Endogamous Marriage of Prophet's Descendants on the Perspective of Sociology of Islamic Law

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Abstract:

This study aims to comprehensively describe the endogamous marriages of the Prophet Muhammad's descendants from the perspective of the sociology of Islamic law. The marriage mainly occurs in *syarifah* (the female descendants); they are required to marry the prospectives from *sayyid* (male descendants) groups only. Endogamous marriage will be explored holistically by clarifying the reciprocal relationship between social change and Islamic law among *syarifah*. This field research examines the enactment of the law in social life. It used a sociological Islamic law approach to reveal the facts about endogamous marriage in Bangil, East Java, Indonesia, because many of the Prophet's descendants live there. Data collection techniques were interviews and literature search, while the analysis technique used is Miles and Hubermen's analytical procedure. After conducting in-depth research, a conclusion was found that endogamous marriage among *syarifah* in Bangil is a form of obedience to customs passed down across generations since their ancestors, namely the tradition of

marrying someone of equal lineage. Endogamous marriages have been maintained to this day due to religious teachings, the spirit of protecting the Prophet's family, and the social conditions of those who support its preservation.

Keywords:

Endogamous; Islamic law; Marriage; Sociological; Prophet's descendants.

Abstrak:

Penelitian ini bertujuan untuk mendeskripsikan secara komprehensif perkawinan endogami keturunan Nabi Muhammad dalam perspektif sosiologi hukum Islam. Perkawinan tersebut utamanya terjadi pada *syarifah* (keturunan perempuan); mereka diharuskan menikah dengan *sayyid* (keturunan laki-laki). Perkawinan endogami ini ditelaah secara holistik dengan memperjelas hubungan timbal balik antara perubahan sosial dan hukum Islam di kalangan *syarifah*. Penelitian lapangan ini, dengan demikian, mengkaji berlakunya hukum dalam realita masyarakat. Pendekatan yang digunakan adalah sosiologi hukum Islam untuk mengungkap fakta pernikahan endogami di kalangan *syarifah* yang tinggal di Bangil, Jawa Timur, Indonesia, karena banyakanya keturunan nabi di kota tersebut. Teknik pengumpulan data yang digunakan adalah wawancara dan pencarian literatur yang relevan, sedangkan teknik analisis datanya adalah teknik analisis ala Miles dan Hubermen. Setelah dilakukan penelitian secara mendalam, didapatkan kesimpulan bahwa pernikahan endogami di kalangan *syarifah* di Bangil merupakan bentuk ketaatan terhadap adat yang diturunkan secara turun-temurun dari nenek moyang mereka, yaitu tradisi menikah dengan seseorang dari garis keturunan yang sama. Perkawinan endogami masih dipertahankan hingga saat ini karena didasari oleh ajaran agama, semangat menjaga keluarga Nabi Muhammad, dan kondisi sosial masyarakat yang mendukung terpeliharanya perkawinan endogami tersebut.

Kata kunci:
Endogami; Hukum Islam; Keturunan Nabi; Pernikahan; Sosiologi.

Introduction

In Islam, marriage is a sacred agreement, a worship to Allah, and a Sunna of the Prophet, based on sincerity and responsibility.[1] Marriage is carried out with the intention that humans have a legitimate family to achieve a happy life in this world and the hereafter.[2] In addition to the rules in Islam to help achieve this goal of marriage, several additional rules are made, let alone among certain tribal clans. One of the rules is not to marry other people of different ethnicity or family out of the inner tribe. This rule is known as endogamous marriage.[3]

Endogamous marriage requires people to find a mate in their inner social environment, for example, in the family, social class, or residential setting.[4] Sunarto said that it is a marriage between ethnicity, clan, tribe, or kinship in the same environment. It is usually carried out to keep wealth circulating among themselves, strengthen the clan's defense from enemy attacks, maintain bloodline, or for other more exclusive motives.[5]

This form or system of endogamous marriage is adopted by several ethnic groups, tribes, or community clans in Indonesia; one of which is among *syarifah. Syarifah is* a woman descended from the

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[1] M. Anwar Nawawi et al., "Harmonization of Islam and Human Rights: Judges' Legal Arguments in Rejecting Child Marriage Dispensation in Sukadana, Indonesia," *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan* 22, no. 1 (September 1, 2022): 126, https://doi.org/10.18326/ijtihad.v22i1.117-134.

[2] Aisyah Ayu Musyafah, "Perkawinan Dalam Perspektif Filosofis Hukum Islam," *CREPIDO* 2, no. 2 (November 29, 2020): 111–22, https://doi.org/10.14710/crepido.2.2.111-122.

[3] Muhammad Rizwan Safdar et al., "Socioeconomic Determinants of Caste-Based Endogamy: A Qualitative Study," *Journal of Ethnic and Cultural Studies* 8, no. 2 (February 10, 2021): 39, https://doi.org/10.29333/ejecs/697.

[4] Duwi Nuryani, Setiajid, and Puji Lestari, "Latar Belakang Dan Dampak Perkawinan Endogami Di Desa Sidigde Kabupaten Jepara," *Unnes Civic Education Journal* 1, no. 2 (2015), https://doi.org/10.15294/ucej.v1i2.1011.

[5] Dewi Puspitasari Sari, "Kajian Fenomena Perkawinan Endogami Di Kelurahan Condong Campur Kecamatan Pejawaran Kabupaten Banjarnegara," *E-Societas* 5, no. 5 (October 12, 2016), https://journal.student.uny.ac.id/ojs/index.php/societas/article/view/4003.

Prophet Muhammad.[6] *Syarifah* generally perform endogamous marriages based on ethnicity or clan (descendant) of the Prophet Muhammad. The purpose of this is to preserve the lineage of the Prophet Muhammad. A research conducted by Fathur Rahman Azhari entitled "Motivation of Endogamous Marriage in the *Alawiyyin* Community in Martapura, Banjar Regency," shows that endogamous marriages carried out by *syarifah*(s) aim to preserve lineage.[7]

The question that should be raised is whether a non-*sayyid* man can marry a *syarifah*? Aren't all humans equal before God? Isn't a noble person, before Allah, the most pious person? Some of the questions that arise are worth mentioning because there are several assumptions that sharifah may not marry a non-*sayyid* man to protect offspring.

Khoirul Barriyati conducted another study titled "Social Construction of Endogamous Marriages among Women of Arab Descendants (Studies on Women of Arab Descendants Throughout)." The results of this study indicate that the purpose of endogamous marriage for women of Arab descent from the Ba'alwi group tends to be socially oriented toward traditional values and actions.[8]

Based on the literature review above, the previous researches on the endogamous marriage of *syarifah* mainly concern with the motivation and reasons for this type of marriage. It differs from what we have done in this present research because this examines endogamous marriage among *syarifah* through a sociological Islamic law approach so that the conclusions obtained describe social facts related to the practice not only from a legal standpoint but also from a societal standpoint or a practice that occurs.

The next difference is that the researcher chose Bangil as the place of research, where many of the Prophet's descendants live there. Bangil is a city where *habibs* and *syarifahs* gather and think, especially

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[6] "Arti Kata Syarifah - Kamus Besar Bahasa Indonesia (KBBI) Online," accessed March 2, 2023, https://kbbi.web.id/syarifah.

[7] Fathurrahman Azhari Zainal Muttaqien Sulaiman Kurdi, "Motivasi Perkawinan Endogami Pada Komunitas Alawiyyin Di Martapura Kabupaten Banjar," *Muadalah* 1, no. 2 (February 14, 2013), https://doi.org/10.18592/jurnal.v1i2.677.

[8] Khoirul Bariyati, "Konstruksi Sosial Pernikahan Endogami Di Kalangan Perempuan Keturunan Arab (Studi Pada Perempuan Keturunan Arab Di Sepanjang," *Jurnal Komunitas* 6, no. 3 (2017), http://journal.unair.ac.id.

about Islamic issues in current phenomena while they belong to Sunni and Shia sects.[9] It is furthermore known as the city of Ahlussunnah wal Jamaah.[10] With so many *habibs* and *syarifahs* living in Bangil, it is natural that social interaction among *habibs* and *syarifahs* is still maintained following the values inherited by their ancestors, let alone in the matter of marriage. Their marriages still adhere to the principles inherited by their ancestors, which is an internal-circle marriage with *habib* or *sayyid*.

Therefore, novelty side of this research is that the endogamous marriage of the Prophet's descendants is seen holistically, not only in terms of motivation and reasons beyond, but also legal aspects and causes of *syarifah*'s endogamous marriage, which are still sustainable today. Additionally, we will also discuss the response of the surrounding community to this endogamous marriage.

Methods

This study was field research. Data collection techniques used interviews and literature search (relevant scientific books and journals). The Informants in this study consist of fifty people, including *habib*, *sayyid*, *syarifah*, religious leaders, traditional leaders, community leaders, and Bangil town residents. In determining informants, researchers used a purposive sampling technique; the goal is that the data obtained is more accurate and on target. The criteria for informants were (1) those who understand the endogamy of *syarifah*'s marriage; (2) they have done it at least two times the endogamy of *syarifah*'s marriage, *habib*, *sayyid*, *syarifah*, and (3) a member of the community who lives in the city of Bangil.

The approach used in this study is a sociological juridical approach because this study is a legal study that looks at social reality.[11] This sociological juridical approach is used to discover and describe facts related to the endogamy of *syarifah* marriage in Bangil. The data analysis techniques used various stages, including data

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[9] Habib Ahmad, Interview, 2022.

[10] Arsyad Sobby Kesuma, Abdul Halim, and Nur Syam, "The Religious Politics of Habaib in Surabaya and Bangil East Java: A Socio-Religio-Political Approach," *QIJIS (Qudus International Journal of Islamic Studies)* 10, no. 2 (December 20, 2022): 299, https://doi.org/10.21043/qijis.v10i2.12090.

[11] Muhammad Chairul Huda, *METODE PENELITIAN HUKUM (Pendekatan Yuridis Sosiologis)* (Semarang: The Mahfud Ridwan Institute, 2022), http://e-repository.perpus.iainsalatiga.ac.id/14262/.

reduction, presentation, and conclusion.[12] At the same time, the data validity technique used in this study is source triangulation, namely comparing data obtained from several sources or informants.[13]

Result And Discussion

Kafā'ah as Reason for *Syarifah's* Endogamous Marriage at Bangil and its Stages of Process

Marriage aims to form a *sakīnah*, *mawaddah,* and *rahmah* family, in this world and the hereafter.[14] The goal of marriage will be easily achieved if the marriage is built on a solid foundation; one of which is the existence of *kafā'ah* between husband and wife.[15] In the Arabic dictionary, *kafā'ah* means comfort, commensurate and mate. Meanwhile, in the Indonesian dictionary, *kafaah* means balanced in choosing a life partner. It means that men and women who will form a household should get balanced in everything.[16]

Furthermore, it implies that a husband is equal to his wife, meaning that he has the same and proportional position as his wife regarding social, moral, and economic levels.[17] Rusdaya Basri believes that *kafā'ah* in marriage is a factor that can encourage happiness of the wedded couple and guarantee women's safety from failure or household turmoil. With more equal positions of men with women, the successful husband and wife's life is increasingly secure and more maintained from any loss.[18]

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[12] Matthew B Miles and A. Michael Huberman, *Analisis Data Kualitatif : Buku Sumber Tentang Metode-Metode Baru* (Jakarta: Universitas Indonesia Press, 2014).

[13] Lexy J Moleong, *Metodologi Penelitian Kualitatif* (Bandung: PT. Remaja Rosdakarya, 2018).

[14] Budi Juliandi, Zulfikar Zulfikar, and Syarifah Mudrika, "Syarifah ngai Raya Aceh Timur: Marriage and the Struggle to Find Identity," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 6, no. 1 (June 27, 2022): 273–8 https://doi.org/10.22373/sjhk.v6i1.9149.

[15] Anwar Hafidzi, Rusdiyah Rusdiyah, and Nurdin Nurdin, "Arranged Marriage: Adjusting Kafa'ah Can Reduce Traf king of Women," *Al-Istinbath: Jurnal Hukum Islam* 5, no. 2 November (November 30, 2020): 180, https:/ doi.org/10.29240/jhi.v5i2.1991.

[16] "Arti Kata Kafaah - Kamus Besar Bahasa Indonesia (KBBI) Online," acces March 3, 2023, https://kbbi.web.id/kafaah.

[17] Imam Subchi, "Kafa'ah among the Hadrami Arabs in e Malay World (Anthropology of Law Approach)," *Jurnal Cita Hukum* 8, no. 2 (August 1, 2020): , https://doi.org/10.15408/jch.v8i2.16574.

[18] Rusdaya Basri, *Fiqh Munakahat: 4 Mazhab Dan Kebijakan Pemerintah* (Parepare: CV. Kafaah Learnig Center, 2019), 64.

Apart of it, *kafā'ah* is not a condition for marriage,[19] although the marriage guardian (*walī*) may reject the proposal of a man who is not equal (*kufū'*) to his daughter. According to the stronger opinion, *kafā'ah* only applies to matters of faith and religion, such as Muslims and infidels or pious people and evil people. In this case, the scholars differ on whether *kafā'ah* is one of the legal requirements in marriage or not. The first opinion puts *kafā'ah* as not a legal requirement in marriage. It is the opinion of most scholars; among them are Abu Hanifah, Malik, and As-Syafi'i. They argue that *kafā'ah* is considered very important in the continuation of a marriage, although it is not one of its legal requirements. The second opinion assumes that *kafā'ah* is a legal condition of marriage. This is according to Imam Ahmad, Ats-Tsauri, and some *Hanafiah* scholars.[20]

The term *kafā'ah* is also known among the *syarifah* in Bangil Pasuruan. Habaib--a plural word of *habib*--is usually used as a call for the descendants of Rasulullah circles to determine particular criteria to see someone worthy to accompany her daughter in the future. This eligibility is a benchmark for whether or not the person is compatible with the daughter. In implementing the *kafā'ah* concept among *syarifah* in Bangil, Pasuruan, some *syarifah*(s) have argued that it is included in the pillars of marriage. Some said that *kafā'ah* is only limited to the validity of the wedding due to fear that no one will marry them, but mostly agreed with the reason for *kafā'ah*. The results of the following interviews strengthen this.

In one side, *Syarifah* Hindun said as follow:

> *"We are responsible for protecting our descendants' lineage so that it continues with the origin of the Prophet Muhammad. If we marry ahwal (non-sayyid), our children will no longer be related to the Prophet Muhammad".*[21]

Meanwhile, *Habib* Muhammad said so:

> *"Endogamous marriages among syarifah are not only at Bangil but worldwide;* Syarifah *can only marry sayyids.*

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[19] Syukron Mahbub, "Menakar Kafa'ah (Praktek Perkawinan Kyai Di Madura)," *Jurnal Al-Ihkam* 6, no. 2 (2011): 233.

[20] Nadiyah Nadiyah, Norlaila Norlaila, and Anwar Hafidzi, "Does Kafa'ah Apply To The Descendants Of The Prophet Muhammad. Examine The Concept Of Kafaah Towards The Alawi In Martapura, Banjar," *JOURNAL OF ISLAMIC AND LAW STUDIES* 5, no. 2 (January 12, 2022), https://doi.org/10.18592/jils.v5i3.5985.

[21] Syarifah Hindun, Interview, 2022.

> *Every sayyid who wants to propose to marry a syarifah will be tested first to see if his lineage status is valid through the Rabithah Alawiyyah (institution for the registrar of the Prophet Muhammad's lineage in Indonesia). If the sayyid status has been proven genuine, there will be discussion about marriage. The purpose of this endogamous marriage is to maintain the sanctity of the origin of our children and grandchildren so that it continues in its lineage with the Prophet Muhammad SAW."* [22]

Based on two interviews above, it can be seen that the reason for endogamous marriage among *syarifah* is to keep the lineage in the Prophet Muhammad's line. *Syarifah* is deemed only in the same league as *sayyid*, and there is already legal standing for this type of marriage. According to Islamic law, marriage is valid if it meets the requirements and pillars.[23] However, other rules require the concept of *kafā'ah* or the equivalence between males and females in various matters. In this context, there are mainly two consequences for breaking the rule. *First*, a *syarifah* is considered destroying or breaking the lineage of the Prophet's descendants and *second*, there is generally no blessing from the guardian when a *syarifah* marries a man outside *sayyid* circle.[24]

In a broader context, the concept of *kafā'ah* is found in the descendants of the *Alawiyyin* and other groups, such as the descendants of the sultanate, Kiagus, Kemas and Raden; they do not allow marriage with other than them because their bloodline will be cut off.[25] If their daughter married a commoner, she would lose royal blood, and they would not be recognized as part of a noble family. Likewise, the descendants of the Alawiyyin are very careful about their family, although some consider *kafā'ah* to be a must (*luzum al-*

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[22] Habib Muhammad Bin Yahya, Interview, 2022.

[23] Dri Santoso et al., "Harmony of Religion and Culture: Fiqh Munākahat Perspective on the Gayo Marriage Custom," *Ijtihad : Jurnal Wacana Hukum Islam Dan Kemanusiaan* 22, no. 2 (December 5, 2022): 202, https://doi.org/10.18326/ijtihad.v22i2.199-218.

[24] Nurul Fattah, "Hukum Pernikahan Syarifah Dengan Laki-Laki Nonsayyid: Perspektif Jam'Iyyah Rabithah Alawiyyah Yogyakarta," *Al-Ahwal: Jurnal Hukum Keluarga Islam* 6, no. 2 (February 5, 2021): 129–44.

[25] Rusmini Rusmini et al., "Hadrami's Leadership in Islamizing Jambi: Managerial Psychology Perspective," *Cogent Social Sciences* 9, no. 1 (December 31, 2023): 2203550, https://doi.org/10.1080/23311886.2023.2203550.

aqdi); there is an opportunity to choose (*khiyar*) the presence of *kafā'ah* so as not to cancel the marriage if the elements of *kafā'ah* are not fulfilled.[26]

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Endogamous marriages carried out by *syarifah* in the city of Bangil have several stages, almost the same as the stages of marriage in general. The differences are only in terms of steps, not the substance. An example of this difference is in the long series of the *syarifah* endogamous wedding procession compared to general one which are more straightforward and concise. The cause of the long march of the endogamous *syarifah* marriage is claimed as a form of practicing Islamic teachings as a whole. The results of following interview describe it well;

> *Marriage is a worship, and everyone should act perfectly. It ranges from looking for a prospective wife; you must follow the teachings of the Prophet Muhammad. In the following stages, you must still follow the teachings of the Prophet Muhammad. The wedding reception must also follow the instructions of the Prophet Muhammad*" [27]

Those principles of marriage are still held by the families of the descendants of the Prophet Muhammad when marrying off their sons and daughters. Meanwhile, the stages of endogamous *syarifah* marriage have ten steps as shown in the Figure 1 below.

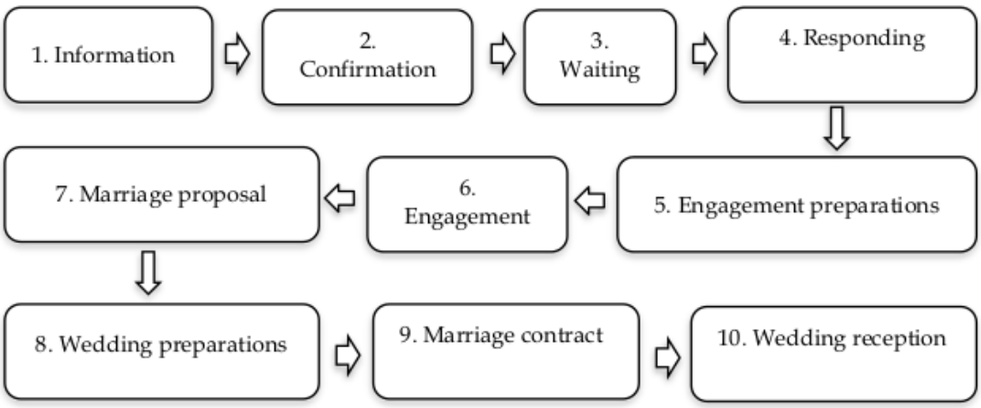

Figure 1. Stages of *Syarifah's* Endogamous Marriage Process

[26] Rahmat Pulungan, "TRADISI MERASI DALAM ADAT PERKAWINAN MELAYU RIAU (STUDI ANALISIS TERHADAP PENENTUAN KAFAAH CALON PENGANTIN DI KELURAHAN BAGAN BATU)," *Islam Realitas: Journal of Islamic & Social Studies* 2, no. 2 (December 20, 2016): 179, https://doi.org/10.30983/islam_realitas.v2i2.188.

[27] Habib Soleh, Interview, 2022.

Based on Figure 1 above, it can be known that the *syarifah* endogamous marriage has several stages as follow.

The *first* is a visit to the prospective wife parents' home to inquire about their daughter's status and let them know that a man is interested in marrying their daughter.

Second, when it is known that the girl is available, the intermediary and the prospective groom, along with his parents and relatives, visit the residence of the future wife aiming to propose her.

Third, for four to seven days, the prospective husband waits for an answer from the prospective wife. On the sidelines of these four to seven days, the future wife's parents investigate the situation as well as the morals of their son in law to be.

Fourth, the prospective wife's family provides answers to the intermediary to be conveyed to the prospective husband's family.

Fifth, if the proposal is accepted, both parties set the engagement date.

Sixth, they carry out the engagement but the prospective husband is not allowed to participate in the event. The future husband's parents bring offerings of coffee, sugar, chocolate, flowers, and rings. The prospective husband's mother puts the ring at the finger of her son's future wife then the daughter in law to be kisses the future in-law mother's hand. Additionally, the date of the marriage proposal was determined at this stage.

Seventh, at the marriage proposal ceremony, the prospective husband's family (also without the presence of prospective husband) makes another visit bringing a set of jewelry tools, make-up tools, toiletries, cloth, sandals, bags, and money as present to the future wife. Then, a collection of jewelry is put on the prospective wife by the prospective husband's mother after deciding the wedding recepetion whish usually takes place a month later.[28] According to Habib Soleh, the items given by the *sayyid* are gifts that aim to foster a sense of mutual love.[29]

Eighth, pre-wedding preparation which begins with seclusion takes place; the prospective wife is not allowed to meet the future husband until the wedding day; then, the future wife uses *henna* to

[28] Muhammad Khusna Amal and Nawirah Ali Hajjaj, "Pernikahan Nasbiyah Sayyid Dan Syarifah (Studi Living Hadits Di Kampung Arab, Kademangan, Bondowoso)," *Al-Manar: Jurnal Kajian Alquran Dan Hadis* 7, no. 1 (November 4, 2021): 23, https://doi.org/10.35719/amn.v7i1.5.

[29] Habib Soleh, Interview, 2022.

decorate her hands and feet as customary for Arabs when they want to do a wedding. After that, both future groom and bride do self-care. At the night before the wedding ceremony begins, at the residence of the prospective wife, they hold a *burdahan* (reading the Prophet's *shalawat* together) which is attended by friends of the future wife to pray for the smoothness of the wedding ceremony and marriage life.

Ninth, the wedding ceremony is carried out, namely the marriage contract (*'aqd an-nikāh* or *ijab qabul*), which is only attended by Muslims and is carried out in the afternoon after the noon prayer. The prospective husband, accompanied by his family, is present at the future wife's residence to declare the marriage vow. Before the marriage contract declaration, there held a wedding sermon by reciting verses from the holy Quran. Declaration of marriage vow uses Arabic language in which the prospective husband holds the hand of his future father in law. After the *ijab qabul*, they are both legally husband and wife. It ends with reading prayers for the bride and groom and serving the invitees while the husband and wife meet and sit on the aisle.

Tenth, at night, the peak event arrives, namely, a wedding reception attended specifically for Muslim guests, filled with greetings, hospitality, and surprise events to entertain the invitees until the event is over.

The stages mentioned above have become a tradition; until now, it is still held firmly and carried out by the *habaib* in the marriage process. Thus, following the predetermined stages is considered a form of obedience and following the Sharia brought by the Prophet Muhammad.[30]

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The Impact of Endogamous Marriage Violation among the Prophet's Descendants at Bangil City

The marriage of a *syarifah* with a *sayyid* as a fellow descendant of the Prophet Muhammad is not a debate. However, *syarifah* weddings with non-*sayyid* or so-called exogamous emerge have different opinions. The first opinion thinks that a *syarifah* is prohibited from marrying non-*sayyid*. It belongs to the majority and is supported by many *habibs*, including Habib Idrus (a prominent *habib* in Bangil). Habib Idrus's opinion was based on the view of Mufti Tarim Sayyid Abdurrahman bin Muhammad bin Muhammad bin Husein Al-Masyur in the book of *Bugyatul Mustarsyidin* as follows: "I do not see

[30] Habib Ridho Baraqbah, Interview, 2022.

the permissibility of marriage (between *syarifah* and non-*sayyid*) even though she and her guardian are pleased with this matter. The glory of lineage should not be contaminated, and every close or distant relative has the right to the descendants of Fatimah Az-Zahra; that is the pleasure of what she is doing".[31]

The prohibition of exogamous marriage is mainly because assumption that the two are not equal. Most of the descendants of the Prophet Muhammad are relatively strong in maintaining their traditions, one of which is choosing a marriage partner from their inner circle. They tend to marry fellow descendants of the Prophet. However, it is common for *sayyid* to marry '*ajamī*' women. It has happened many times, and there is no debate over legal issues. However, even though this marriage did not cause a break in lineage because the child's line was related to their father, some of the *habaib* did not want to attend the wedding reception. Because according to them, this marriage is not equal because the *sayyid* must marry *syarifah*, not *ahwal*.[32] Meanwhile, if a *syarifah* marries a non-sayyid man, there will be a lot of debate and conflict because the child will be cut off (not considered anymore) as a descendant of the Prophet Muhammad. Therefore, *syarifah* maintains cross-generational traditions, especially among her descendants.

The second opinion says that a *syarifah* is allowed to marry an *ajam/ahwâl* (men out of *sayyids*). This is considered weak because most scholars think that *kafā'ah* is also found in lineages.[33] Only a few *habib* follow the second opinion. One of them who is *Habib* Hasan whose idea is as follows:

> *There is no difference between syarif (sayyid) and syarifah and ajam/ahwal people. All humans before Allah are equal, except for their piety to Allah. So differences in lineage, clan, education, and property will not be a problem in marriage between fellow Muslims because no one*

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[31] Sayyid Abdurrahman bin Muhammad bin Muhammad bin Husein Al-Masyur, *Bugyatul Mustarsyidin* (Kediri: PP Hidayah at-Thullab, 1995), 132.

[32] Habib Idrus, Interview, 2022.

[33] Abdurrahman Al-Juzairi, *Al-Fiqh `Ala al-Madzahib al-`Arba`ah*, 4 (Bairut: Dar al-Kutub al-Ilmiah, 2000), 732; Hafsa Pirzada, "Understanding the Divergences: The Legal Implications of Divergence Between Law and Culture," in *Islam, Culture, and Marriage Consent: Hanafi Jurisprudence and the Pashtun Context*, ed. Hafsa Pirzada (Cham: Springer International Publishing, 2022), 227–65, https://doi.org/10.1007/978-3-030-97251-6_8.

can guarantee that the marriage of a fellow syarif/syarifah will bring blessings to the marriage afterward.[34]

Based on the interview results above, the presence of *ridha* (willingness) and approval is an absolute requirement because kafā'ah is the right of the *syarifah* and her guardian. It means that if they agree to waive their rights (by not requiring *kafa'ah*), there is no problem. However, if they reject the proposal of the prospective husband and demand that there be *kafā'ah* in this account, the marriage will not take place.

Based on the interview result above, *ridha* (willingness) is an absolute requirement because the right of *kafā'ah* lies with the guardian of *syarifah*. If they agree to relinquish their rights, there is no problem. However, if they refuse futur husband's marriage proposal and continue to demand the existence of *kafā'ah* in this statement, the marriage will not occur.

A small number of *syarifah* groups marry non-*sayyid* men due to contamination or the influence of cultural trends on the pretext of human rights and gender equality. Another reason is educational and socio-economic factors. For *syarifah*, this was seen as not maintaining the traditions that already existed in her group. Indirectly he mus be prepared to take responsibility for all the risks he will receive. If a *syarifah* woman marries an ordinary man who is not from *habaib*, then her lineage will be cut off (her children are not considered *sayyid* or *syarifah*). It differs from men from the *habaib* circle; they are free to choose partners outside their community because kinship relations are still attached to the man (father), not the woman (mother).

The violation of endogamous marriages rule in *syarifah* gives psychological and sociological impacts.[35] The psychological impact that *syarifah* feels is discomfort after an exogamous marriage along with other sociological implications. This is clear from the interview result below:

The impact of syarifah marriage to non-habib is that her children would lose the hereditary lines. She would also be exiled from the family because she was not recognized as a family with the lineage of Muhammad saw

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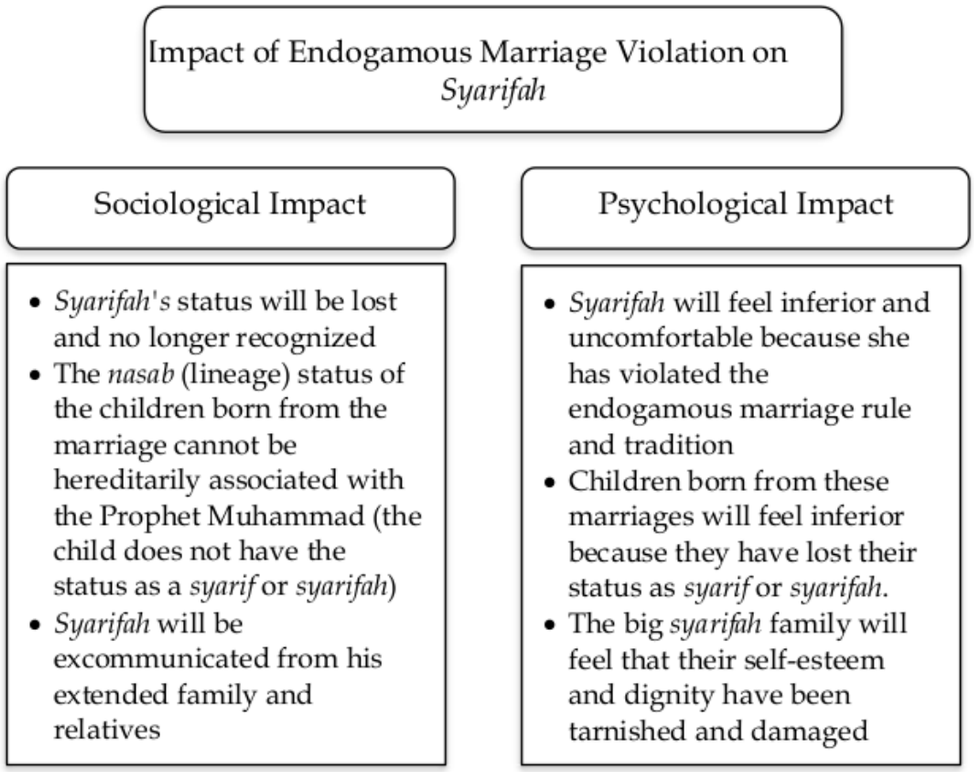
[34] Habib Hasan, Intervie 2022.

[35] Fahmi Ridlol Uyun, "Perkawinan Endogamy Bagi Syarifah Perspektif Sosiologis Dan Maqashid Syari'ah (Study Kasus: Adat Perkawinan Endogamy Di Kampung Arab Kelurahan Kademangan Bondowoso)," *IJIL: Indonesian Journal of Islamic Law* 1, no. 2 (August 26, 2019): 1–15.

anymore. She was even considered to have cut off kinship relations, so they did not reach the Messenger of Allah hereditarily.[36]

The interview result shows that once the *syarifah* violates the marriage tradition, she would be ostracized by her extended family and relatives. A *sayyid* even said that there is not even the most effective medicine as an antidote to the pain caused by insulting the pride of the family whose daughter violated this tradition. The *syarifah* will lose kinship with her family indefinitely because breaking the *kafā'ah* tradition is deemed violation that tarnishes her family's dignity at most. It can be said that there is nothing more valuable to protect *sayyid-syarifah*'s extended family in this world other than maintaining the tradition of endogamous marriage. [37]

The violation impacts of endogamous marriage among *syarifah* can be clearly seen in the Figure 2 below.



[36] Habib Zahir, Interview, 2022.

[37] Dewi Ulya Rifqiyati, "Dinamika Perkawinan Endogami Pada Keturunan Arab Di Yogyakarta," *Khuluqiyya: Jurnal Kajian Hukum Dan Studi Islam* 2, no. 1 (January 29, 2020): 25–44, https://doi.org/10.56593/khuluqiyya.v2i1.38.

Figure 2. The impact of endogamous marriage violation on *syarifah*

Figure 2 shows that there is an impact that will received by *syarifah* both sociologically and psychologically due to endogamous marriage, which has become a tradition in her community. The same thing happened among *syarifahs* in other cities, not only in Bangil. The results of the interviews reinforce this:

> *My aunt married ahwal, and as a result, our extended family ostracized her. Actually, this punishment also occurs in other areas.*[38]

This sanction is indeed given to all *syarifah* who violate the provisions of endogamous marriages. Endogamous marriage rules are made to keep the lineage continuing with the Prophet Muhammad. To maintain endogamous marriage tradition, they form groups or communities of fellow descendants of the Prophet Muhammad to strengthen kinship and find a mate for their children. The women usually undertake an *arisan* (regular social gathering) that consists of *syarifah*(s) whose initial aim was to strengthen kinship ties among their inner group. Meanwhile, young *syarifah* usually gather to conduct Qur'anic recitation activities and discuss religious issue, let alone endogamous marriage theme. With the rapid development of the times and modernization everywhere, the *habib* community, especially in Indonesia, tries not to be collapsed by the current modernity. The tradition of endogamous marriage is maintained in their way.[39]

Endogamous Marriage of Prophet's Descendants on Sociological Islamic Law Perspective

Equality or *kafā'ah*, especially in the case of marriage, has a powerful binding force on *syarifah*. *Syarifah* is not said to be equal with her spouse if she marries to non-*sayyid*. For them, impelementing this principle of *kafā'ah* in a marriage is not deemed at discriminating between one Muslim and another, but protecting the future wife and her family from 'shame' in their inner circle because of being juxtaposed with a husband who is deemed unequal. Regarding with *maqāsid ash-Syarî'ah*, this marriage prohibition

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[38] Syarifah Rahmah, Interview, 2022.

[39] Jihan Suroyyah, "Pernikahan Campuran Dalam Komunitas Arab (Studi Tentang Penerimaan Keluarga Perempuan Arab Terhadap Pernikahan Campuran Di Sepanjang)" (skripsi, UNIVERSITAS AIRLANGGA, 2015), http://www.lib.unair.ac.id.

contains *maslāhat*, namely maintaining offspring (*hifzu an-nasal*).[40] The stipulation of such equality in this marriage should be responded wisely and responsibly so that the principle of *kafā'ah* in lineage can bring benefits while building a household.[41]

The majority of *syarifah* agree with endogamous marriage on the basis that equality in the lineage is fundamental because it is a part of preserving effort on the descendants of the Prophet Muhammad. Most scholars also argue that *kafā'ah* is a legal requirement for marriage. *Kafā'ah* will minimize the potential for quarrels and conflict in the family.[42] The results of interview also reinforces this data.

> *In judging something, when differences of opinion is found among the scholars, then it is better to follow the idea of most scholars. In endogamous marriages, the most potent argument of many Islamic scholars supports it. The legal basis is also clear which leads to the concept of kafā'ah*.[43]

Meanwhile, groups that disagree with endogamous marriage argue that *kafā'ah* is not required for a legal marriage. *Kafā'ah* is a right that belongs to a *syarifah* and her guardian, so they may choose whether to fulfil it or not. The results of other interviews strengthen this data.

> *Kafā'ah is a right, not an obligation. If the guardian and syarifah want to accept* ahwal *as her husband, then the marriage is considered valid because the terms and pillars of marriage have been fulfilled*.[44]

For more details, the response to this sort of exogamous marriage of *syarifah* is showed on table 1 below:

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[40] Haya Zabidi and Rifky Noor, "Tinjauan Maqasid Asy-Syari`Ah Asy-Syatibi Terhadap Larangan Perkawinan Syarifah Dengan Laki-Laki Non Sayyid," *Syariah Darussalam : Jurnal Ilmiah Kesyariahan Dan Sosial Masyarakat* 5, no. 1 (January 9, 2020), https://doi.org/10.58791/sydrs.v5i1.101.

[41] Said Syaripuddin and Andi Banna, "Kafa'ah Nasab Sebagai Syarat Utama Bagi Pernikahan Wanita Syarifah Di Kecamatan Lau," *Al-Tafaqquh: Journal of Islamic Law* 3, no. 2 (July 31, 2022): 73–87, https://doi.org/10.33096/altafaqquh.v3i2.171.

[42] Syarifah Umi Kulsum, Interview, 2022.

[43] Habib Muhammad Bin Tohir, Interview, 2022.

[44] Syarifah Maiymunah, Interview, 2022.

Table 1. The Respond of *Syarifah's* Marriage with Non-*Sayyid*.

No	The Respond	Explanation
1	Total Rejection	This group categorically rejects *Syarifah's* marriage to *ahwal*. This group believes that *kafā'ah* is a requirement for a valid marriage, including in the context of lineage. This group follows the view expressed by the majority of scholars.
2	Allowing with Conditions	This group does not entirely reject *Syarifah's* marriage with *ahwal* on condition that the guardian and his family do not dispute the marriage. This group believes that *kafā'ah* is a right that belongs to the *syarifah* and the bride's guardian. This opinion is also the opinion of some Muslim scholars.[45]

The table 1 shows that the internal rule among prophet's descendants has become a distinct social phenomenon where marriage, in the view of society in general, is allowed to with anyone in terms of religion and ceremonial law. Nevertheless, a *syarifah* woman can only marry to a *sayyid* according to their inner belief held from generation to generation. Therefore, this rule has become the culture among prophet's descendants in determining their daughter's spouse. The Prophet descendant's community still holds firmly to the sacredness and existence of this rule due to the effort to maintain lineage. It is apparent and firmly embedded in their everyday social and cultural life. One of them is their effort to maintain the marriage pattern through the selection of a future spouse through the system they believe in and use since their ancestors. This type of marriage is therefore an agreement influenced by culture, daily social life, and

[45] Imam Syafi'i, "Konsep Kafaah Dan Keluarga Sakinah (Studi Analisis Tentang Korelasi Hak Kafa'ah Terhadap Pembentukan Keluarga Sakinah)," *Asy-Syari'ah: Jurnal Hukum Islam* 6, no. 1 (2020): 31–48.

especially beliefs which are the primary basis for the existence of their community.[46]

According to Sayyid Alwi, *Kafā'ah* for *syarifah* is obligatory. He said that no one is equal (*kufu'*) with the descendants of Sayyidah Fatimah except for the Hasyim clan. Sayyid Alwi revealed that their daughter (*syarifah*) must marry their son (*sayyid/syarif*). Based on the opinion or views of Rabithah Alawiyyah, it is clear that the Alawiy family carries out the basic implementation of *kafā'ah*, which must be exemplified by the Prophet Muhammad saw in marrying his daughter Fatimah to Ali bin Abi Talib. Such rules out that some of the Prophet's daughters did not marry into the Hasyim clan.[47]

Based on the hadith when the Prophet married his daughter to Ali, there should be no more opposition or rejection of *syarifah's* endogamous marriage. However, some people still question the legal standing of this endogamous marriage because some of the Prophet's daughters do not marry the Hasyim clan. Therefore, some people from the *habaib* community disagree or reject endogamous marriage's necessity.

On the contrary, there are several reasons why these *syarifahs* accept endogamous marriage. Most of them live or are in the environment of the *Alawiyyin* family group; they can indirectly understand and accept endogamous marriages. The pattern of religious education coming from internal families, especially parents who teach and ensure that endogamous marriage becomes tradition that should neither be omited nor violated, also matters. External influences, such as fellow relatives and friends, continue to educate and support the strength of endogamous marriages. Respect for parents and close relatives make them reluctant to violate the rule. The result of another interview reinforces this;

> *Family, relatives and friends of syarifah play an important role in instilling the noble value that they always protect the lineage of the Prophet Muhammad so that it does not break. An explanation about the*

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[46] Abd Asis, "Pola Perkawinan Islam Alawiyyin Di Kabupaten Maros," *Gema Kampus IISIP YAPIS Biak* 12, no. 2 (October 30, 2017): 74–80, https://doi.org/10.52049/gemakampus.v12i2.46.

[47] Mustika Sari Wulandari et al., "Cucu Nabi Muhammad Menikah dengan Orang Makassar : Studi Pernikahan Perempuan Islam Sayyid di Cabang, Takalar," *Jurnal Tamaddun: Jurnal Sejarah dan Kebudayaan Islam* 7, no. 2 (2019), https://doi.org/10.24235/tamaddun.v7i2.5499.

importance of protecting lineage must be conveyed frequently, so it sticks in the heart of the syarifah.[48]

Meanwhile, according to informants, those who reject endogamous marriage have several causes. *Firstly,* the pattern of settlement or residence which is scattered and not settled in the *Alawiyyin* community. *Second*, being influenced by modern westernized education. *Third,* lack of socialization or teaching about the values of marriage from the family, especially parents. *Fourth,* there is less external influence, especially from the *Alawiyyin* study center institution which routinely provides education through social media and other activities related to the development of the *Alawiyyin* family, especially for younger generation. The results of these following interviews reinforce the following data.

Syarifah, who is married ahwal, usually has minimal religious knowledge and is influenced by modern westernized education. The essential religion and teachings of the Alawiyin *ancestors were not firmly entrenched in her heart, so she was easily influenced by the currents of modern thought.*[49]

Gatherings among syarifahs are significant for transferring religious knowledge, especially marriage knowledge and chapter kafā'ah. *One of the reasons why Syarifah dares to marry* ahwal *is because of the wrong association. Syarifah rarely associates with fellow syarifahs and the* habib *community. Instead, they associate a lot with modern society which promotes freedom in marriage.*[50]

Those who reject the internal rules in *Alawiyyin* use the argument of verse al-Hujarat: 13. They believe that clan matters are crucial, but the Quran and Hadith exemplify that the quality of a servant is not measured by his lineage but by his piety and deeds.[51] The verse states so:

إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُم

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[48] Syarifah Barsiyah, Interview, 2022.

[49] Barsiyah, Interview, 2022.

[50] Ilyn Tohir, Interview, 2022.

[51] Abu Yazid Adnan Quthny and Ahmad Muzakki, "Urgensi Nasab Dalam Islam Dan Silsilah Nasab Habaib Di Indonesia," *Asy-Syari'ah : Jurnal Hukum Islam* 7, no. 2 (June 25, 2021): 131–51, https://doi.org/10.55210/assyariah.v7i2.592.

"Indeed, the most noble of you in the sight of Allah is the most righteous of you"

They furthermore argue that *kafa'ah* is only in religion, not in descent matters, so it is permissible to marry someone who is not *habaib*. The following hadith of the Prophet also reinforces this opinion.

إِذَا خَطَبَ إِلَيْكُمْ مَنْ تَرْضَوْنَ دِيْنَهُ وَخُلُقَهُ فَزَوِّجُوْهُ، إِلاَّ تَفْعَلُوا تَكُنْ فِتْنَةٌ فِي الْأَرْضِ وَفَسَادٌ عَرِيْضٌ

When someone comes to you whom you can accept his religion and morals (to marry your daughter), then marry him (to your daughter). Because if it is not done, it will become slander on Earth and become severe damage (HR. Tirmidzi).[52]

The following interview result strengthened the Quranic verse above;

I agree that the barometer of kafā'ah is only in faith and piety. The measure of a person's quality is not in his lineage but in his faith and piety. So what is more appropriate is that a syarifah may marry an ahwal; the important thing is that the ahwal has faith and fears to Allah. In addition, the marriage must obtain the consent of both parents. The parents' blessing is essential so that the marriage can be blessed.[53]

The data above implies that *syarifah*'s endogamous marriage in Bangil is not entirely accepted by *syarifah* herself. Some *syarifah*(s) disapprove of this type of marriage. To find out the reasons for accepting or rejecting endogamous marriage, see table 2 below.

Table 2.
Reasons for Accepting or Rejecting Endogamous Marriage for the Descendants of the Prophet in Bangil

No	Aspect	Reason for Receiving	Reason for Rejecting
1	Community	*Syarifah* lives in the community of *Alawiyyin* family groups, so they can indirectly understand and accept the endogamous marriage.	*Syarifah* does not live in the *Alawiyyin* community and gets a modern education then prioritize exogamous marriage.
2	Education	Religious education	*Syarifah* lacks education,

[52] Muhammad bin Isa bin Saurah At-Tirmizi, *Al-Jami' as-Sahih Sunan at-Tirmizi*, 3 (Bairut: Dar Ihya' at-Turas al-Arabii, 1997), 394.

[53] Rahmah, Interview.

		from parents who teach endogamous marriage as a tradition that should not be violated	socialization and support from her family regarding the importance of endogamous marriage
3	Friendship	The influence of relatives and friends who continue to provide education and support to maintain endogamous marriages	*Syarifah* was influenced by the opinion of her friends who believed that the measure of a servant's quality is not measured by lineage, but by piety and deeds.
4	Respecting	Respect for parents and close relatives	*Syarifah* does not respect her parents and relatives while believing that the concept of *kafā'ah* exists only in matters of religion, not in matters of heredity.

Table 2 shows that there are four factors related to the reasons for *syarifah* to accept or reject endogamous marriage, namely (1) the surrounding community factor, (2) the education factor, (3) the friend factor, and (4) the obedience factor. However, it is known that most of *syarifah* follow the internal rules of endogamous marriage as shown by the following interview result:

> *Breaking the rules of endogamous marriage is no more than ten percents. Sometimes these violations occur due to ignorance that in religion, a syarifah is required to marry equals, that is, both of the prophet's descendants, so that the lineage of their children is maintained.*[54]

Most *habib* also support and adhere to this internal rule. The regulations of endogamous marriage profoundly impact Muslim society in general. This is because it provides certainty and clarity to the descendants of the Prophet Muhammad so that the Muslim community, in general, will more easily recognize and glorify the descendants of this Prophet Muhammad.

[54] Baraqbah, Interview.

Conclusion

Endogamous marriages among the Prophet Muhammad's descendants aimed to preserve and maintain the lineage. Based on the results of interviews with leading *habibs* and scholars, it can be concluded that most *habibs* prohibit *syarifah* from marrying non-*sayyids* because they are not equal, as stated by the majority of *syafi'iyah* scholars. They argued that *syarifah's* marriage to a non-*sayyid* would cut off the genealogy that continued with the Prophet Muhammad. However, if a *habib* or *sayyid* marries an *ahwal* or non-*syarifah*, then the law may and will not interrupt the genealogy of the Prophet Muhammad because the genealogy will flow from the father's line. For this reason, *kafā'ah* considerations between *syarifah* and *sayyid* must be well maintained across generations. This tradition, in particular, only applies to *syarifah*, because *sayyid* is still allowed to marry women who are not descendants of Muhammad. Consequently, if *syarifah* marries an *ahwal*, her children's lineage from that marriage will be cut off from the Prophet Muhammad, along with other sociological and psychological sanctions. However, these sanctions are only for prevention and security, so they do not violate the rules.

This study is limited to analyzing only one object of study, so it does not provide comprehensive insights into *syarifah* endogamous marriage in a broader locus, mainly in studying gender equality and women's emancipation. A wise thought is needed to maintain women's rights to marry if *syarifah* does not find a fiancé from *habib* or *sayyid*. The rights of the *syarifah* should not be taken away by gender inequality so that they find it challenging to make their own life choices.

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Harmony of religion and culture: fiqh munākahat perspective on the Gayo marriage custom

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Harmony of religion and culture: *fiqh munākahat* perspective on the Gayo marriage custom

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This study aimed to describe the established harmony between religion and culture within the traditional Gayo marriage custom. In addition, it determined whether the blending of religion and culture in traditional Gayo marriages adheres to fiqh munākahat. This study was descriptive and qualitative field research using the sociological juridical approach. Interviews and documentation were used as data collection methods. Meanwhile, to identify informants, researchers employed a purposive sampling technique. The important finding of this study was that in traditional Gayo marriages, religion and culture are harmonized appropriately and without coercion. The acculturation of fiqh munākahat evidences harmonization: ta'aruf (introduction), khitbah (proposal), marriage advice, discussions, i'lanu nikah (marriage announcement), and hospitality. The acculturation of the fiqh munākahat concept is found in the procession of the risik kono (introduction of the bride and groom's family), the munginte (proposal), the beguru (giving advice), the betelah (discussion), the segenap and begenap (discussion and family), the mah bai (accompanying the groom) and mah beru (accompanying the bride), mah kero opat ingi (carrying rice for four days) and tanag kul (a visit to the bride's house). Moreover, only two of the five Gayonese marriage customs adhere to the fiqh munākahat: ango/juelen (patrilineal) and kuso now (to and fro) marriages. In contrast, engagement marriages (matrilineal), Naik (eloping) and mah tabak (marriage submission) are not in line with fiqh munākahat.

Penelitian ini bertujuan untuk mendeskripsikan harmoni antara agama dan budaya yang terdapat pada tradisi perkawinan adat suku Gayo yang selama ini sudah terjalin. Selain itu, penelitian ini bertujuan untuk mengetahui apakah harmonisasi agama dan budaya dalam perkawinan adat suku Gayo sudah sesuai dengan ketentuan *fiqh munākahat*. Studi ini merupakan penelitian lapangan yang bersifat deskriptif kualitatif. Teknik pengumpulan data yang digunakan adalah wawancara dan dokumentasi. Dalam penentuan informan, peneliti mengunakan teknik *purposive sampling*. Sedangkan pendekatan yang digunakan dalam penelitian ini adalah yuridis sosiologis. Temuan penting dalam penelitian ini adalah proses harmonisasi agama dan budaya dalam perkawinan adat suku Gayo terjadi dengan baik dan tanpa paksaan. Harmonisasi ini terlihat dengan adanya akulturasi konsep *fiqh munākahat*: *ta'āruf* (perkenalan), *khiṭbah* (tunangan), nasehat perkawinan, musyawarah, *i'lānu nikāh* (pengumuman nikah) dan silaturahmi. Akulturasi konsep *fiqh munākahat* ini terdapat pada prosesi adat *risik kono* (perkenalan keluarga calon pengantin), adat *munginte* (peminangan), adat *beguru* (pemberian nasehat), adat *betelah* (bermusyawarah), adat *segenap* dan *begenap* (bermusyawarah dan keluarga), adat *mah bai* (mengantar pengantin laki-laki) dan *mah beru* (mengantar pengantin wanita), adat *mah kero opat ingi* (membawa nasi empat hari) dan *tanag kul* (kunjungan kerumah pengantin wanita). Temuan selanjutnya adalah dari lima bentuk perkawinan adat suku Gayo, hanya dua yang sesuai dengan *fiqh munākahat*: perkawinan *ango/ juelen* (patrilineal) dan *kuso kini* (nikah kesana kemari), sedangkan perkawinan *angkap* (matrilineal), *naik* (kawin lari) dan *mah tabak* (kawin penyerahan diri) tidak sejalan dengan *fiqh munākahat*.

Keywords: *Culture; customary marriage; harmony; gayo tribe religion.*

Introduction

Gayo is one of the tribes in Aceh province whose customs and culture are unique and distinct from those of other tribes (Mustafa and Amri, 2017). The majority of its members is Muslims. According to Mahmud Ibrahim, the Gayo is incredibly devoted to Islam, and their customs and culture conform to Islamic teachings (Abdi, 2019). The Gayo tribe still adheres to sacred customs and traditions, such as traditional wedding ceremonies, passed down from generation to generation. In terms of marriage, the Gayo people have distinctive characteristics and practices. Gayo's traditional wedding ceremony is called *sinte mungerje* (traditional wedding ceremony). This wedding ceremony cannot be separated from its deeply symbolic traditional elements. For instance, when proposing, the groom's family typically brings betel nut, areca nut, and other paraphernalia to symbolize wealth and honor (Fathanah et al., 2020). It is according to the interview results, "*We, the Gayo people, adhere to the traditions inherited by our ancestors. Marriage in the Gayo tribe is carried out according to custom. A series of traditional processions has its own aims and objectives*" (Bahri, 2022).

