married get a gift from their parents in the form of immovable or movable

<sup>9</sup> Ibid, p. 115

<sup>10</sup> Ibid, p. 113



objects, but in villages the average immovable object is like rice fields, field land. In the Decision of the Pamekasan Religious Court, it does not address the issue of marital property, because it is not the object of a marriage dispute, including child custody, which is not the object of the dispute at that time.

The distribution of marital assets after the divorce of Mn and Az is based on the wisdom or wisdom of the two, namely regarding the marital assets as their respective assets returned to both of them, where Mn's assets are brought and managed and under the supervision and Mn's power, while Az's belongings were brought and managed and under Az's control and power. As for the marital property in the form of a paddy field of approximately 1500 m<sup>2</sup> which resulted from the work of the two during the marriage, it was not divided equally (not divided by two (1/2), but by Mn, Az's ex-husband was given to his wife, Az because From the results of the marriage, both were blessed with a child, RJ. Basically not because of having children, but Mn wisely and wisely gave the plot of land to his wife. This gift was not as Mut'ah nor as a living.<sup>11</sup> other property.

Hilman Hadikusuma argued, if there is a divorce between husband and wife according to Islamic law, then the clear legal consequence is that the obligations of husband and wife and their children are imposed, namely:<sup>12</sup>

1. Provide appropriate mut'ah in the form of money or goods.
2. Mut'ah is a gift by the husband to his divorced wife (divorce) so that the wife's heart can be comforted. The gift can be in the form of money or goods, clothes, jewelry according to the circumstances and abilities of the husband.
3. Providing a living, clothing and a place to live while the ex-wife is in idah period as long as the ex-wife has not finished her waiting time (the wife is still in idah period), the ex-husband is obliged to provide her with living expenses in the form of clothing, living expenses and a place to live. Providing income to care for and educate their children from infancy to adulthood and be independent. Ex-wife who takes care of children from the time they are in the womb, give birth to babies and until the children are adults and can be independent, the ex-husband is obliged to provide his living expenses and education. The obligation of the ex-husband does not need to be done as an obligation if the child has assets for life and education.
4. To pay the dowry, the *ta'lik talak* agreement and other agreements when the marriage took place. The husband's obligation to pay the dowry if it has not been paid and fulfills all the promises he made with his ex-wife when they were married before. If these things are not carried out by the husband, then the wife has the right to submit it to the Religious Court.

The decision of the religious court is very decisive in the distribution of marital property, this is because the court decision is a law that is born from a judicial institution through a judge's decision. Court decisions are in law science and are known and recognized in Indonesia as a source of formal law. As a law that was created by a judge's decision, it must be respected and upheld by the parties. The parties who do not accept the court's decision must propose the legal remedies. Legal remedies are a way or a way for parties who are not satisfied with the decision of the court of first instance, so that they can appeal to the High Court (PT), if they are not satisfied with the decision of the high court, then they can appeal to the Supreme Court, and can carry out a review or *rekes sipil*. This is in accordance with the results of the interview, that legal remedies for his disagreement or were not completed by deliberation in the distribution of marital assets were eventually brought to court.

As part of local wisdom in Madura, the distribution of marital assets is carried out by means of mediation attended by community leaders. In this case, the distribution of marital property, namely a family meeting is held and if in our area a community leader (Village Head, Pamong and religious leaders is presented),

<sup>11</sup> Interview with Az at his residence in Bukek Village, Kec. Tlanakan Pamekasan on Friday; September 4, 2020. The name uses the initial name due to the respondent's request.

<sup>12</sup> Hilman Hadikusuma, Loc.Cit, p. 179

the family raises the issue of the distribution of marital assets, then the religious figure who decides to distribute the assets.<sup>13</sup>

The mediation is an effective way to decide a case before it is brought to court. Mediation is carried out to bring together the disputing parties in order to resolve problems in a good way, without having to be brought to court. This consideration is taken as part of the local wisdom of Madura, as well as to reduce the burden of the fees. Going to court requires a lot of money and time, so mediation is an effective way to take.

## CONCLUSION

Based on the results of the research and analysis that was carried out at the beginning, it can be concluded that the implementation model of the distribution of marital property after divorce is in the perspective of Madurese local wisdom, with the wisdom of dividing marital property after divorce with several models or forms as follows :

1. Following the distribution model according to the positive Indonesian legal arrangement, namely what is regulated in state law and is decided by the Religious Court, that the distribution of marital assets, namely widows or divorced widowers, each has the right to half of the marital assets as long as it is not specified otherwise in the agreement. others in marriage. This means, if the marriage agreement states that the marital assets obtained during the marriage take place, and in the event of a divorce, then the marital assets are divided into two. Meanwhile, according to Article 37 of Law Number 1 Year 1974 concerning Marriage, if the marriage breaks up due to divorce, marital assets is regulated according to their respective laws. This means that the respective laws are religious law, customary law and other laws. Meanwhile, according to the Civil Code (KUHPerdata), Article 128 after the dissolution of marital assets, their marital assets are divided between husband and wife, or between their heirs, without question and which party the goods originated from. The provisions contained in Chapter XVII of Book Two, regarding the separation of inheritance, apply to the distribution of marital assets according to law.

2. The post-divorce model of the distribution of marital assets in the perspective of Madurese local wisdom is based on the wisdom of each individual soul or soul divorced husband and wife. The wisdom of each of these minds or souls is partly rooted in the Madurese community, which in this paper is called wisdom. As part of local wisdom in Madura, the distribution of marital assets is carried out by means of mediation attended by community leaders. In this case, the distribution of marital property, namely a family meeting is held and if community leaders (Village Head, and religious leaders are presented in our area), the family presents the problem of distributing marital assets, then the religious figure who decides to distribute the assets.

## ACKNOWLEDGMENTS

On this occasion the researcher would like to thank:

1. The researcher also thanks the Directorate of Research and Community Service (DRPM), Directorate General of Research and Development Strengthening, Ministry of Research and Technology / National Research and Innovation Agency of the Republic of Indonesia for providing research funding assistance, so that this research can be carried out in 2020.
2. On this occasion researchers would like to express their deepest gratitude to the Madura University Research and Community Service (LPPM) for the financial assistance of the research that has been given so that this research can be completed.
3. All respondents and informants who have been willing to help data in research.

<sup>13</sup> Interview with Mr. Khori, *one of the religious leaders* of Plakpak Village.



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7. Interview with Az at his residence in Bukek Village, Kec. Tlanakan Pamekasan on Friday; September 4, 2020. The name uses the initial name due to the respondent's request.
8. Interview with Mr. Khoris, one of the religious leaders of Plakpak Village.