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Alamat Redaksi
Fakultas Syariah IAIN Bengkulu
Jl. Raden Fatah Pagar Dewa - Bengkulu 38613
Email: mizani.sya@gmail.com

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PLURALISTIC FIQH BASED ON PERSPECTIVE OF IMAM AL-SYA'RANI IN THE BOOK OF AL-MIZAN AL-KUBRA

Ahmad Taufik Hidayat[1] & Alfurqan[2]
[1]Faculty of Adab & Humaniora Universitas Islam Negeri Imam Bonjol Padang
[2]Faculty of Social Sciences, Universitas Negeri Padang, Indonesia
Email: [1]ahmadhidayat@uinib.ac.id; [2]alfurqan@fis.unp.ac.id

Abstract: This research was intended to examine al-Sya'rani main thoughts on the diversity of legal schools as outlined in his al-Mizân al-Kubrâ work along with the context and challenges historically which in many cases gave rise to ikhtilaf (differences of opinion) in Fikih, as well as an overview in the legal context as a means of social transformation. The method used in this study was library research, both primary and secondary. Primary sources consisted of the works of al-Sya'rani (especially al-Mizan al-Kubra) with more emphasis on the content analysis. In detail, the problem is formulated in some questions; (1) what is the socio-historical situation (political, socio-economic, intellectual, and religious traditions) behind the formation of al-Sya'rani ideas about Fikih pluralistic?, (2) what is the construction or pattern of al-Sya'rani thought regarding pluralistic Fikih?, (3) what is the position of al-Sya'rani thought in the perspective of law as one of the means of social transformation? As a result of this discussion, al-Sya'rani seeks to provide a new orientation in legal thinking in a direction that is closer to the demands of a real and pluralistic reality of life. The idea is then outlined in four main points of view which include: (1) Justification of three episteme systems (2) The use of pragmatism principles in the application of the law, Legitimacy of legal changes in line with the development of the situation (3) His views on the necessity of ijtihâd and prohibition of taqlîd in practice Sharia law.

Keywords: Pluralistic; Imam al-Sya'rani; manuscript al-Mizan al-Kubra

Abstrak: Penelitian ini dimaksudkan untuk mengkaji pokok-pokok pikiran al-Sya'rani atas fakta keragaman mazhab hukum sebagaimana yang dituangkan dalam karyanya al-Mizân al-Kubrâ beserta konteks dan tantangan historisnya yang dalam banyak hal memunculkan ikhtilaf (perbedaan pendapat) dalam fikih, serta sebuah tinjauan dalam konteks hukum sebagai sarana transformasi sosial. Metode yang digunakan dalam penelitian ini telaah pustaka (library research) baik yang primer maupun sekunder. Sumber primer terdiri atas karya-karya al-Sya'rani (khususnya al-Mizan al-Kubra) dengan lebih mengutamakan sisi analisis isinya (content analysis). Untuk mengkajinya secara lebih rinci, masalah tersebut dirumuskan dalam sejumlah pertanyaan; (1) Bagaimana situasi sosio-historis (politik, sosio-ekonomi, tradisi intelektual dan keagamaan) yang melatarbelakangi terbentuknya ide-ide al-Sya'rani tentang fikih pluralistik? (2) Bagaimana konstruksi atau pola pemikiran al-Sya'rani mengenai fikih pluralistik? (3) Bagaimana posisi pemikiran al-Sya'rani tersebut dalam perspektif hukum sebagai salah satu sarana transformasi sosial. Hasil dari pembahasan ini, al-Sya'rani berupaya memberikan orientasi baru dalam pemikiran hukum ke arah yang lebih dekat dengan tuntutan realitas kehidupan yang sesungguhnya dan bersifat pluralistik. Idenya tersebut kemudian dituangkan dalam tiga pokok pandangannya yang meliputi: (1) Justifikasi tiga sistem episteme (2) Penggunaan prinsip pragmatisme dalam penerapan hukum, Legitimasi perubahan hukum sejalan dengan perkembangan situasi (3) Pandangannya tentang keharusan ijtihâd dan larangan taqlîd dalam pengamalan hukum syariat.

Kata kunci: Pluralistik; Imam al-Sya'rani; naskah al-Mizan al-Kubra

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Introduction

For Muslims, Islamic law in technical terms is called Fiqh. Even though it is quite popular, it is not a convention that is accepted by all Islamic law experts. Some scholars say that Jurisprudence is Islamic jurisprudence[1] occupies a very central position, because the rules which cover all aspects of their lives. Therefore, what is simply called "Islamic law", would actually be more appropriate if it is appreciated as a whole of the religious life system in Islam itself. As a rule, any discussion about the law of Islam always involves the most basic religious beliefs and attitudes of Muslims. This is because in Islamic teachings, divine orders manifest themselves in a concrete way in the form of a certain set of laws and not just general moral commands that are more abstract.[2]

As a religion, Islam is believed by its adherents to have absolute and final truth values, but Jurisprudence as a concept of its application cannot be separated from the influence of changing times and mutually influencing the situation.[3] The scholars concluded that these religious norms through the process of ijtihad from religious sources (*al-masadir al-diniyyah*), which in reality are textually different from one another. From various information groups, the formulation of the norms of life is then drawn using certain methodologies, approaches, and interpretations (*turiiq al-istinbat*).[4] These interpretive rules are known as Usul al-fiqh.[5]

As a result of interpretations that continue to evolve from time to time, the historical environment and socio-cultural atmosphere surrounding individual interpreters are very influential, both on the choice of reference, the method used and the approach pattern used and to the conclusion of ijtihad. The results of this interpretation have now become the enormous intellectual treasury of Islamic law (*tharwa fikihiyyah*). Most of them have been well preserved to date in the works of Jurisprudence in various schools of law.

Research Method

This study is based on a study of libraries (library research), both primary and secondary. The primary source consists of the works of al-Sya'rani (especially *al-Mizan al-Kubra*) with a more emphasis on the side of content analysis. Meanwhile, secondary sources consist of various scientific publications and other scholarly works on *ikhtilâf al-fuqaha'*.

[1] The view that considers the notion of Islamic law as a "translation" of the term Fiqh as it is intended to be used as a whole here, although quite popular, is not a convention that is accepted by all scholars of Islamic law. Noel J. Coulson, for example, in one of his works defines Fiqh as Islamic jurisprudence while Anderson sees it as a Qanun or state law. Some scholars also distinguish the meaning of Islamic law in the context of its general principles (Shar'ia) and in the context of its concepts. technical application (Fiqh). N. J. Coulson, *A history of Islamic Law*, (Aldine Transaction, 2011), p.332.

[2] JND Anderson, Islamic Law in Modern World (New York: University Press, 1959), p. 4; Bandingkan juga dengan D.B. Mc Donald, *Moslem Theology Jurisprudence and Constitutional Theories,* (New York University Press, 1907); and Nasser, *Ideals and Realities of Islam,* (London: George and Allen Unwin, 1966), p. 105-6.

[3] Ahmad Chatib, *Hukum Islam dan Perubahan Masyarakat*, (Jakarta: Intermasa, 1980), p. 357-71. Lihat juga Yusuf Qaradhawi, *Ijtihad Kontemporer Kode Etika dan Berbagai Penyimpangannya*, terj. Abu Barzani, (Surabaya: Risalah Gusti, 1995), p 7-10.

[4] These interpretive rules are known as Usūl al-fiqh. For a broad description of the theories of legal interpretation in Islam, see al-Yasa Abu Bakr, "Some Jurisprudence Theories and Their Applications" in Tjun Sudjarman (ed.), *Hukum Islam di Indonesia Pemikiran dan Praktek* (Bandung: Rosdakarya, 1994), p. 173- 208. Juga Muhammad Hashim Kamali, *Prinsip dan Teori-teori Hukum Islam,* translated by Noorhaidi (Yogyakarta: Pustaka Pelajar, 1996), in chapter IV and V, p. 109-88.

[5] Kutbuddin Aibak, "Penalaran Istislahi Sebagai Metode Pembaharuan Hukum Islam", *Al-Manahij: Jurnal Kajian Hukum Islam,* Vol. 7, No. 2, 2016, doi: 10.24090/mnh.v7i2.2013.pp169-182.

The methods used in this research include descriptive, historical, and synthesis analysis methods.

This is qualitative research, so the strategy and approach is inductive-conceptualization. The data analysis is tentative, so that as long as the research is ongoing there is always the possibility of making adjustments in the discussion frame and also improving the problem mapping frame, in line with the possibility of new findings that might encourage the modification.

The Urgency of Plurality of Fiqh

The wide spectrum of *ikhtilaf* (differences between the schools of Fiqh), as a whole, is a blessing for people's lives and there are many alternative ways to practice religious teachings that they can choose according to the conditions of each individual[6]. The legitimacy of this is often quoted from the Prophet's hadith: "ikhtilaf 'ala ummati rahmah" (differences of opinion among my people are mercy)[7]. However, the authenticity of the hadith is from a certain point of view controversial[8].

However, in reality, the various legal concepts, on the other hand, have created separate dilemmas for the lives of Muslims, both individually and collectively from the past until now.[9] The issue of Law schools which became one of the historical evidence of the brilliant intellectual activity of the early generations of Muslims (especially the 1st to 3rd centuries of Hijriah), it turns out that lately, it has caused many unwanted effects and among the most serious consequences is the disruption of the spirit of solidarity and ukhuwwah among them, as well as the emergence of various difficulties in formulating appropriate forms of response to modernity by sticking to the fundamental values of religious teachings that they believe in.

Many factors influenced this, but among the most dominant was the excessive admiration for the founding fathers and school leaders, who slowly but surely eroded the criticisms of the scholars and tended to limit their intellectual activities to their efforts. collect, understand, develop, defend, record and then disseminate the thoughts of the priests of that school.[10]

The increase in the spirit of sectarian fanaticism is directly proportional to the tendency to weaken creativity and the spirit of innovation to create something new. Another negative implication is the reduced intensity of the flow of healthy intellectual dialogue across schools. So it is natural that over the last five centuries, even though the world has experienced very dramatic historical developments in various fields, the thinking of the scholars has hardly departed from the issues of "margins" which have actually

[6] There are two poles of views in addressing this summary fact. The first group rejected the possibility of *ikhtilaf* because they saw *ikhtilaf* as *bid'ah* and became the cause of the decline of the people. Meanwhile, the second view actually sees it as concrete evidence that even though Islam stands firmly on the basis of absolute truth, it still provides wide space for the development of thought.

[7] This is stated by al-Tabari in *Ikhtilaf al-Fuqaha*' (Beirut: Dar al-Kutub al-Ilmiyya, tt.), p. 6

[8] Syekh Nasiruddin al-Albani, for example, strongly rejected the validity of this hadith. Quoting Allamah Subky, regarding the hadith he said "Sanad da'if and maudu'nya are not found let alone valid ones". see Mun'im A Sirry, "Ke Arah Rekonstruksi Tradisi Ikhtilaf", *Jurnal Ulumul Quran*, vol. V, no. 4, 2004, p. 59.

[9] Among the academic problems regarding this matter, among others, can be seen at Ubaid al-Haqq "Islamic Revival: The Challenge of Change" in Taufiq Abdullah. (ed) *Tradisi dan Kebangkitan Islam di Asia Tenggara*, (Jakarta: LP3ES, 2008), p. 460-83. See Anderson, *Islamic Law*…, p. 81-100

[10] Mun'im A.Sirry, *Sejarah Fikih Islam*, (Surabaya: Risalah Gusti, 2005), p 132.

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been thoroughly discussed by previous scholars. Until now, there are still many Jurisprudence scholars who still like to spend their intellectual energy discussing various classical legal cases that have been the subject of debate for centuries since the Middle Ages. In the context of social life, such patterns of intellectual attitudes naturally fertilize the "seeds of conservatism" in all areas of life and foster "the spirit of sectarian fanaticism" which has been proven to often destabilize the unity of the ummah.

Thus, even though there have actually been various legal concepts as a result of the development of thought in the past, most people still cannot get significant benefits, because culturally most of them are already educated to a priori affiliate themselves (and only want to relate) with a particular school of thought or school of thought. What Coulson describes as a form of conflict and tension between the existing Islamic legal concepts, namely between the principles of unity (unity) and diversity (diversity), remains unsolved.[11]

In response to this situation, a number of scholars attempted to make breakthroughs with cross-sectional legal studies, comparative studies (muqaranah al-mazahib) and tarjîih. Ibn Qudamah (d. 620 H / 1223), a prominent Hanbali scholar, was one of a number of important pioneers. Through his magnum opus, al-Mughni al-Muhtaj (Ibn Qudamah, 1983), he made a critical study of various views of Jurisprudence to be compared with the traditional views that developed within the Hambali school of thought. This step was followed by a number of scholars in the following periods.[12] This effort was, of course, an important and courageous step in trying to break the ice at the time. However, because the comparative study and tarjih are carried out individually based on reference sources, methodologies and their own approaches, while their followers are also not accustomed to appreciating various opinions, from there a number of "new schools" (schools of tarjih results are born again).which vary and have no small influence in the escalation of the growth of sectarian primordialism, especially in the common people.

Here is the problem, that at the level of application, the validity of a concept of Islamic law is not sufficient if it is only approached from the side of the tariqa al-istinbat, but requires more comprehensive approaches, which include: (1) comparative-critical analysis. in terms of methods and approaches in his istinbat (2) epistemological studies, especially regarding sources of knowledge regarding Islamic law that can be considered valid, (3) studies of the aspects of moral philosophy behind the practice of Islamic law and religious obsessions of people people of faith, (4) other approaches in the form of critical analysis from a historical and socio-cultural perspective.[13]

Biography of Imam Al-Sya'rani

Imam Al-Sya'rani was born on the 27th of Ramadan 898 H / 1493 AD in the village of Qalqasyandah, the village of his grandfather from the mother line. His real name is, Abd al-Wahhab ibn Ahmad ibn Ali ibn Ahmad ibn Ali ibn Muhammad ibn Zaufan ibn Shaykh Musa the title of Abu Umran ibn Sultan Ahmad ibn Sultan Fasyin ibn Sultan Mahya ibn Sultan Zaufan ibn Sultan Rayyan ibn Sultan Muhammad ibn Musa ibn Sayyid

[11] N. J. Coulson, *A History of Islamic Law*, p.334.

[12] N. J. Coulson, *Conflicts and Tension in Islamic Jurisprudence*, (Book Review, Archív Orientální, 41, 2003), p. 134.

[13] N. J. Coulson, *Conflicts and Tension*…, p. 182-183.

Muhammad bin Hanafiah ibn Imam, Ali ibn Abi Talib Radiyallahuanhum. Imam Al-Sya'rani memorized al-Quran and several eyes from childhood, Abu Syuja 'and al-Ajrumiyah. Learned these two eyes from his brother who is also a scholar. In the tenth year of his life, he and the scholars studied *nahwu* and others. Has the characters of *zuhud, qana'ah, tawakkal,* and far from the luxury of life, and since he was young he has lived the world of Sufism.[14]

Since childhood, he had been orphaned. For that he was raised by his brother Shaykh Abd al-Qadir, an alim and Sufi. And since he was young, the name Imam Sya'rani began to be known and gained wide acceptance from the community, having recitation in mosques and madrasas.[15] While in Cairo he studied with the best scholars at that time; Imam Jalaluddin as-Suyuti, Zakariya al-Ansari, Nasiruddin al-Luqqani, ar-Ramli, al-Samnudi, Shaykh Nuruddin al-Tarabulisi, Shaykh Syihabuddin asy-Sya'labi, Shaykh Syamsuddin al-Qurra 'al-Kabir, all three Hanafi, Shaykh Ali alKhawwas al-Barlisi, who according to Imam Sya'rani he is illiterate. There he also studied Sufism, fiqh, jurisprudence, hadith, interpretation, and language[16], memorizing the book al-Minhaj by Imam Nawawi, Alfiah ibn Malik, Taudih and Qawa'id ibn Hisyam, Jam'u al-Jawami', Alfiah al-Iraqi, al-Miftah summary, works of the Imam Syatibi, as well as summary books . He also did not forget to memorize a summary of the book ar-Raudah, a book that collects many opinions in the Shafi'i school of thought. Besides the Syafi'i school he also studied 3 other major schools.[17] Under the guidance of Imam Zakariya al-Ansari, Imam Sya'rani read the books of fiqh, ushul fiqh, and tasawuf. Such as: Raudhah, Minhaj, Tafsir al-Qur'an al-Azhim by Imam Baidawi, Hasyiah Tibbi on al-Kasyaf's interpretation, Hasyiah Jalaluddin as-Suyuti Jam'u al-Jawami', Syarah al-Bukhari by Imam Ibn Hajar, al- Kirmani, al-Aini, al-Barmawi, and many others. Imam Zakariya wrote quite a number of articles and was widely distributed, and at that time he was also the great mufti in Egypt.[18]

The depth and breadth of Imam Sya'rani's knowledge can also be seen in the book al-Mizan al-Kubra. Before writing this book, he had studied various books which were classified into three parts,[19] namely:

1. The books that have been memorized by heart, and have been recited to the scholars.
2. The books that have been given sharah verbally in front of the scholars repeatedly in the context of tashih, he mentioned the second part of the book in al-mizan approximately 76 book titles, of which there are volumes and read to the scholars repeatedly, such as: Syarh al-Minhaj, written by Sheikh Jalaluddin asSuyuti which was recited to many sheikhs including Ibn Qadi Ajlum by examining his syarahs in Egypt 10 times.
3. The books are reviewed by themselves, then asked questions that are difficult to the scholars. The books in this section reach approximately 125 book titles, covering books in the fields of fiqh Syafi'iyah, Malikiyah, Hanabilah, Hanafiah, in the

[14] Mahmud Ahmad Hasyim, *al-Imam al-Sya'rani,* (Kairo: Maktab Islamiyah, 2001), h. 16.

[15] Mahmud Ahmad Hasyim, al-Imam al-Sya'rani, h. 75.

[16] Mahmud Ahmad Hasyim, al-Imam al-Sya'rani, h. 20.

[17] Mahmud Ahmad Hasyim, al-Imam al-Sya'rani, h. 46.

[18] Mahmud Ahmad Hasyim, al-Imam al-Sya'rani, (Kairo: Maktab Islamiyah, 2001), p. 123.

[19] Imam Sya'rani, al-Mîzân al-Kubrâ, (Singapura: Mathba"ah Sulaiman Mar"i, t.th), p. 75-79.

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field of language, hadith, fatwas, and qawaid. Such as: Tafsiral-Baghawi which he studied 3 times, Jalalain's interpretation 30 times, Jalal al-Mahalli's Syarah Minhaj 10 times and others.

Of the many books he has read, it can be said that he really has mastered the various thoughts of the scholars across schools of thought, which led him to perform *ijtihad* to integrate these various opinions in his various books.

Imam Sya'rani likes to read the works of scholars, he is also very active and productive in producing various works in various disciplines, ranging from the science of monotheism and faith, jurisprudence, hadith science, ushul fiqh and *qawaid*, knowledge, biographies of scholars, Sufism, medicine and etc. For example the books Mukhtashar I'tiqad al-Baihaqi, Kasyf al-Ghummah, al-Badru al-Munir Fi Ahadis al-Basyir, Thabaqat al-Kubra, Lawaqih al-Anwar al-Qudsiyah, and others.

In Manaqib al-Qubra as conveyed by Muhammad Muhyiddin Abi al-Uns, Imam Sya'rani has written approximately 300 books related to the science of sharia and its tools.[20] Even in some of his works, Imam Sya'rani has a specificity where none of the previous scholars wrote it, and his tasawuf works can be pursued and studied by anyone who studies them without needing a teacher (shaykh).[21] As well as Imam Sya'rani whom Allah met with expert scholars, he also had several students who studied with him, including: Abdur Rauf al-Munawi asy-Syafi'I, Abdur Rahman ibn Abd al-Wahhab asy-Sya'rani, Syihabuddin Ahmad al-Kalaby al-Maliki, Muhammad Hijazy ibn Abdullah al-Qalqasyandi.[22]

[20] Imam Sya'rani, *al-Mîzân al-Kubrâ*, p. 67.

[21] Muhyuddin Abi al-Uns, *al-Manâqib al-Kubrâ.* p. 71.

[22] Muhyuddin Abi al-Uns, *al-Manâqib al-Kubrâ*, p. 90-93

The Reality of the Diversity of Understanding in Fiqh

In the reality of life that always appears various problems that require legal answers, it is often that a particular legal issue gets more than one or even very various opinions as a solution or answer regarding the legal provision. If the opinions are identical or in harmony, perhaps it does not matter. But how are the solutions different? As a result, in a legal issue, where there are various legal opinions or different fatwas, it often raises trush claims from certain groups that can trigger conflict in society.

The attitude of neglect in dealing with differences or various fatwas so far has been a factor causing social disharmony among Muslims in various places. In addressing the various kinds of fatwas of ulama in Islamic law, it is necessary to develop new thoughts as an alternative solution.

In a practical level, fiqh is a science that is flexible and dynamic in accordance with its object and context. This fact can be seen from the many differences in views or opinions between fiqh scholars. This difference does not only arise from those with different schools of thought, but also within the same school as adherents of the same sect.[23]

Therefore, differences in views or opinions on the issue of fiqh are a reality and inevitably occur, because these differences depart from different perspectives on interpretation and understanding of sources, all of which are essentially from the texts of the Al-Qur'an and the Hadith.

The application of shari'a rules is not sufficiently understood as an effort to make texts (both literally contained in sharia texts

[23] R. Sugara, *Reinterpretasi Konsep Bid'ah Dan Fleksibilitas Hukum Islam Menurut Hasyim Asy'ari,* (Jakarta: Asy-Syari'ah, 2019).

and literature by mujtahid ulama) into social realities, but rather as a result of the eternal process of "interactive dialogue", the result being the point of elastic balance of the force of attraction between the demands contained in the text and social reality; also between what is considered ideal and what can actually be strived for, which is expected to provide the best answers to existing social problems, as well as produce a positive impact that is truly felt by the community.

Different situations and conditions are very important in determining the style of thought and life of the community, including in the religious aspect. Differences in the characteristics of religious life between people in mountainous areas with cool air and people living in hot coastal areas. The level of difficulty in praying for example, differs between areas that have an abundant supply of water and areas that are difficult to get clean water. Such natural conditions cause differences in the level of difficulty faced by people in living life, which in turn also determines the diversity of religions in the area.

The diversity of sociological characteristics and the stages of social development also greatly affects the atmosphere of community life and the complexity of problems in the political, economic, social, cultural and scientific development fields. The difference between the life of rural and urban communities, between agrarian and industrial societies, between the poor and the rich, between majority Muslims and minorities, between independent nations and colonized nations and between communities with strong written traditions and those with stronger traditions oral. These differences will also affect the style of thought and practice of religious teachings between community groups.[24]

The influence of ulama who carry or spread religion also greatly influences the understanding and pattern of diversity of the society in which religious teachings are spread. This explains why the Islamic atmosphere in certain regions tends to use certain schools of thought. Differences in psychological maturity, social and spiritual visions between individuals, which are influenced by many factors such as age, gender, completeness and physical abilities, intellectuality, level of economic welfare, social position, educational background, family environment, childhood experiences and other special experiences. This has a profound influence on the legal conclusions that result from istinbâṭ activity on the sources of sharia.[25]

In the stretch of the course of Islamic history, various schools of law reflect the reality of plurality that cannot be denied. Likewise, various fatwas on a certain legal issue have emerged since the time of the Companions, then the time of Tabi'in and their followers and the climax was in the era of the Imam mazahab and so on until now. Various responses have emerged from among the scholars regarding the reality of the various fatwas that have emerged, including from Imam al-Sya'rani.

[24] Mutohharun Jinan, "Penetrasi Islam Puritan Di Pedesaan, Kajian tentang Pola Kepengikutan Warga Majlis Tafsir AlQuran", *Profetika Jurnal Studi Islam,* Vol. 14,No. 2, Desember 2013, doi: https://doi.org/10.23917/profetika.v14i2.2011

[25] M. Arif, "Islam, Kearifan Lokal, dan Kontekstualisasi Pendidikan: Kelenturan, Signifikansi, dan Implikasi Edukatifnya", *Al-Tahrir: Jurnal Pemikiran Islam,* Vol. 15, No.1, 2015, p. 173.

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Imam Al-Sya'rani's thoughts on the plurality of Fiqh

Imam Al-Sya'rani (898-973 H/1492-1565) is one of the small number of scholars who are known to have tried to appreciate all of the above at once and then put it in his theses comprehensively. To support his theses, he also included layers of arguments, both from the texts of the Al-Qur'an, Sunnah, historical explanations and rational elaborations.

For Imam Al-Sya'rani, the diversity of thoughts and the practice of Islamic law in people's lives is not only a historical reality (das Sein) which must be forced to accept, but from an ethical point of view it is also a moral imperative (das Sollen). Of course in order for the appreciation of the work to be carried out properly, all the social visions and ideas contained in it must be seen fairly according to the stages of intellectual development, challenges and the socio-historical situation of society at that time and only then put them in perspective of the problems faced by the community. humans in the present. [26]

Compared to the patterns of handling ikhtilâf developed by other scholars, among the scholars who have discussed this issue (the question of changing the rule of law in line with the development of the situation) is Ibn al-Qayyim (d. 751/1350). both those who lived before and after it, the theory of al-Sya'rani has distinctive important aspects: First, there is an attempt to combine an ethical perspective with a legality approach (between s*yari'at* and *haqiqat*) in developing the theory and application of Islamic law; and also a combination of epistemological approaches between tradition, ratio (reason) and *kasyf* (intuition) on the other.

Second, the concept is very accommodating to the dynamics of people's lives. For al-Sya'rani, the principle of fiqh historicity is something that must fundamentally be accepted. Therefore, the meaning of Islamic law should not be limited to what is explicitly stated in the Al-Qur'an and Sunnah (*ma shahidat lahu al-shari'a sarihan*) or the thoughts that have been developed by the *salaf al-salihin* of the early generations (companions of the Prophet and *tabi'in*), but also includes all intellectual products of the *ummah* throughout history that are in line with the universal messages of the *Shari'a*, even though the Prophet never stated explicitly or did it himself (*wa in lam yusarrih bihi al-shari*').

Third, the affirmation of his belief in the truth (as well as appreciation) for the conclusions of all *mujtahidin* scholars, especially the four main schools of thought that have continued to develop until now. According to him, all the results of the *ijtihad* of the *mujtahidin ulama* figures are not only true and acceptable in the context of their theoretical truth entity, but at the level of application they are also at an equal position, as long as the arguments meet the requirements to be accepted.

The anxiety of al-Sya'rani as a *faqih* in seeing the *faqih*'s way of thinking in response to the needs of the mainstream society, is seen from several aspects; first; the approach used by the *faqih* in understanding sharia tends to be rigid and standardized. Al-Sya'rani's thought tends to be compromise, for example his attitude towards conflicting arguments, using the terms *azimah* and *rukhsah* to take steps to resolve. The terms *azimah* and *rukhsah* are actually one of the discussions in *ushul fiqh*[27]

[26] Zulkifli Hasan, "Yusuf al-Qaradawi dan Sumbangan Pemikirannya", *Global Journal Al-Thaqafah,* Vol. 3, No. 1, 2013, p. 14, https://doi.org/10.7187/GJAT332013.03.01

[27] According to Abdul Wahhab Khallaf rukshah is the

related to the division of *wad'i* laws, but not for the settlement of *ta'arud al-adillah*.

Besides using the terms *azimah* and *rukhsah* in his compromise model, al-Sya'rani uses another term with the same meaning, namely *tasydid* for something categorized as heavy, while *rukhsah* for something that is categorized as light (*takhfif*). Second; doctrinal and ideological approaches in developing legal concepts without considering the implications and needs in responding to society's problems. Third, there is a tendency to give authorization to certain scholars in determining laws in all matters, even on technical matters so that this condition can numb the sense of morality and intellectual society in the ability to distinguish between *Haq* and falsehood. Fourth, legal products that are born tend to worship the truth are considered to have absolute truth, so that there is no gap of opinion, even though the problem decided is zhanni. For example, the opinion of the scholars who oblige the taklid of a muqallid or layman whose scientific position is limited and is unable to perform legal istinbat and perform ijtihad while still providing freedom for them to practice other schools of thought in order to avoid fanaticism.[28] For Imam Sya'rani changing schools is a possibility, and does not blame people who move from one mazhab to another.[29]

Another dimension of al-Sya'rani's orientation is that apart from being based on religious sources, legal thinking must always be linked together with the complexities of life's problems in the spirit of finding solutions. Therefore, the development of the legal concept must be accompanied by careful calculation of the implications that will arise from the application of the rule of law, both for the person concerned and for the citizen in general.

Another thing that can be implicitly identified from al-Sya'rani's thought is the introduction of a kind of pragmatism principle in determining the choice of legal concepts to be applied. Based on these principles, in order to assess the legal concept that will be carried out or applied in the life of a plural society, first of all, it must go through several stages of evaluation.

From a theoretical point of view, there is a sound validity of the bill based on compliance with the source (proposition) and general principles of Sharia law. This stage can also be referred to as the proposition verification stage, namely the steps to confirm whether the legal concept has sufficient arguments from the theoretical study of sharia, regardless of the analysis method and the approach pattern used in concluding.

In this context, al-Sya'rani asserted that his position was different from that of most jurists. According to him, the truth of fiqh at this level is pluralistic and tiered (consisting of several alternatives based on the principles of takhff and tashdid), which is theoretical (only at the level of intellectual construction and has not bound anyone to practice it). Al-Sya'rani thinks at this level it is no longer pluralism, but has been included in the category of parallelism. Parallelism is understood as a flow in theory of thought where a theory of

desire of law that has been declared by Allah for mukkallaf in certain circumstances which are in accordance with that desire. in general from the beginning which is not limited to certain circumstances. Abdul Wahhab Khallaf, *Ushul Fiqh*, p. 167.

[28] Said Ramadhan al-Buthi, *Alla Mazhabiyyah Akhtar Bid'at Tuhaddidu al-Syari'ah al- Islamiyyah*, terj. Anas Tohir Sjamsuddin, *Bebas Mazhab Membahayakan Syariat Islam*, (Surabaya: PT Bina Ilmu, 1983), Cet. ke- 2, p. 63.

[29] Ahmed Fekry Ibrahim, *"Al-Sharänïs Response to Legal Purism, Islamic Law and Society", Brill,* Vol. 20, Issues 1-2, 2013. p. 130. doi: 10.1163/15685195-0004A0004

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interpretation or a special comparative method that seeks to find similarities in the formulation of thoughts between two opinions that have different contexts, emphases, directions of thought and solutions but have characteristics that are in line, congruent or parallel. In other words the view that all schools of thought and schools of thought, though different, tortuous and seemingly contradictory, have a point of alignment which allows them to meet one another at the time limit of the human pilgrimage.

The application of any rule of law needs to prioritize achieving more basic and universal legal objectives, while legalistic-formalistic technical aspects (no matter which version of the school they wish to use) should be placed on secondary priority. That is, all the different views of the law must be accepted without exception, all argue that a pattern-based approach is sufficiently ubiquitous, and tarjih is not necessary from the start to select one idea that is assumed to be true for all (assuming the other is forever). Apart from that, the criteria in determining which version of the legal concept is considered accurate are also closely related to methodological choices, which still have debatable sides. Thus, the formalities of Sharia teachings can be applied flexibly according to situations and conditions, while the achievement of broader moral goals is always a higher priority.

Conclusion

Al-Sya'rani seeks to provide a new orientation in legal thought towards a direction that is closer to the demands of the real and pluralistic realities of life. The idea is then stated in three main points of view which include: (a) Justification of three episteme systems (b) The use of pragmatism principles in the application of law, (c) The legitimacy of legal changes in line with developments in the situation. His view is about the necessity of *ijtihâd* and the prohibition of *taqlîd* in practicing sharia law.

His book *Mizan al-Kubra* provides solutions to jurisprudence problems to cover all opinions of classical scholars regarding various existing *fiqh* problems, ranging from issues of worship, *muamalah, munakah,* or *jinayah*. The other side of al-Sya'rani's thoughts which he stated in his book, is the mapping of the opinions of the scholars who are rather strict (*mutasyaddid*) in issuing fatwas against various cases of fiqh that exist with those who are lighter (*mutasahhil*). This is only intended to provide a more diverse presentation for Muslims in doing charity according to the opinions of the scholars they like.

Al-Sya'rani, who was always compromising in seeing the differences in opinion among the scholars. Respect all the opinions of the scholars, however weak they are. Because after all, what they claim cannot be separated from the methodology and argument. The conclusion is, as long as the opinion is still based on the methodological and systematic argument and *istidlal* (way of reasoning), there is no room for anyone to ignore or even blame it.

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INTEGRATION OF ISLAMIC SHARIA IN NATIONAL LEGAL SYSTEM

M. Sulthon
Faculty of Syariah and Law, UIN Sunan Ampel Surabaya
Jl. Ahmad Yani No.117, Jemur Wonosari, Kec. Wonocolo, Kota Surabaya, Jawa Timur 60237
Email: sulthonproling@gmail.com

Abstract: The purpose of this study is to answer the formulation of the problem of how is the objective condition of Islamic law in the politics of law in Indonesia and to find a concept to integrate Islamic Islamic law into State law. The research method is qualitative with a normative, philosophical and sociological approach. Substantially, the idea of formalizing Islamic law in Indonesia cannot be maximized without adaptation and reform to Islamic law, namely through ijtihad and maslahat. Every text of the Al-Qur'an and hadith that contains the law must contain maslahat. So that maslahat is an attempt to explore the meaning of the text of the Al-Qur'an. Maslahat is operationally manifested in the form of ijtihad theories, for example; qiyas, maslahah mursalah, istihsan, syad al-zdari'ah and urf. Likewise, maslahat affirmation of laws that are not contained in the Al-Qur'an and hadith, can be confirmative and can also be negative. The identification of maslahat as the essence of maqashid al-sharia is based on 1) the texts of the Al-Qur'an, the majority of which are in the form of amar and nahyu, (2) Illat and wisdom found in al-Quran and hadith, (3) al-Istiqra'.