This tradition in Traditional Gayo marriages has been carried out from generation to generation and continues to exist today. This tradition occasionally takes the form of reciprocated pantun traditions (reciprocating rhymes), *sebuku* (crying interspersed with humming words), *beguru* (learning) and other forms of tradition. This tradition is in line with Islamic religious teachings, as the advice in the customary series consists of advice for prospective brides and grooms on how to avoid conflict and always live in harmony in the home (Apriana and Ikhwan, 2020).

In fact, numerous researchers have analised this traditional Gayo marriage. One of them is Pertiwi (2017), who investigated the manners in the wedding speeches of the Gayo tribe in the Lues district. This study employs a qualitative descriptive method of research. The results of this study are language politeness in Gayo traditional weddings in the form of poetry. Ocktarizka subsequently researched "*Customary values in the sebuku ritual in the marriage procession of the Gayo tribe in the Central Aceh district.*" This study employs a qualitative, descriptive methodology. According to the study, *sebuku* (crying interspersed with humming) represents the courtesy of a person who adheres to customary provisions to avoid *sumang* (taboo behavior) (Ocktarizka, 2021).

There are many studies on Gayo tribal marriages, but this research is only about traditional rituals or processions that are studied and analyzed. No research has ever been conducted on the harmony of religion and culture in Gayo traditional marriages. This research is significant to know that the harmonization process aligns with and adheres to the *fiqh munākahat*. The novelty in this research is expected to preserve the good local customs and cultural values in accordance with Islamic law.

Method

Data of the research are conducted by interview and documents. In this study, religious leaders, traditional leaders, community leaders, and Gayo tribe members served as informants. Researchers used a purposive sampling technique to identify informants, intending to obtain more precise and relevant data. This study employed a sociological juridical approach because it examined a social reality of a legal perspective (Huda, 2022). The approach discovers and describes facts about the harmony of religion and culture in Traditional Gayo marriages analyzed using the *fiqh munākahat* theory. The technique for data analysis was executed in stages: reduction, presentation, and conclusion (Miles and Huberman, 2014). At the same time, the data validity technique was source triangulation (Moleong, 2018).

Researchers used the conceptual framework of *Fiqh Munākahat* to comprehend the harmony between religion and culture in Gayo tribal marriages. *Fiqh Munākahat* regulates Muslim marriages; it includes the pillars and conditions of marriage, *khiṭbah, walimah al-urs*, dowry, maintenance, and other related matters to marriage in Islam (Yahya et al., 2021; Sanusi *et al.*, 2022). The scope of fiqh is broad, and researchers use only a portion of it as a tool for data analysis. Etymologically marriage means getting together and having intercourse. While in terminology, marriage is a contract that authorizes sexual relations with the word *inkaha* or *tazwīja* (Subarman, 2013; Supraptiningsih, 2021). Marriage is valid if the conditions and pillars are met (Caniago, 2016; Ali, 2002). There are five pillars of marriage: the prospective husband, the prospective wife, the guardian, two witnesses, and the solemnization of marriage (Khairani and Sari, 2017; Subeitan, 2022). While the conditions for marriage are Islam, there is no *mahrom* (blood relationship), no ihram, dowry,

and willingness (not forced) (Samad, 2017; Lathifah, 2020). Before the realization of marriage, Islam provides opportunities for the bride and groom to understand each other and become acquainted with each other's personalities before marriage. The objective of *ta'ruf* is to recognise one another's personality, religion, family, social background, and habits.

After the *ta'ruf* process has determined that a prospective husband and wife are compatible, the next step is the *khiṭbah* (Hamdi, 2017; Lonthor and Jamaa, 2020). *Khitbah* etymologically means to propose. According to Asy-Syarbiny, *khiṭbah* is a man's request to a woman for marrying him (cited in Sadan and Afandi, 2017; Muslimin, 2019). The next stage after the *khiṭbah* is the marriage contract procession and *walimah al-urs* (wedding party). The wedding party has become an integral and inseparable part of the marriage contract process (Hilmy and Utami, 2021; Abubakar, Nurlaelawati and Wahib, 2022). Imam Syafi'i emphasizes it as *sunnah muākadah* (highly recommended) (Akmal, 2019).

Profile of the Gayo tribe

The Gayo tribe inhabits the Aceh province highlands, which are commonly referred to as the Gayo highlands. The area includes the districts of Central Aceh, Benefest, Gayo Lues, Gayo Serbejadi (a portion of East Aceh district), Gayo Alas (Southeast Aceh district), and Gayo Kalul (part of Aceh Tamiang district). In Aceh, the Gayo people's region is known as the land of Gayo. (Eades and Hajek, 2006). In terms of language, customs, and culture, the Gayo tribe has its own distinctiveness and characteristics. Islam and the customary laws and regulations of the Gayo tribe have many similarities and are compatible. The Gayo tribe's customary laws and regulations have much in common and are in harmony with the Islamic religion (Zain, Fauzi and Muttaqin, 2021). This result is consistent with the interview data *"Customs and sharia are like a areca nut split in two. Our traditions stand firm because they are supported by Islamic sharia"* (Andini, 2022).

The Gayo refer to themselves as Gayonese, not Acehnese, because the culture of the Gayo tribe is distinct from that of the general Acehnese population. However, since Islamic teachings was recognised and spreading throughout Aceh, the Acehnese tribes coexisted and cultural fusion occurred due to Islamic teachings' acculturation (Arfiansyah,

2020; Iswanto, Haikal and Ramazan Ramazan, 2019). Given that the Gayo tribe has deep historical roots, it is natural that their traditions and culture are deeply ingrained in society. Although initially, many Gayo did not adhere to Islamic teachings, it eventually became the foundation of Gayo culture. The relationship between religion and culture is harmonious. The sacred values of the Gayo tradition adhere to several Islamic religious doctrines and beliefs (Ocktarizka, 2021).

Procession of Gayo traditional marriage

Traditional Gayo marriages are known as *kerje* or *mungerje*. This customary marriage has much in common with marriage in Islam. Typically, when looking for a mate, the Gayo tribe prefers a partner from a different village. Mutia (2022) recounts *"we are prohibited from marrying the same person from our village. If looking for a partner, both husband and wife must be in the village. If someone violates these customary rules, they will be subject to customary sanctions"*. The positive philosophy underlying this pattern of marriage prohibition is that the larger the family and the family that becomes related (due to different villages), the stronger the bonds of friendship and brotherhood.

The Gayo traditional wedding ceremony has several rituals divided into four stages.,First, the beginning stage consists of 4 parts: *kusik* (talking between parents to find a partner for their child), *sisu* (whispering/delivering the results of the parents' discussion about searching for their child's partner to the family), *pakok* (a request for the child's willingness to find a partner), and *peden* (negotiations about women who will be future wives). Second, the preparation stage is divided into four parts: *risik* (investigation into the prospective wife's family), *rese* (visiting the prospective wife's family), *kono* (handover), and *kinte* (proposal). Third, the implementation stage which is divided into four parts, which are *berguru* (giving advice), *nyerah* (handing over responsibility), *bejege* (staying up late), and *mah bai* (accompanying husband). Fourth, the completion stage which is divided into five parts is *mah beru* (taking the wife), *serit benang* (winding the thread), *kero selpah* (souvenirs), *tanag kul* (a visit to the bride's house), and *entong ralik* (a visit to the parents' house) (Chalid and Kasbi, 2021).

Forms of Gayo traditional marriage

In the Gayo community, there are five types of marriage: *ango or jeulen* (patrilineal), *angkap* (matrilineal), *kuso kini* (to and fro marriage), *Naik* (eloping), and *mah tabak* (submission). *Ango or juelen* is a type of original marriage in Gayo tribal society. In this type of marriage, the bride is brought to the husband's *belah* (clan). The wife and children from this union will bear the husband's surname (Ramadhani, 2017). Teiga (2022) states "w*hen my sister got married, her children all entered include her husband's surname"* (Teuga, 2022).

Juelen marriages are often called as *kerje berunyuk* (dowry marriages), because the prospective wife's parents receive the *unyuk* (dowry). *Juelen* marriages are patrilineal, which means marriages that follow the lineage from the father's side (Nofiardi and Rozi, 2017). The purpose of this *juelen* is to prevent inbreeding. *Juelen's* marital status is more challenging for her future husband because he has to fulfill the edet (traditional) requirements. The basis of this edet rule is *riḍo bisyai'in riḍo bima yatawaladu minhu* (to be willing with something means to be willing with its consequences) (Azizi, Imron and Heradhyaksa, 2020)which is considered as a progressive and responsive measure to guarantee children's rights. However, the content of this decision is considered to violate Islamic norms in giving family lineage to extramarital children for it will create a stigma that one does not need a sacred marriage institution if he only wants to establish a civil or lineage relationship with his biological father; instead, it only requires evidence based on science and technology or others in court. This article answers the questions of how to interpret the concept of the civil rights of extramarital children to avoid conflicts with Islamic norms and what are the philosophical and sociological benefits of fulfilling civil rights for extramarital children. This study is qualitative in nature. It is focused more on conceptual ideas based on library research using conceptual and case approaches. It was found that (1. The point is that if you want to hold a marriage with the *juelen* model, you have to be willing to accept the consequences of *edet* (traditional rules).

The next customary marriage is *angkap* marriage. It is a form of marriage with a matrilineal system, where the husband will be brought to the wife's clan. The husband and children born from this marriage will use his wife's last name. Tiro (2022) states *"sometimes men from the Gayo tribe when married join their wife's clan. Children born from this marriage also follow the wife's surname"* (Tiro, 2022). The *angkap* marriage is the same as the *japuik* (picking-up) marriage in Minangkabau

(Nofiardi, 2018)hal ini terlihat ketika proses mencari jodoh, penjajakan pertama, peminangan, dan sampai pelaksanaan pesta. Setelah akad nikah, suami dijemput secara adat untuk tinggal di rumah isterinya, meskipun ia bukan orang Minang. Konsekuensi seperti ini, suami ibarat abu di atas tunggul yang mudah terbang ketika angin kencang datang. Ketika terjadi perselisihan dan pertengkaran yang sulit dicarikan jalan keluar dengan isterinya, maka kemungkinan ia meninggalkan isterinya yang disebut dengan baganyi, dan bila tidak diselesaikan bisa berujung kepada perceraian. Tidak jelasnya status isteri (digantung tidak bertali.

The next traditional marriage is *kuso kini* (to and fro). *Kuso kini* is a more realistic marriage, because husband and wife are given the freedom to choose a place for living in which clan they want. Saputra (2022) states *"Kuso kini is the most popular traditional marriage among young people today. Many couples marry Kuso kini. The reason is that Kuso kini marriage minimizes family conflicts in the future. Freedom to choose the clan or where to live become the main attraction of this type of traditional marriage"*. Kuso marriages are now more flexible and different from *anggo* and *angkap* marriages which are more rigid and always keep the clan (Suhartini and Sabekti, 2019). The next customary marriage is *naik*. *Naik* is a form of marriage that occurs when a man runs away with a girl to become his life partner. Ismail (2022) states *"the Gayo tribe really avoids marrying up. In fact, this marriage is a disgrace to the woman's family. The marriage is not normal because the woman is taken away by her future husband"*. *Naik* marriages (eloping) usually occur because the woman's family does not like the man, or the man cannot provide the dowry as requested by the woman's family (Ramadhani, 2017).

The next traditional marriage is *mah tabak*. It is a form of marriage that occurs because a man surrenders himself to the woman's family to be married off, and if he is not married, it is better for him to be killed. (Tiro, 2022) states *"young people from the Gayo tribe can act recklessly. As long as rejection of love only comes from the woman's family, not from the woman he loves, then he will be desperate to come to the woman's family with tabak. If his good intentions are still rejected, it is better for him to be killed"*. *Tabak* is a tool shaped like a pan, round and flat. *Tabak* has a symbol where when the intention of his arrival to ask for marriage with the woman's family is not approved, it is better for him to be killed (Ramadhani, 2017).

The forms of traditional Gayo marriage that have been carried out for generations can be seen clearly in the table below,

Table 1.

Forms of Gayo Traditional Marriage

No.	Forms of Marriage	Illustrations
1	*Ango* or *Juelen*	A form of marriage with a patrilineal system, where the wife is brought to the husband's clan. The wife and children born from this marriage will use her husband's last name.
2	*Angkap*	A form of marriage with a matrilineal system, where the husband will be brought to the wife's clan. The husband and children born from this marriage will use his wife's last name.
3	*Kuso Kini*	A form of marriage that gives freedom to a husband or wife to choose a clan
4	*Naik*	A form of marriage that occurs when a man runs away with a girl to become his life partner.
5	*Mah tabak*	A form of marriage that occurs because a man surrenders himself to a woman's family to be married off, and if he is not married then it is better for him to be killed

Source: Researcher's interpretation

The five forms of marriage for the Gayo tribe, only two are under *munākahat fiqh*: *ango* or *juelen* and *kuso kini* marriages. Marriage in Islam adheres to a patrilineal path, where the child's lineage will follow the father, not the mother, as in a dual marriage. *Kuso kini* marriage is in line with *munakahat fiqh* because Islam has never forced a husband and wife to live in a certain place. The rising and *mah tabak* marriages are not in line with the *fiqh munākahat* because there is an element of coercion in both marriages. The element of coercion in marriage is strictly prohibited because it will be difficult to create a *sakinah mawādah warahmah* family.

Harmonization of religion and culture in Gayo traditional marriage

The process of harmonization of religion and culture in traditional Gayo marriages can be seen in the acculturation of Islamic values in traditional marriages. This acculturation can be seen from before the marriage ceremony took place. The first Islamic values that were acculturated in Gayo marriages were *ta'āruf*. *Ta'āruf* is a means for serious men and women to get to know each other or introduce themselves to each other to establish a legal marriage (Akbar, 2015). The acculturation of *ta'āruf* can be seen in the procession of the

risik kono tradition. This tradition is an event to introduce oneself and family to the bride and groom (Ramadhani, 2017). (Salim, 2022) states *"the procession of the risik kono tradition is a means of finding and choosing the right life partner. This custom is a starting point for exploring the union of two large families in the marriage of their children".*

The *risik kono* tradition functions as a medium or intermediary to choose and determine a potential life partner. This customary term in Gayo proverbs is *"mrahi belang si gere ilen mupancang, marahi utn si gere ilen betene*" (looking for uncultivated fields, looking for unmarked forests). In Gayo custom, there are three possibilities for a person to choose a life partner; own choice, parental choice, or through *ta'āruf* (Bakti, Amin and Fakhrurrazi, 2020). The next Islamic values that are acculturated to the customs of the Gayo tribe are *khiṭbah*. The acculturation of the *khiṭbah* occurs in *munginte* (proposal). In this event, the prospective bride and groom's family comes with money, rice, needles, betel pods complete with contents, and thread. (Teuga, 2022) states *"The munginte custom is a continuation of the risik kono custom. After carrying out the risik kono custom, the next stage is the application or munginte custom. In this procession, families usually bring gifts or souvenirs such as rice, needles, thread, and money".*

This souvenir is a symbol of binding for the woman's family, hence she does not accept any more proposals from other parties. The woman's family will answer acceptance or rejection after three days, usually, if the proposal is accepted, then the gift or souvenir is accepted and not returned. Meanwhile, if the proposal is rejected, then the gift or souvenir will be returned to the man who proposed (Ramadhani, 2017). The next acculturated Islamic values are marriage advice. Acculturation of marriage advice occurs in the *beguru* custom. *Beguru* custom means giving advice, where the two bride and groom will be given advice about household affairs. The purpose of the *beguru* custom is to prepare the mentality and character of the bride and groom so that they can build a household that is *sākinah, mawādah, warāhmah*.

(Abdurrohim, 2022) states *"the beguru tradition is very important in Gayo tribal marriages. Beguru is a medium for transferring religious knowledge that prospective husband and wife must master. Both are required to understand their respective roles, rights and obligations as husband or wife*". The *beguru* event is usually held at the bride's house and is accompanied by a mourning event (wailing) by the bride; This event of lamentation contains sad words for leaving the family to go to a

new place. This beguru event also includes thanks to the extended family, especially the two parents who have educated and loved them wholeheartedly (Ramadhani, 2017).

The next acculturated Islamic values are discussion. Discussion acculturation occurs in the *betelah* (discussion), *segenap* and *begenap* (discussion and family). The custom of *betelah* (discussion) takes place after receiving a proposal from the groom's family; the women's family discusses the dowry which is usually in the form of wedding expenses, gold, or daily necessities. (Tiro, 2022) states *"we, the Gayo people, like to consult on everything. Likewise, about marriage, we always consult. The custom of betelah, Segenap and Begenap are example of embodiment of the values of discussion"*. The *betelah* custom is implemented through family discussions (Daud and Hambali, 2022). In contrast, the *segenap* and *bergenap* (consultation and family) is the custom of discussion when there is a division of tasks for the marriage committee. This committee usually consists of relatives and neighbors (Ramadhani, 2017).

The next acculturated Islamic value is *i'lānu nikāh*. Acculturation of *i'lānu nikāh* occurs in the custom of *mah bai* (accompanying the groom) and *mah beru* (accompanying the bride). (Saputra, 2022) states *"the traditional procession of mah bai and mah beru is always busy. The procession is entertainment for the surrounding community. The purpose of this custom is that traditional marriages must be public so that many community members know about"*. The *mah bai* custom is a traditional procession taking the groom to his future wife's house. Upon arrival at the bride's house, the men will exchange *batil* (betel nut holders) between the two parties and continue to *kiding (*washing feet) in front of the entrance. Meanwhile, *Mah beru*, opposite the mah bai, is the custom of escorting the bride to the groom's house.

The next Islamic value acculturated in the traditional Gayo marriage is hospitality. Gathering acculturation occurs in the *customs of the Mah kero opat ingi (*bringing rice for four days*) and Tanag kul* (a visit to the bride's house*)*. (Kulsum, 2022) states "*through the Tanag Kul custom, we establish friendship with our in-laws' families. At this moment, many family members were introduced. Usually, we also bring forty packs of rice and side dishes as souvenirs"*. The customs of *mah kero opat ingi* (carrying rice for four days) and *tanag kul* (a visit to the bride's house) are usually performed after the wife has been at her husband's house for a week; they will visit the in-law's house to introduce all her family members (Ramadhani, 2017). To clarify the acculturation of Islamic values in traditional Gayo marriages, it can be seen in the table below,

Table 2.
Acculturation of Islamic values in traditional Gayo marriages

No	Islamic values	Acculturation in Traditional Marriage	Explanation
1	*Ta'āruf*	*Risik kono*	This custom is a medium for prospective brides and grooms to get to know each other and understand the character of their partners before marriage.
2	*Khiṭbah*	*Munginte*	This custom usually uses a trusted mediator to convey the desire to marry someone to his family.
3	Marriage Advice	*Beguru*	During the traditional *beguru* procession, the bride and groom will be given advice and instructions on how to carry out their respective roles in the family.
4	Discussion	*Belah, Segenap* and *Begenap*	Discussions are held when determining the dowry, handing over luggage, and dividing the duties of the wedding committee.
5	*I'lānu Nikāh*	*Mah bai* and *Mah beru*	The mah bai custom is the custom of parading the groom. While the custom of *mah beru*, parading the bride to the groom's house.
6	Hospitality	*Mah kero opat ingi and Tanang kul*	After the bride has stayed a week at her husband's house, the wife's family will visit her house, aiming to introduce all family members.

Source: Researcher's interpretation

Harmonization of religion and culture: *fiqh munākahat* perspective on the Gayo traditional marriage

Harmonization between religion and culture in traditional Gayo marriages can be seen clearly in the acculturation of Islamic values in traditional wedding procession. The following are some of the acculturation of religions and cultures that strengthen harmony between religion and culture. The *risik kono* tradition contains the value of ta'āruf. The procession of the *risik kono* itself is very much in line with *fiqh munākahat* as long as the *ta'āruf* process follows the provisions of Islamic teachings. When the ta'aruf process is in progress, it is important to pay attention to the quality of the prospective partner's religion, lineage, and profession (Hamdi, 2017). *Ta'āruf* is a process for the bride and groom to understand each other, and get to know the personality and character of their partner before moving on to the next level, namely marriage. *Ta'aruf* usually takes place in a relatively short time and with

the help of other trusted parties as mediators. The ta'āruf process generally begins with obtaining information about each candidate's personality through the exchange of biodata, including self-identity, life principles, and mindset towards a problem. (Ilhami, 2019).

The *Munginte* tradition contains Islamic values of "*khithāh*". This custom usually uses a mediator who acts as an intermediary to express the desire to marry to his family. In Islamic marriage, customs like this are included in the *khiṭbah* category. Proposals in Islam (*khiṭ bah*) aim to strengthen further the hearts of the two prospective husband and wife couples. Therefore, during the *khiṭbah* process, the bride and groom may first see their partner so there will be no regrets later after the contract is carried out (Zakaria, 2021). Most scholars believe that the law of *khiṭbah* is mubah (permissible). Only Imam Daud al-Zhahiriy said that the *khiṭ bah* is obligatory (Wafa, 2021). Relationships that are born from khiṭbah are different from marriage. They do not justify prohibited actions; the two engaged people remain strangers who are forbidden to have *khalwat* (to be together) or things like that (Daud and Ridlwan Hambali, 2022; Hasyim et al. 2020). This prohibition is actually made for the benefit of man himself (Sururie, 2017; Jafar, 2022). The legal consequences of khiṭbah are limited to the prohibition for women who have been proposed by someone to accept other people's proposals. The purpose of giving khiṭbah in Islam is so that the prospective husband and wife are willing and happy when getting married (Mustakim, 2022;the issue of marriage is one of the urgent issues regulated in various teachings. The Qur'an and as-Sunnah, the two main sources of Islamic teachings, have much to say on this issue. One of the problems related to premarital issues is the issue of khitbah, namely the proposal (to apply Fauzi, 2019).

In the *beguru* custom there is marriage advice which is very helpful in understanding the rights and obligations of husband and wife. In Islamic marriages, marriage advice is usually delivered during the nikāh sermon. In the Nikah sermon, the rights, obligations, and goals of marriage in Islam are clearly stated, and if this is also done in the *beguru* custom, it will be very good. The custom of *betelah*, *Segenap* and *Begenap* contain Islamic values, namely discussion. Family meetings are very important in determining the value of the dowry, gifts, and the marriage committee. The culture of discussion is very much in line with Islam; Whatever the problem, if it is resolved through discussion, a solution will be easily found. In matters of dowry, Islam does not determine the value or price of the dowry, but it is left to the prospective wife and family

to determine for themselves (discussion) the amount of dowry to be requested (Bahri, 2022).

The traditions of *mah bai* and *mah beru* contain elements of i'lānu nikāh (spreading marriage information). The traditions of *mah bai* and *mah beru* are the custom of parading the bride and groom with the aim that many people know about the wedding ceremony. Publication of information about marriage is highly recommended in Islam. Some scholars even require marriage to be published (Teuga, 2022). Some scholars argue that i'lān al-nikāḥ is one of the conditions for a valid marriage. However, most fiqh scholars believe that *i'lān al-nikāḥ* is not a requirement for a valid marriage, but only sunnah (Rohman and Mohsi, 2017)that marriage registration is a necessity of continuing legal actions in the form of marriage. Munakahat Fiqh does not know the name of marriage registration. The existence of marriage registration legislation creates a gap (dispute / conflict.

The custom of *mah kero opat ingi* and *tanang kul* in Traditional Gayo marriages contains the value of friendship which is highly recommended in Islam. These two customs are the custom of visiting each other's homes. Usually, a week after the marriage contract, the wife's family visits her house. This visit aims to introduce all members of the family. These two customs are very much in line with the principle of marriage in Islam. When someone gets married, their partner's family will become their family too, so it is only natural to stay in touch to strengthen kinship ties (Abdurrohim, 2022).

The harmonization of religion and culture in traditional Gayo marriage from the perspective of *fiqh munākahat* can be seen clearly in the table below,

Table 3.
Harmonization of Religion and Culture: *Fiqh Munākahat* Perspective on the Gayo traditional Marriage

No	Islamic values	Acculturation in Traditional Marriage	*Fiqh Munākahat*
1	*Ta'āruf*	*Risik Kono*	Conformable
2	*Khit}bah*	*Munginte*	Conformable
3	Marriage advice	*Beguru*	Conformable
4	Discussion	*Belah, Segenap and begenap*	Conformable
5	*I'lānu Nikāh*	*Mah bai and Mah beru*	Conformable
6	Hospitality	*Mah kero opat ingi* dan *Tanag kul*	Conformable

Source: Researcher's interpretation

The acculturation of Islamic values in traditional Gayo marriages indicates the harmony between Islamic teachings and local culture. The higher the level of acculturation, the better the quality of religious and cultural connection.

Conclusion

After extensive research, the researchers concluded that religion and culture had long coexisted in the traditional Gayo marriage custom. Harmony between religion and culture is maintained through the consistent application of Islamic teachings. In traditional Gayo marriages, the customary laws and regulations have many similarities and are in harmony with Islamic teachings. In traditional Gayo marriages, the established laws and rules share numerous similarities with Islamic teachings and are consistent. This is evidenced by the assimilation of *fiqh munākahat*: *ta'āruf* (introduction), *khiṭbah* (proposal), marriage advice, discussion, *i'lānu nikāh* (marriage announcement), and hospitality at traditional Gayo marriages. This acculturation is reflected in various types of traditional wedding processions: *risik kono* (introduction to the catin family), *munginte* (proposal), *beguru* (giving advice), *betelah* (discussion), *segenap* and *begenap* (consulting and family), *mah bai* (accompanying the groom) and *mah beru* (taking the bride), *mah kero opat ingi* (bringing rice for four days) and *tanag kul* (visiting the bride's house). Based on this fact, the articles concludes that the harmonization of religion and culture in traditional marriages is further improved by enhancing the understanding of *fiqh munakahāt* the greater the comprehension of *Fiqh Munākahat*, the greater the compatibility of religion and culture. Since Gayo is known for its religious ethnicity, it will be easier to strengthen the understanding of *Fiqh Munākahat*.

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Alternatives to Criminal Conviction in a Comparative Analysis of Positive Law and Islamic Criminal Law

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Abstract

This paper aims to comprehensively analyze the concept of alternative punishment in a comparative study of positive law and Islamic criminal law. Currently, imprisonment is still the main choice, causing overcrowding in prisons in Indonesia. Sharp criticism and dissatisfaction with imprisonment have prompted the development of alternative punishments other than imprisonment that are in accordance with the purpose of punishment. This study is a type of qualitative research using data collection techniques through literature studies. The data used in this study was taken from secondary data from various literatures consisting of books, journals, mass media, news, social media related to alternative sentencing. The conclusion of this paper shows that in positive law, alternative provisions for punishment other than imprisonment have been regulated in the Criminal Code (KUHP) and other laws and regulations, including in the form of fines (compensation), rehabilitation sanctions for narcotics abuse cases, and settlement of criminal cases outside the court (APS) by prioritizing the principle of restorative justice, namely peace and forgiveness, for the perpetrators, victims and the community. In positive law, alternative punishment has an ideal concept with the aim of sentencing that leads to recovery, not retaliation. This paper also concludes that in the concept of Islamic criminal law, the provision of alternative punishments contains the principles in *maqashid* sharia, namely in

maintaining religion (*al-dîn*), soul *(al-nafs*), offspring (*al-nasl*), property (*al-mâl*) and reason (*al-aql*).

Keywords: Prison overcrowding; prison; alternative punishment; positive law; Islamic criminal law

Introduction

The phenomenon of overcrowding in prisons is a classic problem that occurs in almost every prison in Indonesia. Based on data from the Institute for Criminal Justice Reform (ICJR), it was stated that there was a significant increase in 2022 as of January reaching 223 percent.[1] Even the occupancy rate in prisons in 2025 is estimated to reach 136 percent, or 311,534 inmates.[2] This high number will almost certainly continue to trigger new problems in correctional institutions. Although various policy steps have been taken, until now the problem of overcrowding in prisons has yet to be resolved.

The condition of chronic overcrowding in prisons has to be acknowledged as having given serious problems related to the impact it has. The issue of prisonization, which is negative in nature, includes extortion between inmates, theft in cells, hazing of new inmates, homosexuality, spread of disease, and so on, is a bad portrait due to overcrowding in prisons.[3] These problems have practically attracted the attention of the government, which firmly asks for the maximum implementation of prison policies. In this case, the Directorate General of Corrections at the Ministry of Law and Human Rights (Dirjen Paskumham) has taken several steps to reduce the density of prisons and detention centers, namely by providing conditional leave (CB), parole (PB), and leave before being released (CMB), including remission. However, the inflow of inmates is greater than the outflow with the limited number of detention room facilities, resulting in these efforts being considered ineffective in solving the problem of overcrowding in prisons comprehensively.[4]

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[1] ICJR: Beban rutan dan lapas per Januari 2022 capai 223 persen, "Httpshttps://Www.Antaranews.Com/Berita/2687101/Icjr-Beban-Rutan-Dan-Lapas-per-Januari-2022-Capai-223-Persen," n.d.

[2] "Kelebihan Kapasitas Lapas Di Indonesia Bisa Mencapai 136 Persen Pada 2025," accessed March 28, 2022, https://www.infoindonesia.id/read/2022/03/17/13640/kelebihan-kapasitas-lapas-di-indonesia-bisa-mencapai-136-persen-pada-2025.

[3] Padmono Wibowo, "Pentingnya Mitigasi Risiko Dampak Kepenuhsesakan Pada Lapas Dan Rutan Di Indonesia," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 2 (2020): 263–83

[4] Aan Riana Angkasa Aji Putra and Ningrum Puspita Sari, "Kendala Pemberian Pembebasan Bersyarat Di Lembaga Pemasyarakatan Kelas IIa Sragen," *Jurnal Hukum Pidana Dan Penanggulangan Kejahatan* 2, no. 3 (2013).

Observing the dynamics of overcoming prison overcrowding, one of the crucial issues lies in the question of the purpose of punishment[5]. The current phenomenon shows the dominance of the orientation of punishment in law enforcement, which still focuses on the notion of retribution, by placing prison as the main choice in imposing crimes[6]. When prisons are still perceived as places where people are guilty, such as in mild cases, or in cases of drug abuse, prisons are still crowded. This is where in order to overcome the overcrowding of prisons, one solution is to re-effectively re-implement alternative punishments in the Criminal Code and other laws and regulations that are oriented towards prevention and rehabilitation.

So far, there are at least two studies that still have a correlation with this study, one of which comes from Ismail Rumadan. In his writings, although he does not focus on examining alternatives to non-imprisonment criminal sanctions in positive law, on many occasions Rumadi discusses alternative models of punishment with a restorative justice approach. According to him, in the midst of the problem of overcrowding that creates a lot of crime in it, the restorative justice model is a step that can be resolved by the community, not only in criminal law issues but also in civil law. This is because the principle of restorative justice was born from customary law which does not recognize the difference between customary law and criminal law. Thus, it can reduce the number of inmates who are incarcerated.[7] Furthermore, according to Usman, in his writings, he views that criminal alternatives such as fines and conditional punishment are a middle way in suppressing the density of prison residents, but needs to be supported by integrating policies through legislative reform, such as the Narcotics Law which has a very high number of criminal acts.[8]

Meanwhile, in the study of Islamic criminal law, related to the purpose of punishment, it cannot be separated from the revelation of universal Islamic law. The Islamic criminal law contains values that live in a society (living law) can be used as one of the mainstay sources that can fulfill the community's sense of justice. It can also be a filter for western law, which is incompatible with Indonesian morals and culture. Likewise, Islamic law can become a partner of customary law which has been a local habit of the community (al-'adah al-

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[5] Aan Riana Angkasa Aji Putra and Ningrum Puspita Sari, "Kendala Pemberian Pembebasan Bersyarat Di Lembaga Pemasyarakatan Kelas IIa Sragen," *Jurnal Hukum Pidana Dan Penanggulangan Kejahatan* 2, no. 3 (2013).

[6] Dede Kania, "Pidana Penjara Dalam Pembaharuan Hukum Pidana Indonesia," *Yustisia* 3 (2014): 19–28.

[7] Ismail Rumadan, "Problem Lembaga Pemasyarakatan Di Indonesia Dan Reorientasi Tujuan Pemidanaan," *Jurnal Hukum Dan Peradilan* 2, no. 2 (2013): 263, https://doi.org/10.25216/jhp.2.2.2013.263-276.

[8] Ismail Rumadan, "Problem Lembaga Pemasyarakatan Di Indonesia Dan Reorientasi Tujuan Pemidanaan," *Jurnal Hukum Dan Peradilan* 2, no. 2 (2013): 263, https://doi.org/10.25216/jhp.2.2.2013.263-276.

muhakkamah), as long as the customs and culture are in accordance with Islamic law.[9]

Based on this framework, this paper has a specific objective of examining alternatives to punishment in positive law as a solution to minimize prison overcrowding by synergizing it with the concept of sentencing objectives in Islamic criminal law which is oriented to peace and benefit.[10] Because the position of Islamic criminal law is very important as a living law that has been tested in solving problems in society.

Discussion

Criminal Conviction in Positive Law and Islamic Criminal Law

1. Criminal Conviction in Positive Law

The punishment system based on positive law in Indonesia includes several theories of punishment. Experts have different views on the classification of the theory of punishment. Algra divides the theory of the purpose of punishment into three types, namely, absolute theory (revenge theory), relative theory or objective theory (doeltheorie), and combined theory/gemengdetheorie.[11] L. J. Van Apeldorn divides the theory of punishment into three groups, namely, absolute theory (absolute theory), relative theory (doeltheorieen), and unity theory (vereengegingstheorie). Meanwhile, Muladi divides theories regarding the purpose of sentencing into three, namely: absolute (retributive) theory, teleological theory, and teleological retributive theory.[12]

The synthesis of the three opinions gave birth to 5 (five) groups of sentencing theories, namely:

a. Absolute Theory or theory of retaliation (absolte theorieen)

The absolute theory or the theory of retaliation emphasizes that the state must punish the perpetrators because people have sinned (*quia pacratum*).[13] In other terms, retaliation is the legitimacy of punishment in which the State has the right to impose a sentence because the criminal has assaulted and raped the rights and interests of the protected law.[14]

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[9] Ismail Rumadan, "Problem Lembaga Pemasyarakatan Di Indonesia Dan Reorientasi Tujuan Pemidanaan," *Jurnal Hukum Dan Peradilan* 2, no. 2 (2013): 263, https://doi.org/10.25216/jhp.2.2.2013.263-276.

[10] Efa Rodiah Nur, "Alternatif Penyelesaian Perkara Pidana Dalam Perspektif Hukum Islam Sebagai Media Menuju Keadilan," *Masalah-Masalah Hukum* 45, no. 2 (2016): 115–22.

[11] N E Algra, "Van Duyvendijk, Mula Hukum, Transl," *Simorangkir, (Bandung: Bina Cipta*, 1983).

[12] Eddy O S Hiariej, *Prinsip-Prinsip Hukum Pidana* (Cahaya Atma Pustaka, 2016)

[13] Van Apeldoorn, "Pengantar Ilmu Hukum, (Jakarta: Pradnya Paramita" 2001).

[14] Adami Chazawi, "Pelajaran Hukum Pidana Bagian I, (Jakarta: PT. RajaGrafindo Persaada, 2007), p. 15.

b. Relative Theory (doeltheorieen)

In principle, this theory teaches that the imposition of a crime and its implementation must at least be oriented towards preventing the convict (special prevention) from repeating the crime again in the future, as well as preventing the wider community in general (general prevention) from the possibility of committing crimes such as crimes that have been committed previously and other crimes. All punishment orientations are in the context of creating and maintaining legal order in people's lives.

c. Unity/Combination Theory (vereenegingstheorie)

This theory is a combination of absolute theory and relative theory. In addition to emphasizing retaliation, the combined theory is aimed at protecting the rule of law out of respect for law and authority. Algra and Apeldoorn argue that "usually punishment requires a double justification. The government has the right to punish, when people commit crimes (if someone commits behavior that deserves punishment) and when it seems that they will be able to achieve a useful goal".[15]

d. Teleological Theory

This theory emphasizes punishment as a moral critique in response to wrong actions. The purpose of the moral criticism is a reform or change in the behavior of the convict in the future.[16]

e. Teleological Retributive Theory

This theory was put forward by Muladi, with the view that "the purpose of punishment is plural because it combines the principles (objective) and retributive as a unit". This theoretical view suggests the possibility of articulating punishment theories that integrate several functions as well as utilitarian retribution, where prevention and rehabilitation are all seen as targets to be achieved by a criminal plan. Because the objectives are integrative, the goals of punishment are: prevention, general and specific, community protection, maintaining community solidarity, and compensation.

Of the various theories that exist, all of them are based on three elements, namely[17]:

a. Deterrence, by imposing a sentence, it is hoped that the perpetrator will become a deterrent and will not repeat the crimes that have been committed (special preventive) and the general public will know that if they commit an

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[15] Muladi, *Lembaga Pidana Bersyarat*, "Bandung" (Alumni, 2008), p. .29.

[16] H Salim Hs, "Perkembangan Teori Dalam Ilmu Hukum, (Jakarta, PT," *Raja Grafindo Persada*, 2010).

[17] John Kenedi, *Kebijakan Hukum Pidana (Penal Policy) Dalam Sistem Penegakan Hukum Di Indonesia* (Pustaka Pelajar, 2017), p. 130.

act committed by the convict, they will experience a similar punishment (generale preventive).
b. Improving the convict's personality, with the treatment and education provided during his sentence in order to the convict feels sorry and will not repeat his actions and return to society as a good and useful person;
c. Familiarize or make the convict helpless, meaning is to impose the death penalty, or to impose a life sentence.

Finally, it should also be stated that the imposition of a criminal (punishment) is essentially an imposition of suffering or misery or other unpleasant consequences. It is given intentionally by a person or institution who has power (by the authorities) to someone who has committed a criminal act according to the law.

2. Criminal Conviction according to Islamic Law

In Islamic criminal law, related to the theory of punishment, it focuses more on the benefit. The general purpose of the law is to uphold justice based on the will of the human creator so that order and peace can be realized in society. A society that obeys the law means loving justice, as in Surah An-Nisaa' [4]: 65:

"But no, by your Lord, they will not [truly] believe until they make you, [O Muhammad], judge concerning that over which they dispute among themselves and then find within themselves no discomfort from what you have judged and submit in [full, willing] submission."

The purpose of law in the Islamic perspective is known as *maqashid* sharia, namely the purpose or objective of Islamic law in other terms called wisdom and *illat* the establishment of a law. At the application level in the field, Abu Ishaq al-Syatibi divides the field of *maqashid* sharia into five parts, namely:

a. *Hifdz al-din* (keeping religion);
b. *Hifdz al-nafs* (keeping life);
c. *Hifdz al-'aql* (guarding reason);
d. *Hifdz al-nasl* (keeping offspring);
e. *Hifdz al-mal* (keeping property)[18];

Based on the several fields above, it is clear that the purpose of Islamic law includes criminal law which not only protects individual interests, but also the interests of society and the state, even further that Islamic law protects interests related to religious beliefs, both concerning the soul, mind and spirit or the potential for thought, lineage, or wealth. So the area that is the goal of protection from Islamic criminal law covers a wide area because it involves all

[18] Asep Saepudin Jahar, *Hukum Keluarga, Pidana & Bisnis* (Prenada Media, 2013), p. 119

aspects of human life, its relation to fellow humans and to the creator.[19] In addition to giving punishment to the perpetrators of criminal acts, the application of Islamic criminal law (*jinayah*) also aims as a means of teaching people about the prohibition of an act being carried out.

Ibn Taymiyya explained that Allah SWT prescribes punishment as a mercy and a reflection of Allah's desire to do good to His servants. Thus, it is appropriate for people to punish others for their mistakes, do good and give mercy to them, like a father who teaches his son and a doctor who treats his patients.[20]

There are two basic aspects of the formulation of punishment in the Islamic criminal law, namely:

a. Aspect of Compensation/Retribution (Retribution). The retributive function of a punishment is the subject that is most discussed by Islamic criminal law experts, in addition to its deterrent function. This seems to be influenced by the existence of the verses of the Qur'an, which discuss a lot about this aspect of retribution. For example, the following Quranic verse:

   "Indeed, the recompense for those who fight against Allah and His Messenger and cause mischief in the land is only that they are killed or crucified, or their hands and feet are cut off in exchange for reciprocity, or are banished from the land (where they live). That is (as) an insult to them in this world, and in the Hereafter they will have a great torment [Qs. 5:33]"

b. Aspect of Deterrence. Sentencing Imprisonment is a legal reasoning for a sentence to be imposed. The main objective is to prevent the recurrence of these crimes in the future. In contrast to retribution, which tends to look back from the point in time of the crime, this deterrence is projected forward, namely the importance of having a preventive measure so that the violation does not happen again. One thing that should be noted is that Islamic criminal law is the legal system that has the strongest adoption of this deterrence aspect when compared to other criminal systems. Islam views the nature of deterrence as the most important thing in giving punishment.[21]

Based on the explanation above, both positive criminal law and Islamic criminal law, if narrowed down, there are two main functions of criminal law, namely: Primary function, as a rational crime prevention tool (as part of criminal policy or criminal politics). The secondary function is as a means of regulating social control which is carried out spontaneously and made by the state with its

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[19] M Nurul Irfan, "Fiqh Jinayah" (Amzah, 2013).

[20] Ahmad Syafiq, "Rekonstruksi Pemidanaan Dalam Hukum Pidana Islam (Perspektif Filsafat Hukum)," *Jurnal Pembaharuan Hukum* 1, no. 2 (2014): 178–90.

[21] Siti Jahroh, "Reaktualisasi Teori Hukuman Dalam Hukum Pidana Islam," *Jurnal Hukum Islam*, 2016.

completeness. In its second function, the task of criminal law is more focused on policing the police, in order to protect citizens from interference by authorities who are not likely to use crime as a means incorrectly, in other terms, crimes with certain motives.

Criminal Sanctions in Positive Law and Islamic Criminal Law

1. Criminal Sanctions according to Positive Law

Criminal sanctions imposed on perpetrators of crimes as stated in Article 10 of the Criminal Code (KUHP) can be classified into two types, namely principal punishment and additional penalties.[22] The principal punishment is the most important punishment imposed on the perpetrator, consisting of: death penalty, imprisonment, confinement, fines, and imprisonment. For more details can be explained as follows:

a. Death penalty; The death penalty is the most severe punishment and can be applied to certain crimes that are intolerant from the point of view of state law. The two main arguments for the death penalty are that apart from being a retaliation, it can also play a role in causing a deterrent effect on the community. Furthermore, the implementation of the death penalty was changed to be more humane, namely by being shot. This change was made through a legal instrument in the form of Law Number 2/PNPS/1964, namely Presidential Decree Number 2 of 1964 which was stipulated as Law Number 5 of 1969 concerning Procedures for Implementing Death Penalty Sentenced by Courts in General and Military Courts. The death penalty is actually still needed because it can provide a stronger deterrent effect than other types of punishment. The threat of criminal punishment is only aimed at extraordinary crimes such as terrorism and narcotics.
b. Imprisonment; Imprisonment that is widely applicable in various countries is a form of criminal substitute for punishments that are considered inhumane as the death penalty. The concept of imprisonment was originally intended for low-class people who were characterized by hard work or forced labor. Imprisonment is carried out in the form of placing a convict in prison for a time determined by the court according to his guilt.
c. Confinement Punishment; The confinement punishment is lighter than imprisonment, namely in terms of carrying out mandatory work and the ability to carry the convicted person's daily equipment. Confinement can be carried out with a minimum limit of 1 (one) day and a maximum of 1 (one)

[22] There are several differences in the RUU-KUHP, in which the Basic Penalties contained in Article 58 are classified into four parts, namely: imprisonment, criminal closure, criminal supervision (control), criminal fines, and criminal social work (community service), while the death penalty regulated in Article 59. Additional penalties include revocation of certain rights, confiscation of certain goods with invoices, announcement of judge's decisions, payment of compensation, and fulfillment of customary obligations.

year as stipulated in Article 18 of the Criminal Code. Confinement sentences are served in cells, generally the prison convicts are separated from the convicts who are serving confinement.[23]

d. Criminal fines; Fines are the oldest criminals, older than imprisonment, perhaps as old as the death penalty. In modern times, fines are imposed for minor offenses, in the form of violations or minor crimes.[24] Therefore, a fine is the only crime that can be borne by someone other than the convict. Although the fine is imposed on the convicted person, there is no prohibition if the fine is voluntarily paid by another person on behalf of the convict.[25] Fines have a civil nature, similar to the payments required in civil cases against people who commit acts that harm others, only that in criminal law, fines are paid to the state.
e. Criminal Closure; The criminal closure became the principal crime based on Law Number 20 of 1946 concerning the Criminal closure. It is reserved for politicians who commit crimes because of their ideology, but in modern judicial practice this provision is never applied. The confinement penalty is one of the crimes that eliminate independence, is heavier than a fine, but lighter than confinement, in accordance with Article 10 of the law in question. In the context of alternative punishments, it can be described hierarchically, in this case a light punishment becomes an alternative to a heavier punishment. It means that imprisonment is an alternative to the death penalty, and a fine is an alternative to imprisonment and confinement. This shows that the Criminal Code actually provides an alternative to imprisonment, as well as criminal law outside the Criminal Code.

2. Sanctions according to Islamic criminal law

In contrast to Indonesian criminal law which divides punishment into main and additional penalties, Islamic criminal law (*fiqh jinayah*) generally stipulates a single rule for each crime (*jarimah*). However, *fiqh jinayah* is open to additional penalties in accordance with the ijtihad of the judge who handed down the sentence. Here are some forms of *jarimah* and their punishments.

When viewed in Islamic criminal law, the types of sanctions and criminal acts are as follows:

a. *Jarimah Hudud*

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[23] Leden Marpaung, "Asas-Teori-Praktik Hukum Pidana, Sinar Grafika" (Jakarta, 2005), p. 109.

[24] Fauzan Fauzan and Nasaruddin Umar, "Norma Pengecualian Dalam Pasal 8 Rancangan Undang-Undang Larangan Minuman Beralkohol (Analisis Fikih Jinayah Dan Ilmu Perundang-Undangan)," *Madania: Jurnal Kajian Keislaman* 22, no. 1 (2018): 131–44.

[25] Hamzah Andi, "Asas-Asas Hukum Pidana," (*Rineka Cipta, Jakarta*, 2008), p. 207.

Crimes that fall into this category are the most serious crimes in Islamic criminal law. It is a crime against the public, but does not affect private interests, but relates to God's rights. *Jarimah hudud* includes *jarimah zina*, *jarimah qadzaf*, *jarimah syurb al-khamr*, *jarimah al-baghyu*, *jarimah al-riddah*, *jarimah al-sariqah*, *jarimah al-hirabah*, and *al-baghyu* (rebellion).[26]

b. *Jarimah Qishash*

This crime is also known as *qishash* and *diyat*, which consists of murder and torture. This *jarimah* is located in the middle position between *hudud* and *ta'zir*. Apart from protecting against crimes against the integrity of the body intentionally, this *jarimah* also makes unintentional crimes its domain, whether it is intentional murder, murder by negligence, maltreatment that causes injury or illness, violence with physical disabilities, and others[27]. Meanwhile, in *al-Mu'jam al-Wasith*, *qishash* is defined by imposing legal sanctions on the perpetrators of the crime exactly the same as the crime committed life for life and limbs are repaid with body parts.[28] It can be concluded that *qishash* is doing the same or similar revenge, the life of the murderer can be removed because he has killed the victim or the perpetrator of the persecution may be persecuted because he has wronged the victim.

c. *Jarimah Ta'zir*

All kinds of crimes that are not regulated in the Qur'an and Hadith. Technical rules, types and implementation are determined by local authorities based on *ijma'* (consensus). The form of this finger is very varied and unlimited, according to the bad action that is done because of the devil's temptation to humans. Among other things, the death penalty, flogging, imprisonment, exile, cross, excommunication, reprimand and fines of *jarimah ta'zir* is an enforcement of the Islamic state's right to punish all forms of criminalization and inappropriate actions both for actions that cause physical, social, and social harm/damage. and social, political, financial, or moral values for individuals and society at large.[29]

In Islamic criminal law (*jinayah*), it can be illustrated that the imposition of sanctions focuses more on corporal punishment, rather than imprisonment. Although in the study of fiqh, the discussion of prison becomes an inseparable part of *ta'zir*, but *fiqh* does not formulate prison institutions. On the contrary,

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[26] Topo Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat Dalam Wacana Dan Agenda* (Gema Insani, 2003), p. 6

[27] Santoso.

[28] Ibrahim Mustafa, "Dkk., Al-Mu'jam Al-Wasit," (*Tahran: Al-Maktabah Al-_ Ilmiyyah, t. Th*,) 1973. : 740

[29] Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat Dalam Wacana Dan Agenda.*

the existence of prisons is an effort to adjust *fiqh* to the context in which *fiqh* develops.

Overcrowding of Prisoners in Indonesia

The problem of overcrowding in prison occupants poses a risk of not succeeding in the concept and purpose of correctional facilities, due to the logical consequence of the dense conditions of prison occupants, resulting in the goal of fostering inmates not being achieved. The criminal justice system which still tends to imprison every form of criminal action has an impact on the high crime rate which ends in legal proceedings with imprisonment as the final place for legal sanctions. It will automatically have an impact on the density of prison inmates in Indonesia. Of course, the problem of prison overcrowding is a separate problem that invites the potential for internal and external conflicts.

Correctional institutions at first were not a complicated problem. However, a number of problems arise because its role has changed to become a center for gathering people who have been sentenced to criminal sanctions. These problems require more detailed and thorough thinking. The number of the problems and demands of thoughts are caused by the implementation of the punishment which takes a long time, some even last a lifetime, according to the philosophy of imprisonment, namely: it must be long, it must show suffering, and it must take the form of a burden as a substitute for the losses suffered by the victim. Imprisonment or correctional punishment must last for a long time, with the aim of general prevention, so that the public gets empirical evidence so that no one repeats similar acts in the future.

The use of prisons or detention centers (Rutan) as a means of accommodating criminals causes many problems in its implementation. Especially on the issue of the length of confinement carried out, the physical condition of the building, and the availability of other facilities and infrastructure that are part of the convict's rights while in prison.[30] Another problem is the limitation of the maximum length of imprisonment whose effectiveness can be accounted for in order to achieve the rule of law. It is common knowledge that long-term punishment can actually be a criminogenic factor,[31] where temporary prisoners who are deposited in Correctional Institutions acquire negative knowledge from criminogenic convicts who have received verdicts that have the permanent legal force. This situation can allow a negative learning process because there is no separation of rooms contained in the Correctional Institution.

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[30] Regarding the rights of prisoners, it can be seen in Article 14 of Law no. 12 of 1995 concerning Corrections.

[31] Criminogenis consists of the words "crime" and "gene" which means "carrier of evil". Criminogenic factors are factors that trigger crime.

Giving remissions, PB, CB, and CMB are good steps to reduce the density of prisons and detention centers, but the provision of facilities for community members only focuses on how to reduce the density of prisons and detention centers but does not aim to prevent similar actions from happening again in the future. The emergence of new recidivists as well as the recurrence of similar crimes in the future is a reflection of the failure of modern punishment patterns that put forward a pseudo-humanist side. In fact, there are several patterns of punishment that seem modern but do not solve problems that keep repeating themselves so that it has implications for the overcrowding of prisons and detention centers and the swelling of state spending.

This is also exacerbated by the weakness in coordination between prisons, the police and the attorney general's office. So that for cases that are classified as narcotics crimes, minor crimes (tipiring) as optimally as possible find solutions through non-imprisonment alternatives, such as fines, rehabilitation or restorative justice steps, namely settlement of cases outside the court.

