Vol. 16 No. 1 June 2021

ISSN (Print) 1907-591X
ISSN (online) 2442-3084
Accreditation: 30/E/KPT/2019

al-Ihkâm

Jurnal Hukum dan Pranata Sosial

Published by :
The Islamic Law Researcher Association (APHI) collaboration with
Faculty of Sharia IAIN Madura
Available online at http://ejournal.iainmadura.ac.id/index.php/alihkam/index

al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 16 No. 1 2021
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

al-Ihkâm
Jurnal Hukum dan Pranata Sosial

Journal Al-ihkam focuses on the issue of Islamic Jurisprudence and Law concerning plurality and living values in Indonesian and Southeast Asian society by publishing articles and research reports aiming to communicate original research and relevant current issues. Al-Ihkam Publish twice a year (June and December) has been indexed at DOAJ, DIMENSION and SINTA 2 (Accredited by the Directorate General of Research And Development of the Ministry of Research, Technology, and Higher Education of the Republic of Indonesia Number 30 /E KPT/2019). Al Ihkam has become a CrossRef Member since year 2015, therefore all articles published by Al Ihkam will have unique DOI number.

al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 16 No. 1 2021
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

PUBLISHED BY :
Faculty of Sharia IAIN Madura collaboration with The Islamic Law Researcher Association (APHI)

al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 16 No. 1 2021
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

OFFICE:
Faculty of Sharia IAIN Madura
Asemanis Dua, Larangan Tokol, Tlanakan, Kabupaten Pamekasan, Jawa Timur, Indonesia 69371.
http: ejournal.iainmadura.ac.id/index.php/alihkam;
email: ihkam@iainmadura.ac.id

Journal Al-ihkam focuses on the issue of Islamic Jurisprudence and Law concerning plurality and living values in Indonesian and Southeast Asian society by publishing articles and research reports aiming to communicate original research and relevant current issues. It aims primarily to facilitate scholarly and professional discussion over current developments on Islamic Jurisprudence and Law concerning Indonesian and Southeast Asian plurality and living

al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 16 No. 1 2021
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

al-Ihkâm
Jurnal Hukum dan Pranata Sosial

Table of Contents

al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 16 No. 1 2021
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 16 No. 1 2021
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

al-Ihkam: Jurnal Hukum dan Pranata Sosial, Vol. 16 No. 1 2021
ISSN: 1907-591X, E-ISSN: 2442-3084
Accreditation: 30/E/KPT/2019

PEDOMAN TRANSLITERASI

Aksara Arab		Aksara Latin	
Simbol	**Nama (Bunyi)**	**Simbol**	**Nama (Bunyi)**
ا	*Alif*	tidak dilambangkan	tidak dilambangkan
ب	*Ba*	B	Be
ت	*Ta*	T	Te
ث	*Sa*	Ṡ	Es dengan titik di atas
ج	*Ja*	J	Je
ح	*Ha*	Ḥ	Ha dengan titik di bawah
خ	*Kha*	Kh	Ka dan Ha
د	*Dal*	D	De
ذ	*Zal*	Ż	Zet dengan titik di atas
ر	*Ra*	R	Er
ز	*Zai*	Z	Zet
س	*Sin*	S	Es
ش	*Syin*	Sy	Es dan Ye
ص	*Sad*	Ṣ	Es dengan titik di bawah
ض	*Dad*	ḍ	De dengan titik di bawah
ط	*Ta*	Ṭ	Te dengan titik di bawah
ظ	*Za*	ẓ	Zet dengan titik di bawah
ع	*'Ain*	‘	Apostrof terbalik

غ	*Ga*	G	Ge
ف	*Fa*	F	Ef
ق	*Qaf*	Q	Qi
ك	*Kaf*	K	Ka
ل	*Lam*	L	El
م	*Mim*	M	Em
ن	*Nun*	N	En
و	*Waw*	W	We
ه	*Ham*	H	Ha
ء	*Hamzah*	‘	Apostrof
ي	*Ya*	Y	Ye

Hamzah (ء) yang terletak di awal kata mengikuti vokalnya tanpa diberi tanda apapun. Jika terletak di tengah atau di akhir, maka ditulis dengan tanda (‘).

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 1-23
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v16i1.4292

Critical Review of Domestic Violence as Reason for Divorce (Comparison of Divorce Laws in Indonesia, Malaysia and the Maldives)

Martina Purna Nisa Jaliansyah
Program Studi Ilmu Syariah Pascasarjana UIN Antasari, Kebun Bunga, Banjarmasin, Kalimantan Selatan, email: tinaalbanzary88@gmail.com

Article history: Received: September 20, 2020, Accepted: May 10, 2021, Published: June 27, 2021

Abstract:

The phenomenon of domestic violence is on the rise every year and often puts a marriage into divorce. Divorce on the grounds of domestic violence frequently appears in the courtroom of Religious Courts in Indonesia as stipulated in Article 19 letter d PP No. 9 of 1975. It affirms that one party committing cruelty or severe persecution that endangers another party can be the legal reason for divorce. And then what about other Muslim countries? This research is library research with a descriptive-analytical method using a juridical normative approach. It found that domestic violence is accommodated as one of the reasons for divorce in family law in Indonesia, Malaysia (Negeri Sembilan, Persekutuan Pulau Pinang, Selangor dan Johor), and the Maldives. However, there are differences in granting the right for filing a divorce because of domestic violence. Divorce law in Indonesia and Malaysia enables both husband and wife to file for divorce because of domestic violence while Maldives law only enables the wife to do so.

Keywords:

Domestic Violence; Divorce Law; Family Law; Muslim Countries

Author correspondence email: tinaalbanzary88@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

Abstrak:

Fenomena kekerasan dalam rumah tangga selalu meningkat setiap tahunnya dan seringkali menjadi sebab perceraian. Perceraian karena kekerasan dalam rumah tangga sering muncul di ruang sidang pengadilan agama di Indonesia. Ini sebagaimana diatur dalam Pasal 19 huruf d PP No. 9 Tahun 1975 bahwa salah satu pihak yang melakukan kekejaman atau penganiayaan berat yang membahayakan pihak lain dapat menjadi alasan hukum terjadinya perceraian. Lalu bagaimana dengan di negara-negara Muslim lainnya? Penelitian ini termasuk dalam penelitian pustaka (library research) yang bersifat deskriptif analitis dengan pendekatan normatif yuridis. Dalam penelitian ini diperoleh temuan bahwa kekerasan dalam rumah tangga diakomodir sebagai alasan perceraian dalam hukum keluarga di Indonesia, Malaysia (Negeri sembilan, Persekutuan Pulau Pinang, Selangor dan Johor), maupun Maladewa. Hanya saja, terdapat perbedaan dalam hak mengajukan perceraian karena kekerasan dalam rumah tangga. Hukum perceraian di Indonesia dan Malaysia membolehkan kedua belah pihak untuk mengajukan perceraian karena kekerasan dalam rumah tangga, sementara hukum Maladewa hanya memungkinkan pihak istri.

Kata Kunci:

Kekerasan Dalam Rumah Tangga; Perceraian; Hukum Keluarga; Negara Muslim

Introduction

The issue of family law is always interesting to discuss. It is because family problems also mean society problems considering that any problems in the family circle will influence society as well. The split of a family because of marriage termination will give consequences not only to individuals in a family, but also society as a whole. This is stated by John Eckelaar as follows:

> "*The breakdown of marriage involves more than the cessation of a relationship between two individuals, for it signifies the ultimate collapse of what is the most important social group in the community*".[1]

[1] John Eekelaar, *Family Security and Family Breakdown* (Penguin, 1971, 11).

The strong relationship between family and society leads the State to intervene in family affairs through the existence of some regulations. The intervention shows the State's attention to family issues. On the other hand, discussion on the dynamics of family law is inseparable from the religious aspects because marriage is deemed as something sacred and noble. Here we find that the law of marriage closely relates to social and religious aspects of life as well as the State.[2]

In conventional *fiqh* of Islam, divorce is often considered to put women in a powerless position.[3] Anytime a husband can divorce his wife. Under any circumstances, if a husband has said the word "*thallaqtuki*" (I divorce you), a divorce occurs no matter he is drunk, joking, swearing and others. Furthermore, the right to do *ruju'* (reconciliation or coming back to the old marriage) is only valid for the husband and not for the wife. This concept is deemed very discriminatory so that many reforms on the Islamic law in Muslim countries have been carried out.[4]

In Indonesia, Article 39 paragraph (2) of Law no. 1 of 1974 which has been described in the Article 19 letter d PP No. 9 of 1975 affirms that one party committing cruelty or serious maltreatment

---

[2] Asaf A. A. Fyzee and Tahir Mahmood, *Outlines of Muhammadan Law, Fifth Edition* Oxford, New York: Oxford University Press, 2009, 88.

[3] This issue is discussed at the formulation of concept offered by the Gender Mainstreaming Team (PUG; *Pengarusutamaan gender*) and known as the Counter Legal Draft (CLD) compilation of Islamic law using four key approaches, namely gender, pluralism, human rights and democracy. CLD criticizes articles at the KHI (*Kompilasi Hukum Islam*; Islamic Law Compilation) which are still deemed to contain gender-biased perspective, such as at the problem of *ruju'* (reconciliation) and '*iddah* (waiting period after divorce). CLD demands both husband and wife to be equally entitled to both issues considering that they are partners. See Prof. Dr. H. Khoiruddin Nasution, Hukum Perdata (Keluarga) Islam Indonesia Dan Perbandingan Hukum Perkawinan Di Dunia Muslim: Studi Sejarah, Metode Pembaruan Dan Materi & Status Perempuan Dalam Hukum Perkawinan/Keluarga Islam, Pertama (Yogyakarta: ACAdemia + Tazzafa, 2009), 81.

[4] There is an expansion of understanding in contemporary divorce law in some Muslim countries. Among others, polygamy as the reason for divorce can even be included in *taklik* divorce as found in Turkish law, Lebanon, Morocco, and Jordan. *See* Khoiruddin Nasution, *Status Wanita di Asia Tenggara: Studi Terhadap Perundang-undangan Perkawinan Muslim Kontemporer di Indonesia dan Malaysia (Jakarta: INIS, 2002),* 120-122.

that endangers another can be a legal reason for divorce. Based on this, domestic violence can be categorized as one of the reasons for marriage termination.

Since 2017, Indonesian Badilag *(Badan Pengadilan Agama*; Religious Court Body) had categorized the causes of divorce more specifically and one of which is domestic violence against women. This might closely relate to 2020 Annual Report of the Directorate General of Religious Courts at the Supreme Court of the Republic of Indonesia about 330824 divorce cases filed by women during the year. Those have been decided at the first level of Indonesian Religious Courts.

In line with it, Religious Courts data from the same year showed that the biggest cause of divorce was ongoing disputes numbering 176,683 cases. The second was the economic factor with 71,194 cases, followed by leaving a spouse away with 34,671 cases, and domestic violence with 3,271 cases.

Furthermore, most of the annual data records compiled by *Komnas Perempuan* (National Commission on Women) on cases handled by the Religious Courts show the same. In 2018, among 406,178 cases of violence against women, 392,610 cases or 96% were from the Religious Courts. The rest of the number, namely about 13,568 cases or 3% were data from 209 service provider partner institutions that filled out the form and returned it to the *Komnas Perempuan* data collection.[5]

The data also shows that the number of cases of violence against women in 2019 Annual Notes has increased from those of 2018 which was 348,446 or around 14% rise. Additionally, The *Komnas Perempuan* observed data on both divorce and divorce lawsuit cases that were granted by the Religious Courts during 2018 and found violence against women as one of the most common causes.

Based on it, this study aims to explain how a country accommodates domestic violence as a reason for divorce in its formal regulation. It focuses on the analysis of similarities and differences among three Moslem countries namely Indonesia, Malaysia, and the

[5] https://www.komnasperempuan.go.id Komnas Perempuan, "*Catatan Tahunan Kekerasan Terhadap Perempuan 2018*," March 9, 2018 Accessed on Monday, 24 June 2020 at 09.00 WIB.

Maldives. The three countries have codified each family law and are always making efforts to reform it. Moreover, most the related regulations originate from Islamic law. which has undergone a codification process.

Taking the perspective of protecting women as the victims of domestic violence, I will further comparatively analyze the role of Islamic law as the guideline for divorce law in those three countries. All in all, this research is formulated into two problems. (1) To what extent is domestic violence as a reason for divorce regulated in the marriage laws in Indonesia, Malaysia and the Maldives? (2) How is the comparative analysis of regulations regarding domestic violence as a reason for divorce in the marriage laws in Indonesia, Malaysia and the Maldives?

Method

This is library research with a descriptive, comparative, and analytical way of delivery using the juridical normative approach. The legal materials for this research consist of primary ones in the form of legislation, secondary ones ranging from books, magazines, websites, journals, articles, papers, to analysis of judges' discussion, and tertiary ones covering dictionaries, encyclopedias, and so on. All legal materials are arranged systematically before being processed and researched as well as evaluated and analyzed descriptively-analytically using the comparative model.

Discussion and Result

The Concept of Divorce Law and Domestic Violence

According to the Big Indonesian Dictionary (KBBI), divorce means a matter of split between husband and wife. The word "divorce" itself means "to drop divorce or to terminate the marriage relationship as husband and wife." Meanwhile, the Civil Code Article 207 defines divorce as the abolition of marriage by a judge's decision, due to demand of one of both parties, and is caused by some reasons as stated in the Law. Definition of divorce is not found at all in the Marriage Law as well as in the explanation and its implementing regulations.

Due to its consequence, divorce is a legal mechanism whereby both parties change their legal status from married to single. Barbara

Stark mentioned divorce as the legal mechanism through which parties change their legal status from married to single. They are 'free of the bonds of matrimony' and free of marriage's rights and obligations, except as specifically provided in the decree of divorce.[6]

Meanwhile, according to Islamic law, one of the reasons for divorce is a very serious fight between a couple which possibly endangers the life/the soul of each. It is called *syiqaq* at the Qur'an, particularly at QS. An Nisaa verse 35 reads:

وَإِنْ خِفْتُمْ شِقَاقَ بَيْنِهِمَا فَابْعَثُواْ حَكَمًا مِّنْ أَهْلِهِ وَحَكَمًا مِّنْ أَهْلِهَا إِن يُرِيدَا إِصْلاَحًا يُوَفِّقِ اللّهُ بَيْنَهُمَا إِنَّ اللّهَ كَانَ عَلِيمًا خَبِيرًا ﴿٣٥﴾

The Meaning: And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allāh will cause it between them. Indeed, Allāh is ever Knowing and Aware.

Apart from *syiqaq,* divorce in Islamic law could occur through mechanism of *talak*[7], *khuluk*[8], *fasakh*[9], *ila'*[10], *zihar*[11], and *li'an*[12].

---

[6] Barbara Stark, *International Family Law: An Introduction* (Burlington, VT: Ashgate, 2005).

[7] Divorce is linguistically derived from the Arabic verb طلقwhich means divorce. It etymologically means breaking the bond. From a terminological perspective, it means breaking the marriage bond. *See Sayyid Sabiq, Fikih Sunnah 8, PT Alma'rif, Bandung, 1980, 7.*

[8] *Khulu'* linguistically means ransom. Meanwhile, according to terminology, *khulu'* means divorce pronounced by a wife by returning the dowry (*mahr*) once paid by her husband. Once the ransom is paid back to the husband, he can divorce her right away. Syafi'i scholars say that *khulu'* is a divorce that a wife demands it by paying something and saying the word 'divorce'. See Abdul Rahman, *Perkawinan dalam Syari'at Islam* (Jakarta: PT. Rineka Cipta, 1996), 112- 113.

[9]Literally, *fasakh* means "canceling an agreement" or withdrawing an offer. *Fasakh,* according to the Hanafi school, is due to one of the following cases: 1) Separation due to the apostasy of the husband and wife; 2) Divorce due to the breakdown (*fasad*) of the marriage; 3) Marriage cancellation because there is no equality of status (*kufu*)' between both or when a husband can not fulfill his obligation. Meanwhile, according to the Syafi'i school and Hambali, *faskah* are due to as follow: 1) Separation due to the disability of one of both; 2) Divorce due to various difficulties of the husband; 3) Termination due to *li'an*; 4) Apostasy of one of both; 5) Breaking of marriage; and 6) Lack of equal status (*kufu'*). *Fasakh* according to the Maliki school occurs in the

As mentioned before, divorce can be triggered by many factors, including violence committed by one of both parties (husband or wife). Destructive behavior in a domestic circle is believed to cause the breakdown of a household. The forms of domestic violence also vary ranging from physical, psychological, economic, to sexual violence. Regarding violence against women and wives, the United Nations Declaration on the elimination of violence against women defines it as all actions based on sexual differences that cause or possibly cause suffering to women physically, sexually or psychologically. Included in the definition are actions of threats, coercion or deprivation of freedom arbitrarily whether in public or in private life.[13]

The word violence is used as the equivalent of the word hardness in English. It means an attack or invasion of a person's

---

following cases: 1) The occurrence of *li'an* 2) The destruction of marriage 3) The apostasy of either husband or wife. See Abdul Rahman, *Perkawinan dalam Syari'at Islam*, (Jakarta: PT. Rineka Cipta, 1996), 83.

[10] *Ila'* according to the language means oath. Whereas according to the term, *ila'* is the oath of a husband by mentioning the name of God or His attributes not to approach his wife either forever or limited to four months or more. See, Abd. Rahman Ghazali, *Fiqh Munakahat* (Jakarta: Prenada Media, 2003), 234.

[11] *Zhihar* comes from the word *zhahrun* which means back as a part of body. In relation to the relationship between husband and wife, *zhihar* is husband's speech to his wife which equates his wife's back with his mother's back. *Zhihar* in pre-Islamic era was used by a husband to forbid himself and other men worldwide for having sex with the wife forever. Therefore, Islam makes *zhihar* having consequences for both this world and hereafter. *See* Syekh. H. Abdul Halim Hasan, Tafsir Al-Ahkam (Jakarta: Kencana, 2006), p. 578. Also refer back to the revelation at Surah Al-Mujadalah verse 2. *Source : https://quran.kemenag.go.id/sura/58*.

[12] *Li'an* is taken from the word *al-la'nu* which means far away and a curse. This is because *li'an* enables a husband and a wife to get separated from each other as they are forbidden to gather anymore as a spouse forever. Furthermore, the fifth (the last) point of the oath accentuates willingness to accept the curse of God if the accouchement is proven wrong. According to terminological perspective, *li'an* is an oath of a husband for accusing his wife of adultery with four times testimony that he is a righteous person on the accusation. After that, the fifth oath of the testimony is along with a willingness to accept the curse of God if he lies. *See* Abd. Rahman Ghazaly, Fiqh Munakahat, (Kencana, Bogor, 2003), cet. ke-1, p. 238. See the basis of other laws on the word of God in *Surah* An-Nisa' verses 6-7.

[13] "Declaration on the Elimination of Violence Against Women. Proclaimed by the General Assembly of the United Nations - Pdf Free Download, 'Article 1 H. 12, Accessed November 15, 2020." (2020).

physical or mental integrity. This is exactly what distinguishes it from how Indonesians limit violence scope to physical attacks only.[14] Theoretically, Martin R. Haskell and Lewis Yabslonswky divided violence into four categories as follow:

a. Legal violence covers violent action supported by the law, such as legal and justified violence for soldiers on duties in a war.
b. Socially sanctioned violence, such as cultural sanction for adultery doers. An important factor in analyzing this type of violence is community support in the form of social sanctions against it.
c. Rational violence. Some illegal acts of violence without social sanctions become rationally recognized crimes, such as murder in an organized crime.
d. Irrational/unemotional violence that occurred without any prior provocation and particular motivation where the perpetrators typically do not know the victims. This can be classified into so- called raw violence as a direct expression of a person's psychological disorders at certain times of his/her life. [15]

Concerning those four, domestic violence does not occur spontaneously. It is typically triggered by several causes, including the imbalanced relationship between husband and wife. Maggi Humm wrote that violence against women is generally used to control women's sexuality and their reproductive roles. In avsocial relationships, for instance, men are put as the ones in need of sexual intercourse while women are the objects who have to accept anything that the men want regardless of their situation. This, ironically, can not be otherwise.[16]

A similar view comes from Stark (2007) who asserts that male psychological and emotional instability lead them to find excuse and strategies to intimidate, hurt, and dominate their partners.

---

[14] Soedjono Dirdjosisworo, *Sinopsis Kriminologi Indonesia,* (Bandung: Mandar Maju, 1994). 12-13

[15] Adil Samadani, *Kompetensi Pengadilan Agama terhadap Tindak Kekerasan dalam Rumah Tangga, Pertama* (Yogyakarta: Graha Ilmu, 2013). 31

[16] Maggie Humm, *The Dictionary of Feminist Theory* Columbus/Ohio: Ohio State University Press, 1990, 23.

> *He asserts that psychologically and emotionally abusive behavior—men's use of various strategies to intimidate, hurt, isolate, and dominate their partners—is often subtle and difficult to detect by outsiders. However, this form of coercive control is used in an attempt to "microregulate" everyday behavior and interactions of their partners and secure masculine privileges—such as sex in marriage.*[17]

From a social and cultural point of view, several factors that cause domestic violence are as follow:

1. A patriarchal culture puts men as superior beings while women as inferior ones.
2. Misleading understanding of religious teachings that lead men to dominate women.
3. A man's imitation of his father's habit to abuse his mother, be it physical, psychological or sexual violence.
4. The economic condition of the spouse who lives in poverty.
5. Bad characteristics of a husband, such as alcoholic drinking, frustration or having a mental disorder. [18]

Apart from common causes beyond domestic violence, divorce is sometimes a choice taken by domestic violence victims as an alternative to getting out from the violence cycle. This is one of a conclusions from *Rifka Annisa* Women's Crisis Center report which found that divorce is the most common solution chosen by domestic violence victims (data for 2001-2005). They likely consider that marriage termination between the victim and the perpetrator will break up or end the violence series.[19]

---

[17] Kersti Yllö and M. Gabriela Torres, Eds., *Marital Rape: Consent, Marriage, and Social Change in Global Context, Interpersonal Violence Series* (Oxford ; New York: Oxford University Press, 2016), 23. See also Stark, Evan. *Coercive Control: How Men Entrap Women in Personal Life*. (Oxford, UK: Oxford University Press, 2007), p.56.

[18] Kementerian Pemberdayaan Perempuan, *Kekerasan terhadap Perempuan-KDRT* (Jakarta, 2002, p.18).

[19] Rika Saraswati, *Perempuan dan Penyelesaian Kekerasan dalam Rumah Tangga, II* (Bandung: PT Citra Aditya Bakti, 2009). 81

Domestic Violence as a Reason for Divorce under the Marriage Laws in Indonesia, Malaysia and Maldives

1. Indonesia

Divorce in Indonesia is regulated in Law Number 1 of 1974 concerning marriage (UUP; *Undang-Undang Pernikahan* or Marriage Law). Additionally, it is also found at the Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law (KHI; *Kompilasi Hukum Islam*) which was confirmed by the Decree of the Minister of Religious Affair No. 154 of 1991 concerning the implementation of Presidential Instruction No. 1 of 1991.

In the KHI, it is stated that marriage can break up because of: (1) death, (2) divorce, and (3) a court decision. The second factor can occur because of either divorce or divorce lawsuits. Divorce itself can only be done in front of a Religious Court hearing after its trial and failure to reconcile both parties. As a consequence, divorce starts to be valid since the declaration before a court hearing.

A wife who experiences violence from her husband and therefore wants to file a divorce needs to file her lawsuit through the Religious Court. Her lawsuit, for example, can demand divorce, *hadhanah* and child custody such as Number 663/Pdt.G/2019/PA.Tng while mentioning the quite tragic domestic violence at the lawsuit's *posita*.[20]

In this case, the Religious Court is a judicial institution authorized to adjudicate certain cases including marriage. This is

[20] *Posita* Lawsuit Point 16 explained a fight in the car when the defendant escorted the plaintiff to her office and caused the plaintiff to suffer stomach cramps and bleeding. After being examined, it turned out that the plaintiff's fetal sac had fallen and could not be maintained, so a curettage had to be taken immediately to clean the remainder of the fetal and ensure the plaintiff's health. This is evidenced by the results of laboratory and ultrasound examination from the maternity hospital St. Yusuf, which concluded that there was an incomplete abortion in the plaintiff's fetus. Furthermore, the plaintiff argued that the defendant was once so emotional and angry at another time that he violently beat, slapped and kicked the plaintiff who was feeding their child. The plaintiff tried to run out of the house but was chased by the defendant and on the way, the defendant continued to act rudely while finally choking her and taking her back to the house. *Source* https://putusan3.mahkamahagung.go.id, *Tangerang Religious Court Decision Number 663/Pdt.G/2019/PA.Tng*.

following the general explanation of Law No. 7 of 1989 concerning Religious Court number 2, particularly the third paragraph, which reads: "The Religious Court is the first level court to examine, decide, and settle cases among Muslims in the field of marriage, inheritance, wills, grants, *waqf,* and *shadaqah* based on Islamic law."

Meanwhile, referring to Government Regulation number 9/1975 as the implementation of the regulation of Law Number 1/1974 concerning marriage, reasons for divorce in the Religious Court are as follow:

1. One party commits adultery or becomes a drunkard, gambler and doers of bad habits that are difficult to cure;
2. One party leaves another one during 2 (two) consecutive years neither with permission nor valid reasons nor for other relevant reasons;
3. One party is sentenced to 5 (five) years imprisonment or a heavier sentence after the marriage has taken place;
4. One party commits cruelty or serious maltreatment which endangers another one or as called by domestic violence;
5. One party has a physical disability or illness which disables him/her to carry out the obligations;
6. Constant quarrels and fights between both where there found no hope to live in harmony anymore;

The above-mentioned reasons are valid in the entire sovereign territory of Indonesia no matter what religious affiliation of a citizen is. Additionally, there also found reasons for divorce specifically to Muslims as enlisted at KHI Article 116 (g-h). It covers conditions when the husband violates *taklik* divorce[21] and religious conversion or apostasy which very likely causes disharmony in the household.

[21] *Sighat ta'liq* is pronounced after the marriage contract and reads as follows: *Bismillah al-rahman al-rahim.* After the marriage contract, I ..... a son of .... sincerely promise, that I will fulfill my obligations as a husband, and I will treat my wife named ... a daughter of .... very well (*mu'âsyarah bil-ma'rûf*) according to Islamic teaching. I declare *sighat ta'liq* on my wife as follows: When I: 1) left her for two years in a row; or 2) I did not give her obligatory living for three months, or 3) I hurt her physically, or 4) I disregard her for six months and she can not accept that and complain about it to The Religious Court or officer who is given the right to handle the complaint, and the complaint is accepted by the Court or the officer, then she paid Rp.1000, - (one thousand rupiah) as *'iwadl* (replacement) to me, then my divorce is counted one for her. See Khoiruddin Nasution, *"Menjamin Hak Perempuan dengan*

The stipulation of additional and specific reasons in the KHI implies that divorce because of the violation of *taklik* divorce and apostasy of a partner is only regulated in Islamic law. Therefore, as a legal product applicable to Muslims, KHI determines both as additional reasons for divorce. Meanwhile, point three of the article reads "or I hurt my wife's body" strongly indicates domestic violence in its physical form.

Regarding with *sighat taklik* divorce, since the enactment of Law Number 22 Year 1946 jo. Law Number 32 Year 1952, its provisions are enforced uniformly throughout Indonesia. Later on, as the formula was taken over by the Ministry of Religious Affair, *sighat taklik* divorce has undergone several changes. The amendment does not only concerned with the main elements, but also the quality of *taklik* requirements and the amount of *iwadl* money.

According to Abdul Manan, this change cannot be separated from the initial mission of institutionalizing *sighat taklik* divorce, namely to protect wife from any abuses of her husband. Besides that, the changes aim to get closer to the truth of Islamic law. One of the changes made is paragraph (3) of *sighat taklik* divorce. In 1950, it read: 'or I hurt my wife by hitting' which implies the specific physical action and exclude many others.[22] Five years later in 1956, the definition and scope of hitting are broadened to any action committed to hurt other people's bodies. It ranges from kicking, pulling others until he/she falls, pulling hair, bumping other's heads to the wall and others.

The above regulations show that every divorce, either it is a divorce or a divorce lawsuit, must be based on the reasons mentioned. A closer look at the regulation also indicates that subject who can take action to initiate or file for divorce can be either husband or wife. This is most evident in each point of article 116 KHI (a to f and h) which begins with "one of the parties" instead of showing to a particular party either husband or wife.

A point that specifically puts the husband as the only subject is KHI article 116 point g which says "husband violates the *taklik*

Taklik Talak dan Perjanjian Perkawinan," Unisia 31, no. 70 (2008), p.335 https://doi.org/335, https://doi.org/10.20885/unisia.vol31.iss70.art3.

[22] Khoiruddin Nasution, "Menjamin Hak Perempuan dengan Taklik Talak dan Perjanjian Perkawinan," *Unisia* 31, no. 70 (2008), p.337 https://doi.org/335, https://doi.org/10.20885/unisia.vol31.iss70.art3.

divorce…". This open determination of reasons for divorce implies that both husband and wife have the same potential to make mistakes, including domestic violence, that lead the legal spouse for filing the initiative for divorce.

2. Malaysia

As a federal country, Malaysian Islamic marriage law varies among one another depending on the law provisions of each state. The law itself can be grouped into two categories. *First,* the laws which follow the Deed of Association although to some extent, still need adjustment. They can be found in Selangor, Negeri Sembilan, Pulau Pinang, Pahang, Perlis, Terengganu, Sarawak and Sabah. *Second,* the laws with some striking differences to the Deed although a few parts are still the same. They are the laws at Kelantan, Johor, Melaka and Kedah.

The Malaysian family laws include The Malacca Islamic Family Law 1983, the 1983 Kelantan Law, the 1983 Nine Land Law, the 1984 Alliance Area Law, the 1984 Perak Law (No.1), the 1979 Law on Kedah, the 1985 Pinang Island Law, the 1985 Trengganu Law, the Law Pahang 1987, the Selangor Law 1989, the Johor 1990 Law, the 1991 Sarawak Law, the 1992 Perlis Law, and the 1992 Sabah Law.

An effort to unify the Islamic family law in Malaysia has once been carried out by a committee chaired by Tengku Zaid with the main responsibility to draft the Islamic family law. After getting approval from the *Majlis Raja*-raja, the draft was circulated to the states so that they could use it as the reference on the cases regarding Islamic family law. Unfortunately, not all states accept the entire contents of the law. Kelantan, for example, made improvements to the draft. As a result, the Malaysian Islamic family law is not practically the same among one another, including the valid reasons for divorce.

According to the legislation of Perak and Pahang law, the reasons for divorce by *fasakh* are impotent husband, husband's very serious mental or physical illness such as crazy, leprosy or vertigo, or contagious venereal disease, wife's illegal permission or consent of marriage, be it situation under force, her mental illness or other valid reasons according to the sharia, husband's nervous illness at the time of marriage contract declaration which makes him ineligible for marriage, or other valid reasons for *fasakh* according to the sharia.

On the other state, namely the Kelantan Sharia Court, data on divorce shows that it is due to several factors. Of the total cases numbering 8678 from 2013 to 2016, the main triggering factor, taken from 2975 divorce cases, was different principles between the couple followed by financial problems in 2162 cases. Afterward, 1166 cases were due to mutual consent problems, a situation where the wife left husbands in 919 cases, and irresponsible husbands with 506 cases. In addition, there were 429 criminal cases related to the Criminal Code which trigger the divorce. The reason for domestic violence was in 292 cases, polygamy in 168 cases and apostasy in 61 cases.[23]

Meanwhile, the most common types, as well as causes of divorce among the Malaysian Muslim, are four with their respective and different processes, namely: divorce or a divorce order from the Court, divorce by redemption (*khulu'*) or taklik divorce, *syiqaq* (irreconcilable fight), and *'li'an* which can only be found at the Sarawak Law.

The process or steps for a divorce starts from filing divorce application to the Court while articulating the reasons or cause, an examination by inviting the parties to the Court and seeking justice, then delivering the verdict.

The second common cause, *taklik* divorce, occurs when a wife reports the violation of *taklik* divorce that her husband does. If the Court considers the report true and reasonable, a divorce hearing will be held under- recording for administrative requirement particularly note-taking. This is based on Article 22 of the Selangor Law (Islamic Family Law of State of Selangor, Enactment 2003).

Taklik divorce itself can be caused by three factors, namely husband's leave for 4 months either intentionally or not, his inability to provide a living for the obedient wife, and his hit or physical attack which makes the wife disabled/sick. The third point implies the domestic violence clause, namely if a husband physically hurts his wife and makes her sick, disabled or bodily hurt. When this happens, a wife can file for divorce, mainly because in Malaysia, although the

[23] Rosfaizal, *Studi Perbandingan Perceraian pada Pengadilan Agama di Indonesia dengan Mahkamah Syariah Malaysia (Studi Kasus di PA Tanjung Karang dan MS Kelantan Tahun 2013-2016)*, 85-86.

taklik divorce is not mandatory and therefore not every couple chose to pronounce it, it still applies right away.

Meanwhile, the divorce process because of *syiqaq* (irreconcilable fight) has the same process as the previous two. It also requires the role of two peacemakers to strive for reconciliation otherwise the divorce decision is finally made. Kelantan satate even makes the same process between divorce and *syiqaq*. Therefore, in principle, the process of divorce, by redemption (*taklik* divorce), and *syiqaq* give the same right for both husbands and wife to initiate the divorce. Additionally, at the end of the process, divorce can be valid under mutual consent or by the decision of the Religious Court.

Meanwhile, the state's law at Negeri Sembilan, Persekutuan Pulau Pinang and Selangor have additional reasons for divorce other than those at Perak and Pahang. The reasons include unknown information about husband's domicile during one last year, his ignorance to provide living (*nafqah*) for three months, his imprisonment sentence for three years or more, his absence to provide spiritual support for one year, his abuse action on the wife, and the condition when the wife was married by her father before her sixteenth birthday along with her rejection and not having intercourse yet.

On the other hand, at the Enakmen of the Johor State Islamic Family Law, Article 53 (1) mentions that a woman or a man following the *syara'* law is entitled to terminate the marriage through either divorce or divorce lawsuit due to the following reasons. They range from unknown information on where either husband or wife lives for more than a year, husband's ignorance on her living during three months, either husband or wife's imprisonment sentence for three years or more, abusement on another party, an unfulfillment of sexual need without any reason for a year, the suffering of insane for two years, leprosy, vitiligo, or venereal disease, husband's impotency while the wife doesn't know it at the beginning of marriage, enforced marriage by the wife's *mujbir* guardian before she reaches the age of adulthood (18 years) along with her rejection and has not been experienced any sexual intercourse.

The description above shows that Malaysian states consider domestic violence as valid reason for divorce from a variety of its

divorce types ranging from divorce, divorce lawsuit, divorce by redemption, to *fasakh*.

3. Maldive

Maldive is a country with 1200 small islands in South Asia adjacent to Sri Lanka and India. Before Islam came to this country in 1153 AD, Buddhism was the most popular religion among its people. The country, which is now a member of the Organization for Islamic Cooperation (OIC), has Muslims as its whole population.[24]

In establishing the Maldivian Family Law No. 4 of 2000, the Maldive government mainly adopted the Malaysian Family Law because it is considered compatible with the characteristics of their socio-cultural conditions. In addition, the majority of *fiqh* jurisprudence of Maldive is also the same as that of Malaysia, namely the Shafi'i school of law.[25] The codified Maldivian Family law primarily aiming at regulating marriage and divorce contains rules on the minimum age of marriage, restrictions in reconciliation (*ruju'*), divorce and polygamy.

Additionally, other rules indicate unique examples of sharia-based family law targeting to integrate itself into a code law while addressing specific social issues. In the Maldives, for instance, Violence Against Women (VAW) also becomes a national concern. General statistics published in Maldives on VAW show that 1 of 3 women aged 18-59 has experienced some forms of physical or sexual violence.[26]

Specifically relating to divorce, the Maldivian Family Law only regulates reasons for divorce lawsuits while the divorce is excluded. Explicitly, there found no mention of the valid reasons for divorce in the Maldivian Family Law. In other words, a husband who wants to divorce his wife doesn't need any reason as mentioned by

---

[24] Marium Jabyn, "Transformations in Shari'ah Family Law in the Republic of Maldives"," *Jindal Global Law Review* 7, no. 1 (2016): 61.

[25] Mohammad Ali Haidar, "'Ketentuan Perceraian di Indonesia dan Maladewa,'" (Skripsi Program Studi Hukum Keluarga Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2020). 39

[26] Source: Ministry of Health - MOH / Maldives and ICF. 2018.Maldives Demographic and Health Survey 2016-17. Malé, Maldives, and Rockville, Maryland, USA: MOH and ICF.

the Law. He can simply file a divorce to the Court right away. On the other hand, if a wife wants to file for divorce, she is required to have valid reasons as regulated in the law.

Article 24 the Maldivian Family Law Number 4 of 2000 outlines legal reasons for a divorce lawsuit as follows: *First,* a husband commits any action which degrades his wife's dignity. *Second,* a husband treats his wife cruelly. *Third,* a husband forces his wife to do any forbidden thing. *Fourth,* a husband stands not to have sexual intercourse with his wife for more than four months without any reason.[27]

When a husband commits any act of domestic violence against his wife as mentioned at the second point, the marriage can be terminated once the wife files for divorce to the Court. The Court might consider one of the following reasons based on the Law No. 3/2012 about so-called *thafriq*. It mentions that if the level of violence has disabled the spouse to rebuild household peaceful life anymore, if the safety, protection, as well as welfare of the victim, cannot be guaranteed, or if the conflict is not possibly reconciled anymore, The Court, based on the article 6 of the family law, can order marriage termination by *thafriq* which then indicates its ending.

In relation with the Article 28 of the Family Law Act (Act No. 4/2000), some events specifically mentioned in Article 48 are hereby considered as those that possibly cause marriage termination because of *faskh* according to Islamic law.[28] *Fasakh* is known in the Maldivian Marriage Law when a woman files a divorce request to the Court because of one of the following reasons. It covers her ignorance on where the husband lives, her husband's failure to provide maintenance payment for more than three consecutive months, or her ignorance on his impotency at the time of marriage contract declaration.

Accordingly, The Maldivian marriage law also does not prohibit the imposition of *khulu*' divorce through an application filed

---

[27] "Maldives - Family Act," 2020, 000 (Act No. 4/2000).," accessed August 22, 2020,%0Ahttp://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=85773&p_classification=01.03.%0A.

[28] Ismail Wisham and Aishath Muneeza, "Harmonization of Civil Law and Shariah in a Small Island Nation," *The Republic of Maldives Case Study*, n.d., 32.

at the Court. It is agreed that a wife can seek divorce from her husband by paying him or giving him something of monetary value.

Comparative Analysis of Divorce Law Reasons for Domestic Violence in Indonesia, Malaysia and the Maldives

A. Equational Analysis

Indonesian, Malaysian and Maldivian Family Law have similarities in terms of the divorce. The forms of divorce available in those three countries, among others, are: 1) divorce; 2) lawsuit divorce; 3) *khulu'*; and 4) *fasakh*. These four forms of divorce are written in the respective law books of those countries. However, in the context of family law in Indonesia, the term *khulu*' is not as defined in the books of jurisprudence although it is known as a situation when a wife requests divorce by giving her husband *`iwâd* so that he will divorce her afterward.

Khulu' is furthermore classified as a form of *ta`lik* divorce and belongs to the divorce lawsuit category. With the divorce lawsuit format, it can provide an opportunity for a wife to have the same rights as her husband in the case of initiating divorce. Until then, the dominance of a husband in married life no longer exists and neither does the stigma regarding the subordinated rights of women in a household.[29]

Meanwhile, domestic violence as a reason for divorce has been already included in the marriage law of those three countries. In Negeri Sembilan, the Federation of Penang and Selangor, it is found at the letter f on husband's abuses on his wife. As for the Johor Islamic Family Law Enactment mentioned it at the regulation of *fasakh*, namely an order to determinate the marriage at the Article 53 (1). The article itself explains that both are entitled to an order to terminate the marriage, for example when one of both cases of abuse another as mentioned at the eighth point of the article.

The same is found in Indonesian Family Law which regulates that one of the causes for divorce is when a party commits cruelty or severe persecution that endangers another. This is typically called KDRT standing for *Kekerasan dalam Rumah Tangga* or household violence. Meanwhile, the accommodation of domestic violence at the

[29] Haidar, "Ketentuan Perceraian di Indonesia dan Maladewa,. 59.'"

Maldivian Family Law is obvious in Article 24 a of the Law Number 4 of 2000 which reads "husbands treat their wives cruelly" as one of the reasons for divorce.

Furthermore, the divorce cause clause based on domestic violence is also implied in the sighat *taklik* divorce known in Indonesian and Malaysian family law. Indonesian KHI at the Article 116 (g-h) reads "the husband violates the *taklik* divorce at the third point when he hurts his wife physically. The same goes on at the Malaysian law, particularly The Article 22 of the Law of Selangor (Enactment 2003), which enlists three reasons that can be included in the *taklik* divorce. The last point refers to a situation when a husband does something particular that makes his wife disabled/sick.

As for the Maldives, its family law only recognizes domestic violence as a cause for *khulu'* procedure filed by a wife. The application to the Court is along with agreement that a wife can file for divorce from her husband by paying him or giving him something worth money

B. Differential Analysis

Indonesian Family Law applies the same rights for both husband and wife to file for divorce. This is particularly clear in the clause listed the causes of divorce in article 19 of Government Regulation No. 9 of 1975, The Article 19 and 116 of Compilation of Islamic Law, and the Article 116. 74 PP No. 9 of 1975 which mentions the phrase 'husband and wife' or 'one of the parties'. This is the same as Family Law Enactment in the Johor State of Malaysia at The Article 53 (1) point 8 regarding divorce, *fasakh* or the order to terminate the marriage which uses the diction of phrase 'a husband or a wife abuses his/her spouse.'

It means that the same reason applies for both husband and wife equally without the one with much more rights and another with the less. This is influenced by the formation of Indonesian Family Law, including The Marriage Law No. 1 of 1974 and the Compilation of Islamic Law, which engaged the spirit of equality between husband and wife. Furthermore, it also reflects the 1948 Declaration of Human Rights held by the United Nations General Assembly in Paris on December 10. Article 16 paragraph 1 of the General Declaration of Human Rights mentions that men and women, without any limitation

of nationality, citizenship, and religion, have the right to marry and to build a family. They also have the same rights in the marriage, during marriage, and at the time of divorce." The last sentence implies that both husband and wife have the same right at the process of divorce, including the same reason that both can apply for filing it.

On the other hand, Maldives Family Law Number 4 of 2000 describing reasons for a divorce which reads "...a husband treats his wife cruelly" only applies to divorce lawsuits and not to divorce. Moreover, there is no requirement or condition for a husband to fulfill when he wants to file for divorce. Once he wants to divorce his wife, there is no reason needed by the law for him to present to the Court. On the contrary, a wife who wants to file for divorce needs a reason as set out in the law. In other words, the reason for divorce based domestic violence does not apply to both parties because it is only valid on behalf of the wife.

Contribution of Islamic Law to the Protection of Domestic Violence Victim in Indonesia, Malaysia and Maldives

Comparative analysis among divorce laws in Indonesia, Malaysia and Maldives imply that the effort of strengthening humanitarian values at the global level, such as human rights and gender equality, especially on the issue of domestic violence, to some extent has affected the legislative process at the national level. This is marked by the emergence of new norms in society as well as legal products in national legislation.

Along with it, Islamic family law also plays an important role in the divorce laws of those three countries. This is particularly clear from the existence of Islamic family law reforms that the countries implement and adopt into their national system by the development of substantial and procedural legal rules in Islamic justice.

In discussing the divorce law, both Imam Malik and Ahmad think that if the wife gets harsh treatment from her husband, she can file a divorce suit. These schools therefore provide possibility of divorce because of the *syiqaq* situation. Among others, it occurs when a husband endangers his wife by saying dirty words, painfully hitting her, leaving her without any reason, ordering her to do forbidden things, being more concerned with other wives, unwilling to visit her parents, or taking her property illegally. If a wife cannot accept how

her husband treats her then she reports this to the judge while proving the charge for filing a divorce, a judge can divorce her by *ba'in* divorce one time.[30] Imam Malik furthermore explained the possibility of *tafriq* because of *syiqaq* or *dharar* as quoted by A. Zamakhsyari (2020). He even recommended the wife ask the judge for divorce once the marriage puts her in danger while the broken relationship is unlikely to get fixed.

Likewise, from the perspective of maslahah (advantage) in the framework of Islamic law, the main objective of shari'ah is to create the benefit of mankind in life which includes five main elements, namely maintaining religion, nurturing the soul, maintaining reason, caring for offspring and maintaining the property. Thus, violence against humans on any basis either in the domestic or public sphere is fundamentally contrary to the main mission of God's teachings. Accordingly, the values of protection in the Islamic law as clear at its family law in Indonesia, Malaysia and Maldives are in line with the demands of humanitarian values at the global level. It also shares the same mission with efforts to reform family law in response to contemporary demands.

Conclusion

There are two conclusions from the above discussion. *First*, domestic violence is accommodated as a reason for divorce in family law in Indonesia, Malaysia (Negeri Sembilan, Federation of Penang, Selangor and Johor) and Maldives. Additionally, it is also implied at the *sighat taklik* divorce in both Indonesian and Malaysian family law. *Second*, the family law in both Indonesia and Malaysia enables both husband and wife to file for divorce due to domestic violence, while in the Maldives, the reason is only valid for a wife. This indicates that further effort for strengthening humanitarian values at the global level, such as human rights and gender equality, especially on the issue of domestic violence, has affected the legislative process at the national level, including at the family law.

[30] Alauddin Kharufa, *Syarh Qanun al-Akhwal asy-Syahsiyyah*, (Baghdad: Matba'ah al-Ma'arif, 1383/ 1963), Juz II, 392.

Bibliography

"Dasar-Dasar HAM Tertuang Dalam Deklarasi Kemerdekaan Amerika Serikat (Declaration of Independence of USA) Dan Dalam UUD 1945 Republik Indonesia, Seperti Terdapat Pada Pasal 27 Ayat 1, Pasal 28, Pasal 29 Ayat 2, Pasal 30 Ayat 1, Dan Pasal 31 Ayat 1. HAM Se," n.d.

"Deklarasi Tentang Penghapusan Kekerasan Terhadap Perempuan. Diproklamasikan Oleh Majelis Umum Perserikatan Bangsa-Bangsa - Pdf Download Gratis," Pasal 1 H. 12, Accessed November 15, 2020. (2020).

Dirdjosisworo, Soedjono. *Sinopsis Kriminologi Indonesia, Cet. 1*. Bandung: Mandar Maju, 1994.

Eekelaar, John. *Family Security and Family Breakdown*. Penguin, 1971.

Fyzee, Asaf A. A., and Tahir Mahmood. *Outlines of Muhammadan Law, Fifth Edition*. Oxford, New York: Oxford University Press, 2009.

Haidar, Mohammad Ali. "'Ketentuan Perceraian Di Indonesia Dan Maladewa,.'" Skripsi Program Studi Hukum Keluarga Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2020.

Humm, Maggie. *The Dictionary of Feminist Theory, Published in 1990 in Columbus Ohio) by Ohio*. State University Press (Columbus (Ohio): Ohio state university press, 1990.

Jabyn, Marium. ""Transformations in Shari'ah Family Law in the Republic of Maldives"." *Jindal Global Law Review* 7, no. 1 (2016): 61.

Kementerian Pemberdayaan Perempuan. *Kekerasan Terhadap Perempuan-KDRT*. Jakarta, 2002.

Kersti Yllö and M. Gabriela Torres, Eds., Marital Rape: Consent, Marriage, and Social Change in Global Context, Interpersonal Violence Series (Oxford ; New York: Oxford University Press, 2016), 23. Lihat Juga Stark, Evan. 2007. Coercive Control: How Men E, n.d.

"Maldives - Family Act," 2020. 000 (Act No. 4/2000).," accessed August 22,

2020,%0Ahttp://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=85773&p_classification=01.03.%0A.

Nasution. "Hukum Perdata (Keluarga) Islam Indonesia Dan Perbandingan Hukum Perkawinan Di Dunia Muslim: Studi Sejarah, Metode Pembaruan Dan Materi & Status Perempuan Dalam Hukum Perkawinan/Keluarga Islam," no. 7 (n.d.).

Nasution, Khoiruddin. ""Menjamin Hak Perempuan Dengan Taklik Talak Dan Perjanjian Perkawinan." *Unisia* 31, no. 70 (2008). https://doi.org/335,https://doi.org/10.20885/unisia.vol31.iss70.art3.

Samadani, Adil. *Kompetensi Pengadilan Agama Terhadap Tindak Kekerasan Dalam Rumah Tangga, Pertama*. Yogyakarta: Graha Ilmu, 2013.

Saraswati, Rika. *Perempuan Dan Penyelesaian Kekerasan Dalam Rumah Tangga, II*. Bandung: PT Citra Aditya Bakti, 2009.

Stark, Barbara. *International Family Law: An Introduction*. Burlington, VT: Ashgate, 2005.

Suadi, Amran. *Peranan Pengadilan Agama Dalam Perspektif Pembaruan Hukum Islam Di Bidang Penghapusan Kekerasan Dalam Rumah Tangga," T.T.*, n.d.

Wisham, Ismail, and Aishath Muneeza. ""Harmonization of Civil Law and Shariah in a Small Island Nation." *The Republic of Maldives Case Study*, n.d.

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 24-49
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam. v16i1.4340

Portraying "Village Regulations" among Urban Community in Campago Guguak Bulek *Nagari*, Mandiangin Koto Selayan, Bukittinggi, West Sumatra

Helfi
IAIN Bukittinggi, Jl. Paninjauan Garegeh Bukittinggi
Email: helfi@iainbukittinggi.ac.id

Fajrul Wadi
IAIN Bukittinggi, Jl. Paninjauan Garegeh Bukittinggi
Email: fajrulwadi74@gmail.com

Beni Firdaus
IAIN Bukittinggi, Jl. Paninjauan Garegeh Bukittinggi
Email: benifirdaus@iainbukittinggi.ac.id

Dahyul Daipon
IAIN Bukittinggi, Jl. Paninjauan Garegeh Bukittinggi
Email: dahyuldaipon55@gmail.com

Article history: Received: September 20, 2020, Accepted: March 20, 2021, Published: June 22, 2021

Abstract:

Migrant workers usually come to a city for economic reason as cities are still deemed to provide much available economic opportunities. Urban communities, on the other hand, typically preserve village regulation that they specifically formulate in dealing with comers like what occurs in Bukittinggi, West Sumatra. On the basis of it, this article aims to portray the village regulation taking sample at the Campago Guguak Bulek *Nagari*, Mandiangin Koto Selayan, Bukittinggi, West Sumatra. The research problems are on the current village regulation from its establishment, form, dissemination, sanction, stratification of legal subjects, and the effect as well as how the regulation will look like in the future. This is a qualitative normative research using in-depth interview with comers who

Author correspondence email: helfi@iainbukittinggi.ac.id
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

directly deal with local regulations as well as local communities as the one who preserve the regulation. It found that regulations at Bukittinggi emphasize protection of the local economy and socio-cultural aspect. More specifically, it aims to regulate life together, protect rights and obligations as well as social institutions, maintain safety and order, and improve community welfare. This all make the village regulation deserve for future preservation.

Keywords:
Village regulation; Minangkabau tradition; comers; discriminative

Abstrak:
Salah satu alasan perantau mendatangi sebuah kota biasanya adalah faktor ekonomi. Kota-kota besar hingga hari ini masih dianggap menawarkan banyak peluang ekonomi. Masyarakat kota, di sisi lain, biasanya memiliki berbagai aturan khusus bagi para pendatang seperti yang terjadi di Bukittinggi, Sumatera Barat. Dari situ, artikel ini ingin memotret hubungan antara aturan lokal di Bukittinggi dengan para pendatang di situ, khususnya di Kelurahan Campago Guguak Bulek, Mandiangin Koto Selayan, Bukittinggi, Sumatra Barat. Pertanyaan penelitian ini adalah seputar peraturan kampung yang berlaku mulai dari pembentukan, bentuk-bentuk, sosialisasi, sanksi, subyek hukum, dan efeknya. Selain itu, akan dilihat juga bagaimana prediksi akan 'nasib' peraturan ini di masa mendatang. Penelitian ini bersifat normatif-kualitatif dengan wawancara mendalam kepada para pendatang maupun komunitas lokal sebagai salah satu metode penggalian data utamanya. Hasilnya menunjukkan bahwa aturan-aturan tersebut menitikberatkan pada perlindungan social-ekonomi lokal, utamanya perihal aturan-aturan hidup berdampingan, perlindungan hak dan kewajiban, pranata sosial, jaminan keamanan dan ketentraman, serta peningkatan kesejahteraan. Inilah yang membuat peraturan tersebut layak untuk tetap berlaku hingga di masa mendatang.

Kata Kunci:
Peraturan Kampung; Adat Minangkabau; Pendatang; Diskriminatif

Introduction

Minangkabau people have very strong engagement with their traditions and religion. They apply values of both traditions and religion in their daily life very well. At the last decade, the mix of tradition with Hinduism was then converted into Islamic custom through modification in several aspects. According to M. Nasroen, Hinduism and Buddhism entered Minangkabau in the fifth and sixth centuries CE. It had close connection with the coming of Indians into the archipelago during the fourth to the sixth centuries when pepper production became very lucrative trade commodity causing Indians' immigration to Minangkabau during the era of Adityawarman.[1]

However, neither had Hinduism nor Buddhism greatly affected the local tradition and culture.[2] In fact, each stood alone even contradictory each other, such as the concept of matrilineal lineage, *mamak* (a mother's sibling) power over *kemanakan* (children of siblings), inheritance of high *pusako* (inheritance of a *kamanakan* from *mamak*) property for women, and so on.[3] Differently, when Islam entered Minangkabau in the seventh century CE,[4] Islamic tought had significantly affected the tradition and culture so strongly like diffusion of color and water.

Minangkabau Islamized culture is very well reflected in an adage which reads *adat basandi syara'* (customary is based on Islamic teaching), *syara' basandi kitabullah* (Islamic teaching relies on the Qur'an), and *syara' mangato adat mamakai* (all customary activities are based on Islam or the Qur'an). The strongly rooted legitimation of this custom is also crystallized in a customary *mamangan* (proverb) which reads "*indak lapuak dek hujan, indak lakang dek paneh*" (not *broken* because of the rain, not fading because of the heat). According to Murdan, as quoted from Ade Maman Suherman, this customary law

[1] Wannofri Samry and Azmi Fitrisia, "Fenomena Pengaruh Hindu di Minangkabau," in *Prosiding-National Seminar* (Universitas Hindu Indonesia, n.d.), 373.

[2] M Nasroen, *Dasar Falsafah Adat Minangkabau* (Jakarta: Bulan Bintang, 1970), 32.

[3] Mardiyah Danial, "Wanita Minangkabau di Tengah Adat dan Agama (Studi Kasus Peranan Wanita dalam Pembangunan di Kecamatan Banuhampu di Daerah Minangkabau)" (UIN Jakarta, 1986), 16.

[4] Suharman, "Sejarah Pendidikan Islam di Minangkabau," *Turast; Jurnal Penelitian dan Pengabdian* 6, no. 1 (2018): 93.

is a non-statutory one which mostly consists of cultural habit and Islamic law.[5]

The next development of the law witnessed the inclusion of unwritten customary law into the written one. According to Bushar Muhammad, the first person to use the term "customary law" was Snouck Hurgronje with *adatrecht* as the equivalent term in the Dutch. This was followed by Van Vollenhoven who used it as one of technical terms in juridical literature. Subsequently, the word is also used by Nederburgh, Juynboll, and Scheuer.[6]

As mentioned above, there found two forms of customary law, namely unwritten customary law and the written one. The former refers to culture and way of life of Indonesia that guides its people, both who live in cities and villages, in their daily life and relationship among individuals. The customary law community is bound by solidarity with the existence of equal interests and awareness on the customary law.[7] The customary law itself is what is commonly referred as the original law. Meanwhile, the later, the written one, can be in a form of charters, king's orders, land boundaries, and so on. Comparing between both, although the number of the written one is less than the unwritten, the written one usually does not affect much on the society and is likely ignored.[8]

Customary law which was used to be natural, orally transmitted, and having no signature or stamp, has turned into a written legal obligation with various binding sanctions. The use of the unwritten customary law term itself refers to a living law as a habit that local people maintain it very well. Furthermore, according to Sri Sudaryatmi, customary law typically considers and contains religious elements in the process of its formation.[9]

---

[5] Murdan, "Harmonisasi Hukum Adat, Agama, dan Negara dalam Budaya Perkawinan Masyarakat Islam Indonesia Belakangan," *Asy-Syirah Jurnal Ilmu Syariah dan Hukum* 50, no. 2 (2016): 505.

[6] Bushar Muhammad, *Asas-Asas Hukum Adat Suatu Pengantar* (Jakarta: PT Pradnya Paramita, 2006).

[7] Dedi Sumanto, "Hukum Adat di Indonesia, Perspektif Sosiologi dan Antropologi Hukum Islam," *Jurnal Ilmu Syariah* 17, no. 2 (2018): 184.

[8] Sumanto, 7.

[9] Sri Sudaryatmi, "Peranan Hukum Adat dalam Pembangunan Hukum Nasional di Era Globalisasi," *MMH* 41, no. 4 (2012): 574.

Among others, the city of Bukittinggi as a part of the Minangkabau community in one of its sub-districts has formulated customary rule which is popular as *adat* (customary) law or village regulations. It is the smallest implementation of regional autonomy policies. In a broader scope, regional autonomy is clear from the existence of regional regulations, while village regulations are rules at the *nagari* (village level in Minangkabau) which are formed from local customary structures through customary instruments. The existence of these customary rules is a development of village regulations or those at the village level as stated in Law no. 10. The year 2004 article 7 (1) related to the hierarchy of laws and regulations in Indonesia.[10]

The village regulation targets all people in a certain village area. Among the village rules were born by the customary apparatus of the *niniak mamak* (those holding authority in *nagari* based on social trust) are those found at Campago Guguk Bulek, Mandiangin Koto, Bukittinggi. In particular, it is an area with a significant number of Batak ethnic population compared to other sub-districts. Bukittinggi itself, according to Mardiyah Danial, has very popular tourism destinations due to its location at hilly and canyon areas. During the Dutch era, Bukittinggi was used as a stronghold to attack *Paderi* troops before it had developed as a coffee deposit place or a center of economic activities in the Minangkabau area.[11]

The massive development of Batak ethnic group in the area of Bukittinggi and its surroundings has a very close connection with strategic geographical position of Bukittinggi on the Sumatran crossing. It lies between North Sumatra and West Sumatra and is reachable by land transportation in a relatively short time. Therefore, it is further designed as a tourism destination with various economic growing sectors, such as trade, crafts, transportation, culinary delights, and so on.

Apart of it, Bukittinggi citizens enlive their customary law very well. It is deemed as a very big capital for maintaining harmony in the society. The former minister of religious affair, Suryadarma Ali,

---

[10]Zaka Firma Aditya and M. Reza Winanta, "Rekonstruksi Hierarki Peraturan Perundang-Undangan di Indonesia," *Negara Hukum* 9, no. 1 (2018): 86.

[11] Danial, "Wanita Minangkabau di Tengah Adat dan Agama (Studi Kasus Peranan Wanita dalam Pembangunan di Kecamatan Banuhampu di Daerah Minangkabau)," 26.

mentioned that one concrete way for preventing, handling, and reconciling social conflicts is through social institutions living in society.[12] The institution can be in a form of norms, values, beliefs, and cultures that society recognizes them well, such as the tradition of *pela gandong* (to make people united) in Maluku, *dalihan na tolu* (balances in life) in North Sumatra, and others.

Furthermore, the effectiveness of customary law is also expected to provide rules in how people behave, interact each other, do economic activities, and other purposes, including maintaining Minangkabau customs in the midst of increasing heterogenity of its people along with the entrance of migrant workers. Like other cities in Indonesia, Bukittinggi is also a home for regional migrant workers so there are always different tribes from local population with differences of other aspects as well, such as religions, occupation, and so on.

In a more specific way, discussion on the written customary law in response to Christian immigrants in Bukittinggi or Minangkabau area is increasingly interesting given the fact that customary law is well recognized in Indonesian state administration. It is put as one of sources of formal law in providing social institutions for community down to the lowest level like villages or *nagari* in West Sumatra. Other than customary law, Titik Triwulan Tutik enlisted other sources of formal law ranging from legislation, habit and customs, interstate agreements (treaties), judges' decisions (jurisprudence), to opinions and views of jurists (doctrines).[13] Habit is typically mentioned by Teresia Ngutra, quoted from Achmad Sanusi, as a legal and normal source of formal law with direct recognition.[14]

Method

This field research was conducted using in-depth interviews with local communities, including *nigari* officials and new comers. Additionally, it also extracted data from social structure of local

[12] Suryadarma Ali, *Mengawal Tradisi Meraih Prestasi, Inovasi dan Aksi Pendidikan Islam,* (Malang: UIN Maliki Press, 2013), 40.

[13] Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara Indonesia Pasca Amendemen UUD 1945* (Jakarta: Kencana Predana Media Group, 2010), 41.

[14] Teresia Ngutra, "Hukum dan Sumber-Sumber Hukum," *Jurnal Supremasi* XI, no. 2 (2016): 210.

community institutions. This research aims to reveal what the local community feel about immigrants coming to Bukittinggi. The nature of legal research on this theme tends to be practical and functional instead of ethical-speculative.[15]

Discussion and Result

Establishment of Village Regulations

Law is a form of socio-cultural manifestation that grows everywhere the community exists. In national level, the power of each law products is arranged hierarchically. Laws made at the lower level must not be in conflict with the laws at the higher levels. Therefore in this context, the law formulated by the BAMUS (*Badan Musyawarah;* Deliberative Council) at the *nagari* level must not contradict to the law made by the Second Level Regional Representative Council or those at the higher levels.

The hierarchal arrangement is best described at the pyramid scheme as mentioned by Shidharta and cited by Ch. N. Latif.[16] At the scheme, Pancasila lies at the highest position as the ideal national law followed by principles of national law and positive legal principles consisting of legislation and jurisprudence. Subsequently is the practice of customary law when it is still alive and has not been made a statutory provision.

Practically, customary law moves from unwritten to positive written law. It is a substantial component in addition to structural and legal culture component as said by Lawrence M. Friedman.[17] On this basis, according to Ni'matul Huda, the existence of customary and religious laws must have a reasonable place in enriching the development of national law.[18]

---

[15] Depri Liber Sonata, "Metode Penelitian Hukum Normatif dan Empiris: Karakteristik Khas dari Metode Penelitian Hukum," *Fiat Justisia Jurnal Ilmu Hukum* 8, no. 1 (2014): 25.

[16] H. Ch. N Latief, *Etnis dan Adat Minangkabau, Permasalahan dan Masa Depannya* (Bandung: Angkasa, 2002), 28.

[17] Muh. Sudirman Sesse, "Budaya Hukum dan Implikasinya terhadap Pembangunan Hukum Nasional," *Jurnal Hukum Diktim* 11, no. 2 (2013): 171.

[18] Materi Studium General hari Rabu, 31 Maret 2021 Ni'matul Huda, "Pembentukan, Pembatalan dan Pencabutan Peraturan Daerah," n.d., 27.

Several areas in West Sumatra have tried to make *adat* as a way of bringing back Minang people, who are deemed to being far from the expectation, to where they should be. It is mainly because *adat* law is considered to be still quite strong among the community that it can influence people. This initiative is done through two ways, namely issuing customary law by promulgating it in either written or unwritten form and making it substantially included in the national law at the regional level.

Customary rules in the first way usually take form in oral regulations as found in Kapau area. It belongs to the administrative area of Agam district and is directly adjacent to the city of Bukittinggi to the north. The Kapau customary consensus prohibits its people from selling land to outside residents, moreover to non-Muslims. Meanwhile, written customary rules, among others, can be found in village regulations of Kurai area, Jorong Mandiangin, Koto Selayan, Bukittinggi.

The second way is particularly clear in some regional regulations as a part of regional autonomy in the form of regional rights, authority, and obligations to regulate and manage themselves both in government sector and the local community based on the prevailing laws and regulations.[19] According to Muhtada, at 1999, Indonesia only had 4 regional regulation while at 2013, the number increased significantly to 400.[20] In the West Sumatra itself, the presence of regulations mainly aims to protect local culture instead of maintaining religious teaching although it is popular as *sharia* regulation. The general essence of regional regulations is to regulate coexistence, protect human rights and obligations in society, protect social institutions in society and maintain the safety and order of local communities and general welfare[21] which is specifically characterized by the uniqueness of local culture.

Some samples of those regulation are obligation to cover *aurat* (some parts of bidy) for teachers and students in the Agam Regency

[19] Sekretaris Daerah, "Undang-Undang No. 32 Th 2004 tentang Pemerintahan Daerah" (2004), 5.

[20] Muhtada, "Perda Syariah di Indonesia: Penyebaran, Problem dan Tantangannya" (Semarang, 2014), 5.

[21] Alwi Bik, "Peraturan Daerah Syariah dalam Bingkai Otonomi Daerah," *Al-Daulah* 03, no. 02 (2013): 291.

area and Muslim dress provisions for Agam area in the Perda Kabupaten Agam No. 5 articles 3 stating that every Muslim employee and student are obliged to dress in Muslim style when carrying out their duties or attending school activities.[22] They share substantial common purpose with the municipal regulation of Solok, No. 6 of 2002 regarding the compulsory Muslim dress, the appeal of the Governor of West Sumatra No. 260/421 / X / PPR-05 regarding wearing Muslim clothing to the head of the agency/office/bureau/institution/Mayor of West Sumatra, an instructions of the Mayor of Padang dated March 7, 2005 regarding the use of Muslim clothing, and regional regulation No. 20 of 2003 of the City of Bukittinggi concerning amendments to the regional regulation No. 3 of 2000 about control and prevention of community diseases. Another regulation is the requirement to be good at reading and writing the Qur'anic letters based on Perda Kabupaten Agam No. 5 of 2005 verse 3 which reads that every Muslim student in the formal education or '*kejar paket*' (national high school equivalency examination) A, B, or C must be good at reading and writing the Qur'anic letters properly and correctly.[23]

The emergence of those written and formal customary rules in Bukittinggi is due to two factors, namely socio-cultural and economic factors. The former factor has very close connection with the wide spread of non-Muslim residents at the Kurai area in the city of Bukittinggi. It is deemed to cause the emergence of unprecedented new problems such as environmental uncleanliness, impolite women's dress according to customary rules which prioritize the principles of *alur* (complying with the rule) and *patut* (in line with customary procedure), alcoholic drinking, gambling, and so on.

According to Ridwan, one of Talao youth leaders from Mandiangin Koto, Salayan, Bukittinggi, the initial idea of making village regulations in the form of customary law was mainly motivated by religious factors. There found a three-floor house that the Christian Batak residents which was used to be a place of worship

[22] Sekretaris Daerah Kabupaten Agam, "Peraturan Daerah Kabupaten Agam No. 6 Tahun 2005 Tentang Berpakaian Muslim" (2005), 5.

[23] Sekretaris Daerah Kabupaten Agam, "Peraturan Daerah Kabupaten Agam No. 6 Tahun 2005 Tentang Pandai Baca Dan Tulis Huruf Al-Qur'an" (2005), 7.

every Sunday. This made residents of Talao and its surroundings so angry that they came to the location to stop the activity.[24]

Meanwhile, from the economic factor, the birth of the village regulation was due to the concern of Minangkabau community about the marginalization of indigenous people from their main economic sources. The exclusion of Betawi people from Jakarta is thought as a concrete example of how foreign entrepreneurs have succeeded in marginalizing indigenous people from their homeland. Apart of it, other secondary economic factors have played a role, such as social interaction between young Muslim generation with Christians, mixed marriage, competition for settlements, social pathology**,** and others.

Furthermore, feeling insecure in coping with the new situation deemed far different from the the old Minang or *tempo dulu* (older decade) community had inspired the *ninik mamak* (*nagari* apparatus) and *cadiak pandai* (community figure because of his/her knowledge mastery) in each region to form customary rules. They aim to return the Minang community into customary which substantially contains Islamic spirit or so called *buek*. However, it does not totally solve the problem because in fact, it triggers another problem because it turns out that the newly spawned customary laws also targeted immigrants as other legal subjects mingling with indigenous people of Bukittinggi.

Forms of Village Regulations in Campago Guguak Bulek *Nagari*, Mandiangin Koto Selayan, Bukittinggi

There are several forms of customary regulations at Campago Guguak Bulek. First is those relate to external circle, namely regulations targeted to immigrant communities, especially non-Muslims living in the customary area of Campago Guguak Bulek. This first category has three subcategories consisting of the issue of land conversion right, domicile for non-Muslim at the area, and the construction of worship house. Second is those relate to internal circle, namely rules for handling problems of indigenous community as a part of Minang people. Third is the neutral one valid for both local community members and non-Muslim immigrants.

[24] Ridwan, "Interview" (Bukittinggi, 2018).

On the land issues, Minang community puts the land as not only a place to live or as an economic source, but also a source of inspiration in developing culture. They consider the land as having both inward and outward function. The former functions to seek benefit for the tribe, while the later is to prohibit its people from buying or accepting pawning of other people's land outside kinship.[25]

Furthermore, a person can be culturally recognized as a Minang person due to the ownership of *sako* and *pusako* in addition to other requirements such as having a *pandan pakubur* (grave complex in a *nagari*), *barumah gadang* (customary house of Minangkabau), tribal affiliation, and so on. In this context, land right conversion to others means eliminating one's identity as a part of Minang people and therefore it is forbidden to sell the land except for urgent needs. It is still permissible to mortgage it but not to sell it under several condition.

According to AA Navis, four factors which allow land mortgage according to Minang custom is as follow: First is when the corpse lay at the house which means a family member has passed away and the corpse is laid at the floor so that visitors can see it. Second is to establish an heirloom title. Third is when there found adult girls who are not married yet. Fourth is when *rumah gadang ketirisan* which means the leaking roof of a house.[26] Amir Syarifuddin assumes that the four categorization of AA Navis is for collective interests, while the concret forms of "urgent" conditions can develop by time. It is included as the urgency, for instance, to pay debt of honor, fixing rice field irrigation fees, blood debts (revenge for the killer), losses due to accidents, the costs for doing pilgrimage, and paying off common debts.[27]

Other than that, the customary law of Campago Guguak Bulek also prohibits its people to sell their land to outsiders, let alone to non-Muslim communities. The article 34 reads: Natives who are going to sell land/buildings in the customary jurisdiction of Campago

[25] Siti Raga Fatmi, "Permohonan Tanah Ulayat di Minangkabau Menjadi Tanah Hak Milik," *Lentera Hukum* 5, no. 3 (2018): 420.

[26] AA Navis, *Adat dan Kebudayaan Minangkabau* (Kayu Tanam: INS Kayu Tanam, 1980), 152.

[27] Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau*, 226.

Campago Guguak Bulek are obliged to sell it to another member of the community or a fellow native with a reasonable price. For the first step, they should announce the plan for selling in the respective RT (*Rukung Tetangga*, neighborhood association) and RW (*Rukun Warga*, hamlet) on Friday sessions for 4 times then moving the announcement in the village for 2 weeks. When no indigenous people are interested (especially those with close family line) within a predetermined period, they are allowed to sell it to parties outside the Campago Guguak Bulek customary area.[28]

The prohibition to sell the land to certain parties, according to Ridwan, particularly relates to the situation in which productive land for farming has not been widely used as residential area in the district of Mandiangin. Some local people still live in an agrarian economy by planting rice as the focus of their family economy. The presence of customary law therefore serves to protect indigenous lands from buyers coming for other regions, especially from non-Muslim communities who tend to use the land for residence or industry.