Keywords: Islamic Sharia; maslahat; ijtihad; maqashid sharia; state law

Abstrak: Tujuan penelitian ini untuk menjelaskan kondisi objektif syariat Islam dalam politik hukum di Indonesia, dan upaya menemukan konsep untuk mengintegrasikan syariat Islam Islam ke dalam hukum Negara. Penelitian ini menggunakan metode kualitatif dengan pendekatan normatif, filosofis dan sosiologis. Hasilnya, ide formalisasi syariat Islam di Indonesia secara substansif tidak dapat maksimal tanpa adanya adaptasi dan reformasi terhadap syariat Islam yaitu melalui ijtihad yang mengutamakan maslahat. Setiap teks al-Quran dan hadis yang berisikan hukum, pasti mengandung *maslahat*. Sehingga maslahat merupakan pijakan utama untuk menggali makna teks al-Quran dan hadis. *Maslahat* secara operasional termanifestasikan dalam bentuk teori-teori ijtihad, misalnya *qiyas, maslahah mursalah, istihsan, sadd al-dzari'ah dan urf.* Begitu pula dengan penegasan *maslahat* terhadap hukum-hukum yang tidak terdapat dalam al-Quran dan hadis, bisa bersifat korfirmatif dan bisa juga bersifat afirmatif. Upaya integrasi harus dimulai dari identifikasi *maslahat* sebagai inti dari *maqashid al-syariah* berdasarkan pada ayat-ayat al-Quran, terutama yang berbentuk amar dan nahyu; lalu *illat dan hikmah* yang terdapat dalam al-Quran dan hadis, kemudian *al-Istiqra*' dengan tetap memperhatikan dinamika masyarakat modern di Indonesia.

Kata kunci: Syariat Islam; maslahat; ijtihad; maqashid syariah; hukum negara

Introduction

The efforts to integrate Islamic law into state law in Indonesia have become a tradition that adorns every Order. Starting from the Old Order, the New Order, to the current Reform Order. This is still carried out as one of the agendas for the struggle of Muslims, both in the political, legal, economic, and social order. In its struggle, it also experienced a very dynamic condition. Although Indonesia is known as the largest country with the largest Muslim population in the world, the

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direction and steps of its adherents are also different, there are those who want Islamic law to be implemented based on the Al-Qur'an and hadith, this group is called a group that emphasizes normative-ideological idealism. There are also groups who want the absorption of the values of the teachings of Islam, without emphasizing the mere symbols of the text, but how Islamic teachings can embrace all levels of society as a religion of *rahmatan li al-alamin*.

From a historical perspective, the spirit to fight for Islamic law to become positive law is old issue. Since the time of the Companions until now there have been movements, organizations and understandings that want Islamic law as positive law. Figures such as Hasan al-Banna, Sayyid Qutb, al-Maududi, and Abu Bakr Al-Baasyir are a handful of figures who want Islamic law as state law.[1]

The emergence of the religious spirit of some Muslims by continuing to fight for Islamic sharia to become state law is something we should be grateful for. However, there should be no assumption that "only" is true Islam. Because Islam actually came down not to a social vacuum, Islam pays close attention to the values of the existing locality. This is evidenced by the existence of a cause that underlies the decline of a verse and the emergence of a hadith. Observing some of the issues raised by Islamic formalists, there are suspicions that their movement is more towards the "institutionalization and formalization" of existing Islamic teachings rather than reforming and exploring new laws that pay attention to local values or have Indonesian nuances.

If the above stated that there are groups that want to present Islam in a formal, attributive manner. There are other groups who want to present or fight for substantive Islam.[2] For this group, the most important thing in practicing Islam is the practice of Islamic teachings or Islamic values. In practice, the most important thing for this group is how Islamic teachings can be practiced in all aspects of life, without having to formally accentuate Islam. The efforts made by this group are by extracting new laws from the text or sharia adapted to the existing context.[3]

Basically there are three sources of national law; Western law, Islamic law, and customary law.[4] This proves that Islamic law has a place in the formation of national law. With the recognition of Islamic law as part of the material for making positive Indonesian law, this is an opportunity as well as a challenge for Indonesian Muslims to be able to formulate Islamic law that can be accepted as material for formulating national law. Indonesia, which is a multi-cultural and multi-religious country, is a challenge in formulating Islamic law that can be accepted by all elements.

This study does not intend to assess which model of fighting for Islamic law in Indonesia is the better of the two groups above, but it wants to formulate how Islamic legal efforts become an integral part of positive law or national law.

[1] Haedar Nashir, *Islam Syariat: Reproduksi Salafiyah Idiologis di Indonesia*, (Bandung: Mizan Media Utama, 2013), p. 16.

[2] Siti Mahmudah, Politik Penerapan Syariat Islam Dalam Hukum Positif di Indonesia, *Jurnal Al-Adalah*, Vol. X, No. 4, 2012, p. 403-414.

[3] Masruhan, "Positivasi Hukum Islam di Indonesia Era Reformasi", *Jurnal islamica*, Vol. 6, No, 1, 2011, p. 124-125.

[4] Alda Kartika Yudha, "Hukum Islam dan Hukum Positif: Perbedaan, Hubungan, dan Pandangan Ulama", *NOVELTY (Jurnal Hukum)*, Vol. 8, No. 2, 2017, p. 157-172.

Reseacrh Method

This research is a type of juridical normative or legal dogmatic research, it can also be called a doctrinal law study. The method used is qualitative with a normative, philosophical, and sociological approach.

The ups and downs of Islamic law in Indonesia's political constellation

a. The dynamics of Islamic Law legislation in the New Order Era

Law and politics cannot be separated. The law serves as a guideline for regulating orderly social engineering. Meanwhile, politics functions so that the law can run through recognition and sanctions in the law. So it can be said that the law is determined by political power, because it consists of procedures and a body of laws that are determined or made by political power. Considering that the constitution has the highest legal position, sociological methods were used in its formation.

The history of Indonesian constitutional administration, in its journey often shows the existence of political and legal relations that do not reflect conformity with the mandate of the constitution. In the preamble to the 1945 Constitution it is stated that the Indonesian state is a country that puts sovereignty in the hands of the people. Furthermore, in paragraph three, article one, the explanation of the 1945 Constitution also explains that Indonesia is a state based on law, not only based on power, while its government is based on a system that is not absolute. To build a rule of law is based on four principles; democracy, equality, law, and government that serves the people.

The constitution clearly states that this country is a constitutional state, so that law should play a role in determining all aspects of life. In the Indonesian context, the rule of law has its own specifications. This is because the state foundation in the form of Pancasila is the reference or source of all laws in Indonesia. The main characteristic of Indonesia as a constitutional state which is a state based on Pancasila law is the guarantee of freedom of religious life.

Although the 1945 Constitution in its explanation uses the term rule of law, what is meant by the constitutional state of Indonesia is different from the formulation of a rule of law according to Western conceptions. The concept of a rule of law in Indonesia has unique characteristics, namely that it does not separate state and religion, guarantees freedom of religion, does not justify atheism, does not justify communism. So that Indonesia as a rule of law has several main elements, namely Pancasila, the constitutional system, equality, and law enforcement.

The next period was the Old Order, these basic principles did not work as they should. Where the sovereignty should have been in the hands of the people, but in reality the sovereignty was in the hands of the president. The law is not enforced properly, in fact law becomes the subordination of power. There is an unbalanced relation between law and politics, so that it does not place law as commander, but puts political power as commander.

The next period was the New Order in 1966. This order was determined to correct all abuses and deviations committed by the Old Order, and to improve the pattern of life as a nation and state based on Pancasila. The achievements in this period were quite visible, in particular putting the legal and political relations back under the implementation of Pancasila and the 1945 Constitution.

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However, in the course of time this Order was stuck with the pragmatism interests of development. Where measuring the success of development is only based on quantitative calculations. That is, justification is based solely on political teleology, not emphasizing principles based on law and the constitution.

In practice, executive power is exercised arbitrarily and is untouched by the law or the people's representative institutions. In theory, a state is called a rule of law if the government carries out its duties based on and is responsible for fulfilling the rule of law. Thus, if the government or political power has respected and implemented the law, it is a reflection that that power is in accordance with the will of the sovereign people.[5]

The act of measuring success by only prioritizing quantitative aspects carried out by the New Order meant that it did not pay attention to the principles that had to be upheld, even an attitude that led to arrogance of power. If this is not resolved immediately, it can become an obstacle in realizing the government's commitment to safeguarding and enforcing the constitution, democracy and law. To enforce the law, constitution and democracy it is not enough to rely solely on political will which is rhetorical. More than that, what must be done is a real effort to implement the constitution, maintain and develop democracy as well as build the authority of the law in all aspects of life.

In order to create good governance, it is necessary to have legal institutions and political institutions that support and complement each other in the form of a genuine will in implementing democracy and upholding the authority of the law. It all depends on the understanding and responsibility in carrying out the duties of each legal and political institution in accordance with what is mandated by the constitution. This means that the government must implement legal politics properly. The definition of correct political implementation is the fact that there is also the direction of legal development carried out by the state authorities. This means that the law functions as a legal policy that must be enforced and applied nationally in a country.[6]

From a theoretical-philosophical perspective, legal politics is a measure for the realization of legal guidance and development. Meanwhile, from a normative-operational perspective, legal politics means the will or program of the government to achieve the desired society. A philosophical-theoretical perspective means making Pancasila the ideal of law in the Indonesian state. Then the operational-normative perspective emerged in the form of state law.[7]

In terms of Islamic law, usually only the power of the Religious Courts can be imagined. In fact, it is not only that, but it involves various aspects of life, both those related to vertical and horizontal aspects. According to historical records, Islamic law is slowly starting to be eroded. Only the family law remains the power of the Religious Courts. It is unfortunate if the existence of Islamic law, which in reality has contributed to the history of the Indonesian nation, must be ignored. When the faucets of democracy were opened

[5] Abdurrahman, *Beberapa Aspek Tentang Perkembangan Hukum Nasional,* (Bandung: Citra Aditya Bakti, 1995), p. 47.

[6] Marzuki Wakhid, *Fiqih Madzhab Negara; Kritik atas Politik Hukum Islam di Indonesia,* (Yogyakarta: LKiS, 2001), p. 31.

[7] Ali Abu Bakar," Syariat Islam Dalam Tata Negara Indonesia", *Legitimasi (Jurnal Hukum Pidana Dan Politik Islam)*, Vol.3, No. 1, 2014, p, 514-522.

in national politics, Islamic law began to develop in a broader direction.

Basically, the source of differences in the formulation of Islamic law lies in the epistemology of Islamic law. So it can be said that the difference between the schools is actually the difference in fiqh. Even though there are differences, in fact these schools do not come out of Islamic law, as long as they are based on the Al- Qur'an and hadith.

In a broad sense, sharia is the entire rule that governs the life of Muslims, including the knowledge of divinity which is often referred to as the main *fiqh*. While sharia in the narrow sense, according to Abdul Wahab Khallaf is the result of one's understanding by using certain methods based on the Al-Qur'an and hadith, which includes worship and muamalah. In its development, this domain is known as Islamic law.

It is time for Islamic law to be more empirically realistic, with its main mission to safeguard the benefit of humanity. What is meant by Islamic law in this context is fiqh which is nota bene the product of ijtihadi *fuqaha* fourteen centuries ago. As a product of ijtihad, fiqh, thus it is very possible to accept change and can be placed as a form of legal study.

When viewed from the characteristics of Islamic law established through reasoning, there are things that are adaptive that allow Islamic law to be a science that is comparable to general law. The difference lies in the underlying primary source. Islamic law which is based on revelation, includes values and rewards in the hereafter. While general law does not come from God.[8] Because there is no connection to *ilahiyah* accountability of this kind, law becomes dry and prone to interference by political interests. Law is far from justice and honesty, due to the distance from accountability to the divine dimension. It is in this context that Islamic law can be used as material to be formulated into alternative legal findings that have more value.[9]

In history it has been found that since its arrival until now, Islamic law is a living law in the midst of society. Not just a symbol, but also at a practical level. This is not only because the majority of Indonesia's population is Muslim, but because in various regions in Indonesia Islamic law has become an inherent habit in people's lives. The socio-cultural perspective of Islamic law has taken root in various kinds of community life. The main contributing factor is the flexible and elastic nature of the law. This means that although Islamic law comes from God, it is capable of making a transformative-adaptive effort.

In the Dutch era, Islamic law was already underway and developed, especially after it was applied as the basis for decisions concerning civil matters. For example, a legal provision in force in the Nias region states that a daughter does not have the right to inheritance or inheritance from her father. However, the legal provisions change when the daughter embraces Islam.[10]

It is an advancement that in the perspective of *ius constitutum*, Islamic law in the New Order era shows more of its existence. This is proven by the increasing number of Islamic laws becoming positive law. For example, the issue of marriage through the stipulation

[8] Mohammad Daud Ali, Hukum Islam, *Pengantar Ilmu Hukum dan Tata Hukum Islam di Indonesia,* (Jakarta: Raja Grafindo Persada, 2004), Cet. ke-11, p. 42-43

[9] Fathurrahman Djamil, *Filsafat Hukum Islam*, (Jakarta: Logos Wacana Ilmu, 2009), Cet-ke-3, p. 37-39.

[10] S.M Amin, *Kodifikasi dan Unifikasi Hukum Nasional*, (Jakarta: Hudayya, 2008), p. 15.

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of UUP No.1 Year 1974. Problems in the Religious Courts through the enactment of Law Number 7 of 1989, as well as issues of juvenile justice through the enactment of Law Number 3 of 1997.

The New Order placed Islamic teachings or Islamic law as part of religion. This can be seen when the government gives authority to the Ministry of Religion to regulate matters of Islamic law. This includes placing the Religious Courts under the auspices of the Ministry of Religion, not the Supreme Court (MA). It is biased if religion is in a secularistic area. For the first time, Islamic law that was enforced by the New Order was a law regulating marriage issues, namely through the promulgation of Law no. 1 of 1974, but it is still classified as general in the framework of religion, not purely Islamic law. This can be seen from the article 10 of Law No. 14 of 1970 which states that the meaning of each religion is Islam with a specialization in the Religious Court.

With the existence of several Islamic laws that have become positive laws above, it shows that many Islamic laws during the New Order era were included as positive laws or part of the national legal structure.[11] However, the political will from the state has not maximally obtained the political will from the state. So that Islamic law can be said that there is a crossroads, the area is not so wide, of course this is not comparable to the real capability of Islamic law.

Even though Islamic law during the New Order era had gained a place, it was only limited to legalization. It is not optimal but only partial. Meanwhile, substantially the legal content, political Islamic law in Indonesia has an autonomous character. Meanwhile, in its function, Islamic legal politics in Indonesia in its implementation has a legitimate character.

The end of the New Order era led to demands from some Islamic groups to formalize Islamic sharia. However, this raises concerns for other Islamic groups, because according to them there are several provisions of Islamic law that are incompatible with democratic values. This difference is due to the existence of the religious madel of Indonesian society which includes; first, a group that wants to make Islam an ideology, meaning that this group wants Islamic formalism. Second, the group that wants Islam to only apply morally and ethically, meaning that this group does not want the formal institutionalization of Islamic law. The third group is a moderate group, in the sense that this group supports the formalization of Islamic sharia but which only deals with private law.

The formalization of Islamic law in Indonesia can be said to be a step backwards in democracy and is a step that is less strategic and effective. In the relationship between the nation and the state based on Pancasila, even though there is a regional autonomy law, it does not mean that each group can apply legal politics based on the wishes, tendencies of one particular group or ethnicity.

In order to create a legal structure that has Indonesian characteristics, it is time for Islamic law to be accommodated in a positive legal structure. Such accommodation efforts must be based on an understanding of Islamic law which has special characteristics, namely first, the detachment of Islamic law from a historical perspective, secondly, there must

[11] EMK. Alidar, "Hukum Islam Di Indonesia Pada Masa Orde Baru", *Jurnal Legitimasi*, Vol. 1, No. 2, 2012. p. 88-89

be a strong connection to the basis of the literal interpretation of Arabic, third, there is no single authority that can uniform legal decisions in society.

The material for the formation of national law consists of Western law or general law, Islamic law and customary law. But among the three laws, Islamic law has a more strategic position. The significance of Islamic law lies in the emphasis on religious values, namely the element of responsibility to God. Indirectly, this substance automatically becomes the commitment of a judge in deciding a case, namely that there is always a sentence that says, "based on God Almighty". Judging from its historical roots, Islamic law as a source of law is very likely to be included in law.[12]

b. Dynamics of Legislation of Islamic Law during the Reformation Period

1. Legislation of Law Number 17 of 1999 concerning the Implementation of Hajj

The New Order actually regulated the issue of organizing the Hajj, but this was still not in the form of a law. The form of regulation at that time was Presidential Decree No. 22 of 1969 which was strengthened by Presidential Instruction No. 06 of 1970 where it stated that the government could only carry out the haj pilgrimage.

Entering the Reformation era everything changed fundamentally. These changes include the scope of government, legislative and judiciary institutions. Usually during the New Order era, the Legisative members did not have many suggestions, during the Reformation period they found momentum. For example, even though the membership of the DPR RI at the time of the results of the New Order Election, individually the paradigm of thinking had shifted due to the wave of reform. This can be seen how the right to initiative proposals that have never been used, entered the Reform era, were used, namely the existence of all factions in the DPR[13] proposed a Draft Law on the Implementation of Hajj. Of course, this political climate change has a positive impact on the emergence of awareness of political parties to pay attention to the legal needs of Muslims in Indonesia.[14]

As the rationale for submitting the Draft Law are; first, the second 1945 Constitution, the MPR Decree No. II/MPR/1998 concerning the Outlines of State Policy which have been revoked and replaced by MPR RI Decree No. X/MPR/1998 concerning the Principles of Development Reform in the Framework of Normalizing National Life as a State Policy mandated the need for the implementation of the haj pilgrimage to be regulated in a law as a tangible manifestation of the government's attention so that the implementation of *Hajj* and *Umrah* runs smoothly, safely and transparently in accordance with the guidance of religious teachings; third, the existence of a phenomenon in the community that corresponds to the increasing number of Muslims doing the haj pilgrimage and making *Umrah* trips; and fourth, to improve the quality of services for *Hajj* and *Umrah* affairs that are better, orderly and in an orderly way, and to

[12] Muchsin, *Masa Depan Hukum Islam Di Indonesia,* (Jakarta: Badan Penerbit IBLAM, 2004), p. 67-69.

[13] The factions in the DPR at that time were; 1-Development Work Faction (FKP), 2-Indonesian Armed Forces Faction (ABRI), 3-United Development Faction (FPP), and 4-Indonesian Democratic Party Faction (FPDI).

[14] Azman, "Penerapan Syariat Islam", *Ad-Daulah: Jurnal Hukum Pidana Dan Ketatanegaraan*, Vol. 7, No. 2, Desember 2018. p. 293.

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further ensure an increase in legal protection for the congregation, it is deemed necessary to regulate the Implementation of Hajj and Umrah Affairs which have been regulated by Presidential and Ministerial Decree. Religion was upgraded to law.

2. Increase the Power of the Religious Courts

The enactment of Law Number 7 in 1989 was then updated through Law Number 3 of 2006 concerning Religious Courts, further strengthening the existence of the Religious Courts because they have adjusted to Law Number 4 of 2004 concerning Judicial Power. Amendments were made to Law no.[15] 7 of 1989 brought fundamental changes in two existing institutions in Indonesia, first, the Religious Courts institution, second, the Islamic economic institutions. In the explanation of Law Number 03 of 2006, it is explained that what is meant by a special court in the environment of the Religious Court, namely the Islamic sharia court which is regulated by law.

Prior to additional power in the Religious Courts,[16] All forms of disputes related to the Shari'ah economy are resolved in the General Court or District Court. This means that the change in the law has brought a new history of economic law in Indonesia. Sharia institutional development develops rapidly. This can be seen from the emergence of various kinds of Islamic economic institutions. Among other things, Islamic financial institutions, Islamic pawnshops, and so on. The amendment of Law Number 7 of 1989 to Law Number 3 of 2006 has an important meaning in the emergence of these various Islamic economic institutions. Before any additional power or authority over the Religious Courts institution, if there is a case related to sharia economics before being brought to the District Court, it is first brought to an agency called the Sharia Arbitration Board. However, this agency is not running well because of its limited powers, namely it does not have the authority to bring parties to court, so as a result, many cases of sharia economics are neglected.

3. Sharia Banking Legislation 2008

The addition of power or authority to the Religious Courts has a positive impact.[17] This is proven by the growing enthusiasm of the members of the Indonesian council to draft Islamic economic legislation. This can be seen from the plan to submit the drafting of the Sharia Banking Bill by members of the DPR RI for the 1999-2004 period. However, the efforts of these council members have not been successful due to time constraints, namely the end of the 1999-2004 DPR RI membership period. Furthermore, the idea was forwarded by members of the DPR RI for the 2004-2009 period, particularly through the 2004-2005 session year which included the Sharia Banking Law Plan as an important and prioritized part. Furthermore, Commission XI prepares and compiles a draft

[15] Abdul Ghafur Anshori, *Peradilan Agama di Indonesia Pasca Undang-Undang No. 3 Tahun 2006*, (Yogyakarta: UII Press, 2007), p. 55-57.

[16] Before the added power or authority of the Religious Court only regulated matters of marriage, inheritance, wills, grants, endowments, zakat and shadaqah. Then with the new law added authority, namely in the field of Islamic economics. see: Erfaniah Zuhriah, *Peradilan Agama di Indonesia Dalam Rentang Sejarah Pasang dan Surut*, (Malang: UIN Malang Press, 2008), p. 50-53.

[17] Hasyim Nawawi, "Hukum Islam Dalam Perspektif Sosial-Budaya Di Era Reformasi", *Jurnal Episteme*, Vol. 8, No. 1, 2013, h. 1-27.

or draft of the Sharia Banking Bill, the results of which are then submitted to the leadership of the DPR RI.

In fact, if we look further the Law on Islamic Banking in 2008 is a complement to the previous Law, namely Law No. 7 of 1992 which regulates banking issues. The 2008 Islamic Banking Law is only to reinforce the existing provisions. Therefore this bill is nothing more than the desire of the Indonesian Parliament and the Government to provide a legal framework for the increasing number of businesses in the field of Islamic banking in Indonesia.

The three laws above are only part of the legislation that is "in character", Islamic in the Reformation Era. There are still many Islamic laws that the author does not mention. However, from the three laws, it can be seen that in the Reformation Era there were significant changes to the members of the DPR RI. Members of the DPR RI who in the previous era were only used as tools to legalize laws, in the Reformation Era they began to show their true function as DPR members, namely exercising their right to suggest a bill. So that in this era more and more Islamic laws were issued.

Meeting Point of Islamic Law and State Law

Formulasi Teori Maslahat

Maslahat theory has been formulated by scholars or experts throughout the history of the course of Islamic law. It contains dynamics in formulating the intended reformulation. The explanation below concerns the dynamics of the reformulation of the *maslahat* concept that arose from the ideas of the ulama, including the ushul expert ulama of the contemporary period.

1. Qualification and Existence of Maslahat

The word *al-maslahah* literally means appropriateness, kindness, and harmony. The word *al-maslahah* is often synonymous with *al-mafsadah* and *al-madharrah*, which mean damage.[18]

Meanwhile, according to the term, many were conveyed by scholars. For example, al-Ghazali argued that *maslahat* has the meaning of maintaining and realizing the objectives of Islamic law, namely protecting religion, guarding the soul, maintaining reason, protecting descendants, and protecting property. In his view, anything that guarantees the existence of a part of the aims of religion or Islamic law can be called *maslahat*, on the other hand, anything that can destroy or eliminate some of the above objectives can be considered *mafsadat*.[19] So it can be said that preventing anything that can damage some of the objectives of Islamic law is called *maslahat*.

Meanwhile, *Najm al-Din al-Thufi* said that the meaning of maslahat can be seen in terms of *'urf* and *syar'i*. According to him, in *'urf*, maslahah is a sabab that can have an impact in the form of goodness and benefit, for example trade can be a cause of gaining profit or profit, while in the sense of *syara'*, *maslahat* is the cause which leads to religious or *syara* 'goals, whether it is related to worship and *muamalah*.

Islamic law governs all human affairs and is in accordance with all circumstances. Through the existing texts, Islamic law is able to create *maslahat* for every legal provision that is

[18] Jamaluddin Muhammad ibn Mukaram ibn Manzdur al-Ifriqi, *Lisanul Arab*, juz 2, (Riyad: Dar al-Alam al-Kutub, 2003), p. 348-349.

[19] Akbar Syarif, Ridwan Ahmad, "Konsep Maslahat dan Mafsadat Menurut Imam Ghazali", *Jurnal Tsaqafah*, Vol. 13, No. 2, 2017, p. 362-364.

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raised. There is no legal problem unless the Al-Qur'an and the hadiths govern it. Islamic law is always in accordance with human nature, paying attention to all sides of human life and life and providing perfect guidance for life. Islamic law always puts forward the realization of *maslahat* for all human beings. Thus, *maslahat* makes a significant contribution to the realization of guidelines that should be adhered to by a scholar to know Islamic law regarding everything that is not contained in the Al-Qur'an and hadith. Thus it is clear that *maslahat* is a very important tool for the continuity of Islamic law to always be able to answer every challenge of the age and always be up to date in facing all the problems of human life.

In every legal formula intended to regulate human life, *maslahat* is always used as a foundation. Islamic law always pays attention to aspects of justice and benefit in every legal product. Legal products that contradict all these principles are not Islamic laws. The greatness of Islamic law can be seen from the compatibility of its doctrine with the development of human life because of the maslahat that accompanies it. The existence of *maslahat* in the configuration of Islamic law cannot be denied because *maslahat* and *sharia* are combined and unified, so that the presence of *maslahat* necessitates *sharia* demands.

If we observe that the legal texts in the Al-Qur'an and hadith are all attached to wisdom and *'illat*, which results in *maslahat*, both laws relating to society and individuals. Even Islamic law does not only regulate *muamalah* issues, but also worship issues. So that it can be said that all aspects of life with various kinds of legal provisions that have been outlined by the Al-Qur'an and Hadith that originate and lead to benefits for human life. This is because Allah does not need anything from humans, on the contrary, it is people who need Allah, so that they benefit from the fact that *maslahat* is the basis for the existence of Islamic law. The existence of wisdom and *'illat* in Islamic law is a guarantee of the existence of Islamic law.

Realizing *maslahat* against humans is the goal of Islamic law. Good *maslahat* that is individual, social, present, world, and hereafter. In providing legal provisions, *al-Shari* 'always gives maslahat so that it can cause goodness and eliminate badness, then finally prosperity in the world and the emergence of devotion to Allah are realized. Because the benefit is essentially maintaining the objectives of Islamic law.

The character of *maslahat* is to spread throughout the units of Islamic law type.[20] The point of *al-Shari* 'gives *maslahat* for each unit of law is universal, not limited to a particular problem or object. Islamic law is entirely maslahat, whose representation is in the form of eliminating *mafsadat* and realizing benefits. The basis for the consideration of *maslahat* is a method of thinking to obtain certainty for a problem that has not been regulated by the Al-Qur'an and hadith. In the end, it can be said that *maslahat* is a provision that contains goodness for humans.

Every text of the Al-Qur'an and hadith that contains the law must contain *maslahat*. There is no term *maslahat* should take precedence if it is not in harmony with the Al-Qur'an and hadith. The laws that have not been explained by the Al-Qur'an and the hadiths, then we look for legal provisions that

[20] Abu Ishaq Al-Syatibi, *al-Muwafaqat fi Ushul al-Syari'ah,* Jilid 1, (Mesir: Dar al-Kutub al-Ilmiyah, t.th) p. 42-43.

are capable of realizing *maslahat* whose types and characteristics have been determined by the *ulama*. *Maslahat* that contradicts the Al-Qur'an and hadith is not an essential *maslahat*, but a pseudo-*maslahat*.

In order to determine the above laws, *maslahat* is used which is operationally manifested in the form of *ijtihad* theories,[21] for example: *qiyas, maslahah mursalah, istihsan, syad al-zdari'ah*, and *urf*. Therefore, every effort made by relying on *maslahat*, can be said to be an attempt to explore the meaning of the text of the Al-Qur'an. Likewise, the *maslahat* affirmation of laws that are not contained in the Al-Qur'an and hadith, can be confirmative and negative.

Identification of *maslahat* which is the essence of *maqashidul sharia* based on, (1) the texts of the Al-Qur'an, especially those in the form of *amr* and *nahy*, (2) *Illat* and wisdom contained in al-Quran and hadith, (3) al-Istiqra'. The *maslahat* identification contained in the Al-Qur'an and hadith, especially those with the *al-amr* and *al-nahy* dimensions, is widely used by ushul scholars from *al-Dhahiri* circles. Meanwhile, there are scholars who explore the *maslahat* elaborating many *'illat* and wisdom. While the identification of *maslahat* through *istiqra* is a theory produced by al-Syatibi.

As the core of *maqashid al-sharia*, *maslahat* is the best alternative in developing various kinds of *ijtihad* methods, in which the Al-Qur'an and hadith must be understood with various *ijtihad* methods with due regard to and based on *maslahat. Maslahat* is a medium for change and legal reform. By using *maslahat* theory, Islamic jurists have solutions in solving various kinds of legal problems inherent in a system based on the Al-Qur'an and hadith, which is the basis of limited legal material, while human life with all its dynamics is constantly changing. Thus, this conception legitimizes and provides an opportunity for Islamic jurists to elaborate on cases that are not contained in the Al-Qur'an and hadith.

Furthermore, it is also necessary to convey about who has the right to determine whether something is *maslahat* or not. In this case the measure is the maslahat contained in the Al-Qur'an and the hadith, but if the *maslahat* is an *ijtihadiy* then the *mujtahid* in individual *ijtihad* may determine.[22] However, this matter is prone to misuse of *maslahat* which can disturb the community. That is why the *ijtihad jama'i* (collective) method such as *MUI, Bahtsul Masail NU,* and *Majlis Tarjih Muhammadiyah*, is very necessary to minimize errors in using the *maslahat* theory carried out in *ijtihad fardie*, so that the theory and application of *maslahat* in *ijtihad* can be avoided from mistakes.

2. *Maslahat* categorization

It is important to say here whether something is called *maslahat* or not. There are many views of scholars regarding the criteria or categorization of *maslahat*. For example, Muhammad Muslehuddin categorized *maslahat* into three types, namely *maslahat muktabarah, maslahat mulghah, maslahat mursalah*. Meanwhile *al-Buthi* is of the view that there are five criteria for *maslahat*: First, something that will be decided is still in the area or provisions of the *syara* 'text; second, that something is not against the Al-Qur'an;

[21] Sakirman, "Meretas Kebekuan Ijtihad Dalam Kontruksi Fiqh Sosial", *Jurnal Ilmiah Mizani*, Vol. 25, No. 1, 2015, p. 2-3.

[22] Muhammad Salim Madkur, *al-Ijtihad fi al-Tasyri' al-Islamy*, (Kairo-Mesir: Dar al-Nahdhah al-Arabiyah, 2004), p. 173.

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third, that something or problem does not contradict the hadith; fourth, it is not against *qiyas*; and fifth, it does not conflict with other, more important benefits.[23]

Meanwhile, al-Ghazali argued that, first the *maslahat* got the justification of the Al-Qur'an and hadith (maslahah al-mu'tabarah), and the result was *al-qiyas* and *al-ijma*'. He gave an example of the *fatwa* case of a *mufti* against a ruler who deals with his wife during the day of the month of *Ramadan*, namely the obligation to fast for two consecutive months as *kaffarat* or a punishment that must be carried out by the ruler, with the consideration that if the ruler is given the sentence to free the slave it is so light for him that it does not train himself to strive to stifle lust, so as not to have a deterrent effect. From here, the *maslahat* argument in determining the obligation to fast is *kaffarat* which can have a deterrent effect on him. In al-Ghazali's view, what is like this is an inaccurate legal product, contradicting the Al-Qur'an, which in turn has an impact on the deconstruction of religious teachings on the pretext of social change. Third, maslahat that does not get justification from the Al-Qur'an and hadith, either in the form of acceptance or rejection. This is what has become a disagreement among scholars.

Najm al-Din al-Thufi argues that *maslahat* is divided into two,[24] namely *maslahat syara* perspective and *maslahat* perspective urf. *Maslahat syara* perspective 'is a cause that conveys the meaning of *shari'* which includes aspects of worship and aspects of *muamalah*. While *maslahat* in *'urf'* means something that causes goodness and benefit, for example, commerce is a cause for profit. On the other hand, Najmuddin al-Thufi distinguishes the concept of *maslahah* into two: 1. the *mashlahah* that *al-shari* 'wants for His right, for example all worship in the category of *mahdhah*. 2, the *maslahat* that *al-shari*' wants for the benefit of His creatures and the order of their lives, examples of law that are categorized as *muamalah*.

While al-Syatibi categorized *maslahat* into three types, *al-dharuriyah, al-hajjiyah,* and *al-tahsiniyah*. First, *al-dharuriyah* is something that must exist for the realization of goodness and prosperity, both in the world and the hereafter, that is, if something does not exist, it does not make an orderly and prosperous world life. *Al-Dharuriyah* includes all efforts which include maintaining religion, soul, lineage, property, and maintaining reason.[25]

Second, *al-hajjiyah* is something that is needed to bring convenience and at the same time eliminate difficulties. If no difficulty arises, it's just not to the extent of causing a damage as in the case of *maslahah dharuriyat*. *Hajjiyah* actually complements *dharuriyat*, this means that with the *hajjiyah*, a *masyaqqah* is lost so that a balance is created.

Third, *tahsiniyah*, is a step to take or do a good habit and avoid bad habits by using reasoning properly.[26] Or in other languages with the term good *ahlak* (*makarim al-ahlaq*).

[23] Muhammad Sa'id Ramadan al-Buthi, *Dawabith al-Maslahah fi al-Syari'ah al-Islamiyah*, (Beirut: Muassasat Al-Risalat, 2000), p. 217.

[24] Arifah Millati, "Teori Ri'ayah Al-Maslahah At-Tufi Dan Aplikasinya Dalam Menakar Problematika Ihdad". *Al-Ahwal (Jurnal Hukum Keluarga Islam)*, Vol. 7, No. 1, 2014, p. 7-11.

[25] Abu Ishaq Ibrahim al-Syatibi, *al-Muwafaqat fi Ushul al-Syari'ah*, jilid 1, juz 2, p. 9-15.

[26] Nilda Susilawati, "Stratifikasi al-Maqashid al-Khamsah dan Penerapannya Dalam Al-Dharuriyat, al-Hajjiyat, dan al-Tahsiniyat". *Jurnal Ilmiah Mizani*, Vol. IX, No. 1, 2015, p. 7-10.