Alternative Punishment besides Imprisonment in Various Countries

Several countries have implemented the concept of alternative sanctions as a substitute for imprisonment. France, for example, this country has implemented the concept of "semi liberte" in the form of half-day release for the prison community. Prisoners who receive the benefits of this regulation are free to leave their prisons during the day to participate in a series of activities such as taking courses, training, or studying other sciences. Prisoners can also be employed without pay or become medical volunteers. They will remain in prison if there are no special needs that are oriented to social work as part of their schedule. Uniquely, the days outside the prison are still counted as detention days.[32]

Another concept that is also applied in developed countries is the concept of alternative criminal custodial. This concept applies in Greece, where a prison sentence of less than 6 (six) months can be converted into a fine of money.[33] Even the courts are given the flexibility to grant permission to convert prison punishment into fines to correctional officers who are punished to a maximum imprisonment of 18 (eighteen) months.[34] In addition, social work

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[32] Karl-Ludwig Kunz, "Non-Custodial Sanctions in Europe: An Overview," *Acta Criminologica: African Journal of Criminology & Victimology* 7, no. 1 (1994): 33–39.

[33] Michael Leo Owens and Hannah L Walker, "The Civic Voluntarism of 'Custodial Citizens': Involuntary Criminal Justice Contact, Associational Life, and Political Participation," *Perspectives on Politics* 16, no. 4 (2018): 990–1013.

[34] Emmilia Rusdiana, "Pengenaan Pidana Denda Yang Dapat Dikonversi Dengan Pidana Kurungan Pada Pelaku Kriminogenis terdiri dari kata "*crime*" dan "*gen*" yang berarti "pembawa kejahatan". Faktor kriminogenis ialah faktor yang memicu terjadinya tindak kejahatan.Anak," *Jurnal Yudisial Vol* 12, no. 3 (2019): 363–80.

penalties also applied to correctional residents who are punished with more than 6 (six) months. The social work is carried out in a place in the form of plantations or agricultural land, the results of which are intended for the needs of the wider community. Uniquely, the punishment that is passed by working will reduce two days of the punishment. However, the reduction in the punishment period will be canceled if the correctional officer behaves badly, is disciplinary, or does not carry out the work (which is imposed as a punishment) in an appropriate manner.

Apart from the two countries above, there are also other alternative forms of punishment that are applied. Portugal has a criminal supervision concept in which prison residents are not imprisoned, but are required to do social work for one to three years with supervision in rehabilitation efforts. Another sanction is a reprimand plus compensation for the loss carried out as applicable in Finland, Serbia, Armenia, Romania, Macedonia, Tajikistan, China, and Vietnam. Even the Council of Europe gives judges the prerogative not to impose any punishment on offenses that are deemed light.

That the punishment of social workers, half-day imprisonment, and other alternative custodial punishments will be effectively applied to countries that have a proportional demographic to topographic ratio. Europe, which is currently the center of modern punishment in the world, does not have the landscape and population density found on the Asian continent, especially in Indonesia. Strong safeguards are needed in terms of quality and quantity to carry out supervision for the above alternative punishments, and such a concept will certainly be difficult to apply in Indonesia.

The Urgency of Alternative Criminal Law in the Study of Positive Law and Islamic Criminal Law

The current phenomenon in various countries has abandoned the punishment of imprisonment by replacing alternative punishments other than imprisonment, including social work crimes, supervision crimes, and fines and so on. Likewise, Indonesia should implement alternative punishments other than prison, which is already available in the Criminal Code (KUHP) and other laws and regulations. This alternative punishment is an alternative solution for law enforcement officers who have been using imprisonment with a retributive justice approach (revenge) rather than restorative justice (recovery). So that the problem of overcrowding in prisons with the many problems in it can be minimized. On the other hand, the values of the purpose of punishment in Islamic criminal law should be used as an approach in positive law in Indonesia, especially in the context of implementing alternative punishments. The restorative justice approach, for example, is actually a reflection that has existed in Islamic criminal law for a long time, the law that lives in society (living law) that brings good, both perpetrators, victims and society.

This type of criminal fine is an alternative punishment other than imprisonment that can be applied. Fines or compensation is one of the main types of crime in Article 10 of the Criminal Code (KUHP), in addition to the death penalty, imprisonment, confinement, and criminal closure. Even fines are the oldest form of crime and are older than imprisonment and as old as the death penalty. In practice, the imposition of fines is relatively easy, but requires some support for transparent administrative procedures, with the calculation of appropriate fines.[35] This can be done by recording and keeping a record of the types and forms of criminal acts that have been found in police offices in each sector, known as the Police B1 Book. In its application in the field, penalties for paying fines (*diyat*) can be imposed on perpetrators of minor crimes (tipiring), such as theft, pickpocketing, extortion, vandalism, diversion, and other crimes that are not part of a serious crime. The perpetrator of the offense can be forced to return the stolen goods and compensate for the losses caused by the theft he did. In addition, the perpetrator is also given a sanction in the form of a warning so as not to repeat a similar crime in the future.[36]

In the study of Islamic criminal law, the logic of transferring prison sentences by prioritizing fines is a method to respond to criminal acts by involving conflicting parties in order to repair the damage caused by the crime. This is done through dialogue and negotiation between the two parties, and fines can be used as ransom for a crime so that the perpetrator does not have to be in prison. In Islam, the fine in question belongs to the type of fine whose perfection is not certain, namely the fine that is determined through the judge's ijtihad and adjusted to the violation and/or crime that has been committed. Thus, in the study of Islamic criminal law the existence of a fine (compensation) is essentially a manifestation of the concept of restorative justice (restorative justice), namely the concept of justice that improves all parties.[37]

Furthermore, another alternative punishment is in the form of providing rehabilitation, especially for narcotics crimes. It is undeniable that the biggest contributor is inmates, so that currently the prison is mostly drug-related. Provisions regarding rehabilitation for narcotics abuse have been regulated in Article 54 of Law Number 35 of 2009. Which states, Narcotics addicts and victims of narcotics abuse are required to undergo medical rehabilitation and social rehabilitation. The basis for considering the provision of rehabilitation actually lies in the long-term goal, in order to support individual recovery and

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[35] Reymond Kalangat, "Eksistensi Pidana Denda Dalam Konteks Kitab Undang-Undang Hukum Pidana," *Lex Crimen* 4, no. 7 (2015).

[36] Santoso, *Membumikan Hukum Pidana Islam: Penegakan Syariat Dalam Wacana Dan Agenda*.

[37] Yusi Amdani, "Konsep Restorative Justice Dalam Penyelesaian Perkara Tindak Pidana Pencurian Oleh Anak Berbasis Hukum Islam Dan Adat Aceh," *AL-'ADALAH* 13, no. 1 (2016): 76–81.

reintegration into society, so as to end chronic recidivism that often characterizes the behavior of offenders with drug dependence. Narcotics abusers, including self-victimizing, are individuals who become victims of the consequences of their own actions. In the sense of crime without causing victims (crime without victims). This means that there is an act that is categorized as a crime, but does not cause a victim to others, then the act is not categorized as a crime, so that narcotics abusers are considered victims and not the perpetrators of crime, then the right action is rehabilitation, not imprisonment.[38]

In Islamic criminal law, a drug abuser (user), even though the crime is classified as a crime without a victim, the perpetrator must still be whipped and shown in public before undergoing rehabilitation. This includes drug dealers (dealers), no matter how much drugs are sold, if the impact is large, the dealer deserves the death penalty and does not receive any facilities from the state except during the waiting period for execution. This is done in order to present a deterrent effect in the future. Meanwhile, users or addicts can be categorized as drunkards based on qiyas, so that drug users can be punished 40-80 (forty to eighty) lashes in accordance with the judge's ijtihad by considering the form and type of criminal act that he committed, as well as the conditions concerned.
On the other hand, in the perspective of Islamic criminal law, sanctions for drug abuse can be transferred to rehabilitation, based on the judge's consideration and there is an element of *syubhat*, namely the existence of elements of ambiguity, uncertainty and doubt in proving drug use, as well as confusion in certain articles. In accordance with *maqashid* sharia, rehabilitation aims to restore physical health in accordance with *hifz al-nafs*, restore mental health in accordance with *hifz al-aql*. Rehabilitation can also use a religious approach so as to carry out *hifz al-din*. After the rehabilitation process is complete and the perpetrator has returned to his proper life, there have been efforts *by hifzh al-mal* and *hifzh al-nasl*.

The next alternative is to use a restorative justice approach, namely the out-of-court settlement model or alternative dispute resolution (APS).[39] The strategy of eradicating criminal acts in Indonesia, entering the modern era, must undergo a paradigm shift. The paradigm that was previously only oriented to prison sentences should change with a new stage, namely the stage of strengthening the prevention system (preventive measures) by prioritizing restorative justice in resolving cases. The restorative justice approach, in principle, has the aim of recovering the impact of crime for all parties through

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[38] Andi Najemi, Kabib Nawawi, and Lilik Purwastuti, "Rehabilitasi Sebagai Alternatif Pemidanaan Terhadap Anak Korban Penyalahgunaan Narkotika Dalam Upaya Perlindungan Terhadap Anak," *Jurnal Sains Sosio Humaniora* 4, no. 2 (2020): 440–54.

[39] Ilyas Sarbini and Aman Ma'arij, "Restorative Justice Sebagai Alternatif Penyelesaian Perkara Pidana," *Fundamental: Jurnal Ilmiah Hukum* 9, no. 1 (2020): 31–42.

peace or forgiveness, both perpetrators, victims and the community.[40] More than 80 countries, including Indonesia have used this type of restorative approaches to dealing with crime. Restorative justice programs can be used at any stage of the criminal justice system, in accordance with national law. Restorative justice processes can be adapted to different cultural contexts and community needs.[41]

In Islamic criminal law, the restorative justice approach is carried out through peace and forgiveness by realizing the creation of justice and balance for the perpetrators of crimes and the victims themselves. The concept of restorative justice in Islamic criminal law is explicitly regulated in Q.S. Al-Hujurat [49]: 10 and Q.S. Ash-Syura [42]: 40 who ordered peace and forgiveness in the settlement of criminal acts. The existence of peace and forgiveness in the context of realizing the integrity and sustainability of shared life is essentially in line with the value of the principle of *maqashid* sharia towards the creation of justice and the benefit of all parties, both perpetrators, victims, and the community.

Seeing the benefit that is the goal of human life, alternative punishment can be a solution in enforcing the law. If it is related to the spirit of practicing Islamic law, namely the public benefit, the alternative concept of punishment is in line with the substance of *maqashid* sharia as stated by as-Syatibi. According to this prominent *usul fiqh* scholar who is based on the Maliki school of thought, this benefit can be realized if the five main elements (*al-uṣûl al-khamsah*) can be realized and maintained. The five main elements in question are maintaining (1) religion, (2) soul, (3) descendants, (4) will, and (5) wealth. To maintain these five main elements, three sharia objectives are included which are wasilah and complement each other, namely (a) *maqâṣid ad-darûriyyāt*, (b*) maqâṣid al-hâjiyyāt*, and (c) *maqâṣid at-tahsîniyyât*.[42] From this, it comes to the conclusion that anything that guarantees the maintenance of the five main elements is called *mashlahah*, while anything that eliminates them is called *mafsadah*.

Maqâṣid ad-darûriyyāt is something that requires preserving and maintaining the five main elements in human life. Its application is by upholding the pillars, establishing the rules, and rejecting the mafsadah that has arisen and will occur. *Maqâṣid al-hâjiyyāt* is intended to eliminate narrowness or difficulties while preserve the maintenance of the five main elements so that they are even

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[40] Kristian Kristian and Christine Tanuwijaya, "Penyelesaian Perkara Pidana Dengan Konsep Keadilan Restoratif (Restorative Justice) Dalam Sistem Peradilan Pidana Terpadu Di Indonesia," *Jurnal Hukum Mimbar Justitia* 1, no. 2 (2017): 592–607.

[41] Dewi Setyowati, "Memahami Konsep Restorative Justice Sebagai Upaya Sistem Peradilan Pidana Menggapai Keadilan," *Pandecta Research Law Journal* 15, no. 1 (2020): 121–41.

[42] Abu Ishāq As-Shāthibī, "Al-Muwāfaqāt Fī Uṣūl as-Syarī'ah," (*Beirut: Dār Al-Fikr*, 2005).

better. Meanwhile, *maqâṣid at-tahsîniyyāt* is intended so that humans can do their best to maintain the five main elements. In this case, alternative punishment is a form of hâjiyyāt, which is a much needed solution in protecting the souls of prisoners due to overcrowding in prisons. Prisoners are also human beings whose souls must be guarded even though they are criminals who are currently serving a sentence.

Conclusion

There are several important points that conclude this study; in positive law, provisions for alternative punishment other than imprisonment are available in the Criminal Code and other legislation. There are several alternative forms of punishment that can be used, including models of criminal sanctions, fines, and rehabilitation sanctions. Including the model of settlement of criminal acts outside the court (APS) with a restorative justice approach, namely in the form of peace and forgiveness of the perpetrators, victims and the community. Conceptually, alternative punishment in positive law has an ideal concept with the aim of punishment that leads to recovery not retaliation. Then in the concept of Islamic criminal law, the provision of alternative punishment is in accordance with the principles contained in maqashid al-syariah, namely protecting religion (*al-dîn*), soul (*al-nafs*), offspring (*al-nasl*), property (*al -mâl*) and reason (*al-aql*).

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Alternatives to Criminal Conviction in a Comparative Analysis of Positive Law and Islamic Criminal Law

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PROGRESSIVE LAW PARADIGM IN ISLAMIC FAMILY LAW RENEWAL IN INDONESIA

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Abstract: This paper discusses the progressive legal paradigm in renewal Islamic family law in Indonesia. Starting from the complexity of family problems in the contemporary era, the presence of progressive legal thinking is one of the foundations in order to provide certainty and justice in society. The results of this study indicate that legal reform progressive in the field of Islamic family law can be noticed from law enforcement through court decisions. Various judges' decisions have created jurisprudence and are used as guidelines for Religious Court judges in deciding cases. This can be seen from the decisions of the constitutional justices, including regarding the restrictions on polygamy, the status of children out of wedlock and the age of marriage which was later successfully revised with the issuance of Law 16 of 2019 concerning Amendments to Law 1 of 1974 concerning Marriage. In the context of progressive legal reform in Indonesia, judges use reinterpretation of religious texts (fiqh), and understand the social context of modern society dynamics. For this reason, judges are required to be more courageous not only to be bound textually, but also to put forward the goal of realizing justice and benefit in the midst of society. Thus, the main legal objectives will be realized, namely substantive justice, benefits, and legal certainty because the law is basically for humans, not for the law itself.

Keywords: progressive law; renewal; Islamic family law; Indonesia

Abstrak: Tulisan ini membahas tentang paradigma hukum progresif dalam pembaruan hukum keluarga Islam di Indonesia. Berangkat dari kompleksitas persoalan keluarga di era kontemporer saat ini, kehadiran pemikiran hukum progresif merupakan salah satu landasan dalam rangka memberikan kepastian dan keadilan di tengah masyarakat. Hasil penelitian ini menunjukkan bahwa pembaruan hukum progresif dalam bidang hukum keluarga Islam dapat dilihat dari penegakan hukum melalui putusan pengadilan. Berbagai putusan hakim telah melahirkan yurisprudensi dan dijadikan pedoman bagi hakim Pengadilan Agama dalam memutus perkara. Hal ini tampak pada putusan hakim konstitusi, di antaranya mengenai pembatasan poligami, status anak luar nikah dan usia perkawinan yang kemudian berhasil direvisi dengan terbitnya UU 16 Tahun 2019 tentang Perubahan Atas UU 1 Tahun 1974 tentang Perkawinan. Dalam konteks pembaruan hukum progresif di Indonesia, maka hakim menggunakan reinterprestasi teks keagamaan (fikih), dan memahami konteks sosial dinamika masyarakat modern. Untuk itu, dibutuhkan hakim yang lebih berani untuk tidak terikat hanya pada tekstual, tapi lebih mengedepankan tujuan dalam mewujudkan keadilan dan kemaslahatan di tengah masyarakat. Dengan demikian tujuan hukum yang utama akan terwujud, yaitu keadilan substantif, bermanfaat, dan tercipta kepastian hukum. Sebab pada dasarnya hukum adalah untuk manusia, bukan untuk hukum itu sendiri.

Kata kunci: hukum progresif; pembaruan; hukum keluarga Islam; Indonesia

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Introduction

The realization of issuing Islamic family law-based regulation in Indonesia which is embodied in Law 1 of 1974 concerning marriage and the Compilation of Islamic Law (KHI) is a milestone in the success of reforming the product of Islamic legal thought.[1] This form of success shows that Islamic law has the power of adaptability, universality and flexibility in the Indonesian legal system. With the existence of this Islamic family law product, it has made a positive contribution to the country while strengthening the commitment of Muslims to the nation-state of Indonesia. However, along with the changing times, various family problems that arise in the community have implications for demands for legal reform.

The space for democratization that has rolled out after the reformation has caused the existence of Islamic family law products to require modification to adapt to modern era. The issue of family law carried out by the state has so far been inadequate in finding and answering contemporary problems that occur in society. The law has met a dead end in realizing substantive justice, especially when faced with the absence of a text that has been a reference for law enforcers. Therefore, the idea of reforming Islamic family law with a progressive dimension is a relevant idea in responding to demands for changes in the midst of society.[2]

According to Yusdani, the emergence of the term progressive law in the renewal of Islamic legal thought is a challenge and demand for reality, for the awareness of contemporary Muslim thinkers in an effort to break down the stagnation wall of Islamic legal thought (fiqh). The formulation of Islamic family law as contained in fiqh books is not a standard formula that cannot change, but must be seen as an interpretation or formulation of the scholars of time who needed criticism in accordance with the demands of change. This is important so that Islamic family law does not undergo fossilization, and in turn will lose its actuality and be abandoned by Muslims.[3]

This is in line with the context of national law development, that the orientation of legal reform no longer leads to reform in the form of positivity and codification, but has shifted to the concept of progressive legal thought.[4] In Indonesia, progressive law is the result of Satjipto Rahardjo's thought in an effort to reform the ideal law in the context of national law development. According to Satjipto,[5] in positivistic legal thinking, law enforcers are trapped in mere procedural aspects, so that the law is far from justice and truth. For this reason, progressive legal thinking becomes important in order to free from positivistic thinking by

[1] Nurul Mua'rifah, "Positivisasi Hukum Keluarga Islam Sebagai Langkah Pembaharuan Hukum Isl Di Indonesi: Kajian Sejarah Politik Hukum Islam," *Al-Manahij: Jurnal Kajian Hukum Islam,* Vol. XIII, No. Desember 2019, p. 243–58, https://doi.org/10.24090/mnh.v 2.2692

[2] Maulidi, "Paradigma Progresif Dan Maqashid Syariah: Manhaj Baru Menemukan Hukum Responsif," *Jurnal Asy-Syir'ah,* Vol. 49, No. 2, 2015, p. 251–64

[3] Yusdani, "Usul Fikih Dalam Hukum Islam Progresif," *adania: Jurnal Kajian Keislaman*, Vol. 1, No. 3 2003the progressive Islamic law has a basic concept of ushûl fiqh setting out ijtihad based contextual concept that comes from the essential of Islamic basic values (maqâsid as-syarî'ah, p. 59-70

[4] Derita Prapti Sulaiman, "Pembangunan Hukum Indonesia Dalam Konsep tum Progresif", *Hermeneutik :Jurnal Ilmu Hukum*, Vol. 2, No. 1, 2018, p.128–39, https://doi.org/10.33603/hermeneutika.v2i1.1124.

[5] Satjipto Rahardjo, "Reformasi Menuju Hukum Progresif Sebaiknya Pikiran Untuk Merekonstruksi," 2004, p. 238–41.

placing laws for humans. Furthermore, Romli added that in the paradigm of national law development, the progressive legal model is one of the attainments of the ideal of a just law. [6]

Meanwhile, various family issues regarding human rights (HAM) and gender equality are still heatedly discussed. According to Nasifah, substantially the existence of family law has not succeeded in increasing the status and position of women. The existing legal policies are still biased which have the potential to cause gender injustice.[7] The issue of gender and human rights has been carried out by liberal groups, such as Siti Ruhaini, who stated that the dominance of the positivistic-formalistic flow of law has placed the law tending to be black and white, a-historical and not contextual. In this case, a contextual progressive law with the involvement of experts, especially women is needed in constructing legal products that are substantially contradicting gender bias and protecting children's rights.[8] Meanwhile, in historical records, progressive legal thought in Islamic thought has been well known by Muslim thinkers in the past and has been practiced in the Muslim world. Because it must be admitted, classical fiqh literature is not sufficient to answer contemporary problems that continue to grow.

This paper takes an important part in explaining the roots of the emergence of progressive legal thinking in the reform of Islamic family law in the Muslim community. Furthermore, it explains how the challenges faced in efforts to reform progressive Islamic family law as well as explain the progressiveness of reforming Islamic family law in Indonesia.

Progressive Islamic Law Paradigm in Islamic Family Law in the Muslim Community

The discussion of progressive law in Islamic legal thought is inseparable from the historical roots of Muslims in the post-codification of Islamic law. Development of Islamic law has stagnated after the codification of Islamic law (tadwin). This stagnation is caused by the inability of Islamic law to dialogue with the ever-evolving reality. As a result, Islamic jurisprudence is far behind the development of human civilization in general, and the dependence of Muslims on references to intellectual thought in the classical and medieval ages is the only inevitable choice.[9]

This phenomenon a negative impression on Muslims, first; there is an assessment that Islam is seen as a religion that is less sensitive when responding to the conditions of the times rapidly developing. So that there is a wide gap between the Muslim and the Western community; Second, there is an opinion that Islam is a normative and traditional religion, so that Islam in general and Islamic law (fiqh) in particular are often accused and simultaneously sued as the cause of the emergence of extremism. These two things encourage Muslim scholars to continue to study and to explore fiqh products contextually, with progressive legal dimension.[10]

[6] Romli Artasasmita, "Tiga Paradigma Hukum," *Jurnal Hukum Prioris,* Vol. 3, No. 1, 2012, p. 1–26.

[7] Durotun Nafisah, "Positifisasi Hukum Keluarga Islam Di Indonesia Dalam Perspektif Gender," *Al-Manahij: Jurnal Kajian Hukum Islam*, Vol. VII, No. 1, 2013, https://doi.org/10.24090/mnh.v7i1.575

[8] Siti Ruhaini Dzuhayatin,et.al "Menuju Hukum Keluarga Progressif, Responsif Gender, Dan Akomodatif Hak Anak," *PSW UlN Sunan Kalijaga, The Asia Foudation*, 2013, p. 471, http://digilib.uin-suka.ac.id/20159/

[9] Ahmad Bunyan Wahib, "Reformasi Hukum Keluarga Di Dunia Muslim," *Ijtihad*, Vol. 14, No. 1, 2014, p.1–19.

[10] Anjar Nugroho, "Rekonstruksi Pemikiran Fikih: Mengembangkan Fikih Progresif-Revolusioner," *Al-Manahij: Jurnal Kajian Hukum Islam*, Vol.IX, No. 1 Juni,

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Basically, the position of Islamic law is clear that the value of the universality of Islamic law has been able to adapt and to answer various problems that arise in society. Even the position of Islamic law is not in the position of being trapped and bound by the past, but on the contrary, it is able to see the present and the future. This is in line with the rules of ushul al-fiqh: "The law rotates (is born and changes) along with the presence or absence of *'illat*. This rule suggests the elasticity of fiqh or Islamic law. It can also be said that fiqh is a product of socio-historical conditions.[11]

However, reconstructing progressive Islamic law is not enough with the courage of a mujtahid, but still adhering to the building blocks of Islamic law. Philosophically, one of the foundations of the building of Islamic law is benefit *(maslahah)*. The idea of maslahat as the foundation of Islamic law has developed and is recognized by Imam Malik, ash-Syatibi, al-Ghazali, Izzudin ibn abd Salam, and so on. In essence, *maslahah* is a "value" to be achieved in the formation of law. As emphasized by Najmuddin at-Thufi, an Islamic scholar who lived in the 13th century AD. One of the theories at the core of maslahat teachings is that God sent down the law in order to fulfill human benefit. Religious sacred texts are only limited to wasilah (read: intermediary), while the main objective is to achieve the gold itself. He added that *maslahat* is an independent argument *(dalil mustaqil)* in establishing law. The *hujjah* (argumentation) of maslahat does not need supporting arguments, with the argument that maslahat is based solely on reason.[12] If investigated further, the idea of maslahat at-Thufi turns out to have the same spirit as the progressive legal teachings offered by the Indonesian legal scholar, Satjipto Rahardjo, whose philosophical basis is that law is for humans.

Next, methodologically, namely the approach of fiqh proposals which becomes a very fundamental foundation in answering contemporary problems in society in the effort to achieve maslahat justice. In line with the rules of ushul al-fiqh: (Law is rotating (born and changing) along with whether or not According to Abdullah Seed, thinking methodologically becomes a foothold in the framework of progressive ijtihadists to reinterpret traditional religious foundations or products of Islamic law to accommodate contemporary life, especially in addressing contemporary Muslim fiqh issues. In addition, Muslim thinkers are required to adhere to the maqhasid syariah framework as the goal of establishing Islamic law, namely, maintaining religion, soul, reason, descent and property.[13]

The explanation above shows that progressive ijtihadists are required to master the basics of Islamic law, both philosophically with maslahat theory, and thinking methodologically by

2015, https://doi.org/10.24090/mnh.v9i1.508

[11] Toha Andiko, "Pemberdayaan Qawa'id Fiqhiyah Dalam Penyelesaian Masalah-Masalah Fikih Siyasah Kontemporer," *Al-Adala*, 2014.

[12] At that time, his thought about maslahat was very controversial and tended to go against the existing and well-established current of thought. One of his ideas which until now is still con-sidered controversial and against the current is the necessity of maslahat to annul religious sacred texts (such as the al-Quran and al-Hadith) when it contradicts the values of benefit (maslahah) that develop in society. See, Sarifudin, "Hukum Islam Progresif: Tawaran Teori Maslahat At-Thufi Sebagai Epistemolo untuk Pembangunan Hukum Nasional Di Indonesia," *Jurnal Wawasan Yuridika*, 2019, https://doi.org/10.072/jwy.v3i2.269.

[13] Toha Andiko, Suansar Khatib, Romi Setiawan, *Maqashid Syariah Dalam Ekonomi Islam*, 2018, https://doi.org/10.1051/matecconf/201712107005.

mastering fiqh proposals in an effort to reconstruct a more acceptable and compatible Islamic legal building in contemporary issues. From this concept, there is an agreement with the main thought of progressive legal teaching put forward by Sacipto Raharjo. The similarity lies in the necessity to carry out rule breaking in times of legal impasse and conflicts between legal texts and the spirit of public justice, or in at-Thufi terms it is called benefit (maslahah). Although it must be admitted that the epistemological sources of the two theoretical structures are different, one comes from God's revelation, while the other comes from the Greek philosophy of natural law.

As an example of reforming family law with a progressive legal dimension, it can be seen from the experiences of several Muslim countries in the world. The country of Turkey was one of the first countries to raise the main issue of gender equality and justice. Of these issues, the issue of polygamy has become one of the important issues as the beginning of family law reform. Article 74 explains that the husband is allowed to be polygamous on the condition that he treats his wives fairly. However, the situation and socio-political development of the Turkish state after 1920, has made a shift in society in various fields, including reforming family law by prohibiting polygamy as contained in the 1926 Turkish Civil Law. This prohibition on polygamy is carried out on the principle of ijtihad through text reinterpretation, namely interpretation. Reiterates to Surah an-Nisa' (4): 3, that the justice required for polygamy is not only in terms of living (*nafaqah*), but also includes love.[14] The same thing has also been done in several other Muslim countries, for example the Tunisian State which absolutely prohibits polygamy. This Tunisian state imposes restrictions on polygamy with tough conditions, and several other countries impose sanctions or punishment if they commit violations.[15]

What the Turkish state has done by prohibiting polygamy by reinterpreting holy verses is a step to seek and to find answers to the needs and demands of the times. This step can be said to be the adaptation of the shari'a to the changes that occur in society, as the situation of the Turkish state before the declaration of Modern Turkey.[16] This sharia adaptation is carried out by adjusting sharia to the development of society so that Islamic law is compatible with modern society. Therefore, it is not uncommon to make new legal provisions at the expense of old legal rules that have been practiced. Legal reforms in the form of sharia adaptation can take the form of modifying old provisions or replacing old provisions with new ones.

On the other hand, the Turkish state is a good example for other Muslim countries, because modern legal reforms are not always successful. Modern Turkey's decision to fully secularize by adopting Swiss family law in 1927

[14] Vita Fitria, "Hukum Keluarga Di Turki Sebagai Upaya Perdana Pembaharuan Hukum Islam," *Humanika*, Vol.12, No. 1, 2015, p.1–15, https://doi.org/10.21831/hum.v12i1.3648.

[15] Toha Andiko, "Hukum Keluarga Di Dunia Islam : Studi Kasus Pengaturan Alasan-Alasan Poligami Di Indonesia ," *Nuansa*, Vol. XII, no. 2, 2019, p. 293–306.

[16] The New Turkish State (Republic of Turkey) which was declared in 1923 then carried out the secularization of government, including in the field of law and justice. In 1924, one year after the declaration of modern Turkey, the religious justice system was abolished. In 1927 Turkey also replaced family law by adopting the Swiss Civil Code. In this area of family law, Modern Turkey is completely secularized . See . Ahmad Bunyan Wahib, "Reformasi Hukum Keluarga Di Dunia Muslim," *Ijtihad*, Vol. 14, No. 1, 2014, p.1–19.

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met "failure". Several results of legal reform efforts must be canceled because they do not get strong support from the community. From this phenomenon, it can be concluded that in legal reform, social engineering efforts are needed by considering the legal tradition (legal culture) which represents the need for law and the importance of law in society. So that the fruits of legal reform can be implemented in society without any pressure to be repealed, because historical facts explain that there are laws that cannot be imposed (non-transferability of law) on society.[17]

In the context of progressive law, the case of polygamy based on the letter an-Nisa (4): 3 on the condition that acting fairly is considered incompatible with the situation with the times. Therefore, forbidding polygamy is a form of progressive legal reform by considering factors of socio-historical conditions that will give fiqh features that differ from one place and another.

Progressive Legal Challenges in Renewal Islamic Family law in Indonesia

In Indonesia, the presence of progressive law is a response to the domination of positivist-formalistic thinking which considers the truth of law to be textual truths. For positivists, law is viewed only from one perspective, namely, that law is ius contitutum, namely the command of law giver (order of lawmakers), so that the values that are based on formal law that is deposited by the state are what is said by law. For the progressive legal group, they see that legal truth is truth based on contextual facts (order of fact). Therefore, the progressive legal paradigm exists as an attempt to free from formalistic shackles.

Until now, the attempt to acknowledge Islamic family law products has become a guideline for religious judges in deciding cases in court. It contains regulations regarding marriage, inheritance, waqf and other fields. These Islamic family law regulations generally apply to all citizens of the Republic of Indonesia. The factors of the absence of statutory regulations and the weak substance of legal positification have caused law enforcement to be far from a sense of justice amidst the complexity of family problems as a logical consequence of the dynamics of life that arise in society.

A group called the Counter Legal Draft (CLD)-KHI team has ever criticized the product of Islamic family law. A group of liberal groups represented by feminists by raising the issue of equality of men and women, gender biased laws that tend to make women in a subordinate position, and contradicting several articles with the structure and cultural patterns of society. This group criticized them by offering changes (revisions) to the various formulations of the articles in the Islamic Law Compilation (KHI). More specifically, several issues have become important issues that are considered contrary to human rights and gender, namely polygamy, underage marriage and arbitrary divorce, marriage registration, minimum age restrictions for marriage, interfaith marriages, engagement, divorce, and child issues. All of which became the subject of heated debate, resulting in the birth of CLD KHI and the HTPA RUU after the reformation.[18]

[17] Ahmad Bunyan Wahi b , "Reformasi Hukum Keluarga Di Dunia Mu s lim," *Ijtihad*, Vol.14, No. 1, 2014, p. 1–19.

[18] Yushadeni, "Kontroversi Seputar Pembaharuan Hukum Keluarga Islam Di Indonesia," *Al-Ahwal: Jurnal*

According to Islamy, the movement and discourse of liberalism in Islamic thought related to criticism of the formulation of the post-reformation KHI articles cannot be said to be effective. Historical facts show that these various movements and discourses are merely contestations of open scientific discourse in the public sphere as a result of the opening of the taps of post-reform democracy. This is because the formulation of articles contained in the KHI is sociologically considered relevant to the conditions of Indonesian society, although there are several articles on KHI that appear to be gender biased, but these are not problematic and are not urgent to be revised.[19]

On the other hand, family problems that have been growing lately certainly require legal certainty with a one-stop solution. Like the KHI (compilation of Islamic law), which is only a reference book and a benchmark for judges in deciding laws in court. Therefore, in the context of reforming Islamic law in Indonesia, it is appropriate for the KHI to be fought for justification and legitimacy so that it can be promulgated at a higher legal hierarchy for example by Law, Presidential Decree, or Government regulations. Although this step will definitely face challenges from the Islamic Phobic group and secular groups who do not want Islamic law to take the largest share in national law.

When referring to experiences in various Muslim countries in the world, including in Indonesia, the process of updating Islamic law products is influenced by political configuration, as can be seen in the process of forming Islamic family law, both Law 1 of 1974 concerning Marriage and KHI (Compilation of Islamic Law). The role of state domination is very active in addition to the role of elements of society, because the formation of family law products in Indonesia is actually a government program in the context of realizing the unification and certainty of Islamic family law that applies to Muslims in Indonesia.[20] So it is not surprising that the two products of family law are considered to be products of the New Order law, because they were born during the New Order era.[21]

Explained that in reforming a law in a country there are political contestations that have the potential to influence the development of legal products that apply in that country and also produce products that have certain characters. The existence of a democratic political climate will be able to produce legal products that respond to the needs of society. Meanwhile, the authoritarian political climate will give birth to orthodox legal products.

As it can bee seen from the problem of family law reform described above, law enforcement is an important step in efforts to develop a law with a progressive dimension. In this case, judges have an important role in providing legal decisions with a progressive legal dimension as part of legal reform efforts, particularly family law.[22] Judges are required

Hukum Keluarga Islam, Vol. 8, No. 1, 2015, p. 25, https://doi.org/10.14421/ahwal.2015.08102.

[19] Athoillah Islamy, "Eksistensi Hukum Keluarga Islam Di Indonesia Dalam Kontestasi Politik Hukum Dan Liberalisme Pemikiran Islam," *Al-Istinbath: Jurnal Hukum Islam*, Vol. 4, No. 2, 2019, p.61–75, https://doi.org/10.29240/jhi.v4i2.1059.

[20] Athoillah Islamy, Eksistensi Hukum Keluarga Islam…, h.61-75.

[21] Nurrohman, "Reformasi Dan Transformasi Hukum Keluarga Islam : Model Dan Implementasinya Di Indonesia," n.d.

[22] Mukhlis, "Pembaharuan Hukum Perkawinan Di Indonesia," *ADLIYA: Jurnal Hukum Dan Kemanusiaan* 11, no. 1 (2019): 59–78, https://doi.org/10.15575/adliya.v11i1.4852. Lihat juga.Khoiruddin Nasution, "Metode

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to get out of the trap of formal justice which ignores the substantial justice used by the positive school. Thus, the law will appear to be always moving, changing, following the dynamics of human life. This is what is meant by "liberation", which is to free oneself from legalistic-positivistic types, ways of thinking, principles and theories of law. With the characteristic of "liberation", progressive law prioritizes "goals" rather than "procedures".

The demand for judges, both Supreme Court and Constitutional justices to act progressively through legal interpretation is because the formulation of articles in laws and regulations has beenoften so vague, that justices must interpret them in the context they are facing. The legal objectives to be achieved are such as justice, certainty, and congruence, are still too general, giving the justices the opportunity to develop their own interpretation of the law's purpose. Justices in this case have the authority to take the initiative to find justice-oriented laws by creating jurisprudence.

The essence of legal discovery lies in the freedom of judges who are free to make decisions in accordance with the situation at hand, not based on the outward appearance of the applicable laws but on the basis of wisdom and justice. From this it can be said that judges have implemented the concept of progressive law that carries out law not only according to legislation, but a tool to describe the basic humanity that functions to provide justice to humans. The as-sumptions that underlie the progressiveism of law are firstly, the law exists for humans and not for itself, the second law is always in the status of *law in the making* and is not final, the third law is an institution that has human moral values.

Law enforcement through judge's decisions *(judge made law)* is a process to bring legal ideas into reality. The idea of progressive law is pro-justice and pro-people law, meaning that in punishing legal actors are required to prioritize honesty, empathy, concern for the people and sincerity in law enforcement.[23] The main idea of progressive law is to free humans from the shackles of law. According to progressive law, the function of law is to provide guidance, not just shackle, it is humans who are more important and are not attached to existing laws and regulations.[24]

According to Satjipto Rahardjo, the legal idealist is a judge. Apart from carrying out his duties as a judge, he must also be a sociologist and leave the courthouse to hear the noise of the people, not be imprisoned by legal texts. It is hoped that the presence of legal actors can do something that is visionary, sensitive to moral values and justice, honest and trustworthy, so that they can produce legal decisions that are more pro-justice and the welfare of the people at large. In this case, judges are expected to be able to place the law not limited to the letters that must be applied in handling cases, but what is important is that the decision has a toughness, provides a sense of security, provides protection, justice, and is not isolated and takes into account the aspects that will arise later day.

Pembaruan Hukum Keluarga Islam Kontemporer," *Unisia* 30, no. 66 (2007): 329–41, https://doi.org/10.20885/unisia.vol30.iss66.art1.

[23] Mukhamad Luthfan Setiaji and Aminullah Ibrahim, "Kajian Hak Asasi Manusia Dalam Negara the Rule of Law : Antara Hukum Progresif Dan Hukum Positif," *Lex Scientia Law Review*, Vol. 2, No. 2 2018, P, 123–38, https://doi.org/10.15294/lesrev.v2i2.27580.

[24] Mukhidin, "Hukum Progresif Sebagai Solusi Hukum Yang Mensejahterakan Rakyat," *Jurnal Pembaharuan Hukum*, Vol. 1, No. 3, 2003, P. 267–86.

Based on the explanation above, it takes the courage of a judge with a high level of morality and integrity when making a decision to create a just law for everyone. Next, judges are required to take creative, innovative steps and if necessary carry out "legal mobilization" or *"rule breaking"*. Because, even though the practice of law enforcement by judges through legal discovery has developed based on progressive legal principles, the legal-positivist tradition is still the mainstream of judges, and the strong political influence, at least is the reason that progressive law enforcement has not been maximized.[25] Although it is recognized that the progress and deterioration of the law is not solely in the hands of legal operators, but also users and even legal experts.[26]

Progressiveness of Islamic Family Law Renewal in Indonesia

The emergence of legal thinking with a progressive dimension is admittedly not new. The progressive legal thought developed by Sacipto is a crystallization of thoughts on the portrait of law that is far from justice for all people. Starting in 1980 until now it has experienced significant developments, especially in the post-democratization era with a popilistic responsive tendency in every effort to form legislation.[27] Philosophically, the idea of progressive law wants legal entity to be a living part, developing by adjusting the social life of the community. Pacipto explains that law has power if the law runs dynamically, thus rejecting legal methods that cause legal dynamics to disappear because the law becomes static and stagnant.

The notion of progressive law put forward by Sacipto came back to the fore after the reformation along with the legal reform agenda in Indonesia. As a rule of law, demands for post-reform legal reform are a constitutional mandate in ensuring the fulfillment of gender equality and justice in society. In the 1945 Constitution states that the state guarantees and protects human rights, without differentiation of race, religion, sex or gender. To support the government's commitment to the national law development agenda, Islamic family law products derived from Islamic law are an integral part. In the agenda of legal reform that is just for everyone. In this case, the agenda for legal reform by prioritizing a progressive legal paradigm is an effort in the context of realizing the goal of developing a national law with substantive justice for society.

In the context of a *nation-state*, the existence of Islamic family law in the midst of social change in Indonesia can be understood to function as a potential value substance to provide roots for the growth of *pure legal obedience* as a reality and process of cultural transplantation and sincere towards the existing constitution and legislation.[28] For this reason, efforts to reform progressive family law products always go hand in hand with a process of dialogue between Islamic law and social reality. So that Islamic law is not considered a fossilized framework of

[25] Sigit Irianto, "Hukum Progresif Dalam Perkembangannya Melalui Lembaga Peradilan," *Hukum Dan Dinamika Masyarakat,* Vol. 4, No. 0854, 2007, p.194–205.

[26] Sigit Irianto, Hukum Progresif Dalam…, P.194-205.

[27] Eko Hidayat, "Kontribusi Politik Hukum Dalam Pembangunan Hukum Progresif Di Indonesia," *ASAS*, 2019, https://doi.org/10.24042/asas.v10i02.4536.

[28] J.M. Muslimin, "Hukum Keluarga Islam Dalam Potret Interrelasi Sosial," *AHKAM : Jurnal Ilmu Syariah*, Vol. 15, No. 1, 2019, h. 48, https://doi.org/10.15408/ajis.v15i1.2846.

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understanding, but Islamic law remains consistent with its attitude which has flexibility and creativity. as shown from the experiences of earlier thinkers to this day.

It is admitted that the issue of human rights and gender equality in the public sphere that is aimed at the product of Islamic family law is still an actual, controversial issue and has become an agenda for thematic discussions among ulama, legal practitioners, women activists and academics. The reality of law related to gender has become a sensitive social problem, so that the law is sometimes blind, neutral, and biased. This sensitive attitude is a form of response and responsibility for the social inequality that occurs. Meanwhile, legal opinion has been dominated by a positive-formalistic stream which tends to be black and white, a-historical and not contextual.[29]

The reality in society shows that women are still subordinated in almost all lines of life. In fact, violence perpetrated by husbands against wives is not only physical violence, but also psychological, economic and sexual violence. Based on data from KOMNAS HAM 2020, it shows that in the period 12 years, violence against women increased by 792% (almost 800%). This means that violence against women in Indonesia for 12 years has increased almost 8 times. This fact is an iceberg phenomenon, which means that in the actual situation, the condition of Indonesian women is far from having an unsafe life.[30] Meanwhile, existing statutory regulations have not been able to be maximally enforced. In normative regulation regarding domestic violence has been set in legislation (Act No. 23 of 2004 on the Elimination of Domestic Violence). It is hoped that law enforcement against violence perpetrated by husbands against wives can be carried out optimally, either by means of penal and non-penal countermeasures so that obstacles in resolving violence perpetrated by husbands against wives can be overcome.[31]

The phenomenon of violence against wives is a small part of the shift in weak understanding of the meaning of family formation due to current modernization. In Islam, the formation of a family is a structure in society that is special, binding to one another. It contains responsibility and at the same time a sense of belonging and mutual hope *(mutual expectation)*. The value of love based on religion makes a strong family structure. In contrast to modern society which tends to think and act pragmatically, so that marriage is prioritized as a function of sexual, reproductive and recreation. As a result, a marriage that only focuses on seeking pleasure rather than thinking about responsibilities will give birth to a weak marriage structure causing various family problems, such as divorce and domestic violence.[32] Therefore, modern society needs to make Islam a concept in the formation of a family because the system and

[29] Masnun, "Perempuan Dalam Bingkai Hak Asasi Manusia Dalam Hukum Keluarga Islam," *MUSAWA*, Vol. 15, No. 1, 2016, h. 55–68.

[30] Https://www.komnasperempuan.go.id/read-news-catatan-tahunan-kekerasan-terhadap-perempuan-2020, "Read News," n.d., https://www.komnasperempuan.go.id/read-news-catatan-tahunan-kekerasan-terhadap-perempuan-2020.

[31] Sutan Siregar and Pranjono Pranjono, "Penegakan Hukum Terhadap Tindak Kekerasan Yang Dilakukan Oleh Suami Terhadap Istri," *Jurnal Muqoddimah : Jurnal Ilmu Sosial, Politik Dan Hummaniora*, 2019, https://doi.org/10.31604/jim.v3i2.2019.74-83.

[32] Mufliha Wijayati, "Perempuan Dalam Persidangan KAsus Perceraian," *TAPIS Jurnal Penelitian Ilmiah*, 2012. Lihat juga Toha Andiko & Fauzan, "Dilema Perceraian Suami Muslim Pegawai Negeri Sipil Di Propinsi Bengkulu," *Al Ulum*, Vol. 19, No. 1, 2019, h, 103–28.

its foundation comes from the principle of Tauhid, which is to make God as the maker of rules to be carried out in everyday life.[33]

Regarding the reform of Islamic family law which has a progressive dimension in family mat-ters, it can be seen from the important issues that have been developing. In general, the issues raised in the family sector include legal materials such as law enforcement of marriage, inher-itance, wills, and the political field. state and government, such as the relationship between religion and state, constitutional rights of citizens, culture, gender, human rights, the position of women and others. From these issues, based on the experiences in Muslim countries such as Turkey and other Muslim countries, the issue of human rights and gender equality is one of the important issues for progressive ijtihadits. Paraprogressive ijtihadits in its framework tries to formulate a set of Islamic laws that can serve as a basis for reference. Alternatives and solu-tions for the creation of a just society that upholds human values, respects women's rights, gender equality in the family, justice without any discrimination in the context of realizing the benefit of all mankind.

The progressive ijtihadits in their framework are based on the basic concept of jurisprudence by putting forward the concept of contextual based ijtihad (progressive ijtihadist) which is based on essential Islamic basic values (maqâshid as-syarî`ah). Islamic basic values such as justice, equality, equality, and others are translated and integrated in such a way as to respond to contemporary humanitarian issues in the field of family law, such as human rights, gender equality, the rights of minorities, on that basis. The proposed concept of progressive Islamic jurisprudence intends to develop and offer humanist Islamic fiqh (transformative anthropocentric) by upholding prophetic values.[34]

Meanwhile, considering that Islamic law has historically developed outside state institutions, one of the means in reforming Islamic family law with a progressive legal dimension can be carried out through court decisions. Court decisions are a product of Islamic legal thought apart from fiqh, laws and fatwas. According to Ahmad Rofiq,[35] The court decision is categorized as a product of Islamic legal thought which has a fairly high level of dynamics. This is possible because the decisions handed down by the court involve the role of judges who carry out law enforcement functions. Judges in carrying out their functions are required to explore, follow and understand legal values and a sense of justice that lives in society.

According to Arif Budiman, a judge becomes the spearhead through his courage and creativity to act progressively in finding laws against legal formulations that are often vague. The ability of a judge to interpret a case in the context he is facing will contribute to the development of Islamic law in Indonesia, because a judge's decision will serve as jurisprudence for other judges. The judges' findings contributed positively to the development of Indonesian Islamic Civil

[33] M. Saeful Amri and Tali Tulab, "Tauhid: Prinsip Keluarga Dalam Islam (Problem Keluarga Di Barat)," *Ulul Albab: Jurnal Studi Dan Penelitian Hukum Islam*, 2018, https://doi.org/10.30659/jua.v1i2.2444.

[34] Moh Dahlan, "Pendekatan Antropologis Dalam Paradigma Usul Fikih," *Madania: Jurnal Kajian Keislaman*, Vol. 19, No. 1, 2015, p. 47–59.

[35] Ahmad Rofiq, "Pembaharuan Hukum Islam Di Indonesia, (Yogyakarta:Penerbit Gema Media,2001), cet.1

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Law. The judge's decision has strategic value because it will give color to law enforcement in Indonesia. In practice, these court decisions are then used as jurisprudence by judges in the Religious Courts.[36]

The jurisprudence issued by the judges is a form of legal reform efforts and shows the flexibility of dynamic Islamic law. The rule of the judge is the key in exploring and finding laws that are more contextual to Indonesian conditions. Thus, the progressive reform of the field of Islamic family law carried out by judges has a strategic role in the development of national law. The independence of judges is the key in exploring and finding laws that are more contextual to Indonesian conditions. The jurisprudence issued by judges is a form of legal reform efforts and shows the flexibility of dynamic Islamic law.

In the context of the progressive reform of family law with a progressive dimension, it can be seen from several decisions of the Constitutional Court judges, including:

First, the Constitutional Court Decision Number 46/PUU-VIII/2010 which annulled Article 34 paragraph (1) of Law Number 1 of 1974 concerning Marriage on the basis that the article contained elements of the elimination of extramarital children (even though blood relations between an out-of-wedlock child with a biological father can be proven scientifically and other evidence according to law), as well as against the values of justice and legal certainty as set forth in Article 28B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution.[37]

Second, the verdict of the Constitutional Court justices. 12/PUU-V/2007 which strengthens the provisions on limiting polygamy on the condition that the first wife's permission. The Constitutional Court is of the opinion that monogamy is the principle of marriage in the Marriage Law No.1 of 1974. Polygamy is permitted only if the request for it fulfills the conditions which do not conflict with Islamic teachings. In this case, the Constitutional Court refers to the interpretation of Islamic marriage law that polygamy is not included in the category of worship in sharia. P oligami included in this aspect of social relationships (*mu`amalat*) in sharia and the legal status of origin is permissible. Therefore, the provisions for limiting polygamy in the Marriage Law No. 1 of 1974 does not contradict the clause on religious freedom in the 1945 Constitution. Even the restrictions on polygamy in Law 1 of 1974 are in line with the objectives of marriage in Indonesia, namely to form a family that is sakinah, mawaddah and rahmah.

Thirdly, messenger of the Constitutional Court of the Republic of Indonesia Number 22/PUU-XV/2017 which received the request for a change of article 7 of Law No. 1 of 1974 concerning Marriage by increasing the minimum age of marriage for women and men to be 19 years old. Even the DPR Plenary Session Monday, September 16 2019 has approved the Limited Amendment to Law No. 1 of 1974 concerning Marriage. Important changes made to article 7 of Law no. 1 of

[36] Achmad Arief Budiman, "PENEMUAN HUKUM DALAM PUTUSAN MAHKAMAH AGUNG DAN RELEVANSINYA BAGI PENGEMBANGAN HUKUM ISLAM," *Al-Ahkam*Vol.24, No. 1 April 2014 (n.d.),h. 1–30.

[37] Sarifudin Sarifudin and Kudrat Abdillah, "Putusan Mahkamah Konstitusi No. 46/Puu-Viii/2010 Dalam Bingkai Hukum Progresif," *Jurnal Yuridis*, Vol. 6, No. 1, 2019, p. 94, https://doi.org/10.35586/jyur.v6i1.788.

1974 concerning Marriage, among others, is to increase the minimum age limit for equal marriage for women and men to the age of 19 years. This amendment to Article 7 also provides an exception rule if underage marriage must be made, the exception must be provided with very urgent reasons and sufficient evidence. [38]

The decision of the Constitutional Court shows that the justices of the Constitutional Court have derived a progressive legal concept in the form of invalidating the discriminatory law text, then moving more realistically by considering the values of justice that live in the soul of society. The courage in seeking the truth and substantive justice has led him to *rule breaking* efforts against existing regulations. The position of progressiveness lies in the spirit of the Constitutional Court justices to continue to explore and to seek substantive justice even though it must be by "going beyond" the text of the laws and regulations (*rule breaking*), thus fulfilling a sense of legal justice in society.

In the context of Islamic legal thought, the Constitutional Court's decision in its consideration has accommodated the reform of Islamic law (fiqh), especially in the field of family law which has an empirical-historical vision of humanity and nationality in Indonesia. In this case, fiqh needs to be oriented towards solving humanitarian problems. fundamental and nationalism as a whole. Thus, progressive Islamic jurisprudence can be said to be a new formula (interpretation) of Islamic law that is in accordance with the social life of society.

[38] "Perjuangan Mengakhiri Perkawinan Anak Di Indonesia Membuahkan Hasil," accessed September 28, 2020, https://www.jurnalperempuan.org/warta-feminis/perjuangan-mengakhiri-perkawinan-anak-di-indonesia-membuahkan-hasil.