Meanwhile, regarding with domicile and leasing issues, customary regulations prohibit non-Muslims from living in the Campago Guguak Bulek customary area. Natives, on the other hand, are also prohibit to sell their land or building to people who do not share their faith. This is clearly explained at the article 1 which reads: It is not justified to have non-Muslims residing and living in the village/customary law area of the Campago Guguak Bulek after the confirmation of this written customary law with the exception for those with legal ownership rights and a valid ownership rights certificate.[29]

Accordingly, customary rules do not allow its people to rent out houses to non-Islamic residents as contained in the article 13 which reads; It is forbidden for home owners to lease, rent, or provide housing to non-Muslims in the customary jurisdiction of *kampuang* Campago Guguak Bulek. Violators will be subjected to a maximum fine of 30 sacks of cement or of a price.[30] The regulation is furthermore

---

[28] Tim Niniak Mamak Campago Guguak Bulek, "Undang-Undang Hukum Adat (Peraturan Kampuang) Campago Guguak Bulek Jorong Mandiangin Nagari Kurai" (2014), 4.

[29] Bulek, 1.

[30] Bulek, 3.

valid for those who already rented a house for non-Muslim before the customary had been confirmed. The article 14 of the customary land then continues that it is forbidden for rented homeowners to extend the contracts/leases to non-Muslims since the *campuang* regulations of Campago Guguak Bulek were confirmed. Violators will be penalized with a fine of as many as 30 sacks of cement or as much as possible.

Lastly, the customary law of Cimpago Guguak Bulek prohibits the establishment of worship houses or organization of religious activities other than Islam. This is explicitly mentioned at the Article 2 of the constitution which reads; it is not allowed to establish worship houses or organize religious activities contrary to Minangkabau customary philosophy "*adat basandi syara', syarak basandi kitabullah* (Islamic religion)" in the customary jurisdiction of *kampuang* Campago Guguak Bulek. [31]

Comers in Mandiangin Koto Selayan subdistrict of Bukittinggi city are non-Muslims from Batak as the largest, Nias, Chinese and Java. The last three mentioned ethnics previously lived in harmony with indigenous people. Their interaction run well and they furthermore complemented each other as a global community. Local people, for instance, need Chinesse when buying goods with relatively cheaper price compared to the offer of indigenous merchants themselves. There is even one village in the center of Bukittinggi called *Kampung Cina* that still exists to this day. Meanwhile, the Nias tribe fulfills the needs of brick entrepreneurs in terms of labor and is spreading at almost all corners and suburbs of Bukittinggi.

The social problems had just appeared after a number of Batak Christians inhabited the city of Bukittinggi. It was known that some Batak Christians routinely organized a weekly hidden Mass at a house of a Batak citizen named Maria in Talao area that made indigenous people insecure. It then triggered the release of customary law written in the area of Campago Guguak Bulek. Additionally, some other problems made the condition worse and widen the gap between two groups, namely sleazy environment, land invasion, tribal dominance in a residential neighborhood, letting dogs to walk randomly in a real estate housing, and so on.

[31] Bulek, 1.

This background then leads to prohibition for comers to live or domicile in the Campago Guguak Bulek area of Bukittinggi city at general, although the real target is actually the Christian Batak tribe. Some indigenous people of Bukittinggi even frankly expressed their regret and disappointment for formerly converting land ownership rights to non-Moslem Batak citizens. At the same time, they appreciate the presence of village regulations in Cimpago Guguak Bulek Bukittinggi city.[32]

According to Mr. Sidi, for example, the widespread of Christian Batak citizens settling in Minangkabau area is inseparable from their success in obtaining land ownership. He thinks that those who succeeded in buying the land at *nagari-nagari* in West Sumatra will keep buying for the land more and more. Once some land is sold, as he assumed, they will buy more at the surrounding until they can control the area.

He furthermore assumes that Christians will establish a worship house namely a church in their area as he saw the construction of a church at Pasaman area, the border between West and North Sumatra. The worship house, according to him, is built not based on the needs of Christians, but for claiming more religious power even though knowing that the building is not that ideal as a worship house. In short, he thinks that for Batak Christian migrants, the success of obtaining land is a major and first capital in building economic, religious, and inter-religious forces from North Sumatra.[33]

According to him, non-Muslims should not come in and live among Muslim community because Minangkabau customary originates from Islamic teaching. As he assumes, *niniak mamak*'s initiative to fortify Islamic faith is a good and compatible way with the spirit of tradition originating from Islamic teaching.[34] This is in line with how Harsja W. Bachtiar argues that there are three laws in Minangkabau that its people obey to, namely customary rules, Islamic rules, and national cultural rules.[35]

---

[32] Interview on Friday, January 9th 2018 Ridwan, "Interview."

[33] Interview on Wednesday, Februrary 7th 2018 Pak Sidi, "Interview," 2018.

[34] Interview on Tuesday, February 7th 2018 Sidi, "Interview."

[35] Harsja W Bachtiar, *Pengaruh Adat Istiadat Minangkabau terhadap Kehidupan Wanita dalam Mengembangkan Budaya Bangsa*, Kumpulan N (Jakarta: Yayasan Bunda, 1983), 13.

Meanwhile, Yessi who lives in Inkorba (a part of Guguak Bulek area) said that when a Muslim resident wants to sell his/her land, it must be offered to the common Muslim residents of Inkorba first. If no one buys it, it may be offered to Muslim residents out of Inkorba at the same price. If any resident is known to sell the land to non-Muslim residents, they will be subjects to customary sanctions based on the applicable provisions.[36]

On the other hand, if anyone from outer circle of Guguak Bulek wants to buy land in the customary area, he/she can do *manyuruak* (hide) by doing *malakok* (passing through customary process to be a part of Minang people) to the indigeonius tribes overthere. A precise rule has been set as the basis for permitting land transaction, such as the presence of *mamak, sumando* (son in law), relatives, or other family members who dispose of their presence in the customary area of Guguak Bulek or as popular by *adat diisi limbago dituang* (Minang people need to do daily activities based on the customary habit).

This means that new comers must also comply with the existing rule among indigenous people. The *mamak* who was left behind is those who will also be found as popularly known as *kamanakan batali budi*. According to H. Datoek Toeah, *kamanakan batali budi* is a niece or nephew who comes from outside areas yet wishing to have a *mamak* in the area they live in. This kind of *kamanakan* is the same as the term *kamanakan angkat* (adopted niece/nephew).[37]

Dissemination of Village Regulations in Campago Guguak Bulek, Mandiangin Koto Selayan, Bukittinggi

Village regulation is a customary rule that grows and develops along with the dynamic of time. The birth or *buek* or customary law itself is inspired by *urang nan ampek jinih* (four unsures of customary maintainer)'s concern about the fading customs in the midst of massive socio-cultural developments. In Minang tradition, *buek* belongs to the third form called *adat nan teradat* (customary law in

[36] Interview on Friday, February 27th Yessi, "Interview" (Bukittinggi, 2018).
[37] Toeah, *Tambo Alam Minangkabau*, 80.

nagari level).[38] It can either exist or disappear based on the needs of a certain are as clear at the following proverb;
Lain padang lain belalang
Lain lubuk lain ikannya
Cupak sapanjang batuang
Adat salingka nagari

Furthermore, other adages also imply that the existence of customary rules in a specific area does not always do the same in other territories, including those valid in a certain *luhak*, *nagari*, or *kelarasan***.** One of adages is as follow:
Di mana sumur digali di situ ranting dipatah
Di mana bumi dipijak di sana langit dijunjung
Di mana bumi dihuni di sana adat dipakai.[39]

The village regulation at Campago Guguak Bulek in the area of Mandiangin Koto Selayan Bukittinggi sub-district was firstly arranged in August 2012. It then finished on December 22 and got confirmed two years later on January 14, 2014, based on the agreement among *ninik mamak* members of Campago Guguak Bulek. Next, it is disseminated in public places, including being recited in mosques before the preacher gets to the pulpit on Friday sermons. Once the dissemination gets done, it is recognized that people have already known the rule so the violators will get punished.

Practically, there are 6 (six) places which apply village regulations. They range from Sarojo, Guguak Randah, Guguak Bulek, Talao, Ingkorba, to Bantodarano areas in the sub-district of Mandiangin, Salayan, and Bukittinggi.

Sanction against Village Regulation at Cimpago Guguak Bulek

Effectiveness of any legal products can mainly be measured from its material and philosophical background. Another significant factor is how targetted subjects or indigenous institutions apply the law in term of punishing the violators. Minangkabau people believe that the law should treat all citizens the same regardless of social stratification in the society. It must be the ssame both for the

[38] Amir Syarifuddin, *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau* (Jakarta: Gunung Agung, 1984), 144–46.

[39] Datoek Toeah, *Tambo Alam Minangkabau* (Bukittinggi: Pustaka Indonesia, 1976), 262.

downward and upward as clear at their proverb reading "*tibo di mato indak dipiciangkan, tibo in paruik indak dikampihan*" (what coming to the eye is not closed right away, what coming to the stomach is not deflated immediately, an appeal to be fair for all people).

In the context of village regulation at Cimpago Guguak Bulek, several sanctions for its violators have already been arranged based on the customary law. First is social warning as the ligthest one. Second is fine. Third is announcing the rule breaking at the mosque or through written announcement at the notice board of the *nagari*. Fourth is exclusion and expulsion from the village. Fifth is revocation of social position or *pusako* title.

Moderate and serious violations of the village regulation are punished by fines, namely giving cement. The lightest fine is giving 10 sacks of cement or the equivalent of that while the heaviest is 500 sacks of cement. If the violators do not pay the fines, their cases will be announced formally at the mosque or at notice board of the village. If the condition remains the same, they will be excluded from community social activities or even worse, namely throuth expulsion from the customary territory during 5 years. Sanctions are therefore applied hierarchically from the lightest to the heaviest. If the violators repeat breaking the rule, the sanction can be sentenced repeatedly as well.

On the other hand, if the violaters are one of traditional officials such as *niniak mamak*, *nagari* or *kampuang* officials, youth leaders, heads of RT or RW, and others, the punishment might be in three-fold sanction. Other possibilities range from removal of position, revocation of traditional titles to announcement to the public.

From the perspective of absolute competence of the law, the customary laws do not take up positive jurisdiction. In the event of a criminal act of theft, for example, the customary law serves to solve the problem traditionally through replacing the stolen goods. After that, the case will be processed based on Indonesian law, namely what the Article 19 stipulates. Furthermore, the customary law of Cimpago Guguak Bulek also does not regulate sanction on the persecution that causes injury or death as well as other criminal acts. They are included as the subject of absulte competence of positive law as regulated in the Criminal Code.

The current customary law of Cimpago Guguak Bulek generally focuses on social shame for committing customary violations in addition to the fine sanction in order to provide the deterrent effect to violators and people at general. Meanwhile, its sanctions are also different from classic Minangkabau legal sanctions in the past which were called *nan duo puluah* (twenty) customary criminal laws. Eight of them were material crimes which mentioned the types of crimes and their legal sanctions, while the other twelve are formal law (criminal procedures) on its settling procedure.[40] The penalty for stabbing or killing a person in the classic customary crime rule, for example, was killing the violators. However, this classical customary law is certainly no longer valid when the government has been proactive in protecting people security through the whole legal instruments.

This kind of communally criminal sanction in Minang community is considered more effective in keeping individuals away from committing violations. The concept is more less the same with criminal responsibility procedure in patrilineal kinship which is imposed on clans/tribes, although it goes in reverse among Minang community with the maternal line. The bond of solidarity from *nan saparui* (relatives from motherly line) is very strong. Each individual has a role up, down, and sideways. The first role is like voting rights in appointing the chief or deposing him/her because of disgraceful actions, the second is like *mamak*'s responsibility to *kamanakan*, and the third is like a habit of working together in the funeral or condolence ceremony.

The last point is clear in a customary adage which reads *kaba baik baimbauan, kaba buruak bahampuran* (good news will be well announced, while the bad ones need no announcement because people will immediately come for giving help**)**. When an engagement ceremony is going to be carried out, for example, division of labor will be distributed to the extended family members. However, when a bad thing happens, such as when anyone passes away, all parties will take part in organizing funeral and condolence ceremony without being invited.

[40] M. Sanusi Latief, "Gerakan Kaum Tua di Minangkabau" (IAIN Jakarta, 1988), 28.

Another relevant adage reads *hati gajah samo dilapah, hati tungau samo di cacah. Indak samo dicari, ado samo dibagi* (big profit will be shared so that everyone gets much portion respectively and so does the the small profit. Everyone shares the same in both profit and lost). Including is accountability on any disgrace action committed by a member of the tribe. When a *kamanakan* commits something disgrace, his/her *mamak nan saparuik* can take action by removing the betel out from its stem. However, if *kamanakan* commits adultery, punishment will be given by getting him/her banished from the community with a chance to be still accepted by the closest people based on the consideration of his/her *mamak ninik*.[41]

However, Iskandar Kemal mentioned that pulling betel out from its stem is actually contrary to the moral norms. This is because it symbolizes revocation from the origins. Once *mamak of nan saparuik* firmly did his/her non-formal duties by going to the customary head[42] for reporting the condition while carrying betel leaf and telling that his/her *kemanakan* had been plucked from the stem like a betel leaf, *kamanakan* have culturally been separated from the *paruik* relationship.[43]

Stratification of Legal Subjects in the Village Regulations of Cimpago Guguak Bulek Bukittinggi

Local customary rules do not put legal subjects at the same status. It divides the subjects into two forms, namely general public and special communities. The former covers indigenous communities, migrants who live in customary areas either Minang people themselves or non-Minangkabau residents, and non-Muslim citizens whose existence is recognized by customary law. It also includes residents who live either permanently or temporarily in the

[41] Alfadrian, "Eksistensi Hukum Adat Minangkabau dalam Penerapan Sanksi Denda terhadap Pelaku Zina di Nagari Limo Kaum Kecamatan Lima Kaum," *JOM Fakultas Hukum Universitas Riau* 6, no. 1 (2019): 9. Basyral Hamidy Harahap, *Greget Tungku Rao* (Jakarta: Komunitas Bambu, 2007), 109.

[42] Iskandar Kemal, *Pemerintahan Nagari Minangkabau dan Perkembangannya, Tinjauan tentang Kerapatan Adat* (Yogyakarta: Graha Ilmu, 2009), 57.

[43] Hafizah, "Pergeseran Mamak Kandung Dalam Pelaksanaan Adat Minangkabau pada Masyarakat Jorong Batu Badinding Nagari Limo Koto Kecamatan Bonjol Kabupaten Pasaman," *Jurnal Ilmu Budaya* 16, no. 1 (2019): 36.

customary area and those who pass through the Cimpago customary area. When there found a traveller who used "too loud exhaust", he or she can be a subject of sanctions based on the applicable customary law as regulated in article 31

Meanwhile, special communities as the later are those with social position which can be categorized into three. First is as *niniak mamak* in a customary environment such as *datuak* (the highest customary chief), *panungkek,* (a vice of *datuak*) *malin* (those with Islamic knowledge mastery), and *sutan* (helper of the *datuk* in handling his jobs). Once they violate the regulation, the customary functional positions that they are assigned to enables them to get heavier sanction than *kamanakan* children they underwrite. *Niniak mamak* and their apparatus who violate regulation are subjects to a sentence of 3 times heavier than punishment of ordinary citizens, including the dismissal of traditional positions in the customary functionaries of *kampuang* or *pusako* attached beforeward. Additionally, revocation of positions and titles might also take place then continued by announcement of the case in public.

Second is a number of people with structural position in the customary environment, such as youth leader and apparatus, head of security and its apparatuses, head of *RT* and *RW*, and head of the youth mosque organization. Violating the regulation will cause them to get two- fold heavier sanctions than ordinary people. The sanction can be then followed by the dismissal of the position held. Third is people who keep participating at the events organized by people with the heaviest sanction or other heavy ones. They are punished to pay fine of 15 sacks of cement or an equivalent amount. Therefore, ordinary people or those who do not hold any position in the customary area as village officials or such are treated the same in obtaining legal sanctions.

Interestingly, Muslim in Talao area who violate the customary regulation and therefore are subjects to sanction are not involved in public activities, such as not being invited to work together and not being visited when passing away. This means that customary sanctions in the form of social exclusion are treated based on existing customary provisions of each area.

The Effect of Village Regulations in Urban Community Relationship at Bukittinggi

The decision of *niniak mamak* to formulate customary laws in Mandiangin sub-district, including those at Cimpago Guguak Bulek, aimed to solve the real problem occurring at the regional level. The established customary decision is then valid with binding power for those who live in the territory of Cimpago Guguak Bulek customary area, including non-Muslim citizens who have been recognized by custom. Into some extent, it seems that the customary regulation works well in making harmony social relationship among urban communities.

According to Ridwan, when a family of Bataknesse in Talao held a wedding party, they asked *Parik Paga Nagari* (a local youth organization) to secure and arrange parking around the party location. *Nagari* officials were invited to welcome guests, while Muslim neighbours are also invited to the party. They set the second floor for Muslim community to have meal with special equipments, while the first floor was for Batak Christian community with their specific menu and table equipments as well.[44]

The participation of local community in succeeding non-Muslim Batak party event shows a harmonious multicultural relationship. Each part has a sense of understanding in accepting customary laws which regulate the lives of both residents and migrants. Potential of social tension between Muslims and Christian is deemed to disappear when such activities involving many residents were carried out, such as cooperation, environmental sanitation parties, and others.

Another informant, Mr. Sidi who has lived in Bantodarano for a long time, also gave the positive response to the living customary regulations in Guguak Bulek. Accordingly, Yesi who has lived for 35 years in the Inkorba area revealed that implementation of customary law or *buek* in the Mandiangin area has been disseminated since January 12, 2014. People have shown no rejection as also clear from their positive response by emptying the houses which were previously rented to non-Muslims.

[44] Interview on Friday, January 9th 2018 Ridwan, "Interview."

Meanwhile, Masdiwar, a former member of KPU (*Komisi Pemilihan Umum*; Committee of General Comission) Bukittinggi who lives in Talao mentioned that since the establishment of customary law for Cimpago Guguak Bulek area, there have been significant changes. The natives live peacefully while their land is well protected from immigrants. Non-Muslims communities, particularly from Nias, still live temporarily at the area and typically come and go as brick labors instead of buying indigenous land to live in.[45]

Anoter example is Pasaman area which, according to Muchtar Nai'm as quoted by Basyral Hamidy Harahap, can be considered successful in facilitating acculturation and assimilation between Minang and Mandailing tribes as those in the Cubadak and Simpang Tonang. As the comers, Mandailing people generally accept matrilineal kinship but still retain distinctive features of their original culture. If there is a marriage between these two tribes, for instance, they will make agreement on which custom to use. Neither does exist conflict between both.[46] Futhermore, acceptance of Minangkabau people to Mandailing as a part of the Minang custom can be mainly seen from the appointment of *urang nan ampek jinih*_as *datuk* from Mandailing tribe as happened in Durian Tinggi.[47] This appointment is a part of local wisdom which also strongly characterizes local community's reflection.[48]

The Future of Village Regulations in Multicultural Societies

The customary law in Campago Guguak Bulek is substantially rooted from Minangkabau customs. Its establishment in urban communities like Minang people is actually problematic considering that it is typically the same as enforcing local identities in a pluralistic society. On the other hand, tourism department has a big plan to attract local or foreign tourists to Bukittinggi tourism destination. The

[45] Interview on Friday, May 1st 2018 Masdiwar, "Interview," n.d.

[46]Basyral Hamidy Harahap, *Greget Tungku Rao* (Jakarta: Komunitas Bambu, 2007), 109.

[47] Kemal, *Pemerintahan Nagari Minangkabau dan Perkembangannya, Tinjauan Tentang Kerapatan Adat*, 289.

[48] Eko Noer Kristiyanto, "Kedudukan Kearifan Lokal dan Peranan Masyarakat dalam Penataan Ruang di Daerah (Local Wisdom Position and Role of Society in Spatial Planning in the Region)"," *Jurnal Rechts Vinding* 6, no. 2 (2017): 161.

same effort was also carried out by regional government by inviting entrepreneurs to invest their capital in building industries for generating regional income and reducing unemployment rate on local, regional, and even national scale.

On the other hand, it is generally deemed that Minangkabau socio-cultural assets remain as one of archipelago's wealth that also deserves for consideration. In this context, the village regulation is a clear instrument for maintaining the local custom. Therefore, both local government and community keep doing efforts to preserve the Minang tradition. They routinely organize appointment ceremony of community leaders attended by regional heads such as regents or mayors, preserve *rumah gadang* (Minang traditional house), hold customary density starting from the provincial level to the village level, and so on.

According to Mr. Sidi, it is not fair to say that non-Muslims coming to Minangkabau as Islamic territory get discriminative treatment because the customary laws of each region are different due to each local wisdom. Moreover, the same condition happens among Muslim who want to buy the land in Flores region, East Nusa Tenggara which is predominantly Christians and in Bali with Hindu as the religion of its majority. This shows that each place respectively tries to protect its local culture from outer influences in the context of preserving local and distinctive socio-cultural aspect of each.[49] It clearly seems, therefore, that village regulation will maintain well in the future though modification and innovation might occur.

Conclusion

Various data on the village regulation at Campago Guguak Bulek ranging from its establishment, form, dissemination, sanction, legal subject stratification, to its effects reveal how established the regulation is. Instead of giving discriminatory treatment for comers, the village regulation is in fact a clear way to unite Minang people which are considered to begin leaving their cultural values in addition to maintaining one of archipelago's cultural wealth. Combination of strong implementation among indigenous, respect and obedience of comers, and its inclusion at formal regional regulation make it

[49] Interview on Saturday, February , 7th 2018 Sidi, "Interview."

compatible as the living law which will remain valid in the future. Any modification and innovation, however, are probably found as a customary adage says "*dima bumi dipijak di sinan langik dijunjuang*" (obligation to adjust behavior to where a person lives in).

Bibliography

Aditya, Zaka Firma, and M. Reza Winanta. "Rekonstruksi Hierarki Peraturan Perundang-Undangan di Indonesia." *Negara Hukum* 9, no. 1 (2018).

Agam, Sekretaris Daerah Kabupaten. Peraturan Daerah Kabupaten Agam No. 6 tahun 2005 tentang Berpakaian Muslim (2005).

———. Peraturan Daerah Kabupaten Agam No. 6 tahun 2005 tentang Pandai Baca dan Tulis Huruf al-Qur'an (2005).

Alfadrian. "Eksistensi Hukum Adat Minangkabau dalam Penerapan Sanksi Denda Terhadap Pelaku Zina Di Nagari Limo Kaum Kecamatan Lima Kaum." *JOM Fakultas Hukum Universitas Riau* 6, no. 1 (2019).

Ali, Suryadarma. *Mengawal Tradisi Meraih Prestasi, Inovasi dan Aksi Pendidikan Islam,*. Malang: UIN Maliki Press, 2013.

Alwi Bik. "Peraturan Daerah Syariah dalam Bingkai Otonomi Daerah." *Al-Daulah* 03, no. 02 (2013).

Bachtiar, Harsja W. *Pengaruh Adat Istiadat Minangkabau terhadap Kehidupan Wanita dalam Mengembangkan Budaya Bangsa*. Kumpulan N. Jakarta: Yayasan Bunda, 1983.

Bulek, Tim Niniak Mamak Campago Guguak. Undang-Undang Hukum Adat (peraturan Kampuang) Campago Guguak Bulek Jorong Mandiangin Nagari Kurai (2014).

Daerah, Sekretaris. Undang-undang No. 32 Th 2004 tentang Pemerintahan Daerah (2004).

Danial, Mardiyah. "Wanita Minangkabau di Tengah Adat dan Agama (Studi Kasus Peranan Wanita dalam Pembangunan di Kecamatan Banuhampu di Daerah Minangkabau)." UIN Jakarta, 1986.

Fatmi, Siti Raga. "Permohonan Tanah Ulayat Di Minangkabau Menjadi Tanah Hak Milik." *Lentera Hukum* 5, no. 3 (2018).

Hafizah. "Pergeseran Mamak Kandung dalam Pelaksanaan Adat Minangkabau Pada Masyarakat Jorong Batu Badinding Nagari Limo Koto Kecamatan Bonjol Kabupaten Pasaman." *Jurnal Ilmu*

Budaya 16, no. 1 (2019).
Harahap, Basyral Hamidy. *Greget Tungku Rao*. Jakarta: Komunitas Bambu, 2007.
Huda, Ni'matul. "Pembentukan, Pembatalan dan Pencabutan Peraturan Daerah," n.d.
Kemal, Iskandar. *Pemerintahan Nagari Minangkabau dan Perkembangannya, Tinjauan Tentang Kerapatan Adat*. Yogyakarta: Graha Ilmu, 2009.
Kristiyanto, Eko Noer. "Kedudukan Kearifan Lokal dan Peranan Masyarakat Dalam Penataan Ruang Di Daerah (Local Wisdom Position and Role of Society in Spatial Planning in the Region)"." *Jurnal Rechts Vinding* 6, no. 2 (2017).
Latief, H. Ch. N. *EtnisdDan Adat Minangkabau, Permasalahan dan Masa Depannya*. Bandung: Angkasa, 2002.
Latief, M. Sanusi. "Gerakan Kaum Tua Di Minangkabau." IAIN Jakarta, 1988.
Masdiwar. "Interview," n.d.
Muhammad, Bushar. *Asas-Asas Hukum Adat Suatu Pengantar*. Jakarta: PT Pradnya Paramita, 2006.
Muhtada. "Perda Syariah di Indonesia: Penyebaran, Problem dan Tantangannya." Semarang, 2014.
Murdan. "Harmonisasi Hukum Adat, Agama, dan Negara dalam Budaya Perkawinan Masyarakat Islam Indonesia Belakangan." *Asy-Syirah Jurnal Ilmu Syariah dan Hukum* 50, no. 2 (2016).
Nasroen, M. *Dasar Falsafah Adat Minangkabau*. Jakarta: Bulan Bintang, 1970.
Navis, AA. *Adat dan Kebudayaan Minangkabau*. Kayu Tanam: INS Kayu Tanam, 1980.
Ngutra, Teresia. "Hukum dan Sumber-Sumber Hukum." *Jurnal Supremasi* XI, no. 2 (2016).
Ridwan. "Interview." Bukittinggi, 2018.
Samry, Wannofri, and Azmi Fitrisia. "Fenomena Pengaruh Hindu di Minangkabau." In *Prosiding-Seminar Nasional*. Universitas Hindu Indonesia, n.d.
Sesse, Muh. Sudirman. "Budaya Hukum dan Implikasinya terhadap Pembangunan Hukum Nasional." *Jurnal Hukum Diktim* 11, no. 2 (2013).
Setiadi, Elly M., and Usman Kolip. *Pengantar Sosiologi, Pemahaman*

Fakta Dan Gejala Permasalahan Sosial; Teori Aplikasi dan Pemecahannya. Jakarta: Kencana Predana Media Group, 2011.

Sidi, Pak. "Interview," 2018.

Sonata, Depri Liber. "Metode Penelitian Hukum Normatif dan Empiris: Karakteristik Khas dari Metode Penelitian Hukum." *Fiat Justisia Jurnal Ilmu Hukum* 8, no. 1 (2014).

Sudaryatmi, Sri. "Peranan Hukum Adat dalam Pembangunan Hukum Nasional Di Era Globalisasi." *MMH* 41, no. 4 (2012).

Suharman. "Sejarah Pendidikan Islam di Minangkabau." *Turast; Jurnal Penelitian dan Pengabdian* 6, no. 1 (2018).

Sumanto, Dedi. "Hukum Adat di Indonesia Perspektif Sosiologi dan Antropologi Hukum Islam." *Jurnal Ilmu Syariah* 17, no. 2 (2018).

Syarifuddin, Amir. *Pelaksanaan Hukum Kewarisan Islam dalam Lingkungan Adat Minangkabau*. Jakarta: Gunung Agung, 1984.

Toeah, Datoek. *Tambo Alam Minangkabau*. Bukittinggi: Pustaka Indonesia, 1976.

Tutik, Titik Triwulan. *Konstruksi Hukum Tata Negara Indonesia Pasca Amendemen UUD 1945*. Jakarta: Kencana Predana Media Group, 2010.

Yessi. "Interview." Bukittinggi, 2018.

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 50-67
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v16i1.4302

Significance of Legal Culture Enforcement on Tolerance among Madurese Society through Inclusive Curriculum at IAIN Madura

Achmad Faidi
Sharia Faculty IAIN Madura, Jl. Panglegur KM. 4 Pamekasan
Email: afaidiharis@gmail.com

Achmad Fauzi
Sharia Faculty IAIN Madura, Jl. Panglegur KM. 4 Pamekasan
Email: vauzieachmad@gmail.com

Dimas Danar Septiadi
Sharia Faculty IAIN Madura, Jl. Panglegur KM. 4 Pamekasan
Email: septiadi.dimasd@yahoo.com

Article history: Received: October 5, 2020, Accepted: February 25, 2021, Published: June 27, 2021

Abstract:

The strong fanaticism of Madurese on diversities of religion, beliefs, opinions to affiliation makes it prone to social-religious conflict like between Shi'i-Sunni in Sampang. The minority group finds it hard to express their belief and build worship houses. This hegemony requires the right way to foster attitudes and understanding of values of tolerance. This article argues the importance of building public legal awareness through legal culture enforcement on tolerance. The historical normative approach becomes the basic foundation, including reviews on tolerance concept in the Qur'anic verses and Medina Charter, the concept of human right at Cairo Declaration, the Universal Declaration of Human Rights (UDHR), and the 1945 Constitution of the Republic of Indonesia. It reveals the importance of legal culture enforcement because public legal awareness can't only be built through legal substance and legal structure. Furthermore, the enforcement also functions to maximize several existing legal products on the tolerance building. The enforcement program can be through massive

Author correspondence email: afaidiharis@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

socialization in public spaces both in academic areas, such as universities, and other social institutions. Religious moderation concept of IAIN Madura can potentially become the instrument for the enforcement through the design of an inclusive curriculum.

Keywords:
Tolerance; Legal Culture Enforcement; inclusive curriculum, IAIN Madura, religious moderation

Abstrak:
Kuatnya fanatisme masyarakat Madura terhadap perbedaan agama, keyakinan, pandangan, hingga afiliasi menjadikan daerah ini rawan mengalami konflik seperti konflik Syi'ah-Sunni di Sampang. Bersamaan dengan itu, kelompok minoritas cenderung kesulitan mengekspresikan keyakinannya seperti saat akan membangun tempat ibadah. Hegemoni semacam ini mengharuskan adanya cara yang tepat guna menumbuhkan sikap dan pemahaman tentang nilai-nilai toleransi. Artikel ini memperlihatkan pentingnya membangun kesadaran hukum masyarakat melalui penguatan *legal culture* akan sikap toleran. Pendekatan normatif historis menjadi pijakan utama meliputi tinjauan soal konsep toleransi dalam al-Qur'an dan Piagam Madinah serta konsep HAM dalam Deklarasi Kairo, Universal Declaration of Human Right (UDHR) dan Undang-undang Dasar Negara Republik Indonesia 1945. Artikel ini mengungkapkan pentingnya penguatan *legal culture* di masyarakat sebab kesadaran hukum tidak bisa dibangun hanya dengan *legal substance* dan *legal structure*. Selain itu, penguatan *legal culture* juga berfungsi memaksimalkan beberapa produk hukum yang sudah ada dalam rangka membangun toleransi. Penguatan *legal culture* dapat dilakukan dengan berbagai sosialiasi yang masif melalui ruang-ruang publik, baik di lingkup akademik, seperti perguruan tinggi, maupun lembaga-lembaga sosial kemasyarakatan lainnya. Konsep moderasi agama di IAIN Madura, misalnya, bisa menjadi instrument yang cocok untuk program penguatan tersebut melalui rancangan kurikulum *inklusif*.

Kata Kunci:
Toleransi; Penguatan *Legal Culture;* Kurikulum Inklusif; IAIN Madura, moderasi beragama

Introduction

The religious pattern of the Madurese people relates closely to Islamic fanaticism. Although the number of Muslims is not 100% of its population, it is fair to say that more than 95% of Madurese are Muslim. The stigma of being a "*santri* community" can be justified in line with the large number of Islamic boarding schools scattered in each district in Madura. Based on the records of the Ministry of Religious Affairs, there are no less than 1026 Islamic boarding schools in Madura, making it also feasible to be referred to as "*Pesantren* Island" in addition to its well-known name as a salt island.

Additionally, statistics for *Diniyah* Education and Islamic boarding schools in the Ministry of Religious Affairs show that the four districts on Madura have a quite large number of *Diniyah* Educational Institution and Islamic Boarding Schools compared to other districts in Indonesia. Sumenep has 230 Islamic boarding schools, Pamekasan has 231, Sampang with 386, and Bangkalan with 179. In total, 1026 Islamic boarding schools that exist and develop as Islamic educational institutions. This fact inevitably affects and shapes the style and character of how Madurese people express their Islamic teaching.

For Madurese, the issue of differences in religion, belief, and socio-religious organization affiliation is so sensitive that are prone to cause any social conflict. Sunni-Shi'i conflict in Sampang, responses on Supardi's followers in Sumenep, and rejection of Madura Ulama Forum against Ahmadiyah congregation have clearly shown religious fanaticism among Madurese. According to Latif Wiyata, an anthropologist and a Madurese figure, Shi'i conflict in Sampang was a misused form of religious fanaticism among the Madurese people.[1]

In line with this, Mahfud MD, one of the Madurese figures, also said that Madurese are so fanatical about their religion that without proper management, it possibly leads to something negative such as

[1]https://nasional.tempo.co/read/425968/pemicu-rusuh-sampang penyalahgunaan-fanatisme-agama/full&view=ok

Shi'i conflict in Sampang. Therefore, he encourages all parties, such as the security apparatus, community leaders, and all other layers of society to stem this fanaticism.[2]

Mahfud's statement makes much sense considering that although K.H. Abdurrahman Wahid (Gusdur) has still become a role model among the Madurese community particularly among those affiliated with *Nahdlatul Ulama* (NU), they do not always follow his opinion in responding to any religious phenomenon. Many Madurese *pesantren* leaders (*kiai*) disagreed with Gusdur's opinion about *Ahmadiyah* sect. Approximately, 100 members of *kiai* affiliated in *Madura Islamic Boarding School Ulama Council* (*Badan Silaturrohim Ulama Pondok Pesantren Madura* or BASSRA) deplored Gusdur's opinion which supported *Ahmadiyah* while believing that Ahmadiyah sect deviates greatly from Islamic teachings. Furthermore, they asked the government to prohibit and disband Ahmadiyah congregation in Indonesia. [3]

Meanwhile, from December 2012 until today, Sunni-Sh'iah conflict in Sampang has not found the best and fair solution. Shiah refugees still have to stay at the shelter in Sidoarjo because Sunni followers still refuse their return to Sampang. On June 13, 2018, Sunni followers refused the plan to bury Kurriyah's (24 years) corpse, one of the Shi'ah refugees, at their common hometown. This is the second event after three years earlier, Busidin (65 years) experienced the same. The different sect affiliation causes Shi'ah followers to forcibly get evicted from their hometowns while leaving their various assets behind.

In a broader scope, the dominance of certain religious sects or affiliations has disabled some areas in Indonesia to build houses of worship for minority groups. In Sampang, for instance, there found no church as a place of worship for Christians. Likewise, the local *Forum Komunikasi Antar Umat Beragama* or FKUB (Inter-Religious Communication Forum) Sampang cannot function optimally. In fact, Indonesian multicultural society with several religions, beliefs, sects,

---

[2] "Fanatisme Keagamaan Orang Madura Harus Dibendung" (online) on https://nasional.kompas.com/read/2012/08/28/22195249/fanatisme.keagamaan.orang.madura.harus.dibendung.

[3] https://www.nu.or.id/post/read/3466/ulama-madura-berseberangan-dengan-gus-dur-soal-ahmadiyah

and affiliations requires strong awareness and understanding of the importance of multicultural values. This is mainly because social dynamics of multicultural society tend to be vulnerable to any friction and further conflict. Besides Shi'ah case in Sampang, some similar cases do exist, such as those in Poso, Ambon, Tolikara, Aceh, South Lampung, Situbondo, and others.

Those conflicts make it evident that regulations to protect freedom for religious believers to carry out each religious activity have not been successful yet. Clash and conflict over religion and belief still exist and are mostly triggered by excessive fanaticism as happened in Madurese society. In fact, a multicultural community requires its people to keep their ego down by not considering what they believe is the only right way. Otherwise, diversity will lead to conflict as Hassan Hanafi mentioned that when one truth is judged by another truth, it usually triggers prejudice while prejudice typically leads to conflicts.

Method

This study uses a qualitative analysis method and a socio-legal approach. The approach aims to address a problem through a combination of normative analysis with non-legal science. Data were obtained from library search, documentation, and interview. In this case, the social-humanities sciences are considered appropriate in studying the universal sociological phenomena of the Madurese community as the object of this research.

Theoretical Framework

The Qur'anic Verses

A lot of verses about freedom of religion and belief are mentioned in the Qur'an as the main sourcebook of Muslims. First is the verse which means: "*There is no compulsion to (enter) religion; indeed, the true path is clear rather than the wrong way*[4]." Likewise, another verse explained: "*For you are your religion, and for me my religion*[5]". Another verse also explains the same… "*And had your Lord willed, those on earth*

[4] QS: Al-Baqarah: 256
[5] QS: Al-Kafirun: 6.

would have believed – all of them entirely. Then, (o Muhammad) would you compel the people so that they become believers?[6].

It is also stated that diversity or multiculturality is something inevitable even necessary. It is furthermore a test for mankind whether they can live in harmony together. This is in line with what the Qur'an says; "*…to each of you, We prescribed a law and a method. Had Allah willed, He would have made you one nation, but to test you in what He has given you; so race to good. To Allah is your return all together, and He will inform you concerning that over which you used to differ*" [7]

Other than that, there are at least four important documents that accentuate the concept of tolerance and respect for human rights. They play a significant role in shaping how tolerance and human rights are understood worldwide. Furthermore, the essence of documents is repeatedly considered in making related decisions and policies. They consist of Medina Charter, Universal Declaration of Human Rights, Cairo Declaration, and the Constitution of the Republic of Indonesia (UUD NKRI) 1945 as below:

Medina Charter

The Medina Charter (*Shakhifah Madinah*) was initiated around the 7th century during the leadership of the prophet Muhammad pbuh in Medina. It is a clear blueprint for the protection of human rights and tolerance culture in society. Those two are in line with democratic political policy and good governance at that time.

The respect for human rights, balanced participation of citizens, and social justice in a pluralistic society had become the priority agenda of the Prophet Muhammad at the beginning of his leadership. In particular, Medina Charter is a portrait of mutual agreement between Muslims and other religious communities, as well as fellow Muslims with different cultures and understanding.[8]

Medina itself is a place that is approximately 400 kilometers away from the north of Makkah. Its citizens consist of several Arab and Jewish tribes with different religions and beliefs. The plurality of Medina society consisted of various clans. Among Islam, there were

[6] QS: Yunus: 99.

[7] QS: al-Maidah: 48.

[8] Nurcholish Madjid, *Cita-Cita Politik Islam di Era Reformasi*, (Jakarta: Yayasan Paramadina, 1999), 24.

Muhajirin and *Ansar* while among the Jews, there were *Aus* and *Khazraj*.[9] Apart from them, there were many other groups such as people of Quraidzah, Nadhir, and Qoinuqo as well as some Medina citizens who had not yet converted to Islam.[10]

The plurality is also clear in the aspect of nationality, regional origin, social class and customs.[11] It was inevitable to find Medina society with different ways of thinking and characteristic that it sometimes becomes a potential factor in triggering any multicultural conflict.[12]

Based on this background that Prophet Muhammad wisely understood, he soon formed a collective agreement or *resultant* in the form of legislation named Medina Charter. It aimed to create order, peace, security, and justice that all parts of society can experience and accept very well. It furthermore became a unifying constitution with humanitarian and tolerance values among a pluralistic community[13] that all groups can easily accept it.[14]

On a global level, Medina Charter is broadly considered as one of the first forms of modern state constitutions which inspired the founding of many constitutional countries afterward.[15] At least, it consists of forty-seven articles. Freedom of religion and belief is regulated in article 25 and reads as follows: "As a group, the Jews of *Banu 'Auf* live next to Muslims. Both parties have their respective

---

[9] It needs to know that the majority of *Anshar* people from *Khazraj* clan worshipped idols while the Jews believed in monotheism and were given knowledge and holy book. See Ibn Hisyam, *Sirah Nabawiyah* (Bekasi: PT. Darul Falah, 2015), 389.

[10] Zainul Abidin Ahmad, *Membentuk Negara Islam* (Jakarta: Bulan Bintang, 1960), 93–94.

[11] Ali Irsyad, "*Piagam Madinah dan Pengaruhnya terhadap Masyarakat Madinah,*" research paper (Yogyakarta: Fakultas Adab Jurusan Sejarah dan Kebudayaan Islam UIN Sunan Kalijaga, 2009), 1.

[12] Fahruddin, "*Muatan Nilai dan Prinsip Piagam Madinah dan Pancasila*," 4.

[13] Ahmad Sukardja, *Hukum Tata Negara & Hukum Administrasi Negara: dalam Perspektif Fikih Siyasah* (Jakarta: Sinar Grafika, 2014), 67.

[14] Abdurrahman Asy-Syarqowi, *Muhammad Sang Pembebas*, trans. Ilyas Siraj (Yogyakarta: Penerbitan Universitas Atma Jaya, 2000), 136–37.

[15] Hanif Fudin Al-Azhar, "*Refleksi Normatif Mengenal Ṣaḥīfah Al-Madīnah Terhadap Konstitusi Negara Indonesi*a," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 1, no. 1 (May 29, 2018): 4, https://doi.org/10.24090/volksgeist.v1i1.1617 See also in Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara* (Jakarta: Rajawali Pers, 2015), 85 and Dahlan Thaib et al, *Teori dan Hukum Konstitusi* (Jakarta: Rajawali Pers, 2013), 31

religions and so do each ally. If any of them commit persecution and sinful deed in this relationship, the consequences will be borne by themselves and their fellow citizens".[16]

Overall, there found at least twenty-three articles that regulated internal relationships among Muslims (*Muhajirin* and *Ansar*) while twenty-four articles ruled external relationships of Muslims and others, such as Jews. Therefore, it is fair to say that Medina Charter is an initial constitution that accentuates human rights and religious tolerance that can be used as a foothold to build a peaceful and pluralistic society.

Universal Declaration of Human Rights (UDHR)

In addition to the Medina Charter, the content in the Universal Declaration of Human Rights (UDHR) is another relevant foundation in an effort to build awareness of the importance of tolerance and respect for human rights in diverse societies. As one of the fundamental rights, Article 18 states that; "Everyone has the right to access freedom of thought, conscience, and religion, including freedom for religious conversion and declaration on religion or belief by teaching, practicing, worshiping and obeying it both individually and collectively in both public and private places.[17]

Textually, the wording of the article shows that tolerance and respect for others' fundamental rights are very important. It also makes it clear that the fulfillment of these rights can be carried out either individually or in groups in both public and private places. The article also implies that the right for freedom of religion and belief has individual and collective dimensions or what is known as 'internum forum' and 'externum forum'[18]. While the former is absolute and cannot be limited, the latter is limited under certain conditions because it refers to the freedom to express religion or belief. The principles of these limitations are contained in the *Syracuse Principles*.[19]

---

[16] Medina Charter, article 25.

[17] See UDHR, Article18.

[18] Zainal Abidin Bagir, et.al, 2019, *Membatasi Tanpa Melanggar; Hak Kebebasan Beragama dan Berkeyakinan*, Yogyakarta, CRCS. .

[19] *Ibid*, 9.

Cairo Declaration

The Cairo Declaration is another agreement that accentuates the importance of tolerance. Some consider it as a conception of human rights according to Islam similar to UDHR from the Western perspective. The declaration pays major attention to religious and belief tolerance. Medina Charter is the one that inspired and became the reference of this declaration

The tenth article of this declaration regulates religious and belief tolerance. It states that Islam is a pure religion from Allah the Almighty. It prohibits any form of coercion or exploitation of one's poverty or ignorance to change his/her religion or make him/her become an atheist[20]"

Indonesian Constitution

The protection toward freedom of religion and belief in Indonesia is regulated in the 1945 Constitution or UUD RI. Article 28E states; "Everyone is free to embrace a religion and worship according to his religion, to choose education and teaching, to choose a job, to choose citizenship, to choose a place to live in any territory of the country and leave it then come back afterward." The next verse mentioned that everyone has the right to freedom of religion, speech, and attitude according to each conscience.[21]

Likewise, Article 29 more explicitly explains that the state guarantees freedom of each resident to embrace his/her religion and to worship according to it.[22] The freedom of religion is the most basic right in the Indonesian constitution that no one could interfere under any circumstances.[23]

These provisions are furthermore strengthened by Law no. 39 of 1999 concerning Human Rights. Additionally, Article 22 of the Law repeatedly explains that everyone is free to embrace his/her religion and to worship under the state's guarantee. [24]

[20] Article 10 of the Cairo Declaration
[21] Artikle 28E Verse 1 and 2 UUD RI 1945.
[22] *Ibid*, Pasal 29 ayat 2
[23] *Ibid*, Article 28I verse 1
[24] Article 22 of Law 39/1999 about human rights/HAM (*Hak Asasi Manusia*)

Result & Discussion

Strengthening the Legal Culture of the Community

Several cases of religious conflicts and intolerance in Indonesia reflect that both the legal awareness and the legal culture of the society still tend to be weak. The existence of laws and regulations regarding religious and belief tolerance does not necessarily make Indonesia free from any religious and belief conflicts.

To maximize the function of law in a certain society, the role of several legal systems with some elements is particularly needed. Each of those elements needs to be interrelated with one another to achieve the purpose of establishing any legal product. In the context of Indonesia with multiculturality in various aspects ranging from ethnicities, religions, cultures, and languages, the formulation of an appropriate legal system becomes urgent to maximize the law's function and effectiveness.

According to the theory of the legal system introduced by Friedman, there are at least three elements of legal systems that need to establish, namely legal substance, legal structure, and legal culture.[25] The first element refers to any legal product that has been formed and in the Indonesian context, it includes several forms of legislation. Meanwhile, the legal structure, the second element, is a structural element involved in the formation process of a legal product as well as its executor or enforcer. As for the legal culture, the third element is an implementation of values and expectations in the form of a legal product. In other words, legal culture refers to the manifestation of values in a legal product which has been alive in the midst of society.

Unfortunately, habituation, education, or the process of building public awareness on the law frequently receive less attention as they are often considered less important. In fact, a legal norm will be difficult to obey or enforce without people's awareness, knowledge, and understanding.[26] Therefore, any agenda of habituation or education of law needs intensive and massive development, such as through integrating it into the curriculum of

[25] Lawrence M Friedman, *Sistem Hukum Perspektif Ilmu Sosial* (Bandung: Nusa Media, 2011), 33.

[26] Asshiddiqie, *Pengantar…*, 26.

educational institutions. This is important particularly because the process of building public awareness of the laws requires maximum efforts in various spaces and institutions.

Furthermore, obedience and enforcement of any legal product greatly depend on perceptions, attitudes, or legal culture of the community. In this context, how the process of law education occurs in society, particularly how each legal subject accepts it, gives significant influence. Analogically, if the legal structure is described as a machine while the legal substance is a machine-produced product, the legal culture can be likened to anyone who determines the running or functioning of the product. Therefore, it is very urgent to strengthen the legal culture in various ways.

One of which is through the curriculum of educational institutions. In the context of Madura, various existing of educational institutions can play a role, such as Islamic boarding schools and higher education institutions. They have a strategic position to begin the formulation of multicultural perspective in a hope that it can reduce religious conflict or fanaticisms of understanding among Madurese people.

The Significance of Tolerance Values through Inclusive Curriculum at IAIN Madura

One of the missions of the Indonesian Ministry of Religious Affairs is to spread harmony among religious communities by, among others, establishing the Forum for Inter-Religious Harmony (FKUB; *Forum Komunikasi Umat Beragama*).[27] This indicates that harmony among religious communities gets much attention. Moreover, every level of the working units of the Ministry, such as PTKIN (*Perguruan Tinggi Keagamaan Islam Negeri*, state Islamic high schools), is obliged to become a funnel and facilitator in creating harmony in a very multicultural Indonesian society. Among others, it is done through spreading the religious moderation concepts.[28]

[27] The Rule of the Minister of Religious Affair, Number 42 the year 2016 about Ortaker (*Organisasi dan Tatakerja,* organization and working rules) in the Ministry of Religious Affair, Article 4 verse (4) point a.

[28] Lukman Hakim Saifuddin "*Moderasi Beragama untuk Kebersamaan Umat*" (Religious Moderation for People's Togetherness), speech material of the former minister of Religious Affair in *Rakernas* (*Rapat Kerja Nasional*; National Meeting) of

The religious moderation embodying in the moderate and tolerant attitude is deemed as an important step to build and manage harmony in Indonesia. Considering this, as a part of the working unit of the ministry, IAIN Madura carries responsibility in working on the mission as mentioned above. It makes sense, therefore, to find the mission of the university integrated into the ministries, namely to produce graduates who are religious, moderate, competent, independent, and competitive as well as nationalist.[29]

The point of religious characteristic aims to produce graduates who are devout in religion, maintain noble character, and respects diversity.[30] As the largest religious university in Madura island, IAIN Madura has big potential to spread tolerance value while showing a good attitude in responding to diversity. The university is furthermore a home of more than 10,000 students spreading over ***thirties*** study programs in four existing faculties. They also come from all districts of Madura ranging from Pamekasan, Sampang, Sumenep and Bangkalan. This composition makes the role of IAIN Madura strategic enough to build the habit of tolerance while reducing fanaticism on other religious and cultural understandings.

In order to play the role very well, the university needs to adjust what it can do considering its distinctive asset and function with the need it wants to fulfill. As plurality and multiculturalism require an inclusive perspective of society which will lead to a tolerant attitude on any social fact, particularly diversity, the university can play its role through, among others, its curriculum design. It is an appropriate implementation strategy to spread the concept of religious moderation which will lead to a tolerant attitude towards all forms of diversity. In the context of Madura, it becomes more urgent to apply considering that the Sunni-Shi'i conflict has not yet founded any common ground. Besides, the vulnerability of religious conflict in Madura is another basic reason in building a tolerance perspective toward others by upholding human rights values.

The Ministry of Religious Affair of 2019 on January 23-25, 2019, at Shangrila Hotel Jakarta.

[29] *Statuta* of IAIN Madura

[30] Interview with Mohammad Kosim as the rector of IAIN Madura on November 25, 2019.

On the other hand, curriculum design has an urgent role to achieve academic goals. The curriculum design of an educational institution greatly influences the character building, attitude, and mindset of its alumni. As an example, the exclusive curriculum style of a *pesantren* tends to produce alumni with an exclusive mindset and vice versa. The exclusive curriculum refers to a design that does not enable students to do critical thinking based on various scientific perspectives. Some previous records note that some suicide bombers in Indonesia are alumni of several Islamic boarding schools with exclusive or extreme curriculum designs in religious understanding.

Theoretically, the curriculum is one of the means or bridges that lead students to achieve learning objectives. In another word, it is a learning plan. Therefore, as a plan, the design of a curriculum requires serious attention and consideration to produce graduates as expected. Curriculum also determines the process of policymaking on academic aspects needed by each faculty, department, or study program. Therefore, the curriculum should be a foothold in terms of making goals, content, and learning materials to achieve certain educational targets or goals.

There are at least four factors to consider in designing a curriculum, namely philosophical, sociological, psychological, and epistemological aspects. Of those four factors, the sociological aspect needs to get major attention as it always requires periodic reconstruction considering that sociological issues are always changing dynamically. Moreover, differences in space and time often require specially designed curriculum for certain communities[31] so that content of the curriculum is supposed to be in line with living cultural values in society. Considering that society is a source of learning, the locally based curriculum is the one that enables learning curriculum compatible to suggest a solution for any living problem of a certain society.

In this context, IAIN Madura considerably needs to design a specific curriculum based on the social conditions of the Madurese

[31] Masykuri Abdillah, "Menimbang Kurikulum IAIN; Kasus Kurikulum 1995 dan 1997", in Komaruddin Hidayat and Hendro Prasetyo (Eds.), *Problem dan Prospek IAIN; Antologi Pendidikan Tinggi Islam,* Jakarta: Direktorat Pembinaan Perguruan Tinggi Agama Islam, 2000, 73.

community with strong religious fanaticism. Moreover, the hegemony of dominant particular religious understanding often triggers any religion-based conflict. The curriculum, therefore, needs to be inclusive. While NU is the most dominant group in Madurese society, for instance, the curriculum should not be NU-centrist while ignoring other mass-social organizations. The inclusive spirit will be more easily spread and accepted through an academic approach to avoid any causes which possibly trigger sectoral egos.

An inclusive curriculum has a big chance to serve as a medium for building awareness of cultural diversity, and respect for human rights as well as eliminating or minimizing various types of negative prejudices to build a harmonious multicultural community under a mutual sense of justice. It can be a right beginning to solve or avoid social conflict in society by providing awareness that, for example, conflict is not a good thing to cultivate.

For example, the curriculum of Syari'ah Faculty might accentuate studies on varieties of disciplines needed in building the competence of its alumni.[32] The curriculum itself is divided into four competencies, namely: (a) General Basic Competency Courses (MKDU; *Mata Kuliah Dasar Umum*), consisting of courses that all students of IAIN Madura from any study program must take; (b) Main Courses (MKU; *Mata Kuliah Umum*), consisting of courses that students of Syari'ah Faculty need to take them; (c) Professional Competence Courses (MKP; *Mata Kuliah Kompetensi Pendukung*), consisting of some courses that students in some certain study programs under the auspices of Sharia Faculty must take them, and (d) Other Competency Courses (MKL; *Mata Kuliah Kompetensi Lain*), consisting of some courses that students in a particular study program can take them or not.

The tolerance, multicultural, and inclusive spirit need to get spread through all of the mentioned categories. It can be done by including relevant topics into each syllabus of the courses, such as respect for religious freedom, diverse belief, and the likes. There are some specific courses that possibly contain relevant topics or material for discussing the importance of respecting human rights and practicing tolerance.

[32] Interview with the dean of Sharia faculty, IAIN Madura on August 10, 2019.

The first course is Civics Education (*Pendidikan Kewarganegaraan*) in the first semester. Materials on respecting human rights and strengthening tolerance can be included in the semester course plan considering that the course aims to build awareness and understanding among citizens toward their country identity and characteristics. Therefore, the importance of maintaining the values of tolerance in the context of Indonesian multicultural society is a relevant and proper theme for the course.

The next courses are Introduction to *Ulumul al-Qur'an* (Qur'anic Sciences), History of Islamic Law (*Tasyri'*), and *Ushul Fiqh.* The syllabus of these courses might contain materials on the urgency of respecting human rights, diversity, and differences in the context of a multicultural society as well. The three are even the core courses of Sharia Faculty of IAIN Madura.

Issues on respecting diversity and strengthening the valuesof tolerance in the Introduction to the *Ulumul Qur'an* course can be included in the material of exegesis/Qur'anic interpretation. In discussing some relevant Qur'anic verses on religious freedom, for instance, the issue and spirit of multiculturalism can be well mentioned and portrayed, even made the main subject of class discussion. [33]

Meanwhile, the course of the History of Islamic Law (*tasyri'*) greatly provides space for discussing the theme of human rights and tolerance culture. This is mainly because the course generally discusses the historical aspect of Islamic law from old time to the present, namely from the process of revelation of the Koran, the emergence of Islamic Law formulation in the era of *mujtahid* (the Imams of the School), until the day when the law still lives in the nowadays community. Furthermore, the law products reflect the condition of social dynamics with various ethnic backgrounds and beliefs and as a consequence, Islamic law tends to be different from one another. The difference stems from diverse opinions and considerations of each *mujtahid* or the leaders of *fiqh* schools based on each ethnicity, culture, social, even political background. This point can be well emphasized in discussing the history of the emergence

[33] Based on an interview with a lecturer of *Pengantar Ulumul Qur'an*, Ahmad Qusyairi at Sharia faculty, IAIN Madura, July 17, 2019.

and development of Islamic law so that the students can understand Islamic law in a more open and dynamic way.

Likewise, in the *Ushul Fiqh* subject as a course that examines the procedures for formulating (*istinbath*) Islamic law, incorporating sociological aspect in formulation process needs to get underlined before students. The course can therefore be an entry point for the birth of contemporary Islamic legal formulation products compatible with the recent development of society.

Conclusion

This article found that building public awareness to respect human rights and diversity while practicing tolerance should be done by the whole parties, including higher educational institutions. University can play a role by designing an inclusive curriculum to highlight the importance of harmonious life and tolerance in the plural society while avoiding any social conflict. Madurese society which tends to be homogenous is not excepted to this discussion considering the Sunni-Shi'i conflict in Sampang has not yet found any fair ending. Therefore, IAIN Madura as the biggest Islamic higher educational institution on the island can begin designing an inclusive curriculum that leads the students to be more open coping with diversity. At the Shari'a Faculty, the internalization of multicultural values can be done at least at the course of Civics Education, Introduction to *Ulmul Al-Qur'an*, History of Islamic Law (*Tasyri'*), and *Ushul Fiqh.*

Bibliography

Abdillah, Masykuri "Menimbang Kurikulum IAIN; Kasus Kurikulum 1995 dan 1997", in Komaruddin Hidayah and Hendro Prasetyo (Eds.), *Problem dan Prospek IAIN; Antologi Pendidikan Tinggi Islam,* Jakarta: Direktorat Pembinaan Perguruan Tinggi Agama Islam, 2000.

Abdullah Saaed, *al-Qur'an an Introduction,* New York: Routledge, 2008.

Abidin Bagir, Zainal, et al., *Membatasi Tanpa Melanggar; Hak Kebebasan Beragama dan Berkeyakinan*, Yogyakarta: CRCS, 2019.

Ahmad, Wardini, *Kurikulum Syari'ah,* Palembang: Lembaga Kajian Hukum Islam (LKHI), 2004.

Asshiddiqie, Jimly, *Pengantar Ilmu Hukum Tata Negara,* Jakarta: Rajawali Pers, 2015.

Azhar, Hanifudin "Refleksi Normatif mengenal Ṣaḥīfah Al-Madīnah terhadap Konstitusi Negara Indonesia," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 1, no. 1 (29 Mei 2018)

Eko Riyadi, et.al, *Mengurai Kompleksitas HAM; Kajian Multiperspektif,* Yogyakarta: PUSHAM UII, 2007.

Fajar Riza Ul Haq, et.al, *Islam, HAM, dan Keindonesian; Refleksi dan Agenda Aksi untuk Pendidikan Agama,* Jakarta: Ma'arif Institute for Culture and Humanity, 2007 .

Friedman, Lawrence M, *Sistem Hukum Perspektif Ilmu Sosial*, Bandung: Nusa Media, 2011.

Hanafi, Hassan, *al-Yasaarul Islam,* Kairo: Maktabah Madlubi, 1981.

Hasanuddin AF, *Konsoersium Ilmu Kesyari'ahan dan Struktur Kurikulumnya,* Yogyakarta: Gama Media, 2004

Ibn Hisyam, *Sirah Nabawiyah,* Bekasi: PT. Darul Falah, 2015.

Irsyad, Ali *Piagam Madinah dan Pengaruhnya terhadap Masyarakat Madinah,* Penelitian Yogyakarta: Fakultas Adab Jurusan Sejarah dan Kebudayaan Islam UIN Sunan Kalijaga, 2009.

Jaser Auda*, Membumikan Hukum Islam Melalui Maqashid Syariah;* terjemahan "Maqashid Shariah as Philoshophy of Islamic Law; A System Approach", Bandung: Mizan, 2015.

Kementerian Hukum dan Hak Asasi Manusia RI, *Hak Asasi Manusia untuk Semua,* Dirjen HAM, 2010.

Madjid, Nurcholish *Cita-Cita Politik Islam di Era Reformasi*, Jakarta: Yayasan Paramadina, 1999.

Masdar Farid Mas'udi, *Syarah Konstitusi; UUD 1945 dalam Perspektif Islam,* Bandung: Nusa Media, 2010.

Mashood A. Baderin, *Hukum Hak Asasi Manusia dan Hukum Islam,* Jakarta: Komisi Nasional Hak Asasi Manusia, 2010.

----------, *Islam Agama Peradaban: Membangun Makna dan Relevansi Doktrin Islam dalam Sejarah,* Jakarta: Paramadina.

Muhammad Abid Al Jabiri, *Agama, Negara, dan Penerapan Syariah,* Yogyakarta: Fajar Pustaka Baru, 2001.

RH. Makhrur Adam Maulana, *Konsepsi HAM dalam Islam; Antara Universalitas dan Partikularitas,* Yogyakarta: Pustaka Ilmu, 2015.

Rhona K.M. Smith, dkk, *Hukum Hak Asasi Manusia,* Yogyakarta, PUSHAM UII, 2008.

Schacht, Joseph, *An Introduction to Islamic Law (Indonesian version)* Yogyakarta: Islamika, 2003.

Sukardja, Ahmad *Hukum Tata Negara & Hukum Administrasi Negara: Dalam Perspektif Fikih Siyasah,* Jakarta: Sinar Grafika, 2014.

Syarqowi, Abdurrahman Asy-, *Muhammad sang Pembebas*, trans. Ilyas Siraj, Yogyakarta: Penerbit Universitas Atma Jaya, 2000.

Thaib, Dahlan dan et al, *Teori dan Hukum Konstitusi,* Jakarta: Rajawali Pers, 2013.

Tim Redaksi Ensiklopedi Islam, *Ensiklopedi Islam,* Bandung: Mizan, 1992

Zainul Abidin, Ahmad, *Membentuk Negara Islam,* Jakarta: Bulan Bintang, 1960.

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 68-86
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v16i1.4517

Tarjih Maqashidi of Granting Remission for Terrorist Convict in Indonesia

Dwi Aprilianto
Universitas Islam Lamongan (UNISLA), Jl Veteran No 53 Lamongan
Email: dwiaprilianto4324@gmail.com

Salman Zahidi
Universitas Islam Lamongan (UNISLA, Jl Veteran No 53 Lamongan
Email: salmanzahidi04@gmail.com

Article history: Received: September 20, 2020, Accepted: February 11, 2021,
Published: June 27, 2021

Abstract:

The problem of the deradicalization policy of terrorist convicts is in the regulation of granting remissions for terrorism convicts because terrorist convicts can manipulate the conditions for granting remission to pretend to be good and cooperative (*taqiyah*) during their criminal period in prison, so that they can quickly gain freedom and return to the network. This empirical research was processed descriptively. Data collection was carried out through field research at the Class I Lapas Surabaya prison and Class II B Lamongan prison through a phenomenological approach, interpretive paradigm, and *tarjih maqashidiy* analysis. This study concludes that granting remissions to terrorism convicts has a more significant advantage (*maslahah*) than eliminating remissions on the grounds of extraordinary crimes. Providing the opportunity to change behavior is better prioritized than providing punishment without any attempt to change the behavior of terrorist prisoners with the maximum penalty.

Keywords:
Tarjih Maqashidi; Remission; Terrorist Convicts

Author correspondence email: dwiaprilianto4324@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

Abstrak:

Salah satu problematika yang muncul dari kebijakan deradikalisasi narapidana terorisme adalah aturan perihal pemberian remisi bagi narapidana terorisme dengan syarat kelakuan baik dan kooperatif (taqiyah) selama menjalani masa pidana. Padahal, mereka bisa berpur-pura baik agar segera keluar dari penjara dan kembali ke jaringan lamanya. Penelitian empiris ini diolah secara deskriptif sementara pengumpulan datanya dilakukan melalui observasi dan wawancara di Lapas Kelas I Surabaya dan Kelas II B Lamongan dengan pendekatan fenomenologi, paradigma interpretif, dan analisis tarjih maqashidi. Studi ini menyimpulkan bahwa pemberian remisi pada narapidana terorisme memberikan keuntungan yang lebih signifikan (*maslahah*) dibanding menghapus kebijakan tersebut dengan alasan kejahatan luar biasa yang dilakukan narapidana. Memberikan kesempatan mereka untuk berubah lebih baik dianggap lebih utama dan layak diprioritaskan dibanding memberi hukuman maksimal tanpa usaha apapun untuk mengubah perilakunya.

Kata Kunci:

Tarjih maqashidi; Remisi; Narapidana Terorisme

Introduction

The deradicalization policy of terrorism convicts in Indonesia is contained in the rules of granting remission. It becomes problematic because the convicts can simply manipulate the conditions by pretending to behave well and cooperatively (*taqiyah*) during their criminal period in the prison. Therefore, they can quickly get released and return to the old network.

Some facts of recidivism on former terrorism convicts show how they were re-involved in the terrorist network after being released from Class I Prison Surabaya. They are Nasruddin Mukhtar Moh Sholah Ikhwan, Suryadi Masud, and Syarief Tarabubun who respectively could quickly get lenient sentencing then returning to the old terrorism network. [1]

[1] Documentation Class I Lapas Surabaya prison and Class II B Lamongan prison.

In general, deradicalization can be successful only in terrorism convicts under the category of terrorism sympathizers instead of members of executioners/ideologists. This is mainly because the later group plays an essential role in planning or spreading the violent ideology.

Another problem of remission rules for terrorism convicts is found in the Government Regulation No. 99 of 2012 concerning The Terms and Procedures for the Implementation of Correctional Inmates' Rights. This regulation is considered discriminatory against convicts because of ignoring their fundamental rights such as the right to obtain remission or reduce the punishment. For instance, Class I Surabaya prison terrorism convicts with life sentences (Fathurahman, Asep Djaja, and Ismail Yamsehu) who have met the requirements and been committed to the The Repulic of Indonesia still failed to get remission because their verdicts have not been reviewed yet.

The fact that many radical terrorism convicts still refuse to participate in deradicalization program in the prison is partly due the terrorism law which does not regulate the obligation for them to follow the program. The Law No. 5 of 2018 on the deradicalization of terrorism crimes does not even explicitly oblige them to follow the program.

In fact, terrorism as an extraordinary crime should also be distinctive in its punishment from other ordinary crimes. Accordingly, it makes sense to find policy suggestion on the different treatment of granting remission process for terrorism convicts.

In this context, some suggest that remission is contrary to the certainty of a fair law for crime victims. The verdict of a judge is supposed to represent a sense of community justice, but the government still possibly reduces its implementation without going through a retrial. Therefore, removing the procedure of remission cannot be categorized as human rights violation. Moreover, the basic philosophy and historical root of remission are the mercy of a Dutch queen.[2]

On the other hand, pro-remission party argues that abolishing the chance of remission among terrorism convicts means violating

[2] Widja Priyatno, *Sistem Pelaksanaan Pidana Penjara di Indonesia* (Bandung: Refika Aditama, 2009).

their human rights. According to them, remission aims to prevent any further crimes and fix the characters of perpetrators. Therefore, no matter case of the convicts is, they are supposed to be entitled to remission as long as they behave well in serving their sentences.[3]

Philosophy of Remission of Terrorism Convicts

The implementation of prison sentences with the correctional system in Indonesia currently refers to Law No. 12 of 1995 on Correctional Services. Philosophically, the implementation is emphasized to the concept of rehabilitation and social reintegration so that inmates and juvenile offenders could realize their mistakes and return to be good citizens. This concept does not distinguish any form of crime, including at the process and the procedure of granting the remission and parole.

Based on the Government Regulation of the Republic of Indonesia Number 32 of 1999, remission is a reduction in the period of criminal life given to inmates and juvenile offenders who meet the conditions specified in the legislation. Meanwhile, the provisions of Article 1 of presidential decree of the Republic of Indonesia No.174 of 1999 does not give any clear definition of remission. It only reads: "Every inmate and juvenile offenders serving a temporary prison sentence and criminal confinement can be granted remission if they behave well during the criminal justice process."[4]

One of the conditions for terrorism convicts to get remission is to become so called justice collaborator by helping to dismantle the criminal case they committed. This is mainly crucial because their role in "uncovering" the veil of terrorism network crimes is difficult to do by any law enforcers. A justice collaborator is defined as a witness of a criminal case who is willing to help or cooperate with the law enforcers. Thus, the justice collaborator serves as both a witness and a suspect who must give the trial information. The information that he or she reveals will then be taken into consideration in obtaining remission. However, apart of this procedure, remission is proved not

[3] Government Regulation of the Republic of Indonesia Number 32 of 1999 concerning Terms and Procedures for the Implementation of the Rights of Correctional Assistants, Article 1 point 6.

[4] Presidential Decree Number 174 of 1999 concerning Remissions, Article 1 number 1

to be correlated with a decrease in the number of terrorism crimes. It even tends to increase the number because some perpetrators repeat their offenses both inside and outside the prisons. [5]

The policy of granting remission for terrorism convicts is therefore prone to be abused by the convicts and contrary to the certainty of a fair law for crime victims. The verdict that the judge has made to the terrorist convicts should have represented justice value that the public wishes. However, reducing the sentencing period without any trial is considered contrary to the value. The omission of remmision is therefore can't be considered as human right violation because remmision itself is based on mercy. The controversy over this remission stems from assumption that the verdict of the convicts is still very far from people's expectation considering terrorism as an extraordinary crime. [6]

Meanwhile, the philosophy of correctional sentence for terrorism convicts is essentially a temporary criminal deprivation of freedom for a specific duration of time instead of for lifetime with an indefinite period. On the other hand, a life sentence imposed on certain convicts has a particular purpose as a preresquite of rational criminal politics.

Relating to this, Bjorgo assumes that individuals actually do not want to commit any acts of terrorism. However, he/she can turn the life choice conversely once they join a radical group. Therefore, to omit and get rid of the radical ideology over a person and take him/her out of the radical group, it requires "pushing and pulling factors." The fromer is a negative factor that makes a person reluctant to remain in their old group, while the later is a positive factor in the form of an opportunity to live a more promising life.[7]

---

[5] Government Regulation of the Republic of Indonesia Number 99 of 2012 concerning Second Amendment to Government Regulation Number 32 of 1999 concerning Terms and Procedures for the Implementation of Correctional Guidance Rights Article 43 A.

[6] Roeslan Saleh and A. Josias Simons R, *Budaya Penjara* (Bandung: Karya Putra Darwati, 2010).

[7] Naureen Chowdhury Fink and Ellie B. Hearne, *Beyond Terrorism: Deradicalization and Disengagement from Violent Extremism* (New York: International Peace Institute, 2008).

Table 2. 2 Pushing and Pulling Factor

Pushing Factor	Pulling Factor
1. Social pressure and stigma that make them reluctant to remain in the radical groups. 2. Conflict or opposition in the group's internal circle. 3. Feeling disillusioned with the change in the leader's perspective or the condition when the leader is caught or killed. 4. Disappointed with the group's methods of violence act or loss of attention to group members. 5. Threats from the country or any inner circle of the group 6. Change of the group orientation. 7. Empathy for the victims.	1. Attention from family or friends 2. Willingness to build a household. 3. Finding more interesting new ideology. 4. Willingness to improve economic conditions.

Tarjih Maqashidi

Tarjih maqashidi is putting a certain law over others using the bonds (*quyud*) of *maqashid shar'i* (the main purpose of shariah).[8] In another term, it is mentioned as *taqdim* (favoring one over another) when a *mujtahid* (those who do *ijtihad* or the search of law) prioritizes one of two contradictory proposition *(dalil)* due to the power *(quwwah*) of *maslahah* (advantages).[9] *Tarjih maqashidi* or *tarjh bi al-maqashid* applies not only on the strong contradiction between two propositions, but also at the differences on the forms, kinds, and categories of *maslahah* and *mafsadah* (disadvantages) produced by the provision of law.[10] In this article, we define *tarjih maqashidi* as the

[8] Muhammad Jabri Syamsuddin, *Al-Tarjih al-Maqhasidi bayna al-Nusus al-Muta'ariah*, dalam http://iefpedia.com/arab/?p=8130. accessed March 16, 2020.

[9] Muhammad al-Asuri, "Al-Tarji@h{ Bi Al-Maqas}id Wa D}awabituhu Wa Atsaruhu Fiqhi" (Universitas al-Haj Li Hadar Jazair, 2008). 38.

[10] Ahmad Imam Mawardi, *Fiqh Minoritas* (Yogyakarta: LKIS, 2010). 230.

superiority of a law/policy based on its *maslahah* and *mafsadah* aspects using theories of *mizan maslahah* (the scale of advantages) in the discipline of *maqashid al-shari'ah*.