In Syatibi's view, *tahsniyah* is centered on the virtues that perfect *maslahah al-dharuriyah* and *maslahah hajjiyah*, this is because if there is no *tahsiniyah*, it does not affect or damage the issue of *dharuriyah* and *hajjiyah*. *Tahsiniyah* is only an attempt to create a beauty and comfort in the order of human interaction with God and human-creature interaction. More specifically, Syatibi said that if the *maslahat* is only supplementative, it means that the *hajjiyah* complements *al-dharuriyah* and *al-tahsiniyah* complements *al-hajjiyah.*

Integration of Islamic Law into State Law through Maslahat Theory

Basically, Islamic law is a law taken from Islamic religious doctrine. The normative character has been inherent in the doctrine of Islamic teachings. Islam is known as the "religion of law". The teachings of the Islamic religion say that fiqh and creed cannot be separated, because from the creed a rule or law is built, as well as implementing fiqh aqidah can be maintained. Al-Quran and Hadith are the two main sources of all the rules of law which every believer must obey. The relationship between law and religion cannot be separated. In Islamic law the role of the Prophet Muhammad is very large, he is not only a messenger of God, but also a model for all mankind in carrying out God's laws for the safety of their lives in this world and the hereafter. It is therefore not surprising that Muhammad's prophethood plays a very important role in the Islamic legal tradition, without which there is no connection between the sacred and the profane.

In the Islamic perspective, the law regulates everything according to God's will. The idea of law as an all-encompassing entity is the main character of how Islamic law views life. Since its inception, Islamic law has in fact made no distinction between matters of the relationship between God and humans and the relationship between humans and humans. The relationship between fellow human beings is even seen as a reflection of the relationship between humans and God where the source of sacred texts (al-Quran and hadith) serves as a reference in understanding God's will about this life. All aspects of human life are covered by law. There is nothing in the aspect of human life that is outside the law because all human behavior in this life is derived from its theological perspective. Because there is no longer any separation between "state" and "religion", in Islam religion and government become one. Islamic law is controlled, governed by the Islamic religion. As a consequence, Islam is closer to a theocracy where the public and private spheres are governed by religion, because government, law and religion are essentially intertwined together. Of course, in practice various variations arise in various Islamic countries, but one thing is clear that all law, government and civil authorities are based on Islamic creed.[27]

According to Abdullah Ahmaed An-Na'im, Islamic law can only be offered and applied through adaptation to the needs of modern Islamic society. But the adaptation of the principles of Islamic law in the legislation of modern state law must still be done through secular theory, which is a direct legislation on the principles of Islamic law itself.

In Islam there is no dichotomy between religion and state or between religion and law. The three components when combined

[27] Mahathir Muhammad Iqbal, "Merumuskan Konsep Fiqh Islam Perspektif Indonesia", *Jurnal al-Ahkam,* Vol. 2, No. 1, 2017, p. 17-19.

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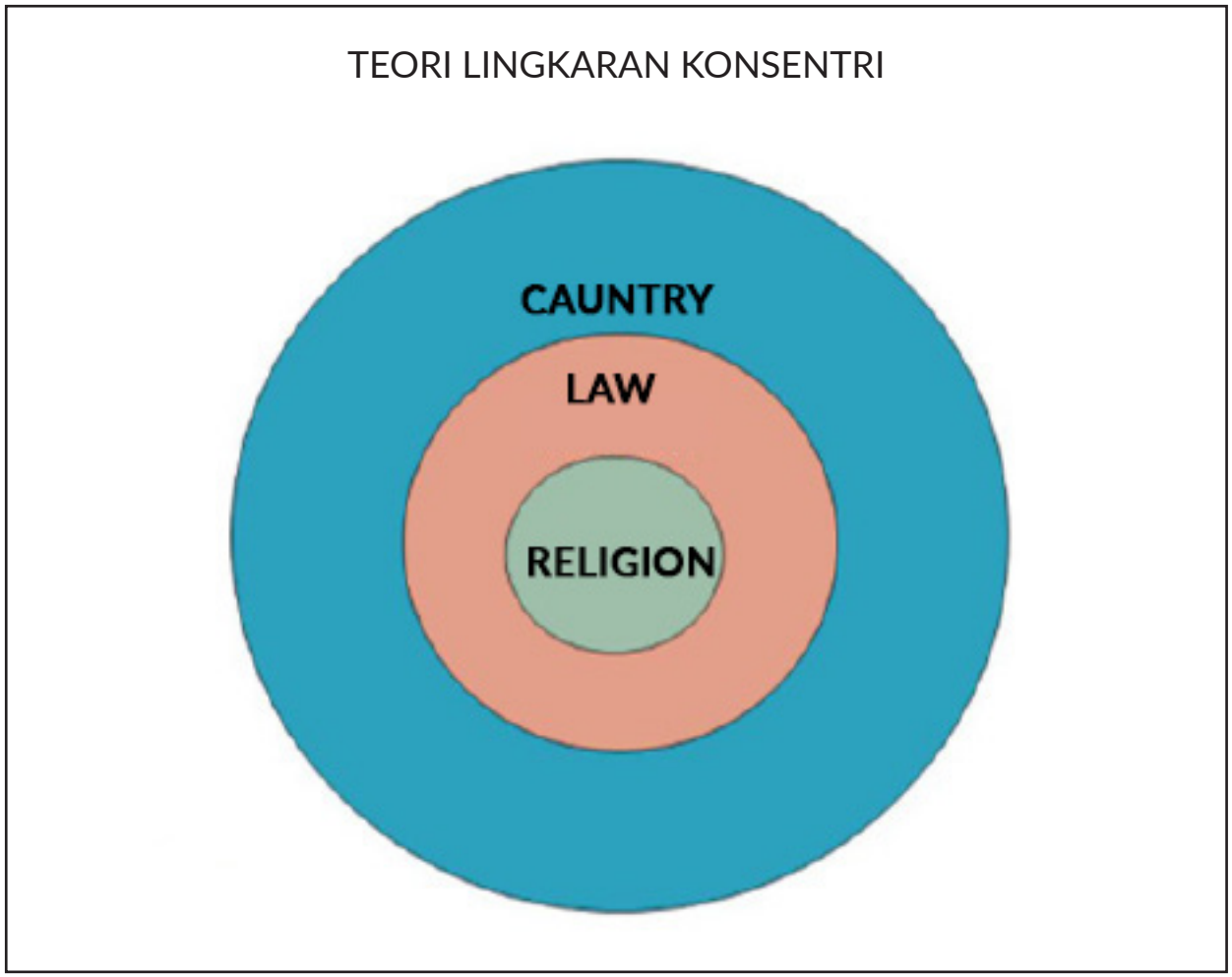
form a concentric circle which is a unity and is closely related to one another. Religion as the first component is in the position of the deepest circle because religion is the core in that circle. Then followed by the law occupying the next circle. This has a very big influence on religion on law and at the same time religion is the main source of law, besides ratio as a complementary source. Viewed from the basic framework of Islam which consists of faith, sharia and morality. Akidah is the central point, while the next structure is sharia and ahlak as well as legal substance, so that the concept of law in that circle contains not only law in a normative sense, but also law and morality. As the third component, countries are in the final circle covering the previous two components, namely religion and law. Here's a concentric pie chart:



This position shows that in this concentric circle, the state includes the former two components, namely religion and law. Because religion is at the core of this concentric circle, the influence and role of religion is very large on law and the State. It can also be seen how close the relationship between religion, law, and also the state are components that are in one unity that cannot be separated. It must be understood that if the position of the state is placed in the latter circle, it does not mean that the state confines or imprisons religious

law.[28] From this it can be said that the state can only operate officially established general principles of law, the principles of sharia can influence politically and sociologically, but are not automatically applied as positive law without state intervention.

In the absence of a dichotomy of religion and state or religion and law, maslahat theory plays an important role. Since its promulgation, sharia has not been built on any other basis except for the benefit of mankind.

Departing from the above thought, some Muslims are of the view that the formalization of Islamic law through positive law or statutory regulations is a necessity. For them, Indonesian law can be divided into several categories; first, the law that makes adat the basis, so that the community norms and customs that have been accepted from generation to generation that last for a very long time and are inherent in public awareness are made into positive law. Second, the law is taken from religious law, namely the religious teachings brought by the prophet. Third, law as a rule in life together originating from official legislators which is accompanied by certain sanctions in the event of violations and is implemented by the state.

The three legal rules above are contained in the legal culture of the Republic of Indonesia which was proclaimed on August 17, 1945. Thus, Indonesian law that was born after that date has four basic forms, namely law products of colonial legislation, customary law, Islamic law, and national products. So orderly and in order to formalize existing laws in Indonesia, so that the constitutionalization of law or Islamic law is also a necessity, although the boundaries of formalization are not clear. With Islamic law formalized, finally the state has the obligation to maintain and enforce it, not only society as a community whose obligations and rights must be protected.[29]

The constitutionalization of Islamic law can be connected to the time of the prophet, friends, caliphs afterward, to the implementation of Islamic law in modern Islamic countries today, for example, Saudi Arabia, Sudan, Pakistan, Malaysia, Egypt, and others. In Indonesia, since the time of the kingdoms and colonialism, Islamic law has been officially applied, although not completely. The emergence of statutory regulations since the founding of the state until now is a lot related to Islamic law which can also be said to be the result of ijtihad by Indonesian ulama.

The formalization of laws and regulations derived from Islamic teachings can be made through the Constitution as basic guidelines that inspire the existing regulations, namely the MPR, UU, Perpu, PP, Presidential Decree, and Perda. The following are several legislative products that lead to sharia enforcement. In the form of Law no. 1/1974 which regulates the validity of marriage based on religious law; UU no. 7/1989 which was updated by Law no. 3/2006 concerning Religious Courts, Law No, 17/1999 on the Implementation of Hajj; UU no. 23/1999 concerning Bank Indonesia mandating the establishment of a Bank or Government Sharia Bank; and Law no. 38/1999 concerning Zakat Management. Meanwhile, the Government Regulations issued were PP N0.70 and 72/1992 which

[28] Muhammad Thahir Azhari, *Negara Hukum: Studi tentang Prinsip-Prinsipnya dilihat dari Segi Hukum Islam, Implementasinya pada Periode Negara Madinah dan Masa Kini*, (Jakarta: Bulan Bintang, 2002), p. 43.

[29] Iqbal Maulana Dan Yuni Roslaili, "Penerapan Syariat Islam Dalam Bingkai Keberagaman Nusantara", *Dusturiyah (Jurnal Hukum Islam, Perundang-Undangan dan Pranata Sosial)*, Vol VIII, No. 1, 2018, p. 11-13.

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explained profit-sharing banks and Law no. 7/1992. Then Inpres N0.1 / 1991 concerning Compilation of Islamic Law was added with Kepmen N0.154 / 1999, as the implementation of the Inpres. In the management of zakat issued Ministerial Decree No. 581/1999 and specifically for the City of Bandung, a Perda No. 30/2003.

Of course, in implementing this law, another law is needed which regulates it as an authorized institution to serve as an umbrella for the enactment of this law. For example, there is Law no. 14/1970 concerning Basic Provisions of Judicial Power which in Article 10 paragraph (1) are promulgated, Judicial Power is exercised by the Court in the following environment: first, General Courts, second, Religious Courts, third, Military Courts, fourth, State Administrative Courts. "So institutionally, Islamic law can be implemented, even though these categories of authority overlap at times because the Muslim community is not aware of the application of sharia in certain fields.

When Islamic law is to be made positive law, the steps taken are through the parliamentary route, where there are many people and parties with different social and religious backgrounds. However, the enforcement of Islamic law through parliamentary channels is the best way for now. There are still many legal issues that need to be adopted in our legislation. The issue that is still being kept is that it relates to Islamic criminal law which of course requires a bigger political decision relating to the overall constitutionality. In fact, the formalization or legislation of Islamic law has been carried out in such a way, so that the future arrangement of Islamic society has adequate legal certainty. Indonesian criminal law requires new engineering and more intensive political power because many people oppose it. If in the early days of independence only "people from the East" were now more than that, but also Muslims, non-Muslims, maybe even certain countries that were not happy with the teachings of Islam.[30]

Conclusion

Integrating Islamic sharia into Indonesian state law is not an easy task, this is due to the state's form factor and the plurality of its people. Even among Muslims themselves, the idea of this differs from one group to another. The first group wants Islam as an ideology whose manifestation takes the form of the formal implementation of sharia as positive law. Meanwhile, the second group wants the implementation of religious ethics and rejects the formalization and integration of sharia into state law. However, there are opportunities to include religious teachings, including Islamic law, in the national legal system, which can avoid socio-political resistance. This opportunity is through the application of maslahat theory while still paying attention to the dynamics of modern society in Indonesia, to transform Islamic law into a state legal framework.

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DILEMMA *EXECUTIVE CONTROL:* DEVELOPMENT OF REGIONAL REGULATORY CANCELING MODELS

Sonia Ivana Barus
Faculty of Law, University of Bengkulu
Jalan WR. Supratman, Kandang Limun, Kecamatan Muara Bangka Hulu, Kota Bengkulu
Email: soniaivana@unib.ac.id

Abstract: The Law Number 23 of 2014 concerning Regional Government clearly states that the Minister of Home Affairs with instruments in the form of a Ministerial decree bears the authority to annul regional regulations which deemed contrary to the provisions of the higher laws, public interests and/or decency. However, the Constitutional Court (MK) through Decision No. 137/PUU-XIII/2015 and MK's Decision No. 56/PUU-XIII/2016 has restrained the authority of the Minister of Home Affairs to annul the Regional Regulation (perda). This is an interesting discussion, some consider that it actually weakens the role of the central government to control local governments, on the other hand, justifying that authority belongs to the Supreme Court. Interesting problems of this research is what is the actual relations of authority between local and central government? Then what is the ideal model for the annulment of regional regulations so that the central government has a role in exercising control (executive control) of regional regulations before and after regional regulations come to be applied? This research was conducted using a normative juridical method, namely a research method that refers to the norms of legal norms contained in statutory regulations. This research resulted that there is a decentralization and decencentration relationship between the central and local governments. In order to anticipate these problems, the ideal model for cancellation of regional regulations to accommodate the authority of the central government is to separate regional regulation according to the content or material.

Keywords: Central Government; Regional Government; annulment of Local Regulations

Abstrak: Undang-Undang Nomor 23 Tahun 2014 tentang Pemerintahan Daerah menyebutkan bahwa Menteri Dalam Negeri dengan instrumen berupa Keputusan Menteri, diberikan kewenangan untuk membatalakan Peraturan Daerah yang dianggap bertentangan dengan ketentuan peraturan perundang-undangan yang lebih tinggi, kepentingan umum dan atau kesusilaan. Faktanya kemudian, Mahkamah Konstitusi (MK) melalui Putusan No. 137/PUU-XIII/2015 dan Putusan MK No. 56/PUU-XIII/2016 telah mengamputasi kewenangan Menteri Dalam Negeri untuk membatalkan Peraturan Daerah. Ini merupakan diskusi yang menarik, sebagian menganggap bahwa ini malah justru melemahkan peran pemerintah pusat untuk mengontrol pemerintah daerah, di sisi lain malah mengamini bahwa kewenangan demikian adalah milik Mahkamah Agung. Adapun permasalahan yang mendasari penelitian ini adalah bagaimana sebenarnya hubungan kewenangan antara pemerintah daerah dengan pemerintah Pusat? Kemudian bagaimana model ideal pembatalan peraturan daerah agar pemerintah pusat tetap punya peran dalam melakukan kontrol *(executive control)* terhadap peraturan daerah, sebelum maupun setelah peraturan daerah berlaku? Penelitian ini dilakukan dengan metode yuridis normatif yakni metode penelitian yang mengacu pada norma-norma hukum yang terdapat dalam peraturan perundang-undangan. Penelitian ini mendapati bahwa adanya hubungan desentralisasi dan dekonsentrasi antara pemerintah pusat dan pemerintah daerah. Untuk mensiasati kedua bentuk hubungan tersebut, model pembatalan peraturan daerah yang ideal untuk mengakomodir kewenangan pemerintah pusat adalah dengan pemisahan perda sesuai dengan konten atau materinya.

Kata kunci: Pemerintah Pusat, Pemerintah Daerah, Pembatalan Perda

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Introduction

The Constitutional Court within its verdict Number 137/PUU-XXI/2015 and No.56/PUU-XIII/2016 has been revoked the authority of central government for annulling Regional regulation which is considered crontradict legislation. This topic becomes viral when the President of Republic of Indonesia ordered Minister of Home Affairs to annul around three thousands (3000) Regional regulations which are considered contradict higher regulations. It means annulling Regional regulation must go through a judicial review to the Supreme Court. For instance, the Regional Regulation of Aceh Province No. 11/2013 about State Property, Regional Regulation of Asahan Regency No.11/2011 about Regional Tax, Regional Regulation of Banjarmasin City No.4/2013 about Donation from Third Party, and many more.

Regional regulations essentialy could be the complementer from distribution of executive power. It means, the objective of regional regulations is the embodiment of autonomy region for creating the balance of power in its enforcement. The basic assumption of regional government in their regulations does not have the sovereignty. Which is different from the federals, the states in feredal country have their sovereignty.[1]

The logic conclusion from the exposure above is that the regional regulations which are the form of the regional autonomy that both of them cannot be separated from the concept of unitary and lawstate embraced by the Republic of Indonesia. Besides creation of the materials indside the regional regulations, another important issue is how to annul them.

Contention arose when Law No. 23 of 2014 about Regional government state that Minister of Home Affairs with Ministerial Regulation, have authority for annulling Regional regulation which contradicts higher rule of law provisions, public interest and/or decency. Act 9 (2) Law No. 12 of 2011 about Establishment of Legislation stated that if there is the law under law considered contradicting the legislation, the review must be taken by Supreme Court.The interpretation in that act emphasizes act 24A in 1945 Constitution stating the Supreme Court has authority to review a regulation under the the law. However, Law No. 23 of 2014 allowed the annulment of Regional regulation which contradicts higher regulation can be done by Minister of Home Affairs or the Governor. At this rate the Supreme Court is the judicial power which is the supervision of legal norms under the law to the law including Regional regulation and Regulation of Regional Head as the law of that region.[2] The problem becomes more complicated when the annulment of Regional regulation inside Law No. 23 of 2014 is only used Ministerial regulation.

Inside the Law No. 12 of 2011,it is clear that Ministerial Regulation is not included in the hierarchy of legislation, so it is not sure where is the position of Ministerial Regulation, it can be higher or lower than Regional regulation, even in province, the regency or the city, however the hierarchy between the regional regulations of province and the regency or the city are clear enough. This hierarchy

[1] Eko Prasojo, Irfan Ridwan Maksum dan Teguh Kurniawan, *Desentralisasi dan Pemerintahan Daerah: Antara Model Demokrasi dan Efisiensi Struktural*, (Jakarta: DIA FISIP UI, 2016), h. 3.

[2] Sri Soemantri, *Hukum Tata Negara Indonesia (Pemikiran dan Pandangan)*, (Bandung: Remaja Rosdakarya, 2014), h. 253.

means every kind of legislation is based on the principle that lower legislation is not allowed to contradict the higher legislation.

Another contention possibly arose if we look at Law No.12 of 2011 act 8. It is explained that Ministerial Regulation recognized its existence and has the power of law as long as related to higher legislation or formed by authority. Based on that statement Ministerial Regulation may be higher than Regional regulation as long as that Ministerial Regulation regulated by Legislation. Based on that statement Ministerial Regulation may be higher than Regional regulation as long as that Ministerial Regulation regulated by Legislation.

After a long time, Constitutional Court finally revoked the authority of Minister of Home Affairs and Governor for annulling municipal regulation by its verdict No. 137/PUU-XIII/2015 dan No. 56/PUU-XIV/2016. One of the reasons of this petition is there are some parties that questioning if Minister of Affairs has authority for annulling Regional regulation.

This verdict revoked the authority of Minister of Home Affairs to annul Regional regulation in province or municipality. Meanwhile, the annulment of Regional regulation by the minister of home affairs according to Law No. 23 of 2014 and Law No. 32 of 2004 described as central government control to the region even the region have an autonomous right. It can be explained further according to the explanation of Law No. 23 of 2014:[3]

> "Granting an autonomy to the region is based on principal of unitary state. In the unitary statesovereignty is only exsist at the central government. Because of that the implementation of regional government will remain in the hands of the national government. The regional government in unitary state is an unity with the national government. Along with it, the regional policies are integrated with the national policy. The differences are how the region can utilize the potention, innovation, competitiveness, and creativity for national goals at regional stage"

In the verdict, Justices of Constitution Court had differents point of view. Four of them which were Arif Hidayat, I Dewa Gede Palguna, Maria Farida Indarti and Manahan MP Sitompul had dissenting opinion in viewing the authority of Minister of Home Affairs for annulling Regional regulation. It shows that the regulations itself still being controversy.

It is important for us to reconstruct the relationship between the central government and regional government. Including between the province and the regency or the city.

Reseacrh Method

In order to answer the research questions that have been described above, The author used qualitative methods which is library research discussing the Phenomenon of Executive Control: Development of Regional Regulatory Canceling Models as a study.[4] Considering that the research is purely literary in nature, the data in this research is obtained by conducting a study of various literatures consisting of books, journals, laws, and regulations, or the results of previous research that have a bearing on the object of

[3] Undang-Undang No. 23 Tahun 2014. Undang-Undang Pemerintahan Daerah, LN No. 244 Tahun 2014, TLN No. 5587, Umum.

[4] Suharsimi Arikunto, *Prosedur Penelitian Suatu Pendekatan Praktek,* (Jakarta: Rineka Cipta, 2005), p. 10.

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discussion.[5] The data collection method was carried out by using content analysis on the The Law Number 23 of 2014 concerning Regional Government.

Relation Between Central Government And Regional Government

Indonesia is a republic unitary state.[6] One of the consequences of the establishment of a country are the presence of government. Through paragraph 18 Constitution of The Republic of Indonesia 1945 Indonesia claim itself as unitary nation by Article No.18 of Republic of Indonesia Constitution 1945 which state The Republic of Indonesia diverted as provinces and the provinces diverted again as regencies and cities, then every regencies and cities have their own regional government.

Government etymologically can be interpreted as doing work to order, which means it has four elements, consisting of two parties, those who are governed and govern and the relationship between them.[7]The definition of government can be defined as government in the legislative, executive and judicial fields. Meanwhile, the government is only represented by the executive sector as the organizer of the state administration. The government is the holder of office (official = *ambtsdrager*) government (to exercise the authority or power inherent in the environment of positions). According to Law No. 23/2014 about Regional Government, the Central Government is the President of the Republic of Indonesia who holds the power of government of the Republic of Indonesia assisted by the Vice President and ministers as referred to in the 1945 Constitution of the Republic of Indonesia.

Different from our perspective about the central government, the definition about regional government in Republic of Indonesia are severally changed following the evolutions of the regulations. Within the Law No.22/1999 about Regional Government state the regional governments are the head of regional with the other autonomy devices as the regional executive. Then, the Law No.32/2004 state, the regional government are the governor, regent or mayor, and regional stakeholders as the administrator of regional government. However the Law No. 23/2014 as the lastest regulation about Regional Government state the Regioal Government is the Head of Regional as the administrator who lead the regional government business carry out the regional autonomy.

Explanation above bring us to the misinterpreted "regional autonomy" which need to correct. Indonesia is different form the federals which have countries inside the country. Becuase of that Indonesia government embrace the desentralisation system based on the autonomy.[8] Regional Governments are not allowed to have sovereignty and separated with the state. The regional government position is wtithin the hierarchy of the unitary state system. It means the regional goverments are under the central government control. The existence of regional governments are only as sub division from the central government.[9]

[5] Mestika Zed, *Metode Penelitian Kepustakaan,* (Jakarta: Yayasan Obor Indonesia, 2007), p. 3.

[6] Undang-Undang Dasar Negara Republik Indonesia tahun 1995, Ps. 1.

[7] Inu Kencana, *Ilmu Negara Kajian Ilmiah dan Keagamaan*. (Bandung: Pustaka Reka Cipta, 2013), h. 46.

[8] M. Laica Marzuki, "Hakekat Desentralisasi dalam Sistem Ketatanegaraan Republik Indonesia, *Jurnal Konstitusi Majalah Konstitusi RI*, Vol. 4, No. 02, Maret 2017. h. 3.

[9] Hanif Nurcholis, *Teori dan Praktik Pemerintahan*

The law 23/2014 defines an autonomous region as a legal community unit that has territorial boundaries that have the authority to regulate the Government and interests of the local community according to their own initiative based on the aspirations of the people in the system of the Unitary State of the Republic of Indonesia.The autonomous region itself is closely related to regional autonomy, where each autonomous region has the right, authority and obligation to manage government affairs by itself, this is what is called regional autonomy.

Epistiomologically, the word autonomy is coming from *"auto"* and *"nomus"* which means "independent" and "law or rule", those words are coming from Greek. In Dutch, autonomy called *"zelfregering"* which means Independent Government and Van Vollenhouven devide it to *zelfwetgeving*, *zelfuitvoering*, *zelfrechtspraak*, and *zelfpolitie*.[10] Meanwhile, regional autonomy in Van Der Pot's view is *eigenhuisholding* which can be interpreted as running and working on its own interests.[11]

Soepomo stated that regional autonomy as a principle means respecting regional life according to history, customs and distinct characteristics in the level of a unitary state. Each region has a different history and special characteristics. Therefore, the government must keep all matters that intend to formalize all regions in one regulatory model.[12] The implementation of regional autonomy in Indonesia is carried out by applying the principles of decentralization and deconcentration.

Indonesia's decentralization reforms began in 1998 when the New Order regime collapsed and reformated. In 1999, Indonesia enacted Law no. 22/1999 concerning Regional Government. The existence of this law cannot be separated from the situation at that time where all parties had the right to reform all sectors of government.Article 4 Paragraph (1) Law no. 22/1999 states that in the context of implementing the principle of decentralization, provinces, regencies and municipalities, which have the authority to regulate and manage the interests of the local community on their own initiative according to community aspirations. Furthermore, Paragraph (2) states that the regions as mentioned in Paragraph (1) are each independent and do not have a hierarchical relationship with each other.[13]

This article describes the absence of a link among the central government and districts/cities and provinces and districts/cities. In other words, there is no relationship among the President, the Governor and the Regent/Mayor. The loss of the relationship as mentioned above, of course, creates confusion in the relationship between the Governor and the Regent/Mayor because the role of the Governor is only to coordinate and not be authorized to directly regulate and manage districts and or cities. In fact, coordination is an important thing in administrative law in exercising the authority to carry out functions jointly without gathering or pulling authority into one complete control.This chaotic relationship even seems to resemble the concept of federalism, let's take the

dan Otonomi Daerah, (Jakarta: Gramedia Widiasarana Indonesia, 2005), h. 60.

[10] S.H. Sarundajang, *Arus Balik Kekuasaan Pusat ke Daerah*, (Jakarta: Pustaka Sinar Harapan, 2000),h. 33.

[11] HM. Laica Marzuki, *Berjalan-jalan di Rumah Hukum, Pikiran-pikiran Lepas*, (Jakarta: Kompress, 2005), h. 125.

[12] H. Rozali Abdullah, *Pelaksanaan Otonomi Luas dan Isu Federasi sebagai Suatu Alternatif,* (Jakarta: Raja Grafindo, 2010), h. 11.

[13] Republik Indonesia, Undang-Undang No. 22 Tahun 1999 tentang Pemerintahan Daerah, Lembaran Negara Tahun 1999 Nomor 60.

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example of the United States. Where the area is divided into small states which have their own existence even though in the end there is still subordination with the federal authority which they state in the supremacy clause.[14]

The relationship between the central government and regional governments in this Law is clearly contrary to the spirit of Article 18 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that the Unitary State of the Republic of Indonesia is divided into provinces and provincial areas are divided into districts and cities, each province, district and city has a regional government which is regulated by law. The word "shared" which is attached to the mention of Article 18 Paragraph (1) of the 1945 Constitution of the Republic of Indonesia clearly shows the connectivity that should be established between the central and regional governments.

Slightly different from the previous law, Law no. 32/2004 concerning the Regional Government trying to connect the "disconnected" relationship. However, it seems that these efforts have not been followed by improvements in other sectors and have even created new problems. There are recorded as many as 22 strategic issues which become crucial discussions in this law.[15]

Even though the government through this law has managed to slightly shift the broadest possible autonomy that was applicable in the previous law. Only then did Law no. 23/2014 concerning Regional Government comes to replace the previous law and is still in effect today. Law no. 23/ 2014 is trying to improve some of the black records of the previous law. Some problems have not yet been resolved, in fact, specifically regarding the relationship between the central and regional governments, this law is deemed no longer to reflect the widest possible autonomy. As mandated by Article 18 Paragraph (5) of the 1945 Constitution of the Republic of Indonesia, however, it seems centralistic.

A political scholar from The Australian University, J.A.C Mackie in 1980 tried to reconstruct the relationship between the central government and local governments in Indonesia using the approaches of centripetalism and centrifugalism.[16] The purpose of this approach is that the relationship of authority between the central government and local governments can be described using the degree of indication where the position of a country is. A country is said to be carrying out centripetalism maneuvers, namely when the country increasingly leads to a centralistic character. Conversely, centrifugalism maneuver is when the state increasingly leads to the character of federalism which indicates the disintegration of the nation.

[14] *Supremacy clause is* in Article VI part 2 of the United States Federal Constitution which states: *This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the Authority of United States……"*

[15] From the academic text of the Regional Government Law Bill prepared by the Ministry of Home Affairs in 2011, there are 22 important issues that become material for revisions to the issue of Law no. 32 of 2004 is the formation and arrangement of autonomous regions; Division of government affairs;Regions characterized by islands; Regional Head Election; The role of the governor as representative of the central government; Regional leadership meetings; Regional Apparatus; District problems; Regional apparatus problems; Regional regulation issues (perda); Regional development; Regional Finance; Public service; Society participation; Urban area problems; Special area problems; Cooperation between regions; Village problems; Guidance and supervision; Legal action against local government officials; Regional innovation problems; The problem of the regional autonomy consideration council.

[16] Eko Parsojo,Konstruksi Ulang Hubungan Pemerintah Pusat dan Pemerintah Daerah di Indonesia: Antara Sentripetalisme dan Sentrifugalisme". Pidato Pengukuhan *sebagai Guru Besar Tetap Depok FISIP UI*, Depok, 2006. h. 4.

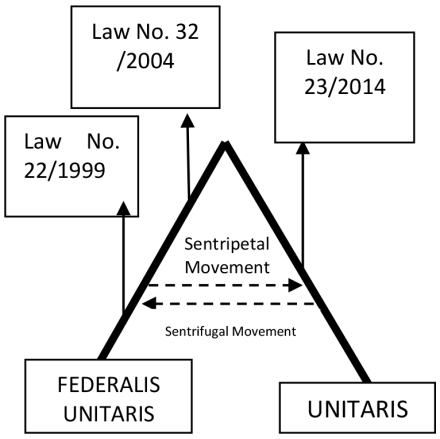

Diagram A.1 manuver of sentripetalisme and sentrifugalisme[17]

If reflected on the explanation of the relationship between the central government and local governments that have been explained previously, then the maneuvers that have been carried out by Indonesia since Law no. 22/1999, Law no. 32/2004 to Law no. 23/2014, can be illustrated by the movement diagram of the triangle pendulum below:

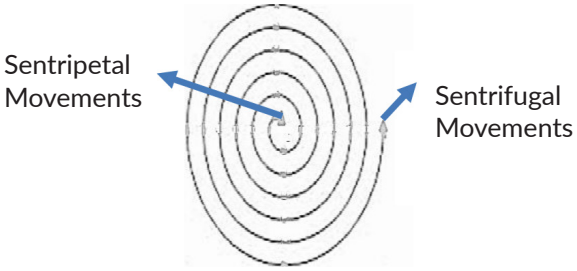

Diagram A.2 Manuver sentripetal dan sentrifugal UU No. 22 Tahun 1999 hingga UU No. 23 Tahun 2014.[18]

The next stage of this presentation is to discuss the relationship between the authorities owned by two of them. The authority possessed by regions in Indonesia cannot be separated from the three principles of regional autonomy, namely the principles of deconcentration, decentralization and the task of assistance. However, the broadest possible autonomy is often only associated with the principle of decentralization.

Law No. 23/2014 concerning Regional Government states that decentralization is the transfer of central government affairs to autonomous regions based on the principle of autonomy.[19] The government of any country, especially with a very large area, cannot determine its own policies. Even if this is possible, the policies taken will be less or even ineffective. This will have an impact on other government programs which will also be inefficient. This proves that the transfer of authority from the central government to the regions, both political and administrative in nature, is very necessary. This leads us to one form of power sharing, namely the distribution of authority carried out by the central government to regional governments.

In a unitary state system, the issue of decentralization is an interesting issue where there is an issue of centralization which often overshadows the unitary state. Theoretically, centralization is the opposite of decentralization. Although centralization and decentralization have opposite meanings, in practice in Indonesia, a strict separation of the two cannot be enforced. Both are likened to the two ends of a line. If expressed in a more concrete form, we can see that no matter how rigid the application of decentralization or centralization is, the point of equilibrium will not be reached if the burden is only on one end. So that there is no possible centralization if there is no decentralization and vice versa.[20]

[17] Modified by the author individually in Eko Parsojo, "Reconstructing the Relationship between Central Government and Local Government in Indonesia: Between Centripetalism and Centrifugalism.

[18] Visualisasi penulis dari Pidato Pengukuhan Eko Prasojosebagai Guru Besar Tetap Depok FISIP UI 2006

[19] Republik Indonesia. UU No. 23 Tahun 2014 tentang Pemerintahan Daerah. Ps. 1 Angka 8.

[20] S.H. Sarundajang, *Arus Balik Kekuasaan Pusat ke Daerah*, (Jakarta: Pustaka Sinar Harapan, 2010), h. 81.

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In addition to decentralization, deconcentration also reflects on regional autonomy in Indonesia. Indeed, deconcentration is a principle that cannot be separated from the centralization. Deconcentration is the delegation of part of Government Affairs which is the authority of the Central Government to governors as representatives of the Central Government, to vertical agencies in certain areas, and/or to governors and regents/mayors as the person in charge of general government affairs.[21] From this understanding, it is clear that deconcentration is only a "transfer", this word indicates that there are still shadows of centralization in it.

Decentralization and deconcentration are the two foundation principles of regional autonomy. The existence of these two principles has implications for the sharing of rights between the central government and local governments. According to F.P.C.L. Tonnaer, government authority is considered as the ability to enforce positive law and thus create a legal relationship between the government and citizens.[22] Juridically, authority is the legal right and power of the government, so in the concept of a rule of law (rechstaat) all government actions that originate from its authority must be based on the principle of legality. The division of authority between the Central Government and Regional Governments currently refers to the provisions in Law no. 23/2014 concerning Regional Government. The classification of governmental affairs is specifically regulated in Article 9 which includes absolute government affairs, concurrent government affairs and general government affairs, namely:

a. *Absolute Government Affairs,* intended as a governmental affair which fully falls under the central authority.[23] Therefore it is not related to the principle of decentralization or autonomy. Absolute Governmental Affairs which fully fall under the authority of the Central Government in Article 10 paragraph (1), which are:
   1) Foreign Affairs Policy;
   2) Security;
   3) Justitia;
   4) National monetary and fiscal;
   5) Religion.
b. *Concurrent Government Affairs,* Article 9 paragraph (3) Law no. 23/2014, concurrent government affairs are intended as governmental affairs that are divided between the central government and local governments, namely provinces and districts/cities.
c. *General Government Affairs*

   Government Affairs which becomes the authority of the President as head of government.