Conclusion

The progressive legal paradigm is an idea implying law essentially aimed to realize substantive justice which emphasizes general benefits, and provides benefits to humans, not law for the law itself (formal legality). As for efforts that must be made in the framework of reform Islamic family law which has a progressive legal dimension, which starts from a comprehensive understanding of law enforcement from legal practitioners, especially judges on the dynamics of local communities in the modern era. Judges are required to reinterpret or comprehend the texts contextually and the prevailing laws and regulations, and the courage of the judges in trying to decide cases that do not understand the existing rules. This effort has partly shown results, such as provisions on the regulation of polygamy requirements in the Marriage Law No.1 of 1974 and KHI, the rights of children outside of marriage based on the MK judge's decision in 2010, and the equal age of marriage for men and women based on Law no. 16 of 2019 concerning amendments to Law no. 1 of 1974. Thus, the presence of progressive Islamic family law in the midst of social change in Indonesia, is able to provide a sense of security and protection, justice, gender equality, balance between human rights and human obligations, and welfare for the wider community as well as to uphold prophetic values. Therefore progressive Islamic family law is able to answer the challenges and problems of contemporary law and to contribute to the development of national law.

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Divorce Dilemma among Husband of Muslim Civil Servants in Bengkulu Province

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Abstract

This article examines the political system ever undertaken by the Prophet Muhammad especially when he was in Medina. The study finds out that the hadith texts show that the political practices of the Prophet indicated that he not only became the spiritual leader of the Muslims community, but also the leader of the state who made the syûrâ as a system in determining the direction of the government of Madinah. The syûrâ system not only offers a political system but also becomes the basis of ethics in politics so that politicians can improvise in exercising power without violating Islamic ethics. Islam does not set certain systems to be embraced by a predominantly Muslim country, although the term syûrâ is contained in the Qur'an and Hadith, but the most important thing is the substance of the syûrâ that should be the system for every country, especially in Indonesia.

Dilema Perceraian Suami Muslim Pegawai Negeri Sipil di Propinsi Bengkulu

Abstrak

Artikel ini mengkaji sistem politik yang pernah dilakukan oleh Nabi saw. khususnya ketika beliau berada di Madinah. Studi ini menemukan bahwa teks-teks haditz menunjukkan bahwa praktek politik yang dilakukan oleh Nabi menunjukkan bahwa dia tidak hanya menjadi pemimpin spiritual umat Islam, tetapi juga pemimpin negara yang menjadikan syûrâ sebagai sistem dalam menentukan arah pemerintahan Madinah. Sistem syûrâ tidak hanya menawarkan sistem politik semata, tetapi juga menjadi dasar etika dalam berpolitik sehingga para politisi dapat berimprovisasi dalam menjalankan kekuasaan tanpa melanggar etika Islam. Islam tidak mematok sistem tertentu untuk di anut oleh negara yang mayoritas berpenduduk muslim, meskipun term syûrâ tercantum dalam al-Qur'an maupun Hadis, namun hal paling terpenting adalah substansi dari syûrâ yang selayaknya dijadikan sistem bagi setiap negara khususnya di Indonesia.

Kata Kunci: perceraian, suami muslim, Pegawai Negeri Sipil, Bengkulu

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A. Pendahuluan

Perceraian adalah terputusnya ikatan keluarga yang disebabkan oleh salah satu atau kedua pasangan memutuskan untuk saling meninggalkan, sehingga berhentilah pasangan suami isteri tersebut dalam memenuhi kewajiban dan perannya dalam rumah tangga, termasuk dalam kekacauan yang terjadi di rumah tangga.[1] Pasal 39 ayat 2 Undang-Undang Perkawinan No. 1 Tahun 1974 dan pasal 19 Peraturan Pemerintah No. 9 Tahun 1975 menyebutkan bahwa alasan-alasan yang dapat dijadikan dasar untuk perceraian adalah: 1) Salah satu pihak berbuat zina atau menjadi pemabuk, pemadat, penjudi, dan lain-lain sebagainyayang sukar disembuhkan, 2)Salah satu meninggalkan yang lain selama dua tahun berturut-turut tanpa izin pihak laindan tanpa alas an yang sah atau karena hal lain di luar kemauan, 3) Salah satu pihak mendapat hukuman lima tahun atau hukuman yang lebih berat setelah perkawinan berlangsung, 4) Salah satu pihak melakukan kekejaman atau penganiayaan berat yang membahayakan terhadap pihak lain, 5) Salah satu pihak mendapat cacat badan atau penyakit yang mengakibatkan tidak dapat menjalankan kewajiban sebagai suami atau isteri, 6) Antara suami isteri terus-menerus terjadi perselisihan dan pertengkaran dan tidak ada harapan akan hidup rukun lagi dalam rumah tangga.

Alasan-alasan sebagaimana tersebut di atas, bukan alasan secara keseluruhan harus ada atau terpenuhi semua alasan-alasan tersebut untuk mengajukan perceraian, melainkan cukup salah satu atau beberapa saja di antara alasan-alasan tersebut. Sehingga sifatnya adalah relatif alternatif. Jadi jika misalnya terpenuhi unsur terjadinya perselisihan atau pertengkaran yang berlangsung terus menerus dan tidak ada harapan akan hidup rukun lagi dalam rumah tangga, maka itu sudah cukup dapat menjadi alasan perceraian diajukan ke Pengadilan yang berwenang.

Oleh sebab itu, tuntutan perceraian hanya dapat diajukan oleh pihak yang tidak bersalah dengan salah satu dari 6 alasan tersebut. Maksud pembuat undang-undang adalah agar perceraian itu hanya dimungkinkan jika fakta seperti tersebut di atas benar-benar terjadi.[2] Menurut Undang-Undang Perkawinan, yang dimaksud perceraian adalah penjatuhan talak. Perceraian hanya dapat dilakukan di depan sidang pengadilan setelah pengadilan yang bersangkutan berusaha dan tidak berhasil mendamaikan kedua belah pihak. Selain itu, untuk melakukan perceraian harus ada cukup alasan yang mengindikasikan bahwa antara suami isteri itu tidak dapat hidup rukun sebagai suami istri. Karena konflik yang terjadi terus menerus dalam rumah tangga dan tidak dapat menemukan keharmonisan, maka perceraian sebagai jalan untuk mengakhiri konflik. Dampak perceraian bukan hanya mengakhiri konflik suami isteri, tapi berdampak juga kepada anak dan keluarga di kedua pihak. Kasus perceraian bisa terjadi pada siapa saja,

[1] Anik Farida dkk. *Perempuan dalam Sistem Perkawinan dan Perceraian di Berbagai Komunitas*, (Jakarta: Balai Penelitian dan Pengembangan Agama, 2017), h. 17
[2] Titik Triwulan, *Hukum Perdata dalam Sistem Hukum Nasional*, (Jakarta: Kencana, 2011), h. 135

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baik masyarakat biasa, tokoh masyarakat, pejabat negara maupun Pegawai Negeri Sipil (untuk selanjutnya disingkat PNS).

Di Propinsi Bengkulu, tingkat perceraian mengalami pasang surut dalam lima tahun terakhir (2013 = 238 kasus; 2014 = 767 kasus; 2015 = 776 kasus; 2016 = 773 kasus; 2017 = 855 kasus, dan 2018 = 886 kasus.[3] Khusus angka perceraian PNS di Bengkulu pada tahun 2017 menunjukkan tren meningkat, terbukti selama bulan Januari sampai Mei 2017, sudah 11 orang yang mengajukan permohonan izin cerai ke Badan Kepegawaian Daerah (BKD) Provinsi. Enam di antaranya sudah diterbitkan SK persetujuan cerai, dan lima lagi sedang upaya mediasi untuk rujuk kembali. Menurut Kepala BKD Bengkulu, Ari Narsa JS, jika dibandingkan tahun 2016 yang totalnya ada 30 PNS yang mengajukan permohonan izin cerai, tahun 2017 ini tergolong cukup tinggi. Sebab baru empat bulan sudah 11 orang yang mengajukan permohonan izin cerai.[4]

Tulisan yang merupakan hasil penelitian di Propinsi Bengkulu ini, akan mencoba menjawab beberapa pertanyaan berikut ini: 1) Apa sebab-sebab perceraian PNS Muslim ? 2) Bagaimana kendala-kendala perceraian suami PNS Muslim ?, 3) Bagaimana model perceraian suami PNS Muslim untuk mensiasati aturan yang ada? Jenis penelitian ini adalah kualitatif, yaitu suatu pendekatan penelitian yang menghasilkan data deskriptif berupa data-data tertulis atau lisan dari orang atau perilaku yang diamati.[5] Pendekatan yang digunakan adalah pendekatan yuridis normatif dan empiris. Yuridis normatif yaitu suatu pendekatan masalah dengan menelaah dan mengkaji suatu peraturan perundang-undangan yang berlaku dan berkompeten untuk digunakan sebagai dasar dalam melakukan pemecahan masalah, sehingga langkah-langkah dalam penelitian ini menggunakan logika yuridis.[6] Sedangkan yuridis empiris yaitu suatu cara atau prosedur yang digunakan untuk memecahkan masalah dengan menggunakan data primer.[7] Teknik pengumpulan datanya adalah memecahkan masalah penelitian dengan meneliti data primer terlebih dahulu, berupa data yang berasal dari lapangan dengan cara wawancara, untuk kemudian meneliti data sekunder berupa peraturan perundang-undangan, buku-buku, dan yang lainnya terkait objek penelitian. Selanjutnya disajikan secara deskriptif analisis, yaitu menganalisis dan menyajikan fakta secara sistematis sehingga dapat lebih mudah untuk dipahami dan disimpulkan. Adapun teknik penarikan sample dalam penelitian ini menggunakan *purposive sampling*, yaitu penarikan sample yang dilakukan dengan cara pengambilan subjek atau responden yang didasarkan pada

[3] Data Perkara Yang Diterima Pada Pengadilan Agama Kelas IA Bengkulu Tahun 2015-2018.
[4] http://harianrakyatbengkulu.com/ver3/2017/05/18/perceraian-pns-meningkat-49-973-wanita-jadi-janda/, diakses tanggal 15 September 2017
[5] Lexy J. Moleong, *Metodologi Penelitian Kualitatif*, (Bandung: Remaja Rosda Karya, 1995), h. 4.
[6] Abu Ahmad dan Cholid Nurbuko, *Metodologi Penelitian*, (Jakarta: Bumi angkasa, 2012), h. 23.
[7] Soerjono Soekanto, *Pengantar Penelitian Hukum*, (Jakarta: UI Press, 1986), h. 6

tujuan tertentu.[8] Selanjutnya, analisis data dalam penelitian ini menggunakan metode kualitatif, karena data-data yang terkumpul tidak berupa angka-angka yang dapat dilakukan pengukuran, tapi pengumpulan data menggunakan pedoman wawancara dan pengamatan[9] di beberapa Pengadilan Agama, Kantor Kementerian Agama, dan Kantor BKPSDM Kota dan Kabupaten yang ada di Propinsi Bengkulu.

B. Prosedur Umum Perceraian Pegawai Negeri Sipil

Secara umum, bagi yang bekerja sebagai PNS baik di Kepolisian, TNI maupun di instansi lainnya dan berkeinginan untuk mengajukan gugatan atau permohonan cerai, harus memperhatikan beberapa aturan terkait yang berlaku di wilayah Republik Indonesia seperti Peraturan Pemerintah nomor 10 tahun 1983 tentang izin perkawinan dan perceraian bagi PNS, Peraturan Pemerintah nomor 45 tahun 1990 tentang perubahan dan peraturan pemerintah nomor 10 tahun 1983 izin perkawinan dan perceraian bagi PNS, Surat Edaran Kepala BAKN nomor: 08/SE/1983 tentang izin perkawinan dan perceraian bagi PNS, dan Surat Edaran Kepala BAKN nomor: 48/SE/1990 tentang petunjuk pelaksanaan Peraturan Pemerintah nomor 45 tahun 1990 tentang perubahan atas peraturan pemerintah nomor 10 tahun 1983 izin perkawinan dan perceraian bagi PNS. Oleh sebab itu, bagi PNS yang beragama Islam yang akan mengajukan perceraian ke Pengadilan Agama, diharuskan pula untuk memperoleh surat izin cerai terlebih dahulu dari atasannya.

Alasan-alasan yang dapat digunakan untuk mengajukan permohonan izin cerai kepada atasan yang berwenang adalah:[10]

1. Salah satu pihak berbuat zina yang dibuktikan dengan: a.Keputusan Pengadilan, b.Surat Pernyataan dari sekurang-kurangnya 2 (dua) orang saksi yang telah dewasa yang melihat perzinahan itu, yang diketahui oleh Pejabat serendah-rendahnya Camat, c.Perzinahan itu diketahui oleh (suami atau isteri) dengan tertangkap tangan. Pihak yang mengetahui segera membuat laporan
2. Salah satu pihak menjadi pemabok, pemadat atau penjudi yang sukar disembuhkan, yang dibuktikan dengan: a.Surat Pernyataan dari 2 (dua) orang saksi yang telah dewasa yang mengetahui perbuatan itu, yang diketahui oleh pejabat yang berwajib serendah-rendahnya Camat, b.Surat Keterangan dari dokter atau polisi yang menerangkan bahwa menurut hasil pemeriksaan, yang bersangkutan telah manjadi pemabok, pemadat atau penjudi yang sukar disembuhkan/diperbaiki.
3. Salah satu pihak meninggalkan pihak lain selama 2 (dua) tahun berturut-turut tanpa izin pihak lain dan tanpa alasan yang sah atau karena hal lain di luar kemampuannya atau kemauannya yang dibuktikan dengan surat pernyataan dari Kepala

[8] Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, (Jakarta: Ghalia Indonesia, 2011), h. 51
[9] Suratman dan H. Philips Dillah, *Metode Penelitian Hukum*, (Bandung: Alfabeta, 2014), h. 145
[10] Pasal 3 ayat (1) Peraturan Pemerintah No. 45/1990

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Kelurahan/Kepala Desa yang disahkan oleh Pejabat yang berwajib serendah-rendahnya Camat.

4. Salah satu pihak mendapat hukuman penjara 5 (lima) tahun atau hukuman yang lebih berat secara terus menerus setelah perkawinan berlangsung yang dibuktikan dengan keputusan Pengadilan yang telah mempunyai kekuatan hukum yang tetap
5. Salah satu pihak melakukan kekejaman atau penganiayaan berat yang membahayakan pihak lain yang dibuktikan dengan Visum et Repertum dari dokter Pemerintah.
6. Antara suami dan isteri terus menerus terjadi perselisihan dan pertengkaran dan tidak ada harapan untuk hidup rukun lagi dalam rumah tangga, yang dibuktikan dengan surat pernyataan dari Kepala Kelurahan / Kepala Desa yang disyahkan oleh pejabat yang berwajib serendah-rendahnya Camat.

Menurut penjelasan pasal 3 ayat (1) PP No. 45/1990, ketentuan ini berlaku bagi setiap PNS yang akan melakukan perceraian, yaitu bagi PNS yang mengajukan gugatan perceraian (penggugat) wajib memperoleh izin lebih dahulu dari pejabat, sedangkan bagi PNS yang menerima gugatan perceraian (tergugat) wajib memperoleh surat keterangan lebih dahulu dari pejabat sebelum melakukan perceraian.

Selanjutnya, penjelasan pasal 3 ayat (2) PP No. 45/1990 mengatakan bahwa permintaan izin perceraian diajukan oleh penggugat kepada pejabat secara tertulis melalui saluran hierarki, sedangkan tergugat wajib memberitahukan adanya gugatan perceraian dari suami/istri secara tertulis melalui saluran hierarki dalam jangka waktu selambat-lambatnya enam hari kerja setelah menerima gugatan perceraian.

Berkenaan dengan jangka waktu kewajiban atasan memberikan pertimbangan dan meneruskan kepada pejabat, mengacu pada Pasal 5 ayat (2) PP No. 45/1990:

"Setiap atasan yang menerima permintaan izin dari PNS dalam lingkungannya, baik untuk melakukan perceraian dan atau beristri lebih dari seorang, wajib memberikan pertimbangan dan meneruskannya kepada pejabat melalui saluran hirarkhi dalam jangka waktu selambat-lambatnya 3 bulan terhitung mulai tanggal ia menerima permintaan izin dimaksud."

Dari beberapa pasal sebagaimana disebut di atas, ada dua hal yang mengatur tentang jangka waktu terkait izin perceraian, yaitu:

1. Jangka waktu bagi PNS yang menjadi tergugat, harus memberitahukan rencana perceraiannya kepada pejabat, yaitu 6 hari setelah menerima gugatan perceraian.
2. Jangka waktu bagi atasan untuk memberikan pertimbangan dan meneruskannya kepada pejabat melalui saluran hirarkhi, yaitu 3 bulan sejak ia menerima permintaan izin perceraian dari PNS di bawahnya.

Dengan demikian, untuk mendapatkan surat izin cerai dari atasan, PNS tersebut harus mengajukan permohonan izin cerai secara tertulis kepada pejabat yang berwenang dengan mencantumkan alasan perceraian dengan lengkap. Jika pihak yang mengajukan gugatan cerai bukan PNS dan pasangannya adalah PNS, maka yang bersangkutan harus

melaporkan keadaan rumah tangganya serta rencana perceraiannya kepada atasan pasangannya (suami/isteri) yang PNS tersebut.

C. Problematika Aturan Perceraian bagi Suami Muslim Pegawai Negeri Sipil

Bagi suami yang beragama Islam, ia harus mengajukan permohonan cerai talak ke Pengadilan Agama.[11] Dalam Kompilasi Hukum Islam pasal 149 dinyatakan bahwa akibat putusnya perkawinan karena talak[12] bagi yang beragama Islam, maka mantan suami wajib: a) memberikan mut`ah (pemberian/nafkah suami kepada istri karena adanya talak) yang layak kepada bekas isterinya, baik berupa uang atau benda, kecuali bekas isteri tersebut *qabla al-dukhul*; b) memberi nafkah, *maskan* (tempat tinggal) dan *kiswah* kepada bekas isteri selama dalam iddah, kecuali bekas istri telah dijatuhi talak ba'in atau nusyuz dan dalam keadaan tidak hamil; c) melunasi mahar yang masih terhutang seluruhnya, dan separoh apabila *qabla al-dukhul*; d) memberikan biaya hadhanah untuk anak-anaknya yang belum mencapai umur 21 tahun.[13]

Jika suami tersebut seorang PNS, maka sesuai ketentuan PP No.10 Tahun 1983 juncto PP No.45 Tahun 1990: a) Apabila perceraian terjadi atas kehendak PNS pria, maka ia wajib memberikan sebagian gajinya untuk penghidupan istri dan anaknya. b) Pembagian gaji sebagaimana dimaksud dalam ayat (1) adalah sepertiga untuk PNS pria yang bersangkutan, sepertiga untuk bekas istrinya, dan sepertiga untuk anak-anaknya. c) Apabila dari perkawinan tersebut tidak ada anak, maka pembagian gaji yang wajib diserahkan suami PNS kepada mantan istrinya adalah setengah dari gajinya. d) Pembagian gaji kepada istri tidak diberikan apabila alasan perceraian disebabkan karena istri berzina, atau istri melakukan kekejaman atau penganiayaan berat baik lahir maupun batin, suami dan atau istri menjadi pemabuk, pemadat dan penjudi yang sukar disembuhkan, dan atau istri telah meninggalkan suami selama dua tahun berturut-turut tanpa izin suami dan tanpa alasan yang sah atau karena hal lain di luar kemampuannya. e) Apabila perceraian terjadi atas kehendak istri, maka ia tidak berhak atas pembagian mantan suaminya.

Oleh sebab itu, jika suami muslim yang mengajukan cerai talak ke Pengadilan Agama, maka ia berkewajiban membayar mut`ah, nafkah, maskan, dan biaya hadhanah kepada anaknya sampai berusia 21 tahun. Tapi yang paling memberatkan bagi suami muslim PNS jika ia mengajukan cerai tanpa alasan yang tercantum dalam pasal 1 huruf e PP No.10 Tahun 1983 juncto PP No.45 Tahun 1990, maka si suami juga akan dipotong 2/3 gajinya dengan rincian 1/3 untuk bekas istrinya dan 1/3 untuk anaknya (pasal 1 huruf b), dan jika tidak ada anak, maka 1/2 gajinya diserahkan kepada mantan

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[11] Pasal 49 Undang-Undang Nomor 3 Tahun 2006 tentang Perubahan atas Undang-Undang Nomor 7 Tahun 1989 tentang Peradilan Agama

[12] Talak adalah ikrar suami di hadapan sidang pengadilan agama yang menjadi salah satu sebab putusnya perkawinan.

[13] Inpres No. 1 Tahun 1991 tentang Kompilasi Hukum Islam

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istrinya (pasal 1 huruf c). Beban kewajiban yang berat ini tentu bisa berakibat mantan suami tersebut akan sulit menikah lagi karena gajinya sudah banyak terpotong.

Problematika yang terjadi jika suami muslim PNS mengajukan permohonan cerai talak ke Pengadilan Agama, salah satunya adalah wajib memperoleh izin atau surat keterangan lebih dahulu dari pimpinannya[14]. Karena itu, ia harus memperoleh izin terlebih dahulu dari pejabat[15] atau atasannya di instansi tempat ia bekerja. Suami PNS tersebut, baik yang berkedudukan sebagai pemohon atau tergugat, untuk memperoleh izin atau surat keterangan harus mengajukan permintaan secara tertulis dengan mencantumkan alasan yang lengkap yang mendasari perceraian tersebut (Pasal 3 ayat (2) dan (3) PP 45/1990), dan di sini suami biasanya merasa malu urusan rumah tangganya diketahui orang lain sehingga enggan menceritakannya termasuk kepada atasannya. Adapun bagi suami yang berani meminta izin atasannya, ini juga memerlukan proses investigasi berjenjang dari atasan tersebut. Dalam hal ini, atasan atau pimpinan umumnya agak "segan" memberikan izin, sebab atasannya tersebut berpotensi akan dipanggil hadir di pengadilan untuk dimintai keterangannya dalam persidangan.

Begitu pula bagi suami muslim berstatus PNS yang menerima gugatan perceraian, ia wajib memperoleh surat keterangan lebih dahulu dari pejabat di instansi tempatnya bekerja sebelum melakukan perceraian. Permintaan izin perceraian tersebut diajukan secara tertulis kepada pejabat melalui saluran hirarkhi.[16] Waktu untuk mengurus izin yang dimaksud adalah 3 bulan.[17] Oleh sebab itu, PNS tersebut harus menunggu waktu 3 bulan sejak permohonan izin cerai ia ajukan kepada atasannya, sebelum ia meneruskan gugatannya ke Pengadilan Agama. Di samping itu, bagi suami muslim PNS yang berani mengajukan permohonan izin cerai dari atasannya, ada kemungkinan juga tidak diberikan izin. Dan jika suami muslim PNS tersebut tidak mendapat izin dari pejabat atau atasannya, maka risiko hukum yang akan ditanggung oleh suami PNS itu—jika tetap mengajukan gugatan cerai ke pengadilan-- adalah dijatuhi salah satu hukuman disiplin berat.[18]

D. Sebab-Sebab Perceraian PNS di Propinsi Bengkulu

1. Kota Bengkulu

[14] Pasal 3 ayat (1) Peraturan Pemerintah Nomor 45 Tahun 1990 tentang Perubahan Atas Peraturan Pemerintah Nomor 10 Tahun 1983 tentang Izin Perkawinan dan Perceraian bagi Pegawai Negeri Sipil

[15] Pejabat yang dimaksud oleh pasal 3 ayat (1) PP 45/1990 berdasarkan pasal 1 huruf b Peraturan Pemerintah No. 10 Tahun 1983 tentang Izin Perkawinan dan Perceraian Bagi Pegawai Negeri Sipil adalah: 1) Menteri; 2) Jaksa Agung; 3) Pimpinan Lembaga Pemerintah Non Departemen; 4) Pimpinan Kesekretariatan Lembaga Tertinggi/Tinggi Negara; 5) Gubernur Kepala Daerah Tingkat I; 6) Pimpinan Bank milik Negara; 7) Pimpinan Badan Usaha milik Negara; 8) Pimpinan Bank milik Daerah; 9) Pimpinan Badan Usaha milik Daerah.

[16] Lihat penjelasan pasal 3 ayat 1 dan 2 Peraturan Pemerintah No. 45 Tahun 1990.

[17] Lihat pasal 5 ayat 2 Peraturan Pemerintah No. 45 Tahun 1990.

[18] Lihat pasal 15 ayat 1 Peraturan Pemerintah No. 45 tahun 1990.

Dari data PNS di Kementerian Agama, dalam lima tahun terakhir angka perceraian terus meningkat. Peningkatan ini juga terjadi di kalangan PNS di lingkungan Pemerintah Kota Bengkulu. Pada tahun ini, dalam tempo empat bulan sudah 15 PNS mengajukan izin bercerai ke Badan Kepegawaian Daerah. Jumlah ini meningkat dibanding beberapa tahun lalu yang hanya 7 hingga 10 orang pertahun. Dari 15 PNS yang mengajukan cerai tersebut, mayoritas fungsionaris guru. Saat ini berkas permohonan izin tersebut masih dikaji di tingkat inspektorat, dan terlebih dahulu inspektorat akan mempertemukan kedua belah pihak.

Tahun 2015, jumlah janda baru di Kota Bengkulu mencapai 829 orang. Tahun 2016 jumlahnya makin meningkat 3,6 persen atau sebanyak 856 orang. Jumlah ini tentu saja selaras dengan pertambahan duda baru. Dari angka perceraian ini, terbanyak mengajukan gugatan cerai adalah para istri. Tahun 2015 istri mengajukan gugatan cerai sebanyak 75 persen atau 622 orang. Sedangkan suami mengajukan perceraian sebanyak 25 persen atau 207 orang. Pada tahun 2016, pihak yang mengajukan gugatan cerai masih didominasi para istri. Sebanyak 60 persen atau 514 istri mengajukan gugatan cerai. Sedangkan para suami yang mengajukan perceraian sebanyak 40 persen atau 342 orang. [19]

Berdasarkan catatan di Kantor Pengadilan Agama Kelas 1 A Kota Bengkulu, semua kasus perceraian yang sudah diputus oleh Pengadilan Agama ini dilatarbelakangi oleh berbagai permasalahan seperti masalah pihak ketiga, masalah ekonomi, masalah perselisihan dan masalah-masalah lainnya yang tidak lagi bisa diselesaikan secara kekeluargaan, sehingga cara terakhir ialah melalui perceraian. Menurut Kepala Humas Pengadilan Agama Kelas 1 A Kota Bengkulu, Kamardi SH., hampir 70 persen karena faktor perselisihan dan ekonomi, dan ia memperkirakan, angka perceraian akan meningkat terus. Terbukti sampai Desember 2018, tercatat 886 kasus yang sudah masuk ke Pengadilan Agama Kota Bengkulu, dan yang sudah diputus 874.[20]

Meskipun, pada setiap menangani kasus perceraian, pihak Pengadilan Agama sendiri selalu mengupayakan mediasi agar kedua belah pihak bisa berdamai dan rujuk lagi. Tetapi langkah mediasi hingga saat ini belum bisa mengalahkan keinginan untuk tetap berpisah atau bercerai. “Kita sering lakukan mediasi, tetapi sebanyak mediasi yang kita lakukan hanya sekitar 1 hingga 2 persen yang berhasil dan kedua belah pihak rujuk lagi,” jelasnya. Ia menambahkan, langkah mediasi merupakan langkah yang harus pihaknya terapkan untuk setiap pasangan yang mengajukan perceraian, tetapi terkadang saat pihaknya ingin melakukan mediasi, salah satu pihak yang ingin bercerai tidak hadir. Sehingga mediasi batal dilakukan dan perceraian pun terjadi. “Ini salah satu kendala jika kita lakukan mediasi, karena kedua pihak yang

[19] https://daerah.sindonews.com/read/990181/174/80-persen-perceraian-di-bengkulu-atas-permintaan-istri-1429175345, diakses 5 Mei 2018.

[20] Data Perkara Yang Diterima Pada Pengadilan Agama Bengkulu Kelas IA Tahun 2018 dan Data Perkara Yang Diputus Pada Pengadilan Agama Bengkulu Kelas IA Tahun 2018

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ingin bercerai dan berpisah, pasti tidak mau lagi melakukan mediasi terutama yang usianya masih singkat, tetapi ada juga yang berhasil tergantung kedua belah pihak, ungkapnya."[21]

2. Kabupaten Bengkulu Tengah

Menyoroti tingginya angka penceraian seakan menjadi gaya hidup, Kepala Kantor Kementerian Agama Kabupaten Bengkulu Tengah H. Sipuan, S.Ag.,MM menekankan kepada seluruh Kepala KUA Kecamatan agar meningkatkan peran dari Suscatin dan BP4. Program pendidikan pra nikah (Suscatin) melalui bimbingan bagi pasangan calon pengantin merupakan program yang sangat efektif karena calon pengantin akan mendapatkan pengetahuan dan keterampilan dalam menjalani rumah tangga. Ia mengatakan:

"Di sebagian kalangan, perceraian itu sudah menjadi *lifestyle*, atau sudah menjadi gaya hidup, dan ini perlu menjadi perhatian kita bersama, khususnya KUA yang memiliki tugas pemberian suscatin. "Pelayanan kepada masyarakat di bidang pernikahan sangat besar pengaruhnya dalam pembinaan dan keutuhan sebuah rumah tangga, oleh karena itu KUA kecamatan diharapkan berperan aktif dan benar-benar memfungsikan kursus bagi calon pengantin termasuk mengoptimalkan fungsi dari Badan Penasihatan Pembinaan dan Pelestarian Perkawinan (BP4)" [22]

Melalui Kasi Bimbingan Masyarakat Islam, Kepala Kemenag Benteng menyampaikan agar peran dan fungsi dari KUA ini benar-benar ditingkatkan, karena di samping meningkatkan bimbingan penyuluhan wakaf, zakat, termasuk pendataan jumlah fasilitas keagamaan seperti jumlah masjid, KUA juga berkewajiban menyelsaikan setiap permasalahan dalam pernikahan yang akan berujung pada perceraian.[23]

3. Kabupaten Seluma

Di kabupaten Seluma, angka perceraian hingga Juni 2018 mencapai 3.659 orang, dan yang telah melakukan perceraian keseluruhannya sebanyak 4.164 orang. Ini diketahui saat dilakukan pendataan dan perekaman Kartu Tanda Penduduk di 14 kecamatan.

Menurut Kepala Dinas Kependudukan dan Pencataan Sipil (Dukcapil) kabupaten Seluma, Hercules Jeraian, dari data saat ini ada 15 orang yang membuat akta perceraian di Dukcapil, dan data itu juga berdasarkan PNS yang telah meninggal dunia, sehingga berstatus duda dan janda. Ia mengatakan:

"Saat ini hanya ada 15 orang saja yang membuat akta perceraian di Dukcapil, data itu baru kami ketahui setelah mereka melakukan pendataan untuk rekam KTP

[21] https://bengkulueksprss.com/1-685-janda-baru-di-bengkulu/, diakses 21 Desember 2018.
[22] Disampaikan pada Rakor bulanan bersama seluruh Kepala KUA, Selasa, 6 Maret 2018
[23] https://bengkulu.kemenag.go.id/berita/502724-kurangi-angka-perceraian-kakemenag-benteng-imbau-tingkatkan-peran-kua, diakses 17 Mei 2018.

sejak Januari. Jumlah perceraian tertinggi terjadi di Kecamatan Seluma Kota dengan total sebanyak 754, Sukaraja sebanyak 448, Talo 308 orang, Semidang Alas berjumlah 253 orang, Semidang Alas Maras berjumlah 411orang, Air Periukan 291 orang, Lubuk Sandi 152 orang, Seluma Barat 135 orang, lalu Seluma Timur 251 orang, Seluma Utara 82 orang, Seluma Selatan 200 orang, serta Talo Kecil 164 orang, Ilir Talo 143 orang dan Kecamatan Ulu Talo dengan angka perceraian terkecil sebanyak 67 orang. "Faktor penyebab mereka bercerai dengan alasan ketidak cocokan serta kurang harmonis lagi."24

4. Kabupaten Bengkulu Utara

Menurut Ketua Pengadilan Arga Makmur Bengkulu Utara, penceraian yang ditangani pihaknya pada tahun 2014-2016 sebanyak 460 kasus, berasal dari warga Bengkulu Utara, Mukomuko, dan Kabupaten Bengkulu Tengah. Sebab, Pengadilan Agama Arga Makmur dalam operasionalnya membawahi tiga kabupaten tersebut. Dalam menanggani kasus penceraian tersebut, Pengadilan Agama Arga Makmur, tidak serta merta langsung memutuskan, tapi diupayakan ada mediasi antara kedua belah pihak agar masalah tersebut dapat diselesaikan dengan jalan berdamai. Mayoritas penyebab mereka mengajukan cerai di Pengadilan Agama karena faktor ekonomi dan sebagian lagi disebabkan pihak ketiga. Penyebab utama kasus penceraian ini adalah faktor ekonomi.[25]

Dalam kurun waktu 3 tahun terakhir, ada 109 orang Pegawai Negeri Sipil (PNS) di Kabupaten Bengkulu Utara bercerai. Menurut Ketua Pengadilan Agama I B Arga Makmur, Drs. H. Muhamad Nasir S, SH, MHI melalui Bagian Humas, Drs. Syaiful Bahri SH., ia mengatakan berdasarkan data tahun 2014 ada sebanyak 39 perkara perceraian PNS yang ditangani pihaknya. Kemudian tahun 2015 sebanyak 45 perkara, dan 2016 sebanyak 25 perkara. Sedangkan pada bulan Oktober terhitung dari awal tahun 2018 hingga 30 Oktober, Pengadilan Agama (PA) Kelas I B Kota Arga Makmur Kabupaten Bengkulu Utara, mencatat perkara perceraian yang masuk di PA Arga Makmur, sebanyak 359 perkara, baik yang sudah putus maupun masih dalam proses persidangan. Data ini berdasarkan hasil sidang perceraian yang telah diputuskan Pengadilan Agama Kelas I B Arga Makmur, Bengkulu. Mengenai penyebabnya berbagai macam alasan mulai dari perselingkuhan, kecemburuan serta ketidakakuran atau konflik dengan orang tua masing-masing pasangan.[26]

Hal yang sama juga disampaikan Lisma Haryati, S.Ag, Panitera Muda Hukum PN Arga Makmur. Ia menerangkan di tahun 2018 mulai dari bulan Januari sampai

[24] Wawancara dengan Herkules Jeraim, Bengkulu, 6 Oktober 2018
[25] Wawancara dengan MN, Panitera Pengganti Pengadilan Agama Arga Makmur, tanggal 30 Juli 2018
[26] Bengkulu Ekspress (Jawa Pos Group)(5/10/2016) dan Wawancara dengan Jawahir, SH Panitera Muda Gugatan Pengadilan Agama (PA) Kota Arga Makmur Kabupaten Bengkulu Utara, tanggal 2 Nopember 2018

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dengan Oktober 2018 ini, kasus perceraian yang diterima sebanyak 424 perkara. Disampaikannya bahwa kasus perceraian yang terjadi di Kabupaten Bengkulu Utara ini, didominasi oleh faktor ekonomi.

"Kebanyakan yang mengajukan perceraian adalah para istri dengan alasan faktor ekonomi dikarenakan suami tak mampu memberi nafkah lebih terhadap kebutuhan keluarga. Kemudian perselingkuhan dalam artian ada kecemburuan dari pihak pengugat yang kita tidak tahu pasti apakah benar dia berselingkuh karna kita tidak menyikapi objek perselingkuhanya yang kita sikapi atau diuraikan oleh hakim adalah tentang pertengkarannya. Untuk faktor ekonomi menjadi alasan utama terjadinya perceraian seperti tak mampu mencukupi kebutuhan anak sekolah, kebutuhan primer dan sekunder".[27]

5. Kabupaten Bengkulu Selatan

Pada tahun 2014 lalu, tercatat sebanyak 462 permohonan kasus perceraian di Pengadilan Agama (PA) Bengkulu Selatan. Kebanyakan kasus gugatan cerai itu diajukan oleh para isteri dengan 294 perkara, sedangkan cerai talak yang diajukan suami ada 168 perkara. Menurut Neli, Panitera Muda Hukum Pengadilan Agama Bengkulu Selatan, kasus perceraian tertinggi oleh pasangan yang masih berusia muda, penyebabnya adalah adanya orang ketiga dalam rumah tangga mereka. Ia mengungkapkan: "Penyebab perceraian karena dinominasi pasangan selingkuh hampir_50 persen, sedangkan sisanya ada karena faktor ekonomi, kekerasan dalam rumah tangga (KDRT) dan penelantaran oleh suami". Untuk PNS, kebanyakan juga para istri yang mengajukan perceraian berjumlah 20 orang. Tercatat sudah 16 PNS yang sudah diputus dan resmi bercerai, sementara 4 lagi masih proses. Penyebabnya juga sama kebanyakan kasus perselingkuhan.[28]

Selama rentang waktu 6 tahun terakhir mulai tahun 2011 sampai 2016, ada 2.610 wanita di Bengkulu Selatan yang menjadi janda. "Dari data persidangan, sejak tahun 2011-2016, ada 2610 warga Bengkulu Selatan menjanda," kata Ketua Pengadilan Agama Manna Bengkulu Selatan, Drs. H. Syazili. SH. MH. didampingi Panitera M. Sahrun S.Ag. Menurut Sahrun, dari data persidangan, setiap tahun jumlah warga yang mengajukan permohonan cerai di Pengadila Agama Manna selalu bertambah. Dikatakannya, pada tahun 2011 ada 399 permohonan cerai yang masuk, tahun 2012 ada 460 permohonan, tahun 2013 ada 462 permohonan, tahun 2015 ada 587 permohonan dan tahun 2016 ada 619 permohonan. Ditambahkan oleh Sahrun bahwa ribuan perceraian di Pengadilan Agama Manna, pada umumnya disebabkan oleh faktor ekonomi. Akibatnya, membuat suami ringan tangan. Sehingga istri tidak terima dan mengajukan gugatan cerai. Selain itu, ada juga yang disebabkan oleh

[27] https://penasumatera.co.id/sampai-oktober-tercatat-359-perkara-perceraian-di-pa-arga-makmur/, diakses 8 Juni 2018

[28] http://kupasbengkulu.com/selingkuh-dominasi-perceraian-di-bengkulu-selatan, diakses 9 Juni 2018

hadirnya pihak ketiga. Jadi alasan perceraian pasangan suami istri mayoritas disebabkan permasalahan ekonomi.[29]

Data dari Pengadilan Agama Manna, Kabupaten Bengkulu Selatan, mencatat angka perceraian di kawasan tersebut hingga pertengahan tahun 2018 mencapai 447 kasus. Uniknya, sebagian besar di antaranya ternyata dipicu penggunaan media sosial yang kurang bijak sehingga rentan terjadi salah paham, karena dugaan adanya pihak ketiga, lalu melupakan kewajiban dan tugas masing-masing. "Status dan komentar romantis, serta komunikasi secara sembunyi-sembunyi menjadi pemicu kecemburuan dan pertengkaran yang akhirnya berujung cerai." Menurut Panitera Pengadilan Agama Manna, Sairun, kendati terbilang cukup tinggi, angka perceraian di Bengkulu Selatan tahun ini ternyata lebih rendah bila dibandingkan dengan periode yang sama pada tahun lalu. Sebab pada 2017 lalu, angka perceraian di kawasan itu mencapai 775. Ia menambahkan, penyebab terjadinya kasus perceraian di Kabupaten Bengkulu Selatan didominasi faktor perselisihan dan pertengkaran akibat adanya pihak ketiga dengan persentase mencapai 80 persen. Perselisihan dan pertengkaran inilah yang kemudian berujung pada gugatan cerai. [30]

6. Kabupaten Mukomuko

Badan Kepegawaian, Pendidikan, dan Pelatihan Daerah Kabupaten Mukomuko, melalui Kabid Diklat dan Kesejahteraan Pegawai Badan Kepegawaian, Pendidikan, dan Pelatihan Daerah Kabupaten Mukomuko, Sutrisna, mengungkapkan tingginya jumlah PNS yang menggugat cerai pasangannya pada 2015, yakni sebanyak 14 orang. Jumlah itu meningkat 100 persen dibandingkan tahun sebelumnya. Dari sebanyak 14 orang PNS yang menggugat cerai pasangannya pada 2015, sebanyak 10 orang PNS telah putus atau resmi bercerai, sisanya masih proses. Dan perselingkuhan diduga menjadi penyebab PNS setempat banyak yang bercerai dari pasangannya.

"Kalau ditanya alasannya pasti tidak harmonis. Tetapi semua itu berawal dari rasa cemburu karena diduga pasangannya selingkuh. Ada juga yang langsung mengakui kalau pasangannya selingkuh".31

Ia juga menambahkan, pihaknya selaku pengawas PNS di daerah itu mengetahui penyebab PNS bercerai itu hanya sebatas perselingkuhan saja. Tidak sampai lebih dalam alasan berselingkuh. "Pastinya, perceraian bukan karena faktor ekonomi, karena pasangan PNS ini tidak hanya sebatas ibu rumah tangga, tetapi ada

[29] https://bengkulueksprees.com/1-685-janda-baru-di-bengkulu/, diakses 11 Juni 2018
[30] https://www.inews.id/daerah/regional/173653/media-sosial-jadi-penyebab-maraknya-perceraian-di-bengkulu-selatan, diakses 8 Agustus 2018
[31] https://www.republika.co.id/berita/nasional/daerah/16/02/05/o22097377-perselingkuhan-jadi-alasan-pns-banyak-bercerai, diakses 21 Juni 2018

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juga yang bekerja sebagai pegawai lainnya. Kalau keduanya pegawai, tidak mungkin mereka selingkuh karena faktor ekonomi."32

Selanjutnya, sejak Januari hingga awal Oktober tahun 2018, Badan Kepegawaian dan Pengembangan Sumber Daya Manusia (BKPSDM) Kabupaten Mukomuko, mencatat sebanyak empat aparatur sipil negara (ASN) di daerah ini mengajukan permohonan cerai. Keempat ASN yang seluruhnya wanita itu bertugas di organisasi perangkat daerah (OPD) berbeda. Dari empat PNS itu, 2 telah resmi bercerai dan 2 lagi masih dalam proses untuk mendapatkan izin dari kepala daerah. Khusus 2 PNS yang masih dalam proses itu, jika disetujui oleh kepala daerah, akan dilanjutkan ke Pengadilan Agama. Gugatan cerai yang disampaikan keempat PNS wanita itu dengan alasan berbeda. Intinya mereka (PNS) itu menyampaikan ketidakcocokan dengan pasangannya.[33]

7. Kabupaten Rejang Lebong (Curup)

Pemerintah Kabupaten Rejang Lebong, menyebutkan bahwa tingkat perceraian kalangan PNS di daerah itu cukup tinggi. Menurut Sekretaris Daerah (Sekda) Pemkab Rejang Lebong, Sudirman:

"Tingkat perceraian di kalangan PNS di lingkungan Pemkab Rejang Lebong saat ini tergolong cukup tinggi, hal ini bisa dilihat sepanjang tahun 2014 lalu angka perceraian dikalangan PNS di daerah ini mencapai 20 orang. Tingkat perceraian PNS di daerah tersebut mayoritas diajukan oleh pihak perempuan atau gugat cerai, dengan faktor penyebab beragam mulai dari faktor pihak ketiga, disharmonisasi serta faktor-faktor lainnya".[34]

Untuk mengurangi angka perceraian di kalangan PNS di daerah ini, pihak yang berwenang dari pejabat pemerintah daerah setempat secara maksimal melakukan pembinaan, bahkan sebelum proses perceraian diajukan ke Pegadilan Agama setempat, pihaknya melakukan upaya penyelesaian secara kekeluargaan agar tidak sampai bercerai. Selain itu, upaya lainnya ialah dengan menyerahkan oknum PNS yang akan bercerai ini ke pihak inspektorat terlebih dahulu guna dilakukan pembinaan, serta akan diajukan ke pihak Baperjakat. Jika langkah-langkah ini tidak bisa menyelesaikan perkaranya, maka diteruskan ke Pengadilan Agama.[35]

8. Kabupaten Kaur

Untuk kabupaten Kaur, mayoritas alasan cerai yang diajukan adalah tidak adanya kecocokan dalam rumah tangga. Sehingga ini salah satu yang mengakibatkan

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[32] https://www.republika.co.id/berita/nasional/daerah/16/02/05/o22097377-perselingkuhan-jadi-alasan-pns-banyak-bercerai, diakses 21 Juni 2018

[33] Empat ASN Ajukan Cerai Empat ASN Ajukan Cerai https://bengkuluekspress.com/empat-asn-ajukan-cerai/, diakses 11 Juni 2018

[34] https://bengkulu.antaranews.com/berita/29779/sekda-tingkat-perceraian-pns-rejanglebong-tinggi, diakses 1 Juli 2018.

[35] https://bengkulu.antaranews.com/berita/29779/sekda-tingkat-perceraian-pns-rejanglebong-tinggi, diakses 11 Juni 2018.

keduanya memilih untuk berpisah. PNS yang mengajukan cerai didominasi kalangan pendidik dan umum (bukan PNS Kemenag). Selanjutnya, perceraian juga banyak terjadi karena adanya pihak ketiga yang turut memperkeruh masalah internal rumah tangga mereka. Bahkan ada PNS yang saat ini sudah pisah ranjang selama bertahun-tahun, tetapi secara hukum mereka belum resmi cerai. Dalam menangani masalah tersebut, pihak Inspektorat selalu meminta mereka untuk mempertimbangkan kembali keputusan mereka dengan matang. Karena perceraian merupakan jalan terakhir jika memang kedua belah pihak sudah tidak bisa lagi untuk kembali bersatu. Pihaknya juga selalu mengingatkan dampak psikologis terhadap anak-anak. Oleh sebab itu diharapkan adanya upaya serius pihak terkait untuk meminimalisir kasus perceraian PNS di Kaur. Ia mengakui bahwa memang lebih banyak PNS dibandingkan masyarakat biasa yang bercerai di kabupaten Kaur.[36]

9. Kabupaten Kepahiang

Di kabupaten Kepahiang, dari tahun 2016 hingga Juli 2018 terdapat 22 PNS yang bekerja di Pemerintahan Daerah yang mengajukan permohonan surat izin cerai. Umumnya yang mengajukan surat keterangan untuk cerai kepada atasannya adalah PNS wanita, ada yang karena suaminya pengedar narkotika dan obat-obat terlarang, ada yang suaminya penjudi, ada yang suaminya kawin lagi, dan ada pula karena suaminya tidak bekerja. Selain itu, ada pula karena tempat tinggal suami yang jauh di Lampung yang berprofesi sebagai polisi, dan perselingkuhan. Alasan karena pasangannya selingkuh ada 5 kasus, karena judi dan narkoba 2 kasus, karena tempat tinggal yang berjauhan terpisah 2 kasus, kekerasan dalam rumah tangga 3 kasus dan karena ketidakcocokan 10 kasus. Khusus suami muslim PNS yang mengajukan permohonan izin cerai ada 1 orang pada tahun 2017. Ini karena suami merasa tertipu sebab keduanya baru nikah 2 bulan, tapi setelah diperiksa ke dokter ternyata si istri sudah hamil 7 bulan.[37]

Sedangkan PNS yang bekerja di Kementerian Agama yang mengajukan surat permohonan izin cerai dari tahun 2017 hingga Juli 2018 tercatat sebanyak 11 orang. Semuanya dengan alasan ketidakcocokan.

10. Kabupaten Lebong

Di kabupaten Lebong, dari tahun 2016 hingga Juli 2018 tercatat 9 orang PNS yang mengajukan surat permohonan izin cerai, dan hanya 1 orang yang berhasil dimediasi hingga tidak jadi bercerai. Sisanya 8 kasus telah dikeluarkan surat izinnya dan berakhir dengan cerai di Pengadilan Agama. Yang dijadikan alasan cerai terdiri dari 3 kasus karena ketidakcocokan, 4 kasus karena perselingkuhan, dan 2 kasus karena faktor ekonomi.[38]

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[36] https://bengkuluekspress.com/perceraian-pns-meningkat/, diakses 2 Juli 2018.
[37] Wawancara dengan Kepala BKPSDM Kabupaten Kepahiang tanggal 21 Nopember 2018
[38] Wawancara dengan Kepala BKPSDM Kabupaten Lebong, tanggal 27 Oktober 2018

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E. Praktik Izin Perceraian bagi PNS di Propinsi Bengkulu

Terkait dengan jangka waktu yang dibutuhkan PNS yang bekerja di Pemerintahan Daerah non Kementerian Agama, untuk memperoleh izin cerai dari atasannya di Bengkulu, dalam implementasinya pemerintahan kota dan beberapa kabupaten menerapkannya dengan berbagai variasi.

Di kota Bengkulu, berdasarkan standar operasional prosedur izin perkawinan dan perceraian tahun 2018 dari Badan Kepegawaian Pendidikan dan Pelatihan Kota Bengkulu bidang Pengembangan, Data dan Pembinaan Aparatur, disebutkan bahwa untuk sampai pada keputusan Walikota tentang pemberian atau penolakan izin perceraian dibutuhkan waktu 20 hari kerja.[39] Ini dengan asumsi PNS yang bersangkutan sudah dimediasi oleh atasan langsung atau OPD tempat ia bekerja selama lebih kurang 3 bulan. Jadi total waktu menunggu bagi PNS yang mengajukan surat izin cerai atau surat keterangan minimal 4 bulan. PNS yang mengajukan surat permohonan harus melampirkan surat keterangan dari RT atau lurah tempat yang bersangkutan berdomisili. Ini dimaksudkan untuk memastikan permasalahan yang dihadapi oleh rumah tangga PNS tersebut, sehingga memudahkan pihak yang berwenang memediasi untuk memanggil dan mendalami permasalahan dengan melacaknya ke pihak ketiga dari orang tua masing-masing pihak atau keluarga lainnya yang dianggap dekat dengan PNS tersebut.[40]

Di kabupaten Seluma, waktu yang dibutuhkan mulai dari mediasi di OPD tempat PNS bekerja maksimal 2 bulan, lalu di BKPSDM maksimal 3 bulan, kemudian di Inspektorat Daerah maksimal 1 bulan. Totalnya maksimal 6 bulan. Ini karena PNS yang akan mengajukan izin cerai harus terlebih dahulu mengajukan permohonan ke Inspektorat Daerah, lalu Inspektorat Daerah membuat surat pengantar ke BKPSDM, lalu dibuat Tim Aparatur Pemerintahan yang akan memediasi. Selanjutnya para pihak dipanggil untuk didengarkan keterangannya 1-3 kali, dan jika tidak bisa didamaikan, maka akan dikeluarkan Surat Izin atau Rekomendasi yang ditandatangani oleh Sekretaris Daerah atas nama Bupati[41].

Di kabupaten Bengkulu Tengah, waktu yang dibutuhkan bisa sampai 9 bulan. Ini karena proses mediasi yang harus ditempuh PNS yang akan mengajukan izin cerai dimulai dari OPD tempat yang bersangkutan bekerja selama 3 bulan dengan beberapa kali pemanggilan, lalu upaya mediasi oleh tim pengelola administrasi (mediasi) izin perkawinan dan perceraian yang dibentuk di BKPSDM selama 3 bulan, dan di Sekda bisa sampai 3 bulan.

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[39] Pemerintah Kota Bengkulu Badan Kepegawaian Pendidikan dan Pelatihan, *Standar Operasional Prosedur Izin Perkawinan dan Perceraian*, 2018, h. 3-5.

[40] Wawancara dengan Ali Martono, Kabid Karir Badan Kepegawaian Daerah Provinsi Bengkulu, 12 Juli 2018.

[41] Wawancara dengan Fariq Hafiz, Kabid. Pengembangan Kompetensi dan Penilaian Kinerja Aparatur Seluma, 19 Juli 2018.