Relating to this, Imam Nawawi said that doing *tarjih* to choose one of several opposing propositions is very important. In a broader scope, making a choice is a certainty in life that everyone can't avoid from. This *tarjih* process particularly enables intellectuals to achieve perfection in mastering various fields of science.[11]

In *tarjih* practice, seeing the problem and contradiction in details will be a main way to understand the problem. Such conditions generally lead to a formulation of solution based on methods corresponding to existing contradictions to find more dominant *maslahah* situation *(arjah masalih,* more advantageous one*)*. To assess and determine which one is more advantageous, a clear and consistent standard is required so that the dominant position exists definitively instead of assumption based.

When it is found contradiction between two types of *maslahah* or *mafsadah,* the categories of each will be observed whether it is *daruriyah* (primary), *hajiyah* (secondary), and *tahsiniyah* (tertiary). From this consideration, we bring up the five scales of *maslahah* and *tarjih maqashidi* concept of as follows:

1. *Qimah Shumul al maslahah* (the quality of *maslahah);*
2. *Miqdar Shumul al maslahah (*the quantity *of maslahah);*
3. *Taakud Nataij al maslahah (*the accuracy of *maslahah);*[12]
4. *Quwah wa umum Atsar al maslahah* (the effectiveness of *maslahah*);[13]
5. *Imtidad Zama@ni al maslahah* (the duration of *maslahah*). [14]

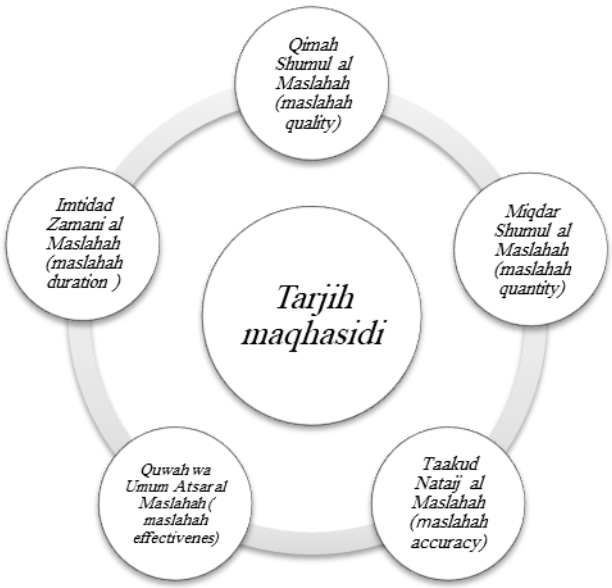
---

[11] Jalal al-din 'Abd al-Rahman Ibn Abi Bakar al-Suyuti, *Tadrib Al-Rawi Fi Sharh Taqrib Al-Nawawi*, 2nd ed. (Beirut: Dar Ihya al-Sunnah al-Nabawiyyah, 1979).196.

[12] Muhammad Sa'id Ramadan al-Buti, *D}awabit Al-Maslahah Fi Al-Shariah Al-Islamiyyah* (Beirut: Mu'assasah al-Risalah, 2000). 249-254.

[13] Abd Majid Najjar, *Maqas}id Al-Shari'ah Bi Ab'ad Jadidah* (Beirut: Dar Garib al-Islami, 2008). 252-265.

[14] Ahmad Al-Raysuni, *Nazhariyyat Al-Taqrib aa Al-Taghlib F@ Al-Ulum Al-Islamiyyah* (Kairo: Dar al-Kalimah, 1997). 350-368.



Picture: *Tarjih Maqhasidi* Concept

Controversy on Terrorism Convicts Remission

The lifetime sentences for Poso terrorists in Class I Prison Surabaya (Asep Jaja, Ismail Yamsehu and Fathurahman) shows contradiction among uncertain period of sentencing time, system of remission justice and correctional philosophy. Based on the Article 9 of the Republic of Indonesia Number 174 of 1999, a convict with a lifetime sentence has no hope for getting a remission before granting Presidential Clemency.

The positive law governing the granting of remissions to criminal convicts itself has reflected and applied the concept of disciplinary in a big framework of criminalization and nurturing the inmates. Moreover, remissions are typically not immediately granted to any inmates. There are stages or processes and conditions of remission that every inmate needs to fulfill. Such circumstances indicate that remission is a form of appreciation or "reward" for the inmate's good behavior.

The remission policy, particularly for terrorism convicts, raises controversy. Arguing between human rights in the framework of nurturing program and the deterrent effect for both convicts and people at general is a part of the controversy. Remission is

furthermore partly seen as the right of terrorism convicts and in line with the philosophy of criminal implementation that enables them to socialize again with other people like before. If a convict has fulfilled the legislation's requirements, he or she must obtain the legislation's rights without exception, including terrorism convicts, as conveyed by Bambang Sugianto as follows:

> "A strong reason on why terrorism convicts in class I Surabaya prison, including Umar Patek, wants to get remission is that because they want to go back to their families, wives and children. Included is those with lifetime sentence who hope to get clemency due to their excellent behavior in the prison. They wish that their proposal for a sentence review can be approved and the prison period can be shorthened to 20 years."[15]

On the other hand, others assume that granting remissions for terrorism convicts is a form of denial on the community's sense of justice. The length of sentencing period imposed by the court and carried out by the convicts is still considered disproportionate to the losses due to terrorism that Indonesian people endure.

Apart of the controversy, a policy of criminal law on granting remission to terrorism convicts has been formulated specifically and differently from other crimes' convicts through the Government Regulation No. 28 of 2006 junto Government Regulation No. 32 of 1999. It regulates that terrorism convicts can get remission after serving a third of their sentence providing that they behave appropriately. This provision exists as a form of embodiment of a sense of justice in the law enforcement.

However, some legal practitioners still question the existence of injustice issue in granting remissions for terrorism convicts. They even propose a policy to abolish remission procedure claiming that the proposal is not contrary to human rights. Moreover, it is based on a firm legal foundation under both sociological and juridical reasons,

[15] Bambang Sugianto, *Interview*, Sidoarjo 16 July 2019.

namely fulfilling the formulation of community justice."[16] On the contrary, some human rights activists assume that the policy not to grant any remission to terrorism convicts has been contrary to the concept of disciplinary itself. In other words, they assume that abolishing remission procedure seems to restore the criminal system in Indonesia into the older one in prison system.

In a short word, proposal of refusing grant remission for terrorism convicts deserves for an appreciation due to the spirit of terrorism eradication. Terrorism as an extraordinary crime had killed an incredible number of victims so that granting remission for its convicts is considered to hurt the community's sense of justice. The community demands that terrorist be punished severely following their actions. Furthermore, granting remission is deemed to be contrary to the spirit of the government in the eradication of terrorism crimes. However, in terms of the philosophy of law and the legal basis of its enforcement, it needs serious review to ensure that the policy has a firm regular basis and in line with the sentencing philosophy in the concept of correctional period. Regarding with that, Umar Patek said so:

> "Granting remission is very important for terrorism convicts, let alone those of us who have behaved well, positively, obeyed all the rules in prison, tried to help the government in deradicalization activities, and pledged to the Unity of Republic of Indonesia. Therefore, the government should give a clear reward and punishment to the inmates as a form of justice. However, the discourse of *taqiyah* by willingness to participate in deradicalization programs along with other wishes, according to me, is not equal with their ideology. The ideology can't be exchanged for a petty change called remission." [17]

[17] Umar Patek, *Interview*, Sidoarjo, 12 October 2019.

Given this kind of situation, efforts to succeed the radicalization program among terrorist convicts as well as to deal with over capacity at the prison can be done by regulating very severe conditions for terrorist convicts to get remission. This strict requirement is deemed not to hurt the sense of justice among Indonesian people who put their hope to eradicate terrorism more effectively. Regarding with the controversy of remission, Mr. Sukir, the chief of guidance and correctional division of the *Ministry of Law and Human Rights* (Kemenkumham) East Java Office, explained as follow:

> "Along with public's demand which expects terrorism convicts to be punished severely, we just can do nothing when some of them remain at the old ideology by not joining any deradicalization program and not participating in nurturing activities of the correctional institution such as praying in the mosque or attending state ceremonies. Neither do they expect remission or conditional release. When this happens and the sentence period ends, we just release them and not hold them on even one more night. After the realease, it becomes the responsibility of The National Counter-Terrorism Agency (BNPT; *Badan Nasional Penanggulangan Terorisme*)."[18]

In line with Sukir, Bambang Sugianto, a guardian (*pamong*) of terrorism convicts in Class I Surabaya prison explained the problem of remission for terrorism convict as follows:

> "Controversy on the remission for terrorism inmates has long been rolling along with the change of policies. For instance, terrorism convicts are required to fulfill very heavy requirement ranging from participating in deradicalization

[18] Sukir, Guidance correctional district *Minister of Law and Human Rights* (Menkumham) East Java, *interview*, Surabaya, 31 January 2019.

> programs, being justice collaborators by dismantling their old network, to willingness to pledge to the Unity of Republic of Indonesia under digital recording. Those requirements are not easy for them and when they are not really sincere or *taqiyah*, we can not know it for sure. However, the pledge will make them deemed as infidels by their old inner circle. Umar Patek knew and felt the contingency with claims and the term *kafir* addressed to him by other inmates." [19]

Tarjih Maqhasidi Application on the Remission for Terrorism Convicts

Along with the controversy, it is worth to formulate suitable policy solution using the analysis of *tarjih maqhasidi* or scales *maslahah* as follows:

1. The Quality of *Maslahah*

One of purposes of granting remission is to reduce the negative impact on the freedom deprivation of inmates who behave well during the sentencing period while giving them confidence to be better persons.[20] Therefore, the policy applies following the sentencing principles through correctional system and respects on inmates' human rights. The remission policy furthermore aims to provide pleasure and drive the inmates to maintain their attitude and behavior while in prison.

Remission is given in the hope that the inmates will be willing to repent and admit the wrongdoing. Furthermore, they are given a chance to return to their family and community. This is included in the protection of life *(hifdz al-nafs)* and human rights *(hifdz al-huquq al-insan)* in the *dharuriyat* category. It is mainly because the family left behind is in desperate need of the figure of the inmates, who typically

[19] Bambang Sugianto, *Interview,* Sidoarjo 16 July 2019.

[20] Gresham M Sykes, Inmates feel *five lost Lost of Liberty, Lost of Security, Lost of Authority, Lost of Sexual, Lost of Good Service* in Andi Hamzah, *Azas-Azas Hukum Pidana* (Jakarta: Rineka Cipta, 1994).

serve as the heads of the household and are responsible for the welfare and security of the family *(hifdz al-usrah).* [21]

The loneliness in the prison and home longing becomes one of the pulling factors for terrorism convicts to leave their old ideology and begin a new peaceful life while building a family. This occurred in the case of Umar Patek, Toni Saronggalo, and Galih who got the motivation to leave the radical circle through their family's encouragement.

2. The Quantity of *Maslahah*

The policy of granting remission is one way to reduce excess capacity and budget savings in the prisons. Apart of it, it is also a part of social reintegration effort aiming at reuniting inmates with the community while reducing the negative impact of imprisonment on their psychology so that they can reintegrate more easily with the society.

Additionally, granting remission for terrorism convicts providing the condition on their willingness to become justice collaborators is a form of *maslahah 'ammah* (public advantages). This is mainly because the disclosure of terrorism network will make it easier for the Police and Counterterrorism Special Detachment **(**Densus 88; *Datasemen Khusus*) to uncover and even prevent any action plans or *amaliyah* that endanger the wider community.

When the convicts can well cooperate with the Police or BNPT, existing terrorism network will be weaker because it implies disintegration of the radical group members. Moreover, the absence of support from networks outside the prisons and claims on infidelity for those who participate in deradicalization program will further strengthen the convicts' willingness to return to the unity of the Republic of Indonesia. This, for instance, occurred at the case of Umar Patek and Ali Fauzi.[22]

3. The Accuracy of *Maslahah*

---

[21] Jasser Audah, Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach. (London: International Institute of Islamic Thought, 2008).

[22] Ali Fauzi, *Interview and Discussion,* with Religius Rehabilitation Group Singapura, Surabaya 9 November 2019.

The fact on terrorism convicts in Class I Prisons Surabaya and other prisons raises questions about the effectiveness of deradicalization programs and remission grant for terrorism convicts in Indonesia. This is mainly because good behavior in prisons does not always guarantee that the convicts have relinquished their radical beliefs. It is still possible to find very good and cooperative behavior in the prison, including participation in some coaching programs, which comes from deception so that after the release, they return to the old network.

However, apart of some allegation (*zani*) on the problem described above, granting remission is deemed to have many favorable and definite (*qot'iy*) impacts on the inmates. This is clear both during sentencing period and after reintegrating to the community. Therefore, a campaign to remove remission chance for terrorism inmates is contrary to the concept of correctional system and the criminalization philosophy namely preventive, rehabilitative, and social reintegration. In other words, the policy seems to restore the criminal system in Indonesia into the prison system as before.

The social reintegration approach of correctional services enables terrorism convicts to get services and acceleration on their return to the public life. Among others, this is done through remission mechanisms as it provides certainty of a broader and better opportunity for inmates to return to society. Still, through a legal formal approach which only concerns with the number in the sentencing, systematic community involvement will be out of consideration. In the later case, the handling of a terrorism convicts will be quite challenging to succeed. [23]

The existence of The Peace Circle Foundation (YLP; *Yayasan Lingkar Perdamaian*) and The Peace Inscription Foundation (YPP; *Yayasan Prasasati Perdamaian*) with a new vision and mission as a pulling factor for terrorism convicts really matters. They approach and embrace both terrorism convicts and ex-convicts while getting them thinking about religion and the state. Many of the convicts have realized their mistakes and rebuilt a new life afterward, such as Galih, Toni Saronggalo and some ex-convicts of the Bali bombings in

[23] N. V. Paranjape, *Criminology & Penology* (Uttar Pradesh: Central Law Publications, 2017).

Tenggulun. They even drove them self to protect Indonesia from any acts of terrorism with counter-narratives of radicalism and regret for things they did at the past. [24]

4. The Effectiveness of *Maslahah*

Remission becomes motivation for inmates to do self-foster considering that it is a part of their rights and coaching facility inseparable from other coaching programs. They believe that if they can perform their obligations very well, they will be entitled to remission as long as the specified requirements have been fulfilled.

On the contrary, retaliation as punishment coming in various forms will not make a person's condition normal anymore because sanctions are only a means to satisfy the presence of suffering. In these conditions, the punishment can vary from an inmate to another. The granting of remission, meanwhile, implies the meaning giving to the suffering itself as well as consequence of a person's change from a criminal to a common part of society.

Changes among terrorism convicts coming from their own awareness will be clear through effective and permanent ideological changes. This initially can stem, for instance, from meeting and feeling compassion with terrorism victims which later become the driving and pushing factor of ideological change from the heart. This kind of situation deserves for concrete appreciation through reduction of sentencing time (remission) to facilitate the repentance of radicalism believers.

5. The Duration of *Maslahah*

The ultimate goal of coaching programs in the prisons is to change the inmates into good people. When an inmate can show the results of behavior change to be fair, he/she is granted for several rights to alleviate the suffering. The sooner any behavior change is clear as a result of coaching, the sooner the suffering ends or reduces. [25]

---

[24] Ivan Aditya, "Sekelompok Mantan Napiter Dukung Terciptanya Keamanan," accessed September 12, 2019, https://krjogja.com/;

[25] Mahrus Ali, *Dasar-Dasar Hukum Pidana* (Jakarta: Sinar Grafika, 2015).

According to inmate integration aspect, the policy on eliminating remission policy for terrorism convicts with a life sentence can be said as inappropriate or not fulfilling the purpose of criminalization itself. Moreover, the correctional system tends to provide impossible protection of life-sentence inmates on the grounds that their life in prison is indefinite. The reduction of criminal term is therefore something that correctional inmates are waiting for because remission is very special and able to accelerate their process for prison-release.

One of the pulling factors for terrorism inmates to participate in deradicalization programs and get remission as the result is the economic incentives in the form of money/capital assistance for those considered to be well behaved while in prison. The capital was once given to Umar Patek who sold goat satay during his imprisonment. Galih and Supyanto in Lamongan Prison also got the same for a handicraft business they managed in the form of paintings, birdcages and fragrant oil as well as Toni Saronggalo with chicken lathe assistance for his business.

The program is managed by the government through cooperation of BNPT, The Police, and several government agencies hoping that terrorism convicts are willing to leave their old groups and start a new life independently after the release. The government claims that the program has been able to help ex-terrorism convicts to integrate back into society, although not all are effective in this way.

Table 2. *Tarjih} Maqhasidi* Remission of Terrorism Convicts Application of *Tarjih Maqhasidi*

	***Maslahah* of Remission for Terrorism Convicts**	***Mafsadah* of Remission for Terrorism Convicts**
Quality	Granting remission to terrorism convicts is a deradicalization offer. It can return them back to families and this is included in the protection of life *(hifdz al-nafs)* and protection of human rights *(hifdz alhuquq al-nafs insan)* in	The remission grant is contrary to the certainty of fair law for the victims. The abolition of remission will not impact anything on the community and is not a part of *daruriyat* that should be imposed on terrorism

	daruriyat category. It is particularly because the abandoned family will be in desperate need of the figure of the household head *(hifdz usra)* as a person responsible for the welfare.	convicts. There found other rehabilitative policies which are better to be implemented, such as deradicalization and rehabilitation.
Quantity	Remission grant for terrorism convicts with the condition of becoming a justice collaborator is a form of *maslahah 'ammah* (public advantage) because the terrorism network's disclosure is a big capital to prevent any terrorism act (*amaliah)* that endangers the wider community.	The cessation of remission has a reason based on the interests of some parts of community (*maslahah khassah*) as victims instead of society in general.
Accuracy	Remission becomes the spirit of all terrorism convicts to do good deeds in prison while trying their best to behave well and following the deradicalization coaching program. This is the purpose of the long-running criminal prosecution of terrorism convicts.	The sentence duration is deemed disproportionate to the harm caused by terrorism act. However, there is also no guarantee that someone detained for a long time will change their ideology.
Effectiveness	The remission procedure makes terrorism inmates expect that the prison sentencing period will be completed more quickly. It also drives them to do good and return to the community in a state of repentance. This punishment's effectiveness functions to incarcerate and	Some terrorism convicts becoming recidivists again after the remission does not reflect ineffectiveness of remission at a wide scale. Instead, it is more about the lack of control in prisons.

	change the inmates for becoming better persons.	
Duration	The procedure of granting remission rights can raise awareness among terrorism convicts to change, behave well and repent to gain freedom faster.	Long-term confinement without comprehensive deradicalization guidance has no impact on the characteristic changes in the terrorism ideology.

Conclusion

Comparative observation between aspects of *maslahah* and *mafsadah* and the consideration of *maqhasid shariah* in five aspects (quality, quantity, accuracy, effectiveness, and duration) of *tarjih maqhasidi* show that granting remission for terrorism convicts contain a stronger *maslahah (arjah)* than abolishing remission for them. Testimonies from sample of terrorism convicts clearly show how they wish for remmision and how it helps them much in building a new life and reintegrating with community both socially and economically.

Bibliography

Abd Majid Najjar. *Maqhasid Al-Shari'ah Bi Ab'ad Jadidah*. Beirut: Dar Garib al-Islami, 2008.

Ahmad Al-Raysuni. *Nazhariyyat Al-Taqrib Wa Al-Taghlib Fi Al-Ulum Al-Isla>miyyah*. Kairo: Dar al-Kalimah, 1997.

Ahmad Imam Mawardi. *Fiqh Minoritas*. Yogyakarta: LKIS, 2010.

Andi Hamzah. *Azas-Azas Hukum Pidana*. Jakarta: Rineka Cipta, 1994.

Audah, Jasser. *Maqasid Al-Shariah as Philosophy of Islamic Law: A Systems Approach.* London: International Institute of Islamic Thought, 2008.

Hearne, Naureen Chowdhury Fink and Ellie B. *Beyond Terrorism: Deradicalization and Disengagement from Violent Extremism*. New York: International Peace Institute, 2008.

Ivan Aditya. "Sekelompok Mantan Napiter Dukung Terciptanya Keamanan." Accessed September 12, 2019. https://krjogja.com/;

Jalal al-din 'Abd al-Rahman Ibn Abi Bakar al-Suyuti. *Tadrib Al-Rawi Fi Sharh Taqrib Al-Nawawi.Beirut: Dar Ihya al-Sunnah al-Nabawiyyah*, 1979.

Mahrus Ali. *Dasar-Dasar Hukum Pidana*. Jakarta: Sinar Grafika, 2015.

Muhammad al-Asuri. "al-Tarjih bi al-Maqhasid wa Dhawabituhu wa Atsaruhu Fiqhi." Universitas al-Haj Li Hadar Jazair, 2008.

Muhammad Sa'id Ramadan al-Buti. *Dhawabit Al-Maslahah Fi Al-Shariah Al- Islamiyyah.* Beirut: Mu'assasah al-Risalah, 2000.

Paranjape, N. V. *Criminology & Penology*. Uttar Pradesh: Central Law Publications, 2017.

Roeslan Saleh and A. Josias Simons R. *Budaya Penjara*. Bandung: Karya Putra Darwati, 2010.

Widja Priyatno. *Sistem Pelaksanaan Pidana Penjara di Indonesia.* Bandung: Refika Aditama, 2009.

Sukir, Guidance correctional district Minister of Law and Human Rights (Menkumham) East Java, Interview, Surabaya,

Ali Fauzi, Interview with Religius Rehabilitation Group Singapura, Surabaya

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 87-110
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v16i1.3948

The Understanding of *Wasl Al-Fiqh Bi Al-Hadith* at Traditional Dayah Aceh

Lazuardi Muhammad Latif
Jabatan Al-Quran dan Al-Hadith, Fakulti Usuluddin Akademi Pengajian Islam, Universiti Malaya, Kuala Lumpur 50603, Malaysia
Email: lazuardimohamed@ar-raniry.ac.id

Faisal Bin Ahmad Shah
Jabatan Al-Quran dan Al-Hadith, Fakulti Usuluddin Akademi Pengajian Islam, Universiti Malaya, Kuala Lumpur 50603, Malaysia

Article history: Received: January 5, 2021, Accepted: February 27, 2021, Published: June 27, 2021

Abstract:

Wasl al-Fiqh bi al-Hadith integrates jurisprudence and hadith so that it enables fiqh experts to rely on hadith in formulating their rulings while hadith experts can derive a more accurate interpretation. Among others, this concept is applied at Aceh traditional dayah as the oldest Islamic educational institution in the Malay Archipelago which Acehness put their respect as the reference in Islamic rulings and teaching. This field study took place at Dayah Mudi Mesra, Samalanga, Aceh, due to its long-established reputation and great influence among Acehnese. The study aims to shed some light on the concept of *wasl al-Fiqh bi al-Hadith* according to some Islamic scholars, analyze the concept as perceived by the traditional Dayah of Aceh, and portray the polemic on Friday prayer ritual as prescribed by the traditional Dayah. The study employs qualitative data collection instruments consisting of library data, interviews, observations, and documentation. Inductive, deductive, and comparative methods were used for data analysis. The study found that implementation of this concept at the Dayah has been synonymous with the exclusive adoption of Shafi'i school as it heavily relies on several Shafi'i books or opinions of Shafi'i scholars as primary references.

Author correspondence email: lazuardimohamed@ar-raniry.ac.id
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

Keyword:
Wasl al-Fiqh bi al-Hadith; Jurisprudence; Dayah Aceh

Abstrak:
Wasl al-fiqh bi al-hadith memadukan kajian fiqh dan hadis sehingga ahli fiqh dapat berpedoman kepada hadis dalam merumuskan aturan-aturan hukum sementara ahli hadis dapat mengetahui makna sebuah hadis dengan lebih akurat. Konsep ini salah satunya diterapkan di Dayah Tradisional Aceh, sebuah lembaga kajian Islam tertua di Kepulauan Melayu yang disegani dan menjadi rujukan dalam hal aturan serta ajaran Islam di masyarakat setempat. Kajian ini merupakan studi lapangan yang bertempat di Dayah Mudi Mesra Samalanga Aceh karena pengaruhnya yang sudah lama dan berakar kuat bagi masyarakat Aceh. Ia bertujuan mendalami konsep *wasl al-fiqh bi al-hadith* menurut para cendekiawan Muslim, mengkaji pemahaman akan konsep *wasl al-fiqh bi al-hadith* di kalangan Dayah tersebut dan memotret polemik soal pelaksanaan Salat Jumat di dalamnya. Kajian ini merupakan studi kualitatif dengan pengumpulan data secara pustaka, wawancara, observasi, dan dokumentasi. Sementara itu, analisis data dilakukan secara induktif, deduktif, dan komparatif. Hasil penelitian ini menunjukkan bahwa implementasi konsep tersebut sebenarnya tidak lebih dari adopsi eksklusif terhadap madzhab Syafi'i karena ketergantungan yang demikian kuat pada buku-buku madzhab Syafi'i serta pandangan ulama-ulama Syafi'iyyah sebagai referensi utama.

Kata Kunci:
Wasl al-Fiqh bi al-Hadith; Jurisprudensi; Dayah Aceh

Introduction

The matter of positioning *hadith* as the second source after the Qur'an is a fact that is always acknowledged by all Muslims in daily life. However, if this matter is studied comprehensively, there are always things that are not in line with the goals to be achieved by the substance of the *hadith*. Yet, it is more to follow whatever suits their interests and deny others. This problem often occurs in the religious life of people in Aceh.

The program implementation was appointed Friday prayers as one example of jurisprudence which has raised the issue of

insurrection and religious conflicts that have occurred among the people in Aceh massively. This event was conducted by a large group of traditional Aceh Islamic boarding school alumni who gathered in the Islamic Defenders Front (FPI) at the mosque of Baiturrahaman Banda Aceh on July 26, 2015.[1] Thousands of Islamic boarding school students and scholars coming from various areas of Aceh in the assembly on 10th of September 2015 in the tomb of Syiah Kuala (Shaykh Kuala) read some claims to the Government of Aceh and the central government in Jakarta. One of the demands is to transfer the administration of the Baiturrahman Great Mosque to the Dayah scholars and under the board of Wali Nanggroe.[2]

Things, as mentioned, have led to the emergence of academic anxiety so that we are interested in studying the conceptual framework of *Wasl al-Fiqh bi al-Hadith* which has been compiled by several scholars and used as a guide in thinking and understanding *hadith* correctly. We also examine the understanding of the concept of *Wasl al-Fiqh bi al-Hadith* in the traditional Aceh Islamic boarding school. The focus that we concern is how Dayah scholars understand the concept of *Wasl al-Fiqh bi al-Hadith*.

[1]Al Chaidar, "Menyoal Benturan Antarmazahab di Aceh," *Aceh Tribunnews*: http://aceh.tribunnews.com/2015/06/26/menyoal-benturan-antarmazhab-di-aceh. Accessed 0n 25 Ogos 2018.

[2]Animos, "Ulama Dayah Minta Pengelolaan Mesjid Raya Baiturrahman di Bawah Wali Nanggroe," *Analisadaily*: https://analisadaily.com/berita/arsip/2015/9/10/169516/ulama-dayah-ingin-kelola-masjid-baiturrahman/. Accessed on 28 September 2020. Humas Aceh, "demonstrasi tak selesaikanperkara ibadah," *Humas Aceh*: https://humas.acehprov.go.id/. Accessed on 12 September 2020.

Method

We used a qualitative approach[3] in the form of descriptive analysis. In doing research, we have divided the processes into two stages, namely data collection and data analysis.

The data were collected through library research, observation, in-depth interview by disguising the name of the interview sample (pseudonym), and documentation which involved online news, printed media, and the website of Lajnah Bahsul Masail (LBM). This study was conducted in Ma'hadal Ulum Diniyah Islamiyah Mesjid Raya Samalanga, Bireuen, Aceh province as the largest and most influential Islamic boarding school in Aceh.[4] Meanwhile, the data were analyzed by using inductive,[5] deductive,[6] and comparative.[7]

Discussion and Result

Conceptual Framework of *Wasl al-Fiqh bi al-Hadith* (*Ma'alim wa Dawabit*)

Concerning the discussion of the conceptual framework of *Wasl al-Fiqh bi al-Hadith,* the scholars have already made some methods that must be practiced to successfully apply this concept as practiced in early Islam.

Faisal Bin Ahmad Shah in his book *Kaedah Tepat Memahami Hadis* has mentioned twenty methods that should be used as a guide in applying this concept, namely (1) understanding *hadith* according to the perspective of the Qur'an[8] which is divided into several parts of the discussion[9] as follows; Strengthening the meaning of *hadith* with

---

[3]See Miles dan Huberman, *Qualitative Data Analysis: A Source Book of New Methods* (California: Sage Publication, 1994).

[4]See Firdaus, Hasbi Amiruddin, dan Amroeni, "The Role of Huda in the Implementation of Islamic Shari'ah in Aceh," *IOSR Journal Of Humanities And Social Science* II, no. 5 (2017): 15, www.iosrjournals.org.

[5]See Muhammad Majid Konting, *Kaedah Penyelidikan Pendidikan* (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1990). 13.

[6]This study is to formulate a conclusion of general evidence.

[7]This study is to formulate a conclusion by doing a comparison of factual data. A Comparative study is used in analyzing the comparison of the concept of *Wasl al-Fiqh bi al-Hadith* in the Dayah's scholars, Aceh.

[8]Faisal Bin Ahmad Shah, *Kaedah Tepat Memahami Hadis* (Kuala Lumpur: Universiti Malaya, 2016). 70.

[9]Faisal, *Kaedah Tepat*, 70-80.

some evidence in the Qur'an, interpreting the meaning of the word *gharib* with some evidence in the Qur'an, understanding the matter of *mujmal* in *hadith* with some evidence in the Qur'an, understanding *hadith* by referring to the Qur'an, understanding *hadith* by generalizing *hadith* with the Qur'an, distinguishing the words shared by *hadith* and the Qur'an, understanding *hadith* by referring to the Qur'an and restricting *mutlaq sunnah* with the Qur'an, (2) explaining *hadith* with other *hadith*,[10] (3) understanding the *hadith* according to the understanding of the *salaf*,[11] (4) mastering the Arabic language and its methods,[12] (5) understanding and deepening the knowledge of *Gharib al-Hadith*,[13] (6) understanding *hadith* according to the method of *Usul al-Fiqh*,[14] (7) identifying and understanding al- *'Amm*, *al-Khass*, *al-Mutlaq* and *al-Muqayyad*,[15] (8) understanding *hadith* by referring to *Asbab al-Wurud*,[16] (9) understanding *hadith* based on *Maqasid*,[17] (10) looking at the actual recitation of the *hadith*; is not in its meaning,[18] (11) distinguishing *Marfu'*, *Mawquf*, *Mursal* and alike,[19] (12) identifying certain properties found in *hadith*,[20] (13) focusing on the objective of the *hadith,* not its essence (form)m[21] (14) adhering to the appearance of *hadith* (textual) without interpreting it,[22] (15) interpreting *hadith* if necessary,[23] (16) distinguishing fact and metaphor (*majaz*) in understanding *hadith,* [24] (17) not to over use common sense in understanding *hadith*,[25] (18) not to interpret *hadith* with interpretations

[10]Faisal, *Kaedah Tepat*,. 80.
[11]Faisal, *Kaedah Tepat*,. 91.
[12]Faisal, *Kaedah Tepat*,. 91.
[13]Faisal, *Kaedah Tepat*,. 96.
[14]Faisal, *Kaedah Tepat*,. 98.
[15]Faisal, *Kaedah Tepat*,. 109.
[16]Faisal, *Kaedah Tepat*,. 115.
[17]Faisal, *Kaedah Tepat*,. 120.
[18]Faisal, *Kaedah Tepat*,. 129.
[19]Faisal, *Kaedah Tepat*,. 132.
[20]Faisal, *Kaedah Tepat*,. 134.
[21]Faisal, *Kaedah Tepat*,. 136.
[22]Faisal, *Kaedah Tepat*,. 143.
[23]Faisal, *Kaedah Tepat*,. 153.
[24]Faisal, *Kaedah Tepat*,. 157.
[25]Faisal, *Kaedah Tepat*,. 161.

that are contrary to *Sunan Ilahiyyah,*[26] (19) understanding *Mukhtalif al-Hadith* wisely,[27] (20) identifying *Nasikh Mansukh* found in the *hadith.*[28]

Although in the title of the twenty methods mentioned to understand the *hadith*, the twenty methods also provide great effectiveness in jurisprudence decisions resulting from the understanding of the *hadith*. Although the definition of *al-Fiqh* referred to in the book has a preferable tendency to *Fiqh al-Qur'an* and *Fiqh al-Hadith* generally,[29] but the word *al-Fiqh* in a special understanding that has been put forward by the scholars of *fiqh* and *Usul al-Fiqh* in the form of law is also produced from *Fiqh al-Qur'an* and *Fiqh al-Hadith*. Therefore, we have seen a strong rationale to make it as a theoretical framework of *Wasl al-Fiqh bi al-Hadith*.

Yusuf al-Qaradawi in his four books has also made a conceptual framework that can be used as a guide, either by the *muhaddithun* or *fuqaha'*. The four books are *Kayfa nata'amal ma'a al-Sunnah al-Nabawiyyah, al-Ijtihad al-Mu'asir bayna al-Indibat wa al-Infirat, al-Ijtihad fi al-Shari'ah al-Islamiyyah,* and *al -Marji'iyyah al-'Ulya li al-Qur'an wa al-Sunnah*. In the book *Kayfa nata'amal ma'a al-Sunnah al-Nabawiyyah,* he has made some theoretical framework to understand the *hadith* correctly mentioned as *Ma'alim wa Dawabit li Husn Fahm al-Sunnah al-Nabawiyyah*, as follows[30] (a) understanding *hadith* according to the perspective of the Qur'an,[31] (b) collecting the entire *hadith* to find the correct understanding,[32] (c) making an effort of *Jama' or Tarjih* between *Mukhtalif al-Hadith*,[33] (d) understanding *hadith* by referring to *Asbab al-Wurud* and *Maqasid*,[34] (e) distinguishing means (*al-Wasilah*) which can be exchanged for its purpose and objective (*al-Ghayah*),[35] (f) distinguishing fact and metaphor (*majaz*) in understanding *hadith*,[36] (g)

[26]Faisal, *Kaedah Tepat*,. 165.
[27]Faisal, *Kaedah Tepat*,. 167.
[28]Faisal, *Kaedah Tepat*,. 195.
[29]Faisal, *Kaedah Tepat*,. 3-4.
[30]Yusuf Al-Qaradawi, *Kayfa Nata'amal ma'a al-Sunnah al-Nabawiyyah*, III (Cairo: Dar al-Shuruq, 2005). 111.
[31]Al-Qaradawi, *Kayfa Nata'amal ma'a al-Sunnah*,. 113.
[32]Al-Qaradawi, *Kayfa Nata'amal ma'a al-Sunnah*,. 123.
[33]Al-Qaradawi, *Kayfa Nata'amal ma'a al-Sunnah*,. 133.
[34]Al-Qaradawi, *Kayfa Nata'amal ma'a al-Sunnah*,. 145.
[35]Al-Qaradawi, *Kayfa Nata'amal ma'a al-Sunnah*,. 159.
[36]Al-Qaradawi, *Kayfa Nata'amal ma'a al-Sunnah*,. 175.

distinguishing the unseen (*al-Ghayb*) and the real (*al-Shahadah*),[37] and (h) identifying the meaning of the naming of the *hadith*.[38]

In the book *al-Ijtihad fi al-Shari'ah al-Islamiyyah*[39] before revealing the theoretical framework that must be guided by a *mujtahid*, firstly he revealed the mistakes that have been practiced by some scholars in producing legal decisions in the discussion entitled "*Min Mazaliq al-Ijtihad al-Mu'asir*",[40] namely (a) do not rely on *Nusus*,[41] (b) do not understand *Nusus* correctly or intentionally negating the correct understanding,[42] (c) do not rely on the correct *Ijma'*,[43] (d) misusing *Qiyas*,[44] (e) do not consider the development of age,[45] and (f) being excessive (*Ghuluww*) in performing the concept of *Maslahah,* so that it contradicts with *Nusus*.[46]

Meanwhile, the framework that must be maintained and practiced is as follows (a) performing *ijtihad* after working hard to find and understand the evidence,[47] (b) do not do struggle in the matter of *Qath'i*,[48] (c) do not make *Zanniyyat* as *Qath'iyyat*,[49] (d) integrating *fiqh* with *hadith*,[50] (e) avoiding worldly influences,[51] (f) accepting useful new things,[52] (g) not being complacent with the current development and needs of people,[53] (h) doing *Ijtihad Jama'i*,[54] and (i) understanding the mistakes that happen to a *Mujtahid*.[55]

---

[37]Al-Qaradawi, *Kayfa Nata'amal ma'a al-Sunnah*,. 191.
[38]Al-Qaradawi, *Kayfa Nata'amal ma'a al-Sunnah*,. 197.
[39]All the substances in the *al-Ijtihad al-Mu'asir bayna al-Indibat wa al-Infirat* have been stipulated in *al-Ijtihad fi al-Shari'ah al-Islamiyyah*. It seems that the discussion of *al-Ijtihad al-Mu'asir bayna al-Indibat wa al-Infirat* is intentionally printed specially and split out from its main book.
[40]Yusuf Al-Qaradawi, *al-Ijtihad fi al-Shari'ah al-Islamiyyah*, III (Kuweit: Dar al-Qalam, 1999). 175.
[41]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 177.
[42]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 184.
[43]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 191.
[44]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 196.
[45]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 198.
[46]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 202.
[47]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 234.
[48]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 235.
[49]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 236.
[50]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 237.
[51]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 238.
[52]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 239.
[53]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 239.

In the book *al-Marji'iyyah al-'Ulya li al-Qur'an wa al-Sunnah,* he mentioned seven main theoretical frameworks that must be guided by *Mujtahid* when they understood the Qur'an and *hadith*. The theoretical framework was mentioned in the discussion entitled "*Ma'alim wa Dawabit fi Fahm al-Aslayn*",[56] namely (a) being honest (objective) in finding the truth,[57] (b) explaining *Nass* with other *Nass*,[58] (c) believing in the perfection of *shari'ah* and believing that *Nusus* does not contradict one another,[59] (d) understanding *Nass Mutashabih* with credible reference to *Nass Muhkam*,[60] (e) understanding *Nass Juz'i* concerning *Maqasid Kulliyyah*,[61] (f) understanding in a guided way to *Nass Qath'i*,[62] *and (g) r*elying on a correct and valid *Ijma'*.[63]

In the book "*al-Ijtihad fi al-Shari'ah al-Islamiyyah*" and "*al-Marji'iyyah al-'Ulya li al-Qur'an wa al-Sunnah*", he mentioned some mistakes that must be avoided by *Mujtahid* when they understood the Qur'an and *hadith*. This discussion was discussed in an event entitled "*Mazaliq wa Mahadhir fi Fahm al-Aslayn*",[64] as follows (a) misleading the meaning of *Nass* from its essential meaning,[65] (b) interpreting the *Nass* incorrectly,[66] (c) prioritizing common sense over Islamic propositions,[67] and (d) prioritizing *Maslahah* by leaving *Nass*.[68]

In addition, 'Abd Allah Ibn Muhammad Ibn al-Siddiq al-Ghumari in his book "*Husn al-Tafahhum wa al-Dark li Mas'alat al-Tark*" has presented a concept in understanding the problems of *al-Tark*. *Al-Tark* is anything that is not carried out by Rasulullah PBUH; not carried out by the *salaf*; and no any *hadith* or *athar* that forbids the

---

[54]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 241.
[55]Al-Qaradawi, *al-Ijtihad fi al-Shari'ah*,. 243.
[56]Yusuf Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam li al-Qur'an wa al-Sunnah: Dawabit wa Mahadhir fi al-Fahm wa al-Tafsir*, II (Cairo: Maktabah Wahbah, 2001). 155.
[57]Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 157.
[58]Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 175.
[59]Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 183.
[60]Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 207.
[61]Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 229.
[62]Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 257.
[63]Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 264.
[64]Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 275.
[65]Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 277.
[66]Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 296.
[67] Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 331.
[68] Al-Qaradawi, *al-Marji'iyyah al-'Ulya fi al-Islam*,. 355.

practice (a prohibition for *haram* and *makruh*).[69] In this context, al-Ghumari has successfully revealed various types of *al-Tark* that can give a specific meaning from each of this *al-Tark*.[70] In a response to this, al-Ghumari has made a statement that *al-Tark* cannot present the meaning of *haram*.[71]

In the book "*al-Radd al-Muhkam*", al-Ghumari has also asserted that whatever the practice categorized into the part of *al-Tark*, the practice (*al-Matruk*) cannot be understood as illegal to practice until a special proposition is found.[72]

Based on the theoretical frameworks presented by previously three experts, it can be seen that the diversity and similarity of the conceptual framework have been revealed. All these frameworks can be used as the main proposals to understand the *hadith* that will be the source of jurisprudence, or in practicing certain *hadiths* during *ijtihad* to reveal the true *ijtihad* in the matter of law. The previous theoretical frameworks are indeed the steps that have been taken by the scholars and have become an ideal framework in applying the concept of *Wasl al-Fiqh bi al-Hadith* from early Islam to the present.

Application of *Wasl al-Fiqh bi al-Hadith* in Dayah

The Dayah Institution is an educational institution that always makes the Qur'an the main basis in the discussion of the jurisprudence law by referring to *Tafsir al-Jalalayn* as its main book (reference). It also refers to and relies on the *hadith*, and *Fath al-Bari Sharh Sahih al-Bukhari*. Both classical books are not implemented in the curriculum, but these books are discussed in the discussion of *Lajnah Bahsul Masail* (LBM).[73]

The concept of *wasl al-Fiqh bi al-Hadith* for Dayah people is a process of merging a preposition (*manqul*) and substance (*ma'qul*). The focus of the concern is merely on *manqul*, so that he is said as

[69]'Abd Allah Ibn Muhammad Ibn al-Siddiq Al-Ghumari, *Husn al-Tafahhum wa al-Dark li Mas'alat al-Tark*, III (Cairo: Maktabat al-Qahirah, 2013). 9.
[70]Al-Ghumari, *Husn al-Tafahhum wa al-Dark*,. 10.
[71]Al-Ghumari, *Husn al-Tafahhum wa al-Dark*,. 11.
[72]'Abd Allah Ibn Muhammad Ibn al-Siddiq Al-Ghumari,, *al-Radd al-Muhkam al-Matin 'ala Kitab al-Qawl al-Mubin*, III (Cairo: Maktabat al-Qahirah, 1986). 49.
[73]FZ (senior teacher on Lajnah Bahsul Masail, Dayah Mudi Mesra Samalanga), in an interview on 21 January 2018.

Wahhabi. Meanwhile, when he focuses himself on *ma'qul,* he will be justified as liberal. It can be said that the successful application of the concept of *Wasl al-Fiqh bi al-Hadith* in Dayah is a reflection of the achievement of the target in integrating textual and contextual understanding.[74] The previous argument is still in the form of general description and theoretical level, while to see the fact of the understanding will be delivered in the upcoming discussion.

Dayah Institute's View on *Hadith* and *Fiqh*

The study of *hadith* in Dayah is merely a study of *hadith* used and practiced by the pioneer scholars of the sect. They do not directly refer to the *hadith* and lectures of the *hadith* scholars and study with a full comparison of the understandings on the *hadith* scholars about a problem. When the school of Imam al-Shafi'i has become a guide in the practice of practical jurisprudence so that the *hadith* being guided are more than to what has become a principle among scholars of al-Shafi'iyyah. In the view of the Dayah people, the study of jurisprudence does not need to directly refer to the book of *hadith* or to the scholars of hadith comprehensively, but they just need to refer to the lectures of the scholars of al-Shafi'iyyah like Imam al-Nawawi, Ibn Hajar al-'Asqalani, and Zakariyya al-Ansari.[75]

When it becomes a guide in understanding such a *hadith*, it is greatly understandable that anything used as a guide and belief in the study of jurisprudence is based on the sect's pioneer. Therefore, not a few *hadith* are not practiced and may not be identified about its existence.

The Guidelines of the Sect in Dayah

Generally speaking, *hadith* is used as a guide through the scholars of al-Shafi'iyyah. The book *Hadith al-Ahkam* (e.g., Subul al-Sal*a*m) composed by Imam al-San'ani does not become a reference to be studied in Dayah, even the author of the book *Bulugh al-Maram* is Ibn Hajar al-'Asqalani. Meanwhile, his book *Fath al-Bari* become the

[74]IM (senior teacher on Lajnah Bahsul Masail, Dayah Mudi Mesra Samalanga), in an interview on, 21 January 2018.
[75]FZ (interview).

main reference in the legal discussion.[76] In our perspective, these phenomena are caused by the status of Imam al-San'ani as the author of the book popularly mentioned as a scholar of the al-Zaydi sect.

It is different from the book of *Nayl al-Awtar Sharh Muntaqa al-Akbar min Ahadith Sayyid al-Akhyar* by Imam al-Shawkani. Based on our experience in contact with some of Dayah's students, this book is highly avoided by Dayah students. Their hatred of Ibn Taymiyyah was ingrained in their minds until most of them could not distinguish between *Majd al-Din 'Abd al-Salam* (Ibn Taymiyyah al-Jadd) as the author of the book *Muntaqa al-Akhbar* which became the author of the book of *Nayl al*-Aw*tar*, and Ahmad Ibn 'Abd al-Halim (Ibn Taymiyyah al-Hafid). Therefore, the reason for them to avoid reading it is very complete; moreover, it is used as a handbook and *hadith* literature. He is the author of a book and is not part of al-Shafi'iyyah. Imam Majd al-Din 'Abd al-Salam Ibn Taymiyyah was a scholar who relied on al-Hanbali school of thought, while Imam al-Shawkani is part of al-Zaydiyyah school of thought. In higher education, this classic book has become one of the compulsory books in the study of *Hadith al-Ahkam* at the Faculty of Shari'a.[77] Yet, there is another thing that sometimes rules for teachers in Dayah. Some teachers recite a book *Nayl al-Awtar* as their reading, but the book is not recommended for students, because they have not been eligible to read such a book. Besides, they are not accustomed to delivering a discussion of *fiqh muqaran*.[78]

There is still many literature on *hadith* and *fiqh* as the creation and work of al-Shafi'iyyah scholars and those do not become a reference for people in Dayah. When a particular book in the sect of al-Shafi'i is not mentioned in the curriculum of Dayah, so that any difference cannot be acceptable, even the difference is a tight opinion and being implemented by some people in the sect of al-Shafi'i. In this context, Aslam Nur revealed some discrepancies when comparing religious practices between those who claim to be followers of al-Shafi'i against the opinion of Imam al-Shafi'i himself. In addition,

[76]FZ (interview).
[77]Fakultas Syari'ah, *Topik Kurikulum Nasional IAIN* (Jakarta: Ditjen pembinaan Kelembagaan Agama Islam Departemen Agama RI, 1995).
[78]MH (teacher and alumnus of Dayah Ummul Aiman, Samalanga), in an interview on 6 July 2018.

there are also contradictions between fellow scholars of al-Shafi'iyyah concerning some religious problem understanding.[79] This statement has finally concluded that the understanding and practice of Dayah people have their colors that are sometimes different from others. The differences were not only among the followers of the al-Shafi'i sect in Aceh but also there was an understanding in the school of al-Shafi'i that sensed to be true and powerful. Meanwhile, If there are other practices different from the Dayah tradition, it will directly be considered as a new incoming matter that should be concerned and avoided to grow.

Teacher's Analysis in Delivering Science

In general, teachers play an important role in guiding the thinking style of students in Dayah, while the books that are used as guidance are all the books of the al-Shafi'iyyah scholars. They believe that anything that has been previously practiced by their teachers is a matter that cannot be transformed and changed.

People in Dayah have a belief that anything that has existed in jurisprudence is the result of a scholarly lecture from *hadith*. Practicing what has been mentioned in the book of jurisprudence is seen as more true than following the explanation revealed in the *hadith* lecture. Therefore, they do not need to look at *hadith* to reinforce a matter of jurisprudence, and the material of the book that is used as a guide is to represent the *hadith*. They feel unworthy to seek law from *hadith*. Therefore, they rarely refer to *hadith*. They just rely on the substance of the book.[80]

In this context, we view that the Dayah people have their terminology in understanding the practices of al-Shafi'i school because they do not hesitate to oppose any practice that contradicts with the tradition that occurs among them, even it is the practice of some of al-Shafi'i scholars and can be scientifically accountable. Such an understanding and practice is conveyed to the general public so that most communities who live around the Traditional Dayah are found very difficult to improve their way of thinking and style.

[79]Aslam Nur, "Mazhab al-Shafi'i atau al-Shafi'iyyah?," *Serambi Indonesia*, 27 September 2014.

[80]Ajidar Matsyah (Alumnus of Dayah Tanoh Mirah Aceh Utara, a lecturer at Islamic State of Ar-Raniry), in an interview on 5 April 2018.

Because a deep sense of bigotry has been so successfully instilled in their minds. Even if someone tries to repair or practice a different tradition that is a practice in the sect of al-Shafi'i as well, then the community does not hesitate to accuse it as a Wahhabi practice.[81]

The Polemic in the Implementation of Friday Prayer

One of the current issues that strike people in Aceh up to some consequential different perceptions of each individual is on the implementation of the Friday prayers. On Friday, 19th June 2015, the congregation visited Baiturrahman Great Mosque to perform Friday prayers. However, the prayers constrained few seconds when there is a group of intellectuals of the Association of Dayah Aceh Scholars (HUDA), Nanggroe Aceh Ulama Assembly (MUNA), and the Islamic Defenders Front (FPI) took over the management of the implementation of the Friday prayers at the mosque. The congregation was amazed by the actions of the scholars and could not do anything when the implementation of the Friday sermon will begin.[82]

These ulama represent a group of traditional sects who are accustomed to using the stick and the call (*adhan*) twice in the Friday prayer congregational ritual. They forced the preacher to use a cane and commanded the second call. They brought a *Toa* (loudspeakers) to call out the second call to prayer which the Dayah group considered it important in the Friday prayer ritual.[83]

One of the scholars who involved in this matter was Teungku Bulqaini[84] from HUDA (Ulama Association of Dayah) stated that they wanted to restore the implementation of Baiturrahman Mosque in Aceh to be a success in the future as the Government Iskandar Muda's period which relied on *Ahl al-Sunnah wa al-Jama'ah*. He also stated that any worship at the mosque must be under the sect of al-Shafi'i.[85]

Furthermore, an internal conflict unusual occurrence in the mosque has attracted the attention of many people in Aceh. The

[81]Ajidar Matsyah (interview).
[82]Al-Chaidar, "Menyoal Benturan Antar Mazhab di Aceh".
[83]Al-Chaidar, "Menyoal Benturan Antar Mazhab di Aceh".
[84]Teungku Bulkaini is an alumnus of Dayah Mudi Mesra Samalanga, currently as a leader in one of Dayahs in Banda Aceh.
[85]Al-Chaidar, "Menyoal Benturan Antar Mazhab di Aceh".

conflict happened among adherents of the same religion (conflict among sects). Therefore, when these events had taken a place, the Council of Ulama Association (MPU) in Aceh as the official institution was established following certain laws and it had its power-related issues in religious discussion after the heartbreaking events.

Finally, the drafting team in the dialogue conducted on Tuesday, October 27, 2015, has spawned several decisions related to the implementation of the rules of the Friday prayers at Baiturrahman Mosque particularly and generally for other mosques in Aceh. The dialogue is not only followed by scholars of Dayah, but also from all religions in Aceh and university experts. When some views and propositions have been given by all parties, they are submissive and no one can dispute the decision related to the previous matter (Friday prayers). Some decisions can be formulated as follows: Two-times call (*adhan*) is a *sunnah*, the preacher holds a stick as *sunnah*, m*uwalat al-Khutbah* is a compulsory requirement of preaching, m*aw'izah* with non-Arabic language is a matter of diversity (difference), and in keeping a tolerance among Muslims, it is expected that the preacher can give a long speech (*maw'izah*) to repeat two pillars of the sermon.

The results of the decision are intended to prevent a split among Muslims in Aceh so that an agreement is necessary to be acceptable to all parties.[86] The mission that arose in several practices in the implementation of the Friday call (*adhan*) for multiple repeats, holding a stick while preaching, and the recitation of the two pillars of the sermon. All of these can be discussed in the following discussion:

Two-time Call for Friday Prayer

If we refer to the narration of the *adhan* in the implementation of Friday prayers, it can be seen that from the period of Rasulullah PBUH to the period of Caliph Abu Bakar and 'Umar Ibn al-Khattab, the Friday prayer call (*adhan*) was only performed once. In the period of Caliph 'Uthman Ibn 'Affan, when the crowd around the mosque was increasing, the business transaction activity in the market was also increasing, so that this evidence had made the Caliph 'Uthman

[86]Muzakarah MPU Aceh, "Ini Hasil Muzakarah Ulamak di MPU Aceh," *MPU Aceh*: Https://mpu.acehprov.go.id/index.php/news/read/2015/10/27/30/ini-hasil-muzakarah-ulamak-di-mpu-aceh.html. Accessed on 25 Ogos 2018.

Ibn 'Affan command *mu'adhdhin* to perform *adhan* for twice. The first call was meant to inform that the time of Friday prayers was coming soon. This first call could make people prepare themselves to come to the mosque to perform Friday prayers. Meanwhile, the second call was performed in the implementation of Friday prayers. It was also a call that sounded after the preacher ascended the pulpit to preach. These phenomena were narrated in the *hadith* by Imam al-Bukhari as follows:

> عن الزهري قال: سمعت السائب بن يزيد يقول ان الأذان يوم الجمعة كان أوله حين يجلس الإمام يوم الجمعة على المنبر في عهد النبي صلى الله عليه وسلم وأبي بكر وعمر رضي الله عنهما فلما كان فى خلافة عثمان وكثروا أمر عثمان يوم الجمعة بالأذان الثالث فأذن به على الزوراء فثبت الأمر على ذلك
>
> "I listen to al-Sa'ib Ibn Yazid saying that: the call (*adhan*) on Friday in the period of Rasulullah PBUH, Abu Bakar and 'Umar Ibn al-Khattab was performed when the prayer leader has come up the pulpit. Then, when people are more crowded, 'Uthman Ibn 'Affan commanded the caller (*mu'adhdhin*) to perform the third call (*iqamah*). Since that time, the first call (*adhan*) was performed on the top of a building in the region of Zawra'. This tradition has developed and progressed up to the upcoming periods".[87]

The tradition of increasing the number of calls (*adzhan*) has become a *Sunnah 'Uthmaniyyah* for Muslims. Up to the present time, this tradition occurs based on the understanding of Caliph 'Uthman Ibn 'Affan when considering the demands and benefits of the *ummah* at that time. According to the Caliph 'Uthman Ibn 'Affan, the addition of such religious deed is impossible to happen. He has a belief that the quantity of *adhan* performed by Rasulullah PBUH does not mean to

[87]Hadith by al-Bukhari, *al-Jami' al-Sahih*, Kitab al-Jumu'ah, Bab al-Ta'dhin 'inda al-Khutbah, no. Hadith 916; Abu Dawud, *al-Sunan*, Kitab al-Salah, Bab al-Nida' Yawm al-Jumu'ah. No. Hadith 1087.

not be added when there is a demand to add as it has occurred in the market of Medina.[88]

Ibn Hajar al-'Asqalani in the deal with this *hadith* said: From the outward appearance of the *hadith*, it can be seen that at that time, this tradition was followed by Muslims throughout the state based on their obedience to the Caliph. Ibn al-Hajar considered every practice that was not done in the time of Rasulullah as heresy, but among the acts of heresy, there were good things that were not a prohibition in religion, while there were also those who were opposites. Based on the history, the Caliph 'Uthman Ibn 'Affan had done it by means to inform people that the Friday prayer's time would set. In this case, he exemplified a notification of the implementation of Friday prayers with the call (*adhan*) and regulated for other prayers too. This commitment still maintained its special feature; that was by performing the call when the preacher had been on the pulpit. In that case, it is an attempt to understand the meaning of the original law; not to repeal it.[89]

On the other hand, Imam al-Shafi'i in his book "*al-Umm*" mentioned that in the period of Rasulullah PBUH, Abu Bakar, and 'Umar Ibn al-Khattab performed the call for once in the Friday prayers. However, when the population of Medina had increased in the period of the Caliph 'Uthman Ibn 'Affan, he added another call and eventually continued to be performed twice. In this context, Imam al-Shafi'i also quotes the opinion of 'Ata' which states that the first caliph who performed **the call for twice** was not 'Uthman, but it happened in Mu'awiyyah when he became a caliph. Imam al-Shafi'i strengthens that whoever has done it before, I still prefer it as it was in the period of Rasulullah PBUH. However, whoever performs the call twice will not cancel the prayer, because the call is not part of the prayer; but it is a call to perform prayer. Even people who perform

[88]'Umar 'Abd Allah Kamil, *Al-Insaf fima Uthira Hawlahu al-Khilaf*, II (Cairo: Al-Wabil al-Sayyib li al-Tawzi' wa al-Nashar, 2011). 46-47.

[89]Kamil, *al-Insaf*,. 46-47. Lihat Zakariyya Al-Nawawi, *Minhaj al-Talibin wa 'Umdat al-Muftin*, I (Jedah: Dar al-Minhaj, 2005). 135. Lihat juga Ahmad Ibn 'Ali Ibn Hajar Al-'Asqalani, *Fath al-Bari bi Sharh Sahih al-Bukhari,* (Jedah: Al-Maktabah al-Salafiyyah, n.d.). 2:394.

prayers by not performing the call are also considered legitimate and do not need to repeat their prayers.[90]

It is slightly different from the opinion of Imam al-Shafi'i, that for *al-Shafi'iyyah* like Zayn al-Din Ibn 'Abd al-'Aziz al-Malibari (d. 987 H) in his book *Fath al-Mu'in* mentions that performing the call for twice when performing Friday prayers is *sunnah*. The first call is done before the preacher ascends to the pulpit, and the second is done after the preacher ascends to the pulpit. This tradition was practiced during the period of Caliph 'Uthman (when the number of Muslims had increased). For him, it was considered a matter of *sunnah* when the situation demanded such things as the presence of pilgrims to the mosque that was very dependent on the first call (*adhan*). As when the matter was considered unnecessary, to follow the *sunnah* by Rasulullah PBUH is better (performing the call for once).[91]

Holding a Stick during the Sermon

Holding a stick during the preacher is preaching is one of the change missions demanded by a group of scholars and Dayah students who perform a protest on Friday, because it is for them to enliven the *sunnah* of the Prophet PBUH following the practice of the school of al-Shafi 'i. See the clarity of the scholars' opinions can be seen in the upcoming discussion.

According to the opinion of Imam al-Shafi'i is an obligatory preacher stand while delivering a sermon, and it is best to hold a stick, bow, or another similar object.[92] He also mentioned that *'anzah* (small stick) is one of the things that can be held when the preacher delivered a sermon. As proof that it was made as to the basis by Imam al-Shafi'i as relevant to a *hadith* narrated by 'Ata' that Rasulullah PBUH while standing to deliver his sermon holding a stick as a place to concentrate. According to the opinion of Imam al-Shafi'i, when a person who preaches does not want to hold a stick or a bow and

[90]Muhammad Ibn Idris Al-Shafi'i, *Al-Umm* (Mansurah: Dar al-Wafa', 2015). 1:224. Mizaj Iskandar, "Suara Rahman dari- Baiturrahman," in *Hukum Islam Kontemporer: Praktek Masyarakat Malaysia dan Indonesia*, ed. oleh Ridwan Nurdin dan Azmil Umur (Banda Aceh: Bandar Publishing, 2015), 16–17.

[91]Zayn al-Din Ibn 'Abd al-'Aziz Al-Malibari, *Fath al-Mu'in Sharh Qurrat al-'Ayn* (Beirut: Dar al-Fikr, n.d.). 1:232.

[92] Al-Shafi'i, *al-Umm*, 1: 272.

arrow, it is best for the preacher not to move his body and hands; either by placing the right hand on top of the left hand or letting both hands lie on their respective positions. The provision of holding a stick or standing quietly is a matter of *sunnah* and has nothing to do with the validity or invalidity of Friday prayers.[93]

Furthermore, Imam al-Nawawi developed the sequence of sticks and bow varied into swords, sticks, and alike.[94] Not only that, Imam al-Nawawi developed his understanding by holding the sword with his left hand, while the right hand held the edge of the pulpit. If the pulpit did not have a handle that could be held, the preacher could stand calmly and placed his right hand on the left hand or stood alone by leaving both hands in their respective positions so that the preacher could be calm and not negligent in delivering the sermon.[95]

From the previous narrations, there was no evidence that Rasulullah PBUH used a stick and alike when preaching since the beginning of the performance of Friday prayers. When we viewed the narrations about the history of making the pulpit at the beginning of the implementation of Friday prayers, Rasulullah PBUH only leaned on palm trees. Evidence narrated by Ummu Qays Bint Mihsan as narrated by Abu Dawud[96] was greatly helpful in providing additional information about the stick that Rasulullah PBUH used as his focus when he preached. This evidence was when Rasulullah PBUH got older and His body got fatter, so he always used a stick for him to use as a place to concentrate while performing prayers.[97]

From this description, the stick used by the Prophet PBUH in preaching was the stick that served as the focus when standing; not simply holding a stick and **sticked** it back to the preacher's shoulder as he always applied in a number of mosques in Aceh.[98]

---

[93]Al-Shafi'i, *al-Umm*,. 2: 409.
[94]Zakariyya Al-Nawawi, *Rawdat al-Talibin* (Beirut: al-Maktabah al-Islamiyyah, n.d.). 2:32.
[95]Al-Nawawi, *Rawdah*,. 2:32. Lihat juga Zakariyya Al-Nawawi, *al-Majmu' Sharh al-Muhadhdhab* (Jedah: Maktabat al-Irsyad, n.d.). 4:399.
[96]Abu Dawud, *al-Sunan*, Kitab al-Salah, Bab al-Rajul ya'tamidu fi al-Salah 'ala 'Asa, no. Hadith 948.
[97]Mizaj, "Suara Rahman," 14.
[98]Mizaj, "Suara Rahman," 15.

Based on previous narration and opinion, in the various schools of jurisprudence, the matter of holding a stick in preaching the law of *sunnah* and does not correlate with the validity or invalidity of the sermon. When the preacher did not feel comfortable delivering the sermon by focusing on the stick, Imam al-Shafi'i suggested that the preacher could calm the movements of his body and hands either by placing his right hand on his left hand or by letting both hands lie flat on their respective positions. We can identify the reason why some mosques in the Middle East did not use sticks when performing Friday sermons, and this commitment is also applied in the mosque of Imam al-Shafi'i in Egypt.[99]

The Reading Repetition on the Pillar of Friday Sermon

Repetition of sermons is always done by most people in Dayah, because some scholars in al-Shafi'iyyah argue that Friday sermon must be delivered in Arabic. The use of Arabic is because *muwalah* is one of the legal requirements of the sermon, and conveying the will of *taqwa* in any language other than Arabic evidently can damage the *muwalah* in the sermon. However, some Dayah scholars do not like to mention it as a repetition of sermons. They prefer to mention it as a starting sentence for the pillars of the sermon.[100]

In the school of al-Shafi'i, the book "*al-Umm*" by Imam al-Shafi'i mentioned that the pillars and conditions of the Friday sermon are not explicitly stated and written in sequence. It was mentioned that the obligatory sermon was delivered in Arabic.[101] In this case, Imam al-Muzani; a disciple of Imam al-Shafi'i in the book "*Mukhtasar*" has started a discussion about the pillars of the sermon, namely (a) the first sermon consisted of: *tahmid*, *salawat*, was*iyyah* (suggestion) to be pious and obedient to Allah the Almighty, and read the verses of the Qur'an; and (b) the pillars of the second sermon consisted of:*hamdalah*, *salawat*, was*iyyah* to be pious and obedient to Allah the Almighty, and to pray. On the other hand, the conditions of the sermon have not

[99]Mizaj, "Suara Rahman," 15.
[100]SLM (one of alumnus of Dayah in Samalanga, a leader on one of Dayahs in the region of Pidie), in an interview on 10 Ogos 2018.
[101]Mizaj, "Suara Rahman," 19.

been clarified in detail in the book "*Mukhtasar*" as well as the obligation to deliver a sermon in Arabic.[102]

The books written by the scholars of al-Shafi'iyyah, such as Imam al-Ghazali (d. 505 H), have started to think that the pillars of the sermon consist of five pillars. Three of them must be read in each sermon, namely:*hamdalah*, *salawat*, and the will of piety. Two of these conditions must be read in a good and proper sentence. The fourth is reciting prayers to the Muslims by at least articulating the word *Rahimakum Allah*. The fifth is to recite the verses of the Qur'an with at least one verse and can be read in one of the two sermons.[103] Yet, Imam al-Ghazali mentions that the author of the book *al-Talkhis* states that there are only three pillars of the sermon. Prayer and reading the verses of the Qur'an are not included in the pillars.[104] Meanwhile, the matter regarding the conditions of the sermon of Imam al-Ghazali in the book "*al-Wasit*" states that the conditions of the sermon consist of seven conditions, namely (a) the sermon begins in the noon, (b) delivered before performing Friday prayers, (c) delivered in a standing position, (d) sitting between two sermons, (e) purified from *hadath* and excrement (*najas*) and keeping *muwalah* (sequential), (f) free from any excrement (holy), and (g) preaching in a loud voice, so that the audience (congregation members) can hear.[105] In this book, al-Ghazali does not mention the delivery of the sermon in Arabic as a condition that should be fulfilled.[106]

In the period of Imam al-Nawawi (d. 676 H), he made the conditions of the sermon with some elements, namely by (a) using Arabic to deliver, (b) delivering the first-three pillars in sequence (*muwalah*), (c) performing after sunset, (d) preaching in a standing position (in an emergency), (e) sitting between two sermons, and (f) delivering in a loud voice.[107] In this book, Imam al-Nawawi suggested using Arabic, but he did not condition "purified from *hadath* and

---

[102]Isma'il Ibn Yahya Ibn Isma'il Al-Muzani, *Mukhtasar al-Muzani fi Furu' al-Shafi'iyyah* (Beirut: Dar al-Ma'rifah, n.d.). 1:27.
[103]Abu Hamid Al-Ghazali, *al-Wajiz fi Fiqh al-Imam al-Shafi'i,* I (Beirut: Dar al-Arqam Ibn Abi al-Arqam, 1997). 1:191.
[104]Abu Hamid Al-Ghazali, *al-Wasit fi al-Madhdhab*, I (Cairo: Dar al-Salam, 1997). 2:279.
[105]Al-Ghazali, *al-Wasit*,. 2:280.
[106]Mizaj, "Suara Rahman," 20-21.
[107]Al-Nawawi, *Minhaj*,. 134.

excrement (*najas*)" as mentioned by Imam al-Ghazali. In some books of al-Shafi'iyyah scholars, the condition of this sermon seems to be further supplemented with some other conditions. According to Wahbah Zuhayli, the condition of the sermon among al-Shafi'iyyah scholars has fifteen conditions, and using Arabic for delivering a speech is one of the conditions in it. The knowledge of a preacher is also classified as one of the fifteen conditions.[108]

Imam al-Nawawi states there are two opinions about whether the use of Arabic in the sermon is viewed as a condition or not. *First*, the use of Arabic in the sermon is required, and it is under the valid opinion of most scholars. The reason is that it is beyond worship so that it must be done in Arabic, like reading *tashahhud* and *Takbirat al-Ihram* in prayer. This opinion is also following the saying of Rasulullah PBUH: "*Pray as you see me praying*", and Rasulullah PBUH always preaches in Arabic.[109] *Second*, the delivery of the sermon by using Arabic is merely a *sunnah*, because the purpose of the sermon is to convey advice, and it cannot be articulated in any language, except in a language understood by the congregation.[110]

Meanwhile, the books of jurisprudence (*fiqh*) written in the Malay language like *Sirat al-Mustaqim* composed by Nur al-Din al-Raniri states that the Friday sermon is compulsory to use the Arabic language. This commitment (idea) is also relevant to a book *Sabil al-Muhtadin* composed by Muhammad Arshad al-Banjari and a book *Matla' al-Badrayn wa Majma' al-Bahrayn* composed by Muhammad Ibn Isma'il Dawud al-Fatani.[111] It is different with the previous opinion that there is a classical book written in the form of Malay language composed by the Aceh's scholar in the nineteenth century 'Abbas Ibn Muhammad Kuta Karang (well known as *Tadhkirat al-Rakidin 'an al-Jihad li Ahl Acih*), states that the Friday sermon is compulsory to use an understandable language by the audiences that present in the prayer. In the classical book, he says that:

> "*Amma ba'd*, that reading the Friday sermon in an *'ajam* state like Aceh is using the Aceh language; not other languages. If

[108]Mizaj, "Suara Rahman," 21.
[109]Al-Nawawi, *al-Majmu'*,. 4:391.
[110]Mizaj, "Suara Rahman," 22.
[111]Mizaj, "Suara Rahman," 23.

> Aceh people read for the Friday sermon by using the Arabic language, the sermon is not eligible based on the principle of *qawl mu'tamad*, because the sermon means *maw'izah* (the teaching of advisory), so that the sermon will not be meaningful for those who do not know the meaning of sermon. *Hashiyah Fath al-Wahhab* says that the Friday sermon is no longer eligible and valid when it uses a language that does not belong to the area. On the other hand, al-Qadi Husayn argues that it is still eligible and valid to use the Arabic language in the sermon of '*ajam* people who do not know the meaning of the sermon. In the 1305 migration, people hold the first *qawl*, because reading the Friday sermon toward people in Aceh by using the Aceh language can impress *maw'izah*. Besides, in that year, stupidity has dominated in Aceh as a cause of infidel war."[112]

The argumentation found in the manuscript of 'Abbas Ibn Muhammad Kuta Karang can be used as evidence that the renowned former Aceh's clerics must also be equal in understanding Islamic jurisprudence. However, for some people in Dayah, the dispute over jurisprudence is no longer just a matter of differences of understanding, but it is more to the level of confidence. Therefore, it is not strange when a person who recites *qunut* does not want to follow the person who does not recite *qunut*, because factually, it will be hostile to him even if it is only a matter of *sunnah*.[113]

Conclusion

The theoretical framework of *Wasl al-Fiqh bi al-Hadith* compiled by some scholars as a guide in understanding *hadith* aims to avoid differences among a number of studies on jurisprudence and hadith. However, *Dayah Traditional* of Aceh is found to be unsuccessful in understanding this concept correctly because, in its application, they just make *al-Shafi'i* school opinion as to the main source. This is clear, among others, at the issue of Friday prayers implementation that the Dayah preached to the public. If the Dayah can follow the concept correctly, its dignity will be better kept while their services and

[112]Mizaj, "Suara Rahman," 23-24.
[113]Ajidar Matsyah (interview).

devotion will be well remembered. In addition, they will not be judged breaking the habit, but developing traditions. There are still many things to discuss about theme, such as how Dayah scholars integrate the study of *hadith* and *aqidah*.

Bibliography

'Abd Allah Ibn Muhammad Ibn al-Siddiq al-Ghumari. *al-Radd al-Muhkam al-Matin 'ala Kitab al-Qawl al-Mubin*. III. Cairo: Maktabat al-Qahirah, 1986.

Abu Hamid Al-Ghazali. *al-Wasit fi al-Madhdhab*. I. Cairo: Dar al-Salam, 1997.

Aceh, Humas. "demonstrasi tak selesaikanperkara ibadah." *Humas Aceh*: https://humas.acehprov.go.id/. Accessed on September 12, 2020.

Aceh, Muzakarah MPU. "Ini Hasil Muzakarah Ulamak di MPU Aceh." *MPU Aceh*: https://mpu.acehprov.go.id/index.php/news/read/2015/10/27/30/ini-hasil-muzakarah-ulamak-di-mpu-aceh.html. Accessed on August 25, 2018.

Al-'Asqalani, Ahmad Ibn 'Ali Ibn Hajar. *Fath al-Bari bi Sharh Sahih al-Bukhari,*. Jedah: Al-Maktabah al-Salafiyyah, n.d.

Al-Ghazali, Abu Hamid. *al-Wajiz fi Fiqh al-Imam al-Shafi'i,*. I. Beirut: Dar al-Arqam Ibn Abi al-Arqam, 1997.

Al-Ghumari, 'Abd Allah Ibn Muhammad Ibn al-Siddiq. *Husn al-Tafahhum wa al-Dark li Mas'alat al-Tark*. III. Cairo: Maktabat al-Qahirah, 2013.