Regional Regulatory Order

The existence of regional regulations is a part of the authority given by the central government to regional governments to manage their own households. This is the result of the specificity of certain regions that are not regulated by the laws and regulations above it or there are even parts of the above laws and regulations that must be further elaborated through regional regulations to implement other regulations of a higher degree.[24]

[21] Republik Indonesia. UU No. 23 Tahun 2014 tentang Pemerintahan Daerah, Ps.1 angka 9.

[22] Ridwan HR, *Hukum Administrasi Negara*, (Jakarta: Raja Grafindo, 2011),h. 70.

[23] Republik Indonesia. UU No. 23 Tahun 2014 tentang Pemerintahan Daerah, Ps. 9 Ayat (2).

[24] Bagir Manan, *Menyongsong Fajar Otonomi Daerah*, (Yogyakarta: PSH FH UII, 2002), h. 136.

This matter seems to be the same as what is mandated by Article 14 of Law No. 12/2011 concerning the Formation of Legislative Regulations. In simple terms, the classification of perda according to the explanation above is

a. Regional Regulation contains regarding the implementation of regional autonomy and co-administration;
b. Regional Regulation contains the special condition of the region;
c. Regional Regulation containsfurther elaboration of higher-level statutory regulations;

The regional regulations that contain the implementation of regional autonomy and co-administration are regional regulations related to concurrent government affairs. Where concurrent government affairs are very synonymous with regional government administration which is driven through the principles of decentralization, deconcentration and assistance tasks.

Meanwhile, regional regulations that contain special conditions for a region are regulations that regulate the uniqueness of an area, both from a cultural perspective and other things that make a region different from other regions. This regulations are of course very specific and often contains substances that regulate something that is impossible to find in other regions in Indonesia.

Regional Regulation contains further elaboration of higher-level laws and regulations, in simple terms it can be linked to the substance of the regional regulation which contains central government affairs, both absolute and general central government affairs that have been regulated in higher laws and regulations is only to clarify the meaning, purpose and purpose of the higher laws and regulations.

Regional Cancellation: Authority And Ideal Model

The relationship between the central government and local governments in the cancellation of regional regulations in the era of the current law has drawn controversy involving four important actors, namely the President, the Minister of Home Affairs, the Supreme Court and the regional government itself. Pre-Constitutional Court Decision, the concept of canceling local regulations in Article 251 of Law no. 23/2014 on Regional Government states that provincial regulations and governor regulations are canceled by the minister and stipulated by a ministerial decree and district/city regulations and regen/mayor regulations are canceled by the governor and stipulated by a governor's decree. It seems that this kind of relationship does seem odd when seen with the naked eye.

AF Leemans argues that there are three hierarchical models that describe the relationship between the central government and local governments[25] one of which is the fused/single hierarchy model. This model is very close to the hierarchical model used in Indonesia where administrative boundaries coincide with regions of the autonomous region.[26]

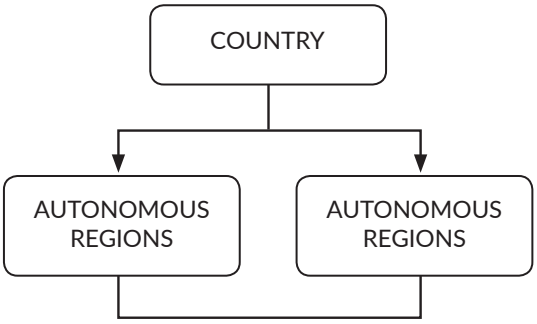

Diagram C.1. kerangka *fused/single model* oleh Leemans.

[25] A.F. Leemans,*Changging Patterns of Local Government*, (The Hague: IULA, 1970), h. 52

[26] Kardin M. Simanjuntak. "Implementasi Kebijakan Desentralisasi Pemerintahan di Indonesia". *Jurnal Bina Praja* Vol. 7, No. 2, Juni 2015, h. 114.

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Such explanation can be found in Article 1 number 9 of Law no. 23/2014 which states that the governor is the representative of the central government. Number 13 then states that the governor's working area also includes the central government working area (administrative area). The governor is also an autonomous regional head.[27] Referring to this theory, it seems that institutionally, the cancellation of district/ city regulations by the governor is indeed inappropriate. It is clear that the governor and the regent do not have hierarchical relations as an institution, their relationship is limited to coordination. It is different from the central government towards provincial and district/city governments which have hierarchical institutional relationships. This pattern indirectly reconstructs the principles of deconcentration and decentralization.

Next is the level of legislation. This concept is actually very clearly stated in Article 7 of Law no. 12/2011 that the provincial and district/city regulation are in the lowest two sequences, respectively. Another discourse then emerged regarding the cancellation of regional regulations, is it possible to use the minister of home affairs' decree to cancel the regional regulations in Article 7 of Law no. 12/2011 itself does not include ministerial decrees in the hierarchy of laws and regulations. We can answer this by using the Stufentheori or legal norms level theory. Hierarchy theory states that the legal system is a system of rungs with tiered rules. The relationship between norms governing the actions of other norms and other norms can be called a super-relationship and subordination in a spatial context.[28] As Kelsen put it:[29]

> "The unity of these norms isconstituted by the fact that the creation of the norm–the lower one-isdetermined by another-the higher-the creation of which of determined by astill higher norm, and that this regressus is terminated by a highest, the basicnorm which, being the supreme reason of validity of the whole legal order,constitutes its unity".

According to Hans Kelsen, a legal norm always originates and is based on the norms above it, but below the legal norms it also becomes the source and becomes the basis for the lower norms. In terms of the structure / hierarchy of the norm system, the highest norm (Basic Norm) becomes the place where the norms depend on it, so that if the Basic Norm changes, the existing norm system will be damaged.[30] This concept clearly has an impact on the cancellation or validity of a legal norm. Logically, when referring to the Stufentheori, the cancellation or invalidity of a legal norm must originate from or originate from the norms above it. Or it is also possible to use the same level norms according to the lex posterior derogat legi prior principle. However, does the minister of the home affairs have no hierarchical relationship with the local government? In fact, the authority possessed by the Minister of Home Affairs is the authority that comes directly from the President.

We recognize that there are three concepts of authority to carry out state administrative actions that come from attribution, delegation and mandate. Attribution authority is the

[27] Article 59 jo. Article 4 of Law no. 23 of 2014 concerning regional government which states that the governor is the head of a province where the province has the status of a region and also an administrative region.

[28] Jimly Asshiddiqie dan Safa"at, M. Ali, *Theory Hans Kelsen Tentang Hukum*, (Jakarta: Sekretariat Jendreral & Kepaniteraan Makamah Konstitusi RI, 2006), Cet. ke-1, h.110.

[29] Hans Kelsen, *General Theory of Law and State*, diterjemahkan oleh Anders Wedberg, (Massachusetts, USA: Harvard University Printing Office Cambridge, 2009), h.124.

[30] Maria Farida Indrati, *Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan*, (Jakarta: Kanisius, 2002) h. 42.

authority that comes from statutory regulations. Where the implementation is carried out by the official or agency stated in the statutory regulations.[31] Philipus M. Hadjon stated that attribution is the authority attached to a position as opposed to the authority delegated.[32] The authority of delegation is the delegation of authority from one governmental organ to another. Delegation is always preceded by an attribution of authority.[33] Delegation is the delegation of authority by an organ that is appointed to carry out something to one other organ, so that from then on (after being delegated) the organ exercises the authority delegated on its behalf and is carried out according to its own opinion (the appointed institution). If in attribution there is a granting of authority (which did not exist and then created), then in the delegation there is a delegation of authority (which already exists).[34] In the mandate, there is no grant or transfer / delegation of authority, only representatives. In this case the recipient of the mandate acts on behalf of and in accordance with the beauty of the person who gives the mandate.[35] This is also expressed by Law no. 30/2014 concerning Government Administration.

Article 4 of the 1945 Constitution of the Republic of Indonesia states that the President is the holder of government power according to the Constitution. Article 17 of the 1945 Constitution of the Republic of Indonesia also states that the President is assisted by state ministers. This means that the Minister is an assistant to the President in carrying out his duties. Article 4 of Law no. 39/2008 concerning State Ministries increasingly emphasizes that each ministry is in charge of certain affairs in government. More specifically, Presidential Regulation No. 11/2015 assures that the Ministry of Home Affairs has the task of carrying out affairs in the field of domestic government to assist the President in administering the state.

The implication of the relationship between the president and the minister of home affairs is the delegation of powers the president has. Although the delegation of authority is often implicit in the laws and regulations, this is unique in Law no. 23/2014 there is no explicit delegation to cancel regional regulations, but the law grants this authority by attribution to the Minister of Home Affairs. The authority possessed by the Minister of Home Affairs is basically legitimate authority. His status as assistant to the President further strengthened his position as part of the central control over the regions (executive control).

However, it seems that the power of the minister of home affairs to overturn regional regulations is distorted. This distortion is caused by the legal product used by the minister of home affairs to cancel regional regulations, namely only in the form of a ministerial decree of the home affair. The previous explanation illustrates that the cancellation of a regional regulation must use statutory instruments that are above it or parallel to it or can use the mechanism for cancellation of a regional regulation through the Supreme Court.

To accommodate these various problems, to reinforce the presence of the central government as executive control, a new model for cancellation of regional regulations is needed. The model offered is the calcification of

[31] Basuki Winamo, *Penyalahgunaan Wewenang dan Tindak Pidana Korupsi*, (Jakarta: Raja Grafindo, 2008), h. 70.

[32] Philipus M. Hadjon, dkk., *Pengantar Hukum Administrasi Indonesia: Introduction to the Indonesian Administrative Law*, (Yogyakarta: Gadjah Mada University Press, 2008), h. 130.

[33] Indroharto, *Usaha Memahami Undang-Undang tentang Peradilan Tata Usaha Negara,*(Jakarta: Pustaka Harapan, 1993), h. 68.

[34] Agussalim, *Pemerintahan Daerah Kajian Politik dan Hukum*, (Bogor: Ghalia Indonesia, 2007),h. 106.

[35] Agussalim, *Pemerintahan Daerah*..., h. 107.

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regional regulations according to the material they contain. In the previous discussion, it has been discussed that the content of regional regulations consists of the first implementation of regional autonomy and assistance tasks, the second contains specific regional conditions and the third perda contains further elaboration of higher-level statutory regulations. Particularly for regional regulations that involve further elaboration of higher-level statutory regulations, the authority to cancel them must rest with the central government. Meanwhile, the regional regulations that regulate the specificity of their area are still in the hands of the Supreme Court.

However, the use of legal instruments or legal products to cancel them is not supposed to use an instrument of the minister of home affairs, using a presidential regulation as was the case in Indonesia through Law no. 32/2004 seems to be the ideal alternative. This is because presidential regulations are in a hierarchical order of laws and regulations, which are above regional regulations. But as a consequence, the minister of home affairs can no longer be given the authority to cancel regional regulations at any level, both at the provincial and district/city levels.

As an example, the following is a table of regional regulations whose content is an elaboration of the above laws and regulations, which are marked by a mandate/delegation by the statutory regulations to form a regional regulation as its translation.

(Tabel C.1. Regional Regulation delegated directly by the Legislation higher than Regional Regulation itself)

LAWS	REGIONAL REGULATIONS
Article 27 of Law No. 22 of 2009 about Traffic and Road Transportation	1. **Bandung District Regulation No. 14 of 2013** about Traffic Alert Tools, Traffic Signs and Road Marks 2. **Cilegon City Regulation No. 10 of 2005**about Placement of Traffic Signs, Road Marks and Traffic Alert Tools 3. **Sumenep District RegulationNo. 6 of 2008**about the Implementation of Traffic and Transportation
Article 65 of Law No. 28 of 2009 about Regional Retribution	1. **Capital City Jakarta Provincial Regulation No. 5 of 2012**about Parking 2. **Medan CityRegulation No. 10 of 2011**about Tax of Parking
Article 10 of Law No. 32 of 2009 about the Protection and Environmental Management	1. **South Kalimantan Provincial Regulation No. 2 of 2017**about Environmental Protection Plan and Management of Environment at South Kalimantan Province 2. **Bali Provincial Regulation No. 1 Year 2017**about the Protection and Environmental Management
Article 28 Presidential Decree 17 Year 2010about Education Management and Implementation	1. **Trenggalek District Regulation No. 1 of 2017**about the Implementation of Education 2. **Bandung City Regulation No. 2 of 2018**about Education Management and Implementation
CHAPTER II Presidential Decree No. 55 of 2016 about General Provisions and Procedures of the Regional Tax Collection	1. **Malang City Regulation No. 16 of 2010** about Regional Taxes 2. **Bungo District Regulation No. 7 of 2012** about Entertainment Taxes

As some regional regulations which are not a direct delegation of the higher regulation are:

(Tabel C.2. Regional Regulation that is not a direct delegation of the higher legislation)

NO	REGIONAL REGULATIONS
1	**Banjarmasin City Regulation No. 19 of 2014** About PreservationLocal Arts and Culture
2	**Solok City Regulation No. 6 of 2005** On Combating and Prevention of Immoral Deeds in Solok
3	**Special Province of Aceh Regulation No. 5 of 2000** on the Implementation of Islamic Sharia
4	**Perda Kabupaten Konawe Selatan No. 3 Tahun 2016** Tentang Penertiban Hewan Ternak dalam Wilayah Kabupaten Konawe Selatan **South Konawe Regulation No. 3 of 2016** about Control of Livestock in Region of South Konawe
5	**Gorontalo Provincial Regulation No. 2 of 2016** about the Implementation of Indigenous Institute

Conclusions

The form of the relations between the central and the provincial government is where the province as an autonomous region and also the administrative area of the central government coincide in the use of the principles of deconcentration and decentralization (fused/ single hierarchy model). Meanwhile, the form of relationship between the central and district/ city governments is the district/city government as an autonomous region. In fact, governors and regents/mayors have a unique relationship. Normatively, the relationship between the two is not hierarchically related, but area. The implication is that the provincial and district/ city governments stand independently and coordinate each other.

There is an error in the authority to cancel a pre-decision by the Constitutional Court, where the authority to cancel regional regulation lies with the governor in the form of a governor's decision. They do not normatively have a hierarchical relationship even though the regions do. Uniquely, the minister of home affairs institutionally has the authority to control local governments, including canceling regional regulations (executive control). However, the only legal products used as "cancellation" of regional regulations are only ministerial decrees. The use of presidential regulations (perpres) is an alternative legal instrument considered more appropriate in accordance with the standard theory or legal norm level theory. In order to accommodate those problems and to return accommodating the existence of the central government as executive control through the cancellation of regional regulations, it is necessary to separate the regulations according to the content or material. Where the central government must have the authority to cancel regulations which contains an explanation or extension of the statutory regulations above the regulations.

The concept of a unitary state in Indonesia carries the president as the head of government while the minister is the assistant to the president in carrying out governmental duties in accordance with statutory regulations. The implication is that the minister of interior acts as assistant to the president in carrying out domestic government affairs. Implicitly, although not stated normatively, the minister of the interior has a stake on behalf of the central government in regional government affairs. For this reason, the model of cancellation of regional regulations offered in this study is expected to be an inspiration to then be able to restore the position of the ministry of interior as executive control after the regulation is enacted to the public.

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ISLAMIC FAMILY AND CHILD PROTECTION LAW'S PERSPECTIVE ON VIOLENCE AGAINST CHILDREN

Beni Chandra[1] & Toha Andiko[2]
[1]Subdit Tipikor, Kantor Kepolisian Daerah Bengkulu
Jl. Adam Malik, KM. 9, Kelurahan Sidomunyo, Kecamatan Gading Cempaka, Kota Bengkulu, Propinsi Bengkulu
[2]Program Pascasarjana IAIN Bengkulu, Jl. Raden Fatah Pagar Dewa Bengkulu
Email: [1]dafabeni25@gmail.com; [2]toha.andiko@gmail.com

Abstract: The Indonesian Government guarantees the rights and protection of children by Act 35 of 2014 concerning Child Protection. The law provides absolute protection for children against physical and psychological violence that they may receive, but on the other hand there is an interest in Moslem's families to educate their children according to Islamic law (*fiqh*), so that there is a contradiction both of them. This research was conducted to determine the view of Islamic family and positive law on the problem of handling and protecting children and the limits of violence against children. The researchers used a comparative approach and library research method. Based on the research conducted, it is found that Islamic family and positive law go in line to provide protection for children. The differences are in the perspective of "children", violence against children, the application of physical and psychological punishment, and actions against perpetrators of violence. In addition, there are limits to acts of both physical and psychological violence as a preventive and repressive measure against children, according to the provisions of Islamic family law.

Keywords: Violence; Children; Islamic Family Law; Child Protection

Abstrak: Pemerintah Indonesia menjamin hak-hak dan perlindungan terhadap anak dalam Undang Undang Nomor 35 Tahun 2014 tentang Perlindungan Anak. Undang-undang tersebut memberikan proteksi absolut kepada anak terhadap kekerasan fisik dan psikis yang mungkin diterimanya, namun di sisi lain terdapat kepentingan keluarga Islam untuk mendidik anak-anaknya menurut hukum Islam (*fiqh*), sehingga terjadi kontradiksi di antara keduanya. Penelitian ini dilakukan untuk mengetahui pandangan hukum keluarga Islam dan hukum positif terhadap persoalan penanganan dan perlindungan anak dan batasan tindakan kekerasan terhadap anak. Peneliti menggunakan pendekatan komparatif (*comparative approach*) dan studi dokumentasi (*library research*). Berdasarkan penelitian yang dilakukan, diperoleh hasil bahwa baik hukum keluarga Islam dan hukum positif, keduanya sama-sama bertujuan memberikan perlindungan terhadap anak. Adapun perbedaan di antara keduanya ada pada perspektif tentang "anak" secara definitif, kekerasan terhadap anak, penerapan hukuman fisik dan psikis, dan tindakan terhadap pelaku kekerasan terhadap anak. Di samping itu, terdapat pula batasan tindakan kekerasan baik fisik maupun psikis sebagai upaya preventif dan represif terhadap anak, menurut ketentuan hukum keluarga Islam.

Kata kunci: Kekerasan; Anak; Hukum Keluarga Islam; Perlindungan Anak

Introduction

The Indonesian government guarantees the rights and protection of children in Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection. In Article 1 paragraph (1) of the Child Protection Law, it is stated that a child is a person who is not yet 18 (eighteen) years old, including children who are still in the womb. Based on this article, children have human

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values that cannot be eliminated for any reason. Thus the protection of children from violence is an important concern for the government, including in the field of child development. The existence of stages of child development and growth shows that the child as a human figure with the basic completeness that is in him has just reached maturity in life through several processes along with his growing age both at home and in the surrounding environment.

Regard to handling children, there are two steps that are generally taken by parents, namely: preventive steps (before the child violates) and repressive steps (after the child violates). The two steps consist of advice, harsh reprimand, even beatings within the framework of children's education. However, in implementing these steps, parents often clash with positive legal regulations (the Child Protection Act) which provide absolute protection against physical and psychological violence.

The Child Protection Law states that:

> "Child Protection means all activities to guarantee and to protect children and their rights so that they can live, grow, develop, and participate optimally in accordance with human dignity and protection from violence and discrimination."[1]

> "Violence is any act against a child which results in suffering or suffering physically, psychologically, sexually, and/or neglect, including threats to commit acts, coercion, or illegal deprivation of liberty."[2]

> "Children in and within the educational unit are required to receive protection from acts of physical, psychological, sexual violence and other crimes committed by educators, educational staff, fellow students, and / or other parties."[3]

Noticing some of the articles above, it can be seen that handling naughty children can create a conflict of interest, on the one hand parents and educators should not be silent about the mistakes their children have made, but on the other hand, physical and psychological violence should not be committed against children. In other words, there are some contradictions in the realm of personal interests and expectations of child protection as part of the government's public interest.

The implication of arranging these articles is that many educators (teachers) are affected. Instead of correcting the students' mistakes, the teachers ended up confronting the law on the basis of the preventive and repressive measures they were doing against their students. At another level, not a few parents or family members also collide with the mandate of the law, when they will take preventive and repressive actions that lead to violence against children for the purpose of children's education.

Discussions regarding acts of physical and psychological violence, both at the level of preventive (prevention) and repressive (action of punishment) against children need to be studied in depth and comprehensively so that clear information can be obtained, accepted and applied by Muslim communities

[1] Pasal 1 angka 2 Undang Undang Nomor 35 Tahun 2014 tentang Perubahan atas Undang Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

[2] Pasal 1angka 15 huruf a Undang Undang Nomor 35 Tahun 2014 tentang Perubahan atas Undang Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

[3] Pasal 54 ayat (1) Undang Undang Nomor 35 Tahun 2014 tentang Perubahan atas Undang Undang Nomor 23 Tahun 2002 tentang Perlindungan Anak.

throughout the territory of the Republic of Indonesia.

There are several studie that discuss child or child crimes against the law which were the researchers's prior research,[4] however, studies that discuss the pattern of child education in Islam are rare in relation to the Child Protection Law. On this basis, the researchers considered that the issues raised were an urgent phenomenon, novelty, and unique.

Based on the background that the authors have explained above, it can be identified the main problems that need to be discussed further, namely how Islamic family law and positive law view the problem of handling and protection of children and how the limits of violence act as preventive and repressive measures that can be enforced against children according to the provisions of Islamic family law.

Research Method

This type of research is qualitative research, namely research that reflects a phenomenological perspective to understand the meaning of an event and its mutual influence with humans in certain situations.[5] This research will be conducted in a specific setting and is context-oriented.[6] The form is normative juridical, namely research on legal principles.

It employed a comparative approach in which the researchers tried to compare two kinds of legal perspectives in examining the aspects under study. The two legal perspectives referred to are Islamic law (fiqh) and positive law.

This is descriptive-analytic research in which the researchers tried to explain existing conditions or hypotheses with the aim of finding facts followed by adequate analysis as an attempt to find problem solutions. This study seeks to explain how the concept of child protection against violence in the Child Protection Act, which is then analyzed with the concept of Islamic law related to violence against children as an effort to take repressive measures to find a common ground.

Furthermore, the researchers used the documentation study method in collecting data, so that the study will be carried out by tracing and examining the literature or written sources related to the subject (research focused on library materials).[7]

As library research, the data collection technique carried out is by tracing data sources or libraries, especially the results of writing, prints, and/or publications related to violence against children, matters related to *jinayah* principles in the framework of Islamic law, and government participation and positive law related to the protection of children in general.

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[4] Penelitian Samuel Fresly Nainggolan, "Faktor-Faktor yang Mempengaruhi Penjatuhan Sanksi Pidana terhadap Anak Nakal", *Jurnal Mahupiki,* Vol. 2, No. 1, Agustus 2013; Penelitian Muhammad Aenur Rosyid, dkk, "Alternatif Model Penanganan Anak Yang Berkonflik dengan Hukum Melalui *Family Group Conferencing* (Analisis Yuridis Undang-Undang Republik Indonesia Nomor 11 Tahun 2012 Tentang Sistem Peradilan Pidana Anak)", *Jurnal Universitas Brawijaya*, Vol. 3, No. 2, Desember 2013; Betania Fransiska Sitanggang, Irma Cahyaningtyas, "Penanganan Perkara Anak Dalam Perspektif Jaksa Penuntut Umum", *Jurnal Pembangunan Hukum*, Vol. 2, No. 1, 2020. https://doi.org/10.14710/jphi.v2i1.66-81

[5] Asmadi Alsa, *Pendekatan Kuantitatif Kualitatif Serta Kombinasinya dalam Penelitian Sosiologi*, (Yogyakarta: Pustaka Pelajar, 2014), p. 32-33.

[6] Asmadi Alsa, *Pendekatan Kuantitatif* …, p. 39.

[7] Abudin Nata, *Metodologi Studi Islam*, (Jakarta: Rajawali Press, 2010), p. 212.

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The Perspective of Islamic Family and Positive Law on Children Handling

In terms of the juridical aspect, the notion of a child is generally defined as a person who is not mature (minderjarig/person underage), a person who is underage/underage (minderjarigheid/inferioriy) or often referred to as a child who is under guardianship (minderjarige ondervoordij). With a starting point of this aspect, Indonesia's positive law (ius constitutum/ius operatum) does not regulate the existence of a universal law unification to determine the criteria for age limits for a child.[8]

The meaning of children here is not only biological children, but also, as confirmed in the explanation of Article 2 paragraph (1) letter a of Law No.23 of 2004, also includes adopted and stepchildren. Thus, the definition of "child" in Law No.23 of 2004 is different from the meaning of "child" according to other laws, for example Law No.23 of 2002 concerning Child Protection. According to Law No.23 of 2002 concerning Child Protection, in Article 1 point 1, a child is someone who is not yet 18 (eighteen) years old, including children who are still in the womb. The definition of "child" in the Child Protection Law is seen in terms of age.[9]

Child protection is part of national development. Protecting children is protecting humans, and building people as whole as possible. This is reflected in the essence of national development, namely the development of the whole Indonesian human being who is virtuous. Ignoring the issue of child protection means that it will not strengthen national development. The result of the absence of child protection will cause various social problems that can interfere with law enforcement, order, security, and national development.[10]

The difference in perspective between Islamic and positive law in viewing the handling of children is a phenomenon and legal issue that is interesting to research. This issue is becoming increasingly important to discuss so that educators and parents can have guidelines or guidelines in handling children in the family.

Several forms of approaches that involve preventive and repressive measures—even though they are well intentioned—are often confronted diametrically (face to face) with criminal law on the basis of the Child Protection Law. The interest of the Islamic family to educate their children according to Islamic law will be faced with the interests of the government as outlined in the law.

Therefore, it seems clear that the conflict that occurs has the potential to cause legal confusion, ambiguity (multiple interpretations of the law), and legal obscurity within the scope of law enforcement against physical and psychological violence committed by parents in preventive and repressive handling of children. Furthermore, a general discourse will be formed which illustrates that Islam is a religion that tolerates beating of children, while positive law protects children more

[8] Ifa Latifa Fitriani, "Islam Dan Keadilan Restroratif Pada Anak Yang Berhadapan Dengan Hukum", *IN RIGHT Jurnal Agama dan Hak Azasi Manusia*, Vol. 2, No. 1, 2012, p. 209.

[9] Taisja Limbat, "Perlindungan Anak Terhadap Kekerasan Menurut Undang-Undang Penghapusan Kekerasan Dalam Rumah Tangga", *Jurnal Lex Crimen*, Vol. III, No. 3, Mei-Juli 2014, p. 48.

[10] Rio Hendra, "Penerapan Keadilan Restoratif Di Indonesia Bagi Anak Yang Sedang Berhadapan Hukum", *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum dan Keadilan,* Vol. 5, No.2, Desember 2018, p. 259.

and is more worthy of being a reference than religion, even though in fact it is not the case.

1. Comparison of child protection between Islamic family and positive law

Islam provides guidelines in relation to child protection, namely: First, the Al-Qur'an states that children should not be the cause of poverty for their parents, and parents should not suffer misery because of their children (QS. Al-Baqarah/2: 233). For this reason, children need to be prepared so that they are ready to face the realities of life and do not always depend on their parents, and do not become a burden for their parents. In addition, children are also not allowed to become a source of slander for their parents. (Surah Al-Taghabun/64: 14-15) This is where good moral education is needed, so that children do not become slander for both parents. On the other hand, the Al-Qur'an requires those children to be entertainers and a source of pride for their families, to be a conditioning for their parents' hearts (Surat al-Furqaan/25: 74). For this purpose, parents are required to be careful in directing and guiding their children. They must be guided and educated to carry out righteous deeds. Second, parents should not cause misery for their children. Children are a mandate entrusted by Allah SWT. to his parents. They must be protected for the safety of their souls, their daily lives, their future, so that they do not become a burden on the compassion of others because they are weak materially or mentally (QS. An-Nisa'/4: 9). Therefore, parents and educators are ordered to carry out that mandate and are not allowed to betray them, including caring for children who have been entrusted with it (QS. Al-Anfal/8:27).

Protection of children, in terms of religion, requires religious education for children at home and in educational institutions where they study, in accordance with the religion their parents adhere to, parents and schools must heed this, if it is not, then nature will decorate the self of every human being from birth is not protected. In the context of protection from a religious perspective, children must also be protected from anything that can damage their morals, because religion cannot be separated from it. The growth of children in shaping attitudes, behavior and personality is not only determined by the family, mother and father, but also by reading and the environment. That is the view of religious leaders and scientists. Environmental factors in schools and communities must be in line with or, at least, not in conflict with what is experienced by children in the family environment. Therefore, parents and society must be able to protect children from reading, viewing, and bad environments. In the context of this protection, the government needs to establish laws and regulations that can ensure the protection of children from all negative impacts on their morals and religion.

Even though Islamic and positive law (the Child Protection Law) both have noble goals for children as the next generation, there are still clear differences in perspective between Islamic family and positive law regarding actions against child protection. A striking difference which has the potential to cause chaos in the application of the articles in the future.

On the one hand, Islamic family law provides protection in accordance with the portion specified in the Qur'an and hadith, namely protection based on morals, while on

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the other hand positive law provides protection that is absolute as a form of product based on philosophical or Western-style "modern legal ethics", not based on morals, namely religion. The differences above indicate the closure of the space for the application of physical and psychological punishment to children in positive law, even though there are times when physical punishment and psychological punishment are among the ones that are ordered in Islamic family law and Islamic legal education.

Based on the Child Protection Law, it can be reflected that all actions against children that cause physical and psychological distress are classified as prohibited forms of violence. As for the form of violence against children-both physical violence and psychological violence-is an act that violates positive law and must be subject to punishment.

The Child Protection Law was issued starting from the many acts of violence that occurred as a result of the arbitrariness of parents and/or educators in the school environment. Actually there is nothing wrong with this, because the issuance of this regulation is a positive response to protect children from adult injustice. However, according to the researchers' judgment, the law is far from perfect. In addition to having non-actual sanctions to suppress and solve the problem of sexual crimes against children, the law appears to provide for the role of parents and educators who truly stand on Islamic ideals.

It is unfortunate that Article 15 letter a, which contains the definition of violence against children, is not provided with additional information in the elucidation of the article, so that the meaning of violence against children can become multi-interpretations and show absolutism in the position of children in various fields. In fact, every child is a young human being who is attached to mistakes, ignorance, and other omissions.

In fact, neglect of children's rights includes social violence against children. In an inappropriate age, the child has to work hard, which can harm not only physically but also psychologically. Physically, the child's body is not fully developed, the height and weight are not yet optimally developed, the bones are still small and are not able to lift heavy loads, the mind is also immature to accept the work that should be done by adults. This of course can affect the physical development of the child, which may be because they often accept and bear heavy burdens, the child's body develops imperfectly. In addition, children who are supposed to learn to prepare for a bright future, ultimately do not have the opportunity to learn, let alone to play and socialize with their friends. Many of the children's time will be sacrificed because of neglect by parents.[11]

The absolutism of the Child Protection Law in protecting children from physical and psychological violence in general indicates the weak position of parents and educators. There is an impression that acts that lead to violence both physically and psychologically against children fall into the realm of *verbooden* (forbidden), so the perpetrator must be punished without paying attention to the reasons for the violence.

The view of positive law on absolute protection of children is diametrically opposed to Islamic family law. Islamic law that makes

[11] Rianawati, "Perlindungan Hukum Terhadap Kekerasan Pada Anak", *RAHEEMA: Jurnal Studi Gender dan Anak*, Vol. 2, No. 1, 2015, p. 9.

physical punishment and psychological reprimand against children as preventive or repressive measures for children will be categorized into forms of physical or physical violence against children in the perspective of positive law. For example, in the application of the hadith, the obligation to pray in the hadith is a continuation of the command to pray to children in the Al-Qur'an (QS. Luqman/31:17). Consider some of the following hadiths:[12]

قَالَ رَسُوْلِ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ: مُرُوْا الصَّبِيَّ بِالصَّلَاةِ إِذَا بَلَغَ سَبْعَ سِنِيْنَ, وَ إِذَا بَلَغَ عَشْرِ سِنِيْنَ فَضْرِبُوْهُ عَلَيْهَا

Rasulullah Saw. said, "Instruct a child to pray when he is seven years old. When you reach the age of ten, beat him to pray." (HR. Abu Dawud dari Sabrah bin Ma'bad al-Juhani ra.)

عَلِّمُوْا اَصَّبِيَ الصَّلَاةِ ابْنِ سَبْعَ سِنِيْنَ, وَالضْرِبُهُ عَلَيْهَاا بْنِ عَشْرِسِنِيْنَ

"Teach a child to pray when he is seven years old, and beat him to pray when he reaches ten years of age." (HR. Tirmidzi)

إِذَا بَلَغَ الْغُلَامُ سَبْعَ سِنِيْنَ أُمِرُ بِاالصَّلَاةِ, فَاِذَا بَلَغَ عَشْرًا ضُرِبَ عَلَيْهَا

"When a child has reached the age of seven, he is ordered to pray. And when he reaches the age of ten, then he is beaten to pray." (HR. Ahmad III/404)

مُرُوْا صِبْيَانَكُمْ بِاالصَّلَاةِ لِسَبْعَ سِنِيْنَ, وَاضْرِبُوْهُمَ عَلَيْهَ لِعَشْرٍ

"Order your children to pray at the age of seven, and beat them to pray at the age of ten." (HR. Ad-Daruquthni I/230)

It is also included in other hadith that:[13]

أَنَّ النَّبِيَّ صَلَى اللهُ عَلَيْهِ وَسَلَّمَ أُمِرُ بِتَعْلِيْقُ السُّوْطِ فِي لِبَيْتِ

"For the Prophet. ordered to hang the whip in the house." (HR. Bukhari II/656)

عُلِّقُوْا السُّوْطِ حَيْثُ يَرَاهُ أَهْلِ الْبَيْتِ, فَاَنَّهُ اَدَبُ لَهُمْ

"Hang the whip where your family can see it, for that is (teaching) manners for them." (HR. Abdurrazaq)

عَلُّقُوْا السُّوْطِ حَيْثُ يَرَاهُ أَهْلُ الْبَيْتِ, فَاَنَّهُ لَهُمْ اَدَبَ

"Hang the whip where your family can see it, for that is (teaching) manners for them." (HR. Thabrani melalui Ibnu Abbas secara *marfu')*

Regard to frightening children (psychic violence) for the purpose of goodness in religion, Mutawalli asy-Sya'rawi (*Grand Shaykh* of Al-Azhar University) argued:

> "It is not a problem to scare children in religious matters. However, it must also be explained to him about the life of heaven-the reward of goodness that is obtained if he obeys religious orders. As there is a picture given as a result of not passing the exam, thus encouraging him to study hard to pass the exam. Likewise, children who do not go to school for reasons of cold weather. Many people love themselves with stupid love. The

[12] Hadis dari Sabrah bin Ma'bad al-Juhani ra., Abu Dawud, *al-Musnad*, No. 459, Imam al-Tirmidzi, *Tuhfatul Ahwadzi fii Syarh Sunan at-Tirmidzi,* Juz II, p. 405. Derajat *hasan shahih* dalam Kitab Digital *Mausu'ah Hadits*; 'Aidh al-Qarni, *Ensiklopedi Dalil Hukum*, (Jakarta: Pustaka Samudera Ilmu, 2005), p. 71; juga di dalam Abu Bakar Jabir al-Jazairi, *Minhajul Muslim*, Solo: Pustaka Arafah, 2014, p. 365; Muhammad Nur Abdul Hafizh Suwaid, *Prophetic Parenting: Cara Nabi Mendidik Anak*, (Yogyakarta: Pro-U Media, 2010), p. 355-356.