Begitu juga di kabupaten Bengkulu Utara, waktu yang dibutuhkan bisa lebih dari 9 bulan. Sebab di sini PNS yang akan mengajukan surat izin cerai harus menempuh mediasi 3 kali di OPD tempatnya bekerja, di BP4 terkadang sampai 3 kali, lalu di BKD 3 kali, baru terakhir jika tidak bisa didamaikan juga, diajukan ke Bupati, dan menunggu 1 sampai 2 minggu untuk keluarnya surat izin cerai tersebut.

Di Kabupaten Bengkulu Selatan dan Kaur, waktu yang dibutuhkan untuk memperoleh surat izin atasan antara 6 hingga 9 bulan. Proses yang dijalani oleh PNS yang mengajukan permohonan tersebut dimulai dari atasan langsung tempatnya bekerja, lalu dibuat berita acara pemeriksaan (BAP) oleh kepala OPD, kemudian diteruskan ke BKPSDM untuk dimediasi, selanjutnya ke Inspektorat Daerah untuk dimediasi lagi, dan terakhir ke Sekretaris Daerah untuk ditandatangani Bupati izinnya.

Di kabupaten Kepahiang, dibutuhkan waktu paling sedikit 6 bulan bagi PNS yang akan memperoleh surat izin cerai. Surat permohonan tersebut ditujukan ke atasan langsung, lalu diteruskan ke OPD, lalu ke Kasubdit Disiplin di BKPSDM. Format surat izin dan BAP diserahkan kepada Bupati, lalu Bupati setelah menandatangani mengirimkan lagi ke BKPSDM, dan terakhir BKPSDM memanggil pihak pemohon dan menyerahkan surat yang sudah ditandatangani Bupati. Namun, surat tersebut tidak semuanya berupa izin dengan rekomendasi, tapi ada juga yang ditolak dan ditangguhkan.

Di kabupaten Mukomuko, Rejang Lebong, dan Lebong, waktu yang diperlukan bagi PNS yang akan memperoleh surat izin cerai rata-rata 6 bulan. Proses yang dijalani hampir sama yaitu melalui mediasi atasan langsung, lalu oleh kepala OPD, kemudian dimediasi oleh tim dari BKPSDM yang dipimpin oleh pejabat bidang pembinaan Aparatur Sipil Negara atau bisa juga Kepala BKPSDM langsung, dan terakhir surat izin yang ditandatangani Sekretaris Daerah atas nama Bupati.

Adapun di wilayah Kementerian Agama, proses memperoleh izin cerai untuk bisa diajukan ke pengadilan relatif lebih cepat, antara 1 hingga 3 bulan, tergantung alasan cerainya. Ini karena mediasi yang dilakukan lebih sederhana mulai dari OPD tempat yang bersangkutan bekerja 3 kali, lalu ke BP4 sebanyak 3 kali mediasi, setelah ada surat mediasi dari BP4 dilanjutkan langsung ke Kepala Kemenag dengan mengeluarkan surat rekomendasi.

Di kota Bengkulu, mulai tahun 2015-2018 tercatat ada 75 permohonan izin cerai, 2 ditolak karena tidak memenuhi persyaratan, 60 dikeluarkan izinnya, dan 13 masih dalam proses. Umumnya karena alasan ketidakcocokan. Tapi yang menarik di akhir tahun 2017 hingga 2018, kecendrungannya istri yang minta surat keterangan karena ingin cerai dari suaminya. Trend ini diduga dampak dari keluarnya sertifikasi guru yang menyebabkan PNS wanita merasa mampu dan gengsi memiliki suami yang non PNS yang penghasilannya di bawah gajinya.[42] Khusus tahun 2018, terdapat 3 suami muslim PNS yang mengajukan surat izin cerai.

[42] Wawancara dengan Kepala BKPSDM Kota Bengkulu, tanggal 18 September 2018

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Di kabupaten Kepahiang, dari tahun 2016 hingga Juli 2018 terdapat 22 PNS yang mengajukan surat izin cerai. Alasannya adalah karena pasangannya selingkuh ada 3 orang, karena judi dan terlibat narkoba 2 orang, karena tempat tinggal yang berjauhan dan terpisah 2 orang, dan sisanya 15 orang karena ketidakcocokan. Sedangkan di Kemenag Kepahiang, dari tahun 2016 sampai 2018, tidak ada pegawainya yang mengajukan izin cerai. Dua orang yang akan bercerai, keduanya bisa dimediasi dan harmonis kembali.

Di kabupaten Argamakmur, dari tahun 2015 hingga Juli 2018, tercatat 32 orang PNS yang mengajukan surat izin cerai. Ada yang disebabkan karena alasan satu pihak selingkuh, alasan adanya kekerasan dalam rumah tangga, dan adanya campur tangan pihak ketiga yang dalam hal ini adalah orang tua isteri. Yang berhasil dimediasi ada 3 orang. Dan suami muslim PNS yang mengajukan ada 3 orang. Sedangkan di Kemenag Argamakmur, dari tahun 2016 sampai Juli 2018, tercatat ada 12 PNS yang mengajukan surat izin cerai, dan hanya 1 pasangan yang berhasil dimediasi sehingga bisa rukun kembali.

Di kabupaten Rejang Lebong, dari 25 orang yang mengajukan surat izin cerai, ada 3 orang yang mencabut permohonan izin cerai karena berhasil dimediasi (2016), dan 2 orang yang sudah keluar surat izinnya tapi tidak jadi bercerai (2017). Ada 6 orang suami muslim PNS yang mengajukan, dan alasan didominasi karena ketidakcocokan.

Di kabupaten Kaur, sejak tahun 2016 hingga Juli 2018, tercatat 15 orang yang mengajukan permohonan izin cerai. Suami yang mengajukan ada 4 orang, dan isteri yang mengajukan ada 11 orang. Di sini juga ada 1 orang yang tidak jadi mengajukan cerai ke Pengadilan Agama, walaupun sudah keluar surat izin dari atasannya. Alasan cerai masih didominasi karena ketidakcocokan, lalu karena istri terlilit hutang (1 kasus), campur tangan orang tua (2 kasus), tempat tinggal yang berjauhan (isteri di Bengkulu Utara dan suami di Kaur) (1 kasus), karena perselingkuhan (4 kasus), dan karena ketidakcocokan (7 kasus).

Di kabupaten Mukomuko, dari tahun 2014 sampai Juli 2018 tercatat 51 PNS yang mengajukan surat permohonan izin cerai. Suami yang mengajukan ada 20 kasus, dan isteri yang mengajukan 31 kasus. Sebanyak 38 orang sudah dikeluarkan izinnya, dan 13 kasus berhasil didamaikan lewat mediasi. Alasan utama karena ketidakcocokan, dan 11 kasus karena perselingkuhan. Sedangkan khusus bagi PNS yang bekerja di kementerian Agama, tercatat sejak tahun 2017 hingga Juli 2018 ada 10 orang yang mengajukan surat izin cerai, 3 orang dari pihak suami dan 7 orang dari pihak isteri.

F. Kendala-Kendala Perceraian Suami Muslim PNS di Propinsi Bengkulu

Dari observasi lapangan dan wawancara dengan berbagai pihak terkait, ditemukan bahwa kendala utama dalam proses perceraian suami muslim PNS di 10 kabupaten dan kota, umumnya adalah izin dari atasan atau pejabat yang berwenang. Bagi PNS yang bekerja di Kemenag, jangka waktunya lebih singkat dan prosesnya dianggap lebih cepat

dibanding PNS yang bekerja di luar instansi Kemenag (Pemda, dan Kementerian lainnya).

Jika di Kemenag, PNS yang akan mengajukan izin PNS harus dibina dahulu oleh BP4, lalu dimediasi oleh Bimas Islam, kemudian dipanggil pihak suami istri untuk dimediasi langsung oleh kepala Kemenag tempat dimana mereka bekerja. Kalau tidak bisa didamaikan juga, maka Kepala Kemenag meneruskan surat permohonan izin dari PNS tersebut ke Kepala Kantor Wilayah Kemenag Propinsi Bengkulu, untuk kemudian dikeluarkan izinnya. Hanya saja, di Kemenag tidak ada batasan waktu minimal dan maksimal proses keluarnya surat izin atasan tersebut. Cepat atau lambatnya proses surat izin keluar, tergantung dari kebutuhan sesuai alasan yang dikemukakan oleh PNS muslim tersebut.

Berbeda halnya dengan PNS yang bekerja di luar Kemenag, PNS Pemda misalnya, mereka harus dimediasi dan dapat rekomendasi dahulu dari atasan langsung tempat mereka bekerja (OPD), jangka waktunya bisa 3 sampai 6 bulan. Ini dimaksudkan agar kedua belah pihak (pemohon/ suami dan isteri) bisa berpikir lebih panjang untuk mempertimbangkan lebih matang konsekuensi yang akan mereka hadapi jika perceraian terjadi. Lalu dari sini baru mereka bisa mengajukan surat permohonan izin ke Bupati melalui Badan Kepegawaian dan Pengembangan Sumber Daya Manusia (BKPSDM). Di BPKPSDM ini lalu dimediasi oleh tim yang sudah dibentuk[43] dengan tahapan pemanggilan suami, lalu isteri yang bisa berlangsung sampai 2 hingga 3 kali dalam masa 1 sampai 3 bulan. Kalau tidak juga bisa dimediasi, maka dilanjutkan ke Sekretaris Daerah, dan di sini pun diupayakan mediasi lagi dalam tempo maksimal 3 bulan. Apabila tidak juga bisa didamaikan, dan PNS pemohon izin berkeras untuk bercerai, maka barulah Bupati atas nama Sekretaris Daerah mengeluarkan surat izin atasan untuk bercerai.

Agak berbeda dengan yang terjadi di Bengkulu Utara, menurut Kepala BKPSDM Argamakmur, PNS yang akan mengajukan surat permohonan izin cerai, harus terlebih dahulu meminta nasehat dan dimediasi oleh BP4 Kemenag, setelah ada rekomendasi dari BP4, barulah surat permohonan mereka bisa diterima dan diproses di BKPSDM.

Oleh sebab itu, kendala utama proses perceraian bagi suami muslim PNS di propinsi Bengkulu pada dasarnya adalah izin dari atasan. Izin dari atasan ini melalui proses yang panjang dan memakan waktu yang cukup lama. Bagi suami muslim PNS yang bekerja di Kementerian Agama, yang bersangkutan harus melalui BP4 terlebih dahulu, lalu ke Bimas Islam, lalu ke Kepala Kemenag, kemudian ke Kepala Kanwil Kemenag Propinsi. Waktunya bisa cepat atau lambat, tergantung dari alasan yang dikemukakan oleh suami muslim PNS tersebut. Jika alasannya karena pihak isteri melakukan hal-hal yang tercela sebagaimana tercantum dalam UU No.1 tahun 1974 dan Inpres No.1 tahun 1991 tentang Kompilasi Hukum Islam, maka prosesnya bisa

[43] Wawancara dengan Ali Martono, Kabid. Karir Badan Kepegawaian Daerah Provinsi Bengkulu, 11 Agustus 2018.

https://doi.org/10.30603/au.v19i1.747

berlangsung cepat. Tapi jika alasannya masih umum karena ketidakcocokan, maka prosesnya agak lama karena BP4 dan Bimas Islam harus meneliti dan mendalami akar masalah timbulnya ketidakcocokan tersebut. Sedangkan bagi suami muslim PNS yang bekerja di Pemda Kabupaten dan Kota, yang bersangkutan harus menjalani proses yang lebih panjang. Kendala lainnya adalah pemotongan gaji PNS tersebut. Jika suami muslim PNS tersebut memiliki anak, maka gajinya dipotong 2/3, dan jika tidak punya anak, gajinya dipotong 1/2. Ketentuan ini tidak berlaku jika si isteri terbukti berzina, menggunakan narkotika dan zat-zat adiktif yang dilarang, melakukan tindakan kekerasan dalam rumah tangga, atau melakukan tindakan kriminal lainnya.

G. Model Perceraian Suami Muslim PNS di Propinsi Bengkulu

Tata cara pengajuan permohonan dan gugatan perceraian bisa secara tertulis maupun secara lisan. Apabila suami mengajukan permohonan talak, maka permohonan tersebut diajukan di tempat tinggal si istri. Sedangkan apabila istri mengajukan gugatan cerai, gugatan tersebut juga diajukan ke pengadilan di mana si istri tinggal. Dalam hal ini, istri memang mendapatkan kemudahan. Mengenai tempat pengajuan gugatan perceraian, mengacu pada pasal 118 HIR.[44]

Jika sudah mendapat surat izin cerai dari atasan, yang bersangkutan bisa datang ke Pengadilan untuk mendaftarkan perkara perceraiannya dengan membawa serta persyaratan-persyaratan lainnnya yang dibutuhkan seperti KTP, Buku Nikah, Akte kelahiran anak (jika ada anak), surat gugatan atau surat permohonan cerai, dan dokumen penting lainnya.

Apabila belum mempunyai surat gugatan atau surat permohonan cerai, yang bersangkutan bisa minta dibuatkan di bagian Posbakum Pengadilan Agama tersebut. Dan jika semua berkas persyaratan sudah lengkap, selanjutnya dilakukan pendaftaran perceraian di meja pendaftaran dan membayar panjar perkaranya ke bagian kasir.

Bagi yang belum mencantumkan surat izin cerai dari atasan dan sudah terlanjur mendaftarkan perkara perceraian di Pengadilan, maka nantinya majelis hakim akan menunda proses persidangan cerai tersebut maksimal selama 6 bulan. Dalam hal ini, biasanya bagian pendaftaran di Pengadilan Agama menjelaskan terlebih dahulu tentang konsekuensi jika yang bersangkutan tidak bisa mendapatkan surat izin atasan selama proses persidangan dan biaya yang dikeluarkan serta waktu yang dibutuhkan. Oleh sebab itu, jika dalam jangka waktu 6 bulan PNS bersangkutan belum mendapatkan surat izin bercerai dari pejabat yang berwenang, maka opsi yang dapat dilakukan oleh PNS antara lain: pertama, mencabut gugatan/permohonan cerai, atau kedua, membuat surat pernyataan secara tertulis untuk siap menerima segala resiko akibat perceraian. [45]

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[44] Helmy Thohir, *Perceraian Menurut UU Perkawinan*, (Bandung: Manjar Maju, 2013), h. 29.
[45] Wawancara dengan Delvi Puryanti, Panitera Pengganti Pengadilan Agama Kelas IA Bengkulu, tanggal 25 Oktober 2018.

Dengan kata lain, PNS yang tetap ingin bercerai meskipun belum atau tidak mendapatkan surat izin dari pejabat yang berwenang, dapat melanjutkan proses persidangan dengan konsekuensi dapat dikenakan sanksi disiplin sebagaimana diatur dalam Peraturan Pemerintah No. 53 Tahun 2010 tentang Disiplin Pegawai Negeri Sipil. Khusus di Bengkulu, ada beberapa suami muslim PNS yang mau membuat surat pernyataan, tapi ada juga yang belum bisa melengkapi surat izin, mereka lebih memilih mencabut gugatan/permohonan cerainya.[46]

Menurut penjelasan Pasal 3 ayat (1) PP 45/1990, ketentuan ini berlaku bagi setiap PNS yang akan melakukan perceraian, yaitu bagi PNS yang mengajukan gugatan perceraian (penggugat) wajib memperoleh izin lebih dahulu dari pejabat, sedangkan bagi PNS yang menerima gugatan perceraian (tergugat) wajib memperoleh surat keterangan lebih dahulu dari pejabat sebelum melakukan perceraian.

Bagi PNS yang mengajukan gugatan cerai ke Pengadilan tanpa adanya surat izin atau surat keterangan dari atasannya, maka yang bersangkutan bisa dikenai sanksi disiplin berat. Salah satu alasan dijatuhkannya hukuman disiplin berat berdasarkan Pasal 10 angka 13 PP 53/2010 adalah karena pelanggaran terhadap kewajiban menaati peraturan kedinasan yang ditetapkan oleh pejabat yang berwenang. Sedang kewajiban menaati peraturan kedinasan adalah salah satunya kewajiban melaporkan perceraian. Adapun jenis hukuman disiplin berat yang dimaksud dalam Pasal 7 ayat (4) PP 53/2010 terdiri dari: a. penurunan pangkat setingkat lebih rendah selama 3 (tiga) tahun; b. pemindahan dalam rangka penurunan jabatan setingkat lebih rendah; c. pembebasan dari jabatan; d. pemberhentian dengan hormat tidak atas permintaan sendiri sebagai PNS; e. pemberhentian tidak dengan hormat sebagai PNS.

Kemudian, mengenai pejabat yang berhak menentukan jenis hukuman disiplin berat mana yang akan dijatuhkan kepada PNS tersebut, tergantung pada jabatan dari PNS itu. Mengenai pejabat yang berwenang menghukum, dapat dilihat dari Pasal 15 – Pasal 22 PP No.53 Tahun 2010.

Untuk menyikapi aturan sebagaimana tersebut di atas, maka bagi suami muslim PNS di Propinsi Bengkulu yang akan mengajukan permohonan cerai ke Pengadilan Agama, ada yang menempuh cara persis sesuai prosedur yang ada, dan ada pula yang mengabaikan surat izin atasan agar cepat terealisir keiinginannya untuk bercerai. Ada model legal dan ada pula model semi legal. Model legal dimaksud adalah suami muslim PNS tersebut mengajukan permohonan cerai talak langsung ke Pengadilan Agama tanpa izin dari atasan langsung, dan bersedia membuat surat pernyataan di Pengadilan Agama bahwa yang bersangkutan siap bertanggung jawab dan menerima konsekuensi lain jika melanggar ketentuan hukum yang berlaku. Ini sah dan dilakukan oleh pihak Pengadilan Agama karena berpegang pada prinsip "pengadilan tidak boleh menolak perkara". Ini juga dimaksudkan agar proses perceraian menjadi lebih cepat, sederhana, biaya ringan,

[46] Wawancara dengan Delvi Puryanti, Panitera Pengganti PA Kelas IA Bengkulu, tanggal 29 Oktober 2018

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dan kedua belah pihak segera mendapat kepastian hukum status perkawinannya. Selain itu, berdasarkan surat edaran Mahkamah Agung, setiap Pengadilan Agama dihimbau agar tidak ada lagi penumpukan sisa perkara lebih dari 10 % hingga akhir tahun, dan masa sidang yang tadinya maksimal 6 bulan, diperpendek jadi 5 bulan.[47]

Sedangkan model semi legal ialah tindakan suami muslim PNS yang merekayasa keadaan. Tindakan ini dilakukan oleh pihak suami jika rumah tangga yang bersangkutan terus cekcok yang berkepanjangan dengan istrinya dan tidak ada lagi peluang untuk didamaikan. Keharmonisan yang tidak tercipta dalam rumah tangga, tentu akan berdampak pada anak dan karir suami PNS. Dalam hal ini, biasanya suami menyuruh istrinya untuk mengajukan gugatan cerai, agar sang suami tidak terkena kewajiban nafkah iddah, mut'ah, maskan (tempat tinggal), dan tidak dipotong 1/3 gajinya oleh atasan tempatnya bekerja. Sebab, apabila perceraian terjadi atas kehendak istri, maka ia tidak berhak atas pembagian mantan suaminya (pasal 1 huruf e PP No. 45/1990). Dan biasanya jika istri yang mengajukan gugatan, dan suaminya tidak hadir pada saat sidang, prosesnya lebih cepat dibandingkan suami yang mengajukan. Karena jika suami yang mengajukan, akan ada sidang pengucapan ikrar talak.[48]

Pada umumnya, hakim Pengadilan Agama tidak mengikuti apa yang tertera dalam PP No.45 Tahun 1990. Karena masalah pembagian gaji tersebut dianggap tidak memenuhi rasa keadilan. Sebab timbulnya hak karena telah melaksanakan kewajiban. Dengan terjadinya perceraian, berarti putuslah perkawinan yang mengakibatkan putus pula kewajiban nafkah suami kepada mantan istrinya.[49] Memang dalam PP No.45 Tahun 1990 tidak menamakan kewajiban tersebut dengan nafkah, tapi dengan ungkapan "wajib" seolah-olah kewajiban tersebut adalah nafkah. Sebab kewajiban suami tersebut berhenti jika mantan istrinya menikah lagi. Kalau pemotongan tetap dilakukan, ini dianggap bertentangan dengan ketentuan hukum Islam, karena kewajiban nafkah suami terhadap mantan istrinya hanya dalam masa iddah. [50]

Dalam kajian fikih, menurut mazhab Hanafi, bekas suami wajib memberikan nafkah kepada bekas istri secara komplit dan utuh, baik makanan, pakaian, dan tempat tinggal selama masa iddah. Sedangkan menurut mazhab Maliki, suami berkewajiban untuk menyediakan akomodasi bagi istri yang dicerainya, bila ia telah bercampur dengannya. Meskipun demikian, suami tidak wajib memberikan nafkah kepada istri yang dicerai talak tiga, tetapi istri yang hamil tetap mendapatkan nafkahnya baik talak satu maupun talak tiga, hingga istri melahirkan anaknya. Adapun masa iddah bagi bekas

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[47] Wawancara dengan Husniadi, Wakil Ketua Pengadilan Agama Kota Bengkulu, tanggal 17 Oktober 2018

[48] Wawancara dengan Delvi Puryanti, Panitera Pengganti PA Kelas IA Bengkulu, tanggal 29 Oktober 2018

[49] Tri Wahyuni Herawati, Yunanto, Herni Widanarti, "Perlindungan Hak Atas Pembagian Gaji Akibat Perceraian Yang Dilakukan Oleh Pegawai Negeri Sipil", *Diponegoro Law Jurnal*, Vol. 6, No, 2 Tahun 2017, h. 9

[50] Nilkhairi, "Tinjauan Hukum Islam Terhadap Kewajiban Pegawai Negeri Sipil Memberi Nafkah Kepada Bekas Istri Pasca perceraian", *Jurnal Qiyas*, Vol. 2, No. 2, Oktober 2017, h. 217.

istri yang dicerai hidup oleh suaminya, jika istri itu masih haid, maka iddahnya 3 kali suci, jika istri yang ditalak tersebut belum atau tidak haid karena belum saatnya (misal karena usianya belum baligh), atau tidak haid lagi karena sudah tua, maka masa iddahnya adalah 3 bulan.[51]

Selain itu, dianggap tidak logis jika bekas suami PNS tetap berkewajiban memberi nafkah kepada bekas istrinya, selama bekas istrinya belum kawin lagi. Karena kewajiban bekas suami ini tidak disertai dengan hak terhadap bekas istrinya. Apabila bekas istri melakukan kawin *siri* (tidak tercatat) dengan pria lain misalnya, maka perkawinan *siri* tersebut tidak dapat menghapus kewajiban bekas suaminya yang didasarkan pada PP No. 10/1983 jo PP No. 45/1990. Kalau terjadi hal seperti ini, tentu merugikan pihak bekas suami. [52]

Sedangkan jumlah pemotongan yang mencapai 1/3 dari gaji suami, ini juga dianggap merugikan suami karena tidak memperhatikan nasib suami di kemudian hari. Padahal, menurut Sayuti Thalib, kewajiban memberi nafkah kepada istri yang diceraikan, seharusnya menurut kemampuan suami. Besar jumlahnya menurut hajat dan adat di tempat masing-masing. Intinya yang menjadi ukuran berapa besar nafkah adalah kemampuan suami.[53] Oleh sebab itu, wajar kiranya dalam hal nafkah ini, hakim Pengadilan Agama cenderung hanya mengacu pada UU Perkawinan No. 1 Tahun 1974 dan Kompilasi Hukum Islam sebagai sandaran hukum materilnya.

Walaupun ketentuan pemotongan gaji tidak termasuk dalam putusan hakim[54], tapi suami muslim PNS tersebut tetap khawatir kalau dilaporkan istrinya ke atasan tempatnya bekerja. Oleh sebab itu, jika isteri tidak mau mengajukan gugatan cerai, maka suami berusaha memancing emosi istrinya, sehingga si istri melakukan tindakan kekerasan dalam rumah tangga terhadap suaminya. Suami sengaja mengalah saat terjadi kekerasan, kemudian meminta visum et repertum dari rumah sakit atas kekerasan yang dialaminya dari sang istri. Bukti visum dari rumah sakit ini lalu dijadikan dasar alasan permohonan cerai talak suami ke Pengadilan Agama. Dengan demikian, istri dianggap telah melakukan nusyuz (terkena pasal 149 Kompilasi Hukum Islam) dan istri dianggap telah melakukan kekejaman atau penganiayaan berat baik lahir maupun batin (terkena ketentuan pasal 1 huruf d PP No. 45/1990). Cara ini dimaksudkan oleh suami untuk mempercepat proses perceraian, sekaligus agar gajinya tidak dipotong ½ untuk istrinya jika tidak memiliki anak, atau 1/3 untuk isterinya jika memiliki anak. Dan suami hanya

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[51] Muhammad Jawad Mughniyah, *Fiqh Lima Mazhab*, terj. Masykur AB, (Jakarta: Lentera, 2011), h. 433.
[52] Muhammad Khambali, Yasmirah Mandasari Saragih, "Perlindungan Hak Janda Pegawai Negeri Sipil Atas Gaji Bekas Suaminya", *Jurnal Al-'Adl*, Vol. X, No. 1, Januari 2018, h. 17.
[53] Sayuti Thalib, *Hukum Kekeluargaan Indonesia*, (Jakarta: UI Press, 2009), h. 78.
[54] Menurut Syafri Amru, MH., hakim tidak ada kewajiban memasukkan dalam putusannya tentang pembagian gaji PNS untuk mantan istrinya, karena pemotongan gaji tersebut adalah kebijakan atasan suami PNS tersebut. Selain itu, peraturan pemerintah tersebut tidak lagi menjadi pertimbangan dalam kasus perceraian PNS, kecuali sebagai syarat administratif saja. Ini karena peraturan pemerintah tersebut bertentangan dengan ketentuan agama Islam dan peraturan pemerintah tersebut bukan hukum materil. Wawancara dengan Hakim Pengadilan Tinggi Agama Bengkulu, tanggal 15 Agustus 2018.

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berkewajiban membiayai nafkah anak sebesar 1/3.[55] Model kedua ini dianggap semi legal, karena suami memanfaatkan celah hukum dengan rekayasa keadaan terhadap istrinya, dan melakukan upaya penyelundupan hukum (menjebak istri melakukan pelanggaran) yang sulit untuk dibuktikan secara yuridis formal.

H. Kesimpulan

Berdasarkan pembahasan di atas, dapat disimpulkan:

1. Sebab-sebab perceraian suami muslim PNS di propinsi Bengkulu adalah didominasi karena perselingkuhan 60 %, faktor ekonomi 17%, campur tangan pihak ketiga yaitu dari orang tua atau mertua 12 %, ketidakcocokan lagi dengan pasangan 6%, dan faktor lainnya (judi, terlibat narkoba, kekerasan dalam rumah tangga, tempat tinggal yang berjauhan) 5%.
2. Kendala-kendala yang dihadapi oleh suami muslim PNS yang akan bercerai di propinsi Bengkulu adalah pertama, izin atasan dari pejabat tempatnya bekerja yang cukup lama. Kedua, jika tetap mengajukan gugatan cerai ke Pengadilan Agama tanpa izin atasan, maka yang bersangkutan beresiko terancam hukuman disiplin berat. Ketiga, pemotongan gaji PNS tersebut jika suami yang mengajukan permohonan cerai tanpa alasan yang tercantum dalam pasal 1 huruf e PP No.10 Tahun 1983 juncto PP No.45 Tahun 1990. Jika suami muslim PNS tersebut memiliki anak, maka gajinya dipotong 2/3, dan jika tidak punya anak, gajinya dipotong ½ untuk mantan istrinya. Ini tentu memberatkan bagi suami jika nantinya ia akan membina rumah tangga baru.
3. Model perceraian suami muslim PNS di propinsi Bengkulu terdiri dari pertama, model legal yaitu dengan mengajukan permohonan cerai talak langsung ke Pengadilan Agama tanpa izin dari atasan langsung, dan bersedia membuat surat pernyataan di Pengadilan Agama bahwa yang bersangkutan siap bertanggung jawab dan menerima konsekuensi lain jika melanggar ketentuan hukum yang berlaku. Kedua, model semi legal yaitu melalui rekayasa dengan menyuruh istrinya untuk menggugat cerai ke Pengadilan Agama, atau jika istri tidak mau, maka sang suami berupaya memancing emosi istrinya agar melakukan kekerasan dalam rumah tangga. Lalu bukti visum dari rumah sakit ini diajukan sebagai alasan untuk mengajukan permohonan cerai talak ke Pengadilan Agama.

[55] Wawancara dengan JKN, Advokat Peradi, tanggal 11 Agustus 2018

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RETRACING THE POSITION OF SHARIA SCIENCE IN THE FORMULATION OF LAWS AND REGULATIONS

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RETRACING THE POSITION OF SHARIA SCIENCE IN THE FORMULATION OF LAWS AND REGULATIONS

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Abstract: This study tries to explain the efforts to retrace the position of Islamic science in the formulation of laws and regulations in Indonesia. As part of the implementation of Islamic law and the national legal sub-system, the position of sharia is particularly strategic and significant. The existence and position of sharia science lie not only in theoretical development through academic studies but also in practical terms which can provide its own colour in the formulation of laws and regulations in Indonesia. The implementation of sharia in life is not only an individual normative obligation, but also a collective responsibility that involves academics, legal practitioners, and the government. The position of sharia in forming laws and regulations theoretically and practically can be seen from three aspects, including substance, structure, and culture.

Keywords: sharia science; law and regulation; substance.

Abstrak: Penelitian ini mencoba menjelaskan tentang upaya pelacakan kembali posisi ilmu syariah dalam pembentukan peraturan perundangan-undangan di Indonesia. Sebagai bagian dari implementasi hukum Islam dan sub-sistem hukum nasional, posisi ilmu syari'ah sangat strategis dan signifikan. Keberadaan dan posisi ilmu syariah bukan hanya terletak pada pengembangan teoritis melalui kajian akademik, tetapi juga secara praktis dapat memberikan warna tersendiri dalam pembentukan peraturan perundangan-undangan di Indonesia. Implementasi ilmu syariah dalam kehidupan, bukan hanya kewajiban individual yang bersifat normative saja, tetapi juga menjadi kewajiban kolektif yang melibatkan akademisi, praktisi hukum, maupun pemerintah. Dengan menggunakan metode deskiptif tekstual-interpretatif, penelitian ini menunjukkan bahwa secara teoritis dan praktis, posisi ilmu syariah dalam pembentukan peraturan perundang-undangan dapat dilihat dari tiga aspek, antara lain: substansi, struktur, dan kultur.

Kata Kunci: ilmu Syariah; peraturan perundang-undangan; substansi.

Introduction

Legal history which governs civilization in Indonesia began with customary law, and then it was followed by Islamic law and finally Western law. These three laws have different characteristics, and their position can improve existing laws in Indonesia.[1] An interesting fact about the population of Indonesia is that the majority of it is Muslims, but the legal system adheres to national law rather than Islamic law.[2] The discourse on the dynamics and development of Islamic law in Indonesia based on three essential notes.[3] *First*, the characteristics of Indonesian Islamic law are dominantly characterized by Arab personality (Arab oriented) and more closely attached to

[1] Muhammad Daud, "Kedudukan Hukum Islam Dalam Sistem Hukum Indonesia," *Jurnal Hukum & Pembangunan*, vol. 12, no. 02 (1982), pp. 101–10.

[2] Muhammad Julijanto, "Implentasi Hukum Islam Di Indonesia Sebuah Perjuangan Politik Konstitusionalisme," in *Annual International Conference Islamic Studies (AICIS XXI)*, (2012), pp. 66–85, http://www.republika.co.id/berita/dunia-islam/islam-mancanegara/12/05/09/m3qcqk-2030-.

[3] Mohammad Daud Ali, *Pengantar Ilmu Hukum Dan Tatata Hukum Islam Di Indonesia*, (Jakarta: PT Raja Grafindo Persada, 2007).

the tradition of Shâfi'î madhhab. This can be seen from the reference books used by the scholars who mostly employ the Shâfi'î *fiqh* books. Such conditions can also be seen in the formulation of the Compilation of Islamic Law formulated by Indonesian scholars who are particularly close to Shafi'i characteristic. Besides, methodologically most scholars use the books of *fiqh* written by Shafi'i madhhab scholars. As it is understood that most of the discussion of *fiqh* concept, primarily that is taught in most Islamic boarding schools, has only reached the issue of *qiyâs*, although there is something broader than that.[4]

Second, viewed from the material aspects of the substance (scope) of Islamic law developed in Indonesia, it seems to be more focused on private law or family law (*ahwal al-syakhsiyyah*), such as marriage, inheritance, *waqf*, as covered by the compilation of Islamic law (KHI). Until now, the Religious Courts Institution has only been authorized to handle cases relating to limited civil law (although there has been an increase in authority in the field of Sharia economics, but in practice, it cannot yet be handled by the Religious Courts).[5] Indeed there is encouraging information that even though formally it cannot be applied, substantially the material contained in the new Criminal Code draft has adopted a lot of Islamic criminal law (*jinayat*). Another encouraging thing is the presence of Sharia banks and *Baitul Mâl Wat Tamwil*, as well as Sharia financial institutions in Indonesia today as the phenomenon of the existence of Islamic law in the field of *muamalah*.[6]

Third, judging from the aspect of enforcement, there seems to be a strong tendency that Islamic law is expected to be part of positive state law, as a form of government accommodation towards Muslims.[7] If this tendency is correlated to the issue of legal effectiveness, there seems to be hope that by being appointed as state law, Islamic law will have a strong attachment to being adhered to by the Muslim community. Such legal logic is temporarily acceptable, although in reality this is not always the case. There is a concern that the government will use these conditions to participate in determining which and what formulations of Islamic law to be implemented in Indonesia.[8]

Some of the reasons mentioned above are interesting and essential to study in completing scientific knowledge, especially in the field of law regarding the position of Sharia science in completing national law in Indonesia since Indonesia is building an ideal law for the people of Indonesia, including the development of the law that is based on the sharia science derived from the Quran and Hadith.[9] Sharia science, which is the second gate in the formulation of law in Indonesia after customary law applied in Indonesian society, is the focus of the current study.[10]

Method

This study discussed normative aspects of sharia science tracking within regulations, and used textual-interpretative descriptive method. This method was used to seek a number of syariah related texts both in the Quran, Hadith, *fiqih* books, and history. In order to address the legislation aspect, it used *taqnin* method. It was used toseek the contribution opportunity of historic-normative sources for national legal products in Indonesia. Through this method, the author hoped to connect amount of information from previous studies with the theories in literature sources.

Sharia science in legal theories approach

The discussion about sharia cannot be seperated from in-depth understanding related to it. Sharia is related to the guidance in every area of life-based on Islamic principles of justice.[11] Sharia science guides how we deal vertically to God and horizontally to humans[12]. In the approach of jurisprudence, sharia

[4] Mohammad Daud Ali, *Hukum Islam PIH Dan THI Di Indonesia,* (Jakarta: PT Raja Grafindo Persada, 1996).

[5] Aden Rosadi, *Peradilan Agama Di Indonesia : Teori Dan Sistem Pembentukan,* (Bandung: Simbiosa Reka Utama, 2015).

[6] Nurul Huda and Mohamad Heykal, *Lembaga Keuangan Islam Tinjauan Teoritis Dan Praktis,* (Jakarta: Kencana, 2010).

[7] Aiman, "Kedudukan Ilmu Syariah Dalam Perundang-Undangan," Aiman selalu berbagi, (2013), http://mamduhhakim.blogspot.com/2013/10/kedudukan-ilmu-syariah-dalam-perundang.html.

[8] Bahtiar Effendi, *Islam Dan Negara: Transformasi Pemikiran Dan Praktik Politik Islam Di Indonesia,* (Jakarta: Paramadina, 1998).

[9] Sopyan Mei Utama, "Eksistensi Hukum Islam Dalam Peraturan Perundang-Undangan Di Indonesia," *Jurnal Wawasan Yuridika,* vol. 2, no. 1 (2018), p. 58, https://doi.org/10.25072/jwy.v2i1.166.

[10] Muhammad Daud, "Kedudukan Hukum Islam…, p. 11.

[11] Yussef Auf, "Islam and Sharia Law Historical, Constitutional, and Political Context in Egypt," *Atlantic Council*, no. 03 (2016), pp. 1–9.

[12] Christine Schirrmacher, *The Sharia – Law and Order In* (Germany: Hänssler Verlag, 2013).

means obligations that must be followed by Muslims about how to deal with God, humans and objects according to the fundamental legal norms set by Allah Swt in the Quran and Hadith delivered by the Prophet.[13] This means that our behaviors towards God, towards fellow human beings and towards objects have all been arranged so that humans do not get astray. Thus, humans as creatures created by God can benefit themselves and their environment. In the implementation aspect, sharia as a theoretical basis in the formulation of legislation uses a way of thinking based on two teachings considered as absolute truths, namely the teachings of the historical madhhab by Von Savigny and the decision theory of Ter Haar. [14] In this case, Sunaryati Hartono has the opinion that at present, both opinions and theories are no longer reliable in an atmosphere of "planned" national development which indicates the formulation of our "national legal system". The theoretical basis used is as follows:[15]

First, the theory of Creed or *syahadat*, which is a continuation of the principle of monotheism in Islamic legal philosophy. The principle of monotheism requires every person who claims to have faith in Allah Swt to submit to Allah's commands while submitting to the Prophet and his sunnah. This theory is the same as the theory of legal authority explained by HAR Gibb, who states that Muslims who have accepted Islam must receive Islamic legal authority over themselves[16]. *Second*, the *receptie exit theory*. Hazarin created this theory. He argues that after the Proclamation of Indonesian Independence and the Establishment of the 1945 Constitution as the Republic of Indonesia Constitution, all Dutch East Indies regulations based on receptie theory no longer apply.[17] Since this theory is precisely contrary to the spirit of the 1945 Constitution and besides it also contradicts the Quran and Sunnah, and contradicts Article 29 paragraphs 1 and 2 of the 1945 Constitution which states "The State is based on the divinity of the Almighty. And paragraph 2 states that "the State guarantees the freedom of the population to embrace their respective religions as well as to worship based on their respective religion and belief. Sayuti Thalib later developed this theory into the theory of *receptio a contrasio*. *Third*, the *Recceptio a contrasio* theory states that customary law applies to Muslims if it does not conflict with Islamic teachings. This theory also applies to Islam.

Based on the theories mentioned above, it can be concluded that Quran and legislation theory can be applied to the object of discussion in the form of laws and regulations relating to restructuring the legal system and legal politics in Indonesia based on the 1945 Constitution which includes the substance of the law, legal structure, and legal culture. Restructuring means reorganizing, correcting, and rearranging the general legal system.

The Role of Sharia Science in the Formulation of Legislation

The role of sharia studies in forming regulations can be divided into four forms.[18] *First*, in the sense that it is an integral part of Indonesian national law; *Second*, in the sense of being recognized for independence, strength and authority by national law and given status as national law; *Third*, in its function as a filter for Indonesian national legal materials; and *Fourth*, in the sense of being the main composition and element for the formulation of national law. Thus, it appears that Islamic law is an integral part of national law. Islamic law is a sub-system of the national legal system.[19] As a sub-system, Islamic law is expected to make a dominant contribution to the development and renewal of national law that reflects the legal awareness of the Indonesian people.[20] This is possible since the majority of Indonesia's populations are Muslims. The position of Islamic law in the post-independence Indonesian constitution, according to Ismail Sunny, is divided into two periods,[21] namely: *first*, the period of

[13] Nurhayati, "Memahami Konsep Syariah, Fikih, Hukum Dan Ushul Fikih," *Jurnal Hukum Ekonomi Syariah*, vol. 2, no. 2 (2018), pp. 124–34, https://doi.org/10.26618/j-hes.v2i2.1620.

[14] Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law*, (Cambridge: Harvard University Press, 1967).

[15] Pipin Sarifin and Dedah Jubaedah, *Ilmu Perundang-Undangan*, (Bandung: Pustaka Setia, 2012).

[16] Juhaya S. Praja, *Filsafat Hukum Islam*, (Bandung: Pusat Penerbitan Universitas LPPM Universitas Islam Bandung, 1995).

[17] Khoiruddin Buzama, "Pemberlakuan Teori-TeoriHukum Islam Di Indonesia," *AL-'ADALAH*, vol. X, no. 4 (2012), pp. 467–72.

[18] M Muhtarom, "Kedudukan Peraturan Perundang-Undangan Negara Dalam Institusi Hukum Islam," *Jurnal Suhuf*, vol. 27, no. Mei 2015 (2015), pp. 22–37.

[19] Mardani, "Hukum Islam Dalam Sistem Hukum Nasional," *Jurnal Hukum & Pembangunan*, vol. 38, no. 2 (2008), p. 175, https://doi.org/10.21143/jhp.vol38.no2.170.

[20] Nasarudin Umar, "Konsep Hukum Modern: Suatu Perspektif Keindonesiaan, Integrasi Sistem Hukum Agama Dan Sistem Hukum Nasional," *Walisongo: Jurnal Penelitian Sosial Keagamaan*, vol. 22, no. 1 (2014), p. 157, https://doi.org/10.21580/ws.2014.22.1.263.

[21] Khalilullah Ahmas, "Hukum Islam Dalam Ketatanegaraan (Telaah Perspektif Menuju Indonesia Baru)," *Jurnal Al-Syirah*, vol. 1, no. 2 (2003), pp. 1–10.

acceptance of Islamic law as a source of persuasion. *Second*, the period of acceptance of Islamic law as an authoritative source, that is, a source that has binding and legal power in Indonesian constitutional law. In subsequent developments, the Government of Indonesia rolled out legal political policies which within certain limits accommodated some of the wishes of Muslims.[22]

The contribution of the role of sharia sciences to the formulation of laws and regulations is part of the politics of law participation of Indonesian Muslim religious community within the democratic climate of Pancasila. Sharia enforcement through the state occurred in Indonesia is not a new agenda championed by Islamic political activists.[23] Since the Constituent Assembly session in the 1950s, Indonesia's political map had narrowed to the Islamic and Nationalist groups. Later, Islamism became weaker, as a result of the emergence of Indonesian Islamic thinkers who were far more moderate and liberal.[24]

On the one hand, Islamic sharia positivation in the Indonesian legal system is the political success of Muslim political actors in achieving one of their political goals.[25] This achievement can be seen from the shifting of antagonism of Islam and the state since the 1980s, until the reform era. This achievement manifests itself in the form of eroding the country's suspicions and developing state accommodation politics towards Indonesian Muslim communities. In connection with the laws and regulations, several laws and regulations based on sharia principles that are currently applied include.[26]

1. Law of the Republic of Indonesia No. 17 of 1999 concerning the Implementation of Hajj (State Gazette of the Republic of Indonesia No. 53, additionally State Gazette of the Republic of Indonesia No. 3832) which was substituted with RI Law No. 13 Year 2008 concerning the Organization of Hajj (State Gazette of the Republic of Indonesia No. 60/2008, a supplement to Law of the Republic of Indonesia No. 4845).
2. Law of the Republic of Indonesia No. 38 of 1999 concerning zakat management (State Gazette of the Republic of IndonesiaYear 1999 No. 164, supplement to State Gazette of the Republic of Indonesia No. 3885).
3. Law of the Republic of Indonesia No. 7 of 1992 concerning banking, (State Gazette of the Republic of Indonesia Year 1992 No. 31, a supplement to State Gazette of the Republic of Indonesia No. 3472, as amended by Law of the Republic of Indonesia 1998 No. 182, a supplement to State Gazette of the Republic of Indonesia No. 3790).
4. Law of the Republic of Indonesia No. 23 of 1999 concerning Bank Indonesia (Statute Book of the Republic of Indonesia No. 66 of 1999, Supplement to State Gazette of the Republic of Indonesia No. 3843) as amended by Indonesian Law No. 3 Year 2004 (State Gazette of the Republic of Indonesia No. 7 Year 2004, supplement to State Gazette of the Republic of Indonesia No. 4357).
5. Law of the Republic of Indonesia No. 24 Year 2004 concerning deposit insurance institution (State Gazette of the Republic of Indonesia Year 2004 No. 96, supplement to State Gazette of the Republic of Indonesia No. 4420).
6. Law of the Republic of Indonesia No. 41 Year 2004 concerning waqf (State Gazette of the Republic of Indonesia Year 2004 No. 159, supplement to State Gazette No. 4459).
7. Law of the Republic of Indonesia No. 11 Year 2006 concerning Aceh Government (State Gazette of the Republic of Indonesia Year 2006 No. 62, supplement to State Gazette of the Republic of Indonesia No. 4633).
8. Law of the Republic of Indonesia No. 40 Year 2007 concerning limited liability companies (State Gazette of the Republic of Indonesia Year 2007 No. 106, supplement to State Gazette of the Republic of Indonesia No. 4756)
9. Law of the Republic of Indonesia No. 21 Year 2008 concerning sharia banking (State Gazette of the Republic of Indonesia Year 2008 No. 44, supplement to State Gazette of the Republic of Indonesia No. 4867).

[22] M Sularno, "Syari'at Islam Dan Upaya Pembentukan Hukum Positif Di Indonesia," *Al-Mawarid*, vol. 14, no. 2 (2006), pp. 211–19. Fauzan, "Progressive Law Paradigm in Islamic Family Law Renewal in Indonesia," *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan* vol. 7, no. 2 (2020). p. 187, https://doi.org/10.29300/mzn.v7i2.3617.

[23] Muhammad Wahyuni Nafis and Rahman Zainuddin, *Konstektualisasi Ajaran Islam*, (Jakarta: Ikatan Persaudaraan Haji Indonesia, 1995).

[24] Ismail Hasani and A. Gani Abdullah, *Pengantar Ilmu Perundang-Undangan*, (Jakarta: . Fakultas Syar'ah dan Hukum UIN Syarif Hidayatullah, 2006).

[25] Masruhan, "Positivisasi Hukum Islam Di Indonesia," *The Indonesian Journal of Islamic Family Law*, vol. 01, no. 02 (2011): 214–17, https://doi.org/10.20885/unisia.vol26.iss48.art11.

[26] Pipin Sarifin and Dedah Jubaedah, *Ilmu Perundang-Undangan…*, 2012.

10. Law of the Republic of Indonesia No. 19 Year 2008 concerning state syari'ah securities (State Gazette of the Republic of Indonesia Year 2008 No. 7, supplement to State Gazette of the Republic of Indonesia No. 4852).
11. Presidential Instruction No. 1 Year 1991 concerning the compilation of Islamic law.
12. Qanun of Nangroe Aceh Darussalam Province No. 2 Year 2004 concerning the election of the Governor and Deputy Governor in the Province of Nangroe Aceh Darussalam as amended by the Qanun of Nangroe Aceh Darussalam Province No. 3 Year 2005 concerning amendment to Qanun of Nangroe Aceh Darussalam Province No. 2 Year 2004.
13. Law of the Republic of Indonesia No. 23 Year 2011 concerning Zakat Management (State Gazette of the Republic of Indonesia Year 2011 No. 115).

On the other hand, the Islamic sharia positivation becomes as if it were futile due to the discipline of Muslims, which showed no difference between before and after the positivation. Therefore, quoting from Arkoun, their main ideas remain imprisoned by regional and ethnographic images, their political articulation is still dominated by ideological and it needs to legitimize the regimes of society today.[27] Descriptions recorded in the efforts to implement Islamic sharia in Aceh as well as in several other areas showed that the application of Islamic sharia was not only suffering from epistemological, political, but also sociological problems characterized by the cynicism of the manifesting society. For this reason, the choice of the role of sharia sciences in more productive laws and regulations must be formulated[28].

Formalization of Islamic law in Indonesia is not an easy problem, at least it can be seen from two things.[29] *First*, the objective conditions of a pluralistic Indonesian nation must be considered, not to cause counter-productive harm to Muslims themselves. *Second*, reformation on the conceptions, strategies and methods of the formulation of Islamic law, so that the resulting Islamic law does not conflict with the public's legal awareness and is following the characteristics of the national legal order that it aspires for. In connection with the second problem above, Islamic law in the context of national law is a law with its own character, namely as local Islamic law following *ijtihâd* and local conditions decided by valid lawmakers in Indonesia. Thus, practically Islamic law can differ from one country to another. Even so, Islamic law in various countries still comes from the same source, namely Islamic law as a divine law[30].

Sharia (Islamic law) deserves to be a source of the formulation of national law, since it is considered capable of underlying and directing the dynamics of Indonesian society in achieving its goals. It contains a dimension rooted in the *nas qath'i* which is universal and applies for all time, besides it also includes a dimension rooted in the *nas zanni* as the area of *ijtihâd* and is adaptive to the times. There are four types of Islamic law reform products in Indonesia, namely: *fiqh, fatwa*, court products, and also laws and regulations. The big theme of the discourse of renewing Islamic legal thinking is derived from the term *ijtihâd*, which in the Indonesian context, the current *ijtihâd* movement shows a variety of methods and tendencies. Formalization of Islamic law in Indonesia faced several obstacles including the objective conditions of a pluralistic Indonesian which if not observed it can lead to counter-productive for Muslims themselves. Another obstacle was the difficulty of the formulation of the conceptions, strategies and methods of the Islamic law that did not conflict with public legal awareness and the characteristics of national law.

The term sharia democratic is basically used to facilitate the understanding of Islamic thought products that are based on critical, contextual, and historical studies. These products of thought generally aim to restore the spirit of fundamental Islam, which has been manipulated and reduced by classical Islamic thinkers and is conditioned in the form of sacred *fiqh*, and accepted by the Islamic community without exception. The product of thought and the basis on the principle of progressive revelation with a liberal interpretation is the meaning of democratic sharia. Democratic sharia is sharia that is acceptable within a social context[31].

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[27] Mohammed Arkoun, *The Concept of Authority in Islamic Thought: La Hukna Illa Li-Llah*, (New York: Institute of Political science, 1984); Effendi, *Islam Dan Negara: Transformasi Pemikiran Dan Praktik Politik Islam Di Indonesia*.

[28] Ismail Hasani and A. Gani Abdullah, *Pengantar Ilmu Perundang-Undangan…*, 2006.

[29] Ashadi L. Diab, "Dinamika Pekiran Hukum Islam Di Indonesia Dan Tantangannya," *Jurnal Al-'Adl*, vol. 8, no. 2 (2015), pp. 37–56.

[30] M Sularno, "Syari'at Islam Dan Upaya…, p. 20.

[31] Ismail Hasani and A. Gani Abdullah, *Pengantar Ilmu Perundang-Undangan…*, 2006.

According to Yusril Ihza Mahendra's speech on the seminar at State Islamic University (UIN) Syarif Hidayatullah Jakarta, in Indonesia, Islamic law is actually a law that lives, develops, known and partly obeyed by Muslims in this country. How is the validity of Islamic law? When we look at the laws in the field of worship, then practically the Islamic law applies without the need to elevate it into positive legal principles, as formalized in the form of legislation. How Islamic law regulates the procedures for carrying out the five daily prayers, fasting and the other rules does not require positive legal rules. That the five daily prayers are obligatory or *fardhu 'ain* according to Islamic law, is not a state matter. The state cannot intervene, and also bargains so that the five daily prayers become the *sunnah* of *mu'akad* for example. Islamic law in this field directly applies without being able to be intervened by state power. The thing needed is a rule that can give Muslims the freedom to carry out the laws of worship, or at most are the aspects of state administrative law to facilitate the implementation of an Islamic legal principle.

Take the example in the field of labor law, of course for example, there are rules that provide opportunities for Muslim workers to perform Friday prayers. Likewise, in the field of hajj and zakat, there is a need for legislation to govern the organization of the hajj pilgrims, zakat administration, and so on. Such an arrangement is closely related to the function of the state which must provide services to its people. Such an arrangement is also associated with our state philosophy, which rejects the principle of "separation of religious affairs from state affairs" which was confirmed by Professor Soepomo in BPUPKI sessions, when the nation's founders drafted a constitution for an independent state. A year ago, the Government prepared a bill of Law concerning the Applied Law on Religious Courts. This bill is an attempt to transform the rules of Islamic law, as a law that lives in society into positive law. Its scope is the legal fields which are the authority of the Religious Courts. Of course, the legal subject of this positive law will apply specifically to Muslim citizens, or who voluntarily submit themselves to Islamic law. The President and the Parliament have also ratified the Law on Waqf, which transforms the rules of Islamic law into positive law. Various laws related to business law have also provided an appropriate place for the rules of Islamic law relating to banking and insurance.