Al-Malibari, Zayn al-Din Ibn 'Abd al-'Aziz. *Fath al-Mu'in Sharh Qurrat al-'Ayn*. Beirut: Dar al-Fikr, n.d.

Al-Muzani, Isma'il Ibn Yahya Ibn Isma'il. *Mukhtasar al-Muzani fi Furu' al-Shafi'iyyah*. Beirut: Dar al-Ma'rifah, n.d.

Al-Nawawi, Zakariyya. *Minhaj al-Talibin wa 'Umdat al-Muftin*. I. Jedah: Dar al-Minhaj, 2005.

———. *Rawdat al-Talibin*. Beirut: al-Maktabah al-Islamiyyah, n.d.

Al-Qaradawi, Yusuf. *al-Ijtihad fi al-Shari'ah al-Islamiyyah*. III. Kuweit: Dar al-Qalam, 1999.

———. *al-Marji'iyyah al-'Ulya fi al-Islam li al-Qur'an wa al-Sunnah: Dawabit wa Mahadhir fi al-Fahm wa al-Tafsir*. II. Cairo: Maktabah Wahbah, 2001.

———. *Kayfa Nata'amal ma'a al-Sunnah al-Nabawiyyah*. III. Cairo: Dar al-Shuruq, 2005.

Al-Shafi'i, Muhammad Ibn Idris. *Al-Umm*. Mansurah: Dar al-Wafa', 2015.

Animos. "Ulama Dayah Minta Pengelolaan Mesjid Raya Baiturrahman di Bawah Wali Nanggroe." *Analisadaily*: https://analisadaily.com/berita/arsip/2015/9/10/169516/ulama-dayah-ingin-kelola-masjid-baiturrahman/. Accessed on September 28, 2020.

Chaidar, Al. "Menyoal Benturan Antarmazahab di Aceh." *Aceh Tribunnews*: http://aceh.tribunnews.com/2015/06/26/menyoal-benturan-antarmazhab-di-aceh. Accessed 0n 25 Ogos 2018.

Firdaus, Hasbi Amiruddin, dan Amroeni. "The Role of Huda in the Implementation of Islamic Shari'ah in Aceh." *IOSR Journal Of Humanities And Social Science* II, no. 5 (2017): 15. www.iosrjournals.org.

Huberman, Miles *Qualitative Data Analysis: A Source Book of New Methods*. California: Sage Publication, 1994.

Iskandar, Mizaj. "Suara Rahman dari-Baiturrahman" in Ridwan Nurdin and Azmil Umur (ed). *Hukum Islam Kontemporer: Praktek Masyarakat Malaysia dan Indonesia* (Banda Aceh: Bandar Publishing, 2015.

Kamil, 'Umar 'Abd Allah. *Al-Insaf fima Uthira hawlahu al-Khilaf*. II. Cairo: Al-Wabil al-Sayyib li al-Tawzi' wa al-Nashar, 2011.

Konting, Muhammad Majid. *Kaedah Penyelidikan Pendidikan*. Kuala Lumpur: Dewan Bahasa dan Pustaka, 1990.

Nur, Aslam. "Mazhab al-Shafi'i atau al-Shafi'iyyah?" *Serambi Indonesia*, 27 September 2014.

Shah, Faisal Bin Ahmad. *Kaedah Tepat Memahami Hadis*. Kuala Lumpur: Universiti Malaya, 2016.

Syari'ah, Fakultas. *Topik Kurikulum Nasional IAIN*. Jakarta: Ditjen pembinaan Kelembagaan Agama Islam Departemen Agama RI, 1995.

Zakariyya Al-Nawawi. *al-Majmu' Sharh al-Muhadhdhab*. Jedah: Maktabat al-Irshad, n.d.

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 111 -137
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v16i1.4550

Building the Values of *Rahmatan Lil 'Alamin* for Indonesian Economic Development at 4.0 Era from the Perspective of Philosophy and Islamic Economic Law

Hisam Ahyani
Islamic University of Miftahul Huda Al Azhar (STAIMA) Banjar City, West Java, Indonesia, and Student of Doctoral program in Islamic Law, Consestration of Sharia Economic Law, UIN Sunan Gunung Djati, Bandung, Indonesia
Email: hisamahyani@gmail.com

Memet Slamet
Islamic University of Miftahul Huda Al Azhar (STAIMA) Banjar City, West Java, Indonesia
Email: memetslamet534@gmail.com

Tobroni
SMKN 1 Jatibarang Indramayu Regency, West Java, Indonesia, and Gradutes Master's Program UIN Sunan Gunung Djati, Indonesia.
Email: ibnurusyd.publising@gmail.com

Article history: Received: May 7, 2021, Accepted: May 23, 2021, Published: Juni 27, 2021

Abstract:

This research aims to build the value of rahmatan lil 'alamin in Indonesian economic development at 4.0 eras from the perspective of philosophy and shariah economic law. The role of both is considered important regarding with freedom to do any economic activities in Indonesia as the non-Islamic state in the formal term yet at the same time is known as a sharia economic community due to its world's largest Moslem population. This literature-normative research is qualitative with a statutory, historical, comparative, and conceptual approach. It found that first, *rahmatan lil 'alamin* value enables the philosophy of Islamic law to develop the Indonesian economy. The goal of Islam as a religion is to guide its believers toward the happiness of the world and the hereafter and the triangle concept among

Author correspondence email: hisamahyani@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

philosophy of God, human, and nature, for example, make it possible for Islamic economic with its rahmatan lil 'alamin values to cover the weakness of the conventional economic system. Second, the rahmatan lil 'alamin in Islamic economics law can be manifested by organizing social services, such as waqf, relying on the spirit of building justice in life, narrowing social gaps, as well as enlivening Islamic values. In the era of 4.0, the implementation of the value can be adjusted to recent demands and situations, such as cash waqf, halal industry, halal food, halal tourism, and so on.

Keywords:
Philosophy; Economic Sharia; Rahmatan Lil' Alamin; Economic in 4.0 Era

Abstrak:
Riset ini bertujuan menggali nilai-nilai rahmatan lil 'alamin dalam perekonomian Indonesia era 4.0 menurut tinjauan filsafat dan hukum ekonomi syariah. Peran keduanya dianggap penting terkait kebebasan berekonomi dalam konteks Indonesia yang bukan merupakan negara Islam secara formal namun memiliki komunitas ekonomi Syariah sebagai negara Muslim terbesar di dunia. Penelitian kepustakaan-normatif ini bersifat kuantitatif dengan pendekatan perundang-undangan, sejarah, perbandingan, serta konseptual. Pada penelitian ini ditemukan bahwa pertama, dengan menggunakan konsep rahmatan lil 'alamin, memungkinkan filsafat hukum Islam untuk berkontribusi dalam mengembangkan perekonomian Indonesia. Tujuan Islam untuk mencapai kebahagiaan dunia-akhirat serta konsep segitiga antar filsafat Tuhan, manusia, dan alam, misalnya, menutupi kekurangan dalam sistem ekonomi konvensional dengan sistem ekonomi Islam. Kedua, nilai rahmatan lil 'alamin dalam hukum ekonomi Islam dapat diwujudkan dengan menyelenggarakan kegiatan-kegiatan sosial seperti wakaf dengan semangat menciptakan kehidupan yang berkeadilan, mengurangi kesenjangan sosial serta menghidupkan nilai-nilai keislaman. Di era 4.0, implementasi nilai rahmatan lil'alamin dapat disesuaikan dengan tuntutan zaman semisal wakaf tunai, industri halal, makanan halal, wisata halal, dan lain sebagainya.

Kata Kunci:
Filsafat; Ekonomi Syariah; Rahmatan Lil 'Alamin; Ekonomi Era 4.0

Introduction

Islam is a complete religion which not only teaches worship but also it practices in the social realm (muamalah). Islam has perfectly explained business ethics such as honesty, openness, and others which will ultimately benefit all parties. In addition, Islamic financial instruments are also very diverse. There are financial instruments intended for business, for example, buying and selling, or in Arabic it is called *bai'*, for example, *bai' murabahah*. Leasing which in Arabic is also called *ijarah* and cooperation which in Arabic is called *syirkah*. Besides, Islam also explains financial instruments to overcome social problems. Poverty and underdevelop are problems that are faced before era 4.0, and we need instruments such as zakat and waqf. As we all know, zakat and waqf in Indonesia are growing rapidly. The awareness of the Indonesian people to pay tithe and waqf either through cash waqf or other forms of waqf is also increasing. This is something to be grateful for considering that the two instruments focus on meeting basic needs, which not all elements of society enjoy. The complexity of building public awareness in terms of zakat and waqf needs to be done through several accurate strategies including applying the concept of *Rahmatan Lil 'Alamin* as the main basis for a Muslim as a companion to human life in the field of Mu'amalah.

The wealth which is one of the gifts of Allah SWT given for human welfare, its existence for humans is very important as one of the supports for survival. But that does not mean that wealth is the ultimate goal in human life because it is only a means to seek eternal life, namely in the hereafter. So Allah SWT also gives syar'i rules that must be followed and obeyed by humans in practicing their assets.[1] Research by Nur Liviasari Yulma and Sri Herianingrum provides training to empowerment targets, for example in empowerment at the *Roudlotul Hikam Islamic boarding school*. Based on the availability indicators, relevance indicators, affordability indicators, utilization

[1] Nur Liviasari Yulma and Sri Herianingrum, "Peran Pemberdayaan Wakaf Tunai (Studi Kasus Pada BMT Amanah Ummah Surabaya)," *Jurnal Ekonomi Syariah Teori Dan Terapan* 3, no. 11 (2016): 856–71, https://doi.org/10.20473/vol3iss201611pp856-871.

indicators, quality indicators, efficiency indicators, the role of BMT Amanah Ummah as a fund-raising institution cash waqf as nazhir can be said to be good because it can collect, manage, and distribute cash waqf on target. This can be seen from how the success indicators of the empowerment program are under the cash waqf program from BMT Amanah Ummah. From this example, it can be seen that the concept of *Rahmatan Lil 'Alamin* (overshadowing the entire ummah) is expected to be able to make the concept exist. This requires the development and in-depth study of the Philosophy of Islamic Law, which is then implemented and developed through the economic field in Indonesia. *Rahmatan Lil 'Alamin* today can be used as a complement or method of Indonesia's economic development where the shortcomings of the conventional economic system can be complemented by an Islamic economic system. It also needs proof of the concept of *Rahmatan Lil 'Alamin* was to think deeply in terms of the philosophy of Islamic economic law to this concept which is based on the triangle concept, namely the philosophy of God, humans, and nature.

The same thing concluded by Abdur Rohman[2] in his journal that Islam is a universal and comprehensive religion. This means that Islam *Rahmatan Lil 'Alamin* is an umbrella that universally covers every human being, which can be used for all mankind on earth and can be applied at any time and place until the end of time. The perfection of Islamic teachings regulates all aspects of human life, not only spiritual aspects (pure worship), but also mu'amalah aspects which include economic, social, political, legal, and so on. As comprehensive teaching, Islam includes three main teachings, namely aqidah, shari'ah, and morals. The relationship between aqidah, shari'ah, and morals in the Islamic system is interwoven in such a way that it is a comprehensive system. Islamic Sharia is divided into two, namely worship and mu'amalah. Included in the study of mua'amalah is buying and selling which puts forward the principle of '*an-taradlin*' (mutual pleasure). Therefore, this paper tries to review

[2] Abdur Rohman, "Menyoal Filosofi 'An Taradin Pada Akad Jual Beli (Kajian Hukum Ekonomi Syariah Dalam Transaksi Jual Beli)," *Et-Tijarie: Jurnal Hukum Dan Bisnis Syariah* 3, no. 2 (2016), https://journal.trunojoyo.ac.id/ettijarie/article/view/3911.

philosophically the meaning and concept as well as its implementation in the study of Islamic economic law.

In the case of Waqf, for example, KNKS (the Sharia Finance National Committee) supports all forms of collaboration between national and international stakeholders, particularly in the development of the halal industry. It can be in the form of halal food, halal tourism, and other halal products. Through this opportunity, KNKS supports the formation of a commitment to cooperation by halal industry players between countries through waqf financing schemes.[3] The essence of waqf, for example, is exemplified by Qurratul 'Aini Wara Hastuti in her research that the principal of the waqf asset should not be reduced. Assets that have been handed over by the wakif or waqf giver to the nazir or the waqf manager must be properly maintained by the nazir. Nazir was responsible for raising these assets. Nazir must be held responsible when the asset is reduced. The business and social orientation that exists in waqf is waqf, especially cash waqf received by nazir must be invested to seek profit as large as possible to be given to *mauquf alaih* or waqf beneficiaries. The goal of looking for profitable business opportunities is to help as many *mauquf alaih* as possible. In this case, of course, there needs to be cooperation between fellow financial institutions receiving cash waqf, but as we can see, this cooperation has not yet been seen, and it seems that each institution runs independently. Based on the things above, the author is interested in discussing the role of Islamic financial institutions receiving cash waqf (LKS-PWU) for optimizing cash waqf.[4]

Kusuma in his research explains that:[5] Islam is not just a belief in certain things in life but is a concept that conveys and connects all aspects of life which can be called a belief system. Islam teaches that

---

[3] "Wakaf Go Global : Kembangkan Inovasi Wakaf Produktif Untuk Industri Halal," Komite Nasional Ekonomi dan Keuangan Syariah, accessed April 9, 2021, https://knks.go.id/berita/85/wakaf-go-global-kembangkan-inovasi-wakaf-produktif-untuk-industri-halal?category=1.

[4] Qurratul 'Aini Wara Hastuti, "Peran Lembaga Keuangan Syariah Penerima Wakaf Uang (LKS-PWU) Bagi Optimalisasi Wakaf Uang," *Ziswaf: Jurnal Zakat Dan Wakaf* 4, no. 1 (February 15, 2018): 41–54, https://doi.org/10.21043/ziswaf.v4i1.3030.

[5] Kumara Adji Kusuma, "Mengembangkan Indikator Ekonomi Islam Melalui Zakat: Sebuah Kerangka untuk Mengukur Kesejahteraan Masyarakat/Negara Muslim," May 28, 2016, http://publikasiilmiah.ums.ac.id/handle/11617/7330.

all aspects of natural life are Allah's will and property; therefore there is no distinction between life in this world and life after death. There is an interconnected relationship between life in this world and life in the hereafter, in which one's behavior in this world has an impact on his life in the hereafter, good deeds in this world result in good rewards from Allah in the hereafter, and Allah will punish those bad things we do in this world. This indicator is expected to measure the level of welfare of a country based on the actual amount of wealth owned by Muslims. Authorities in an Islamic country or a country with a majority Muslim population can determine appropriate strategies and policies to increase the amount of zakat collection, especially by converting mustahik into muzakki, or by increasing the ability of muzakki to pay zakat to achieve *Maqasid al-Shariah*. The second benefit of this indicator is the collection of information about the types of assets that exist and are owned in the community so that they can be used for investment and other positive purposes. This is possible from the type of zakat paid, whether it is in the form of livestock, merchandise, fruits, honey, minerals, industry, factories, etc.

From the importance of the concept contained in *Rahmatan Lil 'Alamin* in realizing Indonesia's Economic Development in Era 4.0, its implementation needs to be known and developed to support it. So that researchers want to uncover and explore related 1) How does the value of *Rahmatan Lil 'Alamin* can be used to build Indonesia's economic development at 4.0 era from philosophical (Islamic economic) perspectives?, 2) How do the concepts of *Rahmatan Lil 'Alamin* in Islamic economic law can be manifested to realize Indonesia's Economic Development in Era 4.0?

Method

The type of research used is normative research with a library research approach. This research is categorized as a descriptive-analytic type, which tries to describe and provide a comprehensive analysis of how the concept contained in *Rahmatan Lil 'Alamin* in realizing Indonesia's Economic Development in Era 4.0, and how the Implementation of the *Rahmatan Lil 'Alamin* Concept in realizing Indonesia's Economic Development in Era 4.0. This research is normative research, where research studies are obtained by studying literature on various documents and related literature. The data is

processed and analyzed qualitatively. The research data was obtained from primary and secondary data taken from a literature review, starting from the study of Philosophy and Theory of Islamic Economic Law, as well as the implementation of the concept of *Rahmatan Lil 'Alamin* in realizing Islamic Economics through the Existence of Islamic Philosophy, Theory of Formation of Islamic Law, Values Islamic economic law philosophy, Measuring the Achievement of the Goals of Islamic Law (Economics), Philosophical construction in sharia economic contracts and Islamic Law Structuring and Views General philosophy of Islamic law (*Maqāsid al-Shari'ah* and conventional legal methodology of Islamic law *al-fiqh*) and also the philosophy of *Rahmatan Lil 'Alamin* in Islamic Economics 4.0 era, and the literature sources from official documents, previous research studies, journals, and other appropriate sources. Thus, the ending can be seen, the analysis, and drawn into a conclusion from the implementation of the concept of *Rahmatan Lil 'Alamin* in the era of the Industrial revolution 4.0 in economic development as it is today, especially through sharia economics.

Discussion and Result

Implementation of the *Rahmatan Lil 'Alamin* Concept in Era 4.0 as a Theory of the Formation of Islamic Law

Jasser Auda's perspective as research conducted by Mukhlishi explained that *Maqashid Al-Shariah* as the formation of Islamic law has no end. This means that the formation of Islamic law exists (the relativity of truth), which is essentially the end of the theory of the formation of Islamic law by using *Maqashid Sharia* needs to be developed by Muslim thinkers, to provide the needs and interests of the lives for the life of Muslims justice, mutual respect, and peace.[6] This means that the implementation of the concept of *Rahmatan Lil 'Alamin* in Era 4.0 as a Theory of Formation of Islamic Law is a necessity. This is as research launched by Mustaqim which explains that Maqasid Al-Shari'Ah is Jasser Auda's version of Islamic legal

[6] Mukhlishi, "Konsep Maqashid Al-Shariah Sebagai Teori Pembentukan Hukum Islam Tak Pernah Tuntas Perspektif Jasser Auda," *Al-Ulum Jurnal Pemikiran Dan Penelitian Ke Islaman* 1, no. 1 (February 6, 2014): 12–27, https://doi.org/10.31102/alulum.1.1.2014.12-27.

philosophy[7] is the idea of maqashid which is constantly changing and developing, which, based on the periodization of time, can be classified into four periods: the period of the Companions, the period of the madhhab imam, the period of development of maqashid theory from the 5th to the 8th century, and the contemporary period. Considering Jasser Auda, it seems that his views on maqashid are not much different from the previous ushul scholars. The completely new concept from Jasser Auda is when he places *maqashid al-shari'ah* as a philosophy of Islamic law. This means that *maqashid al-shari'ah* is placed as an independent discipline and is not one of the themes of the study of Usul fiqh. Therefore, *maqashid al-shari'ah* must function as the fundamental methodology in the workings of Usul fiqh. So that the concept of *Rahmatan Lil 'Alamin* in Era 4.0 as an Islamic Law Formation Theory needs to be developed according to the demands of the times by prioritizing high rationality without leaving the mainstream of religion, where the main points in the Usul fiqh language will be the basis for *istinbath al-Islam*. *Ahkam al-Syar'iyah*, the results of which will give birth to a new Theory of Formation of Islamic Law that is more relevant according to the demands of the times.[8]

In the development of the modern economy, the existence of ushul fiqh is very significant in determining the growth and development of the economic world, especially Islamic economics. Scholars now punish buying and selling transactions as they were in the early first century Hijri without regard to some of the differences in conditions between the two. Jalaluddin stated that the worldly benefits of humans and the means to achieve them will change as time changes. While the texts and qiyas methods that it brings are limited, they will not be enough to solve all the increasingly complex human problems. Therefore the existence of maqashid is needed.[9] The connection with the concept of *Rahmatan Lil 'Alamin* in Era 4.0 as a

[7] Mustaqim, "Maqasid Al-Shari'Ah Sebagai Filsafat Hukum Islam (Pendekatan Sistemik versi Jasser Auda)," *Al-Mabsut: Jurnal Studi Islam dan Sosial* 6, no. 1 (April 1, 2013): 1–19.

[8] I. Nurol Aen, *Dasar-Dasar Kaidah Kebahasaan Dalam Ushul Fiqh* (Tasikmalaya : Lembaga Kajian Komunikasi dan Sosial (Lekkas), 2020).

[9] Jalaluddin Abdurrahman, *Mashalih Al-Mursalah Wa Makanatuha Fi al-Tasyri* (Cairo : Darul Kitab al-Jami'iy, 1983), 88.

Theory of the Formation of Islamic Law where the all-digital era like today is a necessity where the need is very necessary to answer the challenges of the times.

Maqashid Syari'ah Imam al-Syathiby, for example, tends to provide space for ijtihad for economists in making a real contribution to the development of the Islamic economy, both in concept and practical areas. Normatively it shows that Maqashid Syari'ah is very relevant in fulfilling Ijtihad in Islamic economics in the categories of *Dharuriyat* (primary), *Hajiyat* (secondary), and *Tahsiniyah* (Tertiary).[10] Buzama[11], in his research, explained that Islamic law entered Indonesia at the same time as the entry of Islam into Indonesia, which according to some circles was from the 7th or 8th century AD. Meanwhile, Western law was only introduced by the VOC in the early 17th century AD. Before the entry of Islamic law, the people of Indonesia adhered to customary law, which has various systems and is very diverse. Islam had a major influence on the lives of Indonesian people until now. In addition, most of the Indonesian population adheres to Islam, so it becomes natural if Islamic law always colors the national law in Indonesia. So with the concept of *Rahmatan Lil 'Alamin* in Era 4.0 in which an all-digital era like today requires development that is tailored to the needs of *mujtahids*, which when speaking in the Indonesian context, the MUI (Indonesian Ulema Council) must be able to answer problems and challenges in this disruption era.

Prospects of Islamic Law in the Indonesian Legal System as explained by Saifuddin[12], in his research, is very easy to apply in Indonesia, without changing the state order, namely (1) through amendments to the Constitution, (2) through the transformation of legal material, and (3) through regional autonomy such as in Aceh, Banten, Madura, and Gorontalo. Examples such as the

---

[10] Bustanul Arifin, "Eksistensi Maqasid al-Shari'ah Imam aL-Syathiby Dalam Perkembangan Hukum Ekonomi Syari'ah," *At-Tahdzib: Jurnal Studi Islam dan Muamalah* 3, no. 2 (2015): 75–99.

[11] Khoiruddin Buzama, "Pemberlakuan Teori-Teori Hukum Islam di Indonesia," *Al-'Adalah* 10, no. 2 (2012): 467–72, https://doi.org/10.24042/adalah.v10i2.300.

[12] Saifuddin, "Prospek Hukum Islam dalam Sistem Hukum Indonesia," *Al-'Adalah* 14, no. 2 (2017): 461–82, https://doi.org/10.24042/adalah.v14i2.2516.

Contextualization of Al-Hisbah in Business Competition Law in Indonesia in the journal of Ninik Zakiyah, et al.[13] It is explained that the contextualization of a Business Competition Law in Indonesia is evidenced by the existence of supervision of market activities and competition in Islam that has existed since the time of the Prophet and even at the same time became one of the duties of an employee called *muhtasib* (supervisor). Al-hisbah as a supervisory agency for economic activities and market competition aims to enforce the commandments of ma'ruf nahi munkar. KPPU, Commission for the Supervision of Business Competition, is tasked with overseeing the practice of prohibiting monopolies and unfair business competition in Indonesia with the principle of economic democracy. The facts show that in general, the KPPU is similar to the al-hisbah institution because the substance and values contained in the KPPU are the same as those in the al-hisbah institution, especially in the effort to enforce the commandments of ma'ruf nahi munkar in the economic field and market competition. The connection with the concept of *Rahmatan Lil 'Alamin,* as a Theory of Formation of Islamic Law, in Era 4.0 is the amendment of the laws that apply in Indonesia through a superior order without creating noisy divisions between ethnicities, religions, nations, and countries, a small example of the presence Islamic Economic Brand, halal industry, and cash waqf in Indonesia.

Maheasy alluded in his research regarding the issue to be up to date in developing Islamic law, which is the Contextualization of Sharia (*Rahmatan Lil 'Alamin*) and its Contribution to the Development of Indonesian National Law. The reason is very clear that Islam and Islamic Shari'a which was originally revealed in Mecca in 610 AD is very flexible and contextual so it needs to be developed. Islam accepts the Hanif religion (the religion of Prophet Ibrahim) to perfect the Hanif religion which has been misunderstood, perpetuating the good and great teachings of the Hanif religion, and straightening its teachings to preserve its noble and priceless teachings. Islam also respects Arab traditions while at the same time preserving the noble and beneficial Arab traditions, and eradicating traditions that are no

[13] Ninik Zakiyah et al., "Al-Hisbah Contextualization in the Business Competition Law in Indonesia," *AL-'ADALAH* 16, no. 2 (December 26, 2019): 249–62, https://doi.org/10.24042/adalah.v16i2.5365.

longer useful. This is the most important nature of Islam according to Khalil Abdul Karim, which he calls the blueprint for the practice of Islam and Islamic law in the public sphere today. Religion is for humans because God the Most Just is very concerned about the reality of human social life. The law was also created to discipline people's lives; therefore the main concern is the benefit of human life, which in this context, the early history of sharia can be used as the basis for the application of Islamic law anywhere and anytime.[14]

There are three principles of Islamic economic philosophy as quoted by Ahmad M. Saefudin by Mohammad Daud Ali. ***First,*** the principle of all things in the universe, the heavens, the earth, and the natural resources, even the wealth owned by humans belongs to Allah as the Creator. All of Allah's creations are subject to His will and provisions (Surah 20:5). This principle has placed the issue of human ownership as relative ownership and God as the real owner. ***Second,*** the principle of monotheism, that Allah is one God. This principle means that humans as the Caliph of Allah on earth must manage all the facilities given by Allah to serve the one God, namely Allah SWT as the axis of human activity. ***Third,*** the principle of faith in the last day, namely the day of retribution for human deeds in various forms of activity, includes an economic activity. This principle places the basis for economic behavior in controlling divine values as the basis for the value that all human activities in the world will be held accountable at the end of the day. Thus, this principle is intended to build the level of human cognitive awareness that all human activities are always under God's control. Therefore there is no room for him to commit fraud in carrying out economic activities. The three main points of Islamic economic philosophy above gave birth to the basic values of the Islamic economic system.[15] So that with the presence of the *Rahmatan Lil 'Alamin* Concept in Era 4.0 as the Theory of the Formation of Islamic Law, it becomes a real necessity and needs to be implemented immediately to answer the challenges of the times

[14] Siti Mahmudah, "The Contextualization of Sharia and Its Contribution to The Development Of The Indonesian National Law," *AL-'ADALAH* 16, no. 1 (July 29, 2019): 17–40, https://doi.org/10.24042/adalah.v16i1.3393.

[15] Mohammad Daud Ali, *Sistem Ekonomi Islam Zakat Dan Wakaf* (Jakarta : UI Press, 2006), 6.

through various religious terms without oppressing other religions, but still *muntij* (optimistic) and not *mustahliq* (pessimistic).

Implementation of the *Rahmatan Lil 'Alamin* Concept as an Indicator of Achievement of the Goals of Islamic Economic Law

Hard-working as a basic human attitude to life is an Islamic work ethic whose main foundation is a person's belief system[16] The Mudharabah Scheme in Islamic Banking is in the form of profit-sharing and related problems in it[17]. There is a profit-sharing principle in the mudharabah scheme in Islamic banking. Mudharabah schemes are usually applied to financing and investment products that involve two parties: *shahib al-maal* and *mudharib*. Both parties work together to get the benefits that will be distributed according to the ratio agreed at the beginning of the contract. If there is a financial loss, the *sahib al-maal* will bear all of it, but if it is caused by the negligence of the capital manager, the loss must be borne by the *mudharib*. In terms of measuring the achievement of the objectives of Islamic law in the field of economics, the main basis is when the contract is initiated, in which the mudharabah contract, which is the majority of Islamic banks, applies the revenue-sharing principle which is indirectly approved by Fatwa DSN 07/2000. The application of this principle can trigger a sense of injustice because profit sharing is calculated based on gross profit which is more profitable for the *shahib al-maal* and less profitable for the *mudharib*. Therefore, the indicators of achievement under the purpose of Islamic law in the field of Islamic economics are still less effective when viewed from the aspect of the contract alone.

In classical fiqh studies, *mudharabah* contracts are similar contracts to usual that do not have collateral provisions in them. Therefore, there is no need for collateral in the mudharabah, because the mudharabah contract is only based on the element of trust (amanah) so there is no need for guarantees given by customers to Islamic banks / financial institutions. As a result, the collateral in the

[16] Ahmad Janan Asifudin, *Etos Kerja Islami* (Surakarta: Muhamadiyah Unniversiti Pres, 2004), 35.

[17] Supriatna, Irpan Helmi, and Nurrohman, "Mudharabah Scheme Within The Islamic Banking: Profit Sharing And Associated Problems In It," *Kodifikasia : LPPM Institut Agama Islam Negeri (IAIN) Ponorogo* 14, no. 2 (2020), https://doi.org/0.21154/kodifikasia.v14i2.2121.

mudharabah contract serves to avoid deviations from the fund managing customers so that they do not deviate from playing around in managing mudharabah financing funds, there is no need for guarantees and mandatory conditions for every mudharabah financing. Therefore, the LKS (the Islamic Financial Institution) can assign such guarantees to clients which serve to avoid moral hazard from the ***mudharib*** negligent or not under the contract, which is in line with the value of benefits in the Islamic transaction system.[18] So in terms of measuring the achievement of the objectives of Islamic law (Economics) it can be seen in the transaction system used at the beginning of the mutually agreed contract/engagement.

The Percentage of the Poor in Indonesia in March 2020 was about 26.42 million people. It increased around 1.63 million against September 2019, and an increase of around 1.63 million against March 2019. Compared to September 2019, the number of poor people in March 2020 in urban areas rose by 1.3 million people (from 9.86 million people in September 2019 to 11.16 million people in March 2020). Meanwhile, rural areas increased by 333.9 thousand people (from 14.93 million people in September 2019 to 15.26 million people in March 2020). The Poverty Line in March 2020 was recorded at IDR 454,652/capita/month with the composition of the Food Poverty Line of IDR 335,793,- and the Non-Food Poverty Line of IDR 118,859. In March 2020, on average, poor households in Indonesia had 4.66 household members. Thus, the size of the Poverty Line per poor household on average is IDR 2,118,678,-/poor household/month.[19] So from the statistical data above, its relationship with the Indicators of Achieving the Goals of Islamic Law (Economic Sector) is in the Überleitung /transitional category, which it means still needs assistance from the government to alleviate poverty in Indonesia. From this problem, it is needed a precise strategy in alleviating poverty, one of which is through measuring the Achievement of the

[18] Maman Surahman and Mr Nurrohman, "Analysis Of Maqâshid Al-Syarî'ah On The Application Of The Collateral In The Mudhârabah Contract In Sharia Financial Institutions," *Amwaluna: Jurnal Ekonomi dan Keuangan Syariah* 4, no. 2 (July 31, 2020): 276–87, https://doi.org/10.29313/amwaluna.v4i2.5588.

[19] BPS - Statistics Indonesia, "Badan Pusat Statistik," 2020, https://www.bps.go.id/pressrelease/2020/07/15/1744/persentase-penduduk-miskin-maret-2020-naik-menjadi-9-78-persen.html.

Goals of Islamic Law (Economics) by applying the concept of *Rahmatan Lil 'Alamin* in Islamic Economics (the principle of equitable justice).

Hossein Askari, a professor of international politics and business at George Washington University, USA, conducted a unique and interesting study. He carried out "in which country in the world are Islamic values most widely applied?". Askari's recorded 208 countries, not a single Islamic country, was able to rank in the top 25. Instead, Askari found Ireland, Denmark, Luxembourg, and New Zealand as the top five most Islamic countries in the world. Other countries which implement the most real teachings of Islam are Sweden, Singapore, Finland, Norway, and Belgium. Malaysia stayed at 33rd. Other Islamic countries in the top 50 include Kuwait, which is in 48th place, while Saudi Arabia is 91st and Qatar is 111th. Based on his research, Askari[20] said, most Islamic countries use religion as an instrument to control the state. However, there are still many countries that claim to be Islamic countries but often act unfairly, corruptly, and backward. Askari added it is precisely Western countries that reflect Islamic teachings, including in their economic development. Askari tried to compare Islamic ideals in terms of economic achievements, governance, people's rights, and political right, as well as international relations. Ireland, with 49,000 citizens converting to Islam, said Ali Selim, a senior member of the Irish Islamic Cultural Center (ICCI), saying that Muslims and other Irish can live side by side because they share a common history. Ireland was once a colony and several Irish suffer from racial discrimination and are always associated with terrorism, where Muslim immigrants in Ireland have the same opportunity to develop themselves, including in the economic field. The Quran encourages Muslims to live in prosperity and Dublin is one of the largest Islamic investment centers in Europe.[21] According to Askari's research, the relation with

---

[20] Scheherazade S. Rehman and Hossein Askari, "How Islamic Are Islamic Countries?," *Global Economy Journal* 10, no. 2 (May 21, 2010): 1850198, https://doi.org/10.2202/1524-5861.1614.

[21] Kompas Cyber Media, "Studi: Irlandia, Negara Paling Islami di Dunia," Kompas.com, June 10, 2014, https://internasional.kompas.com/read/xml/2014/06/10/2151008/Studi.Irlandia.Negara.Paling.Islami.di.Dunia.

indicators in Measuring the Achievement of the Goals of the Islamic economic sector cannot be measured from certain country models, both from Muslim countries and non-Muslim countries. It can be done is by applying the concept of *Rahmatan lil 'Alamin* in economics (Transparent, healthy competition, continuously innovating according to the demands of the times). So it can be concluded that *Rahmatan lil 'Alamin* in Islamic economics is a market trick (*siyasah Syar'iyyah*) towards real benefit.

It was further mentioned regarding the countries that were ranked in the top 10 as reported in the Islamicity Index (Rehman and Askari), even though none of those countries are known as Islamic countries and members of the OIC, in carrying out the principles of Islamic economics, they are better than Muslim countries themselves.[22] This is proof that the siyasa syar'iyyah through the concept of *Rahmatan Lil 'Alamin* needs to be applied from an early age to create a better economy for both Muslim and non-Muslim countries. This is as stated in his book Nasarudin Umar that living in a non-Muslim country is not easy, it is necessary to maintain strong faith and devotion, especially in matters of worship (Mahdhah and Ghairu Mahdhah).[23] According to the researcher when doing mu'amalah especially in transactions, the concept of *Rahmatan lil 'Alamin* is the answer to the problems above. Furthermore, Nasarudin Umar said in his book "The Movement of Islam in the US" that compassion[24] Islam needs to be implanted so that the comparison between the thoughts of Muslims and non-Muslims is maintained so that the researcher believes that *Rahmatan Lil 'Alamin* has an accurate concept in realizing world peace.

---

[22] Nurohman, *Measuring the Achievement of the Goals of Islamic Law (Economics). Study Materials for the Postgraduate Doctoral Program at UIN Sunan Gunung Djati Bandung, Semester II (Two) in the Philosophy and Theory of Islamic Economic Law, Saturday 3 April 2021, 2021, 7.*, 2021.

[23] Nasaruddin Umar, *Geliat Islam Di Negeri Non-Muslim* (Banten : PT Pustaka Alvabet, 2020).

[24] Nasaruddin Umar, *Geliat Islam Di Amerika Serikat* (Jakarta : Amzah, 2020).

Implementating the *Rahmatan Lil 'Alamin* Concept in Era 4.0 in Sharia Economic Contract

The philosophy of Islamic economic law cannot be separated from three patterns of relationship in terms of religion, but rather as a unit, namely the relationship between God, humans, and nature. This is asked a harmonious relationship among others. Islamic economics is a divine economy that is humanist and illuminates with morals, not only with *lustful Mutmainnah* (good) only. The philosophy of Islamic economic law has the basic nature of economic law with rabbinic and human characteristics. The rabbinic dimension places Allah SWT as the center of human consciousness in carrying out economic activities whose reflection gives birth to economic behavior with human insight that pivots on the application of the values of benefit, justice, and mutual benefit. There are two approaches used in understanding the concept of Islamic economic law: First, the qauliyah verses approach which is called the prescriptive normative approach. Second, the Kauniyyah approach is an empirical-positive-descriptive approach based on empirical sources through the process of formulating economic values inductively by considering the dimensions of human benefit which always move dynamically. Both approaches can be used at the same time, giving birth to a third approach, namely the convergence/complementary approach (complementary) so that it can produce the basic values of Islamic economics comprehensively. As a worship activity, economic or business activity in Islam must avoid harmful and prohibited things such as usury, excessive attitude (*israf*), reducing the scales, *khiyanat,* and *gharar* (speculative activities in business).[25] This means that Sharia Economic Contracts in Era 4.0 need to sustain and improve the *Rahmatan Lil 'Alamin* Concept based on digitalization and that Sharia also contributes to global competition through the contracts that are currently in place in the economy. Furthermore this is also evidenced by the implementation of the MUI fatwa that seven contracts are allowed in Sharia-based

[25] Ridwan, "Konstruksi filosofis akad-akad ekonomi syariah," *Ijtihad : Jurnal Wacana Hukum Islam dan Kemanusiaan* 15, no. 2 (2015): 257–74, https://doi.org/10.18326/ijtihad.v15i2.257-274.

fintech including sale and purchase contracts/*Ba'i*, *Ijarah*, *Musyarakah*, *Mudharabah*, *Qaradh*, *Wakalah*, and *Wakalah bil ujrah*.[26]

In this case, when it comes to Islamic economic contracts, Ridwan's research shows that conceptual disagreements over a contract's normative legitimacy and philosophical foundation are often the cause for issues. As a result, it has been discovered that numerous contracts in Islamic economic law are based on legal philosophical principles. God, man, and nature are the foundations of Islamic economic law. Religious and human knowledge combine to provide the basis for Islamic economic theory. When it comes to economic activities, the rabbinic perspective places God at the core of human awareness, whose reflection gives rise to human-minded economic activity that is based on benefits, justice, and mutual benefits.[27] Philosophical construction of sharia contracts In Muamalah *fiqh*; there are many sorts of contracts that have different legal aims. To determine the legal aims on which the law is enforced, the legal objectives of many forms of Muamalah contracts will be further explored. Contracts in Islamic law are divided into three categories: exchange contracts, cooperation contracts, and trust-giving agreements to make the mapping of contracts in Islamic law easier.[28]

So that concerning the Implementation of the *Rahmatan Lil 'Alamin* concept in era 4.0 in sharia economic contracts, it is necessary to measure the relevance of the existing contracts. This is as a perfect human being in living his life process; humans take on different roles and professions according to their respective talents, interests, and expertise. This necessitates diversity and no human being can independently take care of and meet their proper needs alone without the help of others.

As for the structuring and view of Islamic law, Muhammad Shahrur's believes that the concept of thinking so far in some respects should have been reorganized. Moving on from the framework of thinking that puts forward the principle of the absence of synonymy, gives birth to products of thought that are different from the

---

[26] MUI, *Nomor Fatwa: 138/DSN-MUI/V/2020; Tentang Penerapan Prinsip Syariah Dalam Mekanisme Kliring, Dan Penjaminan Penyelesaian Transaksi Bursa Atas Efek*, 2020.

[27] Ridwan, "Konstruksi filosofis akad-akad ekonomi syariah."

[28] Rachmat Syafei, *Fiqih Muamalah* (Bandung: Pustaka Setia, 2001), 1.

understanding of the majority of scholars. In scientific discourse, a series of contributions of thought that he put forward without relating to his academic background deserves a proportional academic appreciation. The context of the verses of the Qur'an and Sunnah which he understood differently from the understanding of the majority led to the opening of shells for intellectual creation (*ijtihad*) whose initial intention was to align the validity of revelation with the rapid changes and developments of the existing situation. Shahrur's fame was also sustained by the controversy over his thinking. This phenomenon has triggered several scientists to compose works to criticize their thoughts, both for and against. Therefore, referring to these works is very helpful in exploring Shahrur's thoughts further.[29]

The basic values of Islamic economics include three things. ***First,*** the concept of ownership states that ownership in Islam is not absolute control over economic resources, but the ability to utilize them. Man's ownership of his wealth is limited by the limits of his life in this world. Ownership of natural resources that are related to people's livelihoods becomes public property and the control rests with the state. The second is the concept of a balance between worldly and ukhrawi values and between individual interests and common interests, a balance between rights and obligations. The third is the value of justice, namely justice in the process of production and consumption, distribution process, and fairness in the allocation of the results of economic activities by setting aside property obligations in the form of issuing zakat. These three basic values become the basic spirit for the instrumental values of Islamic economics.[30] So that the Implementation of the *Rahmatan Lil 'Alamin* Concept in Era 4.0 in Islamic Economic Contracts today that needs to be emphasized is the concept of ownership, balance, and equitable justice.

In this case, it is related to the Western response to Islamic economics in the 4.0 era of Islamic Economics which is applied in various countries, including Islamic banking, or Indonesia it is also called Sharia Banking. Where the western world's response to sharia economics is that the Western economic system is intended to

[29] Asriyati, "Penataan Dan Pandangan Hukum Islam Muhammad Shahrur," *Mazahib* 14, no. 1 (2015), https://doi.org/10.21093/mj.v14i1.334.

[30] Ridwan, "Konstruksi filosofis akad-akad ekonomi syariah."

embrace the Islamic economic system and support the existence of the Islamic economic system, as a result, the western world implements a free business system based on capitalism that prioritizes capital for economic development in the Islamic world. Second, the contribution of the western world to the economy in Indonesia is a necessity that incidentally is not an Islamic State. However, in its scope, Islamic law in Indonesia in this case the sharia economy is subject to the national economic system, although in Indonesia itself the sharia economic system and conventional economics in Indonesia have their legal umbrella. So that the Islamic economic system in Indonesia until now is an alternative concept for a prosperous economic system in Indonesia, one of which is a capitalist economic system, as long as do not contradict Islamic law, especially the Qur'an and al-Hadith.[31] So that the implementation of the *Rahmatan Lil 'Alamin* concept in era 4.0 in Islamic economic contracts today also needs legal certainty nationally through siyasa syar'iyyah in Islamic law, especially in the field of Islamic economics by prioritizing contracts that are relevant to the demands of the times, such as with the presence of cash waqf in early 2021 ago. Moh. Cholid Wardi in his journal describes the application of cash waqf (money) in the pesantren environment in Madura which has its own uniqueness, namely the development of the waqf fund itself, where the pesantren's assets surrender their entire assets to the waqf body. Prenduan Sumenep Madura.[32]

Usûl al-fiqh and *Maqāsid* mostly confused people, especially Islamic law students. It is important to know the difference between the two branches of Islamic sciences. The structure, scope, and functional properties of the two sciences are different.[33] Nurrohman

---

[31] Hisam Ahyani and Memet Slamet, "Respon Dunia Barat Terhadap Ekonomi Syariah Di Era Revolusi Industri 4.0," *JPED (Jurnal Perspektif Ekonomi Darussalam) (Darussalam Journal of Economic Perspectives)* 7, no. 1 (March 28, 2021), https://doi.org/10.24815/jped.v7i1.19277.

[32] Moch Cholid Wardi, "The Implementation Of Cash Waqf In The Pesantren Of Al-Amien Prenduan Sumenep Regency Of Madura," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 11, no. 1 (July 3, 2016): 93–119, https://doi.org/10.19105/al-lhkam.v11i1.860.

[33] Sulaiman Lebbe and Dr Rifai, "General Philosophy of Islamic Law and Its Legal Methodology. (Maqāsid Al-Shari'ah and Usûl Al-Fiqh)," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 19, 2021), https://papers.ssrn.com/abstract=3789249.

Syarif[34] in his research explains that the revitalization of ideology from an Islamic perspective, both at the national and global levels, always leads to aspirations and demands to implement sharia or Islamic law in total (kaffah). In the Indonesian rule of law, such aspirations and demands cannot always be met. This is because the Indonesian state of law, from the beginning, was built based on a national spirit based on the principles of divinity, humanity, justice, and equality for every citizen before the law. Therefore, aspirations and demands for the application of Islamic law always experience obstacles if there are discriminatory elements or other elements that can eliminate the guarantees and protections for the human rights of citizens that have been guaranteed by the constitution. As a result, the implementation of the *Rahmatan Lil 'Alamin* concept in Era 4.0 in sharia economic contracts is an inspiring concept in building better Islamic law, especially in terms of sharia economic contracts with the spirit of nationality (overshadowing all mankind).

The origins and definitions of maslahat legal instruments that exist in the concept of the public interest have become the general central theme of Islamic legal philosophy. Indeed, in general philosophy, Islamic law determines what is good and bad for the Muslim community. The view of Muslim jurists expresses their opinion that God Almighty revealed His last divine message through His last prophet (Muhammad Saw) to secure the interests and welfare of mankind. God sends His divine messages to promote human interests according to the divine will. But in the view of Muslim jurists today it is difficult to define the basic idea of human interest.[35] For example, in the case of cash waqf[36] where the view of Islamic Economics in Indonesia regarding cash waqf is carried out as Law No. 41/2004 concerning waqf where objects move, namely in "moving object waqf" which is manifested in the form of money. As a result,

---

[34] Nurrohman Syarif, *Islamic Shari'a in the Perspective of the State of Law Based on Pancasila*, vol. 11, 2 vols. (Pandecta Research Law Journal, 2016).

[35] Lebbe and Rifai, "General Philosophy of Islamic Law and Its Legal Methodology. (Maqāsid Al-Shari'ah and Usûl Al-Fiqh)."

[36] Hisam Ahyani and Muharir, "Perspektif Hukum Ekonomi Syariah Tentang Wakaf Uang Di Era Revolusi Industri 4.0," 2021,
http://ejournal.kopertais4.or.id/tapalkuda/index.php/lantabur/article/view/4184.

cash waqf in Indonesia in the industrial revolution 4.0 eras can prosper the economy of the community and also the state. Waqf is positioned as social worship where waqf in Law No. 41/2004 concerning waqf article 1 explains that waqf is the act of a wakif to separate or surrender part of his property to be used forever for worship purposes and also for welfare purposes according to Islamic sharia. These are the contracts that need to be developed according to the demands of the times where the Implementation of the *Rahmatan Lil 'Alamin* concept in era 4.0 in sharia economic contracts can answer the challenges of the present, later, and in the future.

In the thought of Islamic economic theology as research by Ahyani and Slamet[37] It was explained that in the 4.0 era of Islamic economic theology, as it is today, Indonesia adheres to economic freedom, meaning that this freedom is required to always be Muslim-friendly. Therefore the Islamic Economic Theological Thinking Concept is a concept formed in order to realize the aspirations of Muslims regarding economic problems where the conception of Islamic economic theology has a significant effect on its adherents in concrete life. Such as practicing mu'amalah in terms of Islamic legal politics, Islamic Economic Politics, development strategies in halal tourism,[38] dalam Halal Food,[39] cash waqf transaction,[40] and soon. Islamic economics is an alternative choice for a Muslim for several reasons, namely the principles of Islamic economics itself. As a result, Islamic moral philosophy in socio-economic development is primarily

[37] Hisam Ahyani and Memet Slamet, "Pemikiran Teologi Ekonomi Islam Di Indonesia Era 4.0," March 29, 2021, 0.

[38] Hisam Ahyani, Muharir Muharir, and Widadatul Ulya, "Potensi Wisata Halal Kota Banjar, Jawa Barat di Era Revolusi Industri 4.0," *Tornare: Journal of Sustainable and Research* 3, no. 1 (January 12, 2021): 0, https://doi.org/10.24198/tornare.v3i1.31511.

[39] Ahyani Hisam et al., "The Potential Of Halal Food On The Economy Of The Community In The Era Of Industrial Revolution 4.0," *Indonesia Journal of Halal* 3, no. 2 (February 6, 2021): 112–28, https://doi.org/10.14710/halal.v3i2.10244.

[40] Fahruddin Ali Sabri, "WAKAF UANG (Sebuah Alternatif Dalam Upaya Menyejahterakan Masyarakat)," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 8, no. 1 (2013): 40–54, https://doi.org/10.19105/al-lhkam.v8i1.339.

justice which can be proven by an equitable distribution of income, as well as equitable wealth.[41]

Besides the cash waqf at 4.0 eras above, the Islamic economic community in Indonesia in the 4.0 era as it is today in the field of fiqh muamalah has challenges when delaying installment payments, then the Islamic bank will implement a default payment system (failure of payment), this application should not exist in Islamic business transactions, but in the era of globalization as it is today in Islamic banking has become ijtihad maliah a necessity due to the demands of the times.[42] Due to the growing Muslim population, rapid digitalization, high demand for halal products, and an integrated global economy, the halal industry has become one of the most important business segment. Both Muslims and non-Muslims are taking advantage of the enormous potential of the global Halal industry by developing their own products. Different segments of the halal ecosystem include halal food, muslim-friendly tourism as well as halal cosmetics and pharmaceuticals. Based on those facts, a strategy can be proposed by developing and incorporating sustainable halal values, such as *Rahmatan Lil 'Alamin* values, so that Indonesian government encourage Islamic economy development. Therefore, the Islamic economic development in Indonesia can benefit from the development of this sector.

Conclusion

From the explanation above, several conclusions can be drawn: 1) The concept of *Rahmatan Lil 'Alamin* (overshadowing the entire ummah) can make the Existence of Islamic Legal Philosophy, which is then implemented and developed through the Islamic economic system in Indonesia to achieve happiness in the world and the hereafter. *Rahmatan Lil 'Alamin*, with the existing conception of Islamic economic law philosophy, is based on the triangle concept, namely the philosophy of God, man, and nature. 2) Islamic Economics

[41] Zainal Abidin, "Keadilan Sosio-Ekonomi (Kajian Atas Distribusi Pendapatan Dan Kekayaan Yang Merata Dalam Perspektif Islâm)," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 2, no. 2 (2007): 257–72, https://doi.org/10.19105/al-lhkam.v2i2.2625.

[42] Taufiqurrahman Taufiqurrahman, "IJTIHÂD MUÂMALAH MÂLIYAH KONTEMPORER DI ERA GLOBALISASI," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 2, no. 2 (2007): 183–202, https://doi.org/10.19105/al-lhkam.v2i2.2621.

is manifested by applying social interests, such as waqf. The implementation of the concept of *Rahmatan lil-alamin* in Islamic economics is fundamental to just live, in the context of reducing social inequality in human life. In addition, another form of embodiment is economic freedom which demands to always be Muslim friendly. To conclude, the unique conception of *Rahmatan Lil 'Alamin's* offered will create new developments that adapt to the demands of the times such as cash waqf, halal industry, halal food, halal tourism, and so on, if it is applied seriously.

Bibliography

Abdurrahman, Jalaluddin. *Mashalih Al-Mursalah Wa Makanatuha Fi al-Tasyri*. Cairo : Darul Kitab al-Jami'iy, 1983.

Aen, I. Nurol. *Dasar-Dasar Kaidah Kebahasaan Dalam Ushul Fiqh*. Tasikmalaya : Lembaga Kajian Komunikasi dan Sosial (Lekkas), 2020.

Ahyani, Hisam and Muharir. "Perspektif Hukum Ekonomi Syariah Tentang Wakaf Uang Di Era Revolusi Industri 4.0," 2021. http://ejournal.kopertais4.or.id/tapalkuda/index.php/lantabur/article/view/4184.

Ahyani, Hisam and Memet Slamet. "Respon Dunia Barat Terhadap Ekonomi Syariah Di Era Revolusi Industri 4.0." *JPED (Jurnal Perspektif Ekonomi Darussalam) (Darussalam Journal of Economic Perspectives)* 7, no. 1 (March 28, 2021). https://doi.org/10.24815/jped.v7i1.19277.

Ahyani, Hisam, Muharir Muharir, and Widadatul Ulya. "Potensi Wisata Halal Kota Banjar, Jawa Barat di Era Revolusi Industri 4.0." *Tornare: Journal of Sustainable and Research* 3, no. 1 (January 12, 2021): 4–12. https://doi.org/10.24198/tornare.v3i1.31511.

Ahyani Hisam et al., "The Potential Of Halal Food On The Economy Of The Community In The Era Of Industrial Revolution 4.0," *Indonesia Journal of Halal* 3, no. 2 (February 6, 2021): 112–28, https://doi.org/10.14710/halal.v3i2.10244

Arifin, Bustanul. "Eksistensi Maqasid al-Shari'ah Imam aL-Syathiby Dalam Perkembangan Hukum Ekonomi Syari'ah." *At-Tahdzib: Jurnal Studi Islam dan Muamalah* 3, no. 2 (2015): 75–99.

Asriyati. "Penataan Dan Pandangan Hukum Islam Muhammad Shahrur." *Mazahib* 14, no. 1 (2015).

https://doi.org/10.21093/mj.v14i1.334.
Auda, Jasser. *Maqasid Al-Shariah as Philosophy of Islamic Law*. London: The International Institute of Islamic Thought, 2008.
BPS - Statistics Indonesia. "Badan Pusat Statistik," 2020. https://www.bps.go.id/pressrelease/2020/07/15/1744/persentase-penduduk-miskin-maret-2020-naik-menjadi-9-78-persen.html.
Buzama, Khoiruddin. "Pemberlakuan Teori-Teori Hukum Islam di Indonesia." *Al-'Adalah* 10, no. 2 (2012): 467–72. https://doi.org/10.24042/adalah.v10i2.300.
Daud Ali, Mohammad. *Sistem Ekonomi Islam Zakat Dan Wakaf*. Jakarta : UI Press, 2006.
Fahruddin Ali Sabri, "WAKAF UANG (Sebuah Alternatif Dalam Upaya Menyejahterakan Masyarakat)," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 8, no. 1 (2013): 40–54, https://doi.org/10.19105/al-lhkam.v8i1.339.
Hastuti, Qurratul 'Aini Wara. "Peran Lembaga Keuangan Syariah Penerima Wakaf Uang (LKS-PWU) Bagi Optimalisasi Wakaf Uang." *Ziswaf: Jurnal Zakat Dan Wakaf* 4, no. 1 (February 15, 2018): 41–54. https://doi.org/10.21043/ziswaf.v4i1.3030.
Janan Asifudin, Ahmad. *Etos Kerja Islami*. Surakarta: Muhamadiyah Unniversiti Pres, 2004.
Jaya, Asafri. *Konsep Maqasid Al-Shari'ah Menurut As-Syathibi*. Jakarta: Raja Grafindo Persada, 1996.
Kusuma, Kumara Adji. "Mengembangkan Indikator Ekonomi Islam Melalui Zakat: Sebuah Kerangka untuk Mengukur Kesejahteraan Masyarakat/Negara Muslim," May 28, 2016. http://publikasiilmiah.ums.ac.id/handle/11617/7330.
Lebbe, Sulaiman, and Dr Rifai. "General Philosophy of Islamic Law and Its Legal Methodology. (Maqāsid Al-Shari'ah and Usûl Al-Fiqh)." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, February 19, 2021. https://papers.ssrn.com/abstract=3789249.
Mahmudah, Siti. "The Contextualization of Sharia and Its Contribution to The Development Of The Indonesian National Law." *AL-'ADALAH* 16, no. 1 (July 29, 2019): 17–40. https://doi.org/10.24042/adalah.v16i1.3393.

Media, Kompas Cyber. "Studi: Irlandia, Negara Paling Islami di Dunia." Kompas.com, June 10, 2014. https://internasional.kompas.com/read/xml/2014/06/10/2151008/Studi.Irlandia.Negara.Paling.Islami.di.Dunia.

MUI. *Nomor Fatwa: 138/DSN-MUI/V/2020; Tentang Penerapan Prinsip Syariah Dalam Mekanisme Kliring, Dan Penjaminan Penyelesaian Transaksi Bursa Atas Efek*, 2020.

Mukhlishi. "Konsep Maqashid Al-Shariah Sebagai Teori Pembentukan Hukum Islam Tak Pernah Tuntas Perspektif Jasser Auda." *Al-Ulum Jurnal Pemikiran Dan Penelitian Ke Islaman* 1, no. 1 (February 6, 2014): 12–27. https://doi.org/10.31102/alulum.1.1.2014.12-27.

Mustaqim. "Maqasid Al-Shari'Ah Sebagai Filsafat Hukum Islam (Pendekatan Sistemik versi Jasser Auda)." *Al-Mabsut: Jurnal Studi Islam dan Sosial* 6, no. 1 (April 1, 2013): 1–19.

Nurohman. *Measuring the Achievement of the Goals of Islamic Law (Economics). Study Materials for the Postgraduate Doctoral Program at UIN Sunan Gunung Djati Bandung, Semester II (Two) in the Philosophy and Theory of Islamic Economic Law, Saturday 3 April 2021, 2021, 7.*, 2021.

Rehman, Scheherazade S., and Hossein Askari. "How Islamic Are Islamic Countries?" *Global Economy Journal* 10, no. 2 (May 21, 2010): 1850198. https://doi.org/10.2202/1524-5861.1614.

Ridwan. "Konstruksi filosofis akad-akad ekonomi syariah." *Ijtihad : Jurnal Wacana Hukum Islam dan Kemanusiaan* 15, no. 2 (2015): 257–74. https://doi.org/10.18326/ijtihad.v15i2.257-274.

Rohman, Abdur. "Menyoal Filosofi 'An Taradin Pada Akad Jual Beli (Kajian Hukum Ekonomi Syariah Dalam Transaksi Jual Beli)." *Et-Tijarie: Jurnal Hukum Dan Bisnis Syariah* 3, no. 2 (2016). https://journal.trunojoyo.ac.id/ettijarie/article/view/3911.

Sabri, Fahruddin Ali. "Wakaf Uang (Sebuah Alternatif Dalam Upaya Menyejahterakan Masyarakat)." *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 8, no. 1 (2013): 40–54. https://doi.org/10.19105/al-lhkam.v8i1.339.

Saifuddin. "Prospek Hukum Islam dalam Sistem Hukum Indonesia." *Al-'Adalah* 14, no. 2 (2017): 461–82. https://doi.org/10.24042/adalah.v14i2.2516.

Supriatna, Irpan Helmi, and Nurrohman. "Mudharabah Scheme Within The Islamic Banking: Profit Sharing And Associated Problems In It." *Kodifikasia : LPPM Institut Agama Islam Negeri (IAIN) Ponorogo* 14, no. 2 (2020). https://doi.org/0.21154/kodifikasia.v14i2.2121.

Surahman, Maman, and Mr Nurrohman. "Analysis Of Maqâshid Al-Syarî'ah On The Application Of The Collateral In The Mudhârabah Contract In Sharia Financial Institutions." *Amwaluna: Jurnal Ekonomi dan Keuangan Syariah* 4, no. 2 (July 31, 2020): 276–87. https://doi.org/10.29313/amwaluna.v4i2.5588.

Syafei, Rachmat. *Fiqih Muamalah*. Bandung: Pustaka Setia, 2001.

Syarif, Nurrohman. *Islamic Shari'a in the Perspective of the State of Law Based on Pancasila*. Vol. 11. 2 vols. Pandecta Research Law Journal, 2016.

Taufiqurrahman. "Ijtihad Muamalah Maaliyah Kontemporer Di Era Globalisasi." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 2, no. 2 (2007): 183–202. https://doi.org/10.19105/al-lhkam.v2i2.2621.

Umar, Nasaruddin. *Geliat Islam Di Amerika Serikat*. Jakarta : Amzah, 2020.

———. *Geliat Islam Di Negeri Non-Muslim*. Banten : PT Pustaka Alvabet, 2020.

Wardi, Moch Cholid. "The Implementation Of Cash Waqf In The Pesantren Of Al-Amien Prenduan Sumenep Regency Of Madura." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 11, no. 1 (July 3, 2016): 93–119. https://doi.org/10.19105/al-lhkam.v11i1.860.

Yulma, Nur Liviasari, and Sri Herianingrum. "Peran Pemberdayaan Wakaf Tunai (Studi Kasus Pada BMT Amanah Ummah Surabaya)." *Jurnal Ekonomi Syariah Teori Dan Terapan* 3, no. 11 (2016): 856–71. https://doi.org/10.20473/vol3iss201611pp856-871.

Zainal Abidin, "Keadilan Sosio-Ekonomi (Kajian Atas Distribusi Pendapatan Dan Kekayaan Yang Merata Dalam Perspektif Islâm)," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 2, no. 2 (2007): 257–72, https://doi.org/10.19105/al-lhkam.v2i2.2625.

Zakiyah, Ninik, Paramita Prananingtyas, Hari Sutra Disemadi, and Konstantin Gubanov. "Al-Hisbah Contextualization in the

Business Competition Law in Indonesia." *Al-'Adalah* 16, no. 2 (December 26, 2019): 249–62.
https://doi.org/10.24042/adalah.v16i2.5365.

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 138-161
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-ihkam.v16i1.4561

The Dowry Classing Concept Based on Women's Criteria at Karangsono, Wonorejo, Pasuruan; A Study of Berger and Luckmann's Social Construction

Ahmad Arif Masdar Hilmy
KUA Kecamatan Tempursari,
Jl. Raya Pundungsari No. 18, Desa Pundungsari,
Kec. Tempursari, Kabupaten Lumajang, Jawa Timur 67375
Email: arivmasdar@gmail.com

Ria Cahyaning Utami
UIN Sunan Ampel Surabaya,
Jl. Ahmad Yani No.117, Jemur Wonosari, Kec. Wonocolo, Kota Surabaya, Jawa Timur 60237
Email: riacahyaningutami23@gmail.com

Article history: Received: Agustus 07, 2019, Accepted: May 30, 2020, Published: Juni 27, 2020

Abstract:

Determination of the dowry among people of Karangsono Village was originally based on Islamic law by relying on convenience, lightness, and simplicity principles. However later, it was replaced by the so-called dowry classing concept. This article portrays the practice of the concept using social construction theory. This is field research with a qualitative descriptive method using Berger and Luckmann's social construction theory as the analytical tool. The data were from a study on documents, interviews, and observations. The conclusions are: (1) The dowry classing concept is based on the characteristic of the bride, namely marital status (single or widow), physical beauty, and age. The higher quality of the woman, the higher dowry she can get; (2) Determination of the dowry has undergone social construction based on three simultaneous processes. At first, the externalization process occurs through adaptation to religious texts and nowadays life context. Afterward, the process of objectivation is signified by

Author correspondence email: arivmasdar@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

the birth of new meanings which are clear in the actions of the wider community which turn them into objective facts. The last step, internalization, happens through the affirmation of the consciousness that everybody experiences personally and transferring process on the objective meaning.

Keywords:
Dowry Class; Social Construction; Karangsono.

Abstrak:
Penentuan mahar dalam masyarakat Desa Karangsono mulanya didasarkan pada aturan hukum Islam, yakni berdasarkan asas kemudahan, keringanan dan kesederhanaan. Namun belakangan, prinsip tersebut tergantukan oleh konsep kelas mahar. Artikel ini memotret praktik konsep kelas mahar tersebut dengan teori konstruksi sosial. Penelitian lapangan ini menggunakan metode deskriptif kualitatif dengan teori konstruksi sosial Berger dan Luckmann sebagai pisau analisisnya. Pengambilan data dilakukan melalui studi dokumen, wawancara dan observasi. Kesimpulannya adalah: (1) Konsep kelas mahar didasarkan pada karakteristik yang dimiliki calon pengantin perempuan, apakah dia perawan atau janda, bagaimana paras dan berapa usianya. Semakin tinggi kualitas yang dimiliki, semakin tinggi pula mahar yang bisa didapatkan, (2) Penentuan mahar dengan konsep kelas mahar telah mengalami konstruksi sosial berdasarkan tiga proses simultan. *Pertama, p*roses eksternalisasi terjadi melalui adaptasi dengan teks-teks keagamaan dan konteks kehidupan kekinian. Selanjutnya, proses obyektivasi melahirkan pemaknaan baru yang termanifestasikan ke dalam tindakan-tindakan masyarakat sehingga menjadi kenyataan obyektif dan lumrah dalam kehidupan sehari-hari. Selanjutnya, proses internalisasi tergambar dari penegasan akan kesadaran yang dialami secara subjektif dan pentransferan pengetahuan tentang makna-makna obyektif.

Kata Kunci:
Kelas Mahar; Konstruksi Sosial; Karangsono

Introduction

Marriage is an important issue in human life that is regulated in religion, state, even culture. The rules and procedures of marriage aim at none other than to enable both husband and wives to easily reach the peak of so-called *sakinah mawaddah warahmah*.[1] In the sense of marriage validity, for instance, Islamic scholars generally agree about the requirements which consist of the marriage contract, a bride, a groom, a guardian of the bride, two witnesses, and dowry.[2]

Dowry is the main requirement in the marriage contract commencement which a prospective husband gives to his next wife on her preference. It is one of the things that differentiate between marriage before and after Islam. Pre-Islamic brides did not get dowry because it was addressed to their guardians in exchange for the daughters or as a reward for giving them over the groom's family for strengthening the relationship of both families.

Philosophically, dowry is a symbol of serious goodwill of a future husband to his future wife by giving useful gifts either material or non-material.[3] Before the marriage takes place, the couple needs to discuss the dowry as it represents affection, responsibility, and respect for women.[4]

The dowry obligation itself is based on the Qur'an, the hadith as well as the consensus of Islamic scholars. The Qur'an makes it clear at Surat al-Nisā' verse 4 as follow:

وَآتُوا النِّسَاءَ صَدُقَاتِهِنَّ نِحْلَةً فَإِنْ طِبْنَ لَكُمْ عَنْ شَيْءٍ مِنْهُ نَفْسًا فَكُلُوهُ هَنِيئًا مَرِيئًا

"Give the dowry to the woman (whom you marry) as a voluntary gift. If they give you a portion of the dowry with pleasure,

---

[1] Huzaimah Tahido Yanggo, *Problematika Hukum Islam Kontemporer* (Jakarta: Pustaka Firdaus, 1996), 67.

[2] Amir Syarifuddin, *Hukum Perkawinan Islam Di Indonesia: Antara Fikih Munakahat Dan Undang-Undang Perkawinan* (Jakarta: Kencana Prenada Media Group, 2009), 59.

[3] Dian Ramadhan and Farah Ihza Fauzia Balqis, "Pandangan Mazhab Hanafi Dan Maliki Terhadap Jumlah Kadar Mahar Pada Akad Nikah," *Jawi* 3, no. 1 (2020): 45.

[4] Saiful Usman and Ruslan Rida Alfida, "Penetapan Mahar Perempuan Di Desa Kampung Paya, Kecamatan Kluet Utara, Kabupaten Aceh Selatan," *Jurnal Ilmiah Mahasiswa Pendidikan Kewarganegaraan Unsyiah* 1, no. 1 (2016): 90.

then eat (take) that gift (as food) which is delicious again with good consequences."[5]

In addition, to obliging the dowry, the verse also mentions that a husband whose wife has received the dowry then decides to give some parts of it to him voluntarily may accept it.[6] This rule furthermore implies that a dowry belongs fully to a wife and it is her who decides how to use or spend it, including sharing it with the husband who initially gave it for her. Likewise, regulation of the dowry indicates how Islam guides Moslems to build a loving and evergreen family.[7]

Meanwhile, at the hadith, the Prophet Muhammad pbuh once gave an example of giving a simple dowry in the form of an iron ring. The story narrated by Sahl bin Sa'ad al-Sa'idi[8] shows how Islam makes it easy for Moslems in terms of giving dowry.[9]

At the Indonesian positive law, regulation on the dowry is found in Articles 30-38 of the Compilation of Islamic Law. It mentions that a dowry must be given to a wife by considering the principle of simplicity. Additionally, because it is given to the wife, she has full ownership rights. Law No. 1 of 1974 concerning Marriage neither regulates nor mentions the dowry.[10]

Practically, determination of the dowry occurs variously and naturally in society. Most of the time, local culture and values play a role in deciding what kind of dowry the next bride will receive. Some uniqueness and distinctive features inevitably appear because marriage or wedding is not only a religious event, but also a cultural one.

---

[5] Departemen Agama RI, *Al-Qur'an Dan Terjemahnya* (Bandung: Diponegoro, 2006), 77.

[6] Wahbah al-Zuḥaily, *Mausū'ah Al-Fiqh Wa Al-Qaḍāyā Al-Mu'āṣirah* (Damaskus: Dar al Fikr, 2013), 248.

[7] Rida Alfida, "Penetapan Mahar Perempuan Di Desa Kampung Paya, Kecamatan Kluet Utara, Kabupaten Aceh Selatan," 91.

[8] The Prophet SAW said: اُنْظُرْ وَلَوْ خَاتَمًا مِنْ حَدِيْدٍ (Look even if it is only an iron ring).

[9] Amir, *Hukum*, 86.

[10] Amiur Nuruddin and Azhari Akmal Tarigan, *Hukum Perdata Islam Di Indonesia* (Jakarta: Kencana Prenada Media Group, 2016), 64–67.

People at Karangsono Village, Wonorejo District, Pasuruan Regency have a distinctive feature in the determination of the dowry which has become a custom. They practice so-called dowry classing concept in deciding the form of dowry according to the prospective wife's characteristics. It includes her marital status (single or wisdom), her outer or physical beauty, and age. The higher this is used in determining the high or low of the dowry, that will later be given to the bride.

A resident of the village mentions that determining high-value dowries such as motorbikes, cars, land, or property aims as an anticipatory instrument just in case something bad happens, such as the death of a husband with a wife and children left behind. [11] In the general scope, the concept of dowry makes a prospective husband think about the proper form of material dowry based on the characteristic of women they wish to get married to.[12]

This article discusses the concept of the dowry classing in Karangsono Village then portraying it using the perspective of Berger and Luckmann's social construction theory. The phenomenon of classing concept of dowry among people in Karangsono Village is deemed to be worth as a research subject with the theory considering that its people's life has never been stagnant. Instead, it keeps changing while forming a dynamic life order.

Methods

This field research used the qualitative descriptive method in displaying the data. Meanwhile, the data came from a study of documents, observation, and interviews. Document study is a technique of collecting written data related to research topics whether from books, documents, notes, and archives. The document that this research studied included some literature on the concept of dowry in marriage and social construction theory.

Observation, on the other hand, focused on the behavior of Karangsono Village people in determining the dowry for marriage. Meanwhile, interviews targeted some parties involved in determining

[11] SF, *Interview*, Pasuruan, September 25, 2019.

[12] Dian Ramadhan and Farah Ihza Fauzia Balqis, "Pandangan Mazhab Hanafi Dan Maliki Terhadap Jumlah Kadar Mahar Pada Akad Nikah," 46.

the dowry. This study used the purposive sampling method in determining the interviewees who answered certain questions according to the research objectives. The whole data was then analyzed using the social construction theory of Peter L. Berger and Thomas Luckmann.

This research is increasingly important to conduct because previous studies were limited in discussing the concept of dowry mainly from the perspective of Islamic law and gender justice.[13] On the other hand, researches with social construction as an analytical tool were mainly discussed women in mixed marriages or polygamy.[14]

The Methods section is usually the second-longest section in the Abstract. It should contain enough information to enable the reader to understand what was done and important questions to which the Methods section should provide brief answers.

Discussion and Result

The Concept of Dowry in Islamic Law and Indonesian Positive Law

The dowry in Islamic law is called *ṣadāq*. In Indonesia, it is usually called *mahar* or *maskawin*. Terminologically, dowry is a gift that a husband must give to his wife as a form of love, affection, and sincerity.[15] The form, number, or type of dowry is usually pronounced in the marriage contract. A dowry, at least, must fulfill several requirements, such as having value, being useful, lawful, fully owned by the giver or the husband, and clear in the condition, shape, and characteristic.

---

[13] For example, a research conducted by Jannatin Aliah, entitled *Kedudukan Mahar dalam Proses Pernikahan Perspektif Fiqih Munakahat (Studi Kasus di Desa Pemulutan Ilir Kecamatan Pemulutan Kabupaten Ogan Ilir)*. Another research was conducted by Sami Faidhullah with the title *Konsep Mahar Perkawinan berupa Hafalan Surah al-Qur'an Perspektif Keadilan Gender*.

[14] For example, a research conducted by Benazir Bona Pratamawaty, Deddy Mulyana and Dadang Sugiana, entitled *Model Konstruksi Makna Peran dan Posisi Perempuan Indonesia Pelaku Kawin Campur*. Another example is Roibin's research, entitled *Praktik Poligami di Kalangan Para Kiai (Studi Konstruksi Sosial Poligami Para Kiai Pesantren di Jawa Timur)*.