[13] Imam Bukhari, *al-Adab al-Mufrad*, Imam Thabrani, *Shahih al-Jami' ash-Shaghir*, nomor hadis 4022, Kitab Digital *Mausu'ah Hadits*. Lihat juga Hasan Aedy, *Kubangun Rumah Tanggaku dengan Modal Akhlak Mulia*, (Bandung: Alfabeta, 2009), p.128-129.

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> first love is love for the long term, and the second for the short term. Everyone loves life. Give a picture to the child of the next life so that he really hopes for heaven and is afraid of hell. On the contrary, it is very dangerous if the child from childhood does not expect heaven and is not afraid of hell. Of course the explanation must be conveyed with full wisdom and through stages. "[14]

The application of the hadiths and recommendations above inevitably involves threats and perhaps even beatings as a manifestation of the element of psychological and even physical coercion. So that in fact, religious advice that is divine in nature has the potential to conflict with the provisions stipulated by the Child Protection Law. Article 15 letter a of the law in question states that:

> "Violence is any act against a child which results in suffering or suffering physically, psychologically, sexually, and / or neglect, including threats to commit acts, coercion, or illegal deprivation of liberty."

The definition of violence is in line with the meaning of violence in Law no. 23 of 2004 article 1 A which reads: "Violence in the household is any act against someone, especially women, which results in physical, sexual, psychological, and domestic neglect, including threats to commit acts, coercion or illegal deprivation of liberty within the scope of the household".

On the one hand, the purpose of making regulations that prevent violence is considered good, because it is a preventive effort to protect weak parties in the household so that they are protected from acts of violence by family members. At the same time, it is an effort to deter perpetrators of violence so that they do not repeat their actions. However, in this very detailed regulation, there are criteria for violence that are not in line with the provisions of Islamic law. It is also difficult to limit the size and prove it.[15]

According to the Child Protection Law, violence is defined as any act that targets a child and that act causes misery or suffering, both physical and psychological suffering, including threats. Any form of violence or unpleasant acts that fall into the detailed definition of it, is subject to violence against children. So that coercion with threats and beatings on children aged 10 (ten) years and threats of frightening children with a whip in the house are classified as disgraceful physical and psychological violence.

In Article 76 letter C of the Child Protection Law, it is stated that:

> "Everyone is prohibited from placing, permitting, committing, ordering, or participating in violence against children."

Article 80 paragraph (1) contains the threat of punishment for violating the provisions of Article 76 letter C, which states that:

> "Every person who violates the provisions as referred to in Article 76C, shall be sentenced to imprisonment for a maximum of 3 (three) years and 6 (six) months and / or a maximum fine of Rp72,000,000.00 (seventy two million rupiah)."

[14] Mutawwali al-Sya'rawi, *Anda Bertanya Islam Menjawab*, (Jakarta: Gema Insani Press, 2007), p. 555-556.

[15] Toha Andiko, "Kekerasan Dalam Rumah Tangga Dan Sanksinya Perspektif Hukum Islam (Studi Kritis UU No. 23 Tahun 2004 Tentang Penghapusan Kekerasan Dalam Rumah Tangga)", *Manhaj: Jurnal Penelitian dan Pengabdian Masyarakat*, Vol. 6, No. 3, 2017, p. 2

On the basis of these articles, the application of the Sunnah on punishing children-which is one of the instruments of Islamic law-becomes inapplicable in Islamic families in Indonesia. In fact, the methods mandated by the Hadith that the researchers mentioned earlier are part of the tarbiyah in the Islamic family which are spiritual in nature and aim to respect the human being himself so that he can be directed with valid directions as the deeds loved and blessed by Allah SWT.

2. Comparison of the benefits and disadvantages of the prohibition of physical and psychological violence against children

State laws and Islamic law basically agree that children must be protected by their rights and interests, and vice versa, it cannot be justified in any form of violence committed against children that could endanger their life and future.[16]

Positive law rejects physical violence absolutely (in absolute terms), arguing that this method of sanctions contains more harm than good. The benefit of staying away from physical violence according to the positiveists is to provide the widest possible space for children to express themselves without having to be under the shadow of psychological and physical threats. In fact, if we look further, the legal absolutism adopted by the Child Protection Law contains several disadvantages. The losses that arise in this case can be in the form of a lack of respect and obedience to parents and educators, because respect comes after obedience, and obedience is born when there is fear as one of the pillars. Another disadvantage is that there is an attitude of indifference to the orders and prohibitions of parents or educators, because anyone who feels safe from the threat of punishment/sanctions will undoubtedly do whatever he wants. In addition, attitudes against discipline, rules, and decisions taken by parents and educators can emerge, even to the level of fighting parents and fighting with educators. Furthermore, the disadvantages that can arise from absolutism are the emergence of the habit of prioritizing one's own desires, even though it is detrimental to others and a lack of habituation to being patient.

After looking at the description above, the researchers can emphasize that the act of the Child Protection Law which does not provide space for parents and educators to intervene against children's mistakes by means of psychological and physical violence is a fundamental mistake. This is because physical and psychological punishment is clearly known in the Islamic family and in the world of Islamic education. Physical and psychological punishment is applied as a last resort when reprimands and advice can no longer change the wrong behavior of a child.

Researchers see that there is a misunderstanding of the law in translating the word "violence" with the meaning of "violence". Positive law perceives the word "violence" as "violence" which is considered to be increasingly with "cruelty" which connotes crime. So the researchers argues that the legislators should understand that the actions that are prohibited should be "felonies" (cruelty), not violence. This is because all forms of law violations that claim children who have been abused - beating, rape, harassment, etc. against children, including teacher beatings

[16] Yusdani, *Menuju Fiqh Keluarga Progresif*, (Yogyakarta: Kaukaba Dipantara, 2015), p. 133.

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against students-are manifestations of acts of cruelty (felonies), not violence. There is always a visible difference between beating that targets a child in the framework of punishment as a remedy and beating that targets the child in terms of just the release of anger.

In Islam, the purpose of requiring punishment, in this case including its punishment, is no different from the general objective of Islamic law, namely creating and maintaining the benefit of mankind, in order to achieve happiness in the world and the hereafter. According to research by scholars, there are two kinds of purposes of punishment. First, the relative goal *(al-ghard al-qarîb),* which is to punish (inflict pain on) the perpetrator of a criminal act-which in general can encourage the perpetrator to repent-so that he becomes a deterrent, does not want to repeat doing jarim, and other people do not. dare to follow in his footsteps. Second, the absolute goal (*al-ghard al-ba`îd*), namely to protect the public benefit. These two things are what every punishment in Islam is trying to achieve.[17] Therefore, not all violence must be criminalized.

Violence and gentleness are the Sunnah of life, both of them must exist without denying their respective roles. Like human organs, there are hard parts like teeth and soft parts like lips, all of which have their respective roles and functions and all of them cannot negate one another. So it can be said that there are times when a phenomenon in this life will be handled smoothly with just tenderness and there are also complicated events that must be dealt with by means of violence. The same condition can occur in dealing with children.

Even more extreme, it can be explained that psychological violence (threats) and physical violence that may arise in the process of children's education is actually a form of protection itself. Violence must remain, because it is a protection against children from making the same mistakes in the future, protection from ignorance of thought, and guidelines that can lead children to the right path while avoiding evil.

A father hitting his child's leg or a mother twisting his child's ear are both in the final stage of child education in which the child can no longer understand verbal languages. Likewise, when a teacher punishes a student, the teacher is trying to get the student to take lessons so that he does not repeat similar mistakes in the future. Physical and psychological punishment, if applied with the right methods and tools, then this type of sanction will be useful to rectify a child who made a mistake.

To make it easier for readers, researchers have compiled several comparisons of perceptions between Islamic law and positive law in addressing children's problems in the following table form:

Table: Comparison of Islamic Family and Positive Law in addressing child protection, physical violence, and psychological violence

Parameter	**Islamic Family Law (*Fiqh*)**	**Positive Law (Child Protection Law)**
Definition "child"	Under *baligh*.	Under 18 years old.
Protection on Children	Cumpulsory	Cumpulsory
Affection to Children	Cumpulsory	Cumpulsory

[17] Toha Andiko, "Reinterpretasi Sanksi Pidana Islam (Studi terhadap Pemikiran Prof. KH. Ibrahim Hosen, LML)", *Jurnal Madania Vol. XVII, No. 2*, Desember 2014, p. 236.

Parameter	Islamic Family Law (*Fiqh*)	Positive Law (Child Protection Law)
Violence against Children	The law of origin is forbidden, until there is an emergency that allows it.	Under any circumstances, violence against children, both physical and psychological, is absolutely prohibited.
Punish children physically (hit)	Tentative considering the condition with the measure of emergency as *ultimum remedium* (highest penalty).	Absolutely prohibited, because punishment is classified as physical violence.
Punish children psychologically (threatening, boycotting, frowning)	*Mubah*/allowed based on the hadith.	Absolutely prohibited, because the punishment is classified as psychological violence.
Perpetrators of violence against children	Classified as a *jarimah*, except as the highest punishment, the law is *mubah*/ permissible.	Convicted because it is a form of violation of the law (Article 76C jo. Article 80)

The table above is the result of comparing the two poles of law in looking at the issue of child protection. Based on this table, it can be seen that there are a number of similarities and differences related to the formulation of the problem raised. The similarity between Islamic family and positive law in terms of viewing child protection lies in the obligation to protect and provide affection for children. However, there are several striking differences between the two, mainly related to the definition of children, the law of violence against children, physical and psychological punishment against children, and the legal status of the perpetrator of violence against children.

Limitation of Violence as a Preventive and Repressive Effort against Children according to the Provisions of Islamic Family Law

1. Comparison of the impact of violence on children's education

a. Positive and negative impacts of violence against children in positive law

Both physical punishment and psychological sanctions in the framework of violence against children have positive and negative impacts from a positive legal perspective. The positive impact is that there is a guarantee of freedom for a child to be free from all forms of violence that may arise from all forms of action.

Violence against children that appears is often seen as the cause of children not wanting to accept the truth and tend to fight behind the child's boredom and anger.[18] According to a positiveist understanding, a child should have the widest possible freedom to express what he wants and what he understands to be his right. However, from the positive impacts stated above, the researchers sees that the positive law has not been completed in the discussion of the body of the Child Protection Law.

Referring to the definition of the law that a child is a human being in the womb until the age of 18 (eighteen) years, the act of granting the widest possible freedom of expression will backfire on the child himself. This is even more so if the child has entered adolescence to the age of puberty.

[18] Syauqi Muhammad Yusuf, *Seindah Kehidupan Surgawi: Manajemen Rumah Tangga Sesuai Tuntunan Islam*, (Yogyakarta: Mitra Pustaka, 2014), p. 39.

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During the growth period, children and adolescents will go through various phases of life. Each phase requires different treatment. In other words, each phase requires education which cannot be spared from two things, namely: reward and punishment. Children who are given rights solely in the form of state protection from violence as widely as possible are the same as eliminating guidance (directions), which are what children need.

It is possible that the absolutism of the articles of protection from physical and psychological violence contained in the Child Protection Law will be effective for preschoolers, elementary school children, and secondary schools. However, the loading of articles in the legislative product will not be effective in the world of education if the application is applied to children entering adolescence where advice is no longer optimal for changing behavior.

b. The positive and negative impacts of violence against children in Islamic law

Prophet Muhammad SAW. divides the stages of child development into three stages: childhood filled with love *(mahabbah),* addibhu period which is full of guidance in shaping discipline and morality, and shohibhu period where children are treated as friends.[19] So that the handling of children who deviate also requires variations and adjustments. These variations and adjustments are also included in the aspect of providing preventive and / or repressive measures against the child who is at fault.

From an early age, children must be formed and accustomed to good habits. Children who make mistakes should be advised even to be treated firmly. Bad effects will occur for the child's personality, if he does not get advice or firm treatment. Fair and strict punishments in the world of education must be enforced when necessary.

Physical and psychological violence given to children within the framework of education is not always perceived as bad, because there are many positive impacts that accompany it. The positive impact in question can be in the form of high awareness of the child, development of maturity level, disciplinary education, and as therapy for the child's development and development journey. Physical punishment in the form of beatings can be a means of bringing success if it is carried out at the right time and place. Beatings in the framework of tarbiyah, will have both short and long term effects.

This is reflected in the behavior of children who are loyal to the orders and prohibitions that are presented to them. This will become a habit that he will live up to adulthood. Although at first children obey orders and prohibitions for fear of punishment, later this fear will turn into an attitude of respect and respect for others such as parents, teachers, and other educators. Obedience can be established when there is fear as one of the pillars. An attitude of fear and respect breeds continuous obedience.

The only negative impact of physical and psychological punishment on children in Islamic families is when parents or educators mistakenly carry out the punishment, neglect to pay attention to how the punishment is given, and lose direction in the method of punishing the child. In other terms, as long as the sanction is implemented in accordance

[19] Jalaluddin, *Mempersiapkan Anak Saleh: Telaah Pendidikan terhadap Sunnah Rasulullah Saw.* Jakarta: Srigunting (PT. RajaGrafindo Persada, 2012), p. 117-121.

with religious boundaries and is used when all methods of teaching are unsuccessful, then physical punishment in the form of beatings will work effectively.

Physical violence if it is done excessively can turn into a means of destruction, but if it is used carelessly or it is less than tolerable, it will be useless. Karsam can be one of the appropriate means of learning if it is in accordance with the *syar'i* structure.

2. Reasons for permitting violence in children's education

a. The need for violence in children's education

In fact, researchers are a group that agrees that both physical and psychological sanctions can be applied to children and students at certain levels of education, but researchers emphasize that the sanctions for violence will not have a positive impact unless there are causes and motives that encourage the application of these sanctions.

Some of the reasons for permitting physical violence in *tarbiyah* are:

1) When the method of motivation and encouragement has been tried, but it does not produce results (QS. *At-Taubah*/9: 20-22);
2) When the gratification and advisory methods were in place, it didn't work (QS. *Al-Hujurat*/49: 9);
3) When the rejection method (boycott) has been implemented, but has not met any results (QS. *An-Nuur*/24: 2-4);
4) When the method of threatening (psychological violence) has been implemented, but it does not work (QS. *Al-Ahzab*/33: 60);
5) When parents or educators are truly able to predict there is a positive impact behind the physical sanctions given.

For certain cases, there may be a small proportion of children who still do not experience improvement even though all the teaching methods have been given. However, that does not mean that the reason for meekness becomes an obstacle to the application of the method of physical violence sanctions.

b. *Syar'i* arguments that allow the sanction of violence in Muslim families

In general, there are several arguments that indicate that physical sanctions in the form of beatings are allowed. The general arguments referred to include:

1) The beating of the nusyuz woman in the Al-Qur'an *An-Nisaa'*/4: 34 that states:

اَلرِّجَالُ قَوَّامُوْنَ عَلَى النِّسَآءِ بِمَا فَضَّلَ اللّٰهُ بَعْضَهُمْ عَلٰى بَعْضٍ وَّبِمَآ اَنْفَقُوْا مِنْ اَمْوَالِهِمْ ۗ فَالصّٰلِحٰتُ قٰنِتٰتٌ حٰفِظٰتٌ لِّلْغَيْبِ بِمَا حَفِظَ اللّٰهُ ۗ وَالّٰتِيْ تَخَافُوْنَ نُشُوْزَهُنَّ فَعِظُوْهُنَّ وَاهْجُرُوْهُنَّ فِى الْمَضَاجِعِ وَاضْرِبُوْهُنَّ ۚ فَاِنْ اَطَعْنَكُمْ فَلَا تَبْغُوْا عَلَيْهِنَّ سَبِيْلًا ۗ اِنَّ اللّٰهَ كَانَ عَلِيًّا كَبِيْرًا

"Men are leaders for women, because Allah has exaggerated some of them (men) over some others (women), and because they (men) have spent part of their wealth. Therefore, a godly woman who is obedient to God takes care of herself when her husband is not there, because God has taken care of (them). Women whom you are worried about nusyuznya, so advise them and separate them in their beds, and beat them. Then if they obey you, then do not look for ways to trouble them. Verily Allah is Most High, Most Great."

Ibn Kathir stated that the lafazh verse (وَاضْرِبُوْهُنَّ) "and beat them" is done if advice and separation of beds do not thrill him, then it is

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permissible to beat him without injuring him. As the message of the Prophet Muhammad, in the *Hajj Wada'*, namely:

> "The word of Allah ta'ala, 'And beat them'. Namely, if the wife does not leave her bad deeds after being advised and boycotted, then you can hit her with a blow that does not hurt, as it was stipulated in shahihain, from Jabir, from the Prophet. He said in the *Hajj wada*', Fear Allah in the affairs of women, because their being by your side is a difficult test. It is your right and their duty that they should not have anything to do with anyone in your bed. If they do, then hit them without hurting them. Meanwhile, they get sustenance and clothing in *ma'ruf.* "The jurisprudents say" A blow that does not hurt is one that does not break the bone and leaves a mark."[20]

The Quraish Shihab states that the verse *lafazh* (واضربوهنّ) is taken from the word Dharaba which has many meanings. Language, when used in the sense of hitting, is not always understood to mean hurting or committing a harsh and harsh action. The purpose of striking in this verse is hitting which does not hurt. The Quraish shihab wrote:

> "Do not also say that hitting is no longer relevant today, because education experts still admit it - for certain cases - even among the military it is still known for those who violate discipline, and once again it must be remembered that beatings are ordered (religion) and it (a hit) which is neither injurious nor painful. "[21]

With regard to this issue, the interpretation of *Fi Zhilalil-Qur'an* also finds the statement that:

> "And beat them. In line with the intent and purpose of all actions in advance, this beating is not intended to hurt, torture and satisfy oneself. This beating must not be carried out with the intention of humiliating or degrading. Nor should it be done harshly and harshly to submit to a life which one does not like. The beatings that are carried out must be in the context of educating, which must be accompanied by a feeling of affection from an educator, as is done by a father to his children and by a teacher to his student"[22]

2) The blow of the Prophet Ayyub as., to his wife in the Qur'an Surah Shaad/38: 44 which reads:

وَخُذْ بِيَدِكَ ضِغْثًا فَاضْرِبْ بِّهٖ وَلَا تَحْنَثْۗ اِنَّا وَجَدْنٰهُ صَابِرًاۗ نِعْمَ الْعَبْدُۗ اِنَّهٗٓ اَوَّابٌ

"And take with your hands a bunch (of grass), then beat with it and do not break your oath. Indeed, we found him (Ayyub) a patient. He is

[20] Muhammad Nasib ar-Rifa'i, *Ringkasan Tafsir Ibnu Katsir (Jilid 1)*, (Jakarta: Gema Insani., 2009), p. 705. In the Interpretation of the Ministry of Religion of the Republic of Indonesia it is also stated: "How should a husband behave towards a wife who does not obey him (*nusyuz*), that is, to advise her well. If that advice doesn't work, then the husband tries to separate the bed from his wife, and if it doesn't change too, then hit her with a light blow that doesn't hit them and doesn't leave a mark (p. 164). Against a wife who is disobedient to her husband can be done the following actions: To be advised, to separate from bed, or to be beaten with light blows, for the purpose of being educated. " Departemen Agama Republik Indonesia, *Al-Qur'an dan Tafsirnya (Jilid II)*, Jakarta: Lembaga Percetakan Al-Qur'an Departemen Agama, 2009, p. 163-164. In Jalalain's Tafseer it is said: "واضربوهن (And beat them) ie blows that do not hurt, if they are still unconscious". Imam Jalaluddin al-Mahali & Imam Jalaluddin as-Suyuthi, *Terjemahan Tafsir Jalalain Berikut Asbaabun Nuzuul (Jilid 1)*, (Bandung: Sinar Agung Algensindo, 2006), p. 345.

[21] Quraish Shihab, *Tafsir Al-Mishbah: Pesan dan Keserasian Al-Qur'an (Volume 2)*, (Tangerang: Lentera Hati, 2008), p. 432.

[22] Sayyid Quthb, *Tafsir Fi Zhilalil Qur'an: Di Bawah Naungan Al-Qur'an (Jilid 2)*, (Jakarta: Gema Insani, 2011), p. 358.

the best servant. Indeed he is very obedient (to his God).”

Ibn Kathir states in his tafisir this verse (وَخُذْ بِيَدِكَ ضِغْثًا فَاضْرِب بِّهِ. وَلاَ تَحْنَثْ) “And take with your hands a bunch (of grass), then beat it (your wife) and don›t break your oath.”

> “So Allah SWT., gave a fatwa to him to take a bunch of grapes totaling one hundred and then hit his wife once. In this way, he has performed his sumah and he is freed from his vows and has perfected his nadzâ. This also includes relief and a way out of those who repent and repent to Him.”[23]

The interpretation of the Ministry of Religion of the Republic of Indonesia states that:

> “The verse of the Al-Qur'an does not say what because he took an oath and what was his oath. Only the Hadith states that he swore because his wife, whose name was Rahmah bin Ifraim, went out for something and came late. Ayyub vowed to hit him 100 times when he was healed. With the beating of the bundle of grass, he was deemed to have carried out his oath, as a mercy for Job himself and for his wife who had served him well in times of illness. With the mercy of God, even that Job was spared from breaking his oath. “[24]

Regard to the same verse, the Quraish Shihab stated:

> According to history, the Prophet Ayyub as., Once vowed to beat a member of his family - there is a history that states his wife - because his family had done something that irritated the Prophet Ayyub as However, he regrets that his religion is not known as kaffarat as in the Shari'a taught by the Prophet Muhammad. Read QS. Al-Maaidah/5: 89). So, for that, Allah gave him a way out so as not to break his oath, namely to take as much grass as he swore to beat his family. Thus, the Prophet Ayyub as., Carried out his oath but in a way that was not painful.[25]

The evidence that can be learned from the two verses above is that Allah swt. does not command anything except in it there is good and good for the individual and society. Allah SWT. ordered the execution of His punishments of which physical sanctions were a part. Allah SWT. knowing that punishment can thrill and drive (humans) from falling into abominations. This kind of corporal punishment falls within the scope of *tarbiyah* (education), because education stands on two pillars that support it: reward and punishment.

3) Spanking can be done in addition to hitting the face, the argument is based on several hadiths that the researchers has put forward, one of which is:

إِذَا ضَرَبَ اَحَدُكُمْ فَلْيَتَّقُ الْوَجْهُ

[23] Muhammad Nasib ar-Rifa'i, *Ringkasan Tafsir Ibnu Katsir (Jilid IV)*, (Jakarta: Gema Insani, 2000), p. 79.

[24] Departemen Agama Republik Indonesia, *Al-Qur'an dan Tafsirnya (Edisi yang Disempurnakan)*, Jakarta: Lembaga Pencetakan Al-Qur'an Departemen Agama, 2009, p. 381. The meaning of the Interpretation of the Ministry of Religion, Tafsir Jalalain also states: “(And take it with your hands), namely a bunch of thatch grass or a bunch of twigs, (then hit with it) your wife, because the Prophet Ayyub once swore that he would beat his wife as much as a hundred. times cries, because one day he never did not obey his orders. (And do not break your oath) by not beating him, then the Prophet Ayyub took a hundred stalks without hitting him, then the Prophet Ayyub took a hundred sticks of Idzkir wood or other wood, then he hit his wife with one hit. “ Imam Jalaluddin al-Mahalli and Imam Jalaluddin as-Suyuthi, Translation of Jalalain's Interpretation Following Asbaabun Nuzuul (Volume 3), (Bandung: Sinar Baru Algensindo, 2009), p. 1972.

[25] Muhammad Quraish Shihab, *Tafsir Al-Mishbah: Pesan dan Keserasian Al-Qur'an (Volume 2)*, (Tangerang: Lentera Hati, 2008),.h. 152-153

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"If one of you hits, (then) stay away from (hitting) the face." (HR. Bukhari, in chapter al-Hudud, HR. Muslim, chapter al-Birr)[26]

The face is the most noble member of the human body, therein lies good looks or beauty. The face is also the most influential member of the body. Hence, one disgrace on the face may well be equal to various disgrace on the whole body. Just as the face is the most sensitive part of the body physically, it is also the part of the body that has the most psychological influence. On that basis, the Prophet Muhammad. ordered to stay away from blows to the face.

4) The hits can be made no more than ten times

Hits that exceed ten times can only be done for violations of the law (*hudud*) of Allah SWT. In the Bukhari and Muslim Hadith, it is stated that:

لاَ يُجْلَدُ فَوْقَ عَشْرِجَلَدَاتٍ إِلاَّ فِيْ حَدٍّ مِنْ حُدُوْدِ الله

"*A person may not be flogged more than ten times unless he violates one of Allah›s hududs.*" (HR. Bukhari from Abu Burdah al-Anshari).[27]

لاَ يُجْلَدُ أَحَدٌ فَوْ قَ عَشْرَةِ أُسْوَاطٍ, اِلاَّ فِي حَدٍّ مِنْ حُدُوْدِ الله

"*A person may not be flogged more than ten times, except in the hadd law (which is related) to the rights of Allah"* (HR. Muslim from Abu Burdah al-Ashari).[28]

5) Spanking can be used as the only form of final and highest sanction - known as ultimum remedium in the legal world - to correct mistakes.

Islam has its own guidelines in dealing with violence against children. The law of origin of violence against children is haram, however legal changes can occur in several circumstances, for example in the world of *tarbiyah* (learning). In short, physical violence (beatings) and psychological violence (threats) are things that were originally prohibited (*mahzhurat*), but in an emergency for educational purposes, they can be justified. The level of emergency that is intended, can be measured within the limits of the minimum need without giving leeway and addition or being excessive. It is not permissible to create flexibility that goes beyond the boundaries of urgent needs or, for example, enters tertiary needs (*tahsiniyat*) into urgent needs (*dharuriyat*) as mandated by the Al-Qur'an Surah Al-Baqarah/2: 173".[29]

According to Wahbah az-Zuhaili, the emergency condition is in the interest of humans who are allowed to use something that is prohibited, because that interest occupies the top of the interests of human life, if it is not implemented it will cause damage.[30]

[26] Abu Abdullah Muhammad bin Ismail al-Bukhari, *Ensiklopedi Hadits Jilid II: Shahih Bukhari 2*, Jakarta: Almahira, 2012, p. 714 (Bab Batasan *Ta'zir* dan Hukuman untuk Tujuan Mendidik, nomor hadis 6848), Muslim bin al-Hajjaj al-Qusyairi al-Naisaburi, *Ensiklopedia Hadits Jilid IV: Shahih Muslim 2*, (Jakarta: Almahira, 2007), p. 572 (*al-Mu'jam* 32, Bab Larangan Memukul Wajah [*at-Tuhfah* 32], nomor hadis 6651-6656).

[27] Abu Abdullah Muhammad bin Ismail al-Bukhari, *Ensiklopedi Hadits Jilid II: Shahih Bukhari 2*, Jakarta: Almahira, 2012, p. 714. (Bab 42: Batasan *Ta'zir* dan Hukuman untuk Tujuan Mendidik nomor hadis 6848, 6849, 6850).

[28] Muslim bin al-Hajjaj al-Qusyairi an-Naisabur, *Ensiklopedi Hadits Jilid IV: Shahih Muslim 2*, Jakarta: Almahira, 2012, p. 124. (*Mu'jam* 9: Bab Batasan Hukuman *Ta'zir – at-Tuhfah 20*, nomor hadis 4460).

[29] Muhammad Abdul Fatah al-Bayauni, *Fikih Darurat: Pegangan Ilmiah Menjawab Persoalan Khilafiah*, (Jakarta: Turos, 2018), p. 160.

[30] Muchlis Usman, *Kaidah-kaidah Ushuliyah dan Fiqjhiyah*, (Jakarta: PT. RajaGrafindo Persada, 2009), p.

In this case, the improvement of children in education is an emergency, it is related to *hifz ul-'aql* (keeping the mind) which is one of the five fundamental protections in Islam.

Fiqh rules state that:

اَلضَّرُوْرَاتُ تُبِحُ الْمَخْظُوْرَات

"Emergency conditions allow something to be prohibited."

مَا أُبِيْحُ للضّرُ وْرَاتِ يُقَدِّرُ تُقْدِّرُهَا

"What is allowed because of an emergency is measured only for its emergency."

The two principles above actually restrict humans from doing what is prohibited due to an emergency.[31] These principles also require that the permissibility of violence in question is intended to solve difficult problems for parents and educators, where both are unable to control the difficult situation and there is no other choice but to do so. In this case, it is permissible to commit educational violence for the good and protection of the child's future.

Parents and educators are justified in making beatings as a form of physical violence in accordance with the provisions of *syara'* with the sole purpose of improving the child by paying attention to two things:

a) It is permissible to commit violence while still having to maintain oneself (introspection) so that it does not come out of the meaning of the word "modest emergency".[32] When children follow directions after physical or psychological abuse, this last method must be stopped.
b) There is no other way that can be taken to correct the mistake or in which the other route did not meet the expected results;

Apart from the two *dharuriyah* principles above, the principle of acting according to intention must also have a place in this discussion, namely:

اَلْأُمُوْرُبِمَقَاصِدِهَا

"All actions are dependent on the intention."

The relations between the rules of intention and this problem can be described by the researchers as follows: Whereas physical and psychological violence received by children as a form of punishment must really aim to improve the child in the future, not make the child the target of emotional discharge. This step can only be taken if other methods are not effective in correcting children's deviant behavior, in other words as a last option (*ultimum remedium*) to correct children's mistakes.

Children who are punished after making mistakes, must be told their mistakes, then it is hoped that he can change to be wiser and understand the direction. This kind of repair will clearly be different from a child who has never been punished for a mistake he has made.

Based on the arguments and principles above, a conclusion can be drawn that the sanction of physical violence in the form of a blow is an inseparable part of the *tarbiyah* instrument in Islam which has legitimacy in Islamic family law. Apart from that, it cannot be separated from the customs that have occurred in Indonesia since the past.

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[31] A. Djazuli, *Kaidah-Kaidah Fikih*, (Jakarta: Kencana Prenada Media Group, 2011), p. 73.

[32] Abdul Karim Zaidan, *Al-Wajiz*, (Jakarta: Pustaka Al-Kautsar, 2008), p. 111 & 119.

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3. Sociological reasons for allowing violent sanctions

The Child Protection Law was issued on the basis of the spread of child victims in sexual crimes that occur in society, it is not intended to change the social order in which society is the subject that best understands the goodness of an illiteral rule (custom) that applies in society. in society. Indonesian society is accustomed to educating children by advising, reprimanding, threatening, and beating according to their level. So socially, with the need for psychological and physical violence to improve children, it seems that such violence cannot be eliminated by the issuance of these legislative products.

Violence sanctions given both psychologically and physically will actually shape children and adolescents, so that an attitude of respect for regulations, decisions, orders and prohibitions is born. It can also prevent children from being careless in doing/ leaving something except after thinking about the consequences. Violent sanctions can also instill a habit of returning to haq (truth), abandoning mistakes, and preventing dragging into mistakes. In addition, he can also familiarize children or adolescents with being patient and careful.

4. The limitation of tolerance in Islamic law on violence against children

Islam tolerates physical and psychological violence for the purposes of enforcing *sharia (maqashid al-syariah).* The punching sanction in question is carried out as the last means of educating the child. It has entered into the realm of dharuriyat law and must function as an *ultimum remedium* (the last choice of the existing levels of punishment). Allah SWT. which stipulates sanctions for physical violence (hitting) for the purpose of *ta'dib* (teaching *adab*) which is the main element of education. However, Allah SWT. prohibits the sanction of blows that are carried out without *haq* or arbitrarily so that it goes out of its purpose. Children who receive punishment must first be informed of their mistakes, so that on this basis they will realize the mistakes and violations they have committed.

The sanctions should be carried out at the right time and time, equipped with the right facilities. Corporal punishment of children, in any case, must be neither dangerous nor harmful.

There are several things that need to be considered as a condition for punishing children in Islamic family law

a. Children must first be given a warning before punishment is carried out, and punishment must be in accordance with the mistakes committed, both in terms of quantity and quality;
b. The punishment is carried out immediately after the mistake is committed. Delaying the implementation of direct punishment will lose its merits. The same is true when delaying giving gifts to children;
c. Punishment is given after the child is reminded of his mistakes, and he is given the opportunity to first escape from being rude. Also when he keeps making mistakes after things have been fixed, then new punishments can be applied;
d. As much as possible to minimize the application of punishment. The punishment should be given in stages, from lenient to harsh. Some children do not need more than a warning to be deterred, therefore the character of each child needs attention;

e. When carrying out punishment, parents, or educators must be calm and patient. Avoid feelings of resentment and desire to retaliate;
f. As much as possible stay away from threatening language, because threats might scare the child, or even make him believe that the threat is only a bluff;
g. Punishment should not last long so that it torments the child. In any condition it is not justified to hit his face, because of the personality and glory that Allah SWT. created in him would be wasted;
h. It is not justified to punish a child in the presence of his friends, competitors or opponents;
i. The punishment of beating (physical violence) may only be carried out as an *ultimum remedium*.

In addition, there are also matters related to methods of punishing children in Islamic family law

a. Parents or educators must stay away from threatening children with things that are not possible. These kinds of threats lose their impact on the child;
b. Parents or educators are obliged to make efforts so that everything returns to normal immediately after the execution of the sentence;
c. Parents or educators are obliged to avoid the perception that punishment is a frightening act for children, in which case parents or educators are also prohibited from lying;
d. Parents or educators must show assertiveness through tone of voice, but not by screaming. As much as possible, parents or educators must keep calm;
e. Parents or educators should not compare children with other children;
f. Parents or educators must think about the effect of punishment to be applied to children, because errors in choosing the method of punishment will make children's behavior worse.