The Position of Sharia Science in Legislation

The position of sharia science in legislation lies in its position as a core value in various laws and regulations, which is not outlined in the form of formalizing Islamic sharia. Rather, it is outlined in the form of values that exist in the legislation itself. In its implementation, the essential thing is how the sharia sciences become the body of legislation, with due regard to the norms that exist in sharia. In other words, which are included in the legal domain and which are included in the sharia domain that can be applied in the life of the nation and state. Thus the role and contribution of sharia sciences as well as sharia scholars can influence the advancement of law in Indonesia.[32] This indicates the very influential position of sharia science for Indonesian people.

Ratification of sharia-based regional regulations is indeed different from the ratification of laws which contain sharia values. Ratification of laws with a sharia nuance relatively did not cause national debate about the position of Islam or Islamic sharia in the regulatory system in Indonesia.[33] Whereas the ratification of sharia-based regional regulations created a lot of very significant debates, especially from academics, observers, social-political activists and human rights.[34] They considered the application of sharia regulations in the regions to ignore aspects of human rights that the State should protect the lives of its citizens[35].

Critical voices about the formalization and legislation of Islamic law in Aceh and other regions can be categorized into five groups.*First*, criticism comes from people who fear that Islamic law is not implemented in *kaffah* manner, in the sense of not regulating all aspects of life. *Second*, the

[32] Ismail Hasani and A. Gani Abdullah, *Pengantar Ilmu Perundang-Undangan…*, 2006..

[33] Muhammad Julijanto, "Implentasi Hukum Islam…, pp. 66–85.

[34] Bahtiar Effendi, "Duduk Soal Perda Syariah," Gusdur Net, 2008, http://www.gusdur.net/id/mengagas-gus-dur/duduk-soal-perda-syariah-2.

[35] Dalmeri, "Prospek Demokrasi: Dilema Antara Penerapan Syariat Islam Dan Penegakan Hak Asasi Manusia Di Indonesia," *Salam Jurnal Studi Masyarakat Islam*, vol. 15, no. 2 (2012), pp. 228–39, http://download.portalgaruda.org/article.php?article=97959&val=276&title=Prospek Demokrasi: Dilema antara Penerapan Syariat Islam dan Penegakan Hak Asasi Manusia di Indonesia."

opposite of the first, their criticism is based on fear that the sharia will be implemented as a whole. According to them, if the sharia is in the form of Islamic law which has been written in classic books or interpreted by some authorities, it will cause some problems for the community. *Third*, those who criticize the efforts to formalize and legalize sharia, especially in Aceh. According to them, these efforts are not in line with the wishes of the Acehnese people about sharia and do not have a significant impact on solving problems in Aceh. *Fourth*, those who question the relationship between shari'a legislation and the needs of the Indonesian population for good governance, civil society and democracy. *Fifth,* those who question the synchronization between sharia legislation or sharia regulations and national legal system.[36]

Pros and cons to the regional regulations that transform sharia not only occur in society, but also in parliament. Around 56 members of the People's Representative Council (DPR) from a number of factions collected signatures to reject these regional regulations. By viewing that some members of the council performed such behavior, around 134 other council members made a rival and expressed their agreement on the regional regulations that adopted sharia.[37]

According to Masykuri Abdillah, three groups in Indonesia have different attitudes and views on the discourse of the implementation of Islamic sharia. *First*, group-oriented towards making Islam as an ideology. The group always strives to fight for the implementation of Islamic teachings comprehensively (*kaffah*), namely *aqeedah*, sharia and moral ethics. *Second*, group-oriented to Islam as a source of ethics and morals. This group is only trying to fight for the implementation of faith and morals. This group is supported by those whose national insight is more dominant than their Islamic insight. *Third*, a group that fights for the implementation of sharia wherever possible - besides faith and moral ethics – that is integrated into the national system. In short, according to him, the first orientation is to bring Islam an ideology, the second orientation is to bring Islam a source of faith and moral ethics, and the third orientation is to bring Islam as a sub-ideology.[38]

Conclusions

Sharia theoretically and practically is being a part and source in the formulation of laws and regulations since it is considered capable of underlying and directing the dynamics of Indonesian society in achieving its goals. It contains dimensions rooted in the text of the *nash qath'i* which is universal and valid throughout the ages, besides it also includes dimensions rooted in the text of *nashdzanni as* the area of *ijtihâd* and is adaptive to the times. Moreover, there are four types of Islamic law reform products in Indonesia, namely: *fiqh*, fatwa, court products, and legislation. The big theme of the discourse of renewing Islamic legal thinking is sourced from the term *ijtihâd*, which the current *ijtihâd* movement shows a variety of methods and tendencies in the Indonesian context.

The position of sharia knowledge in legislation lies in its position as a core value in various laws and regulations, which is not stated in the formalization of Islamic sharia. The important thing to note is how the sharia become the body of laws and regulations, by constantly taking into account the norms in the sharia, which is the legal and sharia domain. Thus resistance to the role and contribution of the sharia sciences including sharia scholars can be avoided.

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[36] Nurrohman, *Islamic Thought in Indonesia's Religio Political Context*, (Bandung: Penerbit Gunung Djati Press Bandung, 2010).

[37] Muntasir Syukri, "No TitleTransformasi Syariat Islam Di Indonesia," 2011, https://muntasirsyukri.wordpress.com/2011/09/01/transformasi-syariat-islam-di-indonesia/.

[38] Labib Muttaqin, "Positifisasi Hukum Islam Dan Formalisasi Syari'Ah Ditinjau Dari Teori Otoritarianisme Khaled Abou El-Fadl," *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 11, no. 1 (2016), p. 67, https://doi.org/10.19105/al-ihkam.v11i1.859.

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RETRACING THE POSITION OF SHARIA SCIENCE IN THE FORMULATION OF LAWS AND REGULATIONS

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Budaya Syarafal Anam Dalam Prosesi Pernikahan Pada Suku Lembak Dusun Besar Kota Bengkulu Perspektif Hukum Islam

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Budaya *Syarafal Anam* Dalam Prosesi Pernikahan Pada Suku Lembak Dusun Besar Kota Bengkulu Perspektif Hukum Islam

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Abstrak: *Tradisi Syarafal Anam merupakan sebuah tradisi yang sudah melekat pada masyarakat Suku Lembak Dusun Besar Kota Bengkulu. Tradisi ini sudah lama ada di lingkungan Suku lembak, hingga saat ini. Adapun tujuan dari penelitian ini adalah ingin mengetahui lebih jauh mengenai pemahaman, pengembangan, peristiwa, dan fenomena yang terjadi terhadap tradisi Syarafal Anam di lingkungan sekitar masyarakat lembak. Penelitian ini adalah penelitian lapangan (field research), yang bersifat kualitatif. Metode penelitian yang digunakan adalah melalui observasi, dan wawancara, selanjutnya akan didiskripsikan secara sistematis dan faktual tentang Syarafal Anam di masyarakat lembak kota Bengkulu. Kesimpulan dari penelitian ini adalah bahwa dalam pelaksanaannya, tradisi Syarafal Anam adalah tradisi yang memiliki unsur religius atau keagamaan. Khususnya umat muslim, tradisi ini adalah tradisi yang mengajak untuk mengingat Allah dimanapun kita berada serta mengingat kekasih Allah yaitu baginda Nabi Muhammad Saw. Karena dalam pelaksanaannya sendiri dilakukan dengan melantunkan Dzikir dan Sholawat yang diiringi musik rabana. Sedangkan tinjauan hukum Islam tradisi Syarafal Anam sendiri menyangkut dengan `Urf.*

Keywords: *hukum Islam; Syarafal Anam; pernikahan; suku Lembak.*

Abstrak: *The Syarafal Anam tradition is a tradition that has been attached to the Lembak Tribe, Dusun Besar, Bengkulu City. This tradition has long existed in the Lembak tribe until now. This research aims to learn more about the understanding, development, events, and phenomena that occur in the Syarafal Anam tradition in the environment around the Lembak community. This research is field research, which is qualitative. The research method used is observation and interviews, which will then systematically and factually describe Syarafal Anam in the Lembak community of Bengkulu city. This research concludes that in its implementation, the Syarafal Anamtradition is a tradition that has religious or religious elements. Especially for Muslims, this tradition is a tradition that invites us to remember Allah wherever we are, and Allah's lover, namely the Prophet Muhammad S.A.W. Because the implementation itself is done by chanting Dhikr and Sholawat accompanied by rabana music. At the same time, the review of Islamic law in the Syarafal Anam tradition concerns Urf.*

Kata Kunci: *Islamic law; Syarafal Anam; wedding; Lembak tribe.*

Pendahuluan

Kesenian adat *Syarafal Anam* merupakan salah satu kesenian adat yang hidup dan lestari didalam kebudayaan adat istiadat masyarakat Lembak Bengkulu yang tersebar dibeberapa daerah dan masyarakat tertentu. Masyarakat adat Lembak seperti juga masyarakat-masyarakat Bengkulu pada umumnya adalah penganut Agama Islam dan kemudian kebudayaanya juga bercorakkan ciri yang Islami, sama halnya yang terjadi pada kesenian adat *Syarafal Anam* merupakan kesenian yang

memiliki corak dan kekhasan tersendiri yaitu nilai agama yang menyenandungkan pujian-pujian untuk rasul dan bersalawat. Kesenian ini juga hadir yang beriringan dengan berkembangnya agama Islam di Kota Bengkulu. Kesenian adat *Syarafal Anam* atau zikir (bedikir) biasanya ditampilkan ketika ada acara prosesi perkawinan dan aqiqah serta acara membuang rambut cemar.

Kesenian ini datang beriringan dengan perkembangan agama Islam di Bengkulu. Islam di Provinsi Bengkulu diperkirakan mulai masuk pada sekitar tahun 1500-an dan saat itu Bengkulu masih berupa pemerintahan dalam bentuk kerajaan-kerajaan kecil. Islam di Bengkulu berkembang pada tahun 1600 – 1700-an. Islam di Bengkulu masuk melalui beberapa jalur, di antaranya melalui Sumatera Barat, Sumatera Selatan (Palembang), dan interaksi antara kerajaan-kerajaan yang ada di Bengkulu dengan kerajaan Banten Islam di tanah Jawa. Seni melagukan Alquran yang dikenal dengan nagam atau an-nagam fil Quran mulai berkembang sampai tahun 1920-an dalam bentuknya yang klasik dengan lagu dan irama khas Indonesia, yang ditampilkan dalam upacara keagamaan. Bentuk-bentuk nyanyian tradisional selain seni tilawah Alquran yang poluler di Indonesia terutama adalah Marhaban, Barzanji, Hadrah,Ratib Syaman, Rapa'i, Zikir Barat, Shalawatan atau Lawut, Barodah, dan Rodat yang bersifat religius atau semi religius karena menyimbolkan do'a, zikir, puji-pujian kepada Allah atau salawat kepada Nabi Muhammad SAW. Yang datang kemudian dan lebih kental nuansa musiknya adalah gambus atau kasidahan. Namun banyak pula musik-musik tradisional yang berkembang dengan berbagai modifikasi seperti Zikir *Syarafal Anam*dari Bengkulu.[1]

Penelitian yang dilakukan oleh Salim Bela Pili, tahun 2012 dengan judul "*Syarafal anam* dalam perseptif Budaya dan Agama". Hasil dari penelitian ini di temukan *Syarafal Anam*sebagai tradisi budaya keagamaan di Bengkulu, secara pasti belum dapat ditetapkan kemunculanya, akan tetapi disepakati bahwa proses kehadirannya berkaitan erat dengan proses islamisasi awal Bengkulu. Dalam perkembangannya, pelaksanaan *Syarafal Anam* dimanfaatkan juga dalam kepentingan dalam kampanye politik pilkada serta dalam peringatan hari besar Provinsi Bengkulu. Dalam persepektif agama, *Syarafal Anam* adalah bagian dari kasidah Al-Barzanji. Dalam persepektif budaya, *Syarafal Ana*m merupakan identitas kultural masyrakat etnis. Pewarisan tradisi *Syarafal Anam* menghadapi kendala dari dalam yakni kurangnya minat generasi muda, kurangnya kemampuan anggota untuk membaca kitab aslinya, tidak ada inovasi baru.[2] Sementara fokus penelitian yang akan dilakukan dalam tulisan ini adalah bahwa acara *Syarafal Anam* ini menggunakan alat musik dan di iringi oleh tabuhan rebana bersamaan dengan itu disenandungkan sholawat pada saat prosesi acara pernikahan.

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[1]Syarafal Anam, "Makna, Fungsi Pelestariannya", *Jurnal Bimas Islam* 8, no.11 (2015): 10

[2] Salim Bella Pili, *Sarafal Anam Dalam Perspektif Agam Dan Budaya,* (Penelitian,Pusat Penelitian Dan Pengabdian Masyrakat: STAIN Bengkulu, 2013): 88

Metode

Metode yang dilakukan pada penelitian ini adalah penelitian Etnografi. Etnografi adalah strategi penelitian kualitatif, yang melibatkan kombinasi lapangan dan observasi, yang berusaha untuk memahami fenomena budaya yang mencerminkan pengetahuan dan sistem makna yang membimbing kehidupan kelompok budaya.[3] Dan kemudian data yang telah terkumpul di analisis dengan perspektif hukum Islam. Penelitian ini adalah penelitian lapangan *(field research)* yaitu penelitian yang obyeknya mengenai pemahaman, pengembangan, peristiwa, dan fenomena yang terjadi dalam lingkungan sekitar masyarakat lembak. Adapun sifat dari penelitian ini adalah penelitian yang bersifat kualitatif yaitu metode penelitian yang mengembangkan dan menginterprestasikan observasi, wawancara, sesuai yang terjadi dilapangan.[4] Dalam penelitian ini, selanjutnya akan didiskripsikan secara sistematis dan faktual tentang kebudayaan adat dimasyarakat lembak kota Bengkulu.
Metode pengumpulan data yang dilakukan dalam penelitian ini adalah dengan pengumpulan data menggunakan dokumentasi yang merupakan catatan tertulis yang berhubungan dengan suatu peristiwa masa lalu, baik yang dipersiapkan untuk suatu penelitian. Kemudian menggunakan metode wawancara dan observasi

Hasil dan Pembahasan

Sejarah dan pertama masuknya kesenian *Syarafal Anam* ke Bengkulu ini tidak ada tahun yang pasti. Namun diduga kuat masuknya kesenian ini, sejalan dengan masuknya Islam ke Bengkulu. Mengenai masuknya Islam ke Bengkulu ada beberapa teori: Pertama, menyebutkan bahwa Islam masuk ke bengkulu melalui tokoh ulama Aceh, yakni Tengku Malim Muhidin yang menyebarkan Islam di Gunung Bungkuk, dan berhasil mengislamkan Ratu Agung, penguasa Gunung Bungkuk. Kedatangan Tengku Malim Muhidin ini disebutkan pada tahun 1417 M. Kedua, melalui kedatangan Ratu Agung dari Banten menjadi Raja Sungai Serut. Ratu Agung menurut Siddik adalah anak Sultan Hasanuddin dari Banten (1546-1570). Ratu Agung memerintah di Kerajaan Sungai Serut diperkirakan pada tahun 1550-1570 M. Ketiga, melalui perkawinan Sultan Muzaffar Syah (1620-1660 M), raja dari Kerajaan Indrapura dengan Putri Serindang Bulan, puteri Rio Mawang (1550-1600 M) dari kerajaan Lebong (Depati Tiang Empat). Keempat, melalui persahabatan antara Kerajaan Selebar dengan Kerajaan Banten dan perkawinan antara Pangeran Nata Di Raja (1638-1710) dengan Putri Kemayun, Putri Sultan Ageng Tirtayasa. Kelima, melalui hubungan antara kerajaan Palembang Darussalam dengan Raja Depati Tiang Empat di Lebong. Dari

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[3]Suharsini Arikunto, *Prosedur Penelitian Suatu Pendekatan Praktek, (*Jakarta: Rineka Cipta, 2022): 24

[4]Burhan Bungin, *Analisis Data Penelitian Kualitatif*. (Jakarta: PT Raja Grafindo Persada, 2007): 25

kelima teori di atas dapat disimpulkan bahwa Islam masuk ke Bengkulu dalam rentang waktu antara awal abad XV (1417) sampai akhir abad XVII karena itu tidak mengherankan bahwa pada tahun 1685, Bloome melaporkan bahwa penduduk pesisir Bengkulu telah memeluk agama Islam, berpuasa dan bersumpah dengan menggunakan kitab suci al-Qur'an.[5]

Bagi masyarakat lembak kota Bengkulu pada khususnya kesenian *Syarafal Anam* memiliki makna penting sebagai "*kebersamaan dan kerjasama*" antar masyarakat. Dibuktikan dengan dijadikannya kesenian ini sebagai acara wajib pada setiap acara prosesi perkawinan, aqiqah, khitanan, dan acara syukuran lainnya. Uraian di atas, *Syarafal Anam* bertujuan untuk mengembangkan bagi masyarakat lembak yang melaksanakan pernikahan (perkawinan), didalam seni *Syarafal Anam* mempunyai dasar hukum dan aturan yang jelas untuk dilaksanakan. Hal itu dapat meningkatkan esensi *Syarafal Anam* dari sekedar kebiasaan masyarakat lembak menjadi suatu upaya mengikuti ketentuan yang telah ditetapkan Rasulullah SAW.

Masyarakat Lembak seperti juga masyarakat Bengkulu umumnya adalah pemeluk Agama Islam sehingga budayanya banyak bernuansakan Islam, begitu juga dengan kesenian *Syarafal Anam* merupakan kesenian yang memiliki nilai yaitu nilai agama yang merupakan pujian-pujian untuk rasul atau salawat. Kesenian ini juga datang beriringan dengan perkembangan agama Islam di Bengkulu. Berdasarkan pernyataan di atas maka dapat dipahami bahwa kesenian *Syarafal Anam* merupakan kesenian yang menjadi bagian dari rangkaian upacara adat di Kelurahan Dusun Besar. Kemudian juga dapat dipahami bahwa kesenian ini diperuntukan oleh pemeluk agama Islam, disamping itu kesenian *Syarafal Anam* ini merupakan kesenian yang wajib digunakan oleh masyarakat Lembak dalam prosesi adat perkawinan di Kelurahan Dusun Besar tanpa melihat status sosialnya.[6]

Kesenian *Syarafal Anam* suatu kesenian tradisional yang telah dimiliki oleh suku Lembak secara turun menurun. Kesenian *Syarafal Anam* oleh masyarakat Lembak sering disebut bedikir, kesenian *Syarafal Anam* mulai dikenal masyarakat Lembak beriringan masuknya agama Islam di Bengkulu. Kesenian ini dibawa oleh ulama Banten yang menyebarkan agama Islam, ulama ini oleh masyarakat Lembak disebut Datuk Syech Serunting. Sejak masyarakat mengenal agama Islam, maka masyarakat mulai mengenal kesenian *Syarafal Anam*. Masyarakat Lembak yang secara

[5]Willy Lontoh, *Syarafal Anam: Fungsionalisme Struktural Pada Sanggar An-Najjam Kota Palembang*. (Palembang: Catharisis . 2016,): 87

[6]Oktariani Hariani. *Kesenian Syarafal Anam dan Nilai – Niali yang Terkandung Di Dalamnya Pada Masyarakat Lembak Dalam Adat Istiadat (Studi Kasus di Kelurahan Dusun Besar Kecamatan Singaran Pati Kota Bengkulu), (*Bengkulu:2018): 73

garis besar merupakan pemeluk agama Islam menerima dan menjadikan kesenian *Syarafal Anam* sebagai kesenian tradisional yang terus dilestarikan.[7]

Tradisi pembacaan shalawat seperti barzanji, burdah, dan lainnya yang esensinya menghaturkan pujian kepada Nabi Muhammad saw adalah tradisi yang usianya setua Islam itu sendiri karena tradisi ini telah ada semasa beliau hidup. Tradisi ini diperkenalkan oleh tiga penyair resmi Rasulullah saw, yaitu Hasan Ibnu Tsabit, Abdullah Ibnu Rawahah, dan Ka'ab Ibnu Malik. Diceritakan dalam riwayat Ibrahim al Bajuri dalam *Hasyiyat al Bajuri 'ala Matn Qasidah al Burdah* bahwa tradisi pujian kepada Rasulullah ini merupakan tradisi yang perlu didorong dan dilestarikan oleh umatnya agar senantiasa patuh pada Allah dan Rasul-Nya.

Hal tersebut dimaknai ketika Nabi memuji Ka'ab Ibnu Zubair yang menggubah qasidah pujian kepadanya. Setelah mendengarkan pujian yang disampaikan oleh Ka'ab sangat terkesan, sampai-sampai Nabi melepas burdahnya dan dikenakan ke tubuh Ka'ab sebagai hadiah sekaligus ungkapan persetujuan. Qasidah pujian yang digarap oleh ketiga penyair Rasulullah dan Ka'ab kemudian menjadi acuan bagi para penyair muslim, ketika berkreasi menciptakan pujian, baik dalam bentuk *syair* (puisi) maupun *nathr* (prosa), sebagaimana yang tampak dalam kitab *Barzanji*, *Burdah*, dan *Syaraf al Anam* yang beredar sampai sekarang. Karya tersebut melahirkan jenis pujian yang khas, dan dengan karakter yang spesifik, yang dalam kajian sastra arab dikenal dengan istilah *al Mada'ih an Nabawiyah*.

Tradisi pujian kepada Nabi ini kemudian dilanggengkan oleh berbagai kekhalifahan Islam *Syi'ah* seperti Dinasti Fatimiyah di Mesir yang wajib dinyanyikan oleh segenap masyarakatnya manakala perayaan maulid Nabi tiba pada bulan Rabi'ul Awal. Umat Islam *Sunni* sendiri juga merayakan maulid Nabi dengan menghaturkan puji-pujian di berbagai daerah seperti Bukhara, Samarkand, Mosul, Mekkah, maupun Damaskus. Setelah Dinasti Fatimiyah tutup usia, tradisi pujian ini kemudian diteruskan oleh Sultan Salahuddin Yusuf al Ayyubi (Saladin) dari dinasti Bani Ayyub (1174-1193 M atau 570-590 H). Menurut Sultan Salahuddin, tradisi menyanyikan pujian kepada Rasulullah saw dapat mempertebal keimanan dan ketakwaan kepada rasul sekaligus juga menambah semangat juang meliputi membangkitkan semangat perjuangan dan persatuan dalam Perang Salib III melawan pasukan Nasrani dari Eropa yang berupaya menduduki Yerusalem. Saladin pula yang menghidupkan tradisi merayakan Maulid Nabi pertama kali pada 184 (580 H) dengan menyelenggarakan sayembara penulisan riwayat Nabi beserta puji-pujian bagi Nabi dengan bahasa yang seindah mungkin. Sedangkan di Indonesia, perkembangan tradisi pembacaan shalawat dan puji-pujian kepada Nabi tidak terlepas dari pengaruh orang-orang persia yang pernah tinggal di Gujarat yang pertama kali menyebarkan agama Islam di

[7]Muhammad Tarobin, *The Art of "Sarafal Anam" in Bengkulu: Meaning, Function and Preservation Seni "Sarafal Anam" di Bengkulu: Makna, Fungsi dan Pelestarian,* (Jakarta: Balai Penelitian dan Pengembangan Agama Jakarta, 2015): 53

Indonesia. Pendapat ilmiah yang lain mengatakan bahwa tradisi puji- pujian, terutama *barzanji* sendiri dibawa oleh ulama bermadzhab *syafi'i* terutama Syekh Maulana Malik Ibrahim yang dikenal gurunya Wali Songo berasal dari kawasan Hadramaut (Yaman) dalam menyebarkan Islam di daerah pesisir Sumatera Timur maupun Pantai Utara Jawa yang dikenal amat toleran dan moderat dalam berdakwah dengan mengasimilasikannya dengan tradisi maupun kultur lokal. Seni ini kemudian turut mengapresiasi Sunan Kalijaga untuk menciptakan lagu *lir-ilir* maupun *tombo ati* yang sangat familiar di kalangan pesantren dalam melakukan dakwahnya di kawasan pedalaman.

Oleh karena itulah, tradisi ini kemudian berkembang pesat di kalangan pesantren-pesantren yang tersebar di Jawa Tengah maupun Jawa Timur. Nahdlatul Ulama (NU) yang notabene dianggap sebagai pesantren besar dianggap sebagai organisasi pelestari tradisi ini. Tradisi pembacaan shalawat dan puji-pujian kepada Rasulullah saw sebagaimana yang dilakukan oleh kalangan pesantren biasanya dilandaskan kepada pendapat para fuqaha dari madzhab *Syafi'i*. Ibnu Hajar al Atsqalani, misalnya menyatakan bahwa tradisi seperti itu menyimpan makna kebajikan. As Suyuthi juga menunjukkan sikap toleran terhadap produk budaya yang dihasilkan oleh tradisi mengagungkan kelahiran Rasulullah. Ibnu Hajar al Atsqalani dan Abu Shamah pun juga menyetujui tersebut dan bagi mereka, peringatan Maulid menjadi satu perbuatan (baru) yang paling terpuji jika disertai dengan amal ihsan kemasyarakatan seperti shadaqah, infaq, serta kegiatan lain yang bernilai ibadah.

Di Indonesia pembacaan shalawat ditradisikan oleh masyarakat, yang dimotori oleh ISHARI (Ikatan Seni Hadrah Indonesia). Di Yaman sendiri, pembacaan shalawat juga diiringi dengan rebana yang bertujuan untuk memuliakan Nabi Muhammad saw. dengan bermunajat, beribadah, yang dilakukan dengan cara menghadirkan hati dalam bershalawat.

Syarafal Anam Sebagai Shalawat

Dari macam-macam shalawat yang berkembang dikalangan ahli tasauf/tarekat tersebut, beberapa dikenal cukup luas dikalangan masyarakat Islam secara umum. Diantaranya seperti shalawat-shalawat Munziyat, shalawat Kamilah, shalawat Nariyah, shalawat Nuriyah, shalawat Fatihiyah, shalawat Adzimiyah, shalawat Ummiyah & shalawat Aliliyah. Kalau ditelusuri asal-usulnya maka akan ditemukan juga sumbernya dari kelompok-kelompok tarekat yang berkembang luas di nusantara ini yaitu dari Tarekat Naqsyabandiyah, Qadiriyah, Sammaniyah, Ritaiyah dll. Dalam menyikapi shalawat sebagai suatu ibadah kaum muslimin mesti melaksanakanya dengan ketentuan-ketentuan mengenai "kaifiyah" (tata cara) dan adab-adab khusus, seperti adanya suasana khidmat, tempat & pakaian yang suci dan pengucapan yang tepat. Sarafal anam, barzanji adalah shalawat juga karena itu harus disikapi dengan

adab-adab tertentu. Karena itu bias dimaklumi bila ada yang melaksanakanya pada acara walimah nikah, akiqah, atau macam-macam syukuran dan selamatan.

Ada juga yang mengaitkan pembacaannya dengan keistimewaan dan khasiat-khasiat penyembuhan.[8] Kedua, wacana yang berkaitan dengan "Mushalla". Sebagai idola yang kepadanya shalawat diwajibkan Muhammad SAW adalah profil manusia sempurna (insane kamil) yang diakui kawan dan lawannya, masyarakat awam, maupun elite intelektual, dari dalam sampai sekarang bahkan masa depan. Al-Qur'an suci mengabadikannya dalam Q.S. al-Ahzab (33) : 21. yang berbunyi:

لَقَدْ كَانَ لَكُمْ فِيْ رَسُوْلِ اللهِ اُسْوَةٌ حَسَنَةٌ لِّمَنْ كَانَ يَرْجُوا اللهَ وَالْيَوْمَ الْاٰخِرَ وَذَكَرَ اللهَ كَثِيْرًاۗ ٢١

"Sungguh, pada (diri) Rasulullah benar-benar ada suri teladan yang baik bagimu, (yaitu) bagi orang yang mengharap (rahmat) Allah dan (kedatangan) hari Kiamat serta yang banyak mengingat Allah".

Karena itulah, tanpa diperintahkan Tuhan sekalipun, kaum Muslimin yang pelaksanaan ibadah ritual sehari-harinya minus pun akan memberikan penghormatan & pujian kepada Nabi SAW. Ironis tapi nyata, bahkan ada yang mengidentifikasikan keislamannya dengan ke ikut sertaanya dalam acara-acara Mauludan. Tapi begitulah, penghormatan dan pujian terhadap Muhammad SAW bersumber dari kepribadian beliau sendiri. Bagaimana manusia tidak akan memujinya bilamana para malaikat & Allah sendiri telah memujinya. Ketiga, masalah sekitar ungkapan. "lafadz shalawat". Berkaitan dengan lafadz dalam Shalawat ini terdapat beberapa pendapat. Ada yang ketat berpegang pada ketentuan dalil literal/teks, ada yang longgar yang menyatakan boleh mengungkapkannya dalam lafadz apapun asal untuk menghormati, memuji, menyanjung, bertabarukk kepada Rasul. Pendapat ini muncul lantaran memang Rasulullah mengajarkan sendiri lafadz khusus untuk shalawat tersebut. Disamping itu juga beliau memberi ketentuan untuk tidak menggunakan lafadz "SAYYIDINA".[9]

Pendapat pertama menyatakan ungkapan lafadz shalawat itu harus mengikuti petunjuk (dalil) Rasul. Karena dalam ibadah termasuk shalawat tidak boleh ditambah-tambahkan, apalagi ditambahkan dengan lafadz yang Rasulullah sendiri telah melarangnya. Dalam sebuah Hadits Shahih riwayat muslim dari Ibnu Mas‟ud ra. Basyir bin Sahal bertanya kepada Rasulullah tentang bagaimana menyatakan shalawat kepada beliau. Maka Nabi SAW menjawab : "Katakanlah : Allahumma Shalli ala Muhammad, wa „ala ali Muhammad kama sallaita „ala ali Ibrahim, wa barik „ala Muhammad wa „ala ali Muhammad, kama barakta „ala ali Ibrahim, fil alamina innaka hamidun majid".

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[8]Salim Bella Pili, *Sarafal Anam Dalam Perspektif Agam Dan Budaya,* (Penelitian,Pusat Penelitian Dan Pengabdian Masyrakat,: STAIN Bengkulu, 2013): 66

[9]Oktarina Haryani, *Kesenian Sarafal Anam Dan Nilai-Nilai Yang Terkandung Di Dalamnya Pada Masyarakat Lembak Dalam Adat Istiadat (Studi Kasus di Kelurahan Dusun Besar Kecamatan Singaran Pati Kota Bengkulu)*,2018: 9

Pendapat kedua justru menyatakan pemakaian lafadz : "sayyidina" adalah lebih utama (afdhal). Tambahan kata sayyidina merupakan adab sopan santun seorang mukmin kepada Rasulnya. Nabi "melarang" umat ber"sayyidina" kepada beliau untuk menunjukkan sikap tawadhu beliau. Jadi merupakan sopan santun juga bukan "larangan" dalam arti tidak boleh mengerjakannya Dari kedua pendapat yang masing-masing punya dalil tersebut dapat diambil jalan tengahnya.

Pertama, untuk bacaan shalawat dalam ibadah "mahdah" seperti dalam Tahiyyat Shalat, khotbah-khotbah sebaiknya mengikuti bacaan sebagaimana Rasulullah ajarkan dalam Shalawat Ibrahimiyah. Tanpa kata Sayyidina bukan berarti Nabi tidak sopan kepada dirinya maupun Nabi Ibrahim as.

Kedua, untuk kegiatan selain ibadah mahdah, sebaiknya diberikan keleluasaan untuk mengungkap rasa cinta, kagum, pemuliaan, tabarruk, puji-pujian kepada sang Rasul sepanjang tidak menimbulkan Syirik. Karena bagaimanapun Rasul sendiri tidak pernah menyatakan dirinya memiliki sifat-sifat supra-manusiawi.

Sejarah Suku Lembak

Deskripsi wilayah merupakan suatu gambaran umum mengenai lokasi penelitian. Lokasi penelitian menjadi hal yang sangat penting di dalam penelitian ini untuk lebih memperjelas penulis maupun pembaca untuk mengetahui letak daerah yang diteliti. Dimana pada bab ini dijelaskan mengenai lokasi penelitian yang membahas gambaran umum Kelurahan Dusun Besar, struktur pemerintahan, dan lain sebagainya.

Masyarakat Lembak atau juga yang dikenal dengan Suku Lembak yang merupakan bagian dari masyarakat Bengkulu. Provinsi Bengkulu suku Lembak mendiami Kabupaten Rejang Lebong, Kabupaten Bengkulu Tengah dan Kota Bengkulu. Suku Lembak yang mendiami Kabupaten Rejang Lebong disebut suku Beliti, sedangkan suku Lembak yang mendiami Kabupaten Bengkulu Tengah dan Kota Bengkulu disebut suku Lembak Delapan yang terbagi tiga yaitu suku Lembak Bulang, suku Lembak Tanjung Agung dan suku Lembak Pedalaman.

Suku Lembak Delapan pernah memiliki satu kerajaan tua di Bengkulu. Kerajaan yang dimiliki oleh suku Delapan adalah kerajaan Sungai Serut. Konon cerita kerajaan Sungai Serut berada di daerah Tanjung Terdana dan tersebar disepanjang sungai Bangkahulu, sedangkan asal kata kerajaan Sungai Serut berasal dari adanya sungai yang bernama sungai Serut dan kerajaan Sungai Serut ini dipimpin oleh raja yang bernama Burniat.

Pertama kali Suku Lembak ini berada di daerah Padang Ulak Tanding yang terletak di daerah pinggiran kerajaan Rejang Empat Petulai. Dari daerah Padang Ulak Tanding dan Lubuk Linggau penyebaran Berakhir sampai ke Kota Bengkulu. Ada empat alasan yang dapat dipertanggung jawabkan bahwa Suku Lembak adalah suku

asli di Bengkulu, yaitu: Pertama, suku Lembak mempunyai sejarah kerajaan yaitu Kerajaan Sungai Hitam dengan rajanya Singaran Pati yang bergelar Aswanda; kedua, mempunyai bahasa yang khas, dan; ketiga, memiliki kebudayaan baik fisik maunpun non fisik berupa kesenian; keempat, mempunyai wilayah yang jelas.

Suku Lembak mendiami daerah Bengkulu yang tersebar di lembah-lembah sungai dan daerah pengunungan. Penyebaran suku Lembak pada lembah sungai Bangkahulu, Danau Dendam Tak Sudah serta Sungai Hitam dan pada Hilir sungai Babatan. Di Kota Bengkulu yang dikenal adanya suku Lembak Bulang yang mendiami wilayah Dusun Besar, Panorama, Jembatan Kecil, Jalan Gedang, Sidomulyo , sedangkan suku Lembak Delapan mendiami wilayah Tanjung Agung, Tanjung Jaya, Semarang, Surabaya serta Bentiring.

Suku Lembak yang berada di wilayah Kota Bengkulu dapat dilihat pada tabel yaitu :

Table 3.1

Data Kecamatan Dan Kelurahan Suku Lembak Di Kota Bengkulu

NO	Kecamatan	Kelurahan
1.	Selebar	Pekan Sabtu, Sukarami, Pagar Dewa
2.	Gading Cempaka	Jalan Gedang, Sidomulyo
3.	Singgatan Pati	Dusun Besar, Panorama, Jembatan Kecil
4.	Sungai Serut	Tanjung Agung, Tanjung Jaya, Semarang, Surabaya.
5.	Muara Bengkulu	Bentiring

Dalam kehidupan masyarakat suku Lembak, masih banyak tradisi atau kebiasaan lama yang masih dipedoman dan dilakukan. Tradisi yang masih dilakukan yang berkaitan dengan upacara daur hidup (lahir sampai dengan meninggal) seperti adat istiadat perkawinan, membuang rambut Cemar dan Aqiqah dan kesenian tradisional seperti Kesenian *Syarafal Anam*. Masyarakat Suku Lembak seperti juga masyarakat Bengkulu umumnya adalah pemeluk Agama Islam sehingga budayanya banyak bernuansakan Islam seperti Kesenian *Syarafal Anam*, salah satu masyarakat suku Lembak di Kota Bengkulu, tepatnya di Dusun Besar yang merupakan keturunan masyarakat suku Lembak Bulang.

Kondisi Masyarakat Budaya

Kelurahan Dusun Besar yang berpenduduk asli masyarakat Lembak memiliki adat istiadat dan ritual khusus yang telah diwariskan secara turun menurun tentang adat istiadat baik tata cara perkawinan dan kesenian *Syarafal Anam* yang berlaku pada masyarakat suku Lembak. Pada masyarakat Lembak di kelurahan ini masih kental adat istiadatnya, sehingga peraturan adat istiadat masih digunakan seperti kesenian Sarafal Anam.

Kesenian *Syarafal Anam* yang merupakan kesenian yang digunakan dalam acara perkawinan, pembuangan rambut cemar dan aqiqah. Kondisi sosial masyarakat Kelurahan Dusun Besar yang masih berpegang teguh dengan adat-istiadat dari nenek moyang, salah satunya terlihat dari masih berlangsungnya kesenian *Syarafal Anam* di Kelurahan ini. Kesenian *Syarafal Anam*dijadikan semacam suatu peninggalan yang harus dijaga oleh masyarakat sehingga tetap terjaga. Kesenian *Syarafal Anam* dikenalkan kepada masyarakat pada awalnya dari mulut ke mulut. [10]

Kemudian melalui kontak dan komunikasi masyarakat mensosialisasikan Sarafal Anam, sehingga akhirnya dikenal oleh semua masyarakat. Hal tersebut berlangsung melalui hubungan sosial yang terjalin atau dalam konsep Sosiologi dikenal dengan konsep interaksi sosial. Disamping itu di kelurahan Dusun Besar adanya persatuan kesenian Sarafal Anam. Persatuan *Syarafal Anam* ini dibentuk oleh para pemain *Syarafal Anam* itu sendiri.

Budaya *Syarafal Anam* dalam Prosesi Pernikahan Masyarakat Suku Lembak Kelurahan Dusun Besar Kota Bengkulu

Pelaksanaan adat perkawinan umumnya memeliki tradisi masing-masing disetiap daerah. Ada yang mengunakan atau melaksanakan dengan cara modern seperti mengundang artis, menyewa organ tunggal, dan di laksanakan di tempat mewah seperti di hotel atau di tempat tertutup lainya. Utamanya di Provinsi Bengkulu ini sendiri sudah banyak pelaksanaan perkawninan yang dilaksanakan dengan cara modern. kemungkinana karena trend dan dampak dari kemajuan zaman yang mempengaruhi kebudayaan adat di suku daerah tersebut.

Kegiatan *Syarafal Anam* ini masih sangat sering dilakukan atau dilaksanakan oleh masyarakat Lembak Dusun Besar. Dalam kegiatan ini biasanya sering kita lihat di acara-acara pernikahan. *Syarafal Anam* ini sendiri adalah suatu budaya peningalan dari leluhur dan nenek moyang masyrakat Suku Lembak Dususn Besar Kota Bengkulu. Kegiatan ini adalah suatu kegiatan Religius yang telah lama hadir berdampingan dengan masyarakat Suku Lembak. Bisa di katakana acara ini adalah acara pembeda dari adat-adat lain yang berada di wilayah Kota Bengkulu.

[10] Sukri, Lurah Dusun Besar, *Wawancara,* 12 Desember 2021

Dari hasil penelitian yang dilakukan di Suku Lembak Dusun Besar Kota Bengkulu. Terdiri dari beberapa kegiatan serta larangan dan aturan-aturan yang harus di patuhi melaksanakan acara adat *Syarafal Anam* yang telah kami kumpulkan dari narasumber Tokoh Adat dan Masyarakat.

Adapun tahapan kegiatan acara *Syarafal Anam* tersebut sebagai berikut:

Tahapan sebelum melakukan kegiatan acara *Syarafal Anam* di Prosesi Pernikahan.

Dalam adat atau pelaksanaan yang akan diselengarakan dengan tradisi *Syarafal Anam*, pihak mempelai harus melapor terlebih dahulu kepada kantor KUA dan menjelaskan prosesi dari acara pernikahannya. Setelah itu meraka mengumpulkan keluarga besar dan juga mengundang tokoh adat dan masyarakat untuk memberikan informasi tentang agenda dari pernikahan yang akan dilaksanakan.
Berikut ini penjelasan dari tokoh adat masyarakat Suku Lembak:

Wawancara pelaku adat *Syarafal Anam*

> "Dalam pelaksananya, menurut saya yang pernah saya alami ketika mengunakan adat *Syrafal Anam* ini acaranya sangat memberikan dampak baik bagi kami selaku yang mempunyai hajat, dan juga kepada masyarkat yang ikut serta dalam menjalankan adat *Syarafal Anam* ini"[11]

Wawancara bapak tokoh adat bapak Sukri Suku lembak dusun Besar

> "Dalam acara adat pernikahan Suku Lembak, memang masi banyak yang mengunakan *Syarafal Anam* di acara pernikahannya. Dalam acara ini biasanya kita laksanakan setelah acra akad nikah, dan dilaksanakan satu hari penuh. "[12]

Di sambung dari penjelasan dari tokoh masyarak yang diwakili oleh Lurah setempat.
"ya biasanya dalam kegiatan *Syarafal Anam* tadi yang telah dijelaskan oleh bapak pemangku adat bahwasanya prosesi pelaksanaanya harus disiapkan secara matang dan benar-benar membutuhkan kordinasi agar acaranya berjalan dengan lanacar. Dengan mengumpulkan sanak saudara serta tetangga kiri kanan, agar mereka ikut serta dalam membatu mensukseskan acara *Syarafal Anam* ini"[13]

Tambahan dari tokoh Agama saudara bapak Arsyad mengenai pelaksanaan *Syarafal Anam*.

> "Sebelum dilaksanakan acara itu, kita harus kumpul keluarga dahulu, bersama dengan pemangku adat serta masyarakat di desa tersebut, karena acara ini harus

[11]Muhammad Baijuri, Pelaku Adat, *Wawancara,* 22 Desember 2021
[12]Sukri , Tokoh Adat, *Wawancara* 22 Desember 2021
[13]Ahmad Sukri, Lurah, *Wawancara*, 22 Desmber 2021

kita siapkan secara matang. Supaya berjalan dengan baik dan sesuai harapan kita semua."[14]

Dari penjelasan di atas maka acara pernikahan yang mengunakana adat *Syarafal Anam* di Suku Lembak memang sangat perlu di siapkan dengan sematang mungkim agar acara atau tradisi tersebut berjalan dengan sukses serta maksimal.

Masyarakat Suku Lembak menggunkaan tradisi *Syarafal Anam* di adat pernikahan.

Acara *Syarafal Anam* ini memang sudah sangat lama sekali melekat pada masyarakat Suku Lembak. Sehingga tradisis ini sangat di junjung oleh lingkungan masyarakat tersebut. Mereka sangat melestarikan warisan dari para leluhur yang telah di ajarkannya dari zaman dahulu. Selanjutnya di bawah ini adalah wawancara dari tokoh adat mengenai kapan masyarakat suku lembak mulai melaksanakan tradisi *Syarafal Anam* ini.

Dari keterangan kepala adat oleh bapak Sukri.

"Budaya ini sudah lama di lestarikan oleh masyarakat, udah dari dzaman nenek moyang dan leluhur kami. Dalam adat ini kami sebagai masyarakat suku lembak sangat melestarikan acara kegiatan *Syarafal Anam* ini. Acara *Syarafal Anam* ini dilaksanakan bukan hanya untk acara pernikahan, tapi juga seperti acara islam lainya. Contohnya seperti mauled Nabi, Isra` miraj, acara tahun besar islam. Dan juga dalam kegiatan masyarakat Suku Lembak seperti, marhabanan, dan acara-acara lingkungan masyarakat lainya. Kami sangat menjunjung tinggi tradisi ini. Untuk kejelasanya mulai dari tahun berapa kami belum dapat memastikan.yang jelas acara ini sangat melekat pada lingkungan kami. Dalam pelaksanaannya pun masyarakat tidak dituntut untuk diwajibkan dalam kegiatan ini. Karena dari kami sendir pahami bahwa ada beberapa kendala yang mungkin bisa membuat acara ini tidak dilaksanakan dalam prosesi pernikahan, contohnya saja, dalam prosesi pernikahan kan butuh namanya kesepakatan dari keluarga kedua mempelai, dan juga ada yang mungkin karena alasan biaya pelaksanaanyan. "[15]

Dari penjelasan di atas memang sepertinya tradisi *Syarafal Anam* ini sangat di lestarikan di lingkungan Suku Lembak. Karna tradisi ini adalah peningalan dari para leluhur serta pendahulu mereka. Bahkan sampek sekarang di kota Bengkulu tepatnya masi banyak peneliti jumpai tradisi ini. Jadi dapat peneliti pahami bawasanya ini adalah suatu warisan yang memang telah dijaga dari sejak dulu dan akan terus dilestarikan sehingga akan bertahan lama di lingkungan masyarakat Suku Lembak.

[14]Arsyad , Tokoh Agama, *Wawancara.* 22 Desember 2021
[15]Sukri , Tokoh Adat, *Wawancara*, 22 Desember 2021

Pemahaman Masyarakat Terhadap Tradisi Prosesi Pernikahan *Syarafal Anam.*

Dari hasil penelitian yang peneiliti peroleh bahwa kegiatan prosesi *Syarafala Anam* ini sangat didukung sekali oleh masyarakat. Dalam tradisi ini khususnya masyarakat Suku Lembak Dusun Besar Kota Bengkulu ingin bahwa prosesi Syarafall Anam ini terus di lestarikan karena dalam penelitian yang penliti peroleh bahwa kegiatan ini adalah sebua budaya yang telah ditingalkan oleh leluhur serta nenek moyang sehingga wajib bagi mereka untuk melestarikan budaya ini.

Selanjutnya mereka juga sangat tidak keberatan dengan pelaksanaaan acara ini. Walaupun pada zaman sekarang masyarakat menginginkan hiburan-hiburan yang lebih meriah, contohnya tadi seperti organ tunggal, nyanyian-nyaian musik, dan acara hiburan lainya yang mungkin jauh dari syraiat Islam. Untuk solusinya biasanya merekan membedakan hari pelaksanaanya. Agar kegiatan-kegitan yang mereka lakukan terlakasana dengan baik serta sesuai dengan perencanaannya.

Pandangan Hukum Islam Terhadap Prosesi Pernikahan *Syarafal Anam*

Sebuah pernikahan yang barokah serta membawa sakinah, mawadah, dan warahmah pada kedua mempelai, tentu saja tidak bisa dilakukan dengan melakukan apa yang dilarang oleh Allah dan Rasulnya. Oleh sebab itu kita berhati-hati dalam melaksanakan pesta dan resepsi pernikahan, yang seringkali tidak disukai Allah.

Bagaimana dengan adanya organ tunggal atau biduan wanita yang menyanyikan lagu-lagu dipesta pernikahan. Jenis hiburan seperti ini sangat banayak sekali terjadi di era sekarang. Bagai mana dengan pandagan hukum kita berkaitan dengan prosesi pernikahan dengan tradisi *Syarafal Anam*. Mengulas lagi dari pemahaman sebelmnya bahwa kegiatan Syarafal Ana mini merupakan suatau kegiatan yang menuntun kita untuk memuji Allah dan Rasul melalui Dzikir serta Sholawat.

Nyanyian dengan disertai rebana untuk merayakan pesta pernikahan telah disebutkan dalam Syariat, yaitu dari Ar Rubayyi' binti Mu'awwidz *Radhiallahu'anha*, ia berkata:

دخل علي النبي ﷺ غداة بُنِيَ عَلَيَّ فجلس على فراشي كمجلسك مني وجويرياتيضربن بالدف

"*Nabi shallallaahu 'alaihi wasallam datang ketika acara pernikahanku. Maka beliau duduk di atas tempat tidurku seperti duduknya engkau (Khalid bin Dzakwaan) dariku. Datanglah beberapa anak perempuan yang memainkan/memukul duff".* (HR. Bukhari 4001)

Dari Rubayyi` binti Mu`awwidz, ia menceritakan:

جَاءَ النَّبِيُّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ فَدَخَلَ حِينَ بُنِيَ عَلَيَّ، فَجَلَسَ عَلَى فِرَاشِي كَمَجْلِسِكَ مِنِّي، فَجَعَلَتْ جُوَيْرِيَاتٌ لَنَا، يَضْرِبْنَ بِالدُّفِّ وَيَنْدُبْنَ مَنْ قُتِلَ مِنْ آبَائِي يَوْمَ بَدْرٍ

"Bahwa Rasulullah datang kepesta perkawaninan yang diselenggarakan untuku. Kemudian beliau duduk di atas tempt tidurku seeperti dudukmu dihadapanku. Lalu para budak perempuan kami mulai menabuh rabana dan meratapi orang-orang yang terbunuh pada perang badar".[16]

Dari Amir bin Sa`ad, ia menceritakan :

دَخَلْتُ عَلَى قُرَظَةَ بْنِ كَعْبٍ، وَأَبِي مَسْعُودٍ الْأَنْصَارِيِّ، فِي عُرْسٍ، وَإِذَا جَوَارٍ يُغَنِّينَ، فَقُلْتُ: أَنْتُمَا صَاحِبَرَسُولِ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ وَمِنْ أَهْلِ بَدْرٍ، يُفْعَلُ هَذَا عِنْدَكُمْ؟ فَقَالَ: اجْلِسْ إِنْ شِئْتَ فَاسْمَعْ مَعَنَا، وَإِنْشِئْتَ اذْهَبْ، قَدْ رُخِّصَ لَنَا فِي اللَّهْوِ عِنْدَ الْعُرْسِ

"Aku pernah mendatangi Qurdhah bin Ka`ab dan Ubay Mas`ud Al-Anshari dalam suatu pesta pernikahan, di mana ada beberapa perempuan budak bernyanyi. Lalu aku bertanya kepada mereka berdua : kalian adalah sahabat Rasulullah, siapa Ahlul Badar yang mengerjakan ini ditempat kalian? Keduanya menjawab: Jika mau, engkau boleh bergabung dengan kami mendengarkannya dan jika tidak, maka boleh juga engkau pergi. Karena, Rasulullah telah memberikan keringanan kepada kita untuk mengadakan permainan dalam pesta pernikahan".

Pendapat Madzahibul Arba"ah mayoritas memperbolehkan hiburan dan permainan (nyanyian, orkesan, musik, tari-tarian, ludruk, wayang, dll). Dengan syarat harus tetap memelihara hal-hal di bawah ini:

Lirik nyanyiannya sesuai dengan adab dan ajaran Islam.

1. Gaya dan penampilannya tidak menggairahkan nafsu syahwat dan mengundang fitnah.
2. Nyanyiannya tidak disertai dengan sesuatu yang haram, seperti minum khamar, menampakkan aurat serta percampuran antara laki-laki dan perempuan tanpa batas.
3. Nyanyian atau sejenisnya tidak menimbulkan rangsangan dan tidak mendatangkan fitnah.

Dan apabila tidak memenuhi syarat-syarat diatas maka hukumnya adalah haram.[17]

Jadi, barang siapa mendengarkan nyanyian dengan niat untuk membantu bermaksiat kepada Allah,maka jelas dia adalah fasik, termasuk semua hal selain nyanyian. Barang siapa berniat untuk menghibur hati supaya dengan demikian dia mampu berbakti kepada Allah dan tangkas dalam berbuat kebajikan, maka dia adalah orang yang taat dan berbuat baik dan perbuatannya pun termasuk perbuatan yang benar.