[15] Putra Halomoan, "Penetapan Mahar Terhadap Kelangsungan Pernikahan Ditinjau Menurut Hukum Islam," *JURIS (Jurnal Ilmiah Syariah)* 14, no. 2 (2016).

In Islamic law, a dowry is required as a gift to the bride-to-be in a valuable form as a marriage sign. Islam considers it as one of the important things in marriage so that it does set any minimum limit regarding the dowry. Furthermore, it can be delivered or paid in advance or postponed after the wedding with the consent of both parties.[16]

The provision and regulation of dowry in Islamic law contain several pearl of wisdom. It ranges from legalizing relationships between men and women, representing respect for the honor and dignity of women, binding love and affection of both to showing goodwill as well as sincerity and seriousness of husband to be responsible in the marriage.[17] The dowry itself can be in a form of material things or non-material ones. The common forms of the former type are money, praying tools, gold, land, house, and the likes. Meanwhile, the later can be an activity or service, such as teaching to recite the Qur'an, memorization of the Qur'anic verses, and so on.[18]

Meanwhile, according to Indonesian positive law, dowry refers to a gift in the form of goods, money, or services from a groom to a bride. It must be paid based on the agreement between both while paying attention to the principles of simplicity and convenience as Islamic teachings recommend. This means that although giving dowry is mandatory, a decision on its form, value, and number must still be based on the principles of convenience and simplicity. Additionally, both parties need to discuss to get a fair agreement on it so that it will not burden the husband and at the same time, it will not be just random that the wife probably does not want it.

Furthermore, KHI regulates the issue of dowry as a form of legal certainty, in addition, to set uniformity in understanding this concept among the community and officials. For example, it highlights that instead of being among one of the marriage pillars, dowry is the main requirement. It also mentions that ethical consideration needs to get attention in determining the dowry while

---

[16] Syed Sahid Ahammad, "A Critical Analysis of Dower (Mahr) in Islam," *IOSR Journal of Humanities and Social Science* 21, no. 07 (2016): 86–91, https://doi.org/10.9790/0837-2107058691.

[17] Ibnu Irawan and Jayusman, "Mahar Hafalan Al-Qur'an Perspektif Hukum Islam," *Jurnal Palita* 4, no. 2 (2019): 126–27.

[18] Arif Jamaluddin, *Hadis Hukum Keluarga* (Surabaya: UINSA Press, 2014), 41–42.

enforcing the principles of simplicity and easiness instead of economic value, social status, and prestige.

The Social Construction Theory of Peter L. Berger and Thomas Luckmann

Discussing the theory of social construction cannot be separated from Berger and Luckman's theoretical building. In 1926, both worked together to write a book entitled *The Social Construction of Reality: A Treatise in The Sociology of Knowledge*.[19] The term social construction was firstly mentioned in the book. It accentuates about dialectical relationship between individuals and their socio-cultural world through three stages namely externalization, objectivation, and internalization.[20]

The process of externalization enables individuals to collectively carry out objectification and creates a new construction of objective reality. Later on, the internalization process enables them to think deeply about the complexity of the definitions of reality, routine behavior, and established patterned or institutionalized action as a social fact.[21]

According to them both, the two main objects of everyday life reality related to knowledge have both subjective and objective dimensions. The former comes in the form of individual knowledge, while the latter is defined as social facts.[22] Both consider society as the product of individuals while at the same time, individuals are also the product of society.

---

[19] The central role of the sociology of knowledge is shown by both of them as an important instrument in building future sociological theories. See Ida Bagus Wirawan, *Teori-Teori Sosial Dalam Tiga Paradigma* (Jakarta: Prenada Media Group, 2015), 106.

[20] Burhan Bungin, *Konstruksi Sosial Media Massa: Kekuatan Pengaruh Media Massa, Iklan Televisi Dan Keputusan Konsumen Serta Kritik Terhadap Peter L. Berger Dan Thomas Luckman* (Jakarta: Kencana, 2008), 15.

[21] Margareth M. Poloma, *Contemporary Sociology*, ed. The Yasogama Translation Team (Jakarta: Raja Grafindo Persada, 2007), 301.

[22] Humans are instruments in the creation of objective social realities through a process of externalization. Even so, individuals who are influenced by social reality through the process of internalization are a reflection of subjective reality. See Sindung Haryanto, *Spektrum Teori Sosial Dari Klasik Hingga Postmodern* (Yogyakarta: Ar-Ruzz Media, 2012), 154.

Through creative activities, individuals are considered able to construct society and various other aspects based on existing social realities. The created social reality then leads them to deal with external and objective reality. Afterward, individuals internalize the reality to become a part of their subjective awareness believing that objective social reality can shape individuals. In other words, individuals are creators of social institutions as well as products of society.[23]

Berger believes that society has a dual reality rather than a single one as the result of social construction. It means that individuals create reality and therefore create themselves. Social construction, meanwhile, occurs when individuals make simultaneous interactions with their environment.[24] Humans are biologically destined to form and inhabit the world together with others. Therefore, the three mentioned stages are deemed as a dialectic process that will keep happening, running, and relating to one another. Society and every part of it are simultaneously characterized by the three stages while returning to the stage of internalization and so on so that individuals can create new meanings and behaviors along with the new values attached. Conversely, any analysis which only uses one of the three stages will not be sufficient.[25]

---

[23] This social reality is everyday knowledge that lives and develops in society. See Burhan Bungin, *Konstruksi Sosial Media Massa: Kekuatan Pengaruh Media Massa, Iklan Televisi Dan Keputusan Konsumen Serta Kritik Terhadap Peter L. Berger Dan Thomas Luckman*, 24.

[24] The implication of this dual reality is that the social realities that are formed can mutually build or collapse each other. Considering that society lives in the dimension of objective reality which is constructed through the process of externalization and the process of objectivation, as well as in the dimension of subjective reality which is lived through the process of internalization. All these processes will always be connected dialectically. See Margareth M. Poloma, *Contemporary Sociology*, 301.

[25] Peter L. Berger dan Thomas Luckman, *Tafsir Sosial Atas Kenyataan: Risala Tentang Sosiologi Pengetahuan* (Jakarta: LP3ES, 2018), 176–249. Burhan Bungin, *Konstruksi Sosial Media Massa: Kekuatan Pengaruh Media Massa, Iklan Televisi Dan Keputusan Konsumen Serta Kritik Terhadap Peter L. Berger Dan Thomas Luckman*, 18–19.

Determination of Dowry in Wedding Process among People at Karangsono Village, Wonorejo District, Pasuruan Regency

Karangsono Village lies at Wonorejo District and is in the administrative area of Pasuruan Regency. The area of Karangsono is 367.43 Ha in width with a 5,673 population. 3,038 of them are female while the rest 2,635 are male. The poverty rate of this village is quite high because 50% of its people are categorized as poor.[26] Islam is the only religion that Karangsono people embrace with high obedience and strict practice of Islamic teaching.

Additionally, there found religious schools (*madrasah diniyah*), al-Qur'an educational parks, and Islamic boarding schools in the village.[27] However, this is not in line with the educational background of its people which is still low considering that the highest number of them is senior high school graduates. Some of them even get dropped out of school because of getting married at a young age.

Besides early marriage, what makes Karangsono different is the high number of unregistered marriage practices or so-called *nikah sirri.* This makes the village popular because when a man can't find future a wife in surrounding villages, such as Rembang, Pajar, Kalisat, and others, they will search in Karangsono. Karangsono is not as popular as its neighbor at first. The increasing number of *nikah sirri* practices closely relates to the assumption that it does not violate any Islamic law as long as the whole marriage's terms and conditions have been fulfilled. Moreover, local religious leaders do not prohibit the practice. Even more, they are the ones who wed the couple in the *nikah sirri* practice.[28]

Chronologically, common practices of the wedding at Karangsono begin with so-called *nontoni* which refers to a man's visit to his prospective wife's house. Her parents play a role as witnesses in

---

[26] Badan Pusat Statistik (BPS) Kabupaten Pasuruan, *Kabupaten Pasuruan Dalam Angka 2019* (Pasuruan: BPS Kabupaten Pasuruan, 2019), 25.

[27] Badan Pusat Statistik (BPS) Kabupaten Pasuruan, 25.

[28] In general, rural and urban communities are different in solving a problem. Rural communities usually resolve their problems through consultation with families, religious leaders, and community leaders. Read also Arif Wahyudi and Fatekhul Mujib Fahruddin Ali Sabri, "Resistance Strategies of Madurese Moslem Women against Domestic Violence in Rural Society," *Al Ihkam : Jurnal Hukum Dan Pranata Sosial* 15, no. 1 (2020): 110.

addition to a matchmaker or intermediary if any. This early step aims to enable both persons to know each other. The future groom can find out the face, attitude, and character of his next wife, including to which category she can get in the dowry classing concept. Meanwhile, the future bride can have a moment to find out the groom who will marry her.

It is during the process of *nontoni* that a decision will be made whether the two are matching each other and can step into the next process. If they don't, the process stops at that phase. Conversely, if the two match each other, it will be continued by the next step called marriage application (*lamaran*). The groom will ask his future the bride's parents for approval of being a husband of their daughter. In the process, it is common for the next groom to bring some gifts during the application process although a few don't do so.

Responding to the application, the parents will discuss with their daughter whether to accept it or not. If accepted, the form or amount of dowry becomes the next discussion topic including its details and the date when the marriage contract takes place. At first, determining the dowry in Karangsono was based on Islamic teaching, namely simplicity and convenience in the order it does not burden the husband. However, over time, it changed into the dowry classing concept based on the classification of the bride. Nowadays, determining dowry using the principles of dowry class concept because common among people at Karangsono Village.[29]

Approximately, there found five classes of dowry, namely class 1 to 5 ranging from the highest to the lowest with the following criteria at table.

Table

Dowry Classes	**Dowry Form**	**Criteria**		
		Not Married yet	**Physically Beautiful**	**Young Age**
1	House/Land	√	√	√
2	Motorcycle	√	√	-

[29] Process of determining dowry above is usually through deliberation between the groom and the bride. However, sometimes, it also involves the family of bride or an intermediary. TA, *Interview,* Pasuruan, 10 December 2019.

	Jewelry	√	-	√
3	Money (high amount)	-	√	√
4	Money (Average amount)	-	√	
		-	-	√
5	Money (low amount)	-	-	-

After determining the dowry, the next step is organizing the marriage contract ceremony. The shortest gap period between the proposal to marriage contract is two days, while the longest is two weeks. Therefore, the bride generally does not reply to the marriage proposal by holding a *balesi* ceremony. After the amount of dowry is determined, the groom typically hands it over to his parents in law to be so that they can divide it according to the agreed portion. Usually, the dowry is well divided for the bride, her parents, the matchmaker if any, *unggakan* money, *jenang abang* money, or other parts as the agreement. This typical division implies that money is the most common dowry among people at Karangsono.

Unggakan money refers to security money in which the amount is determined during the application process. The parents of the bride will appoint someone as an intermediary who will be delegated to pay the security service to the RT, RW**,** sub-village (*dusun*), and village apparatus. This delegation is usually called *pengarep*. Before delivering the money and asking for security service, *pangarep* will first record the data on the predetermined date of the marriage contract.

Afterward, the marriage contract takes place according to the predetermined date at the house of the bride. During the marriage contract process and wedding reception, the host provides the guests with some cakes and meals. The cost for providing the dish is from *jenang abang* money. It covers all operational costs starting from marriage contract to wedding reception.

The Dowry Classing Concept on the Perspective of Social Construction Theory of Peter L. Berger and Thomas Luckmann

People of Karangsono are quite religious and having high spiritual awareness. This is clear from a series of routine religious activities that are still running well. Additionally, they have harmonious relationships and interactions with each other and seem to live their daily lives well. This enables them to exchange ideas and express insight or opinions on one another about some topics, including the determination of the dowry for the bride-to-be. At first, they determined the dowry relying on Islamic law principles, namely convenience, lightness, and simplicity in order not to burden the groom.

However, it gradually changes into a new principle called the dowry classing concept which was initiated then continued by individuals. Instead of using the old principles, they used the new one depending on the characteristics of the bride-to-be, namely marital status, physical appearance, and age. Apart from it, the role of an intermediary still exists in some cases, so that there found two types of the wedding process, including determination of the dowry, among Karangsono people.

The first is without the role of the intermediary. Decision-making on the dowry is through discussion or negotiation between two parties. The broom directly visits the family of the bride to express goodwill to get married to get approval. After getting his marriage proposal approved, he will begin discussing the form and amount of the dowry. Parents of the next bride typically play a lot of roles putting themselves in between suggesting the form and or amount of dowry and letting both decide. However, they do consider the three main characteristics of their daughter in suggesting the dowry as well as when agreeing or disagreeing opinions about the dowry.

Another topic to discuss and decide is the amount of *unggakan* and *jenang abang* money to financially support a series of wedding ceremonies that the bride's family will hold. Sometimes, the parents also talk about other things, such as special requests on the dowry, common gifts to deliver, paying off debts, *taklik* divorce agreements, and so on. It is important to take note that different from dowry, other requests do not necessarily have to be fulfilled. Moreover, the groom

is typically entitled to give his opinion on whether he agrees, rejects, or has a different opinion. Once the agreement is made, the groom must prepare all the details.

The second is the wedding process accompanied by the intermediary. This particularly happens if the groom comes outside Karangsono. The groom will firstly look for the intermediary among community leaders or even local religious leaders who are willing to help him finding the prospective wife. In this case, the form and amount of dowry can be assigned in two ways, namely through the deliberation of the bride's family and deliberation before the groom visits the bride's house along with the intermediary. At the former choice, the groom visits the bride's house for delivering as well as getting approval of his marriage proposal. He will also talk about the same topic as in the first category in addition to gratitude money/commission for the intermediary.

In the latter type, the groom determines the dowry before coming to the bride's house. Usually, the intermediary asks in advance how much dowry the groom can pay, as well as the amount he can get. After that, only then does the intermediary look for a woman according to the dowry classing that the groom could afford. During the process of looking for a bride, the groom has the right to cancel the plan if he feels he doesn't fit. If this happens, the intermediary will try to find another woman until the groom feels interested in her. The bottom line of those different procedures is the use of the dowry classing concept to assess suitable dowry for the bride.

Analyzing the phenomenon, this research uses the social construction theory of Peter L. Berger and Thomas Luckman with its three dialectical models, namely externalization, objectivation, and internalization. This is mainly because any society will always naturally create a dialectical relationship between its individuals and surrounding sociocultural life. In the dialectical process, a dynamic living system leads them to keep changing as a form of social construction.

In the externalization and the objectivation stages of the process, people experience the formation process or primary socialization when individuals try to gain and build their position in society. Therefore, in both processes, individuals consider society as

an objective reality. [30] Meanwhile, in the internalization process, individuals need social rules or institutions to maintain the sustainability of those social institutions or rules, consistency, and justification for these social rules. People create justification by themselves through a process of legitimacy gaining called secondary socialization. [31]

The three dialectical models above show integrated social phenomena which lead to social construction. Considering the theory of Berger and Luckmann, it makes sense and is even inevitable if people of Karangsono with high religiosity apply such kind of dowry classing concept. A more detailed explanation of the application of the model to the case is as follow:

1. Externalization Process

   Social reality causes externalization stage process is born because of. The process of externalization in social construction theory is a necessity for humans who naturally act as social creatures, have a culture, and also have a biological desire. So that the social order is something that already exists, and precedes any of its developments. [32]

   Initially, the process of determining the dowry among Karangsono people did not depend on the bride's characteristics. However, along with recent development and inevitable interaction between both and with others, something new has come and replaced the old one then turning into a social phenomenon or reality. Other factors also play a big role in triggering the change, such as economic needs, requests from brides' parents, dreaming more adequate and happier life, and maintaining the family's esteem.

   Those factors enable people to keep doing interaction and adaptation with their socio-cultural context. As a consequence, conditions, local norms, and traditions of their surroundings have a big role in shaping their mindset. This externalization process makes it possible for Karangsono people to change their old model in determining the dowry into a new one. In this case, the

[30] Berger, *Tafsir*, 178-185.
[31] Ibid., 188-191.
[32] Burhan, *Konstruksi*, 15.

process of externalization occurs through two ways of adaptation, namely:

a. Adaptation with religious texts.

Differences in the sociological and cultural background of each individual make the adaptation process not running the same. This is clear from the different behavior of each individual based on their subjective interpretation. Consequently, all activities do not come suddenly, but are based on the normative basis which is different from one another due to each background.

In determining the dowry, Karangsono people rely on some relevant Qur'anic verses or hadith. This makes them more confident to do the process considering that they have legitimate basics. Among others, they rely on Surat al-Nisā 'verse 34 which mentions men as leaders for women. Another one is QS. Al-Nisa' verse 9 tells about warning not to leave offspring in poor situations. Interpretation of those verses makes them believe that it is highly recommended to find a life partner who can provide material welfare instead of those who let the wives and children in a bad economic condition.

The normative basics become direct legitimacy to support validity on what they practice in determining the dowry. In other words, Karangsono people consider that the way they determine the dowry is based on religious teaching through its verses. Another legitimacy is a hadith mention the suggestion to marry women who have never got married before. They assume that it is a special privilege to marry this type of woman so that they put the criteria as one of the measurements in the dowry classing concept.

The legitimacy of religious text strengthens the practice of this concept and makes it more popular among Karangsono people that it keeps being used until nowadays. Furthermore, it attracts attention from people outside Karangsono with different motives.

b. Adaptation with local traditions.

This mainly occurs along with the special interests of each individual. In responding to the particular social phenomena of the dowry classing concept, the increasingly

urgent economic need, obligation to preserve existing traditions, and difficulties to build a happy and stable family in the hard-economic condition can convince them that the dowry classing concept is one of the life necessities they need to maintain. that must be lived.

In this process, society places the texts of life, such as background motives such as requests from parents, recognition from society about the status of spinster for women aged 20 years and over, feel less with their lonely status, or those who never failed with domestic life in the past, then fostering a pragmatic attitude or local traditions that have been justified based on the legitimacy of local religious leaders, as the belief that choosing a husband who can form a happy and stable family is a good action.

The existence of a dowry class based on a classification accompanied by motives and goals does not violate the rules of Islamic law, even though Islam recommends an easy and simple dowry, there is nothing wrong with a woman and or a family who determines a dowry for the good of her daughter's life. The shows the public's concern for women to determine the dowry because a woman also deserves to get the best dowry according to her version.[33]

The real result of the externalization process in the process of determining the dowry is the magnitude of the surrounding environment which can influence people's thinking patterns. So with that, even though some individuals have their thoughts on determining the dowry, in the end, they will still follow this local tradition that has been passed down from generation to generation. As for some other individuals, apply the process of determining the dowry based on this classification because of the motives and goals to be achieved.

[33] One of the motivations that can encourage women to choose their dowry is that there is a desire to be respected not only as a material issue. See Ibnu Irawan, *Mahar*, 129-130.

2. The Activation Process

In terms of its relation to the process of determining the dowry in the marriage of the Karangsono Village community, the objectivation process that occurs is divided into several stages, namely:

a. First, that the product resulting from the externalization process will form other facts outside the individual. This momentum is defined as a process of institutionalizing the intersubjective struggle between individuals and their social world. This then gives rise to something that stands alone between individuals, which is different from its creation and becomes an entity outside of oneself.

That way, the product that is produced and stands alone is a human product as well or an implication of the activities carried out by humans continuously with the social structure it faces. Apart from the elements of certain subject control, it means that there is an intersubjective network process that influences, institutionalizes, and habituates it until it finally gets affirmation as well as justification.

b. The next stage is the process of building awareness until it finally becomes an action, or what is called institutionalization. In this stage, the goals and values that become the basis for carrying out a meaning that is no longer singular have become an inseparable part, as done and recognized by the people of Karangsono Village.

The process of determining the dowry in marriage carried out by the people of Karangsono Village shows a picture related to the existence of struggles and interactions with religious texts and local traditions whose meaning is understood through the process of study. Each individual understands that the process of determining a dowry is part of the important religious practice and must be carefully thought through, in which various meanings are stored by following with the motives experienced.

Such a perspective seems to have been mutually agreed, that determining the dowry based on the classification of the bride-to-be can provide a better life, create happiness, and maintain the integrity of the family later. From there, it

can be seen that there is a process of institutionalizing thought and action, namely a process formed from objective social reality, which is produced through cultural patterns and gaining mutual understanding, which ultimately influences the mindset and actions of each individual.

This classification of women in the dowry class is a form of settlement that has indirectly been mutually agreed upon on the many reasons or motives that the family and/or women want to achieve. The unconsciousness in the formation of this collective agreement is an objective form. If a different action appears, the people of Karangsono Village feel that this action has violated the agreement. Dialectically, society produces a social reality. This fact then also influences the mindset of each individual to interpret the process of determining the dowry in marriage. At this level, individuals are not just following along, but they understand and are fully aware of the motives, goals, and values of the actions they take.

c. The last stage is a process of rational action aimed at becoming part of everyday life, or what is commonly known as the capitalization process. So that at this stage, individuals no longer need a lot of meaning for action. Given the actions that have been taken have become part of the calculation and accumulation.

Any process that encourages the mindset and action of the Karangsono Village community does not only originate from individual activities, but also as a reality that has been objectivated through an intersubjective pattern. This means that the reality that exists in Karangsono Village, both past and present, is the meeting point of community activities as an objective social reality.

As a phenomenon, this reality is outside the individual but also influences his mindset and actions. So, like it or not, each individual must pay close attention to the process of determining the dowry, based on the classification possessed by the bride.

Thus, individuals have experienced a capitalization process in determining the amount of the dowry. This

capitalization process will give birth to different motives and goals. This is what distinguishes it from the externalization process, where the actions taken are more based on previous interpretations.

The role of religion and government figures also seems to be involved in maintaining the continuity of the capitalization process related to determining the number of dowries in Karangsono Village. This is evidenced by the presence of uploaded money which is included in the details of the dowry amount. Given that the uploaded money is security money that will later be given to RT, RW, Dusun, and Desa.

Not only the *unggakan* money can preserve the process of determining the dowry is also supported by the existence of *jenang abang*. The groom will pay his *jenang abang* money as a sign that he will marry a woman in Karangsono village. That way, the public will not arise questions regarding the marriage carried out by the two.

The justification from local religious leaders has also increasingly encouraged people to continue the process of determining the dowry in this way. Support from all parties allows this capitalization process to take place properly and sustainably. So that the practice is carried out continuously by the people of Karangsono Village. this practice has become a social reality that is continuously undergoing a socialization process, which will continue to be carried out for their children and grandchildren.

3. Internalization Process

In this internalization process, the role of society is quite important to respond to the meanings that exist in objective reality, then proceed to affirmation in the consciousness experienced subjectively. To realize this absorption activity, of course, rely on the continuous socialization process. Socialization is intended as an effort to transfer knowledge about objective meanings from one generation to the next.

The involvement of people who have charisma in the arena of social construction is an important aspect in maintaining the sustainability of the social values that are being faced. When

looking at the social construction model in determining the marriage dowry for the people of Karangsono Village, influential people, such as religious leaders, government leaders, and community leaders, will participate in the socialization process. This process is carried out to increase the attractiveness and sympathy of the community so that what is conveyed will be easily internalized by each individual.

With socialization, it is possible to move the objective reality that is outside the individual to the subjective reality that is within the individual. Things like this can be seen in the number of figures, from religious leaders, government figures to community leaders who also socialize the process of determining dowries based on classes, namely the classifications owned by the prospective bride related to virginity status, the appearance of beauty and age. In this way, continuous production of meaning will be created from one generation to the next.

In the process of internalization, what is manifested is the re-absorption by individuals of the values contained in determining the dowry based on classes, then it is manifested in the process of determining the dowry of marriage. This awareness stage is then able to become a common bond between communities to respect each other, live in harmony, and produce an agreed collective meaning.

Naturally, this reality continues to create dialectical relationships, in the sense that the internalization process experienced by society will occur over a length time, because the order of people's lives is never stagnant and dynamic, even though the entities that occur experience changes along with the changing times. Until finally, this continuity will affect the individual in absorbing the values, which then form a distinctive personality and also apply in society.

In the study of social construction theory, the internalization process for the people of Karangsono Village includes two moments, namely:

a. Pragmatic calculative

   Each individual certainly has a specific goal when they want to take an action. Likewise with the people of Karangsono Village, of course, they also have goals to be

achieved when going through the process of determining the dowry in their marriage. They said that the goal was to secure a better future, to form an economically stable family, to make the wife happy, and to elevate the status of the wife and her family.

b. Religious normative

At this moment, as a society that is devout in religion and strong in religious education, of course, it will be very avoiding having a husband-wife relationship without any marital ties, or even selling oneself because of the motives they experience. So that in practice, the people of Karangsono Village prefer to maintain the existing local traditions, namely determining dowries based on classes. They are of the view that the process of determining the dowry in this way does not violate religious rules at all.

Based on the dialectic of the Berger and Luckman social construction model above, it can be understood that the determination of the dowry based on the classes in the community of Karangsono Village is an integral part of the process of adaptation, interaction, and identification with the sociocultural world. The social construction process that occurs starts from defining, responding, taking an attitude, and taking action. The actions taken vary, of course, according to the motives behind each individual.

Thus, the determination of the classes in the dowry that occurred in Karangsono Village was the result of construction in the community's marriage. So that the concept of the dowry class can be justified and applied in the marriage of the community. The concept of the dowry class in marriage in question is to determine the dowry based on the status of a virgin or widow, the appearance of beauty, and the age of the prospective bride. The higher the quality of the woman, the higher the dowry she can get.

Conclusion

The concept of dowry class in Karangsono Village is based on the characteristic of prospective brides, namely marital status (virgins or widows), physical beauty, and age. This applies to both registered and unregistered or *sirri* marriages. The higher qualification a woman

has, the higher the dowry she can get. Meanwhile, according to the social construction theory of Beger and Luckmann, there found three stages of the process. Externalization occurs through adaptation of religious texts to life experience. After that, it happens objectivation process which gives birth to new meanings in a form of a wider community's behavior which then becomes common objective facts in everyday life. The last stage, namely internalization, is signed by affirmation on the awareness that individuals subjectively experience it as well as the transfer of knowledge on objective meanings. In this context, the knowledge is about the dowry class which has been told and kept across generations.

Bibliography

Ahammad, Syed Sahid. "A Critical Analysis of Dower (Mahr) in Islam." *IOSR Journal of Humanities and Social Science* 21, no. 07 (2016): 86–91. https://doi.org/10.9790/0837-2107058691.

Amir Syarifuddin. *Hukum Perkawinan Islam Di Indonesia: Antara Fikih Munakahat Dan Undang-Undang Perkawinan*. Jakarta: Kencana Prenada Media Group, 2009.

Amiur Nuruddin and Azhari Akmal Tarigan. *Hukum Perdata Islam Di Indonesia*. Jakarta: Kencana Prenada Media Group, 2016.

Arif Jamaluddin. *Hadis Hukum Keluarga*. Surabaya: UINSA Press, 2014.

Badan Pusat Statistik (BPS) Kabupaten Pasuruan. *Kabupaten Pasuruan Dalam Angka 2019*. Pasuruan: BPS Kabupaten Pasuruan, 2019.

Burhan Bungin. *Konstruksi Sosial Media Massa: Kekuatan Pengaruh Media Massa, Iklan Televisi Dan Keputusan Konsumen Serta Kritik Terhadap Peter L. Berger Dan Thomas Luckman*. Jakarta: Kencana, 2008.

Departemen Agama RI. *Al-Qur'an Dan Terjemahnya*. Bandung: Diponegoro, 2006.

Dian Ramadhan and Farah Ihza Fauzia Balqis. "Pandangan Mazhab Hanafi Dan Maliki Terhadap Jumlah Kadar Mahar Pada Akad Nikah." *Jawi* 3, no. 1 (2020).

Fahruddin Ali Sabri, Arif Wahyudi and Fatekhul Mujib. "Resistance Strategies of Madurese Moslem Women against Domestic Violence in Rural Society." *Al Ihkam : Jurnal Hukum Dan Pranata Sosial* 15, no. 1 (2020).

Huzaimah Tahido Yanggo. *Problematika Hukum Islam Kontemporer*.

Jakarta: Pustaka Firdaus, 1996.

Ibnu Irawan and Jayusman. "Mahar Hafalan Al-Qur'an Perspektif Hukum Islam." *Jurnal Palita* 4, no. 2 (2019).

Ida Bagus Wirawan. *Teori-Teori Sosial Dalam Tiga Paradigma*. Jakarta: Prenada Media Group, 2015.

Margareth M. Poloma. *Contemporary Sociology*. Edited by The Yasogama Translation Team. Jakarta: Raja Grafindo Persada, 2007.

Peter L. Berger dan Thomas Luckman. *Tafsir Sosial Atas Kenyataan: Risala Tentang Sosiologi Pengetahuan*. Jakarta: LP3ES, 2018.

Putra Halomoan. "Penetapan Mahar Terhadap Kelangsungan Pernikahan Ditinjau Menurut Hukum Islam." *JURIS (Jurnal Ilmiah Syariah)* 14, no. 2 (2016).

Rida Alfida, Saiful Usman and Ruslan. "Penetapan Mahar Perempuan Di Desa Kampung Paya, Kecamatan Kluet Utara, Kabupaten Aceh Selatan." *Jurnal Ilmiah Mahasiswa Pendidikan Kewarganegaraan Unsyiah* 1, no. 1 (2016).

Sindung Haryanto. *Spektrum Teori Sosial Dari Klasik Hingga Postmodern*. Yogyakarta: Ar-Ruzz Media, 2012.

Wahbah al-Zuḥaily. *Mausū'ah Al-Fiqh Wa Al-Qaḍāyā Al-Mu'āṣirah*. Damaskus: Dar al Fikr, 2013.

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 162-181
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-ihkam.v16i1.3861

Binsabin dan *Tongngebban* as Madurese Local Wisdom: An Anthropology of Islamic Law Analyses

Suhaimi
Fakultas Hukum Universitas Madura Pamekasan
Jln. Raya Panglegur KM. 03 Pamekasan
Email: suhaimi.dorez@gmail.com

Agustri Purwandi
Fakultas Hukum Universitas Madura Pamekasan
Jln. Raya Panglegur KM. 03 Pamekasan
Email: a3purwandi@yahoo.com

Akhmad Farid Mawardi Sufyan
Sharia Faculty Institut Agama Islam Negeri (IAIN) Madura, Jl. Panglegur KM. 4 Pamekasan
Email: faridmawardi@iainmadura.ac.id

Article history: Received: August 07, 2019, Accepted: May 30, 2020, Published: June 27, 2021

Abstract:

There is a unique tradition in the Madurese community of East Java, namely Binsabin and Tongngebban. Both are the absolute requirements for a valid engagement. It means that the engagement is not totally legal without the two things. In the perspective of Islamic law, this is permitted, but from an anthropological perspective, found that there is a social inheritance that is imposed on social bonds, the rules of marriage law and ceremonies in the marriage process. In line with that, this paper wants to describe a local wisdom in a proportional framework, not only seeing society legally, but also society must be seen as a culture (anthropology). This paper is collected from data interviews with two different types of community groups. The results of the study show that first, from an anthropological perspective; the binsabin and tongngebban traditions express the fulfillment of individual psycho-biological needs and maintain the continuity of life of

Author correspondence email: suhaimi.dorez@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

social groups. Anthropology also shows strong the Madurese community is in upholding this tradition from generation to generation even though times round and round. Second, in the perspective of Islamic law, this tradition seeks to build three things, first building a strong agreement between fellow Muslim families, second establishing friendship so as to create a strong emotional bond, third sharing the joy that shown by giving gifts or goods so as to increase the strength of brotherly bonds by religious way (engagement).

Keywords:
Binsabin; Tongngebban; Anthropology; Islamic Law

Abstrak:
Terdapat tradisi yang unik di masyarakat Madura Jawa Timur yakni *Binsabin* dan *Tongngebban*. Dua hal tersebut menjadi syarat mutlak sahnya suatu pertunangan. Artinya bahwa pertunangan tidak dianggap sah secara adat apabila tidak disertai dengan kedua hal di atas. Dalam perspektif hukum Islam memang hal ini tidak bertentangan, akan tetapi dalam kacamata antropologi ditemukan bahwasanya terdapat warisan sosial yang dipaksakan dalam ikatan sosial, aturan-aturan hukum perkawinan dan upacara-upacara dalam proses perkawinan tersebut. Sejalan dengan itu tulisan ini ingin memetakan kerarifan lokal dalam kerangka yang proporsional yakni bukan hanya melihat masyarakat secara hukum saja akan tetapi masyarakat harus dilihat sebagai sebuah budaya (antropologi). Tulisan ini dikumpulkan dari data hasil wawancara pada dua kelompok masyarakat yang bertipe berbeda. Hasil penelitian menunjukkan bahwasanya pertama, dalam kacamata antropologi, tradisi *binsabin dan tongngebban* mengekspresikan Pemenuhan kebutuhan psiko-biologis individu dan menjaga kesinambungan hidup kelompok social. Antropologi juga melihat bagaimana kuatnya masyarakat Madura dalam memegang teguh tradisi ini secara turun temurun meskipun zaman sudah berubah modern seperti saat ini. Kedua, dalam perspekktif hukum Islam tradisi ini berupaya membangun tiga hal yakni membangun kesepakatan yang kuat antar sesama keluarga muslim, kedua menjalin silaturrahim sehingga tercipta ikatan emosional yang kokoh, ketiga saling berbagi kegembiraan yang ditunjukkan dengan pemberian

hadiah atau barang-barang sehingga menambah kuat ikatan persaudaraan dengan cara yang religius (pertunangan).

Kata Kunci:
Binsabin; Tongngebban; Antropologi;Hukum Islam

Introduction

Discussing about Madura Island can open the minds of researchers to investigate further about its heterogeneous socio-cultural condition. It has a lot of uniqueness, especially regarding the local culture characterized by creativity, taste, and intention of the Madurese community. All of these are often carried out by the majority of the community as part of customary law, which has been passed down or practiced. If it is not maintained, then the lawfulness of their belief is still questionable. Various issues of custom and tradition that develop in Madurese community, for example in civil matters, include marriage, inheritance, *waqaf* (donation), and other problems, based on their own uniqueness.

In the case of marriage, there is a compulsory momentum before the marriage takes place, which is called engagement. According to the teachings of Islam, this momentum is highly recommended for the benefit of the marriage. However, according to the perspective of Madurese custom, following traditions that are usually carried out by the ancestors of the Madurese community becomes an obligation. Traditions that must be carried out before marriage are called *Binsabin* and *Tongngebban*. If these two things are not done, then the engagement is considered unlawful in the view of Madura customary law, and it may be possible to cancel the engagement so that the desired marriage cannot take place.

Engagement is a bond between a man and a woman by making a marriage agreement in accordance with customary provisions that apply in the community. Engagement can also be called a period of contemplation, a moment of thinking for the groom and bride before getting married. During this period, they mutually introspect about the existence of each other and their families, as well as their strengths and weaknesses. After they are sure, and there are no obstacles either in Islamic or customary law, the next step is to continue to the level of marriage.

The steps taken in Madurese tradition of engagement are, first, a man proposes to a woman he likes to his guardian or family. After the proposal is accepted, the second step is conducting *binsabin* tradition. *Binsabin* is the tradition when some family members of the man, as the representatives, come to the woman's family to bind the woman who is being proposed legally so that other men cannot propose to her. Binding this woman in Madurese terms is called "*letaleh* or *nale'eh*.[1] In *binsabin*, the man's family must bring something as a sign of lawful bond in the form of several pieces of betel leaf, areca nut, a bunch of bananas, and a typical Madura cake in the form of *wajik, tettel*, and other needed cakes. The third step is *tongngebban* carried out by the woman's family to come to the man's family in return for strengthening the engagement that has been carried out. The process is almost the same as *binsabin*, but the difference is the woman's family does not need to bring betel leaf and areca nut. If the three processions have been carried out, then the engagement is considered lawful under the customary law.[2]

Maintaining the traditions of Madurese community in order to keep developing and to become a role model for the next generation, the authors conduct a research that aims to find out and to analyze further the good traditions in Madura. There are many unique things that become the personality of the Madurese community, which are not possessed by other local communities, especially traditions with positive impacts, which can then become traditions from generation to generation.

Based on the description that has been described earlier, it is very necessary to conduct an in-depth review of this tradition from the perspective of Islamic law in order to prevent practices that deviate from Islamic teachings. Thus, the problem formulations of this study are (1) How is the tradition of *Binsabin* and *Tongngebban* in Madurese engagement beyond anthropology perspective? (2) How is the tradition of *Binsabin* and *Tongngebban* from the perspective of Islamic law?

[1] Urip Santoso, "Local Public Figure" Direct Interview at 30 of June 2020.
[2] Urip Santoso Direct Interview at 30 of June 2020.

Method

In this study, the researchers used a qualitative approach. A qualitative approach is a research procedure that obtains descriptive data in the form of written words or writings from people or observed behavior.[3] The type of research is an empirical study involving the community, especially the Madurese community. This research was directly conducted to the community by digging information in depth through informants, either directly or indirectly involved in the traditional engagement practices.

Discussion and result

***Binsabin* Tradition and *Tongngebban* in Madurese Traditional Engagement**

Engagement is the first step that must be done before the marriage takes place. Besides being a religious doctrine, it is also a common practice in local customs.[4] In general, engagement is only an initial bond so that a man and a woman who are engaged are not allowed to have someone else because there is an agreement between the two sides of the family to enter into an engagement bond. However, the practices and procedures are not determined by sharia, all of which are returned to local customs or traditions (local wisdom).

Regarding Madurese traditional engagement, there are a number of traditions that must be carried out by parties wishing to do the engagement. If the series of tradition is not implemented, then it is considered to have violated the applicable customary provisions. Thus, they get moral sanctions in the form of being a topic of a gossip in the community, being ostracized, and cancellation of the engagement because it is considered unlawful in the perspective of customary law.

Honestly this is part of the procession that has been guided by religion. Anthropologically it is described as the relation of cultural customs with Islam. This phenomenon is seen as not mistaken by

[3] Lexy J. Moleong, *Metode Penelitian Kualitatif* (Bandung: Rosda Karya, 2000), 3.

[4] Umi Supraptiningsih and Khoirul Bariyyah, "Marriage Settlement among Minority Moslem by Datok Imam Masjid in South Thailand," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 14 (2019): 223.

Islam, ic law, so that it continues to apply sustainably in society.5 This kind of anthropological phenomenon is natural, as a form of a way of living together as fellow members of society. In the Nusantara tradition, binsabin and Tongngebban are similar to seserahan (giving some goods in wedding), except that they are not given during the marriage ceremony, but are given at the engagement ceremony.6

In the Madurese customary provisions, this engagement is a custom, and it can even be said to be compulsory in the provisions of customary law.[7] Marriage that does not begin with engagement[8] will have a social impact. *First*, it becomes a public issue because the marriage is carried out without prior introduction. It is as if the public were shocked and caused big questions. *Second*, it raises slander in the form of public suspicion like something negative has happened so the marriage is carried out as soon as possible. *Third*, it may cause damage to the marital relationship because they do not really know each other (*ta'aruf*). Thus, it causes disappointment when there is something disgrace that is not previously known by each other.

The Madurese traditional engagement begins with a man's request for a woman to have a marriage agreement (*nikah*) with a mutually agreed time. This process in the language of *fiqh* is called propose (*khitbah*).[9] Before carrying out this process, the man's family seeks information regarding the situation of the woman and her family to be proposed. This search for information in the Madurese traditional term is called *Nginangen* or *Nyare Angin*.[10] The aim is to find valid and objective data on the condition of the woma related to her face, economic condition, lineage, and religion. These four things are the main orientation in finding a partner so that later, in

---

[5] H. Lebba Kadorre Pongsibone, *Islam Dan Budaya Lokal; Kajian Antropologi Agama*, ed. M. Fatih Mansur, *Kaukaba Dipantara*, I (Yogyakarta: Kaukaba Dipantara, 1967), 16.

[6] J. Van Baal, *Sejarah Dan Pertumbuhan Teori Antropologi Budaya (Hingga Dekade 1970)*, I (Jakarta: PT. Gramedia, 1987), 20.

[7] Tolib Setiady, *Intisari Hukum Adat Indonesia* (Bandung: Alfabeta, 2009), 8.

[8] Suhaimi, "Praktik Khitbah Di Madura Perspektif Hukum Islam Dan Hukum Adat," *Al Ihkam : Jurnal Hukum Dan Pranata Sosial* IX, no. 2 (2014): 286.

[9] Ahmad Warson Munawwir, *Kamus Al-Munawwir* (Surabaya: Pustaka Progressif, 1997), 349.

[10] H. Soeprijadi, "Local Public Figure" Direct Interview on 04 of August 2020.

household life, they reach the *sakinah, mawaddah* and *warahmah* family under the blessings of Allah SWT.

Nyareh Angin in engagement customs is actually a very positive thing to do as the first step before visiting the woman's family, as an act of precaution so as not to make a wrong move[11]. Moreover, it also keeps the possibility that unwanted things will not occur, namely the woman does not accept the proposal. By doing *nginagin*, there are already rumors that the possibility of the proposal will be accepted or not. Therefore, if there is news that the marriage will be accepted by the woman, then the next step will be taken, namely directly proposing. However, if it is certain that the proposal will not be accepted, the steps to propose will never be taken. The refusal of the marriage by the woman will cause social jealousy, shame, feelings of humiliation, and so on.

After *nginangin* is carried out, the next step is to propose (*khitbah*) from the man's family to the woman's family. It means that the man comes to the woman to ask for engagement. This is called "*nyabe' oca*" in Madurese.[12]

There are two ways to propose an engagement request. *First*, the request is made by the man's parents. One of the parents or both (the man's mother and father) visit the woman's parents, then explaining their good intention. *Second*, the proposal is carried out through a delegation or representative. People who are sent are usually elders, leaders, community leaders, and religious figures who are considered capable of carrying out their responsibilities in proposing. This second method is commonly used by the Madurese community. It is proven that the Madurese community really values their elders, community leaders, and scholars (*ustadz* and *kiai*).

The next step after accepting the proposal is *Binsabin*. Previously, there was an agreement about what will be done within

[11] In the Madurese language, it is said to be *ma'le ta 'salatengka* because the matter of *tengka* is considered the main thing by the Madurese as a form of self-respect that cannot be underestimated. Thus, in this matter, there is a slogan attached to the Madurese community with the emphatic language of "*lebbi bagus pote tolang etembang pote matah*" (better white bones than the whites of the eyes). It implied that it is better to die than to have honor be humiliated.

[12] H. Soeprijadi, "Local Public Figure."

the stipulated time between the two families[13]. The man's family will visit the woman's family to do the official customary engagement. This procession is called *Binsabin* in the Madurese engagement custom. In the Madurese customary provisions, *Binsabin* is compulsory to determine whether an engagement from a traditional perspective is lawful, and it becomes a sign that the woman is officially engaged to the man, so other men are not allowed to propose to her. The woman already has a cage, in the Madurese proverb, it is stated as "*Ibarat mano'dhalem Korong*" (like a bird in a cage). This means that the woman already has a man.

Binsabin is a series of processions in the engagement custom of the Madurese community carried out by the man's family to do official engagement so that it is lawful according to customary provisions. Some Madurese people mention *Binsabin* in another term, namely *mogel*.[14] The term *mogel* in Indonesian is defined as binding, grasping, fencing (*nale'e pagar*) so that the woman is not free from the bond and is not allowed to accept someone else's proposal before being released from her fiance.

The things that need to be prepared in the *Binsabin* procession in the Madurese engagement are first, in the beginning, at least three days before, the man must invite some people in his relatives to participate in the *binsabin* event according to the predetermined time. They are from the closest family in the family order. If there is not, then they can be from a rather distant family; the most important thing is that they are still within the family circle. In addition, some of the neighbors who are closest to the house of the man are invited (*sohibu al-hajat*). The intention is that some of the neighbors should know that their son is being engaged[15]. The number of people who are asked to participate must be the same as in the agreement; should not

[13] The timing of *binsabin* has been determined by the man's family when proposing or asking to be engaged, delivered by the man's family delegate that is then approved by the woman's family. The time specified is usually not far from the time of proposal. It may be at least three days, one week, and a maximum of five days after the proposal is declared accepted.

[14] Urip Santoso, "Local Public Figure" Direct Interview on 30 July 2020.

[15]In Madurese terms, it is called *makaber*, providing information to close neighbors about the status of their son who wants to get engaged. Meanwhile, in Arabic it is called *I'lam al-Khitbah*.

exceed or reduce it since it is related to the preparation of meal and accommodation provided by the host from the woman's family.

Second, the next step is preparing everything in the form of trinkets that will be brought to the house of the woman's family (prospective female fiancée). The items that are needed to be brought and are the main things that must be present are *sere penang* (betel leaf and young areca nut), bananas, *bajik* cake, and *tettel*.[16] Betel leaves, young areca nuts, and bananas are placed in a vessel called tenong, which is made of brass.

The items to be brought that have been determined during *Binsabin* are not just ordinary stuff. There is a deep philosophical meaning in the form of betel leaves, young areca nuts, and bananas. The betel leaf shows that the leaves have many benefits to be used as a potent potion in observing various diseases. Besides, the most important thing is that it can be used as a potion for a woman to always look beautiful and always keep the smell of her virginity when she becomes a wife.

Young areca nut (*penang ngodah*) indicates the suitor is a young virgin man (*lancheng kepaceng*), and the areca nut can be used as a potion that will provide the basic needs for his future wife. Young areca nut is known to be very effective in providing stamina for men. Meanwhile, the number of banana brought is one joint (*sakejang*). The philosophical meaning in engagement customs is that the bananas brought includes raw bananas, which indicates that the engagement period will still be long. If the banana is a little ripe, it shows the engagement period will be short and soon it will enter the momentum of the marriage. If the bananas are very ripe, it indicates that the time for the marriage that the man wants is very close. Therefore, whatever is brought in the *Binsabin* program implies certain meanings and signs

[16]The *bajik* and *tettel* cakes are ancient Madurese cakes made when there is a celebration or event in the form of; engagement, wedding, or important moments that need the cakes. *Bajik* cake is made from sticky rice by processing them in such a way, given sugar and made colorful. After it is cooked, the cake is placed in a place in the form of a tray that is rectangular or circular in shape. The most important thing is that the size is not too big so it is practically easy to carry. Meanwhile, the *tettel* cake is also made from glutinous rice flour, which is processed in the same way, but it is not given sugar and is not made colorful. This means that the color remains white as the color of the flour.

according to the tradition of the Madurese elders. Thus, it is necessary to think about the items that will be brought in the procession so that there is no misunderstanding between the two parties, which causes the cancellation of the engagement.

Other items that are brought for the *Binsabin* event, besides the five things mentioned above, are various kinds of pastries. The type depends on the person who brought it. Each person in the group of the man's family will bring one type of cake. It is required that each person brings a different type of cake. Thus, before the *Binsabin* day, there must be coordination regarding the cakes they bring so that there is no similarity. The cake carriers are usually women, while men do not need to bring anything.

Some Madurese people add a kind of *jajan praben*,[17] which is a kind of tart decorated in such a way that it looks good and fun. Usually the names of the engaged parties are written at the top of the cake. With such writing, it is hoped that they will become an eternal spouse without any problems in the household in the future.

The items brought at the time of *Binsabin* are actually as a sign of compassion, which in Madurese is called *tandha pangestoh*. The two families stay in touch with each other, and share happiness by giving a kind of gift so that the emotional bond between the two families is getting closer. Gifts may leave memories in the heart of others, and they will never be forgotten. Therefore, from this *Binsabin* event, it is expected that the two future partners will increasingly form a sincere love with the pleasure of Allah Almighty, and both sides of the family will increasingly unite into a big family that supports each other.

Third, after everything has been prepared, the man's family-in group-will go to the woman's family home, led by one person acting as the group leader. The person also becomes the family representative to deliver the intention of the man's arrival, namely *nale'e pagar*, that is, to bind the future woman in an official engagement bond according to the customary law.

The format of the program commonly used in the *Binsabin* event includes (1) opening the ceremony by the recitation of *basmalah*

[17] It is named *kueppraben* (virgin cake) because the proposed woman is a virgin woman. The cake is only as an addition for those who are economically able since the price is quite expensive.

(bismillah) or al-Qur'an Surah al-Fatihah; (2) presenting the intent and purpose of the arrival of the man's family presented by the head of the group, and then continued by presenting the remarks or answers presented by the representatives of the woman's family; (3) closing the ceremony or prayer; and (4) social section.

After the *Binsabin* event has been carried out, the next step in the Madurese Engagement is *Tongngebban*.[18] *Tongngebban* is a gathering event carried out by the woman's family to respond to what has been done previously by the man's family. It can be said that *Tongngebban* is the reply from *Binsabin*. *Binsabin* is carried out by the man, while *Tongngebban* is carried out by the woman. This means for a balance between the two families.

In the customary provisions, the *Tongngebban* event should be carried out by the woman's family. The implementation is a minimum of three days, or a maximum of one week from the *Binsabin* event. Regarding the preparations that should be done, generally it is the same as the preparations made during the *Binsabin*. However, the difference is related to the goods, namely the absence of lemongrass, areca nuts, and bananas. Meanwhile, there are no certain provisions about the types of cakes that should be brought since it depends on those who bring it.

Even though the procedure is the same as the technical event of *Binsabin*, several important things should be considered in the *Tongngebban* event. First, (1) it needs to pay attention to the number of people participating in the event, which must be the same as the *Binsabin* event conducted by the man's family; for example, if there are 20 people take part in the *Binsabin* event, then there should be 20 people as well that participate in the *Tongngebban* event. Second, (2) the goods that should be carried are not required to be of the same type as before, however, they can be in the same value; most importantly, there is a kind of *tandha pangestoh* or a gift to streng then the brotherhood that can unite the two families. While the format of the *Tongngebban* event is exactly the same as the *Binsabin* event,

[18] *Tongngebban* is derived from the word *tongngebo*r *nongngep*; if it is illustrated in a person, it is a prone position, meaning here is to close or repay the kindness in the form of *silaturrahim* (visit) that has been done previously.

including: opening, remarks, and closing or prayer, then continued with the social section.

Binsabin and *Tongngebban* in Madurese Customary Engagement Based on Anthropology Perspective

Binsabin and Tongngebban in the context of anthropology are studies in the structural-functional matters. This is examining community culture through patterns of functioning relationships between individuals, between groups, or between social institutions within a society, at a certain period of time represented by the culture of society.19 The concept of structure and function was introduced by Radcliffe Brown. According to Radcliffe Brown, structure gave birth to the term model of society. This model is very firmly rooted in a society and will be difficult to disappear even though the times and people have changed. Binsabin and tongngebban in the context of the structure and function of the Madurese are a representation of the strong tradition that has been rooted in society and its people so that the term appears that binsabin and tongngebban are "obligatory"20 in an engagement.

According to Radcliffe Brown, what is interesting in a cultural structure is not how to see humans as individuals, but how to see their social status. Social status in question is social status at the level of thought. For example, in a traditional society, the way of thinking, behavior and habits will be very different from that of modern society. In this context, the Madurese community seems to be a society that highly respects customs, traditions, even though times are modern as it is today.

Maybe this true that as in Clifford Geertz's book entitled *Agricultural Involution: The Process of Indonesia Ecology Changes*, it is stated that Madura and Java are "Outer Indonesia".[21] From the point

---

[19] A.R. Radcliffe -Brown, *Structure and Function in Primitive Society* (London: Routledge and Kegan Paul, 1952).

[20] Zaini, "Local Public Figure" Direct Interview on 14 of July 2020.

[21] Geertz divides Indonesia into two parts, namely Outer Indonesia and Inner Indonesia. Outer Indonesia includes Madura, Java, North West Java, Central, East, South Bali, and Lombok. Meanwhile, Inner Indonesia includesoutside Java and Southwest Java Clifford Geertz, *Proses Perubahan Ekologi Indonesia* (Jakarta: Bhatara Karya Aksara, 1983), 12.

of view of ecological structure, Madura and Java are characterized by moor ecological structure and the outer islands, which are characterized by rice fields. The moor ecological structure is more concerned than rice fields because the plants depend on natural condition. This means that the plants depend more on the state of the rainfall. Thus, if the level of rainfall is low, the yield of moor is not optimal, and even causes famine (*laep*) when the dry season is prolonged.

Unlike Radcliffe Brown, Malinowski sees anthropology in a different view. The difference seems very striking, Radcliffe Brown tries to see society in the frame of the structure as a whole, but Malonowski focuses more on his studies on each individual community. Malinowski sees and emphasizes the human aspect as a psycho-biological being who has a set of psychological and biological needs that need to be met.

Malinowski state that in order to meet the psycho-biological needs of individuals and maintain the continuity of the life of a social group, several minimum conditions must be met by the individual members of the social group. The minimum conditions consist of 7 basic needs, namely nutrition, reproduction, bodily comfort, safety, relaxation, movement, and growth. All activities carried out by individuals are in order to fulfill the 7 basic needs above. For more details, see the table below.

Synoptic Survey of Biological andd Derived Needs and Their Satisfaction in Culture[22]

Basic Needs (Individual)	Direct Responses Responses (Organized, i.e Collective	Instrumental Needs	Responses to Instrumental Needs	Symbolic integrative needs	Systems of Thought and faith
Nutrition (Metabolism)	Commisariat	Renewal of cultural apparatuE	Economis	Tranmission of experience by means of	Knowledge

[22] Bronislaw Malinowski, "The Group and the Individual in Functional Analysis," *American Journal of Sociology*, 1939, 44.

				precise, consistent principles	
Reproductio n	Marriage and family				
Bodily contorts	Domicile and dress	Charters of behavior and their sanctions	Social control		
Safety	Protection and			Means of intelectual. emotional, and prag-matic control of destiny and chance	Magic religion
Relaxation	Systems of play and repose	Renewal of personnel	Education		
Movement	Set activities and systems of communicati on				
Growth	Training and apprenticeship	Organization of force and compulsion	Political organization	Communal rhytim of recreation. exercise and rest	Art sports games ceremonial

Based on the basic needs in the table above, binsabin and tongngebban are included in reproduction needs. Beside on it, n the book Sex and Repression in Savage Society (1927), Malinowski contrasted the animal instinctive basis of marriage and the production of offspring (biological inheritance) with the forms of social ties, the legal rules of marriage, and the beliefs and ceremonies that surround the marriage process. social heritage).23 In fulfilling sexual urges and emotions to produce offspring, human behavior is governed by a set

[23] Bronislaw Malinowski, *Sex and Repression in Savage Society (1927)* (New York: Routledge, 2001). See also Tony Rudyansjah, *Antropologi Agama* (Jakarta: UI Press, 2012), 57.

of norms regarding marriage. and family. These norms are social heritage. This social heritage not only establishes obstacles and opportunities, advises on what is ideal and what is not, lays down values, but also influences the physiological attitude of men towards women through the legal system, ethics, religious principles, the concept of honor,holiness, and sin. This social heritage is imposed by society on each of its members. So, in this context, anthropology actually wants to study traditional practices in society, lest these traditions actually perpetuate bad things, as in the Malinowski language, namely social heritage as described above.

Binsabin and *Tongngebban* in Madura Engagement Based on Islamic Law

After investigated in depth the binsabin and tongngebban traditions in Madurese customary engagement, in general there was permitted within Islamic law. In fact, the tradition that is carried out, from the beginning to the end of the procession contains positive values which fiqh iscalled 'Urf Shohih, it means good habits or traditions.24

Binsabin and *Tongngebban* are actually forms of tradition which contain: *First*, formalizing an engagement contract between a man and a woman who has previously been bond (*mogel*)[25] or was illegally engaged.[26] In Islamic law, this contract is very important in conducting muamalat transactions. The contract can determine the

[24]In the discussion of *mashadir al-Ahkam 'urf* is one of the sources of law. However, the source of the law is not agreed upon (*mukhtalaf*), meaning that some scholars have different opinions as to whether 'urf is a source of Islamic law or not. There are two kinds of traditions (*'urf*) in society, namely: (1) good traditions (*'Urf Shohih*) which are good habits that are accepted both from a review of customary law and Islamic law. (2) bad traditions (*'Urf Fasid*) are habits that occur in society that cannot be accepted by sharia law'.

[25] M. Afnan Asrori A. Ma'ruf Chafidh, *Tradisi Islami, Panduan Prosesi Kelahiran, Perkawinan, Kematian* (Surabaya: Khalista, 2006), 109.See also Anwar Hafidzi and Norwahdah Rezky Amalia, "Marriage Problems Because of Disgrace (Study of Book Fiqh Islam Wa Adilâtuh and Kitâb Al-Nikâh," *Al Ihkam : Jurnal Hukum Dan Pranata Sosial* 13, no. 2 (2018): 275.

[26] Wahbah Zuhaili, *Al-Fiqh Al-Islāmi Wa Adillatuh* (Damaskus: Dar al Fikr, 2010), 24.

future direction of something that is agreed upon, so that there is no dispute in the future.

Every Muslim depends on their contracts (*Al-muslimuna 'ala syurutihim*). This is what the Prophet (PBUH) taught during muamalat transactions with fellow Muslims. For muamalat problems, the Prophet entrusted to his people with his words, "*Antuma'lamu bi umuriddun yakum* (all of you know more about your world affairs)." Therefore, the issue of Madurese engagement can refer to what the Prophet (PBUH) had taught.

A contract is a bond between the two parties, both concrete and abstract. The engagement contract, which is packed with *Binsabin* and *Tonggebban* processions, is a concrete contract. The two families have agreed to tie their sons and daughters in an engagement bond, and make a marriage promise within a specified time together.

A Muslim is obligatory to maintain and fulfill what has become the agreement if this contract has been agreed. According to Allah's command in al-Qur'an, "O, you who believe! Fulfill your covenants."[27] The contracts that must be maintained by both parties in the family are (1) maintaining the honor of each other by means of a mandate that he has been tied with an engagement rope; (2) jointly safeguard the good name of the family by not listening to slander raised by wicked people who want to destroy good relations between families; (3) under Islamic law, an engaged woman may no longer be married to another person unless it has been canceled. It is in accordance with the hadith of the Prophet Muhammad, narrated by Ibn Umar, namely:

وَلاَ يَخْطُبُ عَلَى خِطْبَةِ اَخِيْهِ اِلا اَنْ يَأْذَنَ لَهُ. (رواه مسلم)

"The Prophet (PBUH) forbade people to propose to the woman who is being proposed by their brother until the person who first proposed gave permission to him." (Hadith Narrated by Muslim)[28]

---

[27] Al-Qur'an, Al-Maidah:1

[28]Abi Husein Muslim Ibn Hajjad al-Khushairi al-Nasaburi, *Sahih Muslim,* Juz I (Beirut: Dar al-Fikr, 1988), 647. See also in several Hadith: Muhammad Ibn Isma'il al-Amir San'ani, *Subul Al Salam* (Beirut: Dar al-Kutub al-'Ilmiyah, 1971), 111. Ibn Hajar

Second, in the *Binsabin* and *Tongngebban* processions, the two families alternately come to their respective houses within a predetermined time. This implies the existence of friendship, mutual affection in order to create emotional bonds among Muslims, and to increase the number of brothers and sisters who both want to live up to the Sunnah of the Prophet (PBUH), which is in the form of marriage. In Islamic law, it is highly recommended to keep in touch. People will be in the valley of humiliation if they do not connect with God and human relationships. The Prophet (PBUH) also indicated about the virtue of keeping in touch, which would extend our life and widen our sustenance. For this reason, the author has great enthusiasm in addressing the good traditions, in the form of *Binsabin* and *Tongngebban* in the Madurese engagement.

Third, the tradition is carrying goods (the items) as explained in the first problem statement. From the type of goods, there is no oddity. This means that the goods are not contrary to Islamic law. All of them are permitted halal items. The goods are also easy to find, and economically easy to buy, even by people in middle to lower economies.

The philosophical meaning that can be taken from this tradition is to give gifts to each other, or something that is of charity. Giving gifts to fellow Muslims is a religious doctrine and the Sunnah of the Prophet (PBUH) because it can strengthen the bonds of brotherhood. Giving gifts can give unforgettable memories to the hearts of siblings. Therefore, it is very urgent to preserve this tradition, which actually contains religious values so that it does not just disappear, and it remains sustainable for future generations.

Today, many people are co-opted by the imitation of modern traditions, which are often not in accordance with the provisions of Islamic law. Not a few people practice engagement that deviates from the applicable provisions, including: *First*, during the engagement period, sometimes the man and the woman do not maintain social ethics. They think that the engagement relationship can eliminate the *ajnabiyah* law (the law that regulates the relationship between a man and a woman who is not a *mahram*). Before the marriage contract is

---

Asqalani, *Bulugh Al-Maram* (Surabaya: Al Hidayah, n.d.), 201. Abd al-Rahman Muhammad Uthman, *'Ain Al-Ma'bud* (Beirut: Dar al Fikr, n.d.), 96.

carried out, it is forbidden to be together, sit, and date together without a *mahram*. Anything that can make slander between the two parties is forbidden.

Second, some Madurese people indicate an engagement by exchanging of rings. Usually, it is done by people who are economically capable. In this case, when viewed from the perspective of Islamic law, of course there is no violation whatsoever, and no one prohibits it. It is just that in social life there is an impression of luxury, especially when the engagement is packed with a very luxurious party. It is best to format the event as simply as possible; the most important thing is to fulfill the two laws, that is, legally based on Islamic law as well as the customary law.

Islamic law does not allow the ring exchange by engaged man and woman because their status is still *ajnabiyah*. If it is forced to do an engagement in which there is a ring exchange, then the best step is to embed the ring by the *mahram*. The man's party is performed by the prospective son-in-law or a representative, the woman's party is performed by the prospective daughter-in-law or a representative; in order to avoid sins. The two partners later become a *sakinah, mawaddah, warahmah* (happy, loving, and supportive) family. *Only God knows*.

Conclusion

This research concludes several things, First, anthropology perspective shows that structure and function of the Madurese are a representation of the strong traditions that have been rooted in the binsabin and tongngebban tradition communities. Anthropology also see that binsabin and tongngebban describe the fulfillment of individual psycho-biological needs and maintain the continuity of life of social groups. Anthropology also shows that strong the Madurese community is in upholding this tradition from generation to generation even though times have changed to modern times like today. Second, in the perspective of Islamic law, this tradition seeks to build three things, namely building a strong agreement between fellow Muslim families, secondly establishing friendship so as to create a strong emotional bond, thirdly sharing the joy shown by giving gifts or goods so as to increase the strength of brotherly bonds. in a religious way (engagement)

Bibliography

Abd al-Rahman Muhammad Uthman. *'Ain Al-Ma'bud*. Beirut: Dar al Fikr, n.d.

Ahmad Warson Munawwir. *Kamus Al-Munawwir*. Surabaya: Pustaka Progressif, 1997.

Anwar Hafidzi and Norwahdah Rezky Amalia. "Marriage Problems Because of Disgrace (Study of Book Fiqh Islam Wa Adilâtuh and Kitâb Al-Nikâh." *Al Ihkam : Jurnal Hukum Dan Pranata Sosial* 13, no. 2 (2018).

Asqalani, Ibn Hajar. *Bulugh Al-Maram*. Surabaya: Al Hidayah, n.d.

Asrori A. Ma'ruf Chafidh, M. Afnan. *Tradisi Islami, Panduan Prosesi Kelahiran, Perkawinan, Kematian*. Surabaya: Khalista, 2006.

Baal, J. Van. *Sejarah Dan Pertumbuhan Teori Antropologi Budaya (Hingga Dekade 1970)*. I. Jakarta: PT. Gramedia, 1987.

Clifford Geertz. *Proses Perubahan Ekologi Indonesia*. Jakarta: Bhatara Karya Aksara, 1983.

H. Soeprijadi. "Local Public Figure." 2020.

Malinowski, Bronislaw. *Sex and Repression in Savage Society (1927)*. New York: Routledge, 2001.

———. "The Group and the Individual in Functional Analysis." *American Journal of Sociology*, 1939.

Moleong, Lexy J. *Metode Penelitian Kualitatif*. Bandung: Rosda Karya, 2000.

Muhammad Ibn Isma'il al-Amir San'ani. *Subul Al Salam*. Beirut: Dar al-Kutub al-'Ilmiyah, 1971.

Pongsibone, H. Lebba Kadorre. *Islam Dan Budaya Lokal; Kajian Antropologi Agama*. Edited by M. Fatih Mansur. *Kaukaba Dipantara*. I. Yogyakarta: Kaukaba Dipantara, 1967.

Radcliffe -Brown, A.R. *Structure and Function in Primitive Society*. London: Routledge and Kegan Paul, 1952.

Suhaimi. "Praktik Khitbah Di Madura Perspektif Hukum Islam Dan Hukum Adat." *Al Ihkam : Jurnal Hukum Dan Pranata Sosial* IX, no. 2 (2014).

Tolib Setiady. *Intisari Hukum Adat Indonesia*. Bandung: Alfabeta, 2009.

Tony Rudyansjah. *Antropologi Agama*. Jakarta: UI Press, 2012.

Umi Supraptiningsih and Khoirul Bariyyah. "Marriage Settlement among Minority Moslem by Datok Imam Masjid in South

Thailand." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 14 (2019).
Urip Santoso. "Local Public Figure." 2020.
Wahbah Zuhaili. *Al-Fiqh Al-Islāmi Wa Adillatuh*. Damaskus: Dar al Fikr, 2010.
Zaini. "Local Public Figure." 2020.

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 182-208
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-Ihkam.v16i1.4996

Self-Esteem and Fixed Price in Islamic Law (A Critical Study of the *Pesuke* Tradition among the Nobles of the Sasak Tribe of Lombok)

Zaenudin Mansyur
Faculty of Sharia UIN Mataram, 100 Gajah Mada Pagesangan Street, Sekarbela District, Mataram City, West Nusa Tenggara,
email: zain_nahwa@yahoo.com

Article history: Received: May 7, 2021, Accepted: May 23, 2021, Published: Juni 27, 2021

Abstract:

The Sasak aristocracy in Lombok is still very passionate about carrying out the *pesuke* tradition. Although, the *pesuke* practice did not infrequently cause various conflicts between the prospective bride and groom's families. For instance, when the prospective bride's family sets the *pesuke* value that is too high, which can burden the groom's family. In contrast, religion forbids us to burden and encourages us to work together, help, and ease each other to create a happy and prosperous family in the world to the hereafter. Therefore, this study aims to examine how the perspective of Islamic law on the concept of self-esteem and fixed price in the *pesuke* tradition. The results showed that the motivation of the Sasak aristocratic community in setting a high *pesuke* value so that the public still respected their communal identity. In addition, another reason in determining the fantastic value of *pesuke* is to make it a fixed price in a marriage with *melaik*, *meruput*, or *merugul* systems. Therefore, the groom's family must pay this *Pesuke* as a ransom to restore the bride's family's dignity. Meanwhile, according to Islamic law, the *pesuke* tradition as a form of maintaining self-respect and fixed price should be a tolerable case for the creation of a peaceful and prosperous marriage because of the emergence of mutual willingness and pleasure between the two parties, by the essence of *pesuke*, namely mutual desire.

Author correspondence email: zain_nahwa@yahoo.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

Keywords:
Self-esteem; Fixed Price; *Pesuke*; Sasak Aristocratic

Abstrak:
Kaum bangsawan Sasak di Lombok masih sangat fanatik dalam menjalankan tradisi *pesuke*. Meskipun, tradisi *pesuke* ini ternyata tidak jarang menimbulkan berbagai konflik antara kedua keluarga calon mempelai. Misalnya, ketika keluarga calon mempelai wanita menetapkan nilai *pesuke* yang terlalu tinggi yang dapat memberatkan keluarga calon mempelai pria. Padahal, agama melarang untuk saling memberatkan dan menganjurkan untuk saling tolong menolong, meringankan, dan bahu membahu agar tercipta keluarga yang bahagia dan sejahtera dunia akhirat. Oleh karena itu, penelitian ini bertujuan untuk mengkaji bagaimana perspektif hukum Islam tentang konsep harga diri dan harga mati dalam tradisi *pesuke* tersebut. Hasil penelitian menunjukkan bahwa, motivasi masyarakat bangsawan Sasak dalam menetapkan nilai pesuke yang tinggi agar identitas komunal tetap dihargai oleh publik. Motivasi lain dalam penentuan nilai *pesuke* yang fantastis yaitu untuk menjadikannya sebagai harga mati dalam perkawinan yang dilangsungkan dengan sistem *melaik*, *meruput*, atau *merugul*. *Pesuke* ini harus dibayar oleh keluarga pria sebagai tebusan untuk mengembalikan marwah keluarga wanita. Sementara, menurut hukum Islam, tradisi *pesuke* sebagai wujud mempertahankan harga diri dan harga mati seharusnya menjadi perkara yang dapat ditolerir demi terciptanya perkawinan yang damai, dan sejahtera karena timbulnya kerelaan dan kesenangan diantara kedua belah pihak, sesuai dengan esensi *pesuke*, yaitu suka sama suka.

Kata Kunci:
Harga Diri; Harga Mati; *Pesuke*; Bangswan Sasak

Introduction

The *pesuke* tradition applies to the Sasak people who inhabit the island of Lombok.[1] This tradition is a phenomenal custom but contrary to the rules of marriage in Islam.[2]

[1] Tim Monografi Daerah NTB, *Monografi Daerah Nusa Tenggara Barat* (Mataram: Depdikbud, 1977).

Pesuke is a tradition of giving several goods or money from the male family to the female family according to mutual agreement.[3] The giving of *pesuke* is very varied in quantity because it depends on the level of the social status of the bride and her family.[4] Ordinary people (*jajar karang*) do not set pesuke tariffs like the Sasak aristocrats (*pemenak*).

Generally, the *jajar karang* community asks *pesuke* by adjusting the ability of the prospective groom after the bargaining process first. Although, there are also *jajar karang* women asking pesuke rates that resemble noblewomen. This phenomenon occurs in the *jajar karang* society who domiciled in the majority population area of the aristocracy.

Meanwhile, the majority of the public *pemenak* set tariffs that are pretty fantastic or expensive.[5] In addition, the rates are absolute. In other words, the groom's family must fulfill the request set by the bride's family for the marriage to be carried out. Even in certain localities, many prospective brides' families still use certain symbols that reflect several items or money that the prospective groom's family must prepare if he wants to marry a noblewoman. The fantastic form of giving the *pesuke* is like a sum of money worth up to fifty million rupiahs added with a large area of rice fields, cattle or buffalo, and one sack of rice.

Determination of the value of pesuke by the bride and groom's family often leads to bargaining, which requires a relatively long time and usually even ends with a compulsion for the groom's family. Indeed, giving pesuke is worthy of the prospective groom's family has social status and can economically. However, suppose the

---

[2] Interview with H. Lalu Darmawi on November 20, 2019.

[3] The provision of pesuke is almost similar to the rompak paga custom in the Minangkabau tribe, but the difference between the pesike giving with a certain amount is aimed at consensual families while the rompak paga custom of giving some customary money for the name of custom Salma and Burhanuddin, 'Study of 'Urf on Rompak Paga Tradition in Luhak Lima Puluh Kota of West Sumatra', *Al Ihkam : Jurnal Hukum Dan Pranata Sosial*, 12.2 (2017), 331.

[4] Data were obtained from observations at Marong Karang Tatah, November 23, 2019.

[5] Interview with Ustadz Moh Tamim in Perbawe, Central Lombok on November 27, 2019.

prospective groom comes from a community with ordinary social status and the middle to lower economic level. In that case, pesuke rates that are too high often end up in abnormal marriages. Additionally, the worst thing that could happen is the wedding cancellation, although this case does not occur much.[6]

This fact shows that the Sasak people have commonly practiced this *pesuke* tradition even though it is not uncommon to cause various social problems. In addition, *pesuke* creates gaps in religious values, which can ease Muslims in carrying out marriages..