In addition, there are also things that need to be considered in physical punishment (beating), namely:

a. Parents or educators do not hit after promising not to hit, the goal is so that children do not lose trust in their parents or educators;
b. Prior to doing physical punishment (beating), give the child a chance, especially if the mistake he did was the first time he committed it;
c. If it is necessary to carry out corporal punishment, parents or educators must not do it in front of their loved ones;
d. Corporal punishment was not carried out until it hurt, let alone cause disability or scarring. Parents or educators must stay away from blows against vital body parts such as face, head, stomach, chest, and back;
e. Corporal punishment is not carried out with dangerous tools, such as shoes or sandals. And it is not justified to raise the hand beyond the normal limit in hitting, the goal is that the pain arising from the blow does not multiply;
f. Parents or educators are not allowed to criticize children when they do physical punishment, including not forcing them to apologize before they feel calm so that they are not humiliated;
g. Corporal punishment in the form of

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beatings must not be more than ten strokes, and must not be carried out at the same place over and over again.

h. Parents or educators must create the perception that corporal punishment is done for their good.

Parents or educators must understand well about the terms and methods of carrying out punishment in the form of physical and psychological violence against children. Even though the law has a tendency to prohibit acts of violence against children, sanctions for both physical and psychological violence are still needed to correct children's mistakes.

After understanding the causes of permissibility of violence in children's education, including examining the *syar'i* arguments that allow violence as a sanction, and knowing the limits of tolerance of Islamic law in violence against children, the researchers can conclude that physical violence or spanking is not one thing. the only way out to make someone good, sometimes people can change to be good only with gentle words, direction, and guidance. However, a person can become good after receiving a reproach (psychic violence), even with a beating (physical violence) that is more than mild. One thing is certain that each has its own way which when applied in the right time and place with the right method will produce good results in the future.

Conclusion

Based on the comparisons described in the discussion, there are some similarities and differences between Islamic family and positive law with regard to child protection, namely that Islamic family and positive law both view the problem of handling and protecting children as an urgent issue to be noticed carefully. Islamic family and positive law differ in several areas including the definition of the term "child", violence against children, physical and psychological punishment against children, and actions against perpetrators of violence. Positive law states that all forms of violence against children are a criminal offense, but Islamic family law considers that violence against children is not always a form of offense. Islamic family law emphasizes the context of physical and psychological violence, in addition to paying attention to the textual texts contained in the verses of the Al-Qur'an and hadith.

There are limits to acts of both physical and psychological violence as a preventive and repressive measure against children, according to the provisions of Islamic family law. Physical violence is only allowed as a last option for emergency repairs, if there is no other way to correct the child's mistakes. As for psychological violence in the form of strong reprimands and threats, it is still necessary to discipline children. Physical violence carried out as an *ultimum remedium* can only be carried out with signs that have been determined according to the Islamic family (*fiqh)* as described in the discussion above.

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UNREGISTERED MARRIAGE BETWEEN INDONESIAN CITIZENS AND FOREIGN CITIZENS WITH THE LEGAL PERSPECTIVE OF MARRIAGE IN INDONESIA

Muhammad Ngizzul Muttaqin
Program Studi Hukum Keluarga Islam Pascasarjana IAIN Tulungagung
Jl. Mayor Sujadi No. 46, Kabupaten Tulungagung, Provinsi Jawa Timur, 66221
Email: muttaqinizzul19@gmail.com

Abstract: The practice of unregistered marriage between Indonesian citizens and foreign nationals always raises legal problems, both the law of marriage and the legal consequences of the marriage. This article aims to provide concrete legal solutions and steps to the practice of unregistered marriage between Indonesian citizens and foreign nationals. This study used literature research with qualitative descriptive methods, through a normative legal approach. The results show that unregistered marriage is a social symptom of modern society which always occurs in the practice of today's society. Although unregistered marriage is not specifically regulated in the practice of mixed marriages, it often occurs and must be anticipated. The solution is that there are three legal options that can be taken: first, if the person concerned is domiciled in Indonesia and intends to become an Indonesian citizen, then s/he can register the marriage with the employee who registers the marriage and performs the marriage certificate according to the provisions. Second, if the person concerned is living abroad but wants to become an Indonesian citizen, then s/he can take legal steps by registering the marriage and marriage certificate at the Indonesian Embassy. Third, if the person concerned is domiciled and wants to become a resident of a foreign country, then the person concerned must take the legal route that has been determined in that country. Thus, family law in Indonesia can be adaptive and responsive to the dynamics of social change.

Keywords: Unregistered marriage; Indonesian citizen; foreigner

Abstrak: Praktik perkawinan siri antara warga negara Indonesia dan warga negara asing selalu memunculkan permasalahan hukum, baik hukum perkawinannya maupun akibat hukum dari perkawinannya. Artikel ini bertujuan memberikan solusi dan langkah hukum yang kongkrit terhadap praktik perkawinan siri antara warga negara Indonesia dan warga negara asing. Kajian ini menggunakan penelitian kepustakaan dengan metode deskriptif kualitatif, melalui pendekatan hukum normatif. Hasilnya menunjukkan bahwa nikah siri merupakan gejala sosial masyarakat modern yang selalu terjadi dalam praktik kehidupan masyarakat kini. Meskipun nikah siri secara khusus tidak diatur dalam praktik perkawinan campuran, namun peristiwa ini sering terjadi dan harus diantisipasi. Solusinya, ada tiga pilihan hukum yang bisa ditempuh: *pertama,* jika yang bersangkutan berkedudukan di Indonesia dan berniat menjadi warga Indonesia, maka bisa melakukan pencatatan perkawinan pada pegawai pencatat nikah dan melakukan itsbat nikah sesuai dengan ketentuan. *Kedua,* jika yang bersangkutan berkedukan di luar negeri namun menginginkan menjadi warga negara Indonesia, maka bisa melakukan langkah hukum dengan melakukan pencatatan perkawinan dan itsbat nikah di Kedutaan Besar Republik Indonesia. *Ketiga,* jika yang bersangkutan berkedudukan dan menginginkan menjadi penduduk negara asing, maka yang bersangkutan harus menempuh jalur hukum yang telah ditentukan dalam negara tersebut. Dengan demikian, hukum keluarga di Indonesia dapat adaptif dan responsif terhadap dinamika perubahan sosial.

Kata kunci: Perkawinan siri; warga negara Indonesia; warga negara asing

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Introduction

Marriage is one of the most important dimensions of life in human life in this world.[1] Marriage is the method chosen by Allah SWT as a way for humans to get offspring, live together, and preserve their life.[2] Each partner must be ready to play a positive role in realizing the goals of marriage.[3] In the explanation of Law no. 1 of 1974 concerning Marriage that "marriage is a physical and spiritual bond between a man and a woman as husband and wife with the aim of forming a happy and eternal household based on the Almighty Godhead so that life in this world can reproduce well".[4]

Meanwhile, the provisions on family law have a very strong position in religion.[5] Family law regulates the way of life of each family member. Where the family is the smallest group of a country.[6] In the perspective of Islam, marriage has a very high religious meaning. This is because marriage is not just a legal event, but also a legal relationship between two people (male and female) in order to live together in a conjugal bond with the aim of building a family, avoiding adultery, protecting offspring, and maintaining peace of mind and family.[7]

Meanwhile, the provisions of family law in Indonesia, that through the provisions of Article 2 paragraph 1 of Law Number 1 of 1974 concerning Marriage that a legal marriage is a marriage which is carried out according to their respective laws and beliefs. Furthermore, Article 2 paragraph 2 of the Marriage Law confirms that every marriage is registered according to the prevailing laws and regulations. Thus every marriage must be registered with the Marriage Registration Officer (PPN) at the Office of Religious Affairs (KUA) for Muslims and at the Civil Registration Office for followers of religions other than Islam. This is further regulated in Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974 concerning Marriage.[8]

This marriage registration aims to create administrative order and to protect the rights of the person carrying out the marriage. The registration of marriage is also proof that there has been a marriage.[9] However, the regulations in Indonesia regarding the registration of marriage are different from the regulations for the registration of

[1] Muhammad Ngizzul Muttaqin & Nur Fadhilah, "Hak Ijbar Wali Tinjauan Maqashid Syari'ah Dan Antropologi Hukum Islam", *De Jure: Jurnal Hukum dan Syariah,* Vol. 12, No. 1, 2020, p. 103.

[2] Ahmad Atabik dan Khoirotul Mudhiiah, "Pernikahan dan Hikmahnya Perspektif Hukum Islam", *Yudisia,* Vol. 5, No. 2, 2014, p. 286.

[3] Zakyyah Iskandar, "Peran Kursus Pra Nikah dalam Mempersiapkan Pasangan Suami Istri Menuju Keluarga Sakinah", *Al-Ahwal: Jurnal Hukum Keluarga Islam,* Vol. 10, No. 1, 2017, p. 86.

[4] Syarifah Gustiawati & Novia Lestari, "Aktualisasi Konsep Kafa'ah Dalam Membangun Keharmonisan Rumah Tangga", *Mizan; Jurnal Ilmu Syariah*, Vol. 4, No. 1, 2016, p. 34.

[5] Anung Al Hamat, "Representasi Keluarga dalam Konteks Hukum Islam", *YUDISIA,* Vol. 8, No. 1, 2017, p. 139.

[6] Desi Asmaret, Alaiddin Koto, Afrizal, "Transformasi Hukum Keluarga Islam di Indonesia: Telaah Pemikiran Rifyal Ka'bah", *Al-Ahwal: Jurnal Hukum Keluarga Islam,* Vol. 12, No. 2, 2019, p. 146.

[7] Winengan, "Politik Hukum Keluarga Islam di Aras Lokal: Analisis Terhadap Kebijakan Pendewasaan Usia Perkawinan di NTB", *Al-Ahwal: Jurnal Hukum Keluarga Islam,* Vol. 11, No. 1, 2018, p. 1.

[8] Rachmadi Usman, "Makna Pencatatan Perkawinan Dalam Peraturan Perundang-Undangan Di Indonesia", *Jurnal Legislasi Indonesia,* Vol. 14, No. 3, 2017, p. 270.

[9] For further information, see Siti Musawwamah, "Akseptabilitas Regulasi Kriminalisasi Pelaku Nikah Sirri Menurut Pemuka Masyarakat Madura", *Al-Ihkam: Jurnal Hukum dan Pranata Sosial,* Vol. 8, No. 2, 2013.

marriage in other countries. As in Malaysia, which provides a fine of Ringgit 1000 and/or imprisonment for a maximum of six months for those who marry without being registered. Meanwhile in Indonesia there are no specific regulations that impose sanctions on perpetrators of unregistered marriages.[10] This sanction is still in the Draft Law on the material law of the Religious Courts in Marriage which is included in the 2010 draft National Legislation Program (Prolegnas). Anyone who deliberately marries is not in the presence of a Marriage Registration Officer as referred to in Article 5 paragraph (1).) shall be punished with a maximum fine of Rp. 6,000,000, (six million rupiah) or a maximum imprisonment of 6 (six) months". Meanwhile, Article 144 reads "Every person who engages in a mutah marriage as referred to in Article 39 is sentenced to imprisonment for a maximum of 3 (three years, and the marriage is canceled because of the law".[11]

Marriages not recorded as described above are usually called unregistered marriages.[12] The practice of unregistered marriage and the lack of regulations regarding the registration of marriages in Indonesia are in some ways exploited by a handful of people. As quoted by Replubika.co.id that level II Putussibau West Kalimantan Immigration has recorded four foreign nationals (WNA) who have performed an unregistered marriage with Indonesian citizens (WNI) in the Indonesia-Malaysia border area.[13] Another case is the marriage between a man from China and a girl from Gorontalo which was apparently not registered.[14] Many immigration officers also found cases of unregistered marriage when collecting data in the field.[15]

From several studies that the authors have found in this theme are: First, questioning the legality of unregistered marriage (*istislahiyah* analysis method),[16] the findings in this study indicate that unregistered marriage is a marriage that does not use strong witnesses (marriage registration. Second, unregistered marriage from a legal perspective in Indonesia,[17] The findings in this study indicate that unregistered marriage is a marriage that is not recognized by the state. Third, unregistered marriage in a review of theoretical law and the sociology of Indonesian Islamic law which states that legal certainty of unregistered marriage must go through clear and strong regulations through the marriage certificate in court.[18]

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[10] See Siti Nur Shoimah dan Dyah Ochtorina Susanti, "Urgensi Pencatatan Perkawinan (Perspektif Utilities)", *Jurnal Rechtidee*, Vol. 11, No. 2, 2016.

[11] Lihat, M. Nurul Irfan, "Kriminologi Poligami Dan Nikah Sirri", *Jurnal Al-'Adalah*, Vol. X, No. 2, 2011.

[12] Ahmad Badrut Tamam, "NIKAH SIRRI: Solusi Pernikahan Anak Di Bawah Umur Di Desa Petung, Panceng, Gresik", *Jurnal Al-Ahwal*, Vol. 3, No. 1, 2011, p. 42–43.

[13] REPLUBIKA.co.id, "Empat WNA Diduga Menikah Siri Dengan Warga Kapuas Hulu", *Senin, 17 Juni*, 2019, https://republika.co.id/berita/pt8fvc459/empat-wna-diduga-menikah-siri-dengan-warga-kapuas-hulu, accessed on on 15 Juli 2020.

[14] Tim Editor, "WNA Asal Cina Nikah Siri Dengan Gadis Desa Di Gorontalo", *Kumparan, 8 Oktober*, 2019, https://kumparan.com/banthayoid/wna-asal-cina-nikah-siri-dengan-gadis-desa-di-gorontalo-1s15AODNzsv/full, accessed on on 21 Juli 2020.

[15] Madiani, "Kantor Imigrasi Temukan Banyak Warga Negara Asing Di Pangandaran Nikah Siri", *HarapanRakyat.Com, 5 Agustus*, 2016, https://www.harapanrakyat.com/2016/08/kantor-imigrasi-temukan-banyak-warga-negara-asing-di-pangandaran-nikah-siri/, accessed on on 23 Juli 2020.

[16] Sheila Fakhria, "Menyoal Legalitas Nikah Sirri (Analisis Metode *Istislahiyah*)", *Al-Ahwal: Jurnal Hukum Keluarga Islam,* Vol. 9, No. 2, 2016.

[17] Supriyadi, "Perkawinan Sirri dalam Perspektif Hukum di Indonesia", *YUDISIA: Jurnal Pemikiran Hukum dan Hukum Islam,* Vol. 8, No. 1, 2017.

[18] Aidil Alfin, "Nikah Sirri dalam Tinjauan Hukum Teoritis dan Sosiologi Hukum Islam Indonesia", *Al-*

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From several studies that the author has revealed, the authors found differences in studies in the form of a discussion of the phenomenon of unregistered marriage carried out by Indonesian citizens and foreign citizens. In this incident, according to the author, there are two things behind it, first, because in a foreign country, unregistered marriage is a criminal act, while in Indonesia, unregistered marriage is not penalized. Second, the unregistered marriage in Indonesia is caused by the complicated requirements for registering marriages in Indonesia, which are different from those of the country of origin.[19] This incident certainly intrigued the author to provide a theoretical analysis of the serial marriage between foreigners and Indonesian citizens. With the following research questions: First, what is the background of the unregistered marriage between Indonesian citizens and foreign citizens? Second, what are the steps and urgency of Indonesian marriage law in dealing with unregistered marriage cases between Indonesian citizens and foreign nationals?

In order to answer the research questions that have been described above. The author uses qualitative methods which is library research discussing the phenomenon of mixed marriage (Indonesians and foreigners) as a study.[20] Considering that the research is purely literary in nature, the data in this research is obtained by conducting a study of various literatures consisting of books, journals, laws, and regulations, or the results of previous research that have a bearing on the object of discussion.[21] The data collection method was carried out by using content analysis on the provisions of the law of marriage related to the concept of mixed marriage.[22]

Mixed Marriage and Marriage Registration

Mixed marriage is a marriage between two citizens, namely Indonesian citizens and foreign citizens who are married so that it has civil law consequences. In a mixed marriage between an Indonesian citizen and the foreign citizen concerned, the difference between the nationalities of the two parties is a matter of international civil law, namely which law will apply to the legal issues.[23]

Based on article 58 of Law No.1 of 1974, people who carry out mixed marriages can obtain citizenship according to the methods stipulated in the current citizenship law, namely Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia. Mixed marriages give rise to civil relations which are part of international civil law, because mixed marriages contain foreign elements, namely there are two different nationalities. This foreign element is what makes this relationship international, giving rise to international civil law relations.[24]

Manahij: Jurnal Kajian Hukum Islam, Vol. XI, No. 1, 2017.

[19] tirto.id, "Betapa Rumitnya Menikah Dengan Warga Negara Asing", *13 September*, 2017, https://tirto.id/betapa-rumitnya-menikah-dengan-warga-negara-asing-cwtq, accessed on on 19 Juli 2020.

[20] Suharsimi Arikunto, *Prosedur Penelitian Suatu Pendekatan Praktek,* (Jakarta: Rineka Cipta, 2005), p. 10.

[21] Mestika Zed, *Metode Penelitian Kepustakaan,* (Jakarta: Yayasan Obor Indonesia, 2007), p. 3.

[22] Terkait dengan metode content analysis, lihat dalam C. R. Kothari, *Research Methodology: Methods and Techniques,* (New Delhi: New Age International Ltd. Publisher, 2004).

[23] Herni Widanarti, "Akibat Hukum Perkawinan Campuran Terhadap Harta Perkawinan (Penetapan Pengadilan Negeri Denpasar No: 536/Pdt.P/2015/PN.Dps.)", *Diponegoro Private Law Review,* Vol. 2, No. 2, 2018, p. 162.

[24] see, Gerdha Prastica Pangestu, "Studi Tentang Perkawinan Campuran Antara Warga Negara Malaysia-

Getting married to create a family while preserving offspring is a right for everyone. Article 28 B Paragraph 1 of the 1945 Constitution states that all people have the right to form a family and their offspring through a legal marriage. Meanwhile, Article 10 of Law Number 39 Year 1999 concerning Human Rights states that marriage is a part of human rights. This implies that a marriage cannot be forced, it can only take place according to the wishes of the two candidates and must be in accordance with the applicable laws and regulations.[25]

One of the marital events described above is mixed marriage. In the third part of chapter XII of Law Number 1 Year 1974 it has explained and regulated mixed marriages in Articles 57 to 62. Article 57 states that the meaning of mixed marriage is marriage between two people who are in Indonesia, but have different nationalities and subject to different legal rules due to differences in nationality.

Marriage registration is a rule that contains *mashlahah* and benefits and is a form of announcement to the public,[26] because the things that follow are very important events in the continuity of human life.[27] This regulation regarding marriage registration is intended so that marriages are not misused to fulfill personal needs and harm other parties. The rules that have been described in the General Rules of Law Number 1 of 1974 concerning the principles of legal marriage, all people have the obligation to register their marriage. This aims to provide further legal certainty, such as child birth, inheritance and others. The obligation to register a marriage as regulated in Article 2 Paragraph 2 of the Marriage Law is not only a mere administrative requirement, but also a requirement of legality.[28]

So that in this condition, marriage registration is something that is very urgent nowadays.[29] Because the realization of marriage registration can minimize actions that are detrimental to one of the parties. Thus, everyone should comply with the legal provisions contained in Law Number 1 of 1974 concerning marriage (especially regarding marriage registration).

Marriage law in Indonesia is basically administrative in nature. Therefore it does not determine the legality of a marriage. Although there are differences of opinion among legal experts, whether it is mandatory or not regarding the registration of marriages, enforcement of this rule returns to the government's firmness in protecting the rights of its citizens.[30] Given the importance of

Indonesia", *Gloria Yuris Jurnal Hukum,* Vol. 3, No. 1, 2014.

[25] Rahmat Fauzi, "Dampak Perkawinan Campuran Terhadap Status Kewarganegaraan Anak Menurut Hukum Positif Indonesia", *Soumatera Law Review,* Vol. 1, No. 1, 2018, p. 159.

[26] Khoiruddin Nasution, "Pencatatan Sebagai Syarat Atau Rukun Perkawinan: Kajian Perpaduan Tematik dan Holistik", *Musawa: Jurnal Studi Gender dan Islam,* Vol. 12, No. 2, 2013, p. 184.

[27] Regard to the concepts of *mashlahah* and benefits, see Iffatin Nur dan Muhammad Ngizzul Muttaqin, "Reformulating The Concept of Maslahah: From A Textual Confinement Toward A Logic Determination", *Justicia Islamica: Jurnal Kajian Hukum dan Sosial,* Vol. 17, No. 1, 2020.

[28] Dwi Arini Zubaidah, "Pencatatan Perkawinan Sebagai Perlindungan Hukum dalam Perspektif *Maqashid Asy-Syari'ah*", *Al-Ahwal,* Vol. 12, No. 1, 2019, p. 18.

[29] Nastangin, "Tinjauan Folosofis (Pasal 2 Ayat 2 Undang-Undang Perkawinan Nomor 1 Tahun 1974 Tentang Pencatatan Perkawinan)", *Mahakim: Journal of Islamic Family Law,* Vol. 2, No. 1, 2018, p. 23.

[30] Marwin, "Pencatatan Perkawinan dan Syarat Sah Perkawinan dalam Tatanan Konstitusi", *ASAS: Jurnal Hukum Ekonomi Syariah,* Vol. 6, No. 2, 2014, p. 112.

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marriage registration, namely for the sake of legal certainty and guarantee, in this condition the government takes part in law enforcement, so that there are no more marital cases that will harm either party.[31] Meanwhile, from the State's point of view, marriage registration is obligatory within the framework of the state's function to guarantee protection, guarantee, enforcement and fulfillment of human rights which are the responsibility of the State and must be implemented in accordance with the principles of the state democratic law which are regulated and set forth in statutory regulations.[32]

Comparative Study of Marriage Registration Rules between Indonesia and Several Countries

Marriage registration is a very important thing and cannot be ruled out because it involves the interests of many people. The urgency of marriage registration is not only an administrative requirement, but is an effort to benefit all parties and have strong legal force.[33] This aims to create justice that not only benefits one party, but also benefits the people around them. Meanwhile, the benefit of marriage registration is in accordance with the legal objective, namely to provide the maximum benefit for the community.[34]

Some countries impose an obligation for their people to register their marriage contract at a designated government agency. Although in the implementation in several countries there are differences. As in the State of Jordan which provides a fine of more than 100 Dinars when a person does not register his marriage at the office or authorized officer. This provision is regulated in Article 17 Paragraph 3 of the Law of Family Right. Furthermore, if the registration is not officially carried out by an authorized officer, the officer will receive a penalty and / or a fine and / or dismissal from his position, as stipulated in Article 279 of the Jordanian Criminal Code.[35]

Meanwhile, in the State of Pakistan, a marriage contract that is not registered at the authorized institution will be subject to a maximum prison sentence of three months and a fine of 1000 Rupees. This provision is regulated in Article 5 of the Muslim Family Law Ordinance 1961. Whereas Malaysia, for residents who are getting married and within six months of not registering their marriage with the competent authority, they will be punished with a fine of 1000 Ringgit and/or a maximum imprisonment of six months. . This provision is regulated in the Family Law Law 1984 Article 33.[36]

The last country is Brunei Darussalam, where this country provides a rule that every marriage contract may only be carried out if it is led by a person appointed by the Sultan and given the authority to lead the implementation

[31] Itsnatul Lathifah, "Pencatatan Perkawinan: Melacak Akar Budaya Hukum dan Respon Masyarakat Indonesia Terhadap Pencatatan Perkawinan", *Al-Mazahib: Jurnal Pemikiran Hukum*, Vol. 3, No. 1, 2015, p. 54.

[32] Neng Djubaidah, *Pencatatan Perkawinan dan Perkawinan Tidak Dicatat Menurut Hukum Tertulis di Indonesian dan Hukum Islam*, (Jakarta: Sinar Grafika, 2012), p. 32.

[33] Novita Lestari, "Problematika Hukum Perkawinan Di Indonesia", *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan,* Vol. 4, No. 1, 2017, p. 146.

[34] See Nenan Julir, "Pencatatan Perkawinan Di Indonesia Perspektif Ushul Fikih", *Jurnal Ilmiah Mizani: Wacana Hukum, Ekonomi Dan Keagamaan,* Vol. 4, No. 1, 2017.

[35] Khoiruddin Nasution, *Hukum Keluarga Di Dunia Muslim,* (Yogyakarta: Academia, 2011), p. 45.

[36] See M. Atho Mudzhar, "Hukum Keluarga Di Pakistan (Antara Islamisasi Dan Tekanan Adat)", *Jurnal Al-'Adalah,* Vol. 12, No. 1, 2014.

of the marriage contract.[37] Several of Brunei Darussalam's 2000 family law laws stipulate several things, including article 2 which stipulates that it is not permissible to enter into a marriage contract before obtaining permission from a marriage registration official. Article 3 states that a guardian can marry and lead the marriage contract only in front of an authorized marriage registrar. As well as what it says in Article 37 that whoever leads the marriage contract without obtaining permission from the sultan, will be subject to a fine of 2000 Ringgit and/or a maximum imprisonment of six months.[38]

Marriage Issues between Indonesian Citizens and Foreigners from the Perspective of Marriage Law in Indonesia

Mixed marriage is a marriage between two people who are subject to legal procedures in Indonesia which is carried out by two people with different nationalities called mixed marriage. In the provisions, this mixed marriage must be carried out based on the conditions of the marriage, in accordance with Article 2 of Law Number 1 Year 1974.

In the laws and regulations in Indonesia that regulate marriage, including, 1. Law Number 1 of 1974 concerning Marriage, 2. Government Regulation Number 9 of 1975 concerning Implementation of Law Number 1 of 1974, 3. Presidential Instruction Number 1 Year 1991 concerning Dissemination of Compilation of Islamic law as regulations for those who are Muslim, 4. Law Number 16 of 2019 concerning Amendments to Law Number 1 of 1974 concerning Marriage.

With the issue of citizenship, Article 58 provides that people who are married to mixed marriages can obtain citizenship from their husband or wife and can also lose their citizenship. This is in accordance with the procedures stipulated in the Citizenship Law in force in Indonesia. This is closely related to the Citizenship Law which provides an explanation of how to obtain and lose Indonesian citizenship. In addition, this Article greatly affects the Immigration Law in terms of granting residence permits for wives or husbands who are Indonesian citizens.[39]

Furthermore, if related with the previous Article which regulates marriages outside Indonesia, namely Article 56 Paragraph 1 which states that: "Marriage which is carried out outside Indonesia between two Indonesian citizens or an Indonesian citizen and a foreign citizen is legal if it is carried out according to law. which applies in the country where the marriage was carried out and for Indonesian citizens it does not violate the provisions of this Law".

Furthermore, in the context of a series of mixed marriages in Indonesia, this action is an action that is bound by law in Indonesia. Article 2 of the Marriage Law states that "Marriage is legal, if it is carried out according to the law of each religion and belief. Every marriage is recorded according to the prevailing laws and regulations". Meanwhile, the basic concept of mixed marriage is

[37] Lilis Hidayati Yuli Astutik dan Muhammad Ngizzul Muttaqin, "Positifikasi Hukum Keluarga Di Dunia Muslim Melalui Pembaharuan Hukum Keluarga", *Islamika: Jurnal Ilmu-Ilmu Keislaman,* Vol. 20, No. 1, 2020, p. 61.

[38] A. Intan Cahyani, "Hukum Keluarga Islam Di Brunei Darussalam", *Jurnal Al-Qadhau,* Vol. 2, No. 2, 2015.

[39] Jazim Hamidi dan Charles Cristian, *Hukum Keimigrasian Bagi Orang Asing di Indonesia,* (Jakarta: Sinar Grafika, 2015), p. 56.

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regulated in Articles 57-63 of the Marriage Law, which states "What is meant by mixed marriage in this law is a marriage between two people who in Indonesia are subject to different laws, because of differences in nationality and one of the parties is a national. Indonesia".[40]

Meanwhile, the registration of marriage for those who are Muslim is in accordance with Article 2 Paragraph 2 of Government Regulation Number 9 of 1975, "The registration of marriages of those who carry out their marriage according to the Islamic religion is carried out by Registrar as referred to in Law Number 32 of 1954 concerning Registration. Marriage, Divorce and Reconciliation".[41] While in Article 5 of Compilation of Islamic Law". In order to ensure orderliness of marriage for the Muslim community, every marriage must be recorded. 2. The registration of such marriages as referred to in paragraph (1) shall be carried out by the Registrar of Marriages as regulated in Law Number 22 Year 1946 jo Law Number 32 Year 1954."[42]

In the case of unregistered marriages committed by Indonesian citizens and foreign citizens, in the author's view there are two legal steps that must be taken:

1. If the bride and groom get married in Indonesia

   If the bride and groom are Muslims, then in the context of registration of marriage, they submit a marriage certificate and then submit a marriage certificate to the Religious Court in accordance with the domicile area. This is in accordance with the mandate of Article 7 of the Compilation of Islamic Law, "1. Marriage can only be proven by a Marriage Certificate made by a Marriage Registration Officer, 2. In the event that a marriage cannot be proven by a Marriage Certificate, the marriage certificate can be submitted to the Religious Court, 3. The marriage certificate which can be submitted to the Religious Court is limited to matters that in connection with: a. The existence of marriage in the context of divorce settlement, b. Loss of marriage certificate, c. There are doubts about whether or not one of the conditions of marriage is valid, d. The existence of marriages that occurred before the enactment of Law No. 1 of 1974, e. Marriages that are carried out by those who do not have a marriage impediment according to Law Number 1 of 1974, 4. Those who have the right to apply for a marriage certificate are husband or wife, their children, marriage guardians and parties with an interest in the marriage".[43]

2. If the bride and groom are married abroad

   The registration of marriages held overseas is regulated in Article 56 Paragraph 2 of the Marriage Law, "Within 1 (one) year after the husband and wife return to the territory of Indonesia, proof of their marriage must be registered at the Marriage Registration Office where they live."

   In addition, Article 4 of Law Number 23 of 2006 concerning Population Administration regulates that regarding the obligations for Indonesian citizens who are abroad to, "Indonesian citizens who are outside the territory of the Unitary State

[40] Undang-undang Nomor 1 Tahun 1974 Tentang Perkawinan.

[41] Peraturan Pemerintah Nomor 9 Tahun 1975.

[42] Undang-undang Nomor 22 Tahun 1946 jo Undang-undang Nomor 32 Tahun 1954.

[43] Undang-undang Nomor 1 Tahun 1974 Tentang Perkawinan.

of the Republic of Indonesia are obliged to report Population Events and Important Events that experienced to the local state Civil Registration Implementing Agency and/or to a Representative of the Republic of Indonesia by fulfilling the requirements required in Population Registration and Civil Registration". Important events referred to in Law Number 23 of 2006 are defined in Article 1 point 17 of the General Provisions, namely "Important events are events experienced by a person including birth, death, birth, marriage, divorce, recognition of children, legalization of children , adoption of children, change of name and change of citizenship status".[44]

In the condition when the unregistered marriage is carried out abroad, then the person concerned commits the marriage ceremony abroad. This is based on Law Number 48 of 2009 concerning Judicial Power Article 60B and Supreme Court Decree Number 084/KMA/SK/V/2011 concerning Permits to Determine Marriage (Isbat Nikah) at the Representative Office of the Republic of Indonesia. This regulation provides legal protection and legal certainty for all countries located everywhere.

Registration of Marriage by Indonesian Citizens and Foreign Citizens: Between Legal Protection and State Protection Guarantee

Regulations concerning the importance of marriage registration have important meanings, first, marriage registration from the perspective of the State has a function as an effort of the State to provide protection, enforcement and fulfillment of human rights for married couples. Where this goal is the responsibility of the State and must be carried out in accordance with the principles of the rule of law which are regulated through statutory regulations and not contrary to constitutional provisions. Second, the registration of a marriage is an administrative requirement established by the State as an effort to create a marriage based on law and guarantee its legal consequences. This administrative requirement is proven by authentic evidence, so that it can provide protection and services by the State in the context of fulfilling the rights arising from the existence of the marriage.[45]

Marriage registration as evidenced by the existence of a marriage book is intended to ease the burden of proof.[46] The marriage book, which is the result of the marriage registration, is then used to provide evidence of the origin of the child, inheritance and so on. On the other hand, if the marriage is not registered with the child, it creates a legal problem due to the marriage. Legal issues arising from marriage are not recorded not only in the legal status of marriage in the State, but also regarding legal protection for spouses (wives), children, and everything caused by marriage.

The impact of not recording a marriage results in unclear marital status, even if the child born from the marriage is not registered as a legal child legally. Meanwhile, if there is a divorce in the future, then legal divorce in court also cannot be carried out without proof

[44] Undang-undang Nomor 23 Tahun 2006 tentang Administrasi Kependudukan.

[45] Harpani Matnuh, "Perkawinan Dibawah Tangan dan Akibat Hukumnya Menurut Hukum Perkawinan Nasional", *Jurnal Pendidikan Kewarganegaraan,* Vol. 6, No. 11, 2016, p. 907.

[46] Lihat dalam, Nunung Rodliyah, "Pencatatan Pernikahan dan Akta Nikah Sebagai Legalitas Pernikahan Menurut Kompilasi Hukum Islam", *Pranata Hukum,* Vol. 8, No. 1, 2013.

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of marriage registration. Another impact also causes loss of civil rights for wives and children, because their civil rights are not protected by law. This is because a marriage that is not recorded will not cause a legal relationship between husband, wife and children.[47]

Meanwhile, the Islamic Law Compilation (KHI) considers that the registration of marriage is an administrative requirement. As a result, if the marriage is not registered, the marriage will not have strong legal force. The impact that arises is if one party neglects its obligations, the other party cannot take legal remedies. This is due to the absence of valid evidence of the marriage which he took place.[48]

Another very big effect of marriage registration is the existence of a marriage book which is authentic evidence of a valid marriage.[49] This evidence can last forever as long as it is there. However, it is different from evidence in the form of testimony, only valid as long as the witness is still alive. As an evidence, marriage registration also has implications for rights and obligations protected by law. Such as the obligation to provide for his wife, child support, inheritance, and children's education.

Marriage registration (including mixed marriages) is a very urgent legal effort nowadays. This is due to the many cases of neglect of children and wives, divorce, domestic violence, contract marriages, and one of the causes is unregistered marriages. In order to overcome this problem, through the provisions in Article 2 Paragraph 2 of Law Number 1 of 1974 and Government Regulation Number 9 of 1975, the Indonesian government wants to provide protection for the community. Some of the purposes and benefits of marriage registration are:

1. Creating legal guarantees and certainty as well as the legality of the status of husband and wife and their children born from this marriage.
2. Ensuring and facilitating the bureaucracy and continuity (process) of obtaining birth certificates for children by including the names of both parents.
3. Ensuring the existence of rights and obligations.
4. Guaranteed welfare of children and guaranteed inheritance rights for children born from this marriage.