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[16]Herandi, *Tinjauan Hukum Islman Terhadap Tradisi Hiburan Dalam Pesta Perkawinan Di Kecamatan Bontomarabbu Kabupaten Goa*, *Skripsi*, 2018: 51

[17]Yusuf Qardhawi, *Halal dan Haram Dalam Islam*, (Surabaya: PT Bina Ilmu Offset, 2003): 417

Sebuah pernikahan yang barokah serta membawa sakinah, mawaddah dan warahmah pada kedua mempelai, tentu saja tak bisa dilakukan dengan melakukan apa yang dilarang oleh Allah dan RasulNya. Oleh sebab itu kita perlu berhati-hati dalam melaksanakan pesta atau resepsi pernikahan, yang seringkali diwarnai dengan hal-hal yang tidak disukai Allah.

Dari penjelasan-penjelasan di atas dapat peneliti pahami bahwa prosesi pernikahan Syrafal Anam tidak melangar aturan yang terdapat pada Agama dan Syariat Islam. Karena dalam pelaksanaan nya prosesi ini mengandung unsur-unsur dzikir, dimana kita dalam melakukanya di tuntut untuk selalu mengingat Allah serta Nabi Muhammad dalam Sholawat yang kita lantunkan. Untuk pakaian nya juga mengunakan pakian bernuansa muslim tidak melangar atau menimbulkan maksiat. Serta di iringi dengan musik Rabanna.

Analisis Hukum Islam tentang Prosesi pernikahan *Syarafal Anam* Suku Lembak Dusun Besar Kota Bengkulu

Dalam masalah perkawinan, Islam telah berbicara banyak, dimulai bagaimana cara mencari kriteria bakal calon pendamping hidup hingga bagaimana memperlakukannya dikala resmi menjadi sang penyejuk hati. Islam memiliki tuntunannya, begitu pula Islam mengajarkan bagaimana mewujudkan sebuah pesta pernikahan yang meriah, namun tetap mendapat berkah dan tidak melanggar tuntunan Rasulullah saw, demikian halnya dengan pernikahan yang sederhana namun tetap penuh pesona.

Telah membudaya dikalangan masyarakat umum, baik masyarakat dari lapisan bawah maupun lapisan atas, ketika terlaksana pernikahan akan dilaksanakan pula sebuah perayaan dalam rangka mensyukuri terselenggaranya momen tersebut. Dalam merayakannya itupun sangat variatif. Ada yang dilaksanakan secara kecil-kecilan dengan hanya sebatas menjamu para undangan dengan makanan sekedarnya atau bahkan ada yang merayakannya secara besar- besaran, dengan memakan waktu berhari-hari dan dengan beraneka ragam hiburan dan makanan yang disajikan hingga terkesan berlebihan.

Sebagai mana telah dipaparkan beberapa aspek penyebab yang melatar belakangi masyrakat Suku Lembak Dususn Besar Kota Bengkulu mengadakan tradisi prosesi *Syarafal Anam.* Yang seperti di jelaskan sebelumnya, tradisi ini adalah tradisi yang diwariskan oleh sesepuh atau para pendahulu yang dalam kegiatan-kegiatan masyarakat selalu mengunakan prosesi *Syarafal Anam.*

Selanjutnya adalah bahwa dari prosesi *Syrafal Anam* tidak terdapat pelanggaran-pelanggaran *Syariat* Islam, serta kegiatan ini di angap baik di dalam kalangan masyarakat tersebut. Oleh sebab itu kegiatan ini termasuk lingkup *`Urf* .

penegrtian dari *`Urf* sendiri adalah, suatu perkataan atau perbuatan baik yang telah popular dan dikerjakan oleh orang banyak dalam masyarakat.

Artinya *`Urf* merupakan kebiasaan baik yang dilakukan secara berulang –ulang oleh masyarakat. Dasar pengunaan *`Urf* adalah sebagai berikut, Allah berfirman dalam QS. Al-Araf 199.

خُذِ الْعَفْوَ وَأْمُرْ بِالْعُرْفِ وَاَعْرِضْ عَنِ الْجٰهِلِيْنَ ١٩٩

"Jadilah pemaaf, perintahlah (orang-orang) pada yang makruf, dan berpalinglah dari orang-orang bodoh". (Al-A`raf: 199)

Ayat di atas menunjukan dengan jelas bahwa Allah menyuruh supaya kita mengunakan *`Urf*. Kata `Urf dalam ayat di atas dimaknai dengan suatu perkara yang dinilai baik oleh masyrakat. [18]Ayat tersebut dapat dipahami sebagai perintah untuk mengerjakan sesuatu yang telah diangap baik sehingga menjadi tradisi dalam suatu masyarakat. Seruuan ini didasarkan pada pertimbangan kebiasaan yang baik dan dinilai berguna bagi kemaslahatan mereka.

Begitu juga dalam hadist yang diriwayatkan oleh Ahmad dari Ibnu Mashud bahwa Nabi Muhammmad Saw bersabda yang artinya , "segala sesuatu yang dipandang oleh (orang-orang islam) umum itu baik, maka baik pula disisi Allah dan segal sesuatu yang dipandang (orang-orang islam) umumnya itu jelek, maka jelek juga di sisi Allah.

Imam al-Syatibi dan Ibn Qayyim al-Jauziyah, berependapat bahwa *`Urf* bisa diterima sebagai dalil untuk menentapkan hukum Islam. [19]Suatu hukum yang ditetapkan atas dasar *`Urf* dapat berubah karena kemungkinan adanya perubahan *`Urf* itu sendiri atau perubahan tempat , zaman dan sebagainya. Shingga kaidah pokok dalam *`Urf* adalah, *Adat itu bisa dijadikan patokan hukum*. Dan di dalam kaidah lainya dikatakan, *`Urf menurut shara` itu memiliki suatu penghargaan (bernilai Hujjah) dan kaidah `Urf merupakan dasar hukum yang telah dikokohkan*. Misalnya, kebiasaan seorang laki-laki yang melamar seorang wanita dengan memberikan suatu sebagai hadiah, bukan sebagi mahar.[20]

Maka dari itu dari penjelasan-penjelasan tersebut peneliti memahami bahwa dalam pelaksanaan prosesi pernikahan *Syarafal Anam* berkatian dengan nilai *`Urf* . sebai mana yang di jelaskan dalam hukum Islam tadi bahwa *`Urf* ini adalah suatu kegiatan atau perbuatan yang telah menjadi terdisi di masyarakat dan di anggap baik. Dan juga dalam penelaaah yang peneliti lakukan yang peneliti pahami dari beberapa

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[18]Ahmad Sufyan Che Abdullah. *Aplikasi Doktrin Al-`Urf Dalam Instrument Pasaran Keuwangan Islam Di Malaysia*, Skripsi, 2002: 25

[19]Imron Rosyadi, "Kedudukan Al-Adah Wa Al-`Urf Dalam Bangunan Hukum Islam", *Jurnal Suhuf* Xvii, No. 01, (2005): 6

[20]Toha Andiko, *Ilmu Qowa`Id Fiqiyyah Panduan Praktis Dalam Memproses Problematika Hukum Islam Kontemporer:* 47

narasumber dan tinjauan dari hukum islam sendiri adat *Syrafal Anam* ini digolongkan dalah hukumnya dalah Sunah. Karena masyarakat tidak di tuntut untuk mewajibkan biasanya ada factor yang membuat kegiatan ini tidak terlaksana salah satunya mungking dari kesepakatan antara dua belah pihak keluarga mempelai yang mungkin akan melaksanakan adata pernikahan, selanjutnya dari sumber dana mungkin pendanaan dalam acara sudah dipres dengan kegiatan-kegiatan yang lebih wajib. Maka dari dasar itu hukum syarafal anam ini adalah sunah dilaksanakan bagi masyarakat suku lembak dan tergolong dalam lingkup *Urf*.

Kesimpulan

Dari uraian yang peneliti teliti di atas, maka peneliti akan menyimpulkan hasil penelitian yang di peroleh Tradisi *Syrafal Anam* adalah tradisi yang sudah melekat pada masyarakat Suku Lembak Dusun Besar Kota Bengkulu. Tradisi ini sudah lama ada di lingkungan Suku lembak, bahkan sampai sekarang masi banyak kita jumpai di Dusun Besar Kota Bengkulu. Dalam pelaksanaannya, tradisi ini adalah tradisi yang memiliki unsur religius atau keagamaan. Khususnya umat muslim tradisi ini adalah tradisi yang mengajak kita untuk mengingat Alllah dimanapun kita berada serta mengingat kekasi Alah yaitu baginda Nabi Muhammad Saw. Karaena pelaksanaannya sendiri dengan melantunka *Dzikir* dan *Sholawat* yang di iringi musik rabana.

Dari pandangan masyarakat suku lembak sendiri ini adalah suatu tradisi yang memang telah hadir sejak dulu. Bahkan setiap pelaksanaan kegiatan masyarakat selalu mengunakan tradisi *Syarafal Anam*. Jadi masyrakat sangan melestaraikan tradisi *Syarafal Anam* ini. Serta masyrakat sangat menjunjung tingi warisa yang telah melekat di lingkungan mereka. Serta mereka memahami kegiatan *Syarafal Anam* ini adalah kegiatan yang sangat positif sekali yang bisa menjadi pembelajaran serta menambah daya tarik bagi masyrakat suku lain yang membuat suku-suku atau masyrakat lain kagum akan sebuah persatuan dan kekompakan yang ada pada masyrakat adat suku Lembak khususnya di Dusun Besar.

Selanjutnya, dari tinjauan hukum Islam tradisi *Syarafal Anam* sendiri menyangkut dengan `*Urf*. `*Urf* sendiri yaitu suatu perbuatan atau tindakan yang di angap baik oleh lingkungan masyarakat sekitar. Artinya tradisi *Syarafal Anam* ini adalah tradisi yang baik, yang sangat bermanfaat bagi masyarakat. Jauh sekali dari kata maksiat dan sangat jarang bahkan tidak untuk pelangaran-pelangaran Syariat Islam di dalam pelaksanaan kegiatan *Syarafal Anam* ini. Dari hukum Islam kegiatan ini hukumnya adalah Sunah, karena dalam pelaksanaannya masyarakat tidak terlalu diwajibkan dalam melaksanakan *Syarafal Anam*. Misalnya ada ketidak sepakatan dari kedua keluarga mempelai yang dikarenakan beda suku, dan juga mungkin karena faktor biaya pernikahan yang sudah di atur dan di rincikan dalam bentuk yang paling wajib pelaksanaannya. Disisi yang lain, bahwa tradisi ini bisa meningkatkan

kerukunan masyarakat sehingga selalu kompak dalam membangun kehidupan dilingkungan masyarakat ini, khususnya Suku Lembak Dusun besar.

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The Death Penalty in Legal Literature: A Study of Indonesian Law and International Human Rights

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Abstract: The use of the death penalty in criminal law to achieve the aims of criminal law has sparked much controversy among criminal law professionals. The advantages and disadvantages of adopting death punishment to meet the aims of criminal law, such as providing a sense of security, justice, and so on. In the hierarchy of rules and regulations in Indonesia, the 1945 Constitution is the highest source of legislation. Article 28 (a) of the Indonesian constitution guarantees the right to life and provides that everyone has the right to survive and defend his or her life and existence. As a result, the right to life is a constitutional guarantee. Thus the right to life is a constitutional right. The United Nations also issued a guide entitled Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty through UN Economic and Social Council Resolution 1984/50, dated 25 May 1984. This guide clarifies discussions on the practice of the death penalty under the International Covenant on Civil and Political Rights.

Keywords: *Death penalty, Laws and Regulations, International Human Rights*

Abstrak: Mempersoalkan hukuman mati dalam hukum pidana sebagai sarana mencapai tujuan dari hukum pidana itu sendiri telah banyak menimbulkan perdebatan antar sesama ahli hukum pidana. Pro dan kontra terhadap penggunaan sarana pidana mati sebagai sarana untuk mencapai tujuan hukum pidana, yaitu memberikan rasa aman memberikan keadilan dan sebagainya. Undang-Undang Dasar 1945 adalah sumber hukum tertinggi dalam tata urutan Peraturan Perundang-undangan di Indonesia. Konstitusi Indonesia mengatur ketentuan tentang hak hidup, pasal 28 (a) konstitusi Indonesia melindungi hak hidup dan menyatakan bahwa setiap orang berhak untuk hidup serta mempertahankan hidup dan kehidupannya. Dengan demikian hak hidup merupakan hak konstitusional. PBB juga mengeluarkan sebuah panduan berjudul jaminan perlindungan bagi mereka yang menghadapi hukuman mati (Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty) melalui Resolusi Dewan Ekonomi Sosial PBB 1984/50,tertanggal 25 Mei 1984. Panduan ini memperjelas pembahasan praktik hukuman mati menurut Kovenan Internasional Hak-Hak Sipil dan Politik

Kata Kunci: *Hukuman mati, Peraturan Perundang-Undangan, Hak Asasi Manusia Internasional*

Introduction

Death penalty is a type of punishment in the old age of human life and the most controversial of all criminal systems, both in countries that adhere to the common law system and in countries that adhere to civil law. Questioning the death penalty in criminal law as a means of achieving the goals of criminal law itself has generated a lot of debate among criminal experts.[1] Among them there are those who are against, there are those who are pro against the use of capital punishment as a means to achieve the goals of criminal law, namely to provide a sense of security, provide justice and so on. [2]

In Indonesian criminal law, the use of the death penalty is felt to be very effective in preventing crimes that can be classified as serious crimes. [3] This can be seen from the national Criminal Code which still places the death penalty as the main punishment. In addition, there are also regulations on criminal law outside the Criminal Code that still place the death penalty as a sanction for violations committed.[4]

In history, the practice of the death penalty in Indonesia was enforced when Indonesia was still called the Dutch East Indies.[5] At that time, the codification of criminal law had been enacted in the form of Wetboek van Straftrecht voor Inlanders (Indonesia) or WvSinl on January 1, 1873.[6] Then due to a new development, namely the birth of the first codification of criminal law in the Netherlands, the WVSinl was then adapted to carry out the unification of criminal law in all parts of Indonesia.[7] So that in 1915 the Wetboek van Straftrecht voor Indoensie, (WvSI) was invited and it came into effect on January 1, 1918. Unlike the Netherlands, in the Dutch East Indies the WvSI still included the death penalty. In the Netherlands itself in 1870, three years before WvSinl came into effect in the Dutch East Indies, the death penalty was abolished.[8] The death penalty was maintained in the Dutch East Indies because it was seen as an emergency law as an application of punishment that was considered the most severe by the colonial government. These serious crimes against the death penalty in the Dutch East Indies were limited to crimes of state security, murder, theft and extortion by weighting, robbery, piracy of coastal and river beaches. [9]

Several criminal acts classified as extraordinary crimes, among others, terrorism, narcotics, corruption, and illegal logging were deemed deserving of the death penalty. Not only because the modus operandi of the crime was highly organized, but the widespread and systematic negative access became the point of pressure that the public felt the most. In Islam, it is known as what is said kisas. Kisas is giving the same treatment to criminals as he does to victims. Kisas is set against the perpetrator of the murder. The basis for the validity of this story is based on the word of God in surah al-Baqarah verse 178, and other explanations in the same letter verse 179.[10]

This verse shows that Allah determines

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[1] Ali Imron, "Filsafat Politik Hukum Pidana," *Tribakti: Jurnal Pemikiran Keislaman* 25, no. 2 (201 119–230.

[2] Slamet Tri Wahyudi, "Problematika Penerapan Pidana Mati Dalam Konteks Penegakan Hukum Di Indonesia," *Jurnal Hukum Dan Peradilan* 1, no. 2 (2012 07–34.

[3] Rosa Kumalasari, "Kebijakan Pidana Mati Dalam Perspektif HAM," *Jurnal Untidar* 2, no. 1 (201

[4] Supriyadi Widodo Eddyono et al., *Hukuman Mati Dalam R KUHP: Jalan Tengah Yang Meragukan* (Institute for Criminal Justice Reform, 2015).

[5] DARI MASA K E MASA, "HUKUMAN MATI DI INDONESIA," n.d.

[6] Dede K ia, "Cita Politik Hukum Pidana Mati Di Indonesia," *Jurnal Ilmu Hukum* 5, no. 2 (2014): 137–48.

[7] Eddyono et al., *Hukuman Mati Dalam R KUHP: Jalan Tengah Yang Meragukan*.

[8] SA, "HUKUMAN MATI DI INDONESIA."

[9] Saharuddin Daming, "Konfigurasi Pertarungan Abolisionisme Versus Retensionisme Dalam Diskursus Keberadaan Lembaga Pidana Mati Di Tingkat Global Dan Nasional," *Yustisi* 3, no. 1 (2016): 37.

[10] Zikri Darussamin, "Qisas Dalam am Dan Relevansinya Dengan Masa Kini," *Asy-Syir'ah: Jurnal Ilmu Syari'ah Dan Hukum* 48, no. 1 (2014).

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that the death penalty is an appropriate punishment for the crime of murder because of the impact of the murder. However, there are several conditions for this qisas, [11]:

1. The perpetrator is amukallaf, that is, he is old and wise
2. The murder was committed on purpose
3. There is no doubt about the intentional element in this fulfillment.
4. The perpetrator of the murder was committed voluntarily, without coercion from others.

In the event of a murder involving the perpetrator and the victim who are related by heredity, the kisas cannot be enforced. Regarding this kisas, there are many differences of opinion among Islamic religious leaders themselves, including regarding how to implement kisas. The first opinion says that kisas can only be done with a sword or gun. Regardless of the murder that had been committed using a sword or not. The second opinion says that the kisas was carried out in accordance with the method and tools used by the killer when he committed the murder. However, there is an agreement among Islamic religious experts that if there are other tools that can kill the convict more quickly, then they may be used, so that the suffering and pain felt by the convict is not too long.[12]

For law enforcers in Islam there is a principle "it is better to forgive than to wrongly punish".[13] This principle shows that Islam is very careful in imposing punishments, especially the death penalty. If someone admits the mistakes he has made and sincerely repents, then based on the letter al-Maidah verse 34, he will be forgiven for his actions by Allah. Islamic law enforcers are also guided by this verse in enforcing Islamic law. In this case, if a criminal commits himself and then admits his actions and repents, it should be a consideration for law enforcers in the sentencing process.[14] Departing from the several studies above, the author considers it appropriate to then discuss the issue of death penalty in Indonesia in the literature on Indonesian legislation and international human rights.

Literature Review

Examination of No Norms from the Perspective of Legislation.

The 1945 Constitution is the highest source of law in the order of legislation in Indonesia. The Indonesian constitution adheres to provisions regarding the right to life article 28 a of the Indonesian constitution protects the right to life and states that "everyone has the right to live and has the right to defend his life and existence". Thus the right to life is a constitutional right. The Indonesian Constitution states that the right to life is a right that cannot be reduced under any circumstances (non-derogable rights).[15] Article 28 paragraph 1 states that the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to have a religion, the right not to be enslaved, the right to be recognized as an individual before the law, and the right not to be prosecuted on the basis of retroactive law are rights Human rights cannot be reduced under any circumstances.

Law number 39 of 1999 concerning human rights also contains provisions regarding the right to life. Article 9 of Law No.39/1999 states that everyone has the right to live and maintain life and improve their standard of living. Article 4 of Law Number 39 of 1999 concerning Human Rights states: the right to life, the right not to be tortured, the right to personal freedom, thoughts and conscience, the right to religion, the right not

[11] FITRI FITRI WAHYUNI, "Hukum Pidana Islam" (PT NUSANTARA PERSADA UTAMA, 2018).

[12] Hanafi Hanafi, "Konsep Pidana Mati Dalam Hukum Islam Sebagai Upaya Pembangunan Hukum Pidana Nasional," *VOICE JUSTISIA: Jurnal Hukum Dan Keadilan* 3, no. 2 (2019): 52–72.

[13] Abnan Pancasilawati, "Penegakan Hukum Dalam Syari'at Islam," *Mazahib*, 2013.

[14] Normanita Rizky Ardhiarini, "Tinjauan Hukum Pidana Islam Terhadap Penjatuhan Pidana Dalam Tindak Pidana Perdagangan Orang: Studi Putusan Nomor: 141/Pid. Sus/2018/PN. Kwg" (UIN Sunan Ampel Surabaya, 2019).

[15] Suparman Marzuki, "Perspektif Mahkamah Konstitusi Tentang Hak Asasi Manusia," *Jurnal Yudisial* 6, no. 3 (2013): 189–206.

to be enslaved, the right to be recognized as a person and equality in legal life , and the right not to be prosecuted on the basis of a law that applies retroactively is a human right that cannot be reduced under any circumstances by anyone.[16]

Thus it can be stated that the right to life is protected by national law. Indonesian national law confirms this right as a right that cannot be reduced under any circumstances. This is in line with international provisions governing similar provisions. Does it mean that the right to life is absolute in Indonesian law? Does the imposition and provision of the death penalty regulated by several laws violate the constitution?

Through decision number 2-3/PUU-V/2007, the Indonesian Constitutional Court is of the opinion that life is not absolute. Whereas the imposition of the death penalty in the narcotics law number 27 of 1977 as long as it involves the threat of death penalty does not violate the 45th Constitution. The establishment of the Constitutional Court is based on several opinions, namely that all rights contained in the constitution can be restricted, including the right to life.[17]

In addition, the Constitutional Court is of the opinion that the placement of Article 28J as a closing gives an interpretation that the preceding Article 28A-I is subject to the provisions on the limitation of rights contained in Article 28J of the Indonesian Constitution. The establishment of the Constitutional Court is consistent with the establishment of the Constitutional Court in the Abilio Suarez case. Whereas, according to the Constitutional Court, the right to life is not absolute, it is also based on the argument that international instruments contain the absolute right to life, among the International Covenants on civil and political rights which contain provisions regarding the execution of the death penalty but with certain limitations.[18]

In this case, the constitutional court is of the opinion that the imposition of the death penalty for narcotics crimes does not violate the provisions on the limitations in the international Covenant on civil and political rights. Regarding the imposition of the death penalty which is reserved only for the most serious crimes. The Constitutional Court is of the opinion that the sense of the most serious crime should be read with the next phrase, in accordance with the law in force at the time of the commission of the crime.[19]

In this case, the Constitutional Court then stated that whether the provisions containing crimes with the death penalty in law number 22 of 2007 concerning narcotics are included in the most serious crimes must be linked to the laws that apply to these crimes, both nationally and internationally. . The Constitutional Court then stated that at the international level the law that applies is the UN convention against Ilicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (Narcotics and Psychotropic Substances Convention) where Indonesia is a party to the Convention.[20]

The convention states that narcotics crimes are included in the most serious crimes (particularly serious). Based on the provisions of the Convention, the Constitutional Court is of the opinion that the fact that narcotics are declared as crimes as narcotics crimes are very serious (particularly serious) in the Convention can be included with the most serious crimes (the most serious crimes) according to the provisions of Article 6 of the International Covenant on Rights -civil and political rights. Furthermore, the Constitutional Court is of the opinion that Indonesia has violated no international obligation by imposing the death penalty in

[16] Eva Achjani Zulfa, "Menelaah Arti Hak Untuk Hidup Sebagai Hak Asasi Manusia," *Lex Jurnalica* 2, no. 2 (2015): 17975.

[17] Mei Susanto and Ajie Ramdan, "Kebijakan Moderasi Pidana Mati," *Jurnal Yudisial* 10, no. 2 (2017): 193–215.

[18] Rosihan Anwar, *Sejarah Kecil" Petite Histoire" Indonesia*, vol. 1 (Penerbit Buku Kompas, 2004).

[19] Arie Siswanto, "Pidana Mati Dalam Perspektif Hukum Internasional," 2009.

[20] Anton Sudanto, "Penerapan Hukum Pidana Narkotika Di Indonesia," *ADIL: Jurnal Hukum* 8, no. 1 (2017): 137–61.

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the narcotics law.[21]

Thus, in contrast to the decisions of the Constitutional Courts of several other countries, according to the Indonesian Constitutional Court, the right to life is not absolute and can be limited. The death penalty does not violate the 1945 Constitution. The death penalty provision in law number 22 of 1997 concerning narcotics thus, according to the Constitutional Court, also does not violate the provisions regarding the right to life as a non-derogable right in the constitution. Indonesia. In this case it is also important to remember that the Constitutional Court's interpretation of the most serious crime in the decision is different from the interpretation according to the Covenant and the Committee which does not include drug crimes as the most serious crime.[22]

Method

The type of research used in this article is library research.[23] The approach used by researchers is normative..[24] Primary data comes from The the International Covenant on Civil and Political Rights.

Result and Discussion

Review Of The Death Penalty From An International Human Rights Perspective

The death penalty is one of the most controversial issues in the international covenant on civil and political rights that has been ratified by the Indonesian government (International covenant on Civil and Political Rights). Even though the right to life is recognized as non-derogable rights (rights that cannot be reduced). Article 6 paragraph 1 states that every human being has the right to life which is inherent in him. This right must be protected by law. No one can be deprived of the right to life arbitrarily, in article 6 states (2) that in countries that have not abolished the death penalty. Sentences of the death penalty can only be imposed for some of the most serious crimes in accordance with the law in force at the time the activity was committed, and are not contrary to the provisions of the Covenant and Convention on the Prevention and Law of the Crime of Genocide.[25]

Such punishment can only be carried out on the basis of a final decision rendered by a competent court. Everyone who has been sentenced to death has the right to ask for pardon or commutation of the sentence. Amnesty, pardon or commutation of the death penalty may be granted in all cases where the death penalty may not be imposed for a crime committed by a person under the age of 18 and may not be carried out against a woman who is pregnant. Textually stated that the death penalty is still permissible. Meanwhile in Article 6 paragraph 6 states that nothing in this article may be used to delay or prevent the abolition of the death penalty by a state that is a party to this Covenant, it is again emphasized that there is a spirit of this game to gradually and progressively abolish the practice of the death penalty.[26]

This is based on the argument that at the time of the drafting of this Covenant, the majority of countries in the world were still practicing the death penalty, but more and

[21] Mardenis Pakian and Iin Maryanti, "Pemberlakuan Hukuman Mati Pada Kejahatan Narkotika Menurut Hukum Ham Internasional Dan Konstitusi Di Indonesia," *Masalah-Masalah Hukum* 48, no. 3 (2019): 312–18.

[22] TUGAS KARYA AKHIR, "EFEKTIFITAS HUKUMAN MATI PADA KEJAHATAN," n.d.

[23] Larry Crump, 'Conducting Field Research Effectively', *American Behavioral Scientist*, 64.2 (2020) <http://doi.org/10.1177/0002764219859624>.

[24] Zulfi Diane Zaini, 'Implementasi Pendekatan Yuridis Normatif Dan Pendekatan Normatif Sosiologis Dalam Penelitian Ilmu Hukum', *Pranata Hukum*, 6.2 (2011).

[25] Doortje D Turangan, "Tindakan Kejahatan Genosida Dalam Ketentuan Hukum Internasional Dan Hukum Nasional," 2011.

[26] Nurul Komalasari, "Pidana Mati Dalam Sistem Hukum Indonesia (Studi Tentang Efektivitas Sanksi Pidana Mati Dalam Peraturan Perundang Undangan No. 1 Tahun 2002 Jo Undang-Undang No. 15 Tahun 2003 Tentang Erorisme Dan Undang-Undang No. 35 Tahun 2009 Tentang Narkotika)," 2011.

more countries are imposing abolition or (abolition) of the death penalty. Even today, the majority of countries in the world are abolitionist groups. In the decade of the 1950s, countries that abolished the death penalty for all types of new crimes amounted to 10 or around 12.4%. Countries that abolished the death penalty only for ordinary crimes amounted to 19 or around 23.6%. Meanwhile, until June 2006, the total number of countries that had abolished the death penalty in various forms was 129 or 65%. While the number of countries that still apply the death penalty is 68 or 35%.[27]

Previously, in the 1950 European Convention on Human Rights, the European convention of mental rights/ convention for the Protection of Human Rights and Fundamental Freedoms, Article 2 emphasized the prohibition of the death penalty. This European regional convention is the oldest human rights treaty and the idea of abolishing the death penalty departs from this convention. The provisions on the death penalty were later abolished in various mechanisms of the international human rights court even though its jurisdiction covers the most serious and serious crimes under international law. Statute of the ad hoc International Criminal Tribunal for the countries of the former Yugoslavia (Statute of International Criminal Tribunal for the Former Yugoslavia/ICTY) and Rwanda (Statue of International Criminal Tribunal for Rwanda/ICTR). Likewise, this provision is abolished in the Rome Statute of the International Criminal Court, which is a permanent human rights court.[28]

To understand the text on the international convention on civil and political rights on the death penalty, the United Nations also issued a guide entitled Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty through UN Economic and Social Council Resolutions. 1984/50, dated May 25, 1984). This guide clarifies the limitations of the international covenant on civil and political rights even though the death penalty conventions in 6 international covens on civil and political rights are still being debated. However, there are other interpretations which consider the death penalty a violation of this article. 7 international covenants on civil and political rights .

Although the controversy over the death penalty in Article 6 of the international Covenant on Civil and Political Rights is still being debated, there are other interpretations which consider the death penalty a violation of Article 7 of the International Covenant on Civil and Political Rights concerning degrading and inhumane practices. This includes the Convention against torture and other cruel, inhuman and degrading treatment or punishment which was adopted by UN general assembly resolution 3946 dated 10 December 1984. This interpretation is based on the argument that a death row convict who is facing execution will experience mental stress/ extraordinary psychic nature which is the scope of this Convention against Torture. Another additional provision is the application of the principle of non-refoulement both for countries that have abolished and those that still stipulate the death penalty for this issue. This principle of non-refoulement is the principle that a country must refuse a request for extradition from another country if the person can receive death threats in the requesting country.[29]

As previously stated, Indonesia has not yet abolished the death penalty. It should be remembered, as previously mentioned that Indonesia has ratified international conventions on civil and political rights

[27] T Mulya Lubis, *Kontroversi Hukuman Mati: Perbedaan Pendapat Hakim Konstitusi* (Penerbit Buku Kompas, 2009).
[28] Mufti Makarim, "Beberapa Pandangan Tentang Hukuman Mati (Death Penalty) Dan Relevansinya Dengan Perdebatan Hukum Di Indonesia," *ELSAM, Referrensi Hukum*, 2014, 1–7.
[29] DEWANTO T R Y HUTOMO, "I PERANAN UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) TERHADAP PERLINDUNGAN PENGUNGSI ROHINGYA DI INDONESIA," 2018.

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without reservation. Thus, Indonesia is legally bound by all provisions contained in the Covenant. As previously mentioned, a thorough reading of the provisions of Article 6 states that the Covenant essentially calls for the abolition of the death penalty. The thing that must be answered is whether Indonesia is in an effort to abolish the death penalty and thus is on the way of fulfilling its obligations as a state party fulfilling its obligation to abolish the death penalty or vice versa.[30] In addition, Indonesia actually increases the types of activities that carry the death penalty. Criminal punishments that are threatened are actually not included in the group of crimes that are serious (the most serious crimes) according to the International Covenant on civil and political rights. Here it can then be stated that there is no indication that Indonesia has abolished the death penalty or made efforts to limit the types of crimes that carry the death penalty.

In connection with the limitation of the death penalty only for the most serious crimes (the most serious crimes). Regarding the phrase for the most serious crimes as mentioned above that in this case the death penalty cannot be applied to crimes such as property crimes, economic crimes, political crimes or acts of resistance that do not use violence and must also be abolished for activities related to drugs. The UN human rights commission also stated that the death penalty should not be enforced for non-violent crimes such as financial crimes or non-violent expressions of religious beliefs and practices. As mentioned above the decision of the UN Human Rights Committee through the state reporting mechanism states that the term of the most serious crimes in Article 6 paragraph 2 is limited only to premeditated killings and premeditated acts that cause heartbreaking physical suffering.

With regard to the limitation of the phrase not contradicting the belief as stated above, this phrase essentially stipulates that death penalty decisions must be based on fair national law and based on the rule of law. Death penalty is not permitted based on unjust law. As explained above, this provision also limits the use of the death penalty by the government whose President is part of its repression. From the list of crimes described above, the death penalty is also imposed for political crimes, including treason. It can be stated that this activity is political in nature and very open to the possibility of being used by the government to carry out repression. The provisions of Article 104 of the Criminal Code which regulate the crime of treason is a legacy from the Netherlands which was used by the Dutch government to perpetuate the politics of repression in the occupied areas. It can be assumed that this provision opens up the possibility of being used by the authorities to carry out their repression and thus is not based on the spirit of the rule of law. It can be stated that these provisions are not in line with the provisions of article 6 of the international Covenant on civil and political rights.[31]

As explained above, in this case it must also be remembered that a death penalty can be declared in accordance with the provisions of Article 6 paragraph 1 of the international Covenant on civil and political rights if regulated by national law. That the national law is valid/legal and also fair/just which does not contain elements of capriciousness and unreasonableness. If this is not fulfilled then the death penalty regulated by national law which does not comply with this matter can be included in the class of arbitrary killings.[32]

Based on this provision, various statutory regulations related to treason which carry the death penalty, can also be suspected of being a violation of this Article 6. The phrase does not conflict with the Covenant and also requires that the death penalty method must not cause physical or psychological suffering. Methods that cause physical and psychological suffering are violations of article 7 of the international

[30] Andi Hamzah, *Hukum Pidana Indonesia* (Sinar Grafika, 2017).
[31] Lubis, *Kontroversi Hukuman Mati: Perbedaan Pendapat Hakim Konstitusi*.
[32] Extrix Mangkepriyanto, *Hukum Pidana Dan Kriminologi* (Guepedia, 2019).

Covenant on civil and political rights. Provisions regarding the implementation of the death penalty in Indonesia are regulated in law number 2/PNPS/964. This provision states that the death penalty is carried out by shooting the convict to death. The law states that the method of shooting is to shoot the convict in the heart, while it does not stipulate provisions for the implementation of the death penalty which states that the execution of the death penalty is carried out by shooting the convict to death by firing squad which is not carried out in public. Execution of the death penalty by shooting does not include methods that cause physical and psychological suffering.[33]

However, this also depends on the method of shooting and the accuracy of shooting at the target. In the hearing to review law number 2/ Pnps/ 1964, it was revealed in the testimony of expert witnesses and witnesses the fact that the death penalty has made the convict suffer for 7-10 minutes because the execution of shootings is often not on target, namely the heart of the convict. This testimony provides clues about the possibility of violating the provisions of article 7 of the International Covenant on civil and political rights. Thus, even though the method of shooting to death is not included in the method that causes physical and psychological harm, the execution of shooting that is not accurate opens the possibility of suffering. It can be stated that there is a need for an improvement in the death penalty procedure which truly guarantees that physical and psychological suffering is inevitable.[34]

Regarding the phrase the death penalty can only be executed on the basis of a final decision handed down by a competent court. As emphasized above, because Article 6 paragraph 2 also contains a provision stating that the death penalty is prohibited from violating other provisions of other covenants or conventions, this phrase must be linked to the provisions of articles 14, 15, 2 and 26. Thus this phrase must be read that sentence of death penalty can only be carried out by a court that is fair and competent, independent and impartial which is governed by law and through a non-discriminatory process, based on the principle of the presumption of innocence and the presence of minimum guarantees for the suspects as stipulated in Article 14(3) ICCPR. The most basic question related to this provision is whether the Indonesian legal process has reflected the fulfillment of this provision?

Conclusion

There are three different attitudes towards the death penalty. First, adherents of the ideology of rehabilitation. This understanding completely rejects the implementation of the death penalty. Whatever the reason, if justice is considered as the reason for carrying out the death penalty, that is, punishing the person who kills is commensurate with the guilt he committed. This is contrary to the aim of justice, not to punish but to reform. Because of this, the death penalty is seen as an unfair act against criminals who need to be given the opportunity to change, repent and improve themselves. Both adherents of the reconstructionist ideology, which holds that the death penalty is appropriate for those who have committed major crimes. According to them justice aims to avenge the mistakes made by someone. This understanding is based on the classic Lex talionis (law of revenge) which exists in almost all classical cultures and religions known as the "law of tooth for tooth, eye for eye". In general, the adherents of reconstruction believe that society must be reorganized (reconstructed) on the basis of religious law. So this understanding is also commonly referred to as understanding because they refer to God's law. Third, followers of the ideology of retribution,

[33] Krisnanda Etika Putri, Eko Soponyono, and R B Sularto, "Rekonstruksi Kebijakan Hukum Pidana Terhadap Eksekusi Pidana Mati," *Diponegoro Law Journal* 5, no. 3 (2016): 1–14.

[34] Ruslan Renggong, "PENGANTAR HUKUM PIDANA INDONESIA," 2015.

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adherents of this view hold that the main purpose of the death penalty is to punish the perpetrators of crimes so that the person will no longer commit crimes and other people will become afraid of committing the same crimes. Adherents of this understanding believe that God gave the right to the government to carry out justice by imposing the death penalty

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State Policy Towards Religious Moderation: A Review Of The Strategy For Strengthening Religious Moderation In Indonesia

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Abstract: In the direction of state policy, religious moderation has been contained in the National Medium-Term Development Plan (RPJMN) for 2022-2024. The Ministry of Religion is one of the institutions explicitly given by state to carry out government affairs in the field of religion, especially in strengthening religious moderation. This paper aims to analyze the indicators in implementing the strategy to strengthen the policy direction of religious moderation in the ministry of religion. The method uses library research based on analysis from various referen sources, both books and online journals. This pape concludes that strategies to strengthen the direction of religious moderation are grouped into four indicators: 1). national commitment; 2). Tolerance; 3) non-violence; 4) acceptance of local culture. This paper also shows that the strategy of strengthening moderation requires the participation of all parties. In this case, social agents, community leaders, and religious leaders are expected to play an active role in a moderate attitude toward religion.

Keywords: *religious moderation; Ministry of Religion; policy; reinforcement strategy.*

Abstrak: Didalam arah kebijakan negara, moderasi beragama telah tertuang dalam Rencana Pembangunan Jangka Menengah Nasional (RPJMN) tahun 2022-2024. Kementerian Agama merupakan salah satu lembaga yang diberikan secara khusus oleh negara dalam menyelenggarakan urusan pemerintahan dibidang agama, khususnya dalam penguatan moderasi beragama. Tulisan ini bertujuan untuk menganalis indicator dalam pelaksanaan strategi penguatan arah kebijakan moderasi beragama di kementerian agama. Metode penelitian menggunakan library research dengan berlandaskan analysis dari berbagai macam sumber referensi, baik buku atau junal online. Tulisan ini menyimpulkan bahwa strategi penguatan arah moderasi beragama dikelompokkan dalam empat indikator, yaitu: 1). komitmen kebangsaan; 2). Toleransi; 3) anti kekerasan; 4) penerimaan budaya local. Dalam tulisan ini juga menunjukkan bahwa strategi penguatan moderasi membutuhkan partisipasi semua pihak. Dalam hal ini agen-agen sosial, tokoh-tokoh masyarakat dan tokoh-tokoh agama diharapkan untuk benar-benar berperan aktif dalam sikap moderat dalam beragama.

Keyword: *moderasi beragama; Kementrian Agama; kebijakan; strategi penguatan*

Introduction

The Indonesian nation is a multicultural society with its pluralistic nature. Diversity includes differences in culture, religion, race, language, ethnicity, tradition and so on. In such a multicultural society, tensions and conflicts often occur between cultural groups and have an impact on the harmony of life.[1] Especially on religious issues, until now it still creates a religious atmosphere that feels a bit troubling. Several cases of radicalism that occurred in Indonesia have proved that the problem of religious radicalism cannot be taken lightly. Therefore, an attitude of religious moderation is needed in the form of acknowledging the existence of other parties, having tolerance, respecting differences of opinion, not imposing will by means of violence, and being fair to anyone, in order to create harmony and peace. [2]

In the direction of state policy, religious moderation has been contained in the National Medium Term Development Plan (RPJMN) for 2022-2024. This policy is one of the important issues amidst the still weak understanding and practice of moderate, inclusive and tolerant religious values. The notions of extremism/sectarianism and conflicts between religious communities that occur continue to be common enemies in various parts of the world. The urgency of religious moderation in the 2022-2024 RPJMN is also based on the theological foundation that every religion teaches love, lives in harmony, is full of tolerance and equality. From this concept, state authorities were born to guarantee and be responsible so as not to cause disturbances to security and public order by building the moderate character of Indonesian human resources.[3]

The Ministry of Religion is one of the institutions given specifically by the state in carrying out government affairs in the field of religion, especially in strengthening religious moderation. The Ministry of Religion has an important mission in supporting national commitments, namely in strengthening religious moderation in Indonesia. Therefore, strengthening religious moderation in the ministry of religion is very strategic to achieve the vision of a Forward Indonesia. The Ministry of Religion itself is very interested in contributing to the development of Indonesian human resources accompanied by the internalization of moderate, essential, inclusive, tolerant, harmonious, non-violent religious values, and respect for diversity and differences. However, strengthening religious moderation is not only an important task that must be carried out only within the internal ministry of religion, but also from other related ministries.[4]

In the context of strengthening religious moderation, constitutionally it has a strong legal basis because the 1945 Constitution has emphasized the state's obligation to guarantee the freedom of each citizen to embrace their own religion and to worship according to their religion and beliefs. Protection of religious freedom is also stated in Law Number 39 of 1999 concerning Human Rights.[5] This policy of reinforcing religious moderation is based on the paradigm that on the one hand Indonesia is not a secular state that separates religion from the state, but on the other hand Indonesia is not a state governed by one religion, but Indonesia is a country where the lives of its citizens and nation cannot be separated from religious values. -religious values. In this perspective of religious moderation, the state positions itself "in between". It cannot interfere too much in religious affairs, but it also must not go too far away from dealing with religion. Therefore, the state facilitates the religious needs of its citizens according to the mandate of the constitution.

Various studies on religious moderation have been carried out by several researchers, including by Muhammad Zamzami [6] who studied the formula for mainstreaming religious moderation in the Ministry of Religion in 2019-2020. This study found that the formula for strengthening religious moderation was carried out in various lines, including through pre-marital counseling programs for brides and grooms who are about to get married, and religious moderation instructor cadre training for young preachers, students, lecturers, and other religious figures. Then the article was written by Firmanda Taufiq and Ayu Maulida Alkholid with the title The Role of the Ministry of Religion in Promoting Religious Moderation in the Digital Age. This paper explains that the Ministry of Religion encourages us to continue to be vigilant about the easy spread of radicalism through

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[1] Agus Akhmadi, 'Moderasi Beragama Dalam Kerangka Indoensia', *Jurnal Diklat Keagamaan*, 2019.

[2] Ikang Putra Anggara and Alip Susilo Utama, 'Relasi Agama Dan Negara Untuk Pencapaian Tujuan Pemerintahan', *Jurnal Ilmu Pemerintahan Widya Praja*, 2020 <https://doi.org/10.33701/jipwp.v46i2.1274>.

[3] Dedy Yuliansyah and Basri Effendi, 'Tanggung Jawab Negara Dalam Menjamin Kebebasan Beragama', *Jurnal Hukum Dan Keadilan 'MEDLASI'*, 2021 <https://doi.org/10.37598/jm.v8i1.925>.

[4] Sumarto Sumarto, 'IMPLEMENTASI PROGRAM MODERASI BERAGAMA KEMENTERIAN AGAMA RI', *Jurnal Pendidikan Guru*, 2021 <https://doi.org/10.47783/jurpendigu.v3i1.294>.

[5] Yuliansyah and Effendi. Lihat juga Muhammad Dahlan and Airin Liemanto, 'PERLINDUNGAN HUKUM ATAS HAK KONSTITUSIONAL PARA PENGANUT AGAMA-AGAMA LOKAL DI INDONESIA', *Arena Hukum*, 2017 <https://doi.org/10.21776/ub.arenahukum.2017.01001.2>.

[6] Yoga Irama and Mukhammad Zamzami, 'Telaah Atas Formula Pengarusutamaan Moderasi Beragama Kementerian Agama Tahun 2019-2020', *KACA (Karunia Cahaya Allah): Jurnal Dialogis Ilmu Ushuluddin*, 2021 <https://doi.org/10.36781/kaca.v11i1.3244>.

cyberspace in a structured and massive manner. Various actions and actions of radicalism and extremism in Indonesia were born from a shallow understanding of society due to a lack of extreme information filtering.[7]

From several previous studies, it can be concluded that this study has not thoroughly touched on the need for moderation in religion at the grassroots, giving the impression of being passive and unresponsive formalistic in society. Meanwhile, this paper wants to explain how the strategy for strengthening the direction of strengthening the moderation of the Ministry of Religion is by looking at several indicators or measures that can be implemented in the life of the nation and state..

Conception of Religious Moderation

In the Big Indonesian Dictionary (KBBI), the word moderation has two meanings namely: 1. reduction of violence, and 2. avoidance of extremes. So it can be said that a moderate person means that a person who is mediocre, reasonable, and not extreme. In the Indonesian context, the word moderation is an absorption word that comes from Latin, namely moderâtio, which means something that is moderate, between not lacking and not exaggerating. The word also has the meaning of self-control from the attitude of deficiencies and excesses. In English, the word moderation is often associated with the meaning of core, average, non-aligned or standard.

For Muslims because the spirit of moderation is one of the teachings that originates from the Qur'an. In the Qur'an, moderation is referred to as al-wasatiyyah although in its development there were differences in this context. Etymologically, the word al-wasathiyyah comes from the root word al-wasath which is masdar from the word wasatha. The word al-wasth comes from the dharaf pattern which means in between. The word al-wasathu has several meanings, namely: a noun which means between two positions; secondly, adjectives that have the meaning of choice, main, and best; thirdly, this word has a fair meaning; fourth, means something that exists between bad things and good things.[8]

Interpretation of Verses of Moderation concept has been found in many of the Qur'an, for example, the concept of moderate Islam is associated with the Indonesian context. Quraish Shihab in his commentary explains the letter al-Baqarah verses 142-143 which defines wasathiyyah, namely an attitude that carries a tendency to be fair or impartial to the right and left and a proportional attitude in positioning God and worldly things. Fair attitude is a middle attitude that can be used as an example for anyone and anywhere. This position allowed one to witness anyone from all directions. Meanwhile, a proportional attitude is able to place a view of God Almighty and Almighty, and make the world a field for the afterlife and not exaggerate in looking at the world.[9]

Mohammad Hashim Kamali explained that the basic principles of religious moderation are balance and justice. Within this framework, a religious person should not be extreme in his views, but must always find common ground. For Kamali, this basic concept (moderation/wasathiyah) is the essence of Islamic teaching which are often forgotten by its adherents. In addition, Ismail Raji al-Faruqi (w.1986) also cited the opinion of Ismail Raji al-Faruqi (w.1986) who elaborated on the meaning of balance (tawazun) or the golden mean as an attitude to avoiding two unfavorable extreme poles, while continuing to seek common ground combining them with an attitude of always taking a balanced middle way.[10]

Raghib al-Ashfahani as quoted by Junaidi gives the meaning of the word wasathiyyah as a midpoint that does not lean to the right or the left, and also means justice, equality and glory.[11] In addition, Yusuf Al-Qardhawi defines wasathiyyah as an effort to balance between two opposite sides (at-tawazun), for example egoism is opposite to altruism. At-tawazun means giving proportionally according to the portion to each party. In general, the word wasath also means "everything that is good according to its object". For example, the word "generous", which means the attitude between extravagant and miserly. The word "brave", that is the attitude between desperate (tahawur) and cowardly (al-jubn). The opposite of moderation is tasharruf or excess, which in English means extreme, excessive and radical. The word extreme can also mean "to do something outrageous or to take the opposite action/path". People who apply wasathiyah principles can be called *wasith*.[12]

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[7] Firmanda Taufiq and Ayu Maulida Ayholid, 'Peran Kementerian Agama Dalam Mempromosikan Moderasi Beragama Di Era Digital', *Jurnal Ilmu Dakwah*, 2021 <https://doi.org/10.21580/jid.v41.2.9364>.

[8] Iffaty Zamimah, 'Moderatisme Islam Dalam Konteks Keindonesiaan', *Jurnal Al-Fanar*, 2018 <https://doi.org/10.33511/alfanar.v1n1.75-90>.

[9] Fauziah Nurdin, 'Moderasi Beragama Menurut Al-Qur'an Dan Hadist', *Jurnal Ilmiah Al-Mu'ashirah*, 2021 <https://doi.org/10.22373/jim.v18i1.10525>.

[10] Mohammad Hashim Kamali, 'Diversity and Pluralism: A Qur'anic Perspective', *ICR Journal*, 2020 <https://doi.org/10.52282/icr.v1i1.12>.

[11] Iffaty Zamimah.

[12] Edi Junaedi, 'INILAH MODERASI BERAGAMA PERSPEKTIF KEMENAG', *Harmoni*, 2019 <https://doi.org/10.32488/harmoni.v18i2.414>.

M. Quraish Shihab in his masterpiece, Tafsir Al-Mishbah, when interpreting Surah al-Baqarah verse 143 states that Muslims are made as moderate and exemplary middle people, so that the existence of Muslims is in a middle position. The middle position makes humans impartial to the left and right and can be seen by anyone in different directions, this leads humans to be fair and can be an example for all parties. In addition, Quraish Shihab provides three basic principles that are owned by moderate Islam, namely the view of God and the world is understood proportionally; being impartial to the right and left in the middle position leads humans to be fair; More than that, the conception of Islamic moderation according to Quraish Shihab can be seen from the following indicators: first, justice which means giving equal rights and placing things in their place. Second, balance, which means giving something according to its proportionate level. Third, tolerance which contains the intention of accepting something in realizing the common good and coexisting peacefully.[13]

In addition, al-Sya'rawi also views that Islam is a religion that is flexible and balanced because of the flexibility of Islam as a religion that is contextual in every period and wherever it is, especially in terms of furu'iyyah. Moderate is also interpreted as a middle attitude between materialistic and spiritualistic so that the practices in the world and the hereafter are balanced by making the world a medium for achieving an eternal hereafter. This interpretation is in line with the opinion of Wahbah az-Zuhaili who added that a moderate community would be a witness that the previous messenger had conveyed God's message. These moderate people are not inclined towards materialists or spiritualists, but are able to position themselves in a balanced way.[14]

Dudung Abdul Rohman defines moderation as an attitude that promotes balance in terms of morals, character, and beliefs in relationships as individuals, as well as with agencies. There needs to be indicators, measurements, and limits on how to determine which attitude or perspective in religion is classified as moderate or extreme. These indicators can refer to religious texts, local wisdom, government policies, and collective agreements. Religious moderation must be understood as a religious attitude that is balanced between respect for the way of religion of other people who have different beliefs (inclusive) and their own religious beliefs (exclusive).[15]

Method

This research is literature research that is descriptive and analytical[16]. The method uses library research based on analysis from various reference sources, both books and online journals.

Result and Discussion

A Glimpse of Religious Moderation in the Ministry of Religionc

The Ministry of Religion has a strong influence on the lives of Muslims in Indonesia. The Indonesian government gives a mandate to the Ministry of Religion in managing existing diversity, one of which is through strengthening the spirit of religious moderation. The Ministry of Religion was formerly known as the Ministry of Religion. During the Japanese occupation in 1942–1945, Japan introduced the Office for Religious Affairs (Shumubu), as well as the Indonesian Muslim Syuro Council (Masyumi), then gave Muslims the opportunity to have an institution for the aspirations of Muslims. The Ministry of Religion was established on January 3, 1946. At the beginning of its birth, the Ministry of Religion provided limitations regarding guarantees of religious freedom by making religious conceptions.

During the period when Alamsjah Ratoe Perwiranegara was Minister of Religion, the government created a forum for inter-religious communication called: Forum for Inter-Religious Deliberations (WMAUB). This forum actively initiates dialogues, seminars, discussions at various regional and international levels. Similar forums have also been established in several regions, such as the Inter-Religious Cooperation Agency (BKSAUA North Sumatra) and the Inter-Religious Leaders Communication Forum (FKPA). Meanwhile, in South Sumatra, the South Sumatra Community Communication Forum or FOKUSS was established. Institutes for the study of religious harmony were also formed in several cities, namely Ambon, Medan and Yogyakarta under the name Institute for the Study of Religious Harmony (LPKUB).