None of the sharia law requires that every man who will marry a woman submit a provision that the bride's family has set. Moreover, there is no rule forbidding the prospective bride to leave things that would be troublesome for the future husband she craved, including the provision of marriage. Although, in the marriage contract, the groom must give dowry to the bride.[7] However, religion also suggests that the dowry's value must not be bothersome and burdensome for the prospective groom.[8] As exemplified by the Prophet, if there is no gold, the dowry can be replaced with silver; if there is no silver, it can use copper, even iron is allowed.[9] Wahbah Zuhaili also explained that the marriage also remained valid without it.[10] The fatwa of Imam Syafii also strengthened that wedding can take place if it has completed the main pillars, namely offer (*ijab*) and acceptance (*qabul*).[11] Nevertheless, this tradition continues to be practiced by the *Sasak* Lombok community, especially in the locality of the aristocratic society, so people make pesuke a condition that must be present in the wedding ritual.

---

[6] Interview with Lalu Adnan at Marong Karang Tatah on November 23, 2019.

[7] Abdul Azis Muhammad Azam, *Fiqh Munakahat* (Jakarta: Azzam, 2009), 174–75.

[8] Slamet Abidin and Aminuddin, *Fiqh Munakahat* (Bandung: Pustaka Setia, 1999), 175.

[9] Kamal Mukhtar, *Azas Azas Hukum Islam Tentang Perkawinan* (Jakarta: Bulan Bintang, 1994), 82.

[10] Wahbah Zuhaili, *Al-Fiqh Al-Islāmi Wa Adillatuh* (Damaskus: Dar al Fikr, 2010), 6578 Jilid IX.

[11] Abdurrahman Al-Jaziri, *Al-Fiqh 'Ala Al-Mazahib Al-Arba'Ah*, 4th edn (Beirut: Dar al-Kutub al-Ilmiah, 2003), 16.

This study aims to elaborate and analyze the motivations behind setting high pesuke tariffs/prices, where the nobles of the Sasak tribe in Lombok making it as self-esteem and fixed price. This study also wants to examine how Islamic law views the practice of *pesuke*.

Method

This study uses a social psychology approach, and collecting data is done through observation, interviews, and documentation. Meanwhile, the process of data validity uses Coopersmith's and Abraham Maslow's Self-esteem theory, Hogg D. Abraham's social identity theory, and social interaction theory to evaluate and analyze descriptively-analytic-inductive.

Discussion and Result

Pesuke Tradition in the Sasak Noble Society

The Sasak community in Lombok has social stratification consisting of three groups, namely, *pemenak-perwangsa, and jajar karang.*[12] According to the statements of traditional leaders, religious leaders, and the community, the legality of the practice of pesuke is different for each group. Pesuke is a tradition that is already prevalent and has become the typical characteristic of the Sasak aristocratic community. However, over time this tradition has also developed among the jajar karang community.

H.L. Syafruddin explained that customary law agreed upon by specific communities, such as *awig-awig* regarding *pesuke*, [13]belonged to the whole community and should not be bound by one

[12] Social stratification in Sasak society categorizes humans into three groups, namely atu (aristocrats), pemenak-perwangsa, and jajar karang. Interview with Lalu Masykur on December 13, 2019.

[13] The existence of awig-awig in this marriage is actually a form of accountability from the bride and groom who will hold the marriage, because according to Lombok custom the male side bears everything, including party financing and pesuke. Unlike the minang tribal marriage that marriage is a shared responsibility. Nofiardi, 'Marriage and Baganyi: Sociological Analysis of Culture in Dispute Resolution in Banuhampu District of Religious District', *Al Ihkam : Jurnal Hukum Dan Pranata Sosial*, 13.1 Juni (2018), 1.

particular social group or strata.[14] Some areas that apply the pesuke tradition are Marong Karang Tatah, and Kamasan Mataram Environment in Mataram, Semayan, Prapen, and Perbawe villages in Central Lombok, West and East Sakra villages in East Lombok, and Kediri, Gerung and Kuripan villages in West Lombok. These areas become the sampling location of this research.

The determination of the amount of *pesuke* value also varies for each class of society. Society sets this value based on *aji krame*.[15] *Aji krame* contains numerical symbols which are inherited from the kiyai and preachers. These symbols are the form of da'wah material used by the kiyai and preachers to spread Islam through cultural instruments, namely customs prevailing in the society. [16]

Aji krame has seven levels; the first level is called 5/400 (*samas*),[17] which is a symbol for the Sasak people who have been able to pray five times a day or have practiced the five pillars of Islam. The second level is 7/400 (*samas*), symbolizing that humans besides knowing and believing in the pillars of faith are also aware of their obligations to study, especially religious knowledge. The third level is represented by the number 13, which means that humans have run the pillars of thirteen, namely the pillars of prayer (*shalat*). The fourth level is symbolized by the number 17, meaning seventeen rak'ahs of worship; that is, human beings are capable of and steadfastness (*istiqamah*) in performing prayers five times a day. The fifth level is symbolized by the number 33, which refers to humans who have been able to carry out pillars 13 and understand and believe in the 20 attributes of Allah. This symbol is attached to those who already have a high enough degree of knowledge in fiqh, *ushul*, and Sufism. Finally, the sixth level is symbolized by the number 66. This number

[14] Interview with H.L. Syafruddin, the observer of the Sasak Lombok customs, December 7, 2019.

[15] Etymologically, aji krame comes from the Sasak language, divided into two terms, namely aji and krame. Aji means appreciation while krame is the result of a deliberation decision. In its terminological level, aji krame is a gift from a man family in the form of material to a woman's family according to the tradition or agreement of both parties. Interview with Lalu Najamudin on December 7, 2019.

[16] Compare to Zaki, 'Tradisi Islam Suku Sasak Di Bayan Lombok Barat, Studi Historis Tentang Islam Wetu Telu 1890-1965' (UIN Sunan Kalijaga Yogyakarta), 10.

[17] Interview with Lalu Najamudin on December 7, 2019.

is known as a "complete symbol" because humans have been able to carry out the pillars of Islam, pillars of faith, pillars 13, have known and believed like 20 for Allah, and are experts in prayer. The seventh level, symbolized by the number 100, is the most perfect and most complete symbol. This symbol means that humans have understood and believed 99 names of Allah (*Asmaul Husna*) plus one symbolizing obedience to the teachings of God.

Customary leaders agree that the *krame aji* contains positive values because it facilitates the marriage process in the Sasak community. Therefore, they hope and even oblige the public, especially the aristocracy, to practice the *krame aji* to determine *pesuke* value. *Aji Krame* also indirectly informs that these symbols represent the strata or groups of the community. The symbol number 100 is a tribute to the nobility. The number 66 (*enam dase enem*) symbolizes the price for *perwangsa (pemenak*). The number 33 *(telung dase telu*) symbolizes appreciation for the *jajar karang* community. While the society which consists of the laborers, slaves are valued by the symbol 5/400 (*samas*).

Customs in the Sasak community are categorized into three, namely *adat game, adat wiragama,* and *adat tapsile*[18]. This *pesuke* tradition is included in *adat tapsile* because it is related to manners between fellow humans (*muamalah*). Therefore, determining *pesuke* by *aji krame* in the marriage process must be done. The value of pesuke who does not follow the rules of aji krame is a violation of the agreed custom.[19]

Based on aji krame there are three types of gifts from the prospective groom's family to the prospective bride's family. First, the giving of the groom's family in the form of material based on sincerity.[20] This pesuke can be a specific item in the amount adjusted

[18] *Adat game* is human procedures in establishing good relations with the creator. *Adat wirgama* is a way for humans to interact with the natural surroundings and love other creatures that live around them. While *adat tapsile* is procedures for establishing social relationships with others. In the language of religion it is often referred to as *hablum minallah, hablun min al-kainaat, hablum min An-nas.* Interview with Lalu Syafrudin on 10 December 2019.

[19] Interview with H. Lalu Darwami, 10 December 2019.

[20] Interview with Lalu Muhammad Zakaria Mataram. the 18th of 2019.

to the will and ability of the prospective groom's family.[21] Second, it is also called trasne dane, which gives the prospective groom's family to the bride-to-be based on excessive love. Third, it is called *gantiran*.[22] H.L. Syafruddin explained that *gantiran* consists of two words, namely the word *ganti* and *ran*. When the two words are together, it becomes a term with meaning in terms of terminology, replacing the cost incurred during a *begawe* (party).[23]

The practice of *pesuke* is already attached to the Sasak aristocratic society. Those nobles are also very committed to using symbols that symbolize the number and types of requests of the bride and groom's family. Some regions still apply this old concept or tradition, such as in the Semayan area, the prospective bride brings two coconuts and a handful of rice to the prospective groom's family. This symbol implies that the groom must give a pair of buffalo and a sack of rice to the prospective bride's family. Thus, the amount of *pesuke* is highly dependent on the symbols carried by the future bride. In addition, some people hand over the gantiran or *pesuke* in the form of a plot of paddy land. The groom will adjust the rice fields given to the bride's family according to the custom prevailing in the bride's residence.

In principle, customs must remain in the constellation of religion. Therefore, The ancestors have adjusted the Sasak cultural literature traditions to religious teachings, including customary requests for *pisuke*, *gantiran*, and *aji krame*.[24] According to the essence of traditional *Sasak* marriage, it is not allowed to be burdensome and also not to be too light to remain in the corridor of the Sasak traditional principle, which is *patut, patuh, pacu, solah, onyak, saleh,*

[21] Interview with H.L. Syafruddin, December 20 2019.

[22] This gantiran tradition is considered as compensation between villages. For example, a man who lived in village A applied for a woman from village B with the conditions agreed upon by the customs of the two villages. If village A pays pesuke with a pair of buffalo and 100 kg of rice, then Village B must pay the same amount if its community members apply for women from Kampung A, according to the agreement between the two villages.

[23] Interview with Lalu Safiudin Mataram, 20 December 2019.

[24] Interview with Lalu Masykur, December 23, 2019.

soloh.[25] This principle is in line with the statement of Lalu Syafrudin, that by practicing *awig-awig* that the previous traditional leaders have determined the *pesuke* will not impose on the groom's family.[26] For example, for nobles with the symbol number 100, the *pisuke* must is a cow and a sack of rice.

However, today's phenomenon is that many Sasak people are burdensome to each other by establishing the excessive value of pesantiran or pesuke ranging from millions to tens of millions, and some even use cows buffaloes, rice fields, and so on. They call this gift with the terms *gantiran tinduk* and *gantiran nganjeng*.[27] This phenomenon shows that customary practices have changed from the customs that they should—determination of the value of Pisuke, which actually must be by the provisions of *aji krame*.

A change in social behavior triggered the adat shift due to Law No. 5 of 74 concerning village government regulations and Law No. 5 of 79 concerning regional governance. The issuance of the two constitutions because of *kuningisasi*, namely the interests of the Golongan Karya party at that time. The village head who lacked understanding of *adat* issued a regulation to determine *pesuke* value

[25] The customary principle referred to in the *pesuke* tradition in the Sasak community is the provision of assistance by the groom's family to the bride's family in the form of money or goods in accordance with the agreed *awig-awig*. This assistance is given in the hope that a peaceful atmosphere will be established between the two parties, especially between the bride and groom in order to foster a household based on *keistiqamahan* (diligently) carrying out their duties and obligations as husband and wife, so that a good, safe, harmonious, prosperous, *sakinah, mawaddah, and rahmah* family could be formed, Interview with H. L. Syafruddin, January 20, 2019.

[26] Pesuke tradition is expensive today because the practice of marriage carried out by the people of Lombok is much contrary to the actual Islamic law. Whereas marriage is with all its conditions such as initial inection is a human relationship with others who want a horizontal relationship with peaceful coexistence, harmony and away from violations that can harm themselves and others. Suhaimi, 'Praktik Khitbah Di Madura Perspektif Hukum Islam Dan Hukum Adat', *Al Ihkam : Jurnal Hukum Dan Pranata Sosial*, IX.2 (2014), 306.

[27] *Gantiran tinduk* is the *pesuke* of the prospective groom to the bride's family in the form of several cashed cows. While *gantiran nganjeng* is the *pesuke* of the prospective groom to the bride's family in the form of several cows, which both parties have agreed on numbers. Interview with Lalu Masykur Lalu Syafruddin, December 18, 2019.

that was not by the *aji krame* as determined by previous traditional leaders. This phenomenon occurs because many Sasak people have abandoned local wisdom. This situation gave birth to freedom for community leaders in the village to decide customary rules based on a community agreement.[28]

In addition, at present, the determination of *pesuke* in the Sasak community is still uncertain.[29] The decision of the number of *pesuke* (*suluh*) in the community, sometimes it can be expensive sometimes it is cheap. It depends on the bargaining between the two families, even though the people who hold the marriage are not nobility. According to TGH Abdullah Hakam, the pesuke value requested by the bride's family is between 5 million to 20 million, depending on the bargaining results between the two families. Even in the Tiwu Galih area, the *pesuke* value could reach 30 million. Marriage registration officers in the Semayan area have also found that the number of pesuke in the area reached 50 million.[30] However, people should no longer view this pesuke tradition as a request but a mandatory gift worthy of being given by the prospective groom to the bride.[31]

In addition, the people of Lombok also believe that every habit that contains goodness can be the basis for legal products that can develop in society. Thus, the Sasak nobles continue to maintain this tradition because they want to uphold the values of goodness contained in it.[32] Furthermore, Abdul Wahab Khallaf stated that all elements of society could accept a custom if the custom brings benefit.[33] Therefore, Pesuke becomes a legitimate activity because it produces an agreement from both parties who will get married. The nobles have carried out this tradition for generations, and so far, no upheaval. Therefore, the pesuke practice is a practical matter and does not conflict with the legality of the law contained in the Qur'an and

[28] Interview with Lalu Syafruddin, December 18, 2019.

[29] Interview with TGH Abdullah Hakam on 31 December 2019.

[30] Interview with TGH Abdullah Hakam on 31 December 2019.

[31] Interview with Lalu Azmil Kafrawi December 31, 2019.

[32] Rasyid Hasan Khalil, *Tarikh Tasyri'* (Jakarta: Amzah, 2009), 169.

[33] Abdul Wahab Khallaf, *Ilmu Ushul Fiqh (Kaidah Hukum Islam)* (Jakarta: Pustaka Amani), 118–19.

Sunnah. In his usul fiqh, Abu Zahrah explained that people must preserve an `urf or a good habit.[34] Abdullah bin Mas'ud also revealed;

ما رآه المسلون حسنا فهو عند الله أمر حسن.

Meaning: "Whatever is considered reasonable by the Muslims, then that matter is good according to Allah."[35]

Therefore, the community uses the above expression of the ulama as the basis for maintaining pesuke. This basis also constructs people's thinking that leaving pesuke means lowering the self-esteem of the community concerned. Therefore, this pesuke becomes a fixed price that must be continuously fought for so that the dignity of the nobility remains respected.

Pesuke as a Defense of Self-Esteem and Fixed Price in Noble Society

There are still many Sasak aristocratic people who practice the old customs they received from their ancestors. For example, the business of determining *pesuke* value is different from other groups of people. TGH Fahrurrazi, head of the Nurul Yakin Praya boarding school, also conveyed this statement, who stated that the Sasak aristocratic community was different from other communities; they still maintained the local custom by setting *pesuke* rates high enough. Pesuke that is requested is usually valuables or money, depending on the traditions they agree on in each hamlet and village.[36]

The following factors behind the community maintaining this tradition; First, the married woman will still have dignity.[37] This reason is strong to justify preserving the practice of pesuke in Sasak society, especially among the nobility, especially when considering

[34] Muhammad Abu Zahrah, *Ushul Fiqh* (Jakarta: Pustaka Firdaus, 2003), p. 116.

[35] This ini In line with Nouruzzaman's opinion, quoting the views of the Maliki and Hanafi schools that urf is a source of Islamic law outside the texts scope Nouruzzaman Shiddiqi, *Fiqih Indonesia, Penggagas Dan Gagasannya* (Yogyakarta: Pustaka Pelajar, 1997), 122–23.

[36] Interview with TGH Fahrurrazi on 28 December 2019.

[37] Drs. H. Then Makmur, 'The Head of Religious Affairs (KUA) of Praya Subdistrict', 2019, Direct Interview on November 27, 2019.

that noblewomen are descendants of the blue blood of kings who have high social and economic status in the community. Thus, maintaining this pesuke meant an effort to preserve the dignity of the nobles.

TGH Fahrurrazi also explained that *pesuke* as *suluh/islah*, which means peace or improvement. Therefore, the money given by the prospective groom to the prospective bride's family to carry out the marriage contract is called *uang suluh* (peace money).[38] Therefore *pesuke* or *suluh* is a custom performed by Sasak people in marriages where the family of a man gives money or goods by the request and agreement between the two parties to improve conditions while creating peace between the two parties.[39] Second, pesuke is adat, because adat is part of religious rules, so it is not wrong if implemented. This view becomes legal, aside from the fact that this view still prevails in society and according to the ushul fiqh method, which explains that: " العادة محكمات "(adat is the law).[40]

Meanwhile, the demand for *pesuke* with a high enough price manifests deviations from the rules or *awig-awig* agreed upon by the community, namely regarding the elopement tradition, which is considered a despicable act a harmful activity. A man who does elope will be given an adat sanction in the form of an expensive ransom payment because this action can damage family relations.[41] A marriage registration officer of the Semayan village, Ustazd L. Tamim, stated that the *pesuke* request was also based on the dislike of one of the bride and groom's family parties for the marriage.[42]

In addition, another factor that causes pesuke to be expensive is the existence of a policy to equalize *pesuke* values so that it does not occur "biased" in social stratification. In addition, if *adat* has set 30 million in a village, then the value of *pesuke* remains 30 million onwards, regardless of whether they are aristocrats or *jajar karang*.

[38] Interview with TGH Fahrurrazi on December 28, 2019.

[39] Interview with TGH Izzudin Habib on December 31, 2019.

[40] Interview with TGH Izzudin Habib on July 14, 2007.

[41] H. Syawal, 'The Marriage Registration Officer in the Prapen Sub-District', 2019 Direct Interview on December 15, 2019,.

[42] Direct Interview on December 31, 2019, Ustadz L. Tamim, 'Marriage Registrar', 2019.

Marriage between aristocrats with *jajar karang* can also be the cause of the high *pesuke*. In this context, pesuke is a means to reconcile a family atmosphere so that the relationship between the two families from different strata can remain safe. [43] Since, if the groom is given the convenience, namely by asking for a cheap *pesuke*, the groom will not be charged certain costs, someday the man may not respect his daughter and treat her like a reasonable and useless wife. [44] Therefore, the Sasak aristocratic people usually set *pesuke* in the form of a considerable amount of money, which reached tens of millions of rupiah. Ustazd L Tamim also informed that there was a family of the bride who set *pesuke* went 50 million, for reasons of prestige.

The lack of educational equality between the bride and groom is also the cause of the high *pesuke* tariff, especially if the room is lower than the bride's. [45] As stated by TGH Fahrurrazi, that taking a dowry is required to be expensive so as not to be demeaned. [46] Coopersmith also explains related to this view that one's abilities can be the basis for the emergence of self-esteem. [47]

Whereas in Islam, the *mahr* (dowry) must be simplified, meaning that it is affordable by the community.[48] TGH Mashun strengthen his argument with a hadith أبركهن أيسرهن مهورا "blessing of the marriage obtained by lightening the amount of dowry". The same opinion has also been conveyed by the Marriage Registration Officers at the Office of Religious Affairs. They served in all areas of East Lombok, Central Lombok, West Lombok, and Mataram.

However, all of the above factors become a powerful motivation and can shape the awareness of the Lombok people to

[43] Interview with TGH Izzudin Habib on December 31, 2019.

[44] Interview with TGH Izzudin Habib on December 31, 2019.

[45] Interview with Semayan sub-district marriage registration officer Ustazd L. Tamim on December 31, 2019.

[46] Interview with TGH. Fahrurrrazi on December 28, 2019.

[47] Stanley Coopersmith, *The Antecendents of Self Esteem* (San Fransisco: Freeman Press, 1967).

[48] Interview with TGH. Fahrurrrazi on December 28, 2019.

maintain their self-esteem. Coopersmith explains that strength could be a factor that forms the self-esteem of society.[49]

Analysis of the Aspects of Self-Esteem and Fixed Price in Determining the Value of Pesuke.

1. Self-esteem as the Basis for Determination Pesuke in the Sasak Nobility Society

Humans are born as social beings; this fact causes humans can not usually live without the presence of others.[50] Amin Abdullah explained that plural human affairs could cause various conflicts. This condition will encourage humans to make accommodations to realize wise social attitudes among one another.[51]

Marriage is one way that can accommodate social action in society. Since marriage can bring together different sexes, ethnicities, races, groups, and even religions through dynamic interactions between individuals or groups, as revealed by Elly M. Setiadi.[52] Thus, the practice of marriage has touched aspects of the high-class social paradigm.[53] Marriage not only brings together or brings one group closer to another group but also unites all the differences that exist in the form of an element that complements society, namely the family. Mainly, suppose marriage is carried out by strict customs, such as those carried out by the Sasak aristocratic community. In that case, social interaction must be continuously carried out until the wedding is implemented.

Midang tradition, the introductory stage between the prospective groom and bride, is the initial social interaction between the two parties. At this stage, the man will attract the heart of the

---

[49] Aditomo and Retnowati, *Perfeksionisme, Harga Diri, Dan Kecenderungan Depresi Pada Remaja Akhir* (Yogyakarta: Fakultas Psikologi Universitas Gadjah Mada, 2004).

[50] Asrul Muslim, 'Interaksi Sosial Dalam Masyarakat Multietnis', *Jurnal Diskursus Islam*, 1.3 (2013), 485.

[51] Amin Abdullah, *Dinamika Islam Kultural; Pemetaan Atas Wacana Keilsaman Kontemporer* (Bandung: Mizan, 2000), 68–69.

[52] Elly M Setiadi & Usman Kolip, *Pengantar Sosiologi Pemahaman Fakta Dan Gejala Permasalahan Sosial: Teori, Aplikasi, Dan Pemecahannya* (Jakarta: Kencana, 2011), 63.

[53] Stephen Cotgrove, *The Science of Sociology: An Introduction to Sociology* (London: Gerge Allan & Unwin, 1982).

woman he adores with various sweet talks so that he is accepted as her life partner. Furthermore, the acceptance or approval of a bride for the marriage is also a series of social interactions that people cannot avoid. Therefore, there will be various negotiations and social contacts[54] in realizing marriage. Although, social interactions are also carried out not infrequently, causing disintegration, conflict, and social rift. [55] For example, in the process of determining *pesuke* value. This process must get agreement from both parties, both in the manifest (*zahir*) and the hidden (*batin*).

Marriage carried out according to customs is a form of community care in preserving local wisdom. This tradition has been created and agreed upon as an activity that can provide significant benefits (*maslahah*) for the community, especially for those who practice it. Thus, it is natural that this tradition continues to be maintained and preserved. Everyone is forbidden to leave it. Even in some places, it becomes a non-negotiable rule, even though some community members are *jajar karang* who do not have an obligation to practice it.[56] For example, the practice of determining pesuke value in villages or hamlets where aristocrats inhabit the majority of the population. All forms of *awig-awig* or existing customs should not be abandoned by all community members, even though some of the inhabitants are *jajar karang*.

Pesuke tradition has become one of the Sasak community identities that people should respect. Previous societies sacrificed considerable expense, time, and energy to create it, so it was natural to appreciate people who used it. If referring to the concept of self-esteem Nathaniel Branden, the struggle of the Sasak people in facing

[54] This has become an internal community paradigm because it is done through systematic social interaction Kinlockh Graham C., *Ideology and the Social Science* (Greenwoon Press, 1981). See also Zainuddin Maliki, *Narasi Agung Tiga Teori Sosial Hegemonik* (Surabaya: LPAM, 2004), 19.

[55] In many ways George Foster tries to suggest that the mechanism of social value still applies through a sense of limitations on Resources. Peasant Sciety and the Image of Limitied Good in Jack M. Potter, May N. Diaz and George N. Foster (eds) Peasant Society: A Reader (Boston: Little Brownan Company).

[56] Muhammad Salim Mazkur, *Madkhal Fiqh Al-Islam* (Kairo: Dar al-Qaumiyyah, 1964), p. 120. See also Yusuf Qardawi, *Awami Al-Sa'ah Wa Al-Murunah Fi Al-Syari`ah Al-Islamiyah Bayna Al-Inzibath Wa Al-Infirat* (Kairo: Dar al-Tauzi` wa al-Nasyr al-Islamiyyah, 1994), 18.

challenges and threats that can depose the *pesuke* tradition is believed to be a noble deed. Therefore, the community must maintain this tradition so that it cannot be torn apart by anyone.[57]

Moreover, the struggle that deserves high respect is the struggle of the predecessors of the Sasak people when giving a solid understanding for the community that the *pesuke* tradition is should not be crushed by the times. This pesuke tradition has a very high philosophical meaning because *pesuke* can create a sense of ridha (contentment with God), pleasure, peace, and security in family life. The goal is to reconcile the two parties that will carry out a marriage can be realized. These traditional values should be fought to be made as necessary by the people, especially the aristocratic community thick with tradition and customs. Nathaniel Branden states that people's confidence to get the right to happiness and feelings of worth to assert the needs and desires that they can enjoy because of their hard work. [58]

The functions and benefits of the *pesuke* tradition must be fully understood by the Sasak people so that others can appreciate them. As Abraham Maslow's view of esteem theory, the Sasak people, especially those of nobility, must respect themselves by maintaining their tradition as an activity that has a high value in front of others so that the dignity of the Sasak nobility is maintained. According to Maslow, if the community has maintained their self-esteem, an honor will automatically be obtained.[59] Therefore, various forms of struggle of the Sasak people in maintaining and making people understand the benefit of the pesuke tradition have been considered a success or achievement worthy of appreciation. So, it is natural that the self-esteem of the Sasak people, especially the nobles, can still be maintained.[60]

Thus, the determination of *pesuke* tariffs that "seem" to burden the prospective groom's family is not worth the sacrifice that has been

---

[57] Nathaniel Branden, *The Power of Self-Esteem* (Florida: Health Communications, 1992), 97.

[58] Nathaniel Branden, 97.

[59] Abraham Maslow, *Motivation and Personality* (New York: Harper And Row Publishers, 1975).

[60] F.A Rohmah, 'Pengaruh Pelatihan Harga Diri Terhadap Penyesuaian Diri Pada Remaja', *Humanitas (Jurnal Pskologi Indonesia)*, 1.1, 53–56.

done in maintaining *pesuke* traditions in the community. Rusli Rutan states that everyone deserves to be valuable and beneficial for all efforts done, no matter what has been, is, and will happen.[61] Likewise, in the *pesuke* tradition, Sasak aristocratic society cannot blame if it persists in setting a fantastic *pesuke* price even though it will be burdensome for the groom's family.

If referring to illat (a trait that allegedly contained legal purposes) of the implementation of *pesuke*, this *pesuke* is valid at least normatively formal legal and can be tolerated in Islamic law.[62] The fundamental reason for implementing the *pesuke* is that it can realize the value of the *maqashid syariah* (goals or purpose of Sharia), which is to reconcile both parties so that they can sail the ark of their household safely, comfortably, and happily.[63] Thus, the gathering (*silaturrahmi*) between the bride and groom's family also can occur continuously so that an intact family is formed which is framed with happiness. Meanwhile, the consequences or risks arising from the enactment of this *pesuke* cannot be used as illat to undermine the traditions inherent in the life of the Sasak aristocratic society. Thus, the man who wants to marry a noblewoman must be prepared with an expensive pesuke and ready to face all the consequences that would occur.

The *pesuke* tradition that is expected to create peace between the bride and groom's family can be felt by both prospective bride and groom that their marriage is based on kindness, happiness, serenity, willingness, and comfort. Thus, the tradition is also expected to be a prayer for the bride and groom to become a *sakinah, mawaddah, rahmah,* safe, happy family in the world to the hereafter.[64] Therefore,

---

[61] Rusli Rutan, *Self Esteem: Landasan Keperibadian* (Jakarta: Proyek Peningkatan Mutu Organisasi dan Tenaga Keolahragaan Dirjen Olahraga Depdiknas), 86.

[62] Nadiyah Syarif al-Umari, *Ijtihad Fi Al-Islam* (Give: Muassasat al-Risalah, 1981), p. 255. See also Musthafa Said al-Khin, *Al-Kafi Wa Al-Wafi Fi Ushul Al-Fiqh Al-Islami* (Beirut: Muassasat al-Risalah), 181.

[63] Muhammad Khalid Mas`ud, *Islamic Legal Philosophy* (Islamabad: Islamic Research Institut, 1977), 232.

[64] It is obtained by both the bride and groom and their families. It can be categorized as general self-esteem, which confirms that pesuke is like capital to maintain self-esteem because it is obtained from the experience and history of the Sasak tribe. See Marjohan, 'An Investigation of Factors That Influences Decision and

the ancestors' struggle in producing something good to be passed on to their successors is a very noble act and needs to be emulated from one generation to the next.

Based on social identity theory, people will continue to struggle hard to maintain the positive value of their social identity.[65] Therefore, all efforts made by the traditional leaders to preserve the tradition of this pesuke are good things. [66] The form of the struggle of traditional leaders in making people understand and aware of the practices that they must maintain can prove that the identity of the nobility respects the positive values of the customs of their ancestors. This attitude is not yet shared by other groups such as the *priyai, jajar karang,* and others.[67] Thus, this attitude should be understood and embraced by all social strata in society. The *pesuke* tariff rules that apply to the Sasak aristocracy also should apply to *jajar karang*. Thus, the *jajar karang* community and the nobility must get the same treatment and have the same rights and responsibilities in developing and preserving the customs developed in specific neighborhoods, even though they are a minority community.[68] According to Hogg, et al., this effort is also one method that can be applied in building and respecting the identity of other people or groups. Furthermore, Hogg also stated that a plural community could create a positive identity if they respect each other's identity. This theory emphasizes that a group will have a positive self-identity if they can appreciate the uniqueness of other groups.[69] In other words, the self-esteem of the Sasak aristocratic community will depend significantly on the extent to which they can maintain their identity and respect the uniqueness of different groups, such as

---

Their Relationship to Self-Esteem and Locus of Control Among Minangkabau Students' (University of Tasmania Australia, 1977).

[65] Muhammad Johan N Huda, 'Dinamika Pencapaian Identias Sosial Postif Atas Keistimewaaan Yogyakarta', *Jurnal Pskologi Integratif*, 2.1 (2014), 30–41.

[66] J. C. Giles Turner, *Howard, Intergroup Behavior* (Oxford: Blackwell, 1981).

[67] Michael A Hogg & D. Abrams, 'Social Motivation, Self Esteem Social Identity', in *Social Identity Theory: Constructive Dan Critical Advance*, ed. by D. Abrams & M.A. Hogg (New York: Havaerster Wheatsheaf, 1990), 28–47.

[68] Klandermans, *The Social Psychology of Preotes* (Oxford: Blackwell, 1977).

[69] Alexander Haslam, *Psychology in Organization (The Social Identity Approach)* (New Delhi: Sage Publication, 2001).

the *jajar karang*. McDonal's Self Esteem theory in Cicilia reinforces this statement by explaining that the existence of a person or community in maintaining identity is an integral part of realizing self-esteem because social identity is one of the tools to get appreciation from other groups.[70]

The phenomenon that occurs today is that many people do not require *pesuke* in their marriage processions. Some people set *pesuke* but not made as a priority. Usually, the *pesuke* tradition must be a priority because it is one of the most crucial discussion topics when the two families interact.[71] Marriage will have value and dignity in the community when it is normally carried out, where interaction creates comfort, security, peace, happiness, and willingness between the two parties. [72] Moreover, the blessing will accompany the bride and groom undergoing the household ark because it begins with good social interaction between the two families.[73]

Social contact that continues with intense communication between the two parties is a form of social interaction that cannot be left behind in the marriage tradition.[74] The process of discussing the implementation of the wedding to the offer of *pesuke* made by the prospective groom's family is also an effort to maintain self-identity so that it remains valuable in the community.[75] Accommodation needs to be done to make adjustments between the two families. The groom's family must understand the condition of the bride's family,

---

[70] Y. Cicilia Praswati, 'Pertikaian Kelompok Etnik Di Kalamantan Barat: Tinjauan Berdasarkan Teori Identitas Sosial', *Jurnal Psikologi Sosial*, 2003, 77.

[71] The point is as a basis for bringing the two families closer, Knapp L., *Interpersonal Communication and Human Relationship* (Newton MA: Allyn And Bacon, 1984).

[72] D.O, Sears, L.A. Pelau & Taylor, *Social Psychology* (Englewood Cliffs NJ, Prentice Hall, Inc, 1991), 91.

[73] Muhammad Dja`far, *Etika Bisnis Islami Dalam Tataran Teoritis Dan Praktis* (Malang: UIN Malang Press, 2008), 63.

[74] M. Bahauddin al-Qibbani, *Al-Faqru Wa Al-Ghina Fi Al-Qur`an Al-Karim* (Kairo: Muassasah Dar al-Sya`b), 190.

[75] Maintain self-esteem by maintaining self-identity, namely preserving the pesuke tradition as a social attribute inherent in the Sasak aristocratic society and cannot be influenced/changed, R.B. Burns, *The Self Concept Theory, Measurement, Development and Behaviour* (London: Longman Group, 1979).

must not bargain the tariff of *pesuke* is too cheap because it is feared that it will lower the bride's family's self-esteem. Vice versa, the bride's family should not set the price of the *pesuke* as they please without understanding the condition of the groom's family.[76] This means that the bride's family is not wrong if they ask for a high *pesuke*, as long as the groom's family agrees. The essence of this interaction is to understand each other between the two parties by minimizing all the bad possibilities that can occur, such as the impression that marriage is not blessed, various family conflicts, and a broken home. All these interactions are carried out solely to keep the family's dignity remains safe, peaceful, and prosperous in the world until the hereafter, by the purpose of the pesuke tradition so that the preservation of self-esteem remains a priority.[77] Thus, social interaction can be a means of resolving internal conflicts that may occur between the two parties at the time of determining the *pesuke* value. This conflict can be resolved through correction, compromise, mediation, arbitration, adjudication, stalemate, tolerance, and conciliation.[78]

2. Fixed Price in Determination of *Pesuke* in the Sasak Nobility Society

The motivation to maintain the *pesuke* tradition is not limited to self-esteem and self-identity. However, this tradition has become a "fixed price" that no one must deny. Thus, all efforts made to preserve and maintain it are part of preserving the identity of the Sasak aristocratic community so that it is not underestimated by other groups or members of the community.[79]

In general, the existence of *pesuke* in the internal Sasak community is seen as giving the prospective groom's family to the

---

[76] Soerjono Soekanto, *Sosiologi Sebuah Pengantar* (Jakarta: Rajawali Press, 2010), 56.

[77] M.H. Guindon, *Self Esteem Across The Lifespan* (New York: Francis Group LCC, 2010), 11.

[78] Jabal Tarik Ibrahim, *Sosiologi Pedesaan* (Malang: Universitas Muhammadiyah Malang, 2003), 22.

[79] M. Rosenberg, *Society and The Adolescent Self-Image* (Pincestin NJ: Princeton University Press, 1965), p. This means that the self-esteem shown by the Sasak community is in the form of positive values, as initiated by Rosenberg, See.

prospective bride's family that is "fixed price".[80] Therefore, all Sasak people must carry out this *pesuke* tradition in their marriage procession, regardless of social stratification.

Moreover, if the marriage is not carried out typically (by *adat*), then the process of determining *pesuke* may also not be carried out usually. This means that the specified *pesuke* value could be cheaper and more expensive than the value. Myers states that a person or group with high self-esteem, such as a noble community, may experience failure or disappointment, which makes his self-esteem decline.[81] In other words, if a nobleman does not carry out this tradition, then his self-esteem may be lowered by the community. It is the consequence that will be received by someone who lives in an environment that is bound by solid customs.

In essence, pesuke has become a fixed price in Sasak marriages because the Sasak people, especially the nobility, have realized that the Sasak tribe also has a dignity that must be maintained, even though the prospective bride will be at stake. That means the marriage will be held or foiled depending on the ability of the prospective groom's family to pay for the pesuke. Marriage can continue without pesuke.[82] However, the absence of pesuke will raise public opinion that the wedding did not get the family's blessing. The community also believes that various threats and disasters will occur in the household.[83]

That is why *pesuke* is used as a fixed price by the noble Sasak people. The bride's family will not even hesitate to dispose of (not regard) his daughter customarily if she violates the rules or traditions in the Sasak marriage. This practice is commonly called "*buang telur*"

[80] Steven Fein & S.J. Spencer, 'Prejudice as Self Image Maintenance: Affirming The Self-Through Derogating Others', *Journal of Personal and Social Psychology*, 73 (1997), 31–34.

[81] D. Myers, *Social Psychology* (New York: Mc Graw-Hill, 2005), 75.

[82] M. Nur Yasin, 'Kontekstualisasi Doktrin Tradisional Di Tengah Modernisasi Hukum Nasional: Studi Tentang Kawin Lari (Merari`) Di Pulau Lombok', *Jurnal Istinbath*, IV.1 (2006), 73–75.

[83] Wilis Srusayekti dan David A. Setiady, 'Harga Diri Terancam Dan Perliaku Menghindar', *Jurnal Pskologi*, 42.2 (2015), 141–56.

(egg disposal). [84] This means that the family will not regret disposing of/ not regarding their daughter as part of their flesh and blood (descendant).[85] As a result of the violation, the dignity of his family's nobility was tarnished. However, the situation can still be restored if the prospective groom makes pesuke payments as a ransom for the woman he is going to marry, and his wedding is also celebrated in tradition or custom.[86]

Therefore, this pesuke tradition becomes a fixed price if the two brides are from the aristocracy and marry with an unjustified system, both socially and religiously. For example, they get married using a *melaik* marriage system. Married using this marriage system is very risky in causing dire consequences for both families.[87] A marriage supposed to bring pleasure, peace, family atmosphere, and blessing turns into a marriage colored with hatred, anger, and resentment. In addition, if the bride's family finds out that the groom's family has complained about the pesuke being too expensive. Then automatically, the *pesuke* becomes the fixed price required by a woman's family. If the bride's family does not ask the *pesuke*, society will underestimate the dignity of the bride and her family. Mc. Donald said that basically what Sasak people do is a technical / way to maintain their ethnic self-esteem.[88]

On the one hand, if the prospective groom's family does not fulfill the *pesuke* by the request of the woman's family, one of the consequences that the future groom and his family must receive is the difficulty of getting a marriage guardian. Suppose the marriage continues to be carried out unilaterally by bringing in a guardian of the judge and secretly held. In that case, the bride's family will not allow the bride and groom to carry out the *nyongkolan*, *bejango*,

---

[84] Neuwenhuyzen called it the Sasak custom which was actually practiced for good and benefit. Tim Departemen Pendidikan dan Kebudayaan, *Adat dan Upacara Perkawinan Daerah Nusa Tenggara Barat* (Jakarta: Depdikbud, 1995), 11.

[85] John Bartholomew stated that this custom as a result of the acculturation of Balinese and Sasak culture, in the merari 'custom, John Ryan Bartholomew, *Alif Lam Mim: Kearifan Masyarakat Sasak* (Yogyakarta: Tiara Wacana, 2001), 203.

[86] Wilis Srusayekti dan David A. Setiady, 143.

[87] Fath Zakaria, *Mozaik Budaya Orang Mataram* (Mataram: Yayasan Sumurmas Al-Hamidy, 1998), 10.

[88] Y. Cicilia Praswati, 77.

and *silaturrahim* tradition.[89] That's how the Sasak people, especially the nobility, maintain their self-esteem as a positive identity so that this *pesuke* tradition is known by the public as a fixed price.[90]

Pesuke as a fixed price is also very visible in meruput marriage system. In this system, the two families of the bride and groom do not approve of the marriage contract. This disagreement occurs if the bride and groom come from different social strata. Moreover, if the prospective bride is of royal descent, the future groom is a *jajar karang* society.[91] In this case, the bride will be disposed of traditionally by her family if the marriage continues.[92] For the conflict between the bride and groom's families to end and peace be achieved, the male family must pay the *pesuke* tariff that is more expensive than the usual rate.

Conclusion

The pesuke tradition is one of the traditions practiced by the Sasak people in marriage rituals. This tradition is in the form of handing over goods or money from the prospective groom's family to the bride's family as a guarantee for the continuity of the marriage contract and creating a sakinah, mawaddah, and rahmah family. Thus, the community determines the value of pesuke, referring to the awig-awig prevailing in the society. They also remain steadfast in preserving pesuke because this tradition has a good purpose: to maintain the dignity of women and their families.

On the one hand, the high pesuke value can have a positive impact, such as the impression that the relationship between the bride and groom's families is happily, peacefully, and respectfully established. However, on the other hand, a high pesuke value can also negatively impact conflict and disagreement. Interestingly, today's phenomenon, the value of pesuke among aristocrats and jajar karang

[89] Muhamamd Harfin Zuhdi, *Bias Gender Stratifikasi Perempuan Bangsawan Sasak Dalam Perkwainan Masyarakat Lombok Nusa Tenggara Barat* (Jakarta, 2010).

[90] Nathaniel Branden.

[91] Bustami Saladin, 'Tradisi Merari` Suku Sasak Di Lombok Dalam Perspektif Hukum Islam', *Al Ihkam : Jurnal Hukum Dan Pranata Sosial*, 8.1 (2013), 22.

[92] Gde Suparman, *Titi Tata Adat Perkawinan Sasak, Kepembayunan Lan Candrasengkala* (Mataram: Lembaga Pembukuan dan Penyebaran Adat Sasak Mataram Lombok, 1988).

is often equalized. Therefore, if this phenomenon is not handled wisely and earnestly, it can threaten the peace of the village.

However, pesuke tradition is seen as a manifestation of the self-esteem of Sasak community that must be maintained and preserved. Therefore, the expensive pesuke is applied in society for the dignity of the Sasak community to be respected. The grace of the community will be more valuable and prestigious with the practice of this tradition.

Bibliography

Abdul Azis Muhammad Azam, *Fiqh Munakahat* (Jakarta: Azzam, 2009)

Abdul Wahab Khallaf, *Ilmu Ushul Fiqh (Kaidah Hukum Islam)* (Jakarta: Pustaka Amani)

Abraham Maslow, *Motivation and Personality* (New York: Harper And Row Publishers, 1975)

Aditomo and Retnowati, *Perfeksionisme, Harga Diri, Dan Kecenderungan Depresi Pada Remaja Akhir* (Yogyakarta: Fakultas Psikologi Universitas Gadjah Mada, 2004)

Al-Jaziri, Abdurrahman, *Al-Fiqh 'Ala Al-Mazahib Al-Arba'Ah*, 4th edn (Beirut: Dar al-Kutub al-Ilmiah, 2003)

Amin Abdullah, *Dinamika Islam Kultural; Pemetaan Atas Wacana Keilsaman Kontemporer* (Bandung: Mizan, 2000)

Asrul Muslim, 'Interaksi Sosial Dalam Masyarakat Multietnis', *Jurnal Diskursus Islam*, 1.3 (2013)

Bustami Saladin, 'Tradisi Merari` Suku Sasak Di Lombok Dalam Perspektif Hukum Islam', *Al Ihkam : Jurnal Hukum Dan Pranata Sosial*, 8.1 (2013)

D. Myers, *Social Psychology* (New York: Mc Graw-Hill, 2005)

Drs. H. Then Makmur, 'The Head of Religious Affairs (KUA) of Praya Subdistrict', 2019

Elly M Setiadi & Usman Kolip, *Pengantar Sosiologi Pemahaman Fakta Dan Gejala Permasalahan Sosial: Teori, Aplikasi, Dan Pemecahannya* (Jakarta: Kencana, 2011)

F.A Rohmah, 'Pengaruh Pelatihan Harga Diri Terhadap Penyesuaian Diri Pada Remaja', *Humanitas (Jurnal Pskologi Indonesia)*, 1.1

Fath Zakaria, *Mozaik Budaya Orang Mataram* (Mataram: Yayasan

Sumurmas Al-Hamidy, 1998)
Gde Suparman, *Titi Tata Adat Perkawinan Sasak, Kepembayunan Lan Candrasengkala* (Mataram: Lembaga Pembukuan dan Penyebaran Adat Sasak Mataram Lombok, 1988)
Graham C., Kinlockh, *Ideology and the Social Science* (Greenwoon Press, 1981)
Haslam, Alexander, *Psychology in Organization (The Social Identity Approach)* (New Delhi: Sage Publication, 2001)
Huda, Muhammad Johan N, 'Dinamika Pencapaian Identias Sosial Postif Atas Keistimewaaan Yogyakarta', *Jurnal Pskologi Integratif*, 2.1 (2014)
Jabal Tarik Ibrahim, *Sosiologi Pedesaan* (Malang: Universitas Muhammadiyah Malang, 2003)
John Ryan Bartholomew, *Alif Lam Mim: Kearifan Masyarakat Sasak* (Yogyakarta: Tiara Wacana, 2001)
Kamal Mukhtar, *Azas Azas Hukum Islam Tentang Perkawinan* (Jakarta: Bulan Bintang, 1994)
Klandermans, *The Social Psychology of Preotes* (Oxford: Blackwell, 1977)
L., Knapp, *Interpersonal Communication and Human Relationship* (Newton MA: Allyn And Bacon, 1984)
M. Bahauddin al-Qibbani, *Al-Faqru Wa Al-Ghina Fi Al-Qur`an Al-Karim* (Kairo: Muassasah Dar al-Sya`b)
M. Nur Yasin, 'Kontekstualisasi Doktrin Tradisional Di Tengah Modernisasi Hukum Nasional: Studi Tentang Kawin Lari (Merari`) Di Pulau Lombok', *Jurnal Istinbath*, IV.1 (2006)
M. Rosenberg, *Society and The Adolescent Self-Image* (Pincestin NJ: Princeton University Press, 1965)
M.H. Guindon, *Self Esteem Across The Lifespan* (New York: Francis Group LCC, 2010)
Marjohan, 'An Investigation of Factors That Influences Decision and Their Relationship to Self-Esteem and Locus of Control Among Minangkabau Students' (University of Tasmania Australia, 1977)
Michael A Hogg & D. Abrams, 'Social Motivation, Self Esteem Social Identity', in *Social Identity Theory: Constructive Dan Critical Advance*, ed. by D. Abrams & M.A. Hogg (New York: Havaerster Wheatsheaf, 1990)
Muhamamd Harfin Zuhdi, *Bias Gender Stratifikasi Perempuan Bangsawan Sasak Dalam Perkwainan Masyarakat Lombok Nusa*

Tenggara Barat (Jakarta, 2010)
Muhammad Abu Zahrah, *Ushul Fiqh* (Jakarta: Pustaka Firdaus, 2003)
Muhammad Dja`far, *Etika Bisnis Islami Dalam Tataran Teoritis Dan Praktis* (Malang: UIN Malang Press, 2008)
Muhammad Khalid Mas`ud, *Islamic Legal Philosophy* (Islamabad: Islamic Research Institut, 1977)
Muhammad Salim Mazkur, *Madkhal Fiqh Al-Islam* (Kairo: Dar al-Qaumiyyah, 1964)
Musthafa Said al-Khin, *Al-Kafi Wa Al-Wafi Fi Ushul Al-Fiqh Al-Islami* (Beirut: Muassasat al-Risalah)
Nadiyah Syarif al-Umari, *Ijtihad Fi Al-Islam* (Give: Muassasat al-Risalah, 1981)
Nathaniel Branden, *The Power of Self-Esteem* (Florida: Health Communications, 1992)
Nofiardi, 'Marriage and Baganyi: Sociological Analysis of Culture in Dispute Resolution in Banuhampu District of Religious District', *Al Ihkam : Jurnal Hukum Dan Pranata Sosial*, 13.1 Juni (2018)
R.B. Burns, *The Self Concept Theory, Measurement, Development and Behaviour* (London: Longman Group, 1979)
Rasyid Hasan Khalil, *Tarikh Tasyri'* (Jakarta: Amzah, 2009)
Rusli Rutan, *Self Esteem: Landasan Keperibadian* (Jakarta: Proyek Peningkatan Mutu Organisasi dan Tenaga Keolahragaan Dirjen Olahraga Depdiknas)
Salma and Burhanuddin, 'Study of 'Urf on Rompak Paga Tradition in Luhak Lima Puluh Kota of West Sumatra', *Al Ihkam : Jurnal Hukum Dan Pranata Sosial*, 12.2 (2017)
Shiddiqi, Nouruzzaman, *Fiqih Indonesia, Penggagas Dan Gagasannya* (Yogyakarta: Pustaka Pelajar, 1997)
Slamet Abidin and Aminuddin, *Fiqh Munakahat* (Bandung: Pustaka Setia, 1999)
Soerjono Soekanto, *Sosiologi Sebuah Pengantar* (Jakarta: Rajawali Press, 2010)
Stanley Coopersmith, *The Antecendents of Self Esteem* (San Fransisco: Freeman Press, 1967)
Stephen Cotgrove, *The Science of Sociology: An Introduction to Sociology* (London: Gerge Allan & Unwin, 1982)
Steven Fein & S.J. Spencer, 'Prejudice as Self Image Maintenance: Affirming The Self-Through Derogating Others', *Journal of*

Personal and Social Psychology, 73 (1997)

Suhaimi, 'Praktik Khitbah Di Madura Perspektif Hukum Islam Dan Hukum Adat', *Al Ihkam : Jurnal Hukum Dan Pranata Sosial*, IX.2 (2014)

Syawal, H., 'The Marriage Registration Officer in the Prapen Sub-District', 2019

Tim Monografi Daerah NTB, *Monografi Daerah Nusa Tenggara Barat* (Mataram: Depdikbud, 1977)

Ustadz L. Tamim, 'Marriage Registrar', 2019

Wahbah Zuhaili, *Al-Fiqh Al-Islāmi Wa Adillatuh* (Damaskus: Dar al Fikr, 2010)

Wilis Srusayekti dan David A. Setiady, 'Harga Diri Terancam Dan Perliaku Menghindar', *Jurnal Pskologi*, 42.2 (2015)

Y. Cicilia Praswati, 'Pertikaian Kelompok Etnik Di Kalamantan Barat: Tinjauan Berdasarkan Teori Identitas Sosial', *Jurnal Psikologi Sosial*, 2003

Yusuf Qardawi, *Awami Al-Sa'ah Wa Al-Murunah Fi Al-Syari`ah Al-Islamiyah Bayna Al-Inzibath Wa Al-Infirat* (Kairo: Dar al-Tauzi` wa al-Nasyr al-Islamiyyah, 1994)

Zainuddin Maliki, *Narasi Agung Tiga Teori Sosial Hegemonik* (Surabaya: LPAM, 2004)

Zaki, 'Tradisi Islam Suku Sasak Di Bayan Lombok Barat, Studi Historis Tentang Islam Wetu Telu 1890-1965' (UIN Sunan Kalijaga Yogyakarta)

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 209-231
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v16i1.5027

Al-Pancasila fi al-Mandzûri al-Maqâshidî al-Syar'î: Dirâsah Tahlîliyah

Akhmadul Faruq
Sekolah Tinggi Agama Islam Ma'arif, Sampang
Email: fauraq.madura@gmail.com

Article history: Received: September 11, 2020, Accepted: April 10, 2021, Published: June 27, 2021

ملخص:

هذا المقال يهدف إلى البحث عن البانتشاسيلا (Pancasila) في منظور مقاصد الشريعة. تتكون البانتشاسيلا من المبادئ الخمسة، وهي: الربانية المتفردة، والإنسانية العادلة المهذبة والمتحضرة، والوحدة الإندونيسية، والشعبية الموجهة بالحكمة والحصافة في الشورى النيابية، والعدالة الاجتماعية بين كل المواطنين الإندونيسيين. فهذه الدراسة تعتمد على المنهج الاستقرائي والتحليلي، وذلك لعرض مبادئ البانتشاسيلا من حيث بيان مفهومها، وتفسيرها الرسمي، وتحليلها من المنظور المقاصدي. وقد توصل الباحث إلى تقديم الحلول في التفسير الموافق المقاصد الشريعة للبانتشاسيلا.

الكلمات المفتاحية:

البانتشاسيلا؛ مقاصد الشريعة؛ مفهومها؛ تفسيرها الرسمي؛ الحلول

Abstract:

This article aims to search for Pancasila concept from the perspective of maqashid Sharia. Pancasila is made up of the Five Principles, which are: e.g. belief in the One and Only God, just and civilized humanity, unity of Indonesia, democratic rule

Author correspondence email: fauraq.madura@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

that are guided by the strength of wisdom resulting from deliberation and social justice for all Indonesians. This study relies on inductive and analytical method to present the principles of Pancasila in terms of its concept statement, its formal interpretation, and its analysis from the intentional perspective. I have come up with solutions in the interpretation corresponding to the Sharia purposes of Pancasila.

Keyword:
Pancasila; maqashid Sharia; concept statement; formal interpretation; solutions

مقدمة

إن إندونيسيا دولة كان المسلمون فيها يلعبون دورا مهمّا في استقلالية جمهورية إندونيسيا من قبضة الاستعمار الأجنبي، كما أنهم يشكّلون الغالبية العظمى من الشعب الإندونيسي. وعلى الرغم من ذلك إلا أنها لا تحكم بالشريعة الإسلامية بشكل كامل شامل، بل كانت الدولة تقوم على أساس البانتشاسيلا (المبادئ الخمسة)، وهي: الربانية المتفردة، والإنسانية العادلة المهذبة والمتحضرة، والوحدة الإندونيسية، والشعبية الموجهة بالحكمة والحصافة في الشورى النيابية، والعدالة الاجتماعية لكل المواطنين الإندونيسيين، فهي أساس فلسفي ومصدر أساسي للقانون الوطني والنظام القانوني لجمهورية إندونيسيا. لذلك، فليست جمهورية إندونيسيا بالبلد الثيوقراطي ولا العلماني ولا الشيوعي، بل هي دولة البانتشاسيلا.[1]

[1] Muhammad Taufiq, Akhmadul Faruq, and Ibnu Khaldun, "Implementation of 'The Madina Charter' in a Democratic Country : Indonesia as a Model," in *Proceedings of the 6TH International Prophetic Heritage Conference (SWAN 2018) Istanbul, Turkey* (Istanbul: SWAN, 2018), 523; Abdul Jalil and Muhammad Taufiq, "Al-Âtsâr Al-Mutarattibah 'Âla PERPPU (Lawâih Al-Hukûmiyyah Al-Badaliyyah) Min Al-Munazhzhamât Al-Mujtama'Iyyah Raqm 2 Li 'Âm 2017 Dlidda Wujûd Hizb Al-Tahrîr Indûnîsiyâ Min Manzhûr Saddi Al-Dzarî'Ah," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 14, no. 1 (2019): 144, https://doi.org/10.19105/al-

فكلمة البانتشاسيلا مصطلح لدستور الدولة الإندونيسية يرجع أصلها إلى اللغة السنسكريتية من طبقة برهمانا في الهند، وهي مأخودة من بانتشا (panca) تعني خمسة وسيلا (syila) تعني مبدأ أو أساسا، أو سيلا (syiila) تعني نظام الآداب والأخلاق الكريمة المهمة المناسبة. إذا، فإنها من الناحية اللغوية اللفظية بمعنى أساس وله خمسة عناصر أو خمسة نظم للسلوك المهمة، وهذا المصطلاح قد اشتهر في عهد ماجاباهيت (Majapahit) في القرن الرابع عشرة وهو مدوّن في كتاب ناجارا كرتاجاما (Negara Kertagama) لامبو فرابانجا (Empu Prapanca) وكتاب سوتاصاما (Sutasoma) لامبو تانتولار (Empu Tantular)، فالبانتشاسيلا يراد بها تنفيذ خمسة آداب وهي على ما يلي:

١. Panatipada veramani sikhapadam samadiyani بمعنى منع القتل
٢. Dinna dana veramani shikapadam samadiayani يراد به منع السرقة
٣. Kameschu micchacara veramani shikapadam samadiyani بمعنى منع الزنا
٤. Musawada veramani sikapadam samadiyani بمعنى منع الكذب
٥. Sura meraya masjja pamada tikana veramami يراد به منع السكر أي الكفّ عن شرب الخمر والمخدرات.

وهذه الأسس في الفلسفة الجاوية تعدّ معيارا لتنظيم شؤون حياتهم بعد انقراض عهد ماجاباهيت بمصطلاح جاوي "Ma Lima" أي خمسة منهيات وهي على النحو التالي:

---

ihkam.v14i1.1982; Muhammad Taufiq, *Filsafat Hukum Islam; Dari Teori Ke Aplikasi*, ed. Abd. Jalil, I (Pamekasan: Duta Media, 2019), 219.

١. القتل (Mateni)

٢. السرقة (Maling)

٣. الزنا (Madon)

٤. السكر (Mabuk)

٥. القمار (Main)

إن البانتشاسيلا لا يتم سنها إلا كانت وراؤها مقاصد وحكم وأفكار عظيمة تضمن المصالح الشعبية سواء أكانت من شؤونها الداخلية أو علاقاتها الخارجية، فالمبادئ الخمسة التي هي مرآة ثقافات الإندونيسيين وعاداتهم وسلوكياتهم وقيم حياتهم عهد ذو قيمة عالية بين الشعب والدولة والحكومة.

لذلك، تهدف إلى تكوين المجتمع المدني العدل المزدهر، كما أنها تعدّ وسيلة لتوحيد الشعب الإندونيسي، وهي لا تنصب إلا لمصالح الشعب لتنظيم شؤون الحياة الاجتماعية والاقتصادية والدينية، استجابةً لمتطلبات الجماعة، وسداً لحاجاتها، وتقوم بمثابة هندسة اجتماعية للعلاقات داخل الشعب الإندونيسي، إلا يوجد من خلال تطبيقها في الواقع الإندونيسي اضطراب وارتباك في تطبيق المبادئ الإسلامية حتى يقع حدوث الاختلافات الساخنة بين الموافقين لها والمعارضين عليها.

اختيار البانتشاسيلا دستورا للجمهورية الإندونيسية في بداية الاستقلال

إن سن البانشاسيلا لا يتم إلا وراءها غايات وأهداف ومقاصد مما يحقق مصالح الشعب الإندونيسي من الحرية والعدالة الاجتماعية والمساواة والوحدة في الوطنية،[٢] ومن أهم أهداف نصب البانتشاسيلا استقلال الدولة الإندونيسية وشعبها من احتلال

[2] Kaelan. M.S. *Filsafat Pancasila, Pandangan Hidup Bangsa Indonesia*, (Yokyakarta: Paradigma Yokyakarta, 2009), 2.

الهولنديين واليابانيين، فالبانتشاسلا التي تسري وتتضح في حادثة إلغاء جملة (مع وجوب تنفيذ الشريعة الإسلامية وتطبيقها على معتقديها) في ميثاق جاكرتا (The Jakarta Charter) الذي وُضِع كأساس الدولة حينئذ، وتبديل العبارات الإسلامية في التي تعتبر بابا لتنفيذ الشريعة الإسلامية في هذه الدولة،[٣] بعبارات أخرى وتعديل المبادئ الأساسية في ميثاق جاكرتا إلى البانتشاسيلا لدستور ١٩٤٥م (Pancasila UUD 1945)،[٤]

فإذا وقفنا هذا الجو السياسي من النظرية المقاصدية وجدنا أن تقديم البانتشاسيلا على الإسلام وميثاق جاكرتا في سن دستور الدولة هو تنازل عن المبادئ التي آلت بسببه الويلات والافتراق إلى يومنا هذا. ولسببه ضاعت حقوق المسلمين وبالمقارنة مع البلدان المجاورة التي جعلت الإسلام دينا رسميا مثل ماليزيا (Malaysia)[٥] وبروناي دار السلام (Brunei Darus Salam) وغيرها من البلدان كالسعودية، وباكستان، إيران. فإن الحياة الدينية في إندونيسيا من الناحية السياسية مغلوبة من قبل

[3] Taufiq, Faruq, and Khaldun, "Implementation of 'The Madina Charter' in a Democratic Country : Indonesia as a Model"; Muhammad Taufiq and Masyithah Mardhatillah, "Polygamy in Indonesian Family Law: Analysis of Maqashid Syariah," Journal of Islam in Asia 17, no. 3 (2020); M Mardhatillah and M Taufiq, "The Practice of Amal Masjid in Madura," … Journal of Multidisciplinary Islamic Education, 2020, 53–72, https://core.ac.uk/download/pdf/354363723.pdf; E. Hariyanto et al., "Effectiveness of the Economic System to Zakat and Waqf for Empowerment of the Ummah in Indonesia," International Journal of Advanced Science and Technology 29, no. 6 (2020).

[4] Al Habib Rizieq Syihab, *Wawasan Kebangsaan Menuju NKRI Bersyariah*, (Jakarta: Suara Islam Press, 2013), 4.

[5] Imam Mawardi, "Islamic Law and Imperialism: Tracing on The Development of Islamic Law In Indonesia and Malaysia," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 1 (2018): 1, https://doi.org/10.19105/al-ihkam.v13i1.1583.

غير المسلمين. وفي نفس الأمر، ولتأييد شرعية حكومة إندونيسيا ولتهدئة الجو الساخن في السياسة حينئذ، كان منح الرئيس سوكارنو ومنسوبيه من قِبل جمعية نهضة العلماء منصب "ولي الأمر" أمرا ضروريا بحيث لا يوجد أفضل من سوكانوا في ذلك الموقف الحرج، ولا يجوز خلو الدولة عن الإمام،[٦] هذا القرار يرجع إلى كلام الإمام الغزالي[٧]والحصني في كفاية الأخيار.[٨] وفي هذا القرار اختلافات وانتقادات حادة، بل علّل بعضهم أن هذا القرار مجرد قرار سياسي نفعي مؤقت، فضلا عن كون سوكارنو لا يستحق ذلك اللقب.[٩]

وأما ما قيل إن سبب ذلك الإلغاء هو صدور إنذار من النصارى في شرق إندونيسيا وهم قلة قليلة في إندونيسيا بالانفصال عن إندونيسيا إذا لم تحذف تلك العبارات الإسلامية، وأتى بالمتطلبات والإنذار جند القوات البحرية اليابانى (Opsir kaigun) إلى نائب الرئيس محمد هتا ملحّا له على إنجاز تلك المتطلبات في مساء ١٧ أغسطس ١٩٤٥م،[١٠] فهو خبر غامض وقصته خفية بحيث يحصل ذلك التعديل وإلغاء العبارات الإسلامية مع عدم حضور جميع الزعماء الإسلاميين الذين تم توقيعهم

---

[٦] تم إصدار القرار من قبل جمعية نهضة العلماء في ١٠-١٥ محرم ١٣٨٤هـ/٨-١٣ سبتمبر ١٩٥٤م في سورابايا. انظر: لجنة بحث المسائل لنهضة العلماء، **أحكام الفقهاء في مقررات مؤتمرات نهضة العلماء ١٩٢٦-٢٠١٠** (جاكرتا: لجنة التأليف والنشر بجمعية نهضة العلماء، د.ط، د.ت)، ص٢٨٩-٢٩٠.

[٧] أبو حامد محمد بن محمد الغزالي، **إحياء علوم الدين** (مصر: مؤسسة بابي الحلبي، ١٣٨٧هـ/١٩٦٧م)، ج١، ص١٥٧.

[٨] أبو بكر بن محمد الحصني الدمشقي، **كفاية الأخيار في حل غاية الاختصار** (سورابايا: مكتبة أحمد نبهاني، د.ت)، ج٢، ص١١٠.

[٩] انظر: منتهى أرتاليم، **فقه التعايش بين المسلمين وغيرهم في إندونيسيا: دراسة مقاصدية** (د.م: الجامعة الإسلامية العالمية بماليزيا، د.ط، ٢٠١٣م)، ص١٠٩.

[1010] Endang Saifuddin Anshari, *Piagam Jakarta 22 Juni 1945* (Jakarta: Gema Insani Press, 1997), 51.

على الميثاق ومع إبهام شخصية الجند اليباني الذي جاء إلى محمد هتا وعدم التعرف على النصارى في شرق الدولة الذين صرعوا ذاك الإنذار حتى اليوم.

ويرى الباحث أن ذلك الإلغاء عبارة عن خيانة البانتشاسيلا، كما أن تلك الحادثة كارثة تاريخية وليست موافقة لمقاصد الشريعة لعدم الشورى التي تتطلب عليها الشريعة الإسلامية، ولأن تقديم البانتشاسيلا على الإسلام وميثاق جاكرتا في سن دستور الدولة هو تنازل عن المبادئ التي آلت بسببه الويلات والافتراق إلى يومنا هذا. ولسببه ضاعت حقوق المسلمين، بل هي انهزام المسلمين تحت القوى الوطنية والنصرانية.

بين التشريع الإسلامي (الشريعة) والتشريع الوضعي (البانتشاسيلا)

إن التشريع الإسلامي لا تماثل للبانتشاسيلا ولا تساوي معها، ولا يمكن القياس بينهما، وذلك لأن طبيعته تختلف عن طبيعتها. فيسعى الباحث في هذا المبحث استعراض الاختلافات المتعددة بين التشريع الإسلامي والباتشاسيلا وما يتقف عليهما. فيختلف التشريع الإسلامي عن البانتشاسيلا في ثلاثة أوجه:

الوجه الأول: أن أصل تميز التشريع الإسلامي على التشريع الوضعي (البانتشاسيلا)، راجع إلى مصدر كل منهما، فإن التشريع الإسلامي يستمد من الوحي الذي أنزله الله ﷻ وتتمثل فيه عظمة الخالق، كماله، قدرته، إحاطته بما كان وما يكون، بحيث تحيط بكل شيء في الحال والاستقبال، وكان علمه محيط ﷻ بكل شيء، وأمر ﷻ أن لا تغير ولا تبدل فقال ﷻ ﴿**لاَ تَبْدِيلَ لِكَلِمَاتِ اللهِ**﴾ [يونس: ٦٤]، لأنه لا يحتاج إلى التغيير والتبديل مهما تتغير الأزمان، والأوطان، وتطور

الإنسان،[١١] بينما البانتشاسيلا مستمدة من عقول البشر وعرف وعادات المجتمع الإندونيسي،[١٢] ولما كانت البانتشاسيلا تؤخذ منها يتمثل فيها نقص البشر وضعفهم وعجزهم وقلة حيلتهم ، ومن ثم كانت بحاجة إلى التعديل والتغيير والتبديل والتطوير،[١٣] وكلما تطور شعب الدولة إلى درجة غير متوقعة، أو وجدت في حالات غير منتظرة، فالبانتشاسيلا لا يمكن مواكبتها، ولا تحيط بما سيكون وإن أمكن الإلمام بما كان، بل يمكن أن يطرأ عليها النقص والقصور وتدخل فيها الأهواء والنزعات، لكون صانعيها لا يوصفون بالكمال والعصمة.

الوجه الثاني: أن البانتشاسيلا عبارة عن قواعد مؤقتة وضعتها لجنة الإعداد لاستقلال إندونيسيا لتنظيم شؤون جمهورية إندونيسيا وشعبها، وسد حاجاتها،[١٤] وهي قواعد مؤقتة تمشي مع حال شعبها المؤقت، وتستوجب التغير كلما تغيرت أحوالهم، وأما التشريع الإسلامي فقواعد أثبتها الله ﷻ على سبيل الدوام لينظّم شؤون الناس أجمعين، فهو يختلف عنها في أن قواعده دائمة ثابتة غير قابلة للتعديل والتبديل والتغيير.[١٥]

الوجه الثالث: أن لجنة الإعداد لاستقلال إندونيسيا هم الذين صنعوا البانتشاسيلا[١٦]، ويلونها بعادات شعب إندونيسي وتقاليدهم وأديانهم،[١٧] والأصل فيها

---

[١١] عبد القادر عودة، **التشريع الجنائي الإسلامي مقارنا بالقانون الوضعي** (بيروت: دار الكاتب العربي، د. ت)، ص١٨.

[12] Adian Husaini, *Pancasila Bukan Untuk Menindas Hak Konstitusional Umat Islam, (*Jakarta: Gema Insani Press, 2012*)*, 214.

[13] Ngudi Astuti. *Pancasila dan Piagam Madinah.* Jakarta: Media Bangsa, 26.

[١٤] المرجع نفسه، ص٢٦-٢٧.

[١٥] عودة، **التشريع الجنائي الإسلامي مقارنا بالقانون الوضعي**، ص٢٩-٢٠.

[16] Pandji Setijo, *Pendidikan Pancasila: Perspektif Sejarah Perjuangan Bangsa* (Jakarta: Gramedia Widiasarana Indonesia, 2011), 52-53.

[17] Syihab, *Wawasan Kebangsaan Menuju NKRI Bersyariah*, p.4.

أنها توضع لتنظيم شؤون الدولة وشعبهم لا لتوجيههم، ومن ثم تأخرت عنهم وتابعت لتطورهم، فهي صنع الإندونيسيين. وأما الشريعة الإسلامية فهي من صنع الله الذي أحاط علمه كل شيء وأتقنه خلقه، فالشريعة ومقاصدها لا توضع لتنظيم شؤون الجماعة المعينة فحسب، وإنما المقصود من التشريع الإسلامي تكوين الأفراد الصالحين والأمة المسلمة الصالحة، وإيجاد الدولة المثالية، والعالم المثالي، ومن أجل هذا، جاءت نصوصها ومقاصدها أسمى من مستوى العالم كله وقت نزولها، وما فتئت كذلك حتى الآن.[١٨]

بناء على ما سبق، يظهر للباحث أهم المميزات التي تميز الشريعة عن البانتشاسيلا؛ بخمس ميزات جوهرية:

١. الإلهية: إن الشريعة الإسلامية شريعة إلهية، بينما البانتشاسيلا شريعة وضعية.
٢. الكمال: إن الشريعة تمتاز عليها بالكمال، أي بأن استكملت كل ما تحتاجه الشريعة الكاملة من قواعد ومبادئ ونظريات، وأنها غنية بالمبادئ والنظريات التي تكفل سد حاجات الناس أجمعين في الحاضر القريب والمستقبل البعيد.
٣. السمو: تمتاز الشريعة عليها بالسمو أي بأن قواعده ومبادئه أسمى دائما من مستوى الجماعة، وأن فيه من المبادئ والنظريات ما يحفظ له هذا المستوى السامي مهما ارتفع مستوى الجماعة، وأن تكون مقاصده ونصوصه من السمو والارتفاع ووصل من السمو درجة لا يتصور بعده سمو بحيث لا يمكن أن يتأخر في وقت أو عصر ما عن مستوى الجماعة.

[١٨] عودة، **التشريع الجنائي الإسلامي مقارنا بالقانون الوضعي**، ص٢١-٢٢.

٤. الدوام: إنها تمتاز عليها بالدوام والثبات والاستقرار، فنصوصها لا تقبل التعديل والتبديل مهما مرت الأعوام وطالت الأزمان، وهي مع ذلك تظل حافظة لصلاحيتها في كل زمان ومكان.[١٩]

٥. المرونة والعموم:[٢٠] أن تكون قواعد الشريعة ونصوصها من المرونة والعموم إلى آخر حدود العموم والمرونة بحيث تتسع لحاجات الجماعة مهما تقدمت الجماعة، وتعددت الحاجات وتنوعت وطالت الأزمان.[٢١]

إن هناك جامعاً بين مفهومي البانتشاسيلا والشريعة الإسلامية، وهو يمكن القول بأن المبدأين كلاهما عبارة عن القواعد والمبادئ التي تهدف إلى تحقيق المصالح ودرء المفاسد، مع العلم أن مقاصد الشريعة في حقيقتها تتجاوز كونها مبادئ مجردة إلى كونها خطابا للناس كافة، وكما أن كليهما وُضعا لتنظيم الجماعة. فتبين مما سبق أن البانتشاسيلا إذا كان معانيها ومحتواها توافق لمقاصد الشريعة ويمكن بها تطبيق الشريعة في جمهورية إندونيسيا فلا مانع من إطلاقها شرعا، لأن نوط الأحكام الشرعية تتعلق بالحقائق والمعاني لا بالألفاظ والمباني،[٢٢] وأما إذا كانت مخالفة للشريعة، سواء كانت من النظريات التي تتفق عليها الدولة، أو المسائل المختصة بها فهي غير معتبرة.

---

[١٩] المرجع نفسه، ص٢٤-٢٥.

[٢٠] محمد الطاهر الميساوي، **الشيخ محمد الطاهر بن عاشور وكتابه مقاصد الشريعة الإسلامية** (د. م: البصائر للإنتاج العلمي، ط١، ١٩٩٧م/١٤١٨هـ)، ص٢٢٣.

[٢١] عبد القادر عودة، **الفرق بين الفقه الإسلامي والقوانين الوضعية**، (Retrieved 28th December 2018). <https://etudes-islamic.blogspot.my/2016/02/blog-post_53.html>.