In this condition, the registration of marriages (including mixed marriages) is not only considered an administrative part.[50] However, marriage registration should have clear and binding legal force and as a determinant of whether a marriage is legal or not. This includes mixed marriages, which are marriages conducted by two people with different nationalities.

Conclusion

Unregistered marriage is a social phenomenon that always occurs in the practice of modern society. Indonesian family law must respond to these social symptoms. However,

[47] Dahlia Haliah Ma'u, "Nikah Sirri dan Perlindungan Hak-Hak Wanita dan Anak (Analisis dan Solusi dalam Bingkai Syari'ah)", *al-ahkam: Jurnal Ilmu Syariah dan Hukum,* Vol. 1, No. 1, 2016.

[48] Kompilasi Hukum Islam.

[49] Endang Ali Ma'sum, "Pernikahan Yang Tidak Dicatatkan dan Problematikanya", *Musawa: Jurnal Studi Gender dan Islam,* Vol. 12, No. 2, 2013, p. 203.

[50] See Nur Anisah, "Pelaksanaan Perkawinan Campuran di KUA Tahunan, Jepara dalam Tinjauan Undang-Undang Perkawinan Indonesia", *ISTI'DAL: Jurnal Studi Hukum Islam,* Vol. 5, No. 1, 2018.

unregistered marriage is not specifically regulated in the practice of mixed marriages (between Indonesians and foreigners). It occurs frequently and considers legal status. In the case of a unregistered marriage occurred between Indonesian and foreign citizens, then there are three legal options that must be taken: first, if the person concerned is domiciled in Indonesia and intends to become an Indonesian citizen, then s/he can register the marriage with the employee who registers the marriage and performs *itsbat* the marriage in accordance with the provisions. Second, if the person concerned is living abroad but wants to become an Indonesian citizen, s/he can take legal steps by registering his marriage and marriage certificate at the Indonesian Embassy. Third, if the person concerned is domiciled and wants to become a resident of a foreign country, then the person concerned must take the legal route that has been determined in that country.

The urgency of the legal solution to mixed-unregistered marriages is to provide legal certainty for both parties and their offspring as well as to avoid the smuggling of citizens' laws which could be a problem in the survival of the state. Therefore, it is hoped that law enforcers must be more selective in reading the case of mixed and unmarried marriages.

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DETERMINATION OF MARRIED DISPENSATION NUMBER: 008/Pdt.P/2018/Tgm AND 0012/Pdt.P/2019/Tgm IN MASLAHAH PERSPECTIVE

Tiswarni[1], Jayusman[2], Aimas Soleha Rohilati[3]
[1]UIN Imam Bonjol, Jl. Sudirman No. 15 Padang, Sumatera Barat
[2]UIN Raden Intan, Jl. Letnan Kolonel H Jl. Endro Suratmin, Sukarame,
Kec. Sukarame, Kota Bandar Lampung, Lampung 35131
[3]KUA Kedaton, Bandar Lampung
Jl. Rusa, Sukamenanti, Kec. Kedaton, Kota Bandar Lampung, Lampung 35123
Email: [1]tiswarni@uinib.ac.id; [2]jayusman@radenintan.ac.id; [3]sholeha.pss0571@gmail.com

Abstract: This paper aims to analyze the judges' considerations of the Class I B Tanggamus Religious Court in the case of the determination of the Marriage Dispensation Number 008/Pdt.P/2018/PA. Tgm and 0012/Pdt.P/2019/PA.Tgm, and the reasons put forward by the petitioners, as well as reviewing them from the maslahahah side. This research method is descriptive qualitative, with the Ushul Fiqh approach. Collecting data through documentation and library research, using sources related to the main research problem, both primary and secondary sources with philosophical, juridical, and logical approaches, and content analysis techniques. As a result, the panel of judges gave its decision based on the fact that their marriage could be carried out immediately because the applicants were consensual and always together, and there was a concern that unwanted things would happen in religion or the law. The reasons for parents to marry off their children at a young age (under 19 years) are due to cultural factors, releasing the burden on parents, and because they are pregnant outside of marriage. From the view of maslahah, this dispensation of marriage does not bring benefit, but rather brings harm. Because the impact after marriage, it turns out that one of them always quarrels in his household so he doesn't live together anymore. And one other even though they still live together, but their lives are very deprived and unworthy.

Keywords: Marriage dispensation; maslahah

Abstrak: Tulisan ini bertujuan menganalisis pertimbangan hakim Pengadilan Agama Kelas I B Tanggamus dalam perkara penetapan Dispensasi Nikah Nomor 008/Pdt.P/2018/PA. Tgm dan 0012/Pdt.P/2019/PA.Tgm, dan alasan-alasan yang diajukan para pemohon, sekaligus meninjaunya dari sisi maslahahah. Metode penelitian ini bersifat kualitatif deskriptif, dengan pendekatan Ushul Fiqh. Pengumpulan data melalui dokumentasi dan penelitian kepustakaan *(library research),* dengan menggunakan sumber-sumber yang terkait masalah pokok penelitian, baik sumber primer maupun sekunder dengan pendekatan filosofis, yuridis, dan logis, dan teknik analisis isi *(content analysis).* Hasilnya, majelis hakim memberikan penetapannya berdasarkan bahwa pernikahan mereka dapat segera dilaksanakan berhubung karena di antara para pemohon telah suka sama suka dan selalu bersama, serta dikhawatirkan terjadi hal-hal yang tidak diinginkan dalam agama maupun undang-undang. Adapun alasan orang tua menikahkan anaknya di usia muda (di bawah 19 tahun) adalah karena faktor budaya, melepaskan beban orang tua, dan karena hamil di luar nikah. Dari tinjauan maslahah, dispensasi nikah ini tidak membawa kemaslahatan, tapi justru membawa kemudaratan. Sebab dampaknya setelah pernikahan, ternyata salah satu di antaranya selalu bertengkar dalam rumah tangganya sehingga tidak tinggal bersama lagi. Dan satu lainnya meski masih tinggal bersama, namun kehidupan mereka sangat kekurangan dan tidak layak.

Kata kunci: Dispensasi nikah; maslahah

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Introduction

It is undeniable that in Indonesia there are still many parents who marry off their children when they are underage[1]. This is triggered by various reasons; for example, the culture of marrying young in certain communities. If a girl does not propose to a certain age, then she is considered unsold and is labelled an old maid. This attribute is a very heavy psychological burden for the girl's family so that parents who have daughters are competing to marry off their children even though they are very young.

Apart from the aforementioned background factors, another important cause of underage marriage is the rampant promiscuity of adolescents which leads to pregnancy outside of wedlock; as a result, parents quickly marry off their children.[2] In this case, people still see that marriage is an effective solution to cover up the shame that has befallen their children. Even though many fiqh scholars have different opinions between being allowed to marry and not getting pregnant outside of marriage, Imam Ash-Syaibani tolerates being allowed to marry a woman who is pregnant outside of marriage as long as she does not have sexual intercourse before the child is born.[3]

The reasons for filing a marriage dispensation based on Article 7 Paragraph (2) of the Marriage Law have not or have not been regulated has reduced the concept of dispensation itself, as it is explained that dispensation is a limited state administration decision to set aside prohibitions in special cases. Therefore, the formulation of the permissible reasons is the most basic element to which a dispensation can be given. Thus dispensation is intended to resolve certain cases which may clarify the general statement of the purpose of the law, namely the general good.[4]

In order to realize a marriage that is in accordance with the objectives of marriage, Law Number 1 of 1974 concerning Marriage has determined and established the basics that must be carried out in marriage. One of them is Article 7 paragraph (1) which states that: "Marriage is only permitted if the man has reached the age of 19 (nineteen) years and the woman has reached the age of 16 (sixteen) years", and in the following paragraph states that if there is a deviation in Article 7 paragraph (1), he can ask for dispensation at the court or other appointed official. The amendment to law number 1 of 1974 concerning marriage contained in law 16 of 2019 is in article 7 paragraph (1) which states that: Marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years.

In the al-Qur'an it does not specifically discuss the age of marriage, it only determines

[1] Siskawati Thaib, *Perkawinan Di bawah Umur* (*Ditinjau Dari Hukum Islam Dan Undang-Undang Nomor 1 Tahun 1974*), Lex Privatum Vol. V/No. 9/Nov/2017, p. 48, Siti Hardiyanti Rukmana, *Pertimbangan Non Yuridis Dalam Memutuskan Perkara Dispensasi Nikah* (*Studi Putusan Pengadilan Agama Tanjung Karang Kelas Ia Kota Bandar Lampung*), Tesis Magister, UIN Raden Intan Lampung 2019, http://repository.radenintan.ac.id/id/eprint/6557

[2] Sri Ahyani, *Pertimbangan Pengadilan Agama Atas Dispensasi Pernikahan Usia Dini Akibat Kehamilan Di Luar Nikah*, Jurnal Wawasan Hukum, Vol. 34, No. 1, Februari 2016, p. 31

[3] Anshary. MK, Kamal Muchtar, *Asas- Asas Hukum Islam Tentang Perkawinan*, (Jakarta: Bulan Bintang, 2010, p. 63

[4] Widihartati Setiasih, *Analisis Putusan Dispensasi Nikah Dibawah Umur Dalam Perspektif Perlindungan Perempuan*, Jurnal PPKM III (2017) 235 – 245, Vol 4 No 3 (2017): September, p. 337, https://ojs.unsiq.ac.id/index.php/ppkm/article/view/428/257 dan lih. Nurul Inayah, *Penetapan Dispensasi Nikah Akibat Hamil Di Luar Nikah Di Pengadilan Agama Yogyakarta Tahun 2010-2015* (Analisis Hukum Acara Peradilan Agama), Jurnal *Al-Ahwal*, Vol. 10, No. 2, Desember 2017 M/1439 H, p. 180

with signs and signs of maturity, so it is left to the realm of fiqh and to the Muslims to determine the age limit which should be in accordance with the conditions and signs that have been determined, and adapted to the place where the law will be promulgated. The Word of Allah in Surah al-Nisa verse 1 requires marriage for a male and female partner. Of course, the order is intended for those who are adults.

يَٰٓأَيُّهَا ٱلنَّاسُ ٱتَّقُوا۟ رَبَّكُمُ ٱلَّذِى خَلَقَكُم مِّن نَّفْسٍ وَٰحِدَةٍ وَخَلَقَ مِنْهَا زَوْجَهَا
وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَآءً ۚ وَٱتَّقُوا۟ ٱللَّهَ ٱلَّذِى تَسَآءَلُونَ بِهِۦ وَٱلْأَرْحَامَ ۚ
إِنَّ ٱللَّهَ كَانَ عَلَيْكُمْ رَقِيبًا ﴿١﴾ وَءَاتُوا۟ ٱلْيَتَٰمَىٰٓ أَمْوَٰلَهُمْ ۖ وَلَا تَتَبَدَّلُوا۟ ٱلْخَبِيثَ
بِٱلطَّيِّبِ ۖ وَلَا تَأْكُلُوٓا۟ أَمْوَٰلَهُمْ إِلَىٰٓ أَمْوَٰلِكُمْ ۚ إِنَّهُۥ كَانَ حُوبًا كَبِيرًا ﴿٢﴾

O people, fear your Lord who created you from alone, and from him, Allah created his wife; and from both of them Allah gave birth to a large number of men and women. and fear Allah who by (using) His name you ask one another, and (maintain) good relations. Indeed, Allah is always watching over you. (al-Nisa verse 1)

For a young man, the age for entering the gates of marriage and household life generally focuses on his physical maturity, mental maturity, and his ability to assume responsibility as a husband in his household. That is the standard age for young people unless there are other factors that cause the marriage to take place earlier. For a girl, the age of marriage is because it is related to pregnancy, and it is likely that after marrying there will be a pregnancy. Therefore, it is necessary to take into account the physical and spiritual maturity that makes it possible to carry out the duties as a wife and at the same time as a mother as well as possible,[5] However, sometimes children who have not reached this stage have already married for certain reasons, for this reason, for those who are underage to marry, they must receive a marriage dispensation from the local religious court.[6]

Furthermore, the determination of the dispensation of marriage from 2015 to 2019 at the Religious Court Class IB Tanggamus provides for the determination of 52 cases of marriage dispensation, and 2 of them the determination of the marriage dispensation case determined at the request of the parents (not because they have ever had a husband and wife relationship or are pregnant).

The thing that is interesting for the author in the case that is determined in the average determination is that the prospective bride and groom are already pregnant, while the case that occurred in the Religious Court Class IB Tanggamus in the case of the determination of Marriage Dispensation Number 008/ Pdt.P/2018/PA. Tgm and 0012/Pdt.P/2019/ PA.Tgm, are at the request of parents and without any other shar "i reason. For this reason, the author wants to examine more deeply the judges' considerations in giving dispensation of marriage and what is the motivation of parents to marry off their children at a young age and then review it with maslahah theory. From the explanation above, some of the issues that need to be examined are how to analyze the judges' considerations on the determination of marriage dispensation number 0008/Pdt.P/2018/PA.Tgm and 0012/Pdt.P/2019/PA.Tgm? And 2. How is the review of the issue regarding the judges' considerations in determining the dispensation of marriage Number 0008/Pdt.P/2018/ PA.Tgm and 0012/Pdt.P/2019/PA.Tgm?

[5] Sutan Marajo Nasaruddin Latif, *Problematika Seputar Keluarga dan Rumah Tangga*, Pustaka Hiddayah, Bandung, 2001, p. 23.

[6] Sri Ahyani, *Pertimbangan …,* p. 33-34

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Research Method

This research belongs to the category of normative Islamic law research with the Ushul Fiqh approach. This aims to see how the legal process occurs in reaching a legal opinion in a case. Therefore, this type of research is descriptive qualitative research with a case study model.

To obtain accurate and documentary data, data collection is carried out through documentation and library research, using sources that are related to the main research problem, both primary and secondary sources with a philosophical, juridical, and logical approach[7], and content analysis techniques. The data analysis was done qualitatively. Data analysis was carried out simultaneously since the data collection process, and finally conclusions were drawn deductively.

Maslahah

In terms of language, maslahah comes from the word salaha, which literally means the opposite of bad or damaged words. He is mashdar from saluha, which means goodness or regardless of difficulty.[8] And it can also be said that maslahah is the singular form of masâlih.

As there are two meanings of maslahah, namely maslahah, which means al wrong and maslahah, which means the singular form of al-masâlih. Everything implies the existence of benefits both originally and through processes, such as producing enjoyment and benefits, or prevention and protection such as avoiding obedience. All of that can be called maslahah.[9] In Arabic the meaning of maslahah means actions that encourage human goodness, meaning that everything that is beneficial to humans, either in the sense of attracting or producing, such as producing profit or pleasure or in the sense of rejecting or avoiding such as rejecting fatness or damage. So everything that contains two sides, namely attracting or bringing benefit and rejecting or avoiding fading.[10]

In the study of Islamic legal theory (usûl al-fiqh), maslahah is identified by various designations (attributes), namely principles (al-asl, alqâ'idah, al-mabda'), sources or legal arguments (masdar , dalîl), doctrine (al-dâbit), concepts (al-fikrah), methods (al-tarîqah), and theories (al-nazariyyah). Etymologically, the meaning of al-maslahah can mean goodness, usefulness, appropriateness, worthiness, harmony, decency. The word almaslahah is contrasted with the word al-mafsadah which means damage.[11]

Maslahah can be interpreted from two sides, namely in terms of language and in terms of law or syara'. In terms of language, it refers to the purpose of fulfilling human needs and therefore, it contains the meaning of following lust or lust. Whereas in the meaning of syara 'which is the measure and reference is to maintain soul, reason, religion, descent, and property without giving up the goal of fulfilling human needs, namely getting pleasure and avoiding displeasure.

The division of maslahah in terms of strength as evidence or a foundation in determining the law, there are three: (1) maslahah darûriyah (2)

[7] Cik Hasan Bisri, *Model Penelitian Fiqh,* (Bogor: Kencana, 2013), Cet. ke-1, Jilid I, h. 377

[8] A. Warson Munawir, *Kamus Al Munawir,* (Surabaya: Pustaka Progresif, 2016), p. 788-789

[9] Rachmat Syafei, *Ilmu Ushul Fiqih,* (Bandung: Pustaka Setia, 2017), p. 7.

[10] Amir Syarifudin, *Ushul Fiqih,*Jilid 2, (Jakarta: Kencana, 2015), p. 366.

[11] Asmawi, "Konseptualisasi Teori Mashlahah", *Salam: Jurnal Filsafat dan Budaya Hukum*, Vol. 2, No. 1, 2014, p. 313-314.

maslahah hâjiyah (3) maslahah tahsîniyah, all three have legal powers that are functional, so this classification makes it easier to categorize a problem In terms of the intention of seeking and establishing the law, maslahah is also called munasib. Maslahah in the sense of munasib is divided into three parts: (1) maslahah al-mu'tabarah (2) maslahah al-mughâh (3) maslahah al-mursalah (islislâh).[12]

Maslahah is used as an effort to istinbat Islamic Law or if you hit a problem it can use the maslahah theory because as a barometer, the scholars limit the freedom of reason in maslahah studies, by setting a number of criteria, as follows:

1. The maslahah is a ratio (ma'qul) and relevant (munasib) to the legal case stipulated.
2. The problem must be accepted by rational thought.

The maslahah must be following the meaning of the Shari'a in stipulating the law, and not contradicting with the arguments, either with the textual arguments or with the basic premises of the substance. In other words, it must be in accordance with the maqâsid syarî'ah.

Case for Determination of Marriage Dispensation Number 0008/Pdt.P/2018/PA.Tgm and Number 0012/Pdt.P/2019/PA.Tgm

1. The case for Determination of Marriage Dispensation Number 0008/Pdt.P/2018/PA.Tgm

a. The case for Determination of Marriage Dispensation

The case for Determination of Marriage Dispensation Number 0008/Pdt.P/2018/PA.Tgm is:

1) Whereas the petitioner based on his application letter dated January 16, 2018, which is registered at the Registrar's Office of the Tanggamus Religious Court, wants to marry his son named Al-Mukhtarom bin Saparudin who is 18 (eighteen) years old with his future wife Yuli Puji Lestari Binti Sukarmin who is 16 (sixteen)) year.
2) Whereas the conditions for carrying out the marriage both according to the provisions of Islamic law and the prevailing laws and regulations have been fulfilled except for the age requirement for the applicant's child who has not reached the age of 19 (nineteen) years, and because of that the said intention has been rejected by the Office. Religious Affairs (KUA) Kec. Performance with Letter Number B.09.Kua.08.B.2/PW.01/01/2018 dated January 12, 2018.
3) Whereas the marriage is very urgent to take place because both of them have been engaged since approximately one month ago and their relationship has been so close, so that the petitioner is very worried that an act that is prohibited by the provisions of Islamic law will occur if they are not married immediately.
4) Whereas between the Petitioners' children and his future wife, there is no prohibition against marriage.
5) Whereas the petitioner's child has the status of a bachelor, has reached maturity and is ready to become a husband or head of the family.
6) The petitioner is able to pay all costs incurred as a result of this case.[13]

[12] Amir Syarifudin, *Ushul Fiqih*, p. 372.

[13] Determination of Marriage Dispensation, Number: 0008/Pdt.P/2018/PA.Tgm, p. 3-4

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b. Legal Considerations

The judges' legal considerations in this case are:

1) Whereas the aims and objectives of the petitioner's petition areas mentioned above;
2) Whereas the panel of judges has advised and provided sufficient views so that the marriage should be postponed until it is old enough according to the prevailing laws and regulations, however, the petitioner remains with the petition;
3) Whereas the intention of setting the minimum age limit for marriage, as stated in the Elucidation of Article 7 of Law Number 1 of 1974 concerning Marriage, is in the context of consideration of benefit, because marriage requires mental (psychological) and physical maturity. Besides that, it is also necessary to have economic adequacy, the potential for the ability to educate and socialize in social life, all of which are based on the basis of One Godhead;
4) Whereas the conditions of marriage are aimed at the benefit of marriage, including refusing or at least eliminating marital problems such as divorce, inability to educate, economic deficiency, bad offspring, harmony in the household, and so on. Which is based on the interpretation of Surat al-Nisa verse 9 as follows:

وَلْيَخْشَ الَّذِيْنَ لَوْ تَرَكُوْا مِنْ خَلْفِهِمْ ذُرِّيَّةً ضِعٰفًا خَافُوْا عَلَيْهِمْ ۖ فَلْيَتَّقُوا اللّٰهَ وَلْيَقُوْلُوْا قَوْلًا سَدِيْدًا

"And fear Allah those who should leave behind them weak children, whom they fear for their welfare. Therefore let them have devotion to Allah, and let them pronounce the true statement."

5) Based on the evidence of letters P1-P5, authentic deeds as referred to in Article 285 R.Bg, are also based on the testimony of witnesses, as well as the statements of the Petitioners 'children and the Petitioners' future wives Kesemuay has provided information which strengthens and proves all the posita of the petitioner's petition, in particular regarding the readiness and maturity of the aspects required to carry out a marriage, as well as clarifying and confirming the reasons and motivation of the petitioner's petition and the petitioner's children;
6) Whereas the Petitioner's child, although not meeting the minimum requirements for marriage age, the panel of judges views that the petitioner's child is capable and mature in various aspects to be responsible in carrying out and fostering mitsaqan ghalidhan, a strong bond, a physical and mental bond in the form of a happy marriage bond. and eternal according to the Supreme Lordship;
7) Whereas the Petitioner, as a biological mother, has stated her ability to guide, foster and assist her child in living his household life, both morally and materially;
8) Whereas the Petitioner's child and his prospective wife do not have any obstacle to marriage, whether it is lineage/descent, sexual relations, sexual relations or religious relations, this is in accordance with Article 8 of Law Number 1 the Year 1974 concerning marriage in conjunction with Article 30-44. Compilation of Islamic Law;[14]

[14] Determination of Marriage Dispensation, Number: 0008/Pdt.P/2018/PA.Tgm, p. 5-6

Whereas the Majlis considers it necessary to present the appropriate Syariah arguments as follows;

1) The holy book of al-Qur'an surah an-Nur verse 32:

وَأَنكِحُوا الْأَيَامَىٰ مِنكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ ۚ إِن يَكُونُوا فُقَرَاءَ يُغْنِهِمُ اللَّهُ مِن فَضْلِهِ ۗ وَاللَّهُ وَاسِعٌ عَلِيمٌ

"And marry those who are alone among you, and those who are worthy of marriage from your male and female slave servants, if they are poor, Allah will gather them with His grace and Allah is the most extensive. , lahi is all-knowing."

2) The Safinatun Najah book page 16 which means the following:

"The signs of adulthood (adulthood) are 3 (three) things, namely being 15 years old, for men and women who have dreamed and emitted semen, for men and women aged 19 years and have had menstruation."

c. Legal Establishment

Based on the aforementioned considerations, the panel of judges subsequently issued a ruling which read as follows:

1) Grants the petitioner;
2) To determine, to give dispensation to the petitioner to marry off the petitioner's child named Al-Mutarom bin Saparudin with his future wife named Yuli Puji Lestari Binti Sukarmin;
3) Charged the court fee to the petitioner, amounting to Rp. 211,000 - (two hundred and eleven thousand rupiahs);

2. Determination of Marriage Dispensation Number 0012/Pdt.P/2019/PA. Tgm.

a. Sitting in the case of the Determination of Marriage Dispensation Number 0012/ Pdt.P/2019/PA. Tgm. are as follows

1) Whereas the petitioner based on his application letter dated January 16, 2018 which was registered at the Registrar's Office of the Tanggamus Religious Court, wants to marry his son Miftahudin bin Solihin who is 18 (eighteen) years 4 (four) months old with his future wife Eliyana Binti Khoiruddin who is 18 (eight) twelve) years and 10 (ten) months.
2) Whereas the conditions for carrying out the marriage both according to the provisions of Islamic law and the prevailing laws and regulations have been fulfilled except for the age requirement for the applicant's child who has not reached the age of 19 (nineteen) years, and because of that the said intention has been rejected by the Office. Religious Affairs (KUA) Kec. Performance with Letter Number B.115/Kua.08.13.2/ PW.01/03/2019 dated March 20, 2019.
3) Whereas the marriage is very urgent to take place because both of them have been engaged since approximately 3 (three) months ago and their relationship has been so close, that the petitioner is very worried that an act that is prohibited by the provisions of Islamic law will occur if they are not married immediately.
4) Whereas between the Petitioners' children and his future wife, there is no prohibition against marriage.
5) Whereas the petitioner's child has the status of a bachelor, and has reached maturity and is ready to become a husband or head of the family.

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6) The petitioner is able to pay all costs incurred as a result of this case.[15]

b. Legal Considerations

The judges' legal considerations in this case are:

1) Whereas the aims and objectives of the petitioner's petition areas mentioned above;
2) Whereas the panel of judges has advised and provided sufficient views so that the marriage should be postponed until it is old enough according to the prevailing laws and regulations, however, the petitioner remains with the petition;
3) Whereas the intention of setting the minimum age limit for marriage, as stated in the Elucidation of Article 7 of Law Number 1 of 1974 concerning Marriage, is in the context of consideration of benefit, because marriage requires mental (psychological) and physical maturity. Besides that, it is also necessary to have economic adequacy, the potential for the ability to educate and socialize in social life, all of which are based on the basis of One Godhead;
4) Whereas the conditions of marriage are aimed at the benefit of marriage, including refusing or at least eliminating marital problems such as divorce, inability to educate, economic deficiency, bad offspring, harmony in the household, and so on. Which is based on the interpretation of Surat al-Nisa verse 9 as follows:

وَلْيَخْشَ الَّذِيْنَ لَوْ تَرَكُوْا مِنْ خَلْفِهِمْ ذُرِّيَّةً ضِعٰفًا خَافُوْا عَلَيْهِمْ ۖ فَلْيَتَّقُوا اللّٰهَ وَلْيَقُوْلُوْا قَوْلًا سَدِيْدًا

"And fear Allah those who should leave behind them weak children, whom they fear for their welfare. Therefore let them have devotion to Allah, and let them pronounce the true statement."

5) Based on the evidence of letters P1-P5, authentic deeds as referred to in Article 285 R.Bg, are also based on the testimony of witnesses, as well as the statements of the Petitioners 'children and the Petitioners' future wives Kesidangay has provided information that strengthens and proves all the posita of the petitioner's petition, especially regarding the readiness and maturity of the aspects needed to carry out a marriage, besides that it has clarified and confirmed the reasons and motivation for the petitioner's petition and the petitioner's children;
6) Whereas the petitioner's child, although not meeting the minimum requirements for marriage age, the panel of judges views that the petitioner's child is capable and mature in various aspects to be responsible in carrying out and fostering mitsaqan ghalidhan, a strong bond, a physical and mental bond in the form of a happy and eternal according to the One Godhead;
7) Whereas the petitioner, as the biological mother, has stated her ability to guide, foster and assist her child in living his household life, both morally and materially;
8) Whereas the petitioner and his prospective wife's child does not have any obstacle to marriage, whether it is lineage/descent, sexual relations, sexual relations or religious relations, this is following Article 8 of Law Number 1 the Year 1974 concerning marriage in conjunction with Article 30-44. Compilation of Islamic Law;

[15] Determination of Marriage Dispensation, Number 0012/Pdt.P/2019/PA.Tgm, p. 1-2

9) Whereas the Majlis considers it necessary to present the appropriate syar'iyyah argument as follows;

(a) The holy book Al-Qur'an surah An-Nur verse 32:

وَأَنكِحُوا الْأَيَامَىٰ مِنكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ ۚ إِن يَكُونُوا فُقَرَاءَ يُغْنِهِمُ اللَّهُ مِن فَضْلِهِ ۗ وَاللَّهُ وَاسِعٌ عَلِيمٌ

"And marry those who are alone among you, and those who are worthy of the marriage of your male and female slave servants, if they are poor, Allah will gather them with His grace and Allah is the most extensive of gifts. Him, Allah is All-Knowing."

(b) The fiqhiyyah qaidah which reads:

دَرْءُ الْمَفَاسِدِ مُقَدَّمٌ عَلَىَ جَلْبِ الْمَصَالِحِ

"Rejecting obedience takes precedence over attracting benefit".[16]

c. Legal Establishment

Based on the aforementioned considerations, the panel of judges subsequently issued a ruling which read as follows:

1) Grants the petitioner;
2) To determine, to give dispensation to the petitioner to marry off the petitioner's child named Al-Mutarom bin Saparudin with his future wife named Yuli Puji Lestari Binti Sukarmin;
3) Charged the court fee to the petitioner, amounting to Rp. 306,000, - (three hundred and six thousand rupiah);[17]

[16] Determination of Marriage Dispensation, Number: 0008/Pdt.P/2018/PA.Tgm, p..3

[17] Determination of Marriage Dispensation, Number: 0008/Pdt.P/2018/PA.Tgm, p.4-5

Judges' Considerations in the Determination of Marriage Dispensation Number 0008/Pdt.P/2018/PA.Tgm and 0012/Pdt.P/2019/PA.Tgm perspective Maslahah

By examining various cases that have been raised in several writings, especially cases related to marriage issues, the author realizes how important the socialization of Islamic law to society is not only the form of normative legal formulation, but also especially regarding aspects of legal objectives, which are generally not others aim to achieve benefit and avoid oblivion.

The duty of judges as law enforcers, every application of law or legal decisions made by judges should be in line with the objectives of the law to be achieved by syari'at. If the application of formula will conflict with the results of human benefit, the application of the law must be suspended. In order to achieve the benefit, which is the main objective of the application of laws, legal exceptions need to be enforced. The purpose of law enforcement in Islam is a benefit. Maslahah means actions that encourage human goodness, meaning that everything that is beneficial to humans, either in the sense of attracting or producing, such as producing profit or pleasure or in the sense of rejecting or avoiding such as refusing obedience or damage. So everything that contains two sides, namely attracting or bringing benefit and rejecting or avoiding fade.[18]

In the order of the determination of the two Marriage Dispensations above, the Panel of Judges granted the petitioner's petition, namely to grant a Marriage Dispensation to the petitioner to marry off his child. With

[18] Amir Syarifudin, *Ushul Fiqih,*Jilid 2, (Jakarta: Kencana, 2015), p. 366

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the consideration that there will be a greater madarat if the two candidates for the bride and groom are not married immediately. Mudarat in question arises from the concern of the parents as the petitioner.

The decision of the Panel of Judges did not deviate from the provisions of the Marriage Law which did not specifically discuss Marriage Dispensation and Islamic Law Compilation which implicitly did not prohibit marrying someone whose age was less as stipulated in statutory regulations.

In the study of Islamic legal theory (ushul fiqh), maslahah is identified by various designations (attributes), namely principles (principle, al-asl, al-qâ'idah, al-mabda') sources or legal propositions (source, al-masdar), ad-dalîl), doctrine (doctrine, al-dâbit), concepts (concept, al-fikrah), methods (method, al-tarîqah), and theories (theory, al-nazariyyah)[19]

The foundation of the Islamic Sharia building is represented by maslahah, which is aimed at the interests of human life as a servant of Allah, both concerning his worldly life and his spiritual life. Islamic Sharia upholds the principles of justice ('adâlah), compassion (rahmah), and maslahah. Any rule of law that deviates from these principles is not a part of Islamic Sharia, although rationalization (ta'wîl) is sought to make it a part of Islamic Sharia. The greatness and nobility of Islamic Sharia is manifested in the compatibility of Sharia laws with the development of human life because the maslahah spirit moves it. The existence of maslahah in Islamic Sharia buildings cannot be denied because al-maslahah (المصلحة) and asy-Syarî›ah (الشريعة) have combined and merged, so that the presence of al-maslahah necessitated the demands of al-Syarî›ah (الشريعة).

Realizing maslahah is a vital thing in Islamic Sharia. In every rule of law, asy-Syâri' transmits maslahah so that goodness/benefit is born and bad/damage is avoided, which in turn the realization of prosperity and welfare on earth and purity of devotion to Allah. Because, maslahah is actually maintaining and paying attention to the goals of Syara' in the form of goodness and benefit desired by Syara›, not by human passions. The legal norms contained in the Sharia texts (nusûs asy-syarî›ah) can certainly manifest maslahah, so that there is no problem outside the guidance of the Sharia text; and because of that, it is not valid to think that maslahah should be prioritized if it contradicts the Sharia text. So, maslahah is essentially the axis of circulation and change of Islamic law, where the interpretation of the Sharia text can rest on it.[20]

Yusuf al-Qaradawi is concerned that the maslahah substance desired by Islamic Sharia to be upheld and maintained is a comprehensive, integral and holistic maslahah, which includes a combination of maslahah dunyawiyyah and maslahah ukhrawiyyah, maslahah maddiyyah and maslahah rûhiyyah, maslahah fardiyyah and maslahah. maslahah qaumiyyah khâssah and maslahah insâniyyah 'âmmah, maslahah hâdirah and maslahah mustaqbalah. On this basis, Yusuf al-Qaradawi emphasized that the concept of maslahah which animates Islamic Sharia cannot be identified with utility and pragmatism, which not a bene originated from materialism.[21]

[19] Husain Hamid Hisân, *Nazariyyat al-Maslahah fi al-Fiqh al-Islâmiy*, (Beirut: Dâr al-Nahdah al-'Arabiyyah, 1971), p.607.