The concept of the Harmony Trilogy initiated by Alamsjah Ratoe Perwiranegara seeks to invite religious people to understand that there is not only one people in Indonesia, but have different religions and backgrounds.

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[13] Quraish Shihab, 'Tafsir Al-Misbah', *Jakarta: Lentera Hati*, 2 (2002).

[14] Azizatul Qoyyimah and Abdul Mu'iz, 'Tipologi Moderasi Keagamaan: Tinjauan Tafsir Al-Munir Karya Wahbah Az-Zuhaili', *Jurnal Ilmiah AL-Jauhari: Jurnal Studi Islam Dan Interdisipliner*, 6.1 (2021), 22–49.

[15] Dudung Abdul Rohman, *Moderasi Beragama Dalam Bingkai Keislaman Di Indonesia* (Lekkas, 2021).

[16] Musda Asmara and Lilis Sahara, 'Problems with Choosing a Mate in Islam for People Who Choose a Mate through Social Media', *Nusantara: Journal Of Law Studies*, 1.1 SE-Articles (2022), 40–49 <https://juna.nusantarajournal.com/index.php/juna/article/view/12>.

During Lukman Hakim Saifuddin's leadership as Minister of Religion, efforts to promote religious moderation were carried out more systematically and continuously, through 3 (three) strategies, including: a) socialization and dissemination of the idea of religious moderation; b) institutionalization of religious moderation into binding policies; and c) integrating the perspective of religious moderation into the National Medium-Term Development Plan (RPJMN) 2020-2024 (Balitbang Kemenag 2019a). Currently the leadership of the Minister of Religion is held by Yaqut Cholil Qoumas who is still vigorous and does not subside in voicing religious moderation.

Policy Direction and Strategy for Religious Moderation of the Ministry of Religion

In the 2020-2024 RPJMN, religious moderation has been determined as one of the directions of state policy to build the moderate character of Indonesian human resources, namely adhering to the essence of religious teachings and values, oriented towards creating the public good, and at the same time upholding national commitments. Therefore, strengthening religious moderation is very strategic to achieve the vision of an advanced Indonesia. This is a road map that is projected not only to strengthen religious moderation within the Ministry of Religion internally, but also to strengthen religious moderation in other related Ministries/Institutions (K/L).

The policies and strategies of the Ministry of Religion for 2020-2024 are directed as follows:

1. Improving the quality of understanding and practicing religious teachings.

The policy direction in improving the quality of understanding and practice of religious teachings is to increase the piety of religious people by intensifying the quality of religious guidance and counseling, as well as the performance of religious instructors. The strategy is:

a. fostering and increasing the competence of religious instructors and broadcasters in conducting religious guidance to religious people;
b. increasing the competence of religious instructors in the ICT field, especially in the use of digital platforms for online counseling (on-line);
c. increasing the frequency of counseling and religious guidance to religious people;
d. strengthening the facilitation of social care activities which are the embodiment of the practice of religious values;
e. optimizing the benefits of religious activities in increasing the understanding and practice of religious teachings; And
f. empowering the target group of religious counseling in practicing the values of religious teachings.

2. Improving the quality of religious moderation and religious harmony.

Policies in improving the quality of religious moderation and religious harmony are emphasized on strengthening religious moderation in order to strengthen harmony and resolve intra- and inter-religious conflicts. The strategy to be adopted is:

a. increasing the role of religious instructors, religious institutions, socio-religious organizations, religious leaders, community leaders, and education and training institutions in internalizing and spreading moderate, substantive, inclusive, and tolerant religious values;
b. preparation of moderate religious literacy in line with local wisdom, in electronic form stored in an easily accessible clearing house;
c. reviewing literature and conducting research and development in the field of religious moderation;
d. strengthening the content of religious moderation in the subject of religion and morals at all levels and types of education;
e. increasing religious extra-curricular activities involving students and educators, across religions/regions/countries;
f. improving the quality of tolerance and ethical behavior of students, educators and other educational staff;
g. forming a working group that develops concepts, policies, implementation strategies and reviews the content of religious moderation literature;
h. increasing the capacity of religious teachers/religious broadcasters in teaching and giving examples of religious moderation practices;
i. strengthening the role of Islamic boarding schools in developing religious moderation;
j. increasing the role of houses of worship as centers for broadcasting religious moderation; increasing the quality and frequency of broadcasting religious moderation in religious institutions and mass media institutions;
k. increasing the frequency of dialogue forums between religious leaders discussing the practice of moderation among religious adherents; m. increasing the frequency of intra-religious harmony dialogues

in preventing and resolving conflicts;

l. increased understanding of the indicators and potential for community conflict originating from religious understanding; and o. increasing the capacity of FKUB members in the regions in conveying messages and examples of inter-religious harmony.

3. Increasing harmony in religious and cultural relations.
   a. Improving the harmony of religious and cultural relations is focused on controlling conflicts between traditions and rituals of religious culture and religious teachings as well as increasing the treasures of religious-inspired culture. This is done through the following strategies:
   b. strengthening cross-religious and cultural dialogue involving elements of religionists, humanists, media, millennials, and academics;
   c. development of religious interpretation in the context of cultural development;
   d. respect for cultural diversity which is a manifestation of the implementation of the practice of religious values;
   e. the development of literacy in cultural treasures with a religious breath;
   f. preservation and optimization of religion-based cultural products to improve the welfare of the people; And
   g. use of religious and cultural celebrations to strengthen tolerance

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4. Improving the quality of religious life services

In improving the quality of religious life services, the policy is directed at increasing the satisfaction of haj pilgrimage services, sub-district KUA, and halal product certification that meets standards, is based on digitalization of services, and pays attention to gender mainstreaming. The strategy to be carried out is:

   a. digitalization of religious services to make them easily accessible, transparent and rich in information;
   b. development of one-stop integrated religious services at the central and regional levels equipped with SOPs so as to be able to solve problems directly;
   c. increasing the competency of ASN as frontline officers in work units so that they have technical skills in providing religious services on time, including in using digital technology;
   d. improving the quality of KUA infrastructure and supporting operational costs;
   e. increasing access to and use of holy books including through digital products;
   f. increasing the provision and distribution of holy books that are right on target;
   g. increasing the facilitation of religious institutions in improving the quality of services; h. improving the quality of worship service facilities and infrastructure;
   h. administering quality service administration in the registration and certification of halal products;
   i. organizational development and institutional governance systems to support halal product services;
   j. increasing cooperation and standardizing the assessment of halal products;
   k. guidance and supervision for business actors, halal auditors, halal inspection agencies, halal supervisors, RPU and RPH;
   l. increasing cooperation with other ministries/institutions; increasing the efficiency of the operational costs of organizing the pilgrimage;
   m. increasing diplomacy with the Government of Saudi Arabia in the quota of pilgrims and the services and protection of pilgrims;
   n. improvement of emergency response in Armuzna as part of the Crisis Center procedures involving muassasah;
   o. improvement of the mobile application-based reporting system for group reports and officer services integrated with Siskohat;
   p. provision of Full Covered Consumption, namely by adding consumption during the peak season;
   q. revitalization and development of haj hostel services;
   r. construction of an Integrated Hajj and Umrah Service Center (PLHUT) to accelerate and improve Hajj and Umrah services in districts/cities and Saudi Arabia;
   s. efficiency of the visa process, namely verification and visa requests are carried out at the Kanwil;
   t. simplification of recommendations for making a passport for the umrah pilgrimage;
   u. establishment of PPNS (Civil Servant Investigators) in the public accounting firm registration scheme for PPIU audits; And
   v. increasing cooperation with associations of umrah organizers in the context of supervision

5. Increasing the utilization of the religious economy of the people.

Policies in utilizing the religious economy of the people are focused on increasing sources of funds from religious economic institutions which are used to support the development of religion, education, and poverty alleviation through the following strategies:

a. preparation of regulations and data collection on social-religious fund management institutions and religious economic potential of the people;
b. improving the management, coaching and empowerment of zakat funds;
c. improvement of waqf asset management;
d. increasing the empowerment and quality of Christian religious donations/Catholic religious donations/dharma funds/paramitha funds/virtuous funds;
e. increasing the participation of financial institutions and the business world in utilizing community economic funds in the framework of participating in alleviating poverty;
f. improving the management quality of social religious fund managers in institutions and houses of worship; And
g. increasing socialization in understanding the importance of socio-religious funds to the community.

Ministry of Religion Strengthening Religious Moderation Strategy

As mandated in the 2020-2024 RPJMN, the Ministry of Religion has an important task in realizing the direction and policy of religious moderation in Indonesia. Therefore, a strategy for strengthening programs and policies is needed that is guided by indicators or measures in the implementation of religious moderation. Thus, the program's policy is concrete and serious and not artificial in nature which does not actually solve the real problem of religious moderation. There are at least four indicators or measurements that form the basis of the Ministry's strategy for strengthening religious moderation, including:

1. National commitment;

National commitment is the main indicator to measure one's perspective and way of religion related to the acceptance of Pancasila as the state ideology and its derivatives and attitudes of nationalism. Initiations that have been carried out by the two campuses include: giving religious moderation courses, initiating KKN with the theme of moderation, holding seminars on moderation by inviting moderate national figures. This effort is a form of commitment to strengthening nationality in providing understanding regarding the acceptance of Pancasila as the state ideology so that it can be internalized in everyday life.

2. Tolerance;

Tolerance is related to an open attitude, accompanied by respect, accepting differences and positive thinking. The aspect of tolerance is not only a matter of religious belief, but also related to differences in ethnicity, culture, race, and so on. In this case the emphasis on religious tolerance is intra-religious tolerance and inter-religious tolerance related to social and political aspects. For example, cross-faith discussions, field trips to places of worship of other religious communities are forms of initiation to build tolerance for other people of different beliefs. In this case discussions about religious moderation through FKUB are one of the concrete steps to strengthen and strengthen harmonious, safe and peaceful religious life..[17]

3. Non-violence;

Violence in this context is defined as an ideology that wants to make changes to the social and political system by using excessive means in the name of religion, both physically, verbally and mentally. Radicalism or violence is often associated with terrorism, because radical groups can use any means to make their wishes come true, including hurting those who don't agree with them. Although radicalism is often associated with certain religions, basically radicalism is not only related to that religion, but can also be attached to all religions. Radicalism usually arises because of injustice and threat that is felt by a person or group of people. He will be born ideologically by fostering hatred against groups that are considered opposition and cause injustice that threatens his identity. For example campaigning for moderation through social media.l

4. acceptance of local culture

Acceptance of local culture to see how far a person is able to accept religious practices that accommodate local wisdom and traditions. Moderate people tend to easily accept local culture related to their way of religion as long as it does not conflict with religious teachings. On the other hand, there are groups that are not accommodating to local wisdom because it is considered something that harms religious purity

In addition to the Ministry of Religion's strategy to strengthen religious moderation, there are several notes

[17] M. Thoriqul Huda, 'Pengarusutamaan Moderasi Beragama; Strategi Tantangan Dan Peluang FKUB Jawa Timur', *Tribakti: Jurnal Pemikiran Keislaman*, 2021 <https://doi.org/10.33367/tribakti.v32i2.1745>.

that must be observed, namely: first, to become a public morality, religious moderation requires the participation of all parties. The ideas and movements of religious moderation must be top down, so that the ideas and strategies can be discussed within religious groups. Second, to accelerate and strengthen religious moderation in society, a structure is needed that provides support for its dissemination in society. In this case, it does not mean that there are hegemonial structures, but social agents, community leaders and religious leaders who are around us who need to be encouraged and supervised to actually play an active role in disseminating religious moderation in attitudes, actions and thoughts. character after receiving training, so that later it is the community that will absorb it and finally be able to show a moderate attitude in religion

Conclusion

In the 2020-2024 RPJMN, religious moderation has been determined as one of the directions of state policy to build the moderate character of Indonesian human resources, namely adhering to the essence of religious teachings and values, oriented towards creating the public good, and at the same time upholding national commitments. In 26plementing the strategy to strengthen the direction of religious moderation, 4 indicators are grouped, namely: 1. national commitment; 2. tolerance,3; anti-violence, and 4; acceptance of local culture. Then, the strategy of strengthening moderation requires the participation of all parties. In this case social agents, community leaders and religious leaders are expected to really play an active role in a moderate attitude in religion.

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Issuance of Family Cards: An Overview of *Maslahah* Against Legitimacy of Marital Status for *Sirri* Married Couples

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Abstract: This study aims to comprehensively describe the issuance of Family Cards in the perspective of *maslahah* (social benefit) and justice for the legitimacy of marriage for *sirri* married couples in Bengkulu Province. This research is a qualitative empirical research with a statutory approach, a case and field approach, and a concept approach. This study found that the issuance of Family Cards for marriages of unmarried couples is a form of upholding justice in a social (commutative) framework where everyone has the same rights over marital status. On the other hand, the issuance of a Family Card for unmarried couples can be categorized as *maslahah al-khassah* (special benefit) which benefits only a few parties, not *maslahah al-ammah* (general benefit) which applies to the whole community. This study also found that the impact of including the statement "Unregistered Marriage" in the issuance of Family Cards for unregistered married couples can lead to *maslahah al-mulghah* in the form of legal confusion regarding the legality of one's marriage while at the same time hindering the updating of centralized data which is on the government's agenda.

Keywords: Family Card, Sirri Marriage, social benefit, Justice

Abstrak: Penelitian ini bertujuan unutuk mendeskripsikan secara komprehensip penerbitan Kartu Keluarga dalam perspektif kemaslahatan dan keadilan terhadap legitimasi perkawinan bagi pasangan nikah *sirri* di Propinsi Bengkulu. Penelitian ini berjenis penelitian empiris kualitatif dengan pendekatan perundang-undangan, pendekatan kasus dan lapangan, dan pendekatan konsep. Penelitian ini menemukan bahwa penerbitan Kartu Keluarga bagi perkawinan pasangan nikah *sirri* merupakan bentuk penegakan keadilan dalam kerangka sosial (komutatif) di mana setiap orang memiliki hak yang sama atas status perkawinan. Disisi yang lain, penerbitan Kartu Keluarga bagi pasangan nikah *sirri* dapat dikategorikan sebagai *maslahah al-khassah* (maslahat khusus) yang menguntungkan beberapa pihak saja, bukan *maslahah al-ammah* (maslahat umum) yang berlaku bagi seluruh masyarakat. Penelitian ini juga menemukan bahwa dampak dari pencantuman keterangan "Kawin Tidak Tercatat" dalam penerbitan Kartu Keluarga bagi pasangan nikah *sirri* tersebut dapat menimbulkan *maslahah al-mulghah* berupa kekacauan hukum mengenai legalitas perkawinan seseorang sekaligus menghambat pemutakhiran data terpusat yang menjadi agenda pemerintah.

Keyword: Kartu Keluarga; Nikah Sirri; *Maslahah*; Keadilan

A. Introduction

The state of Indonesia is a country that upholds the rule of law in all fields, so that all existing rules both within the scope of public law and private law must be enforced imperatively. Marriage registration is an administrative requirement[12]which must be carried out by the government based on the mandate of statutory regulations that have long been in force.

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[1] This means that the marriage remains valid, because the standard of whether or not a marriage is valid is determined by the religious norms of the parties carrying out the marriage. Marriage registration is regulated because without registration, a marriage has no legal force, See. Ahmad Rofik, *Hukum Perdata Islam Indonesia*, (Jakarta: Rajawali Pers, 2013): 93.

[2] Rofiq Ahmad, "Hukum Perdata Islam Di Indonesia," (*Jakarta: Raja Grafindo Persada*), 2013.

Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage, in Article 2 paragraph (1) states that:

Registration of marriages for those who carry out their marriages according to the Islamic religion, is carried out by Registrar Employees as referred to in Law Number 32 of 1954 concerning Registration of Marriages, Divorces and Reconciliation.[3]

In Article 3 paragraphs (1) and (2) it is also stated that: Paragraph (1): Every person who is going to get married shall notify his wish to the Registrar at the place where the marriage will take place; Paragraph (2) : The notification referred to in paragraph (1) is made at least 10 (ten) working days before the marriage takes place.

Violations of the provisions on the registration of marriages can be subject to criminal penalties as regulated in Article 45 paragraph (1) of the same regulation, namely: ... whoever violates the provisions regulated in Article 3, 10 paragraph (3), 40 of this Government Regulation is punished by a maximum fine of Rp. 7,500 (seven thousand five hundred rupiah).[4]

In addition to the government regulations above, there are also two other regulations governing the registration of marriages, namely Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law in Indonesia and Regulation of the Minister of Religion Number 20 of 2019. Article 5 of the Compilation of Islamic Law states that: Paragraph (1) : In order to ensure orderliness of marriage for the Islamic community, every marriage must be recorded. Paragraph (2) : The registration of the marriage referred to in paragraph (1) is carried out by the Marriage Registrar as stipulated in Law Number 22 of 1946 jo. Law Number 32 of 1954. Furthermore, it also mentions the technical implementation and legal status of marriages that are not registered by the state. Article 6 paragraph (1) and (2) of the Compilation of Islamic Law states that: Paragraph (1) : To fulfill the provisions in Article 5, every marriage must take place before and under the supervision of a Marriage Registrar. Paragraph (2) : Marriages performed outside the supervision of a Marriage Registrar do not have legal force.

In order to carry out orderly administration, transparency and legal certainty in the implementation of Islamic marriages, the Minister of Religion Regulation Number 20 of 2019 concerning Marriage Registration was issued. The regulation regulates the registration of the will of marriage, examination of documents of the will of marriage, rejection of the will of marriage, announcement of the will of marriage, marriage agreements, the implementation of registration of marriages to the handover of the Marriage Book to the bridal couple.

Based on the several regulations above, it can be concluded that the registration of marriages has long had an important meaning in marriage law in the positive law of the Indonesian state. Marriage registration is a procession that must be carried out for married couples.

Registration of marriage actually has a legal basis in the Qur'an which can be used as evidence to support its realization in society. Al-Qur'an Surah Al-Baqarah / 2 verse 282 states which means: Meaning: "O you who believe, if you don't do muamalah in cash for a specified time, you should write it down. and let a writer among you write it correctly."

Based on qiyas – as a method of interpretation of Islamic law, the registration of marriages which is a mu'amalah legal act becomes an important thing to do as is the importance of recording non-cash transactions in mu'amalah activities among Muslims. In other words, it can be formulated that marriages which are sacred are of course far more important to be recorded for the sake of orderly government administration.

It should be underlined that the registration of marriages is only done for marriages registered with the Office of Religious Affairs (KUA). As for marriages that are not registered beforehand, they will be termed "underhand marriage" or "sirri marriage". Talking about sirri marriages, these administratively flawed marriages are still often found in society today.

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[3] See. Pasal 1 ayat (1) Undang Undang Nomor 22 Tahun 1946 tentang Pencatatan Nikah, Talak, dan Rujuk, tentang mengenai sanksi yang ditetapkan bagi pelanggarnya dalam Pasal 3 ayat (1).

[4] See. Pasal 3 ayat (1) Undang Undang Nomor 22 Tahun 1946 tentang Pencatatan Nikah, Talak, dan Rujuk, mengenai sanksi asal yang ditetapkan bagi pelanggarnya.

Marriage without the role of the marriage registrar tends to harm the woman (wife). Apart from not providing civil legitimacy for a wife, unregistered marriages tend to harm the wife's position in her family.[5]

At the beginning of October 2021 an interesting phenomenon related to sirri marriages occurred, namely the massive issuance of Family Cards by the Population and Civil Registry Service (Dukcapil) in a number of regions to accommodate the needs of sirri marriage partners.[6] The issuance of the Family Card is intended to provide legal certainty regarding sirri marriage status as well as proof of marital status for sirri marriage partners.[7] The Family Card will then be used as a requirement for managing other population needs.

The issuance of the Family Card is based on Government Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration, as well as Minister of Home Affairs Regulation Number 109 of 2019 concerning Forms and Books Used in Population Administration.

Government Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration implies a stipulation that all important events in a person's life can be recorded in the civil registration register at the Dukcapil Service. Article 1 paragraph (2) states that:

Civil Registration is the recording of important events experienced by a person in the Civil Registration register at the Regency/Municipal Population and Civil Registration Service or the Technical Implementation Unit of the Population and Civil Registration Service.

Based on the provisions of the government regulations above, there is a loophole for recording sirri marriages on the Family Card, with the assumption that sirri marriages can be categorized as an important event in one's life journey. On the basis of this legal logic, the registration of sirri marriages is necessary to continue to be carried out. Article 12 letter b of the intended government regulation can be the basis for issuing a Family Card for unregistered married couples by attaching a Statement of Absolute Responsibility (SPTJM) as proof of a religious marriage or a statement of sirri marriage. The SPTJM will act as a description of changes in population events and important events required.

There were pros and cons regarding the issuance of Family Cards for unmarried married couples by the Department of Population and Civil Registry. On the one hand, the issuance of the intended Family Card provides a space for public recognition of unmarried married couples in the form of a Family Card, but on the other hand, this issuance creates the impression of overlapping main tasks and functions (tupoksi) between the Dukcapil Office and Marriage Registrars from the Office of Religious Affairs (KUA) and even the The Religious Courts have the authority to issue marriage certificates.

Even though it was later acknowledged that the Dukcapil were not in a position to marry – they only noted that a marriage had taken place.[8] This kind of condition can risk other legal

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[5] Jahar, "Hukum Keluarga, Pidana Dan Bisnis: Kajian Perundang-Undangan Indonesia, Fikih Dan Hukum Internasional. Jakarta: Kencana Prenadamedia Group & UIN Jakarta Press, 2013"

[6] Ismet Selam, "Disdukcapil Cetak 50 Ribu KK Pasangan Nikah *Sirri* di Cianjur", *detiknews.com*, October 08, 2021. https://news.detik.com/berita-jawa-barat/d-5758824/disdukcapil-cetak-50-ribu-kk-pasangan-nikah-sirri-di-cianjur, Rahmat Hidayat, "Ratusan Pasangan Nikah *Sirri* Buat KK di Bekasi", *okezone.com*, October 13, 2021. https://megapolitan.okezone.com/read/2021/10/13/338/2485459/ratusan-pasangan-nikah-sirri-buat-kk-di-bek, October 9 2021.

[7] Andi Saputra, "Nikah *Sirri* Nasibmu Kini, Bisa Dicatat di KK tapi Tak Diakui Perkawinan", detikNews.com, october 13, 2021. https://news.detik.com/berita/d-5764657/nikah-sirri-nasibmu-kini-bisa-dicatat-di-kk-tapi-tak-diakui-uu-perkawinan.

[8] Statement of Zudan Arif Fakrullah (Direktur Jenderal Kependudukan dan Pencatatan Sipil Kementerian Dalam Negeri) dalam Darlinda Oktavia Erwanti, "Pasangan Nikah *Sirri* Ternyata Bisa Buat Kartu Keluarga", October 07, 2021, https://news.detik.com/berita/d-5756446/pasangan-nikah-sirri-ternyata-bisa-buat-kartu-keluarga.

consequences in the future, so it is necessary to examine its legal certainty, its compatibility with the values of justice in society, and its *maslahah*

s among Muslims.

The theory of justice is a very important norm/principle in Islamic law. The word "fair" is mentioned in many places in the Qur'an, even to the third place after the names of Allah and science.[9] Justice in Islam is placing things only in their place and giving things only to those who are entitled and treating things according to their position.[10] "Mashlahah" is definitively interpreted as everything that is beneficial to humans, [11] that can be achieved by humans by obtaining it or by avoiding it. The essence of syara' orders and prohibitions is basically to realize the goals of sharia which are returned to a rule, namely jalb al-mashalih wa dar'ul mafasid (attracting benefit and rejecting damage).[12]This article examines the Issuance of Family Cards for Siri Marriage Couples in Bengkulu Province and its *maslahah*s for the Legitimacy of Marital Status for Siri Marriage Couple. It becomes an interesting thing when the conflict of interest above is confronted diametrically with the theory of *maslahah* and the theory of justice contained in Islamic law, because Islamic law recognizes the theory of *maslahah* initiated by Imam Maliki and popularized by Ash-Syatibi, as well as the theory of justice which is disseminated by Imam al-Ghazali. Both types of theory will be used as a "scalpel" for the analysis of the problems studied using a combination of approaches that are relevant to the research objectives.

B. Methods

The research conducted is qualitative empirical research. The approach used is statutory approach, a case and field approach, and a conceptual approach. The research team uses primary data and secondary data. The primary data used comes from the object under study and/or other objects related to research, while the secondary data in this study includes three legal materials, namely: Primary legal materials, secondary legal materials and tertiary legal materials.[13] Data were obtained directly from the object under study, namely the Dukcapil and KUA in Bengkulu Province or other parties related to them in the field through deep interview techniques (deep interviews in field research). Several informants were selected by purposive sampling according to research needs Collection of secondary and tertiary legal data was obtained by means of literature searches (documentation studies), both through studies in libraries and data searches through websites (websites). The secondary data in question were collected through the method of documentation study (library research) in various places including available libraries.

The next step is to process and analyze the data, so that the meaning contained in it can be interpreted. Both legal material obtained in the field and obtained from documentation studies, both of which will be processed by coding, then through the editing and classifying stages according to the needs of the researcher. The legal material that has been classified is then analyzed by interpreting and describing the data based on the principles of *maslahah* and justice theory.[14] The research used the cycling method popularized by Milles and Huberman in conducting content analysis from the data collection stage, followed by data display, then data reduction, and ended with a conclusion drawing (verifying).[15]

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[9] uhammad Daud and H Ali, "Asas-Asas Hukum Islam," *Jakarta: Rajawali Pers*, 1991.
[10] athurrahman Djamil, *Hukum Ekonomi Islam: Sejarah, Teori, Dan Konsep* (Sinar Grafika, 2023).
[11] ok Jumantoro and Samsul Munir Amin, *Kamus Ilmu Ushul Fikih* (Amzah, 2005).
[12] ka Yunia Fauzia, *Prinsip Dasar Ekonomi Islam Perspektif Maqashid Al-Syariah* (Kencana, 2014).
[13] Peter Mahmud Ma uki, "Penelitian Hukum, Kencana" (Jakarta, 2005).
[14] Burhan Ashshofa, "Metode Penelitian Hukum, Cetakan Keenam, PT," *Rineka Cipta, Jakarta*, 2010.
[15] Dr Sugiyono, "Memahami Penelitian Kualitatif," 2010.

C. Result and Discussion

Legal Arguments for the Issuance of Family Cards for Sirri Married Couples by the Population and Civil Registry Service (Dukcapil) in Bengkulu

Law is a tool, not a goal,[16] but the goal is human. The existence of law in society, in fact, can not only be interpreted as a means of controlling people's lives, but also as a means that can change people's mindsets and behavior patterns.[17] The main objective of law is to create an orderly social order, to create order and balance. In achieving this goal, the law is tasked with dividing rights and obligations between individuals in society, dividing authority and regulating how to solve legal problems and maintaining legal certainty.[18]

Certainty is a matter (statement) that is certain, conditions or provisions. The law essentially must be certain and fair. Legal certainty is a question that can only be answered normatively, not sociologically.[19] Legal certainty is a situation in which human behavior, both individuals, groups and organizations, is bound and is in the corridor that has been outlined by the rule of law.[20]

Legal certainty according to Jan Michiel Otto defines as the possibility that in certain situations:

1) Availability of rules that are clear (clear), consistent and easy to obtain, issued by and recognized due to (power) of the state.
2) Authorities (government) apply these legal rules consistently and also submit and obey them.
3) Citizens in principle adjust their behavior to these rules.
4) Independent and thoughtless judges (judiciary) apply the legal rules consistently when they resolve legal disputes.
5) The court's decision is concretely implemented.[21]

Based on the facts and findings obtained in the research field through interviews with informants with the status of Heads of the Dukcapil Service in various Regencies and Cities in Bengkulu Province (or those representing them), a common perspective of argumentation was obtained which stated that the issuance of Family Cards was the authority of the Dukcapil Office and has become its main task and function, namely to record events that occur in society. Not only recording marriage events, other events such as birth events (which are manifested in birth certificates) and death events (which are manifested in death certificates), both are recorded by the Dukcapil Service for population administration in accordance with applicable laws and regulations.[22]

The Dukcapil Service stated that the legal basis for issuing the Family Card can be found in Government Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration and confirmed by Minister of Home Affairs Regulation Number 109 of 2019 concerning Forms and Books Used in Population Administration.[23] Government Regulation Number 96 of 2018 concerning Requirements and Procedures for Population Registration and Civil Registration mandates that all important events

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[16] RajaGrafindo Persada, "Problematika Hukum Indonesia, Teori Dan Praktik," n.d.
[17] Ellya Rosana, "Hukum Dan Perkembangan Masyarakat," *Jurnal Tapis: Jurnal Teropong Aspirasi Politik Islam* 9, 1 (2013): 99–118.
[18] Laurensius Arliman, "Mewujudkan Penegakan Hukum Yang Baik Di Negara Hukum Indonesia," *Dialogia Iuridica: Jurnal Hukum Bisnis Dan Investasi* 11, no. 1 (2019): 1–20.
[19] Dominikus Rato, "Realisme Hukum: Peradilan Adat Dalam Perspektif Keadilan Sosial," *Jurnal Kajian Pembaruan Hukum* 1, no. 2 (2021): 285–308.
[20] Samudra Putra Indratanto and Kristoforus Laga Kleden Nurainun, "Asas Kepastian Hukum Dalam Implementasi Putusan Mahkamah Konstitusi Berbentuk Peraturan Lembaga Negara Dan Peraturan Pemerintah Pengganti Undang-Undang," *Samudra* 2020 (2020).
[21] Raharjo Soeroso, *Pengantar Ilmu Hukum* (Sinar Grafika, 2020).
[22] Suwanto, "Interview with the Head of Dukcapil North Bengkulu Regency" (2022).
[23] Dewi Ilmiawanti, " Interview with the Head of Dukcapil North Bengkulu Regency" (2022).

in a person's life can be recorded in the civil registration register at the Dukcapil Service. Minister of Home Affairs Regulation Number 109 of 2019 concerning Forms and Books Used in Population Administration in Article 1 paragraph (2) states that:

Civil Registration is the recording of important events experienced by a person in the Civil Registration register at the Regency/Municipal Population and Civil Registration Service or the Technical Implementation Unit of the Population and Civil Registration Service.

The Dukcapil Office does not question the status of the Family Card applicant, whether the applicant is in a marital status that has been registered at the Office of Religious Affairs (KUA) or vice versa, has never registered a marriage. The focus of Dukcapil is to collect data according to events that occur in the midst of society, so that someone whose marriage is underhanded or unregistered marriage must still be able to be recorded according to the reality that is happening in society.[24]

There is a public opinion – which has been conveyed to the Dukcapil Office – that arranging marriages at the Office of Religious Affairs (KUA) takes a long time, costs a lot, and is impractical, as a result, the administrative documents needed by unregistered marriage partners quickly in order to obtain rights recognition of population and participation in social assistance provided by the government seem less accommodated.[25] On the other hand, there is an assumption that the community can "take cover" behind the opinion of classical scholars who think that unregistered marriage is a religiously valid marriage, so it does not need to be registered again at the local Religious Affairs Office.[26]

The author found an interesting fact in the field research conducted, that all Dukcapil Agencies agreed on one thing, that the "recording" of marital status listed on the Family Card does not require a recommendation from the KUA or proof of a Marriage Book.[27] A person who has performed unregistered marriage can obtain a Family Card by simply submitting an Absolute Accountability Letter (SPTJM) with the knowledge of the local regional apparatus. The SPTJM will be the basis for the issuance of the Family Card and is deemed sufficient to represent a legal instrument that justifies the information contained in the Family Card.

In addition, the Dukcapil Office also said that it has no interest in further checking regarding the status of a sirri marriage that has been carried out, whether it was actually carried out after obtaining permission from the first wife (for those who are polygamous) or whether the sirri marriage was carried out in accordance with the pillars and conditions marriage (for example related to the existence of a marriage guardian and the issue of itsbat marriage). According to the Dukcapil Office, the main duties and functions (tupoksi) of Dukcapil are only limited to recording important events that occur in society. In other words, the Dukcapil Office does not see any urgency to coordinate intensively with the Office of Religious Affairs and the Religious Courts in carrying out these basic tasks and functions.[28]

Legal Arguments for the Issuance of Family Cards for Sirri Married Couples According to the Office of Religious Affairs (KUA) in Bengkulu

1. **Marriage Sirri and the Urgency of Marriage Registration in the Office of Religious Affairs (KUA)**

Marriage is considered valid and occurs with the consent (submitting) uttered by the guardian of the prospective wife and the qabul (accepting) uttered by the male party in the presence of witnesses along with the availability of a dowry (dowry). This is the provision of the

[24] Muradi ,"Interview with the Head of Dukcapil Rejang Lebong Bengkulu Regency" (2022).
[25] Widodo,"Interview with the Head of Bengkulu City " (2022)
[26] Muradi," interview".
[27] Ilmiawati. interview".
[28] Oly Stupevis, interview with the head of Dukcapil Kepahiyang Regency" (2022).

classical Islamic marriage doctrine, which is hereinafter widely known as the pillars of marriage.[29] There are no rules regarding the obligation to register marriages in classical Islamic law. Furthermore, the development of the times and the complexity of life have encouraged the scholars to carry out a reform related to marriage. Muslim countries realize the importance of carrying out marriage registration in order to obtain a clear basis for marital activities. In other words, marriage registration is a guarantee of legal certainty for marriage ties in the modern era.[30]

Currently, marriage registration is enforced in almost all Muslim countries in the world, even though the provisions differ from each other. There are countries that require registration of marriages for the sake of orderly administration with the threat of sanctions for violators, such as Brunei Darussalam, Iran and Pakistan. However, there are also countries that only make marriage registration an administrative requirement without any sanctions for those who do not register their marriages, such as marriage registration in Morocco and Libya. As for Syria, it is an example of a country that requires the registration of marriages and still recognizes marriages that are not registered.[31]

Indonesia is included in the category of countries that require marriage registration to be carried out by married couples who are about to get married. Couples who do not register their marriage at the Office of Religious Affairs do not obtain legal certainty about their marital status. The legal certainty in question is proven by the existence of a Marriage Book which is given to married couples who have registered their marital status at the Office of Religious Affairs through a Marriage Registrar. This mandatory registration provision gave birth to the term sirri marriage for marriages that are not registered at the Office of Religious Affairs.

Some Muslim communities still understand that the validity of marriage emphasizes a fiqh-centric perspective. This understanding has the substance that marriage is considered valid, if the conditions and pillars have been fulfilled based on the provisions of fiqh. As a consequence, marriage registration and marriage certificates are not seen as something important until there is an emergency need for them. This fact gives fresh air to the practice of sirri marriage, without involving Marriage Registrar (PPN) officers as officers entrusted with recording marriages. It will become a big problem if society's denial of the role of registering marriages is protracted, illegal polygamy without the permission of the first wife or without following the procedures of the Religious Courts can become a major obstacle to the realization of the implementation of Law Number 1 of 1974 concerning Marriage.

The above issues are disclosed to the reader with the intention that all parties – both the Dukcapil Office, the Office of Religious Affairs, the Religious Courts, and the general public – are aware of the urgency of justice and order (*maslahah*) in a marriage. Further details regarding the obligation to register marriages can be found in Presidential Instruction Number 1 of 1991 concerning the Compilation of Islamic Law, in Article 5 paragraphs (1) and (2), Article 6 paragraphs (1) and (2) jo. Government Regulation Number 9 of 1975 Article 2.[32]

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[29] Heparpiton, interview with the Head of KUA Kepahiyag Regency' (2022).

[30] Saiful Kholidin, "interview with the Head of KUA Rejang Lebong Regency" (2022).

[31] Ahmad Tholabi Kharlie, *Hukum Keluarga Indonesia* (Sinar Grafika, 2022).

[32] Presidential Instruction No. 1 of 1991 concerning Compilation of Islamic Law in Indonesia (KHI) Article 5 paragraph (1) "In order to ensure orderliness of marriage for the Islamic community, every marriage must be recorded", (2) "The registration of the marriage mentioned in paragraph (1) is carried out by Marriage Registrar as regulated in Law Number 22 of 1946 jo. Law Number 32 of 1954"; Article 6 paragraph (1) "To comply with the provisions in Article 5, every marriage must take place before and under the supervision of a Marriage Registrar", (2) "Marriage performed outside the supervision of a Marriage Registrar has no legal force."; Government Regulation Number 9 of 1975, Article 2 "The registration of marriages of those who carry out their marriages according to the Islamic religion, is carried out by Registrar Employees, as stipulated in Law number 32 of 1954 concerning Registration of Marriages, Divorces and Reconciliation".

The two regulations above clearly state that the registration of marriages which is the prerogative of the Marriage Registrar is an attempt to guarantee the orderliness of the marriage. In addition, there are null and void sanctions against marriages carried out outside the supervision of the Marriage Registrar. With regard to this provision, the inclusion of the phrase "Unrecorded Marriage" by the Dukcapil Office on the Family Card –although it is not meant to legalize it – still gives the impression of acknowledging the marital status of unregistered married couples. In fact, in some cases it was found that sirri marriages that occurred were not in accordance with the pillars and conditions of marriage in Islam, for example mistakes in determining marriage guardians and violations of Law Number 1 of 1974 concerning Marriage,[33] namely Article 5 paragraph (1) when an unregistered marriage occurs without the permission of the first wife/previous wives.[34]

Marriages that are not registered at the Office of Religious Affairs as well as not recorded by the Marriage Registrar have serious consequences in Islamic civil law. In addition to not obtaining legal certainty regarding their marital status, married couples of sirri marriages – especially sirri wives – have the potential to suffer losses in the future, if problems occur in the form of divorce disputes (gonogyny) or inheritance issues. If a dispute occurs in a sirri marriage – whether it is a divorce dispute or an inheritance dispute – then the dispute cannot be filed/resolved in the Religious Courts, because there is no legal basis for the validity of the marriage from the start, even though there is a Family Card stating the sirri marriage status. Underhanded marriages (sirri marriage) must also be resolved underhanded when a dispute arises in the marriage.[35]

The legal basis for registration of marriages by the Office of Religious Affairs is Government Regulation Number 9 of 1975 concerning the Implementation of Law Number 1 of 1974 concerning Marriage, Article 2 paragraph (1) states that registration of marriages according to the Islamic religion is carried out by Registrar Employees as referred to in the Law Number 32 of 1954 concerning Registration of Marriage, Divorce and Referrals. Furthermore, in Article 3 paragraphs (1) and (2) it also regulates notification of the will to marry to the Registrar at the place where the marriage will take place no later than 10 (ten) working days before the marriage takes place. Violation of the provisions on the registration of marriages can be subject to fines as stipulated in Article 45 paragraph (1).

The above regulation is the only government regulation that clearly regulates the registration of marital status in Indonesian Muslim society. A provision that has been broadly and uniformly applicable throughout Indonesia since 1975. This fact should be a concern, consideration, as well as a reference before implementing Government Regulation Number 96 of 2018 jo. Regulation of the Minister of Home Affairs Number 109 of 2019 which is the basis for issuing Family Cards for unmarried married couples.

With regard to the SPTJM made as evidence of the occurrence of an unregistered marriage, it cannot be used as a basis for the validity of the marital status. Because the validity of marriage has been regulated in Article 6 paragraph (1) of Presidential Instruction No. 1 of 1991 concerning the Compilation of Islamic Law in Indonesia which states that a marriage performed outside the supervision of a Marriage Registrar does not have legal force as previously stated. Registration of marriages by Marriage Registrars from the Office of Religious Affairs (KUA) is carried out as an effort to protect the state against order marriages for Islamic communities. The above regulations were further strengthened by Minister of Religion Regulation Number 20 of 2019 concerning Marriage Registration.

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[33] Islam Setiawan, "Interview with the Head of KUA Central Bengkulu Regency" (2022).

[34] Law Number 1 of 1974 concerning Marriage, Article 5 paragraph (1) "To be able to submit an application to the court, as referred to in Article 4 paragraph (1) of this law, the following conditions must be fulfilled: a) There is approval from the wife/ wives."

[35] Mukmin Nuryadin, "Interview with the Head of KUA Selebar Bengkulu City" (2022)

2. **Legal Argumentation of the Office of Religious Affairs (KUA) regarding Issuance Regarding the Issuance of Family Cards for Sirri Marriage Couples**

The Office of Religious Affairs gave various responses to the issuance of the Family Card by the Dukcapil Office. The research team found 2 (two) opinions regarding the issuance of a Family Card which contains information on a person's unregistered marital status. On the one hand there are parties who oppose the issuance of a Family Card which contains a person's sirri marriage status and on the other hand there are parties who agree to the issuance of the Family Card. Furthermore, the two groups in question can be referred to as retentionist groups[36] and abolitionist groups [37] regarding the issuance of Family Cards for husband and wife married sirri.

The retentionist group stated that the issuance of a Family Card which contained a statement of Unregistered Marriage was a violation that violated the applicable legal provisions, because the display of an Unregistered Marriage certificate originating from unregistered marriage meant legitimizing one's marital status indirectly. This act equates marriages registered at the Office of Religious Affairs with unregistered marriages which are actually violations. According to this group, registration of marriages is only the domain of the Office of Religious Affairs, not the authority of the Dukcapil Office as stipulated in Government Regulations, therefore there is no eligibility standard for the Dukcapil Service to include information on Unregistered Marriages in the Family Card.

Unlike the retentionist group, the abolitionist group is of the opinion that the issuance of a Family Card with the title of Unregistered Marriage is not a serious problem. Precisely with the information on Unregistered Marriages, it is hoped that there will be coordination from the Dukcapil Office to follow up on married couples of unregistered marriages so that they can immediately register their marriages at the Office of Religious Affairs with the aim of obtaining legal certainty. What's more, the issuance of the Family Card is carried out for emergency needs where other solutions cannot be found to eliminate the emergency, so the issuance of such a Family Card does not include acts that are destructive to the authority of the Office of Religious Affairs, even though it is a deviation from the applicable provisions.

Issuance of Family Cards for Sirri Married Couples in Bengkulu Province in the Perspective of *Maslahah*

The Family Card is a human right for every family from the perspective of its function as an identity. Consequently, every family must have a Family Card, regardless of their status. The theory of justice in Islam which is oriented towards fulfilling individual needs within a social framework outlines the provision that every individual and family must obtain the same rights if there are indeed provisions governing them. The state must be active in meeting the primary needs of the community. This concept is similar to commutative justice which applies equal treatment to all legal subjects receiving rights in a country.

Allah SWT. in QS. Shaad/38: 26 orders rulers and law enforcers, as caliphs on earth to administer the law as well as possible, to apply justice to all mankind. With regard to the issue of the obligation to uphold justice.

Islam teaches that basically all humans are equal before the law. Rulers are not protected by their power when they commit tyranny, so are rich and high-ranking people not protected by their wealth and rank when faced with the court of Allah SWT. In QS. Al-Maaidah/5: 8 Allah SWT. orders that humans act fairly as a witness, act straightly in carrying out the law even though there

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[36] Parties who refuse the issuance of Family Cards by the Dukcapil Office for applicants who carry out unregistered marriages.

[37] Parties who do not respond negatively to the issuance of Family Cards by the Dukcapil Office for applicants who carry out unregistered marriages.

are obstacles in the form of threats, pressure, or temptations in any form. Justice is the main general rule that must be considered in applying the law.[38]

Moreover, in an emergency situation, there are demands that must be met by the state with regard to issues of self-identity and family. For example, the need for identity to register children in school, get social assistance, and so on. Here, the nuclear family as the smallest part of society must obtain identity-making facilities initiated by the state. In short, the issuance of Family Cards to all citizens who need them has fulfilled the principle of justice in Islam, especially in accordance with commutative justice which has a social dimension.

Issuance of Family Cards in the Perspective of *Maslahah* Theory

The theory of legal expediency was initiated by Jeremy Bentham (1748-1832).[39] Jeremy Bentham defines utility as a property in any object with which the object tends to produce pleasure, good or happiness or to prevent damage, suffering or evil and unhappiness for those whose interests are considered.[40] Meaning Utilitis states, that the purpose of law is nothing but how to provide the maximum *maslahah* for the majority of society. [41]

The *ushul fiqh* experts divide maslahat into several types, seen from several aspects. In terms of quality and importance, *maslahah* is divided into 3 (three) types, namely: first, *Maslahah adh-Dharuriyah,*[42]which is divided into five, namely: Preserving religion, maintaining the soul, maintaining the mind, maintaining offspring, and maintaining property. Second, *Maslahah al-Hajiyah*, namely the *maslahah* needed in perfecting the basic (fundamental) *maslahah*s before those in the form of relief to maintain and maintain basic human needs. Third, *Maslahah at-Tahsiniyah*, *maslahah* for which the needs of human life do not reach the level of dharuri, nor do they reach the level of hajiyah, but these needs need to be fulfilled in order to give perfection and beauty to human life.[43]

In terms of *maslahah* content, it is divided into two. The first is *Maslahah al-'Ammah*, namely *maslahah* that concerns the interests of many people. This *maslahah* does not mean for the *maslahah* of everyone, but can be in the form of the interests of the majority of the people or most of the people. Second, *Maslahat al-Khashshah*, namely personal *maslahah* and this is rare.

In terms of whether or not the *maslahah*s change, according to Mustafa asy-Sya'labi, it is divided into two. The first is Maslahah ats-Tsabitah, namely maslahah that is permanent, does not change until the end of time. The second is *Maslahah al-Mutaghayyirah*, namely *maslahah* that

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[38] Hasbi Ash-Shiddieqy, "Fakta Keagungan Syariat Islam" (Jakarta: Bulan Bintang, 1975).

[39] Jeremy Bentham is a Utilist with John Stuart Mill and Rudolf von Jhering even though there are different views, where Jeremy Bentham is known as the Father of Individual Utilitarianism (the father of legalo utilitarianism) w is the most radical of the utility experts. Meanwhile, Rudolf von Jhering is the father of sociological utilitarianism). Jeremy Bentham was a philosopher, economist, jurist and legal reformer who had the ability to weave from the threads of the "principle of utility" into a broad tapestry of ethical and legal doctrine known as utilitarianism the schools of utilities. The Principle of Utility was put forward by Bentham in his monumental work, Introduction to the Principles of Morals and Legislation (1)

[40] Van Apeldoorn, "Pengantar Ilmu Hukum, Terj," *Oetarid Sadino, Jakarta: Pradnya Paramita*, 2006.

[41] Rahardjo Satjipto, "Ilmu Hukum" (Cetakan ke-IV, PT. Citra Aditya Bakti, Bandung, 2006).

[42] Jumantoro and Amin, *Kamus Ilmu Ushul Fikih (2005)*.

[43] Jumantoro and Amin.

changes according to changes in place, time, and legal objects. Maslahah like this is related to issues of muamalah and customs.[44]

In terms of the existence of maslahah according to syara', it is divided into three. The first is *Maslahah al-Mu'tabarah*, namely *maslahah* supported by syara'. Second, *Maslahah al-Mulghah*, namely *maslahah*s that are rejected by syara' because they conflict with syara' provisions. The third is *Maslahah al-Mursalah*, namely *maslahah* that is not mentioned by *syara'* and there are also no comprehensive arguments for doing or leaving it, whereas if it is done it will bring great good or *maslahah* .[45]

Viewed from the theory of *maslahah* in general, the issuance of a Family Card with the statement "Unrecorded Marriage" in the marital status column only *maslahah*s certain individuals – namely the perpetrators of unregistered marriages, so that issuance falls into the category of special *maslahah*s (*maslahah al-khassah*). The Family Card obtained from the Dukcapil Office can assist applicants in their efforts to complete administrative documents for public service needs such as registering school children, receiving social assistance, and so on. However, if this issue is viewed through a broader lens of benefit (*maslahah al-am*mah), the issuance of a Family Card including the statement "Unrecorded Marriage" in the marital status column poses potential problems in the future.

Inclusion of the statement "Unregistered Marriage" can be classified as maslahah al-mulghah considering the impact that may arise in society as a result of differences in Government Regulation Number 9 of 1975 concerning Marriage Registration. There are several negative implications of issuing a Family Card for unregistered marriages, namely:

a. There is no centralization of data, because the Dukcapil Office and the Office of Religious Affairs cannot synergize in an effort to support the completeness of administrative data for the state. This means that data on marital status will become chaotic;
b. Disregard for the contents of the article in Government Regulation Number 9 of 1975 concerning Marriage Registration[46] This will raise concerns about the rise of sirri marriages which are carried out illegally without involving the registration process at the Office of Religious Affairs. Even though marriage registration is a public benefit, namely maintaining public order, preventing falsification or other legal deviations such as the identity of the prospective bride and groom and their marital status, including the possibility of differences in their religion.
c. Neglect of the obligation to register marriages by registrars at the Office of Religious Affairs has resulted in people having different views about the legality of a marriage. There will be a perception among the public that in order to obtain marital status, the bride and groom no longer need to register through the Office of Religious Affairs, but it is enough to do a sirri marriage and obtain an SPTJM as a provision to obtain a Family Card from the Dukcapil Service which they see as a legality for the marriage being carried out . This kind of reality will obviously cause big problems in society and be classified as bad maslahah (*maslahah mazmumah*) not good maslahah (*maslahah mursalah*).

Some of the points of potential problems that have been stated above are evidence that the inclusion of the statement "Unrecorded Marriage" in the Family Card issued by the Dukcapil

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[44] Jumantoro and Amin,

[45] Jumantoro and Amin.

[46] Government Regulation Number 9 of 1975 in Chapter II Article 2 paragraph (1) states that: "The registration of marriages of those who carry out their marriages according to the Islamic religion is carried out by Registrar Employees, while intended in Law Number 32 of 1954 concerning Registration of Marriages, Divorces and Refer."

Office for unregistered marriage actors will eventually cause harm if it is not addressed properly.

There are several principles of fiqh that can be used with regard to harm that can arise from the issuance of a Family Card for perpetrators of unregistered marriages[47], namely:

دَفْعُ الضَّرَرِ أَوْلَ مِنْ جَلْبِ النَّفْعِ

Meaning: "Rejecting harm is more important than achieving *maslahah*"

دَفْعُ الْمَفَاسِدِ مُقَدَّمٌ عَلَى جَلْبِ الْمَصَالِحِ

Meaning: "Rejecting evil takes precedence over gaining *maslahah*"

الضَّرَرُيُزَالُ

Meaning: "Embarrassment must be eliminated"

The purpose of sharia is to achieve goodness (*maslahat*) and reject evil (*mafsadat*). The word adh-dharar can be applied to *maslahah*s from one side and harm from the other.[48] Based on the two conceptions above, in the long term perspective, the disadvantages that can arise as an effect of issuing a Family Card for unregistered marriage actors must take precedence over taking the *maslahah*s contained therein. It is a different case if the issuance of a Family Card for the Sirri marriage partner is given a deadline for its validity, for example only for the need to complete administrative documents that are sudden or emergency in nature.

Conclusion

The Department of Population and Civil Registry (Dukcapil) believes that the issuance of Family Cards for sirri marriage couples is part of the main duties and functions (tupoksi) that must be carried out by agencies based on applicable laws and regulations, this issuance has an urgency for recording events as well as administrative documents for unregistered married couples; while the Office of Religious Affairs (KUA) generally stated that the issuance of Family Cards for unmarried married couples was an act that deviated from existing legal norms and at the same time violated the standard order that had long been in effect in society.

The theory of justice in Islamic law views the issuance of Family Cards for sirri married couples by Dukcapil in Bengkulu Province as an enforcement of justice within a social (commutative) framework in which everyone has the same rights over marital status. Based on this social justice, the purpose of publishing it must be just to meet emergency needs such as taking care of children going to school, making motor vehicle correspondence, buying and selling land, and other civil law actions. However, the issuance of Family Cards for sirri marriage couples by Dukcapil in Bengkulu Province can be categorized as *maslahah al-khassah* (special benefit) which benefits only a few parties, not *maslahah al-am*mah (general benefit) which applies to the whole community. In fact, the impact of including the statement "Unrecorded Marriage" in the issuance of Family Cards for unregistered marriage actors can cause *maslahah al-mulghah* in the form of legal confusion regarding the legality of one's marriage while at the same time hindering updating of centralized data which is on the government's agenda.

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