[٢٢] الميساوي، **الشيخ محمد الطاهر بن عاشور وكتابه مقاصد الشريعة الإسلامية**، ص٢٤٥.

الرؤية المقاصدية في المبادئ الخمسة (البانتشاسيلا)

إن سن البانتشاسيلا دستورا للدولة ليس فيه بأس ما دامت تراعى مقررات ثابتة في الشريعة الإسلامية ومقاصدها الكلية العامة،[٢٣] كما يعبر ابن الجوزية عن مثل هذا بأنه سياسة جزئية بحسب المصلحة،[٢٤] وكما أن تصرفات النبي محمد ﷺ بالتشريع الخاص هي شرع غير ملزم على سبيل الدوام في ذاته وملزم في منهجه ومقاصده وغاياته وأهدافه ومرتبط بزمان أو مكان أو أحوال أو أفراد معينين لا عامة لجميع المسلمين.[٢٥] فحاول الباحث أن يسعى تقديم الحلول في التفسير الموافق المقاصد الشريعة للبانتشاسيلا.

١. الربانية المتفردة

يراد بها الشهادة بأن الله تعالى هو الواحد الأحد، المطلق المتعالي رب كل ما في الوجود ومالكه،[٢٦] بحيث يؤمن العبد بأن الله موجود ليس معدوم، قديم ليس بحادث، قادم لا يطرأ عليه العدم، مخاف للحوادث لا شيء يماثله، قائم بنفسه لا يحتاج إلى محل ولا مخصص، واحد لا مشرك له في ذاته ولا صفاته ولا أفعاله، القادر، والمريد، والعالم،

---

[23] Taufiq, Faruq, and Khaldun, "Implementation of 'The Madina Charter' in a Democratic Country : Indonesia as a Model."

[٢٤] ابن قيم الجوزية، **الطرق الحكمية في السياسة الشرعية**، تحقيق: نايف بن أحمد الحمد (جدة: دار عالم الفوائد للنشر والتوزيع، ط١، ١٤٢٨هـ/٢٠٠٨م)، ص٤٧.

[٢٥] أحمد يوسف، **تصرفات الرسول صلى الله عليه وسلم بالإمامة وصلتها بالتشريع** (د.م: جامعة قطر، مجلة مركز بحوث السنة والسيرة، العدد الثامن، ١٤١٥هـ)، ص٤٣٧-٤٣٨.

[٢٦] المرجع نفسه، ص٦٢.

والحيّ، والسميع، والبصير، والمتكلم.[٢٧] ويؤمن بما جاء به أنبياؤه عموما ونبينا محمد ﷺ خوصوصا، بحيث من اعترف بالإلهية والوحدانية ولكنه جحد النبوة من أصلها عموما أو نبوة نبينا خصوصا، واحدا من الأنبياء الذين نص الله عليهم بعد علمه بذلك فهو كافر لا ريب.[٢٨]

بهذا المبدأ تتيح الحكومة للشعب حرية الاعتقادات بحيث تعترف بتعدد الأديان في المجتمع الإندونيسي مع امكان التعايش السلمي بين أفراده والحفاظ على هوية المجتمع وخصوصيته مع مراعاة المبادئ الإسلامية، وتترك كل محاولات الإجبار والإكراه على تغيير الدين أو المعتقد أو مذهب، لا بمعنى أن تقرر الضالين والكافرين على كفرهم[٢٩] كما لا بد على الحكومة من حفظ الدين الإسلامي بحيث تقيم أركانه وأن تثبت قواعده من العمل به والجهاد من أجله والدعوة إليه والحكم به، وأن تدفع كل ما يخالف دين الإسلام من الأهواء والبدع والمنكرات.[٣٠]

وبهذا المبدأ يجيب على كل فرد أن يجعل شريعة الله ﷻ مرجعا أساسيا ومصدرا رئيسيا في كل مجال حياته سواء كان ذلك يتعلق بالفرد أم بالأسرة أم بالمجتمع والأمة أو بالوطن والبلد وكذا يلزم على الحكومة وممثلي الشعب في البرلمان أن لا تتخذوا قرارت وقوانين إلا موافقة للشريعة ومقاصدها.[٣١] وهذا المبدأ أكد أن الإسلام دين التوحيد:

---

[٢٧] محمد هاشم أشعري التبواريني الجانباني، **هذه الرسالة جامعة المقاصد**، تحقيق: عصام الدين حاذق (جونبنج: مكتبة التراث الإسلامي، د.ط، د.ت)، ص٣.

[٢٨] أشعري، **هذه الرسالة جامعة المقاصد**، ص ١٣.

[٢٩] الزحيلي، **قضايا الفقه والفكر المعاصر**، ص٥٧١.

[٣٠] اليوبي، **مقاصد الشريعة الإسلامية وعلاقتها بالأدلة الشرعية**، ص١٩٤-١٩٥.

[31] Jalil and Taufiq, "Al-Âtsâr Al-Mutarattibah 'Âla PERPPU (Lawâih Al-Hukûmiyyah Al-Badaliyyah) Min Al-Munazhzhamât Al-Mujtama'Iyyah Raqm 2 Li 'Âm 2017 Dlidda Wujûd Hizb Al-Tahrîr Indûnîsiyâ Min Manzhûr Saddi Al-Dzarî'Ah."

توحيد الإله وتوحيد الرسل في التيشير لهذا الدين الواحد، فهو دين الوحدة بين العبادة والمعاملة، والعقيدة والشريعة، والروحيات والماديات والقيم الاقتصادية والمعنوية، وعن تلك الوحدة تصدر تشريعاته وفرائضه وتوجيهاته وحدوده وقواعده في سياسية الحكم وسياسة المال وفي الحقوق والواجبات.[٣٢]

٢. الإنسانية العادلة المهذبة

المراد بالإنسانية مجموعة من الأفكار الغالية والتصرفات الحميدة التي تصدر عن الفرد والتي تدمج ما بين العقل والروح لتُبين أهمية وجود الإنسان وقيمته في المجتمع، فنزل بها الإنسان في مرتبة عالية ويمكنه بعقله وبضميره إيجاد قيم ونظم إيجابين. فلا تتم الإنسانية العادلة إلا فيها مبادئ الحرية والتسامح والمساوة، فالحرية هي الإباحة التي تمكن الإنسان من القول والفعل المعبر عن إرادته، في أي ميدان من ميادين الفعل، وبأي لون من ألوان التعبير مع مراعاة حدود الشرع الإسلامي. وهي تطلق على منعيين أحدهما ضد العبودية بأن لا يتوقف تصرف الشخص العاقل بالأصالة على رضا شخص آخر، والمعنى الثاني هو تمكن الإنسان من التصرف في نفسه وشؤونه كما يشاء مع عدم معارض.[٣٣]

فالحرية بالمعنى الثاني تتعلق مظاهرها بأصول الناس من اعتقاداتهم وتصرفاتهم من أقوالهم وأفعالهم، فحرية الاعتقادات قد تقدم بحثه في المبدأ الأول، وأما الحرية القولية فيقصد بها التصريح بالرأي والاعتقاد في ميدان الإذن الشرعي مثل حرية العلم والتعليم

---

[٣٢] سيد قطب، **العدالة الاجتماعية في الإسلام** (بيروت: دار الشروق، د.ط، ١٤١٥هـ/١٩٩٥م)، ص٢٦.

[33] Moh. Zahid and Moh Hasan, "The Existence of Wasathiyyah Islam in Madura (An Analysis of Urban Society's Acceptance of Islamic Content on Social Media)," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 2 (2018): 382, https://doi.org/10.19105/al-ihkam.v13i2.1875.

والتأليف، كما أن حرية الأعمال إما في عمل المرء في خويصته وإما في عمله الماس بعمل غيره، فالأولى تدخل في تناول جميع المباحات المأذون فيها بحيث لا يتجاوز العمل عامله ويكون العمل المؤثر في عمل غيره لا يُنشأ ضرارا عليه مثل اختيار الملابس والمطاعم والمساكن، وأما من حرية الأعمال التي تتعلق بأعمال الغير فما يجيب به المرء على نفسه بموجب هذه الحرية من التزامات وإجراء العقود لمصلحة يراها،[٣٤] فإلزام الشخص نفسَه ذو تأثير حرية العمل الموجب به حقا لغيره عليه على تفاصيل العقود التي تجب بالتعاقد القولي والتي لا تجب إلا بالشروع في العمل.[٣٥]

والتسامح هو احترام متبادل بين الشعب الإندونيسي بعضهم بعضا، والاستعداد لتقبل المختلف واحترام البشر المختلفين من حيث المظهر، ولون البشرة، والجنس، والديانة والمعتقدات مع عدم تجاوز الحد الشرعي.[٣٦]

والمساواة يراد بها أن يقام جميع الشعب الإندونيسي أمام القضاء والحكم وفي الحقوق والواجبات على سواء من غير تمييز ولا تفريق بينهم إلا عند وجود مانع من موانع المساواة، والمراد بها العوارض التي إذا تحققت تؤدي إلى إلغاء حكم المساواة لظهور مصلحة[٣٧] راجحة في ذلك الإلغاء أو لظهور مفسدة عند إجراء المساواة.[٣٨] واعتبار هذه الموانع يكون في الهدف الذي من حقها منع المساواة ليس على اطلاقها،

---

[34] Muhammad Taufiq, "A Critique against the Perspective of Al-Thufy on the Contradiction of Maslahat and the Holy Text," *Millati: Journal of Islamic Studies and Humanities* 5, no. 2 (2020): 121–28, https://doi.org/10.18326/mlt.v5i2.121-128.

[٣٥] الميساوي، **الشيخ محمد الطاهر بن عاشور وكتابه مقاصد الشريعة الإسلامية**، ص٢٨٠-٢٨٧.

[36] Maimun Maimun, "Islam Nusantara in Islamic Law Epistemology Perspective," *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 11, no. 2 (2017): 392, https://doi.org/10.19105/al-ihkam.v11i2.779.

[37] Taufiq, "A Critique against the Perspective of Al-Thufy on the Contradiction of Maslahat and the Holy Text."

[٣٨] المرجع نفسه، ص٢٣٥.

فالعوارض التي تتعتبر موانعَ إجراء مبدأ التساوى في بعض الأحكام الشرعية تنقسم إلى أربعة أقسام، وهي على النحو التالي:

١. الموانع الجبلية

هذه الموانع تقتصر على موجبات أصل الخلقة مثل إبطال حكم التساوي بين الرجل والمرأة في الخلافة وإمارة الجيش. فمن ملحقات الجبلي ما هو من آثار الجبلة مثل منع التساوي بينهما في النفقة بحيث يجب ذلك على الرجل (الزوج) لما تقرر فى العوائد من كونه هو الكاسب للأسرة، وصفات تكتسب ناشئة عن قابلية وعن سعي، وترك آثار في الخلقة لا تبلغ إلى مثلها إلا من اكتسب أسبابها وتفيد كماله في التفكير والإحساس، مثل عدم المساواة بين العالم وغيره في الصلاحية لإدراك المدركات الخفية من فهم النصوص الشرعية واستنباط الأحكام وتحقيق المناط في النوازل وغيرها.[٣٩]

٢. الموانع الشرعية

ويراد بها ما كان تأثيرها بتعيين التشريع الحق، لأنه لا يستند إلا إلى حكم وعلل ومقاصد ومعاني معتبرة، وقد تكون تلك الحكم خفيّة وقد تكون جليّة، فالشريعة ذات القدوة والسلطة في تحديد هذه الموانع وما ينشأ عن أصول تشريعة تعتبر إجراء الموانع أرجح من إجراء المساواة، وهذه تعرف بالقواعد مثل قاعدة حفظ النسب في أن يمنع التساوي بين المرأة والرجل في جواز تعدد الأزواج، وبتتبع الجزئيات في لأحكام الشرعية مثل اعتبار شهادة المرأتين في المجالات المالية.[٤٠]

٣. الموانع الاجتماعية

---

[٣٩] الميساوي، **الشيخ محمد الطاهر بن عاشور وكتابه مقاصد الشريعة الإسلامية**، ص٢٣٧.

[٤٠] المرجع نفسه، ص٢٣٧-٢٣٨.

هذه الموانع غالبها تبني على ما فيه المصالح الاجتماعية يرجع بعضها إلى المعاني المعقولة مثل منع التساوي بين العالم والجاهل في التصدي للنظر في مصالح الأمة، وبعضها الآخر إلى عرف الناس وعاداتهم التي تأصلت فيهم مثل منع المساواة العبيد للأحرار في قبول الشهادة، وكما أنها توجد كثيرا في المجالات الاجتهادية.[٤١]

٤. الموانع السياسية

وهي الأحوال التي لها تأثير في سياسة الأمة، فتتطرق إلى منع حكم المساواة بين أصناف، أو أفراد، أو في المجالات والأحوال الخاصة، ولا يكون ذلك إلا لتحقق مصلحة من مصالح الدولة. وغالبية هذه الموانع تقع موقتة،[٤٢] مثل ما قاله ﷺ: «مَنْ دَخَلَ دَارَ أَبِي سُفْيَانَ فَهُوَ آمِنٌ، وَمَنْ أَلْقَى السِّلَاحَ فَهُوَ آمِنٌ، وَمَنْ أَغْلَقَ بَابهُ فَهُوَ آمِنٌ».[٤٣]

٣. الوحدة الإندونيسية

فالوحدة في البانتشاسيلا تنبنى على شعار "بينيكا تونغال إيكا (Bhinneka Tunggal Ika)" يعني الوحدة في التنوع، وإرادة الشعب الإندونيسي بالوحدة بأن ينضم الشعب إلى وحدة يجمعهم فيها الوطنية الإندونيسية وتراد بها وحدة الدستور والسياسة والاقتصاد والشؤون الاجتماعية والثقافة والأمن في حكومة إندونيسيا، وتهدف إلى تحقيق الحياة الدولية الحرة في الدولة المستقلة ذات السيادة الكاملة، وحماية الشعب الإندونيسي وتطوير رفاهيتهم وتثقيف حياتهم وتحقيق العدالة الاجتماعية والمحافظة على

---

[٤١] المرجع نفسه، ص٢٣٨.

[٤٢] الميساوي، **الشيخ محمد الطاهر بن عاشور وكتابه مقاصد الشريعة الإسلامية**، ص٢٣٨.

[٤٣] مسلم بن الحجاج أبو الحسن القشيري النيسابوري، **صحيح مسلم**، تحقيق: محمد فؤاد عبد الباقي (بيروت: دار إحياء التراث العرابي، د.ت)، باب فتح مكة، رقم الحديث: ١٧٨٠، ج٣، ص١٤٠٧.

السلام العالمي.[٤٤]وهي ضد الاختلاف والتفرقة والانتقاء وبها تحقق التكافل العام[٤٥] بأن يحارب التظالم والطغيان.

٤. الشعبية الموجهة بالحكمة والحصافة في الشورى النيابية

الشورى أهم الطرق للوصول إلى اتّخاذ القرارات المتعلقة بشؤون البلاد بما يضمن حقوق جميع الأفراد استجابة لمتطلباتهم، وسدّاً لحاجاتها، ويتحقّق ذلك من خلال أخذ آراء الناس من أعضاء مجلس النواب وراعيتهم قبل اتّخاذ أيّ قرارات من شأنها الإضرار بالناس أو إحداث مصالح لهم، ولم تصح تلك القرارات إلا بالاتفاق أو بالتصويت الذي هو الحل الأخير، ويجيب إذا دعى للتصويت أن يدلي بشهادته ولايكتمها.[٤٦]

إن للشورى حدودا لا تتعداها بحيث تكون سلطة مجالس النواب غير مطلقة، وإنما هي مقيدة بالقواعد والضوابط والمبادئ والأحكام الشرعية التي شرعها الله، فلا تخرج عن إطار شريعة الله ودينه وأصوله العامة، ولا يملك برلمان ولاحكومة إلغاء شيء منها، وتقيّد هذه الأنظمة بنظام الإسلام بأن تعتمد في اتخاذ قراراتهم ووضع قوانينهم على الشريعة ومقاصدها من حفظ الدين وحفظ النفس وحفظ العقل وحفظ النسل وحفظ المال وحفظ الدولة والعدالة والأمن وحفظ نظام الأمة، فيكون الشعب محكومون بالأمرين: الشريعة والأخلاق، فلا يملك مجلس النواب مخالفة نص واضح الدلالة في الكتاب أو السنة النبوية، وإنما يتحرك هذا المجلس في ثلاثة مجالات وهي:

١. في ما لا نص فيه، بحيث لم يرد فيه دليل شرعي نقلي من القرآن والسنة.

---

[44] Ahmad Hariadi, *45 Butir Nilai Luhur Pancasila Bagian Ajaran al-Quran*. (Jakarta: Yayasan Kebangkitan Kaum Muslimin, 2015), 42-64.

[45] Hariyanto et al., "Effectiveness of the Economic System to Zakat and Waqf for Empowerment of the Ummah in Indonesia."

[٤٦] القرضاوي، **من فقه الدولة**، ص٣٧.

٢. فيما فيه نص ظني الدلالة.
٣. في إطار التنفيذ أي إصدار القوانين واللوائح التنظمية والقرارات.[٤٧]

ويجب على المرشح للبرلمان في إيطار الديمقراطة البانتشاسيلوية أن يكون حفيظا عليما وقويا أمينا وحكيما عدلا، كما يشترط في الناخب العدالة وحسن السيرة. ويجوز لكل فرد من الشعب أن ينصحهم ويأمرهم بالمعروف وينهاهم عن المنكر.[٤٨]

٥. العدالة الاجتماعية لكل المواطنين الإندونيسيين

إن العدالة الاجتماعية هي عدالة إنسانية شاملة لكل جوانب الحياة الإنسانية وليس مجرد عدالة اقتصادية محددة، لأن الحياة البشرية ليست علاقات مقطوعة، وإنما هي تراحم وتواد وتعاون وتكافل بين المسلمين في إندونيسيا على وجه خاص، وبين جميع أفراد الشعب من النصارى واليهود والبوذيين وغيرهم على وجه عام، فللعدالة الاجتماعية ركيزتان وهما: الوحدة المطلقة التي تتناسق بين مقوامات الإسلام، والتكافل العام بين المواطنين الإندونيسيين. فالوحدة ضد التجزيء والانتقاء، وأما التكافل ضد التظالم والطغيان. فليس في العدالة الاجتماعية قبول طغيان الفرد على الجماعة، ولا إظهار ظلم الجماعة على فطرة الفرد ومواهبه. بناء على ما سبق، فحفظ كرامة الفرد واجب ليتمكن له من أن يبدع وأن يستثمر كامل طاقته مقررا مبدأ تكافؤ الفرص والعدل بين الشعب، ولكنه ترك مجالا للتفاضل بالعمل والجهد. لهذا لا تفرض فيها المساوة الحرفية في المال. لأن تحصيله تبع لاستعدادات، كما أن العدل المطلق يؤدى

---

[٤٧] الزحيلي، **قضايا الفقه والفكر المعاصر**، ص٥١٥-٥١٦.
[٤٨] القرضاوي، **من فقه الدولة**، ص٣٦-٣٧.

إلى تفاوت الأرزاق مع تحقيق العدالة الإنسانية. وأما أساس هذه العدالة ومبادئها الرئيسية هي ما يلي:

١. التحرر الوجداني المطلق.
٢. المساواة الإنسانية الكاملة.
٣. التكافل الاجتماعي الوطيد الوثيق بين المواطنين الإندونيسيين داخلها وخارجها.

وهذا كلها من مضامن قول سيد قطب عن العدالة الاجتماعية.[٤٩]

الخاتمة

اتضح عند الباحث أن وجه الاختلاف والاتفاق بين البانتشاسيلا والشريعة الإسلامية، فتختلف الشريعة عن البانتشاسلا بثلاثة أوجه أساسية؛ أولها: إن الشريعة الإسلامية تستنبط من الوحي إلهي، بينما البانتشاسيلا تستمد من عقول البشر وعرف وعادات المجتمع الإندونيسي. ثانيها: إن الشريعة وضع إلهي، بينما البانشاسيلا وضع بشري. ثالثها: تمتاز الشريعة عن البانتشاسيلا في الكلية والجزئية، فالشريعة لا تقبل التغيير والتعديل شاملة إلى جميع البشر، بينما البانتشاسيلا هي قواعد مؤقتة تمشي مع حال شعبها المؤقت، وتستوجب التغير كلما تغيرت حالهم. فأما الوجه الجامع بين مفهومي البانتشاسيلا والشريعة الإسلامية، فيمكن القول بأن كلا المبدأين عبارة عن القواعد والمبادئ التي تهدف إلى تحقيق المصالح ودرء المفاسد، مع العلم أن الشريعة في حقيقتها تتجاوز كونها مبادئ مجردة إلى كونها خطابا للناس كافة، وكما أن كليهما وُضعا لتنظيم الجماعة. فلا بد للباحث سعى تقديم الحلول في التفسير الموافق المقاصد الشريعة للبانتشاسيلا. كما في المبدأ الأول تتيح الحكومة للشعب حرية الاعتقادات

[٤٩] سيد قطب، **العدالة الاجتماعية في الإسلام**، ص٢٩-٣٢.

بحيث تعترف بتعدد الأديان في المجتمع الإندونيسي مع امكان التعايش السلمي بين أفراده والحفاظ على هوية المجتمع وخصوصيته مع مراعاة المبادئ الإسلامية، ومبدأ التسامح والمساواة في المبدأ الثاني، ومبدأ الوحدة للمبدأ الثالث، ومبدأ الشورى في الرابع، وفي الخامس مبدأ العدالة. وهذه المبادئ كلها لا من مراعاة المقاصد الشرعية الخمسة من حفظ الدين والنفس والعقل والنسل والمال حتى تحقق المصالحة الوطنية والشعبية العامة.

المراجع:

Ahmad Hariadi, *45 Butir Nilai Luhur Pancasila Bagian Ajaran al-Quran*. Jakarta: Yayasan Kebangkitan Kaum Muslimin, 2015

Al-Dimasyqi, Abu Bakar Muhammad. *Kifayatu al-Akhyar fi Hilli Ghayati al-Ikhtishar*. Surabaya: Maktabah Ahmad Nabhani, Vol. 2.

Al-Ghazali, Abu Hamid Muhammad. *Ihya' Ulum al-Din*. Egypt: Muassasah Bab al-Halabi, Vol. 1, 1967.

Al-Jauziyah, Ibn Al-Qayyim. *al-Thuruq al-Hukmiyah fi al-Siyasah al-Syar'iyyah*. Jeddah: Dar 'alami al-Fawaid, Vol. 1, 2008.

Al-Misawi, Muhammad al-Thaher, *Al-Syaikh Muhammad Al-Thaher bin Asyur wa Kutubuhu Maqashid al-Syariah al-Islamiyah*. Al-Bashair li Intaji al-Ilmi, Vol. 1, 1997.

Al-Qardawi, Yusuf, *Min Fiqhi al-Daulah fi al-Islam*. Beirut: Dar al-Syoroq, vol. 1, 1997.

Al-Yubi. *Maqashid al-Syariah wa 'alaqatuha bi al-Adillah al-Syar'iyyah*. Riyadh: Dar al-Hijrah, Vol. 1, 1418.

Al-Zuhaili. *Qadhaya al-Fiqh wa al-Fikr al-Mu'ashir*.

Astuti, Ngudi. *Pancasila dan Piagam Madinah.* Jakarta: Media Bangsa.

Asyari, Muhammad Hasyim, Hadzihi *Al-Risalah Jami'ah al-Maqashid*, Tahqiq Ishomuddin Hadziq, Jombang: Maktabah al-Turats al-Islami.

Audah, Abd al-Qadir, *Al-Farqu Baina al-Fiqh al-Islami wa al-Qawanin Al-Wadh'iyyah*, (Retrieved 28th December 2018). <https://etudes-islamic.blogspot.my/2016/02/blog-post_53.html>.

Audah, Abd Al-Qadir. *Al-Tasyri' al-Jina'i al-Islami Muqaranan bi al-Qanun al-Wadh'i*. Beirut: Dar al-Kotob al-Arabi.

Endang Saifuddin Anshari. *Piagam Jakarta 22 Juni 1945*. Jakarta: Gema Insani Press, 1997.

Hariyanto, E., M. Taufiq, Z. Abidin, M. Ulum, and Maimun. "Effectiveness of the Economic System to Zakat and Waqf for Empowerment of the Ummah in Indonesia." *International Journal of Advanced Science and Technology* 29, no. 6 (2020).

Husaini, Adian. *Pancasila Bukan Untuk Menindas Hak Konstitusional Umat Islam,* Jakarta: Gema Insani Press, 2012.

Jalil, Abdul, and Muhammad Taufiq. "Al-Âtsâr Al-Mutarattibah 'Âla PERPPU (Lawâih Al-Hukûmiyyah Al-Badaliyyah) Min Al-Munazhzhamât Al-Mujtama'Iyyah Raqm 2 Li 'Âm 2017 Dlidda Wujûd Hizb Al-Tahrîr Indûnîsiyâ Min Manzhûr Saddi Al-Dzarî'Ah." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 14, no. 1 (2019): 144. https://doi.org/10.19105/al-ihkam.v14i1.1982.

Kaelan. M.S. *Filsafat Pancasila, Pandangan Hidup Bangsa Indonesia*. Yokyakarta: Paradigma Yokyakarta, 2009.

Lajnah Bahstul Masail. *Ahkamu al-Fuqaha' fi Muqarrati Mu'tamarat Nahdlatul Ulama 1926-2010*. Jakarta: LTN NU.

Maimun, Maimun. "Islam Nusantara in Islamic Law Epistemology Perspective." *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 11, no. 2 (2017): 392. https://doi.org/10.19105/al-ihkam.v11i2.779.

Mardhatillah, M, and M Taufiq. "The Practice of Amal Masjid in Madura." *… Journal of Multidisciplinary Islamic Education*, 2020, 53–72. https://core.ac.uk/download/pdf/354363723.pdf.

Mawardi, Imam. "Islamic Law and Imperialism: Tracing on The Development of Islamic Law In Indonesia and Malaysia." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 1 (2018): 1. https://doi.org/10.19105/al-ihkam.v13i1.1583.

Muslim, Al-Hajjaj Abu Al-Hasan al-Nisapuri. *Shahih Muslim*. Beirut: Dar Ihya al-Turost al-Arabi. Vol. 3.

Qutub, Sayyid, *al-Adalah al-Ijtima'iyah fi al-Islam*. Beirut: Dar Al-Syuruq, 1995.

Setijo, Pandji. *Pendidikan Pancasila: Perspektif Sejarah Perjuangan Bangsa*. Jakarta: Gramedia Widiasarana Indonesia, 2011.

Syihab, Rizieq. *Wawasan Kebangsaan Menuju NKRI Bersyariah*. Jakarta: Suara Islam Press, 2013.

Taufiq, Muhammad. "A Critique against the Perspective of Al-Thufy on the Contradiction of Maslahat and the Holy Text." *Millati: Journal of Islamic Studies and Humanities* 5, no. 2 (2020): 121–28. https://doi.org/10.18326/mlt.v5i2.121-128.

———. *Filsafat Hukum Islam; Dari Teori Ke Aplikasi*. Edited by Abd. Jalil. I. Pamekasan: Duta Media, 2019.

Taufiq, Muhammad, Akhmadul Faruq, and Ibnu Khaldun. "Implementation of 'The Madina Charter' in a Democratic Country : Indonesia as a Model." In *Proceedings of the 6TH International Prophetic Heritage Conference (SWAN 2018) Istanbul, Turkey*, 523. Istanbul: SWAN, 2018.

Taufiq, Muhammad, and Masyithah Mardhatillah. "Polygamy in Indonesian Family Law: Analysis of Maqashid Syariah." *Journal of Islam in Asia* 17, no. 3 (2020).

Yosof, Ahmed, *Tasharrufatu al-Rasul Shallallahu Alaihi Wa Sallam bi al-Imamati wa Shilatuha bi al-Tasyri'*. Qatar: Jami'atu Qatar, Majallah Markaz Buhus al-Sunnah wa al-Sirah, Ed. VIII, 1415.Hariyanto, E., M. Taufiq, Z. Abidin, M. Ulum, and Maimun. "Effectiveness of the Economic System to Zakat and Waqf for Empowerment of the Ummah in Indonesia." *International Journal of Advanced Science and Technology* 29, no. 6 (2020).

Jalil, Abdul, and Muhammad Taufiq. "Al-Âtsâr Al-Mutarattibah 'Âla PERPPU (Lawâih Al-Hukûmiyyah Al-Badaliyyah) Min Al-Munazhzhamât Al-Mujtama'Iyyah Raqm 2 Li 'Âm 2017 Dlidda Wujûd Hizb Al-Tahrîr Indûnîsiyâ Min Manzhûr Saddi Al-Dzarî'Ah." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 14, no. 1 (2019): 144. https://doi.org/10.19105/al-ihkam.v14i1.1982.

Maimun, Maimun. "Islam Nusantara in Islamic Law Epistemology Perspective." *Al-Ihkam: Jurnal Hukum & Pranata Sosial* 11, no. 2 (2017): 392. https://doi.org/10.19105/al-ihkam.v11i2.779.

Mardhatillah, M, and M Taufiq. "The Practice of Amal Masjid in Madura." *… Journal of Multidisciplinary Islamic Education*, 2020, 53–72. https://core.ac.uk/download/pdf/354363723.pdf.

Mawardi, Imam. "Islamic Law and Imperialism: Tracing on The Development of Islamic Law In Indonesia and Malaysia." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 1 (2018): 1. https://doi.org/10.19105/al-ihkam.v13i1.1583.

Taufiq, Muhammad. "A Critique against the Perspective of Al-Thufy

on the Contradiction of Maslahat and the Holy Text." *Millati: Journal of Islamic Studies and Humanities* 5, no. 2 (2020): 121–28. https://doi.org/10.18326/mlt.v5i2.121-128.

———. *Filsafat Hukum Islam; Dari Teori Ke Aplikasi*. Edited by Abd. Jalil. I. Pamekasan: Duta Media, 2019.

Taufiq, Muhammad, Akhmadul Faruq, and Ibnu Khaldun. "Implementation of 'The Madina Charter' in a Democratic Country : Indonesia as a Model." In *Proceedings of the 6TH International Prophetic Heritage Conference (SWAN 2018) Istanbul, Turkey*, 523. Istanbul: SWAN, 2018.

Taufiq, Muhammad, and Masyithah Mardhatillah. "Polygamy in Indonesian Family Law: Analysis of Maqashid Syariah." *Journal of Islam in Asia* 17, no. 3 (2020).

Zahid, Moh., and Moh Hasan. "The Existence of Wasathiyyah Islam in Madura (An Analysis of Urban Society's Acceptance of Islamic Content on Social Media)." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 2 (2018): 382. https://doi.org/10.19105/al-ihkam.v13i2.1875.

Zaim, Muntaha Artalim. *Fikih Al-Ta'ayus Baina al-Muslimin wa Gairihim fi Indunesia: Dirasah Maqashidiyah*. Al-Jami'ah al-Islamiyah al-Alamiyah Malaysia, 2013.

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 232-253
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v16i1.3050

Manâfidu al-Muharramât ilâ Muntijâti al-Halâl: "Dirâsah Tahlîliyah fî Dhaw'i Ma'âyir Majma' al-Fiqh al-Islâmî al-Dawlî wa al-Ma'âyir al-Mâlayziah"

Ahmed Salem Ahmed
Researcher & Legal Consultant: Libyan Authority for Research, Science, and Technology, Libya
Email: ahmed.s.ahmed1977@gmail.com

Muhammad Taufiq
Faculty of Sharia, State Islamic Institute of Madura (IAIN Madura), Indonesia
Email: mh.taufiq.phd@gmail.com

Article history: Received: May 7, 2019, Accepted: March 27, 2021, Published: June 27, 2021

Abstract

This paper examines the changing process of unlawful (*haram*) materials into a lawful (*halal*) product according to both International Islamic Fiqh Academy standard and Malaysian standard. To harmonize those two *halal* standards on certain products, the subdiscipline of *fiqh* which determines lawful product standardization has put some fundamental sharia laws to clearly distinguish between *halal* and *haram*. The changing process is based on so called *istihalah*, referring to the merge among *halal* and *haram* and *istihlak* or possibility to take *rukhshah* (legal relief) and easiness to cope with any difficult condition using *darurat* (emergency causes) and *umum al-balwa* (common disaster). However, critical points of the standardization method need to well described, mainly on its composition based on shariah rules of *halal* product. The discussion covers difference opinions on the sharia law to the weak political policy on the Islamic law arrangement for *halal* product standardization that it is recommended to consider clear and more careful concepts (instead of *istihalah, istihlak, darurat* and *umum al-balwa*) in formulating the law.

Author correspondence email: mh.taufiq.phd@gmail.com
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

Keywords:
Istihalah, Istihlakh, Darura, Umum Al-Balawi, Halal, Haram,

ملخص البحث

هذا المقال يبحث عن منافد المحرمات إلى منتجات الحلال حيث يقارن بين الدراسة في ميزان معايير مجمع الفقه الإسلامي الدولي والمعايير الماليزية. للتوفيق بين معايير الحلال والمعايير السائدة ذات الصلة بالمنتجات، حاول الفقه الذي تبلورت مجهوداته في معايير المنتجات الحلال توظيف بعض الأسس الشرعية القائمة على الحدّ الفاصل بين الحلال والحرام، والمتمثلة في تحوّل الحرام إلى الحلال وفقاً للاستحالة، أو بالجمع بين الحلال والحرام وفقاً للاستهلاك، أو من خلال توظيف رُخص التخفيف والتيسير ورفع الحرج، كحالتي الضرورة، وعموم البلوى، إلا أنه ونظراً لقيام هذه الأسس في النقاط الحرِجة بين الحلال والحرام فقد أستشعر الباحث أهمية وضرورة تسليط الضوء عنها للتنوية بخطورتها على المضمون الشرعي للحلال في المنتجات، حيث أنه وبمُطالعة هذه الأسس في ضوء معايير الحلال وما دار حولها من اختلافات شرعية، توصّل إلى ضعف السياسة التشريعية في تقنينها ضمن إطار معايير المنتجات الحلال، مما أوصى معه بالنأي عنها والميل نحو الأوثق والأحوط عند التقنين.

الكلمات المفتاحية:

الاستحالة، الاستهلاك؛ الضرورة؛ عموم البلوى؛ الحلال؛ الحرام

مقدمة

فرض اتصال مفهوم الحلال بالصناعة والإنتاج معايير خاصة ذات طبيعة شرعية لم تكن مألوفة ضمن إطار النظم الفنية والقانونية السائدة ذات الصلة بالمنتجات، ومُحاولةً من الفقه التوفيق بين المضامين الشرعية للحلال من جهة، والمعايير الأخرى ذات الصلة

بالمنتجات من جهةٍ أخرى،[1] سَلَكَ مسلكاً كان فيه أميَل إلى تطويع المعايير الشرعية لتواكب المعايير الأخرى، حيث أنكبّ على إيجاد الأسس القائمة على الحدّ الفاصل بين الحلال والحرام لتقرير المعايير الشرعية للحلال في المنتجات، ومن تلك الأسس التي تم توظيفها في هذا الشأن ما يتعلّق بتعزيز الأساس الشرعي لتحوّل الحرام إلى الحلال من خلال ما يُعرف بالاستحالة، ومنها ما كان يتّصل باجتماع الحلال والحرام، من خلال ما يُعرف بالاستهلاك، على الرّغم مما يُحيط بهما من اختلافات فقهية، فضلاً عن توظيفه للرُّخص الشرعية للتّخفيف ورفع الحرج كالضرورة وعموم البلوى اللتان قد يُصار بهما إلى تجاوز قدرهما والنفاد من خلالهما إلى الحرام، وهي حالات يرى الباحث أهمية تسليط الضوء عليها لكونها تُشكِّل المنافذ الرئيسية للحرام إلى المنتجات، مما يُهدر مفهوم الحلال فيها، ويُفرِّغه من مضمونه الشرعي.

وبالتالي سوف يتناول الباحث تلك الأسس ضمن إطار معايير المنتجات الحلال مع بيان مدى الأخذ بها ضمن إطارها، فضلاً عن الاختلافات الفقهية بشأنها، حالةٌ بحالة، حيث نتناول في الفقرة الأولى، الاستحالة، يليها الاستهلاك في الفقرة الثانية، ثم نتناول الضرورة الشرعية في الفقرة الثالثة، لتليها آخرها عموم البلوى.

[1] M Cholil Nafis, "Damânu Muntijah Al-Halâl Li Himayati Huqûq Al-Mustahlikîn," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 15, no. 2 (2020): 301–26.

الاستحالة *(Istihalah)*

الاستحالة لغةً من مصدر الفعل استحال، أي تغير طبعه ووصفه،[٢] أما اصطلاحاً فهي تغيُّر العين النجسة وانقلاب حقيقتها إلى حقيقة أخرى، أو هي انقلاب المادة من حقيقتها الأصلية التي كانت تُعرف بها إلى مادة بصفةٍ أخرى.[٣]

أما من حيث موقف الفقه منها، فهي على خلافٍ واسع فيما بينهم حول قُدرتها على تغيير العين النجسة وتطهيرها، حيث يرى الحنابلة[٤] والشافعية[٥] وبعض المالكية[٦] عدم قدرة الاستحالة على تطهير العين النجسة، في حين يرى الحنفية قدرتها على ذلك.[٧]

ويستدل من قال بها بأحوالٍ متعدِّدة لا يتسع المقام للتفصيل فيها؛ كتحوَّل الخمر إلى خِلَّ، وتحول اللبن من بين فرثٍ ودم إلى لَبَن سائغ للشاربين، وتحوَّل الخنزير

---

[٢] الفيومي، أحمد بن محمد بن علي، **المصباح المنير**، قاموس عربي – عربي، كتاب الشين، (لبنان: مكتبة لبنان، ب.ط، ١٩٨٧)، ص ٦٠.

[٣] الدويري، زايد نواف عواد، **أثر المستجدات الطبية في باب الطهارة**، (الأردن: دار النفائس، ط ١، ٢٠٠٧)، ص ٢٢٢.

[٤] ابن قدامة، موفق الدين أبي محمد عبد الله، **المغني**، ج ١، (القاهرة: دار الحديث، بلا عدد الطبعة، ٢٠٠٤)، ص ٩٤.

[٥] الشربيني، شمس الدين محمد بن الخطيب، **مغني المحتاج**، ج١، عناية محمد خليل عيتاني، (بيروت: دار المعرفة، ط١، ١٩٩٧)، ص ١٣٤.

[٦] البهوتي، منصور بن يونس، **شرح منتهى الإرادات**، ج١، (بيروت: عالم الكتب، ط٢، ١٩٩٦)، ص ١٠٥.

[٧] ابن عابدين، محمد أمين بن عمر بن عبد العزيز عابدين الدمشقي الحنفي، **رد المختار على الدر المختار**، ج ١، (بيروت: دار الفكر، ط٢، ١٩٩٢)، ص ٣١٦.

الذي يوقع في المملحة إلى مِلح وغيرها[٨]، حيث يقول ابن القيم ان الله يخرج الخبيث من الطيّب، ويخرج الطيّب من الخبيث، ولا عبرة بالأصل، وإنما العبرة بوصف الشيء نفسه بما آل إليه.[٩] بل أن ابن تيمية يُنكر على الشيء الذي أستحالَ وصف النجس المستحل، لأنه أصبَحَ شيئاً آخر يختلف عن الأول وصفاً وحكماً ويجب تناوله ضمن أحكام الحلال والطيبات لا المحرمات.[١٠]

إلا أنه وإن كانت القاعدة تقضي بأن الأصل في الأشياء الإباحة على اختلاف أصنافها وأوصافها،[١١] إلا أن بُعد الحرام عن الحلال أملى على الباحث ليطمئنَّ قلبه أن يستقصي رأي العلم بشأن حقيقة تحوَّل صفات ومكونات العين النجسة، في الأمثلة المتقدِّمة والتي يقول بها في غلب من يقول بالاستحالة، كاستحالة اللبن الذي خرج من بين فرثٍ ودم، ومكونات الخنزير التي قيل بطهارتها، وفي الخمر الذي قِيلَ باستحالته خِلّاً.

حيث قِيل في مثال خروج اللبن من بين فرتٍ ودم في قوله تعالى: ﴿وَإِنَّ لَكُمْ فِي الْأَنْعَامِ لَعِبْرَةً نُسْقِيكُمْ مِمَّا فِي بُطُونِهِ مِنْ بَيْنِ فَرْثٍ وَدَمٍ لَبَنًا خَالِصًا سَائِغًا لِلشَّارِبِينَ﴾،[١٢] بأن اللبن يتكون بطريقة ربّانية هيّأها الله سبحانه وتعالى لها خصائصها المختلفة عن العمل البشري، وذلك لأن الطعام الذي يتناوله الحيوان الحلوب يتفكك خلال عملية

---

[٨] حماد، نزيه، **المواد المحرمة والنجسة في الغذاء والدواء بين النظرية والتطبيق**، (دمشق: دار القلم، ط١، ٢٠٠٤)، ص ١٦ وما بعدها.

[٩] ابن القيم، محمد بن أبي بكر بن أيوب بن سعد شمس الدين، **أعلام الموقعين عن رب العالمين**، ج١، تحقيق: محمد عبد السلام إبراهيم، (بيروت: دار الكتب العلمية، ط١، ١٩٩١)، ص ٣٩٤.

[١٠] ابن تيمية، **مجموع الفتاوى**، مرجع سابق، ج٢١، ص ٧.

[١١] ابن تيمية، نفس المرجع، ص ٥٣٥.

[١٢] سورة النحل: الآية (٦٦).

الهضم ليتحول إلى عناصره الأولية التي تنتقل إلى الدم، ومن ثم يُعاد تركيب عنصر جديدة في الغدد اللبنية فيتكون (الكازيين) البروتين اللبني والدسم وسُكَّر الحليب ومواد أخرى مغايرة تماماً للدم الذي حمل إليها المواد الأولية السابقة، وهي صورة تتحقّق فيها الاستحالة الكاملة، إلا أنه لا يمكن مُحاكاتها صناعياً بواسطة عمل بشري.[١٣]

أما مسألة طُهر الخنزير النجس عند وقوعه في المملحة وتشرَّب النباتات لبقاياه، فهي دورة طبيعية تتمثَّل في استخلاص النباتات للمعادن التي تفككت من العناصر النجسة وتصفيتها بشكل طبيعي بحيث لا يظهر ناتجها في النبات وثماره، وهو أيضاً طريقة تلقائية لا يُمكن تقليدها صناعياً.[١٤]

أما فيما يتعلَّق بتحوّل الخمر من نباتات حلال إلى خمر حرام ثم إلى خِلّ حلال والذي يقول به سنداً للاستحالة حتى من ينكرها في غيره من النجاسات،[١٥] يقول الشيخ أحمد الخليلي[١٦] تفسيراً قرآنياً للآية الكريمة ﴿يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ﴾[١٧]لم يقع عليه نظر الباحث عند غيره، حيث يقول بأن الميسر والأنصاب والأزلام في الآية جاءت معطوفة علي الخمر، وحيث أنه لا نجاسة في الأنصاب والأزلام، فإن المعطوف والمعطوف عليه حكمهما واحد، مما ينتهي معه إلى القول بأنه لا نجاسة في الخمر ولا تأتي حُرمتها إلا مما آلت إليه من إسكار وهي الغاية من تحريمها والتي أنتَفَت بتحولها إلى خلّ، وبذلك

---

[١٣] رفيس، باحمد، **الأطعمة المصنعة بين التأصيل الشرعي والتحليل العلمي**، ج١، مرجع سابق، ص ٤٧١.

[١٤] التكروري ، حامد، ومحمد حميض، **إستحالة الأعيان النجسة**، ص ٧، مشار إليه عند رفيس، نفس المرجع، ص ٤٧٩

[١٥] الطريقي، **أحكام الأطعمة في الشريعة الإسلامية**، مرجع سابق، ٣١٢-٣١٣.

[١٦] مفتي عام سلطنة عمان حالياً.

[١٧] سورة المائدة: الآية، (٩٠).

فإنه لا مجال للاستحالة إلا فيما كانت النجاسة فيه عارضة، حيث أنه لا يصُحّ القول بطهارة البول عند تنقيته ولو زالت رائحته ولونه، وبالتالي لا يصح القول بتحليل شيئاً من الخنزير أو الميتة ولو تغير طبيعته لاستمرار علة التحريم فيه،[١٨] وهو ما يؤكِّد عليه حامد التكروري[١٩]بالقول بإنه إذا كانت عِلَّة تحريم الخمر ظاهرة وهو ما أمْكَنَ معه القول باستحالتها عند زوال عِلَّة التحريم، فإن عِلَّة تحريم الميتة والخنزير غير معروفة حتى يُقال يُمكن معرفة زوالها من بقائها.[٢٠]

أما على مستوى معايير الحلال، فإن المعايير الماليزية للمنتجات الحلال نأت عن نفسها عن الأخذ بالاستحالة وحسناً فعلت، حيث أحدث في ذلك بقرار مجلس الفتوى الوطني الماليزي الصادر في جلسته السادسة والعشرون المنعقدة يومي السابع والثامن من مارس ١٩٩٠ والقاضي بحظر استخدام المواد المنشطة ذات المصدر الحيواني المحرّم في الأغذية، بنصِّه على أنه "يجوز استخدام المواد المنشِّطة في الأغذية شريطة أن تكون نباتية المصدر أو من مصدر حيواني من حيوان مأكول اللحم مذبوح وفقاً للشريعة الإسلامية.[٢١]

أما مجمع الفقه الإسلامي الدولي فقد أخذ في معاييره بالاستحالة[٢٢] مُستنداً إلى توصيات المنظمة الإسلامية للعلوم الطبية في الصادرة في ندوة المواد المحرمة والنجسة في

---

[١٨] الخليلي، أحمد بن حمد، **الفتاوى**، الكتاب الخامس، مرجع سابق، ص ٣٥٩ ،٣٦٠.

[١٩] أستاذ علوم الأغذية بالجامعة الأردنية.

[٢٠] رفيس، باحمد، **الأطعمة المصنعة بين التأصيل الشرعي والتحليل العلمي**، ج١، مرجع سابق، ص ٤٨٠.

[٢١] رملي، ياسر، **أحاديث الأطعمة والأشربة ومدى تطبيقها في الأغذية الحلال الماليزية (جاكيم)**، مرجع سابق، ص ١٠٠.

[٢٢] قرار مجمع الفقه الإسلامي الدولي المنبثق عن منظمة التعاون الإسلامي **رقم ١٩٨ (٢١/٤)** الصادر في دورته الحادية والعشرين بالرياض، المملكة العربية السعودية في الفترة من ١٨ إلى ٢٢ نوفمبر ٢٠١٣.

الغذاء والدواء المنعقدة بالكويت في الفترة من ٢٢ إلى ٢٤ مايو ١٩٩٥ بالمنظمة الإسلامية للعلوم الطبية بالكويت،[٢٣] والتي عرَّفَت الاستحالة بأنها: (تغيير حقيقة المادة النجسة أو المحرَّم تناولها وانقلاب عينها إلى مادة أخرى مختلفة عنها في الاسم والخصائص والصفات، من خلال تفاعل كيميائي كامل، مثل تحوّل الزيوت والشحوم على اختلاف مصادرها إلى صابون، وتحلل المادة إلى مكوناتها المختلفة كتفتيت الزيوت والدهون إلى أحماض دسمة وجلسرين، وكما يحصل التفاعل الكيميائي وكما يحصل هذا التفاعل بالوسائل العلمية الفنية، يحصل أيضاً بصورة غير منظورة في الصور التي أوردها الفقهاء على سبيل المثال التخلل والدباغة والإحراق، أما إذا كان التفاعل الكيميائي جزئياً فلا يعتبر ذلك استحالة، وإن كانت المادة نجسة فتبقى على حالها ولا يجوز استخدامها، وبناءً على ذلك (قرّر) الآتي:

- المركبات الإضافية ذات الأصل الحيواني المحرَّم أو النَّجس التي تتحقق فيها الاستحالة حسب المتقدَّم تعتبر طاهرة وتناولها حلال في الغذاء والدواء.
- المركبات الكيميائية المستخرجة من اصول نجسة أو محرمة كالدم المسفوح أو مياه المجاري والتي لم تتحقق فيها الاستحالة بالمصطلح السابق لا يجوز استخدامها في الغذاء والدواء.
- أما بلازما الدم التي تعتبر بديلاً رخيصاً لزلال البيض، وقد تستخدم في الفطائر والحساء والنقانق والهامبرجر وصنوف المعجنات كالكعك والبسكويت والعصائد البودينغ والخبز ومشتقات الألبان وأدوية الأطفال وأغذيتهم، والتي قد تضاف إلى

[٢٣] للإطلاع على التوصيات؛ يُنظر مجلة مجمع الفقه الإسلامي، الدورة العاشرة، العدد العاشر، الجزء الثاني، ١٩٩٧، ص ٤٥٩ إلى ٤٦٦.

الدقيق فإنها حلال تختلف عن الدم في الاسم والخصائص والصفات وليس لها حكم الدم).

وهو ما أعاد التأكيد عليه في دورته الثانية والعشرين بموجب قراره رقم ٢١٠ (٢٢/٦)[٢٤] باستثناء بلازما الدم التي قرّر إعادة النظر فيها.

وبالنظر إلى القرارين المتقدِّمين، فإنهما استندا في أخذهما بالاستحالة إلى اشتراط أساس جديد للقول بها، وهو ما أطلقوا عليه "الاستحالة الكيميائية التامة"، إلا أنهما وإن كَانَا يشترطان ذلك، إلا أنهما يَقَّعان في تعارضاً صريحاً يتمثَّل في النصَّ بدايةً على عدم قدرة الاستحالة على تحويل النجاسة بنصهما على أنه: "وإن كانت المادة نجسة فتبقى على حالها ولا يجوز استخدامها"، إلا أنهما يَعدِلانِ عن ذلك بنصهما على أنه: "وبناءً على ذلك؛ المركبات الإضافية ذات الأصل الحيواني المحرَّم أو النجس التي تتحقق فيها الاستحالة حسب المتقدّم تعتبر طاهرة وتناولها حلال في الغذاء والدواء"، وهو تناقض يقتضي تصويبه.

أما في حقيقة الاستحالة التامة "دون الجزئية" التي جاء بها القرار، فهي وإن كان توحي بأهميتها في تحرّي الحلال، إلا أنها غير مُتحقِّقة من حيث الواقع، حيث أثبتت التجارب العلمية أن المواد التي تحتوي على المكونات الخنزيرية تنتقل إلى الناتج الجديد محتفظة بخصائصها الأصلية[٢٥]، حيث أن مجرد تفكيك تركيبة المادة الأصلية (الحرام)

---

[٢٤] صدر في الدورة الثانية والعشرين لمجلس مجمع الفقه الإسلامي الدولي المنعقد في الكويت في الفترة من ٢٢-٢٥ مارس ٢٠١٥.

[٢٥] شهرون، محمد، معمل الحلال بالمركز الدولي لدراسات وأبحاث الحلال بالجامعة الإسلامية العالمية ماليزيا أثناء دورة الحلال التنفيذي (Halal executive) التي حضرها الباحث بالمعهد المذكور في الفترة من يناير إلى مارس ٢٠١٨.

وتجزئتها مع بقائها على أصلها لا يُعدّ استحالة واتخاذه مسوغاً للإباحة،[٢٦] حيث تقتضي الاستحالة التغير الجزيئي (Molecular)، وهي تفاصيل تقتضي بلوغ اليقين العلمي تحليلاً وتقريراً للاستناد إليها لِنَعتْ الحرامُ حلالاً طيباً، وشتَّان، أما الاكتفاء نظرياً بالقول بأنها تغيرت كيميائياً كما جاء في قرار المجلس الأوروبي للإفتاء بقوله "المضافات ذات المنشاء الحيواني لا تبقى على أصلها، وإنما تطرا عليها استحالة كيميائية تُغيِّر طبيعتها تغيراً تاماً وتتحول إلى مادة جديدة طاهرة"، هو قولاً مُرسلاً لا يستند إلى حقائق علمية.[٢٧]

ولذلك نوصي المجمع بإعادة النظر في قراراته بشأن الأخذ بالاستحالة وتقنينها في معاييره نظراً لما لها من مرجعية عالمية، تؤثِّر بشكل مُباشر على حقيقة الحلال في المنتجات، خصوصاً وأنها لا يجني منها المجتمع المسلم "المستهلك" سوى شُبهة الحُرمة، إذا لم نقُل الحُرمة ذاتها، في المنتجات التي تحتوي على المحرَّمات التي قِيلَ باستحالتها، فضلاً عما لدرء مواضع الشبهات من آثار فعَّالة على الابتكار في صناعة الحلال وهو ما اثبتته التجربة الماليزية في التوصل إلى مخرجات علمية هامة لتكون بديلة عن المكونات محلّ الخلاف والشبهة.[٢٨]

الاستهلاك *(Istihlak)*

---

[٢٦] الزحيلي، وهبة، **حكم إستعمال الدواء المشتمل على شئ نجس العين**، ص ١٩٦، مشار إليه عند رفيس، **الأطعمة المصنعة بين التأصيل الشرعي والتحليل العلمي**، ج١، مرجع سابق، ص٤٧٥.

[٢٧] رفيس، باحمد، نفس المرجع، ص ٤٧٧.

[٢٨] أحمد سالم أحمد (الباحث)، ومحمد ليبا، **التورع عن الشبهات سر الإبتكار في صناعة الحلال؛ دراسة في ضوء معايير الحلال الماليزية ومعايير مجمع الفقه الإسلامي**، مجلة إسلام في آسيا، تصدر عن كلية معارف الوحي بالجامعة الإسلامية العالمية ماليزيا، تم قبوله بتاريخ: ١٣ أغسطس ٢٠١٨.

الاستهلاك هو اختلاط العين بغيرها على وجه يُفوِّت صفاتها وخصائصها، حيث انه إذا اختلطت عينٌ مُحرَّمة أو نجسة قليلة في طاهرٍ غالب حتى زالت صفاتها من اللون والطعم والرائحة، باتت مُستهلكة في الحلال الغالب وتأخد حكمه من الطهارة والحِلَّ [٢٩]، حيث يقول ابن تيمية؛ إذا وقعت الميتة أو الدم أو لحم الخنزير أو الخمر في الماء أو غيره واستهلكت لم يبقى لها وجود[٣٠].

وقد أخَذَ مجمع الفقه الإسلامي الدولي به بموجب قراره رقم ٢١٠ (٢٢/٦) [٣١] وعرَّفه بأنه "انغمار عين في عين تزول معه صفات وخصائص العين المغمورة، ولا يُمكن تمييزها بوجه من الوجوه"، أما تعريفه وفقاً لتوصيات الندوة الفقهية الطبية التاسعة[٣٢] فهو "امتزاج مادة محرَّمة أو نجسة في مادة أخرى طاهرة حلال غالباً مما يُذهِب عنها صفة النجاسة والحُرمة شرعاً، إذا زالت عن صفات ذلك المخالط المغلوب في الطعم واللون والرائحة حيث يصير المغلوب مستهلكاً في الغالب بحيث يكون الحكم للغالب"، وهو ما أخدت به في توصياتها لإباحة الأغذية والأدوية التي يستعمل في محلولها كمية قليلة من الكحول، أو الليستين والكوليسترول والأنزيمات الخنزيرية كالببسين المستخرجة من أصول نجسة باعتبار استهلاكها في الغالب.[٣٣]

---

[٢٩] حماد، نزيه، **المواد المُحرَّمة والنجسة**، مرجع سابق، ص ٢٦.

[٣٠] ابن تيمية، **مجموع الفتاوى**، مرجع سابق، ج٢١، ٥٠٢.

[٣١] صدر في الدورة الثانية والعشرين لمجلس مجمع الفقه الإسلامي الدولي المنعقد في الكويت في الفترة من ٢٢-٢٥ مارس ٢٠١٥.

[٣٢] توصيات الندوة الفقهية الطبية التاسعة، (الدار البيضاء ،١٤-١٧/يونيو/١٩٩٧) مجلة مجمع الفقه الإسلامي، الدورة العاشرة، العدد العاشر، ج٢، ص٤٦٢.

[٣٣] توصيات الندوة الفقهية الطبية التاسعة، (الدار البيضاء، ١٤-١٧/يونيو/١٩٩٧)، مجلة مجمع الفقه الإسلامي، الدورة العاشرة، العدد العاشر، ج٢، ص ٤٦٢ – ٤٦٣.

إلا أن الأخذ بالاستهلاك على النحو المتقدِّم استناداً مُبهماً أغفَلَ ما عليه إجماع الفقهاء، حيث أنهم وإن كانوا قد أجمعوا على القول بالاستهلاك في الماء الذي يغلب على المائع الذي تزول صفاتِهِ،[٣٤] الا أنهم أجمعوا في المقابل على عدم القول به في غير الماء[٣٥]، حيث أن الماء له قوة دفع النجاسات بخلاف غيره من المائعات، وهو بلا لون ولا رائحة، وبالتالي فهو مخلوق لغاية التطهير،[٣٦] أما في غيره من المواد فإن الاستهلاك غير جائز لما جاء في حديث النبي ﷺ (وإن كان مائعاً فلا تأكلوه)،[٣٧] وبالتالي فإن القول بالاستهلاك وتقنينه ضمن معايير الحلال يفتقر إلى الأساس العلمي،[٣٨] ويغفل التمييز بين المواد التي يقول باستهلاكها والظروف المحيطة بها، حيث أن حديث النبي ﷺ (إذا بلغ الماء قلتين لم يحمل الخبث)[٣٩] الذي أُخذ كأساس للقول بالاستهلاك كان مناطه الرُّخصة في ماء الغُدران والفلوات التي لا يُمكن صيانتها،[٤٠] وبالتالي فإنه لامجال للقول بالاستهلاك في خلط المحرَّمات في المنتجات الحلال، إلا لتيسير اتخاذها كوسيلة لنفاد المحرَّمات إلى المنتجات الحلال، وهو ما يوصي معه الباحث بالعدول عنه في تقنين معايير الحلال تحرّياً للحلال في المنتجات.[٤١]

---

[٣٤] النووي، **المجموع**، مرجع سابق، ج١، ص ١٦٢.

[٣٥] ابن عبد البر، أبو عمر يوسف بن عبد الله بن محمد بن عبد البر بن عاصم النمري القرطبي، **التمهيد لما في الموطأ من المعاني والأسانيد**، ج٩، تحقيق: مصطفى بن أحمد العلوي، ومحمد عبد الكبير البكري، (المغرب: وزارة عموم الأوقاف والشئون الإسلامية، ب.ط، ١٣٨٧هـ)، ص ٤٠.

[٣٦] النووي، نفس المرجع، ص ١٣٨.

[٣٧] الترمذي، السنن، **كتاب الطهارة**، مرجع سابق، ج١، ص ٩٧.

[٣٨] رفيس، باحمد، **الأطعمة المصنَّعة**، مرجع سابق، ج٢، ص ٤٥٠.

[٣٩] رواه الترمذي والنسائي وابن ماجه، **المسند**، مرجع سابق، ج ٢، ص ٢٣.

[٤٠] الشربيني، **مغني المحتاج**، مرجع سابق، ج١، ص ٢٣.

[41] Nafis, "Damânu Muntijah Al-Halâl Li Himayati Huqûq Al-Mustahlikîn."

حالة الضَّرورة *(Darurah)*

الضرورة لغةً هي الحاجة،[٤٢] أما اصطلاحاً فيعرِّفها الحموي بأنها بلوغ حدَّ الهلاك الذي إذا لم يتناول فيه المرء الممنوع هَلك، وهو ما يُبيح له تناوله،[٤٣] ويأتي عُذر الإباحة للاضطرار من قوله تعالى الله بعد بيان المحرمات: ﴿فَمَنِ اضْطُرَّ فِي مَخْمَصَةٍ غَيْرَ مُتَجَانِفٍ لِإِثْمٍ ۙ فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ﴾،[٤٤] كما يأتي في قوله جلّ وعلا: ﴿إِنَّمَا حَرَّمَ عَلَيْكُمُ الْمَيْتَةَ وَالدَّمَ وَلَحْمَ الْخِنْزِيرِ وَمَا أُهِلَّ بِهِ لِغَيْرِ اللَّهِ ۖ فَمَنِ اضْطُرَّ غَيْرَ بَاغٍ وَلَا عَادٍ فَلَا إِثْمَ عَلَيْهِ ۚ إِنَّ اللَّهَ غَفُورٌ رَحِيمٌ﴾،[٤٥] وهو ما يُشكّل أساس لقاعدة "الضرورات تُبيح المحظورات".

إلا أنه من شروط الضرورة أن تكون مُتحقِّقة بالفعل، وأن تكون ملتجئة، وأن تُقدَّر بقدرها، وألا توجد وسيلةٌ غيرها، كما يجب ألا تؤدي إلى ضررٍ أكبر. وتكون متُحقِّقة إذا قامت على تيقُّن الهلاك في حالة عدم ارتكاب المحظور، وتكون ملتجئة في حالة الخوف من تلف النفس أو الأعضاء وبلوغ حدَّ الضرورة، أما عن قدرها، فيُراد به ما يكفي لدفع الضرر، كما أنها يجب ألا يُصار إليها إلا عند استنفاد الوسائل الأخرى

---

[٤٢] أنيس ابراهيم وآخرون، **المعجم الوسيط**، ج ١، (مصر: مجمع اللغة العربية، مكتبة الشروق الدولية، ط٤، ٢٠٠٤)، ص ٥٣٧.

[٤٣] ابن نجيم، **حاشية الحموي على الأشباه والنظائر**، مرجع سابق، ج ١٩، ص ٤٨٣.

[٤٤] سورة المائدة: الآية (٣).

[٤٥] سورة المائدة: الآية (١٧٣).

المباحة، كما أنها يجب ألا تؤدي إلى ضررٍ أكبر،[٤٦] وهي محالّ اختلاف بين الفقهاء لا يتَّسع المقام لعرضها[٤٧].

وعلى الرغم من الاختلافات الفقهية حول الضرورة وقدرها وأحوالها، إلا أن مجمع الفقه الإسلامي الدولي أبى إلا أن يأخذ بها بموجب قراره رقم ٢١٠ (٢٢/٦) المشار إليه، والذي جاء فيه؛ "وإن رحمة الله بعباده وتيسير سبيل الإتباع لشرعه مراعاة حال الضرورة والحاجة التي تضمنتها مبادئ شرعية مقررة منها: أن الضرورات تُبيح المحظورات، وأن الحاجة تنزل منزلة الضرورة عامة كانت أو خاصة، وأن الأصل في المنافع الإباحة ما لم يقم دليل معتبر على الحرمة، كما أن الأصل في الأشياء الطهارة ما لم يقم دليل معتبر على النجاسة ولا يعتبر تحريم أكل الشيء أو شربه حكماً بنجاسته شرعاً"، وهو ما أعاد المجمع التأكيد عليه في قراره رقم ٢١٠ (٢٢/٦) المشار إليه، مما أجاز وفقاً له الهيبارين الخنزيري، وصمامات القلب الخنزيري، إعمالاً للضرورة، كما أنه أباح الأدوية التي تحتوي على الكحول بموجب قراره رقم ٢٣ (٣/١١) بشأن الرد على استفسارات المعهد العالمي للفكر الإسلامي واشنطن،[٤٨] كما أنه أباح استعمال المشيمة والأدوية التي تُستخرج منها للأغراض الطبية أخذاً بالضرورة.[٤٩]

---

[٤٦] خطاب، حسن السيد، **الضرورات تبيح المحظورات وتطبيقاتها المعاصرة**، (مجلة الأصول والنوازل، العدد ٢، ١٤٣٠ هـ)، ص ١٧٥ – ١٨٤.

[٤٧] أنظر مثلاً: الزحيلي، وهبة، **نظرية الضرورة الشرعية، مقارنة مع القانون الوضعي**، (دمشق: دار الفكر، ط ٤ ،١٩٩٧)، ص ٦٣- ٦٤، والطريقي، مرجع سابق، ص ٤٢٥ – ٤٧٨.

[٤٨] القرار الصادر عن الدورة الثالثة للمجمع المنعقدة في عمان الأردن في الفترة من ١١-١٦ أكتوبر ١٩٨٦، مجلة المجمع العدد الثالث، ج٢، ص ١٠٨٧.

[٤٩] مجلة مجمع الفقه الإسلامي، العدد السادس، السنة الرابعة، ١٩٩٢، ص ٣٢٠.

وبالنظر إلى القرارات المتقدِّمة، نُشير إلى أن المجمع يأخذ بحالة الضرورة في الدواء دون الغذاء، حيث أنه وفي الوقت الذي يُبيح المحرمات المتقدَّمة لأغراضٍ علاجية، إلا أنه كان قد رفض إعمال الضرورة في الغذاء الدي يحتوي على الخمائر الخنزيري والجلاتين الخنزيري لعدم وجود ضرورة وذلك بمعرض ردِّه على استفسارات المعهد العالمي للفكر الإسلامي بواشنطن (السؤال الثالث عشر)، بالإضافة إلى ما جاء في قراره رقم ٢١٠ (٢٢/٦) المشار إليه، والذي نص في الفقرة السادسة منه على أنه لا يجوز استخدام دهن الخنزير لانتفاء الاضطرار إليه، وهو ما يبرُز أهمية التفرقة بين المنتجات موضوع الدراسة.

حيث إن حالة الضرورة في الغذاء، تختلف عنها في الدواء، وعنهما في مستحضرات التجميل، حيث إنه وإن كانت هناك موجبات لإعمال الضرورة في الدواء، إلا أنها تكون نادرة في الغذاء، ومنعدمة في مستحضرات التجميل والعناية الشخصية لكونها من الكماليات.

كما أنه وفي الدواء أيضاً يجب التفرقة بين حالة المرض للقول بالضرورة. فالضرورة في الأمراض الخطيرة والفتَّاكة ليست هي في الزكام ونزلات البرد كما جاء في القرار المتقدِّم. كما أن مسألة أثر الدواء في تسريع الشفاء وتأخيره التي يؤخذ بها كأساس لإباحة الدواء الذي يشتمل على مُحرَّم لطالما كان يُعجِّل الشفاء ويُقرِّره طبيب ثقة[٥٠]هي أيضاً محلّ نظر من قبل الباحث.

حيث أن التوسّع في القول بالضرورة في المعايير المتقدِّمة يتجاوز الاشتراطات الشرعية للضرورة، كما أنه يستند إلى أُسس تفتقر إلى أي تنظيم قانوني، فالطبيب الثقة

---

[٥٠] أبوفارس، حمزة، **حكم الإنتفاع بالمواد المحرّمة**، الملتقى الدولي الحادي عشر حول الصناعات الغدائية بين أحكام الشريعة الإسلامية ومتطلبات السوق، (المواد المستوردة والمضافة نمودجاً)، ٢٦-٢٧ مايو ٢٠٠٩، جامعة الجزائر كلية العلوم الإسلامية، ص ١٨.

الذي يُعوَّل عليه كمرجِع في وصف الدواء لا وجود له من الناحية القانونية، اللهم إلا لمحاولة التَّخلُّص من المسئولية والإلقاء بها على عاتق طرف آخر، حيث أنه لطالما كان الطبيب بالفعل هو حلقة الوصل بين المريض وحالة المرض تخضع لسلطته التقديرية، إلا أن مفهوم الطبيب الثِّقة يقتضي تقنيناً يُتيح إلقاء المسئولية عليه بما يحمي أطراف العلاقة والمضمون الشرعي للحلال، وهو ما يقتضي في نظر الباحث إيجاد آليات قانونية لتقنين الطبيب الثقة وفقاً لمعايير الحلال وسنّ ميثاق للأخلاقيات في هذا الجانب، أما مُجرَّد القول بما يُقرِّره طبيب ثقة هو قول يستوي والعدم من الوجهة القانونية.[٥١] أما بشأن تقنين الضرورة يوصي الباحث بإعادة النظر فيها بحيث تبقى مسألة تقديرية يُصار إليها عند التطبيق.

عموم البلوى *(Umumul Balwa)*

عموم البلوى لغةً مُصطلح مُركَّب من مقطعين؛ عموم ومصدره عَمَّ، ويعني الشمول والجمع، والبلوى من الابتلاء والبلاء، وتعني الاختبار والمحنة[٥٢]. اصطلاحاً هو شيوع المحظور أو البلاء شيوعاً يصعب على المرء التخلص منه أو الابتعاد عنه مما يقتضي التيسير في الأحكام والعبادات،[٥٣] ويستند مفهوم عموم البلوى إلى أدلَّةٍ متعدِّدة منها حديث كبشةُ بِنت كعب أن أبا قتادة دخل فسكبت له وضوءًا فجاءت هِرَّةٌ فشربت

---

[51] Imam Mawardi, "Islamic Law and Imperialism: Tracing on The Development of Islamic Law In Indonesia and Malaysia," *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 1 (2018): 1, https://doi.org/10.19105/al-ihkam.v13i1.1583.

[٥٢] الزبيدي، محمد بن محمد بن عبد الرزاق المرتضى، **تاج العروس من جواهر القاموس**، (الكويت: الثرات العربي، ب.ط، ١٩٦٥)، جزء ٣٣، ص ١٤٩، وجزء ٣٧، ص ٢٠٦.

[٥٣] الزحيلي، وهبة، **نظرية الضرورة الشرعية**، مرجع سابق، ص ١١٥.

منه فأصغى لها الإناء حتى شربت، فقالت كبشة: فرآني أنظر إليه، فقال: أتعجبين من هذا يا ابنة أخي؟ فقلت: نعم، فقال: إن رسول الله ﷺ قال: (إنها ليست بنجس، إنها من الطوَّفين عليكم والطوَّافات)،[٥٤] ووجه الدلالة منه أن النبي ﷺ اعتبر شيوع الابتلاء بملامسة الهِرَّة الطوَّافة أمرًا يُخَفَّفُ عنده، فلا يقال بنجاسة ما تلامسه.

ويشهد مفهوم عموم البلوى خِلافاً فقهياً حول الضابط الشرعي لإعماله، فيُعبَّر عنه جانب من الفقه بما لا يُدرك بالطرف أو بالقليل التافه، ومنه من يُنيطُهُ بجانب الشيوع فيه، فيجعل الضابط هو عُسر الانفكاك منه، ومن الفقه أيضاً ما يجمع بينه وبين الضرورة، ولعلَّه من الأحوط للقول بها الجمع بين عموم البلوى وصعوبة التحرُّز منها[٥٥]، حيث لا يُصار إلى عموم البلوى إلا إذا كانت قائمة فعلاً وتعسَّرَ بالفعل التحرُّز منها بمشقَّةٍ بالغة تقتضي التخفيف[٥٦]، أما إذا كانت بسبب تساهل من المرء، أو ترخُّص منه أو كانت بمقدور البعض التَّحرُّز منها فلا اعتبار لعموم البلوى.[٥٧]

أما عن موقف معايير الحلال من هموم البلوى، نُشير إلى أن مجمع الفقه الإسلامي الدولي قد أخذ بها في معاييره وفقاً لما جاء في قراره رقم ٢١٠ (٢٢/٦) المشار إليه بالاستناد إلى عموم البلوى كأساس لإباحة الأغذية التي يدخل في تركيبها الكحول لغرض إذابة بعض المواد أو غيرها من الاستخدامات الصناعية، أما بالنسبة

---

[٥٤] المباركفوري، محمد بن عبدالرحمن بن عبدالرحيم، **تحفة الأحوذي بشرح الترمذي**، ج١، (بيروت: دار الكتب العلمية، ب.ط، ب.ت)، ص ٢٦٢.

[٥٥] الدوسري، مسلم، **عموم البلوى، دراسة نظرية تطبيقية**، (الرياض: مكتبة الرشد، ب.ط)، ص ٦٥ – ١٣٧، وكوارع، مصعب محمود، **عموم البلوى وأثرها على خبر الواحد**، (ماجستير غير منشورة: الجامعة الإسلامية غزة، كلية الشريعة والقانون، ٢٠١٠)، ص ٣٤- ٤١.

[٥٦] الدوسري، نفس المرجع، ص ٦١.

[٥٧] الدوسري، نفس المرجع، ص ٣٣٨، وص ٣٤٧.