[20] Ali Hasaballah, *Qiyâs al-Maslahah*.(Mesir: Dâr al-Ma'ârif, 1383 H/1964 M), p.257

[21] Yusuf al-Qaradawi, *Madkhal li Dirâsat al-Syarî'ah*

According to al-Gazâli's view, based on the aspect of whether or not there is Syara›s firm justification for him (syahâdat asy-syar'i), maslahah is divided into three, namely (1) maslahah which has confirmed Syara's justification for its acceptance (maslahah mu'tabarah); (2) maslahah which was confirmed by Syara' justification for his refusal (maslahah mulgâh); and (3) maslahah which is not confirmed by Syara' justification, both for its acceptance and rejection (maslahah mursalah). Muhammad Muslehuddin saw that the maslahah categorization with the trilogy maslahah mu'tabarah, maslahah mulgâh, and maslahah mursalah still had to consider the dimensions of society's interests and the changing social reality so that Islamic law (Sharia) must move in line with changes in social reality that occur, in turn, the flexibility of Islamic law (Sharia) can be maintained.[22]

On the other hand, al-Gazâli also categorizes maslahah based on the strength of its substance (quwwatihâ fî dzâtiha), where maslahah is divided into three, namely (1) maslahah darûrât level, (2) maslahah level hâjât level, and (3) maslahah level tahsîniyât/tazyînat. Each part is accompanied by a complementary maslahah/complement (takmilah/tatimmah). The maintenance of the five basic goals/ principles (al-usûl al-khamsah), which is at the emergency level is the strongest and highest level of maslahah. The five basic objectives/ principles include (1) maintaining religion (hifz ad-dîn), (2) maintaining the soul (hifz an-nafs), (3) maintaining intellect (hifz al-'aql), (4) maintaining offspring (hifz an-nasl), and (5) maintaining wealth (hifz al-mâl). Al-Gazali›s view of al-usûl al-khamsah was refined by Syihâb al-Dîn al-Qarafi by adding one more objective/basic principle, namely maintaining self-respect (hifzal-›ird) even though al-Qarafi himself acknowledged that this is the subject of debate by scholars.[23]

Meanwhile, in the second case, the determination of the compensation, the panel of judges issued a ruling based on the fact that their marriage could be carried out immediately because the applicants were consensual and always together and there was a concern that unwanted things would occur in Religion and the Law, And this is considering, that the children of the Petitioners, at that time were respectively 18 years and 18 years 4 months, so that based on Article 7 paragraph (1) of Law Number 1 the Year 1974, to marry off there must be dispensation. From the court. Actually, there is no age requirement in Islamic law if you want to carry out a marriage, the requirement that must be met to carry out marriage is baligh.

Based on this information, the requirements described in article 7, paragraph 1, are only permitted if the male party has reached 19 years, and the woman has reached 16 years. From the two cases, the authors concluded that the reason the judge fulfilled the petitioner›s petition was to emphasize the concern of the petitioner›s parents.

BAPPENAS reports that in 2018, underage marriages occurred in Indonesia, nearly 35% of cases out of 2 million couples who married. The high rate of underage marriage is inseparable from the legal, social and cultural factors that develop in society, concerning:

al-Islâmiyyah, (Kairo: Maktabah Wahbah,1990), p. 62.

[22] Yusuf al-Qaradawi, *Madkhal li Dirâsat…,* p. 65.

[23] Yusuf al-Qaradawi, *Madkhal li Dirâsat…,* p. 72.

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1. Religious norms (especially Islam) do not prohibit or oppose underage marriage, and there is no criminalization against underage marriage;
2. Habits and traditions that have been entrenched in society;
3. Marriage or marriage as a way to get out of the shackles;
4. The economic downturn and the burden of life;
5. And the tendency to develop promiscuity of adolescents and children.[24]

Meanwhile, if it is observed in the determination of the Marriage Dispensation in the two stipulations, that the reason for applying for an underage marriage is due to the parents/Petitioner›s concern about their children's relationship so that the marriage is considered urgent to be implemented.

The existence of maslahah can be seen from the post-determination of the Marriage Dispensation. And from the two determinations that the author examined, one of them did not live together because he was always fighting in his household. And one other, although they still live together, their household life is classified as inadequate due to economic shortages. This proves that the existence of maslahah also needs to pay attention to the emotional and psychological maturity of the prospective brides and the readiness of parents to be responsible for their children›s lives after marriage.[25]

For this reason, the authors observe that in determining the Marriage Dispensation, it is necessary to have a regulation that strengthens the boundaries of matters related to the application for Marriage Dispensation, both in terms of age, psychological impact and economic impact which can be proven in terms of the applicant›s ability, in this case, the parents as the person in charge in taking responsibility for the household life of their children after marriage, so that the existence of maslhahah can be realized in real terms.

Furthermore, in Law No.1 of 1974, the reasons for the dispensation of marriage permit should be stated so that the judge in determining the marriage dispensation permit can give the best decision. Judges should also tighten the requirements in applying for a license for dispensation of underage marriage, to reduce the number of cases of early marriage that are currently rife in Indonesia.

Conclusion

In Indonesia, there are still many parents who marry off their children when they are still underage. This is triggered by various reasons; for example, the culture of marrying young in certain societies. For the poor, marrying off their children is a burden relieving. Apart from the background above factors, another important cause of underage marriage is the rampant promiscuity of adolescents which has resulted in pregnancy outside of marriage. This is also exacerbated by the existence of a marriage dispensation rule, and marriage is only permitted if the man and woman have reached the age of 19 (nineteen) years. In compelling circumstances, marriage below the minimum age limit as stipulated in the Marriage Law is possible after obtaining dispensation from the court at the request of

[24] http://bashanovathink.blogspot.com/2011/03/kajian-sosiologi-hukum-terhadap.html, on 12 Nopember 2019

[25] Results of observations and direct interviews with the person concerned, on December 23, 2019.

the parents. However, the facts in the field are often reversed. This can be seen in the case at the Religious Court Class I B Tanggamus in the case of the determination of Marriage Dispensation Number 008/Pdt.P/2018/PA. Tgm and 0012/Pdt.P/2019/PA.Tgm is at the request of parents and without any other syariah reason. Judges' considerations in determining the dispensation of marriage Number 0008/Pdt.P/2018/PA.Tgm and 0012/Pdt.P/2019/PA.Tgm turned out to not bring good and benefit to their household. Lack of knowledge, experience, and financial capacity are the cause of domestic conflict.

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THE PROBLEMATICS ON IMPLEMENTATION OF LAW NUMBER 23 YEAR 2011 CONCERNING *ZAKAT* MANAGEMENT AT BAZNAS LUBUK LINGGAU CITY

Aneka Rahma[1] & Badrun Tamam[2]
[1,2] Faculty of Sharia IAIN Bengkulu
Jl. Raden Fatah Pagar Dewa Kota Bengkulu
Email: [1]anekarahma91@gmail.com; [2]badruntaman.ofc@gmail.com

Abstract: This study aims to explain the problems in implementing Article 3 of Law Number 23 Year 2011 concerning Zakat Management in BAZNAS, Lubuklinggau City, South Sumatra. This is qualitative field and library research. The data collection techniques are observation, interview and documentation. The issues are how the efforts of Baznas Lubuk Linggau in implementing Law Number 23 Year 2011 and what are the problems in its implementation. The results show that Baznas Lubuk Linggau strives to empower zakat funds optimally through the Smart Lubuklinggau Program, Lubuk linggau Peduli, Lubuk linggau Taqwa, Lubuk linggau Sehat, Lubuk linggau Makmur, and Lubuk linggau Amil, as well as proposing a Mayor Regulation on zakat. Meanwhile, the problem of implementation are: the manager does not yet have compelling authority, the institution cannot be controlled by muzakki, supervision of implementation of planned programs is not optimal; lack of awareness of public participation, and the mindset of the people who still think that the zakat funds they receive is a provision and become their right that do not need to be accounted.

Keywords: effectiveness; zakat management; poverty; Lubuklinggau

Abstrak: Penelitian ini bertujuan untuk menjelaskan problematika pelaksanaan pasal 3 Undang-undang Nomor 23 Tahun 2011 tentang Pengelolaan Zakat di BAZNAS kota Lubuklinggau Sumatera Selatan. Jenis penelitiannya adalah kualitatif lapangan dan pustaka. Teknik pengumpulan data yang digunakan adalah observasi, wawancara dan dokumentasi. Rumusan masalahnya adalah bagaimana upaya Baznas Lubuk Linggau dalam mengimplementasikan Undang-Undang Nomor 23 Tahun 2011 dan bagaimana problematika pelaksanaannya. Hasil penelitian menunjukkan bahwa Baznas Lubuk Linggau berupaya dengan melakukan pemberdayaan dana zakat secara optimal melalui Program Lubuklinggau Cerdas, Lubuk Linggau Peduli, Lubuk Linggu Taqwa, Lubuk Linggau Sehat, Lubuk Linggau Makmur, dan Lubuk Linggau Amil, serta mengajukan Peraturan Walikota tentang zakat. Sedangkan problematika pelaksanaannya adalah pengelola belum memiliki kewenangan yang bersifat memaksa, lembaga tidak bisa dikontrol oleh muzakki, pengawasan dalam pelaksanaan program yang direncanakan belum optimal, kurangnya kesadaran partisipasi masyarakat, dan pola pikir masyarakat yang masih menganggap dana zakat yang diterimanya adalah suatu rezeki dan menjadi hak mereka yang tidak perlu dipertanggungjawabkan

Kata kunci: efektivitas; pengelolaan zakat; kemiskinan; Lubuklinggau

Introduction

Paying zakat is one of the five pillars of Islam that every capable Muslim must carry out. After the nisab and haul of his assets in the form of agricultural products, livestock and wealth in the form of gold, silver and various other forms of work has accumulated. The obligation of zakat is stated in the Qur'an after the command to establish prayers and the third order in the pillars of Islam,

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automatically becomes an absolute part of one's Islam. Normatively, the obligation of zakat is not only vertical in dimension (*hablum min Allah)*, but also has a horizontal dimension (*hablum min al-nas)*.[1]

In the *hablum min Allah* dimension, zakat is a manifestation of a servant's obedience to Allah. Whereas in the *hablum min al-nas* dimension, zakat can generate and increase solidarity commitment among fellow Muslims. In this context, zakat is one of the components that becomes an instrument of social justice and human solidarity, in order to eliminate social injustice.[2]

Morally, zakat is able to erode negative traits, such as greed for property (the tendency to monopolize property excessively). Meanwhile, socially, zakat serves as a powerful tool to reduce poverty in the midst of society[3] and at the same time it will also be able to make rich people aware of their social responsibility to others, so that a healthy wealth distribution process occurs in the midst of society. As a result, the gap and social jealousy between the rich and the poor can be suppressed and minimized.[4] Thus, zakat has a very strategic value in community empowerment efforts, especially those who are weak, needy and poor.[5]

The idealism and normativsm of the extraordinary potential of zakat has not been "grounded" and significantly beneficial as it should be. In this case there are several obstacles that cause it, among others, first, the low level of awareness of the Muslim community towards zakat.[6] Second, information about zakat that reaches the community is still relatively minimal and limited. Third, the level of public understanding of how to calculate zakat is still low, which is often related to their honesty level in calculating their zakat. Whereas fourth, public trust in zakat management organizations is still low because they are considered less professional and less transparent (accountability aspect), so that many muzakki pay or give their zakat personally and directly to the mustahiq.[7]

Meanwhile, according to Qardhawi, factors that can affect the success of zakat management are the expansion of the scope of compulsory zakat assets (zakat objects) which are still debatable, management that is not fully professional, and the allocation and distribution process which is not yet effective and efficient.[8] Meanwhile, according to Abdurrahman Wahid, although there have been various zakat management organizations for a long time, regardless of their form and name, most of them are not yet professional and relatively more incidental and unsustainable. According to

[1] Faisal, "Sejarah Pengelolaan Zakat di Dunia Muslim dan Indonesia", *Jurnal Analisis*, Vol. XI, No. 2, December 2011, p. 246

[2] Fitri Kurniawati, "Filosofi Zakat Dalam Filantropi Islam", *Adzkiya: Jurnal Hukum dan Ekonomi Syariah*, Vol. 05, No. 2, September 2017, p. 233

[3] Anis Tyas Kuncoro, "Zakat: Katup Pengaman Keseimbangan Kehidupan Ekonomi Umat", *Jurnal Ulul Albab: Jurnal Studi dan Penelitian Hukum Islam* Vol. 1, No. 1, Oktober 2017, p. 75.

[4] Abdul Mannan, *Teori dan Praktek Ekonomi Islam*, (Jakarta: Dana Bhakti Wakaf, 2005), p. 256

[5] Yoghi Citra Pratama, "Peran Zakat Dalam Penanggulangan Kemiskinan (Studi Kasus: Program Zakat Produktif Pada Badan Amil Zakat Nasional), *The Journal of Tauhidinomics* Vol. 1 No. 1, April 2015, p. 94

[6] Anik dan Iin Emy Prastiwi, "Peran Zakat Dalam Meningkatkan Pertumbuhan Ekonomi melalui pemerataan "Equity", *Proceeding Seminar Nasional & Call For Papers The Role of Cross Cultural Program in Facing Digital Economy,* STIE AAS Surakarta, 4 September 2019, p. 133

[7] Syafe'i, Ermi Suhasti, "Mengoptimalkan Potensi Zakat", diseminarkan dalam *Prosiding Simposium Nasional Ekonomi Islam* (P3EI) UII, (Yogyakarta: (P3EI) UII, 2002), p. 17

[8] Yusuf Qardhawi, *Kiat Islam Mengentaskan Kemiskinan*, (Jakarta: Gema Insani Pers, 1991), p. 16

him, there are at least three main causes, namely first, the organization or institution does not yet have compelling authority. Second, the organization or institution cannot be controlled by the muzaki, directly or indirectly. Third, socio-politically there is an impression that there is a strengthening of the framework of secularism and the promotion of covert secularism which seeks to determine the religious affairs of the state. The consequence is that the aspect of zakat is considered as the authority of religion (ulama).[9]

From the description and some of the constraints above, it appears that the institutional factor is the most prominent and dominant. Furthermore, in this case, until now the factor of the ability of institutions or organizations managing zakat has not reached the level of service quality and management expected. One indicator is that although on the one hand the awareness of Muslims in paying zakat has shown an encouraging increase, on the other hand, on the real ground, the poor still exist, both in terms of quality and quantity.[10] In order to respond to the high hopes of the Muslims for a trustworthy, transparent and professional zakat management organization, the institutional reform of the zakat management organization is very urgent. Because of its strategic role, it is time to build institutions and management of zakat funds as well as possible.

Currently, zakat management institutions are the latest form for institutions that have the power to manage zakat assets. For that reason, the *ámilin* in charge should have characteristics in accordance with Islamic values and have high professionalism, so that zakat assets can be managed properly and on target. They must have Islamic ethics in general, such as being supportive and friendly to zakat obligators and always praying for them, be able to explain the importance of zakat in creating social solidarity and distribute zakat effectively and efficiently so that the assets of zakat are really beneficial by muzakki and so also for mustahik.[11]

This zakat management has been regulated by law, namely Law Number 23 Year 2011 concerning Zakat Management. In the Law of the Republic of Indonesia Number 23 of 2011 concerning Zakat Management, it is stated that what is meant by zakat is assets that must be set aside by a Muslim or an entity owned by a Muslim in accordance with religious provisions to be given to those entitled to receive it.[12]

In this law there are two forms of institutions, first the Amil Zakat Agency (BAZ) which is formed by the government, the second the Amil Zakat Institute (LAZ) which is confirmed, fostered and protected by the government. The collection of zakat by zakat institutions is very much determined by the recognition of society, in this case how the Islamic community realizes the importance of managing zakat by a professional, trustworthy and trustworthy institution. Public awareness and participation will greatly support the collection of the huge potential of zakat.[13]

With the issuance of Law Number 23 of 2011 concerning Zakat Management, it is

[9] Abdurrahman Wahid, *Pajak Itu Zakat*, (Bandung: Mizan Pustaka, 2005), p. xi-xii.

[10] Budi Budiman, *Potensi Zakat Dana ZIS,* (Yogyakarta: (P3EI) UII, 2002), p. 1

[11] Widi Nopiardo, " Urgensi Berzakat Melalui Amil Dalam Pandangan Ilmu Ekonomi Islam", *Jurnal Ilmiah Syari'ah*, Vol.15, No. 1, Juni 2016, p. 93

[12] Hadi Setia Tunggal, *Undang-Undang Pengelolaan Zakat dan Wakaf*, (Jakarta:Fokus Media, 2000), p. 10

[13] Sari Viciawati Machdum, "Upaya Peneguhan Eksistensi Lembaga Amil Zakat Sebagai Salah Satu Bentuk Faith Based Organization di Indonesia", *Empati: Jurnal Ilmu Kesejahteraan Sosial*, Vol. 2, No. 1, Juni 2013, p. 20

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hoped that zakat management institutions can play a role in managing zakat, especially for poverty alleviation and social justice. For this reason, the effectiveness of zakat management institutions is needed so that the benefits of zakat can be felt, especially to improve the standard of living of the poor. Every zakat manager is required to always improve zakat management in a better, integrated, and optimal manner with a neat, orderly and professional management.[14] Thus, zakat management institutions can make zakat a religious institution that has a direct functional relationship in solving social problems, such as poverty alleviation.

In reality, the achievement of the objectives of Article 3 of Law Number 23 Year 2011 concerning Zakat Management has not been maximized. This is because the existence of zakat is felt until now it has not been able to reduce the level of poverty, especially in the City of Lubuklinggau. Although the poverty rate has decreased based on figures from the Central Statistics Agency (BPS) in 2015-2017. In 2015 it was known that there were 33.21000 or 15.6 percent, 2016 amounted to 31.01000 or 13.99 percent, while 2017 amounted to 29.54000 or 13.12 percent with a population of 226,002 people in Lubuklinggau.[15]

This study aims to analyze the problems faced by BAZNAS Lubuk Linggau in realizing the effectiveness and service of zakat management as well as increasing the benefits of zakat to create welfare and poverty alleviation in the city of Lubuk Linggau. The problems found are then used as a reference for recommendations for solutions. In more detail, the research questions include: first, how effective are the existing zakat laws and regulations? Second, what are the problems in the Baznas Lubuk Linggau City environment related to the effectiveness of the zakat laws and regulations. Third, what solutions can be recommended for the problems faced by Baznas Lubuk Linggau City. This description will analyze the aspects of the strength of the existing zakat laws and regulations, then verify their implementation by the research subjects of Baznas Lubuk Linggau City, so that the root causes and solutions that deserve to be recommended are found.

Research Method

This type of research the researchers used empirical legal research. According to Soerjono Soekanto, empirical legal research consists of research on legal identification and effectiveness. Empirical legal research, in other words, is a type of sociological research and can also be called field research, which examines the applicable legal provisions and what happens in reality in society. In this case the author examines the efforts made by BAZNAS in alleviating poverty and the effectiveness of the implementation of Article 3 of Law Number 23 Year 2011 concerning Zakat Management at BAZNAS Lubuklinggau City.

This research is descriptive qualitative. The selection of this type of research was carried out to obtain an overview of the efforts made by BAZNAS in overcoming poverty in Lubuk Linggau City and to find out the effectiveness of the implementation of Article 3 of Law Number 23 Year 2011 concerning Zakat Management at BAZNAS Lubuklinggau City.

[14] Kemenag RI, *Panduan Organisasi Pengelola Zakat,* (Jakarta: Reva Bumat Indonesia, 2013), p. 27-29

[15] Rahman Sani, Sekda Kota Lubuklinggau dan Hj. Farida, Kepala Bappeda Kota Lubuklinggau

The data collected in this study were divided into three types, namely, primary data, secondary data, and tertiary data.[16] Primary data obtained directly from the first source. Primary data in this study is information obtained directly by researchers from the object of research collected through individual or group subject opinions conducted in BAZNAS Lubuklinggau City, as well as Article 3 of Law Number 23 Year 2011 concerning Zakat Management.

Secondary data used in this study are books, journals, articles, internet, and other sources that have corrections for this research. Secondary data provides an explanation of primary data. In other words, secondary data in this study are the opinions of several zakat management figures conveyed through mass media, either through the internet or via television or other print media. Tertiary data is obtained from instructions and explanations of primary and secondary data consisting of a legal dictionary, a large Indonesian dictionary, and an encyclopedia.

Data collection techniques were observation and interviews. Observations were made by conducting direct observations at BAZNAS Lubuklinggau City. The interview technique carried out in this research was the free interview technique, which is an interview that is not centered, meaning that the question is not centered on one main problem, the questions can be switched from one subject to another, so that the data collected can be manifold and types of nature. In this case, it is carried out on zakat managers in BAZNAS Lubuk Linggau City in order to find out their opinion about the object, subject and allocation of zakat fund distribution.

Data analysis in this study used qualitative descriptive data, namely describing, presenting, describing or explaining all data clearly. Then the authors conclude the data inductively, which is to draw conclusions from statements that are specific to the general in nature, so that their presentation can be understood easily.

Effectiveness Assessment Factors

The effectiveness of the implementation of Article 3 of Law Number 23 Year 2011 concerning Zakat Management at BAZNAS Lubuklinggau City is viewed from 5 factors, namely: 1) Law factors, 2) Law enforcement factors, 3) Facility factors, 4) Community factors, 5) Cultural factors. Based on this, the effectiveness of its implementation can only be found in statutory factors and facilities or facilities. Meanwhile, law enforcement, community and cultural factors appear to be ineffective.

Law Factors

In this case the objectives of article 3 of law Number 23 of 2011 concerning zakat management are achieved which reads: (1) increasing the effectiveness and efficiency of services in managing zakat, the indicator is an evaluation of the work program of BAZNAS management, (2) increasing the benefits of zakat to realize welfare and poverty reduction, the indicator is distribution of zakat funds more evenly so that it can reduce the level of poverty in the city of Lubuklinggau.

This can also be seen from the zakat funds collected by BAZNAS Lubuklinggau City in 2015-2017 as follows: in 2015 amounted to IDR 169,000,000, in 2016 amounted to IDR. 179,000,000, and in 2017 amounting to IDR 541,500,000. To alleviate poverty in

[16] Amirudin dan H. Zainal Asikin, *Pengantar Metode Penelitian Hukum,* (Jakarta: PT. Raja Grafindo Persada, Jakarta, 2004), p. 30

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Lubuklinggau City, the Amil Zakat Agency makes the following efforts: first, optimally empowering zakat funds through BAZNAS programs, namely the Smart Lubuk Linggau Program, Lubuk Linggau Care, Lubuk Linggu Taqwa, Healthy Lubuk Linggau, Prosperity Lubuk Linggau, and Lubuk Linggau Amil.

Empowerment is an effort to increase the capacity or potential of the community in economic activities in order to meet the needs of life and improve their welfare and have the potential in the national development process.[17] Zakat is manifested in the form of providing revolving capital for capitalizing social projects such as building school facilities, health facilities or places of worship as well as business capital to assist the business development of traders or small entrepreneurs.[18] Based on these data the authors analyze that zakat is able to reduce poor families, is able to reduce the poverty gap and income gap. This proves that zakat has an extraordinary potential instrument in poverty alleviation.[19]

Facility Factor

Good facilities are an indicator of the effectiveness of organizational performance.[20] The facility factor of the Lubuklinggau City BAZNAS has met the effectiveness of the implementation of Article 3 of Law Number 23 of 2011. This can be seen from the adequate work space of the staff. In an effort to empower zakat so that it can be carried out, what must be done is to prepare people personally for entrepreneurship, because in overcoming the problem of poverty is by working. By providing business coaching and training, this will be an important provision when entering the world of work.

Law Enforcement Factors

This factor has not been effective because of the lack of program supervision. BAZNAS in Lubuklinggau City does not carry out optimal supervision, for example in the Lubuklinggau Makmur program. The lack of supervision can be explained as follows: volunteers consisted of a coordinator and 5 members who fostered about 300 community members divided into about 20 groups. Every month all volunteers report the training carried out in the Lubuklinggau Makmur program to BAZNAS Lubuklinggau City. The report contains the absence of members or targets and the implementation of the program in the form of implementation dates and the number of attendees each week, as well as the title of the material given.

Before being given to BAZNAS Lubuklinggau City, the coordinator made a recapitulation of the reports made by all volunteers, both the coordinator and its members, who provided guidance in the Lubuklinggau Makmur program. The recap is attached with the volunteer report containing all volunteer names, the date of the coaching implementation and the number of coaching carried out in a month. All volunteers, apart from providing monthly reports to BAZNAS, Lubuklinggau City, also attend the coordination meeting which is held if BAZNAS deems necessary, the date

[17] Artis, "Strategi Pengelolaan Zakat Berbasis Pemberdayaan Masyarakat Miskin Pada Badan Amil Zakat Nasional (Baznas) Kota Pekanbaru", *Jurnal Risalah*, Vol. 28, No. 2, December 2017, p. 59

[18] Hamka, *Standar Operasional Prosedur (SOP) Lembaga Pengelolaan Zakat*, p. 68

[19] Firmansyah, "Zakat As An Instrument For Poverty And Inequality Reduction", *Jurnal Ekonomi dan Pembangunan*, Vol. 21, No. 2 December 2013, p. 179

[20] Tri Firmansyah, Achmad Supriyanto, Agus Timan, "Efektivitas Pemanfaatan Sarana Dan Prasarana Dalam Meningkatkan Mutu Layanan", *JMSP: Jurnal Manajemen dan Supervisi Pendidikan*, Vol. 2, No. 3 July 2018, p. 180

of the coordination meeting will be informed by telephone or sms to the volunteer coordinator then the volunteer coordinator will inform the members of the meeting plan. Because the coordination was not planned, the volunteers, apart from not knowing the coordination agenda, often did not attend the meeting. BAZNAS Lubuklinggau City in a coordination meeting, provides announcements related to the members or targets of the Lubuklinggau Makmur program.

Supervision of the Lubuklinggau City National Zakat Board of programs carried out by volunteers based on the monthly reports provided by the volunteer coordinator and information or complaints made by volunteers in coordination meetings. The supervision carried out by BAZNAS is not optimal because it only relies on reports and information from volunteers, without checking back or directly monitoring the implementation of programs or activities that have been carried out, especially in the Lubuklinggau Makmur program.[21] For this reason, there is a need for strong commitment and cooperation from various parties, especially support from the community, the Lubuklinggau city government, and no less important is the role of the Amil Zakat Board, as a whole in realizing sustainable zakat development.

Community Factors

This factor has not been effective, it can be seen from the lack of awareness of community participation in zakat. As stated by the Deputy Chairperson of BAZNAS in Lubuklinggau City, the main source of income is actually obtained from schools (SD-SMA) in the form of donations, while we know that the tuition fees for school children are not much. In fact, if this is done by zakat compulsors such as ASN, both structurally and functionally to support their zakat distribution, then zakat funds could reach billions. This is due to the lack of socialization from BAZNAS so that many people think that the zakat that must be issued is only zakat fitrah. In addition, there is a lack of regulations from the local government governing the income zakat that employees must issue.

Important things that must be done to generate awareness and trust society in this zakat becomes more fertile is to give equitable knowledge to the Islamic community about the importance of carrying out zakat to get welfare of the people while doing it obligation as a Muslim who has ordered in the Koran. Muslims are not carry out the obligation to pay zakat, because all this time they know that zakat that is obliged to be done is only zakat fitrah must be fulfilled for a moment before the Eid al-Fitr. Apart from zakat fitrah there are still a lot of zakat that can be spent by a Muslim from his property in between other than their income, from livestock, products of trade, agriculture and goods mine. All of them have their terms each. For that he needed zakat campaign, especially in the month of Ramadan to the Muslim community and officials government in order to raise awareness to pay zakat in the community in order can channel zakat through institutions government or legal amil zakat.[22]

[21] It was stated in interviews with several volunteer members in the Lubuklinggau Sehat program on June 13, 2018

[22] Siti Nurhasanah and Suryani, "Maksimalisasi Potensi Zakat Melalui Peningkatan Kesadaran Masyarakat", *JEBI: Jurnal Ekonomi dan Bisnis Islam,* Vol.3, No. 2 December 2018, p. 191

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Cultural Factors

This factor is still ineffective because of the way people think that zakat funds are like sustenance which is their right. Based on facts in the field most of the people are still not familiar with zakat institution. Community understanding about zakat institutions is very lacking, only partly small can understand the institution zakat, even when the researcher mentioning the word zakat institution they spontaneously said that only mosques obey they are zakat institutions.[23]

This problem can be seen from the additional capital from the institution for business development. The capital submitted by BAZNAS for community businesses has not shown a good profit. According to the explanation above, BAZNAS Lubuklinggau City also empowers zakat funds that are productive. This productive zakat fund can help alleviate poverty. Productive zakat in the form of revolving capital assistance for street vendors. This assistance takes the form of providing loans to mustahik in a group system. The minimum number of groups is 5 people and the maximum loan is IDR 5,000,000 (five million rupiah). At the beginning of the loan, the institution only provides a loan of IDR 1,000,000 (one million rupiah), in the following year the institution will increase the amount of the loan. The loan is interest-free and without collateral, and the repayment system is paid in installments every month within one year.

So, the effectiveness of the implementation of Article 3 of Law Number 23 Year 2011 concerning Zakat Management at BAZNAS Lubuklinggau City can be concluded that it is not yet effective. The ineffectiveness of the implementation of this law is not only due to internal factors of BAZNAS as the zakat management institution, but also external factors, namely social and cultural factors that do not support the implementation of the law to make it more effective.

BAZNAS's efforts in order to carry out community economic empowerment are to prepare people themselves to become entrepreneurs. This training or coaching from BAZNAS can be a provision for the future to become entrepreneurs. Through training, the community can understand all kinds of problems that exist. So that people get more comprehensive insight and knowledge about the business world and can foster motivation for the community. Meanwhile, the empowerment of zakat which is consumptive is zakat distributed directly to mustahik for daily consumption needs, such as the distribution of zakat mal to the poor directly by BAZNAS administrators to mustahik who are in dire need, due to lack of food or experiencing disaster. This pattern is a short-term program in overcoming community problems. BAZNAS Lubuklinggau City also helps in the field of education by providing scholarships to high-achieving and underprivileged students, because parents who cannot afford to send their children to school. By providing scholarships for underprivileged children, it automatically reduces the burden on parents and at the same time increases their willingness to learn. So, empowerment is directed at increasing the people's economy productively, so that it can produce high added value and bigger income.

In an effort to improve the standard of living of the community, targeted empowerment patterns are needed, the right form is to

[23] Henry Reza Novianto and Muhammad Nafik H.R., "Mengapa Masyarakat Memilih Menunaikan Zakat Di Masjid Dibandingkan Dengan Lembaga Zakat?", *JESTT,* Vol. 1 No. 3 March 2014, p. 232

provide opportunities for the poor to plan and implement the development programs they have determined. The goal to be achieved from empowerment is to shape individuals and communities to become independent. This independence includes independence to think, act and control what they do.

In addition, the efforts being made are making or submitting a Mayor Regulation (Perwali) on zakat. City Regional Regulation is one type of statutory regulation referred to in Article 7 paragraph (1) of Law Number 12 Year 2011 concerning the Establishment of Legislation. The purpose of the Lubuklinggau City National Amil Zakat Agency to make / propose a Mayor Regulation concerning zakat is so that the public will increase their awareness to pay zakat. The mayoral regulation also aims to increase the income of zakat funds which will be managed by BAZNAS, so that the managed funds can help reduce poverty and achieve good zakat management as expected.

Conclusion

Efforts made by BAZNAS in Implementation Of Law Number 23 2011 to alleviate poverty in the city of Lubuklinggau are to empower zakat funds optimally through the Smart Lubuklinggau, Lubuklinggau Peduli, Lubuklinggu Taqwa, Lubuklinggau Sehat, Lubuklinggau Makmur, and Lubuklinggau Amil Programs, and proposes Regulation of Mayor. Ideally, the efforts made by BAZNAS can be an effective solution, in order to increase the benefits of zakat to create welfare and poverty alleviation.

The main problem that becomes an obstacle in implementing the Law is that the management institution does not yet have coercive authority, and this institution cannot be controlled by the muzakki. Apart from that, there are three indicators that show the ineffective implementation of zakat management at BAZNAS Lubuklinggau city, namely law enforcement factors, because supervision in the implementation of the planned program is not optimal; lack of awareness of public participation, because not all of them are willing to pay their zakat; and cultural factors, namely the mindset of the people who still think that the zakat fund they receive is a provision, and become their right that does not need to be accounted for.

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PROGRESSIVE LAW PARADIGM IN ISLAMIC FAMILY LAW RENEWAL IN INDONESIA

Fauzan
Fakultas Syariah IAIN Bengkulu
Jl. Raden Fatah Pagar Dewa Bengkulu
Email: fauzan@iainbengkulu.ac.id

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 Islam 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.v13i2.2692

[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," *Madania: 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 Hukum 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 Epistemologi Untuk Pembangunan Hukum Nasional Di Indonesia," *Jurnal Wawasan Yuridika*, 2019, https://doi.org/10.25072/jwy.v3i2.269.

[13] Toha Andiko, Suansar Khatib, Romi Adetio 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 jurispudence 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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MIZANI

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e. Makalah seminar, contoh:
Ibrahim Hosen, "Jenis-Jenis Hukuman dalam Pidana Islam dan Perbedaan Ijtihad Ulama dalam Penerapannya", disampaikan pada *Seminar Sehari Kontribusi Hukum Islam Terhadap Pembinaan Hukum Nasional*, Fakultas Syari'ah IAIN Syarif Hidayatullah Jakarta, 17 Juli 1993, h. 9.

f. Artikel dari internet, contoh:
Mustafa Abu Sway, *Towards an Islamic Jurisprudence of the Environment: Fiqh al-Bî'ah fi al-Islâm,* http://homepage.iol.ie/~afifi/Articles/environment.htm, diakses tanggal 21 Februari, 1998.

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Konsonan			
Arab	**Latin**	**Arab**	**Latin**
ء	Tidak dilambangkan	ض	Dh
ب	B	ط	Th
ت	T	ظ	Zh
ث	Ts	ع	`
ج	J	غ	Gh
ح	H	ف	F
خ	Kh	ق	Q
د	D	ك	K
ذ	Dz	ل	L
ر	R	م	M
ز	Z	ن	N
س	S	و	W
ش	Sy	ه	H
ص	Sh	ي	Y

Catatan:

a. Konsonan yang bertasydid ditulis dengan rangkap, misalnya: ربنا ditulis *rabbanâ*.

b. Vokal panjang (*mad*):
Fathah (baris di atas) ditulis â, *kasrah* (baris di bawah) ditulis î, dan *dhammah* (baris di depan) ditulis dengan û. Misalnya: القارعة ditulis *al-qâri`ah*, المساكين ditulis *al-masâkîn,* المفلحونditulis *al-mufli<u>h</u>ûn*

c. Kata sandang *alif* + *lam* (ال):
Bila diikuti oleh huruf qamariyah, ditulis *al*, misalnya: الكافرون ditulis *al-kâfirûn*. Begitu juga bila diikuti oleh huruf syamsiyah, tetap ditulis *al*, misalnya: الرجال ditulis *al-rijâl*.

d. Ta *marbûthah* (ة):
Bila terletak di akhir kalimat, ditulis *h*, misalnya البقرةditulis *al-baqarah*. Bila di tengah kalimat, ditulis *t*, misalnya: زكاة المال ditulis *zakât al-mâl*, atau سورة النساء ditulis *sûrat al-Nisâ'*.

2. Naskah bisa dikirimkan lewat e-mail: mizani.sya@gmail.com atau melalui pos ke alamat: Fakultas Syariah IAIN Bengkulu, Jl. Raden Fatah Pagar Dewa Bengkulu 38613.