للمعايير الماليزية، فإنه وإن لم يتوقَّف الباحث عن موقفها بشكل دقيق، إلا أن المجلس الوطني الماليزي للفتوى في سابقة له تتعلَّق بما يُعرف بـ (قضية كادبوري)،[٥٨] قد أشار إلى أن انتشار الحمض النووي للخنازير في المنتجات هو من عموم البلوى الذي لا يُمكن التحرُّز منه والذي لا يَمُسّ من حقيقة المنتَج بأنه حلال.[٥٩]

وهو ما بات سائداً من حيث إذا جُهِل حال ما تحتوي عليه المنتجات ولم يُعرف ما إذا كانت تحتوي هذا مكونات مُحرَّمة وعمَّت البلوى بذلك ومسَّت حاجة الناس إلى هذه المواد جاز تناولها.[٦٠]

إلا أن ذلك يراه الباحث توسُّعاً في القول بعموم البلوى بما يتجاوز شروطها، حيث إنه وإن باتت المحرَّمات تُستخدم على نطاق واسع في المنتجات، فإن ذلك لا يُبرَّر تقنينها في معايير الحلال، بل على العكس من ذلك يجب النص في معايير الحلال على حظر المشتقَّات المحرّمة في منتجات الحلال بأي شكل من الأشكال مع التدقيق على ذلك في الكشف من الناحية الفنية والرقابية، أما ما يتجاوز ذلك فيكون من

---

[٥٨] وهي قضية تعود إلى إعلان وزارة الصحة الماليزية في ٢٣ مايو ٢٠١٤ اكتشاف الحامض النووي للخنزير في منتجات للشيكولاتة تابعة لشركة (كادبوري) وهو ما أدى إلى حملة واسعة ضد منتجات الشركة من منظمات حماية المستهلك، إلا أنه في الثاني من يونيو أعلن جاكيم خُلوّ المنتجات محل البحث من أي مشتقات للخنزير، أنظر:

Jaques, T 2015, 'Cadbury and pig DNA: when issue management intersects with religion'Corporate Communications, vol. 20, no. 4, Link to https://dx.doi.org/10.1108/CCIJ-10-2014-0066 , 468-482.

[59] Nurhafilah Musa and others, The Cadbury Controversy: Blessings in Disguise?, Contemporary Issues and Development in the Global Halal Industry, Selected Papers from the International Halal Conference 2014, published by Springer Nature, ISBN 978-981-10-1450-5, 99-100.

[٦٠] إدريس، عبد الفتاح، **استخدام الجلاتين الخنزيري في الغذاء والدواء**، (مجلة البحوث الفقهية المعاصرة، السنة ٨، العدد ٣١، ١٤١٧ هـ)، ص ٢٩.

عموم البلوى قد ينال المستهلك المسلم فيه بعفو ربّه، أما القول بخلاف ذلك فهو تقنين للحرام في المنتجات الحلال.

وفي ختام الاستثناءات التي تَرِدْ على المصادر الشرعية لتقنين الحلال والمتمثِّلة في الاستحالة والاستهلاك والضرورة وعموم البلوى، كانت قد وُظِّفت بشكل واسع للتَّيسير لنفاد المحرَّمات إلى المنتجات الحلال على الرغم من الخلافات الفقهية الدائرة حولها، أو من حيث افتقارها إلى أُسسٍ علمية، وخصوصاً مسألتي الاستحالة والاستهلاك، وهي في مجملها أحوال تقع في الحدَّ الفاصل بين الحُرمةِ والحِلّ، بحيث إن لم تُوقَع بالمنتَج الحلال في الحُرمة فهي توقَعُ به في الشَّكَّ والشُّبهة التي تُوقَعُ في الحُرمة، حيث جاء في حديث النعمان ابن بشير الذي رواه الشيخان أنه قال: سمعت رسول الله يقول : "إن الحلال بيّن والحرام بيّن وبينهما مشَّبهات لا يعلمها كثيرٌ من الناس، فمن اتقى المشَّبهات استبرأ لدينه وعرضه ومن وقع في الشبُهات كراعٍ يرعى حول الحمى يوشك أن يوقعه ألا وإن لكل ملِكٍ حمى ،ألا إنَّ حمى الله في أرضه محارمه".[٦١]

وتحرّياً للحلال في المنتجات يرى الباحث النأي عن مواطن الخلاف والشكّ في المصادر التي يتأسس عليها تقنين الحلال فيها أخذاً بالأحوط حفظاً للنَّفس واستبراء للدين ودِرءاً للريب[٦٢] عملاً بحديث النبي ﷺ "دع ما يُريبك إلى ما لا يُريبُك"، أو كما قال الصحابي الجليل عمر الفاروق رضي الله عنه (كُنا نَدَعْ سبعين باباً من الحلال مخافة الوقوع في الحرام)،[٦٣] وفي هذا الجانب نُشِيد بالسياسة التشريعية التي أتَّبَعَها المشرَّع الماليزي في تقنينه لشروط الذكاة من حيث اشتراطه لقطع الحلقوم والمريء

---

[٦١] رواه البخاري في كتاب الإيمان، **باب فضل من إستبراء لدينه**، ج١، ص ١٦.

[٦٢] ابن تيمية، **مجموع الفتاوى**، مرجع سابق، ج١٠، ص ٦١٥.

[٦٣] الخليلي، أحمد بن حمد، **الفتاوى**، مرجع سابق، ص ٣٣٣.

والودجين،[٦٤] وعدم الاكتفاء بقطع الحلقوم والمريء على الرغم من إجازة المذهب الشافعي[٦٥] المعتمد في ماليزيا،[٦٦] كما أنَّه وفي سابقة أُخرى لم يجِدُها الباحث عند غيرِه، قد قنَّن الشكّ كَسَبَبْ لرفض منح شهادة الحلال إذا حصَل شَكّ في المكونات من الوجهة الشرعية[٦٧]، وهو ما يوصي الباحث بالأخذ به في كافة معايير الحلال.

خاتمة

ومن خلال ما تقدّم يتبين أن معايير الحلال دأبت على تقنين الاستحالة والاستهلاك وحالة الضرورة وعموم البلوى في أحوالٍ متعدِّدة بشكل مُطلق، مما ينوّه معه الباحث إلى الاحتراس من تقنين هذه الأسس مخافةً من إمكانية استغلالها استغلال سيئ يُسيئ بالمستهلك المسلم بالدرجة الأولى، ويُفقد الثقة والمصداقية في صفة الحلال في المنتجات مما يُقوّض قطاع الحلال بِرمّته، ويُوصي بالنأي عن مواطن الخلاف الفقهي ميلاً نحو الأوثق والأسلم.

المراجع

Abdurrahman Ben Naser Ben Al-Sa'dy. *Taysir al-Karem al-Rahman fi Tafsir Kalami al-Minan*. Al-Muassah al-Risalah, 2000.

---

[٦٤] MS: 1500: 2009, op. cit, (2.5).

[٦٥] الشافعي، محمد ابن إدريس، **الأم**، ج٢، (ب.م.ن: دار المعرفة، ب.ط، ١٩٩٠)، ص ٢٦٠.

[٦٦] نورالهدى، محمد فردوس، **آثار الظروف الإجتماعية على الفتاوى الشرعية؛ ماليزيا أنموذجاً**، (ماليزيا: مركز البحوث بالجامعة الإسلامية العالمية ماليزيا، ط١، ٢٠٠٣)، ص ١٣٥.

[67] Manual Procedure for Malaysia halal certification (Third revision) 2014, Published in Malaysia by: Jabatan Kemajuan Islam Malaysia (JAKIM), first published in 2015, Jabatan Kemajuan Islam Malaysia, (MPPHM 2014), (4.8).

Abdurrahman. *Syahadatu al-Halal fi Qithai Shina'ati al-Muntijati al-Zira'iyah*. Muntada al-Buhus al-Iqtishadiyah al-Zira'iyah. Ishdaru 34, No. 1, July 2006.

Abu Al-Mudzhar Mansur Bin Muhammad Bin Al-Jabbar Al-Sam'ani. *Qawathi' al-Adillah fi al-Ushul*. Vol 1, Beirut: Dar el-Kotob el-Ilmiah.

Abu Malik Kamal Bin Sayyid Salim. *Fiqh al-Sunnah li al-Nisa'*.

Ahmadi Miru. *Ahkam Dhamanu al-Mustahlek*. Jakarta: Syirkat Raja Grafindo Persada, 2008.

Al-Jurjani, Ali Ben Muhammad Ben Ali. *Tahqiq Ibrahim Al-Bayri*, Beirut: Dar al-Kotob al-Araby. Vol. 1, 1405.

Al-Qanun Raqm 33 Sanah 2014 AD fi Sya'ni Dhaman al-Muntij al-Halal.

Al-Shabuni, Muhammad Ali. *Shafwatu al-Tafasir*. Beirut: Dar el-Fikr, Vol. 1.

Al-Wizarah li Al-Syuun al-Diniyah. *Irsyadat Shahadat al-Halal*. Jakarta: Al-Wizarah li al-Syuun al-Diniyah, 2003.

Grinda, Wakalah Fahs al-Ghida' wa al-Dawa' wa al-Aghdiyah – Adwa Majlis al-Ulama' al-Indunisi. *Min Syahadati al-Halal Ila Ilshaqiha*. Jakarta: Pustaka Jurnal Halal, 2008.

Hakim, Luqman. *Dissecting the contents of law of Indonesia on Halal Product Assurance, Indonesia Law Review*. (January-April 2015)

Ibn Al-Araby, Abu Bakr Muhammad bin Abdullah. *Ahkam al-Qurani*. Beirut: Dar Al-Fikr, Vol. 2.

Ibn Katsir, Abu al-Fida'ah Ismail Ben Umar. *Tafsir al-Quran al-Adzim*. Vol 1, Dar el-Thaibah, 1999.

Majlis Ulama Indonesia. *Nidzam wa Ijra' Ishdari Fatwa al-Muntijadi al-Halal*, Jakarta.

Masyru' al-Marafiq wal Baniyah al-Tahiyah Li Muntijati al-Halal, Al-Idarah al-'Ammah Li Irsyadi al-Mujtama' wa Tanfidz al-Haj. *Al-Irsyadat al-Faniyah li Nidzami Intaji al-Halal*. Jakarta: Al-Wazirah li al-Syuun al-Diniyah, 2003.

Muhammad Ruwas Qal'aji wa Muhammad Sadiq Qanuni. *Mu'jam Lughatu al-Fuqaha'*. Beirut: Dar al-Fikr, Vol. 1, 1985.

Nafis, M Cholil. "Damânu Muntijah Al-Halâl Li Himayati Huqûq Al-Mustahlikîn." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 15, no. 2 (2020): 301–26.

Nasution. *Ahkam Dhamanu al-Mustahlikin: Muqaddimah*. Jogjakarta:

2001.Mawardi, Imam. "Islamic Law and Imperialism: Tracing on The Development of Islamic Law In Indonesia and Malaysia." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 13, no. 1 (2018): 1. https://doi.org/10.19105/al-ihkam.v13i1.1583.

Nafis, M Cholil. "Damânu Muntijah Al-Halâl Li Himayati Huqûq Al-Mustahlikîn." *AL-IHKAM: Jurnal Hukum & Pranata Sosial* 15, no. 2 (2020): 301–26.

Qarar Wazirah al-Syuun al-Diniyah, Raqm 519 'Am 2001 Tarikh 30 Min November 2001 M. *Bi Sya'ni Al-Wakalah al-Munfidzah li Hukumati al-Aghdiyah al-Halal*.

Qarar Waziru al-Din, Raqm 982 'Am 2019. *Bisya'ni Khadamat Syahadati al-Halal*.

Riyaz, Khudri. *Intaj al-Tha'am al-Halal*. Florida: 2004.

https://www.moeslimchoice.com/read/2019/12/06/29978/kemenag-terbitkan-kma-982-tentang-layanan-sertifikasi-halal

https://bisnis.tempo.co/read/1060737/2020-penduduk-ri-tembus-271-juta-orang-bps-sensus-kian-berat/full&view=ok

https://databoks.katadata.co.id/datapublish/2019/09/24/berapa-jumlah-penduduk-muslim-indonesia

al-Ihkam: Jurnal Hukum dan Pranata Sosial, 16 (1), 2021: 254-276
ISSN: 1907-591X, E-ISSN: 2442-3084
DOI: http://doi.org/10.19105/al-lhkam.v16i1.5024

Dawâbit Al-Igtiyâl al-Ma'nawî fi al-Fiqh wa al-Qânûn al-Indûnîsî: Dirâsah Muqâranah Tahlîliyah

Imam Sujoko
Universitas Islam Negeri (UIN) Syarif Hidayatullah Jakarta
Email: imamsujoko@uinjkt.ac.id

Hossam el-Dien Ibrahim el-Safy
International Islamic University Malaysia
Email: hossam@iium.edu.my

Muntaha Artalim Zaim
International Islamic University Malaysia
Email: muntaha@iium.edu.my

Article history: Received: January 3, 2020, Accepted: May 10, 2021, Published: June 27, 2021

Abstract:

This study purposes to analyze the issue of character assassination in perspective of Islamic Jurisprudence and Indonesia's Law. Many people get involved in the criminal case on character assassination. Different ways in understanding and interpretating the meaning of character assassination are main problem in this article. It particularly focuses on the measurement of character assassination in Islamic Jurisprudence and Indonesia's Law. This study is based on library research referring to books, journal articles, and official sites related to the topic. The data was then described and analyzed with the approach of Islamic Jurisprudence and Indonesia's Law. The result of the study shows that character assassination should have measurements, as a standard of evident in which any practice of character assassination issue must be referred to. Additionally, there are some exceptional cases in which the practice of character assassination is permissible juridically and legally for Maslahah (advantage).

Author correspondence email: imamsujoko@uinjkt.ac.id
Available online at: http://ejournal.iainmadura.ac.id/index.php/alihkam/

Keyword:
Measurement; Character Assassination; Islamic jurisprudence; *Maslahah*.

ملخص:

تهدف هذه الدراسة إلى تحليل قضية الاغتيال المعنوي في منظور الفقه الإسلامي والقانون الإندونيسي. يتورط كثير من الأفراد في القضايا الجنائية بدعوى الاغتيال المعنوي. اختلاف طرق فهم وتفسير معنى الاغتيال المعنوي هي مشكلة أساسية في هذه الدراسة. فكيف حقيقة الإغتيال المعنوي وضوابطه في الفقه والقانون؟ تستند هذه الدراسة إلى البحث المكتبي حيث ترجع إلى المراجع المكتبية من الكتب والمجلات والمقالات والمواقع الرسمية، وذلك بطريقة الاستقراء والتوصيف ثم قام بتحليلها بمنظور الفقه الإسلامي والقانوني. تشير الدراسة إلى النتيجة بأن الاغتيال المعنوي لابد من الضوابط التي هي عبارة عن المعيار يرجع إليها عند إثبات قضية الاغتيال المعنوي. فليس هناك أي دعوى إجرام الاغتيال المعنوي إلا بالرجوع إلى تلك الضوابط، وإن كان هناك حالات استثنائية يسمح فيها عملية الاغتيال المعنوي فقهيا وقانونيا قائم على المصلحة.

الكلمات المفتاحية:

الضوابط؛ الاغتيال المعنوي؛ الفقه الإسلامي؛ القانون؛ المصلحة

مقدمة:

الجريمة لها صور متنوعة فمنها جريمة مادية ملموسة مثل السرقة وشرب الخمر وقطع الطريق والبغي والزنى وغيرها من الاعتداءات على النفس أو دون النفس، وأخرى معنوية مثل الفتنة، والقذف، والاستهزاء على الرموز الدينية، والإشاعات الكاذبة، وحملة السوداء (Black Campaign)، وحملة السلبية (Negative Campaign)، على الآخرين، والاغتيال المعنوي للأفراد أو الجماعة؛ ومن ناحية الكيفية، فالجرائم منها ما

تكون عن طريق المباشر وأخرى غير المباشر، بمعنى أن من الجرائم يقصد منها حقيقة إيقاع تلك الجريمة والاعتداء الجسدي على المجنى عليه، ومنها قد يقصد أمرا آخر وراء تلك الجريمة، فهي تكون وسيلة للوصول إلى غرض آخر وراء الظاهر، أو أن فاعل الجريمة ليس صاحب الغرض، وإنما هو أجير لفعل الجريمة.

فقضية الاغتيال المعنوي هي جانب من صور الجريمة المعنوية، وهو أيضا من الظواهر الموجودة في العصور القديمة ويظل يستمر إلى الآن غير أن وسائله تختلف وتتغير حسب الظروف وتطور الزمان، وفي مثل هذا العصر مع تقدم العلوم والتكنولوجيا يستخدم الاغتيال المعنوي وسائل الإعلام والشبكات الإلكترونية والإنترنت، والشبكات الاجتماعية، وكثيرا ما تقع ممارسة الاغتيال المعنوي في قضايا الديانة والسياسة.

وموضوع الاغتيال المعنوي (character assassination) يتعرض على الأمور المعنوية مثل العرض والسمعة والسلوك والمنزلة والمكانة، سواء كان على الأفراد أو الجماعة، والعرض في الفقه الإسلامي له مكانته السامية والرفيعة، وأدخله بعض العلماء من المقاصد في رتبة الضروريات،[١] والبعض الآخر جعلوه من ضمن الحاجيات كما قاله ابن عاشور في كتابه مقاصد الشريعة.[٢]

ولكن ليس كل ما في ظاهره اغتيال معنوي يعتبر اغتيالا معنويا، كما جرى في علم الجرح والتعديل، حيث وضع علماء الحديث مصطلحات تحتوي فيها تجريح على الرواة في تصوير أحوال شخصيتهم مثل مصطلح "لين"، و"ليس بثقة"، و"متهم

---

[١] حسن بن محمد بن محمود العطار الشافعي، **حاشية العطار على شرح الجلال المحلي على جمع الجوامع**، (بيروت: دار الكتب العلمية، د.ط، د.ت)، ج٢، ص٣٢٣.

[٢] محمد الطاهر بن عاشور، **مقاصد الشريعة الإسلامية**، تحقيق: محمد الطاهر الميساوي، (الأردن: دار النفائس، ط٢، ١٤٢١هـ/٢٠٠١م)، ص٣٠٥.

بالوضع"، و"الكذاب"، و"الدجال"،[٣] ولكنها لا تعتبر اغتيالا معنويا، وكذا ما اشتهر في السيرة أن النبي صلى الله عليه وسلم لقب عمر بن هشام بأبي جهل، كما ورد في دعائه صلى الله عليه وسلم «اللهم أعز الإسلام بأحب هذين الرجلين إليك بأبي جهل أو بعمر بن الخطاب»،[٤] وهل معنى ذلك يجوز إسقاط شخصية غير المسلم لغرض معين أو في حالة معينة؟، وكذا ما جرى في المجتمع من نشر الأخبار والمعلومات عن أشرار شخص معين فإنه لا يعتبر استهزاء ولا ازدراءا إذا كان لأجل المصلحة العامة[٥] أو حمايتهم عن شرهم أو دفاع عن نفسهم،[٦] فأتاح القانون حرية إبداء الآراء، ولكن في نفس الوقت صدر قانون عن تجريم الازدراء والاستهزاء وبث العداوة، فقد يكون شخص أبدى رأيه في الشبكة الاجتماعية تعليقا أو تعقيبا عن أشرار شخص معين يريد من ذلك تحليلا على الحادثة أو إعلاما للآخرين عن خطورة ذلك الشخص، ولكن يدعى بدعوى جرائم الازدراء، وإسقاط سمعة الفرد، وقتل شخصية الإنسان، فهنا يبقى السؤال ما هي حقيقية الاغتيال المعنوي، وما هي ضوابطه في نظر الفقه الإسلامي والقانون الإندونيسي؟

---

[٣] شمس الدين أبو عبد الله محمد بن أحمد بن عثمان بن قايماز الذهبي، ذكر من يعتمد قوله في الجرح والتعديل، تحقيق: عبد الفتاح أبو غدة (بيروت: دار البشائر، ط٤، ١٤١٠هـ/١٩٩٠م)، ص١٧٤.

[٤] محمد بن عيسى بن سورة بن موسى بن الضحاك، الترمذي، أبو عيسى، سنن الترمذي، تحقيق وتعليق: أحمد محمد شاكر، محمد فؤاد عبد الباقي، وإبراهيم عطوة عوض المدرس في الأزهر الشريف (القاهرة: شركة مكتبة ومطبعة مصطفى الباجي الحلبي، ط٢، ١٣٩٥هـ/١٩٧٥م)، ج٥، ص٦١٧، باب في مناقب أبي حفص عمر بن الخطاب رضي الله عنه.

[5] Muhammad Taufiq, "A Critique against the Perspective of Al-Thufy on the Contradiction of Maslahat and the Holy Text," *Millati: Journal of Islamic Studies and Humanities* 5, no. 2 (2020): 121–28, https://doi.org/10.18326/mlt.v5i2.121-128.

[6] Kitab Undang-Undang Hukum Pidana (KUHP)

فتهدف الدراسة إلى الإجابة على هذه المشكلة، وهي معرفة حقيقة الاغتيال المعنوي، وضوابطه وإعطاء الضوء على القضية الموجودة من منظور الفقه الإسلامي مقارنا بالقانون،[٧] والأهمية من ذلك ليفهم القارئ والناس عموما عن ماهية الاغتيال المعنوي، والضوابط التي تكون معيارا في إثبات الاغتيال المعنوي حتى لا يقع الناس فيه ويحذر منه، ولئلا يكون فيه تفريط وإفراط في قضية الاغتيال المعنوي.

والمنهج المتبع في هذه الدراسة هو المنهج الوصفي والاستقرائي، وذلك بجمع المعلومات من المصادر والمراجع المكتبية من الكتب والمجلات والمقالات المتعلقة بالموضوع ثم تحليل تلك المعلومات بنظر الفقه الإسلامي والقانون الإندونيسي.

نظرية عامة عن مفهوم الاغتيال المعنوي

مصطلح الاغتيال المعنوي أو ما يعبر عنه في اللغة الإنجليزية ب–" Character Assassination"، لم يكن مقررا في كتب الفقه، فلذا لم يكن هناك تعريف عند الفقهاء القدامى، ولأن هذا المصطلح يعتبر مصطلحا حديثا، فبالتالي بعض تعريفات المعاصرين؛

عرف جلال الحسين الاغتيال المعنوي هو "وسيلة لدفع الأشخاص والهيئات إلى الإحباط والاكتئاب والعزلة والجمود ويحدث ذلك غالبا عن طريق التضليل و إعطاء صورة سلبية مكذوبة أو رسم صورة بشعة مغايرة للصورة الحقيقية أو قد يحدث ذلك أحيانا عن طريق تحري الصدق و به تكشفت الحقائق و يتم إبراز الصورة السلبية

[7] Husnul Haq and Arif Ali Arif, "Istighlâlu Barâati Al-Ikhtirâ' Fî Al-Qânûn Al-Indûnîsî Dirâsah Fiqhiyah Taqwîmiyah" 15, no. 1 (2020): 117–52.

الحقيقية للشخص مثل كونه ظالم أو فاسد أو مستبد أو مرتشي أو غير ذلك من النواقص الأخلاقية".[٨]

وعرف ماجد بن مطر الجعيد الاغتيال المعنوي بأنه "قتل الطموح، وبث روح الإحباط، والذي يقوم على تشويه صورة الأشخاص وإضعافهم وإلصاق التهم التي تحط من قدرهم، واستعداء السلطة عليهم وتحوير مقاصدهم".[٩]

وعرف أبو الهيثم محمد درويش الاغتيال المعنوي بأنه "الاعتداء على حرمة إنسان أن يتم تشويه صورته مع بقاء أثر هذا التشويه ليصبح هو على الوجه القبيح".[١٠]

ورأى مصطفى النجار معنى الاغتيال المعنوي بأنه "تعمُّد الإضرار بشخصية المستهدَف وصورته السياسية والأخلاقية، ليتم استنزافه وإضعاف تأثيره في الجمهور من خلال التشكيك في مصداقيته أمام مجتمعه ومؤيديه ليصبح محل اتهام في عيون من حوله لتناله سهامهم".[١١]

وعرف أيريك شيرايف (Eric Shiraev) الاغتيال المعنوي هو "محاولة عمدية جدية في إلحاق الضرر على الآخر لغرض إفساد سمعته أو طابعه أو وضعه الاجتماعي أو إنجازاته".[١٢]

---

[٨] جلال الحسين، **القتل المعنوي**:
http://www.egyptwindow.net/Articles/23914/Default.aspx

[٩] ماجد بن مطر الجعيد، الاغتيال المعنوي: http://www.alriyadh.com/1637461

[١٠] أبو الهيثم محمد درويش، **الاغتيال المعنوي**: http://ar.islamway.net/article/54404/

[١١] مصطفى النجار، **فن الاغتيال المعنوي**:
http://www.almasryalyoum.com/news/details/190497

[12] Eric Shirev, *Character Assassination: an Interdisciplinary Approach* (George Mason University, USA).

ويستخلص من هذا بأن الاغتيال المعنوي هو ممارسة عمدية بإلصاق تهم أو صفات تحط من قدر الأفراد أو الجماعة باستخدام الوسائل، سواء كانت هذه التهم أو الصفات حقيقية أو مختلقة أو بعضها حقيقي ولكن يتم تضخيمه، والهدف في النهاية هو كسر الهيبة وإضعاف الثقة وتقليل القيمة ومحو التأثير وغيرها.

وكذلك لم يكن في القانون الإندونيسي تعريف خاص لمصطلح الاغتيال المعنوي، ولكن صدرت المواد القانونية التي تنص على القضايا المتعلقة بالاغتيال المعنوي مثل جريمة الاستهزاء على الآخرين، وجريمة الازدراء على الأديان (Religious Blasphemy)،[١٣] وجريمة الحملة السوداء (Black Campaign)، والحملة السلبية (Negative Campaign) في قضية السياسة الانتخابية وقضية المزاحمة التجارية، وجريمة التزوير، وجريمة الغش، وغيرها من الجرائم المعنوية،[١٤] فمن خلال مدلولات تلك الجرائم المعنوية التي تشير إلى الاغتيال المعنوي يستنبط معنى الاغتيال المعنوي قانونيا بأنه محاولات لقتل شخصية الأخرين بوسائل معينة ولأهداف معينة.

وسائل الاغتيال المعنوي وصوره

تعددت وسائل الاغتيال المعنوي وكيفيته على حسب الوضع والظروف والأزمان والأهداف، فقد تختلف طريقة وكيفية في قضية عن قضية أخرى بسبب الظروف والأوضاع والأزمان والمستهدف. ومن الوسائل والكيفيات المستغلة في ممارسة الاغتيال المعنوي هي:

[13] Kitab Undang-undang Hukum Pidana (KUHP).

[14] Alfred B. David Dodu (2017). *Penerapan Regulasi Politik Kampanye Hitam: Studi Kasus Pada Pilkada Kabupaten Banggai tahun 2015*, (Jurnal Wacana Politik, Vol. 2, No. 1).

أولا: القول،[١٥] وهو أن يلقى أحد قولا يحتوي فيه عناصر الاغتيال المعنوي فرد أو مؤسسة، سواء كان يلقيها أمام الجمهور وانتشر هذا القول أو يلقيها إلى أفراد وتم انتشاره بعد ذلك، وحقيقة أنه يريد من ذلك قتل شخصية ذلك الفرد أو المؤسسة أو إسائتهم حتى يبقى في أذهان الناس أنهم في صورة سيئة، والمثال على ذلك عبارات الاستهزاء على الدين، أو على النبي أو الرموز الدينية الأخرى.

ثانيا: الكتابة،[١٦] وهي أن يكتب أحد كتابة يحتوي فيها عناصر الاغتيال المعنوي على الفرد أو المؤسسة ثم ينشرها سواء عن طريق تعليق تلك الكتابة على الجدران أو ينشرها في الجرائد والمجلات أو الشبكات الاجتماعية وغير وسائل الإعلام ثم تم انتشارها ويمكن لأي واحد أن يحصل أو يشكف تلك الكتابة.

ثالثا: الصورة،[١٧] وهو أن يأتي أحد بالصورة سواء كانت رسما أو فيديو (أفلام) يحتوي على عناصر الاغتيال المعنوي على الفرد أو الجماعة وينشره عبر وسائل الإعلام مثل راديو وتلفاز والمواقع الإنترنيت ثم تم انتشارها على الناس، والحقيقة يريد من ذلك قتل شخصية الفرد أو الجماعة، والأصل أن الخبر غير صحيح، أو أن الخبر فيه نوع من الصحة ولكن تم تضخيمها وتوسيعها إلى درجة ضاع فيه الأصل، والمثال على ذلك ما فعلت باميلا غيلر (Pamela Geller) قائدة منظمة "المبادرة الأميركية للدفاع عن الحرية"، حيث أقامت المعرض في ولاية تكساس وفيه مسابقة لرسوم كاريكاتيرية للرسول الكريم، وتسلحت المنظمة للدفاع عن هذه المسابقة بحرية التعبير، وما سخرت مجلة فرنسية شارلي أبدو الأسبوعية من النبي محمد بتصويره عاريا في رسوم كاريكاتيرية مما يهدد بإشعال غضب المسلمين حول العالم الذين أثار حفيظتهم بالفعل فيلم صوره

[15] Kitab Undang-undang Hukum Pidana, 562.
[16] Kitab Undang-undang Hukum Pidana (KUHP), 562.
[17] Kitab Undang-undang Hukum Pidana (KUHP), 563.

زير نساء. وتهدد الرسوم التي نشرتها مجلة شارلي أبدو الأسبوعية الساخرة بتفاقم الأزمة التي شهدت اقتحام سفارات أمريكية وغربية وقتل السفير الأمريكي في ليبيا وتفجير انتحاري في أفغانستان.[١٨]

أهداف الاغتيال المعنوي

بناء على مفهوم الاغتيال المعنوي فإن له أهداف وهي قتل الشخصية سواء كانت شخصية الأفراد أو المؤسسات، وقد يكون بعد ذلك الهدف غرض آخر أساسي على حسب المجالات، وهي:

أولا: قتل الشخصية لجلب شعور عداوة الناس على المستهدف،[١٩] وهو يعتبر الهدف الأساسي من الاغتيال المعنوي كما أنه قد يكون الغرض الأساسي الأخير من الأغتيال المعنوي، بمعنى أن المستهدف من الاغتيال المعنوي صار على صورة قبيحة وسيئة أمام أعين الناس حتى يغضبوا ويبغضوا عليه ويلقوا عليه العداوة، ويتراجعون عن تأييده وتعزيزه إن كان من أهل المكانة والمنزلة، ثم سقطت سمعته ويبقى على ذلك أمام الجمهور.

ثانيا: تحقيق غرض الآخرين: هذا من أنواع الغرض من الاغتيال المعنوي وهو لأجل تحقيق الغرض الآخرين بطريقة الاغتيال على خصمه، فصاحب ممارس الاغتيال هنا جهة ثالثة، بمعنى هي آلة أو وسيلة يستغل بها صاحب الغرض.[٢٠]

---

[١٨] أخبار، **مجلة فرنسية ساخرة تنشر رسوم كاريكاتير للنبي محمد**: https://yemen-press.com/news12596.html

[١٩] مصطفى النجار، **فن الاغتيال المعنوي**: http://www.almasryalyoum.com/news/details/190497

[٢٠] مصطفى النجار، **فن الاغتيال المعنوي**

ثالثا: إبطال حق الآخرين:[٢١] وهذا أيضا من أهداف الاغتيال وهو إبطال حق الآخرين. وصورة ذلك أن يقوم شخص أو مؤسسة بممارسة الاغتيال على الأفراد أو المؤسسات له حق في الحصول على منصب أو إنجاز ما، سواء في مجال السياسة أو الاقتصاد، فيمارس خصمه في ذلك باستغلال ما عليهم من النقائص اغتيالا معنويا لهم، حتى لا يصلح لهم أن يحصلوا على ذلك المنصب أو الإنجاز، وسبب ذلك إما للمصلحة العامة أو مصلحته الخاصة أو مجرد لوجود الخصومة بينهما.[٢٢]

رابعا: التخلص من حال إلى حال:[٢٣] من أهداف الاغتيال أيضا هو التخلص من حال معين إلى حال آخر أو غرض آخر، يعنى ذلك قد يكون شخص يقع في حالة سيئة من الحالات السياسية أو الاقتصادية أو حالة أخرى، فأراد التخلص من تلك الحالة بطريقة ممارسة الاغتيال المعنوي على شخص آخر أو مؤسسة، بدلا من حالته، أو ليلفت أنظار الناس إليها وانشغل عن حاله، وهذا ما يحدث كثيرا في مجال السياسة.

خامسا: الإشاعة: هذا أيضا من أهداف الاغتيال المعنوي، وصورة ذلك إما بنشر الأخبار الكاذبة عن مساوئ الآخرين أو تهمة قبيحة على الآخرين وينشرها على الجمهور، مثل ما حصل في حديث الإفك على أهل بيت رسول الله صلى الله عليه وسلم.[٢٤]

---

[21] Eric Shirev, *Character Assassination: an Interdisciplinary Approach*, (George Mason University, USA).

[22] Taufiq, "A Critique against the Perspective of Al-Thufy on the Contradiction of Maslahat and the Holy Text."

[23] Eric Shirev, *Character Assassination: an Interdisciplinary Approach*, (George Mason University, USA).

[٢٤] ابن كثير، أبو الفداء إسماعيل بن عمر بن كثير القرشي البصري ثم الدمشقي، **البداية والنهاية**، تحقيق: مصطفى عبد الواحد (لبنان: دار المعرفة، د.ط، د.ت)، ج٣، ص٣٠٤-٣٠٦.

هذه من أهداف ممارسة الاغتيال المعنوي، وإن كان ثبوت الاغتيال المعنوي لا يلزم وقوع هذه الأهداف.

نظرية الجرح والتعديل فيها عناصر الاغتيال المعنوي؟

الجرح والتعديل هو عبارة عن ممارسة ومحاولة لمعرفة أحوال الرواة أي حاملوا الأحاديث بطريقة اختبارهم عبر المعاملة معهم، فهم مجروحون إذا ساء خلقهم ودينهم، ويثنون عليه إذا حسن خلقهم ودينهم، ومن ذلك يعرف مراتبهم، فيتأثر في روايتهم، منهم من تقبل روايته ومنهم من ترد، والذين قاموا بالجرح والتعديل هم العلماء الذين هم حاملوا علم، والذين يختبرون بالجرح والتعديل هو الرواة،[٢٥] وفيه ضوابط يلتزم به علماء الجرح والتعديل وهي؛

أولا: إن للجرح والتعديل ألفاظ ومراتب؛ بمعنى إن في الجرح والتعديل ألفاظ معروفة استعملها العلماء، وقد يختلف البعض عن بعض في استعمال تلك الألفاظ، فلذلك لا بد لكل لفظ بيان معناه المقصود، ومن أمثلة مراتب ألفاظ الجرح والتعديل: لفظ ثقة، وصدوق، ولا بأس به، وكذلك في الجرح مثل ألفاظ الغفلة والوهم وسوء الحفظ والكذب واختراع الأحاديث الكاذبة، وغيرها.[٢٦]

ثانيا: في الجرح والتعديل علماء متخصصون؛ معناه ليس كل واحد يقبل قوله في الجرح والتعديل، فالذين قبل قولهم في الجرج والتعديل باعتبار القلة والكثرة على

[٢٥] حاتم بن عارف بن ناصر الشريف العوني، خلاصة التأصيل لعلم الجرح والتعديل (مكرمة المكرمة: دار عالم الفوائد للنشر والتوزيع، ط١، ١٤٢١هـ)، ص٦.

[٢٦] عبد العظيم بن عبد القوي بن عبد الله أبو عبد الله زكي الدين المنذري، جواب حافظ أبو محمد عبد العظيم المنذري المصري عن أسئلة الجرح والتعديل، تحقيق: عبد الفتاح أبو غدة (حلب: مكتب المطبوعات الإسلامية، دط، دت)، ٤٩.

ثلاثة أقسام؛ قسم تكلموا في أكثر الرواة كابن معين وأبي حاتم الرازي، وقسم تكلموا في كثير من الرواة كمالك وشعبة، وقسم تكلموا في الرجل بعد الرجل كابن عيينة والشافعي.[٢٧]

ثالثا: الجرح والتعديل قضية اجتهادية فهي ليس أمرا متفقا عليه بل مختلف فيه؛ بمعنى أن علماء الجرح والتعديل يختلفون كاختلاف الفقهاء، كل ذلك يقتضيه الاجتهاد، فأن الحاكم إذا شهد عنده بجرح شخص، اجتهد في أن ذلك القدر مؤثر أم لا؟، وكذلك المحدث إذا أراد الاحتجاج بحديث شخص ونقل إليه فيه جرح، اجتهد فيه هل هو مؤثر أم لا؟[٢٨]

رابعا: مجال الجرح والتعديل يكون فيما ظهر من الناس، ولا يبتحث عن السرائر؛ بمعنى أن ممارسة الجرح والتعديل ليست التجسس أو الاغتياب، وإنما يختبر ما هو ظاهر من الخلق والعمل الديني، فعلى هذا وضع بعض العلماء حدود الجرح والتعديل وهو أن حد العدل في المسلمين من لم يظهر به ريبة، أو للعدل بين المسلمين أو العدل في الشهادة الذي لم تظهر منه ريبة.[٢٩]

وبهذه ضوابط الجرح والتعديل والأهداف من عملية الجرح والتعديل والقائم بها والمجال الذي يمارس فيها، فهل يعتبر عملية الجرح والتعديل من الاغتيال المعنوي؟

---

[٢٧] شمس الدين أبو عبد الله محمد بن أحمد بن عثمان بن قايماز الذهبي، ذكر من يعتمد قوله في الجرح والتعديل، تحقيق: عبد الفتاح أبو غدة (بيروت: دار البشائر، ط٤، ١٤١٠هـ)، ص ١٧١.

[٢٨] المنذري، أسئلة الجرح والتعديل، ص٨٣.

[٢٩] عبد المنعم السيد نجم، ععلم الجرح والتعديل (المدينة المنورة: الجامعة الإسلامية، دط، دت)، ج١، ص٥٦.

ضوابط الاغتيال المعنوي في الفقه والقانون

الضوابط هي المعيار الذي يرجع إليها ثبوت الاغتيال المعنوي، وهي تنقسم إلى الضوابط العامة والضوابط الخاصة، فالضوابط العامة يرجع إليها جميع أنواع الجرائم، وبينما الضوابط الخاصة هي التي تختص بالاغتيال المعنوي:

أولا: وجود النص الشرعي أو القانوني، وهو ضابط عام لجميع الجريمة، بمعنى لا بد هناك النصوص الشرعية التي يدل ظاهرها أو مدلولها على أن تلك ممارسة أو عملية ما تعتبر اغتيالا معنويا، لأن القاعدة تقول: "لا جريمة بدون نص"،[٣٠] أي في منظور الفقه الإسلامي ليس هناك أي ممارسة تعتبر جريمة يعاقب عليها إلا إذا وجد النص الذي دل ظاهره أو مدلوله على أنها من الجرائم، ولأن الإنسان في الأصل براءة الذمة. ولم يكن هناك نص صريح يدل على قضية الاغتيال المعنوي، وإنما نصوص تشير إلى تحريم السباب، والسخرية، والاستهزاء، والقذف، وغيرها مما يدل على تحريم الجريمة على المعنوية، مثل الآية: وَلَا تَسُبُّوا الَّذِينَ يَدْعُونَ مِنْ دُونِ اللَّهِ فَيَسُبُّوا اللَّهَ عَدْوًا بِغَيْرِ عِلْمٍ..،[٣١] وحديث: «سباب المسلم فسوق، وقتاله كفر».[٣٢]

ثانيا: وجود الفعل المادي، وهذا أيضا شرط عام لجميع الجريمة،[٣٣] بمعنى أنه لا بد من وجود الفعل أو الممارسة أو العملية الملموسة أو المحسوسة أو المعنوي، فبالنسبة

---

[٣٠] الإمام محمد أبو زهرة، الجريمة والعقوبة في الفقه الإسلامي، (بيروت: دار الفكر العربي، د.ط، د.ت)، ص ١٤٠.

[٣١] سورة الإنعام: ١٠٨

[٣٢] محمد بن إسماعيل أبو عبد الله البخاري الجعفي، صحيح البخاري، تحقيق: محمد زهير ناصر بن الناصر (دمشق: دار طوق النجاة، ط١، ١٤٢٢هـ)، ج١، ص١٩، باب: خوف المؤمن من أن يحبط عمله وهو لا يشعر.

[٣٣] عبد القادر عودة، التشريع الجنائي الإسلامي مقارنا بالقانون الوضعي (بيروت: مؤسسة الرسالة، ط١٤، ١٤٢٢هـ)، ص١١١.

لقضية الاغتيال المعنوي لا بد من وجود العمل المكون للاغتيال أو يوجد العناصر المحتملة في ممارسة الاغتيال المعنوي، وهذه العناصر هي؛ **أولا**، عنصر العداوة[٣٤] بمعنى أن أية ممارسة أو عملية تعتبر اغتيالا معنويا بشرط إذا كانت تلك الممارسة أو العملية قائمة على العداوة أو وجد فيها عنصر العدواة بين المغتال والمغتال عليه، وهذا مما نص عليه الشرع في كل نوع من الجريمة بأن من شروط ثبوت الجريمة بين النفرين فأكثر لا بد من وجود العداوة بينهم، وإن لم يكن بينهم عداوة فلا يعتبر جريمة أصلية فتختلف العقوبة المترتبة عليها، كما في جريمة القتل إذا لم يكن فيها عداوة فيكون القتل خطأ أو شبه العمد،؛ **ثانيا**، عنصر التعيير أو الاستهزاء أو الازدراء وهو بأن يهجم شخص على الأفراد أو المؤسسات بقول أو كلمة أو صورة يحتوي فيها ذلك العنصر؛ **ثالثا**، عنصر الفتنة والتهمة،[٣٥] وهو من الأساليب التي يمارسها فاعل الاغتيال المعنوي، ويراد من ذلك جلب أنظار الناس على هذا المتهم أو المفترى عليه ليبقى في أذهانهم وتصورهم أنهم على تلك صورة قبيحة وسيئة، والحقيقة ليس كذلك؛ **رابعا**، عنصر إسقاط السمعة أو المروءة،[٣٦] ولأن مما استهدف من عملية الاغتيال المعنوي هو إسقاط السمعة والمروءة سواء كان أفرادا أو جاعة.

ثالثا: أن تتم إشاعتها للناس،[٣٧] بمعنى أن الممارسة أو العملية أو العناصر المحتملة فيها وهي العداوة الكذب والفرية والبهتان والتهمة تم نشرها وإشاعتها وتبشيعها على الناس، وأصبحوا يعتقدون على أن الأفراد أو المؤسسات على تلك الصورة المفترى عليها، وسواء كانت تلك الأخبار غير الصحيحة كلها أو أصلها صحيحة غير أنها تم

---

[٣٤] أبو زهرة، العقوبة، ص ١٤٠.

[35] Kitab Undang-Undang Pidana (KUHP), 562.

[36] KUHP

[37] KUHP

تضخيمها حتى خرجت عن موضوعها الأصلي بل ضاع أصلها وبقى الأخبار الإضافية المكذوبة، والمراد بتضخيم الأخبار هنا مثلا أن القضية المرتبطة بتلك الأفراد أو المؤسسات المغتال عليهم هي قضية قضائية حيث إن طريقة إنهاء المشكلة في المحكمة أو القضاء، ولكن يُستغلّ بها بالاغتيالات المعنوية لهدف ما.

الضوابط المتعلقة بالمغتال

المغتال هو الشخص الذي قام بممارسة الاغتيال المعنوي، ويعتبر مغتالا إذا توفر فيه ضوابط سواء كانت عامة أو خاصة وهي؛ **أولا**: الأهلية أو ما يسمى بالمسؤولية الجنائية: بمعنى أن فاعل الاغتيال المعنوي لا بد أن يكون له أهلية وهو قصد الجريمة ومدرك، وهو ضابط عام في جميع الشروط في الأحكام التكليفية سواء في العبادات والمعاملات، ولأن المجنون والصبي غير مكلفين، فلا يترتب عليهما أحكام تكليفية شرعية ولا أحكام قانونية وضعية، وهذا الضابط مبني على النص الشرعي «رفع القلم عن ثلاثة: عن النائم حتى يستيقظ، وعن المبتلى حتى يبرأ، وعن الصبي حتى يكبر».[٣٨]

ثانيا: العمد أو الخيار،[٣٩] بمعنى أن فاعل الاغتيال المعنوي لا بد أن يكون له خيار أو إرادة أو قصد من عند نفسه وليس مكرها أو تحت ضغط شخص آخر بأن يعمل أو يمارس هذه العملية الاغتيالية فلا يعد اغتيالا، لأن المكره لا يرتب عليه أحكام شرعية وكذا عند القانون الوضعي، وهذا الضابط قائم على النص الشرعي: مَنْ

---

[٣٨] أبو داود، سليمان بن الأشعث بن إسحاق بن بشير بن شداد بن عمرو الأزدي السِّجِسْتاني، **سنن أبي داود**، تحقيق: محمد محيي الدين عبد الحميد (بيروت: المكتبة العصرية، د.ط، د.ت)، ج١، ص٣.

[39] Yulia Kurniati, Agna Susila, Heni Hendrawati, *Unsur-unsur pidana dalam tindak pidana pencemaran nama baik melalui media online*, (5th urecol proceeding), 334.

كَفَرَ بِاللَّهِ مِنْ بَعْدِ إِيمَانِهِ إِلَّا مَنْ أُكْرِهَ وَقَلْبُهُ مُطْمَئِنٌّ بِالْإِيمَانِ..،[٤٠] وحديث «إن الله قد تجاوز عن أمتي الخطأ، والنسيان، وما استكرهوا عليه».[٤١]

ثالثا: الالتزام بالأحكام بمعنى أن يكون فاعل الاغتيال ممن يلتزم بالأحكام الشرعية أو القانون، أي عالم بالأحكام الشرعية أو القانون، لأن الجاهل بالأحكام أو لا يعرف بأن ما فعله ويمارسه مخالفا للأحكام الشرعية أو القانون الوضعي، فلا يعد جريمة أو لا يعد اغتيالا معنويا، كمن هو حديث عهد بالإسلام بحيث لم يفهم كثيرا عن أحكام الشريعة أو غير المسلم الذي يعيش في بلاد الإسلام،[٤٢] ولكن في القانون الإندونيسي لا يشترط أن يكون فاعل الاغتيال المعنوي من المواطنين، بل أي واحد يمارس الاغتيال المعنوي مهما كان ليس من أهل البلد فيرتب عليه العقوبة حسب القانون الموجود.[٤٣]

تحليل قضية الاغتيال المعنوي من ضوابطه الفقهي والقانوني

بناء على ما سبق من المعلومات من مفهوم الاغتيال المعنوي ووسائلها وأهدافها ونظرية الجرح والتعديل، فيلاحظ أن حقيقة الاغتيال المعنوي لابد من الضوابط ترجع إليها ولا يتحقق الاغتيال المعنوي إلا إذا توفر جميع العناصر في تلك الضوابط، وإلا فإن الاغتيال المعنوي يعد اغتيالا معنويا أو اغتيالا معنويا ناقصا. وتلك الضوابط تتعلق

---

[٤٠] سورة النحل: ١٠٦.

[٤١] ابن ماجة أبو عبد الله محمد بن يزيد القزويني، **سنن ابن ماجه**، تحقيق: محمد فؤاد عبد الباقي (فيصل عيسى الباجي الحلبي: دار إحياء الكتب العربية، د.ط، د.ت)، ج١، ص٦٥٩.

[٤٢] عبد القادر عودة، التشريع الجنائي الإسلامي، ج٢، ص٦٠٢.

[43] Kurniati, dkk, 334.

بعملية الاغتيال المعنوي نفسه، وبفاعل الاغتيال المعنوي وفي مجالات متنوعة، كما يتحقق الاغتيال المعنوي بالوسائل المتعددة ولأهداف متعينة.

وبالنسبة لنظرية الجرح والتعديل إذا ضبط بضوابط الاغتيال المعنوي فيستفاد بأن بين نظرية الجرح والتعديل والاغتيال المعنوي ليست بينهما علاقة مباشرة، ولكن بينهما جانب يتداخلان فيه، وهو كونهما يتكلمان عن معنوية الناس، ولكن نظرية الجرح والتعديل تبحث عن جانبي المساوئ والمحاسن من خلق الناس ودينه، بينمها الاغتيال المعنوي يلتمس جانب مساوئ الناس، ويختلفان في البواعث والدوافع والأغراض منهما، حيث إن الجرح والتعديل هو جزء من العلم ليعرف به منزلة الحديث الصحة من الضعف، وأما الاغتيال المعنوي له هدف وهو قتل شخصية الناس، وإسقاط سمعته، والإشاعة وإثارة الفوضى وغيرها من السلبيات. وإن كان من العلماء من يرى أن في عملية الجرح والتعديل فيه نوع من الاغتياب، فلذلك من علماء الجرح والتعديل من هو متساهل، ومنهم متشدد، ومنهم متوسط.

وعلى ذلك فحكم الجرح في الرواة جائز باتفاق أئمة الشأن صيانة للشريعة الإسلامية من أن يدخل فيها ما ليس منها، وهو من باب نصيحة لله ورسوله عليه السلام والمسلمين ولا يقف على معرفة ذلك إلا المحدث الصادق المشهور بطلب الحديث التقى الورع.

ومن الملاحظ، إن في القرآن بعض الآيات التي تفيد معنى الجرح والتعديل، مثل تعديل القرآن للصحابة: وَالسَّابِقُونَ الْأَوَّلُونَ مِنَ الْمُهَاجِرِينَ وَالْأَنْصَارِ وَالَّذِينَ اتَّبَعُوهُمْ بِإِحْسَانٍ رَضِيَ اللَّهُ عَنْهُمْ وَرَضُوا عَنْهُ..،[٤٤] والآيات التي فيها أسلوب الجرح مثل الآيات التي تصف الكفار ب"شر البرية" (البينة: ٦)، والذين لا يستعملون الأعين

[٤٤] التوبة: ١٠٠

والآذان والقلوب للإيمان بآيات الله بتشبيههم ك"الأنعام" (الأعراف: ١٧٩)، والذين يعتدون على النبي ب"شياطين الجن والإنس" (الأنعام: ١١٢)، وغير ذلك من الآيات.

وكذلك عبارات الأحاديث التي فيها نوع من أسلوب التحقير، والاستهزاء، والتوبيخ لأفراد أو طائفة من الناس، مثل حديث: عن عائشة: «أن رجلا استأذن على النبي صلى الله عليه وسلم، فلما رآه قال: «بئس أخو العشيرة، وبئس ابن العشيرة، فلما جلس تطلق النبي صلى الله عليه وسلم في وجهه وانبسط إليه، فلما انطلق الرجل قالت له عائشة: يا رسول الله، حين رأيت الرجل قلت له كذا وكذا، ثم تطلقت في وجهه وانبسطت إليه؟ فقال رسول صلى الله عليه وسلم: «يا عائشة، متى عهدتني فحاشا، إن شر الناس عند الله منزلة يوم القيامة من تركه الناس اتقاء شره».[٤٥]

تعامل العلماء هذه الأحاديث التي في ظاهرها نوع من الطعن والتوبيخ والتحقير والغيبة ببيان معانيها، وبالتالي بعض أقوال العلماء: قال الخطابي في هذا المقام جمع هذا الحديث علما وأدبا وليس في قول النبي صلى الله عليه وسلم في أمته بالأمور التي يسميهم بها ويضيفها إليهم من المكروه غيبة، وإنما يكون ذلك من بعضهم في بعض بل الواجب عليه أن يبين ذلك ويفصح به ويعرف الناس أمره فإن ذلك من باب النصيحة والشفقة على الأمة ولكنه لما جبل عليه من الكرم وأعطيه من حسن الخلق أظهر له البشاشة ولم يجبهه بالمكروه لتقتدي به أمته في اتقاء شر من هذا سبيله وفي مداراته ليسلموا من شره وغائلته.[٤٦]

---

[٤٥] البخاري، صحيح البخاري، ج٣، ص١٣.

[٤٦] محمد زكريا المدني الكاندهلوي، أوجز المسالك إلى موطأ مالك، تحقيق: تقي الدين الندوي (دمشق: دار القلم، ط١ن ١٤٢٤هـ)، ج١٦، ص٨٢.

وقال القرطبي: " في الحديث جواز غيبة المعلن بالفسق أو الفحش ونحو ذلك من الجور في الحكم والدعاء إلى البدعة مع جواز مداراتهم اتقاء شرهم ما لم يؤد ذلك إلى المداهنة في دين الله تعالى".[٤٧]

وقال الحافظ ابن حجر في شرح هذا الحديث: "كل من اطلع من حال شخص على شيء وخشي أن غيره يغتر بجميل ظاهره فيقع في محذور ما فعليه أن يطلعه على ما يحذر من ذلك قاصدا نصيحته وإنما الذي يمكن أن يختص به النبي صلى الله عليه وسلم أن يكشف له عن حال من يغتر بشخص من غير أن يطلعه المغتر على حاله فيذم الشخص بحضرته ليتجنبه المغتر ليكون نصيحة بخلاف غير النبي صلى الله عليه وسلم فإن جواز ذمه للشخص يتوقف على تحقق الأمر بالقول أو الفعل ممن يريد نصحه".[٤٨]

وهكذا فهمه بعض العلماء من الأحاديث التي في ظاهرها نوع من الطعن على الأفراد، وإنما يراد من ذلك نصيحة الدين لمن لا يعرف حال الشخص حتى لا يغتر الآخرون، وكذلك الآيات التي فيها أسلوب التوبيخ، إنما ذلك لحال من أعلن الفسق والكفر، وكما رأى القرطبي بجواز غيبة المعلن بالفسق والفحش، أو يقال أنها حالات استثنائية.

---

[٤٧] أبو الحسن نور الدين علي بن محمد الملا الهروي القاري، مرقاة المفاتيح شرح مشكاة المصابيح (بيروت: دار الفكر، ط١، ١٤٢٢هـ)، ص٣٠-٣٤.

[٤٨] أبو الفضل أحمد بن علي بن حجر العسقلاني الشافعي، فتح الباري شرح صحيح البخاري (بيروت: دار المعرفة، دط، ١٣٧٩هـ)، ج١، ص٤٥٤.

الخاتمة

بناء على سبق من عرض المعلومات وتحليل ضوابط الاغتيال المعنوي فقهيا وقانونيا، يمكن أن يستنتج أهم النتائج وهي:

لم يكن مصطلح الاغتيال المعنوي (Character Assassination) مقررا في كتب الفقه القديمة ولا في القانون أيضا، فيستخلص تعريفه فقهيا مما عرفه المعاصرون، وكذلك قانونيا يستفاد من معاني تفريعات الجرائم المعنوية بأنه محاولات لقتل شخصية الأخرين بوسائل معينة ولأهداف معينة.

الاغتيال المعنوي له ضوابطه فقهيا وقانونيا سواء كانت متعلقة بعملية الاغتيال نفسه أو المغتال، وإن إثبات الاغتيال المعنوي لا بد من الرجوع إليها، فإذا انتفت الضوابط أو لم يتوفر أحدها فلا يعد اغتيالا معنوايا أو هو اغتيالا معنويا ولم يكن بين الفقه والقانون فرق في ضوابط الاغتيال المعنوي، إلا من ناحية المصادر، فالفقه الإسلامي مصدره النصوص الشرعية والقانون الإندونيسي مصدره كتاب القانون الجنائي.

وليس كل ما في ظاهرها ممارسة الاغتيال المعنوي يعد اغتيالا معنويا، كمن نشر مساوئ الآخرين لأجل مصلحة الجماعة وكفهم عن شره، أو دفاع عن نفسه، وكما جرى في علم الجرح والتعديل، فاتفق أهل العلم على جوازه، وإن كان فيه جانب يتداخلان فيه.

هناك حالات استثناءية أباح فيها الشرع التحقير وذكر المساوئ والاستهزاء التي هي من عناصر الاغتيال المعنوي، وهي لمن جهر بالفسق والعناد والكفر، وذلك لأجل النصيحة في الدين وحفظ الناس من شرهم.

المراجع:

A. S. Haris Sumadiria. *Hukum dan Etika Media Massa Panduan Pers, Penyiaran, dan Media Siber* (1st Edition). Bandung: Simbiosa Rekatama Media, 2016.

Abu Al-Haistam Muhammad Darwis. *Al-Ightiyal al-Ma'nawi*. http://ar.islamway.net/article/54404/

Abu Daud, Sulaiman Al-Azdi. *Sunan Abi Daud*. Tahqiq Muhammed Muhyiddin, Beirut: Al-Maktabah Al-Ashriyah.

Abu Zahrah, Al-Imam Muhammad. *Al-Jarimah wa al-Uqubah fi al-Fiqh al-Islami*. Beirut: Dar Al-Fikr.

Akhbar, Majallah Faransiyah Sakhirah Tansuru Rusum Karikatir li al-nabi Muhammad, https://yemen-press.com/news12596.html

Al-'Ani, Khaled Abd al-Razzaq. *Al-Ahadis fi Haddi al-Qadf min Kutubi al-Sunan al-Tsalas Abi Daud wa al-Tirmidzi wa al-Nisaai Takhrijuha wa Bayan Ahkamiha*. Kuwait: Maktab al-Mannar al-Islamiyah, Vol. 1, 1985.

Al-'Aoni, Hatem Arif Naser Al-Syarif. *Khulashatu Al-Ta'shil li 'ilmi al-Jarh wa al-Ta'dil*. Mekkah: Dar 'Alam al-Fawaid, Vol. 1, 1421.

Al-Asqalani, Ibn Hajar. *Fathu al-Bari Syarh Shahih al-Bukhari*. Beirut: Dar Al-Ma'rifat.

Al-Atthar, Hasan Muhammed Mahmoed. *Hasyiyatu al-Atthar 'ala Syarh Al-Jalal al-Mahalli 'ala Jam'i al-Jawami'*. Beirut: Dar el-Kotob el-Ilmiah.

Al-Bukhari. *Shahih al-Bukhari*. Tahqiq Muhammed Zahir Al-Nasher, Beirut: Dar Tauqa al-Najah.

Al-Dzahabi, Syamsuddin Abu Abdillah. *Dzikru Man Ya'tamid Qaulahu fi Al-Jarh wa al-Ta'dil*. Beirut: 'Abd al-Fattah Abu Ghudah, Dar al-Basyair, Vol. 4, 1990.

Alfred B. David Dodu. "Penerapan Regulasi Politik Kampanye Hitam: Studi Kasus Pada Pilkada Kabupaten Banggai tahun 2015". *Jurnal Wacana Politik*, Vol. 2, No. 1, (2017).

Al-Kandahlawi, Muhammad Zakariya al-Madani. *Awjazu al-Masalik ila Muwaththa' Malik*. Demasyqus: Dar al-Qalam, Vol. 1, 2003.

Al-Khudri, Muhammed Afifi Al-Bajuri. *Nur al-Yaqin fi Sirati Sayyidi al-Mursalin*. Demasyqus: Dar al-Faiha', Vol. 2, 1425.

Al-Qari, Abu Al-Hasan. *Mirqatu al-Mafatih Syarh Misykatu al-Mashabih*. Beirut: Dar al-Fikr, Vol. 1, 2002.

Al-Raisuny, Ahmed. *Nadzariyatu al-Maqashid 'inda al-Imam Al-Syatibi*. Al-Dar al-Alamiyah li al-Kotob al-Islami, Vol. 2, 1992.

Al-Syatibi, Ibrahim Musa Muhammed. *Al-Muwafaqat*. Cairo: Dar Ibn Affan, Vol. 1, 1997.

Al-Tamimi, Saifuddin Umar. *Al-Fitnah wa Waq'at al-Jamal*. Tahqiq Ahmed Rateb, Beirut: Dar Al-Nafais.

An article: Eric Sheraev. *Character Assassination: An Interdisciplinary Approach.* Virginia: George Mason University.

Grahamedia Press. *3 Kitab Undang-Undang KUHPer, KUHP, KUHAP.* Jakarta: Gramedia Pressindo, 2016.

Hasanain, Izzat. *Jaraim al-I'tida' 'ala al-Syaraf wa al-I'tibar Baina al-Syariah wa al-Qanun*. Riyad: Dar Al-Naser, Vol. 1, 1974.

Haq, Husnul, and Arif Ali Arif. "Istighlâlu Barâati Al-Ikhtirâ' Fî Al-Qânûn Al-Indûnîsî Dirâsah Fiqhiyah Taqwîmiyah" 15, no. 1 (2020): 117–52.

Ibn 'Abd Rabbah. *Al-'Aqad Al-Farid*. Beirut: Dar Al-Kotob Al-Ilmiyah, 1404.

Ibn 'Asyur, Muhammed Al-Thahir. *Maqashid Al-Shariah al-Islamiyah*. Oman: Dar Al-Nafais, Vol. II, 2001.

Ibn Al-Mulaqqin. *Sirajuddin, Al-Badr al-Munir fi Takhrij al-Ahadist wa al-Atsar al-Waqi'ah fi al-Syarh al-Kabir*. Tahqiq Musthafa, Riyadh: Dar al-Hijrah li al-Nasr wa al-Tawzi', Vol. I, 2004.

Ibn Katsir. *Al-Sirah Al-Nabawiyah (Min al-Bidayah wa al-Nihayah)*. Tahqiq Mushtafa, Lebanon: Dar Al-Ma'rifat, 1976.

Ibn Majah. *Sunan Ibn Majah*. Tahqiq Muhammed Al-Baqi, Dar Ihya' al-Kotob al-Arabiyah, 1102.

Ibn Mandzur, Muhammad Mukarram Abu al-Fadhal. *Lisanu al-Arab*. Beirut: Dar al-Shadiq, Vol. III, 1414.

Ibn Taymiyah. *Minhaj al-Sunnah al-Nabawiyah fi Naqdi Kalami al-Syi'ah al-Qadriyah*. Tahqiq Muhammad Rashad Salem, Riyadh: Jami'ah Al-Imam Muhammad Ibn Sa'ud Al-Islamiyah, Vol. 1, 1986.

Jalal al-Husain. *Al-Qatl al-Ma'nawi*. https://www.egyptwindow.net/Articles/23914/Default.aspx

Khalaf, Abd Al-Wahhab. *Ilmu Usul al-Fiqih wa Khulashati Tarikh al-Tasyri'*. Egypt: Matba'ah al-Madani.

Majed Bin Mathar al-Ja'id. *Al-Ightiyal al-Ma'nawi*. http://www.alriyadh.com/1637461

Musthafa al-Najjar. *Fannu al-Igtiyal al-Ma'nawi*. http://www.almasryalyoum.com/news/details/190497

Najm, 'Abd Al-Mun'im Al-Sayyid. *'Ilmu al-Jarh wa al-Ta'dil*. Medina al-Munawwarah: Al-Jami'a al-Islamiyah, Vol. 12, 1400.

Syakir, Mahmoed. *Al-Tarikh al-Islami*. Beirut: Al-Maktab Al-Islami, Vol. 7, 2000.

Taufiq, Muhammad. "A Critique against the Perspective of Al-Thufy on the Contradiction of Maslahat and the Holy Text." *Millati: Journal of Islamic Studies and Humanities* 5, no. 2 (2020): 121–28. https://doi.org/10.18326/mlt.v5i2.121-128.

Yulia Kurniati, Agna Susila, Heni Hendrawati, article: *Unsur-unsur pidana dalam tindak pidana pencemaran nama baik melalui media online*, (5th urecol proceeding).

al-Ihkâm
Jurnal Hukum dan Pranata Sosial

The Author Guidelines of "*Al-Ihkam: Jurnal Hukum dan Pranata Sosial*" since the publication year of 2015 (online).

1. Introduction

Al-Ihkam: Jurnal Hukum dan Pranata Sosial is a high-quality open-access peer-reviewed research journal published by the Faculty of Sharia, Institut Agama Islam Negeri Madura, Pamekasan, East Java, Indonesia. This journal focuses on providing readers with a better understanding of Islamic jurisprudence and law concerning plurality and living values in Indonesian and Southeast Asian society by publishing articles and research reports.
Al-Ihkam: Jurnal Hukum dan Pranata Sosial specializes in Islamic jurisprudence and Indonesian as well as Southeast Asian Islamic law, and aims to communicate original research and relevant current issues. This journal warmly welcomes contributions from scholars of related disciplines. *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* has been available online since June 1st, 2015. This journal is indexed in DOAJ, DIMENSION, Indonesia Publication Index (IPI), Google Scholar, Indonesian Scientific Journal Database (ISJD), and SINTA 2 (Accredited by the Directorate General of Research And Development of the Ministry of Research, Technology, and Higher Education of the Republic of Indonesia Number 30 / E / KPT / 2019).

It aims primarily to facilitate scholarly and professional discussion over current developments on Islamic jurisprudence

and law concerning Indonesian and Southeast Asian plurality and living values. Publishing articles exclusively in English and Arabic since 2019, the journal seeks to expand boundaries of Indonesian and Southeast Asian Islamic law discourses to access broader English or Arabic speaking contributors and readers worldwide. Hence, it welcomes contributions from international legal scholars, professionals, representatives of the courts, executive authorities, researchers, and students.

Al-Ihkam: Jurnal Hukum dan Pranata Sosial contains topics concerning Jurisprudence as well as Indonesian and Southeast Asian Islamic law society. Novelty and recency of issues, however, are the priority in publishing. The range of contents covers established jurisprudence, Indonesian and Southeast Asian Islamic law society, local culture, and various approaches on legal studies such as comparative Islamic law, political Islamic law, sociology of Islamic law and the likes.

2. **How** to **Write the Title, the Name, and the Author's Address**

The title of the manuscript should be on the top of the first page with the center text alignment. Meanwhile, the author's name (without academic degree) and the affiliation address of the author should also be at the center text alignment under the title of the article. The author should give two line spaces between the title and his/her name. Then, the space between the author's affiliation address and the abstract title is one space. The keywords must be written below the overall abstract for all words in alphabetical order and be separated by semicolons numbering three to five words. Additionally, the Indonesian title of the article, if any, should be stated in English.

The responsible or corresponding author's name must be written first and then followed by the second, the third, and so on. Communication regarding the article revision and the final statement will be informed via email to the corresponding author only. If there is more than one author, the author's names should be written down separated by comma (,). If the

author's name consists of at least two words, the first name should not be shorted. If the author's names are only one word, it should be written as it is. However, in the online version, it will be written in two words with the same name repeatedly for the metadata indexing (Camdali and Tunc, 2006; Friedman, 2008). For each data retrieval or quoted from other references, the author must write the reference source. References or citations are written in the description/text by the author's name and the year (Irwan & Salim, 1998). If there are more than two authors, just write the name of the first author followed by "et al." (Bezuidenhout et al., 2009; Roeva, 2012). All references in the text must be listed in the References section and vice versa, all written in the References should be cited in the text (Wang et al., 2011).

3. The Manuscript General Guidelines

The manuscript text general guidelines are as follows:

1. The manuscript is the authentic research result that has not been published yet in other publication media or publishing houses.
2. The manuscript does not contain any plagiarism element. To check the possibility of plagiarism, use the application Turnitin. The article must below 20% of plagiarism. The editorial board will directly reject the text that indicates plagiarism.
3. The submission and the publication have no APCs, submission charges, or another fees.
4. The manuscript article writing guidelines and template can be downloaded at the home page of *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* website and are available in MS Word (*.doc/*.docx) format.
5. The manuscript online submission procedure is available at online submission guidelines in the next part.

6. Any inappropriate manuscript with *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* writing guidelines will get returned to the author before the reviewing process.
7. The manuscript should contain several aspects of a scientific article as follows: (a) the title of the article, (b) the author's name (no academic title), (c) the affiliated author's address, (d) the author's email (e) the abstract and the keywords, (f) the introduction, (g) the method (h), the research findings and discussion (i), the conclusion (j), the references.
8. The subtitles included in the discussion part (*Introduction, Methods, Finding and Discussion, and Conclusion*) should be numbered in the Arabic order starting from one. The subtitles are written in the bold and title case format. It uses the left text alignment without underline. The next expanded subtitles should be in bold and sentence case format using the left text alignment and the numbering format level two.
9. The manuscript can be in either English or Arabic with the standard language. The body of the paper must be elaborated between 6500 - 7.000 words (maximum) including abstract, references, and footnotes, written in Book Antiqua Style, size: 11, line spacing: single. The article is on B5-sized papers (176x250 mm) with custom margins as follows: left 40 mm, right 30 mm, bottom 30 mm, and top 40 mm.
10. The words from uncommon or foreign languages are in Italic format. Each paragraph starts 11 mm from the left side border and there is no space among paragraphs. All numbers are written in Arabic numbering format except for the new sentence.
11. The tables and figures are placed in the text group. Each figure and table must be given a title and be numbered in Arabic format. The figure attachment should be guaranteed well printable (font size, resolution, and line space are clearly seen). The figure, the table, and the chart

should be placed in the center between text groups. If it has a bigger size, it can be placed in the center of the page. The table should not contain vertical lines, while horizontal lines are allowed only for the important point.

4. The Guidelines for the Manuscript Body Text

The title of the manuscript: The title should be informative and be written both briefly and clearly. It cannot diverse multi interpretations. It has to be pinpoint with the issues that will be discussed. The beginning word is written in the capital case and symmetrically. The article title does not contain any uncommon abbreviation. The main ideas should be written first and followed then by their explanations. The article title should be written within twelve words, 13pt-sized font, with the bold selection and in the center text format. Meanwhile, the abstract has to be within 250 words maximum and followed by four to five keywords.

Introduction: The introduction must contain (shortly and consecutively) a general background and a literature review (state of the art) as the basis of the brand new research question, statements of the brand new scientific article, main research problems, and the hypothesis (if any). In the final part of the introduction, the purpose of the article writing should be stated. In the scientific article format, it does not allow to write down the references as in the research report. They should be represented in the literature review to show the brand news of the scientific article.

Method: The method aims to solve problems, including analytical methods. The methods used in the problem solving of the research are explained in this part.

Discussion and Result: Discussion and Result must be written in the same part. They should be presented continuously starting from the main result until supporting results and

equipped with a discussion. Figures and tables (if any) should be put in the same part of this section and should be actively edited by the editors.

Conclusion: This is the final part containing conclusions and pieces of advice. The conclusions will be the answers to the hypothesis, the research purposes, and the research discoveries. The conclusion should not contain only the repetition of the results and discussions. It should be the summary of the research results as the author expects in the research purposes or the hypothesis. The advice contains suggestions associated with further ideas from the research.

Bibliography: All the references that are used in the article must be listed in this part. In this part, all the used references must be taken from primary sources (75% from all the references) that were published in the last ten years. Each article should have at least ten references.

5. The Guidelines for Literature Reviews, Citations, and References

Author may cite several articles from *Al-Ihkam: Jurnal Hukum dan Pranata Sosial*. All the presented data or quotes in the article taken from other author articles should attach the reference sources. The references and literature review should use a reference application management Mendeley The writing format in *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* follows the format applied by *Chicago Manual Citation Style:17th Ed.*

6. The Online Submission Manuscript Guidelines

The manuscript text submission must be through these following steps:

1. Firstly, the author should register as either an author or reviewer (checking role as author or reviewer) in the "*Register*" bottom.
2. After the registration step is completed, log in as author then click on the "New Submission" column. The article submission stage consists of five stages, namely: *(1). Start, (2). Upload Submission, (3). Enter Metadata, (4). Upload Supplementary Files, (5). Confirmation.*
3. In the "*Start*" column, choose Journal Section (Full Article) and check all the checklists.
4. In the "*Upload Submission*" column, upload the manuscript files in MS. Word format.
5. In the "*Enter Metadata*" column, fill in with all of the author data and affiliation, including the journal title, abstract, and indexing keywords.
6. In the "*Upload Supplementary Files*" column, the author is allowed to upload supplementary files, the statement letter, or any other else.
7. In the "*Confirmation*" column, click "*Finish Submission*" if the data entered are all correct.

If the author has difficulties in the submission process through the online system, please contact *Al-Ihkam: Jurnal Hukum dan Pranata Sosial* editorial team at email: alihkam@iainmadura.ac.id.

FACULTY OF SHARIA

INSTITUT AGAMA ISLAM NEGERI (IAIN) MADURA

ISSN 1907-591X

ISSN 2442-3084